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## Jerry Mashaw and the Public Law Curriculum

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## Jerry Mashaw and the Public Law Curriculum

Peter L. Strauss\*

Jerry Mashaw's magisterial account of the first one hundred years of American Administrative Law<sup>1</sup> 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”<sup>2</sup> 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.”<sup>3</sup> If one were to imagine a public law curriculum true to the realities he so powerfully unearthed, it would be one that permitted students to encounter administrative law in just this way, as administrative actors and the public dealing with them do. They might also be asked to “see” the relationships between agencies and legislatures or central executives as the agencies and those bodies do. They would not, repeatedly and with the virtual exclusion of other perspectives, encounter these matters just through the eyes of reviewing courts, or in relation to what the judiciary might command.

The judicial perspective still shapes the public law curriculum, thanks to Christopher Columbus Langdell and his introduction of the case method to Harvard Law School and, not long thereafter, to the American law school world.<sup>4</sup> As Kevin Stack has forcefully reminded us,<sup>5</sup> the birth over a century ago of law school courses in public law concerned with legislation and executive agencies coincided with the ascendancy of Langdell's case method, treating law as a science whose raw materials were appellate judicial decisions, and naught else.<sup>6</sup> In the earliest of administrative law

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<sup>1</sup> *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (2012).

<sup>2</sup> *Id.* At 313.

<sup>3</sup> *Ibid.*

<sup>4</sup> For a suggestion that its prairie-fire spread resulted from its demonstrable effect in freeing law students from commitments to a particular common law jurisdiction, and hence giving them the confidence to practice in any, see Peter L. Strauss, *Transsystemia – Are We Approaching a New Langdellian Moment? Is McGill Showing the Way?*, 56 *J.Leg.Ed.* 161 (2006).

<sup>5</sup> *Lessons from the Turn of the Twentieth Century for First-Year Courses on Legislation and Regulation*, *Journal of Legal Education* (forthcoming).

<sup>6</sup> 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*

casebooks,<sup>7</sup> 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.”<sup>a</sup> As a result, Freund emphasized that statutory construction thus deserved a prominent place in a course on administrative law.<sup>b</sup> 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.”<sup>c8</sup>

But although “Freund bemoaned the identification of the field of administrative law with judicial decisions,”<sup>9</sup> his Dean, whom the University of Chicago’s new law school had imported from Harvard precisely to bring the case method with him, would not permit him to offer a course on administrative law in the law school curriculum until he had produced materials based on cases.”<sup>10</sup> Freund complied.<sup>11</sup> If administrative law was to be taught at all, it would be taught through decided cases. As in Louis Jaffe’s masterful monograph this year celebrating its golden anniversary, “Judicial Control of Administrative Action”<sup>12</sup> would be the subject.

The case method, and the essentially private law, common law curriculum it anticipated, has remained dominant in American legal education ever since. 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 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. Only in 2006 did Harvard adopt changes that, inter alia, finally brought a course on legislation and regulation into the first year’s required curriculum. Yet its instructors self-consciously agreed that this course would “follow the familiar,

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Education. 57 Okla. L. Rev. 579, 586 (2004), citing LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 617 (2d ed. 1985).

<sup>7</sup> ERNST FREUND, CASES ON ADMINISTRATIVE LAW (1911)

<sup>a</sup> Freund, CASES ON ADMINISTRATIVE LAW, at 3.

<sup>b</sup> *Id.*

<sup>c</sup> *Id.*

<sup>8</sup> Stack, n. 5 above, at \_\_\_\_ . a, b, and c footnotes in original.

<sup>9</sup> *Ibid.*, citing Ernst Freund, *The Correlation of Work for Higher Degrees in Graduate Schools and Law Schools*, 11 ILL. L. REV. 301, 306 (1916).

<sup>10</sup> *Ibid.*, 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).

<sup>11</sup> 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.

<sup>12</sup> (1965).

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.”<sup>13</sup>

Early in his career, Jerry Mashaw took an initial step toward change. This year is the fortieth since Jerry Mashaw, with Richard Merrill, published teaching materials ambitiously entitled “The American Public Law System,” designed for the first year of law school and treating legislation and administrative action as subjects worthy of serious study, side by side. They would be followed the next year by George Bunn and Hans Linde’s “Legislative and Administrative Processes,” created to the same end. Neither prevailed. Mashaw’s work was soon transformed, with other co-authors, into a standard set of administrative law teaching materials, again turning its face toward the legislature only now. Bunn and Linde never reached a second edition. But the last quarter-century, starting perhaps with my school’s ultimately failing effort to create a required first-year course on the regulatory state, has seen a steady movement towards courses on legislation and regulation – today’s predominant sources of law – as required elements of first year curricula.

To what extent have students in these courses been invited to view legislatures and agencies, as institutions and through their work, through other than judicial eyes? The law school curriculum endlessly invites attention to courts and the means by which they settle (that is to say, make) law. To be sure, its students do not often see the attending lawyers’ work by which judicial action is usually (one might say preferably) shaped, but the typical first-year curriculum includes not only Civil Procedure and much discussion of the strengths and weaknesses of common law processes,<sup>14</sup> but also an exercise in brief writing, moot court. Has the Langdellian imperative to use cases only as the primary materials of law study been overcome in these new courses? Do they invite similar direct attention to these other institutions and their ways, before which today’s lawyers may so often have to appear? Or do they still appear primarily through the eyes of judges in decided cases, looking backwards over some particular, completed piece of work?

Jerry Mashaw’s extraordinary evocations of agency functioning in his scholarship provides another link between this paper and this welcome Festschrift. “Bureaucratic Justice: Managing Social Security Disability Claims,” awarded Harvard’s prestigious Henderson Prize in 1973 and only one of his many works on this subject,<sup>15</sup> is as perceptive and sympathetic a portrayal of the Social Security Administration’s functioning as exists. The Struggle for Auto Safety, written with David Harfst and also a scholarly prize-winner, evokes the functioning and interactions of Congress and the National Highway Transportation Safety Administration with equal understanding and skill. Not “Judicial Control of Administrative Action,”<sup>16</sup> but getting inside administration, has been the

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<sup>13</sup> John F. Manning and Matthew Stephenson, Legislation & Regulation and Reform of the First Year, \_\_\_ Journal of Legal Education (forthcoming).

<sup>14</sup> Not so common may be attention to the ways in which the contemporary reality of high court dockets affects the rationale for the common law system of *stare decisis*. These dockets are chosen by the judges not made by party initiative, and judges chose them with a view not to party needs but to legal questions thought important to settle. As the New York Court of Appeals once began an opinion, with unusual candor, “We granted leave to appeal in order to take another step toward a complete solution of the problem partially cleared up in [two of its recent decisions].” *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432 (1963). This reality makes new doctrine the product of a will to make law, rather than of the necessity of deciding a case the court involuntarily finds on its docket and as to which the existing body of precedent supplies no clear answer.

<sup>15</sup> [list]

<sup>16</sup> Louis Jaffe, 1965.

hallmark of his career from beginning<sup>17</sup> to the present day.<sup>18</sup>

The pages that follow present an impressionistic survey of law school teaching materials as they might have been encountered in the New Deal, at about the time of Mashaw's "Introduction to the American Public Law System" and today, exploring the extent to which students would encounter legislatures and agencies other than through the eyes of the possibly censorious, and inevitably retrospective and incidental litigation-oriented courts.

### I. Beginnings

"Cases only" remained dominant as the New Deal began, when Harvard Law School professors Felix Frankfurter and J. Forrester Davison published one of the earlier sets of law school teaching materials on Administrative Law, "Cases on Administrative Law."<sup>19</sup> 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 nor courts but partake of the functions of both."

This is well said, but well over 90% of the 1150 pages of the book are given over to 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 27 pages of extracts from House of Lords debates, even the exceptional pages have as their subject courts and judicial review. The cases come from all over the common law world, England and Australia much more commonly than American states, and doubtless the discussion in them often presents "the anatomy and physiology of the law-making agencies" – but presented as the judges perceived them in the particular litigation that happened to have been put before them. Never do students see statutes or regulations before judges do, American legislative history independent of judicial selections, the materials of rulemaking, or (with that brief and solitary exception) an administrative decision. Freund's basic criticism, that the materials are about constitutional law and judicial review, not administrative action as such, seems thoroughly justified.

Eight years later, Walter Gellhorn, intellectual father of the Administrative Procedure Act, would publish the first edition of his enduring teaching materials. Here, too, judicial opinions dominate although, in what would come to be a recognizable Columbia style, they might be more stringently edited, and rich notes and text discussions frequently appear. A forty-page table of cases presented or cited is matched by 22 pages of text and periodical citations. The introductory essay and literature excerpts marshal strong arguments for the necessity and propriety of administrative agencies, and

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<sup>17</sup> Welfare Reform and Local Administration of Aid to Dependent Children in Virginia, 57 Va. L. Rev. 818 (1971); The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction, 122 U. Pa. L. Rev. 1 (1973).

<sup>18</sup> Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (2012).

<sup>19</sup> (1932). Ernst Freund, to whom the book is dedicated, wrote a not wholly appreciative review, 46 Harv.L.Rev. 167 (1932), noting its limited focus on constitutional issues and the courts.

against the near-hysteria then being voiced by elements of the bar respecting administrative adjudications, in particular. The likelihood of good faith and regularity in the behavior of public servants is strongly evoked, but attention to the internal law of administration or, for that matter, direct attention to primary materials reflecting external controls other than judicial ones is neither promised nor provided. After about 300 pages on issues of constitutional structure (both separation and delegation of powers), the next 400 pages would have extensively engaged Gellhorn's students in a variety of issues about the law of administrative hearings – notice, fair hearing, and findings – before reaching two final chapters given over to judicial controls. This chooses Freund's organization over Frankfurter's. Note, however, that only administrative adjudication at the hearing stage – that is, the agency equivalent of trials – was considered, and its consideration came from the perspective of judicial overseers. This constituted a powerful argument in the bar's contemporary debates about the propriety of administrative adjudications, but still very much in thrall to the commitment to cases as the material of legal study.

## II. The Legal Process

By mid-century, other materials had begun to intrude into the law school classroom. Scholarly excerpts were common; primary law materials other than cases and direct attention to institutions other than courts, less so. Hart & Sacks "The Legal Process: Basic Problems in the Making and Application of Law"<sup>20</sup> was a notable exception. Enormously influential but unprinted in its time, its intellectual roots and influence were thoroughly explored in the lengthy essay with which William Eskridge and the late Philip Frickey prefaced the published edition they brought into print almost four decades after its final "tentative edition" had appeared in the mimeographed pages from which it was widely taught.<sup>21</sup> Noteworthy here is that from its very beginning it confronted law students with other institutions and their work, with materials of the legal process that had *not* been predigested by courts. 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 by which "the case" was ultimately resolved, forty pages of materials engage the student with factual background, statutory text and its legislative history in some detail, regulatory text and the Department of Agriculture and its decisionmaking, important information about state law and trade practice, and, finally, the Department's administrative decision.

Chapters are devoted to "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," but four other chapters of the materials are organized around other instrumentalities and the primary materials of their working. In the 158 pages given to private ordering, only seven opinions appear, consuming less than 20% of them; they appear *after* students' have been asked to consider, independent of them, other materials from 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, and the only use of judicial opinions in the chapter (there are just three) is as elements of the background notes students must work through to respond to problems

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<sup>20</sup> Tent ed. 1958.

<sup>21</sup> "An Historical and Critical Introduction to *The Legal Process*," in Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process, Basic Problems in the Making and Application of Law* pp. li-cxxxvi (William N. Eskridge, Jr., and Philip P. Frickey, eds. 1994) [hereafter *Published Legal Process*]

at the level of legislation. These notes devote many more pages to primary legislative materials -- statutory language (as enacted or in draft) to be read independent of judicial views, legislative history documents or testimony, legislative procedural rules, etc. In the much shorter and admittedly incomplete<sup>22</sup> “The Executive Branch and the Administrative Process,” problems place the student before executive actors. She is asked to advise President Truman on the seizure of steel plants, given factual background, statutory provisions and executive order, *before* she is permitted to read *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>23</sup> Then, with Baltimore city ordinances and no judicial opinions in hand, she is asked to analyze two problems involving issues that, in part, would reach the Supreme Court in *Frank v. Maryland*<sup>24</sup> the year after the tentative edition appeared. Finally, as an agency legal adviser, she must read agency decisional documents, and an independent discussion of the legislative history of the provision with which they deal, in order to comprehend brief excerpts from a Supreme Court opinion that are also given.

The problem method the authors chose in place of the case method was essential to their accomplishment. The primary point here is not to celebrate the acclaimed influence these materials had upon their students and hence upon intellectual understandings about the nature of law and its constraints in its time. Rather it is to note that 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

Three works of the mid-70's permit an impressionistic assessment of the impact of this approach did or did not have in focusing the attention of public law teaching materials on other-than-judicial actors. One finds movement from the case-centered norm, but not to the extent Hart & Sacks appeared to promise.

#### A. Gellhorn & Byse, Administrative Law – Cases and Comments (6<sup>th</sup> Ed. 1974)

The Sixth Edition of Gellhorn & Byse, Administrative Law – Cases and Comments could have been strongly influenced by The Legal Process approach. As war clouds gathered over Europe, more or less contemporaneously with Gellhorn’s first edition of Administrative Law, Gellhorn had worked with Hart and another on materials for the courses on legislation they each then taught;<sup>25</sup> his co-editor Byse had been a colleague of Hart and Sacks since 1957. The “problem method,” Eskridge and Frickey report, was the “chief pedagogical innovation” of the 1940 materials, but it appears Hart was the chief proponent of engaging the students with legislatures and their materials, independent of judges and cases. Gellhorn’s wish for the project “insist[ed] on more elaborate, doctrinally

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<sup>22</sup> E.g., pp. 1046, 1059-60, 1109.

<sup>23</sup> 343 U.S. 579 (1952)

<sup>24</sup> 359 U.S. 360 (1959).

<sup>25</sup> Published Legal Process n. 21 above, at lxxiv.

focused organization.”<sup>26</sup> And the 1974 edition of Gellhorn & Byse reveals few signs of a Hart & Sacks influence. Although early pages introduce students to Congress’s extra-statutory (budgetary and oversight) controls over agency action, and to the possibilities for presidential controls as well, its predominant focus is on doctrine, not institutions and their functioning – constitutional issues and judicial review now precede all else; the internal structures of agencies and issues about their operation appear only in the final chapter. Expending over four hundred pages of materials on judicial controls before turning to administrative action is in itself a striking privileging of those controls, in comparison with Gellhorn’s first edition.<sup>27</sup> Administrative action is almost exclusively adjudication; rulemaking, little developed, appears only as a sub-topic in two chapters. Students see virtually all issues through the eyes of judges – or, occasionally, scholars or the Administrative Conference of the United States, in which Gellhorn was deeply involved. The book required its students to respond to and evaluate judicial decisions and commentary, not to engage in legal practice outside of court. Gellhorn did have a set of problems he published to accompany the casebook, and these raised issues requiring the use of the caselaw in counseling, or before agencies, as well as in court. Yet each problem was quite brief – basically, an opportunity to apply the doctrine appearing through the cases, not independent sets of non-judicial materials that would require students to act outside the judicial decision framework or confront them with an agency’s internal administrative law.

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

“The Legal Process” appears to have had a greater influence on Mashaw and Merrill’s “Introduction to the American Public Law System.” The editors stress their “functional perspective,”<sup>28</sup> and that their “larger and primary aim is to bring an integration of administrative law into the larger fabric of the legal order”<sup>29</sup> by “integrat[ing] analysis of the administrative process with ways of thinking about the legislative process.” Correspondingly, the book begins with a study of the development and implementation of the 1899 Rivers and Harbors Act, in the first part of which the student must understand the development of a complicated set of statutory materials controlling discharges into navigable waterways and advise an Assistant Attorney General about several issues of interpretation and policy *before* being engaged in the second part of the chapter by a course of highly contested Supreme Court opinions and extensive notes on statutory interpretation technique. A third section turns to concern with criminal enforcement of the act against polluters, engaging the student with 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 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

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<sup>26</sup> *Id.*, lxxvii n. 118.

<sup>27</sup> I have been an editor of those materials since the seventh edition (1980) when, recently returned from service inside a government agency, I encouraged a reorganization making events at the agency level more central and introducing rulemaking as an activity worthy of independent study – but still, it must be acknowledged – essentially limiting the use of primary materials to edited judicial decisions..

<sup>28</sup> Xvii

<sup>29</sup> Xviii



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 100 pages of materials on agency rulemaking – the subject virtually missing from Gellhorn & 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 chapter 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, beginning in the year these materials were published, more than 80 pages effectively place the student inside the FDA, dealing with its implementation of 1962 amendments to its basic statute. Extensive statutory and regulatory texts and administrative history must be mastered 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)

Linde and Bunn's "Legislative and Administrative Processes" more fully presaged today's leg-reg courses in its thorough treatment of Congress and administrative agencies as institutions, and its disciplined attention to political as well as legal controls on their behavior. Indeed, while its students often encountered law through judicial opinions as well as statutory and regulatory texts, the latter often dominated<sup>30</sup> and what they would *not* find as doctrinal headings were statutory interpretation,<sup>31</sup> 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."<sup>32</sup> No student studying these materials could have failed to leave them without understanding her need independently 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.

At Wisconsin, where Bunn at the time was Dean, these materials were used in a first-year second-semester elective that in the spring of 1972 succeeded to a required first semester course on

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<sup>30</sup> 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 six documents generated within the executive branch. Chapter 6, "The 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.

<sup>31</sup> 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 *University of Chicago Law Review* 149 (2001), rather than as an element of instruction about statutory interpretation by courts.

<sup>32</sup> Xviii

law in society based on materials created by Lloyd Garrison and Willard Hurst<sup>33</sup> that had focused on workplace injuries and traced how the law changed how it tried to deal with them, relying first just on tort law and ultimately settling on workmen's comp. The required course, which thus introduced a good deal of material on legislation and the administrative process, was last taught in the 1970-71 academic year, having become quite unpopular with students (who said it was just political science, they wanted real law, etc.);<sup>34</sup> its fate thus resembled that of Columbia's 1990 introduction of a course on the regulatory state. 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, appears to have claimed it as a victim.

#### IV. The Current Day

##### A. Courses in Administrative Law and Legislation

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 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. That is certainly the case with the Administrative Law materials I have co-edited since the 7<sup>th</sup> Edition's appearance in 1979. While our book deals extensively with events at the agency level before explicitly reaching the issues of judicial review, and includes considerable discussion of both internal agency action and relations with its political overseers, virtually all its primary materials are decided cases and its focus is on judicial doctrine; only the Constitution, the Administrative Procedure Act, and Executive Order 12,866 and its amendments are presented as texts students must deal with independently of judicial decisions. The Rivers and Harbors Act, attention to Congress as an institution to be understood on its own, and the FDA's struggles with the 1972 Amendments to its fundamental statutes long ago disappeared from Jerry Mashaw's casebook, now in its Seventh Edition (2014) and retitled "Administrative Law – The American Public Law System – Cases and Materials. Here, too, the primary materials students encounter are with few exceptions judicial decisions, and the understandings they are striving for, consequently, are doctrinal. They do not encounter a notice of proposed rulemaking or an adopted rule, save as judges or the authors might describe them; a brief section on electronic rulemaking does not even identify the URL for the

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<sup>33</sup> Law in Society, A Course Designed for Undergraduates and Beginning Law Students (1940), succeeded by a revision created by two others, Carl A. Auerbach and Samuel Mermin, Legal Process : An Introduction to Decision-making by Judicial, Legislative, Executive and Administrative Agencies (1956). Both, like the tentative edition of Hart & Sacks, were informally produced but, centered on Wisconsin law and the particular problems of workers' compensation, not widely circulated. The Garrison-Hurst materials open by treating one case that had arisen before the Wisconsin Industrial Commission with remarkable fullness, providing and explaining most of the documents generated in the matter or, like statutes, bearing on its resolution – before the agency as well as the courts – and thus providing a much fuller orientation to the world of law than a focus on appellate opinions and doctrine could ever achieve. The second part uses the historical development of the law of industrial accident as the focus of a somewhat broader exploration of common law, statutory development, and administrative agencies. The organization of the 1956 revision is much more conventional; though replete with excerpts from the secondary literature and statutes as well as judicial decisions, *Wisconsin Mutual Liability Company v. Industrial Commission*, 202 Wisc. 428 (1930), with the events preceding it, does not appear until p. 838.

<sup>34</sup> 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).

government's e-rulemaking site, much less suggest that a student observe a rulemaking there. Save for their attention to E.O. 12,866 and its impacts on rulemaking – issues not open to judicial review – administrative law teaching materials generally follow this pattern.

For courses on Legislation, contemporary teaching materials address both Congress as a functioning institution and the problems of statutory interpretation. The first can hardly be accomplished by reading judicial decisions; some combination of legislative documents, exposition, and secondary literature excerpts must be dominant. When one comes to statutory interpretation, on the other hand, the case method reasserts itself. Of course judges do read statutes, and the continuing controversies among them how this might best be done require making one's students aware of that. But are they the only ones to do so? Today, reading statutes (and regulations) constitutes a major part of lawyers' work, if not the majority as compared with reading cases; in any uncertain matter, lawyers and their clients must usually read them before their meaning has been judicially resolved. Very often those statutes are first read by agencies, both within themselves and in dealings with the public. Are the students of today's legislation courses often required to read statutes for themselves, before judges get to them, with such aids to understanding as may then be available? This, in effect, was what the Legal Process materials, Mashaw-Merrill, and Linde-Bunn required of them in the materials earlier described. But the teaching materials of Legislation courses typically require students to dig the statute that is being interpreted out of the interstices of a judicial opinion, with only such elements of it as the opinion-writer(s) found relevant to include.<sup>35</sup> They are not given the other 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 its political or legislative history (again, save such elements as occurred to opinion writer(s) to include). They are not, in other words, invited to read the statutes for themselves.

## B. The New Course in Legislation and Regulation

At least six sets of law school teaching materials have recently been published for use in connection with the first-year courses on legislation and regulation that are increasingly finding their way into that year's required curriculum.<sup>36</sup> The phenomenon is an overdue reaction to the continued dominance of common-law, judicially oriented, doctrinal analysis courses in the first year, conveying to entering students a strikingly inaccurate sense of the current world of law. And the impact of those distorted first impressions can be enduring. For many years, McGill Law School has offered its students degrees qualifying graduates for both common law and civil law qualification. When this was done in a four-year program, with students taking their first year studying beginning courses in the system of their choice, and their second year studying the same issues in the other, with two years of electives to follow, its graduates were marked by their choices. If they had begun on the common law side, they graduated as common lawyers who knew some civil law, and vice versa. When McGill converted its program to a three-year program, in which first-year courses were offered transsystemically – that is, on a problem basis, with civilian and common law materials presented

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<sup>35</sup> Professor Eskridge's two new editions, discussed below, now frequently depart from this pattern by placing the relevant statutory texts before opinions interpreting them. Focusing student attention on what will prove to be the problem for the court by briefly also stating a problem could further ingrain the habits of careful reading any attorney must cultivate.

<sup>36</sup> By the time this essay is published, the papers associated with a January 2015 panel on the subject at the annual AALS meeting will have appeared in the *Journal of Legal Education*.

side by side (and bilingually) as equally possible means of response – it found that these self-identifications to one system or the other disappeared.<sup>37</sup> First impressions matter.

To what extent, however, do these curricular changes presage a change from the Langdellian commitments to using appellate judicial decisions and teaching doctrine? The six sets of materials each present political institutions and agencies, statutes and regulations as central actors and elements in the legal world, but offer a wide range of approach on this perspective.

John F. Manning and Matthew C. Stephenson “Legislation and Regulation”<sup>38</sup>

As already remarked, Manning and Stephenson’s “Legislation and Regulation” materials “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.”<sup>39</sup> Their purpose, they remark in prefatory comments “is to teach students both how federal statutory and regulatory law is made, and how judges and administrative interpreters construe these legal materials.”<sup>40</sup> Notice, first, that the teaching is to be about “how judges and administrative interpreters construe” and not, as such, 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. And, second, the purpose of learning “how judges and administrative interpreters construe” dominates, as 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;<sup>41</sup> and also by the virtual absence of attention to Congress and administrative agencies as institutions functioning on their own internal law. Two and a half pages address “Congressional Rules of Procedure” in summary, idealized fashion<sup>42</sup>; three, typically rich with a well-balanced mix of insights from the literature but lacking institutional detail, address congressional appropriations and oversight.<sup>43</sup> Consideration of internal agency processes of decision, as distinct from statutory and judicial requirements for them, is simply missing.

The materials are, however, very well adapted to teaching “how judges and administrative interpreters construe [statutory and regulatory law].” Its first two chapters address statutory interpretation; its fourth (largely), APA interpretation in the rulemaking context, and its fifth, judicial

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<sup>37</sup> Strauss, n. 4 above.

<sup>38</sup> 2nd ed. 2013.

<sup>39</sup> John F. Manning and Matthew Stephenson, Legislation & Regulation and Reform of the First Year, \_\_ Journal of Legal Education (forthcoming).

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<sup>41</sup> In her contribution to the Journal of Legal Education Symposium, n. 36 above, Abbe Gluck reports that the new leg-reg courses appear to be displacing Legislation as an upperclass course, but not Administrative Law. To the extent those courses examine the institutional functioning of legislatures, that loss counsels 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.

<sup>42</sup> 24-26. 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. A good deal more emerges, however, in the interstices of their subsequent discussions of the debates over the use of legislative history.

<sup>43</sup> 423-25

review of agency statutory interpretation.<sup>44</sup> Taking the first as an example, its introductory section, after well framing the general questions students will want to consider, opens with the example of *TVA v. Hill*,<sup>45</sup> a case that preceded the revival of sharp controversy over interpretive technique yet opens many of these questions. And here, atypically, the student is asked to read the statutory provisions at issue (albeit he is not given facts or a problem that might help him to do so before he encounters the court's reading). Notes point out the several interpretive tools the Justices used, and the background and subsequent history of the statute, suggesting the essentially retrospective application of the Endangered Species Act the decision entailed. The brief introduction to Congress's legislative process is also a part of this section.

The second section of the Chapter, "The Letter Versus the Spirit of the Law," makes clear both the breadth of scholarship brought to this enterprise and the balance of its authors in engaging students with it. John Manning is deservedly regarded as the leading academic scholar supporting the "new textualism," the letter as against the spirit, but 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 an accommodating center, 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. Section III, "What is the Text?" (Scientific or Ordinary Meaning? Legal Terms of Art? Colloquial Meaning or Dictionary Meaning), Section IV, "Legislative History," (Post New-Deal Approach, Textualist Critique, The New Synthesis) and Section V, "The Judicial Power and Equitable Interpretation" continue in the same vein. Again, the materials are all judicial opinions. The section on legislative history fully and fairly presents the history of use and abuse of legislative history; what it does not ever do is present a student with the challenge of considering legislative history documents on her own, rather than seeing them through the selective eyes of opinion-writers. For "The Judicial Power and Equitable Interpretation," the stakes are again "letter" v. "spirit," and both case selection and notes make clear the reality of this tension and difficulty of a definitive resolution. Here, the authors commendably set out the statute to be interpreted in advance of the opinion – and the case, *United States v. Marshall*,<sup>46</sup> involves disagreeing opinions of Judges Easterbrook and Posner that others have thought the best statements of their competing positions to be found in federal caselaw. The student who carefully reads the case citation will see that it was affirmed by the Supreme Court, but the opinions there – less interesting, and less capable of engaging the student with the tension – are not otherwise mentioned.

Other than the Constitution and relevant provisions of the Administrative Procedure Act, the only non-judicial materials used as primary readings in Manning and Stevenson are Executive Order 12,866 and a presidential memorandum on clean water protection, as the principal readings for a section on "Presidential Control of Agencies." The Executive Order is introduced by a thoughtful history adumbrating the political debates over its appropriateness and uses, but without a suggestion to students of a posture they might take in reading it. As OIRA administrator, are you now in a

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<sup>44</sup> This chapter essentially is devoted to *Chevron v. NRDC*, 467 U.S. 837 (1984); statutory interpretation by agencies, whose techniques arguably are influenced by its responsibilities and by its continuous contact with both its constitutive statutes and with Congress, is discussed only as it may influence judicial interpretation.

<sup>45</sup> 437 U.S. 153 (1978).

<sup>46</sup> 908 F.2d 1312 (7<sup>th</sup> Cir. 1990)(en banc), aff'd 500 U.S. 453 (1991) sub nom *Chapman v. United States*.

position to control the subjects on which rulemaking occurs? As a desk officer in OIRA, what opportunities are you given to influence the outcomes of a particular agency rulemaking? As an agency rulemaker, how will these requirements influence the outcomes you reach? Public participation in your rulemakings? What if any defenses will you have against White House “meddling”? The notes following the Order first take four-and-a-half pages for a balanced and richly annotated account of the debates over the appropriateness of presidential control, and then give similar space and attention to the debates over its uses of cost-benefit analysis. President Clinton’s Memorandum on Clean Water Protection, directing EPA and other agencies to take certain defined steps to protect the quality of recreational water bodies, serves to introduce a further discussion of the appropriate level of presidential influence or control over matters statutorily assigned to agencies for decision. The questions are well identified, and the literature bearing on them fully and fairly presented. The materials do not, but of course the instructor could, invite a student to consider what her agency should/must do on receiving such a memorandum.

A colleague teaching the upperclass offering in Administrative Law expressed some concern to me last spring about the overlap between her syllabus and what she understood had been dealt with in a first year elective taught from Manning and Stephenson. Probably if one knew one’s students had studied its thorough treatment of the Constitution’s bearing on agency rulemaking and of standards of judicial review of rulemaking and *Chevron* – more than 200 pages of the book in each case – one could feel free to spend more time on issues not at all touched (e.g., due process, APA adjudication, agency enforcement, agency decision processes, information acquisition and FOIA, access to judicial review) and to deepen the treatment of rulemaking and its associated statutory and executive controls. Thus, the overlap with “administrative law,” is only partial. Despite its relative inattention to institutional concerns, a course taught from this book is much more likely to provide an alternative to Legislation<sup>47</sup> courses than Administrative Law. And in this respect, in my judgment, its most significant weakness (but not one that distinguishes it from other teaching materials on the subject) is the consistency with which it makes students critics and not actors, inviting them to the interpretive task after, and not before, judges and administrators have performed it.

## 2. Samuel Estreicher and David P. Nolls’ “Legislation and Regulatory State”<sup>48</sup>

Aside from the question about Langdellian change, Samuel Estreicher and David P. Nolls’ “Legislation and Regulatory State,” [about to be/recently] published by Lexis Books, has much to commend it for first year use. Appellate decisions are virtually the only primary materials listed in the book’s detailed table of contents,<sup>49</sup> but the notes following them consistently invite attention to case and doctrinal analysis issues reinforcing both important student habits (What is the procedural posture here? How was a described doctrinal issue analyzed? What other possibilities live in other cases or critical commentary?) and the book’s overall “regulatory state” theme (What was the justification for regulation? The mode of regulation employed? What alternatives were possible?) Its students will have an excellent sense of the legal landscape, but plenty of room is left for

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<sup>47</sup> N. 41 above.

<sup>48</sup> Forthcoming? 2015. This paragraph is based on prepublication materials the authors kindly provided in May, 2015, and some details may have changed.

<sup>49</sup> The exceptions are Federalist No. 10, E.O. 12,866, and the Customs Service letter that eventuated in *Mead Corp. v. United States*, 533 U.S. 218 (2001).

following courses in Legislation or Administrative Law that examine their subjects in some depth. Congressional and executive branch institutions and practices are well, if somewhat idealistically<sup>50</sup> 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;<sup>51</sup> issues such as risk assessment or economic analysis are mentioned, but not at all developed as subjects for study. A documentary supplement permits consulting the Constitution, the Administrative Procedure Act and four other statutes bearing generally on administrative agency action,<sup>52</sup> and statutes and legislative history associated with three of the judicial decisions given as primary materials in the text.

A sense of the materials' strengths and weaknesses, the performance they do and do not demand of their reader, might be provided by looking in some detail at its treatment of a judicial opinion involving statutory interpretation, and of Executive Order 12,866 – the one statutory or quasi-statutory text the book itself sets out for students to read as primary material. *Maracich v. Spears*<sup>53</sup> is the first case students encounter in the materials on statutory interpretation, and it is one of the three for which the documentary supplement sets out statutes and legislative history excerpts. Several things about it mark it as an especially good choice for this purpose. Like many of the opinions in the book, it is contemporary. The issue it presents, whether a federal statute possibly bans an attorney's obtaining and using Department of Motor Vehicles information about recent purchasers of automobiles to solicit participation in a possible class action, is both readily understood, apolitical, and likely to command future attorneys' interest. Decision 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-

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<sup>50</sup> 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 Orenstein's prominent scholarship on the current congressional disarray, or Abbe Gluck and Lisa Bressman's study of the realities of congressional drafting practice. In discussing presidential control of agency action, the book commendably reproduces for discussion the 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 *Georgetown L.J.* 927 (2014) or many other secondary works about presidential thumbs on the scale.

<sup>51</sup> *Viz.*,

**8. Further Reading.** For more on the causes of statutory blindspots 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).

[Ch. II(2)(b)(v)(Notes and Questions)]

<sup>52</sup> The Congressional Review Act, the Unfunded Mandates Reform Act, the Federal Advisory Committee Act, and the Paperwork Reduction Act. While these statutes may be referred to in notes, the book never asks students to refer to them.

<sup>53</sup> 133 S. Ct. 2191 (2013)

liberal alignments students might be expecting. Justice Kennedy wrote for the Chief Justice, and Justices Thomas, Breyer, and Alito finding that the attorney's conduct violated the statute in an opinion suggesting but not stating that he had consulted legislative history,<sup>54</sup> and openly using many of the tools of contemporary textualism. Justice Ginsburg, who in somewhat similar "purpose and context v. plain meaning" circumstances would find purpose and context controlling in the very next case presented,<sup>55</sup> dissented for herself and Justices Scalia, Sotomayor and Kagan on the basis of what the statute plainly and permissibly said. Justices Sotomayor, Thomas and Kennedy also switched sides in that next opinion, one unusually rich with references to legislative history, and sharply illustrating the difficulties courts face in mediating text and purpose. These, then, are not cases that will feed student cynicism about the political valence of Supreme Court decision.

Students are asked to review the statute at issue in *Mararich*, reproduced in the statutory supplement, before reading the opinion, but are not at that point given any context for the task, as they might be if challenged to advise a client before litigation whether a planned course of action was permissible. Once they have read the case, however, a three-page note discusses the enactment of the federal statute involved, supplemented by the legislative history to be found in the statutory supplement. Requiring students to read these materials in the context of a problem based on case facts – an opportunity that the documentary supplement apparently provides three times over the course of the book – would give them 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. Given the prominence and placement of the opinions in the book, however, one supposes the temptation to short-cut that assignment would not be easily resisted. Subsequent notes, considerably shorter than the enactment history, follow the pattern that seems characteristic. What is the justification for the regulation?, contrasting available tort remedies for breach of privacy. Why *federal* and not state regulation? What was the procedural posture of the case? What were the textual issues? Contrast the two opinions' use of canons. How important are considerations of statutory design, and which opinion better evokes it? What of arguments made in the opinions drawing on other areas of law, such as state bar regulation of solicitation? And finally a postscript about subsequent developments.

As an exemplar of case and doctrinal analysis, for students just beginning their legal education, this is commendable. The case is likely 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. These 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.

Executive Order 12,866 appears as the sole primary reading in the subsection of Chapter 3,

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<sup>54</sup> "Congress was aware that personal information from motor vehicle records could be used for solicitation, and it permitted it in circumstances that it defined, with the specific safeguard of consent by the person contacted. So the absence of the term "solicitation" in (b)(4) is telling." At 2203

<sup>55</sup> *Yates v. United States*, 135 S. Ct. 1074 (2015)



Administrative Agencies, given over to formal presidential oversight of agency action. This chapter is given over to the constitutional position of administrative agencies – the separation of powers questions followed by subsections on congressional and presidential oversight controls. The order is set out *in extenso*, with an apt characterization of the powerful opportunity it gives the White House to affect agency rulemaking – a process students will not encounter in any detail until Chapter 4, “The Work of Agencies” – but with no requested work to do. That appears in the notes and questions following the order.

After very brief discussion of the nature of executive orders and several pages well describing its development to the current day, the notes consider the problems the order is trying to solve (coordination as well as analytic technique and improved presidential management); the regulatory agenda; the vetting of agency regulations with some attention to the available evidence of its impact; a comparison of presidential with congressional or judicial oversight; and a brief discussion of the possibilities for agency avoidance of presidential oversight under the order. A subsequent note briefly described the many responsibilities of the Office of Management and Budget – the budget side in particular; however the following questions return to EO 12866: what is the significance of the director of the office that administers it? Has the EO process contributed to rulemaking ossification? Is the cost-benefit analysis it requires inherently anti-regulatory? These notes well identify important issues about the executive order, issues that perhaps could not be well understood in advance of encountering rulemaking as an administrative procedure, and here they are placed in advance of the brief, well-focused treatment of rulemaking as a procedure to be found in Chapter Four, “The Work of Agencies.” Estreicher and Nolls want their students to know what the Executive Order is and does, but they do little more than point at its issues and refer to useful literature,<sup>56</sup> leaving the arguable virtues and faults of cost-benefit analysis essentially undiscussed.

These pages’ focus on the judicial issues, not the E.O. process as such, is striking. Once the history of E.O. 12,866 has been set out, the only note of any length following it is several pages discussing the D.C. Circuit’s *Business Roundtable*<sup>57</sup> decision. That decision imposed *judicially* defined cost-benefit analysis understandings on the SEC, and did so retrospectively and not, like E.O. 12,866, as the rule was being developed. This is an important contrast between presidential and judicial controls, but not one that develops an understanding of the cost-benefit analysis process as such. The note develops the uncertainties the D.C. Circuit’s requirements imposed on SEC rule development, and suggests that the executive order administration reflects “interagency conventions about appropriate approaches to cost-benefit analysis” that are “the product of formal processes.” But what are those conventions? How is one to value the immeasurable in performing economic analysis? To deal with such issues as valuing human life, assessing risk, or setting appropriate discount rates for appraising future benefits in relation to contemporary costs? One immediately understands that these materials are laser-focused on law; if one is interested in exposing one’s students to interdisciplinary materials and understandings, this is not the place to come.

### 3. Lisa Heinzerling and Mark Tushnet, *The Regulatory and Administrative State*<sup>58</sup>

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<sup>56</sup> See n. 51 above.

<sup>57</sup> *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). Manning and Stephenson treat this decision in a much more summary way, in considering “arbitrary and capricious” review rather than cost-benefit analysis as such. 719-20.

<sup>58</sup> Oxford 2006.

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<sup>59</sup> – would 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,<sup>60</sup> with agency documents occasionally given as well. The first two parts of the book are concerned with evaluating regulation as an alternative to contract between parties known to each other, and regulation as an alternative to the use of criminal law or torts in relation to events occurring between strangers. Do wages include a premium for taking risks? Are criminal law and tort effective means for compensating persons for strangers' infliction of unacceptable risks on them? In the case of diffuse, long-term (environmental) harms? The contrast both these parts offer to contracts and torts, 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. Clearly enough, these materials have a point of view, reflected in doubts cast on classical law-and-economics thinking also well presented, and in the often gruesome facts of employer indifference to worker safety and industrial indifference to environmental harms to be found in the cases and secondary materials selected. But the final chapter of these two parts, "Linking Common Law and Statutes: The Case of Workers' Compensation," in part through consideration of the moral hazard problem, is not simply a paean to regulation; it clearly communicates the ways in which the "great compromise"<sup>61</sup> 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 for management.

Part III, "The Modern Regulatory State," thus introduces students to the apparatus and procedures of regulation only 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. (Heinzerling and Tushnet's modern regulatory state, as they acknowledge, is one concerned with environmental, health and safety risks, the state of EPA, NHTSA and the FDA, not a financial market (SEC) or monopoly control (utility rate regulation) state; an instructor interested in other areas would have herself to supply those "ribs"<sup>62</sup>). It takes up the basic issues of statutory interpretation and rulemaking in a manner adequate to introduce them, but that will not persuade any student that he has plumbed their depths, 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 the situations they face? If standards are to be set, how are acceptable levels of residual risk best determined?

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<sup>59</sup> 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.

<sup>60</sup> 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.

<sup>61</sup> Alison D. Morantz, Rethinking the Great Compromise: What Happens When Large Companies Opt Out of Workers' Compensation? (July 10, 2015). Available at SSRN: <http://ssrn.com/abstract=2629498>

<sup>62</sup> ix-x.

Christopher Columbus Langdell would not recognize these as proper law school teaching materials. Interdisciplinary materials are as important to it, if not more so, 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. The only constitutional issue from the conventional administrative law syllabus that is dealt with at all is "The Nondelegation Problem," and that does not appear until Chapter 12, which is followed immediately by Chapter 13, "Political Approaches to Choices among Regulatory Institutions." Much more than the other texts considered to this point, these materials continuously place the student outside the judicial system – usually, 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. The materials are not "balanced"; while their selections from the literature fairly present competing views, one has no difficulty understanding the authors' normative preferences favoring workers and citizens against corporate interests, which the fact situations they choose to present tend to evoke. Yet teaching students to think in a disciplined way about how a variety of legal institutions and approaches work in relation to the social problems they mean to deal with takes one beyond doctrine – as, in their way, the materials of *The Legal Process* did.. 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.

These are materials I have taught from once, seven years ago, before turning when they became available to those next to be discussed. Their interdisciplinarity was challenging to one tested hard enough by the teaching of administrative law,<sup>63</sup> and correcting for their "slant" was hard for one basically sympathetic to it. But, in my judgment, 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,"<sup>64</sup> they are far superior to doctrinally centered materials. While this course teaches enough about legislative and administrative processes to deal with its concerns, no student will be deceived into thinking that she has learned those subjects – and the taste and context may have given her reason to do so. And – because I had to struggle? – teaching Heinzerling and Tushnet produced evaluations as high as I have ever received, equally high regard for the quality of the course materials, and complete acceptance of the importance of the course.<sup>65</sup>

#### 4. Lisa Bressman, Edward Rubin and Kevin Stack, *The Regulatory State*<sup>66</sup>

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. Reading a statute or a regulation or other congressional or agency materials without an accompanying case is a common requirement here, as it is in practice. The materials thoroughly introduce Congress and agencies as functioning institutions, and take the trouble to 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,

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<sup>63</sup> Peter L. Strauss, *Teaching Administrative Law: The Wonder of the Unknown*, 33 *J.Leg.Ed.* 1 (1983).

<sup>64</sup> N 6 above.

<sup>65</sup> Teaching evaluations for the *Regulatory State*, Spring Term 2008, on file at Lawnet on the Columbia Law School website.

<sup>66</sup> 2d ed. 2014.

or even chiefly, about judicial opinions and doctrine, about the world as seen through judicial eyes.

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 removals can come at a political price.

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, setting what will be the materials’ pervasive concern; 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, then, decisionmaking that should make plain to a student attentive to her own mental processes the need for and 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.<sup>67</sup> 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 that led to its enactment, 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. The lesson is reinforced by having them read excerpts from five other statutes of varying age, and relate them also to statutory structure. In relation to opinions, this is elementary stuff, that students learn to do from the first day of law school. Must they not also learn it in relation to statutes, which they will often be encountering in their practice in just such a way? 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 using the tools being taught oneself come in the notes.

Statutory *Implementation* by Agencies, the next chapter, begins by briefly describing both the APA rulemaking process (the Executive Order procedures are not yet mentioned here; the development of the air bag standard largely preceded them) and the back-and-forth about air bag requirements that preceded the Reagan Administration rule rescinding the passive restraint requirement. Its first large task is to ask students to do for the documents of rulemaking what they have already done for the NTMVSA – read first the Federal Register notice of proposed rulemaking

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<sup>67</sup> They might, however. See n. 71 below.

and then the Federal Register publication of the adopted rule,<sup>68</sup> outlining their various parts, considering their reasoning, and 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 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 (which, typically, is set out to be read before notes and questions about its structure and functioning), 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 well covers 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 the 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 air bags standard, for which the ground was laid by “Airbags 101,” from its inception through the immediate aftermath of *Motor Vehicles Mfrs. Ass’n of the United States, Inc. v. State Farm Mutual Ins. Co.*<sup>69</sup> 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. Dept. of Transportation*,<sup>70</sup> a 1972 Sixth Circuit decision. That decision found fault with the “objectivity” of the dummies with which compliance with the passive 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.<sup>71</sup> The political

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<sup>68</sup> Federal Register notices, throughout, are published in Federal Register format, as if photocopied – adding perhaps to the reality of the encounter.

<sup>69</sup> , 463 U.S. 29 (1983)

<sup>70</sup> 472 f2d 659 (6<sup>th</sup> Cir. 1972).

<sup>71</sup> 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

firestorm resulting from consumer resentment of the interlocks, as Jerry Mashaw and David Harfst have so well recounted,<sup>72</sup> 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<sup>73</sup> and the contemporary realities of statute-making in the Congress.<sup>74</sup> Edward Rubin's grounding in political science and philosophy, and understanding of the deficiencies of Langdellian methodology,<sup>75</sup> 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<sup>76</sup> and contemporary puzzles<sup>77</sup> 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.<sup>78</sup> They have produced an effective antidote.

#### 5. William N. Eskridge Jr., Abbe R. Gluck and Victoria Nourse, Statutes, Regulation, and Interpretation – Legislation and Administration in the Republic of Statutes<sup>79</sup>

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 for the new course that are centered on the production and interpretation of statutes and regulations, without being centered on courts.<sup>80</sup> The introductory materials introduce as having equal importance to the enterprise “How Judges Think About Statutes,” “How Legislatures Think About Statutes,” and “How Administrators

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affirmative, with little more to support the result than the court's understanding of “objective.”

<sup>72</sup> The Struggle for Automobile Safety, TAN 15 above.

<sup>73</sup> Bressman-Vanderbergh.

<sup>74</sup> Bressman-Gluck.

<sup>75</sup> 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.

<sup>76</sup> SEC .v Chenery

<sup>77</sup> Interpreting Regulations

<sup>78</sup> N. 5 above.

<sup>79</sup> 2014.

<sup>80</sup> 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 for reasons that will shortly appear. 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). In it, brief materials in the first chapter – also centered on the Civil Rights Act of 1964 – introduce Agency Implementation, and new Chapters 8 and 9, the final quarter of the book, take up administrative implementation of statutes and the theme and variations on *Chevron*, see TAN 93 below. Like the work discussed in text, its introduction to administrative procedures is sketchy – the APA provision governing informal rulemaking does not appear in text, and only about half as many pages are addressed to that process (12) as to interpretive rules and policy statements (22), though it has the advantage, like Bressman-Rubin-Stack of introducing the issues of presidential oversight subsequent to these pages. (Here, too, the text of the Executive Order is relegated to an Appendix, albeit in readable type. See TAN 87 below.) 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 on Congress as a functioning institution here than there, and less on agencies.

Think About Statutes.” As will be discussed, it is unfortunate that there is not equal analytic attention to “How Lawyers Think About Statutes” and “How Affected Individuals Think About Statutes,”<sup>81</sup> but this fault is hardly theirs alone. In comparison to Heinzerling-Tushnet and Bressman-Rubin-Stack these materials give relatively little attention to the issues of economic analysis, risk assessment, scientific judgment, and human psychology that so affect regulatory decisionmaking (E.O. 12,866 and its administration, for example, are described; but the order itself is not presented and the description of its operation and issues is largely in political terms); for primary materials other than judicial opinions and some statutory excerpts, students are directed to the place where they can be found and invited to consult them – saving pages, but reducing the possibility of in-class use and thus making that consultation the less likely. Yet there is much to admire here. Problems regularly set in its pages place students in active, practice-oriented roles. Particularly for teachers who understand, as Professor Gluck has reported,<sup>82</sup> 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*,” 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.” Then at the conclusion of an imagined legislative process, how could the student use the history that has been described, and ought the student be able to use that material, in appealing a conviction for a child’s use of a tricycle in the park? And after introducing administrators who might have the authority to define prohibited “vehicles,” can the student draft a proposed rule? How should her commission respond to a supposed comment supporting the inclusion of tricycles? Having in mind both its political overseers, and the possibility of engagement with the courts? 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. And 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.

The first part starts with attention to Congress, and then the executive branch, President and agencies, before moving on to the courts. The legislative process is introduced through the history of the Civil Rights Act of 1964, with particular attention to Representative Howard Smith’s failed attempt to sabotage the process by his successful introduction of an amendment prohibiting sex discrimination. It’s a choice, like several others in the book, that has the virtues of dramatically illustrating the features of the process under discussion (here, the process of legislation) in a context

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<sup>81</sup> 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.” 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 their aid.

<sup>82</sup> N. 41 above.

whose importance students will readily understand, at the possible cost of exciting deeply held normative or political commitments – in this respect, quite unlike the Estreicher-Nolls choice of *Mararich*<sup>83</sup> as a context-framing exemplar. Now a problem requires the student to advise his client whether it can safely take affirmative action to redress decades of sex discrimination in employment – but as an exercise in interpretation, without attention to the possible consequences of either action or inaction that such a client would need to consider. Following ample descriptions of House and Senate processes, how would he expect controversial legislation to proceed? Can he draft a bill? Get it past the veto-gates? Congress has a choice between courts and agencies as law-enforcers; as counsel for NOW or for the Chamber of Commerce, how can it work effectively to influence the authority Congress gives the Equal Employment Opportunity Commission. A handful of separation of powers cases are presented in considering constitutional limits on Congress’s authority to control agency and presidential behavior, but the focus of these materials is resolutely on the legislature and its behaviors.

The executive branch materials might more properly be described as an introduction to the President, including his relationship to agencies. He is a presence throughout, with agencies and their functioning a subordinate interest. One reads a lot about his removal power (with a problem involving the status of the EEOC, well illustrated by an opinion of the Office of Legal Counsel), about *Youngstown Sheet & Tube* and about the War Powers Resolution (in connection with Libya) before any agency action, as such, is introduced. Until one gets to “Introduction to Agency Statutory Implementation,” any primary reading that is not a case involves advice to the President, a quasi-constitutional focus. Then one encounters *FDA v. Brown & Williamson Tobacco Corp.*,<sup>84</sup> preceded by a discussion of the history of tobacco regulation by Congress and the FDA and relevant statutory sections. Students are invited to consider statutory arguments before reading the case, and hopefully they will – this is the sort of problem/assignment too often missing from our statutory teaching. One wonders, though – particularly given the chapter’s emphasis on the President as well as agencies – why they are not then also shown the presidential directive acknowledged in the following notes, or the agency’s regulation itself. These are materials any lawyer considering the situation would have had and used; their absence suggests the difference between the impulses underlying Bressman-Rubin-Stack and these materials. Finally there are some materials on cost-benefit analysis (but not the executive orders themselves), again emphasizing the President, not the view from inside the agency. An introductory problem, excellent from this perspective and principally considering congressional-presidential-agency relations, addresses OIRA pressures on the Department of Transportation respecting the implementation of a new statute on pilot fatigue – but students see only the statute and a descriptive account of subsequent events, neither the rule nor any OIRA documents that might be discoverable.<sup>85</sup> “Pull up the Federal Register now and read the agency’s explanation

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<sup>83</sup> TAN 53 above.

<sup>84</sup> 529 U.S. 120 (2000).

<sup>85</sup> In the author’s experience, DOT has been much more assiduous to include OIRA documents in its rulemaking dockets on the Federal Data Management Service, as the executive orders direct, than most agencies, and apparently it did so here. The blog account on which the authors rely in their description states, as they do not,

A red-lined version of the final rule showing all the changes that had been made to the draft while it was under OIRA review confirms that this exemption was added during OIRA’s review process. What’s more, the red-lined version shows that OIRA directed the FAA to include new language in the rule’s preamble justifying this change solely on the basis of cost-benefit analysis, with clear disregard for applicable law and relevant



... .”<sup>86</sup> The same contrast should be evident; it recurs throughout the book.

The next chapter, “The Courts,” and Part II, “Statutory Interpretation,” cover familiar territory and cover it as imaginatively and well as one would expect from these authors. These are the pages, with the prior treatment of Congress, that could excuse a law school requiring the course they imagine in its first year from continuing to offer Legislation as an upperclass elective. For many of the cases, the authors do what, on the whole, materials on statutory interpretation do not – setting out the statutory portions at issue in front of the case in which they are construed. This is a welcome advance, yet one yearns for a further step. A student’s independent reading might be more likely if those portions were attended with a problem that could lead her to the issues the court would have to resolve, as well as a precis of any materials a lawyer would have in hand when presented with it. That could not prevent her from looking ahead to see “if the butler did it,” but if one were able to reach problems at the end of one class and opinions at the beginning of the next, she might quickly come to appreciate the difficulties lawyers face in reading statutes for their clients and to develop for herself the essential skill of seeing a statute as others might, and not just as she initially does. Something like this does sometimes happen. The final problem of “The Courts” follows a considerable work-up of cases on Title VII of the Civil Rights Act and pregnancy discrimination, and Congress’s consequent enactment of a pregnancy discrimination act. How, now, should the EEOC approach accommodation of breast-feeding, or workplace rules controlling exposure of lactating or pregnant workers to toxic substances?

Part III, Agencies and Administrative Implementation, is less successful in my judgment, though readers might think the author of widely used teaching materials on administrative law a biased observer. It comprises three chapters, “Introduction to Administrative Law,” “Delegation, Deference, and Judicial Treatment of Agency Statutory Interpretations,” and “Administrative Constitutionalism.”

Since it is the agency equivalent of statutory formation and has already been met several times in the context of presidential-OIRA relations, one might imagine “agency rulemaking” would receive the closest attention in “Introduction.” It does come first, but its treatment is summary indeed. The governing section of the APA<sup>87</sup> and Executive Order 12,866 – the latter already several times described but not seen – are not set out. Students never see the documents of a rulemaking, either proposal or resulting rule; the only judicial opinions provided as primary material (that is, rather than summarized in text) concern substantive judicial review of rules, and the unspoken tension between those opinions and the APA’s text is not addressed; respecting the Executive Order (whose text appears only as an Appendix, in perhaps 8-point type), students are given a Bush-administration OMB Circular describing the process and asked to evaluate its application to a rulemaking on prison rape elimination – the authors provide a citation to where the regulatory impact analysis might be found, but the text only summarizes the rule and the cost-benefit issues that might be considered. Perhaps the skeletal nature of this presentation was intended as an accommodation to the

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science.

<http://www.progressivereform.org/CPRBlog.cfm?idBlog=9CA2427E-B023-E297-6E9CA1731AF03E99> (viewed July 30, 2015). How much more evocative of the agency experience this problem would have been had this version been included in it ... or even given as a “pull up,” with a reference to where it could be found.

<sup>86</sup> 220.

<sup>87</sup> 5 U.S.C. 553.

continuation, in this course's wake, of Administrative Law courses that must be left with something to do. But in terms of providing a basis for understanding the rulemaking process, including the Executive Order interactions, the contrasts with Heinzerling-Tushnet and Bressman-Rubin-Stack should be evident.

Although APA adjudication procedures are given only a paragraph's summary, the adjudication materials, after considering due process questions through the lens of *Mathews v. Eldridge*<sup>88</sup> and a problem drawing on *Hamdi v. Rumsfeld*,<sup>89</sup> contain a well-developed series of materials drawing on the FCC's dispute with Fox Television Stations (and others) over the airing of indecent material. First, one encounters the FCC's decision<sup>90</sup> – one of only two administrative decision documents I found reproduced in the book<sup>91</sup> – with good questions how it might have been understood and applied; then, excerpts from the two Supreme Court decisions resulting from the ensuing litigation;<sup>92</sup> and finally, a request to advise the (new) Commission what if any room it has to act, and what are its procedural options for doing so. Engaging bundles like this, requiring students to act in awareness of political as well as legal constraints and without complete guidance from judicially developed doctrine, well fit “The Legal Process” heritage and what can distinguish a course of this character from the ordinary law school fare. One simply wishes there were more of them.

The second chapter of this part is, essentially, theme and variations around *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,<sup>93</sup> appropriately ending with Jerry Mashaw's scholarship on the differences between agency and judicial statutory interpretation, that Bressman-Rubin-Stack also invoked – albeit, here, in a set of materials whose gaze is otherwise firmly fixed upon the courts. The third and final chapter builds on Professor Eskridge's scholarship about “super-statutes”<sup>94</sup> with three stories illustrating how law emerges socially, through the actions of many actors and not (hardly!) only through the courts. The first pulls together the materials on Title VII and various forms of discrimination around child-birth issues that have been a running theme of the materials; it does so by discussing the Family and Leave Act of 1993, upheld in *Nevada Department of Human Resources v. William Hibbs*.<sup>95</sup> In this case, Justices who earlier had rejected Title VII claims for pregnancy-related discrimination now accepted legislation grounded in congressional findings of continued social reliance on “invalid gender stereotypes in the employment context” – validating both congressional fact-finding and the EEOC's earlier action as juris-generative. The second story uses the congressional, administrative and social history of the social security program to illustrate how a statute can mature from fragile beginnings to become “an entrenched element in America's statutory constitution.”<sup>96</sup> What might this entail for the Affordable Care Act? Clearly a matter for politics, legislatures, presidents and agencies much more than the courts, as the recent decision in

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<sup>88</sup> 424 U.S. 319 (1976).

<sup>89</sup> 542 U.S. 507 (2004).

<sup>90</sup> 780

<sup>91</sup> The other, the last reading in the course, is Revenue Ruling 2013-17, the Internal Revenue Service's response to *United States v. Windsor* (133 S.Ct. 2675 (2013)), at 1009.

<sup>92</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) and 132 S.Ct. 2307 (2012)

<sup>93</sup> 467 U.S. 837 (1984).

<sup>94</sup> *A Republic of Statutes: Our New American Constitution* (Yale 2010) (with John Ferejohn); William N. Eskridge, Jr., *America's Statutory “constitution,”* 41 U.C. Davis L. Rev. 1 (2007); John Ferejohn and William N. Eskridge, Jr., *Super-Statutes*, 50 Duke L.J. 1215 (2001).

<sup>95</sup> 538 U.S. 721 (2003).

<sup>96</sup> 977.

*King v. Burwell* (sure to be identified as a supplement to this materials) strongly suggests. And the third is the story of the social changes in attitudes towards sexual preference and the institution of marriage, producing not only *United States v. Windsor*, but also an Attorney General's Statement announcing the President's conclusion (with which he agreed) that the United States should not defend the constitutionality of the Defense of Marriage Act, as it had been applied to deny Edith Windsor recognition of the validity of her marriage to Thea Spyer for purposes of federal law, and the subsequent IRS Revenue Ruling on what relationships would now be recognized as marital. Concluding problems, outside the courts, engage the possibilities now open.

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, and most of the time the modern regulatory state is far ahead of the courts."<sup>97</sup> In this sense, Langdell has been overcome, and perhaps the most important purpose of a contemporary introductory public law course well satisfied. If, as must be obvious, my preference remains with Bressman-Rubin-Stack as materials to the same end, it is because of the extent to which those materials require students to confront and use the actual materials of the administrative state – statutes, regulations, Federal Register notices, Executive Orders – keep themselves freer of judicial opinion, and introduce students to the economic, scientific, psychological, and political considerations underpinning the contemporary debates about rulemaking and its White House control.

### 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 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. Courses in professional ethics, and requirements to take skills courses and to complete two substantial writing requirements, have been added subsequently, but not a course requiring understanding of the real world of today's law. Perhaps Yale's students, brilliant as they are, are not misled on this question.<sup>98</sup> 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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<sup>97</sup> 1020.

<sup>98</sup> TAN 36 above