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From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys

Ilisabeth Smith Bornstein

In 1996, Congress limited opportunities for the poor to pursue a class action lawsuit by forbidding legal services providers that receive federal funds from initiating or participating in class action lawsuits.¹ The class action prohibition was one of many restrictions imposed on the activities of federally funded legal services providers.² Although the Supreme Court struck down one such restriction as unconstitutional,³ no court has ruled yet on the constitutionality of the class action prohibition.⁴

This Comment suggests that the class action prohibition is unconstitutional because it represents impermissible viewpoint discrimination. Part I of the Comment reviews the history and mandate of the Legal Services Corporation, examines the legislative history behind the class action prohibition, and provides an overview of legal challenges to the 1996 restrictions. Part II sets out the relevant law on viewpoint neutrality and explains why the restriction on class actions can be considered viewpoint discriminatory. Part III examines whether the government has a compelling state interest in promulgating the restriction and concludes that there is no such interest.

¹ B.A. 1997, Yale University; J.D./M.P.P. Candidate 2004, University of Chicago.
³ See 42 USC § 2996f(b) (2000).
⁴ See Legal Services Corp v Velazquez, 531 US 533 (2001).
⁵ At the time of publication, one case challenging the class action prohibition was pending in federal district court in New York. See Dobbins v Legal Services Corporation, 01 Civ 8371 (FB) (E D NY filed Dec 14, 2001), consolidated with Legal Services Corporation v Velazquez, 97 Civ 00182 (FB). For more information on the Dobbins case, see the Brennan Center’s Access to Justice project online at <http://www.brennancenter.org/programs/prog_ht_dob_vel_index.html> (visited Oct 15, 2003).
I. THE LEGAL SERVICES CORPORATION AND CHALLENGES TO THE 1996 RESTRICTIONS

A. History and Mandate of the Legal Services Corporation

The Legal Services Corporation ("LSC") is a nonprofit entity whose purpose is to provide "financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." Congress created the LSC in 1974 to ensure equal access to the court system. The LSC provides financial support by making grants of federal money to local organizations that provide free legal services to the poor. Congress decided to fund the LSC and the corresponding local legal aid providers because it recognized that "providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice and assist in improving opportunities for low-income persons consistent with the purposes of this Act." In 1996, Congress passed a sweeping set of restrictions on the activities of agencies that receive funds from the LSC. One of the restrictions forbids the involvement of LSC-funded attorneys in class action lawsuits. The ban on class action involvement originated from a perception that the initial purpose of the LSC was to fund the needs of individuals only, not the needs of a class of poor people, and a restriction on class action involvement was

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42 USC § 2996b(a) (2000).
See 42 USC § 2996(1)-(2).
42 USC § 2996(3).

1996 Act, 110 Stat 1321. Although states also have imposed similar restrictions on money derived from Interest on Lawyers Trust Accounts (IOLTA), this Comment focuses only on federal restrictions. For a discussion of the role of IOLTA funds in supporting local legal service providers, see Washington Legal Foundation v Legal Foundation of Washington, 271 F3d 835, 841-45 (9th Cir 2001), affd sub nom Brown v Legal Foundation, 2003 US LEXIS 2493.

1996 Act at § 504(a)(7) ("None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that initiates or participates in a class action suit.").

See Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996, Domenici amendment No 2819, 104th Cong, 1st Sess (Sept 29, 1995), remarks of Senator Pete V. Domenici (NM), in 141 Cong Rec S 14573, 14608 ("[T]he reason for the [prohibition against class actions] is because legal services . . . [was intended] to represent individual poor people in individual cases, not to represent a class of poor people."). See also Life After Legal Services, Wash Post A16 (Sept 18, 1995) (editorializing that the LSC was originally intended to meet the needs that the poor brought individually, and that any action helping the poor as a whole is counter to the original
necessary to restore the program to its original purpose of representing individual poor clients. According to advocates of the 1996 restrictions, representation of the individual needs of the indigent involves providing legal aid for "day-to-day legal needs" only. Activities such as fighting welfare reform and engaging in class action lawsuits were restricted because they were not considered part of the provision of day-to-day legal needs. Prior to the 1996 restrictions, however, LSC-funded organizations used class actions often and with substantial success to represent their clients' interests on everyday matters ranging from housing issues to medical needs to voting.

In addition to the requirement that LSC fund only civil suits, Congress historically has placed other restrictions on the use of its funds. One such restriction prohibits the LSC from using its
funds to support or promote political activities or interests.\textsuperscript{17} Congress implemented this restriction in recognition that the legal services program needed to be kept free from "the influence of or use by it of political pressures" in order for the program to survive.\textsuperscript{18} The types of political activity originally intended to be prohibited include influencing the result of an election,\textsuperscript{19} contributing to political parties or campaigns,\textsuperscript{20} and running for office.\textsuperscript{21} Over time, the definition of "political activities" has been broadened to include campaigns on ballot propositions and school desegregation litigation.\textsuperscript{22}

When President Richard Nixon created the LSC, he recognized that "Legal Services is concerned with social issues and is thus subject to unusually strong political pressures . . . . [I]f we are to preserve the strength of the program, we must make it immune to political pressure and make it a permanent part of our justice system."\textsuperscript{23} "Political pressures," as used in this context, referred to a fear that legal aid providers funded by the state might be subject to pressure by powerful community interests.\textsuperscript{24} An independent federal corporation was established expressly to ward off pressure from such constituencies.\textsuperscript{25} More recently, some have redefined "political" as the point of view LSC-funded attor-
ney's take on behalf of their clients. This is despite President Nixon's recognition that legal services are concerned with social issues which, practically by definition, are subject to political pressures.

B. Challenges to the 1996 Restrictions

1. Legal Services Corporation v Velazquez.

The Supreme Court addressed the constitutionality of one of the 1996 LSC restrictions in 2001, when it held that a restriction prohibiting LSC-funded attorneys from challenging existing welfare law violated the Constitution. In *Legal Services Corporation v Velazquez*, a group consisting of indigent clients and their lawyers, employed by grantees of funding from the LSC, challenged the constitutionality of restrictions on advocacy in welfare cases. This restriction on “suits for benefits” prohibited LSC attorneys from arguing the constitutionality of any existing welfare laws. Under the suits for benefits restriction, attorneys were permitted to sue welfare agencies for recovery and payment of benefits but were not allowed to challenge the law under which the client sought benefits.

The Court held the restriction against welfare law challenges to be unconstitutional because it constituted unacceptable viewpoint discrimination. Regulations that restrict expression of a particular point of view generally violate the First Amendment. However, a viewpoint-based funding decision may be sustained in two instances: (1) if the government is the speaker, or (2) if the

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26 See discussion in Part II.
27 Note that Nixon specifically distinguishes social issues from political pressures. See Larkin, 34 Judges' J at 1 (cited in note 23).
30 Id at 537.
31 See id at 540.
33 *Velazquez*, 531 US at 537.
government is using private speakers to promote a governmental message.\textsuperscript{36}

The Court in \textit{Velazquez} determined that the LSC program fit neither exception to the prohibition against viewpoint discrimination.\textsuperscript{37} The Court did not consider the government to be speaking, finding instead that "advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech."\textsuperscript{38} Nor did the Court view the attorneys as private speakers promoting the government's message.\textsuperscript{39} Because the LSC funding neither constituted nor was intended to promote governmental speech, the government was not entitled to impose any viewpoint-based restrictions.\textsuperscript{40}

As further evidence that the restrictions constituted impermissible viewpoint discrimination, the Court noted that the restrictions improperly limited freedom of speech rights, resulting in a distortion of the legal system.\textsuperscript{41} The Court found that the government was using an existing medium of expression, legal advocacy, and controlling it, via the restriction against suits for benefits, in such a way that the implementation of the restriction would have distorted the usual functioning of the medium.\textsuperscript{42} According to the Court, restricting how LSC-funded attorneys may advise their clients and what arguments these attorneys may present to the court in suits for benefits sufficiently distorts the functioning of the judiciary by altering the traditional role of attorneys.\textsuperscript{43}

Moreover, the Court found that the restriction threatened to impair judicial function by insulating laws from judicial scrutiny.\textsuperscript{44} According to the Court, the restriction against suits for benefits was an attempt by the government "to define the scope of the litigation it funds to exclude certain vital theories and ideas."\textsuperscript{45} This attempt to circumscribe attorneys and litigants was

\textsuperscript{36} See \textit{Rosenberger}, 515 US at 833. The rationale for these exceptions is that when the government is trying to support a viewpoint, either directly or indirectly, it is entitled to make sure that its message is not garbled or distorted, such as by including contrary viewpoints. See \textit{id}.

\textsuperscript{37} \textit{Velazquez}, 531 US at 542–43.

\textsuperscript{38} Id.

\textsuperscript{39} Id.

\textsuperscript{40} Id.

\textsuperscript{41} \textit{Velazquez}, 531 US at 544.

\textsuperscript{42} Id at 543.

\textsuperscript{43} Id at 544.

\textsuperscript{44} Id at 546.

\textsuperscript{45} \textit{Velazquez}, 531 US at 548.
held unconstitutional because it implied that Congress might be allowed to impose "rules and conditions which in effect insulate its own laws from legitimate judicial challenge."\(^{46}\)

The governmental policies at issue in Velazquez were insulated from judicial challenge because the Court found no adequate alternative avenue for a client to seek legal assistance.\(^{47}\) This outcome was unacceptable to the Court, which noted that "[t]he explicit premise for providing LSC attorneys is the necessity to make available representation 'to persons financially unable to afford legal assistance.'\(^{48}\)

2. Legal Aid Society of Hawaii v Legal Services Corporation.

While the Velazquez case was still pending in lower courts, the Legal Aid Society of Hawaii ("LASH") sued LSC, claiming that all of the 1996 restrictions were unconstitutional.\(^{49}\) The plaintiffs in LASH initially sought an injunction preventing the LSC from enforcing the 1996 regulations.\(^{50}\) The preliminary injunction was granted on the grounds that some of the restrictions implicated First Amendment rights of association,\(^{51}\) but the court declined to extend the First Amendment right of association to class actions.\(^{52}\) At the time of the first LASH decision, no higher court had extended First Amendment protection to class actions and the district court was reluctant to do so without appellate precedent.\(^{53}\) The district court did note that an earlier Supreme Court case had implied a potential constitutional right to pursue a class action,\(^{54}\) but ultimately the district court feared that extending the rights of association to protect the right to file class actions would make class actions a constitutional entitlement.\(^{55}\)

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\(^{46}\) Id.

\(^{47}\) See id at 546.

\(^{48}\) Id, quoting 42 USC § 2996(a)(3).

\(^{49}\) See Legal Aid Society of Hawaii v Legal Services Corp, 145 F3d 1017, 1022–23 (9th Cir 1998), cert denied 525 US 1015 (1998) (hereinafter "LASH").

\(^{50}\) See Legal Aid Society of Hawaii v Legal Services Corp, 961 F Supp 1402, 1410 (D Hawaii 1997), affd in relevant part, 145 F3d 1017 (9th Cir 1998), cert denied, 525 US 1015 (1998) (questioning whether the First Amendment right to associate for the purpose of engaging in litigation as a form of political expression extends to class actions).

\(^{51}\) Id at 1408–09, 1411.

\(^{52}\) Id at 1410–11.

\(^{53}\) Id at 1410.

\(^{54}\) See California Motor Transport Co v Trucking Unlimited, 404 US 508, 510–11 (1979) ("[l]t would be destructive of rights of association and of petition to hold that groups with common interests may not . . . use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view.").

\(^{55}\) LASH, 961 F Supp at 1410.
The appellate level proceedings in *LASH* did not address the First Amendment arguments because the class action prohibition was not the subject of the appeal. Instead, the Ninth Circuit focused on the constitutionality of the regulations as a whole.\(^5\) The court examined whether the 1996 restrictions represented unconstitutional conditions,\(^6\) and addressed a more general concern regarding the degree to which federally funded organizations could engage in restricted activities with non-federal funds.\(^7\) Ultimately, the Ninth Circuit found the restrictions constitutional because the “program-integrity” regulations\(^8\) issued by Congress sufficiently provided an alternate avenue by which to engage in restricted activities.\(^9\)


Although the federal courts routinely have avoided ruling on the class action prohibition, a state Supreme Court in New York scrutinized the restriction on engaging in class action lawsuits.\(^10\)

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\(^5\) *LASH*, 145 F3d at 1020.

\(^6\) Id at 1024. The “unconstitutional conditions” doctrine provides that Congress cannot condition the receipt of a benefit on the relinquishment of a constitutional right. See *Rust v Sullivan*, 500 US 173, 196 (1991). For further illustration of the unconstitutional conditions doctrine, see *Speiser v Randall*, 357 US 513 (1958) (finding it unconstitutional to condition receipt of a property-tax exemption on an oath not to advocate the overthrow of federal or state government because such an act penalized certain forms of speech).

\(^7\) *LASH*, 145 F3d at 1028–29.

\(^8\) Program integrity regulations, developed to address the needs of organizations that receive both federal and non-federal funding, describe how organizations can use non-federal money to pursue a purpose prohibited by the conditions of the federal money. See, for example, *Rust*, 500 US at 187–88 (describing how non-federal funds may be used to provide health care services that cannot be funded with federal funds).

\(^9\) *LASH*, 145 F3d at 1024–25. In adjudging the constitutionality of the restrictions, the Ninth Circuit used the standard of review put forth in *Rust* for facial challenges to legislative acts: “the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.” *Rust*, 500 US at 183. The Ninth Circuit upheld the restrictions at issue in *LASH* because of their similarity to the regulations upheld by the Supreme Court in *Rust*. *LASH*, 145 F3d at 1025. The constitutionality of the LSC’s program integrity regulations was not addressed by the Supreme Court in *Velazquez*. The Second Circuit addressed the issue briefly but ultimately upheld the regulations because the *Velazquez* plaintiffs could not sustain a facial challenge to the regulations. See *Velazquez*, 164 F3d at 767 (finding that the plaintiffs failed to show that “no set of circumstances exists under which the Act would be valid”). The court expressed doubt, however, that regulations modeled on those upheld in *Rust* would by definition provide adequate avenues for protected expression. See id at 766.

In Varshavsky v Geller, the court found the 1996 restriction against class actions unconstitutional, but only to the extent that the restriction limited what recipient organizations could do with non-federal funds. The court held that the restriction penalized the LSC recipient "for engaging in political expression that Congress disapproves of using funds wholly independent of the federal government." After the Varshavsky decision, the LSC regulations were amended regarding the use of non-LSC money. The Varshavsky case, therefore, does not provide any instructive analysis of the class action prohibition since the case was decided before the LSC amended its regulations to include the program integrity regulations upheld by the Ninth Circuit in LASH.

There is a case currently pending in federal district court in New York, Dobbins v Legal Services Corporation, which seeks to challenge the class action prohibition. The Dobbins plaintiffs joined the Velazquez plaintiffs to seek a preliminary injunction against the 1996 restriction on the uses of non-LSC funds by an LSC-funded organization. While Dobbins focuses on the extent to which Congress may control a non-profit organization's use of non-federal funds, the Dobbins plaintiffs also contend that the government's "selective exclusion of the clients of LSC grantees" from utilizing the class action device constitutes viewpoint discrimination.

The remainder of this Comment applies content-neutrality analysis to the class action prohibition to examine how the restriction could constitute viewpoint discrimination, and then explores whether the government has any interests that are compelling enough to justify such viewpoint discrimination.

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63 Id.
64 Id.
65 See 45 CFR §§ 1610 et seq. See also id at 1610.8 (describing program integrity standards for the use of non-LSC funds); LASH, 145 F3d at 1023 (explaining the revision of the regulations).
66 01 Civ 8371 (FB) (E D NY filed Dec 14, 2001).
67 For more information on the Dobbins case, see the website for the Brennan Center for Justice at New York University Law School (cited in note 4).
II. THE CLASS ACTION PROHIBITION AND VIEWPOINT NEUTRALITY

Before analyzing the class action prohibition for viewpoint discrimination, it is necessary to clarify whether the speech at issue is governmental or private. How a court characterizes speech involved in the subsidization of legal services guides the extent of the viewpoint neutrality analysis.

A. Nature of the Speech

When the government establishes a subsidy for specified ends, it may impose certain restrictions in order to define the limits and purpose of the program and to ensure that its message is not garbled or distorted. The Court in Velazquez found that “the LSC program was designed to facilitate private speech, not to promote a governmental message.” In determining that the speech was not governmental, the Court examined whether the LSC-funded attorneys were acting as private speakers transmitting a governmental message. The Court determined that the attorneys were not conveying a governmental message since they were funded by Congress to represent the interests of indigent clients.

The Court reached this conclusion in the specific context of suits for benefits, in which the government’s voice is represented by the opposing counsel, whose job is to defend the government’s policy. In the class action context, most of the indigent’s issues are institutional in nature and involve the government as an adversary. Although this is not always the case, the finding of private speech in Velazquez necessarily extends to the entire function of the LSC. As an initial matter, it would be counter-intuitive for an LSC-funded attorney’s advocacy to be considered private in some cases and governmental in others. Additionally, the restriction on suits for benefits illustrates the larger principle that the LSC program presumes the necessity of private, nongovernmental...
tal speech.\textsuperscript{76} The Court in \textit{Velazquez} stated that the “advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech”\textsuperscript{77} without qualifying only certain circumstances in which this might be so. Accordingly, an LSC-funded attorney’s actions are likely to be characterized as private speech regardless of what he or she argues.

B. Viewpoint and Content Neutrality

At first blush, the prohibition on federally-subsidized class actions may appear to be a content-neutral regulation since the restriction on class action involvement does not regulate content on its face. Adherents to this view may perceive class actions as purely procedural devices, containing no content to regulate. Nonetheless, a closer examination of these arguments, particularly in light of the \textit{Velazquez} analysis, reveals how the restriction on class actions constitutes viewpoint discrimination.

1. Finding substantive content.

One objection against finding viewpoint discrimination in the restriction on class actions concerns the nature of class actions. Those who view class actions as solely procedural devices might perceive the ban on class actions as content-neutral, reasoning that a procedural device contains no content to be regulated.\textsuperscript{78} Such a narrow view, however, is misleading, for a growing body of scholarship argues that class actions have a significant substantive component and are not merely self-contained procedural devices.\textsuperscript{79}

\textsuperscript{76} \textit{Velazquez}, 531 US at 543.

\textsuperscript{77} Id at 542–543.

\textsuperscript{78} For examples of explicit references to class actions as procedural devices, see \textit{Deposit Guaranty National Bank of Jackson, Mississippi v Roper}, 445 US 326, 331 (1980); Markham R. Leventhal, \textit{Class Actions: Fundamentals of Certification Analysis}, 72 Fla Bar J 10, 10 (1998).

Several points elicit how and why the class action has substantive content. First, despite appearing to be “neutral” and “designed to facilitate implementation of existing substantive law,” the effect of the class action is to transform and modify substantive law.80 Second, the class action suit has long been recognized as a means to equalize81 and empower82 litigants. In the context of legal services providers, the inability of attorneys to file class action lawsuits on behalf of their clients essentially limits the procedures available to these clients, which puts them on unequal footing with other potential litigants whose procedural opportunities are not restricted.83 The result is a substantive effect on the law.

Although there is disagreement about whether using class actions to change substantive law constitutes “furtive” and “surreptitious” attempts to effect new laws,84 or simply is a natural part of the legal process,85 it is widely recognized in many areas of the law that class actions do, in fact, change substantive law. For example, the process of class certification shapes substantive claims by plaintiffs in human rights class actions.86 Similarly, in the field of mass torts, class actions produce substantive changes in the law87 and have been proposed as a method by which to re-
solve problems of proving causation. These examples demonstrate how the class action amplifies procedural devices to effect substantive change.

The congressional response to class actions, particularly in the context of the LSC, also has emphasized the substantive effects of the class action rather than its role as a procedural device. Discussions surrounding the 1996 restrictions demonstrate this perception of the class action. The LSC was described as promoting a "liberal agenda" and serving "left-wing causes," and its attorneys were characterized as "political activists" who use "exotic theories" to pursue cases beyond small claims and municipal courts. Activities such as class actions were restricted because Congress did not approve of using LSC funds to advance "political or ideological ends" that offended conservative views. These descriptions all represent views on the substantive effects of class actions. Although discussion of legislative motive is not directly relevant to constitutional analysis, it is useful to show that class actions are not purely procedural devices and that regulation of class actions can be examined for content-neutrality.

2. Express regulation of content.

A second objection to finding viewpoint discrimination in the restriction on class actions is that the restriction does not regulate content on its face. The ban on class actions is not restricted to certain subjects, such as class actions on housing issues. Nor does the restriction expressly forbid class actions that take a certain viewpoint. The restriction prohibits initiation or participation in any class action suit, regardless of the content of legal dispute or the viewpoint advocated by the LSC attorney in such a

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89 See Epstein, 4 CLP Manhattan Institute at 16 (cited in note 79).
92 Id at 7005, Remarks of Representative Norman D. Dicks (WA).
suit. For these reasons, the argument goes, the restriction must be found constitutional.

This same reasoning was used, and rejected, in *Velazquez*. The Court in *Velazquez* relied on the Second Circuit's analysis that the restriction on suits for benefits sought to discourage advocacy for reform of government policy. By denying funding for welfare cases that challenge existing welfare law, the restriction discouraged viewpoints that challenged the status quo. Because the speech at issue involved the right to criticize the government and advocate change in government policy, it was subject to the First Amendment's strongest protection. The Second Circuit then noted that because the courtroom is recognized as the prime marketplace for exposing ideas regarding the constitutionality or legality of a government rule, such viewpoint discrimination effectively drives the idea—here, of welfare reform—from the marketplace.

As further evidence that the suits for benefits provision was not content-neutral, the Supreme Court pointed to the distortion that the ban had on the legal system. The Court found that while the government encouraged the use of the state and federal courts and the independent bar by subsidizing LSC attorneys, the restriction on how attorneys could advise their clients and what arguments could be presented altered the role of attorneys so much as to distort the legal system. The Court considered the prohibited activities (advocacy regarding the constitutionality of welfare laws) to be speech necessary for the proper functioning of the legal system. To illustrate this point, the Court noted that if an LSC-funded attorney representing a client in a welfare benefits case were asked by a judge if there was a constitutional concern present, the restriction would prohibit the attorney from answering the question. Because the judiciary's primary mission is to interpret both the law and the Constitution, the result of

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95 1996 Act, § 504(a)(7).
96 See *Velazquez*, 164 F3d at 769.
97 Id at 770. Prior to the Court's distinction of *Rust* on the basis of government versus private speech, the Second Circuit distinguished the facts from *Rust* by noting that the speech at issue, namely expression on public issues and the right to criticize government policy, is a more protected category of speech than abortion counseling. See id at 770–71.
98 See id at 771.
99 Id at 772.
100 *Velazquez*, 531 US at 544.
101 See id.
102 Id at 545.
103 Id, citing *Marbury v Madison*, 5 US 137, 177 (1803).
the restriction would be an under-informed judiciary due to the attorney's inability to address constitutional questions surrounding statutory viability.\textsuperscript{104}

The \textit{Velazquez} analysis can be applied to the class action prohibition as well to support a finding of viewpoint discrimination. The first argument is that the class action prohibition restricts how attorneys may advise their clients and what arguments the attorney may present to the court, and thus distorts the functioning of the legal system in much the same way as was found with the suits for benefits restriction. The Supreme Court clearly stated that the proper exercise of the courts depends upon attorneys being able to present "all the reasonable and well-grounded arguments necessary for the proper resolution of [a] case.\"\textsuperscript{105} If the LSC-funded attorney is prevented from filing a class action, she must present her suit in the context of her client's experience only. The court may then get the impression that the acts of the other party were isolated or limited to this client, when in fact the client's experience may be merely an example of a systematic pattern of illegal behavior on the part of the other party.

Second, the class action prohibition distorts an attorney's representation of her client. Under the 1996 restrictions, an attorney may not provide any advice to the client regarding the possibility of filing the client's suit as a class action. The attorney is permitted to advise clients about the pendency and effects of a class action which has already been filed, and can represent a client who wants to withdraw from or opt out of an existing class action.\textsuperscript{106} But if the same client were to approach an attorney with her individual complaint, the attorney is restricted in the advice she can offer. LSC-funded attorneys are forbidden from initiating or participating in class actions, and the prohibition extends to the provision of advice on filing class actions.\textsuperscript{107} If a client's complaint is best litigated as a class action, the client's representation and the legal system as a whole become distorted because the LSC attorney is forced to present an inferior method for seeking relief.\textsuperscript{108} And for those whose claims can only be filed as a

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\textsuperscript{104} \textit{Velazquez}, 531 US at 545.
\textsuperscript{105} Id.
\textsuperscript{106} See 61 Fed Reg 63754, 63755.
\textsuperscript{107} See 1996 Act, § 504(a)(7).
\textsuperscript{108} See Laura K. Abel and David S. Udell, \textit{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, 884–85 (2002) (noting the discrep-
class action, their suits will be driven from the marketplace if LSC-funded attorneys cannot file such cases on their behalf.

Incomplete advice and argument to the court distorts the functioning of the judicial system and harms the client. A significant number of the poor's problems occur to them as a class and are of the variety that the class action device is specifically aimed to help: small claims and persistent maltreatment by a person or, more likely, an entity. A class action is more likely to yield lasting results and be broader-based in terms of the relief it provides, and it is a more effective deterrent than an individual suit. Moreover, because the legal problems of the poor may be institutional in nature, the class action is all the more important given that institutional change rarely results from individual suits.

Third, in Velazquez, the Court found that the effect of the ban on suits for benefits was to insulate government policies from judicial inquiry by sifting out cases presenting constitutional challenges. According to the Court, even in suits that were litigated, the restriction would result in lingering suspicion on the part of both the judiciary and the public as to whether the LSC-funded attorney had undertaken a complete analysis of the case, given full advice to the client, or properly presented the case to the court. The same can be said of a class action restriction, particularly when the LSC attorney, judge, and opposing counsel

109 See, for example, id at 882, 885–86 (providing examples of potential LSC clients who are denied relief because their claims are not incorporated into a class action, and noting that class actions are particularly appropriate for groups such as residents in adult homes and migrant workers who may be afraid to participate in individual cases for fear of retaliation); Roth, 33 Harv CR-CL L Rev at 155–56 (cited in note 15) (explaining that class actions may provide essential relief in cases where someone who is not a party to the initial litigation may never obtain relief). For a general discussion of why certain claims may only be filed as a class action, see Deposit Guaranty National Bank of Jackson, Mississippi, 445 US at 339 (noting that in cases where the cost of bringing suit exceeded the benefit sought, potential claimants were not bringing suit); United States Parole Commission v Geraghty, 445 US 388, 402–03 (1980) (noting that rulemakers created the class action to allow claimants with similar claims to spread the litigation costs amongst themselves in order to be able to sue the wrongdoer).

110 See Houseman, 67 Fordham L Rev at 2204 (cited in note 16) (noting that the government agencies often take actions affecting a large group of people, including the poor).

111 See Failinger and May, 45 Ohio St L J at 17 (cited in note 11); see also Abel and Udell, 29 Fordham Urb L J at 886 (cited in note 108) (noting that individual suits may obtain relief for the litigant but allow the defendant to continue to discriminate against others similarly situated).

112 See Failinger and May, 45 Ohio St L J at 18, 30–32 (cited in note 11).

113 Velazquez, 531 US at 546.

114 Id.
are repeat players. If the judge sees repeated cases with similar fact patterns, she may wonder whether any of the individual cases were properly presented to the court or analyzed in a manner best resolving the clients' claims.

Aside from the Velazquez analysis, there are other reasons to find the class action prohibition unconstitutional. Restricting how the attorney may advise the client, as well as how she may inform the court, truncates the attorney's presentation to the court in a way that implicates protected speech and expression. Ligation theories are a protected form of expression, and the speech at issue here, expression on public issues and criticism of government policy, is accorded the highest protection under the First Amendment. The Court views such a restriction on attorney advocacy and judicial function as "serious and fundamental."

That the LSC attorney could withdraw from a case touching restricted activities is beside the point. The Court recognized in Velazquez that the LSC was created precisely to provide legal representation to those who are unable to afford an alternate source of legal assistance. The lack of an alternate channel for the expression that Congress sought to restrict made such a restriction on the expression unconstitutional. For these reasons, the Court also rejected the argument that the client could find a non-LSC attorney to represent him with regards to the restricted speech.

The viewpoint against which the class action prohibition discriminates has been described as one that seeks to hold the gov-

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115 Id at 545.
116 See Tashima v Administrative Office of the United States Courts, 967 F2d 1264, 1270 (9th Cir 1992) (establishing that the litigation strategy and views of a party on a matter constitute legitimate forms of expression protected by the First Amendment).
117 See Velazquez, 164 F3d at 771.
118 Velazquez, 531 US at 544.
119 Id at 546.
120 Id at 546-47.
121 Because of the desirability to be represented by counsel familiar with one's own institutions and issues, finding a non-LSC lawyer may be even more difficult for a client seeking class action representation than for a client filing a suit for benefits. See Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons, 67 Fordham L Rev 1751, Recommendation 6, at 1754 (1999) (noting that in order to represent a group of indigent clients, an attorney must have a detailed understanding of the group's history and objectives, as well as of the characters and institutions with which the group frequently interacts). In fact, it may be even more difficult for a client to find a non-LSC lawyer to file a class action because it is precisely the LSC-funded lawyer, not the pro bono attorney in private practice, who is likely to have exposure and access to a class of clients suffering the same harm.
ernment accountable for its actions, particularly when the actions infringe upon substantive rights. This is precisely what the suits for benefits restriction prevented when it banned arguments on the constitutionality of welfare laws, and the class action restriction should be considered unconstitutional for the same reasons.

It has also been suggested that the 1996 restrictions implicate certain other First Amendment rights, namely, the right of association and the right to petition the government for grievances. The Court has recognized these rights as being "among the most precious of the liberties safeguarded by the Bill of Rights," and has warned against making such rights "hollow promises" by denying groups the means to exercise these rights. Those who support restrictions on LSC acknowledge that it is legitimate to file suits on behalf of individuals who are being denied funds improperly or who are being treated improperly by the state, yet offer no reason why suits on behalf of a group so situated are not just as legitimate.

\(^{122}\) See Roth, 33 Harv CR-CL L Rev at 121 (cited in note 15).

\(^{123}\) Some still may view the total effect of the class action restriction as only disparate impact, and thus not worthy of constitutional scrutiny. In response, see Susan H. Williams, Content Discrimination and the First Amendment, 139 U Pa L Rev 615, 715 (1991) (arguing that disparate impact cases should be treated as a type of content discrimination deserving of strict scrutiny).

\(^{124}\) See LASH, 961 F Supp at 1410, citing California Motor Transport Co v Trucking Unlimited, 404 US 508, 510-11 (1972) ("[I]t would be destructive of rights of association and petition to hold that groups with common interests may not . . . use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view.").

\(^{125}\) See California Motor Transport Co v Trucking Unlimited, 404 US 508, 510 (1972) (finding that the right to access the courts is an aspect of the right of petition). See also Larkin, 34 Judges' J at 3 (cited in note 23) (stating that anyone who has a grievance should have the opportunity to have it addressed by the judiciary).


\(^{127}\) See United Transportation Union v State Bar of Michigan, 401 US 576, 585-86 (1971).

\(^{128}\) See also Dawson v Delaware, 503 US 159, 163 (1992) and John Leubsdorf, Constitutional Civil Procedure, 63 Tex L Rev 579, 590-91 (1984) (recognizing that the right to present claims to the court extends to groups as well as individuals).

One may counter that even if the class action prohibition implicates First Amendment rights, the government is not required to subsidize the exercise of these rights, regardless of how fundamental they may be. Once the government subsidizes some speech, however, it cannot discriminate in its funding in a viewpoint discriminatory manner, which is what Congress has done in implementing the ban on class action involvement.

III. STATE INTEREST

If actions by LSC attorneys are not government speech and the restriction against class action involvement is viewpoint discriminatory, the class action prohibition still may be upheld if the government presents a compelling interest for imposing the restriction. In Velazquez, the Second Circuit found no state interest to justify the restriction against suits for benefits. The Supreme Court noted that the government defended the suits for benefits restriction on two grounds. First, the government argued that the restriction was necessary to “define the scope and contours of the federal program.” The Court rejected this proffered interest, recognizing that it is circular for the government to claim that any viewpoint discrimination inherent in the program is permissible when the purpose of the program is to advocate just that type of discrimination.

Second, the government claimed that the suits for benefits restriction was necessary to help the welfare system function more efficiently, by removing complex challenges, such as those

LSC attorneys are “very worthwhile” and that the poor should have full access to the legal system.

130 See Harris v McRae, 448 US 297, 315 (1980).

131 See Leubsdorf, 63 Tex L Rev at 617–18 (cited at note 127) (arguing for a constitutional right to class actions based on the established First Amendment right to associate and present grievances to the court). According to Professor Leubsdorf, when the only means by which an individual can seek redress from illegal acts is by filing a class action, then the First Amendment should protect the individual’s right to bring such an action. See id at 618.

132 See NAACP v Button, 371 US 415, 438 (1963) (“[O]nly a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify limiting First Amendment freedoms.”). See also Perry Education Association v Perry Local Educators’ Association, 460 US 37, 45 (1983) (noting in addition that the interest must be narrowly tailored, and may be subject to time, place and manner restrictions provided that there are ample alternatives for communication).

133 Velazquez, 164 F3d at 772.

134 Velazquez, 531 US at 547.

135 Id (“Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.”).
challenging the constitutionality of the welfare laws. Again, the Court dismissed this interest. Instead of finding such a limit on welfare advocacy to be compelling, the Court viewed the restriction as an attempt by the government to insulate its laws from constitutional scrutiny.

There are, similarly, no interests in the class action restriction that are compelling. As the Court in Velazquez noted, the danger in subsidized speech is in allowing the government to define its subsidization programs in an unchecked and self-referential manner. For this reason and the reason put forth by the Supreme Court in Velazquez, any argument that the point of the restriction is to discourage class action lawsuits necessarily must fail.

Moreover, the ban on class action involvement directly contradicts provisions in the LSC Act regarding attorney responsibilities and the purpose of the existence of the LSC. The LSC Act specifically instructs the LSC to structure itself so as to provide “the most economical and effective delivery of legal assistance to persons in both urban and rural areas.” If the goal of the LSC truly is to meet the needs of as many of the poor as possible, then the government has every incentive to reduce litigation costs by consolidating similar suits into a class action, thereby freeing up more money to meet more of the indigent’s legal needs. In addition, many in the legal aid community suggest that LSC funds currently being used to adhere to the program integrity

136 Id.
137 Id.
139 42 USC § 2996f(a)(3).
140 See Reforming an ‘Incredibly Political’ Agency, Interview with Donald Bogard, President, Legal Services Corporation, US News & World Rep 66–67 (Oct 31, 1983) (noting the great demand for legal services and encouraging LSC funds to be used to meet as many legal needs as possible).
141 See Failinger and May, 45 Ohio St L J at 28 (cited in note 11) (arguing that Rule 23’s primary goal is efficiency and that the resulting savings in attorney time through group litigation ultimately enables more poor clients to be served); Abel and Udell, 29 Fordham Urb L J at 882 n 34 (cited in note 108) (noting that the prohibition on class actions leads to duplicative lawsuits which waste judicial resources). See also End Legal-Aid Program for Poor?, Interview with Archibald Cox, Professor, Harvard Law School, US News & World Rep 33 (Aug 3, 1981) quoting Professor Cox (“[C]lass actions are often the most cost-effective way of benefiting people in need. If a single suit can establish the rights of a class certified by a judge—possibly several thousand people—then that is the best way to take care of the legal needs of the poor.”); Eyak Native Village v Exxon Corp, 25 F3d 773, 781 (9th Cir 1994) (finding that even in cases where an individual suit could be brought, the rule makers for Rule 23 thought it best to economize the judiciary’s resources by condensing similar claims into one suit).
regulations mandating separate facilities\textsuperscript{142} could be better spent on the provision of legal services.\textsuperscript{143}

The LSC Act also states that “attorneys providing legal assistance must have full freedom to protect the best interests of their clients.”\textsuperscript{144} Attorneys do not have full freedom to protect their clients’ interests when they are limited in what services they can provide,\textsuperscript{145} particularly when a client’s best interests are not immediately apparent. An attorney may not always know at the outset of a case whether a class action will be appropriate.\textsuperscript{146} If the attorney thinks the class action might be appropriate, she must turn away the client, and the client’s needs will go unmet. If the attorney accepts the client before realizing that the class action is the most appropriate way to proceed, then the attorney will be forced to withdraw from the case, the client’s needs will remain unmet, and time and resources will have been expended without any appreciable result.\textsuperscript{147} Some scholars have argued that this restriction on the use of class actions is contrary to the dictate of the Model Code of Professional Responsibility because of its impact on the attorney’s ability to be an effective advocate for the client.\textsuperscript{148}

\textsuperscript{142} See 45 CFR § 1610.8.

\textsuperscript{143} See, for example, Udell, 17 Yale L & Pol Rev at 351–55 (cited in note 15) (detailing the costs in time, energy, and money of adhering to the LSC program integrity regulations). But see LASH, 145 F3d at 1027–29 (rejecting appellant’s contention that the requirement of separate staff and facilities greatly increases the difficulty of providing legal services).

\textsuperscript{144} 42 USC § 2996(6).

\textsuperscript{145} See Abel and Udell, 29 Fordham Urb L J at 884–85 (cited in note 108) (providing examples of the court being unable to learn the complete facts about a defendant’s practices because an individual client has limited powers of discovery compared to that of a class in a class action). See also Udell, 17 Yale L & Pol Rev at 368 (cited in note 15) (stating that a single class action provides greater relief to a larger population than is possible now with the 1996 restrictions).

\textsuperscript{146} See Houseman, 67 Fordham L Rev at 2199 (cited in note 16).

\textsuperscript{147} See Failinger and May, 45 Ohio St L J at 24–25 (cited in note 11) (posing hypothetical cases where an attorney must choose between meeting the legal needs of one versus many clients).

\textsuperscript{148} See id at 6; Robert R. Kuehn, Shooting the Messenger: The Ethics of Attacks on Environmental Representation, 26 Harv Envtl L Rev 417, 440 (2002) (characterizing limits on the advocacy a client may receive as contrary to rules of professional responsibility). See also Legal Services Corporation Act of 1974, Pub L No 93-355, 1974 USCCAN 3872, 3880-81 (analyzing the Legal Services Act of 1974 § 7(7) and determining that the choice of “how best to proceed in particular cases is always best left to the attorney and client, and the Corporation should not seek to substitute its judgment for that of the attorney in determining how best to serve the interests of particular clients”).
CONCLUSION

The debate over what types of noncriminal legal activities the LSC should fund mirrors a larger debate on the extent to which the government should subsidize the needs of the poor. Despite arguments that the Legal Services Corporation was created to address the needs of individual poor people, there is plenty of evidence that the federally-funded poverty law program was directed from its inception to serve the interests of the poor as a group, particularly by engaging in class action lawsuits. This is supported by data showing that at the time of the LSC’s inception, there was less than one lawyer for every ten thousand people below the poverty line, which implies that Congress did not intend to provide enough money to meet the needs of individual poor clients. Although the poor are not recognized as a suspect class, deserving of strict scrutiny under constitutional due process analysis, some scholars have argued that the legal needs of the poor are equivalent to those of criminal litigants in terms of the losses at stake, such as loss of economic liberty, loss of means of support, and loss of spouse and children. And while some justify the 1996 restrictions by saying that they leave the poor no worse off than if the LSC never existed, many argue that both scenarios, restricted services and no services, are unacceptable.

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149 An earlier debate existed between those who believe legal assistance should be provided to attack the causes and effects of poverty, and those who viewed legal assistance as a means of providing as many poor individuals as possible with access to the courts. See Failinger and May, 45 Ohio St L J at 5 (cited in note 11). The authors argue that both of these models are consistent with group-oriented approaches to legal assistance for the poor. See id at 55. This debate also has been characterized as one between “impact” and “service” cases. See Udell, 17 Yale L & Pol Rev at 362 (cited in note 15).


152 See San Antonio Independent School District v Rodriguez, 411 US 1, 29 (1973) (finding that wealth discrimination is not an adequate basis for invoking strict scrutiny).

153 See Failinger and May, 45 Ohio St L J at 12 (cited in note 11).

154 See Velaquez, 531 US at 556 (Scalia dissenting).

155 See, for example, Larkin, 34 Judges’ J at 1-2 (cited in note 23) (noting that pro se cases are a growing and significant problem for the courts). For a general discussion of the effect on the poor of the restriction on class action involvement by LSC attorneys, see Taking the Offensive—Summit on Court Strategy, 40 San Diego L Rev 115 (2003).
The Velazquez Court's finding that one of the 1996 restrictions constitutes viewpoint discrimination and distorts the functioning of the judiciary can apply to the class action prohibition as well. The government is not speaking or funding others to convey a governmental message when it finances LSC. Despite claims of being "activist," the LSC has continued to address the social issues faced by the poor, as envisioned by President Nixon. The position LSC clients take on these social issues is a viewpoint—one against which Congress has impermissibly discriminated in its decision to fund only certain legal services. The government has not provided any compelling interest for silencing viewpoints that may only be expressed in a class action. Accordingly, it cannot select which types of arguments may be litigated by the attorneys it funds.

Because the courtroom is considered the prime marketplace for arguing a legal principle, and because the clients served by the LSC, by definition, have few, if any, other options for legal counsel, a prohibition on the use of legal procedures, such as a class action, effectively ensures that the rights sought to be protected in the class action will not be heard in the legal marketplace. Such a result distorts the function of the courts by artificially removing arguments and theories from the province of judges.

Despite the presence of the Dobbins suit, there is concern that the holding of Velazquez is too narrow and the political culture too fragile to support a challenge to the class action prohibition. This Comment suggests that when and if legal challenges to the class action prohibition surface in greater number, it is possible to challenge the restriction on the basis of viewpoint discrimination. Long before the 1996 restrictions, the ABA Committee on Ethics and Professional Responsibility declared that it was

157 See Failinger and May, 45 Ohio St L J at 18, 30–31 (cited in note 11) (noting that opponents to the restrictions contended that this "activism" was necessary in some cases to meet the basic legal needs of the poor). But see Larkin, 34 Judges’ J at 2 (cited in note 23) ("LSC is not about promoting an agenda . . . . It is about providing access to the courts and legal processes.").
158 See Redish and Kessler, 80 Minn L Rev at 557–58 (cited in note 138) (arguing that a negative subsidy such as refusing to fund class action involvement reduces the development of the speaker and potential listeners by reducing the speech available for use in community and legal decisions)
159 See Dobbins v Legal Services Corporation, 01 Civ 8371 (FB) (E D NY filed Dec 14, 2001), consolidated with Legal Services Corporation v Velazquez, 97 Civ 00182 (FB) (E D NY Dec, 2001).
unethical to limit an attorney’s ability to file a class action lawsuit when such relief was essential for the attorney’s client.\textsuperscript{161} A closer look at the class action prohibition shows that the restriction infringes upon established First Amendment rights and runs contrary to the mandate of the LSC—to provide high quality legal services to those who cannot otherwise afford them.

\textsuperscript{161} See ABA Committee on Ethics and Professional Responsibility, Formal and Informal Opinions, Formal Opinion 334 (ABA 1995). See also Megan Elizabeth Lewis, Note, Subsidized Speech and the Legal Services Corporation: The Constitutionality of Defunding Constitutional Challenges to the Welfare System, 74 NYU L Rev 1178, 1209 (1999) (arguing that the welfare benefits restrictions determine which causes of action a lawyer may bring, interfere with the lawyer-client relationship, and skew debate within the forum).