THE CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS FOR PRISONERS

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While the Supreme Court has established the fundamental right of access to the courts, obligating state prisons to provide legal assistance to prisoners in pro se civil rights suits, it has left ambiguity regarding the extent of assistance required beyond the pleading stage, resulting in a circuit split. While the Seventh and Third Circuits advocate for continuous affirmative assistance, the Ninth Circuit limits it to the pleading stage. This Note argues that state prisons should be mandated to offer assistance throughout all litigation stages. It explains the constitutional basis for the right of access to the courts, which is rooted in the Due Process and Petition Clauses. It contends that such assistance ensures meaningful access to justice and aligns with constitutional rights. Moreover, this approach is pragmatic, increasing legal access for prisoners without imposing substantial financial burdens on state prisons.

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I. INTRODUCTION

Imagine that a prisoner dares to challenge the system that confines him. In a bold move, he files a pro se civil rights suit against his prison. Does the prison, the very institution responsible for his confinement, hold an obligation to extend to him a lifeline in the form of legal aid? Yes—the Supreme Court in *Bounds v. Smith* held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[1]

There is one issue, however, that the Supreme Court did not make clear: whether this right of access to the courts requires prisons to assist prisoners throughout all stages of litigation—indeed, there is a circuit split on this issue.[2] The Seventh Circuit and Third Circuit have held that an inmate has a right to affirmative assistance beyond the pleading stage.[3] The Ninth Circuit has held

1. 430 U.S. 817, 828 (1977).
2. Rivera v. Monko, 37 F.4th 909, 921 (3d Cir. 2022) (discussing the circuit split).
3. *Id.* at 913; Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006).

that the right to affirmative assistance is only available during the pleading stage and that during trial, the inmate's right is limited to litigate claims without active interference by prison officials.[4] This Note will argue that state prisons and prison officials should be required to provide affirmative assistance to prisoners in pro se civil rights suits during all stages of litigation.

Part II will provide a background on the right of access to the courts, summarizing the key Supreme Court precedents that have defined this right.[5] It will also explain why circuits have reached different conclusions on the scope of this right and provide background on constitutional provisions from which this right may originate.[6]

Part III will focus on identifying which specific provisions of the Constitution create this right of access to the courts in the first place.[7] It will conclude that the Due Process Clause and Petition Clause work together to create this right, and it will explain why other constitutional provisions are not the source.[8] Part III will also identify why there is a circuit split; i.e., that the Supreme Court has been silent on the issue of whether the right of access continues throughout all stages of litigation.[9]

Part IV will recommend that the circuit split should be resolved in favor of obligating state prisons to provide legal assistance throughout all stages of litigation.[10] First, this is the only way to ensure "meaningful access" to courts as required by the Supreme Court.[11] Second, since the Due Process Clause and Petition Clause rights continue after the initial complaint, the obligations placed upon state prisons should continue through all stages of a civil rights suit.[12] Lastly, public policy favors this solution because it increases legal access for prisoners without incurring significant additional costs to state prisons.[13]

II. BACKGROUND

The constitutional right of access to the courts is a right that developed from a few landmark Supreme Court cases.[14] The early Supreme Court cases that developed this right are *Ex parte Hull*, 312 U.S. 546 (1941), *Johnson v. Avery*, 393 U.S. 483 (1969), and *Younger v. Gilmore*, 404 U.S. 15 (1971).[15] Later, *Bounds*

4. Silva v. Di Vittorio, 658 F.3d 1090, 1103 (9th Cir. 2011).
5. *See infra* Subsections II.A.1–3.
6. *See infra* Subsection II.A.3; Section II.B.
7. *See infra* Section III.A.
8. *See infra* Sections III.C–D.
9. *See* Rivera v. Monko, 37 F.4th 909, 919 (3d Cir. 2022) (arguing that Supreme Court precedents have not made it clear whether prisons owe a duty to provide legal assistance to prisoners at the trial stage of litigation); *infra* Section III.D.
10. *See infra* Part IV.
11. *See infra* Section IV.A.
12. *See infra* Section IV.B.
13. *See infra* Section IV.C.
14. *See infra* Subsection II.A.1–2.
15. *See also* Douglas v. California, 372 U.S. 353, 354 (1963); Burns v. Ohio, 360 U.S. 252, 253 (1959); Griffin v. Illinois, 351 U.S. 12, 13 (1956); Wolff v. McDonnell, 418 U.S. 539, 542–43 (1974). These are all

largely clarified the rulings in these early cases by explicitly holding that states have an affirmative duty to provide legal assistance to prisoners.[16] The last case, *Lewis v. Casey*, partly abrogated *Bounds.*[17]

A. The Supreme Court Precedents That Created the Right

To understand the scope and limitations of the right of access to the courts, an overview of the case law that created the right is useful.

1. Early Cases

One of the early cases on the right of access to the courts was *Ex parte Hull*.[18] In *Ex parte Hull*, a prisoner sued his prison after the prison guard, pursuant to prison policy, confiscated papers that the prisoner wanted to file with the court.[19] The Court struck down this policy, holding that states cannot "abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus."[20] The Supreme Court in *Avery* adhered to this non-interference principle when it prohibited a state prison from banning prisoners from helping each other draft legal paperwork.[21] It reasoned that such a ban, without providing alternative assistance, effectively forbids illiterate or poorly educated prisoners from filing habeas corpus petitions.[22] The Court also noted the initial burden of presenting a claim for post-conviction relief usually rests upon the indigent himself with few tools at his disposal.[23] It concluded that a prisoner is effectively denied access to the courts unless some type of legal assistance is available.[24]

The court in *Lynch*, which was affirmed by the Supreme Court, had a similar holding.[25] In *Lynch*, prisoners sued the state prison on the grounds that the prison did not have adequate legal material in the state prison libraries.[26] The Court held that since the prisoner's burden of proof for an evidentiary hearing for a habeas corpus is heavy and difficult to prove, the state must provide

access-to-the-courts line of cases decided before *Bounds*. But, these cases mainly apply earlier case law like *Ex parte Hull*, *Johnson v. Avery*, and *Gilmore v. Lynch* but do not add much precedent that is relevant to the circuit split in this Note.

16. Bounds v. Smith, 430 U.S. 817, 824 (1977); *see also* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 572–76 (1999).

17. Lewis v. Casey, 518 U.S. 343, 354 (1996).

18. 312 U.S. 546, 550 (1941); *see also* Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1192 (2013).

19. 312 U.S. 546, 548 (1941).

20. *Id.* at 549.

21. Johnson v. Avery, 393 U.S. 483, 487 (1969).

22. *Id.* at 488.

23. *Id.*

24. *Id.*

25. Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15, 15 (1971). The Supreme Court in *Younger v. Gilmore* affirmed the holding in *Gilmore v. Lynch* with a mere three-sentence holding. *Younger*, 404 U.S. at 15. Thus, in order to understand the precedent that *Younger* created, only the district court decision in *Lynch* needs to be analyzed.

26. *Lynch*, 319 F. Supp. at 107.

resources to help the prisoner achieve that burden.[27] Thus, the Court concluded that unless the prison provided alternatives, the lack of books in the library infringed upon a prisoner's right of access to the courts.[28] The *Lynch* decision was significant because, unlike *Avery* and *Ex parte Hull*, *Lynch* required prisons to do more than just not interfere with prisoners' court access: it obligated the prison to spend money on improving its law library or obtain other forms of legal assistance to prisoners.[29]

2. Modern Cases

The Supreme Court in *Bounds* was more explicit in creating an affirmative duty imposed on the states to provide legal assistance when it noted that "our decisions have consistently required States to shoulder *affirmative obligations* to assure all prisoners meaningful access to the courts."[30] The Court went on to hold that prisoners have a constitutional right of access to the courts, which requires access to law libraries or assistance from people trained in the law that is adequate to assist in the "preparation and filing of meaningful legal papers."[31] Specifically, *Bounds* mandated a North Carolina prison facility to either update their law libraries or provide other legal assistance to the prisoners.[32]

The Supreme Court in *Lewis v. Casey* later limited the rights established in *Bounds*.[33] In *Casey*, a group of prisoners brought a class action lawsuit against their state prison alleging that the shortcomings of the prison's system violated "their rights of access to the courts and counsel protected by the First, Sixth, and Fourteenth Amendments."[34] *Casey* partly abrogated the rights of access to the courts by requiring an "actual injury," and narrowed it to only certain claims, such as civil rights suits challenging the conditions of confinement.[35] The "actual injury" requirement meant that *Bounds* did not create a freestanding right to a law library or legal assistance.[36] Instead, a prisoner must prove that lack of access to such legal assistance caused the prisoner to "hinder[] . . . his efforts to pursue a nonfrivolous legal claim."[37] The Court reasoned that this requirement comes from the constitutional requirement of standing.[38]

27. *Id.* at 110.

28. *See id.*

29. *See id.* (citation omitted) ("Johnson v. Avery makes it clear that some provision must be made to ensure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the courts.").

30. 430 U.S. 817, 824 (1977) (emphasis added).

31. *Id.* at 828.

32. *Id.* at 830–31.

33. Lewis v. Casey, 518 U.S. 343, 354 (1996).

34. *Id.* at 346 (internal quotations omitted).

35. *Id.* at 343. The court also held that inmates can bring access to the courts claims for direct appeals from their conviction and habeas petitions. *Id.* at 354.

36. *Id.* at 343.

37. *Id.*

38. *Id.*

Furthermore, *Casey*'s reading of *Bounds* is that there is no duty for state prisons to allow prisoners to "litigate effectively" once in court or to discover grievances.[39] The Court reasoned that if states were required to assist prisoners—who are "mostly uneducated and indeed largely illiterate"—in litigating effectively and discovering grievances, it would be akin to requiring "permanent provision of counsel," which the Constitution does not require.[40]

Casey also rejected the prisoners' claims by relying on Supreme Court precedent *Turner v. Safley*.[41] In *Turner,* the Court held that a prison regulation is valid even if it infringes on a prisoner's constitutional rights if the prison regulation "is reasonably related to legitimate penological interests."[42] *Casey* held that the lower court should have deferred to the judgment of the prison authorities since there was a legitimate government purpose for the prison's regulation that limited the prisoners' access to legal material.[43]

Justice Stevens, in his dissent, however, notes that some of the majority's discussion is pure dicta.[44] First, he claims that the majority's discussions on limiting the scope of this right to only certain claims—such as attacks on conditions of confinement—are dicta.[45] Specifically, he argues that since the plaintiffs have not met the new requirement of standing, it was unnecessary for the Court to discuss this scope of the right of access to the courts.[46]

Second, Justice Stevens argues that the majority's conclusion that the right of access to the courts does not extend to the right to litigate effectively and discover grievances is dicta.[47] He reasoned that this discussion was mostly unnecessary because the majority emphasized the deference that must be given to state prisons under *Turner*.[48] Nonetheless, many lower courts have treated *Casey*'s limitation on the right of access to the courts as binding precedent.[49]

Another limit on the right of access to the courts comes from statute instead of the courts. Specifically, the Prison Litigation Reform Act ("PLRA") has a three-strike provision that limits the number of times that a prisoner can file a pro se suit.[50] Under this three-strike provision, a pro se litigant is not entitled to a fee waiver if three or more of their previous suits failed to state a claim or were frivolous.[51]

39. *Id.* (emphasis omitted).
40. *Id.* at 354.
41. *Id.* at 360.
42. Turner v. Safley, 482 U.S. 78, 89 (1987).
43. *Casey*, 518 U.S. at 360.
44. *Id.* at 343, 409 n.6 (Stevens, J., dissenting).
45. *Id.* at 409 (Stevens, J., dissenting).
46. *Id.* at 409 n.6 (Stevens, J., dissenting).
47. *Id.* (Stevens, J., dissenting).
48. *See id.*
49. *See, e.g.*, Rivera v. Monko, 37 F.4th 909, 920–21 (3d Cir. 2022).
50. *See* 28 U.S.C. § 1915(g).
51. *Id.*

3. The Constitutional Origins of the Right of Access to the Courts

Despite the fact that *Bounds* confirmed a "constitutional" right of access to the courts, it did not explain where exactly in the Constitution this right comes from.[52] Furthermore, even *Casey*, which mostly upheld *Bounds*, did not clarify which provisions of the Constitution created this right.[53] In fact, the absence of such an explanation has prompted some Justices to argue that this right is *not* guaranteed by the Constitution at all.[54] For example, Justice Rehnquist in *Bounds* opined that "the 'fundamental constitutional right of access to the courts' which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived."[55] Justice Thomas, in his concurrence in *Casey*, stated that when addressing the issue of whether a state "exceeds the constitutional requirements set forth in *Bounds*,'. . . we do so without knowing which Amendment to the Constitution governs our inquiry."[56] Although there have been different views in the Supreme Court about where this right comes from, there has never been a clear consensus.[57] The circuit courts that have addressed this issue do not discuss the origins of the right either.[58] Thus, it is important to determine where this right stems from in order to resolve the circuit split.

There are many theories about where this right of access to the courts originates.[59] For example, some courts have attributed the right of access to the courts to the Equal Protection Clause or Due Process Clause.[60] Other courts have related the right to the Petition Clause, the Privileges and Immunity provision, the Fundamental Rights Doctrine, and the Sixth Amendment right to self-representation.[61] A brief overview of the different potential constitutional sources of the right of access to the courts is useful.[62]

52. Bounds v. Smith, 430 U.S. 817, 840 (1977) (Rehnquist, J., dissenting).
53. 518 U.S. 343, 366 (1996) (Thomas, J., concurring).
54. *Bounds*, 430 U.S. at 840 (Rehnquist, J., dissenting).
55. *Id.* (Rehnquist, J., dissenting).
56. *Casey*, 518 U.S. at 367 (Thomas, J., concurring) (citation omitted).
57. *See id.* at 366–67 (Thomas, J., concurring).
58. *See infra* Section II.B.
59. *See infra* notes 60–62 and accompanying text.
60. *See* Abel, *supra* note 18 at 1207–08 n.267 (discussing the lack of consensus on the origin of this right).
61. *Id.*
62. Understanding the different sources is important because the remedies and standard of review that is required for each constitutional right can differ and thus the source of the right of access to the courts can determine whether it should extend after the initial complaint. *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 530 (1945) (explaining that the due process rights and first amendment rights have different remedies and standards of review); *see also* Andrews, *supra* note 16, at 633, 647 (arguing that due process requires courts to respond to motions to the court but that the petition clause does not).

a. Petition Clause

The Petition Clause is from the First Amendment of the Constitution which guarantees "the right of the people . . . to petition the Government for a redress of grievances."[63] One Supreme Court decision has interpreted this clause to mean that "the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes."[64]

b. Due Process

The Due Process Clause of the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty or property, without due process of law."[65] The Fourteenth Amendment applies to the states, while the Fifth Amendment applies due process to the federal government.[66] The purpose of the Due Process Clause is to prevent the government "from abusing [its] power, or employing it as an instrument of oppression" by depriving citizens of "life, liberty, or property, without due process of the law."[67] But the Supreme Court has explained that "[t]he Clause is phrased as a limitation on the State's power to act . . . but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."[68]

c. Equal Protection

The Equal Protection Clause also stems from the Fourteenth Amendment and provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws."[69] The Equal Protection Clause applies to any law or regulation that treats one protected class of people differently based on race.[70] It also applies if a law is neutral on its face but is "unexplainable on grounds other than race."[71] In other words, racist intent is required to violate the Equal Protection Clause: discriminatory impact is not enough.[72] While the Equal Protection Clause typically applies to suspect classes like race, current case law is not clear on how it applies to indigent people.[73]

63. U.S. CONST. amend. I.

64. Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 387 (2011).

65. U.S. CONST. amend. XIV, § 1.

66. *Id.*; *id.* amend. V.

67. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989) (quoting Davidson v. Cannon, 474 U.S. 344, 348 (1986)); U.S. CONST. amend. XIV, § 1.

68. *DeShaney*, 489 U.S. at 195.

69. U.S. CONST. amend. XIV, § 1.

70. Miller v. Johnson, 515 U.S. 900, 905 (1995).

71. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

72. *See id.*

73. Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 420 (2010).

d. Habeas Corpus

The Constitution does not explicitly create the right of habeas corpus, but it does provide that the "Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it."[74] But, federal and state courts have authority to hear requests of habeas corpus relief because such authority is granted by federal statute.[75] The right of habeas corpus gives prisoners the right to have a federal court determine whether their confinement is legally valid.[76] A request for habeas corpus relief proceeds similarly to a civil action against a state,[77] and the right is usually used by a prisoner as a post-conviction challenge against the application of federal law in a criminal trial that resulted in their confinement.[78]

B. The Circuit Split

It is settled that an inmate must have access to the courts to file an initial complaint,[79] but there is a circuit split on the scope of the right to access legal resources to prepare for trial after they file their initial complaint.[80] The disagreement stems mainly from how the circuits have interpreted the Supreme Court decisions in *Bounds* and *Casey*.[81]

1. Broad Interpretation

The Seventh Circuit and Third Circuit have held that an inmate has a right to affirmative assistance beyond the pleading stage.[82] In *Casey*, the Supreme Court held that an inmate can bring an access-to-courts claim when they show that a complaint was "dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known."[83] The Seventh Circuit interpreted this to mean that as long as an inmate's denial of access to legal material caused an actual injury, they can bring an access-to-courts claim, regardless of when that access was denied.[84] The Third Circuit reasoned that "[o]nce in court, a prisoner's need to access legal materials is just as great—if not greater—than when a prisoner initially filed a complaint."[85]

74. U.S. CONST. art. I, § 9, cl. 2.
75. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 305 (2001); *see also, e.g.*, 28 U.S.C. § 2241.
76. *See, e.g.*, Peyton v. Rowe, 391 U.S. 54, 60 (1968).
77. *See, e.g.*, Harris v. Nelson, 394 U.S. 286, 293–94 (1969).
78. *See, e.g.*, *Peyton*, 391 U.S. at 60.
79. *See* Bounds v. Smith, 430 U.S. 817, 824 (1977).
80. Rivera v. Monko, 37 F.4th 909, 921–22 (3d Cir. 2022) (discussing the circuit split).
81. *See id.* at 921–23 (discussing the reasoning of the circuit courts).
82. *Id.* at 913; Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006) (citing Lewis v. Casey, 518 U.S. 343, 351 (1996)).
83. *Marshall*, 445 F.3d at 969 (citing *Casey*, 518 U.S. at 351).
84. *Id.*
85. *Rivera*, 37 F.4th at 922–23.

2. Narrow Interpretation

The Ninth Circuit has held that the right to affirmative assistance is only available during the pleading stage, and that during trial, the inmate's right is limited to litigate claims without active interference by prison officials.[86] The Ninth Circuit reached this decision after interpreting its own precedent and the Supreme Court's decision in *Lewis*, focusing on the distinction between affirmative assistance and freedom from active interference.[87] Specifically, the court held that states have an affirmative duty to assist prisoners in filing meaningful paperwork only during the initial pleading stage.[88] But the duty of a state and state officials to not interfere with the access to the courts continues throughout all stages of litigation.[89]

III. ANALYSIS

Perhaps the most controversial aspect of the constitutional right to access the courts is that the Supreme Court has never singled out which specific provision of the Constitution the right stems from.[90] Indeed, some Supreme Court Justices, in their dissents, have argued that there is no constitutional basis for this right to exist.[91] Although there is no consensus on the source, different courts have suggested various constitutional provisions.[92] This Part will conclude that the right of access to the courts stems from the Petition Clause and Due Process Clause. It is important to understand the wrinkle that has created the circuit split; the Supreme Court has been silent on whether the right of access continues throughout all stages of litigation.[93] Lastly, this Part will point out that, in practice, the right of access to the courts concerns access to a law library as opposed to alternative methods of legal assistance.[94]

86. Silva v. Di Vittorio, 658 F.3d 1090, 1103 (9th Cir. 2011).

87. *See id.*

88. *See id.* at 1102.

89. *Id.* at 1103.

90. Abel, *supra* note 18, at 1107–08.

91. Bounds v. Smith, 430 U.S. 817, 840 (1977) (Rehnquist, J., dissenting) ("[T]he 'fundamental constitutional right of access to the courts' which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived.").

92. Knop v. Johnson, 977 F.2d 996, 1002–03 (6th Cir. 1992) (citations omitted):

> The Court's opinion in *Bounds* is silent as to the source of this right, but on other occasions the Supreme Court has said variously that it is founded in the Due Process Clause of the Fourteenth Amendment, or the Equal Protection Clause, or the First Amendment right to petition for a redress of grievances. Lower courts have also implicated the Privileges and Immunities Clause of Article IV.

93. *See* Rivera v. Monko, 37 F.4th 909, 919–22 (3d Cir. 2022) (arguing that Supreme Court precedents have not made it clear whether prisons owe a duty to provide legal assistance to prisoners at the trial stage of litigation).

94. *See infra* Section III.E.

A. The Petition Clause as the Source

This Section will argue that since the Petition Clause includes the right to use litigation for individual grievances and because any court motion can be a petition, the right of access to the courts comes from the Petition Clause.

1. The Petition Clause Covers Private Disputes and Grievances

The right of access to the courts stems from the Petition Clause of the First Amendment.[95] The Petition Clause of the Constitution provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."[96] Courts have held that the Petition Clause clearly includes situations where a citizen is addressing the government for a personal grievance.[97] This contention is also supported by the history of the use of the petition.[98] When the Petition Clause references "the right of the people," it likely intended to codify an existing individual right, so it is appropriate to look at history to determine its scope.[99] In Colonial America, citizens petitioned the legislature for a variety of personal matters, such as requests for modifying a criminal sentence.[100] Thus, the text and history of the Petition Clause show that it covers personal matters.

2. A "Petition" Can Include Litigation

The Supreme Court in *Borough of Duryea, Pa. v. Guarnieri* suggested that a lawsuit can be considered a petition to the court under the Petition Clause when it stated that "[p]*etitions to the courts* and similar bodies can likewise address matters of great public import . . . . Individuals may also 'engag[e] in litigation as a vehicle for effective political expression and association.'"[101] A prisoner who is attempting to file a civil rights lawsuit against a state prison is effectively petitioning the court to address a grievance: the grievance being their allegedly unlawful confinement.[102] Thus, a prisoner's right to file a lawsuit against a state prison is protected under the Petition Clause.[103]

But it is important to note that the parties in *Guarnieri* litigated their dispute on the mere premise that the Petition Clause applies to lawsuits.[104] Indeed, Justice Thomas, in his dissent in Guarnieri, claims that the Court did not need to

95. Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 387 (2011).

96. U.S. CONST. amend. I.

97. *Guarnieri*, 564 U.S. at 394.

98. *See id.*

99. *See id.* at 403 (Scalia, J., dissenting).

100. *See id.* at 394.

101. *Id.* at 397 (second alteration in original) (emphasis added) (quoting NAACP v. Button, 371 U.S. 415, 431 (1963)).

102. *See, e.g.*, Rivera v. Monko, 37 F.4th 909, 916 (3d Cir. 2022) (prisoner brought an access to the courts claim alleging that the lack of legal resources impeded his "nonfrivolous legal claim challenging his conditions of confinement").

103. *See* Andrews, *supra* note 16, at 593.

104. *Guarnieri*, 564 U.S. at 387.

decide whether lawsuits are petitions.[105] Similarly, Justice Scalia, in his dissent in Guarnieri, claims that neither the Court nor any other Supreme Court decisions explicitly held that lawsuits are petitions under the Petition Clause, noting the Court's observance that even if the premise that lawsuits are petitions is wrong, the plaintiff's claim would have still failed.[106] Justice Scalia also makes the historical observation that laws regarding petitions in Colonial America concerned petitions directed to the executive and legislative branches instead of the judicial branch.[107] He also argues that since the Supreme Court had never even suggested a First Amendment right to litigate until there had already been 200 years' worth of lawsuits, there is a presumption that a right to petition does not include the right to file lawsuits.[108]

Although Justice Scalia and other Supreme Court Justices make compelling arguments,[109] a closer look suggests that the Petition Clause should include a right to file lawsuits. First, a Supreme Court precedent has used *Avery* and *Ex parte Hull* to support the claim that the right to petition includes the right of access to the courts.[110] For example, the Court in *California Motor Transport v. Trucking Unlimited* noted that "[t]he right of access to the courts is indeed but one aspect of the right of petition."[111] Second, there is a very plausible reason why laws regarding petitions in Colonial America only concerned petitions to the executive and the legislative branch: it was not necessary to make laws that authorize petitions to the courts.[112] In Colonial America, the state legislature typically addressed personal grievances just like a court would.[113]

3. Baseless Litigation and Limits to Prisoners' Access to the Courts

Similarities between the limits of the Petition Clause and the limits of a prisoner's right of access to the courts suggest that the right of access to the courts has its roots in the Petition Clause.[114] The Petition Clause does not protect "baseless litigation."[115] The Supreme Court in *Bill Johnson's Restaurants* explained that baseless litigation in the context of the Petition Clause refers to a suit based

105. *Id.* at 400 (Thomas, J., dissenting).

106. *Id.* at 403–04 (Scalia, J., dissenting).

107. *Id.* at 403 (Scalia, J., dissenting).

108. *Id.* at 403–04 (Scalia, J., dissenting).

109. Justice Thomas in his concurrence in *Guarnieri* also agrees with Justice Stevens that lawsuits are not petitions under the petition clause. *Id.* at 399 (Thomas, J., dissenting).

110. Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972).

111. *Id.* (citing Johnson v. Avery, 393 U.S. 483, 485 (1969); *Ex parte* Hull, 312 U.S. 546, 549 (1941)).

112. Andrews, *supra* note 16, at 596. ("The English Parliament and colonial legislative assemblies performed judicial roles and resolved individual grievances that today would constitute civil actions.").

113. *Id.*

114. Under the rule of *in pari materia*, the meaning of a previously enacted statute (or in this case, different constitutional provisions) is used to analyze later enacted statutes in the same context "'in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting,' and 'is therefore entitled to great weight in resolving any ambiguities and doubts.'" Erlenbaugh v. United States, 409 U.S. 239, 243–44 (1972) (citing United States v. Stewart, 311 U.S. 60, 64–65 (1940)).

115. Bill Johnson's Rests. v. NLRB, 461 U.S. 731, 743 (1983).

on insubstantial claims or that lacks a reasonable basis.[116] The Court reasoned that a claim that lacks merit does not have a "bona fide" grievance, which is required to be protected by the Petition Clause.[117]

In order to have a successful access-to-the-courts claim, a prisoner must have a legitimate underlying claim because *Casey* created an "actual injury" requirement for these claims.[118] Thus, both the right to bring a case under the Petition Clause and the right to bring an access-to-the-courts claim require that there be a meritorious underlying claim,[119] which is consistent with the idea that the Petition Clause creates the right of access to the courts.

But the right of access to the courts has a limit that is not on its face consistent with the right to petition. Namely, the right of access to the courts applies only to suits challenging direct appeals, habeas relief, and direct appeal convictions.[120] This means that it does not cover every type of grievance, such as a civil lawsuit against another private citizen for an issue not related to the prisoner's confinement.[121] This is inconsistent with the text of the Petition Clause, which provides that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a *redress of grievances*."[122] The text does not expressly limit the type of grievances that are protected under this clause.[123] In fact, in both Colonial America and England, citizens would commonly petition the government for private civil disputes.[124]

A closer look, however, suggests that this limit on the right of access to the courts is justified and consistent with the First Amendment right to petition. There are many instances in which a First Amendment right is limited for practical reasons or for state interest.[125] In the prison context, for example, prisons can restrict a prisoner's access to newspapers and magazines in order to incentivize better prison behavior.[126] In *Casey*, the Court reasoned that an inmate's inability to file private civil lawsuits is "simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration."[127]

Limiting the right of access to the courts to only certain suits is justified in a similar way that the First Amendment restrictions were justified in *Beard v. Banks*.[128] The Court in *Beard* reasoned that restricting materials available to

116. *Id.*
117. *Id.*
118. Lewis v. Casey, 518 U.S. 343, 349 (1996).
119. *Id.*; *Bill Johnson's*, 461 U.S. at 743.
120. *Casey*, 518 U.S. at 355.
121. *See id.*
122. U.S. CONST. amend. I. (emphasis added).
123. *Id.*
124. *See* Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 394 (2011).
125. Time, place, and manner restrictions of freedom of speech are examples. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
126. Beard v. Banks, 548 U.S. 521, 531–32 (2006).
127. Lewis v. Casey, 518 U.S. 343, 355 (1996).
128. *Beard*, 548 U.S. at 530–31.

prisoners in order to induce better prison behavior established a "'valid, rational connection' between the Policy and 'legitimate penological objectives.'"[129]

Similarly, restricting a prisoner's ability to file a private civil suit can be rationally connected to the policy of punishing prisoners.[130] For example, prisons can force inmates who are kept in "lockdown" to have less access to legal materials even if it results in actual injury because such inmates pose special disciplinary and security concerns compared to the general prison population.[131] Thus, in prison, a state can restrict prisoners' petition rights in a way it could not do outside of the prison context.

4. The Petition Clause Continues After the Initial Complaint

It can be argued that the right to petition only includes the right to petition the government one time for the same issue; in other words, it only includes the right to file an initial complaint.[132] Generally, the government does not have a duty to respond to petitions.[133] There is certainly no reference to such a duty in the Petition Clause as it merely provides that the government must not abridge the right to petition, not that it must resolve any grievances.[134]

Although the Petition Clause does not create a duty for the government to respond to the petition, in the litigation context, the Due Process Clause creates a duty for the government to respond.[135] Thus, the Petition Clause creates a right to file papers with the courts, while the Due Process Clause requires the courts to respond to those papers.[136] This begs the question of whether papers filed after the initial complaint, such as motions or discovery requests, are additional "petitions" covered by the Petition Clause.[137] After all, each paper the prisoner files with the court after the initial complaint is an act by the prisoner to reach out to the government in order to obtain redress for a grievance.[138] Thus, on its face, it seems that subsequent court filings are petitions. History also suggests that subsequent documents filed with a court should be considered a petition.[139] The

129. *Id.* at 531 (quoting Turner v. Safley, 482 U.S. 78, 89 (2006)).

130. For example, a delay in receiving legal assistance to file a civil suit might not violate a constitutional right even if it resulted in actual injury. *See Casey*, 518 U.S. at 362.

131. *Id.* at 361–62.

132. *See* Andrews, *supra* note 16, at 645–47 (arguing that the petition clause only protects the right to file an initial complaint).

133. *Id.* at 634–37.

134. *See* U.S. CONST. amend. I.

135. *See* Andrews, *supra* note 16, at 648.

136. *See id.*

137. There is no clear consensus from case law and authors about whether papers filed after the initial complaints, such as motions or discovery requests are additional "petitions" covered by the petition clause. *See id.* at 594 n.128 (discussing the different case law on this issue but concluding that the petition clause does not apply beyond the initial complaint of litigation).

138. For example, a motion to the court or discovery requests all involve the plaintiff asking the court to order the plaintiff to do something in order to relieve the grievances of plaintiffs.

139. When the petition clause references "the right of the people," it likely intended to codify an existing individual right, so it is appropriate to look at history to determine its scope. *See* Borough of Duryea, Pa. v.

1641 Massachusetts Bay Colony Body of Liberties granted a right of petition that seems to include the right to file motions when it provided that "[e]very man . . . shall have libertie [sic] to come to any publique [sic] Court . . . to move any lawfull [sic], seasonable and materiall [sic] question, or to present *any necessary motion*, complaint, petition, Bill or *information*."[140] The broad language of "any necessary motion . . . or information" suggests that citizens are able to submit multiple petitions to the government, even if all of the petitions concern the same grievance, as long as they are "necessary."[141] In the context of civil litigation, this means that prisoners have a right under the Petition Clause to submit documents to the courts as long as there is a reasonable basis for it.[142]

Arguably, subsequent filings cannot be petitions because they involve the same grievance.[143] But the Constitution does not place a limit on how many times a person can petition the government for the same grievance.[144] Indeed, many other First Amendment rights have no limit on how much they can be exercised unless the limit is due to a compelling state interest that is narrowly tailored to such interest.[145] The right to free speech and assembly does not require that a person who exercises this right must do so for a different reason each time.[146] For example, citizens can hold multiple peaceful protests for the same issue.[147] Nor does the First Amendment right of religion restrict the number of times a person can attend a church gathering.[148] Similarly, citizens should be able to file multiple petitions with the government for the same grievance. Allowing multiple petitions for the same grievance actually makes it more likely that the citizen's concerns will be heard and addressed by the government,[149] which is a policy goal underlying the Petition Clause.[150] There might be a concern that allowing for unlimited petitions for the same grievance can overburden the

Guarnieri, 564 U.S. 379, 403 (2011) (Scalia, J., dissenting) (quoting District of Columbia v. Heller, 554 U.S. 570, 592 (2008)).

140. MASSACHUSETTS BODY OF LIBERTIES of 1641, *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 73 (Leon Friedman et al. eds.) (1971) (emphasis added).

141. *See id.*

142. Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1982) (holding that the petition clause protects the right to file civil suits but that suits that lack a "'reasonable basis' . . . are not within the scope of First Amendment protection").

143. *See* Andrews, *supra* note 16, at 647.

144. U.S. CONST. amend. I.

145. Davis v. FEC, 554 U.S. 724, 744 (2008).

146. *See* U.S. CONST. amend. I.

147. *See id.*

148. *See id.*

149. Andrews, *supra* note 16, at 636 ("The mere ability to make a request improves a person's chance of getting relief over a system in which he had no right to request relief.").

150. *See* Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 397 (2011) ("The right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign.").

government.[151] But, if it does reach that point, the government's narrow ability to limit First Amendment rights will step in and solve this problem.[152]

But the issue of whether court motions or similar documents are petitions under the First Amendment is not something that is settled.[153] This is likely because the Due Process Clause requires a court to respond to motions, and so courts have typically not needed to rely on the Petition Clause.[154]

B. Due Process Creates a Duty to Respond Through All Stages of Litigation

The Due Process Clause is what requires the courts to take action after the initial filing and each subsequent court filing.[155] Indeed, the Due Process Clause governs what happens after the initial complaint, such as rules for responsive pleadings and discovery.[156] Although the Due Process Clause typically protects defendants, it has been extended to plaintiffs when access to the courts is the only way to resolve their violation of a fundamental right.[157] In the prison context, filing a claim challenging confinement is the only practical way a prisoner can resolve their issue.[158] Thus, the Due Process Clause creates an obligation for a state to provide legal assistance even if the rights that come from the Petition Clause end after the initial complaint.[159]

This means that the Due Process Clause and Petition Clause work together to create a right of access to the courts through all stages of litigation.[160] The Petition Clause creates a duty for prisons to assist prisoners in submitting documents to the courts, even after the initial complaint,[161] and the Due Process Clause requires the courts to respond to each one according to the rules of civil procedure.[162] It is important to note that the Fourteenth Amendment and First Amendment typically offer different levels of protection or deference to the government; First Amendment rights are more strictly protected, while the government is given more deference in Fourteenth Amendment issues.[163] This is supported by the decision in the Supreme Court case of *Thomas v. Collins*:

> [T]he preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . . gives these

151. *See* Andrews, *supra* note 16, at 679 ("The government certainly has an interest in promoting efficient use of its resources and in avoiding the waste of taxpayer money.").

152. *See* Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983) (discussing suits that are not protected by petition clause).

153. Andrews, *supra* note 16, at 594.

154. *See infra* Section IV.B.

155. Andrews, *supra* note 16, at 594.

156. *Id.* at 647.

157. *See* United States v. Kras, 409 U.S. 434, 444–45 (1973).

158. Lewis v. Casey, 518 U.S. 343, 404–06, 405 n.1 (1996) (Stevens, J., dissenting).

159. *See* Andrews, *supra* note 16, at 646–47 ("The Petition Clause, with all of its attendant 'strict scrutiny' protections under the First Amendment, protects the initial filing of the complaint, and the Due Process Clause, and its somewhat lower 'reasonableness' standard of protection, steps in from that point forward.").

160. *Id.* at 648.

161. *See id.* at 647.

162. *Id.* at 594.

163. Thomas v. Collins, 323 U.S. 516, 530 (1945).

> liberties a sanctity and a sanction not permitting dubious intrusions. . . . For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.[164]

Thus, different remedies and standards of review are used for claims based on Due Process violations compared to First Amendment violations.[165] It will be further explained in Part IV that this implication favors requiring states to provide affirmative assistance to prisoners rather than merely requiring the states to stay out of the way.[166]

C. Other Potential Constitutional Sources

Although the right of habeas corpus and the Equal Protection Clause are plausible sources of the right of access to the courts, a closer analysis reveals that the right is better analyzed under the Petition Clause and Due Process Clause.

1. Habeas Corpus

The habeas corpus right is also a potential source of the right of access to the courts.[167] The right of access to the courts and the right of habeas corpus are often used for similar reasons; they are both used as a post-conviction attack on sentencing or detainment.[168] A request for habeas corpus relief proceeds similarly to a civil action against a state[169] and is usually used by a prisoner as a post-conviction challenge against the application of federal law in a criminal trial that resulted in their confinement.[170] Similarly, the right of access to the courts can be invoked when a prisoner brings a civil suit against their prison after conviction to challenge the condition of their confinement.[171] Since the right of habeas corpus gives prisoners the right to have a federal court determine whether their confinement is legally valid,[172] it is very plausible that it can be extended to include the right to access legal materials in order to effectuate the right of habeas corpus.[173] Indeed, the court in *Lynch* held that since the prisoner's burden of proof

164. *Id.*
165. *Id.*
166. *See infra* Section IV.A.
167. Many access to the courts cases involve prisoners seeking habeas petitions. Lewis v. Casey, 518 U.S. 343, 354 (1996).
168. *See, e.g.*, Harris v. Nelson, 394 U.S. 286, 293–94 (1969); Peyton v. Rowe, 391 U.S. 54, 60 (1968); *Casey*, 518 U.S. at 349.
169. *See, e.g.*, *Harris*, 394 U.S. at 293–94.
170. *See, e.g.*, *Peyton*, 391 U.S. at 60.
171. *Casey*, 518 U.S. at 349.
172. *Harris*, 394 U.S. at 289.
173. *See* Johnson v. Avery, 393 U.S. 483, 485 (1969); *Ex parte* Hull, 312 U.S. 546, 549 (1941). Both of these cases, which gave rise to the right of access to the court, were brought as requests for habeas corpus relief.

for an evidentiary hearing for a habeas corpus is heavy and difficult to prove, the state must provide resources to help the prisoner achieve that burden.[174]

But there are some significant differences between the right of access to the courts and the right of habeas corpus. First, although Article I of the Constitution provides that the "Privilege[s] of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it[,]"[175] the Constitution does not explicitly create the right of habeas corpus.[176] Instead, federal and state courts have the authority to hear requests for habeas corpus relief because such authority is granted by federal statute.[177] In contrast, Supreme Court cases claim that the right of access to the courts has its source in the Constitution.[178] Thus, if the right of access to the courts comes from the Constitution,[179] and the Constitution does not create the right of habeas corpus,[180] then it is not likely that the right of access to the courts is an extension of the right of habeas corpus.

Second, a writ of habeas corpus is intended to be used by prisoners to challenge the judicial process that resulted in their confinement, while the right of access to the courts is used when prisoners challenge the condition of confinement itself.[181] The judicial process that created the confinement and the confinement itself are independent from each other.[182] The process might be valid, but the confinement is too harsh, or alternatively, the process was invalid but the confinement for someone convicted of such crime was fair. Thus, the right to habeas corpus is not the source of the right of access to the courts.

2. Equal Protection

It has also been suggested that the Equal Protection Clause is the source of the constitutional right of access to the courts.[183] In the Supreme Court case of *Pennsylvania v. Finley*, the Court held that a prisoner's "equal protection guarantee of 'meaningful access'" was not violated when the state refused to provide the prisoner with appointed counsel in a post-conviction proceeding.[184] The Court reasoned that a prisoner does not have an underlying constitutional right to appointed counsel in a state post-conviction proceeding.[185] *Casey* also held that the constitutional right of access to the courts does not include the right to

174. Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).

175. U.S. CONST. art. I, § 9, cl. 2.

176. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 301 (2001).

177. *See id.* at 305; *see also, e.g.*, 28 U.S.C. § 2241.

178. Bounds v. Smith, 430 U.S. 817, 828 (1977) ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates . . . .").

179. *See id.*

180. *See I.N.S.*, 533 U.S. at 301.

181. Wilkinson v. Dotson, 544 U.S. 74, 78 (2005).

182. *See id.*

183. Pennsylvania v. Finley, 481 U.S. 551, 557 (1987).

184. *Id.*

185. *Id.*

appointed counsel.[186] This suggests that the right of access to the courts stems from the Equal Protection Clause but is not broad enough to cover appointed counsel.[187]

A disproportionate number of prisoners who are poor, and thus need legal assistance from the state, are people of color,[188] who fall within a protected class under the Equal Protection Clause.[189] Thus, if a prison regulation treats people of color differently by not giving them adequate legal assistance, then the regulation might violate equal protection unless the state provides "reasonable access."[190] But, if such a regulation is race-neutral on its face, then there must be evidence of discriminatory intent, which can be difficult to show.[191]

While equal protection typically applies to suspect classes like race, current case law is not clear on how equal protection applies to indigent people.[192] It is well established that laws that deny indigent people basic criminal procedure protections because of their inability to pay violate equal protection.[193] Thus, in cases where prisoners invoke the right of access to the courts when they are seeking a direct appeal of their criminal conviction or habeas corpus relief, equal protection likely applies since appeals and habeas corpus relief both challenge the criminal prosecution itself.[194]

But it is less clear what is required in the civil procedure context: the Supreme Court has suggested that classifications based on wealth might violate equal protection, but never has directly held so.[195] For example, *Lynch* noted that the lack of legal assistance available to indigent prisoners compared to affluent prisoners "raises serious equal protection questions."[196] Another Supreme Court case held that equal protection does not "require the State to 'equalize economic conditions.'"[197] This means that when a prisoner is invoking the right of access to the courts to bring a civil action against the state challenging their condition

186. Lewis v. Casey, 518 U.S. 343, 354 (1996).

187. *Id.* at 367 (Thomas, J., concurring) (acknowledging that the right of access to the courts has been articulated as an "aspect" of equal protection).

188. Eli Day, *The Race Gap in US Prisons Is Glaring, and Poverty Is Making It Worse*, MOTHER JONES (Feb. 2, 2018), https://www.motherjones.com/crime-justice/2018/02/the-race-gap-in-u-s-prisons-is-glaring-and-poverty-is-making-it-worse [https://perma.cc/Q55N-LW8A].

189. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

190. *See* Gilmore v. Lynch, 319 F. Supp. 105, 111 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).

191. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 259, 265, 270 (1977) (in which the Court found no discriminatory intent even though government action had disproportionate impact on black residents, and that even if motivated by race, plaintiff needs to show that the racist motive caused the government act).

192. *See* Rose, *supra* note 73, at 420.

193. *Id.*

194. *See, e.g.*, Peyton v. Rowe, 391 U.S. 54, 60 (1968). It also would not be relevant that equal protection applies to habeas petitions or direct appeals because this Note concludes that neither of them create the right of access to the court.

195. *See* Rose, *supra* note 73, at 420.

196. Gilmore v. Lynch, 319 F. Supp. 105, 111 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).

197. Ross v. Moffitt, 417 U.S. 600, 612 (1974) (quoting Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring)).

of confinement, it is not clear if equal protection applies.[198] *Casey* suggested that it does apply to civil actions under 42 U.S.C. § 1983, when it compared such civil suits to habeas corpus petitions, stating: "the demarcation line between civil rights actions and habeas petitions is not always clear," and "[i]t is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ."[199]

It is unlikely, however, that the right can come from the equal protection guarantee because even if equal protection applies to both classifications based on wealth or race, when a law is neutral on its face, discriminatory intent is generally required in the civil context to prove violation of equal protection.[200] In many cases that discuss the right of access to the courts, there is no discussion on whether there was any intent for the law to discriminate against indigent prisoners.[201] Thus, although it is possible that equal protection can apply if there is evidence of discriminatory intent, that is usually not the case.[202] It is best to analyze the right of access to the courts as a Due Process and Petition Clause right.

D. The Supreme Court Is Silent on When Access to the Courts Stops

None of the Supreme Court precedents have ever explicitly held that states must stop providing legal assistance after a certain stage of a lawsuit.[203] Instead, what the Supreme Court in *Bounds* emphasized is that "[m]eaningful access" is the "touchstone."[204]

1. The Meaning of "Litigate Effectively"

The *Casey* Court noted that the right of access to the courts does not require the state to enable the prisoner to "litigate effectively once in court."[205] The Court reasoned that if it did, it would demand permanent provision of counsel, which the Constitution does not require.[206] Although this could be construed to mean that legal assistance is not required after a certain stage, it is likely not what the Court meant.[207] The Court used the term "meaningful access" and then "litigate

198. *See supra* notes 192–97 and accompanying text.

199. Lewis v. Casey, 518 U.S. 343, 354–55 (1996) (quoting Wolff v. McDonnell, 418 U.S. 539, 579 (1974)).

200. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

201. *See, e.g.*, *Casey*, 518 U.S. at 361. Although the Court discussed whether the prison regulation was related to a legitimate penological reason, it did not discuss any possibility of discriminatory intent.

202. *See Vill. of Arlington Heights*, 429 U.S. at 259, 265, 270 (finding no discriminatory intent even though government action had disproportionate impact on black residents, and that even if motivated by race, plaintiff needs to show that the racist motive caused the government act).

203. *See* Rivera v. Monko, 37 F.4th 909, 919 (3d Cir. 2022) (arguing that Supreme Court precedents have not made it clear whether prisons owe a duty to provide legal assistance to prisoners at the trial stage of litigation).

204. Bounds v. Smith, 430 U.S. 817, 823 (1977).

205. *Casey*, 518 U.S. at 354 (emphasis omitted).

206. *Id.* at 354.

207. *See id.*

effectively."[208] Because the Court used different terms, it likely meant different things.

The Court likely intended to express the view that the legal assistance provided need not be so great that it puts the prisoner in a position that is equivalent to having an attorney.[209] The Court might have been implying that after the initial complaint is filed, the prison's duty to provide some legal assistance is limited, although it still exists.[210] If it did, then this would be consistent with the idea that the right to petition guarantees the ability to file the initial complaint, while the Due Process Clause—which generally offers less protection—guarantees at least minimal legal assistance during the trial stage.[211] Indeed, the Court stated that "conferral of such sophisticated legal capabilities . . . is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires."[212] This seems to suggest that prisons are not required to provide "sophisticated legal capabilities" but are required to provide some lesser type of legal assistance during trial, such as access to a law library.[213]

Moreover, *Casey*'s discussion on the limitation to "litigate effectively" is technically dicta.[214] In *Casey*, the prisoner did not meet the standing requirement because they could not show actual injury as required by *Casey*.[215] When a plaintiff does not have standing, a court should refrain from discussing the merits of the case.[216] Even if there was standing, *Casey* did not need to discuss the scope of the right of access to the courts because the Court rejected the prisoner's claim based on the deference that must be given to state prisons under *Turner*.[217] Thus, even though many cases have treated all of the limitations on the right of access to the courts discussed in *Casey* as binding precedent, courts are not required to do so.[218]

208. *Id.* (emphasis omitted).

209. *See id.* at 355.

210. *See id.* ("*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines . . . . Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.").

211. *See* Andrews, *supra* note 16, at 646–47 ("The Petition Clause, with all of its attendant 'strict scrutiny' protections under the First Amendment, protects the initial filing of the complaint, and the Due Process Clause, and its somewhat lower 'reasonableness' standard of protection, steps in from that point forward.").

212. *Casey*, 518 U.S. at 354.

213. *Id.*

214. *Id.* at 409 n.6 (Stevens, J., dissenting).

215. *See id.* (Stevens, J., dissenting).

216. *See id.* (Stevens, J., dissenting).

217. *See id.* (Stevens, J., dissenting).

218. *See, e.g.*, Rivera v. Monko, 37 F.4th 909, 920 (3d Cir. 2022).

E. Sufficiency of Law Libraries

The Supreme Court has never held that law libraries are necessary to fulfill the state obligation to provide meaningful court access to prisoners.[219] *Bounds* held that "adequate law libraries" were sufficient, but it is unclear what suffices as adequate.[220]

Even though law libraries are not necessary and it is not clear if they are efficient in assisting prisoners, most prisons have embraced law libraries as a cost-efficient way to fulfill their obligations.[221] *Lynch* merely suggested that access to a law library was one possible method, among others, to provide access to the courts.[222] *Bounds* later held that the "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."[223] Many cases dealing with the right of access to the courts also involve claims that a prison deprived prisoners of access to a law library.[224] For example, two cases involved in the circuit split, *Rivera* and *Marshall*, both involved allegations by a prisoner that the prison library officials refused to grant him access to a library.[225] In those cases, the courts did not discuss the issue of whether the law library was adequate enough to help a prisoner win a suit; instead, they assumed that it would be helpful and only analyzed the issue of whether the prisoner had a right to the library after the initial complaint.[226]

Courts will often find that an adequate law library is sufficient to fulfill the state's requirement regardless of the prisoner's literacy or legal training.[227] Thus, when analyzing the circuit split, the issue in practice will be how far the right to a law library should extend as opposed to whether other legal resources are needed, such as public defenders, volunteer attorneys, or senior law students.[228] This is important because the prevalence of law libraries affects how much time and effort states must use to fulfill the requirements both at the initial pleading and beyond.[229]

219. Bounds v. Smith, 430 U.S. 817, 830 (1977).

220. *Id.* at 830–31.

221. Abel, *supra* note 18, at 1195–96.

222. Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).

223. *Bounds*, 430 U.S. at 828 (emphasis added).

224. *See, e.g.*, Rivera v. Monko, 37 F.4th 909, 913 (3d Cir. 2022).

225. *Id.*; Marshall v. Knight, 445 F.3d 965, 967 (7th Cir. 2006).

226. *Rivera*, 37 F.4th at 915; *Marshall*, 445 F.3d at 968.

227. *See* Abel, *supra* note 18, at 1196–97.

228. *See id.* at 1192–93.

229. *See id.* at 1196–97.

F. Comparing Civil Trials to Criminal Trials

The main difference between criminal trials and civil suits that challenge the conditions of confinement that resulted from such trials is that criminal trials have more fundamental rights at risk: criminal trials determine whether the defendant will lose his freedom while such civil suits will not change whether the defendant is confined.[230] This difference is reflected by the fact that criminal defendants have a right to legal counsel while criminals who bring such civil suits only have access to a law library.[231]

One Supreme Court case noted that the language of the Due Process Clause "cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means."[232] This could suggest that states only have a duty to not prevent access to legal materials but not that they have a duty to provide such assistance.[233]

IV. RECOMMENDATION

The circuit split should be resolved in favor of obligating states to provide legal assistance throughout all stages of litigation. First, this is the only way in practice to ensure "meaningful access" to courts as required by the Supreme Court.[234] Second, since there are due process rights in all stages of criminal trials,[235] the obligations placed upon state prisons regarding the right of access to the courts should continue through all stages of a civil rights suit. Lastly, public policy favors this solution because it increases access for prisoners without incurring significant additional costs to state prisons.

A. Meaningful Access Requires Access Throughout Trial

As stated earlier, the test created in *Bounds* is "whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."[236] Legal assistance throughout all stages of litigation may be needed to give prisoners an "adequate opportunity to present claim[s] . . . to the courts."[237] Thus, for the right of access to the courts to actually make a difference to prisoners, it must continue throughout all stages of litigation.[238]

230. *See* Paul M. Matenaer, Comment, *But Instead Expose Them: Public Access to Criminal Trials in U.S. Law and Canon Law*, 2021 WIS. L. REV. 891, 902.

231. *See* Lewis v. Casey, 518 U.S. 343, 354–55 (1996).

232. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1986).

233. Silva v. Di Vittorio, 658 F.3d 1090, 1103 (9th Cir. 2011).

234. *Casey*, 518 U.S. at 351.

235. *See* Andrews, *supra* note 16, at 594.

236. Bounds v. Smith, 430 U.S. 817, 825 (1977).

237. *Id.*

238. *See* Rivera v. Monko, 37 F.4th 909, 922–23 (3d Cir. 2022) ("Once in court, a prisoner's need to access legal materials is just as great—if not greater—than when a prisoner initially filed a complaint.").

Because states are not required to help prisoners "litigative effectively," the legal resources provided to prisoners after the initial complaint are not that significant.[239] Usually, proper access to a law library, either with physical books or online legal tools, fulfills this requirement.[240] One concern with relying on law libraries is that prisoners who are illiterate will not be able to get an "adequate opportunity to present claim[s] . . . to the courts" even if legal assistance is provided through all stages of litigation.[241] This would just burden the state without providing benefit to the prisoner.[242]

But most prisoners will be able to benefit from access to legal materials. First, the standard for pro se complaints are lower than regular complaints: courts review pleadings and other papers from pro se plaintiffs liberally and hold them to a less stringent standard than those that attorneys prepare.[243] Furthermore, states can utilize standard forms for pro se prisoners, such as "standardized habeas corpus forms" designed for laymen.[244] In fact, since prisoners can only use the right of access to the courts for certain types of legal actions, it is likely feasible for prisons to create standardized forms to cover most of those suits.[245] Since pro se prisoners will be given the benefit of the doubt and can use standardized forms, even ones who have no legal training still have some chance at getting meaningful court access so it is worth expanding the right to all stages of litigation.

B. Due Process Continues After the Initial Filing of the Claim

Since there are due process rights in all stages of criminal trials,[246] the obligations placed upon state prisons to provide legal assistance to prisoners should also continue throughout all stages of a civil rights suit. When a prisoner goes through a criminal trial, the Due Process Clause guarantees the defendant certain procedural rights to give him a fair chance to maintain his innocence.[247] For example, the Sixth Amendment provides that the process that is due for a criminal defendant who cannot afford a lawyer is assistance of counsel provided by the state.[248] A criminal trial says little about conditions of confinement: the trial only determines whether a defendant is guilty or not and how long the sentence will be.[249] In both criminal trials and civil rights suits challenging confinement, the

239. *Casey*, 518 U.S. at 354.

240. *See* Abel, *supra* note 18, at 1196–97.

241. *Bounds*, 430 U.S. at 825.

242. *See* Andrews, *supra* note 16, at 679 ("The government certainly has an interest in promoting efficient use of its resources and in avoiding the waste of taxpayer money.").

243. *See* Greenhill v. United States, 81 Fed. Cl. 786, 790 (2008) (citing Haines v. Kerner, 404 U.S. 519, 520–21 (1972)).

244. Abel, *supra* note 18, at 1193 (citing Johnson v. Avery, 393 U.S. 483 (1969) (Douglas, J., concurring)).

245. Lewis v. Casey, 518 U.S. 343, 349 (1996).

246. *See, e.g.*, State v. Caldwell, 803 N.W.2d 373, 384 (Minn. 2011).

247. *See, e.g.*, *id.*

248. U.S. CONST. amend. VI.

249. *See* Matenaer, *supra* note 230, at 902.

prisoner's constitutional rights are at stake.[250] Once convicted, however, a prisoner does not have an opportunity to challenge his confinement unless he brings a lawsuit.[251] At criminal trials, a defendant's right to assistance of counsel serves the purpose of allowing a defendant to receive partisan advocacy on his side of the case, which is what is required in the adversary system of criminal justice.[252] Civil trials also depend on such an adversarial system,[253] and the policy behind the right of access to the courts is to provide a prisoner with a threshold amount of resources to advocate his side of the case.[254] Thus, the right of access to the courts to challenge a confinement is essentially an extension of the due process rights given to a defendant in a criminal trial.

The difference between criminal and civil trials, as discussed in Part III,[255] says nothing about how long the right to legal assistance lasts.[256] Thus, since there are due process rights in all stages of criminal trials,[257] the obligations placed upon state prisons to provide legal assistance to prisoners should also continue throughout all stages of a civil rights suit.

The rights under the Petition Clause, which is the other source of the right of access to the court, also apply beyond the initial complaint.[258] Thus, even though criminal trials may offer more protection than civil trials in terms of due process,[259] the First Amendment right of petition applies in access-to-the-courts claims which requires more protection than due process.[260]

It has been suggested that due process only prevents states from restricting court access to prisoners; it does not impose an affirmative duty to provide legal assistance.[261] But in the prison context, the state has already taken action to deprive a prisoner of his access to due process by placing him in jail: prisoners do not lose their right to due process just because they are in jail.[262] Thus, a state's

250. *See* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) (citation omitted) ("[W]hile 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.").

251. *See* Andrews, *supra* note 16, at 574 ("This special rule for prisoners has some policy justifications. A prisoner has unique circumstances: he is in special need of judicial relief, yet he is confined away from normal avenues of case preparation and settlement.").

252. *See, e.g.*, Nance v. Ozmint, 626 S.E.2d 878, 880 (S.C. 2006).

253. *See, e.g.*, Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1429 (3d Cir. 1991).

254. *See* Johnson v. Avery, 393 U.S. 483, 488 (1969).

255. *See supra* Section III.F.

256. Rivera v. Monko, 37 F.4th 909, 921 (3d Cir. 2022).

257. *See, e.g.*, State v. Caldwell, 803 N.W.2d 373, 384 (Minn. 2011).

258. *See supra* Subsection III.A.4.

259. *See* Lewis v. Casey, 518 U.S. 343, 354 (1996) (discussing that the right of access to the courts does not demand free counsel).

260. First Amendment rights are stricter, while courts tend to give more deference to the government on Fourteenth Amendment issues. Thomas v. Collins, 323 U.S. 516, 530 (1945); *see also* Andrews, *supra* note 16, at 646–67 ("The Petition Clause, with all of its attendant 'strict scrutiny' protections under the First Amendment, protects the initial filing of the complaint, and the Due Process Clause, and its somewhat lower 'reasonableness' standard of protection, steps in from that point forward.").

261. *Cf.* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1986).

262. *See* Andrews, *supra* note 16, at 574 ("This special rule for prisoners has some policy justifications. A prisoner has unique circumstances: he is in special need of judicial relief, yet he is confined away from normal avenues of case preparation and settlement.").

duty to provide affirmative legal assistance to prisoners can be seen more as a duty to rectify the restrictions on due process the state has created by confining the prisoners in the first place.

C. The Prison Litigation Reform Act and Other Limits

The limitations on the right of access to the courts ease any concern that requiring states to provide legal assistance throughout all stages of litigation is too burdensome.

1. The Prison Litigation Reform Act

A concern of a broad interpretation of the right of access to the courts is that it will overburden the states by requiring them to provide legal assistance to prisoners throughout all stages of litigation at their own expense. But the PLRA has a three-strike provision to resolve this concern.[263] Under this three-strike provision, a pro se litigant cannot receive a filing fee waiver if three or more of their previous suits failed to state a claim or were frivolous.[264] This lack of fee waiver will act as an incentive for prisoners to not abuse their ability to file pro se suits against their prison and have the prison assist them with their suit. To be sure, the right of access to the courts is mainly useful because it reduces the cost of litigation for indigent prisoners.[265] So when the abuse of the privilege of pro se suits leads to higher litigation costs as a result,[266] prisoners will likely only take advantage of the right of access to the courts when they have a legitimate legal claim or defense.

The requirement of actual injury,[267] along with the PLRA fee waiver limitation, will ensure that the right of access to the courts is not abused. In order to win a claim for lack of access to the courts, a prisoner needs to show that the lack of legal assistance caused a defect in their suit that prevented them from being successful.[268] Because a prisoner will never win their case unless they pay the appropriate legal fees, the prisoner must also show that they would be willing to pay any legal fees required for the case filing.[269] Thus, a prisoner cannot ask for free legal assistance from their prison when they don't have a claim or when they aren't willing to pay the legal fees required for their suit[270]: this reduces costs for the state prisons.

263. *See* 28 U.S.C. § 1915(g).
264. *Id.*
265. *See* Johnson v. Avery, 393 U.S. 483, 488 (1969).
266. *See* 28 U.S.C. § 1915(g).
267. For a discussion on the actual injury requirement, see Lewis v. Casey, 518 U.S. 343, 349–55 (1996).
268. *Id.* at 351–53.
269. *Id.* at 350.
270. *Id.*

2. Practical Use of Law Library

A main concern about providing legal assistance throughout all stages of litigation is the cost that it imposes on states.[271] But extending the right from the initial complaint to the end of trial is not unreasonably burdensome to the states. *Bound* held that a prison library may be sufficient to provide meaningful access to courts and that is what most prisons opted for.[272] Allowing access to such a library even after the initial complaint will likely not cause the state prison to incur any more significant expenses while it greatly increases the prisoner's ability to challenge their confinement.[273] Furthermore, state prisons may limit access to legal assistance in order to further legitimate penological goals, or only to certain claims such as those that challenge confinement.[274] Given these limits, states will still retain their autonomy even with a broad reading of the right of access to the courts.[275] Thus, public policy favors this recommendation.

Experimentation that is favored by the courts will also allow prisons to find a method of fulfilling their affirmative obligation to provide legal assistance in the most effective way. The *Bounds* court noted that "we encourage local experimentation" in choosing methods of ensuring access to the courts.[276] For example, in lieu of a law library, a state could attempt to provide less access to legal advice but provide sample forms for inmates to fill out that ask for only facts and no legal analysis.[277] Such a program would remain in force until a prisoner can prove that such a system was defective as to prevent him from bringing a legitimate legal claim.[278]

Today, prison officials can utilize internet-based legal tools such as Westlaw and free websites to provide legal assistance to prisoners.[279] Although it is unclear how useful sophisticated legal tools like Westlaw will be to prisoners without legal training, many free websites can be useful for laymen.[280] For example, websites like Justia explain legal concepts in simple terms and Google Translate can be used for free by prisoners who do not speak English.[281] Such free websites can save the prison money. Further, because of *Casey*'s "actual injury" requirement, prisons would not need to provide prisoners with any additional resources until the prisoners prove that their meritorious lawsuit would be

271. This concern is evidenced by the fact that prison officials look for the cheapest way to fulfill the requirement of providing prisoners with access to the courts even if the cheapest way is not actually helpful to illiterate prisoners. Abel, *supra* note 18, at 1203–04.

272. *Id.* at 1203 ("States quickly warmed to law libraries as a way of complying with their access-to-courts responsibilities.").

273. Bounds v. Smith, 430 U.S. 817, 826–27 (1977) ("[T]his Court's experience indicates that pro se petitioners are capable of using lawbooks to file cases raising claims that are serious and legitimate even if ultimately unsuccessful.").

274. Lewis v. Casey, 518 U.S. 343, 355, 361 (1996).

275. *See generally* Abel, *supra* note 18, at 1203–04.

276. *Bounds*, 430 U.S. at 832.

277. *Casey*, 518 U.S. at 352.

278. *Id.* at 352–53.

279. Abel, *supra* note 18, at 1214–15.

280. *Id.*

281. *Id.*

impeded without more resources.[282] Thus, because of the actual injury requirement and the Supreme Court's encouragement of "local experimentation," state prisons are free to create a system that provides adequate legal assistance in a way that is the least burdensome to the prison.[283]

V. CONCLUSION

There is a circuit split on whether the right of access to the courts requires state prisons to provide legal assistance throughout all stages of litigation or just the initial pleading stage.[284] This Note recommends that the circuit split should be resolved in favor of requiring such assistance throughout all stages of civil litigation. First, this is the only way in practice to ensure "meaningful access" to courts as required by the Supreme Court.[285] Second, since there are due process rights in all stages of criminal trials,[286] the obligations placed upon state prisons from the right of access to the court should continue through all stages of a civil rights suit.[287] Lastly, public policy favors this solution because it increases access for prisoners without incurring significant additional costs to state prisons.[288]

Resolution of this circuit split has a few important implications. First, resolving this circuit split will reduce uncertainty for state prisons because the expectation going forward will be that prisons must ensure that prisoners receive access to legal assistance even after they file their complaint. Second, it is important to understand which parts of the Constitution create a certain right because the relevant constitutional provision is what determines the scope and limits of that right and further creates a framework that can be used to discuss issues related to this right.

282. *See Casey*, 518 U.S. at 349, 353.
283. *See id.* at 352–53.
284. Rivera v. Monko, 37 F.4th 909, 921–22 (3d Cir. 2022) (discussing the circuit split).
285. *Casey*, 518 U.S. at 351 (quoting Bounds v. Smith, 430 U.S. 817, 830 (1977)).
286. *See, e.g.*, State v. Caldwell, 803 N.W.2d 373, 384 (Minn. 2011).
287. *See supra* Section IV.B.
288. *See supra* Section IV.C.