

NATIONAL-STATE COOPERATION-ITS PRESENT POSSIBILITIES*

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IN AN admirable article commenting upon certain recent decisions of the Supreme Court, Professor Bunn has remarked:

"Effective governmental power to regulate the main strategic factors of 'ordinary private business' is non-existent in this country. To those who think that everywhere and always an unregulated economy is best, that business decisions are necessarily more wise and beneficial to the public if made by business people rather than politicians, the situation must be highly satisfactory. To those who disagree, who think that government must interfere before the oil is gone and the soil blown away into the ocean, and that at other points our economic life now or hereafter may need major regulation at the hands of government, the present status is a nightmare. For 'when power is lacking the wisest statesmen' in the world are ineffective. The question is, what shall we do about it?"¹

Professor Bunn thereupon proceeds to answer his own question thus: "Within the Constitution, two main methods are proposed: interstate compacts and a Constitutional amendment." The former alternative he rejects outright, for the following cogent reasons:

"1. Where the states concerned are scattered or their interests diverse, agreement is unlikely. In Congress a majority governs, to make a compact requires unanimity.

"2. Where the states concerned are near together and their interests united, there is danger of action for sectional rather than national welfare. Congress has a veto, but it has no affirmative authority, and it can hardly be expected to be as alert to the national interests as it should be where it initiates action itself.

"3. A compact once made is a contract—it is as hard to amend it as to make it in the first place.

"4. States cannot by compact acquire powers which the Constitution denies them. The Fourteenth Amendment and the commerce clause will continue to control state action however much the states may contract to the contrary.

"Compacts are clearly therefore not the main solution."²

*This is the first of a series of articles looking to a re-examination of the history of the National Constitution in the year of its one hundred and fiftieth anniversary as a document, and as an instrument of government its one hundred and forty-eighth.

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1. Bunn, *Production, Prices, Income and the Constitution* (1936) 11 WIS. L. REV. 313.

2. *Id.* at 320-21.

Mr. Bunn then turns to the amendment method as the single remaining possibility. But this, too, I contend, is open to strong objections when the underlying reasons for the present situation are thoroughly explored. As I have elsewhere put the matter:

"Most, if not all, of the principal New Deal legislation might have been sustained had the Court chosen to give the doctrines invoked against it as liberal an application as it has sometimes done in the past; or if it had simply chosen to give the words of the Constitution itself their logical and historical meanings.

"But if this is so, what would be the point in adding 'new' powers to Congress by Constitutional amendment? And more especially, what would be the point in doing so if these powers were to be exposed to the same principles of construction as made them necessary?

"How long would they, subjected to the vague, indefinite tests of constitutionality to which the New Deal legislation succumbed, remain adequate to the purposes for which they were adopted?

"The further question accordingly arises, whether those who urge Constitutional amendment as the best means of meeting the present situation would like to see the above mentioned tests of constitutionality abolished? It seems not.

"What they propose is really that the power which was originally granted in broad terms to the National Government should be re-granted piece by piece, and that without any guaranty that the re-grant would be more effective than the original grant has turned out to be!

"This may not be quite the same thing as proposing that the national legislative power be gradually transferred from Article I to Article V of the Constitution, but it is pretty nearly that.

"The suggestion of specific Constitutional amendments as a means of meeting the present situation may, therefore, be ruled out without more ado. If the Court does not exchange its present application of 'the reserved powers of the States' concept, the 'due process of law' concept, and the maxim against delegated legislation for more liberal views, such amendments would not suffice—indeed, they might prove a positive menace to admitted powers, on the well-known principle of construction that a specific power argues against a more general one.

"If, on the other hand, the Court does come around to the liberal views on which the New Deal legislation was justifiably predicated, then such amendments would be unnecessary."³

In short, *we must still trust the Court, as we have so largely in the past, to correct its own errors.* At the same time, however, we must recognize that admission of error comes hard to human nature, and especially to that indurated type of human nature which is apt to occupy

3. See New York Post, Dec. 1, 1936, p. 1, col. 2.

high judicial office. Can we then help the Court out of its present predicament by suggesting to it a somewhat different approach to some of the problems of constitutionality which it must solve in the near future? To put the matter otherwise—Why should the Court be led back over the Serbonian bog of its past mistakes if a new path can be pointed out to it which avoids said bog? And can that way be found in the manifold possibilities of National-State Cooperation?

1.

The following are the salient and pertinent features of "our dual form of government": 1. As in all federations, a union of several autonomous political entities, or "states," for common purposes; 2. An apportionment of the sum total of legislative power permissible in a free commonwealth between a "national government," on the one hand, and constituent "states," on the other; 3. The direct operation for the most part of each of these centers of government, within its assigned sphere, upon all persons and property within its territorial limits; 4. The provision of each center with the complete apparatus of law enforcement, executive and judicial; 5. The supremacy of the "national government" within its assigned sphere over any conflicting assertion of "state" power; 6. Dual citizenship.

The problem which I shall treat in this paper is, what species of National-State relationship do the above "fixed data" of dual federalism admit of? The question may, conceivably, be approached from either of two points of view. The two governmental centers may be envisaged as *more or less jealous rivals for power*, or they may be viewed as *mutually supplementing agencies of government*. Fortunately, except for the period immediately preceding the Civil War, when the self-defensive necessities of slavery affected constitutional interpretation unduly, the latter is the conception which has generally prevailed.

The theory of the Articles of Confederation was that the powers of the General Government should be exercised through the state governments. The theory was not effectively realized in practice, with the result, pointed out by Chief Justice Marshall in *McCulloch v. Maryland*, that the government set up by the Constitution of 1787 was not, in general, left dependent upon the states "for the execution of the great powers assigned to it."⁴ At the same time, however, this independence was very far from being regarded as utterly divorcing the two governmental centers or as making state governmental machinery unavailable for national purposes.

In point of fact, it would seem that the framers of the Constitution looked forward to something like a mixed system of *functional* and

4. 4 Wheat. 316, 424 (U. S. 1819).

dual federalism—one which would permit the gradual transference of the greater part of the legislative power to the National Government, while incorporating the judicial and executive organs of the states into the national administrative mechanism. In this connection the following entry in the official Journal of the Convention for July 17th becomes most instructive:

"It was moved and seconded to postpone the consideration of the second clause of the Sixth resolution reported from the Committee of the whole House in order to take up the following:

"To make laws binding on the People of the United States in all cases which may concern the common interests of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned" which passed in the negative (Ayes—2; noes—8). It was moved and seconded to alter the second clause of the 6th resolution so as to read as follows, namely

'and moreover to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.'

"which passed in the affirmative (Ayes—6; noes—4). . . .

"It was moved and seconded to agree to the following resolution namely

'Resolved that the legislative acts of the United States made by virtue and in pursuance of the articles of Union and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States as far as those acts or Treaties shall relate to the said States, or their Citizens and Inhabitants—and that the Judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding.' Which passed unanimously in the affirmative."⁵

Two things here emerge: 1. That it was the intention of the Convention that the legislative powers subsequently to be delegated the National Government should be interpreted from the point of view of making them adequate "for the general interests of the Union" and for those purposes "to which the States are separately incompetent;" 2. That it was not intended that the supremacy which the Constitution accords national legislation made in pursuance of the Constitution should be qualified or limited by the powers of the states even with respect to "matters of internal police" only. National-State relationship was at first rested squarely upon the principle of national supremacy as thus

5. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION (1911) 21.

conceived; and it has continued to rest there to this day within the field of judicial power.

Turning to the Constitution itself, we find it directly incorporating the states into the new national structure at vital points—conspicuously in the choice of senators and of presidential electors. The feature of the Constitution, however, which bears most directly on the question here under investigation is its provision in Article VI, Paragraph 3, that “the members of the several State legislatures and all executive and judicial officers . . . of the States shall be bound by oath or affirmation to support this Constitution.”

Commenting upon this provision in the *Federalist* No. 27, Hamilton wrote:

“Thus the legislatures, courts and magistrates of the respective members will be incorporated into the operations of the National Government as far as its just and constitutional authority extends and will be rendered auxiliary to the enforcement of its laws.”⁶

Indeed, the younger Pinckney had expressed the same idea on the floor of the Philadelphia Convention:

“They (the States) are the instruments upon which the Union must frequently depend for the force and execution of its powers.”⁷

And substituting the word “may” for “must” in Pinckney’s statement, we find it to be amply justified by early Congressional legislation. The Judiciary Act of 1789 left the state courts in sole possession of a large part of the jurisdiction over controversies between citizens of different states and in concurrent possession of the rest. What is more important, it was provided by the famous Twenty-fifth Section of this Act that a case “arising” under the Constitution and laws of the United States which was first brought into a state court, should remain there for final disposition unless the decision of the highest state court into which the case might under state law be brought, was adverse to the party claiming under national authority, in which contingency there should be an appeal on writ of error to the Supreme Court of the United States. By other sections of the same act state courts were authorized to entertain proceedings by the United States itself to enforce penalties and forfeitures under the revenue laws, while any justice of the peace or other magistrate of any of the states was authorized to cause any offender against the United States to be arrested and imprisoned

6. THE FEDERALIST (Lodge’s Ed. 1888) 162. Madison speaks to the same effect in No. 44, *id.* at 284-5. See also Holcombe, *The States as Agents of the Nation*, (1921) 1 SOUTHWESTERN POL. SCI. Q. 307.

7. 1 FARRAND, *op. cit. supra* note 5, at 404.

or bailed under the usual mode of process.⁸ Even as late as 1839, Congress authorized all pecuniary penalties and forfeitures under the laws of the United States to be sued for before any court of competent jurisdiction in the state where the cause of action arose or where the offender might be found.⁹

Pursuant also to the same idea of treating state governmental organs as available to the National Government for administrative purposes, the Act of 1793 entrusted the rendition of fugitive slaves in part to national officials and in part to state officials, and the rendition of fugitives from justice from one state to another exclusively to the state executives.¹⁰ Certain later acts empowered state courts to entertain criminal prosecutions for forging paper of the Bank of the United States and for counterfeiting coin of the United States;¹¹ while still others conferred on state judges authority to admit aliens to national citizenship and provided penalties in case such judges should utter false certificates of naturalization—provisions which are still on the statute books.¹²

And from the first, treaties of the United States have thrown open the state courts to aliens on the most-favored-nation basis and have in other ways stipulated the active aid of state authorities in certain contingencies, as in the interception and return of deserting alien seamen. Indeed, the unity of the United States in the sphere of international relationships is today an accepted feature of our dual system. In this field the National Government is not a "foreign" government with respect to the states, nor are the latter "sovereign" or "independent" with respect to the former. And with the establishment of this principle the relationship between the two is not normally one of competition, but rather of cooperation and reciprocal service. The treaty-making authority is the champion of the interests of the states, safeguarding their local laws and customs, subject only to the proviso that these shall not, in general, discriminate against aliens as such. On the other hand, it is through these same local laws and authorities that the rights stipulated for on behalf of aliens, in return for similar rights to American citizens abroad, are rendered effective.¹³

8. 1 STAT. 73 (1789).

9. 5 STAT. 322 (1839).

10. 1 STAT. 302 (1793).

11. 2 STAT. 404 (1806). For the development of opinion, especially on the part of the state courts, adverse to the validity of the above discussed legislation, see 1 KENT'S COMMENTARIES (1826) *396-*404.

12. 2 KENT'S COMMENTARIES (1826) *64-*65. 34 STAT. 596 (1906), 8 U. S. C. §§ 357, 379 (1934); 34 STAT. 602 (1906), 18 U. S. C. § 135 (1934). For cases recognizing the right of Congress to authorize naturalization proceedings in state courts, see *Holmgren v. United States*, 217 U. S. 509 (1910) and citations there given.

13. See generally MITCHELL, *STATE INTERESTS IN AMERICAN TREATIES* (1936).

Cooperation, nevertheless, between the two governmental centers, on the basis of the supremacy of the National Government, came in time to be challenged, and first of all in the area in which it was most extensively employed in early legislation, namely, in the judicial field. The basis of the challenge was furnished by the notion of the equal sovereignty of the states and the National Government in their respective spheres. Quite obviously this notion cannot be harmonized with the Supremacy Clause of the Constitution¹⁴ so long as the two spheres of jurisdiction overlap, as they inevitably do when state organs are utilized for national purposes. If, therefore, the principle of equal sovereignty was to make good, it was incumbent upon its advocates to establish first the total independence of the two governmental centers within their respective fields. The effort initially took the form of an assault on the constitutionality of Section 25 of the Judiciary Act of 1789.

In the Philadelphia Convention the champions of States Rights had urged that it was unnecessary to provide for an inferior federal judiciary. It would be sufficient, they contended, if state courts were employed as national courts of first instance, with a final appeal to the Supreme Court; and the wording of Article III, Section 1, which provides that "the judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish," represents a concession to this point of view.¹⁵ Indeed, as late as 1802 the suggestion was broached that the entire inferior federal judicial establishment ought to be abolished and its jurisdiction distributed between the state courts and the Supreme Court¹⁶—an idea which was effectively spiked when the latter held in *Marbury v. Madison*¹⁷ that its original jurisdiction might not be enlarged by statute.

Yet ten years later the Virginia Court of Appeals, in *Hunter v. Martin*,¹⁸ held the Twenty-fifth Section to be void on the ground that it was not competent for Congress to authorize appeals from the courts of another sovereignty, in this instance Virginia, to those of the United States; and this argument was renewed in 1821 in *Cohens v. Virginia*,¹⁹ where the Court, speaking by Chief Justice Marshall, disposed of it in these terms:

14. U. S. CONST. ART. VI, PAR. 2.

15. See especially the proceedings of June 5th, 1 FARRAND, *op. cit. supra* note 5, at 124-125. The New Jersey Plan reverted to the idea of using state courts as national courts of first instance, with appeals to "a federal judiciary . . . to consist of a supreme Tribunal, . . ." *Id.* at 244.

16. 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1922) 219-222.

17. 1 Cranch 137 (U. S. 1803).

18. 4 Munford 3 (Va. 1814) overturned in *Martin v. Hunter's Lessee*, 1 Wheat. 304 (U. S. 1816).

19. 6 Wheat. 264 (U. S. 1821).

"It (the National Government) can, in effecting its objects, legitimately control all individuals or governments in the American territory. . . . The States are constituent parts of the United States. They are parts of one great empire—for some purposes sovereign, for some purposes subordinate."²⁰

Proceeding from this basis Marshall held the Twenty-fifth Section to be a law "necessary and proper" to effectuate the judicial power of the United States and hence within the legislative power of Congress.

And meantime, in the case of *Houston v. Moore*,²¹ the Court had recognized a similar relationship as existing between the power of Congress "to provide for calling forth the militia" and state executive power. Here the legislation under review was an Act of Pennsylvania which provided that the officers and privates of the militia of that state, "neglecting or refusing to serve, when called into actual service, in pursuance of any order or requisition of the President of the United States, shall be liable to the penalties defined in the Act of Congress of the 28th of February, 1795, c. 277,"²² or to any penalties which may have been prescribed since the date of that act, or which may hereafter be prescribed by any law of the United States."²³ While the Act was sustained by a divided Court the division was not over the question whether Congress had the power which the Pennsylvania Act itself inferred, but over the exclusiveness of this power. Also, it was conceded that this power did not stop short of the chief executive of the state. In the words of Justice Johnson's concurring opinion:

"The doctrine must be admitted, that Congress might, if they thought proper, have authorized the issuing of the President's order even to the Governor. For when the constitution of Pennsylvania makes her Governor commander in chief of the militia, it must subject him in that capacity (at least when in actual service) to the orders of him who is made commander in chief of all the militia of the Union."²⁴

The Court first lent definite approval to the equal sovereignty theory in *Prigg v. Pennsylvania*,²⁵ decided in 1842, in which the constitutionality of the provision of the Act of 1793, making it the duty of state magistrates to aid in the return of fugitive slaves, was challenged. Speaking for the Court, Justice Story said:

20. *Id.* at 414.

21. 5 Wheat. 1 (U. S. 1820).

22. 1 STAT. 424 (1795).

23. It is interesting to note that nobody seems to have commented on the delegation of legislative power here involved.

24. 5 Wheat. 1, 40 (U. S. 1820).

25. 16 Pet. 539 (U. S. 1842).

"The clause relating to fugitive slaves is found in the national Constitution, and not in that of any state. It might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government; nowhere delegated or intrusted to them by the Constitution. On the contrary, the natural, if not the necessary conclusion is, that the national government, in the absence of all positive provisions to the contrary, is bound through its own proper departments, legislative, executive, or judiciary, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution."²⁶

The Court, nevertheless, sustained the challenged provision in the sense and to the extent "that State magistrates may, if they choose, exercise the authority (conferred by the act) unless prohibited by State legislation."²⁷ In other words, the cooperation of the state in the enforcement of the Act was purely voluntary, and the principle of national supremacy did not apply.

And in *Kentucky v. Dennison*,²⁸ decided on the eve of the Civil War, the provisions of the same Act making it "the duty" of the chief executive of a state to render up a fugitive from justice upon the demand of the chief executive of the state from which the fugitive had fled, was given a similar construction. Pertinently, Chief Justice Taney remarked for the Court:

"Looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of the opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties

26. *Id.* at 541 (headnote), 615-616.

27. *Id.* at 542 (headnote), 622.

28. 24 How. 66 (U. S. 1861).

of a character incompatible with the rank and dignity to which he was elevated by the State."²⁹

"It is true," the Chief Justice conceded, "that in the early days of the Government, Congress relied with confidence upon the cooperation and support of the States when exercising the legitimate powers of the General Government, and were accustomed to receive it." But this, he explained, was "upon principles of comity and from a sense of mutual and common interest where no such duty was imposed by the Constitution."³⁰

The holding, therefore, does not question the doctrine of the *Prigg* case, that the National Government may invite the cooperation of the executive agencies of the states in the enforcement of national laws, so long as it leaves the state authorities, and ultimately the state legislatures, free to decline the invitation. Nor does it disturb the principle of earlier cases that state courts may be required, within their assigned jurisdiction, to enforce rights claimable under the Constitution and laws of the United States, whenever Congress chooses to employ them for the purpose.³¹

During the Civil War, President Lincoln repeatedly exercised his military functions through the state governors, especially in the early years of the war, but the cooperation accorded by the latter was regarded as strictly voluntary. Said Attorney General Bates in an official opinion dealing with the matter:

"The Governors of the loyal States have, both personally and officially, rendered most valuable and effective service to the National Government. . . . But these labors are in aid of the Government and with its approbation. They are performed not because it is a legal duty imposed by Congress, or in many instances, even by their respective States, but under the impulse of a generous humanity and patriotism."³²

Not only does this language seem to traverse the doctrine of *Houston v. Moore*,³³ it also contrasts sharply with assumptions which prevailed later during the World War, when the Selective Service Act was enforced almost entirely through state officials, who were held to strict accountability to national law.

Tendencies following the Civil War were, in fact, conflicting. In *Collector v. Day*,³⁴ decided in 1870, the Court, speaking by Justice Nelson,

29. *Id.* at 107-108.

30. *Id.* at 108.

31. See *e. g.*, *Claffin v. Houseman*, 93 U. S. 130, 136, 137 (1876); *Second Employers' Liability Cases*, 223 U. S. 1, 55-59 (1912).

32. OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Ser. III, Vol. II, 151.

33. 5 Wheat. 1 (U. S. 1820).

34. 11 Wall. 113 (U. S. 1870).

asserted that the principle of national supremacy did not operate in the field of the "reserved powers" of the states—a doctrine which if literally applied would go far to repeal the Supremacy Clause of the Constitution. Actually the decision in the case holds only that the National Government may not tax state instrumentalities, a result which could have been easily rested on the guaranty by the United States to each state of a republican form of government.

Nine years later in the *Siebold* case,³⁵ the Court sustained the right of Congress under Article I, Section 4, Paragraph 1, of the Constitution, to cast additional duties upon state election officials in connection with a Congressional election and to prescribe additional penalties for the violation by such officials of their duties under state law. While the doctrine of the holding is expressly confined to cases in which the National Government and the states enjoy "a concurrent power over the same subject matter," no attempt is made to catalogue such cases.³⁶ What is more, the outlook of Justice Bradley's opinion for the Court is decidedly nationalistic rather than dualistic, as is shown by the answer made to the contention of counsel "that the nature of sovereignty is such as to preclude the joint cooperation of two sovereigns, even in a matter in which they are mutually concerned." To this Justice Bradley replied:

"As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of State sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity."³⁷

And he later added:

"We may mystify anything . . . If we allow ourselves to regard it (the National Government) as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority."³⁸

35. 100 U. S. 371 (1879).

36. *Id.* at 384-386.

37. *Id.* at 392.

38. *Id.* at 393.

Obviously, these words are much more in the spirit of *Cohens v. Virginia* than of *Kentucky v. Dennison*.

Thus, the framers of the Constitution did not regard it as incompatible with the nature of our dual system that the National Government should utilize the states as subordinate instruments of its powers. Nor did the later contrary principle, of the equal dignity of the states with the National Government, operate to displace the idea of the availability of state powers for national purposes; it only transferred this idea to a new basis, that of state consent. Furthermore, the chief result of the earlier principle for our constitutional system, the subordination of the state judiciaries in the enforcement of the National Constitution and laws, still remains unimpaired, while as to state executive power it has been restored to an undefined extent. In short, the two governmental centers may cooperate voluntarily in matters of common interest without affront to our dual system. Such becomes even more apparent from an examination of more recent legislation and adjudication.

2.

We come, therefore, to consider two forms of joint action by the National Government and the states which have been developed within recent decades and which call into exercise primarily the legislative powers of the two governmental centers. The two forms of joint action referred to are these: 1. The National Government has brought its powers over interstate commerce and communications to the support of certain local policies of the states in the exercise of their reserved powers; 2. The National Government has held out inducements, primarily of a pecuniary nature, to the states to use their reserved powers to support certain objectives of national policy in the field of expenditure. The same rationale governs both types. On the one hand, there has been a growing recognition of problems demanding to be dealt with on a national scale; on the other hand, there has been reluctance to incur the dangers of centralization. So devices have been sought which will secure both these desiderata as far as practicable.

1. The outstanding reason for federal cooperation of the first type arises from the principle that Congress' power over interstate commerce and communication is ordinarily exclusive, from which it results, usually, that a state may not obstruct the flow of commerce across its borders from its sister states even when such flow threatens to undermine local legislation.³⁹ In consequence Congress has come, at different times, to the aid of the state police powers in the repression of lotteries,⁴⁰ of

39. Many of the cases are collected in *The Minnesota Rate Cases*, 230 U. S. 352, 398-402 (1913).

40. 28 STAT. 963 (1895), 18 U. S. C. § 387 (1934).

the liquor traffic,⁴¹ of traffic in game taken in violation of state laws,⁴² of commerce in convict-made goods,⁴³ of various criminal activities,⁴⁴ and—though thus far ineffectively—of commerce in child-made goods.⁴⁵

The constitutionality of Congressional legislation stopping interstate commerce in lottery tickets was finally established in 1903.⁴⁶ Supplementing the state prohibition laws offered greater difficulty, inasmuch as liquor was regarded by the Court as "a legitimate article of commerce," whereas lottery tickets were not. After a thirty-year struggle, however, it was at last conceded that Congress could place liquor coming from other states unrestrictedly under the laws of the state of destination. This occurred in the case of the *Clark Distilling Co. v. Western Maryland Railway*,⁴⁷ in which the Webb-Kenyon Act of 1913 was sustained. Chief Justice White remolded the argument against the Act into "the contradiction in terms that because Congress in adopting a regulation lesser in power than it was authorized to exert, therefore, its action was void for excess of power." He then went on:

"Or, in other words, stating the necessary result of the argument from a concrete consideration of the particular subject here involved, that because Congress in adopting a regulation had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between the local and national forces of government to the end of preserving the rights of all, it had thereby transcended the complete and perfect power of regulation conferred by the Constitution."

It is true that this statement of the issue did something less than justice to the case against the Act, but that is a matter of minor im-

41. 26 STAT. 313 (1890), 27 U. S. C. § 121 (1934); 37 STAT. 699 (1913), 27 U. S. C. § 122 (1934).

42. 31 STAT. 188 (1900), 35 STAT. 1137 (1909), 18 U. S. C. § 392 (1934).

43. 45 STAT. 1084 (1929), 49 U. S. C. § 60 (1934).

44. The white slave traffic, 36 STAT. 825 (1910), 18 U. S. C. § 399 (1934); traffic in stolen motor vehicles, 41 STAT. 324 (1919), 18 U. S. C. § 408 (1934); kidnapping, 47 STAT. 326 (1932), 18 U. S. C. § 408a (1934); stolen property, 48 STAT. 794, 18 U. S. C. § 415 (1934); racketeering, 48 STAT. 979, 18 U. S. C. § 420a (1934). The leading cases are *Hoke v. United States*, 227 U. S. 308 (1913), sustaining the WHITE SLAVE ACT; and *Brooks v. United States*, 267 U. S. 432 (1925), sustaining the MOTOR VEHICLES THEFT ACT. In *Gooch v. United States*, 297 U. S. 124 (1936), the FEDERAL KIDNAPING ACT was broadly construed without comment on the constitutional question. For a survey of the legislative proposals of 1934, many of which were subsequently enacted, see the *New York Times*, May 24, 1934, p. 2, col. 2.

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

46. *Champion v. Ames*, 188 U. S. 321 (1903).

47. 242 U. S. 311 (1917).

portance. The thing in which we are interested is the glimpse here afforded of the availability of the idea of National-State cooperation as a way of retreat in certain instances from the difficulties created by embarrassing precedents.

And meanwhile in sustaining, early in 1913, the Mann "White Slave" Act,⁴⁸ the Court had voiced the general conception of dual federalism upon which National-State cooperation rests, in these terms:

"Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction . . . , but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral."⁴⁹

And it is in reliance on this precedent that the National Government has subsequently come to the assistance of the states in the suppression of automobile thefts, of kidnaping, and of other criminal activities involving the crossing of state lines,⁵⁰—a somewhat striking development when set alongside the original assumption of the Constitution that the problem of the migratory offender would be dealt with by the process of interstate extradition.⁵¹ Nor, in fact, has the National Government confined its assistance to the states in the discharge of their most primitive function to the precincts of the legislation just alluded to. Notorious offenders against state laws who had previously escaped punishment were in many instances proceeded against successfully under the National Income Tax Act, the Alien Deportation Act, and the Anti-Trust Acts.⁵² The Court, moreover, has distinctly countenanced National-State admin-

48. *Hoke v. United States*, 227 U. S. 308 (1913).

49. *Id.* at 322.

50. Note 44 *supra*.

51. U. S. CONST. Art. IV, § 2, par. 2.

52. This type of cooperation originated in joint national and state efforts to break up bootlegging in Prohibition days. In this connection President Coolidge, on May 8, 1926, issued an order permitting the appointment of state and local officials as Federal Prohibition officers. For the controversy over validity of this order, which terminated in its vindication by the Senate Committee on the Judiciary, see *New York Times*, May 22, 1926, p. 1, col. 8; *id.* May 25, 1926, p. 1, col. 6; *id.* May 26, 1926, p. 1, col. 8; *id.* June 8, 1926, p. 1, col. 5. See also *New York Times*, Oct. 21, 1923, p. 1, col. 4, for the Conference of Governors called by President Coolidge to consider national and state cooperation in Prohibition enforcement. Nor has national-state cooperation in the administrative field been confined to the criminal field. Thus President Hoover authorized the opening of federal income tax returns to the inspection of officials of states with income tax laws. Under the Transportation Act of 1920, 41 STAT. 456 (1920), 49 U. S. C. §§ 71-74, 76-78, 141 (1934), cooperation between the Interstate Commerce Commission and State Commissions has become an established practice.

istrative cooperation in criminal law enforcement, even when proceeding on no definite statutory basis.⁵³

Yet, when Congress undertook to prohibit the transportation of child-made goods from one state to another, in the aid presumably of states maintaining a superior standard with reference to this subject, it was held, in *Hammer v. Dagenhart*, to have exceeded its powers, and its legislation was invalidated as an effort to coerce certain states "into compliance with Congress's regulation of State concerns."⁵⁴ Thus the Court deliberately placed itself in the same predicament in relation to anti-child labor legislation as that from which it had so recently—and, as it turned out, resultlessly—extricated itself in relation to anti-liquor legislation. And once again it has had to beat a retreat from an untenable position. The retreat is, to be sure, still under way, but who, with the results of the recent election in mind, can seriously doubt that it will be carried out? The starting-point is *Whitfield v. Ohio*,⁵⁵ decided last term, where was sustained the Hawes-Cooper Act of January 29, 1929, which prohibits the sale in the original package of convict-made goods entering a state through the channels of foreign or interstate commerce.⁵⁶ The basis of the holding was a liquor case which was decided nearly half a century ago,⁵⁷ and *Hammer v. Dagenhart*, on which the opponents of the Act had relied, is not even mentioned in the Court's opinion! Even more recently, the Court has upheld the validity of the Ashurst-Sumners Act of July 24, 1935,⁵⁸ which applies the principle of the Webb-Kenyon Act to convict-made goods.⁵⁹ Speaking for the unanimous Court, Chief Justice Hughes said:

"The subject of the prohibited traffic is different, the effects of the traffic are different, but the underlying principle is the same. The pertinent point is that where the subject of commerce is one as to which the power of the State may constitutionally be exerted by restriction or prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy . . . The Congress in exercising the power confided to it by the Constitution is as free as the States to recognize the fundamental interests of free labor."

53. *Ponzi v. Fessenden*, 258 U. S. 254 (1922).

54. *Hammer v. Dagenhart*, 247 U. S. 251 (1918). The quoted words are from Chief Justice Taft's opinion in the Child Labor Tax Case of 1922, 259 U. S. 20, 39.

55. 297 U. S. 431 (1936).

56. 45 STAT. 1084 (1929), 49 U. S. C. § 60 (1934).

57. *In re Rahrer*, 140 U. S. 545 (1891).

58. 49 STAT. 494, 49 U. S. C. A. § 61 (Supp. 1935).

59. *Kentucky Whip and Collar Co. v. Illinois Central R. R.*, U. S. Sup. Ct. (1937) 4 U. S. L. Week 485.

Can it be doubted that these words sound the doom of *Hammer v. Dagenhart*?

It may be contended, however, that there is a genuine difference, from the point of view of concern for our dual system, between the act disallowed in *Hammer v. Dagenhart* and an anti-child labor act modelled on the Webb-Kenyon Act; that while the one was coercive of state policies, the other would be cooperative with them. The contention derives such plausibility as it possesses from the fact that the state policies thought of are in the one instance those of producing states and in the other instance those of consuming states. But Congress's purpose in both cases is precisely the same, namely, to prevent a certain type of goods from reaching the interstate market. In the one case, it relies on its own unaided power, in the other it supplements certain legislation of the consuming states; but in both instances the producing states are, as such, "coerced." For what is the interstate market after all except the sum total of the individual state markets for goods coming from without?

On the other hand, we must not overlook the fact that the same bench which decided the *Whitfield* Case⁶⁰ also decided, practically contemporaneously, the *Ashton* Case,⁶¹ the *Constantine* Case,⁶² and the *Carter* Case,⁶³ in all of which it professed to treat proffers of National cooperation with state policies as coercive of the latter, and this in face of vigorous protests in two of these cases, by the states most immediately concerned, that they favored the condemned legislation.⁶⁴

What it all boils down to is this: In the instances in which the National Government has been sustained in bringing its regulatory powers to the aid of state policies, its right to do so has been ultimately based by the Court on the plenary nature of those powers as to the subject-matter governed; and in such instances, as the Court has not hesitated to declare, the National Government may with equal right traverse state policies.⁶⁵

Yet even so, the final result was assisted, on one occasion at least, by a judicial invocation of the idea of National-State cooperation, which thus served to screen in some measure the Court's retreat from an untenable position; and what is more, the same thing seems to be happening today all over again. In a word, permitted National-State cooperation in a field of *regulation* is, it would seem, a half-way house to national

60. *Whitfield v. Ohio*, 297 U. S. 43 (1936).

61. *Ashton v. Cameron Water Imp. Dist.*, 298 U. S. 513 (1936).

62. *United States v. Constantine*, 296 U. S. 287 (1935).

63. *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

64. The *Whitfield* case was decided Mar. 2, 1936; the *Carter* case, May 18th; the *Ashton* case, May 25th; the *Constantine* case, Dec. 9, 1935.

65. *United States v. Hill*, 248 U. S. 420, 425 (1919). And note the Chief Justice's further words in *Kentucky Whip and Collar Co. v. Illinois Central R. R.*, U. S. Sup. Ct. (1937) 4 U. S. L. WEEK 485, 487: "The Congress has exercised its plenary power . . ."

domination of the field, and little more. Is it of greater significance in the field of national *expenditure*? The question brings us to the so-called "Federal Grant-In-Aid."

2. The earliest precursor of the present "grant-in-aid" was the Act under which, in 1802, Ohio was admitted to the Union. This measure contained provisions whereby, in return for a grant of lands to each township in the state for public schools, and other concessions, the state pledged itself to withhold its hand in the matter of taxation for a term of years as regards land sold by the National Government to settlers. Later similar compacts were entered into with other states as they were admitted into the Union.⁶⁶

Building upon these beginnings, and animated especially by its increasing interest in agricultural development, Congress in February, 1859 passed a bill the purpose of which was announced to be "the endowment, support, and maintenance of at least one college (in each State) where the leading object shall be, without excluding other scientific or classical studies, to teach such branches of learning as are related to agriculture and the mechanic arts, as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life."⁶⁷ The bill assigned to each state twenty thousand acres of land for each senator and representative in the existing Congress and an additional twenty thousand acres for each additional representative to which it might become entitled under the census of 1860. In return each state was required "to provide within five years at least not less than one college, or the grant to said state," was to cease forthwith, and the state was to pay over to the United States any amounts it had received from lands previously sold. Other conditions were also specified, and the consent of the state must be communicated to the National Government within two years. Although the bill was upset by Presidential veto,⁶⁸ the Morrill Act embodying substantially the same provisions became law three years later.⁶⁹

But while grants-in-aid were made by Congress in exercise of its power to "dispose" of the property of the United States,⁷⁰ present-day Federal grants-in-aid are of money appropriated from the revenues of the United States, and hence call into requisition Congress's power to lay and collect taxes and to spend the proceeds thereof for "the general welfare."

66. Corwin, *The Spending Power of Congress* (1923) 36 HARV. L. REV. 548, 570. On the power of Congress, when admitting a new state into the Union, to make such compacts with it, see *Stearns v. Minnesota*, 179 U. S. 223, 244-250 (1900).

67. 5 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS (1898) 543.

68. *Id.* at 547-548.

69. 12 STAT. 503 (1862), 7 U. S. C. § 301 (1934).

70. U. S. CONST. Art. IV, § 3, par. 2.

A significant grant-in-aid of this character, marking a distinct advance upon previous donations from the National Treasury, was the Act of 1911 whereby the Secretary of Agriculture was authorized:

"On such conditions as he deems wise, to stipulate and agree with any State or group of States to cooperate in the organization and maintenance of a system of fire protection on any private or State forest lands within such State or States, and situated upon the watershed of a navigable river. No such stipulation or agreement shall be made with any State which has not provided by law for a system of forest-fire protection. In no case shall the amount expended in any State exceed in any fiscal year the amount appropriated by that State for the same purpose during the same fiscal year."⁷¹

Thirteen years later the authorization was extended from timber to cut-over lands and from watersheds of navigable streams to those from which water for domestic use for irrigation was taken in the cooperating states. Also the Secretary of Agriculture was:

"Authorized and directed, in cooperation with appropriate officials of the various States or, in his discretion, with other suitable agencies, to assist the owners of farms in establishing, improving, and renewing wood lots, shelter belts, windbreaks, and other valuable forest growth, and in growing and renewing useful timber crops. Except for preliminary investigations, the amount expended by the Federal Government under this section in cooperation with any State or other cooperating agency during any fiscal year shall not exceed the amount expended by the State or other cooperating agency for the same purpose during the same fiscal year."⁷²

By similar legislation since 1911 the National Government has undertaken to subsidize agricultural extension work in the states,⁷³ the training of teachers in agriculture and industrial subjects and of home economics,⁷⁴ vocational rehabilitation and education,⁷⁵ the maintenance of nautical schools,⁷⁶ experiments in reforestation,⁷⁷ the construction of highways,⁷⁸ the equipment and training of the National Guard,⁷⁹ and other

71. 36 STAT. 961 (1911), 16 U. S. C. § 563 (1934).

72. 43 STAT. 653 (1924), 16 U. S. C. §§ 564, 565 (1934).

73. 38 STAT. 372 (1914), 7 U. S. C. §§ 341-348 (1934).

74. 39 STAT. 929 (1917), 45 STAT. 1151 (1929), 48 STAT. 792 (1934), 20 U. S. C. §§ 11-15d (1934).

75. 41 STAT. 735 (1920), 43 STAT. 431 (1924), 46 STAT. 524 (1930), 47 STAT. 448 (1932), 29 U. S. C. §§ 31-38 (1934).

76. 36-STAT. 1353 (1911), 34 U. S. C. § 1122 (1934).

77. 45 STAT. 699 (1928), 16 U. S. C. § 581 (1934).

78. THE FEDERAL HIGHWAY ACT, 42 STAT. 212 (1921), 23 U. S. C. §§ 1-25 (1934).

79. THE NATIONAL DEFENSE ACT, 39 STAT. 197 (1916), 32 U. S. C. §§ 1-4 (1934).

matters falling normally under the reserved powers of the states. Most of the measures referred to stipulate for financial participation by the cooperating states, usually on an equal basis, while some of them, the Federal Highway Act and the National Defense Act in especial, subject state policies and activities in the field of cooperation to national supervision in some detail. With, however, the exception of the National Defense Act, none of these measures brings pressure to bear upon the states to enter into cooperation with the National Government other than the advantage to be anticipated from doing so. The National Defense Act is of a different character, since by virtue of Congress's power to withhold consent to a state's maintaining "troops" in time of peace, the states are virtually prohibited from keeping a militia except in accordance with the terms of this Act.⁸⁰

On the other hand, it should be noted, the cooperation which the grant-in-aid brings about between the National Government and the states is not merely a cooperation in expenditure. Even the consideration moving from the National Government to the states is not exclusively pecuniary, for the National Government, in laying down standards, supplies a guidance for state policies which the states generally welcome, rather than accept with reluctance. Nor is the consideration which prompts the National Government to initiate cooperative programs solely the financial aid which the states will bring to such programs, but also the aid which they can lend through their reserved powers. Thus federal highway construction relies on the state power of eminent domain, as well as on state power to police and protect highways during and after their construction. Also, national protection of forests is supplemented by the power of the states to regulate the conduct of persons entering forests; and the Shepard-Towner Maternity Act was implemented by the power of the cooperating states to compel birth registration, the licensing of mid-wives, etc.

There is, in short, a real wedding of diverse powers on the part of the two governmental centers. The greater financial strength of the National Government is joined to the wider coercive powers of the states.

Various objections have been made to federal grants-in-aid, some of which may bear, indirectly at least, upon the question of their constitutionality.⁸¹ One is that they are financially oppressive to certain states, especially to those which pay the larger share of the national income tax. The argument ignores the fact that the vast proportion of the income referred to is drawn from the country at large, and that so much of it is paid from a certain few states simply because the takers thereof—whether individuals or corporations—choose to reside or maintain their headquarters in these states. The fact is, as was pointed out by

80. U. S. CONST. ART. 1, § 10; 39 STAT. 198 (1916), 32 U. S. C. § 192 (1934).

81. See MACDONALD, *FEDERAL AID* (1928) c. X.

the United States Treasury Department in 1922; "there is no way of ascertaining from the income tax returns the amount of income earned in the separate States or the amount of tax paid on that basis." On the other hand, as the leading authority on the subject has pointed out, if we compare the amount of each state's wealth or its current income with the amounts received by it under federal grants-in-aid, the discrepancy made so much of by certain critics is ordinarily very greatly reduced.⁸²

A more serious charge against the grant-in-aid from the point of view of concern for our dual system, is that it breaks down state initiative and devitalizes state policies. The exact contrary appears to be the case. For:

"State and county funds for extension work, vocational education, highways—in fact, for every line of activity subsidized by the federal government—have multiplied several fold as a direct result of the stimulus of federal funds. Federal aid is often referred to as the 'fifty-fifty' system, but it might more accurately be called the 'eighty-twenty' or 'ninety-ten' system. Most of the money is coming from local sources. The people in their local communities are testifying to their interest most concretely by more than matching federal funds. Often federal funds are matched several times over. State and local expenditures for agricultural extension work are nearly twice as large as the federal subsidy. For forest fire prevention state and local funds are three times as large as the federal grant. Every subsidy except that for the National Guard is exceeded by local appropriations, and most of these local appropriations would never have been made, in the judgment of state officials, without the stimulus of federal funds. The administration of all these appropriations, federal and state alike, is in the hands of state authorities. They are directly responsible for the framing and execution of state policies. How, then, is it possible to justify the assertion that local initiative is being stifled? When the records show four or five states with satisfactory, well developed programs of civilian rehabilitation or child hygiene in 1918 or 1920, and forty or forty-five with such programs in 1927, controlled by state authorities and largely supported by state funds, it is difficult to believe that local responsibility is being shirked, and that the people are sitting back in complacent indifference."⁸³

Finally, it is charged that federal aid means the growth of an immense bureaucracy in Washington, which in turn will threaten our dual system. Granting, however, the inevitability of the increase in governmental services in response to the needs of modern society, it would seem that the federal grant-in-aid was well devised to obviate this very difficulty.

82. *Id.* at 248-250.

83. *Id.* at 255-256.

On the basis of the grant-in-aid a most varied exchange of official services has developed in recent years between the National Government and the states, with the result that, while the usefulness of the state administrative systems to their several localities has increased, the National Civil Service had not, prior to the depression, been enlarged to anything like the dimensions that it must have attained had the National Government chosen to proceed alone in the field of National-State cooperation.⁸⁴ For example, during the war with Germany, when the National Government decided to seek state cooperation in the enforcement of the Selective Service Act, there were at one time more than 192,000 persons "who functioned directly under State superiors, while the office of the Provost-Marshal General in charge of the Federal Operation of the Act had only 429 employees throughout the States."⁸⁵ This is an extreme instance, no doubt, but it serves to demonstrate the effect of National-State cooperation in diffusing bureaucracy in preference to concentrating it at the national capital.

The positive case for the grant-in-aid is that it has activated state policies with respect to certain governmental services which modern conditions make desirable from both a local and national point of view, and has at the same time enabled certain states to avail themselves of improved standards in the rendition of such services. Local government has not been broken down, but has on the contrary been endowed with increased usefulness, and therefore with the increased prospects of survival which go with usefulness. On the other hand, the expanded employment by the National Government of its power to make financial provision for the "general welfare" has not resulted in a corresponding expansion in national official personnel. All these advantages go to stamp federal aid as a type of National-State relationship entirely harmonious with the spirit of dual federalism, while they illustrate also the continued capacity of the Constitution to adjust itself to modern conditions.

The question remains whether federal grants-in-aid run afoul of any decisions of the Court. Two cases are directly in point: *Massachusetts*

84. See especially Clark, *Joint Activity Between Federal and State Officials* (1936) 51 POL. SCI. Q. 230; also FITE, *GOVERNMENT BY COOPERATION* (1932) c. III; also a series of articles, *Topical Survey of the Government*, which appeared in the *United States Daily* during the summer and early autumn of 1928, each by an expert of some departmental bureau of the National Government. Said Mr. Hoover, when Secretary of Commerce: "There is an . . . important field for cooperation by the Federal Government with the multitude of agencies, State, Municipal, and private, in the systematic development of those processes which directly affect public health, recreation, education, and the home. We have need further to perfect the means by which government can be adapted to human service," FITE, *supra*, at 7. See also note 52, *supra*.

85. Clark, *supra* note 84, at 243.

v. Mellon,⁸⁶ decided in 1923 and *United States v. Butler*,⁸⁷ decided during the past term. In the former the Court declined to enjoin, upon the application of a state, the Secretary of the Treasury from paying out certain sums which had been appropriated by Congress in the furtherance, it was contended, of "non-Federal purposes". In the words of the Court:

"What, then, is the nature of the right of the State here asserted and how is it affected by this statute? Reduced to its simplest terms, it is alleged that the statute constitutes an attempt to legislate outside the powers granted to Congress by the Constitution and within the field of local powers exclusively reserved to the States. Nothing is added to the force or effect of this assertion by the further incidental allegations that the ulterior purpose of Congress thereby was to induce the States to yield a portion of their sovereign rights; that the burden of the appropriations falls unequally upon the several States; and that there is imposed upon the States an illegal and unconstitutional option either to yield to the Federal Government a part of their reserved rights or lose their share of the moneys appropriated. But what burden is imposed upon the States, unequally or otherwise? Certainly there is none, unless it be the burden of taxation, and that falls upon their inhabitants, who are within the taxing power of Congress as well as that of the States where they reside. Nor does the statute require the States to do or to yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding.

"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."⁸⁸

This language, it seems clear, goes beyond rejecting the application of the state on the ground of its raising "a political question". It also meets the contention that this type of legislation is coercive with respect to the states, and rejects that contention.

The decision in *United States v. Butler* does not in any wise impair the authority of *Massachusetts v. Mellon* touching this matter. In the later case it was held that certain payments to agriculture which were

86. 262 U. S. 447 (1923).

87. 297 U. S. 1 (1936).

88. 262 U. S. 447, 482-483 (1923).

conditioned on the recipients' contractually agreeing to perform certain acts not within the power of the National Government to compel, represented an effort by the National Government to regulate matters which the Constitution had reserved to the states. The decision turned on the proposition that the proposed beneficiaries of federal largess were not free to reject it on account of the sharp competitive relation in which they stood to each other. Clearly this line of reasoning in no wise disturbs the statement in the *Mellon* case, with reference to a statute not to be differentiated in this respect from any grant-in-aid, that it did "not require the States to do or yield anything." And in another respect, *United States v. Butler* clearly improves the standing in Constitutional law of the federal grant-in-aid, inasmuch as Justice Roberts took occasion in his opinion to record the Court's acceptance of the Hamiltonian theory of the scope of the spending power of Congress.⁸⁹

And with these results before us, let us turn for a moment to the Social Security Act, which marks the culmination to date of the federal grant-in-aid.⁹⁰ In what terms ought the constitutional case for the Act be formulated? The question is asked with special reference to Titles III⁹¹ and IX,⁹² which have to do with unemployment compensation. The first and foremost task of the defenders of the Act is, obviously, to show that the outlay of national funds which it authorizes is for "the general welfare of the United States;" in light of the history of public relief the last few years this ought to be a comparatively easy task. And the remission of taxes provided for in Title IX is to be justified in the same way, *Florida v. Mellon*⁹³ making this method of purchasing state compliance equally eligible with the more conventional method of an outright appropriation. Next it should be shown that the terms stipulated by the Act for state cooperation are designed to make such cooperation better promotive of the main purpose of the Act and are not intended to foist policies upon the cooperating states which are not relevant to this purpose. Lastly, the argument should invoke the

89. See 297 U. S. 1, 65 (1936).

90. 49 STAT. 620, 42 U. S. C. §§ 301-1305 (Supp. 1935). The Act has already been held constitutional in *Davis v. Boston & Maine R. R.*, Mass., (1936) 4 U. S. L. WEEK 416 and by Judge David J. Davis in the federal district court for Alabama in dismissing a suit by 200 Alabama concerns to enjoin collection of the tax levied by the Act. N. Y. Times, Jan. 15, 1937, p. 7, col. 3. The *Davis* case is now on appeal and argument has already been had before the Circuit Court of Appeals. N. Y. Times, Jan. 15, 1937, p. 7, col. 4. For an extended discussion of the constitutionality of the Social Security Act, see Shulman, *The Case for the Constitutionality of the Social Security Act* (1936) 3 LAW & CONTEMP. PROB. 298; cf. Denby, *The Case Against the Constitutionality of the Social Security Act* (1936) 3 LAW & CONTEMP. PROB. 315.

91. 49 STAT. 626, 42 U. S. C. §§ 501-503 (Supp. 1935).

92. 49 STAT. 639, 42 U. S. C. §§ 1101-1110 (Supp. 1935).

93. 273 U. S. 12 (1927).

right of the states to set up a system of unemployment compensation.⁹⁴ Cooperating with the states in implementing this right, the National Government is relieved from the necessity of vindicating, in face of the hostile dicta of the *A. A. A.*⁹⁵ and *Alton*⁹⁶ cases, its own independent right to do the same thing.

National-State cooperation has rested successively on the principle of national supremacy and that of voluntary cooperation on the part of the states constitutionally equipped to cooperate. The participation of the state courts in certain portions of the jurisdiction which is described in Article III, Section 2 of the Constitution still testifies to the effectiveness of the earlier type of cooperation. But there are also cases in good standing that hold that the state executive power too may be at times laid under requisition by the National Government. Nevertheless, the very extensive joint activity between national and state officialdom which has grown up within recent decades rests almost exclusively on the principle of voluntary cooperation.⁹⁷

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. The validity of the former type of cooperation is dependent upon the Court's recognition of the national legislative power which is exerted as being one which is not conditioned by the reserved powers of the states. The validity of the latter depends on the Court's conception of "the general welfare of the United States," as that term is used in the first clause of Article I, Section 8 of the Constitution.

94. See *Associated Industries of New York State, Inc. v. Department of Labor of State of New York*, 57 Sup. Ct. 122 (1936) wherein an equally divided court affirmed the New York Court of Appeals which had upheld the constitutionality of the New York Unemployment Insurance Act, [271 N. Y. 1, 2 N. E. (2d) 22 (1936)]. See also *Gillum v. Johnson*, Cal. Sup. Ct., (1936) 4 U. S. L. WEEK 419, and *Haines Brothers Co. v. Unemployment Compensation Commission*, Mass. Sup. Jud. Ct., (1936) upholding the constitutionality of the California Unemployment Reserves Act and the Massachusetts Unemployment Compensation Law respectively. But cf. *Gulf States Paper Corp. v. Carmichael*, N. D. Ala., (1936) 4 U. S. L. WEEK 450 in which a three judge federal court held the Alabama Unemployment Compensation Law unconstitutional.

95. *United States v. Butler*, 297 U. S. 1 (1936).

96. *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330 (1935).

97. See Clark, *loc. cit. supra* note 84.

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. But the other type, too, has its value at the present moment in enabling the Court to beat a retreat from its recent out-of-date positions regarding national power, with a minimum loss of face.