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Frank Edward Horack Jr.
Indiana University School of Law - Bloomington

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FEDERAL-STATE COOPERATION FOR SOCIAL SECURITY: THE GRANT-IN-AID

By FRANK E. HORACK, JR.†

During the past decade, and more especially in the years since 1929, the functions of federal, state, and local government have become inexorably tangled. So long as fiscal independence existed, vigorous governmental identities persisted; but with credit collapse, there has been an increasing relinquishment of independence by the state and local governments. Only with the recent partial revival of economic confidence does the return of governmental responsibilities to smaller governmental units seem likely.

Political and legal science has described the form of the modern state as either “unitary” or “federal.” In the former there is no lack of local administration, but its signalizing quality has been the concentration of responsibility in a “single government.” In the federal system there has been an attempt to divide administration and responsibility both territorially and functionally and within these limits to define strictly the activity of each of several independent governments. But, of course, regardless of theory, overlapping of function and jurisdiction has been inevitable; and so a large branch of our constitutional law has grown up around “the federal-state relation.”

Perhaps it will be through the development of this relation that the inadequacies of the federal system (primarily lack of “cooperation”) can be surmounted without the acceptance of the deficiencies of unitary government (e.g., administration without “play in the machinery” for local conditions). At least after a half century of negligible development of the federal-state relationship (except negatively by way of litigation to determine the “proper” spheres for state and federal action), the present Social Security Act¹ outlines a program of cooperation between federal and state government which is strange to American constitutional law and which requires a new definition of “federalism.”

I

The Act seeks to achieve this cooperation through the use of the grant-in-aid. This device, although not new to American government, has been extended to a new significance by the terms of

† Visiting Professor of Law, Indiana University Law School.
THE GRANT-IN-AID

293

this legislation. Its early uses were numerous. It insured the building of the railroads. It made possible the establishment of the "Land Grant Colleges," and the underwriting of education in the West. Likewise, it provided aid for agriculture. Ship-subsidy signaled governmental experimentation with the device as an aid to industry, while the grants made to the states under the Shepard-Towner Maternity Act are most illustrative of a use similar to that in the Social Security Act.

The grant-in-aid is essentially only a method, a device for the distribution of money. Thus every appropriation is, in its widest sense, a grant-in-aid. But as it relates to government, the grant-in-aid is now understood to describe the method whereby one government which owes no duty to support another government, function, or institution, undertakes to contribute financially to the other's success. The grant is made in order to encourage the recipient to pursue policies which the granting authority is desirous of promoting. Thus, the grant is usually made conditionally, the condition being that the money be used for the purpose intended by the grantor, that the recipient also contribute, and that certain results be obtained with the money expended. In addition to giving financial assistance, the device, by requiring the grantee to contribute, assures its greater interest in the success of the project.

The amount of money granted, however, may be fixed or proportional according to the terms of the grant. If, for example, the grantor contributes $50,000 regardless of the amount pledged by

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3 The Morrill Act, 12 Stat. 503 (1862), 7 U. S. C. A. §301 (1926), "for the endowment, support and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts." Cf. Second Morrill Act, 26 Stat. 419 (1890), 7 U. S. C. A. §321 (1926).
4 In 1802 Congress offered to Ohio the sixteenth section in every township for the use of the schools. 2 Stat. 173 (1802). Each state, save three admitted to the Union since that date has received a grant for educational purposes. In 1848 the amount was increased to two townships; in 1894 to four. See, MacDonald, Federal Aid (1928).
9 A common condition is that the recipient comply with certain standards of administration which the grantor has determined.
the recipient, it is said to be a "block grant." This, the earliest type of grant, has been the least effective because experience has demonstrated that an outright contribution neither stimulates the recipient to increase his stake in the investment nor his diligence in promoting the enterprise. The "proportional grant" has been somewhat more satisfactory. It grants funds on a "dollar-for-dollar," on a 60-40, or other proportional basis. These proportional grants, however, are unsatisfactory for many purposes. Frequently, the grantee in the greatest need of aid would be precluded from benefiting under the "dollar-for-dollar" grant, as the amount it could contribute would be infinitesimal. Thus, the "weighted" grant which bases the amount of the grant upon the need for aid, the ability to pay, and the necessity of result has gradually become, at least in England, the most widely used type of grant. However, the Social Security Act adopts, for the most part, only block and proportional grants as the means of distributing funds to assist and stimulate state participation in the program of social and economic security.

The reasons for the adoption of the grant-in-aid principle at the present time are, of course, conjectural. In part they arise from the belief that only through the grant-in-aid can the benefits of a national policy of social security be realized within the limits of present constitutional limitations. In the administration of relief endless difficulties were encountered because of the inability of a single central administration to adjust a policy to the divergent needs of the different localities that compose the United States. Finding the state authority which was entitled to the cooperation of the federal government, was another problem. Dealing directly with local municipal officials without offending state officials, or conversely, contacting state officials without antagonizing local representatives proved to be impossible. All this experience suggested the adoption of a system which would eliminate these frictions. The problem of finance was, perhaps, the most significant reason for the adoption of the grant-in-aid device. When the federal government relieved the states of the burden of maintaining their poor, indigent, and physically handicapped citizens, the states failed to

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10 See, Webb, op. cit. supra note 8, at 91. "... the Grants should not be fixed sums, but should, year by year, be dependent on local efficiency."


12 Administrator Hopkins expressed the need for assistance, and the lack of guidance in extending it when he said that although he was "convinced that the need is greater in some states than in others ... if some one were to ask me to prove that conviction ... that is not always easy to do. It is a matter of opinion." Hearings before Sub-comm. of House Comm. on Appropriations, 73d Cong., 2d Sess. (1934) 15.
lighten the state tax burden but expended their revenue for other purposes. Thus, the Act abandoned the policy of a centralized expenditure for a "cooperative" decentralization which would require the states to share the financial burden. This was an inevitable result of dwindling tax sources and the inability to administer effectively all human relations from the nation's capital. In need of a new device for administration, the grant-in-aid principle was adopted as the sanction to secure the general enactment of state social security programs.

The terms of the Act and the scope of its provisions have been so frequently set forth that it would add unnecessarily to the length of this article to reiterate them here. Some consideration of the method by which this sanction is sought to be made effective, however, should precede the consideration of its constitutionality or administrative effectiveness.

For the purposes of this discussion the non-contributory old age assistance program need not be considered. The federal government assumes the entire burden of a non-contributory system of old age benefits for industrial workers, and the program is for the present largely a means of continuing support to aged unemployed after the cessation of work-relief.

The remaining provisions of the Act anticipate state action supported by federal aid. The grants specified afford assistance to state programs of old age assistance, unemployment compensation, support for dependent children, maternal and child welfare, public health work, and aid to the blind. Only the grants involving the promotion of the public health are conditioned upon an allotment of funds. Upon complying with the federal standards, each state is entitled to a specific grant for the promotion of health. If the entire allotment is not spent during the year, the unexpended portion inures to the benefit of the state for the following year. Thus at the beginning of each year, a state can determine the amount of money that it can expect from the federal government. The allotment system has proven an effective stimulus to state participation. It is believed that the failure to provide a method for allotment of funds under the other grants is unfortunate. The difference of method is only psychological, but the experience of the Public Health Service suggests their belief in its importance.

14 See The Social Security Act, supra note 1, at §§502, 512, 521, 602.
15 Within the limits of the federal appropriation, the federal government ex-
The grants themselves are of four kinds: (1) block grants to complying states for the support of maternal and child health, crippled children, and child-welfare service; 16 (2) “dollar-for-dollar” grants for the encouragement of state old-age assistance, maternal and child welfare, aid to crippled children and to the blind; 17 (3) grants up to one-third of the amount necessary for the maintenance of dependent children; 18 (4) grants in such amount as the Board “determines to be necessary” for the maintenance of adequate “unemployment compensation” systems, 19 and grants as directed by the Surgeon General, with the approval of the Secretary of Treasury, after conference with state and local health authorities. 20

So far as the block grants are concerned the legislative policy is clear and the amount of the expenditure is certain. And even with the “matching grants” the interest of the state in the use of its own money affords some protection against local extravagance. But in those grants which depend as to amount solely upon the determination of the Federal Board, 21 within the limits of the money appropriated, there is no expenditure control that insures the federal government its money’s worth. This is remedied, at least in part, by the requirements which the state must meet before the local plan is approved.

Each grant is conditioned upon the preparation of a state plan which will meet the standards Congress considered essential to the protection of the federal investment. The standards vary with each grant, but in general, the following are required:

1. Mandatory state-wide application of the state plan. 22
2. Fiscal participation by the state. 23
3. Provision for a single state agency for administration or supervision. 24
4. Approval of state methods of administration by the Social Security Board. 25

pend within a state, providing the state complies with the federal standard, an amount equal to the amount the state expends—except in the case of dependent children where the maximum is one-third the state expenditure.

16 The Social Security Act, supra note 1, at §§502, 512, 521.
17 Id. at §§2, 303(a), 514(a), 1003(a).
18 Id. at §403(a).
19 Id. at §302(a). “The Board's determination shall be based on (1) the population of the State; (2) an estimate of the number of persons covered by the State law and of the cost of proper administration of such law; and (3) such other factors as the Board finds relevant.” (Italics ours.)
20 Id. at §602(c).
21 Supra note 19.
22 Id. at §§2, 303, 402, 1002.
23 Id. at §§2, 402, 503, 513, 1002.
24 Id. at §§2, 303, 402, 503, 513, 1002.
25 Id. at §§2, 303, 402, 503, 513, 1002.
5. Such reports and information as the Board may require.  

6. Provision for fair hearing to all persons claiming injury from the administration of the act.  

There are three general prohibitions:

1. No residence requirement other than those presented in the Act shall be included in the state plan.  

2. No citizenship requirement which excludes a United States citizen shall be included.  

3. The state act shall not be administered so as to discriminate on the basis of residence or citizenship.  

In short, the Act requires that the state program of social security must be state wide, partially state financed, provide a “single administration,” comply with “such methods of administration as are found necessary for the efficient operation of the plan” and not discriminate in distributing its benefits. But detailed provisions such as these concerning organization insure only slightly the effectiveness of administration. Unfortunately, the thirty-two pages of the Act reiterate monotonously less important administrative requirements and leave no guide for the significant one—expenditure control. It is in this unmarked field that the real problem of administration lies.  

II  

The social security program is developing at a time when there will be the greatest insistence upon effective administration. Few persons will quarrel with the objectives of economic security. Some will fear its effect upon “initiative,” and others will object to governmental participation. But more will protest the taxes, and at the same moment insist on more service for their tax dollar. The ever present opposition to an increase in tax burdens is intensified by the horizontal and vertical increase in taxation, but there is no lessening in the insistence on greater governmental benevolence. The only solution is in expenditure control. Not until government can do more with less money, not until the tax dollar is spent with the same care as the industrial dollar, can there be a reduction in the tax burden. This is a problem not for legislatures, nor for courts, but for administration. Thus, the success of the present undertaking lies largely with expenditure administration. This  

26 Id. at §§2, 303, 402, 503, 513, 1002. 

27 Id. at §§2, 303, 402, 1002.  

28 Id. at §§2, 303 (b), 505, 513, 1004.  

29 Id. at §§2, 303 (b), 404, 505, 513, 1004. 

30 Id. at §§4, 303 (b), 404, 505, 513, 1004.
administration will even condition the judgment of the courts. Whether the courts will feel Congress has gone too far depends upon the application of the Act, and not the principles set forth in its enactment.

The heritage of relief administration cannot be entirely forgotten in determining the constitutionality or the administrative policy of the new legislation. And that heritage is for the most part an unfortunate one. The Public Works Administration and the Civil Works Administration were burdened with difficulties of time, personnel, and the immediate need for relief. Funds had to be distributed and projects "created" with little or no planning. And thus, funds were expended more in relation to the effectiveness of demand rather than according to the realities of need. Many projects were fantastic. "Boondoggling" became a by-word. Final authorization was given to many projects without consideration of preference, economy; or the ability to complete the work.

These expenditures were made by an inexperienced administration, for the most part ignorant of local tradition and sectional psychologies, and indifferent to the need for cooperation with state legislatures and municipal officials. Interfractional conflicts signalized widespread discord with the methods and manner of distribution of funds, and emphasized the need for carefully co-ordinated state and federal administration. Nineteen states contributed less than one-tenth of one per cent of the total relief funds distributed to their citizens. Difficulties such as these, of course, can be attributed to the emergency character of the undertaking; but the cost factor remains.

The Social Security Act seeks to profit by the mistakes of the relief administration. The title of the Act provides neatly that the purpose of the Act is:

"To provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several states to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws; . . ." Tacit within this policy is the desire to insure a maximum of local administration, state responsibility, and adequate federal supervision. But the desire is not enough. There must be a practical plan for effectuating the policy.

A zoology professor once said, "You have not seen a frog until you can draw one." Likewise, you cannot establish a policy without

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32 The Social Security Act, supra note 1.
creating an orderly administration. Generalizations about the amphibious nature of the frog with perhaps undue attention given to the unpredictability of his jump are of little practical value. Study and observation will reveal more; indeed, may even belie the correctness of the aphorism. The Social Security Act needs similar study. There must be a blue print if adequate protection against constitutional attack is to be insured and useful standards for administrative relationships are to be provided. The Social Security Act does not now meet these requirements.\(^3\)

The grant-in-aid provisions already have been outlined. A repetition of the provisions would not be useful, but a consideration of the operative conditions which must be met seems essential. A successful administration must: (1) keep the federal cost at a minimum, (2) insist that each state bear its "fair-share" of the burden, (3) expend funds with a view to the assistance of "needy" cases, (4) in a fashion that will foster local service and development, and (5) in a manner that will preserve national minimums of social and economic existence. These goals are also vague and in great need of definition. But, of course, it must be readily admitted that it is difficult to fix exact standards in a field entirely new to American government. A method of administration must be devised that depends less upon the number of persons who present themselves for relief and the insistence of their demand, and depends more upon the real need for relief, the locality's ability to pay, and its capacity to spend effectively.

Objective tests for the determination of need and of ability to support, by local taxation, necessary governmental functions have not been devised in this country. The matching of funds and the supervision of results have generally been thought sufficient to protect the grantor's interest.\(^4\) Unfortunate experience with school aid apparently has not proven an adequate warning.\(^5\)

The English experience seems to be an indication of what our own will be, unless we learn from them and not from our own mis-

\(^3\) Cf. supra note 19; supra note 1, at 83(b). "The Board shall, . . . estimate the amount to be paid to the State . . . such estimate to be based on (A) a report filed by the State . . . (B) records showing the number of aged individuals in the State, and (C) such other investigation as the Board may find necessary."

\(^4\) See, MacDonald, op. cit. supra note 4, at 239 et seq.

\(^5\) "But although the Grant should, in the interests of efficiency, be a variable one, experience should dissuade us from allocating it on any such mechanical basis as the number of persons treated, or the number of officers engaged, at so much per head or at such a proportion of the salaries paid, at so much per school place or per hospital bed, at any given sum per attendance at school or per week per patient." Webb, op. cit. supra note 8, at 94. Most states extend to local school districts aid for the promotion of school terms, library facilities, improved standards of teaching. The mechanical measures almost universally used have resulted in most flagrant falsifications.
takes. Originally, the English grant extended to aid many separate items of national concern. The iniquitous practice of assigning special revenue to special grants also received trial. Shortly, the grant became a rule of thumb by which tax relief was extended to favored communities, without any compensating return to the central government for improved service or greater administrative efficiency. So long as the grant was extended on the basis of the number of persons treated, on the basis of salaries paid, on school attendance, or on any measure of service extended to particular persons, the costs continued to rise as each community sought to qualify more recipients for aid. Indeed, the central government had placed a bounty on extravagance.

Learning much from this experience the English have since measured their grants according to the more objective standards of need and ability to pay. This expenditure safe-guard is expressed in terms of a formula. First, the total available appropriation for grants is divided by the total population. This provides a basis for the minimum per capita expenditure of the central government's funds in any community. Obviously this does not assist communities where needs are excessive and revenues sparse, but rather tends to extend unneeded gratuities to communities of affluence. Thus, to make the formula reflective of the relative need and ability to pay for public functions, the population is "weighted" by factors indicating those qualities. Empirical experience provided four standards.

The number of children under five years of age. A study of need disclosed that welfare requirements, health standards, educational needs tended to vary according to the relation the number of children under five years of age bears to the total population. A survey of the British census disclosed that, at the time of its last taking, the number ranged from 48 to 135 per 1,000. Thus, the ratio

36 Webb, op. cit. supra note 8, at 80 et seq.
37 "If... Parliament assigns specific sources of revenue to the Local Authorities... it denies the community as a whole of part of its public resources... without giving to the National Government that effective backing of its supervision and control, that effective strengthening of its counsel and advice, without which it is powerless to check local extravagance and local waste. The psychological effect upon the Local Authorities of assigned revenues instead of Grants in Aid is, moreover, wholly to the bad. To a Local Authority the proceeds of assigned revenues soon become regarded as its own property, which it ought to be able to spend at its will as freely as the rates which it levies upon its constituents, or even more so, and yet without the check to extravagance that is supplied by the consciousness of having to face, at the elections, those from whom the money has been raised." Webb, op. cit. supra note 8, at 85.
38 The formulae hereinafter discussed are from the report of Dr. John F. Sly to the President's Committee on the Upper Monongahela Valley Planning Project. The author wishes to express his especial indebtedness to Dr. Sly for their use.
of 50 per 1,000, which was adopted as the first factor in the formula, was a safe minimum upon which to compute the grant.

The assessed valuation of property per person. The ratio of the assessed valuation of property per person was almost uniformly less than £10. The relationship here is clear, for as the proportion of taxable wealth to population decreases, the ability of the community to provide "essential services" also decreases. The test (if "fair" property valuations can be assured) is particularly valuable.

The percentage of the population represented by unemployed insured persons. The widest variations existed in the ratio of unemployed persons to total population. One and one-half per cent, the figure used as a base for the formula, was considerably below the average, which was about two and two-tenths per cent of the total population. This low figure permitted certain adjustments which protected the margin of error, for the weighting factor was determined by taking the amount the percentage exceeded one and one-half per cent and multiplying it by ten. In areas where unemployment was greatest this was as high as eighty-two per cent.

Estimated population per mile of public road. The concentration of population was found to be an accurate guide to the need for assistance. The density of population is indicative of housing conditions, which in turn speak of welfare problems, sanitation, unemployment, health, and educational conditions. Furthermore, as most roads have been financed through bond issues, the highway factor would frequently express an unusually heavy debt service which would prevent the normal portion of the tax dollar from being expended upon educational, health, and social services, and thus enhance the need for federal aid. These factors expressed through objective physical standards provide safer methods for the grant of aid than the demands of local officials or of popular ultimatums for relief.

These factors once determined are set as a standard by which the actual population figure may be increased to reflect the need of a particular community for a greater share in the distribution of funds. The formula directs that the actual population (as estimated in the last previous census) be "weighted" as follows:

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39 See, particularly, Report on the Application made in 1933 by the States of South Australia, Western Australia, and Tasmania, for Financial Assistance from the Commonwealth, Commonwealth Grants Commission (1934). At page 123 the Commission reported that "The adverse effect of all disabilities together will be reflected in the financial position of a State. We have examined the finances of the claimant States in comparison with those of the other States, and we find them in an inferior position in respect to a number of important features—the severity of taxation, scale of social services, maintenance of capital equipment, as well as in their real budgetary position."
By the percentage by which the number of children of five years of age per 1,000 population exceeds 50.

By the percentage by which the assessed valuation of property per person is below £10.

With the actual population increased by these two additions the new sum is further “weighted” by:

The number of unemployed insured men and women expressed as a percentage of the actual population. And if during a three-year period the average is in excess of one and one-half per cent, the population is increased by ten times the excess of one and one-half per cent.

The percentage by which the actual population per mile of road is less than 200 persons, if it is less than 100; or, in case the population is 100 or more, by the percentage which 50 persons bear to the actual population per mile.

The operation of these factors, however, can best be understood when cast into a formula for the determination of a specific grant. Using the English county of Durham as an illustration, the sums allocable to it are determined as follows:

The actual population is 996,700. The available appropriation for England and Wales is 31.35 pence per head. Thus entitling the county to £130,194 without any “weighting” of its local conditions. By the use of the formula the population is thus increased:

There are 113 children under five years of age per 1,000. As this figure exceeds 50 by 63, or 126 per cent, there is added by this percentage ........................... 1,255,843.

The average property valuation per person is only £2.95, or £7.05 less than the standard £10. As this is 70.5% less than £10, the population is multiplied by that amount .................. 702,674.

The actual population is ............................... 996,700.

The new “weighted” population is now .............. 2,955,216.

In more technical form the formula may be set forth as follows:

Let “p” = the population of a county in a standard year.
“c” = 50, or the number of children under five years of age per 1,000 persons whichever is the larger.
“a” = 10, or the ratable value in £ per person, whichever is the lesser.
“u” = 1.5%, or the percentage of unemployed men calculated according to Cmd. 3134, whichever is the greater.
“m” = the number of persons per mile of public road.

Then if “m” is greater than or equal to 100, the “weighted” population is:

\[ p \left( \frac{1 + c-50 + 10-a}{50} \right) \left( \frac{1 + u-1.5 + 50}{10} \right) = 1 + \frac{u-1.5 + 50}{10} \]

If “m” is less than 100, the “weighted” population is:

\[ p \left( \frac{1 + c-50 + 10-a}{50} \right) \left( \frac{1 + u-1.5 + 200-m}{10} \right) = 1 + \frac{u-1.5 + 200-m}{10} \]
This population is now further increased by the unemployment factor and the density of population-public road factor as follows:

5.2% of the population of Durham were unemployed. As this exceeded the standard by 3.7%, because of the employment problem at that time, it was necessary to increase this figure ten fold, thus $37 \times 2,955,216$ is $1,093,430$.

A population of 444 per mile of road being in excess of 100, the base of 50 was used; 50 is 11.3% of 444, and $2,955,216$ increased 11.3% is $333,939$.

Thus the population is further "weighted" by $1,427,369$.

This method of "weighting" increased the population of Durham from 996,700 persons to 4,382,585, and thus the county is entitled to a grant of £572,475 instead of £130,194. Measured by its "actual" population Durham would receive 31.35 pence per head. By this "weighting" process it actually receives 137.8 pence per person, or four and one-half times as much as its actual population would have entitled it.

Experience with this formula in England has been satisfactory. The method seems equally useful, constitutional questions aside, in the United States. No thought should be entertained, however, that the English formula could operate unchanged in this country. We must build our own formulas by the same empirical process by which the English have devised theirs. And even after formulas have been devised many dangers remain.

Physically discernible standards such as the miles of hard surfaced roads, the density of population, and the number of children can be safely evaluated. But inevitably the formula must contain some "judgment" factors. And herein lies the difficulty. Not only must the local bodies determine intangible factors of need, but the Social Security Board must decide the equally intangible question of "compliance." Valuation of property, for example, is a matter of opinion and juggling with values for tax purposes has long been a temptation to local agencies. Likewise in the administration of state old-age assistance plans, the determination by local boards, through the "means" test, of those persons who are unable to maintain a minimum living standard affords unusual opportunity for inflating the factors in an American formula. Local boards supposedly are better able to select those entitled to assistance; yet, it can hardly be doubted that many "errors in selection" will swell the list of those eligible for aid. Theoretically, the fact that the state or community must also contribute at least one-half the cost of support

1935]
should afford protection against extravagance. Experience, however, is to the contrary.\footnote{See, supra note 35.}

The control of expenditure after allotment, the supervision of local administration, and the appraisal of results are problems that arise after the grant of money has been made. It is in this regard that the federal-state relationship in America, as contrasted with the unitary system in England, is most significant.

The state or local government's responsibility in the first instance is the supervision of the expenditures. Thereafter it must seek to apply, effectively, the nationally determined policy, adjust it to the peculiarities of the local community, provide for hearing and review of complaints, and for the settlement of conflicts without recourse to the federal administration. If the existing standards of health and welfare, for example, are below the federal minimum, the local administration must remedy the deficiency and give to the federal government the protection which it has a right to expect. Cooperation of this character has been insisted upon in many instances. The protection of the general health by embargo and quarantine is familiar enough.\footnote{The inconvenience, if not the danger, from undeveloped highway systems has brought to an early fruition federal-state cooperation in the construction of roads.}\footnote{The need for national standards in matters of economic relationships and local governmental performance is as great but not as apparent. The deficiencies of the "backward" community are its own concern only so long as they do not adversely burden the realization of federal policy. The interstate commerce clause is an instance of the early appreciation of this principle. We are today discovering that the limits of "affectation" have run far beyond the physical concepts of commerce. But as now interpreted no judicial extension of the concept seems immediate; if constitutionally permissible, these ends may be achieved through a grant-in-aid fostered federal-state cooperation.}

\footnote{See, supra note 35.}
\footnote{See, MacDonald, op. cit. supra note 4, at 85-122.}
\footnote{"We cannot afford to let the inhabitants of Little Pedlington suffer the penalties of their own ignorance or their own parsimony, because the consequences fall, not on them alone, but also upon the neighboring districts, upon everyone who passes through their benighted area. . . . We see this clearly enough when it is a question of infectious disease. . . . If they are permitted to bring up their children in ignorance, to let them be enfeebled by neglected ailments, and to suffer them to be demoralized by evil courses, it is not the Little Pedlingtonites alone who will have to bear the inevitable cost of the destitution and criminality thus produced." Webb, op. cit. supra note 8, at 23.}
The federal participation in the relationship, in addition to the contribution of funds, should be for the guidance of policy, the protection of national interests, and the avoidance of local interference. The federal government should establish national minimum standards of efficiency and economy and should by instruction stimulate in the local authorities an interest and willingness to comply. In particularly flagrant cases the withdrawal of funds may be necessary, but for the most part cooperative guidance will accomplish the desired results. Finally, the federal administration should collect information, conduct research, and plan for improvement in the social and economic order. Its greater horizon can give to the local governments a breadth of experience which they, because of the cost, could not themselves acquire.

The Social Security Act is the first extensive federal attempt to cooperate with the states. Federal roads, land grant colleges, and trifling grants for public health services have provided a limited experience in cooperation. Administration has always been directed toward the realization of a specific objective, as, the establishment of a school, or the building of a road; the present program, although multiplying the number of specific grants has not gone far beyond this original conception. But the results sought by the security program are for the most part less tangible—the elimination of disease, the protection against want, security from loss of economic competence—than those formerly sought. This is the beginning of a wider, more significant administrative relation, a step toward the supervision of efficiency and economy in government wherever local administration affects national services. To determine what are national services will be difficult; to determine it judiciously may require the acuteness of a Heimdal. Who can say when excessive local debt services, the burden of bonded indebtedness, the duplication of personnel increase the expense of local government, and consequently its tax burden, sufficiently to interfere with locally administered national services? The danger and the difficulty are both apparent. And it is equally apparent that active federal participation in the affairs of state and local governments cannot, as we now see the relationship, be made with profit either to the local community or to the federal government.

Jeremy Bentham in 1797 outlined a proposal for social security which is almost identical with the present Social Security Act in the scope of its coverage. He was quick, however, to warn against its dangers. Particularly, he was insistent that a more complete knowledge of the factual basis of the program was necessary. "What say you," he said, "to this idea of forming a valuation of that part of the national live stock which has no feathers to it, and walks upon two legs?" 8 BENTHAM, WORKS (Bowring Ed. 1843) 166.

He was of eternal vigilance. He could see three hundred miles; could hear the grass grow and the wool on the backs of sheep.
On the care and caution with which the social security program avoids excess regulation will depend largely the extension of the grant-in-aid as a cooperative device for federal and state governments. If the Board will fix scientifically defensible standards for the allotment of funds and accurate measures for the determination of the effectiveness of local service and will leave local policy with local officials, it will not only assist the local community in the creation of a more durable society, but also will inoculate the federal economy against future economic epidemics. The administrative success of the program is dependent upon restraint, accuracy, predictability. Its constitutionality depends in large measure upon these same qualities.

III

The ability of the social security program to maintain its integrity in the face of constitutional attack will depend upon the persistence of the laissez-faire philosophy of government as the dominant premise of constitutional logic. And in spite of the host of legislative expressions of collectivism, the doctrine of individualism has great judicial vitality. Indeed, the depression itself has fostered a hope that these conditions are temporary and will be infrequent in the future; and then by a strange juxtaposition between prosperity and individualism, individualism assumes the glow and the attributes of prosperity. This imputation of perfection to an individualistic system of social organization keeps alive the economic dogma that in America, success is attendant upon personal courage, moral integrity, and faithful industry; that continued economic dependency entitles the unfortunate only to so much "relief" as is necessary to remove him as an affront to the sensibilities of "normal" people; and that any attempt to extend to him any larger degree of "security" does violence to some "higher law" concept of our constitutional system.

Under the compulsion of the depression, many of those tenets of individualism have been abandoned. But their abandonment bears tacit warning that collectivistic concepts will in turn be forgotten with the ascendancy of a "new prosperity." The "seasonal market" of any philosophy is determined by the necessity of rationalizing the exigencies of present action. In short, the philosophical flux leaves collectivism as well as individualism upon shifting sands.

47 A. L. A. Schechter Poultry Corp. v. United States, 55 S. Ct. 836, 843 (1935). "The further point is urged that the national crisis demanded a broad and intensive cooperative effort by those engaged in trade and industry, . . . But the statutory plan is not simply one for voluntary effort. . . . It involves the coercive exercise of the lawmaking power."
Every new order visualizes itself as a "new era." But the order inevitably changes. And so, constitutional prediction must frequently become an evaluation of ever-shifting emphasis, a continual readjustment of social control to the rise of new social and economic conditions.

The social security program is, of course, an expression of disbelief in the old order; but so was the minimum wage legislation. Each seeks the goal of continuous economic security. Minimum wage assurance sought that guarantee by the payment of a security wage in times of plenty, in order that the employee might be provisioned to protect himself in times of hardship. The frailty of mankind—his inability or unwillingness to save for the rainy day—has caused the social security program to give protection in those times when physical or economic incapacity prevents the employee from being self-supporting.

The relationship between these two legislative attempts may have a significance that has been passed by in the wishful acceptance of the workmen's compensation analogy in support of the social security legislation's constitutionality. But in the conflict of analogies, constitutional dialectics will provide not the result, but rather the pattern for the expression of less discernible but none the less powerful economic faiths.

The concern of this article, however, is not the substantive constitutionality of the social security program. Obviously, however, in the final analysis the substantive question cannot be divorced from the inquiry into the validity of the administrative devices for the enforcement of the legislation. Each will reflect light or cast shadow and the other cannot escape it. But for our purposes a separation of inquiry will permit a more exact analysis of the constitutional relationships arising from the grant-in-aid. For example, the inter-acting effect of state and federal constitutions must be

48 See, 40 STAT. 960 (1918); Adkins v. Children's Hospital, 261 U. S. 525, 43 S. Ct. 394 (1923); Powell, The Judiciality of Minimum Wage Legislation (1924) 37 Harv. L. Rev. 545.

49 "Some are for doing everything by savings out of earnings; but this will not do very well where there can be no savings, still less where there can be no earnings." Bentham, op. cit. supra note 45, at 367.

50 The acceptance of analogies depends, frequently, more upon results than upon means. Thus the fact that the results of the social security program resemble more nearly minimum wage legislation may be more significant than that the form of the Social Security Act establishes a machinery analogous to workmen's compensation legislation. Note Bentham's comment, "As to the casual inadequacy of the earnings of the individual compared with the demand for subsistence on the part of the same individual, two expedients have presented themselves: one is to fix the rate of wages, and thereby of earnings, viz., of the rate to be paid to individual labourers by individual employers; the other is leaving the rate indefinite, to make up the deficiency, whatever in each individual instance it may happen to amount to, at the public charge." Id. at 442.
taken into account. Unfortunately, there has been a cavalier dismissal of the relationship under the belief that the thaumaturgic powers of the federal legislation would surmount all obstacles. Constitutionally this may be true, but practically it may retard general acceptance of the federal program, or even long delay uniform social security legislation.

Some state constitutions, in all forty-two, limit the expenditure of funds to those appropriated by the legislature.\(^{51}\) And in some states it was necessary to amend the constitution to permit of specific payments under workmen's compensation laws.\(^{52}\) Obviously, if such provisions require the specific appropriation of each payment under the social security program the system would be totally unworkable. Likewise, constitutional limitations upon the disbursement of funds hinder the ready administration of the security program in some states.\(^{53}\) But in spite of these difficulties it is probable that in most states, by one device or another, the administrative standards of the federal program will be obtained without the necessity of constitutional amendment.\(^{54}\)

Validity under the federal constitution also presents problems as yet not determined by existing judicial decisions. Considering only administrative detail and not the validity of federal participation in the social security function, among others two questions are posed: (1) Who may raise the constitutional issue involved in the distribution of federal funds? (2) Is the grant-in-aid \textit{qua} grant

\(^{51}\) For example, see, \textit{Pa. Const.} c. III, §16. "No appropriation shall be paid out of the Treasury, except upon appropriation and by law, and on warrant by the proper officer in pursuance thereof." Or the slightly more liberal provision of \textit{Minn. Const.} c. IX, §9. "No money shall ever be paid out of the treasury of this state except in pursuance of an appropriation by law." Limitation in some constitutions that the money expended must be for a public purpose and in others that no pension or gratuity shall be granted have created difficulties. Busser v. Snyder, 282 Pa. 440, 128 Atl. 80 (1925); In re Opinion of the Justices, 78 N. H. 617, 100 Atl. 49 (1917); 85 N. H. 562, 154 Atl. 217 (1931).

\(^{52}\) See, Railroad Comm. v. Riley, 194 Cal. 37, 218 Pac. 415 (1924); State v. Hall, 99 Neb. 228, 153 N. W. 228, 156 N. W. 16 (1916); Fisher Bros. v. Brown, 111 Ohio St. 602, 146 N. E. 100 (1924); Jobe v. Caldwell 93 Ark. 503, 125 S. W. 423 (1910); Baltimore v. O'Connor, 147 Md. 638, 128 Atl. 759 (1925).

\(^{53}\) Twenty states limit appropriation of public funds to fixed periods. Ten states set out the character of the disbursement procedure in their constitutions. \textit{Conn. Const.} Art. III, §17, directs that the treasurer "shall receive all moneys belonging to the state and disburse the same only as he may be directed by law. He shall pay no warrant or order for the disbursement of public money, until the same has been registered in the office of the Comptroller." Constitutionally prescribed disbursing devices often delay payment as long as thirty days. Prompt and punctual payment by scores of disbursing officers seems necessary, but impossible, in many states.

\(^{54}\) However, Nebraska has already run into difficulties in its efforts to comply with the federal plan. See Smithberger v. Banning, U. S. L. Week, October 1, 1935, at 6, where a state act creating a state assistance committee and providing for the raising of funds to be used for the relief of the unemployed, old age pensions, \textit{etc.}, was held to violate the state constitution, as a delegation of legislative power to the committee and also to the Congress of the United States.
constitutional? These questions were before the court in Massachusetts v. Mellon, and thus the approach, if not the decision, in that case becomes of immediate concern in any attempt at constitutional prediction.

**Who may raise the constitutional issue involved in the distribution of federal funds?** It has uniformly been held that the federal taxpayer does not have a sufficient interest to maintain an action. There is no consistency of decision asserting or denying the authority of the state taxpayer to contest the expenditure of state funds. Municipal taxpayers, generally, have been accorded the privilege of contesting municipal expenditures. The distinction has been placed upon the rule of de minimus. The disparity of position between the federal and municipal taxpayer has been apparent in the cases so far raised. Quaere, if that disparity does not exist, will the conflict of decisions continue? If the taxpayer’s interest is the measure of review then the decision in Massachusetts v. Mellon would seem to have only persuasive value in case the contestant of the validity of the social security legislation was one of the nation’s largest taxpayers. Considerations of fitness and convenience, however, would seem to urge against any rule which would require the court to determine how great the tax burden must be to be “great enough.”

**Is the grant-in-aid qua grant constitutional?** Assuming a case proper for review, the court must consider the constitutionality of the grant-in-aid as a device for the distribution of federal funds. As the distribution must be made from funds raised by taxation, the initial question is, for what purposes can the federal government

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55 262 U. S. 447, 43 S. Ct. 597 (1923). The case involved the Sheppard-Towner Act (supra note 7) which sought to reduce maternal and infant mortality. The Act provided for grants to the states on the condition that they contribute money and comply with certain standards. Massachusetts attacked the Act as interfering with state sovereignty and entering a local field reserved to the states under the Tenth Amendment. A taxpayer also sued individually on the ground that her property would be taken, under the guise of taxation, without due process of law. The court refused to discuss the merits of either case, holding that the Massachusetts suit presented no justiciable controversy either in its own behalf, or as the representative of its citizens, while the individual taxpayer had no such interest in the subject-matter as to enable her to sue. Massachusetts v. Mellon, supra note 55; Bradfield v. Roberts, 175 U. S. 291, 20 S. Ct. 121 (1899); Wilson v. Shaw, 294 U. S. 24, 27 S. Ct. 233 (1907); Elliot v. White, 23 F. (2d) 998 (App. D. C. 1928). Nor can the state sue for its citizens. Florida v. Mellon, 273 U. S. 12, 47 S. Ct. 285 (1927).


57 See Note (1924) 37 Harv. L. Rev. 750; (1924) 19 Va. L. Rev. 147; (1923) 72 U. of Pa. L. Rev. 722.
impose taxes? This immediately requires an inquiry into the purpose of expenditure. That the expenditure must be for a "public purpose" or be "national in character" is an answer frequently given. But the determination of what is "national" or "public" must yet be made; and so far, the court has wisely said that "public purpose" or "national character" was precisely what Congress said it was. Thus for all practical purposes, the court has refused to consider the merits of particular cases and the "general welfare clause" though not a grant of power, is likewise, not a limitation.

It has been suggested that the court must eventually alter its policy of non-interference with Congressional expenditures. In the interpretation of the "commerce clause" the court has insisted upon a "literal" application of its terms and suggested that any change in the scope of federal power must come through "formal" constitutional amendment. Those who applaud such an interpretation would be eager for a "reconsideration" of the interpretation of the "general welfare clause." In the light of earlier decisions, consistency would suggest that "reconsideration" was unlikely. But consistency has not always been an immutable quality of the decisions.

The suggestion that jurisdiction over expenditures is necessary to preserve the court's independence overlooks the fact that such a jurisdiction might be too burdensome. The bulk of litigation that would arise (and conceivably it would arise anew with each session of Congress) would appear to be tremendous. Further, such a jurisdiction would throw the court into the conflict of inter-departmental administration to a degree that would little befit the judicial dignity. Corwin puts the practical difficulty neatly when he says "that into the 'dread field' of money expenditure the court may not 'thrust its sickle'."

A further question which might be raised, assuming the rule de minimus did not bar the action, is that the grant-in-aid device infringes on state sovereignty. The State of Massachusetts, to which the de minimus disqualification did not apply, urged this point in the Mellon case. The court there suggested that the state could protect its sovereignty by the somewhat costly expedient of refusing the federal benevolence. Avoiding a decision on the

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66 Corwin, loc. cit. supra note 59.
67 "If Congress enacted it (the act) with the ulterior purpose of tempting them (the states) to yield, that purpose may be effectively frustrated by the simple expedient of not yielding." Sutherland, J., in Massachusetts v. Mellon, supra.
point, it was said that the issue as raised involved a "political question" and therefore (was) not a matter which admits of the exercise of judicial power. As the federal-state relation created by the Social Security Act is the same as that under discussion in the Mellon case, it might be concluded that what was a political question in 1923 will be a political question in 1935.

But in the controversies over federal invasion of state rights in the federal employers' liability cases, the child labor cases, and the NRA case the court only determined whether the power exercised by Congress had been delegated to it by the Constitution. Similarly under the present Act, the court may decide the case on its merits and the "political question" doctrine will be no bar to the action.

Other questions concerning taxation and expenditure—Can the expenditure be traced to the source from which the fund was raised? Is the collection of the tax from one class and its expenditure for the benefit of another a "taking of property"? Is the taxation plus the disbursement a thin veil for federal regulation of non-federal subjects—are of importance but are beyond the scope of our inquiry.

The validity of conditioning the grant of funds with standards of conduct which must be complied with by the grantee goes most directly to the heart of the grant. Arguments that such a condition destroyed state sovereignty, placed unequal burdens upon the states, and amounted to federal regulations have been denied when presented to the court. Even when compliance with the federal standards has been prohibited by a state constitution it has been no bar to the national policy. The court has steadily insisted that

note 55, at 482. Cf. "Fundamentally this is compulsion. How does this differ as far as compulsion is concerned from rejecting an option of abstaining from a prohibited act, and paying the fine instead?" Hale, Force and the State: A Comparison of 'Political and Economic' Compulsion (1935) 35 Col. L. Rev. 149.

64 Quaere: Does the fact that a state raised the question in the Mellon case affect the applicability of the political question doctrine?


66 Second Employers' Liability Cases, 223 U. S. 1, 32 S. Ct. 169 (1911).


68 Schechter Poultry Corp. v. U. S., supra note 47.

69 Thus if in the protection of private interests, the boundary between federal and state sovereignty is questioned, it is no objection that sovereignty is involved. Georgia v. Tennessee Copper Co., 206 U. S. 230, 27 S. Ct. 618 (1907); Alabama v. Burr, 115 U. S. 413, 6 S. Ct. 81 (1885).

70 Massachusetts v. Mellon, supra note 55, and articles cited, supra note 58.
the government must be preserved the right enjoyed by every other grantor to condition his grant as he pleases.\textsuperscript{71}

That the states have been induced to comply is no ground for attack. Indeed, the very purpose of the grant is to stimulate the states to action. “It is desirable that they should feel that it (the assistance) comes as a recognition of the fact that the local service thus aided is one which is performed, not for the locality alone, but, in part at least, in furtherance of the interests of the community as a whole; and that accordingly the community as a whole has a right to satisfy itself . . . that the service is performed at least up to the extent, and with the degree of efficiency, that the community may, in its own interests, from time to time prescribe.”\textsuperscript{72}

The Social Security Act depending upon the grant-in-aid device for the distribution of its funds, seems well protected by the language of prior cases so far as the method of finance is concerned. Much, however, will depend upon the administrative care with which the finance is handled. Thus, it is suggested that definite formulas and standards should be added, at once, to the general pronouncements of policy with which the Act itself was content. Both its administrative success and its constitutional defensibility depend upon it.

IV

The social security program, as practically all the recent legislation, has been attacked by a band of oppositionists who declare that “the government in its years of existence has never demonstrated any creative ability” and proceed to denounce all experiment, without which, of course, creation is impossible. The reply to this attack has been oracular pronouncement of general policy and condemnatory reference to the critics. Little inquiry has been directed (because it is both tedious and not particularly vote compelling) to the development of a competent administrative system to handle the new relationships between the several governments, between government and “business,” and between government and the individual. Some are willing to rely upon “improved governmental personnel,” others attack any system which depends upon the personal equation, because of the danger of “abuse of power,” others are content with despair alone. System and personnel interact and stimulate each other. Thus with the Social Security Act

\textsuperscript{71} “. . . the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions.” Ervein v. U. S., 251 U. S. 41, 40 S. Ct. 75 (1919).

\textsuperscript{72} Webb, op. cit. supra note 8, at 86.
emphasizing the federal-state relationship, political scientists, economists, and lawyers must seek administrative devices, which, with the system and the personnel that we can expect, will protect against abuse and insure that the taxpayer receives his dollars' worth.

Early in the last century a National Formulary was adopted to provide standards of reliability in the prescription for human physical ills. A National Formulary with prescriptions for the relief of social indigestion and economic cramps is badly needed. Without such a system we must treat each disorder as unique—past suffering will have been in vain; past experience, accidental and unprofitable.

To avoid these results a Federal-State Relations Service should establish grant-in-aid formulas for the determination of local need, the efficiency of local government, and its capacity to spend effectively. With the administration of the Social Security Act established, there are innumerable other problems in the federal-state relation toward which the Service's attention might profitably be directed.

We have had enough of fact-finding bodies, what we now need is a fact-using organization.

73 The United States Pharmacopoeia was first established, circa 1820. In form somewhat similar to the Formulary, it has provided the pharmaceutical profession with standards for over a century.