JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS: IMPOSITION OF FILING FEES ON INDIGENTS

Ortwein v. Schwab, — Ore. —, 498 P.2d 757 (1972)

Petitioners sought judicial review after the Oregon State Welfare Division reduced their welfare payments. Oregon law requires a twenty-five dollar filing fee for judicial review of administrative decisions,[1] but petitioners sought to have the filing fee waived because of their indigency. The court of appeals refused to waive the fee, and petitioners sought a writ of mandamus from the Oregon Supreme Court ordering the lower court to accept their petition without payment of the fee. They argued that the fee requirement[2] violated the due process[3] and equal protection[4]

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1. ORE. REV. STAT. § 21.010 (1965):
Filing and appearance fees on appeal. The appellant in a civil case, upon taking an appeal to the Supreme Court or the Court of Appeals, shall pay the sum of $25 in the manner prescribed by ORS § 19.035 (1965). The respondent in such case, upon entering his first appearance or filing his first brief in the court, shall pay the clerk of the court the sum of $15. The party entitled to costs and disbursements on such appeal shall recover from his opponent the amount so paid.
Judicial review of administrative decisions that adversely affect individuals is provided by ORE. REV. STAT. § 183.480 (1965).

2. For an historical discussion of filing fee requirements and other court costs in civil proceedings, *see generally* Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923); Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253 (1968); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516 (1968).

3. No state shall "deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1. This concept of due process is based on a concern that state action be fair. *See* Galvan v. Press, 347 U.S. 522, 530 (1954); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Lisonba v. California, 314 U.S. 219, 236 (1941). The clause protects individuals from state action that would infringe upon "the principles of liberty and justice which lie at the base of all our civil and political institutions." Hebert v. Louisiana, 272 U.S. 312, 316 (1926). *See also* Palko v. Connecticut, 302 U.S. 319, 325 (1937); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). The Supreme Court has established that due process requires at a minimum that, absent a countervailing state interest of overriding significance, "persons forced to settle their claims . . . through the judicial process must be given a meaningful opportunity to be heard." Boddie v. Connecticut, 401 U.S. 371, 377 (1971). *See also* Windsor v. McVeigh, 93 U.S. 274 (1896).

4. Since judicial review is allowed by law, petitioners in *Ortwein* argued that the equal protection clause requires that it be available to all, regardless of ability to pay a fee. *See, e.g.*, Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1971), where the court of appeals held that, even though no constitutional right to counsel at a hearing for revocation of mandatory early release existed, where a statute had been interpreted

clauses of the fourteenth amendment.[5] The Oregon Supreme Court *held*: The requirement that indigents pay a filing fee in order to obtain judicial review of an adverse administrative ruling violates neither the due process nor the equal protection clauses of the fourteenth amendment.[6]

The Supreme Court has developed two tests to determine the validity of state statutes under the equal protection clause. At a minimum, a statutory classification must bear some relationship to a legitimate state purpose.[7] When the statutory classification infringes upon a "fundamental personal right"[8] or when the classifications are based on certain "suspect" traits,[9] the Court has exercised a stricter scrutiny, requiring a compelling state interest to sustain the classification. Absent a "fundamental personal right" or a "suspect" trait, the classification will not be

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to afford a parolee an opportunity to be represented by retained counsel, equal protection prohibits denial of counsel because a parolee is financially unable to retain one.

5. Petitioners also argued that the fee was violative of their first amendment right to "petition for redress." *See* Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); United Mine Workers Dist. 12 v. Illniois State Bar Ass'n, 389 U.S. 217 (1967). The contention was summarily rejected as not relevant because later decisions concerning access to the courts without paying filing fees have not mentioned the first amendment. Ortwein v. Schwab, — Ore. —, —, 498 P.2d 757, 759 (1972).

The court dismissed petitioners' due process argument based on the state constitution, ORE. CONST. art. 1, § 10, for the same reasons it dismissed the fourteenth amendment due process argument. *See* discussion of *Boddie* accompanying notes 15-17 *infra.*

Finally, petitioner also argued that the court had the inherent common law power to waive the fee requirement. The court, relying on Therkelsen v. Therkelsen, 35 Ore. 75, 54 P. 885 (1898), reasoned that its common law power to waive the fee was nullified by the legislature's action in requiring it. *But see* Ferguson v. Keays, 4 Cal. 3d 649, 484 P.2d 70, 94 Cal. Rptr. 398 (1971); Martin v. Superior Court, 176 Cal. 289, 168 P. 135 (1917); O'Connor v. Matzdorf, 76 Wash. 2d 589, 458 P.2d 154 (1969).

6. Ortwein v. Schwab, — Ore. —, 498 P.2d 757 (1972).

7. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972); Morey v. Doud, 354 U.S. 457 (1957); Williams v. Lee Optical Co., 348 U.S. 483 (1955); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

8. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel interstate); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote); Griffin v. Illinois, 351 U.S. 12 (1956) (right with respect to the criminal process); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (right to procreate).

9. Graham v. Richardson, 403 U.S. 365, 372 (1971) (". . . classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny"); Dandridge v. Williams, 397 U.S. 471, 485 n.17 (1970) (the Court impliedly limited "suspect" classifications to those "infected with a racially discriminatory purpose or effect"). *See also* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972).

disturbed unless "palpably arbitrary"[10] or "resting on grounds wholly irrelevant to the achievement" of some permissible state purpose.[11]

It is well recognized that an indigent's access to the courts in criminal cases may not be restricted because of inability to pay a fee or court cost.[12] That principle was first articulated in *Griffin v. Illinois*,[13] where the Supreme Court held that a state law denying full appellate review to persons convicted of a crime if they were unable to pay for a transcript of a trial violated the due process and equal protection clauses of the fourteenth amendment.

In applying the equal protection clause to discriminatory practices in criminal procedure, the Court has used language broad enough to cover civil cases as well, but it has failed to do so.[14] In *Boddie v. Connecticut*,[15] however, the Court decided that the imposition of filing fees on indigents can violate the fourteenth amendment, but it based its holding on the due process clause rather than the equal protection clause.[16] The Court held that welfare recipients seeking a divorce need not pay statutory filing fees for two reasons: the courts are the only available forum to grant the relief sought; and a state's interest in reducing frivolous litigation is not a countervailing state interest of overriding significance.[17]

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10. International Harvester Co. v. Missouri, 234 U.S. 199, 215 (1914).

11. McGowan v. Maryland, 366 U.S. 420, 425 (1961).

12. *See* Williams v. Oklahoma City, 395 U.S. 458 (1969); Roberts v. LaVallee, 389 U.S. 40 (1967); Long v. District Court of Iowa, 385 U.S. 192 (1966); Douglas v. California, 372 U.S. 353 (1963); Draper v. Washington, 372 U.S. 487 (1963); Smith v. Bennett, 365 U.S. 708 (1961).

13. 351 U.S. 12 (1956).

The Supreme Court has summarized the holdings of a direct line of cases from *Griffin* to the present: "Our decisions have made it clear that the differences in access to the instruments needed to vindicate legal rights, when based on the financial situation of the defendant, are repugnant to the Constitution." Roberts v. LaVallee, 389 U.S. 40, 42 (1967). Here the Court held that a requirement to pay five dollars per one hundred words for a copy of a transcript of a public hearing in a criminal proceeding was a denial of equal protection.

14. For a discussion of the applicability of the *Griffin*-equal protection approach to civil cases, *see* Willging, *supra* note 2, at 289; Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 436-39 (1967).

15. 401 U.S. 371 (1971).

16. *Id.* at 382-83. In an earlier case, the Supreme Court has held that the dismissal of an answer to a complaint in a civil proceeding for inability to pay a court fee violated due process. Hovey v. Elliot, 167 U.S. 409 (1897).

17. 401 U.S. at 380. For a discussion of *Boddie*, *see generally* 51 NEB. L. REV. 367 (1972); 16 ST. LOUIS U.L.J. 328 (1971); 17 S.D.L. REV. 269 (1972).

The *Ortwein* court pointed out that the majority in *Boddie* had held that the state's interest in reducing frivolous litigation and defraying the costs of operating the judi-

The *Ortwein* court followed the due process analysis of *Boddie*, but distinguished the principal case on its facts. It reasoned that marital status can be changed only by a court, regardless of any private agreement or consent between the parties; in the principal case, "the State Welfare Division can decrease petitioners' welfare payments,"[18] and access to the courts is sought only for review of the administrative decision.[19] Although *Boddie* could have been decided by extending to civil cases the equal protection principles developed in the line of cases marked by *Griffin*,[20] the Supreme Court granted relief in *Boddie* on due process grounds without discussion of the equal protection arguments.

In *Frederick v. Schwartz*,[21] the Supreme Court vacated and remanded, in light of *Boddie*, a district court decision[22] upholding the imposition of a filing fee on an indigent seeking judicial review of a welfare commission's ruling against increased payments. In his dissent Justice Black argued for outright reversal, reasoning that the *Boddie* decision made access to the courts in all types of actions available to all on equal protection grounds, regardless of one's ability to pay a filing fee.[23]

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ciary were not countervailing state interests of overriding significance. — Ore. at —, 498 P.2d at 759, *citing* Boddie v. Connecticut, 401 U.S. 371, 381 (1971). *See also* Justice Brennan's concurring opinion in Shapiro v. Thompson, 394 U.S. 618 (1969) (state's interest in saving money is not a sufficient state interest to deny due process).

18. — Ore. at —, 498 P.2d at 760.

19. *Id.* at —, 498 P.2d at 760. The *Ortwein* court read *Boddie* strictly: it reasoned that if any means other than the courts is available for determining legal rights, the *Boddie* decision is not controlling. *But cf.* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 960 (1971) (Black, J., dissenting) (courts may be the only available forum for resolving not only divorce suits, but also many other legal disputes).

20. *See* LaFrance, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487. *See also* note 9 *supra*.

21. 402 U.S. 937 (1971).

22. 296 F. Supp. 1321 (1969). *But cf.* Wyman v. James, 400 U.S. 309 (1971), where the Court held that the termination of welfare benefits to an Aid for Dependent Children recipient for failure to consent to a welfare official's entry into the recipients home did not fall within the fourth amendment's proscription against unreasonable searches and seizures. But Justice Douglas, dissenting, argued that government "largesse," including welfare payments, is property. *Id.* at 390. This argument of Justice Douglas is consistent with the petitioners' claim in *Ortwein* that the filing fee should have been waived because its imposition deprived them of property without due process of the law.

23. Frederick v. Schwartz, 402 U.S. 937, 955 (1971) (Black, J., dissenting):

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

Justice Black's interpretation of *Boddie* has recently been repudiated in *United States v. Kras*.[24] The petitioner in *Kras* had filed a voluntary petition in bankruptcy and, relying on *Boddie*, sought to have the filing fee waived because of his indigency. The Court rejected any application of the *Boddie* due process rationale to bankruptcy cases because the settlement of debtor-creditor disputes, unlike the dissolution of marriage, are capable of resolution without resort to the courts.[25] The Court also held that the fee requirement did not deny Kras the equal protection of the laws because, since the right to a discharge in bankruptcy is not a fundamental personal right,[26] only a rational justification need be shown for the fee requirement.[27]

The decisions in *Boddie* and *Kras* demonstrate the Court's unwillingness to apply the *Griffin*-equal protection rationale to civil cases generally. Rather, the Court has adopted a case-by-case analysis of the underlying substantive claims to determine whether a fundamental right is involved,[28] leaving open the possibility that filing fees may be a denial of equal protection if a party is seeking access to the courts to vindicate such an interest.

In *Ortwein*, the proper resolution of the petitioners' equal protection argument appears to depend on whether receipt of welfare payments is a fundamental right.[29] If so, Oregon must demonstrate a compelling state

24. 93 S. Ct. 631 (1973). *See also* Huffman v. Boerson, 405 U.S. 951 (1972) (Douglas J., dissenting); Boddie v. Connecticut, 401 U.S. 371, 383 (1971) (Douglas, J., concurring).

25. "However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust by negotiated agreement with his creditors." 93 S. Ct. at 638. *But see* O'Brien v. Treventhan, 336 F. Supp. 1029 (Conn. 1972); *In re* Ottman, 336 F. Supp. 746 (E.D. Wis. 1972); *In re* Smith, 323 F. Supp. 1082 (D. Colo. 1971) (decided before *Boddie*).

26. 93 S. Ct. at 638.

27. The Court declared that the legislative history of the Bankruptcy Act demonstrated that Congress intended to make the bankruptcy system self-sustaining and paid for by those who use it. 93 S. Ct. at 639.

28. In declaring a discharge in bankruptcy not to be a fundamental right, the Court contrasted it to "free speech or marriage," 93 S. Ct. at 638, implying that, had *Boddie* been decided on equal protection grounds, the strict scrutiny test would have been applied to the case because it involved the fundamental right of marriage.

29. It is also possible that wealth might be declared a suspect trait. There is considerable dicta in opinions of the Court to the effect that wealth is indeed a suspect trait. *See* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 807 (1969) ("And a careful examination . . . is especially warranted where lines are drawn on the basis of wealth or race . . . two factors which would independently render a classification highly suspect . . . ."); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth or property . . . are traditionally dis-

interest, something beyond the rational justification actually shown.[30] If the receipt of welfare benefits does not constitute a fundamental right,[31] then the "rational justification" test applies and *Ortwein* was properly decided.

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favored"); Douglas v. California, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting) ("The States . . . are prohibited . . . from discriminating between 'rich' and 'poor' as such. . . ."). *See also* Griffin v. Illinois, 351 U.S. 12, 16-19 (1956); Edwards v. California, 314 U.S. 160, 184-84 (1941) (Jackson, J., concurring); Karst & Horowitz, *Reitman v. Mulkey: Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 75 ("distinctions based on wealth—at least those that run against the poor—will no doubt be assimilated to the race cases"). However, given the Court's recent pronouncement of what constitutes a suspect trait, a determination that wealth is such a trait is unlikely. *See* Dandridge v. Williams, 397 U.S. 471, 485 n.17 (1970).

30. The *Ortwein* court held that the filing fee requirement tends to discourage frivolous appeals and helps to financially support the state courts. Ortwein v. Schwab, — Ore. —, —, 498 P.2d 757, 759 (1972), *citing* Frederick v. Schwartz, 296 F. Supp. 1321, 1322 (D. Conn. 1969).

31. The *Ortwein* court held that "the right to obtain judicial review of a ruling of the State Welfare Division" is not a fundamental right. — Ore. at —, 498 P.2d at 761.