

BOOK REVIEWS

FEDERAL COOPERATION WITH THE STATES. By Joseph E. Kallenbach. University of Michigan Press, Ann Arbor, 1942. Pp. viii, 428. Price: \$4.00.

As always in time of war, the federal government is today increasing in power and activity. It is, therefore, well to be reminded at this period of the country's history that the force of legislation by Congress using the interstate commerce power to supplement and bulwark state legislation has not yet spent itself. The volume at hand is a clear and thorough exploration of the development of the legislation and practice by which Congress has extended state power in relation to commerce and has incorporated state laws by reference into the system of federal regulation of commerce. In other words, the author has analyzed federal-state cooperative legislation under the commerce clause and has studied the judicial reasons by which such legislation has been sustained. His focus and plan are entirely clear and well defined, for he deals exclusively with federal support of state legislation and makes no attempt to deal with the general constitutional problems of intergovernmental cooperation or of state support of federal legislation save as they concern his main theme. His attention is fixed on problems of constitutional power and not on evaluation of policies or of federal-state administrative cooperation. The volume has the virtues and vices of such a plan in that the exposition is clear, logical and well-defined but gives only the bare bones of the constitutional skeleton without administrative flesh and blood.

In orderly and well-planned fashion, the volume traces the theory of exclusiveness of the commerce power, and then turns to three excellent chapters on the formula of the Wilson Act and the effect of the application of that formula on state power. The author well realizes that the importance of the Wilson Act and of its logical successor, the Webb-Kenyon Act, cannot be overemphasized in any discussion of American constitutional theory. The two best constructed chapters of the whole excellent volume are those on federal protection of commerce for the aid of both shipping and receiving states. Mr. Kallenbach is entirely clear in his realization that the use of the federal commerce power to uphold and strengthen the laws of states of origin and destination in the shipment of goods in interstate commerce is so important that it is "the culmination of the development of federal cooperation with the states through the commerce power". Despite its importance, and its possibilities for future development, there are limitations to its usefulness at least on the administrative side, and the author realizes that federal regulation secured merely by supplementing state laws would be an utter impossibility in this era of close intercommunication throughout the country and the world. Such regulation, he well states, "would lead to legislative chaos destructive to the nation's commerce".

It is never within the province of a reviewer to criticize an author for omission of that which he makes no attempt to discuss as long as he deals competently with those subjects which lie within his field of choice. The volume deliberately states that it will omit discussion of federal-state administrative cooperation. In this field, however, the constitutional framework is so closely related to administrative possibilities that the author in his treatment of the conditional-prohibition form of federal regulation under the Ashurst-Sumners Act trespasses on his own forbidden

territory and takes up the difficulties of inspection and border patrol of the states which Congress is attempting to protect by the use of this device. Although the book is entirely correct in its realization that the administration of this form of conditional federal regulation is infinitely more complicated than the administration of uniform direct federal regulation, discussion is not given to the administrative difficulties to make the point with entire clarity. Mr. Kallenbach is on the horns of the dilemma of those who try to separate constitutional and administrative problems into too thoroughly watertight compartments.

Much of the volume was evidently written before the decision of the United States Supreme Court in *United States v. Darby Lumber Co.*, 312 U. S. 100 (1941), which in so many words reversed the famous—or infamous—decision in *Hammer v. Dagenhart*, 247 U. S. 251 (1918), as the *Darby* decision is discussed only in footnotes. Therefore the assault of the Ashurst-Sumners Act on the principle of *Hammer v. Dagenhart* is, as the author realizes, less important than formerly, for the way is now open for more direct federal legislation in the commerce field.

The summary and conclusions are excellent in their realism as well as their sense of direction. Mr. Kallenbach is aware that “the rulings of the Court have often been supported by language which confuses rather than clarifies”, but that these rulings have been concerned solely with the production of a uniform result, namely, “the protection of essential national and local interests without undue restriction upon either state or federal legislative authority.” The author believes that cooperative regulation will ordinarily be resorted to as a means of reaching only those matters that Congress is unable to reach by direct federal regulation. Is it not also possible that cooperative regulation may be used in fields where uniformity is not *desirable* throughout the country, but where existing state standards need more protection than the individual state can give? The last word has not yet been said on the effect of the cooperative effort on the constitutional theory of American federalism. It is in this field that the conclusions leave most to be desired.

The type and format are worthy of an excellent and well-organized volume.

Jane Perry Clark Carey.†

PATENTS AND INDUSTRIAL PROGRESS. By George E. Folk. Harper and Bros., New York, 1942. Pp. xiii, 393. Price: \$3.00.

In 1938 Congress created the Temporary National Economic Committee to make a study of the concentration of economic power and financial control over production and distribution of goods. It was to consist of three senators, three representatives and one member from each of six government departments. This committee set up agencies to study particular problems and itself held numerous hearings over a period of eighteen months. Eventually it made public its conclusions and published the various monographs. Monograph number 31, 179 pages long, related to “Patents and Free Enterprise” and was written by Walton Hamilton. The contention of that monograph is that the control of invention through patented monopolies has resulted in a socially harmful concentration of economic power. In the highly literary verbiage of Mr. Hamilton,

“Long ago law joined policy to decree that no man is to exploit his wealth in such a way as to create a scarcity, make for a lower standard of life, or drive a barrier between a people and their re-

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sources. . . . The imprisonment of invention and production spells doom; the nation which discovers how to release to mankind the great storehouse of creative energy shall inherit the earth."

To promote this release, to prevent the artificial creation of scarcity, Mr. Hamilton's idea about inventions—whatever he may think about pigs and wheat—is that the patentee must be compelled to permit use of his invention by others and that he must not be permitted to place any conditions, other than the payment of a reasonable royalty, upon such authorization.

That monograph is not an exposition and analysis of the evidence presented to the Committee, nor is it a statement by the Committee of its own views. It is merely a study made by Mr. Hamilton at the Committee's request and an assertion of his own views. But because of that study, or of the evidence, or of both, the Committee eventually recommended these changes in the law:

"That the Congress enact legislation which will require that any future patent is to be available for use by anyone who may desire its use and who is willing to pay a fair price for the privilege."

"That the owner of any patent be required to grant only unrestricted licenses . . . should not be permitted to restrict a licensee in respect of the amount of any article he may produce, the price at which he may sell, the purpose for which or the manner in which he may use the patent or any article produced thereunder, or the geographical area within which he may produce or sell such article. . . ."

With these recommendations and with the Hamilton thesis leading toward them Mr. Folk takes vigorous issue. He, unlike Hamilton, sets out the testimony before the Committee and undertakes to evaluate it. He deals specifically with "the case presented by the Department of Justice", "the case presented by the Department of Commerce", "factual data supplied by the commissioner of patents", and other basic matters of actuality, or assumed actuality. Against this background he discusses, and criticizes, the various recommendations of the Committee. He points out occasional inaccuracies in the others' use of legal terms, and, as a matter of fact, it is evident to any trained reader that the Committee commits the sin of using "patent" indiscriminately to connote the patent proper, the monopoly created by the patent, the invention covered by the patent, and a tangible embodiment of the invention. Certainly whoever wrote the Committee's recommendations was not a patent lawyer. But, aside from minor matters of verbiage, Mr. Folk's criticism goes to the very substance of the recommendations. Nor does he hesitate to speak forthrightly in his attack.

"Why", he says, "did the Committee recommend for legislation, as 'approved without objection', the proposal of the Department of Justice with respect to restrictions on the licensing of patents? Undoubtedly it was because the Committee was led, or rather was misled, into believing that the alleged control exercised by a so-called 'typical industry' was due to the fact that it made it a practice to issue such 'restricted' licenses. . . . The question then arises as to why the Assistant Attorney General misled the Committee on a subject entrusted to his care and guidance. Granting his sincerity, then his ignorance of patents and the patent system must be assumed; and 'unenlightened sincerity is dangerous'."¹

1. Page 321.

This reviewer does not wholly agree with the implications of Folk's statement concerning Hamilton, that "Unquestionably the views he advocates could best be advanced by one unhampered by any considerable knowledge of the subject."² Nevertheless when the reviewer read the Hamilton monograph, though he was tempted toward persuasion by the force of its literary style and rhetorical flourish, he had the distinct feeling that its author had adopted a premise without supporting evidence and was asserting the conclusions to be drawn therefrom rather than demonstrating the truth of the premise. Hence the reviewer was predisposed to look with favor upon the Folk repudiation of those conclusions. But at any rate, it is strongly recommended that Mr. Folk's book be read before the conclusions of the Hamilton monograph or the recommendations of the Committee are accepted.

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2. Page 78.

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