BOOK REVIEWS

THE RISE OF A NEW FEDERALISM. By Jane Perry Clark. New York: Columbia University Press. 1938. Pp. xviii, 347.

Federalism has developed in the United States and other federations as an adversary form of government. There is apparently a general assumption that state and national interests are fundamentally opposed. As a result questions of the distribution of power between local and central governments have traditionally been settled, at least in this country, not according to any preconceived philosophy of government but by a process of barter and compromise between extreme "states-righters" and ardent "federalists." Furthermore it is apparently considered part of the adversary operation of federalism that the division of powers necessarily precludes any cooperation in their exercise. Two or three cooperative functions are suggested in the Constitution, and Congressional reliance on state assistance in the execution of some federal legislation can be traced back at least to the Fugitive Slave Act of 1793; but it is nevertheless true that until very recently there has been practically no coordination of federal and state activities, either legislative or executive. The occasional friction between state police and representatives of the Department of Justice, and the excessive duplication of tax legislation and administration are but random illustrations. There have appeared during the past few years numerous manifestations of a new willingness of state and federal authorities to join forces in the treatment of some of their mutual problems; there is some evidence of a weakening of the tradition of a government divided against itself. The Federal Government has "divested" certain interstate commodity shipments "of their interstate nature" so that the states might better effectuate local policies in regard to the use of these commodities; conversely, there are instances of state sanctions being exerted in support of federal policies. The grant-in-aid, whereby the Federal Government supplies the funds and the state authorities administer them, is not new, but it is only recently that this device has come into any very general use. Similar in method is the scheme by which federal tax-credits are granted to estates out of which state death taxes have been paid, or to employers who are participating in a state unemployment insurance plan approved by the federal authorities.

The Rise of a New Federalism is an investigation of the experience with these and various other forms of intergovernmental cooperation. It is primarily a descriptive study, an outline of the various forms which cooperation has taken. Score of actual cooperative programs are described and, although the list is not intended to be exhaustive and includes only those examples which are most illuminating, the really important experiments in "cooperative federalism" in the United States are presented here in the most orderly and understandable form available. The chapters on the grant-in-aid and the tax-credit are especially well organized. The discussion of executive agreements is less clearly presented, but this is prob-

ably because it is still impossible to find much order in this gallimaufry of trial and frequent error.

Consistently with her intention to make this primarily a description of what has happened, the author devotes little time to analysis or evaluation, save as actual results reveal success or failure, and even results are much less emphasized than methods. The constitutionality of these devices is very little discussed, and in some instances, as, for example, in the outline of the Housing Authority grants and the "hot-oil" legislation, the omission of more than passing recognition of the legal implications of the problem leaves the treatment incomplete. Another noticeable omission is that of any reference to the experience with this technique of government in other federations; some comparison here would not only have added to the completeness of this particular volume but would have filled an unfortunate lacuna in the literature on this subject.

The careful organization of the greater part of this study is its most commendable feature. But in the chapter devoted to "Interdependent Legislation" some unfortunate results follow from the fact that the organization is based on similarities and differences in the form of the statutes involved rather than on a comparison of their purposes and effects. It is at best questionable terminology to describe federal statutes providing that no one may fish in Yosemite Park unless he has a California fishing license, or that no liquor manufacturer or importer can secure a federal license until he has complied with the laws of the state in which he is doing business, as illustrations of "Federal Dependence on State Action." The converse phrase, "State Dependence on Federal Action," is used to describe, first, state statutes such as those requiring all pilots and airplanes flying in the state to have federal licenses, and second, federal statutes barring the channels of interstate commerce to articles shipped out of a state in violation of its laws. A third label, "Federal Laws Contingent on State Activities," sounds very much like the first, but under it are described federal statutes of the same kind as those included under the second heading, plus other federal statutes prohibiting or "divesting of their interstate nature" shipments of goods destined for states whose laws do not permit their sale or manufacture. These statutes are all alike in that each contains some reference to enactments of the other authority, but in purpose and effect they are very different. The purpose behind the legislation mentioned under the first heading is the achievement of uniformity in the laws governing a particular activity in a given area; "dependence" refers simply to the fact of statutory cross-reference. The same is true of the state statutes included under the second heading, but in the federal statutes mentioned there and in the following section, the purpose is something quite different, *viz.*, to exert or release the federal commerce power in such manner as to aid the states in effectuating local policies in regard to certain activities; "dependence" here is a matter of function rather than form and refers to the impossibility of effective state action without federal cooperation. This emphasis on statutory form also justifies the suspicion that a further analysis of some of this legislation might have revealed that, in result at least, it is

not cooperative at all. By prohibiting, under the Ashurst-Sumners Act, for instance, shipments of convict-made goods from Kentucky, which permits the sale of such goods, to Ohio, which does not, Congress is cooperating with Ohio—but hardly with Kentucky. This ostensibly cooperative device may very possibly be simply another camouflaged, or perhaps unwitting, form of Congressional response to the demands of the labor pressure group. It may still be called cooperation—with a state which has already made certain concessions to the same pressure—but in so far as cooperation with one state means the exertion of federal force against another (or the granting to one state of more aid than that granted another) the dual effect of the statute should be recognized. Description based exclusively on form must needs be inaccurate and incomplete.

This chapter on legislation by cross-reference is also subject to criticism because of the practically complete omission of any discussion of what may be called "responsive" rather than "interdependent" legislation. In addition to its prohibition of shipments of liquor and convict-made goods into states whose laws do not permit their sale or manufacture, Congress has also prohibited absolutely and irrespectively of the laws of the state of origin or destination the interstate shipment of certain other subjects of commerce, among them lottery tickets, kidnapped children and automobiles, impure foods and women. Although there is here no patent cooperation, there is considerable reason to believe that much of the federal legislation of this latter type is passed in response to the enactment by a large number of states of statutes prohibiting, so far as the states can prohibit, the activities against which the Congressional enactments are directed. Conversely standards set in certain federal statutes have been shown to have a very definite effect upon those established in subsequent state legislation. But here again, in federal as well as state legislation, there is the question as to whether these statutes are enacted as part of a program of cooperation with another government or with some pressure group which has already persuaded the other government; mention of the existing federal oleomargarine laws and of the proposed cottonseed oil legislation gives substance to this suggestion. But at all events if the suggested correlation could be proven, this type of legislation seems as completely cooperative in effect as that which Miss Clark describes as "interdependent," and it is unfortunate that its "independence" of form prevented its more complete discussion in her book.

Although the author maintains an admirable objectivity throughout her study, there is at least some justification for believing, despite certain prefatory protestations against any bias whatsoever, that she finds this cooperation a very satisfactory and perhaps an inevitable trend in the development of the federal form of government. "Perhaps," she concludes, "* * * the method of cooperation will arrive, and it may lead to a better and more nationally conceived realization of the federal formula than that which we have reached." This statement is, out of its context, comparatively noncommittal, and yet, taken with the suggestion implicit in the title of the book that this cooperation is itself the new federalism, it car-

ries an implication which deserves comment. Perhaps the data collected here would better have supported another title, "The Decline of the Old Federalism." Although experiment indicates a certain dissatisfaction with the *status quo*, it is not necessarily itself characteristic of the future. There are numerous defects inherent in the cooperative method: administrative duplication is inevitable in some forms of joint action; a division of authority may lead to an absence of responsibility; unfortunate friction has appeared in certain joint planning projects; federal crutches may permanently cripple states only temporarily weakened. Perhaps these resorts to cooperation merely alleviate for the time being the evil results of certain defects which they by no means cure. Is the grant-in-aid the most effective form of spending federal moneys for the purposes to which it has been put, or is it merely the best constitutional substitute for methods of federal regulation prohibited under the presently controlling construction of the welfare clause? Is its increasing use merely a tacit recognition that some much more basic changes should be made? In this connection it is of course essential to distinguish between various types of cooperation and their application to different situations. That all methods have in common the element of cooperation does not mean that they are equally efficacious. A criticism of the grant-in-aid has no necessary application to administrative cooperation in the collection of statistics. A tax-credit may involve duplication of administrative functions whereas Congressional acquiescence in state control of certain interstate shipments may eliminate it. A suggestion that the increasing number of federal grants-in-aid may perhaps indicate that a wider interpretation should be given the general welfare clause is not inconsistent with a preference for the system of liquor control established by the Twenty-First Amendment over that set up under the Eighteenth. It is simply suggested that it is dangerous to describe changes in the existing form of government, all of them still comparatively recent, as characteristics of a "new federalism."

It is important to determine, however, whether there is in the development of the cooperative system any evidence of a tendency toward greater or less centralization of power in the national government. There are some who find in it the means for preserving the integrity of the states. It is rather apparent, however, that the degree of federal assistance to the states is much greater than that of the states to the central government. Grants-in-aid and tax-credits operate in only one direction. Even the permissive federal liquor legislation was followed by a shift to extreme centralization of control, and the subsequent failure of the latter experiment might not always follow. Cooperation between a stronger and a weaker force frequently loses its equilibrium unless there is some restraining force. The Federal Government has at least the advantage of a larger and steadier income, and there is already evidence that relaxation of some of the restraints of the Constitution may be effected under the protective coloration of cooperation. It is significant that most of the fields of activitiy now controlled cooperatively were formerly occupied by the states.

These are problems, however, for those who work on from where Miss

Clark has stopped. Those criticisms of her book which have been made undoubtedly reveal as much the predilections of the reviewer toward some forms of "cooperative federalism" as they do weaknesses in the study itself. The author set herself to the task of describing a vast mass of phenomena; she has drawn the picture in full, and for the most part, orderly detail; and her work will serve as an excellent starting place for analytical studies of what may or may not be a new facet of federalism.

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READINGS ON PERSONAL PROPERTY. By William T. Fryer. Third edition. St. Paul: West Publishing Company, 1938. Pp. xxxii, 1184.

To the public this is a new book, despite its designation as "Third Edition." In its earlier forms its use was limited to the experimental efforts of the editor, who was convinced that casebooks limited in size to that of practical utility in the classroom failed to give an adequate picture of the nature and judicial solution of fundamental legal problems. It would also appear that he was convinced that the omission *could* not be supplied by the dialectics and expositions of the instructor, and *would* not be supplied merely by citation to additional case, periodical, and treatise material. Presumably he chose the field of personal property for his contribution because he has been concerned with teaching it at George Washington University for a number of years; but the general location of the course at the beginning of law school curricula plus the conglomeration of scarcely related subjects which it ordinarily embraces makes it a favorable one for introducing the student to the broader aspects of legal study.

Professor Fryer is no exponent of the Hornbook and Illustrative Case system, nor does he attempt to fill the space between cases with textual treatment in the fashion of Walsh's Cases on Equity. He has compiled a few reports, a great many law review notes and comments on other cases, and most of the standard essays on the subjects covered. It should be observed that the notes are, for the most part, not annotations to the cases reported in the standard casebooks, the function of which would be largely duplicated by classroom analysis, but instead serve the purpose of concise abstracts of reports of related cases, collating additional authorities thereon, and suggesting some of the multitudinous aspects of the property concepts. Certainly the anonymous student law review editor comes into his own in this book, and if writing notes is good preparation for the practice of law, so might reading them have value apart from the factual information obtained.

In his preface Professor Fryer intimates that the best use of the collateral and source material he has compiled might be obtained by realignment of the subjects covered in the course (to show "the history and function of property") without specifying in detail the approach he favors. "The orthodox classification of topics has been adhered to, in order to make possible use by the greatest number of students." Specifically the order

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