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The Putative Problem of Pestersome Paupers: A Critique of the Supreme Court's Increasing Exercise of Its Power to Bar the Courthouse Doors Against *In Forma Pauperis* Petitioners

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> I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.[1]

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a)

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803) (quoting the judicial oath).

is paid and the petition is submitted in compliance with Rule 33.1.[2] (citation omitted)

Introduction

The above disposition—what might well be termed a "*Martin* directive" to the clerk—appears formulaically and with regularity in the Supreme Court's list of orders.[3] One might wonder why, given the seemingly straightforward alternative of the Court's simply denying the petition for certiorari without further elaboration, as is its prerogative.[4] Instead, the Supreme Court has increasingly adopted the practice of categorically and prospectively barring its more pestersome petitioners from proceeding *in forma pauperis*—that is, without paying a filing fee.[5] At a gestalt level, the optics of closing the courtroom doors to those who cannot afford to pay are not particularly seemly.[6] Nonetheless, the Court has persevered in and expanded this practice, to the point where such two-sentence directives interdicting the indigent are now included by rote in the Court's order lists.[7] In the beginning, however, the Court grappled thoughtfully with the wisdom of this practice.[8] A quarter century after the Court's final word to date, the topic is ripe for reexamination.

This Article chronicles the emergence and evolution of *Martin* directives in a series of cases featuring strident and occasionally fiery dissents, and revisits the question of whether the Court's present trajectory effectively balances general principles of access to relief with judicial efficacy. In Part I, this Article introduces the underpinnings of the American imperative of access to the courthouse, describing the statutory measures and constitutional prescriptions that animate the ideals of the Revolution and Framers of the Constitution. Part II turns to the responses of lower courts to

2. As this Article explains, this identical verbiage (or very similar, for petitioners seeking writs other than certiorari) could be cited to many hundreds of dispositions; amongst the first were Baba v. Japan Travel Bureau, 528 U.S. 1016 (1999) and *In re* Reidt, 528 U.S. 1018 (1999). *See also* Christopher E. Smith, *Justice John Paul Stevens and Prisoners' Rights*, 17 TEMP. POL. & CIV. RTS. L. REV. 83, 102–03 (2007).

3. *See* Martin v. D.C. Ct. App., 506 U.S. 1 (1992) (*per curiam*); *infra* Part IV.

4. *See* Singleton v. C.I.R., 439 U.S. 940, 942 (1978) (Stevens, J., respecting denial of certiorari); Brown v. Allen, 344 U.S. 443, 491–97 (1953) (Frankfurter, J., dissenting); Maryland v. Baltimore Radio Show, 338 U.S. 912, 917–19 (1950) (Frankfurter, J., respecting denial of certiorari).

5. *See infra* Part IV.

6. *See In re* Sindram, 498 U.S. 177, 182 (1991) (Marshall, J., dissenting) (calling the practice "unseemly").

7. *See infra* Part III.

8. *See infra* Part IV.

litigants who importune the generous admittance of the judicial system, and the constitutionally suspect "extreme remedy" of proscribing prolific petitioners entirely. The heart of the Article commences in Part III, which recounts in detail the origins of, debate over, and ultimate institutionalization of *Martin* directives effecting a similar remedy in the Supreme Court, leading to the current legal regime, which is reviewed substantively and statistically in Part IV. Part V then undertakes the reexamination of these holdings that is so ripe, reweighing the arguments for and against in light of reason and experience over the last twenty-five years.

Ultimately, the Article concludes that ensuring both the appearance and reality of evenhanded treatment of rich and poor alike outweighs other considerations, and thus that *Martin* directives are ill-advised at best. This conclusion is of course contrary to the resolution reached by the Supreme Court in *Martin* and its predecessor cases.[9] It is noteworthy, however, that *Martin* has no progeny substantively addressing its continuing cogency: this is presumably because a litigant seeking to challenge a *Martin* directive would be barred by the directive itself from filing any such challenge.[10] Besides illustrating the presumably unintended consequences of *Martin* directives, that paradox also commends the subject to legal scholarship, for if scholars do not engage with *Martin* then no one will.[11] Yet academia has afforded scant attention to *Martin* directives—and no article has appeared since a student comment by Cristina Lane some fifteen years ago.[12] Given *Martin*'s continuing entrenchment in that time, it would become the Court to revisit the wisdom of this catch-22 to ensure at least that the Court itself still believes its application of *Martin* to be good law.[13]

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9. *See* cases cited *infra* note 298.

10. *See* Martin v. D.C. Ct. App., 506 U.S. 1 (1992) (*per curiam*).

11. *Cf.* Cristina Lane, Comment, *Pay Up or Shut Up: The Supreme Court's Prospective Denial of In Forma Pauperis Petitions*, 98 NW. U. L. REV. 335, 365–66 (2003) (noting that if the Court does not *sua sponte* change direction, only Congress has the ability to supersede the practice).

12. *See* Lane, *supra* note 11; *see also* Stephen L. Wasby, Note, *A Follow-up on Judicial Responses to One-person "Litigation Explosions" (or Can Frequent Filers Be Made to Fly Away?)*, 18 JUSTICE SYS. J. 94 (1995) [hereinafter Wasby 1995] (reviewing the Supreme Court and lower court cases prior to the advent of "*Martin* directives"); Stephen J. Wasby, Note, *Judicial Responses to One-Person "Litigation Explosions,"* 14 JUSTICE SYS. J. 113 (1990) [hereinafter Wasby 1990] (same). By no means is reproach intended to the quality of these works: they are excellent treatments of the issues at stake, and this Article refers to them often. Nonetheless, the Court's increasing reliance on "*Martin* directives" has only become apparent in the intervening fifteen years. *See infra* Part IV.

13. *See* Attwood v. Singletary, 516 U.S. 297, 298 (1996) (Stevens, J., dissenting) (citations omitted) (quoting Martin v. D.C. Ct. App., 506 U.S. 1, 4 (1992) (Stevens, J., dissenting)), quoted *infra* note 696.

> There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the

I. The American Imperative of Access to the Courthouse

The abrogation by the government of King George III of the nascent American people's right to trial by jury was one of the "injuries and usurpations" enumerated in the Declaration of Independence.[14] The revolutionaries reckoned that the British monarchy had systematically obstructed and corrupted the judicial system and its common law in service of "absolute Tyranny."[15] Thus in formulating their own basic law, the framers of the Constitution guaranteed the right to trial by jury in criminal matters,[16] and those of the Bill of Rights clarified that the right inhered in both criminal and civil cases.[17] At the dawn of the twentieth century, the Supreme Court branded the right of access to the courts as the bulwark against Hobbesian anarchy and fundamental to the commonwealth itself: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."[18] Nor is this right formalistic or

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> process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane, he had to fly them. If he flew them, he was crazy and didn't have to; but if he didn't want to, he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle. "That's some catch, that Catch-22," he observed. "It's the best there is," Doc Daneeka agreed.

Cf. JOSEPH HELLER, CATCH-22 at 46 (1961)

> 14. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. . . . He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation: . . . For depriving us in many cases, of the benefit of Trial by Jury.

THE DECLARATION OF INDEPENDENCE paras. 2, 15, 20 (U.S. 1776).

15. *Id.* at paras. 2, 10, 11, 22 ("He has obstructed the Administration of Justice by refusing his Assent to Laws for establishing Judiciary Powers. He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries. . . . For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies."); *see also* Daniel Jacob Hemel & Eric A. Posner, *Presidential Obstruction of Justice* (July 18, 2017). 106 CALIF. L. REV. (forthcoming 2018), https://ssrn.com/abstract=3004876 (discussing British obstruction of American courts).

16. U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . .").

17. U.S. CONST. amends. XI, XII.

18. Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907); *accord* César Cuauhtémoc García Hernández, Op-Ed., *Keep ICE Arrests Out of Courts*, N.Y. TIMES, Nov. 27,

nominal: American jurisprudence has long sought—indeed, demanded—that all subject to its jurisdiction enjoy a meaningful opportunity to obtain effective relief in its courts.[19]

A. Of Princes and Paupers

The objective of universal access cannot be realized when fees are required for filings.[20] Inevitably, the more impecunious of society will lack the means to meet such fees; this may be literally true for the truly destitute, or prudentially so for those with some income but inadequate means to encompass court fees in addition the bare necessities of life.[21] Absent some accommodation by the judicial system,[22] the natural outcome would then be to bifurcate the body politic into moieties by their material wealth:[23] Princes

2017, at A23 (quoting *Chambers*); *see* Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070–71 (1985); Boddie v. Connecticut, 401 U.S. 371, 374–377 (1971); *cf.* THOMAS HOBBES, LEVIATHAN ch. 13 (1651) ("Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man.").

19. *See, e.g.*, *Talamini*, 470 U.S. at 1070–71; Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 335 (1985); Bill Johnson's Rest., Inc. v. NLRB, 461 U.S. 731, 741 (1983); Bounds v. Smith, 430 U.S. 817 (1977).

20. *See* Robert S. Catz & Thad M. Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 RUTGERS L. REV. 655, 685 (1978) ("The principle of equality before the law requires the courts to afford everyone an opportunity to be heard. Yet frequently the meritorious claims of indigents are neither fully adjudicated nor vindicated, due to the costs and expenses of litigation. Only by eliminating expensive and unnecessary barriers to litigation can indigents be assured justice."); *e.g.*, Campbell v. Chicago & N.W. Ry., 23 Wis. 490, 490-91 (1868) (dismissing for lack of financial ability to lodge security).

21. We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty "pay or give security for the costs . . . and still be able to provide" himself and dependents "with the necessities of life." To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution. We think a construction of the statute achieving such consequences is an inadmissible one.

See Adkins v. E.I. Dupont de Nemours & Co., 335 U.S. 331, 339–40 (1948)

22. *Cf.* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I,* 1973 DUKE L.J. 1153, 1166 (1973) ("But judicial relief from equipage costs must, most clearly for civil plaintiffs but as well for civil defendants, take the 'affirmative' form of requiring the state to undertake some combination of subsidizing the indigent's litigation costs and substantially restructuring its judicial system.").

23. *See* Ben C. Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1270 (1966) ("In short, this bill presents the question whether this Government, having established courts

who enjoy access to the legal system at their own initiative, and paupers whose only encounter with the courts will be when they are haled in by the government or their better-heeled compatriots.[24] Although much wealth-based inequality has been accepted throughout American history—indeed, early courts expressed moral disapprobation of indigents[25]—public policy has rightly recoiled from so stark a reification of the prerogatives of affluence.[26] The Supreme Court has averred that the government may not afford the affluent access categorically unavailable to the indigent by means of fees or assessments,[27] describing this "'flat prohibition' of 'bolted doors'" to the courthouse as being "securely established."[28]

The framework of the *in forma pauperis* system, codified at 28 U.S.C. § 1915, serves as the backbone of the federal government's accommodation of this dilemma.[29] Yet despite the centrality of the courts to American values, Congress did not act to provide for indigent access until 1892,[30] playing catch-up to the many states that had already provided the impoverished with access to state courts.[31] Fittingly, the House of Representatives invoked lofty principles in its debate on the new law: "Will the Government allow its courts to be practically closed to its own citizens, who are conceded to have valid and just rights, because they happen to be

to do justice to litigants, will admit the wealthy and deny the poor entrance to them . . . .") (quoting H.R. REP. NO. 1079, 52d Cong., 1st Sess. 1 (1892)).

24. Duniway, *supra* note 23; *see also* Michelman, *supra* note 22, at 1163. One is reminded of an old quip about Dublin: "[T]he River Liffey . . . historically has divided the wealthy, cultivated south side of the town from the poorer, cruder north side. While there's plenty of culture above the river, even today 'the north' is considered rougher and less safe. Dubliners joke that north-side residents are known as 'the accused,' while residents on the south side are addressed as 'your honor.'" RICK STEVE & PAT O'CONNOR, RICK STEVE'S SNAPSHOT DUBLIN 14–15 (2014).

25. *See infra* notes 596–601 and accompanying text.

26. *See* M.L.B. v. S.L.J., 519 U.S. 102, 110–12 (1996); *Adkins*, 335 U.S. at 338–40; Duniway, *supra* note 23, at 1270–72.

27. *See, e.g.*, *M.L.B.*, 519 U.S. at 110–12; Ross v. Moffitt, 417 U. S. 600, 607 (1974); Griffin v. Illinois, 351 U.S. 12, 16–20 (1956).

28. *M.L.B.*, 519 U.S. at 110–112.

29. *See In re* Oliver, 682 F.2d 443, 445 (3d Cir. 1982) ("[T]he 'In Forma Pauperis' statute, was enacted specifically to provide poor persons with equal access to the federal courts."); *see generally* Stephen F. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute–Equality and Frivolity*, 54 FORDHAM L. REV. 413 (1985); Kenneth R. Levine, Comment, *In Forma Pauperis Litigants: Witness Fees and Expenses in Civil Actions*, 53 FORDHAM L. REV. 1461 (1984); Catz & Guyer, *supra* note 20; Duniway, *supra* note 23.

30. Act of July 20, 1892, ch. 209, 27 Stat. 252; *see* Feldman, *supra* note 29, at 413; Catz & Guyer, *supra* note 20, at 657.

31. *See* Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa, 490 U.S. 296, 314–15 (1989) (Stevens, J., dissenting) (also quoting H.R. REP. NO. 1079, 52d Cong., 1st Sess., 1–2 (1892)).

without the money to advance pay to the tribunals of justice?"[32] Yet it took some time for Congress to sort out the details: The *in forma pauperis* system was revised repeatedly, in 1910, 1922, 1949, 1951, and 1959, to allow for incrementally greater access to the courts, first expanding the right of access to defendants and criminal actions, then waiving appellate fees, then the costs of printing the record for appeal, and finally allowing any indigent person (not merely citizens) the benefit of the system.[33] Until recently,[34] the legislative history of the modern statute thus reflects its expansion to allow ever-greater participation in the judicial system.[35]

As presently framed, the statute's mandate is both expansive and straightforward:

> [A]ny court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.[36]

The statute goes on to provide that once a suit is so authorized, the officers of the court will serve the indigent litigant's process and "perform all duties in such cases,"[37] and that a court may direct the United States to pay the costs of any required appellate record,[38] thus accounting for additional basic costs of participation in the legal system not strictly characterizable as court fees or security.[39]

Taken literally, the statutory language is permissive rather than obligatory, affording courts discretion to waive judicial costs and fees

32. H.R. REP. NO. 1079, 52d Cong., 1st Sess. 2 (1892); *see* Feldman, *supra* note 29, at 413–14 n.5 (quoting the House report).

33. *See* Catz & Guyer, *supra* note 20, at 657–59 (discussing the legislative evolution of the *in forma pauperis* system); Duniway, *supra* note 23, at 1272–76 (same).

34. *See infra* Parts I-B & II-A (describing tightened provisions introduced by the Prisoner Litigation Reform Act).

35. *See* Catz & Guyer, *supra* note 20, at 657 (attributing the succession of loosening amendments to combatting restrictive interpretations of the 1892 Act's scope).

36. 28 U.S.C. § 1915(a) (1996).

37. *Id.* § 1915(d).

38. *Id.* § 1915(c).

39. *See* Catz & Guyer, *supra* note 20, at 659–61.

according to their best judgment.[40] Yet interpreting New York's equally permissive *in forma pauperis* law only two years after the passage of its federal counterpart, the state court of common pleas reasoned:

> Is it discretionary with the court to accord or to refuse a plaintiff the liberty of suing as a poor person when he conforms to the prescribed conditions? True, the language of the Code is that "the court may admit him to prosecute as a poor person;" but it is the settled rule of construction that when, by permissive words, power is conferred on an officer for the benefit of the public or third persons, "may" means "must," and power is the equivalent of duty.[41]

This is consistent with the role of § 1915 as a remedial statute, passed "for the benefit of the public."[42] Moreover, the state court's views are instructive because the federal statute was expressly intended "to give federal courts the same authority to allow *in forma pauperis* actions that the courts in the most progressive States exercised."[43] This formulation casts *in forma pauperis* status as an entitlement or right rather than a discretionary privilege.[44] Yet federal judges have proven notably reluctant to adopt this reading.[45] The Fifth Circuit in 1935 described it as a "statute of grace," even whilst admitting somewhat begrudgingly that it "extends to those embraced in it, but only to those, the privilege of prosecuting, without paying or securing the costs, appeals which are substantially meritorious, and which, because of the appellant's poverty, could not be prosecuted if bond or

40. *See* E. Elizabeth Summers, *Proceeding in Forma Pauperis in Federal Court: Can Corporations Be Poor "Persons"?*, 62 CALIF. L. REV. 219, 225 (1974); *see also* Feldman, *supra* note 29, at 424 ("Section 1915(a) states that a court 'may,' not 'shall,' authorize an applicant to proceed in forma pauperis if he or she is financially eligible.").

41. Shapiro v. Burns, 27 N.Y.S. 980 (Com. Pl. 1894).

42. *Id.*; *see* Catz & Guyer, *supra* note 20, at 663 ("Moreover, the federal courts recognized very early that Congress intended the first federal in forma pauperis statute as a remedial measure. Given its remedial purpose, section 1915 should be liberally construed, according to the ancient and fundamental rule of statutory construction.").

43. Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa, 490 U.S. 296, 314–15 (1989) (Stevens, J., dissenting).

44. *See generally* Catz & Guyer, *supra* note 20, at 662–63 (Part III: "The Legal Nature of In Forma Pauperis: 'Right versus Privilege' Distinction").

45. *See id.* at 662 ("Many courts have justified denial of leave to proceed in forma pauperis by characterizing it as a privilege rather than a right.") (citing cases); Duniway, *supra* note 23, at 1277–80 ("[T]he accepted doctrine [is] that the litigant does not have a right to proceed *in forma pauperis*, but only a privilege to do so.").

security were required."[46] Other appellate panels have expressed similar views that *in forma pauperis* status is "not a right but a privilege the granting of which is within the discretion of the court to which the application is made" in affirming denials of *in forma pauperis* applications.[47] Like the Fifth Circuit, however, these cases recite the privilege-not-right rubric in dismissing based on the applicant's unsuitability under the statute itself, not in arbitrarily rejecting a qualified applicant.[48]

The proper perspective, then, is that the privilege-not-right language used by the lower courts is more semantic than substantive.[49] In any event, the Supreme Court had discouraged such grudgingness anent *in forma pauperis* status in 1948 with *Adkins v. E.I. Dupont de Nemours & Co*.[50] Whilst affording a "limited judicial discretion in the grant or denial of the right" to preclude wholly meritless filings,[51] the Court repeatedly described the statute as affording a right to the litigant that could not be gainsaid if the statute was complied with.[52] Some commentators have described *Adkins* as more ambivalent,[53] and the Court's use of the word "right" hardly controls, but its holding that § 1915 vests in the indigent an affirmative entitlement is

46. Boggan v. Provident Life & Ace. Ins. Co., 79 F.2d 721, 723 (5th Cir. 1935) (citations omitted).

47. *In re* Pierce, 246 F.2d 902, 903 (9th Cir. 1957); *accord, e.g.*, Gomez v. United States, 245 F.2d 346, 347 (5th Cir. 1957) ("Leave to proceed in forma pauperis under 28 U.S.C. § 1915 is a privilege, not a right."); Parsell v. United States, 218 F.2d 232, 235 (5th Cir. 1955) ("An appeal in forma pauperis is a privilege and not a right. Refusing to grant one the right thus to appeal does not offend the requirements of due process."); Higgins v. Steele, 195 F.2d 366, 367–68 (8th Cir. 1952) ("Leave to proceed in forma pauperis under 28 U.S.C.A. § 1915 is a privilege, not a right. An application for leave to proceed in forma pauperis is addressed to the sound discretion of the court . . . .") (citations omitted); Clough v. Hunter, 191 F.2d 516, 518 (10th Cir. 1951) ("Assuming, as appellant contends, that he was denied the right in the sentencing court to appeal in forma pauperis, that did not make the remedy under Section 2255 inadequate. An appeal in forma pauperis is a privilege and not a right. Refusing to grant one the right thus to appeal does not offend the requirements of due process.").

48. *See* cases cited *supra* notes 46-47 and accompanying text.

49. *See* Catz & Guyer, *supra* note 20, at 662–63.

50. Adkins v. E.I. Dupont de Nemours & Co., 335 U.S. 331 (1948); *see* Duniway, *supra* note 23, at 1280 (arguing same).

51. *Adkins*, 335 U.S. at 337.

52. *Id.* at 340 ("We do not think that this petitioner can be denied a right of appeal under the statute . . . ."; "This case illustrates that such a restrictive interpretation of this statute might wholly deprive one of several litigants of a right of appeal, even though he had a meritorious case and even though his poverty made it impossible for him to pay or give security for costs."); *id.* at 343 ("Section 3 of the statute specifically states that litigants who make affidavits of poverty shall be entitled to the same court processes, have the same right to the attendance of witnesses, and the same remedies as are provided by law in other cases.").

53. *E.g.*, Duniway, *supra* note 23, at 1282.

unmistakable.[54] As the Fifth Circuit conceded along with its sister circuits, indigent litigants who fall within the statute are indeed entitled to its forgiveness of fees.[55] Contrarily, as will be discussed below in Part II, *in forma pauperis* petitioners may (indeed must) be statutorily barred from proceeding under § 1915 should their plea of poverty be false or their claims be patently baseless, but they cannot be barred based solely on the caprice of the court.[56] What the privilege-not-right terminology forecloses is for courts to extrastatutorily permit indigent litigants to *proceed* when they *violate* the law's minimal requirements.[57]

This approach avoids the constitutional problems that would occasioned by taking a wholly discretionary view.[58] Time and time again, the Supreme Court has made clear that meaningful access to the courts is indeed a right of broad constitutional dimension, drawing from numerous clauses.[59] In the early case of *Chambers v. Baltimore & Ohio R. Co.*, the Court held that states could not discriminate against citizens of other states in access to their courts, relying on the Article IV Privileges and Immunities Clause.[60] Several decisions stand for the principle that "the right of access to the courts is an aspect of the First Amendment right to petition the

54. *See* Catz & Guyer, *supra* note 20, at 662 n.40.

55. *See* Boggan v. Provident Life & Ace. Ins. Co., 79 F.2d 721, 723 (5th Cir. 1935).

56. *See infra* Section II-A.

57. *See* Duniway, *supra* note 23, at 1279 ("Despite some pre-1892 cases which indicated a judicial power to permit *in forma pauperis* proceedings, it soon became established dogma that such proceedings are purely statutory and that the statute defines the limits of the benefits conferred. Thus the courts deprived themselves of the opportunity to remedy any deficiencies in the statute through case-by-case precedent."); *see also infra* Part II-A (discussing framework for assessing requirements).

58. *Compare* Burns v. Ohio, 360 U.S. 252, 257 (1959) (indigent prisoners must be forgiven docketing fees in appeals and habeas), *and* Smith v. Bennett, 365 U.S. 708 (1961), *with* Wolff v. McDonnell, 418 U.S. 539, 576 (1974) (finding *habeas* indistinguishable for right of access purposes from other constitutional claims); *see also* Jody L. Sturtz, *A Prisoner's Privilege to File In Forma Pauperis Proceedings: May It Be Numerically Restricted?,* 1995 DET. C.L. REV. 1349, 1351 (1995) ("Since a vast majority of inmates are indigent, the constitutional right to access would be meaningless without the In Forma Pauperis Statute. Without these provisions, financial obstacles would likely prevent a prisoner from filing suit. This monetary preclusion would raise critical constitutional issues. An inmate's fundamental constitutional right is closely connected with the Federal In Forma Pauperis Statute.").

59. *See, e.g.*, Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907) (Article IV Privileges and Immunities Clause); Bill Johnson's Rest., Inc. v. NLRB, 461 U.S. 731, 741 (1983) (First Amendment Petition Clause); Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 335 (1985) (Fifth Amendment Due Process Clause); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (Fourteenth Amendment Equal Protection Clause); Wolff v. McDonnell, 418 U.S. 539, 576 (1974) (Fourteenth Amendment Due Process Clause); Boddie v. Connecticut, 401 U.S. 371 (1971) (same). *But see also* Boddie, 401 U.S. at 376–78 (noting that "this Court has seldom been asked to view access to the courts as an element of due process").

60. *Chambers*, 207 U.S. at 148.

Government for redress of grievances."[61] The Court has also assessed whether a court's "process allows a claimant to make a meaningful presentation" and thus comports with the Due Process Clause under the Fifth Amendment[62] and Fourteenth Amendment.[63] The Court has reviewed state court access as an equal protection issue under the Fourteenth Amendment.[64] And it has specifically guaranteed plaintiffs access to courts if they would have no other forum to lodge a claim.[65] Reading the *in forma pauperis* statute to allow courts untrammeled discretion to deny access to those who could not otherwise pay would contravene this well-rooted right[66]—indeed, one that is foundational to American society and democratic governance.[67]

B. Of Prison and Paupers

In practice, a palpable portion of *in forma pauperis* petitioners are prisoners, which poses particularly perplexing pragmatic policy problems.[68] Commentators and courts alike have observed rightly that just as with the general populace,[69] "[t]he right to have access to the courts is viewed as the basis of all rights possessed by prisoners."[70] But how to vindicate that right when their access is quite literally impeded by their incarceration?[71] Given

61. *Bill Johnson's Rest., Inc*., 461 U.S. at 741; *accord* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (citing Johnson v. Avery, 393 U.S. 483, 485 (1969) and *Ex parte* Hull, 312 U.S. 546, 549 (1941)).

62. *See Walters*, 473 U.S. at 335.

63. *See Wolff*, 418 U.S. at 576–80; *Boddie*, 401 U.S. at 376–78.

64. *Finley*, 481 U.S. at 557.

65. *Boddie*, 401 U.S. at 376–77.

66. *See* M.L.B. v. S.L.J., 519 U.S. 102, 110–12 (1996); *Boddie*, 401 U.S. at 376–77; Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252, 257 (1959); Griffin v. Illinois, 351 U.S. 12, 16–20 (1956); *see also* Adkins v. E.I. Dupont de Nemours & Co., 335 U.S. 331, 337–43 (1948) (limiting court discretion in view of the statute's creation of an entitlement); Sturtz, *supra* note 58, at 1351.

67. *See* McCarthy v. Madigan, 503 U.S. 140, 153 (1992) ("[T]he right to file a court action might be said to be [a prisoner's] remaining 'most fundamental political right, because preservative of all rights.'") (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)); Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070–71 (1985); *Boddie*, 401 U.S. at 375–77; Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907).

68. *See generally* Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519 (1996); Sturtz*, supra* note 58; James E. Doyle, *The Court's Responsibility to the Inmate Litigant*, 56 JUDICATURE 406, 412 (1973).

69. *Chambers*, 207 U.S. at 148.

70. Sturtz, *supra* note 58, at 1353; *see id.* at 1350 & nn.13–14 (citing 2 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 11.00, at 3 (2d ed. 1993)); *McCarthy*, 503 U.S. at 153 (quoting *Yick Wo*, 118 U.S. at 370).

71. Sturtz, *supra* note 58, at 1351 ("The problem then arises as to how an indigent, unrepresented prisoner gains access to the federal courts.").

the proliferation of prisoner suits,[72] and the important constitutional questions implicated, the Supreme Court has addressed the issue often.[73] First, in *Ex parte Hull*,[74] a prison had repeatedly intercepted and obstructed an inmate's attempts to file a writ of habeas corpus in federal court, relying on a regulation allowing the prison to screen all claims for proper form.[75] The petitioner eventually managed to smuggle out copies of his attempted filings, and the Court reproved the prison, confirming that the fundamental right of access trumps even reasonable correctional regulations:

> The regulation is invalid. The considerations that prompted its formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.[76]

More reticulated constitutional protections than the barest ability to transmit a filing followed apace. In *Johnson v. Avery*,[77] another species of regulation categorically forbade any inmate from assisting another in preparing writs or other legal matters,[78] and this too was struck down by the Court as effectively disallowing access to the court[79]—though the Court did allow the prison obviously has leeway in regulating how and when prisoners took advice.[80]

To be sure, the early cases of *Hull* and *Avery* cited "the fundamental importance of the writ of habeas corpus in our constitutional scheme" above

72. *See* Procup v Strickland, 792 F.2d 1069, 1071 (11th Cir. 1986) (*per curiam*) (*en banc*) ("Recent years have witnessed an explosion of prisoner litigation in the federal courts."); Abdul-Akbar v. McKelvie, 239 F. 3d 307, 311–12 (3d. Cir. 2001).

73. *See, e.g.*, *Ex parte* Hull, 312 U.S. 546 (1941); Johnson v. Avery, 393 U.S. 483 (1969); Younger v. Gilmore, 404 U.S. 15 (1971); Cruz v. Beto, 405 U.S. 319 (1972); Wolff v. McDonnell, 418 U.S. 539, 539 (1974); Bounds v. Smith, 430 U.S. 817 (1977); Lewis v. Casey, 518 U.S. 343, 355 (1996).

74. *Hull*, 312 U.S. at 548.

75. *Id.* at 547–49.

76. *Id.* at 549.

77. *Johnson*, 393 U.S. at 483.

78. *Id.* at 484–85.

79. *Id.* at 486–87 (affirming and quoting the district court's conclusion that "[f]or all practical purposes, if such prisoners cannot have the assistance of a 'jail-house lawyer,' their possibly valid constitutional claims will never be heard in any court.").

80. *Id.* at 488–900.

and apart from judicial access generally.[81] But the Court unanimously extended *Avery* to all civil rights actions in *Wolff v. McDonnell*,[82] holding that the "right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause, and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."[83] *Bounds v. Smith*[84] held prisons must take affirmative steps to vindicate the general right of access, by providing stationary, writing utensils, notarial services, and postage[85]—along with well-stocked law libraries![86] Finally, *Lewis v. Casey* extended these rights to prisoners' claims that "challenge the conditions of their confinement."[87]

As with those concerning indigents generally, these holdings call into question lower courts' privilege-not-right view of *in forma pauperis* status: If prisons may not constitutionally restrict prisoners' meaningful access to justice (including providing libraries and notaries),[88] it is difficult to believe that a law effectively forbidding the courts entirely to such indigent prisoners by means of an unpayable fee could possibly stand.[89] Some commentators, however, have intimated as much, resting on the traditional privilege-not-right terminology.[90] As will be discussed later, there is significant if not

81. *Johnson*, 393 U.S. at 485–86 (noting cases finding unconstitutional the imposition of filing fees or denial of transcripts in *habeas* cases).

82. Wolff v. McDonnell, 418 U.S. 539, 579 (1974).

83. *Wolff*, 418 U.S. at 577–80 (The Court simply could not distinguish the two in principle: "First, the demarcation line between civil rights actions and habeas petitions is not always clear. The Court has already recognized instances where the same constitutional rights might be redressed under either form of relief. Second, while it is true that only in habeas actions may relief be granted which will shorten the term of confinement, it is more pertinent that both actions serve to protect basic constitutional rights.") (citations omitted).

84. Bounds v. Smith, 430 U.S. 817 (1977).

85. *Id.* at 824–25.

86. *Id.* at 828 ("We hold, therefore, 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."); *accord* Younger v. Gilmore, 404 U.S. 15 (1971).

87. Lewis v. Casey, 518 U.S. 343, 355 (1996).

88. *See* cases cited *supra* note 73.

89. *Compare* Burns v. Ohio, 360 U.S. 252, 257 (1959) (indigent prisoners must be forgiven docketing fees in appeals and habeas), Smith v. Bennett, 365 U.S. 708 (1961) (same), *and Bounds*, 430 U.S. 817 (citing both), *with* Wolff v. McDonnell, 418 U.S. 539, 576 (1974) (finding *habeas* indistinguishable for right of access purposes from other constitutional claims).

90. *See* Sturtz, *supra* note 58, at 1360–61 ("The right to proceed in forma pauperis is statutory and not constitutional in nature. There is no absolute right to proceed in forma pauperis in federal court. The benefits extended by the In Forma Pauperis Statute are granted as a privilege and not as a matter of right. Proceeding in forma pauperis is a statutory privilege extended to persons unable to pay filing fees when the action is not frivolous or malicious. Since the right to proceed in forma pauperis is statutory, Congress may amend the statute with more ease than would be the case if it

irresoluble tension between Supreme Court decisions commanding meaningful access for all indigent plaintiffs and the many lower court decisions barring meaningful access based on a history of frivolous filings.[91]

In any event, Congress initially included prisoners as much as anyone else within the ambit of the *in forma pauperis* statute.[92] Nonetheless, in light of the special difficulties attending prisoner lawsuits, Congress did eventually amend § 1915 in the Prison Litigation Reform Act ("PLRA") to create a *sui generis* payment regime for such suits.[93] The required affidavit of poverty must be supplemented with a copy of the prisoner's institutional trust fund account,[94] in order that the prisoner be compelled to contribute to the necessary fees according the resources available in that account:

> (1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—
>
> (A) the average monthly deposits to the prisoner's account; or
>
> (B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.
>
> (2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments

were a constitutional right. Even though the In Forma Pauperis Statute affects a prisoner's right to access, which is a constitutional right, Congress may limit prisoner use of the statute without completely denying such persons this constitutional right. What Congress created Congress may limit or eliminate.").

91. *See infra* Part II-B-3.

92. *See* Doyle, *supra* note 68, at 407 (discussing application to prisoners prior to PLRA); Sturtz, *supra* note 58, at 1351 (same).

93. Act of Apr. 26, 1996, Pub. L. No. 104–134, 110 Stat. 1321 (1996); *see* Abdul-Akbar v. McKelvie, 239 F. 3d 307, 311–12 (3d. Cir. 2001); Joshua D. Franklin, *Three Strikes and You're Out of Constitutional Rights—The Prison Litigation Reform Act's Three Strikes Provision and Its Effect on Indigents*, 71 U. COLO. L. REV. 191 (2000).

94. 28 U.S.C. § 1915(a)(2) (West 1996).

> from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.
>
> (3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.
>
> (4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.[95]

Although this regime places a higher burden on prisoners than other indigent litigants, the safety valve provided at § 1915(b)(4) saves the provision from potential constitutional infirmity:[96] although contributions are required if available even from the destitute, the lack thereof cannot prevent a litigant from filing.[97]

Then-chief-judge of the Second Circuit Jon O. Newman provided a thoughtful view of the importance of prisoner litigation in 1996,[98] the same year that Congress passed the PLRA seeking to curtail prisoner lawsuits.[99] Whilst acknowledging that "nearly all are filed pro se, and the vast majority are dismissed as frivolous," Judge Newman could recite a lengthy roll of "serious matters that pose[d] substantial issues" and "resulted in significant victories."[100] The judge went on to debunk sensationalist accusations by attorneys general of rampant ridiculous claims, quoting, for example, a *New York Times* description of "the inmate who sued because there were no salad bars or brunches on weekends and holidays," who in fact challenged "dangerously unhealthy prison conditions, not the lack of a salad bar."[101] All

95. 28 U.S.C. § 1915(b).

96. *See* Franklin, *supra* note 93, at 204.

97. *See supra* note 89 and accompanying text; *cf.* Sturtz, *supra* note 58, at 1351. That said, a separate provision added by the PLRA to address prolific prisoner petitioners may indeed raise serious constitutional concerns. *See infra* Section II-B.

98. Newman, *supra* note 68.

99. Act of Apr. 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321; *see* Newman, *supra* note 68, at 522–23.

100. Newman, *supra* note 68, at 519–20 & n.2.

101. *Id.* at 520–22. Judge Newman also readily debunked grossly inaccurate characterizations of "the case where a prisoner is suing New York because his prison towels are white instead of his preferred beige; and . . . the case where an inmate sued, claiming cruel and unusual punishment because he received one jar of chunky and one jar of creamy peanut butter after ordering two jars of chunky from the prison canteen." *Id.*

in all, Judge Newman was optimistic about the PLRA's schema of asking *in forma pauperis* prisoners to make some financial investment in their suits whilst keeping the courthouse doors open to those who lack funds for even a minor contribution, concluding that in any case, "courts will continue to have the important task of looking through the 'haystacks' of prisoner lawsuits for the 'needles' of meritorious prisoner claims."[102]

Judge Newman's attention to these claims has been echoed by other sitting judges as well.[103] The courts' far-reaching solicitude to preserving prisoners' right of access to the courthouse underlines how fundamental that right is to the American system.[104] Even those who have duly forfeited their Fifth or Fourteenth Amendment right to *liberty itself* after criminal conviction do not thereby surrender their right to judicial review and relief, the wellspring of all others.[105]

C. Of *Pro Se* and *Pro Bono*

Of course, *in forma pauperis* system scarcely places the indigent (whether imprisoned or not) and affluent on level playing field. Most fundamentally, there are numerous miscellaneous outlays associated with the proper prosecution or defense of litigation that do not fall within the neat confines of the statute, including the costs of investigation, discovery, and fees payable to witnesses both lay and expert.[106] To take witness fees as an example: a note by Kenneth R. Levine observes that, absent such fees' payment, "witnesses are not required, nor may they be able, to attend the trial. As a result, impoverished civil litigants may be given access to the courts by § 1915 only to have their claims dismissed because they cannot afford to bring along their evidence."[107] This outcome is perverse given the statute elsewhere prescribes that "witnesses shall attend as in other cases."[108]

102. Newman, *supra* note 68, at 526–27.

103. *See, e.g.*, Doyle, *supra* note 68.

104. *Compare, e.g.*, Bounds v. Smith, 430 U.S. 817 (1977), *with* Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907).

105. *See supra* notes 69-70 accompanying text; *see also* Wolff v. McDonnell, 418 U. S. 539, 555–56 (1974) (holding rights only forfeited in prison to the extent demanded by "exigencies of the institutional environment").

106. *See* Duniway, *supra* note 23, at 1274–75 ("An even more glaring weakness of the act is that it makes no provision for actual payment of the miscellaneous expenses of litigation," including investigation and discovery); Michelman, *supra* note 22, at 1163; John MacArthur Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361, 362 (1923); *see also generally* David Medine, *The Constitutional Right of Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L.J. 281 (1990) (expert witnesses); Levine, *supra* note 29, at 1463–70 (witness fees).

107. Levine, *supra* note 29, at 1464.

108. 28 U.S.C.A. § 1915(d) (West 1996).

Levine argues persuasively that some combination of that prescription and the court's authority to order the attendance of witnesses under the Federal Rules allow the *in forma pauperis* litigant to avoid payment of fees,[109] but acknowledges that the near-universal consensus of courts is to the contrary.[110]

Those poor enough to qualify as indigent will not have funds for a lawyer either, and thus will often depend on *pro bono* counsel if they are to have counsel at all.[111] The *in forma pauperis* statute contemplates that a judge might "request" counsel to represent the indigent litigant,[112] but the Supreme Court has squarely held that courts cannot thereby compel counsel to serve in like manner as in other appointments.[113] As the case illustrates, lawyers who are busy or profess to lack the proper "training or temperament" may well decline to take on indigent applicants absent compulsion,[114] notwithstanding the profession's ethical duty to provide *pro bono* representation.[115] Responding to this conundrum, commentators early on opined that "Congress should provide for mandatory appointed counsel for any in forma pauperis plaintiff—whether a prisoner or not—whose complaint is not frivolous," so that "an indigent plaintiff would actually have a reasonable chance for success on the merits of a meritorious claim."[116] Congress, however, has not done so in the thirty years since the suggestion was offered.[117]

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109. Levine, *supra* note 29, at 1470–81.

110. *Id.* at 1467–68 n.26 ("Courts have nearly unanimously held that the term 'fees and costs' does not encompass witness fees and expenses.") (expansively citing and discussing cases); *but see id.* at 1472 (discussing, as a notable exception, U.S. Marshals Serv. v. Means, 741 F.2d 1053, 1057–60 (8th Cir. 1984) (en banc)).

111. *See* Duniway, *supra* 23, at 1274 ("[T]he act made no provision for compensation of counsel; nor does it make such a provision today."); Catz & Guyer, *supra* note 20, at 684 ("Indigents have no monopoly on malicious or frivolous actions, although they do have a virtual monopoly on being unrepresented by counsel.").

112. 28 U.S.C.A. § 1915(e)(1) ("The court may request an attorney to represent any person unable to afford counsel.").

113. Mallard v. U.S. Dist. Ct. for the S. Dist. Of Ia., 490 U.S. 296, 301–08 (1989).

114. *Id.* at 299–300.

115. *Id.* at 310 (observing that "lawyers' ethical obligation to volunteer their time and skills *pro bono publico* is manifest"); *accord id.* at 310-11 (Kennedy, J., concurring) ("Lawyers also have obligations by virtue of their special status as officers of the court. Accepting a court's request to represent the indigent is one of those traditional obligations.").

116. Feldman, *supra* note 29, at 437; *see also* Duniway, *supra* note 23, at 1274 ("The provision for counsel is less than adequate.").

117. The four-justice dissent in *Mallard*, of course, was of the opinion that Congress had quite clearly provided for compelling attorneys to serve under the *in forma pauperis* statute absent good reason. *Mallard*, 490 U.S. at 315–16 (Stevens, J., dissenting) ("It is evident that the drafters of this statute understood these terms to impose similar obligations and simply assumed that members of our profession would perform their assigned tasks when requested to do so by the court."); *id.* at

Poor litigants might also find counsel to represent them on a contingency basis (and to pay needful expenses, obviating the need for the statute), but such representation will depend on the financial return expected from their claims, which does not necessarily correlate with merit.[118] A poor defendant, moreover, can anticipate no judgment with which to compensate counsel, and must choose between *pro se* and default if no *pro bono* counsel appears.[119] True, there are fee-shifting measures like those under the Equal Access to Justice Act,[120] which provide for awarding fees and costs to certain parties prevailing against the government, allowing litigants and their counsel to be compensated for the outlays made in demonstrably meritorious actions.[121] As the statute's name suggests, its purpose is to provide a further measure of equal opportunity to all litigants, regardless of their financial means,[122] in part by attracting competent counsel to deserving but unfunded causes.[123] Yet there are countervailing pitfalls as well: Counsel may be wary of taking on an *in forma pauperis* matter, as the statute expressly provides that the United States cannot be assessed for costs even under ordinary fee-shifting rules.[124]

Needless to say, a litigant lacking *pro bono* or contingency counsel and compelled to proceed *pro se* is at a severe disadvantage to an adversary with experienced representation.[125] Many commentators and courts have adverted to the burdens placed on both the litigant and courts when the

317 ("In context, I would therefore construe the word 'request' in § 1915([e]) as meaning 'respectfully command.' If that is not what Congress intended, the statute is virtually meaningless.").

118. *See generally* Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231 (1998); Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act: A Qualified Success*, 11 YALE L. & POL'Y REV. 458, 464 (1993); *cf.* Duniway, *supra* note 23, at 1285 ("The poor plaintiff who has a meritorious money or property claim can nearly always find a lawyer who will take his case because of the almost universal use of the contingent fee to finance the litigation—and even the litigant.").

119. Duniway, *supra* note 23 ("The situation of a poor defendant with a meritorious defense (unless he also has a good money cross-claim) is different. It may be that some defendants in federal cases simply default because they cannot afford to litigate.").

120. Act of Aug. 5. 1985, Pub. L. No. 99-80, 99 Stat. 183 (1985).

121. 5 U.S.C. § 504 (2011); 28 U.S.C. § 2412 (2011); *see generally* Krent, *supra* note 118.

122. *See* Sullivan v. Hudson, 490 U.S. 877, 883 (1989); Hensley v. Eckerhart, 461 U.S. 424 (1983).

123. *See* Blum v. Stenson, 465 U.S. 886, 897 (1984) (discussing *Hensley*, 461 U.S. 424).

124. 28 U.S.C.A. § 1915(f)(1) (West 1996).

125. *See* Kay v. Ehrler, 499 U.S. 432, 437–38 (1991); Faretta v. California, 422 U.S. 806, 832–34 (1975); Doyle, *supra* note 68, at 410; Feldman, *supra* note 29, at 437; *see generally* Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13 (1998).

former proceeds both *in forma pauperis* and *pro se*.[126] In one of its more famous cases, *Gideon w. Wainwright*, the Supreme Court noted that a "defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*" in 1932:[127]

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[128]

Apropos of Justice Sutherland's words, it must be noted that much of the preceding discussion contemplates a civil case; the Sixth Amendment guarantees that defendants in criminal actions enjoy the assistance of counsel.[129] Strikingly, however, criminal defendants were excluded from the *in forma pauperis* statute until the revisions of 1910.[130] Similarly remarkable is that the Amendment's seemingly self-executing guarantee of a defendant's right "to have the Assistance of Counsel for his defence"[131] was not held to entitle the indigent to counsel in all federal criminal trials until 1938.[132] The Supreme Court did not confirm a right to counsel on appeal until 1957,[133]

126. *See Kay*, 499 U.S. at 437–38; *Faretta*, 422 U.S. at 832–34; Goldschmidt, *supra* note 125; Doyle, *supra* note 68, at 410 (sitting judge detailing the issues occasioned by *pro se* prisoner litigants).

127. Gideon v. Wainwright, 372 U.S. 334, 344 (1963).

128. *Gideon*, 372 U.S. at 344–45 (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932)).

129. U.S. CONST. amend. VI.

130. Act of June 25, 1910, Pub. L. No. 61-317, 36 Stat. 866 (1910); *see* Catz & Guyer, *supra* note 20, at 657–58.

131. U.S. CONST. amend. VI.

132. Johnson v. Zerbst, 304 U.S. 458 (1938).

133. Johnson v. United States, 352 U.S. 565, 566 (1957) (*per curiam*); *accord* Ellis v. United States, 356 U.S. 674, 674–75 (1958); *see also* Douglas v. California, 372 U.S. 353, 357 (1963) (citing *Johnson* and *Ellis* in constitutional context). It is questionable, however, whether these *per*

even though provision for *in forma pauperis* appellate proceedings had similarly been added in 1910.[134] Nor was it until 1963 than the same basic right to counsel was recognized via the Fourteenth Amendment in state criminal proceedings, original[135] and appellate.[136] And even though an attorney be guaranteed, the efficacy of legal representation may suffer from chronic governmental understaffing and underfunding, despite the best efforts of a dedicated corps of public defenders.[137]

Nonetheless, under the *in forma pauperis* regime, impoverished litigants at least have their "day in court," whatever their disadvantages be against their adversaries.[138] Failing the forgiveness of required fees, many of society's most needy would lack even that.[139] The law cannot endow everyone with equal resources to prosecute and defend their claims in a nation of such disparate means, but it can at least ensure the courthouse doors themselves are open to all.[140]

II. Pestersome Paupers in the Lower Courts

To be sure, the right of access to judicial process and the *in forma pauperis* system no more affords indigents a prerogative to bring frivolous or malicious actions than any other litigant.[141] The risks of such actions are at least nominally heightened for indigent litigants because they will not be retarded by the requirement of putting their money where their mouth is,

curiam decisions implicate constitutional grounds rather than statutory interpretation of the § 1915 entitlement, though the effect is largely the same. *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1246–50 (2013).

134. Act of June 25, 1910, Pub. L. No. 61-317, 36 Stat. 866 (1910); *see* Catz & Guyer, *supra* note 20, at 658

135. Gideon v. Wainwright, 372 U.S. 334, 335 (1963).

136. Douglas v. California, 372 U.S. 353, 356–58. (1963)

137. *See generally* Emily Rose, Note, *Speedy Trial as a Viable Challenge to Chronic Underfunding in Indigent-Defense Systems*, 113 MICH. L. REV. 279 (2014); David A. Simon, *Equal before the Law: Toward a Restoration of Gideon's Promise*, 43 HARV. C.R.-C.L. L. REV. 581 (2008); Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis Is Chronic: Balanced Allocation of Resources Is Needed to End the Constitutional Crisis*, 9 CRIM. JUST. 13 (1994).

138. *See* Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 179, 212, 250–51 (1972); *see also In re* Amendment to Rule 39, 500 U.S. 13, 14 (1991) (Marshall, J., dissenting).

139. Levine, *supra* note 29, at 1461 n.3; Maguire, *supra* note 106, at 362.

140. *See supra* Section I-A.

141. *In re* Oliver, 682 F.2d 443, 446 (3d Cir. 1982) ("No person, however, '. . . rich or poor, is entitled to abuse the judicial process.'") (quoting Hardwick v. Brinson, 523 F.2d 798, 800 (5th Cir. 1975)); Green v. Carlson, 649 F.2d 285, 287 (5th Cir. 1981) (Unit A) (same); *see generally* Mary Van Vort, *Controlling and Deterring Frivolous In Forma Pauperis Complaints*, 55 FORDHAM L. REV. 1165 (1987).

increasing the incentives to lodge any and every claim they might dream up, regardless of merit.[142] Anticipating these concerns, the *in forma pauperis* statute provides recourse for courts confronting baseless claims to dispose of them with expedition.[143] Unfortunately, the lower courts—both state and federal—have not uncommonly confronted so-called "prolific petitioners" who are seen to strain the *gratis* system afforded them by sheer volume.[144] When statutory mechanisms fail, courts have turned to their inherent powers and the expansive All Writs Act to craft novel solutions to address the claims of their most pestersome paupers.[145]

A. Statutory Mechanisms for Meritless Filings *In Forma Pauperis*

Meritless *in forma pauperis* filings may be dismissed for failure to state a claim, the same as any case;[146] indeed, the Federal Rules of Civil Procedure provide several mechanisms for clarifying or disposing of fundamentally incoherent complaints.[147] But Congress was aware of the unusual potential for abuse absent fees,[148] and thus the *in forma pauperis* statute contemplates a unique screening mechanism for all claims, under which the presiding judge must make a peremptory evaluation of whether the stated allegations merit consideration:[149]

> Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—
>
> (A) the allegation of poverty is untrue; or
>
> (B) the action or appeal—

142. *See* Neitzke v. Williams, 490 U.S. 319, 324 (1989); Procup v. Strickland, 792 F.2d 1069, 1071–72 (11th Cir. 1986) (*en banc*) (*per curiam*); *see also* Van Vort, *supra* note 141, at 1180–81; Sturtz, *supra* note 58, at 1362.

143. *See infra* Section II-A.

144. *See Procup*, 792 F.2d at 1071–72; *see generally* Wasby 1995, *supra* note 12; Wasby 1990, *supra* note 12.

145. *See infra* Section II-B.

146. *See* FED. R. CIV. P. 12(b)(6); *see* Lane, *supra* note 11, at 342–43.

147. *See, e.g.*, FED. R. CIV. P. 12(b), (c), (e) & (f).

148. *See* Denton v. Hernandez, 504 U.S. 25, 31 (1992); *see also* Abdul-Akbar v. McKelvie, 239 F.3d 307, 311–12 (3d. Cir. 2001) (specifically in prisoner context).

149. *See* Sturtz, *supra* note 58, at 1358–61; Feldman, *supra* note 29, at 415–23; Van Vort, *supra* note 141, at 1167–79.

> (i) is frivolous or malicious;
>
> (ii) fails to state a claim on which relief may be granted; or
>
> (iii) seeks monetary relief against a defendant who is immune from such relief.[150]

Despite its simplicity, the details of executing the statute's mechanism have proven controversial.[151] Originally, the provision employed the familiar permissive language found elsewhere in the statute, allowing that a court "may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious," and omitted any mention of preemptive screening for whether the claim was properly pled.[152] In *Neitzke v. Williams*, the Supreme Court thus found that the provision, as then written, did not permit courts to dismiss indigent claims for failure to state a claim.[153] This mattered because the bar for dismissal under Federal Rule 12(b)(6) for failure to state a claim was higher than that for frivolousness under § 1915(e).[154] In passing the Prison Litigation Reform Act of 1996,[155] however, Congress both replaced the permissive construction with the current obligatory "shall" and added the clause at § 1915(e)(2)(B)(ii), which the lower courts have found "clear[ly] . . . not only permits but requires a district court to dismiss an in forma pauperis complaint that fails to state a claim."[156] In doing so, it was equally clear that Congress intended to supersede *Neitzke* and thus force the courts' hand.[157]

Courts, therefore, *must* now *sua sponte* assess frivolousness, maliciousness, and baselessness, but the question of how to do so has occasioned a great variety of doctrine throughout the statute's history.[158] On one end of the spectrum, the Ninth Circuit cautioned that dismissal of *in forma pauperis* suits on grounds of frivolousness is proper only in the same circumstances as would warrant *sua sponte* dismissal of a paying litigant's

150. 28 U.S.C.A. § 1915(e)(2) (1996).

151. *See* Feldman, *supra* note 29, at 415–23; Van Vort, *supra* note 141, at 1167–79.

152. 28 U.S.C.A. § 1915(d) (1994).

153. Neitzke v. Williams, 490 U.S. 319 (1989); *see* Lopez v. Smith, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (discussing the history of the dismissal provision).

154. *Neitzke*, 490 U.S. at 320–29; *see* Sturtz, *supra* note 58, at 1359–60 (discussing case).

155. Act of Apr. 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321.

156. *Lopez*, 203 F.3d at 1126–27 (citing Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998)); *see* Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999).

157. *Lopez*, 203 F.3d at 1126.

158. *Compare, e.g.*, *id.* at 1126–27, *with* Benson v. O'Brian, 179 F.3d 1014, 1016 (6th Cir. 1999).

suit without argument[159]—a high standard to meet.[160] Representing the other, the Eighth Circuit admonished the lower courts anent their liberal allowances of meritless appeals:

> We realize that the serious consideration which this Court has given to appeals *in forma pauperis* in hopeless cases may have led the District Judges in this Circuit to believe that such appeals should be allowed with extreme liberality. We are now of the opinion that much greater care should be taken in screening such cases, in order to separate those which are clearly without merit from those which are meritorious or which at least present some substantial question worthy of consideration.[161]

Consistent with the Ninth Circuit's philosophical evenhandedness are a number of decisions questioning whether *in forma pauperis* litigants may be granted leave to amend given a dismissal under § 1915(e)(2)(B)(ii). Multiple circuits have agreed in principle that "a pro se plaintiff who is proceeding in forma pauperis should be afforded the same opportunity as a pro se fee-paid plaintiff to amend his complaint prior to its dismissal for failure to state a claim."[162] But Congress's clear intention to enforce rigorous standards for indigent litigants cannot be ignored either.[163] If the process and standard for dismissal is identical regardless of *in forma pauperis* status, the

159. The District Court 'may' authorize the commencement of a civil action in forma pauperis, and thereafter "may dismiss the case * * * if satisfied that the action is frivolous." It follows that the District Court was authorized to deny leave to proceed in forma pauperis at the outset if it appeared from the face of the proposed complaint that the action was frivolous. This authority is to be exercised with great restraint, and generally only where it would be proper to dismiss the complaint sua sponte before service of process if it were filed by one tendering the required fees.

Reece v. Washington, 310 F.2d 139, 141 (9th Cir. 1962) (citations omitted).

160. *See* Harmon v. Superior Court, 307 F.2d 796 (9th Cir. 1962) (cited in *Reece*, 310 F.2d at 140).

161. Higgins v. Steele, 195 F.2d 366, 369 (8th Cir. 1952).

162. *Gomez*, 171 F.3d at 796; *see* Perkins v. Kansas Dep't of Corrections, 165 F.3d 803, 806 (10th Cir. 1999); *see also* Bazrowx v. Scott, 136 F.3d 1053, 1054 (5th Cir. 1998) (assuming leave to amend is available); Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C. Cir. 1998) (same). *Contra* Benson v. O'Brian, 179 F.3d 1014, 1016 (6th Cir. 1999); McGore v. Wrigglesworth, 114 F.3d 601, 612 (6th Cir. 1997). The Ninth Circuit in *Lopez* provides a thorough discussion of these cases and, after evaluating policy considerations, aligns itself with the majority. *See Lopez*, 203 F.3d at 1127–30.

163. *See Lopez*, 203 F.3d at 1129 n.10 ("It is true that 1915(e)(2)'s provision for dismissal for failure to state a claim itself penalizes indigent non-prisoner plaintiffs for the alleged abuses of prisoner plaintiffs. However, Congress inserted 1915(e)(2) into the in forma pauperis statute, and we must follow this clear statutory direction.").

particularized statutory language would be largely surplusage, in defiance of the canon against superfluities.[164]

As is often the case, a middle-of-the-road approach is likely the best.[165] Congress has now directed that courts proactively police the claims of *in forma pauperis* litigants,[166] presumably to expeditiously dispose of those unquestionably meritless.[167] If a filing can be saved by amendment from a failure to state a claim, then the court retains discretion to permit such amendment,[168] and likely will.[169] But claims that are wholly frivolous or malicious, lacking even "an arguable basis in law or in fact,"[170] can and must be weeded out to prevent unwarranted burden on the court, fulfilling Congress's design.[171] Whilst imposing some disparate treatment upon the poor,[172] it is hard to complain that those choosing to press utterly baseless claims without the payment of fees are afforded no more attention than necessary.[173] If courts prove more likely to dismiss *in forma pauperis* claims as frivolous than to do so *sua sponte* of paying claims, as the Ninth Circuit feared,[174] the disparity may well be the unfortunate but unavoidable result of indigent claimants lacking the advice of counsel or the deterrent of filing

164. *See* Hibbs v. Winn, 542 U.S. 88, 101 (2004) (quoting 2A N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06, 1, 181–86 (rev. 6th ed. 2000)); Mkt. Co. v. Hoffman, 101 U.S. 112, 115 (1879) (describing the canon as a "cardinal rule").

165. *Cf.* Gray v. Bicknell, 86 F.3d 1472, 1482–84 (8th Cir. 1996) (evaluating three options regarding privilege—a "lenient," "strict," and "middle of the road" approach—and finding the "middle test is best suited to achieving a fair result").

166. 28 U.S.C. § 1915(e)(2); *see supra* notes 149-157 and accompanying text.

167. *See Lopez*, 203 F.3d at 1126–27; *see also* Higgins v. Steele, 195 F.2d 366, 369 (8th Cir. 1952) (expressing concerns prior to PLRA about overliberal allowance of *in forma pauperis* proceedings).

168. Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999); *see* Perkins v. Kansas Department of Corrections, 165 F.3d 803, 806 (10th Cir. 1999); *see* Feldman, *supra* note 29, at 430–32.

169. *See* Feldman, *supra* note 29, at 430–32.

170. Neitzke v. Williams, 490 U.S. 319, 325 (1989); *see* Feldman, *supra* note 29, at 431–32.

171. *See Lopez*, 203 F.3d at 1127–30.

172. *See* Van Vort, *supra* note 141, at 1169–71.

173. *See id.*; Sturtz, *supra* note 58, at 1361–68.

174. *See* Reece v. Washington, 310 F.2d 139, 141 (9th Cir. 1962).

fees.[175] No litigant, rich or poor, is entitled to long maintain a patently groundless claim.[176]

B. The Predicament Presented by Prolific Petitioners

Most *in forma pauperis* litigants can be and are duly accommodated by the expedited statutory regime contemplated by § 1915(e).[177] But there has long been a distinct class of litigants sometimes denominated prolific petitioners (or, more drolly, "frequent filers"[178]), who file dozens or even hundreds of petitions with the courts seeking redress of dubious injuries, and who pose a more perplexing predicament to the judiciary.[179] In 1981, the D.C. Circuit Court of Appeals described one Reverend Clovis Carl Green Jr. as "in all likelihood the most prolific prisoner litigant in recorded history," tallying as many as seven hundred filings amongst various state and federal courts.[180] Another circuit court of appeals named him the "instigator of hundreds of frivolous and malicious pro se actions."[181] And the New York Times's doyenne of Supreme Court coverage, Linda Greenhouse,[182] called him a "specter haunting American courts."[183]

1. Initial Judicial Responses to Prolific Petitioners

The varying responses of the courts importuned by Reverend Green provide a survey of early judicial responses to the problem posed by prolific petitioners. Given its jurisdiction over the site of Reverend Green's

175. *See supra* Section I-C; *e.g.*, *In re* Oliver, 682 F.2d 443, 445–46 (3d Cir. 1982) (noting the uniform frivolity of the petitioners' filings dismissed theretofore); *see also, e.g.*, *In re* McDonald, 489 U.S. 180, 180–82 nn.1–5 (1989) (*per curiam*) (noting same of petitions for certiorari and extraordinary writs).

176. *In re Oliver*, 682 F.2d at 446 ("No person, however, '. . . rich or poor, is entitled to abuse the judicial process.'") (quoting Hardwick v. Brinson, 523 F.2d 798, 800 (5th Cir. 1975)); Green v. Carlson, 649 F.2d 285, 287 (5th Cir. 1981) (Unit A) (same).

177. *See* Lane, *supra* note 11, at 341–43.

178. Wasby 1995, *supra* note 12, at 94, 95, 97.

179. *See* Procup v. Strickland, 792 F.2d 1069, 1071–72 (11th Cir. 1986) (*en banc*) (*per curiam*); *see generally* Wasby 1995, *supra* note 12; Wasby 1990, *supra* note 12.

180. *In re* Green, 669 F.2d 779, 781 (D.C. Cir. 1981).

181. *Green*, 649 F.2d at 287.

182. *See* Linda Greenhouse, *2,691 Decisions*, N.Y. TIMES, July 13, 2008, at WK1. Greenhouse covered the court for thirty years, spanning the mentioned 2,691 decisions, wrote nearly 3000 articles, and won the Pulitzer Prize before her retirement in 2008, a celebration for which seven of the sitting Supreme Court judges attended. *See id.*; Tony Mauro, *A Goodbye for Greenhouse*, BLT: THE BLOG OF LEGAL TIMES, (June 12, 2008), http://legaltimes.typepad.com/blt/2008/06/goodbye-to-gree.html.

183. Linda Greenhouse, *Paper Siege by Prisoner Provokes Ire*, N.Y. TIMES, Apr. 7, 1983. The comment on flinching, of course, is presumably artistic license.

imprisonment, the Missouri State Penitentiary, the Eighth Circuit provides the most thorough tour.[184] In 1978, it confronted an appeal of a conviction for criminal contempt in that Green violated an injunction against his assisting fellow inmates in making their own frivolous filings.[185] The court of appeals recognized that *Johnson v. Avery* protected such conduct generally,[186] but found the injunction tailored to discipline Green as one might any other practitioner of law,[187] "an inveterate writ writer for his own benefit and for the benefit of other convicts from whom he receives fees for his services."[188] In entering the injunction, the district court had found that Green "engaged in a flagrant and gross abuse of the judicial process, that he repeatedly files frivolous and harassive lawsuits, that he has deliberately and intentionally deceived this Court with respect to his financial status, that he fails to follow the rules and procedures of the Court in filing actions."[189] The Eight Circuit agreed, and affirmed the contempt conviction.[190]

The following year, the Eighth Circuit convened *en banc* to consider what to do about Green.[191] Green had filed a striking sixty-six petitions for writ of mandamus over the course of the year, all of which had been patently frivolous,[192] and the district judge charged with addressing Green's filings had lodged an earnest plea to the court of appeals to afford him some relief, explaining that the court simply could not handle the volume of Green's filings.[193] The court of appeals barred Green from further mandamus filings on the same subject as the sixty-six already filed, and advised the district court to dismiss *in forma pauperis* claims that were facially frivolous, as well

184. *See, e.g.*, *In re* Green, 586 F.2d 1247 (8th Cir. 1978); *In re* Green, 598 F.2d 1126 (8th Cir. 1979) (*en banc*); Green v. White (*In re* Green), 616 F.2d 1054 (8th Cir. 1980) (*per curiam*).

185. *In re Green*, 586 F.2d at 1247.

186. *Id.* at 1251.

187. *Id.*

188. *Id.* at 1249.

189. *In re Green*, 586 F.2d at 1250 (quoting Green v. Wyrick, 428 F. Supp. 732, 743 (W.D. Mo.1976)).

190. *Id.* at 1253.

191. *Id.* at 1127.

192. *Id.* at 1127–28.

193. *Id.* ("Green has continued to abuse the judicial process at all levels of the state and federal judiciary. That abuse of the judicial process has now become critical. It is now approaching the point that the time and resources of several judicial officers, both on the trial and appellate level, are substantially engaged in the processing of Green's cases. In light of the size of our criminal and civil dockets, we cannot afford to expend this amount of judicial effort in processing the litigation of one person. Quite frankly we do not have the judicial resources to give Green immediate service upon the myriad of matters which he raises in this court by way of his unending flow of paper.").

as any cumulative claims recapitulating those already filed.[194] In crafting this narrowly tailored remedy, the court reaffirmed that "[i]t is axiomatic that no petitioner or person shall ever be denied his right to the processes of the court."[195]

But the Eighth Circuit returned to the Reverend Green yet again a year later in 1980, as he had persisted obstinately in his importunities.[196] In desperation, the district court had entered an order under the All Writs Act enjoining Green from filing *in forma pauperis* at all.[197] The court of appeals held the district court had gone too far, and thus required the "deletion of the requirement that the petitioner pay a filing fee with every writ, petition or complaint or motion he files and that enjoins him from ever proceeding in forma pauperis."[198] The court did, however, "severely limit" Green's future *in forma pauperis* filings, limiting them to those that "specifically allege constitutional deprivation by reason of physical harm or threats thereof to petitioner's person."[199] The other aspects of the order, requiring Green to list any previous filings on the same subject and verify all pleadings, were upheld.[200] In the end, Green's recognized "right to the processes of the court" was trimmed to a narrow set of causes of action—but not *wholly* eliminated.[201]

By 1981, other circuits too had been driven to curtail the Reverend Green's access to the courts in response to the deluge.[202] The D.C. Circuit confronted orders entered by similarly desperate district courts: one that had directed its clerk not to accept any further filings at all, and another that prohibited *in forma pauperis* filings and required a fee uniformly.[203] Whilst sympathizing with the need to curb Green's "flagrant and serious abuse," the court of appeals nonetheless found such punitive measures to "violate Green's statutory and constitutional rights of access to the courts" and vacated them.[204] This was because:

194. *In re Green*, 586 F.2d at 1128.

195. *Id.* at 1127.

196. Green v. White (*In re* Green), 616 F.2d 1054 (8th Cir. 1980) (*per curiam*).

197. *Id.* at 1055.

198. *Id.*

199. *Id*.

200. *Id.* at 1056.

201. *In re Green*, 598 F.2d at 1127.

202. *See, e.g.*, Green v. Carlson, 649 F.2d 285 (5th Cir. 1981) (Unit A); *In re* Green, 669 F.2d 779 (D.C. Cir. 1981).

203. *In re Green*, 669 F.2d at 780–81, 784–85.

204. *Id.* at 781.

> [T]he court has in effect entered a *conclusive* presumption that anything Green submits to the district court will be duplicative, frivolous or malicious. While methods that other courts have employed to deter Green from continuing to harass them amount in effect to *rebuttable* presumptions that Green is submitting papers in bad faith, those orders have left the courthouse door ajar, if only slightly.[205]

Instead, the court of appeals ordered that Green must in future seek leave of the court to make any filing, and certify the claims lodged were novel, on penalty of contempt if the certification proved false.[206] Calling even this lesser penalty "severe," the court nevertheless concluded that only the threat of further incarceration via contempt conviction could deter Green whilst still observing his constitutional and statutory right of access via feeless filing.[207]

By contrast, even whilst citing the D.C. Circuit's measured disposition,[208] the Fifth Circuit instead mimicked the Eighth in drastically restricting the Reverend Green's ability to file *in forma pauperis* within its jurisdiction, directing its own clerk to refuse to docket any such filings unless they alleged "constitutional deprivation by reason of physical harm or threats to petitioner's person," and allowing its district courts to do the same.[209] There, however, the court relied on its "general supervisory power to control its docket," rather than the All Writs Act.[210] Its reasoning was clear: "Flagrant abuse of the judicial process can enable one person to preempt the

205. *In re Green*, 669 F.2d at 785–86.

206. *Id.* at 787. The Seventh Circuit reached a very similar result when confronted with Green. *See* Green v. Warden, 699 F.2d 364, 370 (7th Cir. 1983) (requiring affidavit that claim is novel and leave of court to file).

207. First, the order does not impose any financial restrictions that might operate to preclude Green from filing a new and legitimate complaint. Green is free to seek to proceed in the district court (and this court on appeal, if necessary) *in forma pauperis*. However, Green must in each case satisfy, in addition to the terms of the order, the requirements of section 1915. Second, Green is entitled to the processes of the district court to file any claim upon a satisfactory demonstration of the novelty of the claim and its *bona fide* nature. This condition is not at all onerous and certainly does not interfere with Green's right of access. In determining" whether a claim Green wishes to raise is a new one, the district court shall employ traditional notions of res judicata. Failure to certify that the claim has not been decided before in any federal court or a false certification will render Green in violation of this order and in contempt of court. Although the penalty for any further abuse of the processes of this court is potentially substantial, the order does not preclude or even unduly burden Green from submitting a new and nonfrivolous complaint.

In re Green, 669 F.2d at 787–88

208. Green v. Carlson, 649 F.2d 285, 286 (5th Cir. 1981) (Unit A).

209. *Id.* at 287.

210. *Id.*

use of judicial time that properly could be used to consider the meritorious claims of other litigants,"[211] and "others have honest claims upon our limited capacities of time and judgment. The attention which Green's spurious ones have demanded insures that other claims of arguable merit must tarry."[212] Like the D.C. Circuit, however, the Fifth relied on the prospect of contempt should Green persist in his attempts despite the injunction.[213]

To be sure, proscriptions have not been limited to the Reverend Green.[214] The Eleventh Circuit faced its own *bête noir* in the person of prisoner Robert Procup, the proponent of over three hundred baseless lawsuits.[215] A beleaguered district court had enjoined Procup from bringing any suits *pro se*, relying on the All Writs Act to require an attorney approve a claim before the clerk would file it.[216] This farfetched remedy was ostensibly necessary because the court thought no other course—including the precertification of the D.C. Circuit, or even drastic interdictions of the Fifth and Eighth Circuits—could suffice.[217] On appeal, the Eleventh Circuit was unsparing: it found the injunction "overbroad," noted that no other circuit had gone so far, and concluded that the order's:

> [U]nlimited scope denies Procup adequate, effective, and meaningful access to the courts. Moreover, inherent in a judicial ruling which completely forecloses an individual's pro se access to federal court is an ominous abandonment of judicial responsibility, the import of which far exceeds the actual abuse attributable even to the exceptional prisoner litigant. The efficient operation of our judicial system does not require the issuance of an unlimited restriction on this pro se litigant's access to the courts.[218]

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211. *Green*, 649 F.2d at 287.

212. *Id.* at 286.

213. *Id.* ("In the event that Green's pattern continues, we commend the contempt sanction to any panel upon which he seeks to impose.").

214. The short survey here should not be construed to imply there have not been many other decisions addressing prolific petitioners. *E.g.*, *In re* Oliver, 682 F.2d 443 (3d Cir. 1982); Peck v. Hoff, 660 F.2d 371 (8th Cir. 1981); Gordon v. United States Department of Justice, 558 F.2d 618 (1st Cir. 1977); *see, e.g.*, Wasby 1995, *supra* note 12, at 96–98 (discussing cases); Wasby 1990, *supra* note 12, at 113–16 (same).

215. Procup v. Strickland, 567 F. Supp. 146, 150–151 (M.D. Fla. 1983), *rev'd*, 760 F.2d 1107 (11th Cir. 1985), *vacated and remanded*, 792 F.2d 1069 (11th Cir. 1986) (*en banc*) (*per curiam*).

216. *Procup*, 567 F. Supp. at 160–61.

217. *See id.* at 159–160 (considering and rejecting verification under penalty of contempt, limitation to constitutional claims of harm, and plenary judicial preapproval).

218. Procup v. Strickland, 760 F.2d 1107, 1110 (11th Cir. 1985), *vacated and remanded*, 792 F.2d 1069 (11th Cir. 1986) (*en banc*) (*per curiam*).

That was not the final word, however. The court of appeals reconsidered the case *en banc* and, whilst reaching the same result, stressed that the district court had ample options to curtail Procup's excesses.[219] True, "courts must carefully observe the fine line between legitimate restraints and an impermissible restriction on a prisoner's constitutional right of access to the courts."[220] This left the district court with much latitude, however: "Procup can be severely restricted as to what he may file and how he must behave in his applications for judicial relief. He just cannot be completely foreclosed from any access to the court."[221]

For like reasons, other circuits have often forborne from absolutist prohibitions in favor of requiring lesser measures such as prescreening or leave of court to file.[222] Likewise, in *Cello-Whitney v. Hoover* and *In re Tyler*, district courts approved novel but well-targeted remedies restricting a claimant to a certain number of *in forma pauperis* filings per month or year (as well as precertification), neatly maintaining access as well as constraining prolificacy.[223] *Tyler*, moreover, did so whilst also allowing a familiar exemption from the limit on annual filings in the event of an allegation of imminent harm.[224] This thoughtful approach has been approved on appeal as well in the Tenth Circuit in *Rubins v. Roetker*.[225]

2. Prolific Petitioners After the Prisoner Litigation Reform Act

Aside from the courts themselves, commentators had suggested the judiciary possessed the inherent power and indeed duty to curtail access to prolific litigants who persisted in frivolous *in forma pauperis* filings.[226] Jody L. Sturtz endorsed a categorical three-per-year approach as a necessary evil to combat the alleged reality that "courts can no longer control its [*sic*] management of the ever increasing number of frivolous, meritless suits."[227] Faced with these burgeoning demands, Sturtz rejected case-by-case

219. Procup v. Strickland, 792 F.2d 1069, 1072–73. (11th Cir. 1986) (*en banc*) (*per curiam*).

220. *Id.* at 1072.

221. *Id.* at 1074.

222. *See Procup*, 567 F. Supp. 157–60 (surveying approaches), *rev'd*, 760 F.2d 1107 (11th Cir. 1985), *vacated and remanded*, 792 F.2d 1069 (11th Cir. 1986) (*en banc*) (*per curiam*).

223. Cello-Whitney v. Hoover, 769 F. Supp. 1155, 1157 (W.D. Wash. 1991) (three per year); *In re* Tyler, 677 F. Supp. 1410, 1414 (D. Neb. 1987) (one per year); *see* Sturtz, *supra* note 58, at 1373–76 (discussing cases).

224. *In re Tyler*, 677 F. Supp. at 1414.

225. Rubins v. Roetker, 737 F. Supp. 1140, 1145 (D. Colo. 1990) (one per year), *aff'd*, 936 F.2d 583 (10th Cir. 1991).

226. *See generally* Sturtz, *supra* note 58.

227. *Id.* at 1368–91, 1378.

adjudication as unworkable and proponed a universal rule for all prisoners.[228] As in many courts,[229] the predicament presented by prolific prisoners was framed as especially acute.[230]

Congress evidently agreed in drafting the PLRA, under which such prisoners are subjected to categorically stringent treatment when seeking to proceed *in forma pauperis* under § 1915 and prevailing precedent.[231] The most remarkable statutory mandate is provided in subsection (g), and parallels some of the more extreme responses of courts prior to the PLRA's passage:[232]

> 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.[233]

Congress thus far exceeded Sturtz's recommendation, by imposing a permanent ban on all future petitions once the threshold of three dismissals was reached.[234] But courts encountering this new provision found nothing out of ordinary, observing that courts had "routinely revoked a prisoner's ability to proceed [*in forma pauperis*] after numerous dismissals," pointing to the saga of Reverend Green.[235] Perhaps because of this history, the courts thus found nothing constitutionally objectionable about a statute barring civil access to the federal judiciary almost entirely.[236] Indeed, the vanishingly slender residual exception for claims involving "danger of serious physical

228. *See* Sturtz, *supra* note 58, at 1373–74.

229. *See supra* Section I-B.

230. *See* Sturtz, *supra* note 58, at 1377–79.

231. 141 CONG. REC. 14,570 (1995); *see supra* Section I-B.

232. Franklin, *supra* note 93, at 192 ("One of the more controversial changes to section 1915 was the addition of subsection 1915(g) . . . .").

233. 28 U.S.C. § 1915(g) (1996).

234. *See id.*

235. Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996) (citing Green v. Carlson, 649 F.2d 285, 287 (5th Cir. 1981) (*per curiam*)).

236. *See* Abdul-Akbar v. McKelvie, 239 F.3d 307, 317–18 (3d. Cir. 2001); Rivera v. Allin, 144 F. 3d 719, 723–28 (11th Cir. 1998); Wilson v. Yaklich, 148 F.3d 596, 604–05 (6th Cir. 1998); Carson v. Johnson, 112 F.3d 818, 821 (5th Cir. 1997).

injury"[237] transparently evokes the similarly absolutist regimes approved by the Fifth and Eighth Circuits.[238] Yet such a bar would seemingly contravene firmly established Supreme Court precedent.[239]

The Third Circuit in *Abdul-Akbar v. McKelvie* provided particularly creative reasoning in defense of the PLRA.[240] There, the Third Circuit read Supreme Court precedents to hold that due process demands only there be *some* avenue for a prisoner to bring his claim.[241] As the prisoner in question could avail himself of the Delaware *in forma pauperis* statute, the court found that barring access to the federal courts entirely would not preclude a judicial hearing of his § 1983 complaint,[242] and thus eschewed strict scrutiny and reviewed the PLRA's restriction only under rational basis review, which it could easily pass.[243] The court also expressed doubt that Abdul-Akbar's claim was in the "narrow category" of civil claims to be guaranteed access to the courts.[244]

Yet the *Abdul-Akbar* dissent readily illustrated the failings of the majority's arguments.[245] The claim at issue was manifestly constitutionally grounded, protected under Supreme Court precedent.[246] And the ability to remove a state action to federal court (where it would be promptly dismissed for lack of a filing fee) would afford the defendant effective immunity.[247] Moreover, the constitutionality of a general federal statute cannot turn on the happenstance of state law,[248] a principle the Court has long recognized:[249]

237. *See* Franklin, *supra* note 93, at 193.

238. *See Green*, 649 F.2d at 287; Green v. White (*In re* Green), 616 F.2d 1054, 1055 (8th Cir. 1980) (*per curiam*).

239. *See generally* Franklin, *supra* note 93.

240. *Abdul-Akbar*, 239 F.3d at 317–23.

241. *Id.* at 317–18 (analyzing M.L.B. v. S.L.J., 519 U.S. 102 (1996) and the "seminal case" of Boddie v. Connecticut, 401 U.S. 301, 371, 382–383 (1971)).

242. *Id.* at 318.

243. *Id.* at 318–19.

244. *Abdul-Akbar*, 239 F.3d at 317–18 (quoting *M.L.B.*, 519 U.S. at 113 (1996)); *see also* Asemani v. U.S. Citizenship & Immigration Servs., 797 F.3d 1069, 1076–77 (D.C. Cir. 2015) (quoting *M.L.B.*).

245. *Abdul-Akbar*, 239 F.3d at 325–33 (Mansmann, J., dissenting).

246. *Id.* at 325–28 ("That these rights are fundamental to our constitutional system cannot be gainsaid.").

247. *Id.* at 330.

248. *Id.* at 329–30.

249. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 394–95 (1971); Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 145–46 (2009) (discussing Court cases that condemned "permitting federal rights to depend on state laws"); *see also* Carlson v. Green, 446 U.S. 14, 28 n.2 (1980) (Powell, J., concurring) (citing *Bivens*). *But see Carlson*, 446 U.S. at 23 (majority) ("The question whether respondent's action for violations by federal officials

what result were Abdul-Akbar incarcerated across the Delaware River in Pennsylvania, where the state applied a parallel "three strikes limitation" on *in forma pauperis* status, and thus no avenue existed?[250] Upholding § 1915(g) would then deny prisoners any forum for their claims,[251] in apparent defiance of the Supreme Court's precedents on the right of access.[252] This result is particularly jarring because the Third Circuit, in a case involving the same prolific petitioner, had previously held such a bar unconstitutional—until the PLRA endorsed it.[253] The preponderance of appellate courts, however, have upheld the PLRA against constitutional challenge, even the Eleventh and D.C. Circuits.[254]

3. The Case for the Constitutionality of Access

The consensus in favor of § 1915(g) thus invites closer examination of the constitutionality of access to the courtroom.[255] The Third Circuit in *Abdul-Akbar* rightly noted that the Supreme Court has classified certain species of civil claims as not implicating the constitution right of access, including bankruptcy filings and welfare benefit determinations.[256] But equally surely, the Court has made clear that the right to lodge a constitutional claim, writ of habeas corpus, or suit challenging conditions of confinement *is* protected under the due process clauses.[257] It has held more generally that a plaintiff has a right of access if there is no other forum in which the claim can be lodged.[258] And it has found that a fee that effectively forbids an indigent litigant from filing infringes this right, notwithstanding

of federal constitutional rights should be left to the vagaries of the laws of the several States admits of only a negative answer in the absence of a contrary congressional resolution.").

250. *Abdul-Akbar*, 239 F.3d at 329–30 (Mansmann, J., dissenting).

251. *Id.*

252. *See* Wolff v. McDonnell, 418 U.S. 539, 577–80 (1974); Boddie v. Connecticut, 401 U.S. 371, 374–377 (1971); *see also* Abdul-Akbar v. Watson, 901 F.2d 329 (3d Cir. 1990).

253. *Abdul-Akbar*, 239 F.3d at 319–20 ("While not expressly repudiating our holding in *Watson*, [901 F.2d 329,] the majority nonetheless essentially holds that what the District Court was then precluded from doing by the Constitution it is now required to do by statute.").

254. *See*, *e.g.*, *id.*; Wilson v. Yaklich, 148 F.3d 596, 604–05 (6th Cir. 1998); Carson v. Johnson, 112 F.3d 818, 821 (5th Cir. 1997); Rivera v. Allin, 144 F.3d 719 (11th Cir. 1998); Asemani v. U.S. Citizenship & Immigration Servs., 797 F.3d 1069 (D.C. Cir. 2015). *But see* Lyon v. Kroll, 940 F. Supp. 1433 (S.D. Iowa 1996); Franklin, *supra* note 93, at 205–08 (discussing *Lyon*).

255. *See generally* Franklin, *supra* note 93.

256. Franklin, *supra* note 93 (citing United States v. Kras, 409 U.S. 434, 450 (1972) and Ortwein v. Schwab, 410 U.S. 656, 659 (1973)). Critically, such claims are creatures solely of statute rather than constitutional in nature.

257. Lewis v. Casey, 518 U.S. 343, 355 (1996); *Wolff*, 418 U. S. at 577–80 (1974); *see generally* Franklin, *supra* note 93, at 200–01, 219.

258. Boddie v. Connecticut, 401 U.S. 371, 374–77 (1971).

the court is technically available—if only the litigant (contrafactually) had the funds to avail.[259] All of this follows straightforwardly from the Court's view that without a real right of access to the courts to vindicate claims, no other rights can have substance, and civil society itself is endangered.[260]

Indeed, while Sturtz robustly defended the constitutionality of an annual limit on *in forma pauperis* filings, she noted that this was only so "because the prisoner could still file a limited number of *in forma pauperis* lawsuits" and thus the limit "in no way closes the courthouse doors to the indigent prisoner."[261] Several courts support this distinction.[262] Absent such a yearly allowance, Sturtz too would seemingly find the sort of "total denial of the right to access" implicated by a perpetual ban infringes on the Petition Clause of the First Amendment.[263]

Undeniably, more measured approaches to the abuses of prolific petitioners leave some potential for further abuse: As the *Procup* district court declaimed at length, litigants may perjure themselves in sworn precertifications, deluge the court with requests for leave to file, and prove undeterred by the threat of contempt if already set for long incarceration.[264] Yet such is the price of a constitutionally sound system of justice open to all, as evidenced by the Eleventh Circuit's sharp reversal on constitutional grounds,[265] as well as that of the D.C. Circuit.[266] Eschewing absolutist interdictions like those of the PLRA along with the Fifth and Eighth Circuits still affords district courts plentiful tools, if not the most convenient nuclear

259. *See* M.L.B. v. S.L.J., 519 U.S. 102, 110–12 (1996); *Boddie*, 401 U.S. at 376–77; Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252, 257 (1959); Griffin v. Illinois, 351 U. S. 12, 16–20 (1956); *see also* Franklin, *supra* note 93, at 195–201.

260. *See* Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907); *Boddie*, 401 U.S. at 374–377.

261. Sturtz, *supra* note 58, at 1374–76.

262. *See* Rubins v. Roetker, 737 F. Supp. 1140, 1145 (D. Colo. 1990), *aff'd*, 936 F.2d 583 (10th Cir. 1991); Cello-Whitney v. Hoover, 769 F. Supp. 1155, 1157 (W.D. Wash. 1991); *In re* Tyler, 677 F. Supp. 1410, 1414 (D. Neb. 1987).

263. Sturtz, *supra* note 58, at 1374–76.

264. Procup v. Strickland, 567 F. Supp. 146, 158–160 (M.D. Fla. 1983), *rev'd*, 760 F.2d 1107 (11th Cir. 1985), *vacated and remanded*, 792 F.2d 1069 (11th Cir. 1986) (*en banc*) (*per curiam*).

265. *See* Procup v. Strickland, 760 F.2d 1107, 1111–15 (11th Cir. 1985), *vacated and remanded*, 792 F.2d 1069 (11th Cir. 1986) (*en banc*) (*per curiam*) ("The centerpiece of the Section 1915 procedures is the district court's exercise of its discretion on a case-by-case basis, however tedious this exercise of discretion may become. The statute places the responsibility of reviewing prisoner complaints in the district court alone, and 'any order that does not allow a district court the appropriate exercise of discretion under § 1915 is invalid.'") (quoting *In re* Green, 669 F.2d 779, 786 (D.C. Cir. 1981)), *vacated and remanded*, 792 F.2d 1069 (11th Cir. 1986) (*en banc*) (*per curiam*).

266. *In re* Green, 669 F.2d 779, 785–87 (D.C. Cir. 1981).

option of permanently barring the courthouse doors to virtually all claims.[267] If nothing else, the monthly or annual limits endorsed by *Cello-Whitney*, *Tyler*, *Rubins*, and Sturtz provide a robust check on volume.[268]

To say the Fifth and Eight Circuits' interdictions leave the courthouse doors remain "ajar, if only slightly" is euphemistic at best:[269] In fact, such orders prejudge that "in forma pauperis claims not involving actual or threatened physical harm are ipso facto duplicative, frivolous, or malicious."[270] Avoiding such prejudice is of constitutional scope: It is nigh-impossible to square the Eight Circuit's *en banc* recognition of an "axiomatic" right of access to the courts with a panel's peremptory interdiction of nearly all claims heedless of their frequency, novelty, or merit.[271] (Remarkably, the *Procup* district court found even the Fifth and Eighth Circuits nigh-absolute proscriptions insufficient, on the theory that Procup would simply insert spurious claims of physical injury into every filing.[272]) Even to burden, let alone bar, a fundamental right requires the statute be "narrowly tailored to serve a compelling government interest."[273]

Another case from the Third Circuit, *In re Oliver*, provides perhaps the best accounting of the Fifth and Eighth Circuits' approval of these far-reaching penalties.[274] There the court confirmed the use of similar interdictions against prolific petitioners,[275] even whilst noting "any such order is an extreme remedy, and should be used only in exigent

267. Procup v. Strickland, 792 F.2d 1069, 1072–73 (11th Cir. 1986) (*en banc*) (*per curiam*).

268. *See* Cello-Whitney v. Hoover, 769 F. Supp. 1155, 1157 (W.D. Wash. 1991); Sturtz, *supra* note 58.

269. *See In re Green*, 669 F.2d at 785–86 (quoted *supra* note 207).

270. *Procup*, 760 F.2d at 1111–12 (questioning "whether such an injunction should ever be employed").

271. *Compare In re* Green, 598 F.2d 1126, 1127 (8th Cir. 1979) (*en banc*), *with* Green v. White (*In re* Green), 616 F.2d 1054, 1055–56 (8th Cir. 1980) (*per curiam*).

272. *Procup*, 567 F. Supp. at 159 ("Likewise, the approach taken by the Fifth and Eighth Circuits in dealing with Green—allowing Green to file suit in forma pauperis only if he alleges a constitutional deprivation stemming from physical injury—does not appear to be a wholly satisfactory method of curbing Procup's abuse. While such an order would curtail Procup's complaints concerning the living conditions of his confinement, the Court is concerned that it would merely ensure that Procup's future allegations included a claim of physical harm to his person."), *rev'd*, 760 F.2d 1107 (11th Cir. 1985), *vacated and remanded*, 792 F.2d 1069 (11th Cir. 1986) (*en banc*) (*per curiam*).

273. Plyler v. Doe, 457 U.S. 202, 216–17 (1982) (quoted in Abdul-Akbar v. McKelvie, 239 F. 3d 307, 316, 325 (3d. Cir. 2001)); *see* Franklin, *supra* note 93, at 194.

274. *In re* Oliver, 682 F.2d 443 (3d Cir. 1982).

275. *Id.* at 446 ("We agree with the First and District of Columbia Circuits, however, that a continuous pattern of groundless and vexatious litigation can, at some point, support an order against further filings of complaints without the permission of the court. The case before us appears to reveal a situation sufficient to justify exercise of the court's power, under the All Writ's [*sic*] Act, to do so.").

circumstances."[276] Indeed, in the same breath the court professed that "[a]ccess to the courts is a fundamental tenet of our judicial system; *legitimate* claims should receive a full and fair hearing no matter how litigious the plaintiff may be" and that "the 'In Forma Pauperis' statute, was enacted specifically to provide poor persons with equal access to the federal courts."[277] Barring *frivolous* claims would not implicate the right of access to the courts, however,[278] and this distinction is critical to the Third Circuit:

> The record suggests that Oliver's claims have been not only numerous but patently without merit—none has yet stated a claim sufficient to require a hearing. The express language of the order mandates that "the Clerk . . . accept no future case for filing from Mr. Oliver, *absent* a specific Order from a Judge of this Court." In reviewing the Court's order we *understand* that, Oliver's propensity for filing numerous frivolous suits notwithstanding, the district court would permit the filing of any nonfrivolous claim submitted by Oliver.[279]

This "understanding" is evident in circuits only requiring sworn precertification or leave of court to file.[280] And it seems to be the (unstated) understanding of the more draconian Fifth and Eighth circuits in approving absolutist interdictions as well.[281] Indeed, the Fifth Circuit, amongst others, has reaffirmed that in enacting the PLRA, "Congress did not intend to 'freeze out meritorious claims or ossify district court errors.'"[282] Yet given the unfailing frivolousness of past filings, these courts apparently presume

276. *In re* Oliver, 682 F.2d at 445.

277. *Id.* at 446 (emphasis added).

278. *Id.* ("No person, however, '. . . rich or poor, is entitled to abuse the judicial process.'"); *see* Sturtz, *supra* note 58, at 1377 (arguing right of access not implicated for frivolous filings); Feldman, *supra* note 29, at 433–34 (same).

279. *Id.* at 446. (second emphasis added).

280. *See, e.g.*, Green v. Warden, 699 F.2d 364, 370 (7th Cir. 1983); *In re* Green, 669 F.2d 779, 787 (D.C. Cir. 1981); Gordon v. U.S. Dep't of Justice, 558 F.2d 618 (1st Cir. 1977); *see* Procup v. Strickland, 760 F.2d 1107, 1111 (11th Cir. 1985) (discussing cases), *vacated and remanded*, 792 F.2d 1069 (11th Cir. 1986) (*en banc*) (*per curiam*).

281. *See, e.g.*, Peck v. Hoff, 660 F.2d 371, 374 (8th Cir. 1981); Green v. Carlson, 649 F.2d 285, 287 (5th Cir. 1981) (Unit A); Green v. White (*In re* Green), 616 F.2d 1054, 1055 (8th Cir. 1980) (*per curiam*).

282. Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 780 (10th Cir.1999) (quoting Adepegba v. Hammons, 103 F.3d 383, 388 (5th Cir.1996)); Thompson v. DEA, 492 F.3d 428, 432–33 (D.C. Cir. 2007) (quoting same).

future filings will follow suit, raising no constitutional concerns.[283] If a claim rebuts that presumption, there remains the supposition, as in *Oliver*, that the claim will *somehow* be allowed to proceed.[284] The devilish fallacy of this happy supposition lies, as usual, in the details:[285] However are judges to even become aware of a meritorious claim if their clerks are invisibly and automatically rejecting every filing without regard for its merit?[286] (Some panels have implied that indigent petitioners are expected to somehow accrue the means to pay a fee in order to signal that *this* claim is worth reviewing[287]—unless the statute of limitations expires first.[288]) Commentators have split over whether such a regime can pass constitutional muster.[289] At the end of the day, however, the Supreme Court appears to

283. *See Procup*, 760 F.2d at 1111 ("Imposing this type of injunction creates, in effect, a *conclusive* presumption that future in forma pauperis claims not involving actual or threatened physical harm are ipso facto duplicative, frivolous, or malicious.") (discussing *Green*, 649 F.2d 285, and *In re Green*, 616 F.2d 1054), *vacated and remanded*, 792 F.2d 1069 (11th Cir. 1986) (*en banc*) (*per curiam*); *Peck*, 660 F.2d at 374 ("It had experienced a number of meritless complaints filed by inmate Peck. When it entered its order of June 11, 1981, it had every reason to expect the pattern to continue, as indeed it did."); *see also* Feldman, *supra* 29, at 434–35.

284. *In re Oliver* only makes explicit what is implicitly so of any court: a later judge or panel can surely enter an order expressly directing the docketing of a meritorious claim notwithstanding a standing interdiction.

285. *Cf.* United States v. Villalpando, 588 F.3d 1124, 1129 (7th Cir. 2009) ("Unfortunately for Villalpando, the devil is in the details."); United States v. Turcotte, 405 F. 3d 515, 521 (7th Cir. 2005) ("As the old adage instructs, the devil is in the details.").

286. The answer that the interdicted litigant in possession of a meritorious claim could write to the issuing judge by letter to plead its worth hardly solves anything: Presumably judges issuing interdictions of this sort are not expecting to simply transfer their review of the merits of a tidal wave of claims from their formal docket to their inboxes, and will not accommodate prolific petitioners who engage in such a letter-writing campaign, but rather discard letters as peremptorily as formal filings. *See* Procup v. Strickland, 567 F. Supp. 146, 160 (M.D. Fla. 1983) ("The approach taken by the First and Third Circuits and by the Western District of Missouri in dealing with Green—prohibiting him from filing any further pleadings of any sort without leave of court—could possibly be effective in preventing Procup from engaging in further abuse of the judicial process. Unless Procup convinced the Court that his complaint was meritorious, he would be barred from prosecuting any further actions. Upon closer examination, however, such a sanction does not appear likely to alter significantly the present situation. The Court would, in all likelihood, continue to be deluged by Procup's frivolous filings; they would merely be accompanied by his requests to obtain the Court's permission to proceed with his cases. Those requests would necessitate repeated preliminary reviews similar in form to those presently given. Therefore, in substance, the Court would not have effectively curtailed Procup's abusive filing practices.").

287. *See, Peck*, 660 F.2d at 374 (approving interdiction in part because an indigent petitioner can still supposedly access the court by paying the required fee).

288. Abdul-Akbar v. McKelvie, 239 F.3d 307, 328 (3d. Cir. 2001) (Mansmann, J., dissenting) ("If they cannot buy entry into court, they must wait until they can; and if the wait is too long, justice will be denied to them.").

289. *Compare, e.g.*, Franklin, *supra* note 93 (detailing constitutional problems with the PLRA), *and* Michelman, *supra* note 22 (discussing constitutional problems in the Supreme Court right of access decisions), *with* Lane, *supra* note 11, at 353–63 (finding no constitutional argument

have at least obliquely sanctioned this brand of "extreme remedy"[290] in citing such cases with approval whilst fashioning its own brand of interdictions.[291]

III. The *In Forma Pauperis* Supreme Court Cases

Notwithstanding the various approaches and occasional "extreme remedy" levied by the lower courts,[292] the Supreme Court itself had managed its caseload for the vast majority of its history without resort to proscribing any of its petitioners.[293] It was not until 1989—exactly two centuries after the Court's establishment[294]—that the putative problem of pestersome paupers goaded the Court into action.[295] But change came swiftly thereafter, especially for such a ponderous institution: just three years later, the Court had revised its rules and adjusted its jurisprudence to bar the courthouse doors against what would become a lengthy roll of indigent litigants.[296] Nor was the Court unacquainted of the import of its interdict, as the first decisions were narrow 5-4 votes, and all featured increasingly fiery dissents decrying the cost to the Court.[297] The majority, by contrast, consistently wrote without attribution—*per curiam*.[298] Figure 1 illustrates the shrinking dissenting coalition over the course of the eight cases.

against the Supreme Court's use of the practice), *and* Sturtz*, supra* note 58, at 1374–78 (distinguishing constitutionality of various degrees of interdiction).

290. *In re* Oliver, 682 F.2d 443, 445 (3d. Cir. 1982).

291. *In re* McDonald, 489 U.S. 180, 184 & n.8 (1989) (citing Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986), *Peck*, 660 F.2d 371 (8th Cir. 1981), and Green v. Carlson, 649 F.2d 285 (5th Cir. 1981)); *see infra* Section III-B; *see also* Lane, *supra* note 11, at 355 ("As a result, it is safe to say that a right of access for IFP litigants will not be recognized any time soon, absent an explicit law by Congress, because the current membership of the Court is unlikely to establish one.").

292. *See supra* Section II-B.

293. *In re McDonald*, 489 U.S. at 184; *see also id.* at 185 (Brennan, J., dissenting).

294. An Act to Establish the Judicial Courts of the United States, 1st Cong., § 1, 1 Stat. 73 (Sept. 24, 1789) ("Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum . . . .").

295. *In re McDonald*, 489 U.S. 180.

296. *See* Martin v. D.C. Ct. App., 506 U.S. 1 (1992); *In re* Amendment to Rule 39, 500 U.S. 13 (1991).

297. *See infra* Figure 1.

298. *See Martin*, 506 U.S. 1; Zatko v. California, 502 U.S. 16 (1991) (*per curiam*); *In re Amendment to Rule 39*, 500 U.S. 13; *In re* Demos, 500 U.S. 16 (1991) (*per curiam*); *In re* Sindram, 498 U.S. 177 (1991) (*per curiam*); Wrenn v. Benson, 490 U.S. 89 (1989) (*per curiam*); *In re McDonald*, 489 U.S. 180; Brown v. Herald Co., 464 U.S. 928 (1983) (*per curiam*).

Figure 1: Votes in the In Forma Pauperis *Supreme Court Cases*

Brown	Burger	Brennan	White	Marshall	Blackmun	Powell	Rehnquist	Stevens	O'Connor
McDonald	Rehnquist	Brennan	White	Marshall	Blackmun	Stevens	O'Connor	Scalia	Kennedy
Wrenn	Rehnquist	Brennan	White	Marshall	Blackmun	Stevens	O'Connor	Scalia	Kennedy
Sindram	Rehnquist	White	Marshall	Blackmun	Stevens	O'Connor	Scalia	Kennedy	Souter
Demos	Rehnquist	White	Marshall	Blackmun	Stevens	O'Connor	Scalia	Kennedy	Souter
Rule 39	Rehnquist	White	Marshall	Blackmun	Stevens	O'Connor	Scalia	Kennedy	Souter
Zatko	Rehnquist	White	Blackmun	Stevens	O'Connor	Scalia	Kennedy	Souter	~~Thomas~~*
Martin	Rehnquist	White	Blackmun	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas

☐ Presumed Majority ☐ Minority ■ With Written Dissent
* Did Not Participate.

A. *Brown v. Herald Co.* [299] — October 31, 1983

Six years earlier, the Court had undertaken a subtle change in its practice that would herald the coming upheaval in courtroom access. In the therefore aptly captioned *Brown v. Herald Co.*, a two-sentence *per curiam* opinion denied the petitioner leave to file *in forma pauperis*, reserving any judgment on the merits of the petition until the filing fee was paid (or a renewed motion for leave made).[300] In dissent, Justice William Brennan, joined by Justices Thurgood Marshall and Harry Blackmun, observed that "when at least some of us proclaim that we are sorely pressed for adequate time to do our work, this treatment is both unfair and wasteful."[301] Previously, the Court evaluated whether a claim merited its plenary review without regard for the validity of the affidavit attesting to pauper status.[302] The dissent observed that this made ample sense: what possible value could

299. *Brown*, 464 U.S. at 928.

300. *Id.*

301. *Id.* at 929 (Brennan, J., dissenting).

302. *Id.* at 928–30 ("Each year, roughly 1,000 motions supported by affidavit are made for leave to proceed in forma pauperis. These motions usually accompany a petition for a writ of certiorari or a jurisdictional statement, and our practice heretofore has almost always been not to pass on the in forma pauperis motion but to proceed directly to grant or deny the petition based on the merits of the questions presented in the petition or statement.").

there be in directing parties to resubmit their claims if they had no merit?[303] Fairer and more efficient to continue as the Court always had: to deny certiorari on the merits rather than encourage relitigation of collateral matters.[304] The imperative was only amplified by the fact that eligibility for *in forma pauperis* filings lacked "an articulated set of standards" by which the decision could even be made.[305]

Justice John Paul Stevens too dissented, agreeing that "we should simply deny unmeritorious certiorari petitions without scrutinizing the petitioner's right to proceed in forma pauperis," but writing separately to address the circumstance where an *in forma pauperis* petition did show merit.[306] In such cases, Justice Stevens emphasized that the question of whether the petitioner was truly indigent must then be taken up, and if the "examination disclosed the kind of disrespect for our rules that has motivated the Court's unusual action in these cases, I would deny the petition even if it would otherwise have merited review."[307] Such an approach would amply police any abuse of the *in forma pauperis* system, in providing a compelling motivation to avoid fraudulent claims by withholding the dearest gift in the Court's grasp: a grant of plenary review.[308] By contrast, Justice Stevens could "see no purpose . . . in insisting that these petitioners—none of whom is represented by counsel who could advise them that their petitions stand no chance of being granted—pay a fee for the privilege of having their petitions denied."[309]

The Supreme Court's reversal of the order of affairs may seem picayune, but it was not nugatory. Formerly, all petitions were assessed for merit in the first instance, regardless of the status of the petitioner. By now putting the proverbial cart before the horse, the Court refashioned the petitioner's filing status into a gatekeeper that could forbid even an initial review of the merits. Such a reversal is all the more perplexing given that

303. *Brown*, 464 U.S. at 931 ("What possible justification can support the scrutiny of 1,000 affidavits in support of in forma pauperis motions each year?").

304. *Id*. at 930–31.

305. *Id.* at 930.

306. *Id.* at 931 (Stevens, J., dissenting).

307. *Id.*

308. *Id.* ("That would remove any incentive a petitioner might otherwise have to seek in forma pauperis status although ineligible for such status, without requiring the Court to assume the burden of examining every motion for leave to proceed in forma pauperis. In borderline cases the petitioner should, of course, be given an opportunity to pay the required costs before final action is taken on his application.").

309. *Brown*, 464 U.S. at 931.

the new ordering would multiply the Court's work pointlessly.[310] Indeed, Justice Stevens had previously written that "given the volume of frivolous, illegible, and sometimes unintelligible petitions that are filed in this Court, our work is facilitated by the practice of simply denying certiorari once a determination is made that there is no merit to the petitioner's claim."[311] And in the first intimation that these kind of questions matter, Justice Brennan also added in a footnote that "[m]otions to proceed in forma pauperis are a special case since they will determine whether an individual gains access to this Court."[312]

B. *In re McDonald* [313] — February 21, 1989

The proscriptive potential of *Brown*'s newly fashioned gatekeeping approach to *in forma pauperis* filings did not go untapped overlong. Over the course of the 1980s, one Jessie McDonald had applied to the Supreme Court seventy-three times; every appeal, petition, and motion had been denied.[314] His latest filing not-too-coherently sought an extraordinary writ of habeas corpus, as well as, like his other filings, leave to proceed *in forma pauperis*.[315] Without reaching the merits, the Court denied leave and gave McDonald three weeks to come up with the cash for filing fees,[316] despite the Court's underlining that the Court had never before denied him *in forma pauperis* status,[317] and there being no question he was in fact impoverished.[318] (The standard court fee represented the entirety of McDonald's stated monthly income.[319]) Rather, the court viewed the statute

310. *Brown*, 464 U.S. at 930 (Brennan, J., dissenting); *see also id.* at 931 ("Our time certainly can be spent in more productive effort than the determination of whether a petitioner or appellant is able to pay $200 plus the cost of printing and still provide himself and his dependents with the necessities of life.").

311. Davis v. Jacobs, 454 U.S. 911, 914 (1981) (Stevens, J., opinion respecting denial of certiorari) (quoted in *Brown*, 464 U.S. at 931).

312. *Brown*, 464 U.S. at 930 n.4.

313. *In re* McDonald, 489 U.S. 180 (1989) (5-4) (*per curiam*).

314. *Id.* at 181–82.

315. *Id.* at 180.

316. *Id*.

317. *Id*. at 182 ("We have never previously denied him leave to proceed *in forma pauperis*.").

318. *Id.* at 182 n.6.

319. *Compare In re McDonald*, 489 U.S. at 182 ("In the affidavit in support of his present motion to proceed *in forma pauperis*, petitioner states that he earns approximately $300 per month.") *with In re* Amend. to Rule 39, 500 U.S. 13 (1991) (*per curiam*) ("Filings under our paid docket require a not-insubstantial filing fee, currently $300, and compliance with our printing requirements.").

prescribing *in forma pauperis* filings as permissive, allowing courts to deny leave based on concerns other than lack of penury.[320]

But the Court went further. Noting that *pro se in forma pauperis* litigants lack the deterrents of fees to penalize meritless claims, the Court found that McDonald's continuing drain on the Court's limited resources warranted a novel penalty:[321] "We also direct the Clerk not to accept any further petitions from petitioner for extraordinary writs pursuant to 28 U.S.C. §§ 1651(a), 2241, and 2254(a), unless he pays the docketing fee."[322] The Court recognized its ban on McDonald ever again seeking an extraordinary writ *in forma pauperis* was without precedent in its own jurisprudence.[323] But the Court looked to precedents in the lower courts to justify its newfound approach.[324] In defense of the ban, the Court emphasized that extraordinary writs are virtually never granted in any event, and petitioner remained free to seek relief via the ordinary routes of certiorari or appeal.[325] Tellingly, the majority repeatedly characterized *in forma pauperis* status as a privilege that could be retracted, rather than a right.[326]

The four dissenters from *Brown* again rebelled, arguing that the Court lacked the power to preemptively deny *in forma pauperis* status in any and all extraordinary petitions.[327] Taking the pen once more, Justice Brennan admitted McDonald likely abused the Court's process, but disagreed "that he poses such a threat to the orderly administration of justice that we should

320. *In re McDonald*, 489 U.S. at 183–84 ("Title 28 U.S.C. § 1915 provides that '[a]ny court of the United States *may* authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor.' . . . Each year, we permit the vast majority of persons who wish to proceed *in forma pauperis* to do so.").

321. *In re McDonald*, 489 U.S. at 184 ("But paupers filing pro se petitions are not subject to the financial considerations filing fees and attorney's fees that deter other litigants from filing frivolous petitions. Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice. The continual processing of petitioner's frivolous requests for extraordinary writs does not promote that end.").

322. *Id.* at 180.

323. *Id.* at 184; *see also id.* at 185 (Brennan, J., dissenting) ("In the first such act in its almost 200-year history, the Court today bars its door to a litigant prospectively.").

324. *Id.* (majority) (citing Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986), Peck v. Hoff, 660 F.2d 371 (8th Cir. 1981), and Green v. Carlson, 649 F.2d 285 (5th Cir. 1981)).

325. *Id.* at 185.

326. *See id.* at 184 ("Each year, we permit the vast majority of persons who wish to proceed *in forma pauperis* to do so; last Term, we afforded the privilege of proceeding *in forma pauperis* to about 2,300 persons."); *id.* at 185 ("Petitioner remains free under the present order to file *in forma pauperis* requests for relief other than an extraordinary writ, if he qualifies under this Court's Rule 46 and does not similarly abuse that privilege.").

327. *In re McDonald*, 489 U.S. at 185–86 (Brennan, J., dissenting).

embark on the unprecedented and dangerous course the Court charts today."[328] Turning to the statute, Justice Brennan noted that it allowed the court to dismiss only "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."[329] And that statutory language was thus fatal to the Court's sweeping interdiction: "Needless to say, the future petitions McDonald is barred from filing have not been 'found to be' frivolous. Even a very strong and well-founded belief that McDonald's future filings will be frivolous cannot render a before-the-fact disposition compatible with the individualized determination § 1915 contemplates."[330] Justice Brennan also observed that the Court's own rules mandated that its clerk docket properly filed papers, and the Court now placed the clerk in the unhappy predicament of being directed to violate those very rules.[331] "Of course," he chided, "we are free to amend our own rules should we see the need to do so, but until we do, we are bound by them."[332]

Justice Brennan's peroration on the wisdom of the Court's course, which would prove prescient, bears reproduction in full:

> Even if the legality of our action in ordering the Clerk to refuse future petitions for extraordinary writs *in forma pauperis* from this litigant were beyond doubt, I would still oppose it as unwise, potentially dangerous, and a departure from the traditional principle that the door to this courthouse is open to all. The Court's order purports to be motivated by this litigant's disproportionate consumption of the Court's time and resources. Yet if his filings are truly as repetitious as it appears, it hardly takes much time to identify them as such.
>
> I find it difficult to see how the amount of time and resources required to deal properly with McDonald's petitions could be so great as to justify the step we now take. Indeed, the time that has been consumed in the preparation of the present order barring the door to Mr. McDonald far exceeds that which would have been necessary to process his petitions for the next several years, at least. I continue to find puzzling the Court's fervor in ensuring that rights granted to the poor are not abused, even when so doing actually increases the drain on our limited resources. Today's

328. *In re McDonald*, 489 U.S. at 185–86 (Brennan, J., dissenting).

329. *Id*.

330. *Id.* at 186.

331. *Id.*

332. *Id*.

> order makes sense as an efficiency measure only if it is merely the prelude to similar orders in regard to other litigants, or perhaps to a generalized rule limiting the number of petitions *in forma pauperis* an individual may file. Therein lies its danger.
>
> The Court's order itself seems to indicate that further measures, at least in regard to this litigant, may be forthcoming. It notes that McDonald remains free to file *in forma pauperis* for relief other than extraordinary writs, if he "does not similarly abuse that privilege." But if we have found his 19 petitions for extraordinary writs abusive, how long will it be until we conclude that his 33 petitions for certiorari are similarly abusive and bar that door to him as well? I am at a loss to say why, logically, the Court's order is limited to extraordinary writs, and I can only conclude that this order will serve as precedent for similar actions in the future, both as to this litigant and to others.
>
> I doubt—although I am not certain—that any of the petitions Jessie McDonald is now prevented from filing would ultimately have been found meritorious. I am most concerned, however, that, if, as I fear, we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim. It is rare, but it does happen on occasion that we grant review and even decide in favor of a litigant who previously had presented multiple unsuccessful petitions on the same issue.
>
> This Court annually receives hundreds of petitions, most but not all of them filed *in forma pauperis*, which raise no colorable legal claim whatever, much less a question worthy of the Court's review. Many come from individuals whose mental or emotional stability appears questionable. It does not take us long to identify these petitions as frivolous, and to reject them. A certain expenditure of resources is required, but it is not great in relation to our work as a whole. To rid itself of a small portion of this annoyance, the Court now needlessly departs from its generous tradition and improvidently sets sail on a journey whose landing point is uncertain. We have long boasted that our door is open to all. We can no longer.[333]

333. *In re McDonald,* 489 U.S. at 186–88 (citations omitted).

As telling as the language of the majority opinion is that of the dissent, speaking of the "rights granted to the poor" to make *in forma pauperis* filings.[334] This distinction seemingly animates the entire disagreement between the two sides: the minority saw access to the courtroom as a vested entitlement, whereas the majority saw it as a privilege forfeitable for misbehavior.

C. *Wrenn v. Benson* [335] — April 17, 1989

Less than two months later, the Court returned to the subject of prolific *in forma pauperis* petitioners; *Wrenn v. Benson*, however, was considerably less seismic than *McDonald*. Over the preceding three years, one Curtis Wrenn had filed twenty-two petitions for certiorari, almost all of them seeking to proceed *in forma pauperis*.[336] In each case, the Court had examined the required affidavits, determined Wrenn was not in fact eligible to proceed, and denied leave, following the inverted process approved in *Brown*.[337] Wrenn had nonetheless continued to seek *in forma pauperis* status, and having seen that the previous nineteen rejections had not curbed Wrenn's enthusiasm, the majority now "direct[ed] the Clerk of the Court not to accept any further filings from petitioner in which he seeks leave to proceed *in forma pauperis* under this Court's Rule 46.1, unless the affidavit submitted with the filing indicates that petitioner's financial condition has substantially changed."[338]

By way of reasoning, the majority pointed to the rationale expressed in *McDonald* that "[e]very paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice."[339] Unlike McDonald, however, the chastisement for Wrenn was considerably more measured.[340] In directing the clerk to evaluate future affidavits to determine whether they stated a change of circumstance supporting a plea of poverty, the Court was simply delegating that fundamentally ministerial function to its clerk rather than expending its own time; it was not preventing Wrenn from proceeding *in forma pauperis* if in fact he lacked the funds to

334. *In re McDonald,* 489 U.S. at 187.

335. Wrenn v. Benson, 490 U.S. 89 (1989) (6-3) (*per curiam*).

336. *Id.* at 89.

337. *Id.* at 89–91.

338. *Id.* at 92.

339. *Id.* (quoting *In re McDonald*, 489 U.S. at 184).

340. *Compare In re McDonald*, 489 U.S. at 184, *with Wrenn*, 490 U.S. at 92.

pay.[341] (Notably, Wrenn had paid the filing fee for one of his many petitions; he apparently could not or did not want to pay the others.[342])

Perhaps because of this more modest accommodation, Justice Blackmun registered no disagreement with the *per curiam* decision. The remainder of the *Brown* and *McDonald* dissenting wing remained defiant, however, with both Justices Brennan and Stevens writing.[343] Neither had anything to add to the dialogue however: Justice Brennan simply stated his dissent for the same reasons given in *Brown* and *McDonald*;[344] Justice Stevens did the same, reiterating only his belief that "the preparation and enforcement of orders of this kind consume more of the Court's valuable time than is consumed by the routine denial of frivolous motions and petitions."[345] This uncharacteristic brevity likely bespeaks the fact that the majority's remedy was not particularly problematic in terms of access to the Court, and certainly less so than the sweeping interdiction of *McDonald* or the more extreme remedies yet to come.[346]

D. *In re Sindram* [347] — January 7, 1991

A brief hiatus followed *Wrenn*, but nonetheless only two more years passed before the next advance in the Court's move to bar its doors. Michael Sindram had applied to the Court for relief forty-three times over three years, and twenty-four times in that very term; all had been denied.[348] Returning now with a request for an extraordinary writ and leave to proceed *in forma pauperis*, the Court denied leave, citing *McDonald*.[349] Indeed, the opinion of the Court closely tracked that of the earlier case, once again noting the lack of deterrents to *in forma pauperis* litigants and its concern that the "goal of fairly dispensing justice, however, is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests."[350] This time, however, the Court responded to one of Justice Brennan's prior arguments in dissent, explaining that the "risks of

341. *Wrenn*, 490 U.S. at 91–92.

342. *Id.* at 89.

343. *Wrenn*, 490 U.S. at 92 (Brennan, J., dissenting); *id.* (Stevens, J., dissenting).

344. *Id.* (Brennan, J., dissenting).

345. *Id.* (Stevens, J., dissenting).

346. *See In re* McDonald, 489 U.S. 180, 184 (1989); Martin v. D.C. Ct. App., 506 U.S. 1, 3 (1992).

347. *In re* Sindram, 498 U.S. 177 (1991) (6-3) (*per curiam*).

348. *Id.* at 177–78.

349. *Id.* at 177–79.

350. *In re Sindram*, 498 U.S. at 179–80. Too, the Court noted its previous generosity in permitting Sindram to proceed *in forma pauperis*, and that other avenues for relief remained open. *Id.* at 179–80 & n.2.

abuse are particularly acute with respect to applications for extraordinary relief, since such petitions are not subject to any time limitations and, theoretically, could be filed at any time without limitation."[351] Perceiving not only the ability but the "duty" to protect itself against abusive *in forma pauperis* litigants, the Court once more directed its clerk to accept no further petitions for extraordinary writs *in forma pauperis*.[352]

The same justices as *McDonald* yet again dissented, sans only Justice Brennan, who had retired from the bench in the interim.[353] Given the thorough airing of the issues in *McDonald*, Justice Marshall was sparer, but no less critical: serial litigants are at worst a "minor inconvenience," and simply denying their petitions is likely easier than those with paid counsel given the skill of the latter at making weak claims seem meritorious.[354] Singling out the frivolous filings of the poor, he opined, "in response to a problem that cuts across all classes of litigants strikes me as unfair, discriminatory, and petty."[355] Brief mention was given to the statutory argument that the Court lacks the power to prescribe the poor,[356] but the gravamen of the dissent once again lay in its peroration:

> Our longstanding tradition of leaving our door open to all classes of litigants is a proud and decent one worth maintaining.
>
> Moreover, we should not presume in advance that prolific indigent litigants will never bring a meritorious claim. Nor should we lose sight of the important role *in forma pauperis* claims have played in shaping constitutional doctrine. As Justice Brennan warned, "if . . . we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim." By closing our door today to a litigant like Michael Sindram, we run the unacceptable risk of impeding a future Clarence Earl Gideon. This risk becomes all the more unacceptable when it is generated by an ineffectual gesture that serves no realistic purpose other than conveying an unseemly message of hostility to indigent litigants.[357]

351. *In re Sindram*, 498 U.S. at 180.

352. *Id.*

353. *Id.* at 180–82 (Marshall, J., dissenting).

354. *Id.* at 180–81.

355. *Id.* at 181.

356. *Id.*

357. *In re Sindram*, 498 U.S. at 182 (citations omitted).

Justice Blackmun, joined by Justice Marshall, dissented separately to highlight that *Sindram* did not merely repeat *McDonald*'s sin but advanced it.[358] McDonald, it could well be argued, truly had abused the Court's process for extraordinary writs, having applied nearly twenty times for patently unavailable relief; Sindram, however, had applied only twice.[359] Observing that a mere two such petitions could not credibly be construed as a serial abuse of process, Blackmun discerned a more dangerous step: that Sindram was in fact being punished indirectly for his many frivolous filings for certiorari.[360] Such a move intimated that the Court might turn its eye to interdictions not against the rarefied extraordinary writs seen in *McDonald* and *Sindram*, but the ordinary backbone of the Court's docket, petitions for certiorari.

E. *In re Demos* [361] — April 29, 1991

The Court's next foray warrants little further comment, for it mirrors *Sindram* almost entirely and came but a few months later: the petitioner had brought a great many petitions, and the Court now revoked his right to file any future petitions for extraordinary writs because of that abuse, for the reasons before stated.[362] Justice Marshall dissented with Stevens and Blackmun:

> I continue to oppose this Court's unseemly practice of banning *in forma pauperis* filings by indigent litigants. As I have argued, the Court's assessment of the disruption that an overly energetic litigant like Demos poses to "the orderly consideration of cases," is greatly exaggerated. The Court is sorely mistaken if it believes that the solution to the problem of a crowded docket is to crack down on a litigant like Demos.
>
> Two years ago, Justice Brennan sagely warned that in "needlessly depart[ing] from its generous tradition" of leaving its doors open to all classes of litigants, the Court "sets sail on a journey whose landing point is uncertain." The journey's ominous destination is becoming apparent. The Court appears resolved to close its doors to increasing numbers of indigent litigants—and for increasingly

358. *In re Sindram*, 498 U.S. at 182–83 (Blackmun, J., dissenting).

359. *Id.* at 183.

360. *Id.*

361. *In re* Demos, 500 U.S. 16 (1991) (6-3) (*per curiam*).

362. *Id.* at 17.

> less justifiable reasons. I fear that the Court's action today portends even more Draconian restrictions on the access of indigent litigants to this Court.
>
> In closing its doors today to another indigent litigant, the Court moves ever closer to the day when it leaves an indigent litigant with a meritorious claim out in the cold. And with each barrier that it places in the way of indigent litigants, and with each instance in which it castigates such litigants for having "abused the system," the Court can only reinforce in the hearts and minds of our society's less fortunate members the unsettling message that their pleas are not welcome here.[363]

Even more so than *Sindram*, the dissent foreshadowed—indeed predicted—the Court's forthcoming expansion of its interdiction jurisprudence to writs of certiorari.[364]

F. *In re Amendment to Rule 39* [365] — April 29, 1991

First, however, there was the matter of Justice Brennan's irksome observation that the Court was violating its own rules its zeal to prune its *in forma pauperis* docket.[366] But as he had noted, the Court could always change its rules, and so it had done on the same day as *Demos*, amending Rule 39 to add an eighth clause: "If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ, as the case may be, is frivolous or malicious, the Court may deny a motion for leave to proceed *in forma pauperis*."[367] Retreading its traditional arguments, the majority explained the change was necessary to permit the Court to police its *in forma pauperis* docket, which was not susceptible to control by the ordinary application of damages and costs as sanctions, to ensure that "the right to file *in forma pauperis* not be encumbered by those who would abuse the integrity of our process by frivolous filings, particularly those few persons whose filings are repetitive with the obvious effect of burdening the office of the Clerk and other members of the Court staff."[368] It is ironic that

363. *In re Demos*, 500 U.S. at 18–19 (Marshall, J., dissenting) (citations omitted).

364. *Compare id.* at 18 n.*, *with id.* at 183 (Blackmun, J., dissenting).

365. *In re* Amend. to Rule 39, 500 U.S. 13 (1991) (6-3) (*per curiam*).

366. *In re* McDonald, 489 U.S. 180, 186 (1989) (*per curiam*); *supra* note 332.

367. *In re Amend. to Rule 39*, 500 U.S. at 14.

368. *Id.* at 13–14.

the Court only referred at last to a "right" to *in forma pauperis* filings in the course of restricting it.[369]

Not unexpectedly, Justices Marshall, Stevens, and Blackmun dissented. Justice Marshall, writing for himself, was pithy in his final word on the subject:

> This Court's rules now embrace an invidious distinction. Under the amendment adopted today, an indigent litigant may be denied a disposition on the merits of a petition for certiorari, jurisdictional statement, or petition for an extraordinary writ following a determination that the filing "is frivolous or malicious." Strikingly absent from this Court's rules is any similar provision permitting dismissal of "frivolous or malicious" filings by paying litigants, even though paying litigants are a substantial source of these filings.
>
> This Court once had a great tradition: "All men and women are entitled to their day in Court." That guarantee has now been conditioned on monetary worth. It now will read: "All men and women are entitled to their day in Court only if they have the *means* and the *money*."[370]

Pointedly, these symbolic losses transcended whatever clerical concerns animated the measure: "Our inviolable obligation to treat rich and poor alike is echoed in the oath taken by each Justice prior to assuming office. 'I . . . do solemnly swear that I will administer justice without respect to persons, and *do equal right to the poor and to the rich* . . . .'"[371]

Justice Stevens, joined by Justice Blackmun, was more measured, though not by much.[372] He reaffirmed that he saw no great crisis in the Court's workload and that the Court's new rule was thus a step in the wrong direction, as it was generally easier to simply deny a petition, and symbolically erected distinctions between the rich and poor, to the detriment of the Court's mission.[373]

369. *Cf. In re McDonald*, 489 U.S. at 187 (Brennan, J., dissenting) ("I continue to find puzzling the Court's fervor in ensuring that rights granted to the poor are not abused.").

370. *In re Amend. to Rule 39,* 500 U.S. at 14–15 (Marshall, J., dissenting).

371. *Id.* at n.* (citations omitted).

372. *Id.* at 15 (Stevens, J., dissenting).

373. *Id.*

G. *Zatko v. California*[374] — November 4, 1991

The first use of the new Rule 39.8 came soon enough: only a few months later, in the ensuing October term.[375] Petitioners Vladimir Zatko and James L. Martin had filed seventy-three and forty-five petitions respectively over the last decade *in forma pauperis*, and all were denied without dissent.[376] Now, the court invoked Rule 39.8 to deny Zatko and Martin leave to file *in forma pauperis* for their latest petitions for certiorari, expressing the "the hope that our action will deter future similar frivolous practices."[377] Although citing *Sindram*, *Zatko* represented the first time that leave to file ordinary petition for certiorari rather than for an extraordinary writ was blocked as frivolous.[378] The majority did not address how such a step squared with its explanation in *McDonald* and *Sindram* that the extreme measures taken were justified by the continued availability of the ordinary writ of certiorari to indigent defendants.[379]

Rather, noting the numerous other *in forma pauperis* petitioners it afforded the traditional opportunity of review, the Court reemphasized the symbolic purpose of its denial, a "limited step of censuring two petitioners who are unique—not merely among those who seek to file *in forma pauperis*, but also among those who have paid the required filing fees—because they have repeatedly made totally frivolous demands on the Court's limited resources."[380] Given such language of censure, the Court clearly viewed Rule 39.8 as a parallel form of sanctions only to be levelled against the poor by denying them *in forma pauperis* status.[381] Ominously, the majority concluded by noting that "[f]uture similar filings from these petitioners will merit additional measures."[382]

Justice Marshall had retired, reducing the dissenting wing of the Court to two, for whom Justice Stevens wrote.[383] Justice Stevens turned his latest

374. Zatko v. California, 502 U.S. 16 (1991) (7-2) (*per curiam*).

375. *Id.* at 17 ("Today, we invoke Rule 39.8 for the first time . . . .").

376. *Id*.

377. *Id.*

378. *Id.*

379. *See In re* Sindram, 498 U.S. 177, 179–80 & n.2 (1991) (*per curiam*); *In re* McDonald, 489 U.S. 180, 185 (1989) (*per curiam*).

380. *Zatko*, 502 U.S. at 18.

381. *See id.* at 16–17 ("Because *in forma pauperis* petitioners lack the financial disincentives–filing fees and attorney's fees–that help to deter other litigants from filing frivolous petitions, we felt such a [r]ule change was necessary to provide us some control over the *in forma pauperis* docket."); *id.* at 17 ("We conclude that the pattern of repetitious filing on the part of Zatko and Martin has resulted in an extreme abuse of the system.").

382. *Id.* at 18.

383. *Id.* at 18–20 (Stevens, J., dissenting).

opinion to the practical logistics, observing that nearly one thousand petitions by paupers had already been denied per the usual process that year—well over half frivolous—without any appreciable impact on the integrity of the Court's process.[384] Questioning the purpose of Rule 39.8, he went on to note the "practical effect of such an order is the same as a simple denial," but that "the symbolic effect of the Court's effort to draw distinctions among the multitude of frivolous petitions—none of which will be granted in any event—is powerful," for different reasons that the majority thought.[385] To wit: It may communicate that the poor have less entitlement to justice than the rich, and assessing petitions of the rich and poor under different standards risks the latter not receiving due attention.[386] In the balance, Justice Stevens concluded, "the Court has little to gain and much to lose by applying Rule 39.8 as it does today."[387]

H. *Martin v. District of Columbia Court of Appeals* [388] — November 2, 1992

The majority's threat in *Zatko* of "additional measures" did not prove idle. One year later, the Court decided *Martin v. District of Columbia Court of Appeals*, after the same James L. Martin filed another eleven petitions for certiorari in the interim.[389] Adverting again to the deleterious effect of voluminous frivolous filings, the Court levelled its most severe penalty yet on Martin: no future noncriminal petitions for certiorari would be accepted.[390] (In fairness, Martin's escalation rather than acquiescence following his censure in *Zatko* seems at best petty and at worst gallingly provocative;[391] Justice Felix Frankfurter's admonition four decades earlier is apt: "The old saw that hard cases make bad law has its basis in experience. But petty cases are even more calculated to make bad law. The impact of a sordid little case is apt to obscure the implications of the generalization to which the case gives rise."[392])

Martin represented a dramatic expansion of *McDonald* and *Sindram*. Both had prospectively interdicted indigent petitioners only from filing for

384. *Zatko*, 502 U.S. at 19.

385. *Id*.

386. *Id.* at 19–20.

387. *Id.* at 20.

388. Martin v. D.C. Ct. App., 506 U.S. 1 (1992) (7-2) (*per curiam*).

389. *Id.* at 2–3.

390. *Id.* at 2.

391. *Cf. In re* Sindram, 498 U.S. 177, 181 (1991) (quoted *supra* note 355).

392. United States v. Rabinowitz, 339 U.S. 56, 68 (1950) (Frankfurter, J., dissenting).

extraordinary writs.[393] Indeed, the rationale for those interdictions rested critically on the role of extraordinary writs on the Supreme Court's docket. In defense of its holding, *McDonald* had explained that "we have not granted the sort of extraordinary writ relentlessly sought by petitioner to any litigant—paid or *in forma pauperis*—for at least a decade," and that "extraordinary writs are, not surprisingly, 'drastic and extraordinary remedies,' to be 'reserved for really extraordinary causes,' in which 'appeal is clearly an inadequate remedy.'"[394] *Sindram* had added that the "risks of abuse are particularly acute with respect to applications for extraordinary relief, since such petitions are not subject to any time limitations and, theoretically, could be filed at any time, without limitation."[395] And both had justified their holding on the basis that relief could readily be sought via certiorari for any meritorious claim.[396]

Now, however, despite its reliance on those two decisions, the Court expanded the scope of interdictions to the ordinary writ of certiorari that had purportedly provided a crucial safety valve in its previous decisions.[397] Ironically, one of Martin's intervening petitions for certiorari had not even been frivolous.[398] Yet the Court provided no defense of the expansion other than Martin's serial abuse, professing sorrow in the ostensibly compelled result:

> Although this case does not involve abuse of an extraordinary writ, but rather the writ of certiorari, Martin's pattern of abuse has had a similarly deleterious effect on this Court's "fair allocation of judicial resources." (citation omitted). As a result, the same concerns which led us to enter the orders barring prospective filings in *Sindram* and *McDonald* require such action here.
>
> We regret the necessity of taking this step, but Martin's refusal to heed our earlier warning leaves us no choice.[399]

393. *See In re Sindram*, 498 U.S. at 184; *In re* McDonald, 489 U.S. 180, 180 (1989) (*per curiam*).

394. *In re McDonald*, 489 U.S. at 184–85 (citations omitted).

395. *In re Sindram*, 498 U.S. at 180.

396. *Id.*; *In re McDonald*, 489 U.S. at 185.

397. Martin v. D.C. Ct. App., 506 U.S. 1 ,3 (1992) (7-2) (*per curiam*).

398. *Id.* ("With the arguable exception of one of these petitions, see Martin v. Knox, 502 U.S. 999 (1991) (Stevens, J., joined by Blackmun, J., respecting denial of certiorari), all of Martin's filings, including those before us today, have been demonstrably frivolous.").

399. *Id*.

Still standing at two members, the minority had little more to add after all the rhetoric of yesteryear: They had already written all they had to say in predicting this ultimate result.[400] In what would prove to be the last major dissent on the subject, Justice Stevens only pointed to his own prior opinions and those of Justices Brennan, Marshall, and Blackmun, concluding that "[t]he theoretical administrative benefit the Court may derive from an order of this kind is far outweighed by the shadow it casts on the great tradition of open access that characterized the Court's history prior to its unprecedented decisions."[401]

IV. Trends and Tendencies in Supreme Court Cases After *Martin*

With *Martin*, the Supreme Court's evolution was complete. Thereafter, the Court could and has referred straightforwardly to that holding in issuing directives to its clerk to enforce the reasoning of the *Martin* decision and refuse to accept any civil petitions from litigants absent payment.[402] From 1992 to October 1999, the Court cited *Martin* twenty-six times to bar litigants from future filings.[403] Notably, these later dispositions no longer included the thoughtful dialectics between majority and dissent that had characterized the cases up to and including *Martin*; the issue was evidently settled in the eyes of the justices.[404] Early on, Justice Stevens announced that

400. *See, e.g.*, *In re* Demos, 500 U.S. 16, 18–19 & n.* (1991) (Marshall, J., dissenting); *In re Sindram*, 498 U.S. at 183 (Blackmun, J., dissenting); *In re McDonald*, 489 U.S. at 187–88 (1989) (Brennan, J., dissenting).

401. *Martin*, 506 U.S. at 4 (Stevens, J. dissenting).

402. Lane, *supra* note 11, at 350.

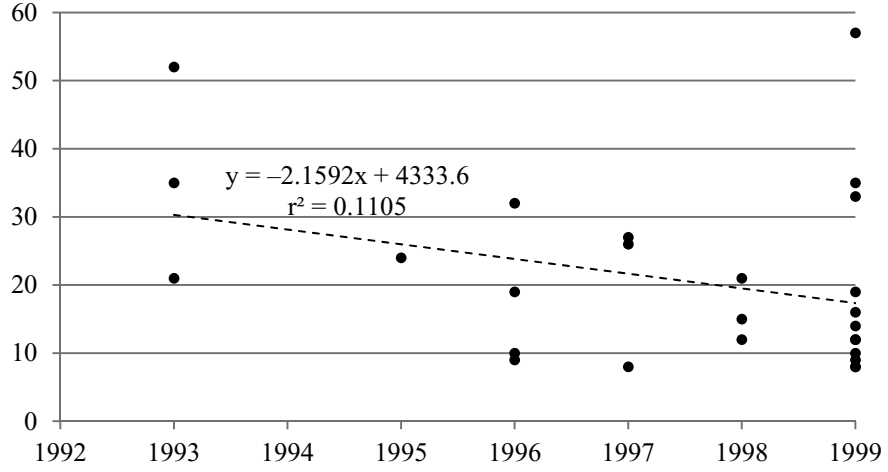
403. Demos v. Storrie, 507 U.S. 290 (1993) (52 filings); Day v. Day, 510 U.S. 1 (1993) (35 frivolous filings); *In re* Sassower, 510 U.S. 4 (1993) (21 filings); Whitaker v. Super. Ct. of Cal. S.F. Cty, 514 U.S. 208 (1995) (24 filings); Attwood v. Singletary, 516 U.S. 297 (1996) (9 frivolous filings); Jones v. ABC-TV, 516 U.S. 363 (1996) (32 filings); Shieh v. Kakita, 517 U.S. 343 (1996) (10 filings); *In re* Gaydos, 519 U.S. 59 (1996) (19 filings); *In re* Vey, 520 U.S. 303 (1997) (26 filings); Vey v. Clinton, 520 U.S. 937 (1997) (27 filings); Brown v. Williams, 522 U.S. 1 (1997) (8 filings); Arteaga v. U.S. Court of Appeals for the Ninth Circuit, 522 U.S. 446 (1998) (21 filings); Glendora v. Porzio, 523 U.S. 206 (1998) (15 filings); *In re* Kennedy, 525 U.S. 153 (1998) (12 filings); Schwarz v. Nat'l Sec. Agency, 526 U.S. 122 (1999) (35 filings); Rivera v. Fla. Dep't of Corrs., 526 U.S 135 (1999) (14 filings); Lowe v. Pogue, 526 U.S. 273 (1999) (33 filings); Cross v. Pelican Bay State Prison, 526 U.S. 811 (1999) (16 filings); Ferstel-Rust v. Milwaukee Cty. Mental Health Ctr., 527 U.S. 469 (1999) (8 filings); Whitfield v. Texas, 527 U.S. 885, *reconsideration denied*, 528 U.S. 805 (1999) (9 filings); Antonelli v. Caridine, 528 U.S. 3 (1999) (19 filings); Dempsey v. Martin, 528 U.S. 7 (1999) (10 filings); Prunty v. Brooks, 528 U.S. 9 (1999) (57 filings); Brancato v. Gunn, 528 U.S. 1 (1999) (8 filings); Judd v. U.S. Dist. Ct. for W.D. Tex., 528 U.S. 5 (1999) (12 filings); *In re* Bauer, 528 U.S. 16 (1999) (12 filings).

404. *E.g.*, *Demos*, 507 U.S. at 291 (Stevens, J., dissenting) ("I continue to adhere to my previously stated views on this issue . . . ."); *Jones*, 516 U.S. at 364 (Stevens, J., dissenting) ("For the reasons I have previously expressed, I respectfully dissent.").

"I shall not encumber the record by noting my dissent from similar orders denying leave to proceed *in forma pauperis*, absent exceptional circumstances."[405] (In reality, Justice Stevens continued to register his dissent like clockwork, even absent any noted egregiousness to the case.[406])

As for the majority, the cases briefly recited the same litany: the petitioner had filed many meritless claims; the petitioner had been warned; addressing meritless claims impedes the Court's business; the petitioner was now prospectively banned from future such filings absent a fee.[407] Yet of the twenty-six cases, there seems little rhyme or reason as to why the proscribed petitioners had been singled out: on the same day in October 1999, one petitioner was barred for a lifetime total of fifty-seven meritless petitions,[408] whilst another received the same punishment for eight.[409] Figure 2 illustrates the general randomness of result, though there is a very weak trend downward, reflecting that the Court was overall requiring fewer and fewer frivolous filings to justify an interdiction.

Figure 2: Meritless Petitions at Time of Ban, by Year, From Martin *Through Oct 1999*



A few of these cases warrant further comment. The first to cite *Martin* was *Demos v. Storie*, where the Court used its newly-minted precedent to

405. *Day*, 510 U.S. at 3 (Stevens, J., dissenting).

406. *See* cases cited *supra* note 403.

407. *E.g.*, *Glendora*, 523 U.S. at 206; *In re Kennedy*, 525 U.S. 153; *Schwarz*, 526 U.S. at 122; *Lowe*, 526 U.S. at 273.

408. Prunty v. Brooks, 528 U.S. 9 (1999).

409. Brancato v. Gunn, 528 U.S. 1 (1999).

withdraw the right to petition for certiorari from John R. Demos Jr., the litigant who had previously been barred from filing extraordinary writs in in the 1991 *Demos* case.[410] Most jurisprudentially noteworthy is *Whitaker v. Superior Court of California*, where the majority noted a further reason why proscription of certiorari filings was required: The petitioner, having already been barred from filing *in forma pauperis* for extraordinary writs, had taken to labelling such petitions as if they were for certiorari.[411] Much like the petitioner's pettiness in *Martin*, such inane subterfuge sheds light on why the Court felt goaded into action.[412] On the other side, Justice Stevens only became more convinced of the wastefulness of the *Martin* process over time, observing in 1996 that "experience with the administration of orders like the one the Court is entering in this case today has merely reinforced my conviction that our 'limited resources' would be used more effectively by simply denying petitions that are manifestly frivolous."[413]

But even such minor elaborations on *Martin* cases were soon to end, perhaps driven by the *annus horribilis* of 1999, when the Court issued no less than twelve prospective proscriptions through October, nearly as many as it had issued in all prior years.[414] In November, the Court formulated the shorthand "*Martin* directive" quoted at the start of the Article, which could be applied summarily to any case barring indigent petitioners, thus allowing the incidence of such dispositions to be tracked mechanically (and making it easier for cases to be disposed of mechanically).[415] Tabulating that incidence demonstrates unequivocally that, armed with such a time-saving device, the Supreme Court has resorted to the expedient of *Martin* directives ever more frequently over time, with the total number verging on five hundred by

410. Demos v. Storrie, 507 U.S. 290 (1993); *see supra* Section III-D.

411. Whitaker v. Super. Ct. of Cal. S.F. Cty, 514 U.S. 208, 209–09 (1995).

412. *See supra* Section III-H.

413. Attwood v. Singletary, 516 U.S. 297, 298 (1996) (Stevens, J., dissenting); *see also Demos*, 507 U.S. at 291 (Stevens, J., dissenting).

414. Schwarz v. Nat'l Sec. Agency, 526 U.S. 122 (1999); Rivera v. Fla. Dep't of Corrs., 526 U.S 135 (1999); Lowe v. Pogue, 526 U.S. 273 (1999); Cross v. Pelican Bay State Prison, 526 U.S. 811 (1999); Ferstel-Rust v. Milwaukee Cty. Mental Health Ctr., 527 U.S. 469 (1999); Whitfield v. Texas, 527 U.S. 885, *reconsideration denied*, 528 U.S. 805 (1999); Antonelli v. Caridine, 528 U.S. 3 (1999); Dempsey v. Martin, 528 U.S. 7 (1999); Prunty v. Brooks, 528 U.S. 9 (1999); *Brancato*, 528 U.S. 1; Judd v. U.S. Dist. Ct. for W.D. Tex., 528 U.S. 5 (1999); *In re* Bauer, 528 U.S. 16 (1999).

415. *See* Lane, *supra* note 11, at 350. The first two such cases were *Baba v. Japan Travel Bureau*, 528 U.S. 1016 (1999), and *In re Reidt*, 528 U.S. 1018 (1999), both issued on November 29, 1999. Confirming the regularity of the new practice, the next such disposition, *Cunningham v. Moreno*, 528 U.S. 1059 (1999), appeared only two weeks later, on December 13, 1999. Two precursors may be found earlier in November in *In re Tyler*, 528 U.S. 983 (1999), and *In re Tyler*, 528 U.S. 984 (1999), where the language differed only by a few articles and punctuation.

2015.[416] Figure 3 illustrates the number of *Martin* directives issued in each year, as well as a linear regression line demonstrating a robust upward trend; Figure 4 presents the annual and total number of *Martin* directives.

Figure 3: Martin *Directives Issued by Year from 1999, with Least-Square Linear Regression*

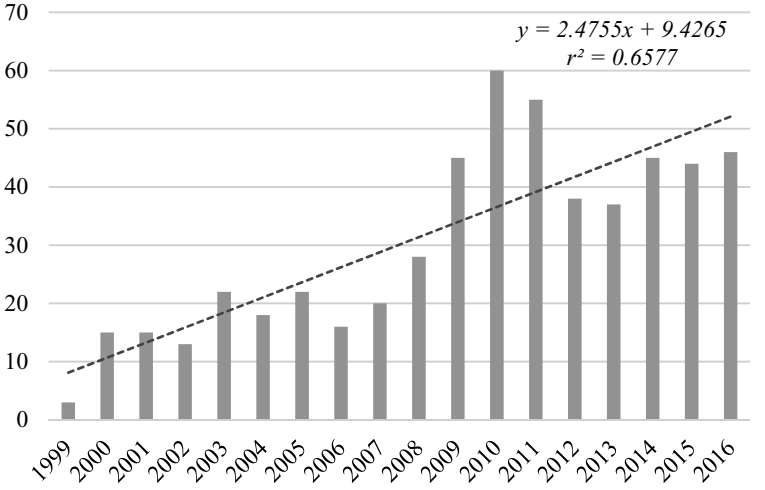


Figure 4: Historical Annual and Total Martin *Directives*

Year	***Annual***	***Total***	**Year**	***Annual***	***Total***
1999	*3*	*3*	2008	*28*	*172*
2000	*15*	*18*	2009	*45*	*217*
2001	*15*	*33*	2010	*60*	*277*
2002	*13*	*46*	2011	*55*	*332*
2003	*22*	*68*	2012	*38*	*370*
2004	*18*	*86*	2013	*37*	*407*
2005	*22*	*108*	2014	*45*	*452*
2006	*16*	*124*	2015	*44*	*496*
2007	*20*	*144*	2016	*46*	*542*

416. The many pages necessary to provide citation to well over five hundred cases is not recommended here, given the expedient of a simple text search on Westlaw or Lexis. *E.g.*, Lane, *supra* note11, at 351. However, the data set from which these figures are derived, current through calendar 2016, is on file with the author and is available to interested academics or researchers upon request via the editorial board of the *Hastings Constitutional Law Quarterly*.

Taken together, these figures paint a picture starkly different from that intimated in the *in forma pauperis* Supreme Court decisions of Part III. Whereas one might have imagined that only some minuscule number of long-term troublemakers would warrant banishment, and that these would be swiftly identified and disposed of, the reality has not borne out that optimistic presumption.[417]

The initial cases targeted petitioners who had importuned the Court many dozens of times;[418] with *Martin* on the books, troublemakers were banned after as few as eight filings.[419] And once the formulaic *Martin* directive was put into practice, the Court has not even quantified the degree of abuse that justified its ultimate punishment being meted out to hundreds of indigent litigants.[420] Thus rather than one or two, dozens more paupers are being added the rolls of the proscribed every year—permanently—yielding a rapidly growing list of litigants denied access to the highest court.[421] What was intended as an "extreme remedy" for "exigent circumstances" to be deployed "with particular caution" has become rote.[422] If the Court has not found and banned the vast majority of pestersome paupers over the last two decades, one must be skeptical that its mission will ever be complete.[423] Rather, *Martin* directives and concomitant barring of the courtroom doors seem set to continue indefinitely into the future, as a ceaseless supply of paupers commend themselves to the attention of the Court's censorial tendencies.[424]

And of course *Martin* directives have no effect on those who can afford to subsidize their filings, as those of means are ineligible for *in forma*

417. *See, e.g.*, Zatko v. California, 502 U.S. 16, 18 (1991) ("For that reason we take the limited step of censuring two petitioners who are unique—not merely among those who seek to file *in forma pauperis*, but also among those who have paid the required filing fees—because they have repeatedly made totally frivolous demands on the Court's limited resources.").

418. *E.g.*, *Zatko*, 502 U.S. at 176 (73 and 45 filings); *In re* Demos, 500 U.S. 16 (1991) (32 filings); *In re* Sindram, 498 U.S. 177, 177–78 (1991) (42 filings); *In re* McDonald, 489 U.S. 180, 181–82 (1989) (73 filings).

419. *E.g.*, *Ferstel-Rust*, 527 U.S. at 470 (8 filings); *Whitfield*, 527 U.S. at 886 *reconsideration denied*, (9 filings); *Brancato*, 528 U.S. at 2 (8 filings).

420. *See, e.g.*, *Baba*, 528 U.S. 1016 and *In re Reidt*, 528 U.S. 1018.

421. *See supra* figs. 3 & 4. Eventually, one imagines, the list will begin to see some diminution as banned litigants perish.

422. *In re* Oliver, 682 F.2d 443, 445 (3d Cir. 1982) (quoting Pavilonis v. King, 626 F.2d 1075, 1079 (1st Cir. 1980)).

423. *See* Lane, *supra* note 11, at 351 (quoting ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 8.2 (8th ed. 2002)).

424. *Id.*

pauperis status in the first place.[425] The result: of those petitioners, past and future, that the Supreme Court deems sufficiently pestersome to act, the wealthy may freely continue their importunities to the Court by paying for the right to do so, whilst the impoverished are increasingly categorically barred, whatever the merits of their claims.[426] The key to the highest courtroom can be bought.[427]

V. Reassessing the Arguments For and Against *Martin* Directives

Given the Court's increasingly rote use of *Martin* directives, a reassessment of the merits of the practice is timely. There is a broad difference between, on the one hand, *Martin*'s vision of proscribing a singularly wayward petitioner as an example to all, and on the other hand, the present trajectory of perfunctorily banishing an ever-growing list of indigent petitioners. In the following part, the arguments raised by the two sides in the Court's *in forma pauperis* dialectic are addressed roughly in order of their cogency, resulting in a chiastic structure that begins with the dissent's weakest arguments, proceeds through the majority's more or less legitimate concerns, and finally returns to what this Article concludes to be the strongest argument, by the minority.

A. *Minority* — Prospective Proscription Exceeds the Court's Power

The most straightforward argument the minority musters is also the weakest: that the Court lacks the power to prospectively proscribe its petitioners. This argument came in two flavors, the first of which was that the Court's own Rule 39.4 disallowed the clerk from doing what the Court had directed: refusing to docket a properly filed *in forma pauperis* petition.[428] The Court ostensibly corrected this oversight when it altered its rules to allow for dismissals in *In re Amendment to Rule 39*.[429] Oddly, although the

425. *See* Smith, *supra* note 2, at 103 (observing that "the rule only applied to petitioners—such as prisoners—who are too poor to pay the $300 filing fee"); Franklin, *supra* note 93, at 202.

426. *Cf.* Abdul-Akbar v. McKelvie, 239 F. 3d 307, 327–30 (3d. Cir. 2001) (Mansmann, J., dissenting).

427. *See id.* ("If they cannot buy entry into court, they must wait until they can; and if the wait is too long, justice will be denied to them.").

428. *In re* McDonald, 489 U.S. 180, 186 (1989) (Brennan, J., dissenting) (referring to an earlier version of the Supreme Court Rules in which the operative rule was numbered 46); *see* Sup. Ct. R. 39.4 ("When the documents required by paragraphs 1 and 2 of this Rule are presented to the Clerk, accompanied by proof of service as required by Rule 29, they will be placed on the docket without the payment of a docket fee or any other fee.").

429. *In re* Amend. to Rule 39, 500 U.S. 13 (1991) (*per curiam*).

majority there apparently believed that its amendment would now empower the clerk to refuse any interdicted claims, there is nothing in the amendment that perceptibly effectuates that goal.[430] This is underscored by the fact that *Martin* directives expressly depend on Rule 39.8 only for the dismissal of the petition *sub judice*—which Rule 39.8 clearly does permit; authority for the prospective ban relies only on *Martin*.[431] Whether the Court's clerk may properly refuse to file a petition under the unmodified Rule 39.4 is not resolved by the text of Rule 39.8.[432] Nonetheless, this argument fails more fundamentally because, whatever its rules seem to say, the Court surely has the *power* to reinterpret them as it sees fit.[433]

Similarly, the dissent argued that the federal statute governing *in forma pauperis* filings, 28 U.S.C. § 1915, did not permit prospective denials, because the court's discretion to dismiss was limited to complaints "*found to be* frivolous or malicious."[434] A hypothetical as-yet-unfiled claim, of course, could not be found to be anything.[435] This is a rather pretty argument, but is undercut by the permissive language in the statute, to which the majority adverted pointedly: A court "*may*" allow filing *in forma pauperis*, but it is not required to.[436] The dissent admits this almost parenthetically, but then moves beyond the text itself in favor of inferring a statutory mandate incumbent on the Court from the "comprehensive scheme" laid out, which is hardly conclusive.[437] True, courts have read § 1915 to at least require access to trial courts and an appeal of right when the statute's requirements are complied with, avoiding potential constitutional infirmity.[438] But the Supreme Court has elsewhere reserved the question of whether discretionary appeals enjoy the same constitutional position as those of right.[439] Whatever

430. Lane, *supra* note 11, at 360.

431. *See, e.g.*, Baba v. Japan Travel Bureau, 528 U.S. 1016 (1999); *In re* Reidt, 528 U.S. 1018 (1999).

432. Lane, *supra* note 11, at 360.

433. *Id.* ("As a practical matter, however, the technical language of Rule 39.8 is irrelevant because the Court promulgates its own rules and, thus, the Court's intent behind or interpretation of those rules is all that matters."). *But cf. In re McDonald*, 489 U.S. at 186 ("Of course, we are free to amend our own rules should we see the need to do so, but until we do we are bound by them.").

434. *In re McDonald*, 489 U.S. at 185–86.

435. *Id.*; *see also In re* Sindram, 498 U.S. 177, 181–82 (1991) (Marshall, J., dissenting).

436. *In re McDonald*, 489 U.S. at 183 (*per curiam*).

437. *Id.* at 185 (Brennan, J., dissenting).

438. *See* Adkins v. E.I. Dupont de Nemours & Co., 335 U.S. 331, 337–40 (1948); *see also supra* Section I-A. *But see* Shapiro v. Burns, 7 Misc. 418, 420, 27 N.Y.S. 980 (N.Y. Ct. Com. Pl. Mar. 1, 1984) (employing statutory construction to find an analogous statute should be read as obligatory rather than permissive).

439. Douglas v. California, 372 U.S. 353, 356 (1963) ("We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims

the mandate for *in forma pauperis* filings, the statute's text does not clearly answer the question as to the Supreme Court.

In any event, to advance a rules-based or statutory argument to delimit the Court's authority is likely futile. It is well established that all courts have the inherent power under Article III of the Constitution to protect their process against abuse by litigants and maintain the efficiency of their docket.[440] Similarly, the expansive All Writs Act provides a basis for courts to issue any orders needful to their function, including the sanctioning of petitioners:[441]

> It is well within the broad scope of the All Writs Act for a district court to issue an order restricting the filing of meritless cases by a litigant whose manifold complaints raise claims identical or similar to those that already have been adjudicated. The interests of repose, finality of judgments, protection of defendants from unwarranted harassment, and concern for maintaining order in the court's dockets have been deemed sufficient by a number of courts to warrant such a prohibition against relitigation of claims. . . . We agree with the First and District of Columbia Circuits, however, that a continuous pattern of groundless and vexatious litigation can, at some point, support an order against further filings of complaints without the permission of the court. The case before us appears to reveal a situation sufficient to justify exercise of the court's power, under the All Writ's [*sic*] Act, to do so.[442]

Such power is not cabined by procedural rules or statute, and is by its nature malleable to the circumstances demanding its deployment.[443] Even if the Court's rules and the *in forma pauperis* statute prescribe different forms, therefore, the Court may resort to unique measures if the standard framework proves lacking and the integrity of the judicial function itself is threatened.[444]

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have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with the *first appeal*, granted as a matter of right to rich and poor alike from a criminal conviction.") (citiation omitted).

440. *See* Roadway Express v. Piper, 447 U.S. 752 (1980); Joseph C. Anclien, *Broader Is Better: The Inherent Power of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 44–49 (2008); Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845, 861–62 (1984).

441. 28 U.S.C. § 1651(a).

442. *In re* Oliver, 682 F.2d 443, 445–46 (3d Cir. 1982).

443. *See id.*; Anclien, *supra* note 440, at 37–41 (inherent powers).

444. *See* Anclien, *supra* note 440, at 47–48 (noting that "one of the most common and important roles of inherent powers is to allow courts to craft flexible sticks to sanction contumacious parties" and providing examples); *see, e.g.*, *In re* Green, 669 F.2d 779, 780–81 & 784–85 (D.C. Cir. 1981) (entering order sanctioning prolific petitioner under the All Writs Act);

(Whether pestersome paupers pose such a threat is a factual question distinct from that of the Court's inherent power.[445]) To borrow an idiom, judicial procedural rules are not a suicide pact.[446] Justice Brennan recognized as much in conceding *arguendo* that his statutory objections to *Martin* directives were less than dispositive.[447] The minority's repeated reproach that the majority had identified no "statute or rule giving it the extraordinary authority" for its practice gained no greater cogency with repetition.[448] The judiciary's inherent power, and the breadth of the All Writs Act, *are* extraordinary.[449]

B. *Minority* — Proscription Offends Due Process by Prejudging a Petitioner's Claims

A related argument is that a prospective proscription improperly adjudicates a petitioner's future claims to be meritless before they are even filed (or, in all likelihood, even conceived). Rather than couch this observation as violating a court rule or statute, this stronger argument implies that such prejudice would offend a petitioner's right to due process. Curiously, however, the dissents only adumbrated this idea, perhaps best expressed in *Sindram* when Justice Marshall opined that "we should not presume in advance that prolific indigent litigants will never bring a meritorious claim."[450] Yet having posed that provocative point, Marshall pivoted directly to a more generalized argument about the effects that

Green v. Carlson, 649 F.2d 285, 286 (5th Cir. 1981) (Unit A) (same but citing inherent powers); *Oliver*, 682 F.2d at 445–46 (same).

445. *See, e.g.*, *infra* Sections V-C, V-D.

446. *Cf.*, *e.g.*, Edmond v. Goldsmith, 183 F.3d 659, 663 (7th Cir. 1999) ("The Constitution is not a suicide pact.").

447. *In re* McDonald, 489 U.S. 180, 186 (1989) (Brennan, J., dissenting) ("Even if the legality of our action in ordering the Clerk to refuse future petitions for extraordinary writs *in forma pauperis* from this litigant were beyond doubt . . . .").

448. *E.g.*, *In re* Demos, 500 U.S. 16, 17 (1991) (Marshall, J., dissenting); *see In re* Sindram, 498 U.S. 177, 181–82 (1991) (Marshall, J., dissenting).

449. United States v. Denedo, 556 U.S. 904 (2009) (discussing "the All Writs Act and the extraordinary relief the statute authorizes" via the *coram nobis* writ); Penn. Bureau of Corr's v. U.S. Marshall Serv., 474 U.S. 34, 43 (1985) (observing that "the Act empowers federal courts to fashion extraordinary remedies when the need arises"); ITT Comm. Development Corp. v. Barton, 569 F.2d 1351, 1358 (5th Cir. 1978) (referring to "[t]he authority of a district court to invoke the extraordinary powers conferred by the All Writs Act and the inherent powers doctrine"). *N.b.*: Whilst a court's inherent power and the All Writs Act may well allow it to supersede rules or statutes that inadequately address a problem, they presumably would not permit transgression of a discrete constitutional dictate.

450. *In re Sindram*, 498 U.S. at 182 (Marshall, J., dissenting).

discouraging *in forma pauperis* claims might have on the justice system.[451] But the proposition that the judiciary injures the individual petitioner by prejudging a hypothetical future claim warrants more attention that the cases explicitly afford.

After all, lower courts had repeatedly rejected overly sweeping bans on indigent litigants as violating due process and the constitutional right of access to the courts.[452] Although *Martin* directives leave open the possibility of a proscribed petitioner objecting to a criminal penalty, their complete ban on pursuing any civil matter whatsoever cannot be characterized as interdicting only matters on which a petitioner has already clearly demonstrated that no valid claim inheres; such a ban preemptively cuts off scrutiny of even wholly novel claims.[453] The lower courts have stated that this brand of prejudice offends due process: "It is axiomatic that no petitioner or person shall ever be denied his right to the processes of the court."[454] And the Supreme Court exceeded even the most extreme remedies of the PLRA and Fifth and Eight Circuits: Whereas all had permitted narrow exemptions for cases alleging corporal jeopardy, a *Martin* directive's interdiction of civil petitioners is absolute and unqualified.[455] Even the Eighth Circuit expressly rejected such a remedy as transgressing due process,[456] and the Fifth Circuit followed the Eight Circuit's precedent.[457]

It is problematic to fault the Supreme Court in this regard, however—perhaps this is why the minority never emphasized the point. The circuit courts of appeals differ crucially from the Supreme Court: Whilst the direct appellate court must consider appeals as a matter of right,[458] the Court's certiorari docket is purely discretionary.[459] No petitioner has any entitlement to a writ of certiorari from the Court,[460] and thus even its peremptory denial

451. *In re Sindram*, 498 U.S. at 182 ("Nor should we lose sight of the important role *in forma pauperis* claims have played in shaping constitutional doctrine."); *see also infra* Section V-E.

452. *E.g.*, Procup v. Strickland, 792 F.2d 1069, 1071 (11th Cir. 1986) (*en banc*); *In re* Green, 669 F.2d 779, 785–87 (D.C. Cir. 1981); *In re* Green, 598 F.2d 1126, 1127 (8th Cir. 1979) (*en banc*).

453. *See Sindram*, 498 U.S. at 182 (Marshall, J., dissenting); *In re* McDonald, 489 U.S. 180, 187–88 (1989) (Brennan, J., dissenting).

454. *In re Green*, 598 F.2d at 1127.

455. Martin v. D.C. Ct. App., 506 U.S. 1 (1992) (*per curiam*).

456. *See* Green v. White, 616 F.2d 1054, 1055 (8th Cir. 1980).

457. *See* Green v. Carlson, 649 F.2d 285, 286–87 (5th Cir. 1981) (citing *Green*, 616 F.2d 1054 and *In re* Green, 598 F.2d 1126).

458. 28 U.S.C. § 1291; *see* Donald P. Lay, *A Proposal for Descretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151, 1151 & n.2 (1980) ("Federal litigants in both civil and criminal cases have been given the right of appellate review in the courts of appeals since the Act of 1891 creating the federal courts of appeals."); Lane, *supra* note 11, at 363.

459. *See* Brown v. Allen, 344 U.S. 443, 491–97 (1953) (Frankfurter, J., dissenting); Kapral v. United States, 166 F.3d 565, 568 (3d Cir. 1999); Lane, *supra* note 11, at 363.

460. *See Brown*, 344 U.S. at 491–93.

has not abridged any process due a litigant.[461] In short, if the Court may deny certiorari for any reason (or no reason at all), the method of its denial cannot implicate due process as such.[462] It is for this very reason that the Court has long stated that its denial of certiorari expresses no opinion on the merits of a petition.[463] The Court's peremptorily denying certiorari on a litigant's future petitions similarly does not call into question their merit; it invokes the Court's unquestioned power to grant—or not grant—review as a matter of grace, not obligation.[464] Due process demands no more.[465]

C. *Majority* — Absent Proscription, a Prolific Petitioner Imperils the Court's Efficacy

Leaving aside the minority's initial arguments, the Supreme Court's majority originally fastened on a singular argument in defense of the logic behind *Martin* directives: that proscription was necessary to prevent a prolific petitioner from diminishing the Court's ability to effectuate its mission. This was expressed in some form in each of the earlier cases, beginning with *McDonald*:

> Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the

461. *See also* Peck v. Hoff, 660 F.2d 371, 373 (8th Cir. 1981) ("We also find no basis for a due process claim. It is well settled that in order to be entitled due process under the Fourteenth Amendment, there must be some legal entitlement, right or liberty interest that is protected under state or federal law.") (citing Meachum v. Fano, 427 U.S. 215, 223-24 (1976), and Montanye v. Haymes, 427 U.S. 236, 242 (1976)).

462. *See* Maryland v. Baltimore Radio Show, 338 U.S. 912, 917–19 (1950) (Frankfurter, J., respecting denial of certiorari).

463. *E.g.*, *id.*; Singleton v. C.I.R., 439 U.S. 940, 942 (1978) (Stevens, J., respecting denial of certiorari); House v. Mayo, 324 U. S. 42, 48 (1945); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916).

464. *See Brown*, 344 U.S. at 491–97 (Frankfurter, J., dissenting); *see Maryland*, 338 U.S. at 917–19; *Singleton*, 439 U.S. at 942.

465. It might be argued that—analogous to precedent on peremptory strikes that require no justification—a court's ability to deny a petition for no reason at all does not confer a concomitant right to deny a petition for an invidious reason. *Cf., e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986). Whether discrimination based on wealth constitutes such an invidious purpose, whether *Martin* directives do discriminate in a constitutional sense, and indeed whether such an analogy is cogent in the context of the Supreme Court's plenary discretion, went undiscussed in the Supreme Court cases, and are questions for another scholar. Given serious difficulties with such an argument given precedent that indigence is not a "suspect" classification, *see* sources cited *infra* note 630, and the Court's pretermitting any such consideration in its dialectic, this Article rests on prudential rather than constitutional reasons for the Court to reverse course. *See also* Lane, *supra* note 11, at 335–58 (considering and rejecting a constitutional argument against *Martin* directives).

> interests of justice. The continual processing of petitioner's frivolous requests for extraordinary writs does not promote that end.[466]

Sindram and *Demos* would echo the same logic, whilst amplifying it. *Sindram* opined that "the goal of fairly dispensing justice" was "compromised" and "the fair administration of justice" was "unsettl[ed]" by addressing the petitioner's serially meritless requests, and therefrom discerned a duty to deny Sindram further feeless access to its courtroom.[467] *Demos* went even further, espying malice in its petitioner, whose "method of seeking relief . . . could only be calculated to disrupt the orderly consideration of cases."[468] In all of these early cases, the concern of the Court was squarely aimed at the potential of the prolific litigant *sub judice* to substantively impede the business of the Court if not prospectively proscribed.

But the Court's fear cannot be credited as stated. Inferior courts too have adverted to the possibility of a single prolific petitioner clogging their clerks with demands for attention, and more importantly, demanding the plenary review of the Court time and time again.[469] But as the discussion of due process highlighted, whilst a lower court bound to hear an appeal must substantively do so, the discretionary docket of the Supreme Court mandates no such dedication of time.[470] The dissenting justices observed recurrently that the denial of a frivolous petition for certiorari requires almost no time and is a most efficient way to address such a petition.[471] The eminent Henry M. Hart, Jr. estimated that time at a mere five minutes.[472] True, an interdicted petitioner will never again waste that scintilla of attention, but even a lifetime vaingloriously dedicated to tilting at the windmills of futile claims, spanning many hundreds of petitions, could never have an appreciable effect on the

466. *In re* McDonald, 489 U.S. 180, 184 (1989) (*per curiam*).

467. *In re* Sindram, 498 U.S. 177, 179–80 (1991) (*per curiam*).

468. *In re* Demos, 500 U.S. 16, 16–17 (1991) (*per curiam*).

469. *E.g.*, Green v. Carlson, 649 F.2d 285, 286 (5th Cir. 1981) (Unit A); *In re* Green, 598 F.2d 1126, 1127 (8th Cir. 1979) (*en banc*).

470. *See supra* notes 458–464 and accompanying text; Lane, *supra* note 11, at 363; *see generally* Henry M. Hart, Jr., *The Supreme Court 1958 Term*, 73 HARV. L. REV. 84 (1959).

471. *E.g.*, *In re Amend. to Rule 39*, 500 U.S. at 15 (Stevens, J., dissenting) ("It is usually much easier to decide that a petition should be denied than to decide whether or not it is frivolous."); *In re Sindram*, 498 U.S. at 180–81 (Marshall, J., dissenting); Wrenn v. Benson, 490 U.S. 89, 92 (1989) (Stevens, J., dissenting); *In re McDonald*, 489 U.S.at 188 (Brennan, J., dissenting); Brown v. Herald Co., 464 U.S. 928, 928–930 (1983) (Brennan, J., dissenting).

472. Hart, *supra* note 470, at 88, 90.

Court's ability to function.[473] Such petitions may be minor if inconvenient wastes of time, but they cannot imperil the Court.[474] No one person has the capacity for such mischief.[475]

The example of the Reverend Clovis Carl Green Jr. discussed above in Section II-B is instructive. Even this paragon of prolific petitioners could not so encumber the judiciary as to merit an absolute proscription: The D.C. Circuit affirmed that Green had a "right of access to federal courts" and struck down an order interdicting Reverend Green,[476] and even the Eighth and Fifth Circuits left the courtroom doors *slightly* ajar.[477] By 1983, Reverend Green had targeted the Supreme Court with no less than sixty-six petitions and motions, to the point that justices "flinch[ed] at the sound of his name."[478] Notwithstanding such provocation, the Court was "content . . . to simply deny Mr. Green's petitions without comment,"[479] only departing from that practice when Green omitted the required affidavit for leave to file *in forma pauperis*.[480] Critically, even then its order denying leave "applie[d] only to the current petition, and did not bar Mr. Green from filing unpaid petitions in future cases."[481] And once Reverend Green submitted the affidavit, the Court granted him *in forma pauperis* status without cavil.[482] If the indefatigable Reverend Green—"the most prolific prison litigant in

473. *See* Zatko v. California, 502 U.S. 16, 19 (1991) (Stevens, J., dissenting) (noting that despite the Court's processing of one thousand *in forma pauperis* petitions in a single term, of which over half were likely frivolous, "[t]he 'integrity of our process' was not compromised in the slightest . . . .").

474. *See, e.g.*, *In re Sindram*, 498 U.S. at 180–81 (Marshall, J., dissenting) (describing petitioner as a "minor inconvenience" and opining that "the Court's worries about the threats that hyperactive in forma pauperis litigants like Sindram pose to our ability to manage our docket are greatly exaggerated").

475. It must be said that in a day of electronic filing (or perhaps even in the days of photocopiers), one could imagine a litigant who files hundreds or thousands of petitions *every day*—perhaps millions over a lifetime—and who could actually present a logistical hazard to the machinery of a court. Such legal tsunamis are purely conjectural, however, with the most prolific litigants tallying *lifetime* totals in the hundreds, not millions. *See* Linda Greenhouse, *Paper Siege by Prisoner Provokes Ire*, N.Y. TIMES (Apr. 7, 1983), https://www.nytimes.com/1983/04/07/us/paper-siege-by-prisoner-provokes-ire.html. The machinery of the Court can surely handle the equivalent of denying an average of one extra petition a week, which far exceeds the upper threshold of temerity of any known real-world litigant.

476. *In re* Green, 669 F.2d 779, 785–87 (D.C. Cir. 1981).

477. Green v. White (*In re* Green), 616 F.2d 1054 (8th Cir. 1980) (*per curiam*); *In re* Green, 598 F.2d 1126, 1127 (8th Cir. 1979) (*en banc*); Green v. Carlson, 649 F.2d 285, 287 (5th Cir. 1981) (Unit A).

478. Greenhouse, *supra* note 475.

479. *Id*.

480. Green v. White, 460 U.S. 1067 (1983), *vacated*, 462 U.S. 1111 (1983).

481. Greenhouse, *supra* note 475.

482. Green v. White, 462 U.S. 1111.

recorded history," in the words of the D.C. Circuit[483]—could not bring the wheels of justice to a halt, it is implausible that anyone could.

D. *Majority* — Proscriptions Are Required to Deter Meritless Petitions Generally from Impeding the Court

Although the initial cases ostensibly aimed at redressing a single petitioner's abuses, the majority made its reasoning more clear (and more creditable) in the later cases. Even if *one* petitioner cannot wreak havoc on the Court by superfluity, if *numerous* petitioners were to do so, the Court might indeed be overwhelmed. Those that were particularly prolific in their frivolous filings, therefore, must be censured and potentially interdicted to serve as a deterrent to such behavior. Whilst any single miscreant—even a Reverend Green—poses a scant threat, interdicting that egregious example could serve to forestall numerous other potential meritless claims whose proponents might fear similar treatment. If meritless petitioners considered in the aggregate threatened the Court's function, then singling out the most egregious to prevent even greater numbers from swamping the Court might well be necessary, however distasteful.[484]

Indeed, the minority discerned early on that this was the majority's true trajectory. Justice Brennan recognized in *McDonald* that the majority's "order makes sense as an efficiency measure only if it is merely the prelude to similar orders in regard to other litigants, or perhaps to a generalized rule limiting the number of petitions *in forma pauperis* an individual may file. Therein lies its danger."[485] Subsequent cases in the following months and years only confirmed and reconfirmed these suspicions.[486] By the time *Zatko* and *Martin* arrived, the Court's ultimate destination had become something of a foregone conclusion.[487]

By the majority's lights, only by meeting exceptional abuse with rejoinder in kind could the Court's docket as a whole be properly

483. *In re* Green, 669 F.2d 779, 781 (D.C. Cir. 1981).

484. *See* Martin v. D.C. Ct. App., 506 U.S. 1, 3 (1992) (*per curiam*).

485. *In re McDonald*, 489 U.S. at 187 (Brennan, J., dissenting); *see id.* at 188.

486. *See In re Demos*, 500 U.S. at 18–19 (Marshall, J., dissenting); *In re* Sindram, 498 U.S. 177, 182 (1991) (Marshall, J., dissenting).

487. *See In re Demos*, 500 U.S. at 18–19 (Marshall, J., dissenting) ("Two years ago, Justice Brennan sagely warned that in 'needlessly depart[ing] from its generous tradition' of leaving its doors open to all classes of litigants, the Court 'sets sail on a journey whose landing point is uncertain.' *In re McDonald,* 489 U.S. at 188 (dissenting opinion). The journey's ominous destination is becoming apparent. The Court appears resolved to close its doors to increasing numbers of indigent litigants–and for increasingly less justifiable reasons. I fear that the Court's action today portends even more Draconian restrictions on the access of indigent litigants to this Court.").

constrained.[488] Or as *Zatko* put it, "[i]n the hope that our action will deter future similar frivolous practices, we deny Zatko and Martin leave to proceed in forma pauperis in these cases."[489] Such sanctions, under that theory, would be rare indeed: "we take the limited step of censuring two petitioners who are unique—not merely among those who seek to file in forma paupers, but also among those who have paid the required filing fees—because they have repeatedly made totally frivolous demands on the Court's limited resources."[490] And as *Zatko* taught by limiting its sanction to a single rather than prospective denial of leave, lesser abuses would merit lesser sanctions[491]—but as *Martin* would teach, obdurate persistence would necessitate more extreme measures as an example to discourage such recalcitrance by all petitioners.[492]

1. The Problem of Judgment-Proof Paupers and Prisoners

As for why that extremity meant interdiction rather than more traditional remedies, the majority found it followed straightforwardly from the unique position of *in forma pauperis* petitioners.[493] A typical plaintiff's responsibility for filing fees and costs dissuade frivolous filings.[494] True, a wealthier petitioner intent on serially abusing the Court's time could pay the filing fee to continue to do so.[495] But, reasoned the Court, payment of the filing fee acts as a real deterrent to all but the very rich:[496] Although $300 may seem a relatively small sum, a petitioner considering a barrage of filings might think twice before expending, for example, the $21,900 necessary to file the seventy-three hopeless petitions that Vladimir Zatko had been able to submit *gratis*.[497]

Petitioners of means may be further deterred by the ordinary function

488. *See Martin*, 506 U.S. at 2–3; *see* Zatko v. California, 502 U.S. 16, 17-18 (1991) (*per curiam*).

489. *Zatko*, 502 U.S. at 17.

490. *Zatko*, 502 U.S. at 18.

491. *Id.*

492. *Martin*, 506 U.S. at 2–3; *see also Zatko*, 502 U.S. at 18 ("Future similar filings from these petitioners will merit additional measures.").

493. *See In re* Amend. to Rule 39, 500 U.S. 13, 13 (1991) (*per curiam*); *In re* Sindram, 498 U.S. 177, 180 (1991) (*per curiam*); *In re* McDonald, 489 U.S. 180, 184 (1989) (*per curiam*).

494. *See In re Amend. to Rule 39,* 500 U.S. at 13; *In re Sindram*, 498 U.S. at 180; *In re McDonald*, 489 U.S. at 184.

495. *See* Abdul-Akbar v. McKelvie, 239 F. 3d 307, 328 (3d. Cir. 2001) (Mansmann, J., dissenting).

496. *See In re Amend. to Rule 39,* 500 U.S. at 13 ("Filings under our paid docket require a not-insubstantial filing fee."); *Sindram*, 498 U.S. at 180; *McDonald*, 489 U.S. at 184.

497. *See Zatko*, 502 U.S. at 17 (*per curiam*).

of the Court's system of assessing punitive damages under Rule 42.2.[498] Historically, however, such power had been employed very rarely,[499] and the Court had hesitated to fine litigants even for obtusely frivolous petitions.[500] In the 1985 case of *Talimini v. Allstate Insurance Co.*, moreover, the dividing line between the *in forma pauperis* majority and minority factions was vividly on display.[501] There, the Court declined to sanction the filer of an appeal whose defect "competent counsel should readily recognize."[502] Justice Stevens and his usual co-dissenters concluded that denial of certiorari was so painless that there was no more reason for monetary sanctions than they would see for interdiction.[503] Accordingly, the threat of onerous sanctions would imperil the tradition of "open access to all levels of the judicial system" that would animate the *in forma pauperis* cases.[504] Chief Justice Burger, writing for himself and Justices Rehnquist and O'Connor, made an impassioned plea for more liberal use of sanctions to patrol the Court's docket.[505] Still, given a choice between sanctions and interdiction, even the minority should agree monetary sanctions are better targeted and suited to punish serially bad-faith filings whilst still allowing through the

498. *In re Amend. to Rule 39,* 500 U.S. at 13; *see* Sup. Ct. R. 42.2 ("When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.").

499. *See* Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1069, n.7 (1985) (Stevens, J., concurring).

500. *See id.* at 1072–73 (Burger, J., dissenting).

501. *Compare id.* at 1068–72 (Stevens, J., concurring) *with id.* at 1072–73 (Burger, J., dissenting). Because Justice Powell was recused from the case, and Justice White discerned no jurisdiction and would thus dismiss, Justice Stevens's concurrence for four justices was the controlling plurality of the Court.

502. *Id.* at 1069 (Stevens, J., concurring).

503. *Id.* ("Because of the large number of applications for review that are regularly filed in this Court, the public interest in the efficient administration of our docket requires that we minimize the time devoted to the disposition of applications that are plainly without merit. Any evenhanded attempt to determine which of the unmeritorious applications should give rise to sanctions, and which should merely be denied summarily, would be a time-consuming and unrewarding task.").

504. *Id.* at 1070–72.

505. *Id.* at 1072–74 (Burger, J., dissenting) ("Rule 49.2 [then providing for sanctions] has a purpose which has too long been ignored; it is time we applied it. I would apply it here.").

potentially meritorious,[506] as have commentators.[507]

In forma pauperis petitioners, especially prisoners, are crucially different. Some may be able to afford some partial pittances,[508] but the truly destitute are insusceptible of filing fees and functionally immune from financial sanctions.[509] Courts have accordingly declined to fruitlessly assess such costs or sanctions against *in forma pauperis* litigants,[510] notwithstanding their sure authority to do so.[511] Nor can the threat of contempt always serve as an effective deterrent.[512] A litigant at liberty, to be sure, will likely see the threat of incarceration as a "potent discourager"; it may be the "only one, in the case of prisoners."[513] But prisoners serving long or life sentences may quite rationally be less docile.[514] Indeed, even prisoners serving shorter terms may not adhere to their own self-interest, becoming their "own worst enemy" in racking up avoidable contempt sentences.[515] The prolific Reverend Green would have been freed in 1980 were it not for such sentences, but instead found himself still in jail a year later, persevering at his trade of jailhouse lawyering and frivolous petitioning.[516]

Though there remain other remedies such as self-certification and a requirement for leave of court, these inevitably leave some opening for abuse

506. *See Talamini*, 470 U.S. at 1071 (Stevens, J., concurring) ("This is not, of course, to suggest that courts should tolerate gross abuses of the judicial process. . . . [I]f it appears that unmeritorious litigation has been prolonged merely for the purposes of delay, with no legitimate prospect of success, an award of double costs and damages occasioned by the delay may be appropriate.").

507. *See* Van Vort, *supra* note 141, at 1179–90 (discussing how to balance limited versions of monetary assessments against *in forma pauperis* litigants with the need to ensure access for meritorious claims).

508. *See id*.

509. Van Vort, *supra* note 141, at 1165 ("Some courts attempt to deter non-indigent frivolous lawsuits by assessing monetary sanctions against plaintiffs or their attorneys. Such measures, however, cannot be applied practically against either indigents.").

510. *Id.* at 1165 n.6 (citing cases); *id.* at 1188 & n.146 (same).

511. 28 U.S.C. § 1915(e); *see* Von Vort, *supra* note 141, at 1188–90.

512. *See* Procup v. Strickland, 567 F. Supp. 146, 159–60 (M.D. Fla. 1983), *rev'd*, 760 F.2d 1107 (11th Cir. 1985), *vacated and remanded*, 792 F.2d 1069 (11th Cir. 1986) (*en banc*) (*per curiam*).

513. Duniway, *supra* note 23, at 1286.

514. *Procup*, 567 F. Supp. at 159 ("Procup is presently serving a term of life imprisonment. The threat of receiving additional periods of incarceration for being held in contempt of court does not appear likely to deter Procup from his abusive practices.").

515. *In re* Green, 669 F.2d 779, 782 (D.C. Cir. 1981) (*per curiam*).

516. *Id.*

by malicious litigants.[517] Some will do so.[518] Even annual limits foresee a regular stream of continuing litigation.[519] Only proscription guarantees that a prolific *in forma pauperis* petitioner will petition no more.[520] The question is whether the aggregate detriment to the Court from undeterred frivolous filings is sufficiently grave to justify deployment of the sole sure deterrent the Court can bring to bear against those without means.[521] And answering that question requires taking a closer look at the demands on the Court's time and thus at the numbers behind its docket itself.

2. The Supreme Court's "Incredible Shrinking Plenary Docket"[522]

That the volume of cases taken by the Supreme Court has declined steadily over time has been the subject of much scholarly literature spanning decades.[523] Some of the brightest luminaries in the legal firmament have written of the phenomenon.[524] And this shrinking docket coincides with a steady increase in the number of petitions being filed, with the mathematically inexorable result that an ever-smaller percentage of cases are deemed worthy of review.[525] As a function of time, petitioners—indigent or

517. *See Procup*, 567 F. Supp. at 158–160 (discussing potential for abuse of various remedies), *rev'd*, 760 F.2d 1107 (11th Cir. 1985), *vacated and remanded*, 792 F.2d 1069, 1072–73 (11th Cir. 1986) (*en banc*) (*per curiam*) (outlining various options).

518. *See Green*, 669 F.2d at 782–84.

519. *See* sources cited *supra* notes 223-25.

520. *See Procup*, 567 F. Supp. at 158–60.

521. *Compare, e.g.*, Martin v. D.C. Ct. App., 506 U.S. 1, 2–4 (1992) (*per curiam*), *with id.* at 4 (Stevens, J., dissenting).

522. David M. O'Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court's Shrinking Plenary Docket*, 13 J.L. & POL. 779, 779 (1997) (internal quotation marks omitted).

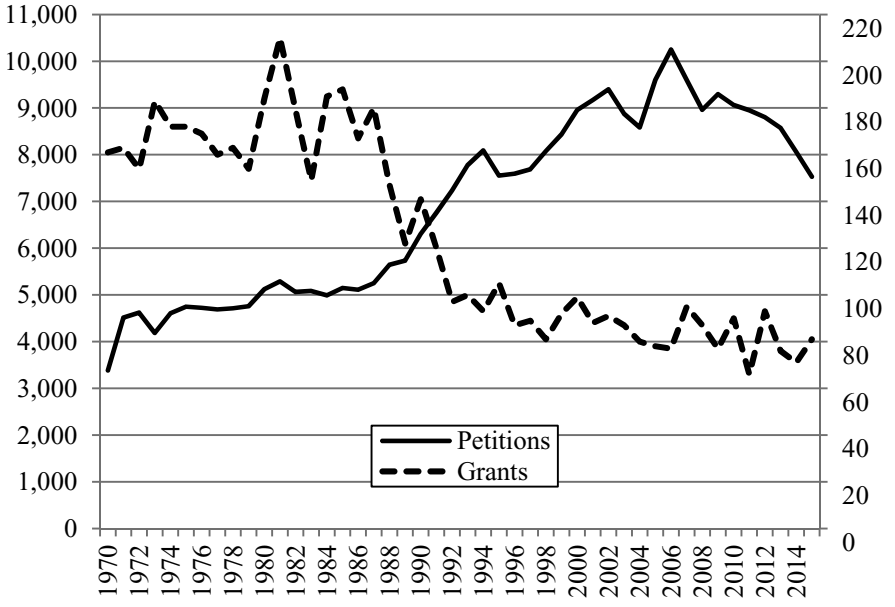
523. *See id.* ("The 'incredible shrinking' plenary docket of the Supreme Court has drawn considerable attention."); *e.g.*, Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012); David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151 (2010); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363 (2005); Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001); Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403 (1996); Arthur D. Hellman, *The Supreme Court, the National Law, and the Selection of Cases for the Plenary Docket*, 44 U. PITT. L. REV. 521 (1983); Gerhard Casper & Richard A. Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUD. 339 (1974); William O. Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 404–07 (1960) ("During the last two decades, there has been a marked decline in the number of opinions written each term.").

524. *See, e.g.*, Starr, *supra* note 523; Casper & Posner, *supra* note 523; Douglas, *supra* note 523.

525. *See* O'Brien, *supra* note 522, at 779–80 & fig.1.

not—have faced longer and longer odds that the Court will deem their claims worthy of plenary review.[526] Figure 5 illustrates these trends.[527]

Figure 5: Supreme Court Petitions and Grants, OT 1970-2015



The burgeoning number of petitions is facially explicable: there is only one Supreme Court, and ever more litigants whose claims therefore filter up the highest court eventually.[528] Why the Court has responded by steadily decreasing the absolute number of cases accepted, rather than increasing it, is a more confounding question; such a response only exacerbates the systemic numerical disparity.[529] Legal scholars have sought to solve this puzzle in various ways.[530]

Some have adverted to the Court's varying willingness to revisit and reinterpret constitutional issues and a greater call for such cases when law

526. *See* Casper & Posner, *supra* note 523, at 349–52; O'Brien, *supra* note 522, at 779–80 & fig.1.

527. The data for this and further discussion of Supreme Court caseload statistics is drawn from that presented in the annual *Journal of the Supreme Court of the United States*, as published from 1970 to 2015. Petitions and grants include cases in certiorari and direct appeal stances, but not original cases.

528. *See* Casper & Posner, *supra* note 523, at 352–60.

529. *See generally* Stras, *supra* note 523 ("The decline in the Supreme Court's plenary docket over the past thirty years has puzzled commentators.").

530. *See* sources cited *supra* note 523.

and society are rapidly evolving;[531] others have pointed to personnel: the strong influence of different chief justices in setting expectations for the Court's docket,[532] the impact of individual justices' views,[533] or ideological polarization in the Court's makeup correlating to fewer grants.[534] Commenting on the phenomenon, Justice Souter adverted to extrinsic influences, such as lower rates of legislation, antitrust enforcement, and civil rights litigation, as well as internal factors like fewer jurisprudential disagreements with lower courts, and less division within the Court calling for resolution.[535] But whatever the ultimate causes, as early as 1959, Hart summed up the problem succinctly: "the fact [is] that the Court has more work to do than it is able to do in the way in which the work ought to be done."[536] Justice Douglas agreed then,[537] and the problem has clearly only aggravated since.[538]

Focusing on whether a petitioner is paying or has *in forma pauperis* status offers further insight. It is unmistakable and remarkable that both trajectories—the increase in petitions, and the decrease in granted cases—advanced precipitously between 1988 and 1992.[539] One commentator suggested this "extraordinary" decline may be attributed to the "high turnover" of justices between 1986 and 1993.[540] But this is also the very lustrum during which the Supreme Court was likewise precipitously revising its jurisprudence on *in forma pauperis* proscriptions.[541] Perhaps there might be some common factor that explains these contemporaneous phenomena? Critically, by distinguishing between filing statuses, one can see that there were actually two trends at play during this pivotal lustrum, as illustrated in Figure 6.

531. Casper & Posner, *supra* note 523, at 352–53, 357–59.

532. *See* O'Brien, *supra* 522, at 782.

533. *See* Stras, *supra* note 523.

534. *See* Owens & Simon, *supra* note 523.

535. *See* O'Brien, *supra* note 522, at 780–82 (discussing Shannon Duffy, *Inside the Highest Court: Souter Describes Justices' Relationship, Caseload Trend*, PA. LAW WKLY., April 17, 1995, at 11).

536. Hart, *supra* note 470, at 84.

537. Douglas, *supra* note 523.

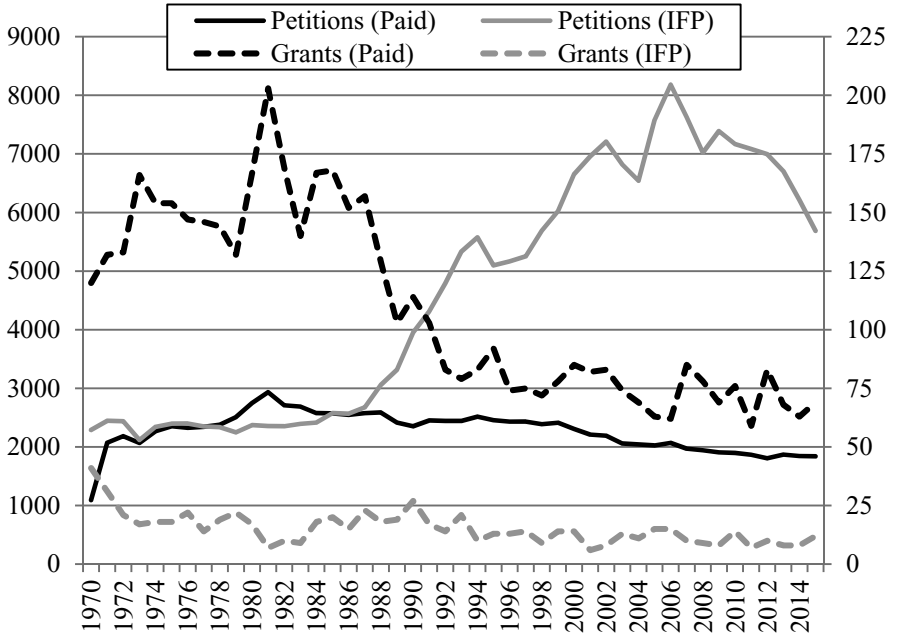
538. *See supra* Figure 5; Owens & Simon, *supra* note 523, at 1229 & fig.1; Stras, *supra* note 523, at 152–53 & fig.1.

539. *See supra* Figure 5; Stras, *supra* note 523, at 152–53 & fig.1; O'Brien, *supra* note 522, at 780 & fig.1; *id.* at 782 (observing that "the plenary docket gradually declined and, then, fell sharply in the early 1990s.").

540. Stras, *supra* note 523, at 152–161.

541. *See supra* Part III.

Figure 6: Supreme Court Petitions and Grants, by Filing Status, OT 1970-2015



From roughly 1970 to 1988, petitioners were divided equally between *in forma* pauperis and paying filings. Notably, however, a dramatically higher proportion of paying filers were granted review: usually between 125 and 175, versus between ten to thirty indigent claims. The first set of trends from 1988-1992 shows that even as the number of *in forma pauperis* cases ballooned, the Supreme Court maintained its practice of accepting roughly the same number every year. The result, of course, is that the portion of paupers received a hearing plummeted: from 0.93% in the period from 1970 to 1980 to 0.15% in the period from 2005 to 2015, a sixfold decrease. Paying petitioners did not fare markedly better. Although the Court did not see any real increase in such petitions annually, the number granted fell, with the result that the portion of paying petitioners receiving hearings similarly fell by half, from 6.8% from 1970-1980 to 3.7% in 2005-2015. In the era of the Court's incredible shrinking docket, all petitioners have suffered.

Yet the suffering is not in the same degree or for the same reason. Despite the drastic increase in *in forma pauperis* petitions, the Court has not granted more; if anything, the number granted has dwindled slightly over the last fifty years. This suggests that the increase does not represent the sudden outpouring of theretofore unfiled meritorious claims, but a proliferation of

frivolous or at least less worthy filings that do not garner grants.[542] This may also be evidenced by the proportion of *in forma pauperis* claims grants dropping more than those of paying petitioners.[543] On the other hand, there is little reason to think that the more constant influx of paid claims suddenly became less cogent between 1988 and 1992.[544] Thus the sharp decline in their grants likely represents the Court declining review to a higher percentage of meritorious claims.[545] This development, correlating with the dramatic increase in *in forma pauperis* filings, lends credence to the majority's view in the critical lustrum that worthy cases were not receiving the attention they deserved.[546]

With these understandings, a credible causal inference thus emerges as to the hidden factor underlying all of these trends. As the majority argued, the explosion of *in forma pauperis* claims seems to have indeed reduced the Supreme Court's ability to discern and grant review to meritorious claims.[547] The majority couched this concern specifically in terms of unworthy paupers crowding out the worthy claims of their colleagues, impeding earnest *in forma pauperis* petitioners.[548] There is some small evidence of this in a mild decline in *in forma pauperis* grants.[549] Interestingly, however, the primary victims of the Court's distraction have been paying litigants. The Court, its time ever more consumed with the volume of frivolous claims, appears unable or unwilling to grant review to what would have, in an earlier era,

542. *See* Sturtz, *supra* note 58, at 1362 (writing in 1995 of the rampant abuse of *in forma pauperis* filings).

543. *See* Lane, *supra* note 11, at 344 (reviewing potential reasons for the plummeting percentage of *in forma pauperis* petitions granted).

544. *Cf.* Casper & Posner, *supra* note 523, at 367 ("The decline in the proportion of cases accepted for review revealed by these tables would have little significance if one believed that it reflected a decline in the average merit of applications for review. But there is no basis for such a belief after the correction for the presumed lesser merit of the average indigent case made in Table 17. On the contrary, theory suggests that the average merit of the applications for review has increased over the period covered by our study.").

545. *See id.* at 369 ("A more serious consequence of the caseload increase, we said, was the probable reduction in the number of meritorious cases accepted for review."); *see also* Owens & Simon, *supra* note 523, at 1252–54 (discussing issue of meritorious cases being overlooked as grants decrease).

546. *E.g.*, Martin v. D.C. Ct. App., 506 U.S. 1, 3–4 (1992) (*per curiam*); Zatko v. California, 502 U.S. 16, 17–18 (1991) (*per curiam*); *In re* Amend. to Rule 39, 500 U.S. 13, 13–14 (1991) (*per curiam*); *In re* Sindram, 498 U.S. 177, 180 (1991) (*per curiam*); *In re* McDonald, 489 U.S. 180, 184. (1989) (*per curiam*).

547. *Zatko*, 502 U.S. at 17; *In re Amend. to Rule 39*, 500 U.S. at 14; *In re Sindram*, 498 U.S. at 180; *In re McDonald*, 489 U.S. at 184.

548. *In re Amend. to Rule 39*, 500 U.S. at 14.

549. *See* Lane, *supra* note 11, at 344.

been a paid claim meritorious enough to warrant plenary review.[550] The Court's shrinking docket thus credibly derives at least in part from the modern influx of pestersome paupers, as the majority feared.[551] Yet the litigants predominantly harmed are not fellow paupers, parlous few of which have ever gained review, but paid filers.

3. Lessons from the Court's Dwindling Docket

Whatever the cause of the decline, the Supreme Court's dwindling capacity for review suggests that its concerns for preserving its ability to manage its docket must be given substantial credence.[552] One modern treatise glibly quipped: "With the 10,000 or so petitions presented to the nine justices every year, it is amazing that they have the time to do much of anything. Consequently, it is easy to become careless and overlook things."[553] The question remains, however, whether prospective proscriptions actually effect meaningful relief of the Court's burden.[554] A portion of the burden may be directly relieved, when highly prolific petitioners are banned and thus can no longer add their importunities to the totals of the future.[555] This factor, however, can only represent a minority of the many thousands of petitions the Court must consider annually.[556] Of critical import is whether such proscriptions in fact deter *in forma pauperis* litigants at large from submitting frivolous claims.[557]

On this point the evidence is more equivocal, but there is tantalizing support for the majority's view. True, *in forma pauperis* petitions continued to rise sharply well after *Martin* in 1992, and after the formulation of *Martin* directives in 1999, reaching their peak volume to date in 2006 with just over 8000 petitions (totaling over 10,000 when combined with those of paying litigants). But since 2006, *in forma pauperis* petitions have trended notably downwards, falling to roughly 5700 by 2015. Indeed, by 2015, the volume of the indigent docket had returned to nearly where it stood in 1992, wiping

550. *See Zatko*, 502 U.S. at 17–18; *In re Amend. To Rule 39*, 500 U.S. at 14; *In re McDonald*, 489 U.S. at 184; *see also* Casper & Posner, *supra* note 523, at 369.

551. *Zatko*, 502 U.S. at 17–18.

552. *Cf.* Owens & Simon, *supra* note 523, at 1251–63 (discussing several potential negative results of a diminished docket).

553. RONALD K. L. COLLINS & DAVID M. SKOVER, THE JUDGE 39 (Oxford Univ. Press 2017).

554. *See* Lane, *supra* note 11, at 362.

555. *See, e.g.*, Martin v. D.C. Ct. App., 506 U.S. 1 (1992) (*per curiam*). *But see* Lane, *supra* note 11, at 364 (noting that through 2003, Martin "managed to file over fifteen cases with the Court despite being blacklisted").

556. That said, it is interesting to note that the decline in *in forma pauperis* numbers since 2006 coincides roughly with unprecedented levels of *Martin* interdictions: It is possible the portion of these "missing" petitions attributable to interdicted prolific petitioners is relatively substantial.

557. *See* Lane, *supra* note 11, at 363–64 (arguing there is little deterrent effect).

out the towering heights of the early twenty-first century. It is entirely plausible that the ever-increasing list of proscribed petitioners have had the concomitant effect of deterring some litigants who might otherwise have indulged frivolous claims; it is plausible as well that this deterrent effect might be somewhat delayed as litigants become more familiar with the Court's willingness to ban transgressors.[558] (Of course, it is also the case that it may deter litigants with worthy claims as well.[559]) This is the case even if one may expect *in forma pauperis* prisoners to be highly resilient to deterrence in the first place—the threat of being denied any further access to the Supreme Court may be the only thing that *can* deter someone with essentially unlimited time and motivation to challenge their incarceration.[560]

The majority thus presents a facially powerful argument, but there remain countervailing considerations. In the first place, it is indeterminate whether lesser penalties such as annual limits, precertifications, or requiring leave of court might have a comparable deterrent value, or indeed comparable value in directly relieving petitions. If meritless *in forma pauperis* filings could be reduced and attention to worthier claims increased with less infringement on the right of access to the courts, interdictions would be far less justifiable. As the Supreme Court never essayed such lesser penalties, there are no statistics upon which to undertake such an analysis, even if the degree of deterrence could somehow be detected from the raw data. The experience of the lower courts suggests that such regimes can prove effective: although spurned by the Eighth and Fifth Circuits, other courts facing prolific petitions have relied on these lesser measures.[561]

More damningly, the reduction in *in forma pauperis* filings from its peak in 2006 has not had the desired effect. That is, even if the Supreme Court's regime of *Martin* directives has dissuaded frivolous filings, the Supreme Court has—for whatever reason—not responded by increasing the number of cases on which it grants plenary review. To the contrary, from 2005 to 2015, that number has not changed appreciably. The Court and its petitioners are hardly injured by baseless filings if worthy petitioners are no

558. *Cf.* Franklin, *supra* note 93, at 203 (quoting Michelman, *supra* note 22, at 559) (discussing differential potentiality for deterrence from access fees).

559. *See* Lane, *supra* note 11, at 364.

560. *See* Casper & Posner, *supra* note 523, at 366 ("In many cases, perhaps, the benefits to the applicant for review if he obtains a reversal of the lower court's judgment are so great, or the costs of applying for Supreme Court review so small, that even a substantial decline in the probability of obtaining review will not deter the application. A good example is provided by applications submitted by prisoners. The benefits to the applicant if his case is accepted for review and the judgment reversed may be very great—his liberty—and the cost of seeking review, which consists primarily of the opportunity costs of the prisoner's time, may be very low."); Sturtz, *supra* note 58, at 1362–63.

561. *See supra* Section II-B-1.

more likely to gain an opportunity for relief.[562] Reduction of *in forma pauperis* filings is not an end in and of itself, notwithstanding certain comments implying as much by the majority;[563] it is defensible only insofar as it permits the Court to focus on meritorious work.[564] Because this has not demonstrably happened, the majority's best argument remains potent but unproven (though hardly disproven), reducing its weight. This is doubly so given the many alternative explanations provided by eminent scholars for the Court's reduced plenary docket and concomitant pretermitting of more meritorious claims.[565]

E. *Minority* — Proscriptions Will Improperly Impede an Indigent's Meritorious Claims

The majority and dissent both expressed concern about frivolous claims impeding the claims of meritorious *in forma pauperis* litigants.[566] As has been noted, the data indicate that the victims of the Court's increasing caseload have been predominantly paying rather than indigent litigants,[567] contrary to the majority's fretting about the rights of the indigent.[568] On the other hand, interdicting an indigent claimant *ipso facto* impedes all future claims from that claimant, an argument that the dissent raised several times.[569] On its face, this is a potent protestation: surely the Court cannot know with certainty that all of a prolific petitioner's future output will be as frivolous as the past.[570] Or as Justice Marshall put it lyrically:

> [W]e should not presume in advance that prolific indigent litigants will never bring a meritorious claim. Nor should we lose sight of

562. *See* Zatko v. California, 502 U.S. 16, 17–18 (1991) (*per curiam*) (explaining the rationale for its decision as preserving Court resources for petitioners who did not abuse the Court's process); *In re* Amend. to Rule 39, 500 U.S. 13, 13–14 (1991) (*per curiam*) (similar); *In re* Sindram, 498 U.S. 177, 179–80 (1991) (*per curiam*) (similar); *In re* McDonald, 489 U.S. 180, 184 (1989) (*per curiam*) (similar).

563. *E.g.*, *In re Demos*, 500 U.S. at 17–18 (*per curiam*) (proscribing petitioner for abuse without reference to ensuring access to other petitioners).

564. *See Zatko*, 502 U.S. at 17–18; *Rule 39*, 500 U.S. at 13–14; *In re McDonald*, 489 U.S. at 184.

565. *See supra* notes 523-528 and accompanying text.

566. *See, e.g.*, *In re Amend. to Rule 39*, 500 U.S. at 13–14; *In re McDonald*, 489 U.S. at 187 (Brennan, J., dissenting).

567. *See supra* Section V-D-2 & V-D-3

568. *See In re Amend. to Rule 39*, 500 U.S. at 13–14; *cf. In re McDonald*, 489 U.S. at 187 (Brennan, J., dissenting) ("I continue to find puzzling the Court's fervor in ensuring that rights granted to the poor are not abused.").

569. *In re Sindram*, 498 U.S. at 182 (Marshall, J., dissenting); *In re McDonald*, 489 U.S. at 187–88 (Brennan, J., dissenting).

570. *Id.* (Marshall, J., dissenting); *McDonald*, 489 U.S. at 187 (Brennan, J., dissenting).

> the important role in forma pauperis claims have played in shaping constitutional doctrine. (citation omitted). As Justice Brennan warned, "if . . . we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim." (citation omitted). By closing our door today to a litigant like Michael Sindram, we run the unacceptable risk of impeding a future Clarence Earl Gideon.[571]

Yet there is less here than meets the eye. True, there is some chance that a petitioner whose past behavior had been so irresponsible as to merit proscription might have mended his ways in the future, given the chance.[572] But though the past is no guarantee of the future, it is certainly a fair basis for prediction.[573] Petitioners who have demonstrated an inability to restrain themselves from frivolous claims are more likely to reoffend in the future.[574] Justice Brennan readily admitted that he thought it highly unlikely that Jessie McDonald would ever come up with a meritorious claim—rather, he objected on principle to even a vanishingly small possibility being foreclosed.[575] Even blessed with a claim more than frivolous, it remains highly improbable that the Court will grant review:[576] Innumerable meritorious petitions are denied every year for lack of time to hear them all.[577] In short, there is only a fleeting chance of a serially frivolous petitioner actually rather than notionally being injured, as all on the Court agreed.[578]

And the loss of that chance is in many ways a self-inflicted injury. Nothing compels litigants to present their every imagined claim to the Court other than their own obstinacy,[579] and those who opt to make numerous frivolous filings can object but faintly when their demonstrated lack of discernment is used as a basis to predict that they will continue to exhibit

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571. *In re Sindram*, 498 U.S. at 182 (Marshall, J., dissenting).

572. *In re McDonald*, 489 U.S. at 187–88 (Brennan, J., dissenting).

573. *See, e.g.*, *In re McDonald*, 489 U.S. at 180–82, 184 (*per curiam*) (noting the volume of past frivolous petitions and barring the "continual processing of petitioner's frivolous requests"); *In re* Oliver, 682 F.2d 443, 446 (3d Cir. 1982).

574. *Cf. In re Oliver*, 682 F.2d at 446; Wasby 1990, *supra* note 12, at 114–16.

575. *In re McDonald*, 489 U.S. at 187–88 (Brennan, J., dissenting).

576. *Cf. id.* at 184 (*per curiam*) ("It is perhaps worth noting that we have not granted the sort of extraordinary writ relentlessly sought by petitioner to any litigant–paid or *in forma pauperis*–for at least a decade.").

577. *See* Brown v. Allen, 344 U.S. 443, 491–97 (1953) (Frankfurter, J., dissenting); Kapral v. United States, 166 F.3d 565, 568 (3d Cir. 1999) (finding 0.45% chance of review being granted).

578. *Compare In re McDonald*, 489 U.S. at 183–84 (*per curiam*), *with id.* at 187–88 (Brennan, J., dissenting).

579. *See* Sturtz, *supra* note 58, at 1362–63; Lane, *supra* note 11, at 363–64.

that failing.[580] Should a petitioner wish to avoid such a fate, there is a simple solution: forebear from bringing tenuous claims so that the Court may view the meritorious ones more favorably when presented.[581] It is not without reason that "the boy who cried wolf" is a cautionary tale as old as Æsop's Fables.[582] No petitioner has the right to be heard by the Supreme Court,[583] and denying those that have demonstrated themselves chronically unable to frame a claim does relatively little actual harm to the petitioner *in propria persona*.[584] (Clarence Earl Gideon, after all, was no prolific petitioner.[585])

Thus it is the majority that narrowly has the better of the argument here: as the data suggest, dockets flooded with the frivolous petitions of pestersome paupers would indeed make it more likely that any given meritorious petition will be overlooked.[586] Those petitioning sparely and wisely are more likely to present a proper claim, and thus more likely to suffer harm if their claim is overlooked.[587] By contrast, a court's deliberately pretermitting the likely frivolities of its most prolific petitioners occasions a lower chance that the court will in fact deny a meritorious petition in error.[588] If errors are to be made—as inevitably they will by any human decisor,[589]

580. *See In re McDonald*, 489 U.S. at 187–88 (Brennan, J., dissenting) (distinguishing between barring the petitioner, whom Brennan doubted would ever file a meritorious claim, from the more abstract question of whether issuing such order might one day bar another petitioner with a worthy claim).

581. *Cf. In re* Demos, 500 U.S. 16, 17 (1991) (*per curiam*) ("Petitioner remains free under the present order to file *in forma pauperis* requests for relief other than an extraordinary writ, if he qualifies under this Court's Rule 39 and does not similarly abuse that privilege."); *In re* Sindram, 498 U.S. 177, 184 (1991) (*per curiam*) (similar); *In re McDonald*, 489 U.S. at 185 (*per curiam*) (similar).

582. Æsop, ÆSOP'S FABLES 9–11 (Jan Fields trans. 2012) ("When you are known as a liar, no one believes you even when you speak the truth.").

583. *See supra* notes 459-464 and accompanying text.

584. *See In re* Amend. to Rule 39, 500 U.S 13, 14 (1991) (*per curiam*) ("The Rule applies only to those filings that the Court determines would be denied in any event, and permits a disposition of the matter without the Court issuing an order granting leave to proceed *in forma pauperis*.").

585. *See* ANTHONY LEWIS, GIDEON'S TRUMPET 28–41 (Vintage 1964).

586. *See* Martin v. D.C. Ct. App., 506 U.S. 1, 3–4 (1992) (*per curiam*) ("But it will free this Court's limited resources to consider the claims of those petitioners who have not abused our certiorari process."); *supra* Sections V-D-2 & V-D-3.

587. *See* Casper & Posner*, supra* note 523, at 366–69; *cf.* Duniway, *supra* note 23, at 1285–86 ("My objections to the statute are twofold. First, it does not do enough for the litigant with a meritorious cause."); Feldman, *supra* note 29, at 437.

588. *See, e.g.*, Duniway, *supra* note 23, at 1285 ("The fourth group is made up of *in propria persona* litigants—a few of whom plague every court—who have an imaginary grievance and a compulsion to litigate continually. The man involved in meritorious litigation who uses the statute is a *rara avis*.").

589. I. J. Good & Gordon Tullock, *Judicial Errors and a Proposal for Reform*, 13 J. LEGAL STUDIES 289 (1984) ("[W]e argue that it is possible for a judge or court, specifically the Supreme

especially one beset with as many supplicants as the Supreme Court[590]—then better they be made in circumstances that minimize the damage done.[591] There are few more likely circumstances than cases proponed by serially frivolous prolific petitioners.[592]

F. *Minority* — Proscriptions Institutionalize Unseemly Discrimination on the Basis of Wealth

But even if pestersome paupers are losing little real opportunity to be heard, and diverting some quantum of attention from more meritorious cases, nonetheless the Supreme Court's ballooning use of *Martin* directives may compromise the Court in a most crucial way: By undermining public confidence in the equal and evenhanded administration to justice to all Americans, be they rich or poor.[593] Of late, the Court has repeatedly returned to the importance of such public confidence in other postures: Avoiding even the appearance of impropriety in cases where judges might be accused of improper bias, and extirpating any insinuation of invidious racial considerations infecting the judicial system.[594] These laudable programs to promote both the appearance and actuality of fairness generally shed clarifying light on how the Court should approach divisions based on wealth.[595]

This concern is amplified by the unhappy reality that early civil society expressed rather benighted biases against the impoverished.[596] Courts associated poverty with moral degradation or improbity,[597] up to and including the Supreme Court, which infamously held in 1837 in *City of New York v. Miln* that it is "as competent and necessary for a state to provide

Court of the United States, to be wrong."); *cf.* ALEXANDER POPE, AN ESSAY ON CRITICISM 31 (Floating Press 2010) ("To err is human . . .").

590. *See* Collins & Skover, *supra* note 553; *supra* Section V-D-2.

591. *Cf.* Good & Tullock, *supra* note 589, at 294–97 (proposing the Court reserve close decisions for a second review in order to minimize the chance of error).

592. *See* Martin v. D.C. Ct. App., 506 U.S. 1, 3–4 (1992) (*per curiam*); *In re* Amend. to Rule 39, 500 U.S. 13, 14 (1991) (*per curiam*).

593. *See* Feldman, *supra* 29, at 437 ("Moreover, any appearance of judicial impropriety would be undermined. The initial screening of frivolous complaints would not appear merely as a means for district courts to sweep the poor from their dockets. Rather, the screening would be a means of identifying those complaints worthy of further serious consideration. Only then would the federal courts be truly open to the poor."); Lane, *supra* note 11, at 363.

594. *See infra* Section V-F-1.

595. *See infra* Section V-F-2.

596. *See* Albert M. Bendich, *Privacy, Poverty, and the Constitution*, 54 CAL. L. REV. 407, 416–17 (1966); Feldman, supra note 29, at 413; Catz & Guyer, *supra* note 20, at 657.

597. *See* Bendich, *supra* note 596, at 416–27; Catz & Guyer, *supra* note 20, at 657 (citing Stefan A. Reisenfeld, *The Formative Era of American Public Assistance Law*, 43 CALIF. L. REV. 175, 175–200 (1955)).

precautionary measures against the moral pestilence of paupers, vagabonds, and convicts, as it is to guard against the physical pestilence may arise from unsound and infectious articles imported."[598] Thankfully, the Court has since repudiated such language and philosophy in firm terms—albeit after the lapse of over a century, in 1941.[599] Nonetheless, remnants of such prejudices have persisted even into the relatively recent past, including the familiar rhetoric that advocates for the poor were "using dilatory tactics or raising frivolous points."[600] Even the Court has at times inspired more modern dissents pointing to the persistence of class bias in its own holdings.[601] As other contexts indicate, such a history underscores the importance of affirmatively rebutting any hint of bias or discriminatory treatment to ensure public confidence in the judicial system.[602]

1. Avoiding the Appearance of Bias and Preserving Public Confidence

Most fundamentally, public confidence in the judicial system is fatally compromised when litigation is presided over by judges whose impartiality might reasonably be questioned.[603] The Supreme Court gave this doctrine greater constitutional ambit in *Caperton v. A.T. Massey Coal Co.*,[604] in which a justice on the West Virginia Supreme Court cast the decisive vote reversing a $50 million judgment against his largest campaign contributor.[605] Four times, the justice had refused to recuse himself after conducting "a probing

598. City of New York v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837) (cited in Catz & Guyer, *supra* note 20, at 657 n.12); *accord* The Passenger Cases, 48 U.S. (7 How.) 283, 457 (1849) (Grier, J., concurring).

599. Edwards v. California, 314 U.S. 160, 177 (1941) ("Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous.").

600. Robert D. McFadden, *Some Judges Held Hostile to Poor*, N.Y. TIMES (Dec. 21, 1970), at 52.

601. *See* Wyman v. James, 400 U.S. 309, 323 n.9 (1971) (Douglas, J., dissenting) (quoting the relevant passage from *Miln* and "regretfully conclud[ing] that today's decision is ideologically of the same vintage"); *see also* Hicks v. District of Columbia, 383 U.S. 252, 256–57 (1966) (Douglas, J., dissenting).

602. *See infra* Section V-F-1.

603. *See* Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 889 (2009) ("The Conference of the Chief Justices has underscored that the codes are '[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'").

604. *Caperton*, 556 U.S. at 889.

605. This greatly simplifies the situation; the reader interested in the political arcana of judicial elections in West Virginia is best directed to the thorough recapitulation in the case itself. *Id.* at 872–76.

search into his actual motives and inclinations" and finding no fault.[606] The Court, however, ruled that subjective inquiry was not sufficient; an objective assessment of whether the "probability" or "risk" of bias was too great was also required.[607] This holding accorded with prior cases finding that actual bias was unnecessary; what mattered was whether an "average judge" similarly situated had a "unconstitutional 'potential for bias.'"[608] The Court subsequently reaffirmed this rule in *Williams v. Pennsylvania* only seven years later.[609]

To be sure, there is no evidence that the modern Supreme Court is operating under some institutional animus against the poor in promulgating *Martin* directives; the mandate against actual judicial bias is not at play.[610] However, the Court's insistence on recusal even when no actual bias has been shown to avoid any possible *appearance* thereof teaches an important lesson: ultimately, the lodestar is objective public perception of impropriety, not the existence thereof.[611] Such a broad brushstroke emphasizes how vitally important confidence in the fairness of the judicial system really is.[612] Especially when the past reveals invidious preconceptions by yesteryear's judges against a particular group, it is all the more important for the modern bench to extirpate any sense that such a bias might linger.[613]

Closer to home is a slightly different sort of failing of the judicial system: when litigants' cases are adjudicated not on their merits, but on the basis of some invidious outside factor irrelevant to the claims at issue. The most archetypal of such invidious factors, given aspects of the nation's

606. *Caperton*, 556 U.S. at 882.

607. *Id.* at 882–87.

608. *Id.* at 881 (discussing *In re* Murchison, 349 U.S. 133 (1955) and Mayberry v. Pennsylvania, 400 U.S. 455 (1971)); *see id.* at 878–79 (discussing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986), Ward v. Monroeville, 409 U.S. 57 (1972), and Tumey v. Ohio, 273 U.S. 510 (1927).)

609. Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."'") (quoting *Caperton*, 556 U.S. at 881).

610. Some of the more fiery dissents in the *in forma pauperis* cases, however, at least approach such an accusation; *see, e.g.*, *In re* Sindram, 498 U.S. 177, 180–82 (1991) (Marshall, J., dissenting); but that is likely best put down to rhetoric than a serious accusation. *But see* cases cited *supra* note 601.

611. *Williams*, 136 S. Ct. at 1908–09 ("This risk so endangered the appearance of neutrality that his participation in the case 'must be forbidden if the guarantee of due process is to be adequately implemented'") (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)); *Caperton*, 556 U.S. at 889; Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (quoted by *Caperton*, 556 U.S. at 889).

612. *Williams*, 136 S. Ct. at 1908–09; *Caperton*, 556 U.S. at 888–89; *White*, 536 U.S. at 793.

613. *See supra* notes 596–601 and accompanying text.

history, has been race.[614] The Court has long denounced any use of race as a judicially cognizable consideration, perhaps most famously in *Batson v. Kentucky*.[615] There, as need hardly be recounted, the Court overturned the contrary *Swain v. Alabama*[616] and declared that exclusion of jury members on the basis of race violates the Equal Protection Clause.[617] This marked a culmination of the Court's self-described "unceasing efforts to eradicate racial discrimination in the procedures used to select the venire from which individual jurors are drawn."[618] Of particular importance, the Court recognized that "procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious . . . ."[619]

The passage of time has not diminished the Court's concern with this public confidence. In 2016, Chief Justice John Roberts reaffirmed *Batson* and its progeny for a near-unanimous Court and reversed the petitioner's conviction based on two racially-motivated peremptory strikes;[620] Justice Alito added in concurrence that "[c]ompliance with *Batson* is essential to ensure that defendants receive a fair trial and to preserve the public confidence upon which our system of criminal justice depends."[621] A year later, Chief Justice Roberts again wrote to reverse the death sentence rendered by a jury informed by an expert that the defendant "was more likely to act violently because he is black."[622] In reaching this conclusion, the Court once more decried discrimination in terms of public confidence in the judiciary, relying on considerable authority:

> "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Relying on race to impose a criminal sanction "poisons public confidence" in the judicial process. *Davis v. Ayala*, 135 S.Ct. 2187, 2208 (2015). It thus

614. *See* Korematsu v. United States, 323 U.S. 214 (1944), *overruled by* Trump v. Hawaii, No. 17–965, slip. op. at 38 (U.S. June 26, 2018), *as recognized id.* at 28 (Sotomayor, J., dissenting); Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, Kan., 347 U.S. 483, 494–95 (1954); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

615. Batson v. Kentucky, 476 U.S. 79 (1986).

616. Swain v. Alabama, 380 U.S. 202 (1965), *overruled by Batson*, 476 U.S. 79.

617. *Batson*, 476 U.S. at 100 & n.25.

618. *Id.* at 85.

619. *Id.* at 86–87 (citations omitted).

620. Foster v. Chapman, 136 S. Ct. 1737 (2016). Only Justice Clarence Thomas dissented. *See id.* at 1761–67 (Thomas, J., dissenting).

621. *Id.* at 1760 (Alito, J., concurring).

622. Buck v. Davis, 137 S. Ct. 759, 767 (2017).

> injures not just the defendant, but "the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts." *Rose*, 443 U.S. at 556.[623]

And only a month later, the Court ruled that even the hallowed inviolability of jury deliberations could be penetrated if racial discrimination was credibly alleged.[624] Yet again, the Court found allowing such bias to stand would "risk systemic injury to the administration of justice,"[625] and redressing it even after a verdict was "necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."[626] In short, discrimination not only does harm to its target, but also to the judicial system, and to the society at large that depends upon its scrupulousness—and is thus to be avoided at all costs.[627]

2. Equal Access to Justice as a Right Rather Than a Privilege

Discrimination on the basis of wealth is not the same as that on the basis of race;[628] jurisprudentially, race is a "suspect" classification entailing the strictest scrutiny,[629] and wealth is not.[630] Moreover, the *in forma pauperis* regime cannot and does not afford all litigants equal means to pursue and prove their claims; it serves the far more modest goal of affording everyone the opportunity to be heard.[631] Given already pervasive disparities between

623. *Buck*, 137 S. Ct. at 778 (parallel citations omitted).

624. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 866–69 (2017).

625. *Id.* at 868.

626. *Id.* at 869.

627. *E.g.*, *id.* at 871; *Buck*, 137 S. Ct. at 767.

628. *See Pena-Rodriguez*, 137 S. Ct. at 868 ("The same cannot be said about racial bias, a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice. This Court's decisions demonstrate that racial bias implicates unique historical, constitutional, and institutional concerns."); *see also* Feldman, *supra* note 29, at 436 ("Had the Court recognized indigency as a suspect classification, different treatment of in forma pauperis plaintiffs would probably violate equal protection, and the problem of how to define a fundamental right of access to the courts would be bypassed. But because indigency is not recognized as a suspect classification, the search for equality focuses on the identification of fundamental rights, whether under equal protection or substantive due process.").

629. Adarand Constructors, Inc. v. Pena, 515 US 200, 215–227 (1995) (discussing history of race as a "suspect" classification requiring strict scrutiny and overturning theory of intermediate scrutiny for "benign" discrimination); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.").

630. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 457–58 (1988); Harris v. McRae, 448 U.S. 297, 323 (1980); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); *accord* Feldman, *supra* note 29, at 435 (citing *Harris* and *San Antonio* in stating that "indigency is not a suspect classification").

631. *See supra* Section I-C.

the resources enjoyed by litigants, therefore, one might argue that closing the courthouse doors against those who putatively abuse the judicial system is small offense.[632] (Others might call it adding insult to injury.[633]) After all, those of meager means who have serially presented frivolous and thus unwinnable claims are vanishingly unlikely to prevail; regardless of any *Martin* directive, not only can they expect no hearing from the Court, they can also expect no redress on meritless petitions.[634]

Nevertheless, the wound to public confidence remains dire when discrimination of any sort is afoot.[635] This message of bias was the most recurrent theme of the dissent's objections, and the most puissant: Justice Brennan said so in *McDonald*,[636] and Justice Marshall said so in *Sindram*, *Demos*, and *Rule 39*.[637] Justice Stevens too wrote in *Rule 39* that "[t]ranscending the clerical interest that supports the Rule is the symbolic interest in preserving equal access to the Court for both the rich and the poor. I believe the Court makes a serious mistake when it discounts the importance of that interest."[638] In *Zatko*, he amplified this concern: "[T]he symbolic effect of the Court's effort to draw distinctions among the multitude of frivolous petitions . . . is powerfulFalse[T]he message that it actually conveys is that the Court does not have an overriding concern about equal access to justice for both the rich and the poor."[639] And in *Martin,* he concluded that whatever "theoretical administrative benefit the Court may derive from an order of this kind is far outweighed by the shadow it casts on

632. Michelman, *supra* note 22, at 1163–64; *cf. Rodriguez*, 411 U.S. at 19–25 (considering "whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence" and finding it is).

633. *See In re* Sindram, 498 U.S. 177, 181 (1991) (Marshall, J., dissenting); *cf.* cases cited *infra* note 661 (discussing liberal treatment of *pro se* litigants).

634. *See* Michelman, *supra* note 22, at 1163–64. This is essentially the *in propria persona* argument presented in Section V-E.

635. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (extending *Batson* to gender-motivated strikes); Smith Kline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 486 (9th Cir. 2014) (extending *Batson* to strikes based on sexual orientation). *But see* United States v. Blaylock, 421 F.3d 758 (8th Cir. 2005) (expressing doubt *Batson* would apply to strikes based on sexual orientation).

636. *In re* McDonald, 489 U.S. 180, 186, 188 (1989) (Brennan, J., dissenting).

637. *In re* Amendment to Rule 39, 500 U.S. 13, 15 (1991) (Marshall, J., dissenting); *In re* Demos, 500 U.S. 16, 19 (1991) (finding the Court's action could "only reinforce in the hearts and minds of our society's less fortunate members the unsettling message that their pleas are not welcome here"); *In re* Sindram, 498 U.S. 177, 182 (1991) (Marshall, J., dissenting) (finding the Court was "conveying an unseemly message of hostility to indigent litigants").

638. *In re Amend. to Rule 39*, 500 U.S. at 15 (Stevens, J., dissenting).

639. Zatko v. California, 502 U.S. 16, 19–20 (1991) (Stevens, J., dissenting).

the great tradition of open access that characterized the Court's history prior to its unprecedented decisions."[640]

So it is. To preemptively bar the courthouse doors prejudges pestersome petitioners' future claims based on their past and does so only when they lack the means to pay filing fees.[641] Such institutionalized prejudice does injury to a judicial system premised on the idea that all have the right to have their claims adjudicated exclusively on their own merits.[642] Courts surely have the inherent right to protect themselves and their process against abuse[643]—but the generally accepted recourse for courts against litigants who abuse their process include prescreening measures, sanctions, and contempt, not everlasting exile from judicial process.[644] In the end, a prolific petitioner's sin is only a flurry of frivolous filings.[645] Especially on account of so petty an offense, to banish anyone—rich or poor—from ever petitioning a court again seems contrary to basic American values.[646] Indeed, banishment has not been meted out as a penalty for even threats of violence to the judiciary.[647] Perhaps most ominously, paupers barred from the legal system will have no recourse for redress but extralegal "self-help."[648]

The Court has sought to justify this banishment because the payment of filing fees deters frivolous claims, and therefore those excused from that requirement warrant greater oversight.[649] Properly viewed, goes this reasoning, nobody has been banished: The privilege of feeless filing has simply been withdrawn because of serial abuse, and abusers remain free to

640. Martin v. D.C. Ct. App., 506 U.S. 1, 4 (1992) (Stevens, J., dissenting).

641. *See In re* Green, 669 F.2d 779, 785–86 (D.C. Cir. 1981); Feldman*, supra* note 29, at 437.

642. *See* Feldman*, supra* note 29, at 437.

643. *See* Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1071 (1985) ("This is not, of course, to suggest that courts should tolerate gross abuses of the judicial process."); *supra* notes 440-449 and accompanying text.

644. *See Talamini*, 470 U.S. at 1071; Procup v. Strickland, 792 F.2d 1069, 1072–73 (11th Cir. 1986) (*en banc*) (*per curiam*).

645. *See* Wasby 1995, *supra* note 12; Wasby 1990, *supra* note 12.

646. See *supra* Part I.

647. *See, e.g.*, Stewart v. Corbin, 850 F.2d 492 (9th Cir. 1988) (upholding the gagging of defendant after, *inter alia*, threatening the judge); *cf., e.g.*, Commonwealth v. McPherson, No. 1450-WDA-2013, 2014 WL 10790341, at *7–*8 (Penn. Super. Ct. Oct. 6, 2014) (reversing trial court that banned appellant from entering a town because of threats to town officials) ("THE COURT: . . . I don't know if it is legal to ban him from a community. Is it legal? [Appellant's counsel:] I don't think so, Your Honor. THE COURT: . . . I don't think it is. I don't think it is either, but I think I'm going to do it anyway. I think I'm going to make it illegal under the unique circumstances in this case . . . .").

648. *See Talamini*, 470 U.S. at 107071; Lane, *supra* note 11, at 335; Michelman, *supra* note 22, at 1194, 1198.

649. *See In re* Amendment to Rule 39, 500 U.S 13 (1991) (*per curiam*); *In re* Sindram, 498 U.S. 177, 180 (1991) (*per curiam*); *In re* McDonald, 489 U.S. 180, 184 (1989) (*per curiam*); *see also* Lane, *supra* note 11, at 359–60.

file whatever they wish as long as they are willing to pay for it.[650] But that very reasoning lays bare the flaw in the argument: To insist that those who cannot pay must pay is to forbid them, whatever the semantics.[651] *In forma pauperis* filings vindicate the foundational American project of allowing all to access the courthouse;[652] it is not a privilege that can (or rather should, as *Martin* illustrates) be blithely retracted, but the quintessential necessity of an equitable justice system.[653] The judicial system has a monopoly on state-sanctioned compulsory relief.[654] If the price of a system open to all is that a tiny minority will misuse that openness, then that is a price the system must pay unless it faces an insuperable and existential threat.[655] Pestersome paupers do not pose such a threat, singly or collectively.[656]

Moreover, and perhaps more damning, the Court's rule only poorly serves its avowed purpose of reducing the frivolous filings it must consider: a nominal filing fee is unlikely to deter the wealthy, and therefore imposing such a requirement serves only to categorically bar the destitute (however worthy their claim) rather than deter meritless petitions by anyone else.[657] The Court itself has said "again and again" that a large proportion of

650. Peck v. Hoff, 600 F.2d 371, 374 (8th Cir. 1981) (explaining that "the court's order does not bar Peck from bringing civil rights actions but rather limits his use of the cost free privileges of filing under 28 U.S.C. § 1915"); *see In re* Demos, 500 U.S. 16, 17 (1991) (*per curiam*) ("If petitioner wishes to have one or both of these petitions considered on its merits, he must pay the docketing fee required by Rule 38(a) . . ."); *see also* Lane, *supra* note 11, at 358.

651. M.L.B. v. S.L.J., 519 U.S. 102, 110–112 (1996); Boddie v. Connecticut, 401 U.S. 371, 374–377 (1971); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252, 257 (1959); Griffin v. Illinois, 351 U. S. 12, 16–20 (1956).

652. *Talamini*, 470 U.S. at 1070–71 ("Freedom of access to the courts is a cherished value in our democratic society. . . . This Court, above all, should uphold the principle of open access."); *see supra* Part I.

653. *See* Franklin, *supra* note 93; Lane, *supra* note 11; *e.g.*, McCarthy v. Madigan, 503 U.S. 140, 153 (1992) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)); *Talamani*, 470 U.S. at 1070–71; *Boddie*, 401 U.S. at 374–377; Chambers, v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 1488 (1907). To be clear, the Article does not argue that the Court's *Martin* directives are unconstitutional, but rather than the essential goal of establishing public confidence in the judicial system is crucially undermined by their existence and thus makes for bad policy. Nonetheless, the constitutionality of such bars against the indigent is not assured either—there are legitimate concerns about a system that prejudges the claims of the indigent as unworthy, but not those of the wealthy. *See* M.L.B. v. S.L.J., 519 U.S. at102, 110–112 (1996); *compare* Lane, *supra* note 11, at 335–58 (considering and rejecting a constitutional argument against *Martin* directives), *with* Franklin, *supra* note 93 (opining that the PLRA "three strikes" provision is unconstitutional).

654. *See* Michelman, *supra* note 22, at 1178–85, 1198; *see also Boddie*, 401 U.S. at 374–77 (1971).

655. *See, e.g.*, *In re* Sindram, 498 U.S. 177, 180–182 (1991) (Marshall, J., dissenting); *In re* McDonald, 489 U.S. 180, 186–188 (1989) (Brennan, J., dissenting).

656. *See supra* Sections V-C & V-D.

657. *See* Abdul-Akbar v. McKelvie, 239 F.3d 302, 331 (3d Cir. 2001) (Mansmann, J., dissenting); Franklin, *supra* note 93, at 202.

certiorari petitions (of every ilk) are "wholly frivolous and ought never to have been filed."[658] As Justice Marshall observed repeatedly, the Court's paying customers manage plenty of frivolous filings themselves, despite the fact that they can presumably afford counsel to advise against such waste.[659] Instead, counsel for the rich can often disguise meritless claims more effectively by artful pleading, thus increasing the challenge for the justices.[660] It is precisely because *pro se* litigants lack counsel that their filings are read more indulgently to winkle out a poorly pled but persuasive claim.[661] If the Court truly wishes to prune back frivolous filings whilst entertaining the worthy, it must cut with a sharper scalpel than simply silencing the impoverished[662]—for example, by denying them on their (lack of) merit as was its long tradition,[663] or limiting annual filings.[664]

Meanwhile, the proposition that public confidence in the justice system has been compromised by a perception that money can buy results is hardly speculative. Much scholarship has been expended in documenting disparate treatment of the rich and poor in American courts.[665] Polls regularly show that Americans believe that courts afford the wealthy a different brand of justice than the poor.[666] One metaanalysis summarized that "[o]ver twenty

658. Hart, *supra* note 470, at 88.

659. *In re* Amend. to Rule 39, 500 U.S. 13, 14 (1991) (Marshall, J., dissenting); *In re Sindram*, 498 U.S. at 181 (1991) (Marshall, J., dissenting).

660. *In re Sindram*, 498 U.S. at 181.

661. *See* Erickson v. Pardus, 551 U.S. 89 (2007) (*per curiam*) ("A document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'") (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)); *see also* Hart, *supra* note 470, at 90 (referring to "ferreting out the occasional points of merit" in *in forma pauperis* petitions).

662. *See In re Demos*, 500 U.S. at 17–18 (Marshall, J., dissenting); *In re Sindram*, 498 U.S. at 181 ("To single out Sindram in response to a problem that cuts across all classes of litigants strikes me as unfair, discriminatory, and petty.").

663. *See In re Amend. to Rule 39*, 500 U.S. at 15 (Stevens, J., dissenting); Wrenn v. Benson, 490 U.S. 89, 92 (1989) (Stevens, J., dissenting); *In re* McDonald, 489 U.S. 180, 186–87 (1989) (Brennan, J., dissenting).

664. *See, e.g.*, Rubins v. Roetker, 737 F. Supp. 1140, 1145 (D. Colo. 1990) (one per year), *aff'd*, 936 F.2d 583 (10th Cir. 1991); Cello-Whitney v. Hoover, 769 F. Supp. 1155, 1157 (W.D. Wash. 1991) (three per year); *In re* Tyler, 677 F. Supp. 1410, 1414 (D. Neb. 1987) (one per month).

665. *See generally, e.g.*, JEFFREY H. REIMAN & PAUL LEIGHTON, THE RICH GET RICHER AND THE POOR GET PRISON (10th ed. 2012); JEFFREY H. REIMAN, . . . AND THE POOR GET PRISON: ECONOMIC BIAS IN AMERICAN CRIMINAL JUSTICE (Allyn & Bacon 1996); John R. Lott, Jr., *Should the Wealthy Be Able to "Buy Justice"?*, 95 J. POL. ECON. 1307 (1987).

666. *E.g.*, Matt Murphy, *ACLU Poll: Mass. criminal justice system 'biased'*, NEWBURYPORT NEWS, July 13, 2017 ("It clearly shows that Massachusetts voters feel the criminal justice system is broken and biased. For far too long, the system has given preference to the connected and wealthy"); Rodney Ellis, *Texas still has a way to go for fair justice*, SAN ANTONIO EXPRESS-NEWS, Nov. 1, 2013; David B. Rottman & Alan Tomkin, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, COURT REV., Fall 1999, at 24; David B. Rottman, *On*

years of surveys, the same negative and positive images of the judiciary recurred with varying degrees of forcefulness across all of the national and state surveys," and noted the ubiquitous "concern that the courts are biased in favor of the wealthy and corporations. Indeed, the perception of economic-based unfairness in civil cases seemed to rival the perception of judicial leniency in criminal cases as a source of public dissatisfaction."[667] And the issue transcends politics: A bipartisan editorial in July 2017 by Senators Kamala Harris and Rand Paul decried the dysfunctional and discriminatory effects of the prevailing approach to bail on those of little means, concluding that reform "would help restore Americans' faith in our justice system."[668]

To be heard by the Supreme Court is an honor afforded only to a few—and ever fewer over time—but it must be a honor granted on the merits of petitioners' claims, not on the balance in petitioners' bank accounts.[669] The Court has been admirably dogged in rooting out any hint of other sorts of bias throughout the judicial system—and long may that remain.[670] But that doggedness only underscores the anomaly of its willingness to treat the destitute differently when they seek redress.[671] All must have a right of access to the courts; that access is not a privilege but the foundation of civil society, and thus denying access on the basis of wealth is wrong, whatever a petitioner's past sins.[672] The Supreme Court is the forum to which eyes turn as a bellwether of equity, probity, and impartiality,[673] and thus it is the Court

Public Trust and Confidence: Does Experience with the Courts Promote or Diminish It?, COURT REV., Winter 1998, at 14.

667. Rottman & Tomkin*, supra* note 666, at 25.

668. Kamala D. Harris & Rand Paul, Op-Ed., *To Shrink Our Jails, Let's Reform Bail*, N.Y. TIMES, July 21, 2017, at A27.

669. *See* M.L.B. v. S.L.J., 519 U.S. 102, 110–112 (1996); Griffin v. Illinois, 351 U. S. 12, 16–20 (1956); Abdul-Akbar v. McKelvie, 239 F.3d 302, 331 (3d Cir. 2001) (Mansmann, J., dissenting); *cf.* Brown v. Allen, 344 U.S. 443, 491–97 (1953) (Frankfurter, J., dissenting) (explaining the Court's process for granting certiorari and its meaning); O'Brien, *supra* note 522 (same).

670. *See supra* Section V-F-1.

671. *See McDonald*, 489 U.S. 180, 186–88 (1989) (Brennan, J., dissenting).

672. *See* Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070–71 (1985); Franklin, *supra* note 93; Lane, *supra* note 11, *see generally supra* Part I.

673. *See* Planned Parenthood v. Casey, 505 U.S. 833, 865–66 (1992) ("The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."); Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (quoted by Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 889 (2009)); *see also* United States v. Alvarez-Machain, 504 U.S. 655, 687 (1992) (Stevens, J. dissenting) ("The way that we perform that duty in a case of this kind sets an example that other tribunals in other countries are sure to emulate.").

and nation even more than the individual petitioner that lose most when the highest court institutionalizes divisions between Americans based on their means,[674] abjuring the judicial oath unchanged since before *Marbury v. Madison* to "do equal right to the poor and to the rich . . . ."[675]

Conclusion

All in all, the Supreme Court has seemingly been dismayingly high-handed in rebuking its most troublesome supplicants. To be pretermitted with no more process than a rubber stamp of an order based on past sins is an unkind cut to those least able to bear it.[676] But perhaps some context is in order: the Bible provides the response of an even more Supreme Authority to pestersome petitions of questionable quality:

> Then the LORD answered Job out of the whirlwind, and said, Who is this that darkeneth counsel by words without knowledge? Gird up now thy loins like a man; for I will demand of thee, and answer thou me. Where wast thou when I laid the foundations of the earth? declare, if thou hast understanding. Who hath laid the measures thereof, if thou knowest? or who hath stretched the line upon it? Whereupon are the foundations thereof fastened? or who laid the corner stone thereof; When the morning stars sang together, and all the sons of God shouted for joy? Or who shut up the sea with doors, when it brake forth, as if it had issued out of the womb? When I made the cloud the garment thereof, and thick darkness a swaddlingband for it, And brake up for it my decreed place, and set bars and doors, And said, Hitherto shalt thou come, but no further: and here shall thy proud waves be stayed?[677]

So too the experience of the average petitioner to the Supreme Court, who will be afforded no further adjudication than a reasonless denial of certiorari: there shall their proud claims be stayed.[678] Fair enough, so long

674. *See* cases cited *supra* notes 636-640.

675. *Compare* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 179 (1803), *with In re* Amend.to Rule 39, 500 U.S. 13, 15, n.* (1991) (Marshall, J., dissenting); *see also* Doyle, *supra* note 68, at 407 (sitting judge quoting the oath and then stating: "Upon a showing of financial inability to prepay these fees and costs, prepayment may be dispensed with, and any indigent non-prisoner can sue anyone else (28 U.S.C. §1915(a).) Within the time fixed by the rules, the defendant is obliged to respond. There is a lawsuit. So must it be with prisoners. No less.").

676. Though perhaps not "the most unkindest cut of all." WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR, act 3, sc. ii.

677. Job 38:1–11 (King James).

678. *See* Brown v. Allen, 344 U.S. 443, 491–97 (1953) (Frankfurter, J., dissenting) (discussing Court's approach to certiorari); *e.g.*, Kapral v. United States, 166 F.3d 565, 568 (3d Cir. 1999)

as all petitioners' cases are treated equally.[679] But why should the disfavored poor be categorically afforded a lesser opportunity—even a marginally lesser one—than the wealthy for lack of a filing fee?[680]

True, the Supreme Court has infinitely fewer resources to decide appeals than the Supreme Judge of the world appealed to in the Declaration of Independence.[681] The Court is not misguided in attempting to ensure that the greater body politic enjoys the most effective exercise of its judicial oversight.[682] But the Court's increasing issuances of *Martin* directives are disproportionate, seeking to swat mosquitos with cannonades.[683] The dissents in the cases leading through *Martin* make the convincing argument that such extreme measures are more convenient than compulsory to the Court's good function, and that convenience should not shut the courthouse doors against the poor.[684] The evidence that the average petition—especially the average frivolous *pro se* petition—occupies only a few minutes of institutional effort means that whatever extra time is occasioned by the Court's most pestersome, that time remains *de minimis* in the ocean of its overall workload.[685]

Notwithstanding the gravamen of the previous discussion, the Court's present approach does injure the petitioner directly, not just society: it is possible that some of those pestersome paupers might be the victims of some grave miscarriage of justice crying out for relief, only to be mechanically barred from even filing for certiorari because of their penury and past peccadillos.[686] And that risk increases with every interdiction.[687] In the end,

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(adverting to a mere 0.45% chance of review being granted in assessing whether courts of appeals decisions are effectively final).

679. *See* Lane, *supra* note 11, at 361–66

680. *See id.*; Feldman, *supra* note 29, at 437.

681. We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these united Colonies are, and of Right ought to be Free and Independent States . . . .

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682. *See, e.g.*, *In re* Sindram, 498 U.S. 177, 183–84 (1991) (*per curiam*); *In re* McDonald, 489 U.S. 180, 184 (1989) (*per curiam*); *see also* Lane, *supra* note 11, at 365.

683. *See* Lane, supra note 11, at 361–63.

684. *See supra* Part III.

685. *See In re* Amend. to Rule 39, 500 U.S. 13, 15 (1991) (Stevens, J., dissenting); *In re McDonald*, 489 U.S. at 188 (Brennan, J., dissenting); Hart, *supra* note 470, at 88–91; *see also* Lane, *supra* note 11, at 361–63.

686. *See In re* Demos, 500 U.S. 16, 18–19 (1991) (Douglas, J., dissenting); *In re Sindram*, 498 U.S. at 182 (Marshall, J., dissenting); *In re McDonald*, 489 U.S. at 187–88.

687. *In re Sindram*, 498 U.S. at 182 (an "unacceptable risk"); *In re McDonald*, 489 U.S. at 187–88 ("I am most concerned, however, that, if, as I fear, we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim.").

after all, we learn that the beleaguered Job did get the relief he was looking for (and much more):

> [T]he LORD gave Job twice as much as he had before. Then came there unto him all his brethren, and all his sisters, and all they that had been of his acquaintance before, and did eat bread with him in his house: and they bemoaned him, and comforted him over all the evil that the LORD had brought upon him: every man also gave him a piece of money, and every one an earring of gold. So the LORD blessed the latter end of Job more than his beginning: for he had fourteen thousand sheep, and six thousand camels, and a thousand yoke of oxen, and a thousand she asses. He had also seven sons and three daughters. And he called the name of the first, Jemima; and the name of the second, Kezia; and the name of the third, Kerenhappuch. And in all the land were no women found so fair as the daughters of Job: and their father gave them inheritance among their brethren. After this lived Job an hundred and forty years, and saw his sons, and his sons' sons, even four generations. So Job died, being old and full of days.[688]

Paupers petitioning the Supreme Court should be so fortunate![689] Indeed, much fortune is required for those *not* interdicted to obtain a hearing, let alone such bounteous relief.[690] And those on the proscribed list lack even that faint hope at winning the judicial lottery of a hearing at the highest court.[691]

Yet ultimately, the greatest injury is to a society expecting the judiciary to be a model of evenhanded fairness.[692] What the Supreme Court loses in institutional gravitas and public confidence surely outweighs the mild cost occasioned by the briefest review of serially frivolous claims.[693] Setting aside whether *Martin* directives are constitutional or not, they make for powerfully poor public policy.[694] The Court would be better served in weaning itself off of such practices and returning to its prior practice of permitting even the most pestersome paupers a few minutes of its clerks'

688. Job 42:10–17 (King James).

689. *Compare* Douglas, *supra* note 523, at 406–08 (discussing the Supreme Court's treatment of *in forma pauperis* petitions from a uniquely personal perspective), *with In re Demos*, 500 U.S. at 18–19 (Douglas, J., dissenting), *and In re Sindram*, 498 U.S. at 182 (Douglas, J., dissenting).

690. *See* Kapral v. United States, 166 F.3d 565, 568 (3d Cir. 1999).

691. *In re Demos*, 500 U.S. at 18–19; *In re Sindram*, 498 U.S. at 182.

692. *See supra* Section V-F-2.

693. *Id.*

694. *Id.*

time.[695] As Justice Stevens mused hopefully in his last substantive comment on the subject: "Perhaps one day reflection will persuade my colleagues to return to 'the great tradition of open access that characterized the Court's history prior to its unprecedented decisions in *In re McDonald* and *In re Sindram*.'"[696] If not, Lane's recommendation, now fifteen years old, that Congress supersede the Court's practice of proscription by statute may be the only remedy.[697]

695. *See supra* Section V-F-2; *see* Lane, *supra* note 11, at 361–65.

696. Attwood v. Singletary, 516 U.S. 297, 298 (1996) (Stevens, J., dissenting) (citations omitted) (quoting Martin v. D.C. Ct. App., 506 U.S. 1, 4 (1992) (Stevens, J., dissenting)).

697. *See* Lane, *supra* note 11, at 335.

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