

Notes

THE LEAST AMONG US: UNCONSTITUTIONAL CHANGES IN PRISONER LITIGATION UNDER THE PRISON LITIGATION REFORM ACT OF 1995

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I don't like prisoners. Nobody pretends to like them, but every once in a while, one of these people is right. And a society is judged by how it treats the least among it, not the best. I'm not worried about how presidents of banks and chairmen of the board and of country clubs are treated, or star quarterbacks, or other prima donnas. The job of the Constitution is to make sure that everyone is treated properly. [Prisoners] fall[] into the everybody category.¹

INTRODUCTION

Chunky instead of creamy. A "defective" haircut. A soggy sandwich and a broken cookie. In the age of sound-bytes and the thirty-second news brief, suits such as these are being paraded in front of the nation as prime examples of how bored and disgruntled prisoners attempt to retaliate against the criminal justice system by filing frivolous claims, wasting millions of tax dollars in the process.² The federal courts increasingly have been inundated with prisoner litigation.³ For example, the number of inmate suits alleging constitutional violations at the hands of prison personnel has climbed from

1. ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 35 (1995) (quoting an unnamed U.S. District Court judge).

2. See Greg Moran, *Cruel and Unusual: Where Does Punishment End and Cruelty Begin?*, SAN DIEGO UNION-TRIB., Aug. 9, 1996, at A1; George Raine, *Inmates' "Ridiculous" Lawsuits Rile Officials: One Prisoner at Sing Sing Sued After a "Defective" Haircut*, S.F. EXAMINER, Feb. 11, 1996, at A1.

3. See Jeffrey R. Maahs & Rolando V. Del Carmen, *Curtailing Frivolous Section 1983 Inmate Litigation: Laws, Practices, and Proposals*, FED. PROBATION, Dec. 1995, at 53.

just 218 cases filed in 1966⁴ to 56,283 in 1994.⁵

The reasons for the growth in prisoner litigation are varied but in large part may be attributed to the growth of the prison population. With society adopting an increasingly hardened attitude toward crime and punishment,⁶ political leaders attempt to out-do each other in their haste to appear “tough on crime.”⁷ In the past fifteen years, this political posturing has produced countless new federal crimes⁸ and an increased rigidity in the federal sentencing structure,⁹ both in

4. See William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 611 (1979) (noting that 1966 was the year in which the federal courts first began to report this statistic).

5. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 213 tbl.341 (115th ed. 1995).

6. See, e.g., Time/CNN/Yankelovich Partners, Inc. Poll, Question 7 (Aug. 23-24, 1995) (finding that 65% of people surveyed think prisoners should be put on chain gangs); Princeton Survey Research Assocs. “Great American TV Poll #3,” Question 33 (Feb. 7-10, 1991) (finding that 46% of those surveyed think prisoners live in conditions that are too comfortable).

7. See, e.g., Patricia Williams, *The Saints of Servitude*, N.Y. TIMES, Oct. 13, 1996, § 4, at 13 (citing the irony of the return of chain gangs as a way to teach prisoners “discipline” and “hard work,” when crushing rocks for its own sake “bears little relation either to saving taxpayer dollars or to the lessons of any labor market”); Robert Reno, *A Criminal Passion for Incarcerating Countless Legions*, NEWSDAY, Sept. 22, 1996, at F8 (relating Bob Dole's approval of the institution of female chain gangs, and Bill Clinton's desire that everyone recognize “his appetite for putting people in jail is as healthy as any Republican's”); Marianne Means, *Clinton, Dole, and the Ever-Escalating War on Crime*, SAN DIEGO UNION-TRIB., Sept. 19, 1996, at B9 (chronicling the incessant political exchanges between Clinton and Dole over crime, despite statistics indicating that crime has decreased).

8. See, e.g., Child Support Recovery Act of 1992, Pub. L. No. 102-521, § 2(a), 106 Stat. 3403, 3403 (codified at 18 U.S.C. § 228 (1994)) (making the failure to pay past-due child support a federal crime); False Identification Crime Control Act of 1982, Pub. L. No. 97-398, §§ 2, 4, 96 Stat. 2009, 2009-11 (codified at 18 U.S.C. §§ 1028, 1738 (1994)) (making it a federal crime to provide false identification documents); Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, § 2(d), 100 Stat. 1213, 1213-14 (codified at 18 U.S.C. § 1030(a) (1994)) (making it a federal crime to access a federal computer intentionally without authorization); Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, § 2, 106 Stat. 928, 928-29 (codified at 18 U.S.C. § 43 (1994)) (making it a federal crime physically to disrupt an animal enterprise); see also Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1282 (1995) (discussing the proliferation of new federal offenses during the 1980s and 1990s); John C. Jefferies, Jr. & John Gleason, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1095-98 (1995) (discussing “[n]ew federal crimes [that have been] created [in] response[] to problems states cannot handle”).

9. See, e.g., Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(a)(4), 100 Stat. 449, 458-59 (1986) (codified at 18 U.S.C. § 924(e) (1994)) (establishing a mandatory sentence if a violation follows three previous convictions for robbery or burglary, or both); see also Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) (“For the time being we have settled for a correctional policy that focuses on legislation creating many new crimes with long terms for both the new and the old. Such a ‘hard time’ and longer term policy has . . . been accompanied by less attention to prisoners' rights and prison conditions”).

the number of years a prisoner receives and in the actual number of those years that must be served.¹⁰ As a result, the prison population has been growing steadily,¹¹ with federal prisons at 125% capacity and thirty-seven of the fifty state prison systems over 100% capacity.¹²

The increase in prisoner litigation stemming from this growth in the prison population spurred a movement for reform. Academicians, judges, and corrections officials suggested various changes in the ways that federal courts should handle this deluge of litigation, including eliminating frivolous suits, streamlining the litigation process once a complaint has been filed, conducting phone "triage" with the prisoner, and mandating court-appointed attorneys to review prisoner claims before they are filed.¹³

The Prison Litigation Reform Act of 1995¹⁴ (PLRA) represents a political answer to the increasing number of prisoner petitions. The PLRA was passed by Congress as a rider to the Omnibus Consolidated Rescission and Appropriations Act of 1996 and was signed into law by President Clinton on April 26, 1996. Buried deep within an appropriations bill, the PLRA was "never the subject of a committee mark-up, and there is no Judiciary Committee report explaining the proposal. The PLRA was the subject of a single hearing in the Judiciary Committee, hardly the type of thorough review that a measure of this scope deserves."¹⁵

Despite the scant attention paid it by Congress and the media, the PLRA fundamentally alters the landscape of prisoner litigation.

10. See Beale, *supra* note 8, at 1289-91 (noting that a "significant factor in the increase in federal inmates is the increasing length of federal prison terms").

11. See ALLEN J. BECK & DARRELL K. GILLIARD, U.S. DEP'T OF JUSTICE, PRISONERS IN 1994, at 3 tbl.2 (1995) (reporting 1,053,738 prisoners under the jurisdiction of state or federal correctional authorities, representing an 8.6% increase from 1993); see also *id.* at 4 tbl.3 (reporting increases in the total state and federal United States prison population of 8.2% from 1992 to 1993 and 42.5% from 1989 to 1994).

12. See *id.* at 7 tbl.8 (reporting that prisoner populations in 37 states exceed the states' highest prison capacities, that is, the largest reported capacity among the rated, operational, and design capacities).

13. See Kim Mueller, Comment, *Inmates' Civil Rights Cases and the Federal Courts: Insights Derived from a Field Research Project in the Eastern District of California*, 28 CREIGHTON L. REV. 1255, 1289-1308 (1995).

14. Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 (1996) (codified as amended in scattered sections of U.S.C.A. tits. 11, 18, 28, and 42).

15. 142 CONG. REC. S2296 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy); see also Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) ("[S]ome believe that this legislation which has a far-reaching effect on prison conditions and prisoners' rights deserved to have been the subject of significant debate. It was not. A single Senate hearing before the Judiciary Committee, one substantive House Report, and some floor debate is all we can find.").

The PLRA includes: provisions that prevent a court from issuing any relief in a prison or jail conditions case absent a violation of law, thereby effectively prohibiting court-enforceable "consent decrees;"¹⁶ provisions that limit the compensation special masters can receive, thus deterring qualified persons, such as medical doctors, from serving as special masters;¹⁷ and provisions that prevent a court from awarding attorney's fees to plaintiff's counsel in settled cases absent a violation of federal law, subjecting prisoners' attorneys to the risk of not receiving adequate compensation.¹⁸

While each of these provisions, and many others in the PLRA, implicates constitutional concerns, this Note focuses on three changes made by the PLRA in the administration of prisoner litigation in the federal courts.¹⁹ First, the filing fee provision of the PLRA requires indigent inmates eventually to pay the full \$150 filing fee²⁰ in a civil suit,²¹ whereas indigent inmates previously could submit an affidavit of poverty and secure a complete waiver of filing fees. This provision of the PLRA impermissibly burdens the fundamental right of indigent inmates to bring constitutional claims in federal court, and is an irrational attempt by Congress to limit frivolous prisoner litigation.

Second, the "three strikes" provision of the PLRA²² bars prisoners with three prior suits dismissed as frivolous, malicious, or for failure to state a claim from proceeding in forma pauperis (ifp). Inmates

16. 18 U.S.C.A. § 3626(c)(1) (West Supp. 1997). In the words of one commentator:

[The PLRA] will severely limit the ability of the federal courts to correct serious abuses suffered by prisoners, including those [courts] who seek to enjoin the rape of juveniles and women prisoners by prison guards, sadistic beatings of prisoners and failure to provide prisoners with minimally adequate medical and mental health care. The effects will be profound.

David C. Leven, *25 Years After Attica*, N.Y. L.J., Sept. 19, 1996, at 2.

17. See 18 U.S.C.A. § 3626(f)(4) (West Supp. 1997).

18. See 42 U.S.C.A. § 1997a(b) (West Supp. 1997). Under the PLRA, attorneys' fees are now limited to "150 percent of the hourly rate established . . . for payment of court-appointed counsel." *Id.* § 1997e(d)(3). Prior to the enactment of the PLRA, attorneys could receive, at the court's discretion, "a reasonable attorney's fee . . . as a part of the costs." 42 U.S.C. § 1997a(b) (1994).

19. Although prisoners can bring civil rights claims under 42 U.S.C. § 1983 in state courts, this Note will examine the PLRA's impact on prisoner claims in the federal courts, as "the burden of dealing with complaints from prisoners has fallen disproportionately on the federal judiciary." FEDERAL JUDICIAL CTR., RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 8 (1980); see also text accompanying notes 30-31.

20. See 28 U.S.C.A. § 1914(a) (West Supp. 1997).

21. See *id.* § 1915(b).

22. See *id.* § 1915(g).

with three prior dismissals must now pay full filing fees to commence a suit, effectively barring these inmates from pursuing constitutional claims in court. This provision of the PLRA similarly violates the fundamental right of indigent prisoners to access the courts.

Third, the PLRA prevents prisoners from bringing claims for mental or emotional injury without a prior showing of physical injury.²³ This provision of the PLRA impermissibly burdens inmates' fundamental right of access to bring Eighth Amendment claims, unless courts interpret the term "injury" to encompass physical manifestations of mental or emotional injury, such as weight loss, sleep deprivation, or hypertension.

Part I of this Note outlines the history of prisoners' rights to seek redress for deprivation of their constitutional rights in the federal courts under 42 U.S.C. § 1983. Part II examines section 804(a) of the PLRA,²⁴ which amends the filing fee procedures for prisoners seeking to proceed in forma pauperis to require indigent prisoners eventually to pay full filing fees, and argues that 804(a): 1) substantially burdens a fundamental right and is therefore unconstitutional under the equal protection component of the Fifth Amendment; in the alternative, 2) even if the provision is found not to burden a fundamental right, it is still unconstitutional under "second order" rational basis review; and 3) 804(a) should not apply to state habeas corpus petitions. Part III argues that section 804(d),²⁵ which adds a new section to the in forma pauperis procedures to prevent prisoners who have had three or more prior claims dismissed as frivolous from proceeding in forma pauperis, violates equal protection, as it both impermissibly burdens indigent prisoners' fundamental right of access to the courts and is irrational legislation that is neither necessary to accomplish a legitimate government objective nor the least restrictive means of doing so. Part IV examines section 803(d),²⁶ which prohibits all prisoners from bringing claims for mental or emotional injury without a prior showing of physical injury, and finds that without a viable saving construction, it violates equal protection. Part V considers the larger policy implications of the PLRA and suggests that, regardless of the constitutionality of the various provisions, the PLRA is an unwise congressional solution to the issue of burgeoning prisoner litigation.

23. *See id.* § 1997e(e).

24. *Id.* § 1915(b).

25. *Id.* § 1915(g).

26. 42 U.S.C.A. § 1997e(e) (West Supp. 1997).

The Note concludes with recommendations for addressing the increase in prisoner litigation without erecting unconstitutional barriers to prisoner access to the federal courts and chilling potentially meritorious claims.

I. HISTORICAL OVERVIEW OF A PRISONER'S RIGHT TO SEEK
REDRRESS FOR CONSTITUTIONAL VIOLATIONS IN THE
FEDERAL COURTS

Two statutes form the basis of a prisoner's right to sue in federal court. In 1871, Congress enacted 42 U.S.C. § 1983 to provide a remedy for parties deprived of their constitutional rights, privileges, and immunities by anyone acting under color of state law.²⁷ Shortly thereafter, Congress recognized the right of indigent persons to sue in the federal courts when it created the federal in forma pauperis statute, which allowed poor litigants to file claims without paying filing fees.²⁸ Coupled with section 1983, the federal ifp statute provides the means by which most indigent prisoners bring suit in the federal courts to vindicate their civil rights.²⁹

In *Monroe v. Pape*,³⁰ the Supreme Court held that section 1983 allows plaintiffs to seek redress in the *federal* courts for violations of their constitutional rights at the hands of an official acting under color of *state* law.³¹ *Pape*, coupled with the criminal procedure deci-

27. See Act of April 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1994)). The Act states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

Id.

28. See Act of July 20, 1892, ch. 209, 27 Stat. 252 (codified as amended at 28 U.S.C. § 1915 (1994)). This Act provides in relevant part:

Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

Id.

29. See Mueller, *supra* note 13, at 1261-62.

30. 365 U.S. 167 (1961).

31. See *id.* at 172; see also Mueller, *supra* note 13, at 1262 (discussing inmate use of section 1983 to improve confinement conditions).

sions of the 1960s expanding the rights of the accused,³² and the more recent decisions expanding the ability of prisoners to file suits,³³ led to an enormous increase in the number of lawsuits filed by prisoners after 1960.³⁴ These court victories for prisoners and their advocates, however, were tempered by concomitant decisions restricting prisoners' rights in other areas as the courts also attempted to conserve judicial resources by restricting the number of prisoner suits.³⁵

In 1980, Congress weighed in on the battle being waged in the courts to strike the proper balance between the constitutional rights

32. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 444-91 (1966) (holding that statements made by a person in custody may not be used by the prosecution unless law enforcement officials followed certain procedural safeguards to ensure the Fifth Amendment's privilege against self-incrimination); *Fay v. Noia*, 372 U.S. 391, 399-415 (1963) (finding habeas corpus appropriate where a conviction is procured by a coerced confession in violation of the Fourteenth Amendment); *Mapp v. Ohio*, 367 U.S. 643, 659-60 (1961) (holding that evidence obtained in an illegal search and seizure is inadmissible in a criminal trial).

33. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that states must protect the rights of prisoners to seek redress in the courts by providing them with adequate law libraries or other legal assistance to prepare constitutional claims); *Wolff v. McDonnell*, 418 U.S. 539, 577-80 (1974) (extending, unanimously, the right of prisoners to assist each other in drafting habeas petitions to cover assistance in civil rights actions); *Morrissey v. Brewer*, 408 U.S. 471, 487-88 (1972) (holding that due process requires a state to provide an inmate, upon request, with an opportunity to be heard before revoking parole); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (holding that prohibiting a practicing Buddhist prisoner from contacting his religious advisor and committing him to solitary confinement for distributing religious materials violates the First and Fourteenth Amendments); *Haines v. Kerner*, 404 U.S. 519, 520 (1971) (holding that prisoner and nonprisoner claims are subject to the same summary dismissal standard); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (striking down a ban prohibiting prisoners from assisting each other in drafting habeas petitions); see also CHRISTOPHER E. SMITH, COURTS, POLITICS, AND THE JUDICIAL PROCESS 289, 289 (1993) (noting that in the 1960s and 1970s, judicial decisions began to protect the limited rights retained by convicted offenders).

34. See RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 102-03 (1996) (noting that from 1960 to 1983, prisoner cases increased 234%, followed by a much smaller increase of 100% between 1983 and 1995); cf. Robert G. Doumar, *Prisoners' Civil Rights Suits: A Pompous Delusion*, GEO. MASON L. REV., Fall 1988, at 1, 6 ("Without question, the civil rights statutes were 'virtually dormant' from the 1890s to the 1940s.") (citation omitted). Prior to the 1960s, a prisoner convicted of a felony, "while not civilly dead, could not bring suit nor be a witness in a suit." *Id.* at 5; see also Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 422 (1993) (noting that prisoners convicted of felonies were prohibited from bringing suit at common law).

35. See, e.g., *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 129 (1977) (denying legal recognition to prisoner unions); *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (holding that the transfer of state prisoners to institutions with less favorable living conditions does not deprive prisoners of a liberty interest); *Baxter v. Palmigiano*, 425 U.S. 308, 315-22 (1976) (denying prisoners the right to counsel and to cross-examine witnesses in disciplinary hearings); *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973) (holding that prisoners could not use section 1983 to challenge their confinement); see also Turner, *supra* note 4, at 629-31 (summarizing rulings that have sought to limit prisoners' cases).

of prisoners and the efficient allocation of judicial resources by passing the Civil Rights of Institutionalized Persons Act (CRIPA).³⁶ CRIPA continued to balance recognition of prisoners' rights with concern for judicial resources by providing, on the one hand, for attorneys general to litigate on behalf of inmate populations deprived of their legal rights,³⁷ and on the other by establishing federally certified state inmate grievance procedures to address concerns about the increasing number of prisoner suits.³⁸

Despite this effort to reduce prisoner suits, the number of prisoner suits filed continued to rise.³⁹ Recognizing this trend, judges fashioned their own remedies:⁴⁰ the courts of appeals in each circuit (with the exception of the District of Columbia's, which did not address the issue) had approved the required payment by prisoners of partial filing fees prior to the enactment of the PLRA.⁴¹ As of February 1996 (also before the enactment of the PLRA), forty-seven districts (half of all federal district courts) required partial filing fees in some form.⁴² Of these forty-seven districts, twenty-one relied on local rules or orders to establish a variety of procedures for assessing partial filing fees.⁴³ The other twenty-six districts used informal policies that allowed judges to review the prisoner's affidavit of poverty and to exercise discretion by assessing partial filing fees.⁴⁴ None of these districts required indigent prisoners to pay anything beyond the initially-assessed fee.⁴⁵

36. Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. §§ 1997-1997j (1994)). In addition to prisoners, Congress examined the civil rights of the mentally ill, juveniles, orphaned children, and nursing home residents. *See id.* § 2.

37. *See id.* § 3.

38. *See id.* § 7.

39. In 1980, prisoners filed 23,287 petitions; by 1984, the number had increased to 31,107. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 169 tbl.293 (107th ed. 1987).

40. Congress also provided federal judges with the power to enjoin litigants with abusive and lengthy filing histories. *See* 28 U.S.C. § 1651(a) (1994).

41. *See* Marie Cordisco, *Pre-PLRA Survey Reflects Courts' Experiences with Assessing Partial Filing Fees in In Forma Pauperis Cases*, FJC DIRECTIONS, June 1996, at 25, 25.

42. *See id.*

43. *See id.*

44. *See id.* The remaining districts decided not to adopt partial filing fee procedures for the following reasons: 1) data from courts with partial filing fee procedures showed no significant decrease in the number of filings as a result of the fee; 2) partial filing fees increased the administrative burden placed on the clerk's office to assess the prisoners' financial status and to collect the fees; and 3) appellate court decisions limited the court's ability to direct *sua sponte* section 1915(a) dismissals once a partial filing fee had been paid. *See id.* at 26.

45. *See id.* at 28-32.

These judicially-crafted filing fee schemes enabled federal judges to examine prisoner petitions on an individual basis and to assess fees where appropriate. The case-by-case system of taxing fees developed by the judges was successful in keeping frivolous prisoner litigation stable, despite burgeoning prison populations,⁴⁶ and, more importantly, did not impinge upon prisoners' fundamental rights of access to the courts.

The PLRA represents a drastic departure from these partial fee systems used by half of the nation's federal district courts. The PLRA requires that "all courts must conform their procedures, whether previously implemented by rules, orders, or informal policies, to the Act's requirement of a single formula for assessing partial filing fees."⁴⁷ By virtue of the PLRA, the delicate balance forged through legislative and judicial efforts to ensure prisoners' fundamental rights of access to the courts, while at the same time conserving scarce judicial resources, has swung emphatically in the direction of a reduced judicial role at the expense of the constitutional rights of prisoners.

II. THE IN FORMA PAUPERIS FILING FEE PROVISION VIOLATES EQUAL PROTECTION

Prior to the enactment of the PLRA, indigent prisoners were able to access the courts under the federal ifp statute.⁴⁸ Simply by submitting an affidavit of poverty, an indigent person could file an action "without prepayment of fees and costs."⁴⁹ The PLRA alters the statute to require that prisoners, but not other indigent litigants, "shall be required to pay the full amount of a filing fee."⁵⁰ The filing

46. See *infra* notes 80-82 and accompanying text.

47. Cordisco, *supra* note 41, at 25.

48.

Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, *without prepayment of fees and costs* or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

28 U.S.C. § 1915(a) (1994) (emphasis added). Indigents were routinely granted ifp status, entitling them to a full waiver of filing fees. See *Santana v. United States*, 98 F.3d 752, 754 (3d Cir. 1996) ("Prior to the passage of the PLRA, imprisoned litigants who were granted leave to proceed *in forma pauperis* could seek and easily obtain waivers of filing fees.")

49. 28 U.S.C. § 1915(a).

50. *Id.* § 1915(b). The PLRA states, in part:

(a)(1) Subject to subsection (b), any court of the United States may authorize the

fee provision of the PLRA creates a legislative classification for ifp filings that distinguishes between incarcerated and nonincarcerated indigent plaintiffs.⁵¹

The Equal Protection Clause of the Constitution states that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵² Because the Fourteenth Amendment applies only to the states, however, equal protection challenges to federal legislation must be brought under the Fifth Amendment’s Due Process Clause,⁵³ which the Supreme Court has construed as having an equal protection component.⁵⁴ While equal protection and due process are not interchangeable constitutional safeguards, the Court has held that “discrimination [by the federal government] may be so unjustifiable as to be violative of due process.”⁵⁵

The right to equal protection of the laws, however, must “co-exist with the practical necessity that most legislation classifies for

commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit . . . that the person is unable to pay such fees or give security therefor

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner *shall be required to pay the full amount of a filing fee*. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

- (A) the average monthly deposits to the prisoner’s account; or
- (B) the average monthly balance in the prisoner’s account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month’s income credited to the prisoner’s account. The agency having custody of the prisoner shall forward payments from the prisoner’s account to the clerk of the court each time the amount in the account exceeds \$10 *until the filing fees are paid*.

Id. § 1915(a)-(b) (emphasis added).

51. *See id.* § 1915(b).

52. U.S. CONST. amend. XIV, § 1.

53. “No person shall be . . . deprived of life, liberty, or property, without due process of law” U.S. CONST. amend. V.

54. *See Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *see also Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that school segregation in the District of Columbia violated the Fifth Amendment).

55. *Sharpe*, 347 U.S. at 499.

one purpose or another, with resulting disadvantage to various groups or persons.”⁵⁶ Recognizing this need for balance between the principle of equal protection and the reality of inevitable legislative classification, courts first examine a law to determine whether it burdens a fundamental right⁵⁷ or targets a suspect class.⁵⁸ If a law either burdens a fundamental right or targets a suspect class, courts evaluate the law under heightened scrutiny;⁵⁹ if it does not burden a fundamental right or target a suspect class, the law is granted a strong presumption of constitutionality and will be upheld so long as the legislative classification bears a rational relation to some legitimate government interest.⁶⁰

A. Fundamental Right to Access Burdened

The right of prisoners, as citizens, to access the federal courts for civil actions was originally recognized with respect to habeas corpus petitions;⁶¹ this right was later acknowledged to include civil actions

56. *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (invalidating an amendment to Colorado’s constitution that would preclude action by any governmental authority to protect the status of persons based upon their sexual orientation).

57. The Supreme Court has identified several fundamental rights. *See, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (right to marry); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (interstate travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (right to vote); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (right to privacy).

58. The Supreme Court has enumerated several suspect classes of individuals. *See, e.g.*, *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982) (legitimacy); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (gender); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (race); *Oyama v. California*, 332 U.S. 633, 646 (1948) (national origin).

59. Courts *purport* to evaluate both laws which burden fundamental rights and which identify suspect classes under strict scrutiny. *See infra* notes 87-92 and accompanying text (suggesting that only race classifications are reviewed under strict scrutiny, while laws impinging upon fundamental rights are reviewed under some version of intermediate scrutiny). Gender classifications are reviewed under intermediate scrutiny. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (“Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification.” (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981))).

60. *See Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (“[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.”); *see also New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587-94 (1979) (deferring to the policy decision of the legislature and upholding a rule that prohibited the employment of persons undergoing methadone treatment for drug addiction).

61. *See Ex parte Hull*, 312 U.S. 546, 549 (1941) (holding that “the state and its officers may not abridge or impair [a prisoner’s] right to apply to a federal court for a writ of habeas corpus”).

in which prisoners sought redress for constitutional violations.⁶² The Supreme Court has established “beyond doubt that prisoners have a constitutional right of access to the courts” for numerous purposes.⁶³ This access is not merely procedural; it must be “adequate, effective, and meaningful.”⁶⁴ The Court has further opined that “[m]eaningful access’ to the courts is the touchstone” to respecting the fundamental right of access.⁶⁵ This emphasis on the integral nature of the right of access extends to “habeas corpus and civil rights actions [which] are of fundamental importance . . . because they directly protect our most valued rights.”⁶⁶

When examining whether a fundamental right has been burdened under equal protection analysis, the Court focuses not on whether the state has sufficiently protected a right but on whether the state has extended evenly those rights it has *chosen* to grant in accord with some substantive norm of equality.⁶⁷ For example, while the Supreme Court has never required a state to hold elections for any particular office, “once franchise is granted to the electorate, lines may not be drawn that are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”⁶⁸ Similarly, states are not required

62. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 577-80 (1974) (holding that inmates are permitted to assist each other in preparing civil rights actions); *Ross v. Moffitt*, 417 U.S. 600, 616 (1974) (rejecting the claim that indigent defendants have a constitutional right to appointed counsel for discretionary appeals, but maintaining that states must “assure the indigent defendant an adequate opportunity to present his claims fairly”); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (striking down a regulation that prohibited prisoners from assisting each other with habeas corpus applications and other legal matters).

63. *Bounds v. Smith*, 430 U.S. 817, 821 (1977); see also *Lewis v. Casey*, 116 S. Ct. 2174, 2179 (1996) (noting that *Bounds* acknowledged “the (already well-established) right of access to the courts” (emphasis omitted)).

64. *Bounds*, 430 U.S. at 822.

65. *Id.* at 823 (citation omitted).

66. *Id.* at 827 (internal quotation marks omitted). Most recently, the Supreme Court reaffirmed the importance of “meaningful access” by establishing the right of an indigent to a civil appeal in a parental termination proceeding. In *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 569-70 (1996), the Court extended the category of civil cases in which the government must provide access to its judicial processes without regard to a party’s ability to pay court fees, revisiting the principle announced over forty years ago in *Griffin v. Illinois*, 351 U.S. 12 (1956): once the government affords a right, even if it has no obligation to do so, it thereafter may not “bolt the door to equal justice.” *Id.* at 24.

67. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-10, at 1460 (2d ed. 1988); see also *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970) (abolishing the rights-privilege distinction); Eisenberg, *supra* note 34, at 424 (“By 1970 the Supreme Court had made clear that merely denominating a benefit a ‘privilege’ did not preclude federal court consideration of the manner in which the benefit was granted, changed, or withdrawn.” (citation omitted)).

68. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966) (invalidating state

by the Constitution to provide a system of appellate review; however, if a state decides to grant defendants an appeal by right from criminal convictions, it cannot do so “in a way that discriminates against some convicted defendants on account of their poverty.”⁶⁹ Following the same logic, Congress is not required to provide any mechanism for fee waivers to indigent citizens.⁷⁰ Nonetheless, Congress extended the right of meaningful access to the courts to indigents in the original ifp provision;⁷¹ in that statute, Congress did not distinguish between incarcerated and non-incarcerated indigents.⁷² Once Congress chose to provide indigent citizens with an ifp proceeding, it could not arbitrarily withhold the benefits of this procedure from some indigents while granting it to others.⁷³ The PLRA, under the guise of administrative and judicial efficiency, does just that: it provides non-incarcerated indigents with fee waivers, while withholding the waiver from indigent prisoners.⁷⁴

Neither did Congress intend for the ifp statute to grant a blank check to indigent filers. Recognizing the potential for abuse among indigent filers even in 1892, Congress vested the courts with discretionary powers of dismissal under section 1915(d).⁷⁵ However, courts

poll tax).

69. *Griffin*, 351 U.S. at 18; see also *TRIBE*, *supra* note 67, § 16-11, at 1461.

70. Provided, of course, it could somehow otherwise manage to guarantee “meaningful access” to indigent litigants.

71. See *supra* note 28 and accompanying text.

72. See 28 U.S.C.A. § 1915(a) (West Supp. 1997); see also *Coppedge v. United States*, 369 U.S. 438, 447 (1962) (observing that the principle compelling the allowance of in forma pauperis appeals is “to assure equality of consideration for *all* litigants” (emphasis added)).

73. See William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1454 (1968) (“Even a privilege, benefit, opportunity, or public advantage may not be granted to some but withheld from others where the basis of classification and difference in treatment is arbitrary.”).

74. For the text of the current version of 28 U.S.C. § 1915(b), see *supra* note 50.

75. 28 U.S.C. § 1915(d) originally provided: “The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.” The PLRA has significantly, and perhaps unconstitutionally, expanded this provision. See *infra* note 99 and accompanying text. As noted in *Cruz v. Hauck*:

The benefits of this generous provision [28 U.S.C. § 1915 as enacted by Congress in 1892] have been limited, however, by the important proviso added in 1910 (36 Stat. 866) which, as now amended, reads: “An appeal may not be taken in forma pauperis if the *trial court* certifies in writing that it is not taken in good faith.” “Good faith” has been defined as a requirement that an appeal present a nonfrivolous question for review.

404 U.S. 59, 61-62 (1971) (emphasis added).

For a discussion of the PLRA’s alterations to the *sua sponte* dismissal power, see *infra* notes 99, 154 and accompanying text.

did not possess unfettered discretion to dismiss claims.⁷⁶ By leaving some room to maneuver within 1915(d), Congress created a delicate balance between indigents' access to the courts (thereby making effective the right of access guaranteed by the Equal Protection Clause of the Fourteenth Amendment) and judicial resource management.⁷⁷ The PLRA dismantled this effective system. Gone are the partial-fee schemes every circuit had successfully developed to handle the increasing numbers of prisoner petitions;⁷⁸ now prisoners "shall be required to pay the full amount of a filing fee."⁷⁹

76. Prior to the enactment of the PLRA, appellate courts held that if an inmate had paid part of a filing fee, the case could not be dismissed *sua sponte* as frivolous. See *Grissom v. Scott*, 934 F.2d 656, 657 (5th Cir. 1991) (per curiam); *Herrick v. Collins*, 914 F.2d 228, 230 (11th Cir. 1990); *In re Funkhouser*, 873 F.2d 1076, 1077 (8th Cir. 1989); *Bryan v. Johnson*, 821 F.2d 455, 458 (7th Cir. 1987). The Supreme Court has also recognized that protection from *sua sponte* dismissal for failure to state a claim is a meaningful right. See *Neitzke v. Williams*, 490 U.S. 319, 329-30 (1989) (criticizing a district court's equation of frivolousness under the pre-PLRA section 1915(d) with failure to state a claim).

These courts held that once any payment was made, all of the Federal Rules of Civil Procedure had to be followed, including the issuing of a summons to the defendant, FED. R. CIV. P. 4(a), and giving the plaintiff a chance to amend the complaint before it could be dismissed, FED. R. CIV. P. 15(a). Because of this restriction, some district courts chose not to assess partial filing fees, deciding instead that the ability to dismiss a prisoner case *sua sponte* as frivolous outweighed the deterrence value of partial filing fees. See *Maahs & Del Carmen*, *supra* note 3, at 55; cf. THOMAS E WILLGIG, PARTIAL PAYMENT OF FILING FEES IN PRISONER IN FORMA PAUPERIS CASES IN FEDERAL COURTS: A PRELIMINARY REPORT 21-23 (1984) (evaluating frivolousness of cases dismissed for failure to pay partial filing fees).

For a discussion of *sua sponte* dismissals when a prisoner fails to state a claim, see *infra* note 154 and accompanying text.

77. The Supreme Court has articulated this balance on at least one occasion:

In enacting the federal *in forma pauperis* statute, Congress "intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because . . . poverty makes it impossible . . . to pay or secure the costs" of litigation. At the same time that it sought to lower judicial access barriers to the indigent, however, Congress recognized that "a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." In response to this concern, Congress included subsection (d) as part of the statute, which allows the courts to dismiss an *in forma pauperis* complaint "if satisfied that the action is frivolous or malicious."

Denton v. Hernandez, 504 U.S. 25, 31 (1992) (citations omitted).

78. See *supra* notes 40-45 and accompanying text.

79. 28 U.S.C.A. § 1915(b)(1) (West Supp. 1997). The PLRA does provide that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee." *Id.* § 1915(b)(4). It appears that this provision, however, only applies to prisoners with no money in their prisoner account at the time of filing. A prisoner with even the smallest amount of money in his prisoner account can be assessed a partial filing fee. See, e.g., *Walp v. Scott*, 115 F.3d 308, 309 (5th Cir. 1997) (noting that the district court assessed an initial filing fee of fourteen cents against the prisoner pursuant to the PLRA); *Dale v. Schoe-*

Proponents of filing fee requirements for prisoners argue that the number of prisoner suits has climbed exponentially in recent years;⁸⁰ the PLRA therefore does not “arbitrarily” distinguish between incarcerated and non-incarcerated indigent citizens, but arguably distinguishes between two differently situated groups of indigents. In fact, the number of prisoner claims *has* risen exponentially over the past decade, from 23,287 in 1980⁸¹ to 56,283 in 1994,⁸² representing about a 142% increase. The reason for this growth, however, is not simply that prisoners have suddenly become more litigious; rather, the *prison population* has grown at an even faster rate—from 329,821 in 1980 to 1,053,738 in 1994, representing an increase of over 220%.⁸³ Per capita, prisoners have actually become *less* litigious.

This fact notwithstanding, Congress has elected to rescind the right to proceed *ifp* without paying the full filing fee only for incarcerated indigents.⁸⁴ By effectively eliminating indigent prisoners’ ability to proceed *ifp*, the PLRA will have a chilling effect on potentially valid claims, as prisoners, unlike other indigent litigants, must now pay full filing fees.⁸⁵ The filing fee provision of the PLRA should therefore be evaluated under strict scrutiny.⁸⁶

field, Case No. 1: 97 CV 453, 1997 U.S. Dist. LEXIS 14204, at *2 (W.D. Mich. Aug. 25, 1997) (upholding an initial partial filing fee of \$3.74 against a prisoner pursuant to the PLRA); Calhoun v. DeTella, No. 96 C 3564, 1997 U.S. Dist. LEXIS 1745, at *19 (N.D. Ill. Feb. 18, 1997) (taxing a \$2.00 initial partial filing fee). In addition, all prisoners, whether they are required to pay the initial partial filing fee or are exempted under section 1915(b)(4), will eventually have to pay the full filing fee. See 28 U.S.C.A. § 1915(b)(1).

80. See *Kyl to Introduce Amendment to Curb Frivolous Prisoner Lawsuits*, Congressional Press Releases, Sept. 26, 1995, available in LEXIS, Nexis Library, Wires File (quoting Senator Jon Kyl’s observation that “[t]he volume of prisoner litigation represents a [sic] unwieldy burden on a judicial system that is already overtaxed”).

81. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 206 tbl.331 (113th ed. 1993).

82. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 215 tbl.342 (116th ed. 1996).

83. See BECK & GILLIARD, *supra* note 11, at 1 tbl.1; see also Harvey Berkman, *Reform Act Cuts Prisoner Suits*, NAT’L L.J., Aug. 18, 1997, at A10 (noting that the total number of prisoner suits between fiscal years 1992-1996 rose 41%, but that that increase merely tracked the 43% rise in prisoners incarcerated over the same time period).

84. Compare 28 U.S.C.A. § 1915(a)(1) (providing that a court may permit a “person” to proceed *ifp*), with *id.* § 1915(b)(1) (requiring that a “prisoner” must “pay the full amount of a filing fee” when bringing a civil action or appeal *ifp*).

85. See 28 U.S.C.A. § 1915(b)(1).

86. Proponents of “reigning in” the ability of prisoners to file lawsuits now have tipped the scales, upsetting the delicate balance that had previously existed between prisoners rights and judicial economy: prisoners are not entitled to attorneys in civil rights suits, see Eisenberg, *supra* note 34, at 446-47; see also *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 31-32 (1981)

B. *Strict Scrutiny Applicable*

In evaluating equal protection claims, the Supreme Court appears to apply closer scrutiny to cases involving suspect classifications than it applies to those cases involving statutory burdens on fundamental interests. In suspect class equal protection cases, the Court uses strict scrutiny to invalidate classifications based upon race. In these cases, strict scrutiny essentially means “fatal scrutiny”⁸⁷ and the statute in question will be invalidated, as only one statute in the last half-century has survived under this type of scrutiny.⁸⁸ By contrast, when reviewing fundamental interest equal protection cases, the Court, while purporting to apply strict scrutiny, appears to employ some sort of intermediate scrutiny, where significant burdens on rights that the Court has classified as fundamental have been permitted.⁸⁹

Under more traditional strict scrutiny, if the Court were to de-

(holding that there is no absolute right to counsel in termination of parental rights cases); *Thomas v. Pate*, 493 F.2d 151, 157 (7th Cir.), *cert. denied*, 419 U.S. 879 (1974) (“A plaintiff in a civil action, as contrasted with a defendant in a criminal prosecution, has no Sixth Amendment constitutional right to competent counsel.”), to law libraries, *see Lewis v. Casey*, 116 S. Ct. 2174, 2180 (1996) (holding that “*Bounds* did not create an abstract, free-standing right to a law library or legal assistance”), or to filing fee waivers, *see* 28 U.S.C.A. § 1915(b)(1), and the PLRA increases the likelihood that their claims will be dismissed *sua sponte* as frivolous or for failing to state a claim. *See id.* § 1915(e)(2).

87. *See Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (observing that strict scrutiny is “strict in theory, but fatal in fact”) (Marshall, J., concurring).

88. *See Korematsu v. United States*, 323 U.S. 214, 223 (1944) (applying strict scrutiny but nonetheless upholding the criminal conviction of Japanese-American citizens for refusing to move to relocation camps in the United States during World War II). *But see Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (holding that all racial classifications are to be subject to strict scrutiny, but noting that “[w]e wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact.” (citation omitted)).

89. *See, e.g., Vacco v. Quill*, 117 S. Ct. 2293, 2301-02 (1997) (upholding a state statute prohibiting physician-assisted suicide in finding that a person’s fundamental liberty interest includes only the right to refuse unwanted medical treatment); *Planned Parenthood v. Casey*, 505 U.S. 833, 879-901 (1992) (holding that the right to an abortion encompasses only the right to be free from “undue burdens” on the exercise of the right); *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 278-80 (1990) (holding that a person’s liberty interest in refusing unwanted medical treatment may be limited by a state’s legitimate interest in the preservation of human life); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 507-11 (1989) (holding that a state has no obligation to allocate resources to subsidize non-therapeutic abortions); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (holding that the right to privacy does not include the right to engage in homosexual sodomy); *Maher v. Roe*, 432 U.S. 464, 469-80 (1977) (holding that the Equal Protection Clause does not require a state participating in the Medicaid program to pay the expenses incident to non-therapeutic abortions for indigent women); *Roe v. Wade*, 410 U.S. 113, 147-64 (1973) (holding that a woman’s fundamental right to privacy includes only the qualified right to have an abortion).

termine that a prisoner's fundamental right of access to the courts were burdened, it would automatically invalidate the PLRA's filing fee provision. For the purpose of this Note, however, I will assume the application of fundamental interest strict scrutiny, where the Court does not find a statute burdening a fundamental right to be invalid on its face—the "fatal scrutiny" referred to by Justice Marshall in *Fullilove v. Klutznick*⁹⁰—but rather proceeds to determine whether the statute is the narrowly-tailored, least restrictive alternative⁹¹ available to further a compelling government interest.⁹²

90. 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

91. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973) ("Only where state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive alternative.").

92. Although Justice Marshall also applied the "strict scrutiny" test, prior to *Adarand* that test was a perfunctory one, spoken of only formalistically and never actually applied.

Justice Stevens, in his dissent in *Adarand*, recognized this fact:

I think it is unfortunate that the majority insists on applying the label "strict scrutiny" to benign race-based programs. That label has usually been understood to spell the death of any governmental action to which a court may apply it. The Court suggests today that "strict scrutiny" means something different—something less strict—when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of "strict scrutiny" will skew the analysis

515 U.S. 200, 243 n.1 (Stevens, J., dissenting).

After *Adarand*, the status of "strict scrutiny" jurisprudence is in a state of flux because the Court's language in *Adarand* accentuates the subtle differences between two distinct types of "strict scrutiny" applied by the Court. Traditionally, judicial review has subjected racially discriminatory laws to the most intense strict scrutiny (the "necessary test"), automatically invalidating the statutes under the theory that racial classifications can never be necessary. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (holding that a miscegenation statute could never withstand strict scrutiny, that is, could never be "necessary to the accomplishment of some permissible state objective"); cf. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) ("[A]ppellees were exercising a constitutional right [to travel], and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." (emphasis in original)).

Some statutes, however, have been subjected to a different, and less intense, verbal formulation of the strict scrutiny test—the statute must be the *least restrictive means* necessary to achieve a compelling government interest. See, e.g., *Denver Area Educ. Telcomms. Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2417 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("When applying strict scrutiny . . . there must be some basis in the record, in legislative findings or otherwise, establishing the law enacted as the least restrictive means."); *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 578 (1993) (articulating the least restrictive means test).

While the "least restrictive means" test typically covers only First Amendment cases, it has been used inconsistently in the fundamental rights context as well. See *Bernal v. Fainter*, 467 U.S. 216, 219 (1984) (finding, in an opinion by Justice Marshall, that a state law that discriminated on the basis of alienage could pass strict scrutiny only if it advanced "a compelling state interest by the least restrictive means available"); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 51 (requiring a least restrictive means analysis); cf. *Skinner v. Oklahoma*, 316 U.S. 535, 541

The government interest in passing the PLRA was to reduce frivolous prisoner litigation in order to conserve judicial resources.⁹³ During the Senate debate on the PLRA, supporting senators stated that prisoner litigation constitutes a large percentage of the federal civil docket, wastes judicial resources, and affects the quality of justice non-incarcerated citizens receive.⁹⁴ Assuming this interest in protecting judicial resources against frivolous prisoner suits is compelling,⁹⁵ the PLRA's elimination of filing fee waivers for indigent prisoners nonetheless is neither "narrowly tailored" nor the least restrictive means of achieving this government interest.

The partial fee systems already in place in every circuit prior to the enactment of the PLRA permitted judges to assess filing fees against indigent prisoners where the prisoner had sufficient funds for such a partial payment. These systems forced inmates to consider the merits of their claims before bringing them without enmeshing the courts in the administrative nightmare of collecting full filing fees through drafting installments from prisoners' accounts. As compared with the judicially-crafted partial fee systems, the PLRA will not nec-

(1942) (applying strict scrutiny to invalidate a state sterilization statute that interfered with the fundamental rights of marriage and procreation).

This syntactical confusion has perhaps been resolved in favor of the "least restrictive means" formulation for all cases this year, as a majority of the Court applied the "least restrictive means" test to construe section five of the Fourteenth Amendment. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2171 (1997) (holding that the requirement that a state "demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law"). Of course, the opinion in *City of Boerne* represented a hybrid situation: the Court applied the Fourteenth Amendment in invalidating the Religious Freedom Restoration Act, an Act promulgated to define the rights of citizens under the First Amendment. *See id.* at 2160, 2172.

Nevertheless, after *City of Boerne*, it is probably fair to conclude that the "least restrictive means" test would apply in determining the constitutionality of the PLRA under the equal protection components of the Fifth and Fourteenth Amendments. If this test is used, the result will still most likely be invalidation of the Act, because "if 'compelling interest' really means what it says . . . many laws will not meet the test." *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990). This wording of the test best describes the distinction: it is the difference between *all* laws failing strict scrutiny ("necessary" test) and *many* laws failing strict scrutiny ("least restrictive means" test). If the "necessary" test were applied to the PLRA, the PLRA would assuredly fail strict scrutiny, since charging filing fees could never be "necessary" to any government interest involving the adjudication of fundamental rights.

93. *See, e.g.*, 141 CONG. REC. S14,626-28 (daily ed. Sept. 29, 1995) (statements of Sen. Dole, Sen. Hatch, and Sen. Reid).

94. *See id.*

95. One could argue that the government does not have a sufficiently compelling interest in reducing *any* prisoner litigation, whether frivolous or not.

essarily reduce frivolous suits more effectively.⁹⁶ Absent an assurance that the PLRA will be more effective than were judicially-crafted systems, the PLRA infringes upon prisoners' fundamental rights of access to the courts; it should therefore be held unconstitutional under strict scrutiny analysis.

First, the PLRA's elimination of filing fee waivers for indigent prisoners is not narrowly tailored, as the new provision burdens many claims that are not frivolous while allowing many claims that are frivolous to proceed, making the statute both overinclusive and underinclusive.⁹⁷ The biggest concern with eliminating fee waivers is that potentially meritorious claims will never see the light of day; inmates, unversed in petition-writing and the legal standards for stating a valid constitutional claim, may decide against filing for fear of being assessed the full \$150 filing fee⁹⁸ if their claim is dismissed *sua sponte* as frivolous *or* for failure to state a claim.⁹⁹ The PLRA lumps failure to state a claim into the same category as frivolousness and requires judges to dismiss both at the earliest possible time.¹⁰⁰ Of course, suits are not necessarily frivolous simply because they fail to state a

96. See *infra* text accompanying notes 105, 109.

97. Cf. *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966) (holding that a state may not require only incarcerated persons to reimburse the cost of criminal appeal transcripts; such a requirement burdens nonfrivolous as well as frivolous appeals and does not serve a legitimate state interest).

98. See 28 U.S.C.A. § 1914(a) (West Supp. 1997).

99. Prior to the enactment of the PLRA, the *sua sponte* dismissal power of section 1915(d) provided that "[t]he court may . . . dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d) (1994).

The PLRA added a new provision that reads:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or
 (B) the action or appeal—
 (i) is frivolous or malicious;
 (ii) fails to state a claim on which relief may be granted; or
 (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C.A. § 1915(e)(2).

Senior Circuit Judge Lay of the United States Court of Appeals for the Eleventh Circuit recognized the constitutional issue Congress created by including failure to state a claim in the PLRA's *sua sponte* dismissal provision. In his concurrence in *Mitchell v. Farcass*, Judge Lay noted that "[e]asing the small bit of the courts' burden that is made up of complaints that are not frivolous but nonetheless fail to state a claim simply cannot be justified when weighed against the procedural right ifp litigants are denied." 112 F.3d 1483, 1492 (11th Cir. 1997) (Lay, J., concurring).

100. See 28 U.S.C.A. § 1915(e)(2).

claim.¹⁰¹

Furthermore, the PLRA is not narrowly tailored because, while suppressing potentially meritorious claims, it does not effectively eliminate frivolous prisoner suits. The PLRA assumes that frivolous suits are being filed solely by indigent prisoners. There is no data, however, to support this claim; non-indigent prisoners under the pre-PLRA statute may have been just as, if not more, disposed to file frivolous suits.¹⁰² Further, it assumes that indigent prisoners will not file frivolous claims under the new filing fee provision, as the knowledge that the prisoners will be taxed the full filing fee will serve as a deterrent. Again, however, there is no data to show that a prisoner will not simply apply for ifp status, pay the partial filing fee, and allow the court to draft money out of her prisoner account (which may be only a dollar or two each month) until the full fee is paid. Chief Judge Jon O. Newman of the Court of Appeals for the Second Circuit has noted that “[w]hether the new fee obligations of the PLRA will deter some prisoners from filing complaints and appeals remains to be seen.”¹⁰³ A policy such as the PLRA’s filing fee provision cannot be said to be necessary to achieve a compelling governmental interest in reducing frivolous prisoner litigation when neither Congress nor members of the judiciary are convinced that it will serve its stated purpose.

Second, the statute is not the least restrictive means to reduce frivolous prisoner litigation because there are less restrictive alternatives to achieving the congressional goal. Prior to the enactment of the PLRA, every circuit that had addressed the issue had approved the assessment of partial filing fees against indigent prisoners;¹⁰⁴ thus prisoners were already being made to “feel the deterrent effect created by liability for filing fees.”¹⁰⁵

101. See *Nietzke v. Williams*, 490 U.S. 319, 329-31 (1989); see also *infra* note 154.

102. See *Mueller*, *supra* note 13, at 1289 (noting the dearth of empirical data on inmates’ civil rights suits and stating that “[o]f course, not all correctional institutions and courts have felt constrained by a lack of data in fashioning responses to the inmates’ civil rights caseload”).

103. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 527 (1996); see also Jim Thomas, *Inmate Litigation: Using the Courts or Abusing Them?*, CORRECTIONS TODAY, July 1988, at 124, 126 (“[T]here is little evidence that attempts to curtail litigation by imposing or [sic] filing fees have succeeded, and this may only penalize indigent litigants with meritorious claims while doing little to deter abuse by filers who are sufficiently clever to circumvent established policies.” (citation omitted)).

104. See *supra* notes 40-45 and accompanying text.

105. *Leonard v. Lacy*, 88 F.3d 181, 185 (2d Cir. 1996); see also *Prison Reform: Enhancing the Effectiveness of Incarceration: Hearing Before the Senate Comm. on the Judiciary*, 104th

Judge Richard Posner of the Court of Appeals for the Seventh Circuit documents that other than social security claims, prisoner petitions, once filed in district court, are the least likely type of case to go to trial;¹⁰⁶ on appeal, prisoner cases similarly are of “below-average difficulty.”¹⁰⁷ Additionally, the Supreme Court has noted that “many [prisoner] cases may be disposed of without the necessity of pretrial discovery proceedings. Our experience teaches us that the vast majority of prisoner cases are resolved on the complaint alone. Of those prisoners whose complaints survive initial dismissal, few attempt discovery and fewer still actually obtain it.”¹⁰⁸

The PLRA does nothing to improve the partial fee systems already in place at the time of its enactment. In fact, it forces courts to micromanage the process by which indigent inmates pay filing fees, likely producing a greater waste of judicial resources than would result if judges were simply left unconstrained to assess one-time partial filing fees on a case-by-case basis, as over forty districts did before the enactment of the PLRA.¹⁰⁹ Under the PLRA, judges have no discretionary ability to tax a one-time filing fee based upon the amount of money the prisoner has had in his or her prison account for the past six months. Instead, judges are forced to assess an initial partial filing fee, if funds exist.¹¹⁰ After the initial fee is paid, or after it is waived due to a lack of funds in the prisoner’s account, the court then must engage in the lengthy and resource-consuming process of

Cong. 112 (1995) [hereinafter *Prison Reform Hearings*] (prepared statement of O. Lane McCotter, Executive Director, Utah Dep’t of Corrections) (“The driving force behind this flood of litigation is that inmates have ‘nothing to lose’ in filing even the most frivolous case”); *supra* notes 81-83 and accompanying text (noting that prison populations are increasing at a faster rate than are the number of prisoner claims filed).

106. See POSNER, *supra* note 34, at 228-29 tbl.7.4.

107. *Id.* at 231.

108. *Cleavinger v. Saxner*, 474 U.S. 193, 208 (1985) (rejecting the “flood of litigation” argument in denying absolute immunity to members of a prison’s discipline committee). The Court in *Cleavinger* cited to the work of William Bennett Turner which argued that:

The impact of prisoner section 1983 cases on the efficient functioning of the federal district courts is not nearly as great as the numbers might indicate. The burden is relatively light because such a large proportion of the cases are screened out and summarily dismissed before they get under way, because court appearances and trials are rare, and because prisoner cases are not particularly complex as compared to other types of federal litigation.

Turner, *supra* note 4, at 637.

109. See Philip Hager, *Should Inmates Suit Themselves?*, CAL. LAW., May 1995, at 33, 35. Indeed, it is this issue that raised the ire of those who believe that the courts are “becom[ing] . . . enmeshed in the minutiae of prison operations.” *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

110. See 28 U.S.C.A. § 1915(b)(1) (West Supp. 1997).

drafting twenty-percent of the prisoner's preceding month's income each time her account exceeds ten dollars.¹¹¹

This exacting process could continue for years in a single case, as there is no guarantee a prisoner will have ten dollars in her account at the end of any given month—it may, in fact, “take more time to figure out how much a prisoner should pay than it does to decide one of these cases.”¹¹² An empirical analysis of prisoner claims filed in the Middle District of North Carolina in August 1996 suggests that a prisoner account balance over ten dollars is the exception, rather than the rule.¹¹³ Assessing these fees, which are supposed to serve as a deterrent to filing, is counterproductive to the intent of the PLRA—to reduce frivolous prisoner litigation in an effort to conserve scarce judicial resources. Instead, the courts are forced to waste time and energy staying abreast of prisoner trust fund accounts in addition to adjudicating the prisoner's claim on the merits; some of the fees assessed appear to be insufficient even to cover the cost of collecting them.¹¹⁴

C. Irrational Government Interest

In the alternative, the PLRA should be found unconstitutional even if the court determines that the elimination of the filing fee waiver does not impinge a fundamental right. For equal protection

111. See *id.* § 1915(b)(2).

112. Howard Mintz, *No Pay, No Play*, RECORDER, July 23, 1993, at 1 (quoting Ira Robbins, Professor of Law, American University, about the prospect of inmates paying filing fees: “Is this going to stem the tide of prison litigation? I don't think so.”); see also Gail L. Bakaitis DeWolf, Note, *Protecting the Courts from the Barrage of Frivolous Prisoner Litigation: A Look at Judicial Remedies and Ohio's Proposed Legislative Remedy*, 57 OHIO ST. L.J. 257, 278 n.131 (1996) (citing *Hearings on S.B. 261 Before the Ohio Senate Criminal Justice Subcomm.*, 120th Gen. Assembly (1994) (statement of Miles Durfey, Clerk, Court of Claims) (testifying that it would take over six years to collect a \$25 filing fee from prisoners earning \$3 per month)).

113. Among the twenty-seven prisoner claims examined that were filed in August 1996 (four months following the enactment of the PLRA), the initial partial filing fees assessed included fees of \$1.33, \$3.08, and \$3.33. See Notes of Author's Review of Petitions Filed by Prisoners in the Middle District of North Carolina (Aug. 1996) (on file with the *Duke Law Journal*). The court becomes embroiled in assessing these paltry initial fees, and then must continue to oversee the prisoner's account in order that money can be drafted from the account each month until the entire filing fee is paid. While the length of time it will take each prisoner successfully to pay the entire fee will vary according to how much income an individual prisoner has, a cursory look at the sixteen prisoner claims that were accompanied by affidavits and trust fund account statements in this survey suggests that the process could be extremely lengthy: of the sixteen claims, twelve had account balances of less than ten dollars. Theoretically, the court could be involved in the oversight of these prisoner accounts for many years.

114. See *supra* note 113 and accompanying text.

cases not involving a suspect class or a fundamental right, the Court applies the highly-deferential rational basis standard of review. As in the strict scrutiny arena, the Court must go through the motions of examining the relationship between the classification and the end to be achieved by the law.¹¹⁵ Under rational basis review, a law will be upheld so long as it advances a legitimate government interest, even if it appears to be unwise, works to the disadvantage of a particular group, or is not the least restrictive alternative.¹¹⁶

This deference to legislative initiative is not uniform, however. The Court occasionally employs what has become known as “second order” rational basis review¹¹⁷ or “rational basis [review] with [a] bite,”¹¹⁸ where it purports to use rational basis review, but nonetheless finds that an administrative or economic statute unconstitutionally classifies certain groups.¹¹⁹ In using this “tougher” version of rational basis review, the Court scrutinizes the government’s asserted reasons

115. See *supra* notes 87-92 and accompanying text.

116. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473-74 (1981) (upholding a Minnesota law banning plastic non-returnable containers in hopes of encouraging environmentally desirable alternatives); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 177-79 (1980) (upholding a statute that phased out retirement benefits for certain groups of railroad employees); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587-93 (1979) (upholding a statute denying employment to methadone users); *Williamson v. Lee Optical*, 348 U.S. 483, 488-89 (1955) (upholding an Oklahoma law that subjected opticians to a regulatory system from which sellers of ready-to-wear glasses were exempted); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (upholding a city statute banning all vehicular advertising except that connected with the business of the vehicle’s owner).

117. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 458 (1985) (Marshall, J., concurring in part and dissenting in part) (agreeing with the Court’s decision to invalidate a zoning ordinance prohibiting retarded individuals from living together, but criticizing the Court for using what he terms “second order” rational basis review instead of simply announcing it is using heightened scrutiny).

118. Gayle Lynn Pattinga, Note, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987) (describing *City of Cleburne* as “rational basis with bite”).

119. See *City of Cleburne*, 473 U.S. at 441-42 (invalidating, under rational basis review, a statute denying a residential permit to a group home for the mentally retarded); see also *Romer v. Evans*, 116 S. Ct. 1620, 1627-29 (1996) (invalidating, under rational basis review, a Colorado statute denying homosexuals governmental protection of their civil rights); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 621-22 (1985) (invalidating, under rational basis review, a New Mexico law granting a tax exemption to Vietnam veterans only if they had resided in the state prior to a specific date arguably related to the conclusion of the Vietnam War); *Zobel v. Williams*, 457 U.S. 55, 65 (1982) (invalidating, under rational basis review, an Alaska statute distributing income from its natural resources to state residents based upon a person’s length of residency); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (invalidating, under rational basis review, a statute withholding free public education from undocumented children); *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (invalidating, under rational basis review, a statute denying food stamps to hippies).

for the classification closely. If the statute is based upon negative and unsubstantiated stereotypes about the class, the Court will find the government's reasoning to be irrational or illegitimate and will not defer to the government's judgment.¹²⁰

The PLRA should be found unconstitutional under this second order rational basis standard of review for many of the same reasons it should be held unconstitutional under strict scrutiny. Assuming the governmental interest in conserving judicial resources is a legitimate one, eliminating filing fee waivers for incarcerated indigents, while retaining them for unincarcerated indigents, is not rationally related to a legitimate government purpose.¹²¹

First, if Congress had been motivated solely by the desire to conserve judicial resources through reducing frivolous litigation, it would have made the filing fee provision applicable to all indigent civil litigants, not just to indigent prisoners.¹²² Congress, of course, is entitled to approach a perceived problem incrementally;¹²³ it should not, however, hide behind that incremental approach to discriminate invidiously against a class of people.¹²⁴ By playing upon the longstanding

120. See *City of Cleburne*, 473 U.S. at 448-50 (finding that the government's interest in denying a permit to a group home for the mentally retarded was illegitimate and its purpose was not practically served).

121. In addition, had Congress taken a broader view toward reducing frivolous claims, it could have aimed at *nonprisoner* civil filers who are not seeking redress of constitutional issues. See *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring). Justice Blackmun, in discussing the "concern" with judicial overload caused by frivolous prisoner claims, noted that:

[W]here particular classes of cases to be nominated for exclusion from the federal courthouse, we might look first to cases in which federal law is not sensitively at issue rather than to those in which fundamental constitutional rights are at stake. The right to file for legal redress in the court is as valuable to a prisoner as to any other citizen. Indeed, for the prisoner it is more valuable . . . [T]he right to file a court action stands . . . as [the prisoner's] most "fundamental political right, because [it is] preservative of all rights."

Id. (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); see also *Dorn v. DeTella*, No. 96 C 3830, 1997 U.S. Dist. LEXIS 1983, at *16 n.6 (N.D. Ill. Feb. 20, 1997) (mem.) (noting that challenges, by nonincarcerated individuals, to the Internal Revenue Code are frequently frivolous).

122. See *Mitchell v. Farcass*, 112 F.3d 1483, 1488 (11th Cir. 1997) ("The volume of prisoner litigation represents a large burden on the judicial system, *which is already overburdened by increases in nonprisoner litigation.*" (emphasis added) (citations omitted) (quoting 141 CONG. REC. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl)). In fact, per capita prisoner litigation has actually *decreased*. See *supra* notes 80-83 and accompanying text.

123. See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.").

124. See *TRIBE*, *supra* note 67, at 1448 n.11 (noting that a "political defect" results when the

public animosity towards prisoners, and only eliminating fee waivers for them, Congress was able to avoid the full political consequences of its actions. Had Congress sought to limit the ability of *all* indigents to file civil claims, public opinion against such a sweeping elimination of ifp proceedings might have prevented the enactment of the legislation. As Justice Jackson said, “nothing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”¹²⁵

There is no rational explanation for Congress’ failure to apply the filing fee provision of the PLRA to nonincarcerated indigents seeking to proceed ifp, as they, like indigent prisoners, have no financial deterrent to filing frivolous claims. Furthermore, it appears to be just as easy to require nonincarcerated indigents to make affirmative monthly showings of their financial status and to pay full filing fees over the same installment schedule now required of indigent prisoners. The administrative burden on the courts would presumably be *less* in dealing with nonincarcerated indigents, as the burden of keeping the court abreast of their financial status on a monthly basis would likely fall on the claimant, rather than on the court as it currently does under the PLRA with indigent prisoners.

Second, the practical implications of the filing fee provision further indicate that Congress has fashioned an irrational policy for conserving judicial resources. The terms of the filing fee provision require the courts to oversee prisoner accounts for potentially many years, consuming more judicial resources than were used by district court judges prior to the enactment of the PLRA in assessing one-time partial filing fees against an inmate.¹²⁶ The administrative burden created by the filing fee provision of the PLRA flies in the face of the congressional goal in enacting the PLRA—the conservation of scarce judicial resources.

Finally, animosity toward prisoners apparently played a role in Congress’ crafting of the PLRA effectively to end ifp status for indi-

legislature excludes “the politically powerless for no better reason than that it fears reprisal from this group less than from others”).

125. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring); see also *TRIBE*, *supra* note 67, at 1447-48 (discussing Justice Jackson’s statement regarding selective application of legislation by officials).

126. See *supra* notes 104-14 and accompanying text; 28 U.S.C.A. § 1915(b) (West Supp. 1997).

gent prisoners and not other indigent claimants. The limited legislative history of the PLRA—indeed even the fact that the legislative history is so limited—indicates that it was passed by politicians not necessarily concerned with the conservation of judicial resources, but rather preoccupied with appearing “tough on crime” in an election year.¹²⁷ Congress could have deflected this appearance of impropriety by holding open deliberations on the filing fee provision before including it in the PLRA. The complete lack of congressional debate over the PLRA¹²⁸ suggests that Congress was driven principally by animus toward prisoners when it effectively ended filing fee waivers for indigent prisoners only. A district court judge stated that the “legislative history suggests that there was significant animosity towards prisoners in Congress. The debates on the Senate floor appear to be more rhetoric than reason and hardly extensive [T]he long diatribes on the Senate floor about the importance of punishment do not provide [Congress with] a legitimate interest”¹²⁹ In addition, the Chief Judge of the Court of Appeals for the Sixth Circuit has noted that

“In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.” When Congress penned the Prison Litigation Reform Act of 1995, the watchdog must have been dead.¹³⁰

Second order rational basis review was designed precisely “to assure that the hostility or thoughtlessness . . . has not carried the day.”¹³¹ Some Justices have gone so far as to acknowledge that “[t]he courts, of course . . . have a special obligation Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared, often

127. See Marcia Coyle, *Clinton, Dole Rate Low on Civil Liberties*, NAT'L L.J., Oct. 28, 1996, at A1 (noting that “[i]n the long run, [the PLRA] proposals are going to seem very misdirected and harmful. In the short run, they give [Clinton] the advantage of being tough on crime”); see also *supra* note 7 and accompanying text.

128. See *supra* notes 14-15 and accompanying text.

129. *Benjamin v. Jacobson*, 935 F. Supp. 332, 354 (S.D.N.Y. 1996) (holding other sections of the PLRA constitutional).

130. *McGore v. Wrigglesworth*, 114 F.3d 601, 603 (6th Cir. 1997) (citations omitted) (noting also that the Sixth Circuit has been forced to issue “an unprecedented administrative order in an attempt to organize the chaos,” *id.* (citation omitted) stemming from the management of the filing fee provision).

131. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 (1985) (Marshall, J., concurring in part and dissenting in part).

deservedly so, shut away from public view, prisoners are surely a 'discrete and insular minority.'"¹³² While not a suspect class as traditionally defined,¹³³ prisoners nonetheless comprise a politically vulnerable and underrepresented group that must rely on the courts for protection from measures such as the filing fee provision of the PLRA.¹³⁴ The filing fee provision of the PLRA should therefore be found unconstitutional under second order rational basis review because it is an illegitimate expression of unsubstantiated stereotypes about indigent prisoners.

*D. Elimination of Filing Fee Waivers for Prisoners Should Not Apply to Habeas Corpus Petitions*¹³⁵

Another constitutional concern would be implicated if the filing fee provision were construed to apply to habeas corpus filings. The PLRA is ambiguous on this point because the filing fee requirement applies to prisoners who "bring a civil action" or who "appeal a judgment in a civil action or proceeding."¹³⁶ The PLRA, however,

132. *Hudson v. Palmer*, 468 U.S. 517, 557 (1984) (Stevens, J., dissenting) (citations omitted); see also SMITH, *supra* note 33, at 289 ("Incarcerated criminal offenders constitute a despised minority without political power to influence the policies of legislative and executive officials . . .").

133. See *United States v. King*, 62 F.3d 891, 895 (7th Cir. 1995); see also *City of Cleburne*, 473 U.S. at 440-41 (listing suspect classes).

134. See *Rhodes v. Chapman*, 452 U.S. 337, 358-61 n.7 (1981) (Brennan, J., concurring) ("[P]art of the problem . . . is the attitude of politicians and officials. Of course, the courts should not *assume* that state legislatures and prison officials are insensitive to the requirements of the Constitution, but sad experience has shown that sometimes they can *in fact* be insensitive to such requirements." (internal quotation marks omitted) (citation omitted)); *id.* at 369 (Blackmun, J., concurring) ("[I]ncarceration necessarily, and constitutionally, entails restrictions, discomforts, and a loss of privileges that complete freedom affords. But incarceration is not an open door for unconstitutional cruelty or neglect. Against that kind of penal condition, the Constitution and the federal courts . . . together remain as an available bastion."); *United States v. Bailey*, 444 U.S. 394, 423-24 (1980) (Blackmun, J., dissenting) ("It is society's responsibility to protect the life and health of its prisoners.").

135. The writ of habeas corpus is a fundamental right, written into the Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

Congress has provided the federal courts with the power to grant writs of habeas corpus. See 28 U.S.C. § 2241 (1994). The right of state prisoners to file federal habeas corpus petitions is codified at 28 U.S.C. § 2254 (1994); federal prisoners file for post-conviction relief of convictions and sentences pursuant to 28 U.S.C. § 2255 (1994). Prisoners are required by Congress to pay a five dollar habeas corpus filing fee. See 28 U.S.C. § 1914(a) (1994); RULES GOVERNING § 2254 CASES IN THE U.S. DISTRICT COURTS, Rule 3, Rule 3 advisory committee's notes [hereinafter SECTION 2254 RULES].

136. 28 U.S.C.A. § 1915(a)(2), (b) (West Supp. 1997).

does not define "civil action" as it applies to ifp claims.¹³⁷ Although the majority of courts that have addressed the issue have found that the PLRA is not applicable to habeas proceedings,¹³⁸ at least one court has applied the PLRA's filing fee provision to a habeas corpus proceeding.¹³⁹ The majority of courts reason correctly that, although habeas proceedings are "civil actions,"¹⁴⁰ the ifp filing fee provisions of the PLRA should not apply to habeas petitions for three reasons: 1) habeas corpus petitions are used by prisoners to challenge erroneous sentences, while the legislative history of the PLRA suggests that changes to the ifp procedures in the PLRA were designed to limit frivolous prisoner litigation challenging prison conditions;¹⁴¹ 2) subjecting the five dollar filing fee for habeas petitions to the intricate payment schedules of the PLRA would counteract the original congressional intent to simplify the filing procedures for habeas claims by charging only five dollars;¹⁴² and 3) applying the filing fee provi-

137. See *infra* note 140 and accompanying text.

138. Six circuits have thus far held that the PLRA's filing fee provisions are inapplicable in habeas proceedings. See *Smith v. Angelone*, 111 F.3d 1126, 1131 (4th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3128 (U.S. July 23, 1997); *Naddi v. Hill*, 106 F.3d 275, 277 (9th Cir. 1997); *United States v. Cole*, 101 F.3d 1076, 1077 (5th Cir. 1996); *Santana v. United States*, 98 F.3d 752, 753-56 (3d Cir. 1996); *Martin v. United States*, 96 F.3d 853, 855-56 (7th Cir. 1996); *Reyes v. Keane*, 90 F.3d 676, 678 (2d Cir. 1996). *But cf.* *Green v. Nottingham*, 90 F.3d 415, 418 (10th Cir. 1996) (holding that the PLRA's filing fee provision "is broad enough to include petitions for extraordinary writs, including mandamus").

139. See *Van Doren v. Mazurkiewicz*, 935 F. Supp. 604, 606 (E.D. Pa. 1996) (holding that the PLRA does apply to habeas corpus petitions because habeas petitions are civil actions). Although *Van Doren* preceded *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996), by nearly two months and *Santana* did not disavow explicitly *Van Doren's* holding, the district court's ruling is surely in doubt.

140. See *Ex parte Tom Tong*, 108 U.S. 556, 559 (1883) (holding that habeas corpus review is a civil proceeding because "[p]roceedings to enforce civil rights are civil proceedings and proceedings for the punishment of crimes are criminal proceedings"). The Third Circuit decision in *Santana* provides a list of cases that have held habeas review to be a "hybrid" action and therefore outside the reach of the phrase "civil action." See *Santana*, 98 F. 3d at 754-55, and cases cited therein; see also SECTION 2254 RULES, *supra* note 135, Rule 11 advisory committee's note (applying the Federal Rules of Civil Procedure to habeas corpus proceedings only to the extent to which they are not inconsistent with the habeas rules).

141. Nevertheless, the *Van Doren* court argued that, because Congress expressly excluded habeas proceedings from one provision of the PLRA, it would have excluded them from the filing fee provision as well if it had intended to do so. See 935 F. Supp. at 606 ("If Congress had intended to limit Section 804 of the Act to prisoner cases other than habeas corpus petitions, it could have said so."). The filing fee provision, however, unlike section 802 dealing with prison release orders, does not clearly encompass habeas corpus proceedings. There was no reason, therefore, for Congress to contemplate a direct exclusion of habeas proceedings as it did in section 802. See *Santana*, 98 F.3d at 755. In addition, *Van Doren* is questionable law. See *supra* note 139.

142. See *Reyes v. Keane*, 90 F.3d 676, 678 (2d Cir. 1996) (noting that Congress endeavored

sion to habeas petitions could bar a prisoner who has filed three groundless suits from seeking habeas relief.

As the circuit courts correctly observe, there is nothing in the legislative history to suggest that Congress meant to include sentence challenges when it eliminated filing fee waivers for prisoners seeking to bring civil actions.¹⁴³ Rather, as Senator Spencer Abraham stated when introducing the PLRA to the Senate, Congress was concerned with “limiting judicial remedies in prison cases and . . . limiting frivolous litigation.”¹⁴⁴ The legislative history is supported by the fact that Congress, two days before passing the PLRA, passed the Antiterrorism and Effective Death Penalty Act (AEDPA), which imposed significant restrictions on the ability of prisoners to file second, third, and fourth habeas corpus petitions.¹⁴⁵ The AEDPA, however, made no changes to the filing fee waivers available for indigent prisoners, indicating that Congress did not intend to change the habeas filing fee requirements for prisoners in the PLRA either.¹⁴⁶

Furthermore, the PLRA establishes an intricate procedure by which prisoners must pay full filing fees through the monthly drafting of money from their prisoner trust account; to apply this procedure to the five dollar habeas filing fee¹⁴⁷ would counteract the primary goal of the PLRA—reducing frivolous prisoner litigation in an effort to conserve judicial resources. It seems extremely unlikely that Congress would have imposed the administrative burdens that the PLRA’s filing fee provision engenders upon courts to collect a five dollar fee, as it would cost courts more than five dollars to collect the fee, thereby forcing courts to expend more judicial resources than they would have in simply waiving the fee.¹⁴⁸ Courts should avoid

to make the filing of habeas petitions easier than filing typical civil actions by setting the district court filing fee at five dollars).

143. See, e.g., *Santana*, 98 F.3d at 755 (noting that “[i]f Congress had wanted to reform the *in forma pauperis* status of habeas petitioners, it might have done so in the [Antiterrorism and Effective Death Penalty Act of 1996]”); *Martin v. United States*, 96 F.3d 853, 855-56 (7th Cir. 1996) (same); *Reyes*, 90 F.3d at 678 (noting that the PLRA should not be applied to habeas corpus partly because the AEDPA deals directly with the subject).

144. 141 CONG. REC. S14,316 (daily ed. Sept. 26, 1995) (Statement of Sen. Abraham).

145. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, 110 Stat. 1214, 1220-21 (codified at 28 U.S.C. §§ 2244, 2253-55, 2261-66) (West Supp. 1997).

146. See *supra* note 143 and accompanying text.

147. See 28 U.S.C. § 1914(a) (1994).

148. See *Santana*, 98 F.3d at 756; *Reyes*, 90 F.3d at 678; see also *Leonard v. Lacy*, 88 F.3d 181, 186 (2d Cir. 1996) (holding that the PLRA applies to the one hundred dollar docketing fee for an appeal, and not just the five dollar filing fee, stating that “Congress likely [would not] have imposed administrative burdens on appellate courts and prisons only for such a nominal

such an irrational result by not applying the filing fee provisions to habeas petitions.

Finally, if the filing fee provision is applied to habeas petitions, a prisoner who has had three civil suits dismissed as frivolous, malicious, or for failure to state a claim would be barred from habeas relief unless she could pay the full filing fee up front.¹⁴⁹ As Judge Richard Posner noted in *Martin v. United States*, “[t]his result would be contrary to the long tradition of ready access of prisoners to the federal habeas corpus”¹⁵⁰ By not applying the filing fee provision to habeas petitions, this inequitable result can be avoided.¹⁵¹

III. THE “THREE STRIKES” PROVISION OF THE PLRA VIOLATES EQUAL PROTECTION

Section 804(d) of the PLRA adds another new section to the old ifp statute:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.¹⁵²

This so-called “three strikes” provision applies only to inmates seeking to proceed ifp on claims, including constitutional ones, that do not involve imminent danger of physical injury. It treats these inmates differently from the similarly situated class of inmates with

amount”).

149. See *Smith v. Angelone*, 111 F.3d 1126, 1130-31 (4th Cir. 1997); see also *infra* Part III (discussing the three strikes provision of the PLRA).

150. 96 F.3d 853, 855-56 (7th Cir. 1996).

151. Equal protection analysis also supports the conclusion that the filing fee provision cannot apply to habeas filings because the right to petition for habeas corpus is a fundamental one: in *Bounds v. Smith*, the Supreme Court stated that “habeas corpus and civil rights actions are of ‘fundamental importance . . . in our constitutional scheme’ because they directly protect our most valued rights.” 430 U.S. 817, 827 (1977) (citing *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); *Johnson v. Avery*, 393 U.S. 483, 485 (1969)). In 1961, the Supreme Court held that to “interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner equal protection of the laws.” *Smith v. Bennett*, 365 U.S. 708, 709 (1961). Taken together, these cases clearly demonstrate that burdens imposed on habeas filers would be subjected to some form of strict scrutiny under the Equal Protection Clause.

152. 28 U.S.C.A. § 1915(g) (West Supp. 1997).

three claims previously dismissed as frivolous who are not seeking to proceed ifp.¹⁵³ While many prisoner claims do involve danger of physical injury, many more involve constitutional issues unrelated to physical danger.

The three strikes provision completely bars indigent prisoners with three previous suits dismissed as frivolous, malicious, or for failure to state a claim¹⁵⁴ from bringing constitutional claims in court un-

153. See *Lyon v. Vande Krol*, 940 F. Supp. 1433, 1439 (S.D. Iowa 1996) (holding the three strikes provision unconstitutional under the Equal Protection Clause). Other Supreme Court decisions suggest both that such disparate treatment is unconstitutional and that restraints on ifp filings should at least be questioned. Cf. *Bennett*, 365 U.S. at 710, 714 (“The gist of these cases is that because ‘[t]here is no rational basis for assuming that indigents’ motions . . . will be less meritorious [than motions filed by non-indigents] . . . ‘[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.’” (citations omitted)); *Burns v. Ohio*, 360 U.S. 252, 257-58 (1959) (finding a state filing fee for appeal to the state supreme court unconstitutional); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (holding that an indigent criminal defendant is entitled to a free transcript of the record of his trial if the defendant needs it to prosecute effectively an appeal from the original conviction).

154. Beyond the scope of this Note is the discussion about whether prisoner claims that fail to state a claim should be included in the three strikes that will preclude a prisoner from proceeding ifp. Frequently prisoners “fail to state a claim” in their petitions. “Failure to state a claim,” however, does not necessarily mean that a claim is “frivolous.” See *Neitzke v. Williams*, 490 U.S. 319, 329-31 (1989) (holding that a complaint filed ifp is not automatically frivolous within the meaning of section 1915(d) because it fails to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure). Courts have faced great difficulty in attempting to define what does constitute a frivolous claim. See Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 *FORDHAM L. REV.* 413, 415 & n.14 (1985) (noting the various definitions of “frivolous” that have been used by circuit courts); see also, e.g., *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992) (holding that a court may dismiss an ifp claim as factually frivolous only if the facts alleged are “clearly baseless,” “fanciful,” “fantastic,” or “delusional;” claims “may not be dismissed, however, simply because the court finds the plaintiff’s allegations unlikely”).

Prisoners often simply do not know what constitutes a valid claim, despite the conventional wisdom that prisoners merely enjoy filing frivolous lawsuits against prison officials. Because prisoners are generally unsophisticated in their legal knowledge, the Supreme Court has held that prisoners are allowed “inartfully to plead” their civil rights complaints. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (“Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence.”). The Court in *Haines* also noted that pro se complaints are held “to less stringent standards than formal pleadings drafted by lawyers.” *Id.*; see also Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 *WM. & MARY L. REV.* 935, 971 (1990) (“Under *Haines* and the spirit of the federal rules [of civil procedure] . . . any heightened pleading requirement should not apply to pro se complaints.”).

As a result of the permissiveness accorded prisoner complaints by the courts, some of the most groundbreaking prisoners’ rights cases were begun by prisoners proceeding ifp and pro se. See, e.g., *Cruz v. Beto*, 405 U.S. 319, 322-23 (1972) (granting a prisoner’s motion to proceed ifp to bring a free exercise of religion claim); *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (holding that indigent defendants have a right to be represented without charge in a

less they are in danger of physical injury.¹⁵⁵ In *Bounds v. Smith*, the Supreme Court held that “meaningful access” to the courts is the touchstone to respecting the fundamental right of access.¹⁵⁶ The three strikes provision effectively deprives a particular group of prisoners of meaningful access to the courts—in fact, it deprives these prisoners of *all* access to the courts, unless they can pay the full filing fee upon filing suit.

The Constitution’s protection of fundamental rights, such as religious freedom and freedom of speech, is meaningless absent enforceability.¹⁵⁷ Prisoners do not relinquish completely their constitutional rights when they pass through the prison gates.¹⁵⁸ Prisoners, like non-incarcerated citizens, must enjoy meaningful access to a forum in which to vindicate violations of those rights.¹⁵⁹ The three strikes provision impermissibly burdens the ability of certain prisoners to use the courts and thus should be evaluated under strict scrutiny.¹⁶⁰

Similar to the filing fee provision of the PLRA, the three strikes provision can only withstand strict scrutiny if it is the least restrictive means of achieving a compelling governmental interest.¹⁶¹ Assuming that the congressional goal of reducing frivolous prisoner litigation to conserve judicial resources is compelling, the three strikes provision

felony prosecution).

155. See 28 U.S.C.A. § 1915(g).

156. 430 U.S. at 827.

157. See *DeMallory v. Cullen*, 855 F.2d 442, 446 (7th Cir. 1988) (“A prison inmate’s right of access to the courts is the most fundamental right he or she holds. ‘All other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden.’” (quoting *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973))).

158. See, e.g., *Turner v. Safley*, 482 U.S. 78, 84 (1987) (“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”); *Wolff v. McDonnell*, 418 U.S. 539, 580-81 (1974) (Marshall, J., dissenting) (“[A] prisoner does not shed his basic constitutional rights at the prison gate . . .”).

159. See *supra* text accompanying notes 61-66; cf. *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (“[I]nmates must have a reasonable opportunity to seek and receive the assistance of attorneys.”); *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (“[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes ‘access of prisoners to the courts for the purpose of presenting their complaints.’”); *NAACP v. Button*, 371 U.S. 415, 430 (1963) (holding that access to judicial agencies is within the First Amendment right to petition the government for a redress of grievances and that a statute impairing such a right is unconstitutional).

160. See, e.g., *Lyon v. Vande Krol*, 940 F. Supp. 1433, 1438 (S.D. Iowa 1996) (reviewing section 1915(g) under strict scrutiny because requiring indigent prisoners who would otherwise qualify for ifp to pay the \$150 filing fee up front is a “substantial burden”); see also *supra* notes 87-114 and accompanying text.

161. See *supra* notes 87-92 and accompanying text.

is not the least restrictive means of achieving that goal. Rather, three strikes appears to be the *most* restrictive means by which to reduce frivolous prisoner litigation because it eliminates *all* constitutional claims by indigent prisoners who have previously had three suits dismissed as frivolous.

Prior to the enactment of the PLRA, judges, using partial filing fees¹⁶² and the federal courts' inherent power to limit inmates' abuse of the courts, already had the authority to penalize individual prisoners who were abusing ifp procedures, either by taxing filing fees against them or by having them declared vexatious litigants.¹⁶³ The three strikes provision adds nothing to this judicial authority; it does not take into account "length of incarceration, different periods of incarceration, the number of meritorious actions filed by [an] inmate, and other pertinent information that might guide a federal court in properly limiting abuse of the court system."¹⁶⁴ Instead, it removes all judicial discretion from the evaluation of whether an individual inmate is an "abusive litigant." Thus, the three strikes provision has eliminated a lesser restrictive means through which the judiciary was able to combat abusive litigants.

Furthermore, as a matter of its public policy, the PLRA should be viewed with a critical eye. In the haste to have the Act included in the Omnibus Consolidated Rescission and Appropriations Act of 1996, Congress created legislation that, as Chief Judge Boyce R. Martin, Jr. of the Court of Appeals for the Sixth Circuit noted, "contains typographical errors . . . creates conflicts with the Rules of Appellate Procedure . . . and is internally inconsistent Moreover, the year in its name, 1995, does not correspond to the date of its enactment, 1996. We have even issued an unprecedented administrative order . . . in an attempt to organize the chaos."¹⁶⁵

This "chaos" is strikingly evident where prisoners seek to bring constitutional claims for freedom of religion. Congress, in 1992, enacted the Religious Freedom Restoration Act (RFRA),¹⁶⁶ in response

162. See *supra* notes 40-45 and accompanying text.

163. See, e.g., *Delong v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir. 1990) (noting that, in dealing with abusive litigants, the federal courts possess "inherent power . . . to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances"); see also 28 U.S.C. § 1651(a) (1994).

164. *Lyon*, 940 F. Supp. at 1438.

165. *McGore v. Wrigglesworth*, 114 F.3d 601, 603 (6th Cir. 1997) (citations omitted).

166. Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-2000bb-4 (1994)).

to the Supreme Court's decision in *Employment Division v. Smith*.¹⁶⁷ In *Smith*, the Court replaced the compelling interest test it had previously used in Free Exercise cases with an inquiry into whether a "governmental burden on religiously motivated action [was] both 'neutral' and 'generally applicable.'"¹⁶⁸ Unhappy with the *Smith* decision, Congress trumped the Supreme Court with RFRA, which elevated the constitutionality test from rational basis to strict scrutiny for legislation imposing burdens on religion.¹⁶⁹ Pursuant to RFRA, the government could not "substantially burden a person's exercise of religion" unless the burden was "in furtherance of a compelling governmental interest" and was "the least restrictive means of furthering that compelling governmental interest."¹⁷⁰

In June 1997, the Supreme Court held RFRA unconstitutional in *City of Boerne v. Flores*,¹⁷¹ on the grounds that Congress had exceeded its enforcement power under Section 5 of the Fourteenth Amendment.¹⁷² Despite RFRA's unconstitutionality, the intersection of RFRA and the PLRA demonstrates the disjointed state of congressional intent regarding the rights of prisoners to have access to the courts and to exercise religious freedom.¹⁷³ In addition, an examination of this intersection remains important in the wake of congressional reaction to the *City of Boerne* decision, where various members of Congress promised to rework RFRA to pass constitutional muster.¹⁷⁴ In testimony before the House Judiciary Committee in July 1997, one witness testified that "I believe Congress should an-

167. 494 U.S. 872 (1990).

168. *Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979, 980 n.1 (1994) (Thomas, J., dissenting in denial of certiorari).

169. See 42 U.S.C. § 2000bb-1.

170. *Id.*

171. 117 S. Ct. 2157. For articles discussing the constitutionality of RFRA prior to the Supreme Court's decision in *City of Boerne*, see, for example, William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291 (1996) (arguing that RFRA exceeds congressional legislative authority), and Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209 (1994) (arguing that RFRA is constitutional).

172. See *City of Boerne*, 117 S. Ct. at 2160.

173. The Supreme Court did not mention the PLRA in finding RFRA unconstitutional, see *id.*, so its decision does not change the fact that it conflicted with the PLRA. In addition, the fact that two different Congresses enacted RFRA and the PLRA is not relevant to the constitutional analysis. See *Tome v. United States*, 513 U.S. 150, 168 (1995) ("[A] statute . . . says what it says . . .") (Scalia, J., concurring in part and concurring in the judgment).

174. See, e.g., Frank J. Murray, *Incensed Congress Prepares Response*, WASH. TIMES, June 26, 1997, at A1 (quoting Senator Edward Kennedy, co-author of RFRA with Senator Orrin Hatch: "We cannot take this 'no' from the Supreme Court as the final answer.").

nounce that, as far as it is concerned, RFRA is still in effect.”¹⁷⁵ It appears likely, therefore, that RFRA may be reenacted in a form that will pass the Court’s scrutiny.

Traditionally, courts have accorded “substantial deference” to decisions of prison administrators that limit the religious rights of inmates, upholding restrictions that are rationally related to a legitimate penological interest.¹⁷⁶ In conjunction with deference to prison officials, however, the Supreme Court has held that “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.”¹⁷⁷ Because RFRA had applied equally to prisoners and to free citizens,¹⁷⁸ Congress had created a situation where the provisions of RFRA and the PLRA pulled in opposite directions. RFRA used a strict scrutiny test to protect vigorously against attempts to limit religious expression, while the PLRA prohibited a prisoner from even bringing a RFRA claim if the prisoner had previously had three suits dismissed as frivolous (assuming very few RFRA claims would have involved an “imminent threat of serious bodily injury”).

In addition, RFRA had severely limited preemption by a later statute, as the section that addressed “Applicability” expressly stated:

In general.—This [Act] applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [the enactment of this Act].

Rule of Construction.—Federal statutory law adopted after [the date of the enactment of this Act], is subject to this [Act] unless such law explicitly excludes such application by reference to this [Act].¹⁷⁹

175. *Testimony Before House Judiciary Committee, Supreme Court Decision on Religious Issues*, Federal Document Clearing House Congressional Testimony, July 14, 1997, available in LEXIS, Nexis Library, Script File (testimony of Charles W. Colson, President, Prison Fellowship Ministries). Colson went on to say that: “Congress cannot duck this fight.” *Id.* at 13.

176. See *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 351-53 (1987) (using a “reasonableness” test, the Court held that a prison did not need to alter its work requirements despite the fact that the requirements prevented Muslims from attending weekly religious services important to their faith); see also *TRIBE*, *supra* note 67, § 14-13, at 1266 (explaining the three factors used in the *O’Lone* case to determine “reasonableness”).

177. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974); see also, e.g., *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam) (finding that a Texas prison discriminated against an inmate by denying him a reasonable opportunity to pursue his Buddhist faith compared to that offered prisoners adhering to other religions).

178. See 139 CONG. REC. S14,461-68 (daily ed. Oct. 27, 1993) (debating Amend. No. 1083, offered by Senator Harry Reid of Nevada, which would have prohibited RFRA’s application to inmates. This amendment was ultimately rejected.).

179. 42 U.S.C. § 2000bb-3 (1994) (emphasis added).

The PLRA, enacted almost three years after RFRA, was subject to RFRA, as the PLRA did not “explicitly exclude[] such application by reference to [RFRA].”¹⁸⁰ The three strikes provision in the PLRA therefore violated RFRA; should Congress’ potential reworking of RFRA include a similar clause limiting preemption by later statutes, the friction between the PLRA and RFRA would remain.

The PLRA and a reworked RFRA¹⁸¹ would present contrary messages about how religious freedom claims of indigent prisoners should be addressed—RFRA evaluated religious freedom claims, including those of indigent prisoners, under strict scrutiny, while the three strikes provision of the PLRA prevents an indigent prisoner who has three prior frivolous dismissals from even bringing a claim, including a religious claim, without paying the full filing fee. Because Congress appears to be promulgating inconsistent legislation regarding prisoners’ ability to bring religious claims, the PLRA should be viewed in a suspect light.

IV. CHANGES IN THE CIVIL RIGHTS FOR INSTITUTIONALIZED PERSONS ACT VIOLATE EQUAL PROTECTION

The PLRA, in section 1997e(e), seeks to curtail prisoner suits that allege mental or emotional injury when those injuries are not accompanied by a physical manifestation of the injury.¹⁸² Section 803(d) amends the Civil Rights of Institutionalized Persons Act to include the following provision: “No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.”¹⁸³ This provision, however, conflicts with a prisoner’s right to bring claims for strictly emotional injury under the Eighth Amendment.¹⁸⁴ While not every discomfort a prisoner endures is a constitutional violation, as “the

180. *Id.*; cf. *Cheffer v. Reno*, 55 F.3d 1517, 1522 n.10 (11th Cir. 1995) (holding that RFRA is not pre-empted by the subsequently passed Freedom of Access to Clinic Entrances Act, Pub. L. No. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C.A. § 248 (West Supp. 1997)), because the Access Act does not explicitly exclude the application of RFRA).

181. *See supra* note 173 (noting that the Supreme Court did not mention RFRA’s preemption section in holding RFRA unconstitutional).

182. *See* 42 U.S.C.A. § 1997e(e) (West Supp. 1997).

183. *Id.*

184. The Eighth Amendment reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

Constitution does not mandate comfortable prisons . . . ,”¹⁸⁵ the Supreme Court, in delineating claims that rise above mere discomfort to constitutional violations, has held that the Eighth Amendment prohibits the unnecessary and wanton infliction of “pain,” rather than injury.¹⁸⁶ Further, Justice Blackmun has stated that “I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes. If anything, our precedent is to the contrary. . . . Psychological pain often may be clinically diagnosed and quantified through well established methods”¹⁸⁷

It is not difficult to imagine situations in which prisoners suffer mental or emotional injuries at the hands of prison officials with no accompanying physical injury.¹⁸⁸ Despite widespread popular and Supreme Court recognition of the legitimacy of mental and emotional injury, the PLRA attempts to bar these claims. By so completely restricting the judicial remedy available to prisoners who have suffered a violation of their constitutional rights, Congress has “in essence tak[en] away the rights themselves by rendering them utterly hollow promises.”¹⁸⁹ Because section 1997e(e) not only substantially burdens, but completely bars, prisoners from seeking redress for cer-

185. *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

186. *See Hudson v. McMillan*, 503 U.S. 1, 7-9 (1992).

187. *Id.* at 16-17 (Blackmun, J., concurring). Justice Blackmun cites several cases for precedent that psychological pain is a cognizable constitutional claim. *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (noting that Article III standing exists for “aesthetic” injury); *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (recognizing school children’s feelings of inferiority due to public school segregation); *see also Carey v. Piphus*, 435 U.S. 247, 258, 264 (1978) (holding that mental and emotional distress can constitute compensable injury in section 1983 cases and that “[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated”); *Doe v. Welborn*, 110 F.3d 520, 524 (7th Cir. 1997) (“The Constitution ‘does not countenance psychological torture merely because it fails to inflict physical injury.’” (quoting *Babcock v. White*, 102 F.3d 267, 273 (7th Cir. 1996))); *Zehner v. Trigg*, 952 F. Supp. 1318, 1330-31 (S.D. Ind. 1997) (“The court takes as a given the premise that the Eighth Amendment may be violated by deliberate, cruel infliction of psychological harm, without accompanying physical injury.”).

188. *See, e.g.*, *Wisniewski v. Kennard*, 901 F.2d 1276, 1277 (5th Cir. 1990) (applying the “serious injury” requirement later rejected in *Hudson* to reject an inmate’s claim of psychological harm resulting from a guard placing a revolver in the inmate’s mouth and threatening to “blow his head off”).

189. *Zehner*, 952 F. Supp. at 1331 (finding section 1997e(e) constitutional as applied to barring prisoners’ Eighth Amendment claims of being deliberately exposed to asbestos, but noting only that the point at which the Congressional restriction of available judicial remedies reaches “hollow promises . . . has not been reached by enactment of § 1997e(e) as applied *here*.”) (emphasis added). The court appears to acknowledge that there will be instances in which § 1997e(e) will render violations of constitutional remedies “hollow promises.”).

tain violations of their Eighth Amendment rights, the provision can only be upheld under strict scrutiny if the government has a compelling interest in burdening the right, and the law is the least restrictive means of attaining the governmental interest.¹⁹⁰

Once again, assuming Congress' interest in reducing frivolous prisoner litigation in an effort to conserve judicial resources is compelling, to completely bar prisoners from suing for strictly mental or emotional injuries suffered while in custody is not the least restrictive means of attaining that goal; it appears, in fact, to be the *most* restrictive means, as *all* suits alleging a strictly mental or emotional injury without physical manifestations are barred—not simply the frivolous ones. Further, there is no evidence of an abundance of frivolous prisoner litigation seeking redress for strictly mental or emotional injury without an accompanying physical injury; even if such evidence existed, this PLRA provision is not, again, the least restrictive means of reducing frivolous prisoner litigation.

Regardless, courts have a duty to construe statutes in conformity with the Constitution, if such a reading can be borne by the text of the statute.¹⁹¹ In this case, courts can avoid the aforementioned constitutional problems by interpreting section 1997e(e) to encompass pain and emotional suffering that has physical manifestations such as weight loss, loss of sleep, or hypertension. This reading of the provision is plausible, especially given that the legislative history of the PLRA contains no definition of the term "injury."¹⁹² By allowing claims for mental or emotional injury where the "accompanying physical injury" is the result of the psychological trauma, courts avoid having to address the equal protection questions raised by the statute and, therefore, to allow prisoners who have experienced an actual injury access to the courts.

190. See *Plyer v. Doe*, 457 U.S. 202, 216-17 (1982); see also *supra* notes 87-92 and accompanying text.

191. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 508-09 (1979) (Brennan, J., dissenting) ("The general principle of construing statutes to avoid unnecessary constitutional decisions is a well-settled and salutary one."); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (citation omitted)).

192. See *Zehner*, 952 F. Supp. at 1325 ("The legislative history contains virtually no discussion specifically concerning . . . Section 1997e(e).").

V. THE PLRA AS CONGRESSIONAL POLICY

Dostoyevsky wrote in the middle of the 19th century that “the degree of civilization in a society is revealed by entering its prisons.”¹⁹³ While it remains to be seen how these selected provisions of the PLRA will stand up under judicial scrutiny, the larger question, as Judge Harold Baer noted in his opinion in *Benjamin v. Jacobson*, is how this policy will play out in the day-to-day events of prison litigation: “Far more important [than the constitutionality of the PLRA] is what will happen to prisoners’ rights and the conditions in our prisons as a consequence of this legislation.”¹⁹⁴ Even if the above discussed provisions are found constitutional, they do not represent a well-considered policy.

First, the government arguably does not have a compelling interest in reducing prisoner litigation, whether frivolous or not. It has been said many times that “a prisoner does not shed his basic constitutional rights at the prison gate;”¹⁹⁵ yet it has been only through the initiation of widespread litigation that prisoners have been able to vindicate many important constitutional rights.¹⁹⁶ Ensuring that prisoners’ rights are brought to light justifies forcing courts to sift through whatever petitions may be submitted.¹⁹⁷

In *Dorn v. DeTella*, Judge Rebecca Pallmeyer noted that at least one reported decision “recognizes important limitations on the state’s interest in curtailing frivolous litigation.”¹⁹⁸ In that decision, *Cain v. Darby Borough*,¹⁹⁹ the Third Circuit struck down a prison policy that conditioned access to a probation program upon the willingness of a prisoner to waive civil rights claims. The court acknowledged that “there can be a valid law enforcement interest in preventing the public fisc from being wasted by defending frivolous lawsuits,” but held that a blanket policy that discouraged meritorious civil rights claims

193. *Benjamin v. Jacobson*, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) (quoting FYODOR DOSTOYEVSKY, *THE HOUSE OF THE DEAD* 76 (Constance Garnett trans., 1957)).

194. *Id.*

195. *Wolff v. McDonnell*, 418 U.S. 539, 580-81 (1974) (Marshall, J., dissenting in part).

196. *See supra* note 159.

197. *See Dorn v. DeTella*, No. 96 C 3830, 1997 U.S. Dist. LEXIS 1983, at *16 (N.D. Ill. Feb. 20, 1997) (mem.) (noting that “[s]ince lawsuits are the method by which legal rights are enforced, courts are reluctant to find that the interest in avoiding lawsuits overrides the rights to be enforced through them”).

198. *Dorn*, 1997 U.S. Dist. LEXIS 1983, at *17.

199. 7 F.3d 377 (3d Cir. 1993).

as well as frivolous ones was unacceptable.²⁰⁰ The PLRA's filing fee and three strikes provisions form part of precisely this type of blanket policy.

Second, even if the government has a legitimate interest in trying to reduce frivolous prisoner litigation, Congress should not be given unlimited license to curtail prisoners' rights. As Judge Baer noted, however, "the current political environment makes it unlikely that the legislature or executive branches [sic] would be receptive to calls for prison reform"²⁰¹ This inevitable, and to some extent, understandable, legislative and public prejudice against prisoners should force courts to be vigilant defenders of prisoners' constitutional rights; not only is there little political opposition to limiting the rights of prisoners, but it is in fact politically expedient to appear "tough" on prisoners.²⁰² The legislative history of the PLRA "emphasize[s] that 'hard time' for convicted men and women is the only way to protect the public and that more hard time will protect the public more."²⁰³ The reintroduction of chain gangs as a legitimate prisoner "punishment" perfectly encapsulates the country's attitude toward prisoners.²⁰⁴

Finally, the curtailment of prisoners' rights through legislation like the PLRA, however, represents a short-sighted policy by our nation's lawmakers. As prison sentences become increasingly harsh and prisoners have more rights taken away, the overflowing prison populations become increasingly dangerous.²⁰⁵ Eventually, most prisoners incarcerated today will "come out uneducated, unemployable, politically disenfranchised and angry . . . 'within a few years [there will be] a significant segment of society who are *prison-influenced*

200. *Id.* at 381.

201. *Benjamin v. Jacobson*, 935 F. Supp. 332, 354 (S.D.N.Y. 1996).

202. *See supra* notes 6-10 and accompanying text.

203. *See Benjamin*, 935 F. Supp. at 341; *Prison Reform Hearings*, *supra* note 105, at 4.

204. *See* Neal R. Peirce, *But In Its Prisons, Georgia Has Reverted to the Bad Old Days*, PHILADELPHIA INQUIRER, July 19, 1996, at A19 (quoting Gov. William Weld of Massachusetts as speaking for many when he says prisons should be "a tour through the circles of hell," where inmates should learn only "the joys of busting rocks").

205. Perhaps this dangerous propensity should not be further fueled by curtailing access to the courts. *See* Bruce Shapiro, *How the War on Crime Imprisons America*, NATION, Apr. 22, 1996, at 19 ("[T]he real 'ticking time bomb' is prison expansion."); Eisenberg, *supra* note 34, at 441 ("Even with the additional burden such litigation places on the federal courts, it is better for the prisoner to file a frivolous section 1983 complaint than to assault a correctional officer, murder another prisoner, or engage in additional antisocial behavior.").

and *prison-behaved.*”²⁰⁶ Further, despite the burgeoning prison population due to harsher sentencing laws like California’s “Three Strikes And You’re Out,”²⁰⁷ prison-bond referendums were defeated in several states this past election, meaning fewer new prisons will be built.²⁰⁸ The PLRA will only add to the unrest by erecting barriers to prisoners seeking court remedies for potentially unconstitutional prison conditions.

The long-term societal problems engendered by legislation like the PLRA negate any potential short-term conservation of judicial resources. There is, however, no political solution to this problem. Politicians serve a maximum of six years, and often serve as few as two; re-election therefore plays a prominent role in every policy decision. Since politicians do not have an incentive to gaze beyond the next election, the federal courts should maintain discretionary power to deal with prisoner litigation.

The filing fee provision of the PLRA, however, ties the hands of the federal judiciary in dealing with indigent prisoners seeking to ameliorate prison conditions. Prior to the passage of the PLRA, all of the circuit courts had approved partial payment schemes for dealing with indigent prisoner litigation, and forty-two percent of the district courts required partial filing fees from prisoners seeking to proceed *in forma pauperis*—using standing orders, local rules, and informal policies.²⁰⁹ Judges previously had the ability to analyze each case individually; this maneuvering room allowed them to consider information such as length of incarceration, how many meritorious suits a particular inmate had filed in the past, and so on, enabling the court to screen out potential abusers of the system while ensuring that meritorious claims were not lost in the shuffle.²¹⁰ The PLRA, in treating all indi-

206. See Shapiro, *supra* note 205, at 19.

207. Signed into law in 1994 by California Governor Pete Wilson, “Three Strikes and You’re Out” requires defendants to serve three times their normal sentence or life in prison without the possibility of parole, whichever is longer, when they are convicted of a third offense. See CAL. PENAL CODE § 667 (West 1988 & Supp. 1997).

208. See, e.g., Stephen Lee, *Inmate Riot is Quelled at Kane County Jail*, CHI. TRIB., Nov. 25, 1996, Metro Northwest Section, at 1 (attributing the riot to jail overcrowding that could have been relieved had a \$51 million referendum to expand the jail not been defeated); Jon McKenna, *Voters Authorize \$10.3 Billion of Debt*, BOND BUYER, Nov. 7, 1996, at 1 (noting that Los Angeles bond and \$700 million of state debt for jails failed to be passed by voters); *Prison Downsizing*, TAMPA TRIB., Feb. 23, 1997, Commentary Section, at 1 (noting that Texas “has mothballed five prisons, and Oregon has shelved plans to build a 1,500-bed facility”).

209. See Maahs & Del Carmen, *supra* note 3, at 55.

210. See *Lyon v. Vande Krol*, 940 F. Supp. 1433, 1439 (S.D. Iowa 1996).

gent prisoners alike in assessing full fees, has discarded the baby with the bathwater.

As an alternative to the PLRA, Congress should examine the discretionary plans in place prior to the enactment of the PLRA. The most sensible of the various discretionary plans was used by the Middle District of Louisiana.²¹¹ The plan employed a sliding-scale to determine the proper fee to be taxed against the indigent prisoner. This plan provided judges with a structure for assessing fees without binding them to a specific amount or percentage.²¹² Judges also had the authority to ignore the sliding scale if they felt that the prisoner's account did not accurately reflect the prisoner's financial status.²¹³ This plan was sensitive to a prisoner's constitutional rights while simultaneously allowing a court some mechanism through which to protect itself against abusive filers.

To avoid the administrative burden imposed by the PLRA's continual drafting of funds from a prisoner's account, the sliding-scale approach should ensure that a federal judge makes only a one-time assessment of the prisoner's financial status. To facilitate an accurate first-and-only assessment, courts should require inmates to submit a standardized financial disclosure form with their ifp application, which would be filled out by prison personnel who can then document the inmate's financial status. The PLRA already requires such a financial disclosure by a prisoner seeking to proceed ifp;²¹⁴ the PLRA, however, goes on to require that prison officials constantly stay abreast of the account's activity so that funds continually can be drafted to pay the full filing fee. The one-time assessment of a fee is a more sensible way to conserve judicial resources.

To protect further against abusive filers, the courts should retain the *sua sponte* dismissal power provided to them by the PLRA.²¹⁵ Even if an inmate submits a partial filing fee, the court should be permitted to dismiss a suit as frivolous. In exchange for retaining the dismissal power granted to federal judges, the PLRA should be amended to eliminate the three strikes provision²¹⁶ and the provisions

211. See Mueller, *supra* note 13, at 1296-97.

212. See *id.*

213. See *id.*

214. See *supra* note 50.

215. See 28 U.S.C.A. § 1915(e)(2) (West Supp. 1997). *But see supra* notes 99-100, 154 and accompanying text (discussing the *sua sponte* dismissal power with respect to frivolous or malicious suits or for failure to state a claim).

216. See 28 U.S.C.A. § 1915(g).

barring prisoners from bringing claims of mental or emotional injury if they do not have an accompanying physical injury.²¹⁷ By removing these provisions and yet retaining the *sua sponte* dismissal power, the PLRA will strike a better balance between protecting the federal courts against frequent frivolous filers, while at the same time ensuring that potentially legitimate claims are not completely barred in violation of equal protection.

CONCLUSION

Whether one thinks that the increasing number of prisoner petitions filed in the federal courts represents an unjustifiable waste of taxpayers' money, or is simply the outgrowth of a rapidly increasing prison population, harsher sentencing laws, and public apathy about living conditions endured by prisoners, it is clear that some reform of the prisoner litigation process must be undertaken. The federal dockets are swollen with prisoner claims, and the system must be streamlined. In the process, however, Congress and the courts must be careful "to make sure [they] don't lose sight of the meritorious claims. [They] have to separate the wheat from the chaff."²¹⁸

The PLRA represents Congress' attempt to address increased prisoner litigation. Rather than arriving at the new legislation through an open deliberative process that included prison officials, members of the judiciary, prisoners' rights advocates, and state and federal attorneys, however, the PLRA was hustled through Congress. As a result, the PLRA represents a political response to the growing antiprisoner sentiment among the general populace; no attempt was made to preserve the delicate balance, established through decades of legislation and litigation, between the conservation of scarce judicial resources and the protection of prisoners' constitutional rights. Not only do some of the provisions of the PLRA appear to be unconstitutional, but the Act also represents bad policy and bad policy-making.

The Constitution cannot be suspended in the name of judicial and administrative efficiency. The United States has a black history

217. See 42 U.S.C.A. § 1997e(c) (West Supp. 1997); 28 U.S.C.A. § 1346(b)(2).

218. Hager, *supra* note 109, at 35 (quoting Judge Cynthia Imbrogno).

of denying equal protection under its laws to discrete and insular minorities²¹⁹ in times of crisis.²²⁰ It is, therefore, in times of crisis that the civil rights of groups predisposed to legislative discrimination must be especially protected by the courts.²²¹ The PLRA should be strictly scrutinized by the courts for constitutionality.

219. Then-Associate Justice Stone, in his famous footnote, first suggested that "prejudice against discrete and insular minorities may be a special condition [] which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

220. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (upholding the criminal conviction of Japanese-American citizens for refusing to move to relocation camps in the United States during World War II); *Hirabayashi v. United States*, 320 U.S. 81, 92 (1943) (finding that a curfew imposed on Japanese-Americans in wartime did not violate the equal protection component of the Fourteenth Amendment); *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) (determining that the Fourteenth Amendment did not proscribe a state's creation of separate facilities for people of different races); *The Slaughterhouse Cases*, 83 U.S. 36, 80-81 (1872) (holding that equal protection did not prevent states from erecting discriminatory barriers to the conduct of interstate commerce).

221. *See* 142 CONG. REC. S2296-97 (daily ed. Mar. 19, 1996) (statement of Sen. Kennedy) ("I note with great concern that the [PLRA] would set a dangerous precedent for stripping the Federal courts of the ability to safeguard the civil rights of powerless and disadvantaged groups."); *see also* Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L.J. 17, 30-31 (1996) ("[T]here is a need for a federal judiciary to protect . . . 'discrete and insular minorities.' . . . I believe that prisoners, for example, will get no protection from the political process. They have no political constituency. The only way to protect prisoners from inhumane treatment is a federal judiciary.") (statement of Professor Erwin Chemerinsky, Legion Lex Professor of Law, University of Southern California Law Center).