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## A REAPPRAISAL OF THE INDIGENT'S RIGHT OF ACCESS TO BANKRUPTCY PROCEEDINGS

TIMOTHY E. GAMMON\*

### I. INTRODUCTION

IN 1963, Robert F. Kennedy stated, "To a serious extent, the scales of justice in this country are weighed against the poor"<sup>1</sup> One year later, the Office of Economic Opportunity was created, which helped balance the scale in some areas by providing legal service programs<sup>2</sup> for indigents. Nevertheless, the enormous need of legal service for indigents has not and cannot be met under present programs.<sup>3</sup> The 1964 legal service program failed to provide money for fees and court costs in judicial and administrative proceedings so petitioners who could not proceed *in forma pauperis* were denied access to those proceedings. No person is poorer or in greater need of relief than the indigent who must resort to bankruptcy, who is in a hopeless bargaining position, totally destitute, and who has neither fifty dollars, nor hope of having fifty dollars within six months.

As the Bankruptcy Act<sup>4</sup> presently exists, it denies an indigent the same right, privilege, and relief afforded every other citizen under the Act. To state that the indigent petitioner would not be assisted by a provision waiving the fees and costs, or that he can obtain this right, privilege, and relief at some future date does not justify the invidious discrimination, which

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<sup>1</sup> *Hearings on S. 63 and S. 1057 Before the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. 7 (1963). See also Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 *YALE L.J.* 1317, 1337 (1964) (Reprint of speech by Senator Robert Kennedy):

Helplessness does not stem from the absence of theoretical rights. It can come from the inability to assert real rights. The tenants of slums and public housing projects, the purchasers from disreputable finance companies, the minority group members who are discriminated against—all of these may have legal rights which if we are candid—remain in the limbo of the law.

J. Gardner, *Preface to A. BLAUSTEIN & R. WOOCK, MAN AGAINST POVERTY: WORLD WAR III* (1968); See generally L. SILVERSTEIN, *DEFENSE OF THE POOR IN AMERICAN STATE COURTS* (1965).

<sup>2</sup> 42 U.S.C. §§2701 et seq. (1964). See L. SILVERSTEIN, *AVAILABILITY OF LEGAL SERVICES FOR THE POOR: A PRELIMINARY REPORT ON CASE STUDIES OF SAMPLE COUNTIES* (1966); A. SUTHERLAND, *THE PATH OF THE LAW FROM 1967* (1968); Tucker, *The Private Lawyer and Public Responsibility—The Profession's Armageddon*, 51 *NEB.L.REV.* 367 (1972).

<sup>3</sup> See Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 *IOWA L. REV.* 223 (1970) (hereinafter cited as Goodpaster); Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 *J. URBAN L.* 217 (1969). Silverstein, *Eligibility for Free Legal Services in Civil Cases*, 44 *J. URBAN L.* 549 (1967); Cf. Carlin & Howard, *Legal Representation and Class Justice*, 12 *U.C.L.A. L. REV.* 381, 409-10 (1965).

<sup>4</sup> 11 U.S.C. § 1 et seq. (1971).

results from wealth classification and the denial of access to courts and administrative proceedings for indigents who cannot pay fees and costs. Beyond the evident injustice underlying such denial of access, it represents what can be considered as dangerous precedent for further limitation of due process and equal protection. It is clear that there is a need for egalitarian legislation which would provide for a right of access to court and administrative proceedings that could not be denied because of the petitioner's inability to pay costs and fees. Until such legislation is enacted, the situation requires evaluation under the principles outlined by the fourteenth amendment and interpreted by the courts.

## II. FIRST AMENDMENT RIGHT OF ACCESS

A review of the arguments and decisions, with regard to the right of access to a bankruptcy court, indicates the complexity of the matter. Any attempt to unravel the confusion resulting from this complexity must at the outset deal with the construction of the term "access." While many have attempted a definition by describing its ramifications, one judicial decision has supplied a simple and concise interpretation: entry to the broad, intricate scheme for dispute settling and the enforcement of public and private rights when what is desired is some remedy or settlement.<sup>5</sup>

It is the right of access which is the concern here, and should therefore be distinguished from any right to discharge in bankruptcy which is outside the scope of this article. There is no doubt that this right to be heard is more fundamental than any right to a discharge in bankruptcy.<sup>6</sup>

The right to petition the government for redress of grievances was a major provision of the Magna Carta.<sup>7</sup> In America, this right was specifically included in the Bill of Rights. James Madison's early draft of what became our first amendment included the right to apply "to the legislature by petition" and congressional debate extended this to all elected representatives of the

<sup>5</sup> *In re Smith*, 323 F.Supp. 1082, 1089 (D.Colo. 1971).

<sup>6</sup> See *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969); *Schroeder v. New York*, 371 U.S. 208, 212 (1962); *United States v. Illinois Central R. R.*, 291 U.S. 457 (1934); *Hovey v. Elliot*, 167 U.S. 409, 414 (1897). *But see Recent Developments, Requiring Filing Fees as a Prerequisite to Bankruptcy Discharge for Indigents Is Unconstitutional*, 60 GEO. L.J. 1581, 1587 (1972) (petitioners in bankruptcy do not just want relief from creditors, they want a new legal basis for their economic future).

<sup>7</sup> F. MAITLAND & F. MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 208 (7th ed. 1927) [hereinafter cited as MAITLAND & MONTAGUE]; 1 *SOURCES OF OUR LIBERTIES* 21 (R. Perry ed. 1959): The Magna Carta stated, "To no one will we sell, to no one will we deny, or delay, right of justice," [hereinafter cited as SOURCES]. Even during the reign of Henry III (1216-1272), paupers did not have to pay court costs. See 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 195 (2d ed. 1968): "That the poor should have their writs for nothing was an accepted maxim."

people.<sup>8</sup> But the version which was enacted provided this right of access to the entire government, a significant change since it resulted in the right of petition to the judicial and administrative branches of government.<sup>9</sup> This was reinforced by the Civil Rights Act of 1870, which provided equal access and rights for all persons embraced within the jurisdiction of the American judicial system.<sup>10</sup> The Supreme Court long ago identified the fundamental importance of this right of access.

The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . .<sup>11</sup>

A remedy which would be satisfactory and yet fall short of abolishing all court costs and fees would be to provide procedures whereby indigents could proceed without funds. An alternative would be to require that all fees and costs be waived in appropriate situations. The approach at common law was to allow the court in its discretion to waive fees; yet, the obvious problem is that there was no right to proceed and it was only the court's benevolence which allowed the indigent to proceed.<sup>12</sup>

Long before Robert Kennedy voiced concern for the poor, provisions were made for individuals without financial resources to proceed *in forma pauperis*. This right to petition in Anglo-American law, even without financial resources to pay fees and costs, can be traced to the Magna Carta, although the right at that time applied exclusively to those who otherwise could sue. Only later was it extended to all classes of citizens.<sup>13</sup> In America, there was a reluctance to grant indigents this concession, although several statutes were enacted which allowed indigents to proceed *in forma pauperis*.<sup>14</sup>

A literal reading of the Bankruptcy Act at first glance would seem to

<sup>8</sup> 1 ANNALS OF CONGRESS 452, 766 (1836); Comment, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055 (1973).

<sup>9</sup> U.S. CONST. amend. I.

<sup>10</sup> Act of May 31, 1870, ch. 114, 16 Stat. 144. See also Note, *Constitutional Law: Free Divorce for the Indigent*, 24 U. FLA. L. REV. 180 (1971).

<sup>11</sup> *Chambers v. Baltimore & O.R.R.*, R. R., 207 U.S. 142, 148 (1907). See also E. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 201 (11th ed. 1954).

<sup>12</sup> See Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VALPA. L. REV. 21 (1967) [hereinafter cited as Silverstein, *Waiver and Appointment*].

<sup>13</sup> See MAITLAND & MONTAGUE, *supra* note 7; SOURCES, *supra* note 7, at 21. See also Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 363-79 (1923); Note, *Indigent Access to Civil Courts: The Tiger Is at the Gates*, 26 VAND. L. REV. 25, 30-32 (1973) [hereinafter cited as *Indigent Access to Civil Courts*].

<sup>14</sup> See, e.g., 28 U.S.C. § 1915 (1964). See also Silverstein, *Waiver and Appointment*, *supra* note 12.

lead to the conclusion that indigents in bankruptcy could proceed *in forma pauperis* the same as every other class of petitioners in federal courts, even though the Act contained mandatory fee provisions.<sup>15</sup> The Bankruptcy Act of 1898 specifically provided for pauper petitions and it also provided, as an alternative, for waiver of fees at the time of filing the petition by an affidavit to pay.<sup>16</sup> These provisions were sufficient to prevent wealth-based discrimination because they assured access to bankruptcy proceeding regardless of petitioners' economic status. The Referees Bill of 1946 changed this by deleting the above provisions and substituting in their place a provision that bankruptcy fees could be paid in installments.<sup>17</sup> Nevertheless, it is certain that legal writers and the judiciary are convinced that *in forma pauperis* is not available to an indigent petitioner in bankruptcy under the existing law.<sup>18</sup> There is also little doubt that Congress intended payment at filing or by installment to be a condition precedent to discharge.<sup>19</sup> This congressional intent was enacted as the specific statutory requirement that all installments must be paid in full before a discharge would be granted.<sup>20</sup> The Bankruptcy Act itself provides no relief for individuals who have neither the mandatory fees nor hope of having that amount within six months; and, in essence, this results in the denial of access to bankruptcy to indigents as a class.

Initially, it should be established that access to bankruptcy proceedings stands on the same ground as access to any court.<sup>21</sup> The Constitution specifically provided for bankruptcy and left the organization and administration to Congress.<sup>22</sup> Congress established a procedure and special courts which are quasi-judicial, quasi-administrative in nature. These proceedings are as valuable and worthy of protection as any strictly judicial remedy an indigent may have. The similarity between bankruptcy and ordinary court proceedings

<sup>15</sup> Bankruptcy Act §4(a), 11 U.S.C. §22(a) (1970).

<sup>16</sup> Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, 558, 588-89. See also General Order 35(4), 172 U.S. 665 (1898).

<sup>17</sup> Bankruptcy Act §40(c)(1), 11 U.S.C. §68(c)(1) (1970). But see *In re Passwater*, 2 CCH Pov. L. RER. ¶ 15,075 (S. D. Ind. 1971), where the court permitted an indigent to proceed *in forma pauperis*.

<sup>18</sup> See *In re Smith*, 341 F. Supp. 1297 (N.D. Ill. 1972); *In re Partilla*, 2 CCH Pov. L. REP. ¶13,885 (S.D.N.Y. 1971); Comment, *Constitutional Law — Indigent's Filing Fee as a Condition Precedent to Discharge in Bankruptcy Held Unconstitutional*, 21 J. PUB. L. 239 (1971); Note, *Bankruptcy Filing Fee Subjected to Constitutional Test*, 50 N.C.L. REV. 654 (1972); Note, *Bankruptcy Proceedings: The Right of an Indigent to File Without Paying the Required Filing Fee*, 8 WAKE FOREST L. REV. 437 (1972).

<sup>19</sup> See S. REP. NO. 959, 79th Cong., 2d Sess. 7 (1946). See also Schaffer, *Proceedings in Bankruptcy In Forma Pauperis*, 69 COLUM. L. REV. 1203, 1211 (1969).

<sup>20</sup> Bankruptcy Act §§14(b), [14(c)(8), [59(c), [11 U.S.C. §§32(b), 32(c)(8), 68(c)(1), 95(g) (1971).

<sup>21</sup> But see *United States v. Kras*, 409 U.S. 434 (1973).

<sup>22</sup> U.S. CONST. art I, §8.

has been acknowledged: "Bankruptcy proceedings are stamped throughout with judicial imprimatur. The referees or judges . . . have the general power to decide legal questions which arise in such proceedings, including the constitutional question (access) before this court."<sup>23</sup>

There is, therefore, no rational basis for denying indigents access to bankruptcy proceedings because such proceedings are labeled administrative instead of judicial. If labels were controlling, the Supreme Court decision in *United States v. Kras*<sup>24</sup> would compel reversal of recent Supreme Court decisions<sup>25</sup> in which it was held that juveniles were entitled to rights and privileges in juvenile hearings similar to those afforded adults in criminal trials. Individuals should be afforded the same right of access and constitutional safeguards whenever adjudication can effect their life, liberty, or property, regardless of the label the proceeding itself has been given. It would be an injustice to assume that constitutional rights and privileges apply to such a narrow spectrum that they could be effectively denied by changing the label of the proceeding.

The Supreme Court has not focused on the first amendment right to petition in recent cases involving indigents who sought access to judicial and administrative proceedings.<sup>26</sup> Nevertheless, in addition to the historical basis as seen in the legislative history of the first amendment, there is judicial precedent for allowing access to proceedings under the first amendment. To this end, the Supreme Court has upheld the right of access to courts where unions sought to assist their members in litigation brought under the Federal Employer's Liability Act.<sup>27</sup>

A 1966 Supreme Court decision struck down a Virginia poll tax on the theory that it involved an invidious discrimination against the poor and denied them their right to participate in government and the democratic process.<sup>28</sup> In equating the Court's position on poll tax with the right of

<sup>23</sup> *In re Smith*, 323 F. Supp. 1082, 1089 (D. Colo. 1971).

<sup>24</sup> 409 U.S. 434 (1973).

<sup>25</sup> See, e.g., *Breed v. Jones*, 95 S. Ct. 1779 (1975); *Davis v. Alaska*, 415 U.S. 308 (1974).

<sup>26</sup> *Ortwein v. Schwab*, 410 U.S. 656, petition for rehearing denied, 411 U.S. 922 (1973); *United States v. Kras*, 409 U.S. 434 (1973); *Boddie v. Connecticut*, 401 U.S. 371 (1971). See also note 40 and accompanying text *infra*.

<sup>27</sup> See *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1970); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Brotherhood of R. R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). See also *Birkly & Murphy, Interest Group Conflict in the Judicial Arena: The First Amendment and Group Access to the Court*, 42 TEXAS L. REV. 1018 (1964); Comment, *Constitutional Protection for Group Legal Service Plans*, 44 NOTRE DAME LAW. 220 (1968).

<sup>28</sup> *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). Note, *Constitutional Law—Fourteenth Amendment Equal Protection—State Poll Tax Prerequisite to Voting—Denial*

indigents to bring suit it has been noted that the performance of the judicial functions are "at least as important as the electoral process."<sup>29</sup> However, one inherent weakness in the utilization of the poll tax case to argue that the fees and costs of bankruptcy should be waived for indigents is that the Court there did not simply hold that poll tax be waived for indigents, but rather the Court struck down poll tax in its entirety for all citizens.<sup>30</sup> A similar result emerged in a 1972 decision which struck down filing fees for all candidates in state primaries; and, although the Court reached the same result, it approached the problem under a different theory.<sup>31</sup> In that decision, the Court held it would be a denial of equal protection to permit filing fees.<sup>32</sup> These two decisions would tend to support the abolishment of fees and costs altogether. But a less drastic solution could have been used in these decisions. A reasonable solution in bankruptcy proceedings would be to require that the fees and costs be waived for indigents in appropriate situations, or the reinstatement of *in forma pauperis* provisions.

There is a basis for the use of the first amendment to allow all citizens access to any legislative, judicial, or administrative proceeding where determinations will be made affecting their life, liberty, or property. The fullest expression of this principle was by a Supreme Court case in 1972.<sup>33</sup> Because the circumstances there involved the right to an administrative hearing concerning business operations and the transportation of goods, the case is of particular significance to bankruptcy proceedings, which are of a judicial-administrative nature.

The right of petition is one of the freedoms protected by the Bill of Rights . . . . The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. The right of access to the courts is indeed but one aspect of the right to petition.<sup>34</sup>

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*of Equal Protection—Harper v. Virginia Bd. of Elections*, 16 AM. U. L. REV. 128 (1966); The Supreme Court, 1965 Term, 80 HARV. L. REV. 124, 176 (1966); Note, *Constitutional Law—Poll Tax—Violative of Equal Protection—Harper v. Virginia Bd. of Elections*, 28 OHIO ST. L.J. 189 (1967); Note, *Constitutional Law—The Poll Tax*, 8 WM. & MARY L. REV. 161 (1966).

<sup>29</sup> *In re Smith*, 323 F. Supp. 1082 (D. Colo 1971).

<sup>30</sup> 383 U.S. 663 (1966).

<sup>31</sup> *Bullock v. Carter*, 405 U.S. 134 (1972).

<sup>32</sup> *Id.*

<sup>33</sup> *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

<sup>34</sup> *Id.* at 510, *citing* *Eastern R. R. Conference v. Noer Motor Freight*, 365 U.S. 127, 138 (1961). *See also* *Johnson v. Avery*, 393 U.S. 483, 485 (1969); *United Mine Workers v. Pennington*, 381 U.S. 657, 669 (1965); *Ex parte Hull*, 312 U.S. 546, 549 (1941).

Other arguments on right of access are tied to the due process and equal protection clauses of the fifth and fourteenth amendments respectively. Because of their complexity and interrelation they are considered in the following section.

### III. FIFTH AND FOURTEENTH AMENDMENTS—DUE PROCESS AND EQUAL PROTECTION

The fourteenth amendment, which requires citizens be extended equal protection under law, applies to the states but not the federal government.<sup>35</sup> The fifth amendment, which does contain an equal protection *principle*, applies to the federal government as well as the states.<sup>36</sup> Yet, the absurdity of arguing that due process only applies to procedure and the federal government has no obligation to provide equal protection is seen by the logical extension of such argument. This extension would imply that as long as due process were afforded, and access to court was provided, the federal government could discriminate on the basis of race, sex, or religion by denying relief in any case on any basis.<sup>37</sup>

<sup>35</sup> U.S. CONST. amend. XIV. On the development and use of the fourteenth amendment, see Avins, *The Equal "Protection" of the Laws: The Original Understanding*, 12 N.Y.L.F. 385 (1966); Barnett, *The Balance of Interests in the Equal Protection of the Laws*, 29 ORE. L. REV. 65 (1950); Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131 (1950); Gunther, *Foreword: In search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949). For a general explanation and analysis of the enactment and judicial interpretation of the fourteenth amendment, see 2 BOUDIN, *GOVERNMENT BY JUDICIARY* 53-125 (1932); 2 CROSSKEY, *POLITICS AND THE CONSTITUTION* 1083-1158 (1953); FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); 2 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 533-621 (rev. ed. 1937); Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643 (1909); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, 1950 WISC. L. REV. 479; Howe, *A Footnote to the "Conspiracy Theory"*, 47 YALE L.J. 1007 (1939); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Suthon, *The Dubious Origin of the Fourteenth Amendment*, 28 TUL. L. REV. 22 (1953).

<sup>36</sup> U.S. CONST. amend. V. See also *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Schneider v. Rusk*, 377 U.S. 163 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Truax v. Corrigan*, 257 U.S. 312, 332 (1921): ". . . (the due process clause of the Fifth Amendment) tends to secure equality of law in the sense that it sets a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislation may not withhold."; Antieau, *Equal Protection Outside the Clause*, 40 CALIF. L. REV. 362 (1952). *Contra*, *Detroit Bank v. United States*, 317 U.S. 329 (1943); *Helvering v. Lerner Stores Corp.*, 314 U.S. 463 (1941); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

<sup>37</sup> Several articles dealing with the application of "equal protection" to the federal government suggest that it could provide a remedy to indigent petitioners. See, e.g., Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).



Both equal protection and due process involve an idea of fairness and reasonableness and to that extent overlap and apply to both federal and state actions and tribunals. This idea was presented in a bankruptcy proceeding where the court relied on Supreme Court cases dealing with indigent criminal defendants and civil rights.

[W]e do not mean to suggest that fifth amendment due process takes in all of fourteenth amendment equal protection. It is enough to note that fifth amendment due process does include an equal protection principle and that the two are co-extensive insofar as they prohibit discriminations which are based upon race and other discriminations which are invidious or deprive persons of constitutional rights.<sup>38</sup>

The most common area in which the fifth and fourteenth amendment have been used to provide access have been in criminal cases, and in related appeals and civil proceedings. One landmark case involved a criminal defendant who had been denied a statutory right of appeal because of his inability to pay the necessary fees to get a transcript.<sup>39</sup> The Supreme Court held the denial was a violation of equal protection and due process and stated: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."<sup>40</sup>

In 1966, the Court stated that once opened, access to courts must be kept free of unreasoned distinctions that can only impede equal access to the courts.<sup>41</sup> Thus, support is gained for the contention that if indigents

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[hereinafter cited as Michelman]; Wilcox, *Justice Lost by What Appellate Papers Cost*, 33 N.Y.U.L. REV. 934 (1958); Comment, *Poverty and Equal Access to the Courts: The Constitutionality of Summary Dispossession in Georgia*, 20 STAN. L. REV. 766 (1968); Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967). See also cases cited note 40 *infra*.

<sup>38</sup> *In re Smith*, 323 F. Supp. 1082, 1088 (D. Colo. 1971).

<sup>39</sup> *Griffin v. Illinois*, 351 U.S. 12 (1956); *Gardner v. California*, 393 U.S. 367 (1969); *Long v. District Court*, 385 U.S. 192 (1966). See also Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151 (1957); Note, *Failure to Provide Transcript Without Cost to Indigent Defendants Violates Equal Protection Clause*, 34 TEXAS L. REV. 1083 (1956); Comment, *Due Process and Equal Protection: Right of an Indigent Defendant to a Transcript of the Trial*, 4 U.C.L.A.L. REV. 274 (1957).

<sup>40</sup> *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). See also *Entsminger v. Iowa*, 386 U.S. 748 (1967); *Anders v. California*, 386 U.S. 738 (1967); *Lane v. Brown* 372 U.S. 477 (1963); *Gideon v. Wainwright*, 373 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 353 (1963).

<sup>41</sup> *Rinaldi v. Yeager*, 384 U.S. 305 (1966). On the right to counsel of indigent defendants, see *Gideon v. Wainwright*, 372 U.S. 335 (1963); Beany, *Right to Counsel, Past, Present, and Future*, 49 VA. L. REV. 1150 (1963); Bennett, *Right to Counsel—A Due Process Requirement*, 23 LA. L. REV. 662 (1963); Craig, *The Right to Adequate Representation in Criminal Process: Some Observations*, 22 SW. L.J. 260 (1968); Day, *Coming: The Right to Have Assistance of Counsel at All Appellate Stages*, 52 A.B.A.J. 135 (1966); *Fronton, Appellate Counsel for the Indigent Accused*, 6 WASHBURN L.J. 417 (1967); *Grano, The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV.

are allowed to *begin* the bankruptcy proceedings because of a promise to pay or installment arrangements, they should be entitled to an adjudication regardless of whether they are able to actually pay the costs and fees. The Supreme Court has also considered the problem of access for indigents and stated: "Differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."<sup>42</sup> Since the right of access on an equal protection and due process basis was first recognized by the Supreme Court, at least two federal appellate courts have upheld the right in habeas corpus actions, which were civil proceedings brought in federal courts.<sup>43</sup> In a strong decision, the United States Court of Appeals for the District of Columbia Circuit established that equal protection also applied to civil cases.

The equal protection clause applies to both civil and criminal cases; the Constitution protects life, liberty, and property. It is the importance of the right of the individual, not the technical distinction between civil and criminal, which should be of importance to a court in deciding what procedures are constitutionally required in each case. Often a poor litigant will have more at stake in a civil case than in a criminal case . . . . The right of all to have free access to the courts is basic to our democratic system. It too cannot be conditioned on the payment of a fee where such a condition precludes the exercise of the right.

Court procedures which of themselves invidiously discriminate between the rich and the poor impair guarantees of equal justice which the Constitution was designed to protect. As *Shelley v. Kramer* teaches, the courts themselves may not be vehicles of discrimination.<sup>44</sup>

*Bolling v. Sharpe*<sup>45</sup>

*Bolling* was a companion decision to *Brown v. Board of Education* in

1175 (1970); Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523 (1970); Marden, *Equal Access to Justice: The Challenge and the Opportunity*, 19 WASH. & LEE L. REV. 153 (1962); Seidelson, *The Right to Counsel: From Passive to Active Voice*, 38 GEO. WASH. L. REV. 849 (1970); Simeone & Richardson, *Indigent and His Right to Assistance in Criminal Cases*, 8 ST. LOUIS U. L.J. 15 (1963); Steele, *The Doctrine of the Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 SW. L.J. 488 (1969); Stephens, *The Assistance of Counsel and the Warren Court: Post-Gideon Developments in Perspective*, 74 DICK. L. REV. 193 (1970); Tucker, *The Supreme Court and the Indigent Defendant*, 37 S. CAL. L. REV. 151 (1964); Watts, *Indigent Defendants and Criminal Justice*, 42 N.C.L. REV. 322 (1964).

<sup>42</sup> *Roberts v. LaValle*, 389 U.S. 40, 42 (1967).

<sup>43</sup> *Pembrook v. Wilson*, 370 F.2d 37 (9th Cir. 1966); *Blair v. California*, 340 F.2d 741 (9th Cir. 1965); *Ragan v. Cox*, 305 F.2d 58 (10th Cir. 1965). See also *Smith v. Bennett*, 365 U.S. 708 (1961); *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065 (1969).

<sup>44</sup> *Lee v. Habib*, 424 F.2d 891, 901 (D. C. Cir. 1970).

<sup>45</sup> 347 U.S. 497 (1954). See also J. GREENBERG, *RACE RELATIONS AND AMERICAN LAW* 213 (1959).

1954, which held racial segregation in public education unconstitutional.<sup>46</sup> *Bolling* focused on the segregated school system in the District of Columbia. A separate opinion was necessary because the fourteenth amendment equal protection clause had been the cornerstone of the *Brown* decision, but on its face the fourteenth amendment did not apply to the District of Columbia. The Court succinctly identified the problem of equating equal protection and due process, and then resolved the problem simply but eloquently.

The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.<sup>47</sup>

The decision thus identified the fundamental fairness and equality which is required by both due process and equal protection, and held further that the Constitution required *fair treatment* by the federal government.<sup>48</sup>

In declaring the alleged discrimination unconstitutional the Court noted the absurdity of the contention that the Constitution meant to allow invidious discrimination on the federal level while preventing it on the state level.

In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public

<sup>46</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See generally Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421-30 (1960); Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956); Kohn, *Social Psychological Data, Legislative Fact, and Constitutional Law*, 29 GEO. WASH. L. REV. 136 (1960); Roche, *Plessy v. Ferguson: Requiescat in Pace?* 103 U. PA. L. REV. 44 (1954); Sanders, *The School Segregation Cases*, 7 VAND. L. REV. 985 (1954); Waite, *Race Segregation in the Public Schools: Jim Crow at the Judgment Seat*, 38 MINN. L. REV. 612 (1954); Comment, *Separate but Equal Doctrine and the Segregation Cases*, 19 ALBANY L. REV. 233 (1955).

<sup>47</sup> 347 U.S. 497, 499 (1954); *Kills Crow v. United States*, 451 F.2d 323 (8th Cir. 1971). See also *Detroit Bank v. United States*, 317 U.S. 329 (1943); *Currin v. Wallace*, 306 U.S. 1, 13 (1939); *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937).

<sup>48</sup> See Rossman, *Review of Recent Supreme Court Decisions—Bolling v. Sharpe*, 40 A.B.A. 619 (1954); Note, *Constitutional Law—Segregation in Public Schools*, 15 LA. L. REV. 204 (1954); Note, *Supreme Court Equity Discretion: The Decrees in the Segregation Cases*, 64 YALE L. J. 124 (1954).

schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.<sup>49</sup>

The *Bolling* case, by extension, provides a basis for prohibiting the denial of access to the bankruptcy court, when that denial is the result of an invidious and unconstitutional discrimination. A strong case for the use of "equal protection" as a requirement of fundamental fairness can be maintained, especially if wealth were to be treated on the higher constitutional test as a "suspect classification."<sup>50</sup>

To apply *Bolling* to bankruptcy proceedings, it would be necessary to establish that the fee provisions result in a suspect classification based on wealth and an invidious discrimination, without an overriding government interest. The Court would have to hold the Bankruptcy Act as such an open and direct affront to equal protection that it is a denial of due process. That the treatment by the Supreme Court of statutory classifications under the equal protection clause is relevant to the instant discussion, is evident first, because it shows the problem of applying *Bolling* to indigents denied access to bankruptcy courts. Secondly, it indicates the possibility of holding that there is an invidious discrimination which is so flagrant a denial of equal protection as to amount to a denial of due process. Finally, an appraisal of the Supreme Court's treatment of statutory classifications under the equal protection clause, illustrates, together with *Kras*, *Bolling*, and *Boddie v. Connecticut*, the inconsistency, confusion, and uncertainty with which the Court has approached equal protection. Since the topic is equal protection, in most instances the statutes involved were state not federal statutes.

The Supreme Court has utilized two separate tests in considering the constitutionality of legislative classifications under the equal protection clause.<sup>51</sup> Legislative classification means simply a discrimination or grouping of particular segments for specific reasons, either by design or by result. Under the traditional test, in order to determine if a statutory classification violated equal protection, the courts were faced with a presumption of

<sup>49</sup> 347 U.S. at 500. Cf. *Hurd v. Hodge*, 334 U.S. 24 (1948).

<sup>50</sup> Cf. *Rodriguez v. San Antonio Indep. School Dist.*, 411 U.S. 1 (1973) (Marshall, J., dissenting); *James v. Valtierra*, 402 U.S. 137 (1971) (Marshall, J., dissenting); *Turner v. Fouche*, 396 U.S. 246 (1969); *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969).

<sup>51</sup> See *Developments in Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969). *Contra*, *Dandridge v. Williams*, 397 U.S. 471, 489 (1970) (Harlan J., dissenting) (there is no solid basis for the doctrine of two equal protection standards to assess legislative classifications). *But see Gunther, Forward: In Search of An Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974).

constitutionality if the classification was rationally related to a legitimate governmental objective.<sup>52</sup> Thus, the burden to overcome the minimal requirement was with the classification's challenger.

Later, the Supreme Court determined that the traditional test was inadequate for protecting fundamental rights and it subsequently created "a second test."<sup>53</sup> This test, referred to most commonly as the "compelling interest test," required that the government establish not only that it had a compelling interest which justified the law, but also that the distinctions drawn by the law were necessary to fulfill that legislative purpose. The governmental interest in requiring bankruptcy fees is that bankruptcy is supposed to pay its own way; but, should this interest override the interest of providing individuals with an adjudication of their claim to a discharge? Is the classification of indigents and the distinction that you have no right of access to a bankruptcy court unless you have fifty dollars reasonable?

The Court has employed this second test and required the state to establish a compelling governmental interest and the necessity of the classification in furthering that interest only after a determination has been made that there was either a suspect classification<sup>54</sup> or a fundamental interest<sup>55</sup>

<sup>52</sup> *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Rapid Transit Corp. v. City of New York*, 303 U.S. 573, 578 (1938). See also *Lindsey v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-80 (1910); *Dykstra, Legislative Favoritism Before the Courts*, 27 IND. L.J. 38 (1951); *Warsoff, The Weight of the Presumption of Constitutionality Under the Fourteenth Amendment*, 18 B.U.L. REV. 319 (1938); *Willis, Due Process of Law Under the United States Constitution*, 74 U. PA. L. REV. 331 (1926).

<sup>53</sup> See *Shapiro v. Thompson*, 394 U.S. 618, 658 (1968); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *McLaughlin v. Florida*, 379 U.S. 184 (1964). See generally Comment, *Constitutional Law—Freedom of Travel—Residency Requirements Constitute an Invidious Discrimination Denying Applicants Equal Protection of the Laws, Violate the Due Process Clause of the Fifth Amendment, and Place a "Chilling Effect" on the Right of Interstate Travel*, 1 ST. MARY'S L.J. 268 (1969); Note, *Constitutional Law: Residency Requirements*, 53 MARQ. L. REV. 439 (1970); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 118 (1969).

<sup>54</sup> *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Oyama v. California*, 332 U.S. 663 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944). On the suspect classification of the Japanese and their relocation during World War II, see THOMAS & NASHIMOTO, *THE SPOILAGE* (1946); Alexander, *The Nisei—A Casualty of World War II*, 28 CORNELL L.Q. 385 (1943); Freeman, *Genesis, Exodus, and Leviticus—Genealogy, Evacuation, and Law*, 28 CORNELL L.Q. 414 (1943); Rostow, *Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945); Wolfson, *Legal Doctrine, War Power, and Japanese Evacuation*, 32 KY. L.J. 328 (1944); Comment, *Constitutional Aspects of War Relocation Authority and Japanese Americans*, 11 GEO. WASH. L. REV. 482 (1943); Comment, *Civil Rights and Anti-Japanese Discrimination*, 18 U. CHI. L. REV. 81 (1949). On suspect classification of different races and the unconstitutionality of anti-miscegenation statutes, see *Loving v. Virginia*, 388 U.S. 1 (1967); Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966); Riley, *Miscegenation Statutes—A Reevaluation of Their Constitutionality in Light of Changing Social and Political Conditions*, 32 S. CAL. L. REV. 28 (1958); Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes*, 42 CORNELL L.Q. 208 (1957).

<sup>55</sup> See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966); *Griffin v. Illinois*,

which justified subjecting the statute to strict scrutiny.<sup>56</sup> The compelling interest test increases the likelihood that the statute will be struck down by reversing the presumption of constitutionality and placing the burden on the government. This test will obviously be used in cases involving voting rights, school segregation, and criminal defendants since it was in these cases that the compelling interest test and the concepts of suspect classification and fundamental interest were first developed; and historically, the equal protection clause was "largely a product of the desire to eradicate legal distinctions founded upon race."<sup>57</sup>

Consequently, the Court may be reluctant to act in picking out particular interests, like education or access to bankruptcy courts, and characterizing them as fundamental interests, since such a decision may place the Court on the level of a super legislature.<sup>58</sup>

The Court in recent decisions has narrowed the equal protection clause and the role of the Court in judging legislative classifications by its treatment of interests which could have been labeled fundamental. In one case, the Court held the traditional test was better than the compelling interest test because the former did not allow federal courts to impose their views of what constituted wise economic or social policy upon government.<sup>59</sup> A

351 U.S. 12 (1956). See also notes 28 & 39 *supra*. On the fundamental rights or interests interpretation of the due process clause, see generally 2 BOUDIN, GOVERNMENT BY JUDICIARY 374-442 (1932); CORWIN, LIBERTY AGAINST GOVERNMENT 116-83 (1948); 2 CROSSKEY, POLITICS AND THE CONSTITUTION 1119-58 (1953); H. WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS (1970); Barnett, *Vested Rights in the Common Law*, 27 ORE. L. REV. 25 (1947); Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 CORNELL L.Q. 561 (1954); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928-29); Hyman & Newhouse, *Standards for Preferred Freedoms*, 60 NW. U.L. REV. 1 (1965); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and a Criticism*, 66 YALE L. J. 319 (1957); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

<sup>56</sup> See *Skinner v. Oklahoma* 316 U.S. 535, 541 (1942); Comment, *Validity of Sex Offenders Acts*, 37 MICH. L. REV. 613 (1939); Comment, *Sane Laws for Sexual Psychopaths*, 1 STAN. L. REV. 486 (1949); See generally Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-law-due-process-formula,"* 16 U.C.L.A.L. REV. 716 (1969); Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629 (1970); Symposium, *Equal Protection* 29 OHIO ST. L.J. 941 (1968).

<sup>57</sup> *Shapiro v. Thompson*, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting).

<sup>58</sup> *Id.*

<sup>59</sup> See *Dandridge v. Williams*, 397 U.S. 471 (1970). See also Comment, *Legal Rights of AFDC Recipients After Rosado v. Wyman and Dandridge v. Williams*, 21 AM. U. L. REV. 207 (1971); Comment, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61 (1971); Note, *Social Welfare—Maryland's Maximum Grant Regulation on AFDC Payments Does Not Violate the Equal Protection Clause Nor Is It Inconsistent with the Social Security Act*, 35 ALBANY L. REV. 416 (1971); Note, *Constitutional Law—The Maximum Welfare Grant*, 9 DUQUESNE L. REV. 271 (1970); Note, *Equal Protection—A Judicial Cease Fire in the War on Poverty?*, 36 MO. L. REV.

second decision considered the possible racial implications of an article in the California constitution which required community approval before initiating low-rent housing projects.<sup>60</sup> The Court was satisfied the article did not classify on the basis of race and it decided not to declare the article unconstitutional merely because it prevented some individuals from obtaining public housing. The Court refused to even consider whether the California provision classified citizens on the basis of wealth. In *Boddie v. Connecticut*,<sup>61</sup> the Court could have declared it was a denial of equal protection to bar indigents from divorce courts because they could not pay court costs; yet, the Court held the petitioners did have a right to proceed without payment of fees under the *due process clause*. *Boddie* could thus be interpreted as a philosophical stand-off because if it was an expansion of due process, then it was also a limitation of equal protection.

A comparison of the equal protection aspects of these three pre-*Kras* decisions with decisions in which the Court used the compelling interest test reveals the critical determinant in deciding whether the traditional test or the compelling interest test should be utilized is the characterization of the statutory classification and the interests of those classified. Nevertheless, the Court has never required that a state establish a compelling interest or the necessity of a wealth classification unless it first found the statutory classification affected a fundamental interest of the person assailing the statute.

There is no reason to believe the Court will invoke equal protection until they are persuaded a fundamental interest, *i.e.*, the right of access to

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117 (1971); Note, *Dandridge v. Williams: Equal Protection and Welfare Law*, 1 N.Y.U. REV. L. & SOC. CHANGE 119 (1971). For comments favorable to the position of welfare petitioners and the dissent of Justices Brennan, Douglas, and Marshall in *Dandridge*, see O'NEIL, *THE PRICE OF DEPENDENCY; CIVIL LIBERTIES IN THE WELFARE STATE* (1970); Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 CALIF. L. REV. 555 (1970); Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U.L. REV. 836 (1968); Reinstein, *The Welfare Cases: Fundamental Rights, the Poor and the Burden of Proof in Constitutional Litigation*, 44 TEMP. L.Q. 1 (1970).

<sup>60</sup> James v. Valtierra, 402 U.S. 137 (1971). See generally Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CALIF. L. REV. 1384 (1971); Comment, *Constitutional Law—Equal Protection—Mandatory Referendum on Low-Income Housing*, 13 B.C. IND. & COM. L. REV. 603 (1972); Comment, *The Poor, Equal Protection, and Public Housing: James v. Valtierra—Where to from Here?*, 20 KAN. L. REV. 253 (1972); Note, *Constitutional Law—Equal Protection and the "Right" to Housing*, 50 N.C. L. REV. 369 (1972); Note, *Constitutional Law—Mandatory Referendum Approval of Low-Rent Housing Projects*, 46 TUL. L. REV. 806 (1972); Note, *James v. Valtierra: Housing Discrimination by Referendum?*, 39 U. CHI. L. REV. 115 (1971); Note, *Mandatory Referendum and Approval for Low-Rent Housing Projects: A Denial of Equal Protection?*, 25 U. MIAMI L. REV. 790 (1971); Note, *Constitutional Law—Public Housing for Low-Income Families—Mandatory Referendum Requirement, James v. Valtierra*, 1972 WISC. L. REV. 268.

<sup>61</sup> 401 U.S. 371 (1971).

bankruptcy courts, and a suspect classification, *i.e.*, denying only indigents access, are involved. But, the Court could apply equal protection by way of due process to reach the succinct conclusion that requiring a fifty dollar filing fee and denying indigents access to bankruptcy involves a suspect classification which touches upon a fundamental interest triggering active judicial review and application of the compelling interest test.

#### IV. ACCESS TO BANKRUPTCY UNDER AN EQUAL PROTECTION THEORY

Having reviewed the problems and possibilities with equal protection, it is plain that precedent applies for both the positive and negative sides. Equal protection standards could be invoked to guarantee a right of access to bankruptcy proceedings, which is not conditioned on petitioner's ability to pay costs and fees. Equal protection criteria requires finding: first, a fundamental right of petitioner; second, a suspect classification which effectively denies petitioner his right; and, third, that there is no overriding governmental policy. The following will attempt such a brief but positive analysis and application affording grounds for the invocation of equal protection.

Identifying or declaring that an interest is a fundamental right is difficult. Often such determinations turn on the beliefs and prejudices of the individual or court which has to make the decision. A better approach would be to ask what interests and to what degree should existing interests be protected.<sup>62</sup> Bankruptcy does involve the functioning of a court,<sup>63</sup> and, there should be a right of access to that court.<sup>64</sup> Although the Constitution specifically provides for bankruptcy, there cannot be found any suggestion or direct implication that bankruptcy was intended and included only for those who have fifty dollars. Yet, it should once again be emphasized that the fundamental right is not the discharge in bankruptcy, rather it is the access to the bankruptcy proceeding.

Rather than simply declaring wealth or any other single factor as suspect *per se*, the far more beneficial course involves the identification of the essential elements of an invidious classification. Among the numerous attempts at identifying such elements of invidious classifications, Professor Michelman seems to offer some clear-cut guidelines for evaluation:

<sup>62</sup> See Goodpaster, *supra* note 3; Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 437-38 (1967).

<sup>63</sup> See 11 U. S. C. § 1 (1970). See also Collet v. Adams, 249 U.S. 545 (1919); Mt. Vernon Hotel Co. v. Block, 157 F.2d 637 (9th Cir. 1946). See generally D. COWENS, BANKRUPTCY LAW AND PRACTICE (1963).

<sup>64</sup> See *In re Smith*, 323 F. Supp. 1082, 1087 (D. Colo. 1971). See also Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1967); Comment, *Constitutional Law—Indigent's Filing Fee as a Condition Precedent to Discharge in Bankruptcy Held Unconstitutional*, 21 J. PUB. L. 239, 243 (1971); *Indigent Access to Civil Courts*, *supra* note 13, at 25, 38.



An "invidious" classification or trait is one which combines, in greater or lesser degree and in varying proportions, three qualities: (1) a general ill-suitedness to the advancement of any proper governmental objective; (2) a high degree of adaption to uses which are oppressive in the sense of systematic and unfair devaluation, through majority rule, of the claims of certain persons to nondiscriminatory sharing in the benefits and burdens of social existence; (3) a potency to injure through an effect of stigmatizing certain persons by implying popular or official belief in their inherent inferiority or undeservingness.<sup>65</sup>

While the government objective, which is the third element, will be considered later, the other two elements are best considered together at this point.

The second element is present in wealth classifications. Certainly poverty and oppression are the end result of virtually all discrimination and so discrimination on the basis of wealth in many ways is the cornerstone of all discrimination. The Court has declared that classifications which are directed against members of a disadvantaged minority are constitutionally suspect.<sup>66</sup> It has also been suggested that wealth would afford an independent ground for strict judicial scrutiny.<sup>67</sup> While Professor Michelman has expressed reservations regarding the inclusion of wealth within those factors affording an independent basis he has argued that wealth should be established as a suspect classification:

The convincing reasons which can be offered for extremely skeptical judicial inspection of official acts which explicitly classify by race . . . seem applicable to statutes which explicitly or designedly classify by wealth or income, *in the sense of deliberately subdividing the population according to wealth or income criterion for the purpose of extending different treatment to the groups so distinguished.*<sup>68</sup>

Since the Supreme Court decision in *Kras*, only those who are truly indigent and most in need of bankruptcy are denied access, which results as a practical matter in such a deliberate discrimination on a wealth classification.

<sup>65</sup> Michelman, *supra* note 37, at 20. See also *Frontiero v. Richardson*, 411 U.S. 677 (1973) (Brennan, J.); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1124-27, 1173-76 (1969); Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967).

<sup>66</sup> *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>67</sup> *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807 (1969). See also *Bullock v. Carter*, 405 U.S. 134 (1972). *Contra*, *Rodriguez v. San Antonio Indep. School Dist.*, 411 U.S. 1 (1973); *Ortwein v. Schwab*, 410 U.S. 656, *petition for rehearing denied*, 411 U.S. 922 (1973); *United States v. Kras*, 409 U.S. 434 (1973); Michelman, *supra* note 37 at 21 (wealth is yet to become a suspect classification).

<sup>68</sup> Michelman, *supra* note 37, at 20-21.

The stigmatizing effect is an invariable result of wealth classifications. Several responses to this element indicate that courts are not responsive to the poor and some suggest the poor are even treated and regarded with hostility.<sup>69</sup> One writer has suggested that: "[T]here is a demonstrable hostility on the part of courts to legal service offices and to litigation by the poor."<sup>70</sup> This seems inconsistent with the nature and purpose of bankruptcy as expressed by former Supreme Court Chief Justice Earl Warren:

The Bankruptcy laws are laws of compassion, adopted by a compassionate government which wants to give a man an opportunity to rehabilitate himself, get back into business, into the stream of economic life, and contribute his part to the future.<sup>71</sup>

The interest in removing invidious classifications should not be limited to the discriminated minority. It is in the best interests of a democratic republic to expand equal protection and due process to the four corners of society. Every American should be provided equal access to all three branches of government and every proceeding which may effect or determine life, liberty, or property rights. The role of judicial and administrative proceedings, including bankruptcy, is very important in this scheme.

If a man has no resort to law for protection, all the grandiose language of the Constitution becomes a pious platitude. The denial of access on the basis of wealth alone makes this discrimination all the more invidious. Once access is established as a fundamental right, any measure tending to limit that right "must be judged by the stricter standard of whether it promotes a compelling state interest."<sup>72</sup>

<sup>69</sup> REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISOBEDIENCE 5-10 (1968); Jacoby, *Legal Aid to the Poor*, 53 HARV. L. REV. 940 (1939).

<sup>70</sup> Stumpf & Janowitz, *Judges and the Poor: Bench Responses to Federally Financed Legal Services*, 21 STAN. L. REV. 1058, 1064-67 (1969). See also Goodpaster, *supra* note 3, at 228. But see Fuentes v. Shevin, 407 U.S. 67 (1972); Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

<sup>71</sup> E. WARREN, PROCEEDINGS OF THE FIRST SEMINAR FOR REFEREES IN BANKRUPTCY 1 (1964).

<sup>72</sup> Comment, *Access to Bankruptcy Court for Indigents: The Extension of Boddie v. Connecticut*, 16 ST. LOUIS U.L.J. 328, 337 (1971). See also Note, *Boddie v. Connecticut and the Constitutional Rights of Indigents*, 45 TEMP. L.Q. 390, 402 (1972) (all civil litigants should have those services provided which would render their resort to the courts truly effective.). On the general expansion of both procedural and substantive rights of indigents and welfare recipients prior to *Kras and Ortwein*, see Fuentes v. Shevin, 407 U.S. 67 (1972); Wymann v. James, 400 U.S. 309 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970). Accord, Fontaine, *The Constitutional Law of Remedies in Welfare Litigation*, 23 ME. L. REV. 41 (1971); Cooley & Goldberg, *The Search for Due Process in the Administration of Social Welfare Programs*, 47 N.D.L. REV. 209 (1971); O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 SUP. CT. REV. 161; Packard, *Fair Procedure in Welfare Hearings*, 42 S. CAL. L. REV. 600 (1969); Smith, *Due Process and the Poor in Public Housing*, 15 HOW. L.J. 422 (1969).

The government's interest in denying indigents access and requiring the payment of fees could be based on deterring unmeritorious litigation, resource allocation, or cost recoupment. The Supreme Court has denied access by determining that the fees are reasonable and bankruptcy must support itself.<sup>73</sup> One district court has attacked this reasoning, stating that, "the government's purely economic justification for bankruptcy filing fees is not a sufficiently compelling interest to make such fees a precondition of access to the courts."<sup>74</sup> This district court's position was supported in a statement by Justice Brennan in a case considering access to other civil proceedings. Justice Brennan indicated that the indigent's interest in being heard was greater than the states' interest in imposing a fee requirement.<sup>75</sup>

It is difficult to uphold the fee requirement on the basis that bankruptcy must pay its own way, because bankruptcy no longer pays its own way, as indicated by comparatively recent statistics and reports advocating the abolishment of the principle of self-support for bankruptcy.<sup>76</sup> Although never enacted, legislation was introduced in Congress in 1971, to abolish self-support for the bankruptcy courts.<sup>77</sup> In addition, there are no filing or hearing fees for the analogous proceedings for workman's compensation and unemployment benefits; and, the Social Security administration affords not only free filing of applications and initial determinations, but also free hearings and appeals.<sup>78</sup>

The issue has been whether to require fees in bankruptcy because it must support itself, and the resultant fear that abuses will follow from not requiring payment by all petitioners. The answer has been and continues

<sup>73</sup> United States v. Kras, 409 U.S. 434 (1973).

<sup>74</sup> *In re Naron*, 334 F. Supp. 1150 (D. Ore. 1971). Compare *In re Cheval*, 386 F.2d 127 (3d. Cir. 1967); [and] *In re Neiderheiser*, 45 F.2d 489 (8th Cir. 1930), with *St. Regis Paper Co. v. Jackson*, 369 F.2d 136 (5th Cir. 1966), *In re Solari Furs*, 263 F. Supp. 658 (E.D. Mo. 1967), [and] *In re Feinberg*, 287 F. 254 (E.D. Pa. 1923) (A discharge in bankruptcy is only a privilege or service and there is no right to a discharge.).

<sup>75</sup> *Boddie v. Connecticut*, 401 U.S. 371, 386 (1971) (Brennan, J., concurring).

<sup>76</sup> 1970 JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 24, 201 (1970); 1969 JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS 23-24 (1969); Cyr, *Bankruptcy Courts in Transition Toward Debtor Rehabilitation*, 22 ME. L. REV. 333, 346-47 (1970); Hufstедler, *Consumers in Bankruptcy Land*, 45 AM. BANKR. L.J. 199, 202 (1971).

<sup>77</sup> S. 1394, 92d Cong., 1st Sess. (1971); H. R. 4816, 92d Cong., 1st Sess. (1971). See generally *Recent Developments, Requiring Filing Fees as a Prerequisite to Bankruptcy Discharge for Indigents Is Unconstitutional*, 60 GEO. L.J. 1581 (1972); Note, *Bankruptcy Filing Fee Subjected to Constitutional Test*, 50 N.C.L. REV. 654 (1972) [hereinafter cited as *Bankruptcy Filing Fee*].

<sup>78</sup> See CCH UNEMPL. INS. REP. ¶ 12,551-669; Note, *Constitutional Law—Failure to Extend Equal Protection To Guarantee Indigent's Right of Free Access to the Courts in Divorce Proceedings*, 17 N.Y.L.F. 634 (1971).

to be yes.<sup>79</sup> A policy decision should be made that no longer can citizens be denied access to judicial or administrative proceedings based on indigency. The focus then would become finding an appropriate remedy short of abolishing fees which would also serve the government's interest in the recoupment of costs and preventing abuse of non-payment provisions.

The Bankruptcy Act could be amended to provide that a petitioner could proceed upon a finding or declaration of indigency. If income was raised or found at any time during the proceeding the fee could be reinstated. A second possibility would be to provide that the fee be paid out of future assets or that the fee be withheld from discharge, both of which would have the same effect. Even if self-support were not abandoned, it seems reasonable that this policy could be adequately served by a statutory provision excluding the government's claim for administrative costs from the scope of a discharge without making non-payment a ground for denying the bankrupt relief from his other obligations.<sup>80</sup> In comparing Section 17(a), which controls payment of taxes as an exception to discharge, with Section 14(c), which lists non-payment of filing fees as an objection to discharge, one writer has suggested:

The government's interest in taxes is analogous to its interest in the administration costs in bankruptcy that are provided by the filing fee. Since the government already protects its interests in taxes by providing that taxes remain outside a discharge, it seems reasonable that it could similarly protect its interest in these administration costs. Thus the government's claim for the filing fee could be treated simply as an additional exception to a discharge under Section 17 a rather than as a Section 14 c objection to a discharge. This is, in effect, what the courts in *Kras* and *Smith* have done, and these two cases are an important step toward making the bankruptcy discharge the substantial debtor's remedy it was intended to be.<sup>81</sup>

#### V. DUE PROCESS AND *Boddie v. Connecticut*<sup>82</sup>

The unanticipated approach of the Court and the ramifications of the decision make the Supreme Court decision in *Boddie* important. Petitioners

<sup>79</sup> See *United States v. Kras*, 409 U.S. 434 (1973).

<sup>80</sup> See *Bankruptcy Filing Fee*, *supra* note 77.

<sup>81</sup> *Id.* at 663-64. See also Bankruptcy Act §§ 14(c), 17(a), 11 U. S. C. §§ 32(c), 35(a) (1970); *In re Kras*, 331 F. Supp. 1207 (E.D.N.Y. 1971); *In re Smith*, 323 F. Supp. 1082 (D. Colo. 1971). See also 1971 JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED BANKRUPTCY RULES AND OFFICIAL FORMS UNDER CHAPTERS I TO VII OF THE BANKRUPTCY ACT 42 (1971) (Another relief-bringing change would be to provide that a dismissal for failure to pay fees would be without prejudice unless otherwise stated).

<sup>82</sup> 401 U.S. 371 (1971).

in *Boddie* were denied access to divorce proceedings because of their inability to pay court costs. They sought a declaration that the statute requiring payment of costs as a condition precedent to obtaining court relief was unconstitutional as applied to petitioners and all other members of the class which they represented. The district court upheld the fee requirement, the case was then argued before the Supreme Court in 1969 and reargument was heard in 1970.<sup>83</sup> Justice Harlan summarized the opinion of the majority.

Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.<sup>84</sup>

The limits of the majority decision were identified in the last paragraph of the opinion by Justice Harlan.

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.<sup>85</sup>

Concurring in result Justice Douglas stated that indigents should be granted a right of access in civil as well as criminal trials and appeals.<sup>86</sup> He concluded that all invidious classification, in this instance wealth classification, should be held unconstitutional.<sup>87</sup> Concurring in part, Justice Brennan criticized the limits of the decision and stated the right of access to divorce proceedings should extend to all proceedings.<sup>88</sup> Justice Black in dissent, attacked the use of due process and equal protection, and decried the practice of creating

<sup>83</sup> *Id.* at 373, 374.

<sup>84</sup> *Id.* at 374.

<sup>85</sup> *Id.* at 382-83. *But see* *Boddie v. Connecticut*, 401 U.S. 371, 374 (Harlan, J.) (Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitely settle their differences in an orderly, predictable manner. Without such a legal system, social organization and cohesion are virtually impossible; with the ability to see regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society.).

<sup>86</sup> *Id.* at 383 (Douglas, J., concurring). *See* *Griffin v. Illinois*, 353 U.S. 12, 19 (1956).

<sup>87</sup> *Id.* at 386.

<sup>88</sup> *Id.* at 387-88 (Brennan, J., concurring in part).

fundamental interests and judging governmental action by the Court's sense of fairness.<sup>89</sup>

Several writers<sup>90</sup> foresaw the limitation of *Boddie* which occurred in *United States v. Kras*. Yet much of the promise of *Boddie* came not from the decision, but rather from writers who may have been too enthusiastic in hoping for an expansion of that holding. One annotator appeared to advocate application to bankruptcy when he said that in accordance with *Boddie*, individuals with fundamental rights, which are capable of being settled only in federal tribunals whether judicial or administrative, should be allowed cost free access to these arenas.<sup>91</sup>

Another commentator extended this to the sweeping suggestion that all civil litigants should be provided these services, on the basis of due process.<sup>92</sup> Other writers<sup>93</sup> supported expansion of *Boddie*, although some on a less definite bases.<sup>94</sup> Ironically, the strongest support for extension or at least application of *Boddie* has come from the single Justice who opposed granting a right of access to divorce proceedings. Dissenting from a denial of certiorari in a later case, Justice Black identified the import of *Boddie*.

[T]he 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,

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<sup>89</sup> *Id.* at 389 (Black, J., dissenting).

<sup>90</sup> See Note, *Prepayment of Filing Fees as a Condition Precedent to the Grant of a Discharge in Bankruptcy of an Indigent Petitioner Denies Equal Protection*, 72 COLUM. L. REV. 781 (1972). See also Michelman, *supra* note 37; Note, *Boddie v. Connecticut: Free Access to Civil Courts for Indigents*, 76 DICK. L. REV. 749, 774 (1972); Note, *Constitutional Law—Due Process Clause—Access to Divorce Courts for Indigents*, 46 TUL. L. REV. 799, 806 (1972). Note, *Constitutional Law—A State's Denial to Indigents of Access to It's Courts in a Divorce Proceedings Due to Financial Barriers Is a Violation of Due Process*, 20 KAN. L. REV. 554 (1972) (The degree to which a right is considered fundamental will vary according to the attitudes and views of the different courts and the structure of society).

<sup>91</sup> Comment, *Boddie v. Connecticut: Whither the Indigent Civil Litigant?*, 22 CATHOLIC U. L. REV. 427, 433 (1973).

<sup>92</sup> Note, *Boddie v. Connecticut and the Constitutional Rights of Indigents*, 45 TEMP. L.Q. 390 (1972).

<sup>93</sup> Comment, *Access to Bankruptcy Court for Indigents: The Extension of Boddie v. Connecticut*, 16 ST. LOUIS U.L.J. 328, 377 (1971) [hereinafter cited as *Extension of Boddie*]; *Indigent Access to Civil Courts*, *supra* note 13, at 25.

<sup>94</sup> See Note, *Constitutional Law—Access to Courts—Indigents Seeking Divorce Decree*, 10 DUQUENSE L. REV. 123 (1971); Note, *Constitutional Law—Due Process—Equal Protection—State's Refusal to Permit Indigents to Institute Divorce Actions Without Prepayment of Court Fees and Service Costs Is a Denial of Due Process*, 47 NOTRE DAME LAWYER 366 (1971); Note, *Constitutional Law: Free Divorce for the Indigent*, 24 U. FLA. L. REV. 180 (1971).

because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire a lawyer.<sup>95</sup>

Later in the same opinion, Justice Black explained that exclusiveness of the judicial process as a remedy was not a limitation because the States and federal government held the ultimate power of enforcement in virtually every dispute or claim. He added that because society places a relatively high value on marriage and low value on divorce, virtually every other kind of legally enforceable right should be considered as fundamental to society. His conclusion left no doubt that access to bankruptcy proceedings was as fundamental as access to divorce proceedings.<sup>96</sup> Justice Douglas echoed the sentiments of Justice Black, and argued the equal protection clause should have been an alternate basis for relief.

Courts ought not be a private preserve for the affluent. All these cases (considered with *Meltzer*) contain an invidious discrimination based on poverty, a suspect legislative classification . . . .

[O]btaining a fresh start in life through bankruptcy proceedings or securing adequate housing and the other procedures in these cases, seemingly come within the Equal Protection Clause . . . .<sup>97</sup>

Clearly, the use of *Boddie* and due process would be a possibility in analyzing the claim of an indigent who has been denied access to bankruptcy proceedings. The advantage of using due process would be that while equal protection invalidations require the infringement of a fundamental interest, the Court, as Justice Douglas pointed out, has not "restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."<sup>98</sup> The irony of this distinction has been explained, as follows:

Justice Harlan's due process analysis, then, leads to waiver of court fees in all forms of litigation. There is some irony in this, for the majority's approach was seemingly calculated to avoid the breadth of an equal protection analysis. The latter approach, however, might have limited waiver of court fees to cases involving constitutionally cognizable interests, such as marriage, race, or first amendment interests.

<sup>95</sup> *Meltzer v. C. Buck LeCraw & Co.*, 225 Ga. 91, 166 S.E.2d 88, cert. denied, 402 U.S. 954, 955-56 (1971) (Black, J., dissenting from the denial of certiorari) (Justices Black and Douglas stated their dissents were intended to apply not only to *Meltzer*, but also to the denial of certiorari in the bankruptcy case. See *In re Garland*, 428 F.2d 1185 (1st Cir. 1970), cert. denied, 402 U.S. 966 (1971).

<sup>96</sup> *Id.* at 957-58.

<sup>97</sup> *Id.* at 961 (Douglas, J., dissenting from denial of certiorari).

<sup>98</sup> *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966). See also Michelman, *supra* note 37; *Indigent Access to Civil Courts*, *supra* note 13.

No such limitations are possible under the majority's due process approach, at least as structured by Justice Harlan.<sup>99</sup>

Other commentators, however, see the situation as a limitation of equal protection by relying on due process which requires more to overturn the statute, or in this case establish a right of access.<sup>100</sup> The Supreme Court decision in *Kras* has limited the possibility that a right of access to bankruptcy proceedings will be established in the near future.

## VI. *United States v. Kras*<sup>101</sup>

### A. *The District Court's Decision*

William Robert Kras sought to file a bankruptcy petition. The clerk of the federal district court, who was charged with assigning the case and referring it immediately to a referee, refused to do so because the filing fee had not been paid. Kras petitioned for leave to file a bankruptcy petition without prepayment of filing fees and the matter was presented to Judge Travia for determination instead of being sent directly to the bankruptcy court for determination.<sup>102</sup>

The affidavit in support of the motion depicted the circumstances. Petitioner lived with his mother, niece, wife, and two children, the youngest of which had cystic fibrosis. The family unit subsisted on a public assistance allotment of less than four hundred dollars per month and petitioner had over six thousand dollars in debts with no assets to pay them. Petitioner had been discharged from his job with the Metropolitan Life Insurance Company when premiums he had collected for them were stolen and he could not replace the money. Since then petitioner had been unable to find work because of bad references from the insurance company. Finally, because of indigency, the sick child, and lack of employment, petitioner could neither pay nor promise to pay the filing fee now or in installments.

The court dismissed the argument that there was a statutory right of access within the Bankruptcy Act itself; but, it relied on *Boddie*, the dissent in the denial of certiorari in *Garland*, the Colorado *Smith* opinion, and petitioner's memorandum to find a right of access under the equal protection

<sup>99</sup> LaFrance, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487, 536.

<sup>100</sup> Note, *Constitutional Law—Failure to Extend Equal Protection to Guarantee Indigent's Right of Free Access to the Courts in Divorce Proceedings*, 17 N.Y.L.F. 634 (1971). See also *Anders v. California*, 386 U.S. 738 (1967) (Black, Harlan, & Stewart, JJ., dissenting); *Carrington v. Rash*, 380 U.S. 89 (1965) (Harlan, J., dissenting); *Mapp v. Ohio*, 367 U.S. 643 (1961) (Frankfurter, Harlan, & Whittaker, JJ., dissenting).

<sup>101</sup> 409 U.S. 434 (1973), *rev'g* 331 F. Supp. 1207 (E.D. N.Y. 1971).

<sup>102</sup> *In re Kras*, 331 F. Supp. 1207 (E.D. N.Y. 1971).



and due process meaning of the fifth amendment.<sup>103</sup> The court quoted from *Smith* and held the issue was not simply bankruptcy, but access to court. The court agreed the question thereby takes on "greater significance, at least for those who are trained in the law and who regard the legal system as fundamental to our way of life."<sup>104</sup>

Judge Travia noted the status of petitioner as an indigent could be challenged after the petition was filed and he suggested that the referee provide in the ruling for survival of petitioner's obligation to pay the filing fee. He added that the potential for abuse should not control in constitutional areas. He relied on petitioner's memorandum to establish that granting the motion of petitioner would not promote or result in increased frivolous petitions by indigents.<sup>105</sup>

In summary, the district court decision granted petitioner's motion to file a petition in bankruptcy even though he had not and could not promise to pay the costs and the clerk was thus ordered to file the petition and refer it to the referee.

#### B. Reaction to the Decision of the Federal District Court

While most writers saw the decision of Judge Travia as the logical expansion of the right of access doctrine formulated in *Boddie*, some opposition was identifiable. The nature and extension of the doctrine was sarcastically identified in one article which focused on *Boddie*:

These expanded guidelines of invidious discrimination were possessed of a manifest egalitarian rhetoric propounding the notion that the state had embarked upon a discriminatory policy on the basis of wealth equivalent to the 'traditionally disfavored' category of racial discrimination.<sup>106</sup>

The unfavorable tone of the above comment was echoed in another article

<sup>103</sup> *Id.* at 1214.

<sup>104</sup> *Id.* at 213, citing *In re Smith*, 323 F. Supp. 1082, 1087 (D. Colo. 1971). (In language identical to that in *Kras* the court conceded that although bankruptcy standing alone might not be a fundamental right, what was at stake was not simply bankruptcy, but access to court. Like the court in *Kras*, the court in *Smith* concluded access to court was more important and fundamental to our legal system.)

<sup>105</sup> *In re Kras*, 331 F. Supp. 1207, 1215 (E.D. N.Y. 1971).

<sup>106</sup> Note, *Constitutional Law—Failure to Extend Equal Protection to Guarantee Indigents' Right of Free Access to the Courts in Divorce Proceedings*, 17 N.Y.L.F. 634, 640-41 (1971). Accord, Foster & Freed, *Unequal Protection: Poverty and Family Law*, 42 IND. L.J. 192, 198-200 (1967); Silverstein, *Waiver and Appointment*, *supra* note 12; Solomon, *This New Fetish for Indigency: Justice and Poverty in an Affluent Society*, 66 COLUM. L. REV. 248 (1966); Willeing, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253, 270 (1968).

that attacked the position of the court in *Smith*, which was virtually identical to the position of Judge Travia in *Kras*. The article concluded: "The *Smith* decision represents a dangerous and unwarranted expansion of *Griffin*."<sup>107</sup>

A position contrary to the one in *Kras* was taken by another lower federal court in *In re Garland*.<sup>108</sup> The First Circuit in *Garland* focused on the right of discharge rather than the right of access. It held the rights of an individual in bankruptcy were not fundamental, but were merely privileges to which Congress could attach reasonable conditions. The court explained that there were only two classifications of assetless individuals: first, those who are attempting to conceal assets, and secondly, those who presently have no assets but who expect to have assets in the future, and wish to be rid of their creditors so they can enjoy them. The court summarily dismissed the first group. The court considered the second group but said only that their claim was not compelling enough to establish a constitutional right to a discharge. It used the equal protection formula and stated that usually equal protection and due process were denied only when laws were applied differently to different persons under the same or similar circumstances. The court denied the claims that a fundamental interest was involved and that the denial of the right to petition without payment of fees should be held unconstitutional.<sup>109</sup>

Five of six casenotes dealing with the district court decision were in support of the decision and its logical extension. The sixth article discussed the myriad of approaches and solutions which would be available to the Supreme Court when it reviewed the decision.<sup>110</sup> The writer suggested that it was unlikely that the Court would abandon the due process approach for an equal protection approach since use of due process better enabled the Court to limit the holding of *Boddie* and decide on a case-by-case basis whether a claimed right was fundamental. The article concluded that the choice of an applicable standard would be the key to the Court's decision.<sup>111</sup>

One writer praised the district court for focusing on the correct issue of right of access to courts instead of becoming mired in consideration of whether there was a right of discharge comparable to the rights of life, liberty, and franchise.<sup>112</sup> A second article stated that the decision was an

<sup>107</sup> Note, *In Forma Pauperis Relief—An Endless Road?—In Re Smith*, 6 U. RICHMOND L. REV. 175, 180 (1971).

<sup>108</sup> 428 F.2d 1185 (1st Cir. 1970), cert. denied, 402 U.S. 966 (1971).

<sup>109</sup> *Id.*

<sup>110</sup> See Note, *Boddie v. Connecticut: Free Access to Civil Courts for Indigents*, 76 DICK. L. REV. 749 (1972).

<sup>111</sup> *Id.* at 787.

<sup>112</sup> See *Extension of Boddie*, supra note 93.

important step in making the bankruptcy discharge the substantial debtor remedy it was intended to be.<sup>113</sup> A third article argued that denial of access to bankruptcy proceedings should be a denial of due process.<sup>114</sup> This article supported the decision, but it also noted that even if the Supreme Court refused to establish a right of access, Congress might be provoked into legislating a right of access. A fourth article began by drawing parallels to criminal cases where the Court had identified a right to be heard.<sup>115</sup> The writer then noted, that both divorce and bankruptcy are sworn to and both allow the petitioner to start life anew. He pointed out that a fifty dollar fee in bankruptcy was particularly illogical when there was only a fifteen dollar fee for other proceedings.<sup>116</sup> He concluded that the district court opinion had justly recognized a constitutionally protected fundamental interest in being heard.<sup>117</sup> A fifth writer compared the district court decision in *Kras* with the circuit court opinion in *Garland* and concluded that the former was better reasoned and more likely to be followed.<sup>118</sup>

Several lower court decisions supported the district court decision in *Kras*. The most important of these was decided seven months prior to *Kras*.<sup>119</sup> In *Smith*, Judge Arraj discussed the meaning, nature, and relation of equal protection and due process and declared: "[T]he Bankruptcy Act's filing requirement does deny to indigents the equal protection of the laws."<sup>120</sup> Judge Arraj distinguished between a right of discharge and the constitutionally more significant right of access. He cited both cases and articles in holding that it was a denial of court access and unconstitutional to require an indigent to pay a fee as a condition precedent to being entitled to an order of discharge.<sup>121</sup>

A second decision relied on equal justice and cases involving criminal defendants to hold that the bankruptcy filing fee, as applied to indigents, violated the principle of equal protection of the laws.<sup>122</sup> The court stated

<sup>113</sup> See *Bankruptcy Filing Fee*, *supra* note 77.

<sup>114</sup> Recent Developments, 60 GEO. L.J. 1581, 1587 (1972).

<sup>115</sup> Comment, *Constitutional Law—Indigent's Filing Fee as a Condition Precedent to Discharge in Bankruptcy Held Unconstitutional*, 21 J. PUB. L. 239 (1971).

<sup>116</sup> *Id. Cf.* 28 U.S.C. §1919 (1970), 11 U.S.C. §§68(c)(1), 76(c), 80(a) (1971).

<sup>117</sup> *Id.*

<sup>118</sup> Note, *Bankruptcy Proceedings: The Right of an Indigent to File Without Paying the Required Filing Fee*, 8 WAKE FOREST L. REV. 437, 441-42 (1972).

<sup>119</sup> *In re Smith*, 323 F. Supp. 1082 (D. Colo. 1971).

<sup>120</sup> *Id.* at 1085.

<sup>121</sup> *Id.* See *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Lee v. Habib*, 424 F.2d 891 (D.C. Cir. 1970); *Bynum v. Connecticut Commission on Forfeited Rights*, 410 F.2d 173 (2d Cir. 1969); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 559, (1967).

<sup>122</sup> *In re Naron*, 334 F. Supp. 1150 (D. Ore. 1971).

that the Supreme Court decision in *Boddie* would provide an alternate basis for its holding since there were no relevant reasons for distinguishing between the right to be judicially freed from an unwanted spouse and the right to be judicially liberated from harassment by creditors.<sup>123</sup> A third court relied on due process and held there was a fundamental right to start life anew.<sup>124</sup> Several other courts relied on *Boddie*, *Kras*, *Smith*, *In re Naron*, and *O'Brien v. Trevethan* to hold that it would be unconstitutional to deny access to bankruptcy proceedings based upon the indigency of the petitioner.<sup>125</sup> Typical of these was a district court memorandum opinion which stated that it was not necessary to reiterate the established legal analysis of the Colorado *Smith* and New York *Kras* decisions, but that:

It is sufficient to state that both courts found the statutory requirement compelling an indigent person filing a petition in bankruptcy to pay the filing fee as a condition precedent to being entitled to an order of discharge violative of the equal protection principle embodied in Fifth Amendment due process.<sup>126</sup>

### C. The Supreme Court Decision

With the weight of six casenotes and a dozen federal district court decisions behind it, *Kras* appeared to present a prime opportunity for a learned and egalitarian decision by the Supreme Court. But it was not to be. A five-to-four opinion reversing the decision of the district court was handed down January 10, 1973.<sup>127</sup> Writing for the majority, Justice Blackmun stated there was neither a statutory right under the Bankruptcy Act, a constitutional right within the meanings of the due process and equal protection clauses of the fifth and fourteenth amendments, nor a common law right to proceed in bankruptcy without payment of fees. The reasonableness of the fifty dollar fees was discussed along with the provision for paying by installments, and the specific problems of Mr. Kras. The remainder of the decision carefully presented and distinguished *Boddie* so as to leave no doubt concerning the limitation the Court intended to place on *Boddie* by its decision. The Court made clear the other remedies available in bankruptcy, and it distinguished the fundamental interest in the marital relationship and the dissolution of that relationship from petitioner's interest

<sup>123</sup> *Id.* at 1152.

<sup>124</sup> *O'Brien v. Trevethan*, 336 F. Supp. 1029 (D. Conn. 1972).

<sup>125</sup> See *In re Haddock*, 2 CCH Pov. L. REP. ¶ 15,565 (D. Conn. 1972); *In re Ottman*, 336 F. Supp. 746 (E. D. Wisc. 1972); *In re Reed*, 2 CCH Pov. RFP. ¶ 15,079 (W.D.N.Y. 1971); *In re Passwaters*, 2 CCH Pov. L. REP. ¶ 15,075 (S. D. Ind. 1971) (where the court allowed *in forma pauperis* petition to avoid the constitutional question). See also cases cited at *United States v. Kras*, 409 U.S. 434, 440 n. 5 (1973).

<sup>126</sup> *In re Smith*, 341 F. Supp. 1297, 1298 (N.D. Ill 1972).

<sup>127</sup> *United States v. Kras*, 409 U.S. 434 (1973).

in obtaining a discharge in bankruptcy. Chief Justice Burger in a separate opinion added that it was for Congress to declare the policy, which the dissenters claim already exists within the Constitution.<sup>128</sup>

Justices Brennan and Douglas joined in the dissent of Justice Stewart, and in addition relied on *Bolling* to establish a denial of equal protection, stating:

The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law', and therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process. The invidious discrimination in the present case is a denial of due process because it denies equal protection within our decisions which make particular "invidious" discriminations based on wealth or race.<sup>129</sup>

Justice Stewart outlined the circumstances surrounding petitioner *Kras'* decision to seek refuge in a court of bankruptcy.<sup>130</sup> He compared the petitioner's plight to that of Mrs. Boddie and concluded that neither could pay court costs and neither had an effective alternative to judicial relief. He concluded that *Boddie* should control and that the government should not be allowed to pre-empt the right to dissolve legal relationships, in divorce or bankruptcy, without affording all citizens access to the methods prescribed for accomplishing this.<sup>131</sup>

Justice Marshall agreed with the dissenters, but focused on the extraordinary route by which the majority reached its conclusion.<sup>132</sup> He questioned the majority's findings that, first, the fee was reasonable and could have been paid if petitioner really wanted a discharge; secondly, the denial of certiorari in *Garland* was important and established precedence for the majority's opinion in *Kras*; and finally, the circumstances surrounding divorce and the *Boddie* case were significantly different from the circumstances surrounding bankruptcy and the *Kras* decision.<sup>133</sup> Justice Marshall stated that the principle case involved the right of access to the courts not just the right to a discharge in bankruptcy, and that petitioner *Kras* was denied access to the only forum in our legal system empowered to determine his claim. Justice Marshall

<sup>128</sup> *Id.* at 450 (Burger, C. J., concurring).

<sup>129</sup> *Id.* at 457, 458 (Brennan & Douglas, JJ., dissenting), citing in part *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

<sup>130</sup> *Id.* at 451, 457 (Stewart, J., dissenting).

<sup>131</sup> *Id.* See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *Williams v. United States Fidelity & Guarantee Co.*, 236 U.S. 549, 554-55 (1915).

<sup>132</sup> 409 U.S. 434, 458 (1973) (Marshall, J., dissenting).

<sup>133</sup> *Id.* at 458-61.

added that only courts, and not the possibility of private settlements, could authoritatively determine the validity of a claim of right. He concluded that adjudication of petitioner's claim would be the only way to determine whether a right existed:

I have some doubt about the proposition that a statutorily created right can be finally determined by an agency, with no method for a disappointed claimant to secure judicial review. But I have no doubt that Congress could not provide that only the well-off had the right to present their claims to the agency. As should be clear, the question is one of access to the forum empowered to determine the claim of right; it is only shorthand to call this a question of access to the courts.<sup>134</sup>

Justice Marshall would thus give the petitioner his day in court regardless of his financial ability to pay court costs presently or within six months.

#### D. Reaction to the Supreme Court Decision

The decision was reviewed with little comment, but the *Wall Street Journal* began its report of the case by stating, "Some people may be too poor to go bankrupt."<sup>135</sup> The *Washington Post* suggested that before the most recent changes in the Court's composition, the Court would have reached a different holding.<sup>136</sup> Fifteen journal articles discussing the decision had been published through August 1975. Two were mere summaries of the opinion, although they did devote as much space to the dissenting opinions as they did to the majority decision.<sup>137</sup> Most of the other articles criticized the Supreme Court for failing to hold that access to bankruptcy proceedings constituted a fundamental right or interest that was not to be denied indigents, although several of these articles noted that the limitation of *Boddie* was to be expected.<sup>138</sup>

<sup>134</sup> *Id.* at 462 n. 5.

<sup>135</sup> *Wall Street Journal*, January 11, 1973, at 11, col. 1. See *Chicago Daily News*, January 11, 1973, at 11, col. 6; *New York Times*, January 11, 1973, at 15, col. 1; *St. Louis Post-Dispatch*, January 10, 1973, at 16D, col. 1.

<sup>136</sup> *The Washington Post*, January 11, 1973, at 25A, col. 1:

The opposite result apparently would have been reached if the case had been decided last year when the late Justice Black, who was succeeded by Justice Powell, declared that the Court's decisions compelled the striking down of bankruptcy filing fees.

<sup>137</sup> Young, *Supreme Court Report—Some People Are Too Poor Even to Go Bankrupt*, 59 A.B.A.J. 287 (1973); *The Supreme Court*, 1972 Term, 87 HARV. L. REV. 57 (1973).

<sup>138</sup> Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Comment, *The Right of Access to Civil Courts by Indigents: A Prognosis*, 24 AM. U. L. REV. 129 (1974); Comment, *United States v. Kras: Justice at a Price*, 40 BROOKLYN L. REV. 147 (1973); Comment, *Access to Courts in Civil Cases: An Extension of Boddie Refused*, 3 CAPITAL U. L. REV. 115 (1974); Comment, *The Heirs of Boddie: Court Access for Indigent Litigants: Searching for the Remains of Boddie After a Kras Landing*, 48 IND. L.J. 452 (1973); Note, *United States v. Kras—A Barrier Intact*, 13

The best article on the decision presented three tracks which it stated the majority pursued, and then attacked the Court's finding that the interest of the *Boddie* petitioners in seeking dissolution of marriage rests on a higher constitutional plane than the interest of petitioner Kras in securing a new start in life.<sup>139</sup> The writer stated the majority failed to note the restrictiveness of New York's bankruptcy exemption law, the effects of insolvency upon indigent's efforts to gain employment, the ineffectiveness of the exemption law in the face of coercive creditor action, or the consequences of action by the creditors upon the individual and his family. He stated that the Court failed to establish a constitutional right to adjudication of a claim to bankruptcy because it could not comprehend the effects of insolvency.

The writer of the above article then attacked the contention of the Court that the statute of limitations and private negotiated settlements were meaningful alternative forms of relief. He pointed out that private negotiated settlements hold little promise for petitioner considering his bargaining position. He added that the period of limitation, unlike a discharge in bankruptcy, would not provide immediate relief since in New York an action in contract need only be commenced within six years and contract judgments then survive at least twenty years.<sup>140</sup>

In addition, the writer criticized the Court's attempts to differentiate the monopoly held by the state on divorce from the federal government's monopoly on bankruptcy. He pointed out that both forms of relief are restricted. Certain conduct will bar discharge and certain debts are exempt from discharge, while generally divorce is obtainable only on specific grounds and certain conduct may bar a divorce. He stated that the Court's statement that bankruptcy might be enforced by an administrative agency could also be applied to divorce actions as well as other areas of governmental

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J. FAMILY L. 366 (1974); Note, *Constitutional Law—Due Process—Conditioning Indigent's Discharge in Bankruptcy Upon Payment of Filing Fees Held Constitutional*, 25 MERCER L. REV. 343 (1974); Comment, *Constitutional Law—The Indigent and Access to the Civil Courts*, 52 N.C.L. REV. 172 (1973); Comment, *Constitutional Law—Right to Bankruptcy—Equal Protection—Due Process*, 19 N.Y.L.F. 894 (1974); Comment, *Bankruptcy and the Poor, The Constitutionality of Filing Fees*, 1973 UTAH L. REV. 302; Note, *Bankruptcy Law—Constitutional Law: Supreme Court Denies Indigents Access to the Courts*, 8 VAL. U. L. REV. 455 (1974). On the probability that *Boddie* would be limited and restricted, as it was in *Kras* and *Ortwein*, see Note, *Indigent's Access in Civil Court*, 4 COLUM. HUMAN RIGHTS L. REV. 267, 294 (1972). *Contra*, LaFrance, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487, 537; Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 77, 93 (1973).

<sup>139</sup> McGuire, *The Indigent Debtor's Dred Scott*, 47 AM. BANKR. L.J. 157 (1973) [hereinafter cited as McGuire].

<sup>140</sup> See New York Civil Practice Law and Rules, §§211(b), 213 (1970).

concern, particularly those involving *in rem* and *quasi in rem* jurisdiction. Further, he maintained that the number of indigents who are denied access to the bankruptcy courts due to excessive fee costs remains unknown. The writer, a referee in bankruptcy himself, concluded, "From the herniation of reason displayed by the Court to avoid *Boddie's* application, the continued vitality of the *Boddie* principles would appear to be in serious doubt."<sup>141</sup>

### E. Progeny of the Supreme Court Decision

The Supreme Court has already issued one opinion, which relied on *Kras* and further limited *Boddie*. In *Ortwein v. Schwab*<sup>142</sup> the petitioner sought a mandamus from the Oregon Supreme Court requiring the Oregon Court of Appeals to hear his appeal from a decision by the Oregon Public Welfare Division to reduce his old age assistance. The Oregon Supreme Court denied the petitions of Ortwein and the others who had joined him thus barring them from judicial adjudication of their claims solely because they were unable to pay the appellate filing fee.<sup>143</sup>

The United States Supreme Court in a *per curiam* decision held that the filing fee requirement was not a denial of due process because petitioners received agency evidentiary hearings which met due process requirements. It also held the fee requirement did not deny equal protection or unconstitutionally discriminate against the poor because the fees were needed to meet court expenses. Finally, the Court held the fees were not arbitrary, capricious, or in violation of equal protection since other petitioners had been allowed to appeal *in forma pauperis*.<sup>144</sup>

The Court alignment was identical to that in *Kras*. Justices Brennan and Stewart wrote short dissents saying the majority position was well-established and it would do no good to set the case for oral argument.<sup>145</sup> Justice Douglas, in dissent, emphasized petitioners were denied access solely because of their indigency and he argued the situation of the petitioner in *Ortwein* was more analogous to that in *Boddie* than in *Kras*.

I continue to believe that this invidious discrimination against the poverty stricken—a classification based on wealth—is proscribed by the Equal Protection Clause . . . .

We are concerned in this case not with appellate review of a judicial

<sup>141</sup> McGuire, *supra* note 139, at 159-61.

<sup>142</sup> *Ortwein v. Schwab*, 410 U.S. 656, *petition for rehearing denied*, 411 U.S. 922 (1973).

<sup>143</sup> *Ortwein v. Schwab*, 262 Ore. 375, 498 P.2d 757 (1972).

<sup>144</sup> *Ortwein v. Schwab*, 410 U.S. 656, *petition for rehearing denied*, 411 U.S. 922 (1973).

<sup>145</sup> *Id.* at 661, 664 (Brennan & Stewart, JJ., dissenting).



determination, but with *initial access* to the courts for review of an adverse administrative determination . . . .

Access to the courts before a person is deprived of valuable interests, at least with respect to questions of law, seems to me to be the essence of due process. We have recognized that token access cannot satisfy the requirements of due process. Certainly, no access at all cannot stand in better stead.<sup>146</sup>

Justice Marshall also deplored the result and identified the relation between *Kras* and *Ortwein*, but like Douglas he argued the consequences in *Ortwein* were even further reaching than in *Kras*.<sup>147</sup> He relied on the language of Justice Brandeis to support his contention that there should be a right of access which is not preconditioned on the ability to pay fees.

[T]he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied, and whether the proceeding in which facts were adjudicated was conducted regularly . . . . That opportunity was denied in this case, and important benefits were thereby taken from appellants without affording them a chance to contest the legality of the taking in a court of law.<sup>148</sup>

In *Rodriguez v. San Antonio Independent School District*,<sup>149</sup> which was handed down by the Supreme Court during the 1972 Term, the Court upheld the Texas public school financing system against attacks that the system discriminated against those children in the poorer districts. The three judge federal court recommended application of a principle of fiscal neutrality,

<sup>146</sup> *Id.* at 662-63 (Douglas, J., dissenting).

<sup>147</sup> *Id.* at 665 (Marshall, J., dissenting).

<sup>148</sup> *Id.* at 665-66, citing in part *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring). See also *Fuentes v. Shevin*, 407 U.S. 67, 92 (1972); *Williams v. Shaffer*, 385 U.S. 1037 (1967); *Yakus v. United States*, 321 U.S. 414 (1944); *Crowell v. Benson*, 285 U.S. 22 (1922); *Dixon v. Bd. of Educ.*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961). See generally CHAMBERLAIN, DOWLING, & HAYS, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* (1942); COOPER, *ADMINISTRATIVE AGENCIES AND THE COURTS* (1951); DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); FRIENDLY, *FEDERAL ADMINISTRATIVE AGENCIES* (1962); LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); LYNCH, *JUDICIAL REVIEW OF FEDERAL ADMINISTRATIVE ADJUDICATION* (1939); POUND, *ADMINISTRATIVE LAW—ITS GROWTH, PROCEDURE, AND SIGNIFICANCE* (1942); STASON & COOPER, *THE LAW OF ADMINISTRATIVE TRIBUNALS* (3d ed. 1957); WADE, *ADMINISTRATIVE LAW* (2d ed. 1967); WADE, *TOWARDS ADMINISTRATIVE JUSTICE* (1963); WOLL, *ADMINISTRATIVE LAW: THE INFORMED PROCESS* (1963); Frey, *The Right of Counsel in Student Disciplinary Hearings*, 5 VAL. L. REV. 48 (1970); Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 U. PA. L. REV. 612 (1970); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 HARV. L. REV. 1362 (1953); Haskell, *Judicial Review of School Discipline*, 21 CASE W. RES. L. REV. 211 (1970); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368 (1968); Comment, *Application of Constitutional Guarantees of Jury Trial to the Administrative Process*, 56 HARV. L. REV. 282 (1942).

<sup>149</sup> 411 U.S. 1 (1973), rev'g 337 F. Supp. 280 (W.D. Tex. 1971).

noting that for poor districts in Texas the challenged financing system was a tax more-spend less proposition. But the Court reversed the federal district court decision and thus reinstated the Texas educational financing system. The majority, which consisted of the four Nixon appointees and Justice Stewart, acknowledged that the system favored more affluent school districts, but held that the Constitution does not require "absolute equality or precisely equal advantages."<sup>150</sup> *Rodriguez* is certainly not on all fours with *Kras*, but it is significant both because it is another blow against indigents and because it is a further limitation or qualification of due process and equal protection. The inconsistency between *Brown* and *Rodriguez* is obvious from the statement by Justice Powell, writing for the majority in *Rodriguez*, that the Supreme Court does not consider the right to education to be among the constitutionally guaranteed fundamental rights which require the Court to apply strict judicial scrutiny: "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."<sup>151</sup> The decision in *Rodriguez* was attacked both by Justices and legal scholars, and the weight of prior scholarly argument and lower court decisions were contrary to the majority opinion.<sup>152</sup>

<sup>150</sup> *Id.* at 24.

<sup>151</sup> *Id.* at 33.

<sup>152</sup> *Id.* at 70 (Marshall J., dissenting); Van Dusartz v. Harfield, 334 F. Supp. 870 (D.C. Minn. 1971); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); Robinson v. Cahill, 119 N.J. Super. 40, 289 A.2d 569 (Super Ct.), enforcing 118 N.J. Super. 223, 287 A.2d 187 (Super. Ct. 1972); Sweetwater County Planning Committee v. Hinkle, 491 P.2d 1234 (Wyo. 1971); Porras, *The Rodriguez Case—A Crossroad in Public School Financing*, 26 TAX LAWYER 141, 160 (1972); Note, *An Attack on the Texas Financing System—Rodriguez v. San Antonio School District*, 26 Sw. L.J. 608, 613 (1972); Wall Street Journal, March 22, 1973, at 3, col. 2 (Remarks of Professor Wise).

For comment on and support of the position of the California Supreme Court in *Serrano*, see COONS, CLUNE, & SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 6-7, 201-42 (1970); MOSTELLER & MOYNIHAN, ON EQUALITY OF EDUCATIONAL OPPORTUNITY (1972); WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY 147 (1968); Berke, *Serrano v. Priest: Milestone or Millstone for School Financing?*, 21 J. PUBLIC L. 23 (1971); Bloomfield, *Equality of Educational Opportunity: Judicial Supervision of Public Education*, 43 S. CAL. L. REV. 275 (1970); Coons, *Fairness in the Distribution of Education*, 1972 U. ILL. L.F. 219; Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financing Structures*, 57 CALIF. L. REV. 305 (1969); Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L. REV. 504 (1972); Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968); Kurland, Wise & Kirp, *The Poor, the Schools, and Equal Protection*, 38 HARV. EDUC. REV. 635 (1968); Moynihan, *Solving the Equal Educational Opportunity Dilemma: Equal Dollars Is Not Equal Opportunity*, 1972 U. ILL. L.F. 259; Schoettle, *The Equal Protection Clause in Public Education*, 71 COLUM. L. REV. 1355 (1971); Silard & White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause*, 1970 WIS. L. REV. 7; Weitz, *Equal Educational Opportunity in the Allocation of Public School Faculties*, 39 GEO. WASH. L. REV. 341 (1970). See also OFFICE OF EDUCATION, U.S. DEPARTMENT OF H.E.W., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); Overlan, *An Equal Chance to Learn*, NEW REPUBLIC, May 13, 1972, at 20-21; Note, *Serrano v. Priest: Renaissance for School Financing Through the Equal Protection Clause*, 21 AM. U. L. REV. 685 (1972); Note, *The Public School Financing*

## VII. CONCLUSION

It was over twenty years ago that Chief Justice Vinson handed down the first *Brown* decision. It is to be hoped that shifts in the political alignment or legal philosophy of the Court will lead to a second consideration of *Kras*, but this is unlikely. Appraising the attitude of the Court last term toward the poor can only lead to conclusions that: first, we have reached the low arc in the cyclical history of the development and expansion of individual rights, and secondly, an individual's claims may receive constitutional sanction if the individual is non-white, female, or a criminal defendant, but only heaven can help the individual whose claim is based on poverty.<sup>153</sup> Justice and equity compel reversal of *Kras* and *Ortwein* not only for the sake of indigents, but also for the integrity of our democracy. Whether the ultimate verdict is based on the Bible, the Magna Carta, the Constitution, a common law right of access, the arguments of indigent petitioners, or sheer equity, the courts or Congress must acknowledge a right of access to proceedings which affect and determine the claims, privileges, and rights of individuals to their freedom and property. This right must not be conditioned on the ability to pay costs and fees. Only when such a right is established will judicial and administrative remedies be meaningful for those who need them the most. Costs could still be retained for non-indigents, all indigents could be allowed to proceed *in forma pauperis*, or, in bankruptcy, the fees could be exempted from discharge as are taxes. The only possible remaining justification for affirming *Kras* would be that it is inconsistent with our competitive, rugged,

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*Case: Interdistrict Inequalities and Wealth Discrimination*, 14 ARIZ. L. REV. 88 (1972); Note, *Constitutional Law—California School Financing System Which Discriminates Against Students in Poorer School Districts Held to Be in Violation of the Equal Protection Clause*, 60 GEO. L.J. 799 (1972); Note, *Constitutional Law—School Financing System Based on Local Property Taxes Which Results in Inequalities of Spending by School Districts Violates the Equal Protection Clause*, 85 HARV. L. REV. 1049 (1972); Note, *Serrano v. Priest: The End of an Era in Public School Financing*, 23 HASTINGS L.J. 365 (1972); Note, *Equal Protection and Public School Financing: Serrano v. Priest*, 5 LOYOLA OF L.A. L. REV. 162 (1972); Note, *Equal Protection in School Financing*, 43 MISS. L.J. 266 (1972); Note, *Constitutional Law—Equal Protection—Financing Public Education—A Challenge to California's Allocation of Educational Revenues Sustained*, 47 NOTRE DAME LAWYER 690 (1972); Note, *Equal Educational Opportunity: A Case for the Children*, 46 ST. JOHN'S L. REV. 280 (1971); Note, *Constitutional Law—A Public School Financing System Which Relies Heavily on Local Property Taxes and Causes Substantial Disparities Among Individual School Districts in the Amount of Revenue Available Per Pupil for the District's Education Grants Invidiously Discriminates Against the Poor and Violates the Equal Protection Clause*, 3 ST. MARY'S L.J. 347 (1971); Note, *Constitutional Law—Equal Protection—School Financing System Which Substantially Relies on Local Property Tax Violates Equal Protection Clause*, 24 VAND. L. REV. 1265 (1971); Note, *The Aftermath of Serrano: The Strict Scrutiny Approach and the Viability of Property Tax Financing for Public Educational Systems*, 17 VILL. L. REV. 928 (1972).

<sup>153</sup> See *Rodriguez v. San Antonio Indep. School Dist.*, 411 U.S. 1 (1973); *Ortwein v. Schwab*, 410 U.S. 656, petition for rehearing denied, 411 U.S. 922 (1973); *United States v. Kras*, 409 U.S. 434 (1973).

individualistic, capitalistic heritage for an individual not to pull his share and pay his own way. It even sounds like the fundamentalist American Spirit to cry, "By God, if a man wants to go bankrupt let him get down and go to work and pay for it like a real one hundred percent American." The majority opinion in *Kras* was more subtle, but the intent and consequences of the decision are crystal clear.