Lessons from the Turn of the Twentieth Century for First-Year Courses on Legislation and Regulation

Kevin M. Stack

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts . . . .
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> – *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952)

Consider the following two arguments in favor of adopting a "legislation and regulation" or "regulatory state" ("leg-reg") course in the first year of law school:

> 1. One of the basic aims of the first year of law school is to provide an overview of the modern legal system and the general skills necessary to function as a lawyer today.[1] In light of those goals, a leg-reg course is a critical component of the first year and has been for many years.[2] That we live in an "age of statutes" is old news;[3] indeed, in our current era, regulations and decisions issued by administrative agencies leave as deep a mark on our law as legislation. If law and legal practice is dominated by statutes and agencies as primary implementers of statutes, then a general introduction to these materials and institutions deserves a place in the first year of law school.[4]
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> 2. A basic goal of the first year is to provide students with the knowledge and skills necessary and helpful to understanding the more specialized courses of

Kevin M. Stack is Professor of Law and Associate Dean for Research, Vanderbilt Law School.

1. *See* Edward Rubin, *What's Wrong with Landell's Method, and What to Do About* It, 60 Vand. L. Rev. 609, 651 (2007).
2. *Id.* at 622 ("The first-year, common-law curriculum simply does not reflect the impact of the administrative state. . . . The failure to integrate [statutory and regulatory law] into that curriculum disconnects it from the basic of modern practice in a manner that betrays that curriculum's intention. . . .").
3. *See, e.g.,* Guido Calabresi, A Common Law for the Age of Statutes 1-2, 183 (1982) ("All agree that modern American law is dominated by statutes.").
4. *See, e.g.*, Rubin, *supra* note 1, at 651; Ethan J. Leib, *Adding Legislation Courses to the First-Year Curriculum*, 58 J. Legal Educ. 166, 169-72 (2008); James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?*, J. Legal. Educ. 3, 6-16 (2015).

> their second and third years of law school.[5] It is widely observed that law and legal practice are increasingly specialized.[6] Clusters of statutes, agencies, and regulations play an important role in defining those specialties and shaping how they are taught in law school. As a result, an introduction to statutes, agencies, and forms of regulation provides critical context and skills for the more specialized statutory and regulatory studies in upper-level courses.

These arguments both strike me as persuasive. What is puzzling is that these same arguments could have been confidently pressed more than 70 years ago—or, in line with the Supreme Court's suggestion in my epigraph, considerably before that. This extraordinary length of time, especially relative to the life of legal education in the United States, suggests that something more than well-worn stories of faculty inertia or student distaste with things "administrative" is at work in the slow pace of adoption of a leg-reg course in the first year.

To gain some insight and critical perspective, this essay looks back to the arguments and debates stirred by the incorporation into the law school curriculum of a related course that appeared exotic and now is a mainstay: a credit-bearing class in administrative law. At the turn of the 20th century, a small cluster of scholars—Frank Goodnow, Ernst Freund, and Bruce Wyman—charted the first definitions and accounts of administrative law (so called) in the United States, taught the first courses in the subject, and produced its first teaching materials.

A brief look back at their conceptions of the field, and the resistance it met, informs the debate over leg-reg courses in three ways. First, these early scholars' arguments for administrative law, made a century or more ago, add further urgency to adoption of a first-year leg-reg course today. The resonance of their arguments in the debate today shows how slowly legal education has progressed, and how far we yet have to go, in synchronizing the "law" of law school with the true dimensions of the legal order. Second, returning to these early works provides a vantage point on the material to be covered in a leg-reg course. There is a strong argument that part of what was left on the cutting-room floor in the debate over what would be taught as part of "administrative law"—the coverage of agency decision-making and internal administrative law—deserves a prominent place in today's first-year leg-reg courses. A first-year course with coverage of the primary sources agencies produce and examination of how agencies make decisions not only brings the first-year curriculum closer to capturing this critical aspect of lawmaking today, but also provides the groundwork for upper-level courses, including an upper-level course in administrative law focused on judicial review.

5. *See* Leib, *supra* note 4, at 171; Brudney, *supra* note 4, at 21-25 (2015).

6. *See* Todd D. Rakoff, *The Shape of Law in the Administrative State*, 11 Tel Aviv U. Stud. L. 9, 9 (1992) ("Probably the most common observation American lawyers make about American law is that it is increasingly specialized."); Rubin, *supra* note 1, at 657 (noting specialization as a condition of American law). Professor Rakoff's article includes a helpful diagram depicting this specialization. *See* Rakoff, *supra*, at 6.

Finally, examining the sources of resistance to these early courses exposes deeper grounds for the continued wariness about a first-year leg-reg course in a jurisprudence for which the case method is the privileged pedagogy. Indeed, the recrudescence of interest in arguments that all administrative regulations and decisions are not law or "unlawful"[7] might have more to do with the failure of law schools to provide a portrait of law that reflects its current form than the wholesale illegality of the administrative state.

I. "Administrative Law" at the Turn of the Twentieth Century

Scholars at the turn of the 20th century made a powerful and simple argument for the increasing importance of administrative law. Based on the premise that the legislatures were creating more and more administrative bodies and had vested them with greater powers to reach binding decisions, it follows that the law governing how agencies and public officers act, and the remedies private parties could seek from them—what these scholars came to call "administrative law"—would play an ever more important role for lawyers. Moreover, as these scholars recognized the centrality of this distinctive branch of public law, they also sought to introduce it into the law school curriculum.

A. The Rise of the Administrative State and Administrative Law

One of the earliest and most forceful statements of the relevance of administrative bodies and the law that governed them is found in the work of Frank Goodnow, who held a joint appointment in law and political science at Columbia University.[8] In 1893, Goodnow produced a two-volume monograph comparing the administrative structures in the United States with those of England, France and Germany.[9] Goodnow's book convincingly argues for the centrality of an administrative law that his work helped to define, and does so in terms that speak directly to the grounds for a first-year leg-reg course today.

Goodnow launches his book with a declaration that could have been pulled from the preface of any of the current course books for leg-reg classes: "A detailed consideration of the directions of administrative action, as well of its methods, is . . . a necessity for the practicing lawyer."[10] As we do today,

7. *See, e.g.*, Philip Hamburger, Is Administrative Law Unlawful? (2014). Professor Adrian Vermeule's review of Professor Hamburger's book pointedly confronts the book's denial of the administrative state's legality. *See* Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547 (2015) (review of Philip Hamburger, Is Administrative Law Unlawful?).

8. William C. Chase, The American Law School and the Rise of Administrative Government 48-49 (1982).

9. Frank J. Goodnow, Comparative Administrative Law: An Analysis of the Administrative Systems National and Local, of the United States, England, France and Germany, Vols. I & II (1893) (New York: G.P. Putnam's Sons).

10. *See* Goodnow, *supra* note 9, at iv; *compare with, e.g.*, Lisa Schultz Bressman, Edward L. Rubin, & Kevin M. Stack, The Regulatory State xxi-xxii (2nd ed. 2013) ("Statutes and regulations are paramount in this book because they are principal sources of law in our modern regulatory state. . . . [T]he principal goal is practical: to provide an introduction to the laws and institutions lawyers confront in their practices every day.").

Goodnow connects the centrality of administrative law to the demands on and developments of modern government. "Our modern complex social conditions," Goodnow writes, "are making enormous demands of the administrative side of the government, demands which will not be satisfied at all or which will be inadequately met unless a greater knowledge of administrative law" is gained.[11] In a few compact pages, Goodnow defends administration as a necessary function of government. For Goodnow, "administration" is the catch-all category of government action that falls outside the work of the legislature and courts.[12] "Whenever we see the government in action as opposed to deliberation or the rendering of a judicial decision, there we say is administration."[13] In this sense, "administration" is to be found in all the manifestations of executive action, from the appointment of officers, the assessment and collection of taxes, the training of an army, and the investigation of a crime to the execution of a judgment.[14]

With this definition of administration as "the function of execution"—which encompasses the chief executive and his "most humble . . . subordinates"[15]—Goodnow's argument for the centrality of administrative law unfolds easily, though the term was unfamiliar at the time. Goodnow concedes that while there is wide acknowledgment of the functions of administration, "there is hardly an American or English lawyer who would recognize the existence of a branch of law called administrative law."[16]

Goodnow attributes this blind spot to an overreading of Professor Albert Venn Dicey's widely quoted declaration that "in England and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles on which it rests are unknown."[17] Dicey served as the Vinerian Professor of English Law at Oxford and a fellow of All Souls from 1882 until 1909, and his *Law of the Constitution* is viewed as one of the most important books on public law in the common law tradition—and is also widely misunderstood.[18] Goodnow explains that in Dicey's notorious passage distancing administrative law from the English legal tradition, Dicey simply meant to deny the reception of a particular form of the French *droit administratif* into English law, not the existence of a law which "governs the relations of the executive and administrative authorities of

11. *See* Goodnow, *supra* note 9, at iv.

12. *Id.* at 1-2.

13. *Id.* at 2.

14. *Id.*

15. *Id.* at 5.

16. *Id.* at 6.

17. *See* Goodnow, *supra* note 9, at 6 (quoting A.V. Dicey, The Law of the Constitution (3rd ed. 304-05)).

18. *See* Mark D. Walters, *Dicey on Writing the Law of the Constitution*, 32 Oxford. J. of Leg. Stud. 21 (2012).

government."[19] In this larger sense, Goodnow argued, administrative law is an inevitable aspect of the state and operates as a supplement and complement to constitutional law.[20] Whereas constitutional law sets the general organization of the state, administrative law "fixes the organization of administrative authorities" and "indicates what are the rights of the individual which the administration must respect."[21] With an expanding set of tasks taken on by government, it would be difficult to deny the centrality of the law that applies to "government in action" for the lawyer and the citizen.

Goodnow was hardly alone in recognizing the critical role of administrative law in the modern state and for contemporary lawyers. Goodnow's student Ernst Freund, who had a long tenure at the University of Chicago, and Harvard's Bruce Wyman also offered definitions of the field of administrative law—and defended its centrality. In an 1894 article, Freund joined Goodnow in arguing for acceptance of administrative law as a distinct field of public law.[22] For Freund, administrative law "regulates and limits government action without involving constitutional questions;" its subject matter is "public affairs" outside of legislation and the jurisdiction of the courts.[23] Like Goodnow, Freund saw the importance of this law as tied to the expanding powers of federal administration.[24] The Constitution, Freund observed, grants broad discretion to the legislature to act; of the numerous statutes enacted, "the largest number regulate, in some respect, [to] the administration of the government, creating official powers or duties."[25] With the basic premise that executive lawmaking was on the rise, it again follows easily that the law setting the constraints on these new administrative functions was all the more important.[26] In step with Goodnow, Freund also "hoped that the term [administrative law] will become more familiar to the public, and especially to the legal profession, than it is as present."[27] In the same short span of years, the newly minted Harvard Law

19. Goodnow, *supra* note 9, at 7; *see also* Edmund M. Parker, *State and Official Immunity*, 19 Harv. L. Rev. 335, 336 (1906) (arguing that reading full discussion of Dicey's chapter on *droit administratif* makes clear he did not intend to deny that general common law governed the duties of officials, and that he should not be so misread).

20. Goodnow, *supra* note 9, at 8.

21. *Id*.

22. Ernst Freund, *The Law of Administration in America*, 9 Pol. Sci. Q. 403 (1894).

23. *Id*. at 404.

24. *Id*. at 408 ("Of course the peculiar sphere of federal administration aided this development very materially").

25. *Id*. at 403.

26. Interestingly, Freund also observed another phenomenon with strong contemporary relevance—the increase of the president's powers over administration, which "amount at the present time to a substantial direction of national administration." *Id*. at 408. With extensive powers over personnel, Freund notices, "a strong executive naturally became the depository of extensive delegated statutory powers." *Id*.

27. *Id*. at 404.

School faculty member Bruce Wyman[28] schematized administrative law as a field in similar terms,[29] and defended its place as constitutional law's coordinate branch of public law in his 1903 treatise based on his lectures in administrative law.[30]

B. Introducing Instruction in "Administrative Law"

Recognizing the importance of administrative bodies and thus "administrative law," these scholars also sought to introduce this material to law students and lawyers. Goodnow, Wyman, and Freund all produced books that could be used for instructional purposes or were adapted from them.[31]

One of the most striking features of these treatments is how their coverage differs from current conventional coverage in administrative law. Three differences in their proposed coverage are most relevant for the coverage of a leg-reg course. First, these early writers recognized and taught the role of law internal to administration. Wyman's *The Principles of the Administrative Law* provides a robust treatment of the set of constraints internal to the executive branch.[32] Wyman classified administrative law as having two elements, an "external administrative law" that pertains to the relations of officials to citizens, and "an internal administrative law" that concerns the relations of officers with one another:[33]

> Internal law addresses "the fact that many officers are bound together in action," and thus seeks to expose "the position of the officer in his organization and his function in its action." (14) The internal law thus concerns the allocation of authority among the many actors within the agency and the practices by which their individual actions constitute a collective action on behalf of the entity. Wyman acknowledges that this internal law is in part positive, something discernible as a social fact or institutional practice. The difficulty in studying administration, Wyman remarks, is "the problem is as often institutional as it is legal." (22) The "proper relations of the officials in the administration is the institutional problem." (23) But the internal law still has normative content; it is concerned with the "proper" relations of officials (23), "whether there has been proper or improper administration." (20) The internal law thus is the set of norms, procedures and practices that structure and unite activities of officers into proper collective action.[34]

28. Bruce Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers, With New Introduction by Kevin M. Stack iii (1903) (republished with new introduction 2014).

29. *See* Wyman, *supra* note 28.

30. *Id.* at 23.

31. *See* Goodnow, *supra* note 9; Wyman, *supra* note 28; Ernst Freund, Cases on Administrative Law (1911).

32. *See generally* Wyman, *supra* note 28.

33. *Id.* at 4.

34. Wyman, *supra* note 28, at xvi-xvii (quoting Stack's Introduction) (with references in

As Professor Jerry Mashaw has emphasized, this "internal administrative law" has not been the focus of contemporary administrative law scholarship, despite its importance to administrative legality.[35] Outside of coverage of the presidents' executive orders providing for regulatory review,[36] this internal law also does not figure prominently in most administrative law courses today.

Second, 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.[37] "[T]he operation of general principles of administrative law is constantly affected, and frequently controlled by, the language of statutes."[38] As a result, Freund emphasized that statutory construction thus deserved a prominent place in a course on administrative law.[39] 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."[40] Statutory interpretation has been a constant occupation of administrative law, but frequently only in the context of review of executive action. The current iterations of leg-reg courses generally answer this call more systematically than administrative law courses. In other writing, Freund also argued for a greater presence of policy analysis, what we might call public administration, of the methodology of agency decision-making within law schools' coverage.[41] Freund bemoaned the identification of the field of administrative law with judicial decisions.[42] What this did in law teaching, in Freund's view, was

parentheses to the pages of Wyman's treatise).

35. *See* Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 222-23 (2012); Peter L. Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department: Reflections on the Interior Department's Administration of Mining Law,* 74 Colum. L. Rev. 1231, 1233 (1974) (emphasizing importance of internal law within the agency) Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 Geo. L.J. 259, 268-70 (2015) (calling for the development of a jurisprudence that addresses the legal constraints, beyond the courts, on administrative activity); Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 Tex. L. Rev. 1137 (2014) (calling attention to the importance of administrative law and practice beyond the cognizance of the Administrative Procedure Act).

36. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

37. Freund, Cases on Administrative Law, *supra* note 31, at 3.

38. *Id*.

39. *Id*.

40. *Id*.

41. Ernst Freund, *The Correlation of Work for Higher Degrees in Graduate Schools and Law Schools*, 11 Ill. L. Rev. 301, 306-08 (1916) [hereinafter Freund, *Correlation*].

42. *Id*., *see also* Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck*, 1894-1932, 23 Studies in Am. Pol. Dev. 171, 175 (2009) (noting sources in which Freud recognized "law could arise outside the courts").

leave "no room for the constructive aspect of public law" that should guide policymaking under broad standards.[43] Principles of common law and equity were "by no means adequate guidance to needed readjustments of legal relations" brought about by modern legislation.[44] In this respect, Freund urged the incorporation of social science into law schools.[45]

Finally, for these early writers and teachers, administrative law had a greater horizontal scope than it does today. They treat subjects that clearly involve the law governing the executive but have fallen outside of the coverage of most administrative law courses. For instance, both Goodnow and Wyman include extensive treatment of criminal prosecution by public officials.[46] They also included treatment of the executive conduct of foreign affairs.[47] This treatment follows from a comprehensive assessment of the law governing executive officers, as both foreign affairs and criminal enforcement implicate the executive. The treatment of these topics has been carved out of the analysis of administrative law, with a few notable exceptions,[48] and out of its course coverage. While these subjects long have been elevated to separate fields and courses, their contemporary convergence within national security agencies today, which implicate criminal procedure rights and foreign affairs doctrines at the same time,[49] at least prompts the question of what is lost in the isolation of these areas from a general law of executive constraint.

II. Resistance to Administrative Law

These early scholars appeared to have an unassailable argument for the importance of administrative law. Based on the premise that statutes were increasingly granting powers to administrative bodies, it would seem to

43. Freund, *Correlation*, at 306; *see also* Chase, *supra* note 8, at 96-97; *see also* Ernst Freund, Administrative Powers over Persons and Property 29 (1928).

44. Freund, *Correlation*, *supra* note 41, at 306.

45. *See* Freund, *Correlation*, *supra* note 41, at 308; *see also* Rubin, *supra* note 1, at 654 (arguing that underemphasis on social policy represents a serious gap in legal education).

46. *See* Wyman, *supra* note 28 (Chapter 10); Goodnow, *supra* note 9, vol. II, at 178-86.

47. *See* Wyman, *supra* note 28, at 104-107; Goodnow, *supra* note 9, vol. I, at 2.

48. *See, e.g.*, Kenneth Culp Davis, Police Discretion (1975) (examining constraints on the police); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715 (2005) (exploring prosecution as a mode of administration); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 Stan. L. Rev. 869 (2009) (same); Barry Friedman & Maria Ponomarenko, *Governing Policing*, 90 N.Y.U L. Rev. (forthcoming 2015) (exposing how criminal prosecution has fallen outside of norms and treatment of administrative law). For war powers from an administrative perspective, *see, e.g.*, Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 Va. L. Rev. 649 (2000) (examining war powers from an administrative perspective); Ganesh Sitaraman, *Foreign Hard Look Review*, 66 Admin. L. Rev. 489 (2014) (examining war powers from an administrative perspective).

49. *See, e.g.*, Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 Stan. L. Rev. 1079 (2008) (arguing that there has been a convergence in these two models in process and substantive criteria of detention).

follow that administrative law—a body of law that governed the constraints on executive action and legal remedies against administrative powers—would have relevance for the classroom. Despite the logical and practical force of these arguments, the path to adoption of credit-bearing course in administrative law was uneven and took nearly a decade. Part of the reason for this delay may have been that the underlying premises of a course in administrative law sat uneasily with jurisprudential and pedagogical commitments of the time. Indeed, those commitments required transformation of the administrative law course into one that focused judicial review of agency action. They may also undergird the continued reluctance to introduce these aspects of public law to first-year students, or at least the continued impression of administrative forms of lawmaking as outside the norm despite their ubiquity.

For our purposes of gaining insight into the sources of resistance to the teaching of a leg-reg course in the first year, I treat the rich intellectual climate of the era rather crudely, especially in comparison with the luminous histories of the era.[50] With a pragmatic focus, we can isolate two overlapping sets of ideas that help to explain why teaching administrative law appeared exceptional, and why the course needed to be normalized into the case method to gain acceptance: conceptions of law that marginalized administrative regulations (and legislation) and a commitment to instruction exclusively through the case method.

A. Is it Law?

At the turn of the 20th century, jurisprudential commitments as to what constitutes "law" challenged the critical premise of the argument for the importance of administrative law, namely, that administrative bodies were lawmakers.

Perhaps the most prominent and formal expression of this perspective took the view that law consists of a set of principles, few in number, which existed independent from any judicial or statutory decision. This position is widely identified with the first dean of the Harvard Law School, Christopher Columbus Langdell.[51] One of Langdell's colleagues and disciples, Professor Joseph Beale, also articulates a strong form of this view.[52] In line with Langdell, Beale argued that law "is not a mere collection of arbitrary rules, but a body

50. *See, e.g.*, Ernst, *supra* note 42; Chase, *supra* note 8; Rubin, *supra* note 1, at 616-31; Neil Duxbury, Patterns of American Jurisprudence (1995).

51. Professor Thomas Grey provides a compact account of Langdell's view of law as a science. *See* Thomas G. Grey, *Langdell's Orthodoxy*, 45 U. Pitt. L. Rev. 1, 6-13 (1983). One of the most famous passages encapsulating Langdell's view is the following, for which Grey provides helpful commentary: "Law, considered as a science, consists of certain principles or doctrines. To have such mastery of these as to be able to apply them with constant facility and certainty to ever-tangled skein of human affairs, is what constitutes a true lawyer;… [T]he number of fundamental legal doctrines is much less than commonly supposed.…" Christopher Langdell, Cases on Contracts viii-ix (1st ed. 1871; 2nd ed. 1879).

52. *See* Grey, *supra* note 51, at 34.

of scientific principle."[53] As Neil Duxbury explains, if judges were to find, not make, the law,[54] "the function of changing the law has never been committed by the sovereign to the judge, and consciously to make a change in the law would be a usurpation on the part of the judge."[55] As a result, for Beale, "the decision and judgment of a court . . . can in no sense be regarded as in itself the law."[56]

If the judge cannot change the law, then the law would exist independent from the meddling of other institutions as well, such as the legislature and administrative bodies. Indeed, for Beale, only rarely would a statute be capable of "being assimilated into the common law; "more typically, a statute is "done by haphazard legislation by a legislature chosen not primarily for its wisdom."[57] This jurisprudence denies the critical starting premise of the argument for administrative law advanced by the early scholars, namely, that administrative bodies were increasingly important lawmakers. Without that premise, the argument for this new branch of law loses its force.

A second strain of thought at the time took a more positive turn, but was no friendlier to administrative actions as a species of law. On this more positivist approach, "the Law" is fully identified with judicial decisions. Another Harvard Law School faculty member, John Chipman Gray, is the standard bearer of this view. For Gray, "The Law of the State or any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties."[58] Gray distinguishes between sources of law and the Law itself, and considers both statutes and administrative rules to be sources of law, but not the Law itself.[59] As statutes do not interpret themselves, Grey writes, "*it is with the meaning declared by courts, and with no other meaning, that they are imposed upon the community as Law*."[60]

53. Joseph H. Beale, A Treatise on the Conflict of Laws 135 (1st ed. 1916); *see* also Duxbury, *supra* note 50, at 22-23.

54. *See* Duxbury, *supra* note 50, at 23.

55. *Id*. (quoting Beale, *supra* note 53, at 148).

56. Duxbury, *supra* note 46, at 23 (quoting Beale, *supra* note 49, at 153).

57. For Beale, only rarely would a statute be capable of "being assimilated into the common law"; more typically, a statute is "done by haphazard legislation by a legislature chosen not primarily for its wisdom." *Notes by Robert Lee Hale from Jurisprudence Lectures given by Joseph Henry Beale, 1909*, 29 U. Miami L. Rev. 281, 297-301 (1975). Langdell held the same views. *See* Grey, *supra* note 51, at 34-35 n.131. For a recent provocative treatment of legislation as a form of common law, *see* Jeffrey Pojanowski, *Reading Statutes in the Common Law Tradition*, ____ Va. L. Rev. ____ (forthcoming 2015) (arguing that the common law included a tradition for understanding legislation as a form of common law).

58. John Chipman Gray, The Nature and Sources of Law 84 (2nd ed. 1948, orig. pub. 1909).

59. *Id*. at 112 (discussing administrative rules) and 170 (discussing statutes).

60. *Id*. (emphasis in original). For Gray, it is the finality and superiority of courts that makes their decisions "the Law," and legislative and administration merely possible "sources" of it. *Id*. at 172.

Gray reaches the same conclusion with regard to administrative rules.[61] This full submission of law under the mantle of judicial decisions also denies the core premise of the argument for teaching administrative law.

A melding of these views can be seen in Roscoe Pound's 1907 pointed challenge to administrative action.[62] In the strongly worded essay, Pound canvasses with concern the vast areas of law that have been delegated to executive boards and commissions, often without a provision for judicial review, in areas of land and water rights, elections, the handling of the incarcerated, immigration, taxation, and the public health.[63] Pound argues that the resurgence of these forms of administrative action is "one of those reversions to justice without law which are perennial in legal history and serve, whenever a legal system fails for the time being to fulfill its purpose."[64] Indeed, for Pound, the reliance on executive actors or "executive justice" is fundamentally opposed to law, and inevitably makes individuals' rights beholden to the arbitrariness of officials:

> [Executive justice] is an attempt to adjust the relations of individuals with each other and with the State summarily, according to the notions of an executive officer for the time being as to what the public interest and a square deal demand, unincumbered [sic] by rules. The fact that it is justice without law is what commends it to a busy and a strenuous age. Hence we must attribute the popularity of executive justice chiefly, if not wholly, to defects in our present legal system; to the archaic organization of our courts, to cumbrous, ineffective and unbusinesslike procedure, and to the waste of time and money in the mere etiquette of justice which for historical reasons disfigures American practice. Executive justice is an evil. It has always been and it always will be crude and as variable as the personalities of officials.[65]

The contrast between Pound's depiction of the growth of administration as a growth of this "extra-legal–if not anti-legal–element"[66] and Wyman's account of the internal law of administration could not be more stark. For

61. *Id*. at 112; *see* Robert W. Gordon, *The Case for (and Against) Harvard*, 93 Mich. L. Rev. 1231, 1244 (1994) (reviewing William P. LaPiana, Logic and Experience: The Origins of Modern American Legal Education (1994)) (noting that a strain of Harvard scholars "did not even consider statutes and administrative decisions to be 'law' until and unless they were interpreted by a court").

62. Roscoe Pound, *Executive Justice*, 55 Am. Law Register (Univ. of Penn.) 137 (1907).

63. *Id*. at 141-44.

64. *Id*. at 144-45.

65. *Id*. at 145.

66. *Id*. at 139. The parallels between this essay of Pound's and Philip Hamburger's recent book, Hamburger, *supra* note 7, are striking. For instance, Hamburger writes in the vein of Pound's *Executive Justice*, *supra* note 62, "What is more concretely at stake here is rule *through* and *under* law (or put another way, rule *by* and *under* law). Although the English, and then Americans, long struggled to preserve this sort of legal governance, it is exactly what prerogative and then administrative power evaded by working outside and above the law." Hamburger, *supra* note 7, at 7 (emphasis in original).

Pound, executive discretion constitutes lawlessness; for Wyman, discretion is a condition of not only the modern legal system—that "most of administration is with discretionary powers"[67]—but also one that will involve the overlap of administration and politics. Indeed, Wyman writes, "in the larger matters, questions of administration cannot be separated from questions of politics."[68] But for Wyman, this overlap of administration and politics did not deny administration its status as law; on the contrary, Wyman invites study into the internal administrative law of the executive, including a national executive common law.[69]

For one reason or another, Langdell, Beale, Grey, and Pound embraced views of law which put administrative action outside of its purview. Once the decisions and rules of administrative agencies are not understood as "law," the argument for including a course in administrative law loses its motivating premise.

B. Can It Be Taught Through the Case Method?

Administrative law, at least as conceived by Goodnow, Freund, and Wyman, encompassed more than judicial decisions reviewing agency action. But teaching a course including coverage of more than court decisions directly challenged the idea that law is to be taught solely through the case method. In this confrontation, the case method won.

The circumstances surrounding Freund's teaching of administrative law at the University of Chicago provide a nice illustration of this clash. As part of the University of Chicago's effort to establish a law school, Chicago's first president, William R. Harper, arranged for one of Harvard Law School's prominent professors, none other than Joseph Beale, to serve as the first dean at Chicago.[70] As part of these early arrangements, Ernst Freund, who already had an appointment at Chicago as a professor of political science, had meetings with then-Professor Beale and Harvard's Dean Ames to discuss the curriculum of the new law school, which Freund was to join.[71] This meeting prompted a well-known letter from Dean Ames to President Harper on March 31, 1902.[72] In the letter, Dean Ames emphasizes his commitment to a case-based method of teaching in the context of warning Harper of Freund's unconventional views:

> Our School is conspicuous for its belief in the learning of law by systematic study of Cases. If Professor Beale is to be Dean with the purpose of

67. Wyman, *supra* note 28, at 142.

68. *Id.* at 196 (internal citations omitted).

69. *Id.* at 297.

70. *See* Comment, *Ernst Freund—Pioneer in Administrative Law*, 29 U. Chi. Rev. 755 763-64 (1962) [hereinafter *Ernst Freund—Pioneer*].

71. *Id.*

72. *Id.* at 764-65 (reprinting the letter).

> reproducing the Harvard method, he must have a Faculty that believe in that method. Whether Professor Freund is convinced that this is the true way of studying law I do not know. I did not ask him his views on the point. Certainly his belief in the general methods of German Universities [sic], and his general views as to the function of a law-school would predispose him against a thoroughgoing belief in our methods.[73]

Beale emphasized these same points in his own letter to President Harper following the meeting with Freund.[74] Beale asked for assurance that "no person shall teach in the school who does not frankly concur in adopting for the school the spirit and the methods of Harvard Law School."[75] He also made clear that the faculty should be "composed solely of persons who teach law in the strict sense of the word."[76]

This strong reaction to Freund's proposals responded to more than Freund's views about administrative law, but they also had a decisive effect on it as well. Shortly after Beale's arrival at Chicago in 1902, it was established that all instruction would be "entirely by the case method."[77] This had direct consequences for Freund's teaching of administrative law. As William Chase reports, Dean Beale did not permit Freund to offer his administrative law course to law students in the school's first year, restricting his enrollment to graduate students and undergraduates.[78] "Not until the following year, when Freund had worked up a course based on cases, was he permitted to offer administrative law to law students. . . . "[79] While Freund's eventual *Cases on Administrative Law* shows that he clearly embraced the case method as part of the pedagogy for law teaching,[80] he did not understand all administration to be reducible to case-based instruction.[81] In a similar spirit, Wyman's extensive treatment of internal administrative law, existing largely outside the purview of reviewing courts, also suggests that understanding the operation of the administrative state requires looking beyond or outside of courts.[82] But the vision of administrative law that could fit within the jurisprudence and

73. *Id*.

74. *See id*. at 766-67 n.40 (quoting letter from Dean Beale to Dr. Harper, April 2, 1902).

75. *Id*.

76. *See id*. at 766.

77. *See* Chase, *supra* note 8, at 57 (quoting Law School Faculty Minutes, 1902-27, item 1 (n.d.), p. 3, University of Chicago Library).

78. *Id*. at 72.

79. *Id*.

80. *See Ernst Freund—Pioneer*, *supra* note 70, at 768.

81. *See id*. (describing a letter from Beale to Freund, wherein Beale wrote that he feared Freund would launch an assault on the case method of legal instruction if he became Dean of the University of Chicago's new law school).

82. *See generally* Wyman, *supra* note 28.

pedagogy of the time was case-based, and focused exclusively on administrative law as the law of judicial control over and remedies from administration.

Though Freund acquiesced in teaching administrative law as a course in judicial decisions, his dissatisfaction with this state of affairs shines through in comments he made many years later: "[T]he more favorable the attitude of the law school was to these subjects [including administrative law], the more they tended to become pure law school subjects…; but incidentally the evolution of these courses testifies to the absorbing and overmastering interest in the judicial aspect of any branch of law that is administered by the courts."[83]

III. Lessons for a First-Year Legislation and Regulation Course

What lessons concerning adoption of a first-year "legislation and regulation" or "regulatory state" course can be gained from this brief tour of the history of administrative law and its early teaching? At a most general level, this history provides a cautionary tale of the ways in which abstract legal and pedagogical commitments can divert teaching away from the law as it exists in action and is practiced. As Robert W. Gordon observes, "[t]he consequence of these self-imposed limits to the province of 'pure' law was that the schools deliberately kept their distance from a large and growing component of the work of their most successful graduates."[84]

This history thus provides clear guidance that the construction of the first-year curriculum should begin with a mapping of the work of lawyers in the modern legal system. This sounds obvious, but there remain surprising omissions. Perhaps most fundamental is the level of continued reliance on judicial decisions in courses on "legislation and regulation" and "regulatory state" instead of providing direct exposure to legislation and the materials produced by administrative agencies. The nonjudicial material that was cut away from Freund's course and left out of versions of administrative law following Wyman's lectures—legislation, the actual decisions and rules of agencies, and internal constraints on agencies operating independently from judicial review—still and even more urgently deserves a place in the curriculum.[85] Bernard Schwartz pressed this point so forcefully in 1959 in the pages of this journal that I cannot resist quoting him at some length here:

> Doubt about the case method as the sole tool for teaching law is now fairly widespread in our law faculties. But the deficiencies of that method are particularly apparent in administrative law. The limitations upon the scope of judicial review in our system make a presentation of the administrative process solely through court decisions only a skeleton-like one. Unless administrative law students are to be placed in the position of Plato's men,

83. *See* Freund, *Correlation*, *supra* note 41, at 305-06.

84. *See* Gordon, *supra* note 61, at 1244.

85. *See* Rubin, *supra* note 1, at 619-22 (arguing that the advent of the regulatory state changed the content of law and the primary lawmaker and that first-year courses should address these changes).

> who were chained in a cave and saw nothing but shadows, they must be given some direct acquaintance with the actualities of agency life itself. A week's analysis of key decisions from the case law of an agency like the FCC would teach students more about the way the federal agencies really operate than a semester devoted exclusively to appellate court opinions.[86]

Based on the premise that law students, like lawyers, should confront primary sources of law in the regulatory state,[87] it does not make sense to replicate the exclusive focus on judicial decisions in the newest addition to the curriculum, the first-year leg-reg course. The course should include materials from the legislative process, materials from rulemaking processes, agency adjudicative decisions, and guidance alongside judicial decisions on statutory interpretation and review of agency action, as Schwartz and his predecessors urged. At the very least, the course should require students to read an entire statute, a prominent piece of legislative history, such as a committee report, a notice of proposed rulemaking (NPRM), a final rule, an example of agency guidance, and an agency adjudicative decision. Moreover, a first-year leg-reg course is the right occasion to introduce students directly these nonjudicial materials, as this course is likely to be the only first-year course that provides direct and considered study of these nonjudicial sources.

As to pedagogical approach, these nonjudicial materials should be presented with the same pragmatic focus of judicial decisions. With court decisions, instruction emphasizes applicative judgment, pushing students to greater sophistication in arguing what prior judicial decisions stand for as they apply them to new fact patterns. So too with primary legislation and regulation materials. Instruction should emphasize how students interpret, argue from, and challenge the validity of these legal sources. To do that, students will have to be introduced to the basic legal tools that agencies rely upon in developing their positions, including how agencies engage in statutory interpretation and cost-benefit analysis, and how they use scientific and technical studies and gauge their political environment. In a sense, this approach places agency statutory implementation on par with judicial statutory construction; in both cases, law students need to understand the modes of analysis and vocabulary of legal justification, interpretation, and challenge. If agencies are the primary implementers of federal statutes, the first-year leg-reg course should treat them as such.

This approach also has advantages for the fit between the first-year leg-reg course and upper-level courses in administrative law. Providing a robust overview of procedural forums of agency action as well as the legal operations that they involve would provide a groundwork for the upper-level course in administrative law, which would be an unapologetic study of judicial doctrines, teaching to a population that has already seen agencies in action in the first

86. Bernard Schwartz, *Oversight and Oversights in Administrative Law Teaching*, 11 J. Legal Educ. 358, 362 (1959).

87. Rubin, *supra* note 1, at 620.

year. A first-year course that provides more focus on the primary legal sources of regulatory state and relatively less emphasis on traditional judicial decisions taught in administrative law would reduce the problems of duplicate coverage between the first-year offering and upper-level administrative law, and, in time, uproot student perceptions that they need not take the upper-level course.[88]

A mapping of legal practice also reveals a tremendous volume of legal work involved in the everyday tasks of following regulatory law, tasks that fall under the label of "compliance" or "regulatory," often identified with work under particular statutes or agencies. This work involves knitting together statutes, agency pronouncements and decisions of various kinds, including legislative rules, interpretive rules or guidance documents, adjudicative decisions, and other statements of particular effect. While current leg-reg courses provide a solid overview of statutory interpretation by courts, they do much less work with the interpretation of agency documents. Among the most important sources of law in the United States are the "legislative rules" or "regulations" produced by federal agencies through the notice-and-comment process.[89] In other writing, I have argued that our jurisprudence has fallen behind in developing an approach to the interpretation of regulations.[90] The interpretation of regulations is a central task in legal compliance work, and regulatory interpretation is also implicated in judicial review of the validity of those regulations and the validity of subsequent agency interpretations of them.[91] According, treatment of the interpretation of regulations should take its place alongside statutory interpretation as one of the basic interpretive tasks confronting lawyers in our regulatory state.

Conclusion

When the gap between law teaching and law in action becomes too great, "law as taught is mostly fiction."[92] The century-old dialogue about how to teach basic elements of administrative law—statutory and regulatory interpretation, an understanding of how agencies make law, and the doctrines of judicial review of agency action—illustrates how long the law as taught can remain

88. *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 (offering results of a survey on impact of introduction of 1L leg-reg offering on administrative law and legislation upper-level enrollments).

89. For an admittedly crude measure of pages of the Federal Register of proposed and final rules, *see* Maeve P. Carey, Cong. Research Serv., R43056, Counting Regulations: An Overview of Rulemaking, Types of Regulations, and Pages of the Federal Register 17 tbl 6 (2013).

90. Kevin M. Stack, *Interpreting Regulations*, 111 Mich. L. Rev. 355 (2012).

91. *Id.* at 367, 371 (arguing that application of *Chevron* and *Auer/Seminole Rock* requires the reviewing court to interpret the regulation, either to judge the regulation's validity under *Chevron* or to assess the whether the agency's interpretation is consistent with the regulation under *Auer/Seminole Rock*).

92. *See* Schwartz, *supra* note 86, at 363.

isolated from a positivist understanding of the law as practiced. First-year courses in "legislation and regulation" or the "regulatory state" are a critical opportunity to help reduce the gap between law teaching and law in action—and to provide first-year students a foundation for more advanced study of specialized statutory and regulatory courses in the upper level. But to do so these courses must not shy away from providing direct exposure to the primary sources of law in the administrative state, sources beyond the judicial opinion.

Perhaps just as important, these courses give new prospects for shifting the image of the law that so profoundly shapes law students' conceptions in their first year of law school. The commitment to the case method exacted a price for absorbing administrative law into the law school curriculum; it became a case-based course. Once this transformation occurred, teaching of administrative law did not provide a fulcrum for shifting the focus of law teaching to reflect the true dimension of the administrative state or lawyering within it. As a result, the traditional course in administrative law does much less than it otherwise might to shift law students' "mental scenery of the law."[93] The real challenge for our new courses in "legislation and regulation" and the "regulation state" may be to shift the scenery of law that students see, and thus their sense of what constitutes the norm and the peripheral among sources of law.

93. Felix Frankfurter, Book Review, 37 Harv. L. Rev. 638, 640 (1924) (reviewing Ernst Freund et al., The Growth of American Administrative Law (1923)).