

July 2013

Measuring the Justice Gap: Flaws in the Interstate Allocation of Civil Legal Services Funding and a Proposed Remedy

Dion Chu
Jefferies & Company

Matthew R. Greenfield

Peter Zuckerman
Wachtell, Lipton, Rosen & Katz

Follow this and additional works at: <http://digitalcommons.pace.edu/plr>

 Part of the [Legal Profession Commons](#)

Recommended Citation

Dion Chu, Matthew R. Greenfield, and Peter Zuckerman, *Measuring the Justice Gap: Flaws in the Interstate Allocation of Civil Legal Services Funding and a Proposed Remedy*, 33 Pace L. Rev. 965 (2013)
Available at: <http://digitalcommons.pace.edu/plr/vol33/iss3/3>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

Measuring the Justice Gap: Flaws in the Interstate Allocation of Civil Legal Services Funding and a Proposed Remedy

Dion Chu,* Matthew R. Greenfield,** and Peter
Zuckerman***†

I. Introduction

While Justice Lewis Powell, Jr. famously stated that it was “fundamental that justice should be the same, in substance and availability, without regard to economic status,”¹ the available evidence suggests that Justice Powell’s ideal of equal access remains unrealized. Rather, as the Legal Services Corporation (“LSC”) has found, in the United States “there continues to be a major gap between the civil legal needs of low-income people and the legal help that they receive.”² Underscoring the extent of this “justice gap,” the LSC concluded in 2009 that: (i) “for every client served by an LSC-funded program,” one had to be turned away because of inadequate resources; (ii) fewer than

* U.S. Rates Trading Associate—Jefferies & Company.

** Law Clerk to the Honorable Sidney H. Stein—U.S. District Court for the Southern District of New York.

*** Associate—Wachtell, Lipton, Rosen & Katz.

† This article represents the opinions and legal conclusions of its authors and not necessarily those of their respective employers.

1. Lewis Powell, Jr., U.S. Supreme Court Justice, Remarks made as President of the American Bar Association, [http://www.nlada.org/News/Equal Justice Quotes](http://www.nlada.org/News/Equal_Justice_Quotes) [hereinafter Powell Remarks].

2. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2009) [hereinafter LSC, 2009 JUSTICE GAP REPORT]. The LSC’s 2009 study updates a 2005 report that reached the same conclusion about the existence of a justice gap. *See id.*; LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 4 (2005) (finding “a major gap between the legal needs of low-income people and the legal help that they receive”).

twenty percent (20%) of legal problems encountered by low-income people were addressed by a lawyer; (iii) only one legal aid attorney was available for every 6415 low-income individuals (in contrast, one private attorney was available for every 429 individuals above the LSC-eligible income threshold); and, (iv) state courts were experiencing large increases in the number of unrepresented litigants unable to afford a lawyer.³

Given the troubling scale of the justice gap identified by the LSC, this study attempts to explore why the delivery of legal services to low-income individuals in the United States falls so far short of Powell's ideal. The easy answer is that funding for legal services is grossly inadequate,⁴ but recognizing that "[w]e have been too quick to assume that all we need is money to solve the access problem,"⁵ this study looks beyond the easy answer and argues that the magnitude of funding is only part of the problem. The focus of our investigation is the way that legal services funds—both LSC and non-LSC funds—are allocated across states. Relying on data from the Civil Justice Infrastructure Mapping Project's *Access Across America* report,⁶ the LSC's *Fact Book 2010*,⁷ and our own data measuring various legal needs, we find that funding tends to be insensitive to actual demand for legal services. With the supply of legal services not particularly responsive to demand, we conclude that the justice gap could be narrowed simply by reforming the way in which policymakers distribute legal services funds while holding constant the total amount of funds distributed.

In reaching this conclusion, we proceed in two parts. First, drawing largely from *Access Across America* and LSC data, we

3. See LSC, 2009 JUSTICE GAP REPORT, *supra* note 2, at 1-2.

4. See *id.* at 2-3 (arguing that LSC funding should be doubled).

5. JEANNE CHARN & RICHARD ZORZA, CIVIL LEGAL ASSISTANCE FOR ALL AMERICANS 15 (2005), available at <http://www.zorza.net/Bellow-Sacks/Cover.pdf>.

6. See REBECCA L. SANDEFUR & AARON C. SMYTH, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT (2011) [hereinafter ACCESS ACROSS AMERICA].

7. See LEGAL SERVS. CORP., FACT BOOK 2010 (2011) [hereinafter LSC, FACT BOOK 2010], available at http://grants.lsc.gov/sites/default/files/Grants/Fact_Book_2010.pdf.

analyze the supply of legal services funding across states. Since eligibility for LSC funds is principally determined by income (only individuals in households with income at or below 125% of the federal poverty level are LSC eligible),⁸ variations in legal services funding among states are strongly correlated with LSC eligibility levels. However, LSC funding likely accounts for well under forty-three percent (43%) of overall legal services funding, with the remainder (“non-LSC funding”) generated by, inter alia, state and local grants, filing fees, interest on lawyer trust accounts (“IOLTA”), and private grants.⁹ Because the precise magnitude of non-LSC funding is unclear, we estimate it with three different measures. Using each of these measures, we then analyze its disparity among states. In every case, after explaining *Access Across America’s* finding that non-LSC funding is not proportional to population,¹⁰ we conclude that it also has no statistically significant relationship to key economic indicators, such as LSC eligibility, median household income, or unemployment. In fact, of the variables we tested, only the number of lawyers

8. See 45 C.F.R. § 1611.3(c) (2011). Eligibility is determined in accordance with the poverty guidelines set annually by the Department of Health and Human Services (“DHHS”). See *id.* § 1611.3(c)(1). The DHHS currently defines poverty-level income for a one-person household as \$11,170 and for a four-person family as \$23,050. Annual Update of the HHS Poverty Guidelines, 77 Fed. Reg. 4034-35 (Jan. 26, 2012). Thus, for the year 2012, a person living alone is eligible for LSC-provided legal services if he earns no more than \$13,962.50, and a person living in a four-person household is eligible if the household earns no more than \$28,812.50. Notably, however, the threshold for poverty under the guidelines is higher for residents of Alaska and Hawaii. See *id.*

9. Part II.A, *infra*, explores various estimates of the magnitude of non-LSC funding. The LSC’s *Fact Book 2010* provides a lower bound for non-LSC funding (and thus, an upper bound for LSC funding) because it indicates that among LSC-funded organizations, about fifty-seven percent (57%) of funds are not supplied by the LSC. See LSC, FACT BOOK 2010, *supra* note 7, at 8. The overall proportion of non-LSC funds must be higher than fifty-seven percent (57%) because some non-LSC funds go to organizations that do not receive any LSC funds. To be sure, in *Access Across America*, non-LSC funding accounts for under forty percent (40%) of total funding but only because the report considers non-LSC funding merely from court fines, court fees, and legislative appropriations. See SANDEFUR & SMYTH, *supra* note 6, at 136-37.

10. See SANDEFUR & SMYTH, *supra* note 6, at 18-19.

in a state relates significantly to any of our measures of non-LSC funding, and of these three measures, the only one for which the number of lawyers has statistical significance is non-LSC funding received by organizations that also receive LSC funding.

After examining how legal services funds are supplied across states, we then analyze how they are demanded. Measuring demand is quite challenging, particularly on the state level, because it requires assessing not the amount of legal services that low-income individuals do use, but rather the amount that they *want* to use, which is an unobservable variable. The LSC has attempted to measure such demand through a survey of individuals seeking assistance from LSC-funded programs, but, as the LSC concedes, this approach comes with inherent limitations that likely under-represent unmet needs.¹¹ We therefore take a different approach: after assuming that the overall frequency with which civil legal services are delivered reflects the relative demand for these services *across* states, we estimate demand *within* each state through proxies for the most significant categories of services. Because, according to LSC data, nearly eighty-five percent (85%) of LSC-eligible cases arise from just four types of disputes (consumer finance, family, housing, and income),¹² we can reasonably project state-level demand for legal services by estimating the frequency of these disputes within each state. Upon doing so, we find that there is no clear connection between state-level demand and supply, particularly with respect to LSC funding. In other words, states with the greatest need for LSC funding (because their residents encounter legal problems the most based on our estimates) do not necessarily have more funding than states with lower funding needs.

Though we recognize that fixing this imbalance will not be easy, we conclude by offering a proposal that attempts to do so. In this regard, we recommend that the LSC move away from complete reliance on an income-based test toward a needs-

11. See LSC, 2009 JUSTICE GAP REPORT, *supra* note 2, at 9-11.

12. See LSC, FACT BOOK 2010, *supra* note 7, at 27.

based test. Such a framework would allow the LSC to more effectively serve unmet demand for civil legal services and thus, help realize Justice Powell's ideal.

II. Supply of Legal Services Funding

In this Part, we analyze the supply of LSC and non-LSC funding. We show that whereas LSC funding is almost entirely explained by a state's LSC-eligible population, non-LSC funding (however estimated) is allocated idiosyncratically and thus, cannot be explained by ostensibly important economic, legal, and demographic variables.

A. *Types of Legal Services Funding*

In examining the drivers of the supply of legal funding across states, we divide our analysis into two parts, focusing first on LSC funding and then turning to non-LSC funding. This division is necessary because, as explained further below, LSC funding is in large part statutorily determined through a means test, while non-LSC funding is largely determined by the states themselves, on a more ad hoc basis that makes use of a number of delivery methods. Unfortunately, this also means that whereas LSC funding is easily ascertainable, non-LSC funding is impossible to precisely quantify. Given this difficulty, we estimate non-LSC funding in three different ways, examining: (i) the non-LSC funding received by LSC-funded programs ("non-LSC 1"), (ii) the state-generated funding reported in *Access Across America* ("non-LSC 2"), and (iii) the sum of these two measures ("non-LSC 3").

To be sure, each of these three measures is not without problems. Both non-LSC 1 and non-LSC 2 underestimate total non-LSC funding, the former because some programs that are not funded by the LSC receive non-LSC funding and the latter because some non-LSC funding comes from sources other than court fees, court fines, and legislative appropriations (the only sources that *Access Across America* examines).¹³ Further, non-

13. See SANDEFUR & SMYTH, *supra* note 6, at 136-37.

LSC 3 is imperfect not only as a result of the deficiencies associated with non-LSC 1 and non-LSC 2, but also because non-LSC 1 and non-LSC 2 overlap to an unquantifiable extent.¹⁴ In spite of these unavoidable problems, our estimates of non-LSC funding at the least offer a useful starting point for analyzing the disparities in such funding across states. Indeed, as we discuss in greater detail in Part II.C below, all three measures strongly suggest that non-LSC funding is idiosyncratically determined, distributed in magnitudes that are not closely connected to ostensibly significant economic, legal, and demographic variables.

Illustrating these magnitudes as well as the magnitude of LSC funding, Table 1 summarizes the size and breakdown of legal services funding across the fifty states and the District of Columbia. Notably, the total legal services funding estimate based on LSC and Non-LSC 3, approximately \$1.2 billion, is quite close to a recent \$1.3 billion estimate of total funding based on data from the American Bar Association.¹⁵

14. See Email from Rebecca Sandefur, Senior Res. Soc. Scientist, Am. Bar Found., to Peter Zuckerman (Mar. 8, 2012, 10:27 AM EST) (on file with authors) (noting that “there’s undoubtedly double-counting in [the LSC and *Access Across America*] data sources, but there’s no way to identify it and account for it given the way data are currently collected and reported”).

15. ALAN HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009, at 2 (2009), available at <http://www.clasp.org/admin/site/publications/files/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-2.pdf>.

Table 1: LSC and Non-LSC Funding (2009/2010)¹⁶

Type of Funding	Amount	LSC % of Total
<i>LSC</i>	\$395,915,410	
<i>Non-LSC</i>		
Non-LSC 1	\$534,757,305	
Non-LSC 2	\$226,729,917	
Non-LSC 3	\$761,487,222	
TOTAL LSC + Non-LSC 1	\$930,672,715	42.5%
TOTAL LSC + Non-LSC 2	\$622,645,327	63.6%
TOTAL LSC + Non-LSC 3	\$1,157,402,632	34.2%

B. *LSC Funding*

Section 1007(a)(2)(A) of the Legal Services Corporation Act of 1974 requires that the LSC “establish, in consultation with the Director of the Office of Management and Budget and with the Governors of the several States, maximum income levels (taking into account family size, urban and rural differences, and substantial cost-of-living variations) for individuals eligible for legal assistance”¹⁷ Pursuant to this directive, in its own regulations the LSC has provided that “every recipient [of LSC funds] shall establish annual income ceilings for individuals and households, which may not exceed one hundred and twenty five percent (125%) of the current official Federal Poverty Guidelines amounts.”¹⁸ Thus, those with incomes above 125% of the federal poverty level are ineligible for LSC funds, and “LSC basic field funding is allocated on the basis of census

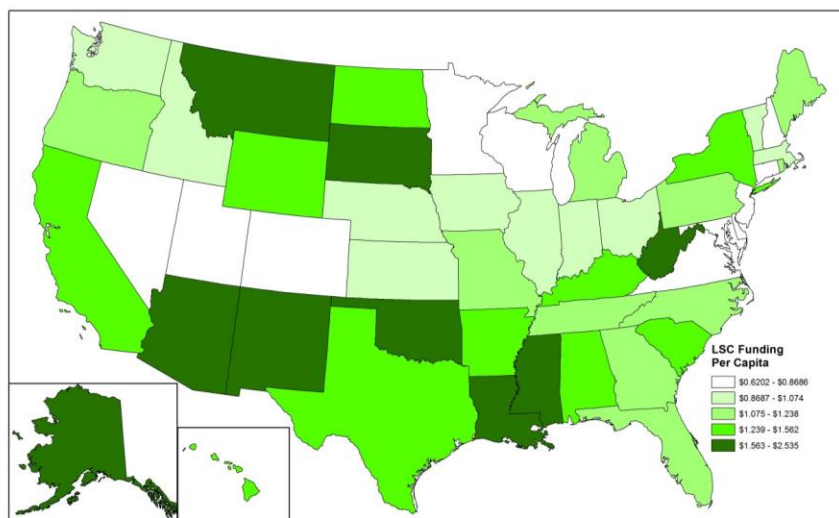
16. See LSC, FACT BOOK 2010, *supra* note 7, at 9-10; SANDEFUR & SMYTH, *supra* note 6, at 31-132. The LSC Funding and Non-LSC 1 figures are based on data from 2010 while the Non-LSC 2 measure is largely based on data from 2009.

17. Legal Services Corporation Act of 1974 § 1007(a)(2)(A), 42 U.S.C. § 2996f(a)(2)(A) (2006).

18. 45 C.F.R. § 1611.3(c)(1) (2013).

counts of the poverty population in the service area.”¹⁹ One might therefore expect the number of people in a state whose income falls below the 125% threshold (the “LSC-eligible population”) to be highly correlated with the amount of LSC funding that a state receives.

Figure 1: Map of Population-Normalized LSC Funding by State



Both our results and those in *Access Across America* confirm this expectation. *Access Across America* finds that “[LSC] funds are distributed with little disparity” relative to a state’s LSC-eligible population.²⁰ That is, fifty-nine percent (59%) of states receive an amount of LSC funding “at parity” with what their LSC-eligible population would suggest, while only twenty-four percent (24%) of states receive an amount “above parity,” and just eighteen percent (18%) obtain an

19. Linda E. Perle, *Legal Services Corporation Funding for 2012: Concern About Proposed Reductions*, CLASP (Jun. 14, 2011), http://www.clasp.org/issues/in_focus?type=civil_legal_assistance&id=0005.

20. SANDEFUR & SMYTH, *supra* note 6, at 17-18.

amount “below parity.”²¹ Further, among the states that do not receive funding perfectly proportional to their LSC-eligible populations, average deviations from parity tend to be small (at least compared to average non-LSC funding deviations).²²

We reach a similar conclusion using a linear regression. Specifically, we regress each state’s receipt of LSC funding on a set of variables intended to proxy for potentially relevant economic, legal, and demographic attributes. For economic attributes, we look at: (i) the state’s LSC-eligible population;²³ (ii) the dollar amount of taxes it collects;²⁴ (iii) its median household income;²⁵ (iv) the state’s percentage of total enrollment in the Federal Supplemental Nutritional Assistance Program (“SNAP” or “food stamp” program);²⁶ (v) the dollar amount of SNAP funds the state distributes;²⁷ and (vi) its unemployment rate.²⁸ For legal attributes, we examine: (i) the number of lawyers in the state;²⁹ (ii) whether the state has adopted ABA Model Rule 5.3 (requiring that lawyers have

21. *Id.* at 19. To evaluate parity of LSC funding, *Access Across America* calculates a ratio for each state equal to the percentage of total LSC funds received in that state (that is, the LSC funds received in that state divided by all LSC funds distributed nationally) divided by the percentage of total LSC-eligible population that lives in that state. *Id.* at 18 n.2. Ratios of 1.0 are considered “at parity,” while ratios above 1.0 are considered “above parity,” and ratios below 1.0 are deemed “below parity.” *Id.*

22. *See id.* at 19 (noting that among “above parity” states, the average ratio of actual to predicted LSC funding is 1.5, compared to 2.4 for a non-LSC state-generated funding metric calculated based on state population over total population, and that among “below parity” states, the average ratio is 0.7, compared to 0.4 for the state-generated funding metric); *see also infra* text accompanying note 40.

23. As reported by SANDEFUR & SMYTH, *supra* note 6, at 31-132.

24. U.S. CENSUS BUREAU, 2012 STATISTICAL ABSTRACT 288 tbl.453, available at <http://www.census.gov/prod/2011pubs/12statab/stlocgov.pdf>.

25. *Id.* at 460 tbl.706, available at <http://www.census.gov/prod/2011pubs/12statab/income.pdf>.

26. *Id.* at 367 tbl.571, available at <http://www.census.gov/prod/2011pubs/12statab/socins.pdf>; *id.* at 19 tbl.14, available at <http://www.census.gov/compendia/statab/2012/tables/12s0014.pdf>.

27. *Id.*

28. *Id.* at 405 tbl.629, available at <http://www.census.gov/prod/2011pubs/12statab/labor.pdf>.

29. As reported by SANDEFUR & SMYTH, *supra* note 6, at 31-132.

supervising authority over non-lawyers that they employ);³⁰ and, (iii) the number of civil cases per capita in the state.³¹ Finally, for demographic attributes, we turn to: (i) the state's percentage of Democratic Party votes in the 2008 presidential election;³² (ii) the median age of the state's population;³³ and (iii) the state's population density.³⁴ Table 2 below shows the results of our regression using these three groups of variables.

30. MODEL RULES OF PROF'L CONDUCT R. 5.3, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant.html. We code adoption data based upon reports in SANDEFUR & SMYTH, *supra* note 6, at 31-132.

31. U.S. CENSUS BUREAU, *supra* note 24, at 211 tbl.335, *available at* <http://www.census.gov/prod/2011pubs/12statab/law.pdf>; *id.* at 19 tbl.14, *available at* <http://www.census.gov/compendia/statab/2012/tables/12s0014.pdf>.

32. This variable measures the percentage of votes cast in the state in the 2008 presidential election for Barack Obama. *Id.* at 250 tbl.406, *available at* <http://www.census.gov/prod/2011pubs/12statab/election.pdf>.

33. *Id.* at 21 tbl.16, *available at* <http://www.census.gov/prod/2011pubs/12statab/pop.pdf>.

34. *Id.* at 19 tbl.14, *available at* <http://www.census.gov/prod/2011pubs/12statab/pop.pdf>.

Table 2: Linear Regression of LSC Funding by State

Coefficient	Estimate	T-Statistic
Intercept	-1.96×10^6	-0.62
<i>Economic Variables</i>		
LSC-Eligible Population	$6.73 \times 10^{0***}$	8.05
Taxes Collected (\$)	$1.13 \times 10^{-4**}$	2.78
Median Household Income (\$)	2.70×10^1	1.09
Food Stamp Enrollment (%)	$2.52 \times 10^{7***}$	4.02
Food Stamps Distributed (\$)	$-1.92 \times 10^{-3**}$	-2.92
Unemployment Rate (%)	-3.20×10^7	-1.63
<i>Legal Variables</i>		
Lawyers	$6.72 \times 10^{1**}$	3.41
Adoption of ABA R. 5.3	5.11×10^4	0.13
Civil Cases per Capita	-4.02×10^6	-0.62
<i>Demographic Variables</i>		
Democratic Party Votes (%)	-2.95×10^6	-1.10
Median Age	7.18×10^3	0.08
Population Density (sq. mi.)	$-7.10 \times 10^{2**}$	-3.30

Statistical Significance: *** 0.001; ** 0.01; * 0.05

R-squared: 0.99; **Adjusted R-squared:** 0.99

R-squared: 0.99

Table 2 indicates that of our twelve dependent variables, only six have a statistically significant relationship with LSC funding at a level of five percent (5%) or less. And among this latter group of variables, LSC-eligible population is the most statistically significant by a factor of two. Its coefficient implies that for every person below the 125% poverty threshold, a state receives about \$6.73 in LSC funding.

While not as powerful, the other statistically significant variables also offer some interesting insights on the allocation of LSC funding. In particular, Table 2 suggests that states with

lower population densities receive more funding (about \$709.50 for every fewer person per square mile) while at the same time, states with more lawyers receive more funding (about \$67.20 for every additional lawyer). The relationship between funding and population density might stem from the relatively high cost of providing legal services to more spread-out populations, including perhaps the need for more legal services offices to maintain a threshold of accessibility. The relationship between funding and the number of lawyers is more difficult to explain intuitively, although it is possible that additional lawyers render a state better able to attract or use funding.

The coefficients of the other three statistically significant variables, relating to economic attributes, can also be explained in terms of need and capacity for funding. On the one hand, Table 2 suggests that for every \$10,000 of taxes collected, a state receives approximately \$1.13 of additional LSC funds. While this result might appear counterintuitive on the grounds that states collecting more taxes should be able to rely more on local funding, it is reasonable if one believes that states with higher tax revenues are better able to support organizations that receive legal services funding, whether from LSC or non-LSC sources. In this sense, tax revenue serves as a proxy for capacity to receive funding. On the other hand, food stamp (SNAP) enrollment percentage might be interpreted as a proxy for funding need. Under this view, it is not surprising that every additional percentage point of food stamp enrollment is associated with about \$252,100 of additional LSC funding. Further, for a given level of food stamp enrollment, the amount of food stamps distributed might be negatively correlated with LSC funding (such that every \$1,000 of food stamps distributed is associated with a \$1.92 reduction in funding) because individuals that receive more food stamps might have *less* need for certain legal services (particularly, those related to income).

But whether or not this narrative and those relating to the other variables aside from LSC eligibility explain what is in fact happening, the clearest conclusion from Table 2 is that LSC eligibility represents by far the most important driver of LSC funding. Indeed, while the regression in Table 2 has a high level of fit (an R-squared of 0.99), a simple linear

regression of LSC funding on LSC eligibility has almost as high of a fit (an R-squared of 0.97). As a practical matter, therefore, one can treat LSC funding as determined almost entirely by LSC eligibility.

C. *Non-LSC Funding*

The determinants of non-LSC funding, on the other hand, are far less clear because states differ significantly with respect to both how they provide non-LSC funding and the extent to which they provide it. More fundamentally, since non-LSC funding comes from so many different sources, not all of which are even publicly available, the magnitude of non-LSC funding itself defies precise quantification. For this reason, as explained in Part II.A, we adopt three different estimates of non-LSC funding. In contrast, *Access Across America* relies on only one.

But, for all of our measures of non-LSC funding, we reach conclusions largely similar to *Access Across America*. First, we confirm *Access Across America*'s conclusion that "disparity in [non-LSC] state-generated funding is much more common and much larger" than disparity in LSC funding.³⁵ In particular, just as it calculates disparity ratios for LSC funding based on each state's percentage of national LSC funds divided by the state's percentage of LSC-eligible population, *Access Across America* calculates disparity ratios for non-LSC funding (what we classify as non-LSC 2) based on each state's percentage of total state-generated funds divided by the state's percentage of total population.³⁶ It finds that based on this latter ratio, only six percent (6%) of states are "at parity" (providing non-LSC funding commensurate with their population) while fifty-five percent (55%) are "below parity" and thirty-five percent (35%) are "above parity."³⁷ Moreover, the deviations from parity are quite large: states above parity generate 2.4 times more

35. SANDEFUR & SMYTH, *supra* note 6, at 18.

36. *Id.* at 18 n.2; *see also supra* note 21.

37. SANDEFUR & SMYTH, *supra* note 6, at 18. It is not clear why the percentages reported by *Access Across America* sum to only ninety-six percent (96%).

funding than their relative population suggests (compared to 1.5 times for the comparable LSC ratio) while those below parity generate only 0.4 times as much funding (compared to 0.7 times for the LSC ratio).³⁸ Conducting similar analysis for all of our measures of non-LSC funding, we find similar results, with the caveat that the frequency and magnitude of interstate disparities are slightly lower—though still quite significant—for non-LSC funding provided to LSC-funded organizations (Non-LSC 1). Table 3 below summarizes these results.

Table 3: Interstate Disparities in Non-LSC Funding³⁹

A. Frequency of Disparities

Category	Non-LSC 1	Non-LSC 2	Non-LSC 3
<i>States Below Parity</i>	56.9%	62.7%	62.7%
<i>States At Parity</i>	7.8%	3.9%	3.9%
<i>States Above Parity</i>	35.3%	33.3%	33.3%

B. Magnitude of Disparities (Proportion of Non-LSC Funding/Proportion of Population)

Category	Non-LSC 1	Non-LSC 2	Non-LSC 3
<i>States Below Parity</i>	0.49	0.33	0.56
<i>States Above Parity</i>	1.64	2.37	1.72

38. *See id.* at 19 tbl.2.

39. Our numbers for non-LSC 2 do not precisely match those reported by *Access Across America* because, for all of our measures, we characterize states as “below parity” if their parity score (proportion of non-LSC funding divided by proportion of total population) is below 0.95 and “above parity” if their score is above 1.05. Slightly changing these bounds does not materially affect our results.

Though the above disparity analysis clearly indicates that non-LSC funding is generally not distributed based on population, it is not clear why one would even expect such a relationship. Rather, to the extent that non-LSC funding serves the same purpose as LSC funding—to help those with few economic resources—one might expect non-LSC funding to be positively associated with measures of poverty and other indicators of economic weakness. To investigate this further, we apply our model from Part II.B to each of our measures of non-LSC funding. Tables 4 through 6 below show our results.

Figure 2: Map of Population-Normalized Non-LSC Funding by State (Non-LSC 1)

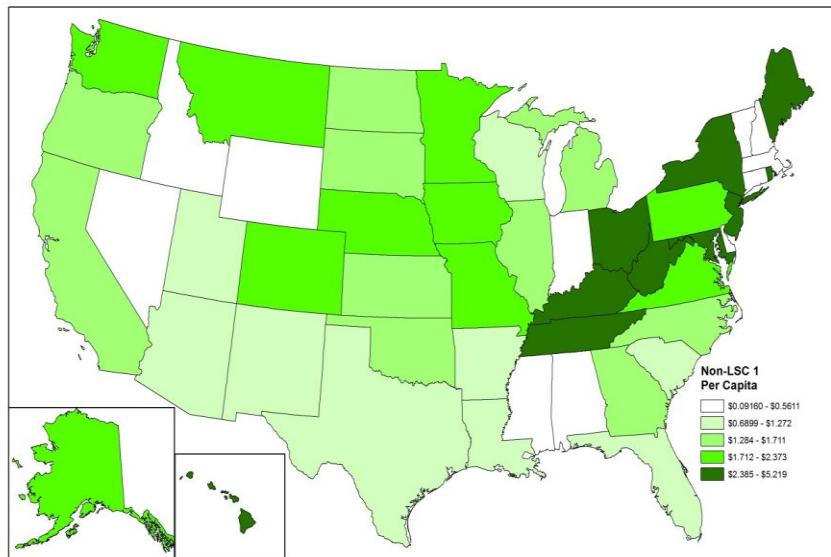


Figure 3: Map of Non-LSC Funding by State (Non-LSC 2)

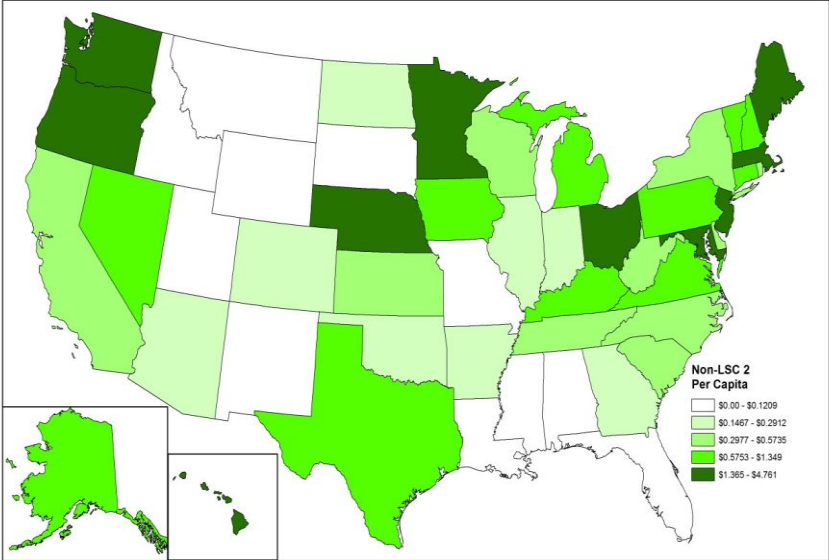


Figure 4: Map of Non-LSC Funding by State (Non-LSC 3)

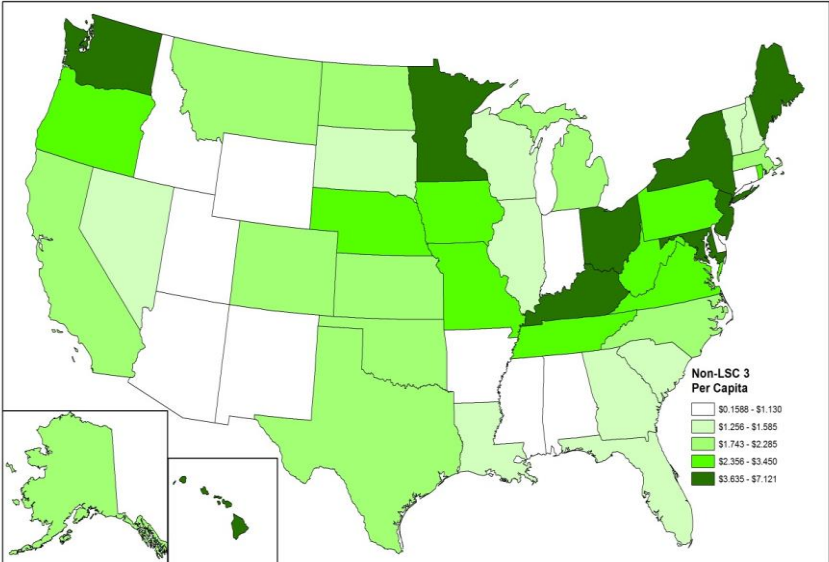


Table 4: Linear Regression of Non-LSC 1 Funding by State

Coefficient	Estimate	T-Statistic
Intercept	-1.83 x 10 ⁷	-0.99
<i><u>Economic Variables</u></i>		
LSC-Eligible Population	-5.00 x 10 ⁰	-1.03
Taxes Collected (\$)	1.60 x 10 ⁻⁴	0.67
Median Household Income (\$)	7.92 x 10 ¹	0.55
Food Stamp Enrollment (%)	-5.15 x 10 ⁶	-0.14
Food Stamps Distributed (\$)	5.94 x 10 ⁻³	1.54
Unemployment Rate (%)	-1.00 x 10 ⁸	-0.87
<i><u>Legal Variables</u></i>		
Lawyers	2.61 x 10 ^{2*}	2.27
Adoption of ABA R. 5.3	3.64 x 10 ⁶	1.60
Civil Cases per Capita	4.97 x 10 ⁷	1.30
<i><u>Demographic Variables</u></i>		
Democratic Party Votes (%)	-4.79 x 10 ⁶	-0.31
Median Age	4.01 x 10 ⁵	0.80
Population Density (per sq. mi.)	-1.21 x 10 ³	-0.97

Statistical Significance: *** 0.001; ** 0.01; * 0.05

R-squared: 0.86; **Adjusted R-squared:** 0.82

Table 5: Linear Regression of Non-LSC 2 Funding by State

Coefficient	Estimate	T-Statistic
Intercept	-2.89×10^7	-1.87
<i><u>Economic Variables</u></i>		
LSC-Eligible Population	3.63×10^0	0.88
Taxes Collected (\$)	1.29×10^{-4}	0.65
Median Household Income (\$)	2.27×10^2	1.86
Food Stamp Enrollment (%)	-2.56×10^7	-0.83
Food Stamps Distributed (\$)	2.27×10^{-4}	0.07
Unemployment Rate (%)	2.97×10^6	0.03
<i><u>Legal Variables</u></i>		
Lawyers	-8.87×10^1	-0.92
Adoption of ABA R. 5.3	2.58×10^6	1.35
Civil Cases per Capita	2.43×10^7	0.76
<i><u>Demographic Variables</u></i>		
Democratic Party Votes (%)	-1.14×10^7	-0.86
Median Age	6.20×10^5	1.46
Population Density (per sq. mi.)	1.05×10^3	0.99

Statistical Significance: *** 0.001; ** 0.01; * 0.05

R-squared: 0.54; **Adjusted R-squared:** 0.40

Table 6: Linear Regression of Non-LSC 3 Funding by State

Coefficient	Estimate	T-Statistic
Intercept	-4.72×10^7	-1.58
<i><u>Economic Variables</u></i>		
LSC-Eligible Population	-1.38×10^0	-0.17
Taxes Collected (\$)	2.89×10^{-4}	0.75
Median Household Income (\$)	3.07×10^2	1.30
Food Stamp Enrollment (%)	-3.08×10^7	-0.52
Food Stamps Distributed (\$)	6.17×10^{-3}	0.99
Unemployment Rate (%)	-9.73×10^7	-0.52
<i><u>Legal Variables</u></i>		
Lawyers	1.72×10^2	0.92
Adoption of ABA R. 5.3	6.22×10^6	1.68
Civil Cases per Capita	7.40×10^7	1.19
<i><u>Demographic Variables</u></i>		
Democratic Party Votes (%)	-1.62×10^7	-0.63
Median Age	1.02×10^6	1.25
Population Density (per sq. mi.)	-1.63×10^2	-0.08

Statistical Significance: *** 0.001; ** 0.01; * 0.05

R-squared: 0.80; **Adjusted R-squared:** 0.74

Relative to our LSC funding regression, which has six statistically significant variables and an R-squared of 0.99, our non-LSC funding regressions have considerably lower explanatory power. Indeed, in only one of these three regressions (for non-LSC 1), is there a statistically significant variable (number of lawyers), and in none of the three regressions does the R-squared exceed 0.90. Confirming the findings of *Access Across America*, which restricts its data to non-LSC 2, our model proves to be a particularly poor fit for non-LSC 2. This suggests that while all non-LSC funding might be difficult to explain, funding not associated with LSC-funded organizations might be especially idiosyncratic.

Differences in the signs of coefficients are also suggestive of differences in the way non-LSC funding is allocated among LSC-funded and non-LSC-funded organizations. In particular, for our non-LSC 1 regression, the signs of the coefficients on the economic variables suggest (albeit without statistical significance) that if anything, non-LSC funding tends to be associated with economic *strength* (represented here by, inter alia, low LSC-eligible population, high median household income, and low unemployment rate) as opposed to economic weakness. This in turn suggests that at least for LSC-funded organizations, non-LSC funding might be complementing rather than substituting for LSC funding, which, as stressed above, is highly positively correlated with LSC-eligible population. But our non-LSC 2 regression points (albeit quite weakly) in the other direction, with a positive coefficient for not only LSC-eligible population but also unemployment rate, another variable indicating economic weakness. Yet, given the low overall explanatory power of our non-LSC 2 regression and the signs of certain other economic variables (namely, median household income and food stamp enrollment) suggestive of a positive association between non-LSC 2 funding and economic strength, we are hesitant to draw any broad conclusions based on our non-LSC 2 results.

As for the sole variable that does have statistical significance, in Table 4, our explanation is similar to the one we offered with respect to LSC funding—namely, the more

lawyers that a state has, the better able it is to attract and use legal services funding. This explanation appears even stronger in the non-LSC context insofar as our results for non-LSC 1 in Table 4 suggest that a lawyer has 3.9 times more of an effect on non-LSC 1 funding (\$261.10 in additional funding for every additional lawyer) than on LSC funding (\$67.20 in additional funding). Yet Table 4 also indicates that the adoption of ABA Model Rule 5.3, which has statistical significance at 11.7%, is associated with \$3,641,000 in added non-LSC 1 funding. One might argue that this result is inconsistent with our preceding explanation if the adoption of ABA Model Rule 5.3 limits the number of legal services providers. However, states might simply be reticent to fund legal services programs in which non-lawyers provide legal services, as non-lawyers would likely have an easier time doing in a jurisdiction that did not adopt ABA Model Rule 5.3. Under this view, the adoption of ABA Model Rule 5.3 might limit the number of legal services providers, but it nonetheless might attract legal services funding by alleviating concerns over the quality of the services provided. This might also explain why the adoption of ABA Model Rule 5.3 is positively associated with both non-LSC 2 and non-LSC 3 funding as well (in the latter case, with statistical significance at 10.1%).

The impact of ABA Model Rule 5.3 and legal services providers on non-LSC funding aside, our results in Tables 4 through 6 support the central implication of *Access Across America* concerning non-LSC funding—namely, that such funding is not allocated by states in a systematic manner. Rather, because state-generated funding is not subject to any overarching federal standards, states can do as they please. So, while some states might be particularly responsive to economic indicators, others might not see the need for legal services funding at all.⁴⁰ Owing to this diversity of approaches, it is not a surprise that neither we nor *Access Across America* can comprehensively model non-LSC funding across states.

40. In fact, in 2009, two states provided no funding at all for civil legal services. SANDEFUR & SMYTH, *supra* note 6, at 18.

III. Demand for Legal Services Funding

In this Part, we analyze the demand for legal services funding and conclude that LSC funding is not allocated in a manner that optimally satisfies this demand.

A. Sources of Demand

Whereas Part II analyzed the supply of legal services funding, this Part analyzes the demand in an effort to connect it to supply. Civil legal services come in a wide variety of forms and address a wide array of problems,⁴¹ in no small part because of the breadth of the LSC's mandate—"providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."⁴² Indeed, the LSC is subject to few restrictions on the civil legal assistance that it can support.⁴³ But, while the LSC—and non-LSC entities—can fund a broad assortment of civil legal services, the evidence indicates that low-income individuals principally seek assistance for only four types of problems.

Table 7: LSC-Eligible Case Services by Case Type (2010)⁴⁴

Type of Legal Problem	% of Overall Services
Consumer Finance	12.2%
Family	34.5%
Housing	25.2%
Income	12.7%
SUBTOTAL	84.6%
Other	15.4%
TOTAL	100.0%

41. See, e.g., LSC, FACT BOOK 2010, *supra* note 7, at 24-25 (listing LSC-eligible case types and legal actions).

42. 42 U.S.C. § 2996b(a) (2006).

43. See *id.* § 2996f(b) (enumerating these restrictions).

44. See LSC, FACT BOOK 2010, *supra* note 7, at 27.

As Table 7 above indicates, in 2010, disputes implicating consumer finance, family, housing, and income issues accounted for the vast majority of LSC services. While this does not necessarily mean that eligible individuals demanded these services to a precisely proportionate degree, we nonetheless make such an assumption—that is, that the percentage of overall services provided is a reasonable proxy for the relative demand for these services *across* states. We make this assumption because, for a given level of funding, we can think of no compelling reason why, on the whole, LSC-funded programs would be significantly better positioned to handle one type of legal problem than another. To be sure, if most LSC programs could not easily manage a certain legal problem, the percentage of cases addressing that problem could materially under-represent demand.

Table 8: Estimate of LSC-Eligible Cases Turned Away (2008)⁴⁵

Type of Legal Problem	% Turned Away
<i><u>Consumer Finance</u></i>	<i><u>47.5%</u></i>
Education	56.5%
Employment	61.1%
<i><u>Family</u></i>	<i><u>55.6%</u></i>
Health	41.9%
<i><u>Housing</u></i>	<i><u>37.1%</u></i>
<i><u>Income</u></i>	<i><u>33.4%</u></i>
Individual	74.7%
Juvenile	55.4%
Miscellaneous	74.3%
TOTAL	51.5%

But the evidence indicates that the LSC is not significantly more likely to turn away some types of cases than others.

45. See LSC, 2009 JUSTICE GAP REPORT, *supra* note 2, at 11. In this table, as in Table 7, “Housing” includes foreclosure cases.

Indeed, Table 8 above, which is based on the LSC's estimates of legal problems turned away relative to overall legal problems brought to LSC-funded organizations, suggests not only that the four major categories of problems identified in Table 7 do not have materially lower than average turn-away rates but also that turn-away rates across categories fall within a relatively narrow band.⁴⁶ We therefore assume that the four major categories account for almost all of the demand for legal services and that, across states, they do so in proportion to the relative frequency with which they are provided.

B. *Intrastate Proxies of Demand*

Given the preceding assumptions that: (i) aggregate demand for legal services can be captured by relative demands for consumer finance, family, housing, and income services, and (ii) relative demands can in turn be captured by the relative frequency with which these services are provided *across* states, this Part considers what factors drive demand for legal services *within* states. That is, taking demand for the four major categories of legal services *across* states as given, we attempt to estimate the demand for each category *within* a state. To do so, we make one further assumption and then rely on various demand proxies linked to the preponderance of disputes in a particular category for a particular state.

46. Upon first glance, it may seem that our conclusion here with respect to turn-away rates—namely, that these rates do not materially differ among legal services categories—is inconsistent with our later conclusion that LSC funding is sub-optimally allocated in a manner that does not take into account relative demand for legal services. *See infra* Part III.D. These conclusions would conflict if we also concluded that this sub-optimal allocation was leading to inefficiently greater supply of some services relative to others (in that case, some services would have materially higher turn-away rates than others), but we are in fact not making this claim. Rather, our conclusion is that the misallocation is distorting the overall size of a state's funding "pie," yet we do not investigate how this pie is then being divided among the major categories of legal services. Indeed, Table 10, *infra*, which demonstrates the effect of misallocation on the overall size of the pie, actually assumes that the pie is divided in a manner commensurate with relative demand.

Our final assumption is that the proportion of LSC-eligible residents demanding a specific category of legal services is the same across states. In other words, if State A has total demand x for one category of legal services and State B has total demand y for that category, we are assuming that each state's LSC-eligible population accounts for the same $k\%$ of the states' respective levels of demand. By making this assumption, we avoid having to directly estimate the demand for legal services among the low-income portion of a state's population and instead can simply estimate total state-level demand. Indeed, this assumption allows our model to apply to any economic subset of a state's population. So, while this Part implicitly assumes that allocations are made only to a state's LSC-eligible population, we could just as easily expand or contract the pool of eligible recipients based on another income threshold (or no income threshold at all). We believe that we would be justified in doing so because we are aware of no systematic differences across states that would cause the economic mix of clients demanding a particular service to differ significantly.

With the preceding assumptions in hand, we estimate total state-level demand using the following proxies. Since the bulk of consumer finance problems stem from bankruptcy and collections,⁴⁷ we estimate the demand for consumer finance services with two sets of variables: (i) measures of auto and credit card delinquencies from the Federal Reserve Bank of New York's ("FRBNY") Consumer Credit Panel⁴⁸ and (ii) total non-corporate bankruptcy filings as reported by the American Bankruptcy Institute.⁴⁹ To proxy for the demand for family law services—which predominantly implicate custody, divorce, and

47. See LSC, FACT BOOK 2010, *supra* note 7, at 24 (suggesting that bankruptcy and collection matters accounted for about 77.6% of all consumer finance problems).

48. See *Household Credit*, FED. RES. BANK N.Y., <http://www.newyorkfed.org/creditconditions/> (last visited July 28, 2013) (go to "Household Debt and Credit Statistics by County," under "Resources").

49. See *Annual Business and Non-Business Filings by State (2007-11)*, AM. BANKR. INST., <http://www.abiworld.org/AM/TemplateRedirect.cfm?template=/CM/ContentDisplay.cfm&ContentID=65164> (last visited July 28, 2013).

domestic abuse disputes⁵⁰—we turn to the Court Statistics Project’s data on domestic relations caseloads by state.⁵¹ For housing-related services—the majority of which relate to landlord/tenant disputes, federally subsidized housing matters, and foreclosures⁵²—we rely on data from the U.S. Department of Housing and Urban Development (“HUD”) that estimates the number of low-income households with housing problems and the number of households living in federally subsidized housing.⁵³ Finally, for disputes relating to income—which primarily arise from matters concerning food stamps (both SNAP- and state-provided), Social Security Disability Insurance (“SSDI”), Supplemental Security Income (“SSI”), Temporary Assistance for Needy Families (“TANF”), and unemployment compensation⁵⁴—we look at unemployment data from the U.S. Department of Labor⁵⁵ and Social Security data from the U.S. Social Security Administration covering SSI and Old-Age, Survivors, and Disability Insurance (“OASDI”).⁵⁶ Table 9 below summarizes our demand proxies and their sources.

50. See LSC, FACT BOOK 2010, *supra* note 7, at 24 (suggesting that these three categories accounted for about 82.2% of all family problems).

51. See *Domestic Relations – Total Caseloads*, CT. STAT. PROJECT, <http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/SCCS/2010/Total%20Domestic%20Relations%20Caseloads%202.ashx> (last visited July 28, 2013) (go to “Domestic Relations – Total Caseloads 2009”).

52. See LSC, FACT BOOK 2010, *supra* note 7, at 25 (noting that these categories accounted for 55.9%, 16.5%, and 10.1%, respectively, of all housing problems).

53. See *A Picture of Subsidized Households – 2008*, HUD USER, http://www.huduser.org/portal/picture2008/2008_county.zip (last visited July 28, 2013) (go to “2008_county.zip”); *Housing Problems of Low Income Households (2009)*, HUD USER, <http://www.huduser.org/tmaps/LI-household/chas.html> (last visited July 28, 2013).

54. See LSC, FACT BOOK 2010, *supra* note 7, at 25 (suggesting that these categories accounted for 87.7% of all income problems).

55. See U.S. DEP’T OF LABOR, OFFICE OF WORKFORCE SEC., UNEMP’T INS. DATA SUMMARY: 4TH QUARTER 2010 (2011), *available at* http://www.ows.doleta.gov/unemploy/content/data_stats/datasum10/DataSum_2010_4.pdf.

56. See *Congressional Statistics, December 2010*, SOC. SEC. ONLINE, http://www.socialsecurity.gov/policy/docs/factsheets/cong_stats/2010/ (last visited July 28, 2013).

Table 9: Demand Proxies

Type of Legal Problem	Most Common Subtypes (2010 LSC)⁵⁷	Our Demand Proxies
Consumer Finance	Collection (42.9%); Bankruptcy (34.7%)	Auto and Credit Card Delinquencies; Non-Corporate Bankruptcy Filings
Family	Divorce/Separation (38.7%); Custody/Visitation (28.2%); Domestic Abuse (15.2%)	Domestic Relations Caseloads
Housing	Landlord/Tenant (55.9%); Fed. Subsidized Housing (16.5%); Mortgage Foreclosures (10.2%)	Households Living in Federally Subsidized Housing; Low Income Households with Housing Problems
Income	SSI (28.5%); Unemployment Compensation (23.2%); Food Stamps (15.1%); SSDI (10.5%); TANF (10.4%)	OASDI; SSI; Unemployment Rate

57. See LSC, FACT BOOK 2010, *supra* note 7, at 24-25.

C. Model

With the above demand proxies, we estimate a constrained linear regression equation to test the extent to which legal services funding addresses demand for legal aid services across the four major categories of legal problems.⁵⁸ The equation and its constraints are detailed below.

Equation 1: Constrained Linear Regression

$$\frac{Funding_{\alpha}}{Funding_{Total}} = \beta_{Con.Fin.} \frac{Demand_{Con.Fin.,\alpha}}{Demand_{Con.Fin.,Total}} + \beta_{Fam.} \frac{Demand_{Fam.,\alpha}}{Demand_{Fam.,Total}} + \beta_{Hous.} \frac{Demand_{Hous.,\alpha}}{Demand_{Hous.,Total}} + \beta_{Inc.} \frac{Demand_{Inc.,\alpha}}{Demand_{Inc.,Total}},$$

where $\beta_{Con.Fin.} + \beta_{Fam.} + \beta_{Hous.} + \beta_{Inc.} = 1$; $0 < \beta_i < 1$

As Equation 1 indicates, we are estimating a weight β_i for each of the four major categories of legal services by regressing funding in a given state α over total funding on the demand for the category in state α over the total demand for that category across states. We impose two constraints: (i) the weights on the categories must amount to one, and (ii) each of the weights must be greater than zero and less than one.

If funding is allocated optimally, the estimated β_i for each of the four major categories should be similar to the percentage of services actually provided for that category. That is, if we assume that the percentage of services provided reflects the relative demand for these services across states—and for reasons suggested above, we think that this is a rational assumption—we would want this figure to match the responsiveness of LSC funding in a given state to demand for a given service.

An example may help illustrate this point. Consider two states, States A and B, and two types of legal problems,

58. For details on the theoretical underpinnings of constrained linear regression, see generally TAKESHI AMEMIYA, *ADVANCED ECONOMETRICS* (Harv. Univ. Press 1985).

consumer finance and family. Suppose further that among the combined LSC-eligible populations of the two states (or among the combined low-income populations, however one wishes to define “low income”), consumer finance cases account for twenty five percent (25%) and family cases account for seventy-five percent (75%) of overall legal services demand, which equals \$1 million. Finally, suppose that among LSC-eligible populations, State A accounts for forty percent (40%) of demand for consumer finance services and State B accounts for sixty percent (60%) and that State A accounts for sixty percent (60%) of demand for family services and State B accounts for forty percent (40%). This means that on a dollar basis, if the price of all legal services is the same across states, the demand for legal services among State A’s LSC-eligible population is \$550,000 ($40\% * 25\% * \$1 \text{ million} + 60\% * 75\% * \1 million) and the demand among State B’s LSC-eligible population is \$450,000 ($60\% * 25\% * \$1 \text{ million} + 40\% * 75\% * \1 million). State A’s LSC-eligible population therefore accounts for fifty-five percent (55%) of the dollar demand for legal services, and State B’s LSC-eligible population accounts for forty-five percent (45%). Our optimal allocation rule would allocate legal services funds to the two states in accordance with these percentages. Specifically, under the optimal rule, β for consumer finance would be 0.25 and β for family would be 0.75. This in turn means that State A would receive fifty-five percent (55%) of total LSC funding ($0.25 * 40\% + 0.75 * 60\%$) and State B would receive forty-five percent (45%) ($0.25 * 60\% + 0.75 * 40\%$), in line with their relative dollar demands. But if instead β for consumer finance were 0.50 and β for family were 0.50, State A would end up receiving fifty percent (50%) of total LSC funding ($0.50 * 40\% + 0.50 * 60\%$) and State B would receive fifty percent (50%) ($0.50 * 60\% + 0.50 * 40\%$). Under this scenario, State A would be underfunded and State B would be overfunded, even if each state then internally reallocated its funding in a manner commensurate with relative demand for the two categories of legal services.⁵⁹ Table 10 below assumes such a reallocation and summarizes all of the preceding results.

59. Indeed, such reallocation would be consistent with the finding in Table 8, *supra*, that turn-away rates are fairly constant across categories of legal services.

Table 10: Example of Constrained Linear Regression

A. Optimal Allocation Scheme			<u>State A</u>		<u>State B</u>	
Type of Legal Problem	β_i	Actual Total Demand	Demand	Funding - Demand	Demand	Funding - Demand
Consumer Finance	0.25	0.25	\$100,000	\$0	\$150,000	\$0
Family	0.75	0.75	\$450,000	\$0	\$300,000	\$0
TOTAL	1.00	1.00	\$550,000	\$0	\$450,000	\$0

B. Sub-Optimal Allocation Scheme			<u>State A</u>		<u>State B</u>	
Type of Legal Problem	β_i	Actual Total Demand	Demand	Funding (reallocating) - Demand	Demand	Funding (reallocating) - Demand
Consumer Finance	0.50	0.25	\$100,000	-\$9,000	\$150,000	\$17,000
Family	0.50	0.75	\$450,000	-\$41,000	\$300,000	\$33,000
TOTAL	1.00	1.00	\$550,000	-\$50,000	\$450,000	\$50,000

The logic above, captured in Table 10, makes the simplifying assumption that prices of legal services are the same across states and across type. This assumption regards the amount of funds needed to satisfy a given degree of demand for a given legal service in one state as commensurate with the amount required to satisfy the same degree of demand for another legal service in another state. If we further posit that the key determinant of the price of legal services is the price of labor, our simplifying assumption amounts to a supposition that legal labor costs are similar across states and that different types of legal services require the same amount of labor. Even if neither of these assumptions fully holds, we have reason to believe that deviations are not substantial enough to materially affect our results.

To examine the effect of interstate price differences, we calculated the correlation between excess LSC funding and various price measures such as median rent and household income. If interstate price differences had a material effect on our results, the correlation between our selected price measures and excess LSC funding would be positive. That is, states that our model suggests receive disproportionately large amounts of LSC funding relative to their demand for legal services would tend to be the states with the highest price levels. If this were the case, these states' supposed "overfunding" might be the product of higher prices, not misallocation of funds. In fact, however, the correlation between our price measures and excess LSC funding was mildly negative, suggesting that the instances of overfunding that our model identifies are not merely the result of omitted interstate price variables.

To estimate the potential effect of inter-service price differences, we examined the percentage of cases in each of the four major categories that, according to the LSC's *Fact Book 2010*, were disposed of merely with "counsel and advice."⁶⁰ Assuming that dispositions with this classification involved the lowest amount of work, we estimated that categories with a higher percentage of "counsel and advice" cases were on

60. See LSC, *Fact Book 2010*, *supra* note 7, at 19.

average less expensive to administer than those with a lower percentage. By this metric, consumer finance, with counsel and advice accounting for seventy-two percent (72%) of all dispositions, is the cheapest to administer, and income, with counsel and advice accounting for only fifty-three percent (53%), is the most expensive.⁶¹ If these differences materially affected our results, the correlation between counsel and advice percentages and our model's estimate of over-weighting for a given category of legal problems would be negative. This follows because what our model interprets as a high β (over-weighting) might then reflect a category's high cost of services rather than funding misallocation. But, as with the correlations discussed above for interstate price differences, the relevant correlation here is of the opposite sign to that suggesting a material omitted variable problem (and, in this case, is slightly positive).

D. LSC Funding

Using the constrained linear regression model discussed in Part III.C, we estimate weights with LSC funding as the dependent variable. Our estimates are detailed in Table 11 below.

Table 11: LSC Funding Constrained Linear Regression

Type of Legal Problem	β_i	% of Services Actually Provided ⁶²	Over (Under) Weighting
Consumer Finance	0.46	0.14	0.32
Family	0.04	0.41	(0.37)
Housing	0.28	0.30	(0.02)
Income	0.22	0.15	0.07
TOTAL	1.00	1.00	

61. See LSC, FACT BOOK 2010, *supra* note 7, at 24-25.

62. This represents the amount of services provided in the category relative to the total amount of services provided in all four categories.

As suggested in Part III.C, if funding were allocated optimally—in line with demand for services provided—the weightings of β_i (column two above) would equal the percentage of services actually provided (column three above). But instead, as Table 11 indicates, states in effect receive far too much LSC funding on account of their demand for consumer finance services and far too little on account of their demand for family services.

The effects of these disparate weightings are most easily viewed on a state level. To that end, we compare the per capita LSC funding that a state actually receives with the amount that it would receive under an optimal allocation scheme, where weights equal relative demand for services. Table 12 and Figure 5 below show the five states with the most overfunding and the five states with the most underfunding per LSC-eligible person.

Table 12: Per Capita LSC Overfunding and (Underfunding)

State	Overfunding (Underfunding) per LSC- Eligible Person	Actual LSC Funding per LSC-Eligible Person ⁶³	Actual LSC Funding / Optimal Funding
South Dakota	\$8.30	\$16.29	2.0x
Alaska	\$6.37	\$17.52	1.6x
Louisiana	\$4.56	\$9.40	1.9x
New Mexico	\$3.73	\$9.71	1.6x
Oklahoma	\$3.40	\$8.37	1.7x
New Hampshire	(\$4.85)	\$6.32	0.6x
Vermont	(\$5.14)	\$7.72	0.6x
New Jersey	(\$5.46)	\$7.83	0.6x
Virginia	(\$8.05)	\$7.31	0.5x
Delaware	(\$10.79)	\$6.41	0.4x

63. See LSC, FACT BOOK 2010, *supra* note 7, at 9-10; SANDEFUR & SMYTH, *supra* note 6, at 31-132.

Figure 5: Map of Overfunding and Underfunding by the LSC

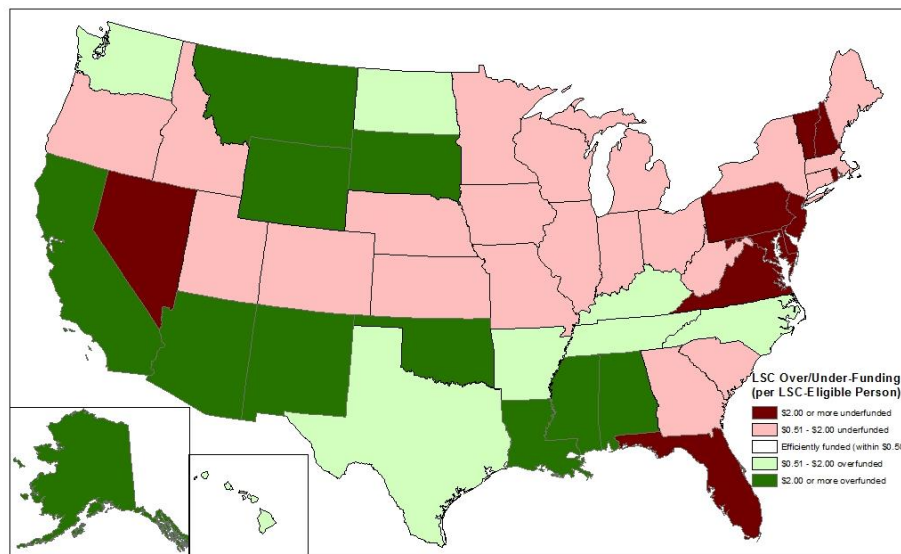


Table 12 suggests that the differences between actual and optimal LSC funding are substantial. Indeed, each eligible resident in South Dakota receives twice as much LSC funding as an optimal allocation would provide, whereas each eligible resident in Delaware receives less than half the optimal amount.

E. *Non-LSC Funding*

But because LSC funding is only one component of overall legal services funding, one might argue that legal services funding in aggregate may not be misallocated even if LSC funding is. Investigating this possibility requires examining the interstate allocation of non-LSC funding across states. Yet, since non-LSC funding is allocated *within* states, not *across* states, we cannot think of it in the same terms as LSC funding, which amounts to a “federal pie” that can be redistributed according to general parameters.

Even so, our model will still yield unbiased results on the responsiveness of non-LSC funding to our demand indicators, provided that there is no omitted variable bias—that is, that interstate differences in non-LSC funding do not stem from an omitted variable that is correlated with our measures of demand.⁶⁴ While our results in Part II suggest that non-LSC funding differs across states for unidentifiable reasons, we are unaware of any grounds to believe that these reasons are related to the demand for legal services. We therefore are not concerned that omitted variable bias influences our analysis. Thus, we apply our model to non-LSC funding and report our results in Table 13 below.

64. On omitted variable bias, *see generally* WILLIAM H. GREENE, *ECONOMETRIC ANALYSIS* (Macmillan Publ'g Co.2d ed. 1993).

Table 13: Non-LSC Funding Constrained Linear Regression

A. Non-LSC 1

Type of Legal Problem	β_i	% of Services Actually Provided	Over (Under) Weighting
Consumer Finance	0.00	0.14	(0.14)
Family	0.62	0.41	0.21
Housing	0.00	0.30	(0.30)
Income	0.38	0.15	0.23
TOTAL	1.00	1.00	

B. Non-LSC 2

Type of Legal Problem	β_i	% of Services Actually Provided	Over (Under) Weighting
Consumer Finance	0.00	0.14	(0.14)
Family	0.02	0.41	(0.39)
Housing	0.00	0.30	(0.30)
Income	0.98	0.15	0.83
TOTAL	1.00	1.00	

C. Non-LSC 3

Type of Legal Problem	β_i	% of Services Actually Provided	Over (Under) Weighting
Consumer Finance	0.00	0.14	(0.14)
Family	0.50	0.41	0.09
Housing	0.00	0.30	(0.30)
Income	0.50	0.15	0.35
TOTAL	1.00	1.00	

Like Table 11, Table 13 reveals significant disparities between the actual and optimal allocation of legal services funding. However, the disparities for non-LSC funding in many instances appear to partly offset those for LSC funding. In particular, whereas LSC funding is too sensitive to consumer finance by 0.32, all measures of non-LSC funding are not sensitive enough by 0.14, and whereas LSC funding is not sensitive enough to family by 0.37, non-LSC 1 funding is too sensitive by 0.21 and non-LSC 3 funding is too sensitive by 0.09. This suggests that LSC and non-LSC funding might be acting as complements, rather than substitutes. Table 14 below, applying our model to combined LSC and non-LSC funding, corroborates this hypothesis with respect to non-LSC 1 funding but offers less support for it with respect to non-LSC 2 and non-LSC 3 funding.

Table 14: Total Funding Constrained Linear Regression**A. LSC Funding and Non-LSC 1**

Type of Legal Problem	β_i	% of Services Actually Provided	Over (Under) Weighting
Consumer Finance	0.12	0.14	(0.02)
Family	0.40	0.41	(0.01)
Housing	0.22	0.30	(0.08)
Income	0.26	0.15	0.11
TOTAL	1.00	1.00	

B. LSC Funding and Non-LSC 2

Type of Legal Problem	β_i	% of Services Actually Provided	Over (Under) Weighting
Consumer Finance	0.11	0.14	(0.03)
Family	0.06	0.41	(0.35)
Housing	0.26	0.30	(0.04)
Income	0.57	0.15	0.42
TOTAL	1.00	1.00	

C. LSC Funding and Non-LSC 3

Type of Legal Problem	β_i	% of Services Actually Provided	Over (Under) Weighting
Consumer Finance	0.00	0.14	(0.14)
Family	0.31	0.41	(0.10)
Housing	0.21	0.30	(0.09)
Income	0.48	0.15	0.33
TOTAL	1.00	1.00	

That non-LSC 1 funding appears to be complementary to LSC funding is not surprising given that organizations receiving LSC funding are most affected by—and most clearly require solutions to—the shortcomings of the current LSC funding allocation scheme. But even if some non-LSC funding is thus compensating for the shortcomings of the LSC funding allocation scheme, we still cannot conclude that flaws in the current LSC funding regime are inconsequential. For one, Table 14 reveals that our other measures of non-LSC funding are at most only weakly complementary to LSC funding. Further, even if these measures were far more complementary, the LSC funding system would, in our view, still be unacceptable. After all, putting the burden on states to patch federally bored holes in access to justice (by asking them to under- or over-compensate for sub-optimal LSC funding decisions) seems rather unfair. In what follows, therefore, we propose a new LSC funding system that would reduce the need for subsequent funding adjustment by states.

IV. A New System for the Allocation of LSC Funding

In light of our conclusion in Part III that LSC funding is allocated sub-optimally, in this Part, we first propose a model that better addresses state-level demand for legal services and then respond to possible criticisms of our model.

A. *Our Model*

The central conclusion of Part III is that LSC funding is not allocated in a manner consistent with state-level demand for civil legal services. This conclusion should not come as a surprise given our finding in Part II that LSC funding is highly correlated with LSC eligibility, which one would not expect to be a particularly precise proxy for state-level demand for civil legal services. In light of our chief conclusion, if the federal system takes seriously the ideal of equal access to justice, the system for allocating LSC funding should be changed.

To this end, we propose that the LSC incorporate considerations of state-level demand into its funding allocation

decisions. The funding that the LSC distributes to a particular state should be linked to the unmet needs for civil legal services in the state, which would be a function of the state's demand for civil legal services and the state's economic ability to satisfy this demand. Thus, states with more unmet needs (higher demand and lower ability to satisfy it) would receive a greater share of LSC allocations. Equation 2 below sketches the outlines of this model for a given state i .

Equation 2: Our Model for LSC Allocations

$$\text{Unmet Legal Services Demand}_i = \text{Legal Services Demand}_i - \text{State Ability to Satisfy Demand}_i \quad ;$$

$$\begin{aligned} \text{LSC Allocation}_i &= \left(\frac{\text{Unmet Legal Services Demand}_i}{\text{Total Unmet Legal Services Demand}} \right) \\ &\times \text{LSC Allocable Funds} \end{aligned}$$

Since the above equation is meant to offer just a basic illustration of our model, it does not specify how to measure either a state's demand for legal services or a state's ability to satisfy this demand. But, as we discuss in Part IV.B below, we assume that each of these variables can be reasonably measured. Under this assumption, our model will clearly result in a more optimal allocation of LSC funds than the status quo as, unlike the current scheme, it will minimize unmet legal services demand.

B. *Objections*

Our proposal faces at least two possible objections. First, the difficulty of defining "unmet legal services demand" may create an execution challenge. But while it is true that the term cannot be precisely measured, there is no reason why the LSC cannot employ reasonable proxies that estimate the demand for particular legal services and the extent to which a state can afford these services. For example, to estimate state-

level demand, the LSC could turn to a number of easily measurable variables such as the ones that we have examined in this study. And to estimate a state's ability to satisfy this demand, the LSC could look at tax revenue and existing government expenditures. Based on these estimates, the LSC might then assign each state an "unmet legal services demand" score, which, as Equation 2 suggests, would be the prime determinant of the state's allocation of LSC funding.

Accepting our view about the feasibility of measuring unmet legal services demand, one might nonetheless raise a second objection—that our proposal might encourage undesirable behavior from states and individuals. Specifically, states might be incentivized to reduce their non-LSC funding in the hopes of securing a greater share of funds from the LSC. But this type of opportunistic behavior can be easily prevented if the LSC does not take into account non-LSC funding at all when calculating a state's composite number. Rather, estimates of a state's ability to pay could simply be based on the wealth of the state's residents and the wealth of its government (as measured by per capita tax revenue, for example).

Even if one concedes that state incentives to behave sub-optimally can thus be curtailed, one might assert that individuals will be incentivized to act badly, again in the hopes of securing more LSC funds. The argument here is that individuals might try to "game" the system by, for example, defaulting more, filing more civil challenges, or engaging in other behavior that suggests that they have more legal demands than they really do. Yet the incentives to engage in such behavior are minimal given the considerable personal costs of doing so and the limited benefit, in the form of an extremely small probability of higher LSC funding, which, on the off chance that it materializes, will be spread among a large population.

To be sure, the preceding objections, which are not significant in our view, are not the only possible criticisms of our proposal. But we are not attempting to deliver a problem-free alternative. Indeed, there are none. Instead, we wish

simply to advance the conversation forward, away from what our analysis suggests is an inefficient framework.

V. Conclusion

In this Article, we investigate the supply of and demand for legal services funding across states. After finding that the supply of LSC funding is determined almost entirely by the size of a state's LSC-eligible population while the supply of non-LSC funding is determined idiosyncratically, we examine the extent to which state-level demand for civil legal services funding matches supply. We principally conclude that with respect to LSC funding, state-level demand and supply are significantly mismatched. Though we note that the allocation of non-LSC funding to LSC-funded organizations in part mitigates this mismatch, we argue that the LSC funding system should still be improved and propose a system that allocates funding based on unmet needs. In our view, such a system would help make "justice . . . the same, in substance and availability, without regard to economic status,"⁶⁵ as Justice Powell had hoped.

65. Powell Remarks, *supra* note 1.