

Loyola University Chicago, School of Law

**LAW eCommons**

---

Faculty Publications & Other Works

---

2021

## Why Do the Poor Not Have a Constitutional Right to File Civil Claims in Court under Their First Amendment Right to Petition the Government for a Redress of Grievances?

Henry Rose

*Loyola University Chicago, School of Law, hrose@luc.edu*

Follow this and additional works at: <https://lawcommons.luc.edu/facpubs>



Part of the [Constitutional Law Commons](#), and the [First Amendment Commons](#)

---

### Recommended Citation

Henry Rose, *Why Do the Poor Not Have a Constitutional Right to File Civil Claims in Court under Their First Amendment Right to Petition the Government for a Redress of Grievances?*, 44 *Seattle U. L. REV.* 757 (2021).

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

Why Do the Poor Not Have a Constitutional Right to File  
Civil Claims in Court Under Their First Amendment  
Right to Petition the Government for a Redress of  
Grievances?

*Henry Rose\**

CONTENTS

I. CONSTITUTIONAL PROTECTION OF THE RIGHT TO ACCESS COURTS	758
I. FILING FEES AND <i>IN FORMA PAUPERIS</i> PETITIONS.....	761
III. SUPREME COURT CASES INVOLVING ACCESS OF THE POOR TO CIVIL COURTS .....	762
A. <i>Boddie v. Connecticut</i> .....	762
B. <i>United States v. Kras</i> .....	763
C. <i>Ortwein v. Schwab</i> .....	765
IV. UNITED STATES SUPREME COURT DECISIONS ON CIVIL COURT FILING FEES AS THEY APPLY TO THE POOR AND THEIR CONSTITUTIONAL RIGHT TO ACCESS THE COURTS .....	766
V. VOTING RIGHTS ANALOGY OF THE RIGHT TO ACCESS COURT BY PERSONS WHO CANNOT AFFORD TO PAY FILING FEES.....	768
CONCLUSION .....	769

Since 1963, the United States Supreme Court has recognized a constitutional right for American groups, organizations, and persons to pursue civil litigation under the First Amendment right to petition the government for redress of grievances.<sup>1</sup> However, in three cases involving

---

\* Henry Rose is a Curt and Linda Rodin Professor of Law and Social Justice at Loyola University Chicago School of Law. He dedicates this article to Arthur B. LaFrance, one of the attorneys for plaintiffs in *Boddie v. Connecticut*. He is also grateful to Barry Sullivan and the editors and staff of Seattle University Law Review for their helpful comments, suggested edits, and production assistance in the publication of this article.

1. Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO STATE L.J. 557, 576–89 (1999) (surveying the development of the constitutional right to access the courts under the First Amendment and proposing standards for defining the right).

poor plaintiffs decided by the Supreme Court in the early 1970s—*Boddie v. Connecticut*,<sup>2</sup> *United States v. Kras*,<sup>3</sup> and *Ortwein v. Schwab*<sup>4</sup>—the Supreme Court rejected arguments that all persons have a constitutional right to access courts to pursue their civil legal claims.<sup>5</sup> In the latter two cases, *Kras* and *Ortwein*, the Supreme Court concluded that poor persons were properly barred from accessing the courts when they were unable to pay court filing fees. The shocking lesson of this triumvirate of Supreme Court cases is that certain poor persons who cannot afford to pay court filing fees can be denied access to the Judicial Branch of government to seek resolution of their civil legal claims. But paying court filing fees, like paying government-imposed fees to vote, should not be a precondition to the exercise of a constitutional right. This Article asserts that these three cases should have recognized that the poor—like all other groups, organizations, and persons—have a First Amendment right to access the courts to seek redress of their grievances, even when they cannot afford to pay court filing fees.

First, Part I of this Article identifies the important role that the Judicial Branch of government plays in the enforcement of the civil legal rights of Americans and traces the development of the First Amendment right to access the courts for this purpose. Part II summarizes typical civil court filing fees and explains how available fee-waiver processes are ineffective. Parts III and IV consider the triumvirate of Supreme Court cases involving poor plaintiffs and asserts that the Court should have considered their rights to access the courts under the First Amendment right to petition the government for redress of grievances. Finally, Part V analogizes to Supreme Court precedent involving the right to vote and asserts that the imposition of fees for pursuing civil litigation, like fees for voting, violates equal protection as an improper precondition to the exercise of a constitutional right.<sup>6</sup>

## I. CONSTITUTIONAL PROTECTION OF THE RIGHT TO ACCESS COURTS

The Judicial Branch of government performs the essential role of ensuring that all persons are able to enforce their legal rights, and the First Amendment recognizes the right to access the courts as the principal means by which the Judicial Branch performs this role.

---

2. *Boddie v. Connecticut*, 401 U.S. 371, 382–83 (1971).

3. *United States v. Kras*, 409 U.S. 434, 447 (1973).

4. *Ortwein v. Schwab*, 410 U.S. 656, 659–60 (1973).

5. Although the indigent persons in *Boddie* were allowed to proceed with their divorce actions without paying court filing fees under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the Court majority stated that it was not deciding that access to the courts was a due process right available to all persons in all circumstances. *Boddie*, 401 U.S. at 382–83.

6. See *infra* Part V.

In *Marbury v. Madison*, Chief Justice Marshall stated: “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.”<sup>7</sup> Through civil litigation, persons can seek enforcement of their legal rights against entities and persons who violate them. They can also seek to invoke the law-making authority of judges to define the common law.<sup>8</sup> Finally, they can seek to enforce provisions of the Constitution against entities or persons who transgress them.<sup>9</sup> It is imperative that all persons have access to the Judicial Branch of government to enforce their rights under law.

The First Amendment to the Constitution of the United States of America is the legal basis of the right to access the courts. It provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>10</sup>

The initial Supreme Court case that interpreted the First Amendment to protect the right to file civil litigation is *NAACP v. Button*.<sup>11</sup> In this case, the National Association for the Advancement of Colored People (NAACP) challenged on First and Fourteenth Amendment grounds the Attorney General of Virginia’s enforcement of a state statute that prohibited the solicitation of legal business.<sup>12</sup> The Virginia Conference of the NAACP had actively encouraged Black citizens of Virginia to obtain representation from NAACP lawyers to challenge the racial segregation of public schools in Virginia.<sup>13</sup> The Court held that the NAACP’s activities were modes of expression and association protected by the First and Fourteenth Amendments that could not be prohibited under Virginia’s power to regulate the legal profession.<sup>14</sup> The Court stated that “under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.”<sup>15</sup>

---

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

8. *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055, 1060 (1973).

9. *Id.* at 1059–60.

10. U.S. CONST. amend. I.

11. *NAACP v. Button*, 371 U.S. 415, 428–31 (1963).

12. *Id.* at 417–19, 428–29.

13. *Id.* at 420–22.

14. *Id.* at 428–29.

15. *Id.* at 430.

In *Brotherhood of Railroad Trainmen v. Virginia*,<sup>16</sup> *United Mine Workers of America, District 12 v. Illinois State Bar Ass'n*,<sup>17</sup> and *United Transportation Union v. State Bar of Michigan*,<sup>18</sup> the Court extended to unions the First Amendment right of organizations to advise their members about their legal rights and remedies free of state regulation of the legal profession. In these cases, the Supreme Court recognized the First Amendment association and petition rights of unions to advise their members about how to seek compensation for work-related injuries through litigation and other means. The majority opinion in *United Transportation Union* stated: "The common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."<sup>19</sup> The Supreme Court also recognized a First Amendment right to access the courts under the petition clause in *California Motor Transport Co. v. Trucking Unlimited* when it concluded that it would be destructive to hold that groups with common interests could not use the courts to advocate their causes of action *vis-à-vis* their competitors, unless their litigation was sham.<sup>20</sup> In this case, plaintiffs sued competing trucking companies and alleged that defendants conspired to violate federal antitrust laws by commencing federal and state litigation to interfere with plaintiffs' ability to acquire or transfer operating rights.<sup>21</sup> Defendants countered that plaintiffs' suit violated defendants' First Amendment right to petition government for redress of grievances.<sup>22</sup> The Court agreed with defendants and stated: "Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition."<sup>23</sup>

Thus, the Judicial Branch of government performs the indispensable role of ensuring that all persons can enforce their legal rights. The First Amendment right to petition the government for a redress of grievances has been consistently interpreted by the Supreme Court to include the right to file civil actions in courts to enforce these rights.

---

16. *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 8 (1964).

17. *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 221–22 (1967).

18. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 580–81 (1971).

19. *Id.* at 585.

20. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11 (1972).

21. *Id.* at 509.

22. *Id.* at 510.

23. *Id.*

## II. FILING FEES AND *IN FORMA PAUPERIS* PETITIONS

Despite the constitutional right to access the courts, fees to file civil claims can be substantial, impeding poor persons who seek to pursue civil legal actions. For example, the fee to file a civil action in federal court is \$402.<sup>24</sup>

Federal district court judges may approve the commencement of a civil action without prepayment of fees based on the submission of an *in forma pauperis* affidavit stating the prospective plaintiff's assets and asserting an inability to pay court fees.<sup>25</sup>

Many state courts also have *in forma pauperis* processes allowing the filing of some civil actions without payment of court filing fees. However, these *in forma pauperis* processes are not available to all potential litigants. For example, in both *Boddie v. Connecticut* and *United States v. Kras*, *in forma pauperis* processes were not available to the poor persons seeking to file these civil court claims.<sup>26</sup> Additionally, courts may deny *in forma pauperis* petitions. In *Ortwein v. Schwab*, welfare recipients sought to pursue administrative review actions in court without paying filing fees, but their *in forma pauperis* petitions were denied without explanation.<sup>27</sup> Court procedures for reviewing *in forma pauperis* petitions can be lax and opaque, resulting in some poor persons being unable to pursue their civil legal claims based on ambiguous court processing of their petitions.<sup>28</sup>

Expensive court filing fees can pose an impediment to poor plaintiffs seeking to pursue civil litigation. The *in forma pauperis* procedures available to overcome this impediment are often inadequate or unavailable, as demonstrated in *Boddie*, *Kras*, and *Ortwein*.

---

24. 28 U.S.C. § 1914(a) requires a \$350 filing fee to institute any civil action. Pursuant to 28 U.S.C. § 1914(b), the Judicial Conference of the United States requires an additional \$52 administrative fee for filing a civil action in a district court. 28 U.S.C.A. § 1914 ¶ 14 (West 2020) (“Administrative fee for filing a civil action, suit, or proceeding in a district court, \$52.”).

25. 28 U.S.C. § 1915(a)(1).

26. See *infra* Sections III.A, III.B. In *Boddie*, *in forma pauperis* processes were not available in Connecticut state court civil actions. *Boddie v. Connecticut*, 286 F. Supp. 968, 973–74 (D. Conn. 1968). In *Kras*, the Supreme Court determined that *in forma pauperis* processes are not available in bankruptcy cases. *United States v. Kras*, 409 U.S. 434, 439 (1973).

27. See *infra* Section III.C.

28. See Laura Ernde, *Fee Waivers Denied for the Poor*, L.A. DAILY J., Sept. 14, 2011, at 592. See generally Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019) (surveying review of *in forma pauperis* petitions by federal judges and concluding that the *in forma pauperis* process in federal courts is irrational, inefficient, and invasive).

### III. SUPREME COURT CASES INVOLVING ACCESS OF THE POOR TO CIVIL COURTS

In *Boddie v. Connecticut*,<sup>29</sup> *United States v. Kras*,<sup>30</sup> and *Ortwein v. Schwab*,<sup>31</sup> the Supreme Court rejected arguments that all persons have a constitutional right to access the courts to pursue civil claims, even when they cannot afford to pay court filing fees. The Court decided these three cases during the same period that it decided the cases involving the First Amendment right of groups and organizations to access the civil courts.<sup>32</sup> Thus, while the Court recognized a First Amendment right of groups and organizations to access courts, it denied the same right to poor persons based on their inability to pay civil court filing fees.

#### A. *Boddie v. Connecticut*

In *Boddie v. Connecticut*, the Supreme Court ignored plaintiffs' First Amendment argument, but held that due process prohibits states from denying welfare recipients access to court to pursue divorce actions due to their inability to pay court filing fees.<sup>33</sup> In this case, a class action was filed in federal district court alleging that female welfare recipients in Connecticut were unconstitutionally prohibited from pursuing divorce actions in Connecticut state courts due to their inability to pay court filing fees.<sup>34</sup> Plaintiffs argued that this prohibition violated their First Amendment right to petition the government for redress of grievances and their Fourteenth Amendment rights to due process and equal protection.<sup>35</sup> The three-judge district court panel dismissed plaintiffs' complaint because it found no fundamental right to access court without paying the required filing fees.<sup>36</sup> Plaintiffs appealed the district court's decision, and the Supreme Court noted probable jurisdiction and transferred the case to its appellate docket.<sup>37</sup>

Plaintiffs made the same First Amendment argument to the Supreme Court, adding that the constitutional right to access court is applicable to the states under the Fourteenth Amendment's Due Process Clause.<sup>38</sup> They

---

29. *Boddie v. Connecticut*, 401 U.S. 371, 382–83 (1971).

30. *Kras*, 409 U.S. at 447.

31. *Ortwein v. Schwab*, 410 U.S. 656, 659–60 (1973).

32. The Supreme Court later recognized that individual persons also have a First Amendment right to file civil court actions under the Petition Clause. See *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).

33. *Boddie*, 401 U.S. at 374.

34. *Boddie v. Connecticut*, 286 F. Supp. 968, 970 (D. Conn. 1968).

35. *Id.*

36. *Id.* at 973–74.

37. *Boddie v. Connecticut*, 395 U.S. 974 (1969).

38. Brief of Appellants at 26, 29, *Boddie v. Connecticut*, 401 U.S. 371 (1971) (No. 27).

further asserted that the district court ignored their First Amendment argument despite the fact that it was briefed and argued there.<sup>39</sup>

The Supreme Court ruled in favor of the poor plaintiffs but ignored their First Amendment argument.<sup>40</sup> Instead, the Court concluded that the importance of marriage in “society’s hierarchy of values and the concomitant state monopolization of the means for” dissolving the marital relationship compelled its due process decision.<sup>41</sup> The Court was careful to point out that its decision only applied to indigent persons seeking divorce, and it did not decide that all persons have a due process right to access courts in all circumstances.<sup>42</sup> In his concurring opinion, Justice Brennan asserted that the due process right to be heard requires that indigent persons not be denied access to courts by filing fee requirements when they seek to vindicate any right under federal or state law.<sup>43</sup> Although Justice Brennan reached his conclusion through the Due Process Clause rather than the First Amendment, he was the first Justice to recognize a constitutional right of poor people to access civil courts to vindicate their legal rights.

#### B. *United States v. Kras*

In *Kras*, the Supreme Court held that neither due process nor equal protection allowed Robert Kras to proceed to bankruptcy discharge without paying court filing fees.<sup>44</sup> Mr. Kras sought to file a petition for bankruptcy in federal district court, but the clerk refused his petition because he could not pay the filing fees.<sup>45</sup> Mr. Kras filed a motion for leave to file his petition in bankruptcy without prepayment of filing fees due to his indigency.<sup>46</sup>

The district court judge who considered Mr. Kras’s motion held that to not allow Mr. Kras to file his bankruptcy petition because of his inability to pay court filing fees violated equal protection under the Fifth Amendment’s Due Process Clause.<sup>47</sup> The judge relied on *In re Smith*,<sup>48</sup> which held that access to the courts is a fundamental interest and court filing fees are not a compelling government interest that satisfy equal

---

39. *Id.* at 30.

40. *Boddie v. Connecticut*, 401 U.S. 371, 374, 383 (1971).

41. *Id.* at 374.

42. *Id.* at 382–83.

43. *Id.* at 387–88 (Brennan, J., concurring).

44. *United States v. Kras*, 409 U.S. 434, 446, 450 (1973).

45. *In re Kras*, 331 F. Supp. 1207, 1208 (E.D.N.Y. 1971).

46. *Id.* at 1208–09.

47. *Id.* at 1212.

48. *Id.* at 1210–11.

protection.<sup>49</sup> The United States appealed the district court's decision, arguing that the waiver of filing fees was unconstitutional, and the Supreme Court noted probable jurisdiction.<sup>50</sup>

In the Supreme Court, Mr. Kras argued that "there is only one right at issue in this case and that is the right to access the courts."<sup>51</sup> He asserted that this right derived from the Due Process Clause of the Fifth Amendment and its equal protection component.<sup>52</sup>

The Supreme Court reversed the district court and prohibited Mr. Kras from obtaining a bankruptcy discharge until he paid the court filing fees.<sup>53</sup> In doing so, the Court mischaracterized the district court's decision as holding that "a discharge in bankruptcy was a 'fundamental interest.'"<sup>54</sup> In fact, the district court held that access to court is a fundamental interest.<sup>55</sup> As a result, the Supreme Court found no fundamental interest to be implicated in Mr. Kras' bankruptcy petition, explaining: "We see no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy."<sup>56</sup> The Court also reasoned that, unlike the plaintiffs in *Boddie*, Mr. Kras had alternative remedies available to him. It stated, "In contrast with divorce, bankruptcy is not the only [legal] method available to a debtor for the adjustment of his legal relationship with his creditors."<sup>57</sup> In dissent, Justice Marshall viewed the case as involving the right to access the courts, the only forum in our legal system empowered to authoritatively resolve a person's claim of right under law.<sup>58</sup> For that reason, Justice Marshall would have granted Mr. Kras his "day in court," regardless of his inability to pay court filing fees.<sup>59</sup>

---

49. In *Smith*, the district court considered the constitutionality of the filing fees in a bankruptcy case as applied to an indigent person and found that access to court is a fundamental interest and the government's requirement of a filing fee is not a compelling government interest. *In re Smith*, 323 F. Supp. 1082, 1087-88 (D. Colo. 1971). As a result, the court held that the equal protection component of the Fifth Amendment Due Process Clause allowed Ms. Smith to proceed in the bankruptcy case without paying a filing fee. *Id.* at 1085. Due to its reliance on equal protection, the court did not consider Ms. Smith's argument that the filing fee also violated her First Amendment right to petition for redress of grievances. *Id.*

50. *United States v. Kras*, 405 U.S. 915 (1972).

51. Brief for Appellee at 16, *United States v. Kras*, 409 U.S. 434 (1973) (No. 71-749).

52. *Id.* at 21-22.

53. *Kras*, 409 U.S. at 450.

54. *Id.* at 440.

55. The court stated "that what is at stake here is not simply bankruptcy but access to court, a fundamental interest." *In re Kras*, 331 F. Supp. 1207, 1214 (E.D.N.Y. 1971).

56. *Kras*, 409 U.S. at 445.

57. *Id.*

58. *Id.* at 462-63 (Marshall, J., dissenting).

59. *Id.*

*C. Ortwein v. Schwab*

In *Ortwein v. Schwab*, the Supreme Court held that welfare recipients were denied neither due process nor equal protection when they were barred from pursuing civil cases in Oregon state courts due to their inability to pay court filing fees.<sup>60</sup>

In this case, the Oregon state welfare department's reduction of benefits to two welfare recipients was upheld after the recipients contested the reductions in administrative hearings conducted by the welfare department.<sup>61</sup> Under Oregon law, the welfare recipients had a right to seek judicial review of these administrative decisions in the Oregon Court of Appeals.<sup>62</sup> Each moved to proceed *in forma pauperis* to seek waiver of their filing fees in the court of appeals, but their motions were denied without opinions.<sup>63</sup> They then sought a writ of mandamus from the Supreme Court of Oregon to order the Oregon Court of Appeals to waive their filing fees and review their administrative decisions pursuant to state law.<sup>64</sup>

The welfare recipients argued in the Supreme Court of Oregon that they were entitled to have their filing fees waived based on their First Amendment right to petition the government for redress of grievances and their Fourteenth Amendment rights to due process and equal protection.<sup>65</sup> The Supreme Court of Oregon found that the First Amendment "is not relevant to our present inquiry"<sup>66</sup> and held that the failure to provide judicial review of state administrative decisions does not violate due process.<sup>67</sup> The Oregon Supreme Court further held that the right to obtain judicial review of an adverse decision of the state welfare department is not a fundamental right; therefore, equal protection is not violated by making such right dependent upon paying a court filing fee.<sup>68</sup> The Oregon Supreme Court concluded that the welfare recipients must pay the required fees to file their administrative review cases.<sup>69</sup> The welfare recipients appealed to the United States Supreme Court where the Court affirmed without considering either briefs or argument.<sup>70</sup>

---

60. *Ortwein v. Schwab*, 410 U.S. 656, 660–61 (1973).

61. *Id.* at 656–57.

62. *Id.* at 658; OR. REV. STAT. § 183.480(2) (1971).

63. *Ortwein*, 410 U.S. at 658.

64. *Id.*

65. *Ortwein v. Schwab*, 498 P.2d 757, 758–59 (Or. 1972).

66. *Id.* at 759.

67. *Id.* at 760–61.

68. *Id.* at 761.

69. *Id.* at 761–62.

70. *Ortwein v. Schwab*, 410 U.S. 656, 663 (1973).

The United States Supreme Court affirmed the Oregon Supreme Court's decisions based on *United States v. Kras*.<sup>71</sup> It found that, like the petitioner in *Kras* who had alternative remedies to adjust relationships with his creditors, the welfare recipients had alternative redress because their welfare benefit reductions were reviewed in state agency hearings.<sup>72</sup> As a result, the Court found that the welfare recipients were not denied due process.<sup>73</sup> In a conclusory footnote, the Court stated that its due process analysis demonstrated that the welfare recipients' First Amendment rights to petition for redress "have been fully satisfied."<sup>74</sup> However, a hearing before a state administrative agency is not equivalent to obtaining judicial review of the agency's decision in the appellate courts of the state as is explicitly allowed by Oregon state law. Access to the Judicial Branch of government to enforce rights under state law is certainly one of the basic protections afforded under the First Amendment right to petition the government for redress of grievances. A state administrative hearing does not satisfy the important First Amendment right to access the courts to seek judicial review of the decision rendered at the state administrative hearing.

As to equal protection, the Supreme Court found no fundamental interest or suspect class adversely affected by the court filing fee requirements and concluded that the applicable standard of review is that of rational justification.<sup>75</sup> Since the state court filing fees provide revenue that offsets the costs of operating the Oregon court system and is an effective means to achieve this goal, the Court found the requirement of rationality met and equal protection satisfied.<sup>76</sup> The United States Supreme Court affirmed the decision of the Supreme Court of Oregon that welfare recipients must pay the court filing fees as a condition of having their administrative review cases heard in the Oregon Court of Appeals.<sup>77</sup>

#### IV. UNITED STATES SUPREME COURT DECISIONS ON CIVIL COURT FILING FEES AS THEY APPLY TO THE POOR AND THEIR CONSTITUTIONAL RIGHT TO ACCESS THE COURTS

As a composite, the United States Supreme Court's decisions in *Boddie*, *Kras*, and *Ortwein* indicate that courts should consider two factors in determining the constitutionality of civil court filing fees as they apply to poor persons who cannot afford to pay them:

---

71. *Id.* at 656.

72. *Id.* at 659-60.

73. *Id.*

74. *Id.* at 660 n.5.

75. *Id.* at 660.

76. *Id.*

77. *Id.* at 656, 661.

- First, does the underlying court case that a poor person seeks to file implicate a fundamental constitutional interest? If so, this factor favors the waiver of the fee under the United States Constitution.
- Second, does judicial review represent the exclusive means available to protect the person's fundamental constitutional interest? If so, this factor also favors the waiver of the fee under the United States Constitution.

In *Boddie*, both of these factors favored the welfare recipient members of the plaintiff class. As a result, the filing fees for divorce actions as applied to plaintiffs who could not afford to pay them were held unconstitutional under the Due Process Clause of the Fourteenth Amendment. In contrast, neither of these factors favored the poor persons seeking to file civil court actions in *Kras* and *Ortwein*, so plaintiffs were required to pay the court filing fees to have their cases heard in court. *Kras* and *Ortwein* yielded the shocking outcomes of poor persons being denied access to the Judicial Branch of government to seek redress of their grievances based on their inability to pay court filing fees.

The other shocking aspect of *Boddie*, *Kras*, and *Ortwein* as a triumvirate of cases is that the Supreme Court ignored arguments made in each case that all persons have a constitutional right to seek enforcement of their legal rights in civil courts.<sup>78</sup> The Court also did not acknowledge its own decisions recognizing a First Amendment right of groups and organizations to pursue civil court claims under their right to petition the government for redress of grievances, even though these issues were raised in *Boddie* and *Ortwein*.<sup>79</sup> The Supreme Court should have addressed these arguments and precedents squarely to determine whether the poor have a constitutional right to access courts to enforce their legal rights, even when they cannot afford to pay court filing fees. At the very least, the Supreme Court should have determined whether the government had a compelling interest to impose civil court filing fees under equal protection since these fees limited the poor persons' exercise of their First Amendment rights to access courts.<sup>80</sup>

---

78. In *Boddie* and *Ortwein*, appellants argued in the United States Supreme Court that they had a constitutional right under the First Amendment to access the courts to petition the government for redress of grievances. *Boddie v. Connecticut*, 401 U.S. 371, 373–74 (1971); *Ortwein*, 410 U.S. at 659–60. In *Kras*, the appellee argued that he had a right to access the courts derived from the Due Process Clause of the Fifth Amendment and its equal protection component. *United States v. Kras*, 409 U.S. 434, 435 (1973).

79. See *supra* Part III.

80. See *NAACP v. Button*, 371 U.S. 415, 438–39 (1963).

V. VOTING RIGHTS ANALOGY OF THE RIGHT TO ACCESS COURT BY  
PERSONS WHO CANNOT AFFORD TO PAY FILING FEES

The First Amendment right to access courts, like the right to vote, should not allow the payment of a government-imposed fee as a precondition for exercising a constitutional right. In 1966, the Supreme Court decided *Harper v. Virginia State Board of Elections* and held that the requirement of the payment of a poll tax in order to vote in a state election violated equal protection.<sup>81</sup> In *Harper*, the State of Virginia imposed an annual poll tax on residents who were twenty-one years of age and older, and if the tax was not paid, a delinquent resident could not vote in state elections.<sup>82</sup> The Court in *Harper* noted that the Supreme Court had long recognized that voting is preservative of all rights.<sup>83</sup> The Court found that government classifications restraining the right to vote must be closely scrutinized under equal protection because voting is a fundamental interest.<sup>84</sup> The Court concluded that the Fourteenth Amendment's Equal Protection Clause is violated whenever the affluence of voters or the payment of any fee is an electoral standard.<sup>85</sup>

As the right to vote provides citizens the constitutional right to choose their representatives in the executive and legislative branches, the First Amendment provides Americans the constitutional right to access the Judicial Branch of government to seek redress of grievances.<sup>86</sup> The Supreme Court has also long recognized that, like the right to vote, access to courts protects all legal rights: "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."<sup>87</sup> Under equal protection, the payment of a court filing fee should not be a precondition for a poor person to exercise the constitutional right to pursue civil legal claims in courts, just as the affluence of a voter or the payment of any fee should not limit the right to vote.

---

81. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966). *Harper* is a voting rights case involving a similar issue as *Boddie*, *Kras*, and *Ortwein*: whether the right to vote in a state election can be conditioned on the payment of a fee. The issue in *Harper* is analogous to whether poor persons can be constitutionally required to pay filing fees to access courts.

82. *Id.* at 664 n.1.

83. *Id.* at 667 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

84. *Id.* at 670.

85. *Id.* at 666.

86. See *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972).

87. *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

## CONCLUSION

The United States Supreme Court has consistently recognized a First Amendment right to access courts to pursue redress of grievances for various groups, organizations, and persons: the NAACP;<sup>88</sup> labor unions;<sup>89</sup> trucking companies;<sup>90</sup> restaurant owners;<sup>91</sup> major motion-picture studios;<sup>92</sup> an industrial general contractor;<sup>93</sup> and a former police chief of a borough in Pennsylvania.<sup>94</sup> However, the Supreme Court has not only declined to provide this First Amendment protection to poor persons seeking to file civil claims in courts, but it has also declined to address the issue when it has been directly raised before it.<sup>95</sup> As a result, poor persons are denied the protections of a First Amendment right that is available to all other Americans: The right to pursue a civil claim in court.<sup>96</sup>

Poor persons who cannot afford to pay civil court filing fees deserve better. They should be accorded the same First Amendment right to access the courts that is available to other groups, organizations, and persons. The poor will then be able to fully participate in the Judicial Branch of government to exercise their right to seek redress of their legal grievances.

---

88. See *NAACP v. Button*, 371 U.S. 415, 428–30 (1963).

89. See generally *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 16–19 (1964); *United Mine Workers of Am., Dist. 12. v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967).

90. See generally *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971).

91. *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741–43 (1983).

92. *Pro. Real Est. Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 52, 62 (1993).

93. *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 535–37 (2002).

94. *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).

95. See *supra* notes 49, 51 and accompanying text.

96. The author is not the first person to assert that the poor are denied some constitutional rights that are available to other persons. See Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 *FORDHAM URB. L.J.* 629 (2008) (asserting that the poor are denied the protections of certain constitutional rights that are available to other persons).

