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Depoliticizing Legal Aid a Constitutional Analysis of the Legal Services Corporation Act

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DEPOLITICIZING LEGAL AID: A CONSTITUTIONAL ANALYSIS OF THE LEGAL SERVICES CORPORATION ACT

The Legal Services Corporation Act (LSCA)[1] was enacted in 1974 after stormy debate in both Houses of Congress and a Presidential veto of a previous version of the bill.[2] Although few legislators openly disputed the premise of the Act, that "providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice . . . ,"[3] the mechanics of realizing this goal had long been a controversial subject on Capitol Hill. The Office of Economic Opportunity (OEO) Legal Services Program,[4] established during the Johnson administration, antagonized many conservatives by advocating "law reform" in addition to rendering legal assistance on a case-by-case basis.[5] Critics

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[1] Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378, 42 U.S.C. §§ 2996-96*l*, 2971e (Supp. IV, 1974).

[2] *The President's Message to the Senate Returning S. 2007 Without His Approval*, 7 WEEKLY COMP. PRES. DOCS. 1634 (Dec. 9, 1971). The history of the controversies that have surrounded legal services programs and proposals has been well chronicled. *See, e.g.*, E. JOHNSON, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM (1974); Bowler, *National Legal Services—the Answer or the Problem for the Legal Profession?*, 50 CHI.-KENT L. REV. 415 (1973); George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681 (1976); Note, *Legal Services—Past and Present*, 59 CORNELL L. REV. 960 (1974); Note, *The Legal Services Corporation: Curtailing Political Interference*, 81 YALE L.J. 231 (1971). For a journalistic account of the controversies generated by the Legal Services Corporation Act see Arnold, *And Finally, 342 Days Later . . .*, JURIS DOCTOR, Sept. 1975, at 32; Arnold, *The Odyssey of Legal Services and the Games Politicians Play*, JURIS DOCTOR, Oct. 1974, at 23. The historical foundation set forth in this literature serves as the point of departure for this Note's analysis of the Legal Services Corporation Act.

[3] 42 U.S.C. § 2996(3) (Supp. IV, 1974).

[4] The OEO Legal Services Program was not specifically authorized by the legislation establishing OEO. *See* Economic Opportunity Act of 1964, Pub. L. No. 88-452, 88 Stat. 508, *as amended*, 42 U.S.C. §§ 2701-2996*l* (1970 & Supp. IV, 1974). A 1965 amendment to that Act, since repealed however, did state that OEO could sponsor additional programs for the poor not explicitly provided for by Congress. Act of Oct. 9, 1965, Pub. L. No. 89-253, § 12, 79 Stat. 974. *See* Note, 59 CORNELL L. REV. 960, *supra* note 2, at 960 n.4, 964 n.21.

[5] The Office of Legal Services deemed law reform a legitimate concern of OEO Legal Services Program attorneys. "Advocacy of appropriate reforms in statutes, regulations, and administrative practices is a part of the traditional role of the lawyer and should be among the services afforded by the program." Office of Economic Opportunity, Guidelines For Legal Services Programs 23 (1967). Even as late as 1973, the Comptroller General's evaluation of the Legal Services Program criticized inadequate involvement in the law reform area, concluding that grantees ought "to develop a plan for achieving . . . law reform objectives." Comptroller General of the United States, The Legal Services Program—Accomplishments of and Problems Faced By Its Grantees, G.A.O. B-130515, at 18 (Mar. 21, 1973). *See* Sullivan, *Law Reform and the Legal Services Crisis*, 59 CALIF. L. REV. 1 (1971); Note, 81 YALE L.J. 231, *supra* note 2, at 255-56.

protested that the OEO program was dominated by "ideological vigilantes" who subsidized their own radical crusades with Legal Services Program funds.[6] In 1973, President Nixon authorized dismantling of the OEO Legal Services Program,[7] forcing Congress to consider alternative legal assistance bills.[8] Liberals and conservatives were in agreement that any new legal services program must be politically neutral, but consensus regarding particular proposals was difficult to reach because legislators defined political neutrality from differing perspectives. Conservatives stressed that the new legal services program must be free of political taint from within; that is, the legal services program must not become a vehicle for social reform or a base for political action.[9] Liberals wanted to isolate the new program from outside political pressures to ensure that the executive and legislative branches of government would be unable to compromise the professional independence of legal services attorneys.[10] The Act Congress finally passed reflects the concerns of both conservatives and liberals and is loaded with provisions designed to depoliticize the rendition of legal services to the poor.

After describing these depoliticizing provisions, this Note will analyze two classes of statutory prohibitions: restrictions upon the types of cases legal services attorneys may handle, and restrictions upon the political activities of these attorneys. Both classes of prohibitions, although evidencing congressional concern that federally sponsored legal aid programs not be used as a tool of social reform or be identified with any political ideology, raise serious constitutional issues. Furthermore, the underlying assumption of the LSCA that legal aid to the poor can be totally depoliticized is questionable.

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[6] Agnew, *What's Wrong With The Legal Services Program*, 58 A.B.A.J. 930, 931 (1972). The controversy generated by the OEO Legal Services Program's attention to law reform, perhaps the "hottest" legal services issue, is discussed in the materials cited in note 2 *supra*, and in Sullivan, *supra* note 5. In JUSTICE AND REFORM, *supra* note 2, Earl Johnson defended law reform as a legitimate goal of the OEO Legal Services Program. Johnson, a former Director of that program, asserted that test cases, the prime vehicle for law reform, generated "benefits to the poverty community [which] outweighed the cost of the program by a ratio of approximately 7 to 1." Id. at 232. Another participant in the Legal Services Program, however, while acknowledging that test case litigation "*has* had some significant effects on the lives of poor people[,]" observed that the concern with law reform did detract from the quality and quantity of attention given to the day-to-day case load. Vanaman, *Book Review*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 772, 778 (1975) (emphasis in original).

[7] *See* Note, 59 CORNELL L. REV. 960, *supra* note 2, at 966.

[8] *See* Bowler, *supra* note 2, at 430.

[9] *See* 120 CONG. REC. 831 (1974) (remarks of Senator Fannin); 119 CONG. REC. 41,631-33 (1973) (remarks of Senator Helms).

[10] See discussion of the genesis of the "corporation" concept in Bowler, *supra* note 2, at 427-28. *See also* George, *supra* note 2, at 690-98.

It is unrealistic to expect that an institution enabling the poor to assert legal rights will remain politically uncharged. Indeed, any effort to give the poor greater access to the courts is bound to offend some political sensibilities. Such considerations suggest that several of the restrictions designed to depoliticize legal services will not only fail to achieve their stated purpose, but in fact will serve to inject politics into the provision of legal assistance to the poor. This will occur for two important reasons. First, by restricting certain Legal Services Corporation (LSC) activities that were thought to be politically charged, Congress has legitimized further politically motivated criticism of the LSC. Second, since the LSC is dependent upon congressional appropriations, it will be susceptible to political pressure emanating from Congress.

I

DEPOLITICIZING LEGAL SERVICES: AN OVERVIEW

In setting forth the goals of the Legal Services Corporation Act, Congress declared that "to preserve its strength, the legal services program must be kept free from the influence of or the use by it of political pressures . . . ."[11] In conformance with this statement, the new legal services program is administered by a corporation, independent of the executive and legislative branches of government.[12] The corporate form is designed to insulate the program from "politics," thereby establishing its independence of action and political neutrality. Several other provisions are designed to protect the LSC and its personnel from political pressures. Political tests or qualifications may not be applied in selecting employees for the Corporation or its recipients.[13] In addition, Corporation employees

[11] 42 U.S.C. § 2296(5) (Supp. IV, 1974).

[12] *See id.* § 2996b (authorization of corporate form); *id.* § 2996d(e)(1) (dissociation of Corporation from federal government).

[13] Three classifications which recur throughout the LSCA ought to be set forth to avoid unnecessary confusion: "Recipient" means any grantee, contractee, or recipient of financial assistance from the Legal Services Corporation. *Id.* § 2996a(6). Local legal aid programs are the primary "recipients" of assistance from the Corporation. "Corporation" means the Legal Services Corporation. *Id.* § 2996a(2). Thus employees of the Corporation are employed directly by the Corporation while employees of recipients work for entities funded by the Corporation. "Staff attorney" is defined as a lawyer who earns at least 50% of his professional income from federally funded legal services work. *Id.* § 2996(a)(7). But see Proposed Regulations for the Legal Services Corporation Act, § 1600.1, 41 Fed. Reg. 18,512 (1976), which states that only attorneys receiving more than half of their professional income from recipients "organized *solely* for the provision of legal assistance to eligible clients," are to be considered staff attorneys. (Emphasis added.) This regulatory definition, if adopted, will greatly reduce the class of staff attorneys.

and staff attorneys in legal services offices are prohibited from pressuring coworkers to support political causes or candidates.[14]

The LSCA also contains provisions to ensure that the Corporation and its recipients maintain an apolitical course of conduct. For example, an employee may not intentionally identify the Corporation or recipient with social causes, political parties, or political organizations,[15] and legal services attorneys may not engage in "any political activity" while on duty.[16] Similarly, a separate provision prohibits employees from engaging in "any public demonstration or picketing, boycott, or strike"[17] while carrying out legal services activities. Furthermore, at no time may such personnel engage in "civil disturbance" activity that violates a court injunction, or "any other illegal activity."[18] Additional off-duty restrictions are imposed on staff attorneys.[19] No funds of the Corporation may be used to advance "particular public policies";[20] no corporate funds, personnel, or equipment may be made available to any political party, political organization, candidate for public office, or to promote any

[14] 42 U.S.C. § 2996e(e)(2) (Supp. IV, 1974) provides that the political conduct of employees of the Corporation is regulated by portions of the Hatch Act, 5 U.S.C. §§ 1501–08 (1970 & Supp. IV, 1974). 42 U.S.C. § 2996f(a)(6) (Supp. IV, 1974) subjects staff attorneys to § 1502a of the Hatch Act. For a more detailed explanation of the Hatch Act see note 103 *infra*.

[15] 42 U.S.C. §§ 2996e(b)(5)(B)(iv), (e)(I) (Supp. 1V, 1974).

[16] *Id.* § 2996f(a)(6)(A). Resort to the legislative history is necessary in order to understand that this section distinguishes off-duty hours from on-duty hours. *See* notes 99-100, 148-55, 161 and accompanying text *infra*.

[17] 42 U.S.C. § 2996e(b)(5) (Supp. IV, 1974). An exception to the ban on public demonstrations, picketing, boycotts, or strikes is made for matters pertaining to the employee's personal employment situation. *Id.* Regulations promulgated by the Corporation tracking this provision may be found at 40 Fed. Reg. 42,362 (1975). In addition, employees are prohibited from encouraging others to engage in these activities and from advising others to violate outstanding injunctions. *Id.*

A suit has recently been filed attacking the constitutionality of this restriction. Welfare Rights Org. v. Cramton, Civil No. 75-1938 (D.D.C., filed Nov. 20, 1975). The plaintiffs, a welfare rights organization, its chairman, and a legal aid attorney who rendered legal advice to the organization regarding the lawfulness of various public demonstrations, have alleged that such advice is essential to the organization's enjoyment of first amendment rights. Additionally, plaintiffs have charged that the LSCA advice restrictions constitute a fifth amendment deprivation of liberty without due process "since they are not free to obtain required legal assistance from the only source available to them." *Id.*, complaint at 8-9. The plaintiff attorney has alleged that the restrictions violate due process because they interfere with his professional duty as an attorney to fully and completely advise and represent his clients. Furthermore, the plaintiff attorney claims a first amendment right to "demonstrate in support of his clients." *Id.* at 9.

[18] 42 U.S.C. § 2996e(5)(B) (Supp. IV, 1974). This provision also prohibits attorneys from engaging in voter registration activity or voter transportation, unless such activity is incidental to the rendition of legal advice or representation.

[19] *Id. See* notes 96-127 and accompanying text *infra*. For the statutory definition of "staff attorney" see note I3 *supra*.

[20] 42 U.S.C. § 2996f(b)(5) (Supp. IV, 1974).

ballot measure;[21] no legal services office may organize coalitions or associations, *e.g.*, tenants' or welfare rights organizations, unless necessary for the provision of bona fide legal assistance to eligible clients;[22] and no federally-funded legal services entities may lobby before legislative or administrative bodies.[23]

Finally, the LSCA places restrictions on the types of cases legal services attorneys may handle and the nature of advice they may provide. Legal services attorneys may not represent clients in desegregation suits,[24] abortion cases,[25] selective service and military desertion cases,[26] criminal proceedings and habeas corpus actions,[27] or fee generating cases.[28] Staff attorneys are also prohibited from bringing any class action that has not been approved by their program superiors.[29] The LSCA provides that no employee may "en-

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[21] *Id.* §§ 2996e(d)(3-4).

[22] *Id.* § 2996f(b)(6).

[23] *Id.* §§ 2996e(c)(2), 2996f(a)(5). Lobbying prohibitions imposed on legal services attorneys have been attacked as unconstitutional in the context of state regulation of such attorneys. *See* Botein, *The Constitutionality of Restrictions on Poverty Law Firms: A New York Case Study*, 46 N.Y.U.L. REV. 748 (1971). In practice, however, the effect of the LSCA lobbying restrictions may be minimized by the willingness of the Corporation to construe a wide variety of lobbying activities as incidental to client representation. Dean Roger Cramton, Chairman of the Board of the Legal Services Corporation, has suggested such a policy:

> [P]articipation in administrative or legislative proceedings may often be appropriate or necessary in order to advance or protect the client's interest.
>
> . . . If full and zealous representation means suing city hall, or attacking a federal or state administrative regulation, that is what the poor client should get. Some controversy may result, but it is the duty of the board—and, I believe, the legal profession as a whole—to defend legal services lawyers who are doing their job in the best professional manner . . . .

Cramton, *The Task Ahead in Legal Services*, 61 A.B.A.J. 1339, 1342-43 (1975).

[24] 42 U.S.C. § 2996f(b)(7) (Supp. IV, 1974) provides:

> No funds made available by the Corporation under this subchapter, either by grant or contract, may be used . . . to provide legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school or school system . . . .

See notes 33-94 and accompanying text *infra*.

[25] 42 U.S.C. § 2996f(b)(8) (Supp. IV, 1974) provides:

> No funds made available by the Corporation under this subchapter, either by grant or contract, may be used . . . to provide legal assistance with respect to any proceeding or litigation which seeks to procure a nontherapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or such institution.

See notes 33-94 and accompanying text *infra*.

[26] 42 U.S.C. § 2996f(b)(9) (Supp. IV, 1974).

[27] *Id.* § 2996f(b)(1).

[28] *Id.*

[29] *Id.* § 2996e(d) (5). The significance of this provision is subject to differing interpretations. It may be viewed as an attempt to allocate the limited resources available to legal services programs by weeding out trivial or frivolous suits. The discretion vested in the project directors to approve such suits, however, presents the ominous possibility that authorization

courage" others to engage in public demonstrations, picketing, boycotts, strikes, riots, civil disturbances, or any illegal activity.[30] A legal services attorney may not advise anyone to violate outstanding court injunctions.[31] The enforcement devices established by the LSCA are twofold: employees who violate any of the above rules may be "disciplined," and the Corporation may withhold funding from any recipient organization that engages in or tolerates violations.[32]

II

Restrictions on Classes of Litigation

As previously noted,[33] the LSCA forbids the expenditure of corporation funds on abortion and desegregation cases.[34] The legislative history of these restrictions reveals congressional disapproval of controversial Supreme Court decisions in these areas.[35] In fact, no

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will depend upon political factors. Indeed, staff attorneys, the persons constantly identified by critical legislators as the greatest threat to the program's political neutrality (see discussion of the extraordinary limitations imposed upon staff attorneys' political activities in notes 104-27 and accompanying text *infra*), are the only legal services lawyers who must get prior approval to bring class actions—a fact which suggests that the draftsmen of this provision intended it as a device to prevent the initiation of politically disfavored actions. This theme is developed in notes 33-94 and accompanying text *infra*.

[30] 42 U.S.C. § 2996e(b)(5)(A) (Supp. IV, 1974). A suit has been commenced challenging the constitutionality of this provision. *See* note 17 *supra*. Although a thorough consideration of the restriction limiting the nature of advice that a legal services attorney may provide to a client is beyond the scope of this Note, the apparent inconsistency of this provision with other aspects of the LSCA deserves mention. The advice restriction cannot be reconciled with the following portion of the LSCA, which exalts the professional independence of legal services attorneys: "[A]ttorneys providing legal assistance must have full freedom to protect the hest interests of their clients in keeping with the Code of Professional Responsibility . . . ." 42 U.S.C. § 2996(6) (Supp. IV, 1974). Moreover, Congress has committed the Legal Services Corporation to "insure the maintenance of the highest quality of service and professional standards, the preservation of attorney-client relationships, and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients . . . ." *Id.* § 2996f(a)(1). This conflict is noted in Bowler, *supra* note 2, at 432-33.

[31] 42 U.S.C. § 2996e(b)(5)(B)(ii) (Supp. IV, 1974).

[32] *Id.* §§ 2996e(b)(1)-(2).

[33] *See* notes 24-28 and accompanying text *supra*.

[34] This Note concentrates only on the abortion and desegregation restrictions for two reasons. First, the legislative history surrounding the restrictions on these types of cases reveals a clear congressional intent to "punish" advocates of the causes of abortion and busing. Second, because of this clear legislative history, these restrictions lend themselves to analysis under the Supreme Court's new equal protection line of decisions. *See* notes 73-94 and accompanying text *infra*.

[35] Typical of the rhetoric used by supporters of the restrictions was a speech by Representative Hogan, sponsor of an original version of the abortion restriction:

[T]hese poverty law activists assume that abortion is good for the poor. . . . It is not

Congressman who supported the restrictions advanced any basis other than the unpopularity of abortion and busing to support the restrictions,[36] although opponents of the restrictions did challenge their constitutionality during the floor debates.[37]

This section of the Note will examine the validity of these restrictions under the first amendment and the equal protection clause of the Constitution. Although the restrictions probably do not infringe the first amendment rights of legal services attorneys or their clients, a strong argument can be made that they violate the equal protection clause of the Constitution, as applied to the federal government through the fifth amendment due process clause.[38]

A. *The First Amendment Right to Litigate*

The LSCA restrictions may be attacked as directly infringing a right protected by the broad language of the first amendment. In

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> enough that the poor . . . have the legal right to slaughter an unknown person, but legal services activists want the Federal Government . . . to pay for the deed.

120 CONG. REC. H. 3967 (daily ed. May 16, 1974). The House, however, had no monopoly on inflammatory prose. Senator Bartlett, sponsor of the Senate version of the busing restriction, stressed the unpopularity of abortion at great length in supporting the restrictions.

> [Abortion] is anathema to a substantial portion of the American taxpayers.
>
> . . . .
>
> My amendment would prohibit legal services attorneys from involving themselves with abortion issues. . . . [I]t is obvious . . . that a substantial number of our citizens are opposed to abortion on demand.

120 CONG. REC. S 824-25 (daily ed. Jan. 30, 1974).

[36] Although at least one supporter of the busing restriction did cite statistics on the cost of busing litigation, compiled by Harvard's Center for Law and Education, an OEO legal services backup center, the statement was made not as a justification for the restriction but as an indication of how legal services attorneys had thwarted the popular will. *See* 120 CONG. REC. S 928 (daily ed. Jan. 31, 1974) (remarks of Senator Tower). Senator Tower's speech is representative of the tactic used by proponents of the restrictions:

> My concern is that the American taxpayers, *who have repeatedly shown their overwhelming opposition to forced busing*, have been paying $1.5 million in the last three years to . . . prosecute this case . . . . I can assure you the people of Texas will not stand for Federal funding of . . . forced busing.

Id. (emphasis added). Thus, Tower, the only Senator to mention the cost of funding a busing suit, did so not to point out that these funds could be allocated more rationally to other parts of legal services, but instead to indicate how legal services had been thwarting the popular will.

[37] Opponents of the restrictions made only a feeble effort in opposition; Representative Abzug did manage to suggest that the issues raised by the restrictions were of constitutional dimension. *See* 120 CONG. REC. H. 3957 (daily ed. May 16, 1974). In the one colloquy on constitutional issues that occurred during the debate over the restrictions, Representative Abzug raised the potential equal protection problems posed by the restrictions and noted that Congress, by enacting the restrictions, was continuing the discrimination against the poor which the bill sought to remedy. 120 CONG. REC. H. 3957 (daily ed. May 16, 1974). In replying to Representative Abzug, Representative Meeds, a supporter of the restrictions, brought up the standard argument in favor of any legislative classification. "[I]t is not a deprivation of constitutional rights for the Federal Government to put conditions on the expenditure of its funds." 120 CONG. REC. H 3957 (daily ed. May 16, 1974).

[38] *See* Bolling v. Sharp, 347 U.S. 497 (1954).

NAACP v. Button,[39] for example, the Supreme Court held that a state could not forbid the plaintiff civil rights organization from hiring staff attorneys to represent both members and nonmembers of the association in civil rights litigation.[40] The Court stated that members of the NAACP had a right to associate in order to foster common goals and that this first amendment right was threatened by the challenged regulations.[41] One of the techniques for achieving these common goals was litigation; hence, for the state to infringe the right of the NAACP to litigate was in effect state infringement upon the right to associate. The state's undoubted power to regulate the conduct of attorneys[42] was subordinate to the plaintiff's first amendment rights.[43] Moreover, subsequent Supreme Court cases have struck down state restrictions on group legal service plans, even though the groups sponsoring such plans did not use litigation as a vehicle for fostering political goals.[44]

Although *Button* indicates that groups affected by the LSCA restrictions would have the right to organize private legal assistance programs to litigate abortion cases,[45] the holding does not suggest

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[39] 371 U.S. 415, 433-38 (1963).

[40] *Id.* The Virginia statute under consideration by the Court forbade attorneys from accepting employment by any organization that was neither a party to litigation nor pecuniarily interested in the outcome of the litigation. VA. CODE ANN. §§ 54-74, -78, -79 (1958), *as amended*, (1974).

[41] 371 U.S. at 429-31.

[42] The Court noted that the state's interest in regulating the solicitation of business by an attorney was designed to prevent champerty and barratry and thus to prevent misuse of legal process. This interest, the Court reasoned, was not served by the statute. 371 U.S. at 439. The Court argued that "[r]esort to the courts to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private gain." 371 U.S. at 443.

[43] The Court found the Virginia statute to be potentially stifling of all litigation brought to vindicate the civil rights of black people, since it made effective advocacy of civil rights cases difficult, if not impossible. The Court stressed that civil rights cases were "unpopular" in Virginia and that the petitioner's activity was one way of making the advocacy of civil rights litigation "meaningful." 371 U.S. at 434-38.

[44] *See, e.g.*, United Transp. Workers Union v. State Bar of Michigan, 401 U.S. 576 (1971); UMW v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R. R. Trainmen v. Virginia, 377 U.S. 1 (1964). These three cases, unlike *Button*, stressed the freedom of association issues inherent in group legal service plans and downplayed the free speech aspects of the right of a group to hire or recommend attorneys for its members. Thus, in the *Trainmen* case the Court noted: "Laymen cannot be expected to know how to protect their rights . . . and for them to associate together to help one another to preserve and enforce rights granted them . . . cannot be condemned as a threat to legal ethics." 377 U.S. at 7. This problem of deciding whether free speech or associational rights are involved in the right to hire an attorney or to litigate to express one's political beliefs is especially important when, as in the legal services restrictions, legislative restrictions do not touch the right of groups to litigate, but do affect the right of free speech of individual clients and attorneys.

[45] Just as the NAACP had the right to hire attorneys to handle desegregation cases, so, under *Button*, a state could not restrict the right of a women's organization to hire attorneys for

that the right to litigate civil cases encompasses the right to have an attorney provided by the government. Nevertheless, by relying on dicta in *Button*, an argument against the LSCA restrictions might be tenuously constructed.

The *Button* majority rejected Virginia's argument that since individual plaintiffs could vindicate their constitutional rights through the use of non-NAACP counsel, a state could forbid the hiring of attorneys by a group. Justice Brennan, for the majority, wrote that NAACP counsel were necessary to make the plaintiffs' right to litigate "meaningful,"[46] since private attorneys in Virginia were reluctant to take civil rights cases.[47] The majority also noted that litigation was a form of "political expression"[48] for the NAACP.

From this reasoning, two potential lines of first amendment attack on the LSCA restrictions could be advanced. First, if litigation is a form of political expression protected by the first amendment, it should include protection of an attorney's right to express his own political beliefs through litigation. Thus restrictions on the attorney's right to use litigation for political ends would run afoul of first amendment protection.[49] Second, if a client's right to litigate in-

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women seeking abortions. *Button, Trainmen,* and *Mine Workers* clearly establish the right to group legal services if they establish nothing else. *See, e.g.,* Bodle, *Group Legal Services: The Case for BRI,* 12 U.C.L.A.L. REV. 306 (1965); Zimroth, *Group Legal Services and the Constitution,* 76 YALE L.J. 966 (1967).

[46] Justice Brennan, writing for the Court, stated: "Chapter 33 . . . prohibits every cooperative activity that would make advocacy of litigation meaningful." 371 U.S. at 437-38. *See also* United Transp. Workers Union v. State Bar of Michigan, 401 U.S. 576 (1971). In *Transportation Workers,* the Court also spoke of "collective activity undertaken to obtain meaningful access to the courts" as being protected. 401 U.S. at 585.

[47] 371 U.S. at 443.

[48] In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality. . . . It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.

Id. at 429.

Justice Brennan's cryptic reference to litigation as a form of political expression led the Illinois Court of Appeals to hold that group legal services were only protected when the group hiring the attorney had political objectives. But the Court refused to limit *Button* in such a manner in UMW v. Illinois Bar Ass'n, 389 U.S. 217, 221 (1967), where Justice Black, writing for the Court, suggested that rights to assemble peacefully and to petition for redress of grievances were implicated in group legal services cases. 389 U.S. at 222. Exactly *whose* right of free expression—that of a group or that of an individual member of a group—is infringed by restrictions on the hiring of an attorney is not made clear in the *Button* line of cases. The issue is further complicated by the statement in *Transportation Workers* that "[t]he common thread running through our decisions . . . is that *collective* activity undertaken to obtain meaningful access to the courts is a fundamental right . . . ." 401 U.S. at 585 (emphasis added).

[49] This argument rests on the assumption that in some cases, especially those involving controversial issues such as busing or abortion, an attorney is both an advocate for his client and a spokesman for the cause he advocates. This reasoning involves an acceptance of the

cludes the right to a competent advocate, then arguably prohibiting a client from choosing a legal services attorney in abortion or desegregation cases would deny him the "most meaningful representation"[50] and would infringe upon his first amendment right to litigate.[51]

An argument premised on the unqualified right of an attorney to bring political cases, however, faces three strong objections. First, assuming that such a right does exist, Congress has not encroached upon that right in the LSCA. LSCA-employed attorneys are arguably free to bring suits of their own choosing so long as federal funds are not expended on such efforts.[52] No court has held that Congress

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uneasy assumption that the lawyer must and will use the courtroom as the forum for a political statement—that in fact the lawyer in his decision to take certain types of cases is making a political statement. Thus, it is argued, if the client has a right to use courtrooms for political expression, and if that right cannot be infringed by state action under *Button*, then similarly a lawyer's right to use his skills of advocacy on one side of a controversial issue is also a form of political expression that cannot be infringed by state action. This is especially true when the limitations deprive a lawyer of his opportunity to make a statement through advocacy on one side of a controversial legal issue. This argument has been advanced by a legal services attorney who is challenging the LSCA restriction of picketing on behalf of a client. *See* note 17 *supra*.

For a discussion of the lawyer as a political advocate, see Clark, *Lawyers in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary?*, 19 KAN. L. REV. 459 (1971); Dorsen, *Role of the Lawyer in America's Ghetto Society*, 49 TEXAS L. REV. 50 (1970); Lyman, *State Bar Discipline and the Activist Lawyer*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 235 (1973); Note, *Rebel With A Cause: The Movement Lawyer in the Criminal Courts*, 2 AM. J. CRIM. L. 146 (1973). The latter Note suggests that whatever the traditional view of the lawyer's role, many activist attorneys perceive themselves to be political advocates rather than neutral counsellors. For the more traditional view of the lawyer's role, see A.B.A. CANONS OF PROFESSIONAL ETHICS No. 17, where the drafters pointedly note: "Clients, not lawyers, are the litigants." *See also id.* No. 10.

[50] Any argument along this line must again rest on the assumption that the "meaningful advocacy" spoken of in *Button* and *Transportation Workers* is a personal right implied from the right of free speech, and not a group right incident to the right of free association. *See* note 46 *supra*. If there is only a *group* right to band together toward the end of achieving meaningful advocacy, it is difficult to argue that the *individual* client has a right to choose his own attorney. Perhaps the strongest language supporting an individual's right to litigate with the lawyer of his choice in civil matters is contained in Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964), where the Court wrote: "A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress . . . ." 377 U.S. at 7.

[51] This argument avoids the difficult problem of arguing that the Constitution guarantees a civil litigant the right to counsel. *See* notes 57-58 and accompanying text *infra*. Rather, one could argue that although government need not provide counsel to civil litigants, once counsel is provided the government may take no action infringing the lawyer's right to use the courtroom for political expression or the client's right to choose a legal services lawyer to handle his case.

[52] Although the restrictions on abortion and desegregation cases relate only to the expenditure of corporation funds on such suits, other restrictions may operate to limit the ability of an attorney directly employed, or whose salary is partially funded by the Corpora-

must fund the free speech activities of citizens,[53] although such funding may itself be permissible under the first amendment.[54] Second, it can be argued that *Button* held that the right to litigate was incidental only to the client's right of association and not to the client's right of free speech.[55] Because a client's right of association is not affected by the LSCA restrictions, no constitutional objection can be made on this basis. The group legal service cases following *Button* strengthen this line of analysis.[56] Third, although it may be conceded that a client has a first amendment right to litigate to express his political views, a strong argument exists against extending such protection to attorneys. Any political expression made in the course of litigation is the client's; the attorney is not party to a suit and acts only as his clients representative. If the first amendment does protect speech through litigation, it would seem that the speech protected is the client's and not the attorney's.

An argument premised on the client's right to unlimited choice of attorney in civil actions is also weak because it depends upon the assumption that there is a broad right to counsel in civil cases. Although scholars have argued that such a right ought to exist,[57] no

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tion, to take such suits on his own time. For instance, 42 U.S.C. § 2996f(a)(4) (Supp. IV, 1974) provides that full-time staff attorneys may take uncompensated outside cases only as authorized in guidelines promulgated by the Corporation. Should the Corporation issue restrictive guidelines, staff attorneys might be restrained from taking abortion or desegregation cases on their off-duty hours, even if they did not charge a fee. Similarly, *id.* § 2996i(c) provides that grantees shall not spend any nonfederal funds for a "purpose prohibited by this subchapter," although grantees are allowed to make "other arrangements with private attorneys [and] private law firms" for the provision of otherwise prohibited services. Two questions are raised by this section of the Act. First, do the abortion and desegregation restrictions on the spending of federal funds make the taking of an abortion or desegregation case a "purpose prohibited by the Act"? Second, would a shared-time arrangement between a grantee and a local law firm allowing an attorney employed by the grantee to take abortion and desegregation cases on the private firm's time fall within the exception to the proviso in *id.* § 2996i(c)? To date no clear cut answers are apparent.

[53] An exception to the general rule that the first amendment does not require the government to promote all forms of speech equally is found in the field of broadcast regulation, where the Supreme Court has held that a licensee of the Federal Communications Commission may be required to give equal time to all political points of view. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). In general, however, the first amendment is a restriction on government and not a positive command to actively promote free speech. *Cf.* Avins v. Rutgers University, 385 F.2d 151 (3d Cir. 1967), *cert. denied,* 390 U.S. 920 (1968) (held right to free speech does not imply that state university must accept all articles submitted to law review).

[54] In Buckley v. Valeo, 96 S. Ct. 612 (1976), the Court held that the government could distribute funds to political candidates on a nondiscriminatory basis without violating the first or fifth amendments. *Id.* at 672-77. The Court noted, however, that such funding was not required by the first amendment. *Id.* at 672-73.

[55] *See* note 50 *supra.*

[56] *See* notes 44-45 *supra.*

[57] For an effective argument that whatever the constitutional underpinnings for a right

court has yet so held.[58] Consequently, there is no basis for requiring that Congress make a full range of legal services available to indigents where criminal litigation is not involved. Moreover, the right to meaningful advocacy was linked by the *Button* court to the right of association.[59] Since no associational rights are infringed by the LSCA restrictions, no authoritative first amendment basis for challenging the restrictions exists.

B. *An Equal Protection-Due Process Analysis*

1. *Two-Tiered Analysis*

There is a two-step inquiry in any traditional equal protection-due process analysis of a legislative classification. First, does the classification discriminate against a suspect class of citizens[60] or deprive any group of fundamental rights?[61] If the answer is affirmative,

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to counsel are, there ought to be, as a matter of good social policy, court-appointed counsel in civil cases, see O'Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach,* 28 OHIO ST. L. J. 1 (1967).

[58] For examination of the right to counsel in habeas corpus hearings see Flowers v. Oklahoma, 356 F.2d 916 (10th Cir. 1966); Dorsey v. Gill, 148 F.2d 857 (D.C. Cir.), *cert. denied,* 325 U.S. 890 (1945); United States *ex rel.* Duchin v. Follette, 251 F. Supp. 1006, 1009 n.7 (S.D.N.Y. 1966). Each court concluded that counsel need not be provided because habeas corpus is a civil, rather than criminal proceeding.

[59] 371 U.S. at 431-45.

[60] The criteria by which a classification becomes suspect have never been fully explained by the Supreme Court. For a definition of some indicia of "suspectness," see Justice Brennan's opinion in Frontiero v. Richardson, 411 U.S. 677, 678-91 (1973). There, speaking for four members of the Court, Justice Brennan asserted that sex is a suspect classification. The nation's "long and unfortunate history" of discrimination based on sex, "an immutable characteristic determined solely by the accident of birth," was analogized to race and nationality. *Id.* at 684, 686. Since classifications based on the latter factors are clearly suspect, Justice Brennan reasoned that sex is also a suspect class.

This opinion provides some guidance in explaining the factors that unite the groups that have been found to be suspect classes; it provides little instruction, however, as to why some groups that have suffered from historic discrimination based solely upon some immutable characteristic have not been included in the suspect category. Justice Brennan made a convincing argument that women have been victims of past discrimination based solely on the immutable characteristic of sex; yet he failed to persuade a majority of the court that sex is a suspect classification. Therefore, the only clear statement that can be made is that certain classifications have been held suspect. The clearest suspect classification is one based on race. *See, e.g.,* Norwood v. Harrison, 413 U.S. 455 (1973); McLaughlin v. Florida, 379 U.S. 184 (1964). Alienage is also a suspect class. *See, e.g, In re* Griffiths, 413 U.S. 717 (1973); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948).

[61] The Supreme Court, in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1972), severely restricted the definition of fundamental right, at least for purposes of applying strict scrutiny to a governmental classification ostensibly infringing these rights. The Court held: "[T]he key to discovering whether education is 'fundamental' . . . lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." 411 U.S. at 33-34. Thus, the Court attempted to distinguish, however roughly, between benefits such as education, and rights such as free speech; only the latter category of rights,

a court will apply strict scrutiny to the classification and demand that the government show a compelling state interest to support the discriminatory scheme.[62] Second, if the answer to the first inquiry is negative, a court will inquire whether or not the classification has a rational basis and serves some legitimate governmental purpose.[63]

An argument can be made in favor of adopting a strict scrutiny standard of review in assessing the constitutionality of the LSCA restrictions. Certainly, one can argue that the abortion restrictions exact a penalty for the assertion of a fundamental right, and hence should be subjected to strict scrutiny under the doctrine of *Shapiro v. Thompson.*[64] This line of analysis has been followed in cases where

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those explicitly or implicitly mentioned in the Constitution, were held fundamental. Therefore, only a classification that infringed the latter category of rights was subject to strict scrutiny. The analysis of the *Rodriguez* Court is not, however, the only method of approaching cases involving infringement upon an interest that does not achieve fundamental status. *See* note 73 *infra.*

[62] *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1968). In *Shapiro,* Justice Brennan outlined in classic fashion the first test in the two-tiered equal protection analysis: "[A]ppellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." 394 U.S. at 634 (emphasis in original).

The compelling state interest test referred to in *Shapiro* is almost impossible to satisfy. *See, e.g.,* Welford v. Battaglia, 485 F.2d 1151 (3d Cir. 1973); Cianciolo v. City Council, 376 F. Supp. 719 (E.D. Tenn. 1974); Barnes v. Michigan Veterans Trust Fund, 369 F. Supp. 1327 (W.D. Mich. 1973). The one striking exception is that in time of war the Court has held military necessity to outweigh the interests of a suspect class whose rights had been violated. Korematsu v. United States, 323 U.S. 214, 216 (1944) (detention of Japanese justified by wartime exigencies). *Korematsu* has a deservedly bad reputation because of the violations of civil liberties tolerated by the Court in the name of military necessity. Paradoxically, *Korematsu* was the forerunner of the suspect class-compelling interest line of equal protection analysis.

[63] The rational basis test is grounded in notions of due process as well as in notions of equal protection. Under traditional criteria developed by the Court, however, the rational basis test is easily satisfied. Justice Brennan, in Katzenbach v. Morgan, 384 U.S. 641 (1966), noted that for the Court to find a rational basis for a congressional enactment it need only "be able to perceive a basis upon which the Congress might resolve the conflict as it did." *Id.* at 653. Clearly, a court could "perceive a basis" for almost any congressional act.

[64] In Shapiro v. Thompson, 394 U.S. 618 (1969), the Court dealt with a Connecticut statute that denied welfare benefits to those who had lived in Connecticut for less than a year before applying for such benefits. The Court struck down the statute on the grounds that its purpose was to deter migration of people into the state and that no justification offered by the state was sufficient to save the statute. The Court held that "any classification which serves to penalize the exercise of [the] right [to travel]" is invalid unless a "*compelling* governmental interest" is shown to justify the classification. 394 U.S. at 634 (emphasis in original). The Court, however, significantly retreated from *Shapiro* in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973). *See* note 61 *supra.* Moreover, one can read U.S.D.A. v. Moreno, 413 U.S. 528 (1973), as limiting the scope of *Shapiro* to those cases involving direct infringement on constitutional rights. In *Moreno,* the classification indirectly infringed rights of association, but the Court considered the case in terms of a sliding-scale equal protection analysis. *See* note 73 *infra.* This interpretation of *Moreno* finds support in the concurring opinion of Justice Douglas, who analyzed the case under the compelling state interest standard of *Shapiro.* 413

Medicaid restrictions on the funding of abortions have been struck down.[65] One can also argue that the desegregation restrictions involve a racial classification, and hence discriminate against a suspect class.[66]

There are several difficulties with this analysis. Although the adoption of a strict scrutiny standard would almost certainly result in striking down the restrictions, recent Supreme Court cases have indicated that a different standard of review will be applied to cases where the infringement on a right is indirect rather than direct.[67] Moreover, the ban on desgregation suits, although singling out a class of litigation of special interest to racial minority groups, is grounded in a legislative history that shows no hostility to these groups per se, but rather shows a hostility to the busing remedy for desegregation.[68] Nevertheless, the arguments in favor of applying a strict scrutiny standard are defensible.[69]

U.S. at 545. This Note concludes that these restrictions fail no matter what standard of review is applied. The Court, however, does seem to be retreating from the broad language of *Shapiro.*

[65] *See* Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1974); Doe v. Rose, 499 F.2d 1112 (10th Cir. 1974); Doe v. Westby, 402 F. Supp. 140 (W.D.S.D. 1975). The Medicaid restrictions, however, directly infringe upon the right to abortion, since women are denied funds for abortions. The LSCA restrictions are more indirect, since they merely deny a woman funds for a lawyer to assert her right to an abortion. Of course, if her legal claim is invalid, she may have no right at all. Thus, the LSCA restrictions interfere with the exercise of fundamental rights, although they do not directly restrain the exercise of these rights. In any event, the courts in the Medicaid abortion cases, although applying a strict scrutiny test to the restrictions, also decided in each case that the Medicaid restrictions failed to meet a rational basis test.

[66] *See* note 60 *supra* and cases cited therein.

[67] *See* note 64 *supra.*

[68] *See* note 36 *supra.*

[69] Courts have been willing to find that a classification is directed at racial minority groups in fact, even where on the face of the statute no discrimination is apparent. See, e.g., Hunter v. Erickson, 393 U.S. 385 (1969), in which the Court found that an amendment to a city charter requiring voter approval of a fair housing ordinance unconstitutionally discriminated against racial minority groups, since it singled out "laws to end housing discrimination based on 'race, color, religion, national origin or ancestry' " to run the gauntlet of voter approval. *Id.* at 390. The Court added, however, that

> although the law on its face treats Negro and white . . . in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination.

Id. at 391. Thus, *Hunter* may be read as holding that, at least in matters of race, the Court will go beyond the nondiscriminatory words of a statute to examine its impact on minority groups. On the other hand, in James v. Valtierra, 402 U.S. 137 (1971), the Court upheld a law mandating a referendum on low-rent public housing projects, finding that the law was not, on the record, aimed at racial minority groups. The LSCA restrictions on taking desegregation suits are more closely analagous to *Hunter;* however, the government could argue that the statutory classification does not directly infringe on the rights of blacks in particular, since both whites and blacks are forced to use private attorneys in desegregation cases. And, using *James,* the government could argue that nothing in the legislative history of the LSCA shows a

Clearly, no other suspect class is discriminated against by the LSCA restrictions. Even if one were to make the questionable assumption that indigents are such a class,[70] it is evident that the LSCA restrictions do not make an invidious discrimination based on indigence. The LSCA confers no benefit on the rich that is denied to the poor, nor does it involve any state-imposed barrier to the poor's enforcing their right to an abortion or to attend desegregated schools.[71] Rather, the distinctions drawn by the statute are based on the type of case involved. All individuals similarly situated are treated alike; both rich and poor must rely on private counsel to vindicate their right to abortion and to attend desegregated schools. Must the restrictions, therefore, be judged solely in light of an easily satisfied rational basis test? Under traditional equal protection analysis, the answer would be yes and the outcome almost certain.[72]

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congressional desire to single out blacks for unfair treatment. Therefore, the statutory classification is racially neutral.

[70] Although the Supreme Court has given some past indication that indigence may he categorized as a "semi-suspect" class (*see, e.g.,* Boddie v. Connecticut, 401 U.S. 371 (1971); Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963)), these cases involved either the imposition of filing fees as a condition of access to the courts, or the denial of free transcripts or attorneys to indigents in cases where appeals were provided of right. Thus, the Court has been willing to examine classifications based on wealth under a strict scrutiny test only when other rights were denied by the classification. In addition, notions of due process have been invoked together with equal protection arguments. In *Boddie,* the Court noted that the state's filing fee denied indigents "an opportunity to be heard." 401 U.S. at 380. In United States v. Kras, 409 U.S. 434 (1973), however, the Court limited the application of the *Boddie* decision, and rejected challenges to a bankruptcy filing fee on both equal protection and due process grounds. *Id.* at 446-50. Finally, in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court held that one challenging a statute on wealth discrimination grounds must meet two threshold tests before the Court will consider such a challenge. Individuals discriminated against on the basis of wealth must be "completely unable to pay for some desired benefit, and as a consequence, they [must have] sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Id.* at 20. Moreover, the Court held that indigents must show that a classification discriminates "against a class of definably 'poor' persons" before an equal protection challenge may be made. *Id.* at 22.

[71] Thus, an indigent challenging the statute will not be able to show that the statute discriminates against a class of poor persons, since the essence of discrimination for 14th amendment purposes is state action conferring a benefit, directly or indirectly, on one class of persons while denying it to another suspect class. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 20-22 (1973). The rich have no benefit conferred upon them by the LSCA that is denied to the poor, nor does the statute impose a barrier against the poor's access to the courts, as did the filing fees struck down in other wealth discrimination cases. *See* note 70 *supra.* Both rich and poor have an equal right to litigate their abortion and desegration claims; any disparities in the ability to litigate those claims is based not on state-imposed discrimination, but rather on the disparities in wealth resulting from private economic realities.

[72] If a court need only "perceive a basis" for the restrictions, the government could easily argue that Congress might have found that the restrictions are necessary to allocate resources, or to prevent fraud. The allocation of resources argument would be particularly

2. *Sliding-Scale Analysis*

A few recent cases, however, suggest that the two-tiered analysis of equal protection-due process is not the only test that a legislative classification must meet. Rather, the Supreme Court has suggested that in certain instances a sliding-scale equal protection analysis will be applied to legislative classifications.[73] Under this test, the interest

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effective, since the Supreme Court has long recognized the need for legislative discretion in allocating social benefits. Thus, in Dandridge v. Williams, 397 U.S. 471 (1970), the Court noted that when economic and social legislation "not affecting freedoms guaranteed by the Bill of Rights" is before the Court, it will grant the legislature wide latitude in allocating such benefits. *Id.* at 484.

[73] The origins of the new equal protection-due process analysis are uncertain. Notions of substantive due process are certainly emerging from recent Supreme Court scrutiny of legislative classifications, but it is not clear whether this new substantial interest test is rooted in the due process or the equal protection clause. In the case of a federal statute, of course, only the due process clause of the fifth amendment is at issue.

The current introduction of a third level between the strict scrutiny and rational basis tests began in the sex discrimination area. In Reed v. Reed, 404 U.S. 71 (1971), the Supreme Court struck down an Idaho statute that gave automatic preference to men in appointment as administrators of decedents' estates. Chief Justice Burger, writing for the Court, used the rational basis test as propounded by the Court in Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), to invalidate the classification. *Id.* at 75-77. In *Royster*, the Court struck down an economic regulation because it violated substantive due process, holding that a classification must rest "upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 253 U.S. at 415. This substantive relationship test has subsequently become the Court's mode of analysis in sex discrimination cases. *See, e.g.,* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

The substantial relation test was more fully articulated in Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), a case involving discrimination against illegitimates. Justice Powell, writing for the Court, attempted to redefine the Court's treatment of the equal protection clause in interest-balancing terms:

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed . . . . The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

Id. at 172-73 (citations omitted). Justice Powell then showed that the classification bore no "significant relationship" to a valid state goal. *Id.* at 175. This test of significant or substantial relationship between legislative ends and means where fundamental interests are involved has now become the preferred mode of analysis in cases where illegitimates are involved. *See, e.g.,* Jimenez v. Weinberger, 417 U.S. 628 (1974).

In a related line of procedural due process cases, the Court has also engaged in interest balancing when the right to a hearing prior to deprivation of some benefit is involved. *See, e.g.,* Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974). Justice White, concurring in Vlandis v. Kline, 412 U.S. 441 (1973), applied the equal protection interest-balancing test to a due process case when he wrote:

> [I]t must now be obvious . . . [that] as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.

Id. at 459.

The sliding-scale test has also been applied in a situation where legislative history put the Court on notice that an otherwise justifiable classification was used to punish those who

of the plaintiff infringed by a legislative classification will be balanced against the state interest served by the classification.[74] As the classification begins to affect some fundamental right, or discriminate against a group having some indicia of a suspect class,[75] the Court will demand that the government show the classification serves a substantial governmental interest. This test then becomes stricter than the rational basis test, but less onerous than the compelling state interest test, because the government need only demonstrate a substantial interest. Should the sliding-scale analysis be applied to the LSCA restrictions? This Note argues that it should and that under such analysis the restrictions must fall.

The LSCA restrictions create two classes of otherwise eligible legal services clients and deny benefits to one class solely on the basis of the type of case. In *U.S.D.A. v. Moreno*,[76] the Court considered a legislative classification that discriminated among otherwise eligible food stamp beneficiaries solely on the basis of their living arrangements. *Moreno* and the LSCA restrictions make analogous classifications. Moreover, a similar legislative purpose prompted the enactment of both sets of classifications. *Moreno*, therefore, furnishes an appropriate touchstone for analyzing the LSCA restrictions. The case also illustrates the type of analysis undertaken in sliding-scale equal protection challenges.[77] In *Moreno*, the Court considered a

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asserted fundamental rights. *See* U.S.D.A. v. Moreno, 413 U.S. 528 (1973). Although the contours of the new equal protection-due process analysis are not yet clear, Justice Marshall, dissenting in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1972), best expressed the direction the Court is likely to take in future cases:

> The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific [guarantee and interest] . . . draws closer . . . the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

Id. at 102-03. The nature of the inquiry the Court makes when faced with an equal protection problem has significantly shifted in these new cases. In place of the old question concerning the suspectness of a class or the fundamental nature of a right, the Court now inquires into the interests of both plaintiff and government. This weighing of the interests determines the burden both government and plaintiff must meet in litigating the validity of a classification.

Whatever the future of the new due process-equal protection interest-balancing test, it is important to note that it potentially substitutes the Court's judgment for that of the legislature in cases where traditional equal protection analysis would defer to the legislative decision.

[74] *See* U.S.D.A. v. Moreno, 413 U.S. 528 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). Women and illegitimates seem to be in this category. The Court, however, has never held that women are a suspect class for equal protection purposes. *See* Frontiero v. Richardson, 411 U.S. 677 (1973). But statutory distinctions based on sex have in recent years repeatedly been struck down. *See* note 73 *supra*.

[75] *See* note 60 *supra*.

[76] 413 U.S. 528 (1973).

[77] *See* note 73 *supra*.

classification made in the food stamp program[78] between unrelated persons living in a single household and related persons similarly situated. The Court examined the legislative history of the classification and found that the enactment was designed to punish "hippie communes."[79] The Court held that this legislative purpose, standing alone, was impermissible, since it punished individuals for exercising their rights to association and to privacy.[80] Thus, although the classification did not directly deny the hippie his fundamental right of association, it indirectly punished him for exercising that right by denying him a benefit. *Moreno* is therefore a classic case of indirect infringement on a fundamental right. The legislative history of the LSCA indicates that the only rationale for enacting the challenged restrictions was to punish those who assert their fundamental right to privacy, since the right to abortion derives from the right of privacy, and to desegregated education.[81] On this first level, then, *Moreno* and the LSCA restrictions stand on similar ground, since in both cases those who attempt to assert a fundamental right are punished by the denial of a benefit to which they would otherwise be entitled.

Faced with a legislative history revealing an impermissible purpose affecting a fundamental right, the *Moreno* Court examined the Food Stamp Act to see if some other permissible goal set forth in the Act was served by the classification. After a lengthy analysis, the Court concluded that no such goal was served.[82] The LSCA restrictions also fail to serve any of the Act's broader stated purposes.[83]

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[78] The section of the Food Stamp Act before the Court was 7 U.S.C. § 2012(e) (1970).

[79] 413 U.S. at 534.

[80] *Id.* at 533-38. Although the majority did not make clear the connection between the interests that were infringed by the classification and the lack of a legitimate governmental purpose, Justice Douglas, in his concurring opinion, noted that the classification rode "roughshod" over the rights of association and privacy, and thus failed to pass constitutional muster under a strict scrutiny test. *Id.* at 543-44. Nevertheless, the majority opinion stressed that "hippies" were being *indirectly* punished for the exercise of their political rights; hence, from the majority opinion one can conclude that even if fundamental rights are not directly infringed, indirect restraint for the purpose of punishing the exercise of those rights is an impermissible governmental activity.

[81] *See* notes 35-37 *supra.*

[82] The Court noted that the goals of the Food Stamp Act could be found in the congressional declaration of policy prefacing the Act. Examined in light of those purposes, the Court found that the classification before it was "irrelevant" to an achievement of the goals. 413 U.S. at 534. *See* note 88 *infra.*

[83] 42 U.S.C. § 2996 (Supp. IV, 1974) sets forth the purposes of the Legal Services Corporation Act. The statement of legislative purpose reads in pertinent part as follows:

> The Congress finds and declares that—
>
> (1) there is a need to provide equal access to the system of justice . . .
>
> (2) there is a need to provide high quality legal assistance to those who would be otherwise unable to afford [it] . . .

The classifications do not further the LSCA's stated goal of providing high quality legal service to the poor, since the poor are in fact denied legal service under the restrictions.[84] Nor do the restrictions serve to affirm the faith of the poor in a government of laws,[85] since they are denied government-provided counsel in cases involving rights held to be fundamental.[86] Finally, even if Congress could legitimately attempt to depoliticize legal services, it is clear that Congress could not do so by penalizing those attempting to assert unpopular rights in court.[87]

The *Moreno* Court also analyzed the classification before it in light of other governmental goals not stated in the Food Stamp Act but nevertheless served by the classification. The Court concluded that the government had not shown that such classification substantially served any governmental interest and therefore held the classification invalid under the due process clause of the fifth amendment.[88]

Going beyond the stated purposes of the LSCA, the government could argue that the classification drawn by the LSCA between

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(3) providing legal assistance to those who face an economic barrier . . . will serve best the ends of justice;

(4) for many of our citizens the availability of legal services has reaffirmed faith in our government of laws;

(5) to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and

(6) attorneys providing legal assistance must have full freedom to protect the best interests of their clients.

The legislative purposes can be broken down into three distinct sets. First, the major purpose of the Act is to provide legal assistance to the poor, and to provide attorneys with the resources to defend indigents denied access to the courts. Second, the Act seeks to use legal services as a method of reaffirming poor people's faith in government. Third, the Act seeks to depoliticize the legal services program.

[84] *See* notes 24-28 *supra.*

[85] *See* note 83 *supra.*

[86] *See* notes 64-65 and accompanying text *supra.*

[87] *See* notes 79-80 *supra.*

[88] The Court analyzed the supposed relationship between the statute and the governmental interest in preventing fraud, holding that "in practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud. . . . [T]wo *unrelated* persons living together and meeting all . . . conditions [of the statute] would [be] . . . ineligible." 413 U.S. at 537 (emphasis in original). The Court then noted that a simple alteration in living arrangements would make the parties eligible; hence, the government could be easily defrauded despite the regulation. The Court professed to be analyzing the *Moreno* fact pattern under a traditional rational basis test. *Id.* at 538. It refused, however, to accept government assertions of the rationality of the statutory classification at face value; instead, it undertook an extensive inquiry into actual congressional purposes, which it found to be illegitimate. This searching inquiry into the relationship between purpose and classification is much closer to the type of analysis undertaken in Reed v. Reed, 404 U.S. 71 (1971), than it is to the perfunctory examination undertaken in traditional rational basis cases such as Katzenbach v. Morgan, 384 U.S. 641 (1966).

abortion or desegregation cases and other types of litigation serves the legitimate goal of resource allocation. Although this might be an effective argument, recent case law suggests that it would fail in the LSCA context. In *Jimenez v. Weinberger*,[89] the Court considered a legislative classification that granted benefits to some illegitimates while denying benefits to others. The Court invalidated the classification on the grounds that it was irrational and without sufficient justification under a sliding scale equal protection analysis; the potential for costly claims was as great among the class granted benefits as among the class denied benefits, and the government failed to demonstrate any other significant basis for the classification. The Court distinguished *Jimenez* from *Dandridge v. Williams*[90] on the ground that *Dandridge* involved a significant cost savings to the state, while in *Jimenez* no such clear-cut savings could be demonstrated.[91]

The LSCA also creates two classes of individuals whose potential for costly claims is identical. But a client with a costly consumer claim is given assistance, while a client with an inexpensive abortion claim is not. Moreover, the Court noted in *Jimenez* that a resource allocation rationale would validate a classification only if the government could demonstrate that significant dilution of benefits would result from invalidation of the classification.[92] In light of legal

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[89] 417 U.S. 628 (1974).

[90] In Dandridge v. Williams, 397 U.S. 471 (1970), the Court noted that when economic and social regulation "not affecting freedoms guaranteed by the Bill of Rights" is before the Court and challenged on due process grounds, the Court will be willing to allow the states wide latitude in making choices among categories of potential beneficiaries. *Id.* at 484. *Dandridge*, however, is distinguishable from the LSCA situation on two grounds. First, the interest of the plaintiffs in *Dandridge* was purely an economc one; they felt that they had been improperly denied money by the state. In the case of the LSCA restrictions, however, fundamental rights of privacy and equal protection in schooling are at least threatened, and in such a situation the Court must balance the legitimate interests of the state against the potential denial of fundamental rights. The strength of interests opposing the LSCA restrictions indicates that *Dandridge* may not be in point. Second, in Jimenez v. Weinberger, 417 U.S. 628 (1974), the Court pointed out that *Dandridge* required the government to show evidence that allowing appellants to receive benefits would "significantly impair the federal Social Security trust fund and necessitate a reduction in the scope of persons benefited by the Act." *Id.* at 633. *Jimenez* therefore indicates that the government must show not only that finite resources must be rationed, but that the classifications made in rationing significantly serve that end. For an argument that the LSCA restrictions do not significantly serve to allocated resources see note 92 *infra*.

[91] 417 U.S. at 632-34.

[92] *Id.* at 633. For example, there is no evidence in the LSCA legislative history to indicate that the types of cases that Legal Services attorneys cannot take are extraordinarily costly. Even if such a rationale were advanced, it does not appear that the government could demonstrate that these restrictions, if they were lifted, would "significantly impair" the service provided to other legal aid clients. *Id.* at 634. These actions might often be handled by other organizations with greater expertise in these matters. For a list of 31 school desegregation

services provided by private organizations in abortion and desegration cases,[93] it appears unlikely that abortion and desegregation cases would flood legal services offices should the LSCA restrictions be invalidated. Thus, the inclusion of abortion and desegregation cases within the scope of LSCA coverage would not result in a substantial decrease in benefits to LSCA beneficiaries having nonabortion or nondesegregation claims.[94] Because fundamental rights are affected by the LSCA restrictions, and because the Court would therefore demand that the government show a significant governmental interest to support the classification, the LSCA classifications should be invalidated.

III

POLITICAL RESTRICTIONS ON LEGAL SERVICES ATTORNEYS[95]

A. *Section 2996f(a)(6)*

The principal LSCA provision limiting the political activities of legal services attorneys, section 2996f(a)(6), provides that the Corporation shall

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cases taken by the NAACP Legal Defense Fund in Virginia between 1954 and 1962 see NAACP v. Button, 371 U.S. 415, 435 n.16 (1963). The litigative activity of women's and civil rights groups is well known; thus, even if the restrictions were lifted, the legal services system would probably not be overburdened with these cases.

Moreover, even if it could be shown that certain desegregation or abortion cases are costly, the Act does not exclude other costly cases. The Act does not divide the classes of cases along rational lines of costly cases, which cannot be taken, and routine cases, which may be taken. Rather, the distinction is arbitrarily drawn between politically unpopular cases, which may or may not be costly, and all other cases, which also may or may not be costly. Thus, in practical effect, the statute creates an arbitrary distinction that has little or no relationship to the allocation of resources rationale often advanced to support statutory restrictions. Unlike the legislative classification upheld in *Dandridge,* which imposed a ceiling on welfare benefits and thus resulted in a real cost saving to the state, the restrictions of the LSCA do not clearly serve to place upper limits on Corporation expenditures for litigation. This distinction, like the distinction between legitimates and illegitimates invalidated in *Jimenez*, will "discriminate between the two subclasses . . . without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses." 417 U.S. at 636.

[93] For instance, counsel hired by the NAACP Legal Defense Fund are experienced in the intricacies of desegregation law. Because of their special commitment to the civil rights cause, they are also likely to be the best possible advocates for plaintiffs in desegregation cases. At the least, organizations like the NAACP constitute an alternative vehicle for the institution of such cases.

[94] *See* note 92 *supra.*

[95] This analysis of the restrictions placed on legal services attorneys by LSCA is also relevant to state and local attempts to regulate the conduct of such attorneys. For example, according to the judicially established rules of one New York jurisdiction, an attorney working for any legal aid organization supported by public funds is subject to the Hatch Act (*see* note

> insure that all attorneys engaged in legal assistance activities supported in whole or in part by the Corporation refrain, while so engaged, from—
>
> (A) any political activity, or
>
> (B) any activity to provide voters or prospective voters with transportation to the polls or provide similar assistance in connection with an election (other than legal advice and representation), or
>
> (C) any voter registration activity (other than legal advice and representation);
>
> and insure that staff attorneys refrain at any time during the period for which they receive compensation under this subchapter from the activities described in clauses (B) and (C) of this paragraph and from political activities of the type prohibited by section 1502(a) of Title 5, whether partisan or nonpartisan . . . .[96]

Because the meaning of this provision is not discernible from its confusing structure and ambiguous language, reference to legislative history is essential. Section 2996f(a)(6) embodies two distinct congressional attempts to depoliticize legal services by restricting the political activity of legal services attorneys.[97] For the sake of conceptual clarity, one should imagine this provision as being divided into two parts: part one containing subparagraphs (A), (B), and (C), and part two containing the remainder of the provision, beginning with "and insure." The most obvious difference between the two parts is that the prohibitions of part one affect "all attorneys" engaged in federally-funded legal assistance activities, whereas the restrictions of part two only affect staff attorneys, *i.e.*, lawyers who earn at least fifty percent of their professional income from federally-funded legal services work.[98] The other major distinction involves the time periods during which these restrictions are in effect. The legislative history clearly indicates that part one's "while so engaged" covers all times that attorneys are performing legal services work, that is, on-duty hours.[99] The restrictions contained in part two, however,

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103 *infra*), and is explicitly precluded from running for office or being "publicly active in (including the publishing or distributing of statements) any political campaign on behalf of any candidate." N.Y. App. Div., 1st Dep't, R. 608.7(c) (McKinney 1975). Such broad prohibitions raise similar constitutional issues to the LSCA prohibitions. *See* Botein, *supra* note 23, at 754-66. See also Young Lords Party v. Supreme Court of New York, 328 F. Supp. 66 (S.D.N.Y. 1971), where the New York restrictions were inconclusively challenged.

[96] 42 U.S.C. § 2996f(a)(6) (Supp. IV, 1974). In addition, *id.* § 2996e(b)(5) places restrictions on the political activity of legal services attorneys during on-duty time, and absolutely prohibits participation in civil disturbances, activities violative of court injunctions, and "any other illegal activity" at all times.

[97] *See* note 100 *infra*.

[98] 42 U.S.C. § 2996a(7) (Supp. IV, 1974).

[99] *See* note 100 *infra*.

governing the conduct of staff attorneys "at any time during the period for which they receive compensation," limits off-duty as well as on-duty activities.[100]

Therefore, all attorneys while on-duty must refrain from "any political activity"[101] and voter transportation and registration activity. Subsection 2996e(b)(5)(A) of the Act adds picketing, boycotts, and strikes to the list of prohibited on-duty activities.[102] For staff attorneys, however, the ban on voter transportation and registration activity extends to off-duty as well as to on-duty periods. The LSCA further restricts staff attorneys' freedom to participate in community affairs during off-duty hours by subjecting staff attorneys to a portion of the Hatch Act.[103] Moreover, although the Hatch Act itself

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[100] The preconference version of the LSCA placed restrictions only on legal services attorneys' on-duty time. Such a limited provision was intended to

> insure that all attorneys while engaged in on-time activities refrain from political activity. . . . [F]urthermore, attorneys supported by the corporation will fully retain their first amendment rights to participate in political activities during their office hours [*sic*: "office hours" is a misprint of "off-hours"] but such attorneys must refrain from participating in political activities during the time they are engaged in legal assistance . . . .

H.R. REP. No. 247, 93d Cong., 1st Sess. 9 (1973). A number of legislators, however, protested that the ban on political activities needed to be more comprehensive:

> The Committee draft is ineffective in that such prohibitions apply only while the attorney is "on-duty." Presumably, since attorneys are professionals, this would exclude lunch hours, coffee breaks, and virtually all such situations when such activity would normally occur. If the program is truly to be independent and free of politicization, the Administration provision [which included off-duty restrictions] should be restored.

H.R. REP. No. 247, 93d Cong., 1st Sess. 28 (1973) (remarks of Representative Landgrebe). Ultimately, Congress adopted the more restrictive approach. *See* H.R. REP. No. 1039, 93d Cong., 2d Sess. 23 (1974). The Corporation is currently attempting to clarify the on-duty and off-duty restrictions via regulation. Section 1608.6(b) of the regulations proposed on May 5, 1976 defines "while so engaged" to include working hours only. 41 Fed. Reg. 18,527-28 (1976).

[101] This prohibition invites a vagueness attack. *See* notes 146-53, 159 and accompanying text *infra*.

[102] *See* note 96 *supra*.

[103] 42 U.S.C. § 2996f(a)(6) (Supp. IV, 1974). The Hatch Act (named for its sponsor, a New Mexico Senator) was originally enacted in 1939 to prevent employees of the federal government from being coerced by colleagues to support political causes or candidates, and to insure the political neutrality of federal government service by restricting the political activities of federal employees. Act of Aug. 2, 1939, ch. 410, 53 Stat. 1147, *as amended*, 5 U.S.C. §§ 7321-27 (1970). The Act was later extended to cover state employees who derive some portion of their remuneration from federal sources. Act of July 19, 1940, ch. 640, 54 Stat. 767, *as amended*, 5 U.S.C. §§ 1501-08 (1970 & Supp. IV, 1974). And supplementing the Act are criminal penalties for campaign abuses. 18 U.S.C. §§ 591-617 (Supp. IV, 1974). For a short history of the Hatch Act see United States Civil Serv. Comm'n v. Letter Carriers Union, 413 U.S. 548, 557-63 (1972).

It is important to distinguish the federal employees' branch of the Hatch Act, 5 U.S.C. §§ 7321-27 (1970), from the branch regulating state and local employees, 5 U.S.C. §§ 1501-08 (1970 & Supp. IV, 1974), especially since recent legislation has greatly liberalized the political restrictions on state and local employees. See notes 105-08 and accompanying text *infra*.

only regulates partisan political activity, section 2996f(a)(7) applies the Hatch Act prohibitions so as to restrict staff attorneys' nonpartisan political activity as well.

B. *Off-Duty Political Restrictions on Staff Attorneys*

Before the specific off-duty activities prohibited to staff attorneys can be ascertained, the version of the Hatch Act currently incorporated by LSCA section 2996f(a)(6) must be determined. At the time the LSCA was enacted, section 1502(a) of the Hatch Act prohibited certain public employees from: (*1*) using their official authority to interfere with an election; (*2*) directly or indirectly coercing a public employee to support a political cause or candidacy; or (*3*) taking "an active part in political management or in political campaigns."[104] Three months after the LSCA became law, however, section 1502(a) of the Hatch Act was substantially amended.[105] Congress deleted the prohibition against political management and campaigning,[106] and substituted a provision forbidding only candidacy for elective office.[107] Thus, section 1502(a) as amended, is far more permissive than the version in effect when the LSCA was enacted. Nevertheless, it is clear that the LSCA draftsmen intended to place greater limitations on staff attorneys' off-duty political activities than merely precluding candidacy for elective office.[108] This conflict generates an obvious question: Which version of the Hatch Act governs for the purposes of LSCA section 2996f(a)(6)? According to generally accepted principles of statutory construction, the more severe, preamendment terms of Hatch Act section 1502(a) determine the political restrictions to which staff attorneys are subject.[109]

Meanwhile, the 94th Congress passed a similar reform of the federal employees portion of the Hatch Act, H.R. 8617, 94th Cong., 1st Sess. (1975), but President Ford vetoed the measure on April 12, 1976. *See* N.Y. Times, Mar. 12, 1976, at 9, col. 1 (city ed.); *id.*, April 13, 1976, at 28, col. 2. Since the LSCA incorporates the state and local employees branch of the Hatch Act, 5 U.S.C. §§ 1501-08 (1970 & Supp IV, 1974), references in this Note to the Hatch Act apply to that branch.

[104] 5 U.S.C. § 1502(a) (1970), *as amended,* (Supp. IV, 1974).

[105] 5 U.S.C. § 1502(a) (Supp. IV, 1974), *amending id.* (1970).

[106] This prohibition had been viewed as the Hatch Act's harshest off-duty political restriction and had long been the source of considerable controversy. *See, e.g.,* United States Civil Serv. Comm'n v. Letter Carriers Union, 413 U.S. 548, 596 (1973) (dissenting opinion, Douglas, J.). *See generally* Shartsis, *The Federal Hatch Act and Related State Court Trends—A Time for Change?,* 25 BUS. LAW. 1381 (1970).

[107] 5 U.S.C. § 1502(a)(3) (Supp. IV, 1974).

[108] See H.R. REP. No. 1039, 93d Cong., 1st Sess. 23 (1974), which specifically lists those prohibitions intended to be effected by reference to the Hatch Act, including "taking an active part in . . . political campaigns."

[109] A leading treatise on statutory construction explains:

Therefore, to obtain a sense of the political activities that have been placed out of bounds for staff attorneys, in the absence of LSCA regulations,[110] the now superseded regulations implementing the preamendment version of the Hatch Act should be consulted.[111] Permissible political activity under the "old" Hatch Act included voting in any election,[112] attending political gatherings,[113] expressing personal opinions privately and publicly on political subjects and candidates,[114] and contributing to political causes.[115] Among the political activities prohibited under the "old" Hatch Act were participating in political fund-raising activities,[116] endorsing candidates in advertisements,[117] and soliciting votes on behalf of a candidate.[118] In addition, the "old" Hatch Act regulations indicated that staff attorneys were precluded from organizing political clubs,[119] and a fortiori, could not manage campaigns or become candidates themselves.[120] Because the LSCA extends such restrictions to parti-

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> A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implicaton shown its intention to incorporate subsequent amendments with the statute. In the absence of such intention subsequent amendment of the referred statute will have no effect on the reference statute.

2A SUTHERLAND STATUTORY CONSTRUCTION § 51.08, at 324 (C. Sands ed., 4th ed. 1973). Courts have invoked this rule of statutory construction in unwaivering tones:

> It is well established that, absent a contrary intent of the legislature, the adoption or incorporation of a statute by reference is an adoption of the law as it existed at the time the adopting statute was enacted and is unaffected by any subsequent amendment or repeal of the statute adopted.

Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 217 F. Supp. 210, 214 (S.D.N.Y. 1963) (citations omitted). The rules of statutory construction distinguish between the incorporation of specific references, such as the reference to § 1502a of the Hatch Act found in the LSCA, and general references. If general references are at issue, such as a reference to existing provisions of federal law or to an act as it may be amended from time to time, then any subsequent amendment of the referred statute will become part of the reference statute. 2A SUTHERLAND STATUTORY CONSTRUCTION, *supra*, § 51.08, at 324. *See* Somermeier v. District Director of Customs, 448 F.2d 1243, 1244 (9th Cir. 1971).

[110] Although no regulations regarding political restrictions on staff attorneys are currently in force, such regulations were proposed by the corporation on May 5, 1976. 41 Fed. Reg. 18,527 (1976). *See* notes 123, 126 and accompanying text *infra*.

[111] 5 C.F.R. §§ 151.101-.123 (1974), *as amended*, 40 Fed. Reg. 42, 733 (1975). The superseded regulations provide a persuasive indication of Congressional intent in subjecting staff attorneys to the Hatch Act.

[112] 5 C.F.R. § 151.111(1) (1974).

[113] *Id.* § 151.111(6).

[114] *Id.* § 151.111(2).

[115] *Id.* § 151.111(8).

[116] *Id.* § 151.122(b)(4).

[117] *Id.* § 151.122(b)(10).

[118] *Id.* § 151.122(b)(7).

[119] *Id.* § 151.122(b)(2).

[120] *Id.* § 151.122(b)(6).

san and nonpartisan political activities, the broad sweep of the political restrictions imposed upon staff attorneys becomes apparent. For example, a staff attorney on his own time will be precluded from organizing nonpartisan clubs devoted to a diversity of "political" causes, from local school improvement to pacifism.

Outside organizations have proposed LSCA regulations that incorporate the new, more permissive version of the Hatch Act.[121] Under these proposals, a staff attorney would only be prohibited from becoming a candidate for public office.[122] Should the Legal Services Corporation adopt this view,[123] Congressmen whose support of the LSCA was based in part upon its severe political restrictions are likely to be antagonized.[124] In addition to expressing displeasure during appropriation hearings, Congressmen may avail themselves of more formal means of challenging liberal interpretation of these restrictions.[125]

Nevertheless, permissive interpretation of section 2996f(a)(6) is less constitutionally suspect than restrictive interpretation. Perhaps a court will therefore choose the less restrictive version in order to

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[121] Office of Legal Services Transition Committee, Proposed Regulations for Legal Services Corporation § 40, at 7, (July 9, 1975); The Umbrella Group of Interested Organizations, Proposed Regulations for the Legal Services Corporation § 530-2 to-3 (June 9, 1975). (Both on file at the *Cornell Law Review*).

[122] *See* proposed regulations cited in note 121 *supra*.

[123] The regulations proposed by the Corporation regarding political restrictions follow the new, amended version of the Hatch Act. Proposed Regulations for the Legal Services Corporation Act, 41 Fed. Reg. 18,527 (1976). 5 U.S.C. §§ 1502(a)(1)-(2) (Supp. IV, 1974) are tracked in §§ 1608.5(a)-(b); 5 U.S.C. § 1502(a)(3) (Supp. IV, 1974) is extended to nonpartisan candidacy in § 1608.5(c), to reflect 42 U.S.C. § 2996f(a)(6) (Supp. IV, 1974).

The Corporation may justify this interpretation by stressing that § 2996f(a)(6) merely requires the Corporation to ensure that staff attorneys refrain from political activity "*of the type* prohibited by section 1502(a) [of the Hatch Act] . . . ." (Emphasis added.) Thus the Corporation may argue that this reference to the Hatch Act is not specific, but rather indicates a congressional intention that the Corporation use the Hatch Act as an instructive but nonmandatory guide in formulating its own regulations. Nonetheless, it may be questioned whether these regulations conform to the Act itself, in light of the legislative history. There can be no doubt, however, that the Corporation's interpretation is more consistent with the Constitution. *See* note 126 *infra*.

[124] Indeed, proponents of the restrictions have declared that they will pay close attention to LSCA regulations. An aide to Senator Helms explained: "We want to make sure that they don't accomplish by regulation what they failed to accomplish by legislation." Arnold, *And Finally, 342 Days Later . . .*, JURIS DOCTOR, Sept. 1975, at 32-33.

[125] Congressmen could seek a ruling from the Comptroller General that any expenditure of funds in accordance with permissive regulations violates legislative intent and is therefore illegal. The authority of the Comptroller General to determine the propriety of federal expenditures is set forth and discussed in Fischer, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROBS. 135, 169-70 (1972). There is even authority allowing Congressmen to challenge in court such violations of the legislative mandate. *See* Note, *Congress and the Executive: The Role of the Courts*, 11 HARV. J. LEGIS. 352 (1972).

interpret the LSCA in conformity with the Constitution.[126] However, in light of the clarity with which Congress voiced its restrictive intention, a court would be precluded by accepted principles of statutory construction from adopting an interpretation so contrary to the legislative intent.[127]

IV

THE CONSTITUTIONALITY OF POLITICAL RESTRICTIONS ON LEGAL SERVICES CORPORATION ATTORNEYS

The LSCA restricts in varying degrees the political activity of full and part-time attorneys working on programs supported by the Corporation.[128] Although Congress expressed little doubt as to the constitutionality of these limitations,[129] analysis reveals that they are vulnerable to constitutional attack under the first amendment and the due process clause.

A. *General Approach*

Congress has broad authority to set terms and conditions of government employment. An exercise of such power is usually analyzed under a rational basis standard.[130] The rational bases that can

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[126] The Corporation's proposed regulations, *see* note 123 *supra*, embody the concept that the required political restrictions be as liberal as possible, while still preserving the neutrality of the LSC. This concept has often been adopted by the courts when reviewing governmental infringement of constitutional rights. Therefore the Corporation's regulations are less vulnerable to constitutional attack than would be regulations incorporating the old, preamendment version of the Hatch Act.

[127] "[O]ur task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." United States Civil Serv. Comm'n v. Letter Carriers Union, 413 U.S. 548, 571 (1973).

[128] *See* note 13 *supra.*

[129] The only serious questioning of the constitutionality of these political restrictions came from the floor of the House on June 21, 1973.

> These sections also seriously infringe on the attorneys' first amendment rights by declaring that they may not participate in activities such as picketing, boycotts and strikes. . . . The constitutionality of these provisions is questionable especially in light of Judge Gesell's opinion in last year's District of Columbia District Court case declaring the Hatch Act violative of the constitution. [The reference is to the district court *Letter Carriers* decision, which was subsequently reversed by the Supreme Court; *see* text accompanying notes 181-83 *infra.*]

119 CONG. REC. 20,702 (1973) (remarks of Representative Abzug).

> I believe the amendment [imposing broad restrictions on staff attorneys] to be unconstitutional, because I think it takes away rights of these people which are rights guaranteed by the Constitution and which they do not give up because they become Legal Service attorneys.

Id. at 20,741 (remarks of Representative Meeds). *See generally id.* at 20,706-07 (remarks of Representative Drinan); *id.* at 20,708-09 (remarks of Representative Lehman). *See also* note 169 *infra.*

[130] In United Pub. Workers v. Mitchell, 330 U.S. 75,101 (1947), the Court noted that:

be advanced to support LSCA restrictions on attorney political activity include the perceived needs (*1*) to ensure attorney efficiency and concentration on Corporation matters,[131] (*2*) to minimize Corporation vulnerability to political influences,[132] and (*3*) to avoid identification of the Corporation with political controversy.[133] Because these provisions infringe first amendment rights of political expression and association, however, they must meet a higher standard of scrutiny.[134]

Although the Supreme Court has stated that the government has a greater interest in regulating the first amendment rights of its employees than the rights of other citizens,[135] the Court has carefully noted that the government does not have the constitutional prerogative of imposing unlimited restrictions on political activity as a condition of government employment.[136] Rather, the Court

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> [f]or regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service.

See also United States Civil Serv. Comm'n v. Letter Carriers Union, 413 U.S. 548, 596-97 (1973) (dissenting opinion, Douglas, J.).

[131] *See* 119 CONG. REC. 41,460 (1973) (remarks of Senator Humphrey).

[132] "The Congress finds and declares that— . . . to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures . . . ." 42 U.S.C. § 2996(5) (Supp. IV, 1974).

[133] Employees of the Corporation or of recipients shall not at any time intentionally identify the Corporation or the recipient with any partisan or nonpartisan political activity associated with a political party or association, or the campaign of any candidate for public or party office.

Id. § 2996e(e)(I).

[134] In discussing the Hatch Act prohibitions on government employee participation in political management and campaigns, 5 U.S.C. § 7324(a)(2) (1970), the Supreme Court has stated: "Thus we have a measure of interference by the Hatch Act . . . with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments." United Pub. Workers v. Mitchell, 330 U.S. 75, 94-95 (1947). The Court's observation merely reaffirmed the established principle that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights." Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). The Court has, however, held that certain forms of government employee partisan political conduct are not protected by the first amendment. *See, e.g.*, United States Civil Serv. Comm'n v. Letter Carriers Union, 413 U.S. 548, 556 (1973).

[135] In Pickering v. Board of Educ., 391 U.S. 563, 568 (1968), the Court emphasized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."

[136] "We have said that Congress may regulate the political conduct of government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action." United Pub. Workers v. Mitchell, 330 U.S. 75, 102 (1947). " '[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' " Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967), *quoting* the Second Circuit's opinion, 345 F.2d 236, 239 (1965). See Pickering v. Board of Educ., 391 U.S. 563, 568 (1968), for the application of *Keyishian* to first amendment rights of expression.

generally tests applied limitations on employee political rights by balancing the individual's interest in the right against the governmental interest in the restriction.[137] For a statute constitutionally to restrict such first amendment rights, a showing of compelling state interest is required.[138] Furthermore, because equal protection

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[137] In United Pub. Workers v. Mitchell, 330 U.S. 75, 96 (1947), the Supreme Court stated: "Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government." Although the Court thus purported to use a balancing test in *Mitchell,* some commentators have suggested that the test actually applied was one of reasonableness. *See* Comment, *The Hatch Act—A Constitutional Restraint of Freedom?,* 33 ALBANY L. REV. 345, 349-50 (1969); Note, *Political Activity and the Public Employee: A Sufficient Cause for Dismissal?,* 64 NW. U.L. REV. 736, 744 (1970). Whether the *Mitchell* Court is seen to have actually carried out a balancing test, or not, it is clear that balancing is now the preferred mode of evaluating political restrictions applied to government employees. *See* United States Civil Serv. Comm'n v. Letter Carriers Union, 413 U.S. 548, 564-67 (1973); Alderman v. Philadelphia Housing Authority, 496 F.2d 164, 173 (3d Cir.), *cert. denied,* 419 U.S. 844 (1974); Magill v. Lynch, 400 F. Supp. 84, 92 (D.R.I. 1975); Phillips v. City of Flint, 57 Mich. App. 394, 225 N.W.2d 780 (1975). This balancing approach was definitively established in Pickering v. Board of Educ., 391 U.S. 563, 568 (1968), where the Court held the dismissal of a public school teacher for exercising his first amendment rights to be unconstitutional. Moreover, interest balancing has received new vitality from the Supreme Court's recent review of the Federal Election Campaign Act Amendments of 1974 (2 U.S.C. §§ 431-42, 18 U.S.C. §§ 608-17, 26 U.S.C. §§ 9001-13 (Supp. IV, 1974)):

> We find that, under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling.

Buckley v. Valeo, 96 S. Ct. 612, 640 (1976).

If a facial overbreadth attack were launched against the attorney political restrictions, however, a balancing analysis would probably not be employed by the courts. *See* note 162 *infra*; Note, *Overbreadth Review and the Burger Court,* 49 N.Y.U.L. REV. 532 (1974). The Warren Court explicitly disavowed the balancing approach in facial overbreadth cases and instead adopted a potent absolutist position which invalidated any statute effecting a significant chill on first amendment rights, regardless of the countervailing governmental interests in the regulation. *See* United States v. Robel, 389 U.S. 258, 268 n.20 (1967); Note 49 N.Y.U.L. REV., *supra,* at 535. There have been occasional signs that the Burger Court may be moving towards a balancing approach to facial overbreadth. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); Note, 49 N.Y.U.L. REV., *supra,* at 540-41. The Court recently affirmed summarily, however, a district court decision which appears to reject the balancing approach to facial overbreadth and recognize "that despite any legitimate state interest involved, the chilling effect on protected expression is too high a price to pay when the regulatory scheme has not been narrowly drawn." Vanasco v. Schwartz, 401 F. Supp. 87, 95 (S.D.N.Y. 1975), *aff'd mem.,* 96 S. Ct. 763 (1976). Thus the role of interest balancing as a part of the facial overbreadth doctrine is subject to considerable doubt.

[138] *See, e.g.,* Buckley v. Valeo, 96 S. Ct. 612 (1976); Sherbert v. Verner, 374 U.S. 398, 406 (1963); Gibson v. Florida Legislative Comm., 372 U.S. 539, 555 (1963); NAACP v. Button, 371 U.S. 415, 438 (1963).

Some commentators have described an evolution in the Court's analysis of restrictions on employee first amendment rights. In United Pub. Workers v. Mitchell, 330 U.S. 75 (1947), the Court is seen to have invoked a reasonableness or rational nexus approach which has now given way to a compelling state interest test. *See* Minge, *Federal Restrictions on the Political*

violations are suggested by subjecting the fundamental rights of certain attorneys to unusually restrictive regulation, an even stricter first amendment standard may apply to these prohibitions.[139] Even where limitations on political activity are constitutionally permissible, they must be narrowly drawn.[140]

Application of a balancing test may invalidate specific LSCA political restrictions on attorneys. Although the Supreme Court, in scrutinizing Hatch Act political limitations on civil servants, has struck the balance in favor of compelling governmental interests, the Court has left open the possibility that more restrictive regulation might tip the scales in favor of the individual's first amendment rights.[141] In fact, governmental interests at stake under the LSCA are less compelling than those involved in the Hatch Act. Although the government has a legitimate interest in controlling its own employees, that interest decreases as the employment relationship attenuates from civil servant, to federal corporation employee, to government contractor employee. Certainly governmental interests in controlling the political behavior of employees of a corporation intended to be independent of the federal bureaucracy[142] are less than governmental interests in regulating its own employees.[143] Since the LSCA limitations on attorney political activity are more restrictive than those Hatch Act provisions that survived first amendment challenge, the courts may invalidate the application of certain LSCA limitations as violative of the first amendment, and may do so without overruling the established line of cases upholding the Hatch Act.

B. *On-Duty Restrictions*

Legal Services Corporation attorneys, whether full or part-time, are subject to on-duty limitations on their political activity.[144] Section

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Activities of State and Local Employees, 57 MINN. L. REV. 493, 530-35 (1973). Whether this currently evolving theory or the balancing theory is the chosen perspective, the result is the same—the Court now requires a compelling state interest to justify limitations on constitutionally protected political activities.

[139] For discussion of the equal protection-first amendment interface see notes 178, 196-200 and accompanying text *infra*.

[140] The Court has emphasized that first amendment rights are "delicate and vulnerable" and "need breathing space to survive." NAACP v. Button, 371 U.S. 415, 433 (1963).

[141] *See* United States Civil Serv. Comm'n v. Letter Carriers Union, 413 U.S. 548 (1973); United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).

[142] *See* note 12 and accompanying text *supra*.

[143] Analyzed from this perspective, the proposed repeal of the Hatch Act as applied to federal employees produces the anomalous result that LSC attorneys are subject to substantially greater political restriction than are federal civil servants. *See* note 103 *supra*.

[144] 42 U.S.C. § 2996f(a)(6) (Supp. IV, 1974).

2996f(a)(6) places a general restriction on "any political activity"[145] and specific restrictions on election[146] and voter registration[147] activities. These prohibitions, which apparently apply to both partisan and nonpartisan conduct, reflect congressional concern that attorneys engage only in legal services matters during periods for which they are being paid by the Corporation. Because on-duty behavior is more likely to have an impact on job performance, the government has a stronger interest in regulating the use of on-duty time than it has in regulating the use of off-duty time. Nevertheless, an argument can be made that Congress has run afoul of the Constitution in imposing these restrictions on Corporation attorneys.

The most constitutionally suspect on-duty restriction is that which forbids attorneys from engaging in "any political activity." Although it is apparent that Congress enacted this provision in reaction to scattered reports that OEO legal services attorneys were engaging in political activity during office hours,[148] the scope of the provision is not clear. It could be construed to apply to a very large or to a relatively small spectrum of activity. Because "men of common intelligence must necessarily guess at its meaning . . . ,"[149] there is substantial doubt as to the constitutionality of the restriction under the due process vagueness doctrine. Arguably, the phrase "any political activity" offends three of the "important values"[150] that the vagueness doctrine seeks to protect.[151] First, it fails to provide adequate warning to the citizenry of what conduct is proscribed.[152] Second, it fails to set explicit standards for application of the law to avoid "arbitrary and discriminatory" enforcement.[153] Third, the ambiguity of the provision exerts a chilling effect upon the free

[145] *Id.* § 2996f(a)(6)(A).

[146] *Id.* § 2996f(a)(6)(B).

[147] *Id.* § 2996f(a)(6)(C).

[148] *See* 120 CONG. REC. S 808-09 (daily ed. Jan. 30, 1974) (remarks of Senator Helms).

[149] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[150] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[151] Although vagueness and facial overbreadth are theoretically distinct doctrines, there are close parallels between the two doctrines as applied to first amendment rights. *See* Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844, 871-75 (1970). Both analyses seek to remedy chilling effects on fundamental rights and curb excessive official discretion in applying statutes restricting protected activity. Therefore, it is not surprising that judicial analysis of the two doctrines is often blurred within a single case. *See, e.g.,* Gooding v. Wilson, 405 U.S. 518 (1972); Vanasco v. Schwartz, 401 F. Supp. 87, 95 (S.D.N.Y. 1975), *aff'd mem.,* 96 S. Ct. 763 (1976). The one discernable difference between the two doctrines in the first amendment arena is that a "hard core" plaintiff may invoke the rights of third parties under facial overbreadth but not under vagueness. Parker v. Levy, 417 U.S. 733 (1974). *See also* notes 137 *supra* and 160-62 *infra.*

[152] Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

[153] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

exercise of first amendment rights.[154] The Supreme Court has held that statutes affecting such rights will be subject to particularly rigorous vagueness scrutiny.[155]

For many years the Hatch Act and state and local counterparts (mini-Hatch Acts) have been unsuccessfully attacked under the vagueness doctrine.[156] The statutes that have been upheld, however, used uniformly more precise language than "any political activity," and were supported by regulations and agency or court interpretations that helped to clarify the restrictions.[157] To date, there have been no regulations promulgated to clarify the meaning of "any political activity,"[158] and regulations proposed by interested outside groups do little to alleviate the vagueness of the provision.[159] Although the Supreme Court has shown some recent hostility toward the vagueness doctrine,[160] this provision of the LSCA could suc-

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[154] Baggett v. Bullitt, 377 U.S. 360 (1964).

[155] And this Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.

Smith v. California, 361 U.S. 147, 151 (1959) (Los Angeles ordinance forbidding possession of indecent writings held unconstitutional).

[156] *See* United States Civil Serv. Comm'n v. Letter Carriers Union, 413 U.S. 548 (1973); State *ex rel.* Gonzales v. Manzagol, 87 N.M. 230, 531 P.2d 1203 (1975).

[157] For example, in *Letter Carriers,* the majority relied heavily upon a "complex network" of Civil Service Commission regulations to uphold the Hatch Act. 413 U.S. at 571-74. See also the conflict between Justice White's majority opinion and Justice Brennan's dissent in Broadrick v. Oklahoma, 413 U.S. 601 (1973), as to whether or not interpretations by the State Personnel Board and the State Attorney General provided sufficient definition to an Oklahoma statute, prohibiting political activity by state civil servants, to defeat a vagueness attack. *Id.* at 617-18, 623-27.

[158] Regulations were issued by the Corporation on September 12, 1975, 40 Fed. Reg. 42, 362 (1975), and on May 5, 1976, 41 Fed. Reg. 18,527 (1976), but they shed no light upon the meaning of "any political activity." It therefore appears that the Corporation is consciously refraining from defining this troublesome statutory phrase.

[159] The Umbrella Group Proposed Regulations, *see* notes 121-22 and accompanying text *supra,* do not attempt to define "any political activity." The Office of Legal Services Proposed Regulations, *see* notes 121-22 and accompanying text *supra,* by merely tracking the LSCA statutory language also fail to clarify the provision. Although it can be argued that the Hatch Act and its implementing regulations should be regarded as persuasive authority for clarifying "any political activity," it would be difficult to explain why Congress failed to incorporate the Hatch Act by reference, as it did with off-duty provisions, if it intended that Act to define the scope of LSCA on-duty restrictions. *See* note 103 and accompanying text *supra.*

[160] In *Letter Carriers,* the Court emphasized the "limitations in the English language with respect to being both specific and manageably brief" in rejecting a vagueness challenge to the Hatch Act. 413 U.S. at 578-79. In Rose v. Locke, 96 S. Ct. 243 (1975), the Court recently rejected a vagueness attack on a Tennessee "crime against nature" statute. Litigants seeking to invoke the vagueness doctrine will also encounter standing problems. The Court has made it clear that "hard core" plaintiffs, those to whom the statute clearly and validly applies, will not be heard to attack the statute on vagueness grounds. *See* Parker v. Levy, 417 U.S. 733 (1974). In *Rose,* however, the Court recognized that a higher standard of vagueness scrutiny applies

cumb to a vagueness attack unless the Corporation promulgates adequate clarifying regulations.

In addition, absent narrowing regulations this general restriction may be applied to a broad range of traditionally protected activity and thus may be susceptible to standard first amendment challenge. For example, the restriction could be invoked to forbid legal services attorneys from wearing political buttons or driving cars displaying political bumper stickers. Although such political expression has little effect on an attorney's job performance, he has a basic interest in such activity. If a court were to balance the governmental need for the restriction against the individual's interest in the activity, the individual would likely prevail. Thus a court could easily find a specific application of the "any political activity" prohibition to be an unconstitutional infringement upon first amendment rights under a traditional, "as applied," first amendment analysis. Because the Corporation may be reluctant to enforce the Act against such marginal behavior as political buttons and bumper stickers, however, the alternative first amendment facial overbreadth doctrine might be invoked.[161] Although the phrase "any political activity" invites facial overbreadth analysis, that theory would likely fail because the Burger Court has been resistant to such claims.[162]

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where fundamental rights are involved. 96 S. Ct. at 244 n.3. It is apparent from cases like Gooding v. Wilson, 405 U.S. 518 (1972) (Georgia breach of peace statute unconstitutionally vague), that the vagueness doctrine remains vital in the first amendment arena.

[161] For a general comparison of "as applied" and "facial overbreadth" first amendment scrutiny, see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970). *See also* Broadrick v. Oklahoma, 413 U.S. 601, 610-16 (1973).

[162] Under facial overbreadth reasoning, a litigant to whom a statute is constitutionally applied may attack theoretically unconstitutional applications of the statute to theoretical parties—the facial overbreadth doctrine being an exception to established standing concepts invoked in first amendment cases. The rationale for the doctrine is the necessity of avoiding chilling effects on fundamental first amendment rights. *See* Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965). The Burger Court, however, has cut back on the special treatment afforded first amendment litigants and has shown specific hostility toward the facial overbreadth doctrine. *See, e.g.*, Tribe, *The Supreme Court 1972 Term*, 87 HARV. L. REV. 1, 141-53 (1973); Note, *Overbreadth Review and The Burger Court*, 49 N.Y.U.L. REV. 532 (1974). The Court appears to be fashioning a new facial overbreadth doctrine by imposing the ambiguous requirement that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

Although the exact meaning of Justice White's majority opinion in *Broadrick* is not clear, it is evident that the Burger Court seeks to render the facial overbreadth doctrine at once less accessible and less potent. *See generally* Erznoznik v. Jacksonville, 422 U.S. 205, 215-17 (1975) (facial overbreadth must be both real and substantial); Bigelow v. Virginia, 421 U.S. 809, 815-18 (1975) (availability of facial overbreadth doctrine may depend upon proportion of speech to conduct regulated); Grayned v. City of Rockford, 408 U.S. 104 (1972) (Court may

The other two on-duty restrictions, those limiting election and voter registration activitites, seem immune to constitutional attack. These provisions merely prohibit attorneys from using on-duty hours to promote political causes by transporting voters to the polls or by encouraging voter registration. In balancing the governmental and individual interests affected by these restrictions, the government would probably prevail. Significantly, an exception to the prohibition permits attorneys to advise and represent clients in election and voter registration matters.[163]

C. *Off-Duty Restrictions*

In addition to the on-duty restrictions imposed on all Corporation attorneys, the LSCA also requires staff attorneys[164] to limit their off-duty partisan and nonpartisan political activities.[165] Staff attorneys are specifically prohibited from engaging in partisan and nonpartisan election and voter registration activities during off-duty hours.[166] In addition, the Act incorporates by reference the prohibitions contained in section 1502(a) of the Hatch Act.[167]

Off-duty restrictions are more difficult to justify than the on-duty restrictions previously examined. What an attorney does during his off hours is only of consequence to the Corporation to the extent that off-duty conduct affects on-duty performance.[168] Although a

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resort to balancing of interests affected by statute). *See also* 61 CORNELL L. REV. 640 (1976). Although the Burger Court is apparently transforming the facial overbreadth doctrine, the current vitality of the doctrine, in some form, has been recognized by seven of the sitting justices. *See* EMERSON, HABNER, & DORSIN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1246-47 (1976). Thus the facial overbreadth doctrine is currently in a state of flux.

[163] The exceptions create loopholes in the prohibitions which arguably allow attorneys to engage in a wide range of election and voter registration activities under the guise of advice or representation. This is but one example of what critics in Congress called "illusory probibitions," which

> give the appearance of being addressed to some of the notorious abuses of the present program [OEO] but which are actually calculated to perpetuate some of the worst of these abuses and, in some instances, to pave the way for new and more imaginative outrages to be committed. The general pattern in the examples which follow is to set fortb language which appears to be probibitory but then to provide for a qualifying phrase or exception which renders the apparent prohibition ineffective or "inoperative."

119 CONG. REC. 20,704 (1973) (remarks of Representative Rousselot).

[164] For a definition of staff attorney, see note 13 *supra*.

[165] 42 U.S.C. § 2996f(a)(6) (Supp. IV, 1974).

[166] *Id.* Staff attorneys may not participate in partisan or nonpartisan election and voter registration activities at any time. This section of the Note, however, focuses only upon staff attorney off-duty restrictions. For a discussion of on-duty political restrictions, see notes 142-63 and accompanying text *supra*.

[167] *See* notes 103-20 and accompanying text *supra*.

[168] As Justice Douglas stated in his dissenting opinion in United States Civil Serv. Comm'n v. Letter Carriers Union, 413 U.S. 548, 597 (1973):

few liberal Congressmen expressed concern that the off-duty prohibitions might be more vulnerable to constitutional attack than the on-duty restrictions,[169] congressional debate was influenced by fear that "movement lawyers" would capitalize on the ambiguity between a professional's on and off-duty hours to play politics on Corporation time.[170] The off-duty provision may also have been an attempt to drive such attorneys out of the federally-sponsored legal services program.

The substance of the Hatch Act incorporation into the LSCA depends upon which version of the Hatch Act controls.[171] If the "old" Hatch Act applies, then stricter regulation of attorney off-duty conduct is required; if the "new" Hatch Act applies, then more lenient regulation results. In either event, it is significant that despite similarities between Hatch Act and LSCA off-duty provisions, the latter are more restrictive than the former in that they reach nonpartisan as well as partisan conduct.[172] Thus, a constitutional challenge to these off-duty restrictions would not necessarily be rendered futile by the line of cases upholding the off-duty partisan restrictions of the Hatch Act.[173] The constitutionality of these provisions will be examined under the first amendment, initially assuming

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But it is of no concern of Government what an employee does in his spare time, whether religion, recreation, social work, or politics is his hobby—unless what he does impairs efficiency or other facets of the merits of his job. Some things, some activities do affect or may be thought to affect the employee's job performance. But his political creed, like his religion, is irrelevant. In the areas of speech, like religion, it is of no concern what the employee says in private to his wife or to the public in Constitution Hall.

[169] Congress was not persuaded by Representative Drinan's opinion that

[a] lawyer's life is a busy one, and it is difficult to tell when he or she is acting "while engaged in—Legal Services—activities." While it would be blatantly unconstitutional to prohibit Legal Services attorneys from engaging in political activity *on their own time*, the several questions raised by the broad prohibitive language of section 6(b) (5) are so fraught with first amendment difficulties as to make me extremely doubtful of the advisability and constitutionality of this part of this legislation.

119 CONG. REC. 20,706 (1973) (emphasis added).

[170] *See id.* at 20,704-05 (remarks of Representative Rousselot); 120 CONG. REC. S 808-09 (daily ed. Jan. 30, 1974) (remarks of Senator Helms). *See also* note 100 *supra*.

[171] *See* notes 103-09 and accompanying text *supra*.

[172] 42 U.S.C. § 2996f(a)(6) (Supp. IV, 1974) requires the Corporation to ensure that staff attorneys refrain "from political activities of the type prohibited by section 1502(a) of Title 5, whether partisan or nonpartisan . . . " (referring to 5 U.S.C. § 1502(a)(1970), *as amended*, (Supp. IV, 1974)). Subsections 1502(a)(1)-(2), dealing with the use of authority to affect election or nomination results and with the use of coercion to encourage political contributions, apply equally to partisan and nonpartisan behavior. Subsection 1502(a)(3), however, dealing with political management and campaigns (or simply candidacy in the new version), applies only to *partisan* activity. Because § 1502(a)(3) is certainly the most controversial and restrictive provision in the Hatch Act, it is particularly significant that the LSCA broadens the scope of that provision to reach *nonpartisan* conduct.

[173] *See* notes 184-85 and accompanying text *infra*.

incorporation of the "old" Hatch Act, followed by an analysis assuming incorporation of the "new" Hatch Act.

1. *The "Old" Hatch Act Incorporated into the LSCA*

According to established principles of statutory construction, section 2996f(a)(6) incorporates the old version of the Hatch Act.[174] This incorporation gives rise to a wide range of off-duty restrictions[175] that are vulnerable to constitutional attack under the first amendment and perhaps under a due process-equal protection analysis.

Off-duty restrictions infringe upon first amendment rights of political expression and association.[176] As such, their application gives rise to immediate constitutional suspicion and can only be upheld by a showing that compelling governmental interest in the prohibitions outweighs individual interest in the rights.[177] These restrictions may, in fact, be subject to stricter scrutiny than is usual in first amendment cases because they apply only to a particular group, staff attorneys, arguably on account of their political beliefs.[178]

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[174] *See* note 109 and accompanying text *supra.*

[175] *See* text accompanying notes 112-20 *supra.*

[176] *See* note 134 and accompanying text *supra.*

[177] *See* note 138 and accompanying text *supra.*

[178] As is discussed in the text accompanying notes 196-200 *infra,* the LSCA singles out staff attorneys for particularly restrictive treatment and touches upon the fundamental first amendment right of political expression. The LSCA legislative history reveals that such restrictive regulation may have been imposed upon staff attorneys to curb the radical political sympathies that group demonstrated under the OEO Legal Services Program. *See, e.g.,* 120 CONG. REC. S 809-23 (daily ed. Jan. 30, 1974) (remarks of Senator Helms).

This line of analysis suggests two due process-equal protection violations. First, the fifth amendment is violated by a classification affecting fundamental rights. *See* note 61 and accompanying text *supra.* Second, the sliding-scale due process-equal protection requirement is violated by the special treatment of staff attorneys, which cannot be justified under the stated purposes of the LSCA, but can only be explained by the demonstrated congressional intent to muzzle a politically unpopular group of attorneys. For a discussion of the sliding-scale due process-equal protection analysis see note 73 *supra.*

The suggestion of due process-equal protection violations may also require that the off-duty provisions be subjected to a stricter first amendment analysis. The Supreme Court has implied on several occasions tbat the applicable first amendment standard may depend upon whether legislation affects groups or political viewpoints in an unequal manner. For example, in upholding Oklahoma's mini-Hatch Act, OKLA. STAT. ANN. tit. 74, § 818 (1972), the Court stated: "Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." Broadrick v. Oklahoma, 413 U.S. 601, 614 (1973). The Court continued:

> But at the same time, § 818 is not a censorial statute, directed at particular groups or viewpoints. Cf. Keyishian v. Board of Regents, [385 U.S. 589 (1969)]. The statute, rather, seeks to regulate political activity in an even-handed and neutral manner. As indicated, such statutes have in the past been subject to a less exacting overbreadth scrutiny.

Thus the governmental interest supporting the restrictions must be compelling in order to survive challenge.[179] The essence of that interest would be a need to ensure that legal services are delivered efficiently and without political bias. The off-duty aspect of the prohibitions might also be justified (*1*) on the basis of the difficulty of distinguishing between a lawyer's on and off-duty hours,[180] (*2*) on the theory that off-duty political activities may genuinely interfere with an attorney's ability to work on-duty, and (*3*) on the assumption that off-duty activity may tarnish the neutral identity of the Corporation and thus limit its effectiveness. In support of its case, the government could point to the analysis established in *United Public Workers of America v. Mitchell,*[181] and "unhesitatingly reaffirmed" in *United States Civil Service Commission v. Letter Carriers Union*[182] which held that the "old" Hatch Act prohibitions on political management and campaigning were "sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act."[183] Although these Hatch Act cases would necessarily be persuasive, they would not be dispositive.

The Hatch Act cases involved statutory provisions substantially less restrictive than the LSCA. The controversial political management and campaigning prohibition upheld in both *Mitchell* and *Letter Carriers* did not expressly apply to nonpartisan activities.[184] Therefore, the leading Supreme Court cases in this area have not addressed the type of nonpartisan provision contained in the LSCA. The Court in both *Mitchell* and *Letter Carriers* was careful to note that "[i]t is only *partisan* political activity that is interdicted."[185] Cases like *Broadrick v. Oklahoma*[186] indicate that the Court may have been studiously avoiding the difficult matter of nonpartisan limitations.[187]

Id. at 616. *See also* United States Civil Serv. Comm'n v. Letter Carriers Union, 413 U.S. 548, 564 (1973).

[179] *See* note 138 and accompanying text *supra.*

[180] See notes 100, 170 and accompanying text *supra.*

[181] 330 U.S. 75 (1947).

[182] 413 U.S. 548, 556 (1973).

[183] *Id.* at 564.

[184] *See* note 172 and accompanying text *supra.*

[185] 330 U.S. at 100; 413 U.S. at 556, *quoting* 330 U.S. at 100 (emphasis added). Throughout the majority opinion in *Letter Carriers,* the adjective "partisan" conspicuously qualified the Court's endorsement of the Hatch Act political restrictions.

[186] 413 U.S. 601 (1973).

[187] In *Broadrick,* state employee plaintiffs conceded the validity of partisan political restrictions as applied, but challenged the Oklahoma statutory scheme as overbroad in its effect on nonpartisan activities. The Court, however, refused to address the nonpartisan claim, avoiding difficult constitutional questions by holding that the plaintiffs did not have

Regulation of nonpartisan conduct is problematic because it is not related to the concerns of party influence and loyalty central to governmental rationalization of purely partisan restrictions. Arguably, the Court's avoidance of the nonpartisan question is some indication that it considers such restriction unconstitutional. In addition, lower federal courts and state supreme courts have held nonpartisan provisions virtually per se unconstitutional.[188] Under this analysis, the LSCA nonpartisan provisions would be automatically invalidated.

Even if the nonpartisan restrictions were not deemed invalid per se, the off-duty prohibitions might be vulnerable to constitutional attack. Several courts have recently rejected the per se approach as an analysis founded upon formalistic distinctions between

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standing to raise the claim and that the state agencies had interpreted the statute as inapplicable to nonpartisan matters. In Phillips v. City of Flint, 57 Mich. App. 394, 225 N.W.2d 780 (2d Div. 1975), the Michigan Court of Appeals examined a city charter restriction on city employees and stated:

> Our reading of *Broadrick, Letter Carriers* and *UPW v. Mitchell* convinces us that the Supreme Court has never definitively ruled on whether nonpartisan political activities of public employees can be constitutionally proscribed. In each case, the law upheld by the Court proscribed only partisan activity.

Id. at 403, 225 N.W.2d at 784. *See also* Alderman v. Philadelphia Housing Auth., 496 F.2d 164, 183 (3d Cir.), *cert. denied,* 419 U.S. 844 (1974); Magill v. Lynch, 400 F. Supp. 84 (D.R.I. 1975).

[188] In holding unconstitutional a Philadelphia Housing Authority memorandum that forbade employees from discussing an upcoming tenant plebiscite, the Third Circuit stated: "We think, however, that *Broadrick* and *Letter Carriers,* properly viewed, carve out carefully circumscribed exceptions to the sweeping injunction of the First Amendment, exceptions allowing a legislature—Congress or state law makers—to inhibit *only* 'partisan political activity' not all political 'discussion.'" Alderman v. Philadelphia Housing Auth., 496 F.2d 164, 172 (3d Cir.), *cert. denied,* 419 U.S. 844 (1974) (emphasis in original). Similarly, while striking down Ohio state and local restrictions on police political activities, a federal judge stated: "[T]he position taken by this Court is that the Hatch Act limitations sanctioned by the Supreme Court in *Mitchell* represent the outermost limitation to which any governmental body may restrict the political activities and free speech of its employees." Gray v. Toledo, 323 F. Supp. 1281, 1286 (N.D. Ohio 1971).

Several state courts have found mini-Hatch Acts to be unconstitutionally overbroad, largely because of nonpartisan political provisions. *See, e.g.,* Kinnear v. San Francisco, 61 Cal. 2d 341, 392 P.2d 391, 38 Cal. Rptr. 631 (1964); De Stefano v. Wilson, 96 N.J. Super. 592, 233 A.2d 682 (L. Div. 1967); Minielly v. Oregon, 242 Ore. 490, 411 P.2d 69 (1966). Most of these state cases, however, were decided in the interval between *Mitchell* (1947) and *Letter Carriers* (1973). As such, they illustrate a theory that gained currency during that interval: that intervening first amendment cases like NAACP v. Button, 371 U.S. 415 (1963), and Sherbert v. Verner, 374 U.S. 398 (1963), had eroded the holding of *Mitchell. See, e.g.,* Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964). This theory was rejected by the Court in *Letter Carriers,* leaving the earlier state court decisions of questionable precedential value. There is some indication that state courts are now retreating in light of *Letter Carriers. See* Boston Police Patrol Ass'n, Inc. v. Boston, 326 N.E.2d 314 (1975). *Letter Carriers* has not, however, deterred some state courts from overturning nonpartisan political restrictions. *See* Phillips v. City of Flint, 57 Mich. App. 394, 225 N.W.2d 780 (2d Div. 1975).

partisan and nonpartisan activity.[189] It has been suggested that the preferred inquiry is whether or not the prohibition actually promotes employment efficiency and impartiality.[190] If so, then a first amendment balancing test would be invoked.[191] Under this alternative approach, the LSCA off-duty restrictions would be at least constitutionally suspect. Some prohibited conduct, such as taking part in a nonpartisan school board campaign, would appear to have little or no effect on a staff attorney's ability to perform legal services work. On balance, the individual's interest in such conduct would probably prevail. Any job-related political restrictions that are justifiable would have to be regulated by a more narrowly drawn provision.[192]

This first amendment argument is strengthened when the LSCA political restrictions are viewed in their entirety. One of the rationales used by the Supreme Court to uphold the Hatch Act was the existence of numerous outlets for political expression which remained unfettered under the statute.[193] The LSCA permits a staff attorney only very limited means of political expression under a regime of broad on and off-duty limitations.[194] Thus, under either a per se or a balancing analysis, the off-duty restrictions as incorporated into the LSCA by the "old" Hatch Act are vulnerable to first amendment attack.[195]

There are also indications of due process-equal protection violations throughout the LSCA political restrictions. The statute sets up numerous classifications: (*1*) legal services attorneys and the rest of

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[189] In Phillips v. City of Flint, 57 Mich. App. 394, 403, 225 N.W.2d 780, 784 (2d Div. 1975), the court stated: "We feel that dividing political activities of public employees into categories of 'proscribable' and 'non-proscribable' cannot be done by dividing them into 'partisan' and 'nonpartisan.' The proper inquiry is a balancing of government needs and private rights." The inadequacy of analyses relying on partisan/nonpartisan distinctions is manifest in states like Minnesota, where most elective offices are nonpartisan by statute. MINN. STAT. ANN. § 203A.21 (1975). *See* Johnson v. State Civil Serv. Dep't, 280 Minn. 61, 157 N.W.2d 747 (1968).

[190] *See* Phillips v. City of Flint, 57 Mich. App. 394, 225 N.W.2d 780 (2d Div. 1975). *See also* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 591-92 (1970).

[191] *See* note 137 *supra.*

[192] As the Court stated in NAACP v. Button, 371 U.S. 415, 433 (1963): "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

[193] The Court in United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947), emphasized: "Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success."

[194] *See* notes 95-127 and accompanying text *supra.*

[195] The inherent problems of invoking facial overbreadth analysis against LSCA on-duty restrictions are equally applicable to these off-duty provisions. *See* notes 137, 161-62 *supra.*

the citizenry; (2) legal services attorneys and other attorneys; and (3) part-time and staff legal services attorneys. To the extent that these classifications are based on criteria such as poverty,[196] or touch upon important rights such as expression, voting, or candidacy, they are arguably violative of the equal protection clause as applied to the federal government through the fifth amendment due process clause.[197] Although a few Congressmen expressed some concern about the equal protection ramifications of the proposed statute,[198] the history of Hatch Act litigation suggests that courts will be reluctant to apply an equal protection analysis and will be more receptive to a first amendment argument.[199] To date, only one federal court has adopted the strict equal protection analysis.[200]

2. *The "New" Hatch Act Incorporated into the LSCA*

If section 2996f(a)(6) is interpreted to incorporate the "new" Hatch Act, only partisan and nonpartisan candidacies are prohibited.[201] Incorporation of the new version, therefore, gives rise to far less restrictive provisions than does incorporation of the old version. The available constitutional arguments are correspondingly reduced.

In evaluating these candidacy restrictions, it is first necessary to determine whether they should be subject to the easily satisfied rational basis standard generally applicable to employee prohibitions,[202] or to the stricter test reserved for restrictions affecting first amendment and other fundamental rights.[203] This determination depends upon the status of the right to candidacy under the Constitution.[204] The Supreme Court has never explicitly held that seek-

[196] One critic has suggested that the New York State Appellate Division restrictions on poverty law firms (*see* note 95 *supra*) violate the equal protection clause. Botein, *supra* note 23, at 763-64.

[197] *See* note 178 and accompanying text *supra*.

[198] 119 CONG. REC. 20,741 (1973) (remarks of Representative Meeds).

[199] As has been demonstrated, the equal protection aspects of the LSCA at least serve to make the first amendment arguments more persuasive. *See* note 178 *supra*.

[200] In Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973), the First Circuit used an equal protection approach to strike down a city charter provision that forbade civil servants from becoming candidates for public office. Although *Mancuso* has not been explicitly overruled, it has only been cited with approval in two cases: Magill v. Lynch, 400 F. Supp. 84, 85 (D.R.I. 1975); Lecci v. Cahn, 360 F. Supp. 759, 766 (E.D.N.Y. 1973), *appeal dismissed*, 493 F.2d 826 (2d Cir. 1974).

[201] *See* notes 106-07 and accompanying text *supra*.

[202] *See* note 130 *supra*.

[203] *See* notes 137-38 *supra*.

[204] *See* Le Clercq, *The Emerging Federally Secured Right of Political Participation*, 8 INDIANA L. REV. 607 (1975). The author constructs a "federally secured right of political candidacy" from the confluence of fundamental voting and association rights. *Id.* at 625-36.

ing elective office is a protected form of expression.[205] In fact, the Court has recently upheld limitations on such activity.[206] Nevertheless, there is a strong argument that candidacy rights are embodied in the first amendment through the close relationship of candidacy to fundamental rights of political expression, association, and voting. This view is bolstered by two recent Supreme Court cases. In *Williams v. Rhodes*[207] the Court implied that the right to candidacy is protected by the first amendment. That implication was strengthened by the Court's finding in *Buckley v. Valeo*[208] that campaign spending is protected first amendment expression. Several federal and state courts have followed the Court's suggestion in *Williams* and *Buckley*.[209]

Even if it is assumed that the right to candidacy is constitutionally protected, off-duty restrictions would probably still survive a first amendment challenge. The staff attorney's interest in running for elective office becomes less significant in light of the many other outlets for political expression available under section 2996f(a)(6) if it incorporates the "new" Hatch Act.[210] Although the nonpartisan aspect of the provision would perhaps be vulnerable, the restriction might be deemed compelling on the basis that even nonpartisan candidacies would be time-consuming and thus directly interfere with an attorney's ability to perform on the job. In addition, either partisan or nonpartisan office-seeking might cause the Corporation to be identified with political issues, a posture the LSCA explicitly seeks to avoid.[211] Several federal and state decisions upholding restrictions on partisan and nonpartisan candidacies applied to gov-

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[205] In Mancuso v. Taft, 476 F.2d 187, 195 (1973), the First Circuit Court of Appeals stated: "The Supreme Court has never directly decided this point [whether there is a first amendment right to candidacy]. However, Williams v. Rhodes, [393 U.S. 23 (1968)], strongly suggests that the activity of seeking public office is among those rights protected by the First Amendment."

[206] In Storer v. Brown, 415 U.S. 724 (1974), the Court upheld California legislation that denied independent ballot designation to candidates with recent partisan affiliations. A Texas law requiring candidates to submit voter petitions to obtain ballot position was approved in American Party v. White, 415 U.S. 767 (1974). In Jeness v. Fortson, 403 U.S. 431 (1971), the Court upheld a similar Georgia statute.

[207] 393 U.S. 23, 30-31 (1968). *Williams* examined an Ohio statutory scheme that made it virtually impossible for minority party electors to obtain a place on the state's presidential ballot.

[208] 96 S. Ct. 612 (1976).

[209] *See, e.g.*, Mancuso v. Taft, 476 F.2d 187, 196 (1st Cir. 1973); Johnson v. State Civil Serv. Dep't, 280 Minn. 61, 157 N.W.2d 747 (1968); Commonwealth *ex rel.* Specter v. Moak, 452 Pa. 482, 307 A.2d 884 (1973).

[210] *See* notes 106-07 and accompanying text *supra*. These alternative outlets for political expression are highly significant. *See* note 193 and accompanying text *supra*.

[211] 42 U.S.C. § 2996e(e)(1) (Supp. IV, 1974).

ernment employees, also support the conclusion that the balance would be struck in favor of governmental interests.[212]

CONCLUSION

The Legal Services Corporation Act contains diverse provisions ostensibly designed to insulate the program from political pressures and guarantee the program's nonpartisan, professional stance. This Note, however, has demonstrated that at least two of these attempts to "depoliticize" legal services threaten constitutional rights. Provisions that forbid the Corporation and its grantees from representing clients in desegregation and abortion suits contravene the clients' equal protection and due process rights. Moreover, the sweeping political restrictions imposed upon LSC attorneys unjustifiably deprive those attorneys of first amendment rights.

Apart from these constitutional considerations, more fundamental questions regarding congressional attempts to create a politically neutral legal services corporation emerge from the foregoing discussion. Under the broad cloak of "depoliticization," Congress sought to do more than merely establish political neutrality and professional independence for the new program; restrictions on classes of litigation and attorney activities reflect attempts to protect the societal status quo and avoid controversy. These designs are attributable to either congressional naivete or lack of commitment to the goal of providing legal services to the indigent. The essence of the legal services ideal is to afford hitherto powerless citizens a means of vindicating their legal rights. This vindication, whether in the area of landlord-tenant, consumer, welfare, abortion, or desegregation law, inevitably disturbs society's existing power relationships. It would be impossible for a legal services program to represent its clientele effectively and at the same time avoid political controversy.[213] Thus, some of the restrictive provisions in the Act reveal a congressional decision to withhold full legal assistance from the

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[212] *See, e.g.*, Gray v. City of Toledo, 323 F. Supp. 1281, 1288 (N.D. Ohio 1971); Boston Police Patrol Ass'n, Inc. v. Boston, 326 N.E.2d 314 (1975); State *ex rel.* Gonzales v. Manzagol, 87 N.M. 230, 531 P.2d 1203 (1975). *Contra*, De Stefano v. Wilson, 96 N.J. Super. 592, 233 A.2d 682 (L. Div. 1967); Minielly v. Oregon, 242 Ore. 490, 411 P.2d 69 (1966).

[213] As Dean Roger C. Cramton, Chairman of the LSC Board of Directors, pointed out in a speech before the California Bar Association on September 24, 1975: "If a legal service program does not arouse some controversy it probably isn't doing its job, which is to provide the poor full, zealous and effective representation." Cramton, *The Task Ahead in Legal Services*, 61 A.B.A.J. 1339, 1343 (1975).

poor in order to avoid governmental involvement in certain particularly sensitive social issues.

Ironically, although Congress attempted the impracticable task of disengaging the Corporation from political controversy, it actually exposed the program to powerful new political pressures. Congressional desire to guarantee that the LSC not facilitate politically unpopular developments in abortion and desegregation law legitimizes future attacks on the Corporation on the basis of the results it obtains for its clients. Similarly, because the Act focuses attention on the activities of Corporation personnel, LSC attorneys are vulnerable to criticism motivated by hostility toward the objectives of the program but expressed in the sanctimonious tones of nonpartisanship. Most significantly, legislative debate and ultimate passage of the LSCA has put the program on notice that its activities will be thoroughly scrutinized by Congress. Because the Corporation relies upon congressional appropriations for its very existence, it can only survive by carefully measuring and conforming to the shifting political winds.

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