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Dismissing the Class: A Practical Approach to the Class Action Restriction on the Legal Services Corporation

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The class action lawsuit has emerged as an effective legal device for addressing common harms. Claimants who might not litigate their claims individually are empowered by the opportunity to speak with one voice. The class action device, however, has been made largely unavailable to legal services lawyers representing the poor. Congressional restrictions enacted in 1996 prohibit legal services organizations that receive federal funding from the Legal Services Corporation from using that funding to initiate or participate in any class action lawsuit. This article examines the social, legal and professional impact of the class action restriction on the Legal Services Corporation and on the recipients of its funding. This article concludes that the class action restriction has adversely affected the poor and, consequently, should be reconsidered. In the event that the class action restriction is not revised or repealed, this article suggests practical alternative strategies for delivering effective group representation to the poor.

I. Introduction

Common harms inspire collective action. Defective automobile tires, toxic dietary supplements and fraudulent accounting practices are just a few of the many harms that motivate the masses to act collectively. When such common harms strike, the affected individuals often turn to the class action lawsuit as a means of seeking redress. The class action lawsuit empowers the affected class, while enhancing the efficiency of the litigation system. Yet, despite the benefits of the class action lawsuit to both claimants and the courts, this legal tool has effectively been made unavailable to legal services lawyers representing the poor.

The poor have been unable to utilize the class action lawsuit as a legal mechanism for instituting change because Congress has restricted the vast majority of legal services organizations from engaging in class action lawsuits. Legal services organizations—non-profit providers of free legal services—are a key source of legal representation for the poor. Many of these organizations depend on federal funds distributed by the Legal Services Corporation (the “LSC”), a private non-profit corporation established by Congress. In 1996, in addition to reducing dramatically the amount of federal funding distributed from the LSC to legal services organizations, Congress imposed significant restrictions (the “1996 Restrictions”) on the types of activities for which LSC funds could be used. One of these restrictions prohibits LSC-funded legal services organizations from using federal funds to initiate or participate in any

class action lawsuit.¹

As a result of the 1996 legislation, many class action lawsuits maintained by legal services offices were dropped or referred to private firms.² It is probable that since 1996, legal services lawyers have been prevented from filing a significant number of potential class action lawsuits. Class action lawsuits were seen by some as an effective and efficient tool available to legal services lawyers in representing their clients. Class action lawsuits enabled legal services lawyers to aggregate small individual claims that addressed common harms, rather than litigating them individually. Class action lawsuits, however, were more than a method of legal aid for many in the poor community. They also were a conduit through which the poor's political voices could be heard by often intimidating regulatory agencies.

The impacts of the class action restriction have resonated throughout the public interest legal world.³ The 1996 Restrictions implicate not only the poor community's constitutional right of access to the courts, but also private donors' First Amendment freedom of speech rights. The 1996 Restrictions have also raised a number of ethical dilemmas for legal services lawyers. Finally, the scarce resources of legal services offices have been stretched even further in an effort to comply with the 1996 Restrictions.

This article argues that the 1996 Restrictions on class action lawsuits by LSC-funded organizations have adversely impacted the delivery of legal services to the poor. The article will offer a critical analysis of the value of class action lawsuits as a legal tool for the poor and will also recommend practical strategies that LSC-funded legal services programs can use to responsibly institute class actions.

Part II of this article will describe the development of the Legal Services Corporation and the 1996 Restrictions. Part III will analyze and discuss the legal and social benefits and drawbacks of the class action device. Next, Part IV will assess the social, legal, and professional issues that have arisen as a result of the 1996 Restrictions. Lastly, Part V will

1. See 45 C.F.R. § 1617.3 (2000) ("Recipients [of LSC funding] are prohibited from initiating or participating in any class action"). A "class action" is defined as "a lawsuit filed as, or otherwise declared by the court having jurisdiction over the case to be, a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure or the comparable State statute or rule of civil procedure applicable in the court in which the action is filed." 45 C.F.R. § 1617.2(a) (2000).

2. See *infra* Part IV-A.

3. For a description of studies examining the effects of the 1996 Restrictions, see Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy By Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L.J. 873 (2002) [hereinafter Abel & Udell, *If You Gag the Lawyers*].

present multi-faceted alternatives to the current system. Towards that end, short-term goals, such as revising the 1996 Restrictions, will be presented along with long-term strategies, such as community education, that will refocus the LSC towards providing legal assistance that better addresses the problems of the poor community. Part VI will conclude by recommending that the class action restriction be repealed or that, in the absence of repeal, the legal services community develop an alternative means of advocacy to fill the void created by the class action restriction.

II. The Legal Services Corporation and the 1996 Restrictions

Before assessing the impact of the LSC's class action restriction on the delivery of legal services to the poor, it is helpful to review the history of the LSC and the 1996 Restrictions.

A. *The History of the Legal Services Corporation*

The LSC is a private, non-profit corporation that Congress established in 1974 for "the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."⁴ The concept of the LSC as a vehicle for providing federal funding to support legal services for the poor grew out of the Legal Services Program of the Office of Economic Opportunity, an important creation of President Lyndon B. Johnson's War on Poverty Acts.⁵ Today, the LSC distributes federal funds to qualifying legal services organizations throughout the United States. The President of the United States appoints the eleven members of the LSC's board of directors, and the U.S. Senate confirms them.⁶ By law, the LSC's board of directors must be bipartisan, as no more than six of its members may be of the same political party.⁷

4. 42 U.S.C. § 2996b(a) (1994). For a more detailed history of the LSC, see Charles J. Cooper and Michael A. Carvin, *The Price of "Political Independence": The Unconstitutional Status of the Legal Services Corporation*, 4 B.U. PUB. INT. L.J. 13 (1994); Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681 (1976); Marie A. Failing & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST L.J. 1 (1984) [hereinafter Failing & May, *Litigating Against Poverty*]; and John A. Dooley & Alan W. Houseman, *LEGAL SERVICES HISTORY* (1984).

5. See CHARLES K. ROWLEY, *THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES* 6-11 (1992); William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation From the 1960's to the 1990's*, 17 ST. LOUIS U. PUB. L. REV. 241 (1998) [hereinafter Quigley, *The Demise of Law Reform and the Triumph of Legal Aid*].

6. For rules governing the LSC, see Legal Services Corporation, at http://www.lsc.gov/welcome/wel_who.htm (last visited May 16, 2005).

7. *Id.*

The LSC does not, however, deliver legal services through a centralized delivery system.⁸ Instead, the LSC funds approximately one hundred eighty local programs, which serve one to two million indigent clients annually.⁹ The boards of these local programs hire their own executive directors, who in turn hire a staff of attorneys and non-attorneys. In addition to LSC funding, many local programs also receive funds from private sources, such as law firms and corporations. Other funding sources include state and local governments, Interest on Lawyer Trust Accounts (“IOLTA”) programs, and individual donors.¹⁰ When an organization accepts LSC funding, however, it must abide by both the LSC’s internally-created regulations and any Congressional mandates.¹¹

In an attempt to create a separate and distinct organization to deliver legal services to the poor using federal funds, Congress required that the LSC “be kept free from the influence of or use by it of political pressures.”¹² In the years preceding the creation of the LSC, some Congressmen opposed burdening the LSC with any restrictions that would prevent recipients of its funding from pursuing cases based on their subject matter. Such restrictions, they contended, could prevent the poor from obtaining access to the legal system, resulting in the mere façade of justice. In a 1973 Congressional debate regarding the creation of the LSC, Pennsylvania Representative Edward Biester argued that any restrictions could “discourage lawyers from assuming controversial cases, the kinds of cases which may, for instance, question the actions of those who exert power or influence in the community.”¹³

Despite attempts to immunize the LSC from political forces, the controversy over the use of federal funds to provide legal assistance to the poor has continued for decades. While the Carter administration increased funding for the LSC and generally supported its goals, the Reagan administration attempted to eliminate the LSC completely in 1982.¹⁴ Although its efforts failed in that respect, the Reagan

8. See Fiscal Year 1997 Testimony of House of Representative Appropriations For Commerce, Justice, State, and Judiciary, before the Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies of the House Comm. on Appropriations, 104th Cong. 208 (1996) (statement of Alexander D. Forger, President, Legal Services Corporation).

9. See *id.*

10. See 45 C.F.R. §§ 1610.2(d)-(f) (2000) (defining such sources as “non-LSC funds”).

11. See *id.* § 1610.1 (2000).

12. 42 U.S.C. § 2996(5) (1994). See also *id.* § 2996e(b)(3) (prohibiting the LSC from “interfer[ing] with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility”).

13. 119 Cong. Rec. 20,688 (1973).

14. See Quigley, *The Demise of Law Reform and the Triumph of Legal Aid*, *supra*

administration succeeded in significantly reducing the LSC's annual budget and making "a number of other changes ostensibly designed to rein in the perceived left-wing radicals allegedly in control of legal services programs across the country."¹⁵

After the November elections of 1994, efforts to dismantle the LSC were reborn when Republicans regained the majority in both the U.S. House of Representatives and the U.S. Senate. As the 1996 presidential election neared, Congress and President Clinton agreed that the LSC would continue to exist, but with drastically reduced funding and severe restrictions on the types of legal actions in which it could be involved.¹⁶ For fiscal year 1996, the LSC's budget was reduced from \$400 million to \$278 million.¹⁷

To the surprise of many historic supporters of the LSC, the administration of George W. Bush has been strongly supportive of the program. In fiscal year 2002, for example, the Bush administration requested that Congress allocate \$329.3 million to the LSC.¹⁸ The House Appropriations Subcommittee accepted the President's request, and Congress passed his proposed allocation with almost no debate.¹⁹ Despite its financial support, however, the Bush administration has not advocated the repeal of the many restrictions, including those imposed by Congress on the LSC in 1996.

B. The 1996 Congressional Restrictions on the Legal Services Corporation

In the fall of 1996, after months of contentious debate, the Republican-controlled U.S. Congress and President Clinton reached a compromise on the future of the LSC. Under the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (the "1996 OCRAA"),²⁰ the LSC was subjected to a thirty percent reduction in federal funding and nineteen new restrictions on the types of clients and cases with which grantees of LSC funding could be involved.²¹ These restrictions applied

note 5, at 256. For further discussion of the Reagan administration's opposition to the LSC, see Joseph A. Dailing, *Their Finest Hour: Lawyers, Legal Aid and Public Service in Illinois*, 16 N. ILL. U. L. REV. 7 (1995) [hereinafter Dailing, *Their Finest Hour*].

15. See Dailing, *Their Finest Hour*, *supra* note 14, at 21.

16. See *id.* at 23-24.

17. *Legal Services Corporation*, American Bar Association, available at <http://www.abanet.org/poladv/priorities/lsc.html> (last visited May 16, 2005).

18. See *id.*

19. See *id.*

20. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321.

21. See *id.* § 504. It should be noted that Congress retained these restrictions for Fiscal Year 1997.

to any legal services provider that received LSC funding.²² Although the restrictions allowed LSC-funded legal service providers to use private funds to participate in restricted activities, such as class action lawsuits, they could only do so using facilities that were physically separate from those in which LSC funds were used.²³

The 1996 Restrictions explicitly prohibit grantees of LSC funding from filing any class action lawsuits on behalf of clients, regardless of the subject matter or type of defendant.²⁴ Efforts to restrict the use of government funds for class action lawsuits have been mirrored at the state level. In Texas, for example, funds from the Texas Interest on Lawyers Accounts and from the portion of court filing fees reserved for the provision of civil services to low-income Texas residents can no longer be used in connection with any state or federal class action lawsuit.²⁵

In addition to the class action prohibition, the 1996 Restrictions also ban legal services attorneys from attempting to influence federal, state, or local government activities. Under the legislation, grantees of LSC funds are not permitted to lobby for or against any executive order or any federal, state, or local government regulation.²⁶ Grantees are also prohibited from attempting to influence the passage or defeat of any legislation, constitutional amendment, or referendum.²⁷

Grantees of LSC funding are also severely restricted from accepting particular cases because of their subject matter. The LSC statute prior to 1996 prohibited grantees from accepting criminal cases, fee-generating cases, and desegregation cases, among others. The 1996 Restrictions, however, extended the prohibition to cases involving redistricting and

22. *See id.* § 504(d)(1).

23. *See* 45 C.F.R. §1610.8 (2000). The impact of this requirement, however, may have been softened somewhat by the decision in *Velazquez v. Legal Serv. Corp.*, 349 F. Supp. 2d 566 (E.D.N.Y. 2004). In that case, the court issued a preliminary injunction in favor of the three plaintiff legal services providers. *Id.* The injunction permitted some overlap between facilities involving LSC-funded providers and those involving non-LSC-funded providers so long as certain guidelines were followed. *Id.* It is unclear, however, how legal services providers other than the three plaintiff organizations in this action will be able to utilize the court's decision in their operations. *Id.*

24. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, § 504(a)(7). Prior to the enactment of the 1996 legislation, LSC grantees could participate in class action suits. The original LSC Act, however, only allowed such participation with the permission of the director of the local legal services office. 42 U.S.C. § 2996e(d)(5) (1994).

25. *See* Elisabeth Jacobs, *LSC Restriction Fact Sheet #1*, Brennan Center for Justice, at http://www.brennancenter.org/programs/pov/factsheet_classact.html (May 10, 2000).

26. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, § 504(a)(2).

27. *See id.* § 504(a)(4).

most cases related to assisted suicide.²⁸ The 1996 Restrictions also prohibit all grantees from participating in any welfare-reform advocacy.²⁹ Consequently, under the statute, a legal services lawyer representing clients before certain regulatory agencies would only be able to seek relief according to those agencies' current regulations and could not challenge the validity of the regulations themselves.

Reaction from legal services attorneys to the 1996 Restrictions was swift and condemning. One attorney working for a legal services organization commented that the "LSC [was] caving in to budgetary blackmail," and that is why it failed to mount a serious challenge to the new restrictions.³⁰ Several legal commentators and academics have argued that grantees of LSC funding should challenge the constitutionality of the 1996 Restrictions.³¹ It has even been claimed that some local legal services organizations have simply ignored the class action restriction.³²

In response to the call by many in the legal community to challenge the 1996 Restrictions in court, several legal services advocates litigated

28. See Assisted Suicide Funding Restriction Act of 1997, Pub. L. No. 105-12, 111 Stat. 23, § 5(b)(1)(E); see also 45 C.F.R. § 1643.3 (2000) ("No recipient may use LSC funds to assist in, support, or fund any activity or service which has a purpose of assisting in, or to bring suit or provide any other form of legal assistance for the purpose of: (a) [s]ecuring or funding any item, benefit, program, or service furnished for the purpose of causing, or the purpose of assisting in causing, the suicide, euthanasia, or mercy killing of any individual; (b) [c]ompelling any person, institution, or governmental entity to provide or fund any item, benefit, program, or service for such purpose; or (c) [a]sserting or advocating a legal right to cause, or to assist in causing, the suicide, euthanasia, or mercy killing of any individual").

29. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, § 504(a)(16) (No funds are to be used by grantees to "initiate[] legal representation, or participate[] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system").

30. See David E. Rovella, *Legal Aid Lawyers Roll Dice with New Lawsuit*, NAT'L L.J., Feb. 10, 1997, at A6.

31. See *id.*

32. See Testimony of Edwin Meese III, Hearing before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary of the House of Representatives, 107th Cong. (2d Sess.), February 28, 2002 ("Another example of the LSC's Orwellian interpretation of its own restrictions involves Congress's prohibition of any LSC funds going to any individual or group that 'initiates or participates in a class action.' Despite this clear prohibition against class-action litigation, LSC grantees have filed class action suits in Georgia and California and LSC has taken no action to stop them. In dismissing complaints from Members of Congress and watchdog organizations, LSC maintained that the California action was not a class action but a 'representative action' and, as such, did not fall under the congressional restrictions. As this Subcommittee knows, 'representative actions' are the functional equivalent of class actions in several states. Indeed, both *Black's Law Dictionary* and *Ballentine's Law Dictionary* agree that 'representative action' and 'class action' are interchangeable terms. Apparently, Bill Clinton's artful definitions live on in the LSC Board members he appointed.")

Legal Services Corporation v. Velazquez,³³ which was ultimately decided by the U.S. Supreme Court in 2001. In the action, Carmen Velazquez, a grandmother living in the Bronx, challenged the 1996 OCRAA and its restrictions.³⁴ Specifically, Velazquez sought a preliminary injunction on the ground that the 1996 Restrictions limited her freedom of speech. The U.S. Supreme Court held that the prohibition on challenges to existing law was unconstitutional because it impermissibly discriminated on the basis of viewpoint by disfavoring those who opposed the *status quo*.³⁵ Writing for the majority, Justice Kennedy concluded that the 1996 Restrictions distorted the judicial system by altering the traditional role of the attorneys and by “prohibit[ing] speech and expression upon which courts must depend for proper exercise of the judicial power.”³⁶ The U.S. Supreme Court, therefore, struck the portion of the 1996 Restrictions concerning challenges by legal services attorneys to existing welfare law. The Court concluded that the 1996 Restrictions prohibited the lawyer from answering and, therefore, violated the First Amendment rights of clients utilizing LSC-funded organizations. Despite the *Velazquez* decision and other more recent decisions that limit the breadth of the 1996 Restrictions, the class action restriction remains.³⁷

III. The Class Action as a Legal Device

The class action evolved as an equitable device for joining numerous litigants with similar claims where joinder was not otherwise legally possible.³⁸ In the English courts, compliance with compulsory joinder rules often frustrated litigants and forced the separation of cases even when consolidation would have allowed for a better administration of justice.³⁹ In the American legal system, the class action serves multiple purposes. One purpose of the class action is to allow for more efficient caseload management by the courts by avoiding a multiplicity of lawsuits that concern one legal issue and set of facts.⁴⁰ Towards that

33. *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533 (2001).

34. *See* Brief for Respondent at 3, *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533 (2001) (No. 99-603 & No. 99-960).

35. *See Velazquez*, 531 U.S. at 546.

36. *See id.* at 545.

37. *See infra* Part IV-B.

38. *See* *Hansberry v. Lee*, 311 U.S. 32, 41-42 (1940); *see generally* HERBERT B. NEWBERG & ALBA CONTE, *CLASS ACTIONS*, (3d ed., McGraw-Hill 1992) (1977) [hereinafter *NEWBERG & CONTE*]. For an excellent history of the class action device, *see* STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (Yale University Press, 1987) [hereinafter *YEAZELL*].

39. *See* YEAZELL, *supra* note 38, at 4.

40. *See* *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 550-51 (1974) (describing the class action as a legal tool of convenience and economy).

end, the class action effects the “protection of the defendant from inconsistent obligations . . . [and] the provision of a convenient and economical means of disposing of similar lawsuits.”⁴¹

A. Legal and Social Benefits of the Class Action Device

Class actions create better access to the courts.⁴² The class action device accomplishes this ideal by allowing individuals to bring similar claims as a group, often in cases where the litigants would have been unable to bring their claims individually.⁴³ The Federal Rules of Civil Procedure authorize a class action in cases where common issues predominate within a class and where the class action is a superior adjudicating mechanism when compared to other procedures.⁴⁴ The U.S. Supreme Court has recognized that the drafters of the Federal Rule authorizing the increased use of class actions were considering “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”⁴⁵

In the past, the class action device has been used effectively to enforce the rights and claims of the poor.⁴⁶ In the context of the disabled

41. U. S. Parole Comm’n v. Geraghty, 445 U.S. 388, 402-03 (1980).

42. See Failing & May, *Litigating Against Poverty*, *supra* note 4, at 17 (asserting that “group representation devices such as class actions are often the most effective way of representing an individual poor person. . . . The individual lawsuit . . . cannot remedy past and future harassment or restore the political balance of power between the institution and the individual. By contrast, the class suit can secure relief for the client that is not only longer-lasting but also broader-based”); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1881 (2002) (“Rules enabling liberal party joinder and representative litigation have equalizing consequences because these rules essentially allow parties to pool resources in prosecution of a common claim”); see generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974) (arguing that class actions remedy some of the disadvantages faced by poor litigants).

43. See Eisen v. Carlisle, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting) (finding the class action to be “one of the few legal remedies the small claimant has against those who command the status quo”).

44. FED. R. CIV. P. 23.

45. Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 617 (1997), *citing generally* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967).

46. See Barbara Rabinowitz, *Servicing the Poor*, MASS. LAWYERS WKLY., May 10, 1993, at 29 (discussing the ability of Boston’s LSC legal services programs to use class actions to attain benefits for the poor); William J. Dean, *Success Story*, 5/29/93 N.Y.L.J. 3 (noting the use of class actions to aid the homeless); Lynn Pierce, *Trend and Development: Raising the Roof on Community Housing for People with Disabilities*, 6 APPEAL 22 (2000) [hereinafter Pierce, *Trend and Development*]; and Gordon Bonnyman, *Adapting Without Accepting: The Need for a Long-Term Strategy for “Full Service” Representation of the Poor*, 17 YALE L. & POL’Y REV. 435, 437 (1998) [hereinafter Bonnyman, *Adapting Without Accepting*] (asserting that “we cannot forget why it is that the particular advocacy activities that Congress prohibited remain so indispensable to the

poor, the ability of LSC-funded legal services providers to litigate class actions is especially important because the disabled are often unable to assert their legal rights individually. As one commentator asserted, “[w]hen the plaintiff is poor, marginalized, legally incompetent, ignorant of legal rights, or unable to assert rights for fear of sanctions or otherwise, and these disabilities are shared by others similarly situated, the class action may be the only effective means to obtain judicial relief.”⁴⁷

Poor children have also benefited from class action lawsuits filed on their collective behalf. For example, Gordon Bonnyman, Managing Attorney at the Tennessee Justice Center, noted how a class action filed on behalf of children who were also Medicaid recipients forced the reform of the state’s administration of medical services to the poor.⁴⁸ A similar class action forced the Tennessee welfare program to institute quality control devices that diminished the number of poor families that lost their state welfare benefits by fifty percent.⁴⁹ Mr. Bonnyman concluded that “it was the combination of class action litigation, sophisticated legislative and administrative advocacy, and close collaboration with community groups, that made possible these important gains for [his] clients.”⁵⁰

Class actions also enable claims that may be economically and socially insignificant as individual claims, but that are far more significant as a whole, to be heard. For example, in the early 1980s, many patients of New York City hospitals became homeless after they were discharged pursuant to a new state policy.⁵¹ The class action filed on behalf of these patients was likely the only way that any of these potential plaintiffs could have challenged the state rule. Viewed in isolation, each poor patient’s claim may not have been valuable enough, either economically or socially, to merit a full-blown lawsuit; however, as a class, all of the patients affected by the policy were able to bring forth their legitimate claims. Similarly, class actions have aided the ability of the homeless to force the government to provide housing.⁵²

poor”).

47. Pierce, *Trend and Development*, *supra* note 46.

48. Bonnyman, *Adapting Without Accepting*, *supra* note 46, at 437.

49. *Id.*

50. *Id.*

51. Pierce, *Trend and Development*, *supra* note 46 (explaining that the patients were made homeless due to the state policy of “least restrictive, community care”) (also citing *New York Lawsuit for More Community Services is Justiciable*, 8 MENTAL DISABILITY LAW REPORTER 388 (1984)).

52. See Stephen Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. REV. 387, 399 (1991) [hereinafter Wizner, *Homelessness: Advocacy and Social Policy*] (discussing LSC local services providers that have used class actions to require government housing for the homeless).

Regardless of whether such lawsuits are successful, offering the poor access to the courts through the use of class actions represents an important step in creating equal treatment under the law.

Class action lawsuits enable even the unaware to be joined in lawsuits instituted on their behalf. For example, prior to the victory of a class action against the U.S. Secretary of Health and Human Services and the Health Care Financing Administration, Medicare recipients were often denied reimbursement from Health Maintenance Organizations (“HMOs”) without any sort of administrative hearing or appeals process.⁵³ The class action suit challenging this practice was originally brought on behalf of a few indigent women in Arizona who had been denied necessary medical care without written notice or notice of an appeals process.⁵⁴ The plaintiffs joined in the class action were all those who had been enrolled in the Medicare-associated HMOs and who either had been denied services without notice or without knowledge of the right to appeal.⁵⁵ Thus, the class representation served the interests of all Medicare recipients, even though many beneficiaries of the class action did not realize that they had been denied entitlements. Further, the plaintiffs, arguing that “the Constitution requires an expedited hearing before an HMO can deny services and that HMOs carry the burden of proof for Medicare denials,”⁵⁶ succeeded in convincing a federal district court to find due process violations under the current Medicare reimbursement system.⁵⁷ As a result, the class action forced the U.S. Department of Health and Human Services to provide quicker reimbursement notices to all Medicare beneficiaries.⁵⁸

Class action lawsuits also eliminate power imbalances by allowing a class of underrepresented people with similar claims to attract more effectively the attention of a powerful defendant. As a result of the magnitude of the potential liability in class actions, defendants are forced to treat them more seriously. The possibility of a class action lawsuit’s success may force a potential defendant to devote closer attention to the issue that is the subject of the collective claim.

The class action lawsuit, thus, can be viewed as a tool that requires potential defendants to internalize the costs of socially injurious policies.

53. See *Grijalva v. Shalala*, 152 F.3d 1115 (9th Cir. 1998); *vacated*, 526 U.S. 1096 (1999), and *remanded* 185 F.3d 1075 (9th Cir. 1998) (remanded based on U.S. Supreme Court decision in *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) and passage of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 275-330).

54. See *Grijalva*, 152 F.3d at 1117.

55. See *id.*

56. *Grijalva v. Shalala*, 946 F. Supp. 747, 750 (D. Ariz. 1996).

57. *Id.* at 757-59.

58. *Grijalva*, 152 F.3d at 1119.

For example, in *Robinson v. Caulkins Indiantown Citrus Co.*,⁵⁹ John H. Robinson, the lead plaintiff for the class, asserted that his employer had disproportionately underpaid wages and benefits to hundreds of African-American employees.⁶⁰ In bringing the lawsuit as a class action, Robinson forced the Caulkins Indiantown Citrus Company to defend itself against a single claim that could result in damages owed to many plaintiffs. Ultimately, the class of over seven hundred employees obtained damage payments exceeding \$13.5 million from the company.⁶¹ Without the availability of the class action device, it is doubtful that Mr. Robinson and the other affected parties would have been able to force the company to address its alleged wrongdoing. In this case, the class action allowed an otherwise unprotected class of persons to force a large company to pay for the social and economic harms that it caused.

Furthermore, class action lawsuits draw public attention to issues that are unique to the poor community.⁶² Such increased public awareness may provide the impetus for necessary political, legal, and social reforms.⁶³ A good illustration of the impact of a class action lawsuit on public awareness can be found in a suit brought by the poor living in Philadelphia public housing, who claimed that the city government had prevented the construction of a new public housing development based on racial concerns. The suit charged that the city government had reached its housing decision based on local municipal officials' reluctance to place African-American public housing residents in a predominantly white neighborhood.⁶⁴ The class action's public nature aided the successful construction of the highly-integrated public housing development.

Last, the mere possibility of a class action lawsuit may encourage a government or private agency to change its behavior without engaging in litigation.⁶⁵ An example of such an expedited form of relief occurred when the federal government stopped granting Supplemental Security Income to 150,000 Philadelphia children a decade ago. It was also reported that federal government officials pressured the affected children's families not to appeal the cessation of benefits.⁶⁶ An LSC-

59. 771 F. Supp. 1205 (S.D. Fla. 1991).

60. *Id.* at 1205.

61. See JoAnne Dellaverson, *Recent Developments under Title VII and Section 1981, as Amended by the Civil Rights Act of 1991*, 527 PLI/LIT 249, 261 (1995) [hereinafter Dellaverson, *Recent Developments*].

62. See NEWBERG & CONTE, *supra* note 38.

63. See *id.* at 31, 35.

64. See Elisabeth Jacobs, *LSC Restriction Fact Sheet #1*, Brennan Center for Justice, at http://www.brennancenter.org/programs/pov/factsheet_classact.html (May 10, 2000).

65. *Id.*

66. *Id.*

funded attorney in Philadelphia began preparation for a national class action. Within three months of the attorney's notice to the Social Security Commissioner of the potential suit, a change in policy was made. The federal government granted the children and their families, who were originally discouraged from fighting the denial of benefits, another appeals opportunity.⁶⁷

B. Drawbacks to the Class Action Device

Despite its many benefits, the class action lawsuit is not a flawless mechanism for advancing the claims of the poor. A class action is an all-or-nothing venture that can extinguish any potential future claims for members of the class. This heightened risk, inherent in all class actions, may outweigh potential client benefits.

Unlike an individual lawsuit, in a class action, the interests of the class come before the interests of individual class members.⁶⁸ Individuals may find that group litigation will not address their needs for justice appropriately. Class actions are almost always unable to tailor the pace of the litigation to individual class members. Time delay can be a huge obstacle in class actions, where defendants can utilize a broad range of unique delay tactics.⁶⁹ Mr. Robinson and his class, for example, were only able to collect their \$13.5 million in damages after more than *fifteen* years of litigation.⁷⁰ Whether LSC-funded attorneys should engage in lengthy class action litigation, as opposed to seeking quicker solutions that more closely meet the needs of individual clients, is certainly a question that should be considered.

The decreased focus on individual clients that occurs in many class actions was a motivating factor for Congress when it enacted the class action restriction. The legislative history indicates that Senators supporting the 1996 legislation believed the class action ban would "refocus LSC on its primary mission, which is to provide basic legal services to indigent American citizens."⁷¹ There was a perception, especially among opponents of the LSC, that legal services lawyers were "hijacking" cases in order to achieve desired legal reform goals based on their own political desires.⁷² Congressman Dan Burton of Indiana testified that LSC-funded lawyers "[have] routinely been involved in

67. *Id.*

68. See NEWBERG & CONTE, *supra* note 38, at 35-36.

69. See *id.* at 41-42.

70. See Dellaverson, *Recent Developments*, *supra* note 61, at 261.

71. S. REP. NO. 104-392, at 1 (1996).

72. See Dan Burton, Congressional Testimony before the House Appropriations Committee, Subcommittee on Commerce, Justice, State and Judiciary, 1996 WL 160917 (Mar. 29, 1996).

controversial class action suits and other litigation that promotes [sic] a radical agenda.”⁷³ Other critics accused legal services lawyers of “having strayed into a liberal political activism, neglecting the provision of legal aid to the indigent.”⁷⁴ These comments are representative of the arguments that were offered in support of the class action restriction.⁷⁵

Most of the class actions filed on behalf of the poor, however, have attempted only to force government and private agencies to follow current law. Injunctive relief, and not actual monetary damages, is usually the remedy sought by attorneys representing the poor.⁷⁶ On the other hand, multiple plaintiffs filing individual suits that indicate a common source of harms could force defendants to respond just as quickly as they would to a class action. Legal services lawyers nevertheless have argued that class actions are a device that levels the litigation playing field between the poor and paying clients.⁷⁷ As Professor William P. Quigley laments, “Congress has decided that legal aid alone and not legal aid and law reform will be available to the poor. As a consequence, poor people’s lawyers will not be allowed access to all the tools available to the lawyers for the rest of the population.”⁷⁸

The question of whether class action lawsuits bolster the legal representation of the poor or, alternatively, propel the political and social agenda of legal services lawyers, remains. If the class action device causes a legal services lawyer to substitute his own policy objectives for the individual needs of the class members, use of this device could be challenged on ethical grounds. Such conflicts inevitably arise. For example, a regulatory agency’s admission of liability in a settlement agreement in exchange for lower monetary damages might be appealing to some legal services lawyers, whereas the affected class might prefer higher damages even in the absence of such an admission. Assuming

73. *Id.*

74. Tom Jackson, *Legal Aid Staff Waits to See if Office Will Survive*, THE SUNDAY CONST. (Lawton, Okla.), Aug. 3, 1997.

75. *See id.* at pt. 2 (Rep. William McCollum also testified that “we have seen extensive abuses within the LSC by lawyers with their own political agendas actively recruiting clients, creating claims, and advancing their own social causes”).

76. *See* Elisabeth Jacobs, *LSC Restriction Fact Sheet #1*, Brennan Center for Justice, at http://www.brennancenter.org/programs/pov/factsheet_classact.html (May 10, 2000).

77. *See, e.g.*, Quigley, *The Demise of Law Reform and the Triumph of Legal Aid*, *supra* note 5; Legal Services 1996 Annual Report: Legal Services in Congress in 1996 (the class action ban was “imposed despite the fact that class-action litigation, along with other kinds of advocacy, have ‘always been recognized as important tools for attorneys to employ on behalf of their clients’”).

78. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid*, *supra* note 5, at 264. In fact, Mr. Quigley was so incensed that he decided to run for a Louisiana Supreme Court seat largely based on certain 1996 Restrictions. Mark Schleichstein, *Foster, Clinics Face Off on Rules, Legal Debate Goes Beyond Shintech*, NEW ORLEANS TIMES-PISCAYUNE, Aug. 2, 1998, at A1.

that the interests of the class remain the priority of the legal services lawyer, however, it would be difficult to argue that the class action lawsuit, in and of itself, is objectionable.

Despite their benefits, class action lawsuits still present a legal services lawyer with extreme challenges.⁷⁹ Besides the practical implications of addressing the needs of many persons, there are almost always large costs, both economic and otherwise, associated with litigating class actions. The value of the class action lawsuit should be evaluated in terms of opportunity cost because by allocating resources to a class action, a legal services provider is necessarily diverting assistance from individual clients. Unlike a regular lawsuit, representation of a class requires public notice through local newspapers or personalized notices,⁸⁰ both of which are expensive.⁸¹ Class actions also require significantly more labor than individual claims require.⁸² It is possible that individual clients could be given more immediate relief if legal service providers allocated the time and money required in a class action to these individuals. Class actions also may face a harsh reception in court, depending on whether the judge agrees with the critical views of LSC-funded class actions discussed above.⁸³

It is reasonable to question whether class actions would be the best use of LSC funds. Some commentators contend that class actions as a legal advocacy tool may be ineffectual, as they represent “slow, god-awful, very ineffective, bull-in-a-china-shop kinds of efforts.”⁸⁴ These commentators claim that proponents of LSC-funded class actions often overlook potential costs. For example, legal services lawyer Gordon Bonnyman has extolled the benefits of class actions in commentary regarding the 1996 Restrictions.⁸⁵ While he comments that prior to the 1996 Restrictions, a colleague of his won a “55-page class action settlement that will reform Medicaid managed care services for a half million poor children in Tennessee,”⁸⁶ he does not mention that this settlement took years to achieve. Bonnyman also neglects to explore any alternatives to class actions as viable means of seeking redress. In the absence of a more balanced view of class actions as a legal device, it is

79. See NEWBERG & CONTE, *supra* note 38, at 35-39.

80. FED. R. CIV. PROC. 23.

81. *Id.*

82. See Bruce A. Green & Martha Matthews, *Report of the Working Group on Rendering Legal Assistance to Similarly Situated Individuals*, 67 FORDHAM L. REV. 1801, 1805 (1999).

83. See NEWBERG & CONTE, *supra* note 38, at 38, 48-51.

84. Robert Hayes, *Litigating on Behalf of Shelter for the Poor*, 22 HARV. C.R.-C.L. L. REV. 79, 87 (1987) [hereinafter Hayes, *Litigating on Behalf of Shelter for the Poor*].

85. Bonnyman, *Adapting Without Accepting*, *supra* note 46. See *supra* Part III.

86. Bonnyman, *Adapting Without Accepting*, *supra* note 46, at 437.

not surprising that some critics have concluded that such efforts for the poor “may, by choice or necessity, implement social policies that do not properly address the causes of the problem they confront.”⁸⁷

IV. Assessment of the Class Action Restriction

A. *The Social Impact*

The claim that the class action restriction has actually *improved* the delivery of legal services to the poor ignores the obvious social impact of the restriction. The 1996 Restriction regarding class actions prevents clients from bringing legitimate claims, causes inefficiency within local legal service centers, and hinders effective change in bureaucratic and regulatory policy.

According to the LSC annual report delivered to Congress for fiscal years 1997 and 1998, the class action restriction caused legal services lawyers to resign from over 600 cases involving more than four hundred thousand clients.⁸⁸ Although these numbers alone do not indicate any social harm, in many of these cases, no other lawyer took the helm of the already formed class action after the legal services lawyers were forced to resign.⁸⁹ Also, according to David Udell, Director of the Brennan Center for Justice, “[f]or every class action case that Legal Services programs abandoned, there are countless others that they will never take, depriving thousands of potential clients of the representation they otherwise could expect from Legal Services lawyers.”⁹⁰

The fact that the class action restriction has caused legal services lawyers to resign from or refuse to participate in cases involving the poor

87. Wizner, *Homelessness: Advocacy and Social Policy*, *supra* note 52, at 398.

88. In addition, the Brennan Center for Justice at NYU School of Law has conducted extensive studies regarding the impact of the class action restriction on the representation of the poor. According to its 2000 study, the class action restriction has resulted in a significant drop in class action lawsuits filed by recipients of LSC funds. See Brennan Center for Justice, *Restricting Legal Services: How Congress left the Poor with Only Half a Lawyer*, at <http://brennancenter.org/resources/atj/atj2.pdf> (2000); Brennan Center for Justice, *Left Out in the Cold: How Clients are Affected by Restrictions on their Legal Services Lawyers*, at <http://brennancenter.org/resources/atj/atj6.pdf> (2000); and Brennan Center for Justice, *Bearing Witness: Legal Services Clients Tell Their Stories*, at <http://brennancenter.org/resources/atj/atj5.pdf> (2000).

89. See Brennan Center for Justice, *Restricting Legal Services: How Congress left the Poor with Only Half a Lawyer*, at <http://brennancenter.org/resources/atj/atj2.pdf> (2000); Brennan Center for Justice, *Left Out in the Cold: How Clients are Affected by Restrictions on their Legal Services Lawyers*, at <http://brennancenter.org/resources/atj/atj6.pdf> (2000); and Brennan Center for Justice, *Bearing Witness: Legal Services Clients Tell Their Stories*, at <http://brennancenter.org/resources/atj/atj5.pdf> (2000).

90. David S. Udell, *Implications of the Legal Services Struggle for Other Government Grants for Lawyering for the Poor*, 25 *FORDHAM URB. L. J.* 895, 906 (1998) [hereinafter Udell, *Implications of the Legal Services Struggle*].

community has caused social harm. In New York City, for example, lawyers working for MFY Legal Services met with over a dozen mentally ill, indigent individuals who have not been able to obtain reduced-fare “Metro Cards” to use the city subway system.⁹¹ David F. Dobbins, a private attorney working for a corporate law firm in New York, volunteered at MFY Legal Services for years. He was prepared to file suit and rely on a state law requiring the Metro Transit Authority to offer reduced-fare Metro Cards to people suffering from serious mental illness who were eligible for federal Supplemental Security Income disability benefits.⁹² Mr. Dobbins determined that “adequate representation of his indigent clients require[d] him to file a class action to assure that the legal challenge to MTA policy [was] not mooted by granting relief to an individual litigant.”⁹³ In light of the class action restriction, Mr. Dobbins considered severing his ties with MFY Legal Services and bringing the reduced-fare litigation as a private individual.⁹⁴ Mr. Dobbins stated, however, that it would be “both unwise and professionally inappropriate to seek to be the sole legal representative for a class of indigent mentally disabled persons with whom [he had] an extremely limited relationship, and about whom [his] knowledge [was] extremely limited.”⁹⁵ Consequently, the reduced-fare class action, and its potential participants, has not made its way into court. In December 2001, however, Mr. Dobbins did file a claim challenging the constitutionality of the class action restriction.⁹⁶

It is possible to argue that Mr. Dobbins and MFY Legal Services overstated the need to bring a class action lawsuit. A myriad of alternatives to litigation could have enabled MFY Legal Services and pro bono volunteers to pressure the Metro Transit Authority to grant the mentally ill reduced-fare Metro Cards. MFY Legal Services could have filed multiple suits against the agency on behalf of individual plaintiffs. Indeed, such a barrage of suits could have pressured the large agency, facing its own time and budgetary constraints, to alter its policy. The increased use of standard pleading forms from electronic templates could have made such an alternative preferable to the complex compliance procedures of class actions.

Mr. Dobbins, however, responded that as a litigator from a large corporate law firm, his expertise was largely focused on class action

91. See Elisabeth Jacobs, *LSC Restriction Fact Sheet #1*, Brennan Center for Justice, at http://www.brennancenter.org/programs/pov/factsheet_classact.html (May 10, 2000).

92. See *id.*

93. *Id.*

94. See *id.*

95. *Id.*

96. *Velazquez v. Legal Serv. Corp.*, 356 F. Supp. 2d 267 (E.D.N.Y. 2004).

lawsuits.⁹⁷ In this case, the class action restriction had a drastic impact on Mr. Dobbins' ability to represent the poor on a pro bono basis, as his volunteer schedule made it impossible for him to represent every mentally ill client seeking a half-fare Metro Card. Without this restriction, Mr. Dobbins, with his years of corporate litigation experience, might have been able to provide relief to hundreds of MFY Legal Services clients.

Another striking example of the restriction's negative social impact is apparent in attempts by South Brooklyn Legal Services to provide relief to low-income workers operating day care centers in underprivileged neighborhoods throughout the city.⁹⁸ According to the Center's director, John C. Gray, these workers were shortchanged payments owed to them by New York City as a result of an incorrect reimbursement formula.⁹⁹ When the class action restriction was enacted in 1996, Mr. Gray complained that South Brooklyn Legal Services was forced to withdraw from the pending class action lawsuit against New York City regarding the reimbursement.¹⁰⁰ Consequently, Mr. Gray claimed that the legal services lawyers in his organization were only able to obtain a twelve thousand dollar settlement for one of the women who had been harmed by the faulty reimbursement formula.¹⁰¹ According to Mr. Gray, the delay tactics inherent in any lawsuit cause the process of obtaining multiple settlements for hundreds of plaintiffs to be relatively slow.

The inability of local legal services programs to organize class action lawsuits can result in the inefficient use of legal services resources, and thus, of LSC funds. While class actions enable legal services lawyers to bring one case that can help many members of a community, the class action restriction causes legal services lawyers to duplicate work for many clients seeking redress from the same party for the same harm.¹⁰² According to a director of a legal services center,

97. See Elisabeth Jacobs, *LSC Restriction Fact Sheet #1*, Brennan Center for Justice, at http://www.brennancenter.org/programs/pov/factsheet_classact.html (May 10, 2000).

98. See Abel & Udell, *If You Gag the Lawyers*, *supra* note 3, at 883.

99. See *id.*

100. See *id.*

101. See *id.*

102. In a 1999 conference on the class action restriction and other restrictions on the LSC, participants argued that the class action restriction is inefficient in that it requires legal services lawyers to duplicate litigation regarding common harms. See *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 *FORDHAM L. REV.* 1751, 1752-53 (1999) [hereinafter *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*] ("When court calendars are clogged with numerous cases involving the same issue because court and counsel are barred from using the class action mechanism to resolve the issue, resolution of the cases of other litigants is delayed. This makes the judicial system less efficient and

“when clients are unable to proceed in a class action, they must instead pursue their claims individually, burdening the resources of the legal services program and those of the courts.”¹⁰³

The lack of a class action option may also result in the provision of inconsistent legal services to clients who possess similar legal claims. If multiple clients seek redress for the same harm, such as the refusal to grant half-fare Metro Cards to the mentally ill, different staff members working on the cases at local legal services programs may give different advice. Some clients may be told to file an appeal with a regulatory agency, while others may be assisted in bringing actual lawsuits. If these clients could bring their claims together as a class, the possibility of inconsistent treatment would decrease dramatically.

The autonomy of local legal services programs has been significantly diminished by the class action restriction. The purpose of decentralized service is to increase the ability of local legal services providers to specialize in their community’s needs. For example, the potential half-fare Metro Card class action lawsuit would enable local legal services programs in New York City to help mentally-ill clients as a group, rather than dealing with individual claims. It is unlikely that this suit would have been brought by politically motivated legal services lawyers merely to champion “liberal ideals.”¹⁰⁴

The class action restriction enables regulatory agencies to act without an important check on their power to interpret and apply the law appropriately. While class actions can compel government bureaucracies to follow the law, the class action restriction effectively removes the threat of public claims by large groups of concerned citizens. According to Maryland Attorney General J. Joseph Curran, who often defends the state against class action lawsuits, “Government is not infallible. As uncomfortable and irritating as it may be, sometimes it is class-actions by [LSC-funded] lawyers that require the state to do what it is legally bound to do.”¹⁰⁵ The restriction against class action lawsuits, therefore, has inhibited the change of regulatory agency policies that adversely affect the poor.

The class action ban also has prevented actors outside of a regulatory agency from reviewing that agency’s relevant policies. Prior to the class action restriction, legal services lawyers instituted class actions in order to force judicial review of agency policies. In

reduces public confidence in, and support for, the judicial system.”).

103. Laurence E. Norton, *Not Too Much Justice for the Poor*, 101 DICK. L. REV. 601 (1997).

104. *Id.*

105. Elisabeth Jacobs, *LSC Restriction Fact Sheet #1*, Brennan Center for Justice, at http://www.brennancenter.org/programs/pov/factsheet_classact.html (May 10, 2000).

Philadelphia, for example, the city deemed children age four and older ineligible for any benefits from the “Women, Infants and Children” program, which offers food to poor children.¹⁰⁶ As a result of a class action lawsuit instituted on behalf of those children, legal services lawyers obtained not only a ruling from a judge that the city’s policy was unconstitutional, but also a new requirement that the responsible city agency devise fair hearing regulations, ensuring that other children would not go without food in the future due to “the bureaucratic rules of the game.”¹⁰⁷

It should be recognized that individual and multi-plaintiff lawsuits also play a role in achieving changes in government policy. A landmark judicial decision regarding an individual plaintiff has often paved the way for the fundamental changes for which progressive lawyers have fought for years. The class action lawsuit, therefore, should be viewed not as a panacea, but rather as one of many legal devices that should be available to the poor.

B. *The Legal Impact*

The 1996 Restrictions, including the class action restriction, may impinge upon legal services clients’ constitutional right of access to the courts.¹⁰⁸ Although the poor generally are not a protected class of individuals in the eyes of the courts, heightened scrutiny is appropriate for a statute or regulation that “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”¹⁰⁹ In other words, if the rights to be exercised by the poor are necessary in order to ensure that the government does not disenfranchise the poor without the availability of redress, then those rights should be strongly protected.¹¹⁰ Access to the courts is a powerful

106. For a thorough discussion of this litigation, see Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 675-78 (1987) [hereinafter Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*].

107. *Id.* at 688 n.172.

108. U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”); *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (finding that “the right to file a court action stands, in the words of *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), as his most ‘fundamental political right, because preservative of all rights.’”) (Blackmun, J., concurring).

109. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

110. See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating a poll tax because the right to vote may not be conditioned on wealth); *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating an campaign filing fee because the right to run for office may not be conditioned on wealth).

device with which the poor, a weak political class, can find redress.¹¹¹ The effect of the class action restriction, therefore, can be viewed as “denying some citizens any effective voice in the governmental affairs which substantially affect their lives.”¹¹²

The class action restriction admittedly does not prevent poor clients from bringing class actions; instead, it forces them to bring class action lawsuits through private lawyers or legal aid services that do not receive LSC funds. Effective legal representation requires access to a “full range of quality legal services,” including class actions.¹¹³ Providing the poor with “access” to the courts without the full range of legal tools available “may make lawyers feel good about themselves and the legal system, but, like a medical facility that dispenses only aspirin, this type of program is of little societal value.”¹¹⁴ Without the availability of the class action to LSC-funded lawyers, the number of class actions brought on behalf of the poor also has diminished significantly.¹¹⁵ This decrease indicates that the poor are no longer receiving the array of legal services that was available to them before the class action restriction took effect.

Additionally, it is probable that those class actions brought by private lawyers have been weakened by the lack of collaboration with LSC-funded legal services programs and their resources.¹¹⁶ One commentator has noted that “the staff-attorney system [of LSC-associated legal services programs] provides a cadre of lawyers who are intellectually and personally committed to serving the poor.”¹¹⁷ Although privately-funded legal aid organizations and LSC-funded legal services centers have not often collaborated in the past, perhaps a successful use of the class action tool would encourage such joint efforts. It would seem sensible to conclude, therefore, that forcing privately-supported legal aid lawyers to bring class actions effectively prevents them from employing the expertise of the LSC-associated legal services lawyers in a meaningful way.

111. See Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 600 (1994) [hereinafter Cramton, *Delivery of Legal Services to Ordinary Americans*] (“Winning the battle in the courts rather than in the legislatures does not violate democratic principles because the courts are intervening on behalf of groups that are under-represented in the legislatures.”).

112. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969).

113. See Allen Redlich, *A New Legal Services Agenda*, 57 ALB. L. REV. 169, 174 (1993).

114. *Id.* at 175.

115. See *supra* note 88.

116. See Cramton, *Delivery of Legal Services to Ordinary Americans*, *supra* note 111. According to Professor Cramton, the delivery of legal services could be organized “so that clients are served by experienced specialists in various areas of poverty law, such as welfare, housing, or education”. *Id.* at 590.

117. *Id.*

The burdens on poor litigants are further increased by the federal government's right to re-litigate issues already decided in similar cases.¹¹⁸ The inapplicability of the offensive collateral estoppel doctrine in cases against the government means that individual plaintiffs are unable to rely on case precedent unfavorable to the government. The federal government, meanwhile, may re-litigate a decided-upon matter again and again. For the poor, the inability to rely on already litigated cases makes the burden to bring forth individual suits even greater. In the class action context, the pursuit of a class action on behalf of an entire class of individuals may only result in a single instance of litigation. Conversely, without the availability of the class action, the cost of re-litigating an issue on multiple occasions is passed on to each individual litigant, resulting in large individual costs as well as uncertain case outcomes. The class action restriction thus constitutes an extreme burden on poor litigants. It is quite possible, then, that the class action restriction is impermissible restriction on a poor citizen's fundamental right of access to the courts.

The argument also can be made that the restriction unconstitutionally impairs the "judicial function," thereby violating the separation of powers mandated by the Constitution. In *Legal Services Corporation v. Velazquez*,¹¹⁹ the Court held that certain 1996 Restrictions (other than the class action restriction) violated the separation of powers between the branches of government.¹²⁰ The Court noted that certain restrictions would result in "lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper presentation of the case."¹²¹ As the judiciary is typically the branch that determines whether lawsuits ought to be litigated individually or as a class, this sort of "truncated representation" may occur as a result of the class action restriction. Judges are now preempted from making these decisions in cases involving poor classes because clients with LSC-funded legal services lawyers are forced to present all cases individually without ever making judges aware of the need for a class action. Congress has effectively wrested control of case management away from judges.

The class action restriction also affects judicial efficiency, as the blanket ban ensures that LSC-funded legal services programs will not bring class actions, even when they would be the most efficient form of litigation. Thus, already clogged courts are additionally burdened when

118. See, e.g., *United States v. Mendoza*, 464 U.S. 154, 158 (1984) (finding offensive collateral estoppel inapplicable against the government).

119. 531 U.S. 533 (2001).

120. *Id.* at 546.

121. *Id.*

claims based on a common issue must be litigated individually in order for each member of the class to obtain relief.

The class action restriction also may burden a private donor's First Amendment speech rights.¹²² Private donors often contribute funds to legal services organizations. Private funds flow to legal services centers because donors desire to support certain speech (*i.e.*, the representation of the poor and the promotion of issues important to the poor). It is unclear whether legal services programs should be considered public fora, like sidewalks or public parks, for speech purposes because they have mixed characteristics. For example, legal services programs receive federal money to provide representational conduct, but the legal services programs themselves may not be considered open to the public for expressive activity.¹²³ It is similarly unclear whether the class action restriction is a speech restriction that should be considered viewpoint neutral in nature.

As a result of the lack of clarity regarding the nature of the speech forum and the nature of the restriction itself, it is also unclear how significant the government interest would need to be in order to limit such speech justifiably. If legal services programs were found to be public fora or if the class action restriction were determined not to be viewpoint neutral, then the government would have to justify the restrictions with a compelling state interest.¹²⁴ The asserted government interest in this case is refocusing LSC-funded services on individual poor clients rather than on class interests.¹²⁵ It is unclear that a complete ban could, however, be justified based on this interest, even if it were compelling. Such speech regulations usually must be narrowly tailored to avoid burdening speech any more than necessary to serve the governmental interest.¹²⁶

Even if the legal services programs are not public fora, the government normally must demonstrate that it has a rational interest that outweighs the burden placed upon the speaker.¹²⁷ Typically, this entails

122. See Elisabeth Smith Bornstein, *From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys*, 2003 U. CHI. LEGAL F. 693 (2003), in which the author argues that the class action restriction is unconstitutional because it imposes viewpoint discrimination.

123. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (determining that public property may become a public forum if the state designates it as such, even if traditionally had not been considered to be a public forum).

124. See *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640 (1981).

125. See also *Class Actions*, 45 C.F.R. Pt. 1617; H.R. REP. NO. 104-196 at 120 (1995).

126. See *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

127. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985) (finding it reasonable for the government to exclude certain political advocacy groups from a charity drive in order to serve the government interest of minimizing workplace

demonstrating that the regulation is reasonable and not aimed at suppressing certain viewpoints.¹²⁸ Although the regulation has a rational interest of serving individual clients rather than the whole class, an argument could be made that the class action restriction *is* geared towards suppressing the viewpoints of the poor. If only the poor are going to be affected by the decrease in class action lawsuits brought as a result of the increased compliance costs of the restriction, then it is possible that this restriction is viewpoint-based. This is especially true given the political motivation underlying the enactment of the 1996 Restrictions.¹²⁹

Nevertheless, the lone case in which the 1996 Restrictions on class actions were found to be unconstitutional was *Varshavsky v. Perales*.¹³⁰ In that case, the court found that the First Amendment right “of LSC lawyers, their clients and anyone who agrees with them” was burdened by the restrictions.¹³¹ Further, the federal government’s asserted interest was not deemed compelling enough to justify the restrictions. The court was particularly troubled by the politically-charged nature of the government’s interest in enacting the restrictions. It noted that Senator Phil Gramm had stated that “these restrictions will ensure that scarce resources available for this purpose are not diverted to costly class action or impact litigation, or to activities which promote a particular political agenda.”¹³² The court also noted that Congressman Robert Dornan had asserted “[i]t’s time to defund the left.” The court concluded that the class action restriction was unconstitutional, as “the legislation weakens the ability of poor people to stand up for their legal rights and to have an impact, when it may be their only effective method to petition the government for redress of grievances.”¹³³

The limitations of *Varshavsky*, however, are clear. The case was only decided at the state trial level, and other courts have relied upon it for the proposition that other 1996 Restrictions burdening speech are unconstitutional.¹³⁴ The judge’s decision to find the restrictions

disruption); *cf.* *Int’l Soc’y of Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (finding that the government’s interest in keeping an airport terminal clear of pedestrians was not sufficient to ban leafletters).

128. *See* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

129. *See supra* Part III for further discussion.

130. No. 40767/91 (N.Y. Sup. Ct. Dec. 24, 1996).

131. *Id.*

132. *Id.*

133. *Id.*

134. *See* *Velazquez v. Legal Services Corp.*, 164 F.3d 757, 768 (1999); *Velazquez v. Legal Services Corporation*, 349 F. Supp. 2d 566 (E.D.N.Y. 2004), *modified by* 356 F. Supp. 2d 267 (E.D.N.Y. 2005); *see also* *Legal Aid Society of Hawaii v. LSC*, 961 F. Supp. 1402, 1410 (D. Haw. 1997) (finding that it “would be imprudent to constitutionalize the civil rules of procedure” by recognizing a constitutional right to

unconstitutional did not reach the situation where the restriction applies only to the use of federal funds. Further, the decision appears to be limited to finding that the legal services lawyer in that particular case, who was seeking to continue her representation of the class, would be allowed to do so. The relevance of *Varshavsky*, therefore, was limited in terms of addressing the constitutional questions that the class action restriction posed. Additionally, and more importantly, the *Velazquez* Court found the class action restriction to be facially valid, and a subsequent federal decision discussed below declined to find constitutional defects with the restriction.¹³⁵

As was discussed earlier, in December 2001, MFY Legal Services lawyer David F. Dobbins filed a claim challenging the constitutionality of the class action restriction.¹³⁶ This suit was combined with the ongoing *Velazquez* litigation.¹³⁷ As might be expected, the plaintiff legal services providers asserted that the class action restriction violated the First Amendment.¹³⁸ The plaintiffs also argued that the requirement of maintaining separate programs for non-LSC-funded class actions was an unconstitutional burden on LSC-funded legal services programs.¹³⁹ Although the court in this case issued a preliminary injunction severely limiting the “physical separateness” requirements between LSC-funded legal services providers and legal services providers that do not receive LSC funds (so long as certain guidelines were followed), the court declined to find that the class action restriction was unconstitutional.¹⁴⁰ Based on the Supreme Court’s reasoning in *Velazquez*, the court was “constrained to reject plaintiffs’ argument that the restriction [on class action lawsuits] is impermissibly viewpoint based because it distorts the legal system.”¹⁴¹ The court ruled that the plaintiffs had not “demonstrated how, under *Rosenberger’s* formulation of viewpoint-based regulation of speech, the restriction targets the ‘specific motivating ideology or the opinion or perspective of the speaker.’”¹⁴² Because the class action restriction was deemed to be viewpoint neutral, the only constitutional requirement for the restriction was reasonableness, and the

bring class action lawsuits.”).

135. *Velazquez v. Legal Services Corporation*, 349 F. Supp. 2d 566 (E.D.N.Y. 2004).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* See also Brennan Center for Justice, at http://www.brennancenter.org/programs/pov/dobbins/dobbins_decisions.pdf (last visited May 17, 2005) for a description of these guidelines.

141. *Id.*

142. *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

court found that the justifications underlying the class action restriction were reasonable.¹⁴³

C. *The Professional Impact*

In addition to the social and legal effects of the class action restriction, the ethical and professional implications posed by the restriction offer further reason to consider its legitimacy. Legal services lawyers have questioned whether they can represent clients ethically in accordance with the American Bar Association Model Rules of Professional Conduct and still comply with the class action restriction.¹⁴⁴ In certain cases that are otherwise permissible under the 1996 Restrictions, legal services attorneys may desire to proceed in a certain strategic direction, but cannot follow their best legal judgment because of the restriction.

This dilemma often arises when a legal services attorney represents or advises an individual client involved in an action against a defendant who is alleged to have harmed a large group of similarly situated individuals. The legal services lawyer may believe that the best course of action is to institute a class action lawsuit against the defendant. According to several legal services lawyers, such ethical dilemmas often arise when large regulatory agencies follow unconstitutional or statutorily inconsistent policies that affect a large group of individuals. Aside from harms potentially caused by government agencies, legal services lawyers also face this situation when dealing with a significant number of consumer claims, such as those directed towards a single large company. In these cases, the only efficient means of proceeding may be a class action lawsuit. If the legal services attorney works for an LSC-funded organization, he may only assist the client as an individual and may not attempt to organize a class. The question of whether he has violated any of the Model Rules, however, still remains.

Rule 1.1 of the Model Rules of Professional Conduct states that

143. *Id.* (describing the justification for the class action restriction, including its belief that the class action as an advocacy device was an inappropriate use of LSC funds and that alternative private agencies existed for such advocacy).

144. *See, e.g.*, Alan Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 *FORDHAM L. REV.* 2187, 2188 (1999) [hereinafter Houseman, *Restrictions by Funders*] (arguing that the 1996 Restrictions may “force attorneys into ethical dilemmas that can only be resolved through resignation” and consequently, “[the] current restrictions must be removed, and no further restrictions should be imposed.”). *See also* Samuel J. Levine, *Legal Services Lawyers and the Influence of Third Parties on the Lawyer-Client Relationship: Some Thoughts from Scholars, Practitioners, and Courts*, 67 *FORDHAM L. REV.* 2319 (1999); *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, *supra* note 102.

lawyers must “provide competent representation” to all of their clients.¹⁴⁵ According to this Rule, if a lawyer knowingly fails to present a sound legal issue to a client or to raise one in a legal proceeding, the lawyer has violated his ethical obligation to his client.¹⁴⁶ It could be argued that if a client’s objectives and needs may only be satisfied through a class action lawsuit, a lawyer would not be providing competent representation if he did not suggest this route to his client.

Proponents of the 1996 Restrictions could contend, however, that Rule 1.2 of the Model Rules of Professional Conduct permits a lawyer to limit the scope of the representation if the client consents after consultation.¹⁴⁷ Further, Rule 1.2 explicitly allows a legal services lawyer to restrict the scope of his representation of a client in accordance with legislative restrictions or agency regulations.¹⁴⁸ The Rule states, however, that the legal services client must give his consent to the limitation of representation.¹⁴⁹ In the absence of such consent, the legal services lawyer would be forced to resign from representing the client.

Despite the claim that Rule 1.2 permits the class action restriction, there are boundaries to the limitations on representation that a client may accept.¹⁵⁰ According to commentary of the American Bar Association, a client may not agree to surrender rights if doing so would cause his representation not to accord with the Model Rules of Professional Conduct.¹⁵¹ For example, a client may not be permitted to surrender the right to terminate his attorney’s employment or the right to settle claim. It is unclear, however, whether a client may permissibly surrender the right to participate in certain types of litigation, such as class action lawsuits.

The restrictions also may intrude upon other aspects of the lawyer-client relationship in many class action cases. According to regulations promulgated by the LSC, a grantee of LSC funding may engage in “non-adversarial activities” with clients regarding class action litigation.¹⁵² If

145. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2002) (“In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances”).

146. *See id.*

147. MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2002).

148. *See Houseman, Restrictions by Funders, supra* note 144.

149. MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2002).

150. *See* MODEL RULES OF PROF’L CONDUCT R. 1.2(c) cmt. 5 (2002)

151. *See id.*

152. *See* 45 C.F.R. § 1617.2(b)(2) (1998).

the legal services lawyer advising the client assists in any aspect of the opposing counsel's case, however, he must withdraw from advising the client immediately. Consequently, legal services lawyers who attempt to stay within the boundaries of permissible conduct under LSC regulations may risk providing counsel that is inadequate.

The class action restriction also poses a number of professional problems to grantees of LSC funding. The class action restriction may cause legal services centers to duplicate efforts by filing numerous identical cases. The restriction explicitly requires that the grantees of LSC funding establish a separate entity, with its own facility and own staff. Separate records must also be kept.¹⁵³ As David Udell, Director of the Brennan Center for Justice, suggests, however, segregating LSC offices from non-LSC offices is a discouragingly inadequate solution, for very few local legal services programs would be able to support multiple centers with multiple staffs.¹⁵⁴ While several legal services programs, such as Greater Boston Legal Services, have reallocated funds or simply refused federal LSC funds,¹⁵⁵ it is not likely that small legal services offices would make such budgetary changes simply to be able to bring class action lawsuits.

V. Alternatives and Proposed Solutions

A. *Revising the 1996 Restrictions*

The first, and most obvious, alternative to the current legal regime is to revise the class action restriction. As the U.S. Supreme Court has struck down the provisions of the 1996 Restrictions prohibiting grantees from challenging existing welfare laws,¹⁵⁶ Congress should consider preempting further possible judicial intervention by removing the current class action restriction.

In light of the social, legal and professional harms posed by the class action restriction, Congress should remove this portion of the statute. The significant opposition to the use of LSC funds for class action lawsuits, however, may prevent a complete overhaul of the current statute. As Senator Domenici of New Mexico commented to the press regarding his support of the 1996 Restrictions, "You have to eliminate class actions if you expect the Senate to be supportive of this program. I have to be able to stand up on the floor and say 'no more class

153. *See id.*

154. Udell, *Implications of the Legal Services Struggle*, *supra* note 90, at 920-21. *But see supra* Part IV-B.

155. *See* Udell, *Implications of the Legal Services Struggle*, *supra* note 90, at 895 n.2.

156. *See* *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001).

actions.”¹⁵⁷ Many commentators have argued that Congress oversimplified the issues surrounding the class action lawsuit provision in 1996 by passing draconian legislation.¹⁵⁸ As Senator Domenici concluded, “Although I could live with only a partial restriction on class actions, I think I have to give assurance that there are to be no more class actions permitted.”¹⁵⁹

In place of the current class action restriction, new legislation could provide that LSC-funded lawyers may participate in class action lawsuits only with the consent of the executive director of the local legal services office. This provision was the predecessor of the current class action restriction.¹⁶⁰ Under such a provision, Congress would be assured that legal services lawyers would be restrained from launching class action lawsuits haphazardly. If proposed class actions were not given much scrutiny by executive directors, however, then this provision would not be a serious check on the institution of class actions by legal services lawyers. To address this concern, Congress could also direct the LSC to issue regulations prescribing factors that an executive director must consider when approving or disapproving a potential class action lawsuit. For example, these requirements could mandate that an executive director or executive board may approve a class action only if:

- 1) the lawsuit would directly benefit current clients of the legal services center;
- 2) the lawsuit would be the only means by which to acquire relief from a regulatory or government agency;
- 3) the lawsuit would enable the legal services center to operate in a more efficient manner; and
- 4) the lawsuit would otherwise respond to relevant Congressional concerns.

Any potential replacement of the current restriction could also prohibit consideration of the potential monetary award from a class action lawsuit.¹⁶¹ As a complete revocation of the current provision is

157. Alexander Forger, *Address: The Future of Legal Services*, 25 *FORDHAM URB. L.J.* 333, 335 (1998).

158. *See id.* Alexander Forger asserted that he “had the impression that many in Congress literally believed that a class action meant the lower classes against the upper classes.” *Id.*

159. *Id.*

160. *See* 42 U.S.C. § 2996(f)(b)(7)-(10) (1994).

161. It should be noted that most legal services organizations are already prohibited from considering potential monetary awards from any lawsuit under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. The Legal Services Corporation itself is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended. *See* 42 U.S.C. § 2996b(a) (1986) (“The Corporation, and any legal assistance program assisted by the Corporation, shall be eligible to be treated as an organization described in section 170(c)(2)(B) of Title 26 and as an organization described in section

unlikely to win Congressional support, these supplemental requirements could allay Congressional queries or fears.

Congress could also require the LSC to promulgate regulations compelling grantees of federal funds to submit records regarding involvement in class actions. The LSC, in turn, could require that every grantee of its funds require any of its attorneys who participate in class action lawsuits to submit an annual report to the LSC attesting to the number of class action lawsuits in which he was involved. Such a provision would enable the LSC and Congress to monitor any legal services lawyer suspected of engaging in too many “political” class action lawsuits. It could be argued, however, that such a provision would enable Congressmen or LSC officials to “single out” specific lawyers for pursuing what Congressman Dan Burton has described as a “radical agenda.”¹⁶² In response to this potential hazard, Congress might add language establishing that a frequent number of class actions by a single attorney does not necessarily establish a presumption that the attorney was motivated by ideological rather than client considerations. Such provisions would enable Congress to revoke the class action restriction while retaining the ability to monitor LSC-funded class action lawsuits.

Congress could also require that lawyers in particular legal services centers could only participate in a certain number of class action lawsuits per year. For example, such a provision might restrict lawyers’ participation to five class action lawsuits each year, or it could provide that no more than a certain percentage of the lawyer’s cases each year could be class action lawsuits. A potential danger of this recommendation, though, is that a legal services lawyer could face the same ethical challenges when reaching his legislated limit as he did before the revocation of the class action restriction. The limit on the total number of class action lawsuits should be considered with great care.

Last, after revoking the class action restriction, Congress or the LSC could require that an LSC-funded legal services center participate in a class action lawsuit only if a specific number of potential class members are clients of that legal services center. Such a requirement would ensure that legal services lawyers only participate in class action lawsuits which would benefit their centers’ own clients.

501(c)(3) of Title 26 which is exempt from taxation under section 501(a) of Title 26.”)

162. Appropriations for 1997: Hearings Before the Subcomm. on Commerce, Justice, State and Judiciary of the House Appropriations Comm., 104th Cong. Pt. 9 at 129-30 (1996) (testimony of Rep. Dan Burton).

B. Compliance Strategies

Instead of advocating for the revocation of the current class action restriction, recipients of LSC funding could attempt to engage in class actions by complying with the restrictions set forth in the 1996 OCRAA legislation. Although compliance with those restrictions may result in increased costs and inefficiency, class action relief for the poor is technically possible under current law.

A recipient of LSC funds can participate in class action lawsuits using private funds only if it transfers those funds to a separate organization.¹⁶³ According to the statute, that organization must be a “legally separate entity” and “must not receive transfer of LSC funds.”¹⁶⁴ Aside from the organizational requirement, the entity must be physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds, therefore, is not sufficient. Whether sufficient physical and financial separation exists is determined on a “case-by-case basis and is based on the totality of the facts.”¹⁶⁵

Congress has described a number of factors that the LSC should consider when auditing a grantee of its funds in order to determine whether a separate entity has been properly organized. Relevant factors that the LSC is required to consider include: (1) the existence of separate personnel; (2) the existence of separate accounting and timekeeping records; (3) the degree of separation from facilities in which restricted activities occur and the extent of such restricted activities; and (4) the extent to which signs and other forms of identification which distinguish the recipient from the organization are present.¹⁶⁶

Although the separate facility requirement may appear to be an attractive alternative to compliance with the current restriction, significant burdens may arise. The segregation of personnel, leasing of new physical space, and purchasing of duplicative office equipment may be cost-prohibitive for smaller legal services programs.

Many commentators have stated that an alternative to complying with the separate facility requirement is to lobby for its removal. Legal services activist Alan Houseman has argued that “because the restrictions are so pernicious, and their impact and ongoing effect so comprehensive, the reaction against the restrictions should be, conversely, intense and

163. See 45 C.F.R. § 1610.8 (2005). *But see* Velazquez v. Legal Services Corporation, 349 F. Supp. 2d 566 (E.D.N.Y. 2004), discussed *supra* Part IV-B. The impact of this decision, in which the court issued a preliminary injunction limiting the scope of the physical separateness requirements discussed in this Section, remains to be seen. This litigation is ongoing.

164. 45 C.F.R. § 1610.8 (2005).

165. *Id.*

166. *See id.*

broad based.”¹⁶⁷ He concludes that the goals should “include eliminating the ‘physical separation requirement’ that still prevents programs from using ‘other funds’ to engage in restricted activities.”¹⁶⁸

Another alternative to the current class action restriction is to transfer non-LSC funds to other organizations for use in pursuing class actions. Although Congress passed restrictions preventing grantees of LSC funds from “circumvent[ing] statutory conditions”¹⁶⁹ by transferring the funds to another organization, it did not extend this restriction to non-LSC funds. A legal services program can effectively “outsource” class action litigation by transferring potential cases, along with non-LSC funds, to private organizations. The private organization, which does not receive LSC funds and is not otherwise restricted, can then pursue the action.¹⁷⁰ The transfer of the non-LSC funds might be justified if the potential class action could benefit a substantial number of the legal services center’s clients.

In addition to the transfer of funds to private organizations, an LSC-funded legal services program could also refer potential class actions to private attorneys. If a legal services attorney, for example, begins to review a number of consistent complaints by clients against the same state or federal agency regarding the same issue, he may refer the matter to a private attorney who could then organize a class of individuals to file a suit. Such a referral should only be considered when the ultimate result of the class action would benefit the legal service center’s clients, rather than the private attorney handling the case.

It should be noted that LSC-funded legal services lawyers are permitted to assist clients in class actions as long as they restrict their participation to “non-adversarial activities.”¹⁷¹ This restriction against advocacy, coupled with limited resources, however, makes this option unrealistic for most legal services programs.

C. *Community Education*

A more fundamental change that the LSC-funded legal services programs should consider is shifting their focus toward creating

167. Houseman, *Restrictions by Funders*, *supra* note 144.

168. *Id.*

169. 61 Fed. Reg. 63,749, 63,752 (Dec. 2, 1996).

170. This strategy may not apply if the private organization is registered with the Internal Revenue Service as a non-profit organization as described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

171. *See* 45 C.F.R. § 1617.2(b)(2) (1998) (non-adversarial activities include “efforts to remain informed about, or to explain, clarify, educate or advise others about the terms of an order granting relief”).

awareness of legal rights within the poor community.¹⁷² This “community education approach” would lead LSC-funded legal services programs to serve large numbers of clients without being bogged down by the labor and costs of class action litigation. An emphasis on community education also would lead the poor community to realize their rights and assert them both collectively and individually, without initially attempting to influence actors outside the poor community.

The community education model should be contrasted with current approaches. Traditionally, LSC-funded legal services programs have engaged in “first-dimensional lawyering”¹⁷³ in which the legal services lawyer uses legal tools to represent the individual poor client. There are certainly many drawbacks to this attorney role, as the solutions that it offers usually are not long-term in nature. Typically, a poor client may find his situation unchanged because the underlying causes of the harms suffered have not been addressed by the individual representation.¹⁷⁴

Class actions represent a second approach, embraced by those who believed that law reform could be effected by increasing social awareness of the poor community and its problems. This “second-dimensional approach” utilizes the “trial or legislative session . . . [as an] educational or theatrical event that is designed to move its audiences to empathize with poor people and form political coalitions with them.”¹⁷⁵ The drawbacks to this approach have already been discussed above, but it is important to note that class actions have often been criticized as a short-term strategy that lacks the ability to effect the social policy reforms necessary for long-term client solutions.¹⁷⁶

The alternative approach would involve LSC-funded legal services programs aiding poor communities by advising them of ways in which they could assert their legal rights. By enabling the client to contribute to

172. For a discussion of this type of approach to the delivery of legal services, see Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699. Professor White discusses how a lawyer and organizer educated and empowered residents of Driefontein, a South African village, to resist the local government's eviction efforts. See also Ruth Buchanan & Louise G. Trubek, *Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687 (1991); Ingrid V. Eagly, *Community Education: Creating a New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433, (Spring 1998) [hereinafter Eagly, *Community Education*]; Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, *supra* note 106.

173. Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157 (1994) [hereinafter White, *Collaborative Lawyering in the Field?*].

174. See Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970) [hereinafter Wexler, *Practicing Law for Poor People*].

175. White, *Collaborative Lawyering in the Field?*, *supra* note 173, at 157.

176. See *supra* Part III; see also Wizner, *Homelessness: Advocacy and Social Policy*, *supra* note 52; Hayes, *Litigating on Behalf of Shelter for the Poor*, *supra* note 84.

the development of strategies that will best serve his needs, the legal services lawyers also would avoid the dependency problem to which many clients fall victim.¹⁷⁷ The client would be able to address legal problems as they arise, rather than having to defer to his legal services lawyer every time. These approaches also “deepen the solidarity among poor people, their advocates and allies,” potentially giving “poor people a momentary feeling of dignity, community and power that is too often lacking in their encounters with the law.”¹⁷⁸

Community education may be an important part of achieving actual client solutions through an alternative model of legal services lawyering. By being able to tailor community education programs to fit the particular poor community served, LSC legal services programs would be able to serve that community more effectively. This model stands in stark contrast to class actions, where the objective of delivering relief to specific segments of communities may be disregarded in an attempt to remedy a larger-scale social problem.¹⁷⁹

Community education is not as novel an idea as might be expected. For example, a community education program was developed by the Philadelphia Unemployment Project over twenty-five years ago. That program educated community members about their legal rights regarding welfare, unemployment, and other benefits. Similarly, lawyers volunteered to help the Welfare Rights Organization educate poor clients about welfare regulatory law in order to facilitate the receipt of benefits, as well as to help increase community political awareness of the “welfare rights” movement.¹⁸⁰

177. See Wexler, *Practicing Law for Poor People*, *supra* note 174.

178. Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. L. REV. & SOC. CHANGE 535, 563 (1987-8). It could be argued, however, that such measures actually *increase* the amount of paternalism inherent in the legal aid lawyer/client relationship. When clients have particular claims, lawyers are normally guided by those interests; in contrast, the decisions made regarding what community education would actually “teach” may reflect the values of lawyers and legal aid directors, instead of the values of the community members supposedly being served.

179. A coordinated “service” effort involving similar claims against a government or private entity is possible. This approach attempts to combine first dimensional services (aiding the client through legal expertise) with second and third dimensional goals (addressing community problems by heightening social/political awareness within and without the community). See Gary Bellow, *Turning Solutions Into Problems, The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977) (discussing “focused case pressure” as a legal services approach).

180. Muhammad I. Kenyatta, *Community Organizing, Client Involvement, and Poverty Law*, 35 MONTHLY REV. 18 (1983) [hereinafter Kenyatta, *Community Organizing, Client Involvement, and Poverty Law*]. It should be noted that community education can often increase the amount of legal service required, as opposed to lessening it through self-empowerment. Community recognition of legal rights may result in members of those communities seeking to enforce those rights, which may often require

Community education programs can take many forms, including educational brochures, manuals, or videos.¹⁸¹ Self-help workshops and similar programs “can demystify some of the legal procedures that are normally monopolized by lawyers and provide the non-lawyer with the means to improve his own life.”¹⁸² “Leadership development” can also allow clients to develop their own “tools of problem solving.”¹⁸³ Finally, media announcements and public service messages can help raise community awareness of legal rights and pitfalls.¹⁸⁴

The advantages of the community education approach should be evaluated against the alternative of using LSC resources to bring class actions to advocate for the poor. One advantage of community education programs is that they reach members of the community that otherwise may be ignored in the traditional first-dimensional lawyer model, where the client has a problem and seeks the lawyer out for use of his legal skills.¹⁸⁵ Another advantage of community education is that it “provides an environment for clients to learn about issues relevant to their cases and to meet others who are facing similar circumstances.”¹⁸⁶ In this way, community education may be more effective than the class action device, which is limited in its ability to bring clients together. Although class actions formally join a group of clients together, there is no internal mechanism for actual interaction among class members. Community education allows members of a community to consult with one another and develop a more vested interest in collective efforts for relief or

the expertise of a lawyer.

181. See Angelo N. Ancheta, *Review Essay: Community Lawyering*, 1 ASIAN L.J. 189 (1994).

182. *Id.* at 212. It should be cautioned that making community members feel more at ease with legal procedures may not actually simplify the problem-solving process. If legal procedures are hopelessly complex or archaic, then making community members aware of such procedures may not be comforting.

183. *Id.*

184. See *id.* The 1996 LSC restrictions should be carefully considered in developing any community education program. LSC funds may not be used to advocate particular political ideas or encourage political activity. See 45 C.F.R. § 1612.8 (1997). Similarly, LSC funds may not be used for the organization of alliances, such as federations or labor unions. See 45 C.F.R. § 1612.9(a) (1997). These restrictions, however, should not be problematic if the education truly does not entail advocacy of political viewpoints and/or organizing. Mere appraisals of potential clients’ legal rights does not violate any of the 1996 Restrictions. In addition, legal services lawyers also are not allowed to give “unsolicited advice to a non-attorney that such non-attorney should obtain counsel or take legal action.” Omnibus Consol. Recissions and Appropriations Act of 1996 (OCRAA) § 504(a)(18). This restriction can be avoided, as legal services lawyers could still inform the community regarding the services provided by legal services programs and provide contact information. See Eagly, *Community Education*, *supra* note 172.

185. See Eagly, *Community Education*, *supra* note 172, at 472.

186. *Id.* at 474.

change.¹⁸⁷

Community education can also respond to problems that the legal system cannot resolve.¹⁸⁸ Class action lawsuits usually only provide relief in those situations where there was some illegal or tortious action, whereas community education can help poor community members address a vast array of problems. Community education also allows poor community members to address those problems using their own developed skills, including new leadership skills.¹⁸⁹ The class action tool, at its best, may only address specific past harms suffered by the affected poor community, whereas community education is a mechanism for remedying harmful situations encountered in the future.

Community education does have its drawbacks. For example, lawyers may find it difficult to embrace the “collaborative approach” of community education and often may find themselves “dominating conversations and decisions about legal strategies.”¹⁹⁰ Class actions, on the other hand, do not force the lawyer to take on roles, such as that of an educator, which may be unfamiliar to him.

The strongest criticism of community education is that it may not be what the poor community desires.¹⁹¹ Some instead argue that poor clients consult lawyers because they have specific legal problems, and they want lawyers, not fellow community members, to use their legal skills to address those problems.¹⁹² Certain situations also may not be able to be rectified through community education and may require legal

187. *Id.*; see also Gary Bellow & Jeanne Charn, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633, 1666 (1995) (discussing the lack of such organizational support within LSC). If community education only reaches a small fraction of a community, however, there may not be a significant impact to the ability of community members to use each other as resources.

188. See Eagly, *Community Education*, *supra* note 172.

189. See GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE*, at 70 (1992) [hereinafter LOPEZ, *REBELLIOUS LAWYERING*] (asserting that the poor can be helped by community education to “gain confidence in their ability to handle situations that they would otherwise experience as utterly foreign and unmanageable”); Kenyatta, *Community Organizing, Client Involvement, and Poverty Law*, *supra* note 180 (noting that “the relationship of equality with the poverty lawyer [through alternative lawyering aids like community education] . . . can help mold and test the capacity of poor minorities and women to become self-confident community leaders”).

190. LOPEZ, *REBELLIOUS LAWYERING*, *supra* note 189, at 79 (noting that “expectations of how lawyering works frequently get reproduced despite the best efforts of all involved”); see Eagly, *Community Education*, *supra* note 172, at 480 (questioning whether or not “poverty lawyers, as outsiders to the communities that they serve[,] . . . [can] effectively facilitate the educational process”).

191. See Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretic of Practice Movement*, 61 BROOK. L. REV. 889, 929 (1995).

192. See *id.*

services. Of course, there is no readily apparent reason why a proactive approach to legal aid involving community education could not be accompanied by the more traditional services of lawyers.¹⁹³ Thus, community education may remain a highly viable “third-dimensional” lawyering alternative to the second-dimensional tool of the class action.

Finally, arguments regarding the proper role of legal services lawyers should not tend towards absolutism. Some may argue that class actions (and the second-dimensional lawyering they represent) are a superior legal service compared to community education because class actions are able to represent and benefit even absentee plaintiffs. In contrast, others may contend that community education is the superior legal services approach because community education actually informs community members of their rights. In addition, community education offers a proactive approach to asserting and protecting the rights of community members, whereas class actions are narrow and specific in the relief accorded to the class.¹⁹⁴ A conclusory assertion regarding the superiority of community education versus class actions, however, would be unwarranted. Each approach to legal services has its advantages as well as its disadvantages; consequently, context must be seen as the crucial factor in determining what type of legal services a certain problem requires. When addressing the problems of the poor, a legal services lawyer should keep an open mind in ascertaining his proper role in order to ensure that clients receive not only the legal services they need, but also the legal services they deserve.

VI. Conclusion

This article has demonstrated that the class action restriction should be reconsidered. Class actions were once an important part of the LSC’s goal of remedying the past harms suffered by the poor as a class and preventing such harms from occurring in the future. Class actions once proved to be an efficient tool for legal services lawyers, preventing the duplication of litigation regarding the same issues when a government or private actor adversely affected the poor community. The burdens of the class action restriction have proved to be very costly, both for the poor community and for LSC-affiliated programs.

This article has suggested that LSC-funded programs should consider strategies that attempt to accomplish both short- and long-term

193. Furthermore, the anti-paternalist criticism certainly is not unique to the community education approach, as it was often leveled at LSC-funded legal services programs for bringing class actions that allegedly served lawyers’ interests more than those of clients. *See supra* Part III.

194. *See* Eagly, *Community Education*, *supra* note 172.

goals. The effort to overturn the class action restriction on constitutional grounds is certainly a legitimate approach. Recipients of LSC funding should also inform Congress of the practical implications of the class action restriction. LSC-funded legal services programs, however, should also consider better compliance strategies designed to minimize the cost to their already thin budgets.

LSC-funded programs should also contemplate their current mode of operation and consider whether an alternative delivery model of legal services to the poor should be adopted. For many years, some critics have advocated the adoption of a “third-dimensional” approach, which would empower clients to solve their social problems on their own. Prior to the 1996 Restrictions, most legal aid consisted of the first-dimensional approach, meaning that the client would approach the lawyer for legal advice and representation in solving legal problems. In addition, second-dimensional advocacy approaches, including the use of the class action, were used in order to heighten public awareness of issues concerning the poor community. However, the traditional relationship dominated.

The third-dimensional approach would attempt to accomplish the same goals as a class action advocacy approach. Instead of heightening the general public’s knowledge of the poor community’s issues in order to obtain social and justice reform, lawyers could undertake efforts to educate the poor community. By encouraging lawyers to act as educators and counselors as much as legal advisers, the poor community would be apprised of their legal rights and remedies. This approach would represent the kind of legal services that other segments of the population already enjoy and would allow members of the community to develop their own problem-solving skills.

The adverse impact of the class action restriction on the delivery of legal services is unambiguous. The restriction has largely eliminated the class action lawsuit as a means of legal advocacy for the poor. The fact that the class action no longer exists as a viable option for most legal services lawyers requires that a new method of delivering legal aid to the poor community must be developed. Community education, like class actions, can empower the poor to achieve justice for past harms suffered and prepare them to face future harms as well.