

Court Strategy*

TABLE OF CONTENTS

I.	STATEMENT OF ISSUES	115
II.	ACCESS TO COURTS	115
III.	COURT SECRECY.....	119
IV.	COURT BIAS	119
V.	PUBLIC EDUCATION AND TOOLS.....	120
VI.	BACKGROUND ON PANELISTS	120
VII.	PANEL DISCUSSION	124

I. STATEMENT OF ISSUES

The court strategy agenda focuses on the following four issue areas: (1) access to the courts, (2) secrecy of court documents and settlements, (3) court bias, and (4) public education and tools.

II. ACCESS TO COURTS

Our judicial system primarily decides disputes in two categories: criminal cases given priority, and civil disputes between wealthy interests. Exacerbating the access problem are (1) barriers to deciding cases on a class, or en masse, basis—particularly by those representing the poor; (2) standing and immunity doctrines which undermine Title VII and other civil rights protections; (3) prohibitive costs and delays inherent in litigation; (4) a lack of streamlined procedures to adjudicate

* March 24, 2001. Moderator: Robert C. Fellmeth, Price Professor in Public Interest Law, University of San Diego School of Law; Executive Director, Center for Public Interest Law. Panelists: Alan B. Morrison, Co-Founder, Public Citizen Litigation Group; Theodore M. Shaw, Associate Director and Counsel, NAACP Legal Defense and Educational Fund; Nadine Strossen, President, American Civil Liberties Union and Professor of Law, New York Law School; Patricia Sturdevant, Co-Founder, National Association of Consumer Advocates.

legitimate disputes in a timely fashion; (5) costs of \$150–\$500 per hour to employ licensed attorneys; (6) attacks on contingency fees (limits) which inhibit representation of those unable to pay hourly rates; (7) increasing reliance on compulsory mediation or arbitration imposed in adhesive fashion by banks and other corporations; and (8) diminished supply of publicly funded courts and the concomitant growth of private adjudication by retired judges to whom public litigants are referred and who bill at substantial rates.

Are these the major threats to access to the courts? Are there others? Which are paramount and addressable within the next decade? Possible strategies to address these access problems include the following:

(1) *Class actions are difficult to maintain.* What should be done to promote the representation of the interests of large groups? Should we distinguish between different types of class actions (for example, Federal Rule of Civil Procedure 23(b)(1) and (2) actions in equity, as opposed to the class action damage action under Rule 23(b)(3), which requires predominance of common questions, superiority, manageability, and individual notice)?

The Legal Services Corporation (LSC) attorneys representing the indigent remain restricted in bringing class actions against those who violate the legal rights of impoverished groups. Does the Supreme Court decision in *Legal Services Corp. v. Velazquez*¹ resolve the problem? If it does not, what alternatives are available to represent the interests of the poor beyond single client representation?²

Apart from the LSC, should public interest litigants in general shift to petitions for writ of ordinary mandamus rather than rely on class actions?³

What are the options to fund major class actions? A separate corporation? Public or private partnerships? Is there another way to combine on behalf of diffuse and future interests?⁴

Federal Rule of Civil Procedure 23 has suffered court-imposed limits—stricter construction of commonality and the “add-on” requirements of superiority and manageability. State courts have followed suit. Class actions are intended to allow diffuse interests unable to bring suit individually to vindicate their rights in a single and efficiently

1. 531 U.S. 533 (2001).

2. See Brennan Center for Justice, *Fact Sheets on Legal Service Corporation Restrictions* (2000–2001), available at <http://www.brennancenter.org> (last visited Feb. 1, 2003).

3. See Robert C. Fellmeth, *No Class*, L.A. DAILY J., Jan. 17, 1996, at 7.

4. See, for example, the litigation model utilized by plaintiff attorneys challenging tobacco on an addiction theory nationally in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

prosecuted action. But because these interests have no other alternative, a court decision to decertify a class eliminates the case. Ironically, where separate cases can and will be brought individually in large numbers, the class is more likely to win certification. Courts have betrayed the class action purpose by eliminating the very cases most needing class format so a wrong (often a massive one) can reach our courts. One strategy, perhaps related to forming a corporation to finance such actions noted above, could be to respond to decertification by filing hundreds or even thousands of individual actions. How likely are judges to deny certification if the alternative is piecemeal, repetitive, and wasteful litigation visited upon them?

Another alternative would be to use a modified version of California's Unfair Competition Act⁵ as a legislative model for the other forty-nine states. This statute provides for a private attorney general action on behalf of the general public.⁶ Three modifications to this concept (notice, adequacy of representation, and hearing on final judgment) could avoid the Federal Rule 23 barriers noted above and satisfy due process to give it collateral estoppel impact.⁷

Some have advocated broader use of law enforcement remedies, such as public prosecutor enforcement.⁸

(2) *Reverse standing and immunity limitations, which may be accomplished by statute.* Such barriers to justice include the *Allison* problem,⁹ police practice limitations, 1996 court stripping statutes,¹⁰ and Supreme Court decisions expanding state immunity.¹¹

(3) *Facilitate access by awarding prevailing plaintiffs attorneys' fees.* Many states have private attorney general attorney fees by court decision, statute, or both.¹² The *Alyeska Pipeline* case precludes private

5. CAL. BUS. & PROF. CODE § 17200 (2002).

6. See Robert C. Fellmeth, *Unfair Competition Act Enforcement by Agencies, Prosecutors, and Private Litigants: Who's On First?*, 15 CAL. REG. L. REP. 1 (1995).

7. *Id.* at 8.

8. See, e.g., CAL. PENAL CODE § 387 (West 1999).

9. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (9th Cir. 1998).

10. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2241–2255 (2000); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified in scattered sections of 18 U.S.C.).

11. See, e.g., *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

12. See, e.g., *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977); see also CAL. CIV.

attorney general fees federally, although numerous specific statutes award fees to prevailing plaintiffs, and some circuits allow a percentage of a benefit to be awarded to mass tort or other common fund counsel.¹³ What should the highest priority be to stimulate representation of general and future interests at the state level?

(4) *Reduce attorney costs to facilitate access.* Why not create a class of practitioner—the independent legal technician—to provide noncomplex legal services (for example, those consisting primarily of the completion and filing of forms) to those below the wealthy class, at \$20 per hour rather than \$200 per hour? Such persons could be examined and licensed in narrow areas of high demand (for example, landlord-tenant, immigration, family law), restricted to practice in that area, and required to take periodic re-examinations in that area. Such a system would assure competence more assiduously than do state bars, which do little to assure competence in actual areas of practice.

(5) *Reduce court costs and delay.* Would it help if civil litigators were not steeped in a “hired gun” mentality? Should litigators be paid by courts and given bonuses where they help the court find the truth? What other methods are available to elevate the officer of the court function and lessen the commonly dishonest and obstructionist hired gun approach?

Should the *fast track* experiment now under way in many jurisdictions be made mandatory and general?

Do we need *more courts*? How many, and how do we get them?

Can we *streamline litigation* by expanding summary judgment, attorney sanctions for abuse, attorney discipline applied to big firm civil discovery, and other abuses? What new ideas do we have?

(6) *Impede the trend toward privatization of adjudications.* Should mandatory arbitration or mediation be opposed or bent in a fairer direction? How? What can we do about the inclusion of these clauses in employment contracts?¹⁴

PROC. CODE § 1021.5 (West Supp. 2002).

13. *Alyeska Pipeline Service Co. v. Wilderness Soc’y*, 421 U.S. 240 (1975); *see also Lealao v. Beneficial Cal., Inc.* 82 Cal. App. 4th 19, 26–31 (2000) (summarizing current federal and state law and related history).

14. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); Brief of Amici Curiae Public Citizen, Green Tree Financial Corp. v. Randolph, 531 U.S. 79 (2000) (No. 99-1235); NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, POSITION PAPER: REASONS TO OPPOSE PRE-DISPUTE ARBITRATION CLAUSES IN CONSUMER CONTRACTS (2000) (on file with author).

III. COURT SECRECY

Many regulatory failures, including those portending irreparable harm, are revealed through private litigation. The Firestone tire tread example is one of many private personal injury suits to do so, and consumer law cases abound to remedy abuses that should have been addressed by responsible regulators. But confidentiality agreements muzzle plaintiffs and inhibit public protection, additional deterrent-producing suits, and preventive regulatory action. The publicly funded courts are used by plaintiffs to obtain money damages, which are increased on condition that the abuse is not shared to create additional liability for the defendant. Both parties gain at the expense of those not at the table. Clearly, the option of secrecy and muffling should be taken off the table so that it cannot be part of the bargaining process. How do we accomplish that? Are there legitimate areas of confidentiality?¹⁵

IV. COURT BIAS

The 2000 *Bush v. Gore*¹⁶ decision amplified what most of us already know: courts are biased. Not a little, but a lot. The almost infinite rationalizing power of the human mind allows personal and political bias to guide decisions far more certainly than any notion of fair or consistent application of legislative intent. To be sure, absolute objectivity is impossible. But judges should strive toward a higher degree of objectivity than was exhibited in *Bush v. Gore*, where five U.S. Supreme Court justices suddenly discovered an activist view of the Equal Protection Clause they had previously been unable to find in a thousand cases. What can we do to lead jurists to apply the law in a more principled, consistent fashion?

The manner and *terms of judicial appointment, election, and retention* can create or reinforce bias. Campaign contributions in judicial elections are a particularly pernicious form of influence by those who give and expect an advantage in court. Texas and some other states allow campaign contributions. Other states require judges to mount substantial campaigns to remain in office. In Los Angeles it costs a sitting judge, where challenged, at least \$80,000 just to appear in the

15. See Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure; Where Does the Balance Lie?*, 24 U. RICH. L. REV. 109 (1989).

16. 531 U.S. 98 (2000).

necessary official voter pamphlet.¹⁷

Bias turns strongly along empathy lines. In whose shoes does the court stand? Accepting the notion that some bias is unavoidable, how can we promote the appointment and retention of persons who identify with future and diffuse interests and those of the dispossessed?

V. PUBLIC EDUCATION AND TOOLS

The media largely sets the table for public policy alteration, particularly for those lacking campaign contribution influence. How do we reach the media with these issues to facilitate our priority goals? For example, press story selection criteria favor coverage of seemingly absurd personal injury cases (a lawsuit by a burglar against his victim, harm from hot coffee, and so forth). On the other hand, the *Firestone*¹⁸ case coverage has raised court secrecy issues and amplified serious regulatory deficiencies. How do we more systematically stimulate visibility for access, secrecy, and bias issues—particularly when the harm is general, prospective, or not amenable to the typical journalistic handles of celebrity, violence, sex, or irony (boy bites dog)?

* * * * *

VI. BACKGROUND ON PANELISTS

Robert Fellmeth is the holder of the Price Chair in Public Interest Law at the University of San Diego School of Law. He is founder and executive director of USD's Center for Public Interest Law and the Children's Advocacy Institute.

A graduate of Stanford University and Harvard Law School, Fellmeth was one of the original Nader's Raiders, organizing the student groups in 1968 and directing the Nader Congress Project in 1970–72. As a deputy district attorney and assistant U.S. attorney in San Diego from 1973–81, he litigated twenty-two antitrust actions and founded the nation's first antitrust unit in a district attorney's office.

After forming the Center for Public Interest Law in 1980, he litigated many cases enforcing California's public records, open meetings law, and other sunshine statutes, as well as cases relevant to consumer protection, political reform, and, since 1990, children's rights.

17. See *Kaplan v. Los Angeles County*, 894 F.2d 1076, 1078 (9th Cir. 1990); see also *Public Citizen Complaint for Declaratory and Injunctive Relief, Pub. Citizen v. Bomer*, 274 F.3d 212 (5th Cir. 2001) (No. 00-51009), at <http://www.citizen.org/printarticle.cfm?ID=658>; *Public Citizen Brief for Appellants, Pub. Citizen v. Bomer*, 274 F.3d 212 (5th Cir. 2001) (No. 00-51009), at http://www.citizen.org/print_article.cfm?ID=6285.

18. *In re Bridgestone/Firestone, Inc.*, 129 F. Supp. 2d 1207 (S.D. Ind. 2001).

He currently chairs the board of directors of Public Citizen Foundation, is a member of the board of the National Association of Counsel for Children, and is counsel to the board of the National Association of Child Advocates. He has served on the board of directors of Consumers Union and California Common Cause.

He has taught at the National Judicial College, the National College of District Attorneys, and the California Judicial College. He has authored or co-authored fourteen books or treatises, including *The Nader Report on the Federal Trade Commission*;¹⁹ *The Politics of Land*;²⁰ *California Administrative and Antitrust Law: Regulation of Business, Trades and Professions*;²¹ and *California White Collar Crime*.²² He is currently writing *Child Rights and Remedies*,²³ a text on the rights of children.

Alan Morrison co-founded the Public Citizen Litigation Group, the nation's preeminent public interest law firm based in Washington, D.C. Litigation Group attorneys bring precedent setting lawsuits on behalf of citizens to protect health, safety, and rights of consumers.

He has handled a broad range of litigation including leading consumer, ethics, and Freedom of Information Act²⁴ cases. Morrison has trained public interest attorneys for U.S. Supreme Court practice and assisted them in their case preparation across a wide range of issues, from civil rights to the current challenge of the Texas judicial election process for alleged campaign finance abuse.

Morrison currently serves as an adjunct professor at the New York University School of Law and is immediate past president of the American Academy of Appellate Lawyers. He served for nine years as a member of the Board of Governors of the District of Columbia Bar. He is also a member of the National Academy of Sciences' Program on Science, Technology and Law.

He also served as an assistant U.S. attorney for the Southern District

19. EDWARD F. COX, ROBERT C. FELLMETH & JOHN E. SCHULZ, 'THE NADER REPORT' ON THE FEDERAL TRADE COMMISSION (1969).

20. ROBERT C. FELLMETH, POLITICS OF LAND (1973).

21. ROBERT C. FELLMETH & RALPH H. FOLSOM, CALIFORNIA ADMINISTRATIVE AND ANTITRUST LAW: REGULATION OF BUSINESS, TRADES AND PROFESSIONS (1991).

22. THOMAS A. PAPAGEORGE & ROBERT C. FELLMETH, CALIFORNIA WHITE COLLAR CRIME: CRIMINAL SANCTIONS AND CIVIL REMEDIES (1995).

23. ROBERT C. FELLMETH, CHILD RIGHTS & REMEDIES: HOW THE U.S. LEGAL SYSTEM AFFECTS CHILDREN (2002).

24. 5 U.S.C. § 552 (2000).

of New York from 1968–72; visiting professor at Harvard Law School; adjunct professor at Tulane University and Stanford University; guest lecturer at Fudan University, Shanghai, China; and Wallace Fujiyama visiting professor at Richardson School of Law, University of Hawaii. He taught as a visiting professor at Stanford Law School during the 2001–02 academic year.

Theodore M. Shaw has litigated civil rights cases throughout the country on the trial and appellate levels and in the U.S. Supreme Court and has worked internationally on a broad range of discrimination issues. Arguing for the Legal Defense Fund, Shaw recently led the battle at the United States Supreme Court on behalf of parents and the Kansas City school district in the long running school desegregation case, *Missouri v. Jenkins*.²⁵

In 1989 Shaw was a fellow in the Twenty-First Century Trust's Seminar on Global Interdependence, and in 1991 he was a participant in the Salzburg Seminar on American Law. In 1993 he participated in a conference on affirmative action in post-apartheid South Africa in East London, South Africa. In 1994 he addressed and consulted with the Senate Judiciary Committee of the Spanish Parliament and a select group of Spanish judges in Madrid, Spain, on the subject of the American jury system as Spain considered implementation of a jury system for civil trials. In 1998 he was part of the National Employment Association Delegation attending joint symposia in Tokyo and Osaka. In 1994, 1995, and 1999 Shaw led delegations of Legal Defense Fund lawyers to South Africa where they conducted seminars for the Black Lawyers' Association on constitutional litigation.

Shaw is a member of the bar in New York and California and is admitted to practice before the U.S. District Courts for the Central and Northern Districts of California; the U.S. Courts of Appeals for the Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits; and the U.S. Supreme Court. He is also an adjunct professor at Columbia Law School and currently serves on the Advisory Board of the European Roma Rights Council in Budapest, Hungary. He is vice chair of the Board of Trustees of Wesleyan University and is a board member of the Greater Brownsville Youth Council, the Poverty and Race Research Action Council, FairTest, and the Archbishop's Leadership Project.

Nadine Strossen has written, lectured, and practiced extensively in the areas of constitutional law, civil liberties, and international human rights. In 1991 she was elected president of the ACLU, the first woman to head the nation's largest and oldest civil liberties organization. Because the ACLU presidency is nonpaid, Strossen continues in her faculty position

25. 515 U.S. 70 (1995).

as a professor of law at New York Law School.

Since becoming ACLU president, Strossen has made more than 200 public presentations per year before diverse audiences, including approximately 500 campuses, and in many foreign countries. She comments frequently on legal issues in the national media and has been a monthly columnist for the online publications, *Intellectual Capital* and *The Position*.²⁶

Strossen has more than 250 published works including her book, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*,²⁷ which was named by the *New York Times* a "Notable Book" of 1995 and was republished in 2000 by NYU Press. Her co-authored book, *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties*,²⁸ was named an "Outstanding Book" by the Gustavus Myers Center for the Study of Human Rights in North America.

The *National Law Journal* has twice named Strossen one of "The 100 Most Influential Lawyers in America." She graduated phi beta kappa from Harvard College and magna cum laude from Harvard Law School, where she was an editor of the *Harvard Law Review*.

Patricia Sturdevant has specialized in consumer protection for more than two decades, both in legal services programs and later in a public interest private practice in which she emphasized complex and class action litigation challenging unlawful, unfair, and deceptive business practices.

A graduate of the University of California at Los Angeles School of Law, Sturdevant is a past president of the San Francisco Women Lawyers' Alliance and recipient of the President's Pro Bono Service Award from the State Bar of California for District Four, Vern Countryman Award, and William F. Willier Award from the National Consumer Law Center.

Sturdevant is co-founder of the National Association of Consumer Advocates (NACA), a nationwide association of more than 600 attorneys and consumer advocates who have a wide range of experience curbing abusive and predatory business practices and promoting justice

26. See generally *The Position*, at <http://www.theposition.com> (last visited Feb. 1, 2003).

27. NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (1995).

28. HENRY LOUIS GATES, JR., ANTHONY P. GRIFFIN, DONALD E. LIVELY, ROBERT C. POST, WILLIAM B. RUBENSTEIN, & NADINE STROSSEN, *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* (1994).

for consumers. NACA's key issues include: sale of defective vehicles (lemons), home equity scams, unlawful and abusive practices in the extension of credit, unfair and abusive debt collection practices, and unfair credit reporting practices.

VII. PANEL DISCUSSION²⁹

ROBERT FELLMETH:

I'll be moderating a panel this morning on court strategy, process changes that could better ensure that underrepresented voices are heard by our courts. We know that courts are increasingly devoted to resolving disputes among the wealthy. The average citizen faces diminished access to public courts as tort reform and corporate defenses limit the right to hold defendants accountable. Problems faced by less powerful and unorganized interests often include undue cost and delay, settlement secrecy, tort reform limitations and impediments to mass tort remedies, the growing use of the mandatory arbitration clauses, and court favoritism for the powerful.

Hopefully, we will be able to discuss some of the problems in the current status of the law on these questions, and some potential solutions. Recent cases, including some in the last several weeks, impact our subject. We will have some questions right after the break, with Dave Vladeck screening them.

We have quite an array of distinguished panelists in this Summit, and this Session is no exception. We're going to be talking about access, standing, cost of delay, and court bias.

I want to begin by noting that there has been a recent case, *Legal Services Corp. v. Velazquez*,³⁰ on the issue of legal services. As you know, the LSC has been restricted statutorily by Congress in the representation of clients beyond the individual who might come into the office.³¹ Under the Reagan administration, hostility toward class actions and systemic lawsuits that would resolve a dispute en masse was transcendent. That is an issue important to court access. If the poor cannot get access to the courts through an efficient mechanism, then we have a problem.

I wanted to begin with Ted and ask him about that issue, that problem, and whether or not the case resolves it.

29. This Part has been edited to remove the minor cadences of speech that appear awkward in writing and to identify significant sources when first referred to by the speakers.

30. 531 U.S. 533 (2001).

31. Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 504(a)(16), Pub. L. No. 104-134, 110 Stat. 132 (prohibiting LSC funding of any organization that represented clients in an effort to amend or otherwise challenge existing welfare law).

TED SHAW:

Good morning. I first want to note that for those of you who are not familiar with this, the Legal Defense Fund is a separate institution from the NAACP. It was once part of it, but there is often confusion, so I don't want to sit here and have people think that I represent the NAACP. We were founded by the NAACP, but we are entirely separate.

Turning to the question that was put to me, the *Velazquez* case was a case in which the Supreme Court decided that a congressional limitation on a legal service attorney's ability to make certain kinds of arguments and to bring class action cases was unconstitutional.³² It was a decision that was somewhat heartening, but I don't think it solves the problem. For some time now, there has been a concerted attempt by those in Congress, who really want to make sure that a certain agenda doesn't go forward, to limit the ability of legal services lawyers to pursue class action cases and other kinds of cases. The Court was primarily concerned with the First Amendment implications of these limitations, and the First Amendment issues had to do with the fact that the legal services attorneys could not make arguments on behalf of private individuals they represented and could not make the full range of arguments that the courts ought to hear in order to resolve an issue.³³ The attorneys were put in a position where they either had to make a choice of withdrawing from the litigation or abandoning certain, possibly critical, arguments. That also raised certain considerations relevant to the ethical duties of lawyers, both to the courts and to clients.

It is unlikely that Congress is finished with these issues. The dissenting opinion by Justice Scalia is unsettling, but not surprising. Justice Scalia says "so what" to all of the problems raised by the majority. He contends that this is merely a decision by the Congress not to fund certain kinds of activities. To his thinking, it is not a problem.³⁴ And in fact, as I was coming out here on the plane and reading the excerpt from the opinion again, I just had to share with you this one line that is stunning, but, as I said, not surprising. It says that it may well be that the bar (of § 504(a)(16)) will cause LSC funded attorneys to decline

32. *Velazquez*, 531 U.S. at 537–38.

33. Among these restrictions, legal services attorneys are presumably barred from challenging the constitutionality of Congressional enactments—raising a rather serious separation of powers issue in limiting judicial review.

34. *Velazquez*, 531 U.S. at 549–50 (Scalia, J., dissenting).

or withdraw from cases involving statutory validity.³⁵ But that means that fewer statutory challenges to welfare laws will be presented to the courts because of the unavailability of free legal services for that purpose. Scalia contends: so what? He argues that the same result would ensue from excluding LSC funded lawyers from welfare litigation entirely.³⁶ So his point was that the Congress could say no welfare litigation by LSC lawyers or legal services lawyers, period, and that would be okay. And that is a suggestion. And if the conservatives in Congress are so inclined to do so, they could come back and do exactly that. It is certainly advice to conservatives.

There are a lot of discussions that go on in Supreme Court decisions, sometimes between the Justices, sometimes between the Justices and another branch of government, and sometimes between Justices and other people who are out there involved in these issues. So I'm not sure that I would feel all that sanguine about this being a resolved issue, because this is all about the ability of legal services lawyers to contest the constitutionality or legality of actions affecting welfare services and the impoverished. So Congress, having enacted welfare reform, and feeling punitive towards poor people, has also tried to limit their ability to contest welfare reform and delivery, and they're not going to give up on this.

NADINE STROSSEN:

I'd like to comment on that. I think that the *Velazquez* case was a welcome victory, but a very narrow one in two senses. Narrow, first, in that the rationale that the too slim majority used was itself a very narrow one, as Ted has indicated. But secondly, the massive attack and cutback on legal services that Congress passed in 1996 was accomplished by the time *Velazquez* reached the Supreme Court. The ACLU, along with the Brennan Center for Justice, had brought a broad-based attack on all of the cutbacks on legal services. All but one of these challenges were rejected by the lower courts. So the Supreme Court did not even have a chance to strike down the many other restrictions, starting with funding slashes. And the Congress enacted a limit on the kinds of clients that could be represented by legal services. I want to emphasize that all of this is still "good law," neither reviewed nor struck down by the Supreme Court.

For example, legal services may not represent any "aliens"—that was the term used in the statute—or prisoners.³⁷ These are people whose

35. *Id.* at 556 (Scalia, J. dissenting).

36. *Id.*

37. Omnibus Consolidated Rescissions and Appropriations Act of 1996, § 504(a)(11), (a)(15), Pub. L. No. 104-134, 110 Stat. 1321.

rights are very much embattled, who are often impecunious and in need of representation. Second, there was an absolute prohibition on certain cases being brought. Again, the *Velazquez* case couldn't touch this. For example, no cases involving abortion, no cases involving redistricting for voting, no cases involving prisons—again, major areas where there are civil liberties violations. Legal services attorneys are incapacitated. Furthermore, there is a limit on the activities that legal services lawyers can undertake. For example, legal services lawyers may not lobby, even though this would be a very cost effective way to protect the rights of their clients. Nor can they communicate with legislators to oppose laws that are cutting back rights and access to justice.

There are also limits on the kinds of claims that can be made and the litigation methods that can be invoked, not only in the specific context of welfare legislation. The cutback in 1996 prohibited any use of the class action device whatsoever and also prohibited any challenge to the constitutionality of any statute, not only the welfare statute that was specifically involved in the *Velazquez* case. It also prohibited victorious legal services lawyers from seeking attorneys' fees. So this was a huge, devastating, wholesale cutback.

Aside from the one narrow provision that went to the Supreme Court, only a small portion of the statute—the across-the-board prohibition on challenging statutes—had been rejected by the courts. The Second Circuit decision that did go to the Supreme Court in *Velazquez* had rejected the facial challenge that should be brought to all these other aspects. However, they remain open to bringing an as-applied challenge. I spoke to the ACLU's legal director who had litigated a companion case in the Ninth Circuit, and he said that, given the lower court rulings, the odds of successfully challenging some of the other prohibitions on an as applied basis would be slim.

To put all of this devastating attack in even broader context, it was fought in a situation in Congress where there was a serious effort to defund legal services altogether, not just make it fade out of existence, but go the whole hog. And Ted, that is taking the argument of Scalia's dissent one step further, that Congress doesn't have to fund legal services at all. And it was very painful for us to watch the legal services lawyers themselves (the LSC) decide what is the lesser of two evils. Do we go along with all of these restrictions, because that is the price we pay for legal services continuing to exist at all, or do we go to the mat fighting these restrictions, realizing that we may end up with no legal services program?

ROBERT FELLMETH:

Well, I guess the key question then is, what do we do about it? We have *Velazquez* sitting there, which gives us a sliver of a victory. Here is a question for the panel to consider: is it worth going back up with an as-applied challenge—given some scintilla of hope from *Velazquez* which might influence some of the circuits? Is it worth going to the Congress? Is it worth trying to run around it? In terms of class actions, you can try filing sequential cases and move for consolidation, you can try all sorts of contrivances, perhaps mandamus, if you can get away with it under the restrictions. What is the best approach to take here? Do you create a § 501(c)(4), as some have done, separate from the legal services and then fund litigation from there? What is the best approach to take here? Any comments?

ALAN MORRISON:

No more court challenge. Put your tail between your legs. Do something else for the time being. You've got to be realistic.

ROBERT FELLMETH:

You don't think it would be worthwhile?

ALAN MORRISON:

I don't say never, but I would not spend a lot of time looking for an as-applied challenge. Beside the fact that you probably cannot win it, even if you do win it, it is going to be as applied, which is very narrow, even narrower than the *Velazquez* opinion. I am not a legal services lawyer, so it is a question of how to allocate our resources. If I were a legal services lawyer and a particular case came along, I might feel differently about it, although they probably cannot bring their own cases to challenge constitutionality even as applied, because that would violate another part of the law.

ROBERT FELLMETH:

What about state funded legal services?

PAT STURDEVANT:

I was going to say something different. I think that the best hope for success, particularly in the representation of consumers, is a private-public partnership. What we have seen in the National Association of Consumer Advocates is an influx of attorneys who used to be with legal services programs and who are now going into private practice. They

remain motivated by public interest goals. Historically, there may have been some distrust of private lawyers, but they are doing very good work all across the country. Not only are public-private partnerships important but also the kind of joint venturing and cooperative efforts that we saw on a very broad scale in *Castano*.³⁸ Those things are happening all across the country.

For example, a number of attorneys in the South and in Minnesota and in New York have combined together to challenge the practice of mortgage lenders giving kickbacks to mortgage brokers for bringing in borrowers at interest rates, higher than those for which they would otherwise qualify. This is called yield spread premiums. So if you would qualify for a seven percent mortgage, but they bring you in at eight percent, they get a kickback; and the consumer unknowingly pays that increased mortgage over the thirty-year life of the mortgage. This costs consumers \$14 billion a year as a nationwide practice. But it is being challenged by a consortium of individuals. I think that is a hopeful mechanism for proceeding in the future.

TED SHAW:

Bob, I wanted to take issue with Alan's "no more court cases" comment. I'm not sure how absolute you want to be about that. I agree generally with the sentiment that we do not want to look to the courts, and certainly not to the Supreme Court and the federal judiciary generally, for expansiveness to restore the ability of poor people or minorities or other people to win protection. On the other hand, where you have real clients, real life wrongs, you have got to go to court. Lawyers are faced with the choices of when to go to court, when not to go to court, and that is something they have to discuss with clients. It is a very thorny set of issues, and I, for one, would be the first one to say that we have to be very strategic about it. More specifically, within the boundaries of what *Velazquez* allowed, which is narrow, as Nadine has pointed out, I think that there is some room to litigate the kinds of cases that were opened up or saved by *Velazquez*. But when it comes to reestablishing more protection for legal services lawyers and their clients, I do not see the courts as a big avenue for that. I do not see the

38. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (involving the collaboration of hundreds of personal injury and consumer attorneys in numerous states challenging the tobacco industry nationally for unfair competition in marketing a manipulated addictive product).

legislative fix as being in the cards either, without a change in Congress. So I think it is just trench warfare. You have got to slug it out and make choices on a day-to-day basis in consultation with clients.

NADINE STROSSEN:

Ted, I am not quite as pessimistic about the legislative fix, because I think this was rammed through Congress with a lot of disinformation out there. For example, that so-called bastion of the so-called liberal media, the *Washington Post*, had an editorial opining that the restrictions were not tragic, because the ACLU can pick up the cases that legal services cannot handle. And I think there was just a tremendous amount of ignorance about the under-resourced nature of my organization and others, and of our ability to pick up the slack for this kind of litigation.

Second, we have done extensive polling on people's attitudes toward the death penalty. It shows that even among people who strongly support it, they are enormously concerned—not so much about the race discrimination, not so much about the geographic disparity or lack of access to DNA evidence—but about inadequate representation. They feel that you have got to have a good lawyer. Now, obviously, in that situation we are talking about death, but I think we can make a case that when you are talking about people seeking subsistence welfare, when you are talking about people who are seeking political asylum (to use some examples of the types of cases that legal services can no longer handle) these are matters that are tantamount to life and death. I think there is a great opportunity to make a case of fundamental fairness. So I would like to try to make that case a lot more concerted than it was made last time around.

ROBERT FELLMETH:

Should we do it on a state level and build up to the Congress? Because we have an opportunity in many states to make a case and to provide legal services without necessarily invoking these federal restrictions, is that a viable option?

TED SHAW:

The climate varies state to state. I don't know that there is one answer to that. But I can think about one example, Texas, where the IOLTA fund (the fund generated from the interest on attorney trust funds) has been restricted so that it cannot be used. It cannot be used to support any class action litigation or, actually, any public interest litigation. So some of the same spirit that animates federal policies is also at work in some of the states. That is not to say that we should not continue to try to open up those opportunities or reverse those policies, but I am saying

that we have to face the fact that this is a phenomenon that is not limited to the federal level.

ROBERT FELLMETH:

For those of you who are not familiar with it, the IOLTA funding relates to attorneys' trust funds. The interest from those trust funds generally goes into an account that is then spent on legal services for the poor by the bars in the various states and in varying arrangements. In addition to the issue that Ted raised, there is the issue of a challenge to IOLTA funding itself, based on the "paycheck protection" concept, the concept that really you cannot take this money without the permission of the clients, because it is the clients' property. That whole battle is being fought in some of the states right now. So that money may be vulnerable.

But I think what we are concluding here is that we have a very difficult landscape of multiple challenges and multiple opportunities, possibly navigable by some litigation challenges and some legislative challenge at the state level. As Nadine points out, there may even be an opportunity in the Congress, because the Congress today certainly is not as reactionary as the Congress that enacted this particular provision. It is a rather extreme set of provisions.

I am thinking that we may also want to consider another aspect. What about the fiduciary duty of an attorney to the attorney's client, to the client group, which we have a tradition of honoring and respecting in this country going back to cases like *Cox v. Delmas*³⁹ in the 1890s, where the court noted that: "The relationship between attorney and client is a fiduciary relation of the very highest character . . ."⁴⁰ To what extent are you intruding in that fiduciary duty by telling an attorney you cannot go to this other forum and help your client out, you cannot say this, you cannot seek that remedy, and you cannot challenge unconstitutional statutes or acts? I think that kind of attack might be more helpful than a First Amendment attack—which is maybe somewhat limited in the terms of its scope, as *Velazquez* indicates.

NADINE STROSSEN:

That is an interesting idea, Bob. You might find some surprising allies on the Supreme Court. For example, Chief Justice Rehnquist has

39. 33 P. 836 (Cal. 1893).

40. *Id.* at 839.

been very firm in his defense of the independence of the judiciary. He's a very staunch supporter of an independent bar and an independent judiciary, so that might be the kind of appeal that he would find persuasive.

ROBERT FELLMETH:

That could be a critical vote. I wanted to mention also with regard to Pat's comments that her alternative remedy is an important one to keep in mind, because if you are blocked in terms of public money and legal services money, you might need that option of the public-private partnership. She mentioned *Castano*,⁴¹ and for those of you who don't know what that involves (I think there's a *Castano* attorney here) *Castano* is a consortium of hundreds of attorneys who got together nationally to take on tobacco. It was an extraordinary event in American legal history. Tobacco had won 800 straight individual personal injury and product liability cases. A group of attorneys got together and said: "That's it, we're taking them on. They have a lot of attorneys, we'll have a lot of attorneys." Each law firm involved committed \$100,000 and together devoted hundreds of attorneys. They were able to certify a national class action lawsuit and took tobacco on. The defense began to cave in a bit with the *Liggett* settlement.⁴² Then *Castano* was decertified by the Fifth Circuit because of some of the class action problems we will discuss in a moment.⁴³ But the *Castano* attorneys stuck together and filed state class actions in twenty states, kept the pressure on, and, substantially because of their efforts, we have a tobacco settlement. The point is, they got together and created a kind of a partnership, if you will, among themselves, to create a massive law firm. Now, I do not know how you facilitate that in general. If we give them enough attorneys' fees, that might help. Maybe Pat has some ideas.

PAT STURDEVANT:

Yes. I wanted to mention another example, because that bit of litigation is probably beyond the means of all but a very small percentage of the attorneys in the country. But there have emerged other public-private partnerships that are effective. One excellent example of that is the work done by my friend and colleague, Bill Brennan, who is at the Atlanta Legal Services Home Defense Project, and for years he has been a proponent of working together with private lawyers. He has a

41. *Castano*, 84 F.3d at 734.

42. See Attorneys General Settlement Agreement, available at <http://stic.neu.edu/settlement/LIGGETTSETTLE.htm> (last visited Feb. 1, 2003).

43. *Castano*, 84 F.3d at 752.

staff of people who are inundated with foreclosure defense cases because of the emergence of predatory mortgage lending practices. He has developed a technique of identifying the issues, identifying the clients who are capable of being class representatives, referring these cases to private lawyers, and then working with them during the course of the litigation. In just one case against Fleet Financial, they galvanized the community, civil rights, consumer groups, community groups, legislators, and in effect drove Fleet Financial out of Georgia some seven years ago. The result of the class action lawsuit was a settlement in excess of \$17 million which fully compensated all of the victims of these predatory practices. In addition, through *cy pres* monies, they set up the Consumer Law Center of the South, which operated for several years; gave additional sums to local organizations that enabled them to continue to advise victims of similar practices; and contributed a small portion of money to the National Consumer Law Center and the National Association of Consumer Advocates. I think that is the model for one kind of public-private partnership that can work very effectively.

ROBERT FELLMETH:

A lot of legal services type attorneys are in a position to detect serious violations which maybe they can not handle directly. Perhaps they can handle them through a § 501(c)(4) adjunct not subject to federal restrictions (which many of them have created) or through a public-private partnership, which Pat mentions. But let us keep in mind that you have another barrier in front of you, the developing impediments to class action. I want to discuss that a little bit because that ties in. It is certainly going to be important if you remove the congressional barriers to representation. Whether they are there or not, you still have the court barriers to class action certification.

We have developed over the past thirty years a series of obstacles which are replicated at the state level to the representation of people en masse. You have the requirement that common questions predominate. You have the requirement that the class action be a superior method of resolving the grievance. You have the unmanageability defense. You have the adequate representation barriers. And you have the expense of certification.

The courts have been increasingly hostile to class actions, particularly to large class actions. We have a recent case, *Allison*,⁴⁴ in the area of civil rights, which has traditionally been one where there has been a lot of license for class action certification. It indicates a cutting back even there. I wonder if maybe Ted could comment a little about *Allison*, what it means, and what we might do to overcome it.

TED SHAW:

Allison is a case out of the Fifth Circuit which covers Texas, Louisiana, and Mississippi. It involved a suit against Citgo Oil Company. It was a class action involving a range of issues from hiring all the way through to promotion. A broad array of remedies were sought, including back pay, front pay, injunctive relief, and damages. The court looked at the 1991 Civil Rights Act, which was a legislative fix to a series of decisions that the Supreme Court handed down in the late 1980s, many of them in the 1989 term. They cut back on the ability of plaintiffs to attack employment discrimination in a number of ways. The Fifth Circuit effectuated a fundamental change in the case law with respect to the ability of plaintiffs in employment cases to win class certification. It primarily relied on the fact that damages were being sought and that damages are very individualized. For those of you familiar with it, a class to be certified under Federal Rule of Civil Procedure 23(b)(3) (for damages at law) could not easily be certified. Even a class to be certified under Rule 23(b)(2), which would ordinarily allow injunctive relief to be sought collectively, might be problematic. These are very complex issues. The Court said that even the systemic injunctive or mandate change that all of the plaintiffs sought (regardless of their individualized damages) also could not be pursued through a class action. Given how difficult it is to litigate these cases, the complexity of the issues, and the enormous amount of time and energy it takes to litigate individual cases, such a bar may sound the death knell for employment discrimination cases. It makes litigation difficult where you have these kinds of procedural barriers.

Allison is now being followed by courts in some other circuits. We are obviously looking at a Supreme Court opportunity to review it. So in sum, that is what *Allison* is about.

It is a serious problem, and it is particularly lethal when you wed it with some of the other attacks on court accessibility. For example, the Supreme Court's decision in *Circuit City*, which allows mandatory arbitration to cut off the ability of employees to bring suit once they

44. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (9th Cir. 1998).

enter into an employment contract.⁴⁵ It has never been easy to litigate Title VII cases. Now it is really up in the air as to how we can effectively pursue relief for those who suffer employment discrimination.

NADINE STROSSEN:

I would just like to add to what Ted has said about how the courts are interpreting, or more accurately, misinterpreting the Federal Rules of Civil Procedure in general with respect to class actions. Here too, we face another problem, which is Congress passing laws that expressly prohibit class actions as a method for asserting rights on behalf of particular clients or by particular lawyers. Before, I mentioned the legal services legislation as one example of where Congress has also prohibited using the class action as a device to bring a constitutional challenge to a statute that Congress passed. One recent example, I could mention others, but let me confine myself to the badly misnamed Immigration Reform Act that was passed a few years ago in 1996, under which, in addition to cutting back substantively on the rights of noncitizens, one of the other things that Congress expressly did was to prohibit any class action to challenge the unconstitutional provisions of that law.⁴⁶

ROBERT FELLMETH:

By way of background to Ted and Nadine's comments: You have Federal Rule of Civil Procedure 23(b)(1), (b)(2), and (b)(3)—three different types of class actions. Rule 23(b)(3) is the damage class action, and that is the one where barriers have been extensively put in place by federal courts. Class actions brought under Rules 23(b)(1) and 23(b)(2) have traditionally been civil rights injunctive relief types of actions in equity, which have traditionally been open to suit much more readily on a class action basis. What is important about the *Allison* case is the bleeding of the Rule 23(b)(3) barriers into the Rule 23(b)(2) action. It means that all of a sudden the barriers that have been put in the way of the damages remedy may now be visited upon a Rule 23(b)(2) case.

This has implications in terms of Pat's public-private partnerships.

45. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122–24 (2001).

46. *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

Guess what, it is going to be pretty difficult to get a private partnership if you are not getting attorneys' fees. You may not get attorneys' fees without damages, and you are not getting meaningful damages if the damage class action is barred in mass cases. This is a chess game that you have got to play very carefully.

My suggestion is, rather than presumptively turning to the class action, we should bring mandamus actions against the relevant public officials for abuse of discretion on behalf of the identifiable persons or groups. The fact is, if you win a judgment under an abuse of discretion standard of review, that decision will affect more than just your client. It will become a de facto kind of class action without the barriers and without the certification problems. I hope public interest attorneys go that route more often, because I think it is open to them more than they realize.

NADINE STROSSEN:

But isn't the abuse of discretion standard of review an extraordinarily high burden of proof? It certainly is for the companion procedure in New York.

TED SHAW:

It is in federal court. As you know, mandamus is an extraordinary remedy. But I take it, Bob, you are talking about under California law. I know there is a counterpart in New York. I think it is viewed differently under California law. And so what you are suggesting really pushes us to the question of whether we should get out of federal courts in certain kinds of actions. You have to consider the decisions like *Allison* and whether there are adequate state court remedies or procedures and statutes.

Just to be entirely clear, in the past, the employment discrimination class actions have been bifurcated so that one could pursue the Rule 23 (b)(1) and (b)(2) issues separately if necessary, and then, if there are individualized damage issues, they can be sorted out on an individual basis. So what the court has done is really abandoned all of the governing case law, which has allowed for those first stage proceedings to go forward and eventually end up with individualized considerations.

ALAN MORRISON:

Bob, a couple of points. First, mandamus actions are principally against government officials. Citgo, of course, is a private company. And aside from the legal differences, there are practical differences. The government is more likely to be bound to and obey the law than private companies are in regard to individual actions; and with the individual

actions, such a private firm may simply buy off an individual plaintiff. Second, attorneys' fees are available in a Title VII action regardless of whether there are damages, so it is not quite a Pandora's box on that score.

I want to ask Ted a question. Ted, suppose that in *Allison*—and I do not know if this is actually happening or not—or in another case like it, you simply abandon your damages claim. That is, you ask for restitution, which I take it is not yet precluded, so that you could recover restitution damages. You only lose your other damages, and you eliminate Seventh Amendment issues. Why don't you comment, first, on whether you think that would work, and second, what kind of a conflict does that put you in with your clients, where you ask them to choose between giving up their damages (beyond restitution) or giving up their opportunity for class treatment?

TED SHAW:

Well, that is a wonderful question. It goes to the core of the dynamics in employment discrimination and class action cases. You have the lead plaintiffs (class representatives), who often have issues between themselves and the class. One problem is the defendant's ability to buy off the lead plaintiff versus the lead plaintiff's obligation to represent the class overall. However, those issues are always there. Second, because of the buy-off problem that you are talking about, the balance between injunctive relief and damages is often a struggle and must be resolved with our clients.

The scenario you are proposing raises some interesting questions, but it puts us in an almost impossible situation because, more often than not, given the way our legal system works in this country and the part that money plays in it, the named plaintiffs are going to say: "We want to be represented by somebody who is going to win damages for us." That can be a problem, were we to pursue injunctive relief exclusively or where we short change the class representatives. Another thing is going on that I want to be careful in framing. Some judges listening in may deny this is happening, but let me tell you what it feels like to me. It feels like the federal judiciary, dominated by very conservative judges, is consciously attempting to cut off the ability to litigate many kinds of civil rights cases. And if I am correct, then I suspect that some of what we see in *Allison* and other cases is going to continue to be articulated even if we do not have the damages question before us. For example, to

the extent that one could say, well, if you look at this class, you have people in various job classifications, categories (the teamsters issue, and so forth). Some of these judges are simply going to try to find a way to make class actions impossible and unpalatable. I hope I am wrong on that.

ROBERT FELLMETH:

Well, that has happened already in the consumer area, hasn't it? Pat, don't we have a strong trend toward finding all sorts of distinctions among the class in order to find a lack of requisite commonality? How do we get around that to allow a mass suit in order to vindicate a large scale grievance? As I mentioned in an early draft of the materials, only half jokingly, if we went out and got all 5000 of your laborers who were discriminated against and had them file individual actions, it would be amazing how fast either class action certification (or consolidation) would occur. The courts and Congress would be singing a different tune. It is ironic, because one of the bases for a class action is that it is not a case that can be brought otherwise and that disability forms its *raison d'être*. But in fact, that very disability is enabling the courts to bar them and avoid adjudication altogether, because courts know that plaintiffs do not have the resources to bring them individually. If we could arrange the cases so that they were brought anyhow, in some other format, it could lead to a countertrend.

On the issue of leaving out damages, restitution and damages often merge, they are often very similar in practical application. We have a statute in California, the Unfair Practices Act,⁴⁷ which gives restitution rather than damages. It is still very useful. And it may be time to "beard the lion," as it were, and to take up Alan's suggestion. We need to require the courts to expose their own intellectual dishonesty where they interpose arbitrary judicial barriers to obtaining a remedy. In other words, maybe litigation is essentially an exercise in making people expose their unstated biases.

I wanted Pat to comment briefly about California's Unfair Competition Act as an option to bypass some of the problems that Alan and Ted are talking about. Instead of facing judicial barriers, such as the alleged commonality failure, the mantra that common questions do not predominate, or findings that it is unmanageable or not superior as a method, you have cause of action. It is in equity and does not afford damages, but it does afford restitution, and it does have broad standing and broad scope. In this state it has a private attorney general structure which eliminates virtually all of the barriers that have been discussed. Pat, do you want to talk about that a little bit?

47. CAL. BUS. & PROF. CODE §§ 17000–17100 (West 1997).

PAT STURDEVANT:

Yes. This is a somewhat unusual statutory device that, if not unique, is at least more developed in California than in other parts of the country. This statute, codified at section 17200 of the Business and Professions Code,⁴⁸ essentially prohibits any unfair, deceptive, or unlawful practice, so you can borrow from any other illegality in municipal ordinance, a federal statute, a state law, civil rights, and so forth. Anything that is prohibited by any statute, even a criminal statute, can be the basis for an action under section 17200. It's called a nonclass class action or a representative action, and it has very broad coverage. It has been used in California to challenge, for example, insurance packing by finance companies, overcharging for interest on mortgages, overcharging for junk fees on mortgages, sale of unusable lots on subdivisions, abusive collection practices, mistreatment of patients in nursing homes, and violations of mobile home park ordinances. So it is extremely broad.

ROBERT FELLMETH:

It has also be used to combat the sale of obscene literature, the sale of endangered whale meat, and the hiring of illegal aliens.

TED SHAW:

We have used it in housing discrimination cases in California.

PAT STURDEVANT:

Yes. It is a very strong statute because it provides for a broad grant of standing. Any individual can sue. The individual does not even have to be aggrieved. In addition, organizational plaintiffs can sue. The remedies that are available are also extremely effective in curbing wrongful business practices, because you can get an injunction against the unlawful practice, and you can get restitution to all individuals who have lost money by reason of the practice. It is not the same as damages, but in most consumer cases, there is a very subtle difference, if any.

It has been used by organizations acting together with private clients. For example, in our *Badie v. Bank of America*⁴⁹ case, we challenged the bank's attempt to impose mandatory binding arbitration on its credit card

48. CAL. BUS. & PROF. CODE § 17200 (West 1997).

49. 79 Cal. Rptr. 2d 273 (1998).

and deposit account customers and were successful in the court of appeal. The advantages are that you do not need to certify a class, you save time in litigation, you save expensive notice, and you can get effectively the same result.

In many states there are similar statutes, called UDAP laws. In the District of Columbia⁵⁰ we were recently successful in passing a statute modeled on the California act which goes even further.⁵¹ It has the same broad grant of standing, but it expands on the remedies available, so that in addition to injunctive relief and restitution, you can get damages of \$1500 per instance or treble damages, whichever is greater, and punitive damages. But even in the states that do not have that expansive grant of standing and those expansive remedies, their UDAP statutes provide for injunctive relief that can be used as an alternative.

But I also do not think, Bob, that we have seen the same cutbacks in certification of consumer class actions as in other areas—possibly because in consumer transactions you are dealing with standardized form contracts, which are contracts of adhesion, and are used in virtually all transactions.

ROBERT FELLMETH:

I think we probably see it on the product liability side more than on the typical consumer law case.

PAT STURDEVANT:

Yes. On the consumer side it is easier to get a class certified because the practices are typical and tend to treat all of the victims in the same way.

ALAN MORRISON:

There is one exception, of course, to getting classes certified in federal court, and that is if the defendant wants them certified. Usually the defendant wants them certified where it has a pigeon for a plaintiff and they are ready to buy off the plaintiff class lawyers. We have spent a good deal of our efforts over the last five years fighting these class action settlements where the principal beneficiaries are the lawyers and occasionally the class representatives and, of course, the defendants. The Supreme Court in the *Amchem* case⁵² and also with *Fibreboard*⁵³ set some ground rules in these kinds of cases.

50. D.C. CODE ANN. § 28-3901 to 28-3909 (1996 & Supp. 2001).

51. CAL. BUS. & PROF. CODE §§ 17200–17209 (West 1997 & Supp. 2003).

52. *Amchem v. Windsor*, 521 U.S. 591 (1997).

53. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

One interesting question is whether a case like *Allison* will be followed. In a Fifth Circuit case involving a similar situation, the court simply sent it back without even bothering to quote *Allison*, because it was so clearly wrong. Rather, the court cited *Fibreboard*. The federal courts (and some state courts) may be willing to certify cases, as long as they can get rid of the case and the defendant wants to dispose of it as well. But where some class members have viable claims and want to certify a class and defendants object and the case is not viable without certification and hence will go away, certification is more problematic. So it is clearly a one-way street in our view.

ROBERT FELLMETH:

So you are concerned about the possibility of the defendant selecting the suitor? Is that it?

ALAN MORRISON:

They do not have to select the suitor, it is kind of an arranged marriage. They know who the cooperative lawyers are, and they bring the lawsuits, and the judges know who they are. We have had terrible problems with this.

ROBERT FELLMETH:

What is the solution to that?

ALAN MORRISON:

We have managed to anger our private partners in these lawsuits by coming in and objecting; pointing out that fees have been excessive, which does not make us any more popular. But we've got to use Rule 23(e) to protect the class members if the courts and the parties will not do it. The courts of appeals are better, and the Supreme Court is better still, when they have been willing to step in. But one of the things that we have seen (and the reason I asked Ted this question) is that defendants and plaintiffs—partly in order to avoid the possibility of plaintiffs opting out of the class—have been recharacterizing cases as injunctive when they were originally brought as damages cases. It becomes an injunctive case when that becomes the way to settle it without the opt-out problem. So that battle is still going on. I am not referring to cases where there are genuine issues about injunctive relief, but where that relief is disingenuous. For example, where plaintiffs

order the defendant to stop doing that which the defendant has already stopped doing anyway. In one Texas case, the plant had closed down. The judgment ordered the defendant “not to reopen” the plant. It is bogus.

NADINE STROSSEN:

That is a good segue way to my remarks, because in a lot of our cases injunctive and declaratory relief are really the heart of what we seek. So for all practical purposes, it does not matter as much whether the class is certified or not. Obviously, that is true in a situation where we are facially challenging a statute, as we did last week to the latest federal Internet censorship law. But it is also important in work where we are protecting the rights of individuals against governmental abuses. A major example recently has been our work on racial profiling and other police abuses and, in particular, racial discrimination throughout the criminal justice system. We now have pending about a couple of dozen of these cases. We seek class certification in all of them, and it has really been hit or miss as to which classes are certified and which are not.

By the way, I asked our legal director, not knowing to what extent you were joking, about filing a lot of individual lawsuits. His response was that in the cases we deal with, if the class is not certified, we could not even bring an individual action. And if the ACLU does not have the resources to do that, as a relatively large organization, who would? What we do, of course, is hope that even in an individual action we have a sufficiently sympathetic client or group of clients. Last week, for example, we filed against the police department in Cincinnati where our clients represent many individuals joined together as the Black Citizens’ Coalition. Their individual affidavits are just riveting and are getting a great deal of media attention, a great deal of political attention; and, of course, our aspiration is that their individual claims are sympathetic enough so that the threat of damages awarded to them will be enough to prompt governmental reform or that the favorable press coverage will be sufficient to bring about pressure on the agency to change.

ROBERT FELLMETH:

That is interesting.

ALAN MORRISON:

I think it is really important when people are bringing these lawsuits to ask the question: do you need a class action? Can you bring a mandamus action; can you bring some other kind of an action? And if so, what kind of a class action will really achieve your goals? This, of course, gets you to the tension between your institutional goals and the

goals of the individual client, with the very difficult ethical problems that you face. But you also have to tell your clients: “Look, in theory you would like money damages; we would like to get you money damages, but the question is: What kind of a half loaf can we do?” This question really becomes important in the context of class actions. It may also be important in legal services cases, because in some of them you can actually litigate them as test cases—without litigating them as class actions.

TED SHAW:

I started out as a Justice Department lawyer many, many years ago. And the Justice Department lawyers at the time focused on injunctive relief. I recall that some years later I moved out to California for a few years and opened up the West Coast office of the Legal Defense Fund, and one of the first cases that we litigated was a housing discrimination case. We were dealing with an ex-Justice Department lawyer, somebody I knew, whom we were going to litigate with as co-counsel. We had tension with them about the issue of damages or whether we would be seeking primarily injunctive relief. These kinds of discussions are very common. But as time went on, I came to believe in and to see very clearly how important it is to seek damages, even in cases where we were pursuing injunctive relief. If there is one thing that people who are in business understand, it is money. If you want to dissuade them from acting in a discriminatory manner, I think that you have to make them think about monetary exposure. I have come to believe deeply in that. With injunctive relief, slap them on the hand and make them change their ways, abide by the law, and so forth. But that is not enough of a disincentive, at least in discrimination cases.

So what you are talking about is real in terms of these tensions. And it plays out, once we file the cases. When you have the named representative saying: “I want a million dollars” (everybody thinks one million is a nice round figure, right?); and then you have to say: “Well, we represent the class as a whole.” Is that possible in terms of injunctive relief, and so forth? All those issues are there. But I want injunctive relief on behalf of the client, and I also understand why institutionally we want to pursue damages. And I understand why, if they have been subjected to horrendous practices, why they also want damages. That is the way America works, whether we like it or not.

ROBERT FELLMETH:

Well, there are a number of options here to consider. One is, take the Unfair Competition Act concept of a private attorney general remedy in equity, expanding the notion of restitution (maybe applying it more readily) or perhaps expanding it through civil penalty assessment. Again, it could be a remedy in equity that might not invoke the same kind of class action barriers that we are seeing with Rule 23(b)(3) damage class actions. There are some options that might loophole, or at least leave behind, the large reservoir of debilitating case law that is an obstacle to us in pursuing a case on a class basis. Those options may range from going to the public prosecutor and getting him or her to take the case to trying to enact an adjusted unfair competition type of statute. Any thoughts on what options might be advisable or politically opportune?

ALAN MORRISON:

I would not go to the U.S. Justice Department right now.

ROBERT FELLMETH:

Good advice from Alan. What about the related problems we have with the “court stripping” statutes, the state immunity decisions that have been hampering us, even if we do get a class certified or we do not have a class problem? Or, if we go by way of mandamus against the government official, but, all of a sudden, the state is immune. These cases are amazing to me. We have these reconstruction statutes intended to punish Southern states for their post-Civil War regression, and, all of a sudden, these same laws are interpreted to immunize the very targets of the (then) Congress. I don’t understand it. Nadine, I would like to hear your thoughts on that.

NADINE STROSSEN:

Bob has raised the issue of judicially created obstacles to access to the courts. Even if you get into the courts, obstacles to meaningful remedies still exist. Certainly, the judge-created immunity doctrines have been a major obstacle to success in addressing the police misconduct problem. And I agree with Ted that it is not only private business but also municipalities and governmental agencies that are not going to take your claims as seriously (nor will they take their legal obligations as seriously) if you do not have the clout of money damages behind you. In addition to those judge created doctrines that are barring meaningful relief, we are now seeing a sustained and unusually successful barrage of legislation from Congress, and it is being replicated at the state level. In

many states across the country, legislation purports to expressly deny power to the federal courts to review whole categories of disfavored claims. This, of course, has been part of the battle throughout American history. Every time the courts have issued an unpopular decision, we have a flurry of legislative proposals to deny the federal courts power to do everything from desegregate the schools to enforce reproductive freedom and separation of church and state. What has happened recently though is that these laws have passed. A whole series of them passed in 1996 amidst almost no political debate and almost no press or media attention. They are usually slipped through as last minute amendments to gigantic appropriations bills. This is one area where reporting and getting the public concerned has been a major strategy in terms of legislative reform. The ACLU issued a report in 1996 about some of these court stripping bills.⁵⁴

Let me follow up on the actual adverse impact of these lesser known laws. I have already mentioned one of them—the law that greatly reduced the ability of legal services lawyers to pursue a whole slew of important kinds of cases. Another was the Prison Litigation Reform Act (PLRA)⁵⁵ which makes it extremely difficult to protect the constitutional rights of an increasingly large proportion of Americans (in particular, African American men) who are incarcerated in this country. Even if you can show constitutional violations, you are denied attorneys' fees that you used to be able to get. You are also denied special masters, which you used to be able to get.

Consent decrees are prohibited, and a major way of winning these cases politically as well as economically had been through the negotiation of such decrees. Consent decrees that exist now automatically expire after two years, and any of you who have done institutional reform litigation know that often nothing has changed in

54. See American Civil Liberties Union, *Court Stripping: Congress' Campaign to Undermine the Power of the Judiciary, an ACLU Special Report* (June 1996), available at <http://www.aclu.org/library/ctstrip.html> (last visited Feb. 1, 2003). The ACLU has published an updated report on this problem, which was exacerbated by the USA PATRIOT Act, antiterrorism legislation enacted in October 2001. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 8 U.S.C., 15 U.S.C., 18 U.S.C., 22 U.S.C., 31 U.S.C., 42 U.S.C., 49 U.S.C., 50 U.S.C.); see also Ronald Weich, American Civil Liberties Union, *Upsetting Checks and Balances: Congressional Hostility Toward the Courts in Times of Crisis* (October 2001), available at <http://www.aclu.org/news/NewsPrint.cfm?ID=9810&c=111> (last visited Feb. 1, 2003).

55. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (codified in scattered sections of 18 U.S.C.).

two years. Unfortunately, the U.S. Supreme Court last year issued a decision in an ACLU case, in which it narrowly rejected a separation of powers constitutional attack on this law.⁵⁶ We all know that the Court is very faithful to preserving its own power and the power of other federal courts in certain situations. It did not care that much that the power of federal courts to enforce constitutional rights on behalf of incarcerated people was slashed.

Another example is the grotesquely but accurately named Antiterrorism and Effective Death Penalty Act.⁵⁷ This statute cut back habeas corpus relief even further than the courts had already accomplished. Again, even when individuals on death row have constitutionally meritorious claims, the federal courts are incapacitated from reviewing them. The U.S. Supreme Court has started to hear some of the constitutional challenges to that law, but, not surprisingly, we do not have as good a record as we would like.

And the last example is an immigration reform act that again denies complete access, not only to the federal courts, but even to administrative courts within the INS, for very important claims under international and domestic law.⁵⁸ For example, those who are fleeing persecution can be turned away from our borders by, in effect, a police officer of the INS without even an opportunity for an administrative review, let alone federal court review. The Supreme Court is going to be hearing two constitutional challenges to aspects of that litigation.⁵⁹

So if all of that is not bad enough, it is just the tip of the iceberg. Congress has been holding hearings for the last few years on what it calls “judicial activism.” These laws are part of a sustained assault on the power of the federal courts to enforce constitutional rights. They started with those who are the least powerful and the least popular in our society: the poor, the immigrants, the prisoners, and those on death row, but the principles, or lack of principles if you will, that are getting these laws passed and getting the Supreme Court to uphold them, would sustain denial of access to the courts to anybody with any constitutional claim.

56. *Miller v. French*, 530 U.S. 327 (2000).

57. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2241–2255 (2000).

58. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

59. The Supreme Court upheld the ACLU’s challenges to these provisions in both cases. *See INS v. St. Cyr*, 533 U.S. 289 (2002); *Calcano-Martinez v. INS*, 533 U.S. 348 (2001).

ROBERT FELLMETH:

Well, Nadine, that is one of the most depressing recitations I have heard in a long time.

NADINE STROSSEN:

It is supposed to energize people. We have got so much good work to do.

TED SHAW:

I would like to add to our depression, but I hope also to our energy, because I refuse to give up or give in. I think it is very important, because we get to these sessions, and we can talk about what is going on, but once the other side knows that people are despondent or in despair, they have won. And I refuse to give in. But we have to lay out the picture and see what the reality is. I agree with all that Nadine has just recited, but let me just round the picture out a little bit and talk about access to the courts when it comes to police misconduct or to systemic reform of police departments. There was a case that the U.S. Supreme Court decided some years ago, back in the 1980s called *City of Los Angeles v. Lyons*.⁶⁰ This was a case that involved the chokehold that police used to subdue people who they had stopped and detained. It was used disproportionately on minorities. At the time the chief of the police department responded to a series of incidents in which African-American males were stopped and choked (resulting in deaths and serious injuries) with the observation that there might be something physiologically different about African Americans—that the carotid veins in their necks, or something like that, allegedly made them more susceptible to injury than Caucasians. This was Darryl Gates, whom you may remember. And I am not making this up. In any event, the underlying case went to the Supreme Court, a challenge brought on behalf of an African-American who was stopped, detained, and held in a chokehold. The Supreme Court found that he did not have standing (nor would any other individual like him have standing) to challenge the practices of the police department, including the use of a chokehold, unless they could show that they were very likely to be subjected to the same conduct individually. In other words, I would have to show that I am going to be stopped and choked, which of course I cannot show.

60. 461 U.S. 95 (1983).

ALAN MORRISON:

What about damages? Have you tried for damages in these chokehold cases yet?

TED SHAW:

I don't remember how that issue fell out offhand. But it is possible to seek damages.

ALAN MORRISON:

Aside from the official immunity they would have.

TED SHAW:

I don't know what happened in that particular case, but obviously you can pursue damages in an individual case. But what I am talking about is systemic reform. For example, it was just announced in the newspaper as I was leaving New York that Abner Louima—you remember, the man sodomized with a broom handle, in a horrific incident at the seventieth precinct in New York—is settling with the city for millions of dollars. But he has given up whatever pressure his lawsuit might bring for systemic change within the police department.

Now, when you lay this on top of the Amadou Diallo killing and Patrick Dorismond—I do not want to focus too much on New York, but I think you all know these stories. At the end of the Clinton administration, civil rights groups were urging the Justice Department, the Attorney General, not to give up, to do something about pursuing systemic reform through litigation in New York City. And it didn't happen. I think this was a major failure on the part of the Clinton Justice Department. They went out of office without filing a suit. They were trying to negotiate with the current Mayor of New York, and I am sure he was buying time. But the bottom line is, it did not happen. If the Justice Department—which has the ability to seek this kind of systemic reform—does not do so, private citizens simply cannot do it.

Now, let me just end this dialogue, or diatribe, by saying that those of us who litigate civil rights cases on behalf of African-Americans or Latinos are seeing so-called reverse discrimination cases where standing principles, which have been tightened up for us in our cases and raised as barriers, have been loosened for those so-called reverse discrimination cases. Causes of actions that did not even exist before are now allowed, and standing principles that had constricted for us have been loosened. One of my former colleagues (who happens to be White) is Pam Karlin, who teaches up at Stanford Law School. She calls it the Universal

White People Standing Rule. Hence, in *Shaw v. Reno*,⁶¹ we have the redistricting cases challenging the creation of congressional districts that allow opportunities for African American and Latinos to elect representatives of choice. These cases on behalf of white voters are going forward, even where you do not have the traditional vote dilution—the predicate for showing that there was an injury in cases that we would bring. Now, White plaintiffs can bring these so-called reverse discrimination cases, and we are about to have a whole new round of litigation after the upcoming postcensus redistricting. I hope you are getting the picture. I think that standing principles are being used in an unprincipled way, in a way that is biased against civil rights litigation, in particular on behalf of racial minorities.

ALAN MORRISON:

Actually, there is another principle you forgot, that you have standing to lose. In *Duke Power Co. v. Carolina Environmental Study Group Inc.*,⁶² we had standing to get into court, and then we lost the victory we won in the lower court.⁶³ It also happened in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁶⁴ it is the same principle—you have standing to lose.⁶⁵

ROBERT FELLMETH:

I want to point out that there is a distinction between the cases that Nadine and Ted are talking about and the cases that Pat is talking about in the consumer law area. In the cases that Nadine is talking about, you really have to rely on the courts as a check. You cannot rely as much on political institutions, which may be a little friendlier to consumer interests. Not always, but sometimes. But it is consistently hard to get a jury, much less a legislature, to identify with someone on death row. So you have an important need for access to the courts; they are really your last resort. You are not going to do very well in any other forum when you are representing the people that Nadine is talking about.

So you need that unbiased court which we are going to be talking about after the break, and we are going to be talking about access to it.

61. 509 U.S. 630 (1993).

62. 438 U.S. 59 (1978).

63. *Id.* at 72, 82.

64. 429 U.S. 252 (1977).

65. *Id.* at 261–62, 270–71.

But it seems to me that the standing and access is critical. We have not even talked about cost yet; I think we will talk about that after the break as well. But I do want to end this little discussion right here and have you think about the standing problem we have been discussing. We have the Unfair Competition Act model; it is directed at private action. Can that model be adapted to the kinds of cases we are talking about here, even though you might take a hit on damages? I am simply suggesting that there may be some remedies available to us that might surmount the barriers that Ted is talking about. Every time you require the power elite to shift, you expose its bias toward stasis and status quo protection. That is, of course, what it may be all about in the final analysis. But there is some stated principle that we must be consistent. And it is difficult to be consistent and not expose your bias or your racism if you have to continually shift ground and contradict yourself.

As we think about solutions, let's take a ten-minute break and then get back to the issues of cost, access, standing, and strategies.

[Break]

ROBERT FELLMETH:

What I propose to do is to talk about one other aspect of barriers to access that we have not talked about, the privatization issue, and then to go to opportunities we might entertain to overcome some of the barriers we have been discussing, including the class action obstacles, legal service type barriers, court costs and delay barriers, as well as the issue of incompetence of counsel, which Nadine alluded to, in the representation of folks who are in desperate straits.

The privatization issue is so important because of the trend of the law—the tendency toward more and more adhesive contracts (whether it be on the labor side, the consumer side, or the financial side), to include provisions which deprive many of access to the courts. These adhesive contracts confine the resolution of a suit to a one-on-one arbitration or mediation process, which might cost money and which is often stacked against the consumer. Increasingly, the courts uphold such remedies, perhaps due to the tension of their own workload. I would like some discussion first from Alan and then Pat about the danger of privatization and what it means in terms of access.

ALAN MORRISON:

I do not think I need to tell anybody in this room what it means to be forced to give up your right to go to court due to an arbitration agreement. In some situations, arbitration is perfectly fair and reasonable, and, if that is so, then consumers and employees may be expected to agree to them. But when they are not fair and reasonable, should people be forced into them?

I think that the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*⁶⁶ is probably the worst of their arbitration cases because it was unnecessary, and it completely misreads the statutory language and history. It assumes that Congress created a scheme to exclude from arbitration contracts a tiny slice of the economic world (interstate transportation workers). Leaving aside the details, these interstate folks were the only people Congress thought it could constitutionally cover in 1925 when enacting the Federal Arbitration Act.⁶⁷ The Court held that this narrow-focused Congress intended to subject every employee in the United States who had any connection to commerce to the Arbitration Act. To say that this is an outcome determined result is the mildest of understatements.

I think the decision is terrible for workers, but it is also terrible for consumers for one reason: if this case had gone the way it should have gone, the Congress would have acted to change the statute to include employees in general. But as the price of bringing virtually all employees in, they would have included elements of essential fairness, because the burden would have been the other way around. Now the burden is completely shifted, and the victims of the Arbitration Act have to muster up enough votes (including enough votes to override what will probably be a presidential veto) to do anything about this. So I consider this to be one of the worst arbitration cases to come along, if not the worst. Certainly, it has been a real disaster for the public. It is another one of these five-to-four decisions, with the five people in the majority those we expect to be there.

Senator Sessions, who is not normally thought of as being on the consumer side, introduced a bill last year with a number of features that would have helped out and made arbitrations less unfair. It did not go all the way, as many people hoped it would. Now the question is whether he will even be interested in continuing with that activity, because part of the impetus was the arbitration of employment disputes, which are now clearly on the other side. So it is a very bad development, and it could be fixed legislatively, except for one problem: the people who want to fix it do not have control of either House of Congress or the White House. Other than that, it is a cinch.

66. 532 U.S. 105 (2001).

67. 9 U.S.C. §§ 1-14 (2000).

ROBERT FELLMETH:

Pat, I would like you to comment, and then I will go to Nadine for some opportunities so we can get optimistic.

PAT STURDEVANT:

I would like to comment because I think this is a pernicious threat to our system of justice and it is not something that has come about by accident. There has been a real move by financial institutions to adopt arbitration clauses as a way of enhancing their bottom line. They have set up a particular provider, the National Arbitration Forum, which advertises its services in a way that no court could ever do. It says: “Bring your cases to us, and you can be sure there will be no class actions,” which arbitrations circumvent. So it has been adopted, and it is being followed as a way of giving industries a leg up to prevent consumers from getting access to injunctive relief, to punitive damages, and to class certification.

But we are going to have to make that record in order to change the Federal Arbitration Act so that it excludes consumer and employer disputes. So far, there has been an adoption by the highest court that arbitration is a benign alternate forum—without understanding what happens in it. I do not think it can be fixed. I do not think it is going to help, for example, to provide some discovery or to let the institution bear the cost or make them follow the law, because the intent and the design was to set up an unfair process. We do have the recently issued Rand Study which dispels the myth that arbitration is faster and cheaper.⁶⁸ But we have to show where arbitration is excessively costly, where the result is unfair or unjust. And it is possible to do. For example, it has been done in sex discrimination cases. We have to do it, and then and only then will we be able to make a persuasive case that the statute needs to be changed to allow consumers and employees their right to court.

ROBERT FELLMETH:

We need the case studies that the personal injury attorneys specialize in so well, the actual “horribles” in terms of what happens.

PAT STURDEVANT:

We have to have that, because otherwise the discussion is all in the abstract. Proponents of arbitration contend that it is just an alternate

68. DEBORAH R. HENSLER, RAND INSTITUTE FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (1999), *available at* <http://www.rand.org/publications/MR/MR969.1/MR969.1.pdf> (last visited Feb. 1, 2003).

forum, that you can obtain the same remedies; but, I think as a factual matter that is not the case, but that is yet to be demonstrated.

ROBERT FELLMETH:

Essentially, we have arbitrators who depend upon the graces of one side, the side giving them repeat business, and that is not the consumer.

PAT STURDEVANT:

That's right. Another thing I think we can do is have our members seek to be arbitrators. If you apply to the AAA, for example, which is considered to be neutral and unbiased, you will find that in order to be appointed as an arbitrator, you have to be recommended by existing arbitrators. You have to agree to follow the principles of the arbitration association, to promote the association, to adopt its point of view. It is just apparent on the papers that what they are looking for is not a neutral person, but somebody who is already on the side of industry. But in light of the two recent Supreme Court rulings, that is the case that we have to make in order to obtain reform.

ROBERT FELLMETH:

Looking at all these barriers, we also must consider the critical issue of cost. Most citizens cannot afford a lawyer to provide access to the court in the first place. What do we do in terms of opportunities? What do we do to take the offensive—which is the theme for this conference? What strategies should we undertake? We have already discussed the Unfair Competition Act and its replication in other states, perhaps with some adjustments, but what else? What else is available to us on the political side, the legal side, or the court side that might allow us to turn the corner here and begin to unravel some of these problems? Nadine, do you have any thoughts?

NADINE STROSSEN:

Well, I want to correct any misimpression that we should be depressed. I think that by definition, many people here are public interest lawyers. You should feel thrilled about how important you are and how necessary you are. In all seriousness, a lot of the problems we talked about can be addressed by lawyers taking cases individually, either cases that would contribute toward bringing about system wide reform or individual cases on their own terms. So where we cannot

bring class actions, we will bring these cases one by one. And at least in the area of civil rights, attorneys' fees are generally available—not only at the federal level but also at the state level. We have also been lobbying, in those states where attorneys' fees are not yet recoverable for successful civil rights plaintiffs, to enact fee recovery provisions.

The only area where we faced cutbacks in attorneys' fees for prevailing plaintiffs, the only one that targeted such fees, is the PLRA, the Prison Litigation Reform Act.⁶⁹ It did create a monetary disincentive to bring those cases, and that has importance, but only in a defined range of cases. So the ACLU will continue to fill that void through our National Prison Project. But as far as the rest of our docket is concerned, prevailing plaintiffs generally can recover attorneys' fees. So yes, this is an advertisement for you to join forces with us to right some of these injustices.

ROBERT FELLMETH:

In our Session here, we have two aspects which interact on taking the offensive. One is court secrecy, because we may be helped to the extent that what happens in court is public. To the extent that we represent democratic forces, it helps to have the judges operating in the public domain. And we should consider the related issue of court bias. Judicial bias underlies a lot of the problems that we have been discussing. How do we stimulate courts that are neutral and manifest an obligation to the general public, to the future, to the law, and to consistency?

I want us to talk a little bit about secrecy, because I think it is an important aspect of our taking the offensive. We are not going to be able to take the offensive if we are dealing with a system that is operating in secret. Nadine, you have the ultimate example of secrecy that you might share with everybody.

NADINE STROSSEN:

I had the opportunity to discuss this with one Supreme Court Justice who had read a newspaper story about this a couple years ago and said: "This cannot be true; this cannot be happening in the United States." It is in fact true, but is not as well known as it should be. As a result of the anti-immigration and so-called antiterrorism laws that were passed in 1996, additional power was given to the INS to detain (the euphemism for imprison) individuals who are suspected of being terrorists. It does not matter if they are lawful residents, it does not matter how long they have lived in this country or what their ties are. Many of them have

⁶⁹. Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626, 28 U.S.C. § 1932 (2000).

children who were born in this country. They may not only be imprisoned indefinitely, but they may be held on secret evidence; that is, evidence that is classified to such an extent that it is not even revealed to their lawyer. And in some cases, even the judge is shown only a summary of this evidence in camera. There are approximately two dozen individuals who have been held in prison in this country on such so-called secret evidence. We have had mixed results in the courts in challenging this law. Right now, a bipartisan piece of legislation is pending in Congress. Again, once you get it out to the public and to politicians that this is going on in the United States, you find very conservative members of Congress, as well as liberal ones, saying that it is just plain unfair. And I would segue back to my original point: I think that a lot of these injustices are so blatant that if the public reacts and the media exposes it, a number of politicians (including some who might surprise you) will jump on board to support legislative fixes.

ROBERT FELLMETH:

That's interesting. Your description of secret tribunals rather sounds like Amnesty International describing Iraq. Alan, what about secrecy in general, beyond the extreme cases Nadine is talking about. For example, we have the use of courts to secretly settle cases, the *Firestone* case being settled quietly and so forth. That is an access issue that is not discussed very often. What are your thoughts about that?

ALAN MORRISON:

There are some different issues relevant to secrecy we need to keep straight. One has to do with the secrecy about the amount that the defendant is paying the plaintiff. That is always interesting, but, in my judgment, is not the ultimate issue in the case that we really ought to be fighting about. Second is this issue of whether things can be kept secret in cases while the case is going on. And third, what happens when the case is over, typically without a trial being held, so that there is no public event at which this information is revealed? What happens to the data then?

There are two sets of concerns. One is data sharing among lawyers, and we have seen positive developments in the last half a dozen or so years, particularly in product liability cases. For example, tobacco cases, breast implants, and others where courts have been insisting upon centralized data banks where all the depositions and all the documents

are being placed, with essentially no restrictions on them. They are not requiring the plaintiffs to reinvent the wheel and redo all the discovery, with the defendants hiding what they said in the early depositions. That is a positive development.

But a lot of cases do not rise to the level of mass torts, at least not at the beginning. Take *Firestone* for example; a plaintiff's lawyer with whom we have dealt for many years and have high regard for told me he was placed in the incredibly difficult position of representing a client whom he was told would get a huge amount of money from the defendant on one condition, that all the documents relating to the unsafe Bridgestone-Firestone tires would be kept secret. As a result, hundreds, thousands of people may have died. The lawyer is put in a terrible position. But he could not spread it out in the public record and put it in the newspapers. He was forbidden from even telling the National Highway Traffic Safety Administration that he had the data and the other evidence or that the defendant had it and all they had to do was go ask for it. It seems to me that when we are talking about crucial health and safety data with a product that is still on the market, there can be no justification whatsoever for the level of secrecy that we are now seeing.

I understand that California has a bill and that they are working on this issue now. It is something that we have just got to pay attention to, because I do not think most people are aware of the level of secrecy and the kind of information that is being affected. You hear all this nonsense about trade secrets; well, everything is a secret as far as the industry is concerned. And there may be some legitimate trade secrets, but the number of trade secrets, legitimate or even quasi-legitimate, as compared to the amount of secrecy, is *de minimis*.

This is an area where we have really got to keep on the offensive, and *Firestone* is a great example of it. But it is true in many other areas as well. This happened for years in asbestos cases. It did not happen in tobacco cases because the defendants kept all this evidence from the plaintiffs by making bogus claims of attorney-client privilege and work product, but rather because they ran all their medical research through their law firms. That is another story. But this is an area where we can and should be on the offensive. It is going to be very difficult for legislators to explain to anybody how information that potentially will save the lives of people in the United States ought to be kept secret even from the regulators who have the authority to decide if these products stay on the market.⁷⁰

70. See Alan B. Morrison, *The Secrecy Scandal*, BOSTON GLOBE, Apr. 14, 2002, at E7 (commenting on secrecy agreements in priest sexual abuse cases).

ROBERT FELLMETH:

I think legislators can see that you have got a nonzero sum game where you have got the defendant and the plaintiff and you have got the conflict of interest. The plaintiff wants the money, and the defendant does not want any other cases, so they have an interest in common to keep it secret and to pay an additional sum for that secrecy. The only way to solve the problem, it seems to me, is that you have got to take that off the table. You take it off the table by a statutory prohibition. You just cannot do it. The information is going to be public or can be made public, and you cannot prohibit it, and any such agreement is void, with proper safeguards for protective orders and so forth.

I drafted a statute four years ago that would do that, and Governor Wilson vetoed it. Fortunately, the author was Bill Lockyer, whom you heard from last night, and who is sponsoring another bill this year to do the same thing. So, hopefully, we will get it. Hopefully, it will happen in other states as well.

I also want to talk about another place to take the offensive: who is sitting on the bench and how do they operate? As we can see, the courts are often a last resort. In some of our cases, we cannot win politically. We are really relying on the protective offices of the court. We have a court vacancy likely to come up in the Supreme Court, two perhaps, in the very near future.

We have important issues at the local level regarding the campaign financing of judges who are elected or re-elected and where the court has become highly politicized. People appearing before the courts can be very involved in the campaign of the judge. Alan knows a lot about this because he has filed a case in Texas, and he is also interested in the courts and the whole ABA issue with Bush. I would like to hear Alan's thoughts on court bias and how we can influence the courts to make them more independent, as an oasis, if you will, of objectivity and consistency.

ALAN MORRISON:

Maybe we should talk about these issues one at a time. We will talk first about judicial elections and what they mean. Texas used to have a law under which there were no—I say zero—limits on the amount of money that could be contributed to campaigns for judges who were

running for election. In 1995 they changed the law. Now, individuals are limited to \$5000.⁷¹ That is five times the amount of money that you are allowed to give a candidate for President of the United States. If you are a lawyer, your law firm can give \$30,000; and if you are a political action committee, you can give \$300,000 to the judge.⁷² The judge is specifically authorized by an exception, found virtually only in Texas, to the Code of Judicial Conduct to personally solicit money from anybody they want, including litigants or lawyers in cases before them. This is the capstone of it all. I could give \$5000, and my client could give \$5000, to a judge where we have a case pending, and the judge does not have to recuse him or herself. Now, this is a law that nobody outside of Texas believes when I tell them about it. They think I have made this up. And yet that is the law in Texas, and the Texas Supreme Court has held that giving such money does not constitute a basis for recusal.

So we brought an action in the federal court in Austin on behalf of Public Citizen and some legal services lawyers and other lawyers who do employment discrimination cases and who don't give money to judges.⁷³ Public Citizen doesn't give money to judges. We are a corporation, and corporations and unions are not permitted to give; but, of course, their executives can give as much as they want, as can a trade association. Well, the judge threw us out on two grounds.⁷⁴ The first ground was we had to go to the state courts to litigate this, although that is clearly an exercise in futility. And the second basis was that it was a political question. This means that no court, including the Supreme Court of the United States, could ever entertain a due process challenge—even one coming from the state court where we had been told to go. So we filed our brief; if you are interested, the case is in the materials. The case is ready for screening; it will be argued in the Fifth Circuit probably sometime this summer.⁷⁵ We are hoping to get rid of this law—this nonlaw is what it is—and the relief we have asked for is simply to declare it unconstitutional and to tell the legislature they have got to do something better. Whatever the right answer is, this is not it.

But I think this gets to more fundamental questions of what we do about judicial elections. How are they supposed to be financed? Are they supposed to be privately financed? Should we have public

71. TEX. ELEC. CODE ANN. § 253.155 (Vernon 1997).

72. *Id.*

73. Pub. Citizen v. Bomer, 115 F. Supp. 2d 743, 744 (W.D. Tex. 2000).

74. *Id.*

75. The decision was affirmed on appeal, on standing grounds, not on either of the grounds relied on by the lower court. Pub. Citizen v. Bomer, 274 F.3d 212 (5th Cir. 2002).

financing for them, even if we do not have it for anyone else? What are judicial elections supposed to be about?

I'm sure Nadine has seen these cases come up where the courts and the bar associations are saying: "You cannot ask anybody anything that anybody would conceivably want to know about a candidate," so you might as well be shooting dice in deciding who you are going to elect. Anyway, I think it is an issue with which we need to come to grips. The wonderful idea that we should not have tyrants on the bench runs up against the ideal that if we do not want tyrants, how are we going to figure out who these people are? How are we going to get them off the bench, and how are we going to prevent voters from campaigning against judicial officers who are doing what Justice Bird did here (in California) or Justice White did in Tennessee—taking principled positions against unprincipled laws.⁷⁶

NADINE STROSSEN:

What I am going to say now is not an official ACLU policy. We do not have one on this issue. But personally and as a civil libertarian, I am very concerned about the double bind confronting judges running for election. They are, or can be, attacked on their records, including very distorted versions of their decisions, and yet they are gagged from any meaningful response. That obviously raises enormous free speech problems, as well as problems for democracy. If there is any rationale for electing judges, it is to facilitate free and full debate about their powers and how they exercise those powers, but then we do not allow that free and full debate. So my personal position is very much against the election of judges. I think we lose a lot more than we gain through that process.

Over history, we have seen the role that nonelected federal judges have consistently played in enforcing the rights of minorities, whether they be racial minorities or political minorities. I am certainly not here to say that the federal courts are perfect; far from it. But at least structurally, removing their selection somewhat from the political process is a good thing. Part of the problem with what is happening to the federal bench is that the appointment process is moving closer toward an electoral model that breaks down that division.

76. On June 27, 2002, the Supreme Court ruled five to four in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), that state rules that forbid candidates for elected judicial office from announcing their views on disputed legal and political issues that might come before them if elected to the bench violate the First Amendment.

I have to interpose one dissenting viewpoint from one of my colleagues at the ACLU. As I say, I am speaking as an individual. The head of our Washington, D.C. office, who happens to be an African-American woman and who has relatives who have been elected to the judiciary in Maryland, says that elections in certain communities, and at certain points in our history, have been an opportunity for minorities who have not been appointed by the President or designated by their senators to gain access to the bench. So I think she has a good argument, but I think mine is better.

ROBERT FELLMETH:

Well, I would like to hear some questions from Dave, if you want to come up here.

DAVID VLADECK:

The intellectual firepower of this panel has sparked far more questions than we are going to have chance to get to this morning. So I urge you, at the break, to find a panelist and pursue your question if it does not get asked.

Early in the panel, Nadine used the term “under-resourced” to describe the resources of the ACLU, and Pat talked about forging public and private partnerships. Those two comments spawned quite a number of questions that I think I can combine into two related questions.

Do you agree with the proposition that our side is under-resourced? Charlie Halpern did a study in the early 1970s on the number of public interest lawyers in the United States; I think his total was about 600. I am not sure we have gained in size since then. Pat had suggested that organizations like ours try to form partnerships with the private sector. And the question really is: what are the limits on those combinations? One question posits concern, for example, that private lawyers in police misconduct cases might be more interested in maximizing the plaintiff’s recovery than in long term injunctive relief. Is that kind of trade-off something that is inherent when you engage in a sort of public-private partnership in case representation? And this really is a question addressed to all panelists; I don’t know who wants to take the first crack.

PAT STURDEVANT:

Let me start, David. I think there is no question but that we are under represented. Any time we take on a battle against entrenched interests, we are always outgunned and out manned, and I use that term advisedly. So our weapons are that truth is on our side, justice is on our side, and the media may be on our side—to the extent we can bring them there. I think it is extremely important that we reach out to members of the

private bar. There always is tension over objectives—going back to Ted’s example of when he was in a prosecutorial office with emphasis on injunctive relief and not damages. But if you discuss those things in the beginning and work out the terms of representation, you can surmount that difficulty. There are a number of examples, particularly in the consumer context, where, on state issues or on national issues, a consortium of individuals can get relief, whereas one attorney or one public interest organization would be powerless acting alone.

NADINE STROSSEN:

I would like to echo Pat’s point. Although we are often described as the largest law firm in the country, it is mostly because of our volunteers. The ACLU is the ultimate partnership of the type Pat referred to—where nonpaid, nonsalaried members and lawyers are volunteers. We have about 100 underpaid staff lawyers, but at any given moment we also have thousands of completely unpaid lawyers who are in the private sector. I am a complete volunteer; there are a number of others in the audience I have met today who are either with law firms or law faculties or corporations, who are generously donating their time and their firm’s time and resources to help us process these cases. Having said that, it is never nearly enough. For example, we have had many complaints over racial profiling—partly because we have placed ads publicly encouraging people who have been the victims of racial profiling in the criminal justice system to call an 800 number. We have advertised in minority publications, media, and neighborhoods. Our phones are ringing off the hook all over the country. We find it hard even to process all of the complaints, let alone to pursue them.

You cannot individually litigate all these cases. That is why you have to look for legislative reforms as well. And on the positive side of alternative strategies, again using racial profiling as an example, we have found an amazing number of police departments that voluntarily approach us in light of the adverse publicity about this problem. They ask us to help with training and resources. Now even *that* is something that takes resources. Again, the generosity of lawyers who are not working for the ACLU has made a tremendous difference, but never enough.

TED SHAW:

Let me say a few words in addition to what Nadine just said. One of the disadvantages is that even in getting our stories told, there is a slant

in the media and, of course, from the conservatives. They complain about an alleged liberal media slant all the time. But if, for example, Clinton Bolick (who many of you may know with the conservative organization Center for Individual Rights in Washington), wants to get a piece in the *Wall Street Journal* op ed page to attack a nominee under a Democratic administration—let's say for Assistant Attorney General for Civil Rights—a wild hypothetical—he almost has carte blanche. Forget the almost, he has carte blanche to the *Wall Street Journal*'s editorial page, or op ed pages.

And the *Wall Street Journal*'s editorial pages do not even make a pretense of being objective or balanced in any way. The same thing is true of the *Washington Times*, and I could go on and on. If you think about the papers and you ask about what national newspapers can counterbalance that, people would think about the *New York Times* and the *Washington Post*. But those are not newspapers that have the same kind of slant to provide an even balance. I mean, if we want to get something on the op ed pages of the *Washington Post* or the *New York Times*, it is a fight. Sometimes it happens, sometimes it does not. But you will find Ward Connolly with his piece in the *New York Times* op ed pages just as likely as you will find ours. So I am saying it is uneven. There is *Fox News*, if any of you are cable junkies, and *Fox News Television* any time you turn it on. There is a constant diatribe against anything that is viewed as liberal. You get the point. It is a fight. Then there are the foundations. Foundations do not like to support litigation; they think it is contentious.

ALAN MORRISON:

A four-letter word.

TED SHAW:

That's right. And I always say: "Contentious as compared to what?" Compared to Bosnia or Rwanda? We resolve a lot of the most contentious issues in this country through our judicial system. So compared to what? Is it really all that terrible compared to the alternatives? But they do not like funding lawyers, and when it comes to our work, they do not like race issues either. So funding lawyers who litigate on race issues is almost a nonstarter. We have a few foundations that have stayed with us, but foundations are always looking for the next exciting thing and to move on beyond these issues that they think are old and intractable. Frankly, the people who have the big money tend to be more conservative. We need the support of many individuals with small contributions; they add up. But if you talk about big money, it seems to be more on the other side. I could go on and on, but you get the point.

But nonetheless, we are powerful if we organize and if we cooperate and if we work together. Part of what I think our side has failed to do is to organize as effectively as the other side has organized. And then they have stolen the pages from our play book. The Center for Individual Rights has stolen exactly the model that the Legal Defense Fund used to litigate impact cases over the years.

And finally, I want to say about this public-private distinction: it is important to have that coalition. But I can tell you, for example, that the Legal Defense Fund has litigated employment discrimination cases since Title VII was enacted in 1964. And the way we approach those cases may be different than an individual in a law firm. Law firms didn't do Title VII plaintiffs' work until fairly recently for the most part. But now after *Texaco*⁷⁷ and *Coca-Cola*,⁷⁸ they think they can make a killing in this kind of work. But they do not bring to it the same kind of approach or seek the same ends. It goes back to Alan's discussion about the split between damages and injunctive relief, with a few exceptions. They do not bring the same perspective to it that an institution like the Legal Defense Fund is going to bring to it. We have to be careful, because the way the private bar may litigate those cases may have a profound impact on the way the case law develops. It can come around to bite those of us who are doing those cases in ways that seek to do more than open up a new avenue for income streaming into a big law firm. Get the point? So it is a relationship that we have to have, but it is one that we have to think through carefully.

ALAN MORRISON:

I agree with most of what has been said. Our most successful partnerships have been on an issue basis. For example, in the product liability area, which is a lot of what our overall organization has been concerned about, we have developed expertise in preemption law. Preemption is the "get out of jail free card." If you comply with a minimum federal standard, state law cannot apply. In torts, banking, labor, you name it, it is there. We do a tremendous amount of this, and so what we have tried to do is to find cases where private attorneys are handling cases for actual damages for personal injuries. We do not get involved in the basic liability aspect of the case and try to prove

77. *Roberts v. Texaco, Inc.*, 979 F. Supp. 185 (S.D.N.Y. 1997).

78. *Abdallah v. Coca-Cola Co.*, 133 F. Supp. 2d 1364 (N.D. Ga. 2001).

damages. What we try to do is either help out and take over or help with the preemption issue.

We do that in other areas too, particularly through our Supreme Court Assistance Project. That project helps lawyers with a variety of issues, as well as preemption, when they are in the Supreme Court. And we have trouble raising money from foundations. I tell the foundations, look, you may not like litigation, but if the case is in the Supreme Court, you cannot avoid it. And if you think your foundations are unhappy with you, try being in situations in which you have got company executives or law firm partners on the board of the foundation and you are suing them or their client. That makes it even more popular. So I do not want to be discouraging, because I think there is a role for collaboration with the private sector, but I think we have to recognize that there are differences between public interest institutions like ours and private law firms.

NADINE STROSSEN:

I would like to mention one other strategy here, and I know both the Legal Defense Fund (LDF) and the ACLU have used it, and that is what I think of as creative coalition building. For example, in the University of Michigan affirmative action suit,⁷⁹ I thought it was just brilliant that LDF and ACLU became part of a coalition of civil rights organizations that are supporting the affirmative action program. But at least as influential, and probably in some circles more influential, are the friend of the court briefs that have been submitted by dozens of major corporations located in Michigan explaining why affirmative action is absolutely essential for their economic success. So where people might not be moved by concerns of racial justice, they may be moved by concerns of economic well-being. We have been able to do the same thing with some of our Internet censorship cases, combining odd allies such as the United States Chamber of Commerce and the National Association of Manufacturers.

DAVID VLADECK:

I would like to put together a number of questions that relate to civil rights litigation. Neither Ted nor Nadine had a chance to comment on the impact *Circuit City* is likely to have on civil rights litigation. The question I would like to ask is: in light of *Circuit City* (which essentially gives employers of nonunionized employees the ability to assert mandatory arbitration clauses in employment contracts),⁸⁰ given the

79. Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

80. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 109 (2001).

problems that you mentioned before with class action litigation, how are you going to be able to enforce Title VII in the courts? Related to this query, a number of the questioners asked whether there are administrative remedies that might be available. Are there new arguments that might be available to you under the Court's theories as developed in *Bush v. Gore*?⁸¹ Where are you going to turn?

TED SHAW:

Let me address the *Bush v. Gore* thing first, because a lot of people were trying to see a silver lining in that cloud. It is mostly cloud, and there is a lot of rain in it. First of all, the *Bush v. Gore* theory is an ill-defined equal protection concept. If we know anything about it, it is probably going to be interpreted very narrowly. I think the Supreme Court has made clear that they do not intend to open up a huge new area. Those of us in the civil rights community do need to push. If they want to talk about equal protection, let's talk about equal protection. We have been trying to talk about that for a long time, and they hardly ever want to talk about it. So we need to push it as far and as hard as we can. Having said that, *Bush v. Gore* does not have any application that I can see to Title VII and employment.

I think the *Circuit City* case is a profound defeat in terms of those who want to keep open the avenue for employment discrimination litigation for nonunionized employees. But the good news, as we noted earlier, is that it is statutory. It is not constitutional; it can be fixed. And we did pass the 1991 Civil Rights Act, as I indicated earlier, under a Republican administration. We need to see a little bit of a shift in the composition of the House, I think. But even with this Congress closely divided, I think it is possible to do it.

Ordinarily, the way these things work, you have to kind of wait and, as we talked about earlier, see the horror stories. When the parade of horror stories comes out, we will probably have to take with it a bundle of other issues that will need some fixing before there will be enough momentum and steam built up to address *Circuit City*.

But in the meantime, we will continue to file Title VII cases where we can. Unfortunately, individuals who enter into employment relationships now are going to face mandatory arbitration clauses. And if you are seeking a job, you are not going to say: "Well, I really can't take this job

81. 531 U.S. 98 (2000).

because of the provision you have in here.” It is an unequal bargaining position that people are in. So people are going to be hurting because of this if there is discrimination. But I think we can go back and fix it. I do not know about administrative remedies, at least federally. EEOC is overburdened as it is now. It is very slow to resolve complaints before it. Once in a while they take on some issue and deal with it effectively, but for the most part, what they do is issue “right to sue” letters, so that people can go into court and fend for themselves. Here, they are not going to have that right. So I think we are just going to have to wait and get a legislative fix on the federal level.

ALAN MORRISON:

Are they going to issue “right to arbitrate” letters? Are you going to have to go through the EEOC, Ted, in order to arbitrate now?⁸²

TED SHAW:

That is an interesting question. My gut reaction is no.

ALAN MORRISON:

Whatever you want to do, they won’t want you to do, right?

TED SHAW:

You can count on that.

DAVID VLADECK:

Let me ask this to all panelists. Before, you talked about some of the difficulties with using class actions, particularly in civil rights litigation. The class action device has recently been modified. Federal Rule of Civil Procedure 23(f) was added to allow interlocutory appeals. There are bills in Congress that would, in essence, federalize all class action law by allowing virtually any state-based class action to be removed to federal court. What do you forecast in the near future about the fate of Rule 23? Do you think it is going to be modified significantly? The Rules Committee again is looking at sweeping changes to Rule 23. Any of you want to address what you think is likely to happen?

ALAN MORRISON:

I do not think the Rules Committee is going to do very much. The proposals that are currently before them are relatively modest, and I

82. *See* EEOC v. Waffle House, 534 U.S. 279 (2002) (ruling that the EEOC was not bound by an arbitration agreement signed by an employee and was entitled to seek both an injunction and damages on behalf of the employee).

think are more in line with what we actually favor, which is toughening up the standards for supervision of class action settlements. So I am not too worried about that. I think that Rule 23(f), the right to appeal, is in theory a two-way street. But my concern is that most of the time courts of appeal are going to exercise their discretion to hear appeals when the defendants have been ruled against in the lower courts. As for the broader federalization of class actions, the Judicial Conference of the United States has been quite strong in opposing that bill as it is written now—because it is so sweeping. What their position would be if somebody got wise and made it more narrow is a different question.

I should also say that there are some cases in which we have been involved in state courts that have been actually worse than the federal courts. We now have some federal courts of appeals willing to look at some of these collusive settlements in ways that state courts are not willing to look at them.

But it is clear to me that the statutory remedy of, in essence, giving the right to go to federal court at any time in the class action is a terrible idea, and one that I think will not get through simply because it is too extreme. There is enough interest in the Senate to stop it through filibuster if need be.

DAVID VLADECK:

This is a question that I think is principally directed toward Nadine. There has been a spate of Supreme Court decisions resting on the Eleventh Amendment that essentially forbids litigants from bringing suits against states under statutes such as the age statute, the disability act. What, if any, limit do you think there is to this progression? Where do you see the Supreme Court heading with its Eleventh Amendment jurisprudence?

NADINE STROSSEN:

First of all, this is a regression, not a progression, and I just do not see anything changing the five-to-four split without new appointments. And it does not seem likely to me that the new appointments that we are going to get are going to change it in a positive direction.

DAVID VLADECK:

Someone suggested that the Spending Clause statutes, such as the Individuals with Disabilities Education Act (IDEA),⁸³ which gives states a stick but also the carrot of federal funding, may be the line the Court ultimately draws. Do you see any promise in that occurring?

NADINE STROSSEN:

I am not optimistic only in the sense that I see the Court's federalism jurisprudence, especially when you take *Bush v. Gore* into account, as being nothing but result oriented. Of course, we could make principled arguments that would allow those cases to be distinguished, but realistically I do not think this Court is going to be swayed. Or, more appropriately, five members are not going to be swayed.

ALAN MORRISON:

I guess I disagree with that on the Spending Clause, in part because you have got the abortion cases, among others. And I think there is an even more potentially dangerous case coming up that should be on the Court's conference in a couple weeks, whether they are going to treat sex discrimination like race discrimination, in which case you could deal with it under the Fourteenth Amendment, or whether they're going to treat it like age or disability discrimination, in which case they are not going to allow section 5 of the Fourteenth Amendment to override. That is a really dangerous case.

TED SHAW:

The question that you asked goes right to the relationship between Eleventh Amendment and Section 5 of the Fourteenth Amendment. Of course, the 1960 civil rights cases that went at discrimination through the use of the Commerce Clause are the bedrock for all of this legislation that has been passed. The question is: How far are they going to regress in the race area, and will they touch any of that? So far, I think they have drawn a line because, at least when it comes to race, it is clear that Section 5 was intended to allow Congress to act in fighting racial discrimination. But this has been a clear power grab by the Court. It has been a fundamental shift in federalism, and there are separation of power issues here that are profound. Like Nadine, I see the Court continuing to progress in the same direction. I do not think anything but a change in the composition of the Court is going to change this, and the question is, when will they feel compelled to stop.

83. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1487 (2000).

NADINE STROSSEN:

What is even more discouraging, I will not say depressing, but I will say discouraging, is that when the whole civil rights and civil liberties and religious communities banded together to pass a law to undo some of the damage that the Supreme Court had done, not dealing with race discrimination, but with religious freedom, the Court said that this act overstepped unduly into its powers. It struck down as unconstitutional the so-called Religious Freedom Restoration Act.⁸⁴ So you are really facing a bind here, where I guess the only avenue for action may be at the state level.

I think we did not spend enough time on how extremely important it is to mobilize all of our Senators and all of us who vote in senatorial elections on every appointment to every court, not just the Supreme Court, and also to pay attention to state court appointments.

DAVID VLADECK:

You have given me the perfect segue to the next question. What is the fallout going to be concerning the Bush administration's decision to shed reliance on the ABA screening process for federal judicial nominations?

ALAN MORRISON:

I view it not as bad news, but as good news. Why do I say that? Not only because I want to take the offensive and because we have got to be optimistic about something, but because I never believed the ABA screening process was worth very much anyway. My own view was that they gave their imprimatur to a lot more bad guys than they kept out as a result of it. That once you got the ABA's approval, you were by the door and anybody could say: "Well, I'll vote for that person because the ABA says she or he is qualified."

So I look at it as an opportunity for us to do a couple things. The first is to go on the offensive before there is a vacancy and for the people in this room and many others to band together and to start thinking about some criteria that we want to come forward with, some questions that we want to ask, not because the questions are going to be answered any more honestly or meaningfully than Attorney General Ashcroft answered them at his confirmation hearing, but because we want to know about the person and what they have done and how they have

84. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

practiced in their lives. We want to know what kind of background they have and what their qualifications are for sitting on the bench, particularly on the Supreme Court. And we should pull together a set of criteria that people can agree upon and get those out on the table in advance before there is a vacancy, as a means of emboldening the members of the Judiciary Committee. If they have some agreed-upon criteria, they can start to think about these issues in advance and in new ways. This means talking to those on the Judiciary Committee sooner rather than later, to remind them that there is a word in their vocabulary which they seem to have forgotten, filibuster.

If the Republicans in control of the Senate thought that they were entitled to filibuster Dr. Satcher when he was nominated for the mighty post of Surgeon General of the United States because he dared mention the word “abortion” sometime in his past, then surely those who feel strongly about nominees for high federal court posts ought to be willing to say the word “filibuster” and do something about it, instead of giving the nominee a pass. The rules, in my judgment, were permanently changed in the last six years by the Republicans in the Senate.

Those of us who care deeply about the Supreme Court and about the lower federal courts have got to start doing something about this now, before there is a vacancy, because what we are likely to see is what happened in 1986 when there was a vacancy announced and on that same day nominees were in place before anybody had the time to do anything about it. I am hopeful that we will take the offensive, remembering this may not be an offense in the sense that we assure advantageous nominations; but, in the absence of a good offense, a good defense is a good start.

TED SHAW:

I do not think that there is anything good that I can see from the ABA being removed from the process. First of all, we are concerned not only about the Supreme Court but also about the courts of appeals. I can tell you that a lot of the focus of the current administration right now is on the federal courts of appeals as well as the district courts. There are many vacancies here right now that have been backed up. One of the things that the ABA was able to do with its process and resources was to track all of these nominations and do the investigation up front. I am not sure how this is going to work now. Certainly, the nominee’s name is not going to be made public in the way that it was before. To date, the name was given to the ABA, and it would start the investigation right away, assuring both an investigation and a time lag.

Look, here is what is behind what this Administration is doing: it is no secret, you have seen the stories about it. People who are not on the

bench are being told: “If you want to be on the bench, join the Federalist Society.” We hear about judges who are either state court judges or district court judges. If the state court judges want to move to the federal district court or the federal court judges want to go the courts of appeals, if you are not a member of the Federalist Society, it is not going to happen. That is what we hear.

Certainly the Federalist Society is playing a very active role behind the scenes right now and sometimes right up front in the selection of these judges. All these vacancies exist because the Republicans, as we know, held up so many nominations for so many years that now they want to rush appointments through before there is a change in the composition of the Senate.

One of the problems, as we know, is if you have a slim Democratic majority in the Senate, you find that the Democrats do not tend to hold fast in the same way that the Republicans do. So the scenario looks bad to me. There is no question about that. I do not see a silver lining in it.

And while I am speaking to this issue, we fought for some years to have a change in the court of appeals for the Fourth Circuit—more African-Americans live in that circuit than in any other circuit. There has never been an African-American appointed to the Fourth Circuit until President Clinton appointed Roger Gregory as a recess appointee, which means that the appointment expires with the expiration of this current Congress, unless he is nominated by President Bush. President Bush has made noises about nominating him, given the bad publicity. But this is a circuit in which there have been all kinds of vacancies. The chief judge is pulling up judges from district courts to fill out panels because they have all these vacancies. A judicial emergency was declared because there were so many vacancies. And the chief judge was saying, while the Senate was blocking confirmation of African-American and other appointees who they consider to be too liberal, that the circuit does not want any more judges or need any more judges because it would interfere with collegiality. Well, you understand what that means. The Fourth Circuit has been the last segregated circuit up until this recess appointment.

That is what is going on in the federal courts to some degree or another, not only the Fourth Circuit, but in terms of getting appointments filled everywhere. And now the Republicans want to rush this through; the White House wants to rush these appointments through. Well, I think that the loss of the ABA is going to mean that the Senate is going

to have the Judiciary Committee play a much more active role and that organizations are going to have to play a much more active role. But frankly, Alan, I am very concerned about this spiraling down that we have seen for the last ten years or so with respect to the nominations process. It does not serve anybody's interest to have this process continue to spiral down into the kinds of battles that we have seen. I say that without backing off one minute from opposing extremist nominees from the court. But I think we have to find a way out of this; we have to find a better way.

ALAN MORRISON:

I think your point about the lower courts is certainly well taken.

NADINE STROSSEN:

I agree with Ted that in the long run making this into a political battle is not any good. On the other hand, I know that Ted agrees with me that Clinton did not make it enough of a political battle. So I think for the moment we have to recognize that, for all practical purposes, the Constitution and civil liberties and civil rights (among the other public interest causes we are talking about) are just not going to exist in reality unless there is a judge who is willing to enforce the Constitution and the laws, and every single nominee at every level has the effective capacity to amend the Constitution. And just as I would fight against a constitutional amendment to reduce individual rights, I am going to fight against judicial nominees who would have the same impact.

ROBERT FELLMETH:

We are pretty much over time now, so let's take one minute for each of us to wrap up as we have in the previous panels. Give us your thoughts on the two or three points you would most like to emphasize in terms of taking the offensive to address access to the courts and bias in the courts. Let's start with Alan.

ALAN MORRISON:

Despite the pessimistic sound of this panel, as a confirmed litigator, I am not about to give up. I think we have to keep litigating even if we lose sometimes, for several important reasons. Sometimes a loss is necessary as a prelude to legislative solution; arbitration cases are clearly an example. Second, litigation continues to perform an enormous function of educating the public about real injustices that they are not aware of. Third, sometimes it is necessary to remind some people that you can litigate to prevent them from doing worse things than they would do if you didn't take them to court. There are some limits, even

in these courts and these days, where courts will draw lines. Fourth, never forget the related blessing of embarrassment, that some people will do things out of embarrassment even though they might not be legally required to. And last, the beauty of the judicial forum is that they do have to answer your charges in some way or another, assuming that you get around the problem of standing. So we are not about to stop litigating, and I hope you aren't either.

TED SHAW:

As I said earlier, in spite of how bad the picture looks, the worst thing we could do is to give in and give up. And the more we hear these challenges, the more we have to be committed to the work we do. It just means that there is work to be done.

One of the things that I always remind myself of is that this has always been a very conservative country for the most part, and we had a relatively short era that we can define as the Warren Court era that had some bleed-over beyond the Warren Court. For the most part, that is the period of time in which the Court became as aggressive as many of us who do civil rights, civil liberties work, think is proper.

This kind of work is incremental. We have to continue to do it because the other side is going to be in the courts, and we have to meet them on every front, not only in the courts, but in the political arena, the arena of public opinion, everywhere.

I am not disheartened at all, because I know that in the big picture, over the long run, the whole story of the struggle for human rights and civil liberties is a struggle in which we are prevailing. History is a march toward progress, and as Martin Luther King said: “[T]he arc of the moral universe is long, but it bends toward justice.”⁸⁵ So even though at any given moment we might think that things are looking pretty grim, I know that progress is inevitable, and, even if we take a step backwards once in a while, we are going to take a few more steps forward tomorrow.

NADINE STROSSEN:

I absolutely agree with that, and, despite the assaults on the courts and on their power and on their personnel, they still are, in many important

85. Martin Luther King Jr., *Our God Is Marching On!* (Mar. 25, 1965), available at <http://www.mlkonline.com/ourgod.html> (last visited Feb. 1, 2003).

areas, serving their intended function. I am speaking mostly of the federal courts now because of their relative insulation from political pressure. They still are serving their intended function as the ultimate safety net for individual and minority rights that are not adequately protected in the political process.

So I think it is important to talk about some of the ways in which courts are serving that function in spite of all the setbacks. I would like to mention two examples on our agenda. If you look at all of the Internet censorship laws that have been passed both by Congress and by states all over the country, we have now challenged about a dozen of them. These have real implications, not only for freedom of speech but also for equality rights. If you look at what is being censored, it includes much expression of and about women and women's rights and reproductive freedom, as well as lesbians and gay men. I think that the latest law that Congress passed is a good example of how rights of poor people, who, unfortunately, are disproportionately racial minorities, are particularly under assault because the censorship is aimed at the public libraries and the public schools, where these individuals tend to have their only access to the Internet. Look at the court rulings in these cases; we have not only won every single one of them, but we also have the affirmative vote of every single judge, including the entire United States Supreme Court. We have prevailed before three dozen different judges appointed by Presidents going all the way back to Richard Nixon. Contrast that with the lopsided supermajorities which these laws obtain in their passage by the elected branches of government. The contrast you see is not between Republicans and Democrats; it is not between conservatives and liberals; it is between elected officials and judges, those who take an oath to uphold the Constitution and who are able to have a little bit of insulation from the political process and keep that oath.

The other example I would like to offer is reproductive freedom. Consider the badly mislabeled so-called partial birth abortion bans, which have been struck down by the United States Supreme Court six to three.⁸⁶ And if you look at the lower court rulings, again, in virtually every single one of these cases the courts have done the very politically unpopular thing, including very conservative judges appointed by very conservative Presidents. Now having said that, there are limits to litigation success in other areas, on racial justice, certainly affirmative action. We are winning some in the lower courts, but the Supreme Court warrants pessimism there.

We need to see litigation more and more as part of a multipronged strategy, and this picks up a little bit on what Alan was saying.

86. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Litigation can function as a tool that we use for purposes of public education, for purposes of prompting voluntary governmental reform, for purposes of prompting legislative reform. And even all of you out there, or most of you, who may think of yourselves as litigators, I want to encourage you to use your knowledge of the law and your commitment to the public interest to advocate in forums other than courts of law, to advocate in the public arena, to advocate through grassroots organizing, to advocate through lobbying elected members of government as well. Your knowledge and your skills as lawyers will serve you and our causes in those other arenas as well.

PAT STURDEVANT:

I think Nadine is exactly right, and this example of multifaceted advocacy is what we have to push for the future. I also think that it is essential that we take another look at the issues that we are advocating and find overarching issues that appeal not only to the consumer movement but also to the civil rights movement. An excellent example of an issue ripe for multiform attack is mortgage lending—now the scourge of communities all across the country. It particularly disadvantages elderly African-American widows. It is a national disgrace. It is causing individuals to lose their homes and the equity in their homes, it is disrupting neighborhoods, and it is disrupting communities. It has gotten a great deal of attention from regulators at the national level and from the media all across the country. It provides one immediate and important opportunity for us to come together and work collaboratively in the courts, agencies, legislatures, and before the public.

ROBERT FELLMETH:

Thanks, Pat. I want to wrap up by directing your attention to the exhibits in this Session's materials and their specific recommendations. We were not able to get into a lot of them. Many of them do attack problems we have been discussing. There is an exhibit on mandamus as an alternative class action.⁸⁷ There is one on the *Castano* case litigation model, which is what Pat is talking about in terms of combining together with private partnerships.⁸⁸ There is an article on the Unfair Competition

87. See Fellmeth, *supra* note 3, at 7.

88. See Myron Levin, *As Tobacco Litigation Goes, Castano Suit Is Super Bowl*, L.A. TIMES, May 22, 1996, at A1.

Act alternative that Pat discussed briefly, and so did Alan.⁸⁹ There is the California Corporate Criminal Liability Act,⁹⁰ which brings public prosecutors into this sphere. There is also a model Independent Legal Technician Statute. We did not discuss in depth the costs of legal access, a serious issue, but that model is a promising proposal in that area. The position paper of the NACA on Consumer Contracts and Arbitration Clauses and suggestions there is included.⁹¹ The exhibits also include an article by Alan Morrison concerning protective orders, setting forth solutions to that problem.⁹²

So although we have listed and discussed many problems, we also have some solutions on the table. They are possible avenues of attack, and we have to begin to think about and talk about them. In the final analysis, it may come down to the media being able to put these issues on the public agenda table, which as we discussed, has occurred where we generate emotive horror stories. These drive the media and drive the legislators who often legislate in an anecdotal fashion. We have to use that, perhaps regrettably. But we have to use the biases of the media to get them beyond celebrities, cute animal stories, and petty ironies. We have to learn to bend our stories in their direction in a way so that they reach the public agenda. We do not do well in the lobbies; we do not do well where money counts; but, we do well if the public sees what is at stake in human terms.

So with that, I want to thank the panel for their contribution to our understanding of court strategy alternatives.

89. See Fellmeth, *supra* note 6, at 1.

90. CAL. PENAL CODE § 387 (West 1999).

91. NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, POSITION PAPER: REASONS TO OPPOSE PRE-DISPUTE ARBITRATION CLAUSES IN CONSUMER CONTRACTS (2000) (on file with author).

92. Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure; Where Does the Balance Lie?*, 24 U. RICH. L. REV. 109 (1989).