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Michael F. Noone Jr.

Urban A. Lester

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## DEFINING TUCKER ACT JURISDICTION AFTER *BOWEN V. MASSACHUSETTS*

*Michael F. Noone, Jr.\**

*Urban A. Lester\*\**

Such writ did not use to be made of old time . . . . But all was once other than it is now, and will be other again. New King, new law, new Justices, new masters . . . .<sup>1</sup>

Various reasons have been offered to explain why the English doctrine of sovereign immunity came to be applied in the United States.<sup>2</sup> Congress gradually modified the doctrine, as it applied to claims not sounding in tort, in a series of Court of Claims Acts<sup>3</sup> initiated in 1855 and culminating in the Tucker Act of 1887 (Tucker Act or Act).<sup>4</sup> The Tucker Act granted United States circuit and district courts concurrent jurisdiction over small claims

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\* Associate Professor of Law, The Catholic University of America, Columbus School of Law. B.S., 1955, LL.B., 1957, LL.M. 1962, Georgetown University; S.J.D., 1965 George Washington University.

\*\* Associate Professor of Law, The Catholic University of America, Columbus School of Law. B.A., 1954, J.D., 1959, The Catholic University of America, Columbus School of Law.

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1. 31 YEAR BOOKS OF EDWARD II 87 (1311-12) (Seldeon Society ed. 1915).

2. H. STREET, GOVERNMENTAL LIABILITY 8-11 (1953). Professor Street gives three possible explanations for the adoption and survival of sovereign immunity in the United States: (1) the United States received the doctrine with the rest of the English common law; (2) the doctrine survived due to the financial instability of infant American states, and (3) logically, there could be no legal right against the power that created the laws. *Id.* at 8-9. See generally Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963) (discussing the English law of sovereign immunity and its applicability in American law).

3. Act of February 24, 1855, ch. 122, 10 Stat. 612; Act of March 3, 1863, ch. 92, 12 Stat. 765 (allowing executive review of judgments), *repealed by* Act of March 17, 1866, ch. 19, 14 Stat. 9; Act of June 25, 1868, ch. 71, § 2, 15 Stat. 75 (providing for Court of Claims appeals to the United States Supreme Court).

4. The Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified as amended in scattered sections of 28 U.S.C.). Concurrent jurisdiction of the district court is codified as amended at 28 U.S.C. § 1346(a)(2) (1988).

defined as those not in excess of \$10,000.<sup>5</sup> The system worked well for over a century, and circuit courts regularly struck down efforts by district court plaintiffs to breach the "Little Tucker Act's" \$10,000 barrier.<sup>6</sup> In 1988, however, the United States Supreme Court held in *Bowen v. Massachusetts*<sup>7</sup> that a state's suit against the Secretary of Health and Human Services seeking the release of millions of dollars in Medicaid funds could be brought in district court. The *Bowen* majority reasoned that it was not a suit under the Tucker Act<sup>8</sup>, but fell instead within the general waiver of sovereign immunity found in section 702 of the Administrative Procedure Act (APA).<sup>9</sup> Likewise, appeals from such district court judgments would not fall within the jurisdiction of the United States Court of Appeals for the Federal Circuit,<sup>10</sup> rather, they would be within the jurisdiction of the regional circuit courts of appeals.<sup>11</sup>

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5. 28 U.S.C. § 1346(a)(2) (1988). See also *infra* note 29 (discussing the historical development of the \$10,000 jurisdictional limit in the district court).

6. See, e.g., *Gower v. Lehman*, 799 F.2d 925, 928 (4th Cir. 1986) (noting that the district court did not have jurisdiction over plaintiff's monetary claim for back pay because it was in excess of \$10,000); *Cape Fox Corp. v. United States*, 646 F.2d 399, 401-02 (9th Cir. 1981) (Court of Claims has exclusive jurisdiction for claims greater than \$10,000); *Mathis v. Laird*, 483 F.2d 943 (9th Cir. 1973) (same); *Ove Gustavsson Contracting Co. v. Floete*, 278 F.2d 912, 914 (2d Cir. 1960) (same); *Sutcliffe Storage & Warehouse Co. v. United States*, 162 F.2d 849, 951 (1st Cir. 1947) (same); *Hill v. United States*, 40 F. 441 (1889) (jurisdiction only conferred on circuit court by waiving damages in excess of \$10,000); *Andrews v. Webb*, 685 F. Supp. 579, 580 n.1 (E.D. Va. 1988) (exclusive Claims Court jurisdiction for claims greater than \$10,000).

7. 487 U.S. 879 (1988).

8. *Id.* at 908.

9. 5 U.S.C. § 702 (1988).

10. Congress created the United States Court of Appeals for the Federal Circuit in 1982 to "establish doctrinal uniformity." Cihlar, *An Overview of Appellate Jurisdiction of the Court of Appeals for the Federal Circuit*, in HANDBOOK ON PRACTICE BEFORE THE UNITED STATES CLAIMS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT 197-98 (1986). See Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25 (1982); S. REP. NO. 275, 97th Cong., 1st Sess. 2 (1981) (noting that a motivating concern of Congress in creating the Court of Appeals for the Federal Circuit was the special need for nation-wide uniformity in suits against the Federal Government); Schwartz, *Two New Federal Courts*, 68 A.B.A. J. 1091 (1982).

11. See Cihlar, *supra* note 10, at 197-220.

In 1988, Congress amended the judicial code to allow for appeals from district courts to the United States Court of Appeals for the Federal Circuit on orders denying or allowing transfers of cases to the Claims Court under 28 U.S.C. § 1631 (1988). See 28 U.S.C.A. § 1292(d)(4)(A) (Supp. 1990). Because Congress wanted to "ensure uniform adjudication of Tucker Act issues in a single forum," it gave exclusive jurisdiction to the Federal Circuit over these appeals. Judicial Improvements and Access to Justice Act, Nov. 19, 1988, Pub. L. No. 100-702, 102 Stat. 4652 (1988); H.R. REP. NO. 889, 100th Cong., 2d Sess., reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 6012.

One of the first cases to use the new procedure was *Mitchell v. United States*, 930 F.2d 893 (Fed. Cir. 1990). *Mitchell* involved a National Guardsman's back pay claim. The Federal

Three years have passed since the *Bowen* decision and, while there is still no agreement as to whether the decision was a radical avulsion in traditional jurisprudence,<sup>12</sup> the decision calls for a reassessment of the Tucker Act's provisions limiting those suits which can be brought in district courts. This Article is a contribution to that reassessment, attempting to find in *Bowen* those peculiar characteristics which will enable lawyers and jurists to discern whether a suit which seeks a money judgment against the United States implicates the Tucker Act.

Part I of this Article summarizes the relevant provisions of the Tucker Act, and examines courts' interpretations of whether a district court had jurisdiction over a claim when a potential judgment exceeded \$10,000. This Article suggests that, over time, traditional Tucker Act jurisdiction has been distorted by the appearance of a new kind of plaintiff<sup>13</sup> seeking "structural reform"<sup>14</sup> rather than the kinds of compensation envisioned by the Act. This Article also suggests that Tucker Act jurisdiction has been distorted by two congressional actions: the creation of the judgment fund;<sup>15</sup> and amendments to the Administrative Procedure Act.<sup>16</sup> These congressional actions could be construed to extend district court jurisdiction over claims for money damages. As a result, the distinction between Tucker and non-Tucker Act remedies has been blurred.

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Government argued that because the claim was for money damages in excess of the \$10,000 Little Tucker Act jurisdictional limit, the district court should have dismissed the case or transferred it to the Claims Court. Counsel for the plaintiff argued that Mitchell's request for active duty credit and reinstatement to active duty was neither a request for monetary relief nor money damages; thus, the district court had sole jurisdiction. *Id.* at 897. The Federal Circuit, noting the Claims Court's extensive experience with back pay suits, held that the Claims Court had explicit statutory authority to hear Mitchell's claim. The court relied on the *Bowen* majority's distinction between grant-in-aid cases and back pay cases, thereby limiting *Bowen's* applicability, a decision this Article supports. *Id.*

*See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4652 (1988); H.R. REP. NO. 889, 100th Cong., 2d Sess., reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5982, 6014-15.

12. Compare, e.g., Fallon, *Claims Court at the Crossroads*, 40 CATH. U.L. REV. 517, 531-32 (1991) (rejecting Justice Scalia's assertion that the Claims Court's jurisdiction has been obliterated) with Sisk, *Two Proposals to Clarify the Tucker Act Jurisdiction of the Claims Court*, 37 FED. BAR NEWS & J. 47, 49 (1990) (quoting Justice Scalia's criticism of *Bowen* that "[t]he Court cannot possibly mean what it says today").

13. *See infra* notes 31-35 and accompanying text.

14. "The structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by present institutional arrangements. The injunction is the means by which these reconstructive directives are transmitted." Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudences of Lyons*, 59 N.Y.U.L. REV. 1, 4 (1984).

15. *See infra* notes 53-54 and accompanying text.

16. *See infra* text accompanying notes 69-70.

Part II of this Article explicates the case law before and after the passage of the APA and its relevant amendments. This Article notes how, in the 1980's, the Department of Justice (DOJ) began to assert that state suits against the Federal Government seeking reimbursement of grant-in-aid funds<sup>17</sup> should be treated as Tucker Act claims and tried in the United States Claims Court, rather than as non-Tucker Act claims to be tried in the district courts. Although the DOJ achieved some measure of success, Judge Bork, in a masterful display of judicial legerdemain, offered alternative reasoning which became the basis for the *Bowen* decision. This alternative was superficially attractive but intrinsically false and created the impression that *Bowen* had diminished the traditional jurisdiction of the Claims Court and Court of Appeals for the Federal Circuit.

Part III discusses and analyzes the *Bowen* case, outlining its procedural history, and highlighting the United States Supreme Court's efforts to distinguish *Bowen* from the "run of the mill" Tucker Act suits. In part IV, this Article offers alternative interpretations of the *Bowen* ruling. Finally, part V of this Article advances the "preferred solution" and suggests how the *Bowen* decision can be reconciled with a century of case law, thereby avoiding the kind of judicial nihilism evidenced in this Article's introductory quotation.

## I. THE TUCKER ACT

### A. *Antecedents and Structure*

The United States Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>18</sup> Accordingly, Congress, from its inception, required individuals seeking private relief to confront Congress with petitions for compensation.<sup>19</sup> For administrative purposes, Congress made an early attempt to delegate this claims adjudication function to the judiciary. Its attempt, however, foun-

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17. "The federal government has long had various measures for transferring fiscal resources from rich to poor states. Traditionally, federal assistance to state and local governments has taken four forms: (1) categorical grants-in-aid directly related to narrow purposes as defined by Congress and administered with tight grantor control; (2) block grants structured to consolidate narrow categorical grants but with broader grantee discretion and less grantor control; (3) intergovernmental loans; and (4) general revenue sharing of federal funds with few restrictions." Shurtz, *State Taxation of Energy Resources: Are Consuming States Getting Burned?*, 36 VAND. L. REV. 55, 96-97 (1983).

18. U.S. CONST. art. I, § 9, cl. 7.

19. See generally, Freund, *Private Claims Against the State*, 8 POL. SCI. Q. 625 (1893) (discussing jurisdiction of courts over the state and the state's liability for claims against it).

dered on the separation of powers doctrine.<sup>20</sup> After the appointment of several ad hoc commissions,<sup>21</sup> Congress attempted to alleviate the workload and injustices of private relief bill legislation by passing the Court of Claims Act of 1855.<sup>22</sup> The Act established a tribunal which investigated claims based upon any congressional law, executive department regulation, or express or implied contract with the Federal Government.<sup>23</sup> After investigating a claim, the tribunal was to make recommendations to Congress. In 1864, the United States Supreme Court refused to hear an appeal from the United States Court of Claims on the grounds that the court's judgments were subject to non-judicial review when Congress appropriated funds to pay the judgments.<sup>24</sup> Congress quickly eliminated the offensive provision that allowed executive review,<sup>25</sup> and the Supreme Court acknowledged its jurisdiction over Court of Claims judgments.<sup>26</sup>

In 1887, when Congress passed the Tucker Act,<sup>27</sup> it added two new features to the claims mechanism: first, it permitted claims founded upon the United States Constitution;<sup>28</sup> second, it granted circuit courts concurrent jurisdiction with the Court of Claims over claims for money damages up to \$10,000.<sup>29</sup> Thus, by 1887, the Tucker Act had assumed its present contours, permitting suits against the United States in three circumstances, contrac-

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20. *Hayburns Case*, 2 U.S. (2 Dall.) 409, 410-14 (1792). In 1792, Congress attempted to assign some of its claims processing activities to the courts without making the courts' decisions on the claims final. The United States Supreme Court refused to take on the non-judicial duties of claims processing in *Hayburns Case*. *Id.*

21. For example, Congress created two ad hoc commissions to address claims arising from the War of 1812 and the Mexican War. See W. COWEN, P. NICHOLS, JR. & M. BENNETT, *The United States Court of Claims: A History*, reprinted in 216 Ct. Cl. 1, 7-13 (1978) (citing Act of April 9, 1816, ch. 40, § 11, 3 Stat. 263; Act of March 3, 1849, ch. 107, 9 Stat. 393).

22. Ch. 122, 10 Stat. 612. See W. COWEN, P. NICHOLS, M. BENNETT, *supra* note 21 at 12-16; see also Crane, *Jurisdiction of the United States Court of Claims*, 34 HARV. L. REV. 161, 166 (1920) (noting that Congress often delayed acting upon private bills).

23. Court of Claims Act of 1855, ch. 122, 10 Stat. 612.

24. *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864) (holding that the Supreme Court did not have appellate jurisdiction over the Court of Claims under the Constitution) (*superseded by* Act of March 17, 1866, ch. 19, 14 Stat. 9).

25. Act of March 3, 1863, ch. 92, 12 Stat. 765, 768, *repealed by* Act of March 17, 1866, ch. 19, 14 Stat. 9.

26. *United States v. Jones*, 119 U.S. 477 (1886) (reciting history of the United States Supreme Court's appellate jurisdiction over Tucker Act judgments).

27. Tucker Act of March 3, 1887, ch. 359, 24 Stat. 505.

28. The statute permitted a judicial remedy pursuant to the fifth amendment's takings clause: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

29. Tucker Act, ch. 359, 24 Stat. 505. The Tucker Act gave regional circuit courts jurisdiction for claims up to \$10,000. In 1911, after abolishing these circuit courts, Congress gave district courts the same concurrent jurisdiction. Act of March 3, 1911, ch. 231, 36 Stat. 1087.

tual claims, noncontractual claims where plaintiff seeks the return of money paid to the government, and, noncontractual claims where the plaintiff asserts that he is *entitled* to payment by the government.<sup>30</sup>

## B. Characteristics of Tucker Act Jurisdiction

### 1. The Vindication of Personal Rights

Although there is little legislative history of the Court of Claims and Tucker Act statutes, Congress clearly intended for the court to vindicate the rights of claimants by "render[ing] prompt justice against itself, in favor of [its] citizens."<sup>31</sup> Professor Hohfeld, in *Some Fundamental Legal Concep-*

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The \$10,000 jurisdictional limit represented a congressional compromise which balanced two goals: one, to protect the United States Treasury by requiring that claimants lodge claims against the United States in Washington, D.C. where departmental heads reside; and two, to reduce claimants' inconvenience and travel expense to Washington, D.C. to litigate relatively small claims. Note, *Sovereign Immunity: District Court Jurisdiction for Damage Awards Exceeding \$10,000 Against Federal Officers for Unconstitutional or Ultra Vires Acts*, 3 *HAMLIN L. REV.* 163, 171 (1980). By failing to raise the \$10,000 jurisdictional limit for over a century, Congress frustrated the purposes of the dual jurisdictional grant. If the \$10,000 limitation had been indexed for inflation, the limitation at the district court would be \$131,000 today. If this higher limit applied, those claimants who desired to sue the government in district court would not be forced to attempt to convert bare money claims into suits seeking specific relief. See generally United States Bureau of Census *HISTORICAL ABSTRACTS OF THE UNITED STATES: COLONIAL TIMES TO 1970* (1975) (for the computation of 1887 dollars to 1967 dollars); United States Bureau of Census, *STATISTICAL ABSTRACT OF THE UNITED STATES 1990* (1990) (for computation of 1967 dollars to 1988 dollars).

30. The Court of Claims divided non-contractual claims into two classes:

[1] those in which the plaintiff has paid money over to the government, directly or in effect, and seeks return of all or part of that sum; and [2] those instances in which money has not been paid but plaintiff asserts that he is nevertheless entitled to a payment from the treasury.

*Eastport S.S. Co. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967). In the first class of suits, the claimant must assert that money or property has been taken in contravention of the Constitution, a statute, or a regulation. Tax refund cases and cases involving sums exacted by a federal agency are examples of the first class. See, e.g., *Clapp v. United States*, 117 F. Supp. 576 (Ct. Cl. 1954) (sums exacted from purchasers of vessels by Maritime Commission returned) *cert. denied*, 348 U.S. 834 (1954).

The second class of suits contains cases where the government has failed to pay money and the claimant asserts that a particular provision of law grants him the right to be paid a sum certain. Examples include inverse condemnation cases, retirement and back pay cases, and claims for compensation. See, e.g., *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950) (claim for deprivation of riparian rights based on the Rivers and Harbors Act); *United States v. Causby*, 328 U.S. 256 (1946) (inverse condemnation suit based on the government's violation of statutes regulating aircraft flight plans); *Lemly v. United States*, 75 F. Supp. 248 (Ct. Cl. 1948) (claiming retired pay and allowances under a personnel act for naval aviation employees); *Elchibegoff v. United States*, 106 Ct. Cl. 541 (1946) (government employee discharge case based on a civil service commission rule).

31. *United States v. Mitchell*, 463 U.S. 206, 213 (1983) (quoting *CONG. GLOBE*, 37th Cong., 2d Sess., 2 App. (1861) (President Lincoln's State of the Union Message)). "Person"

tions as Applied in Judicial Reasoning,<sup>32</sup> distinguishes between two types of plaintiffs, classifying their status as either natural or unnatural. Natural plaintiffs are those who seek redress of injuries for harms compensable at common law and claim the breach of a right which runs to them.<sup>33</sup> Unnatural plaintiffs are those who "aspire to secure the enforcement of legal principles that touch others as directly as themselves and that are valued for moral or political reasons independent of economic interests."<sup>34</sup> While it is true that suits against the United States are not suits at common law, Congress originally intended that the Court of Claims grant damages for the vindication of individual rights.<sup>35</sup> The means by which the Hohfeldian plaintiff gains the right to sue at the Claims Court is determined by the classic judicial test of whether a statutory right gives rise to a Tucker Act claim. In *Eastport Steamship Corp. v. United States*,<sup>36</sup> the court noted that "some specific provision of law [must] embod[y] a command to the United States to pay the plaintiff some money, upon proof of conditions which he is said to meet."<sup>37</sup>

## 2. The Award of Money Damages

The *Bowen* decision turned on the majority's conclusion that a suit for Medicaid funds was not a suit for damages.<sup>38</sup> As one critic explained, the *Bowen* Court erroneously defined the term damages "in ways that are unsus-

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was construed early in the history of the court to include corporations, as well as states. *Louisiana v. United States*, 22 Ct. Cl. 85, 90, *aff'd*, 123 U.S. 32 (1887) (a state, like a public corporation makes contracts, does business like an individual, and has the same rights and remedies in court); *Livingston, Bell & Co. v. United States*, 3 Ct. Cl. 131 (1867).

32. 23 YALE L.J. 16, 28-44 (1923); *see also* Fallon, *supra* note 14, at 3-8 (1984) (noting that the terms "Hohfeldian" and "non-Hohfeldian" plaintiff are terms of art in the scholarly writings on standing); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian Or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1033 (1968) (characterizing a Hohfeldian plaintiff as one "seeking a determination that he has a right, a privilege, an immunity or a power").

33. Hohfeldian plaintiffs could bring suit only if they were vindicating a right for which there was a correlative duty owed to them by defendant. Hohfeld, *supra* note 32, at 31.

34. Fallon, *supra* note 14, at 4. This Article will refer to the unnatural plaintiff as a "non-Hohfeldian plaintiff."

35. *McElrath v. United States*, 102 U.S. 426, 440 (1880). "As article III jurisprudence developed, it relied increasingly on the private rights, or 'Hohfeldian,' model as its paradigm of litigation. This model, by definition, asks . . . court[s] to resolve . . . dispute[s] between two parties." Comment, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CALIF. L. REV. 1061, 1069 (1988) (footnote omitted).

36. 372 F.2d 1002, 1009 (Ct. Cl. 1967); *see also* *United States v. Testan*, 424 U.S. 392, 398, 401-02 (1976) (approving *Eastport*).

37. *Eastport*, 372 F.2d at 1008; *see also* Cohen, *Claims for Money in the Claims Court*, 40 CATH. U.L. REV. 533, 540-47 (1991) (discussing statutes requiring a monetary payment).

38. *Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988).



ported by any historical notion of the common law damages remedy."<sup>39</sup> To understand the flawed reasoning of the *Bowen* decision, a review of the nineteenth century meaning of the term "damages" is necessary.

In trespass cases, very early common law courts provided for either a fixed *bóit* appointed by law, or the award of fact specific compensation.<sup>40</sup> The second category, fact specific compensation, subsequently came to be described as damages, and the term was extended to losses which arose from the breach of a promise.<sup>41</sup> The late nineteenth century case, *Scott v. Donald*,<sup>42</sup> defined damages as "compensation which the law will award for an injury done."<sup>43</sup> In this respect, damages awarded were substitutionary relief. Damages gave the plaintiff money, by way of compensation, to make up for some loss that was not originally a money loss, but one that ordinarily could be measured in money. It was only with the development of the writ of *assumpsit*, however, that courts proceeded to award compensation, or damages, for failure to perform a promise.<sup>44</sup>

The branch of the law which came to be known as "quasi-contract" developed slowly in the sixteenth and seventeenth centuries.<sup>45</sup> This development

39. Webster, *Choice of Forum in Claims Litigation*, 37 FED. BAR NEWS & J. 534, 535 (1990) [hereinafter Webster, *Choice of Forum*] (stating that "the Court misdefined 'damages' which are . . . the key to interpreting the statutory phrase [of section 702] permitting residual district court relief"); see also Webster, *Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*, 49 OHIO ST. L.J. 725, 735-37 (1988) [hereinafter Webster, *Beyond Federal Sovereign Immunity*]. Webster notes that damages should be defined "not by what might be, but rather by their *compensatory purpose* and enforcement by writ." *Id.* at 736 (emphasis supplied) (footnote omitted). Webster finds the *Bowen* Court's definition of damages incorrectly based on the underlying claim:

The Court opened a can of worms with its apparent suggestion that Massachusetts' relief was not damages because the underlying claim was for enforcement of a statute . . . . The usual relief granted in Tucker Act claims is damages. Statutory claims do not a nondamages action make. . . . [Further,] [d]amages do not become something else simply because the Court *might* order alternative relief.

*Id.* at 735-36 (emphasis in original).

40. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 370 (5th ed. 1948) (tracing change of Anglo-Saxon *bóit* to damages); 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF THE ENGLISH LAW* 523 (2d ed. 1968) (damages assessed as proper compensation for the particular wrong suffered by the plaintiff).

41. A. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 67 (1987) (noting the same concept of a fixed sum due applied in debt cases).

42. 165 U.S. 58 (1897).

43. *Id.* at 86.

44. A. SIMPSON, *supra* note 41, at 68; see also 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 451 (7th ed. 1956) (citing *Slades' Case*, 76 Eng. Rep. 1072 (1826), which established the character of the action of *assumpsit* and allowed a remedy for breach of purely executory contracts).

45. 3 W. HOLDSWORTH, *supra* note 44, at 447-54.

culminated in the case of *Moses v. McFerlan*,<sup>46</sup> which permitted a suit in assumpsit on an implied promise.<sup>47</sup> In some quasi-contract cases, the amount claimed was similar to an action in debt for a sum certain: for money had and received, or money paid on account.<sup>48</sup> In other cases, the claim was similar to an action in assumpsit where the plaintiff sought reasonable compensation for either goods received or services rendered.<sup>49</sup> Whether the quasi-contract case sounded in debt (for a sum certain) or assumpsit (for fact specific compensation), courts described the amount sought to be recovered as damages.<sup>50</sup> Thus, by the time Congress passed the Tucker Act in 1887, any claim for, or award of, a money judgment arising from an action at law would be described, albeit improperly, as “damages” — without regard to the theory of liability on which the plaintiff relied.<sup>51</sup> The term “damages” was also used to describe monetary awards granted as part of equitable relief.<sup>52</sup>

Tucker Act suits involved suits for money damages, whether they were for a sum certain (as in entitlement cases) or were for fact specific compensation (as in breach of contract or takings cases). They could be distinguished from suits for money damages brought in district courts as equitable claims or as legal actions because Tucker Act suits were always against the United States whereas non-Tucker Act suits were suits against the government officer. In this latter type of suit, courts assumed that the officer against whom the suit was brought was holding money appropriated by Congress for the very purpose sought by the plaintiff.<sup>53</sup> Until 1956, judgments against the United

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46. 97 Eng. Rep. 676 (K.B. 1760).

47. *Id.* at 678.

48. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES, 235-38 (1973).

49. *Id.*

50. *See* *Dutch v. Warren*, 93 Eng. Rep. 598 (K.B. 1720) (for an example of a court's misapplication of the term “damages” in an equitable action) (*cited in* *Moses v. McFerlan*, 97 Eng. Rep. 676, 680 (K.B. 1760)).

51. *See, e.g.*, *Doherty v. Aaron Machinery Co.*, 238 N.Y.S.2d 179, 18 A.D.2d 915 (1963); *Levin, Equitable Clean-Up and the Jury: A Suggested Doctrine*, 100 U. PA. L. REV. 320 (1951).

52. *See, e.g.*, *Dutch*, 93 Eng. Rep. at 598.

53. In the absence of an appropriation, mandamus will not lie. *See, e.g.*, *McAdoo v. Ormes*, 47 App. D.C. 364 (1918) (noting that “where money has been appropriated by Congress . . . the Officials of the Treasury Department are charged with the ministerial duty of making payment upon the demand of the person in whose favor the appropriation has been made, and they may be compelled to make payment to mandamus”) (emphasis supplied), *aff'd sub nom.* *Houston v. Ormes*, 252 U.S. 469 (1920).

*Compare* *Hetfield v. United States*, 78 Ct. Cl. 419, 422 (1933) (no cause of action because no appropriation by Congress) and *Citizens Bank & Trust Co. v. United States*, 240 F.2d 863 (D.C. Cir. 1956) (where no new issue raised from prior suit, reaffirmation of previous judgment is barred), *cert. denied*, 355 U.S. 825 (1957) with *Mack, Compulsory Process to the Comptroller General*, 3 GEO. WASH. L. REV. 97, 101 (1934) (discussing *Miguel v. McCarl*, 291 U.S. 442,

States were, with few exceptions, paid from funds specially appropriated by Congress.<sup>54</sup> Thus, awards by district courts, pursuant to ancillary equitable jurisdiction or a mandamus action, were made by a government official from previously appropriated funds while Congress had to appropriate new funds to pay Tucker Act judgments. Therefore, a claimant seeking money from the government might attempt to bring his claim in district court as an alternative to a Tucker Act suit.

## II. ALTERNATIVE REMEDIES TO THE TUCKER ACT

### A. Remedies Available Before the Passage of the Administrative Procedure Act

Prior to the passage of the APA, there was a potential alternative judicial remedy available to persons seeking relief which could include a monetary component. This remedy was asserted through the writ of mandamus.<sup>55</sup> The United States Supreme Court applied this remedy in *Kendall v. United States ex rel. Stokes*,<sup>56</sup> and affirmed the issuance of a writ which directed the Post Master General to pay a claim allowed by the solicitor of the Treasury.<sup>57</sup>

The writ, however, would not issue if it would interfere with the judgment or discretion of the executive branch.<sup>58</sup> Further, by the time Congress passed the Court of Claims and Tucker Acts, it was clear that mandamus

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454 (1934), and noting that "the duty of the disbursing officer to pay the voucher in question 'is so plainly prescribed as to be free from doubt . . . and so ministerial that its performance may be compelled by mandamus'" (quoting *Wilbur v. United States*, 281 U.S. 206, 218 (1930)).

54. See, e.g., Act of June 25, 1864, ch. 147, 13 Stat. 145, 148 (where Congress appropriated a lump sum for payments of judgments to be rendered by the Court of Claims). Congressional control over the award of money judgments continued until the relatively recent creation of a permanent indefinite appropriation. Act of July 27, 1956, 70 Stat. 694, (codified at 31 U.S.C. § 1304 (1988)).

55. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, Chief Justice Marshall affirmed the availability of the writ of mandamus against a government official:

where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid . . . in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

*Id.* at 171.

56. 37 U.S. 524 (1838).

57. *Id.* at 532.

58. *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 517 (1840).

would not issue in the context of a dispute over rights.<sup>59</sup> The fact that a plaintiff had a potential remedy at law in the Court of Claims, however, would not preclude a mandamus action.<sup>60</sup> It is noteworthy that although the financial consequences of the mandamus writ fell on the Federal Government and could exceed \$10,000, Little Tucker Act jurisdiction limitation was never invoked, nor were the financial consequences described as "damages."

*B. Remedies After the Passage of the Administrative Procedure Act*

Significantly, when Congress passed the APA in 1946<sup>61</sup> and provided a statutory basis to judicial review of agency action, it did not speak to the issue of monetary compensation for past interference with rights.<sup>62</sup> Section 702 of the APA established a right of judicial review: "A person suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof."<sup>63</sup> Further, section 704 of the Act made "[a]gency action . . . reviewable by statute and final agency action for which there is no other adequate remedy in a court . . . subject to judicial review."<sup>64</sup>

In 1976, Congress added three sentences to section 702:

An action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in of-

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59. *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (1 How.) 284 (1855); see also Note, *Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts: A Study in Procedural Manipulation*, 38 COLUM. L. REV. 903 (1938).

60. Compare *Miguel v. McCarl*, 291 U.S. 442 (1934) and *Smith v. Jackson*, 246 U.S. 388 (1918) (claims for specific compensation brought as mandamus actions) with *Benedict v. United States*, 176 U.S. 357 (1900) (claim for specified compensation brought as a Tucker Act suit). Thus, the plaintiff's election might well turn on the availability of appropriated funds to satisfy the claim. See *supra* notes 54-56 and accompanying text.

61. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

62. H.R. REP. NO. 1980, 79th Cong., 2d Sess. 250, reprinted in 1946 U.S. CODE CONG. & ADMIN. NEWS 1195.

63. 5 U.S.C. § 702 (1988).

64. 5 U.S.C. § 704 (1988).

fice, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal ground or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.<sup>65</sup>

The Committee report explained the statutory reference to "any other statute that grants consent to suit or expressly or impliedly forbids the relief"<sup>66</sup> with the example of the Court of Claims Act's formulation of a damage remedy for contract claims confining jurisdiction to the Court of Claims for suits in excess of \$10,000.<sup>67</sup> Congress intended this measure to bar specific performance of government contracts. Under this provision, the Tucker Act " 'impliedly forbids' relief other than the remedy provided by the Act."<sup>68</sup> Thus, the amendment to section 702, partially abolishing sovereign immunity, did not modify existing boundaries on specific relief contained in statutes handling such matters. Clearly, the Committee intended to rule out other remedies for statutes which allowed suit and dictated particular remedies.<sup>69</sup> The amended provision also stressed that the necessary intent can be implied, as well as expressed.<sup>70</sup>

A standard text, *LITIGATION WITH THE FEDERAL GOVERNMENT*,<sup>71</sup> summarized the purpose of the amendment to section 702 as follows:

A reading of the hearings and committee reports seems to reveal a legislative intention merely to clear the air of unthinking invocations of sovereign immunity as grounds for dismissing suits for specific relief and to substitute deliberate balancing of the need for judicial review to protect against illegal official action and undue interference with government actions.<sup>72</sup>

Commentators viewed the passage of the 1976 amendment of the APA as a reaffirmance of the status quo.<sup>73</sup> Nevertheless, the burgeoning number of district court suits questioning the Executive Branch's efforts to limit eligibility to federal entitlements apparently compelled the DOJ to try a new

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65. 5 U.S.C. § 702 (emphasis added).

66. *Id.*

67. H.R. REP. NO. 1656, 94th Cong., 2d Sess. 13, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6133.

68. *Id.*

69. *Id.*

70. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237.

71. J. STEADMAN, D. SCHWARTZ, S. JACOBY, *LITIGATION WITH THE FEDERAL GOVERNMENT* (2d ed. 1983).

72. *Id.* at 332.

73. See, e.g., Webster, *supra* note 39, at 731; Jacoby, *Roads to the Demise of Sovereign Immunity*, 29 ADMIN. L. REV. 265, 271 (1977).

tactic.<sup>74</sup> Because these suits were typically brought as class actions involving claims in excess of \$10,000, the DOJ argued that the claims were in fact Tucker Act claims over which the Court of Claims had sole jurisdiction.<sup>75</sup> While it was true that the DOJ's efforts to use this tactic after the 1976 amendment foundered, some of these cases involved claims which, if satisfied, would have been paid from the permanent indefinite appropriation, and were thus apparent efforts to circumvent the Tucker Act.<sup>76</sup> Claims to accounts specifically appropriated by Congress, such as grant-in-aid programs, however, raised a more difficult question.

### III. *BOWEN V. MASSACHUSETTS*

The Medicaid Program,<sup>77</sup> established in 1965 by Congress, is one of several grant-in-aid<sup>78</sup> programs which Congress intended to provide federal financial assistance to states to meet specified objectives.<sup>79</sup> "Although the federal contribution to a State's Medicaid program is referred to as a 'reimbursement,' the stream of revenue is actually a series of huge quarterly advance payments that are based on the State's estimate of its anticipated future expenditures."<sup>80</sup> Between 1978 and 1982, the Department of Health and Human Services (HHS), which administers the grant program, contributed nearly \$5 billion to the Massachusetts Medicaid program. More than ten percent of the Massachusetts contribution, or \$546 million, provided medical and rehabilitative services to mentally retarded patients in intermediate care facilities.<sup>81</sup> In 1982, HHS disallowed \$6.4 million of claimed reimbursements for treatment of the mentally retarded between July 1, 1978, and December 31, 1980, on the ground that the claim was actually for educational expenses, not medical expenses.<sup>82</sup>

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74. See, e.g., *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980) (Federal Government argued exclusive Court of Claims jurisdiction and court disagreed), *cert. denied*, 454 U.S. 855 (1981); *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979) (although the Federal Government will incur an expense in complying with injunctive relief, the creation of such expense does not necessarily remove that form of relief), *cert. denied*, 441 U.S. 961 (1979).

75. See *Beller*, 632 F.2d at 795.

76. See *supra* note 74 and accompanying discussion.

77. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 343.

78. *Glossary of Terms Used in the Federal Budget Process*, PAD 81-27, p. 61-62 (distinguishing "grants" which are made to non-governmental entities).

79. Social Security Amendments of 1965, Pub. L. No. 89-97, § 1901, 79 Stat. 343 (indicating that the purpose of the Act was to enable "each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance . . . and (2) rehabilitation and other services").

80. *Bowen v. Massachusetts*, 487 U.S. 879, 883-84 (1988) (footnote omitted).

81. *Id.* at 886 n.6.

82. *Id.* at 886-87.

### A. *The Evolution of Bowen*

Following established procedures under 42 U.S.C. § 1396,<sup>83</sup> the State appealed the disallowance to HHS's Grant Appeals Board, which affirmed the administrative decision. Invoking federal question jurisdiction, the State then filed suit against the Secretary of the Department in the District Court for Massachusetts.<sup>84</sup> The State alleged that the United States had waived its sovereign immunity under section 702 of the APA.<sup>85</sup> The state sought declaratory and injunctive relief, asking the court to set aside the Board's order.<sup>86</sup> A second suit followed when the Department disallowed, for the same reasons, nearly \$5 million of claimed reimbursements for the period January 1, 1981, through June 30, 1982.<sup>87</sup>

District court suits appealing a federal disallowance of a grant-in-aid reimbursement claim were not uncommon. A number of cases, both before and after the 1976 amendment to the Administrative Procedure Act, had reached the regional courts of appeals.<sup>88</sup> In *Bowen*, the district court treated Massachusetts's suit as a routine claim under the APA.<sup>89</sup> After reviewing the claim, the court concluded that the statute's language entitled the plaintiff to reimbursement for the expenses incurred between July 1978 and December 1980 and it granted the State's motion for summary judgment.<sup>90</sup> Three months later, the same judge granted on the same ground the State's

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83. 42 U.S.C. § 1396 (1988).

84. *Bowen*, 487 U.S. at 887.

85. 5 U.S.C. § 702 (1988).

86. *Bowen*, 487 U.S. at 887.

87. *Id.* at 887-88.

88. See *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524 (1985) (district court reviewed the Department of Health and Human Services' denial of Connecticut's reimbursement request under the Medicaid Act); *Illinois v. Bowen*, 808 F.2d 571 (7th Cir. 1986) (district court reviewed Department of Health and Human Services' disallowance of Illinois' reimbursement request under the Social Security Act); *Illinois v. Bowen*, 786 F.2d 288 (7th Cir. 1986) (same); *Mississippi Medicaid Comm'n v. Heckler*, 633 F. Supp. 78 (S.D. Miss. 1985) (district court reviewed Department of Health and Human Services' disallowance of claims under the Medicaid Act), *aff'd*, 786 F.2d 1161 (5th Cir. 1986); *Oregon v. Heckler*, 651 F. Supp. 6 (D. Or. 1984) (district court reviewed agency's denial of Oregon's claim for federal reimbursement of administrative costs under the Aid To Families with Dependent Children Foster Care program); *Illinois v. United States Dep't of Health and Human Servs.*, 594 F. Supp. 147 (N.D. Ill. 1984) (district court reviewed agency's disallowance of Illinois's reimbursement request under Medicaid).

89. "Decisions of the [Department Grant Appeals] are . . . reviewable in a United States District Court." *Massachusetts v. Heckler*, 616 F. Supp. 687, 689 n.2 (D.C. Mass. 1985), *aff'd in part, vacated in part sub nom.*, *Massachusetts v. Secretary of Health & Human Servs.* 816 F.2d 796 (1st Cir. 1987), *aff'd in part, rev'd in part sub nom.*, *Bowen v. Massachusetts* 487 U.S. 879 (1988).

90. *Heckler*, 616 F. Supp. at 693-95.

motion for summary judgement on its appeal from the disallowed expenditures for the period January 1, 1981, through June 30, 1982.

The Secretary of HHS appealed to the Court of Appeals for the First Circuit on two grounds: first, that the district court erred in its analysis of the Agency's decision; and, second, that the court lacked jurisdiction to order release of the withheld funds because the claim to those funds fell solely within the Claims Court's Tucker Act jurisdiction.<sup>91</sup> The Secretary argued, therefore, that the suit was barred by section 702 of the APA which limited jurisdiction of the district courts to suits "seeking relief other than money damages."<sup>92</sup>

The Federal Government had used this jurisdictional argument in other cases seeking specific relief, with varying degrees of success.<sup>93</sup> In particular, the DOJ advanced this argument in another Medicaid decision pending before the First Circuit.<sup>94</sup> The decision in *Massachusetts v. Departmental Grant Appeals Board*<sup>95</sup> guided the circuit court's decision in *Bowen*.<sup>96</sup> *Grant Appeals Board* involved a Medicaid disallowance which was wholly retrospective, and the court concluded that, as such, the relief sought was solely for money damages and should have been brought in the United States Claims Court as a Tucker Act suit.<sup>97</sup> *Bowen*, however, presented a more difficult problem because the relief sought was both retrospective and pro-

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91. *Id.*

92. *Secretary of Health & Human Servs.*, 816 F.2d at 799.

93. *Id.* The earliest case where a court accepted this jurisdictional argument was *Carter v. Seamans*, 411 F.2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970) (argument accepted in suit for declaratory judgment that officer's discharge was illegal, and seeking back pay and reinstatement). See also *Hahn v. United States*, 757 F.2d 581 (3d Cir. 1985) (reversing district court and accepting the argument in suit by Public Health Service Officers seeking declaration that constructive service credit should be granted them and the award of back pay in excess of \$10,000); *Chu v. Schweiker*, 690 F.2d 330, 333 (2d Cir. 1982) (affirming in part, reversing in part, accepted argument by Public Health Service that adjudication must take place in the Court of Claims); *Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376 (9th Cir. 1981) (rejected in suit by corporation seeking declaratory judgment that it possessed contract rights against the United States); *Spaulding v. Nielsen*, 599 F.2d 728, 730 (5th Cir. 1979) (accepted in mandamus suit seeking unliquidated damages); *Doko Farms v. United States*, 588 F. Supp. 867 (N.D. Tex. 1984) (rejected mandamus suit by farmers seeking release of funds withheld because of alleged overpayments); *Wingate v. Harris*, 501 F. Supp. 58, 62 (S.D.N.Y. 1980) (accepted argument and noted that declaratory relief is merely incidental to principal remedy of damages); *United States v. Pennsylvania*, 394 F. Supp. 261 (M.D. Pa. 1975) (rejected in State's counterclaim seeking mandamus to release withheld Medicare funds); *Brown v. United States*, 365 F. Supp. 328 (E.D. Pa. 1973) (rejected in mandamus suit seeking return of fines or forfeitures levied by an invalid court-martial), *aff'd in part, rev'd in part on other grounds*, 508 F.2d 618 (3d Cir. 1974), *cert. denied*, 422 U.S. 1027 (1975).

94. *Massachusetts v. Departmental Grant Appeals Bd.*, 815 F.2d 778 (1st Cir. 1987).

95. *Id.*

96. *Bowen v. Massachusetts*, 487 U.S. 879, 889 (1988).

97. 815 F.2d at 782.



spective. The retrospective relief sought was the release of the \$10 million withheld. The prospective relief sought was confirmation of the Commonwealth's right to future reimbursement for the services which the Grant Board had ruled were ineligible. The *Bowen* court concluded that section 702 and the Tucker Act barred any retrospective claim for money and remanded the case after concluding that the district court had properly vacated the Grant Appeals Board's decision.<sup>98</sup> The court of appeals, in that ruling, disassociated itself from the test applied in *New Mexico v. Regan*,<sup>99</sup> a 1984 Court of Appeals for the Tenth Circuit decision which had looked to the intent of the complainant in deciding whether the primary objective of the suitor was money damages or non-monetary relief.<sup>100</sup> The *Bowen* court concluded that the district court could, at most, order a more comprehensive audit of the questioned services.<sup>101</sup> If, after such an audit, the court concluded that reimbursement should be made, the State would have to bring suit in the Claims Court for money past due.<sup>102</sup>

Rather than accepting the remand, the Secretary, and subsequently the State, sought and were granted certiorari to the United States Supreme Court.<sup>103</sup> The original appeal had been taken from a district court's order granting the State's motion for summary judgment. Therefore, there were two noticeable gaps in the record: it was unclear, first, whether the State had retained the amount in dispute and, second, whether the Secretary had withheld the disputed amounts from the next quarterly payment due the State.<sup>104</sup>

### B. *The United States Supreme Court's Decision*

Justice Stevens, writing for the majority,<sup>105</sup> framed the issue as whether the district court had jurisdiction to review Secretary Bowen's final order

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98. *Bowen*, 487 U.S. at 910. Although the court did not say so, presumably it would have permitted a claim which fell within a district court's "Little Tucker Act" jurisdiction.

99. 745 F.2d 1318 (10th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985).

100. *Id.* at 1322.

101. *See Bowen*, 487 U.S. at 910.

102. *See id.*

103. *Id.* at 879.

104. *Id.* at 887 n.8 & n.9.

105. Justices Brennan, Marshall, Blackmun, and O'Connor joined the majority. *Id.* at 881. Justice White filed a concurring opinion. *Id.* at 912. Chief Justice Rehnquist, and Justices Scalia and Kennedy dissented. *Id.* at 913.

The importance of the case is evidenced by the number of organizations submitting amici briefs in support of the State. Their labors, however, and those of Massachusetts, did little to enlighten the majority. Briefs were filed by the State of California, the Center on Law and Social Policy, Michigan Legal Services, National Health Law Program, National Housing Law Project, National Legal Aid and Defender Association, National Senior Citizens Law Center, Solano County (California) Legal Assistance, Council of State Governments, International City Management Association, National Association of Counties, National Conference of

refusing to reimburse the State for certain expenditures made pursuant to the program.<sup>106</sup> The majority rejected certain obvious criteria which courts had used to reconcile the conflict between the APA and the Tucker Act.<sup>107</sup> Courts have held, for example, that whenever a claimant seeks a judgment against the United States which exceeds \$10,000, the Claims Court has exclusive jurisdiction.<sup>108</sup> The Federal Government took this position in *Bowen*. Nevertheless, the *Bowen* majority concluded that despite Claims Court jurisdiction over "the purely monetary aspects of the case,"<sup>109</sup> the district court was free to exercise its equitable jurisdiction under the APA. The majority also concluded that as part of that equitable jurisdiction, the district court could issue a decree directing the Secretary to release the money to the state.<sup>110</sup> The majority opinion concluded that the district court had both the jurisdiction and the power to grant the State complete relief.

In holding that the district court and not the Claims Court was the proper forum, Justice Stevens reasoned that a court's disallowance decision was not an award for "damages;"<sup>111</sup> rather, it was an adjustment in the federal grant funds paid to the state. Further, the Court indicated that a suit in the Claims Court would not have provided an "adequate remedy at law."<sup>112</sup>

In his dissenting opinion,<sup>113</sup> Justice Scalia disagreed with both propositions. He emphasized that the distinction between damages and specific relief must be based on the substance, and not the form, of the claim.<sup>114</sup> Further, he viewed the request for retroactive reclassification, or reimbursement for funds already expended under the program, as a claim barred in the

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State Legislatures, United States Conference of Mayors, National Governors Association, National League of Cities, and the States of Alabama, Alaska, Arkansas, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Michigan, New York, Oklahoma, Utah, West Virginia, and Wisconsin.

106. *Bowen*, 487 U.S. at 882. The Secretary argued that the United States Claims Court had exclusive jurisdiction over the State's claim. *Id.* at 890.

107. See, e.g., Bowman, *Bowen v. Massachusetts: The "Money Damages Exception" to the Administrative Procedure Act and Grant-in-Aid Litigation*, 21 URB. LAW. 557, 571 n.59 (1989) (noting the Court's failure to rely on precedent and stating that "[i]n fact, the Court virtually ignored the case law developed under § 702, apart from Judge Bork's decision in the Maryland case"). For a full discussion of Judge Bork's analysis, see *infra* notes 143-54 and accompanying text.

108. See *supra* note 5 and accompanying text.

109. *Bowen*, 487 U.S. at 910-11, n.48.

110. *Id.*

111. *Id.* at 893. Justice Stevens reaches the same conclusion regardless of whether the court's decision affirms or reverses the disallowance decision. *Id.*

112. *Id.*

113. *Id.* at 913 (Scalia, J., dissenting).

114. *Id.* at 915.

district court because of the adequate available remedy in the Claims Court.<sup>115</sup>

### C. Ambiguities in Bowen

Even supporters of the outcome have described the *Bowen* majority opinion as "fail[ing] to answer correctly the complex issues before the Court,"<sup>116</sup> as "less brilliant [than the dissent];"<sup>117</sup> and, as employing artificial canons of statutory construction and creating a mythical legislative history.<sup>118</sup> Moreover, there is a consensus among scholars that the majority failed to set criteria for litigants and subordinate courts that would enable them to decide whether a non-tort suit resulting in the disbursement of federal funds is a suit for money damages that must be brought under the Tucker Act.<sup>119</sup>

As noted above, the *Bowen* majority observed that:

If, however, § 702 of the APA is construed to authorize a district court to grant monetary relief—other than traditional "money damages"—as an incident to the complete relief that is appropriate in the review of agency action, the fact that the purely monetary aspects of the case could have been decided in the Claims Court is not a sufficient reason to bar that aspect of the relief available in a district court.<sup>120</sup>

The passage is ambiguous because it is introduced by the conditional "if." There is general agreement that Congress implemented the amendments to 5 U.S.C. § 702<sup>121</sup> and 28 U.S.C. § 1331(a)<sup>122</sup> to facilitate district courts' exercise of jurisdiction in suits seeking to control the actions of government officials.<sup>123</sup> Congress clearly intended the section 702 amendment,<sup>124</sup> designed

115. *Id.* at 922. Justice Scalia agreed with the majority that the district court would be the proper forum for the State's action seeking injunctive relief with a prospective effect. *Id.* at 921.

116. Webster, *Beyond Federal Sovereign Immunity*, *supra* note 39, at 725.

117. Mason, *Bowen and the Nichomachean Ethic*, 24 PUB. CONT. NEWSL., No. 2, 14 (1989) (suggesting that the Court reached a sound result despite Mason's criticism of the majority's opinion).

118. Bowman, *supra* note 107, at 572-73. Bowman notes that "by employing a variety of canons of statutory construction, . . . the *Bowen* majority purported to answer the following question: what did the 94th Congress have in mind when it inserted the phrase 'money damages' into section 702 of the APA?" She admits that *Bowen* was not necessarily wrongly decided, despite the Court's incorrect focus on congressional intent. She suggests, however, that the Court *should* have addressed the question: "[h]ow would the enacting legislators have wanted this statute applied to a situation they did not foresee?" *Id.* at 575.

119. *See, e.g., supra* notes 116-18.

120. *Id.* at 910-11, n.48.

121. 5 U.S.C. § 702.

122. 28 U.S.C. § 1331(a) (1988).

123. *See* J. STEADMAN, D. SCHWARTZ & S. JACOBY, *supra* note 71, at 330-31.

to remove restrictions on actions for injunctions, declaratory relief, and mandamus, to enhance district courts' equitable jurisdiction.<sup>125</sup> Thus, the conditional "if" must be addressed to determine whether a district court, exercising its equitable jurisdiction in a public law case, can award ancillary monetary relief, commonly described as damages.<sup>126</sup> All federal courts had assumed that they could award such relief. They disagreed, however, over the application of the Little Tucker Act's \$10,000 jurisdictional limitation.<sup>127</sup>

The *Bowen* Court's ultimate ruling on behalf of the State seems to assume that the jurisdictional limit does not apply. This is the interpretation that Justice Scalia applied in his dissent.<sup>128</sup> The majority's use, however, of the conditional "if" could lead to the alternative interpretation that the statement is dicta, and that the actual thrust of the *Bowen* decision is based on a holding that the State had no substantive claim for Tucker Act damages.<sup>129</sup> In view of the dissent's interpretation, it is doubtful that the government could successfully advance a "Little Tucker Act" argument in post-*Bowen* cases.

A further factor that courts should consider is distinguishing a prospective judgment from a retrospective judgment. A prospective judgment would prospectively affect the agency's interpretation of its regulations, and collaterally give rise to a suit for payments for past misinterpretations. A retrospective Tucker Act claim, on the other hand, seeks retrospective money awards and may collaterally affect the agency's prospective interpretation of its regulations.<sup>130</sup> This position was taken by the Court of Appeals for the Eighth Circuit in *Minnesota ex rel. Noot v. Heckler*,<sup>131</sup> and subsequently fol-

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124. 5 U.S.C. § 702.

125. Although mandamus was traditionally a legal writ, its issuance is to be governed by equitable principles. See *supra* notes 55-60 and accompanying text.

126. See *supra* notes 50-51 and accompanying text. Cf. *Tull v. United States*, 481 U.S. 412, 425 (1987) (suggesting that the "Government was free to seek an equitable remedy in addition to, or independent of, legal relief").

127. See *supra* note 5 and accompanying text.

128. *Bowen v. Massachusetts*, 487 U.S. 879, 910 n.48 (1988); see also *id.* at 925 (Scalia, J., dissenting) (citing 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 457 (7th ed. 1956) to establish that the term "adequate remedy" was derived from equity but failing to note Holdsworth's discussion of ancillary monetary relief).

129. See Webster, *Beyond Federal Sovereign Immunity*, *supra* note 39, at 735 n.73.

130. *Bowen*, 487 U.S. at 889 (making the prospective/retrospective distinction).

131. 718 F.2d 852 (8th Cir. 1983). In *Noot*, Minnesota claimed and was paid \$896,159 in federal financial participation funds for services provided to Medicare recipients at three Intermediate Care Facilities. *Id.* at 855. These funds were disbursed by the HHS Health Care Financing Administration for one quarter. In an audit report, HHS characterized the facilities in question as "institutions for mental diseases" and disallowed the claim by offsetting the paid amount against federal financial participation in a supplemental grant to the state. After ex-

lowed by the Court of Appeals for the First Circuit in *Kozera v. Spirito*.<sup>132</sup> Unfortunately, this position was rejected by the *Bowen* Court.<sup>133</sup>

Most importantly, the majority ignored the fact that the goal of the claimant should be dispositive. If the claimant's real effort is to obtain a money judgment, even though declaratory and injunctive relief are sought, then the suit should be transferred to the Claims Court. The Third,<sup>134</sup> Fifth,<sup>135</sup> Ninth,<sup>136</sup> and Tenth Circuits,<sup>137</sup> had taken this "ultimate purpose" approach. The *Bowen* majority did not rely on these cases,<sup>138</sup> instead, it relied on an alternative test,<sup>139</sup> effectively rejecting the "ultimate purpose" test.<sup>140</sup>

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hausting administrative remedies, Minnesota filed for review in the district court. The district court granted summary judgment in favor of Minnesota, holding that HHS acted arbitrarily and capriciously. *Id.* at 856. On appeal, the United States Court of Appeals for the Eighth Circuit held that, although the district court had jurisdiction to review the disallowance and to grant prospectively declaratory relief, the award of money damages was exclusively in the jurisdiction of the Claims Court. *Id.* at 857. The court further reasoned that although the Claims Court had the power to grant limited equitable relief collateral to damages, in this instance the injunctive relief would have significant prospective effect. The appeals court, therefore, bifurcated the claims because of the limited jurisdiction of both courts. *Id.* at 858.

132. 723 F.2d 1003 (1st Cir. 1983). In *Kozera*, the Massachusetts Department of Public Welfare filed a third party complaint against the Secretary of Health and Human Services responding to a challenge to a state regulation that had recently been promulgated to conform with its Federal counterpart. *Id.* at 1004-05. The third party complaint alleged that if the state regulation violated the federal Constitution or a federal statute, so did the federal regulation. The Secretary removed the case to federal court, and the case was dismissed on sovereign immunity grounds. On appeal, the United States Court of Appeals for the First Circuit closely examined the distinction between prospective and retroactive relief, holding that in the case at bar, because the relief sought was equitable, jurisdiction was properly in district court, even though the injunction might result in increased outlays of federal funds. *Id.* at 1009.

133. *Bowen*, 487 U.S. at 904-05.

134. *Jaffee v. United States*, 592 F.2d 712 (3d Cir. 1979) (a claim for injunctive relief to provide medical care is in fact a claim for monetary damages), *cert. denied*, 441 U.S. 961 (1979).

135. *Amoco Prod. Co. v. Hodel*, 815 F.2d 352, 367 (5th Cir. 1987) (plaintiff cannot avoid Claims Court Tucker Act jurisdiction by characterizing action as equitable), *cert. denied*, 487 U.S. 1234 (1988).

136. *Chula Vista City School Dist. v. Bell*, 762 F.2d 762 (9th Cir. 1985) (where real effort is to obtain money, exclusive jurisdiction is in Court of Claims, even when the complaint is framed to seek injunctive relief), *cert. granted, vacated sub. nom.* *Chula Vista City School Dist. v. Bennett*, 474 U.S. 1098 (1986); *Bakersfield City School Dist. v. Boyer*, 610 F.2d 621 (9th Cir. 1979) (same).

137. *United States v. City of Kansas City*, 761 F.2d 605 (10th Cir. 1985) (no district court jurisdiction for counterclaim against the United States where the purpose was to obtain previously denied grant money); *New Mexico v. Regan*, 745 F.2d 1318 (10th Cir. 1984) (same), *cert. denied*, 471 U.S. 1065 (1985).

138. The majority opinion alluded to one such case, *Chula Vista City School District*, in a footnote. *Bowen v. Massachusetts*, 487 U.S. 879, 882 n.1 (1988).

139. The *Bowen* Court applied the alternative test devised by Judge Bork in *Maryland Department of Human Resources v. Department of Health & Human Services*, 763 F.2d 1441 (D.C. Cir. 1985). For a discussion of the case, see *infra* notes 141-54 and accompanying text.

#### IV. ALTERNATIVES FOR COURTS AND LITIGANTS CONFRONTED WITH *BOWEN*

In the aftermath of *Bowen*, courts and litigants are left with several alternatives as they try to discern whether a suit should be brought under the Tucker Act in the Claims Court or under the APA in district court. The alternatives focus on damages, remedies, and restitution, respectively.

##### A. Applying a "Damages" Test

A "damages test" treats jurisdictional grants as mutually exclusive and applies a damages definition to decide which forum is appropriate. This approach is dictated by the *Bowen* majority's reliance on the Court of Appeals for the District of Columbia's opinion in *Maryland Department of Human Resources v. Department of Health and Human Services*.<sup>141</sup> In *Human Resources*, Judge Bork rejected the Federal Government's argument that section 702 of the APA barred a state's appeal from an order upholding a Medicaid disallowance; section 702 referred to "actions seeking relief other than money damages."<sup>142</sup>

Judge Bork did not apply the tests devised by the other circuits in their attempts to distinguish between APA and Tucker Act suits.<sup>143</sup> Instead, he concluded that the money sought by Maryland did not constitute a claim for money damages because it was not "a sum of money used as compensatory relief . . . to substitute for a suffered loss."<sup>144</sup> The money Maryland sought was "funds to which a statute allegedly entitle[d] it, rather than money in compensation for the losses . . . that Maryland will suffer or has suffered by virtue of the withholding of these funds."<sup>145</sup>

Judge Bork relied on Professor Dobbs' definition of the term "loss" in classifying the types of remedies available as either substitutionary, i.e., compensation for the loss, or specific, i.e., "giv[ing] the plaintiff the very thing to

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140. Justice White's concurring opinion can be read as supporting a variant of this test which might be called "the artful pleading" test:

The Court's opinion, as I understand it, also concludes that the District Court, in the circumstances present here, would have had jurisdiction to entertain and expressly grant a prayer for a money judgment against the United States. I am unprepared to agree with this aspect of the opinion and hence concur only in the result the court reaches with respect to the construction of § 702.

*Bowen*, 487 U.S. at 912; see *Bowman*, *supra* note 107, at 572.

141. 763 F.2d 1441 (D.C. Cir. 1985).

142. 5 U.S.C. § 702 (1988) (emphasis added); *Maryland Dep't of Human Resources*, 763 F.2d at 1446.

143. See *supra* notes 134-140 and accompanying text (for the other circuits' tests).

144. *Maryland Dep't of Human Resources*, 763 F.2d at 1446 (citing D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 135 (1973)).

145. *Id.* at 1446.

which he was entitled."<sup>146</sup> Judge Bork concluded, and the *Bowen* majority apparently agreed, that when Congress employed the term "money damages" in section 702, it used the term in "the ordinary understanding of the term as used in the common law for centuries."<sup>147</sup> Judge Bork noted that during the debate over the amendment, none of the legislators objected to *Larson v. Domestic & Foreign Commerce Corp.*'s<sup>148</sup> "classic distinction between the recovery of money damages and 'the recovery of specific property or monies.'"<sup>149</sup>

Judge Bork's rationale for concluding that the Claims Court did not have jurisdiction was as questionable as the Federal Government's argument that the case had been tried in the wrong forum. The government's argument was questionable because the Medicaid statute established two categories of adverse agency action. First, a state might be sanctioned for noncompliance, and if its appeal to the Departmental Grant Appeals Board failed, it could appeal to the appropriate regional court of appeals.<sup>150</sup> Second, in less serious cases, a state's claim for reimbursement might be disallowed. Although noncompliance sanctions could involve millions of dollars, the DOJ made no effort to transfer jurisdiction over such cases to the Court of Appeals for the Federal Circuit after the court's establishment in 1982. Further, states had, in the quarter century of the Act's operation, routinely sought judicial review in the appropriate district court despite the absence of a provision for judicial review of disallowances in the Medicaid statute.<sup>151</sup>

With respect to his rejection of Maryland's claim for money damages, Judge Bork was presumably familiar with the traditional tripartite distinction of Tucker Act claims between those based on an express or an implied contract, those based on the Constitution, and those based on a statute or regulation.<sup>152</sup> If we apply these categories to his assertion that the money

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146. *Id.* (quoting D. DOBBS, *supra* note 144, at 135). Remedies may be either legal or equitable. Generally, legal remedies are compensatory rather than specific. D. DOBBS, *supra* note 144, at 1-3. Equitable remedies, on the other hand, are often intended to grant specific relief, although equity courts may also grant ancillary relief, in the form of damages, to accord the suitor complete relief. *Id.*

147. *Maryland Dep't of Human Resources*, 763 F.2d at 1447; *Bowen v. Massachusetts*, 487 U.S. 879, 900-01 (1988).

148. 337 U.S. 682 (1948).

149. *Maryland Dep't of Human Resources*, 763 F.2d at 1447 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949)).

150. 42 U.S.C. § 1316(a)(3) (1988).

151. The Executive Branch's sole effort, claiming that the Act's silence dictated that there should be no judicial review, failed in the mid-1970's. See *County of Alameda v. Weinberger*, 520 F.2d 344, 348 (9th Cir. 1975) (judicial review of agency action is not precluded absent a persuasive reason to believe this to be the intent of Congress).

152. *Eastport S.S. Co. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967).

sought by the state was not intended as compensatory substitutionary relief, then his comment must have related to the third category: suits based on a statute or regulation. If his comments were limited to those based on a statute or regulation, however, then his reliance on a private, as opposed to public, law definition of damages was inappropriate. Any Tucker Act suit on a statute or regulation is a suit premised on an assertion of entitlement, a public right, rather than a claim for compensation for losses, a private right. "Loss," as Judge Bork used it, is a term without any legal meaning. Courts usually use the term, however, in the context of contract suits, as a definition of the claimant's expectancy or reliance interests—not for public law issues. Judge Bork and the *Bowen* Court concluded that when section 702 was amended to exclude suits for money damages Congress did not intend to exclude statutory entitlement claims, because such claims were not for losses, and Congress was aware of the *Larson* rule that specific relief could entail the recovery of money. Surprisingly, neither Judge Bork nor the *Bowen* majority referred to Professor Dobbs's work for elucidation on the latter point. Had they done so, they would have discovered that replevin, a legal remedy as distinguished from an equitable remedy, is never available for specie.<sup>153</sup> Equity would never direct the return of money unless it was so unique that it could be considered an irreplaceable chattel. Thus, any principled attempt to reconcile *Bowen's* reliance on *Human Resources* fails. Judge Bork's criteria could be applied to all statutory entitlement cases, as they were based on a misreading of private law which he then applied to construe a public law provision.<sup>154</sup>

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153. See *infra* note 195 and accompanying text.

154. In fact, Congress amended section 702 to permit district courts to exercise their jurisdiction to review "the legality of official conduct which adversely affects private persons." H.R. REP. NO. 1656 ON S. 800 HOUSE COMMITTEE ON THE JUDICIARY, 94th Cong. 2d Sess. 4 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6121, 6125. This "withdraw[s] the defense of sovereign immunity, in actions for injunctions, declaratory judgement and mandamus." J. STEADMAN, D. SCHWARZ & S. JACOBY, *supra* note 71, at 331. *But see* Webster, *Beyond Federal Sovereign Immunity*, *supra* note 39, at 734-44 n.149 (believing that the authors should have taken a more expansive view of the effect of section 702). For example, *Sibley v. Ball*, 924 F.2d 25 (1st Cir. 1991), involved a marine officer's attempt to secure a declaratory judgment that he had been unlawfully discharged. The Secretary of the Navy argued that the effect of the officer's suit (which concurrently sought back pay) required that the claim be processed under the Tucker Act. If the Court had followed Judge Bork's analysis, and *Bowen*, it would have concluded that this was a suit for specific relief which simply entailed the recovery of money and was not a claim for a "loss." In fact the Court, without reference to Bork or *Bowen*, concluded that the Tucker Act did apply.



### B. An Adequacy of Remedies Test

In the alternative, a district court faced with an APA suit for specific relief, which, if granted, would result in payment of government monies, could apply an adequacy of remedies test in deciding whether the suit was actually a Tucker Act claim. Professor Webster favored this approach in his provocative article, *Beyond Sovereign Immunity: 5 U.S.C. § 702 Spells Relief*.<sup>155</sup> He correctly asserts that Congress intended section 702 to apply to equitable forms of relief and the common law coercive writs.<sup>156</sup> From that premise, he correctly concludes that district courts should grant specific, as distinguished from substitutionary, or monetary, relief only when there is no adequate remedy at law, i.e., a Tucker Act suit. Webster, however, offers little guidance as to appropriate criteria to apply in deciding when the Tucker Act offers an adequate remedy; he simply states that "the courts now agree that an alternative remedy is inadequate unless it is equally 'complete, practical and efficient.'"<sup>157</sup> In fact, it has recently been suggested, by Professor Laycock, on whom Professor Webster relies, that courts seeking to exercise their equitable powers have consistently abused the "inadequacy of remedy" test.<sup>158</sup> Thus, Professor Webster's case by case approach encourages indeterminate outcomes—an unfavorable characteristic of the equitable law suit in our view.<sup>159</sup>

There are other objections to this approach as well. First, it puts a premium on the well-plead complaint,<sup>160</sup> and second, the requested relief may not be reconstrued as equivalent to damages. Instead, proof of adequacy

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155. See Webster, *Beyond Federal Sovereign Immunity*, *supra* note 39, at 755.

156. *Id.* at 749. Surprisingly, Webster's remedies-based analysis does not focus on Judge Bork's misuses of the Dobbs' treatise to prove that claims for disapproved grant-in-aid funds were not claims for damages.

157. *Id.* at 750-51 & n.194 (quoting *Terrace v. Thompson*, 263 U.S. 197, 214 (1923)).

158. Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 688 (1990) (failing to distinguish between private claims between individuals, and public law claims against the government).

159. See Solum, *USC Symposium on Judicial Election, Selection, and Accountability*, 61 S. CAL. L. REV. 1735, 1753 (1988). Solum articulates Aristotle's concept of equity: "No general rule can guarantee the best outcome in all particular situations. Equity allows the judge to dispense with the general rule in the particular case and reach a result. In modern legal parlance, we refer to the same idea as informed judicial discretion or equitable discretion." *Id.* (footnotes omitted) (citing THE COMPLETE WORKS OF ARISTOTLE 1751 (J. Barnes ed. 1984)). One scholar notes that this discretion allowed by equity is ripe for abuse. D. LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 14 (1991) (suggesting that "[o]rders to pay money were sometimes available in equity, and courts and legislators sometimes use equitable monetary relief to manipulate jurisdiction or avoid jury trial").

160. "The adequacy talisman requires the unthinkable of some courts: they must accept the well pleaded prayer for nondamage relief of the complaint, entertaining it on its own terms." Webster, *Beyond Federal Sovereign Immunity*, *supra* note 39, at 749 n.185.

must be required if the Claims Court remedy is to oust district court relief,<sup>161</sup> thus elevating form over substance.<sup>162</sup>

Webster acknowledges that his adequacy test would also, under some circumstances, lead to district court intervention in claims traditionally relegated to the Claims Court—specifically, contract disputes and fifth amendment takings claims.<sup>163</sup> The most persuasive objection to Professor Webster's approach is that he gives no hint as to how subordinate federal courts, acting within the doctrine of *stare decisis*, could apply an "adequacy test" while purportedly adhering to *Bowen*. Despite this criticism of his article, however, he is the only *Bowen* commentator who has attempted to suggest a judicial solution to the problems the case poses.

### C. A Restitutionary Test

A third test is to treat the jurisdictional grants as complimentary and apply a restitutionary test to decide which forum is appropriate. The language in *Bowen* suggests this approach: "[n]either a disallowance decision, nor the reversal of a disallowance decision, is properly characterized as an award of 'damages.'" <sup>164</sup> Either decision is an adjustment. Indeed, decisions usually order relatively minor adjustments in the size of the federal grant to the state that is payable in huge quarterly installments. Congress uses the terms "overpayment" and "underpayment" to describe such adjustments in the open account between the United States and each state.<sup>165</sup> Specific agency action that reverses a disallowance decision is described as "restitution."<sup>166</sup>

This approach is initially appealing because it enables subordinate courts to limit the admittedly overbroad language of *Bowen* to those claims which satisfy these criteria—relatively minor adjustments in claims due on open accounts, and statutory uses of the term "restitution." Unfortunately, the test suffers from two defects. First, it is unclear when a minor adjustment

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161. *Id.* n.184.

162. *Id.*; see also Bowman, *supra* note 107, at 578. Bowman notes that:

[U]ntil the precise scope of the *Bowen* decision is clear, litigants may well be advised to frame their pleading with care. It is probably wise, for example, to do the following: (1) to seek an injunction against failure to reimburse, rather than to ask that the district court order the federal government to pay a sum of money, (2) to avoid the language of damages, (3) to emphasize the restitutionary nature of claims, where possible, and (4) to highlight the prospective effect of the court's decision upon an ongoing relationship with the federal government.

*Id.* at 578.

163. Webster, *Beyond Federal Sovereign Immunity*, *supra* note 39, at 749. The Judicial Conference of the United States would not view this consequence with equanimity.

164. *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988).

165. See 42 U.S.C. § 1396b(d) (1988).

166. *Bowen*, 487 U.S. at 893.

would become "major" because it requires a comparison of two funds.<sup>167</sup> Second, the use of the term "restitution" would encourage an activist court to extend its section 702 equitable jurisdiction to claims for monetary relief which courts have traditionally regarded as falling outside the Tucker Act's waiver of sovereign immunity.<sup>168</sup>

The law of restitution "is the law relating to all claims, quasi-contractual or otherwise, which are founded upon the principle of unjust enrichment."<sup>169</sup> Litigants can alternatively seek relief on either legal grounds, under a theory of quasi-contract, derived from *Moses v. McFerlan*<sup>170</sup> or on equitable grounds, relying on the doctrines of constructive trust, subrogation, or equitable lien.<sup>171</sup> Courts have traditionally excluded quasi-contracts, contracts which are implied-in-law, from Tucker Act jurisdiction.<sup>172</sup> In particularly egregious cases, courts have "found" a contract implied-in-fact, for example, to repay money wrongfully collected which in a private law setting would have given rise to a contract implied-in-law or a tort claim.<sup>173</sup> Professor Webster, who is generally supportive of increased district court participation in traditional Tucker Act cases, seems troubled by this possibility.<sup>174</sup>

To date, no one has considered the possibility that the *Bowen* Court's use of the term "restitution" might be an invocation of the equitable doctrine of constructive trust.<sup>175</sup> Professor Street, in his magisterial work, *GOVERNMENTAL LIABILITY*,<sup>176</sup> touched on the possibility that the government could

167. For example, most government contract claims involve relatively minor adjustments in the total contract price.

168. See *supra* text accompanying note 68 (noting that Tucker Act claims must be claims for money damages).

169. R. GOFF, *THE LAW OF RESTITUTION* 3 (3d ed. 1986).

170. *Moses v. MacFerlan*, 97 Eng. Rep. 676, 681 (K.B. 1760) ("the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money").

171. R. GOFF, *supra* note 169, at 3, 4-5.

172. *Merritt v. United States*, 267 U.S. 338, 341 (1925). But see *Wall & Childres, The Law of Restitution and the Federal Government*, 66 NW. U.L. REV. 587 (1971) (for several idiosyncratic lower court decisions).

173. See, e.g., *Clapp v. United States*, 117 F. Supp. 576, (Ct. Cl. 1954) cert. denied, 348 U.S. 834 (1954); see also *Boyd & Huffman, The Treatment of Implied-in-Law and Implied-in-Fact Contracts and Promissory Estoppel in the United States Claims Court*, 40 CATH. U.L. REV. 605, 606-09 (1991) (discussing jurisdiction of implied-in-law and implied-in-fact contracts in the Claims Court).

174. Webster, *Beyond Federal Sovereign Immunity*, *supra* note 39, at 754-55 (misreading, in our judgment, *Eastport and Testan*); see *supra* note 30 (for a discussion of *Eastport*).

175. R. GOFF, *supra* note 169, at 3.

176. H. STREET, *supra* note 2, at 129 (citing *Mellon v. Orinoco Iron Co.*, 266 U.S. 121, 129 n.8 (1924)).

be a trustee.<sup>177</sup> In *United States v. Mitchell*,<sup>178</sup> the Supreme Court recognized that a particular statutory scheme might give rise to a fiduciary relationship.<sup>179</sup> Although the *Mitchell* case was initiated in the Claims Court, its trust doctrine, when combined with *Bowen's* expansive language permitting restitutionary claims in district courts, unfortunately suggests the possibility of a new class of claims.<sup>180</sup> The Supreme Court's reliance on the statutory term "restitution" should not be used to extrapolate some sort of equitable restitutionary claim against the government.

#### V. THE PREFERRED SOLUTION: MAINTAINING CONSISTENCY

This Article is based on the premise, shared by other commentators,<sup>181</sup> that *Bowen* creates more forum selection problems than those it purports to solve. Short of outright reversal, or corrective legislation, what can lower courts do to mitigate its effect? We suggest that courts emphasize the peculiar characteristics of Massachusetts's claim in *Bowen* and Maryland's claim in *Maryland Department of Human Resources*,<sup>182</sup> and that *Bowen's* effect should be limited to similar cases which involve grant-in-aid legislation. Such suits can be distinguished from the normal Tucker Act case by examining the claimant and the nature of the claim, and then by examining the type of relief sought.

##### A. *The Nature of the Plaintiff and the Claim Advanced*

The state in grant-in-aid cases is a non-Hohfeldian plaintiff,<sup>183</sup> and as such is not the kind of claimant envisioned by the Tucker Act. States, however, have standing to assert claims for reimbursement:<sup>184</sup> "non-Hohfeldian plaintiffs invoke the judicial power to redress injuries not easily definable in terms of personal, financial loss or other harms actionable at common law."<sup>185</sup> In *Claims Court at the Crossroads*,<sup>186</sup> Professor Fallon identifies other characteristics as well, and he does not remark on the peculiar status

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177. *Id.* at 128.

178. 463 U.S. 206 (1983) (*Mitchell II*).

179. *Id.* at 226.

180. *Id.* at 226-27.

181. See Sisk, *supra* note 12, at 48-49; Sisk, *Tucker Act Appeals to the Federal Circuit*, 36 FED. B. NEWS & J. 41, 45-46 (1989); Webster, *Choice of Forum*, *supra* note 39, at 536-37.

182. 763 F.2d at 1441, 1451 (D.C. Cir. 1985).

183. See *supra* notes 31-35 and accompanying text.

184. *Bowen*, 487 U.S. at 885; see also *County of Alameda v. Weinberger*, 520 F.2d 344 (9th Cir. 1975).

185. Fallon, *supra* note 14, at 4 (this is "[i]n contrast with the classic plaintiffs of American legal history").

186. Fallon, *supra* note 12.

of the state as plaintiff in *Bowen*. The authors of this Article do not claim that he would agree with this Article's analysis. His article, however, succinctly identifies the non-Hohfeldian plaintiff—states seeking Medicare reimbursement meet that description.<sup>187</sup> Thus, the state's reimbursement claims were not to "redress injuries definable in terms of *personal*, financial loss."<sup>188</sup> Their "losses" were either lost opportunities to spend state revenues for other purposes, while maintaining the controverted services, or, if the service were curtailed or eliminated, the claimed loss would be the value of the services which would otherwise have been rendered to the beneficiaries.

The claim advanced in a state suit for reimbursement is unlike the traditional Tucker Act suit on a statute or regulation. State suits for reimbursement neither assert that the United States has violated a statutory direction to pay a specified sum,<sup>189</sup> nor do they assert that the statute "can fairly be interpreted as mandating compensation to them by the federal government for the *damage* sustained."<sup>190</sup> Therefore, the majority decisions in *Maryland Department of Human Resources* and *Bowen* were right for the wrong reasons: the state, as a claimant, had not sustained any "damage" as the term is used in Tucker Act jurisprudence, these two decisions seemed to miss this point, because of the peculiar nature of the state's "loss."<sup>191</sup>

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187. *Id.*

188. Fallon, *supra* note 14, at 4 (emphasis supplied).

189. *See, e.g., Drier v. United States*, 70 F. Supp. 888 (Ct. Cl. 1947).

190. *United States v. Testan*, 424 U.S. 392, 402 (1976) (citing *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)) (emphasis added); *see also United States v. Mitchell*, 463 U.S. 206, 211-19 (1983) (*Mitchell II*) (holding that the "Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that expressly or implicitly create substantive rights to money damages"). *Cf. City of Alexandria v. United States*, 737 F.2d 1022 (Fed. Cir. 1984). The Court of Appeals for the Federal Circuit, in *City of Alexandria*, suggested that the City had the same problem as the plaintiff in *Eastport*. *Id.* at 1028 (citing *Eastport*, 372 F.2d at 1002 (Ct. Cl. 1967)). Neither plaintiff could show that money was illegally exacted or that any provision of law commanded payment. Thus, "not every instance of misgovernment by a United States agency that is costly to private parties, or local or state interests, generates a valid Tucker Act claim." *City of Manassas Park v. United States*, 633 F.2d 181, 183, *cert. denied*, 449 U.S. 1035 (1980).

191. The *Bowen* Court's reliance on Judge Bork's decision caused the Court to base its discussion of damages on a false premise—that suits to compel payments and reimbursements were not suits for damages within the meaning of the Tucker Act because courts have always distinguished "monetary ancillary relief" granted in equity from damages awarded in law. Moreover, Justice Stevens and Judge Bork erroneously rely on Dobbs's comment that "[o]ccasionally a money award is a specie remedy," *Bowen*, 487 U.S. at 895 (quoting *Maryland Dep't of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1447-48 (D.C. Cir. 1985)), and *Larson's* allusion to orders directing the "recovery of specific property or monies." *Bowen*, 487 U.S. at 893 (quoting *Larson v. Domestic & Foreign Commerce Corp.* 337 U.S. 682, 688 (1949)) (emphasis added). Both references related to those *rare* cases where a court will treat specie as property and use its equitable powers to direct the

The real distinction between the enforcement of a promise to pay money and a statutory duty to do so is that in grant-in-aid cases, the money which the beneficiary claims in the suit must be spent in a specified fashion and is subject to federal audit to ensure compliance. In a typical "damages" suit, the amount awarded, whether in a suit at law or as ancillary to an equitable decree, is not subject to any similar restraints. Further, the amendment to APA section 702 makes it clear that the drafters and scholarly commentators used "damages" in the traditional sense of an award of discretionary funds—funds available for spending, unconstrained by federal limitations on expenditures.<sup>192</sup> When a state or municipality sues the United States in contract or tort, whether in law or equity, any award that it receives is not subject to federal audit. Thus, a reimbursement claim is distinctive because any such award is still subject to these same federal fiscal controls. This is one of two ways in which courts can distinguish *Bowen* from other suits involving federal funds.

### B. *The Nature of the Relief Sought*

Courts can also examine the type of relief sought by the plaintiff to determine if the suit involves reimbursement. Justice Stevens and Judge Bork correctly concluded that the courts in grant-in-aid cases were being called on to exercise their equitable powers, rather than award money damages. Nevertheless, they should have based their conclusion on the fact that grant-in-aid suits effectively seek *declaratory relief*, establishing the eligibility of a state *program* rather than federal reimbursement. Because the Tucker Act is not a grant of jurisdiction over declaratory judgment actions,<sup>193</sup> the courts

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return of identifiable funds. See *Larson*, 337 U.S. at 687 ("the area of controversy is entered when the suit is not one for damages but for specific relief: i.e., the recovery of specific . . . monies"); see generally D. DOBBS, *supra* note 144, at 421-22 (noting that "common law courts took the position that an action of trover for conversion of money would not lie unless there was an obligation to return some specific pieces of gold or the like").

Similarly, Judge Bork's reliance on private civil litigation concepts in *Maryland Department of Human Resources*, failed to distinguish between the enforcement of a mere promise to pay money and a statutory duty to do so. His obfuscation of the issue was apparent when he stated that: "Maryland is seeking funds to which a statute allegedly entitles it, rather than money in compensation for its losses . . . [thus permitting a district court to grant specific relief]." *Bowen*, 487 U.S. at 895 (citing *Maryland Dep't of Human Resources*, 763 F.2d at 1441); see also *Bowen*, 487 U.S. at 894-901; *Maryland Dep't of Human Resources*, 763 F.2d at 1446-48. If Judge Bork's reasoning was correct, all Tucker Act suits on a statute or regulation in which the suitors sought funds to which they were allegedly entitled would be suits for specific relief.

192. See *supra* notes 68-76 and accompanying text.

193. See *United States v. King*, 395 U.S. 1, 4 (1969) ("[C]ases seeking relief other than money damages from the Court of Claims have never been 'within its jurisdiction.'"); see also *Richardson v. Morris*, 409 U.S. 464, 465 (1973) ("[T]he Act has long been construed as authorizing only actions for money judgments and not suits for equitable relief . . .").

in *Bowen* and *Maryland Department of Human Resources* made two categorical errors by failing to distinguish the nature of the plaintiff and the nature of the relief sought.<sup>194</sup>

Grant-in-aid suits for reimbursement do not fit comfortably within the Tucker Act's grant of jurisdiction. Although the Claims Court has routinely accepted such claims for money past due and owing, its jurisdictional basis is questionable because the grant relationship shares the characteristics of both a contract and a statutory entitlement.<sup>195</sup> For example, in *Kentucky ex rel. Cabinet for Human Resources v. United States*,<sup>196</sup> a recent Claims Court case in which the State sought grant-in-aid reimbursements, the court requested supplemental briefs in light of *Bowen*.<sup>197</sup> The State of Kentucky asserted that jurisdiction was based on an express or implied contract, while the Federal Government submitted that the claim was based on a statute which mandated payment.<sup>198</sup> The court concluded that both grants of jurisdiction applied although the opening sentences of its opinion asserted the traditional view that the grants are mutually exclusive:

The Tucker Act provides four alternative foundations for claims against the United States. The Claims Court may render judgment on any claim founded "either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."<sup>199</sup>

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194. A standard English administrative law treatise, which discusses declaratory proceedings, makes the point clearly:

In some of the cases . . . in which both parties to the declaratory action have been public authorities, the issue could equally have arisen between private individuals, or between a private individual and a public authority. But there are some classes of disputes which arise exclusively or predominantly between public authorities and which cannot be judicially determined except by means of a judgment in declaratory form. . . . These include the financial contribution payable by a government department to a local authority in respect of compensation . . . . The role of the declaratory judgment as a means of resolving such issues is clearly very important.

J.M. EVANS, DE SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 496-97 (4th ed. 1980).

195. U.S. GENERAL ACCOUNTING OFFICE, OFFICE OF GENERAL COUNSEL, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 13-8 (1982) (distinguishing the contractual relationship under a grant from a procurement contract). *Id.* at 13-9 (discussing the role of the Comptroller General in determining whether a particular expenditure is consistent with the intent of Congress).

196. 16 Cl. Ct. 755 (1989).

197. *Id.*

198. *Id.* at 761.

199. *Id.* at 760-61 (citing 28 U.S.C. § 1491(a)(1)) (emphasis in original).

Only grant-in-aid cases give rise to this confusion,<sup>200</sup> which is due in part to the fact that, unlike most Tucker Act judgments, any sums awarded as reimbursement claims will not be drawn from the Judgment Fund<sup>201</sup> but from the specific monies appropriated by Congress to support the grant program.<sup>202</sup> While the source of payment should not always be dispositive of the question of Tucker Act jurisdiction,<sup>203</sup> *Bowen's* references to "ledger adjustment"<sup>204</sup> add weight to the conclusion that suits by states for grant-in-aid reimbursement of moneys withheld are *sui generis*<sup>205</sup> and are not claims within the Tucker Act's jurisdiction. Thus, this Article conforms to the dictates of *Bowen*, but returns to the practice which prevailed before the Department of Justice began to make its creative arguments in section 702 cases involving grants-in-aid.<sup>206</sup>

Return to the status quo would mean that grant-in-aid suits for prospective non-monetary relief would be brought in the district court. Appeals would be taken to regional courts of appeal—even if the effect of the relief would be to increase expenditures under the grant-in-aid program. This approach would be consistent with the goals of section 702,<sup>207</sup> and, for example, with the Medicaid statutory scheme which grants regional courts a role in the review process.<sup>208</sup> Suits seeking both prospective non-monetary relief and retrospective monetary relief would fall similarly within the district courts' equitable jurisdiction, relying on the general doctrine that equity will

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200. *Bowen v. Massachusetts*, 487 U.S. 879, 923 (1988) (Scalia, J., dissenting) (citing two Claims Court grant cases, which gave "rise to enforceable obligations analogous to contracts"); see, e.g., *Missouri Health & Medical Org., Inc. v. United States*, 641 F.2d 870, 873 (Ct. Cl. 1981); *Idaho Migrant Council, Inc. v. United States*, 9 Cl. Ct. 85, 89 (1985), *aff'd*, 802 F.2d 471 (Fed. Cir. 1986).

201. See *supra* notes 53-54 and accompanying text.

202. In such cases, the judgment is already provided for by congressional appropriations of funds for the purpose of running the program. See *supra* notes 53-54 and accompanying text.

203. See *Ford, Powell & Carson, Inc. v. United States*, 4 Cl. Ct. 200, 204 (1983) (requirement is not that appropriated funds have been used, but that the agency's authorizing legislation allows congressional appropriation of funds if necessary).

204. *Bowen*, 487 U.S. at 906-07; see also *id.* at 883-84 (discussing stream of revenue adjustments).

205. See *Bowen*, 487 U.S. at 906-07 (for *Bowen's* allusion to the unusual nature of the State's interest implicated in such suits). "[The State's] interest in planning future programs for groups such as the mentally retarded . . . may be more pressing than the monetary amount in dispute." *Id.* at 907.

206. See *supra* notes 74-76 and accompanying text.

207. "[Congress] intended . . . [in] the Medicaid Act to provide merely a right, knowing that the APA provided for a review of [disallowance actions]." *Bowen*, 487 U.S. at 906 n.42.

208. *Id.* at 908; see also *Mason, supra* note 117, at 15. "We sometimes give deference to an administrative agency's interpretation of a statute. We should also give weight to an administrative agency's failure during a long history of its administration to advance a contention that it now advances as representing the original intent of its Act." *Id.*



afford complete relief,<sup>209</sup> and that such orders are specific and not substitutive, as the terms were used in *Bowen*.<sup>210</sup> We must emphasize that this Article contends that the *Bowen* Court misapplied these terms, as did Judge Bork.<sup>211</sup> This Article's goal, however, is to rationalize *Bowen*, and it must, therefore, utilize the language of the opinion. Moreover, this analysis assumes that grant-in-aid cases are fundamentally different; therefore, the analysis should not extend to other classes of claims where section 702 and the Tucker Act may compete.<sup>212</sup>

Perhaps the most difficult category of claims is the suit for money past due and owing under an ongoing grant program where the litigant seeks a judicial declaration of eligibility to participate in a program. *Bowen's* emphasis on congressional intent and the role of state law in disallowance actions, as well as the "complex ongoing relationship between the parties"<sup>213</sup> simply has no relevance to such a suit, which might be brought either as a Tucker Act claim for money, or as a claim for specific relief, whether it be mandamus, injunction, or a declaratory judgment. Because this Article rejects any interpretation of *Bowen* which assumes that the Court was creating a new class of concurrent district court and Claims Court jurisdiction, it starts from the premise that one court system or the other should have jurisdiction over such claims. *Bowen*, by distinguishing *Massachusetts v. Departmental Grant Appeals Board*,<sup>214</sup> suggested that the Claims Court might continue to hear retrospective suits for a "naked money judgment"<sup>215</sup> if the relief "is unlikely to have any significant prospective effect upon the ongoing grant-in-aid relationship between the [State] and the United States."<sup>216</sup> Most retrospective money judgments, however, will have a significant prospective effect by virtue of the determination that a particular activity or function warrants reimbursement and therefore should be treated as claims for prospective relief, properly brought in a district court.<sup>217</sup>

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209. See *supra* note 51 (referring to the equitable clean-up doctrine).

210. *Bowen v. Massachusetts*, 487 U.S. 879, 910 (1988).

211. See *supra* text accompanying notes 193-206.

212. See, e.g., *Cape Fox Corp. v. United States*, 646 F.2d 399 (9th Cir. 1981) (action under Alaska Native Claims Settlement Act held to be properly before the district court for declaratory judgment, but the Court of Claims had jurisdiction over the damage claim).

213. *Bowen*, 487 U.S. at 905.

214. 815 F.2d 778 (1st Cir. 1987).

215. *Bowen*, 487 U.S. at 905.

216. *Id.* at 905 n.41 (quoting the concurring opinion in *Grant Appeals Bd.*, 815 F.2d at 789).

217. Professor Bowman described the circumstances in *Grant Appeals Board* as "rare" because the challenged Medicaid expenditures were for abortions for which the state had been paid pursuant to a court order pending resolution of a challenge to the Hyde Amendment.

This Article urges courts to avoid the temptation to find "bare money," and thus Tucker Act claims, in suits involving grant-in-aid reimbursements. In his *Bowen* dissent, Justice Scalia remarked that jurisdictional symmetry has its virtues: "[n]othing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply the same law."<sup>218</sup>

## VI. CONCLUSION

*Bowen's* reach should be limited to those suits where a state claims that the Federal Government erred in ruling that a program was ineligible for grant-in-aid reimbursement. Although the Medicaid statutes were poorly drafted,<sup>219</sup> it is apparent that because Congress wanted non-compliance cases to be heard by regional courts of appeals, it intended that disallowance cases be heard by district courts. Courts should apply the same reasoning to governmental suits seeking a determination of programmatic eligibility. Thus, the circuit courts incorrectly decided *United States v. City of Kansas*,<sup>220</sup> *Bakersfield City School District v. Boyer*,<sup>221</sup> *Chula Vista City School District v. Bennett*,<sup>222</sup> and *Massachusetts v. Departmental Grant Appeals Board*<sup>223</sup> as Tucker Act cases. These cases were wrongly decided for three reasons: first, any money which the plaintiffs received would not come from the Judgment fund; second, any money received would be subject to federal audit controls after award; and, finally, the recovery would only indirectly benefit the "non-Hohfeldian plaintiff" who brought the suit.

Justice Scalia's dissent in *Bowen* lists the potential adverse consequences of courts taking the majority's expansive language at face value. Because of the glacial pace of most federal civil litigation, several years normally pass before a case is heard on its merits, a decision is rendered, and the opinion is reported. None of these predicted consequences will arise if our advice is taken. Meanwhile, *Bowen* offers three salutary lessons: to the Department of Justice when it is next tempted to deploy a novel jurisdictional argument; to trial and appellate courts who accepted or rejected "Little Tucker Act" arguments according to the terms set by litigants in lieu of independent anal-

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Bowman, *supra* note 107, at 568. If the challenge failed, any ruling on the claim would be entirely retrospective. *Grant Appeals Bd.*, 815 F.2d at 784.

218. *Bowen*, 478 U.S. at 930 (Scalia, J., dissenting).

219. See, e.g., Mason, *supra* note 117, at 15 (characterizing the statute as "limping legislation" because of its unworkable distinction between noncompliance and disallowance cases and because of its failure to address court review in disallowance cases).

220. 761 F.2d 605 (10th Cir. 1985).

221. 610 F.2d 621 (9th Cir. 1979).

222. 824 F.2d 1573, 1578-79 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988).

223. 815 F.2d 778 (1st Cir. 1987).

ysis; and finally, to law faculties who, by failing to teach students the difference between public and private law, and between legal and equitable remedies, facilitated mistakes that would never have been made a generation ago.