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In order to be married in Cook County, Illinois, a couple must obtain a marriage license from the Cook County Clerk by paying a $60 marriage license fee.[2] *The marriage license fee will not be waived even if the couple applying for the license cannot afford to pay it.*[3]

Assume a couple who desires to marry in Cook County but cannot afford to pay the marriage license fee sues the county clerk arguing that the nonwaivable fee prevents them from getting married and, therefore, violates their rights under the Fourteenth Amendment to the U.S. Constitution. What standards would the courts apply to decide this important constitutional question?

I. INTRODUCTION

The United States Supreme Court has often addressed the issue of the constitutionality of government fees that indigent people cannot afford to pay. This issue has arisen in the context of people involved in both the civil and criminal justice systems as well as government-imposed fees on partic-

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2. *Applying for a Marriage License*, COOK COUNTY CLERK, http://www.cookcountyclerk.com/vitalrecords/marriagelicenses (last visited Jan. 16, 2013).

3. Interview with Kevin Crutcher, Employee, Cook County Clerk (Sept. 6, 2011).

ipation in the electoral process and on the receipt of government services. The most recent decision of the Supreme Court addressing this issue, *M.L.B. v. S.L.J.*,[4] resulted in a lack of clarity about the constitutional standards to be applied to this issue.[5]

The purposes of this Article are to explore the history of United States Supreme Court decisions addressing the issue of the constitutionality of government fees as they apply to indigent persons and to analyze the coherence of the constitutional doctrine that arises from these decisions. The principle focus of the Article will be on how this issue is resolved outside of the criminal justice context. This Article will conclude with suggestions as to how the courts can provide more constitutional clarity to the resolution of this issue in the future.

II. CRIMINAL CASES

The first Supreme Court decision to address the constitutionality of a government fee as applied to the poor was *Griffin v. Illinois*.[6] In *Griffin*, two defendants were tried together and convicted of armed robbery.[7] In order to pursue an appeal of their convictions, the defendants needed to obtain a transcript of the trial proceedings, but they could not afford to pay for it.[8] The defendants' request for a free transcript was denied by the trial court.[9] The defendants argued the failure of the state to provide a free transcript prevented them from seeking appellate review of their convictions and, therefore, violated their due process and equal protection rights under the Fourteenth Amendment to the U.S. Constitution.[10]

Justice Black, writing for three other justices in *Griffin*, framed the issue broadly: "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal."[11] Black traced the goal of equal justice in the administration of criminal laws back to the Magna Carta in 1215.[12]

Black concluded that preventing poor defendants from seeking appellate review of their convictions because they could not afford to pay for transcripts violates due process and equal protection because the defendants

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4. M.L.B. v. S.L.J., 519 U.S. 102 (1996).
5. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 755 (8th ed. 2010).
6. Griffin v. Illinois, 351 U.S. 12 (1956).
7. *Id.* at 13.
8. *Id.* at 13-14.
9. *Id.* at 15.
10. *Id.* at 14-15.
11. *Griffin*, 351 U.S. at 16.
12. *Id.* at 16-17.

are discriminated against on account of their poverty.[13] He stated, "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[14]

Justice Frankfurter concurred with Justice Black that the defendants' constitutional rights had been violated.[15] However, Frankfurter asserted that the constitutional right at issue in this case was "equal protection of the laws."[16]

In later cases, the Supreme Court extended *Griffin* to require the waiver of court-filing fees for indigent criminal defendants in other contexts: paying state supreme court docket and filing fees[17] and paying filing fees for habeas corpus petitions.[18] *Griffin* also led to the holding that a state must provide an attorney to an indigent criminal defendant seeking to appeal a conviction as a matter of right.[19] In addition, *Griffin* underlaid the Supreme Court's decision that a criminal defendant who is convicted of a crime cannot be incarcerated beyond the statutory maximum time due to the inability of the defendant to pay a court-imposed fine and court costs.[20]

The Supreme Court has also determined that, unlike some rights of criminal defendants,[21] *Griffin* applies to criminal defendants who are not incarcerated as a result of their criminal convictions. In *Mayer v. City of Chicago*, the Supreme Court extended *Griffin* to require a free appellate transcript for an indigent defendant who had been convicted of violating two city ordinances even though the violations were only punishable by a fine and not by incarceration.[22]

III. NON-CRIMINAL CONTEXT

A. FEES FOR PARTICIPATION IN THE ELECTORAL PROCESS OR RECEIPT OF GOVERNMENT SERVICES

The first time the Supreme Court addressed the constitutionality of a government-imposed fee outside the criminal law context was in *Harper v.*

13. *Id.* at 18.
14. *Id.* at 19.
15. *Id.* at 20.
16. *Griffin*, 351 U.S. at 25.
17. Burns v. Ohio, 360 U.S. 252, 258 (1959).
18. Smith v. Bennett, 365 U.S. 708, 714 (1961).
19. Douglas v. California, 372 U.S. 353, 357-58 (1963).
20. Williams v. Illinois, 399 U.S. 235, 243-44 (1970).
21. For example, no indigent person can be incarcerated after conviction of a crime unless he was offered trial counsel at a state's expense. Argensinger v. Hamlin, 407 U.S. 25, 37 (1972). However, if an indigent person convicted of a crime is not sentenced to a term of imprisonment, the failure of the state to provide counsel at trial is not a constitutional defect. Scott v. Illinois, 440 U.S. 367, 373-74 (1979).
22. Mayer v. City of Chicago, 404 U.S. 189, 198 (1971).

Virginia State Board of Elections.[23] In *Harper*, the State of Virginia imposed a $1.50 poll tax on residents who desired to vote in state elections.[24] The constitutionality of the poll tax was challenged by some Virginians who could not or did not pay it.[25] The Supreme Court held that such a poll tax violated the Equal Protection Clause of the Fourteenth Amendment "whenever it makes the affluence of the voter or payment of any fee an electoral standard."[26] The Court considered the right to vote a fundamental right and any classification that restrained it "must be closely scrutinized and carefully confined."[27] The Virginia poll tax was found to violate equal protection.[28]

The Supreme Court addressed the constitutionality of another government fee that individuals could not afford to pay in *Bullock v. Carter*.[29] In *Bullock*, the plaintiffs sought to be candidates in various county primary elections in Texas but could not afford to pay the candidate filing fees (ranging from $1,000 to $6,300).[30] As a result, they were denied places on the ballot.[31] The plaintiffs challenged, on equal protection grounds, the requirement in Texas that payment of a filing fee is a prerequisite to a candidate's participation in a primary election.[32] The Court recognized the burden of denying candidates a place on the ballot based on their inability to pay a filing fee fell more heavily on potential candidates and voters based on their economic status.[33] As a result, the Court applied strict scrutiny in its equal protection analysis of the fees.[34] The Court concluded that Texas failed to establish the filing fees were necessary to achieve otherwise legitimate objectives and, therefore, they violated equal protection of the laws.[35]

In *Lubin v. Panish*, another case involving access to the ballot, an indigent person challenged a California statute that imposed a $701.60 filing fee to place his name on the ballot in a primary election for county office.[36] The plaintiff was denied nominating papers for the county office because he was unable to pay the filing fee.[37] The Court held that an electoral system

23. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).
24. *Id.* at 668.
25. *Id.*
26. *Id.* at 666.
27. *Id.* at 667.
28. *Harper*, 383 U.S. at 670.
29. Bullock v. Carter, 405 U.S. 134 (1972).
30. *Id.* at 135-36.
31. *Id.* at 136.
32. *Id.* at 141.
33. *Id.* at 144.
34. *Bullock*, 405 U.S. at 144.
35. *Id.* at 149.
36. Lubin v. Panish, 415 U.S. 709 (1974).
37. *Id.* at 711.

that bars a candidate from the ballot solely because he cannot pay a filing fee violates equal protection.[38]

The only Supreme Court decision that addresses a government-imposed fee for the receipt of government services that an indigent person could not pay is *Kadrmas v. Dickinson Public Schools*.[39] In *Kadrmas*, a rural public school district in North Dakota imposed an annual fee of $97 for a child to ride the school district's buses to and from school.[40] The Kadrmas family, who lived sixteen miles from their child's school, could not afford to pay the school bus fee, and the school district buses stopped picking up the Kadrmas' child.[41] Mrs. Kadrmas and her child sued the school district, contending the school bus fee violated their equal protection rights.[42] The Supreme Court concluded that strict scrutiny review was not appropriate because the poor are not a suspect class, and education is not a fundamental right.[43] The Supreme Court held there was a rational basis for the school bus fee because requiring that all children ride free would create a disincentive for a school district to choose to provide bus service at all and, therefore, equal protection was satisfied.[44]

B. CIVIL LITIGATION FEES

In several cases, the Supreme Court has addressed the constitutionality of fees in civil litigation that poor people could not afford to pay. The first case in which this issue was addressed was *Boddie v. Connecticut*.[45] In *Boddie*, welfare recipients filed a class action challenging the state statutory requirement that court fees totaling between $60 and $95 must be paid by plaintiffs before their divorce cases would be heard in Connecticut state courts.[46] The Supreme Court found the marital relationship involves interests that are of basic importance in our society and that the only forum authorized to terminate a marriage are state courts.[47] Given these two factors, the Court held the imposition of fees on the filing of divorce cases violated due process because the fees preempted the plaintiffs' right to dissolve their marriages by the only means the state provided for doing so.[48]

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38. *Id.* at 718.
39. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450 (1988).
40. *Id.* at 454.
41. *Id.* at 454-55.
42. *Id.* at 455.
43. *Id.* at 458.
44. *Kadrmas*, 487 U.S. at 461-62.
45. Boddie v. Connecticut, 401 U.S. 371 (1971).
46. *Id.* at 372.
47. *Id.* at 376.
48. *Id.* at 383.

In *United States v. Kras*, the Supreme Court addressed the constitutionality of a $50 filing fee that had to be paid before a petitioner could be discharged in bankruptcy.[49] The petitioner in *Kras* was unable to pay the fee due to his family's impecunious circumstances and, as a result, his bankruptcy discharge was not approved.[50] The Supreme Court distinguished *Kras* from *Boddie*, finding no constitutional interest involved in a discharge in bankruptcy and also finding the bankruptcy process was not the only method available to a debtor to adjust the legal relationship with his creditors.[51] The Court found neither a fundamental right to be involved in a bankruptcy petition[52] nor any suspect class to be affected by the bankruptcy process.[53] Instead, the Court found bankruptcy legislation to be in the area of economics and social welfare, requiring only a rational justification to satisfy equal protection.[54] The Court concluded that there is a rational basis for the bankruptcy filing fees in that they further Congress's objective that the bankruptcy system be self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public.[55]

The logic of *Kras* was followed by the Supreme Court in *Ortwein v. Schwab*.[56] In *Ortwein*, two welfare recipients in Oregon brought appeals to the Oregon Court of Appeals seeking judicial review of administrative decisions of state welfare officials that reduced their welfare benefits.[57] All appellants in the Oregon Court of Appeals were required to pay a $25 filing fee, and both of these appellants were unable to pay the fee.[58] The appellants challenged the imposition of the filing fees on both due process and equal protection grounds.[59] The Supreme Court found that *Kras*, rather than *Boddie*, applied because increased welfare payments do not have the constitutional significance of the marital interests involved in *Boddie*, and the administrative hearings conducted by the state welfare department provided

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49. United States v. Kras, 409 U.S. 434 (1973).
50. *Id.* at 438-39.
51. *Id.* at 443-44.
52. *Id.* at 444-45. The author agrees with Justice Marshall, who asserted in his dissent in *Kras* that any indigent person who seeks adjudication of his claim of right under law should have a right of access to the courts because the courts are the exclusive forum for the authoritative resolution of such claims. *Kras*, 409 U.S. at 462-63 (Marshall, J., dissenting). *See also* Gary S. 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, 225 (1970); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part H*, 1974 DUKE L.J. 527, 567 (1974).
53. *Kras*, 409 U.S. at 445.
54. *Id.*
55. *Id.* at 447.
56. Ortwein v. Schwab, 410 U.S. 656 (1973).
57. *Id.* at 656-57.
58. *Id.* at 658.
59. *Id.* at 656.

the appellants with due process.[60] As in *Kras*, the Court found that welfare benefits are in the area of social welfare, and the applicable equal protection standard is rational justification.[61] The Court concluded the filing fees are imposed to generate revenue to offset the expenses of operating the Oregon court system and, therefore, there was a rational basis for the filing fees that satisfied equal protection.[62]

Little v. Streater involved a due process challenge to a Connecticut statute that provided that, in paternity actions, the cost of blood grouping tests are to be borne by the party requesting them.[63] The appellant was a man against whom a paternity action was brought in Connecticut state court.[64] He requested blood grouping tests be done on the mother and child at state expense because he was indigent; the trial court authorized the tests but denied his request that the state pay for them.[65] The tests were not done and, after trial, the appellant was found to be the child's father and was ordered to pay child support as well as the mother's expenses and attorney's fees.[66] The appellant contended that due process was violated when the trial court denied his request, based on indigency, that the state pay for the blood grouping tests.[67] The Supreme Court acknowledged that blood grouping tests can provide strong exculpatory evidence that a man is not the father of a child.[68] The Court also recognized that Connecticut was a state actor in the paternity case because the child's mother was receiving welfare benefits from the state, and any child support would be paid to the state.[69] Finally, although a paternity action is a civil action, the Court found it has "'quasi-criminal' overtones" because a man found to be a father of a child in a paternity action can be imprisoned if he fails to comply with a child support order entered by the trial court.[70] The Court considered the three factors announced in *Mathews v. Eldridge*[71] to determine whether due process required the blood grouping tests be paid by the state.[72] After considering the

60. *Id.* at 659-60.
61. *Ortwein*, 410 U.S. at 660.
62. *Id.*
63. Little v. Streater, 452 U.S. 1 (1981).
64. *Id.* at 3.
65. *Id.* at 3-4.
66. *Id.* at 4.
67. *Id.* at 5.
68. *Little*, 452 U.S. at 6-8.
69. *Id.* at 9.
70. *Id.* at 10.
71. Mathews v. Eldridge, 424 U.S. 319 (1976). The *Mathews* Court held that in deciding procedural due process issues, courts should evaluate the private interests at stake, the government interests, and the risk of error in the extant procedures as well as the probable value of additional procedures. *Id.* at 334-35.
72. *Little*, 452 U.S. at 13.

Mathews factors, the Court concluded that the due process rights of the indigent appellant were violated when the Connecticut trial court failed to order blood grouping tests at the state's expense.[73]

C. *M.L.B. V. S.L.J.*

The Supreme Court's most recent case involving a government-imposed fee that an indigent person could not pay is *M.L.B. v. S.L.J.*[74] In *M.L.B.*, a mother was sued by the father of her children for termination of her parental rights in Mississippi state court.[75] After trial, the state court judge entered a decree terminating all of the mother's parental rights.[76] The mother desired to appeal the trial court decision, but her appeal was dismissed because she could not afford to pay a $2,352.36 record preparation fee.[77] The mother appealed to the U.S. Supreme Court, contending the denial of her right to appeal within the Mississippi court system violated her right to due process and equal protection of the laws.[78]

The Supreme Court in *M.L.B.* recognized that "providing equal justice for poor and rich" is an "age-old problem."[79] The Court examined the *Griffin* line of cases that guaranteed criminal defendants waiver of fees on appeals of convictions that were a matter of right.[80] This line of cases included *Mayer v. Chicago*,[81] in which appeal costs were waived by the Court for an indigent criminal defendant who was convicted of violating city ordinances that did not involve incarceration as a penalty.[82] The Court followed *Mayer* and held that the mother in *M.L.B.* was constitutionally entitled to appeal the decree terminating her parental rights without paying a fee to produce a record.[83] The Court was strongly influenced by the fact that the lower court's decision permanently terminated M.L.B.'s relationship with her children, and the relationship between a parent and child is constitutionally protected from unwarranted governmental intrusion.[84]

The Court's reasoning in *M.L.B.* is perplexing in several respects. The *M.L.B.* Court relied on the *Griffin-Mayer* line of cases, involving the rights of criminal defendants, even though the Supreme Court has stated that the

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73. *Id.* at 16-17.
74. M.L.B. v. S.L.J., 519 U.S. 102 (1996).
75. *Id.* at 107.
76. *Id.* at 107-08.
77. *Id.* at 106.
78. *Id.* at 109.
79. *M.L.B.*, 519 U.S. at 110 (quoting Griffin v. Illinois, 351 U.S. 12, 16 (1956)).
80. *Id.* at 110-13.
81. Mayer v. City of Chicago, 404 U.S. 189 (1971).
82. *M.L.B.*, 519 U.S. at 111-12.
83. *Id.* at 107, 111, 120-23, 125, 128.
84. *Id.* at 116.

principles announced in these cases should only be applied in criminal cases and not more generally.[85] Thus, the *Griffin-Mayer* line of cases has limited applicability outside of a criminal context to a civil case involving the termination of parental rights.

The Court in *M.L.B*. also recognized the *Griffin-Mayer* line of cases reflects both due process and equal protection concerns.[86] However, the *Griffin-Mayer* line of cases does not follow the traditional principles of equal protection[87] and procedural due process[88] that are normally applied in non-criminal cases. The *M.L.B.* Court concluded the equal protection concern is paramount because it focuses on "fencing out would-be appellants based solely on their ability to pay core costs."[89] The *M.L.B.* Court adopted a balancing test to decide the issue before it: "[W]e inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other."[90] However, this balancing test is not consistent with the normal equal protection analysis that the Court has developed in other non-criminal cases.[91] Moreover, the precedent that the Court in *M.L.B.* found most persuasive, *Mayer v. Chicago*, rejected a balancing of the indigent accused's interests with the state's interests.[92]

IV. POST-*M.L.B. V. S.L.J.* ANALYSIS OF GOVERNMENT FEES AS APPLIED TO THE POOR

In *M.L.B. v. S.L.J.*, the Supreme Court took a wrong turn in several respects. It should not have followed constitutional doctrine developed in the unique criminal law context and applied it in a civil law case. It also should not have applied a balancing test to resolve an important constitutional issue when the application of traditional equal protection doctrine would have yielded the same result.

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85. Maher v. Roe, 432 U.S. 464, 471 n.6 (1977).

86. *M.L.B.*, 519 U.S. at 120.

87. In a non-criminal context, equal protection analysis focuses on several levels of scrutiny of governmental classifications depending upon the suspectness of the groups affected by the classification and whether a fundamental interest is burdened by the classification. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-42 (1985).

88. In a non-criminal context, procedural due process analysis focuses on the private interests at stake, the governmental interests, and the risk of error in extant procedures as well as the probable value of additional procedures. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

89. *M.L.B.*, 519 U.S. at 120.

90. *Id.* at 120-21.

91. *See supra* note 87.

92. Mayer v. City of Chicago, 404 U.S. 189, 196-97 (1971). Justice Brennan, writing for the majority in *Mayer*, stated that the *Griffin* principle does not involve a balancing test but rather "is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way." *Id.*

The preference the Court in *M.L.B.* stated for equal protection analysis of government fees was appropriate because it focuses on denying people government services based on an inability to pay a fee. It is long established that government actions that are neutral on their face may violate equal protection if their application disadvantages a specific group.[93] Thus, challenges on equal protection grounds to government fees that indigent people cannot afford to pay are challenges to the fees in their application and not on their face. Had traditional equal protection doctrine been applied in *M.L.B.*, Mississippi would have been required to justify its mandatory record preparation fee by establishing that it was necessary to satisfy a compelling governmental interest because the child-parent relationship involves a constitutionally protected interest. It is unlikely that Mississippi could have met this standard.[94]

Some constitutional law scholars have suggested the decision in *M.L.B.* may represent a trend in Supreme Court decisions to apply a "balancing test" to equal protection cases involving fundamental interests.[95] If this suggestion is true, it would be an unfortunate development in equal protection doctrine because it would represent a diminution in the level of scrutiny that courts apply to government classifications that burden fundamental rights.[96]

Traditional equal protection analysis of government classifications is an effective and sensible way for courts to review government fees that indigent people cannot afford to pay. If the fee burdens no fundamental interest, the courts will find equal protection to be satisfied so long as the fee is rationally related to a legitimate governmental interest.[97] On the other hand, if the fee does burden a fundamental interest, the fee will only be upheld if it is narrowly tailored to serve a compelling governmental interest.[98]

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93. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

94. The Court in *M.L.B.* recognized that Mississippi's interest in the mandatory record preparation fee is financial: offsetting the cost of its court system. *M.L.B.*, 519 U.S. at 122. However, the Court also considered that waiving the fee would not create an undue burden on the state because there are so few appeals of parental termination decisions in Mississippi. *Id.* Moreover, while the Court recognized that imposing fees to defray the costs of government ordinarily provides a rational basis under equal protection, it is not a sufficient justification for a government fee that impinges a fundamental right. *Id.* at 123-24.

95. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 735-55 (8th ed. 2010).

96. Under traditional equal protection scrutiny, courts apply strict scrutiny to government classifications that burden fundamental rights requiring the government to establish that they are suitably tailored to serve a compelling government interest. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

97. *City of Cleburne*, 473 U.S. at 440.

98. *Id.*

A couple who desires to marry in Cook County, Illinois, but cannot afford to pay the $60 marriage license fee and, as a result, are denied a marriage license could challenge the denial in court on equal protection grounds. Since marriage involves constitutionally protected interests,[99] the courts should provide strict scrutiny and require Cook County to establish that the marriage license fee is necessary to satisfy a compelling government interest. It is unlikely that Cook County could meet this burden, and the courts would likely conclude that the marriage license fee is unconstitutional as applied to the poor.

If Cook County, Illinois, requires residents to pay a fee to play golf on a county golf course and a resident cannot afford the fee, the fee could also be challenged on equal protection grounds. However, since playing golf does not involve a constitutionally protected interest, courts would only require that the fee be rationally related to a legitimate government interest. Raising revenue to fund county government would undoubtedly constitute a rational basis that satisfies equal protection.

There may be one circumstance in which due process might invalidate a government fee when equal protection would not. If an indigent person has been involuntarily summoned to court as a defendant in a civil case and a government fee in the case prevents the defendant from mounting a defense, due process may invalidate the fee even if no fundamental interest is at stake. If the defendant could convince the court that weighing the factors announced in *Mathews v. Eldridge*[100] led to the conclusion that the fee barrier prevented the defendant from receiving a meaningful opportunity to be heard in the case, then due process would be violated.[101]

V. CONCLUSION

An important constitutional issue is, when does the Fourteenth Amendment require that government fees be waived for indigent persons who cannot afford to pay them? The Supreme Court has addressed this issue in many contexts. As a result of its most recent decision on this issue, *M.L.B.*, the constitutional standards for deciding this issue are uncertain. The author believes that, in the large majority of cases that raise this issue, the multiple levels of scrutiny involved in traditional equal protection anal-

99. *M.L.B.*, 519 U.S. at 116.

100. Mathews v. Eldridge, 424 U.S. 319 (1976).

101. This scenario tracks *Little v. Streator*, 452 U.S. 1 (1981). In *Little*, the defendant was sued in a paternity case in which he denied being the father of the child. The defendant could not afford to pay for blood grouping tests that might establish that he is not the father. After considering the *Mathews* factors, the Court in *Little* held that it violated due process for the state to not pay for the tests because, without them, the defendant was denied a meaningful opportunity to be heard. *Little*, 452 U.S. at 16; *Mathews*, 424 U.S. 319.

ysis will coherently resolve the issue for the poor and for the government entities who seek to charge them a fee.