

# Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?

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## Introduction

The first-year curriculum at American law schools has been remarkably stable for more than 100 years. Many would say ossified. At Harvard, the First-Year Course of Instruction in 1879-80 consisted of Real Property, Contracts, Torts, Criminal Law and Criminal Procedure, and Civil Procedure.<sup>1</sup> These five courses—focused heavily on judge-made common law—dominated Harvard’s 1L curriculum from the law school’s founding into the 21<sup>st</sup> century.<sup>2</sup> The same five subjects have long commanded the primary attention of first-year students at Fordham, founded in 1905,<sup>3</sup>

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1. LAW SCHOOL OF HARVARD UNIVERSITY, ACADEMIC YEAR 1879-80, at 2, 3 (1879).
2. LAW SCHOOL OF HARVARD UNIVERSITY, ANNOUNCEMENTS 1900-01, at 8 (1900); HARVARD UNIVERSITY, THE LAW SCHOOL 1920-21, 17 SUPPLEMENT TO OFFICIAL REGISTER OF HARVARD UNIVERSITY NO. 10, at 2-4 (May 18, 1920); HARVARD UNIVERSITY, THE LAW SCHOOL, INCLUDING COURSES OF INSTRUCTION FOR 1940-41, 37 OFFICIAL REGISTER OF HARVARD UNIVERSITY NO. 29, at 8-10 (Apr. 29, 1940); HARVARD UNIVERSITY, THE LAW SCHOOL, CATALOGUE FOR 1960-61, 57 OFFICIAL REGISTER OF HARVARD UNIVERSITY NO. 5, 36-38 (Apr. 4, 1960); HARVARD LAW SCHOOL, 1980-81 CATALOG 47-49 (1980) [hereinafter *1980-81 Catalog*]; HARVARD LAW SCHOOL, HARVARD LAW SCHOOL CATALOG 2000-2001, at 76-82 (2000) [hereinafter *2000-01 Catalog*]. There have been minor adjustments. By 1920, criminal law had become a one-semester course. It was paired in that year with Principles of Liability, but by 1940 it was paired with Agency. In the latter part of the 20th century, Harvard added some first-year electives as well as a course in Legal Writing, Research and Analysis. See *1980-81 Catalog*, *supra* at 49; *2000-01 Catalog*, *supra* at 78-82.
3. FORDHAM UNIVERSITY, ANNOUNCEMENT OF THE SCHOOL OF LAW, 1905-06, at 10-11 (July 1905). See also FORDHAM UNIVERSITY, SCHOOL OF LAW ANNOUNCEMENT 1920-1921, 13 BULLETIN OF INFORMATION NO. 1, at 12-13 (Jan. 1920); THE SCHOOL OF LAW OF FORDHAM UNIVERSITY, ANNOUNCEMENT 1940-1941, at 16-17; FORDHAM UNIVERSITY, SCHOOL OF LAW 1960-1961, at 24-25; THE SCHOOL OF LAW 1980-81, 16 FORDHAM UNIVERSITY BULLETIN 11, at 32-33 (1980);

and at virtually every other U.S. law school throughout the 20th century.

Starting in the 1990s, however, a growing number of schools have required a 1L course examining different aspects of statutes and regulations. In previous decades, a handful of law schools offered upper-level elective courses in Legislation, including statutory interpretation,<sup>4</sup> to a mixed reception.<sup>5</sup> Administrative Law has been a more regular elective subject, although enrollments by school reflect an uneven proportion of upper-level students.<sup>6</sup> What is new is the array of law schools deciding that a course in Legislation (“Leg”), or Legislation and Regulation (“Leg-Reg”), should be mandatory for first-year students.

There are at least 27 schools that require a first-year course in Leg-Reg, generally for either three or four credits.<sup>7</sup> An additional group of schools

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FORDHAM UNIVERSITY SCHOOL OF LAW, STUDENT BULLETIN 1999-2000, at 24-25 (1999). In addition to the five core subjects, Fordham included 1L courses in Agency, Domestic Relations, and Jurisprudence though the first half of the past century. By 1980, those three additional subjects were no longer part of the 1L curriculum; they were replaced by Constitutional Law and Legal Writing.

4. See Albert M. Sacks, Book Review, 5 HARV. J. ON LEGIS. 121 (1967) (noting that legislation courses began in law schools in the 1920s and 1930s, and multiplied after World War II). Early course listings include BULLETIN, UNIVERSITY OF SOUTHERN CALIFORNIA, LAW SCHOOL 17 (July 1923) (upper-level elective); THE LAW SCHOOL, ANNOUNCEMENT OF COURSES 1937-1938, BULLETIN OF THE UNIVERSITY OF WISCONSIN, SERIAL NO. 2262, at 22 (Aug. 1937) (upper-level elective) [hereinafter *Wisconsin Bulletin*]; THE LAW SCHOOL, INCLUDING COURSES OF INSTRUCTION FOR THE ACADEMIC YEAR 1950-1951, 47 OFFICIAL REGISTER OF HARVARD UNIVERSITY no. 8, at 29 (April 1950) (second-year elective); GEORGE WASHINGTON UNIVERSITY, BULLETIN, THE LAW SCHOOL 1951-52, at 41 (1951) (upper-level elective); BULLETIN OF THE UNIVERSITY OF SOUTHERN CALIFORNIA 1952-1954, SCHOOL OF LAW, at 21 (1952); Early casebooks include, Charles B. Nutting & Sheldon D. Elliott, CASES AND MATERIALS ON LEGISLATION (West Pub. Co. 1950); Julius Cohen, MATERIALS AND PROBLEMS ON LEGISLATION (Bobbs Merrill Co. 2d ed. 1967).
5. Early casebooks and courses focused heavily on the legislative process and lawyering connected to that process, although they also covered interpretation of statutes by courts. See Sacks, *supra* note 4, at 122 (raising questions about coherence with respect to Cohen casebook); Nutting & Elliott, *supra* note 4, at xi-xii (setting forth table of contents that addresses legislative power, legislative bodies, legislative process, legislative drafting, and statutory interpretation); *Wisconsin Bulletin*, *supra* note 4. Henry Hart taught his Legislation materials, part of the famous Hart & Sacks tentative edition, while a visiting professor at Ohio State in the 1954-55 academic year. See William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2040 (1994). According to a colleague at the time, the course was sometimes referred to by students as Darkness at Noon (oral discussion between author and Professor Howard Fink in 1992, in which Fink related recollections shared earlier by Professor Robert Nordstrom, a friend and colleague of Hart’s).
6. See *infra* Part IIA. See generally Kevin M. Stack, *Lessons from the Turn of the Twentieth Century for First-Year Courses on Legislation and Regulation*, 65 J. LEGAL EDUC. 28 (2015) (examining and analyzing early 20<sup>th</sup> century resistance to inclusion of administrative law as part of legal education).
7. Based on my polling in February 2014 of Listserv participants in the AALS section on Legislation and Law of the Political Process, supplemented by polling conducted among members of the Admin Law section listserv in June 2014, the following law schools require a 1L course in Leg-Reg (variously titled), with credits listed in parentheses: Cleveland-

require 1Ls to take Leg, a course that often includes greater focus on topics related to the legislative process but does not encompass regulations or the regulatory process as a major component.<sup>8</sup> Overall, nearly 40 law schools currently require some kind of Leg-Reg or Leg course, almost all of them as part of the first-year curriculum. The number of schools requiring such a course represents a sharp increase within the past decade alone.<sup>9</sup>

This article focuses on the importance for legal education of mandating such a course. Part One addresses three distinct justifications for inserting Leg-Reg into the first year of law school. From a pragmatic standpoint, lawyers since the New Deal have devoted ever-increasing time and energy to understanding, applying, interpreting, litigating, and counseling about statutes and the regulations or agency judgments that flow from those statutes. Legal education must catch up. Immersing first-year law students in a systematic approach to the methodology of statutes and regulations is at least as important to their future legal practice as immersing them in the methodology of the common law.

In addition, an early exposure to what it means to “think like a lawyer” outside the courtroom setting can illuminate and deepen appreciation for our three-branch system of government. Courts are the exclusive arbiters of what the common law means, and federal courts have become the primary arbiters of what the Constitution means as well.<sup>10</sup> For statutes, however, the setting is

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Marshall (4), Fordham (4), Harvard (4), Michigan (4), NYU (4), Vanderbilt (4); Brigham Young (3), Case Western (3) Colorado (3), Florida State (3), Houston (3), Idaho (3), Maine (3), McGeorge (3), New York Law School (3), Ohio Northern (3), Pittsburgh (3), Richmond (3), Southern Illinois (3), Texas A&M (3), Vermont (3), West Virginia (3), Widener (3); Akron (2), Emory (2), Michigan State (2); Duke (1). In addition, Wake Forest requires such a course for 2Ls (3). For comparable data covering the 99 top-ranked law schools, see Abbe R. Gluck, *The Ripple Effect of “Leg-Reg” on the Study of Legislation & Administrative Law in the Law School Curriculum*, 65 J. LEGAL EDUC. 121 (2015).

8. Schools requiring a 1L course (again differently titled) that covers Statutory Interpretation and Legislation include Boston University (3), Chicago-Kent (3), Ohio State (3), and Penn State (3). Boston University required Legislation for many years but as of 2015-16, first-years are required to take Administrative Law instead. Law schools requiring 2Ls to take a Statutory Interpretation/Legislation course include Dayton (3) and Mercer (2). Several schools (Columbia, UC Irvine, Minnesota) require 1Ls to address Statutory Interpretation as a formal component of a separate 1L required course. Another group of schools (American, Chicago, Columbia again, Georgetown, Hofstra and Villanova) include Leg-Reg or Leg on a short list of 1L courses from which students must choose one.
9. See Muriel Morisey, *Liberating Legal Education From the Judicial Model*, 27 SETON HALL LEGIS. J. 231, 268 n.139 (2003) (reporting that eight of 143 American law schools require a course on legislation, with no reference to any schools including a regulation component); Gluck, *supra* note 7, at 123 (reporting that 15 of 17 survey respondents with a required course have added the course since 2000, and 10 of those 15 since 2010).
10. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). *But cf.* *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 80-81 (2000) (discussing Congress’ authorization under section 5 of Fourteenth Amendment to remedy and deter violation of rights guaranteed under that Amendment); *Baker v. Carr*, 369 U.S. 186, 210-11 (1962) (observing that under political question doctrine

more complex, reflecting a dynamic conversation among all three branches. By requiring first-year students to engage this conversation, law schools generate a more balanced set of insights about how our laws are made and applied. This, in turn, can help to minimize simplistic dichotomies between principled and political decision-making, and encourage students to recognize legislative virtues like consensus building and democratic responsiveness as comparable to the adversarial legalism of the courtroom.

Finally, statutory and regulatory subjects dominate the upper-level curriculum. Accordingly, it makes sense in foundational terms to require that students approach these subjects with an understanding of how laws and rules are shaped and informed by legislative and regulatory processes. A sophisticated methodological background should enable students to focus in more rigorous and also nuanced ways when they grapple with finer points of securities law, environmental law, or the law of telecommunications or civil rights.

Having taught both a required Leg course and a required Leg-Reg course, I believe there are solid arguments for each option. My current thinking is that Leg-Reg presents the stronger claim, but I will briefly address certain separate strengths of a Leg course as well. Whichever option one may consider, a case can be made that it borders on educational malpractice not to include either Leg-Reg or Leg as a mandatory element of the iL curriculum.

The fact that a Leg-Reg or Leg course should be required does not mean that implementing such a course is straightforward. Part Two discusses some challenges that accompany the development of a mandatory Leg-Reg course. These include deciding what topics should be covered and how to calibrate the emphasis between legislation and regulation; determining how Leg-Reg topics may be harmonized with existing subjects, notably Constitutional Law and Administrative Law but also Legal Writing and upper-level electives in Legislation; and reviewing certain institutional obstacles related to staffing a iL course as well as to persuading colleagues with long-standing, sincere investments in their common law subjects to yield some space for a newcomer.

## I. Justifications for a Mandatory iL Course

### *A. Preparing for a Legal Career*

It has become a commonplace that we live in an age of statutes. By the time Guido Calabresi published his celebrated book on the subject in 1982,<sup>11</sup> we had been denizens for at least half a century. A decade later, the MacCrate Report<sup>12</sup>

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the constitutionality of political branch decision-making in foreign affairs or national security is often nonjusticiable).

11. GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

12. *Legal Education and Professional Development—an Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, A.B.A. SECT. OF LEGAL EDUC. & ADMISSIONS TO THE BAR (July 1992) [hereinafter *MacCrate Report*].

noted the striking growth in new areas of law and regulation since the 1950s, identifying statutory fields such as “the environment, occupational health and safety, nuclear energy, discrimination and individual rights, health and mental health care, biotechnology, [and] the development and use of computers.”<sup>13</sup>

The report also emphasized the expanding areas of transactional practice permeated by regulation. These areas often relate to the management and control of risks affecting business ventures, including “new business formation, mergers and acquisitions, international trade and finance... consumer protection...[and] tax reforms...”<sup>14</sup> Lawyers operating in such business settings, replete with state and local as well as federal regulation, function more as “transactional engineers”<sup>15</sup> than trial or appellate litigators.

In the twenty years since the MacCrate Report, growth in practice fields continues to be focused on highly regulated sectors of the economy such as telecommunications, securities, banking and finance, food and drugs, labor and employment, and tax. American Bar Association data on lawyer specialization by practice areas indicates substantial increases in these statute-dominated fields and others like elder law, immigration, natural resources, workers’ compensation, bankruptcy, estates, and criminal law.<sup>16</sup>

To be sure, disputes involving the meaning of statutes and regulations frequently give rise to litigation. As courts continue to interpret and apply contested provisions, the role of judges and their core technique of analogical reasoning from prior precedent remains important. Precedent, however, often carries limited authoritative weight when construing a statute or regulation that was purposefully enacted to displace prior law or to fill a gap in the legal landscape.<sup>17</sup> Instead, lawyers must learn to master additional methodological tools, including textual and substantive canons of construction, legislative history, consequential considerations linked to fulfillment of underlying statutory policies, and the role of legislative acquiescence.<sup>18</sup>

The pre-eminence of statutory and regulatory law does not mean that traditional common law subjects have faded into irrelevance. Parties often seek to contract alongside of positive law rights and responsibilities, or even to circumvent such rights or responsibilities through written agreements. And tort law continues to help shape legal developments in diverse fields including

13. *Id.* at 17.

14. *Id.* at 17, n.12, quoting T.C. FISCHER, LEGAL EDUCATION, LAW PRACTICE, AND THE ECONOMY: A NEW ENGLAND STUDY 77 (1990).

15. *Id.*

16. LAWYER SPECIALTY CERTIFICATION BY THE NUMBERS 1996-2012, A.B.A. NATIONAL ROUNDTABLE ON LAWYER SPECIALTY CERTIFICATION slides 1, 4 (2013), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2012\\_national\\_certification\\_census.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2012_national_certification_census.authcheckdam.pdf).

17. See Edward Rubin, *What’s Wrong with Langdell’s Method and What to Do About It*, 60 VAND. L. REV. 609, 620-21 (2007).

18. For further discussion of these factors, see *infra* Parts IB and IC.

malpractice, product liability, the environment, and employment. But unlike the practice of law in the nineteenth and early twentieth centuries, these common law developments tend to be interstitial to statutes and regulations rather than part of a steady or uninterrupted flow of judicial decisions.

Moreover, an increasing number of attorneys practice law while rarely if ever appearing in a courtroom. Many work in-house for government agencies or serve as counsel for federal, state, or local legislatures. Others lobby on behalf of private or nonprofit clients before agencies and legislatures, or become inside counsel helping businesses to navigate the regulatory terrain.<sup>19</sup>

Given these changing circumstances, it is hardly surprising that private law practice has become far more focused on statutes and regulations. Lawyers advising their business clients with respect to new options or opportunities are constantly enmeshed in federal, state, local, and international laws. In addition, businesses must react to and navigate the dramatically expanding world of corporate compliance. Law firms representing these businesses emphasize the need to understand and respond to a range of civil, criminal, administrative, and legislative investigations and reporting requirements—virtually all of which are premised on statutes and regulations.<sup>20</sup>

A recent survey by the National Conference of Bar Examiners, organized in thirteen major fields including administrative law, sought to describe the job activities of a newly licensed attorney.<sup>21</sup> Respondents who indicated they performed tasks in administrative law came mostly from private practice (government attorneys were second).<sup>22</sup> In addition, attorneys who identified with other areas mentioned regulatory work as a major responsibility in their field and/or a deficiency in preparedness for new lawyers.<sup>23</sup>

19. This range of policy-oriented extrajudicial problem-solving, which occupies much of the legal profession, has attracted substantial numbers of female and minority attorneys. A smaller percentage of women lawyers than men are in private practice, while a higher percentage practice in government, for private associations, or in public interest positions. See *MacCrate Report*, *supra* note 12, at 20; *Employment Patterns 1999-2010*, NAT'L ASS'N OF LAW PLACEMENT (NALP) (Aug. 2011), <http://www.nalp.org/employmentpatterns1999-2010>. Similar disparities were reported for minority lawyers in the *MacCrate Report* (at 25-26), and subsequently on a more modest scale in the study commissioned by NALP assessing employment patterns from 1999 to 2010. See *MacCrate Report*, *supra* note 12, at 25-6.
20. To take just a few examples, there are internal compliance and remedial programs structured by the SEC and the Justice Department; governance procedures required by Sarbanes-Oxley; fiduciary responsibilities involving advice given to individual officers and directors; investigation of whistleblower claims as well as protections for whistleblowers under a range of statutes; and counseling and training for companies on various anti-corruption laws.
21. See NAT'L CONF. OF BAR EXAMINERS (NCBE), A STUDY OF THE NEWLY LICENSED LAWYER, NCBE (July 2012). [hereinafter *NCBE Study*].
22. *Id.* at 232.
23. *Id.* at 55-56, 57, 60, 79, 93. For instance, a lawyer from urban Mississippi, engaged in intellectual property and mergers-and-acquisitions practice, stated that statutory research and regulations, rules, and agency interpretive sources were major responsibilities for newly licensed attorneys in those fields, and that entry-level attorneys “need to understand that the

Notwithstanding this reality, our law schools have tended to promote administrative law as valuable primarily for working inside of government.<sup>24</sup> A Leg-Reg course can encourage first-year law students to recognize that all lawyers, including particularly lawyers counseling businesses, need to attain a basic familiarity and comfort level with regulatory processes and practices. The disconnect between the private profession's concern to enhance regulatory lawyering skills, techniques, and perspectives, and the law schools' frequent anticipation that such skills and perspectives are mainly relevant to government work, further illustrates the gap we need to fill.

Although the dramatic shift in the foundations of our law practice and its consequences for the job market have been widely recognized, the impact on first-year education has been minimal. During that formative first year, which signals to students what matters most for their professional futures, we continue to “inaccurately treat[] the law suit as the defining event in the legal system” while ignoring or undervaluing training in lawyers' skills as legislative policymakers and administrative implementers.<sup>25</sup> This reflects in turn a failure to appreciate that legislatures and agencies function as lawmaking enterprises in ways that are methodologically distinct from courts—distinct but not therefore unprincipled or dishonorable.

Indeed, the 1L experience too often promotes, however subconsciously, a false dichotomy between politics and law, compromise and principle, a dichotomy the legal profession has long ceased to accept. In the modern era, legal practice requires an ability to utilize skills and integrate mindsets associated with legislatures and agencies: the virtues of responsiveness to voter policy preferences, regard for interest group participation, deference to bureaucratic expertise, and success at consensus building in often-volatile circumstances. This ability must coexist alongside the capacity to absorb traditional values associated with courts: respect for ideological neutrality, clarity, and predictability.<sup>26</sup> That Congress at times fails to fulfill some of its own virtues, such as democratic responsiveness and consensus building, does not define the institution as hopelessly political or unprincipled, any more than Supreme Court decisions such as *Bush v. Gore*<sup>27</sup> define that institution as hopelessly lawless.

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lawyers exist in a fairly regulated [setting] across government bodies.” *Id.* at 55. Similarly, an experienced antitrust and trade attorney in urban Pennsylvania emphasized the importance for new lawyers to know “what does section \_\_\_ [sic] of the code mean.” *Id.* at 57.

24. For example, *A Guide to Careers in Administrative Law* (2011), drafted by the Office of Public Interest Advising at Harvard Law School, focuses almost exclusively on Administrative Law being of value for careers in federal, state, or local government, with only passing reference made to its relevance for private practice. *See id.* at 8-32.
25. Rubin, *supra* note 17, at 653-54.
26. *See* Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. LEGAL EDUC. 166, 171 (2008).
27. 531 U.S. 91 (2000). *See generally* Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535 (2001);

Exposing first-year students to nonjudicial skills and perspectives on a systematic basis will make them more adept at the interpretive and advocacy efforts undertaken in an adjudicatory setting. Importantly, as this next section discusses, engaging those skills and perspectives also will introduce students at an early stage to the complex realities of a legal structure that features separate yet interdependent forms of lawmaking.

### *B. Thinking Like a Lawyer in the Administrative State*

It is worth repeating that unlike common law and constitutional law, the formation and implementation of statutory law reflects a continuing dialogue involving all three institutional branches of government. Effective lawyering in this setting requires sensitivity to the techniques and assumptions valued in legislative and agency decision-making, and how they differ from judicial decision-making. In order to construct or criticize analyses of statutory meaning and regulatory implementation, law students must consider the distinctive ways in which legislators and agency bureaucrats approach their problem-solving responsibilities. And in furtherance of that consideration, students require substantial exposure to legislative and administrative “raw materials,” taking them well beyond the traditional case-method approach.<sup>28</sup>

A Leg-Reg course enables first-year students to explore some of these fundamental distinctions. It does so with the goal of establishing a broad-based understanding for how statutes and regulations are produced, why courts often disagree over their interpretation, and how legislative and administrative lawyers may function in this setting. Several examples are illustrative.

*What Counts as Reliable Information.* In the typical litigation setting presented in most first-year courses, courts evaluate factual information offered by the parties for its relevance and reliability, using established control mechanisms such as the rules of evidence, the swearing of witnesses, and the opportunity for cross-examination.<sup>29</sup> In a legislative setting, there are no comparable rule-based controls on the availability of facts or policy information. The legislative record developed by Congress leading up to a given statute typically includes

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Pamela S. Karlan, *Unduly Partial: The Supreme Court and the Fourteenth Amendment in Bush v. Gore*, 29 FLA. ST. U. L. REV. 587 (2001).

28. In this regard, I differ from colleagues who advocate “mak[ing] Leg-Reg appear as much like a traditional 1L course as possible, in particular through the use of the case method.” John F. Manning & Matthew Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 J. LEGAL EDUC. 45, 51-52 (2015). The case method remains an integral part of Leg-Reg pedagogy, but in my view it should be preceded and then complemented by distinctive treatment of the lawmaking and regulatory processes. For additional discussion, see *infra* Part IIA. For other pedagogical approaches less heavily devoted to the traditional case method, see Dakota S. Rudesill, Christopher J. Walker, & Daniel P. Tokaji, *A Program in Legislation*, 65 J. LEGAL EDUC. 70 (2015); Deborah A. Widiss, *Making Sausage: What, Why, and How to Teach About Legislative Process in a Legislation or Leg-Reg Course*, 65 J. LEGAL EDUC. 96 (2015). Compare Stack, *supra* note 6, at 12 (describing how early administrative law courses were “normalized into the case method [in order] to gain acceptance.”).

29. See Morisey, *supra* note 9, at 240.



information generated at committee hearings, presented in committee reports, and introduced through floor statements—all without formal institutional filters for reliability or relevance.<sup>30</sup> At the same time, the segmented structure and division of labor within the legislative process means that no individual legislator can observe every bill, and only a limited number of legislators can be present for any given bill’s deliberative passage through to enactment.<sup>31</sup>

Against this background, Leg-Reg students must learn how to assess the relevance and value of information developed during and as part of the lawmaking process. This in turn entails understanding the organization and use of committees within our bicameral system.<sup>32</sup> In the absence of like rules governing the reliability of legislative “evidence,” lawyers assign relative weight to factual assertions, policy arguments, and legal analyses advanced through committees and on the floor.<sup>33</sup>

The reference to “lawyers assigning relative weight” encompasses a number of separate legal contexts of which students should be aware. Legislators and their staffs often consider committee report materials *ex ante* as a source of information and possible persuasion for anticipated floor proceedings.<sup>34</sup> Later, many agencies will regard the reports as offering guidance on early implementation and enforcement of the new law,<sup>35</sup> and regulated businesses may find clarification and instruction as to how the new statute should apply. Still later, judges reviewing statutory disputes may derive insight into the meaning of provisions that are inconclusive on their face.<sup>36</sup>

30. In addition, the staff for committee and individual legislators typically receive and often benefit from information (solicited and unsolicited) supplied by interest group lobbyists, executive agencies, and research divisions within Congress. *See generally* Morisey at 240-41; Cohen, *supra* note 4, at 402-03.
31. *See* HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 696 (William N. Eskridge Jr. & Philip P. Frickey eds., 1994).
32. *See id.* at 706-10; ROBERT A. KATZMANN, *JUDGING STATUTES* 13-20 (2014). The value of information amassed in the regulatory process is similarly shaped by distinct practices associated with rulemaking and other agency efforts to develop guidance or advice, practices to which Leg-Reg students are introduced. *See, e.g.*, *Rybachek v. EPA*, 904 F.2d 1276, 1286 (9th Cir. 1990) (addressing agency’s use of after-acquired information in notice-and-comment rulemaking process); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (addressing agency’s obligations to respond in some detail to material questions or concerns regarding a proposed rule, obligations less structured than those imposed for judicial trials).
33. Viewed from this perspective, the textualist position that evidence developed during the legislative process is essentially inadmissible to help explain the meaning of an enacted law reflects a misapprehension of the legislative model.
34. *See generally* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation From the Inside—An Empirical Study of Drafting, Delegation, and the Canons: Part I*, 65 *STAN. L. REV.* 901 (2013); Victoria Nourse & Jane Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *N.Y.U. L. REV.* 575 (2002).
35. *See generally* Christopher J. Walker, *Inside Agency Interpretation*, 67 *STAN. L. REV.* 999 (2015).
36. KATZMANN, *supra* note 32, at 35.

Evaluative screening of legislative record evidence is not as formalized and rule-oriented as the monitoring of facts or precedent in a common law litigation setting. But this less uniform approach contains its own set of standards and presumptions, tied to the structure of congressional lawmaking.<sup>37</sup> By examining that structure, first-year students will begin to appreciate how to perceive or infer in comparatively objective terms the persuasive value of such evidence.

*What Counts as Authority.* Common law courses focus on judicial precedents as primary sources of authority. Departure from these precedents is incremental, with due regard for lawyers' obligations to support their claims and arguments under existing legal principles.<sup>38</sup> By contrast, Leg-Reg addresses how law created through statute and subsequent agency implementation aims to change the status quo in non-incremental ways. Congress does not always legislate to create whole new fields of legal policy. In numerous settings, it builds on prior statutes when enacting new ones; examples include successive accretions in our employment discrimination laws, our antitrust laws, and our environmental laws.<sup>39</sup> But even these accretions tend to reflect substantial and unanticipated public policy priorities and/or interest group agendas rather than a commitment to utilize case law precedents as basic guideposts.

As part of their greater freedom in departing from the status quo, legislatures and agencies rely on a diverse menu of formats when generating lawmaking controls. Courts addressing a particular controversy typically resolve the meaning of a legal rule or standard in explicit case-specific terms that are then authoritative until the next opportunity arises for case-specific incremental change. But when deciding how best to assert its authority in a particular subject matter field, Congress may choose from a range of

37. See James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CAL. L. REV. 1199, 1225-27 (2010) (discussing standards for reliability of legislative history based on the best evidence of consensus within the legislature that can be routinely discerned, or evidence deemed to have been noticed, understood, and endorsed by a reasonable legislator).
38. See Morisey, *supra* note 9, at 243-44 (discussing Federal Rules of Civil Procedure 11(b)(2) and Model Rules of Professional Conduct Rule 3.1 as reinforcing the limits imposed by precedent).
39. For employment discrimination laws, see Title VII of the Civil Rights Act, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in 42 U.S.C. § 2000e (2014)) and subsequent changes by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972); Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); and Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009); Antitrust law via Sherman Act, 26 Stat. 209 (1890) (codified as amended in 15 U.S.C. §§ 1-7 (2004)); Clayton Act, Pub. L. 63-212, 38 Stat. 730 (1914) (codified as amended in 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (2014)); Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified at 15 U.S.C. § 13 (2014)); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94-435, 90 Stat. 1383 (1976); for Environmental law see Federal Water Pollution Control Act of 1948, 62 Stat. 1155 (1948) and subsequent amendments, Pub. L. No. 92-500, 86 Stat. 816 (1972); Pub. L. 95-217, 91 Stat. 1566 (1977) (codified as amended in 33 U.S.C. §§ 1251-1387 (2014)).

lawmaking approaches, including direct coercion, incentives to private actors, and regulatory delegation.<sup>40</sup>

A Leg-Reg course can examine how these choices reflect in part the open-ended nature of the legislative process, where achieving sufficient consensus to enact a statute requires a complex blend of problems, policies, and politics.<sup>41</sup> Thus, Congress may authorize public enforcers to prosecute violators of the statute and exact some penalty from them through criminal statutes. Alternatively (or additionally), Congress may authorize private victims of unlawful conduct, or an agency official acting on their behalf, to sue the violators for civil damages and/or injunctive relief as well as attorney's fees. Finally, the legislature can delegate the development of standards, the adjudication of violations, and the promulgation of guidance to a public administrative agency.

The first two implementation choices allow courts to assist directly in developing statutory meaning through interpretive standards and rules. For this reason, Leg-Reg courses typically devote considerable time and emphasis to statutory interpretation. The interpretive approaches, however, involve less independence than judicial decision-making under common law. They are subject to the formal controls of legislative override<sup>42</sup> and agency nonacquiescence,<sup>43</sup> and the indirect constraints of legislative disapproval through oversight or appropriations activity<sup>44</sup> and agency evasion through strategic choices.<sup>45</sup>

The third implementation option, delegation to an administrative agency, is also a major focus of Leg-Reg treatment, as it has become increasingly characteristic of the modern administrative state at both the federal and state levels. Although courts may review the exercise of this delegated power, the sheer breadth and scope of agency action makes such review of minor

40. See HART & SACKS, *supra* note 31, at 845-57 (discussing these three distinct approaches).

41. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* 87-88 (2d ed. 1995).

42. See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317 (2014) (reporting on frequency of overrides, especially in certain areas like criminal law and civil rights).

43. See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 705-12 (1988) (discussing the venue-uncertain conditions under which the NLRB operates where administrative law judges follow precedents established by the Board unless reversed by the Supreme Court).

44. See generally *Baraka v. McGreevey* 481 F.3d 187, 203 (3d Cir. 2007) (declining to award payment of \$10,000 honorarium for statutorily created position because legislature never appropriated funds for payment of the amount provided for under authorizing statute); see also *Green v. C.I.R.*, 507 F.3d 857, 863 n.4 (5th Cir. 2007) (concluding that under Texas law, "the legislature may choose, through the appropriation process to pay all, some, or none of an individual's judgment against the state.").

45. See generally Yehonantan Givati, *Strategic Statutory Interpretation by Administrative Agencies*, 12 AM. L. & ECON. REV. 95, 96, 114 (2010); M. Elizabeth Magill, *Agency Choice of Policymaking Forum*, 71 U. CHI. L. REV. 1383, 1395-1403 (2004).

importance in the larger lawmaking picture<sup>46</sup> Most of the time, agency actions are either unreviewed by courts or essentially unreviewable. Thus, the authority-creating options available to agencies are more complex and varied than what legislatures employ, and far more so than the case method utilized by courts.

When students learn about separation of powers in Constitutional Law, the concepts typically are presented through a focus on the substantive authority exercised by and constraints imposed upon each branch of national government. The Leg-Reg approach to separation of powers focuses more directly on the untethered agendas and diverse procedural mechanisms through which the two politically accountable branches make law. Moreover, by exploring separation of powers doctrines through Supreme Court decisions, Constitutional Law courses subtly reinforce the 1L message that the finality and principled nature of “law” derives from and evolves through the judiciary. A required exposure to the processes by which legislatures and agencies modify the status quo, processes that also are principled and final, will allow first-year law students to develop an appreciation for how lawmaking is a genuine tripartite enterprise, one in which courts often play a subordinate role.

Teaching law students to respect the richness and diversity of lawmaking methodologies as part of their baseline legal education might even yield ancillary dividends with a larger audience, given the legal profession’s role in helping to shape public attitudes towards the politically accountable branches. Congress and many state legislatures assuredly have a poor public image, and this is in part well-earned. The public’s low opinion, however, also relates to the cacophonous transparency and messiness of legislative operations, which are easy targets for skeptical media coverage in contrast to the secretive, presumptively orderly judicial decision-making enterprise. If the next generation of attorneys is trained to recognize that these messy, noisy democratic processes have a foundation of coherence and on occasion even elegance, and to explore their special lawmaking qualities as distinct from the adjudication of legal disputes, newly minted graduates will be in a position to promote a more balanced perspective on the effectiveness of the nonjudicial branches.

*What Counts as Successful Advocacy.* In order for lawyers to become effective professional advocates, they must understand that the approach of a litigator differs in important respects from what is called for in legislative and administrative law practice.<sup>47</sup> For a start, legislative and regulatory decision-makers are not expected to be neutral in the way that judges are. Voters elect

46. A Leg-Reg course explores the range of options available to agencies when exercising their law-implementing authority. These options include formal and informal rulemaking and adjudication, but also interpretive rules, policy guidance, and processes with less than general applicability such as opinion letters or advisory statements. See generally HART & SACKS, *supra* note 31, at 1060-61; Nina Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2006).

47. See Morisey, *supra* note 9, at 236-38, 246-63 for in-depth treatment of this issue.

legislators, and elected executives appoint top agency officials, based on their ideological values and policy preferences. While we presume agencies will follow certain procedural norms that are “neutral” in the sense of even-handed and fair, they are not expected to be disinterested but rather to act cooperatively with political leaders of government.<sup>48</sup>

Legislative and administrative practice lawyers representing non-governmental clients advocate for some form of public policy result before these politically interested bodies. In doing so, they are less bound to the zero-sum litigation model in which one side “wins” and the other side “loses.” Leg-Reg students are encouraged to consider how an attorney for an industry that emits pollutants (or some other business venture) may oppose a specific legislative or regulatory approach while accepting the need for a regulatory solution. The posture of most legislative or regulatory proposals allows for, if it does not invite, give-and-take and compromise as part of the lawmaking process.<sup>49</sup> It would generally be unwise for a private party lawyer to view the legislature or the agency regulator as an opponent in the same way that plaintiffs and defendants in court are opponents.<sup>50</sup>

Relatedly, issue-framing in litigation demands tailoring the scope of the legal question with a judge or jury in mind, so as to make the law apply readily in a client’s favor. Framing issues in legislative and regulatory advocacy requires lawyers to articulate a problem and propose remedies that evoke widely held values or beliefs linked to broad public policy positions. This more expansive framing approach is directed at an audience that is correspondingly broader than legal decision-makers inside the courtroom. For legislative lawyering, the audience includes not only legislators but different private or public constituencies and also the media.<sup>51</sup> For regulatory lawyering, the audience consists of agency policymakers, who are scientists and economists as well as attorneys. In both instances, lawyers must understand the importance of becoming nimble and articulate about issues that go well beyond how to interpret and apply the current state of legal precedent or authority.

48. See Peter L. Strauss, *Administrative Law: The Hidden Comparative Law Course*, 46 J. LEGAL EDUC. 478, 488 (1996).

49. With respect to legislation, that give-and-take may arise prior to bill introduction, as when the major premise of according new rights or protections to a large group of citizens (such as consumers or employees) is combined with a minor premise of defenses or exemptions that reduce or immunize business liability in certain settings. Compromise also may occur during the post-introduction enactment process on a particular issue or provision, reflecting accommodations deemed necessary by proponents in order to achieve sufficient consensus for final passage.

50. See Morisey, *supra* note 9, at 248.

51. See *id.*, at 249-50. One famous example is President Lyndon Johnson’s appeals (in which he was joined by leading congressional lawmakers) to civil rights and labor leaders, religious groups, and the general public to help enact the 1964 Civil Rights Act. See, e.g., ROBERT CARO, *THE PASSAGE OF POWER: THE YEARS OF LYNDON JOHNSON* 488-92 (2012); WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION STATUTES AND THE CREATION OF PUBLIC POLICY* 9 (5th ed. 2014).

In sum, legal education in the creation and application of public law should encourage an appreciation for distinctly nonjudicial policymaking procedures and dynamics. These include the informational record from which laws and regulations are constructed; the minimal role played by respect for and adherence to the status quo; and the wide-ranging approaches to advocating for change in the status quo. Early systematic exposure to thinking like a lawyer outside the courtroom will contribute to a richer and more balanced first-year experience. As the next section indicates, it also will create a stronger foundation for upper-level studies that focus on statutes and regulations.

### *C. Preparing for the Rest of Law School*

When examining practical and doctrinal justifications for a 1L Leg-Reg course, my focus has been on benefits obtained by first-year students from taking the subject. But upper-level students and professors in other courses also will derive important advantages from this requirement. Developing an in-depth understanding about the formulation and implementation of statutes and regulations allows for a more fine-grained and sophisticated approach to the array of follow-on regulatory courses.

This understanding cannot be conveyed interstitially by professors teaching other 1L courses.<sup>52</sup> In addition to the focus on common law methodologies and a felt need to cover substantive doctrine, many of these courses have experienced a reduced number of credits to make room for other subjects besides Leg-Reg.<sup>53</sup> Nor can the topics and perspectives discussed earlier in this part be readily integrated through piecemeal detours undertaken by professors teaching upper-level substantive subjects. Instead, courses like employment discrimination, environmental law, or financial institutions will be enriched when entering students have examined in comprehensive terms the role of certain basic interpretive resources as well as key aspects of the regulatory process. Several examples again help to illustrate the point.

*Legislative history.* Since Justice Scalia joined the Court, judges and scholars have debated whether Congress' pre-enactment legislative record should be deemed relevant to ascertain the specific intent of key supporters or the more general purposive meaning of a statute. Heated disagreements between textualists and purposivists have focused on to what extent legislators' descriptions of and justifications for provisions of a bill in progress are a legitimate source for lawyers and judges to invoke during litigation over

52. See Todd D. Rakoff, *The Harvard First-Year Experiment*, 39 J. LEGAL EDUC. 491, 492 (1989) (describing challenges confronting a first-year reform effort at Harvard in the 1980s that included a "mini-course" in courts, legislatures, and statutes, and observing that "the premises of the first-year curriculum—its division of the world by common-law rubrics; its reliance on the case method; even its pedagogical form of many students, one teacher—would limit what could successfully be achieved within it.").

53. See Leib, *supra* note 26, at 173 (discussing addition of Constitutional Law, Legal Writing, and Moot Court).

the enacted text.<sup>54</sup> These disagreements, and in some instances Congress' legislative responses, have influenced the interpretation of federal statutes in every major regulatory field. There has been comparable discourse among judges and legislators at the state level, where legislative history has been influential although less scrutinized by legal scholars.<sup>55</sup> Devoting time in Leg-Reg to examining how courts assign greater or lesser weight to different kinds of legislative history, and why some judges find this history entirely inadmissible, yields dividends for many other courses focused on substantive law.

Outside of litigation, agency bureaucrats and regulated entities often pay careful attention to Congress' pre-enactment legislative record.<sup>56</sup> The value of committee reports for nonjudicial audiences is likely enhanced when the reports are produced in a bipartisan, objective manner. This is often the case, for instance, with respect to reports accompanying major tax reform legislation.<sup>57</sup> Tax committee reports have been described as performing a mini-regulatory function in situations when the Treasury Department takes years to issue formal rules on specific topics covered under the new law.<sup>58</sup>

In short, it is important that students be able to understand legislative history in a systematic way and to examine it in critical terms. By appreciating how such history has variable probative value in a litigation setting and also beyond the courtroom, students are better equipped to analyze its use or misuse in the development of substantive law doctrines.

*Canons.* Here too, students need a well-ordered and comprehensive approach. One can imagine spending time on the Rule of Lenity in Criminal Law, but students in that course are likely to focus heavily if not exclusively on the substantive problem or case being used as a vehicle. Similarly, the canon of Constitutional Avoidance may be addressed by constitutional law professors, but only as a parenthetical to high profile doctrinal issues, as when examining the Court's recent review of challenges to the Affordable Care Act.<sup>59</sup>

By contrast, Leg-Reg treatment of these canons involves asking broad methodological questions that are both distinct from specific substantive

54. See, e.g., *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276-83 (1996) (Stevens, J. concurring, debating with Scalia, J., concurring); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 610-12 n.4, 616-23 (White, J., writing for the Court, debating with Scalia, J. concurring). See generally KATZMANN, *supra* note 32, at 35-49.

55. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2009).

56. See *supra* notes 34-35 and accompanying text.

57. See James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1282 (2008).

58. See Michael A. Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX L. REV 819, 841 (1990).

59. See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) (Roberts, C.J.).

law examples and informative with respect to application in future contested settings. For instance, is the Rule of Lenity best justified as providing fair warning to citizens? As vindicating the presumptive requirement of *mens rea* for criminal penalties? As imposing constraints on prosecutorial power and judicial discretion?<sup>60</sup> Whatever rationales are deemed appropriate by lawyers or judges in a particular context, there are further choices as to how a reviewing court may frame its reliance on the canon. Should the rule be invoked as a tiebreaker at the back end of the interpretive process, reserved for situations in which a judge regards the two parties' competing interpretations as essentially in equipoise? Or is the rule better understood as a presumption invoked at the front end of the process, inviting the other side to overcome it through sufficiently persuasive support for the contrary interpretation?<sup>61</sup>

Similarly, the constitutional avoidance canon might support a number of different values. A court may be respecting legislative rationality by assuming there was no intent to press constitutional limits. Alternatively, a court may be preserving its own institutional capital by declining to confront the prospect of legislative invalidation. Finally, the avoidance canon may be a backdoor way for a court to give effect to underenforced constitutional norms.<sup>62</sup> Law students' ability to understand how the canon has been applied to shed light on a statute's meaning may depend on which values they believe were deemed prominent, and—for the underenforced norms rationale—how strongly they believe the judge or agency was committed to the norm in question.<sup>63</sup>

*Cost-Benefit Analysis.* Torts courses often treat the cost-benefit issue in connection with their discussion of particular judicial efforts to allocate risks between plaintiffs and defendants. During the past several decades, this subject area has assumed considerable importance in the regulatory context based on initiatives by presidents from both parties. Acting through the Office of Management and Budget and its Office of Information and Regulatory Affairs, the White House has made cost-benefit analysis a linchpin for its structured efforts at *ex ante* monitoring of agency rulemaking.

60. ESKRIDGE ET AL., *supra* note 51, at 694-95.

61. *See id.* at 693. The Court was closely divided over this framing question in *Muscarello v. United States*, 524 U.S. 125, 138-39, 148-49 (1998) (comparing Justice Breyer's majority opinion using tiebreaker approach with Justice Ginsburg's dissenting opinion using presumption approach).

62. *See* ESKRIDGE ET AL., *supra* note 51, at 726-27.

63. For a recent example of the avoidance canon being invoked to vindicate privacy-based rights, *see Fair Housing Authority of San Fernando Valley v. Roommate.com LLC*, 666 F.3d 1216 (9th Cir. 2012). Further, as with the example of the Rule of Lenity, lawyers and judges must decide how to frame their approach to the avoidance canon. Should one first decide that there is a fair or reasonable alternative statutory interpretation that will avoid the possible constitutional question? Or should one start by determining whether the constitutional question to be avoided is itself serious or substantial? If the latter approach is followed, does seriousness depend on the fundamental nature of the constitutional provision being implicated? On the likelihood that the provision has been violated? *See* ESKRIDGE ET AL., *supra* note 51, at 726.



Leg-Reg coverage allows first-year students to explore various technical issues related to cost-benefit analysis. This includes modern techniques for the valuation of economic benefits but also aspects incorporated in recent executive orders such as the role of non-monetizable benefits and the need to determine whether benefits “justify” as opposed to “outweigh” costs.<sup>64</sup> A Leg-Reg approach also invites students to consider related legal issues, notably Congress’ choice to prohibit, permit, or require cost-benefit analysis in particular statutory schemes, and how aggressive or deferential judicial review should be in an area involving highly technical economic models and assumptions.<sup>65</sup> Finally, Leg-Reg treatment can address the political dimensions of interagency coordination and conflict over cost-benefit analysis, an issue that highlights tensions between the White House and the agency bureaucracy.<sup>66</sup> In sum, as is the case for legislative history and the canons, the Leg-Reg course offers a systematic overview on the weighing of costs and benefits in agency rulemaking that implicates a broad set of institutional values and relationships, going well beyond what would be addressed in a case-specific or substantive law setting.

## II. Challenges to Developing a Mandatory iL Course

It is not an accident that the first-year curriculum has remained substantially intact for over a century. There are the familiar bromides about not tinkering with the best part of legal education, not shoehorning all important subjects into the first year, and not repeating failed experiments from the past.<sup>67</sup> On this last point, one recurring argument has been that students often give low evaluations to Leg or Leg-Reg courses, and their level of dissatisfaction then discourages professors from embracing or sticking with the course.<sup>68</sup>

While student concerns deserve to be taken seriously as a general matter, it is not clear that they should influence faculty commitment in this setting. The concerns tend to relate to what students rightly perceive as the unfamiliar aspects of Leg-Reg—it is methodological rather than doctrinal, and focused less on courts than all other iL courses. But the lack of familiarity and related discomfort are an important part of the reason students need to be exposed to the subject at an early stage.<sup>69</sup> In addition, as an increasing number of law schools require the course, and students perceive their first-year friends

64. See Exec. Order No. 12866, 58 Fed. Reg. 51735 (Oct. 4, 1993) (discussing in Section 1(b)(6) the key question of whether benefits “justify” costs); Exec. Order No. 13563, 78 Fed. Reg. 3821 (Jan. 21, 2011) (authorizing in Section 1(c) agencies to consider values impossible to quantify such as equity, dignity, and fairness).

65. See ESKRIDGE ET AL., *supra* note 51, at 1025-31.

66. See generally Cass Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2012).

67. See Leib, *supra* note 26, at 178-81.

68. *Id.* at 174.

69. The reasons have been amply discussed in Part I.

elsewhere to be in their same position, the “strangeness” factor is likely to diminish. Finally, as professors become more comfortable teaching what is for many of them a different kind of course than they have taught in the past, student responses should also adjust. Data from several law schools indicates that student evaluations of required first-year courses in Leg-Reg and Leg are consistent with evaluations for other 1L subjects.<sup>70</sup>

Beyond overcoming student discomfort and associated professorial reluctance, it is worth considering a range of issues that faculties and administrators may face when seeking to add Leg-Reg to the 1L curriculum. Some are tailored to the particular content of Leg-Reg; others apply to the insertion of any new 1L requirement.<sup>71</sup> What follows are responses, necessarily abbreviated in this context, to concerns that may be raised under each heading.

#### *A. Concerns Specific to Leg-Reg*

*Structure of the Course.* An unusual dimension of the Leg-Reg course is its combination of two related yet distinct subject areas. Leg is often presented as largely methodological, whereas Reg includes more traditionally doctrinal elements borrowed principally from Administrative Law.<sup>72</sup> The existence of these potentially separable components invites more attention to organizational aspects of the course. There are now a number of casebooks offering different ways to integrate the two parts. The following observations, while not meant to be rigidly prescriptive, suggest certain guideposts.

First-year students tend to have little recollection of how laws are made and little or no knowledge about regulations. Accordingly, starting the course with

70. At Fordham, where Leg-Reg has been a required 1L course since 2011-12, the Leg-Reg mean evaluations are in the middle of the pack for first-year courses; they also have risen steadily for professors teaching the course in each of its first three years. At Harvard, where Leg-Reg has been required since 2007-08, course evaluations are similarly located midstream when compared with other required 1L subjects. At Ohio State, the Leg evaluations were middle of the pack among 1L course composite records for the past two academic years, 2012-13 and 2013-14. Student evaluation composite records for the three law schools are on file with the author; they are anonymous as to individual professor identities.
71. Some observers may also contend that Leg-Reg (or Leg) could be required in the fall semester of second year, which would avoid destabilizing existing 1L arrangements. A requirement in the second year is preferable to no requirement at all, although others may object to imposing further mandates beyond the first year. But given the well-recognized formative and signaling qualities of the initial law school year, a Leg-Reg course should become part of this core intellectual experience. Indeed, an important function of such a required course is precisely to destabilize long-settled arrangements that have unduly exalted the common law and judge-centered approach to legal education.
72. A comparable dichotomy between methodological and substantive law topics also arises in a Leg course. Exposure to the way Congress makes laws has substantive dimensions, and distinct legislative process components such as lobbying, redistricting, speech or debate clause immunity, and campaign finance are plainly doctrinal. These distinct process components are often part of a basic Leg course. See Rudesill et al., *supra* note 28, at 78-84 [Part IB] (discussing pedagogical approaches to law of the political process). When Leg is part of a Leg-Reg course, faculty often focus primarily on statutory interpretation, though with some introductory material on the lawmaking process.

an orientation to fundamentals of the lawmaking process is important. Students, especially those whose college majors were in the sciences or humanities, are often puzzled or anxious about revisiting a topic they last contemplated in high school. And a 1L course that begins by focusing for several classes on Congress rather than case law analysis may initially reinforce this discomfort. Yet there is little prospect for constructively and critically examining what legislatures produce without becoming “up close and personal” with the process that yields those statutory products. Encouraging students in the first week to appreciate that the role of statutes is more central than their truncated recital in appellate court footnotes suggests will start to reorient their thinking for the entire semester.<sup>73</sup> An initial exposure to the legislative process should also include an introduction to agencies and the different ways they contribute to implementation.<sup>74</sup> This allows 1Ls to begin perceiving how the two political branches interact to make the rule of law effective.

In addition to the lawmaking process itself, there are a series of “core areas” that, if possible, should be part of the Leg-Reg course. These areas include theories of statutory interpretation (notably textualism, purposivism, dynamic interpretation); related practical tools of statutory interpretation (canons, dictionaries, legislative history, legislative inaction, *stare decisis*); threshold operational questions about agencies (such as delegation from Congress and removal powers of the president); agency process options for implementation (related to the Administrative Procedure Act); approaches to the oversight or monitoring of agencies (*ex ante* by the executive branch and *ex post* by Congress and the courts); and judicial deference to agencies as part of statutory interpretation. The last area mentioned—agency deference—is especially valuable as a final unit, because it combines Leg and Reg and builds

73. My first reading assignment includes a review of initial Republican and Democratic versions of the bills that became Title VII of the 1964 Civil Rights Act. In an opening class discussion, students invariably do a thoughtful job debating the general pros and cons for courts using legislative history to illuminate statutory meaning—they focus impressively on questions of legitimacy, reliability and efficiency. But when then asked to review and analyze actual bill language, there is often prolonged silence punctuated by the deer-in-the-headlights look of incomprehension. Getting students to identify and analyze *competing statutory formulations* as to the compensation and tenure schemes for EEOC members, or enforcement and remedial approaches under proposed Title VII, is comparable to getting them to understand differences among holding, dicta, and reasoning at the start of a common law course. On the second day of class, students review the eight pages of the House floor debate that led to inclusion of the sex discrimination amendment. The fact that this amendment—covering many millions more Americans than the central race discrimination provisions of Title VII—was introduced by Southern Democrats as a “poison pill,” was opposed by the bill managers from both parties on strategic and sincere grounds, and was approved as an amendment with crucial outspoken support from a handful of female members, is invariably eye-opening for students and triggers animated discussion.
74. One can rely on an extended case study to present this introductory material, as the Eskridge, Frickey, Garrett & Brudney casebook does using Title VII of the 1964 Civil Rights Act. (see *supra* note 51, at 2-36, 61-79) Alternatively, the overview might be presented through one or more problem-solving opportunities, or perhaps in lecture format.

on students' accumulated understandings about both the legislature and the bureaucracy.

With respect to a Leg course that does not address the regulatory process, there is more leeway to explore important and engaging aspects of the legislative process beyond lawmaking *per se*. Topics frequently covered (and worthy of examination) include immunity under the Speech or Debate Clause, lobbying and bribery, campaign finance and its regulation consistent with the First Amendment, electoral redistricting, and direct democracy. Apart from their intrinsic interest as part of a separation of powers orientation, each of these areas can enhance student insights into factors that affect—or distort—the time and energy legislators spend on lawmaking activities.

*Coordinating with Other Subjects, 1L and Upper-Level.* The Leg-Reg course addresses, from its own distinctive angle of vision, a number of issues that may be covered in other courses as well. Accordingly, Leg-Reg professors should reach out to faculty in these other areas to avoid unnecessary duplication or unintended gaps. With respect to Constitutional Law, Leg-Reg faculty will likely wish to cover nondelegation and the president's powers to appoint and remove agency personnel, though probably not the line-item veto and possibly not the legislative veto if it is covered in depth by constitutional law professors. Assuming that both Leg-Reg and Con Law are required, and that students will often take these two courses in the same semester of the first year, a commitment to coordinate decisions about specific areas of coverage is important.<sup>75</sup>

With regard to Administrative Law, an upper-level elective course, coordination challenges are more complex. In terms of topics to be covered, Leg-Reg professors might decide to introduce the basic agency implementation options (formal and informal rulemaking, adjudication, interpretive rules, policy guidance) as well as judicial review under the APA and agency deference under *Chevron* and *Skidmore*, while eschewing in-depth treatment of these matters and avoiding altogether other topics such as adjudicatory due process, ripeness and exhaustion, standing, implied rights of action, and the Freedom of Information Act. The problem is that for many students this may be their only exposure to the subject. Administrative Law occupies an important place in the upper-level curriculum of most law schools, but it is not a required course and actual enrollments vary considerably between schools and from one year to the next.<sup>76</sup>

75. For example, if—unknown to the professors involved—the same 1L section is assigned *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), for Constitutional Law one week and for Leg-Reg the following week, students may be puzzled by the repetitive or divergent perspectives, and by depletion of the scarce resource of 1L class time.

76. Annual enrollment at Harvard has ranged from 191 to 413 students since 2006-07 (out of approximately 1,600 total upper-level students). Enrollment has varied from 20 to 115 students at Fordham since 2008-09 (out of an average of approximately 800 total upper-level students), from 32 to 140 students at Vanderbilt since 2005-06 (out of an average upper-level student population of 380) and from 115 to 188 students at Columbia since 2009-10 (out of approximately 900 upper-level students). Data for these four law schools are on file

This raises the question whether to introduce students to Reg topics with the expectation they will return to the subject in the subsequent specialized course. One can imagine two scenarios developing after Leg-Reg is established as a 1L requirement. Some students will conclude that their exposure to Reg makes it unnecessary or excessive to revisit the subject area in a separate full course: a “been there, done that” mindset. Other students, intrigued by the 1L presentation of Reg issues, will decide to pursue an in-depth exploration of the subject: a “whetted appetite” mindset. Data collected from three law schools with a 1L Leg-Reg requirement indicate that administrative law enrollments have declined at some institutions; whether this is due to the presence of Leg-Reg or other factors is not entirely clear.<sup>77</sup>

Any diminution in Administrative Law enrollment should be viewed alongside the fact that the entire student body is now experiencing a substantial Reg component as 1Ls. At Fordham, for instance, the numbers enrolled in Administrative Law in the three years prior to Leg-Reg averaged under 20 percent of all upper-level students.<sup>78</sup> Having 100 percent take a course that includes basics of Administrative Law may be deemed worth the trade-off of

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with the author. Even students who do not take the course may find that they are tested in Administrative Law on their state bar examination. *See, e.g.*, NEW YORK STATE BOARD OF LAW EXAMINERS, CONTENT OUTLINE FOR THE NEW YORK STATE BAR EXAM I (Aug. 2014), <http://www.nybarexam.org/Docs/contentoutline.pdf> (testing for state administrative law starting February 2015); OREGON STATE BOARD OF BAR EXAMINERS, OREGON BAR EXAM SUBJECT MATTER SUMMARY CHART (including state and federal Administrative Law as a subject since 2009), [http://www.osbar.org/\\_docs/admissions/SubjectSummaryChart.pdf](http://www.osbar.org/_docs/admissions/SubjectSummaryChart.pdf). *See generally* Rudesill et al., *supra* note 28, at footnote 13 (listing 10 states that test administrative law as an essay subject on the bar exam).

77. At Fordham, the average Administrative Law enrollment declined by more than half between the four academic years preceding Leg-Reg and the first two academic years following its introduction. At Vanderbilt, the decline in average Administrative Law enrollment also was roughly one-half between the three academic years preceding Leg-Reg and the six years after it was introduced. At both schools, Administrative Law was offered fall and spring semesters in all or most years prior to Leg-Reg, but in only one semester for the years following Leg-Reg. In addition, enrollment varies based on the identity of particular professors. At Harvard, the decline was just under one-third between the two academic years preceding Leg-Reg and the first six years following its introduction. Administrative Law enrollment at Columbia has not been affected by the introduction of Leg-Reg as one of a small number of 1L elective options. In contrast to Fordham and Vanderbilt, Columbia continues to offer Administrative Law in both fall and spring semesters; like those two schools, year-to-year variations in enrollment are affected by the professor teaching the course. Data for all four law schools are on file with the author. *See also* Gluck, *supra* note 7, at 33-34 and Figure 20 (reporting mixed results from eight law schools regarding whether Administrative Law enrollments increased or decreased following addition of a required Leg-Reg course).
78. Enrollment in Administrative Law for 2008-09 through 2011-12 (the last four years when upper-level students had no exposure to Leg-Reg) averaged 79 students per year out of some 1,000 upper-level students enrolled in a given two-year period. At Harvard, Administrative Law enrollment for the two years prior to introduction of a Leg-Reg 1L requirement averaged just over 60 percent: 345 students per year out of some 1,100 upper-level students enrolled in a given two-year period. *Id.*

reducing upper-level enrollments in a full Administrative Law course from 20 percent to 10 percent.

Faculty may seek to minimize or even reverse the decline in Administrative Law enrollment through closer coordination between the two subjects. In order to encourage more students to view Leg-Reg as an appetite-whetting introduction to Administrative Law, Leg-Reg professors might explain to their students in some detail the types of issues omitted from the 1L course, and why the specialized Administrative Law course is important as a follow-up area of study. Presenting this explanation—and perhaps even distributing a current Administrative Law syllabus—is more likely to be persuasive if Leg-Reg faculty are on the same page as to what they are and are not covering within the administrative law subject area. Accordingly, coordination is at least as important here as for Constitutional Law.

Requiring Leg-Reg or Leg also may result in fewer students enrolling in upper-level legislation-related courses, or in fewer such courses being offered. At the same time, as Abbe Gluck documents, a number of law schools requiring Leg-Reg or Leg had no course in this field before the requirement.<sup>79</sup> Moreover, several schools that added a required course also have added a new upper-level course: in legislative drafting, state and local government, or theories of statutory interpretation.<sup>80</sup> And at least one school—Ohio State—offers a diverse set of experiential learning options at the upper-level, building on its first-year foundation in legislation.<sup>81</sup> These examples suggest that the ripple effect of a required first-year course may be harder to anticipate in the relatively new area of legislation when compared with more heavily charted fields like administrative law or constitutional law.

Finally, there may be an interest in coordinating Leg-Reg with 1L research and writing courses. At Fordham, the four-credit Leg-Reg course includes two take-home graded writing assignments during the semester. Typically, one addresses a statutory interpretation problem and one a regulatory process issue. The faculty included this writing requirement in an effort to supplement and enrich the first-year writing experience, and the timing of assignments requires coordination with parallel assignments being undertaken in a stand-alone Research and Writing course. For law schools that do not incorporate a writing component for Leg-Reg, there is the possibility of coordination with at least some Legal Writing sections to offer a topic that can build upon or reinforce learning experiences during the Leg-Reg course, including helping to promote the non-court-oriented skill set that lawyers need to develop.

79. See Gluck, *supra* note 7, at 141-142 and Figure 11 (identifying Wake Forest, Fordham, Houston, and Case Western Reserve among the 16 respondents that added a required course).

80. See *id.* (identifying Harvard, Wake Forest, and Fordham from the group of 16 respondents).

81. See Rudesill et al., *supra* note 28, at 86-94 (Part IIB). The centerpiece of Ohio State's upper-level offerings is a legislation clinic in which students work directly with state legislative leaders and their staffs. Given that approximately 40 law schools are located in state capitals, there would seem to be considerable room for growth with respect to this type of clinic structure.

*B. General Concerns*

Although there are doubtless other concerns of a more general nature, two are worthy of mention in this context.

*Communication Among Sufficient Numbers of Committed Faculty.* It can be rewarding to design and implement a new required course, but the chances for success are higher if the enterprise is a genuinely collective one. A cooperative planning approach has special resonance for Leg-Reg, given that integration of its two distinct component parts and coordination of coverage with professors from other courses are ongoing responsibilities. In addition, the anxiety of 1Ls in facing a new type of subject places a premium on advance planning to achieve a relatively uniform approach. In established common law courses like Property, faculty interests or areas of specialization often result in considerable variation: Some professors may focus heavily on intellectual property issues, others on landlord-tenant law, still others on zoning. Students tend not to question such variations because Property is accepted as a traditional 1L requirement. By contrast, Leg-Reg is a recent arrival on the 1L scene and still a minority presence in law schools. Substantial variations in coverage or approach are more likely to trigger critical scrutiny from anxious student consumers. Accordingly, it is worth striving for greater than usual levels of communication and coordination among faculty teaching the Leg-Reg course.

In terms of faculty numbers, my experience at two law schools suggests that the “bench” for a Leg-Reg course should include at least two more faculty than will teach the course in any particular year. This level of initial commitment provides a cushion given the recurrence of anticipated semester leaves and unanticipated administrative demands. If possible, all professors teaching the course should be involved in the initial planning and rollout. Faculty often migrate to Leg-Reg from having taught heavily statutory and/or regulatory subjects, as well as from Constitutional Law or Administrative Law. For some, the course may be a second calling rather than a primary passion. Regardless of their motivation, all participants should understand the importance of inculcating in students an essential shift from doctrinal to methodological orientation, as well as the need to work at integrating Leg and Reg components. Again speaking from experience, these understandings are more readily achieved when there is joint planning and design involved.

*The Institutional Politics of Mining for 1L Credits.* It may seem obvious that there can be no addition of a 1L course without subtraction. A Leg-Reg or Leg course of three or four credits means either that other courses must shave a credit to accommodate the new arrival or that a different 1L course must be removed to the second year. This challenge is heightened by the reality that some professors in traditional 1L subjects cannot in good conscience readily conceive of reducing (or in some instances reducing a second time) the content of their courses.

The case for Leg-Reg as part of first-year legal education has been presented at length in Part I. Advocates for change must be respectfully

persuasive while prepared to explain in some depth the importance of this new addition. Each law school has a different 1L history and culture, and every faculty has its own distinct personalities. Solutions to the challenge of altering an institutional status quo will have to be tailored to those individual circumstances; there is no single or even recommended approach to this political reality.

### Conclusion

When reviewing the first edition of the Eskridge & Frickey casebook on Legislation, Judge Richard Posner observed in 1988 that “the creation and interpretation of statutes are now paramount concerns of the legal profession.”<sup>82</sup> Posner lamented the typical law school curriculum’s failure to grapple with the legislative process and the difficulties of statutory interpretation, adding that upper-level statutory courses “often treat the legislature as a black box out of which a text somehow emerges, and treat interpretation as a straightforward process of making the statute conform to some reasonable (the instructor’s?) conception of its purposes.”<sup>83</sup> He concluded that the new casebook, combining practical and theoretical materials on the legislative process with in-depth exposure to statutory interpretation across many fields of law, “has the potential to alter the law school curriculum.”<sup>84</sup>

More than twenty-five years later, the alteration predicted or hoped for by Posner has yet to be fully realized. This article has sought to establish that the arguments in favor of a first-year Leg-Reg course—practical, doctrinal and pedagogical—are separately substantial and collectively compelling. The presence of such a required course retains the potential to reshape perceptions and beliefs about legal practice and our separation of powers structure for the next generation of attorneys.

We may be approaching a tipping point. A growing number of law schools—public and private, elite and non-elite—have added Leg-Reg or Leg as a first-year requirement. Casebooks have proliferated and professors entering the field now have a range of worthy choices comparable to those available for other first-year courses.<sup>85</sup> Obstacles remain that ought not to be minimized, including assuring sufficient faculty investment, overcoming

82. Richard A. Posner, *Book Review: Cases and Materials on Legislation: Statutes and the Creation of Public Policy*, 74 VA. L. REV. 1567, 1567 (1988).

83. *Id.*

84. *Id.*

85. See, e.g., LISA SCHULTZ BRESSMAN ET AL., *THE REGULATORY STATE* (2d ed. 2013); WILLIAM N. ESKRIDGE JR., ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (5th ed. 2014); WILLIAM N. ESKRIDGE JR. ET AL., *STATUTES, REGULATIONS, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* (2014); LISA HEINZERLING & MARK V. TUSHNET, *THE REGULATORY AND ADMINISTRATIVE STATE: MATERIALS, CASES, COMMENTS* (2006); JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* (2d ed. 2013); ABNER J. MIKVA & ERIC LANE, *LEGISLATIVE PROCESS* (3d ed. 2009).



student uneasiness, and adjusting credits and coverage for other courses. In the end, though, circumventing those obstacles seems less a narrow path for the aspirationally virtuous than a necessary route for legal education.