Review of “Federal Regulation of the Production of Oil,” By James Hayden

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But the new wine in this edition is also of considerable significance, revealing as it does the remarkable judicial development that has taken place in the law of torts during the five years that have elapsed since the publication of the previous edition. In this fact lies perhaps the chief raison d'etre of the present edition. The recent opinions of the New York Court of Appeals, under the guidance of its distinguished Chief Judge, would alone have justified the publication of a new edition. The book is also made more comprehensive and up-to-date by copious references in the footnotes to recent literature on the law of torts.

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To what extent, if at all, can the Federal government lawfully regulate the production of oil on lands in the United States belonging to private citizens or business associations? This is the problem considered. Mr. Hayden starts with the premise that the government cannot regulate the production of oil in this country on any theory of unlimited sovereignty, that such power, if it exists, must fairly be implied from express grants of power to Congress or from any other power that Congress has by virtue of the Constitution. He then goes into the provisions of the Constitution under which legislative action by Congress might possibly be justified. Eliminating the general welfare clause and the common defense clause of the Preamble on the ground that the Preamble grants no power; the tax clause (Art. I Sec. 8) because the words "to pay the debts and provide for the common defense and the general welfare" simply qualify the taxing power therein given and do not constitute another distinct power; the commerce clause for the reason that the Supreme Court has held that the mining of coal, the manufacture of oleomargarine, the mining of iron ore, and the ginning of cotton preparatory to extracting seeds for the manufacture of cotton-seed oil are not commerce and entitled to protection under the commerce clause and, therefore, is not likely to hold that the production of oil is commerce and subject to regulation by Congress; the war powers of Congress (Art. I Sec. 8 clauses 11, 12, 13, 16) as not giving Congress power to control oil production in peace simply because oil is essential in time of war; and the incidental powers (Art. I Sec. 8 clause 18) as not giving Congress power over subject-matter not properly included in actual grants of authority, he comes to the conclusion, in support of which he calls attention to the Fifth, Fourteenth, and the Tenth Amendments, that the Federal government cannot regulate the production of oil directly.

But Mr. Hayden does not leave us without a ray of hope as to Federal regulation. He suggests a method by which Congress may, by exercise of the power vested in it under the commerce clause, assist in the solution of the problem of overproduction, recommending that the Hepburn Amendment to the Interstate Commerce Act be amended to include pipe-line companies as well as railroads within the prohibitions against carrying their own products. The factual basis of this plan lies in the ownership of more than half of the oil produced by the same interests which own and control the great pipe lines. The producers of oil are not on a par with respect to
market facilities, with respect to common interests in the matter of over-
production, and with respect to transportation facilities. With this situa-
tion in mind, Mr. Hayden believes that if transportation of oil were dis-
sociated from ownership, and carriers forced to render impartial service,
producers could be expected to work out their problems on a basis of com-
mon self-interest, agreements for the voluntary regulation of production
following as a matter of course. These agreements would, under the plan,
receive the sanction of Federal law in order to avoid prosecution under the
antitrust laws. The method suggested would, of course, do no more than
clear the way for agreements for the curtailment of production to be volun-
tarily entered into by the promoters.

Though Mr. Hayden’s conclusion that any direct control by the Federal
government through legislation would be unconstitutional is undoubtedly
justified on the basis of precedent, it must not be forgotten that, however
legal scholars may seek to camouflage the truth, necessity makes measures
legal and constitutional which were not so before the necessity arose.

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THE STABILIZATION OF THE PETROLEUM INDUSTRY, by Leonard M. Logan
(Oklahoma Geological Survey, Bulletin No. 54). University of Okla-

The author of this book, which gives the false first-impression of being
highly technical, appropriately indicates his purpose in the preface by
stating that it is to give the background out of which the problem of over-
production in the petroleum industry has grown, to explain the problem,
and to discuss the principal plans offered for its solution. The brief intro-
duction, which discusses the variant views of several editorialists and states-
men on the problem, is of much value to one who is encountering the sub-
ject for the first time. In three brief chapters, the author discusses re-
spectively the historical, geological and legal backgrounds of the industry.
The treatment of each subject is commendable in that such a wide field is
covered both adequately and concisely.

With this foundation in mind, he gives an able discussion of the economics
of the production of petroleum, in terms of demand, supply and price. With
a few exceptions, those economists and technologists who are acquainted
with petroleum, decree the exhaustion of its supply within the comparatively
near future. The use of such substitutes as shale oil, coal, lignites, and
agricultural products to alleviate the situation is impractical so long as the
price of petroleum is less than its substitutes. The price of petroleum
should be maintained at a high level, that is, high enough to justify a rea-
sonable profit and at the same time to eliminate unessential uses of the
product. To create such high prices some form of organized production and
marketing would be necessary. The backwardness of the producers and the
government to recognize and cope with the problem, however, has helped the
archaic anti-trust laws to obstruct any material development along the lines
of cooperation among the producers.

The author gives interesting briefs of the plans offered for stabilization
by various authorities, both private and governmental, and he discusses in
detail the proration and unit operation plans. Although there are on the
statute books of most oil-producing states some conservation laws, most of
them are too feeble to be of much effect. The Lyon gas conservation law
of California is commended.

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