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THE IMPACT OF FEDERAL SUBSIDIES ON STATE FUNCTIONS

Thomas A. Gilliam*

I. HISTORICAL IMPACT

1923 may serve as an introductory year to this subject. Then, as now, it was complained that federal subsidies are invasions upon the traditional power of the states in the American federal system. In that year, however, *Massachusetts v. Mellon*¹ was decided by the United States Supreme Court. This decision involved two actions, one instituted by a Harriet Frothingham as a taxpayer, and the other, by the state of her residence on behalf of other of its citizens to restrain the government from making payments to any state under the Sheppard-Towner Act, federal legislation enacted in 1921 for maternal and child welfare.² The plaintiff taxpayer alleged that the effect of the statute would be to take her property, under the guise of taxation, without due process of law. In addition, the plaintiff state asserted that the appropriations provided by the act fell unequally among the several states, and that the act was an attempted exercise of the power of local self-government reserved to the states by the tenth amendment.³ The Court, by Justice Sutherland, however, not only declined jurisdiction in the taxpayer's case on the ground that her interest was too remote, but also declined jurisdiction in the state's case, as follows:

In the last analysis the complaint of the plaintiff state is brought to the naked contention that Congress has usurped the reserved powers of the several states by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political, and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.⁴

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¹ 262 U.S. 447 (1923).

² 42 Stat. 224 (1921). Payments were made on a matching basis with a state accepting the provisions of the legislation.

³ *Massachusetts v. Mellon*, *supra* note 1, at 479.

⁴ *Massachusetts v. Mellon*, *supra* note 1, at 483.

Thus it was indicated that the tenth amendment to the Constitution of the United States, to the effect that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people", would not be a hindrance where a state consented to Congressional sharing of taxes in a traditional area of local determination. This mitigated then the position taken by the Court only shortly before in the *Child Labor Cases*,⁵ wherein federal legislation directed against such labor without reliance on the states, but based upon the Congressional powers to regulate commerce⁶ and to tax for the general welfare,⁷ was struck down as invading the reserved power of the states. For it was apparent, under *Massachusetts v. Mellon*, *supra*, that Congress could legislate indirectly as to matters within the orbit of the tenth amendment, if it could not do so directly.

A. CORWINIAN VIEWPOINT

In reaching this view it is of course impossible to determine how much the Court was aware of the writings of that year.⁸ However, one very famous student, Edward S. Corwin, had criticized⁹ not only this challenge by Massachusetts to the constitutionality of the Sheppard-Towner Act but also the *Child Labor Cases*, *supra*,¹⁰ as resulting from a limited appreciation of the power of

⁵ *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁶ U.S. Const. art. I, § 8, cl. 3.

⁷ U.S. Const. art. I, § 8, cl. 1.

⁸ Burdick, *Federal Aid Legislation*, 8 CORNELL L.Q. 324, 325 (1923), pointed out that any attempt at delegation by states of their power to the government, was, at most, an infringement of a state and not of the federal constitution. (Cf. Sutherland, separate opinion in *Steward Machine Company v. Davis*, 301 U.S. 548, 610, note 27 *infra*). Another writer anticipating "Cooperative Federalism," note 32 *infra*, defined every federal state as an experiment, "a workable adjustment between the central and the local," THOMPSON, *FEDERAL CENTRALIZATION* 3 (1923). See Merrill, *The Function of the States Today—A Tentative Blueprint for Federation in Twentieth Century America*, 30 IOWA L. REV. 169, 170 (1945).

⁹ Corwin, *The Spending Power of Congress—Appropos, The Maternity Act*, 36 HARV. L. REV. 548 (1923).

¹⁰ *Bailey v. Drexel Furniture Co.*, and *Hammer v. Dagenhart*, *supra* note 5. The former case held that Congress could not under the guise of taxation regulate directly in an area reserved to the states and the latter case held that the commerce power did not extend to the same area.

Congress to legislate for the general welfare,¹¹ the definition of which, he urged, is what Congress finds it to be.¹² Only briefly did Corwin treat¹³ upon the consent feature of the Sheppard-Towner Act, as opposed to direct action by Congress; in fact, in his historical illustration to prove his point on just how broad the scope of the congressional power was, he deprecated, although admitting the existence of, the element of state consent. For after citing President Washington's recommendations in his final message to Congress for manufactures on public account, for the establishment of a national university,¹⁴ and for the promotion of agriculture to demonstrate that it was early assumed that Congress could directly legislate on problems of welfare, Corwin nevertheless, continued:

A few months later the Virginia and Kentucky Resolutions were promulgated, the theory of which was essentially that the Constitution, being a compact of sovereign states, reserved to the latter a mediating function between the people and the national government. It followed of course that the national government, before undertaking within the boundaries of the states any new or unaccustomed activity, must secure their consent. Indeed it was insisted that the 'necessary and proper' clause implied this requirement, since no matter how *necessary* a measure might be as a means to a constitutional end, propriety required that the state or states most immediately concerned should be consulted. . . . Thus from the outset the question of 'internal improvements' . . . became involved with the doctrine of 'state consent.' . . .¹⁵

Whether or not the Court was aware, however, of the Corwinian viewpoint, *Massachusetts v. Mellon* was in line with what had been a rich tradition of historical interaction of the states and the federal government, a tradition which Professor Corwin had noted above. For as early as 1785 under the Articles of Confed-

¹¹ While observing that the Welfare Clause was not an independent grant of power but a qualification of the taxing power, Corwin nevertheless urged, citing Story, that the congressional ability to tax, so qualified, was not confined to or in aid of the other enumerated powers, 36 HARV. L. REV., *op. cit. supra*, note 9, at 552-554.

¹² *Id.* at 580.

¹³ *Id.* at 580-582.

¹⁴ Washington's will also contained a bequest, consisting of stock in a Potomac company, to the United States for the establishment of such university. This did not receive the approval of Congress, however, and no steps were taken to carry out this provision. Roberts, *Development of Federal Aid to Education*, 30 IOWA L. REV. 210, 211 (1945).

¹⁵ 36 HARV. L. REV. *op. cit. supra*, note 9, at 556.

eration, Congress had provided that a section of every township in the federal domain be set aside for the maintenance of public schools, and after the Constitution was adopted, the states had become so obligated in debt, mainly incurred in the prosecution of the Revolutionary War, that Congress, at the instance of Alexander Hamilton, had assumed these debts. In the 1830's the United States distributed its surplus revenues so as to aid the states which had been again overwhelmed, this time because of internal improvements. In addition, upon admission to the Union, new states were given land for aiding common schools, universities, normal schools, schools of mines, flood control, wagon roads, canals, and river navigation. Even the land grants to the railroads were initially channeled through the states, although later going directly to the public carriers. The impact, of course, of these early unconditional subsidies was of course to enable the states to function at all.

B. FIRST MODERN CONDITIONAL GRANT

The first modern conditional grant, of a type such as was before the Supreme Court in *Massachusetts v. Mellon*, *supra*, became law while the Civil War was yet in progress. This was the Morrill Act of 1862, enacted for the establishment of agricultural and mechanical colleges.¹⁷ Among other conditions such as annual reports and direction as to the investment of funds, it was provided that such funds could not be used for buildings, thus insuring that the states accepting such benefits must also invest.¹⁸ The effect of such legislation was as follows:

The system of public support, assured for technological and agricultural education by the Morrill Act of 1862, rapidly became the keystone of all higher education in the Midwestern, Rocky Mountain and Far Western regions. Lacking the colleges and universities of private endowment traditional in the East, the West built its collegiate and university structure, for cultural and vocational training, upon the base of state and federal aid.¹⁹

¹⁶ These early grants are summarized in the COUNCIL OF STATE GOVERNMENTS, REPORT OF THE COMMITTEE ON FEDERAL GRANTS-IN-AID (1949), at 1-4.

¹⁷ 12 Stat. 503, 7 U.S.C. §§ 301-305, 307, 308. Mr. Charles K. Burdick had filed for the Association of Land Grant Colleges, a brief as amicus curiae in *Massachusetts v. Mellon*. Also see note 8 *supra*.

¹⁸ *Ibid.*, § 305.

¹⁹ Wecter, *Instruments of Culture on the Frontier*, 36 Yale L. J. 256 (1947), as noted in Report, *op. cit. supra*, note 16 at 4. The first Morrill Act, July 2, 1862, 12 Stat. 503 (1862), now appears in 7 U.S.C.

And prior to 1914, the principal expansion of the conditional aid program was in connection with these colleges such as the second Morrill Act, the Hatch Act and the Adams Act, legislation which provided cash grants conditional upon compliance with federal standards and audits. The Hatch and Adams Acts established the agricultural experimental stations, a matter so important to state activity that, stimulated by grants from the Rockefeller Foundation, a system of "county agents" sprang up around the country.²⁰ In 1914, the Smith-Lever Act was enacted providing for cooperative agricultural extension work between the land-grant colleges and the Department of Agriculture, and contained such measures as 50-50 matching, an apportionment formula of distribution of funds between states, and advance approval of state plans by the government. Thus all the essentials of the American subsidy system were established by 1914.²¹ It may be also noted here that, in the previous year the sixteenth amendment was adopted by the states permitting the federal income tax to be established. This was later to become an important factor in favor of federal subsidy, for the alternative to grants-in-aid in the financing of the major improvements of counties and cities, the political subdivisions of the states, is local bonds, repayable ultimately from property, sales and excise taxes; whereas, federal bonds will be repaid from national income.²² By 1914 then, not only was the structure of subsidy established but by that time the industrial and commercial economic system had made obsolete the system of taxation based primarily upon real estate.²³

One of the basic demands of the new industrialism was of course adequate highways. Each state was required to create a highway department under the Federal Aid Road Acts of 1916 and 1921,²⁴ under which there resulted an enormous program of de-

§§ 301-305, 307, 308 (1958). The second Morrill Act, Aug. 30, 1890, 26 Stat. 417 (1890), 7 U.S.C. §§ 321-326, 328 (1958), contains a restriction as to social discrimination, 7 U.S.C. (1958) § 323, but permitted application of the "Separate but equal" doctrine, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁰ Report, *op. cit. supra*, note 16 at 5. Now 7 U.S.C. §§ 361-389 (1958).

²¹ *Id.*, 6. The general provisions relating to agricultural extension work now appear in 7 U.S.C. §§ 341-348 (1958).

²² See BITTERMANN, STATE AND FEDERAL GRANTS-IN-AID, at 130-1 (1938).

²³ *Id.* at 12.

²⁴ Act of July 11, 1916, 39 Stat. 355; Act of Nov. 9, 1921, 42 Stat. 212, 23 U.S.C. §§ 101-131 (1958).

velopment considering that the states matched the federal funds. The impact on state functions? In 1928, state officials, who administered federal aid, replied affirmatively to a questionnaire as follows:

- | | |
|---|--------------------|
| 1. How federal grants stimulated state activity with respect to the aided programs? | 90.9% |
| 2. Has federal supervision improved state standards of administration and service? | 68.6% |
| 3. Has federal aid led to federal interference in state affairs? | 6.1% ²⁵ |

Despite the excellent results of the evolved method of sharing tax receipts, the depression intervened, and due to the inability of the states to contribute their share, matching funds for highways for that interim was discontinued. Then finally in 1937 most of the depression relief activity began to be undertaken by the direct operation of the federal government without reciprocal arrangement with the states.²⁶

II. THEORETICAL IMPACT OR COOPERATIVE FEDERALISM

1937 becomes the next focal year then in this discussion, a year in which the same events which had produced *Massachusetts v. Mellon*, *supra*, which sustained in 1923 the constitutionality of the Sheppard-Towner Act of 1921, were repeated to produce two new Supreme Court decisions, *Steward Machine Company v. Davis*,²⁷ and *Helvering v. Davis*,²⁸ this time sustaining the constitu-

²⁵ *Report of the Committee on Federal Aid to the States of the National Municipal League*, NAT'L MUNIC. REV. (Supp. Oct. 1928, Vol. XVIII, No. 10).

²⁶ Report, *op. cit. supra*, note 16 at 33.

²⁷ 301 U.S. 548 (1936). This case upheld the validity of Title IX of the Social Security Act, note 29 *infra*. Although Justice Sutherland, who spoke for the Court in *Massachusetts v. Mellon*, note 1 *supra*, wrote a separate opinion, he concurred, *id.* 609, with most of what was said in the majority opinion written by Justice Cardozo, who answered the attack made on the Act as being violative of the tenth amendment, that the state had consented, *id.* 589. The state's unemployment compensation law was upheld in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1936), decided the same day.

²⁸ 301 U.S. 619 (1936). This case did not involve grants-in-aid but related to the old age insurance feature of the Social Security Act. The act was therefore sustained not merely because of its reciprocal provisions with reference to the states but on the ground that unemployment is a general national ill which Congress may check by the nation's resources under the general welfare clause and because of the states' lack of resource and their reluctance to increase the tax burden.

tionality of the Social Security Act of 1935, federal legislation which, while mainly containing features of federal-state reciprocity, also involved direct action by the government as well.²⁹ Again, just as before in the *Child Labor Cases*, *supra*,³⁰ the Supreme Court had previously handed down recent decisions³¹ which had again thrown doubt on the government's ability to legislate directly as to matters thought traditionally reserved to the states. And again, Professor Corwin wrote in defense of the Congressional legislation, this time asserting that the Social Security Act was valid under a theory of federal-state cooperation as follows:

Cooperation between the National Government and the states in the legislative field rests, likewise, upon the voluntary principle in-the main, can rest on no other. Such cooperation takes two forms: First, the national legislative power, particularly that over commerce and communications, is exerted in aid of state policies; secondly, the national power to tax and spend is used to provide financial inducements to the states to exert their reserved powers in the furtherance of the legitimate objectives of national expenditure. . . .

It is this last type of National-State cooperation, effected by means of the federal grant-in-aid, which best realizes the ideal of Cooperative Federalism. By this device there is brought about a real mergence of powers and a real reciprocity of service for common ends, on the part of the two governmental centers.³²

A. NEW FEDERAL-STATE COOPERATION

Corwin's new emphasis on federal-state cooperation, of course, differed from his 1923 thesis that Congress had direct power to legislate for the national welfare. However, the Supreme Court had a year before partially accepted this earlier position of his

²⁹ Aug. 14, 1935, 49 Stat. 620, now generally dispersed throughout 42 U.S.C. including grants to the states for: old age assistance, §§ 301-306; and to dependent children, §§ 601-606; maternal and child welfare, §§ 711-715, 721; and aid to the disabled, §§ 1351-1354 (1958).

³⁰ Note 5, *supra*.

³¹ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. Butler*, 297 U.S. 1 (1936).

³² Corwin, *National-State Cooperation its Present Possibilities*, 46 YALE L. J. 599, 622 (1937). Cf. Strong, *Cooperative Federalism*, 23 IOWA L. REV. 459 (1938). For cooperation in reverse, with reference to the Commerce Clause, see *Clark Distilling Co. v. Western Md. Ry.*, 242 U.S. 311 (1917); Dowling and Hubbard, *Divesting an Article of its Interstate Character*, 55 MINN. L. REV. 100, 253 (1920-21); Dowling, *Interstate Commerce and State Power-Revised Version*, 47 COLUM. L. REV. 547, 552, fn. 19 (1947).

in *United States v. Butler*,³³ still apparently being of the opinion, however, even with respect to the congressional tax and commerce powers, that there was some area of jurisdiction reserved to the states under the tenth amendment, and very definitely accepted it in 1941 when one of the *Child Labor Cases*, *supra*, was overruled.³⁴ Thus, the American subsidy system historically established the right of the federal government to participate in welfare matters, and once that right became ascendant, became theoretically the only remaining means whereby the states could function when such matters were deemed affected by the national interest. And possibly in appreciation of this, Corwin, in his final analysis, placed his emphasis on federal-state cooperation which permitted the states to participate in the solution of national problems.

In any event even with the Social Security Act sustained, the basis of its constitutionality was still obscure as to whether or not it had been upheld because of its cooperative features, and there still remained a lingering notion that there was yet an area reserved to the states upon which the government could not encroach without their participation. As a consequence, this form of "Co-operative Federalism" again became dominant over the alternative of direct federal action, an alternative induced by the depression.³⁵ It was defined by Henry Bittermann, in a pioneer volume published in 1938, which demonstrated that it was the traditional method that is followed not only in federal-state relations but in state-local relations as well:

By a grant-in-aid is here meant a payment made by a central to a local authority to defray part of the cost of a service administered by the local authority, usually subject to some conditions set by

³³ *United States v. Butler*, note 31 *supra*. This case declared the Agricultural Adjustment Act of 1933, 48 Stat. 31 (legislation which sought to enlist the voluntary cooperation of the individual rather than the state), unconstitutional in that it attempted to regulate agricultural production which the Court held was a matter reserved to the states under the tenth amendment. The Court, however, acknowledged that the Congressional power to tax for the general welfare is not confined to areas within the enumerated powers, in an analysis at pp. 64-67 which closely paralleled Corwin's 1923 argument, notes 9 and 11, *supra*.

³⁴ *United States v. Darby*, 312 U.S. 100 (1941), overruling *Hammer v. Dagenhart*, notes 5 and 10 *supra*. This case holds that it is no objection to the assertion of the power to regulate interstate commerce that its exercise of the police power of the states, *id.*, 114; cf. *Bowman v. Chicago and Northwestern Ry.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890) and note 66 *infra*.

³⁵ Report, *op. cit. supra*, note 16, at 33.

the central government, which may inspect and partially control the service and, if conditions are not satisfactory, withhold future payments of the grant.³⁶

While Bittermann wrote a definitive study in the field, and his conclusions defended the system, he warned that they were based on theory and must await their proof until more extensive studies were made.³⁷

One such study was made in 1940. In that year the American Academy of Political and Social Science devoted an entire volume of its "Annals to intergovernmental relations in the United States, the first three articles of which relate to federal-state relations."³⁸ In the opening article,³⁹ the potential of a vast administrative hierarchy was noted if the then current trend to overall treatment by the federal government of welfare problems was pursued in subsidy administration.⁴⁰ The writer predicted⁴¹ that the Office of the President, since it united politics and administration would become dominant, and that public control could only be exercised in the political party as an instrument of party and consent, both on a national and local level despite the Hatch Political Activity Act of 1939.⁴²

B. MASS OF FACILITATING LEGISLATION

The second article in the series remarked as to the mass of state legislation that had been enacted to facilitate federal legislation and apparently saw no danger in this.⁴³ There is, however, a danger related to the problem of responsibility noted above, that is to say, the creation by the state of quasi-municipal entities,

³⁶ Bittermann, *op. cit. supra*, note 22, at 5.

³⁷ *Id.* at 3. However, a pioneer study made on the subject a decade before MacDONALD, *FEDERAL AID: A STUDY OF THE AMERICAN SUBSIDY SYSTEM*, did not have first-hand experience, as Bitterman did, with the alternative of direct federal action.

³⁸ Vol. 207, Jan. 1940.

³⁹ *Id.* at 1, DURHAN, *POLITICS AND ADMINISTRATION IN INTER-GOVERNMENTAL RELATIONS*.

⁴⁰ *Id.* at 4-5.

⁴¹ *Id.* at 6.

⁴² 53 Stat. 1147, 5 U.S.C. § 118(k), (1958), removes from active political activity state and local agency employees whose principal employment is in connection with any activity financed in whole or in part by government subsidy.

⁴³ Key, *State Legislation Facilitative of Federal Action*, *op. cit. supra*, note 38, at 7.

particularly in the case of slum clearance legislation,⁴⁴ to avoid constitutional and charter limitations on cities, the political subdivisions of a state. Unrestrained administrative action between such independent local agencies and federal agencies, both policy making bodies remote from elective control, may violate the spirit and purpose of the tenth amendment.⁴⁵ For that amendment reserves power to the states or the people and if there is vitality left in this concept, it lies in context with the Bill of Rights.

The final article of this 1940 analysis dealt with the effect of piecemeal federal aid subsidy, i. e., — aided state services were placed in a preferred position and other services, while equally important, suffer because of the diversion of local funds into the preferred services.⁴⁶ The recommended cure for this was for the federal government to provide for all of the most expensive state and local functions,⁴⁷ a solution it was urged would also develop efficient professional administration.⁴⁸

The culmination of these writings on what should be the relationship of the federal and state governments took place in

⁴⁴ The "Housing Authorities Law," model legislation enacted by states desirous of obtaining federal grants and loans for public housing under the United States Housing Act of 1937, 50 Stat. 888-899, 42 U.S.C. §§ 1401-1433 (1958), created commissions independent of the usual constitutional and charter limitations on municipal corporations; *Dornan v. Philadelphia Housing Authority*, 331 Pa. 209, 200 Atl. 834 (1938); *Allydorn Realty Corp. v. Holyoke Housing Authority*, 304 Mass. 288, 23 N.E.2d 665 (1939); *Nashville Housing Authority v. City of Nashville*, 92 Tenn. 103, 237 S.W.2d 946 (1951); *People ex rel. Stokes v. Newton*, 106 Colo. 61, 101 P.2d 21 (1940). Although such authorities have to obtain initial local approval of a particular housing project, they are responsible thereafter chiefly to the Federal Housing and Home Finance Agency. The Housing Act of 1949, 63 Stat. 413-438, 42 U.S.C. §§ 1441-1483 (1958), changes the emphasis, however, in slum clearance from public housing to redevelopment by private enterprise, and model legislation, suggested by the Division of Law, Housing and Home Finance Agency, October 12, 1956, in respect to such redevelopment, permits a municipality to create an urban renewal agency either as an independent commission or as a city agency, the latter more responsive to local policy.

⁴⁵ Kades, *An Irrevocable Federal Subsidy: A Study of Its Legal Aspects*, 36 A.B.A.J. 97, 166-167 (1950).

⁴⁶ Harris, *Future of Federal Grants-in-Aid*, *op. cit. supra* note 38, at 14, 18.

⁴⁷ *Id.* at 20.

⁴⁸ *Id.* at 21-26. Cf. note 85 *infra*.

1943. In that year, after a review of state functions, the conclusion of the Ross Essay was as follows:

It appears that from the foregoing paragraphs that there is no consensus of opinion as to whether education, general relief, labor, housing, criminal law administration, and taxation, are state or national functions or both. This strongly suggests that the basic function of the states in our system of government should be cooperation with the national government. 'The alternative of centralization is efficient cooperation.' . . . According to Professor Corwin it is 'national-state cooperation, effected by means of the federal grant-in-aid, which best realizes the ideal of co-operative federalism.' . . .⁴⁹

It must be observed, however, that all of the writers had now become aware that the federal government could achieve its objectives without state help since there was no longer an area left to the states which was unaffected by the national interest. Logically then, the alternative to a strong central government was to sponsor a program wherein the states could be integrated, administratively and financially. But assuming that there is the same necessity of achieving uniformity in the field of welfare as there is in commerce,⁵⁰ it is a great deal less expensive to achieve uniform commercial regulation. However, probably because the United States had emerged from a depression to engage in war, and had, as a consequence, passed through an era in which the federal government had played a dominant role, the view still persisted as late as 1943 that complete centralization was somehow inevitable. Illustrative of this was a report submitted that year to the Secretary of the Treasury by a special committee on inter-governmental fiscal relations,⁵¹ which while professing to seek a middle ground,⁵² nevertheless assumed that in the functional division of responsibility the question was, in any given area, whether the government should take direct action or employ the grant-in-aid mechanism, the latter course indicated in some instances for "cordial Federal-State relations."⁵³

III. ACTUAL IMPACT

After the War a different viewpoint began to prevail and attention was focused, almost for the first time, on the reality of

⁴⁹ Orfield, *What Should Be the Function of the States in Our System of Government?* 29 A.B.A.J. 480, 488 (1943).

⁵⁰ Cf. text supported by note 66 *infra*.

⁵¹ S. DOC. NO. 69, 78th Cong., 1st Sess. (1943).

⁵² *Id.* at 4-5.

⁵³ *Id.* at 181.

federal subsidy as it existed. This was probably with the realization that the government could not, as theoretically assumed, perform even indirectly, far less directly, the functions of the states, however those functions were affected with the national interest. In 1949 the matter of inter-governmental relations was again reviewed, this time by the first Hoover Commission. The assets of the American subsidy program were listed by this very thorough but brief analysis as follows:

1. Services have been provided which many states would have been unable to supply and there has been some redistribution of resources from states that have superior means to those that lack them.
2. The level of all aided services has been raised without transferring functions entirely to the national government, this accomplished by a division of functions: the government giving aid and establishing broad standards, the states sharing the burden and retaining primary administration.
3. The activities of state governments have expanded with these additional resources enabling them to embark on additional and more public service programs.
4. There had taken place a satisfactory stimulus in state government and
5. Improved professional administration.⁵⁴

The liabilities in fairness were also reported, but this time not on the tacit assumption that state government was somehow obsolete:

1. No one agency concerned with the overall impact has been developed.
2. Large areas of discretion, policy making, ultimate responsibility and control for public services, are in the government.
3. Unaided programs have been neglected.
4. National taxation has been expanded for the aid program to the states and for war purposes to such an extent that there has been an invasion of tax sources which could be used for state and local governments.
5. States are rewarded which avoid responsibility and those which accept it are penalized.⁵⁵

⁵⁴ The Commission on Organization of the Executive Branch of the Government, overseas administration-federal states relations-federal research, A Report to the Congress, at 30-31 (March, 1949).

⁵⁵ *Id.* at 31-32.

The recommendation was for a continuing agency on federal-state relations,⁵⁶ a significant recommendation in view of the commission's responsibility to recommend measures for efficiency in government. It is interesting to note, moreover, in view of the earlier writing predicting the necessity of centering political responsibility in the President,⁵⁷ that another recommendation made by the Commission for a new Department for Social Security and Education eventually became a reality⁵⁸ and Indian affairs, traditionally thought purely a federal function, is progressively transferred, whatever the wisdom of this may be, to state governments through the media of this Department.⁵⁹

A. FEDERAL AID SURVEY

In 1949 the Council of State Governments also presented a study of federal-state relations undertaken by a committee headed by Governor Earl Warren. To obtain an over-all picture of the views of state officials who administer federally aided programs, a questionnaire was again developed. This questionnaire and the major percentage of response were as follows:⁶⁰

- | | | |
|---|------|-------------------|
| 1. Have federal grants stimulated state activity with respect to the aided program? | 93.8 | Yes. |
| 2. Has federal supervision improved states standards of administration and service? | 70.3 | Yes. |
| 3. Has federal assistance led to an interference in state affairs? | 64.2 | No. ⁶¹ |

⁵⁶ *Id.* at 36.

⁵⁷ Notes 38, 39, and 42 *supra*.

⁵⁸ Although the Commission recommended a separate United Medical Administration, Social Security-Education-Indian Affairs, A Report to the Congress, March 1949, at 4, the Public Health Service was also integrated under the Secretary of Health, Education and Welfare, a Cabinet post created by the Act of April 1, 1953, 67 Stat. 18, 5 U.S.C. § 623 (1958).

⁵⁹ See Report, note 58 *supra*, at 65, 71.

⁶⁰ See Report, note 16 *supra*, Appendix A, p. 273.

⁶¹ There was virtually no change in opinion on questions (1) and (2) since the earlier questionnaire in 1928, note 25 *supra*, but the percentage of those answering yes to question (3) had increased. That the percentage had not gained further, in view of greatly increased federal activity, is the surprising result. Moreover, the dissatisfaction of state officials in 1948, as the council points out at p. 281, was chiefly derived from the employment security group where federal aid to administration is 100%.

4. Should federal appropriations for existing grant programs be increased or decreased? 77.6 Increased
5. Should the system of federal grants be expanded? 51.6 Yes.
6. Does federal aid tend to unbalance overall state programs? 69.1 No.
7. Should federal aid funds be budgeted and subject to the same financial controls as are state funds? 87.8 Yes.
8. Are existing provisions relative to the matching of funds satisfactory? 73.9 Yes.
9. Are existing provisions relative to the apportionment of funds among the states satisfactory? 68.6 Yes.
10. Are existing provisions relative to the allocation of funds among the various portions of an aided program satisfactory? 78.0 Yes.

The favorable evidence of this 1949 questionnaire seems to be also sustained by that of the President's Commission on Intergovernmental Relations whose findings were made public in 1955.⁶² This report, the most comprehensive study ever made on the actual workings of the federal grants-in-aid, found for the most part⁶³ that the federal system was still in a healthy state of affairs:

The continuing vitality of State and local governments affords the most solid evidence that our federal system is still an asset and not a liability. To be sure it is not a neat system, and not an easy one to operate. . . .⁶⁴

The Commission supported the grant-in-aid device as a vital part of that system, saying that in the field of service, as opposed to that of regulation, the choice between direct national action and joint effort favors the latter.⁶⁵ Various considerations affect this choice, principally that variation and accommodation are here more important than uniformity, indeed are the ingredients of efficiency, and that such a course promotes the vitality of state government rather than would extensive national performance of a program or segment of a program.⁶⁶

⁶² A Report to the President for Transmittal to the Congress, June, 1955.

⁶³ Notable dissent came from the Commission's Vice-Chairman, former Governor Alfred E. Driscoll of New Jersey. See *The Biggest Con Game in Politics*, Reader's Digest, December, 1956, and January, 1957.

⁶⁴ Report, *op. cit. supra* note 62, at 2.

⁶⁵ *Id.* at 67.

⁶⁶ *Ibid.*

B. IMPACT STUDIES

The Commission's findings were supplemented by two sets of impact studies.⁶⁷ The first of these covered twenty-five states, states of wide geographical distribution and of great range as to size and population, wealth and income, the type of economy — whether chiefly industrial or agricultural, and in constitutional and governmental arrangement. In nine of these federal grants exceeded 20% of the amount raised by state and local taxation, and, at the other end of the scale, there were three where grants were 10% or less of such revenue. While such a study produced a variety of results since it covered a nation wide operation of the American subsidy system, general conclusions could be reached. First, it was discovered, with reference to the executive branch of state governments, that the impact of federal aid is less than might have been expected, although "strong" governors complain more about federal dictation than do "Chief Executives, not masters in their own house."⁶⁸ It was also concluded that overall state administrative reorganization has neither been helped nor hindered by federal aid, but that reorganization of a particular function has been helped by the federal "single agency" requirement.⁶⁹ Likewise, federal grants do not prevent the introduction and use of a good executive budget system, although, because of their minute categorization, they complicate the budget.⁷⁰ Finally it was noted that the political rule of the governor was enhanced rather than weakened by such aid,⁷¹ and that in general the relations between federal agencies and their state counterparts were excellent.⁷²

⁶⁷ (1) A Survey Report on The Impact of Federal Grants-in-Aid on Structures and Functions of State and Local Governments, submitted to the Commission on Intergovernmental Relations (June 1955); (2) Summaries of Survey Reports on The Administrative and Fiscal Impact of Federal Grants-in-Aid, prepared from Original Survey Reports Submitted to the Commission on Intergovernmental Relations (June 1955).

⁶⁸ Impact Report (1), note 67 *supra*, at 5-6.

⁶⁹ *Id.* at 6. This concept, which requires administration of a particular federal program by a single state agency was apparently used to oppose reorganization in some states. The Council of State Governments urges, however, that there is nothing in this requirement that prevents over-all budgetary control. See Report, *op. cit. supra* note 16, at 124-125.

⁷⁰ Impact Report (1), note 67 *supra*, at 7.

⁷¹ *Id.* at 7-9.

⁷² *Id.* at 9.

Next discussed is the impact on the State Legislature.⁷³ Here it was discovered that federal grants have produced shifts in state policies both in the introduction of services which would not have been undertaken without such grants, and in the beginning of functions sooner and more extensively than could have been otherwise the case. But most significant of all, in view of earlier reports that had pronounced it a major defect⁷⁴ it was found that non-federally aided functions had not been "conspicuously neglected", although in poorer states the claims of some non-aided functions do not have as high priority.⁷⁵

The second set of impact studies dealt with seven additional states, states which presented the same range and variety as the twenty-five states surveyed in the first report. In the first of these states, Connecticut, it was found that since aid is not limited to need, generally less expenditure was recommended particularly as to the larger grants.⁷⁶ In Kansas, on the other hand, less federal direction was recommended. For while it was acknowledged that federal subvention had greatly stimulated the legislature to enact "Little Hoover" reorganization, legislation which included executive budgeting of federal funds, it was felt that the state had reached such a point that federal fiscal and administrative controls should be exercised by specific policy statements and not through detailed administrative regulations.⁷⁷ In Michigan, grants-in-aid accounted for only slightly over 10% of the total revenue, and here it was found that the organizational structure was influenced relatively little by federal grant programs. Again there was some irritation on the part of state officials as to the failure of federal auditors to recognize the overall adequacy of state financial controls.⁷⁸ By way of contrast, Mississippi reported that federal aids stimulated the establishment and development of needed governmental services, which otherwise would not have been provided. And it was reported that this had been achieved without unduly impairing the independence of local officials; and, indeed, that the federal program had supported such officials' own efforts to raise standards.⁷⁹ South Carolina, another southern state

⁷³ *Id.* at 11.

⁷⁴ See notes 46 and 55 *supra*.

⁷⁵ Impact Report (1), note 67 *supra*, at 11-12.

⁷⁶ Impact Report (2), note 67 *supra*, at 1, 5 and 8.

⁷⁷ *Id.* at 16 and 25.

⁷⁸ *Id.* at 35-37.

⁷⁹ *Id.* at 45. Cf. Helm, *Federal Kickbacks to the States*, Am. Mercury 83: 75, 78, July 1956, wherein it was assumed that since Mississippi

with a strong tradition of states rights, however, advocated the system of block grants, — i. e., unconditional grants, but in general reported satisfaction with prevailing grant requirements.⁸⁰ The State of Washington went a step further and reported similarly to Connecticut in advocating eventual withdrawal of many federal activities.⁸¹ Wyoming, the last state in this survey, reported that standards required by federal regulation have influenced the development of balanced programs, and that, with few exceptions, state officials have readily accepted and expanded such standards which have increased uniformity in operation and administration.⁸²

IV. CONCLUSION

The actual impact then seems to be varied but on the whole generally favorable, and may the same be said for the various alternatives? One such alternative is that the government return to the early day unconditional grants, this based on the argument that a state should be left to itself, in terms of local autonomy, to determine the incidence of national largesse. But such a course would not remove the pressure to develop national projects, which as in the case of Australia and Canada would lead to the superimposition of such projects on the block grants without any economy and probably with more extravagance.⁸³

Another alternative would be in terms of centralization — i. e. direct achievement by the government of its objectives without any recourse to the states. But this would be the most extravagant course of all⁸⁴ and bigness reaches the point of diminishing returns as the first Hoover Commission has suggested.⁸⁵ An alternative

received back a disproportionate share of the federal tax dollar, this involved federal dictation. Very often, the poorer states contain the most federal tax-exempt domain. Morley, *States Rights Dwindle as Land Control Increases Federal Government Powers*, *Nation's Business* 44:21, April 1956.

⁸⁰ Impact Report (2), note 67 *supra*, 68, 74.

⁸¹ *Id.* at 81-82, 92.

⁸² *Id.* at 108.

⁸³ See Report, *op. cit. supra* note 16, at 122.

⁸⁴ The Council of State Governments in analyzing this alternative concludes: "Far from reducing federal expenditures, this would add new billions of dollars to the national budget to say nothing of its effect on our federal system of government." *Id.* at 92.

⁸⁵ Concluding report, May 1949, at 37: "As a general rule, economy can be achieved in administration by centralizing services common to all agencies. There is a limit, however, in the size and complexity

opposing this, of course, is that the states should perform their functions without any help from the government. But it seems inequitable in a modern economy to base these functions entirely upon the tax structure of the states, a tax structure more suited to an agrarian than an industrial economy. Finally, there is the approach of the theoretical writers, who, following the lead of Corwin, envisioned that the federal government could and should legislate for the public welfare, but principally through the states, extending federal subsidy and controls to the major functions of those governments. However, as it developed, this alternative to the threat of direct federal action became unnecessary⁸⁶ and, moreover, such an approach would reduce the states to mere administrative provinces of the central government, even if it were assumed that the national budget could stand such a program in view of the continuing war threat.

In contrast to these various alternatives, the American subsidy system as it actually has evolved, seems particularly appropriate and particularly American.⁸⁷ It originated even before the Constitution was adopted⁸⁸ and has continued ever since. And while in a time of crisis some urged complete centralization and others, fearing this, posed the alternative of state participation, an alternative, however, which in terms of theoretical efficiency involved subsidization of most of state services, the solution that actually developed was decidedly piecemeal.⁸⁹ Such a program may have

of Government beyond which it is no longer feasible to furnish services centrally without creating serious bottlenecks, delays, and confusion. As a result, the services become more costly and less efficient than if performed by the agencies themselves.

"This point has long been reached in the operations of the Federal Government."

⁸⁶ Note 35 *supra*.

⁸⁷ See Bittermann, *op. cit. supra* notes 22 and 36.

⁸⁸ See Report, *op. cit. supra* note 16.

⁸⁹ See *e.g.*, federal aid programs for: land grant colleges, note 19 *supra*; agricultural extension work, note 21 *supra* and 20 U.S.C. §§ 12, 15 (1958); trade, home economics and industrial subjects, 20 U.S.C. §§ 13, 15 (1958); practical nursing, 20 U.S.C. § 15 (aa) (1958); schools overburdened by federal activity, 20 U.S.C. §§ 236-244 (1958); state conferences on education to provide for White House Conference, 20 U.S.C. § 331 (1958); wildlife, 16 U.S.C. § 777 (1958); watershed protection and flood prevention, 16 U.S.C. §§ 1001-1007 (1958); federal highway program, note 24 *supra*; state homes for disabled veterans, 24 U.S.C. § 134 (1958); shore construction, 33 U.S.C. § 426(e) (1958); sewerage treatment works, 33 U.S.C. § 466(d) (1958); public health including grants to the states for purposes of mental health, 42 U.S.C.

its disadvantages, but these are not as serious as believed⁹⁰ and the advantage is that subsidy has become merely a stimulus to, rather than a taking over, of the functions of the states. Moreover, most significant of all as the actual studies reveal, where there is a highly functioning state government, the trend is to seek curtailment of federal aid rather than increase.⁹¹ Thus the Yankee ingenuity for compromise has avoided the consequences of the extremes.

§ 242(a) (1958), for the prevention, control and treatment of various diseases, § 246, and the construction of adequate state hospitals, § 291; social security, note 29 *supra*; low-rent housing, slum clearance and farm housing, note 44 *supra*; public works, 42 U.S.C. §§ 1491-1496 (1958); school lunch programs, 42 U.S.C. §§ 1751-1760 (1958); disaster relief, 42 U.S.C. § 1855 (1958); public airport development, 49 U.S.C. §§ 1101-1119, 1181 (1958); armed force reserve facilities, 50 U.S.C. § 882(c) (1958); and civilian defense, 50 U.S.C. App. § 2281 (1958).

⁹⁰ See notes 74 and 75 *supra*. The endless adjustment in federal-state relations is reflected in the current debate noted by the Committee on Education Beyond the High School in its First Report to the President at p. 10 (Nov. 1956), and in that between the United States Chamber of Commerce and the Secretary of Health Education and Welfare over the extent of the matching program necessary to provide for the alleged shortage of classrooms in the primary and secondary schools, see Roger Stuart, *Aid to Education Hits Snag*, Washington Star, March 13, 1957.

⁹¹ Notes 76 and 81 *supra*.