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Bankruptcy Law—Constitutional Law: Supreme Court Denies Indigents Access to the Courts

CASE COMMENT

BANKRUPTCY LAW—CONSTITUTIONAL LAW: *Supreme Court Denies Indigents Access to the Courts*

INTRODUCTION

The courthouse door which was opened ever so slightly by the United States Supreme Court in *Boddie v. Connecticut*[1] has now been closed by the Court in *United States v. Kras*.[2] In *Kras*, the Court held that an indigent who filed a voluntary petition in bankruptcy could not proceed without prepayment of the necessary fees.[3] This decision postpones indefinitely any recognition of a general right of access to the courts for the poor.

Robert Kras sought a discharge in bankruptcy from over $6,000 in debts in an effort to relieve himself of financial insolvency and creditor harassment.[4] His economic difficulties were clear. Unemployed for two years, except for odd jobs, Kras and his household subsisted on $210 per month public assistance received for Kras' own family and $156 per month public assistance received for his mother and her daughter.[5] Kras, his wife and two young children, together with his mother and her child, lived in a 2½-room apartment.[6] His eight-month-old son had cystic fibrosis and was undergoing hospital treatment.[7] Kras' assets consisted of $50 worth of clothing and household goods.[8]

In his motion for leave to file his petition in bankruptcy and proceed without prepayment of any of the fees normally a condition precedent to a discharge,[9] Kras alleged that he was unable to pay the $50 fee[10] and that he could not promise to pay in installments.

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1. 401 U.S. 371 (1971). The Court held that failure to waive filing fees for indigents seeking a divorce in a state court was violative of the due process clause of the fourteenth amendment.
2. 409 U.S. 434 (1973).
3. *Id.* at 450.
4. *Id.* at 452.
5. *Id.* at 437-38.
6. *Id.* at 437.
7. *Id.*
8. Clothing and household goods are exempt in a bankruptcy proceeding under 11 U.S.C. § 24 (1970) and N.Y. CIV. PRAC. § 5205 (McKinney 1963).
9. *See* 11 U.S.C. §§ 32(b)(2), (c)(8), 68(c)(1), 95(g) (1970).
10. Three separate charges are involved: $37 for the referee's salary and expense fund,

The district court held that the statutory requirement of a prepaid bankruptcy filing fee would violate Kras' fifth amendment right of due process, including equal protection.[11] It ordered the petition filed and referred the proceeding to a referee in bankruptcy.[12] On appeal by the government,[13] the Supreme Court reversed.[14]

Pauper Petitions in Bankruptcy

Under the Bankruptcy Act of 1898,[15] fees could be waived at the time a petition was filed on affidavit of inability to pay. However, provision for petitions *in forma pauperis*[16] was eliminated in 1946 when Congress set up a system of full-time referees paid from a central fund.[17] The decision to eliminate pauper petitions and replace them with a provision for payment on an installment basis was motivated, in part, by a desire to maintain the self-financing arrangement of the federal bankruptcy system.[18] To protect further the fiscal integrity of the bankruptcy system, Congress provided that all installments must be paid in full before the bankrupt is eligible for discharge.[19] Three separate sections of the Act specifically condition a discharge upon payment of the required fees.[20]

With the 1946 changes, bankruptcy proceedings are the only matter in federal courts for which filing fees cannot be waived upon a showing of poverty.[21] In addition, since the bankruptcy system is

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$10 for compensation of the trustee and $3 for the clerk's services. 11 U.S.C. §§ 68(c)(1), 76(c), 80(a) (1970).

11. *In re* Kras, 331 F. Supp. 1207, 1212 (E.D.N.Y. 1971). Although the fifth amendment does not mention equal protection, its principles have been found by the Court to be included in the amendment's concept of due process. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

12. 331 F. Supp. at 1215.

13. Appeal was taken directly to the Supreme Court pursuant to 28 U.S.C. § 1252 (1970).

14. 409 U.S. at 450.

15. Bankruptcy Act of 1898, ch. 541, §§ 40(c), 51(2), 30 Stat. 556-59.

16. In the character or manner of a pauper. The term describes permission given to a poor person to sue without liability for costs. Black's Law Dictionary 895 (rev. 4th ed. 1968).

17. *See generally* S. Rep. No. 959, 79th Cong., 2d Sess. 7 (1946). For a discussion of *in forma pauperis* petitions in bankruptcy, *see generally* Shaeffer, *Proceedings in Bankruptcy In Forma Pauperis*, 69 Colum. L. Rev. 1203 (1969).

18. Shaeffer, *supra* note 17, at 1209.

19. *See* 11 U.S.C. §§ 32(b)(2), (c)(8), 68(c)(1), 95(g) (1970).

20. *Id.*

21. *See* 28 U.S.C. § 1915(2) (1970). Although § 1915(a) is seemingly applicable to all matters in the federal courts, the specific intent of Congress that pauper petitions not be allowed in bankruptcy proceedings was held to be controlling by the Court. 409 U.S. at 440.

designed to be self-financing, the $50 bankruptcy filing fee is much greater than the typical $15 filing fee for civil cases in the federal courts.[22] Those who, like Kras, are unable to pay even in installments have petitioned the courts for the right to proceed anyway.

SPLIT IN PREVIOUS DECISIONS ON WAIVER OF FEES

Prior to *Kras*, the two courts deciding the question of whether to waive the bankruptcy filing fee for indigents had reached opposite results. The First Circuit, in *In re Garland*,[23] did not see the issue as one involving the right of poor people to gain access to the courts. Rather, it narrowly defined the issue as involving the right to a discharge in bankruptcy.[24] The *Garland* court, in fact, did not even characterize a bankruptcy proceeding as judicial in nature:

> Although bankruptcy is administered in a "court" it is in most particulars a very unusual court . . . . Referees are primarily administrators who, together with trustees, render financial services. A bankruptcy is not litigation in the normal understanding of the term, but merely a process under which the bankrupt files a petition, turns over his assets, if any, and awaits the receipt of a discharge.[25]

As a simple governmental service, a bankruptcy discharge was found to be not a fundamental right, but a privilege to which Congress could attach reasonable conditions. These conditions—the payment of a fee—only had to bear "a rational relation to the service offered and to the bankrupt's need for that service."[26] The petition to proceed without prepayment of the filing fee was denied.[27]

In contrast to the *Garland* decision, a district court in *In re Smith*[28] characterized the issue as one of access to the courts. From

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Other services that may be provided for indigents in both civil and criminal cases include the expense of printing the record on appeal and, at the court's discretion, the employment of counsel. 28 U.S.C. § 1915(b), (d) (1970). For a discussion of the history and application of federal *in forma pauperis* statutes, see Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270 (1966).

22. 28 U.S.C. § 1914(a) (1970).
23. 428 F.2d 1185 (1st Cir. 1970), *cert. denied*, 402 U.S. 966 (1971).
24. *Id.* at 1188.
25. *Id.* at 1187.
26. *Id.* at 1188.
27. *Id.*
28. 323 F. Supp. 1082 (D. Colo. 1971).

this perspective, bankruptcy was found to be a fundamental interest:

> Counsel for the United States argue that bankruptcy is not a fundamental interest. We agree that, standing alone, bankruptcy cannot be placed on a par with voting or with appealing from a criminal conviction. However, we believe what is at stake here is not simply bankruptcy but access to court. So viewed, the question presented takes on a greater significance, at least for those of us who are trained in the law and who regard the legal system as fundamental to our way of life.[29]

After finding that a bankruptcy discharge was a fundamental interest, the court applied the "compelling interest" test[30] to the requirement of filing fees rather than the "rational relation" test[31] utilized in *Garland*. On the basis of prior Supreme Court decisions,[32] the *Smith* court concluded that it would be difficult to "imagine that fiscal integrity could ever be described as a compelling interest in other than grave financial circumstances."[33] As a result, the prepayment requirement was found to be violative of equal protection.[34]

Waiver of Filing Fees for Divorce

Intervening between the *Garland* and *Smith* decisions and *Kras* was the Supreme Court's decision in *Boddie v. Connecticut*[35] that state court filing fees for divorce are unconstitutional when required of indigents.[36] Instead of defining the issue as one of general access

29. *Id.* at 1087.

30. In applying equal protection principles, two standards of justification for the government-created classifications have been developed by the Supreme Court. The traditional test, first set out in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911), requires only that the classification have a reasonable basis. *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). In more recent cases, the Court has required that the classification be based on a compelling governmental interest where a fundamental interest is involved. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 638 (1969); or where the classification is a suspect one of race, nationality or alienage, *see, e.g.*, Graham v. Richardson, 403 U.S. 365, 375 (1971).

31. *See* sources cited in note 30 *supra*.

32. Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963).

33. 323 F. Supp. at 1088.

34. *Id.* at 1093.

35. 401 U.S. 371 (1971).

36. *Id.* at 383.

to the courts, the Court chose a narrow approach and considered the problems in terms of a right to a divorce. In fact, it carefully limited its decision to that particular right:

> We do not decide 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 so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that those appellants resort to the judicial process is entirely a state-created matter.[37]

Even without a broad characterization of the issue the Court was able to classify the right to a divorce as a fundamental right.[38] This conclusion was based on previous acknowledgements by the Court that marriage involved interests of basic importance to society.[39]

Of potentially greater importance than the Supreme Court's narrow characterization of the access issue in *Boddie* was its choice on a second threshold issue: questions of due process, rather than equal protection, were involved. Discussing the case in terms of due process allowed the Court to limit strictly its decision. Since due process involves a meaningful opportunity to be heard, the Court reasoned that if alternatives other than resort to the judicial process existed for those seeking a divorce, due process would not be denied by the imposition of filing fees. Thus, it was the state monopoly over the marriage relationship, coupled with the financial barrier of filing fees for divorce, that denied due process for those unable to pay.[40] Viewed more broadly, such reasoning led to the pronouncement that the "legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain."[41]

The *Boddie* decision suggested that the poor's access to the

37. *Id.* at 382-83.

38. *Id.*

39. *See* Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

40. 401 U.S. at 380-81.

41. *Id.* at 375-76.

courts for a particular type of relief may be barred by the imposition of filing fees or other state-imposed monetary conditions where there are other remedies available to the litigant. Since the concurring opinions of Justices Douglas and Brennan rested on equal protection as well as on due process, they were not led to this requirement of an exclusive judicial remedy.[42] For Mr. Justice Brennan, the case presented "a classic problem of equal protection of the laws"[43] and not just due process:

> Certainly, there is at issue the denial of a hearing, a matter for analysis under the Due Process Clause. But Connecticut does not deny a hearing to everyone in these circumstances; it denies it only to people who fail to pay certain fees. The validity of this partial denial, or differentiation in treatment, can be tested as well under the Equal Protection Clause.[44]

Tested under equal protection, Mr. Justice Brennan concluded that the availability of other avenues of relief is of no importance since courts "are bound to do equal justice under law, to rich and poor alike."[45]

No Extension to Bankruptcies

It was to the concurring opinions of Justices Douglas and Brennan, rather than to the majority opinion in *Boddie*, that the district court looked in deciding that Kras should be allowed to proceed in bankruptcy without prepayment of the filing fee.[46] As a result, the court characterized the two threshold issues as involving both the broad question of access to the courts and the application of equal protection of the laws.[47]

On appeal, the Supreme Court decided these two crucial threshold issues differently and reversed, denying Kras the right to proceed without prepayment of the filing fee.[48] Writing for the ma-

42. *Id.* at 383, 386.
43. *Id.* at 388.
44. *Id.*
45. *Id.*
46. *See In re* Kras, 331 F. Supp. 1207, 1212-14 (E.D.N.Y. 1971).
47. *Id.*
48. 409 U.S. 434, 450 (1973). One possible method to avoid the result of the *Kras* decision is for the indigent bankrupt to admit in writing his inability to pay his debts and his willingness to be adjudged a bankrupt under 11 U.S.C. § 21(a)(6) (1970) and to find a

jority, Mr. Justice Blackmun discussed and evaluated the access issue as one of the availability of a discharge in bankruptcy rather than a question of general access to the judicial process. He wrote of Kras' "interest in elimination of his debt burden" and "desired new start."[49] Described in these terms, Kras was found not to be asking for recognition of a fundamental right:

> If Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense. Gaining or not gaining a discharge will effect no change with respect to basic necessities. We see no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy.[50]

Bankruptcy, as opposed to access to the courts, was decided to be "hardly akin to free speech" or other rights "that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated."[51]

This rejection of a question of general access to the judicial process was the Court's first threshold choice. Its emphasis on due process was the second. Although the Court also found no denial of equal protection in the requirement of a filing fee,[52] its major concentration was on the due process considerations raised in *Boddie*. Accordingly, the exclusiveness of a bankruptcy proceeding for the adjustment of debts became important on the *Boddie* theory[53] that the due process "meaningful opportunity" can be satisfied without resort to the courts if other alternatives are available. Kras' situation was distinguished from *Boddie* on this "exclusivity" test:

> In contrast with divorce, bankruptcy is not the only method

creditor or someone else to pay the filing fees. The fees, if paid by creditors in involuntary cases or by persons other than the bankrupt in voluntary cases, have priority in payment out of the bankrupt estate second only to the costs and expenses of administration and so may be recoverable. 11 U.S.C. § 104(a)(1) (1970). This approach, however, assumes both a person willing to pay the fees for the bankrupt, which is unlikely for an indigent bankrupt, and a bankrupt estate large enough to cover administration costs and filing fees.

49. 409 U.S. at 445.
50. *Id.*
51. *Id.* at 446.
52. *Id.*
53. 401 U.S. at 376-77.

> available to a debtor for the adjustment of his legal relationship with his creditors. . . .
>
> However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors. At times the happy passage of the applicable limitation period, or other acceptable creditor arrangement, will provide the answer. . . .
>
> Resort to the court, therefore, is not Kras' sole path to relief. *Boddie's* emphasis on exclusivity finds no counterpart in the bankrupt's situation.[54]

So distinguished, the Court refused to extend the *Boddie* ruling to *Kras*.[55]

In dissent, Mr. Justice Marshall,[56] perhaps recognizing the importance of the threshold characterizations of the issues involved in the case, argued for a wider view on the access question:

> 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.[57]

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54. 409 U.S. at 445-46.

55. *Id.* at 450. Mr. Justice Stewart contended that *Boddie* could not be distinguished since governmental monopolization of the means of dissolution of one's obligations is just as complete for indigent bankrupts as for indigents seeking a divorce. *Id.* at 456 n.7 (Stewart, J., dissenting). He found the majority's suggestion of alternative remedies for indigent bankrupts to be unworkable:

> While the creditors of a bankrupt with assets might well desire to reach a compromise settlement, that possibility is foreclosed to the truly indigent bankrupt. With no funds and not even a sufficient prospect of income to be able to promise the payment of a $50 fee in weekly installments of $1.28, the 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 only hope is that eventually he might make enough income for them to attach.

Id. at 455.

56. In the 5-4 decision, Mr. Justice Stewart wrote a dissenting opinion joined in by Justices Douglas, Brennan and Marshall. 409 U.S. at 451. Justices Douglas and Brennan joined in a separate dissenting opinion. *Id.* at 457. Mr. Justice Marshall also wrote a separate dissenting opinion. *Id.* at 458.

57. 409 U.S. at 462.

Kras, Justice Marshall explained, was asserting "a right under the Bankruptcy Act to be free of any duty to pay his creditors."[58] Since the only way to determine whether he has such a right is by resort to the judicial process, failure to allow him to do so "denies him access to the courts."[59] Justices Douglas and Brennan joined to stress the importance of considering the case in the light of equal protection. They thought that equal protection, as opposed to the due process approach of the majority, was more explicit in its attack on unfairness. As a result, they found due process lacking in *Kras* because a filing fee "denies equal protection within our decisions which make particularly 'invidious' discrimination based on wealth or race."[60]

Implications of Supreme Court's Choice on Threshold Issues

The Supreme Court's choice on the threshold questions involved in *Kras* was much more important than the particular decision itself. By refusing to characterize Kras' petition as one seeking access to the courts, the Court was able to discuss and compare a bankruptcy discharge to a divorce. This suggests the approach the Court intends to take on future access questions: a comparison of remedies sought on the basis of their "constitutional level."[61] Only for those rights or remedies high enough in the constitutional hierarchy will free access to the courts be granted to indigents.

Such an approach is troubling for two reasons. First, the task of deciding which reasons for gaining access to the courts are important enough for a waiver of filing fees and which are not is "highly subjective and dependent on the idiosyncracies of individual judges."[62] Justice Black, for example, thought the need to file for a discharge in bankruptcy was more fundamental than that of a divorce.[63] This is the opposite of what the majority decided to be

58. *Id.* at 463.
59. *Id.*
60. *Id.* at 458.
61. *Id.* at 445.
62. Boddie v. Connecticut, 401 U.S. 371, 385 (1970) (Douglas, J., concurring in the result).
63. Meltzer v. C. Buck LeCraw & Co., 225 Ga. 91, 166 S.E.2d 88, *cert. denied*, 402 U.S. 954, 958 (1971) (Black, J., dissenting). Mr. Justice Black's dissent applied to the Supreme Court's denial of certiorari in a number of cases, including *Garland*, which required further interpretation of *Boddie*.

fundamental in *Kras*.[64] The folly of trying to measure reasons for a desire to gain access to the courts is pointed to by a hypothetical proposed in *Smith*:

> [I]f a state or the federal government were to condition the enforcement of all statutory and common law rights upon the payment of a $5,000 filing fee, access to court as we now conceive it would be severely impaired. . . . If we were to begin attacking the above scheme by deciding that only the exercise of certain rights could be so conditioned, how would we make the choice? Would we decide this issue on the basis of how many people avail themselves of the particular action? On some other standard for judging the social importance of the right? How do we devise a scale for measuring the importance of bankruptcy as compared with any other statutory or common law action?[65]

Moreover, it seems that any right or remedy which a person purposely chooses to pursue in the judicial system, the ultimate dispute-settling mechanism in our society, is certainly fundamental unless it involves a patently frivolous claim.

The Court's decision to look at access in the narrow context of what it is that the indigent seeks to litigate is also troubling for a second reason. By defining the problem as one of the access to the judicial system for a particular purpose, the majority emasculates the more general concept of access to the courts. The phrase "access to the courts" implies the right to bring one's disputes or seek one's remedies in the ultimate forum established by the state or federal government for such matters. Even though individuals come to the courts for specific reasons, the idea of general access is important in itself and seems to characterize more cogently the issue involved in cases like *Kras*. The *Smith* court was convinced "that the generality has meaning and poses a problem worthy of consideration that leads us to reject the narrow view."[66]

Analysis of Kras' petition primarily in terms of due process, rather than equal protection, was a second threshold decision made by the Court. It, too, was a choice of great potential impact. Al-

64. 409 U.S. at 445.
65. 323 F. Supp. at 1089.
66. *Id.*

though due process and equal protection may be overlapping concepts which differ more in emphasis than in substance,[67] the difference in emphasis may easily lead to different results. Due process involves a balancing of the importance of individual rights against relevant governmental interests, while equal protection focuses on differences among individuals in relation to the government.[68] Equal protection analysis, then, more clearly conceptualizes the wide unevenness with which the rich man and poor man approach the judicial system.

In addition to its conceptual accuracy for access cases, equal protection analysis does not necessitate a finding that the judicial remedy sought by the indigent be the exclusive means of dispute resolution. Where a fundamental interest is at stake, the Court has found that any classification based upon wealth is invidious and so must be carefully scrutinized.[69] Fiscal integrity, or, in the case of bankruptcy, Congress' intent that the system be self-supporting, would not survive such a strict review.[70] In contrast, the due process analysis of *Boddie* involves a two-fold test for recognition of a right of access: a fundamental interest and the exclusiveness of the judicial remedy.[71] If the Court continues to look at access cases as involving questions of due process, rather than equal protection, both the difficult fundamental interest and exclusive remedy tests will have to be satisfied.[72]

CONCLUSION

In *Kras*, the Supreme Court refused to extend *Boddie* to another substantive area. Since bankruptcy would have been particularly appropriate for an additional step in recognizing the right of access to the judicial process, the *Kras* decision is disturbing.[73]

67. Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 439 (1967).

68. *See generally id.*

69. *See, e.g.*, Harper v. Bd. of Elections, 383 U.S. 663, 670 (1966); Griffin v. Illinois, 351 U.S. 12, 17 (1956).

70. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

71. 401 U.S. at 382-83.

72. The difficulty of overcoming both tests is well illustrated in *Ortwein v. Schwab*, 410 U.S. 656, 659-60 (1973). There, two months after the decision in *Kras*, the Court denied free access to Oregon's appellate courts for an indigent seeking to appeal a cut in his old age assistance payments. Under state law, appeals of welfare agency decisions had to be made to the Oregon Court of Appeals, which had a $25 filing fee.

73. *See* Shaeffer, *supra* note 17. *See generally* 50 N.C.L. REV. 654 (1972); 60 GEO. L.J.

What, in effect, the Court decided was "that some of the poor are too poor even to go bankrupt."[74] But even more disturbing is that the Court postponed indefinitely any recognition of a general right of access to the courts for rich and poor alike. It thus appears certain that an indigent's right of access to the judicial process will depend on what it is that he seeks to litigate. This is an odd result if the courts of the United States and the states truly belong to the people.

1581 (1972).

74. 409 U.S. at 457 (Stewart, J., dissenting).