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# FEDERALISM AND FEDERAL GRANTS-IN-AID

SAM J. ERVIN, JR.\*

When Alexis de Tocqueville said that the first problem facing Americans in 1787 was intricate and by no means easy of solution, he was guilty of perhaps the greatest understatement of his noted commentaries. Americans, he said, had to divide the authority of the different states composing the Union so that each of them "should continue to govern itself in all that concerned its internal prosperity, while the entire nation, represented by the Union, should continue to form a compact body and to provide for the general experiences of the people."<sup>1</sup>

As a people, we have sought the solution to our problem, as de Tocqueville stated it, through the structural forms of federalism, and we have furthered the goals of national union through various devices of government, one of them being the grant-in-aid.

To understand the role of the federal grant-in-aid in our development as a nation, and its significance in our governmental system, it is important to examine the nature of American federalism.

## I. FEDERALISM IN THE UNITED STATES

Federalism is a concept of government not peculiar to the United States of America, nor were we the first people to adopt it, but under it we have progressed as no other nation in history. A comparison of certain characteristics of federations has led to this definition of the national-state relationship:

A Federation, then, is a permanent union of communities so distinct that they might have been sovereign states, so linked by common interest that they have surrendered absolute sovereignty, but so conscious of their distinctness that they have made the surrender in a form which protects those separate rights.<sup>2</sup>

Federalism is, of course, not the only political system by which a nation can be effectively governed; however, for the United States,

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<sup>1</sup> TOCQUEVILLE, *DEMOCRACY IN AMERICA* 87 (Oxford ed. 1946).

<sup>2</sup> STEWART, *MODERN FORMS OF GOVERNMENT: A COMPARATIVE STUDY* 145 (1959).

composed of so many divergent regional and ethnic groups and cultures, flung across a large continent, each with different interests and objectives, this political system has worked well for nearly 200 years. No other large nation has ever maintained such a high degree of stability and at the same time preserved the freedom of the individual. One reason for this was pointed out by Mr. Justice Harlan recently before the American Bar Association:

We are accustomed to speak of the Bill of Rights and the 14th Amendment as the principal guarantees of personal liberty. Yet it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have.<sup>3</sup>

Our federal system has provided a framework within which states, local governments, and individuals have been able to work out, albeit often slowly, permanent and pragmatic contributions to the economic, social, and political development of our country.

Even though our federal system was achieved to satisfy the interests and the needs of the various independent states, political expediency was not the only reason for its birth. From their observations of the monarchies of Europe, the members of the Constitutional Convention were well aware of the despotic propensities that exist in every unitary system of government. They fully comprehended the everlasting political truth that no man or set of men can be safely trusted with unlimited governmental power. Accordingly, they divided the functions of the states and federal government not only to protect their local political and economic interests, but also more wisely to protect the future generations of Americans from a totalitarian government. The weakness of the Articles of Confederation led the members of the Convention to seek "a more perfect Union" and at the same time to try to preserve a measure of independence for their states. This resulted in the adoption of the modified "Virginia Plan" which delegated to the federal government the power necessary to enable it to discharge its enumerated functions as a central government and left to the states all other powers.<sup>4</sup>

The tenets of our American federalism have not been rigid

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<sup>3</sup> Address by Associate Justice Harlan, American Bar Center, Aug. 13, 1963.

<sup>4</sup> See generally Comm'n on Intergovernmental Relations, *A Report to the President for Transmittal to the Congress*, H.R. Doc. No. 198, 84th Cong., 1st Sess. 9-11 (1955).

and unchanging. Ours is an age of innovation which requires new areas of involvement by government—impossible for the Founding Fathers to foresee—and corresponding adjustments in our federal system. Woodrow Wilson aptly summarized the need for a viable federalism when he said:

The question of the relation of the States to the federal government is the cardinal question of our constitutional system. At every turn of our national development we have been brought face to face with it, and no definition either of statesmen or of judges has ever quieted or decided it. It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.<sup>5</sup>

## II. FEDERAL GRANTS-IN-AID: DEVELOPMENT AND MAGNITUDE

Grants under our system do not follow the traditional federal formula, *i.e.*, that of strict separation of governmental functions. All units of the governmental structure are involved, and because the purse strings of this involvement are held by the central authority, they pose a great challenge to our federal system.

No instrument of national policy can do as much good or as much harm to our system as the grant device. Grants are used by all forms of governments, both unitary and federal, to implement programs of national policy through the smaller units of government; but in a federal system there is a greater need for care in selecting the area of need and the conditions imposed.

Grants-in-aid vary greatly in their details and their individual characteristics. They have been described by various authorities as follows:

The grant-in-aid is a money payment by a state to a local government or by the national government to a state, usually upon some condition.<sup>6</sup>

[T]he system of federal grants-in-aid to the states . . . is a scheme by which the national government offers to match the states, dollar for dollar, or on some such basis, in promoting enterprises which are properly within state jurisdiction but need to be speeded up.<sup>7</sup> The usual form of the grant-in-aid involves a periodical lump-sum payment to the states for the conduct of specified activities.

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<sup>5</sup> WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 173 (1911).

<sup>6</sup> WALKER, *PUBLIC ADMINISTRATION IN THE UNITED STATES* 40 (1937).

<sup>7</sup> MUNRO, *THE GOVERNMENT OF THE UNITED STATES* 483 (1946).

The management of the work is usually in the hands of a state officer, and the funds are held in custody and disbursed through the ordinary fiscal machinery of the state.<sup>8</sup>

At times federal grants-in-aid have been referred to as "the Federal system" or the "American subsidy system" consisting of the following elements: "(1) federal money payments to the states; (2) apportionment of funds among the states usually on the basis of population; (3) federal supervision; (4) state matching of funds; and (5) state conformance with federal conditions."<sup>9</sup> With respect to the conditions upon which grants are made, it has been pointed out that there are usually at least four:

- (1) that the state shall spend the national money only for the exact purpose indicated and under whatever conditions may have been laid down; (2) that the state itself, or its subdivisions, shall make concurrent appropriations for the purpose in hand (usually in amounts at least equal to its share of the national grant, but sometimes more, sometimes less, and occasionally none at all); (3) that the state shall maintain a suitable administrative agency—highway commission, extension director, vocational education board, or whatever it may be—with which the national government can deal in connection with the activity to be carried on; and (4) that in return for the assistance received, the state shall recognize the national government's right (with suitable regard for local conditions) to approve plans and policies, interpose regulations, fix minimum standards, and inspect results.<sup>10</sup>

While grants-in-aid as we know them in the twentieth century appear to be of recent origin, they in fact antedate the Constitution in one form or another. As early as 1785 provision was made for federal grants of land for public schools.<sup>11</sup> Two years later this same policy was expanded and implemented when the Confederation Congress enacted the Northwest Ordinance of 1787. The Congress set aside certain public lands in every township of the Northwest Territory for school purposes.

The federal government has been giving financial aid to the

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<sup>8</sup> KEY, *THE ADMINISTRATION OF FEDERAL GRANTS TO STATES* 23 (1937).

<sup>9</sup> COUNCIL OF STATE GOVERNMENTS, *FEDERAL GRANTS-IN-AID* 29 (1949), expressing views found in MACDONALD, *FEDERAL AID: A STUDY OF THE AMERICAN SUBSIDY SYSTEM* 7-8 (1928).

<sup>10</sup> OGG & RAY, *INTRODUCTION TO AMERICAN GOVERNMENT* 69 (12th ed. 1962).

<sup>11</sup> 28 *JOURNALS OF THE CONTINENTAL CONGRESS* 251-55 (Fitzpatrick ed. 1933).

land-grant colleges of the various states under the terms of the Morrill Act<sup>12</sup> since 1862. The Morrill Act was antecedent in many ways of conditional grants as we know them today. The conditions imposed by the Morrill Act on those states which accepted them were not as complex as those in present-day grants; however, an accounting of the funds realized from the sale of lands was required to be made to Congress; reports from the states were required showing the development of the colleges; and a rudimentary form of state matching was evidenced by the condition that no funds realized from the sale of lands could be used for the construction of school buildings. Thus, the states in order to comply with the act had to furnish their own funds for the buildings and their equipment.<sup>13</sup> In 1837, Congress provided for a cash distribution to the states in the form of "loans."<sup>14</sup> No repayment was ever demanded and it seems none was intended.<sup>15</sup> The first annual cash grant was enacted in 1887 to assist the states in establishing agricultural experiment stations.<sup>16</sup>

The passage of the Smith-Lever Act<sup>17</sup> in 1914 introduced a more sophisticated type of grant-in-aid and "is usually regarded as the beginning of the modern grant period."<sup>18</sup> This act, which aided agricultural extension work, "inaugurated such new features as 50-50 matching, an apportionment formula, and advance approval of state plans by the federal government."<sup>19</sup>

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<sup>12</sup> Morrill Land Grant Act, 12 Stat. 503 (1862), as amended, 7 U.S.C. §§ 301-08 (1958). North Carolina's land-grant institutions, North Carolina State at Raleigh and the Agricultural and Technical College at Greensboro, have been receiving such aid under the act since they were created by the North Carolina legislature.

<sup>13</sup> For a discussion of the Morrill Act, see COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 9, at 4-5; GRAVES, AMERICAN INTERGOVERNMENTAL RELATIONS 492-97 (1964); House Comm. on Government Operations, *Federal-State-Relations: Federal Grants-in-Aid*, H.R. REP. No. 2533, 85th Cong., 2d Sess. 21 (1958).

<sup>14</sup> For a discussion of the distribution to the states of the surplus funds in the U.S. Treasury, see MAXWELL, THE FISCAL IMPACT OF FEDERALISM IN THE UNITED STATES 14-19 (1946). For the "deposit" act, see Act of June 23, 1836, ch. 354, 5 Stat. 52, particularly §§ 13-14.

<sup>15</sup> COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 9, at 2; House Comm. on Government Operations, *op. cit. supra* note 13, at 21.

<sup>16</sup> Hatch Experiment Station Act, ch. 314, 24 Stat. 440 (1887). See generally COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 9, at 5; House Comm. on Government Operations, *op. cit. supra* note 13, at 21-33.

<sup>17</sup> Smith-Lever Act, ch. 79, 38 Stat. 372 (1914).

<sup>18</sup> House Comm. on Government Operations, *op. cit. supra* note 13, at 21.

<sup>19</sup> COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 9, at 6.

Today, the monetary size and magnitude of the grants from the federal treasury are startling. The cash distribution of 1837 appears to have amounted to a mere 28,100,000 dollars.<sup>20</sup> However, from 1929 to date, ever-increasing federal appropriations for grants have been made, ranging from an annual total of 118,721,000 dollars in 1929 to an estimated 7,450,479,000 dollars in 1962.<sup>21</sup> Approximately 86 billion dollars were distributed to the states in such grants during the period 1934-1962. In 1959 these grants, as a percentage of all state and local general revenue, ranged from a low of 6.4 per cent (New Jersey) to a high of 32.3 per cent (Alaska, Wyoming), averaging 14.1 per cent for all the states. The median state was North Carolina with 17.1 per cent.<sup>22</sup> It is estimated that there are approximately forty to forty-five different grants-in-aid existing in 1963 involving disbursements of federal funds in excess of 8 billion dollars.<sup>23</sup>

The impact of these figures is tempered somewhat by the realization that "federal expenditures for civilian functions, expressed as a percentage of the gross national product, have *decreased* by more than 50 per cent in the last thirty years. . . . And state-local expenditures for civilian functions during the recent years have been roughly six times central government expenditures for those purposes."<sup>24</sup> State and local spending has risen by 130 per cent in the last ten years, while federal spending has increased by 35 per cent during the same period of time.<sup>25</sup>

### III. CONSTITUTIONAL JUSTIFICATION: THE RISE OF THE GENERAL WELFARE POWER

The constitutional authority for the early land grants-in-aid for education and other purposes rested upon article IV, section 3 of the Constitution which provides that "the Congress shall have power to dispose of and make all needful rules and regulations re-

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<sup>20</sup> MAXWELL, *op. cit. supra* note 14, at 15.

<sup>21</sup> *Hearings on H.R. 7802 Before a Subcommittee of the House Committee on Government Operations, 87th Cong., 1st Sess. 56-78 (1961).*

<sup>22</sup> *Id.* at 33.

<sup>23</sup> *Id.* at 25; 1963 U.S. TREAS. ANN. REP. 678. Preliminary figures for 1964 are in excess of 10 billion dollars.

<sup>24</sup> Grodzins, *Local Strength in the American Federal System*, in CONTINUING CRISIS IN AMERICAN POLITICS 132, 133 (1963).

<sup>25</sup> STAFF OF SUBCOMM. ON INTERGOVERNMENTAL RELATIONS, SENATE COMM. ON GOVERNMENT OPERATIONS, *THE FEDERAL SYSTEM AS SEEN BY STATE AND LOCAL OFFICIALS* 85 (Comm. Print 1964).

specting the territory or other property belonging to the United States." The existence of this plenary congressional power, together with the fact that the public lands were originally ceded to the central government to be used for the common benefit, including education, seems to have been the basis of a consensus of the constitutionality of such grants.<sup>26</sup>

Unlike the congressional power over the disposition of land or other property of the United States, its power to dispose of the cash resources of the nation, raised by taxation, was not quite so clear. Article I, section 8 of the Constitution provides: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . ."

From the earliest days of our Republic there has been debate as to the meaning of this section of the Constitution.<sup>27</sup> James Madison thought that the power granted to Congress to provide for the "general welfare" was limited by the direct grants of legislative power found in article I, section 8.<sup>28</sup> Alexander Hamilton argued that the section provided for much broader congressional action by conferring a power separate from those enumerated, and that this power was limited only by the requirement that the appropriation be for the "general welfare."<sup>29</sup> After many years the problem was resolved in 1936 in favor of Hamilton's position. Speaking for the Supreme Court, Mr. Justice Roberts wrote in *United States v. Butler*<sup>30</sup> that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."<sup>31</sup> The following year, in *Helvering v. Davis*,<sup>32</sup> the Court reaffirmed the statement concerning the "general welfare" in the *Butler* case. The Court said that "Congress may spend money in aid of the 'general welfare.'" <sup>33</sup>

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<sup>26</sup> COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 9, at 15-16; Burdick, *Federal Aid Legislation*, 8 CORNELL L.Q. 324 (1923).

<sup>27</sup> See generally U.S. LEGISLATIVE REFERENCE SERVICE, LIBRARY OF CONGRESS, CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION 112-15 (1953).

<sup>28</sup> THE FEDERALIST No. 41 (Madison).

<sup>29</sup> THE FEDERALIST Nos. 30, 34 (Hamilton).

<sup>30</sup> 297 U.S. 1 (1936).

<sup>31</sup> *Id.* at 66.

<sup>32</sup> 301 U.S. 619 (1937).

<sup>33</sup> *Id.* at 640.

The first important case brought by a state attacking the constitutionality of a grant-in-aid was *Massachusetts v. Mellon*.<sup>34</sup> This case, it should be noted, was decided in 1923, before the recognition of the independent existence of the general welfare power in *Butler*. Here the state challenged the constitutionality of a grant-in-aid called the Maternity Act.<sup>35</sup>

The Court did not rule on the merits of the constitutional questions since it found that the matter involved a "political question," which of course it had no jurisdiction to decide.<sup>36</sup> It did, however, say in passing that "probably, it would be sufficient to point out that the powers of the State are not invaded, since the statute imposes no obligation but simply extends an option which the State is free to accept or reject,"<sup>37</sup> and also that "if Congress enacted it [the Act] with the ulterior purpose of tempting them [the states] to yield, that purpose may be effectively frustrated by the simple expedient of not yielding."<sup>38</sup>

Since 1923 the Supreme Court has followed the indications of *Massachusetts v. Mellon* and has not declared any federal grant-in-aid statute unconstitutional.<sup>39</sup>

#### IV. GUARDING OUR FEDERAL STRUCTURE

The deterioration of the states' autonomy is a portent foreseen by some in the realm of intergovernmental relations. An authority in this field recently wrote that "if present trends [in federal-state relations] continue for another quarter century, the states may be left hollow shells, operating primarily as the field districts of fed-

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<sup>34</sup> 262 U.S. 447 (1923). The Supreme Court combined and decided in the same opinion the case of *Frothingham v. Mellon*, a taxpayer's suit on the same grant.

<sup>35</sup> Act of November 23, 1921, ch. 135, 42 Stat. 224.

<sup>36</sup> 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.

Mr. Justice Sutherland speaking for the Court in *Massachusetts v. Mellon*, 262 U.S. 447, 483 (1923).

<sup>37</sup> *Id.* at 480 (dictum).

<sup>38</sup> *Id.* at 482 (dictum). For a general discussion of the *Massachusetts* case, see COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 9, at 20-24.

<sup>39</sup> *Id.* at 24-25; U.S. LEGISLATIVE REFERENCE SERVICE, *op. cit. supra* note 27, at 115-16.

eral departments . . . ."<sup>40</sup> This is a pessimistic statement, but one that does raise a legitimate flag of warning. In the present grant programs, there are many inherent dangers to our federal system. The expansion of the grants-in-aid by the federal government is usually accomplished at the expense of state and local government action. This often has the consequence of destroying state and local initiative and leads to a growing dependence on the federal government to solve their problems. Also, the grant can lure the states into providing matching funds for federal programs to the disadvantage of programs that the state feels should have first priority. All of the dangers involve the increased concentration of authority in the federal government and a corresponding decrease in authority and responsibility in state and local government.<sup>41</sup>

However, grants-in-aid are historically and judicially accepted facts. The courts have indicated that they intend to follow a "reading of the general welfare clause that places no discernible judicial limits on the amounts or purposes of Federal spending . . . ."<sup>42</sup> Thus Congress alone, ultimately, has the awesome burden of reconciling every grant with constitutional federalism.

Each grant has to be studied in the light of its probable effects on our federal system. Each grant should be measured by its contribution to the viability of state and local governments. In order to give continuing reality to Chief Justice Chase's statement that "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states,"<sup>43</sup> Congress, as an umpire of the federal system, must develop a national policy concerning grants and federalism. To assist Congress in evolving this national policy, the Advisory Commission on Intergovernmental Relations<sup>44</sup> has recommended the following broad principles to determine the desirability of a grant program:

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<sup>40</sup> WHITE, *THE STATES AND THE NATION* 3 (1953).

<sup>41</sup> For a list of the pros and cons of grant legislation, see COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 9, at 41-43; House Comm. on Government Operations, *op. cit. supra* note 13, at 23-26.

<sup>42</sup> Comm'n on Intergovernmental Relations, *op. cit. supra* note 4, at 29.

<sup>43</sup> *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

<sup>44</sup> The composition of the commission is as follows: three private citizens appointed by the President; three members of the U.S. Senate; three members of the U.S. House of Representatives; three officers of the executive branch of the national government; four governors; three state legislators; four mayors; and three county officials. The President designates the chairman and vice-chairman of the commission.

1. A grant should be made or continued only for a clearly indicated and presently important national objective. This calls for a searching and selective test of the justification for National participation. The point has been made . . . that existence of a national interest in an activity is not in itself enough to warrant National participation. Related questions are the relative importance of the national interest and the extent to which it may be served by State and local action. Consequently, where the activity is one normally considered the primary responsibility of State and local governments, substantial evidence should be required that National participation is necessary in order to protect or to promote the national interest.

2. Where National participation in an activity is determined to be desirable, the grant-in-aid should be employed only when it is found to be the most suitable form of National participation. It is important to compare the strong and weak points of the grant-in-aid device with those of other forms of National-State cooperation as well as with those of direct National action. It is likewise important to consider the types of objectives and situations for which the grant is best adapted. The probable effect on State or local governments is an important consideration.<sup>45</sup>

These are the proper guidelines to the future grant policy of Congress.

Congress has indicated its awareness of the need for close scrutiny of grants and their effect on the growing complexity of federal-state-local relations by the establishment of Subcommittees on Intergovernmental Relations in both the Senate and in the House of Representatives. These subcommittees have attempted to inform Congress of the nature and effect of existing aid programs in order for future grant policy to benefit from past experience. Also, the subcommittees serve as important vehicles through which state and local officials make their views in all areas of intergovernmental relations known to the members of Congress. Examples of effective legislation that these subcommittees have helped prepare are S. 2114<sup>46</sup> and H.R. 7159,<sup>47</sup> Eighty-eighth Congress, which provide for mandatory periodic congressional review of federal grants. In too many instances grant programs, like other government programs, tend to perpetuate themselves once they have been established; they go on living long after the original purpose for which they were

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<sup>45</sup> Comm'n on Intergovernmental Relations, *op. cit. supra* note 4, at 123.

<sup>46</sup> S. 2114, 88th Cong., 2d Sess. (1964), sponsored by Senators Muskie (D.-Me.), Ervin (D.-N.C.), and others.

<sup>47</sup> H.R. 7159, 88th Cong., 2d Sess. (1964).

conceived has been accomplished. These bills neither favor nor condemn any individual grant-in-aid programs. They recognize that Congress, with an increasing multiplicity of duties, must set up statutory criteria to coordinate the activities of congressional committees toward the threefold goal of ascertaining whether the congressional purposes of future grant-in-aid programs to state and local units have been met, whether there is need for future federal aid for the programs, and whether the particular programs need to be changed.

An omnibus bill, S. 561,<sup>48</sup> was recently introduced in the Senate to encourage increased cooperation between state and national officials in the administration of grant programs. By providing that state governors shall receive complete information on grant funds to their states, title I of this legislation would encourage states to budget federal grant funds along with other revenue items. Title II, like S. 2114, provides for periodic congressional review of grants. Title III would enable the states, on a reimbursable basis, to use effectively the technical assistance and training services of the different federal agencies and departments, and thus avoid the expense of duplicating those services. This type of cooperative arrangement is presently in effect with the Bureau of the Census, the Weather Bureau, and the Internal Revenue Service. Fourthly, to encourage more effective use by local officials of federal grant programs affecting metropolitan areas, title IV defines coordinated policy of intergovernmental assistance for those areas. Additionally, title IV provides for review of such grant applications by area wide planning agencies representing local units of government. The last title deals with the acquisition, use, and disposition in conformity with local development objectives of federal land within urban areas. These proposals embody the spirit with which all members of Congress should consider new grant programs, and their enactment would indicate that the Congress is willing to assume its necessary role of guarding our federal structure.

Aiding in the drafting of the bills to improve grant programs has been the Advisory Commission on Intergovernmental Relations. The Commission, which has made many contributions toward the preservation of our federal structure, is a permanent bipartisan

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<sup>48</sup> S. 561, 89th Cong., 1st Sess. (1965), sponsored by Senators Muskie (D.-Me.), Ervin (D.-N.C.), and others.

body established by Congress to coordinate all areas of activity among local, state and national levels of government. It has compiled much valuable information on grant programs and their impact on state and local governments,<sup>49</sup> and has continually investigated ways by which state governments can be strengthened in order to reduce the need for future federal aid. For example, the Commission has recommended methods to increase the effectiveness of the real property tax.<sup>50</sup> Property taxation is the most important source of revenue for local governments, and its increased effectiveness should enable local governments to assume a more responsible role in the governmental structure.

Because the successful operation of a federal system of government is dependent upon the existence of strong state governments, Congress shares with the states its burden of protecting that system. Thomas Jefferson once said that the only way the states can guard against overcentralization of power in the national government is "to strengthen the state governments: and as this cannot be done by any change in the federal Constitution, . . . it must be done by the states themselves . . . ."<sup>51</sup> He continued that "the only barrier in their power is a wise government. A weak one will lose ground in every contest."<sup>52</sup> It is inevitable that states will lose their rights if they fail to meet their responsibilities.

Of course, there are certain activities which the national government is best qualified to perform; however, in the grey area where the responsibility is concurrent, the states should aggressively assume a position of leadership. Only when the states are willing to assume this responsibility can they exert pressure against future expansion of national activities and ensure their rightful role in the governmental structure.

In any discussion of strengthening state governments, the problem of their revenue is paramount. State and local governments are badly in need of new revenue sources to meet the ever-growing needs of their citizens for additional schools, hospitals, health and

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<sup>49</sup> See, *e.g.*, GOVERNMENTAL AFFAIRS INSTITUTE, *THE IMPACT OF FEDERAL GRANTS-IN-AID ON THE STRUCTURE AND FUNCTIONS OF STATE AND LOCAL GOVERNMENTS* (1955).

<sup>50</sup> See generally ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX* (1963).

<sup>51</sup> Letter From Thomas Jefferson to Archibald Stuart, Dec. 23, 1791, in 5 *THE WRITINGS OF THOMAS JEFFERSON* 409 (Ford ed. 1895).

<sup>52</sup> *Id.* at 410.

welfare services.<sup>53</sup> State and local expenditures are continuing to climb at a rapid rate.<sup>54</sup> With archaic tax systems which place heavy reliance on sales taxes, fees, and property taxes rather than taxes on income,<sup>55</sup> which have largely been pre-empted by a high federal income tax, it is becoming increasingly difficult with each passing year for state and local governments to support the rising costs of those programs so vital to the well-being of their citizens. Without adequate funds the states cannot carry out these programs; hence a vacuum is created into which the federal government with new grant proposals can easily step.

Congress can act to improve the fiscal status of the states in several ways, if federal spending is reduced or the burgeoning economy produces greater tax income. An obvious possibility would be for the Congress to release some of its tax sources to the states.<sup>56</sup> This tax source could take the form of the gasoline tax, for instance, and the release could be coupled with a corresponding decrease in federal grants for roads.<sup>57</sup> It could be a relinquishment of some part of the federal estate and gift tax,<sup>58</sup> or a percentage of the income tax base might be returned to the states. These tax sources could also be exchanged for existing federal grant programs; realistically, however, this is not likely to occur. Still, even though existing programs are not curtailed, the need for some future grants could be obviated.

Another alternative would be to grant tax credits on federal income tax paid by individuals and corporations for amounts paid for state and local taxes.<sup>59</sup> This would leave the determination of the most practical method of taxation to the discretion of the states.

A third method of helping the states fiscally and conceivably lessening the need for future conditional grants is the "block" grant

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<sup>53</sup> Anderson, *Can the State Live on Crumbs?*, Saturday Rev. of Literature, Jan. 9, 1965, p. 31.

<sup>54</sup> STAFF OF SUBCOMM. ON INTERGOVERNMENTAL RELATIONS, *op. cit. supra* note 25, at 85.

<sup>55</sup> See Anderson, *supra* note 53, at 32 (chart).

<sup>56</sup> *Id.* at 32.

<sup>57</sup> STAFF OF SUBCOMM. ON INTERGOVERNMENTAL RELATIONS, *op. cit. supra* note 25, at 88.

<sup>58</sup> For examples of proposed legislation which would increase federal estate tax credits for amount paid for state estate taxes, see H.R. 5039, 88th Cong., 1st Sess. (1963); H.R. 6206, 88th Cong., 1st Sess. (1963); H.R. 6207, 88th Cong., 1st Sess. (1963).

<sup>59</sup> STAFF OF SUBCOMM. ON INTERGOVERNMENTAL RELATIONS, *op. cit. supra* note 25, at 87; Anderson, *supra* note 53, at 32.

proposal recently espoused by Dr. Walter W. Heller, who was formerly Chairman of the President's Council of Economic Advisers.<sup>60</sup> The plan would set aside a fixed percentage of federal revenues each year in a trust fund for distribution to state and local governments with no strings attached. These grants made to state and local governments without the usual strict supervision would enable them to operate more independently—free from federal control. Local officials would be free from federal domination, and the spread of a growing federal bureaucracy would be slowed. State and local governments would thus be in a stronger financial position, and a better fiscal balance would be achieved among federal, state, and local governments. Also, the present grant method of equalization, which helps the poorer states by distributing funds according to population and average income, could be utilized. This program is contemplated only in the event of future federal budget surpluses rather than deficits—indeed an optimistic contemplation.

The present practice of aiding local governments raise money by exempting state and municipal bonds from federal taxation should be continued.

Finally, the Congress should avoid the future pre-emption of tax sources that are being used exclusively by the states. These include property, sales, and motor vehicles license taxes.<sup>61</sup>

## V. CONCLUSION

In conclusion, grants-in-aid have a long history of solid accomplishment in many fields such as education, agriculture, health, roads, and conservation. Equalization requirements, for example, have distributed grant funds partially on the basis of a state's per capita income and thus have been instrumental in bringing to the poorer states services and programs, such as hospital construction funds, that they never would have been able to afford. Grants, as alternatives to programs of direct federal administration, have served to improve the position of the states and have made an important contribution to preserving federalism in an era of increasing centralization. However, we must never forget that "the

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<sup>60</sup> Anderson, *supra* note 53, at 32; Wall Street Journal, Nov. 17, 1964, p. 1, col. 1.

<sup>61</sup> STAFF OF SUBCOMM. ON INTERGOVERNMENTAL RELATIONS, *op. cit. supra* note 25, at 87.

making of federations is a difficult feat of political engineering . . ."<sup>62</sup> which does not lend itself to easy solutions of all our problems by the national government. It would be well for our country if those who advocate unlimited federal spending and action would pause and ponder these words of the late Mr. Justice Sutherland:

Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified.<sup>63</sup>

After all, the most important aid the national government can provide in solving local problems is to allow the people at the local level to use their inherent authority to solve their own problems. Usurpation by the national government erodes the power of the states and should be resisted. The federal government should only complement the states' activities or supplement them when the states do not have the wherewithal to perform.

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<sup>62</sup> STEWART, *MODERN FORMS OF GOVERNMENT: A COMPARATIVE STUDY* 145 (1959).

<sup>63</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238, 295-96 (1936).