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## Commentary: The Emerging Law of Federal Assistance

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# COMMENTARY

## THE EMERGING LAW OF FEDERAL ASSISTANCE

RICHARD B. CAPPALLI\*

Professor Catz's wonderfully detailed demonstration of grantee due process rights could not be more timely. The budget holocaust of 1981<sup>1</sup> undoubtedly will produce funding cutoffs as federal administrators struggle to meet their severe spending limits, as did their predecessors during the Nixon economic retrenchment.<sup>2</sup> While the Impoundment Control Act<sup>3</sup> has created a process for congressional-executive collaboration on wholesale funding reductions, called "rescissions" and "deferrals," the Act does not address the question of actions on individual grants and does contain its own ambiguities.<sup>4</sup> Cutoffs will result not only from efforts to comply with statutory mandates, but also from self-initiated budget actions of agency heads eager to please the chief by trimming program fat.

We are pleased that Catz's legal exploration confirms many of the thoughts we set forth in *Rights and Remedies Under Federal Grants*.<sup>5</sup> The core of the idea is simple enough: the Supreme Court offers procedural due process to statutory entitlements, and the grant-in-aid qualifies as such an entitlement.<sup>6</sup> The challenge is the idea's elaboration in a

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1. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357.

2. See generally Mills & Munselle, *Unimpoundment: Politics and the Courts in the Release of Impounded Funds*, 24 EMORY L.J. 313 (1975); Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 YALE L.J. 1636 (1973).

3. Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. §§ 1400-1407 (1976). Title X of this Act is known as the "Impoundment Control Act." See *id.* § 1301 note.

4. A major ambiguity is whether the President may postpone expenditures when the program legislation mandates spending but sets no time limits. Compare 54 Comp. Gen. 453 (1974) with *Maine v. Goldschmidt*, 494 F. Supp. 93 (D. Me. 1980).

5. R. CAPPALLI, *RIGHTS AND REMEDIES UNDER FEDERAL GRANTS* 180-243, 331-58 (1979).

6. Compare, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (due process attaches to "legitimate claim of entitlement") with *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 136-37 (1947) (highway allocations are entitlements).

field as richly complex as federal assistance. Our earlier writing and the Catz effort should together offer a firm analytical foundation for courts and agencies interested in creating satisfactory hearing procedures for grantees facing adverse fiscal action.

This commentary offers some additional thoughts and information about the main article. While these are reportorial and disconnected, they suggest important dimensions of the problem. Following these addenda, we attempt to place the due process issue in the broader framework we refer to as the emerging law of federal assistance.<sup>7</sup> The right to due process is but one element of a broader trend toward the formalization and legalization of the assistance system. Seeing the Catz theories in this broader mosaic confirms their viability and significance.

## I.

The setting of the main article is the dramatic, sympathy-provoking termination of the financing of a struggling community organization. The article's scenario excludes the funding termination or audit disallowance of a state or local government administering "entitlement" grants. As to volume, this latter situation is by far the most important. In the years following the Great Society program explosion, the formula grant to state and local governments maintained its position as the dominant form of federal aid,<sup>8</sup> and, outside the research and development field, the discretionary project grant slipped in importance.<sup>9</sup> In terms of quantitative value, therefore, the most relevant

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7. Also known as the "slumbering giant." *See* Southern Mut. Help Ass'n v. Califano, 574 F.2d 518, 522 (D.C. Cir. 1977). The metaphor has attracted a large and growing number of admirers. *See, e.g.*, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, AWAKENING THE SLUMBERING GIANT: INTERGOVERNMENTAL RELATIONS AND FEDERAL GRANT LAW (1980); R. CAPPALLI, *supra* note 5, at 1; Catz, *Due Process and Federal Grant Termination: Challenging Agency Discretion Through a Reasons Requirement*, 59 WASH. U.L.Q. 1067, 1070 (1982).

8. *Compare* 1 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FISCAL BALANCE IN THE AMERICAN FEDERAL SYSTEM 151-53, 294 table A-22 (1967) (280 project grant programs distributing \$2.8 billion; 99 formula programs distributing \$9.8 billion, 78% of total) *with* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CATEGORICAL GRANTS: THEIR ROLE AND DESIGN 44 table I-17, 92 table IV-1 (1978) (296 project grant programs distributing \$11.6 billion; 157 formula programs distributing \$37.6 billion, 76% of the total).

9. The heyday of the project grant was the latter part of the 1960s in programs such as model cities, urban renewal, community action, and vocational training. Many of these were absorbed into formula entitlements such as the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301-5317 (1976), and the Comprehensive Employment and Training Act of 1973, 29 U.S.C. §§ 801-992 (1976).

question is whether process is owed state and local governments when federal administrators attempt to strip them of entitlements in whole or part. While this question is preliminarily posed in the same way as for a nonprofit organization—is the grant a property which cannot be deprived without due process?—the additional issue arises as to whether a government agency is a “person” to whom fifth amendment protections extend. In its 1966 decision *South Carolina v. Katzenbach*, the Supreme Court thought not.<sup>10</sup> Fortunately, the Court’s analysis in that case was perfunctory and superficial, making, we think, the decision surmountable.<sup>11</sup> Apart from precedent, one confronts the argument that states and cities have little need for due process because they can use their political influences to protect themselves in Washington.<sup>12</sup> We demonstrate the analytical falsity of this reasoning in our earlier writing,<sup>13</sup> and congressional action in 1981 was a strong practical demonstration of its falsity in practice.<sup>14</sup>

Two further distinctions between the state (or other entitlement recipient) suffering a formula grant cutoff and the nonprofit organization suffering a project grant cutoff deserve mention. First, in the typical case the former gets a statutory right to pretermination notice and hearing,<sup>15</sup> while the latter gets nothing.<sup>16</sup> This makes the constitutional due process protection less significant but not insignificant, because many statutes do not protect formula grantees with the boiler plate hearing clause.<sup>17</sup> Also, the constitutional right acts as a backup in cases in which there is a statutory due process right. When the federal administrator has begrudgingly implemented the statutory right with procedures perceived by an entitlement recipient to be inadequate, the Constitution is available to test the reasonableness of the agency proce-

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10. *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966).

11. See R. CAPPALLI, *supra* note 5, at 225-43.

12. See, e.g., F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 1049 (1970); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

13. R. CAPPALLI, *supra* note 5, at 234-36. Accord, Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 857-68 (1979).

14. The states got their block grants, see note 20 *infra* and accompanying text, but only in hybrid form. Multiple federal “strings” continued to be attached resulting in a severe financial cost and sharp reductions in total appropriations. See Stanfield, *The Dry End of the Deal*, 13 NAT’L J. 1554 (1981).

15. See R. CAPPALLI, *supra* note 5, at 245-46 n.2; note 22 *infra*.

16. See R. CAPPALLI, *supra* note 5, at 272-79.

17. See *id.* at 247 n.3. See also note 21 *infra*.

ture.<sup>18</sup> The second distinction is that nonprofit organizations do not have the taxing power. The state agency can preserve its program through new assessments, but the nonprofit organization has no alternative but to disband. The economic realities of state and local finances, however, make the distinction purely theoretical in many cases.

In 1981, Congress shifted 7.5 billion dollars out of the categorical grant system (both formula and project)<sup>19</sup> and into several new "block" grants.<sup>20</sup> What effects will this have on grantee rights to notice and an opportunity to be heard? With only one exception,<sup>21</sup> a statutory right to prior notice and opportunity to be heard at the primary level is given to the states when the federal secretary is contemplating withholding part or all of a block grant.<sup>22</sup> This simply follows the statutory pattern

18. See, e.g., *NAACP v. Wilmington Medical Center, Inc.*, 453 F. Supp. 330 (D. Del. 1978) (due process claim rejected), *rev'd on other grounds*, 599 F.2d 1247 (3d Cir. 1979).

19. Stanfield, *For the States, It's Time to Put Up or Shut Up on Federal Block Grants*, 13 NAT'L J. 1800 (1981).

20. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 551-558, 95 Stat. 463-69 (to be codified in 20 U.S.C. §§ 2844, 3801 & note, 3802-3807) (Education Consolidation and Improvement Act of 1981); *id.* §§ 561-587, 95 Stat. 469-80 (to be codified in 20 U.S.C. §§ 3811-3863) (consolidation of various education grant programs); *id.* §§ 2601-2611, 95 Stat. 893-902 (to be codified in 42 U.S.C. §§ 8601-8612, 8621 & note, 8622-8629) (Low-Income Home Energy Assistance Act of 1981); *id.* §§ 671-683, 95 Stat. 511-19 (to be codified in 42 U.S.C. §§ 9901 & note, 9902-9912) (Community Services Block Grant Act); Social Security Act of 1935, tit. V, as added by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2191-2192, 95 Stat. 818-26 (to be codified in 42 U.S.C. §§ 701-716) (Maternal and Child Health Services Block Grant Act); Public Health Service Act, tit. XIX, pt. A, as added by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 901, 95 Stat. 535-43 (to be codified in 42 U.S.C. §§ 300w to 300w-8) (Preventive Health and Health Services Block Grant); Public Health Service Act, tit. XIX, pt. B, as added by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 901, 95 Stat. 543-52 (to be codified in 42 U.S.C. §§ 300x to 300x-9) (Alcohol and Drug Abuse and Mental Health Services Block Grant); Public Health Service Act, tit. XIX, pt. C, as added by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 901, 95 Stat. 552-59 (to be codified in 42 U.S.C. §§ 300y to 300y-11) (Primary Care Block Grants). A ninth block grant was not new but reworked. Social Security Act of 1935, tit. XX as revised by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2351-2352, 95 Stat. 867-71 (to be codified in 42 U.S.C. §§ 1397-1397f) (Social Services Block Grant Act).

21. Most likely because of inadvertence, the hearing right afforded states in the original social services block grant was dropped in the 1981 revision. Compare Social Security Act of 1935, § 2003(e), 42 U.S.C. § 1397b(e) (1976) with Social Security Act of 1935, tit. XX, as revised by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2351-2352, 95 Stat. 867-71 (to be codified in 42 U.S.C. §§ 1397-1397f).

22. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 592, 95 Stat. 480-81 (to be codified in 20 U.S.C. § 3872); *id.* § 2608, 95 Stat. 901-02 (to be codified in 42 U.S.C. § 8627); *id.* § 679, 95 Stat. 51 (to be codified in 42 U.S.C. § 9908); Social Security Act of 1935, § 506(b), as added by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2192, 95 Stat. 824 (to

of the replaced and remaining formula entitlement programs.<sup>23</sup>

On the secondary level, at which funds flow through the state to political subdivisions and the private nonprofit sector, the block grant seems to strip subgrantees of federal procedural protection. The fifth amendment no longer applies because the United States' involvement after sending the state its block grant payments is minimal. If a fund cutoff occurs at the subgrant level, the deprivation is not the handiwork of the federal government. Federal statutory protection will be unavailable to subrecipients because the streamlined block grants are free from such mandates.<sup>24</sup> Federal administrative protection will be absent because, in catching the block grant spirit, agencies will not use their discretion to add management and procedural mandates.<sup>25</sup> Consequently, if the disputes circular of the Office of Management and Budget is ever finalized,<sup>26</sup> it will probably not extend to the block grants.

Nevertheless, the fourteenth amendment prevents deprivation by states without due process. What may happen is that states, prodded by the federal bureaucracy, will set up distribution systems parallel to those in the federal assistance system for parceling out their own block grants, and in this process create entitlements. The entire due process scenario, including Catz-like articles of lesser dimension, will become a road show in each of the states. While the blocks may have congested the federal assistance system somewhat, the price will be congestion and confusion at the state level.

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be codified in 42 U.S.C. § 706n); Public Health Service Act, § 1907, as added by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 901, 95 Stat. 541-42 (to be codified in 42 U.S.C. § 300w-6); Public Health Service Act, § 1917, as added by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 901, 95 Stat. 550-51 (to be codified in 42 U.S.C. § 300x-6); Public Health Service Act, § 1929, as added by Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2192, 95 Stat. 558 (to be codified in 42 U.S.C. § 300y-8). This hearing right is implemented, as to the block grants administered by the Department of Health and Human Services, at 46 Fed. Reg. 48,582, 48,590-91 (1981) (to be codified in 45 C.F.R. §§ 96.51-68).

23. See R. CAPPALLI, *supra* note 5, at 245-46 n.2, 289-90 n.1.

24. *Cf.* Comprehensive Employment and Training Act of 1973, § 106(a)(1), 29 U.S.C. § 816(a)(1) (Supp. III 1979) (grievance procedures required to be established by CETA prime sponsors); Elementary and Secondary Education Act of 1965, § 164(c), 20 U.S.C. § 2811(c) (Supp. III 1979) (state education agency hearings for school district applicants for subgrants).

25. See 46 Fed. Reg. 48,582, 48,584 (1981) (Department of Health and Human Services; exemption of block grants from normal administrative rules); 46 Fed. Reg. 43,690 (1981) (Community Services Administration; grantees left with "responsibility of complying with statutory requirements without further detailed direction from the Federal Government").

26. See note 27 *infra* and accompanying text.

At the federal level, two events are in process which bear importantly upon the subject of the main article. One is the creation of an administrative directive that will promote uniformity in agency dispute mechanisms. In September of 1980, the Office of Management and Budget announced the initiation of a policy review that would explore the desirability of a government-wide assistance policy on handling disputes between federal agencies and assistance recipients.<sup>27</sup> This review had produced a draft set of guidelines and standards<sup>28</sup> and had started lively debate<sup>29</sup> when it apparently lost momentum because of the change of administration in Washington. This policy review did result in a modern regulation for the Grant Appeals Board of the Department of Health and Human Services, which should be the model for dispute resolution processes in the years to come.<sup>30</sup>

The second event is congressional contemplation of across-the-board treatment of grantor-grantee disputes, although the proposed measures at the time we write are disappointingly modest. The latest version of the Federal Assistance Improvement Act contains a section entitled "Procedural Safeguards."<sup>31</sup> Our pulse quickened when we first noticed the clause, which was added by the Senate Committee on Governmental Affairs. Here, we thought, was the grantee bill of procedural rights and the government-wide disputes board we passionately advocated in *Rights And Remedies*.<sup>32</sup> Not quite. What parades under the procedural safeguards banner is merely an advance statement of reasons to state and local governments when federal administrators contemplate withdrawing aid, refusing to renew aid, and renegeing on an announced entitlement. States and localities can also get an explanation of why their applications for discretionary funds have been rejected. The Senate Committee desires to prevent the grants system from being converted into a regulatory system, to preserve its present flexibility and informality, and to avoid unnecessary tension, "delays," and "confusion."<sup>33</sup> This view is a far cry from the regimen of legal

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27. 45 Fed. Reg. 63,592 (1980).

28. Draft dated Aug. 11, 1980 (on file with author).

29. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FEDERAL ASSISTANCE ROUNDTABLES: SUMMARY AND RECOMMENDATIONS at V to V-20 (mimeographed July 20, 1981).

30. 46 Fed. Reg. 43,816 (1981) (to be codified in 45 C.F.R. §§ 16.1-23).

31. S. 807, 97th Cong., 1st Sess. § 601 (1981).

32. See R. CAPPALLI, *supra* note 5, at 331-59.

33. S. REP. NO. 97-136, 97th Cong., 1st Sess. 56 (1981).

entitlements that Professor Catz and I perceive. The grant system is still being controlled by the public administrators, who are nervously looking over their shoulders as the lawyers close in.

The public administrators misperceive both the nature of the assistance system and the intent of the lawyers, or at least that of some of us. To describe grants as nonregulatory ignores the thousand or so mandates attached to federal aid for cities, counties, and other users.<sup>34</sup> These cannot be ignored, for it is such mandates, and not procedural safeguards, that produce tension, delay, confusion, and inflexibility. As we stated in *Rights And Remedies*,

[a]ccording procedural fairness . . . does not alter the fundamental relationships between the national government and its partners in governance. On the contrary, it promises to *avoid* dislocation of whatever working balance has been politically struck at any point in time. Insisting that the states be given a voice in the partnership simply affirms their dignity, essentiality, and ability to contribute.<sup>35</sup>

Perhaps the public administrators fear the importation of the rituals of medieval legal systems. It need not happen that way, however. The Health and Human Services Department has an appellate process that is flexible, efficient, streamlined, responsive, and easily understandable to the layman.<sup>36</sup>

## II.

The Catz article is important in its own right. Recognition of a right to a hearing prior to grant termination will appreciably raise the fairness quotient of the federal assistance system, whether it occurs in one or more statutes, an OMB directive, a program regulation, or an adjudication. Yet the article attains even more significance when viewed as part of a broader development, which we can call the emerging law of federal assistance.<sup>37</sup>

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34. C. LOVELL, R. KNEISEL, M. NEIMAN, A. ROSE & C. TOBIN, *FEDERAL AND STATE MANDATING ON LOCAL GOVERNMENTS: AN EXPLORATION OF ISSUES AND IMPACTS* 56 (1979). See also 5 JOINT ECON. COMM., *SPECIAL STUDY ON ECONOMIC CHANGE*, 96th CONG., 2D SESS. 326-77 (Comm. Print 1980) (Work by Muller & Fix entitled *The Impact of Selected Federal Actions on Municipal Outlays*).

35. R. CAPPALLI, *supra* note 5, at 242-43 (footnote omitted).

36. See note 29 *supra*.

37. For some of my earlier thoughts on the lawyer's place within the grant system, see Cappalli, *Federal Grant Disputes: The Lawyer's Next Domain*, 11 URB. LAW. 377 (1979). The infelicitous title may explain some of the nervousness of the public administrators. See text accompanying notes 32-33 *supra*.

The field of federal assistance has moved out of the era graphically described in the Cahns' seminal 1968 article as "the antithesis of democracy" and as a lawless "no man's land."<sup>38</sup> We believe that one may fairly characterize today's federal assistance both as a "system" and as a "body of law." These elements combine to produce the systematic application of a body of common rules, thereby enabling us to speak of the emerging "federal assistance law." Here, we will sketch the main characteristics that federal assistance law shares in common with older branches of American law. The details will have to await our forthcoming treatise on the topic.<sup>39</sup>

First, a set of fundamental purposes informs federal assistance law, and these purposes have, in turn, spawned central concepts and precepts. One example is the basic purpose of support:<sup>40</sup> federal aid transfers economic resources, produced by the powerful sixteenth amendment taxing power, to subnational institutions that have constitutional responsibility for basic governmental functions but suffer from impoverished treasuries. From the support rationale derive the basic precepts of grantee autonomy<sup>41</sup> and voluntary grantee participation in federal assistance.<sup>42</sup> The optional nature of grantee participation in federal economic support has resulted in a doctrine of construction

38. Cahn & Cahn, *The New Sovereign Immunity*, 81 HARV. L. REV. 929, 971 (1968).

39. The treatise is tentatively to appear in three volumes under the title FEDERAL ASSISTANCE and is scheduled to be published in the fall of 1982.

40. See Federal Grant and Cooperative Agreement Act of 1977, § 5, 41 U.S.C. § 504 (Supp. III 1979).

Each executive agency shall use a type of grant agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever—

- (1) the principal purpose of the relationship is the transfer of money, property, services, or anything of value to the State or local government or other recipient in order to accomplish a public purpose of support . . . .

*Id.* See also R. CAPPALLI, *supra* note 5, at 34-42.

41. See Federal Grant and Cooperative Agreement Act of 1977, § 5, 41 U.S.C. § 504 (Supp. III 1979):

Each executive agency shall use a type of grant agreement as the legal instrument reflecting a relationship between the Federal Government and a State or local government or other recipient whenever—

- (2) no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity.

*Id.* See also *Forsham v. Harris*, 445 U.S. 169, 180-81 (1980) (grants of federal funds do not create partnership between government and recipient); *United States v. Orleans*, 425 U.S. 807, 815-18 (1976) (grant regulations do not transfer grantee's actions into those of federal government).

42. See, e.g., *Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531, 1536-37, 1539-

under which the terms of support, unilaterally established by the United States, will be strictly interpreted against the United States when grantee responsibilities are sought to be implied from vague statutory language.<sup>43</sup>

Second, the law of federal assistance is unified and made coherent by a set of operational rules common to all programs. This enables knowledge, interpretations, and solutions to be transferred between programs, and it makes viable the teaching and practice of federal assistance administration and law. One body of common principles is the product of statutes that apply to all federal financial assistance, thereby sweeping under their mandates the hundreds of separate aid programs.<sup>44</sup> A second body comes from repetitive patterns in the statutes that authorize aid: common statutory style, structure, mechanics, and boiler plate. Cost-sharing (“matching”), maintenance of effort, nonsupplantation, federal audit, and access to grantee records are but a few examples. A third body of common principles is the inspiration of the Office of Management and Budget in the form of circulars. These are directives to the federal agencies on topics such as grant administration,<sup>45</sup> intergovernmental cooperation,<sup>46</sup> and cost principles.<sup>47</sup> Finally, there is even a comprehensive statute that contains a potpourri of rules tagged onto assistance programs.<sup>48</sup>

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40 (1981); *Wheeler v. Barrera*, 417 U.S. 402, 425 (1974). See generally R. CAPPALLI, *supra* note 5, at 80-88.

43. See *Pennhurst State School & Hosp. v. Halderman*, 101 S. Ct. 1531, 1540 (1981) which stated that “[b]y insisting that Congress speak with a clear voice, we enable the States to exercise their choice [of accepting or rejecting federal assistance] knowingly, cognizant of the consequences of their participation.”

44. See, e.g., Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (1976) (prohibition of racial and ethnic discrimination in federally assisted programs). For a general discussion of such “cross-cuts,” see Cappalli, *Mandates Attached to Federal Grants: Sweet and Sour Federalism*, 13 *URB. LAW.* 143 (1981).

45. See, e.g., OMB Circular No. A-102, Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments, 42 Fed. Reg. 45,827 (1977); OMB Circular No. A-110, Grants and Agreements With Institutions of Higher Education, Hospitals and Other Nonprofit Organizations: Uniform Administrative Requirements, 41 Fed. Reg. 32,015 (1976).

46. See OMB Circular No. A-95, Evaluation, Review, and Coordination of Federal and Federally Assisted Programs and Projects, 41 Fed. Reg. 2052 (1976).

47. See OMB Circular No. A-21, Principles for Determining Costs Applicable to Grants, Contracts, and Other Agreements With Educational Institutions, 44 Fed. Reg. 12,386 (1979); OMB Circular No. A-87, Cost Principles for State and Local Governments, 46 Fed. Reg. 9548 (1981); OMB Circular No. A-122, Cost Principles for Nonprofit Organizations, 45 Fed. Reg. 46,022 (1980) (as corrected by 46 Fed. Reg. 17,185 (1981)).

48. Intergovernmental Cooperation Act of 1968, 42 U.S.C. §§ 4201-4244 (1976).

Third, democratic systems of law involve sets of rights and duties possessed by interacting parties. If all rights are held by one side, we have monarchy, oligarchy, or other forms of absolutism. This may have been an accurate description of federal aid in its earlier years, although practical and political constraints were often asserted as holding absolute federal power in check.<sup>49</sup> Today's federal assistance has been democratized through the vesting of substantive rights in recipients of federal aid. The key substantive right is that of receiving funds upon compliance with all preconditions.<sup>50</sup> Such right may be successfully asserted in court to release an impoundment,<sup>51</sup> collect an allocation,<sup>52</sup> stop a termination,<sup>53</sup> or recover monies due.<sup>54</sup> The grant-in-aid has matured into a type of defeasible property. The grantee has a defeasible right to collect the proceeds from the United States. The defeasance occurs when the grantee commits a violation of the grant conditions, and it may be partial or full depending upon the nature of the violation.<sup>55</sup> To the extent that the program vests implementation discretion in the grantee—permissible ranges of choice on fund uses, on policies such as civil rights, and on procedures—these may also be seen as substantive powers of the grantee in that federal efforts to dictate actions contrary to the grantee's desires can be thwarted by appropriate judicial action.<sup>56</sup>

Fourth, a body of law must have a content of sufficient clarity to be understood and applied consistently and uniformly. Federal assistance law has lacked precision in expression and definition because its bulk is of recent creation and the raw material from which statutes and regula-

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49. See, e.g., Weidner, *Decision Making in a Federal System*, reprinted in part in F. MICHELMAN & T. SANDALOW, *supra* note 12, at 1201.

50. See, e.g., *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127, 136 (1947).

51. See, e.g., *Train v. City of New York*, 420 U.S. 35 (1975).

52. See, e.g., *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977).

53. See, e.g., *Southern Mut. Help Ass'n v. Califano*, 574 F.2d 518 (D.C. Cir. 1977).

54. See, e.g., *Arizona v. United States*, 494 F.2d 1285 (Ct. Cl. 1974).

55. Compare *United States v. City of Chicago*, 411 F. Supp. 218 (N.D. Ill. 1976) (suit which could have resulted in repayment of \$135 million in revenue-sharing funds for violation of civil rights requirements), *modified on other grounds*, 549 F.2d 415 (7th Cir. 1977) with *In re Southern Mut. Help Ass'n, Inc.*, Dec. No. 20 (HHS Grant App. Bd. June 23, 1976) (challenge to audit disallowance of \$1,385 in travel expenses and \$7,000 to produce a film).

56. In hundreds of cases, grantees have been given standing to seek declaratory and injunctive relief against allegedly illegal action by federal sponsors. See generally R. CAPPALLI, *supra* note 5, at 108-71.

tions are created comes mostly from the soft sciences.<sup>57</sup> Nonetheless, each day brings new definitions, new court and board interpretations, and increased custom and usage. These, in combination with the reasonably clear understanding of assistance's purposes and central concepts, result in a legal system with a precision at least equivalent to areas such as torts.

Fifth, the body of law must be dependable and enforceable. Otherwise, it is merely a body of morals or ethics upon which parties cannot confidently plan their actions. Concerning recipient responsibilities, the federal government has been able to enforce the standards attached to the aid from an early date.<sup>58</sup> This coin's flip side, however, has borne a different stamp. The national government has claimed its ancient prerogatives to alter the rules through revised regulations,<sup>59</sup> to issue informal, undependable rules by way of manuals, instructions, and guidelines,<sup>60</sup> and to refuse to be bound by the statements and assurances of its officials.<sup>61</sup> This too has changed considerably. Increasingly, the agencies are publishing their rules in the *Federal Register* and are thereby binding themselves by giving their rules the force of law.<sup>62</sup>

Finally, sets of procedures are evolving for the application of the law of federal assistance. Without a forum for dispute resolution, a body of purposive, defined, mutual, and dependable rules dissolves into pure power politics. On the other hand, the most solicitous procedural protections go for naught if the body of substantive rules to be applied therein is amorphous, shapeless, arbitrary, and uninspired by com-

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57. See, e.g., Eglit, *The Age Discrimination Act of 1975, As Amended: Genesis and Selected Problem Areas*, 57 CHI. KENT L. REV. 915, 925 (1981).

58. See, e.g., *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947) (collection of fiscal penalty for Hatch Act violation); *In re School Bd.*, 475 F.2d 1117 (5th Cir. 1973) (voiding of grant); *United States v. Harrison County*, 399 F.2d 485 (5th Cir. 1968) (injunction to enforce agreed use of aided public beach); *Utah State Bd. for Vocational Educ. v. United States*, 287 F.2d 713 (10th Cir. 1961) (recovery of federal funds used for unauthorized purpose).

59. See, e.g., *Thorpe v. Housing Auth.*, 393 U.S. 268 (1969) (grantee bound to follow agency directives issued subsequent to grant).

60. See, e.g., *Massachusetts Dep't of Correction v. Law Enforcement Assistance Admin.*, 605 F.2d 21 (1st Cir. 1979) (agency need not follow its written, internal grant selection procedures).

61. The "estoppel" argument drifts like smoke through federal assistance disputes. The courts blow it away with the ancient canard that the government is not bound by unauthorized acts and statements of its officials. See, e.g., *Robinson v. Vollert*, 602 F.2d 87, 93-94 (5th Cir. 1979). Perhaps there is enough fire—agencies backing away from assurances upon which grantees have relied—to justify a revamping of the doctrine.

62. See generally Yamada, *Rulemaking Requirements Related to Federal Financial Assistance*, 39 FED. B.J. 89 (1980).

monly accepted purposes and concepts. Within this broader framework of the emergent law of federal assistance, we finally see the full significance of the main article. The assistance system now provides a body of legal principles of a content and character suitable for application in due process hearings. And without such hearings the advances in lawfulness made in the past two decades by the assistance system will be severely blocked, for, as elsewhere, rights without remedies are meaningless in the assistance field.