

## Class Actions and the Poor

HENRY ROSE\*

### I. THE PROBLEM

Imagine that you are a legal aid lawyer in America whose services are funded by the Federal Legal Services Corporation (LSC).<sup>1</sup> You interview a prospective client and learn that she was recently laid off from her job; she applied for and was denied Unemployment Insurance (UI)<sup>2</sup> benefits by the state; and she is in a desperate financial situation.<sup>3</sup> You accept the client's case to determine whether she has a legal basis to challenge the denial of her UI claim. You research your client's problem and form the opinion that the denial of her UI claim was based on a provision of state law that conflicts with a superior federal law. You also realize that thousands of other needy state residents are likely denied UI benefits each year for the same reason as your client and that the amount of UI financial assistance that they lose as a result may be in the millions of dollars. You discuss your research with your client and she desires to pursue litigation that will not only seek a judicial remedy for herself but also for the other state residents who face the same problem. The obvious judicial avenue for your client to pursue is a class action<sup>4</sup> case against the state, but you cannot file such a case because a 1996 federal law prohibits you from participating in class actions.

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\* Associate Professor of Law, Loyola University Chicago School of Law. The author wishes to thank the following persons: Fred Barnhart, Maura Deady, and Lee Robertson for research assistance; Nelson Brown, Jeffrey Gilbert, Robert Lehrer, and Joseph Mueller for providing information and insights about the *Pennington* case; Brett Frischmann, Jerry Norton, Spencer Waller, and Anita Weinberg for commenting on drafts; and Elaine Gist and Christine Heaton for production assistance.

1. The Federal Legal Services Corporation was created and funded by Congress in 1974 to provide free legal services to low-income Americans in civil cases. *See* Legal Services Corporation Act of 1974, 42 U.S.C. §§ 2996–2996I (2006).

2. Unemployment Insurance is a joint federal-state program that provides temporary financial aid to persons who involuntarily lose a job and are seeking a new one. *See* 42 U.S.C. §§ 501–504 (2006).

3. The scenario described here is based on the class action filed by Luella Pennington against Illinois officials in 1984 when LSC-funded attorneys could pursue class action cases on behalf of their clients. *See* *Pennington v. Doherty*, 110 F.3d 502 (7th Cir. 1997), *cert. granted, vacated on other grounds*, 522 U.S. 909 (1997).

4. A class action in civil litigation is when a person(s) is allowed to represent the interests of a large group of unnamed persons who share a common legal position.

## II. PURPOSE

The purpose of this article is to examine the policy justifications for the 1996 federal law<sup>5</sup> that prohibits lawyers and legal assistance organizations funded by LSC from initiating or participating in class action litigation. No other attorneys in America who engage in civil litigation are barred by law from representing their clients in class action cases. This article will consider whether this prohibition is justified for LSC-funded attorneys. It will also explore the consequences of the prohibition for low-income persons and for American society.<sup>6</sup> This examination of the policy justifications for the class action prohibition will be done in the context of a review of *Pennington v. Doherty*,<sup>7</sup> a typical class action case filed on behalf of low-income persons.

## III. HISTORY OF CIVIL LEGAL SERVICES FOR THE POOR AND THE ROLE OF CLASS ACTIONS

Prior to the mid-1960s, a poor person in America with civil legal problems could receive free representation largely through urban, bar association-sponsored legal aid programs<sup>8</sup> or through pro bono representation by private attorneys. Even though low-income Americans faced many legal problems then, two-thirds of them never sought the assistance of an attorney.<sup>9</sup>

In 1965, the Federal Office of Economic Opportunity created the Legal Services Program (LSP) to provide lawyers for the poor in civil cases on a national basis.<sup>10</sup> The new LSP was part of the federal government's War on Poverty and it was designed to reform the law on behalf of the poor as

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5. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321 (1996) [hereinafter OCRAA]. The prohibition was implemented by the Legal Services Corporation via an amendment to its regulations. 45 C.F.R. § 1617.1 (2007).

6. This article will not address the constitutionality of the prohibition of LSC-funded attorneys from participating in class action litigation because that question has been explored elsewhere. See Elisabeth Smith Bornstein, *From the Viewpoint of the Poor: An Analysis of the Constitutionality of the Restriction on Class Action Involvement by Legal Services Attorneys*, 2003 U. CHI. LEGAL F. 693 (2003); Jessica A. Roth, *It Is Lawyers We Are Funding: A Constitutional Challenge to the 1996 Restrictions on the Legal Services Corporation*, 33 HARV. C.R.-C.L. L. REV. 107 (1998). Also, the prohibition has withstood constitutional challenge in *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 595-96 (E.D.N.Y. 2004).

7. 110 F. 3d 502 (7th Cir. 1997), cert. granted, vacated on other grounds, 522 U.S. 909 (1997).

8. Alan W. Houseman, *Legal Aid History*, in POVERTY LAW MANUAL FOR THE NEW LAWYER 18 (2002).

9. DEBORAH L. RHODE, ACCESS TO JUSTICE 61 (2004).

10. Houseman, *supra* note 8, at 18-20.

well as to represent indigent persons with individual legal problems.<sup>11</sup> Coincidentally, Rule 23 of the Federal Rules of Civil Procedure was substantially amended in 1966, introducing the modern class action procedure.<sup>12</sup> This new class action procedure was used by LSP lawyers in federal litigation to pursue law reform for their low-income clients.<sup>13</sup>

LSP lawyers brought a substantial number of cases that were decided by the U.S. Supreme Court in the late 1960s and early 1970s.<sup>14</sup> Among these cases were class action cases in which important legal precedents were established favoring LSP clients. For example, in *King v. Smith*,<sup>15</sup> the Supreme Court held that federal standards for government benefits programs were superior to conflicting state standards. In the companion cases, *Goldberg v. Kelly*<sup>16</sup> and *Wheeler v. Montgomery*,<sup>17</sup> the Court launched the due process revolution<sup>18</sup> by requiring that welfare recipients be afforded procedural due process protections when government officials planned to terminate their welfare benefits.

The success that LSP lawyers and their clients achieved in the U.S. Supreme Court and other fora made for some powerful enemies; governors from Arizona, California, Connecticut, Florida, and Missouri sought to veto LSP activities in their states.<sup>19</sup> Vice President of the United States, Spiro Agnew, criticized the activities of LSP lawyers as the “Federal Government funding a program designed to effectuate major political changes.”<sup>20</sup>

In the early 1970s, bar officials, members of Congress, and officials of the Administration of President Richard Nixon began to discuss the creation of an independent legal services entity that would be insulated from political pressures.<sup>21</sup> In 1974, these discussions led Congress to create the Legal Services Corporation (LSC), a not-for-profit corporation whose

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11. William P. Quigley, *Legal Services: The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960s to the 1990s*, 17 ST. LOUIS U. PUB. L. REV. 241, 245 (1998).

12. STEPHEN C. YEAZELL, CIVIL PROCEDURE 791 (6th ed. 2004).

13. CHARLES K. ROWLEY, THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES 364 (1992).

14. LSP lawyers took 219 cases to the U.S. Supreme Court from 1967 to 1972; 136 were decided on the merits, including seventy-three that were decided in favor of LSP clients. EARL JOHNSON JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 189 (1974).

15. 392 U.S. 309 (1968).

16. 397 U.S. 254 (1970).

17. 397 U.S. 280 (1970).

18. Houseman, *supra* note 8, at 23.

19. JOHNSON, *supra* note 14, at 193.

20. Spiro Agnew, *What's Wrong with the Legal Services Programs*, 58 A.B.A. J. 930, 931 (1972).

21. Houseman, *supra* note 8, at 20.

board was to be independent and non-partisan.<sup>22</sup> LSC was funded by annual appropriations from Congress.<sup>23</sup> Although certain types of cases could not be pursued by LSC-funded lawyers (e.g., school desegregation cases),<sup>24</sup> these lawyers could participate in class action litigation if they had the express approval of the project director of their local program in accordance with policies established by the governing body of the program.<sup>25</sup>

The initial years of LSC in the late 1970s saw a dramatic increase in congressional funding and expansion of services from initially urban areas to virtually all counties in the United States.<sup>26</sup> However, the election of Ronald Reagan as President in 1980 resulted in a dramatic challenge to the continued existence of LSC. While President Reagan was governor of California in the late 1960s and early 1970s, he frequently clashed with LSP-funded programs in California that had mounted successful legal challenges to certain administrative initiatives involving farmworkers and welfare recipients.<sup>27</sup> Governor Reagan unsuccessfully sought to veto federal funding for LSP-funded activities in California.<sup>28</sup>

In his first proposed federal budget in 1981, President Reagan recommended the defunding of LSC.<sup>29</sup> Due to intense lobbying by the American Bar Association and others, LSC survived elimination, but its funding from Congress in 1982 was reduced by twenty-five percent.<sup>30</sup> These budget cuts resulted in the closing of hundreds of legal services field offices and the elimination of thousands of attorney and paralegal positions in LSC-funded programs.<sup>31</sup> Also in 1982, Congress sought to limit law reform activities by LSC grantees by imposing new limitations on class actions against government entities, requiring local program directors to determine before a class action is filed that the government entity is not likely to change a policy or practice that is adverse to low-income clients; the government entity has been given notice of the planned class action; and responsible

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22. Pub. L. No. 93-355, §§ 1003(a), 1004(a), 88 Stat. 378 (1974).

23. *See id.* § 1010(a).

24. *Id.* § 1007(b)(7).

25. *Id.* § 1006(d)(5).

26. Houseman, *supra* note 8, at 21.

27. Quigley, *supra* note 11, at 248, 250, 254–55.

28. *Id.* at 248–50.

29. *Id.* at 256.

30. *Id.* at 257. Although the Reagan Administration and its supporters were not able to eliminate LSC altogether, they hobbled LSC programs in the 1980s by appointing members to the LSC Board of Directors who were hostile to its goals and imposed new restrictions and administrative burdens on the local programs that LSC funded. *Id.* at 257–58.

31. Houseman, *supra* note 8, at 22.

efforts to resolve the dispute have been unsuccessful or would harm the low-income clients.<sup>32</sup>

Congressional funding for LSC declined in real terms in the 1980s,<sup>33</sup> but advocates for the legal rights of the poor were buoyed by the election of President William Clinton in 1992 because he strongly supported LSC.<sup>34</sup> Nevertheless, congressional elections in 1994 resulted in Republicans taking control of both chambers of Congress and ushered in a new period of crisis for LSC.

Initially, the new congressional leadership proposed to phase out LSC,<sup>35</sup> but they were not able to muster enough support for this drastic measure. However, in 1996, Congress reduced funding for LSC by more than thirty percent, resulting in the closing of 200 field offices and the loss of 900 attorney positions.<sup>36</sup> Congress also imposed new legislative restrictions on activities by LSC grantees.<sup>37</sup> Among the new restrictions was a prohibition on LSC recipients from initiating or participating in any class action.<sup>38</sup> This 1996 legislation, the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA), ended the involvement of LSC-funded attorneys and their clients in class actions.<sup>39</sup>

#### A. Pennington v. Doherty

A case that was typical of the class actions that LSC-funded attorneys filed on behalf of their low-income clients before OCRAA was *Pennington v. Doherty*.<sup>40</sup> *Pennington* will serve as a case study examining Congress's ban on class actions by LSC-funded lawyers.

Luella Pennington was employed by a messenger service in Chicago, Illinois before she was laid off in 1984. In June, 1984, she applied to the

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32. Further Continuing Appropriations Act of 1983, Pub. L. No. 97-377, 96 Stat. 1830, 1875 (1982).

33. Houseman, *supra* note 8, at 22, Legal Services Corporation Appropriations table.

34. *Id.* at 23.

35. See Legal Aid Act of 1995, H.R. 2277, 104th Cong. (1995).

36. Houseman, *supra* note 8, at 22–23, Legal Services Corporation Appropriations table.

37. See OCRAA, *supra* note 5. These restrictions on LSC-funded entities prohibited the following: efforts to influence the passage of legislation or the issuance of regulations on any agency action at any level of government; encouraging individuals to participate in any political activity; seeking to reform any federal or state welfare system through litigation, lobbying or rule-making; any requests for attorneys fees in litigation even if authorized by other federal or state law; participation in any litigation involving abortion; assisting any persons incarcerated in federal, state or local prisons; assisting any illegal aliens; assisting any person charged with the illegal sale or use of drugs in a case seeking to evict them from public housing; supporting any litigation involving reapportionment; and participation in any class action. See OCRAA, *supra* note 5, § 504(a).

38. *Id.* § 504(a)(7).

39. OCRAA, *supra* note 5.

40. 116 F. 3d 502 (7th Cir. 1997), *cert. denied, vacated on other grounds*, 522 U.S. 909 (1997).

State of Illinois for Unemployment Insurance (UI) benefits that were designed to provide her with financial assistance while she sought a new job.

Ms. Pennington's June 1984 application for UI benefits was denied because she had not earned enough qualifying wages during her base period. In Illinois, a UI claimant's base period is the first four of the five calendar quarters immediately prior to the quarter in which the claimant applies for benefits,<sup>41</sup> and the claimant must have earned at least \$1600 in wages during the base period.<sup>42</sup> Thus, since Ms. Pennington had applied for UI in the second quarter of 1984, her base period under Illinois law was the four calendar quarters of 1983. Since she had not earned the requisite wages in 1983, Ms. Pennington's UI claim was denied.

Ms. Pennington contacted the Legal Assistance Foundation of Chicago (LAFIC), a LSC-funded legal services agency serving low-income residents, seeking assistance on the denial of her UI claim. The attorneys at LAFIC researched Ms. Pennington's problem and concluded that if Illinois considered her base period to include the quarter immediately preceding the quarter in which she applied for UI (i.e., the lag quarter), then Ms. Pennington and thousands of other similarly situated UI applicants in Illinois would be eligible to receive UI benefits sooner after their loss of employment. Further, the LAFIC attorneys determined that applicable provisions of federal law required that states provide UI benefits promptly.<sup>43</sup> Therefore, they opined that Illinois's refusal to consider the lag quarter as part of the base period violated superior federal law.

In 1985, LAFIC attorneys filed a class action lawsuit in federal district court on behalf of Ms. Pennington and all others who had been or would be denied UI benefits because Illinois's statutory definition of the base period excluded the lag quarter.<sup>44</sup> The case had a complex and lengthy history, but in 1996 the district court found that the failure of Illinois to consider the lag quarter, as part of the base period, adversely affected the eligibility of between 14,000 and 40,000 Illinois applicants for UI each year, resulting in the annual loss of between \$30,000,000 and \$40,000,000 in UI benefits to them.<sup>45</sup> The district court further found that changes in technology

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41. 820 ILL. COMP. STAT. 405/237, 242 (2007).

42. 820 ILL. COMP. STAT. 405/500(E) (2007).

43. 42 U.S.C. § 503(a)(1) (2006); 20 C.F.R. § 640.3(a) (2007).

44. The *Pennington* class was certified to be:

All claimants for unemployment insurance benefits under the Illinois Unemployment Insurance Act ("the Act") who since July 15, 1983, have been, are being or will be denied such benefits by the Illinois Department of Employment Security solely because part or all of their wages otherwise sufficient to satisfy section 500 (E) of the Act were disregarded by operation of Section 237 of the Act.

*Pennington v. Doherty*, No. 85 C 6327, 1996 U.S. Dist. LEXIS 1058, at \*7 (N.D. Ill. July 11, 1986).

45. *Id.* at \*30.

had made it feasible to consider wages from the lag quarter in determining UI eligibility and that failure to consider lag quarter wages violated the Federal Social Security Act's requirement that UI benefits be paid promptly "when due."<sup>46</sup> Finally, the district court authorized a permanent injunction prohibiting Illinois from applying its statutory definition of base period to the class represented by Ms. Pennington.<sup>47</sup> In 1997, the Seventh Circuit affirmed.<sup>48</sup>

The *Pennington* decisions represented a victory for the thousands of Illinois residents who lose their jobs each year and who need UI financial assistance while they seek new employment.<sup>49</sup> Yet, no LSC-funded attorney could participate in a class action like *Pennington* after OCRAA was enacted in 1996.

### B. Policy Reasons for Prohibition on Class Actions

Why did Congress prohibit LSC-funded attorneys for the poor from participating in any class action litigation? The legislative history of the prohibition is scant, but what exists indicates that there were two primary policy reasons for the prohibition: (1) LSC grantees should represent individuals only and should not seek to pursue the interests of the poor as a group,<sup>50</sup> and (2) Advocacy for political and social change for the poor is not an appropriate use of federal funds.<sup>51</sup>

While these two policy reasons can be discerned from the legislative history of the class action prohibition, it is also apparent that broader political forces were at work in imposing the OCRAA restrictions on LSC.

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46. *Id.* at \*34–35.

47. *Id.* at \*36.

48. *Pennington v. Doherty*, 110 F. 3d 502 (7th Cir. 1997), *cert. granted, vacated on other grounds*, 522 U.S. 909 (1997).

49. Approximately four months after the Seventh Circuit issued its decision in 1997 affirming that federal law required Illinois to consider lag quarter wages as part of the Illinois base period, the Federal Social Security Act was amended by Pub. L. No. 105-33, 111 Stat. 251. The effect of this amendment was to no longer subject state UI programs to the "when due" provision of federal law. As a result of this amendment, Illinois did not have to consider a former worker's lag quarter wages to be part of the UI base period. However, Illinois enacted P.A. 93-634 in 2003 to amend the Illinois Unemployment Insurance Act to require that lag quarters be considered part of the state's base period beginning in 2008.

50. See 141 CONG. REC. S14608 (1995) (Senator Pete V. Domenici commenting, "I want everyone to know the reason for the prohibitions is because legal services, when it was founded by Richard Nixon in association with the American Bar, intended this to represent individual poor people in individual cases, not to represent a class of poor people suing a welfare agency or suing a legislature or suing the farmers as a class"); Legal Services Corporation, Supplemental Information Regarding the Final Rule on Class Action Participation, 61 Fed. Reg. 63,754 (1996).

51. *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 595–96 (E.D.N.Y. 2004) (noting that in discussing class actions and other restrictions, the committee "understood that advocacy on behalf of poor individuals for social and political change is an important function in a democratic society" but did "not believe that such advocacy is an appropriate use of federal funds").

Republican congressional leadership in 1995–1996 desired to phase out LSC, and they proposed legislation to accomplish this goal.<sup>52</sup> A substantial number of other members of Congress supported the continuation of LSC but concluded that its long-term political survival depended on fundamental modifications in its service delivery system, including the elimination of class actions.<sup>53</sup> Alexander D. Forger, President of LSC in 1995 and 1996, was informed by congressional supporters of LSC that unless class actions were eliminated, LSC could not survive.<sup>54</sup> Thus, a legislative compromise was reached in 1996—class actions and some other controversial activities of LSC grantees were restricted and LSC survived, albeit with a thirty percent decrease in funding.<sup>55</sup>

#### IV. ANALYSIS OF POLICY REASONS TO PROHIBIT CLASS ACTIONS BY LSC-FUNDED ATTORNEYS

##### A. *Focus on Individual Client Problems*

The first identifiable policy reason supporting the ban on LSC-funded attorneys pursuing class action cases is to focus these attorneys on assisting individual poor persons with legal problems rather than focusing on the poor as a group. This rationale assumes that individual low-income persons with civil legal problems will be disadvantaged if their lawyers pursue class action cases. However, this policy reason misses the point of the class action procedural mechanism. A class action is simply a means to aggregate the claims of a large number of individuals who happen to share a common legal position. A successful class action offers meaningful judicial relief to those individuals who comprise the class.

The *Pennington* class included all persons in Illinois who would apply for UI benefits but whose claims would be denied because Illinois statutes excluded their lag quarter wages from their base periods.<sup>56</sup> Annually, be-

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52. See Legal Aid Act of 1995, H.R. 2277, 104th Cong.

53. 141 CONG. REC. S14573, 14608 (1995) (Senator Arlen Specter, commenting, "I, frankly, have some concerns about the limitations which are present in this bill. I talked to Senator Domenici about them, especially the limitations on the use of non-Federal funds, and I know that this is a compromise to try to get the extra funding, to have some limitations. I have grave reservations about these limitations. But I do know this—even with the money which is left, this is not enough to handle individual cases where individuals need representation on complex legal matters."); Houseman, *supra* note 8, at 23.

54. Alexander D. Forger, *Symposium Address: The Future of Legal Services*, 25 FORDHAM URB. L.J. 333, 335 (1998).

55. *Id.*; Houseman, *supra* note 8, at 23.

56. *Pennington v. Doherty*, No. 85 C 6327, 1996 U.S. Dist. LEXIS 1058, at \*2 (N.D. Ill. July 11, 1986).

tween 14,000 and 40,000 people have their UI applications summarily denied by Illinois for this reason.<sup>57</sup> Each of these thousands of claimants is an individual who would face a serious legal problem, i.e., ineligibility for UI at a time of financial need due to loss of employment income. Pursuing judicial relief in a class action that challenged the exclusion of lag quarter wages from their base periods afforded these thousands of individuals an opportunity to seek judicial relief in one case. Thus, the class action in *Pennington* sought to benefit thousands of individuals who happen to share a common legal position. Class actions like *Pennington* do not serve to disadvantage the legal interests of the individuals who comprise the class. Rather, they simply aggregate the shared claims of these individuals in one suit.

Could class action involvement by LSC-funded attorneys limit their ability to serve other low-income clients with individual problems? In a facile sense, the answer is yes because an attorney's involvement in a complex class action like *Pennington* would undoubtedly reduce the attorney's ability to handle a large number of other individual cases (e.g., divorces). However, in a more important sense, a class action affords the attorney an opportunity to provide meaningful judicial relief to a large number of unnamed individuals who face the same legal problem as the named party. While the plaintiffs' attorneys in *Pennington* could handle fewer individual cases because of their involvement in a class action case, they sought in *Pennington* to avert a serious legal problem for thousands of other individuals, i.e., ineligibility for UI in Illinois at a time of great financial need.

Even when LSC-funded attorneys could lawfully participate in class actions, the number of class actions they participated in was very small. In 1995 (the last year that class action representation was allowed), LSC-funded lawyers handled 134,161 court cases for their clients; 630, or 0.47% of the total court cases were class action cases.<sup>58</sup> The percentage of LSC court cases that were class actions had steadily declined from the late 1980s to 1995.<sup>59</sup> Thus, even though class actions were a sliver of all court cases that LSC-funded attorneys were involved in, Congress still saw fit to ban them in 1996.

LSC regulations that implement the OCRAA restriction on class actions do not prohibit LSC-funded attorneys from referring their clients to private attorneys for class action representation.<sup>60</sup> However, such referrals

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57. *Id.* at \*28.

58. Michael Givel, *Legal Aid to the Poor: What the National Delivery System Has and Has Not Been Doing*, 17 ST. LOUIS U. PUB. L. REV. 369, 379, tbl. 4 (1998).

59. *Id.* at 379–80.

60. See 45 C.F.R. § 1617.1 (2006).

deprive low-income persons of legal representation by the attorneys with the deepest knowledge of the laws that affect them. Many of the government benefit programs that exist to assist low-income people, like UI, are complex federal-state statutory and regulatory schemes that require extensive experience to master. The decision in *Pennington* favoring UI claimants in Illinois was based on an intricate argument that federal statutes and regulations required a more expansive interpretation of the base period than Illinois statutes allowed.<sup>61</sup> It is unlikely that many private attorneys, who have little or no experience representing UI claimants, would have developed these arguments on their own.

When OCRAA was enacted in 1996, LSC interpreted it to require that LSC-funded lawyers withdraw as attorneys for their clients in all pending class action cases.<sup>62</sup> Efforts were undertaken, with the assistance of the American Bar Association, to identify private attorneys who would be willing to substitute for LSC-funded attorneys in the pending cases, but substitute counsel was not found in all cases and some were dismissed for this reason.<sup>63</sup> The reality is that private attorneys will not be willing to pursue all worthy class actions on behalf of low-income clients. For this reason, low-income persons and their LSC-funded lawyers should be allowed to pursue class action cases that they conclude the law allows and the needs of the clients require.

The policy justification for the class action prohibition—that it will focus LSC-funded attorneys on the individual problems of their clients rather than the poor as a group—does not withstand scrutiny. The involvement of LSC-funded attorneys in class actions at the time the prohibition was enacted was only a tiny percentage of all of their court cases. More important, class action representation affords LSC-funded lawyers the opportunity to provide meaningful judicial relief to large numbers of low-income individuals who share common legal problems. Class actions are merely a procedural means to address the significant legal problems of many individual low-income persons in a single case. Class actions serve to benefit rather than to disadvantage the low-income individuals whom LSC-funded lawyers are authorized to serve.

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61. *Pennington v. Doherty*, 110 F.3d 502 (7th Cir. 1997), *cert. granted, vacated on other grounds*, 522 U.S. 909 (1997).

62. Class Actions, 61 Fed. Reg. 63,754 (Dec. 2, 1996).

63. BRENNAN CENTER FOR JUSTICE, LEFT OUT IN THE COLD: HOW CLIENTS ARE AFFECTED BY RESTRICTIONS ON THEIR LEGAL SERVICES LAWYERS 8–10 (2000), <http://www.brennancenter.org/dynamic/subpages/atj6.pdf>.

### B. Seeking Political/Social Change Using Federal Funds

The second identifiable policy reason supporting the ban on LSC-funded attorneys from litigating class action cases is to prevent the attorneys from using federal dollars to pursue political or social change. This rationale assumes that class action litigation has primarily political or social goals rather than legal ones.<sup>64</sup>

Federally-funded attorneys for the poor have long been criticized for seeking to achieve law reform through their work.<sup>65</sup> However, the principal vehicle available to these attorneys to seek reform of the law—litigation—can only seek to have judges apply or interpret existing legal standards in a particular factual context. Litigation is not a means to create new laws or to change society beyond the reach of the law (e.g., to reduce poverty or income/wealth inequalities in America).

*Pennington* is an example of a case that seeks to reform the law in that plaintiffs' attorneys persuaded federal judges that existing federal statutes and regulations demanded a more timely base period for UI than Illinois statutes allowed. The application of the Illinois base period to UI claims was found to be illegal by the federal courts in *Pennington*. These judicial decisions did not create new laws but rather were based on an interpretation of an existing federal statutory/regulatory scheme. The decision in favor of the plaintiff class in *Pennington* was made by a district court judge and was upheld on appeal by three circuit court judges, all of whom were nominated to the federal bench by President Reagan.<sup>66</sup> Seeking application or interpretation of existing law is not a radical act. It could as accurately be described as *enforcement* of the law as *reform* of it.

Some victories for the poor in class action cases can certainly have political or social consequences. For example, there certainly were interest groups or persons who were not pleased with the decisions of the federal judges in *Pennington* that would likely result in an increase in UI taxes on

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64. In his efforts to defend LSC from its congressional critics in the mid-1990s, LSC President Alexander D. Forger was frustrated by the lack of understanding among members of Congress about class actions. "I had the impression that many in Congress literally believed that a class action meant 'the lower classes against the upper classes.' There really was a lack of awareness on the part of most of what a class action was all about, except it was bad." Forger, *supra* note 54, at 335.

65. Agnew, *supra* note 20; Kenneth F. Boehm, *The Legal Services Program: Unaccountable, Political, Anti-Poor, Beyond Reform, and Unnecessary*, 17 ST. LOUIS U. PUB. L. REV. 321, 328 (1998).

66. The district court judge who entered the injunction in *Pennington*, Paul E. Plunkett, was nominated by President Reagan in 1982. The Seventh Circuit judges who affirmed the injunction in *Pennington* were Circuit Judges Jesse E. Eschbach, Michael S. Kanne, and Kenneth F. Ripple. Each was nominated to the Seventh Circuit by President Reagan: Judge Eschbach in 1981; Judge Ripple in 1985; and Judge Kanne in 1987.

Illinois employers<sup>67</sup> to fund the estimated \$30,000,000 to \$40,000,000 in UI benefits that would be triggered by implementation of the decisions. However, any tax increase on employers in Illinois that would result from the *Pennington* decisions would result from an interpretation of the law by federal judges after the attorneys for the plaintiff class and the defendant state officials both had a fair and full opportunity to contest the interpretation. A judge's proper role in deciding a class action case like *Pennington* is to reach the correct legal result, apart from the political or social consequences of the decision.

The use of federal dollars to fund legal representation for the poor has been the source of controversy, particularly when the federal dollars support litigation against local, national, and state governmental entities.<sup>68</sup> However, many low-income persons receive a variety of government benefits from units of government at all levels. Many of these government benefits, such as UI benefits, are based on complex federal and state statutory and regulatory schemes. It is natural that many of the legal problems that the poor face involve their eligibility for or their receipt of benefits under these myriad government assistance programs.

To prohibit low-income persons from pursuing legal grievances against government entities with the assistance of LSC-funded lawyers would be to ignore a wide range of the civil legal problems of the poor. Wisely, neither Congress nor LSC have chosen to enact such a draconian prohibition, and LSC attorneys are free to assist their clients with most government-related legal problems.

Since Congress has seen fit to allow LSC lawyers to assist their individual low-income clients with grievances against government entities, the use of federal dollars to fund class actions against government agencies or others is similarly legitimate. Class actions are simply a procedural mechanism in litigation to aggregate common legal claims on behalf of a large number of persons who share them. If the underlying legal claims of the members of a class can lawfully be pursued by LSC attorneys on behalf of the members as individuals, federal LSC dollars are not tainted by being expended in a class action case in which the individuals' identical claims are pursued together.

For many years, federal LSC funds were used to fund the plaintiffs' legal representation in *Pennington*. At its core, *Pennington* represented an effort to enforce federal legal standards on a state-administered government assistance program. The federal judges in *Pennington* decided that

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67. UI benefits in Illinois are paid from a fund based on contributions of employers in Illinois. 820 ILL. COMP. STAT. 405/240 (2007).

68. RHODE, *supra* note 9, at 63.

federal laws must be followed in the administration of Illinois's UI program. Federal law was upheld in *Pennington*. It is difficult to imagine a more appropriate use of federal dollars than to fund a successful class action case like *Pennington*, which sought to enforce federal legal standards on behalf of thousands of needy low-income persons. *Pennington* does not represent political action by LSC-funded attorneys but rather a vindication of principles of federalism and enforcement of the rule of law—on behalf of a large group of low-income Americans.

#### V. POLICY REASONS TO ALLOW CLASS ACTIONS BY LSC-FUNDED ATTORNEYS

Allowing LSC-funded attorneys to represent their clients in class actions offers many benefits. Among these benefits are as follows: economical expenditure of public funds, judicial efficiency, accountability and deterrence, hiring and retention of attorneys for the poor, and equal justice.

##### A. *Economical Expenditure of Public Funds*

The Legal Services Corporation Act requires that its grants be “made so as to provide the most economical and effective delivery of legal services.”<sup>69</sup> Federal taxpayers also have a strong interest in public funds expended in an economical manner. The prohibition against class actions by LSC-funded lawyers undermines the goal of the economic expenditure of public funds.

One indisputable fact about civil legal assistance to the poor is that the assistance of LSC-funded lawyers is a scarce resource. Unlike holdings in criminal cases, the U.S. Supreme Court has declined to hold that indigent litigants in civil cases are entitled to free legal representation at government expense.<sup>70</sup> Surveys of the civil legal needs of low-income Americans consistently show that they are able to access legal assistance for no more than one in five of their legal problems.<sup>71</sup> Since 1980, funding for LSC has declined by approximately half in real dollars.<sup>72</sup> The reality is that LSC-funded attorneys have only been able to provide legal assistance to their low-income clients in a small fraction of the situations in which assistance is needed.

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69. Pub. L. No. 93-355, § 1007(a)(3).

70. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 26–27 (1981).

71. LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 4 (2005); RHODE, *supra* note 9, at 3, 103.

72. Houseman, *supra* note 8, at 22, Legal Services Corporation Appropriations table.

A class action allows the aggregation, in a single lawsuit, of the claims of all persons who share a common legal position. Consequently, class actions offer the opportunity to provide meaningful judicial relief to a large number of aggrieved individuals.

In *Pennington*, Luella Pennington was certified by the federal courts to represent all Illinois UI claimants who had been or would be denied benefits because their lag quarter wages were not considered part of their base period.<sup>73</sup> Due to this class certification and Ms. Pennington's meritorious legal position in her case, her LSC-funded attorneys represented between 14,000 to 40,000 Illinois UI claimants who would annually be denied benefits because of the exclusion of their lag quarter wages from their base period. The class action in *Pennington* had the potential to avert a significant legal problem for tens of thousands of needy Illinois residents each year.

Representing, in one class action case, thousands of persons who would be illegally denied government benefits by state officials is obviously an economical way of redressing their grievances. For LSC-funded attorneys, the alternative to pursuing a class action case on behalf of the *Pennington* class was to represent some of the thousands of persons in Illinois who would annually be denied UI benefits because of the exclusions of their lag quarter wages in separate cases challenging the denial of each of their UI claims. This approach would result in a massive duplication of efforts by the LSC-funded attorneys in a potentially huge number of cases involving an identical legal issue. The expense of such an undertaking would be enormous. Undoubtedly, many of the persons who would be denied UI benefits by Illinois because their lag quarter wages were not considered part of their base period would not seek legal assistance to challenge the denial of their claims. Such persons would not receive the legal benefit that a successful conclusion to a class action affords, and the unlawful denial of their UI claims would not be vindicated. Finally, if LSC-funded attorneys must pursue duplicative individual case representation on behalf of their clients with similar legal positions, it will render those attorneys unavailable to represent other low-income clients who have different but legitimate legal claims or defenses.<sup>74</sup>

The prohibition of class actions by LSC-funded attorneys undermines the goal of the economical expenditure of federal LSC funds. It results in a denial of legal assistance and protection of the law to poor clients who

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73. *Pennington v. Doherty*, 110 F.3d 502, 503 (7th Cir. 1997), cert. granted, vacated on other grounds, 522 U.S. 909 (1997).

74. Marie A. Failinger & Larry May, *Litigating Against Poverty: Legal Services and Group Representation*, 45 OHIO ST. L. J. 1, 28 (1984).

could benefit if class action litigation were utilized in meritorious cases. Appropriate class actions allow LSC-funded programs to maximize the number of low-income clients they can assist with their limited resources, and this result is entirely consistent with the congressional goal of “economical and effective delivery of legal services” by LSC.

### B. *Judicial Efficiency*

Class actions are allowed in civil litigation because they serve the important judicial functions of achieving economies of time, effort, and expense and promoting uniformity of adjudication for similarly situated persons.<sup>75</sup> Class actions allow courts, in a single case, to efficiently adjudicate the rights of numerous individuals who share a common legal position.

Even though LSC-funded attorneys can no longer pursue a class action like *Pennington* on behalf of all Illinois residents who would be denied UI benefits because their lag quarter wages are not considered part of their base period, these attorneys could still represent the denied claimants in individual cases. After all, each of these denied claimants would be a needy person with a serious legal problem. This individual approach to an identical problem would necessitate multiple cases being filed in the courts, all raising the same legal issue. Does federal law require Illinois to consider lag quarter wages to be part of the UI base period?

Multiple cases on behalf of individuals that raise the same legal issue would result in hugely expensive duplication of filing, pleading, discovery, and adjudication in the courts. The court personnel and judges involved in these cases would expend their time very inefficiently. In addition, the trial judges in each case could issue conflicting rulings, absent binding appellate court precedent,<sup>76</sup> resolving the legal issue common to each case. One trial judge might conclude that federal law requires the inclusion of lag quarter wages in the Illinois base period; another trial judge might conclude that it does not. The goal of the promotion of uniformity of adjudication would be poorly served by multiple individual decisions in cases involving identical legal issues.

Class actions not only potentially benefit the members of a class, but they serve judicial efficiency as well. All taxpayers have an interest in judicial systems that hear claims and defenses efficiently and avoid the inconsistent adjudication problems raised by multiple cases addressing the same legal issue. Class actions promote judicial efficiency.

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75. FED. R. CIV. P. 23 (see advisory committee’s note).

76. Trial courts are only bound by *stare decisis* to follow the legal rulings of appellate courts in their jurisdiction. RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE 513 (2006).

### C. Accountability and Deterrence

A class action case necessarily focuses the court, the litigants, and their attorneys on the institutional treatment of the class rather than on the particular plight of each member of the class. This institutional focus of the litigation can offer increased public accountability for a proven wrongdoer's conduct and greater deterrence of future wrongdoing by the litigants and others.

If Ms. Pennington's claim had been pursued in court individually, rather than as a class action, it would have represented the litigation of an important legal problem for a former worker in Illinois. As a class action, Ms. Pennington's claim represents the litigation of an important public legal issue, the resolution of which could affect thousands of other needy Illinois residents.

As an individual claim, Ms. Pennington's case would have faced several outcomes. First, the state defendants might have offered Ms. Pennington favorable settlement terms in order to moot out the claim and insulate the Illinois base period from an adverse judicial decision.<sup>77</sup> On the other hand, once Ms. Pennington's case was certified as a class action, the case could not be settled unless the court approved a settlement that was fair to all class members.<sup>78</sup>

Second, if Ms. Pennington's claim had been litigated as an individual case, there would have been no need to develop evidence about the 14,000 to 40,000 other Illinois residents who are annually denied millions of dollars in UI benefits because of the exclusion of their lag quarter wages from the base period.<sup>79</sup> As a class action, the numerosness of the class is a central issue in the class certification process,<sup>80</sup> and discovery would be allowed to determine the number of persons affected by Illinois's base period definition and the amount of their loss. Class action status allows the trial judge to learn the full scope of the legal problem for all affected persons and to provide appropriate remedies if the class action proves meritorious.

Third, if Ms. Pennington's individual case reached a final decision on the merits by a trial judge finding that Illinois's base period violated federal law, that decision would apply to Ms. Pennington's UI claim only; state officials would not be judicially required to follow the decision in

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77. See Failinger & May, *supra* note 74, at 17; see also Laura K. Abel & David S. Udell, *If You Gag the Lawyers, Do You Choke the Courts? Some Implications for Judges When Funding Restrictions Curb Advocacy by Lawyers on Behalf of the Poor*, 29 FORDHAM URB. L. J. 873, 886-87 (2002).

78. FED. R. CIV. P. 23(e)(1)(c).

79. See Abel & Udell, *supra* note 77, at 884-85.

80. FED. R. CIV. P. 23(a)(1).

considering future UI applications of other claimants. The state defendants would also have no obligation to reconsider past UI denials for other persons in Illinois whose lag quarter wages had not been considered part of their base period.<sup>81</sup> On the other hand, the interests of the class were integral to the judicial resolution of *Pennington*. The district court judge weighed the benefits, to the thousands of members of the plaintiff class, of including lag quarter wages in the base period against the costs to the state to implement such an inclusion—and determined that the benefits to the plaintiff class clearly outweighed the costs to the state.<sup>82</sup> This cost-benefit analysis led to the judge's holding that the federal law's commitment to the prompt processing of UI claims was violated by Illinois's base period definition that excluded lag quarter wages.<sup>83</sup> Finally, the district court judge authorized the issuance of a permanent injunction against the application of the Illinois base period to the plaintiff class.<sup>84</sup> The class action certification in *Pennington* allowed Ms. Pennington, her attorneys, and the district court to consider a judicial remedy that could benefit all of the persons in Illinois who had been or would be adversely affected by Illinois's UI base period definition. If Ms. Pennington had pursued the same case as an individual, a favorable judicial ruling would have benefited only her.

Finally, if a trial judge found in Ms. Pennington's individual suit that Illinois's base period violated federal law, such a decision would have limited preclusive effect on future, similar cases. It would not preclude the state from opposing any similar claim made in a later case by another denied UI claimant because the claim preclusion doctrine only bars claims between the same parties involved in the initial case.<sup>85</sup> It is possible that the state would be precluded, in a later, similar case brought by a different UI claimant, from relitigating the same legal issues adjudicated in Ms. Pennington's individual case.<sup>86</sup> However, this application of issue preclusion would still necessitate piecemeal litigation involving identical legal issues to be brought sequentially rather than in the more efficient class action format. Moreover, a judgment in a class action has preclusive effect on the members of the class for all claims litigated in the case.<sup>87</sup> Thus, a class action has the potential to definitively answer, in one case, legal questions that affect large numbers of people.

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81. See Abel & Udell, *supra* note 77, at 882–83.

82. See *Pennington v. Doherty*, No. 85 C 6327, 1996 U.S. Dist. LEXIS 1058 (N.D. Ill. July 11, 1986).

83. *Id.* at \*12.

84. *Id.* at \*12.

85. FREER, *supra* note 76, at 514.

86. *Id.* at 560–66.

87. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 880 (1984).

The poor are often affected uniformly by government policy or by the conduct of private actors. Class actions allow the poor to challenge the legality of these activities in a way that addresses the full dimensions of the problems they create. Judges, in meritorious class actions, can fashion judicial relief that fits the scope of these problems for all affected persons. Class actions contribute to public accountability for illegal conduct and offer comprehensive methods of providing judicial remedies to all of the victims of the wrongful conduct.

#### *D. Hiring and Retention of Attorneys*

The prohibition of class action participation by LSC-funded attorneys makes these positions less attractive to attorneys interested in serving the legal needs of the poor. It eliminates from an LSC-funded attorney's practice experience, a complex and interesting means of representing their clients. More important, it renders unavailable to these attorneys an important mechanism for effectively redressing the legitimate legal grievances of their clients. It means that LSC-funded attorneys must represent their clients with the proverbial "one hand tied behind the back," and many prospective LSC-funded attorneys for the poor will find this limitation unattractive.

Attorneys who are unable to represent their clients in class actions also face ethical problems. Attorneys who are limited in their ability to pursue a class action on behalf of their clients are compromised in their ethical duty to provide effective representation and to exercise independent professional judgment about that representation.<sup>88</sup> Moreover, there are certain types of individual legal grievances that can only be effectively pursued in a class action case (e.g., chronic delays in paying government benefits due to government budget policies).<sup>89</sup> An attorney who cannot pursue a class action on behalf of a client when the attorney's professional judgment indicates that a class action is the best approach to address the client's problem is left in an ethical morass. This ethical minefield for LSC-funded attorneys, caused by restrictions on representation like the class action prohibition, renders these attorney positions less appealing.

Available LSC-funded attorney jobs attract a limited pool of applicants because of the low compensation these positions traditionally offer. When the restrictions on representation and their attendant ethical challenges are also considered, LSC-funded attorney positions become less attractive to

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88. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974); RHODE, *supra* note 9, at 114.

89. Failinger & May, *supra* note 74, at 17-18.

prospective candidates. This is most unfortunate. Legal assistance to the poor should attract a wide pool of excellent candidates for attorney positions. That is not the case when unsound restrictions, like the prohibition on class action participation, render the positions professionally unattractive.

#### *E. Equal Justice*

The primary policy reason to allow class action participation by LSC-funded attorneys is that the current prohibition undermines America's commitment to equal justice under law. The stark reality is that LSC-funded lawyers for the poor are the only lawyers in America who cannot participate in class actions when the needs of their clients require it. Low-income persons have as many or more civil legal problems as other Americans, but they have fewer resources to respond. Yet, Congress has determined that it is necessary to limit the avenues of redress available to the poor to deal with these legal problems. The prohibition on class actions relegates the poor to second class justice, a fundamental wrong in a legal system that seeks to guarantee all equal justice under law.

### VI. CONCLUSION

This article has demonstrated that the prohibition of class action participation by LSC-funded attorneys is based on unsound policy. As such, the prohibition should be repealed. When it is repealed, America will move a step closer to the Legal Services Corporation's goal "to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances."<sup>90</sup>

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90. 42 U.S.C. § 2996(1) (2006).