UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 52 | Number 1 Article 13

11-1-1973

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Recommended Citation

Irvin W. Hankins III, *Constitutional Law -- The Indigent and Access to the Civil Courts*, 52 N.C. L. Rev. 172 (1973).
Available at: http://scholarship.law.unc.edu/nclr/vol52/iss1/13

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those creditors from "knowledge" to "notice."[47] The first proposal differs only slightly from the careful inquiry actions suggested by the trial court and the dissent in *Adrian Tabin.* The second proposal has the merits of being simple and easy to effectuate. Either would greatly reduce the possibility of bulk transfers in defraud of creditors. In the last analysis, *Adrian Tabin* is truly a fulfillment of the prophecy of White and Summers that section 6-104(3) "may prove to be unwise."[48]

HENRY ALEXANDER EASLEY, III

Constitutional Law—The Indigent and Access to the Civil Courts

Recent decisions in state and federal courts have attempted to define the scope of an indigent's right to obtain free access to civil courts.[1] The United States Supreme Court responded to the confusion created by several of these decisions with *United States v. Kras,*[2] which presented a constitutional challenge to the filing fee requirement for the initiation of bankruptcy proceedings. The Court refused to extend its holding in *Boddie v. Connecticut*[3] to bankruptcy actions and rejected the indigent petitioner's constitutional attack on mandatory filing fees.[4] This decision not only upholds the constitutionality of filing fees in bankruptcy proceedings but also provides some guidelines for determining the constitutionality of similar fees in other areas of civil litigation.

Robert W. Kras submitted his petition in bankruptcy to the United

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[47]*See* UCC § 1-201(25).

[48]WHITE & SUMMERS § 19-3, at 650. Before one assumes from the Adrian Tabin decision that such a transferor consequently escapes the criminal laws and the grasp of his creditors, two points are of noteworthy significance. First, UCC § 6-104, Comment 3, states that "the sanction for the accuracy of the list of creditors is the criminal law of the state relative to false swearing . . . ." Second, other creditors' remedies such as attachment and execution pursuant to judgment on other assets of the transferor are available. Furthermore, no provision in Article 6 precludes an attack on a bulk transfer as a fraudulent conveyance.

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[1]*In re* Garland, 428 F.2d 1185 (1st Cir. 1970); Lee v. Habib, 424 F.2d 891, (D.C. Cir. 1970); Bacon v. Graham, 348 F. Supp. 996 (D. Ariz. 1972); Almarez v. Carpenter, 347 F. Supp. 597 (D. Colo. 1972); *In re* Smith, 341 F. Supp. 1297 (N.D. Ill. 1972); Application of Ottman, 336 F. Supp. 746 (E.D. Wis. 1972); O'Brien v. Trevethan, 336 F. Supp. 1029 (D. Conn. 1972); Robinson v. Kaufman, 8 Cal. App. 3d 783, 87 Cal. Rptr. 678 (1970); Danforth v. State Dept. of Health and Welfare, 303 A. 2d 794 (Maine 1973).

[2]409 U.S. 434 (1973).

[3]401 U.S. 371 (1971). The Court held filing fees in divorce actions unconstitutional as applied to indigents.

[4]409 U.S. at 443-50.

States District Court for the Eastern District of New York.[5] Simultaneously he moved for permission to proceed with the litigation without first satisfying the filing fee requirement,[6] contending that his status as an indigent required waiver of the prerequisite fee.[7] He accordingly advanced three arguments in support of his request: (1) that the federal in forma pauperis statute[8] applied; (2) that the common law sanctioned such procedure; and (3) that the filing fee as applied to indigents was a denial of due process and equal protection.[9] The district court rejected the first two arguments,[10] and the Supreme Court agreed.[11] Accordingly, this note will be limited to an analysis of the constitutional argument advanced by the petitioner.

The district court characterized access to the judicial process as a "fundamental right", and declared the filing fee to be a denial of equal protection.[12] However, on appeal by the government,[13] the Supreme Court reversed the lower court in a divided opinion.[14] The majority emphasized three essential points: (1) a discharge in bankruptcy is not a "fundamental right" subject to constitutional protection; (2) private avenues of relief outside the judicial process were available to the petitioner; and (3) the fee provisions of the Bankruptcy Act, as applied, constituted a reasonable exercise of governmental power.[15] In rebuttal, the dissent of Justices Brennan and Douglas stressed that a classification

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[5]*In re* Kras, 331 F. Supp. 1207 (E.D.N.Y. 1971).

[6]*Id.*

[7]*Id.* at 1208-11. The evidence indicated that Kras was unemployed, did not have any non-exempt assets, and derived his only income from welfare payments. His outstanding debts amounted to over $6,000.

[8]28 U.S.C. § 1915(a) (1970).

[9]409 U.S. at 439-41.

[10]331 F. Supp. at 1209-10. The district court decision has received analysis in the following materials: Comment, *Boddie and Beyond: Rights of the Indigent Civil Litigant*, 18 CATH. LAW. 67 (1972); Comment, *Access to Bankruptcy Courts for Indigents: The Extension of Boddie v. Conn.*, 16 ST. LOUIS U.L.J. 328 (1971); Note, *Bankruptcy—Filing Fees Subjected to Constitutional Test*, 50 N.C.L. REV. 654 (1972); Note, *Bankruptcy—Filing Fees Deny Indigents' Fundamental Interest in Access to Courts Under Due Process and Equal Protection Guarantees*, 18 WAYNE L. REV. 1431 (1972); 60 GEO. L.J. 1581 (1972).

[11]409 U.S. at 439-40.

[12]331 F. Supp. at 1210-15. The district court applied the equal protection guarantee as a part of the fifth amendment due process requirement.

[13]*See* 28 U.S.C. § 1252 (1970). The statute permits the government to appeal directly to the Supreme Court if a statute is declared unconstitutional by a district court.

[14]409 U.S. at 434. The decision was five to four. Justices Blackmun, Burger, White, Powell, and Rehenquist formed the majority, while Justices Brennan, Douglas, Stewart and Marshall dissented.

[15]409 U.S. at 444-49.

based on wealth is inherently suspect, invoking strict judicial inspection.[16] Accordingly, they reasoned that the application of the filing fee requirement to petitioner constituted invidious discrimination which resulted in a denial of his constitutional rights.[17]

To understand the constitutional issue presented by these opposing opinions in *Kras*, it is necessary to examine the Supreme Court's decision in *Boddie*,[18] a challenge to the constitutionality of Connecticut's mandatory filing fee in divorce actions. In *Boddie* the Court ruled that the marriage relationship is an interest of "fundamental" importance[19] and declared that the state could not condition the individual's access to the sole legal means of terminating the marriage relationship on the basis of wealth.[20] The Court found that such an action by the state was an unreasonable deprivation of liberty and therefore a denial of due process.[21]

Even though no criminal proceedings were involved in *Boddie*, it is easy to understand why the withholding of a means of divorce constituted a deprivation of liberty. The state alone has the power to terminate a marriage,[22] and so long as an existing marriage is in effect, intimate association with another member of the opposite sex could result in criminal prosecution for adultery.[23] Furthermore, private separation without legal sanction provides the individual spouse with no legally enforceable right against the other spouse with respect to the distribution of marital property[24] or child custody.[25] Such consequences result from state participation in the marriage contract and thus constitute a deprivation of individual liberty through state action.

Faced with the possibility of such limitations on individual liberty, a potential civil litigant is entitled to an opportunity to be heard.[26] This

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[16]*Id.* at 457.

[17]*Id.* at 458. However, Justices Stewart and Marshall felt that the decision should have been made in the same manner as in *Boddie*, using the strict due process approach. They did not feel that the case could be distinguished from *Boddie*, and therefore concluded that petitioner could be afforded relief without the application of equal protection standards. *Id.* at 451.

[18]401 U.S. 371 (1971).

[19]*Id.* at 376.

[20]*Id.* at 380-81.

[21]*Id.*

[22]CONN. GEN. STAT. ANN. § 46-13 (Supp. 1973); N.C. GEN. STAT. § 50-5 (Supp. 1971).

[23]No. 176, [1949] Conn. Pub. Acts 150 (repealed 1969); N.C. GEN. STAT. § 14-185 (Supp. 1971).

[24]*See* CONN. GEN. STAT. ANN. § 46-21 (Supp. 1973); N.C. GEN. STAT. § 50-16.3 (Supp. 1971).

[25]*See* CONN. GEN. STAT. ANN. §§ 46-23, -24 (Supp. 1973); N.C. GEN. STAT. §§ 50-13.1 to -13.3 (Supp. 1971).

[26]Boddie v. Connecticut, 401 U.S. 371, 377 (1971).

right is embraced within the due process concept of fundamental fairness.[27] Therefore the majority in *Boddie* refused to allow a state to condition the right to a hearing on the payment of a fee.[28] In arriving at this decision, the Court did not address the matter of inequality among citizens seeking access to civil courts but rather stressed the problem of inherently unfair treatment by the state of a particular individual.

However, in concurring opinions, Justices Douglas and Brennan expressed their belief that the filing fee requirement created inequalities in access to divorce proceedings on the basis of wealth, and therefore, constituted a denial of equal protection.[29] This position, which was adopted by the district court in *Kras*,[30] requires analysis.

Since no state action is involved in the bankruptcy proceeding, the fourteenth amendment is not applicable. Nevertheless, the equal protection requirement has been imposed on the exercise of federal power,[31] and arguably, all aspects of that guarantee are included within the fifth amendment due process standard.[32] In evaluating a statute which has been challenged on equal protection grounds, courts normally apply either the compelling governmental interest test[33] or the rational basis test.[34]

The compelling interest test is used if a fundamental right is involved or if the classification effected results from the use of a suspect category.[35] Among the fundamental interests delineated by the Supreme Court are voting,[36] procreation,[37] interstate travel,[38] marriage,[39] and criminal procedures.[40] Suspect categories include race,[41]

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[27] *Id.*

[28] *Id.* at 380-81.

[29] *Id.* at 383 (Douglas, J., concurring); *id.* at 386 (Brennan, J., concurring).

[30] 331 F. Supp. at 1211-12.

[31] Bolling v. Sharpe, 347 U.S. 497 (1954).

[32] *See, e.g.*, cases cited in Lee v. Habib, 424 F.2d 891, 898 n.21 (D.C. Cir. 1970).

[33] *E.g.*, Goosby v. Osser, 409 U.S. 512, 519-20 (1973); United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

[34] McGowan v. Maryland, 366 U.S. 420 (1961).

[35] Cases cited note 33 *supra.*

[36] *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

[37] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

[38] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[39] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1 (1967).

[40] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).

[41] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

ancestry,[42] alienage,[43] and poverty on a conditional basis.[44]

The Supreme Court has on occasion appeared to include poverty as a category equal in importance to race. In *McDonald v. Board of Elections*[45] the court stated, "[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 and thereby demand a more exacting judicial scrutiny."[46] Again in *Harper v. Virginia Board of Elections*[47] the Court asserted, "[L]ines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored."[48] However, an analysis of the above cases reveals that the Court was not only dealing with discrimination on the basis of wealth, but also with discrimination in respect to voting rights which the Court has considered worthy of constitutional protection as a fundamental interest.[49] Thus, wealth, or the lack of it, standing alone has not been sufficient to subject a statute to the compelling governmental interest test.

This conclusion is supported by the recent decision in *San Antonio Independent School District v. Rodriguez*.[50] In that case, the Court upheld a Texas public school financing plan under which each school district received funds commensurate with the tax valuation of the property within that particular district. Holding that the plan did not violate the equal protection clause, the Court refused to apply the compelling state interest test since classifications based on wealth are not inherently suspect[51] and since the right to an education is not a fundamental right.[52] The majority noted that the Court "has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . . ."[53]

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[42]*See* Korematsu v. United States, 323 U.S. 214 (1944).

[43]*See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

[44]*See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1124 (1969).

[45]394 U.S. 802 (1969).

[46]*Id.* at 807.

[47]383 U.S. 663 (1966).

[48]*Id.* at 668.

[49]McDonald v. Board of Elections, 394 U.S. 802 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); *see* San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 29 (1973); James v. Valtierra, 402 U.S. 137 (1971); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1124 (1968).

[50]411 U.S. 1 (1973).

[51]*Id.* at 28.

[52]*Id.* at 37.

[53]*Id.* at 29. *See also* James v. Valtierra, 402 U.S. 137 (1971), in which the Court upheld a

Since poverty alone is not adequate to invoke the compelling interest test, the district court in *Kras* characterized access to the courts as a "fundamental" right.[54] Justice Brennan's concurring opinion in *Boddie* stated that position as follows:

> Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether . . . . A state may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee.[55]

However, Justice Harlan's majority opinion in *Boddie* was specifically limited to divorce proceedings,[56] and it is this limited approach to which the Court adhered in *Kras*. In fact, *Kras* does not approach the issue of access generally, but rather speaks to the constitutional significance of access to a particular type of relief.[57] This concept, which the Court appears to have adopted, is aptly expressed by Professor Goodpaster.

> The right of access . . . stretches across . . . a continuum of interests from the trivial to the most significant. Aside from its general use in the resolution of private disputes, access to the courts takes its specific importance and coloration from the right or interest it is being used to protect. The fundamentalness of the right of access . . . is, therefore, a conclusion to be drawn in the particular case.[58]

Having recognized this analysis as the Court's preferred method of approach, what then distinguishes a discharge in bankruptcy from the dissolution of marriage such that the latter is designated "fundamental" while the former is not? The Constitution provides that Congress may establish uniform bankruptcy standards, but no constitutional provision requires that a means of obtaining a discharge shall be granted.[59] In fact

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California requirement for a local referendum as a prerequisite to construction of federally funded low-income housing. The provision had been attacked as a denial of equal protection, but the Court found no suspect category nor fundamental right present.

[54]331 F. Supp. at 1213-14.

[55]401 U.S. at 388-89 (Brennan, J., concurring); *see* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954 (1971) (Black, J., dissenting); Barbier v. Connolly, 113 U.S. 27 (1885).

[56]401 U.S. at 382-83.

[57]409 U.S. at 446-47.

[58]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, 253-54 (1970).

[59]U.S. CONST. art. I, § 8.

except for three short periods, which together total only about fifteen years, no such relief was available during the first one hundred years of the republic.[60]. Secondly, the individual has the option of private settlement of his debts, and therefore he is not permanently hampered in any of his "fundamental" associations because of the government's failure to act. Furthermore, in contrast to the state's participation in every valid marriage celebration,[61] the government is not a party to the formation of private monetary obligations from which a petitioner might seek a discharge.

Certain problems with these distinctions are readily apparent. To the truly indigent person, private settlement, although a theoretical alternative, may be a practical impossibility. In addition, even though the government did not participate in the formation of the debt, that obligation is good only because of the judicial processes that are available to effect enforcement.[62] Such considerations seem to be directly related to the fundamental fairness concept.

Perhaps it is because of this relationship, which may be the essence of the dilemma, that the Court in *Kras* discussed the actual possibilities of paying the required fee. The Court stated, "[T]his much available revenue [$1.28 per week] should be within his able-bodied reach when the adjudication in bankruptcy has stayed collection and has brought to a halt whatever harassment, if any, he may have sustained . . . ."[63] In view of this language, it seems plausible that the majority believed that the filing fee requirement was fair even to the indigent. If so, this belief may have enabled the Court to overcome the objections made above to the points relied upon to distinguish the bankruptcy problem from the divorce issue previously decided in *Boddie.*

Although no fundamental right or suspect category was deemed present in *Kras,* the statute was still subject to assault on equal protection grounds, but in the context of the more lenient rational basis standard.[64] Under that standard, inequalities are allowed to exist if some set of facts will reasonably justify the law.[65] The legislative intent to provide

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[60]409 U.S. at 447.

[61]*See* C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 170 (1966).

[62]409 U.S. at 455 (Stewart, J., dissenting).

[63]*Id.* at 449.

[64]*Id.* at 447-49; Lindsey v. Normet, 405 U.S. 56 (1971). In Lindsey, the court upheld conditions on entry into court in a housing eviction case, but struck down the required double appeal bond on the grounds that there was no rational justification for it.

[65]*E.g.,* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961).

funds for the operation of the court system was a purpose sufficient to satisfy the rational basis test.[66] This reasoning seems well based in precedent, and, accordingly, once the determination is made that the compelling governmental interest test will not be applied, the indigent's constitutional thrust is effectively parried.

In refusing to recognize access to the courts generally as a fundamental right, it seems apparent that the Court examined certain policy considerations. Acceptance of the position taken by the lower court in *Kras* could conceivably result in demands upon the judicial system which would necessitate the expenditure of public funds and resources not presently allocated. Specifically, if the indigent is guaranteed access to the civil courts on the basis of equal protection, it follows logically that he should receive equal access.[67] Equal access might be construed to require government provided counsel, discovery expenses, and appeal fees. Obviously the achievement of complete equality would be difficult, and the brand of equality actually effected might be more onerous to the public than the present system.[68] For example, if the indigent person received subsidized assistance, he would actually be in a better position than the person able to bear the expense, who must base his decision on whether to litigate by balancing his costs against his chances of success. Such an exercise in equal protection could only result in arbitrary line-drawing.

Although filing fees are not a widespread problem due to the availability of in forma pauperis procedures,[69] the *Kras* case appears to be a clear indication that the Supreme Court does not favor the use of equal protection reasoning as a vehicle for obtaining free access to the civil courts. *Ortwein v. Schwab,*[70] decided subsequent to *Kras,* is further evidence of this intent. In *Ortwein,* the Court recognized a due process right to a hearing prior to a reduction in welfare payments but refused to prohibit a state from conditioning the right of appeal on the basis of a filing fee.[71] Even though the appeal in *Ortwein* was from an adminis-

[66]409 U.S. at 447-49; Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 550-55 (1949).

[67]The writer recognizes that the equal protection clause as it is presently applied does not require absolute equality. The point made here is one resting on logic and is designed to point out the dilemma with which the Court must cope when the controlling concept is declared to be equal protection.

[68]*See* Griffin v. Illinois, 351 U.S. 12, 34-35 (1956) (Harlan, J., dissenting).

[69]*See* M'Clenahan v. Thomas, 6 N.C. 198 (1813); N.C. GEN. STAT. §§ 1-110 (Supp. 1971), 1-112 (1969), 1-288 (Supp. 1971), 6-24 (1969), 52A-11.1 (1966).

[70]410 U.S. 656 (1973) (per curiam).

[71]*Id.* at 659-60; *see* Goldberg v. Kelly, 397 U.S. 254 (1970).

trative hearing and sought initial access into the court system, the Court reaffirmed its position that there is no constitutional right to appeal.[72] Thus in determining the right of access, the Court looked not only to the type of relief sought, but also to the stage of the judicial process involved.[73] This holding points out that the due process concept of fairness does not necessarily lead to the far-reaching expansion which logically follows if the standard is equality of access.

Although the Court does not seem inclined to increase the presently delineated fundamental rights,[74] it is important to consider what requirements may result in an area categorized as "fundamental". In the field of criminal procedure, transcripts for appeal,[75] waiver of filing fees on appeal,[76] and court appointed counsel on appeal[77] have ensued from the application of the strict equal protection standard. Since *Boddie* declared marriage a fundamental right, it seems reasonable to expect similar developments if that decision is logically expanded. The New York Supreme Court has already reacted in this direction.[78] Although such expansion may be curtailed by the Supreme Court, the designation of marriage as a fundamental interest by the Court necessarily appears to invoke the compelling governmental interest test when dealing with restrictions upon the exercise of divorce proceeding. Thus, it follows that the designation of access to the civil courts as a "fundamental" right would require application of the same stringent compelling interest test to any judicial evaluation of procedures affecting access. Accordingly, it seems reasonable to conclude that fear of the far-reaching repercussions of the designation "fundamental" was the basic justification for the Court's refusal to consider specifically the broad concept of access to the civil courts.

In conclusion, certain observations can be made on the basis of *Kras*. If the issue of access involves a previously delineated fundamental right, and the civil courts provide the exclusive available remedy, the Court will impose the due process right of an unconditional opportunity to be heard. However, the Court appears determined to prevent the

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[72]410 U.S. at 659-60; McKane v. Durston, 153 U.S. 684 (1893).

[73]*See* Ortwein v. Schwab, 410 U.S. at 659-60.

[74]San Antonio Independent School Dist. v. Rodgriquez, 411 U.S. 1, 33-34 (1973). "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the law." *But cf.* Roe v. Wade, 410 U.S. 113 (1973).

[75]Griffin v. Illinois, 351 U.S. 12 (1956).

[76]Burns v. Ohio, 360 U.S. 252 (1959).

[77]Douglas v. California, 372 U.S. 353 (1963).

[78]Vanderpool v. Vanderpool, 344 N.Y.S.2d 572 (Sup. Ct. 1973).

introduction of the equal protection compelling interest requirements in this area of the law and, accordingly, will not designate access to the civil courts generally as a fundamental right.[79] Such a course seems wise to this writer. Government is not shackled with the command to achieve the impossible goal of equality; yet the Court retains the option to eliminate unfairness in specific areas where the burden on the indigent is unreasonably heavy.

IRVIN WHITE HANKINS III

Employment Discrimination—Building Up the Headwinds

In 1971 the United States Supreme Court held in *Griggs v. Duke Power Co.*[1] that a private employer's hiring practices violated the mandate of Title VII of the Civil Rights Act of 1964.[2] Faced with a showing of racially discriminatory impact without intent,[3] a unanimous Court[4] concluded that "employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups"[5] were invalid absent proof of genuine "business necessity"[6] within the scope of the Title

[79] *But see* Note, *Free Access to the Civil Courts as a Fundamental Constitutional Right: The Waiving of Filing Fees for Indigents*, 8 NEW ENG. REV. 275, 302 (1973). This note states the novel proposition that since the Supreme Court did not specifically address the concept of access to the courts generally, the designation of that concept as a fundamental right by the lower courts remains intact.

[1] 401 U.S. 424 (1971). The Court invalidated Duke Power's requirement of a high school diploma and satisfactory aptitude test scores for employment in all non-labor force departments. The requirement was instituted, without a meaningful validation study, despite the successful performance of non-high school graduates already employed in those departments.

[2] Civil Rights Act of 1964 [hereinafter cited as Act], §§ 701-16, 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, Equal Employment Opportunity Act of 1972, 42 U.S.C.A. §§ 2000e to 2000e-15 (Supp. 1972). For pertinent portions of the Act see text accompanying note 18 *infra*. For a recent analysis of the application of Title VII to hiring practices see Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1119-51 (1971).

[3] An analysis of the doctrine of unintentional discrimination is not within the scope of this note. It is now generally accepted that intent is unnecessary for the establishment of a violation of Title VII. *See, e.g.*, Sprogis v. United Airlines, Inc., 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.) petition for *cert. dismissed*, 404 U.S. 1006 (1971). However, it is clear that an employment practice must have a discriminatory impact to violate Title VII. *See, e.g.*, Rios v. Steamfitters Local 638, 326 F. Supp. 198, 202-03 (S.D.N.Y. 1971). For a detailed discussion of the ramifications of the Court's redefinition of discrimination see Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

[4] Mr. Justice Brennan did not participate.

[5] 401 U.S. at 432.

[6] *See* notes 20-33 *infra* and accompanying text.