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Fall 1981, Vol. 7 No. 4

Intergovernmental

# PERSPECTIVE



**THE COURTS  
AS UMPIRES OF THE  
INTERGOVERNMENTAL  
SYSTEM**

# View From The Commission

Dear Reader:

In recent years, the judiciary especially federal courts—has played a growing role in intergovernmental relations.

The judiciary has become the cutting edge on many social and economic issues. Many scholars and judges argue that whatever the framers' expectations may have been, broad Constitutional guarantees require the courts to articulate and apply values that are widely and deeply held in society. These values, while rooted in our history, they argue, evolve over time.

This judicial activism grew during the Supreme Court tenure of Chief Justice Earl Warren. The Warren Court was willing to be an engine of social reform. As Prof. Philip B. Kurland commented, "If the road to hell is paved with good intentions, the Warren Court has been among the great roadbuilders of all time."<sup>1</sup>

During the 1950s and 1960s, many legal scholars became critical of this growing judicial activism.<sup>2</sup> Nonetheless, the Warren Court's activism has continued on many fronts in the Burger Court.<sup>3</sup> And among the foremost examples of this activ-

ism as it affects intergovernmental relations has been the Supreme Court's recent decisions on Title 42 U.S.C. Section 1983.

Passed during Reconstruction, Section 1983 was an amendment to the **Civil Rights Act of 1871**. Designed to implement the first section of the newly passed 14th Amendment, Section 1983 provided a direct remedy through the federal courts; thereby securing equal protection of the laws and guarantees of due process. But recent Court decisions have increased dramatically the scope and impact of Section 1983.

In **Monroe v. Pape**,<sup>4</sup> 1961, the Supreme Court expanded the scope of Section 1983 and opened the gates for suit against individual municipal officials. In 1978, the Court's decision in **Morrell v. Department of Social Services**,<sup>5</sup> made it substantially easier to bring municipal liability suits by making a municipality liable for "Constitutional torts" resulting from a specific municipal regulation or even an official policy not formally adopted but pervasive in custom and usage. The Court had stripped municipalities of the immunity states enjoy under the 11th Amendment. Subsequent Supreme Court decisions have diminished the "good faith" defense for municipal officials,<sup>6</sup> and declared Section 1983 actions are not limited to



Richard Williamson

Constitutional deprivations.<sup>7</sup>

The expansion of Section 1983's reach dramatically impacts intergovernmental relations. It has created further federal intrusion into the affairs of local governments. Expanded exposure to Section 1983 liability inevitably impacts local decisionmaking. The real, and threatened, payment of damages and legal fees distorts local budgetary preferences.

This issue of **Intergovernmental Perspective** contains an important article on Section 1983 written by ACIR Analyst Cynthia Cates Colella. She presents an analysis of the roots of Section 1983 and its expansion under recent activist Supreme Court decisions. She also suggests some options for reform that merit further consideration by ACIR, elected officials, and others who desire to make our intergovernmental system work.

<sup>1</sup>Kurland, "Earl Warren, The Warren Court, and the Warren Myths," 67 *Mich. L. Rev.* 353, 357 (1968).

<sup>2</sup>Bickel and Wellington, "Legislative Purpose and the Judicial Process: The Lincoln Mills Case," 71 *Harv L. Rev.* 1, 3 (1957); Burger, **Government by Judiciary: The Transformation of the Fourteenth Amendment**, Harvard University Press, 1977.

<sup>3</sup>Howard, "The Burger Court: A Judicial Nonet Plays the Enigma Variations," *Law and Contemp. Problems*, 7, 1980.

<sup>4</sup>365 U.S. 167 (1961).

<sup>5</sup>436 U.S. 658 (1978).

<sup>6</sup>**Owen v. City of Independence, Missouri**, et al., 455 U.S. 622 (1980).

<sup>7</sup>**Maine v. Thiboutot**, 448 U.S. 1 (1980).

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*Intergovernmental Perspective*  
is published four times a year  
by the Advisory Commission on  
Intergovernmental Relations,  
Washington, DC 20575.  
202-653-5536

# Intergovernmental FOCUS

## Federalism Takes Center Stage At Conferences, Hearings

Current federalism issues came to the fore recently in several forums including a series of Congressional hearings, a state convocation, and a conference called by a California research organization.

### House Hearings on Federalism

In testimony October 6, ACIR Chairman James Watt concluded a series of hearings on federalism held by the House Intergovernmental Relations and Human Resources Subcommittee.

In discussing the current condition of American federalism, Chairman Watt cited the "overreaching of the federal role" as generating "popular discontent with government at all levels, as state and local agencies have often been blamed for the poor results of federally mandated undertakings."

He traced the growth of the federal role, cited Washington's assumption of important new responsibilities in the 1960s, and described the collapse of traditional legal and political constraints against a large federal role in the process. When this happened, he said, no new set of federalism principles emerged to limit the areas of federal involvement. Thus, many people came to see the proper role of government as a "balancer and accommodator of interest group pressures."

He blamed many of today's intergovernmental problems on "a growing cynical attitude that the federal government is a vast source of free funds to be tapped at no cost to the beneficiary."

He compared today's problems to those of the grazing commons—where each grazer had the incentive to get as much forage for his livestock as he could before someone else got there first. His own grazing would be a small enough part of the whole not to affect the overall trend of forage supply. The overall result, however, would be severe overgrazing—as happened throughout the west. The solution to this problem was, of course, to make each

grazer responsible for his own forage, principally in giving each grazer rights to his own small piece of range. In the same way government today must try to induce a more responsible public attitude by more closely linking the use of public funds to the generation of these funds.

Over the span of ten hearings, the subcommittee heard a variety of witnesses including both academics and practitioners. Among them were Elmer Staats, former Comptroller General, and Alice Rivlin, Director of the Congressional Budget Office, as well as representatives of the National Governors' Association, National Conference of State Legislatures, National League of Cities, U.S. Conference of Mayors, National Association of Counties, and the National Association of Towns and Townships. Also testifying were William Colman, former executive director of ACIR; two former ACIR chairmen, Farris Bryant and Robert Merriam; and two former ACIR members, Arthur Naftalin and George Romney.

ACIR's executive director and assistant directors were lead off witnesses for the first hearing held last April.

### Vermont Calls Federalism Convocation

On August 7, Vermonters gathered for what their Governor, Richard Snelling, called the nation's first convocation on federalism in modern times. Gov. Snelling urged Vermonters to see the New Federalism as an opportunity for enhancing their own control over governmental affairs and to take a constructive, bipartisan approach in the months ahead. Vermont's convocation, jointly sponsored and conducted by the state's executive and legislative branches, was attended by some 300 people from throughout the state.

In his keynote address, Gov. Snelling outlined four major themes he hoped would be developed during the day-long program: the need to reduce the burden of federal taxation and regulations; the need to return certain decisionmaking pow-

er to the states through the block grant approach; the need to sort out priorities by deciding what government should be doing and what level of government can do it most efficiently; and the need for cooperation between the state and local governments in revitalizing federalism.

### The New Federalism Revisited

The Institute for Contemporary Studies, a California-based think tank, sponsored a Conference on the New Federalism on September 8-9, in Washington, DC, where seven Administration spokesmen described President Reagan's federalism initiatives. Murray Weidenbaum, Chairman of the President's Council of Economic Advisers, summed up the philosophy behind the New Federalism this way: "The Reagan Administration is dedicated to reversing the trend toward greater control over state and local programs by the federal government."

A number of scholars presented their views as well. Daniel Elazar, Chairman for the Study of Federalism at Temple University, commented,

The present Administration is right when it seeks to do so through radical measures since only by getting to the root of the problem can the dangerous trends of the past generation be reversed. . . . I would really like to believe that the Reagan Administration offers Americans a great opportunity to revitalize federal democracy now.

Another session focused on the role of the federal courts in the New Federalism. University of Virginia Law Professor A. E. Dick Howard said the Supreme Court has not adequately played its pivotal role of arbiter of the federal system. Instead of just deferring to Congress on federalism issues, Prof. Howard believes that the court should insist that Congress clearly and explicitly state its intentions when preempting state and local activities. Such actions, he said "would discourage sloppy drafting and would make it less likely that those voting on a bill would be unaware that a stat-



ute would be impinging on traditional state interests.”

### **States Gear Up for Block Grants, New CDBG Responsibilities**

The nine block grants created by Congress as part of the **Omnibus Reconciliation Act of 1981** present a new challenge to the states.

Block grants on community services and low-income home energy assistance went into effect October 1, 1981. Sometime during the present fiscal year, states must verify that they are ready to assume administration of block grants in four areas—maternal and child health services; preventive health and health services; alcohol, drug abuse and mental health; and social services. States have until September 30, 1982, to assume these block grants or lose federal funds. Two of the block grants, the primary care and elementary and secondary education block grants, do not go into effect until fiscal year 1983. The small cities community development block grant (CDBG) program will be administered differently as outlined below.

What are the states doing to gear up for the block grants? The states are, of course, a diverse group and, although each will undoubtedly approach block grant assumption in unique ways, an overall pattern is emerging across the country. The general rule appears to be a two-step process of first gathering/disseminating information and, secondly, using that data to set priorities. Most states have established special task forces or commissions composed of the heads of the agencies most affected by program changes, the state's chief financial officers, leaders of the legislature, and representatives from local governments and interest groups. Twenty-two states are drawing on groups already in existence, either alone or in conjunction with special task forces, to coordinate work on block grant implementation. At least seven states—Alabama, Florida, North Carolina, Tennessee, Vermont, Virginia, and West Virginia—are holding convocations, hearings, or workshops which deal primarily with

block grants and budget cuts. As this **Perspective** went to press, eight states were considering special legislative sessions and six others may take up block grant issues when their regular sessions are held later this year.

These and other state responses to recent changes in federal grant programs are described in more detail in an **ACIR Information Bulletin**, “Federal Block Grants: The States’ Response.” Copies are available from ACIR’s Implementation Section, 1111 20th Street, N.W., Washington, DC 20575.

### **States “Buy In” to Small Cities Block Grant**

Between 36 and 38 states have indicated that they will most likely “buy into” the small cities block grant program, according to Peter Harkins, staff director of the Senate Subcommittee on Housing and Urban Affairs. The Subcommittee played an important role in developing the small cities’ community development block grant program, passed by Congress as part of the **Omnibus Reconciliation Act of 1981**.

“We are delighted at the way states are moving to constructively assume new responsibility,” Harkins said in an interview with ACIR staff, “and, it appears that all the states that have indicated they will ‘buy in’ are planning high quality programs designed to be responsive to local needs.”

Unlike a number of the other newly created block grants, the small city CDBG program is optional for the states which must provide funds equal to 10% of their federal allocation, the so-called “buy-in” provision. The program allows states to receive in a block monies for community development purposes to be redistributed to those smaller cities and rural areas that are not directly entitled to community development funds from the Department of Housing and Urban Development. HUD will continue to administer the small cities program in those states which do not opt for block grant participation.

### **OMB, White House Sponsor Meetings**

In response to widespread concerns over block grant implementation, the White House Office of Intergovernmental Affairs, the Office of Management and Budget, and the relevant federal agencies held a series of eight regional meetings for state and local officials. The purpose of the meetings was to give states the information they need to begin implementation of the block grants as soon as possible, to reorient the thinking of state and local officials to the idea that their interpretation of the law is as good as a federal agency’s, and to open channels of communication with these officials. The Reagan Administration’s philosophy, as outlined at the regional meetings is guided by three principles: simplicity/flexibility—reversing centralization and federal intrusiveness into state/local affairs; neutrality of the federal executive branch; and, accountability according to state, not federal, law and practices.

### **Seven Federalism Subcommittees Consider Timely IGR Issues**

Seven subcommittees of the Presidential Advisory Committee on Federalism are scheduled to meet over the next few months.

The first, and perhaps, most controversial, subcommittee considered revenue resource return in a meeting Oct. 22. Other subcommittees and their scheduled meeting dates are: health and human services, Oct. 29; housing and urban development, Nov. 5; education, Nov. 12; transportation, Nov. 19; land and water, Dec. 3; and regulatory and judicial reform, Dec. 10.

At its recent meeting, the revenue resource return subcommittee members voiced their support for General Revenue Sharing and their concern at possible cutbacks in fiscal year 1982 funding. Members also discussed a variety of possible tax sources from percentages of the federal income tax to “sin” taxes on alcohol and cigarettes, from a national sales tax to a percent of the federal corporation income tax.

# The Courts and Grant Reform: A Time for Action

By George D. Brown

**Beyond a doubt, there is a "law" of federal grants. Its most obvious manifestation is the hundreds—probably thousands—of federal court decisions concerning the award or administration of federal financial assistance. Indeed, the judiciary has assumed such a substantial role in the operation of the intergovernmental aid system that it would seem difficult to understand the functioning of that system—let alone reform it—without an appreciation of what the courts are doing, and why.**

Yet, the current intergovernmental reform efforts devote little or no attention to the judicial role. The same is true of many analyses of the grant system and its problems. This article raises the question of whether such "benign neglect" is sound public policy, especially during a period of intense interest in grant issues. Is not the law of federal grants too important to be left to the lawyers (and the courts)? Should not those who design, work with, and analyze grant programs recognize the phenomenon and seek to influence it?

To give the reader a sense of the type and magnitude of the questions with which courts deal, the article begins with an analysis of three salient questions in grant law:<sup>1</sup> Can grantees overturn grant conditions, who can sue to enforce conditions, and what remedies are available? Next, the volume, causes, and possible impacts of grant litigation are considered. The article concludes with some modest proposals for change and for future study.

## Three Salient Issues in Grant Law

### Can Grantees Overturn Grant Conditions?

Federal grants—even General Revenue Sharing—come with "strings" attached. Thus, there is always an inherent tension between the grantor's desire to see funds expended in a certain way and the grantee's desire for flexibility. However, federal strings extend far beyond the area of "how the money is spent" as that term is normally used. Receipt of federal funds can now affect virtually all facets of state and local government, ranging from organization and personnel practices, through concern for national values such as nondiscrimination, to the very processes of government itself. According to one analyst, the

dynamic federal assistance area is where many of the most crucial issues confronting contemporary federalism arise, including the mandated "use" of states by the national government for some of its own regulatory purposes, a reliance on the spending power and the conditions that may be attached thereto to achieve regulatory purposes beyond the scope of the commerce power, and the use of grant conditions to force Constitutional and institutional changes in recipient governments. . . .<sup>2</sup>

Recipients might chafe at such conditions, but any possibility of judicial relief seemed, until recently, blocked by the Supreme Court's insistence that since participation in grant programs is voluntary, objectionable conditions can be avoided by not participating. The Court first enunciated this principle in the 1923 case of *Massachusetts v. Mellon*,<sup>3</sup> declar-

<sup>1</sup>The term "grant law" obviously encompasses more than a group of court decisions. It includes statutes, regulations, and, arguably, a set of general principles. This article focuses primarily on the functional role of the courts in the operation of the system, although the Constitutional cases also illustrate the role of the courts in establishing underlying principles.

<sup>2</sup>David B. Walker, *Toward a Functioning Federalism*, Cambridge, MA, Winthrop Publishers, 1981, p. 154.

<sup>3</sup>262 U.S. 477 (1923).

ing that the state had "the simple expedient of not yielding," i.e., not participating, if it thought a grant program invaded its reserved powers. The Court reinforced the notion of voluntariness in a 1937 decision,<sup>4</sup> which did not involve a grant program, and in *Oklahoma v. Civil Service Commission*,<sup>5</sup> which did. In *Oklahoma* a state attacked a particular grant condition: the Hatch Act's prohibition on political activity by state or local officials involved in the administration of federally financed programs. *Oklahoma* argued that this condition had the effect of regulating its internal political processes, and thus interfered with its reserved powers. The Court disagreed. Citing *Massachusetts v. Mellon*, the Court reiterated that *Oklahoma* had the "simple expedient of not yielding." The opinion also noted that "[t]he offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual."

This steadfast adherence to the doctrine of voluntariness is troubling for several reasons. First, the Court has recognized limitations upon Congress' ability to attach conditions to expenditures when these conditions infringe upon the rights of persons.<sup>6</sup> Second, the doctrine of voluntariness rests upon a premise that is no longer true: that the expedient of not yielding is "simple." It is not simple, or feasible, for many jurisdictions in which federal funds make up a sizable portion of their operating budgets. Giving up federal funds is particularly difficult in the case of large programs such as revenue sharing and AFDC. Although there have been an increasing number of instances of withdrawal and nonparticipation, for most grantees the expedition is a fiction. A third troublesome aspect relates to conditions which apply across-the-board to many or all federal grants. Clearly if the recipient objects to these, not yielding becomes exceedingly complex and painful.

**The State Sovereignty Attack.** The Supreme Court's 1976 decision in *National League of Cities v. Usery*<sup>7</sup> suggested that concerns about an overreaching grant system might attract judicial support. In that case the Court struck down amendments to the *Fair Labor Standards Act* which extended coverage to state and local employees. The majority reasoned that the Constitution contained, implicitly and explicitly, a principle of respect for essential attributes of state sovereignty, and that this principle could limit Congressional action even in a field—interstate commerce—where its authority to act was unquestioned.

The logic of the N.L.C. opinion would seem to apply equally well to Congressional actions affecting

the states through exercises of the spending power. The majority, however, treated this issue as an open question; and three dissenting justices read the decision as having no effect on Congress' power to impose strings. The N.L.C. decision generated a barrage of grantee attacks on grant conditions based on state sovereignty grounds. However, the lower courts have invoked, at times almost mechanically, the voluntariness rationale and rejected the challenges.<sup>8</sup>

One of the best known of these cases is *Florida Department of Health and Rehabilitative Services v. Califano*.<sup>9</sup> As a reorganization reform, Florida had consolidated its vocational rehabilitation services, along with other health functions, into a broad human services agency. The U.S. Department of Health, Education and Welfare ruled that the new structure would not meet the organizational criteria of the *Rehabilitation Act* and that Florida would be ineligible for further funding under that program. The state challenged the decision, in part on Constitutional grounds.

The district court had little difficulty in harmonizing N.L.C. with the foundation cases on voluntariness. N.L.C. involved a direct displacement of state (and local) freedom to act since it involved coercive legislation enacted under the commerce power. On the other hand, any federal intrusion through a grant program would be, at best, indirect, given the voluntary nature of grants. "The [Rehabilitation] Act does not impose a set of coercive, mandatory requirements such as were involved in *National League of Cities*."<sup>10</sup> Although other federal courts have utilized similar reasoning in rejecting grantee challenges to grant conditions, the state sovereignty argument refuses to go away. A number of legal commentators, as well as the ACIR, have insisted that it be taken seriously.<sup>11</sup> Two recent Supreme Court decisions suggest that the issue is not dead after all.

In *Fullilove v. Klutznik*<sup>12</sup> a divided Supreme Court rejected a Constitutional challenge to the requirement that 10% of the funds granted to state and local governments under a public works program be set aside for minority businesses. In his plurality opinion Chief Justice Burger considered the powers Congress had employed in enacting the set aside provision. He viewed the program as primarily an exercise of the spending power and reasoned that any action permissible under one of the regulatory powers was clearly permissible under the spending power. He concluded that the commerce power provided ample authority "insofar as the program objectives pertain to the action of private contracting parties

<sup>4</sup>*Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). The case involved the Constitutionality of the federal unemployment compensation program, in particular, whether states were coerced to participate.

<sup>5</sup>330 U.S. 127 (1947).

<sup>6</sup>See *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969).

<sup>7</sup>426 U.S. 893 (1976).

<sup>8</sup>E.g., *City of Macon v. Marshall*, 439 F. Supp. 1209 (M.D. GA. 1977).

<sup>9</sup>449 F. Supp. 274 (N.D. Fla.), *aff'd*, 585 F. 2d 150 (5th Cir. 1978).

<sup>10</sup>449 F. Supp. at 284.

<sup>11</sup>E.g., Lewis Kaden, "Politics, Money, and State Sovereignty: The Judicial Role," *Columbia Law Review*, 79, June 1979, p. 874. See Advisory Commission on Intergovernmental Relations, *In Brief. The Federal Role in the Federal System: The Dynamics of Growth*, B-4, Washington, DC, U.S. Government Printing Office, 1980, pp. 31-32.

<sup>12</sup>100 S. Ct. 2758 (1980).

...” However, states and local governments were affected as well. The Chief Justice noted that N.L.C. imposed limitations on the reach of the commerce power to these governments, but that the Fourteenth Amendment was an adequate source for this aspect of the program. For the purposes of this article, the key point is that three members of the Court cited N.L.C. as relevant to a discussion of the validity of a grant-in-aid condition.

The issue surfaced again—and again, somewhat obliquely—in *Pennhurst State School and Hospital v. Halderman*,<sup>13</sup> a 1981 case involving conditions at a state facility for the mentally retarded. The plaintiffs asserted federal Constitutional and statutory claims as well as claims based on state law. At issue before the Supreme Court was whether the “bill of rights” provision of the **Developmentally Disabled Assistance and Bill of Rights Act** imposed requirements on states participating in the program.

It must be noted that the defendants did not contest the validity of any condition but asserted that the bill of rights was separate from the Act’s conditions. Nonetheless, the majority noted “[t]here are limits on the power of Congress to impose conditions on the states pursuant to its spending power . . . .” The opinion cited the Chief Justice’s opinion in *Fullilove* as direct support for this proposition and also cited N.L.C. as general support. (In addition, the Court cited an opinion by Justice Cardozo which suggested that inducement to participate in a program might reach the level of coercion.)<sup>14</sup> This discussion may be of limited precedential value since it is set forth in a footnote and is not directly relevant to the actual decision. Still, Supreme Court footnotes are often harbingers of things to come; and this particular statement may force lower courts to take more seriously challenges to grant conditions based on state sovereignty grounds.

**The Pennhurst “Clear Statement” Rule.** The actual decision in *Pennhurst* suggests additional arguments which grantees may make in attacking conditions, particularly those imposed by grantor agencies. The Court held that the statute’s bill of rights was not one of the conditions which the Act imposed on grantees. The majority analyzed the grant device as “much in the nature of a contract . . . .” Thus,

The legitimacy of Congress’ power to legislate under the spending power rests on whether the state voluntarily and knowingly accepts the terms of the “contract.” There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. (Emphasis added, citations and footnotes omitted.)

At this point, one can only speculate as to the im-

“ The actual decision in *Pennhurst* suggests additional arguments which grantees may make in attacking conditions, particularly those imposed by grantor agencies. ”

pact of the Court’s “clear statement” rule. Since the opinion referred to the “legitimacy” of Congressional action, it may be that unclear or retroactive conditions will be invalidated, particularly if they would impose heavy financial burdens. Taken seriously, this approach would call into question basic features of the grant system such as enactment of new cross-cutting conditions which apply to existing programs. (The Court did state that Congress cannot “surprise participating states with postacceptance or ‘retroactive’ conditions.”) It is more likely that, as in *Pennhurst* itself, the clear statement rule will be used as a canon of statutory construction. Thus, bills of rights, Congressional statements of policy, etc., will not be viewed as conditions at all, and expressly stated conditions will be narrowly construed.

Far more promising, from the grantee perspective, is the possibility that *Pennhurst* sets the stage for attacks on administrative implementation of grant strings—through regulations, guidelines, etc.—on the ground that the agency has imposed duties beyond those contained in the relevant statute itself. Of course, if the administrative interpretation is known at the time of acceptance of the grant, any argument based on contractual theory is substantially weakened.<sup>15</sup> It has been suggested that the Court’s citations of 11th Amendment cases such as *Edelman v. Jordan*<sup>16</sup> is significant, since these cases require “strong evidence” that a state has surrendered prerogatives of sovereignty, and that, by implication, this evidence must be found in the relevant statute.<sup>17</sup> (It is not clear whether this analysis helps local grantees, whom the 11th Amendment does not protect.)

Even before *Pennhurst*, courts were beginning to take a hard look at implementing regulations of grantor agencies, at times declaring them invalid.<sup>18</sup> *Pennhurst* will surely add impetus to this development. In the words of one former regulator, “It is likely to provide a philosophical and legal basis for the re-examination and likely elimination of a broad range of terms and conditions in federal grant pro-

<sup>13</sup>Stewart Baker, “Making The Most of *Pennhurst*’s ‘Clear Statement’ RULE,” p. 4. (Paper prepared for the Center for State and Local Advocacy Project in 1981. On file with the author.)

<sup>14</sup>415 U.S. 651 (1974).

<sup>15</sup>See Baker, *supra*, at 5-7.

<sup>16</sup>E.g., *Islesboro School Committee v. Califano*, 593 F. 2d 424 (1st Cir.) cert. denied, 100 S. Ct. 467 (1979).

<sup>17</sup>101 S. Ct. 1531 (1981).

<sup>18</sup>*Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90 (1937).



grams . . . ."<sup>19</sup> In a recent concurring opinion, Chief Justice Burger sent the lower federal courts a strong message along these very lines.<sup>20</sup>

### Who Can Sue? The Retreat from *Thiboutot*

There are two major types of federal grant litigation: grantor-grantee disputes and third party litigation. Grantor-grantee disputes are usually initiated by grantees or would-be grantees and generally involve such matters as denial of a grant, reimbursement disputes, terminations, suspensions, and other fiscal issues. Although there has been an increase in such suits, the second category—third party suits—has primarily been responsible for the grant law explosion. And these suits are the ones most affected by the question, who can sue?

In third party suits, plaintiffs typically assert that they are beneficiaries either under a condition of the grant statute itself or a "cross-cutting" provision applicable to grants on a more general basis. Such plaintiffs frequently encounter "threshold" obstacles: that is, does this person have access to a federal court to present his or her claim, apart from the merits of that claim as stated? A principal question is whether the plaintiffs have a "right (or cause) of action" to enforce duties created by the underlying statute. In the grant context, statutes usually say what the grantee must do in return for the funds but are silent as to third party judicial enforcement of these conditions. The norm is to provide for administrative enforcement by the grantor agency itself. Frequently, courts have "implied" a private right of action by construing the statute as containing such a right, albeit not explicitly stated.<sup>21</sup>

As an alternative, third party challengers have asserted that, in the case of grants to governmental entities, 42 United States Code Section 1983 confers upon them an express right to enforce grant conditions. That statute provides that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

Plaintiffs have argued that since grant conditions are "laws" of the United States, any suit to enforce

them is covered by Section 1983. In its 1980 decision in *Maine v. Thiboutot*<sup>22</sup>—a third party grant suit—the Supreme Court appeared to accept this argument without qualification. The Court emphasized the "plain language" of Section 1983 and declined to limit it to any "subset" of laws. Many observers saw the decision as paving the way for a vast increase in suits and liabilities, including attorney's fees. However, two recent cases suggest strongly that the Court intends to step back from the plain language of *Thiboutot* and restrict the ability of third party challengers to bring suit.

*Pennhurst* was precisely such a case. The Court, by a margin of 6 to 3, held that plaintiffs could not sue to enforce the statutory bill of rights, and remanded the case for consideration of their claim that they could sue to enforce the assurances made by the grantee. Although that claim was not before the Court, Justice Rehnquist—for a five man majority—suggested several obstacles it might encounter. As far as threshold problems are concerned, he first raised the question whether the assurances could be considered "rights" secured to the plaintiffs as required by Section 1983. He also noted that the underlying statute contained an express remedy—administrative imposition of fiscal sanctions—and suggested that this remedy might be considered exclusive, thereby precluding any Section 1983 suit.

These statements are "dictum," observations by the Court which were not necessary for it to reach its actual result. However, the Court's subsequent decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*<sup>23</sup> made it clear that they are more than straws in the wind. The case as it came to the Court did not involve Section 1983 at all. Plaintiffs claimed injury to fishing grounds from discharges and ocean dumping of sewage and other waste. They asserted an implied right of action under the *Federal Water Pollution Control Act* and the *Marine Protection, Research, and Sanctuaries Act of 1972*. The Court rejected this argument on the ground that both statutes contained extensive enforcement mechanisms and that it was unlikely that Congress intended to create additional remedies.

Justice Powell, joined by six other justices, also considered whether plaintiffs might invoke Section 1983 against any state and local defendants in the case. He bowed in the direction of *Thiboutot*, but cited *Pennhurst* for the proposition that "[t]he Court, however, has recognized two exceptions to the application of Section 1983 to statutory violations." These exceptions are preclusion of any private enforcement in the underlying statute itself and a lack of any rights secured to the plaintiffs in that statute. He found the first exception applicable, again relying on the elaborate enforcement procedures in the two statutes.

<sup>19</sup>Thomas Madden, "Enforceability of Grant Conditions: Implications of Supreme Court's Decision in *Pennhurst State School v. Halderman*," *Grants and Assistance News*, Washington, DC, National Assistance Management Association, 4, July 1981, pp. 12-14.

<sup>20</sup>*Camenisch v. University of Texas*, 101 S. Ct. 1830, 1835 (1981) (Burger, C. J., concurring).

<sup>21</sup>E.g., *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1977 (7th Cir. 1977). Statutes frequently provide duties to be enforced by a federal agency but are silent as to whether injured private parties may sue to enforce these duties. Courts examine the statute to determine if "implying" such a right would be consistent with Congress' intent.

<sup>22</sup>100 S. Ct. 2502 (1980).

<sup>23</sup>101 S. Ct. 2615.

These two decisions indicate a substantial retreat from *Thiboutot*. The *Pennhurst* statements may be dictum, but *National Sea Clammers* is a holding. The general question which it raises is to what extent the two exceptions swallow up the rule and eliminate third party grant suits.

The first exception is triggered if the remedy is sufficiently extensive to show Congressional intent to make it exclusive. The strongest case is that of citizens suits—express authorization for private enforcement—such as contained in the revenue sharing statute,<sup>24</sup> which afford the plaintiff some remedy. In the grant context the typical scheme is for administrative enforcement only, with no mention of a private suit. In *Pennhurst* Justice Rehnquist suggested that this might be enough. However, such a conclusion could virtually wipe out the doctrine of implied rights of action, which grew up in precisely such a context, albeit involving regulatory statutes. As for grant suits, it would require a rethinking of the welfare cases brought by third parties, particularly *Rosado v. Wyman*<sup>25</sup> in which the Court stressed the value of private judicial enforcement. Obviously, the scope of the first exception will be a principal battleground in grant litigation for years to come.

The operation of the second exception is harder to gauge. At what point do grant conditions—whether program specific or cross-cutting—create rights? Antidiscrimination provisions fit, but the situation is less clear when one comes to preferences, bills of rights, statutory findings, and the like. Perhaps courts, looking to *Pennhurst*, will require a “clear statement” that a grant condition creates individual rights as well as duties on the part of the grantee. It is particularly significant that Justice Rehnquist suggested that assurances to the grantor might not create enforceable rights for plaintiffs.<sup>26</sup>

The net result of the two exceptions may be that the Section 1983 inquiry has become identical with implied right analysis. In the latter context the Supreme Court has focused on two factors: whether the plaintiff is an especial beneficiary of the underlying statute, to the extent that it can be viewed as conferring rights upon him; and, whether the legislative history contains any evidence to provide or deny a private right of enforcement.<sup>27</sup> The Court has been increasingly harsh on would-be implied right plaintiffs. There is growing reason to expect the same result in the Section 1983 context, *Thiboutot* notwithstanding.

#### What Remedies are Available? The Retreat from Cannon

The question of what relief is appropriate arises most acutely in third party challenges to grantee practices. The conditions attached to federal grants, sometimes referred to as “mandates,” are not clearly distinguished from coercive exercises of federal reg-

ulatory power. Yet it is far from clear whether Congress may utilize the spending power to impose any direct obligations.<sup>28</sup> Many grant cases obscure the distinction as well. Courts have allowed remedies in the nature of specific performance;<sup>29</sup> awarded damages;<sup>30</sup> and held that state statutes inconsistent with the terms of federal grant statutes are invalid under the Supremacy Clause.<sup>31</sup>

In many instances the plaintiff will not desire to block the flow of federal funds to the grantee, but to use a grant condition as leverage to force a change in the grantee's conduct to benefit the plaintiff. An important decision in this respect is *Cannon v. University of Chicago*,<sup>32</sup> where the plaintiff alleged sex discrimination in a federally aided education program. She based her complaint on Title IX of the Education Amendments of 1972, which prohibits such conduct. The lower courts ruled that the statute afforded her no private right of action to enforce it. The Supreme Court reversed. Writing for the plurality, Justice Stevens drew a sharp distinction between administrative proceedings for termination of funds, and “the award of individual relief to a private litigant . . . .” He characterized the former as “severe” and inappropriate in the case of an isolated violation. He reasoned that limiting the private plaintiff to a suit to compel the agency to commence enforcement proceedings would also be disruptive. He declared “unquestionably correct” the agency's position that “the individual remedy will provide effective assistance to achieving the statutory purposes.” It would make “little sense” to require a showing by plaintiff of discrimination that would warrant termination.

All of this glosses over the questions of what plaintiff does have to show and, more importantly, what remedy is appropriate. In particular, how does one reconcile “the award of individual relief” with the fundamental doctrine laid down in the foundation cases that the grantee's participation is voluntary? In other words, how can one treat voluntary participation as akin to adherence to a binding norm? Courts have, at times, seen these problems. Notably, in *Rosado v. Wyman*, Justice Harlan stated that the “unarticulated premise” in a third party challenge was that the grantee had the choice of conforming to the federal norm or giving up the federal funds.

As *Cannon* illustrates, the Court's approach to problems raised by the voluntariness doctrine is not always consistent, or even indicative of an awareness of them. However, in *Pennhurst*, Justice Rehnquist indicated that the Court is prepared to confront the remedial issues presented by third party challenges.

<sup>28</sup>See *Pennhurst State School and Hospital v. Halderman*, 101 S. Ct. 1531, 1540, n. 13.

<sup>29</sup>E.g., *Camenisch v. University of Texas*, 616 F. 2d 127 (5th Cir. 1980), vacated, 101 S. Ct. 1830 (1981).

<sup>30</sup>See Richard Cappalli, “Federal Grants and the New Statutory Tort: State and Local Officials Beware!,” *Urban Lawyer*, 12 Summer 1980, p. 445.

<sup>31</sup>E.g., *Carleson v. Remillard*, 406 U.S. 598 (1972).

<sup>32</sup>441 U.S. 667 (1979).

<sup>24</sup>31 U.S.C. 1244.

<sup>25</sup>397 U.S. 397 (1970).

<sup>26</sup>But see *Lau v. Nichols*, 414 U.S. 563 (1974).

<sup>27</sup>See, e.g., *California v. Sierra Club*, 101 S. Ct. 1775 (1981).

**“ In many instances, the plaintiff will not desire to block the flow of federal funds to the grantee, but to use a grant condition as leverage to force a change in the grantee’s conduct. . . . ”**

He stated that plaintiffs’ “relief may well be limited to enjoining the federal government from providing funds to the Commonwealth.” This may mean either that no Section 1983 suit could be brought at all, or that private plaintiffs would have only remedies analogous to those available to the federal government: a declaration that the grantee is not in compliance, and an either/or decree that it alter its conduct or forego federal funding for the activity in question.<sup>33</sup>

Justice Rehnquist cited *Rosado* and admitted that subsequent decisions were not always consistent with it. It is also significant that the three dissenting justices agreed with Justice Rehnquist on the remedial issue. In particular, Justice White disapproved of the lower court’s appointment of a special master with broad powers. Such remedies are frequent in Constitutional litigation. However, there the court is enforcing a binding norm, and the element of “opting out” is not available. *Pennhurst* forces courts to make this distinction when considering the remedial aspects of a third party grant challenge. Once again, its influence on future grant litigation is likely to be profound.

#### **Grant Litigation: Volume, Causes, and Impacts**

Grant law—more precisely, grant litigation—is clearly a “hot” area. The growing volume of cases involves issues which are highly complex and significant to the operation of the grant system.

#### **“A Veritable Explosion”**

The rising tide of lawsuits generated by federal grant programs and their administration has been documented. As early as 1972, Professors Frank Michelman and Terrance Sandalow reported a “veritable explosion” in grant challenges by third parties.<sup>34</sup> In a 1976 analysis of litigation under the *Housing and Community Development Act*, Prof. Richard Kushner reported that “[m]ore legal challenges have been made in the first year of the [*Housing and Community Development Act*] than under

<sup>33</sup>The federal government has an additional remedy: specific performance to enforce the assurances during their term. See *United States v. Marion County School District*, 625 F. 2d 607 (5th Cir. 1980).

<sup>34</sup>Frank I. Michelman and Terrance Sandalow, *Government In Urban Areas*, Supplement, St. Paul, MN, West Publishing, 1972, p. 275.

the past decade of urban renewal and categorical grants.”<sup>35</sup> Others have described and analyzed the growing judicial role in grant programs.

However, it was not until 1979 that an attempt was made to compile and classify all reported grant decisions. This “Survey of the Caselaw Relating to Federal Grant Programs” is one of a series of working papers in the Office of Management and Budget’s Study of Federal Assistance Management Pursuant to the Federal Grant and Cooperative Agreement Act of 1977 (P.L. 95-224).<sup>36</sup> It was prepared under the direction of Thomas Madden, then General Counsel of the Law Enforcement Assistance Administration. The survey is an exceptionally valuable research tool for lawyers and others working in the field.

Even this effort was not comprehensive, however. The authors themselves acknowledged that the document is not complete and that there are areas of grant law which are not fully covered. Our intent when this project began was to collect all of the caselaw relating to federal grant programs. Our best estimate was that there were no more than 200 cases in the area. When we ended our search, we had discovered over 500 cases, and we estimate that there are still more to be discovered.

It is probably impossible to calculate with any precision the number of decided grant cases, let alone those that are filed but settled or otherwise disposed of along the way. For example, many important district court cases are simply not reported at all. Nonetheless, it seems clear that the OMB researchers were correct in concluding that the volume of cases was far greater than previously realized. Moreover, it seems equally clear that the number of cases is increasing.<sup>37</sup>

Why are grantors, grantees, and third parties turning, in ever increasing numbers, to the federal courts for resolution of grant disputes? A simple explanation of the phenomenon might be that as the volume of grant dollars increased, a parallel increase in grant related suits was to be expected, especially in a litigious society such as ours. The real reasons are somewhat more complex, however. They can be found, to some extent, in changing doctrines of federal jurisdiction, which have expanded judicial access generally. Other causes lie within the grant system itself.

#### **Judicial Developments and the Grant Litigation Explosion**

The judicial doctrinal developments have received considerable attention in the legal literature and will

<sup>35</sup>Richard Kushner, “Litigation Strategies and Judicial Review Under Title I of the *Housing and Community Development Act of 1974*,” *Urban Law Annual*, 11, 1976, pp. 37-98.

<sup>36</sup>Office of Management and Budget, *Managing Federal Assistance in the 1980s, Working Paper A-7*, Washington, DC, U.S. Government Printing Office, 1979.

<sup>37</sup>Thomas Madden, “The Law of Federal Grants” in Advisory Commission on Intergovernmental Relations, *Awakening the Slumbering Giant: Intergovernmental Relations and Federal Grant Law*, M-122, Washington, DC, U.S. Government Printing Office, 1980, pp. 9-10.

be dealt with only briefly. The important point here is that the three traditional judicial constraints or barriers—standing, right of action and exhaustion of remedies—have in recent years been relaxed considerably. As a result, the floodgates of grant litigation have been opened even wider.

**Standing.** Standing is a flexible—some might say manipulable—concept. To have standing to sue in federal court a plaintiff must demonstrate harm, causal nexus between that harm and the defendant's conduct, and some likelihood that judicial intervention will alleviate the situation. In the mid-1970s the Court appeared to be turning standing into a formidable barrier, particularly for litigants who complained of harm at the hands of someone other than the defendant. However, recent Supreme Court decisions have taken a much less restrictive approach, requiring, for example, only that a favorable ruling be "likely" to benefit the plaintiff.<sup>38</sup> The lower courts have generally followed the Court's lead in grant suits and other contexts.

**Right (or Cause) of Action.** In the late 1970s, this obstacle also became a good deal less threatening, as courts were frequently willing to imply a right to sue from the underlying statute. The principal cause of this development is the Supreme Court's 1975 decision in *Cort v. Ash*.<sup>39</sup> The Court laid out four factors which determine whether to imply a private right of action: whether the statute creates particular benefits or rights in favor of the plaintiff; the bearing, if any, of legislative history; the effect of private suits on enforcement of the statute; and whether the subject matter is federal or one traditionally left to state law. The lower courts have applied *Cort* very liberally in the grant context, primarily because of the wide range of benefits and rights which grant programs and cross-cutting conditions create. Alternatively, the decision in *Thiboutot* appeared to remove even the need for this inquiry, since third parties suing state and local grantees could rely on Section 1983.

**Exhaustion of Remedies and Primary Jurisdiction.** These interrelated doctrines express a judicially created preference for the administrative process as the first point of recourse when a plaintiff's claims are either against an agency or lie within an agency's special expertise. It might be expected that courts would invoke them frequently in third party challenges to grantee practices. By and large, this has not been the case. A principal reason has been the Court's view that the grievance procedures offered to third parties are inadequate. The Supreme Court in *Cannon* emphasized the fact that the complainant could not participate in the process. The courts seem to feel that requiring recourse to the administrative process would defeat the purpose of allowing a private, third party suit. It is not clear why this should be so, especially if the grantor agency does have

something to contribute. No doubt agency ambivalence on this issue has influenced the judges in this direction.

Other elements contributing to the upsurge in grant litigation include judicial and legislative relaxation and ultimate abolition of the \$10,000 minimum in federal question cases, and the growing availability of attorney's fees in grant cases. Still, it is also necessary to consider changes within the grant system itself.

### **The Evolving Grant System As Generator of More Litigation**

The major change which is most clearly related to grant litigation is the proliferation of the cross-cutting or national policy conditions. These create substantial new clusters of interests—and interest groups—with which a grantee must reckon. Members of these interest groups—such as the handicapped and environmentalists—are frequently well organized and both willing and able to take judicial action. Frequently, they have the assistance of highly specialized "back-up centers" with great expertise in the relevant area. Third party challenges based on asserted violations of the cross-cutting conditions are probably the biggest single growth area within the overall field of grant litigation. At the same time, the rapid growth of these cross-cutting conditions may well be a principal cause of current dissatisfaction with the system. If so, the availability of the federal courts as enforcers has important systemic consequences.

The volume of third party challenges based on program specific conditions, which prescribe how the money is to be spent, is growing as well. A good example is the body of caselaw under the **Education for All Handicapped Children Act**, based primarily on the act's condition that participating states provide all children a "free, appropriate public education." Thus, it is the case that an increase in grant programs—as opposed to grant dollars—will generate more litigation. The point is that here—as in the case of the cross-cutting conditions—Congress has created new interests which can claim judicial protection.

As far as the rise in grantor-grantee disputes is concerned, Prof. Richard B. Cappalli cites the following factors, in addition to judicial developments:

- (1) the change in thinking about the grant from the concept of a gift to that of an entitlement;
- (2) the ever increasing complexity of the grant, as Congress adds more "strings". . . ;
- (3) tremendous expansion of the world of grantees, primarily through the extension of various grants to thousands of local governments and special districts;
- (4) movement away from discretionary grants to formula entitlements, thereby lessening grantor leverage over grantee behavior. . . .<sup>40</sup>

<sup>38</sup>E.g., *Regents of University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>39</sup>422 U.S. 66 (1975).

<sup>40</sup>Richard Cappalli, "Federal Grant Disputes: The Lawyer's Next Domain," *Urban Lawyer*, 11, Summer 1979, pp. 377-88.

The first and fourth factors are perhaps the most significant, in terms of grantee willingness to "fight back." The earlier, highly discretionary grant system was exceedingly one-sided and contained the potential for unbridled exercises of discretion relatively immune from judicial scrutiny. The present system, dominated by formula based programs, creates a sense of entitlement; and since federal funds are an increasingly significant component of state and local budgets, any potential loss is now likely to be contested vigorously.

In sum, the judicial and systemic developments have interacted: Congress has created a plethora of new rights during a period when the federal courts have been increasingly receptive to the assertion of claims based on federal law. The obvious result has been the explosion of grant litigation. What is not obvious is what the effects of this explosion may be on the operation of the system itself.

### Impacts of the Explosion

Attempts at an across-the-board assessment of the impact of grant litigation must be somewhat judgmental and subjective. In any given case it may be possible to identify specific results, but the state of the art does not permit empirically based general conclusions. Nonetheless, the subject would appear to warrant some consideration, if only because of the pervasive presence of the courts as actors in the operation of grant programs.<sup>41</sup> Since the systemic consequences of grantor-grantee suits may be quite different from those of third party suits, the effects will be considered separately.

**Grantor-Grantee Litigation.** Some analysts view the recent increase in grantor-grantee litigation as unhealthy. For example, the Office of Management and Budget has stated that "[t]he number of disputes between federal assistance agencies and recipients is growing apace with the growing importance and complexity of federal assistance. Not only is this costly, it is disrupting what should be partnerships to get things done."<sup>42</sup> In a similar vein, Prof. Cappelli has argued that the judicial forum is inadequate, noting that the courts are "confined in the review function," that the decision may at best involve a remand, and that suits are costly and time-consuming.<sup>43</sup> He concludes that the "ultimate disadvantage is the hostility which litigation engenders," and expresses a strong preference for the administrative process.

On the other hand, one can make the case that going to court is perhaps only another step, albeit a painful one, in an ongoing relationship and that the ability of grantees to sue obviously introduces an element of equalization into the relationship. The

ACIR appears to have accepted this position as early as 1964;<sup>44</sup> and a number of federal statutes authorize appeals by grantees from adverse financial decisions.<sup>45</sup> Availability of the judicial forum is particularly important in cases where the grantee is attacking the grantor's interpretation or the statute itself.

**Third Party Challenges.** The arguments in favor of suits by third parties attacking the award or administration of federal grants appear to be substantially stronger. Justice Harlan's opinion in *Rosado v. Wyman*, suggests two purposes which such suits further: making certain that Congress' will is not ignored by grantees, and protecting the individual beneficiaries of federal aid programs. These justifications overlap but can be examined separately.

Congress attaches conditions to federal aid in order to achieve what it perceives as national objectives. The very presence of any string—program specific or cross-cutting—represents a potential displacement of the grantee's freedom to choose, in that the grantee might well not have chosen to follow the course of conduct "mandated" by the string. That is why Congress imposed the condition in the first place. Yet the grantee may wish to evade or disobey grant conditions due to a desire to cut costs, a legitimate disagreement over how best to operate a program, or an outright desire to convert federal dollars to uses other than those intended by Congress. Thus, allowing third parties to sue to enforce grant conditions is an essential tool to help keep the grantee honest.

It is also important to focus on the types of person likely to bring such suits. In many instances, they will be individuals or groups with little clout in the grantee's political processes. Examples include welfare recipients such as the Thiboutot plaintiffs, racial minorities, classes such as the handicapped, low income persons generally, or those promoting a locally unpopular cause such as environmental protection. A fundamental premise which underlies much of the present grant system is that state and local governments cannot be counted on to respond adequately to such interests. Thus, third party grant suits represent one more instance of the federal courts serving as "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."<sup>46</sup>

On the other hand, it may be that third party suits contribute to the "overload" which ACIR has identified as a principal problem of the present grant system. The Commission argues that problems of effectiveness, efficiency, costliness, and accountability are widespread. Third party suits can contribute to the cost of participating in grant programs. There are the costs of defending the suit, increased project costs in case of delays, possible attorney's fees, and

<sup>41</sup>The role which courts play in establishing the Constitutional parameters of grant programs—in cases such as those discussed earlier—has received considerable attention.

<sup>42</sup>Office of Management and Budget, *Managing Federal Assistance in the 1980s*, Washington, DC, U.S. Government Printing Office, 1979.

<sup>43</sup>Richard Cappelli, *Rights and Remedies Under Federal Grants*, Washington, DC, Bureau of National Affairs, 1979, pp. 169-71.

<sup>44</sup>Advisory Commission on Intergovernmental Relations, *Statutory and Administrative Controls Associated with Federal Grants for Public Assistance*, A-21, Washington, DC, U.S. Government Printing Office, 1964, pp. 81-83, 93-95.

<sup>45</sup>E.g., 31 U.S.C. Section 1245 (revenue sharing).

<sup>46</sup>*Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (Brennan, J.).



even damages. Third party suits also contribute to the complexity and uncertainty of administering federal aid programs. Grantees are likely to insist on elaborate federal guidance and refrain from innovation out of fear of being hauled into court. Accountability issues also emerge, increasing the opportunity for finger pointing and buck passing. To the extent that participation in grant programs becomes more and more unattractive, the phenomenon of opting out is likely to increase.

Grant suits can also frustrate the achievement of program goals. Take the case of an economic development project involving federal, local, and private funds, which is attacked on the grounds of inadequate citizen participation. If the court agrees with plaintiffs and grants an injunction, the resultant delay will drive up costs. The public funds may no longer be sufficient. The developer may pull out. Which would Congress have preferred: the project without the participation, or the participation without the project? The court is not in any position to make such trade-offs. It must enforce the grant conditions as they are written.

In sum, grant litigation, of whatever variety, raises serious institutional questions. Are the various forms of judicial involvement a good thing? Until now the question has largely been unasked, perhaps because the explosion is recent, perhaps because many of those working on grant reform are not lawyers and are understandably perplexed by arcane concepts of federal jurisdiction. Yet the role of the courts seems too important not to be addressed.

#### **The Courts and Grant Reform: A Time for Action**

One can argue that a conscious decision should be made **not** to address the issue of courts and grant reform—to leave it to the lawyers and the courts after all. Indeed, cases such as *Pennhurst* indicate the possibility of judicial self correction. However, if the system is in need of reform—a point generally conceded—that effort ought to at least consider the role of this important, and relatively new, actor: the federal judiciary. (Although the recently enacted block grants may alter the fiscal and political landscape, there is no indication that the judicial role will be significantly altered.)

Short of Congressional action, the grantor agencies might develop accessible and workable grievance procedures. Agency practice in this area varies tremendously but, in general, the administrative avenues available are not viewed as adequate. (Plaintiffs sometimes “exhaust” them anyway, just to be on the safe side.) The availability of such procedures might lead to the resolution of a large number of disputes in a forum more susceptible to negotiation and mediation than a lawsuit. Moreover, the courts would be far more willing to invoke the doctrines of primary jurisdiction and exhaustion of remedies than they are at present.

Still, the primary responsibility rests with Congress. It would be virtually impossible to address the issue of the role of the courts in any across-the-board legislation. The grant programs are simply too varied, and the disputes they generate too dissimilar. Block grants present different issues than categorical programs. It makes a difference whether one is talking about suits to enforce the cross-cutting conditions, or program specific strings. Many different, and difficult, value judgements have to be made. Allegations of racial discrimination in a grant program are more serious candidates for federal judicial review than claims by disappointed vendors that the grantee has violated contractual obligations, while claims of insufficient citizen participation lie somewhere in between. At the moment it is the courts which make these judgments, on an ad hoc basis.

Ideally, the role of the courts ought to be addressed specifically each time the Administration and the Congress deal with restructuring or reauthorizing each grant program. It should be possible to identify in advance the types of third-party disputes which a given program will generate. Policymakers could then decide which should be insulated from judicial review, which should receive limited judicial review, and which should receive whole-scale review of the sort awarded in most third party suits as things stand now. For example, citizen participation issues might be resolved using agency forums, while complaints of racial or sexual discrimination would still be able to be heard in the courts, perhaps after exhaustion of administrative remedies. So far, this has happened only occasionally. The most notable example is the General Revenue Sharing Amendments of 1976, which created an elaborate citizens suit provision including a complaint mechanism and an exhaustion requirement.

As a first step, then, those who deal with grant reform must add the role of the courts to the agenda, recognizing it as a new item. Empirical research is needed to bring to light the judicial impact on categories and subcategories of grant disputes.

The ultimate policy decisions will no doubt rest primarily on a balancing of the relative values accorded to the programmatic and federalism goals to be served by any federal grant statute, and the rights and interests of the individuals affected by such programs. The task is not easy; the trade-offs are difficult. Nonetheless, these issues have been simmering just beneath the surface for some time now. An honest dialogue will be necessary to arrive at an adequate resolution. At the very least, it is time for the dialogue to begin.

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# The Mandate, The Mayor, and the Menace of Liability

By Cynthia Cates Colella

**The former elected officials of one small Kansas town had a healthy respect for their potential liability under the Civil Rights Act of 1871, 42 U.S.C. Section 1983. Upon learning that they could be held personally liable for violations of Constitutional rights of individual citizens, they sought protection through personal liability insurance. When they did, they found that the quoted insurance premium exceeded the total town budget. With true heartland aplomb, they voted to disband the town.<sup>1</sup>**

<sup>1</sup>Martin J. Jaron, Jr., "The Threat of Personal Liability Under the Civil Rights Act: Does It Interfere with the Performance of State and Local Government?," *The Urban Lawyer*, Vol. 13, No. 1, Winter 1981, p. 1.

While the virtue of self-assurance is by no means limited to the heartland, one can hardly imagine the officialdom of New York, Chicago, or Los Angeles voting to throw in the municipal towel. Yet, the furor which has resulted from recent Supreme Court decisions based on Section 1983—in many instances, nothing short of apocalyptic—suggests that just such a scenario is possible, if not probable. At the very least, critics claim that the law, as presently interpreted, could result in serious inertia at the state and local levels. And, like a haunting, if such dire predictions materialize, they will be the legacy of a single sentence passed into law over a century ago.

## Section 1983:

### Revenge of the Radical Republicans

Like biblical lineage, the Civil Rights Act of 1866 begat the 14th Amendment, the 14th Amendment begat the Civil Rights Act of 1871, the Act of 1871 begat an amendment in 1875, and the amendment begat Section 1983, a seemingly simple sentence, which, in its old age, has been doing a lot of begetting itself—begetting some condemnation, some commendation, and a great deal of consternation.

Passed in the waning days of Radical Reconstruction—a period not particularly "conducive to the enactment of carefully considered and coherent legislation,"<sup>2</sup>—Section 1983 was designed to implement the first section of the 14th Amendment<sup>3</sup> by providing a direct remedy through the federal courts.

Hence, the law, as codified, reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>4</sup>

No doubt, the Congressional authors of the legislation were concerned primarily with securing equal protection of the laws and guarantees of due process for the recently freed black population. Indeed, over the next few decades, court interpretation supported that concern—if not adequately, then, at least almost exclusively. Thereafter, however, the 14th Amendment "took off"—giving rise, through ingenious interpretation, to one "Constitutional revolution" after another.<sup>5</sup> Yet, despite the fact that the

<sup>2</sup>*United States v. Williams*, 341 U.S. 70 (1951).

<sup>3</sup>Section 1 of the 14th Amendment reads: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

<sup>4</sup>Title 42 U.S.C. Section 1983.

<sup>5</sup>In the late 18th and early 19th centuries interpretation of the 14th Amendment engendered a revolution in due process, while the 1940s, 1950s, and especially, the 1960s witnessed the drive to apply most of the Bill of Rights protections to the states through the Amendment.

Amendment rather quickly (and continuously) came to be seen as the most significant of Constitutional provisions—"not even second in significance to the original document itself"<sup>6</sup>—its remedial counterpart, Section 1983, lay practically dormant for nearly a century—cited by the Supreme Court a mere 36 times in the first 90 years of its existence.<sup>7</sup> Obviously, then, the Court, though experiencing often radical changes in leadership and ideological bent, chose to view the statute solely as a remedy for gross Constitutional violations—a "loosely and blindly drafted"<sup>8</sup> remedy to be broached only with a great deal of trepidation.

Even had the Court been willing to interpret broadly what constituted deprivation under color of state law, longstanding common law immunity shielding state and local officials and municipalities on the basis of their "good faith" and the 11th Amendment offering absolute immunity to the states would have rendered the bringing of Section 1983 suits virtually meaningless for the purposes of collecting damages. Jurisdictions and their officials, therefore, had little to fear due, on the one hand, to narrow statutory construction and, on the other, to broad common law construction and Constitutional prohibition.

If, as many now suggest, current interpretation of Section 1983 has left municipalities and their strained treasuries vulnerable to every manner of attack, interpretation, prior to the 1960s, was clearly in the other direction—often making it exceedingly difficult for even heinously wronged individuals to receive just remedies. Such relative freedom from the need to consider individual rights when making or implementing policy could not but help, in some cases, to lead to insensitivity to, if not outright violation of, Constitutional protections. And, protection of individual rights is of equal if not greater consequence to the continued viability of American Constitutionalism as adherence to the principles of federalism. Thus, the underutilization or disregard of Section 1983—and civil rights statutes generally—often led to badly unbalanced policy, for "[w]hatever other concerns should shape a particular official's actions, certainly one of them should be the Constitutional rights of individuals who will be affected by his actions. . . ."<sup>9</sup>

### The Initial Unshackling

In 1961, 13 Chicago police officers, in a flagrant misuse of authority, entered a home without warning and forced its occupants to stand naked while the premises were virtually torn apart in a search effort.

<sup>6</sup>Bernard Schwartz, "The Amendment in Operation: A Historical Overview," in *The Fourteenth Amendment*, ed by Bernard Schwartz, New York University Press, 1970, p. 29.

<sup>7</sup>Richard G. Carlisle, "Owen v. City of Independence: Toward? Constructing a Model for Municipal Liability After *Monell*," *The Urban Lawyer*, Vol 12, No. 2, Spring 1980, p. 293.

<sup>8</sup>*Stefanelli v. Minard*, 342 U.S. 117 (1951).

<sup>9</sup>"Note, Developments in the Law: Section 1983 and Federalism," 90, *Harvard Law Review*, 1133, 1224 (1977) as cited in *Owen v. City of Independence*, 445 U.S. 622 at n. 41.

The subsequent court action, brought against both the city and the police officers under Section 1983, culminated in the Supreme Court case of *Monroe v. Pape*.<sup>10</sup> The resulting landmark opinion had three major effects:

- it significantly expanded the scope of the phrase, "under color of state [law]," for the officers involved clearly had not acted according to any state policy;
- in ruling that municipalities were not "persons" under Section 1983, it directed potential litigants to file suits against individual officials; and
- rather predictably, it produced a rush of that most cherished of American pastimes—going to court.<sup>11</sup>

While *Monroe* marked the initial unshackling of Section 1983's vast potential, it still effectively precluded many suits "because of the difficulties presented by having to identify individual officials responsible for a violation, finding responsible officials with financial means to pay substantial judgments, a jury's natural sympathy for 'an official who is perceived to be under attack for doing what he thought to be his job,' and the good faith defense of officials to a Section 1983 action."<sup>12</sup>

### Municipalities as "Persons"

Seldom do legal concepts remain static and "personhood" is no exception. Thus, 17 years following *Monroe*, the Court had reason to reevaluate application of that concept and thereby nudge local governments somewhat further into the "'Wonderland' of Section 1983 liability."<sup>13</sup> In a significant reversal of previous policy, the Court declared that municipalities could indeed be characterized as Section 1983 "persons." And, though it would not have been impossible prior to 1978 to assert a direct cause of action against a locality,<sup>14</sup> *Monell v. Department of Social Services*<sup>15</sup> promised to make the bringing of municipal liability suits easier and, consequently, more attractive.

In effect, the *Monell* decision established a number of "touchstones" that would trigger a Section

<sup>10</sup>365 U.S. 167 (1961).

<sup>11</sup>While specific data on Section 1983 filings has not been systematically collected, the Administrative Office of the United States Courts reported a veritable explosion in post-*Monroe* private civil rights filings. Thus, such filings, excluding suits against the U.S. or its officers, increased from 296 cases in 1961 to 8,159 cases by 1979. Jaron, "The Threat of Personal Liability Under the Federal Civil Rights Act," p. 2.

<sup>12</sup>Robert H. Freilich, Joy Rushing, and Douglass F. Noland, "1978-79 Annual Review of Local Government Law: Undermining Municipal and State Initiative in an Era of Crisis and Uncertainty," *The Urban Lawyer*, 11, Fall 1979, p. 549.

<sup>13</sup>*Ibid.*, 548.

<sup>14</sup>In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court declared that even absent a statute which authorizes a remedial cause of action for Constitutional injury, the federal courts could allow such action directly under the Fifth and 14th Amendments. Although the *Bivens* case involved federal employees, a number of lower court decisions implied that a similar rationale might be applied to localities.

<sup>15</sup>436 U.S. 658 (1978).

## “ Seldom do legal concepts remain static and “personhood” is no exception. ”

1983 cause of action—in other words, the right to bring suit.<sup>16</sup> First, a municipality was liable for its “Constitutional tort” if that wrong resulted from “a policy statement, ordinance, regulation, or decision officially adopted or promulgated by that body’s officers.”<sup>17</sup> Moreover, the Court acknowledged that “official policy” under Section 1983 could also include custom and usage, not formally adopted, but pervasive enough to have the force of law.

Despite this rather stunning reversal of *Monroe* and of traditional local tort law, the Court indicated in *Monell* that it was not completely willing to open municipalities to an all out assault by damage seekers. The Court rejected the notion that a city might be liable for damages simply because it employed an official who, acting contrary to policy, had committed a Constitutional wrong. And, although the Court had stripped municipalities of the sort of absolute immunity which states enjoy under the 11th Amendment, it left open—and by implication, seemed to approve of—the application of qualified, good faith immunity to local governments.<sup>18</sup>

### Demise of the “Good Faith” Defense

[W]e can discern no “tradition so well grounded in history or reason” that would warrant the conclusion that in enacting Section 1 of the Civil Rights Act, the 42nd Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended to so limit the reach of a statute expressly designed to provide a “broad remedy for violations of federally protected civil rights, . . .” we are unwilling to suppose that injuries occasioned by a municipality’s unconstitutional conduct were not also meant to be fully redressable through its sweep.<sup>19</sup>

From slow beginnings, the accumulated force of judicial opinions may build to fast-paced finales. Thus, while it took nearly two decades for the Supreme Court to bestow “personhood” upon municipalities, a mere two years stood between pre-*Monell* immunity and post-*Owen* liability. In *Owen v. City of Independence*, the Supreme Court determined

<sup>16</sup>Bruce M. Kramer, “Section 1983 and Municipal Liability: Selected Issues Two Years After *Monell v. Department of Social Services*,” *The Urban Lawyer*, 12, Spring 1980, p. 240.

<sup>17</sup>*Monell*, 436 U.S. 658 (1978).

<sup>18</sup>For some time after *Monell*, most lower court cases held that qualified, good faith immunity did indeed apply to localities. J. Devereaux Weeks, “Personal Liability Under Federal Law: Major Developments Since *Monell*,” *The Urban Lawyer*, 12, Spring 1980, p. 264.

<sup>19</sup>*Owen v. City of Independence, Missouri, et al*, 455 U.S. 622 (1980).

that the dismissal of the Chief of Police without formal written reason or hearing violated his Constitutional rights to procedural and substantive due process—a violation to be remedied by the award of declaratory and injunctive relief, including back pay. The violator—the City of Independence through the official acts of its city manager and city council members—was deemed liable for those damages and could not assert the “good faith” of its officials to avoid liability. Though the majority justices went to great lengths to establish continuity between *Owen* and previous Section 1983 decisions, most commentators viewed the opinion as a dramatic departure from the past—a departure with serious and costly implications for cities across the nation.

Indeed, the decision added three new elements—one stated, one implied, and one in practical effect—to the increasingly crowded Section 1983 milieu. First, by virtue of denying cities a good faith defense, it imposed upon them strict liability for damages. This is particularly burdensome in the realm of Constitutional violation since the fluidity of Constitutional interpretation, the constant expansion of Constitutional rights, and the often arcane points of Constitutional law combine to make it nearly impossible for city officials to know when and if they have committed a minor violation. For instance, in the *Owen* case, city officials had no way of knowing they had acted unconstitutionally since “Supreme Court decisions declaring a right to . . . a hearing were issued weeks after Chief *Owen* had been fired.”<sup>20</sup> Although court expansions in the scope of rights protected by the Constitution are to be applauded and though no one would suggest that blatantly or obviously unconstitutional acts such as racial or sexual discrimination or denial of religious freedom should go uncorrected, the *Owen* holding appears to ascribe to the average municipal agent an above average ability to anticipate future refinements in Constitutional law.

Second, by implication, the decision appears to extend municipal liability for “official policy” to liability for “official conduct.” *Owen*’s Constitutional deprivation resulted from the actions and inactions of the city manager and city council and the arguable indiscreet statements of a council member. Those circumstances and the resulting decision caused a mystified Court minority to respond sarcastically that “[t]he statements of a single councilman scarcely rise to the level of municipal policy.”<sup>21</sup>

Finally, in practical effect, the Court’s decision to make cities liable for damages imparts to Section 1983 judgments three of the more onerous characteristics of federal mandates: intrusiveness, excessive

<sup>20</sup>Aaron A. Wilson, Samuel Gorlick, and George F. Knox, Jr., *The Local Government Liability Explosion and a Plan to Cope With It; Report and Recommendations By the Committee to Study Creation of a National Municipal Legal Defense Fund*, Washington, DC, National Institute of Municipal Law Officers, 1981, p. 13.

<sup>21</sup>Justice Powell dissenting for himself, the Chief Justice, Justice Stewart, and Justice Rehnquist in 455 U.S. 622 (1980).

Figure 1

## Local Governments Reporting Civil Rights Claims For All Kinds Of Damages

City	Dollar Amount of Civil Rights Claims		General Revenues	City	Dollar Amount of Civil Rights Claims		General Revenues
	Now Pending	Population			Now Pending	Population	
<b>Arizona</b>							
Phoenix	\$160,000,000	665,000	\$ 228,508,000	North Aurora	\$ 150,000	4,833*	
Tempe	2,550,000	84,000	23,113,000	Waukegan	105,000	65,000	\$ 16,969,000
Tucson	1,865,000	296,000	100,979,000	Carbondale	60,000	23,000	8,669,000
<b>Arkansas</b>							
DeQueen	2,599,150	3,863*		Hoffman Estates	50,000	32,000	4,671,000
<b>California</b>							
Los Angeles	200,000,000	2,727,000	1,158,197,000	Oak Park	40,000	60,000	16,895,000
Los Angeles County	59,228,000	6,987,000	2,861,180,000	<b>Iowa</b>			
El Segundo	7,110,000	15,000	10,226,000	Aigona	2,000,000	6,032*	
Marin County	5,000,000	220,000	66,071,000	Cedar Rapids	1,697,251	109,000	46,274,000
Roseville	4,260,000	20,000	6,710,000	Council Bluffs	1,601,200	59,000	19,561,000
Vallejo	3,242,600	71,000	17,011,000	Ames	1,550,000	43,000	16,818,000
San Bernardino	2,260,000	102,000	37,375,000	Sioux City	270,000	86,000	32,526,000
El Monte	1,600,000	68,000	12,430,000	Waterloo	200,000	78,000	24,977,000
San Diego	1,500,000	774,000	235,259,000	<b>Kansas</b>			
Duarte	1,200,000	15,000	2,721,000	Wichita	9,939,000	265,000	84,717,000
San Leandro	1,002,732	67,000	18,981,000	Emporia	1,860,000	22,000	5,699,000
Burbank	953,492	86,000	32,143,000	Hutchinson	1,450,000	41,000	9,213,000
Oceanside	630,000	56,000	18,766,000	Merriam	600,000	11,000	1,605,000
Orange Cove	600,000	3,392*		<b>Kentucky</b>			
Stockton	465,000	118,000	58,925,000	Berea	141,000	6,956*	
Vista	150,000	28,000	4,939,000	Owensboro	80,000	51,000	26,207,000
Sonora	50,000	3,100*		Winchester	10,000	16,000	6,162,000
Grover City	20,292	5,939*		<b>Maine</b>			
Sunnyvale	750	102,000	28,491,000	South Portland	140,000	23,000	11,523,000
<b>Colorado</b>							
Aurora	25,302,000			Waterville	10,000	17,000	7,106,000
Denver	18,440,000	485,000	358,746,000	<b>Maryland</b>			
Colorado Springs	10,000,000	180,000	58,217,000	Anne Arundel County	116,000,000	344,000	233,548,000
Northglenn	450,000	35,000	4,458,000	Prince George's County	100,000,000	678,000	469,427,000
Golden	110,000	13,000	1,458,000	Baltimore	70,000,000	852,000	1,082,204,000
<b>Delaware</b>							
Delaware City	500,000	2,024*		Hagerstown	3,272,000	37,000	7,858,000
Symrna	500,000	4,243*		Annapolis	10,000	32,000	8,734,000
District of Columbia	45,000,000	712,000	1,557,222,000	<b>Massachusetts</b>			
<b>Florida</b>							
Clearwater	5,150,000	67,000	29,193,000	Methuen	2,000,000	35,000	19,718,000
Volusia County	3,865,000	207,000	22,936,000	<b>Michigan</b>			
Jacksonville	2,546,000	535,000	220,264,000	Flint	15,600,000	174,000	141,484,000
Miami Beach	2,500,000	94,000	44,613,000	Saginaw	2,000,000	86,000	36,070,000
Halfandale	1,500,000	33,000	9,599,000	Kalamazoo	1,500,000	80,000	24,888,000
Opa-Locka	300,000	14,000	3,077,000	Plymouth	250,000	12,000	2,982,000
Plantation	100,000	33,000	6,019,000	Muskegon County	250,000	157,000	31,972,000
Pensacola	10,000	64,000	22,353,000	<b>Minnesota</b>			
Deland	10,000	13,000	3,471,000	Duluth	1,800,000	94,000	46,677,000
Venice	5,000	11,000	3,397,000	Rochester	171,000	56,000	15,189,000
<b>Georgia</b>							
Albany	5,000,000	73,000	13,276,000	<b>Mississippi</b>			
Douglasville	900,000	12,000	1,843,000	Jackson	600,000	167,000	65,440,000
Augusta	155,000	54,000	17,871,000	<b>Missouri</b>			
<b>Illinois</b>							
Chicago	775,093,703	3,099,000	1,228,706,000	Columbia	201,000,000	63,000	16,248,000
Joliet	33,822,000	74,000	19,194,000	Independence	40,000,000	111,000	28,133,000
Peoria	1,008,000	126,000	31,367,000	St. Louis	40,000,000	525,000	294,518,000
St. Charles	555,000	16,000	4,077,000	Kansas City	12,500,000	473,000	254,463,000
Willowbrook	290,000	1,169*		Berkeley	7,040,000	15,000	3,252,000
<b>Nebraska</b>							
				Springfield	2,501,000	132,000	48,468,000
				Jennings	480,000	18,000	3,583,000
				Hazelwood	300,000	14,000	2,799,000
				<b>Central City</b>			
				Central City	1,500,000	2,803*	
				Lincoln	600,000	163,000	58,785,000
				Omaha	507,500	371,000	117,720,000



Figure 1  
Local Governments Reporting Civil Rights Claims For All Kinds Of Damages

City	Dollar Amount of Civil Rights Claims		General Revenues	City	Dollar Amount of Civil Rights Claims		General Revenues
	Now Pending	Population			Now Pending	Population	
Nevada				Tennessee			
Sparks	\$ 15,000,000	32,000	\$ 10,009,000	Jackson	\$ 5,000,000	43,000	\$ 38,121,000
Las Vegas	1,250,000	146,000	41,604,000	Franklin	475,000	12,000	2,451,000
New Jersey				Knoxville	360,000	183,000	93,206,000
Newark	14,050,000	340,000	368,931,000	Nashville & Davidson County	250,000	423,000	289,873,000
New Mexico				Waverly	200,000	3,794*	
Grants	2,000,000	8,768*		Texas			
Farmington	1,000,000	28,000	16,522,000	Houston	60,000,000	1,327,000	410,987,000
New York				Dallas	59,000,000	813,000	274,618,000
New York City	251,259,465	7,482,000	14,329,999,000	Amarillo	10,100,002	139,000	52,976,000
Scarsdale	1,780,000	19,000	7,646,000	Plano	7,500,000	37,000	8,579,000
North Carolina				San Antonio	7,000,000	773,000	161,251,000
Greensboro	32,000,000	156,000	32,435,000	Pasadena	6,650,000	95,000	15,669,000
Wilson	7,560,323	34,000	9,616,000	Grand Prairie	5,880,000	57,000	23,202,000
New Bern	2,270,261	17,000	2,902,000	El Paso	5,757,000	386,000	77,681,000
Goldsboro	1,800,000	26,000	7,261,000	Waco	1,625,000	98,000	27,549,000
Pembroke	1,560,000	1,982*		Arlington	455,000	111,000	22,464,000
Reidsville	1,100,000	13,000	3,068,000	Hurst	225,000	28,000	5,001,000
Fayetteville	300,000	66,000	13,963,000	Utah			
Gastonia	155,000	49,000	8,875,000	Salt Lake City	8,960,398	170,000	48,359,000
North Dakota				Logan	451,000	24,000	3,386,000
Minot	80,000	33,000	11,126,000	Vermont			
Ohio				Montpelier	140,000	8,609*	
Cleveland	672,922,500	639,000	986,940,000	Virginia			
Warrensville Heights	600,800,000	18,000	3,068,000	Roanoke	9,961,750	101,000	82,766,000
Dayton	29,890,000	206,000	91,268,000	Arlington County	2,000,000	156,000	125,983,000
Solon	22,000,000	13,000	6,091,000	Norfolk	1,440,055	287,000	217,811,000
Canton	13,125,000	102,000	30,298,000	Portsmouth	1,310,000	109,000	78,604,000
Newark	600,000	39,000	7,250,000	Carroll County	200,000	24,000	7,852,000
Steubenville	350,000	28,000	9,287,000	Loudoun County	20,000	49,000	24,149,000
Kettering	350,000	70,000	10,222,000	Washington			
Fairborn	100,000	33,000	4,841,000	Vancouver	100,000	48,000	14,678,000
Cuyahoga Falls	50,000	47,000	10,192,000	Tacoma	45,000	151,000	64,637,000
Middletown	25,000	48,000	30,742,000	West Virginia			
Oklahoma				Logan	600,000	3,311*	
Edmond	2,179,520	23,000	5,375,000	Buckhannon	250,000	7,261*	
Del City	1,907,889	30,000	2,909,000	Wisconsin			
Enid	201,500	48,000	8,065,000	Brown County	35,530,000	169,000	33,339,000
Geary	115,000	1,380*		Green Bay	715,000	91,000	65,673,000
Oregon				Brookfield	180,000	33,000	8,815,000
Portland	61,505,997	357,000	140,339,000	Whitefish Bay	25,000	17,000	3,019,000
Lake Oswego	750,160	19,000	6,117,000	Wisconsin Dells	20,000	2,401*	
Gresham	224,636	23,000	5,425,000	Wyoming			
Pennsylvania				Casper	3,800,150	41,000	14,011,000
Philadelphia	100,000,000	1,816,000	1,212,708,000	Jackson	2,800,000	2,101*	
Pittsburgh	180,000	459,000	151,088,000	Powell	500,000	4,807*	
Rostraver Township	10,000	10,525*					
Rhode Island							
Newport	5,000,000	29,000	25,405,000				
South Carolina							
Spartanburg	100,000	47,000	11,239,000				

\$4,116,311,276—Total Current Civil Rights Claims Against 169  
Municipalities

**Source:** Preliminary results of a survey undertaken by the National Institute of Municipal Law Officers on the impact of Section 1983 litigation on local governments. **Brief Amicus Curiae of the National Institute of Municipal Law Officers in Support of Petitioners, City of Newport, et al,** in the Supreme Court of the United States, October Term, 1980, **The City of Newport, Rhode Island, et al v. Fact Concerts Inc., et al,** No. 80-396.

\*Population and general revenues data for cities are, generally, for 1975 (population) and 1976-77 (revenues), and are taken from International City Management Association, the Municipal Yearbook 1980, at 9-44. The data for counties are, generally, for 1975 (population) and 1975-76 (revenues), and are taken from International City Management Association, The County Year Book 1978, at 8-40. In a few cases (marked \*), population data are taken from the Bureau of the Census, Census of Population—Number of Inhabitants (1970). Blanks indicate unavailable data.

costs, and the potential displacement of preferred local activities.

One of the major effects of the Owen decision is certain to be an increase in Section 1983 litigation. Americans, as our preeminent observer, Tocqueville, noted nearly 150 years ago, love to go to court. And, it is no mean incentive to go even more frequently if telling it to the judge brings financial reward. While Section 1983 actions may be initiated, and even settled, in state courts, the measure is, in fact, a federal law, generally litigated in federal courts and settled by federal judges. Hence, an increase in such litigation ultimately will mean an increase in federal intervention into local affairs, a point of which Owen's dissenters were keenly aware:

The Court's decision also impinges seriously on the prerogatives of municipal entities created and regulated primarily by the states. At the very least, this Court should not initiate a federal intrusion of this magnitude in the absence of explicit Congressional action.<sup>22</sup>

In addition, in setting localities up as "convenient targets for capricious and expensive damage suits,"<sup>23</sup> Owen is likely to generate a further drain on already troubled municipal treasuries. In fact, the potential for such suits is astounding. Thus, discretionary municipal hiring and firing aside, local decisions in the areas of land use, zoning, licensing, permits, servicing, tax assessments, health and building codes, and environmental regulations may give (and in some cases have already given) rise to Section 1983 actions.<sup>24</sup> The potential of the cost aspect of Section 1983 "mandates" is nothing less than staggering—if damages were collected for all current civil rights claims pending against municipalities, the dollar cost to local treasuries would be an estimated \$4.1 billion.<sup>25</sup> (See *Figure 1*.)

Finally, the Owen decision may work, both directly and circuitously, to displace preferred local activities and functions. In a direct sense, of course, the payment of damages distorts budgetary preferences. Pothole repair is far easier to put off than is payment of a court-ordered damage claim. Moreover, hedging one's bets against potential suits may in itself be enormously expensive.<sup>26</sup>

It is indirectly, however, that the Owen decision stands most seriously to distort local policymaking:

Because [the Court's] decision will inject constant consideration of Section 1983 liability into local decisionmaking, it may restrict the independence of local governments and their ability to respond to the needs of their communities. . . . If officials must look over their shoulders at strict municipal liability for unknowable Constitutional deprivations, the resulting degree of governmental paralysis will be little different from that caused by personal liability.<sup>27</sup>

#### Enter "Pandora's Mandate"

A mere two months and nine days following the announcement of its Owen decision, the Supreme Court chose, in what has been dubbed "Pandora's Mandate,"<sup>28</sup> to extend the scope of Section 1983 even further. In *Maine v. Thiboutot*,<sup>29</sup> a majority of six justices declared that Section 1983 actions would no longer be limited to Constitutional deprivations:

The question before us is whether the phrase "and laws" as used in Section 1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act.<sup>30</sup>

The opinion thus treated as simple and obvious,<sup>31</sup> an issue over which both judicial and scholarly opinion had been sharply divided—with many contending that despite the phrase "and laws" Section 1983 referred only to Constitutional rights and derivative federal equal rights legislation. The Court's decision to explicitly add statutory mal-, mis-, and nonfeasance to the increasingly catch-all character of Section 1983—the opening of a legal can of worms, almost unprecedented in potential magnitude—was attended by a rash of adverse commentary, some of which came quite close to forecasting the ultimate demise of American federalism. Indeed, as the small sampling of laws in *Figure 2* points out, the ruling could affect the administration of a very wide range of federal programs.

"And laws" aside, the Court appeared to beg no end of business for itself, lower federal, and state courts by applying the Civil Rights Attorney's

<sup>22</sup>*Ibid.*

<sup>23</sup>City of New York, *Federal Program: 97th Congress*, New York, City of New York, 1981, p. 44.

<sup>24</sup>See for example: Anotolij Kushnir, "The Impact of Section 1983 After Monell on Municipal Policy Formulation and Implementation," *The Urban Lawyer*, 12, Summer 1980 and Freilich, Rushing, and Noland, "Undermining Municipal and State Initiative in an Era of Crisis and Uncertainty."

<sup>25</sup>Brief Amicus Curiae of the National Institute of Municipal Law Officers in Support of Petitioners, *City of Newport, et al*, in the Supreme Court of the United States, October Term, 1980, *The City of Newport, Rhode Island, et al v. Fact Concerts, Inc., et al No. 80-396*. Actual figure of \$4,116,311,276 represents estimate of claims against 169 municipalities based on the preliminary results of a survey undertaken by NIMLO on the impact of Section 1983 litigation on local governments.

<sup>26</sup>However, these astronomical insurance expenses are becoming less available to localities as more and more commercial carriers refuse to underwrite municipal risks due to the increased number and amount of claims and uncertain tort liability standards in the law. Jaron, "The Threat of Personal Liability Under the Federal Civil Rights Act," 19-20.

<sup>27</sup>Dissent in 455 U.S. 622 (1980).

<sup>28</sup>"Pandora's Mandate," Editorial, *The Wall Street Journal*, June 27, 1980, p. 24.

<sup>29</sup>448 U.S. 1 (1980).

<sup>30</sup>*Ibid.*

<sup>31</sup>The Court offered as a major precedent, a statement in *Edelman v. Jordan*, 415 U.S. 651 at 675 (1974) that the 1970 case of *Rosado v. Wyman*, 397 U.S. 397 (1970) "held that suits in federal court under Section 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating states." The *Thiboutot* dissent, vigorously disagreeing that *Rosado* via *Edelman* acted as plain precedent, replied that ". . . *Rosado* established no such proposition of law. The plaintiffs in that case challenged a state welfare provision on Constitutional grounds, premising jurisdiction upon 28 U.S.C. Section 1343 (3), and added a pendent statutory claim."

*Figure 2*  
**Small Sample Of Statutes That Could Give Rise To  
Section 1983 Actions Following Court's Decision In  
Maine v. Thiboutot**

(Relevant enactments typically fall into one of three categories: (A) regulatory programs in which states are encouraged to participate, either by establishing their own plans of regulation that meet conditions set out in federal statutes, or by entering into cooperative agreements with federal officials; (B) resource management programs that may be administered by cooperative agreements between federal and state agencies; and (C) grant programs in which federal agencies either subsidize state and local activities or provide matching funds for state or local welfare plans that meet federal standards.)

**A. Joint Regulatory Endeavors**

1. Federal Insecticide, Fungicide, and Rodenticide Act, 86 Stat. 973 (1972), as amended, 7 U. S. C. §§ 136 et seq.; see, e. g., 7 U. S. C. §§ 136u, 136v.
2. Federal Noxious Weed Act of 1974, 88 Stat. 2148 (1975), 7 U. S. C. §§ 2801-2813; see 7 U. S. C. § 2808.
3. Historic Sites, Buildings, and Antiquities Act, 49 Stat. 666 (1935), as amended, 16 U. S. C. §§ 461-467; see 16 U. S. C. § 462 (e).
4. Fish and Wildlife Coordination Act, 48 Stat. 401 (1934), as amended, 16 U. S. C. § 661-666c; see 16 U. S. C. § 661.
5. Anadromous Fish Conservation Act, 79 Stat. 1125 (1965), as amended, 16 U. S. C. § 757a-757d; see 16 U. S. C. § 757a (a).
6. Wild Free-Roaming Horses and Burros Act, 85 Stat. 649 (1971), as amended, 16 U. S. C. §§ 1331-1340; see 16 U. S. C. § 1336.
7. Marine Mammal Protection Act of 1972, 86 Stat. 1027, as amended, 16 U. S. C. §§ 1361-1407; see 16 U. S. C. § 1379.
8. Wagner-Peyser National Employment System Act, 48 Stat. 113 (1933), 29 U. S. C. §§ 49 et seq.; see 29 U. S. C. § 49g (employment of farm laborers).
9. Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, 30 U. S. C. §§ 1201-1328; see 30 U. S. C. § 1253.
10. Interstate Commerce Act Amendments of 1935, 49 Stat. 548, as amended, 49 U. S. C. § 11502 (a)(2) (enforcement of highway transportation law).

**B. Resource Management**

1. Laws involving the administration and management of national parks and scenic areas: e. g., Act of May 15, 1965, § 6, 79 Stat. 111, 16 U. S. C. § 281e (Nez Perce National Historical Park); Act of Sept. 21, 1959, § 3, 73 Stat. 591, 16 U. S. C. § 410u (Minute Man National Historical Park); Act of Oct. 20, 1972, § 4, 86 Stat. 1302, 16 U. S. C. § 460bb-3 (b) (Muir Woods National Monument).
2. Laws involving the administration of forest lands: e. g., Act of March 1, 1911, § 2, 36 Stat. 961, 16 U. S. C. §§ 563; Act of Aug. 29, 1935, ch. 808, 49 Stat. 963, 16 U. S. C. §§ 567a-567b.
3. Laws involving the construction and management of water projects: e. g., Water Supply Act of 1958, § 301, 72 Stat. 319, 43 U. S. C. § 390b; Boulder Canyon Project Act, §§ 4, 8, 45 Stat. 1058, 1062 (1928), as amended, 43 U. S. C. §§ 617c, 617g; Rivers and Harbors Act of 1899, § 9, 30 Stat. 1151, 33 U. S. C. § 401.

4. National Trails System Act, 82 Stat. 919 (1968), as amended, 16 U. S. C. §§ 1241-1249; see 16 U. S. C. § 1246 (h).
5. Outer Continental Shelf Lands Act Amendment of 1978, § 208, 92 Stat. 652, 43 U. S. C. § 1345 (oil leasing).

**C. Grant Programs**

In addition to the familiar welfare, unemployment, and medical assistance programs established by the Social Security Act, these may include:

1. Food Stamp Act of 1964, 78 Stat. 703, as amended, 7 U. S. C. § 2011-2025; see e. g., 7 U. S. C. § 2020e-2020 (g).
2. Small Business Investment Act of 1958, § 602 (d)(1), 72 Stat. 698, as amended, 15 U. S. C. § 636(d).
3. Education Amendments of 1978, 92 Stat. 2153, as amended, 20 U. S. C. §§ 2701 et seq.; see, e. g., 20 U. S. C. §§ 2734, 2902.
4. Federal-Aid Highway legislation, e. g., 21 U. S. C. §§ 128, 131.
5. Comprehensive Employment and Training Act Amendments of 1978, 92 Stat. 1909, 29 U. S. C. §§ 801 et seq.; see, e. g., 29 U. S. C. §§ 823, 824.
6. United States Housing Act of 1937, as added, 88 Stat. 653 (1974), as amended, 42 U. S. C. § 1437 et seq.; see, e. g., 42 U. S. C. §§ 1437d (c), 1437j.
7. National School Lunch Act, 60 Stat. 230 (1946), as amended, 42 U. S. C. §§ 1751 et seq.; see, e. g., 42 U. S. C. § 1758.
8. Public Works and Economic Development Act of 1965, 79 Stat. 552, as amended, 42 U. S. C. §§ 3121 et seq.; see, e. g., 42 U. S. C. §§ 3132, 3151a, 3243.
9. Justice System Improvement Act of 1979, 93 Stat. 1167, 42 U. S. C. §§ 3701-3797; see, e. g., 42 U. S. C. §§ 3742, 3744 (c).
10. Juvenile Justice and Delinquency Prevention Act of 1974, 88 Stat. 1109, as amended, 42 U. S. C. §§ 5601 et seq.; see, e. g., 42 U. S. C. § 5633.
11. Energy Conservation and Production Act of 1976, 90 Stat. 1125, as amended, 42 U. S. C. §§ 6801 et seq.; see, e. g., 42 U. S. C. §§ 6805, 6836.
12. Developmentally Disabled Assistance and Bill of Rights Act, 89 Stat. 486 (1975), as amended, 42 U. S. C. §§ 6001 et seq.; see, e. g., §§ 6011, 6063.
13. Urban Mass Transportation Act of 1964, 78 Stat. 302, as amended, 49 U. S. C. §§ 1601 et seq.; see, e. g., §§ 1602, 1604 (g)-(m).

Fees Award Act to statutory Section 1983 claims.<sup>32</sup> That law allows the prevailing party in, among others, Section 1983 cases, to collect "a reasonable attorney's fee as part of the costs."<sup>33</sup> Moreover, the probable increase in case filings will be attended by an even greater financial burden on losing jurisdictions, for attorney's fees may be a large—even the largest—part of the cost of a case. In fact, a recent case, involving \$33,000 in back pay, resulted in an attorney's fee of \$130,000.<sup>34</sup> And, in civil rights cases, the fees awarded have been getting increasingly more substantial.<sup>35</sup>

“ In no small way, then Thiboutot may be viewed as a mandate aiding in the enforcement of other mandates or, a “mandate’s mandate.” ”

In no small way, then Thiboutot may be viewed as a mandate aiding in the enforcement of other mandates or, a “mandate’s mandate.” Certainly, prior to the decision, it was not always easy for potential litigants to enforce conditions of aid:

Plaintiffs in these actions frequently encounter[ed] serious “threshold” difficulties, including the question of whether they [had] a “cause of action” if the underlying grant statute does not provide for such suits. (Such provisions are rare.)<sup>36</sup>

However, these difficulties may now be greatly diminished:

If the grantee whose actions are challenged is a unit of state or local government Thiboutot may sweep away cause of action obstacles previously facing such plaintiffs.<sup>37</sup>

Ironically, though Thiboutot was fought over a state action, its impact will, in all likelihood, be felt most keenly at the local level. State governments are protected, by the terms of the 11th Amendment, from suits originating in the federal courts seeking retro-

active monetary damages.<sup>38</sup> So too, officials at both the state and local levels can, at least, assert their own “good faith” in defense of their actions or inactions. That, of course, leaves only one suable entity, unprotected by either the Constitution or its good faith—the municipality as “person.”

### Section 1983: The Search for Equilibrium

Refusal to recklessly extend the reach of a Section 1983 damages action is not a denial of the worth of a plaintiff's interests, as much as it is a recognition that the term “Constitutional tort” should not mean all things to all people; Section 1983 does not require compensation for all deprivations of Constitutional [and statutory] rights through open-ended municipal liability which would treat city treasuries as a fund for mutual insurance.<sup>39</sup>

While the above sentiment was voiced by the attorney for the City of Independence—obviously, a less than impartial critic—is being echoed with increasing frequency throughout the nation. Indeed, it is sentiment borne of genuine and well-founded state and local alarm, as well as a growing “fear in the civil rights community that the too-ready availability of civil rights claims, and the attendant attorneys’ fees, will influence the courts’ delineation of the civil rights themselves.”<sup>40</sup> Yet, the alteration or reinterpretation of a law so vital to the safekeeping of fundamental civil rights and enforcement of the 14th Amendment requires an exceptionally delicate hand—certainly one which would preserve and protect the essential equal rights aspects of the law. While no Constitutional or statutory modification should be undertaken with a meat-axe, the special significance of Section 1983 requires more than extraordinary sensitivity and no little amount of trepidation.

Three basic approaches have been suggested as means to restoring some balance to Section 1983 litigation. Of the three, the most obvious and, at the same time, the most complex, involves judicial reinterpretation of several Section 1983 issues. The second, and most direct approach, involves Congressional amendment. Finally, the third and most novel response to the increase in the scope and frequency of Section 1983 claims involves the creation of state and local legal defense funds.

### Judicial Reinterpretation

In deciding future cases, the courts may seek to limit Section 1983 in at least three major ways: by

<sup>32</sup>In a companion case, decided the same day, the Court held that attorneys’ fees may be recovered in cases of Constitutionally-based litigation, even when the prevailing party prevails through settlement rather than through litigation. *Maher v. Gagne*, 448 U.S. 122 (1980).

<sup>33</sup>42 U.S.C. Section 1988.

<sup>34</sup>*Copeland v. Marshall*, No. 77-1351 (D.C. Cir. September 2, 1980), cited in Wilson, et al, *The Local Government Liability Explosion and a Plan to Cope With It*, pp. 6-7.

<sup>35</sup>The Lawyers’ Committee for Civil Rights Under Law, “Computation of Public Interest Attorneys’ Fees: Some Good News via *Copeland*,” *Committee Report*, No. 39.

<sup>36</sup>George D. Brown, “Grant Litigation After Thiboutot: Some Observations,” Paper prepared for the Federal Bar Association’s Fourth Annual Conference on Grant Law, Washington, DC, February 20, 1981, p. 2.

<sup>37</sup>*Ibid*.

<sup>38</sup>See *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Quern v. Jordan*, 440 U.S. 332 (1979). In *Thiboutot*, no 11th Amendment question was present because the action was brought in state court and the decision of Maine’s Supreme Judicial Court that Maine must make retroactive payments to the Thiboutot’s was not contested by the state.

<sup>39</sup>Carlisle, “*Owen v. City of Independence*,” p. 307.

<sup>40</sup>Roy D. Bates, et al, *Amendments to the Civil Rights Act of 1871 and the Civil Rights Attorney’s Fees Awards Act of 1976: A Report to Congress By Municipal Attorneys Defending Section 1983 Cases*, Draft Publication, Washington, DC, National Institute of Municipal Law Officers, 1981, p. 20.

## The Judicial Development Of Section 1983: Selected Major Cases

1961	<b>Monroe v. Pape</b>	Expanded the scope of the phrase "under color of state [law]" and ruled that municipalities were not "persons."
1978	<b>Monell v. Department of Social Services</b>	Declared that municipalities may be characterized as "persons" for purposes of Section 1983 litigation.
1980	<b>Owen v. City of Independence</b>	Held that a municipality could not assert the "good faith" of its officials in order to avoid liability.
1980	<b>Maine v. Thiboutot</b>	Asserted that individuals may bring suit under Section 1983 for violations of federal <b>statutory</b> law as well as Constitutional law and upheld application of the <b>Civil Rights Attorney's Fees Award Act</b> to statutory Section 1983 claims.
1981	<b>Pennhurst State School and Hospital v. Halderman Middlesex County Sewerage Authority v. National Sea Clammers Association</b>	Suggested that when federal statutes provide their own exclusive remedies for violations, "they may suffice to demonstrate Congressional intent to preclude the remedy of suits under Section 1983."
1981	<b>Newport v. Fact Concerts, Inc.</b>	Held that municipalities are "immune from <b>punitive</b> damages under Section 1983."

restricting the ability of potential litigants to bring suit under the statute; by reappraising the meaning of "and laws;" and by placing some limits on the extent of liability and damages. In fact, the 1980-81 Supreme Court term resulted in a few limited steps in these directions.

**Restricting Access to the Courts.** In his dissent to the *Thiboutot* decision, Justice Powell suggested that a Section 1983 cause of action would not be available where the "governing statute provides an exclusive remedy for violations of the act."<sup>11</sup> In 1981, a different majority—this time including Powell—expressed some sympathy for this means of limiting third party statutory litigation via Section 1983. Hence, in *Pennhurst State School and Hospital v. Halderman*,<sup>12</sup> the Supreme Court, though remanding the issue to the Court of Appeals, hinted that the lower court might look favorably upon Powell's suggestion. The law in question, the **Developmentally Disabled Assistance and Bill of Rights Act**, does indeed provide an exclusive remedy—enjoining the federal government to terminate federal assistance. Under this law, then, third parties would, effectively, be precluded from seeking or receiving damages. Moreover, several weeks later in *Middlesex County Sewerage Authority v. National Sea Clammers Association*<sup>13</sup> the Court once again found that "[w]hen the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate Congressional intent to preclude the remedy of suits under Section 1983."<sup>14</sup>

**Reexamining "And Laws."** In his *Thiboutot* opinion, the Court grappled with the meaning of the phrase "and laws" and decided that since Congress had "attached no modifiers," it could not be assumed that Section 1983's "plain language" was

"limited to some subset of laws" such as those dealing with equal rights.<sup>15</sup> This interpretation, of course, has been widely challenged. And, indeed, some of the strongest criticism has come from the federal judiciary itself, finding encouragement in echoes of the past.

Thus, in 1939, Justice Harlan Stone sought to limit the application of Section 1983 to deprivations of personal liberty, as opposed to property rights questions.<sup>16</sup> In 1972, the Court rejected that limitation.<sup>17</sup> Recently, however, there has been some support for returning to the Stone definition as a method for restoring balance and meaning to Section 1983.

Judge Henry J. Friendly, Senior Judge of the U.S. Court of Appeals for the Second Circuit, has asserted that a return to the Stone doctrine would come "closer to capturing the spirit of the Civil Rights statute," which, as he notes, was originally drafted to protect the rights of Southern blacks.<sup>18</sup> Moreover, Judge Ruggero J. Aldisert of the U.S. Court of Appeals for the Third Circuit has alleged, with more than a little acrimony, that recent decisions of the Supreme Court have "made the federal court a nickel and dime court. A litigant now has a passport to federal court if he has a 5-dollar property claim and can find some state action."<sup>19</sup>

The Court, in fact, had the opportunity in the 1980-81 term to consider at least a small portion of the Section 1983 property claim issue, but chose not to address that particular question. At issue in *Par-*

<sup>11</sup> 448 U.S. 1 (1980).

<sup>12</sup> *Hague v. CIO*, 307 U.S. 496 (1939).

<sup>13</sup> *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

<sup>14</sup> Henry J. Friendly, *Federal Jurisdiction: A General View*, New York, NY, 1973, p. 91 as quoted in A. E. Dick Howard, *I'll See You In Court: The States and the Supreme Court*, Washington, DC, National Governors' Association Center for Policy Research, 1980, p. 29.

<sup>15</sup> Ruggero J. Aldisert, "Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity, and the Federal Case Load," 1973 *Law and Social Order* 557, n. 90 at 569 as quoted in *ibid.*

<sup>1</sup> Justice Powell dissenting in 448 U.S. 1 (1980).

<sup>2</sup> 49 LW 4363 (1981)

<sup>3</sup> Slip Opinion, Docket No. 70-1711 (June 25, 1981).

<sup>4</sup> *Ibid.*, p. 17.



ratt v. Taylor<sup>50</sup> was a Nebraska state prisoner's claim that the negligent loss by prison officials of his \$23 hobby kit violated his civil rights and therefore triggered a Section 1983 cause of action. State officials asked the Court to "bar 1983 claims based on simple negligence," to estop 1983 relief when a state remedy is available, and to declare "that certain property is so 'de minimis' in value that it is undeserving of the due process protection afforded by the civil rights statutes."<sup>51</sup>

The Court, with Justice Marshall dissenting only in part, ruled against the prisoner, holding that he had "not stated a claim for relief under 42 U.S.C. Section 1983," due, on the one hand, to his failure to prove that a deprivation of due process had occurred and, on the other hand, to his failure to seek initial remedy through the state tort claims procedure.<sup>52</sup> Thus, the Court saw no need to address the value of the property under contention.

**Limitations on Liability and Damages.** Finally, the Court can choose to reconsider the extent of municipal liability and damages awarded. And, while thus far it has not overturned or modified *Owen*, in its 1980-81 session it saw fit to hold the line.

Indeed, the Court's 6-3 decision in *Newport v. Fact Concerts, Inc.*,<sup>53</sup> must have evoked an enormous sigh of municipal relief. In that case, musical promoters Fact Concerts felt that their Section 1983 civil rights had been violated when city officials of Newport, RI, refused to allow a performance by rock group Blood, Sweat, and Tears on grounds that the group was likely to "attract a rowdy and undesirable audience to Newport."<sup>54</sup> The district court agreed with the promoters and awarded Fact Concerts \$72,000 in compensatory damages. Had it stopped at that award, the decision would have constituted little more than a business-as-usual approach to municipal liability cases. However, Fact Concerts also asked for and was granted punitive damages of \$200,000 against the city and an additional \$75,000 against city officials—a precedent which, according to some, would "impact on the states' balance sheets [in a way which] may be close to devastating."<sup>55</sup> Despite the city's failure to object to the punitive damages at the trial level, the Supreme Court decided to consider the issue, ruling, on June 26 of this year, that "[a] municipality is immune from punitive damages under Section 1983."<sup>56</sup> Although, ac-

ording to preliminary estimates, 169 local jurisdictions across the nation remain liable, under pending cases, for approximately \$4.2 billion in Section 1983 damages claims, the Court's decision offered considerable relief for 38 localities previously facing over \$1 billion in punitive damages.<sup>57</sup>

### Congressional Revision

To those who would question his judgment in *Thiboutot*, Justice Brennan responded:

Petitioners' arguments amount to the claim that had Congress been more careful, and had it fully thought out the relationships among the various sections, it might have acted differently. That argument, however, can best be addressed to Congress, which, it is important to note, has remained silent in the face of our many pronouncements of the scope of Section 1983.<sup>58</sup>

Indeed, it is to the direct heirs of the authors of Section 1983, that one, logically, would look for relief from its more onerous aspects. Two current companion bills, S.584 and S.585, sponsored by Sen. Orrin Hatch (UT), would seek to do just that by addressing the major issues in *Thiboutot* and *Owen*.

S.584 would qualify "and laws" to mean those laws "providing for equal rights of citizens or of all persons within the United States," thus, effectively overruling the *Thiboutot* decision. S.585, the anti-*Owen* companion bill, would bar actions against municipalities which have "acted in good faith with a reasonable belief that the actions of the political subdivision were not in violation of any rights, privileges, or immunities secured by the Constitution or by laws providing for equal rights of citizens or persons." Such attempts to Congressionally circumscribe Section 1983 have been supported by Supreme Court Judge Sandra Day O'Connor, commenting recently, "that Congressional action might be taken to limit the use of Section 1983."<sup>59</sup>

Additional measures have been proposed. For example, the National Institute of Municipal Law Officers (NIMLO) suggests that Congress could discourage "the impulse to file frivolous Section 1983 actions" by amending the *Civil Rights Attorneys' Fees Award Act of 1976* "to limit the discretionary award of fees to awards against the United States in enforcement of actions under Title VI of the *Civil Rights Act of 1964*."<sup>60</sup>

### State and Local Response

In the past, it has often been difficult for individual municipalities and states to muster the necessary resources and information with which to defend

<sup>50</sup>Slip Opinion, Docket No. 70-1734 (May 18, 1981).

<sup>51</sup>"Arguments Before the Court," *The United States Law Week* (March 24, 1981), 49 LW 3697.

<sup>52</sup>No. 79-1734. *op. cit.*

<sup>53</sup>Slip Opinion, Docket No. 80-396 (June 26, 1981).

<sup>54</sup>*Ibid.*, p. 2.

<sup>55</sup>Brief Amicus Curiae of the States of Washington, Alabama, Alaska, Connecticut, Hawaii, Indiana, Minnesota, Montana, North Carolina, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, West Virginia, and Wyoming, and National League of Cities and National Association of Counties in Support of Petitioners, City of Newport, et al, in the Supreme Court of the United States, October Term, 1980, *The City of Newport, et al v. Facts Concerts, Inc., et al* 80-396, p. 2.

<sup>56</sup>No. 80-396. *op. cit.*, p. 11.

<sup>57</sup>NIMLO, Brief Amicus Curiae, *op. cit.*, pp. 21-23.

<sup>58</sup>448 U.S. 1 (1980).

<sup>59</sup>Judge O'Connor quoted in Neal R. Peirce, "A Voice for the States: O'Connor May Check High Court's Federal Bias," *Nation's Cities Weekly*, 4, August 10, 1981, p. 7.

<sup>60</sup>Bates, et al, *Amendments to the Civil Rights Act of 1971*, p. 22. Title VI prohibits discrimination on the grounds of race, color, or national origin in any program or activity receiving federal financial assistance.

“ . . . the recent history of Section 1983 brings into conflict two cherished American values: a strong federalism and the constant extension of rights.”

themselves adequately against damage claims. Thus, a final means for restoring balance to Section 1983 litigation, as well as other legal action both initiated by and against states and localities, may rest in the creation of pooled defense funds and/or legal talent, such as the establishment of a joint state-local legal defense organization of the type recently recommended by ACIR.<sup>61</sup>

Other groups and individuals have advocated similar defense strategies. For instance, NIMLO has proposed the creation of a National Municipal Legal Defense Fund. The NIMLO fund would “direct litigation activities to cases of obvious nationwide importance, aid all fund members with information,” and carry on a variety of additional activities such as assisting members in strike management.<sup>62</sup> Speaking to the National Governors’ Association (NGA), Professor A. E. Dick Howard of the University of Virginia has recommended that the states create a legal advocacy committee following the lines of the NIMLO model.<sup>63</sup> Still others favor joint state-local endeavors. For example, Washington lawyer Stewart A. Baker, arguing that “of all the institutional litigants appearing regularly before the Supreme Court, state and local governments consistently present the weakest legal defenses,” urges the creation of a “Federalism Legal Defense and Education Fund” which would develop the type of skills and expertise now available to the federal government through the Solicitor General’s Office.<sup>64</sup>

### Conclusion

Unlike William Ernest Henley’s unsung hero in “Invictus,” state and local officials are not masters of their fate. They do not know what clutch of circumstances will bring them before the courts in a 42 U.S.C. 1983 lawsuit as the Supreme Court wrestles over the meaning and application of the rights, privileges, and immunities secured by the Constitution and other laws of the United States. If past history is any guide, there will evolve newly defined rights for individuals with a commensurate

loss of traditional prerogatives and immunities for state and local government.<sup>65</sup>

At little expected cost, the Thiboutot holding offers the promise that all state and local officials will be both held accountable for past deprivations and deterred from committing future errors. These ends will best be served if Thiboutot plaintiffs are able to recover damages. Only then will effective compensations and deterrence take place.<sup>66</sup>

As the two quotations noted above make clear, the recent history of Section 1983 brings into conflict two cherished American values: a strong federalism and the constant extension of rights. Indeed, as one commentator has noted, “the relationship between the themes of federalism and individual rights is one that runs deep in American intellectual and social history.”<sup>67</sup> While this article has focused primarily on the dangers inherent in the increasingly broad application of Section 1983 for independent state and local decisionmaking, it would be an equally dangerous business to seriously undermine individual rights in the name of state and local autonomy. An imbalance in favor of “states’ rights,” as all too much of our history has shown us, can undermine not only the equal rights and privileges of which we are justifiably proud, but the validity of federal principles as well. Thus, any change in the scope of Section 1983—whether judicial or Congressional—must be handled with the type of kid glove approach generally reserved to Constitutional questions. Resolving whatever problems currently exist in the application of Section 1983 requires a delicate policy balance rather than a drastic swing of the pendulum.

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<sup>61</sup>Advisory Commission on Intergovernmental Relations, *The Federal Role in The Federal System: The Dynamics of Growth*, Vol. X: *An Agenda for American Federalism: Restoring Confidence and Competence*, A-86, Washington, DC, U.S. Government Printing Office, 1981, p. 144.

<sup>62</sup>Wilson, et al., *op. cit.*, pp. 32-34.

<sup>63</sup>Howard, *op. cit.*, pp. 47-52.

<sup>64</sup>Stewart A. Baker, “Why the States Need Better Lawyers,” *The Washington Post*, March 1, 1981, p. C2.

<sup>65</sup>Walter S. Groszyk, Jr., and Thomas J. Madden, “Managing Without Immunity: The Challenge for State and Local Government Officials in the 1980s,” *Public Administration Review*, 41, March/April 1981, p. 274.

<sup>66</sup>“The Supreme Court, 1979 Term,” 94 *Harvard Law Review* 75, 230, November 1980.

<sup>67</sup>“Developments in the Law: Section 1983,” *Harvard Law Review* 90 (1977) 1133, 1135 cited in Neil D. McFeeley, “The Supreme Court and the Federal System,” *Publius*, Fall 1978, p. 7.

# A Fiscal Note

## Taxes and Inflation Take Their Toll

Periodically, the ACIR staff computes the combined federal, state, and local tax burden for families at various income levels. In making this calculation, the staff includes only the major direct taxes—the federal income and social security tax and the state and local income, general sales, and residential property levies.

Excluded from this analysis are the miscellaneous excises and the estimated family share of the “hidden taxes”—those taxes initially paid by business firms and then passed on to the consumers in the form of higher prices for goods and services.

Despite these exclusions, the major direct taxes dominate the American tax landscape accounting for approximately 76% of all taxes in 1980.

This latest update reveals the following findings:

□ The average family paid in 1980 to the federal social security tax collector about as much as it did for all the major direct state and local taxes combined. In fact, with the 1981 social security tax hike, it is estimated that the average family now pays slightly more in social security taxes (6.7% of total family income) than for the major state-local taxes (6.5% of income).

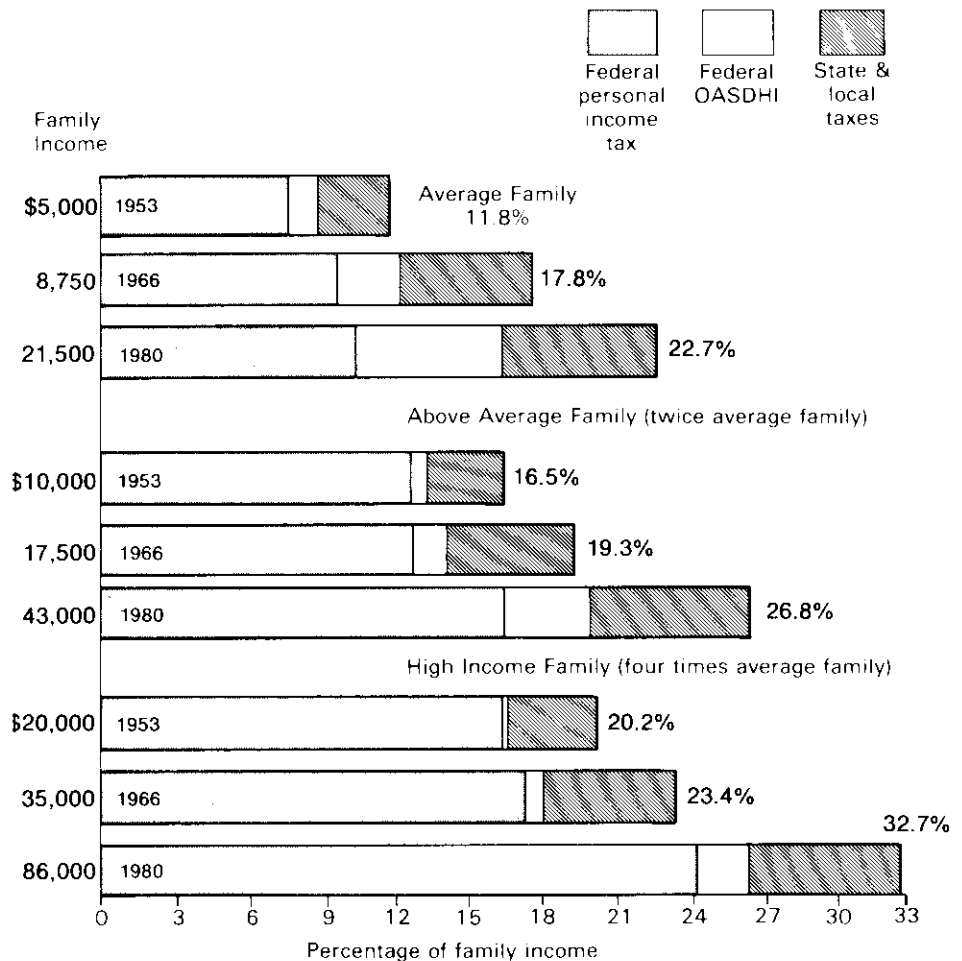
□ The remarkable increase in the income of the average family—it rose from \$5,000 in 1953 to \$21,500 in 1980—is far more apparent than real. While

there was a nominal increase of \$16,500 during this 27-year period, inflation and higher taxes consumed most of this increase. The eroding effect of inflation was especially dramatic during the last ten years.

□ At first glance it would appear that the average family was

hardest hit by steadily rising taxes—its direct tax burden rose almost 100% between 1953-80. In contrast the family with four times the income of the average family experienced a 60% increase in its direct tax bill. However, if the income after tax test is used, a sharply different picture of

**A Comparison of Direct Tax Burdens Borne by Average and Upper Income Families, Calendar Years 1953, 1966, and 1980\***  
(The Steady Growth in the Federal-State-Local Tax Take)



\*These estimates assume a family of four and include only: federal personal income taxes, personal contributions for federal OASDHI, state and local personal income and general sales taxes, and local residential property taxes.

## A Comparison of Direct Tax Burdens Borne by Average and Upper Income Families, Calendar Years, 1953, 1966, 1977, and 1980

comparative tax burden emerges. While the after tax income of the average family declined from 88% to 77% that of the "rich" family fell from 80% to 67% during this same 27-year period.

These tax burden findings are a regular feature of ACIR's series entitled *Significant Features of Fiscal Federalism*. The 1981 edition features a state by state assessment of a variety of fiscal indices including:

- state and local revenue in aggregate and per capita;
- percent federal aid makes up of state and local revenues;
- what portion of state and local general revenues comes from the property tax, income tax, and sales taxes;
- state, local, and state and local expenditures per capita, and a breakdown of expenditures for education, highways, public welfare, and hospitals; and
- state-local general expenditures from all sources, including a breakdown of the percentage financed by federal, state, and local aid for functions such as education, welfare, health, and hospitals.

**John Shannon  
Frank Tippet**

Calendar Year	Selected Direct Taxes as a Percent of Family Income				Exhibit
	Federal Personal Income Tax	Social Security Tax (OASDHI)	Major State-Local Taxes	Total Selected Taxes	
<b>Average Family<sup>1</sup> (\$21,500 in 1980)</b>					
1953	7.6	1.1	3.1	11.8	88.2
1966	9.5	3.2	5.1	17.8	82.2
1977	9.6	5.9	7.0	22.5	77.5
1980	10.1	6.1	6.5	22.7	77.3
<b>Twice the Average Family<sup>2</sup> (\$43,000 in 1980)</b>					
1953	12.8	0.5	3.2	16.5	83.5
1966	12.7	1.6	5.0	19.3	80.7
1977	14.8	3.0	7.0	24.8	75.2
1980	16.6	3.7	6.5	26.8	73.2
<b>Four Times the Average Family<sup>4</sup> (\$86,000 in 1980)</b>					
1953	16.6	0.3	3.3	20.2	79.8
1966	17.3	0.8	5.3	23.4	76.6
1977	22.6	1.5	7.3	31.4	68.6
1980	24.3	1.8	6.6	32.7	67.3

<sup>1</sup>Personal contributions.

<sup>2</sup>Estimates for average family (married couple with two dependents) earning \$5,000 in 1953, \$8,750 in 1966, \$16,000 in 1977, and \$21,500 in 1980 assuming all income from wages and salaries and earned by one spouse.

<sup>3</sup>Estimates for twice the average family. Family earning \$10,000 in 1953, \$17,500 in 1966, \$32,000 in 1977, and \$43,000 in 1980 and assumes that earnings include \$165 (interest on state and local debt, and excludable dividends) in 1980, \$125 in 1977, \$50 in 1966, and \$25 in 1953; also assumes the inclusion of net long-term capital gains of \$1,600 in 1980, \$1,200 in 1977, \$625 in 1966, and \$350 in 1953.

<sup>4</sup>Estimates for four times the average family. Family earning \$20,000 in 1953, \$35,000 in 1966, \$64,000 in 1977, and \$86,000 in 1980 and assumes that earnings include \$1,515 (interest on state and local debt, and excludable dividends) in 1980, \$1,100 in 1977, \$525 in 1966, and \$265 in 1953; also assumes the inclusion of net long-term capitals gains of \$9,200 in 1980, \$7,300 in 1977, \$3,360 in 1966, and \$1,730 in 1953.

**Note:** In computing federal personal income tax liabilities, deductions were estimated to be 14% of family income for the \$5,000 and \$8,750 families, and 12% of income for the \$10,000 family. Estimated itemized deductions were assumed for the remaining families. Interest on state and local debt, dividends, and nontaxable capital gains (estimated, based on I.R.S. *Statistics of Income*) were excluded from family income for these computations.

Residential property tax estimates assume average housing values of approximately 1.8 times family income for the average family in both 1953 (\$5,000) and 1966 (\$8,750), 2.2 times in 1977 (\$16,000), and 2.4 times in 1980 (\$21,500). The ratios for the remaining family income classes are: 1.5 for \$10,000 income (1953) and \$17,500 income (1966); 1.8 for \$32,000 income (1977), and 1.9 for \$43,000 income (1980); 1.4 for \$20,000 income (1953) and \$35,000 income (1966); and 1.5 for \$64,000 income (1977); and \$86,000 income in 1980, with average effective property tax rates of 1.35% in 1980, 1.75% in 1977, 1.70% in 1966, and 1.20% in 1953. Based on U.S. Bureau of the Census, Governments Division, various reports and *U.S. Census of Housing*; Commerce Clearing House, *State Tax Reporter*; Internal Revenue Service, *Statistics of Income*, *Individual Income Tax Returns*; and ACIR staff estimates.

In computing state income tax liabilities, the optional standard deduction was used for the \$5,000, \$8,750, and \$10,000 income families, and estimated itemized deductions for the remaining families.

Estimated state-local general sales tax liabilities are based on the amounts allowed by the Internal Revenue Service as deductions in computing federal personal income taxes. The percentages shown for state local personal income and general sales taxes are weighted averages (population) for all states including those without a sales or income tax.

**Source:** ACIR staff computations.

## ACIR Considers New Research, Wants More Work on Turnbacks

In its 74th meeting October 5, in Washington, the Advisory Commission on Intergovernmental Relations discussed research priorities for the coming months and directed the staff to examine various possibilities for turnbacks of tax and revenues including:

- a study of resource turnbacks to the states in combination with an AFDC (Aid to Families with Dependent Children) and Medicaid responsibility turnback; and
- consideration of minimum benefit levels and eligibility standards and a state-by-state "safety net" analysis, features which would probably be part of any Congressional deliberation on turnbacks involving welfare programs.

The Commission also decided to pursue a study on federal regulations impacting states and localities and to continue research on state-imposed severance taxes on mineral resources. The Commission tabled a motion to reaffirm support for General Revenue Sharing (GRS) and oppose cuts in FY 1982, with some members citing the need for cutbacks to get the economy "back in shape." However, a number of members voiced their firm commitment to ACIR's standing recommendation in support of GRS.

The Commission deferred consideration of recommendations pursuant to a study on a representative tax system as a measure of state's tax capacity and the use of such a system in federal aid formulas. The Commission will consider the report, "The Representative Tax System: An Alternative Measure of Fiscal Capacity," at its next meeting.

Since the meeting was the first for eight members, Chairman Watt felt it was important to "go back to basics" and thus the morning was spent in discussing the direction federalism and the Commission appeared to be headed and where both should go.

Some members, including Robert Hawkins of Sacramento, CA, urged

the Commission to return to the first principles of federalism, to re-think what these first principles are, including what the conflicts are and how the principles are relevant today.

Vermont Gov. Richard Snelling represented a more pragmatic view, making the case that the Commission build on the "vast resources of data we have already accumulated." He noted two areas that are crying out for immediate action: a more refined sorting out of the federal, state, and local responsibilities and a study of the taxing capacity of states and substate governments.

Other research candidates noted by Commission members were impact of excessive regulations, public-private sector cooperation, impact of the courts on intergovernmental relations, and clearer delineation of principles defining the role of the federal government—both in philosophical and practical terms.

Sen. William Roth (DE) and Rep. Clarence Brown (OH) briefed the Commission on recent Congressional legislation on grant reform and establishment of a commission "on more effective government" similar to the Hoover Commissions of the 1950s. Two Senate bills (S. 807 and S. 10) have been reported out of the Governmental Affairs Committee and, according to Sen. Roth, will pass the full Senate this fall. Three similar House bills have been introduced: HR 4643, sponsored by Rep. Brown; HR 4465, introduced by Rep. Harold Daub (NE); and HR 3680 sponsored by Rep. Cecil Heftel (HI). A related measure, HR 4133, introduced by Rep. John Erlenborn (IL), deals with only one aspect of grant reform, improving audit provisions.

Following the meeting, a reception and dinner was held for former ACIR chairman Abraham Beame who resigned earlier this year.

## President Reagan Names Six New Members to ACIR

Six new members—three mayors and a governor, state legislator, and county official—were named to ACIR in September.

Newly named were:

- Governor Fob James of Alabama, replacing Governor Richard Riley of South Carolina;
- Kansas Senate President Ross Doyen, replacing California Speaker Pro Tem Leo McCarthy;
- Mayor Margaret Hance of Phoenix, Arizona, replacing Richard Carver of Peoria, Illinois;
- Mayor James Inhofe of Tulsa, Oklahoma, replacing Tom Moody of Columbus, Ohio;
- Mayor Joseph P. Riley, Jr., of Charleston, South Carolina, replacing John Rousakis of Savannah, Georgia; and
- Peter Schabarum, Chairman Pro Tem, Los Angeles County Board of Supervisors, replacing Doris Dealaman, Somerset County, New Jersey

The new members were appointed by President Reagan based on nominations submitted by the National Governor's Association, National Conference of State Legislatures, National League of Cities, U.S. Conference of Mayors and The National Association of Counties. ACIR members serve two-year terms and may be reappointed.

## Payments in Lieu, Regulation Are Topics of Recent ACIR Testimony

Federal payments in lieu of taxes on federal real property and intergovernmental regulation in environmental legislation were topics of recent ACIR testimony before Congress.

During October, ACIR representatives testified before House and Senate subcommittees on federal payments in lieu of taxes. Wayne F. Anderson, ACIR Executive Director, testified before the House Intergovernmental Relations and Human Resources Subcommittee on October 14; Dallas County Commissioner Roy Orr will present a similar statement before the Senate Intergovernmental Relations Subcommittee on November 4.

The testimony highlighted recent ACIR research and recommendations and cited the Commission's estimate that states and localities lose some \$3.65 billion in real prop-



erty taxes thanks to the tax exemption on federal holdings such as office buildings, post offices, and military bases. And, while the Congress has responded to some of the local governments affected by this tax exempt property with 57 different programs providing direct payments to compensate for federally owned tax exempt real property, its incremental *ad hoc* actions do not add up to anything approaching a comprehensive and consistent solution.

Anderson urged the federal government to replace these *ad hoc* efforts with a comprehensive payments in lieu of taxes program, to be administered under established state/local procedures and kept separate from all other federal programs which provide general and categorical assistance.

In testimony before the Senate Intergovernmental Relations Subcommittee on July 22, ACIR Assist. Dir. David Walker had another suggestion for improving intergovernmental relationships, through sorting out and improving ways Washington mandates state and local activities.

Drawing from recent ACIR work, Walker described the evolution of the federal role in environmental protection, which he said went from "friendly persuasion to partial pre-emption," a technique where the federal government in effect forces the state to administer a national policy by asserting that if the states do not enforce certain standards, then the federal government will.

He urged the subcommittee to begin to carefully examine federal mandates on state and local governments, "sorting out the proper from the improper, the efficient from the inefficient in this large and uncertain area of intergovernmental relations."

#### **ACIR Independence Is Highlighted in Senate Oversight Hearings**

ACIR Chairman James Watt, testifying in ACIR oversight hearings before the Senate Intergovernmental Relations Subcommittee Oct. 21, stressed the importance of ACIR's

independence, saying the Commission was "wisely structured by the Congress to be an independent, bipartisan group that could not be used by any President if he wanted to."

"Had we designed or desired to capture ACIR for partisan purposes or to make it a part of the Reagan Administration, we would have been unsuccessful," he said.

The question of independence has arisen, he said, because of his dual role as cabinet secretary and chairman of ACIR. Yet, he pointed out that many persons "wear two hats" and that while he expects to face some conflicts between the two roles, similar conflicts confront other Commission members in their dual roles as elected officials and ACIR members.

Chairman Watt noted that his appointment was conceived to enhance the status and effectiveness of ACIR. The Reagan transition team studying ACIR concluded that the Commission was an important vehicle for improving intergovernmental relations, he said, and recommended that the President "could best ensure the Commission's success by appointing a chairman of national stature and by insuring that the three federal executive branch members play an active role in ACIR deliberations. President Reagan has directly followed these recommendations."

He noted that the Commission's independence was probably one reason the President was motivated to create the Presidential Federal Advisory Committee and the Coordinating Task Force on Federalism, since members of those committees are "more in tune with the President's philosophy on many issues and will respond directly to him, whereas ACIR responds to the Congress and not to the President."

Chairman Watt noted that in choosing Gov. Lamar Alexander of Tennessee as vice chair, the intent was to share programmatic and staffing decisions that are in the purview of the chairman on a co-chairman-type basis, "simply because if you believe in the federal

system, the national and state governments ought to work together," he said.

Other testimony at the Oct. 21 hearing focused on possible expansion of ACIR membership to include towns and townships and school board representation.

Barton Russell, executive director of the National Association of Towns and Townships, called representation from the nation's small local governments, ACIR's "missing link."

"We would like to stress the need for people from all sizes of communities to be fairly represented in the national policymaking process," Russell said.

He urged adoption of HR 2106 which would amend ACIR's enabling legislation to include three town officials.

Speaking for the inclusion of school board members, Robert Hadlerlein, president of the National School Boards Association, cited similar reasons, saying that "school district government is the only major universal unit of government whose voice is conspicuously absent from the Commission. Inasmuch as the school districts of America are an integral part of the federal government system, we believe that the time is right to amend the law and include school district government representatives on ACIR."

ACIR has traditionally opposed expanding its membership to represent either school boards or townships. ACIR Executive Director Wayne F. Anderson told the subcommittee that the argument against towns and townships was that they are not universal and are not general governments with substantial functions in most states. The argument against including school board membership is that school boards are not general governments and admission of any single function, even the largest state-local one, would open the door to membership for other single purpose units and other types of governmental specialists.

(Continued from page 2.)

There are proposals on this issue drafted by some of the public interest groups and by members of Congress that deserve our attention.

A companion article in this issue of **Intergovernmental Perspective** by Boston College Law Professor George D. Brown also emphasizes the important policy role played today by the judiciary. This article describes the growth of federal grant litigation: its volume, causes, and possible impact.

The explosion of law and litigation in all areas has been staggering. It is estimated that the total cost of legal services equals 2% of America's gross national product, more than the entire steel industry.<sup>8</sup> As Prof. Brown documents, federal grant litigation has been an expanding portion of this growth industry.

Federal grants come with "strings" attached. Sometimes through explicit Congressional intent set forth in statutes, these strings extend beyond merely telling state and local governments how the money is to be spent. Often federal grants are used to achieve regulatory purposes and to force institutional changes on recipient state and local governments. ACIR has accumulated a significant body of research on these Congressional mandates. However, Prof. Brown's article opens questions of equally troubling mandates consequent to federal grants: those created by the courts.

By addressing whether grantees can "overturn grant con-

ditions, who can sue to enforce conditions, and what remedies are available," the judiciary has assumed a substantive role in the operation of the intergovernmental aid system. Prof. Brown both traces the key causes that mark this assumption by the courts, and sets forth a range of proposals to correct distortions created by the activist judiciary—distortions that damage programmatic and federalism goals.

While ACIR research has documented the federalism imbalance created by the growth and pervasiveness of federal grants-in-aid, that research has focused on the actions of Congress and the federal executive branch. It is important to recognize the impact of the judiciary on federalism. These two articles open the subject.

State and local officials must cope with the courts in a growing number of areas. The ac-

tivist courts have spawned new individual rights and more governmental responsibilities. These judicial dictates force policy and implementation directions on elected officials and chill certain local initiatives.

There is a need to balance a strong federal system and individual rights. The courts, just as the legislature and the President, should weigh the impact of their decisions on the intergovernmental system. The importance of federalism should be recognized in the courtrooms as it has become recognized in ballot boxes. For the genius of American federalism is itself among our foremost protection of individual rights.



Richard S. Williamson  
Assistant to the President for  
Intergovernmental Affairs

#### ACIR Updates Count of Federal Categorical Grants

According to the latest ACIR count of categorical federal aid programs available to state and local governments, the total reached 534 as of January 1, 1981. This compares to 492 categorical programs counted in 1978 and 442 in 1975. In addition, four block grant programs were funded as of the beginning of 1981: Comprehensive Health, Comprehensive Training and Employ-

ment Act, Community Development Block Grant, and Social Services. Nine block grants were created or altered by the **Omnibus Budget Reconciliation Act of 1981** (including absorption or modification of the existing CDBG, Comprehensive Health, and Social Service blocks) and, by the Office of Management and Budget count, these replace 73 categorical programs.

ACIR's breakdown of categoricals by type for the three points of time is:

	1975		1978		1981	
	No.	%	No.	%	No.	%
Formula-based						
Allotted formula	96	21.7	106	21.5	111	20.8
Project grants subject to formula distribution	35	7.9	47	9.6	42	7.9
Open-end reimbursement	15	3.4	17	3.5	20	3.8
Total formula-based	(146)	(33.0)	(170)	(34.6)	(173)	(32.4)
Project	296	67.0	322	65.4	361	67.6
Total	442	100	492	100	534	100

<sup>8</sup>Howard, "The Litigation Society?," *The Wilson Quarterly*, 98, 1981.

# And Briefly: BOOKS

The following publications are recent releases of the Advisory Commission on Intergovernmental Relations, Washington, DC 20575. Single copies of these reports are free.

**The Condition of Contemporary Federalism: Conflicting Theories and Collapsing Constraints (A-78).**

This volume, part of the Commission's study, *The Federal Role in the Federal System*, examines the historical, Constitutional, fiscal, political, and other forces that have shaped our federal system for 200 years and which continue to exert influence at the present time.

It concludes that Constitutional limits, and political, structural, and fiscal constraints which were designed to limit federal growth have had limited success. Since 1937, Constitutional limits on the size and scope of the federal government have been greatly diminished. Political constraints have yielded in the face of public opinion which now expects the federal government to play an active role in a wide variety of areas. Fiscal constraints have limited the growth of state and local governments while the federal government with its strong personal income tax system continued to grow at a greater rate.

Although the system of checks and balances was designed to control the growth of the federal government, this report finds that changes in public opinion, judicial decisions and the strong fiscal position of the federal government have all contributed to an increased role for the federal government.

**The Evolution of a Problematic Partnership: The Feds and Higher Ed (A-82).**

Until World War II, the federal role in higher education was relatively small, consisting mainly of land grants to states for higher education and limited federal assistance. Since that time, however, the federal role has grown larger and broader, with federal aid now coming in a variety of programs.

This report discusses how the federal government became more in-

involved in higher education through land grant colleges, the GI education program, research grants to universities, and a growing federal regulatory role. Constitutional, political, and fiscal constraints on the federal role in higher education have served to structure and define it rather than prevent involvement.

**Payments in Lieu of Taxes on Federal Real Property (A-90).**

This report contains major conclusions and Commission recommendations relating to whether the federal government's exemption from state and local real property taxes should be modified or eliminated. ACIR estimates that states and localities lose some \$3.5 billion in property taxes due to this exemption on property such as office buildings, post offices, and military bases.

The Commission recommended that the Congress authorize a tax equivalency system of federal payments in lieu of taxes on federal real property to replace rather than supplement the existing patchwork of property payments.

A second volume of technical appendices is forthcoming.

**Fiscal Management of Federal Pass-Through Grants: The Need for More Uniform Requirements and Procedures (A-102).**

This study is a result of concerns raised by the Federal Assistance Monitoring Panel sponsored by ACIR in 1977. The panel wanted to determine what administrative requirements existed for federal grants which "pass through" the states before reaching the ultimate recipient and which of those requirements were unnecessary and burdensome. This study focuses on requirements imposed by OMB Circular A-102 from the national level through the states to the ultimate recipient.

The report finds that administration of pass-through grants has been uneven because of confusion about the amount of authority Circular A-102 carries and the extent to which specific provisions are supposed to pass through. The study

also found that partial uniformity does exist in the management of federal pass-through grants but there also should exist clear lines of authority and policies that indicate the accountability of federal, state, and local administrators. In light of these findings, the Commission made a number of recommendations to improve the circular.

**The Future of Federalism in the 1980s: Report and Papers from the Conference on the Future of Federalism (M-126).**

This report contains the papers commissioned for the Conference on the Future of Federalism convened by ACIR on July 25-26, 1980. Papers by ACIR staff examine the problems of forecasting the future and review the fundamental changes in American federalism over the past 20 years. A series of background papers commissioned for the conference provide reviews of political, judicial, and fiscal federalism developments and indicate major alternatives for the future. Participants in the conference included federal, state, and local government officials, representatives from public interest groups, and scholars in the field of federalism. Their discussions and conclusions are summarized in this report.

**Studies in Comparative Federalism: Canada (M-127).**

This report, one of three commissioned by ACIR as required by the *State and Local Fiscal Assistance Amendments of 1976*, examines how the Canadian federal system has dealt with current issues of fiscal federalism. Presently Canada is undergoing a period of great stress caused by cultural pressures and the impact of valuable mineral resources on national-provincial relations. The question of federalism in Canada has led to conflict between national and provincial governments as well as conflict between various regions. This study is mainly concerned with fiscal federalism in Canada, including fiscal policy development, revenues and expenditures, and attempts at equalization and economic stabilization.

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is necessary in the transaction of the  
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this periodical has been approved by  
the Director of the Office of Man-  
agement and Budget through March  
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