Florida State University Law Review

Volume 2 | Issue 2 Article 6

Spring 1973

Ortwein v. Schwab, 410 U.S. 656 (1973)

Florida State University Law Review

Constitutional Law—Fourteenth Amendment—Requirement of Filing Fee for Judicial Review of Administrative Reduction of Welfare Benefits Does Not Constitute Denial of Due Process or Equal Protection of Law.—*Ortwein v. Schwab,* 410 U.S. 656 (1973).

Raymond Ortwein and Gwendolyn Faubion appeared before the Oregon Public Welfare Division in separate, unrelated proceedings to contest administrative actions that had resulted in reduction of their welfare payments.[1] After hearings, the Division denied relief. As authorized by Oregon law,[2] each then sought judicial review by the Oregon Court of Appeals. Both Ortwein and Faubion moved to proceed *in forma pauperis,* alleging indigency and inability to pay the 25-dollar filing fee required of all civil appellants in Oregon appellate

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hearing, and counsel was not provided, the sentence was vacated but the revocation remained valid. *See, e.g.,* Bryant v. State, 194 So. 2d 21 (Fla. 3d Dist. Ct. App. 1967); Phillips v. State, 165 So. 2d 246 (Fla. 2d Dist. Ct. App. 1964). The invalidation of the sentence was based on the premise that sentencing, unlike the hearing itself, was a "critical stage" that required the presence of appointed counsel. After *Mempa,* the courts ruled that absence of counsel at a combined revocation and sentencing hearing rendered the entire procedure invalid. *See, e.g.,* Herrington v. State, 207 So. 2d 323 (Fla. 2d Dist. Ct. App. 1968). At least one court read *Mempa* even more broadly and held that the revocation of probation was a "critical stage" requiring the appointment of counsel at all revocation hearings, regardless of the particular facts. *See* Gargan v. State, 217 So. 2d 578 (Fla. 4th Dist. Ct. App. 1969). No Florida court had reached the *Gagnon* conclusion requiring a case-by-case approach to the appointment decision.

Further, no Florida court has held that due process requires appointed counsel at a parole revocation hearing. Prior to *Mempa,* when Florida courts denied probationers a right to counsel, parolees were similarly denied appointed counsel on the ground that probation revocation hearings "are sufficiently analogous to a parole revocation proceeding so as to warrant application of the same rule." Shiplett v. Wainwright, 198 So. 2d 647, 648 (Fla. 1st Dist. Ct. App. 1967); *accord,* Johnson v. Wainwright, 208 So. 2d 505 (Fla. 1st Dist. Ct. App. 1968). After *Mempa,* when some courts invoked that decision to require appointment at probation revocation proceedings, the court that had previously found the two proceedings analogous again refused to extend a right of appointed counsel to parolees. *See* Moore v. Wainwright, 253 So. 2d 736 (Fla. 1st Dist. Ct. App. 1971). After *Gagnon,* however, it is evident that probationers and parolees must be treated alike with respect to appointment of counsel and satisfaction of due process.

1. Raymond Ortwein sustained a reduction in his Oregon old-age assistance when his county welfare agency determined that his sharing of expenses and shelter with another person relieved him of some of the costs upon which his initial award had been based. Gwendolyn Faubion was involved in a work-training program and claimed that certain work-related expenses should be deducted from her gross income in computing her income for purposes of AFDC payments. The deductions were denied, raising her computed income and therefore resulting in lower AFDC payments. Ortwein v. Schwab, 410 U.S. 656, 656-58 & nn.1 & 2 (1973).

2. Ore. Rev. Stat. § 183.480 (1971). The statute provides for judicial review of agency proceedings and confers jurisdiction on the Oregon Court of Appeals.

courts.[3] The Oregon Court of Appeals denied their motions without opinion.[4] Ortwein and Faubion then petitioned the Oregon Supreme Court for writs of mandamus ordering the Court of Appeals to accept their cases without payment of the fees. The Oregon Supreme Court rejected the petitioners' fourteenth amendment arguments and denied the petitions.[5] On appeal, the United States Supreme Court affirmed, per curiam, holding that Oregon's filing fee requirement did not violate appellants' fourteenth amendment rights of due process and equal protection.[6]

Appellants relied upon *Boddie v. Connecticut*[7] in formulating their due process argument, but the Court distinguished *Boddie* and held that *United States v. Kras*[8] governed its decision.[9] Both *Boddie*

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3. *See* ORE. REV. STAT. § 21.010 (1971). The statute applies to civil appeals to the Oregon Supreme Court and Court of Appeals.

4. The decision of the court of appeals is not reported. The disposition of the case is stated in Ortwein v. Schwab, 410 U.S. 656, 658 (1973).

5. Ortwein v. Schwab, 498 P.2d 757 (Ore. 1972). This case was styled an original mandamus action, which would also require the payment of a $25 filing fee. *See* ORE. REV. STAT. § 21.040 (1971).

Petitioners alleged that the filing-fee statutes were invalid as contrary to the first and fourteenth amendments. Their first amendment allegation was that the filing fees operated to deny indigent appellants the right to petition the government for redress of grievances. The court summarily dismissed this contention as irrelevant. 498 P.2d at 759.

Relying on Boddie v. Connecticut, 401 U.S. 371 (1971), petitioners next alleged that requiring filing fees of indigent petitioners denied them their fourteenth amendment rights of due process by operating to deprive them of access to the courts. The court distinguished *Boddie* on the ground that it involved dissolution of marriage, which can only be granted by a court, whereas the right to welfare benefits could be, and was, determined by a hearing before the welfare division. 498 P.2d at 760. The court noted its prior decisions holding that there was no right to judicial review of administrative hearings and concluded that petitioners had suffered no denial of due process. *Id.*

Petitioners' final contention was that the equal protection rationale of Griffin v. Illinois, 351 U.S. 12 (1956), should be applied to invalidate the statutes. The court rejected this plea, stating that the right to judicial review was "not such a 'fundamental personal right' that it is in violation of the Equal Protection Clause to make such right dependent upon the ability to pay a $25 filing fee." 498 P.2d at 761.

6. Ortwein v. Schwab, 410 U.S. 656 (1973).

7. 401 U.S. 371 (1971). Appellants also relied upon Frederick v. Schwartz, 402 U.S. 937 (1971), a case essentially identical to *Ortwein*. There, prior to the Supreme Court's decision in *Boddie*, the district court had held that the fee requirement as applied to welfare recipients was not violative of due process or equal protection. Frederick v. Schwartz, 296 F. Supp. 1321 (D. Conn. 1969). On appeal, the Supreme Court vacated and remanded for reconsideration in light of *Boddie*. In *Ortwein* the Court disposed of *Frederick* by emphasizing that it "was remanded, and not summarily reversed." 410 U.S. at 659.

8. 409 U.S. 434 (1973).

9. 410 U.S. at 659.

and *Kras*, however, were essential to the constitutional analysis undertaken by the *Ortwein* Court.[10]

In *Boddie*, the Court had held that the due process clause of the fourteenth amendment "prohibit[s] a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages."[11] Writing for the majority, Justice Harlan emphasized two factors in reaching this conclusion: first, the Court has long recognized the institution of marriage as "involv[ing] interests of basic importance in our society"[12]; secondly, since the only avenue to dissolution of marriage is through the state courts, the state has monopolized the means for dissolving this relationship.[13] Justice Harlan concluded that the state's refusal to admit to its courts indigent welfare recipients seeking a dissolution of marriage "must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right . . . and, in the absence of a sufficient countervailing justification for the State's action, a denial of due process."[14] The concurring Justices in *Boddie* were critical of the majority's sole reliance on the due process clause,[15] asserting that a better basis

10. For a summary of the evolution and pre-*Boddie* status of the rights of indigents of access to the courts, see Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968).

11. 401 U.S. at 374.

12. *Id.* at 376.

13. *Id.*

14. *Id.* at 380-81. *Boddie* has most frequently been cited for the proposition that due process requires that an individual be given an opportunity to be heard before he is deprived of any significant property interest. *See, e.g.*, Getty Oil Co. v. Ruckleshaus, 467 F.2d 349, 356 (3d Cir. 1972); Lucas v. Wisconsin Electric Power Co., 466 F.2d 638, 671 (7th Cir. 1972).

For a report of the tactics employed by the *Boddie* appellants, see LaFrance, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487. Professor LaFrance, counsel for the appellants, discusses the use of the case as a vehicle for reform. In his view, "Justice Harlan's limitation on *Boddie* cannot last. It may have been a legitimate recognition of the limited facts in *Boddie*, but it will not bear application elsewhere." *Id.* at 536. Professor LaFrance was by no means alone in the view that the application of *Boddie* should be extended beyond the very narrow factual situation. "[G]radual expansion of the scope of *Boddie's* protection for the indigent litigant can be achieved only by an erosion of the two primary limiting criteria in that case: the requirement of a state monopoly over the subject matter of the desired litigation and the specific financial barriers that the case involved." Note, *Indigent Access to Civil Courts: The Tiger Is at the Gates*, 26 VAND. L. REV. 25, 43 (1973). "The basic premise of this article is that the holding of *Boddie* should be expanded to guarantee the waiver of court costs and filing fees in *all* civil litigation . . . ." Comment, *Boddie v. Connecticut and the Constitutional Rights of Indigents*, 45 TEMP. L.Q. 390, 391-92 (1972). "If the logic of the *Boddie* decision is carried to its ultimate conclusion it seems inescapable that eventually indigent litigants will be supplied . . . cost free access to all determinative tribunals . . . in most types of civil litigation." Comment, *Boddie v. Connecticut: Whither the Indigent Civil Litigant*, 22 CATH. U.L. REV. 427, 439 (1973).

15. Justice Douglas was extremely critical of the majority's reliance upon due

for the decision was the equal protection clause as applied in *Griffin v. Illinois*[16] and the subsequent line of cases involving the right of access to the courts.

The first attempts to extend *Boddie* came in the area of bankruptcy.[17] Litigants contended that *Boddie* should be extended to grant indigent petitioners the right to proceed in bankruptcy without filing the required 50-dollar fee.[18] In *In re Garland*,[19] decided while *Boddie* was pending before the Court, the First Circuit had held that a discharge in bankruptcy is not a fundamental right and that the due process clause does not preclude Congress from conditioning such a

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process and would have based the decision on the equal protection rationale of Griffin v. Illinois, 351 U.S. 12 (1956), discussed at note 16 *infra*. In his view the case involved "[a]n invidious discrimination based on poverty." 401 U.S. at 386. His specific criticism of the use of due process was that such a rationale lends itself to a subjective determination by individual judges and is reminiscent of the Court's prior decisions in which substantive due process was used to invalidate state statutes that the individual members of the Court felt were unwise. 401 U.S. at 383-86 (Douglas, J., concurring).

Justice Brennan would have based the decision on the due process clause, but without consideration of the state monopoly factor. In his view the equal protection rationale of *Griffin* was also applicable and appellants had been denied equal protection. 401 U.S. at 386-89 (Brennan, J., concurring).

Justice Black, the lone dissenter, expressed the view that the majority's due process analysis was in reality a "shock the conscience" test that allows the Court to determine constitutionality by a standard of fairness set by a judge's personal views. In his view, *Griffin* was properly restricted to the criminal area and neither the equal protection clause nor the due process clause required access to the courts. 401 U.S. at 389-94 (Black, J., dissenting).

16. 351 U.S. 12 (1956). The issue in *Griffin* was whether the state must supply an indigent criminal appellant with a free transcript of the record of his trial court proceeding. Petitioners had alleged that the state's failure to provide indigents with a free transcript operated to deny them adequate appellate review and thus constituted a violation of their fourteenth amendment rights of due process and equal protection. After acknowledging that a state is not constitutionally required to provide an appellate system, the Court stated that a state that does grant appellate review cannot do so "in a way that discriminates against some convicted defendants on account of their poverty." *Id.* at 18. The Court then observed that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 19. *Accord,* Roberts v. LaVallee, 389 U.S. 40 (1967) (free transcript of preliminary hearing in criminal proceeding); Draper v. Washington, 372 U.S. 487 (1963) (procedure by which decision was made to grant free transcript operated to deny petitioners the rights assured by *Griffin*); Douglas v. California, 372 U.S. 353 (1963) (right to counsel of indigent criminal appellant).

17. *See, e.g., In re* Garland, 428 F.2d 1185 (1st Cir. 1970), *cert. denied,* 402 U.S. 966 (1971); *In re* Smith, 341 F. Supp. 1297 (N.D. Ill. 1972); *In re* Ottman, 336 F. Supp. 746 (E.D. Wis. 1972); *In re* Naron, 334 F. Supp. 1150 (D. Ore. 1971); *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971).

18. A total of $50 in fees is required to file a petition for bankruptcy. *See* 11 U.S.C. §§ 32(b)(2), 68(c)(1), 76(c), 80(a) (1970).

19. 428 F.2d 1185 (1st Cir. 1970), *cert. denied,* 402 U.S. 966 (1971).

discharge on the prepayment of a filing fee.[20] After *Boddie* was decided, petition for certiorari in *Garland* was denied by the Court, as was a petition from one other decision upholding the application of filing fees to indigent civil litigants.[21]

The first explication of *Boddie* came in *United States v. Kras*.[22] There the district court had held, contrary to the First Circuit's decision in *In re Garland*, that the fee requirement in a bankruptcy proceeding was an unconstitutional denial of the indigent petitioner's fifth amendment rights of due process and equal protection.[23] The district court relied primarily on *Boddie* and granted the petitioner leave to file and proceed without the filing of fees. On direct appeal,[24] the Supreme Court reversed, refusing to extend *Boddie* to bankruptcy proceedings.[25] In distinguishing *Boddie*, the majority emphasized two factors as basic to that decision: "state monopolization of the means for legally dissolving marriage"[26] and the "fundamental importance" of the marital relationship under the constitution.[27] Applying these factors to *Kras*, the Court reasoned that "no fundamental interest" was involved[28] and that "*Boddie's* emphasis on exclusivity finds no counterpart in the bankrupt's situation."[29] The interest in a discharge in bankruptcy was found not to "rise to the same constitutional level" as the interest in a dissolution of marriage.[30] The monopolization

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20. *Id.*

21. Borbeau v. Lancaster, 402 U.S. 964 (1971). In two other cases involving such filing fees the Court vacated and remanded for reconsideration in light of *Boddie*. *See* Sloatman v. Gibbons, 402 U.S. 939 (1971), *vacating* 454 P.2d 574 (Ariz. 1969); Frederick v. Schwartz, 402 U.S. 937 (1971), *vacating* 296 F. Supp. 1321 (D. Conn. 1969).

22. 409 U.S. 434 (1973).

23. *In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971). For discussions of *Boddie* as applied by the district court in *Kras*, see Comment, *Boddie and Beyond: Rights of the Indigent Civil Litigant*, 18 CATHOLIC LAW. 67 (1972); 60 GEO. L.J. 1581 (1972); 18 WAYNE L. REV. 1431 (1972). Although the fifth amendment does not include an equal protection clause, the Court consistently applies the same analysis to equal protection challenges brought under the due process clause of the fifth amendment as it applies to those brought under the equal protection clause of the fourteenth. *See* Frontiero v. Richardson, 411 U.S. 667 (1973); Bolling v. Sharpe, 347 U.S. 497 (1954); Faruki v. Rogers, 349 F. Supp. 723 (D.D.C. 1972).

24. The government appealed directly to the Supreme Court pursuant to 28 U.S.C. § 1252 (1970).

25. 409 U.S. 434 (1973). For a discussion of the Supreme Court decision, see Note, *United States v. Kras: Justice at a Price*, 40 BROOKLYN L. REV. 147 (1973); Comment, *Constitutional Law—The Indigent and Access to the Civil Courts*, 52 N.C.L. REV. 172 (1973).

26. 409 U.S. at 441.

27. *Id.* at 444.

28. *Id.* at 445.

29. *Id.* at 446.

30. *Id.* at 445.

factor was not present because, in theory, Kras personally could negotiate a settlement of his debts with his creditors.[31] Thus, the *Kras* Court found no denial of due process in the state's conditioning a bankrupt's access to the courts on the payment of filing fees.

After finding no due process violation, the *Kras* Court went on to hold that neither was there a denial of equal protection.[32] Since the interest involved was not fundamental and did not involve a suspect classification, it fell within the area of economic and social welfare.[33] Therefore, the "rational justification" and not the "compelling interest" test applied.[34] The rational justification test was satisfied by the Court's finding that filing fees were a rational means of making the bankruptcy system self-sustaining and supported by its users rather than by taxpayers at large.[35]

The basis for the *Boddie* decision clearly emerges from *Kras* as a two-prong test for assessing the constitutionality of statutes regulating access to the judicial process. First, the interest at issue must be constitutionally "fundamental." Secondly, resolution of the dispute involving this interest must be monopolized by the state in its courts. If these two requirements are met, *Boddie* would seem to compel a finding that due process has been violated when access has been denied and there is no countervailing justification for the state's action.

The issues in *Ortwein*, as framed by the *Kras* Court's reading of *Boddie*, were (1) whether the right to welfare benefits is constitutionally fundamental and (2) whether the resolution of disputes involving these benefits was monopolized by the state in its courts.

The Court disposed of the first issue by stating that the inter-

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31. *Id.*

32. *Id.* at 446.

33. *Id.* The Court referred to Dandridge v. Williams, 397 U.S. 471 (1970), holding that state regulation of welfare benefits falls within the social and economic area, to which the "rational justification" test applies. *See* 397 U.S. at 484-86.

34. 409 U.S. at 446. Under the "rational justification" or "rational basis" test, the state need only show that its challenged legislation rationally effectuates a legitimate goal. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948). But where state legislation appears to discriminate on the basis of a "suspect" criterion—such as race—or impedes the unfettered enjoyment of a "fundamental" interest —such as the right to vote—that legislation must withstand the "strict scrutiny" of the "compelling state interest" test. Under this standard the state must offer some "compelling" reason for its discriminatory legislation *and* must show that its desired objective cannot be attained in any alternative manner. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Griswold v. Connecticut, 381 U.S. 479 (1965). For a general discussion of this traditional equal protection analysis, see Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

35. 409 U.S. at 448.

est involved, "like that of Kras, has far less constitutional significance than the interest of the *Boddie* appellants."[36] Therefore, as in *Kras*, there was " 'no fundamental interest that [was] gained or lost depending on the availability' of the relief sought by appellants."[37] As to monopolization, the Court found that the agency hearings were an adequate alternative to the courts as a means of dispute resolution.[38] Since appellants had no constitutional right to a free appeal,[39] and since procedural due process was amply afforded by the prereduction welfare agency hearing,[40] the Court held that there was no violation of due process.[41]

Appellants' equal protection argument was summarily disposed of by the same rationale applied in *Kras*. The Court found that since litigation dealing with welfare payments relates to economic and social welfare, and since this litigation involved no suspect classification, the applicable standard was that of rational justification.[42] The test was satisfied by the state's interest in partially offsetting court costs, accomplished by the use of reasonable filing fees.[43]

There are two basic criticisms of the *Boddie* test as it has been applied. First, the restrictive application of the test has resulted in factual distinctions that are more theoretical than real.[44] Second, the

36. 410 U.S. at 659.

37. *Id., quoting from* United States v. Kras, 409 U.S. 434, 445 (1972).

38. 410 U.S. at 659-60.

39. *Id.* at 660. "This Court has long recognized that even in criminal cases, due process does not require a State to provide an appellate system." *Id.*

40. *Id.* at 659. The Court noted that Goldberg v. Kelly, 397 U.S. 254 (1970), required that welfare recipients be given a pretermination evidentiary hearing, which must meet the minimal requirements of due process. 410 U.S. at 659 n.4. The *Ortwein* appellants alleged that their hearing before the division did not meet this requirement but the Court did not discuss this issue, stating that "neither the record nor the opinion of the Oregon court provides support for these contentions." *Id.*

41. 410 U.S. at 660.

42. *Id.*

43. *Id.* The appellants also alleged that they had "capriciously and arbitrarily" been denied an appeal in violation of the equal protection clause, relying on Lindsey v. Normet, 405 U.S. 56 (1972). *See* 410 U.S. at 661. In *Lindsey* the Court had stated that "[w]hen an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." 405 U.S. at 77. The Court was referring to the double-bond requirement for appeal of an adverse decision in a proceeding pursuant to Oregon's forcible entry and wrongful detainer statute. Appellants in *Ortwein* contended that since Oregon does not require the filing fee in certain habeas corpus proceedings, in appeals from termination of parental rights and in criminal appeals, the denial of this right to indigent welfare recipients was arbitrary and capricious. The Court dismissed this issue with the statement that "we cannot say that this categorization is capricious or arbitrary." 410 U.S. at 661.

44. Justices Stewart and Marshall, dissenting in *Kras*, both took the view that the majority had failed to distinguish *Kras* from *Boddie*. 409 U.S. 434, 451-63 (1973). Justices Brennan, Douglas and Marshall, dissenting in *Ortwein*, took the same view of the majority's distinction between *Ortwein* and *Boddie*. 410 U.S. 656, 663-65 (1973).

doctrinal basis for the test was framed so narrowly as to be no test at all, but rather an ad hoc determination of little value as future precedent.[45] Distilled further, these criticisms call into question the basic issue of whether the dual-factor "fundamental interest" and "monopolization" analysis provides any realistic justification for the judicial denial or granting of free access to the courts.

The fundamental interest factor can be no more than a "highly subjective" determination that is "dependent on the idiosyncrasies of individual judges."[46] This has resulted in the determination that the interest in dissolution of marriage is fundamental while the interests in discharge in bankruptcy and welfare benefits are not. Although a distinction between *Boddie* and *Kras* may be drawn on the basis that there is no constitutional right to a discharge in bankruptcy,[47] the crucial importance of welfare benefits, recognized by the Court in *Goldberg v. Kelly*,[48] would seem to establish the interest of welfare recipients as fundamental in any realistic sense of the word.

The Court's distinction between the state's monopolization of dissolution of marriage and discharge in bankruptcy or determination of welfare benefits seems conceptually, but not realistically, sound. Theoretically, divorce is easily distinguished from disputes involving bankruptcy and welfare benefits; only when a divorce is contemplated are the parties *required by the state* to seek judicial resolution of their dispute. While Ortwein and Kras were theoretically free to settle their disputes without resort to the courts,[49] in reality a bankrupt may have little hope of achieving a nonjudicial resolution of his dilemma,[50] and

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45. *See* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 954-60 (1972) (Black, J., dissenting from denial of certiorari); Boddie v. Connecticut, 401 U.S. 371, 383-85 (Douglas, J., concurring), 389-94 (Black, J., dissenting) (1971).

46. 401 U.S. at 385 (Douglas, J., concurring).

47. This point was emphasized by the Court in *Kras*. 409 U.S. at 446. This analysis seems to indicate a return to the "right-privilege" dichotomy that was rejected by the Court in Sherbert v. Verner, 374 U.S. 398, 404 (1963) (to the effect that constitutionality does not depend on whether the interest involved is a right or a privilege). *Accord*, Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969).

48. 397 U.S. 254, 264-65 (1969). The Court recognized that the importance of welfare benefits to recipients required a pretermination evidentiary hearing in order to satisfy due process requirements.

49. In *Kras*, the Court expressed the view that, in theory, a debtor "may adjust his debts by negotiated agreement with his creditors," the statute of limitations may run or some other "acceptable creditor arrangement" will provide the debtor with an answer to his problems. 409 U.S. at 445. In *Ortwein* the petitioners had the right to administrative review of their dispute.

50. The weakness of the majority's contention was pointed out by Justice Stewart in *Kras*:

> [T]he assetless bankrupt has absolutely nothing to offer his creditors. And his creditors have nothing to gain by allowing him to escape or reduce his debts; their

a welfare recipient has no judicial alternative to reduction in benefits except acquiescence to that reduction.[51]

The monopolization factor, therefore, rests not on the reality that the state often may possess the only practical means of resolving a dispute, but on the theory that in only a few disputes—such as divorce—has the state imposed the monopoly by requiring that the dispute be resolved in the state's courts.

That the doctrinal basis for the *Boddie* test was deliberately placed on narrow grounds is implicitly demonstrated by the refusal of a majority of the Court to base the *Kras* and *Ortwein* decisions on either of two alternate grounds that, prior to *Boddie*, seemed to have been viable. Instead of characterizing the specific human interests involved in divorce as fundamental, the *Boddie* Court might have based its decision on the constitutional significance of the broader interest of access to the courts.[52] Prior to *Boddie* it seemed arguable that access

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only hope is that eventually he might make enough income for them to attach. Unless the government provides him access to the bankruptcy court, Kras will remain in the totally hopeless situation he now finds himself. The government has thus truly pre-empted the only means for the indigent bankrupt to get out from under a lifetime burden of debt.

409 U.S. at 455-56 (Stewart, J., dissenting) (footnotes omitted). In Justice Stewart's view, *Boddie* turned on the fact that the monopolization factor was coupled with "the existence of judicially enforced obligations." *Id.* at 456 n.7. Thus, in view of the fact that "[t]he bankrupt is bankrupt precisely for the reason that the State stands ready to exact all of his debts through garnishment, attachment, and the panoply of other creditor remedies," Kras and the *Boddie* litigants were equally left with no alternative save judicial resolution of their disputes. *Id.* at 455. Justice Marshall agreed with Justice Stewart's comments regarding the majority's view of the alternatives open to Kras for resolution of his dispute. *See* 409 U.S. at 458-63 (Marshall, J., dissenting).

51. Once an indigent welfare recipient's right to welfare benefits has been determined by the public welfare division, he must either acquiesce in that determination or seek judicial review. If, as the *Ortwein* Court decided sub silentio, there is no due process right to judicial review of an administrative decision, then the recipient either accepts what the division awards or rejects all benefits; he has no other alternative. The majority in *Ortwein* framed the issue as the right to an appeal and disposed of it by noting that even in criminal cases the Court has long recognized that due process does not require a state to provide an appellate system. 410 U.S. at 660. However, Justices Douglas and Marshall noted that in *Ortwein* the petitioners were seeking *initial access* to the courts, and that the issue of whether there is a right to judicial review of administrative decisions is one that has not before been decided by the Court. 410 U.S. at 661-62 (Douglas, J., dissenting), 665-66 (Marshall, J., dissenting).

52. Justice Marshall, in *Kras*, adopted this position:

I view the case as involving the right of access to the courts, the opportunity to be heard when one claims a legal right, and not just the right to a discharge in bankruptcy. When a person raises a claim of right or entitlement under the laws, the only forum in our legal system empowered to determine that claim is a court.

409 U.S. at 462 (Marshall, J., dissenting) (footnotes omitted). Justice Douglas expressed the same view in *Ortwein*. 410 U.S. at 662 (Douglas, J., dissenting). Justice Black, who had

to the courts, like the constitutionally protected right to vote, could not be abridged because of poverty.[53] Refraining from consideration of this broader issue, however, the Court chose to limit *Boddie, Kras* and *Ortwein* to the question of whether a right of access to the courts existed within the context of the particular factual situations presented. By conditioning free access on the presence of the two *Boddie* factors, the Court implicitly rejected the existence of a broad and independent fundamental right of access to the courts.

Alternatively, the Court might have invoked the equal protection analysis relied upon in *Griffin v. Illinois*.[54] There, the Court held that once a state has established a system for appellate review of criminal prosecutions, the equal protection clause prohibits denial of access to that system based on poverty.[55] At first glance it would appear that *Griffin* and its line of cases logically should have been extended to the *Boddie* factual situation.[56] In each of those cases criminal appellants were denied an opportunity for adequate review because of their inability to pay certain fees.[57] However, the majority in *Boddie* avoided the equal protection question by relying solely on a due process inquiry. In both *Kras* and *Ortwein* the Court did address the issue but found no violation of equal protection.

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dissented in *Boddie*, expressed the following view in Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971):

> In my view, the decision in *Boddie v. Connecticut* can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney.

Id. at 955-56 (Black, J., dissenting from denial of certiorari).

53. *See In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971), where the court held that indigents seeking bankruptcy must be granted access to the courts without paying filing fees because access to the courts is, aside from bankruptcy, a fundamental interest which is protected by the equal protection aspect of the fifth amendment and should not be abridged by a filing fee requirement. There the court analogized the right of access to the courts to the right to vote, stating that voting is a fundamental right "which, once granted, may not be conditioned upon wealth." *Id.* at 1086. The court was relying upon Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), which held that Virginia's poll tax, conditioning the right to vote upon payment of a fee, violated the equal protection clause.

It seems arguable that access to the courts, like the constitutionally protected right to vote, is a "fundamental political right, because preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). "It is surely arguable that access is as important to the establishment and maintenance of a legitimate political system as the right to vote. . . . Just as the equal protection clause prohibits conditioning the right to vote on wealth, it should also prohibit the use of wealth to control access to the courts." Abram, *Access to the Judicial Process*, 6 GA. L. REV. 247, 259 (1972).

54. 351 U.S. 12 (1956).

55. *Id.*

56. *See* note 15 and accompanying text *supra*.

57. *See* note 16 *supra*.

The most obvious rationale for confining the *Griffin* equal protection analysis to the criminal area was stated by Justice Black in his dissent in *Boddie*:[58] Only in criminal proceedings are great governmental powers brought to bear upon the individual, and, therefore, the individual deserves very strict constitutional protection from this power.[59] This distinction between criminal and civil proceedings finds support in the text of the *Griffin* opinion: "In *criminal trials* a State can no more discriminate on account of poverty than on account of religion, race, or color."[60] While this distinction rationally may apply to *Boddie* and *Kras*, it does not seem applicable to civil cases such as *Ortwein* where governmental power seeks to deprive the individual of valuable interests.[61] The same threat of governmental power that mandates equal treatment of rich and poor in criminal cases should entitle the indigent welfare recipient to at least one level of judicial review of administrative action.

Aside from the criminal-civil distinction between *Griffin* and the *Boddie* line of cases, an additional basis for the refusal to extend *Griffin* to the civil area appears to be the Court's conclusion that wealth is not a suspect classification.[62] The Court expressly stated that neither *Kras* nor *Ortwein* involved suspect classifications, and therefore applied the rational justification test.[63] This rejection of the equal protection argument reflects the Court's reluctance to use the equal protection clause as a vehicle to extend broad rights of access to the courts, even where the litigation involves governmental action that has resulted in the loss of an individual's property interests.

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58. 401 U.S. at 390-91 (Black, J., dissenting).

59. *Id.*

60. 351 U.S. at 17 (emphasis added).

61. In *Boddie*, the "dispute" was between two marriage partners; in *Kras*, between debtor and creditor. In *Ortwein*, however, the "dispute" was between welfare recipient and governmental agency—the very agency that denied petitioners relief. In this situation the government and the individual are adverse parties and the loss of a valuable property interest is at stake. Thus, it would seem that the individual should be entitled to the safeguards of a judicial determination in order to protect him from the "great governmental power" of which Justice Black spoke in his dissent in *Boddie*. 401 U.S. at 390.

62. In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court rejected the notion that wealth per se is a suspect classification, stating that "this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking close scrutiny . . . ." *Id.* at 29.

Prior to that decision the Court had suggested that wealth classifications were suspect. *See, e.g.*, McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966). The result of the Court's failure to find a suspect classification in *Rodriguez* was that the rational basis test rather than the more stringent compelling state interest test was applied.

63. *See* Ortwein v. Schwab, 410 U.S. at 660; United States v. Kras, 409 U.S. at 446.

Both *Kras* and *Ortwein* emphasize the Court's final comment in *Boddie*—that in deciding *Boddie* the Court was going "no further than necessary to dispose of the case before" it, and that it was *not* deciding "that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment."[64] Although the *Kras-Ortwein* Court has demonstrated that *Boddie* is to be given a very narrow and restricted application, the right of free access to the courts should not be considered foreclosed.[65] A person asserting a constitutional right to proceed *in forma pauperis* under *Boddie*, however, has a heavy burden of establishing the existence of both a fundamental interest and state monopolization. Many future cases may involve such an interest, but the strict monopolization requirement stands as a barrier to the expanded recognition of free access to the courts.

Class Actions—FEDERAL RULES OF CIVIL PROCEDURE—RULE 23(b)(3) CLASS ACTION REQUIRES PERSONAL NOTICE TO ALL IDENTIFIABLE MEMBERS OF THE CLASS.—*Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973), *aff'd* 42 U.S.L.W. 4804 (U.S. May 28, 1974).

In 1966 Morton Eisen brought an antitrust treble damage suit in federal district court[1] on behalf of himself and all others who had purchased or sold stock in odd-lots[2] on the New York Stock Exchange

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64. 401 U.S. at 382.

65. It has been suggested that actions for paternity, custody and adoption of children, as well as actions for annulment or legal separation of marriage, may involve both elements of the *Boddie* two-prong test. Comment, *The Heirs of Boddie: Court Access for Indigents After Kras and Ortwein*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 571, 575-76 (1973). *See also* Grissom v. Dade, No. 44,178 (Fla. March 27, 1974) (state law requiring adopting party to pay costs of notice by publication in adoption proceeding constitutes denial of equal protection and due process as applied to indigents).

1. Eisen v. Carlisle & Jacquelin, 41 F.R.D. 147 (S.D.N.Y. 1966).

2. The district court described odd-lot trading as follows:

[T]he normal trading units on the stock exchanges are in multiples of 100 shares, sometimes called 'round-lots'. Odd-lots, thus, are units of stock less than 100, the established unit of trading. For odd-lot transactions, in addition to the normal brokerage commission, an additional fee known as the 'odd-lot differential' is charged. At the time this suit was commenced, the differential was 1/8 point (12 1/2 cents) per share when the price per share was 39 7/8 or below and 1/4 point (25 cents) per share when the price was 40 or above. Effective July 1, 1966,