THE LEGAL SERVICES CORPORATION'S SOLICITATION RESTRICTION AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE: HAS THE DEATH KNELL SOUNDED FOR FUTURE CHALLENGES TO THE RESTRICTION?

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I. Introduction

Throughout history, Congress has placed conditions on the disbursement of its federal funds.[1] These conditions have played a role in shaping the conduct of the recipient, whether it is an individual, or state or local government.[2] When challenged, many of these conditions have been found to be a permissible use of Congress' spending power.[3] Thus, it is well settled that Congress can utilize its spending power to further policy objectives and condition disbursement upon compliance

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1 Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987).

2 *Id.* at 1104.

3 *Id.*

with certain stipulations.[4] There have been instances, however, where a condition was found to be an impermissible use of Congress' spending power and unconstitutional on First Amendment grounds.[5] The doctrine typically asserted in these challenges is the doctrine of unconstitutional conditions.[6] This doctrine states that the government may not grant a benefit on the condition that the beneficiary surrenders a constitutional right, even if the government may withhold that benefit altogether.[7] The unconstitutional conditions doctrine has been raised in many different contexts.[8] For example, during the past few years advocates for the

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[4] South Dakota v. Dole, 483 U.S. 203 (1987). In this case the stipulation at issue was Congress' enactment of 20 U.S.C. § 158, which directed the Secretary of Transportation to withhold five percent of federal highway funds otherwise allocated to a state on the condition that the state adopt a minimum drinking age of twenty-one years old. *Id.* at 203. The Court found this condition to be a valid use of Congress' spending power because it was only "mild encouragement to the states to enact higher minimum drinking ages." *Id.* at 211.

[5] Rosenthal, *supra* note 1, at 1103. *See, e.g.,* Speiser v. Randall, 357 U.S. 513 (1958) (holding that California could not deny a tax exemption to claimants who denied to execute an oath on the exemption because doing so is in effect penalizing them for their speech); Perry v. Sindermann, 408 U.S. 593 (1972) (stating that it was an unconstitutional condition for the government to deny employment to a person for exercising First Amendment rights); F.C.C. v. League of Women Voters, 468 U.S. 364 (1984) (determining that restrictions on free speech in public broadcasting were upheld only if the restrictions were narrowly tailored to further a substantial governmental interest).

> For at least a quarter century, this Court has made clear that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

Sindermann, 408 U.S. at 597 (quoting Justice Potter Stewart).

[6] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

> [The Supreme] Court's unconstitutional conditions precedents have consistently recognized that the substantial power of the government's purse is ultimately constrained by the First Amendment – the government cannot purchase the First Amendment rights of those who participate in government funded programs, whether the setting is the public university, as in Keyishian v. Board of Regents of Univ. of State of N.Y., the public airwaves, as in FCC v. League of Women Voters, or in the courts, as in Velazquez.

Brief of Amicus Curiae The Brennan Center for Justice at New York University School of Law in Support of the Appellees, United States v. American Library Ass'n., 539 U.S. 194 (2003) (No. 02-361).

[7] Sullivan, *supra* note 6, at 1415.

[8] Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583 (1926) (invalidating a

Legal Services Corporation ("LSC") have relied on the doctrine when trying to invalidate the restrictions enacted in the Legal Services Reform Act of 1996.[9] However, most of these challenges have been unsuccessful, with only one exception: *Legal Services v. Velazquez*.[10]

This note will examine one of the restrictions placed on the LSC, which prohibits grantees from soliciting clients. The analysis will examine whether the restriction should be found an unconstitutional condition because it requires grantees to forgo a constitutionally protected right in exchange for funding.[11] Part II provides background information on the legislative history of the LSC and the congressionally imposed restrictions. It also discusses why Congress enacted the 1996 restrictions and the goals it sought to achieve.[12] Part III examines the Supreme Court's decision in *In re Primus*[13] and *NAACP v. Button*[14] and argues that the LSC attorney's right to solicit qualifies as a protected activity under the First Amendment.[15] After determining that an LSC attorney's right to solicit is a protected right under the First Amendment, Part IV then applies the unconstitutional conditions doctrine.[16] This note argues that the solicitation restriction is unconstitutional because it conditions the receipt of government funding on the LSC recipient's sacrifice of a fundamental First Amendment right.[17] In conclusion, this note considers what the United States

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state regulation that required a private carrier, as a condition of using the public streets, to become a private carrier); U.S. v. Butler, 297 U.S. 1 (1936) (invalidating a statute to stabilize farm prices by limiting agricultural production). Additionally, the doctrine was raised in *Rust v. Sullivan* to challenge a funding restriction for abortion related services. Rust v. Sullivan, 500 U.S. 173 (1991). This restriction was upheld as a permissible use of Congress' spending power. *Id.*

9 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. 107 (1998).

10 531 U.S. 533 (2001); *see also infra* note 77 and accompanying text.

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

12 *See* discussion *infra* pp. 250-259.

13 436 U.S. 412 (1978).

14 371 U.S. 415 (1963).

15 *See* discussion *infra* pp. 259-264.

16 *See* discussion *infra* pp. 264-273.

17 *In re* Primus, 436 U.S. at 412. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I. This has been taken to mean that government cannot impose restrictions

Supreme Court might decide upon review of an "as-applied" challenge to the solicitation restriction, and how recent case law might affect the Court's decision.[18]

II. Legislative History and Purpose of the Legal Services Corporation

The Legal Services Corporation Act was signed into law on July 25, 1974.[19] Its purpose was to provide "high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel."[20] As a result of the problems the first Legal Services program encountered, which was within the Executive Branch in the Office of Economic Opportunity ("OEO"), an important goal in creating the LSC was to insulate it from political pressures.[21] During its existence, the legal services program in the OEO was plagued with controversy and seen as a political liability.[22] By mid-1970, realizing that it was necessary to insulate the Legal Services program from political controversy, groups were calling for the Legal Services program to move into an independent governmental agency or into a quasi-public corporation.[23]

In response to the ailing Legal Services program, Congress

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on a person's right to speak unless they have compelling reasons. *See* Christian Hammond, *The Supreme Court's Decision in* Legal Services Corporation v. Velazquez *and the Analysis Under the Unconstitutional Conditions Doctrine*, 79 DENV. U. L. REV. 157 (2001).

[18] *See* discussion *infra* pp. 274-275.

[19] 42 U.S.C. § 2996 (2003).

[20] 42 U.S.C. § 2996(2).

[21] Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681, 683 (1976). The OEO was established in 1966 as part of Lyndon Johnson's war on poverty. *Id.*

> By early 1971, the Ash Council recommended that legal services be placed in a nonprofit corporation totally divorced from the executive branch. An important component of this recommendation was the desire to eliminate a political liability: This program should be placed in an organizational setting which will permit it to continue serving the legal needs of the poor while avoiding the inevitable political embarrassment that the program may occasionally generate.

Id. at 691 (quoting President's Adv. Couns. on Exec. Organization, Establishment of a Department of Natural Resources – Organization for Social and Economic Programs 61 (1971)).

[22] *Id.* at 681.

[23] *Id.* at 690. Among the groups calling for an independent agency were the American Bar Association, the National Legal Aid and Defender Association and the National Advisory Committee. *Id.* During this same time, the Executive Branch also recognized the need to reorganize Legal Services. *Id.*

introduced a bill in 1971 proposing an independent organization.[24] For the following three years, there was significant debate between the President and both houses of Congress.[25] During the floor debate in the House, many restrictive amendments were added to the bill.[26] After a compromise between the two houses, the final restrictions included limitations on funding of backup centers, political activity of staff attorneys, school desegregation, abortion, and the Selective Service.[27] Finally on July 25, 1974, the Legal Services Corporation Act was signed into law.[28] Congress designed the new Legal Services program to be highly decentralized and locally controlled.[29] The local legal aid offices would set their own agendas and would run independently from the LSC.[30]

A. *The Legal Services Reform Act of 1996*

Despite Congress's efforts in 1974 to create a program free from political pressure, the structure of the LSC did not lend itself to such a reality.[31] Every year, the LSC had to approach Congress for renewed

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[24] S. 1305, 92d Cong. (1st Sess. 1971); H.R. 6360, 92d Cong. (1st Sess. 1971). When the LSC was created, President Nixon stated that "Legal Services is concerned with social issues and is thus subject to unusually strong political pressures .... If we are to preserve the strength of the program, we must make it immune to political pressure and make it a permanent part of our justice system." George, *supra* note 21, at 696.

[25] George, *supra* note 21, at 696.

[26] 119 CONG. REC. 20, 746-47 (1973). Both the House and Senate placed restrictive amendments on its version of the bill. *Id.* While both added similar restrictions, the House had a more extensive list. *Id.* The House version included limitations on funding of backup centers, restrictions on off-duty nonpartisan political activity of staff attorneys, prohibitions on cases dealing with school desegregations, abortion and Selective Service. *Id.* The Senate version included restrictions on class actions, abortion suits and Selective Service litigation. *Id.*

[27] 42 U.S.C. § 2996. The effort to create the Legal Services Corporation was a long and embattled process, spanning over three years with multiple versions of the bill. George, *supra* note 21, at 697. When the bill was nearing the end of the process in 1974, support seemed to be wavering; therefore, in order to garner additional support, a barrage of new restrictions were added to address some of the earlier objections. *Id.* All of the restrictions were viewed at the time as controversial political issues. *Id.*

[28] 42 U.S.C. § 2996.

[29] 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, 831 (1998). "Rather than utilizing a centralized delivery mechanism, the actual delivery of legal services is done by locally controlled, nonprofit corporations throughout the country." *Id.* at 832.

[30] *Id.*

[31] George, *supra* note 21, at 704.

funding.[32] It is during these appropriation battles that Congress has attempted and succeeded in limiting the scope of the program and placing additional restrictions upon the program.[33]

Congress's frustration with the LSC mounted for years and, finally in 1995, the LSC came under attack by politicians who wanted to reduce government subsidies to the poor.[34] Congress viewed the LSC as engaging in controversial litigation and raised concerns that grantees were straying from the LSC's primary mission and instead undertaking political causes.[35] As a result of the perceived inadequacies, as well as the constant struggle between Congress and the LSC, Congress exercised its funding power to place its most extensive set of restrictions on the LSC in 1996.[36]

Congress reasoned that these severe restrictions were necessary to refocus the LSC on its primary function – providing basic legal assistance to low-income individuals.[37] Congress opined that the purpose of the Reform Act of 1996 was to improve the accountability and the effectiveness of the LSC and its grantees.[38] Additionally,

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[32] *Id.* Having to renew its funding annually contributes to the LSC's vulnerability to political influence in funding matters. *Id.* While Congress' rationale for setting up this structure was to ensure a method of accountability, legislators opposed to the LSC have been able to use it as a weapon in their efforts to cripple the LSC. *Id.* at 705.

[33] *Id.* at 704. In 1995, LSC's critics mounted a well-financed, highly organized publicity effort that helped to convince Congress to cut LSC's appropriation from $400 million to $278 million, as part of a plan to eliminate the program completely over three years. BRENNAN CENTER FOR JUSTICE, ACCESS TO JUSTICE SERIES, WHAT IS REALLY BEHIND ATTACKS ON LEGAL AID LAWYERS, 2 (2001), *available at* http://www.brennancenter.org/resources/atj/atj7.pdf.

[34] Deborah M. Weissman, *Law as Largess: Shifting Paradigms for the Poor*, 44 WM. & MARY L. REV. 737, 759 (2002). This was the most serious attack in the LSC's history as it was aimed at its abolishment. *Id.* at 761. "Conservative members of Congress argued that legal services ranked 'at or near the bottom' of funding priorities and questioned whether it was the responsibility of the government to fund law for the poor at all." *Id.* at 762 (quoting 142 CONG. REC. 18,630 (daily ed. July 23, 1996) (statement of Rep. Doolittle)).

[35] S. 1221, 104th Cong. (2d Sess. 1996).

[36] Yoder, *supra* note 29, at 831. After the Republican takeover in Congress, conservatives once again tried to eliminate the LSC but were unsuccessful when President Clinton vetoed their budget plan. *Id.* Later in a compromise, Congress agreed to the continued existence of the LSC but at a severely reduced funding level in exchange for the enactment of new restrictions. *Id.*

[37] S. 1221, 104th Cong. (2d Sess. 1996)

[38] S. REP. NO. 104-392, at *1 (1996). Congress believed that the LSC was engaging in numerous controversial activities, such as challenging welfare reform efforts, representing drug dealers when public housing authorities sought to evict them, and engaging in lobbying activities. *Id.*

Congress believed that significant reform was necessary to restore public confidence in the program.[39] Congress also asserted that the legislation was intended to depoliticize the LSC, as well as increase fairness to taxpayers who subsidize the program and to defendants who are the subject of LSC litigation.[40] Many legislators felt the restrictions imposed by Congress were urgently needed to rein in the LSC, which was viewed by Republican leaders as a "runaway agency that funded lawyers to pursue a social agenda and make trouble for the government."[41]

Contrary to the Republican leadership, supporters of the LSC believed that Congress was motivated more by ideology than by finances or administrative efficiency,[42] and used the reauthorization of the LSC as a weapon of oppression as it added its latest list of controversial causes.[43] Congress' reasoning for adding restrictions does not seem to be based on hard evidence, but rather on the success of a few cases that led Congress to the conclusion that the LSC was working beyond its scope.[44]

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[39] *Id.* at *4. Congress felt that public confidence in the LSC was lacking because of testimony from people like a Missouri farmer, who complained that he had to pay $100,000 in legal fees for a landlord dispute brought by the Michigan Migrant Legal Assistance. *Id.* This farmer further testified that his industry has been targeted with "client solicitation, union organizing and major class action lawsuits whose real aim was to change and reinterpret Federal and State statutes and regulations, and change the entire labor scene." *Id.*

[40] *Id.* at *1.

[41] Tony Mauro, *LSC Curbs: Court Takes Hard Line, Did Congress Go Too Far?*, LEGAL TIMES, Oct. 9, 2000, at 10.

[42] BRENNAN CENTER FOR JUSTICE, THE ACCESS TO JUSTICE SERIES, HOW CONGRESS LEFT THE POOR WITH ONLY HALF A LAWYER (2000), *available at* http://www.brennancenter.org/resources/atj/atj2.pdf. Carolyn Stewart of the National Legal Aid and Defender Association believed that Congress' implementation of the restrictions was a "disguised effort to destroy a delivery system of legal services that has worked well." *Id.*

[43] Brief of Amicus Curiae of the American Civil Liberties Union at 3, Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) (Nos. 99-603, 99-960). For example, Senator Helms complained that Legal Services programs were "pushing social policies down the throats of local government and citizens." 141 CONG. REC. S8948 (daily ed. June 22, 1995). Similarly, Representative McCollum complained that Legal Services programs were undertaking "impact litigation in an attempt to socially engineer changes in our laws and rules." 141 CONG. REC. E1220 (daily ed. June 9, 1995).

[44] *See* 141 CONG. REC. E1220 (daily ed. June 9, 1995).

> When critics, such as Congressman Dan Burton of Indiana, denounce alleged LSC abuses, they tend to rely upon anecdotes supplied by the Washington-based conservative activists. These are usually shrill allegations about a

Members of Congress on both sides of the aisle believed that the LSC needed to be reformed.[45] Some solutions, however, were more drastic than others. Critics proposed that the LSC should be abolished or phased out over time.[46] In an effort to completely depoliticize the LSC, Congress outlined the appropriate type of litigation in which the LSC should engage.[47] Many of the restrictions seemed to be somewhat politically based because they served to prevent the indigent population from using federally funded lawyers.[48]

As a result of the vastly different opinions regarding the future of the LSC, Congressmen McCollum and Stenholm introduced legislation with proposed restrictions.[49] These restrictions were proffered as a compromise between those who would eliminate the LSC entirely and those who would save it at all costs.[50] Members of Congress believed that these reforms would improve the delivery of legal assistance to the poor and ensure that the LSC would not deviate from its purpose.[51] While critics of the LSC applauded the restrictions as a much needed remedy to correct abuses and misuses of the program, supporters

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> program in a distant state that supposedly represented a drug dealer or someone seeking a sex-change operation. Year after year, those same anecdotes are repeated, until they become what author and journalist Norman Mailer once described as 'factoids' – statements that by sheer repetition come to be accepted as truth.

BRENNAN CENTER FOR JUSTICE, THE ACCESS TO JUSTICE SERIES, WHY ARE ROGUE POLITICIANS TRYING TO KILL A PROGRAM THAT HELPS THEIR NEEDIEST CONSTITUENTS? (2000), *available at* http://www.brennancenter.org/resources/atj/atj3.pdf.

[45] *Legal Services Reauthorization,* 141 CONG. REC. S12837 (daily ed. Sept. 7, 1995) (statement of Rep. McCollum).

[46] *Id.* In his testimony before the House Appropriations Committee, Congressman Dan Burton stated that "last year, many Members felt the LSC should have been eliminated immediately because of its long history of flouting the will of Congress and engaging in dubious litigation that is of no real benefit to poor people." *Id.*

[47] 141 CONG. REC. S8948 (daily ed. June 22, 1995). The approved litigation categories included landlord-tenant disputes, consumer finance, and family law issues. *Id.*

[48] BRENNAN CENTER FOR JUSTICE, *supra* note 42. For example, a poor person who wants to change the makeup of a legislative district under the Voting Rights Act can no longer turn to an LSC-funded attorney for help. *Id.*

[49] S. 1221, 104th Cong. (2d Sess. 1996).

[50] Roth, *supra* note 9, at 9. At the time the restrictions were proposed, many were reluctant to oppose, fearful that any challenge might provoke congressional Republicans to act on their threat to eliminate the LSC altogether. *Constitutional Law – Congress Imposes New Restrictions on Use of Funds by the Legal Services Corporation*, 110 HARV. L. REV. 1346, 1351 (1997). *See also* Jan Hoffman, *Counseling the Poor, But Now One by One*, N.Y. TIMES, Sept. 15, 1996, at 47.

[51] 141 CONG. REC. S12837 (daily ed. Sept. 7, 1995) (statement of Rep. McCollum).

warned that the restrictions would further limit indigent individuals' access to justice.[52]

Critics of the restrictions contended that the restrictions were contrary to Congress' original purpose and intent because Congress did not intend the program to be limited to providing one-on-one, non-controversial legal services.[53] Furthermore, they believed that most of the criticism of the LSC resulted from its successes in a number of contentious cases and not because it is considered an ineffective program overall.[54] Therefore, the restrictions placed on the LSC seem overbroad and unnecessary.[55]

When creating the 1974 Act, Congress recognized that LSC grantees should, in working with low-income persons, have "full freedom to protect the best interests of their clients" and comply with their duty of professional responsibility.[56] Congress also recognized that providing equal justice for the poor should not be "restricted to conform to narrow partisan or ideological considerations."[57] However, the compromise that led to the 1996 restrictions indicated that Congress appeared to be moving away from the Act's original legislative intent.[58]

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[52] Yoder, *supra* note 29, at 830. Supporters of the LSC program opined that the restrictions further prevented low-income individuals from utilizing the justice system. *Id.* Moreover, "the new restrictions would simply ensure that poor people cannot effectively sue the government, the rich, and the influential. Those who would lose the most, they say, are America's least powerful residents – migrant farm workers, battered women, low-wage factory workers, welfare recipients and disabled people . . . ." Steven Stycos, *Revoking Legal Services: Republicans Want to Keep Lawyers from the Poor*, THE PROGRESSIVE, Apr. 1996, at 29.

[53] S. REP. NO. 104-392, at *12 (1996). Senators opposed to the restrictions commented that the client and case restrictions were inconsistent with the basic notion that all persons should have equal access to the justice system. *Id.* Along with providing representation for suits between individuals, the Senators also opined that the LSC should ensure that government programs are operated in a fair and equitable manner. *Id.*

[54] *Id.* at *13. A good deal of the controversy about the LSC arises because the work of local programs is very often mischaracterized. *Id.* at *14. For example, of the "1,686,313 cases closed by legal services programs in 1994, only 8 percent were litigated and only one-tenth of one percent were class actions. The other matters were handled outside the courtroom through counseling, negotiation and other means." *Id.*

[55] *See id.* at *13.

[56] 42 U.S.C. § 2996(5)-(6).

[57] S. REP. NO. 104 -392, at *14 .

[58] *See* Weissman, *supra* note 34, at 760. "Congress reduced the funds to LSC by one-third, imposed new restrictions on the range of work the programs could undertake, and limited the clients it could represent." *Id.* The federal funding level of Legal Services at this time was at a twelve-year low. *Id.* at 763.

As previously stated, the 1996 restrictions were extensive in their reach and originated from the perception that the LSC must be restored to its original purpose.[59] Some of the 1996 restrictions prohibit LSC recipients from participating in class actions on behalf of their clients,[60] seeking or accepting attorney's fees,[61] assisting undocumented aliens,[62] or representing prisoners in civil litigation.[63] These restrictions are applicable to all programs receiving LSC funds.[64] The solicitation restriction provides that "legal services attorneys cannot "accept

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[59] S. 1221, 104th Cong. (1996) (2d Sess. 1996).

[60] Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1350 (1996); § 504(a)(7): "None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a 'recipient'): that initiates or participates in a class action suit." *Id.*

[61] § 504(a)(13). "That claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees." *Id.*

[62] § 504(a)(11). That provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and is—

> (A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(20));
>
> (B) an alien who—
>
> > (i) is married to a United States citizen or is a parent or an unmarried child under the age of 21 years of such a citizen; and
> >
> > (ii) has filed an application to adjust the status of the alien to the status of a lawful permanent resident under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), which application has not been rejected;
>
> (C) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. § 1157) (relating to refugee admission) or who has been granted asylum by the Attorney General under such Act;
>
> (D) an alien who is lawfully present in the United States as a result of withholding of deportation by the Attorney General pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. § 1253(h));
>
> (E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. § 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section; or
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> (F) an alien who is lawfully present in the United States as a result of being granted conditional entry to the United States before April 1, 1980, pursuant to section 203(a)(7) of the Immigration and Nationality Act (8 U.S.C. § 1153(a)(7)), as in effect on March 31, 1980, because of persecution or fear of persecution on account of race, religion, or political calamity.

Id.

[63] § 504(a)(15). "That participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison." *Id.*

[64] David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 YALE L. & POL'Y REV. 337, 338 (1998).

employment resulting from in-person unsolicited advice to . . . obtain counsel or take legal action . . . ."[65] Congress justified the new restriction by stating that it was necessary to protect the less-educated and low-income population from lawyers trying to coerce them into filing suit.[66] Additionally, Congress reasoned that many poor people were being turned away for lack of funding.[67] Therefore, Congress opined that the only reason for solicitation would be to find clients fitting the political agenda of the attorneys.[68] Furthermore, Congress posited that the litigation sought out by attorneys would be on controversial issues.[69]

Given the constraints already placed on all attorneys regarding solicitation, Congress' enactment of the solicitation restriction seems unnecessary.[70] Additionally, under the American Bar Association's

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[65] § 504(a)(18).

[66] Amy Busa & Carl G. Sussman, *Expanding the Market for Justice: Arguments for Extending In-Person Solicitation,* 34 HARV. C.R –C.L. L. REV. 487, 510 (1999).

[67] 141 CONG. REC. E1220 (daily ed. June 9, 1995).

[68] *Id.* However, the controversial issues that Congress referred to and the restrictions imposed "particularly handicap the political viewpoint generally associated with the population served by the LSC recipients – the poor." Roth, *supra* note 9, at 119. "This view has been typed 'liberal' in the contemporary political debate, contrasted with the 'conservative' view that advocates smaller government and less redistributive taxation." *Id.*

[69] 141 CONG. REC. E1220 (daily ed. June 9, 1995). Contrary to Congress' rationale, solicitation and outreach allow legal services lawyers to serve an important function. Phillip Gallagher, *The Restriction Barring Legal Services from Offering Assistance to Potential Clients*, LSC Restriction Fact Sheet #2, (2000) *available at* http://www.brennancenter.org/programs/pov/factsheet_solicit. It allows lawyers to assist those who would not ordinarily know that they have a cause for legal action. *Id.* Further, low-income populations may not be aware that legal services are even available to them. *Id.* While Congress' rationale for the solicitation restriction points out that it is unnecessary for LSC lawyers to seek out clients when they already have more work and clients then they are able to service, it assumes that all poor people will recognize when their rights are being violated or when they have any cause for legal action. 141 CONG. REC. E1220 (daily ed. June 9, 1995); *see also* Ohralik v. Ohio State Bar Ass'n. 436 U.S. 447, 473 (1978) (Marshall, J., concurring) (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)) ("Many persons with legal problems fail to seek relief through the legal system because they are unaware that they have a legal problem, and, even if they 'perceive a need,' many 'do not obtain counsel . . . because of an inability to locate a competent attorney.'"). This case involved a one-year old girl's aunt who was unaware she could afford an attorney when her niece was suffering from a life-threatening illness. BRENNAN CENTER FOR SOCIAL JUSTICE, *supra* note 44, *available at* http://www.brennancenter.org/resources/atj/atj3.pdf. The health coverage provided by the state repeatedly refused to pay for the operation and the only way to save the girl's life was to give her a bowel transplant. *Id.* The aunt, who was the girl's legal guardian, did not know where to turn for help because she assumed that all lawyers cost money and she could not afford it. *Id.*

[70] MODEL RULES OF PROF'L CONDUCT R. 7.3 (amended 1991). The solicitation

Model Rules of Professional Conduct, an exception exists to the prohibition on solicitation, which permits lawyers to solicit potential clients as long as a significant motive for the lawyer's actions is not their own pecuniary gain.[71]

B. *Controversy Over the 1996 Restrictions*

While the additional restrictions placed on the LSC were not surprising, this effort by Congress represented its most comprehensive attempt to control the LSC.[72] Moreover, the recent restrictions differed from previous restrictions because instead of only prohibiting the representation of clients with cases involving volatile political issues, the new restrictions were aimed at prohibiting representation of entire classes of clients.[73]

These restrictions have been controversial since their implementation.[74] However, since the restrictions were considered to be

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restriction was originally created to protect vulnerable groups from "ambulance chasing" lawyers. *Id.* Five major reasons were cited for the restriction's creation: solicitation results in the stirring up of litigation; fraudulent practices; corruption of public officials; detriment to the legal profession and harm to the solicited clients. *A Critical Analysis of Rules Against Solicitation by Lawyers,* 25 U. CHI L. REV. 674, 675 (1958); *see also* Lauren K. Abel & David S. Udell, *Judicial Independence: If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor,* 29 FORDHAM URB. L.J. 873, 893 (2002).

> Prior to 1996, some states instructed their legal services attorneys to go out and educate the members of the community about their legal rights, then represent those people whose rights had been violated. However, the 1996 solicitation restriction now prevents the LSC attorney from representing any client as a result of in-person solicited advice.

Id.

[71] Busa & Sussman, *supra* note 66, at 510. A real life application of the effect of the solicitation restriction can be found in the immigrant community. Phillip Gallagher, *The Restriction Barring Legal Services from Offering Assistance to Potential Clients,* LSC Restriction Fact Sheet #2, (2000), at http://www.brennancenter.org/resources/resouces_act_solicit_factsheet.html. New immigrants come to this country to find work but are unaware of their rights to minimum wage and overtime pay. *Id.* Additionally, they sometimes are forced to work under unsafe conditions. *Id.* Upon learning of their rights, immigrants have sued employers for their rightful pay. *Id.* Without a lawyer informing these immigrants of their rights their employers would have continued with their illegal behavior. *Id.*

[72] Roth, *supra* note 9, at 107. Restrictions included in the original Legal Services Corporation Act included prohibitions on litigation relating to abortion, desegregation, selective service and military cases, and criminal cases. *See* George, *supra* note 21, at 697.

[73] Roth, *supra* note 9, at 107.

[74] *Id.*

a compromise, it has been said that recipients are reluctant to challenge the legality of the restrictions.[75] Despite this general reluctance, some have filed lawsuits challenging the restrictions on First Amendment grounds of free speech and association, Fifth Amendment due process grounds, and equal protection.[76] The only lawsuit to successfully challenge the constitutionality of an LSC restriction was *Legal Services Corporation v. Velazquez*.[77] In this case, the challenged restriction prohibited LSC attorneys from engaging in representation to amend or otherwise challenge the validity of existing welfare laws.[78] Other LSC restrictions were also challenged in this suit, but the Supreme Court only reviewed the prohibition on welfare litigation.[79]

III. The LSC and Political Solicitation

The enactment of the solicitation restriction was an interesting addition by Congress because previous Supreme Court decisions held that solicitation by attorneys working for non-profits was a form of political expression and therefore permissible.[80] The Supreme Court has determined that engaging in solicitation on behalf of a non-profit

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[75] *Id.* at 108.

[76] *Id. See* Legal Aid Soc'y of Haw. v. Legal Servs. Corp., 961 F. Supp. 1402 (D. Haw. 1997) (challenging twelve restrictions that were enacted as part of the Legal Services Reform Act of 1996); Dobbins v. Legal Servs. Corp., 01 Civ. 8371 (FB) (E.D .N.Y. filed Dec. 14, 2001) (arguing that the LSC restrictions should not apply to activities that nonprofit legal service organizations finance exclusively with funds from non-LSC source).

[77] 531 U.S. 533 (2001). The group of plaintiffs in this case included Carmen Velazquez, a Legal Services client in New York City, Farmworkers Legal Services of New York, client advocacy groups, some Legal Services funded lawyers, and New York City and State politicians. *Id.*

[78] § 504(a)(16). This restriction states:

> [T]hat initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.

Id.

[79] *Velazquez*, 531 U.S. at 536. The plaintiffs in this case sought to enjoin several of the 1996 restrictions including the restriction on welfare litigation, attorneys' fees, class actions, the use of non-LSC public funds to pay for restricted activities, legislative and administrative advocacy, and the representation of immigrants and prisoners. *Id.*

[80] *See infra* notes 81-83 and accompanying text.

organization is a protected activity under the First Amendment.[81] The two cases that set the precedent for protecting solicitation under the First Amendment are *NAACP v. Button*[82] and *In re Primus*.[83] Adopting the reasoning of both of these cases, the solicitation restriction appears to be a violation of LSC recipients' First Amendment rights since the attorneys are engaging in solicitation for a non-profit organization and providing legal assistance without charge.[84]

The Supreme Court first addressed the constitutionality of a non-profit attorney's right to solicit in *Button* and sought to answer the question whether solicitation was outside the area protected by the First Amendment.[85] In this case, Virginia was trying to enforce a statute regulating "the improper solicitation of any legal or professional business."[86] Since the NAACP engaged in extensive educational and lobbying activities, it was accused of violating the statute.[87] However, the Court held that the NAACP's solicitation was a form of political expression and therefore protected by the First Amendment.[88]

The Court concluded that abstract discussion is not the only type of communication that the Constitution protects; the First Amendment also protects vigorous advocacy against governmental intrusion.[89] The Court also determined that the type of activity NAACP attorneys engaged in

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81 *In re* Primus, 436 U.S. 412 (1978).

82 371 U.S. 415 (1963).

83 436 U.S. 412 (1978).

84 Legal Services Corporation, *What is LSC?, available at* http://www.lsc.gov/welcome/wel_who.htm. The Legal Services Corporation is a private, non-profit corporation established by Congress to seek to ensure equal access to justice under the law for all Americans by providing civil legal assistance to those who otherwise would be unable to afford it. *Id.*

85 *Button*, 371 U.S. at 429.

86 *Id.* at 419.

87 *Id.*

88 *Id.* at 429. The basic aims and purposes of the NAACP are to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. *Id.* To this end, the Association engages in extensive educational and lobbying activities. *Id.* at 420.

> The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.

Id. at 431.

89 *Button*, 371 U.S. at 429.

was a form of political expression.[90] The litigation was a means for achieving equality of treatment for the members of the black community by the government.[91] The Court also recognized that, as a result of minorities' unique situation, litigation may be the only avenue available to redress their grievances.[92] Further, the Court held that the state did not put forth any compelling public policy interests that would justify the restriction on the NAACP's solicitation.[93]

Similarly, in the case *In re Primus,* an attorney working for a non-profit organization was accused of violating state disciplinary rules for impermissibly soliciting a client on behalf of the ACLU.[94] The Court once again extended First Amendment protection for solicitation.[95] This decision established the precedent that attorneys cannot be punished for furthering their political and ideological beliefs by offering free legal assistance.[96] *Primus* implied that a prohibition on personal contacts cannot be applied where the attorney's communication is motivated by political, as opposed to pecuniary, concerns.[97] Additionally, the Court found that the state did not demonstrate a compelling public policy interest to outweigh the lawyer's First Amendment rights.[98]

The solicitation by LSC attorneys is analogous to the solicitation engaged in by the attorneys in *Button* and *Primus*.[99] In finding the solicitation in *Button* and *Primus* permissible, the Court reasoned that

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90 *Id.*

91 *Id.*

92 *Id.* at 430.

93 Busa & Sussman, *supra* note 66, at 496.

94 *Primus,* 436 U.S. at 412. The ACLU is an organization that renders legal services to indigent clients. *Id.* at 416. The lawyer in this case sent a letter to a woman who had been sterilized as a result of a condition placed on pregnant mothers on public assistance requiring them to be sterilized in order to continue to receive medical assistance under the Medicaid Program. *Id.* The lawyer informed the woman that the ACLU could represent her for free if she wanted to bring suit against the doctor who performed the sterilization procedure. *Id.*

95 *See id.* at 412.

96 *See* Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics,* 71 FORDHAM L. REV. 1971 (2003).

97 *Primus*, 436 U.S. at 431. The Supreme Court also noted that "the ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." *Id.*

98 Busa & Sussman, *supra* note 66, at 496. Since the Court concluded that the attorney's action was protected under the First Amendment, the level of scrutiny applicable was the same used for all core First Amendment rights. *Primus*, 436 U.S. at 432.

99 *See* discussion *supra* pp. 263-265.

the ACLU and the NAACP were engaging in extensive educational and lobbying activities that focused on certain kinds of litigation on behalf of their organization's purpose.[100] Therefore, their actions were protected by the First Amendment.[101] Similar to the ACLU and the NAACP, the LSC is engaged in litigation to fulfill their organization's purpose, which is to provide assistance to low-income individuals.[102] Additionally, the Court concluded that solicitation is protected by the First Amendment when an attorney offers to represent a client free of charge.[103] Since the LSC is a non-profit organization, its attorneys also represent clients without charge.[104] Therefore, an LSC attorney's right to solicit should be a protected activity under the First Amendment.[105]

As evidenced in both *Button* and *Primus*, solicitation is a necessary tool when trying to assist an indigent or less-educated population.[106] The Court in *Primus* recognized the difficulties faced by indigent litigants and stated that the "efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants."[107] Therefore, for the indigent

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100 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 1056 (2d ed. 2002). On the same day *Primus* was decided the Supreme Court also decided *Ohralik v. Ohio State Bar*, which was another case involving the permissibility of an attorney's solicitation. *See* Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978). In *Ohralik*, a lawyer approached the victim of an automobile accident in her hospital room and offered to represent her on a contingency fee basis. *Id.* at 462. The Court found no violation of the First Amendment and reasoned that the government has a "compelling interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct." *Id.* at 462.

101 *Id.*

102 42 U.S.C. § 2996 (West 2003). LSC's mission is to "promote equal access to the system of justice and improve opportunities for low-income people throughout the United States by making grants for the provision of high-quality civil legal assistance to those who would be otherwise unable to afford legal counsel." *Id.*

103 CHEMERINSKY, *supra* note 100, at 1056. The Supreme Court's decisions regarding in-person solicitation establish the proposition that states can prohibit in-person solicitation of clients for profit. *Id.* at 1057. However, when a lawyer does not act for their own pecuniary benefit, rather acts to assist those who would be unlikely to vindicate their own rights, it is permissible. *Ohralik*, 436 U.S. at 462 (Marshall J., concurring). "The underlying rationale is that such speech inherently risks becoming deceptive and thus even truthful solicitations can be forbidden when they are conducted in-person and where the attorney would profit from the representation." CHEMERINSKY, *supra* note 100, at 1057; *see also Ohralik*, 436 U.S. at 447.

104 42 U.S.C. § 2996 .

105 *See* discussion *supra* pp. 264-267.

106 *Id.*

107 *In re* Primus, 436 U.S. 412, 431 (1978).

population, it is unlikely that individuals would be aware that redress is available or where to find such assistance.[108] This same rationale can be applied to the LSC's solicitation restriction to show why it is such an important tool in the LSC attorney's arsenal, and illustrates that prohibiting solicitation creates a barrier for people who are unaware they may be eligible for free legal services.[109]

In both *Button and Primus,* along with examining the attorney's motivation, the Court also examined whether Congress had a compelling public policy interest that would enable them to uphold the restriction.[110] Neither case was found to demonstrate a compelling public policy interest.[111] Following the reasoning of the Court in *Button* and *Primus*, it can be argued that Congress did not demonstrate a compelling public policy interest in enacting the solicitation restriction.[112] Congress' stated public policy concern was to protect the less-educated and low-income population from attorneys trying to coerce them into suit.[113] Since this public policy interest is similar to

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[108] *See* Mark Hansen, *A Shunned Justice System*, 80 A.B.A. 18 (1994). In 1994, a survey was conducted for the ABA's Consortium on Legal Services and the Public and it was found that only half of the low-income families that were surveyed were even aware that free legal help was available. *Id.* Moreover, the survey also found that many people do not seek help because they don't consider their needs to be a problem. *Id.*

[109] *See id.*

[110] *See* Bates v. Little Rock, 361 U.S. 516 (1960); *see also* Buckley v. Valeo, 424 U.S. 1, 44-45 (1976). For example, the test applied in *Primus* was whether the states demonstrated a "subordinating interest which is compelling and that the means used were closely drawn to avoid unnecessary abridgment of constitutional freedoms." *See also Primus*, 436 U.S. at 432 (quoting Buckley v. Valeo, 424 U.S. 1, 44-45 (1976)).

[111] *See* NAACP v. Button, 371 U.S. 415 (1963); *see also Primus*, 431 U.S. at 412. In both cases the Court held that the state's interest in preventing undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients did not outweigh the attorneys rights under the First Amendment. *See Button,* 371 U.S. at 415; *see also Primus*, 431 U.S. at 412.

[112] Busa & Sussman, *supra* note 66, at 489. In First Amendment cases following *Button and Primus*, the Supreme Court has held that the government may limit a First Amendment right only if a compelling state interest exists. Rust v. Sullivan, 500 U.S. 173 (1991) (upholding a federal regulation the prohibited the recipients of federal funds from providing any counseling about abortion); Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983) (upholding a provision of the federal tax law that conditioned tax exempt status on the requirement that the organization not participate in lobbying or partisan political activities).

[113] Busa & Sussman, *supra* note 66, at 510. In determining whether there is a compelling public policy interest and the motivation behind this restriction, the legislative history provides useful insight. *Id.* The 1996 restrictions were adopted during a contentious election year in Congress where opponents of the LSC almost eliminated financing for the

those presented in both *Button* and *Primus*, it can be argued that this restriction does not advance compelling public policy goals and does not outweigh an LSC attorney's First Amendment right.[114] Additionally, it could be found that there are less restrictive ways to achieve Congress' stated goals in protecting low-income populations from coercion.[115]

IV. Application of the Unconstitutional Conditions Doctrine

Critics of the LSC restrictions have relied on the unconstitutional conditions doctrine because they believe the 1996 restrictions require LSC attorneys to surrender a constitutional right in order to receive government funds.[116] Unconstitutional condition issues arise when the government conditions the receipt of a benefit on the recipient performing or foregoing an activity that is usually protected by a constitutional right from governmental interference.[117] Therefore, to prove that an unconstitutional condition exists, it must first be shown that there is a conditioned government benefit. Second, it must be shown that the government confers the benefit with conditions; and third, that there is an affected constitutional right that must be relinquished in order to receive funding.[118] The first and second prong of the unconstitutional conditions analysis is met in the LSC situation, as it is clear that LSC offices will lose funding if they do not abide by

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program all together. Linda Greenhouse, *Supreme Court Roundup; Weighing Restrictions On Legal Aid for Poor*, N.Y. TIMES, Apr. 2, 2000, at A20. While Congress reasoned that these restrictions were necessary to restore the LSC to its original purpose, examination of the legislative record casts doubt on Congress' true motivation. *See id.* Instead of helping the LSC refocus on its primary mission, it appears that these restrictions were an effort to silence unpopular viewpoints. Roth, *supra* note 9, at 149. New York State Justice Beverly Cohen believed that the legislative history of the restrictions showed an invidious intent. *Id.* She noted in her opinion that the legislative history "reveal[ed] that the actual state interest in passing the legislation was a blatant attempt to inhibit the First Amendment rights of LSC lawyers, their clients, and anyone agrees with them. *Id.* The restrictions were designed to minimize, if not prevent, the political impact of the causes of the poor and their champions." Roth, *supra* note 9, at 149.

114 *See supra* note 110.

115 Busa & Sussman, *supra* note 66, at 496.

116 Sullivan, *supra* note 6, at 1415. In *Legal Aid Society of Hawaii*, the court examined the 1996 restrictions to determine whether they qualified as unconstitutional conditions. *Legal Aid Society of Hawaii*, 961 F. Supp. at 402. The plaintiffs in this case were asking for the restrictions to be enjoined. *Id.*

117 Sullivan, *supra* note 6, at 1421-22.

118 *Id.*

the restrictions set out by Congress.[119] Therefore, the government is conferring a benefit with a condition.[120] Utilizing the previous analysis of the *Button* and *Primus* cases and the comparison to the LSC's solicitation restriction, it is likely that a court would find that an LSC attorney's right to solicit is protected under the First Amendment, therefore satisfying the third prong.[121]

Once it has been established that LSC attorneys have a First Amendment right to solicit clients, the next step is to show that the government's enactment of this restriction qualifies as an unconstitutional condition.[122] To begin this analysis, the nature of the relationship between the government and the grantee must be determined.[123] The Supreme Court determined the nature of the relationship between the government and the LSC in *Legal Services v. Velazquez* and stated that "the LSC program was designed to facilitate private speech, not to promote a governmental message."[124] This is a critical distinction as the Court has recognized the differing treatment that results when the government itself is deemed a speaker and in instances where the government provides a subsidy to enable private speakers to deliver their own message.[125]

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119 § 504(a). 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 who violates any of the restrictions. *Id.*

120 *Id.*

121 *See* discussion *supra* pp. 264-267.

122 *See supra* note 6 and accompanying text.

123 Hammond, *supra* note 17, at 161.

> When the government provides funding to governmental speakers, "the unconstitutional conditions analysis is more deferential to the government because the state is considered a participant in the public discourse and, therefore, has the ability to organize its resources in such a way to achieve its goals." However, when private speakers are the funding recipients, the analysis is similar to that applied when no governmental subsidies are involved.

Id. (quoting J. Dwight Yoder, Note: *Justice or Injustice for the Poor?*, 6 WM. & MARY RTS. J. 827, 849 (1998)).

124 Legal Services Corporation v. Velazquez, 531 U.S. 533, 542 (2001); *see also supra* notes 121-123, *infra* notes 125-127 and accompanying text.

125 ACLU Supreme Court Preview: 2000 Term, Legal Services Corp. v. Velazquez, statement of Frank Aksin, at http://archive.aclu.org/court/askin_00.html. "Lawyers who work for LSC-funded offices are not governmental employees, federal bureaucrats, or public attorneys. They are not government spokespeople or conduits for a government message. They are, instead, private lawyers whose work is partly funded by the federal government." The Association of The Bar of the City of New York, *A Call for the Repeal or Invalidation of Congressional Restrictions on Legal Services Lawyers,* 53 THE RECORD 13, 36 (1998).

In order to gauge how a challenge based on the unconstitutional conditions doctrine might fare, it is important to analyze two recent Supreme Court cases and the Court's treatment of the unconstitutional conditions doctrine. *Legal Services Corporation v. Velazquez*[126] and *United States v. American Library Association*[127] both involve government subsidies and the government's placement of conditions as a prerequisite to receiving federal funds.[128] While the Supreme Court typically uses the unconstitutional conditions doctrine to analyze these types of cases, the Court has been inconsistent in its application.[129]

Since the Supreme Court was faced with similar issues facing government subsidies in *Velazquez* and *American Library*, it should follow that the Court would employ the same rationale it used in the earlier case to find a violation of a party's First Amendment rights.[130] However, this was not the case. In *Velazquez*, the Court found the welfare restriction at issue to be an unconstitutional use of Congress' power.[131] In contrast, the majority in *American Library* did not find that the condition placed on libraries in order to receive federal funds was an unconstitutional use of Congress's power.[132]

In *Velazquez,* the Court invalidated the welfare restriction and held that it violated Legal Services attorneys' First Amendment right of free speech.[133] Furthermore, the Court held that Congress could not prohibit LSC attorneys from raising legal or constitutional challenges in the course of litigation on behalf of their clients.[134] Justice Kennedy noted that once Congress chose to fund LSC attorneys, it was not permitted to "define the scope of the litigation it funds to exclude certain vital

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126 *Velasquez*, 531 U.S. at 533.

127 United States v. American Library Ass'n., 539 U.S. 194 (2003).

128 *See American Library Ass'n*, 539 U.S. at 194; *see Velazquez,* 531 U.S. at 533.

129 CHEMERINSKY, *supra* note 100, at 947. For example, in *Federal Communications Commission v. League of Voters of California*, the unconstitutional conditions doctrine was followed and a federal statute that prohibited any noncommercial educational broadcasting station that received a grant from the Corporation for Public Broadcasting from engaging in editorializing. *Id.* However, in another government subsidy case, *Regan v. Taxation with Representation of Washington,* the Court allowed the government to condition a benefit on individuals forgoing their First Amendment rights. *Id.* at 948.

130 *See* discussion *infra* p. 265.

131 *Velazquez*, 531 U.S. at 533.

132 *American Library Ass'n*, 539 U.S. at 194.

133 *Velazquez*, 531 U.S. at 533.

134 *Id.* The Court found that through the suppression of certain arguments, the government was trying to control both sides of the lawsuit. CHEMERINSKY, *supra* note 100, at 948.

theories and ideas.... Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought 'inimical' to the Government's own interest."[135]

The restriction in *Velazquez* was challenged as an unconstitutional condition. However, the Court did not expressly follow a traditional unconstitutional condition analysis.[136] Despite the Court's repudiation of the application of the traditional unconstitutional conditions doctrine, conceptually that is exactly what they used.[137] Some thought that the Supreme Court in *Velazquez* would use this opportunity to clarify the unconstitutional condition doctrine analytical framework for future courts.[138] Instead, the Court announced a new theory stating that the restriction distorted an attorney's role in the judicial system.[139]

Although the Court declined to consider the challenges to other LSC restrictions, part of the Court's reasoning in finding the welfare restriction unconstitutional in *Velazquez* is analogous to the solicitation restriction.[140] On its face, the solicitation and welfare restrictions seem to have little in common.[141] Therefore, it could be argued that a court would not give a great deal of weight to the *Velazquez* decision when determining whether the solicitation restriction is permissible.[142] However, this assumption would be flawed.[143]

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135 *Velazquez*, 531 U.S. at 548-49.

136 CHEMERINSKY, *supra* note 100, at 948. The Court found that Congress placed an impermissible restriction on what the LSC attorneys could argue, therefore, Congress was conditioning the receipt of a government subsidy on LSC attorney's forgoing a First Amendment right. *Id.*

137 Hammond, *supra* note 17, at 166; *see also* CHEMERINSKY, *supra* note 100, at 948.

138 Hammond, *supra* note 17, at 168. For example, "the Court could have elaborated on the characteristics that make a recipient of federal funds a government speaker rather than a private speaker." *Id.*

139 *Velazquez*, 531 U.S. at 533. In its findings, the Court also reasoned that "the restriction operates to insulate current welfare laws from constitutional scrutiny and certain other legal challenges, a condition implicated central First Amendment concerns." *Id.* In addition, the Court found that the insulation of these laws impairs the judicial function because it prevents LSC recipients from raising issues dealing with certain aspects of welfare. *Id.* at 546.

140 *Id.*

141 *See id.* The welfare restriction specifically prohibited certain types of arguments and speech relating to the welfare program, while the solicitation restriction prohibits all solicitation in general and is not targeted toward a specific group. *Id.*

142 *See* discussion *supra* pp. 266-267.

143 *Id.*

In *Velazquez,* the Court cited multiple reasons for finding the restriction unconstitutional.[144] The Court voiced concern that the restriction allowed Congress to insulate itself from legitimate judicial challenges because it was defining the scope of the litigation, amounting to impermissible viewpoint discrimination.[145] Similarly, it can be argued that Congress was attempting to avoid certain judicial challenges and discourage challenges to the status quo when it enacted the solicitation restriction.[146] By prohibiting LSC lawyers from informing the indigent population about violations of their rights, Congress likely believed that controversial litigation would be reduced.[147] Without formally adding any more categories of restrictions, Congress is able to limit additional types of litigation.[148] It can be argued that this restriction also constitutes impermissible viewpoint discrimination.[149]

Critics of the LSC would argue that the solicitation restriction is

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144 *Id.* at 533.

145 *Id.* at 548-49 ("We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.").

146 Mauro, *supra* note 41, at 10. As the legislative history points out, Congress felt it had to rein in the LSC because it was spending too much time on controversial cases. *Id.* These controversial cases garnered a lot of public attention, and occasional embarrassment, to issues that some members of Congress would prefer were left alone. *Id.* Since Congress believed that LSC recipients were purposely trying to seek out more controversial cases and ignoring the cases that LSC was created to serve, it reasoned that the solicitation restriction was a good solution. *Id.*

147 *See Velazquez*, 531 U.S. at 548. In *Velazquez*, the Court believed that Congress, in enacting the welfare restriction, was trying "to define the scope of the litigation it funds to exclude certain vital theories and ideas." *Id.* Similarly, Congress action's in enacting the solicitation restriction can also be seen as trying to define the scope of litigation since Congress believes that the LSC attorney's seek out more controversial issues that reflect poorly on the government. *Id.*

148 Roth, *supra* note 9, at 149. Instead of helping the LSC refocus on its primary mission, it appears that these restrictions were an effort to silence unpopular viewpoints. *Id.* New York State Justice Beverly Cohen believed that the legislative history of the restrictions showed an invidious intent. *Id.* She noted in her opinion that the legislative history "reveals that the actual state interest in passing the legislation was a blatant attempt to inhibit the First Amendment rights of LSC lawyers, their clients, and who agrees with them. The restrictions were designed to minimize, if not prevent, the political impact of the causes of the poor and their champions." *Id.*

149 *See* Ilisabeth Smith Bornstein, *From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys*, 2003 U. CHI. LEGAL. F. 693, 704 (2003) (discussing viewpoint discrimination in relation to the class action restriction).

content neutral as it does not regulate specific content.[150] However, the legislative history and the types of challenges this restriction may prevent constitute evidence that the effect of the solicitation restriction could result in impermissible viewpoint discrimination.[151] The conservative members of Congress' public discontent with the LSC, provides further evidence that the solicitation restriction was aimed at silencing unpopular viewpoints.[152] Moreover, when enacting the 1996 restrictions, Congress made clear that their goal was to shape an agency that comported more with their line of thinking.[153] This evidence demonstrates that in enacting the solicitation restriction, Congress knew the effect would be to exclude certain types of challenges.[154]

The Court in *Velazquez* also took issue with the fact that LSC lawyers litigating welfare cases did not have the same arsenal as other attorneys, thus, the restriction was distorting the basic functioning of attorneys.[155] Similarly, the inability to initiate contact with potential clients is a significant obstacle in providing legal services to the low-income population, preventing LSC attorney's from performing their basic functions.[156]

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150 *Id.* at 704. Congress described the LSC attorneys as political activists who promote a liberal agenda. Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act 2000, Remarks of Representative Dave Weldon, 106th Cong., 1st Sess, (Aug. 4, 1999), in 145 CONG. REC. H 6983-02 at 7004.

151 *See* Bornstein, *supra* note 149, at 705.

152 *Id.*

153 *Id.*

154 *Id.*

> If Congress, in one legislative act, created a program to fund lawyers, yet simultaneously limited their professional capabilities by barring certain subjects and legal activities, one wonders which half of the act Congress intended to take precedence. If Congress was truly committed to providing lawyers to poor people, then the restrictions on subject matter seem inconsistent with this purpose. Introducing restrictions on the lawyer's representational capacities, based solely on the source of the funding, is inconsistent with every tradition and professional ethic dictating undivided loyalty to the client.

Roth, *supra* note 9, at 143.

155 Legal Services Corporation v. Velazquez, 531 U.S. 533, 546 (2001). Along with threatening the severe impairment of the judicial function, the welfare restriction prohibited LSC attorneys from raising "arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider." *Id.*

156 Busa & Sussman, *supra* note 66, at 487. "To the extent that the government becomes involved in regulating the types of cases lawyers may assist their clients with, or which procedural devices they may employ, the relationship between lawyer and client becomes tainted by government influence." Roth, *supra* note 9, at 144.

The Supreme Court's most recent decision regarding a government subsidy was in *American Library*.[157] At issue in this case was the Children's Internet Protection Act ("CIPA").[158] CIPA was challenged on both First Amendment grounds and because it imposed an unconstitutional condition on public libraries.[159] In *American Library*, the Supreme Court relied on cases such as *Rust v. Sullivan* and held that when the government appropriates funds to establish a program, it is entitled to broadly define the program's limits.[160] As in *Rust*, the Supreme Court opined that the condition did not deny a benefit to anyone, rather it insisted that public funds be spent for their authorized purpose.[161] The Court further reasoned that a library's purpose is to obtain material of appropriate quality for educational and information purposes.[162] Therefore, the Court concluded that filtering software helps to fulfill a library's purpose as it assists in providing material of appropriate quality.[163] The Court also determined whether there was a

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157 United States v. American Library Ass'n., 539 U.S. 194 (2003).

158 Children's Internet Protection Act, 47 U.S.C. § 254 (2000). CIPA "requires that schools and public libraries receiving federal support adopt and implement technology protection measures on all modem-equipped computers as a condition of receiving federal funds." *Id.* Congress believed this legislation would aid in preventing children from accessing pornographic websites. *Id.*

159 *American Library Ass'n.*, 539 U.S. at 194. In a 6-3 plurality decision, the Supreme Court held that CIPA was a valid exercise of Congress' power under the Spending Clause. *Id.* Chief Justice Rehnquist along with Justices O'Connor, Scalia, Thomas, Kennedy and Breyer voted to uphold CIPA, while Justices Stevens, Souter and Ginsburg posited that CIPA was an unconstitutional use of Congress' Spending Power. *Id.*

160 Rust v. Sullivan, 500 U.S. 173 (1991). This influential unconstitutional conditions doctrine case represents a discernible conservative shift in the Court by upholding the regulation as constitutional. *See id.* This case challenged a federal regulation that prohibited recipients of federal funds for family planning services from providing counseling about abortion or from providing a referral for an abortion. *Id.* Writing for the Court, Chief Justice Rehnquist upheld the regulation, reasoning that the government could decide what activity to subsidize. *Id.* The plurality's reliance on *Rust* in this case is interesting since subsequent cases involving government subsidies determined that *Rust* only applies to instances of governmental speech, "that is, situations in which the government seeks to communicate a specific message." *American Library Ass'n.*, 539 U.S at 228 (Stevens. J., dissenting). However, the discounts provided by the E-rate program were not designed to transmit any particular governmental message. *Id.*

161 *American Library Ass'n.*, 539 U.S. at 208.

162 *Id.*

163 *Id.*

> A library's need to exercise judgment in making collection decisions depends on itstraditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects materials from any other source. Most libraries already

substantial government interest at stake.[164] The Court weighed the interest of protecting young library users from inappropriate material against an adult user's interest in accessing material without the burden of requesting the filter be removed.[165] The Court concluded that an adult user's access was not sufficiently burdened, therefore the statute was not unconstitutional.[166]

The plurality in *American Library* decided not to address the unconstitutional conditions claim because they believed it would fail on the merits.[167] The dissent disagreed, determining that CIPA did impose an unconstitutional condition on public libraries by impermissibly conditioning the receipt of government funds on the surrendering of a constitutional right.[168] Furthermore, the dissent believed that the restriction at issue in *American Library* was clearly an invalid exercise of Congress' spending power under Article I, Section 8.[169] Contrary to the plurality, the dissent found the reasoning utilized in *Velazquez* instructional because in that case the government also sought to distort the usual function of a medium of expression.[170]

> exclude pornography from their print collections because they deem it inappropriate for inclusion.

Id.

164 *Id.*

165 *Id.*

166 *American Library Ass'n.*, 539 U.S. at 209. The dissent argued that computer software erroneously blocks pages that contain content that is "completely innocuous for both adults and minors." *Id.* In response, the plurality reasoned that if any of the erroneous blocking presents constitutional difficulties, a patron can ask a librarian to unblock it or disable the filter. *Id.* The Solicitor General confirmed that a "librarian can, in response to a request from a patron, unblock the filtering mechanism altogether" and further explained that a patron would not "have to explain . . . why he was asking a site to be unblocked or the filtering to be disabled." *Id.* In his concurrence, Justice Kennedy confirmed the plurality's reasoning on this point by stating, "If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case." *Id.* at 214 (Kennedy, J., concurring).

167 *Id.* at 211.

168 *Id.* The plurality analogized this reasoning to that of *Rust*, stating that "Congress may certainly insist that these public funds be spent for the purposes for which they were authorized." *Id.*

169 *Id.* at 225. *See also* U.S. CONST. art. I, § 8. Section 8 states that "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." *Id.*

170 *American Library Assoc.*, 539 U.S. at 228. (Stevens, J. dissenting). Justice Stevens contended that the over and underblocking of the software distorted the traditional medium of expression. *Id.* However, the plurality distinguished *Velazquez* and said that it was

While legal commentators predict that the plurality decision in *American Library* will have little effect on future cases, it is still an important indicator of how the justices may vote in the future regarding First Amendment issues and the unconstitutional conditions doctrine.[171] For example, while the plurality rejected the unconstitutional conditions doctrine, Justice Breyer advocated another form of the doctrine.[172] Breyer proposed that an intermediate level of scrutiny could be used to evaluate the First Amendment when congressional statutes directly restrict the public's receipt of information.[173] Breyer concurred because he believed that even if this medium level of scrutiny was applied, the blocking provision would still survive since it permitted unblocking at the request of the user.[174] Additionally, there were no superior filters available that did not present the same problem of overblocking and underblocking.[175]

Justice Breyer's form of the unconstitutional condition doctrine set

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mistakenly relied on because "the role of lawyers who represent clients in welfare disputes is to advocate against the Government, and there was thus an assumption that counsel would be free of state control." *Id.* at 213. The plurality continued on to reason that, in contrast, public libraries "have no comparable role that puts them against the Government," therefore there is no assumption that conditions cannot be attached. *Id.* In responding to this statement, Justice Stevens asserted that "*Velazquez* was not limited to instances in which the recipient of Government funds might be 'pitted' against the Government." *Id.* at 228 (Stevens, J. dissenting).

171 Julie Hilden, *A Recent Supreme Court Decision Allowing the Government to Force Public Libraries to Filter Users' Internet Access Is Less Significant Than It Might First Appear* (July 1, 2003), at http://writ.news.findlaw.com/hilden/20030701.html.

172 *Id.*

173 *American Library Ass'n.*, 539 U.S. at 216 (Breyer, J., concurring) ("In ascertaining whether the statutory provisions are constitutional, I would apply a form of heightened scrutiny, examining the statutory requirements in question with special care."). Justice Breyer continued on to say that he:

> would examine the constitutionality of the Act's restrictions here as the Court has examined speech related restrictions in other contexts where circumstances call for heightened, but not 'strict' scrutiny—where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests.

Id. at 217 (Breyer, J., concurring).

174 *Id.* at 219 (Breyer, J., concurring).

175 *Id.* The blocking technology "in its current form, does not function perfectly, for to some extent it also screens out constitutionally protected materials that fall outside the scope of the statute (i.e. 'overblocks') and fails to prevent access to some materials that the statute deems harmful (i.e. 'underblocks')." *Id.* at 215 (Breyer, J., concurring). However, as Justice Breyer pointed out, while this system is not perfect, "no one has presented any clearly superior or better fitting alternatives." *Id.* at 219 (Breyer, J., concurring).

guidelines to determine whether a condition is permissible.[176] First, it requires that there be a "fit between the legislature's ends and means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable."[177] Second, the scope must be in proportion to the interest served.[178] Third, the condition "employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective."[179] Applying this approach to a challenge to the solicitation restriction would likely still result in the restriction being found unconstitutional.[180]

The Supreme Court's decisions in *Velazquez* and *American Library* do not provide a helpful guide in predicting how the solicitation restriction will fare if challenged.[181] Additionally, these cases do not offer definitive insight into how the Court will apply the unconstitutional conditions doctrine in the future.[182] Judging from both past and more recent cases involving the doctrine, it seems that the Court engages in a balancing test between the burden placed on speech and the government's justification for the requirement.[183]

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176 *Id.* at 218 (Breyer, J., concurring).

177 *Id.*

178 *Id.*

179 *American Library Ass'n*, 539 U.S. at 218 (Breyer, J., concurring). Justice Breyer believes this approach is more flexible, yet still provides the legislature with more than "ordinary leeway in light of the fact that constitutionally protected expression is at issue." *Id.*

180 *See id.*

181 *See* discussion *supra* Part III.

182 Hammond, *supra* note 17, at 168. The Court in *Velazquez* could have taken the opportunity to clarify the analytical framework that should be applied under the unconstitutional conditions doctrine, but instead it chose to apply a fact specific analysis that did not utilize the doctrine. *Id.* The only definitive application of the unconstitutional conditions doctrine is in Justice Breyer's concurrence. However, this form of the doctrine can be considered to be an "intermediate" unconstitutional conditions doctrine. *American Library Ass'n.*, 539 U.S. at 218 (Breyer, J., concurring).

183 CHEMERINSKY, *supra* note 100, at 950 (stating that the inconsistent decisions regarding the unconstitutional conditions doctrine might possibly reflect an implied balancing by the Court). If the Court engaged in a balancing test regarding the solicitation restriction, it would seem that the scale would tip in favor of finding the restriction unconstitutional since it would be difficult for the Court to find that Congress presented a compelling interest that warrants the significant burden placed on an LSC attorney's First Amendment rights. *See id.*

A. *Future of Challenges to the Solicitation Restriction*

As evidenced in *Velazquez*[184] and *Legal Aid Society of Hawaii v. Legal Services Corp.*,[185] which challenged a number of the 1996 restrictions, it is likely the only opportunity for a successful challenge to the solicitation restriction would be an "as-applied" challenge.[186] However, recent Supreme Court decisions do little to clarify the area of government subsidies and free speech, and give little guidance as to how the solicitation restriction might be interpreted.[187]

The Supreme Court has recognized that in certain instances the government can grant benefits to individuals and attach conditions, even if the condition restricts the constitutional rights of the recipient.[188] In determining the constitutionality of a condition, courts generally look to any special circumstances and to the nature of the conditions and benefits involved.[189] In theory, the unconstitutional conditions doctrine should ensure that the government does not overstep its bounds and that it protects the constitutional rights of individuals who receive these benefits.[190] Unfortunately, because of both recent Supreme Court decisions and past case law, the unconstitutional conditions doctrine has

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184 Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001). In *Velazquez*, the Supreme Court refused to hear challenges to the other Legal Services restrictions. *Id.*

185 961 F. Supp. 1402 (D. Haw. 1997). The Court in this case denied certiorari.

186 Ellen M. Yacknin, *Supreme Court Throws Out Legal Services Restrictions on Welfare Reform Litigation*, LEGAL SERVICES JOURNAL (Mar. 2001) at www.gulpny.org/Legal%20Services/Articles/legal_restrictions.htm. An as-applied challenge is "a lawsuit claiming that a law or governmental policy, though constitutional on its face, is unconstitutional as applied, usu. because of a discriminatory effect; a claim that a statute is unconstitutional on the facts of a particular case or to a particular party." BLACK'S LAW DICTIONARY 223 (7th ed. 1999).

187 Martin A. Swartz, *Legal Services Attorneys Gain Right to Contest Welfare Rules*, NEW YORK LAW JOURNAL, Apr. 17, 2001, at 3. In *National Endowment for Arts v. Finley*, artists who have been denied a grant by the National Endowment for Arts ("NEA") challenged the grant-making procedures outlined in the National Foundation on the Arts and Humanities Act for First Amendment violations and constitutional vagueness. 524 U.S. 569 (1998). The Court held that the procedure did not violate freedom of speech, and in the subsidy context the Government can allocate competitive funding according to criteria even though it would be impermissible if a direct regulation of speech was at stake. *Id.* Furthermore, the Court posited that as long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude in setting spending priorities and establishing the boundaries of federally funded programs. *Id.*

188 Yoder, *supra* note 29, at 845.

189 *Id.*

190 *Id.*

become less valuable and increasingly difficult to apply.[191] Constitutional experts have opined that the unconstitutional condition cases cannot be reconciled because the decisions simply turn on the views of justices in particular cases.[192]

V. Conclusion

As evidenced in prior case law, the future of unconstitutional conditions challenges is very uncertain. With regard to the solicitation restriction, if the Court finds that the LSC attorney's right to solicit deserves the same protection under the First Amendment as the solicitation in *Button* and *Primus*, the restriction should be found unconstitutional because Congress does not have the right to limit speech.[193] While this conclusion may seem dispositive in finding the entire restriction invalid, there is still a chance the restriction would be upheld when the Court applies the unconstitutional conditions doctrine.[194] If it can be established that the solicitation restriction constitutes viewpoint discrimination, it is likely that a court would follow the Supreme Court's reasoning in *Velazquez*, finding that viewpoint-based restrictions are improper "when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."[195]

Alternatively, if the Court looked to *American Library* for

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[191] *Id.* The absence of a uniform unconstitutional conditions doctrine has led courts to determine its application on a case-by-case basis. *See generally* Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of Rust v. Sullivan,* 45 AM. U. L. REV. 353 (1995). A funding condition can be viewed as a penalty or as a nonsubsidiary, therefore it is up to the court to distinguish the facts of each case. *Id.*

[192] CHEMERINSKY, *supra* note 100, at 950. (If the Court wishes to strike down a condition, it declares it to be an unconstitutional condition; if the Court wishes to uphold a condition, it declares that the government is making a permissible choice to subsidize some activities and not others.)

[193] *See* discussion *supra* pp. 261-262.

[194] *See* United States v. American Library Ass'n., 539 U.S. 194, 203 (2003). "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *Id.* And according to the Court in *American Library Ass'n.*, such objectives certainly could include helping "public libraries fulfill their worthy missions of facilitating learning and educational enrichment." *Id.* In this case, the Court balanced the "burden filters would have on adults versus the harm Internet pornography causes children." *Id.*

[195] Legal Services Corporation v. Velazquez, 531 U.S. 533, 542 (2001).

instruction, it would be more difficult to predict the outcome.[196] The purpose and goal of the statute at issue in *American Library* was to shield children from Internet pornography.[197] Given the saliency of this issue and the public's desire to protect children, the Court engaged in a balancing test, weighing the importance of protecting children against the burden on an adult user to ask for the filter to be disabled.[198] As one would expect, the protection of children prevailed.[199] It is difficult to disagree that protecting children from Internet pornography is a compelling interest.[200] However, when the Court engages in this type of balancing of government subsidies and First Amendment rights, it appears to be setting a dangerous precedent, especially when less restrictive alternatives are available.[201] Going forward in determining a challenge to another government subsidy, such as the solicitation

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196 *See* Julie Hilden, *A Recent Supreme Court Decision Allowing the Government to Force Public Libraries to Filter Users' Internet Access Is Less Significant Than It Might First Appear* (July 1, 2003), *at* http://writ.news.findlaw.com/hilden/20030701.html. While many thought *American Library Ass'n.* would be a major First Amendment decision and a possible clarification of the unconstitutional conditions doctrine, it turned out to be neither. *Id.*

197 *See supra* note 158.

198 *American Library Ass'n.*, 539 U.S. at 207.

199 *Id.*

200 *Id.* at 215. As Justice Kennedy stated in his concurrence, "[t]he interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree." *Id.*

201 *Id.* at 223. The District Court expressly found that a variety of alternatives less restrictive are available at the local level:

> Less restrictive alternatives exist that further the government's legitimate interest in preventing the dissemination of obscenity, child pornography, and material harmful to minors, and in preventing patrons from being unwillingly exposed to patently offensive, sexually explicit content. To prevent patrons from accessing visual depictions that are obscene and child pornography, public libraries may enforce Internet use policies that make clear to patrons that the library's Internet terminals may not be used to access illegal speech. Libraries may then impose penalties on patrons who violate these policies, ranging from a warning to notification of law enforcement, in the appropriate case. Less restrictive alternatives to filtering that further libraries' interest in preventing minors from exposure to visual depictions that are harmful to minors include requiring parental consent to or presence during unfiltered access, or restricting minors' unfiltered access to terminals within view of library staff. Finally, optional filtering, privacy screens, recessed monitors, and placement of unfiltered Internet terminals outside of sight-lines provide less restrictive alternatives for libraries to prevent patrons from being unwillingly exposed to sexually explicit content on the Internet.

Id. (quoting American Library Ass'n v. United States, 201 F. Supp. 2d 401, 410 (2002)).

restriction, the Court may again engage in a balancing of the harms.[202] The danger is that the more conservative members of the Court may once again decide that protecting the indigent population from coercion to file suit is more important then LSC attorneys' First Amendment rights.[203] In both instances, the librarians and the LSC attorneys have been deprived of their ability to render professional judgment, and the government has been permitted to make its own decisions.[204]

The debate about Legal Services funding and the solicitation restriction is not likely to end.[205] Both critics and supporters are passionate about their positions on the future of LSC funding and subsidizing the poor.[206] While it can be argued that the LSC was in need of more structure and accountability prior to the Legal Services Reform Act of 1996, a restriction such as the one on solicitation appears to do more harm than good.[207] Although there may be certain instances where banning in-person solicitation is essential, this should not be one of them.[208] As past cases have determined, Congress, in the exercise of its spending power can choose to fund programs it deems appropriate.[209] However, this power does not include imposing a restriction that it would otherwise be unable to enforce.[210] The creation of the restrictions in 1996 represents a dangerous pattern for Congress, as it seeks to silence any controversial or unpopular challenges.[211]

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202 *See supra* note 194.

203 *See supra* note 191. There is a realistic possibility, as the history of the unconstitutional conditions doctrine has shown, that its malleability allows courts to shape their opinion based on politics. *Id.*

204 Brief of Amicus Curiae The Brennan Center For Justice at New York University School of Law in Support of Appellees, United States v. American Library Ass'n., 539 U.S. 194 (2003) (No. 02-361) (citing *Velazquez*, 531 U.S. at 544).

205 *See* discussion *supra* pp. 258-259.

206 *Id.*

207 *See supra* note 69.

208 Busa & Sussman, *supra* note 66, at 511.

209 *See* South Dakota v. Dole, 483 U.S. 203 (1987).

210 *See supra* notes 6-7 and accompanying text.

211 Busa & Sussman, *supra* note 66, at 511. Solicitation provides LSC attorneys with an important tool as they are able to assist the low-income population who may not be aware that legal services are available. *Id.*