

1-1-1980

## Reviews

John E. Robson

Howard A. Cohen

Charles Douglas Oliver

Follow this and additional works at: <http://scholarship.law.nd.edu/jleg>

---

### Recommended Citation

Robson, John E.; Cohen, Howard A.; and Oliver, Charles Douglas (1980) "Reviews," *Journal of Legislation*: Vol. 7: Iss. 1, Article 13.  
Available at: <http://scholarship.law.nd.edu/jleg/vol7/iss1/13>

This Book Review is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

---

## REVIEWS

---

### REGULATION, ECONOMICS, AND THE LAW

By Bernard H. Siegan

Lexington Books, Lexington, Massachusetts, 1979. 144 pages. \$14.50  
ISBN 0-669-02091-5

Reviewed by John E. Robson\*

The reader may question whether so slim a volume as *Regulation, Economics, and the Law* satisfies its editor's goal of providing "an understanding of the operation of the market and of government regulation . . ." However, Professor Siegan has assembled a spirited little collection which provides some insight into these vital subjects. The rewarding passages are well leavened by examples of simplistic, wool-brained arguments on a variety of topics which includes energy, communications, land use control, consumer protection, national health insurance, and the social responsibility of corporations. There is also a little gem by Milton Friedman on the economics of free speech.

Since this book is compiled from a series of debates between free marketeers and pro-regulationists sponsored by the San Diego Law School, Professor Siegan should not take the rap for bad arguments not of his own making. This reviewer's impression is that something was lost in translation from the "live" debates to the edited transcripts, perhaps an inherent problem in this art form.

Not surprisingly, the recurrent chords struck in the debates are that pro-regulationists maintain an abiding faith in government's capacity to solve problems while free marketeers do not. Examples: "Why must we have more (energy) regulation? The answer is simple - because . . . energy shortages . . . make easy solutions impossible." On the other hand: "The incompetence of government is overwhelmingly evident."

A mystical faith in the ultimate triumph of "good regulation" is what has led this and other advanced industrial nations to persist in the creation of regulatory endeavors. As one of the presentations in this volume puts it, "You do not abolish the agency. You try to make it better." Thus we are distracted from the core issue: why is government engaged in this activity at all?

Another recurrent theme is that business wants to perpetuate regulation. My personal experience as Chairman of the Civil Aeronautics Board that initiated airline deregulation lends some support to this thesis. But it is more accurate to say that what business wants is not more regulation but less competition. And, in some areas of the economy, business has tragically permitted itself to become convinced that government regulation is the best method to avoid competition. After a couple of decades in the regulatory cocoon, an entire industry can become a species of commercial cripple, fearful of unfettered competition and unable to contemplate life in an unregulated environment.

On occasion, the discussion in the debates makes a more subtle point. One is the tendency to pervert a system in order to serve an unrelated objective. Stewart Udall argues that energy prices should not be decontrolled since the anticipated higher prices will severely impact the poor. Why, asks his debating adversary, should we keep energy prices artificially low to aid a small percentage of the population and confer a windfall subsidy on the great majority who are not poor? "If poverty is the problem, why doesn't government solve the problem through a direct antipovertry program?" Good point. Yet it is the case that many systems are "jimmied"

\*Executive Vice President, G.D. Searle & Co., Skokie, Illinois; B.A., Yale University; LL.B., Harvard Law School.

to serve a perceived social problem that we are unwilling to deal with directly. Our systems of education, transportation and taxation all manifest a lattice-work of cross subsidy and irrational features designed to confer covertly on some group economic benefits that have been judged politically embarrassing to confer by direct handout.

A related point emerges in an otherwise mediocre debate concerning corporate social responsibility. Here the issue concerns the appropriate role for business organizations vis à vis other institutions of society. The argument is advanced that corporations must behave in a "socially responsible" way in order to avoid having government "assume total power over every phase of our lives . . ." That is, unless private corporations undertake (with their shareholders' money) various public and social responsibilities, the government will. Unfortunately, this confusion about the corporate role has infected many a board of directors and much of the corporate executive corps. No one advocates socially irresponsible corporations. But that does not make a case for corporations straying from their basic responsibility which is to create value for their investors. To push the business corporation into the social welfare arena does not promote the cause of well-run government. Rather it promotes poorly run corporations. This is surely one area where rendering unto Caesar what is Caesar's and to Mammon what is Mammon's will lead to the proper institutions doing not only what they do best but doing what they ought to be doing.

The collection of debates hits bottom in the episode titled "Government Regulation and the Consumer." Consumer lawyer Morrison unreels a string of hare-brained assertions ranging from finding a general conspiracy on the part of business to do in its customers to a layman's view of the evils of the pharmaceutical industry and the worthlessness of prescription drugs. The quality of the argument may be measured by Morrison's final salvo, apparently in defense of total government regulation: "Somebody has got to look out for people when they are not looking out for themselves."

The pieces by Economist-Nobel Laureate Milton Friedman is worth the price of admission. In a few pages Friedman makes a telling analysis of the impossibility of drawing any clear line between intrusion into political freedoms and economic freedoms. Example: when currency restriction prevent an emigre from taking his worldly possessions with him, has not government infringed upon a basic "First Amendment" political freedom in the name of economic regulation? What troubles Friedman is the fundamental inconsistency manifested by the practice, as he puts it, "that almost any cost may be imposed on third parties . . . to protect . . . Freedom of Speech, but that almost any third-party effect, however trivial, justifies restricting . . . economic freedom." Worth thinking about!

It is observed in one of the debates that the Mayor of Denver goes to Washington D.C. thirty times for every time he travels across the street to petition his State Government. The reason: "He knows where the action is: he knows where the people who can solve his problems are located."

Perhaps this morbid observation will become less true in the future. To the extent that the debates collected in *Regulation, Economics, and the Law* expose lively minds to the pernicious effects of overregulation and burgeoning government, then it will have served an important purpose.

**CRISIS AND LEGITIMACY****The Administrative Process and American Government****By James O. Freedman**Cambridge University Press, Cambridge, 1978  
ISBN 0-521-22036-7**Reviewed by Howard A. Cohen\***

In *Crisis and Legitimacy: The Administrative Process and American Government*, James O. Freedman, professor of law at the University of Pennsylvania, has written a perceptive and important book. Freedman premises his book on the belief that a "sense of crisis" has attended federal administrative agencies' practices and processes which has impaired their legitimacy. "Institutional legitimacy," he notes "is an essential condition for institutional effectiveness" and, therefore, "the sources of the recurrent sense of crisis must be understood if the administrative process is to fulfill the promise that has animated the nation's repeated decisions to rely upon it for the achievement of public purposes."

After an exhaustive review of the historical, constitutional and legal basis of administrative agencies and their activities in our society, Professor Freedman concludes that the "agencies do not conform to three of the most powerful conceptions of the American imagination: the inviolability of the constitutional prescription of a separation of governmental powers, the importance of the judicial norm of trial-type hearings for the fair determination of disputed questions and the insistence that policy-making officials of government be directly accountable to the people through political and electoral processes."

Freedman, throughout his treatise, presents a persuasive and erudite case for his assertion that the legitimacy of the administrative process has been questioned unfairly. To Freedman, Americans have always been ambivalent about governmental regulation; since regulation is the arena in which administrative agencies operate, we have had an ambivalence towards the agencies that perform tasks about which we are unsure.

**Governmental Structure And Processes: Who Governs?**

Professor Freedman has raised anew the question of who governs in our increasingly politicized economy: the statesmen, bureaucrats, policy scientists, lawyers or politicians. Serious discussion of this issue and the related derivative issues are as appropriate today as they have ever been. At a slightly more abstract level, this question was the subject of a series of seminars sponsored by the American Enterprise Institute.

Today, the processes of administrative agencies are often as crucial as the substantive matters. This is especially true because the due process requirements imposed by the Supreme Court and Congress upon the agencies are often considered to be as important, if not more important, than the substantive directions given the agencies. It is this set of procedural issues that receives considerable, but appropriate, attention from Freedman, an administrative law professor.

The book's strengths include a fine and consistent interplay between notions which often appear, at first blush, to be contradictory. For example, in recognizing and treating such a fundamentally contradictory notion as "agency independence and accountability," Professor Freedman demonstrates a firm grasp of the political no man's land into which the Congress has required administrative agencies to live.

He focuses upon the overlapping spheres of interest of the President which, he properly points out, usually has been delegated to the hidden but traditionally high quality bureaucracy. An example of these overlapping spheres is that the Office of Management and Budget, the

\*Associate Professor of Public Management, the Wharton School of the University of Pennsylvania; Secretary of Revenue, Commonwealth of Pennsylvania; former special counsel to the Chairman, U.S. Civil Aeronautics Board, 1975-1977. A.B., 1963, J.D., 1965, Rutgers University; M.B.A., 1977, George Washington University.

Congress and the U.S. Civil Aeronautics Board all have a part in the allocation of international air routes. This analysis by Freedman highlights the contradictions that have lead scholars, lawyers and concerned citizens periodically to question the hodgepodge of American government. This questioning, which all too often takes place at a time when rational, probing discussion gives way to political expediency, raises anew questions regarding the application of conservative constitutional government in an increasingly technologically based urban society.

Professor Freedman accurately sums up the status of the agencies: "The discrepancies between the theory of independence and the fact of its practice have made it difficult to sustain public confidence in the independence of the administrative process. These discrepancies have been significant factors in generating misgivings as to the value of independence in administrative agencies and in creating doubts about the legitimacy of the administrative process."

While anyone familiar with these themes recognizes that there are not going to be acceptable or complete answers to these kinds of questions, it is extremely important, particularly in the quadrennial post-Watergate election years, that such fundamental structural issues of our complex constitutional system be examined and reexamined. Professor Freedman has reopened that door for us.

### **Agency Accountability**

While structural issues are important, equally important are two related considerations: first, the changing political and legal context in which they are reviewed and analyzed and second, the operating organizational behavior which goes on within these usually small, but extraordinarily active arms of modern American government.

Activity and adaptation with respect to the changing political and legal context has usually been reserved to lawyers, politicians and the legitimate economic interests they represent. However, Professor Freedman stresses that since there has never been a general acceptance in our political culture of those inter-active phenomena, a lack of legitimacy for the federal administrative agencies has resulted.

Intraorganizational and management behavior of the agencies is a field which has not recently received significant scholarly attention. The media and the activist citizen organizations periodically reveal some inadequately based examples of misconduct which become quickly and illegitimately ascribed to an entire agency or group of agencies. However, the quantitative mania that swept over the political scientists' community in the sixties and seventies has left this sphere of inquiry to others, especially those in the graduate schools of management who have demonstrated competence on related inquiries in the private profit-oriented organizations. Freedman's work not only highlights the need for such inquiries by those in the law teaching community, but serves to plant a seed that could, if properly nurtured, yield even richer insights. Such insights probably will occur when a substantial number of broadly based inquiries are made by multidisciplinary research teams. These teams would be made up of lawyers, management specialists with the appropriate training and real world appreciation of the dynamics of large organizations and others who understand and respect the political world in which economic decisions of such magnitude as those of federal administrative agencies are made. Such inquiries thus far have been few and far between. Unfortunately, the economics of the eighties may well mean that at a time when such reviews are most needed, they will be unable to get the financial support necessary to fund them.

Of course, one can speculate that those who might support such inquiries would stand to lose the most from them. After all, many of the modern students of these matters have resurrected a profound newly discovered faith in the marketplace and think it to be a better regulator of economic matters than federal administrative agencies.

Indeed, the bold action of the U.S. Civil Aeronautics Board to deregulate domestic commercial civil aviation, the first such reversal of governmental meddling with the domestic economy since the New Deal, deserves such study. What we may find, after all is said and done, is that the sense of crisis and legitimacy so sensitively identified by Professor Freedman was inherently well placed by a freedom loving people who long ago were strong enough to experiment with the twin ideas that citizens could govern themselves wisely and a government that did a little less was to be preferred to a government that did a little more.

### A Guide For Future Studies

With the perspective of teacher and scholar, Freedman treats a mix of historic and theoretical legal and constitutional issues, accompanied by references to new issues for public policy analysts, public managers, working politicians, and citizens with concern. At a time when our citizens are reassessing the role and place of government in their lives, his focus on the federal administrative agencies is relevant and timely.

There are many similar questions which should be reexamined with respect to the administrative agencies of the other levels of government, especially state government. Freedman appropriately has left these to others. Such an effort, especially with respect to anti-competitive practices as are practiced by state public utility commissions, liquor control boards and other administrative agencies, should and will go forward. The substantive issues have begun to receive attention. Hopefully, those who examine those substantive areas will do so with an appreciation for the historic, political, and legal environment in which any change will have to take place. Professor Freedman's wide perspective provides a valuable frame of reference for such work. He also provides a frame of reference for all of us to keep in mind as we prepare to celebrate the bicentennial of our Constitution. Such an anniversary will prompt thoughtful citizens, lawyers and non-lawyers alike to think about basic questions of governance. Professor Freedman has done that, and his thoughts are worth our close attention.

### SOLAR LAW

#### Present and Future

By Sandy F. Kraemer

Shepard's Inc., Colorado Springs, Colorado, 1979. 364 pages.  
ISBN 0-07-035400-6

Reviewed by Charles Douglas Oliver\*

Public concern over the energy crisis has become the signal theme for the 1980's. The rising costs of producing energy, the problems of safely harnessing nuclear power and increasing pollution from spent fossil fuels have ignited unprecedented public debate. In addition, the Western world has been shocked by massive inconvenience and double-digit inflation as political upheavals in distant lands have tightened the flow of crude oil.

Against this background, advocates of solar power have started to gain serious national attention. Forward-looking communities, such as Portland, Oregon and Davis, California, have developed comprehensive energy programs focused upon conservation and development of solar technology. Modern man is experiencing a revitalized "Solar perspective."

*Solar Law* is a forthright treatment of the problems facing the development of solar technology by a leading advocate of solar power. The author, Sandy F. Kraemer, has served as legal counsel to various solar industries and as the legal consultant to the National Science Foundation supported Phoenix Solar Project in Colorado. Calling upon the interdisciplinary tools of engineering, astronomy, architecture, and economics, the author lays a thoughtful foundation for legal analysis of solar energy. While the book is primarily a compendium of legal issues affecting the development of solar technology, it provides a wealth of research material for "solar policy makers, problem solvers, advocates, developers, and consumers."

The book begins with the bold premise that "Oil and natural gas have become legalized national 'drugs' . . . and the American public [are] the addicts." Faced with dwindling reserves of fossil fuels and the dangers of nuclear power, solar energy offers a partial solution to the national crisis in a "post petroleum world." In support of this proposition, the author marshals convincing evidence of the deepening severity of the energy crisis, the dynamics of solar power and the technology required to harness the sun.

\*A.B. University of San Francisco, 1967; J.D. Candidate, University of Notre Dame Law School, 1981.

The author's personal predilection toward solar energy is the source of the book's strongest and weakest points: The book is remarkably well written and the exhortations in favor of solar law are convincing, while not being overdone. Absent this strong bias in favor of solar development, this book would lack a good deal of its force and direction. The American dependency upon fossil fuels is a stark commentary, but the openminded reader will find himself moving toward general agreement with the author after the first three chapters. On the other hand, the initial premise of oil and natural gas being legalized 'drugs' may offend, at the outset, those individuals who have the most to gain from reading this book. While it is unlikely that a proponent of fossil fuels would be swayed toward Kraemer's point of view by weakened prose, this is clearly a book that everyone involved with energy development should digest.

*Solar Law* is well-structured and covers the background of the energy problem, various solar technologies and legal tools, such as solar easements, covenants, zoning and planning, nuisance theory, eminent domain, building codes, utility regulation, and "transfer development rights" (TDR). A helpful set of appendices outlines solar terminology, potential legal issues, tax considerations, public utilities problems, tort liability and general references to solar technology.

Kraemer has devoted a good deal of attention to the development of proposed model legislation and legal forms: The book contains, for example, a Model Solar Easement Statute, a Model Solar Shade Control Easement, a Model Solar Shade Control Covenant, a Model Subdivision Regulation Amendment, and a Model Solar Shade Control Zoning Ordinance – just to mention a few. Kraemer's book may also prove highly informative to architects and real estate developers – there is a comprehensive appendix of solar-related codes and standards accepted by the various engineering societies and associations.

Additionally, the author discusses at length the advantages and drawbacks of proposed legislation and makes worthwhile recommendations that should prove helpful to lawyers and legislators involved in the drafting of solar energy statutes. The book is, therefore, a virtual *must* for every drafting committee library

Solar easements and covenants are among the most difficult legal instruments a lawyer will ever be called upon to describe. There is a demand for precision and that may be accomplished only with reference to the three dimensional movement of light over a given plot of land. The author's suggestions in this regard are invaluable. Kraemer is also careful to point out that the substantive law in each state may vary, and no absolutes can be posited in regard to enforcement of solar easements and covenants.

The author devotes substantial attention to selected examples of existing solar state tax incentive legislation. In the appendix, Kraemer describes various exemptions and tax credits permitted by twenty-three states. The book also covers federal regulation restraining the financing of solar homes and proposes certain amendments to permit greater flexibility to meet the energy-planning needs of the 1980's.

Inevitably, a legal text must prove itself through broad dissemination, repeated application, and general acceptance. Solar energy is in its infancy today and Kraemer's book is a "how to" guide that charts a course in new directions. The ultimate value of the book is yet to be demonstrated, but given the wide-spread public concern over the energy crisis, Kraemer's book deserves to be thoughtfully perused.