

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

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You are a county court judge. A woman, through her lawyer, tells you that her husband has just broken her arm and given her a black eye. She requests a restraining order, which you grant. The order requires the husband to leave the house and to avoid all face-to-face and telephone contact with the woman.

Two weeks later, the woman is back in court. Her lawyer tells you that the husband came by the house the previous night. When the woman refused to let him in, he broke down the door and threatened her with a gun. Perceiving a need to deter the defendant from assaulting his wife and to vindicate the court's authority, you hold the husband in civil contempt and order him to pay his wife's attorneys' fees.

At this point, the woman's lawyer tells you that Congress has barred you—a state court judge—from ordering an attorneys' fee award.¹ Although the attorney's salary is paid by a domestic violence grant from the state, the attorney's office receives some of its funding from the federal Legal Services Corporation (LSC). Con-

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1. For a description of the federal attorneys' fee award restriction, see the discussion *infra* note 14 and accompanying text.

gress prohibits LSC grantees from seeking or accepting fee awards in most circumstances.²

This scenario illustrates how restrictions on legal services lawyers interfere with core functions of the courts. This article will examine restrictions on legal services lawyers that are particularly likely to cause such interference. These restrictions include federal and state restrictions on participating in class actions, claiming attorneys' fee awards, representing certain categories of clients (such as prisoners and certain immigrants), and representing clients in certain categories of claims (such as public housing drug eviction cases).

This article will also examine the effect on state courts of federal restrictions on the funding that state and local governments provide for legal services. Such restrictions cause problems for the courts, including (1) interfering with the ability of courts to certify classes and award fees in appropriate cases; (2) interfering with the ability of courts to ensure that all people subjected to wrongful treatment are provided relief; (3) interfering with the deterrent effect of court orders; (4) interfering with the ability of the courts to decide cases with all relevant facts before them; (5) permitting defendants to insulate their wrongful practices from judicial review; (6) reducing the ability of the courts to prevent themselves from being used for illegitimate ends, such as harassment; (7) reducing

2. This scenario is based on a case handled by LSC grantee MidPenn Legal Services, Inc. The specific acts of domestic violence and the source of the lawyer's funding described in this hypothetical are not necessarily the same as in the MidPenn case.

In the MidPenn case, the program obtained an order of protection for a client from the county court. LSC, Office of Legal Affairs, External Op. 2001-1007 (2001); Telephone Interview with Michelle DeBord, Executive Director of MidPenn Legal Services, Inc. (Jan. 4, 2002). When the defendant subsequently violated the order, the court ordered the defendant to pay the client's attorneys' fees. LSC, Office of Legal Affairs, External Op. 2001-1007 (2001); Telephone Interview with Michelle DeBord, Executive Director of MidPenn Legal Services, Inc. (Jan. 4, 2002). The MidPenn attorney told the judge that she could not accept the fees, but the judge persisted in ordering them. Telephone Interview with Michelle DeBord, Executive Director of MidPenn Legal Services, Inc. (Jan. 4, 2002). Pennsylvania state court judges have the authority to award fees under the governing domestic violence statute, 23 PA. CONS. STAT. ANN. § 61141.1 (West 2001), and under the inherent power of the courts. See *Brocker v. Brocker*, 241 A.2d 336, 338 (Pa. 1968). The Pennsylvania Supreme Court has noted that courts have this inherent power in part because "[t]he interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter." *Bata v. Central-Penn Nat'l Bank*, 249 A.2d 767, 768 (Pa. 1969). Notwithstanding these important interests, and even though "the judge in this matter might be disappointed by his or her inability to award fees . . . in this case," LSC warned the attorney that if she accepted the fees her program would lose all federal funding. LSC Office of Legal Affairs, External Op. 2001-1007 (2001).

the ability of courts and other state legal services funders to allocate money to improve the administration of justice; and (8) increasing the amount of pro se litigation in the courts.³

Finally, this article will discuss the separation of powers and federalism implications of these incursions into court operations. This article will apply the reasoning of the Supreme Court in *Legal Services Corp. v. Velazquez*, in which the Court struck down a federal funding restriction that prohibited lawyers in programs that receive federal LSC funding from challenging welfare reform laws.⁴ The Court was deeply troubled by a rule aimed at depriving federal courts of their supreme authority to resolve constitutional ques-

3. There have been few studies that have seriously examined the impact of legal services restrictions on the courts, clients, lawyers, or the larger society. The Brennan Center for Justice has authored several reports containing information about the effects of the federal restrictions. *See, e.g.*, BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES: HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER (2000); BRENNAN CTR. FOR JUSTICE, BEARING WITNESS: LEGAL SERVICES CLIENTS TELL THEIR STORIES (2000); BRENNAN CTR. FOR JUSTICE, LEFT OUT IN THE COLD: HOW CLIENTS ARE AFFECTED BY RESTRICTIONS ON THEIR LEGAL SERVICES LAWYERS (2000); BRENNAN CTR. FOR JUSTICE, MAKING THE CASE: LEGAL SERVICES FOR THE POOR (1999). These reports are available online at <http://www.brennancenter.org>.

Other reports that contain evidence about the effects of the federal restrictions include ATLANTA LEGAL AID SOC'Y & GA. LEGAL SERVS. PROGRAM, STATE PLANNING REPORT FOR GEORGIA (1998) (finding that prisoners and undocumented immigrants lack access to legal services due to restrictions barring LSC grantees from representing members of those groups); LEGAL SERVS. OF N.J., JUSTICE FOR ALL 2000: A MASTER PLAN FOR LEGAL SERVICES IN NEW JERSEY (1998) (finding that federal restrictions on LSC grantees cause inefficiencies in the way prospective clients are processed and referred and deny essential legal assistance to people in need); *see also infra* note 26 and accompanying text (regarding gaps in access to legal services caused by the restrictions); PUB. INTEREST CLEARINGHOUSE, CIVIL LEGAL SERVICES FOR LOW INCOME CALIFORNIANS: RECOMMENDATIONS AND PROPOSALS (undated) (finding that the federal restrictions barring LSC grantees from bringing class actions, representing clients before legislative bodies, and seeking attorneys' fee awards limit clients' ability to obtain effective representation and remedies).

The Brennan Center is currently preparing to conduct a comprehensive examination of the impact of the LSC restrictions in some states.

In the fall of 2000, LSC announced that it had appointed a commission to examine the impact of the LSC restriction prohibiting attorneys' fee award claims and of 45 C.F.R. § 1610.8, which permits LSC grantees to use non-LSC funds for purposes otherwise prohibited by Congress, but only if they establish an objectively and physically separate entity that receives no LSC funding. LSC Bd. of Dirs., Resolution Establishing a Special Commission to Study and Report on the Effect of Certain Legal Restrictions on Persons Eligible for LSC-Funded Legal Assistance, Resolution 2000-009 (Sept. 18, 2000) (on file with the authors). However, LSC subsequently announced the indefinite suspension of this proposed study. E-mail from Mauricio Vivero, Vice President, LSC, to David S. Udell, Poverty Program Director, Brennan Center for Justice (Jan. 30, 2001, 12:05:51 EST) (on file with the authors).

4. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 537 (2001).

tions.⁵ The *Velazquez* opinion did not, however, explore the legal implications of the effects on the courts of other federal or state legal services restrictions.⁶ In papers filed in December 2001, the plaintiffs in *Velazquez*, as well as in a companion case entitled *Dobbins v. Legal Services Corp.*, requested that the U.S. District Court for the Eastern District of New York consider the First Amendment, separation of powers, and federalism implications of federal restrictions on non-federal funding received by LSC grantees, as well as of the class action, attorneys' fee award, and public outreach restrictions on LSC funding.⁷ At the time of writing, the court had not yet issued a decision.

I. DESCRIPTION OF LEGAL SERVICES RESTRICTIONS

A discussion of legal services restrictions must begin with the conditions the United States Congress imposed in 1996 on legal programs that receive any funding from LSC.⁸ These restrictions

5. *See id.* at 546.

6. In denying a preliminary injunction as to many of those, the Second Circuit did not address the separation of powers or federalism implications of such restrictions. *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757 (2d Cir. 1999). The Supreme Court denied certiorari as to this decision. *Velazquez v. Legal Servs. Corp.*, 531 U.S. 903 (2001). This denial of the certiorari petition has no precedential value. *See Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985); *Maryland v. Balt. Radio Show, Inc.*, 338 U.S. 912, 919 (1950); *Pireno v. N.Y. State Chiropractic Ass'n*, 650 F.2d 387, 395 n.13 (2d Cir. 1981).

In a separate case, the Ninth Circuit addressed the constitutional implications of some of the 1996 restrictions, but did not address the separation of powers or federalism implications of any of the restrictions. *Legal Aid Soc'y of Haw. v. Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir. 1998).

7. *Velazquez v. Legal Servs. Corp.*, No. 97 Civ.00182 (E.D.N.Y. filed Jan. 14, 1997); *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001).

8. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53 to 1321-56 (1996). The 1996 restrictions have been annually renewed by Congress in substantially similar form in each of LSC's subsequent appropriations acts. *See Omnibus Consolidated Appropriations Act, 1997*, Pub. L. No. 104-208, § 502, 110 Stat. 3009, 3009-59 to 3009-60 (1996); *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998*, Pub. L. No. 105-119, § 502(a)(2), 111 Stat. 2440, 2510-11 (1997); *Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999*, Pub. L. No. 105-277, Title V, 112 Stat. 2681, 2681-107 (1998); *Consolidated Appropriations Act, 2000*, Pub. L. No. 106-113, Title V, 113 Stat. 1501, 1501A-49 (1999); *D.C. Appropriations - FY 2001*, Pub. L. No. 106-553, Title V, 114 Stat. 2762, 2762A-101 (2000); *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001*, Pub. L. No. 107-77, Title V, 115 Stat. 748, 794-95 (2001). For information about earlier restrictions applicable to programs receiving funding from LSC, see *Legal Services Corporation Act*, 42 U.S.C. §§ 2996e, 2996f, 2996i, and 2996j (2001).

have had a tremendous impact because Congress applied them not only to activities supported by LSC funds, but also to all activities engaged in by any entity that receives even a penny of LSC funding.⁹ Several lawsuits challenged this “entity restriction” as an unconstitutional infringement of the right to spend one’s own funds in support of protected political speech.¹⁰ These challenges persuaded LSC to authorize LSC grantees to dedicate their non-LSC funds to various forms of restricted advocacy, but only if such programs do so through an “objectively” and physically separate entity, with separate staff, offices and equipment.¹¹ LSC calls this regulation the “program integrity” regulation.¹²

The restrictions that Congress passed in 1996 include the following:

- NO CLASS ACTIONS - LSC grantees may not initiate or participate in class actions on behalf of their clients, even where the legal effort is simply to file an amicus brief or to co-counsel with lawyers who receive no LSC funding.¹³
- NO ATTORNEYS’ FEE AWARDS - Clients of LSC grantees may not claim court-awarded attorneys’ fees, even in cases in which their opponents seek fees. This is true even when the availability of attorneys’ fees reflects a legislative judgment that the right at stake is sufficiently critical to warrant special incen-

9. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a), 110 Stat. 1321, 1321-53 (1996) (“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 engages in prohibited activities].”). See also Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(d)(1), 110 Stat. 1321, 1321-56 (1996) (“[N]o recipient shall accept funds from any source other than the Corporation, unless . . . the recipient . . . notifies in writing the source of the funds that the funds may not be expended for any purpose prohibited by the Legal Services Corporation Act or this title.”); 45 C.F.R. § 1610.1 (2001) (“This part is designed to implement statutory restrictions on the use of non-LSC funds by LSC recipients and to ensure that no LSC-funded entity shall engage in any restricted activities . . .”).

10. *Velazquez v. Legal Servs. Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997); *Legal Aid Soc’y of Haw. v. Legal Servs. Corp.*, 961 F. Supp. 1402 (D. Haw. 1997); *Varshavsky v. Perales*, No. 40767/91 (N.Y. Sup. Ct. Dec. 24, 1996). See also *Legal Aid Soc’y of Haw. v. Legal Servs. Corp.*, 981 F. Supp. 1288 (D. Haw. 1997), *vacated in part*, 145 F.3d 1017 (9th Cir. 1998).

11. 45 C.F.R. § 1610.8 (2001). See also 45 C.F.R. § 1610 (2001) (stating in preamble that *Legal Aid Soc’y of Haw.*, 145 F.3d at 1017, and *Velazquez*, 985 F. Supp. at 323, prompted LSC’s promulgation and subsequent revision of § 1610.8); *Velazquez*, 985 F. Supp. at 328-37 (discussing evolution of § 1610.8).

12. 45 C.F.R. § 1610.8 (2001).

13. See 45 C.F.R. pt. 1617 (2001). The effects of this restriction on the courts are discussed *infra* notes 33-53 and accompanying text.

tives to attract quality representation or when the court desires to use its inherent powers to award fees in order to vindicate its authority.¹⁴

- NO REPRESENTATION OF MANY CATEGORIES OF IMMIGRANTS - LSC grantees generally may not assist undocumented immigrants and many categories of documented immigrants.¹⁵ For example, a migrant farmworker with a valid work visa subject to illegal indentured servitude cannot seek advice from an LSC grantee willing and able to use non-federal funds to represent him.
- NO REPRESENTATION OF PRISONERS IN CIVIL LITIGATION - LSC grantees may not represent incarcerated persons, even in a suit unrelated to the incarceration, such as a child custody proceeding or a housing court matter, even if the claim arose

14. See 45 C.F.R. pt. 1642 (2001). While the federal attorneys' fee award restriction does not bar LSC grantees from seeking or accepting "[p]ayments received as a result of sanctions imposed by a court for violations of court rules or practices, or statutes relating to court practice, including Rule 11 or discovery rules of the Federal Rules of Civil Procedure, or similar State court rules or practices, or statutes," 45 C.F.R. § 1642.2(b)(3), it does bar those lawyers from claiming, or collecting and retaining, all other types of fee awards made "pursuant to common law or Federal or State law permitting or requiring the awarding of such fees." *Id.* § 1642.2(a). The effects of this restriction on the courts are discussed *infra* notes 54-80 and accompanying text.

15. See generally 45 C.F.R. pt. 1626 (2001). Congress has only permitted LSC grantees to represent certain categories of immigrants. See 45 C.F.R. § 1626.5. These include permanent residents, refugees, asylees, certain specially admitted agricultural workers, and aliens falling into several additional categories. *Id.* §§ 1626.5, 1626.11. There are many aliens lawfully in this country who do not fall into these categories and are consequently ineligible for representation. These include workers recruited and brought into this country by their employers under the federal H-2B visa program for nonagricultural employees; individuals granted temporary protected status because they are from countries, like Honduras and Nicaragua, that the U.S. has recognized as being unsafe; asylum applicants; parolees; special immigrant juveniles (undocumented children adjudicated state dependents because of abandonment, neglect, or abuse); aliens in exclusion or deportation proceedings; aliens who have not filed for permanent residence but who are the spouses, parents or unmarried children under age twenty-one of U.S. citizens; individuals on temporary visas (e.g., student visas), and others. Additionally, undocumented aliens are generally ineligible for representation. See 45 C.F.R. § 1626.3 (2001).

The only exceptions are that LSC grantees may use non-LSC funds to represent aliens, regardless of alienage status, who have been battered by their spouses, who have been battered by members of their spouse's family (under some circumstances), or whose children have been battered by their spouses (under some circumstances). *Id.* § 1626.4(a). Additionally, LSC grantees may use non-LSC funds to represent aliens, regardless of alienage status, who are the victims of trafficking in persons. Trafficking Victims Protection Act, 22 U.S.C. § 7105(b) (2001).

before the incarceration or the prisoner has not yet been tried.¹⁶

- NO REPRESENTATION OF PEOPLE IN CERTAIN CATEGORIES OF CLAIMS - LSC grantees may not represent people in abortion-related litigation,¹⁷ or public housing tenants facing eviction based on an accusation of drug-related crimes.¹⁸ The LSC Act contains additional subject-matter restrictions.¹⁹
- NO PUBLIC INTEREST OUTREACH - LSC grantees may not approach victims of legal violations to inform them of their rights and then offer to represent them in seeking remedies.²⁰ A lawyer cannot, for example, make a presentation at a homeless shelter regarding the residents' rights to apply for food stamps, inform the residents that he or she is available to represent them if they have been denied this right, and then represent those people who accept the lawyer's offer of assistance.

In addition to these federal restrictions on LSC funds and non-LSC funds, many providers of legal services operate under additional restrictions attached to state, local, Interest on Lawyer Trust Accounts (IOLTA)²¹ and other funds dedicated to financing legal representation of the poor. In some instances, these restrictions track the LSC restrictions.²² In other instances, the restrictions are novel. For example, some prohibit litigation against the state when it is providing the funding;²³ at least two prohibit representation of migrant workers in employment matters;²⁴ and others prohibit rep-

16. See 45 C.F.R. pt. 1637 (2001).

17. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(14), 110 Stat. 1321-55 (1996).

18. See 45 C.F.R. pt. 1633 (2001).

19. See *supra* note 8.

20. See 45 C.F.R. pt. 1638 (2001).

21. The names of these funds vary from state to state. In New York, for example, the account is called the Interest on Lawyer Account Fund (IOLA).

22. For example, several states prohibit legal services grantees from engaging in class actions. See, e.g., 30 ILL. COMP. STAT. 765/40 (West 2001); IND. CODE § 33-2.1-11-4 (2002 electronic update); MONT. CODE ANN. § 3-2-714 (2001); TENN. CODE ANN. § 16-3-808 (2001); TEX. GOV'T CODE ANN. § 51.943 (Vernon 1998); WASH. REV. CODE § 43.08.260 (1998); ADMIN. OFFICE OF THE COURTS OF GA., DESCRIPTION OF GRANT PROGRAM 2 (2000), (on file with the authors) available at <http://www2.state.ga.us/Courts/aoc/funding.pdf>.

23. See, e.g., MICH. COMP. LAWS § 600.1485(11)(a) (1996) (stating that state funds may not be used "to provide legal services in relation to any lawsuit against the state of Michigan unless the claim against the state had been the subject of an administrative proceeding").

24. See 30 ILL. COMP. STAT. 765/40 (2001) ("A recipient may not use funds received under this Act to file an individual action or class action under the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801 and following) or other

resentation of categories of clients or claims or prohibit lawyers from seeking certain remedies on behalf of clients.²⁵

II. IMPACT OF LEGAL SERVICES RESTRICTIONS ON CLIENTS AND LAWYERS

If restrictions on legal services only affected a few clients and lawyers, then other lawyers could perhaps provide the representation that legal services lawyers are prohibited from providing. Unfortunately, hundreds of thousands of clients are restricted in what they can do — and in many parts of the country there is no one else to help them.²⁶

labor laws.”); E-mail from Mark Braley, Executive Director, Legal Services Corporation of Virginia, to Marilyn Goss et al. (Jan. 26, 2001, 16:25:41 EST) (on file with the authors) (stating that state funds may no longer be used to represent migrant workers in employment matters).

25. See, e.g., N.C. GEN. STAT. § 7A-474.3(c)(5) (2000) (“No [state] funds shall be used . . . [t]o provide legal assistance to persons with mental handicaps residing in State institutions with regard to the terms and conditions of the treatment or services provided to them by the State.”); TEX. GOV’T CODE ANN. § 51.943(c) (Vernon 1998) (“Funds from the basic civil legal services account may be used to support a lawsuit brought by an individual . . . to compel a governmental entity to provide benefits . . . , but not to support a claim for actual or punitive damages.”); ADMIN. OFFICE OF THE COURTS OF GA., DESCRIPTION OF GRANT PROGRAM 2 (2000) (stating that government funds subsidizing legal services to persons victimized by domestic violence may not be used in divorce or deportation proceedings), (on file with the authors) *available at* <http://www2.state.ga.us/Courts/aoc/funding.pdf>.

26. For example, a task force on access to justice acting under the auspices of the Alaska Supreme Court has concluded that as a combined result of funding cuts and federal restrictions on LSC grantee Alaska Legal Services, “[t]here are large groups of people who are no longer eligible to receive Alaska Legal Services assistance and no other organization in place that can fill the gap to meet these needs.” ALASKA ACCESS TO CIVIL JUSTICE TASK FORCE, REPORT AND RECOMMENDATIONS 18 (2000). Similar gaps in service exist in many parts of the country. See, e.g., BRENNAN CTR. FOR JUSTICE: LEFT OUT IN THE COLD, *supra* note 3, at 20 (quoting Pennsylvania Justice Center attorney Peter Zurflieh as saying, “Low-income families and individuals in rural Pennsylvania have no one to represent them before their state legislators, since the LSC restrictions prevent their advocates from ever playing that role.”); BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES, *supra* note 3, at 18-22 (reporting gaps in services in the rural deep South, Florida, Tennessee, Pennsylvania and Rhode Island); PA. STATE PLANNING STEERING COMM., PENNSYLVANIA AGENDA FOR LEGAL SERVICES, 1998-2001: THE ACTION PLAN FOR A STATEWIDE INTEGRATED LEGAL SERVICES DELIVERY SYSTEM 32-34 (1998) (finding that clients outside of Philadelphia lack adequate access to legal services programs that are not subject to federal restrictions); TEX. LSC STATE PLANNING COMM. FOR THE DELIVERY OF LEGAL SERVS. TO THE POOR, THE 1998 TEXAS PLAN: PLANNING FOR THE DELIVERY OF CIVIL LEGAL SERVICES IN TEXAS (1998) (finding that very few legal services programs in Texas serve those clients who LSC grantees cannot serve since programs that receive state IOLTA funds are subject to similar restrictions).

Over \$780 million in funds are dedicated annually to the provision of civil legal services nationwide. Several hundred million dollars come from federal funding allocated to LSC, and hundreds of millions of additional dollars come from federal, state and local governments, IOLTA funds, and private donations (including those of foundations, corporations, bar associations, and lawyer fund drives).²⁷ The federal restrictions applicable to LSC funding encumber approximately \$329.3 million in 2002.²⁸ These funds finance advocacy in more than 200 legal services offices spread throughout the fifty states and several federal territories. These offices provide representation in roughly one million matters annually.²⁹ The LSC restrictions also encumber almost \$300 million of the resources that LSC grantees receive annually from federal, state and local governments, IOLTA funds, and various private sources.³⁰ An additional \$62 million in non-LSC funds carries an independent set of restrictions, imposed in most instances by state or local governments or IOLTA governing structures.³¹ In total, approximately \$660 million in scarce legal services funding is encumbered each year by restrictions: this amounts to about eighty-five percent of all legal services funding.³²

III. IMPACT OF LEGAL SERVICES RESTRICTIONS ON JUDGES

Judges occupy a unique institutional role allowing them to observe patterns in the administration of justice. They are well situated to assess how legal services restrictions burden the courts and cause injustice to individual litigants. This section catalogues some of those effects.

27. Meredith McBurney, *Resource Development Data: Why We Gather It and What We Learn From It*, MGMT. INFO. EXCHANGE J., Fall 2001, at 14, 15.

28. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-77, 115 Stat. 748, 794 (2001). This figure may slightly overstate the amount of money actually distributed to legal services programs. In 2001, when the federal government allocated approximately \$329 million to LSC, LSC in turn distributed approximately \$287 million to local programs. McBurney, *supra* note 27, at 15.

29. LSC, *SERVING THE CIVIL NEEDS OF LOW-INCOME AMERICANS – A SPECIAL REPORT TO CONGRESS 1*, 7 (2000), available at <http://www.lsc.gov/pressr/EXSUM.pdf>. In 1999, LSC grantees closed approximately 924,000 cases. *Id.*

30. LSC, 1999 ACTUAL REVENUE REPORT 1 (1999) (on file with the authors).

31. BRENNAN CTR. FOR JUSTICE, *A CHART OF RESTRICTIONS ON STATE AND IOLTA FUNDING* (2001) (on file with the authors).

32. *Id.*

A. Bans on Participating in Class Actions

Restrictions prohibiting legal services lawyers from participating in class actions³³ warp court functions in several ways. First, class action restrictions selectively introduce inefficiency into judicial proceedings.³⁴ By barring some lawyers from participating in class actions, the rules prevent parties represented by those lawyers from initiating such an action, even where it is the most efficient way to proceed. For instance, MFY Legal Services, Inc., a LSC grantee, is currently working with a private pro bono attorney to bring a lawsuit on behalf of certain mentally disabled people. The lawsuit alleges that the New York Metropolitan Transit Authority (MTA) is unlawfully discriminating against mentally disabled subway riders entitled to reduced fares.³⁵ A class action would be the most efficient form of lawsuit, because thousands of affected subway riders have virtually identical claims. As an LSC grantee, however, MFY Legal Services, Inc. cannot represent clients in a class action. It can only proceed on behalf of individual clients, which significantly increases the burden on the courts.³⁶ If MFY's clients were represented by lawyers able to engage in class actions, this added burden would be removed.

The second effect of class action restrictions is that they interfere with the courts' ability to ensure that low income persons learn of court-ordered remedies that may be available to them. While a court presiding over a class action can require a defendant to identify all persons harmed by a challenged practice, a court's capacity to require disclosure of such information is circumscribed where there is only a single litigant.³⁷ If a lawyer subject to a class action

33. See, e.g., *supra* notes 13, 22 and accompanying text.

34. See *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751, 1753 (1999) (urging that legal services lawyers not be subjected to class action restrictions because such restrictions that lead to repetitive litigation which wastes judicial resources and can lead to inconsistent decisions); see also Daan Braveman, *Class Action Certification in State Court Welfare Litigation: A Request for Procedural Justice*, 28 BUFF. L. REV. 57, 77 (1979) (arguing that the availability of the class action device "removes the necessity for duplicative lawsuits by those who secure representation").

35. Decl. of David F. Dobbins dated Dec. 5, 2001 (on file with the authors), *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001).

36. MFY Legal Services, Inc. is a plaintiff in *Dobbins v. Legal Services Corp.* These and other facts regarding the effects of the federal restrictions on MFY Legal Services, Inc. and its clients are set forth in the Declaration of David F. Dobbins dated December 5, 2001 (on file with the authors), *Dobbins v. Legal Services Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001).

37. Lucy Billings, a former lawyer at LSC grantee Bronx Legal Services and a current New York City Civil Court Judge, has said that one difficulty that the federal

restriction represents a single litigant alleging adverse conditions in an adult home, for instance, the court cannot order the adult home defendant to identify, or provide relief to, all persons subject to the same wrongful treatment. As a result, many affected persons will never receive any relief. LSC grantee South Brooklyn Legal Services faced a similar situation when it successfully represented a mother on welfare seeking to compel New York City to reimburse her for her childcare expenses based on a 4.3-week month rather than on an incorrect formula using a 4-week month.³⁸ New York City settled the claim by agreeing to pay the woman \$12,000 in retroactive child care costs and by abandoning its incorrect reimbursement formula.³⁹ In the absence of a class action, however, it has proved impossible to obtain relief for all the other indigent mothers who New York City unlawfully deprived of childcare reimbursements.⁴⁰

The inability of courts to ensure that institutional defendants provide relief to eligible people extends beyond retroactive compensation. Even when a court rules that a defendant has acted unlawfully with respect to one plaintiff, the defendant may not cease its unlawful behavior with respect to similarly situated individuals unless each of them sues or unless a class action permits a court to protect all affected individuals. According to Charles Delbaum, Litigation Director with LSC grantee New Orleans Legal Assistance Corporation, the local housing authority refuses to hold grievance hearings within the time period required by federal regulations. Because he cannot bring a class action to change agency

class action restriction imposed on her practice is that “class actions provide procedural mechanisms through notice to the class, for example, and discovery, . . . to find out about and make contact with others whose rights are being threatened who would not otherwise be protected.” Staci Rosche et al., *Implementation Issues Panel*, 25 FORDHAM URB. L.J. 321, 329 (1998).

38. South Brooklyn Legal Services is a plaintiff in *Dobbins v. Legal Services Corp.* These and other facts regarding the effects of federal restrictions on South Brooklyn Legal Services are set forth in the Declaration of John C. Gray dated November 29, 2001, *Dobbins v. Legal Services Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001).

39. *Id.*

40. *Id.* Likewise, LSC grantee MFY Legal Services, Inc., which wishes to work with a private pro bono lawyer to represent certain mentally disabled people alleging that the MTA is unlawfully discriminating against mentally disabled subway riders for reduced fares, Decl. of David F. Dobbins dated Dec. 5, 2001 (E.D.N.Y.), *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001), must bring the suit as a class action in order to identify all class members who have unlawfully been denied reduced fares, and in order to provide a remedy for all of them. However, the federal class action restriction prohibits MFY Legal Services, Inc. from proceeding in this manner. *See id.*

policy, he must file virtually the same individual suit “over and over to make them follow rules that are already in place.”⁴¹

The third effect of class action restrictions is that they selectively interfere with the ability of courts to rule on a complete record and order complete relief. In some instances, the litigant represented by a lawyer subject to a class action restriction may be handicapped in developing the strongest set of facts to support his or her claim. For example, the client may be able to obtain discovery of a defendant’s practices and procedures with respect to himself, but not with respect to other persons’ cases, as he would be able to do in a class action.⁴² The result is an incomplete record. This poses a particular problem when an individual’s substandard treatment results from a systemic problem that is certain to recur absent a systemic remedy. If, for example, the client is a welfare recipient who has missed a monthly welfare check, the client will be able to conduct discovery regarding the fact that the welfare agency never sent out his check. If the welfare agency’s failure to send the check is the result of a systemic problem such as a faulty computer system, however, the individual client will probably not be able to obtain discovery of that fact and inform the court. Consequently, the court will never learn the complete facts about the defendant’s relevant practices and procedures. The client and similarly situated individuals will have to return to court repeatedly with the same problem, thus increasing the burden on the courts.⁴³

41. BRENNAN CTR. FOR JUSTICE: RESTRICTING LEGAL SERVICES, *supra* note 3, at 12-13; *see also* Braveman, *supra* note 34, at 79-80 (1979) (describing case brought by individual plaintiffs in which, even after a federal district court held unconstitutional New York’s requirement that female welfare recipients identify the putative fathers of their children, the welfare agency continued to apply the requirement to other welfare recipients); Jeffrey Freedman, *New Rulings Move SSA Away From Policy of “Non-Acquiescence,”* N.Y. Sr. B.J., Mar.-Apr. 1991, at 22 (in the 1980s the federal Social Security Administration refused to apply one federal court of appeals ruling to cases involving claimants in other circuits).

42. Valerie Bogart, an attorney at Legal Services for the Elderly in New York, a LSC grantee, has noted that she and her clients face this problem under the federal restrictions: “We filed a case in state court. It looks like a class action challenging policies and practices, seeking declaratory and injunctive relief. Since it doesn’t have the words ‘class action,’ we’re not representing anyone besides our named plaintiff. When the time comes to start discovery, we’ll be limited.” Rosche et al., *supra* note 37, at 327.

43. Marie A. Failing and Larry May discuss a similar hypothetical:

Consider the poor person who experiences periodic and increasing delays in obtaining Social Security payments. The source of the problem may be management and budget policies, which may not be remediable by even a hundred successful individual suits. Institutional change rarely results from individual suits because individual problems are not traceable much beyond

The Third Circuit addressed a similar scenario in a case brought by sixteen foster children who claimed widespread deficiencies in the state's child welfare system.⁴⁴ Each child sought injunctive relief from harms caused by a lack of trained caseworkers, medical and educational service providers, foster parents, and potential adoptive families. Each child also sought declaratory judgments that the system's deficient and inefficient policies violated state and federal statutes mandating such services.⁴⁵ The Third Circuit held that the lower court abused its discretion when it denied class certification, because by forcing plaintiffs to bring individual claims, "the [lower] court failed to give effect to the proper role of (b)(2) class actions in remedying systemic violations of basic rights"⁴⁶ According to the court, fixing an individual plaintiff's situation would mean little when that child "faces the immediate threat of losing" her remedial services in a system "characterized by the widespread absence of such services."⁴⁷ Moreover, resolving an individual plaintiff's grievances would be inadequate where "each [child in state custody] potentially face[s] all of the system's deficiencies."⁴⁸

The fourth effect of class action restrictions is that they selectively wrest control of the proceedings away from judges. In the traditional function of the courts, the judge, responding to a request from either side, determines whether parties must proceed by class action or by separate or consolidated individual actions.⁴⁹ Class action restrictions prevent one side from presenting the court with such a request and therefore often prevent the court from making such a determination. This is a particular problem when a class action is the most effective way for a case to proceed. For example, class actions are often the most effective way for courts to hear and address concerns about adverse conditions in adult homes or the adverse treatment of migrant workers by employers. This is

the particular administrative officials with whom the client has dealt personally.

Marie A. Failing & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L.J. 1, 18 (1984); see also Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1803 (2001) ("[I]t is usually advantageous for plaintiffs with similar claims to pursue them as class actions, since such collective efforts offer broader relief").

44. *Baby Neal v. Casey*, 43 F.3d 48, 52 (3d Cir. 1994).

45. *Id.* at 53.

46. *Id.* at 64.

47. *Id.* at 63.

48. *Id.*

49. See, e.g., FED. R. CIV. P. 23.

due to the fact that many of the individuals harmed by such practices rely on the defendants for their basic needs and are afraid to participate in individual cases because of the threat of retaliation.⁵⁰ Judges who hear individual adult home or migrant worker cases brought by a lawyer subject to a class action restriction are unaware of the need for a class action and never hear the motion that would, absent the restriction, prompt the case's conversion into a class action.

Finally, class action restrictions selectively cause cases to disappear before they can be resolved by the courts, as defendants rely on the restrictions to insulate themselves from litigation.⁵¹ For example, MFY Legal Services, Inc. has found that when it represents mentally disabled people alleging that the MTA is unlawfully failing to grant reduced fares to mentally disabled subway riders,⁵² the MTA provides relief to individuals who complain, while continuing to discriminate against similarly situated people. This permits the

50. See Decl. of Jeanette Zelhof dated Dec. 6, 2001, ¶ 9, *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001) (on file with the authors); Decl. of James Schmidt dated Nov. 15, 2001, ¶ 41, *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001) (on file with the authors).

51. Chip Gray, Executive Director of South Brooklyn Legal Services, an LSC grantee, has described the importance of class actions in subjecting government agencies to judicial review:

Among South Brooklyn's more notable achievements was litigation compelling the New York City Board of Education to provide adequate educational opportunities to students with disabilities. The *Jose P. v Ambach* case resulted in a consent decree dramatically broadening the educational opportunities available to the disabled. The litigation is particularly relevant to this motion because the use of the class action mechanism was crucial to the result. Previous efforts to seek judicial review of the widespread denial of needed services to students with disabilities had been mooted when the defendants provided relief to the individuals who complained without changing their overall practices. In my experience, it is not uncommon for government agencies to try to insulate a policy or practice from judicial review by granting individual relief in an effort to moot the more general challenge. In those situations, a class action is advantageous, not merely to provide efficient and effective relief to similarly situated plaintiffs, but also to preserve the jurisdiction of the court.

Decl. of John C. Gray dated Nov. 29, 2001, ¶ 7, *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001). Marie A. Failing and Larry May concur:

[U]nlike the class suit, the individual suit will often be rendered moot if the welfare official grants the client the minimal benefit to which he or she was entitled if the suit were successful. But, as often happens, a month or two later the same official may vindictively deny the benefits again, perhaps in retaliation for the lawsuit.

Failing & May, *supra* note 43, at 17; see also Braveman, *supra* note 34, at 68-73 (noting the importance of the class action device in ensuring that litigants' claims are fully litigated and not mooted out by a defendant).

52. See *supra* note 35 and accompanying text.

MTA to avoid judicial review of its policies and practices while continuing to violate the law.⁵³ Were MFY able to bring a class action, the MTA could not avoid judicial review in this manner.

B. Bans on Attorneys' Fee Awards

The federal restriction on awarding attorneys' fees prevents both state and federal courts from establishing economic incentives needed for their efficient operation. When LSC grantees appear in court, the judge is robbed of the ability to use one of the most effective tools for governing the behavior of counsel and litigants – awarding attorneys' fees to the prevailing party.⁵⁴ Opposing counsel sometimes make a point of confirming, during the course of litigation, that clients represented by LSC grantees cannot seek a fee award.⁵⁵ Thus, in cases involving LSC grantees, opposing counsel are well aware that the courts have reduced power to control the proceedings and deter future unlawful behavior.

Perhaps the most dramatic example of the effect of the attorneys' fee restriction on the power of the courts is the inability of courts to use their inherent authority to award attorneys' fees to punish disobedience of their orders and other improper behavior during the litigation of a case.⁵⁶ Ordinarily, federal courts and at least some state courts have the “inherent authority . . . to assess attorney's fees when a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’”⁵⁷ The imposition of sanctions in such a case stems from “a court's inherent power to police itself” and serves to “‘vindicat[e] judicial authority.’”⁵⁸ Federal

53. Decl. of David F. Dobbins dated Dec. 5, 2001, para. 5, *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001).

54. See *A.G. Ship Maint. Corp. v. Lezak*, 503 N.E.2d 681, 682 (N.Y. 1986) (discussing the effectiveness of awarding attorneys' fees).

55. See Decl. of Jeanette Zelhof dated Dec. 6, 2001, para. 15, *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001).

56. Although the federal attorneys' fee award restriction does not prevent LSC grantees from claiming fees pursuant to court practice rules such as Federal Rule of Civil Procedure 11, *see supra* note 14, it apparently does prevent them from claiming fees awarded pursuant to the inherent power of the courts and fees awarded pursuant to civil contempt statutes. See LINDA E. PERLE & ALAN W. HOUSEMAN, *THE CLASP GUIDE TO PARTS 1609 AND 1642 FEE-GENERATING CASES AND ATTORNEYS' FEES* 29 (1998) (“Civil contempt imposed on a party for failure to pay court ordered child support or to abide by the terms of an injunction would not be considered to be sanctions for the purpose of this rule, and recipients would not be permitted to seek attorneys' fees.”). See also LSC Office of Legal Affairs, External Op. 2001-1007 (2001).

57. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 653 (1992) (quoting *Chambers v. Nasco, Inc.*, 500 U.S. 32, 45-46 (1991)).

58. *Id.* (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1979)).

and state courts also have the inherent authority to punish civil contempt by awarding attorneys' fees. One purpose of civil contempt orders is to ensure that courts' orders are respected, thus safeguarding the power of the courts.⁵⁹ As a result of the federal attorneys' fee restriction, however, courts cannot award fees to parties represented by LSC grantees, thus substantially reducing the courts' ability to protect their own authority.

Another effect of the attorneys' fee restriction is that courts have a diminished ability to prevent themselves from being used for illegitimate ends. For instance, the New York legislature has determined that landlords often use the courts to intimidate tenants into leaving premises that the tenants lawfully possess.⁶⁰ The landlords require their tenants to sign a form lease obligating the tenant to pay the landlord's attorneys' fees in cases arising from the tenant's failure to comply with the lease. The form does not contain a reciprocal provision providing for the landlord to pay the tenant's attorneys' fees in cases arising from the landlord's failure to comply with the lease.⁶¹ This leaves landlords with an incentive to bring meritless litigation against the tenants, and it leaves many tenants without the bargaining power or resources to enforce their rights in court. In order to empower the courts to remedy this situation, the New York legislature has empowered courts to order landlords to pay tenants' legal expenses in cases arising out of the landlord's violation of the lease or the landlord's commencement of an unsuccessful action against the tenant.⁶² The law "discourage[s] landlords from engaging in frivolous litigation in an effort to harass tenants, particularly tenants without the resources to resist legal action, into terminating legal occupancy."⁶³ The law also "provides an incentive to resolve disputes quickly and without undue expense" on the part of the court and litigants.⁶⁴

59. See *In re Dep't of Hous. Pres. & Dev't v. DEKA Realty Corp.*, 620 N.Y.S.2d 837, 840 (App. Div. 1987) (noting that one purpose of a civil contempt penalty is "to coerce compliance with the court's mandate" (quoting *In re Dep't. of Env'tl. Protect. v. Dep't of Env'tl. Conservation*, 70 N.Y.2d 233, 239 (1987)); see also *supra* note 2.

60. See *Maplewood Mngmt. v. Best*, 533 N.Y.S.2d 612, 613 (App. Div. 1988).

61. See *Jocar v. Galas*, 673 N.Y.S.2d 836, 839 (City Civ. Ct. 1998).

62. See N.Y. REAL PROP. LAW § 234 (McKinney 2001).

63. *Duell v. Condon*, 647 N.E.2d 96, 98 (N.Y. 1995). See also *Maplewood Mngmt.*, 533 N.Y.S.2d at 612.

64. *Duell*, 647 N.E.2d at 98. The United States Supreme Court has recognized that in civil rights cases a defendant's potential liability for attorneys' fees is often an important bargaining chip encouraging settlement of meritorious lawsuits. See *Evans v. Jeff D.*, 475 U.S. 717, 731-34 (1986). This is equally true in landlord-tenant and other litigation in which fee awards are available. In this way, attorneys' fee awards help reduce the burden on the courts of needlessly long litigation.

When tenants are represented by LSC grantees, however, the courts do not have this important tool. The tenants – by definition the sort of low-income litigants the legislature sought to protect – are forced to defend themselves in housing court knowing that if the landlord's claims are successful they will be forced to pay his attorneys' fees and that if their own claims are successful the landlord will have no such obligation.⁶⁵ The landlords are free to bring repeated meritless litigation, and the courts can do little about it.⁶⁶ In fact, in one case in which MFY Legal Services, Inc. represented a wrongfully evicted tenant, the judge warned the landlord, who conceded that the tenant was entitled to reoccupy the apartment, that if he wasted judicial time by proceeding to trial on the remaining subsidiary issues he would be liable for the tenant's attorneys' fees.⁶⁷ The MFY Legal Services, Inc. attorney was forced to state that her client could not claim a fee award. The resolution of the case was consequently delayed, which likely would not have been the case had the client been able to claim a fee award.⁶⁸ Congress has thus placed the state courts at the mercy of landlords, who have no incentive not to bring meritless claims or to unnecessarily delay litigation and who are free to use the courts to scare tenants represented by LSC grantees into giving up possession of their homes.⁶⁹

It is not only in housing cases that the attorneys' fee restriction causes this sort of damage. In the day care reimbursement case brought by LSC grantee South Brooklyn Legal Services,⁷⁰ the re-

65. This effect of the attorneys' fee restriction is not limited to New York. Robert Sable, the Executive Director of Greater Boston Legal Services, reports that his housing attorneys "felt and feel that [attorneys' fee awards are] important leverage in negotiating with landlords." *Equal Justice and Reconfiguration in Massachusetts: A Dialogue*, MGMT. INFO. EXCHANGE J., Fall 2000, at 40, 44. He says that when the clinical faculty at Boston College Law School operated under the federal attorneys' fee restriction, "[t]hey felt terribly constrained" as a result. *Id.*

66. See Decl. of Peggy Earisman dated Nov. 16, 2001, paras. 15, 16, *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001) (on file with authors).

67. Decl. of Peggy Earisman dated Nov. 16, 2001, para. 15, *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001).

68. *Id.*

69. See *id.* paras. 15, 16. The problem is not limited to New York. A client of LSC grantee Florida Rural Legal Services, successfully fought off two attempts to evict her. Because Florida Rural Legal Services represented her in both cases, she was unable to claim an attorneys' fee award either time to deter the landlord from continuing to attempt to evict her. When the landlord tried to evict her a third time, Florida Rural Legal Services had no attorney available to represent her, she proceeded pro se, and this time she was evicted. BRENNAN CTR. FOR JUSTICE, RESTRICTING LEGAL SERVICES, *supra* note 3, at 14-15.

70. See *supra* note 38 and accompanying text.

striction deprived South Brooklyn Legal Services of the ability to claim attorneys' fees. As a result, there were no mounting fees to serve as an incentive for the agency to dispose of the matter promptly.⁷¹

Strategic lawsuits against public participation (SLAPP suits) are another type of case in which Congress, through the attorneys' fee award restriction, has left courts powerless to control impermissible behavior by litigants and counsel. In such cases, litigants use the judicial system to prevent citizens from exercising their rights in a public arena, such as a court or licensing body. In a classic SLAPP suit a developer might sue an environmentalist who has opposed the developer's application for a building permit.⁷² SLAPP lawsuits use the judicial process to wear down an opponent by using up as much of the opponent's resources as possible.⁷³ SLAPP suits also use up important judicial resources, and by using the judicial system for improper purposes they bring it into disrepute. As one New York court has warned, "[T]he judiciary is as much a victim" of SLAPP suits as the litigants are.⁷⁴

In order to combat litigants' improper use of the courts in this way, the New York legislature has passed a law empowering the courts to award attorneys' fees to people victimized by SLAPP suits.⁷⁵ However, if an LSC grantee is representing a client who is then hit with a SLAPP suit, the lawyer could not represent the client in seeking an attorneys' fee award against the SLAPP suit initiator. This could happen, for example, if a lawyer brings a claim on behalf of low-wage workers against an employer who violated the workers' wage and hour rights, and the employer asserts a SLAPP counterclaim alleging that the worker had tortiously interfered with his business relationships,⁷⁶ or if a lawyer represents individuals in a complaint to a government body against a nursing home that then files a SLAPP counterclaim.⁷⁷ Since an attorneys' fee

71. See Decl. of John C. Gray dated Nov. 29, 2001, para. 17, *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001).

72. See N.Y. C.P.L.R. § 3403 cmt. C3403.3 (McKinney 1992).

73. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992).

74. *Id.* at 654.

75. See N.Y. CIV. RIGHTS LAW §§ 70-a, 76-a (Consol. 2001).

76. See, e.g., *Street Beat Sportswear, Inc. v. Nat'l Mobilization Against Sweatshops*, 698 N.Y.S.2d 820 (Sup. Ct. 1999).

77. See, e.g., *Long Island Ass'n for AIDS Care v. Greene*, N.Y. L.J., Oct. 7, 1997, at 28, col. 4 (N.Y. Sup. Ct.) (citing *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir. 1988)). Additionally, an employee of LSC grantee MFY Legal Services, Inc. has been the target of a SLAPP suit brought by the operator of a nursing home. The SLAPP claim was brought as a separate lawsuit, not as a counter-

award and costs are the only financial penalties that can be imposed on the SLAPP violator if the SLAPP suit does not satisfy the criteria for the imposition of compensatory and punitive damages,⁷⁸ the court may be powerless to take action against the SLAPP violator. Litigants will then remain free to bring SLAPP claims against anyone represented by LSC grantees.

In addition to reducing judges' ability to control the behavior of litigants and lawyers in the courts, the attorneys' fee award restriction also reduces the ability of judges to deter unlawful out-of-court conduct by the parties before them and by others.⁷⁹ This is of particular importance in cases where the damages are negligible — unless there is a potential attorneys' fee award in such cases, it is less expensive for wrongdoers to litigate against the rare victim who goes to court than to cease the wrongdoing.⁸⁰ The result is that courts continue to be burdened by subsequent cases involving the same or similar unlawful actions.

C. Impact of Federal Restrictions on Non-Federal Funding

Federal restrictions on the use of non-LSC funds interfere with the ability of state and local governments, including court systems, to provide funds to LSC grantees in an effort to improve the efficiency and fairness of state and local government institutions. LSC grantees often receive significant financial support from state and local governments. In 1999, for example, LSC grantees received approximately \$307 million from LSC, \$88 million from state and local governments, and \$68 million from state-managed IOLTA programs.⁸¹

claim, and the employee was successfully defended by pro bono counsel who could obtain an attorneys' fee award. Telephone interview with Jeanette Zelhof, Managing Attorney at MFY Legal Services, Inc. (Jan. 8, 2002).

78. N.Y. CIV. RIGHTS LAW §§ 70-a(1)(b), 76-a(2) (Consol. 2001).

79. See Rhode, *supra* note 43, at 1797 (noting that the inability of LSC grantees to collect attorneys' fee awards "removes an effective deterrent to future abuses"); Rosche et al., *supra* note 37, at 330 (according to former Bronx Legal Services lawyer Lucy Billings, "The restriction against attorneys' fees is perhaps the most onerous restriction," in part because "they are a powerful incentive for our clients' adversaries to discontinue their illegal conduct in the future").

80. For example, in the reduced subway fare case involving MFY Legal Services, Inc. and a pro bono attorney, see *supra* note 35 and accompanying text, the inability of MFY Legal Services, Inc. to seek an attorneys' fee award undermines the plaintiffs' ability to deter the MTA from continuing to engage in its allegedly wrongful conduct. Decl. of David F. Dobbins dated Dec. 5, 2001, para. 36, *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001).

81. See LSC, 1999 ACTUAL REVENUE REPORT 1 (1999) (on file with the authors).

State courts play an important role in generating this funding through state court filing fees and fines.⁸² Additionally, state court judges play an important role in administering IOLTA funds.⁸³

Decisions of state and local governments to commit substantial resources to legal services are premised on an understanding that state and local governments function more efficiently and fairly when the poor have effective legal representation. As the Supreme Court observed in *Velazquez*, “An informed, independent judiciary presumes an informed, independent bar.”⁸⁴ Acting on the same premise, state and local governments allocate funds for legal services to ensure that state and local judges will have the benefit of argument by counsel even when the litigants are too poor to afford counsel. The New York legislature, for instance, established the New York IOLA Fund because “the availability of civil legal services to poor persons is essential to the due administration of justice.”⁸⁵

The LSC restrictions diminish the ability of state and local governments to improve the performance of the courts. As a result of the 1996 LSC appropriations act and the “program integrity” restriction, state and local efforts to aid LSC grantees are either encumbered by the 1996 restrictions or expended on wasteful attempts to establish and maintain burdensome separate entities.⁸⁶

82. See ABA, PROJECT TO EXPAND RESOURCES FOR LEGAL SERVICES, A CHART OF SIGNIFICANT FUNDRAISING ACTIVITIES FOR LEGAL SERVICES (2000) (showing approximately \$36.8 million dollars in court filing fees and fines generated annually for civil legal services nationwide), available at http://www.abanet.org/legalservices/sclaid_body.html.

83. See, e.g., 2000 TEX. EQUAL ACCESS TO JUSTICE FOUND. ANNUAL REP. (2000) (two state court justices sit on the board of Texas IOLTA), available at <http://www.txiolta.org/2000annual.pdf>; ARK. IOLTA FOUND., OFFICERS, DIRECTORS AND STAFF (2002) (listing the Treasurer of the Arkansas Administrative Office of the Courts as a director of the Arkansas IOLTA Foundation serving as the designee of the Chief Justice of the state), at <http://courts.state.ar.us/iolta/directors.html>; CONN. BAR FOUND., BOARD OF DIRECTORS (2002) (two state court justices serve on the Connecticut Bar Foundation Board of Directors, which awards IOLTA grants), at <http://www.ctbar.org/public/cbf/page9.shtml>; FLA. BAR FOUND., BOARD OF DIRECTORS (2002) (three state court justices serve as directors of the Florida Bar Foundation, which awards IOLTA grants), at <http://www.flabarfdn.org/>; IND. PRO BONO COMM'N (2002) (three state court justices serve as members of the commission awarding IOLTA grants), at http://www.state.in.us/judiciary/probono/commission_members.html; KY. IOLTA Bd. OF TRS. (a state court justice serves on the IOLTA Board of Trustees), at http://www.kybar.org/KBF_IOLTA/iobd.htm.

84. *Velazquez*, 531 U.S. at 545.

85. N.Y. FIN. LAW § 97-v note (McKinney 2001) (Historical & Statutory Notes) (quoting 1983 N.Y. LAWS 659, § 1).

86. State and local governments can also avoid having their legal services funding subjected to the LSC restrictions by giving their funding only to programs that do not

If state and local grants are subjected to the congressional ban on delivering “restricted” legal services, state-funded lawyers will be hampered in their ability to provide representation in some cases.⁸⁷ For example, states often fund legal services lawyers in order to educate members of particular communities about their legal rights and then to represent indigent persons whose rights have been violated.⁸⁸ The 1996 restrictions, however, prevent the states from funding lawyers to “represent[] a client as a result of in-person unsolicited advice” if those lawyers receive any LSC funding.⁸⁹ Similarly, states often fund legal services attorneys to engage in the categories of representation in which LSC grantees are prohibited from engaging.⁹⁰ Michigan, for example, allocates some of its state funding specifically to provide legal services to migrant agricultural workers.⁹¹ This goal is made significantly more difficult by the requirement that the money be subjected to the federal restriction on providing assistance to certain categories of aliens,⁹² given to a non-LSC program, or used to establish and maintain an objectively and physically separate program that receives no LSC funding.

If state and local governments seek to establish an “objectively” separate legal program in a separate physical facility to deliver the otherwise “restricted” legal services, they will be forced to waste

receive any LSC funding. However, there are often compelling reasons to fund LSC grantees. For example, some LSC grantees have particular expertise or ties to their communities that other lawyers in the area cannot provide.

87. See, e.g., 45 C.F.R. pts. 1617, 1626, 1637, 1638 and 1642 (2001) (barring attorneys employed by LSC grantees from representing prisoners and certain aliens; claiming, or collecting and retaining, court-ordered attorneys’ fee awards; participating in class actions; and conducting outreach to potential clients).

88. See, e.g., N.Y. SOC. SERVS. LAW § 50 (McKinney 2001) (mandating the use of funding for, among other things, “outreach, and provision of services,” including legal services, to prevent homelessness); *id.* § 459-c (mandating the use of funding for, among other things, “community education and outreach activities” and “advocacy” for domestic violence victims).

89. 45 C.F.R. § 1638.3 (1996).

90. For example, *Velazquez* plaintiff Farmworker Legal Services of New York applied for and received a grant from New York IOLA specifically to engage in the categories of work that LSC grantees in New York State are unable to handle. Decl. of James Schmidt dated Nov. 15, 2001, ¶ 25, *Dobbins v. Legal Servs. Corp.*, No. 01 Civ. 08371 (E.D.N.Y. filed Dec. 14, 2001) (on file with the authors). Lorna Blake, Executive Director of the IOLA Fund of the State of New York has noted that in 1995, LSC grantees received seventy-five percent of all New York IOLA funding. Lorna K. Blake, *The IOLA Fund and LSC Restrictions*, 17 *YALE L. & POL’Y REV.* 455, 456 (1998). The New York IOLA Board of Trustees determined that the federal restrictions imposed on LSC grantees in 1996 “conflicted with the Fund’s statutory mandate and its mission to support a full array of legal services.” *Id.*

91. MICH. COMP. LAWS ANN. § 600.1485(8)(c) (West 1996).

92. See *supra* note 87.

scarce resources, shoulder difficult administrative burdens, and accept a programmatically undesirable structure.⁹³ By forcing state or local government funds to be expended to establish and maintain a separate entity that receives no federal funding, the program integrity regulation causes a significant portion of the funds to be wasted on duplicative administration and overhead costs, frustrating the government's interest in ensuring that its legal services funding is used in the most economically efficient manner.⁹⁴

Thus, whether court systems act as legal services funders (by allocating court fees and fines for legal services), or whether they are an intended beneficiary of funding allocated to legal services lawyers by other branches of state government, the imposition of federal restrictions on state legal services funding disadvantages state court systems.

D. Bans on Representing Particular Categories of Persons or Persons With Particular Categories of Legal Claims

At a time when courts around the nation have expressed concern about the problems posed by pro se litigants,⁹⁵ some judges have

93. For a description of the burdens faced by some LSC grantees who have established affiliate relationships with entities that receive no LSC funding, see David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Oregon and Virginia Describe the Costs*, 17 *YALE L. & POL'Y REV.* 337 (1998). The complete administrative, financial and programmatic burdens of operating two separate programs functioning in separate physical locations are too numerous to fully catalogue here. However, in the context of a separate effort to compel LSC grantees to consolidate into larger programs, LSC has warned that operating multiple smaller programs instead of one larger program can interfere with the ability of the programs to recruit qualified lawyers and paralegals; to train, supervise and mentor new lawyers; to develop attorney expertise; to make themselves accessible to clients; and to obtain and use technology. See Letter from Cynthia G. Schneider, LSC Program Counsel, to Gretchen Coll-Marti, Executive Director, Puerto Rico Legal Services, Inc. et al. 5 (Aug. 31, 2000), available at http://www.rin.lsc.gov/rinboard/Review_SP/prfd.htm; Letter from Willie Abrams, LSC Program Counsel, to Janet B. Dyer, Executive Director, Western Arkansas Legal Services et al. 9 (June 13, 2000), available at http://www.rin.lsc.gov/rinboard/Review_SP/ARfd.htm.

94. See, e.g., N.Y. SOC. SERVS. LAW § 50 (McKinney 2001) (expressing a desire "to maximize the effect of state funds" spent on homelessness prevention legal services); N.Y. FIN. LAW § 97-v (2001) (stating that the New York IOLA fund is intended "to provide stable, economical and high quality delivery of civil legal services to the poor").

95. See, e.g., CONFERENCE OF STATE COURT ADM'RS, POSITION PAPER ON SELF-REPRESENTED LITIGATION (2000); JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998) (on file with the authors); JUDICIAL COUNCIL OF CA., ADMIN. OFFICE OF THE COURTS, ASSISTING SELF-REPRESENTED LITIGANTS: REGIONAL CONFERENCES 2001 (2001).

expressed alarm about rules that wipe out representation for whole categories of litigants and, at least in some instances, add to the burden on judges.⁹⁶ For instance, a task force on access to justice acting under the auspices of the Alaska Supreme Court polled five Alaska Superior Court judges about the effects of the federal restrictions on LSC grantees.⁹⁷ The judges reported that they had seen an increase in the number of pro se litigants in their courtrooms, and that the judges had to spend more time on those cases.⁹⁸ This affected other participants in the justice system because the judges were often placed in the uncomfortable and possibly inappropriate position of acting as mediator or attorney for the pro se litigants; the judges had to postpone more complex cases; and attorneys opposing pro se litigants with a poor understanding of the legal process had to return to court repeatedly.⁹⁹ The judges also believed that the legal system as a whole was undermined because pro se litigants were often unable to effectively assert their rights, while litigants who could afford counsel were generally able to do so.¹⁰⁰

In addition to increasing pro se representation, restrictions that disallow representation for entire categories of clients or legal claims make low-income people vulnerable to exploitation as they seek legal representation from the private bar. For example, by forcing indigent immigrants to turn away from the legal services bar in favor of the private bar, the federal restriction on representation of aliens encourages those immigrants to rely on work by lawyers who are not well compensated and therefore, in some instances, are likely to perform sub par work.¹⁰¹ Judges' frustrations with low rates of compensation for lawyers are well known.¹⁰²

96. These include the federal restrictions preventing LSC grantees from representing certain types of clients, such as certain immigrants and prisoners, and from representing people in certain types of claims, such as abortion-related litigation and evictions of public housing tenants who are accused of drug-related crimes. *See supra* notes 15-16 and accompanying text. These also include similar restrictions on state and local funding. *See supra* notes 21-25 and accompanying text.

97. *See ALASKA ACCESS TO CIVIL JUSTICE TASK FORCE*, *supra* note 26, at 12.

98. *Id.* at 12-13.

99. *Id.*

100. *See id.* at 11-12.

101. We do not here suggest that lawyers who charge a low fee will necessarily do poor work—indeed, many such lawyers should be applauded for their altruism—but rather note the systemic problem created when legal representatives are not adequately compensated.

102. *See, e.g., In re Nicholson*, No. 00-CV-2229, 2001 WL 1661707, at *4 (E.D.N.Y. Dec. 21, 2001) (noting “the overwhelming consensus of New York state officials, judicial officers, legal experts, and published opinions as well as the evidence that the

Courts are further burdened by rules that, in eliminating legal services for certain categories of low-income people who often have claims against certain institutions, inherently increase the leverage of those institutions in cases that do reach the courts. Judges may find that “repeat players” — such institutional litigants as public housing authorities, the federal Immigration and Naturalization Service, and various federal and state prison systems — have an unfortunate advantage in litigation when few cases against them ever reach the courts,¹⁰³ or when those that do reach the courts involve the institution against a pro se party. Apart from the burden on the courts of protecting the rights of any single pro se litigant, the courts must also be concerned about whether institutional litigants who rarely, if ever, face opposition from represented litigants, can be relied on to make accurate representations to the court.

Courts should also be aware of whole categories of individuals who remain out of court, never advancing their claims. For example, courts hearing the rare prison abuse case in which a prisoner is represented by skilled counsel cannot help but wonder if the case is indicative of a much larger problem that will never come before any court. Courts should do everything they can to enable immigrants, prisoners, and others to obtain their day in court. Otherwise, judges will face a deepening public perception that courts are inherently unfair because the most victimized people in the society are unable to obtain access.

IV. SEPARATION OF POWERS AND FEDERALISM IMPLICATIONS OF THE IMPACT OF LEGAL SERVICES RESTRICTIONS ON JUDGES

Restrictions on legal representation for the poor raise profound legal concerns, including concerns under the First, Fifth and Fourteenth Amendments to the federal Constitution. These concerns relate to the principles of separation of powers and federalism embodied in that document and the ethical regimes under which at-

current statutory rates do not permit [assigned] lawyers to provide competent representation to their clients, and that as a result mothers are consistently denied their constitutional rights”).

103. Leti Volpp has argued that institutional litigants such as the Immigration and Naturalization Service have a similar advantage when they cannot be subjected to class actions. See Leti Volpp, *Court-Stripping and Class-Wide Relief: A Response to Judicial Review in Immigration Cases After AADC*, 14 GEO. IMMIGR. L.J. 463, 470 (2000).

torneys practice.¹⁰⁴ This article discusses some separation of

104. This article does not attempt an exhaustive exploration of the myriad legal problems that legal services restrictions cause for clients, lawyers, courts, and other affected people and institutions. Other articles have discussed the First and Fourteenth Amendment implications of the 1996 federal restrictions. *See, e.g.*, Ass'n of the Bar of City of N.Y., Comms. on Civil Rights & Prof'l Responsibility, *A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers*, 53 THE RECORD 13, 32-54 (1998); Matthew Diller et al., *Symposium: Constitutional Issues Panel*, 25 FORDHAM URB. L.J. 345 (1998); Rhode, *supra* note 43, at 1802-04; Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.—C.L. L. REV. 1630 (1998); David S. Udell, *Implications of the Legal Services Struggle for Other Government Grants for Lawyering for the Poor*, 25 FORDHAM URB. L.J. 895 (1998); J. Dwight Yoder, *Justice or Injustice for the Poor? A Look at the Constitutionality of Congressional Restrictions on Legal Services*, 6 WM. & MARY BILL RTS. J. 827 (1998); Note, *Recent Legislation*, 110 HARV. L. REV. 1346, 1348-49 (1997).

Several commentators have briefly discussed the separation of powers or court-stripping nature of the 1996 federal restrictions. *See, e.g.*, Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 730-32 (1999); Catherine G. Patsos, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205 (1998); Nadine Strossen, *The Current Assault on Constitutional Rights and Civil Liberties: Origins and Approaches*, 99 W. VA. L. REV. 769 (1997); Jonathan A. Weiss, *Should the Government Fund Legal Services? If So, What Should the Lawyers Do?*, 2 J. INST. FOR STUDY LEGAL ETHICS 401, 408 (1999).

Numerous commentators have discussed ethical problems caused by legal services restrictions. *See, e.g.*, Ass'n of the Bar of City of N.Y., Comms. on Civil Rights & Prof'l Responsibility, *supra*, at 54-59; *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751 (1999); Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187 (1999); 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); Russell G. Pearce et al., *Ethical Issues Panel*, 25 FORDHAM URB. L.J. 357 (1998); Rosche et al., *supra* note 37; Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 MINN. L. REV. 1469, 1514-21 (2000); Udell, *supra* note 93; Weiss, *supra* note 104.

Some commentators have warned that the imposition of legal services restrictions, standing alone or combined with grossly inadequate funding for legal services, may make it more urgent for courts to examine the extent to which due process requires a right to counsel in civil cases. *See, e.g.*, Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. 83, 102 (2000) ("The existing restrictions in the Legal Services Corporation Act are enough in themselves to establish an urgent need for a judicially protected right."); Hon. Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998) (arguing that a civil *Gideon* is necessary to help "courts maintain the confidence of the society and to perform the task of insuring that we are a just society operating under a rule of law." This is especially true because most indigent people do not have access to lawyers, in part as a result of the 1996 federal restrictions.).

Finally, the constitutional issues raised by state legal services restrictions have rarely, if ever, been explored. Potential issues, too numerous to thoroughly discuss here, include the right to travel implications of restrictions on legal services for mi-

powers and federalism implications of the federal restrictions, as these are the doctrines that most directly affect judicial power.¹⁰⁵

A. Separation of Powers and Federalism Implications Under *Velazquez*

In *Velazquez*, the Supreme Court articulated a framework for understanding if governmental restrictions on legal services lawyers violate the separation of powers. The *Velazquez* Court invalidated a federal restriction banning LSC grantees from arguing, on behalf of their clients, that welfare reform statutes or regulations were unconstitutional or contrary to the governing law.¹⁰⁶ The Court reasoned that bans on lawyers' speech that "distort" the judiciary's ability to receive information needed to perform the judicial function violate both the First Amendment and principles of separation of powers.¹⁰⁷ The Court held that the prohibition before it warped the exercise of the judicial function by preventing LSC grantees from advancing valid legal arguments, thus depriving courts of information relevant to their determinations:

Restricting LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys in much the same way broadcast systems or student publication networks were changed in the limited forum cases we have cited. Just as government in those cases could not elect to use a broadcasting network or a college publication structure in a regime which prohibits speech necessary to the proper functioning of those systems, . . . it may not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary.¹⁰⁸

grant workers and the First Amendment implications of state restrictions that prohibit the use of state funding for lawsuits against the state.

105. Although the separation of powers and federalism doctrines embodied in the federal Constitution limit only the actions of the federal government, state legal services restrictions may fall afoul of the separation of powers principles embodied in state constitutions.

106. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

107. *Id.* at 544-45. It is well established that the First Amendment protects the rights of public interest lawyers and their clients to associate for the purpose of providing and receiving free legal representation. *See, e.g., In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963).

108. *Velazquez* 531 U.S., at 546 (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)).

In *Velazquez*, the Court's holding ultimately rested on a recognition that the opportunity to advance all relevant legal arguments is essential to the proper functioning of the judiciary.¹⁰⁹ The Court relied on the separation of powers doctrine to support its finding that the basic function of the courts is to hear such arguments:

The restriction imposed by the statute here threatens severe impairment of the judicial function. [The restriction] sifts out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry. If the restriction on speech and legal advice were to stand, the result would be two tiers of cases. In cases where LSC counsel were attorneys of record, there would be lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper presentation to the court. The courts and the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute, avoided all reference to questions of statutory validity and constitutional authority. A scheme so inconsistent with accepted separation of powers principles is an insufficient basis to sustain or uphold the restriction on speech.¹¹⁰

Although it only made explicit mention of separation of powers principles, the Court effectively overturned the welfare challenge restriction with respect to proceedings in both federal and state courts.¹¹¹ Implicit in the Court's opinion is a recognition that since Congress lacks the power to warp the proceedings in federal courts, it cannot, consistent with established principles of federalism, have the power to warp the proceedings in state courts. The Supreme Court has held that "It is incontestible that the Constitution established a system of 'dual sovereignty,'"¹¹² in which the states "retain [] 'a residuary and inviolable sovereignty.'"¹¹³ Within this system, the federal government has the power in enumerated settings to regulate private behavior, but the federal government is without power to direct a state's exercise of sovereign

109. *Id.* at 545.

110. *Id.*

111. *Id.* at 548-49.

112. *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

113. *Id.* (internal citation omitted).

functions.¹¹⁴ As the Supreme Court has warned, Congress cannot “intrude on state governmental functions.”¹¹⁵

Federal interference with state control over the proper functioning of state court systems clearly implicates the tenets of federalism. The Supreme Court has, for example, ruled that a federal attempt to curtail a state’s authority over who can serve as a state court judge would pose “a constitutional problem,” because a state’s choice of the qualifications of its state court judges “is a decision of the most fundamental sort for a sovereign entity.”¹¹⁶ It has also held that state sovereignty is affected when federal courts intervene in state courts’ exercise of disciplinary authority over lawyers practicing in state court.¹¹⁷ Finally, although a state court adjudicating federal rights must apply federal procedures that form part of the substance of those rights,¹¹⁸ at all other times control over the procedures is under the sole control of the states.¹¹⁹

Restrictions such as those on participating in class actions or claiming an attorneys’ fee award are especially likely to raise separation of powers and similar federalism concerns. Restrictions on class actions interfere with the ability of courts to ensure that low-income people learn about and benefit from court-ordered remedies; selectively interfere with the ability of courts to rule on a complete record; selectively interfere with the ability of courts to determine whether a case should proceed as a class action; and selectively cause cases to disappear before they can be resolved by

114. *Id.* at 935. (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal regulatory program.”); *New York v. United States*, 505 U.S. 144, 162 (1992) (holding that Congress cannot “require the States to govern according to Congress’ instructions”).

115. *Gregory*, 501 U.S. at 470.

116. *Id.* at 460, 464.

117. *See Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (warning that federal courts should not “intrude into the state’s proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts”); *see also Erdmann v. Stevens*, 458 F.2d 1205, 1210 (2d Cir. 1972) (applying *Younger* abstention to a case challenging a New York court’s ethics decision, because “if a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court’s initiation of a disciplinary proceeding against its own officer, the state judiciary might suffer an unfair and unnecessary blow to its integrity and effectiveness”).

118. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952).

119. *See Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) (holding that “the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control”); *Mondou v. New York*, 223 U.S. 1, 56 (1912) (noting that Congress did not attempt in the Federal Employers’ Liability Act “to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure”).

the courts. The federal attorneys' fee restriction deprives courts of the abilities to prevent themselves from being used for illegitimate ends; ensure that litigants and counsel do not unduly delay the proceedings; and ensure that their rulings have the maximum deterrent effect.¹²⁰

Both restrictions cast doubt on the reliability of some federal and state court proceedings in a way that the *Velazquez* Court has held is constitutionally unacceptable. The Court warned that the federal ban on the challenge of welfare laws and regulations by LSC grantees representing clients in welfare cases "threaten[ed] severe impairment of the judicial function,"¹²¹ by creating one category of cases—those in which the lawyers were funded by LSC—where the fairness of the outcome of the case would be in doubt, and another category—those in which the lawyers received no LSC funding—in which the outcome would be reliable.¹²² The class action and attorneys' fee award restrictions likewise cast doubt on the validity of cases involving LSC grantees, in which the court's ability to control the proceedings and the outcomes has been compromised, while leaving unaffected those in which no LSC grantee is involved. This is a serious interference with the integrity of the courts with important separation of powers and federalism implications.

B. Additional Separation of Powers and Federalism Implications of Restrictions on Non-Federal Funding

The federal restrictions on LSC grantees pose two additional federalism concerns. First, by prohibiting courts from certifying class actions or awarding attorneys' fees in cases involving LSC grantees, the federal class action and attorneys' fee restrictions interfere with the ability of state governments to control the availability of these procedures and remedies in state courts. State governments, including state courts, often find that class actions and attorneys' fee awards are essential to the administration of state justice systems.¹²³ For example, in signing the most recent amendments to New York's class action statute, which increased the availability of class actions, then-Governor Carey stated, "By

120. See *supra* notes 54-80 and accompanying text.

121. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001).

122. *Id.*

123. The findings of the New York legislature and New York courts regarding the necessity of attorneys' fee awards to the administration of justice are discussed *supra* notes 54, 63-64 and accompanying text.

permitting common questions of law or fact affecting numerous persons to be litigated in one forum, the bill would result in greater conservation of judicial effort.”¹²⁴ In support of the same amendments the New York Office of Court Administration wrote that a revised class action statute was necessary because of “pressing needs for an effective, flexible and balanced group remedy in vital areas of social concern.”¹²⁵ The Office noted that without the amendments there “exists no workable remedy when neither relief on an individual basis nor actual joinder of the class is economically or administratively feasible.”¹²⁶ Because the judiciary, the legislature, and the executive branch have all made clear that they desire class actions and attorneys’ fee awards to be available in state courts in certain circumstances, the federal government’s interference with the availability of class actions and attorneys’ fee awards cases involving LSC grantees has serious federalism implications.

The second additional federalism concern is that the federal restrictions on non-federal funds received by LSC grantees hamper the ability of state governments, including court systems, to allocate funding to improve the administration of justice in state courts.¹²⁷ As described above, Congress has prevented states from financing legal services lawyers to operate effectively in state courts or to represent certain categories of clients, unless those lawyers spend a significant portion of the state funding to establish wasteful and duplicative programs.¹²⁸ Given the importance of lawyers to the proper functioning of the courts,¹²⁹ the ability of a state to assure that a state-funded lawyer is free to represent clients effectively in order to enhance the administration of justice in its

124. Memorandum from Hugh L. Carey, Governor of New York, filed with N.Y. Assembly Bill No. 1252-B (1975); *see also* N.Y.C.P.L.R. 901 (2001) (stating a class action is appropriate if it would be “superior to other available methods for the fair and efficient adjudication of the controversy”).

125. *See* Memorandum from the State of New York, Office of Court Administration, in support of S-1309 & A-1252, at 1 (1975).

126. *See id.*

127. Several members of Congress recognized the federalism implications of federal restrictions on state and local government funding in 1992, when they urged the rejection on federalism grounds of a predecessor to the 1996 LSC restrictions, which would have restricted the funding that state and local governments allocated to LSC grantees. *See, e.g.*, 138 Cong. Rec. H3115-02, H3115-H3121 (May 12, 1992) (statements of Reps. Frank, Boxer, Lowey, Washington and Norton in opposition to attempt to restrict state and local funding). The measure did not pass in 1992, although it passed in an altered form in 1996. *See supra* note 9.

128. *See supra* notes 9, 11 and accompanying text.

129. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 546-48 (2001).

courts is just as important to a state's sovereignty as are selecting its judges, regulating attorney ethics, or determining the procedures that attorneys will follow. By forbidding state and local governments that fund legal services lawyers from allocating funding to those lawyers for the purposes that the states deem important to the functioning of their judiciaries, unless the government wastes money on a duplicative and burdensome separate entity, Congress thus intrudes on state sovereignty.

The interference of the federal class action restriction with the functioning of the federal and state courts is particularly offensive to principles of separation of powers and federalism because the class action mechanism arises out of the common law, and both state and federal courts retain at least some inherent equity power to certify and control class actions.¹³⁰

Likewise, the attorneys' fee award restriction constitutes an unacceptable intrusion into the separation of powers and federalism, because both federal courts and state courts retain the inherent power to impose attorneys' fee awards on attorneys and parties who defy court orders, litigate in bad faith, or otherwise abuse the judicial forum.¹³¹ This power permits both Article III and state courts to use the attorneys' fee sanction in cases falling outside of Federal Rule of Civil Procedure 11.¹³² In cases in which an LSC grantee represents one side, however, the court is powerless to use its inherent authority to award fees to control the proceedings before it,¹³³ in violation of both separation of powers and federalism.

CONCLUSION

We do not suggest that there is any quick fix for the problems caused by legal services funding restrictions. But for judges con-

130. See *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 301-02 (1853) (holding, without reference to the federal procedural rules then in effect, that "where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others"); Kevin M. Forde et al., *State Practice: Illinois' Class Action Statute*, ILL. INST. FOR CONTINUING LEGAL EDUC. (Apr. 2001) ("[I]t is the authors' view that the court has the inherent equity power to certify a mandatory class.").

131. See *Chambers v. Nasco, Inc.*, 501 U.S. 32, 43-46 (1991); *Gordon v. Marrone*, 590 N.Y.S.2d 649, 653-54 (Sup. Ct. 1992) (discussing the inherent powers of federal and New York courts to assess attorneys' fees for bad faith litigation). See also *supra* note 57 and accompanying text.

132. *Chambers*, 501 U.S. at 46-47; *Gordon*, 590 N.Y.S.2d at 653-54.

133. See *supra* note 14 and accompanying text.

cerned about doing justice and about operating effective courtrooms, there are a number of ideas to explore:

1. Judges can track the status of legal services restrictions and find ways to defend the integrity of their judicial function in cases where counsel for one side is constrained by funding restrictions. For example, judges can promote consistent application of court procedural rules to all counsel if one side is unable to claim attorneys' fees and the other side sees that disability as an invitation to engage in extensive unwarranted motion practice. One approach would be to sua sponte require offending litigants to pay fees to the client of the legal services office¹³⁴ or to a third party such as a state's general fund for legal services.¹³⁵

2. Judges can rule on the constitutionality of any proposed withdrawal of legal services counsel that is driven by the restrictions. If necessary, judges can actually prevent counsel from withdrawing, holding that the restrictions requiring withdrawal are unconstitutional in the context of that particular case.¹³⁶

3. Judges and organizations reflecting their concerns can study the effects of legal services restrictions and inadequate funding for legal services on courts, litigants, lawyers, and the larger society. They can speak out about the adverse consequences and legality of restrictions and inadequate funding in settings including the legislature, the amicus brief process,¹³⁷ the media at large, conferences,

134. The Supreme Court has held that attorneys' fee awards are generally the property of clients, not of their attorneys. *Evans v. Jeff D.*, 475 U.S. 717, 730 (1986).

135. LSC has endorsed the idea of judges awarding attorneys' fees to third parties. See LSC Office of Legal Affairs, External Op. 2001-1007 (2001) ("You might recommend that the judge order the fees which would have been paid to your program to be paid by the defendant directly to some other worthwhile charity. A donation to the local battered women's shelter (or another organization that promotes the elimination of domestic violence) might be an appropriate alternative in this circumstance.").

136. In 1996, some judges refused to grant legal services lawyers' conditional motions to withdraw, ruling instead that the lawyers must be permitted to continue as counsel in light of client's concerns and constitutional concerns. See, e.g., *Varshavsky v. Perales*, No. 40767/91 (N.Y. Sup. Ct. Dec. 24, 1996). See also Udell, *supra* note 93, at 341, 343-44. Additionally, according to documents received by the authors from LSC pursuant to a FOIA request, in 1996 a court, acting pursuant to Illinois Rule of Professional Conduct 1.16, denied a request by LSC grantee Legal Aid Foundation of Chicago to withdraw from a class action because it determined that the class would be "prejudiced" if the attorney withdrew.

137. For example, the American Judicature Society filed an amicus brief in support of the plaintiffs in the *Velazquez* case. See Brief for Amicus Curiae The American Judicature Society in Support of Respondents, *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

law reviews,¹³⁸ and elsewhere. Judges can also encourage state and local legislatures and IOLTA funds to provide money for legal services and to avoid imposing restrictions on that funding. Judges can do this by establishing court offices or designating personnel to deal with justice issues.¹³⁹ They can also establish or participate in commissions, task forces, working groups and other efforts to address gaps in the provision of legal representation to the poor caused by legal services restrictions and inadequate federal, state, and local funding for legal services.¹⁴⁰

4. In some states, judges can play a significant role in deciding how filing fees and other funds for legal services should ultimately be spent.¹⁴¹ In those states, judges may see ways to avoid imposing restrictions that ultimately handicap the work of the courts themselves in dispensing justice.

5. Judges can rule on motions to appoint counsel, write about problems that occur when they are unable to appoint counsel, and explore the legal bases for recognizing a right to counsel.¹⁴²

6. Judges can recognize the predicament of pro se litigants, understanding that there may be insufficient numbers of legal services and other lawyers available to take certain categories of cases. They can, for example, promulgate rules or issue opinions giving judges special responsibilities to ensure that justice is done in cases

138. For examples of judges who have written law review articles containing criticism of the restrictions, see Johnson, *supra* note 104 and Sweet, *supra* note 104.

139. For example, New York Court of Appeals Chief Judge Judith S. Kaye has created the New York State Access to Justice Center, headed by Deputy Chief Administrative Judge for Justice Initiatives Hon. Juanita Bing Newton, who is charged with, among other things, assessing gaps in legal services delivery and working with the legislature and the public to increase funding for civil legal services. Press Release, Hon. Jonathan Lippman, : Chief Judge Targets Shortfall of Civil Legal Services for New York's Poor (Sep. 11, 2001), at http://www.courts.state.ny.us/pr2001_16.html; Press Release, Hon. Jonathan Lippman, : Judge Juanita Bing Newton Appointed Deputy Chief Administrative Judge for Justice Initiatives (June 29, 1999), at http://www.courts.state.ny.us/pr99_13.html.

140. For example, the Montana Supreme Court has established an Equal Justice Task Force "to examine the unmet legal needs of low and moderate income people, and to work toward adequate funding for civil access to justice." The task force was created partly in order to respond to the constraints of the federal restrictions. Mary Helen McNeal, *Montana's New Equal Justice Task Force Has Gotten Down to Work*, MONTANA L., Sept. 2001, at 8.

141. See *supra* note 82 and accompanying text.

142. See, e.g., *In re Nicholson*, No. 00-CV-2229, 2001 WL 1661707, at *4 (E.D.N.Y. Dec. 21, 2001).

involving pro se litigants.¹⁴³ They can also make court staff available to directly help pro se litigants, create written materials to help pro se litigants, or make space available in courthouses where attorneys can help pro se litigants.¹⁴⁴

143. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2013-17 (1999) (listing court rules and cases requiring judges to assist pro se litigants, including by construing their pleadings liberally and explaining rules to them).

144. *Id.* at 1999-2003 (describing various initiatives).