

has to do with the method by which the foreign law is to be brought before the court and so is a rule to which counsel can adapt themselves. The convenience of the rule, and its tendency to cure errors of counsel in cases where the problem was not recognized or the law of the wrong state considered at the trial stage, should commend it to a court which has frequently to deal with transactions foreign to the state in which it sits. When the local law states that the foreign law is applicable, a federal court should use the most expeditious means of applying it.*

INSECURITY UNDER THE SOCIAL SECURITY ACT

The Social Security Act¹ was designed to provide safeguards for the "security of the men, women, and children of the Nation."² Some of the eleven titles, such as those dealing with unemployment³ and old age⁴ insurance, the Congress saw fit to have administered directly by the federal government. In other instances, however, the Congress left a large area of discretion to the state legislatures. With respect to problems of old age assistance,⁵ aid to dependent children,⁶ and aid to the blind,⁷ the act makes use of the grant-in-aid device;⁸ the states receive the federal funds upon conforming to certain conditions. The Social Security Board was established to insure adherence to these stated conditions and may refuse to certify a state plan which does not conform to them. While the conditions as stated do not seem complicated or vague, the board's methods of administering the act have introduced considerable conflict and confusion. State legislators have had difficulty in determining what sort of plans will meet the board's interpretation of these requirements. Plans which seem to meet all the formal conditions have not received the approval of the board. Plans which have received the approval of the board have not been administered in accordance with their terms; through the board's power to withhold funds, other and inconsistent provisions have been, in practical effect, read into the plans.

The conditions, in the order in which they are stated in the statute, are:

* The second part of this note, dealing with other problems arising out of the decision in *Erie R. Co. v. Tompkins*, will appear in the February issue.

¹ 49 Stat. 620 (1935), amended by 53 Stat. 1360 (1939), 42 U.S.C.A. § 301 (Supp. 1940).

² Economic Security Act, Hearings before the Committee on Ways and Means on H.R. 4120, 74th Cong. 1st Sess. (1935), at 13.

³ Title 3.

⁵ Title 1.

⁴ Title 2.

⁶ Title 4.

⁷ Title 10.

⁸ Address of E. Clague, Associate Director of the Bureau of Research and Statistics of the Social Security Board, before the Public Charities Association of Pennsylvania, Pittsburgh, Pa., May 6, 1936: ". . . the act is founded upon a tried and proven method known as Federal grants-in-aid, a method which offers opportunities for assistance to states without undermining their sense of responsibility."

1) the program must be statewide; 2) the state must participate financially; 3) the plan must be supervised or administered by a single state agency; 4) the applicant, denied help locally, must be afforded an opportunity for a fair hearing before the state agency;⁹ 5) the state's methods of administration must be proper and efficient and must include a merit system for personnel;¹⁰ 6) the plan must provide for informational reports to the federal board in the form the board requires;¹¹ 7) the "state agency shall, in determining need, take into consideration any other income and resources of an individual";¹² 8) information and records regarding recipients and applicants must not be open to the public.¹³ In addition, there are three requirements relating to the types of individuals who may be given aid: 1) in plans for the aged, the age requirement cannot be greater than sixty-five;¹⁴ 2) a residence requirement cannot be longer than five years within the last nine, with one year's continuous residence immediately preceding the application;¹⁵ 3) there can be no citizenship requirement which excludes any citizen of the United States.¹⁶

The public statements of the board give no indication that there should be any great difficulty in interpreting the conditions of the act. Members of the board always say that the power to determine which individuals are in need is left to the states; they constantly make statements such as: "The Social Security Act lays down minimum requirements"¹⁷ and "states . . . make their own plans."¹⁸ They emphasize that the plan violates none of the traditional notions of states' rights¹⁹ and is little more "than an enabling statute, granting aid to state systems. . . ."²⁰ The final decision as to who receives aid and as to

⁹ Tit. 1, § 2(a)(1)-(4), 49 Stat. 620 (1935), 42 U.S.C.A. § 302(a)(1)-(4) (Supp. 1940).

¹⁰ Tit. 1, § 2(a)(5), 49 Stat. 620 (1935), amended by 53 Stat. 1360 (1939), 42 U.S.C.A. § 302(a)(5) (Supp. 1940).

¹¹ Tit. 1, § 2(a)(6), 49 Stat. 620 (1935), 42 U.S.C.A. § 302(a)(6) (Supp. 1940).

¹² Tit. 1, § 2(a)(7), 53 Stat. 1360-61 (1939), 42 U.S.C.A. § 302(a)(7) (Supp. 1940).

¹³ Tit. 1, § 2(a)(8), 53 Stat. 1361 (1939), 42 U.S.C.A. § 302(a)(8) (Supp. 1940).

¹⁴ Tit. 1, § 2(b)(1), 49 Stat. 620 (1935), 42 U.S.C.A. § 302(b)(1) (Supp. 1940). There is no age requirement under Title 10, dealing with aid to the blind, nor under Title 4, providing for aid to children.

¹⁵ Tit. 1, § 2(b)(2), 49 Stat. 621 (1935), 42 U.S.C.A. § 302(b)(2) (Supp. 1940). The residence requirement for children, under Title 4, is that they have lived in the state for one year, or have been born during the previous year if the mother resided in the state.

¹⁶ Tit. 1, § 2(b)(3), 49 Stat. 621 (1935), 42 U.S.C.A. § 302(b)(3) (Supp. 1940).

¹⁷ Address of V. M. Miles, member of the Social Security Board, before Annual Meeting of National Dry Goods Association, New York City, Jan. 21, 1936; consult Social Security Board, *Social Security in America* 217 (1937).

¹⁸ Address of F. S. Bane, Executive Director of Social Security Board, before Conference of Mayors, Washington, D.C., Nov. 17, 1936.

¹⁹ Address of F. S. Bane before Public Charities Association of Pennsylvania, Philadelphia, Pa., Jan. 18, 1936.

²⁰ Address of V. M. Miles before the Northeastern Retail Lumber Dealers, New York City, Jan. 29, 1936.

how much aid shall be given under a plan is left to the states.²¹ And in a publication of the Social Security Board in 1940, it is stated that "the State—not the Federal Government—decides who shall get aid and how much shall be paid to each person . . . each State decides how much property or other resources those it aids may have."²²

There is considerable discrepancy, however, between these statements of the board and its methods of administration. It is the purpose of this note to consider the grounds upon which the board has disapproved state plans or changed the methods of administering them, and the power of the board under the act to refuse certification or withhold funds on the grounds it does.

FEDERAL BOARD ACTIVITIES IN THE STATES

One source of difficulty has been the question of family responsibility. Many states have, or at one time had, provisions prohibiting deduction of the resources of an applicant's family in determining whether or not he should receive aid. Despite these provisions, family responsibility appears to be a part of the social security system throughout the country.²³ The board has not found it necessary actually to refuse certification of any plan in order to secure this result. The power to withhold funds has been sufficient.

In Missouri, after state appellate courts had interpreted the state statute as meaning that the possibility of help from relatives was not to be regarded as income of the applicant,²⁴ the state administrator was faced with the alternative

²¹ Address of V. M. Miles before the Chamber of Commerce, Lynchburg, Va., April 9, 1936: "Each state determines for itself who is eligible for old-age assistance and the amount to be paid monthly to the needy aged." Address of A. J. Altmeyer, Chairman of the Social Security Board, before the National Association of Mutual Insurance Companies, Grand Rapids, Mich., Oct. 4, 1937: "In public welfare, this country has had years of experience under state and local laws, and all that the Social Security Act does is to offer federal aid in developing these existing programs." J. B. Tate, General Counsel of the Social Security Board, has written: "One very definite limitation upon the Social Security Board's authority will occur at once. The state agency represents the state government. Without attempting to clarify the muddy waters which engulf most discussions of sovereignty, I may say that the agency represents the state in its sovereign capacity. . . . These powers have been recognized as including the ultimate right to interpret state legislative policy including specifically, their own statutes. Any treading upon the prerogatives of the state agency gives rise immediately to a conflict between the federal agency and the state agency. They act under distinct laws and have distinct powers of interpretation, decision, and administration. . . ." Tate, *Problem of Advice in the Administration of Social Security Laws*, 3 Fed. B.A.J. 319, 320 (1939).

²² Social Security Board, *What Is Social Security?*, at 14, 15 (1940).

²³ For a review of state laws and the uniformity of policy in regard to family responsibility in spite of wide differences in those state laws, consult Hart, *Legal Responsibility of Relatives for Care of the Aged*, 15 Soc. Serv. Rev. 285 (1941).

²⁴ *Price v. State Soc. Security Com'n*, 232 Mo. App. 721, 121 S.W. (2d) 298 (1938); *Moore v. State Soc. Security Com'n*, 233 Mo. App. 536, 122 S.W. (2d) 391 (1938).

of losing federal funds or disobeying the state court order.²⁵ His dilemma was solved only by an amendment to the state act providing for family responsibility.²⁶ The state administrator in Washington had much the same experience,²⁷ and the statute prohibiting family responsibility was changed.²⁸ The same problem is likely to arise again, however, for under the recently passed Senior Citizens Act, family responsibility is prohibited in certain instances.²⁹ In Oklahoma, where the statute enacted to comply with the provisions of the Social Security Act contained no reference to family responsibility,³⁰ that policy is enforced under color of a long-forgotten statute which, when enacted, had no relation to social security.³¹ In Texas, under a statute excluding consideration of the ability of children to support an applicant,³² the same problem has arisen. As stated by a member of Congress from that state, "this item soon became the chief object of the case workers' investigations. . . . We thought that under this act the State would be the judge of the need of an applicant, but we were to soon find that our own ideas of need had little to do with the actual administration of the program. Ostensibly in the hands of local people our program has been controlled by the interpretations and investigations of the 'approved' social service consultants which the Social Security Board has forced upon us. And these people have in almost every case taken the unreasonable attitude that no matter how destitute an old person or an old couple might be, that their evident need was no basis of certification to the pension rolls if perchance any child made even a small contribution to their support."³³

Another conflict between the federal board and the state legislatures concerns legislative directions to state agencies prohibiting them from deducting certain amounts of *personal* income or certain kinds of resources in determining need. In California, the amount to be disregarded in giving old age assistance was personal income up to \$15 per month and certain other personal

²⁵ The Courts and Family Responsibility, 13 Soc. Serv. Rev. 105, 109 (1939): ". . . the Social Security Board is an administrative body. It has neither legislative nor judicial powers. The Congress did not define the needy aged as persons without relatives who are willing to give assistance. Can the Social Security Board require the states to make such a definition? We hope the Missouri authorities will ask the United States courts if the administrators of the Social Security Board are not exceeding their authority."

²⁶ Mo. Stat. Ann. (1939) § 9406 (6).

²⁷ Conant v. State, 197 Wash. 21, 84 P. (2d) 378 (1938).

²⁸ Wash. Rev. Stat. Ann. (Remington, Supp. 1940) § 10007-117a; The Courts and Family Responsibility, 13 Soc. Serv. Rev. 105, 110 n. 5 (1939).

²⁹ Wash. L. (1941) c. 1, § 3(h)(1).

³⁰ Okla. Stat. (Harlow, Supp. 1940) § 4715221(a), (b).

³¹ Okla. Stat. (Harlow, Supp. 1938) § 1691.

³² Tex. Stat. (Vernon, Supp. 1941) art. 6243-6.

³³ 84 Cong. Rec. 6851 (1939).

resources such as lodging, firewood, water, and garden produce.³⁴ On March 25, 1941, the Executive Director of the Federal Social Security Board wrote Congressman Voorhis of California that this statute was out of conformity with the Federal Social Security Act, suggesting four alternatives which the state might adopt, each of which gave "due regard to the income and resources of the individual."³⁵ On April 5, the letter was printed in the California legislative assembly journal;³⁶ on June 14, the statute was amended, adopting one of the alternatives.³⁷

The same problem arose in Minnesota and in Iowa, with regard to aid to the blind. The Minnesota plan, providing for a grant of \$30 per month to all blind persons with less than \$365 per year, was disapproved by the board, but not, it is true, on this ground alone.³⁸ The similar Iowa statute was amended, apparently at the suggestion of the board.³⁹

In many instances, the board has had its own way without the necessity for such open conflicts. The most effective way for the board to secure control, of course, is by means of state legislation giving to the state agency complete

³⁴ Calif. Welfare and Institutions Code (Deering, Supp. 1939) §§ 2020, 3084.

³⁵ California Legislature Fifty-fourth Session Assembly Daily Journal 1595 (April 5, 1941). The choices as set out were: 1) Consideration of all income and resources of the applicant followed by a grant of aid sufficient "to provide him with a reasonable subsistence compatible with health and well being." Under such a provision, awards would be determined on a budgetary basis . . . considered by the board to be the most satisfactory basis. . . ." 2) Consideration of all income and resources of the applicant followed by a grant of aid which, "when added to the income . . . of the applicant from all other sources, [equals] forty dollars (\$40) per month. . . ." If the applicant's need is greater than \$40, he may receive aid up to \$40 which, when added to his income, "shall equal his actual need . . . provided that the same standards of determining his need were applied [as would have been in the case of] a person without any income or resources." 3) Provision that "the amount of aid to which any applicant shall be entitled shall be, when added to the income of the applicant from all other sources," \$40 per month. 4) Provision increasing the grant to \$55; then instead of ignoring an applicant's first \$15 per month income, investigation of need resulting in a deduction of \$15 from the grant of those who earned it or were given it. Thus those without any income would receive \$55. As the Director said, "This would, no doubt, increase the cost of the programs."

³⁶ *Ibid.*

³⁷ Calif. Welfare and Institutions Code (Deering, Supp. 1939) §§ 2020, 3084, amended by Calif. S. 1347, Reg. Sess. (June 14, 1941). In this revision the Executive Director's second alternative was adopted. Note 35 *supra*.

The act also split the program for aid to the blind into two parts: one administered by the state alone with state funds, the other to meet the requirements for securing federal aid. The first plan retains substantially the same provisions as the one under which the state had formerly been receiving federal aid. The second adopts the suggestions of the Social Security Board, including the methods of investigating need.

³⁸ Orfield, *Old Age Assistance: With Special Reference to Nebraska*, 17 Neb. L. Bull. 287, 302 (1938). Plans of Illinois, Missouri, Nebraska, and Pennsylvania, with the same provision as this Minnesota plan, have likewise been disapproved.

³⁹ Iowa Acts 170, at § 2 (1941).

power to cooperate with the board.⁴⁰ In fact, states have been constantly amending their statutes to this effect in the past few years. The language varies in intensity from "cooperate with the Federal Government in welfare matters of mutual concern,"⁴¹ and "cooperate with the federal social security board . . . in any reasonable manner which may be necessary to qualify for federal aid,"⁴² to "act as the agent of the federal government in welfare matters of mutual concern."⁴³ There is, of course, little evidence as to what part the board has played in securing the insertion of these provisions in the state statutes.⁴⁴ Certainly, however, the contrast between the board's statements and its activities relative to the power of the states to determine need indicates that its public utterances may not reveal accurately its position as to the states' power to formulate policy.⁴⁵

The desire for a state agency, free from all controls other than those of the

⁴⁰ An example of this type of statute is that enacted in Michigan: "The Commission, with the approval of the governor, shall have power to cooperate with the federal government, or any of its agencies or instrumentalities, in handling the welfare and relief problems and needs of the people of this state, to the extent authorized by the laws of this state. To such end, the commission shall have power to adopt any plan or plans required or desirable to participate in the distribution of federal moneys or the assistance of the federal government, and the commission shall have power to accept on behalf of the State of Michigan any allotment of federal moneys. The commission shall be authorized and empowered to adopt any rules and regulations and enter into any agreement or agreements with local units of government as may be necessary to enable the State of Michigan, or such local units, or both, to participate in any such plan or plans as said commission may deem desirable for the welfare of the people of this state. For the purpose of assuring full federal approval of the activities of the department and local departments with respect to the operation of any such plan or plans, the commission shall have the power to do all things reasonable and proper to conform with all federal requirements pertaining to methods and standards of administration. In the making of any rules and regulations with respect thereto, there shall be included such methods and standards of administration for the work of local units, including the necessary supervision thereof, as may be required for the receipt of aid from the federal government." Mich. Stat. Ann. (Henderson, Supp. 1941) § 16.410.

⁴¹ Ala. Code Ann. (Michie, 1940) tit. 49, § 8(6).

⁴² Ind. Stat. Ann. (Burns, Supp. 1941) § 52-1104(h).

⁴³ Wyo. Rev. Stat. Ann. (Courtright, Supp. 1940) § 103-1605(h).

⁴⁴ Ariz. Code Ann. (Bobbs-Merrill, 1939) § 70-206(e); Ark. Dig. Stat. (Pope, Ann. Supp. 1940) 486, at § 7(9); Colo. Stat. Ann. (Michie, 1935) c. 141, § 20(6); Conn. Gen. Stat. (Supp. 1939) § 567e; Fla. Comp. Gen. Laws Ann. (Supp. 1940) § 4139 (2); Ga. L. (1937) 355, at § 6(9); Idaho Code Ann. (Supp. 1940) § 30A-202 (5), (7)-(9); Iowa Code (1939) § 3661.007(2); Kan. Gen. Stat. Ann. (Corrick, Supp. 1939) § 39-708(a); Me. Acts & Res. (1937) 310, at § 16; Md. Ann. Code (Flack, 1939) art. 70A, § 5(d); Minn. Stat. (Mason, Supp. 1940) § 3199-102(6); Miss. L. (1940) 489, at § 4(e); Mo. Rev. Stat. (1939) § 9399(2); Mont. Rev. Codes (Supp. 1939) § 349A. 48 (f); Nev. Comp. Laws (Hillyer, Supp. 1938) § 5154.04(e); N. H. Laws (1937) 429, at § 6, vii; N. M. Stat. Ann. (Courtright, Supp. 1938) § 134-2509; N.Y. Social Welfare Law (McKinney, 1941) § 29; R. I. Gen. Laws (1938) c. 59, § 2 (e); S. C. Code (Supp. 1938) § 4996-59.

⁴⁵ Note 21 supra.

federal board, is further manifested by the board's interpretation of the single agency requirement with reference to judicial review. In Illinois an aged applicant was awarded assistance by the local agency, which determination was overruled by the state agency. Acting under a statute providing for trial de novo, the circuit court directed the state agency to grant the applicant assistance. Upon the first hearing the Illinois Supreme Court affirmed. Upon rehearing the court held that the statutory right to a trial de novo was a grant of executive power to the courts and hence unconstitutional.⁴⁶ The opinion apparently left open, however, the possibility of review of state agency determinations. At some time, either before or after the opinion on rehearing, the Executive Director of the Federal Social Security Board wrote as follows to the Illinois Department of Welfare: "If the effect of this decision is to limit the State agency to purely ministerial activities and to divide the administrative authorities so that there is no longer a single State agency as contemplated by the Social Security Act, it will be necessary for the Social Security Board to consider the continuing conformity of the Illinois plan to the Social Security Act."⁴⁷

STATUTORY JUSTIFICATION FOR THE BOARD'S ACTIVITIES

The question naturally arises whether the board has the power under the act to indulge in this sort of activity. In considering the provisions of the act itself perhaps the most important of the 1939 amendments should first be mentioned. Requirement (7) of Title 1, Section 2(a), added at that time, provides that "the state agency shall, in determining need, take into consideration any other income and resources of an individual claiming old age assistance."⁴⁸ At the same time, the word "needy" was added in four additional places scattered throughout these public welfare titles.⁴⁹ These two elements of the 1939 amendments, in addition to the fact that the act was originally to be for the benefit of needy persons, might seem to give the board power to impose its policy of individual need determination. On closer examination, however, it becomes quite clear that neither the original act nor any of the amendments was intended to empower the board to impose the conditions it does.

These amendments must be interpreted in the light of the original act.⁵⁰ As originally provided, the conditions with which the states were required to comply were almost entirely matters of administration rather than of policy. States were to determine questions of policy such as that of need. The preamble to

⁴⁶ *Borreson v. Dept. of Pub. Welfare*, 368 Ill. 425, 14 N.E. (2d) 485 (1938), noted in 37 Mich. L. Rev. 639 (1939) and 27 Ill. B. J. 203 (1939).

⁴⁷ Schneider, *Social Security Act in Operation*, 17 Neb. L. Bull., No. 4, at 145, 148 (1938).

⁴⁸ Similar changes were made in Titles 4 (aid to dependent children) and 10 (aid to blind).

⁴⁹ Title 1, § 6; Title 4, § 406(a); Title 10, §§ 1003, 1006.

⁵⁰ 1 Sutherland, *Statutory Construction* §§ 231, 235 (Lewis ed. 1904); Black, *Interpretation of Laws* §§ 130-34 (1896).

each of the welfare titles⁵¹ states the following purpose: "An act to provide for the general welfare . . . by enabling the several states to make more adequate provision for aged persons." The same intent is expressed in the enabling portion of each title, where it is stated that the act is "for the purpose of enabling each state to furnish financial assistance, as far as practicable under the conditions in such state. . . ." There is no specific indication that the federal board was to consider any of these problems. There is strong reliance upon the fact that state legislators are more familiar with the peculiar local conditions, and therefore in a far better position to determine the amounts and kinds of need.

The legislative history of the measure lends further weight to this interpretation.⁵² In the original report of the House Committee on Ways and Means it was stated that "a few standards are prescribed which the states must meet to entitle them to Federal aid, but these impose only reasonable conditions and leave the states free of the arbitrary interference from Washington."⁵³ During the debates,⁵⁴ and in answer to specific questions on this point of construction,⁵⁵ the pattern remained unchanged. The Chairman of the Senate Finance Committee said when introducing the bill: "It attacks major problems presented by . . . destitution of the aged and blind and of physically handicapped or orphaned children, and seeks to accomplish these purposes through encouragement given the states to meet these problems by state actions."⁵⁶ The sponsor of the bill in the senate assured a questioner that the act was intended merely to provide aid to supplement state efforts.⁵⁷

This interpretation is reinforced by a consideration of the specific conditions

⁵¹ Titles 1 (aged), 4 (dependent children), and 10 (blind).

⁵² On the wide use of such data in the interpretation of statutes, consult Jones, *Extrinsic Aids in the Federal Courts*, 25 *Iowa L. Rev.* 737 (1940); Sutherland, *op. cit. supra* note 50, at §§ 456, 470.

⁵³ H. R. Rep. 615, 74th Cong. 1st Sess. (1935).

⁵⁴ 79 Cong. Rec. 5780, 5782, 5897 (1935).

⁵⁵ 79 Cong. Rec. 5474 (1935).

"Mr. McLaughlin. May I inquire how the determination is to be made in the individual case as to the amount which that individual is to obtain?

"Mr. Doughton. That will be under State law and will be determined entirely by State law.

"Mr. McLaughlin. Will there be different formulas set up in the different States, or will there be one national formula?

"Mr. Doughton. No; the National Government will not have anything to do with it. The administration of the law is left entirely to the States.

"Mr. McLaughlin. The National Government and none of its agencies or instrumentalities will have anything to say about how much the individual gets in a State?

"Mr. Doughton. Not a word. The State might set up a system that the federal government would not approve, but it will not have the right to say just how much the State should give or not give. . . . They would not have any right to say what amount should be paid. That would be left entirely to the State law."

⁵⁶ 79 Cong. Rec. 9267 (1935).

⁵⁷ 79 Cong. Rec. 9426 (1935).

stated in the act. Of these requirements, the first six are clearly of an administrative nature. A state-wide program, state participation financially, supervision by a single state agency, opportunity for appeal from local to state agency, proper and efficient state administrative methods, filing of reports with the board—all are administrative.⁵⁸ It is true that the last three requirements—age, residence, and citizenship⁵⁹—do impose some conditions as to the types of persons who may receive aid. But certainly from these very specific conditions no requirement of conformity to general policy notions of the board can be derived.⁶⁰ The board administers the specifically stated conditions; all other policy determinations are left to the states. This is corroborated not only by the language used by the legislators in considering the measure, but also by the fact that they rejected a provision which would have put some policy-determining power in the board. The original bill contained a provision vesting wide discretionary power in the hands of the federal administrator, and the states under his direction were to furnish assistance compatible with “decency and health.” Congress struck the provision.⁶¹ The states were not to be told “how much aid shall be given” or “to whom it shall be given.”⁶²

Furthermore, the Congress rejected the Wagner amendment, which provided “that money payments to any permanently blind individual will be granted in direct proportion to his need; and . . . [that plans shall contain] a *definition of need* which will meet the approval of the Social Security Board.”⁶³ It was pointed out that this would not only lead to domination by the board but would conflict with the states’ power to determine need.⁶⁴

Moreover, the fact that the act nowhere contains a definition of “need” indicates that that matter was left to the states. Other terms, such as “wages,” “employment,” “employees,” “persons,” “farm”—key terms under other titles of the act—are precisely set forth. The word “needy” appears frequently in the public welfare titles but is nowhere defined, either before or after the amendments.⁶⁵

⁵⁸ Notes 9-11 *supra*.

⁵⁹ Notes 14-16 *supra*.

⁶⁰ Consult Sutherland, *op. cit. supra* note 50, at § 422.

⁶¹ 79 Cong. Rec. 11321 (1935).

⁶² For discussion of the significance of the refusal to accept this amendment, consult Douglas, *Social Security in the United States* 86 (1936); Burns, *Toward Social Security* 41 (1936). Senator Harrison urged that a federal minimum for recipients was undesirable because the state is to determine who is to get aid and how much it will give. 79 Cong. Rec. 9441 (1935). An amendment offered by Senator Borah, requiring that a state's receiving aid be based on the state's granting a \$30 minimum pension, was defeated. 79 Cong. Rec. 9634 (1935).

⁶³ 79 Cong. Rec. 9367 (1935) (*italics added*).

⁶⁴ *Ibid.*, at 11327-28.

⁶⁵ Sutherland, *op. cit. supra* note 50, at § 358: “Where the law-maker declares its own intention in the enactment of a particular law, or defines the sense of the words it employs in a statute, it not only exercises its legislative power, but exercises it with a plausible aim; for it

If by requirement (7) of Title 1, Section 2(a)⁶⁶ Congress had intended that the state legislatures could not direct that certain types of income be disregarded, it might better have been placed along with those other three requirements—age, residence, and citizenship—which have to do with the types of persons who may receive aid. Instead, the section was placed in another subheading along with the group of administrative requirements; what is more, this amendment took place at the same time that two other administrative requirements were placed under the same subhead. To requirement (5) was added a provision for a merit system for personnel,⁶⁷ and requirement (8) was inserted, prohibiting use of records outside the agency offices.⁶⁸ Requirement (7) itself reaffirms the power of the states to determine need. Specifically, the words are: "The state agency, in determining need, shall. . . ."

Nor is there anything in the legislative history of the amendments to indicate an intention to alter the role of the states as policy-determining bodies. It was positively stated that "what constitutes need is left to states; . . . the Federal Government does not concern itself with that, but leaves the matter entirely up to the states."⁶⁹

professes to furnish aid to a correct understanding of its intention. . . ." Black, *op. cit.* supra note 50, at § 75: ". . . particular words and phrases employed, are not to be considered in themselves alone . . . but they are to be interpreted with reference to the language surrounding and accompanying them,—the context. . . ."

The terms defined are those more easily standardized than "need." The absence of a standard in the presence of strong indications that the state may determine need reasonably lead to the belief that the state may set its own standard.

⁶⁶ Note 12 supra.

⁶⁷ Tit. 1, § 2(a)(5), 49 Stat. 620 (1935), amended by 53 Stat. 1360 (1939), 42 U.S.C.A. § 302(a)(5) (Supp. 1940). A state plan must "provide such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Board shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Board to be necessary for the proper and efficient operation of the plan."

⁶⁸ Note 13 supra.

⁶⁹ 84 Cong. Rec. 6704 (1939). The debate is reported as follows:

"Mr. Duncan. . . . We have the most unusual problems in this Nation of any nation in all the world when it comes to dealing with social problems of this kind. There is just as much difference between the social, economic, and climatic conditions in Maine or northern New York or Wisconsin and those in New Mexico or Texas or California as if they were in different countries. In one section of this country the people have to dress differently than in others. They have to build against the cold; they have to buy every particle of food they eat, and it comes from some other section of the country. In other sections the people grow five or six garden crops a year and grow different types of crops. They do not have cold temperatures to contend with. . . . It is true there is written into this bill a provision that in determining the eligibility of an applicant there shall be taken into consideration the income of the applicant, but, after all, it is up to the State to determine it, and I know that it has been discussed in the Ways and Means Committee time after time. It was discussed 5 years ago and agreed by every man on the committee that it was not absolutely necessary to be in want in order to have an

OTHER JUSTIFICATIONS FOR THE BOARD'S POLICY

The board's primary objection to state provisions precluding individual need determination is that there must be an "equitable distribution" of the funds⁷⁰ available in the state for public welfare purposes. Leaving aside for the moment the question of the desirability of such a condition, it is rather difficult to see how its imposition can be reconciled with the policy that the states are to determine need. It seems quite clear that when a state provides that certain resources of an individual shall not be deducted it is making a determination as to what persons are in need. For instance, when the California legislature provided that the first \$15 of a person's monthly income should not be deducted from a \$40 grant, it was in effect saying that all persons receiving from nothing to \$15 should be considered as having need for the maximum grant authorized by the statute.⁷¹ Persons receiving more than \$15 should be considered as being in proportionately less need. Likewise, those state legislatures which have prohibited the deduction of the resources of an applicant's family have simply said that a person is in need, even though specified family resources are available. Admitting that the states have the power to make these determinations, it is difficult to see how the board can consistently bring forth the requirement that

old-age pension. You might have a piece of property, you might have a house and yet be eligible for an old-age pension. . . .

"Mr. Brewster. You do understand then, that in its administration if any State chooses to allow a man to have a home and then a pension in addition the Federal administration will not object?"

"Mr. McCormack. As a matter of fact, under the law, what constitutes need is left to the States; in other words, the Federal Government, by the Social Security Act, does not undertake to say to any State what constitutes need. For example, one State might exempt the equity in a house up to \$2,000, another one \$3,000, while another State might say, 'No; we will allow no equity.' The Federal Government does not concern itself with that, but leaves the matter entirely up to the States.

"Mr. Brewster. Would there be any limits imposed? Suppose they gave one to John D. Rockefeller.

"Mr. McCormack. Of course, there would be a limit.

"Mr. Brewster. What is the limit?"

"Mr. McCormack. This money comes out of public funds, and one of the basic requirements is need, but what is need is a question of fact for the State to determine. Of course, there are cases where it clearly goes beyond need, but so far as the Federal Government is concerned the question of need is left to the State in a very flexible manner."

⁷⁰ O. M. Powell, Executive Director, Social Security Board, in an Interoffice Communication to W. C. Coy, Assistant Administrator (Dec. 12, 1940), stated that the Board does not attempt "to define need." He admitted, however, that the Board does insist upon an individual investigation of need to "do substantial justice to . . . individuals. . . . This requirement does not mean that the State agency must limit its awards to persons who are in dire poverty." Nevertheless this statement does indicate that an individual determination of need is made by someone who necessarily exercises discretion.

⁷¹ Norton, *Old Age and the Social Security Act of 1935*, at 1-15 (1937).

there be an "equitable" distribution of funds.⁷² It is true, of course, that if insufficient funds were available to take care of all whom the state has classified as needy, then as a matter of common fairness, it might be required that all those having no income should receive help first. But it appears that in California there were ample funds to provide for all who had been declared needy. The state had simply indicated that, for reasons to be discussed later, there should be no distinction made between those persons with no income and those who received \$15 a month.

It cannot be argued that these state provisions are improper, on the ground that aid to the aged, aid to the blind, and aid to dependent children should be uniform throughout the country. Congress might, of course, have made such provisions, as it did with regard to other titles of the Social Security Act. But in these public welfare titles, Congress stated only certain minimum conditions as to which there should be uniformity throughout the country. The very fact that other matters were left to the states indicates that uniformity was not expected.⁷³ Standards of living, notions as to the conditions for granting aid, and the amounts of money available for such purposes all may vary in the different states.

Furthermore, even if these matters did not vary, it would still be desirable to permit experimentation⁷⁴ by the states in order to develop better systems of public aid.⁷⁵ No one can at this time define the "best" system; but certainly the

⁷² Letter from O. M. Powell, Executive Director, Social Security Board, to all State agencies administering approved public assistance plans, Social Security Board File No. 15:OD: "Such restrictions or limitations are not recommended since they operate to establish a presumption of need in favor of applicants who may not in fact be in need while also excluding others who may be needy without allowing a full consideration of their requirements." Such language cannot be easily reconciled with statements that the state determines need. Note 21 *supra*.

⁷³ Address of A. J. Altmeyer, Chairman of the Federal Social Security Board, before the National Association of Mutual Insurance Companies, Grand Rapids, Mich., Oct. 4, 1937: "In public welfare, this country has had years of experience under state and local laws, and all that the Social Security Act does is to offer federal aid in developing these existing programs."

⁷⁴ Frances Perkins, in Hearings, note 2 *supra*, at 185: "I cannot recommend to you too sincerely the desirability of allowing the States some freedom to find their own way, to use their own particular genius in these particular problems." Dodd, *The Decreasing Importance of State Lines*, 27 A.B.A.J. 78, 84 (1941): "With respect to national prohibition, the gain in a uniform standard and in national enforcement was more than offset by inefficient national administration and by the loss of a sense of responsibility upon the part of the state and local governments. May we not expect a similar result with a nationally dominated social security program? . . . Had we, thirty years ago, placed the administration of workmen's compensation under the control of the national government, conditions might have been worse than they have been. The transfer of control to the national government may in many cases cause loss rather than gain in the achievement of the objective of better social and industrial organization."

⁷⁵ Ballantine, *Grants in Aid—Possibilities and Problems*, 6 *Legal Notes on Local Gov't* 11, 16 (1940): "Governors and Mayors must not become primarily supplicants at Washington, but must remain vigorously constructive in working out their own problems."

board's system leaves much to be desired. The board's system smacks strongly of pauper relief, a system which it was hardly the purpose of the act to perpetuate.⁷⁶ The "security"⁷⁷ and "protection"⁷⁸ emphasized during the consideration of the act must mean more than the mere giving of something where nothing had been given before. "Security" and "protection" would seem to take into account the fact that the manner of the giving may be of equal importance with the giving.⁷⁹ The general impression was that a dignified form of help would be given under well-defined conditions, eliminating the degradation and humiliation of the former pauper laws. But insistence upon family responsibility and consideration of every item of income of the applicant (looking toward deduction of these items), necessitating minute investigations by case workers into the affairs not only of the applicant but of his family as well, removing the incentive of the individual to do some work on his own and perhaps to rehabilitate himself, and subjecting him to the insecurity of relying on precarious family help—does not lead to a dignified system.

These state attempts, on the other hand, have much to recommend them. Under statutes exactly specifying the conditions and the size of the grant, the case-worker is restricted in the scope of his investigation and lacks discretion as to the amount of aid to be given; all he has to do is to ascertain the amount of the applicant's income and perform the mathematical computation directed by the statute. The individual has greater security, in that inquiries into his more intimate modes of living are eliminated. The recipient can easily check errors of case-workers, and he possesses the means to insure his independence with respect to his conduct and funds. There is security, too, in his knowing that if he does some things for himself, his condition will be bettered—that it will not simply result in a deduction from the state grant. This factor may often be of considerable significance in his rehabilitation.⁸⁰

Again, the policies of some of the states with reference to family responsibility are preferable, for under the board's policy, the investigator must pry into the income of all the family, the conditions of which investigation are uncertain. The case investigator may ask a relative if he is able and willing to help the applicant. The impecunious relative, through embarrassment, shame, or even positive goodwill, may promise assistance. Then the relative may find it difficult to

⁷⁶ Burns, *Toward Social Security* 42 (1936): "In this respect the old-age pension is not a great deal better than the security given under the public welfare laws. It carries with it a strong tinge of charity and at least some of the stigma of the poor law."

⁷⁷ Hearings, note 2 *supra*, at 3.

⁷⁸ Hearings, note 2 *supra*, at 10.

⁷⁹ Burns, *Toward Social Security*, 42-43 (1936).

⁸⁰ Irwin and McKay, *The Social Security Act and the Blind*, 3 *Law & Contemp. Prob.* 278 (1936): ". . . if the result of this federal aid is to discourage the blind from efforts to be self-supporting, to deter employers from employing capable blind persons and to produce in the minds of the seeing public the false impression that 'the blind are now taken care of,' the Act will do more harm than good."

sustain the help promised, or the help may become irregular, or it may be given in an unpleasant manner.⁸¹

That the board's policy is not necessarily the best one and that these attempts by the states have something to recommend them is further indicated by British experience. Great Britain has recently put into statutory form express provisions as to deductions which can and deductions which cannot be made.⁸² Even this measure has been criticized as not going far enough in the abolition of oppressive tests for the determination of need.⁸³

⁸¹ Abbott, *Poor Law and Family Responsibility*, 12 *Soc. Serv. Rev.* 598, 618 (1938): "If the poor laws are to be written in the light of modern social welfare theories, any attempt to enforce by legal machinery the responsibility of relatives, one of the surviving provisions of the sixteenth century poor law system, should be completely abolished." It is also significant that the Twentieth Century Fund, Committee on Old Age Security, has urged that all states abolish family responsibility and disregard the first \$15 per month income of the aged. Schneider, *More Security for Old Age* 113 (1937), criticized by Witte, *More Security for Old Age*, 12 *Soc. Serv. Rev.* 34, 37 (1938) (emphasizing the revenue problem).

⁸² 4 & 5 *Geo. VI*, c. 11 (1941), *Law Times* 5 (Sept. 13, 1941); Owen, *The End of the Household Means Test in Great Britain*, 43 *Internat'l Lab. Rev.* 627 (1941).

⁸³ Owen, *op. cit. supra* note 82.