

Review Essay: Christopher Columbus Langdell and the Public Law Curriculum

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Teaching materials in public law courses typically rely almost wholly on judicial opinions as their primary materials, amplified by selections from the secondary literature. Constitutional text may appear independently, but statutory text rarely does, and the materials of the legislative process are generally absent. In administrative law course books, administrative opinions and the materials of rulemaking rarely if ever appear. Yet these are primary materials with which lawyers must deal with increasing frequency. Lawyers encounter statutes, rules, administrative policies, and administrative disputes without judicial guidance, looking forward and not backward in time. The growth of courses in legislation and the regulatory state offers a chance for change from limitations owing much to Christopher Columbus Langdell's insistence that only judicial opinions provided the appropriate raw material for law study. A review of the materials developed for the course reveals only a few departures from this aged and, in the author's judgment, impoverished and fundamentally misleading pattern.



When asked to write a contribution to a *festschrift* celebrating Professor Jerry Mashaw's life of extraordinary administrative law scholarship, I was struck by the sharp distinction he has long drawn between internal and external administrative law—between those contributions to the regularity and legality of agency behavior that emerge from its own institutions and practices, and the constraints imposed by external actors, legislative, executive, and judicial. The “systems of internal control and audit” he found common to nineteenth-century governance in his magisterial account of early American administrative law¹ are subordinated, if not suppressed, in today's thinking about administrative

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1. CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 313 (2012).

law. “In our world of multiple transsubstantive statutes and ubiquitous judicial review, we tend to think of our administrative constitution as a set of external constraints upon agencies. We then relentlessly analyze these external constraints as if they were the major determinants of agency efficacy, procedural fairness and legal legitimacy. Yet, in many ways it is the internal law of administration—the memoranda, guidelines, circulars and customs within agencies that most powerfully mold the behavior of administrative officials.”²

Not *Judicial Control of Administrative Action*,³ but getting inside administration has been the hallmark of Mashaw’s scholarship from its beginning⁴ to the present day.⁵ A public law curriculum with the same ends would permit students to encounter administrative law in just this way, as it is encountered by administrative actors and the public. It would engage them directly with their materials, require them to “see” the relationships within agencies, and between them and legislatures or central executives, just as the people in the agencies and those bodies do. The very first teaching materials Jerry Mashaw edited provided just such encounters for his students. He did not ask students, to the virtual exclusion of other perspectives, to encounter these matters just through the eyes of reviewing courts, or in relation to what the judiciary might command.

This, and the recent growth of required courses on legislation and regulation, suggested the possible interest of an essay exploring the extent to which American law students, through the years, might encounter legislatures and agencies other than through the eyes of the courts, which can be censorious and are inevitably retrospective and oriented to incidental litigation. To what extent have American law students been invited to view the work of legislatures and agencies from the perspectives of those lawmaking institutions themselves rather than from a judicial perspective? Although Hart and Sacks’s *The Legal Process*⁶ invited a brief detour in the middle of the past century, even today the law school curriculum endlessly invites attention to courts and the means by which they settle (that is to say, make) law. Well over a century ago, Harvard’s innovative Christopher Columbus Langdell treated law as a science whose

2. *Id.*

3. LOUIS JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

4. Jerry L. Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. PA. L. REV. 1 (1973); Jerry L. Mashaw, *Welfare Reform and Local Administration of Aid to Dependent Children in Virginia*, 57 VA. L. REV. 818 (1971). So too, two of his prize-winning books. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990); JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1983).

5. JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

6. HENRY MELVIN HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958). This work was finally brought into print in 1994 by Foundation Press. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

raw materials were appellate judicial decisions alone.⁷ Has the Langdellian imperative to use only cases as the primary materials of law study prevailed in the study of legislatures and agencies as well? Do the materials of today's new courses invite direct attention to these other institutions and their ways, before which lawyers so often must appear? Or do new course materials continue to present legislatures and agencies primarily through decided cases in which judges looked backwards over some particular, completed piece of work?

I. Beginnings

Court-centered instruction has been with us since Langdell's innovations captured law school curricula. Administrative law first appeared in them around the turn of the twentieth century and, as Kevin Stack has forcefully reminded us,⁸ its birth coincided with the Langdellian ascendancy. In the earliest administrative law casebooks,⁹ says Stack, Ernst Freund

emphasized both the role of legislation and public administration, including the methods agencies use to make decisions, as critical features of administrative law. Because exercises of administrative power must be authorized by legislation, Freund made clear that statutory construction was to be a central occupation for administrative law. "[T]he operation of general principles of administrative law is constantly affected, and frequently controlled by, the language of statutes." As a result, Freund emphasized that statutory construction thus deserved a prominent place in a course on administrative law. Indeed, Freund argued, in light of the "rapid and enormous growth of public regulation of all kinds," that principles of statutory construction are "as deserving of careful study as common-law principles."¹⁰

But the University of Chicago's brand-new law school had imported Freund's Dean from Harvard, precisely to bring the case method with him. Although "Freund bemoaned the identification of the field of administrative law with judicial decisions,"¹¹ the Dean would not permit him to offer a course

7. Langdell's approach excludes "the array of social, economic, and political forces that interacted with law. In Lawrence Friedman's view, this made 'Langdell's science of law . . . a geology without rocks, an astronomy without stars.'" Stephen Dow, *There's Madness in the Method: A Commentary on Law, Statistics, and the Nature of Legal Education*, 57 OKLA. L. REV. 579, 586 (2004), citing LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 617 (2d ed. 1985).
8. See 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).
9. ERNST FREUND, *CASES ON ADMINISTRATIVE LAW* (1911).
10. Stack, *supra* note 8, at 34.
11. *Id.*, citing Ernst Freund, *The Correlation of Work for Higher Degrees in Graduate Schools and Law Schools*, 11 ILL. L. REV. 301, 306 (1916).

on administrative law in the law school curriculum until he had produced materials based on cases.¹² Freund complied.¹³

“Cases only” remained dominant as the New Deal began, when Harvard Law School professors Felix Frankfurter and J. Forrester Davison published *Cases and Other Materials on Administrative Law*.¹⁴ In its preface one finds these apt words:

Since we are dealing with law in the making, this collection draws upon all sources that help to make law—cases, statutes, legislative debates, rules and regulations, legal writings and lay comment One cannot, then, stress too much the tentative stages of hypothesis and generalization in Administrative Law, and the predominant importance of knowing the anatomy and physiology of the law-making agencies that are neither legislature nor courts but partake of the functions of both.¹⁵

This is well said, but well over ninety percent of the book’s 1150 pages present judicial decisions, edited but (in the Harvard style of the time) uncommented upon; and with the exception of introductory excerpts from the classic separation-of-powers literature, a brief ICC order, a couple of short statutory passages and twenty-five pages of extracts from House of Lords debates, even the exceptional pages have as their subject courts and judicial review. The book presents “the anatomy and physiology of the law-making agencies” only as judges perceived them in the particular litigation that happened to have been put before them. Students see statutes and regulations only through their eyes. They view no legislative history independent of judicial preselection, no materials of rulemaking, or (with that brief and solitary exception) no administrative decision. Freund’s basic criticism of the book, that the materials are about constitutional law and judicial review, not administrative action as such, seems thoroughly justified.

Walter Gellhorn, intellectual father of the Administrative Procedure Act, would publish the first edition of his enduring teaching materials eight years

12. Stack, *supra* note 8, at 40, *citing* WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 72 (1982) and Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 *VAND. L. REV.* 609, 617-18 (2007).
13. Only excerpts from judicial opinions appear in Freund’s first edition. The second, published in 1928, added a few notes and statutory texts, and two excerpts from the annual reports of the ICC. ERNST FREUND, *CASES ON ADMINISTRATIVE LAW* (2d ed. 1928). Freund stuck to his principles in important respects: The first half of each edition was devoted to “Administrative Power and Action,” before reaching (wholly judicial) “Relief against Administrative Action.” Issues of constitutional law (e.g., “delegation”) were essentially left to courses in that subject.
14. FELIX FRANKFURTER & J. FORRESTER DAVISON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* (1932). Ernst Freund, to whom the book is dedicated, wrote a not-wholly-appreciative review. Ernst Freund, Book Review, 46 *HARV. L. REV.* 167 (1932) (noting its limited focus on constitutional issues and the courts).
15. FRANKFURTER & DAVISON, *supra* note 14 at vii-viii.

later.¹⁶ Here, too, judicial opinions dominate—although, in what would come to be a recognizable Columbia style, they might be more stringently edited, and rich notes and text discussions frequently appear. An introductory essay and secondary source excerpts marshal strong arguments for the necessity and propriety of administrative agencies, and against the bar's then near-hysteria respecting administrative adjudications (rulemaking was not yet a subject). Although strongly evoking the likelihood of good faith and regularity in public servants' behavior, the materials neither promise nor provide attention to the internal law of administration; nor do they provide primary materials reflecting external controls other than judicial ones. After about 300 pages on issues of constitutional structure (both separation and delegation of powers), the next 400 pages would have extensively engaged Gellhorn's students various issues about the law of administrative hearings—notice, fair hearing, and findings—before reaching two final chapters given over to judicial controls. This chooses Freund's organization over Frankfurter's. Note, however, that only administrative adjudication at the hearing stage—that is, the agency equivalent of trials—was considered, and its consideration came from the perspective of judicial overseers. This constituted a powerful argument in the bar's contemporary debates about the propriety of administrative adjudications, but was still very much in thrall to the commitment to cases as the material of legal study.

II. The Legal Process

By midcentury, other materials had begun to intrude into the law school classroom. Scholarly excerpts were common; primary law materials other than cases and direct attention to institutions other than courts, less so. *The Legal Process: Basic Problems in the Making and Application of Law* by Henry M. Hart, Jr., and Albert M. Sacks¹⁷ was a notable exception. Enormously influential although unprinted in its time¹⁸—taught from mimeographed pages—the material from its very beginning confronted law students with other institutions and their work, materials of the legal process that had *not* been predigested by courts. The authors' famous introductory problem, "The Significance of an Institutional System: The Case of the Spoiled Cantaloupes," is particularly striking in this respect. Preceding the three judicial decisions by which "the case" was ultimately resolved were forty pages of materials engaging students with factual background, statutory text and its legislative history in some detail, regulatory text from the Department of Agriculture, important

16. WALTER GELLHORN, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (1940).

17. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

18. Its intellectual roots and influence are thoroughly explored in the lengthy essay with which William Eskridge and the late Philip Frickey prefaced the published edition, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at li-cxxxvi (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994).

information about state law and trade practice, and, finally, the Department's administrative decision.

While two later chapters understandably consider "The Courts as Places of Initial Resort for Solving Problems Which Fail of Private Solution" and "The Role of the Courts in the Interpretation of Statutes," four other chapters are organized around other instrumentalities and the primary materials of *their* working. Only seven opinions appear in the 158 pages devoted to private ordering, consuming less than twenty percent of them; they appear *after* students' have been asked to consider, independent of them, other materials from other actors. Three hundred fifteen pages on legislatures and the legislative process introduce their structure and work in detail. Many of these pages are textual, describing legislative process, actors, and problems, not judicial perspectives. The problems place students in or before legislative bodies, and the three judicial opinions in the chapter appear as elements of the background notes students must work through to respond to problems set in legislatures. These notes devote many more pages to primary legislative materials—statutory language (as enacted or in draft) to be read independent of judicial views, legislative history documents or testimony, legislative procedural rules, *etc.*

The much shorter and admittedly incomplete chapter titled "The Executive Branch and the Administrative Process" put students before executive actors.¹⁹ Given factual background, statutory provisions, and executive order, they were required to advise President Truman on the seizure of steel plants *before* being permitted to read *Youngstown Sheet & Tube Co. v. Sawyer*.²⁰ Then, with Baltimore city ordinances and no judicial opinions in hand, they were asked to analyze two problems involving issues that, in part, would reach the Supreme Court in *Frank v. Maryland*²¹ the year after the tentative edition appeared. Finally, as agency legal advisors, they had to read agency decisional documents and an independent discussion of the legislative history of the pertinent provision to comprehend brief excerpts from a Supreme Court opinion.

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

19. See, *e.g.*, *id.* at 1046, 1059-60, 1109.

20. 343 U.S. 579 (1952).

21. 359 U.S. 360 (1959).

III. And After a Generation

Three works of the mid-1970s permit an impressionistic assessment of the impact that this approach did or did not have in focusing the attention of public law teaching materials on other-than-judicial actors. One finds movement from the case-centered norm, but not to the extent Hart and Sacks appeared to promise. Consider in that regard the following three examples.

A. *Walter Gellhorn & Clark Byse, Administrative Law—Cases and Comments (6th ed. 1974)*²²

Hart and Sacks's approach might have influenced the Sixth Edition of Gellhorn & Byse, *Administrative Law—Cases and Comments*. In 1940, Gellhorn had worked with Hart and another on materials for the courses on legislation they were teaching, in which the problem method was the chief pedagogical innovation.²³ But where Hart argued for directly engaging students with legislatures and their materials, Gellhorn insist[ed] on more elaborate, doctrinally focused organization. His co-editor Clark Byse had been a colleague of Hart and Sacks's since 1957. Yet aside from its use of a short supplement setting problems²⁴ (but not providing primary materials), the 1974 edition of *Gellhorn-Byse* revealed few signs of Hart and Sacks's influence. Throughout, it required its students to respond to and evaluate judicial decisions and commentary rather than engage in legal practice outside of court. Early pages introduced them to Congress's extrastatutory (budgetary and oversight) controls over agency action, and to the possibilities for presidential controls. Even so, the predominant focus was on doctrine, not institutions and their functioning. Students would read more than 400 pages of material on judicial control of administrative action before turning to that action itself; the internal structures of agencies and issues about their operation, seen through judicial eyes, appeared only in the final chapter.

B. *Jerry Mashaw & Richard Merrill, Introduction to the American Public Law System (1975)*²⁵

The Legal Process appears to have had a greater influence on Mashaw and Merrill's *Introduction to the American Public Law System*—materials that like today's legislation and regulation materials were designed specifically for the first year of law school. A course treating legislation and administrative action as subjects independently worthy of early, serious study, side by side, gave its students a clearer picture of the actual American legal system than a first-

22. WALTER GELLHORN & CLARK BYSE, *ADMINISTRATIVE LAW—CASES AND COMMENTS* (6th ed. 1974).

23. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical Critical Introduction to THE LEGAL PROCESS*, in HART & SACKS, *supra* note 18, at li, lxxiv.

24. WALTER GELLHORN, CLARK BYSE & PAUL R. VERKUIL, *ADMINISTRATIVE LAW PROBLEMS FOR USE IN CONJUNCTION WITH GELLHORN AND BYSE'S ADMINISTRATIVE LAW*, 6TH ED (1978).

25. JERRY L. MASHAW & RICHARD A. MERRILL, *INTRODUCTION TO THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS* (1975).

year curriculum wholly committed to cases and the common law. The editors stressed their “functional perspective,”²⁶ saying their “larger and primary aim is to bring an integration of administrative law into the larger fabric of the legal order”²⁷ by “integrat[ing] analysis of the administrative process with ways of thinking about the legislative process.”

Correspondingly, their book began with a study of the development and implementation of the 1899 Rivers and Harbors Act. Before reaching highly contested Supreme Court opinions and extensive notes on statutory interpretation technique, this chapter obliged students to understand the development of a complicated set of statutory materials controlling discharges into navigable waterways and to advise an Assistant Attorney General about several issues of interpretation and policy. After the cases, materials on criminal enforcement of the act against polluters brought them to discussions between government prosecutors and congressional committees. A fourth section, on administrative implementation, turned on a presidential executive order that directed the creation of a discharge permit program and assigned responsibilities for it to various agencies, congressional testimony about the program then established, and statutory materials addressing the President’s authority to reorganize governmental agencies. The chapter ended with a discussion of the congressional reaction. Cases, yes; but the students had to read and interpret for themselves relatively complex statutory text, and they encountered as other primary material a presidential executive order and several excerpts from congressional testimony, all in the service of the authors’ “larger and primary aim.”

Following this chapter and two considering judicial restrictions on legislative processes, almost 100 pages of materials on agency rulemaking—the subject virtually missing from *Gellhorn-Byse*—preceded only slightly longer materials on agency adjudication. In all these chapters, it is fair to say “judicial control of” were the words that introduced virtually every chapter subheading. But then came a chapter on “agency choice of mode of action,” in which, again, the students’ gaze was strongly diverted from the courts. Perhaps presaging Merrill’s two years of service as Chief Counsel to the FDA, beginning in the year these materials were published, more than eighty pages effectively placed the student inside the FDA, dealing with its implementation of 1962 amendments to its basic statute. The students had to master extensive statutory and regulatory texts and administrative history to deal effectively with a course of judicial decisions interpreting the statute. The materials’ consistent focus on FDA actions, interpretations and regulatory dilemmas invited continuous discussion of the FDA’s internal administrative law. In these pages, “judicial control of” was the secondary, not primary, focus; the cases were among the building blocks provided for an FDA attorney, not doctrine to be learned.

26. *Id.* at xvii.

27. *Id.* at xviii.

C. *Hans Linde & George Bunn, Legislative and Administrative Processes (1976)*²⁸

Another book suggesting the Hart and Sacks model was Hans Linde and George Bunn's *Legislative and Administrative Processes*, which appeared the following year. These materials more fully presaged today's leg-reg courses in their thorough treatment of Congress and administrative agencies as institutions, and their disciplined attention to political as well as legal controls on agency behavior. Indeed, while students often encountered law through judicial opinions as well as statutory and regulatory texts, the latter often dominated.²⁹ What they did *not* find as doctrinal headings were "statutory interpretation,"³⁰ "scope of review," or "access to judicial review." Issues concerning courts *as courts*, judicial processes as subject matter, were left to the many other law school courses in which they would appear. While in relation to administrative action the focus of the book (like the others of its time) was on adjudication and not rulemaking, "it touches on administrative adjudications only insofar as they differ from litigation in courts."³¹ No students studying these materials could have failed to leave them without understanding that statutory and administrative materials must be dealt with independently of judicial decisions, or that legislatures and agencies were institutions acting in both a political and a legal environment, and in themselves worthy of study.

D. *Langdell Triumphant*

Neither *Mashaw-Merrill* nor *Linde-Bunn* survived. Mashaw and his co-authors transformed their work into a standard set of administrative law teaching materials, abandoning its innovative turn. The book has returned to the legislature only in its most recent edition.³² The *Linde-Bunn* materials had supplanted a first-year course long taught at Wisconsin³³ (where Bunn

28. HANS A. LINDE & GEORGE BUNN, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* (1976).

29. The detailed Table of Contents for Chapter 3, "Legislative Process," for example, listed as primary materials for its 261 pages: 15 cases, 16 statutes or bills, 18 passages from committee reports or hearing testimony, 24 excerpts from the literature (all but two focused on legislatures, not courts or judicial doctrine), and six documents generated within the executive branch. Chapter 6, "The Administrative Agency—Responsibility and Control" showed a similar imbalance between cases (two) and documents generated within the executive or legislative branches (16), and literature excerpts concerning them (seven). Other chapters were more heavily case-oriented, but not to the exclusion of primary and secondary materials generated by or about the political branches.

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

31. LINDE & BUNN, *supra* note 28, at xviii.

32. JERRY MASHAW, RICHARD MERRILL, PETER SHANE, ELIZABETH MAGILL, MARIANO-FLORENTINO CUELLAR & NICHOLAS PARRILLO, *ADMINISTRATIVE LAW, THE AMERICAN PUBLIC LAW SYSTEM: CASES AND MATERIALS* (7th ed. 2014).

33. LLOYD GARRISON & WILLARD HURST, *LAW IN SOCIETY, A COURSE DESIGNED FOR*

was Dean) using materials rivaling *Hart-Sacks*; that earlier course had become unpopular with students, who thought it political science, not real law. The substitution did not catch hold. *Linde-Bunn* never reached a second edition. Habituation to the case method, perhaps, and/or the difficulty of engaging students with institutions other than courts—with statutory and administrative materials as primary sources for learning and application—appear to have claimed it as a victim.³⁴

The Langdellian commitment to courts and their opinions as the proper medium of law study—indeed the implicit proposition that the common law is what law is about—has dominated law schools’ first-year curricula ever since his time, even as the practice of law, if it ever was that unidimensional, has shifted steadily toward statutory regimes and their administrators. In a remarkable conversation before Harvard Law students in the fall of 2015, Justice Elena Kagan and Professor John Manning recalled their Harvard education in the mid-’80s.³⁵ At the school of Hart and Sacks, the curriculum was devoid of disciplined, and certainly of first-year, attention to statutes. Until ten years ago, Harvard Law School’s first-year curricular requirements remained essentially as they had been for a century (civil procedure, contracts, criminal law, property and torts). Hence, the “case method” remained firmly in place—altered, to be sure, by the effects legal realism, critical legal studies, law and economics, and other challenges had in shattering the “science” illusion, but juricentric nonetheless. Indeed, when in 2006 Harvard introduced a required course in legislation and regulation into the first-year curriculum, the Langdellian commitment remained in place. Professors John Manning and Matthew Stephenson self-consciously agreed that the materials they prepared for the new course would “follow the familiar, case-oriented approach—relying on appellate opinions and notes and comments on those opinions as the main course materials and the focus of the discussion.”³⁶ At Yale, today’s required curriculum remains essentially what it was when I was a student there fifty-four years ago—and long before that. First-year students must still take civil procedure, constitutional law, contracts and torts in the first semester, as I did, and criminal law and administration (but no longer property) at some

UNDERGRADUATES AND BEGINNING LAW STUDENTS (1940), succeeded by CARL A. AUERBACH & SAMUEL MERMIN, LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE AND ADMINISTRATIVE AGENCIES (1956). Like the tentative edition of HART & SACKS, *supra* note 17, both were informally produced but, centered on Wisconsin law and the particular problems of workers’ compensation, neither was widely circulated. For many years, the book by LINDE & BUNN, *supra* note 28, was also used as part of the first-year course materials at the University of Oregon’s School of Law.

34. I am indebted to William Whitford, Professor Emeritus at Wisconsin, for the information preceding this footnote. (Emails to the author, Jan. 12 and 23, 2015). A quarter-century later, Columbia’s regulatory state course would suffer the same fate, for the same reasons.
35. See Harvard Law Sch., *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <http://www.youtube.com/watch?v=dpEtszFToTg>.
36. John F. Manning & Matthew C. Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 J. LEGAL EDUC. 45 (2015).

subsequent point. Other than these courses, encounters with public law and its primary materials are not required.

IV. The Current Day

A. Courses in Administrative Law and Legislation

Fast-forward to the current day, and one finds strongly revived interest in studying legislation and, in particular, statutory interpretation—thanks in good part to the work of Jerry Mashaw’s colleague William Eskridge, Jr., and his co-authors. Administrative law is finding its way into bar examinations and is increasingly understood by students to be a required course, whether or not their curriculum so provides. But the doctrinal and judicial orientation of these courses remains strong. That is certainly the case with the administrative law materials I have co-edited since the seventh edition’s appearance in 1979.³⁷ While our book deals extensively with events at the agency level before explicitly reaching the issues of judicial review, and includes considerable discussion of both internal agency action and relations with its political overseers, virtually all its primary materials are decided cases and its focus is on judicial doctrine. Only the Constitution, the Administrative Procedure Act, and Executive Order 12,866 and its amendments are presented as texts students must deal with independently of judicial decisions. In teaching the course, however, I insist that students become familiar with agency and White House websites, and view the rulemaking process as it is occurring through those lenses. The Rivers and Harbors Act, along with attention to Congress (understood as an institution on its own) and to the FDA’s struggles with the 1972 Amendments to its fundamental statutes, all long ago disappeared from Jerry Mashaw’s casebook, now in its Seventh Edition (2014) and retitled *Administrative Law—The American Public Law System—Cases and Materials*. Here, too, the primary materials students encounter are with few exceptions judicial decisions, and the understandings they strive for, consequently, are doctrinal. They do not encounter a notice of proposed rulemaking or an adopted rule, except as judges or the authors might describe them. A brief section on electronic rulemaking does not even identify the URL for the government’s e-rulemaking site, much less suggest that students observe a rulemaking there. Besides Executive Order 12,866 and its impacts on rulemaking—issues not open to judicial review—attention to administrative law teaching materials, generally, follows this pattern.

For courses on legislation, contemporary teaching materials typically address Congress as a functioning institution and the problems of statutory interpretation. The first can hardly be accomplished by reading judicial decisions; some combination of legislative documents, exposition, and secondary literature excerpts must be dominant. For statutory interpretation, by comparison, the case method reasserts itself. Of course judges do read

37. PETER L. STRAUSS, TODD D. RAKOFF, CYNTHIA R. FARINA & GILLIAN E. METZGER, GELLHORN AND BYSE’S ADMINISTRATIVE LAW: CASES AND COMMENTS (11th ed. 2011) (current edition).

statutes, and the continuing controversies among them about how this might best be done require making one's students aware of that.³⁸ But are they the only ones to do so?

Today, reading statutes (and regulations) constitutes a major part of lawyers' work, if not the majority, as compared with reading cases. In any uncertain matter, lawyers and their clients must usually read them before their meaning has been judicially resolved. Very often those statutes are first read by agencies, both within themselves and in dealings with the public. Are the students of today's legislation courses often required to read statutes for themselves, before judges get to them, with such aids to understanding as may then be available? This, in effect, was what the *Legal Process* materials, *Mashaw-Merrill*, and *Linde-Bunn* required of them. But the teaching materials of today's legislation courses often require students to dig out the statute being interpreted from the interstices of a judicial opinion, with only such elements of it as the opinion writer(s) found relevant to include.³⁹ If the materials provide statutory text before the opinion, as do Professor Eskridge's two new editions, discussed below, they are not given a problem to consider that might lead them independently to see statutory issues, or the other materials a private lawyer or an agency lawyer would certainly consult; they get no sense of the past history of the problem, other statutes that might be relevant, or its political or legislative history (again, besides such elements as the opinion writer(s) chose to include). Students are not, in other words, invited to read the statutes for themselves.

B. The New Course in Legislation and Regulation

The past quarter-century, starting perhaps with my school's ultimately failing effort to create a required first-year course on the regulatory state, has seen a steady movement toward courses on legislation and regulation—today's predominant sources of law—as required elements of first-year curricula.⁴⁰ The phenomenon is a long-overdue reaction to the continued dominance of common-law, judicially oriented doctrinal analysis courses in the first year, conveying to entering students a strikingly inaccurate sense of the current world of law.⁴¹ At least six sets of law school teaching materials have recently

38. See Peter L. Strauss, *Robert Katzmann's Judging Statutes*, 65 J. LEGAL EDUC. 443 (2015) (book review).

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

40. Abbe R. Gluck, *The Ripple Effect of "Leg-Reg" on the Study of Legislation and Administrative Law in the Law School Curriculum*, 65 J. LEGAL EDUC. 121, 126-27 (2015) (showing that twenty-one law schools of the top ninety-nine, according to the 2014 *U.S. News Rankings*, currently require a course on legislation or leg-reg in the first-year curriculum).

41. The impact of distorted first impressions can be enduring. Consider the experience at McGill Law School, which for many years offered its students degrees qualifying graduates for both common-law and civil-law qualification. I visited there earlier this century, a visit that led to

been published for use in connection with the first-year courses on legislation and regulation that are increasingly finding their way into that year's required curriculum.⁴² All present political institutions and agencies, statutes and regulations as central actors and elements in the legal world, but they offer a wide range of approach. To what extent, however, do these curricular changes presage a change from the Langdellian commitments to using appellate judicial decisions and to teaching doctrine?

1. *John F. Manning & Matthew C. Stephenson, Legislation and Regulation*⁴³

Langdell dies hard at Harvard, as we have seen. In their preface, Professors Manning and Stephenson describe their purpose as being “to teach students both how federal statutory and regulatory law is made, and how judges and administrative interpreters construe these legal materials.”⁴⁴ Notice that this teaching is to be about “how judges and administrative interpreters construe,” and not about how lawyers do. Consistent with Langdellian premises, Manning and Stephenson lead their students almost invariably to see issues gazing backward in relation to the already explained interpretations of judges and administrators, and not forward, in the absence of fixed meanings, to advise clients about important choices. That the purpose of learning “how judges and administrative interpreters construe” statutes dominates the work is suggested by the omission of legislation from the list of courses in the upper-level curriculum for which it might serve as a foundation,⁴⁵ and also

my Peter L. Strauss, *Transsystemia—Are We Approaching a New Langdellian Moment? Is McGill Showing the Way?*, 56 J. LEGAL EDUC. 161 (2006). There, I learned that when this was done in a four-year program, with students spending their first year studying beginning courses in the system of their choice and their second year studying the same issues in the other, with two years of electives to follow, graduates were marked by their choices. If they had begun on the common-law side, they graduated as common lawyers who knew some civil law, and vice versa. When McGill then converted its program into a three-year program, in which first-year courses were offered transsystemically—that is, on a problem basis, with civilian and common-law materials presented side by side (and bilingually) as equally possible means of response—it found that these self-identifications to one system or the other disappeared. .

42. All from a 2014 AALS meeting panel on *Leg-Reg Courses and the Core Curriculum*, 65 J. LEG. EDUC. 1 (2015). See James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?*, 65 J. LEGAL EDUC. 3 (2015); 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); John F. Manning & Matthew Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 J. LEGAL EDUC. 45 (2015); 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); Gluck, *supra* note 40.
43. JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* (2nd ed. 2013).
44. *Id.* at v.
45. In her contribution to the *Journal of Legal Education* Symposium, Professor Gluck, *supra* note 40, reports that the new leg-reg courses appear to be displacing legislation as an upperclass course, but not administrative law. *Id.* at 153. To the extent those courses examine the institutional functioning of legislatures, that loss counsels assuring that the new courses

by the materials' virtual absence of attention to Congress and administrative agencies as institutions functioning on their own internal law.⁴⁶ Consideration of internal agency processes of decision, as distinct from statutory and judicial requirements for them, is simply missing. Other than the Constitution and relevant provisions of the Administrative Procedure Act, the only nonjudicial materials used as primary readings are Executive Order 12,866 and a presidential memorandum on clean-water protection. The materials simply fail to engage students with primary materials other than judicial opinion.

The materials are, however, very well-adapted to teaching "how judges and administrative interpreters construe [statutory and regulatory law]." The first two chapters address statutory interpretation, the fourth (largely) APA interpretation in the rulemaking context, and the fifth judicial review of agency statutory interpretation.⁴⁷ Taking the first chapter as an example, its introductory section, after well framing the general questions students will want to consider, opens with the example of *TVA v. Hill*,⁴⁸ a case that preceded the revival of sharp controversy over interpretive technique yet opens many of these questions. And here, atypically, students are asked to read the statutory provisions at issue (albeit they are not given facts or a problem that might help them to do so before encountering the court's reading). Note materials point out the several interpretive tools the Justices used and the background and subsequent history of the statute, suggesting the essentially retrospective application of the Endangered Species Act the decision entailed. The brief introduction to Congress's legislative process is also a part of this section.

The second section of the chapter, "The Letter Versus the Spirit of the Law," makes clear both the breadth of scholarship brought to this enterprise and the balance of its authors in engaging students with it. John Manning is deservedly regarded as the leading academic scholar supporting the "new textualism," the letter as against the spirit, but the case selections, richly annotated notes, and questions posed should leave students with a sense of the tensions, of the strong arguments on each side of this divide, of some movement toward an accommodating center, a new textually constrained purposivism alongside

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

46. There is no hint here of congressional disarray or of the realities of legislative drafting and processing revealed in Abbe Gluck and Lisa Bressman's pathbreaking scholarship. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014). A good deal more emerges, however, in the interstices of their subsequent discussions of the debates over the use of legislative history.
47. This chapter essentially is devoted to *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Statutory interpretation by agencies, whose techniques arguably are influenced by their responsibilities and by their continuous contact with both their constitutive statutes and with Congress, is discussed only as it may influence judicial interpretation.
48. 437 U.S. 153 (1978).

a new (and more moderate) textualism. Students are consistently engaged in a real debate, with well-chosen cases to illustrate it and no clear outcome required. Section III, “What Is the Text?” (Scientific or Ordinary Meaning? Legal Terms of Art? Colloquial Meaning or Dictionary Meaning), Section IV, “Legislative History” (Post New-Deal Approach, Textualist Critique, The New Synthesis), and Section V, “The Judicial Power and Equitable Interpretation,” continue in the same vein. Again, the materials are all judicial opinions. The section on legislative history fully and fairly presents the history of use and abuse of legislative history; what it does not ever do is present students with the challenge of considering legislative history documents on their own rather than seeing them through the selective eyes of opinion writers.

Other than the Constitution and relevant provisions of the Administrative Procedure Act, the only nonjudicial materials used as primary readings in *Manning-Stephenson* are Executive Order 12,866 and a presidential memorandum on clean-water protection, as the principal readings for a section on “Presidential Control of Agencies.” The Executive Order is introduced by way of a thoughtful history adumbrating the political debates over its appropriateness and uses, but without a suggestion to students of a posture they might take in reading it. For example, they might be asked

- As an OIRA administrator, are you now in a position to control the subjects on which rulemaking occurs?
- If you are a desk officer in OIRA, what opportunities are you given to influence the outcomes of a particular agency rulemaking?
- If you are an agency rulemaker, how will these requirements influence the outcomes you reach? Public participation in your rulemakings?
- What, if any, defenses will you have against White House “meddling”?

The notes following the Order first take four-and-a-half pages for a balanced and richly annotated account of the debates over the appropriateness of presidential control, and then give similar space and attention to the debates over the use of cost-benefit analysis. President Clinton’s Memorandum on Clean Water Protection, directing EPA and other agencies to take certain defined steps to protect the quality of recreational water bodies, serves to introduce a further discussion of the appropriate level of presidential influence or control over matters statutorily assigned to agencies for decision. The questions are well-identified, and the literature bearing on them fully and fairly presented. The materials do not, but of course the instructor could, invite students to consider what their agency should/must do on receiving such a memorandum.

A colleague teaching the upperclass offering in administrative law expressed some concern to me last spring about the overlap of her syllabus with what she understood had been dealt with in a first-year elective taught from *Manning-Stephenson*. Probably if one knew one’s students had studied its thorough treatment of the Constitution’s bearing on agency rulemaking and of standards of judicial review of rulemaking and *Chevron*—more than 200 pages of the book in each case—one could feel free to spend more time on issues not at all touched

(e.g., due process, APA adjudication, agency enforcement, agency decision processes, information acquisition and FOIA, access to judicial review) and to deepen the treatment of rulemaking and its associated statutory and executive controls. Thus, the overlap with administrative law is only partial. Despite its relative inattention to institutional concerns, a course taught from this book is much more likely to provide an alternative to legislation courses than to administrative law. And in this respect, in my judgment, its most significant weakness (but not one that distinguishes it from other teaching materials on the subject) is the consistency with which it makes students critics and not actors, inviting them to the interpretive task after, and not before, judges and administrators have performed it.

2. *Samuel Estreicher & David L. Noll, Legislation and the Regulatory State*⁴⁹

Aside from the question about Langdellian change, Professors Samuel Estreicher and David L. Noll's *Legislation and Regulatory State* (recently published in both print and electronic editions by LexisNexis with an available documentary supplement) also has much to commend it for first-year use. Although appellate decisions are virtually the only primary materials its detailed table of contents identifies,⁵⁰ the notes following them consistently invite attention to case and doctrinal analysis issues reinforcing the book's overall "regulatory state" theme and important student habits.

- What is the procedural posture here?
- How was a described doctrinal issue analyzed?
- What other possibilities live in other cases or critical commentary?
- What was the justification for regulation here?
- What was the mode of regulation employed?
- What alternatives were possible?

Congressional and executive branch institutions and practices are well-described, if somewhat idealistically.⁵¹ The notes often challenge the

49. SAMUEL ESTREICHER & DAVID L. NOLL, *LEGISLATION AND THE REGULATORY STATE* (2015). These paragraphs are based on prepublication materials the authors kindly provided in May 2015. Thus, some details may have changed.

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

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

judicial analysis or raise interesting questions about its subsequent use, but typically do so in relation to other judicial decisions or agency action. The secondary literature is generally referred to, though not presented for active consideration.⁵² The supplement provides many statutory texts, and also some other-than-case primary materials such as are generally missing from this and other primary sets of teaching materials.

A sense of the book's strengths and weaknesses, the performance it does and does not demand of the reader, might be provided by looking in some detail at its treatment of a judicial opinion involving statutory interpretation. *Maracich v. Spears*⁵³ is the first case students encounter in the materials on statutory interpretation, and it is one of the three for which the documentary supplement sets out statutes and legislative history excerpts. Several aspects of it make it an especially good choice for this purpose. Like many of the opinions in the book, it is contemporary. The issue it presents—whether a federal statute possibly bans an attorney's obtaining and using Department of Motor Vehicles information about recent purchasers of automobiles to solicit participation in a possible class action—is readily understood, apolitical, and likely to command future attorneys' interest. A decision in the matter required the Supreme Court's close analysis of statutory text and context (and legislative history?). That decision was reached by a 5-4 margin; the majority opinion adopted an interpretation of the text that was far from the reading most easily given it and—perhaps most important to this appraisal—rather dramatically departed from the usual conservative-liberal alignments students might expect. Justice Anthony Kennedy wrote for the Chief Justice, and Justices Clarence Thomas, Stephen Breyer, and Samuel Alito, that the attorney's conduct violated the statute in an opinion suggesting but not stating that he had consulted legislative history,⁵⁴ and openly using many of the tools of contemporary textualism. Justice Ruth Bader Ginsburg (who in somewhat similar “purpose and context v. plain meaning” circumstances would find purpose and context controlling in the very next case presented⁵⁵), dissented for herself and Justices Antonin Scalia, Sonia Sotomayor and Elena

52. For more on the causes of statutory blind spots and the interpretative challenges they create, see, for example, ROBERT KATZMANN, *JUDGING STATUTES* (2014), *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* (Robert Katzmann ed. 1988); Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1 (2007); Robert A. Katzmann & Russell R. Wheeler, *A Mechanism for Statutory Housekeeping: Appellate Courts Working with Congress*, 9 J. APP. PRAC. & PROCESS 131 (2007); Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123 (1992); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

53. 133 S. Ct. 2191 (2013).

54. “Congress was aware that personal information from motor vehicle records could be used for solicitation, and it permitted it in circumstances that it defined, with the specific safeguard of consent by the person contacted. So the absence of the term ‘solicitation’ in (b)(4) is telling.” 133 S. Ct. at 2203.

55. *Yates v. United States*, 135 S. Ct. 1074 (2015).

Kagan on the basis of what the statute plainly and permissibly said. Justices Sotomayor, Thomas and Kennedy also switched sides in that next opinion (*Yates*), one unusually rich with references to legislative history, and sharply illustrating the difficulties courts face in mediating text and purpose. These, then, are not cases that will feed student cynicism about the political valence of Supreme Court decision.

If in teaching one made disciplined use of the documentary supplement that accompanies the book, the juris-centric character of the main volume could be eased. Students are asked to review the statute at issue in *Maracich*, reproduced in the statutory supplement, before reading the opinion. The supplement includes relevant excerpts from the act in question and selected legislative history. Given a problem based on the case's facts, students could have the opportunity to experience the matter as a lawyer would have; this would be the direct engagement with legislative history that Manning-Stephenson denies its users. The book would permit similar exercises at least three times over its course although, given the prominence and placement of the opinions in the book, one supposes students might not easily resist the temptation to shortcut that assignment. From the perspective of case and doctrinal analysis, for students just beginning their legal education, the choice of this case is excellent. It seems free from normative precommitments that might distract its students; its presentation teaches valuable habits for entering students. If, as one suspects, students find the majority's reading of the statute both surprising and, in purposive terms, compelling, the lesson to explore *possible* meanings of text before settling on an understood meaning is invaluable. At the same time, it is only that. Supplement aside, here as elsewhere in the book, the materials are about what courts do, not what attorneys do. Fresh, imaginative and thorough, still *Estreicher-Noll* never places students where they will often find themselves, having to read a statute on a client's behalf—often with the most important consequences turning on their reading—without a prior judicial reading to guide them. A teacher could fill the gap, if so minded, but the point here is that Langdell still rules—cases and doctrine are at the core.⁵⁶

3. *Lisa Heinzerling & Mark Tushnet, The Regulatory and Administrative State*⁵⁷

Students taking Harvard's course with Mark Tushnet and using his book—the first set of published materials designed for such a course⁵⁸—would have

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

57. LISA HEINZERLING & MARK TUSHNET, *THE REGULATORY AND ADMINISTRATIVE STATE* (2006).

58. Sidney A. Shapiro and Joseph P. Tomain had earlier published *REGULATORY LAW AND POLICY: CASES AND MATERIALS*, whose last (third) edition was published in 2003. It focused

a very different experience from those studying with the *Manning-Stephenson* materials. The lead materials named in the detailed table of contents are primarily excerpts from the secondary literature, not judicial opinions.⁵⁹ Agency documents occasionally appear. The book's first two parts present regulation as an alternative to litigation, first with respect to contracts, and then to criminal law or torts.

- Do wages include a premium for taking risks?
- Are criminal law and tort effective means for compensating persons for strangers' infliction of unacceptable risks on them?
- Are they effective in the case of diffuse, long-term (environmental) harms?

The contrast both these parts offer to contracts and torts (common-law courses of the first year) is strong and helpful in bringing student perceptions of the legal order forward into the twenty-first century. They make the case for regulation as a necessity. Clearly enough, these materials have a point of view, reflected in doubts cast on classical law-and-economics thinking, also well-presented, and in the often gruesome facts of employer indifference to worker safety and industrial indifference to environmental harms to be found in the cases and secondary materials selected. But the final chapter of these two parts, "Linking Common Law and Statutes: The Case of Workers' Compensation," is not merely a paean to regulation; it clearly communicates the ways in which the "great compromise"⁶⁰ of workers' compensation programs left a good deal of work for the courts and tort law to do in providing full compensation to workers and safety incentives to management.

Part III, "The Modern Regulatory State," introduces students to the apparatus and procedures of regulation after five weeks or so of the course is behind them. These will have been weeks in which they have studied a good deal of interdisciplinary material—economics, sociology, cognitive psychology—providing perspectives on situations (environmental harm, workplace injuries) by which the common law is challenged and for which regulation is common. Heinzerling and Tushnet's modern regulatory state, as they acknowledge, is one concerned with environmental, health, and safety risks, the state of EPA, NHTSA and the FDA, not a financial market (SEC) or monopoly control (utility rate regulation) state; instructors interested in other

on the intellectual and legal grounding for regulation of various kinds—substance, methods, and measures of effectiveness—and not institutions or procedures as such. Congress, statutory interpretation and the Administrative Procedure Act scarcely appear.

59. Thirty-one judicial opinions appear in the detailed table of contents, HEINZERLING & TUSHNET, *supra* note 57, at xvii-xxix; seventy-four excerpts from the literature, and five other documents: a criminal indictment, an agency report to Congress, an agency decision document, excerpts from an amicus curiae brief, and a White House memorandum to agency heads. *Id.*
60. See Alison D. Morantz, Rethinking the Great Compromise: What Happens When Large Companies Opt Out of Workers' Compensation? (July 10, 2015), available at SSRN: <http://ssrn.com/abstract=2629498>.

areas would have to supply those “ribs.” The work takes up the basic issues of statutory interpretation and rulemaking in a manner adequate to introduce them, but that will not persuade any students that they have plumbed their depths before returning to regulatory appraisal:

- How can regulation fail, in theory or in practice?
- What is cost-benefit analysis, and the case for and against it?
- Can providing risk-facing individuals with information to inform their decision-making be an effective alternative to command-and-control of the situations they face?
- If standards are to be set, how are acceptable levels of residual risk best determined?

Christopher Columbus Langdell would not recognize these as proper law school teaching materials. Interdisciplinary materials are as important to it, if not more so, than judicial opinions. Understanding the use of the courts, here, is only one of several options, not the ceaseless focus of a student’s attention. Much more than the other texts considered to this point, these materials continually place students outside the judicial system—usually, to be sure, from the critical perspective of academics or citizens, and not as lawyers asked to advise clients on matters of consequence to it. Both the understanding that institutions other than the courts are important to the legal order and the acquisition of critical tools for evaluating their work are important curricular contributions in the current day. In taking students beyond doctrine and beyond courts, as an introduction to the realities of today’s legal order and as a corrective to Langdell’s “geology without rocks,”⁶¹ they are far superior to doctrinally centered materials. Yet the extrajudicial materials of this book are interdisciplinary, not the primary materials of today’s law practice. Exercises like those possible with *Estreicher-Noll’s Maracich* materials would have to be built from scratch.

4. *William N. Eskridge, Jr., Abbe R. Gluck & Victoria Nourse, Statutes, Regulation, and Interpretation—Legislation and Administration in the Republic of Statutes*⁶²

Three of today’s most accomplished scholars of legislation—one of them an editor of *The Legal Process* as finally published—have joined forces to produce materials for a new course, one focused on the production and interpretation of statutes and regulations, without being centered on courts.⁶³ Thus, the

61. *See supra* note 7.

62. WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA NOURSE, STATUTES, REGULATION, AND INTERPRETATION—LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES (2014) [hereinafter ESKRIDGE, ET AL., STATUTES, REGULATION, AND INTERPRETATION].

63. Professor Eskridge has another dog in the hunt, the sixth of the sets mentioned in the prologue to this section, one that will not be discussed in the text for reasons that will shortly appear. The Fifth Edition of the pioneering materials he began with his co-editor on publication of *The Legal Process* (the late Philip P. Frickey) has now been retitled as WILLIAM N. ESKRIDGE,

introductory materials will convey to students that ‘how legislatures think about statutes’ and ‘how administrators think about statutes’ are just as important to the enterprise as ‘how judges think about statutes.’ As will be discussed, it is unfortunate that there is not equal analytic attention to “how lawyers think about statutes” and “how affected individuals think about statutes,”⁶⁴ but this fault is hardly theirs alone. In comparison with *Heinzerling-Tushnet* and *Bressman-Rubin-Stack*, these materials give relatively little attention to the issues of economic analysis, risk assessment, scientific judgment, and human psychology that so affect regulatory decision-making. (E.O. 12,866 and its administration, for example, are described, but the order itself is not presented and the description of its operation and issues is largely in political terms). For primary materials other than judicial opinions and some statutory excerpts, students are directed to the place they can be found and are invited to consult them—saving pages, but reducing the possibility of in-class use and thus making that consultation less likely. Still, there is much to admire here. Problems regularly set in its pages place students in active, practice-oriented roles. Particularly for teachers who understand, as Professor Gluck has reported,⁶⁵ that this course is much more likely to displace the course in legislation than the course in administrative law, these new materials deserve the most serious consideration.

The three-part introduction, imaginatively built off variations on the familiar “No Vehicles in the Park” problem, might be regarded as a set piece like “The Case of the Spoiled Cantaloupes” in *The Legal Process*, though it is less richly developed. After describing some of the ways judges think about statutes,

JR., PHILIP FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, *CASES & MATERIALS ON LEGISLATION AND REGULATION—STATUTES AND THE CREATION OF PUBLIC POLICY* (2014). In it, brief materials in the first chapter—also centered on the Civil Rights Act of 1964—introduce agency implementation, and new Chapters 8 and 9, the final quarter of the book, take up administrative implementation of statutes and the theme and variations on *Chevron*. Like the work discussed in the text, its introduction to administrative procedures is sketchy—the APA provision governing informal rulemaking does not appear in text, and only about half as many pages are addressed to that process (twelve) or to interpretive rules and policy statements (twenty-two). It does, like Bressman, Rubin & Stack, have the advantage of introducing the issues of presidential oversight subsequent to these pages. (Here, too, the text of the Executive Order is relegated to an appendix.) Statutory interpretation cases, as in the book discussed in text, are often preceded by the relevant text, a distinct improvement over past practice. Problems are used, but less frequently, to place students outside the courts; administrative agency documents scarcely appear. Probably the choice between the two books would depend on how far the instructor wished to depart from the materials of “Legislation,” for which both are excellent. There is more on Congress as a functioning institution here than there, and less on agencies.

64. The book’s preface properly notes as a contribution of the book that “we take a broader view of the prototypical legal interpreter. In addition to judges, members of Congress, agency officials, and even state actors are a part of the interpretive process in the modern, multi-layered legal landscape.” But the prototypical legal interpreters are not only, even chiefly, government officers, and a prototypical experience of the practicing attorney is having to interpret laws, on issues of large potential consequence, without yet having their aid.

65. See Gluck, note 40, *supra*.

the first problem invites students to consider the ordinance's application to a variety of ostensible "vehicles." Then at the conclusion of an imagined legislative process,

- How could students use the history that has been described, and ought students be able to use that material, in appealing a conviction for a child's use of a tricycle in the park?
- And after introducing administrators who might have the authority to define prohibited "vehicles," can students draft a proposed rule?
- How should a commission respond to a supposed comment supporting the inclusion of tricycles?
- How should it respond, having in mind both its political overseers, and the possibility of engagement with the courts?

Students cannot avoid understanding that differing institutions and procedures, not only courts, are involved in the generation and interpretation of law; so, too, will they understand that it is on their acts of law generation that the book is resolutely focused. And the following materials, unsurprisingly, confirm this understanding, presented in three parts: an introduction to Congress, agencies and courts; statutory interpretation; and agencies and administrative implementation. The first and third are resolutely multi-institutional; the materials on interpretation focus on courts and judicial doctrine, subjects on which all three authors are well-established scholars.

The first part starts with attention to Congress, and then the executive branch, President and agencies, before moving on to the courts. The legislative process is introduced through the history of the Civil Rights Act of 1964, with particular attention to Rep. Howard Smith's failed attempt to sabotage the process by his successful introduction of an amendment prohibiting sex discrimination. A problem requires students to advise their clients whether they can safely take affirmative action to redress decades of sex discrimination in employment—but as an exercise in interpretation, without attention to the possible consequences of either action or inaction that such clients would need to consider. Following ample descriptions of House and Senate processes,

- How would students expect controversial legislation to proceed?
- Can students draft a bill?
- Get it past the veto gates?

Congress has a choice between courts and agencies as law enforcers; in representing NOW or the Chamber of Commerce, how can counsel work effectively to influence the authority Congress gives the Equal Employment Opportunity Commission? A handful of separation-of-powers cases are presented in considering constitutional limits on Congress's authority to control agency and presidential behavior, but the focus of these materials is resolutely on the legislature and its behaviors.

The executive branch materials might more properly be described as an introduction to the President, including his relationship to agencies. He is

a presence throughout, with agencies and their functioning a subordinate interest. One reads a lot about his removal, about *Youngstown Sheet & Tube v. Sawyer*⁶⁶ and about the War Powers Resolution (in connection with Libya) before any agency action, as such, is introduced. Here, any primary reading that is not a case involves advice to the President, a quasi-constitutional focus. Then one encounters *FDA v. Brown & Williamson Tobacco Corp.*,⁶⁷ preceded by a discussion of the history of tobacco regulation by Congress and the FDA and relevant statutory sections. Students are invited to consider statutory arguments before reading the case, and one hopes they will—this is the sort of problem/assignment too often missing from our statutory teaching. One wonders, though—particularly given the chapter’s emphasis on the President as well as agencies—why they are not then also shown the presidential directive acknowledged in the following notes, or the agency’s regulation itself. These are materials any lawyer considering the situation would have had and used. Finally, there are some materials on cost-benefit analysis (but not the executive orders themselves), again emphasizing the President rather than the view from inside the agency. An introductory problem, excellent from this perspective and principally considering congressional-presidential-agency relations, addresses OIRA pressures on the Department of Transportation respecting the implementation of a new statute on pilot fatigue—but students see only the statute and a descriptive account of subsequent events, and not the rule nor any OIRA documents that might be discoverable.⁶⁸ Rather, the materials advise, ‘Pull up the Federal Register now and read the agency’s explanation. . . .’⁶⁹ The implicit lesson is that these materials are secondary, not important enough for inclusion in what students are required to read. The same contrast recurs throughout the book.

A chapter on “The Courts,” and Part II (“Statutory Interpretation”) cover familiar territory and cover it as imaginatively and well as one would expect from these authors. These are the pages, along with the prior treatment of Congress, that could excuse a law school from continuing to offer legislation as

66. 343 U.S. 579 (1952).

67. 529 U.S. 120 (2000).

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

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

James Goodwin, *Spurred On by Industry, OIRA Weakens Rule to Prevent Fatigue-Related Aviation Catastrophes*, CPR BLOG (May 30, 2012), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=9CA2427E-B023-E297-6E9CA1731AF03E99>. How much more evocative of the agency experience this problem would have been had this version been included in it . . . or even given as a “pull up,” with a reference to where it could be found.

69. HEINZERLING & TUSHNET, *supra* note 57, at 220.

an upperclass elective if it offered the course these authors imagine in the first year. For many of the cases, the authors do what, on the whole, materials on statutory interpretation do not—set out the statutory portions at issue in front of the case in which they are construed. This is a welcome advance, yet one yearns for a further step. Students would be likelier to do some independent reading if those portions were attended with a problem that could lead them to the issues the court would have to resolve, as well as a precis of any materials a lawyer would have in hand when presented with it. That could not prevent students from looking ahead to see “if the butler did it,” but if they were able to reach problems at the end of one class and opinions at the beginning of the next, students might quickly come to appreciate the difficulties lawyers face in reading statutes for their clients and to develop for themselves the essential skill of seeing a statute as others might, and not just as they initially do. Something like this does sometimes happen. The final problem of “The Courts” follows a considerable work-up of cases on Title VII of the Civil Rights Act and pregnancy discrimination, and Congress’s consequent enactment of a pregnancy discrimination act. How, now, should the EEOC approach accommodation of breast-feeding, or workplace rules controlling exposure of lactating or pregnant workers to toxic substances?

Part III (“Agencies and Administrative Implementation”) is less successful, in my judgment, though readers might think the author of widely used teaching materials on administrative law a biased observer. Since agency rulemaking is the agency equivalent of statutory formation and has already been met several times in the context of presidential-OIRA relations, one might imagine it would receive close attention, but its treatment is summary indeed. The governing section of the APA⁷⁰ and Executive Order 12,866—the latter already several times described but not seen—are not set out. Students never see the documents of a rulemaking, either proposal or resulting rule; the only judicial opinions provided as primary material (that is, rather than summarized in text) concern substantive judicial review of rules, and the unspoken tension between those opinions and the APA’s text is not addressed. Respecting the Executive Order, students are given a Bush administration OMB circular describing the process and are asked to evaluate its application to a rulemaking on prison rape elimination; the authors provide a citation to where the regulatory impact analysis might be found, but the text only summarizes the rule and the cost-benefit issues that might have been considered. Perhaps the skeletal nature of this presentation was intended as an accommodation to the continuation, in this course’s wake, of administrative law courses that must be left with something to do. But in terms of providing a basis for understanding the rulemaking process, including the Executive Order interactions, it falls well short.

Although APA adjudication procedures are given only a paragraph’s summary, the adjudication materials contain a well-developed series of materials drawing on the FCC’s dispute with Fox Television Stations (and others) over

70. 5 U.S.C. § 553.

the airing of indecent material. First, one encounters the FCC's decision⁷¹—one of only two administrative decision documents I found reproduced in the book⁷²—with good questions how it might have been understood and applied; then, excerpts from the two Supreme Court decisions resulting from the ensuing litigation;⁷³ and finally, a request to advise the (new) Commission what if any room it has to act, and what its procedural options are for doing so. Engaging bundles like this, requiring students to act in awareness of political as well as legal constraints and without complete guidance from judicially developed doctrine, well fit “The Legal Process” heritage and can distinguish a course of this character from the ordinary law school fare. One simply wishes there were more of them.

One cannot leave these materials without understanding, as the authors insist, that “the doctrines of statutory law and administration are the bread and butter of modern lawyers, and most of the time the modern regulatory state is far ahead of the courts.”⁷⁴ In this sense, Langdell has been overcome, and perhaps the most important purpose of a contemporary introductory public law course well-satisfied. If, as will be obvious, my preference remains with the *Bressman-Rubin-Stack* materials about to be discussed, it is because of the extent to which those materials require students to confront and use the actual materials of the administrative state (that is, statutes, regulations, *Federal Register* notices, and executive orders), reduce the domination of judicial opinion, and introduce students to the economic, scientific, psychological, and political considerations underpinning the contemporary debates about rulemaking and its White House control.

4. *Lisa Bressman, Edward Rubin & Kevin Stack, The Regulatory State*⁷⁵

Readers understanding the general editorial of these pages—a preference for materials that often give students a different experience than looking over the shoulders of courts—will readily understand why these became my preferred teaching materials for a regulatory state course once they were published. In my judgment they exemplify, finally, the escape from Langdell into the other legal worlds that mark today's public law practice environment. Reading a statute or a regulation or other congressional or agency materials without an accompanying case is a common requirement in these materials, as it is in practice. The materials thoroughly introduce Congress and agencies as functioning institutions, and take the trouble to walk students through the

71. HEINZERLING & TUSHNET, *supra* note 57, at 780.

72. The other, the last reading in the course, is Revenue Ruling 2013-17, the Internal Revenue Service's response to *United States v. Windsor*, 133 S.Ct. 2675 (2013); HEINZERLING & TUSHNET, *supra* note 57, at 1009.

73. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) and *FCC v. Fox Television Stations, Inc.*, 132 S.Ct. 2307 (2012).

74. HEINZERLING & TUSHNET, *supra* note 57, at 780.

75. LISA BRESSMAN, EDWARD RUBIN & KEVIN STACK, *THE REGULATORY STATE* (2d ed. 2013).

conventional elements of statutes, rules and *Federal Register* notices—making clear that, just like opinions, these are documents whose working parts a lawyer needs to know. It is not all, or even chiefly, about judicial opinions and doctrine, about the world as seen through judicial eyes.

The first actor considered in these materials is the administrative agency, not Congress, and the first relationships explored are those internal to the executive branch—the constitutional and the political issues around independence and presidential control. Students will (properly) leave the chapter understanding that the “independence” of independent regulatory commissions is an interesting characteristic, but one whose influence over agency behaviors may be marginal.⁷⁶ The independents, too, are within the President’s orbit; tables of organization look much the same, and removals can come at a political price.

A chapter on “The Common Law as a Regulatory Regime,” like the materials in *Heinzerling-Tushnet*, then invites consideration of the limitations of tort law and the justifications for regulation—the first in the context of automobile safety, setting what will be the materials’ pervasive concern, and the second with consideration of the economic and social justifications for regulation, presented with considerable compression and without quite the same level of normative loading as one finds in the other book. “Airbags 101” lays a factual grounding for later problems—requires, then, decision-making that should make plain to students attentive to their own mental processes the need for and frequent difficulty of judgment in relation to technology—and opens a brief discussion of the human problems of judgment under uncertainty.

After a standard description of the legislative process and brief attention to academic theories respecting its operation, Chapter 3 turns to automobile safety legislation—first encapsulating the history of the National Traffic and Motor Vehicle Safety Act of 1966 and relating it to these theories, and then requiring students to read the whole Act, unedited. Students will not have to read a case applying or interpreting this act for hundreds of pages. Rather, they are invited to create an outline of the statute’s structure; then to read lengthy excerpts from a Senate Report accompanying the bill that led to its enactment; then to consider the Report’s aid in understanding the statute itself; and then to consider the typical structure of a modern statute in relation to it. The lesson is reinforced by having them read excerpts from five other statutes of varying ages, and relate them also to statutory structure. In relation to opinions, this is elementary stuff that students learn to do from the first day of law school. Must they not also learn it in relation to statutes, which they will often be encountering in their practice in just such a way? From this point, the chapter proceeds to a brief (caseless) discussion of delegation issues, and the basic steps and political realities of legislative drafting. Only then is there a chapter on “Statutory Interpretation by Courts” that, in the usual way, and largely by attention to cases, introduces the difficulties and tensions with a

76. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM.L.REV. 573 (1984).

case (*Holy Trinity*)⁷⁷ before taking students through first the tools and then the theories of interpretation. As in so many casebooks on the subject, students do not come to the interpretive scene in each of these cases until after the court has ruled, and then with only so much of the statutory framework as they can find in the court's opinion. Opportunities for using the tools being taught come in the notes.

"Statutory Implementation by Agencies," the next chapter, begins by briefly describing both the APA rulemaking process (the executive order procedures are not yet mentioned here; the development of the air bag standard largely preceded them) and the back-and-forth about air bag requirements that preceded the Reagan administration rule rescinding the passive-restraint requirement. Its first large task is to ask students to do for the documents of rulemaking what they have already done for the NTMVSA—read first the *Federal Register* notice of proposed rulemaking and then the *Federal Register* publication of the adopted rule,⁷⁸ outlining their various parts, considering their reasoning, and inviting the submission of "comments" should students find unaddressed matters that ought to be considered. They will not find judicial consideration of these matters until they have read another 323 pages; like the lawyers in that ultimate case, they are on their own, aided by questions invoking particular strands of possible analysis. The next primary reading is another final rule as published in the *Federal Register* (that is, together with its statement of basis and purpose), this one from the Consumer Product Safety Commission permitting further questions about the forms of analysis used. Succeeding questions address issues of agency statutory analysis, providing *Chevron*⁷⁹ (the *only* case the student will encounter in the chapter) alongside a healthy dose of Jerry Mashaw's scholarship on the differences between judicial and agency statutory interpretation; scientific analysis; economic analysis; and political analysis. In each setting agency documents provide illustrations of discussions that are developed largely by well-chosen excerpts from the literature. It is, then, a chapter in which the student is constantly inside the agency or dealing with it, living with its documents and concerns (including the political "help" to be had as its work is done), and, for the moment, oblivious to the courts.

The final chapter ("Control of Agency Action") begins with the President and Congress—introducing at last Executive Order 12,866 (which, typically, is set out to be read before notes and questions about its structure and functioning). It then calls attention to oversight hearings and the questions of executive privilege that occasionally arise in resisting them, before returning to notable "separation of powers" decisions limiting Congress's role, and then, finally, to "Judicial Control of Agency Action." This part well covers the material an administrative law class would treat in considering standards and availability of judicial review; but no student will think that teaching judicial

77. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

78. *Federal Register* notices, throughout, are published in *Federal Register* format, as if photocopied—adding perhaps to the reality of the encounter.

79. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

doctrine is the central ambition of this course. It is an introduction to lawyers' roles in the regulatory state, an introduction in which judicial decision plays a decidedly subsidiary role. The contrast with *Manning-Stephenson*, with its Langdellian roots, could hardly be stronger.

The very last section (a "case study" in control) presents a chronological set of materials associated with the development of the air bags standard, for which the ground was laid by "Airbags 101," from its inception through the immediate aftermath of *Motor Vehicles Mfrs. Ass'n of the United States, Inc. v. State Farm Mutual Ins. Co.*⁸⁰ As usual, most the documents here concern actions by the agency, the White House or Congress, including transcripts of remarkable White House tapes from the Nixon administration. The one exception is *Chrysler Corp. v. Dept. of Transportation*,⁸¹ a 1972 Sixth Circuit decision. That decision found fault with the "objectivity" of the dummies with which compliance with the passive-restraint requirements of Standard 208 were to be tested (and with the accommodation to their limits NHTSA had proposed), but left in place an ignition interlock requirement NHTSA had intended as an interim measure only.⁸² The political firestorm resulting from consumer resentment of the interlocks, as Jerry Mashaw and David Harfst have so well recounted,⁸³ produced statutory changes that delayed passive-restraint requirements for two decades, at the cost of tens of thousands of avoidable highway deaths.

The authors of this book are an estimable and complementary set of scholars. Lisa Bressman's recent work has contributed remarkably to our empirical understandings both of White House-agency relationships⁸⁴ and the contemporary realities of statute-making in the Congress. Edward Rubin's grounding in political science and philosophy, and understanding of the deficiencies of Langdellian methodology,⁸⁵ bring with them an astounding breadth of view about what administrative law might be. Kevin Stack, the youngest of the three, has contributed importantly to the understanding of

80. 463 U.S. 29 (1983).

81. 472 F.2d 659 (6th Cir. 1972).

82. 472 F.2d, at 675. I have had students read the case when they read the Act. I do so to sensitize them to the importance of identifying possible meanings of statutory words they instinctively believe they have understood just by reading them. In one class they must consider whether the "objective criteria" of Section 102(2) and "objective terms" of Section 103(a) are required for testing mechanisms as well as the safety equipment itself, and the information they would want to have to advise Chrysler on this question. Then they get to read the opinion, questionably finding in the affirmative, with little more to support the result than the court's understanding of "objective."

83. See MASHAW & HARFST, *THE STRUGGLE FOR AUTOMOBILE SAFETY*, *supra* note 4.

84. Lisa Bressman & Michael Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 1 (2006).

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

old chestnuts⁸⁶ and contemporary puzzles⁸⁷ and, as remarked at the outset, has redirected our attention to what was lost when administrative law turned Langdellian, turned to a study of courts and doctrine.⁸⁸ The authors have produced an effective antidote.

Conclusion

The contributions of Jerry Mashaw, William Eskridge and other Yale instructors to our understanding of the real world of law notwithstanding, the curriculum at Yale remains essentially what it was when I became its student 54 years ago—and long before that. Courses in professional ethics, and requirements to take skills courses and to complete two substantial writing requirements, have been added subsequently, but not a course requiring understanding of the real world of today's law. Perhaps Yale's students, brilliant as they are, are not misled by the endurance of Langdell's curriculum well past its senescence. Yet one might still think that the deepest recognition of Professor Mashaw's remarkable contributions to our understanding of that real world, its history and its operation today, will come when Yale joins the many law schools now requiring their students to take a course on legislation and regulation in their first year—if, of course, it is taught outside the Langdellian model.

86. See Kevin Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952 (2007).

87. See Kevin Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012).

88. See *supra* note 7 and accompanying text.