

January 1931

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

Philip S. Alexander

Follow this and additional works at: http://openscholarship.wustl.edu/law_lawreview



Part of the [Law Commons](#)

Recommended Citation

Philip S. Alexander, *Review of “Federal Regulation of the Production of Oil,” By James Hayden*, 16 ST. LOUIS L. REV. 264 (1931).

Available at: http://openscholarship.wustl.edu/law_lawreview/vol16/iss3/18

This Book Review is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

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'être* 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.

ISRAEL TREIMAN.

Washington University School of Law.

FEDERAL REGULATION OF THE PRODUCTION OF OIL, by *James John Hayden*. Washington: Gallagher & Company, 1929. Pp. 130.

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 situation in mind, Mr. Hayden believes that if transportation of oil were dissociated from ownership, and carriers forced to render impartial service, producers could be expected to work out their problems on a basis of common 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 voluntarily 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.

PHILIP S. ALEXANDER, '31.

THE STABILIZATION OF THE PETROLEUM INDUSTRY, by *Leonard M. Logan* (Oklahoma Geological Survey, Bulletin No. 54). University of Oklahoma Press, 1930. Pp. 248. Price \$2.50.

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 introduction, which discusses the variant views of several editorialists and statesmen on the problem, is of much value to one who is encountering the subject for the first time. In three brief chapters, the author discusses respectively 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 reasonable 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.