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Reviews

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REVIEWS

LAW, LEGISLATION, AND LIBERTY. Volume I: Rules and Order

by Friedrich A. Hayek

The University of Chicago Press, 1973. 184 pp.

In this first volume of a proposed three-volume work, Professor Hayek undertakes the defense of classical liberalism's admonishments against allowing the expansion of governmental powers in an effort to achieve a consciously directed society to extinguish the paramount principles of the preservation of individual liberty.

The present volume is an examination of the historical and conceptual foundations of the legal order "most conducive to the preservation of individual freedom." Professor Hayek intends to analyze the inability of the use of legislation to achieve "social justice" in his second volume, subtitled "The Mirage of Social Justice." Volume three of this work, subtitled "The Political Order of a Free Society," will then explore alternative institutional inventions to liberal constitutionalism as a means of effectively preserving individual freedom.

"Rules and Order" focuses upon the contention that law is derived from custom and precedent as discovered and interpreted by judges, rather than created as the statutorily expressed legislative will of a sovereign representative body, authorized by the consent of the majority to promulgate laws. Professor Hayek maintains that any deviation from this contention that emphasizes a legislatively-oriented foundation for law making, ignores and defeats the underlying principles inherent to the preservation of individual freedom. In this regard, constitutionalism has failed to prevent the drift towards legislative deference in law making and consequently the distinction between society and government is rapidly eroding at the expense of individual freedom.

A free society presupposes a normative order fostered by the actions and expectations of individuals who interact in the pursuit of their own goals and interests, the purpose of government being to enforce and protect this order. Hence, legislation should be limited to controlling administrative matters, while rules that determine the propriety of conduct generally should be articulated by judges who rely on the customs, traditions and practices deeply rooted in our cultural heritage.

In contravention to the theory of "constructive rationalism," which assumes that all social institutions are or should be the product of deliberate design, Professor Hayek starts from a variant of Burke's thesis, that a social order is far too complicated to be deliberately reconstructed or even modified, and demonstrates that the customary law of a society is founded upon and authorized by its evolutionary success. In this context, Professor Hayek undertakes "a critical reexamination not only of current beliefs but of the real meaning of some fundamental conceptions to which we pay lip service."

Failure to adhere to these concepts has contributed to the decline of constitutionalism and prohibited the doctrine of separation of powers from effectively restraining governmental expansion. Furthermore, three elements, reliance on the use of reason to guide the course of human affairs, misconceptions about the origin and development of social order, and inadequate appreciation of the necessity for upholding and applying principles inherent to individual liberty, have created contemporary misunderstandings of the nature and purpose of law and has distorted the proper roles of the judge and the legislator.

Professor Hayek's argument that the customary law of a society is authorized by its evolutionary success, calls for some critical questioning. Granted that there necessarily are "spontaneous orders" in society that arise naturally from the interaction of human beings, their results may not be wholly beneficial. Professor Hayek admits that "the result of a wholly just transaction may . . . be that one side gets very little out of it." Having also conceded that some human direction may be given to social institutions in at least an administrative capacity, Professor Hayek has set arbitrarily narrow limits to the degree of intervention permissible, consistent with the protection of individual freedom.

Similarly, an unvarying reliance on custom and tradition mandates that the continued survival of freedom depends upon an adaptation to the past rather than the present. Of course, human nature may be the same in any era, but changing populations and technical resources may make the principles that secured freedom in prior generations ill-suited to a much changed environment. Indeed the very practices that Professor Hayek opposes in contemporary society may be manifestations of the same evolutionary process on which he relies. That is, the production of political theories and application of them to society is in itself an evolutionary development whose absence is at least one aspect of that stagnation commonly adduced for the fall of great nations.

Professor Hayek argues persuasively, relying with sound scholarship on the actual history of the law. Of particular interest to the student is the comparison and contrast of his central ideas to those of various philosophical and jurisprudential thinkers. In this context, hopefully the third volume of this work will provide a complete bibliography and a subject index for the entire work, as the present volume has neither.

Notwithstanding the substantial use of repetition to emphasize a few key concepts, this volume is forcefully and articulately written, and should be of considerable interest to both students and the serious general reader. Professor Hayek defends classical liberalism in an era when liberal values are more often associated with egalitarian concepts. Thus, *Law, Legislation, and Liberty* presents a powerful challenge to current trends in social theory and policy.

--Terry M. Schpok

EMPIRE STATE REPORT

The Monthly Magazine on Politics and Government in New York State
Timothy B. Clark, Editor and Publisher

Published by Empire State Report, Inc., One Columbia Place, Albany, N.Y. 12207
 Monthly; Individual Subscriptions, \$18 per year

The New York State legislature's rules, wrote Humphrey S. Tyler in the February/March, 1975 issue of *Empire State Report*, "give almost absolute control of the law-making process to a handful of leaders and the governor."

"Major decisions on important bills," he wrote, "have always been made by the Senate majority leader, the Assembly speaker and the governor protected by the secrecy of closed bargaining sessions and an inviolate tradition of silence."

To those familiar with the workings of the second and third floor of New York's Capitol in Albany, or with the actual legislative processes of any state legislature, Mr. Tyler's statements are not surprising. It is, however, both unusual and startling to see these thoughts in print.

Empire State Report, published since December, 1974 by a not-for-profit corporation known as Empire State Report, Inc., provides such startling reporting on a regular basis. It has become a journal of record and a journal of analysis about New York's government, and is indispensable to anyone interested in the state's major judicial decisions, legislative actions and gubernatorial activities.

David Shaffer, chief of The Associated Press bureau in Albany, wrote in the August, 1975 issue that

The New York Legislature emerged from the test of a new political situation this year with its role essentially unchanged -- a secondary but functional institution in the state's political firmament.

In describing an article about the results of the 1975 legislative session, the contents page of the August issue said that ". . . the 1975 session again proved that without the leadership of a strong governor the legislature wanders aimlessly and accomplishes little of substance on its own."

Humphrey S. Tyler, managing editor of *Empire State Report*, wrote in December, 1975 about "The Legislature's Exclusive Old Boy Club," pointing out that

The importance of the club is not often discussed by legislators when they explain the workings of the legislature, mainly because few would admit that decisions are made on the basis of anything other than hard-headed logic and the wishes of the voters. But pressure to become part of the club and the intricate network of individual alliances and mutual trust often have a more profound effect on the law-making process than constituent and lobbyist pressures, gubernatorial directives and rigid ideological prejudices.

It is difficult for any state legislature fully to serve as a co-equal branch of any state's government. Legislative initiative on major matters most often comes from the state's governor, for legislatures and legislators rarely have the necessary staff to research problems and develop tentative solutions.

New York's legislature now has a respected staff of full-time professional counsel and research assistants, although individual legislator's staff members are

often part-time or no-shows. The no-shows are getting fewer and fewer, however, due in no small part to coverage by *Empire State Report* and the efforts of citizens' lobbies and other good government groups.

The problem of strengthening the New York legislature has been dealt with by many groups. Two of those who have developed the most sophisticated, comprehensive proposals for legislative reform have been the Association of the Bar of the City of New York and the New York State Bar Association.

Too often, recommendations by the organized bar and other organizations for legislative reform are given brief coverage by daily newspaper reporters, and then forgotten. The detailed and comprehensive coverage in the August, 1975 issue of *Empire State Report* of the State Bar Association's proposals for legislative restructuring have given these proposals much greater force and effect than they might otherwise have had.

The State Senate and Assembly, an August article pointed out, "are still fighting with swords compared to a governor's howitzers," and then detailed the State Bar Association's proposals. These proposals included providing full-time and well-paid staff to the standing committees, further strengthening the standing committees by allowing them to function on a year-round basis and eliminating the select and joint committees, increasing legislative terms from two to four years, increasing home rule and diminishing the need for state legislative action on purely local matters, and creating an essential legislative board of ethics.

By stalling bills on the calendar, the majority leader of the State Senate can postpone consideration of these matters until he changes his mind. It's an effective device for insuring the power of the majority leader, but obviously does little in terms of enabling an individual legislator fully to participate in the legislative process. The New York State Bar Association's recommendation to abolish this power on the part of the Senate's majority leader would have been given little continuing coverage by the daily press; by covering this matter, *Empire State Report* not only enables citizens more fully to understand the actual legislative process, but brings pressure to bear on the legislature to abolish a restrictive and antidemocratic procedure.

Empire State Report also deals with those who petition the legislature for a redress of their grievances. Steve Kroft, formerly a political reporter for SW WSYR-TV, Syracuse, N. Y., wrote in April, 1975, about "The Magic and Myth of the Big Lobbyists' Influence on New York State's Government." Articles about lobbyists regularly appear in daily newspapers, but rarely provide as detailed an analysis as did Steve Kroft, who also provided biographies of the state's "top ten lobbyists," listing their clients and their incomes from lobbying as reported to the state legislature.

Empire State Report is an obviously superb research tool and citizens' information system. It does not, however, confine its reporting to the state's legislative branch.

The *Report* published, during 1975, a detailed study of the state's Public Service Commission by David Shaffer, as well as an analysis of the various proposals for Court reform in New York and the conflicts between the judicial approach led by Chief Judge Charles D. Breitel and the legislative approach, led by State Senator Bernard G. Gordon (R. C. Peekskill, N. Y.), chairman of the State Senate's Judiciary Committee.

Betsy Buechner, a reporter for the Albany bureau of the Gannett News Service, gave comprehensive coverage to the background of Governor Hugh L.

Carey's veto of the proposed new state agency for the mentally retarded. The *Report* published a detailed analysis in June, 1975, by Clay and Carol Richards, of the State of New York's Washington office, its politics, history, background and development, its relationship between state legislators, state agencies, the governor, and the state's Congressional delegation.

Empire State Report also provides continuing coverage of the major decisions of the state's Court of Appeals, and of politics among the judges. It covers proposals for court reform, for the appointment of judges, for the reorganization of the court structure.

It provided major coverage to the 1975 opinion by the Court of Appeals in *Slater v. Gallman*, an appeal of an assessment by the State Tax Commission, in which the Court rebuked a past president of both the New York and American Trial Lawyers Association for writing a lengthy, wandering brief. That brief, wrote Judge Matthew J. Jasen, "wanders aimlessly through myriad irrelevant matters of administrative and constitutional law, pausing only briefly to discuss the issues raised by this appeal," and the Court chose this case as an "opportunity to comment on a matter that concerns us greatly, namely, the quality, length and content of briefs presented to this Court."

Alexander Aldrich, former president of Long Island University, wrote that "It is staggering that nobody since Robert Moses in the early 1920s has seen fit to do this kind of systematic review of what goes on in our state government."

Timothy B. Clark, the founder, editor and publisher of *Empire State Report*, did indeed undertake a staggering commitment. Under his editorial leadership, *Empire State Report* has become a journal of record as well as of reference, providing analysis and coverage of major executive and legislative issues, of the effectiveness of state government, of the decisions by the state's important Court of Appeals, and of the politics affecting these governmental determinations, actions and judgments. It is one of the most sophisticated, comprehensive journals of state government in the nation, and a requisite tool for those concerned with government and politics.

—Fredric M. Carlin

LEGISLATIVE LAW AND PROCESS IN A NUTSHELL
by Jack Davies

West Publishing Co., 1975. 279 pp.

In this latest addition to West Publishing's *Nutshell* series, the emphasis is on the broad political process by which a bill becomes a statute. The scope of the book encompasses both an examination of traditional legal analysis with respect to legislative drafting, as well as an exposure to political theory regarding the realities of facilitating the passage of a bill. Sections are devoted to a survey of the fundamental components of the legislative system, bill drafting techniques, legislative policy making, and the relationship between legislation and the courts. The treatment of all topics is necessarily brief, almost cursory, and does not allow for a leisurely or comprehensive study of a particular area.

A survey of this sort is neither an effective research tool nor a satisfactory guide to legislative drafting, but its brevity may provide the means to achieve some initial familiarity with the field without spending a prohibitive period of time with a more exhaustive text. This book is clearly intended as an introduction to the legislative process, and if it does not challenge the reader, at least it provides a pleasant outline upon which to build.

—Eugene H. Turnbull

LEGISLATIVE ANALYSIS: How to Use Statutes and Regulations.

by William P. Statsky

West Publishing Co., 1975. 216 pp.

Professor Statsky's book is directed at anyone who needs to develop practical skills in dealing with legislative statutes and administrative agency regulations. The format is that of identifying specific problems encountered in the processes of drafting legislation and determining "legislative intent." To develop drafting and advocacy skills, Professor Statsky offers assignments which are designed to illustrate such matters as ambiguity in legislation and aids to ascertaining the meaning of statutes and regulations (for instance, the principles of "expressio unius est exclusio alterius" and "ejusdem generis."). He further suggests a method for preparing legal memoranda dealing with the applicability of certain legislation to the facts of a particular client's case.

Professor Statsky's welcome problem-oriented approach can effectively help stimulate proficiency in the analysis and drafting of legislation. It is recommended for those who lack technical skills in legislative research and interpretation and seek a basic familiarity in this area.

—Guy P. Hoadley

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