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FEDERAL AND STATE COOPERATION UNDER  
THE CONSTITUTION

*Louis W. Koenig\**

FEDERALISM, as a system of government, is peculiar in that it involves a union of several autonomous political entities for common purposes which may be achieved through apportioning the sum total of legislative power between a "national" or "central" government, on the one hand, and constituent "states" on the other. In our own federation, a written Constitution has sought to define the functions of both these centers of government, assigning to each certain spheres of influence upon all persons and property within a given territory. At the Constitutional Convention, the committee of detail carefully listed the powers of the National Congress in eighteen brief paragraphs.<sup>1</sup> The central government was to have prescribed powers, while to the states (or the people) were to remain "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states."<sup>2</sup> A salient feature of the new federal state was the apparent equality of our two governmental centers, to which the later addition of the Tenth Amendment tended to give further emphasis.<sup>3</sup> Thus the individual states, successful in retaining their autonomy, assumed the responsibility of adequately treating the various governmental problems arising within their own frontiers.

Experience has clearly demonstrated, however, that many such problems care little for state lines. Throughout the early history of our country little attention was given to social and economic considerations in laying out state boundary lines. Instead, the haphazard formation of our states was the very opposite of the cautious planning necessary to meet modern problems. In the East, the seaboard states originated from early land patents and grants, and hence settlement and economic development in many instances followed arbitrary lines. Farther west, the trans-Appalachian settlements grew up along the rivers and other convenient points. When these villages became numerous enough in any portion of the country, they were grouped together into large

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<sup>1</sup> Later adopted as Article I, Section 8, U. S. Constitution.

<sup>2</sup> U. S. Const., art. X.

<sup>3</sup> McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 194 (1936).

units bounded by rivers and survey lines in such a manner as to provide a compact, contiguous state area. In the western United States the process was even more arbitrary. This great expanse of territory was laid out in quasi-rectangular areas, settlement was encouraged, and whenever the necessary minimum of population prescribed by Congress was reached, statehood was granted.

The inevitable outcome of these circumstances of state origin is that virtually no state is a unit socially, economically, or physically. At the outset federalism is thus handicapped with inadequate units of administration. There result three types of problems with which the individual state, acting in its own capacity, finds itself incompetent to deal. First, there are those problems which are national in scope, action on which has been denied the national government by judicial interpretation of the Constitution. Into this group fall the problems inherent in commercial transactions and business law, and the other questions of private law, such as marriage and divorce, the legal rights of children, and the questions of wills and property rights.<sup>4</sup> The second group of problems concerns forces of a regional character. Flood control, the control of oil production, forest conservation, and social problems such as unemployment relief and the administration of criminal law have no respect for artificial boundaries.<sup>5</sup> The final group is perhaps the most vexatious. States not contiguous and of different regions may be faced by the same problem because of similar industrial processes or because they are competing producers in the same economic field.<sup>6</sup> In this classification may be included the control of agricultural production and the questions concerning labor and industry made especially difficult by the involved problems of competition and varying standards of labor conditions.<sup>7</sup>

So significant is this discrepancy between political boundaries and functional limits that it has resulted in proposals from several quarters

<sup>4</sup> For discussion of these national problems which cannot be dealt with by the federal government, see *HANDBOOKS OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS*.

<sup>5</sup> 9 STATE GOV. 115 (1936); REPORT OF THE (NEW YORK) JOINT LEGISLATIVE COMMITTEE ON INTERSTATE COOPERATION 24 ff. (1936) (N. Y. Leg. Doc. No. 111).

<sup>6</sup> Cf. Williams, "State Walls and Economic Areas," 26 SURVEY GRAPHIC 192 (1937); FIRST REPORT OF THE MASSACHUSETTS COMMISSION ON INTERSTATE COMPACTS AFFECTING LABOR AND INDUSTRIES (1934). See Appendix B, p. 84, for a list of states in each industry competitive to New England industries.

<sup>7</sup> Many problems fall under more than one classification. Milk regulation, e.g., may be termed a competitive problem, although the close relationship to marketing gives its regulation a regional character.

for the redrawing of state boundaries.<sup>8</sup> It is, however, probably neither possible nor desirable to alter state boundaries. States have been "frozen" territorially, socially, legally and psychologically for so long a period that the disadvantages in changing them would outweigh the advantages.<sup>9</sup>

The general ineffectiveness of state action in coping with the problems described has contributed no little to growing dependence upon the national government in dealing with the problems of American society. The rapid recent development of a centralized authority<sup>10</sup> has suffered severe rebuffs from the Supreme Court, however, in decisions invalidating important social and economic legislation of the New Deal.<sup>11</sup> Public officials have been abruptly reminded that the powers conferred upon the federal government are definitely limited. President Roosevelt sought to overcome the obstacle of judicial interpretation and make possible his legislative program by "revitalizing" the Supreme Court, thus assuring a freer interpretation of the Constitution which would grant the national government adequate jurisdiction to act upon modern exigencies. Although the President's proposed legislation suffered defeat in the last session of Congress, indications appear that the proposal had some effect in bringing about a change of viewpoint in the Court.

There still remains the inadequacy of a state's individual efforts in dealing with problems confronting modern government. The national government is willing to assume the tasks which the states cannot perform, but frequently finds itself restrained from action by judicial interpretation. The only apparent alternative is to resort to the amending process and add to the powers of the federal govern-

<sup>8</sup> Cf. Manning, "A National Plan Study Brief," 13 *LANDSCAPE ARCHITECTURE*, special supplement (July, 1923); ELLIOTT, *THE NEED FOR CONSTITUTIONAL REFORM* (1935).

<sup>9</sup> U. S. NATIONAL RESOURCES COMMITTEE, *REGIONAL FACTORS IN NATIONAL PLANNING AND DEVELOPMENT* 20 (1935).

<sup>10</sup> The only departments of the national government achieving decentralization are the Federal Reserve System, Home Owners' Loan Corporation, Tennessee Valley Authority, and the Farm Credit Administration. Some progress has been made in the Department of Agriculture.

<sup>11</sup> Namely, *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 S. Ct. 837 (1935), invalidating the National Industrial Recovery Act; *United States v. Butler*, 297 U. S. 1, 56 S. Ct. 312 (1936) (Agricultural Adjustment Act); *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855 (1936) (wages and hours regulations of the Guffey Soft Coal Act); *Panama Refining Co. v. Ryan*, 293 U. S. 388, 55 S. Ct. 241 (1935) (federal regulation of hot oil shipments); *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 55 S. Ct. 854 (1935) (the original Farm Mortgage

ment. Amendment may be urged as the logical answer to the present anomalous situation where forty-eight separate states enact, independently of one another, social legislation affecting activities which have long ceased to be coterminous with state boundaries. Solution of the problem by constitutional amendment, however, appears improbable for some time to come for the following reasons:

1. Amendments have not been particularly successful in giving Congress powers to legislate for social and economic problems. This is illustrated by the proposed child labor amendment. In this case, a group of states, for their particular reasons, were able to deny regulation of child labor to the twenty-five states that desired it. It is reasonable to suppose that a similar fate would befall any further attempts to improve the conditions of industrial employment.

2. Such amendments would probably continue the growing centralization of our national government, which is undesirable in that federal regulation and control involve the whole nation, while many of the problems under consideration affect only a particular area or group of states.

3. The Roosevelt administration is itself reluctant to use the amending process as a means of securing permanent social and economic legislation. Preliminary propoganda is costly, procedure slow, and ultimate success doubtful. The administration has, therefore shunned the use of the amending process.

In search of a way out of the present dilemma, it is possible to consider federalism from another point of view. Instead of regarding our two governmental centers as independent agencies, each jealous of any encroachment by the other, we may regard them as mutually supplementary agencies, best performing their tasks through coordinated effort.<sup>12</sup> Thus, through the concurrent exercise of their respective powers, the federal and state governments broaden the sum total of legislative power applicable to a given problem and call into action their combined administrative agencies and facilities. This is made possible by various techniques permitted by the Constitution, which the federal government may utilize to secure the assistance of the several states, so that it may deal even with problems hitherto deemed beyond its sphere of authority. In this process of cooperation the federal gov-

Moratorium Act); *Railroad Retirement Board v. Alton R. R.*, 295 U. S. 330, 55 S. Ct. 758 (1935) (the original Railway Pension Act).

<sup>12</sup> *Ex parte McNeil*, 13 Wall. (80 U. S.) 236 at 240 (1871).

ernment is able to assume a directing or supervisory influence over the activities of the several states.

This article will examine these various techniques of cooperation with the intention of showing their sphere of activity as defined by judicial interpretation, the wide variety of problems to which they are applicable, and the general promise they hold of providing necessary social and economic legislation.

## THE TECHNIQUES OF FEDERAL-STATE COOPERATION

### I. *Federal Grants-in-Aid*

One means of realizing federal policy through coordinated effort between the state and national governments is that of the federal grant-in-aid. Very often the national government has found it expedient to hold out inducements to the states, usually of a pecuniary nature, to exercise their reserve powers in support of certain objectives of national policy. The pursuit of this policy by the national government has been prompted largely by a growing recognition of problems of national scope. On the other hand, there has been a natural reluctance to incur the dangers of centralization.<sup>13</sup> Thus grants-in-aid have been employed to achieve both these objectives as far as possible.

While the early grants were made by Congress in the exercise of its power to dispose of the property of the United States,<sup>14</sup> present-day grants are of funds appropriated from the revenues of the United States. Constitutional justification is found in Congress' power to lay and collect taxes and to spend the proceeds for the "general welfare."<sup>15</sup> By legislation the national government has undertaken to subsidize agricultural extension work in the states,<sup>16</sup> the training of teachers of

<sup>13</sup> For discussions of this subject, cf. Douglas, "The Development of a System of Federal Grants-in-Aid," 35 POL. SCI. Q. 255, 522 (1920); Burdick, "Federal Aid Legislation," 8 CORN. L. Q. 324 (1923); Corwin, "The Spending Power of Congress—Apropos the Maternity Act," 36 HARV. L. REV. 548 (1923).

<sup>14</sup> U. S. Const., art. IV, § 3, par. 2. The first grant was made in 1802 (2 Stat. L. 173) when more than seven hundred thousand acres of national lands were turned over to the newly created state of Ohio. Since that time every state of the Union has benefited by Congressional generosity. In 1837 twenty millions of dollars which had been accumulated in the treasury were distributed among the states. Beginning in 1869, the Morrill Act [12 Stat. L. 503 (1862)] opened the way for the establishment of the land grant colleges.

<sup>15</sup> U. S. Const., art. I, § 8, par. 1.

<sup>16</sup> 38 Stat. L. 372 (1914); 7 U. S. C. (1934), §§ 341-348.

agriculture, industrial subjects and home economics,<sup>17</sup> vocational rehabilitation and education,<sup>18</sup> the maintenance of nautical schools,<sup>19</sup> experiments in reforestation,<sup>20</sup> the construction of highways,<sup>21</sup> the equipment and training of the National Guard,<sup>22</sup> and other matters falling normally under the reserved powers of the states. Most of the acts cited require the fulfillment of several conditions on the part of the states before the grant is awarded. First, the state legislature must accept the federal act and make provision for the formation of some state agency endowed with authority and funds sufficient to carry out the subject of legislation. Then this state agency is required to formulate a detailed plan of action subject to federal approval. In the majority of instances the federal supervisory officials have set up minimum standards, but within broad and flexible limits the state agency is given ample opportunity to use its own discretion. A further condition imposed by the federal government in all its more recent subsidy legislation is the matching of federal funds by the benefited states. In this manner the federal government secures the right to supervise twice the amount of the original grant.<sup>23</sup>

Of course, it is not only the financial aid which the states will bring to such programs which prompts the national government to initiate cooperative programs. More important is the assistance they lend through their reserved powers. Accordingly, federal highway construction relies on the state power of eminent domain, as well as on state power to police and protect highways during and after construction. Likewise, national protection of forests is supplemented by the power of the states to regulate the conduct of persons entering forests; and the Shepard-Towner Maternity Act<sup>24</sup> was supplemented by the power of the cooperating states to compel birth registration and the licensing of mid-wives. Thus federal grants-in-aid weld together diverse powers of our governmental centers. The vast financial strength

<sup>17</sup> 39 Stat. L. 929 (1917), 45 Stat. L. 1151 (1929), 48 Stat. L. 792 (1934); 20 U. S. C. (1934), §§ 11-15d.

<sup>18</sup> 41 Stat. L. 735 (1920), 43 Stat. L. 431 (1924), 46 Stat. L. 524 (1930), 47 Stat. L. 448 (1932); 29 U. S. C. (1934), §§ 31-38.

<sup>19</sup> 36 Stat. L. 1353 (1911); 34 U. S. C. (1934), § 1122.

<sup>20</sup> 45 Stat. L. 699 (1928); 16 U. S. C. (1934), § 581.

<sup>21</sup> The Federal Highway Act, 42 Stat. L. 212 (1921); 23 U. S. C. (1934), §§ 1-25.

<sup>22</sup> 39 Stat. L. 197 (1916); 32 U. S. C. (1934), §§ 1-4.

<sup>23</sup> MacDONALD, FEDERAL AID 8 (1928).

<sup>24</sup> 42 Stat. L. 224 (1921), repealed 44 Stat. L. 1024 (1927).

of the national government is coordinated with the broad coercive powers of the states.

Only recently has the grant-in-aid come to be recognized as a fruitful device in dealing with labor problems. The outstanding example of its recent application is the Social Security Act,<sup>25</sup> which has utilized the grant-in-aid in an ingenious manner. The act levies an excise tax upon the pay rolls of employers, but rebates it to those employers who operate in states having laws fulfilling the prescribed minimum standards. The success of this use of federal aid may best be demonstrated by glancing at its results. By March 20, 1936, unemployment insurance laws had been adopted in forty-three states and the District of Columbia. Success in setting up old age pensions has been even greater, since forty-seven states provide this type of security. The third field of labor legislation contained in the Social Security Act is that of health legislation, eight million dollars being made available for allotment to states for public-health programs, thus bringing about a coordinated effort on the part of state and federal governments to solve the problems of human waste and human suffering. The Public Health Service was established to assist the several states in formulating programs for health protection in industry and extending financial aid for the creation and maintenance of facilities for such programs.

Similarly successful has been the Wagner-Peyser Act,<sup>26</sup> establishing a nation-wide United States Employment Service as an arm of the Department of Labor. According to the act passed by Congress, \$700,000 is appropriated for the establishment of the national stem and \$3,000,000 for the state branches on a matching system. By November 1936, forty-three states had accepted the terms of the Wagner-Peyser Act.<sup>27</sup>

A further possible use for grants-in-aid in the field of labor legislation was discussed by the Interstate Conference on Transients and Settlement Laws held at Trenton, New Jersey, March 6-7, 1936, attended by representatives from twenty-one states east of the Mississippi River. The conference was concerned with the plight of 275,000 transients who were deprived of the four million dollars a month aid

<sup>25</sup> 49 Stat. L. 620 (1935); 42 U. S. C. (Supp. II, 1936), c. 7.

<sup>26</sup> 48 Stat. L. 113 (1933), 29 U. S. C. (1934), §§ 49-49l.

<sup>27</sup> PROCEEDINGS OF THE THIRD NATIONAL CONFERENCE ON LABOR LEGISLATION 3 (1936).



received from the Federal Emergency Relief Administration. After discussion, the conference resolved:

“that we call upon the government of the United States, through an appropriate branch of the public service and as a part of the public assistance program, to accept immediate responsibility for the relief and employment of transients, and we urge that this relief and employment be made effective through permanent departments of state government and coordinate local units of administration and that funds be made available by the federal government on a grant-in-aid basis. . . .”<sup>28</sup>

From the instances reviewed, involving the use of the federal grant-in-aid, it is obvious that this phase of federal and state cooperation has rested on the principle of national supremacy and that of voluntary cooperation on the part of the states constitutionally equipped to cooperate. The validity of the grants themselves rests on the Supreme Court's interpretation of the “general welfare” clause of the Constitution. It is in the grant-in-aid that coordination reaches a high degree of effectiveness. By this technique is attained a true merging of powers and a real reciprocity of service on the part of the two governmental centers.

## 2. *Supplementary Legislation*<sup>29</sup>

During the last decades the National Government has seen fit on many occasions to use its powers over interstate commerce to support certain local policies of the states, exercised by the latter under their reserved powers. The chief reason for this type of federal cooperation arose from the doctrine that Congress' power over interstate commerce is ordinarily exclusive, with the usual consequence that a state may not obstruct the flow of commerce across its boundaries from the states with which it has intercourse even when such flow threatens to render local legislation ineffective.<sup>30</sup>

As a result, Congress has seen fit to aid the individual states at different times in the repression of lotteries,<sup>31</sup> the liquor traffic,<sup>32</sup>

<sup>28</sup> REPORT OF THE (NEW YORK) JOINT LEGISLATIVE COMMITTEE ON INTERSTATE COOPERATION 122 (1936) (N. Y. Leg. Doc. No. 111).

<sup>29</sup> Supplementary legislation may be defined as the concurrent application of the state police power and national control of interstate commerce to the regulation of a given problem.

<sup>30</sup> Minnesota Rate Cases, 230 U. S. 352, 33 S. Ct. 729 (1913).

<sup>31</sup> 28 Stat. L. 963 (1895); 18 U. S. C. (1934), § 387.

<sup>32</sup> 26 Stat. L. 313 (1890), 37 Stat. L. 699 (1913); 27 U. S. C. (1934), §§ 121-122.

traffic in game taken in violation of state laws,<sup>33</sup> commerce in convict-made goods,<sup>34</sup> sundry criminal activities,<sup>35</sup> and commerce in child-made goods.<sup>36</sup> This last regulation, however, has been declared invalid; for in the decision of *Hammer v. Dagenhart*,<sup>37</sup> Congress was held to have exceeded its powers, and its legislation was interpreted by the Court as an effort to coerce certain states to conform to Congressional regulation of what was more rightly states' concern.

The more recent decisions of the Supreme Court concerning this type of legislation show the Court retreating from the untenable position it assumed in *Hammer v. Dagenhart*. The first step backward came in *Whitfield v. Ohio*,<sup>38</sup> wherein was sustained the Hawes-Cooper Act of 1929,<sup>39</sup> which prohibits the sale in the original package of convict-made goods entering a state through the channels of foreign or interstate commerce. The decision was founded on the holding of *In re Rahrer*,<sup>40</sup> decided nearly half a century ago, and *Hammer v. Dagenhart*, on which the opponents of the act relied, received no mention in the Court's opinion. Again in *Kentucky Whip & Collar Co. v. Illinois Central R.R.*,<sup>41</sup> the Court by an unanimous decision upheld the Ashurst-Sumners Act,<sup>42</sup> which, based on the exercise of the interstate commerce power, denied transportation of convict-made goods intended for delivery and sale in another state where the local laws forbade it. Chief Justice Hughes, in rendering the decision, said:

"The pertinent point is that where the subject of commerce is one as to which the power of the State may constitutionally be exerted by restriction of prohibition in order to prevent harmful consequences, the Congress may, if it sees fit, put forth its power

<sup>33</sup> 31 Stat. L. 188 (1900), 35 Stat. L. 1137 (1909); 18 U. S. C. (1934), § 392.

<sup>34</sup> 45 Stat. L. 1084 (1929); 49 U. S. C. (1934), § 60.

<sup>35</sup> The white slave traffic, 36 Stat. L. 825 (1910), 18 U. S. C. (1934), § 399; traffic in stolen motor vehicles, 41 Stat. L. 324 (1919), 18 U. S. C. (1934), § 408; kidnapping, 47 Stat. L. 326 (1932), 48 Stat. L. 781 (1934), 18 U. S. C. (1934), § 408a; racketeering, 48 Stat. L. 979 (1934), 18 U. S. C. (1934), § 420a. The leading cases are *Hoke v. United States*, 227 U. S. 308, 33 S. Ct. 281 (1913), sustaining the White Slave Act, and *Brooks v. United States*, 267 U. S. 432, 45 S. Ct. 345 (1925), sustaining the Motor Vehicles Theft Act.

<sup>36</sup> 39 Stat. L. 675 (1916).

<sup>37</sup> 247 U. S. 251, 38 S. Ct. 529 (1918). Accord, *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 42 S. Ct. 449 (1922).

<sup>38</sup> 297 U. S. 431, 56 S. Ct. 532 (1936).

<sup>39</sup> 45 Stat. L. 1084 (1929); 49 U. S. C. (1934), § 60.

<sup>40</sup> 140 U. S. 545, 11 S. Ct. 865 (1891).

<sup>41</sup> 299 U. S. 334, 57 S. Ct. 277 (1937).

<sup>42</sup> 49 Stat. L. 494 (1935); 49 U. S. C. (Supp. II, 1936), § 61.

to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of the state policy. . . . The Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection."<sup>43</sup>

In the light of these recent decisions of the Supreme Court, it has been urged that the principle of supplementary legislation be applied to the problem of child labor.<sup>44</sup> There is little likelihood that all the twenty-five states ratifying the proposed child labor amendment would adopt uniform child labor laws of their own. Fear of economic competition from states with lower standards prevents the individual state from exercising its police power in order to deal with the evil. Under the principle of the Ashurst-Sumners act, however, if the twenty-five states should set up definite standards of child labor, followed by the passage of a federal act, they would be assured protection from an influx of goods from those states where child labor is exploited. This technique would serve not only as a protection to the conforming states, but would also tend to swing the other states into line. The denial of market, in states agreeing, to those not conforming to such standards would be a potent kind of economic coercion toward the nation-wide establishment of child labor standards.

### 3. *Interstate Compacts*<sup>45</sup>

The technique of interstate compacts has been suggested for subjects within the field of federal action, but as to which Congress at least temporarily abstains, and which under certain limitations are open to the states until Congress wishes them to withdraw. On the other hand, compacts have been urged for use in the zone closed to both federal and state action. Finally they are suggested for cooperative state action on a regional basis where states may act, but where

<sup>43</sup> 299 U. S. 334 at 351-352.

<sup>44</sup> FIFTH REPORT OF THE (MASSACHUSETTS) COMMISSION ON INTERSTATE COMPACTS 18 (1936).

<sup>45</sup> Compacts are provided for in article I, section 10, of the Constitution, "No state shall without the consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power. . . ." For discussion of the compact clause see STORY, COMMENTARIES ON THE CONSTITUTION, § 1396 (1833) [5th ed., § 1402 (1891)]; 31 YALE L. J. 635 (1922); 26 COL. L. REV. 216 (1926). Fifty-six acts or joint resolutions consenting to or authorizing compacts had been approved by Congress up to 1935. Of these only twelve came between 1789 and 1900; 14 between 1900 and 1918; and 13 between 1918 and 1935. (Ten interstate agreements

the federal government under its constitutional powers may do nothing.<sup>46</sup>

The zone for exclusive state action is limited, from the constitutional point of view, by the definition of interstate commerce and the doctrine of Congressional consent;<sup>47</sup> but subjects barred here may still fall into the first zone. The course of judicial interpretation of the interstate commerce clause compels the conclusion that the states are not excluded from dealing with interstate commerce as long as Congress itself has not seen fit to legislate, and, furthermore, provided that state action neither discriminates against interstate commerce nor unduly hampers it.<sup>48</sup> The explanation for such an interpretation of the clause is the fact that the regulation of the great expanse of interstate commerce cannot possibly be effected by a single legislative authority. Uninterruptedly since 1789, state legislation has occupied itself with interstate commerce, and such action has found judicial justification by such practical considerations as the adaptability of state relief as against nation-wide action, the restricted manifestation of the problem dealt with, or the limited benefit of its correction.<sup>49</sup> Accordingly, certain interests, although definitely falling in the category of interstate commerce and open to Congressional control, are of such especial concern to the individual states that state action in their regard has been sanctioned. Thus laws concerning health,<sup>50</sup> safety,<sup>51</sup> pilotage,<sup>52</sup> tax-

made between 1803 and 1894, although not approved by Congress, were either not challenged or upheld as not needing consent.) Of all these compacts, however, only thirty-four of those authorized by Congress have been consummated by the states.

<sup>46</sup> Cf. WARREN, *THE SUPREME COURT AND SOVEREIGN STATES* 75 (1924); Bruce, "The Compacts and Agreements of States with One Another and with Foreign Powers," 2 *MINN. L. REV.* 500 (1918); Wilson, "Interstate Compacts under the Constitution—Past Uses and Future Possibilities," 57 *A. B. A. REP.* 734 (1932).

<sup>47</sup> See, Biklé, "The Silence of Congress," 41 *HARV. L. REV.* 200 (1927).

<sup>48</sup> Frankfurter and Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 *YALE L. J.* 685 at 720 (1925).

<sup>49</sup> *Minnesota Rate Cases*, 230 U. S. 352, 33 S. Ct. 729 (1912); *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 2 S. Ct. 185 (1882); *Cardwell v. American Bridge Co.*, 113 U. S. 205, 5 S. Ct. 423 (1884).

<sup>50</sup> *Plumley v. Massachusetts*, 155 U. S. 461, 15 S. Ct. 154 (1894), upholding a state statute prohibiting the sale of deleterious oleomargarine in original packages; *Rasmussen v. Idaho*, 181 U. S. 198, 21 S. Ct. 594 (1901), upholding state statute permitting the governor to prohibit the importation of sheep from localities in other states where he has reason to believe an epidemic exists.

<sup>51</sup> *Kane v. New Jersey*, 242 U. S. 160, 37 S. Ct. 30 (1916), upholding a state statute requiring registration of automobiles of non-resident owners and providing for service of process on them; *Erie R. R. v. Board of Pub. Util. Commissioners*, 254 U. S. 394, 41 S. Ct. 169 (1921), upholding a state statute requiring the abolition of grade crossings.

<sup>52</sup> *Cooley v. Board of Wardens*, 12 How. (53 U. S.) 299 (1851); *Ex parte*

ation,<sup>55</sup> and public works,<sup>54</sup> have been permitted to the several states.<sup>55</sup>

In those instances in which the states assume to extend their police power over some sphere of interstate commerce which Congress has refrained from regulating, the Supreme Court has ruled that an express permission for state control must first be granted by Congress.<sup>56</sup> The Court has ruled that the absence of Congressional action implies that it is the will of Congress that the problem in question remain free from any state interference.<sup>57</sup>

Interstate compacts, therefore, by securing Congressional consent, not only fulfill the stipulations of the compact clause of the Constitution, but in so far as they extend the police power of the states over interstate commerce, meet the requirements of the doctrine of Congressional consent. Congress finds in this condition adequate supervisory power over the action of states which are parties to the agreement.

Moreover, Congress, by giving consent beforehand, is in a position to stimulate and encourage state action. By the Ashurst-Sumners Resolution of 1934,<sup>58</sup> Congress gave advance consent to compacts in the field of crime control. In 1911, Congress anticipated state action and invited states "to enter into any agreement or compact, not in conflict with any law of the United States," with any other state or states, for the purpose of conserving the forests and water supply of the states entering into such agreement or compact.<sup>59</sup> Congress has sought to

McNiel, 13 Wall. (80 U. S.) 236 (1871); *Wilson v. McNamee*, 102 U. S. 572 (1880); *Olsen v. Smith*, 195 U. S. 332, 25 S. Ct. 52 (1904).

<sup>55</sup> The many cases on this subject have been collected by Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 HARV. L. REV. 321 (1918).

<sup>54</sup> *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 S. Ct. 622 (1893), upholding state authorization allowing a corporation to exact tolls for the use of improvements constructed by it in a navigable stream; *Lake Shore & Mich. So. Ry. v. Ohio*, 165 U. S. 365, 17 S. Ct. 357 (1897), upholding a state order requiring removal of a bridge as obstruction to navigation.

<sup>55</sup> *Decker v. Baltimore & N. Y. R. R.*, (C. C. N. Y. 1887) 30 F. 723.

<sup>56</sup> *Leisy v. Hardin*, 135 U. S. 100, 10 S. Ct. 681 (1889); *Bowman v. Chicago & N. W. Ry.*, 125 U. S. 465, 8 S. Ct. 689, 1062 (1888); *Lyng v. Michigan*, 135 U. S. 161, 10 S. Ct. 725 (1889). Here the Court has ruled that though state laws regulating interstate commerce are void, they might have been legal if Congress had authorized them.

<sup>57</sup> *Oregon-Washington R. R. & Nav. Co. v. Washington*, 270 U. S. 87 at 101, 46 S. Ct. 279 (1926).

<sup>58</sup> 48 Stat. L. 1909 (1934); 18 U. S. C. (1934), § 420.

<sup>59</sup> 36 Stat. L. 961 (1911); 16 U. S. C. (1934), § 552.

hasten action by setting time limits in several of the controversial water agreements. In the Columbia River agreement it set the deadline for January 1, 1927,<sup>60</sup> but the dilatory tactics of the conferees necessitated extensions until January 1, 1935. Similar arrangements for a time limit were provided in the Boulder Canyon Project Act,<sup>61</sup> but were likewise unsuccessful in hastening state action.

Whether or not the states desire it, Congress may insist on federal participation in the negotiation of the compact. Thus it conditioned its authorization of a statute for the apportionment of the waters of the Columbia River by stipulating that representatives of the federal government should be present at the writing of the compact.<sup>62</sup> Again in the proposed authorization for labor compacts, Congress provided for active federal participation, despite the fact that the state police power has always held that particular form of legislation as its special province. The original form of Congressional permission proposed that federal consent be conditional on the participation in the negotiations between states of "a representative . . . of the United States, to be appointed by the President."<sup>63</sup>

But Congress may do more than merely participate in the negotiations of a compact. It may grant its consent but retain the right to protect its own interest in the future. Thus the agreement which amplified the powers of the Port of New York Authority contained a proviso that the rights or jurisdiction of the United States should not be affected by the action of New York and New Jersey under the agreement and that no change should be made in the navigable capacity or condition of any such waters until the plans thereof had been approved by the chief of engineers and the Secretary of War.<sup>64</sup> Important is the fact that Congress reserved "the right to alter, amend or repeal this resolution," and thus stretched out its hand into the future.

After the compact has been ratified, federal power continues in several ways. First, there may be an informal use of the resources of the federal government by the interstate administrative organization. The federal government may exercise control over an interstate administration by the relationship of federal law to the administrative body.

<sup>60</sup> 44 Stat. L. 1403 (1927).

<sup>61</sup> 45 Stat. L. 1057 (1928), 43 U. S. C. (1934), § 617 et seq.

<sup>62</sup> 43 Stat. L. 1268 (1925).

<sup>63</sup> H. J. Res. 267, 73d Cong., 2d sess. (1934).

<sup>64</sup> 42 Stat. L. 174-180 (1921).

On the request of the states that are members to a compact, the federal government may be represented in the actual administration of the agreement, as was done in the minimum wage compact. Where the federal government has an especial interest, it may prescribe a definite part for itself in the administration established.<sup>65</sup>

A labor compact agreed to by Congress might subsequently interfere with the control of conditions of labor in interstate commerce, and therefore Congress, regardless of previous stipulations, might repeal or alter its consent. As the federal government retains the right to interfere if its prerogatives are challenged, its control increases as the number of these prerogatives are increased. Here then is a means of important federal regulation of state activities under the compact clause, particularly in regard to matters of social legislation which formerly were the peculiar concern of the states.<sup>66</sup>

Often the assistance of the national government is necessary in order that the compact adopted by the states may be successful. The proposed oil compact is an example. No matter how effectively the states concerned might cooperate to carry out the production quotas of the agreement, they would still be threatened by an independent source of supply, that of importations. The only solution is to secure the assistance of the federal government to check importations and to make them conform to the intent of the compact.<sup>67</sup>

The federal government may also perform the useful function of protecting the interests of the non-compacting states. To use the oil compact again as an illustration, it will be the task of the federal government to see that the production quotas determined will not be to the detriment of the consumer.

It is well established that the United States government may enter into a compact with a state.<sup>68</sup> A recent instance is to be found in the final Boulder Canyon Project Act which includes the federal government as an actual party to the agreement. Again, the prison labor compact was signed not only by the states but also by the District of Columbia and the Department of Justice.<sup>69</sup>

<sup>65</sup> See the Prison Labor Compact, art. 7, § 1 (approved by the President by Executive Order of April 19, 1934); reprinted 2 *NRA REPORTER* 167 (1934).

<sup>66</sup> Clark, "Interstate Compacts and Social Legislation," 50 *POL. SCI. Q.* 502 at 522 (1935).

<sup>67</sup> *REPORT V OF THE FEDERAL OIL CONSERVATION BOARD* 3 (1932).

<sup>68</sup> *Stearns v. Minnesota*, 179 U. S. 223, 21 S. Ct. 73 (1900).

<sup>69</sup> 39 *MONTHLY LABOR REVIEW* (U. S. Bur. Labor Statistics) 1130 (1934).

The problems to which the device of interstate compacts has been applied or suggested vary greatly in their nature. They include such diverse subjects as boundary settlements, conservation of forests, conservation of water supply, flood control, irrigation, navigation, control of water pollution, conservation of game and fish, conservation of oil resources, public works projects (bridges and tunnels), automobile and truck control, public utilities control, commercial law uniformity, debt settlements, conflicting taxation agreements, regulation of prices, regulation of labor (hours and wages and child labor), and relief of transient indigents.<sup>70</sup> Space permits examination of only a few fields of activity which more generally affect constitutional change.

In the matter of utility regulation it is clear that Congress has power to regulate where the utility company is engaged in interstate commerce. But it is undecided whether Congress has power to regulate holding or affiliated companies that are so engaged. It has been suggested from many quarters that the remedy lies in cooperative regulation by federal and state governments so as to leave to the states essentially local or regional problems, to reserve perhaps to the federal government a residuum of control and at the same time to avoid conflicts in administration which would make regulation by all agencies ineffective.<sup>71</sup> The compact would be a fruitful device for permanently establishing regulation of utilities by the cooperative activity of the federal and state governments.

It has been suggested that the Department of Agriculture decentralize its activities on a state and regional basis, wherever practical, by means of the compact or through the use of the grant-in-aid. The eventual solution may be found in the establishment of functional compacts between states having similar farming conditions, with the federal government acting in a coordinating and advisory capacity.

<sup>70</sup> For a list of compacts, see ELY, *OIL CONSERVATION THROUGH INTERSTATE AGREEMENT*, Appendix II, p. 359 (1933). For a list of possible uses of compacts, see HOWARD, *REVIEW OF REFERENCES ON INTERSTATE COMPACTS* (1936). The problems of water supply and irrigation have received treatment in studies of the Colorado River Compact. See Corthell, "The Colorado River Problem," 9 A. B. A. J. 289 (1923); Wiel, "One Aspect of the Colorado River Interstate Agreement," 11 CAL. L. REV. 145 (1923); OLSON, *THE COLORADO RIVER COMPACT* (1926). The problem of public works projects—bridges and tunnels—has been discussed by Cohen, "The New York Harbor Problem and its Legal Aspects," 5 CORN. L. Q. 373 (1920). Labor compacts are summarized by Johnson, "Interstate Compacts on Labour Legislation in the United States," 33 INT. LABOR REV. 790 (1936). Oil conservation through compacts is discussed by Ely, *op. cit. supra*.

<sup>71</sup> REPORT OF THE PRESIDENT'S RESEARCH COMMITTEE ON SOCIAL TRENDS [RECENT SOCIAL TRENDS IN THE UNITED STATES] 1477 (1932).



This has been evidenced already by the efforts made by some of the southern states to formulate a tobacco compact. To pave the way for such cooperation between the federal and state governments, the Department of Agriculture has recently entered into cooperative agreements with the experiment stations of every state for the purpose of getting each state to redefine the agricultural and other regional areas, and determine what adjustments would be necessary in order that fertility be maintained, erosion be controlled, and an efficient and sound farm management program be developed.

The general purposes of the labor compacts now under consideration are the obtaining of higher standards of labor legislation than at present exist in any state, and the promotion of uniformity in existing labor legislation. In this way the compacts may serve to bring states without adequate legislation up to standards already established by the more progressive states. The compacts also seek to deal with the special problems which concern a group of states and are soluble by no single state.<sup>72</sup> Most noteworthy progress has been made in the minimum wage compact which was adopted by seven states in 1934. Action on the child labor compact has been deferred in order not to conflict with the proposed child labor amendment.

Although compacts in the field of labor legislation have not been consummated very rapidly, they have often been mentioned as substitutes for the dead National Industrial Recovery Act. Leaving to the federal government the regulation of industrial conditions under the powers of the interstate commerce clause, it has been urged that compacts could attend to intra-state activity. The federal government would submit its codes of fair competition to the states in the form of a compact, which would be signed by the various states concerned with the particular industry to be regulated.<sup>73</sup> In this way, through the coordinated effort of the national and state governments, and their combined jurisdictions, the problem of regulating industrial conditions would receive more adequate treatment.

Experience with compacts in matters of social and economic nature

<sup>72</sup> Johnson, "Interstate Compacts on Labour Legislation in the United States," 33 *INT. LABOR REV.* 790 (1936).

<sup>73</sup> The states showed their willingness to cooperate with legislation under the NRA. The national act was supplemented in many states by state recovery acts which were designed to make effective national codes of fair competition with respect to intrastate transactions. California, Colorado, Idaho, Illinois, Indiana, Nevada, New Mexico, New York, Ohio, South Carolina, Utah, Virginia, Washington, West Virginia, and Wyoming passed such laws.

has been very slight and relatively recent. Many are discouraged with the slowness of negotiating compacts and the involved procedure necessary before their final consummation. On the other hand, there is reason to believe that habituation to the process of negotiating and the pressure of emergency will gradually cause the interstate compact to become an increasingly fruitful device.

#### 4. *Reciprocal Legislation*

Less complicated than the involved procedure of interstate compacts is that of reciprocal legislation. By this method an agreement between states may take the form of an offer by one state, evidenced by a statute, followed by acceptance by one or many other states, evidenced in the same manner.<sup>74</sup> Doubt still remains whether such an agreement requires Congressional sanction to become valid, since the Supreme Court has never decided this point. It has been contended, however, that the law of interstate compacts would cover reciprocal legislation, particularly in those instances which operate to extend the sphere of political power of a state or which would affect federal sovereignty. Under these circumstances Congressional consent is necessary. In most cases the statute under consideration recites a series of enactments, the effectiveness of which is conditioned upon agreement to similar provisions by other named states.

Reciprocal legislation has achieved its most conspicuous success in the field of taxation. Fifteen years ago, in their desire to tax everything that might conceivably bear taxation, the American states had enacted inheritance laws which often resulted in taxation of the same property in two or more states even where there was no question as to domicile. To remedy this situation, representatives of four states met and decided to recommend to their respective legislatures reciprocal laws dealing with the subject. These laws provided merely that New York, for example, would refrain from taxing the intangibles of Massachusetts decedents if Massachusetts would give the same treatment to inhabitants of the Empire state.<sup>75</sup> The growth of this movement during the past ten years has reduced the possibility of conflicting taxation.

Any appraisal of the usefulness of reciprocal legislation is handi-

<sup>74</sup> See Lindsay, "Reciprocal Legislation," 25 POL. SCI. Q. 435 (1910).

<sup>75</sup> REPORT OF THE (NEW YORK) JOINT LEGISLATIVE COMMITTEE ON INTERSTATE COOPERATION 43 (1936) (N. Y. Leg. Doc. No. 111).

capped by the limited experience in its application. Those who have often despaired of the cumbersomeness of the interstate compact, as applied to a large number of states in the solution of a common problem, have turned to reciprocal legislation as a more convenient method of securing state cooperation, since the absence of a written agreement necessitating lengthy consultation and discussion shortens the time period necessary to attain the desired objective. On the other hand, the vagueness of reciprocity, in that it requires no written agreement and is consequently more susceptible of alteration by subsequent legislation, may reduce its value considerably as a technique of federal and state cooperation.<sup>76</sup>

### 5. *Interstate Regional Planning*

A further method of dealing with the problems which exceed state lines and are common to several contiguous states is the device of regional planning and administration. While it is only recently that interest in this field has become apparent, noteworthy achievement has been made in several instances. In the Rocky Mountain section a large interstate regional survey project is under way. While not yet crystallized into a definite organization for planning, this project evidences definite recognition of the need for development planning on an interstate basis. The New England Planning Commission has gone further in its survey and gives promise of playing a leading role in achieving a more coordinated growth of New England. It is interesting to note that both these regional planning commissions are organized primarily as enterprises for collaborative planning by the several states involved. The membership of the commissions consists entirely of representatives of state planning boards, with the exception of the chairman, who is a federal officer, and one member at large.<sup>77</sup>

The federal government, however, has produced the greatest achievement on a regional scale in the creation of the Tennessee Valley Authority, which is a legal and administrative unit with powers like those of a corporation. It was created by legislative act for the purpose of carrying out specified programs embracing the fields of water control, power development and utilization, fertilizer production, agricultural and industrial development, afforestation and soil erosion

<sup>76</sup> Chamberlain, "Current Legislation," 9 A. B. A. J. 207 (1923).

<sup>77</sup> U. S. NATIONAL RESOURCES COMMITTEE, REGIONAL FACTORS IN NATIONAL PLANNING AND DEVELOPMENT 14, 25 (1935).

control, housing, and social and economic research. Its direct influence has been felt by approximately two million people living in the watershed area while additional millions in the adjoining territory have also been affected. It is interesting to note that all of the seventeen bills before the Seventy-fourth Congress proposing authorities similar to the TVA were actually based on the TVA.<sup>78</sup> However, all of these do not intend to operate on the basis of a federal corporation. The Arkansas Valley Authority, the Connecticut, Merrimack, and Wabash bills each contained a section in which the states concerned are expressly permitted to negotiate compacts for "a comprehensive plan for the development" of the regions concerned.

In its analysis of the possibilities of regional planning, the National Resources Committee came to the conclusion that in the states reside many of the powers necessary to make planning a reality. At the same time it is obvious that the problems to be treated do not conform to state lines, but resolve themselves into regional units, and thus do not offer themselves to treatment by existing political arrangements. The solution seen by the committee is a regional organization for planning, authorized by and based upon a combination of federal and state powers; and interstate compacts, federal corporate authorities, federal-state corporate authorities, or other means suitable to specific cases, for carrying out planned development programs.<sup>79</sup>

To accomplish the desired objectives the committee believes it necessary to proceed in such a manner that regional planning will materialize out of state powers and that full use will be made of the state planning boards which now exist in all but three of the states.

<sup>78</sup> Although a federal corporation, the TVA needed the assistance of the several states to become effective in its operation. In 1933 the Alabama legislature, just before the TVA act was passed by Congress, enacted three laws authorizing counties, cities, and towns to construct and operate electric-light plants, power plants, transmission lines, and power distributing systems. In the eleven bills passed by the Tennessee legislature, some take away the jurisdiction of the state railroad and public utilities commission over the TVA, and authorize a permanent Tennessee state planning commission, regional planning and zoning agencies. Governor McAlister has encouraged the cooperation of the state administrative departments with the TVA wherever possible. On November 20, 1934, a written agreement between the Department of Agriculture and the TVA and the agricultural colleges of seven southern states concerned with the TVA was signed. This agreement, relative to a "systematic procedure for a coordinated program of agricultural research extension and land use planning within the region of the TVA" has the purpose "to coordinate those phases of research extension . . . which are related to a unified regional agricultural program."

<sup>79</sup> U. S. NATIONAL RESOURCES COMMITTEE, REGIONAL FACTORS IN NATIONAL PLANNING AND DEVELOPMENT 23 (1935).

It should be assumed that state planning will continue, but that it may be redirected into the channels of interstate cooperative planning. In this, the federal government will play a supervisory role and devise nuclei about which state planning efforts will come to cluster.<sup>80</sup>

### 6. *The Conference*

In order that there may be a real coordination between the plans and activities of the state and federal governments, some opportunity must be afforded officials of the two governmental centers to meet, and to discuss and organize future programs of governmental action. Recently the method of conferences between our governmental officials has become an essential element of federal and state cooperation.

Particularly important have been the national conferences on labor legislation called by the Secretary of Labor.<sup>81</sup> Experience with the National Recovery Administration has taught the federal government the importance of securing every possible assistance from the various state labor departments in the administration of laws dealing with labor standards. But effective cooperation presupposes the existence of state labor departments financially capable and legislatively empowered to supplement any national program of labor legislation. It is largely toward the fulfillment of these objectives that much of the discussion of the recent labor conferences has been devoted.

Consequently, it has been deemed best to establish the Division of Labor Standards within the United States Department of Labor. The principal duty of this division is to cooperate with the states in the development of their labor legislation and in the planning of such investigations and surveys as they wish to make of the labor problems of a particular area or representative industry which is either new or powerful in the life of the state. The Division is a clearing house of state experience in dealing with various labor problems, so that information is readily available to all states regarding a problem which has already been met by one or more states.

The three national conferences on labor legislation called by the Department of Labor have been very successful in securing the cooperation of the several states in the support of federal legislation. The conferences have served to educate the various state representatives as

<sup>80</sup> *Ibid.*, 24.

<sup>81</sup> There have been three National Conferences for Labor Legislation. The first was held at Washington, D.C., February 14-15, 1934; the second at Asheville, N.C., October 4-5, 1935; the third at Washington, D.C., November 9-11, 1936.

to the purposes of the host of new federal labor laws passed during the last few years. The result has been a rapid acceptance on the part of the states of the standards and recommendations adopted by the conferences. During the years between 1933 and 1936, the several states have enjoyed their most fruitful period of labor legislation. Shortening of hours or strengthening of existing laws was achieved by thirteen states, minimum wage laws were adopted by nine states; protection against accident and industrial disease has been provided by sixteen states; regulation and abolition of industrial homework by three states; collection of unpaid wages by three states; maintenance of state employment services in cooperation with the United States Employment Service in forty-three states; regulation of fee-charging employment agencies by five states; curbs on the issuance of injunctions by eighteen states; regulation of prison-made goods by twenty-nine states; the sixteen-year age minimum for the employment of children has been established by seven states.<sup>82</sup>

Recognizing the desirability of dealing with regional problems, the United States Department of Labor has been ever ready to call regional conferences desired by the various states. Thus during 1935 regional conferences were held in Nashville, Tennessee; Lansing, Michigan; and San Francisco, California; the latter being attended by representatives from the Pacific Coast states and Nevada.

In the light of this progress, labor officials are convinced that conferences between state and federal representatives are excellent means of bringing about improvement in the conditions of wage earners. The conferences have served to clarify the issues and problems and to harmonize different points of view concerning the highly controversial subject of labor legislation. As a result, a practical standard emerges which may serve as a model for state legislation. Despite the brief experience with its usage, the conference method promises to be of invaluable assistance in bringing order out of the chaos that has resulted from sporadic attempts on the part of the states to solve their labor problems by individual action.

#### 7. *The Utilization of State Administrative Agencies by the Federal Government*

A recognition of the constant interaction of economic phenomena in the constitutionally separated interstate and intrastate jurisdictions

<sup>82</sup> PROCEEDINGS OF THE THIRD NATIONAL CONFERENCE ON LABOR LEGISLATION 28 (1936).

reveals the inadequacy of exclusive state or federal intervention and points to the possibilities of joint or cooperative action. Consequently, a technique of federal-state cooperation has been applied, wherein the federal government utilizes state administrative agencies, by authorizing state commissions to administer federal laws, not in a capacity of state officers and by virtue of the authority conferred upon them by their respective state governments, but rather in a federal capacity and by virtue of authority conferred upon them by the federal government. Hence they become its agents.<sup>83</sup>

Such a technique of cooperative activity has been applied to such diverse problems as the apprehension of fugitives from justice,<sup>84</sup> the

<sup>83</sup> In *Parker v. Richard*, 250 U. S. 235 at 239, 39 S. Ct. 442 (1919), a case involving the federal statute requiring the approval of a state probate court as a condition precedent to the valid conveyance of lands by a restricted Indian heir, the Court said: "That the agency which is to approve or not is a state court is not material. It is the agency selected by Congress and the authority confided to it is to be exercised in giving effect to the will of Congress in respect of a matter within its control. Thus in a practical sense the court in exercising that authority acts as a federal agency. . . ."

See also *Matter of Spangler*, 11 Mich. 298 (1863), with respect to the status as federal officers of county draft commissioners appointed by the governor of Michigan during the Civil War in accordance with the President's proclamation. That state officers in administering and executing federal laws are federal agents is emphasized by the cases in which it has been held that state officers when performing federal functions are subject to the limitations imposed by the Constitution upon the federal government. Thus state police in making arrests for federal offenses and judges of state courts in issuing search warrants in connection with alleged federal offenses are bound by the limitations imposed by the Fourth and Fifth Amendments respecting searches and seizures and the issuance of search warrants. *Gambino v. United States*, 275 U. S. 310, 48 S. Ct. 137 (1927); *Byars v. United States*, 273 U. S. 28, 47 S. Ct. 248 (1927).

<sup>84</sup> For illustrative material, see Barnett, "The Delegation of Federal Jurisdiction to State Courts by Congress," 43 AM. L. REV. 852 (1909); Barnett, "Cooperation Between the Federal and State Governments," 17 NAT. MUN. REV. 283 (1928), revised and published in 7 ORE. L. REV. 267 (1928); Holcombe, "The States as Agents of the Nation," 1 S. W. POL. SCI. Q. 307 (1921); Wheeler, "Use of State Agencies in Aid of Discharge of Federal Functions," 99 CENT. L. J. 222 (1926); Beard, "Government by Special Consent," 25 AM. POL. SCI. REV. 61 (1931); MacMahon, "Summary of Round Table Conference on Federal Relations," 22 AM. POL. SCI. REV. 428 (1928).

In the extradition act of 1793, 1 Stat. L. 302, Congress not only authorized but also attempted to make it the duty of the governor of a state, at the request of a governor of another state, to cause a fugitive from justice to be arrested and turned over to the demanding state. See *Kentucky v. Dennison*, 24 How. (65 U. S.) 66 (1860). With only minor changes the provisions of this act are incorporated in the

enforcement of the National Prohibition Act,<sup>85</sup> public health administration,<sup>86</sup> the enforcement of the Plant Quarantine Act,<sup>87</sup> and the Public Utilities Act of 1935 which makes it permissible for the federal commission to utilize the services of state officers.<sup>88</sup>

The method ordinarily utilized by the federal government in securing the assistance of state agencies is to commission their officers. The person so commissioned is vested with authority to execute two sets of laws, federal and state, and, in theory, is following the dictates of two governing bodies. In the actual discharge of his duties, however, he so completely integrates his work that the borderline between the two governmental centers disappears. Such a procedure is illustrated by the Pure Food and Drug Act of 1906, wherein the Secretary of Agriculture was empowered to grant commissions to state officials authorizing them to collect and examine samples of foods and drugs in interstate shipments. At the request of these commissioned state officials, inspectors and agents under their direction are appointed by the Secretary of Agriculture as official agents of his department to provide administrative assistance.<sup>89</sup> State chemists also are appointed

Revised Statutes and are in force at the present time. 18 U. S. C. (1934), § 662. Under the Fugitive Slave Act of 1850, 9 Stat. L. 462, local peace officers acting under warrants issued by local magistrates were authorized to apprehend fugitive slaves and return them to their masters.

<sup>85</sup> An executive order of the President of the United States, dated May 8, 1926 authorized the commission of state peace officers as federal agents, at a nominal salary, to assist in the enforcement of the National Prohibition Act. See Wheeler, "Use of State Agencies in Aid of Discharge of Federal Functions," 99 CENT. L. J. 222 (1926); Hart, "Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement," 13 VA. L. REV. 86 (1926).

<sup>86</sup> The state health authorities assist the Public Health Service in administering and enforcing the United States Interstate Quarantine Regulations. See SCHMECKEBIER, *THE PUBLIC HEALTH SERVICE* 99-105 (1923). State sanitary engineers assist with the inspection of water supplies used by interstate carriers. See Public Health Service, *INTERSTATE QUARANTINE REGULATIONS OF THE UNITED STATES*, rev. ed., § 19 (c) (1921). State engineers are commissioned by the Public Health Service as collaborating sanitary engineers. Likewise officials of state health departments collect and forward reports of diseases to the Service and are commissioned by it as collaborating epidemiologists.

<sup>87</sup> The Plant Quarantine Act—37 Stat. L. 316 (1912), 7 U.S.C. (1934), § 156—authorizes the use of state officials to assist in the enforcement of its provisions. See WEBER, *THE PLANT QUARANTINE AND CONTROL ADMINISTRATION* 23, 125 (1930).

<sup>88</sup> 49 Stat. L. 803 (1935), 15 U. S. C. (Supp. II, 1936), § 79 et seq.

<sup>89</sup> REGULATIONS FOR THE ENFORCEMENT OF THE FEDERAL FOOD AND DRUGS



agents of the Department of Agriculture to analyze foods and drugs in interstate shipments.<sup>90</sup> The Act of 1906 ordered federal district attorneys to prosecute any violation of the act upon presentment of satisfactory evidence by the health, food, or drug officers or agents of any state.<sup>91</sup>

Such cooperation of state and federal administrative agencies is of mutual advantage to the federal and state governments. State governments profit in that it permits local personnel to regulate interstate shipments which otherwise would be out of their reach under the Constitution. Both governments have the benefit of more efficient law enforcement, for if an inspector armed with both federal and state authority seizes a batch of goods, there is no escape, no unnecessary delay, in determining whether the violation concerned federal or state laws. There is no need for the inspector to communicate with any other administrative organization to place the matter in different hands. Under such a procedure, the federal government benefits further, since local men acting as national agents uncover many infringements of the Food and Drug Act which would escape the attention of a separate and necessarily small force of federal field men enforcing the law alone.<sup>92</sup>

Another example of utilizing state agencies by commissioning their officers is that of interstate game supervision, a province in which the federal government has power to act, but does not exercise that power.<sup>93</sup> Instead, state wardens have been deputized for the administration of the Lacey Act<sup>94</sup> and the Migratory Bird Treaty Act.<sup>95</sup> These deputized

ACT, 10th rev., Food and Drug Administration, Service and Regulatory Announcements, Food and Drug No. 1, issued November 1930, U. S. Department of Agriculture, Regulation 3.

<sup>90</sup> See Frisbie, "Federal and State Agencies Unite in Enforcing Food and Drug Acts," U. S. DAILY 9:2 (Oct. 18, 1929); WEBER, THE FOOD, DRUG AND INSECTICIDE ADMINISTRATION 22, 26, 45 (1928).

<sup>91</sup> 34 Stat. L. 769 (1906), 21 U. S. C. (1934), § 12.

<sup>92</sup> Beard, "Government by Special Consent," 25 AM. POL. SCI. REV. 61 (1931); MacMahon, "Summary of Round Table Conference on Federal Relations," 22 AM. POL. SCI. REV. 428 (1928).

<sup>93</sup> Cf. Bureau of Biological Survey, Reprint of Misc. Pub. No. 88, U. S. Department of Agriculture; CONNERY, GOVERNMENTAL PROBLEMS IN WILD LIFE CONSERVATION, cs. 3-9 (1935).

<sup>94</sup> 31 Stat. L. 187 (1900), 16 U. S. C. (1934), § 701.

<sup>95</sup> 40 Stat. L. 755 (1918), 16 U. S. C. (1934), §§ 703-711. See Chamberlain, "The Migratory Bird Treaty Decision and its Relation to Labor Treaties," 14 AM. LABOR LEG. REV. 133 (1920).

state wardens are under the general supervision of their own state officials and also of the Division of Game and Bird Conservation of the Bureau of Biological Survey, Department of Agriculture. Since the Bureau has only twenty-seven agents, each covering the territory of two states and working in cooperation with the deputized state wardens, the state burden is a heavy and difficult one.<sup>96</sup>

Of the commissions of the federal government utilizing state commissions in the discharge of their duties, the Interstate Commerce Commission has achieved, perhaps, the most noteworthy success. In 1920 the Transportation Act gave statutory recognition to the cooperative effort of federal and state commissions to regulate the various phases of the railroad industry.<sup>97</sup> The act specifically ordered the Interstate Commerce Commission to notify interested states of all proceedings bringing into issue any rate, regulation, or practice made or imposed by state authorities. Secondly, the Commission was permitted to confer with state authorities concerning the "relationship between rate structures and practices" of carriers subject to state and federal regulation, and, under rules to be prescribed by it, to hold joint hearings "on any matters wherein the commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the commission." Finally, the commission may

<sup>96</sup> Cf. CONNERY, *GOVERNMENTAL PROBLEMS IN WILD LIFE CONSERVATION* 223-224 (1935).

<sup>97</sup> 41 Stat. L. 484 (1920), 49 U. S. C. (1934), § 13(3). Cooperation in the regulation of the railroad industry started early, for only two years after the passage of the Interstate Commerce Act in 1887, the National Association of Railroad and Utilities Commissioners was formed to secure uniformity in state and federal laws regulating the industry, and to harmonize the regulatory policies and administration of the state and federal tribunals. See 1 *PROC. NAT. ASSN. R. R. & UTIL. COMMRS.* (1889). The Association has been of great assistance to the Commission, particularly when the Commission undertook its comprehensive valuation project in 1913. For prior to the Valuation Act of 1913 [37 Stat. L. 701, 49 U. S. C. (1934), § 19a], eleven states had engaged in the valuation of railroad property for rate-making purposes, thus developing a mass of practical information and experience which was of value despite the great variance in methods and standards. 24 *PROC. NAT. ASSN. R. R. & UTIL. COMMRS.* 34-89 (1912). In the early stages of evaluation, committees of the National Association participated in conferences held by the Bureau of Valuation of the Commission. 26 *PROC. NAT. ASSN. R. R. & UTIL. COMMRS.* 170-185 (1914); 27 *ibid.* 375-378 (1915). It is interesting to note that the Interstate Commerce Commission held joint hearings with state commissions without sanction of statute. 31 *I. C. C. ANN. REP.* 59 (1917).

“avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this act.”<sup>98</sup>

The authority of the Interstate Commerce Commission to control intrastate rates which discriminate against interstate commerce unjustly has been clearly established, but the assertion of federal power over intrastate rates is not an altogether desirable procedure. As an immediate danger, it engenders animosity between the regulatory agencies. It reduces the effectiveness of rate control because federal orders have the effect of ousting the state commissions from their primary jurisdiction over intrastate rates.<sup>99</sup>

In order to avoid the exercise of its authority the commission has followed the practice of giving the state commissions every reasonable opportunity to make voluntary rate adjustments and has declined to make formal findings with regard to intrastate rate discrimination in comprehensive proceedings even when this was urged by the carriers themselves.<sup>100</sup> The success of this plan is indicated by the relatively few instances in which the Commission has found it necessary to issue

<sup>98</sup> The plan of the Commission as to what matters may be handled cooperatively are stated in 36 I. C. C. ANN. REP. 233-234 (1922); and 39 *ibid.* 273-277 (1925). Matters included are rate cases before the Commission which involve intrastate rates alleged to discriminate unjustly against interstate commerce or interstate rates whose modification may substantially affect the relationship between state and interstate rate structures, rate cases before state commissions in which decisions may affect intrastate-interstate relationships, applications for certificates of convenience and necessity involving construction of new lines or abandonment of existing lines, and proceedings with respect to car service. The plan also mentions “any matter or proceedings where the one commission may be of the opinion that matters of mutual concern are involved and where cooperation may be had to advantage.” 39 I. C. C. ANN. REP. 273 at 275. par. 4 (1925). Thus no matters are specifically excluded.

<sup>99</sup> See Lindahl, “Cooperation Between the Interstate Commerce Commission and the State Commissions in Railroad Regulation,” 33 MICH. L. REV. 338 at 380 (1935).

<sup>100</sup> See *Western Trunk Line Class Rates*, 164 I. C. C. I at 206 (1930): “The commissions of the w. t. l. States are cooperating with us . . . and some have already conducted hearings in their intrastate cases. Under the cooperative plan the State commissions will pursue their own course under the laws in their respective States in matters presented by the carriers’ petitions and State cases covering intrastate rates and exceptions. There is no indication that they will not continue their fullest cooperation and render decisions as early as feasible on the matters under their jurisdiction and affected by these proceedings. Under these circumstances . . . there is no compelling reason for findings with respect to the intrastate situations until the State commissions have had a reasonable opportunity to exercise their judgment.”

orders affecting intrastate rates in cooperative proceedings.<sup>101</sup> Such fruitful cooperation between our federal and state administrative authorities perhaps may be explained by the growing familiarity of the state commissioners with facts and issues in cases transcending their ordinary jurisdiction, thus broadening their points of view. Since they assist in the formulation of policies and render decisions concerning major rate adjustments, there is a much greater possibility that rates under state jurisdictions will be modified voluntarily to conform to the rates found reasonable for interstate commerce.<sup>102</sup>

The utilization of state administrative agencies in the motor carrier industry by the Interstate Commerce Commission is predicated on the fact that since only a small percentage of motor carrier operations are of an interstate nature,<sup>103</sup> it would not seem reasonable for the federal government to incur the expense of establishing an exclusively federal administrative machinery to regulate the industry. Instead, it would seem more desirable to utilize the state commissions already set up and in possession of jurisdiction to regulate the larger part of motor carrier operations. Admittedly, the state commissions have the advantage of considerable experience gained from administering their own laws together with a knowledge of local problems which is of great importance in regulating an industry essentially local in character. Finally, to centralize the regulation of interstate motor carriers at Washington, D.C., and require operators of all the small bus companies and other carriers to appear there in order to obtain redress or answer complaints would cause serious economic difficulties for the "small" operator.<sup>104</sup>

<sup>101</sup> For discussion, see Lindahl, "Cooperation Between the Interstate Commerce Commission and the State Commissions in Railroad Regulation," 33 MICH. L. REV. 338 at 383 (1935).

<sup>102</sup> *Ibid.*, 33 MICH. L. REV. 338 at 387 (1935).

<sup>103</sup> The number of buses used in interstate operations is about 19% of the total number of buses used in all intercity operations. (Data for year 1932, found in BUS FACTS FOR 1933, p. 9.)

<sup>104</sup> See Kauper, "Utilization of State Commissioners in the Administration of the Federal Motor Carrier Act," 34 MICH. L. REV. 37 at 43-44 (1935). At the end of 1931, 24 companies engaged in intercity service operated 100 or more buses each. Coordination of Motor Transportation, 182 I. C. C. 263 at 279 (1932). Medium-sized and small units predominate, for the 490 bus companies which were engaged in interstate service in 1932 operated 4680 buses. BUS FACTS FOR 1933, p. 9.

Hence the Motor Carrier Act<sup>105</sup> authorized the Interstate Commerce Commission to utilize "joint boards" whose membership is elected by the regulatory commission of the state from its own membership or otherwise.<sup>106</sup> To these "joint boards" the Interstate Commerce Commission must refer controversies in which the interstate carrier operations involve not more than three states.<sup>107</sup> Controversies involving more than three states may be referred to the boards at the discretion of the Commission.<sup>108</sup> The Commission has power to formulate a uniform administrative policy with respect to such matters as continuous and adequate service, maximum working hours for employees, and general regulations concerning safety of operation and equipment. Substantial uniformity in applying the policies of the act, both administrative and legislative, is assured by giving the Commission power to review the findings and recommendations of the joint boards before they become effective as orders of the Commission.<sup>109</sup>

Cooperative activity, however beneficial it may be during peace times, becomes absolutely necessary during a war campaign. Exigencies of past wars prompted the federal government to obtain the active

<sup>105</sup> 49 Stat. L. 543 (1935), 49 U. S. C. (Supp. II, 1936), §§ 301-327. The Interstate Commerce Act was amended by adding the Motor Carrier Act as Part II thereof.

<sup>106</sup> 49 Stat. L. 549, § 205 (c) (1935); 49 U. S. C. (Supp. II, 1936), § 305 (c). If there is no commission in any state to regulate motor carriers or if the state commission fails to make a nomination when requested by the Commission, then the governor of the state is authorized to nominate the state's representative on the joint board. The Commission is then authorized to appoint as a member upon the joint board any nominee approved by it. If both the state commission and governor fail to nominate a joint board member when requested to do so by the Commission, then the joint board is to be constituted without a member from such state, provided that members from two or more states have been nominated.

<sup>107</sup> 49 Stat. L. 548 (1935), 49 U. S. C. (Supp. II, 1936), § 305 (b). When not more than three states are concerned the Commission must refer the following matters to the joint boards: applications for the issuance of certificates, permits, or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers and acquisitions of control or operating contracts; complaints as to violations by carriers of the requirements established by the Commission with respect to continuous and adequate service, etc.; complaints as to the violations of the Commission's rules by brokers; and complaints as to rates, fares, and charges of motor carriers.

<sup>108</sup> *Ibid.*

<sup>109</sup> Kauper, "Utilization of State Commissioners in the Administration of the Federal Motor Carrier Act," 34 MICH. L. REV. 37 at 57 ff. (1935).

cooperation of state administrative agencies.<sup>110</sup> In the World War, because of the need for a nation-wide army organized by administrative machinery which could take into account local situations and problems, the Selective Service Act<sup>111</sup> authorized the President to create local draft boards which were to supervise the registration and examination of those eligible for military service and to decide on matters of exemption and discharge.<sup>112</sup> Although the three members of each local board were nominally chosen by the President from among the non-military population of the area for which the board was established, actual selection and control of personnel were placed in the authority of the governors of the several states.<sup>113</sup> The act permitted the President to utilize the services of any officers or departments of the several states. All such officers, either directly or through their appointment by the governor, were under presidential regulation.<sup>114</sup> Thus state adjutants-general were made state draft executives by executive order. Later the federal government provided each state adjutant-general with an assistant, appointed by the President, but on recommendation of the state governor, and paid with federal funds.<sup>115</sup> State officials were also utilized when each governor appointed appeal agents to

<sup>110</sup> The Constitution countenances such cooperation. It makes federal agencies out of the state militia since it provides that the militia can be called forth, as provided for by Congress, to execute the laws of the Union, suppress insurrection, and repel invasion. Art. I, § 8 (15). For a discussion of the status of the militia when called out by the federal government, see *Houston v. Moore*, 5 Wheat. (18 U. S.) 1 (1820); 22 Op. U. S. Atty. Gen. 225 (1898); Rosensohn, "Legal Aspects of Federal Compulsory Service of State Militia," 6 Proc. Acad. Pol. Sci. 244 (1916).

During war times the national government has depended upon the machinery of the state and local governments for vital assistance. In the Civil War, governors of states and county commissioners and assessors became federal officials for the purpose of executing the regulations prescribed by the President, under authority of Congress for calling forth the militia. 12 Stat. L. 597 (1862).

<sup>111</sup> 40 Stat. L. 76 at 79 (1917).

<sup>112</sup> See also U. S. Provost Marshall's Office, *Selective Service Regulations* (1917); *First and Second Reports of the Provost Marshall General to the Secretary of War on the Operations of the Selective Service System* (1918 and 1919); 1 PALMER, NEWTON D. BAKER 212-217 (1931).

<sup>113</sup> SECOND REPORT OF THE PROVOST MARSHALL GENERAL ON THE OPERATIONS OF THE SELECTIVE SERVICE SYSTEM 262 (1918).

<sup>114</sup> 40 Stat. L. 80, § 6 (1917).

<sup>115</sup> MACDONALD, *GOVERNMENT RELATIONS IN NATIONAL DEFENSE* 170 (1920) (Bureau of Public Administration, University of California, manuscript copy).

present the viewpoint of the government in the hearing of all cases of those discharged on account of dependency.

The experience gained from the decentralized administration of the Selective Service Act was drawn upon in the selection of personnel for the Civilian Conservation Corps. Time did not permit, nor did it seem feasible, to establish an entire new organization for the purpose of selecting the 250,000 men who were to work for the CCC. Thus by federal legislation the executive officer of each state relief organization was appointed as a representative of the federal Department of Labor in the capacity of a "state director of selection" to apportion the quota of the state into equitable local quotas and to delegate the actual selection of the men to the local relief or public welfare agency under his jurisdiction. In order that there might be uniformity in the administration of the law, the Department of Labor prescribed uniform standards of eligibility.<sup>116</sup>

The National Industrial Recovery Act granted the President authority to utilize state officers and employees, and, with the consent of the state, "to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed."<sup>117</sup> Thirteen states responded with statutes permitting cooperation with the federal government and providing for the governor's consent to presidential utilization of state officers in carrying out the provisions of the law.<sup>118</sup> Particularly important was the method of providing for exceptions to the industrial homework provisions of the NRA. By executive order, employers were permitted to make use of industrial homeworkers, despite code provisions to the contrary, if

<sup>116</sup> CIVILIAN CONSERVATION CORPS, TWO YEARS OF EMERGENCY CONSERVATION WORK, 2 (1935, mimeographed), based upon reports prepared by Robert Fechner, Director of Emergency Conservation Work. Four departments cooperated in the program, namely, War, Interior, Agriculture, and Labor.

<sup>117</sup> 48 Stat. L. 195, tit. I, § 2 (a) (1935).

<sup>118</sup> Cal. Stat. (1933), p. 2632, Gen. Code (Deering Supp. 1933), Act 8775; Colo. Laws (2d Ex. Sess. 1933-1934), c. 17, p. 78; Ill. Laws (3d Spec. Sess. 1934), p. 182; N. J. Laws (1933), c. 372, p. 1016; N. M. Laws (1934), c. 18, p. 69; N. Y. Laws (1933), c. 783, p. 1603; Ohio Laws (1933), p. 601; S. C. Acts (1934), p. 2281; Va. Acts (Ex. Sess. 1933), c. 61, p. 115; Wash. Laws (Ex. Sess. 1933), c. 50, p. 119; W. Va. Acts (2d Ex. Sess. 1933), c. 86; Wis. Laws (1933), c. 476, Stat. (1935), §§ 110.01 to 110.10; Wyo. Laws (Spec. Sess. 1933), c. 16, Rev. Stat. (Supp. 1934), §§ 95-401 to 95-412.

a certificate were obtained for each home from a state agency designated by the federal Department of Labor. The issuance of such certificates was to conform to the instructions of that department.<sup>119</sup> An executive order of a similar nature, on June 27, 1934, provided that apprentices might be employed at lower wages or longer hours than those prescribed in the codes for the industry, if a state agency designated by the federal Department of Labor issued a certificate for employment in accordance with the apprentice training plan of the state agency. Instructions from the Department specifically stated that the provisions under which certificates were to be issued were not to supersede more stringent regulations affecting industrial home work, wages, hours, and other conditions of employment.

The Supreme Court has never rendered a decision in which it has considered thoroughly the constitutionality of the action of the federal government in constituting state officers its agents for the administration and enforcement of federal laws. In the number of cases in which the question has arisen, the Court has declared that the federal government might properly clothe state officers with federal authority, or it has unqualifiedly assumed that to be the case.<sup>120</sup> Undoubtedly, the

<sup>119</sup> Executive Order 6606f, May 15, 1934. See Clark, "Joint Activity between Federal and State Officials," 51 *Pol. Sci. Q.* 230 at 246 (1936).

<sup>120</sup> In *Wayman v. Southard*, 10 *Wheat.* (23 U. S.) 1 at 39-40 (1825), and in *Prigg v. Pennsylvania*, 16 *Pet.* (41 U. S.) 539 (1842), the Court assumed that it was proper for the federal government to constitute state officers its agents. In *Kentucky v. Dennison*, 24 *How.* (65 U. S.) 66 at 108 (1860), involving the federal extradition statute and the duty of a state governor to comply therewith, Chief Justice Taney said: "It is true that Congress may authorize a particular State officer to perform a particular duty. . . ." In *United States v. Jones*, 109 U. S. 513, 3 S. Ct. 346 (1883), the Court held that the federal government in exercising its power of eminent domain could employ a state tribunal to determine the value of the property taken and the compensation to be paid. In *Robertson v. Baldwin*, 165 U. S. 275, 17 S. Ct. 326 (1897), the federal statute authorizing justices of the peace of the several states to apprehend deserting seamen and return them to their vessels was held valid by the Supreme Court. In *Holmgren v. United States*, 217 U. S. 509 at 517, 30 S. Ct. 588 (1910), the Court held that Congress could validly authorize state courts to conduct naturalization proceedings. In *Parker v. Richard*, 250 U. S. 235 at 239, 39 S. Ct. 442 (1919), involving the federal statute requiring the approval of state probate courts as a condition precedent to the validity of conveyances by restricted Indian heirs, the Court held that it was immaterial that the agent chosen to approve the conveyance was a state court. (For a complete citation of cases see Kauper, "Utilization of State Commissioners in the Administration of the Federal Motor Carrier Act," 34 *MICH. L. REV.* 37 at 72-73 (1935).



Court has been influenced by the fact that this practice of appointing state officers to discharge duties strictly federal in nature dates back to the foundations of our government.<sup>121</sup> Nevertheless, the Court has made it clear that the federal government has no power to impose on a state officer any duty whatever, and compel him to perform it,<sup>122</sup> for, obviously, if it had that power, it might overburden the officer with duties which would demand all his attention and prevent him from discharging his duties for the state government.

A further restriction on the utilization of state administrative facilities by the federal government is often to be found in the state constitutions, for many of them have the provision that no person may hold at the same time a state office and an office of trust or profit under the United States.<sup>123</sup> Under such a provision if a state officer accepts

<sup>121</sup> "At this late day, however, after the courts of the states have for more than a century, with the uniform acquiescence and consent of all the departments of the national government and of the state governments, exercised this authority to naturalize aliens granted to them by the acts of Congress, there is one answer which is equally fatal to both the propositions which counsel for the plaintiff in error here presents. It is that the contemporaneous interpretation of the provisions of the Constitution relative to this subject by those who framed it, the concurrence of statesmen, legislators, and judges in that construction, the acquiescence and uninterrupted practice of all the departments of the government in the same interpretation for more than 100 years, conclusively determine their meaning and effect, and place them beyond the realm of doubt or question. . . . It is too late to question the constitutionality of the devolution of this authority upon the courts of the states, or their jurisdiction to exercise it. Those issues have been settled by prescription and practice, and they are no longer open to debate or question." Sanborn, *Circ. J.*, in *Levin v. United States*, (C. C. A. 8th, 1904) 128 F. 826 at 828-829.

<sup>122</sup> A statement which illustrates the Court's position is to be found in the following excerpt from Chief Justice Taney's opinion in *Kentucky v. Dennison*, 24 How. (65 U. S.) 66 at 107-108 (1860): "And we think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

"It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal."

<sup>123</sup> INDEX DIGEST OF STATE CONSTITUTIONS (Columbia University Legislative Drafting Research Fund) 1144-1145 (1915).

an office of profit or trust from the federal government he is disqualified from continuing as a state officer.<sup>124</sup>

The Supreme Court, however, has so defined an "officer" of the United States, that few state agencies cooperating with the federal government fall under these provisions. In *United States v. Hartwell*,<sup>125</sup> the Court has said that "the term [office] embraces the ideas of tenure, duration, emolument, and duties." Since in the majority of instances of cooperative activity between the federal and state governments, the duration of such cooperation is very often undetermined and there is no fixed salary, the provisions of state constitutions restricting office-holding under both the state and federal governments do not apply.<sup>126</sup>

#### THE LIMITATIONS OF FEDERAL-STATE COOPERATION

Cooperative effort between the national and state governments rests on voluntary action. States coordinating their activity with that of the federal government do so strictly of their own accord. As has been indicated, however, the techniques of federal grants-in-aid and supplementary legislation afford the national government means of forcing the more recalcitrant states into line. How far the national government may go in this "coercion" is still problematic.

On the other hand, states willing to cooperate may find themselves limited by the restrictions of their own constitutions. Thus, no state, however willing its officials may be, can embark on a project of legislative cooperation with the national government, unless constitutionally it is equipped to cooperate.

Limitations on cooperative activity between our federal and state governments may come from another quarter—that of the Federal Constitution. In whatever legislative program it pursues, federal-state cooperation must obey the Fourteenth Amendment in particular;

<sup>124</sup> See Hart, "Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement," 13 VA. L. REV. 86 at 99-100 (1926).

<sup>125</sup> 6 Wall. (73 U. S.) 385 at 393 (1867).

<sup>126</sup> In 5 OP. ATTY. GEN. WIS. 886 (1916), the opinion was expressed that under a provision of the Wisconsin Constitution providing that no person holding any office of profit or trust under the United States should be eligible to any office of trust, profit or honor in the state, it was permissible for a federal deputy internal revenue collector to be a member of a county board of supervisors. The position was taken that a deputy revenue collector was not an officer of the United States, for the reason among others that his tenure was entirely at the will of the collector.

if not, it must pay the same penalty as other social and economic legislation which disregards the rule that no state shall "deprive any person of life, liberty, or property without due process of law."

Finally, the employment of only a single technique of federal-state cooperation may be inadequate to secure the desired objectives of the particular social and economic legislation under consideration. It may be necessary to utilize a second technique to supplement the one first applied. The Social Security Act, which used the device of the grants-in-aid, illustrates this point. The broad language of the federal act makes possible wide variation in state laws covering unemployment compensation, old age pensions and other subjects included in that act. States with higher standards may find themselves at a disadvantage with their competitors. To remove this handicap by securing a greater uniformity in state laws, the technique of interstate compacts may be applied. In this and other problems it may prove feasible to use several techniques to obtain the best results from our social and economic legislation.

Despite these limitations, cooperative effort by our state and federal governments, in its comparatively recent application to social and economic problems, promises to become an acceptable alternative to a highly centralized government with the states as merely passive units. Through the techniques described, the federal government may be able to realize its program of social and economic legislation by gaining the assistance of state administrative facilities and supervising their activity so that they will be in harmony with the federal program. By exercising their respective powers concurrently, the two governmental centers may increase the sum total of legislative power applicable to a given problem, besides bringing into the sphere of governmental regulation many problems which otherwise would require constitutional amendment.

State food and drug officials are commissioned as federal inspectors to assist in the enforcement of the federal food and drug laws even in those states that have constitutional provisions prohibiting persons from holding state and federal offices at the same time. The position is taken that since the state officials receive no salary from the federal government, they are not federal officers within the meaning of the constitutional provisions. But state game wardens are not commissioned deputy United States game wardens in states with constitutional provisions of this kind, since the federal government pays a per diem salary to these state deputies, so that they are considered federal officers. See Beard, "Government by Special Consent," 25 AM. POL. SCI. REV. 61 at 65 (1931).