

THREE STRIKES AND YOU'RE OUT OF CONSTITUTIONAL RIGHTS? THE PRISON LITIGATION REFORM ACT'S "THREE STRIKES" PROVISION AND ITS EFFECT ON INDIGENTS

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*A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.*¹

INTRODUCTION

In an effort to respond to the “alarming explosion in the number of lawsuits filed by State and Federal prisoners,”² the 104th Congress enacted the Prison Litigation Reform Act (“PLRA”).³ The primary aim of the PLRA was to reduce the number of frivolous prisoner-initiated lawsuits.⁴ In addition, PLRA sponsors were concerned with indigent prisoners who were exempted from paying the full amount of their court fees.⁵ Prisoners seeking to attain this status when bringing suit in federal court must invoke 28 U.S.C. § 1915, which governs all

1. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (striking down an amendment to the Colorado Constitution prohibiting all legislative, executive, or judicial action designed to protect homosexual persons from discrimination).

2. 141 CONG. REC. 14,570 (1995).

3. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (codified in scattered sections of 18 U.S.C.).

4. *See* 141 CONG. REC. 14,570 (1995).

5. *See id.* Senator Dole expressed concern that indigent prisoners faced “no economic disincentive to going to court.” *Id.* at 14,571. Dole did not, however, offer any reason to distinguish indigent prisoners from non-prisoner indigents who still enjoy *in forma pauperis* status for purposes of avoiding any “economic disincentive” when filing lawsuits. *See id.*

proceedings *in forma pauperis*.⁶ The PLRA made several changes to section 1915 that significantly curtail an indigent prisoner's ability to litigate.

One of the more controversial changes to section 1915 was the addition of subsection 1915(g), which denies *in forma pauperis* status to any prisoner who has filed at least three claims that have been dismissed as frivolous, malicious, or for failing to state a claim.⁷ The only exception to section 1915(g)'s sweeping rule, requiring the categorical denial of leave to proceed *in forma pauperis*, occurs when a prisoner is "under imminent danger of serious physical injury."⁸ This exception is somewhat illusory, however, as courts have construed it narrowly to include only those situations in which the prisoner is still in imminent danger at the time the suit goes to trial or is on appeal.⁹ Further, courts have declined to construe *pro se* complaints liberally,¹⁰ opting instead to deny *in forma pauperis*

6. See 28 U.S.C. § 1915 (1994). *In forma pauperis* "[d]escribes permission given to a poor person (*i.e.* indigent) to proceed without liability for court fees or costs." BLACK'S LAW DICTIONARY 779 (6th ed. 1990).

7. See 28 U.S.C. § 1915(g) (Supp. III 1997). The section reads:

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

Id.

8. *Id.*

9. See *Choyce v. Dominguez*, 160 F.3d 1068, 1069 (5th Cir. 1998) (reporting that plaintiff-appellant alleged that defendant-appellee correctional officers had repeatedly threatened and assaulted him in retaliation "for filing lawsuits protesting his treatment in prison"); *Banos v. O'Guin*, 144 F.3d 883, 884 (5th Cir. 1998). The *Banos* court held that:

[A] prisoner with three strikes is entitled to proceed with his action or appeal only if he is in imminent danger *at the time that he seeks to file his suit in the district court or seeks to proceed with his appeal or files a motion to proceed [in forma pauperis]*.

Id. (emphasis added).

10. Pleadings filed by *pro se* litigants are typically construed liberally. See *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). The court noted that:

[I]f the court can reasonably read the [*pro se* litigant's] pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.

Id.

status to frequent filers¹¹ who fail to allege specifically their otherwise obvious imminent danger.¹² In addition, courts have held that section 1915(g) applies retroactively, thereby counting suits dismissed before the PLRA's enactment.¹³

In promoting the PLRA, its sponsors sought to attack certain types of claims considered wasteful of judicial resources. Former Senator Dole pointed out, "[p]risoners have filed lawsuits claiming such grievances as insufficient storage locker space, being prohibited from attending a wedding anniversary party, and yes, being served creamy peanut butter instead of the chunky variety they had ordered."¹⁴ As compelling as the argument may be for precluding these frivolous claims, however, the breadth of section 1915(g) encompasses valid claims as well, without any inquiry into their merit.¹⁵

This comment argues that the so-called "three strikes" provision is constitutionally suspect in that it violates the equal protection component of the Fifth Amendment's Due Process Clause.¹⁶ Part I examines the Supreme Court's "access to the courts" jurisprudence, as developed by *Griffin v. Illinois*,¹⁷ *Bod-*

11. The term "frequent filer" refers simply to an indigent prisoner who has "three strikes" as defined by section 1915(g), and thereby is precluded from gaining *in forma pauperis* status. See, e.g., *White v. Colorado*, 157 F.3d 1226, 1232 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1150 (1999).

12. See *id.* at 1231-32. Despite Mr. White's allegations that he had "been deprived of life sustaining medication . . . been beaten, and/or otherwise tortured . . . to a[n] extremely life-threatening degree," the Tenth Circuit found that these claims failed to specify "even the general nature of the 'serious physical injury' he asserts is imminent." *Id.* (alteration in original).

13. See *Rodriguez v. Cook*, 169 F.3d 1176, 1181 (9th Cir. 1999) (holding "that § 1915(g) does not raise any retroactivity concerns, because it does not affect a substantive right but merely limits a prisoner's ability to proceed [*in forma pauperis*]").

14. 141 CONG. REC. 14,570 (1995).

15. In describing the congressional debate regarding the PLRA, commentators have credited the conservatives' victory to "law suits focusing on peanut butter sandwiches and premium cable [as] the central images rather than lawsuits that attempted to keep cells free of raw sewage." Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 64 (1997).

16. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the laws."). The Fourteenth Amendment applies only to the states; however, the Due Process Clause of the Fifth Amendment incorporates equal protection principles that are applicable to the federal government. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213 (1995).

17. 351 U.S. 12 (1956) (plurality opinion).

die v. Connecticut,¹⁸ *Bounds v. Smith*,¹⁹ *Lewis v. Casey*,²⁰ and *M.L.B. v. S.L.J.*²¹ These cases unequivocally establish the right of access to the courts where a fundamental interest is at stake, and lend considerable support to the argument for invalidating section 1915(g) of the PLRA.

Part II examines section 1915(g)'s ability to withstand constitutional scrutiny. When an indigent prisoner with three strikes seeks to litigate a matter affecting a fundamental interest, any legislation that substantially burdens the right of access to the courts must be subject to strict scrutiny review, rather than the more deferential rational relation standard of review.²² A strict scrutiny analysis concludes that section 1915(g) is overinclusive, as it strikes down claims affecting prisoners' fundamental interests without any inquiry into their merit. Section 1915(g) is also underinclusive in that it attempts to curb frivolous lawsuits by unjustifiably targeting only indigent prisoners. Non-indigent prisoners who have had three or more claims dismissed are not similarly deterred from filing more lawsuits, irrespective of a claim's merit. A strict scrutiny analysis thus reveals the PLRA's failure to employ means "precisely tailored to serve a compelling government interest."²³ In fact, other provisions within the PLRA itself offer examples of less far-reaching means of deterring frivolous prisoner litigation.²⁴

Part III discusses recent federal decisions addressing the constitutionality of section 1915(g). In *Lyon v. Krol*,²⁵ for example, a district court found that section 1915(g) did, in fact, substantially burden prisoners' fundamental constitutional

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

19. 430 U.S. 817 (1977).

20. 518 U.S. 343 (1996).

21. 519 U.S. 102 (1996).

22. See *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (holding that classifications impinging upon the exercise of a "fundamental right" are required to be "precisely tailored to serve a compelling governmental interest").

23. *Id.* at 217.

24. See 28 U.S.C. § 1915(b) (Supp. III 1997) (requiring *all* prisoners to pay at least partial filing fees in proportion to their prison accounts); 28 U.S.C. § 1915A (Supp. III 1997) (allowing courts to screen prisoner-initiated lawsuits before docketing); 28 U.S.C. § 1932 (Supp. III 1997) (allowing courts to revoke earned release credit from prisoners who file malicious or harassing claims).

25. 940 F. Supp. 1433 (S.D. Iowa 1996), *appeal dismissed*, 127 F.3d 763 (8th Cir. 1997).

right of access to the courts.²⁶ *Lyon* is unique, however, as it remains one of the only cases to apply the strict scrutiny standard of review to the provision in an equal protection analysis.²⁷ In evaluating the three strikes provision, the decision whether to apply strict scrutiny or the rational relation standard of review is, as in most cases, dispositive. The reluctance on the part of the overwhelming majority of courts to apply strict scrutiny reflects an unwillingness to invalidate this popular legislation.²⁸ In light of the constitutionally protected rights that the three strikes provision suppresses, however, the relevant Supreme Court precedent requires application of the strict scrutiny standard of review.

This comment concludes that the three strikes provision of the PLRA should be struck down as violating the equal protection component of the Fifth Amendment's Due Process Clause.

I. FROM *GRIFFIN* TO *M.L.B.*: THE SUPREME COURT'S "ACCESS TO THE COURTS" JURISPRUDENCE

Any inquiry into the constitutional right of access to the courts should begin with a brief review of the relevant Supreme Court precedent, which has established and modified this right over the past several decades.

A. *Griffin v. Illinois*

*Griffin v. Illinois*²⁹ involved two indigent defendants convicted of armed robbery who were denied full appellate review because of an Illinois statute that provided free transcripts for appellate review only to indigent defendants sentenced to

26. See *id.* at 1438.

27. See *id.* at 1438-39.

28. See Tushnet & Yackle, *supra* note 15, at 66-70 (discussing how courts can avoid addressing the constitutional concerns presented by the "popular 'three strikes and you're out' rule"). The authors also observe that "[n]o politician in recent memory has lost an election for being too tough on crime." *Id.* at 1; see also Laurie Smith Camp, *Why Nebraska Needs Prison Litigation Reform*, 76 NEB. L. REV. 781, 782-83 (1997) (declaring the PLRA a success); Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 398-99 (1998) (concluding that "everyone, including federal judges, inmates and taxpayers, will benefit" from the PLRA).

29. 351 U.S. 12 (1956).

death.³⁰ The two defendants challenged the statute on due process and equal protection grounds.³¹ Justice Black, speaking for a plurality of the Court, invalidated the Illinois statute and resolved some significant questions about equal protection in the context of appellate review:

It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty.³²

If applied analogously to section 1915(g) of the PLRA, the principles in *Griffin* demonstrate that the provision is underinclusive because it targets indigent prisoners only. The PLRA offers no parallel measure to address frivolous lawsuits filed by non-indigent prisoners. Although the PLRA does contain other provisions designed to deter frivolous prisoner litigation generally, those provisions are far less rigid.³³

Moreover, unlike section 1915(g), other provisions apply to *all* prisoners. As section 1915(g) applies only to indigent prisoners, it expressly discriminates on the basis of poverty.

A narrow construction of *Griffin* limits its holding to the criminal context. The Court's decision in *Boddie v. Connecticut*,³⁴ however, makes it clear that the right of access to the courts similarly applies to civil matters affecting a fundamental right.

30. *See id.* at 14.

31. *See id.* at 14–15.

32. *Id.* at 18 (citations omitted); *see also* *Mayer v. City of Chicago*, 404 U.S. 189 (1971). The Court in *Mayer* reaffirmed the holding in *Griffin*, stating that “it is now fundamental that, once established . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.” *Id.* at 193 (alteration in original) (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)). The Court went on to hold that in “*all cases* the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds.” *Id.* at 193–94 (emphasis added) (quoting *Draper v. Washington*, 372 U.S. 487, 496 (1963)).

33. *See infra* Part II (reviewing other deterrent PLRA provisions).

34. 401 U.S. 371 (1971).

B. *Boddie v. Connecticut*

Applying *Griffin's* premise of protecting criminal defendants from denial of appellate review on the basis of their inability to pay transcript fees, the Court in *Boddie* held that "a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, preempt the right to dissolve [a marriage] without affording all citizens access to the means it has prescribed for doing so."³⁵ In so holding, the Supreme Court expanded the holding in *Griffin* to protect indigent civil plaintiffs in matters where a fundamental right or interest is at stake.³⁶

In *Boddie*, the fundamental interest at stake was the ability of welfare recipients in Connecticut to bring an action for divorce. The Connecticut statute addressing fees in civil cases created an average cost of approximately \$60 for litigants bringing divorce actions.³⁷ Because a civil action represented the exclusive means of obtaining a divorce in Connecticut, the fees required by the statute had an exclusionary effect upon the appellant class as a result of its members' inability to pay.³⁸ In expanding due process protection to civil plaintiffs under certain circumstances, the Court explained the reasoning for affording such protection to defendants:

The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the only means of resolving the dispute at hand and denial of a defendant's full access to that process raises grave problems for its legitimacy.³⁹

35. *Id.* at 383.

36. *See id.* at 382 (rejecting the State's purported interest of "resource allocation or cost recoupment" on the same rationale as *Griffin*). In addition, Justice Douglas emphatically cited the principles of *Griffin* as the basis for his concurrence, noting its "sturdy growth." *See id.* at 383 (Douglas, J., concurring).

37. *See id.* at 372.

38. *See id.* at 373.

39. *Id.* at 375-76.

This reasoning serves as an analogous justification for due process protection of civil plaintiffs where the adjudication of a matter of fundamental interest is, in fact, the only means available for its resolution. Moreover, as the State is ultimately responsible for providing the means to resolve disputes among its citizens, it is effectively estopped from denying equal access to the prescribed method where that method represents the exclusive form of redress. The Court successfully applied this reasoning to the issue presented by the appellants in *Boddie*:

Thus, although they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one.⁴⁰

The reasoning in *Boddie* is particularly instructive in evaluating section 1915(g)'s unwavering fee requirement. For indigent prisoners suffering violations of their fundamental rights, a resort to the courts represents a similarly exclusive remedy. Moreover, the Court's analysis specifically addressed the hidden due process concerns that arise from inflexible court fee requirements, pointing out 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."⁴¹

C. *Bounds v. Smith*

In a further expansion of the right of access to the courts, the Supreme Court recognized in *Bounds v. Smith*⁴² "beyond doubt that prisoners have a constitutional right of access to the courts."⁴³ The consolidated actions in *Bounds* were brought by

40. *Id.* at 376-77.

41. *Id.* at 380.

42. 430 U.S. 817 (1977).

43. *Id.* at 821.

prison inmates alleging that the state of North Carolina failed to provide adequate law library facilities, and, therefore, denied the prisoners reasonable access to the courts.⁴⁴ The Supreme Court ultimately held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."⁴⁵ The *Bounds* access to the courts holding was somewhat restricted and qualified by the Supreme Court's subsequent decision in *Lewis v. Casey*.⁴⁶

D. *Lewis v. Casey*

The respondent-prisoners in *Lewis* also complained that they were deprived of their rights of access to the courts as a result of the inadequate law library facilities provided by the state of Arizona.⁴⁷ Although *Lewis* reaffirmed a prisoner's "(already well-established) right of access to the courts,"⁴⁸ it required a prisoner seeking to claim a constitutional violation of the right of access to the courts (within the context of an inadequate legal facilities allegation) to "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim."⁴⁹ This "requirement," however, merely emphasizes the constitutional prerequisite of standing.⁵⁰ Whenever an indigent prisoner is precluded from litigating a claim because of the prohibitive effect

44. *See id.* at 817-18.

45. *Id.* at 828.

46. 518 U.S. 343 (1996); *see also* *White v. Colorado*, 157 F.3d 1226, 1233 (10th Cir. 1998) ("[T]he Supreme Court made it plain that a *Bounds* violation requires more than the bald assertion of a violation of a basic constitutional right under 42 U.S.C. § 1983 . . .").

47. *See Lewis*, 518 U.S. at 346-47.

48. *Id.* at 350.

49. *Id.* at 351. The "actual injury" requirement conceivably can be limited to claims alleging inadequate legal facilities in particular. *See id.* at 351 ("Because *Bounds* did not create an abstract, free-standing right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is sub-par in some theoretical sense.")

50. *See id.* at 349 ("The requirement that an inmate alleging a violation of *Bounds* must show actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." (citing *Allen v. Wright*, 468 U.S. 737 (1984)).

of a filing fee, the actual injury requirement announced in *Lewis* is satisfied.⁵¹

E. M.L.B. v. S.L.J.

Finally, in *M.L.B. v. S.L.J.*,⁵² the Supreme Court once again enforced the protection of the "narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees."⁵³ *M.L.B.* involved a mother's challenge to a Mississippi statute that required her to pay court fees in order to appeal a decision dissolving her parental rights over her children.⁵⁴ Unable to pay the court fees, the mother sought leave to appeal *in forma pauperis*, but the Supreme Court of Mississippi denied her motion.⁵⁵ The Supreme Court, through Justice Ginsburg, placed "decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.'"⁵⁶ In doing so, the Court reaffirmed the notion that legislation affecting a fundamental interest is subject to strict scrutiny regardless of the nature of the claim (civil or criminal) or the status of the litigant (plaintiff or defendant).

Thus, the Supreme Court, through its decisions from *Griffin* to *M.L.B.*, firmly established that: (1) although a State is not required to provide appellate review to its citizens, once it does in fact provide for such review it cannot deny it to some because of their inability to pay; (2) the Due Process Clause is applicable to civil plaintiffs' actions where the litigant is invoking his or her exclusive means of dispute settlement; (3) legislation that burdens the ability to vindicate a fundamental right or interest of a particular class of individuals is subject to strict scrutiny review; and (4) the Constitution guarantees

51. See *id.* at 348 (describing actual injury as "actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim" (emphasis added)). As the full filing fee requirement of section 1915(g) substantially prejudices indigent prisoners' ability to present their claims, the *Lewis* injury requirement would *always* be satisfied by a litigant's indigence alone.

52. 519 U.S. 102 (1996).

53. *Id.* at 113.

54. See *id.* at 107.

55. See *id.* at 109.

56. *Id.* at 124 (citing *Griffin v. Illinois*, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring)).

prisoners the right of access to the courts in civil cases. These settled principles, when applied to section 1915(g) of the PLRA, support the propriety of subjecting the provision to strict scrutiny review.

II. APPLICATION OF STRICT SCRUTINY TO SECTION 1915(G)

Having recognized that Supreme Court precedent does, in fact, establish a constitutionally protected right of access to the courts where a fundamental right is at stake, the next inquiry must be whether section 1915(g) of the PLRA can potentially burden claims seeking to vindicate these fundamental rights. "Legislative and administrative classifications are to be strictly scrutinized and thus held unconstitutional absent a compelling governmental justification if they distribute benefits or burdens in a manner inconsistent with fundamental rights."⁵⁷ Therefore, if section 1915(g) does burden claims implicating fundamental rights, the provision can only be upheld as constitutional if it survives strict scrutiny.

In reviewing some of the claims that are subject to nondiscretionary dismissal under section 1915(g), it becomes apparent that several categories of fundamental constitutional rights are potentially suppressed by the provision's sweeping rule.⁵⁸ Therefore, courts *must* review the provision's constitutionality under strict scrutiny.

Strict scrutiny requires the state or federal government "to demonstrate that its classification has been precisely tailored

57. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-7, at 1454 (2d ed. 1988).

58. *See, e.g.*, *Lyon v. Krol*, 940 F. Supp. 1433, 1437 (S.D. Iowa 1996) (noting that plaintiff's First Amendment right to the free exercise of religion was among those fundamental constitutional claims not addressed by the imminent serious physical injury exception); *see also* Stacey Heather O'Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 VA. L. REV. 1189, 1202-10 (1997) (stating that among the notable constitutional rights retained by prisoners that are not addressed by the physical injury exceptions of the PLRA are the right to be free from racial segregation, the First Amendment right to free exercise of religion, the right to privacy, and the right to be free from non-physical violations of the Eighth Amendment); *cf. Zehner v. Trigg*, 952 F. Supp. 1318 (S.D. Ind. 1997) (holding that state prisoners' exposure to asbestos did not constitute a "physical injury" for purposes of supporting a claim for mental or emotional injury under 42 U.S.C. § 1997e(e) of the PLRA).

to serve a compelling governmental interest.”⁵⁹ In promulgating various provisions of the PLRA, including section 1915(g), Congress asserted that the governmental interest served was the curtailment of frivolous prisoner-initiated suits.⁶⁰ It is questionable, however, whether Congress has satisfied its obligation of *demonstrating* that this interest is compelling.

Former Senator Dole noted that “[a]ccording to enterprise institute scholar Walter Berns, the number of ‘due process and cruel and unusual punishment’ complaints filed by prisoners has grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994.”⁶¹ This information does not, however, demonstrate a compelling governmental interest in deterring frivolous lawsuits filed by *in forma pauperis* claimants. Congress has not shown that the “astronomical” rise in the number of complaints has outpaced the growth in prison populations. Further, Congress arguably would be required to respond to the notion that the number of prisoner-initiated lawsuits has risen as a result of conditions related to prison overcrowding. In this regard, Congress has not shown any alarming rise in the *percentage* of prisoner claims that are dismissed as frivolous. Congress’s failure to address these factors significantly undermines the extent to which it has demonstrated a compelling governmental interest in deterring frivolous prisoner-initiated litigation.

Even assuming, *arguendo*, that Congress’s interest in reducing frivolous prisoner litigation is compelling, the means invoked by section 1915(g) are not narrowly tailored to achieve that end. The three strikes provision violates equal protection principles for two reasons. First, section 1915(g) is underinclusive in that it functions by denying *in forma pauperis* status to prisoners who are deemed frequent filers.⁶² It therefore targets indigent prisoners exclusively. Non-indigent prisoners, who cannot qualify for *in forma pauperis* status, are not similarly deterred.

Further, the extent to which section 1915(g)’s flat fee requirement deters frivolous lawsuits varies according to the prisoner. As one commentator observed:

59. *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

60. *See* 141 CONG. REC. 14,570 (1995).

61. *Id.*

62. *See* 28 U.S.C. § 1915(g) (Supp. III 1997).

Frivolity . . . is a matter of degree. So, too, is the deterrent effect of a modest, flat fee—which almost certainly varies inversely with the wealth and income of the prospective litigant. Thus, common sense advises, the wealthy will be deterred only haphazardly; the functionally indigent will be totally “deterred” . . . ; and the in-between will be deterred to an extent. . . . “Deterrence,” in any acceptable sense of that term, can be depended upon to operate only on that group of citizens to whom, say, fifty dollars will seem neither a prohibitive sum nor, on the other hand, a trifling amount to pay for the privilege of demanding one’s rights.⁶³

Second, section 1915(g) is overinclusive in that it precludes a prisoner from proceeding *in forma pauperis* with any claim, regardless of its merit. Valid lawsuits and frivolous lawsuits alike are effectively struck down by the provision’s sweeping rule. As the three strikes provision is not narrowly tailored, it fails strict scrutiny and is therefore unconstitutional. Indeed, other provisions within the PLRA itself arguably provide sufficient deterrence to indigent prisoners who might otherwise consider bringing meritless lawsuits. Moreover, these provisions do so without affecting prisoners’ ability to file valid lawsuits.

A. *Required Prisoner Fees Under 28 U.S.C. § 1915(b)*

The PLRA amended section 1915(b) of the federal *in forma pauperis* statute to require *all* indigent prisoners to pay the full amount of their court fees, regardless of any previously dismissed claims:

[I]f a prisoner brings a civil action or files an appeal *in forma pauperis*, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of . . .

. . . the average monthly deposits to the prisoner’s account; or . . .

63. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part II*, 1974 DUKE L.J. 527, 559.

... the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal. . . .

... After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account.⁶⁴

Unlike section 1915(g), section 1915(b) will not preclude a suit by an indigent who has absolutely no means to pay any portion of a filing fee.⁶⁵

This provision alone provides the economic disincentive that the PLRA sponsors so desperately wanted, and it does so without disregarding the particular circumstances of an indigent prisoner. The provision is skillfully structured so as not to effectively prohibit *any* meritorious claim from being filed. Finally, the potential concern that those prisoners with absolutely no assets are free to flood the courts with frivolous lawsuits is quieted by the PLRA's screening provision.

B. Judicial Screening Under 28 U.S.C. § 1915A

Section 1915A allows a court to review prisoners' claims before docketing in order to quickly assess their merit.⁶⁶ This mechanism complements section 1915(b), and the other provisions of the *in forma pauperis* statute, by addressing the problem of frivolous prisoner lawsuits without unnecessarily suppressing valid complaints from prisoners.

C. Revocation of Earned Release Credit Under 28 U.S.C. § 1932

Another effective PLRA deterrent of frivolous prisoner litigation is 28 U.S.C. § 1932, which allows a federal court to revoke a prisoner's "good time" credit⁶⁷ if that prisoner brings a claim "filed for a malicious purpose; [or] . . . filed solely to har-

64. 28 U.S.C. § 1915(b)(1)-(2) (Supp. III 1997).

65. See 28 U.S.C. § 1915(b)(4) (Supp. III 1997).

66. See 28 U.S.C. § 1915A(a)-(b) (Supp. III 1997).

67. See 18 U.S.C. § 3624(b) (Supp. III 1997) (explaining that good time credit is credit toward the service of a prisoner's sentence, beyond the time served, of up to fifty-four days, that may be awarded at the end of each year if a prisoner displays exemplary compliance with the institutional disciplinary requirements).

ass the party against which it was filed."⁶⁸ Although not every frequent filer is eligible for good time credit, those who are face this severe sanction as a disincentive to filing unmeritorious claims.

These three provisions of the PLRA provide adequate deterrence to indigent prisoners who may otherwise file frivolous lawsuits. They represent more narrowly tailored legislation than section 1915(g). As such, the provisions serve to reveal the overinclusiveness of the three strikes provision, which categorically denies leave to proceed *in forma pauperis* to a class of indigent prisoners bringing both frivolous and meritorious claims. As a result of this overinclusiveness, section 1915(g) should fail strict scrutiny review.

III. THE TREATMENT OF SECTION 1915(G) IN FEDERAL COURTS

Federal courts addressing the constitutionality of section 1915(g) have consistently declined to strike down the provision. In doing so, these courts have invoked the incorrect standard of review in their analysis. If, as this comment contends, strict scrutiny is the appropriate standard of review for examining section 1915(g), courts would be hard-pressed to uphold the constitutionality of the provision. Few cases, however, have applied strict scrutiny review and declared section 1915(g) unconstitutional.

A. *Lyon v. Krol*

One of the first cases to address the constitutionality of section 1915(g) was *Lyon v. Krol* ("*Lyon I*").⁶⁹ In *Lyon I*, the plaintiff was an inmate who sought to bring suit under 42 U.S.C. § 1983 on the ground that he was "denied participation in Jewish services and other practices of the Jewish faith."⁷⁰ The plaintiff had previously had at least three civil actions dismissed.⁷¹ The suit was initially dismissed by the district

68. 28 U.S.C. § 1932(1)-(2) (Supp. III 1997).

69. 940 F. Supp. 1433 (S.D. Iowa 1996), *appeal dismissed*, 127 F.3d 763 (8th Cir. 1997). The underlying claim in *Lyon I* was filed on May 8, 1996, just days after the enactment of the PLRA on April 26, 1996. *See id.* at 1435.

70. *Id.* at 1435.

71. *See id.* All of the previous actions were dismissed prior to the enactment of the PLRA. *See id.*

court, pursuant to section 1915(g).⁷² In addressing the equal protection challenge to the PLRA, the court initially noted that section 1915(g) “treats th[e] class of indigent inmates differently from the similarly situated class of prisoners with three frivolous dismissals who do *not* seek to proceed [*in forma pauperis*].”⁷³ It then went on to consider whether the legislation burdened a fundamental right and thus warranted examination under strict scrutiny. The court defined the right of access to the courts as “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.”⁷⁴ Notwithstanding the “imminent danger of serious physical injury” exception to section 1915(g), the court recognized that the provision would inevitably suppress various “important constitutional claims.”⁷⁵ The court responded to the argument that prisoners do not have a fundamental right to proceed *in forma pauperis*, and that courts have traditionally had broad discretion in deterring frivolous lawsuits:

The difference between § 1915(g) and the power of federal courts to limit abusive litigation is that a federal court limits abuse in response to the actions of an individual litigant based on particular circumstances. The three-dismissal rule does not take into account the length of incarceration, different periods of incarceration, the number of meritorious actions filed by the inmate, and other pertinent information that might guide a federal court in properly limiting abuse of the court system.⁷⁶

As the court found the statute to impinge upon a fundamental constitutional right, it appropriately applied the strict scrutiny standard.⁷⁷ Finally, the court concluded that section 1915(g) was not “narrowly tailored to achieve a compelling gov-

72. *See id.*

73. *Id.* at 1436.

74. *Id.* at 1437 (quoting *Bounds v. Smith*, 430 U.S. 817, 825 (1977)).

75. *See id.* (“Section 1915(g) does burden the ability of the affected class of inmates to file in federal court constitutional claims *other* than those involving imminent serious physical injury.” (emphasis added)). The court went on to describe the plaintiff’s First Amendment free exercise of religion allegations as “just one example of the important constitutional claims that this class of indigent inmates, under § 1915(g), would be prohibited from or substantially burdened in bringing.” *Id.*

76. *Id.* at 1438.

77. *See id.* (citing *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982)).

ernment interest, and therefore [was] unconstitutional under the equal protection component of the Fifth Amendment."⁷⁸

On appeal by the state in *Lyon v. Krol* ("*Lyon II*"),⁷⁹ the Eighth Circuit held that the plaintiff did not have standing to challenge the constitutionality of the PLRA's "three strikes" provision because he had sufficient funds to pay the filing fee.⁸⁰ Therefore, the court found that "section 1915(g) ha[d] not caused an actual injury to him because he was not without the necessary resources to bring his claim to court."⁸¹ In light of the plaintiff's lack of standing, the court considered itself without jurisdiction to consider the constitutional challenge to the statute.⁸²

The dissent in *Lyon II* criticized the majority's avoidance of the issue, and questioned the majority's reasoning in finding that the plaintiff lacked standing:

The panel's requirement that Lyon must be completely broke to have standing is simply not the law of our circuit, and such a requirement violates the same equal protection principles as 1915(g) itself: if a nonprisoner may challenge a statute under [*in forma pauperis*] status, a prisoner should not have a higher burden (i.e., demonstrate complete destitution) to bring such a challenge. Lyon has clearly demonstrated that section 1915(g) has blocked his access to the courts to bring his religious practices claim: he qualified for [*in forma pauperis*] status as it is determined for nonprisoners; he attempted to bring a pro se action under 42 U.S.C. § 1983; and prior to Lyon's challenge to the provision's constitutionality, the court below dismissed the action pursuant to section 1915(g).⁸³

The majority's creative avoidance of the central constitutional issue in *Lyon II* was, unfortunately, not unusual. The courts in *Wilson v. Yaklich*,⁸⁴ *Rivera v. Allin*,⁸⁵ and *White v. Colorado*⁸⁶

78. *Id.* at 1439.

79. 127 F.3d 763 (8th Cir. 1997).

80. *See id.* at 765.

81. *Id.*

82. *See id.* at 765-66.

83. *Id.* at 766 (Heaney, J., dissenting).

84. 148 F.3d 596 (6th Cir. 1998).

85. 144 F.3d 719 (11th Cir. 1998), *cert. dismissed*, 119 S. Ct. 27 (1998).

86. 157 F.3d 1226 (10th Cir. 1998), *cert. denied*, 119 S. Ct. 1150 (1999).

employed similarly evasive maneuvers in upholding the constitutionality of the three strikes provision.

B. Wilson v. Yaklich

In *Wilson v. Yaklich*,⁸⁷ the Sixth Circuit rejected equal protection and due process challenges to the three strikes provision of the PLRA. In rejecting the equal protection challenges to section 1915(g), the court first reasoned that “[b]ecause neither indigents nor prisoners are a suspect class, . . . such differentiation is permissible as long as even a rational basis for the differing treatment can be shown.”⁸⁸ After holding that indigent prisoners were not a suspect class, because neither indigents nor prisoners have been given such protection by the Supreme Court, the court refused to recognize that the plaintiff prisoner’s fundamental right of access to the courts was infringed upon: “The plaintiff, despite being barred from bringing his . . . claims in federal court as an indigent, still had available to him at the time of the initial filing the opportunity to litigate his federal constitutional causes of action *in forma pauperis* in state court.”⁸⁹

The *Wilson* court’s argument that the availability of a state forum effectively defeated any equal protection challenge to section 1915(g) failed to consider either the ramifications of removal to federal court⁹⁰ or the trend among states to adopt parallel legislation to the PLRA.⁹¹ In the event that an indigent prisoner, otherwise precluded by section 1915(g) from bringing a federal claim *in forma pauperis*, brings an action in state court, the defendant can nevertheless remove the case to

87. 148 F.3d 596 (6th Cir. 1998).

88. *Id.* at 604 (citations omitted).

89. *Id.* at 605.

90. See Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You’re Out of Court—It May Be Effective, but Is It Constitutional?*, 70 TEMP. L. REV. 471, 513–15 (1997). Under 28 U.S.C. § 1441, a defendant has the ability to remove a civil rights question to federal court. If a case is removed to federal court and decided in favor of the defendant, the plaintiff may lose the right to appeal the federal claims *in forma pauperis* under the PLRA. In addition, the plaintiff may be unable to appeal pendant state claims if the district court has exercised jurisdiction over them and then chooses to extinguish them. See *id.*

91. See, e.g., LA. REV. STAT. ANN. § 1187 (West Supp. 1999); 42 PA. CONS. STAT. ANN. § 6602(f) (West Supp. 1999); see also Lukens, *supra* note 90, at 513 & n.206 (1997) (citing legislation in Louisiana and Pennsylvania).

federal court.⁹² Once the indigent prisoner's claim is successfully removed to federal court, the prisoner's right to an appeal is essentially taken away: if the defendant prevails in federal district court, the indigent prisoner's frequent filer status will preclude an appeal *in forma pauperis*. Although the right to an appeal is not constitutionally guaranteed,⁹³ equal protection concerns nevertheless arise when this right is effectively denied to only one class of litigant.⁹⁴ In addressing this issue, the Supreme Court in *Douglas v. California*⁹⁵ found:

When an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure. . . . [T]he discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.⁹⁶

While the *Douglas* court did not address the equal protection and due process shortcomings of a filing fee as applied to indigent prisoners, its reasoning is instructive as it touches upon similar constitutional concerns.

In addition to the equal protection problems with section 1915(g) that are revealed by the potential for removal under 28 U.S.C. § 1441, state legislatures are likely to respond to the inevitable increase in indigent prisoner-initiated litigation in state courts with reformed *in forma pauperis* statutes that mirror the federal scheme. Some states have already passed this type of legislation.⁹⁷ Other states are likely to respond simi-

92. See 28 U.S.C. § 1441 (1998); see also Lukens, *supra* note 90, at 513 n.210 and accompanying text.

93. See Griffin v. Illinois, 351 U.S. 12, 18 (1956).

94. See *id.*

95. 372 U.S. 353 (1963) (invalidating a California rule that required California appellate courts to perform an independent investigation into indigent criminal defendant's claims when the defendant sought the appointment of counsel).

96. *Id.* at 357-58.

97. See *supra* note 91 and accompanying text.

larly to the influx of claims brought by frequent filers who are otherwise precluded from bringing suit *in forma pauperis* in federal court.⁹⁸

Moreover, when a state adopts legislation cutting off an indigent prisoner's access to that state's court system *in forma pauperis*, the federal and state systems work in tandem to effectively bar that prisoner's access to any court. In turn, where access to the courts is sought in order to vindicate a fundamental interest, the three strikes provision of the PLRA must withstand evaluation under the strict scrutiny standard of review.⁹⁹ As discussed in Part II, the application of strict scrutiny review to section 1915(g) significantly reduces the provision's chances of constitutional survival.¹⁰⁰

C. *Rivera v. Allin*

The court in *Rivera v. Allin*¹⁰¹ also upheld the constitutionality of the provision, stating that "[s]ection 1915(g) does not prevent a prisoner with three strikes from filing civil actions; it merely prohibits him from enjoying [*in forma pauperis*] status."¹⁰² The reasoning offered by the *Rivera* court ignores the reality of an indigent prisoner's condition, as well as the notion that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."¹⁰³ If the *kind* of trial a man gets cannot depend on the amount of money he has, *a fortiori*, the ability to file a claim cannot be dependent on that variable.

98. See, e.g., *Camp, supra* note 28, at 781 (proposing state legislation in Nebraska to parallel the PLRA).

99. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-39 (1973).

100. In fact, in rejecting the equal protection challenge to section 1915(g) under rational relation review, the Sixth Circuit itself cast doubt upon the three strikes provision's ability to withstand strict scrutiny: "[E]ven though we might not believe the solution advanced by Congress to be the best possible, or even a prudent, response to the problem presented, the legislation cannot be deemed violative of the Equal Protection Clause . . ." *Wilson v. Yaklich*, 148 F.3d 596, 604 (6th Cir. 1998).

101. 144 F.3d 719 (11th Cir. 1998).

102. *Id.* at 723 (first alteration in original) (quoting *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997)).

103. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

D. *White v. Colorado*

In yet another case addressing section 1915(g) of the PLRA, the Tenth Circuit upheld the constitutionality of the provision on both equal protection and due process grounds. *White v. Colorado*¹⁰⁴ involved a *pro se* petition filed by White and six other inmates alleging, *inter alia*, human rights violations on the part of numerous defendants, including the State of Colorado.¹⁰⁵ The district court in the action granted several motions to dismiss with respect to various named defendants in the complaint.¹⁰⁶ The magistrate judge's recommendation indicated that White was diagnosed with somatoform pain disorder, a psychological illness that causes its victims to exaggerate their pain.¹⁰⁷ As a result of this diagnosis, the magistrate judge found that White's complaint failed to demonstrate any Eighth Amendment violations, and therefore recommended dismissing all of White's claims.¹⁰⁸

The district court ultimately dismissed the entire case against all of the remaining defendants for want of jurisdiction.¹⁰⁹ In response to the dismissals, White filed a motion to proceed on appeal *in forma pauperis*.¹¹⁰ The district court denied White's motion, citing the "three strikes" provision of the PLRA.¹¹¹ White appealed once more, challenging section 1915(g) on equal protection grounds.¹¹²

The Tenth Circuit, speaking through Judge Brorby, upheld the constitutionality of section 1915(g). The court initially noted that "the Supreme Court has never held [that] the Due Process Clause of the Fourteenth Amendment requires that all individuals be guaranteed a right of access to the courts in all circumstances."¹¹³ The court's reliance on *United States v.*

104. 157 F.3d 1226 (10th Cir. 1998).

105. *See id.* at 1227. White specifically alleged that he "was denied life-sustaining medication, i.e. 'nitrostat' for six hours while suffering severe chest/heart pain while . . . at Denver County Jail. At 4:30 AM Sunday morning [he] was beaten by a Denver County Deputy Sheriff's captain and four of his men. . . . After release [he] was provided with no medical care." *Id.* at 1229.

106. *See id.*

107. *See id.* at 1229-30.

108. *See id.* at 1230.

109. *See id.* at 1227-28.

110. *See id.* at 1228.

111. *See id.*

112. *See id.*

113. *Id.* at 1233 (citing *United States v. Kras*, 409 U.S. 434, 450 (1973)).

Kras,¹¹⁴ however, is problematic. The *Kras* decision merely reflected reluctance on the part of the Supreme Court “to extend the principle of *Boddie* to the no-asset bankruptcy proceeding.”¹¹⁵ In contrast, the interest at stake in *White* was freedom from the infliction of “cruel and unusual punishments.”¹¹⁶ In light of the severity of an alleged Eighth Amendment violation, as well as the exclusivity of a judicial proceeding as a means of redress from the standpoint of an indigent prisoner, the precedent of *Boddie*¹¹⁷ and *M.L.B.*¹¹⁸ is far more instructive than that of *Kras*.¹¹⁹

The *White* court was forced to respond to the notion of a prisoner’s constitutional right of access to the courts as recognized in *Bounds v. Smith*¹²⁰ and *Lewis v. Casey*.¹²¹ *Bounds* held

The court goes on to quote *Kras* for the proposition that “[t]he Supreme Court has ‘stopped short of an unlimited rule that an indigent at all times and in all cases has the right to relief without the payment of fees.’” *Id.* (quoting *Kras*, 409 U.S. at 450).

114. 409 U.S. 434 (1973).

115. *Id.* at 450. The appellee in *Kras* was an indigent petitioner in bankruptcy who challenged fees imposed by the Bankruptcy Act as a condition precedent to a discharge. Justice Blackmun, speaking for the Court, held that there is no fundamental right to bankruptcy, and that the fees charged passed rational relation review. *See id.* at 446–48. The Court also pointed out that, unlike the situation of a divorce as in *Boddie*, a judicial bankruptcy proceeding is not the exclusive means of dissolving one’s debts. *See id.* at 446.

116. *See White*, 157 F.3d at 1233. *White* specifically alleged that he was “deprived of life sustaining medication and medical attention/treatment, [was] beaten, and/or otherwise tortured and allowed to suffer great pain, so that [his] health degenerated to an extremely life-threatening degree.” *Id.* at 1231–32 (second alteration in original). *White* claimed a violation of the Eighth Amendment, asserting that his right of access to the courts was “fundamental.” *See id.* at 1233. He contended that section 1915(g) was subject to strict scrutiny rather than the rational relation standard of constitutional review. *See id.* at 1232. As discussed *supra* Part II, the application of strict scrutiny as opposed to rational relation standard of review would certainly be dispositive with respect to the ability of section 1915(g) to withstand equal protection and due process challenges.

117. The “access to the courts” argument in *Boddie* was predicated upon the appellant class’s ability to bring an action for divorce. *See Boddie*, 401 U.S. at 372; *supra* Part I.B (discussing *Boddie*).

118. The “access to the courts” argument in *M.L.B.* was predicated upon the petitioner’s right to appeal a judicial decree terminating her parental rights. *See M.L.B.*, 519 U.S. at 107; *supra* Part I.E (discussing *M.L.B.*).

119. The “access to the courts” argument in *Kras* was predicated upon the petitioner’s right to file for bankruptcy without prepayment of filing fees. *See Kras*, 409 U.S. at 435.

120. 430 U.S. 817 (1977); *see also White*, 157 F.3d at 1233–34 (discussing *Bounds* and its progeny).

121. 518 U.S. 343 (1996); *see also White*, 157 F.3d at 1233 (“[T]he Supreme Court made it plain that a *Bounds* violation requires more than the bald assertion

that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."¹²² The Court in *Lewis* subsequently construed the *Bounds* holding to require prisoners to "demonstrate that the alleged shortcomings in the library or legal assistance program hindered . . . efforts to pursue a legal claim."¹²³

In purporting to apply this precedent, the *White* court maintained that White was required to "*allege* acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."¹²⁴ Despite the allegations in White's complaint that, on their face, appeared to satisfy the standard announced in *Lewis*, the court probed further and addressed the merits of White's claims in order to defeat his "fundamental access to the courts" argument.¹²⁵ After discussing the factual findings of the magistrate judge, the court concluded that "White . . . failed to *state* an injury as required under the *Bounds* line of cases."¹²⁶ The court really only established, however, that White did not *prove* an injury. Moreover, for purposes of evaluating White's challenge to section 1915(g), the court did not address the appropriate injury. Pursuant to *Bounds* and *Lewis*, the actual injury inquiry should focus on whether the prisoner-litigant was prevented from pursuing a claim.¹²⁷ In other words, White should have satisfied the injury requirement by demonstrating that the filing fee mandated by section 1915(g) effectively frustrated the litigation of his Eighth Amendment claims. The specific merits of White's claims should have had no bearing on this determination. In fact, the court explicitly noted that its constitutional inquiry was dis-

of a violation of a basic constitutional right under 42 U.S.C. § 1983 . . ." (citing *Lewis*, 518 U.S. at 348-49); *supra* Part I (reviewing both the *Bounds* and *Lewis* decisions).

122. *Bounds*, 430 U.S. at 828.

123. *Lewis*, 518 U.S. at 351.

124. *White*, 157 F.3d at 1234 (emphasis added).

125. *See id.* The court deferred to the findings of the magistrate judge who, "after thoroughly reviewing Mr. White's medical records, concluded he failed to show that [state authorities] have been deliberately indifferent to his serious medical needs." *Id.* (alteration in original) (internal quotations omitted).

126. *Id.* (emphasis added).

127. *See supra* text accompanying notes 50-51.

tinct from the evaluation of the specific merits of the case.¹²⁸ The court nevertheless addressed the merits of the underlying claim in concluding that White's constitutional right of access to the courts was not violated.¹²⁹

The *White* court also reviewed precedent that directly addressed the constitutionality of section 1915(g). The court cited *Rivera v. Allin*¹³⁰ for the proposition that "proceeding [*in forma pauperis*] in a civil case is a privilege, not a right—fundamental or otherwise."¹³¹ This broad suggestion, however, merely begs the question of whether a fundamental interest is at stake for the claimant seeking *in forma pauperis* status. The court in *Rivera* held that the appellant's complaint, which alleged that the prison doctor disregarded his medical needs and fondled his genitals during an exam, failed to advance any cognizable fundamental interest.¹³² In reaching this conclusion, the *Rivera* court relied upon the Supreme Court's holding in *Estelle v. Gamble*:¹³³ "In order to state a cognizable claim [under the Eighth Amendment], a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."¹³⁴

The use of the language in *Estelle* as support for the premise that White did not state a cause of action under the Eighth Amendment is somewhat misleading. In *Estelle*, the prisoner-respondent Gamble did not allege *deliberate* indifference to his medical condition, but rather *negligent* treatment and diagnosis with respect to his back injury.¹³⁵ The Court explained that "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amend-

128. See *White*, 157 F.3d at 1231 ("If we reach the constitutional question and determine § 1915(g) is constitutional, we need not address the merits of [White's] underlying case.").

129. See *id.* at 1234–35.

130. 144 F.3d 719 (11th Cir. 1998).

131. *White*, 157 F.3d at 1233 (alteration in original) (quoting *Rivera*, 144 F.3d at 724).

132. See *Rivera*, 144 F.3d at 724.

133. 429 U.S. 97 (1976).

134. *Rivera*, 144 F.3d at 724 (quoting *Estelle*, 429 U.S. at 106). The court in *White* quoted the same language from *Estelle* in order to support its conclusion that White did not have a "fundamental" right at stake. See *White*, 157 F.3d at 1233–34.

135. See *Estelle*, 429 U.S. at 107.

ment."¹³⁶ Unlike Gamble, White did allege the "deliberate" withholding of life-sustaining medications and medical treatment.¹³⁷ Moreover, unlike White, Gamble explicitly "disclaimed any objection to the treatment provided for his high blood pressure and his heart problem."¹³⁸ The holding in *Estelle*, therefore, actually lends support to the sufficiency of White's Eighth Amendment allegations.

The *White* court also cited *Carson v. Johnson*¹³⁹ in upholding the constitutionality of the three strikes provision.¹⁴⁰ The prisoner-plaintiff in *Carson* sought reassignment from administrative segregation.¹⁴¹ The court held that the prisoner did not have a fundamental interest in his placement, and was therefore not entitled to a waiver of the fee required to file the claim.¹⁴² In contrast to the underlying claim in *Carson*, the plaintiff in *White* complained of Eighth Amendment violations stemming from, *inter alia*, the prison's alleged withholding of vital medical treatment.¹⁴³ White's interest in escaping "cruel and unusual punishment"¹⁴⁴ cannot be characterized as anything but "fundamental." Nevertheless, the *White* court cited *Carson* as relevant authority for the proposition that indigent prisoners' access to courts, due process rights, and equal protection rights are not infringed upon by section 1915(g).¹⁴⁵ Furthermore, the court's assertion that the imminent danger exception to section 1915(g) protects any conceivable injustice failed to take into account those "fundamental" interests that do not involve the "imminent danger of serious physical injury."¹⁴⁶

As the *White* court's opinion failed to recognize any fundamental interest at issue, it offered no analysis regarding the three strikes provision's ability to withstand strict scrutiny. In order for a statute to stand up to strict scrutiny, the legislature must select means "precisely tailored to serve a compelling

136. *Id.* at 106.

137. *See White*, 157 F.3d at 1228.

138. *Estelle*, 429 U.S. at 107.

139. 112 F.3d 818 (5th Cir. 1997).

140. *See White*, 157 F.3d at 1233.

141. *See Carson*, 112 F.3d at 821.

142. *See id.*

143. *See White*, 157 F.3d at 1228.

144. *See U.S. CONST.* amend. VIII.

145. *See White*, 157 F.3d at 1233.

146. 28 U.S.C. § 1915(g) (Supp. III 1997).

governmental interest."¹⁴⁷ In this regard, "[t]he government might show that curtailing the number of claims flooding the courts is a compelling government interest. Even so, it cannot show that the classification of potentially frivolous claims into 'prisoner' and 'nonprisoner' claims is necessary or even effective in addressing the problem."¹⁴⁸ As the sweeping means of the three strikes provision probably would not survive strict scrutiny, courts must avoid treating the interests being litigated by prisoners as fundamental in order to uphold the constitutionality of the provision. The *White* opinion provides a poignant illustration of this exercise.

In addition to the *White* court, other courts have indeed been creative in avoiding the outcome-determinative recognition of a fundamental right of access to the courts.¹⁴⁹ In failing to address the underlying constitutional issue in all of these cases, the courts are merely delaying the inevitable conclusion that section 1915(g) does, in fact, burden—if not eliminate under certain circumstances—indigent prisoners' fundamental right of access to the courts.¹⁵⁰

E. *Ayers v. Norris*

Finally, in one of the most recent cases addressing the constitutionality of section 1915(g), the court in *Ayers v. Norris*¹⁵¹ declared the provision unconstitutional on equal protection grounds. In *Ayers*, the prisoner-plaintiff Mr. Ayers's complaint sought declaratory and injunctive relief for alleged due process

147. *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

148. *Lyon v. Krol*, 127 F.3d 763, 767 (8th Cir. 1997) (Heaney, C.J., dissenting). The dissent also pointed out the government's failure to demonstrate any lack of correlation between the increased number of lawsuits brought by prisoners and the increased number of prisoners. *See id.* at 766–67. Furthermore, "[a] list of reasons for any increase in the number of complaints over a simple increase in the number of prisoners would likely include the high incidence of prison overcrowding, a lack of carefully trained correctional officers, and inadequate and frequently unfair internal grievance procedures." *Id.* at 766 n.6.

149. *See supra* Part III.A (discussing *Lyon I* and *Lyon II*); *supra* text accompanying notes 126–29 (discussing the *White* court's unjustified leap toward the conclusion that *White's* access to the courts was not burdened by section 1915(g) because his claim was rightfully dismissed on the merits).

150. In situations where a defendant removes a state-initiated action to federal court, or in states that have adopted legislation that tracks the PLRA, the indigent prisoner's right of access to the courts is not simply burdened, but eliminated. *See supra* notes 90–92 and accompanying text.

151. 43 F. Supp. 2d 1039 (E.D. Ark. 1999).

violations related to his parole proceedings.¹⁵² In connection with these claims, Ayers challenged the constitutionality of section 1915(g), which would have prevented him from proceeding *in forma pauperis*.¹⁵³ After concluding that Ayers had standing to challenge section 1915(g), the court addressed his contention that the provision violated his equal protection rights.¹⁵⁴

In reviewing the Supreme Court's "access to the courts" jurisprudence, the *Ayers* court noted that any challenge to section 1915(g) would be subject to the *Bounds* "actual injury" requirement.¹⁵⁵ In other words, Ayers was required to "show that section 1915(g) ha[d] actually hindered his efforts to pursue a legal claim."¹⁵⁶ In this respect, the court concluded that Ayers's challenge to the three strikes provision successfully asserted an injury as mandated by *Bounds*:

If the Court were to enforce section 1915(g)'s three strikes provision, Mr. Ayers would be denied *in forma pauperis* status in the instant action. If the Court were to deny Mr. Ayers *in forma pauperis* status, it would effectively bar Mr. Ayers from pursuing his procedural due process claim under section 1983. Mr. Ayers does not presently have the \$150 necessary to prepay the entire filing fee. He is not employed, he has no alternative means of income, and he has some eleven years remaining on his sentence.¹⁵⁷

It is interesting to compare the *Ayers* court's *Bounds* injury analysis to that of the *White* court. The *Ayers* court's inquiry focused on whether section 1915(g) affected the claimant's access to the courts. In doing so, the court appropriately treated the *Bounds* injury requirement as one of standing.¹⁵⁸ In contrast, the *White* court evaluated the merits of the specific claims contained in the prisoner's complaint, rather than the

152. See *id.* at 1044.

153. See *id.*

154. See *id.*

155. See *id.* at 1047.

156. *Id.*

157. *Id.* at 1048.

158. In fact, the court cited *Lewis v. Casey*, 518 U.S. 343 (1996), in support of that proposition by parenthetically indicating that *Lewis* "likened the 'actual injury' requirement to constitutional standing." *Ayers*, 43 F. Supp. 2d at 1047 (citing *Lewis*, 518 U.S. at 349-50).

three strikes provision's effect on his ability to litigate those claims.¹⁵⁹

The *Ayers* court differed from the *White* court, and from the vast majority of courts that have addressed the constitutionality of section 1915(g), in recognizing that the denial of *in forma pauperis* status implicated a fundamental right. *Ayers*'s complaint alleged a denial of due process in connection with the procedures governing his parole proceedings.¹⁶⁰ The court accepted the sufficiency of these allegations for purposes of challenging section 1915(g), noting that "[p]rocedural due process is a fundamental right."¹⁶¹ In response to the notion that proceeding *in forma pauperis* is not a constitutional right, the court explained that "[a]lthough *in forma pauperis* status is not a right, it is a means for ensuring that an indigent prisoner is guaranteed his fundamental right of court access, and . . . it may be constitutionally required."¹⁶²

The court concluded that a fundamental right was at stake—*Ayers*'s right of court access to vindicate his alleged denial of procedural due process—and thus, it evaluated section 1915(g) under strict scrutiny analysis.¹⁶³ In doing so, it aligned itself with the dissenting opinion of Judge Heaney in *Lyon II*, as well as the district court opinion in *Lyon I*, both of which had declared section 1915(g) unconstitutional.¹⁶⁴ The *Ayers* court's holding declared section 1915(g) unconstitutional under the equal protection component of the Fifth Amendment's Due Process Clause, finding the provision simultaneously too broad and too narrow:

If an indigent prisoner files three actions using *in forma pauperis* status and all three are dismissed as frivolous, then his fourth *in forma pauperis* action is barred without regard to the merits of his suit, unless he is under imminent danger of serious physical injury. Section 1915(g) makes no provision for the merits of an indigent prisoner's filings; it

159. See *supra* notes 121–23 and accompanying text.

160. See *Ayers*, 43 F. Supp. 2d at 1048.

161. *Id.*

162. *Id.* at 1050.

163. See *id.*

164. See *id.* at 1050–51; see also *supra* Part III.A (discussing *Lyon I* and *Lyon II*).

does not even grant courts the discretion to hear claims that are clearly meritorious.¹⁶⁵

The *Ayers* court's analysis of section 1915(g) was sound. It was cognizant of the relevant Supreme Court precedent, and applied it in an appropriate and straightforward manner. Unfortunately, *Ayers*, like *Lyon I*, represents the minority position with respect to the constitutionality of section 1915(g).

CONCLUSION

Without providing for any inquiry into the merits of a specific claim, the PLRA's three strikes provision mandates the dismissal of several categories of prisoner claims touching fundamental constitutional rights. Notwithstanding the provision's exception for claims alleging imminent danger of serious physical injury, prisoners under the purview of section 1915(g) are prevented from litigating, *inter alia*, their right to the free exercise of religion,¹⁶⁶ and Eighth Amendment violations not rendering the prisoner in danger of physical harm at the time of filing the claim or appeal.¹⁶⁷

Supreme Court precedent has firmly established a right of access to the courts where a fundamental right is at stake.¹⁶⁸ As these constitutionally protected rights are, therefore, substantially burdened, section 1915(g) should be subject to strict scrutiny review by the courts.¹⁶⁹

The three strikes provision constitutes a sweeping means employed by Congress to achieve the "compelling" government interest of deterring frivolous prisoner litigation. One need not look beyond the PLRA itself in order to find examples of more narrowly tailored means for effecting this purpose. Indeed, the PLRA's payment plan provision,¹⁷⁰ judicial screening provi-

165. *Ayers*, 43 F. Supp. 2d at 1051.

166. See U.S. CONST. amend. I.

167. See U.S. CONST. amend. VIII; see also *supra* notes 8-9 and accompanying text (describing the narrow construction of the "imminent danger of serious physical injury" exception to include only those situations in which a prisoner is *still* in imminent danger at the time the suit goes to trial or is on appeal).

168. See *supra* Part I (reviewing the Supreme Court's "access to the courts" jurisprudence as developed by *Griffin*, *Boddie*, *Bounds*, *Lewis*, and *M.L.B.*).

169. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-38 (1973).

170. See 28 U.S.C. § 1915(b)(1)-(4) (Supp. III 1997); *supra* Part II.A. This

sion,¹⁷¹ and revocation of earned release credit provision¹⁷² all serve to adequately deter frivolous prisoner litigation without sacrificing all inquiry into the merits of specific claims by individual prisoners. These effective deterrents expose the overinclusiveness of the three strikes provision, which prohibits *all* members of its targeted class of indigent prisoners from bringing suit *in forma pauperis*, regardless of the individual merits of a claim. Further, the provision is underinclusive as it only affects indigent prisoners who have had previous claims dismissed. Non-indigent prisoners are not similarly deterred. In light of these shortcomings, section 1915(g) fails to pass constitutional muster under strict scrutiny analysis, and should be struck down as violating the equal protection component of the Fifth Amendment's Due Process Clause.

Due to reluctance on the part of the federal circuit courts to invalidate this popular legislation, *Lyon I* and *Ayers* remain the only cases that squarely address the equal protection issues presented by section 1915(g), appropriately apply strict scrutiny to the legislation, and justly declare it unconstitutional. Until other courts follow suit, indigent prisoners subject to the three strikes provision will continue to be denied meaningful access to the courts.

payment plan provision requires *all* indigent prisoners to make partial payments of their filing fees in proportion to their prison accounts. The provision does not, however, preclude prisoners with no assets from bringing a claim.

171. See 28 U.S.C. § 1915A (Supp. III 1997); *supra* Part II.B. The judicial screening provision allows courts to review the merits of prisoner claims before docketing.

172. See 28 U.S.C. § 1932 (Supp. III 1997); *supra* Part II.C. This provision allows courts to revoke earned good time credit of prisoners who file malicious or harassing claims.