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Jerry L. Mashaw and the Public Law Curriculum

*Peter L. Strauss**

Jerry L. Mashaw's magisterial account of the first one hundred years of Administrative Law[1] sharply distinguishes between internal and external administrative law – between those contributions to the regularity and legality of agency behavior that emerge from its own institutions and practices, and the constraints imposed by external actors – legislative, executive, and judicial. The "systems of internal control and audit"[2] he found common to nineteenth-century governance are subordinated, if not suppressed in today's thinking about administrative law.

> In our world of multiple transsubstantive statutes and ubiquitous judicial review, we tend to think of our administrative constitution as a set of external constraints upon agencies. We then relentlessly analyze these external constraints as if they were the major determinants of agency efficacy, procedural fairness and legal legitimacy. Yet, in many ways it is the internal law of administration – the memoranda, guidelines, circulars and customs within agencies that most powerfully mold the behavior of administrative officials.[3]

A public law curriculum true to these realities would permit students to encounter administrative law in just this way, as administrative actors and the public dealing with them do. It would engage them directly with their materials, require them to "see" the relationships within agencies, and between them and legislatures or central executives, just as the people in the agencies and

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[1] Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (2012) [hereinafter Mashaw, Creating the Administrative Constitution].

[2] *Id.* at 313. [3] *Id.*

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those bodies do. It would not ask them, to the virtual exclusion of other perspectives, to encounter these matters just through the eyes of reviewing courts, or in relation to what the judiciary might command. Reflecting an extraordinary body of scholarship that has consistently plumbed these realities,[4] the very first teaching materials Jerry L. Mashaw edited provided just such encounters for his students.[5] Not "Judicial Control of Administrative Action,"[6] but getting inside administration, has been the hallmark of his career from its beginning[7] to the present day.[8]

This, and the recent growth of required courses on Legislation and Regulation, that might do the same, suggested the possible interest of an essay exploring the extent to which American law students, through the years, might encounter legislatures and agencies other than through the eyes of the possibly censorious, and inevitably retrospective and incidental-litigation-oriented courts.

To what extent have American law students been invited to view legislatures and agencies, as institutions and through their work, through other than judicial eyes? Even today, the law school curriculum endlessly invites attention to courts and the means by which they settle (that is to say, make) law. Well over a century ago, the innovative methods of Harvard's Christopher Columbus Langdell treated law as a science whose raw materials were appellate judicial decisions, and naught else.[9] Has the Langdellian imperative to use only cases as the primary materials of law study prevailed in the study of legislatures and agencies, as well? Do the materials of these courses invite direct attention to these other institutions and their ways, before which lawyers may so often have to appear? Or do legislatures and agencies appear primarily through the eyes of judges in decided cases, looking backwards over some particular, completed piece of work?

[4] As, for example, two of his prize-winning books, Bureaucratic Justice: Managing Social Security Disability Claims (1983) and The Struggle for Auto Safety (1990), written with David Harfst.

[5] *See infra* Section III.B.

[6] Louis Jaffe, Judicial Control of Administrative Action (1965).

[7] Jerry L. Mashaw, *Welfare Reform and Local Administration of Aid to Dependent Children in Virginia*, 57 Va. L. Rev. 818 (1971); Jerry L. Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. Pa. L. Rev. 1 (1973).

[8] Mashaw, Creating the Administrative Constitution, *supra* note 1.

[9] Langdell's approach excludes "the array of social, economic, and political forces that interacted with law. In Lawrence Friedman's view, this made 'Langdell's science of law . . . a geology without rocks, an astronomy without stars.'" Stephen Dow, *There's Madness in the Method: A Commentary on Law, Statistics, and the Nature of Legal Education*, 57 Okla. L. Rev. 579, 586 (2004) (citing Lawrence M. Friedman, A History of American Law 617 (2d ed. 1985)).

I BEGINNINGS

Court-centered instruction has been with us since Langdell's innovations captured law school curricula. Administrative law first appeared in them around the turn of the twentieth century, and, as Kevin Stack has forcefully reminded us,[10] its birth coincided with the Langdellian ascendancy. In the earliest of administrative law casebooks,[11] he relates, Ernst Freund

> emphasized both the role of legislation and public administration, including the methods agencies use to make decisions, as critical features of administrative law. Because exercises of administrative power must be authorized by legislation, Freund made clear that statutory construction was to be a central occupation for administrative law. "[T]he operation of general principles of administrative law is constantly affected, and frequently controlled by, the language of statutes." As a result, Freund emphasized that statutory construction thus deserved a prominent place in a course on administrative law. Indeed, Freund argued, in light of the "rapid and enormous growth of public regulation of all kinds," that principles of statutory construction are "as deserving of careful study as common-law principles.[12]

But the University of Chicago's new law school had imported Freund's Dean from Harvard, precisely to bring the case method with him. Although "Freund bemoaned the identification of the field of administrative law with judicial decisions,"[13] the Dean "would not permit him to offer a course on administrative law in the law school curriculum until he had produced materials based on cases."[14] Freund complied.[15]

[10] Kevin Stack, *Lessons from the Turn of the Twentieth Century for First-Year Courses on Legislation and Regulation*, 65 J. Legal Educ. 28 (2015).

[11] Ernst Freund, Cases on Administrative Law (1911)

[12] Stack, *supra* note 10, at 34 (citing Freund, Cases on Administrative Law 3 (1911)) (internal citations omitted).

[13] Stack, *supra* note 10, at 34 (citing Ernst Freund, *The Correlation of Work for Higher Degrees in Graduate Schools and Law Schools*, 11 Ill. L. Rev. 301, 306 (1916)).

[14] Stack, *supra* note 10, at 40 (citing William C. Chase, The American Law School and the Rise of Administrative Government 72 (1982) and Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 Vand. L. Rev. 609, 617–18 (2007)).

[15] Only excerpts from judicial opinions appear in Freund's first edition. The second, published in 1928, added a few notes and statutory texts, and two excerpts from the annual reports of the ICC. Freund stuck to his principles in important respects: the first half of each edition was devoted to "Administrative Power and Action," before reaching (wholly judicial) "Relief Against Administrative Action"; and issues of constitutional law (e.g., "delegation") were essentially left to courses in that subject.

"Cases only" remained dominant as the New Deal began, when Harvard Law School professors Felix Frankfurter and J. Forrester Davison published *Cases on Administrative Law*.[16] In its Preface one finds these apt words:

> Since we are dealing with law in the making, this collection draws upon all sources that help to make law – cases, statutes, legislative debates, rules and regulations, legal writings and lay comment . . . One cannot, then, stress too much the tentative stages of hypothesis and generalization in Administrative Law, and the predominant importance of knowing the anatomy and physiology of the law-making agencies that are neither legislature not courts but partake of the functions of both.

This is well said, but well over 90 percent of the 1,150 pages of the book present judicial decisions, edited but (in the Harvard style of the time) uncommented upon; and with the exception of introductory excerpts from the classic separation of powers literature, a brief ICC order, a couple of short statutory passages and twenty-seven pages of extracts from House of Lords debates, even the exceptional pages have as their subject courts and judicial review. The book presents "the anatomy and physiology of the law-making agencies" only as judges perceived them in the particular litigation that happened to have been put before them. Students see statutes and regulations only through their eyes. They view no legislative history independent of judicial preselection, no materials of rulemaking, or (with that brief and solitary exception) no administrative decision. Freund's basic criticism of the book,[17] that the materials are about constitutional law and judicial review, not administrative action as such, seems thoroughly justified.

Walter Gellhorn, intellectual father of the Administrative Procedure Act, would publish the first edition of his enduring teaching materials eight years later.[18] Here, too, judicial opinions dominate – although, in what would come to be a recognizable Columbia style, they were more stringently edited, and rich notes and text discussions frequently appear. An introductory essay and literature excerpts marshal strong arguments for the necessity and propriety of administrative agencies, and against the bar's then near-hysteria respecting administrative adjudications (rulemaking was not yet a subject). Although strongly evoking the likelihood of good faith and regularity in public servants' behavior, the materials neither promise nor provide attention to the internal

[16] Felix Frankfurter & J. Forrester Davison, Cases and other Materials on Administrative Law (1932). Ernst Freund, to whom the book is dedicated, wrote a not wholly appreciative review, Ernst Freund, *Cases and Other Materials on Administrative Law*, 46 Harv. L. Rev. 167 (1932), noting its limited focus on constitutional issues and the courts.

[17] Id. [18] Walter Gellhorn, Administrative Law: Cases and Comments (1st ed. 1940).

law of administration; nor do they provide primary materials reflecting external controls other than judicial ones. Four hundred pages treating the law of administrative hearings – notice, fair hearing, and findings – appear only through judicial eyes.

II THE LEGAL PROCESS

Change occurred in Hart and Sacks's remarkable *The Legal Process: Basic Problems in the Making and Application of Law*.[19] Enormously influential although then unprinted, these materials confronted law students from the outset with other institutions and their work, with materials of the legal process that had *not* been predigested by courts.[20] Its famous introductory problem, "The Significance of an Institutional System: The Case of the Spoiled Cantaloupes," is particularly striking in this respect. Before reaching the three judicial decisions that ultimately resolved "the case," students read and discussed forty pages providing factual background, statutory text, legislative history, regulatory text, the Department of Agriculture's decision-making, important information about state law and trade practice, and, finally, the Department's administrative decision.

While two later chapters understandably consider "The courts as places of initial resort for solving problems which fail of private solution" and "The role of the courts in the interpretation of statutes," four others are organized around other instrumentalities and the primary materials of *their* working. In the 158 pages given to private ordering, only seven opinions appear, less than 20 percent; and these opinions only appear *after* students have been asked to consider, independent of them, other materials involving other actors. Three hundred fifteen pages on "Legislatures and the legislative process" introduce their structure and work in detail. Many of these pages are textual, describing legislative process, actors, and problems, not judicial perspectives. The several problems place students in or before legislative bodies; the only use of judicial opinions in the chapter (there are just three) is to provide background students must use to respond to problems set in legislatures. The notes on legislation devote many more pages to primary legislative materials to be read independent of judicial views.

[19] Henry Hart, Jr., & Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law (tentative ed. 1958).

[20] Now printed as Henry M. Hart, Jr., & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) [hereinafter Published Legal Process]. The editors provide an introduction, *id*. at li-cxxxvi, that thoroughly explores the work's intellectual roots and influence.

The much shorter and admittedly incomplete[21] "The Executive Branch and the Administrative Process" puts students before executive actors. Given factual background, statutory provisions, and executive order, they must advise President Truman about the seizure of steel plants, *before* being permitted to read *Youngstown Sheet & Tube Co.* v. *Sawyer*.[22] With city ordinances and no judicial opinions in hand, they must advise on two problems that, in part, would reach the Supreme Court in *Frank* v. *Maryland*[23] the year after the tentative edition appeared. Finally, as agency legal advisers, they must read agency decisional documents, and an independent discussion of the legislative history of the provision with which they deal, before they can comprehend brief excerpts from a Supreme Court opinion.

Problems like these were essential to Hart and Sacks's remarkable accomplishment. They repeatedly required students to study primary materials other than judicial opinions and to imagine interacting with primary actors other than judges – materials and actors that had to be seen prior to and independent of their coming into judicial view. The materials' insistence on student understanding of numerous institutions, all acting within and upon or under law but doing so on their own terms, is their perhaps underappreciated contribution. Given the relative underdevelopment of "The Executive Branch and the Administrative Process," one cannot confidently find here a turn back to the internal law of administrative agencies; but the overall approach strongly suggests that this is where a later edition, tentative or not, would have landed.

III AND AFTER A GENERATION

A *Gellhorn and Byse*, Administrative Law: Cases and Comments *(6th ed. 1974)*

Hart and Sacks's approach might have influenced the 6th Edition of Gellhorn and Byse, *Administrative Law: Cases and Comments*. In 1940, Gellhorn had worked with Hart and another on materials for the courses on legislation they each then taught, in which the problem method was the chief pedagogical innovation. But where Hart argued for directly engaging students with legislatures and their materials, Gellhorn "insist[ed] on more elaborate, doctrinally focused organization."[24] His co-editor, Byse, had been a colleague of Hart and Sacks since 1957. Yet save for its use of a short supplement setting problems (but not providing primary materials) the 1974 edition of Gellhorn and Byse reveals

[21] *E.g.*, *id.* at 1046, 1059–60, 1109. [22] 343 US 579 (1952)
[23] 359 US 360 (1959). [24] Published Legal Process, *supra* note 20, at lxxiv.

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few signs of Hart & Sacks's influence. Throughout, it required its students to respond to and evaluate judicial decisions and commentary, not to engage in legal practice outside of court. Early pages introduced them to Congress's extra-statutory (budgetary and oversight) controls over agency action, and to the possibilities for presidential controls; yet the predominant focus even here was on doctrine, not institutions and their functioning. Students would read over four hundred pages of material on judicial control before turning to administrative action; the internal structures of agencies and issues about their operation, seen through judicial eyes, appear only in the final chapter.

B *Jerry L. Mashaw and Richard Merrill*, Introduction to the American Public Law System *(1975)*

Echoes of Hart and Sacks *are* to be found in the first teaching materials Jerry L. Mashaw produced. Forty years ago he and his colleague Richard Merrill published *Introduction to the American Public Law System*, designed for the first year of law school. A course treating legislation and administrative action as subjects independently worthy of early, serious study, side by side, would give its students a clearer picture of the actual American legal system than a first-year curriculum wholly committed to cases and the common law. The editors stressed their "functional perspective,"[25] and that their "larger and primary aim is to bring an integration of administrative law into the larger fabric of the legal order"[26] by "integrat[ing] analysis of the administrative process with ways of thinking about the legislative process." Correspondingly, their book began with a study of the development and implementation of the 1899 Rivers and Harbors Act. Before they would reach highly contested Supreme Court opinions and extensive notes on statutory interpretation technique, this chapter obliged students to understand the development of a complicated set of statutory materials controlling discharges into navigable waterways and to advise an Assistant Attorney General about several issues of interpretation and policy. After the cases, materials on criminal enforcement of the act against polluters brought them to discussions between government prosecutors and congressional committees. A fourth section, on administrative implementation, turns on a presidential executive order directing creation of a discharge permit program and assigning responsibilities for it to various agencies, congressional

[25] Jerry L. Mashaw and Richard Merrill, Introduction to the American Public Law System, at xvii (1975).
[26] *Id.* at xviii.

testimony about the program then established, and statutory materials addressing the President's authority to reorganize governmental agencies; the chapter ends with discussion of the congressional reaction. Cases, yes; but the student must read and interpret for herself relatively complex statutory text; and she encounters as other primary material a presidential executive order and several excerpts from congressional testimony, all in the service of the authors' "larger and primary aim."

Following this chapter and two considering judicial restrictions on legislative processes, almost one hundred pages of materials on agency rulemaking – a subject virtually missing from Gellhorn and Byse – precede only slightly longer materials on agency adjudication. In all these chapters, it is fair to say "Judicial Control of" are the words that introduce virtually every subheading. But then comes a chapter on "agency choice of mode of action," in which, again, the student's gaze is strongly diverted from the courts. Perhaps presaging Merrill's two years of service as Chief Counsel to the FDA, which began the year these materials were published, more than eighty pages place the student inside the FDA, dealing with its implementation of 1962 amendments to its basic statute. She must master extensive statutory and regulatory texts and administrative history to deal effectively with a course of judicial decisions interpreting the statute; the materials' consistent focus on FDA actions, interpretations, and regulatory dilemmas invites, if it does not in terms command, continuous discussion of the FDA's internal administrative law. In these pages, "Judicial Control of" is the secondary, not primary, focus; the cases are among the building blocks provided for an FDA attorney, not doctrine to be learned.

C *Hans Linde and George Bunn*, Legislative and Administrative Processes *(1976)*

Another book suggesting the Hart and Sacks model, Hans Linde and George Bunn's *Legislative and Administrative Processes*, appeared the following year. These materials more fully presaged today's leg-reg courses in their thorough treatment of Congress and administrative agencies as institutions, and their disciplined attention to political as well as legal controls on agency behavior. Indeed, while its students often encountered law through judicial opinions as well as statutory and regulatory texts, the latter often dominated[27] and what

[27] The detailed Table of Contents for Chapter 3, "Legislative Process," for example, lists as primary materials for its 261 pages 15 cases, 16 statutes or bills, 18 passages from committee reports or hearing testimony, 24 excerpts from the literature (all but 2 focused on legislatures, not courts or judicial doctrine), and 6 documents generated within the executive branch. Chapter 6, "The

they would *not* find as doctrinal headings were "statutory interpretation,"[28] "scope of review," or "access to judicial review." Issues concerning courts *as courts*, judicial processes as subject matter, were left to the many other law school courses in which they would appear. While in relation to administrative action the book's focus (like the others of its time) was on adjudication not rulemaking, "it touches on administrative adjudications only insofar as they differ from litigation in courts."[29] No student studying these materials could have failed to leave them without understanding her need to deal with statutory and administrative materials, independently of judicial decisions, or that legislatures and agencies were institutions acting in both a political and a legal environment, and in themselves worthy of study.

Neither set of materials prevailed. Mashaw and other co-authors transformed his into a standard set of administrative law teaching materials, abandoning its innovative turn. It has returned to the legislature only in its most recent edition. The Linde and Bunn materials had supplanted a first-year course long taught at Wisconsin (where Bunn was Dean) using materials rivalling Hart and Sacks;[30] that earlier course had become unpopular with students who thought it political science, not real law. The substitution did not catch hold. Linde and Bunn never reached a second edition. Habituation to the case method, perhaps, and/or the difficulty of engaging students with institutions other than courts, with statutory and administrative materials as primary sources for learning and application, appear to have claimed it as a victim.[31]

The Langdellian commitment, that courts and their opinions are the proper medium of law study, indeed that the common law is what law is about, has

Administrative Agency – Responsibility and Control" shows a similar imbalance between cases (2) and documents generated within the executive or legislative branches (16) and literature excerpts concerning them (7). Other chapters are more heavily case-oriented, but not to the exclusion of primary and secondary materials generated by or about the political branches.

[28] The sixth of seven subsections in Chapter 3, "Legislative Process," deals with "Legislative History," approaching it from the perspective of understanding how judicial uses of it may affect legislators' behavior, *cf.* Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. Chi. L. Rev. 149 (2001), rather than as an element of instruction about statutory interpretation by courts.

[29] Hans Linde & George Bunn, Legislative and Administrative Processes, at xviii (1976).

[30] Lloyd Garrison & Willard Hurst, Law in Society: A Course Designed for Undergraduates and Beginning Law Students (1940), was succeeded by Carl A. Auerbach & Samuel Mermin, Legal Process: An Introduction to Decision-making by Judicial, Legislative, Executive and Administrative Agencies (1956). Like the tentative edition of Hart and Sacks, both were informally produced but, centered on Wisconsin law and the particular problems of workers' compensation, neither was widely circulated.

[31] I am indebted to William Whitford, Professor Emeritus at Wisconsin, for the information preceding this footnote. Emails to the author (Jan. 12 and 23, 2015). A quarter century later, Columbia's "Regulatory State" course would suffer the same fate, for the same reasons.

dominated law schools' first-year curricula since his time, even as the practice of law, if it ever was that unidimensional, has shifted steadily toward statutory regimes and their administrators. In a remarkable conversation before Harvard Law students in the fall of 2015,[32] Justice Elena Kagan and Professor John Manning recalled their Harvard education in the mid-1980s; At the school of Hart and Sacks it was devoid of disciplined, and certainly of first-year, attention to statutes. Until ten years ago, Harvard Law School's first-year curricular requirements remained essentially as they had been for a century (Civil Procedure, Contracts, Criminal Law, Property and Torts), and the "case method" remained firmly in place – altered, to be sure, by the effects Legal Realism, Critical Legal Studies, Law and Economics and other challenges had in shattering the "science" illusion, but juri-centric nonetheless. Indeed, when in 2006 Harvard introduced a required course in Legislation and Regulation into the first-year curriculum, the Langdellian commitment remained in place. Professors John Manning and Matthew Stephenson self-consciously agreed that the materials they prepared for the new course would "follow the familiar, case-oriented approach – relying on appellate opinions and notes and comments on those opinions as the main course materials and the focus of the discussion."[33] At Yale, today's required curriculum remains essentially what it was when I became its student 54 years ago – and long before that. A first year student must take Civil Procedure, Constitutional Law, Contracts and Torts in her first semester, as I did, and Criminal Law and Administration (but no longer Property) at some subsequent point.

IV THE CURRENT DAY

Fast-forward to the current day, and one finds strongly revived interest in studying legislation and, in particular, statutory interpretation – thanks in good part to the work of Jerry L. Mashaw's colleague William Eskridge, Jr. and his co-authors. Administrative law is finding its way into bar examinations, and increasingly understood by students to be a required course, whether or not their curriculum so provides. But the doctrinal and judicial orientation of these courses remains strong.[34] The last quarter-century, starting perhaps with

[32] Harvard Law School, *A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube (Nov. 25, 2015), http://www.youtube.com/watch?v=dpEtszFT0Tg.

[33] John F. Manning & Matthew C. Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 J. Legal Educ. 45 (2015).

[34] Legislation courses necessarily treat Congress as an institution outside the case method; for interpretation, increasingly they provide the statute to be interpreted before the opinion doing so – but rarely with independent problems. Students are not given in advance the other

my school's ultimately failing effort to create a required first-year course on the regulatory state, has seen a steady movement toward courses on legislation and regulation – today's predominant sources of law – as required elements of first-year curricula. At least six sets of law school teaching materials have recently been published for use in connection with these courses.[35] Each presents political institutions and agencies, statutes, and regulations as central actors and elements in the legal world, but they offer a wide range of approaches. To what extent do these curricular changes presage a change from the Langdellian commitments to using appellate judicial decisions and to teaching doctrine?[36]

1 *John F. Manning and Matthew C. Stephenson*, Legislation and Regulation[37]

Langdell dies hard at Harvard, as we have seen.[38] In their preface, Professors Manning and Stephenson describe their purpose as being "to teach students both how federal statutory and regulatory law is made, and how judges and administrative interpreters construe these legal materials."[39] Notice that this teaching is to be about "how judges and administrative interpreters construe" and not about how lawyers do. Consistent with Langdellian premises, students will almost invariably be seeing issues gazing backwards in relation to the already explained interpretations of judges and administrators, and not forwards, in the absence of fixed meanings, to advise clients about important choices. That the purpose of learning "how judges and administrative interpreters construe" dominates may be suggested by the omission of "Legislation" from the list of courses in the upper-level curriculum for which it might serve as a foundation;[40] and also by the materials' virtual absence of attention to

materials a private lawyer or an agency lawyer would certainly consult – any sense of the past history of the problem, other statutes that might be relevant, or the statute's political or legislative history. They are not, in other words, invited to read the statutes for themselves.

35 A symposium on these courses and their associated issues appears at 65 J. Legal Educ. 1–189 (2015).

36 For better fit with this volume and the imagined interests of its readers, the following pages are highly compressed from the festschrift paper; fuller analysis of the contents of each of the books discussed appears in Peter L. Strauss, *Review Essay: Christopher Columbus Langdell and the Public Law Curriculum*, 66 *J. Legal Educ.* 157 (2016).

37 2d ed. 2013.

38 *See supra* text at note 33. 39 Manning & Stephenson, *supra* note 37, at v.

40 In her contribution to the *Journal of Legal Education* Symposium, Abbe R. Gluck, *The Ripple Effect of "Leg-Reg" on the Study of Legislation & Administrative Law in the Law School Curriculum*, 65 J. Legal Educ. 121 (2015), Abbe Gluck reports that the new leg-reg courses appear to be displacing Legislation as an upper-class course, but not Administrative Law. To the extent those courses examine the institutional functioning of legislatures, that loss counsels

Congress and administrative agencies as institutions functioning on their own internal law.[41] Consideration of internal agency processes of decision, as distinct from statutory and judicial requirements for them, is simply missing. Other than the Constitution and relevant provisions of the Administrative Procedure Act, the only non-judicial materials used as primary readings are Executive Order 12,866 and a presidential memorandum on clean water protection. The materials simply fail to engage students with primary materials other than judicial opinion.

From a more conventional perspective, the materials are excellent, very well adapted to teaching "how judges and administrative interpreters construe [statutory and regulatory law]." John Manning is deservedly regarded as the leading academic scholar supporting the "new textualism"; yet the case selections, richly annotated notes, and questions posed should leave students with a sense of the tensions, of the strong arguments on each side of this divide, of some movement toward a new textually constrained purposivism alongside a new (and more moderate) textualism. Students are consistently engaged in a real debate, with well-chosen cases to illustrate it and no clear outcome required. The problem is, that this is all about courts. Even statutory interpretation by agencies, whose techniques arguably are influenced by their responsibilities and by an agency's continuous contact with both its constitutive statutes and with Congress, is discussed only as it may influence judicial interpretation.

2 *Samuel Estreicher and David P. Nolls*, Legislation and Regulatory State[42]

Aside from the question about Langdellian change, Samuel Estreicher and David P. Nolls's *Legislation and Regulatory State*, recently published in both print and electronic editions by Lexis Books, also has much to commend it for first-year use. The notes following the appellate decisions that are

assuring that the new courses consider legislatures as functioning institutions, as well as the appropriate means by which outsiders may deal with their end-products.

[41] There is no hint here of congressional disarray or of the realities of legislative drafting and processing revealed in Abbe Gluck and Lisa Bressman's pathbreaking scholarship, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) and Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014). A good deal more emerges, however, in the interstices of their subsequent discussions of the debates over the use of legislative history.

[42] 2015. This paragraph is based on prepublication materials the authors kindly provided in May 2015, and some details may have changed.

virtually the only primary materials its detailed table of contents[43] consistently invite attention to case and doctrinal analysis issues reinforcing the book's overall "regulatory state" theme. Congressional and executive branch institutions and practices are well, if somewhat idealistically[44] described. The notes often challenge the judicial analysis, or raise interesting questions about its subsequent use, but typically do so in relation to other judicial decisions or agency action; the secondary literature is generally referred to, not presented for active consideration.[45]

If in teaching one made disciplined use of the documentary supplement that accompanies the book, the juris-centric character of the main volume could be somewhat eased. One of the cases for which the documentary supplement sets out statutes and legislative history excerpts, *Maracich*v. *Spears*,[46] is the first case students encounter in the materials on statutory interpretation. It is an especially good choice for this purpose, one that required the Supreme Court's close analysis of statutory text and context (and legislative history?), was reached 5–4, adopted an interpretation of the text that is far from the reading most easily given it, and – perhaps most important to this appraisal – rather dramatically departed from the usual conservative–liberal alignments students might be expecting. The supplement includes relevant excerpts from

[43] The exceptions are Federalist No. 10, EO 12,866, and the Customs Service letter that eventuated in *Mead Corp.* v. *United States*, 533 US 218 (2001).

[44] Chapter 2, "The Legislative Process and Statutory Interpretation," draws on the works of Robert Katzmann, and Antonin Scalia and Bryan Garner in its discussions of statutory interpretation, but not on works like Thomas Mann and Norman Ornstein's prominent scholarship on the current congressional disarray, or Abbe Gluck and Lisa Bressman's study of the realities of congressional drafting practice, *see supra* note 41. In discussing presidential control of agency action, the book commendably reproduces for discussion a well-edited text of one of Judge Korman's decisions respecting presidential pressure on the FDA's decisions about over-the-counter availability of day-after-intercourse contraceptives, *Tummino* v. *Torti*, 603 F. Supp. 2d 519 (EDNY 2009), but does not refer to Lisa Heinzerling's *The FDA's Plan B Fiasco: Lessons for Administrative Law*, 102 Geo. L.J. 927 (2014) or many other secondary works about presidential thumbs on the scale.

[45] *Viz.*,

> 8. **Further Reading**. For more on the causes of statutory blind spots and the interpretative challenges they create, see, e.g., Judges and Legislators: Toward Institutional Comity (Robert A. Katzmann, ed., 1988); Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for Statutory Housekeeping: Appellate Courts Working with Congress*, 9 J. App. Prac. & Process 131 (2007); Amanda Frost, *Certifying Questions to Congress*, 101 Nw. U. L. Rev. 1 (2007); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575 (2002); Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 Harv. J. on Legis. 123 (1992).

Samuel Estreicher and David P. Nolls, Legislation and Regulatory State, ch. II (2)(b)(v) (Notes and Questions) (prepublication materials).

[46] 133 S. Ct. 2191 (2013).

the act in question and selected legislative history; given a problem based on the case's facts, students could have the opportunity to experience the matter as a lawyer would have; this would be the direct engagement with legislative history that Manning-Stephenson denies its users. The book would permit similar exercises at least three times over its course although, given the prominence and placement of the opinions in the book, one supposes the temptation to short-cut that assignment would not be easily resisted. From the perspective of case and doctrinal analysis, for students just beginning their legal education, the choice of this case is excellent. It seems free from normative pre-commitments that might distract its students; its presentation teaches valuable habits for entering students; if, as one suspects, students find the majority's reading of the statute both surprising and, in purposive terms, compelling, the lesson to explore *possible* meanings of text before settling on an understood meaning is invaluable. At the same time, it is only that. Supplement aside, here as elsewhere in the book, the materials are about what courts do, not what attorneys do. Fresh, imaginative and thorough, still they never place the student where she will often find herself, having to read a statute on a client's behalf – often with the most important consequences turning on her reading – without a prior judicial reading to guide her. A teacher could fill the gap, if so minded; but the point here is that Langdell still rules – cases and doctrine are at the core.[47]

3 *Lisa Heinzerling and Mark Tushnet*, The Regulatory and Administrative State[48]

A student taking Harvard's new course with Mark Tushnet and using his book – the first set of published materials designed for such a course[49] – would

[47] So too with the book's treatment of Executive Order 12,886, the core instrument of presidential dialogue with agencies over their rulemaking activities. Estreicher and Nolls want their students to know what the Executive Order is and does, but never put their students in the shoes of agency lawyers, or lawyers from private enterprise who might wish to influence the process. Nor do they take the opportunity the order's substance gives to discuss the arguable virtues and faults of cost–benefit analysis. The focus on judicial issues, not the EO process as such, is striking.

[48] 2006.

[49] Sidney A. Shapiro and Joseph P. Tomain had earlier published *Regulatory Law and Policy: Cases and Materials*, whose last (third) edition was published in 2003. It focused on the intellectual and legal grounding for regulation of various kinds – substance, methods, and measures of effectiveness – and not institutions or procedures as such. Congress, statutory interpretation and the Administrative Procedure Act scarcely appear.

have a very different experience from those studying with the Manning-Stephenson materials. The lead materials named in the detailed table of contents are primarily excerpts from the secondary literature, not judicial opinions.[50] Agency documents occasionally appear. The book's first two parts present regulation as an alternative to litigation, first in respect of contract, and then criminal law or torts. The contrast both these parts offer to the common-law courses of the first year is strong and helpful in bringing student perceptions of the legal order forward into the twenty-first century; they make the case for regulation as a necessity. And the final chapter of these two parts, "Linking Common Law and Statutes: The Case of Workers' Compensation," is not simply a paean to regulation; it clearly communicates the ways in which the "great compromise"[51] of worker compensation programs left a good deal of work for the courts and tort law to do in providing full compensation to workers and safety incentives tor management.

Part III, "The Modern Regulatory State," introduces students to the apparatus and procedures of regulation after five weeks or so of the course is behind them, weeks in which they will have been studying a good deal of interdisciplinary material – economics, sociology, cognitive psychology – providing perspectives on situations (environmental harm, workplace injuries) by which the common law is challenged and for which regulation is common. It takes up the basic issues of statutory interpretation and rulemaking in a manner adequate to introduce them (but that will hardly displace the virtues of a Legislation course) before returning to regulatory appraisal – how can regulation fail, in theory or in practice? What is cost-benefit analysis, and the case for and against it? Can providing risk-facing individuals with information to inform their decision-making be an effective alternative to command-and-control of risks they face? If standards are to be set, how are acceptable levels of residual risk best determined?

Christopher Columbus Langdell would not recognize these as proper law school teaching materials. Interdisciplinary materials are as prominent as, if not more prominent than, judicial opinions. Understanding and use of the courts, here, is only one of several options, not the ceaseless focus of a student's attention. Much more than the other texts considered to this point, these materials continuously place the student outside the judicial system – usually,

[50] Thirty-one judicial opinions appear in the detailed table of contents; seventy-four excerpts from the literature, and five other documents – a criminal indictment, an agency report to Congress, an agency decision document, excerpts from an amicus curiae brief, and a White House memorandum to agency heads.

[51] Alison D. Morantz, *Rethinking the Great Compromise: What Happens When Large Companies Opt Out of Workers' Compensation?* (Oct. 25, 2015), http://ssrn.com/abstract=2629498.

to be sure, from the critical perspective of an academic or citizen, and not as a lawyer asked to advise a client on matters of consequence to it. Both the understanding that institutions other than the courts are important to the legal order, and the acquisition of critical tools for evaluating their work, are important curricular contributions in the current day. In taking students beyond doctrine and beyond courts, as an introduction to the realities of today's legal order and as a corrective to Langdell's "geology without rocks," they are far superior to doctrinally centered materials. Yet the extra-judicial materials of this book are interdisciplinary, not the primary materials of today's law practice. Exercises like those possible with Estreicher-Nolls's *Mararich* materials would have to be built from scratch.

4 *William N. Eskridge Jr., Abbe R. Gluck, and Victoria Nourse*, Statutes, Regulation, and Interpretation – Legislation and Administration in the Republic of Statutes[52]

Three of today's most accomplished scholars of legislation – one of them an editor of *The Legal Process* as finally published – have joined forces to produce materials that are centered on the production and interpretation of statutes and regulations, without being centered on courts.[53] The introductory materials suggest equal importance to the enterprise for "How Judges Think About Statutes," "How Legislatures Think About Statutes," and "How Administrators Think About Statutes." It is unfortunate that there is not equal analytic attention to "How Lawyers Think About Statutes" and "How Affected Individuals Think About Statutes,"[54] but this fault is hardly theirs alone. In comparison

[52] 2014.

[53] Professor Eskridge has another dog in the hunt, the sixth of the sets mentioned in the prologue to this section, but one that will not be discussed in text. The Fifth Edition of the pioneering materials he began with his co-editor on publication of *The Legal Process*, the late Philip P. Frickey, has now been retitled as William N. Eskridge, Jr., Philip Frickey, Elizabeth Garrett, and James J. Brudney, Cases and Materials on Legislation and Regulation – Statutes and the Creation of Public Policy (2014). Like the work discussed in text, its introduction to administrative procedures is sketchy. Statutory interpretation cases, as in the book discussed in text, are often preceded by the relevant text, a distinct improvement over past practice. Problems are used, but less frequently, to place students outside the courts; administrative agency documents scarcely appear. Probably the choice between the two books would depend on how far the instructor wished to depart from the materials of "Legislation," for which both are excellent. There is more here than there on Congress as a functioning institution, and less on agencies.

[54] The book's preface properly notes as a contribution of the book that "we take a broader view of the prototypical legal interpreter. In addition to judges, members of Congress, agency officials, and even state actors are a part of the interpretive process in the modern, multi-layered legal landscape." *See* Eskridge, Gluck & Nourse, Statutes, Regulation, and

to Heinzerling-Tushnet and Bressman-Rubin-Stack (next discussed), these materials give relatively little attention to the issues of economic analysis, risk assessment, scientific judgment, and human psychology that so affect regulatory decision-making. In comparison to Estreicher-Nolls, students are not provided a supplement but, for primary materials other than judicial opinions and some statutory excerpts, are directed to places where they can be found and invited to consult them. This saves pages and student expense, but at the cost of reducing the possibility of in-class use and thus making that consultation the less likely. Yet there is much to admire here. Its pages regularly set problems placing students in active, practice-oriented roles. Particularly for teachers who understand, as Professor Gluck has reported,[55] that this course is much more likely to displace the course in Legislation than the course in Administrative Law, these new materials deserve serious consideration.

The three-part introduction, imaginatively built off variations on the familiar "No Vehicles in the Park" problem, might be regarded as a set piece like The Case of the Spoiled Cantaloupes in "The Legal Process," or the Rivers and Harbors Act in Mashaw-Merrill, though less richly developed. After describing some of the ways in which judges think about statutes, the first problem invites the student herself to consider the ordinance's application to a variety of ostensible "vehicles." The student cannot evade understanding that differing institutions and procedures, not only courts, are involved in the generation and interpretation of law; and she will also understand that it is on their acts of law-generation that the book is resolutely focused.

The following materials, unsurprisingly, confirm this understanding, presented in three parts: an introduction to Congress, agencies, and courts; statutory interpretation; and agencies and administrative implementation. The first and third are resolutely multi-institutional; the materials on interpretation focus on courts and judicial doctrine, in the setting for which all three authors are well-established scholars. Attention to the details of their approach belongs in another place,[56] but one may say here that the student experience will, again, largely be one of reading what courts have done and not often enough the primary materials of other institutions, that today constitute so large a proportion of the primary materials of law and legal practice. One cannot leave these materials without understanding, as the authors insist, that "the doctrines of statutory law and administration are the bread and butter of modern lawyers,

INTERPRETATION, *supra* note 52, at vi. But the prototypical legal interpreters are not only, even chiefly, government officers, and a prototypical experience of the practicing attorney is having to interpret laws, on issues of large potential consequence, without yet having officials' aid.

[55] *See supra* note 40. [56] *See supra* note 36.

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and most of the time the modern regulatory state is far ahead of the courts."[57] In this sense, Langdell has been overcome, and perhaps the most important purpose of a contemporary introductory public law course well satisfied. Yet these materials do not often require students to confront and use the actual materials of the administrative state, engage them in advance of judicial opinion, or introduce them to the economic, scientific, psychological, and political considerations underpinning the contemporary debates about rulemaking and its White House control.

5 *Lisa Bressman, Edward Rubin, and Kevin Stack,* The Regulatory State[58]

Readers understanding the general editorial of these pages, a preference for materials that often give students a different experience than looking over the shoulders of courts, will readily understand why these became my preferred teaching materials for a regulatory state course once they were published. They will understand as well, perhaps, why the following are the paragraphs that have escaped condensation from the festschrift paper into this chapter. In the author's judgment they exemplify, finally, the escape from Langdell into the other legal worlds that have marked so much of Professor Mashaw's scholarship and that animated his first volume of teaching materials.

Reading a statute or a regulation or other congressional or agency materials without an accompanying case is a common requirement in these materials, as it is in practice. They thoroughly introduce Congress and agencies as functioning institutions, and walk students through the conventional elements of statutes, rules and Federal Register notices – making clear that, just like opinions, these are documents whose working parts a lawyer needs to know. It is not all, or even chiefly, about judicial opinions and doctrine.

The first actor considered in these materials is the administrative agency, not Congress, and the first relationships explored are those internal to the executive branch – the constitutional and the political issues around independence and presidential control. Students will (properly) leave the chapter understanding that "independence" is an interesting question, but one whose influence over agency behaviors may be marginal. The independents, too, are within the President's orbit; tables of organization look much the same, and *any* removals can come at a political price.

[57] *See* Eskridge, Gluck & Nourse, Statutes, Regulation, and Interpretation, *supra* note 52, at 1020.

[58] 2d ed. 2014.

A chapter on "The Common Law as a Regulatory Regime," like the materials in Heinzerling-Tushnet, then invites consideration of the limitations of tort law and the justifications for regulation – the first in the context of automobile safety; and the second with consideration of the economic and social justifications for regulation, presented with considerable compression and without quite the same level of normative loading as one finds in the other book. "Airbags 101" lays a factual grounding for later problems; requires decision-making that should make plain the frequent difficulty of judgment in relation to technology; and opens a brief discussion of the human problems of judgment under uncertainty.

After a standard description of the legislative process and brief attention to academic theories respecting its operation, Chapter 3 turns to automobile safety legislation – first encapsulating the history of the National Traffic and Motor Vehicle Safety Act of 1966 and relating it to these theories, and then requiring students to read the whole Act, unedited. They will not have to read a case applying or interpreting this act for hundreds of pages.[59] Rather, they are invited to create an outline of the statute's structure; then to read lengthy excerpts from a Senate Report accompanying the bill, and consider the Report's aid in understanding the statute itself; and then to consider the typical structure of a modern statute in relation to it. From this point, the chapter proceeds to a brief (caseless) discussion of delegation issues, and the basic steps and political realities of legislative drafting. Only then is there a chapter on "Statutory Interpretation by Courts" that in the usual way, and largely by attention to cases, introduces its difficulties and tensions with a case (*Holy Trinity*), before taking students through first the tools and then the theories of interpretation. As in so many casebooks on the subject, students come to the interpretive scene in each of these cases after the court, with only so much of the statutory framework as they can find in the court's opinion. Opportunities for oneself using the tools being taught come in the notes.

"Statutory *Implementation* by Agencies," the next chapter, begins by briefly describing both the APA rulemaking process and the back-and-forth about airbag requirements that preceded the Reagan Administration rule rescinding the passive restraint requirement. The chapter's first large task is to ask students to do for the rulemaking documents what they have already done for the NTMVSA – read first the notice of proposed rulemaking and then the adopted rule,[60] outlining their various parts, considering their reasoning, and

[59] They might, however. *See infra* text and accompanying notes 62–63.

[60] Federal Register notices, throughout, are published in Federal Register format, as if photocopied – adding perhaps to the reality of the encounter.

inviting the submission of "comments" should the student find unaddressed matters that ought to be considered. She will not find judicial consideration of these matters until she has read another 323 pages; like the lawyers in that ultimate case, she is on her own, aided by questions invoking particular strands of possible analysis. The next primary reading is another final rule as published in the Federal Register (that is, together with its statement of basis and purpose), this one from the Consumer Product Safety Commission, permitting further questions about the forms of analysis used. Succeeding questions address issues of agency statutory analysis, providing *Chevron* (the *only* case the student will encounter in the chapter) alongside a healthy dose of Jerry L. Mashaw's scholarship on the differences between judicial and agency statutory interpretation; scientific analysis; economic analysis; and political analysis. In each setting agency documents provide illustrations of discussions that are developed largely by well-chosen excerpts from the literature. It is, then, a chapter in which the student is constantly inside the agency or dealing with it, living with its documents and concerns (including the political "help" to be had as its work is done), and, for the moment, oblivious to the courts.

The final chapter, "Control of Agency Action," begins with the President and Congress – introducing at last Executive Order 12,866, and calling attention to oversight hearings and the questions of executive privilege that occasionally arise in resisting them, before returning to the judiciary, first with notable "separation of powers" decisions limiting Congress's role, and then with "Judicial Control of Agency Action." This part offers good coverage of the material an administrative law class would treat in considering standards and availability of judicial review; but no student will think that teaching judicial doctrine is the central ambition of this course. It is an introduction to lawyers' roles in the regulatory state (in which judicial decision plays a decidedly subsidiary role) and its materials. The contrast with Manning-Stephenson, with its Langdellian roots, could hardly be stronger.

The very last section of the materials, a "case study" in control, presents a chronological set of materials associated with the development of the airbags standard (for which the ground was laid by "Airbags 101") from its inception through the immediate aftermath of *Motor Vehicles Manufacturers Ass'n of the United States, Inc.* v. *State Farm Mutual Insurance Co.*[61] As usual, the bulk of the documents here concerns actions by the agency, the White House or Congress, including transcripts of remarkable White House tapes from the Nixon administration; the one exception is *Chrysler Corp.* v. *Department of Transportation*,[62] a 1972 Sixth Circuit decision. That decision found fault with the "objectivity" of the dummies with which compliance with the passive

[61] 463 US 29 (1983). [62] 472 F.2d 659 (6th Cir. 1972).

restraint requirements of Standard 208 were to be tested (and with the accommodation to their limits NHTSA had proposed), but left in place an ignition interlock requirement NHTSA had intended as an interim measure only.[63] The political firestorm resulting from consumer resentment of the interlocks, as Jerry L. Mashaw and David Harfst have so well recounted,[64] produced statutory changes that delayed passive restraint requirements for two decades, at the cost of tens of thousands of avoidable highway deaths.

The authors of this book are a remarkable, and complementary, set of scholars. Lisa Bressman's recent work has contributed remarkably to our empirical understandings both of White House–agency relationships[65] and the contemporary realities of statutemaking in the Congress.[66] Edward Rubin's grounding in political science and philosophy, and understanding of the deficiencies of Langdellian methodology,[67] bring with them an astounding breadth of view about what administrative law might be. Kevin Stack, the youngest of the three, has contributed importantly to the understanding of old chestnuts[68] and contemporary puzzles[69] and, as remarked at the outset, has redirected our attention to what was lost when administrative law turned Langdellian, turned to a study of courts and doctrine.[70] They have produced an effective antidote.

CONCLUSION

The contributions of Jerry Mashaw, William Eskridge, and other Yale instructors to our understanding of the real world of law notwithstanding, the curriculum at Yale remains essentially what it was when I became its student fifty-four years ago – and long before that. Perhaps Yale's students, brilliant as

[63] I have had students read the case when they read the Act, as a way of sensitizing them to the importance of identifying possible meanings of statutory words their instinct is to believe they have understood just by reading them. In one class they must consider for themselves whether the "objective criteria" of Section 102(2) and "objective terms" of Section 103(a) are required for testing mechanisms as well as the safety equipment itself, and the information they would want to have to advise Chrysler on this question. Then they get to read the opinion, questionably finding in the affirmative, with little more to support the result than the court's understanding of "objective."

[64] Mashaw & Harfst, The Struggle for Auto Safety, *supra* note 4.

[65] Lisa Bressman & Michael Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Mich. L. Rev. 1 (2006).

[66] *See supra* note 41.

[67] Edward Rubin, *What's Wrong with Langdell's Method, and What to Do About It*, 60 Vand. L. Rev. 609 (2007). Rubin accepted the deanship of Vanderbilt Law School on the understanding, *inter alia*, that he could build this course as a first year requirement.

[68] Kevin Stack, *The Constitutional Foundations of Chenery*, 116 Yale L.J. 952 (2007)

[69] Kevin Stack, *Interpreting Regulations*, 111 Mich. L. Rev. 355 (2012).

[70] *See* Stack, *supra* note 10.

they are, are not misled by its endurance well past senescence. Yet one might still think that the deepest recognition of Professor Mashaw's remarkable contributions to our understanding of that real world, its history and its operation today, will come when Yale joins the many law schools now requiring their students to take a course on Legislation and Regulation in their first year. If, of course, it is taught outside the Langdellian model.

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