NOTE

AMERICA, LAND OF THE FEE: A CONSTITUTIONAL ANALYSIS OF FEDERAL FILING FEES

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† B.S., University of Texas at Austin, 2017; J.D., Cornell Law School, 2022; Publishing Editor, Cornell Law Review, Vol. 107. First and foremost, I am grateful to my entire family for their constant support and unwavering belief that I would, someday, get published. Thank you for always encouraging me to keep writing, from not-so-short stories on lined paper to high school Shakespeare essays to this Note. Specifically, I want to thank my brother Alec for always setting the bar so high and forcing me to challenge myself; I could never have written this note without you. I also want to thank my colleagues at the Southern District of New York's Office of Pro Se Litigation for opening my eyes to the injustices in our filing fee system and giving me something to write about. Additionally, I am so appreciative to my Notes Mentor Zach Sporn for helping me through the note-writing process. I want to give a special thank you to my friends for always celebrating my law school achievements, even when they do not understand them. Finally, I want to thank my fellow editors on Cornell Law Review for selecting my note for publication and for all their work getting it to this point.

INTRODUCTION

The injustices of the criminal justice system have recently been brought to the forefront of American political discourse and legal reform efforts; however, the injustices present in the civil justice system have been left by the wayside. While videos of police brutality have become commonplace on the news and social media, the civil lawsuits brought by the victims and their families rarely get the same attention. Public attention, albeit not without its own set of costs, can present greater opportunities for victims' cases to be picked up by prominent civil rights attorneys or organizations like the American Civil Liberties Union (ACLU).[1] But what happens to the plaintiffs in the cases that do not go viral? Those with the resources can hire the skilled attorneys necessary to help them navigate the court system. A certain number of others may be fortunate enough to secure pro bono representation. However, most will receive inadequate or no legal assistance.[2] For those unable to get legal assistance, a choice must be made between abandoning their claims or fighting the uphill battle pro se, one that almost invariably ends in failure.[3] In 2019, 25,925 non-prisoner pro se cases were filed in federal district courts.[4] Compared to the roughly 1–1.2 million people in need of legal assistance each year, this suggests that staggering numbers of people are simply not bringing their claims in court when faced with the above

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1 *See, e.g.*, Rachel Treisman & Colin Dwyer, *George Floyd's Family Files Civil Lawsuit Against Minneapolis and Police, Lawyers Say*, NAT'L PUB. RADIO (July 15, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/15/891221766/floyd-family-attorneys-to-announce-a-civil-lawsuit-against-minneapolis-and-polic [https://perma.cc/SS5E-TYBA] (noting that George Floyd's family is represented by Ben Crump, a well-known civil rights attorney, who is also representing the families of Breonna Taylor and Ahmaud Arbery).

2 A study done by the Legal Services Corporation (LSC) found that "of the estimated 1.7 million civil legal problems for which low-income Americans seek LSC-funded legal aid," 62%–72% received inadequate or no legal assistance, and state studies have shown that 80% of civil legal needs are not being met. *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid [https://perma.cc/KZS8-3K3H] (last visited Apr. 26, 2021) [hereinafter LSC Study]. Further, a New York study found that "less than 20% of all civil legal needs of low-income families and individuals are met." *Id.*

3 *See* Alexandra D. Lahav & Peter Siegelman, *The Curious Incident of the Falling Win Rate: Individual vs System-Level Justification and the Rule of Law*, 52 U.C. DAVIS L. REV. 1371, 1381 (2019) (expecting an increase in the loss rate if there are more pro se plaintiffs).

4 *See Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, at fig.2, U.S. CTS. (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019#figures_map [https://perma.cc/5U24-6CWF].

choice.[5] Although this disparity can likely be attributed to various factors, the costs associated with litigating certainly play a part.[6]

Under the 14th Amendment, persons in the United States cannot be deprived of their liberties without due process and are afforded equal protection of the laws.[7] Additionally, the Civil Rights Act of 1964 similarly protects all individuals against certain forms of discrimination.[8] However, these protections involve complex judicial enforcement mechanisms[9] and can be remarkably costly to assert both in terms of time[10] and money.[11] Even if such resources are not an issue, the success rate of plaintiff actions in federal courts is only approximately 30%.[12] Contributing factors to the low win rate include pro se litigants,[13] litigants proceeding *in forma pauperis* (IFP),[14] and suits "in which plaintiffs rarely prevail," such as civil rights cases.[15] This suggests that the legal and constitutional guarantees of due process and equal protection under the laws are not as universal as advertised. The path to fighting for civil

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5 *See* LSC Study, *supra* note 2.

6 *See* LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 34 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/L65N-V3EH] (including concern about the costs in a list of reasons why those surveyed did not seek legal help).

7 U.S. CONST. amend. XIV, § 1.

8 *See* 42 U.S.C. § 2000(e) (2018) (prohibiting employment discrimination based on race, color, religion, sex and national origin); *see also*, 29 C.F.R. § 1606.1(c) (2021) ("Title VII . . . protects all individuals, both citizen and noncitizens, domiciled or residing in the United States . . . .").

9 *See* Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 943–46 (2010) (discussing a variety of the existing judicial barriers that civil rights litigants face, including standing and mootness requirements, certain Supreme Court precedents, and the difficulty in obtaining injunctive relief).

10 As of September 30, 2020, the median time in civil cases in U.S. District Courts from filing to disposition was 8.9 months and from filing to trial was 27.1 months. *See U.S. District Courts—Federal Court Management Statistics—Profiles—During the 12-Month Periods Ending September 30, 2015 Through 2020*, U.S. CTS. (Sept. 30, 2020), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2020.pdf [https://perma.cc/UUY3-3V6E].

11 *See District Court Miscellaneous Fee Schedule*, U.S. CTS. (Dec. 1, 2020), https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule [https://perma.cc/D5VU-U7V5] (listing the various fees that litigants must pay in federal district court).

12 Lahav & Siegelman, *supra* note 3, at 1373.

13 Individuals representing themselves. *See Pro Se*, BLACK'S LAW DICTIONARY (11th ed. 2019).

14 IFP status is awarded to indigent litigants and allows them to proceed without the prepayment of certain court fees. *See* 28 U.S.C. § 1915(a)(1) (2018) (allowing "the commencement . . . of any suit . . . without prepayment of fees").

15 *See* Lahav & Siegelman, *supra* note 3, at 1381.

liberties in the United States is gate-kept by the civil-judicial system, which is littered with hurdles that grow taller the lesser your financial and personal resources. As such, certain Constitutional protections are illusory.

Remedying the barriers to access that pervade the American civil judicial system and hinder the ability of individuals to assert or defend their freedoms will require extensive systematic changes. Proposed solutions are numerous and widely differentiated.[16] Aiming to increase overall access to the courts and remove existing barriers in a maximally efficient manner, this Note will focus on a significant cost barrier that serves as the first hurdle for litigants taking their claims to federal court: the $402 fee charged at filing ("the Fee").[17] The Fee is comprised of a $350 filing fee and a $52 administrative fee.[18] As discussed in greater detail later, the filing fee was created through legislation and can be repealed in the same manner. The relative ease with which it could be changed or removed makes it an attractive option for improving equality in access to the courts.

This Note will examine the Fee's impact on those of low-to-moderate income that are ineligible for IFP status. Further, this Note will look at the disproportionate impact the Fee has on racial minorities. This Note will then argue that, for those of low to moderate income, the Fee constitutes an unconstitutional bar to exercising an individual's due process rights to be heard and to have meaningful access to the courts. This Note will propose, as an alternative to the current flat filing fee with an optional waiver for IFP litigants, a graduated pay scale based on income. This means-tested fee scale would better reflect the progressive nature of the American tax and social welfare systems that face similar legal and constitutional considerations.

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16 *See, e.g.*, Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1515 (2019) (proposing a national IFP standard); Ben Notterman, *Leveraging Civil Legal Services: Using Economic Research and Social Impact Bonds to Close the Justice Gap*, 40 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 1, 2 (2015) (advocating for the use of social impact bonds to encourage private investment for civil legal services, which would increase access to those services for indigents); Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 474 (2010) (discussing the American Bar Association's proposal to institutionalize the right to counsel for low-income individuals in certain cases).

17 28 U.S.C. § 1914(a) (2018) ($350 filing fee); *District Court Miscellaneous Fee Schedule*, *supra* note 11 ($52 administrative fee). The Judicial Conference sets the administrative fee. *See* 28 U.S.C. § 1914(b).

18 28 U.S.C. § 1914(a); *District Court Miscellaneous Fee Schedule*, *supra* note 11.

I
BACKGROUND

A. The History of Filings Fees

Since 1978, Congress has raised the federal filing fee five times.[19] The increases were as follows: (1) 1978 from $15 to $60, (2) 1986 to $120, (3) 1996 to $150, (4) 2004 to $250, and (5) 2006 to $350.[20] As significant as the frequency and magnitude of the increases in the last 43 years is the unusual manner in which they have been enacted. Typically, legislation pertaining to federal courts must pass through the House and Senate Judiciary Committees.[21] As a procedural matter, for a bill to be moved from committee to the floor in either the House or the Senate, it generally must be voted on by the committee it is placed in front of.[22] As a result, in the ordinary course, laws pertaining to federal courts must be considered by and voted out of both Judiciary Committees as well as pass both chambers of Congress before becoming law. However, three of the last five increases have taken place in a funding bill.[23] As an example, the 1986 increase in the federal filing fee resulted

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19 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 8:3 & n.1, Westlaw (database updated Nov. 2018).

20 *Id.*

21 *See Jurisdiction,* SENATE COMM. ON THE JUDICIARY, https://www.judiciary.senate.gov/about/jurisdiction [https://perma.cc/5RXN-NGGJ]; *House Committee on the Judiciary*, GOVTRACK, https://www.govtrack.us/congress/committees/HSJU [https://perma.cc/XB49-CNTV] ("The Committee on the Judiciary has jurisdiction over matters relating to the administration of justice in federal courts . . . ."); *see also Congress and the Courts: Committees on the Judiciary*, FED. JUD. CTR., https://www.fjc.gov/history/administration/congress-and-courts-committees-judiciary [https://perma.cc/S8GR-ZH74] ("[T]he committee . . . [is] responsible for reporting to the full Senate on legislation regarding the structure, administration, jurisdiction, and proceedings of the federal courts . . . .").

22 *But see* VALERIE HEITSHUSEN, CONG. RSCH. SERV., 96-548, THE LEGISLATIVE PROCESS ON THE SENATE FLOOR: AN INTRODUCTION 6 (2019) ("[P]aragraph 4 of Rule XIV permits a Senator to bypass a committee referral and have the bill placed directly on the Calendar of Business, with exactly the same formal status the bill would have if it had been considered and reported by a Senate committee.").

23 *See, e.g.*, Deficit Reduction Act of 2005, S. 1932, 109th Cong. (2006) (enacted) (increasing the fee to $350 in a bill that was placed in the Senate Budget Committee); Consolidated Appropriations Act, H.R. 4818, 108th Cong. (2004) (enacted) (increasing the fee to $250 and placed in both Appropriations Committees); H.R.J. Res. 738, 99th Cong. (1986) (enacted) (increasing the fee to $120 in A Joint Resolution Making Continuing Appropriations for the Fiscal Year 1987 placed before both Appropriations Committees). *But see, e.g.*, H.R. 8200, 95th Cong. (1978) (enacted) (raising the fee to $60 in A Bill to Establish a Uniform Law on the Subject of Bankruptcies, which was placed before the Judiciary Committees of both the House and Senate); Federal Courts Improvement Act, S. 1887, 104th Cong. (1996) (enacted) (raising the fee to $150 and placed before the Senate Judiciary Committee).

from "legislative sleight of hand," whereby the increase was buried in an omnibus funding bill.[24] Due to the different procedural nature of omnibus legislation, there were no hearings or debates regarding the 1986 increase, and the issue was placed before the Appropriations Committees rather than the Judiciary Committees, as it would have been in a stand-alone bill.[25] Moreover, following the 1986 increase, there were disagreements as to the likely effects the increase would have, which indicated a lack of Congressional deliberation on the matter.[26] Notably, the increases enacted through funding bills were the largest in terms of aggregate dollar value.[27]

The significance of which committee approves the federal filing fee increase lies in the role of committees. Committees (and their subcommittees) play a crucial role in the legislative process because they possess "specialized knowledge of the matters under their jurisdiction."[28] For example, the Senate Judiciary Committee is specifically tasked with overseeing the courts, pinpointing issues needing legislative resolution, amassing and assessing information pertaining to the courts and identified issues, and suggesting remedies to the Senate.[29] To this end, when a Senate committee picks up a bill for consideration, it typically takes four actions:

First, the committee asks relevant executive agencies for written comments on the measure. Second, it holds hearings to gather information and views from non-committee experts. At committee hearings, these witnesses summarize submitted statements and then respond to questions from the senators. Third, the committee meets to perfect the measure through amendments, which also allows non-committee members to influence the legislative language. Finally, when language is agreed upon, the committee sends the measure back to the full

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24 Martin D. Beier, *Economics Awry: Using Access Fees for Caseload Diversion*, 138 U. PA. L. REV. 1175, 1192 (1990) (citing N.Y. Times, Oct. 29, 1986, at A24, col. 4) (discussing the 1986 increase in the federal filing fee).

25 *See id.*

26 *See id.* (quoting N.Y. TIMES, Oct. 29, 1986, at A24, col. 4).

27 Compared to the increase enacted through funding bills, H.R. 8200 raised the filing fee by only $45, and S. 1887 raised the filing fee by only $30. *See* sources cited *supra* note 23.

28 *Senate Committees*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Committees.htm [https://perma.cc/4U2H-Z33Q] (last visited Apr. 26, 2021).

29 *See Jurisdiction*, *supra* note 21.

Senate for debate, usually along with a written report describing its purposes and provisions.[30]

These steps act as a series of checkpoints, ensuring that legislation only passes through committee after those most knowledgeable on the subject have analyzed the bill and shaped it into its most agreeable form. Thus, circumventing the proper committee(s) all but guarantees a lack of proper consideration and increases the risk of ill-informed legislative changes—particularly when the issue becomes part of an omnibus funding bill.[31]

By way of example, a document from a hearing on the Federal Courts Improvement Act (the stand-alone bill that raised the filing fee in 1996) that took place before the Senate Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary demonstrated thorough deliberation regarding the increase. The document described the 1996 increase as a "modest adjustment affect[ing] only the initial 'user fee'" for litigants not proceeding IFP.[32] It went on to defend the increase by comparing it to the—often higher—fees charged by state courts. Further, the document highlighted an additional change affected alongside the fee increase whereby a larger portion of the filing fee would go toward operating the courts.[33] The subcommittee emphasized that the legislation

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30 *About the Senate Committee System*, U.S. SENATE, https://www.senate.gov/general/common/generic/about_committees.htm [https://perma.cc/TU4K-XF6R] (last visited Ar. 26, 2021).

31 *See, e.g.*, Caitlin Emma, Marianne Levine & Andrew Desiderio, *Senate Approves One-Week Funding Bill to Avert Midnight Shutdown*, POLITICO (Dec. 11, 2020), https://www.politico.com/news/2020/12/11/senate-government-shutdown-444545 [https://perma.cc/M8HJ-YZMS] (highlighting that the Senate passed a "last-minute" funding bill by voice vote in order to avoid a government shutdown at midnight). Situations like this have become the norm, and they make it obvious that appropriations bills are often rushed with little consideration for the details and instead focus on hot-button issues. *See, e.g.*, Julie Hirschfeld Davis & Emily Cochrane, *Government Shuts Down as Talks Fail to Break Impasse*, N.Y. TIMES (Dec. 21, 2018) https://www.nytimes.com/2018/12/21/us/politics/trump-shutdown-border-wall.html [https://perma.cc/E53G-RRQ6] (discussing what eventually became the longest government shutdown in modern history that centered around a fight over border wall funding). Although the funding discussions centered around the border wall, the final appropriations package that was passed to end the shutdown included *seven* appropriations bills covering a variety of areas such as Housing and Urban Development, Agriculture, and the Food and Drug Administration. *See* Consolidated Appropriations Act, H.R.J. Res. 31, 116th Cong. (2019) (enacted).

32 Federal Courts Improvement Act: Hearing Before the S. Subcomm. on Admin. Oversight and the Courts of the Comm. on the Judiciary, 104th Cong. 9 (1996).

33 *Id.*

would allow the judiciary to receive more money and, as a result, "reduc[e] the need for direct appropriations."[34]

In contrast, the Deficit Reduction Act raised the filing fee by $100 in 2006 despite not mentioning the fee in the first three versions of the bill passed by the House and Senate.[35] When the 2006 fee increase did finally appear in the fourth version of the bill, there was no evidence of any discussion in the conference report as to how it got there or the reasoning behind the increase.[36] Moreover, filing fees were not mentioned in any of the Senate Budget Committee hearings leading up to the passage of the Deficit Reduction Act.[37]

The lack of consideration given to the filing fee increases in omnibus bills is particularly worrisome when combined with the fact that the fee increases within such legislation consistently represent the largest dollar increases. In comparison, the considerable deliberation given to the two increases enacted through stand-alone legislation by the Judiciary Committees resulted in smaller increases to the federal filing fee. The disconnect in the resulting magnitude of the fee increases based upon the method by which they have been enacted suggests that the Judiciary Committee process is the more efficient of the two. By examining the circumstances facing the federal court system, the Judiciary Committees have consistently determined that a lower dollar increase can accomplish their intended goals. In contrast, the high dollar increases that result from omnibus legislation appear arbitrary and not tied to addressing any Judiciary-specific issues. It is telling that the resident experts on matters concerning the judiciary have such a differing view on increasing the filing fee than those tasked with budget cuts and government fundraising. While reducing the deficit is a laudable goal, it should not be done at the expense of court access for lower-income individuals. Moreo-

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34 *Id.*

35 *See* S. 1932, 109th Cong. (as placed on Senate calendar, Oct. 27, 2005); S. 1932, 109th Cong. (as engrossed by Senate, Nov. 3, 2005); S. 1932, 109th Cong. (Engrossed Amendment House, Nov. 18, 2005).

36 *See* S. 1932, 109th Cong. (Engrossed Amendment Senate, Dec. 21, 2005); H.R. REP. NO. 109-362, at 184 (2005), *reprinted in* 2006 U.S.C.C.A.N. 3, 3 (Conf. Rep.).

37 *See, e.g.*, *Concurrent Resolution on the Budget for Fiscal Year 2006: Hearings Before the S. Comm. on the Budget*, 109th Cong. (2005) (containing no mention of filing fees); *The Future of Social Security: Hearing Before the S. Comm. on the Budget*, 109th Cong. (2005) (containing no mention of filing fees); *Mid-Session Hearings on the Budget: Hearings Before the S. Comm. on the Budget*, 109th Cong. (2005) (containing no mention of filing fees). These were the only hearings held by the Senate Budget Committee before passing the bill.

ver, as discussed in subpart II.C, this burden tends to fall most heavily on minorities.

B. IFP Status and Its Shortcomings

1. *Vague and Inconsistent Standards*

When filing a civil lawsuit in federal court, a litigant is required to prepay $402[38] unless they qualify for *in forma pauperis* (IFP) status.[39] IFP status allows indigent litigants to proceed without the prepayment of filing fees.[40] Should a litigant wish to receive IFP status, they must make a formal request of the court.[41] Federal courts have discretionary authority over granting IFP status.[42] While there is no formal standard for granting IFP status, the Supreme Court laid out a minimum threshold in *Adkins v. E.I. DuPont de Nemours & Co.*[43] In *Adkins*, the Court stated that to proceed IFP, litigants need not be "absolutely destitute" but may simply lack the ability to "'provide' [themselves] and dependents 'with the necessities of life'" were they required to pay the filing fee.[44]

When assessing whether a litigant qualifies for IFP status, courts look to various criteria, such as the litigant's assets, income, liabilities, and qualification for state benefits programs.[45] Further, some courts compare a litigant's income against the federal poverty guidelines during this assessment.[46] However, this lack of a uniform standard creates inconsistency and erroneous denials.[47] IFP status is an important legal tool to provide indigent litigants access to the courts, and such errors can effectively deny those litigants meaningful access. Moreover, the threshold set by *Adkins* combined with the variations in the standard as applied by courts typically excludes from IFP status litigants who the Fee

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38 *See* 28 U.S.C. § 1914(a) ($350 filing fee); *District Court Miscellaneous Fee Schedule*, *supra* note 11 ($52 administrative fee).

39 28 U.S.C. § 1915.

40 *In Forma Pauperis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

41 28 U.S.C. § 1915(a)(1).

42 *Id.*

43 *See* 335 U.S. 331, 339 (1948).

44 *Id.*

45 *See* Potnick v. E. State Hosp., 701 F.2d 243, 244 (2d Cir. 1983) (affirming IFP status for a litigant receiving welfare and on food stamps and noting that "[i]f the plaintiff demonstrates poverty, he should be permitted to file his complaint [IFP]"); Williams v. Louisiana, No. 14-00154-BAJ-EWD, 2017 WL 3124332, at *2 (M.D. La. Apr. 14, 2017) (denying litigant's request to proceed IFP based on her monthly income, assets, and liabilities).

46 *See Williams*, 2017 WL 3124332, at *2 (noting litigant's income was "well above the official poverty guidelines for a family of her size").

47 *See* Hammond, *supra* note 16, at 1506.

may burden but who are still technically able to afford the necessities of life.[48] The sudden jump from $0 for those who qualify for IFP status to the full $402 Fee for those who do not acts a material barrier to the court system for low-income individuals able to afford the necessities of life but lacking sufficient means to afford the Fee.

2. *IFP Status and Prisoners*

It is important to note an additional group of prospective litigants for which IFP status is particularly relevant, namely prisoners. In 1996, the Prison Litigation Reform Act (PLRA) changed the IFP standard as applied to prisoners and removed the complete waiver of a prisoner's filing fees.[49] The impetus for the change was a concern over prisoners flooding the system with frivolous lawsuits.[50] Under the current law, even if a prisoner is granted IFP status, they are required to pay the fees

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48 A report from the Federal Reserve on the economic well-being of U.S. households in 2019 discussed how those surveyed would deal with a hypothetical unexpected expense of $400. 37% stated that they would not have paid the expense using what the survey called "cash or its equivalent," which refers to cash, savings, or a credit card paid off in the next statement. BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2019, FEATURING SUPPLEMENTAL DATA FROM APRIL 2020 21 (2020), https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf [https://perma.cc/67EN-FJUP] [hereinafter Federal Reserve Report]. This indicates that those individuals would not have had the funds to do so. Additionally, 28% of those surveyed stated that they either could not currently pay their monthly bills or would not be able to do so were they hit with an unexpected $400 expense in addition to their normal bills. *Id.* at 23.

49 The text of the PLRA was included in the Omnibus Consolidated Rescissions and Appropriations Act of 1996 and § 804(b)(1) stated that "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." *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 804(b)(1), 110 Stat. 1321, 1321-73 (codified at 28 U.S.C. § 1915(b)(1)).

50 Abdul-Akbar v. McKelvie, 239 F.3d 307, 312 (3d Cir. 2001) ("Congress subsequently enacted the Prison Litigation Reform Act . . . largely in response to concerns about the heavy volume of frivolous prisoner litigation in the federal courts. *See* 141 Cong. Rec. S14408–01, S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (explaining that the number of prisoner suits filed 'has grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994'). In enacting the PLRA, Congress concluded that the large number of meritless prisoner claims was caused by the fact that prisoners easily obtained I.F.P. status and hence were not subject to the same economic disincentives to filing meritless cases that face other civil litigants. *See* 141 Cong. Rec. S7498–01, S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) ('Filing frivolous civil rights lawsuits has become a recreational activity for long-term residents of prisons.'); 141 Cong. Rec. S7498–01, S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) ('[P]risoners will now "litigate at the drop of a hat," simply because they have little to lose and everything to gain.')." (alteration to Sen. Dole quote in original)).

as the money becomes available in their inmate account.[51] Additionally, the three-strikes rule states that, should a prisoner bring three complaints that the courts dismiss as frivolous, malicious, or failing to state a claim upon which relief may be granted while incarcerated or detained, that prisoner is barred from proceeding IFP in future actions.[52] This rule is not limited per detainment or incarceration but extends to all instances of detainment or incarceration over an individual's lifetime.[53]

The significance of this change is particularly salient when considering the volume of prisoner *pro se* complaints, the proportion of civil rights claims made by prisoners, and the high minority population in U.S. prisons. Prisoner cases comprise the vast majority of *pro se* claims filed each year in federal courts.[54] From 2000–2019, prisoners filed 1,034,308 cases pro se, which accounted for 91% of all prisoner cases filed during that period.[55] Outside of just the pro se sphere, prisoner civil rights petitions accounted for roughly 33% of all civil rights cases filed over the past five years.[56] Further, in 2018, Blacks made up the largest share of the U.S. prison population at 33%, followed by Whites at 30%, and Hispanics at 23%, meaning 70% of the prison population is comprised of minorities.[57] These percentages alone show that minorities face a greater risk of civil rights violations, even without considering the disparities in treatment based on race that have been found in prisons.[58] Given the PLRA reforms as well as the fact

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51 28 U.S.C. § 1915(b).

52 28 U.S.C. § 1915(g).

53 *See* Robbins v. Switzer, 104 F.3d 895, 897 (7th Cir. 1997) ("Both of these suits and appeals count as 'strikes' for the purpose of 28 U.S.C. § 1915(g), should Robbins return to prison and initiate new litigation.").

54 *See Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, *supra* note 4, at fig.5.

55 *Id.*

56 *See infra* Table 1.

57 John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/ [https://perma.cc/8GN9-2YQT].

58 *See, e.g.*, Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759, 773 (2015) (noting that race can impact prison discipline in three ways: first, "non-White inmates are more likely to be perceived as a threat, regardless of the inmate's actual behavior" which means they may be cited more frequently and for more serious conduct; second "the types of punishments for these citations may be more severe for non-White inmates"; and third, "the impact of implicit bias" can be stronger when disciplinary provisions are ambiguous, leading race to play "an even larger role in determining whether a violation occurred"); Juleyka Lantigua-Williams, *The Link Between Race and Solitary Confinement*, THE ATLANTIC (Dec. 5, 2016) (citing a study that found Black and Latino male prisoners were "disproportionately represented in solitary" confinement while

that the overwhelming majority of prisoners proceed pro se, minority prisoners are clearly disproportionately disadvantaged by the Fee. Achieving the goal of fewer frivolous prisoner suits should not come at the expense of prisoners' ability to challenge their mistreatment—particularly given how pervasive prison abuse is in our country.[59] The graduated fee scale this Note proposes in Part III would practically nullify the PLRA rule requiring full payment of filing fees because most, if not all, prisoners would fall into the bottom tier where they would pay nothing.[60]

The Congressional intent behind the discretion given to the courts regarding granting and denying IFP status reflects concerns aligned with those that motivated the PLRA reforms. IFP complaints can be dismissed for frivolity or malice.[61] This power grant is based on a fear "that the removal of the cost barrier might result in a tidalwave [sic] of frivolous or malicious motions" as well as concern "with the financial burden the public would have to bear because of these claims."[62] While such concerns may not be unreasonable, they do not justify effective limitations on the ability of near entire classes of people within the U.S. to assert their civil rights and legal and Constitutional protections. For the reasons discussed in Part

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white prisoners were "underrepresented in solitary"), https://www.theatlantic.com/politics/archive/2016/12/race-solitary-confinement/509456/ [https://perma.cc/35UH-Y9GL]; Nicola Slawson, *Black and Muslim Prisoners Suffer Worse Treatment, Study Finds*, THE GUARDIAN (Oct. 18, 2017) (citing a study that found "being black or Muslim doubles a prisoner's chances . . . of having worse prison experiences . . . includ[ing] having restraints used against them and being put into segregation . . . compared with white prisoners"), https://www.theguardian.com/society/2017/oct/19/black-and-muslim-prisoners-suffer-worse-treatment-study-finds [https://perma.cc/XQ5U-ATFX].

59 *See, e.g.*, Spencer J. Weinreich, *Why Prisoner Abuse and Deprivation Persists in America*, WASH. POST (Mar. 7, 2019), https://www.washingtonpost.com/outlook/2019/03/07/why-prisoner-abuse-deprivation-persists-america/ [https://perma.cc/6GSA-7G38] (highlighting poor prison conditions and the historical roots behind the U.S. prisons' tendencies to treat prisoners as lesser than the general population); *Prisons in the United States of America*, HUM. RTS. WATCH PRISON PROJECT, https://www.hrw.org/legacy/advocacy/prisons/u-s.htm [https://perma.cc/4ZJV-NW26] (last visited Apr. 26, 2021) (discussing the findings of Human Rights Watch reports on U.S. prisons finding violence, unsafe and unhygienic conditions, excessive force, sexual abuse, and overcrowding); *Abuse of the Human Rights of Prisoners in the United States: Solitary Confinement*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/other/abuse-human-rights-prisoners-united-states-solitary-confinement [https://perma.cc/49TN-PC3C] (detailing the frequency with which prisons use solitary confinement and the negative psychological impacts it has on prisoners).

60 *See infra* Part III.

61 28 U.S.C. § 1915(e)(2)(B)(i).

62 McTeague v. Sosnowski, 617 F.2d 1016, 1019 (3d Cir. 1980).

III of this Note, a graduated fee system would address the concern of increased frivolous (outside of the prisoner context) lawsuits while simultaneously increasing court access for low-income individuals and racial minorities.

C. Disparate Impact on Racial Minorities

1. *The Wealth and Equity Gap*

Evidence of the disparate impact the Fee has on racial minorities provides a strong policy argument in favor of changing the current system. The requirement that litigants prepay $402 simply to file their lawsuit in federal court hinders court access for those lacking in liquid assets. This burden tends to fall more heavily on racial minorities for various reasons. First, the well-documented racial and ethnic wealth disparity in the U.S. contributes to this trend. As of 2019, the median young (under 35) Black family has $600 in wealth while the median young White family has $25,400.[63] In terms of absolute value, the gap in median wealth between White families and those of all other races grows significantly at older ages. Young White families have between $11,900 and $24,800 more in median wealth than families of other races.[64] This gap grows to between $101,700 and $261,100 for older White families (over 55).[65] Additionally, the assets of White families tend to be far more liquid than those of minority families. The average White family has over four times the liquid savings of Black and Hispanic families.[66] For example, White families have substantially greater equity holdings that they can access in an emergency. While the typical Black or Hispanic family has $14,400 and $14,900 in equities, respectively, the typical White family has $50,600.[67]

Given these vast disparities in wealth and liquid assets, it follows that producing $402 to file a lawsuit will disproportionately burden minorities. For a better picture of this, we can compare the Fee against the numbers. The Fee is 67% of the

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63 Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm [https://perma.cc/43X9-EETT].

64 *Id.*

65 *Id.*

66 *Id.* The typical White family has $8,100 in liquid assets as compared to $1,500 for Blacks and $2,000 for Hispanics. *Id.*

67 *Id.*

wealth a median young Black family possesses versus 1.6% of the wealth of a median young White family.[68] Further, it constitutes roughly 27% and 20% of a typical Black family's and Hispanic family's liquid assets but only 5% for a typical White family.[69] Findings from the Federal Reserve Report support this conclusion.

The Federal Reserve Report found that higher percentages of Black and Hispanic households were unable to pay their current monthly bills in all education levels than Whites and were more likely to be unable to pay their monthly bills after an unexpected $400 expense.[70] The three categories were (1) high school degree or less, (2) some college/technical or associate's degree, and (3) bachelor's degree or more.[71] Based on those categories, the graph below details the percentages of households within each racial group that could not afford their monthly bills and those that could not pay their monthly bills in the event of an unexpected $400 expense.[72] The numbers in the royal blue sections represent the percentage of households within the specified category that could not pay their monthly bills at the time of the survey. Meanwhile, the numbers in the darker sections show the percentage of households that, while normally able to pay their current monthly bills, could not do so after a $400 unexpected expense. When combined, these percentages make up the total percentage of households within each category that would be unable to stay financially afloat when faced with an unanticipated $400 expense.

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68 402 / 600 = 0.67 (Black), 402 / 25,400 = 0.016 (White). *See id.*

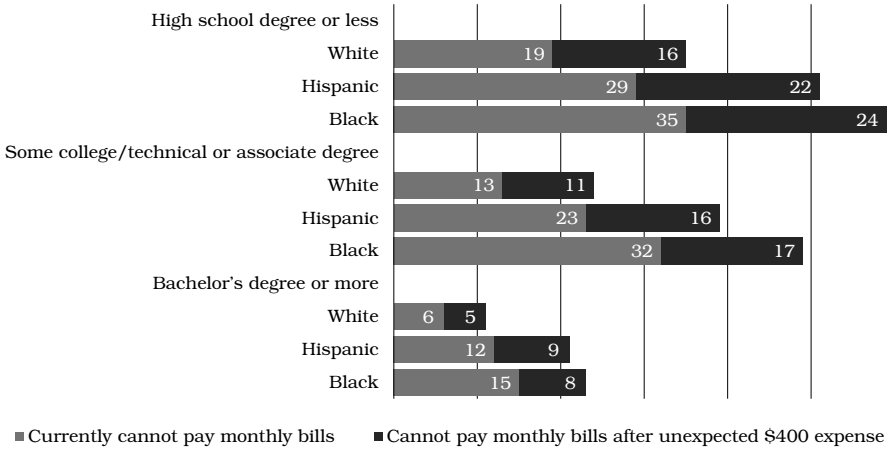
69 402 /1,500 = 0.27 (Black), 402 / 2,000 = 0.20 (Hispanic), 402 / 8,100 = 0.05 (White). *See also* Jenny Schuetz, *Rethinking Homeownership Incentives to Improve Household Financial Security and Shrink the Racial Wealth Gap*, BROOKINGS (Dec. 9, 2020), https://www.brookings.edu/research/rethinking-homeownership-incentives-to-improve-household-financial-security-and-shrink-the-racial-wealth-gap/ [https://perma.cc/N9WC-TF3P].

70 *See* the Federal Reserve Report, *supra* note 48, at 24 fig.16.

71 *Id.*

72 *Id.*

GRAPH 1



In the second and third categories, Black households are more than twice as likely to be unable to pay their current monthly bills than White households, and this held constant when adding in the surprise $400 expense.[73] Hispanic households were between 1.5 and 2 times more likely to be unable to pay their monthly bills—both currently and after the $400 expense—than White households.[74] Given this, Black and Hispanic litigants are approximately 1.5 to 2 times more likely than White litigants to be unable to pay their bills if denied IFP status and required to pay the Fee. Further, given the lack of consistency with which the *Adkins* standard has been applied, it is unclear whether being unable to pay monthly bills would be deemed an inability to afford the "necessities of life" by the reviewing court,[75] but it seems unlikely that every household identified by the study would qualify for IFP status.

2. *Civil Rights Claims*

The chart[76] below details the number of total civil cases as well as civil rights cases filed in federal court from 2015–2019.

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73 *See id.*

74 *See id.*

75 Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339 (1948).

76 *See U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2015 and 2016*, U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/fjcs_c2_0331.2016.pdf [https://perma.cc/F8G5-LEXK] (last visited Aug. 19, 2021); *U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2017 and 2018*, U.S. CTS., https://www.uscourts.gov/file/24436/download [https://perma.cc/JUA9-QTCY] (last visited Aug. 19, 2021); *U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending*

It further breaks down the civil rights case filings into non-prisoner and prisoner civil rights cases.[77] The averages for each demonstrate that civil rights cases make up roughly 20% of the federal cases filed over the past five years.

TABLE 1

	2015	2016	2017	2018	2019	5-year average
Total Civil Cases Filed	281,608	274,552	292,076	277,010	286,289	**282,307**
Total Civil Rights Cases Filed	55,315	55,976	58,944	58,587	62,311	**58,227**
a. Non-prisoner civil rights cases filed	36,841	37,143	38,271	40,371	43,209	39,167
b. Prisoner civil rights cases filed	18,474	18,833	20,673	18,216	19,102	19,060

Further, civil rights cases make up the third-largest share of civil actions filed over the last five years, preceded only by tort actions and personal injury claims.[78] While the Civil Rights Act protects against any form of discrimination based on race, color, religion, sex, or national origin, one of the key underlying purposes of the legislation was to end discrimination against Black Americans.[79] Thus, it is in keeping with the congressional intent to ensure that Blacks and other minorities can file discrimination claims and use the legislation for its intended purpose. It is also worth noting that the vast majority of non-prisoner pro se cases filed from 2000–2019 were civil rights claims.[80]

March 31, 2018 and 2019, U.S. CTS., https://www.uscourts.gov/file/26407/download [https://perma.cc/3SQZ-2QDH] (last visited Aug. 19, 2021).

77 *See* sources cited *supra* note 76.

78 *See* sources cited *supra* note 76. The tort 5-year average was 66,527, and the personal injury 5-year average was 61,386. *See* sources cited *supra* note 76.

79 *See, e.g.*, S. Res. 385, 108th Cong. (2004) (marking the fortieth anniversary of the passage of the Civil Rights Act and noting that "generations of Americans . . . supported Federal legislation to eliminate discrimination against African-Americans").

80 *See Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, *supra* note 4, at fig.4 (showing in Figure 4 that 204,661 non-prisoner pro se civil rights cases were filed in that time frame and that non-prisoner pro se civil rights cases made up 14% of the non-prisoner pro se caseload).

Employment cases typically make up roughly half of all non-prisoner civil rights cases filed in federal court each year.[81] A study ("Employment Study 1") of employment discrimination claims in federal courts found a nearly 40% drop in the number of these cases brought in the early 2000s as well as a very low plaintiff success rate over a thirty-year period.[82] Various articles point to similar findings of low plaintiff success rates.[83] Although this study did not draw any hard conclusions, the decline could reflect a discouragement against filing due to the low success rate or even the increase in filing fees that occurred over the same time span. Another study ("Employment Study 2") done on obtaining legal counsel in employment discrimination cases found that Blacks and other racial minorities were, respectively, 2.5 and 1.9 times more likely to file pro se in these cases than Whites.[84] Pro se litigants are saddled with the burden of not only paying the fees upfront themselves (rather than having the costs paid by an attorney and later passed onto the client),[85] but also drafting their own complaints and supporting documents. As a result of these racial disparities in representation, the groups most subjected to discrimination face the greatest uphill battle in effectively challenging that discrimination.[86] This leads to "a paradox" whereby the Civil Rights Act, which was predominately enacted to help minorities, in reality helps greater numbers of non-minorities in receiving more legal assistance.[87] While Employment Study 1 highlights the hurdles anyone bringing an employment discrimination claim must face, Employment Study 2 shows the additional barriers faced by minority litigants.

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81 *See* sources cited *supra* note 76.

82 Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 127, 131–32 (2009). The authors found that plaintiffs' win rate in employment discrimination cases was just 15%. *Id.* at 127.

83 *See* Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 710 n.16 (2012) (listing eight articles highlighting the low success rates of employment discrimination cases in federal courts).

84 *Id.* at 718. The authors found that 20.8% of Black plaintiffs were pro se throughout their proceedings as compared to 8.4% of White plaintiffs. *Id.* at 714.

85 *How Do I Settle on a Fee with a Lawyer?*, A.B.A. (June 7, 2018), https://www.americanbar.org/groups/public_education/resources/public-information/how-do-i-settle-on-a-fee-with-a-lawyer-/ [https://perma.cc/X7U3-7BQB] ("Your lawyer will usually pay [administrative] costs as needed, billing you at regular intervals or at the close of your case.").

86 *See* Myrick, Nelson & Nielsen, *supra* note 83, at 751.

87 *Id.*

Black litigants made up the largest group of filers of employment discrimination cases, representing 44% of such cases.[88] Overall, minority plaintiffs comprised 67% of employment discrimination claims between 2006 and 2007,[89] while accounting for only roughly 35% of the U.S. population.[90] In comparison, 66% of the national population was White in 2006,[91] yet White litigants made up merely 33% of employment discrimination cases.[92] The clear indication is that minorities are overrepresented as plaintiffs in employment discrimination cases. Taking into consideration the notion that many plaintiffs—and in particular minority plaintiffs—do not proceed with employment discrimination cases due to a perceived inability to succeed or as a direct result of the costs of filing, it is likely that 67% is a low estimate of the percentage of employment discrimination directed at minorities. Although removing or lowering the Fee would not solve all of the problems a minority litigant will face in pursuing their legal claims, particularly one proceeding pro se,[93] doing so would eliminate or reduce an important obstacle faced by minorities in having their legal voices heard and, in so doing, help ensure that minorities are better able to fight against the discrimination they disproportionately face.

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88 *See id.* at 714 tbl.1 (showing that among the 1,434 plaintiffs who indicated their race, 635 were African American).

89 *Id.* (showing that among the 1,434 plaintiffs who indicated their race, 635 were African American, 94 were Hispanic, 43 were Asian American, and 184 were of other minority races).

90 ((38,343 (Black) + 2,903 (American Indian, Alaska Native) + 13,159 (Asian) + 44,321 (Hispanic) + 529 (Native Hawaiian, Other Pacific Islander) + 4,719 (Mixed Race)) / 299,398) x 100 = 34.73%. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2008 11, https://www.census.gov/prod/2007pubs/08statab/pop.pdf [https://perma.cc/7YUP-B7VH].

91 (198,744 (White) / 299,398) x 100 = 66.38%. *Id.*

92 Myrick, Nelson & Nielsen, *supra* note 83, at 714 tbl.1 (showing that among the 1,434 plaintiffs who indicated their race, 478 were White).

93 *See, e.g.*, Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1263 (discussing studies that show "that members of poor and minority groups are less likely . . . to seek help when they experience a civil legal problem," a phenomenon that "is even more pronounced among poor [B]lacks," and finding that this could stem from "negative past experiences with the criminal justice system" and "public institutions perceived as legal in nature" as well as "disparities in trust levels" regarding the legal system (emphasis omitted)).

II
THE DUE PROCESS ARGUMENTS AGAINST FILING FEES

A. *Boddie v. Connecticut*

This Note argues that the $402 federal civil court Fee violates due process. In *Boddie v. Connecticut*, the Supreme Court ruled that filing fees in divorce actions violated due process.[94] In its decision, the Court stated that "a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard."[95] It further found that due process at least requires "that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[96] Specifically, the Court took issue with the fact that the courts were the "sole means in Connecticut for obtaining a divorce;" therefore, litigants without the means to pay the filing fee were barred from "the adjustment of a fundamental human relationship."[97] Importantly, *Boddie* made clear that "the State's interest in the prevention of frivolous litigation" and "its use of court fees and process costs to allocate scare resources" were not, on their own, sufficient justifications for court filing fees.[98]

The same year, the Court denied certiorari in a group of cases related to *Boddie*, and Justice Black used this as an opportunity to clarify the rules set forth in *Boddie*. He stated that *Boddie* rests on the foundation that "no person can be denied access" to the civil courts of the United States "because he cannot pay a fee."[99] Additionally, the courts must provide open access when two criteria are met: (1) when "the judicial mechanism" is "the 'exclusive' means of resolving the dispute" and (2) when "the dispute involve[s] 'fundamental' subject matter."[100] *Boddie*, however, does not specify what other subjects are fundamental beyond divorce.

Over time, the Court has carved out areas that it identifies as fundamental and those it does not. For example, in *United States v. Kras*, the Court found "no fundamental interest" in

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94 *See* Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

95 *Id.* at 380.

96 *Id.* at 377.

97 *Id.* at 380, 383.

98 *Id.* at 381.

99 Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 955 (1971) (Black, J., dissenting from denial of certiorari).

100 *Id.* at 956 (Black, J., dissenting from denial of certiorari).

the availability of a bankruptcy discharge.[101] Also, it highlighted that "[r]esort to the court" was not the litigant's "sole path to relief."[102] In *M.L.B. v. S.L.J.*, the Court stated that it "has consistently set apart . . . [cases] involving state controls or intrusions on family relationships" for closer review of "the governmental interest advanced in defense of the intrusion."[103] Further, it found that marriage, family life, and child rearing are "of basic importance in our society"[104] as well as "rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."[105]

If "fundamental rights" are truly fundamental in our society, it is counterintuitive that there is no guarantee to challenge a deprivation of those rights. The hypothetical presented in the following paragraphs helps demonstrate how the logic behind the Court's reasoning in *Boddie*, namely that fees should not act as a barrier to challenging infringements of fundamental rights, could readily be applied to other fundamental rights claims.

B. The Jane Hypothetical

Take an individual who has been discriminated against by a state actor and denied the right to vote—we will call her Jane for the sake of this hypothetical. Jane's fundamental rights have been violated,[106] something she is supposed to be protected against, and she wants to challenge the deprivation. Jane now has a constitutional claim that she could bring under § 1983. Because § 1983 claims fall under federal question jurisdiction, Jane is free to bring her action in federal court. Now, faced with the choice between bringing her claim in federal court or a court operated by the very state that discriminated against her, the federal court would likely be the more appealing option.[107] So, Jane decides to take her claims to federal court.

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101 United States v. Kras, 409 U.S. 434, 445 (1973).

102 *Id.* at 446.

103 M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996).

104 *Id.* (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).

105 *Id.*

106 *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) ("Long ago in *Yick Wo v. Hopkins*, 118 U. S. [sic] 356, 370 [(1886)], the Court referred to 'the political franchise of voting' as a 'fundamental political right, because preservative of all rights.' Recently in *Reynolds v. Sims*, 377 U. S. [sic] 533, 561–562 [(1963)], we said, 'Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.'").

107 *See, e.g.*, Ilya Shapiro, *You Should Be Able to Go to Federal Court with Your Federal Constitutional Claims*, CATO INST. (Dec. 14, 2015), https://www.cato.org/

Jane is on the lower end of the socioeconomic spectrum, but she works hard. She has a steady job that pays her decently, and she inherited her grandmother's old house, which frees up her income to pay for her basic necessities instead of having to throw it away on rent. That said, she has some pretty sizeable student loans eating away at her income as well as some credit card debt that she accrued after getting unexpectedly laid off from her previous job. She has been chipping away at it, but the interest rates make it difficult. In advance of her filing, she does a little research on what it would cost to hire an attorney and quickly realizes that it is not in her budget. So, she submits a few requests with legal aid clinics to try to secure pro bono counsel but, unfortunately, they are inundated with cases, and she is denied. Disappointed but still determined, she fills out the court's IFP application and lists out all her income, assets, and costs.[108] The court then denies her IFP request on the basis that she owns a home, has a steady income, and has no dependents.[109] Faced with this rejection, Jane looks over her budgeting spreadsheet, but no matter which way she looks at it, she simply cannot afford the $402 necessary to file her complaint without driving herself further into debt. With her options exhausted, she gives up on her quest for justice and never has the violation of her fundamental rights remedied or addressed.

If the old legal maxim is true that there is no right without a remedy,[110] then the protection of Jane's fundamental rights should be itself a fundamental right. Otherwise, we have created a system whereby only those with the means to pay the Fee (or a significant enough lack of means to avoid it) can

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blog/you-should-be-able-go-federal-court-federal-constitutional-claims [https://perma.cc/MU5S-TC5S] ("One reason to have federal courts is to ensure that citizens whose rights have been violated by their state can have their rights vindicated by a truly impartial judge.").

108 *See Application to Proceed Without Prepaying Fees or Costs*, U.S. DIST. CT. S. DIST. OF N.Y., https://www.nysd.uscourts.gov/sites/default/files/2018-06/IFP-application.pdf [https://perma.cc/W4F3-4UJE].

109 *See, e.g.*, Behmlander v. Comm'r of Soc. Sec., No. 12-CV-14424, 2012 WL 5457466, at *2 (E.D. Mich. Oct. 16, 2012) (suggesting that plaintiff's IFP request be denied where her spouse had monthly income of $2,500.00, they owned a home, and had no dependents); Bloom v. San Diego Cnty. Offs. of Health & Hum. Servs., No. 07-CV-1692, 2007 WL 2782562, at *1 (S.D. Cal. Sept. 25, 2007) (denying IFP status where plaintiff owned a vehicle outright and had no dependents); *see also* Brown v. Dinwiddie, 280 F. App'x 713, 715–16 (10th Cir. 2008) (denying plaintiff's IFP application because he had $850 in his savings account and, therefore, could afford the $455 fee for his appeal).

110 *See, e.g.*, Hawkins v. Barney's Lessee, 30 U.S. 457, 463 (1831) ("There can be no right without a remedy to secure it.").

protect and guarantee their fundamental rights and, thus, only those who can pay have these fundamental rights. This calls into question just how fundamental the rights really are if only certain people possess them. Some might argue that if Jane is able to go about her life despite the deprivation of her rights, then her lack of court access is not that significant. However, a lack of long-term effects resulting from the deprivation is irrelevant when it comes to a fundamental right. The mere fact that her rights were infringed is enough to warrant legal action and should be enough to ensure that she is able to actually take legal action under *Boddie*. As for the availability of avenues outside of federal court for challenging the deprivation of her rights, her alternative would be state courts, which are insufficient for the reasons I will discuss shortly.

C. *Bounds v. Smith* and *Mayer v. City of Chicago*

Beyond the *Boddie* view of filing fees as a bar to the due process right to be heard, others have examined access to courts through cases involving prisoners filing civil rights actions against the prisons in which they were confined.[111] In *Bounds v. Smith*, the Court explicitly held that "the fundamental constitutional right of access to the courts" required the prison to assist and accommodate prisoners filing legal documents.[112] Significantly, "the right of meaningful access for prisoners is not based on their confinement, but on the fundamental rights at stake."[113] Consider the Jane hypothetical. The rights at stake for Jane were also fundamental, and thus, under *Bounds*, she too should have a fundamental constitutional right to access the courts like prisoners. While this does not resolve the issue of access for cases outside of those concerning a fundamental right, this does indicate that, at a minimum, there should be guaranteed court access for those with fundamental rights at stake.

Outside of the fundamental rights sphere, something the Court has noted in its opinions on access to courts is concern over outside circumstances that arise due to a lack of access to the courts. In *Mayer v. City of Chicago*, the Court factored in the "collateral consequences" of a petty offense such as barring

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111 *See* Stephen M. Feldman, *Indigents in the Federal Courts: The in Forma Pauperis Statute—Equality and Frivolity*, 54 FORDHAM L. REV. 413, 433 (1985).

112 Bounds v. Smith, 430 U.S. 817, 828 (1977), *abrogated by* Lewis v. Casey, 518 U.S. 343 (1996). *Lewis* overruled *Bounds* only regarding the specific requirements for the level of assistance and accommodation with which the prisons were required to comply. *Lewis*, 518 U.S. at 350–57.

113 *See* Feldman, *supra* note 111, at 433.

a medical student from practicing medicine "because of a conviction he is unable to appeal for lack of funds."[114] Thus, the Court was willing to consider the fact that the litigant's future job prospects would be damaged by his inability to pay for an appeal of his conviction. Importantly, in considering these collateral consequences the Court was willing to take a relatively expansive view of the negative impacts an inability to pay court fees can have on a party, examining not just the immediate due process issues of right to be heard or meaningful access to the courts, but also subsequent economic hardships that may result for the litigant.

Reexamining *Boddie* in light of *Mayer*, it becomes evident that the Court was similarly concerned with collateral consequences. In *Boddie,* the fundamental right the Court focused on was the right to marriage even though the right at issue was to access the courts in order to get a divorce.[115] The Court reasoned that without a divorce, the woman would not be able to remarry.[116] However, the woman seeking a divorce had not affirmatively expressed any intent to get remarried; it was simply the fact that, without a divorce, she would not have the potential opportunity to get remarried, should she wish to. This prospective approach to future consequences tracks the Court's consideration in *Mayer* of the medical student's inability to one day be a doctor without appealing his conviction.

It is important to recognize that there is a significant difference between the rights at stake in the two cases. The Court in *Boddie* deemed the right to marry fundamental, whereas in *Mayer* it held that there is no fundamental right to a certain career path. However, even though there was no fundamental right at stake in *Mayer*, the Court was willing to consider long-term economic consequences, such as the loss of a future career. It follows, then, that the Court would do away with filing fees both in cases where a fundamental right is at stake and in cases where no fundamental right is at stake but the litigant faces a future economic hardship as a result of the court filing fees. To modify our hypothetical slightly to fit this new no-fundamental-right scenario, imagine that instead of being denied the right to vote, Jane is wrongfully terminated from her job at an accounting firm based on her race. In this version of our hypothetical, Jane may not be pursuing medicine, but she could be pursuing a career in accounting, which was thwarted

114 Mayer v. City of Chicago, 404 U.S. 189, 197 (1971).
115 *See* Boddie v. Connecticut, 401 U.S. 371, 374 (1971).
116 *See id.* at 376.

by wrongful behavior that cannot be remedied due to Jane's inability to pay the fees of a case to challenge her employer's actions. In this scenario, it would be impossible to say that the barrier posed by the Fee did not have collateral consequences for Jane. The Court's willingness to consider relatively broad and far-reaching circumstances in cases concerning the barrier posed by fees where no fundamental interest was at stake makes the fees even more vulnerable to attack. This approach could be applied broadly, which implies that the right to access the courts without fee barriers should be extended to large numbers of litigants. However, without a set standard, the courts would have to individually consider the collateral consequences for each litigant. As such, a logical next step is to legislate a fee scale like the one proposed in Part III of this Note, which would remove both the barrier posed by fees and the need for burdensome case-by-case analysis by courts that might result in erroneous denials of IFP.

D. Inadequacy of State Courts as an Alternative to Federal Courts

Federal courts have exclusive jurisdiction over very few types of cases and, thus, state courts have concurrent jurisdiction over most issues that can be brought in federal court, making them an alternate path.[117] In connection with the choice between state and federal court, an alternative, more flexible standard than the *Boddie* test for court access challenges is set out in *Mathews v. Eldridge*.[118] Like in *Boddie*, the Court in *Mathews* looked to the individual's rights at stake, the existence of alternative procedures, and the government's interest.[119] Significantly though, beyond just the *availability* of alternatives, the Court considered the *reliability* of those alternatives.[120] Applying *Mathews* to the choice between federal and state courts, it appears that state courts are a less reliable alternative, particularly when the court is handling a federal question. When applying federal law, state court decisions can be less consistent than those of federal courts.[121] This lack of

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117 KEVIN M. LEWIS & LIBERTY SACKER, CONG. RSCH. SERV., LSB10335, ACHIEVING BALANCE: WHICH CASES BELONG IN WHICH COURTS? 2 (2019).

118 *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Christopher E. Austin, Note, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768, 773 & n.29 (1982).

119 *See* Austin, *supra* note 118, at 773 n.29.

120 *Id.* at 794.

121 *See* Beier, *supra* note 24, at 1187 (noting the longstanding concerns of state courts' efficacy in administering federal law).

consistency in interpretations of federal issues across the states has the potential to increase confusion and lead to more litigation.[122]

State courts are also less insulated from politics and local opinions than federal courts, where judges have lifetime appointments[123] and are not beholden to voters.[124] This, combined with their inconsistency in interpreting federal questions, especially those that break new ground, raises concerns about their reliability.[125] Additionally, as a practical matter, it seems unlikely that an individual whose rights have been violated by a given state would want to seek recourse in courts operated by that state. This feeling would only be intensified if the deprivation of rights involved an element that would work against the individual and their claims given the politics in their state. Referring again to the Jane hypothetical, consider if Jane was a Black woman living in rural Mississippi in 1975. Few would argue that she would be just as likely to succeed bringing her claims in Mississippi state court as she would if she brought them in federal court.[126] Again, if these rights are truly fundamental, we should not accept a system that creates incongruous opinions on deprivations depending on the politics of the state in which the case is brought.

Finally, when looking to congressional action and intent, it is clear federal courts are the better venue for federal question cases, which make up the majority of cases filed in federal courts each year.[127] In 1980, Congress removed the $10,000 minimum amount in controversy requirement in federal question cases, which had served as a barrier to those

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122 *See id.* at 1188.

123 U.S. CONST. art. III, § 1.

124 *See* Beier, *supra* note 24, at 1189 (citing Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378, 1390–91 (1985) (book review); Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1918 (1989)).

125 *See* John Leubsdorf, *Constitutional Civil Procedure*, 63 TEX. L. REV. 579, 604 (1984).

126 Black voters were still being actively discriminated against in Mississippi in the 1970s. *See* U.S. COMM'N ON C.R., RACIAL AND ETHNIC TENSIONS IN AMERICAN COMMUNITIES: POVERTY, INEQUALITY, AND DISCRIMINATION—VOLUME VII: THE MISSISSIPPI DELTA REPORT, https://www.usccr.gov/pubs/msdelta/ch3.htm [https://perma.cc/G8KR-C7MH] (last visited Aug. 19, 2021).

127 In 2019, 150,936 of the 286,289 cases filed in federal court were federal question cases. *See U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending March 31, 2018 and 2019*, *supra* note 76.

seeking resolution in federal court for small claim amounts.[128] This shows an intent to increase access to federal courts and suggests an affirmative desire of Congress to have these cases resolved in federal court. In a 1979 hearing before the Senate Judiciary Committee, one senator made the following statement in support of eliminating the amount in controversy requirement:

> There is no valid reason for retaining the amount in controversy requirement in any Federal question case. Elimination of this requirement will result in only a slight increase in the number of suits in Federal courts and will give every citizen the right to litigate his or her Federal claims before a Federal tribunal.
>
> This bill recognizes that expanded access to Federal courts by citizens with Federal claims and to State courts by citizens with State claims is in the best interest of our judicial system. In the final analysis, the elimination of Federal diversity jurisdiction will undoubtedly improve the quality of justice for all our citizens, in all the courts of this country.[129]

This quote articulates the point that federal questions are better decided in federal courts and highlights the congressional desire to increase access to federal courts. It further suggests all citizens have a *right* to have their federal cases heard in federal court. While the Supreme Court has held differently, the congressional intent was for there to be a right to access the federal courts. Thus, under the *Mathews* standard, state courts are simply not a reliable alternative to federal courts with respect to federal question cases.

III
AN INCOME-DEPENDENT FEE

This Note proposes that, rather than a flat filing fee, Congress should enact a graduated fee scale tied to a potential litigant's income.[130] Specifically, the fee would be equal to a fixed percentage (0.5%) of gross income, which would allow the

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128 The Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (codified as amended at 28 U.S.C. § 1331(a)).

129 *Jurisdictional Amendments Act of 1979: Hearings Before the S. Comm. on the Judiciary*, 96th Cong. 5 (1979) (opening statement of Sen. Metzenbaum, Member, S. Comm. on the Judiciary).

130 The proposed graduated fee scale would replace the $350 filing fee. The Judicial Conference would have to remove the $52 administrative fee that comprises the remaining portion of the Fee to make the estimates proposed in this section accurate. *See supra* note 17. This Note assumes that the administrative fee would be removed if this graduated fee scale were adopted.

fee to scale proportionally to a given litigant's income. Importantly, for the reasons discussed subsequently in this Part III, those with the lowest ability to pay would be carved out from the obligation to pay the fee, similar to the current IFP status. Additionally, this Note proposes a mechanism that balances fairness with a desire to prevent frivolous lawsuits with respect to top earners. This graduated fee scale provides a number of benefits over the current flat fee system.

Although this Note proposes a fee equal to 0.5% of income, Congress could graduate the fee scale in a manner that would approximately equal current revenue generation, allowing the court system to function as efficiently as it presently does. With regards to efficiency, the new system would require proof of income for all litigants rather than simply for those attempting to file IFP. However, when filing a suit in federal court, plaintiffs already must fill out various paperwork regarding their case.[131] Adding one additional line on a single form regarding the litigant's income with a request for proof (such as a prior year's tax return) would not create a substantial administrative burden on the litigants or court. Further, this Note's proposed fee scale would eliminate certain other existing administrative burdens. These include reducing the number of frivolous lawsuits filed by all litigants as discussed in subpart IIII.A as well as removing the need for IFP filings and review as discussed in subpart IIII.D.

In terms of Constitutional fairness and equal protection under the laws, a graduated fee scale allows greater access to the civil courts for low-income individuals and minorities, who would pay proportionately less than they do under the current system. In particular, those at the lowest income bracket would pay nothing at all, significantly decreasing their monetary cost of access to the courts if they choose to represent themselves pro se or are able to find pro bono representation. As shown in the table below, under this Note's proposed fee scale, even at the top end of the lowest income threshold, the current $402 Fee represents approximately 3% of total annual income. That is the equivalent of an individual who earns $100,000 a year annually having to pay $3,000 for access to

131 In addition to filing the complaint, a plaintiff has to fill out a civil cover sheet, a civil category sheet, and a completed summons for each defendant to file with their complaint. In total, the paperwork amounts to, at minimum, ten pages. *See* U.S. DIST. CT. FOR THE DIST. OF MASS., STEP BY STEP: A SIMPLE GUIDE TO FILING A CIVIL ACTION IN THE UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS 4, attachs. 2–4 (2020), https://www.mad.uscourts.gov/general/pdf/StepByStepEnglish.pdf [https://perma.cc/SN2Z-KE8F].

the civil court system. Yet, under the current system the $402 Fee accounts for only 0.4% of that same high-income individual's total annual income. This example demonstrates the regressive nature of the fixed fee and stands in contrast to the progressive character of the U.S. income tax system[132] and a number of key social welfare programs.[133]

A. A Better Barrier to Frivolous Suits

In response to the argument that the filing fee acts as a barrier against frivolous lawsuits, there are two points to note. The first is that, under the graduated fee system, individuals would still be responsible for paying a fee equal to 0.5% of their annual gross income. The use of gross income (rather than adjusted gross income)[134] avoids the possibility that high-income individuals would be able to reduce their fee through tax deductions and, as a result, pay below their proportional share. While not a substantial barrier to entry, this percentage would still serve as a meaningful pause in any individual's decision making with respect to filing in civil court. As such, the graduated fee would continue to serve as a first-line defense against frivolous lawsuits. The second is that, as it currently stands,

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132 Robert Bellafiore, *America Already Has a Progressive Tax System*, TAX FOUND. (Jan. 11, 2019), https://taxfoundation.org/america-progressive-tax-system/ [https://perma.cc/D9TP-SZW3].

133 *See, e.g.*, *Policy Basics: Top Ten Facts About Social Security*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/social-security/top-ten-facts-about-social-security [https://perma.cc/8DJ6-GEZE] (last updated Aug. 13, 2020) ("Social Security benefits are progressive . . . ."); *Eligibility*, MEDICAID.GOV, https://www.medicaid.gov/medicaid/eligibility/index.html [https://perma.cc/NFC2-UQDJ] (last visited May 29, 2021) (stating that financial eligibility for Medicaid and the Children's Health Insurance Program (CHIP) is determined by a Modified Adjusted Gross Income (MAGI) system, which considers taxable income and tax filing relationships). Additionally, many social welfare programs rely on graduated scales like the federal poverty guidelines (or percentage multiples of them) to determine eligibility. *See, e.g.*, *Poverty Guidelines*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (Jan. 15, 2021), https://aspe.hhs.gov/poverty-guidelines [https://perma.cc/CSN4-DA49] ("Programs using the guidelines . . . include Head Start, the Supplemental Nutrition Assistance Program (SNAP), the National School Lunch Program, the Low-Income Home Energy Assistance Program, and the Children's Health Insurance Program."). States also conduct needs-based tests to determine eligibility for public assistance programs. *See SNAP Eligibility*, U.S. DEP'T OF AGRIC. (Mar. 15, 2021), https://www.fns.usda.gov/snap/recipient/eligibility [https://perma.cc/2FFY-P2XA]; *Supplemental Nutrition Assistance Program (SNAP)*, N.Y. STATE OFF. OF TEMP. & DISABILITY ASSISTANCE, https://otda.ny.gov/programs/snap/ [https://perma.cc/QZL6-EAQX] (last visited May 29, 2021) (using roughly 147% of the federal poverty guideline in determining SNAP eligibility).

134 *See Definition of Adjusted Gross Income*, IRS, https://www.irs.gov/e-file-providers/definition-of-adjusted-gross-income [https://perma.cc/78PJ-Z4VP] (last updated Feb. 25, 2021).

the flat filing fee is not actually a barrier to filing frivolous litigation for higher income individuals. Illustrated by the example in the paragraph immediately above, as annual income increases, the current fixed fee represents a decreasing percentage of income, to the point where it eventually becomes immaterial for high-income individuals. Thus, the fixed fee actually violates the "anti-frivolous lawsuit" purpose of the fee to a greater extent than the graduated fee because wealthy individuals and businesses are free to file frivolous lawsuits.[135] As such, the graduated fee serves as both a more equal and more effective barrier to frivolous lawsuits, because it represents the same proportional barrier to all individuals, regardless of income, and, as a result, should prevent a greater total number of frivolous lawsuits (i.e. it impacts all income brackets, rather than only low income).

B. Increased Access and More Civil Rights Claims

In addition to reducing frivolous lawsuits, a graduated fee would likely increase the number of civil rights lawsuits brought by low-income and minority individuals. To demonstrate this, we can look to various points discussed in subpart II.C. First, civil rights cases make up the third largest share of civil actions filed over the last five years, and employment cases typically represent half of all non-prisoner civil rights cases filed in federal court each year.[136] Additionally, Employment Study 2, discussed in subpart I.C, found that Black litigants made up the largest group of filers of employment discrimination cases at 38%.[137] Finally, Blacks have far less wealth than Whites,[138] have a higher likelihood of not being able to pay their monthly bills,[139] and have the highest poverty rate.[140] Collectively, these facts suggest that there would be an increase in civil rights case filings by low-income litigants if the Fee did not pose such a barrier to entry. Any such increase in

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135 *See U.S. Businesses File Four Times More Lawsuits Than Private Citizens and Are Sanctioned Much More Often for Frivolous Suits*, PUB. CITIZEN (Oct. 4, 2004), https://www.citizen.org/news/u-s-businesses-file-four-times-more-lawsuits-than-private-citizens-and-are-sanctioned-much-more-often-for-frivolous-suits/ [https://perma.cc/XN7X-SQUF].

136 *See* sources cited *supra* note 76.

137 *See* Myrick, Nelson & Nielsen *supra* note 83, at 714.

138 *See* Bhutta, Chang, Dettling & Hsu, *supra* note 63.

139 *See* Federal Reserve Report, *supra* note 48.

140 JESSICA SEMEGA, MELISSA KOLLAR, EMILY A. SHRIDER & JOHN F. CREAMER, INCOME AND POVERTY IN THE UNITED STATES: 2019, at 15 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf [https://perma.cc/HK8E-AHDK].

civil rights cases would evidence greater access to the federal civil courts for low-income and minority individuals as a result of the graduated fee scale.

It should be noted that the graduated scale this Note proposes is a fixed percentage of income that produces a graduated total dollar amount. This is in contrast to a truly progressive fee that scales up as a percentage of an individual's income as they earn more, such as the U.S. tax code.[141] The fixed percentage is a more desirable solution because it continues to treat the filing fee as an access fee[142] rather than a tax. Under such a scheme, the fee promotes equality and fairness since it ensures equal access to courts regardless of income. This is in keeping with due process as discussed in Part II[143] and the congressional intent behind the Civil Rights Act.[144]

C. Due Process and Congressional Intent

First, as it pertains to due process, the graduated fee system would not offend the standards set out in *Boddie*, *Mayer*, and *Mathews*. By broadening the group exempted from paying the fee and setting an equal percentage of income for all individuals, the graduated fee system makes court access affordable to a greater number of individuals and significantly reduces the necessity for determining whether the right at stake is fundamental, whether reliable alternative avenues exist to challenge the deprivation, and whether the litigant would face future collateral consequences as a result of an inability to file their claim in court. As a result, the proposed scale would allow courts to circumvent the lengthy and somewhat convoluted analyses set out in *Boddie*, *Mayer*, and *Mathews* because the filing fee would no longer pose such a significant burden on litigants as to raise the concerns present in those cases.

In reference to congressional intent, in 1976, when the filing fee was only $15,[145] the Senate considered legislation regarding the award of attorneys' fees in civil rights litigation. The congressional record indicates that attorneys' fees posed a

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141 *See* Bellafiore, *supra* note 132.

142 *See* Austin, *supra* note 118, at 769–70 (noting that filing fees are a form of access fee and referring to *Boddie* and *Kras* as cases dealing with access fees).

143 *See* Boddie v. Connecticut, 401 U.S. 371, 374 (1971); Mayer v. City of Chicago, 404 U.S. 189, 197 (1971); Bounds v. Smith, 430 U.S. 817, 828 (1977).

144 *See* S. REP. NO. 94-1011, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

145 This would be $70.4 in 2021 dollars. *See Inflation Calculator*, SAVING.ORG, https://www.saving.org/inflation/ [https://perma.cc/462L-JVA5] (last visited Aug. 19, 2021).

significant barrier to civil rights litigants and goes so far as to note that many of such litigants had "little or no money with which to hire a lawyer."[146] Not allowing an award of attorneys' fees in civil rights cases, the record claims, would be equivalent to "repealing the [Civil Rights] Act itself by frustrating its basic purpose."[147] This language indicates that Congress viewed the availability of remedies for civil rights litigants as a fundamental aspect of the Act. As the Fee currently poses a barrier to accessing the courts (let alone collecting damages), it violates the intent of Congress to ensure individuals could bring—and collect upon—civil rights claims. The graduated scale this Note proposes would help restore the access Congress intended.

An argument could be made that a truly progressive tax structure (as opposed to the fixed-percentage fee proposed in this Note) would decrease total civil litigation by creating a greater barrier to access for the wealthy and corporations. This could, in turn, drive down legal costs by removing some of the most expensive players from the market and free up court docket space to hear more cases brought by low-income plaintiffs. However, the *overall* reduction of litigation is not typically one of the stated goals to be achieved by the filing fee.[148] Further, a truly graduated tax-like scale would open the system to due process critiques—like those discussed in Part II—from individuals hit with the higher percentages. Rather than burden shift in this way, the fixed-percentage approach would allow the courts to better achieve the most frequently referenced goal of filing fees—reduction in frivolous suits—and increase access for lower-income and minority litigants.

D. *The $0 Tier vs. IFP*

The one exception to the fixed percentage would be the bottom tier of the structure, which would pay $0. These individuals would be those most likely to qualify for IFP, since the top-end of the bottom bracket proposed under this Note's graduated fee system would be set at the Federal Poverty Level

146 *See* S. REP. NO. 94-1011, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910.

147 *Id.* at 3 (quoting Hall v. Cole, 412 U.S. 1 (1973)).

148 The most frequently stated goals are reduction of frivolous lawsuits and revenue generation for the courts. *See, e.g.*, McTeague v. Sosnowski, 617 F.2d 1016, 1019 (3d Cir. 1980) (identifying a desire for a reduction in frivolous lawsuits as a reason for the cost barrier); Dead Season, L.L.C. v. Does 1–, No. 8:12-CV-2436-T-33EAJ, 2013 WL 424131, at *2 (M.D. Fla. Feb. 4, 2013) ("Filing fees not only provide crucial funding for the operation of the Court, but also serve as a deterrent to the filing of frivolous suits.") (citing In re McDonald, 489 U.S. 180, 184 (1989)).

(FPL)[149] plus the individual standard deduction.[150] Using the FPL with the standard deduction would better protect low-income litigants from the use of gross income in determining their filing fee by widening the group of individuals not obligated to pay the fee to ensure it includes those with the least financial means to afford it. In creating this base bracket, the proposal would reduce the administrative burdens posed by granting and denying IFP status as well as the costs of litigating IFP denials. The current system for granting and denying IFP is disjointed at best.[151] With no set standards for how to handle an IFP motion and differing IFP forms used by district courts,[152] judges are forced to rely on existing means-tests like the Federal Poverty Guidelines,[153] follow another court's standard,[154] or simply make individualized determinations.[155] This process is an inefficient use of court resources and creates inconsistent results whereby a litigant might be denied IFP status in one district court and granted it in another based on the same alleged financial information. By simplifying the system with a blanket carve-out for those at or below the FPL, this Note's proposal could lead to higher court revenues generated by filing fees (even if filing fees were calculated to raise the same revenue as the existing filing fee) because fewer expenditures would go to managing IFP dockets.

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149 *See 2020 Poverty Guidelines*, U.S. DEP'T OF HEALTH AND HUM. SERVS. (Jan. 21, 2020), https://aspe.hhs.gov/2020-poverty-guidelines [https://perma.cc/P5QG-627R].

150 For 2021, the individual standard deduction is $12,550, which is what I will use for the bottom tier in subpart IIII.E. *See IRS Provides Tax Inflation Adjustments for Tax Year 2021*, IRS (Oct. 26, 2020), https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2021 [https://perma.cc/FME3-ULVZ] (last updated Apr. 15, 2021).

151 *See* Hammond, *supra* note 16, at 1500–05.

152 *See Fee Waiver Application Forms*, U.S. CTS., https://www.uscourts.gov/forms/fee-waiver-application-forms [https://perma.cc/T7M3-259M] (last visited May 29, 2021).

153 *See, e.g.*, Boka v. Whalen, No. 15-CV-6629, 2016 WL 9453325, at *1 (2d Cir. Dec. 15, 2016) (citing to the Federal Poverty Guidelines when denying an application to proceed IFP on appeal); Taylor v. Supreme Court of N.J., 261 F. App'x 399, 401 (3d Cir. 2008) (finding that appellant was living below the federal poverty level and, as such, the district court erred in denying his application to proceed IFP).

154 *See* Dauphin v. Geren, No. CV409-141, 2009 WL 3233148, at *1 n.2 (S.D. Ga. Oct. 7, 2009) (stating that the court applied "the IFP standards set forth in *Martinez v. Kristi Kleaners, Inc.*, 364 F.3d 1305, 1306–07 (11th Cir.2007 [sic])").

155 *See, e.g.*, Potnick v. E. State Hosp., 701 F.2d 243, 244 (2d Cir. 1983) (reversing the district court's denial of plaintiff's IFP application and finding that plaintiff's monthly income, welfare benefits, food stamps, checking account balance, assets, and liabilities indicated that his financial condition warranted IFP status).

As an additional benefit, the graduated fee system would reduce the intrusive nature of the IFP process on litigants. The current IFP forms require litigants to disclose a great deal of information about their income, assets, and liabilities.[156] These forms are entered into the court docket and, thus, become public records tied to the litigant. The proposed system would merely require gross income disclosure.

E. A Visualization of Graduated Fees

Because the fee is set at a fixed percentage (0.5%) of income, there is no need for formal brackets like the tax code, with the exception of the bottom rung that relies on the FPL and individual standard deduction. With that exception, the table below uses the existing tax brackets to provide a visualization of what the approximate fee ranges would be using 0.5% of annual income. Of course, some would argue that the fixed percent could create exorbitant fees for those with higher incomes. However, the percentage is fair in that it is the same for all litigants, excluding those at or below the FPL. Further, if the filing fee's oft-stated purpose of reducing frivolous litigation is true, then charging a fee of $10,000 to an individual whose annual income is $2 million serves that purpose better than the current filing fee. Still, a provision could be included allowing all plaintiffs that paid over $1,000 to file their lawsuit to recoup the fee charged in excess of $1,000 if they win their suit. This would still give any wealthy plaintiff pause before filing a frivolous suit but would prevent rates from reaching astronomical amounts on strong claims.

TABLE 2

Fee	Household Annual Income
$0	Up to $25,310[1]
$126 - $203	$25,311 to $40,525
$204 - $432	$40,526 to $86,375
$433 - $822	$86,376 to $164,425
$823 - $1,047	$164,926 to $209,425
$1,048 - $2,618	$209,426 to $523,600
$2,618 +	Over $523,600

156 *See Fee Waiver Application Forms*, *supra* note 152.

CONCLUSION

This Note examined the impact the current $402 Fee has on those of low-to-moderate income that do not qualify for IFP status. Additionally, this Note looked at the history of filing fees in federal courts, the current IFP standard and its shortcomings, and the disproportionate impact the Fee has on racial minorities. This Note then argued that the Fee constitutes an unconstitutional bar to exercising an individual's due process rights to be heard and to have meaningful access to the courts for those of low-to-moderate income. Finally, this Note proposed as an alternative to the current flat filing fee with optional waiver for IFP litigants a fee based on a fixed percentage of a litigant's income that would create a graduated fee scale with an exception for those below the FPL.

Important conversations are taking place now about how to increase equality in our justice system; however, these discussions focus primarily on the criminal justice side.[157] Similarly important, though far less discussed, are the barriers that prevent equality in our civil justice system. This Note touches on one out of countless barriers that hinder equal access to courts and, thus, justice. The solution proposed here is only the starting point of the changes that must be made to ensure that rights are not simply an illusory Constitutional promise for all but those with the means to guarantee them.

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157 *See, e.g.*, Dan Petrella, *Gov. J.B. Pritzker Signs Sweeping Illinois Criminal Justice Overhaul, Which Will End Cash Bail Starting in 2023*, CHI. TRIB. (Feb. 22, 2021), https://www.chicagotribune.com/politics/ct-jb-pritzker-criminal-justice-bill-20210222-nw7lh3upy5aipap2odh7jaofke-story.html [https://perma.cc/38X9-KP5L] (discussing new Illinois criminal justice reform bill); Kayla Sullivan, *Why Indiana's Justice Reform Bill May Become a Model*, FOX 59 (Mar. 4, 2021), https://fox59.com/news/politics/why-indianas-justice-reform-bill-may-become-a-model/ [https://perma.cc/RD2X-46WN] (pointing to the three main aspects of the justice reform bill centering around policing).

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