RECENT DEVELOPMENTS IN FEDERAL-MUNICIPAL RELATIONSHIPS *

E. H. FOLEY, JR.†

It is a common practice in business to take inventory at least once a year in order to see what there is on hand, what has been disposed of, and what should be the future course of action. This practice of stock-taking may well be carried over into the field of law. The attention recently given by Congress to the problems of cities and other local political subdivisions makes the subject of federal-municipal relations a timely one for treatment.

This coupling of the time and the subject is not a mere coincidence. It is, rather, the consequence of a series of events which were destined slowly but steadily to lead to a result which has been characterized by some as a breakdown of states rights and by others as a natural by-product of changing economic conditions.

The very concept of federal-municipal relations provokes thought. To many people certainly, it may sound strange to speak of federal-municipal relations when we are operating under a dual form of government controlled by a Constitution which contains not a word about municipalities.

To grasp the significance of the recent changes in non-federal relationships with the Federal Government, it is necessary to see what has taken place in the field of federal-local cooperation. The most familiar aspect of this cooperation and the one which comes first to mind is, of course, the cooperation between the Federal Government and the states themselves.

Federal Aid to the States

From the very first Congress in 1790 when the Hamilton-sponsored Assumption Act was enacted,[1] providing for the assumption by the Federal Government of state debts incurred during the Revolution, to the recent session of Congress, we have witnessed the exercise of federal functions in cooperation with those of the states. The acts of Congress providing for cooperation with the states are so extensive that a mere citation of the principal ones covered more than eight printed pages in one of the briefs filed by the Government in the Supreme Court of the United States last spring.[2]

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† LL. B., 1929, Fordham University; member of the New York bar; Assistant General Counsel, Treasury Department; author of *Low-Rent Housing and State Financing* (1937) 85 U. OF PA. L. REV. 239, and other articles in legal periodicals.

1. 1 STAT. 138 (1790).

2. Pages 90 to 98 of Brief for Federal Emergency Administrator of Public Works in Duke Power Co. v. Greenwood County, 299 U. S. 259 (1936). For a discussion of the problems of federal-aid administration see KEY, THE ADMINISTRATION OF FEDERAL GRANTS TO STATES (1937).

Liberal grants of federal funds have been made regularly to the states for purposes of agricultural experimentation,[3] vocational education [4] and rehabilitation,[5] maternity and infancy hygiene,[6] highway construction,[7] national guard,[8] forest fire prevention [9] and education.[10]

Two aspects of federal-state cooperation deserve brief treatment. One deals with the results [11] and the other with the constitutionality of such a venture. About ten years ago, a Committee of the National Municipal League on Federal Aid to the States [12] summarized these results in seven points, as follows:

(1) Federal aid has stimulated state activity;

(2) Federal aid has raised state standards;

(3) Federal aid has been consistently administered without unreasonable federal interference in state affairs;

(4) Federal aid has accomplished results without standardizing state activities;

(5) Federal administration of the subsidy laws has been uninfluenced by partisan politics;

(6) Federal aid has mitigated some of the most disastrous effects of state politics; and, finally,

(7) Federal aid has placed no unreasonable burden on any section of the country.

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3. Beginning with the SMITH-LEVER ACT, 38 STAT. 372 (1914), 7 U. S. C. A. §§ 341-348 (1927).

4. Beginning with the SMITH-HUGHES ACT, 39 STAT. 929 (1917), 20 U. S. C. A. §§ 11-28 (1927).

5. Beginning with the FESS-KENYON ACT, 41 STAT. 735 (1920), 29 U. S. C. A. §§ 31-44 (1927).

6. Beginning with the SHEPPARD-TOWNER ACT, 42 STAT. 224 (1921), 42 U. S. C. A. §§ 161-174 (1928).

7. Beginning with the FEDERAL AID ROAD ACT, 39 STAT. 355 (1916), 16 U. S. C. A. § 503 (1927).

8. Beginning with the DICK LAW, 32 STAT. 775 (1903), 32 U. S. C. A. § 11 (1928), but substantially overhauled by the NATIONAL DEFENSE ACT, 39 STAT. 197 (1916), 32 U. S. C. A. § 1 (1928).

9. Beginning with the WEEKS ACT, 36 STAT. 961 (1911), 16 U. S. C. A. §§ 552, 563 (1927).

10. Particularly, the first MORRILL ACT, 12 STAT. 503 (1862), 7 U. S. C. A. § 301 (1927); the HATCH ACT, 24 STAT. 440 (1887), 7 U. S. C. A. § 362 (1927); the second MORRILL ACT, 26 STAT. 417 (1890), 7 U. S. C. A. § 322 (1927); and the ADAMS ACT, 34 STAT. 63 (1906), 7 U. S. C. A. §§ 369, 375 (1927).

11. See MACDONALD, FEDERAL AID (1928) for a detailed discussion of the history and results of the American subsidy system. Federal grants-in-aid to the states should be distinguished from state grants-in-aid to local subdivisions. For a discussion of the latter type of aid, see HINCKLEY, STATE GRANTS-IN-AID (N. Y. State Tax Comm., Spec. Rep. No. 9, 1935). For a discussion of the increased state dictation in local fiscal matters, see Jones, *Effect of the Depression on State-Local Relations* (1936) 25 NAT. MUNIC. REV. 465.

12. *Federal Aid to the States* (1928) 17 NAT. MUNIC. REV. 619 (Report of the Committee on Federal Aid to the States of the National Municipal League).

As to the constitutional question involved in the type of federal-state aid here discussed, no serious issues may now be raised. Ever since the cases of *Frothingham v. Mellon* and *Massachusetts v. Mellon*, disposed of together by the United States Supreme Court,[13] the issue has been clear that the policy of federal aid to the states is constitutional. Those cases arose under the Sheppard-Towner Act,[14] which provided for federal aid to the states in reducing maternal and infant mortality and in protecting the health of mothers and infants. The *Frothingham* case was instituted by a resident of Massachusetts and involved a suit to prevent the enforcement of the Act on the ground that the effect of the appropriation would be to increase the burden of future taxation and thereby confiscate plaintiff's property without due process of law. The Court disposed of this contention by pointing out that Mrs. Frothingham's interest in the moneys of the Treasury was shared "with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity." [15]

The issues presented by the case in which the Commonwealth challenged the constitutionality of the Act were just as readily dismissed. Massachusetts raised the much more serious point that federal aid was a means of inducing the states to yield their sovereign rights. The Court disposed of the case for want of jurisdiction on the ground that the question was a political one and, therefore, was not a "matter which admits of the exercise of the judicial power." [16] The Court's method of dismissing the state's argument that the Act was within the field of local powers exclusively reserved to the states was simplicity itself. If, reasoned the Court, Congress adopted the Act "with the ulterior purpose" of tempting the states to yield, "that purpose may be effectively frustrated by the simple expedient of not yielding." [17]

Federal Services to Municipalities

It must not be presumed that the recent development of federal aid to municipalities has been sudden. Nor is it true that the policy of such aid to the states has been discontinued in favor of direct federal aid to the cities. Not only has federal-state cooperation in the past few years continued, but direct federal cooperation with cities, which commenced on a small scale several decades ago, has gradually developed to the point where it now assumes major proportions.

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13. 262 U. S. 447 (1922).
14. 42 STAT. 224 (1921), 42 U. S. C. A. § 161 *et seq.* (1928).
15. 262 U. S. 447, 487 (1922).
16. *Id.* at 483.
17. *Id.* at 482.

The National Bureau of Standards, the Bureau of Air Commerce, the Coast and Geodetic Survey, the Bureau of Fisheries, the Bureau of Foreign and Domestic Commerce, the Bureau of the Census and the Bureau of Marine Inspection and Navigation of the Department of Commerce; the Bureau of Agricultural Economics, the Bureau of Animal Industry, the Bureau of Biological Survey, the Bureau of Chemistry and Soils, the Bureau of Dairy Industry, the Food and Drug Administration, the Forest Service, the Bureau of Home Economics, the Bureau of Plant Industry, and the Bureau of Public Roads of the Department of Agriculture; the Office of Education, the Geological Survey, the General Land Office, the Bureau of Mines, and the Bureau of Reclamation of the Department of the Interior; the Federal Bureau of Investigation of the Department of Justice; the United States Employment Service, the Bureau of Labor Statistics, the Children's Bureau, the Women's Bureau and the Immigration and Naturalization Service of the Department of Labor; the Public Health Service and the Coast Guard of the Treasury Department; the Office of the Chief of Engineers of the War Department; and the Civil Service Commission, the Library of Congress and the Interstate Commerce Commission—by way of example—all have been engaged in rendering services, in some form or other, to municipalities.[18] So wide has been the range of activities of the Federal Government affecting municipal administration, that in 1931 there was recommended the establishment in the National Government of a Bureau of Municipal Information "to function as a clearing house of information on all things municipal in the Federal Government".[19] It is interesting to note that a similar recommendation was incorporated in a report of the National Resources Committee recently made public.[20]

One authority has ventured to say that prior to 1932, with one or two possible exceptions, no mention of city appeared in the statutes of the United States.[21] It is indeed a curious commentary on our constitutional system of government that this should be true in the face of the scores of services which the Federal Government has been rendering to cities.

But all this has changed—and changed in no unmistakable terms.[22] It is in order, therefore, to summarize some of the statutes which reflect this change.[23]

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18. For a detailed description of these and other federal services to municipalities, see BETTERS, FEDERAL SERVICES TO MUNICIPAL GOVERNMENTS (Munic. Adm'n Serv. No. 24, 1931).

19. *Id.* at 3.

20. OUR CITIES, THEIR ROLE IN THE NATIONAL ECONOMY (Rep. of the Urbanism Comm. to the Nat. Resources Comm. 1937) 10.

21. Wallerstein, *Federal-Municipal Relations—Whither Bound* (1936) 25 NAT. MUNIC. REV. 453.

22. For a discussion of the effect of this change on states, see Graves, *The Future of the American States* (1936) 30 AM. POL. SCI. REV. 24.

23. General interest in this changed relationship is reflected in the extensive literature on this subject. The interest of the municipalities themselves, naturally, is great and finds

An examination of recent federal acts relating to municipalities will disclose that in general they fall into three broad categories with, of course, some degree of overlapping. There are, in the first place, those acts which may be termed enabling, which authorize certain positive action; those which may be termed preferential, which afford benefits to public bodies not generally afforded to others; and those which may be termed exemptive, which exclude public bodies from their effect.

Enabling Legislation

The first of the recent acts to establish direct relationship between the Federal Government and the cities was the Emergency Relief and Construction Act of 1932.[24] Section 201 (a) (1) of that Act authorized the Reconstruction Finance Corporation [25] "to make loans to, or contracts with, states, municipalities, and political subdivisions of States, public agencies of States, of municipalities, and of political subdivisions of States, public corporations, boards and commissions, and public municipal instrumentalities of one or more States, to aid in financing projects authorized under Federal, State, or municipal law, which are self-liquidating in character. . . ." [26] It can be seen at a glance how the federal-city relationship under this Act differs from the type of relationship afforded by the federal services to cities. It is the difference between the Bureau of Mines making available to cities a pamphlet on "What is Known About the Effect of Smoke on Health" and the Reconstruction Finance Corporation lending $71,000,000 to build the San Francisco-Oakland Bay Bridge, the obligations evidencing the loan being payable from the tolls collected for the use of the bridge. They are both services, to be sure; but they illustrate opposite extremes in this important field.

The Home Owners' Loan Act of 1933 [27] does not sound like one which would particularly benefit city treasuries, yet it has proved to be an effective step to rehabilitate city finances by the simple expedient of authorizing a home owner to borrow from the Home Owners' Loan Corporation to pay taxes.[28] As a result of this provision, by 1936 one dollar out of every

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expression in the attention given the subject in: *The Federal Government and the Cities* (1934) 1 MUNIC. YEAR BOOK 33; *Federal-City Relations* (1936) 3 *id.* at 154; *Federal-City Relations in 1936* (1937) 4 *id.* at 145. General discussions of this subject include: Dodds, *Federal Aid for the City* (1935) 25 YALE REV. 96; Merriam, *The Federal Government Recognizes the Cities* (1934) 23 NAT. MUNIC. REV. 107; Reinhold, *Federal-Municipal Relations —The Road Thus Far* (1936) 25 *id.* at 452; Williams, *The Status of Cities under Recent Federal Legislation* (1936) 30 AM. POL. SCI. REV. 1107; Williams, *Municipal Problems Facing the 75th Congress* (1936) 25 NAT. MUNIC. REV. 641. The most detailed treatment of this subject appears in BETTERS, RECENT FEDERAL-CITY RELATIONS (1936).

24. 47 STAT. 709 (1932), 15 U. S. C. A. § 605a (Supp. 1937).

25. Created by 47 STAT. 5 (1932), 15 U. S. C. A. § 601 (Supp. 1937).

26. 47 STAT. 711 (1932), 15 U. S. C. A. § 605b (1) (Supp. 1937).

27. 48 STAT. 128 (1933), 12 U. S. C. A. § 1461 (1936).

28. *Id.* at 130, 12 U. S. C. A. § 1463 (d) (2).

fifteen lent by the Home Owners' Loan Corporation found its way to local treasuries in urban areas.[29]

Of considerable assistance to municipalities has been the Banking Act of 1933,[30] pursuant to which the Federal Deposit Insurance Corporation was set up. Offering the same protection to municipal funds as it does to private funds, the Corporation has been of value to many municipalities, particularly the smaller ones whose deposits do not normally exceed the $5,000 limit of protection.

Federal-city relationship as evidenced by the Works Progress Administration [31] is too familiar to require any extended discussion. Almost entirely financed by the Federal Government, thousands of projects were undertaken upon application to the Works Progress Administration by states, cities and other political subdivisions. The activities of the Works Progress Administration indubitably constitute an important contribution to the material on recent federal-municipal relationiships.[32]

Two statutes adopted in 1936 authorized loans to municipalities. The Rural Electrification Act of 1936 [33] authorizes the making of loans to finance the construction of rural electric distribution systems. Under this Act loans may be made to persons, corporations, states, territories, municipalities, peoples' utility districts and cooperatives.[34] The other Act,[35] as modified in 1937,[36] authorizes the Reconstruction Finance Corporation, through the Disaster Loan Corporation, to make loans for repair, construction, reconstruction or rehabilitation of property of municipalities or political subdivisions of states or of their public agencies where such property has been destroyed or rendered unfit for use by reason of catastrophe.

Reference to catastrophe laws brings to mind still another recent act bearing upon federal-municipal relations. The Flood Control Act of 1936,[37] which, after reciting that "it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government in cooperation with States, their political subdivisions, and localities thereof",[38] authorizes the Army Engineers to undertake certain improvements for the benefit of navigation and the control of destructive

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29. BETTERS, *op. cit. supra* note 23, at 19.

30. 48 STAT. 162 (1933), 12 U. S. C. A. § 227 (1936).

31. Created by Executive Order No. 7034, of May 6, 1935, pursuant to the EMERGENCY RELIEF APPROPRIATION ACT OF 1935, 49 STAT. 115 (1935), 15 U. S. C. A. § 721 (Supp. 1937).

32. In this connection, see Ecker-R, *The Quest for Direct Relief Funds* (1936) 25 NAT. MUNIC. REV. 393.

33. 49 STAT. 1363 (1936), 7 U. S. C. A. § 901 (Supp. 1937).

34. For a discussion of the work of the Rural Electrification Administration, see Cooke, *Municipalities and the R. E. A.* (1936) 25 NAT. MUNIC. REV. 262.

35. 49 STAT. 1232 (1936), 15 U. S. C. A. § 605k (Supp. 1937).

36. Pub. L. No. 5, 75th Cong., 1st Sess. (Feb. 11, 1937).

37. 49 STAT. 1570 (1936), 33 U. S. C. A. § 701a (Supp. 1937).

38. *Ibid.*

flood waters, only after certain conditions have been met. One of these requirements is that states, political subdivisions thereof, or other responsible local agencies give "assurances satisfactory to the Secretary of War that they will (a) provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project; . . . (b) hold and save the United States free from damages due to the construction works; (c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of War".[39]

Preferential Legislation

Although the recent acts which afford preferences to public bodies are not numerous, they are extremely significant. The clearest example of this type of legislation is the statute creating the Tennessee Valley Authority.[40] That Act authorizes the board to sell surplus power to states, counties, municipalities, corporations, partnerships or individuals, giving preference to states, counties, municipalities and cooperatives.[41] Furthermore, the Act declares it to be the policy of the Government, so far as practical, to distribute and sell the surplus power generated at Muscle Shoals equitably among the states, counties, and municipalities within transmission distance.[42]

Included in the category of preferential legislation is the statute creating the Rural Electrification Administration.[43] Although that Act authorized loans to persons, corporations, states, territories, municipalities, peoples' utility districts and cooperatives, preference is provided [44] for the latter five groups.

Another clear example is the act recently approved,[45] which authorizes the completion, maintenance and operation of the Bonneville hydro-electric project and provides in Section 4 (a) that "In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, the Administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives," public bodies being defined as "States, public power districts, counties, and municipalities, including agencies or subdivisions of any thereof".[46]

It is not to be supposed that the type of legislation just described, the so-called preferential legislation, though it is recent, is exclusively a cur-

39. *Id.* at 1571, 33 U. S. C. A. § 701c.
40. 48 STAT. 58 (1933), 16 U. S. C. A. § 831 (Supp. 1937).
41. *Id.* at 64, 16 U. S. C. A. § 831i.
42. *Id.* at 64, 16 U. S. C. A. § 831j.
43. 49 STAT. 1363 (1936), 7 U. S. C. A. § 901 (Supp. 1937).
44. *Id.* at 1365, 7 U. S. C. A. § 904.
45. Pub. L. No. 329, 75th Cong., 1st Sess. (Aug. 20, 1937).
46. *Id.* § 3.

rent development. As far back as 1920, the Federal Water Power Act [47] authorized the Federal Power Commission to grant licenses for power projects on streams subject to federal jurisdiction, and provided for a preference in the issuance of preliminary permits to states and municipalities.[48] And furthermore, that Act provided that "licenses for the development, transmission, or distribution of power by States or municipalities shall be issued without charge to the extent that such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes." [49] However, much greater strides have been made in federal legislation to insure preferential treatment for public agencies in the years subsequent to 1932.

Exemptive Legislation

In addition to the recent federal legislation affecting municipalities of the enabling and of the preferential types, there is the exemptive group. Into this category fall the acts, which, but for language exempting their effect upon municipalities and similar public bodies, would have applied to such municipalities.

The adoption of the so-called "Pink Slip Amendment" in April, 1935,[50] was a distinct aid to local taxing officials. The income tax returns, it will be recalled, were required under the Revenue Act of 1934 to be summarized on a small pink slip of paper.[51] The 1935 amendment withdrew these pink slips from public inspection but made them available to state and local taxing officials. A well known authority, in commenting on this amendment, has said: "Thus, by Congressional enactment, there has been provided a simple and efficient procedure by which local tax officials may discover the existence of taxable properties as well as the names of the owners. The Federal government, in helping local units of government to help themselves has paved the way for a material increase in local revenues and a consequent larger assumption of responsibility for local finances by states and municipalities." [52]

Two recent statutes providing for tax exemption also fall in this group.[53] The first of the two recent acts was the Revenue Act of 1935,[54] which lifted the manufacturers' excise tax imposed by the Revenue Act of

47. 41 STAT. 1063 (1920), 16 U. S. C. A. § 791 (1927).

48. *Id.* at 1067, 16 U. S. C. A. § 800.

49. *Id.* at 1069, 16 U. S. C. A. § 803e.

50. 49 STAT. 158 (1935), 26 U. S. C. A. § 55 (Supp. 1937).

51. 48 STAT. 698 (1934).

52. BETTERS, *op. cit. supra* note 23, at 23.

53. It should be remarked that only *recent* developments in this field are being considered. No attempt is made to go into the more far-flung effects of the exemption now granted from taxation of the income derived from municipal securities. See *infra* note 139.

54. 49 STAT. 1014 (1935), 26 U. S. C. A. § 12 (Supp. 1937).

1932,[55] from all purchases made for the exclusive use "of the United States, any State, Territory of the United States, or any political subdivision of the foregoing, or the District of Columbia." The other was the 1933 Act [56] amending the Revenue Act of 1932, which imposed a three percent tax upon all payments by consumers for electric energy. The 1933 amendment, however, provided that "none of the provisions of this section [616] shall apply to publicly owned electric and power plants." [57]

The Public Utility Act of 1935 [58] affords still another instance of an exemption afforded to municipalities. There provision is made for the registration, regulation, and control of public utility holding companies; but a clause [59] specifically exempts from the effects of that Act "the United States, a State, or any political subdivision" thereof in their operation of utility properties.

Additional legislative enactments specifically exempting municipalities from their operations are the Securities Act of 1933 [60] and the Securities Exchange Act of 1934.[61] All the registration requirements of the former are inapplicable to securities issued by "any political subdivision of a State or Territory",[62] and under the latter, municipal securities fall within the "exempted security" category.[63]

In this review of the so-called municipal enabling, preferential and exemptive legislation, no attempt has been made to include every recent federal-municipal relationship. The effect of the Social Security Act [64] on local relief problems; [65] the benefits to municipalities from the Federal Surplus Commodities Corporation,[66] the Civilian Conservation Corps,[67] the Farm Security Administration [68] and the National Youth Administration; [69] the new federal-city relationships in crime control; [70] the effect on

55. 47 STAT. 169 (1932), 26 U. S. C. A. § 1 *et seq.* (1935).

56. 48 STAT. 254 (1933).

57. *Id.* at 256.

58. 49 STAT. 803 (1935), 15 U. S. C. A. § 79a *et seq.* (Supp. 1937).

59. *Id.* at 810, 15 U. S. C. A. § 79b (c).

60. 48 STAT. 74 (1933), 15 U. S. C. A. § 77a (Supp. 1937).

61. 48 STAT. 881 (1934), 15 U. S. C. A. § 78a (Supp. 1937).

62. 48 STAT. 74 (1933), 15 U. S. C. A. § 77c (a) (2) (Supp. 1937).

63. 48 STAT. 881 (1934), 15 U. S. C. A. § 78c (12) (Supp. 1937).

64. 49 STAT. 620 (1935), 42 U. S. C. A. § 301 (Supp. 1937).

65. For a discussion of the effect of this Act on federal-state relationships, see Clark, *Federal-State Cooperation Under the Social Security Act* (1936) 25 NAT. MUNIC. REV. 151.

66. Formerly Federal Surplus Relief Corporation, incorporated under the laws of Delaware, October 4, 1933.

67. Created, as the Emergency Conservation Work, by Executive Order No. 6101, April 5, 1933.

68. Formerly, Resettlement Administration, created by Executive Order No. 7027, April 30, 1935.

69. Created by Executive Order No. 7086, June 26, 1935.

70. For example: the amendment to the FEDERAL KIDNAPING ACT, 48 STAT. 781 (1934), 18 U. S. C. A. § 408a (Supp. 1937); the act providing punishment for offenses committed

local regulation of utility rates of the so-called Johnson bill of 1934; [71] and the results of the two 1936 Acts authorizing payments by the Federal Government of sums in lieu of taxes on federal property [72]—all of these and many others deserve special mention. However, only three of the most significant aspects of recent federal-municipal relationships have been selected for special treatment: public works, municipal bankruptcy and housing.

The Public Works Administration

The activity of the Public Works Administration [73] constitutes the clearest example of the new type of federal-municipal relationships. Here, on a scale never before attempted, the Federal Government entered into direct negotiations with cities and other local public bodies. The Public Works Administration makes loans and grants to states and local public bodies to aid in financing useful public works. Its activity reflects the Federal Government's efforts to help localities solve their unemployment problems by offering to buy municipal obligations when the financial markets were unreceptive, and to make grants when encouragement to construct useful public works projects was needed. Bonds of municipalities, counties, townships, districts, authorities and states were purchased to aid in financing the construction of every conceivable type of public works.[74]

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against banks organized under the laws of the United States or any member of the Federal Reserve System, 48 STAT. 783 (1934), 12 U. S. C. A. § 588a (1936); the act providing for prosecutions against persons who interfere with trade or commerce, by violence, threats, coercion or intimidation, 48 STAT. 979 (1934), 18 U. S. C. A. § 420a (Supp. 1937); the NATIONAL STOLEN PROPERTY ACT, 48 STAT. 794 (1934), 18 U. S. C. A. § 413 (Supp. 1937); and the NATIONAL FIREARMS ACT, 48 STAT. 1236 (1934), 26 U. S. C. A. § 1132 (Supp. 1937).

71. 48 STAT. 775 (1934), 28 U. S. C. A. § 41 (1) (Supp. 1937).

72. 49 STAT. 2025 (1936), 40 U. S. C. A. § 421 (Supp. 1937) (as to the Federal Emergency Administration of Public Works); 49 STAT. 2035 (1936), 40 U. S. C. A. § 431 (Supp. 1937) (as to the Resettlement Administration).

73. Created pursuant to Title II of the NATIONAL INDUSTRIAL RECOVERY ACT, 48 STAT. 200 (1933), 40 U. S. C. A. § 401 (Supp. 1937). The appropriation for the purposes of carrying out this Act was contained in the FOURTH DEFICIENCY ACT, fiscal year 1933, 48 STAT. 274 (1933). Provisions for additional funds and for authorizing the Reconstruction Finance Corporation to purchase marketable securities from the Public Works Administration were contained in the EMERGENCY APPROPRIATION ACT, fiscal year 1935, 48 STAT. 1055 (1934), 15 U. S. C. A. § 609 (d) (Supp. 1937). The Public Works Administration was continued until June 30, 1937, by the EMERGENCY RELIEF APPROPRIATION ACT OF 1935, 49 STAT. 115 (1935), 15 U. S. C. A. § 728 (Supp. 1937). The FIRST DEFICIENCY APPROPRIATION ACT, fiscal year 1936, 49 STAT. 1608 (1936), 15 U. S. C. A. § 728 (Supp. 1937), authorized the use of funds not to exceed $300,000,000 for grants from the Public Works Administration Revolving Fund, theretofore available only for loans; the initial appropriation for administrative expenses for the fiscal year 1938 was carried in the INDEPENDENT OFFICES APPROPRIATION ACT, Pub. L. No. 171, 75th Cong., 1st Sess. (June 28, 1937); the Public Works Administration was continued until June 30, 1939, by the PUBLIC WORKS ADMINISTRATION EXTENSION ACT OF 1937, Pub. Res. No. 47, 75th Cong., 1st Sess. (June 29, 1937).

74. For detailed information on allotments, employment created, bonds purchased, grants made and other data affecting the Public Works Administration, see *Report of the Business of the Federal Emergency Administrator of Public Works for the Period Ending Feb. 15, 1934*, SEN. Doc. No. 167, 73d Cong., 2d Sess. (1934). See also testimony of the Federal Emergency Administrator of Public Works, *Hearings Before Sub-Committee of Senate Committee on Appropriations on the First Deficiency Appropriation Bill, 1936*, 74th Cong., 2d

Not only in its size, but also in its nature, is this type of federal-city cooperation unique. The procedure of the Administration combines the advantage of federal credit, when municipal markets are faltering, with complete independence on the part of local governmental units.[75] These local agencies initiate the projects; formulate the design; let the construction contracts, determine the size, scope and location; and issue the bonds. When completed, the project is that of the local governmental unit, locally built, locally owned and locally operated. The Federal Government has merely aided in the financing. None of the established local procedure has been changed. If bonds have been issued, they have been authorized in accordance with state laws. Construction has been undertaken in the normal manner. The Administration has demonstrated that it is entirely possible, amidst all the complexities of a dual system of government, to evolve a satisfactory, workable federal-municipal relationship without affecting the independence of local self-government.

But selfish interests have engaged the Public Works Administration in litigation almost from the beginning of its program.[76] In challenging the legality of the Administrator's acts under federal law, several far-reaching issues have been raised. They may be said to include:

(1) Whether the plaintiffs have the right to attack the constitutionality of the applicable statutes or to assert alleged violations thereof;[77]

Sess. (1936); *Hearings Before Sub-Committee of House Committee on Appropriations on the Independent Offices Appropriation Bill for 1938*, 75th Cong., 1st Sess. (1937); *Hearings Before Sub-Committee of House Committee on Appropriations on the Extension of the Public Works Administration*, 75th Cong., 1st Sess. (1937).

75. See *The Purposes, Policies, Functioning, and Organization of the Emergency Administration*, P. W. A. Circular No. 1, July 31, 1933.

76. The following federal cases involve attacks upon the constitutionality of acts affecting the Public Works Administration: Allegan v. Consumers' Power Co., 71 F. (2d) 477 (C. C. A. 6th, 1934), *cert. denied*, 293 U. S. 586 (1934); Missouri Pub. Serv. Co. v. Concordia, 8 F. Supp. 1 (W. D. Mo. 1934); Missouri Util. Co. v. California, 8 F. Supp. 454 (W. D. Mo. 1934); Ashwander v. Tennessee Valley Authority, 8 F. Supp. 893 (N. D. Ala. 1934), *rev'd*, 78 F. (2d) 578 (C. C. A. 5th, 1935), *aff'd*, 296 U. S. 288 (1936); Washington Water Power Co. v. Coeur d'Alene, 9 F. Supp. 263 (D. Idaho, 1934); Arkansas-Missouri Power Co. v. Kennett, 78 F. (2d) 911 (C. C. A. 8th, 1935); Kansas Gas & Electric Co. v. Independence, 79 F. (2d) 638 (C. C. A. 10th, 1935); Missouri Power & Light Co. v. La Plata, 10 F. Supp. 653 (E. D. Mo. 1935); Iowa Southern Util. Co. v. Lamoni, 11 F. Supp. 581 (S. D. Iowa, 1935); Illinois Power & Light Corp. v. Centralia, 11 F. Supp. 874 (E. D. Ill. 1935), *rev'd*, 89 F. (2d) 985 (C. C. A. 7th, 1937); Interstate Power Co. v. Cushing, 12 F. Supp. 806 (W. D. Okla. 1935); Kansas Power Co. v. Hoisington, 89 F. (2d) 358 (C. C. A. 10th, 1937); Alabama Power Co. v. Ickes, 91 F. (2d) 303 (App. D. C. 1937), *cert. granted*, 301 U. S. 681 (1937); Duke Power Co. v. Greenwood County, 19 F. Supp. 932 (W. D. S. C. 1937), *modified*, 91 F. (2d) 665 (C. C. A. 4th, 1937); Graff v. Seward, U. S. D. C. Alaska, Aug. 12, 1937; Arkansas-Missouri Power Co. v. Thayer, U. S. D. C., W. D. Mo., Aug. 25, 1937; Carolina Power & Light Co. v. South Carolina Public Service Authority, U. S. D. C., E. D. S. C., Aug. 31, 1937.

See letter from the Assistant Administrator, Federal Emergency Administration of Public Works, transmitting, in response to Sen. Res. No. 82, 75th Cong., 1st Sess. (1937), information concerning injunctions issued or rendered by federal courts since March 4, 1933, in cases involving Acts of Congress, SEN. DOC. No. 27, 75th Cong., 1st Sess. (1937).

77. The Federal Government has taken the position that they do not, on the theory that unless a plaintiff can show an invasion of his private legal rights by the Administrator,

(2) Whether the proposed loans or grants are authorized by the applicable statute; [78]

(3) Whether the applicable statutes unlawfully delegate legislative power to the Administrator; [79]

(4) Whether the applicable statutes are a constitutional exercise of the power of Congress to spend public funds to promote the general welfare; [80] and

(5) Whether the effect of the applicable statutes is to invade the reserved power of the states.[81]

It is apparent that all these issues are of significance. It is the fifth category, however,—the alleged invasion of the reserved powers of states—which affects the subject of federal-municipal relationships.

The litigation usually results from an offer by the Government to make a loan or grant or both to aid in financing the construction of a public power plant. The contention is made that the necessary effect of the applicable statutes is the regulation of intrastate power rates; hence, the statute is unconstitutional because it invades the exclusive province of the states in violation of the Tenth Amendment.

This regulation of intrastate rates, it is claimed, results from the competition between the plaintiffs and the public body. Of course, there is no evidence to the effect that competition means regulation. But even if the competition can be said to involve regulation, to be denounced as illegal, such regulation must be by the Federal Government. However, to claim this result is to presuppose that once the loan and grant are made to a public body, competition is the inevitable result. The fallacy of this argument becomes obvious when it is realized that if competition occurs, it will be at

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he has no cause of action against the Administrator, and therefore there is no occasion for a court to consider whether the Administrator's conduct, which would otherwise be actionable, is justified by a constitutional statute. See Note (1934) 48 HARV. L. REV. 89.

78. The Government has taken the position that they are authorized, on the theory that the projects attacked are found in the terms of the statute; that the statute has received a consistent administrative interpretation sustaining the Government's position; and that subsequent legislation has either adopted and ratified the previous administrative interpretations or have furnished independent authority for the Administrator's actions.

79. The Government's position has been that there is no unlawful delegation, on the theory that the applicable acts provide adequate standards to guide the Executive in the expenditure of moneys appropriated and that the Constitution does not require Congress to specify in detail the manner in which public money is to be expended. For a detailed discussion of this point see Cowan, *Federal Spending Power and Delegation* (1937) 5 GEO. WASH. L. REV. 809.

80. The Government's position has been that they are constitutional, on the theory that the expenditures greatly relieve distress, increase employment, and help substantially to revive interstate business and industry, resulting in an increase of purchasing power, of the consumption of goods and of the national income. See Note (1935) 2 U. OF CHI. L. REV. 470; Note (1935) 3 GEO. WASH. L. REV. 218.

81. The Government's position has been that such is not the effect, on the theory that no coercive or regulatory power is being exercised by the Federal Government in violation of the Tenth Amendment.

the election of the public body—an agency of the state—and not as a result of action forced by the Federal Government. Consequently, if there is competition, and even if we assume such competition to be "regulation", such regulation is accomplished by the state acting through its political subdivision and not by the Federal Government.

In the four instances in which the circuit courts of appeals have been called upon to decide the question, they have emphatically stated that the procedure followed by the Public Works Administration in making loans and grants conforms to our federal system and constitutes no violation of the Tenth Amendment.

Thus, in *Arkansas-Missouri Power Co. v. Kennett,*[82] the court said:

> "The United States is not proposing to become a competitor of the power company. It will have no right, title, or interest in the plant when completed and nothing to do with operating it. The destruction of the power company's property will come about by reason of the city's operation of the plant when erected. The position of the United States is that of a lender of money, a buyer of bonds, and a giver of gifts." [83]

In *Kansas Gas & Electric Co. v. Independence,*[84] the court disposed of the argument of coercion as follows:

> "In the instant case the grant is to be expended by a state agency. The federal government does not, under the provisions of the National Industrial Recovery Act here involved, propose to enter the territory of the states and there through its own agencies and instrumentalities engage in a nonfederal activity. It simply proposes, in order to promote the general welfare of the United States, to advance funds by loans or grants to the states and their agencies to carry out their own powers to construct public works. The state is free to accept a loan or grant as it wills and there is no encroachment on state sovereignty." [85]

When the case of *Duke Power Co. v. Greenwood County* [86] first came before the circuit court of appeals, that court went into some detail to show that there was no encroachment on state power, pointing out:

> "It is, of course, true that, as Congress may not encroach upon the reserved powers of the states, officers acting under its authority may not so encroach; and the authority of such officers in administering acts of Congress must be held to be limited by the bounds of Congressional power. The administrator, for example, could not, under the guise of carrying out the public works program, make such an expenditure of public funds as would interfere with the states in the exercise of their

82. 78 F. (2d) 911 (C. C. A. 8th, 1935).
83. *Id.* at 914.
84. 79 F. (2d) 638 (C. C. A. 10th, 1935).
85. *Id.* at 639.
86. 81 F. (2d) 986 (C. C. A. 4th, 1936).

reserved powers. See U. S. v. Butler, supra. But we do not understand that any such thing is being done here. Greenwood County is but an agency of the state of South Carolina and remains subject to the control of that state in the management of its power project as well as in other matters. The rates to be charged by public utilities remain subject to state control. All that the administrator proposes to do is to make a loan and grant to the county to enable it to engage in an enterprise which, as a subdivision of the state, it has been given by the state the right and power to engage in. . . . We are unable to see how lending or giving money to a state agency for such purpose can be said to be an encroachment on state power. It is an entirely different thing from giving or lending money to private persons for the purpose of defeating a state policy or regulating matters under state control." [87]

And when *Duke Power Co. v. Greenwood County* came before the same court for the second time,[88] its conclusions on this point were reiterated as follows:

"Likewise, our conclusion that the statute cannot be condemned as an invasion of the reserved powers of the states is fortified by the decision in Stewart Mach. Co. v. Davis, supra, wherein the Court said that before a statute could be condemned on this ground there must be a showing that the things which it authorizes are 'weapons of coercion, destroying or impairing the autonomy of the states.' 57 S. Ct. 890. The carrying out of the program of public works authorized by the statute for the relief of unemployment cannot possibly have this effect, and specifically, the making of loans and grants to municipal corporations to enable them to engage in enterprises which the states have authorized them to engage in cannot, in any use of language, be said to abridge or invade the powers of the states. . . . Any effect which such loans and grants may have upon rates will be incidental to the competition engendered by the construction of the projects; and where the state itself authorizes the projects and the procuring of the loans and grants for their construction . . . and retains the right of regulating the rates through the exercise of state power, it cannot be contended with any show of reason that the power of the state is encroached upon by the making of the loans and grants or by the competition resulting from the construction of the projects which they make possible." [89]

Indeed, it is difficult to see how any other conclusion logically could be reached. So far as rates and competition are concerned, these questions are capable of ready disposition. The interest of the Administrator in the rates to be charged by a municipality for services rendered by a project

87. *Id.* at 995.

88. 91 F. (2d) 665 (C. C. A. 4th, 1937) [after having been remanded by the Supreme Court, 299 U. S. 259 (1936), to the district court and after a denial of the plaintiffs' request for an injunction by the district court, 19 F. Supp. 932 (W. D. S. C. 1937)].

89. 91 F. (2d) 665, 673 (C. C. A. 4th, 1937).

financed by a federal loan is the same as that of any prudent investor. There is no effort to coerce the municipality to reduce rates. If anything, the effect of the transaction is to prevent the rates from being reduced below a certain minimum, since most of the rate ordinances require that the rates must be adequate to pay debt service and reasonable operating and maintenance charges. So far as competition is concerned, it is admittedly authorized under state law. When it is seen that a municipality voluntarily files its application for federal assistance, selects the type of project it wants, has authority under the state law to undertake the construction of the project selected and to finance it in the manner proposed [90] it becomes apparent at once that reserved powers of the states are not violated.

Those who have challenged the constitutionality of the Public Works Administration Acts on the basis of violation of the Tenth Amendment have relied strongly on the decision in *United States v. Butler*.[91] It will be recalled the Agricultural Adjustment Act of 1933 [92] was declared invalid in this case on the theory that, while framed in terms of the spending power, it was "a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the Federal Government." [93] A brief review of the National Industrial Recovery Act [94] and the Agricultural Adjustment Act will clearly demonstrate the difference betwen the two. The latter was deemed compulsory in effect. To use the words of Justice Roberts, it was considered by the majority of the Court as "a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." [95] In the Public Works Administration Acts, on the other hand, there is no compulsion and no attempt to exert a regulatory power over matters reserved to the states.

This distinction is supported by the observations of the District Court for the District of Columbia in the case of *Alabama Power Company v. Ickes*.[96] The plaintiff power company sought to enjoin the execution of loan and grant agreements made by the Federal Emergency Administrator of Public Works with four municipal corporations, from each of which the plaintiff held a non-exclusive franchise. Each agreement contemplated the

90. In most of the cases in which the constitutionality of the Public Works Administration is challenged, the financing contemplated by the public body has been by way of revenue bonds. For a discussion of this method of financing under state laws, see Foley, *Some Recent Developments in the Law Relating to Municipal Financing of Public Works* (1935) 4 FORDHAM L. REV. 13; Foley, *Revenue Financing of Public Enterprises* (1936) 35 MICH. L. REV. 1; Pershing, *Revenue Bond Remedies* (1936) 22 CORN. L. Q. 64; Williams and Nehemkis, *Municipal Improvements as Affected by Constitutional Debt Limitations* (1937) 37 COL. L. REV. 177.

91. 297 U. S. 1 (1936), 84 U. OF PA. L. REV. 547.

92. 48 STAT. 31 (1933), 7 U. S. C. A. §§ 601-659 (Supp. 1937).

93. 297 U. S. 1, 68 (1936).

94. 48 STAT. 195 (1933), 15 U. S. C. A. § 701 (Supp. 1937).

95. 297 U. S. 1, 72 (1936).

96. Decision rendered June 5, 1936, unreported.

construction of a municipally owned electric-distribution system. Relying on the *Butler* case, the plaintiffs contended that the inevitable effect of the agreements would be competition between the municipal and local private utility plants, and that such competition would, in effect, constitute federal regulation of intrastate power rates. The district court found, however:

> "Each of the municipalities involved in this suit determined to enter into the electric distribution business of its own free will. There was no solicitation or coercion on the part of any of the defendants, their agents or subordinates. There was and is no conspiracy between any of the defendants and any other person, nor is there any other effort on the part of any of the defendants to, nor are their actions motivated by a desire to, cause injury or financial loss to the plaintiffs, or to regulate their rates or electric rates generally, or to foster municipal ownership of utilities.
>
> "The expenditures under these statutes involve no purchase of, nor contract providing for, regulation by the United States. The failure of any city to apply for or receive loans or grants under those statutes will impose upon it no disadvantage or financial loss.
>
> "The defendants have not reserved any right or power to influence or control rates to be charged by the proposed municipal power plants. . . .
>
> "Neither the United States nor any of the defendants has reserved any right or power under the existing contracts, or in any other way, to require any of the municipalities to eliminate competition or to designate the person or agency from whom the municipality must purchase its power. . . .
>
> "Neither the United States nor any of the defendants has any power to control the operation of the projects after construction is completed. . . ." [97]

On appeal these findings were accepted by both the Circuit Court of Appeals for the District of Columbia and the United States Supreme Court, in affirming the decrees of the district court, denying the injunctions and dismissing the bills.

The district court, after consideration of the various arguments already mentioned, challenging the validity of the Administrator's acts, held that the plaintiffs had a standing to maintain the suits, but denied the injunctions on the ground that the statutory provisions conferring upon the Administrator the power which he had exercised were constitutional. On appeal, the circuit court considered the validity of the loan and grant agreements, but dismissed the bills after finding that no legal or equitable right of the power company had been invaded and that the power company, therefore, could not challenge the validity of the Administrator's acts.[98] The Supreme Court,

97. Quoted by the Supreme Court in 58 Sup. Ct. 300, 302 (1938).
98. 91 F. (2d) 303 (App. D. C. 1937).

agreeing with the circuit court of appeals, declared that a federal taxpayer cannot challenge the action of the Federal Government in extending financial aid to municipalities, or the federal statutes authorizing such aid, provided that: (a) the municipalities are authorized under state law to accept federal moneys in aid of lawful municipal enterprises, (b) the municipalities determine to undertake such enterprises of their own free will, without solicitation or coercion, and (c) the action of the municipalities or the Federal Government is not motivated by a desire to cause financial loss to existing competing utilities, to regulate their rates or to foster municipal ownership of utilities.[99]

Thus, without passing upon the merits of the constitutional questions which have been before the lower federal courts since 1934 in this and similar cases, the Supreme Court virtually sanctioned this newest type of federal-municipal relationship. This decision is one of far-reaching effect, for it opens the way to further development of the federal-municipal concept.

The Municipal Bankruptcy Act

The Municipal Bankruptcy Act,[100] passed in August, 1937, represents a second attempt[101] on the part of Congress to invoke its power to pass uniform laws on the subject of bankruptcy[102] for the purpose of facilitating municipal debt readjustments.[103] This legislation marks another significant development in federal-municipal relationships. It is another example of enabling legislation by which Congress, as under the acts relating to the Public Works Administration,[104] has attempted to deal with municipalities directly and independently of the states in so far as municipalities are not prevented by state law from participating under the new Bankruptcy Act.[105] But this relationship differs from that resulting from the activities of the Public Works Administration, the difference arising from the nature of the federal assistance to municipalities and the channel through which it is ad-

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99. 58 Sup. Ct. 300 (1938). The case of Duke Power Co. v. Greenwood County, 91 F. (2d) 665 (C. C. A. 4th, 1937), pending in the Supreme Court on certiorari at the time of the decision in the *Alabama Power* case, was decided on the authority of the decision in the latter case. 58 Sup. Ct. 306 (1938). See Note (1938) 36 MICH. L. REV. 587.

100. Pub. L. No. 302, 75th Cong., 1st Sess. (Aug. 16, 1937). This Act amended the present Bankruptcy Act by adding §§ 81-84.

101. See the NATIONAL MUNICIPAL DEBT READJUSTMENT ACT, 48 STAT. 798 (1934), 11 U. S. C. A. § 301 (Supp. 1937), *amended*, 49 STAT. 1198 (1936), 11 U. S. C. A. § 302 (Supp. 1937).

102. U. S. CONST. Art. 1, § 8, cl. 4.

103. For a discussion of the recent financial collapse of municipalities and the historical background therefor, see HILLHOUSE, MUNICIPAL BONDS (1936); Note (1934) 43 YALE L. J. 924. See also Frye, *Municipal Insolvency: Its Special Problems from the Point of View of the General Practitioner* (1937) 2 LEGAL NOTES ON LOCAL GOV'T 195; Sauer, *An Experiment in Muncipal Financing: Factual Background of Ashton v. Cameron County Improvement District No. One* (1936) 5 GEO. WASH. L. REV. 1; Stason, *State Administrative Supervision of Municipal Indebtedness* (1932) 30 MICH. L. REV. 833. See also *infra* note 111.

104. See *supra* note 73.

105. Pub. L. No. 302, 75th Cong., 1st Sess. (Aug. 16, 1937) § 83 (i).

ministered. Here the assistance is offered through the medium of the federal judicial system to financially distressed municipalities for the purpose of preserving their going value as units of local government, in contrast to direct financial aid for the relief of unemployment through an independent agency of the executive department.

Judicial relief to municipalities is unique in the field of federal-municipal relationships. In 1934, Congress amended the Bankruptcy Act, which had expressly excepted municipal corporations from the exercise of its bankruptcy power,[106] by passing the National Municipal Debt Readjustment Act.[107] The Act was designed to permit any distressed [108] municipality or political subdivision of a state to effect a composition of its debts through the federal courts. It provided a forum where, to use the language of the Act, "any municipality or other political subdivision of any State" [109] or any "taxing district" could meet voluntarily with its creditors in an effort to effect an adjustment of its financial difficulties upon a mutually advantageous plan. If the plan were agreed upon by the taxing district and by creditors holding two-thirds in amount of its indebtedness adversely affected, and if the federal court were satisfied that the plan was workable and equitable, the court could confirm the plan. Thereupon the minority of the creditors became bound by the terms of the plan and the jurisdiction of the court ceased. The Act provided that it should not impair the power of any state to control any political subdivision in the exercise of its political or governmental powers, including the power to require by state law the approval of any state administrative agency before the Act could be availed of by such political subdivision.

By the end of 1935, 46 proceedings spread over 13 states had been commenced under this statute.[110] Thirty-one were instituted by drainage, irrigation and levee districts,[111] a class including perhaps the least solvent

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106. 36 STAT. 839 (1910), 11 U. S. C. A. § 11 (1927).

107. 48 STAT. 798 (1934), 11 U. S. C. A. § 301 (1937).

108. ". . . insolvent or unable to meet its debts as they mature. . . ." 48 STAT. 798 (1934), 11 U. S. C. A. § 303 (a) (1937).

109. ". . . including (but not hereby limiting the generality of the foregoing) any county, city, borough, village, parish, town, or township, unincorporated tax or special assessment district, and any school, drainage, irrigation, levee, sewer, or paving, sanitary, port, improvement or other districts. . . ." *Id.* at 779, 11 U. S. C. A. § 303 (a).

110. SECURITIES AND EXCHANGE COMMISSION REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES (1936) Part 4, 122. As to the full extent of participation under the Act, see statement furnished by National Drainage, Levee and Irrigation District Ass'n; and by Mr. Scott, President of the Ass'n, *Hearings Before Sub-Committee of House Committee on the Judiciary on H. R. 2505, 2506, 5403, 5969*, 75th Cong., 1st Sess. (1937) 143.

111. SECURITIES AND EXCHANGE COMMISSION REPORT, *op. cit. supra* note 110, at 123. For a general discussion of the extent of municipal defaults, see HILLHOUSE, *op. cit. supra* note 98, at 1-30; HORTON, LONG TERM DEBTS IN THE UNITED STATES (U. S. Dep't of Commerce, Domestic Commerce Series, No. 96, 1937) 179-184. For summary of municipal defaults, see Shanks, *Municipal Bond Defaults* (1937) 26 NAT. MUNIC. REV. 296.

units. But in May, 1936, before there had been time for any definite legislative experience under the Act, it was declared invalid in *Ashton v. Cameron County Water District No. 1.*[112]

The Legislature of Texas had granted political subdivisions the express right to proceed under the federal law.[113] The Supreme Court recognized Cameron County Water Improvement District No. 1 as a political subdivision of Texas.[114] Speaking for a majority of the Court, Mr. Justice McReynolds perceived in the inclusion of local governmental units within the subject of bankruptcy an encroachment upon the reserved power of a state over the fiscal affairs of its political subdivisions in violation of the Tenth Amendment. In support of this view, he relied upon the absence of any expressed intent in the Constitution to include governmental units within the grant of power to Congress. Mr. Justice Cardozo pointed out in the dissenting opinion,[115] however, that it is not sufficient that the Act affronts the dignity of the state but that the test should be whether the extension of bankruptcy jurisdiction to local governmental units dislocates the balance between state and national power. He concluded that, although the Act might threaten dislocation so far as it was applicable to political subdivisions of the state, the consent of the state would preserve the balance.

The scope of the *Ashton* decision has been interpreted by the Ninth Circuit Court of Appeals in the case of *In re Imperial Irrigation District*[116] as outlawing all "political subdivisions" from participating under the old Municipal Debt Readjustment Act. The Imperial Irrigation District had sought a rehearing on the ground that the Supreme Court of California had held that an irrigation district is "not a political subdivision of the state or county, or a political subdivision at all."[117] The court of appeals ruled that, if the petitioning district is a political subdivision, relief is precluded

112. 298 U. S. 513 (1936), 85 U. OF PA. L. REV. 111. The constitutionality of the first Act had been questioned. Briggs, *Shall Bankruptcy Jurisdiction Be Extended to Include Municipalities and Other Taxable Subdivisions* (1933) 19 A. B. A. J. 637; Morford, *Federal Legislation for Corporate Reorganization; A Negative View* (1933) 19 A. B. A. J. 702, 703; Stebbins, *Constitutionality of the Recent Amendment to the Bankruptcy Law* (1933) 17 MARQ. L. REV. 161. But see Legis. (1933) 35 COL. L. REV. 429, 46 HARV. L. REV. 1317; Note (1934) 43 YALE L. J. 924, 972-974.

113. 2 TEX. STAT. ANN. (Vernon, Supp. 1937) art. 1024a.

114. "The respondent was organized . . . as Cameron County Irrigation District No. One, to furnish water for irrigation and domestic uses; in 1919, it became the Cameron County Water Improvement District No. One, all as authorized by statutes passed under § 52, Art. 3, Constitution of Texas, which permits creation of political divisions of the State, with power to sue and be sued, issue bonds, levy and collect taxes. An Amendment to the Constitution—§ 59a, Art. 16—(October 2, 1917) declares the conservation and development of all the natural resources of the State, including reclamation of lands and their preservation, are 'public rights and duties.' . . . It is plain enough that respondent is a political subdivision of the State, created for the local exercise of her sovereign powers. . . ." 298 U. S. 513, 527 (1936).

115. *Id.* at 532.

116. 87 F. (2d) 355 (C. C. A. 9th, 1936).

117. Wood v. Imperial Irrigation Dist., 216 Cal. 748, 753, 13 P. (2d) 128, 130 (1932).

by the *Ashton* decision; whereas, if it is not a political subdivision, the Federal Act affords no remedy for the reason that the Act is applicable only to political subdivisions.

Congress undertook to remove what it conceived to be the constitutional objections in the earlier act by passing another Municipal Bankruptcy Act [118] this year. Despite the sweeping implications of the majority opinion in the *Ashton* case, the new Act apparently rests on the theory that a vital distinction can be drawn between political subdivisions exercising sovereign powers and municipal corporations.[119] This seems to be the basis [120] for the limitation of the Act to six described classes of taxing districts,[121] the sixth class including "any city, town, village, borough, township, or other municipality".[122] No reference is made to political subdivisions [123] though it will

118. Pub. L. No. 302, 75th Cong., 1st Sess. (Aug. 16, 1937).

119. "The bill here recommended for passage expressly avoids any restriction on the powers of the States or their arms of government in the exercise of their sovereign rights and duties. No interference with the fiscal or governmental affairs of a political subdivision is permitted. The taxing agency itself is the only instrumentality which can seek the benefits of the proposed legislation." SEN. REP. No. 911, 75th Cong., 1st Sess. (1937) 2.

"Therefore, the applicability of the pending bill to any taxing district or agency rests on the corporate character of each petitioner and depends in the actual interference, if any, with its essential governmental functions. . . ." H. R. REP. No. 517, 75th Cong., 1st Sess. (1937) 3.

120. Thus, Representative Wilcox, debating H. R. 5969, 75th Cong., 1st Sess. (1937), in the House, said: "The constitutionality of this bill can be distinguished from the other bill in this way: The original bill extended to those subdivisions of a State government, which are essentially arms of the State government. Now we have left out of this bill counties and those other subdivisions which are essentially a part of the State." 81 CONG. REC., June 24, 1937, at 8219.

And Senator Pepper, commenting on the bill when it was under consideration in the Senate, remarked: "The first bill included counties, which are, in the opinion of a great many people, actual instrumentalities of sovereignty, agencies through which the State carries on the sovereign functions of the government, which is not true with respect to drainage districts or levee districts or road or school districts." 81 CONG. REC., Aug. 9, 1937, at 10963.

121. ". . . (1) Drainage, drainage and levee, levee and drainage, reclamation, water, irrigation, or other similar districts, commonly designated as agricultural improvement districts or local improvement districts, organized or created for the purpose of constructing, improving, maintaining, and operating certain improvements or projects devoted chiefly to the improvement of lands therein for agricultural purposes; or (2) local improvement districts such as sewer, paving, sanitary, or other similar districts, organized or created for the purposes designated by their respective names; or (3) local improvement districts such as road, highway, or other similar districts, organized or created for the purpose of grading, paving, or otherwise improving public streets, roads, or highways; or (4) public-school districts or public-school authorities organized or created for the purpose of constructing, maintaining, and operating public schools or public school facilities; or (5) local improvement districts such as port, navigation, or other similar districts, organized or created for the purpose of constructing, improving, maintaining and operating ports and port facilities; or (6) any city, town, village, borough, township, or other municipality. . . ." A saving clause follows, designed to save the Act otherwise if any one or more of the taxing agencies classified therein should be held to be political subdivisions exercising sovereign powers. Pub. L. No. 302, 75th Cong., 1st Sess. (Aug. 16, 1937).

122. *Ibid.*

123. *Ibid.* See statement by Representative Wilcox: ". . . I wish to point out . . . the fact that whereas the original bill which was held in the Ashton case . . . to be unconstitutional, referred to all the petitioners designated therein as political subdivisions of the State, in the pending bill all such references have been eliminated, and no such petitioner as Cameron County Water Improvement District could take advantage of this act. All such political subdivisions have been eliminated. Therefore, the decision of the Supreme Court of the United States in the Ashton case is wholly without effect upon the constitutionality of

be recalled that the first Act grouped the various classes of taxing districts under the category of political subdivisions.[124] The procedural aspects of the new Act remain substantially unchanged from those of the old Act.

But is the argument tenable that by restricting the Act to municipalities and other local taxing districts, exclusive of counties and other political subdivisions not named in the Act, Congress has overcome the constitutional objection that an extension of the bankruptcy power to local governmental units invades the sovereign power of the states in violation of the Tenth Amendment?[125]

The assumed difference in the character of a political subdivision from that of a municipal corporation, on which the limited scope of the Act is postulated,[126] is that a political subdivision is deemed to be a public body superimposed by the state solely for the administration locally of state governmental functions,[127] whereas a municipality functions in a dual capacity.[128]

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the pending bill. The strictures of that decision with reference to all other classes of petitioners other than such political subdivisions are clearly obiter dicta." 81 CONG. REC., June 24, 1937, at 8214.

124. See *supra* note 108, and text relative thereto.

125. Although the scope of the *Ashton* decision is not clear, the distinction on which the second Act rests does not appear to find support in the majority opinion. The new Act permits the same degree of "interference" with the power of a state over the fiscal affairs of a municipality which, in a broad sense, is a political subdivision of the state as did the invalid Act. That the Act cannot be reconciled with the majority opinion appears to be true, notwithstanding that the majority analogized the bankruptcy power to the taxing power, in the exercise of which the distinction between the proprietary and governmental character of a municipality has been recognized. See *infra* note 131. But see Black, *Has Congress Circumvented the Ashton Decision?* (1937) 23 A. B. A. J. 683.

126. See *supra* notes 119, 120, 123, and text relative thereto.

In the *Opinion of Special Assistant Attorney General Charles Weston*, issued April 21, 1933 [reported in part in C. C. H. BANKR. SERV. ¶ 2803 (1933)], it was declared that the proposed amendment, H. R. 3083, 73d Cong., 1st Sess. (1933), to the Bankruptcy Act was constitutional only in its application to municipalities in the strict sense. "The private or proprietary capacity of a municipality" was deemed to be "sufficiently distinct and definite to bring it within the purview of the bankruptcy power", whereas, a quasi-municipal body, because of its purely governmental function, was considered exempt from its operation. It was suggested that the proposed amendment be changed to reflect this distinction. However, it was not until after the original amendment had been declared unconstitutional that Congress took heed of the suggestion. The distinction was argued in a brief submitted as *amicus curiae* by nine Arkansas and Drainage Irrigation Districts in the *Ashton* case but ignored by the Court. Statement by Mr. Frierson, Counsel for the Districts, *Hearings Before Sub-Committee of House Committee on the Judiciary, supra* note 110, at 87. See Black, *op. cit. supra* note 125.

The importance of the distinction has been questioned in Legis. (1933) 33 COL. L. REV. 1050, on the ground that municipal obligations are generally issued for governmental rather than purely private functions. But see Note (1934) 34 COL. L. REV. 324. Because of the rapid increase in proprietary functions municipal corporations are becoming "gigantic public service corporations." On the other hand, see Wood, *Constitutionality of the Sumners Municipal Relief Bill* (1934) 10 AM. BANKR. REV. 175, criticizing the distinction on the ground that both types of units engage in proprietary functions. However, it has been suggested that "the necessity of dealing with the financial structure supporting proprietary and governmental functions, however defined, as a unit, might serve to justify an extension of the bankruptcy power, if otherwise inapplicable, to the governmental operations of a municipality." Legis. (1935) 35 COL. L. REV. 428, 430.

127. *In re* Cameron County Water Improvement Dist. No. 1, 9 F. Supp. 103 (S. D. Tex. 1934), 83 U. OF PA. L. REV. 920 (1935); 1 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1928) § 135.

128. 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911). "Municipal Corporations as they exist in this country are bodies politic and corporate . . . established by the law

In its governmental capacity it has been said to be a "political subdivision of the State, created as a convenient agency, for the exercise of such of the governmental powers of the State as may be entrusted to it",[129] whereas in its proprietary capacity it has been said to be "a body politic and corporate constituted by the voluntary incorporation of the inhabitants . . . for the purposes of local government thereof." [130]

The proprietary capacity of municipal corporations has been recognized.[131] The Supreme Court decision in *Vilas v. Manila* [132] is illustrative. In that case, when the Philippine Islands were ceded to the United States, it was held that the Spanish municipality of Manila was not abolished by the extinction of the sovereign creating it because a municipality, in its private or business capacity is a "mere legal entity or juristic person" standing "for the community in the administration of local affairs wholly beyond the sphere of the public purpose for which its governmental powers are conferred." [133] However, Mr. Justice Butler, speaking for a unanimous Court in *Trenton v. New Jersey*,[134] said:

> "The basis of the distinction is difficult to state and there is no established rule for the determination of what belongs to the one or the

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partly as an agency of the State to assist in the civil government of the county, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated." *Id.* § 31. "This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper." *Id.* § 32. Hunter v. Pittsburgh, 207 U. S. 161 (1907). *Cf.* Trenton v. New Jersey, 262 U. S. 182 (1923).

129. Trenton v. New Jersey, 262 U. S. 182, 185 (1923).

130. 1 DILLON, *op. cit. supra* note 128, § 31.

131. Mount Hope Cemetery v. Boston, 158 Mass. 509, 33 N. E. 695 (1893) (state may not take, without compensation, property which a municipality holds in a private or proprietary capacity). But *cf.* Trenton v. New Jersey, 262 U. S. 182 (1923) (state may take property held by a municipality, without compensation, in the exercise of proper state functions). Further examples of recognition of this capacity are: Workman v. New York City, 179 U. S. 552 (1900); *Ex parte* New York, 256 U. S. 490 (1921) (libel in personam lies against a municipality for a maritime tort, for which it is not liable under local law, although it does not lie against a state); Hunter v. Pittsburgh, 207 U. S. 161 (1907) (private property of a municipality may be sold on execution). The most numerous illustrations are found in the cases involving tort liability. Municipalities are generally held liable for torts committed by their officers or agents in the exercise of what are deemed to be proprietary functions. See cases cited in Trenton v. New Jersey, *supra.* However, the contrary is true in the exercise of governmental functions. See Harris v. District of Columbia, 256 U. S. 650 (1921) and cases cited.

For additional discussion on this point, see Borchard, *Government Liability in Tort* (1924) 34 YALE L. J. 1, 129, 229, (1926) 36 *id.* at 1, 757, 1039, (1928) 28 COL. L. REV. 577, 734. See also Barnett, *Foundations of Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations* (1937) 16 ORE. L. REV. 250; Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform* (1934) 20 A. B. A. J. 747; Borchard, *Recent Statutory Developments in Municipal Liability in Tort* (1936) 2 LEGAL NOTES ON LOCAL GOV'T 89; Bryan, *The Nature of Governmental Functions* (1914) 1 VA. L. REV. 497; Harno, *Tort Immunity of Municipal Corporations* (1921) 4 ILL. L. Q. 28; Schulz, *The Effect of the Contract Clause and the Fourteenth Amendment upon the Power of the States to Control Municipal Corporations* (1938) 36 MICH. L. REV. 385.

132. 220 U. S. 345 (1911).

133. *Id.* at 356.

134. 262 U. S. 182 (1911).

other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations." [135]

Assuming the test of validity adopted by the majority in the *Ashton* decision, i. e., the corporate nature of a petitioner, the proponents of the second Act presumed [136] that this dual character of a municipality would afford the Court an opportunity to hold the new Act constitutional as applied to municipalities, as well as to those local improvement districts which are not declared by local law to be political subdivisions of a state or which are not exercising state functions, without overruling the *Ashton* decision.[137]

Having in mind the inextricable confusion already wrought by what may be termed the Jekyll-Hyde theorists in the field of municipal tort law [138] and in the field of federal taxation,[139] it is to be hoped that the finespun

135. *Id.* at 191.

136. See statements by Representative Wilcox, *Hearings Before Sub-Committee of House Committee on the Judiciary, supra* note 110, at 31-33. *Cf.* Statement by George Bangs, *id.* at 64 *et seq.* And see Black, *op. cit. supra* note 125; *infra* note 137.

It has been proposed that a federal municipal bankruptcy statute to be constitutional and to overcome the *Ashton* decision would require actual state participation involving examinations, determinations of capacity to pay and continuous supervision by a state administrative agency. Federal courts would intervene only to the extent of reviewing the actions of the administrative agency, passing upon the equity of the plans and compelling acceptance by minority creditors. Kilpatrick, *Federal Regulation of Local Debt* (1937) 26 NAT. MUNIC. REV. 283, 288.

137. The distinction between the proprietary and governmental capacities of a municipality, as ventured by Special Assistant Attorney General Charles Weston, *op. cit. supra* note 126, was suggested merely as a basis on which the extension of the bankruptcy power to municipalities might be sustained. However, his position appears to have been construed by some to mean that the distinctions would justify the application of the bankruptcy power to municipalities in their strict sense only. This interpretation presupposes that the test of validity should be not only the corporate nature of a petitioner under the Act but also the nature of the functions in connection with which the obligations affected by the proceedings under the Act were incurred. See *supra* note 119.

That such a double-barrelled test would render the Act unworkable is self-evident. Likewise, by applying the distinction in this way, the corporate nature of a petitioner would appear to become immaterial, for, by analogy to the tax law, [see South Carolina v. United States, 199 U. S. 437 (1905) and Ohio v. Helvering, 292 U. S. 360 (1934)] it would follow that the bankruptcy power should be applicable to political subdivisions and even to the states in the exercise of proprietary functions. See statement by Mr. Satterfield, Counsel for R. F. C., *Hearings Before Sub-Committee of House Committee on the Judiciary, supra* note 110, at 49. Such an application of the distinction would carry the bankruptcy power beyond what Mr. Weston deemed to be the pale of constitutionality, and would infringe upon the *Ashton* decision.

138. See *supra* note 131.

139. The rule of McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819), has been interpreted by several decisions as clothing states and their instrumentalities with complete immunity from federal taxation. See United States v. Railroad Co., 17 Wall. 322, 327 (U. S. 1872); Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, 584 (1895); Ambrosini v. United States, 187 U. S. 1, 7 (1902). But the trend of more recent decisions has been toward a functional approach. Metcalf & Eddy v. Mitchell, 269 U. S. 514 (1926); Willcuts v. Bunn, 282 U. S. 216 (1931); Brush v. Comm'r of Int. Rev., 57 Sup. Ct. 495 (1937); *cf.* Helvering v. Powers, 293 U. S. 214 (1934), 35 COL. L. REV. 301 (1935). See *Developments in the Law—Taxation* (1934) 47 HARV. L. REV. 1209.

Robert Louis Stevenson yarn will not be needed by the Supreme Court in order to clothe the 1937 Municipal Bankruptcy Act with the cloak of constitutionality.

It is noteworthy that in the recent case of *In Re Lindsay-Strathmore Irrigation District*,[140] the District Court for the Southern District of California, in holding the second Municipal Bankruptcy Act unconstitutional, discarded the tenuous distinction between governmental and proprietary functions of civil and political units of a state to which the state has delegated broad powers, and those local agencies of a more limited scope.

The following observation of the court is pertinent:

> ". . . a governmental body does not lose its character as such merely because it may engage in activities of a proprietary nature. If it is an agency of the state for the performance of certain functions, the fact that the functions are limited does not alter its status. An agency of the state for the performance of governmental functions it still remains. Ultimately, the test is, Does it have the attributes of sovereignty? Do its activities constitute a public as distinguished from a private enterprise? In carrying out its functions, does it exercise that great prerogative which belongs to sovereignty only—the power to tax and assess property within its boundaries for the upkeep of its activities? If it does, then it is a state agency or instrumentality, although it does not fit into any of the old rubrics under which governmental agencies were classified in less complex days—villages, towns, cities, boroughs, and the like." [141]

Feeling bound by the *Ashton* decision, the court declared the second Act, like the first, to constitute interference with state sovereignty.

However, if the minority opinion in the *Ashton* case should become the majority decision when the validity of the new Act is tested before the Supreme Court, the distinction between quasi-municipal corporations and municipalities in the strict sense, and true governmental subdivisions would not be needed. The criterion for the constitutionality of the Act would appear to be whether it interferes substantially with, or burdens the exercise of a state's sovereign powers over, the fiscal affairs of a municipality.[142]

140. 21 F. Supp. 129 (S. D. Cal. 1937), 86 U. OF PA. L. REV. 310 (1938).

141. *Id.* at 132.

142. Dissenting in the *Ashton* case, Mr. Justice Cardozo said: "To read with the bankruptcy clause an exception or proviso to the effect that there shall be no disturbance of the Federal framework by any bankruptcy proceeding is to do more than has been done already with reference to the power of taxation known of all men." 298 U. S. 513, 538 (1936).

Assuming that the bankruptcy power, like the taxing power, yields to considerations of state sovereignty, no reason is apparent why the bankruptcy power should not extend at least to the limits of the doctrine of immunity as invoked in tax cases. There the strict view regarding federal interference by the state instrumentalities, as distinguished from interference by the states with interstate commerce has been modified. See *supra* note 139. The present judicial approach is more like that in interstate commerce cases. See (1933) 33 COL. L. REV. 1075. "The principle . . . of the immunity of state instrumentalities from federal taxation has its inherent limitations. It is a principle implied from the necessity of main-

Applying this test, the Act does not appear to constitute an interference in the constitutional sense with state sovereignty: the proceedings are voluntary; [143] there is no coercion upon municipalities eligible to participate under the Act [144] unless the powers of a petitioning municipality to exert pressure upon a minority of dissenting creditors can be called coercion; there can be no impairment of the power of a state to control, by legislation or otherwise, any municipality in the exercise of its governmental powers; [145] and federal courts cannot regulate or administer the fiscal affairs of the petitioning municipality,[146] for during the proceedings the courts are empowered to act merely to protect the best interests of all parties affected by a reajdustment plan and to afford them the needed protection from each other.[147] If the Act should be sustained on this basis as to municipalities, it would appear to be valid as applied to other local taxing districts, regardless of their corporate nature or status.

The new Act not only gives the Supreme Court an opportunity to reconsider its opinion in the *Ashton* case; it also affords those sorely pressed municipalities which were in the process of readjusting their debts under

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taining our dual system of government. Springing from that necessity it does not extend beyond it." Board of Trustees v. United States, 289 U. S. 48, 59 (1933), 33 COL. L. REV. 913.

It has been suggested, however, that the bankruptcy power, like the commerce, military and currency powers, is plenary, Legis. (1935) 35 COL. L. REV. 428, and that the taxing power is the only power which must yield to state sovereignty, (1933) 33 COL. L. REV. 913, 914.

143. Pub. L. No. 302, 75th Cong., 1st Sess. (Aug. 16, 1937) § 83 (a). "Any petitioner *may* file a petition hereunder stating . . . that it *desires* to effect a plan of composition of its debts." (Italics supplied.) In the *Ashton* case, Mr. Justice Cardozo said: "The question is not here whether the statute would be valid if it made provision for *involuntary* bankruptcy. . . . For present purposes one may assume that there would be in such conditions a dislocation of that balance between the powers of the states and the powers of the central government which is essential to our federal system." (Italics supplied.) 298 U. S. 513, 538 (1936).

144. See Massachusetts v. Mellon, 262 U. S. 447, 482 (1932); *cf.* United States v. Butler, 297 U. S. 1 (1936); Legis. (1935) 35 COL. L. REV. 428. The Act was drawn simply as a composition bill to preclude any doubt that involuntary proceedings could be instituted against a municipality thereunder. See statements by Representative Wilcox, *Hearings Before Sub-Committee of House Committee on the Judiciary, supra* note 110, at 100-104.

145. Pub. L. No. 302, 75th Cong., 1st Sess. (Aug. 16, 1937) § 83 (i). "Nothing contained in this chapter shall be construed to limit or impair the power of any State to control, by legislation or otherwise, any municipality or any political subdivision of or in such State in the exercise of its political or governmental powers, including expenditures therefor."

146. Pub. L. No. 302, 75th Cong., 1st Sess. (Aug. 16, 1937) § 83 (c). ". . . the judge . . . shall not . . . interfere with (a) any of the political or governmental powers of the petitioner; or (b) any of the property or revenues . . . necessary for essential governmental purposes; or (c) any income-producing property, unless the plan of composition so provides." It has been suggested, with reference to the same provision in the first Act, that Congress stepped beyond its constitutional power by adding the proviso: "unless the plans of composition so provides." Legis. (1935) 35 COL. L. REV. 428. But see *supra* note 145. And note that the scheme of the Act does not contemplate judicial supervision of the execution of a confirmed plan of composition.

147. See statement by Representative Wilcox, on H. R. 5969, 75th Cong., 1st Sess. (1937), 77 CONG. REC., June 24, 1937, at 8210.

the first Act an opportunity to complete the readjustment. In fact the latter has been stated as its immediate objective.[148]

Parodoxically, this development of the federal-municipal relationship to the point where the Federal Government extends to municipal corporations the right to reorganize in the same sense that it has extended this right to overcapitalized railroads [149] and private corporations,[150] was provoked in a measure by the liberality with which the federal courts have permitted mandamus [151] to be used by individual preference-seeking bondholders.

The cure for this mischief might be found upon a re-examination of the powers and practices of the federal courts. Such a re-examination would disclose that, although (1) the federal constitutional prohibition against a law impairing the obligation of contracts [152] prevents a state from enacting a bankruptcy statute releasing a debtor from personal liability upon an existing contract [153] and although (2) such a state bankruptcy statute might be ineffective to release a debtor from obligations held by a non-resident creditor not voluntarily submitting to the jurisdiction of the state court,[154] the way is open for state municipal insolvency acts and has been availed of by some legislatures.[155] Such legislation, without threatening to invade the reserved powers of the states, might be implemented by a federal statute to prevent interference by the federal courts during the pendency of read-

148. See statement by Representative Chandler, *id.* at 8216: "It is only for the purpose of completing the benefits of what Congress designated as an emergency measure, but before much good could be accomplished, that measure was declared unconstitutional and this bill is designed to complete the work."

149. 47 STAT. 1474 (1933), 11 U. S. C. A. § 205 (1937).

150. 48 STAT. 912 (1934), 11 U. S. C. A. § 207 (1937).

151. The courts have made rigorous use of mandamus even where municipal solvency was threatened thereby. Galena v. Amy, 5 Wall. 705 (U. S. 1866); Little Rock v. United States, 103 Fed. 418 (C. C. A. 8th, 1900). See Note (1934) 43 YALE L. J. 924, 963-967 and for cases showing that the same view was taken during the recent depression, *id.* at 967, n. 7. *Cf.* Christmas v. Asbury Park, 10 F. Supp. 22 (D. N. J. 1935), *cert. denied*, 296 U. S. 624 (1935), 45 YALE L. J. 702 (1936); State v. St. Petersburg, 126 Fla. 233, 170 So. 730 (1936); Sinking Fund Comm'rs v. Philadelphia, 324 Pa. 129, 188 Atl. 314 (1936).

152. U. S. CONST. Art. I, § 10, cl. 1.

153. Sturges v. Crowninshield, 4 Wheat. 122 (U. S. 1819); International Shoe Co. v. Pinkus, 278 U. S. 261 (1929). But see *infra* note 155.

154. Ogden v. Saunders, 12 Wheat. 212 (U. S. 1827). See Note (1934) 43 YALE L. J. 924, 968.

155. HILLHOUSE, *op. cit. supra* note 103, at 321-360; SECURITIES AND EXCHANGE COMMISSION REPORT, *op. cit. supra* note 110, at 113-116; Frye, *State Receiverships of Insolvent Municipal Corporations* (1936) 25 NAT. MUNIC. REV. 319; Frye, *loc. cit. supra* note 103; Stason, *supra* note 103, at 842 *et seq.*; Note (1934) 43 YALE L. J. 924, 979 *et seq. Cf.* Legis. (1933) 46 HARV. L. REV. 1317; and see Dimock, *Legal Problems of Financially Embarrassed Municipalities* (1936) 22 VA. L. REV. 39. But see Legis. (1933) 46 HARV. L. REV. 1317. State legislation of this kind has been sustained in Hourigan v. North Bergen Twp., 113 N. J. L. 143, 172 Atl. 193 (1934); *In re* Title and Mortgage Guar. Co., 267 N. Y. 533, 196 N. E. 565 (1934), 43 YALE L. J. 1007. But see Note (1936) 45 YALE L. J. 702, 704. *Contra:* Pryor v. Goza, 172 Miss. 46, 159 So. 99 (1935).

justment proceedings undertaken in good faith by a distressed but honest municipality under a state insolvency law.[156]

The United States Housing Act of 1937

The most recent enactment bearing on federal-municipal relationships is, of course, the United States Housing Act of 1937,[157] approved September 1. This Act creates the United States Housing Authority as a corporation in perpetuity in the Department of the Interior,[158] the powers of the corporation to be exercised by an administrator appointed by the President.[159] The Authority is authorized to make loans to public housing agencies, such as states, counties, municipalities and local housing authorities, for housing projects. These loans are to bear interest at a rate not less than the going federal rate plus one-half of one percent, and are to mature in not more than sixty years.[160] The Act provides for two methods of grants: (1) the annual contribution[161] and (2) the capital grant.[162] If the annual contribution method is used, the loans outstanding on any one project in which the United States Housing Authority participates may not exceed ninety percent of the cost of the project; if the capital grant method is used, the loan may not exceed the cost of the project less the grant, but in no event may the loan exceed ninety percent of such cost.[163]

Under the first grant method, the annual contributions the Authority may make to public housing agencies are limited to the amount necessary to assure the low-rent character of a project and may not exceed a sum equal to the annual yield at the going federal rate of interest, plus one percent, upon the cost of the project.[164] The state or political subdivision in which the project is situated must contribute at least twenty percent of the annual federal contribution.[165]

Under the second grant method, in order to assure the low-rent character of a housing project, the Authority may donate not more than twenty-five percent of the cost of the project,[166] provided the state or political sub-

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156. Such an Act, like federal municipal bankruptcy statutes, would serve to thwart obdurate minorities.

Complementary national and state action has been suggested. HILLHOUSE, *op. cit. supra* note 103, at 351-360; Kilpatrick, *Federal Regulation of Local Debt* (1937) 26 NAT. MUNIC. REV. 283, 288; Note (1934) 43 YALE L. J. 924, 1005.

157. Pub. L. No. 412, 75th Cong., 1st Sess. (Sept. 1, 1937), 42 U. S. C. A. § 1401 (Supp. 1937).

158. *Id.* § 3 (a), 42 U. S. C. A. § 1403 (a).

159. *Id.* § 3 (b), 42 U. S. C. A. § 1403 (b).

160. *Id.* § 9, 42 U. S. C. A. § 1409.

161. *Id.* § 10, 42 U. S. C. A. § 1410.

162. *Id.* § 11, 42 U. S. C. A. § 1411.

163. *Id.* § 9, 42 U. S. C. A. § 1409.

164. *Id.* § 10 (b), 42 U. S. C. A. § 1410 (b).

165. *Id.* § 10 (a), 42 U. S. C. A. § 1410 (a).

166. *Id.* § 11 (b), 42 U. S. C. A. § 1411 (b).

division in which the project is located contributes at least twenty percent of such cost.[167]

Funds for grants are to be obtained from moneys available to the Authority, except proceeds derived from the sale of its bonds.[168] Funds for loans are derived from the proceeds of bonds which the Authority is authorized to issue.[169] These bonds are to be guaranteed as to principal and interest by the United States.[170]

In at least one important respect the United States Housing Act of 1937 differs from the recent legislation affecting federal-non-federal relationships. The other statutes provided for cooperation with various kinds of public bodies, but in housing the type of non-federal public body which is primarily affected is the local housing authority.[171] Largely as a result of the suggestions of the Public Works Administration, there are now thirty states where authorities may be created to participate in the benefits of the United States Housing Act of 1937.[172] Without the power to tax, but with the power to undertake slum clearance and low-rent housing projects financed with the aid of obligations payable from their income, these authorities should prove themselves ideally suited as the appropriate instrumentality to initiate, construct, finance and operate housing projects for the benefit of families of low income.

In the only case where the constitutionality of a statute similar to a state housing authority act has been raised, the Court of Appeals of Ken-

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167. *Id.* § 11 (f), 42 U. S. C. A. § 1411 (f).

168. *Id.* §§ 10 (d), 11 (c), 42 U. S. C. A. §§ 1410 (d), 1411 (c).

169. *Id.* § 20 (a), 42 U. S. C. A. § 1420 (a).

170. *Id.* § 20 (c), 42 U. S. C. A. § 1420 (c).

171. For a discussion of the authority as an instrumentality for financing useful, revenue-producing improvements, see Foley, *Low-Rent Housing and State Financing* (1937) 85 U. OF PA. L. REV. 239, 253; Foley, *Legal Aspects of Low-Rent Housing in New York* (1937) 6 FORDHAM L. REV. 1.

172. ALA. CODE (Supp. 1936) § 1297 (8); Ark. Acts 1937, no. 298, p. 1074; Colo. Laws 1935, c. 131, 132, *amended*, Colo. Laws 1937, c. 171, 172; CONN. GEN. STAT. (Supp. 1937) c. 33c, §§ 139d-161d; DEL. REV. CODE (1935) c. 160; Fla. Laws 1937, c. 17981; Ga. Laws 1937, no. 411, p. 210; Ill. Laws 3d Spec. Sess. 1933, no. 4, p. 159, *amended*, Ill. Laws 1937, no. 408-410, pp. 676-688; Ind. Acts 1937, c. 207, p. 1034; KY. STAT. ANN. (Carroll, 1936) § 2741a; La. Acts 1936, no. 275, p. 697; MD. CODE ANN. (Flack, Supp. 1935) art. 78a, §§ 14-20; Mass. Acts 1935, c. 449, 485; Mich. Acts Extra Sess. 1933, no. 18, p. 46, *amended*, Mich. Acts 1935, no. 80, p. 132; MONT. CODE ANN. (Anderson & McFarland, 1935) c. 404, §§ 5309.1-5309.36; NEB. COMP. STAT. (Supp. 1935) §§ 14-1401 to 14-1416, *amended*, Neb. Laws 1937, c. 94, p. 327; N. J. Laws 1933, c. 444 (State Board only); N. Y. CONSOL. LAWS (Cahill, Cum. Supp. 1931-1935) c. 67, §§ 60-78, p. 834; N. C. CODE ANN. (1935) c. 103a; N. D. Laws 1937, c. 102; Ohio Laws, 1933-1934, §§ 1078-29 to 1078-41, *amended*, OHIO CODE ANN. (Baldwin's Throckmorton, 1934) §§ 1078-29 to 1078-41; Ore. Laws 1937, c. 442; PA. STAT. ANN. (Purdon, Supp. 1937) tit. 53, §§ 2900f-2900w, *supplemented by* PA. STAT. ANN. (Purdon, Supp. 1937) tit. 35, § 1501 *et seq.*, § 1541 *et seq.*, § 1581 *et seq.;* R. I. Acts 1935, c. 2255, p. 161; S. C. Acts 1934, no. 783, p. 1369, *amended*, S. C. Acts 1935, no. 301, p. 424 and no. 345, p. 580, *amended and supplemented by* S. C. Acts 1937, no. 284, p. 431; TENN. CODE ANN. (Michie, Supp. 1937) § 4406 (82) *et seq.;* TEXAS STAT. ANN. (Vernon, 1938) art. 1269k *et seq.;* Vt. Laws 1937, no. 231, p. 284; W. VA. CODE ANN. (1937) § 1409 (56) *et seq.;* Wis. Laws 1935, c. 525, p. 900, *amended*, Wis. Laws Spec. Sess. 1937, c. 15, p. 77.

tucky rendered a decision sustaining completely the validity of the Act.[173] This case decided (1) that the law related to one subject, (2) that an authority (called a commisison in Kentucky) may exercise the power of eminent domain (a power also recognized by the New York Court of Appeals[174]), (3) that there is no delegation of legislative power, (4) that the property and the bonds of the authority are tax exempt, (5) that the debts of the authority are not debts of the state or of any political subdivision thereof, and (6) that a city can make an appropriation to an authority to enable it to meet its preliminary functioning expenses.

If a proper degree of federal-municipal relationships is to be encouraged and continued, there must be an appraisal of the Housing Act in terms of its ability to withstand attacks upon its constitutionality.

In the first place, if the constitutionality of the Act is to be assailed, a prospective litigant must establish his right to sue. Although an analysis of the legislative history of the Act discloses that, as originally introduced in Congress, provision had been made for the construction of so-called demonstration projects by the United States Housing Authority, this provision was deleted and no power to construct project now appears in it.[175] The removal of the provision for federally-constructed projects also eliminated a possible assertion by a litigant of a "standing to sue", a point which has sometimes been raised either because of the competition made possible by the Act or because of increased taxation resulting from its operation. As to the first ground, the Housing Act is analogous to the Public Works Administration Acts recently sustained by the United States Supreme Court on the theory that a private citizen has no standing in court to complain against lawful competition.[176] As to the second ground, the fact that there is no federal construction authorized under the Act distin-

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173. Spahn v. Stewart, 103 S. W. (2d) 651 (Ky. 1937).

174. New York City Housing Authority v. Muller, 270 N. Y. 333, 1 N. E. (2d) 153 (1936).

175. As S. 1685, 75th Cong., 1st Sess. (1937) was introduced by Senator Wagner, § 11 was devoted to the development and acquisition of demonstration projects. Provisions for demonstration projects were retained in the bill (§ 12) as it was reported out by the Senate Committee on Education and Labor, SEN. REP. No. 933, 75th Cong., 1st Sess. (1937), but were stricken out when the bill was debated in the Senate, 81 CONG. REC., Aug. 4, 1937, at 10541.

176. Alabama Power Co. v. Ickes, 58 Sup. Ct. 300 (1938).

Since such competition as there may be will not be by the United States Housing Authority but by the local public body which will only receive financial assistance from the United States Housing Authority, the competition complained of can only be that arising from local action pursuant to local law. To claim a "standing to sue" on this basis is to claim a right to be free from competition, whereas the *Alabama Power Company* case is controlling to the effect that it is not competition, but only unlawful competition, that is, competition accompanied by an invasion of legal rights, which gives rise to a "right to sue". See also Railroad Company v. Ellerman, 105 U. S. 166 (1881); Edward Hines Trustees v. United States, 263 U. S. 143 (1923); Sprunt & Son v. United States, 281 U. S. 249 (1930); United States *ex rel.* New York Warehouse v. Dern, 68 F. (2d) 773 (App. D. C. 1934), *cert. denied,* 292 U. S. 642 (1933); Franklin v. Tugwell, 85 F. (2d) 208 (App. D. C. 1936).

guishes it from the *Resettlement* case.[177] The standing in court which the local taxpayer was found to have in that case arose from the fact that local tax burdens would be increased as a result of the exemption of federal property from taxation. Any attempt to claim an interest as a federal taxpayer would, of course, be defeated by the principles laid down in *Frothingham v. Mellon.*[178]

Notwithstanding that it would appear that no potential litigant could challenge the constitutionality of the United States Housing Act, the applicability to the Act of points raised in other cases to challenge the constitutionality of other federal statutes deserves consideration.

The question of delegation of legislative power to an administrative officer has been frequently raised in such cases in recent years. The United States Housing Act of 1937, however, is replete with standards governing its administration. A mere cataloguing of these standards, which Congress imposed to bind the discretion of the Administrator, ought to put at rest any contention that legislative power has been improperly delegated: viz., the definition of low-rent housing and of families of low income;[179] the limitation on the types and amounts of the subsidy which may be made[180] and the provisions which must be inserted in the annual grant contracts;[181] the limit on the loans which may be made on any project[182] and on the amount which may be expended in any one state;[183] the requirement that the Authority shall dispose by lease or sale of the federal projects transferred to it as soon as possible;[184] the provisions with reference to the maximum cost per room and per family unit[185] and the provisions setting up standards relating to labor.[186]

As to the argument that the Act may violate the Tenth Amendment because it invades the reserved rights of the states, the discussion on this point in connection with the Public Works Administration is equally applicable.[187] There is not the slightest interference with the rights of the states or their subdivisions. In fact, it is this very point which makes the Housing Act such a significant development in federal-municipal relation-

177. Franklin v. Tugwell, 85 F. (2d) 208 (App. D. C. 1936) (suit brought to enjoin the expenditure of federal funds for the purchase of lands for a resettlement project).

178. 262 U. S. 447 (1923).

179. Pub. L. No. 412, 75th Cong., 1st Sess. (Sept. 1, 1937) § 2 (1), 42 U. S. C. A. § 1402 (1) (Supp. 1937).

180. *Id.* §§ 10, 11, 42 U. S. C. A. §§ 1410, 1411.

181. *Id.* §§ 10 (c), 15 (3), (4) and (5), 16 (2), 42 U. S. C. A. §§ 1410 (c), 1415 (3), (4) and (5), 1416 (2).

182. *Id.* § 9, 42 U. S. C. A. § 1409.

183. *Id.* § 21 (d), 42 U. S. C. A. § 21 (d).

184. *Id.* § 12 (b), 42 U. S. C. A. § 1412 (b).

185. *Id.* § 15 (5), 42 U. S. C. A. § 1415 (5).

186. *Id.* § 16, 42 U. S. C. A. § 1416.

187. *Supra*, pp. 496-501.

ships. It combines local sponsorship with federal financial assistance in a manner which should prove a model for future legislation. An enumeration of some of the instances will show how scrupulous Congress has been in preserving in proper balance this relationship.

In the first place, the recipients of federal financial assistance are public bodies which *under state law* are authorized to engage in the development or administration of low-rent housing or slum clearance.[188] Provisions originally appearing in the bill relating to loans to limited dividend companies [189] and leases to cooperatives [190] were eliminated.

Secondly, a project is initiated, constructed, financed and operated by the public housing agency in accordance with and pursuant to state law, and the public body in which the authority operates is required to make a local contribution to the project if it wishes federal assistance.[191]

In the third place, any contracts for loans, annual contributions, capital grants, sale or lease, must contain a provision that all architects, technical engineers, draftsmen, technicians, laborers and mechanics employed in the development or administration of a project must be paid wages prevailing in the locality as determined by local law.[192]

And, finally, the Act provides: [193]

> "The acquisition by the Authority of any real property pursuant to this Act shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property; and, insofar as any such jurisdiction may have been taken away or any such rights impaired by reason of the acquisition of any property transferred to the Authority pursuant to section 4(d), such jurisdiction and such rights are hereby fully restored."

An additional argument raised against the constitutionality of Federal Acts relates to the general welfare clause. The power to spend for the general welfare, made clear by the decision in the *Butler* case,[194] is, of

188. Pub. L. No. 412, 75th Cong., 1st Sess. (Sept. 1, 1937) § 2 (11), 42 U. S. C. A. § 2 (11) (Supp. 1937).

189. Loans to limited-profit housing agencies were authorized by § 10 of S. 1685, 75th Cong., 1st Sess. (1937), as introduced by Senator Wagner. This clause was retained in the bill as it was reported by the Senate Committee on Education and Labor, SEN. REP. No. 933, 75th Cong., 1st Sess. (1937) § 9 (b), but was stricken out when the bill was debated on the floor of the Senate, 81 CONG. REC., Aug. 3, 1937, at 10480.

190. Leases of demonstration projects to cooperatives were authorized by § 11 (d) of S. 1685, 75th Cong., 1st Sess. (1937), as introduced by Senator Wagner. This provision was retained in the bill as it was reported, SEN. REP. No. 933, 75th Cong., 1st Sess. (1937) § 12 (d), by the Senate Committee on Education and Labor, but was stricken out when the bill was debated on the floor of the Senate, 81 CONG. REC., Aug. 3, 1937, at 10480.

191. Pub. L. No. 412, 75th Cong., 1st Sess. (Sept. 1, 1937) §§ 10 (a), 11 (f), 42 U. S. C. A. §§ 1410 (a), 1411 (f) (Supp. 1937).

192. *Id.* § 16 (2), 42 U. S. C. A. § 1416 (2).

193. *Id.* § 13 (b), 42 U. S. C. A. § 1413 (b).

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

course, not without limitations. One of these limitations, as pointed out in that case, is the Tenth Amendment. It is clear, however, that there is no "scheme" [195] in the Housing Act which could conceivably be condemned as an attempt to purchase compliance with federal law in violation of a right reserved to the states. In its declaration of policy,[196] in its provisions for financial assistance for the construction of safe and sanitary dwellings,[197] in its attention to slum clearance [198] and in its references to the relief of unemployment,[199] the Act should meet successfully attacks based on its alleged violation of the general welfare clause.

Conclusion

From this attempt, in a broad general way, to outline the recent developments in the field of federal-municipal relationships, it is obvious that the extent of such relationships today resembles nothing that obtained in this field prior to 1932. These developments are different in principle from the familiar grants-in-aid to the states, and they are different in fact and in practice from the much less familiar federal services to municipalities. The past five years have witnessed the elimination of the states as the "middle-man" in negotiations between the Federal Government and local governmental units. This has been due to a variety of causes: viz., to the straitened financial burdens of the cities which the states, similarly straitened, were unable to relieve; to the gradual economic expansion of state lines; to a growing consciousness that a citizen of a municipality is no less a citizen of the United States and entitled to benefits which his own state may be unable or unwilling to provide; and finally, to a growing independence on the part of cities from their states.

Only time can tell to what extent this changing relationship is desirable. Through enabling, exemptive and preferential legislation, Congress has acted toward the cities and other public bodies in a new and significant manner. A fair appraisal of this changed attitude must await solutions to legal, political, economic and social problems which will continue to arise.

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195. *Id.* at 72.
196. Pub. L. No. 412, 75th Cong., 1st Sess. (Sept. 1, 1937) § 1, 42 U. S. C. A. § 1 (Supp. 1937).
197. *Id.* §§ 9, 10, 11, 42 U. S. C. A. §§ 1409, 1410, 1411.
198. *Id.* §§ 10 (a), 11 (a), 42 U. S. C. A. §§ 1410 (a), 1411 (a).
199. *Id.* §§ 1, 11 (e), 12 (a), 16 (6), 42 U. S. C. A. §§ 1401, 1411 (e), 1412 (a), 1416 (6).