Legislation & Regulation and Reform of the First Year

John F. Manning and Matthew Stephenson

This essay discusses the development of a Legislation and Regulation course as part of a 1L curriculum reform that the Harvard Law School faculty unanimously adopted in 2006. The reform was adopted following three years of work by a Committee on Educational Innovations appointed by then-Dean Elena Kagan and chaired by future Dean Martha Minow. The Legislation and Regulation piece of the new curriculum aims to broaden the 1L program's perspective from the essential, but by today's standards incomplete, focus on private law topics and common law reasoning that had dominated the 1L curriculum since 1873.[1] Leg-Reg (as the students call it) instead focuses on statutes and the regulations that implement them. The course emphasizes not only the interpretation of those materials, but also the lawmaking process, institutional context, and political dynamics that shape the production and interpretation of statutes and regulations. As then-Dean Kagan reported in 2008: "Through intensive work with statutes and regulations from the start of law school, [first-year students] are developing rich understandings of the institutional frameworks and modes of the regulatory state—and they and their professors have been happy to find fertile connections between these materials and the rest of the first-year program."[2] Like other elements of the new first-year

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1. *See* Bruce Kimball, The Inception of Modern Professional Education: C.C. Langdell, 1826-1906, at 208-09 (2009). Of course, some of the traditional 1L courses—most notably Civil Procedure and Criminal Law—were not common law, private law courses. But the main substantive law courses other than criminal law—Contracts, Torts, and Property—were very much in that vein.

2. Elena Kagan, From the Bag: *The Harvard Law School Revisited: Reflecting on Louis D. Brandeis's Harvard Law School Reflections* 11 Green Bag 2d 475, 478 (2008).

curriculum, Leg-Reg has gained broad acceptance among not only Harvard Law School 1Ls but also the faculty who teach in the 1L program.[3]

This essay will discuss three aspects of the Harvard experience with Legislation and Regulation: Part I will provide a brief description of the extensive curricular reform process that produced this and two other new 1L courses. Readers more interested in the substance of the Legislation and Regulation course than the process that led to its creation can safely skip this section. But because reforming the 1L curriculum is such a daunting process, and because many people have asked us in various forums about the background of our reforms, we have included a discussion of the context and process from which the course emerged.

Part II will discuss the course's strategy for fitting novel and somewhat different techniques, materials, and concepts into the 1L setting. In particular, it will use materials from the statutory interpretation ("Leg") component of the course to illustrate the main features of its pedagogical approach. Most of the HLS Leg-Reg faculty made a self-conscious decision to construct the course so as to parallel, in two senses, the design of the more familiar 1L course. First, the course tends to 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. Thus, while the course incorporates many topics and methods that are touched on only tangentially, if at all, in other 1L courses (such as textual exegesis, legislative procedure, and public choice theory), it does so by asking students to learn and assess concrete, real-world legal decisions and then building out, through note material, to the broader concepts implicated by the cases. This strategy, moreover, is facilitated by the availability of quite a number of well-known statutory interpretation cases that present simple, intuitive, accessible fact patterns from many different areas of law; these accessible cases offer students a basis for developing an understanding of the intricacies of the legislative process, an interpretive tool kit, and a judicial philosophy. Second, the version of the Leg-Reg course developed here is transsubstantive, rather than focused on a particular policy area. Part II elaborates on this pedagogical approach by discussing how we present some of the key cases on statutory interpretation.

Part III of this essay will focus on the administrative law ("Reg") component of the course. Here, we will discuss how the two elements of the course ("Leg" and Reg") can be profitably integrated, and we also address two common concerns about teaching administrative law in the first year. The first such concern is that administrative law is simply too complicated for 1Ls. We have found, however, that an immersive approach to statutory interpretation in the first section of the course prepares students to tackle the issues raised by the administrative law materials, both in terms of substance and method. A familiarity with foundational interpretive tools and methods proves invaluable

3. For several years running, Legislation and Regulation's mean and median Overall Effectiveness of Course evaluations have consistently been among the top half of such scores for 1L courses.

when discussing, for example, questions of constitutional interpretation that arise when considering separation-of-powers controversies, issues concerning the interpretation of the Administrative Procedure Act (APA),[4] and, of course, matters involving the *Chevron* doctrine.[5] Likewise, familiarity with controversies over the legitimate role of courts, the strengths and limitations of different lawmaking processes, and related matters help frame the larger themes and problems in administrative law. A second concern about putting administrative law in the first year is how doing so affects the upper-level curriculum, in particular the upper-level Administrative Law course. This is a legitimate concern, as Leg-Reg is no substitute for a full course in Administrative Law. Here, as we detail below, we are happy to report that the Harvard experience has been positive: Though enrollment in Administrative Law has dipped somewhat, a large proportion of our students treat Leg-Reg and upper-level Administrative Law as complements rather than substitutes, and indeed the existence of Leg-Reg has enriched the upper-level Administrative Law course and related public law offerings.

Between the two of us, we have taught this course more than ten times. Much of what follows builds on our own experiences in the classroom. Since we helped develop the course we teach, and coedit the casebook we use,[6] readers will want to discount what we say for any bias that may result. But for the reasons we lay out in Parts II and III, both of us have found that the course does what it set out to do.

I. The Kagan-Minow Committee and Reform of the First Year

At Harvard, as at most other U.S. law schools, the first-year curriculum had looked the same for about six generations. When Elena Kagan first became dean in 2003, the staples were the same as when she started law school in 1983 –Civil Procedure, Contracts, Criminal Law, Property, and Torts.

Then-Dean Kagan convened a Committee on Educational Innovations, chaired by then-Professor, now Dean Martha Minow.[7] The committee consulted widely among "faculty, practitioners, alumni, law students and people at other law schools."[8] It also considered curricular innovations "at business, medical and policy schools[,]" as well as "other attempts at reforms in legal education, including those that had been unsuccessful."[9] As Dean Kagan described the net result of the committee's study, it was "[n]ot that legal education is broken," but rather that there were "significant gaps and real

4. 5 U.S.C. §§ 551 *et seq.* (2012).

5. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

6. John F. Manning & Matthew C. Stephenson, Legislation and Regulation (2d ed. 2013).

7. Besides Professor Minow, the committee's members were Professors William Alford, Scott Brewer, Allen Ferrell, Jerry Frug, Todd Rakoff, and Alvin Warren.

8. Elaine McArdle, *A Curriculum of New Realities*, Harv. L. Bull., Winter 2008, at 18, 21.

9. *Id.*

room for improvement."[10] And the stakeholders surveyed showed remarkable agreement on areas in need of improvement.

The committee concluded that the traditional first-year curriculum had three major needs to be filled. *First*, in an increasingly interconnected world in which law practice entails a greater international component, students should have an early introduction to international or comparative law.[11] The faculty implemented this recommendation through the adoption of a required 1L international or comparative course that students select from a menu of offerings. *Second*, the committee found that the 1L curriculum would profit from a course that was designed to simulate the experience of working in teams to develop client-oriented solutions to a range of problems outside of a courtroom setting. The faculty responded by adopting a Problem Solving Workshop for the newly created 1L Winter Term. *Third*, and most relevant here, the committee concluded that in a world in which much law takes the form of statutes and regulations rather than common law precedents, a course on Legislation and Regulation was imperative. The idea behind each of these innovations was not merely to improve the first year, but also to provide a firmer foundation for the second and third years of law school.

Reform of that magnitude is never easy. As noted, Dean Kagan herself acknowledged that the old 1L curriculum "still work[ed] remarkably well in honing many forms of legal analysis[.]"[12] And there were legitimate questions about the opportunity costs of these curricular changes, as the proposed reform entailed reducing the "big five" traditional courses from five to four credit-hours each. Especially on a large faculty like Harvard's, curricular innovation produces a range of views. Law professors, moreover, are not particularly shy about expressing and pressing differences of opinion.

Ultimately, however, the faculty voted unanimously to adopt the committee's proposal. Several factors contributed to this outcome. First, the Committee on Educational Innovations did its homework. As then-Dean Kagan later reported, the committee's process "took us around the world to meet with alumni, professors, and practitioners"[13] about how to equip a 21st-century lawyer. Second, the committee did a lot of listening and consulting with the faculty to build consensus. Over the three years leading up to the adoption of the new 1L curriculum, the dean convened a number of preliminary faculty meetings to think about the shape of the reform and the impact on existing courses. She also held a series of dinners at her home with faculty from various fields. At these dinners, faculty discussed the broad outlines of curricular reform, as well as the particulars of the various proposals that were being developed. Third, by 2006, it had become impossible to deny the reality that our legal system is increasingly structured by statutes and regulations, that the

10. *Id.*

11. *See id.*

12. *See* Kagan, *supra* note 2, at 477.

13. *Id.*

economy and practice of law are ever more global in dimension, and that the profession now expects new lawyers to hit the ground running in a way that had not always been the case.

Some wondered why HLS should opt for a relatively novel 1L course such as Leg-Reg[14] rather than an old staple like Constitutional Law. The committee opted for Leg-Reg over Constitutional Law for good reasons relating to the core objective of the reform. As one committee member reported to us, the committee determined that Leg-Reg simply added more value to the first year because "constitutional law, for all its subject-matter interest, is in the end fundamentally a case-interpretation, build on precedents course, replicating skills already developed in contracts, torts, etc; whereas Leg/Reg develops another whole set of skills needed in the modern state."[15] Perhaps because of the strong tradition of the Legal Process course at Harvard Law School,[16] Leg-Reg was not a hard sell.

The next step in the process was to work out the details of what, exactly, the courses should look like. The 2006 faculty vote approved the creation of the Leg-Reg course, but had done so in fairly general terms; the course description that the faculty approved stated:

> This course will introduce students to the world of legislation, regulation, and administration that creates and defines so much of our legal order. At the same time, it will begin to teach students about the processes and structures of government and how they influence and affect legal outcomes. The course will introduce students to and include materials on most or all of the following topics: the separation of powers; the legislative process; statutory interpretation; delegation and administrative agency and practice; and regulatory tools and strategies. The course will naturally lead into, and enable students to get more out of, advanced courses in the 2L and 3L years on legislation, administrative law, a wide range of regulatory subjects (e.g., environmental law, securities law, and telecommunications law), and constitutional law.[17]

14. NYU had already adopted a first-year course very much like what we were contemplating, but there was relatively little experience with this kind of 1L offering.

15. E-mail from Todd Rakoff, Professor, Harvard Law Sch., to the authors (Nov. 7, 2014, 15:06 EST) [hereinafter "Rakoff email"] (on file with authors).

16. *See* Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (1958). In the post-New Deal period, Harvard Professors Henry Hart and Albert Sacks had pioneered the Legal Process materials that framed the way many thought about legislation for generations. The Legal Process looked at all law, including legislation and regulation, from the perspective of "institutional settlement." *Id.* at 54. The basic idea of the course was that people might differ greatly about the answer to contested social problems but agree, in broad terms, to "duly established procedures" for finding the answers to those problems. *Id.* at 4.

17. Memorandum from the Curricular Innovations Comm. to the Harvard Law Sch. Faculty 3 (Sept. 26, 2006).

To make this concrete—to determine what was in and what was out, and to allocate material between Leg-Reg and the upper-level Administrative Law course—Dean Kagan and Professor Minow put together a working group consisting of the faculty who would likely be teaching the course the first time out (including the two of us).[18] After circulating syllabi from our existing regulatory/public law courses, we met as a group multiple times to decide what the course should look like. There was a range of views on some matters but consensus on others.

In deciding what was in and what was out, we were guided by several overarching principles about the relationship of this course to the rest of the curriculum. First, the course had to address a different problem and teach a different skill set from the primarily common law courses that were the 1L staples. Obviously, the "common law" courses address statutory questions—including the Uniform Commercial Code in Contracts, zoning and fair housing statutes in Property, and the Model Penal Code in Criminal Law. But those courses focus primarily on common law reasoning, and not on the systematic exploration of interpretive techniques or the legislative process questions that lie at the heart of Leg-Reg.[19] Second, the course had to have a scope that a 1L course could realistically cover. Hence, it could not cover all of the material in the upper-level courses from which its core would be drawn. Third, Administrative Law was to be preserved as a central element of the upper-level curriculum. Although we did not achieve complete consensus on topical coverage, we constructed a "guidance document" that divided the (many) topics we'd discussed into three categories: those that should definitely be covered (in some way) in the 1L Leg-Reg course; those that should *not* be covered in the 1L course (but rather reserved for the upper-level Administrative Law course); and those that were optional.

Our main conclusion was that the course should focus tightly on the enactment and interpretation of canonical regulatory texts—statutes and regulations. This focus entailed, first, a unit that emphasized the adoption and interpretation of legislation. Next, because we thought it less satisfying to try to teach about regulations without providing an introduction to the larger issues surrounding the administrative state, we determined that the course should include an introduction to the nondelegation doctrine, congressional control over the regulatory process, and presidential authority to appoint and

18. The other members of this committee were Professors David Barron, Jody Freeman, Todd Rakoff, Mark Tushnet, and Adrian Vermeule.

19. Leg-Reg also may inform discussion of the issues in those classes. As our colleague Charles Donahue recently reported about his first-year Property class:

> My kids this year do not have LegReg until next semester. I pretty much had to explain all of [the interpretive] issues [raised by zoning and planning]. In 2012, when I gave the same classes, the kids were taking LegReg simultaneously, and it showed. They were much better at coming up with the issues themselves.

E-mail from Charles Donahue, Professor, Harvard Law Sch., to John F. Manning (Nov. 13, 2014, 15:40 EST) (on file with authors).

remove regulators. Finally, the course would introduce certain foundational administrative law topics, including the notice and comment rulemaking process, judicial review under the "arbitrary or capricious" standard, and the *Chevron* doctrine.

In addition to our deliberations about topical coverage, our working group spent some time discussing the overall construction of the course, and issues of pedagogical strategy, more generally. Here, we all agreed that there are many ways to teach a successful Leg-Reg course that covers the essential topics, and that the pedagogical discretion of individual instructors must be respected. Nonetheless, our deliberations about course design were extremely helpful. For example, as we will discuss in more detail in Part II, we spent considerable time talking about the most effective way, in a 1L course, to introduce challenging topics like the intricacies of the legislative process, leading theories of regulation, interpretive theory, and the political economy of governmental institutions.

II. Integrating Leg-Reg into the 1L Curriculum: Statutory Interpretation as the Gateway

One of the main challenges in designing the Leg-Reg course was figuring out how to make complex material both interesting and accessible to a broad range of 1Ls coming to the topic with very disparate levels of experience and skill in the subject. Indeed, one of the main objections to the creation of such a course was that this material would be too dry, too abstract, too unfamiliar, and too complicated for 1Ls. Happily, that has not been our experience. Several factors—not least of which is the availability of a number of simple, intuitive building-block cases—have contributed to the accessibility of the course for our first-year students. Four such factors stand out as particularly important to the success of the course.

First, although there was and remains some variation in the philosophy of teaching Leg-Reg at Harvard,[20] the modal approach has been to make Leg-

20. Our colleague Mark Tushnet, for example, teaches a course that focuses more explicitly on the philosophy and justification of administrative regulation. He describes his approach as follows:

> I teach "Legislation and Regulation" from a book with the title "The Regulatory and Administrative State," because I think that the final word in that title better captures my pedagogical aims. Our students live in a regulatory and administrative state, and to be equipped to work as lawyers in that state, they need a distinctive set of tools. For me those tools fit into a general category, comparative institutional analysis, and that category organizes the way I teach the course. I regard the course as a modernized version of the classic Hart & Sacks "Legal Process" class.

E-mail from Mark Tushnet, Professor, Harvard Law Sch., to the authors (Oct. 7, 2014, 18:01 EST) (on file with authors). In addition, while using the same materials as the two of us do, Einer Elhauge frames his teaching to "emphasize[] that because statutory interpretation (whether textualist or purposivist) can at best result in probabilistic statutory meaning, one can understand many tools of statutory construction as default rules, thus linking the

Reg appear as much like a traditional 1L course as possible, in particular through the use of the case method. Students read statutory interpretation cases, structural constitutional cases, and administrative law cases, and then explore the surrounding concepts in the context of evaluating the judicial decisions. In the design of new materials—initially undertaken by the authors of this essay in consultation with other prospective 1L Leg-Reg teachers at Harvard and elsewhere—the strategy was to supply substantial and largely modular note materials that use the cases as a jumping-off point to explore the broader concepts raised by statutory interpretation, the legislative process, the design of regulatory institutions and regulatory policy.[21]

Second, the version of the Leg-Reg course developed here is transsubstantive. We have found that teaching recurring interpretive questions across a range of subjects enables Leg-Reg students, through immersion, to develop a firm set of intuitions about how different tools of construction work and about their legitimacy. By focusing on contexts as diverse as civil rights litigation, corporate law, environmental law, criminal law, immigration, telecommunications, public health, international affairs, or what have you, students have an opportunity to see how common techniques apply across a wide array of problems and topic areas. Indeed, one of the points we want to get across in the course is that the legal tools and principles introduced in Leg-Reg are themselves transsubstantive, and can apply in a diverse range of settings. (This has the collateral benefit that students learn a bit—just a teaser—about a whole range of statutory and regulatory schemes.) So, much as a Contracts class will cover core concepts by looking at contracts cases in a range of settings (employment contracts, commercial contracts, sales contracts, etc.), Leg-Reg works well by covering core concepts in a range of substantive contexts.

Third—and something that we did not fully anticipate—the legislation part of the course supplies a strong entry point into the course overall. It turns out that many of the canonical statutory interpretation cases not only are accessible, but also introduce key themes and concepts that enable students to tackle more complicated materials in the latter part of the course, when they turn to the administrative state and the regulatory process. The energy in the statutory interpretation part of the course has also been enhanced by the simple fact that there has been so much intellectual activity in the area in the past generation[22]

course to the parallel issues that arise about the interpretation of contracts in the contract law course." E-mail from Einer Elhauge, Professor, Harvard Law Sch., to the authors (Nov. 13, 2014, 14:24 EST) (on file with authors).

21. This approach contrasts, for example, with that of Columbia Law School's Foundations of the Regulatory State course (which used to be a mandatory 1L course, and is now an elective). Though the Columbia course's objectives overlapped in many respects with the objectives of the Harvard Leg-Reg course, the Columbia course materials de-emphasized cases and instead explored topics such as theories of regulation, distributive justice, cost-benefit analysis, and market failure, largely through case studies that emphasized the full arc of development of regulatory frameworks from the identification of the problem to the enactment of legislation to the implementation of the regulatory framework.

22. *See* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of*

—and, from a pedagogical perspective, this has proved a boon.[23] Both judicial opinions and scholarly writing provide considerable fodder for exploration of the theoretical and practical aspects of interpretation[24]—in a way that is accessible and appropriate for 1Ls.

Fourth, we—and most of the other Leg-Reg teachers at Harvard—made the potentially controversial choice to try to find cases, especially for the first several class sessions, that are not so politically charged, and where the debates among the judges or Justices do not map neatly or predictably into a conventional left-right ideological dispute. We worried that leading off with high political salience cases might lead students too often to gravitate to a particular interpretive theory because it corresponds, in the case at hand, to a preferred outcome in a contested political dispute. After all, most people gravitate toward a political ideology of some sort before they have developed a view of interpretive methodology or legal theory. (Not to put too fine a point on it: We didn't want our "conservative" students deciding that they were textualists, and our "progressive" students deciding that they were purposivists, within the first week of class, before they've really thought deeply and independently about the issues involved.) Even without lightning rod issues, however, it turns out that there are plenty of cases that are fun to teach, that provoke strong but conflicting intuitive reactions among the students, and that allow productive further exploration of the deeper principles that inform an interpreter's decision.

Irving Younger, 84 Minn. L. Rev. 199 (1999); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 Minn. L. Rev. 241 (1992).

23. Indeed, in the wake of the renewed scholarly interest in the field, several important new Legislation casebooks emerged in the 1980s and 1990s. *See, e.g.*, William N. Eskridge, Jr., & Philip P. Frickey, Legislation (1988); Abner J. Mikva & Eric Lane, Legislative Process (Brown & Co. 1995); William D. Popkin, Materials on Legislation (1993).

24. Legal scholars, political scientists, economists, and linguists have debated an ever-growing array of statutory interpretation questions. The literature is too large even to give a brief summary of all the issues debated today. They include: How reliable are the stated views of legislative committees or other pivotal actors in determining legislative intent? *See, e.g.*, Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction (1991); Adrian Vermeule, Judging Under Uncertainty 115-17 (2006); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 Law & Contemp. Probs. 3 (1994). Do legislatures even have intentions? *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845, 859 (1991); Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 Int'l Rev. L. & Econ. 284, 284 (1992). What do legislative drafters know—and how do they behave—when they draft legislation? 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, 781 (2014); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. Rev. 575, 581 (2002). By the standards of linguistics, do courts do a good job of reading statutory texts? *See, e.g.*, Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 Harv. L. Rev. 1521, 1563-68 (2014); Lawrence M. Solan, *Judicial Decisions and Linguistic Analysis: Is There a Linguist in the Court?*, 73 Wash. U. L.Q. 1069, 1073-79 (1995).

Lest this all sound too abstract and general, we will try to illustrate our approach with three examples, drawn from topics that we introduce in the first month of the course: how courts should resolve clashes between the letter and spirit of the law; how to determine the meaning the words used in statutory and regulatory texts; and the legislative process and its relationship to statutory interpretation (including the use of legislative history).

A. The Letter of the Law versus the Spirit of the Law

Every theory of interpretation requires both a theory of legislation and a theory of adjudication.[25] Accordingly, an important goal of the Leg-Reg course is to help students develop a judicial philosophy—to think about the fundamentals of legislative supremacy, the role of the courts, and the relative place of statutory text and legislative intent and purpose in statutory interpretation. Since the development of such a philosophy requires students to think about complex questions of separation of powers and jurisprudence, one might think this goal a tall order for first-semester 1Ls. To our surprise, 1Ls quickly develop fairly clear senses of what they think. There is almost always a range of views and room for classroom debate. And student opinions change in all directions as the exploration of cases helps them hone their intuitions about how legislatures work and about the appropriate role of courts in our system of government. In part, they are helped by the existence of interesting and accessible cases that raise precisely these issues.

One of us, for example, leads off with *United States v. Kirby*,[26] in which a federal district attorney had indicted a county sheriff (Kirby) for "knowingly and willfully obstruct[ing] or retard[ing] the passage of the mails." What makes the case so interesting is that the sheriff did stop the mail carrier (Farris) just as he was about to board a steamboat with his mail. But Kirby did so only in order to execute a duly issued warrant for Farris' arrest for murder. The case is valuable because almost every student in the class instinctively recognizes that there is something very awkward about enforcing the statute in this situation. But it's not so easy to explain why. Some years, astute students will zero in on what "knowingly and willfully" means. Some will notice that "willfully" must mean something different from "knowingly." Some will look the terms up in *Black's Law Dictionary* and see that "willful," at least, has a specialized legal meaning that implies some form of "bad motive or purpose."[27] This permits a preliminary exploration of how a word or phrase takes on a specialized legal meaning, and when, and why, we should care.

But since the Court's reasoning assumes that the statute is clear but absurd, the case also offers students a larger question: What should a court do when a statute makes little sense as written? Even though the students cannot

25. *See, e.g.*, Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rev. 593, 593–94 (1995).

26. 74 U.S. 482 (1868).

27. Black's Law Dictionary 950, 1737 (9th ed. 2009).

imagine a reason Congress would want Kirby to go to jail for arresting Farris, the challenge for the class is to state a generalizable principle supporting that result. The Court makes it more fun by proclaiming that if Sheriff Kirby had been serving *civil* rather than criminal process, it would have furnished "no justification for the arrest of a carrier of the mail."[28] These *dicta* open up all sorts of interesting avenues of exploration. What about detaining a mail carrier to quarantine him or her? To execute a subpoena to testify at a criminal trial? To address a misdemeanor, such as speeding, jaywalking, or driving without a license? (All of this, by the way, opens up avenues for discussing other forms of legal process for the 1Ls). The Court helpfully emphasized that in the case of an arrest warrant for murder, "[t]he public inconvenience which may occasionally follow from the temporary delay in the transmission of the mail caused by the arrest of carriers upon such charges, is far less than that which would arise from extending to them the immunity for which the counsel of the government contends."[29] This observation invites students to consider where the Court gets the authority to conduct cost-benefit analysis in determining the meaning or scope of a statute. The instructor then has a chance to introduce the inevitable problem of statutory overgenerality—and to begin to explore the question of how the interpreter might devise a rule of decision to cut back on overbroad statutes.

Simpler cases like *Kirby* nicely lay the groundwork for more complicated examples of the conflict between statutory text and apparent statutory purpose, such as *West Virginia University Hospitals, Inc. v. Casey*.[30] In *Casey*, the Court concluded that the text of a statute authorizing recovery of a "reasonable attorney's fee" did not extend to the fees paid to experts who assisted the attorney in preparing the case. Since the Court majority found the text to be clear, the majority did not care that background evidence of legislative purpose pointed squarely in the opposite direction. *Casey* and other modern cases clearly illustrate both the costs and benefits of adhering to the text of a statute when the interpreter confronts strong evidence of a contrary legislative purpose. *Casey* also anticipates the challenges lawyers face when dealing even with seemingly simple terms. The determination of what constitutes a "reasonable attorney's fee" raises nice questions of how to ascertain meaning in context. Is it the hourly billing of a lawyer? Is it a customary fee for representation that includes items such as paralegals, messengers, photocopying, and Westlaw charges? Is it something else? The case also puts into sharp relief the process questions that arise in the choice between text and purpose. Does textualism have any superior claim to capture legislative compromise? Does it permit Congress to draw lines of inclusion and exclusion more precisely? Or does it play "gotcha" with a busy legislature that is prone to make mistakes and that cannot anticipate all that will arise down the road? Students have strong and diverse instincts about these issues—which makes the questions raised by these

28. *Kirby*, 74 U.S. at 486.

29. *Id.*

30. 499 U.S. 83 (1991).

cases highly teachable.

B. The Meaning of Words

A course on legislation must consider communication and theories of language. Again, there are good ways to make this potentially daunting subject intuitive to 1Ls. For example, few cases are as much fun to teach as *Nix v. Hedden*[31]—which asks whether, for purposes of the tariff laws, a tomato is a fruit (untaxed) or a vegetable (taxed at ten percent). It turns out that a botanist might consider a tomato to be a fruit (because it is the seed-bearing part of the tomato plant), but to a grocer, or to the person at the dinner table, a tomato is a vegetable. The case—which takes up less than a page in the casebook—allows the instructor to introduce complexities into the idea of "plain meaning." It permits students to consider the fact that language depends on the practices of a social and linguistic community, of which there are many—including the person in the street, scientists, building contractors, human resources officials, and, of course, lawyers. And the meaning of words will vary depending on whether one attributes to them a specialized or ordinary meaning. *Nix* tells us that the default is the language of the layperson and that there must be good reason to shift to that of the specialist.

Like almost all of these cases, *Nix* also presents deeper issues that instructors may choose to explore. For one thing, if the specialist and layperson have different understandings of a term, should courts treat that variation as a form of ambiguity that invites or even necessitates consideration of legislative purpose? More generally, how does one identify and flesh out a term of art? Does the technical meaning of a term of art trump background evidence of purpose? What role does colloquial meaning play in all of this? Additionally, more adventurous instructors can explore the possible relevance in this case of the "tariff canon," which is a judge-made presumption against applying a tariff in cases of doubt—and which nicely sets up the discussion of canons of construction to come later in the course.

As was true with the text-versus-purpose materials, one can build from simpler, older cases like *Nix* to the more complicated and theoretically involved discussions in more recent cases like *Smith v. United States*,[32] which asks whether someone "use[d]" a firearm "during and in relation to ... [a] drug trafficking offense" when he traded a gun for cocaine. Such cases raise questions about the Court's use of dictionaries, about the trigger for finding ambiguity, and about the problem of how to make sense of a case in which interpreters disagree about "plain meaning." Students come away from these cases with a good working sense about the art and limitations of textual exegesis. Often, because this unit informs their sense of whether there ever is a "plain meaning" to enforce, it will shade back on the question of letter and spirit of the law.

31. 149 U.S. 304 (1893).

32. 508 U.S. 223 (1993).

C. The Legislative Process and Legislative History

As other contributions to this symposium emphasize, a first-year Leg-Reg course should help students understand the legislative process and how it relates to statutory interpretation.[33] The challenge here is that abstract or general discussions of the legislative process can be dry and somewhat inaccessible, particularly for those students without much background in American politics. Again, we have found that the best way to make this material come to life is to use intuitive, accessible cases in which the resolution of the interpretive question requires careful attention to legislative process questions. *Blanchard v. Bergeron*[34] is a prime example. In that case, the Court majority relied in part on a Senate committee report to determine the scope of the "reasonable attorney's fee" that a prevailing civil rights plaintiff may recover from a defendant under the Civil Rights Attorney's Fees Act of 1976.[35] At issue was whether the recovery under that fee-shifting statute was limited by the contractual amount that the plaintiff had agreed to pay his or her lawyer under a contingent fee agreement. In holding that such a contract did not cap the recovery of a "reasonable attorney's fee," the Court treated the Senate committee report as authoritative evidence of the intended meaning of that term. Justice Scalia wrote a stinging separate opinion asserting that no legislator had any idea of what was in the committee reports and that legislative staffers almost surely slipped those cases in the reports solely in order to influence judicial interpretation.

In a few short pages, a case like *Blanchard* introduces a simple, straightforward legislative history problem that will provoke different intuitions in different students. Some think a committee report obviously sheds light on legislative intent. Others see such legislative history as a transparent way to make an end run around the legislative process. From that starting point, the accompanying materials permit the instructor to engage students on a cluster of issues about the legislative process. It permits discussion of the role of legislative committees, and consideration of evidence about whether legislators and their staffs are more likely to read statutory texts or committee reports, and whether that matters. The dispute in *Blanchard*, moreover, calls attention to questions raised by political scientists about the role of committees in the legislative process: Do such committees, in practice, operate as agents of the majority who face effective sanctions if they misrepresent the majority will?[36] To what degree can one expect a typical committee to reflect the composition—or, at least, represent the interests—of the chamber from which it is drawn?[37]

33. *See* Dakota S. Rudesill, Christopher J. Walker & Daniel P. Tokaji, *A Program in Legislation,* 65 J. Legal Educ. 70 (2015); Deborah A. Widiss, *Making Sausage: What, Why, and How to Teach About Legislative Process in a Legislation or Leg-Reg Course*, 65 J. Legal Educ. 96 (2015).

34. 489 U.S. 87 (1989).

35. 489 U.S. at 91-92.

36. *See* Manning & Stephenson, *supra* note 6, at 173–74.

37. *Id.*

Other interpretation cases provide opportunities to explore other aspects of the legislative process, along with the implications for statutory construction. For example, *Tennessee Valley Authority v. Hill*[38] requires students to think about the implications of committee jurisdiction, as well as the distinctive roles of authorizing legislation and appropriations legislation. What is a court to do when appropriations committees earmark funds for a public works project whose completion seems to be prohibited by earlier substantive legislation originating in a different set of committees? How, if at all, should the division of jurisdiction between appropriations and substantive committees help the Court decide how to sort out the conflicting signals?[39] The famous *Continental Can* decision,[40] in turn, introduces students to the practice of "bulleting" floor statements.[41] What should an interpreter do when a bill sponsor places his or her authoritative interpretation of the bill into the *Congressional Record*...but does so (under accepted rules of practice) only *after* the chamber has voted to pass the legislation? And since *Gustafson v. Alloyd Company, Inc.*[42] instructs us that "identical words used in different parts of the same statute are intended to have the same meaning," anyone teaching that case must examine with students whether such "consistent usage" canons correspond to the empirical realities of legislative practice.[43] The list goes on.[44]

In our experience, using this case-based approach to teaching complex material about the legislative process has worked well for 1Ls. Building out from cases makes potentially abstract and sometimes dry process questions more concrete and immediately relevant to legal novices. Rather than ask 1Ls to examine freestanding excerpts of often-voluminous legislative or regulatory materials, the case approach invites them to wrestle with legislative practice, staff attitudes, inter-branch dynamics, and other process questions in real-world controversies that sharpen the issues and define the stakes. Besides offering a format that is more familiar to 1Ls, this method makes it immediately apparent *why* students should care about process details that might seem arcane to the uninitiated (such as planned colloquies, the special role of conference committees, and the idiosyncrasies of the appropriations process). Although

38. 437 U.S. 153 (1978).

39. *See* Manning & Stephenson, *supra* note 6, at 17–18.

40. Continental Can Co., Inc. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union, 916 F.2d 1154 (7th Cir. 1990).

41. *See* Manning & Stephenson, *supra* note 6, at 149–50 (discussing practice of "bulleting").

42. 513 U.S. 561, 570 (1995) (quoting Dep't of Revenue of Ore. v. ACF Indus., Inc., 510 U.S. 332, 342 (1994)) (internal quotation marks omitted).

43. *See* Manning & Stephenson, *supra* note 6, at 224–26.

44. *See, e.g.*, *id.* at 90-91 (using Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989), to explore the House-Senate reconciliation process and what interpretive weight to attach to conference reports that come from that process); *id.* at 280-81 (discussing competing conclusions of studies examining legislative awareness of canons generally); *id.* at 769 (discussing the implications of findings by Gluck and Bressman, *supra* note 24, that legislators produce legislative history, in part, to shape agency policymaking).

there are many good ways to teach about the legislative process,[45] we have found that the cases we have used help make unintuitive material intuitive to our 1L audience get them engaged and stir debate about how the (often-divided) opinions should have come out.

* * * * *

In short, to address the concerns that a 1L Leg-Reg course would prove too abstract, complex, or otherwise inaccessible for first-year students, most (though not all) of us teaching the course at Harvard have employed the following strategy: (1) use something resembling the familiar case method; (2) select cases spanning a range of substantive policy areas; (3) open the course with the legislation/statutory interpretation material, which is more immediately accessible and lays the foundation for the more complicated material to come later; and (4) start with cases that provoke strong intuitive reactions from the students, but that (when possible) do not tend to trigger pre-existing political or ideological commitments. The course's premise is that students will develop a knowledge base, a practical skill set, and a judicial philosophy by being exposed to lots of cases that raise diverse issues in recurring ways in distinct settings. We have attempted to illustrate this approach with a handful of examples that, we hope, show how one can introduce both the legislation material and the broader themes of the course.

It is important to keep in mind that in a methodology course—in a course about the art of interpretation—no case will involve only one issue. Each case may have a primary focus, but it is surprising how many issues—word meaning, legislative history, semantic canons, structural inference, judicial role, etc.—come up repeatedly as incidental parts of a case whose main focus and payoff are something else. Though that can be a challenge in some respects, it is also a virtue: Students get to see common issues presented again and again in different ways, in different areas of law, with different policy and political valences. At times, they will see a tool deployed in a way that produces a result in line with their policy instincts. At other times, that same tool will produce results that disappoint them. The immersion in cases also allows students to see the way different techniques work in combination and develop a sense of how to deploy them in the holistic way that interpretation necessitates. Finally, students also have an opportunity to develop a view of the reliability

45. In addition to our book, a growing array of casebooks have been designed or adapted for a 1L Leg-Reg course. *See, e.g.*, Lisa Schultz Bressman, Edward L. Rubin & Kevin M.Stack, The Regulatory State (2d ed. 2013); William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy (5th ed. 2014); William N. Eskridge, Jr., Abbe R. Gluck & Victoria F. Nourse, Statutes, Regulation, and Interpretation: Legislation and Administration in the Republic of Statutes (2014); Lisa Heinzerling & Mark V. Tushnet, The Regulatory and Administrative State (2006). In addition, a number of basic legislation and statutory interpretation books might be adapted to a 1L course. *See, e.g.*, Abner J. Mikva & Eric Lane, Legislative Process (3d ed. 2009); William D. Popkin, Materials on Legislation: Political Language and the Political Process (5th ed. 2009); Caleb R. Nelson, Statutory Interpretation (2010).

and efficacy of different techniques they are seeing in a variety of contexts. Is the statutory text really more constraining than the legislative history? Or can a willful judge manipulate either? By the end of the interpretation unit of the course, students have developed a good sense of the available tools and how to deploy them, of the institutional stakes, and of their own philosophies of judging, which typically span a broad spectrum and migrate in different directions for different people during the semester. At the conclusion of the Legislation part of the course, students also have the skills and instincts necessary to take on the complexities presented by the Regulation part that follows—and to which we now turn.

III. Regulation

One of the distinctive features of the Harvard Leg-Reg course—and other similar courses offered at, for example, NYU and Vanderbilt—is the integration of statutory interpretation ("Leg") and administrative law ("Reg") into a single course, rather than simply moving the existing Legislation or Administrative Law courses into the 1L curriculum. The inclusion of an introduction to administrative law in the 1L year was deemed important because of the centrality of administrative regulations to modern law and legal practice. Moreover, the HLS Committee on Educational Innovation and the working group that designed the Leg-Reg course believed that the integration of the statutory interpretation and administrative law materials would enhance the students' understanding of each, and would allow for a more comprehensive exploration of common themes.

Nonetheless, the inclusion of the introduction to administrative law in the 1L course presented its own set of challenges. It would clearly be foolish to try to cram all of Legislation and Administrative Law into a single 1L semester. Rather, the objective for Leg-Reg was to give students a basic foundation in the regulatory apparatus so that the students could hit the ground running, as 2Ls, in courses such as Environmental Law, Labor Law, Securities Regulation, and the upper-level courses in Administrative Law and Legislation. Our judgment was to zero in on the aspects of administrative law that are (1) fundamental to understanding the basic structure of the administrative state and the nature of regulation; (2) most likely to come up in the upper-level public law courses for which Leg-Reg supplies the prerequisites; and (3) accessible to first-semester 1Ls who have had the "legislation" component of the Leg-Reg course but have not yet had, say, Constitutional Law.

These considerations led us to emphasize four general topics in administrative law (though, again, each instructor approaches these topics in a different way, and organizes the material somewhat differently). *First*, we thought it important to give students a sense of the constitutional and policy controversies surrounding the very existence of the administrative state, and the practice of congressional delegation of lawmaking power to administrative agencies. *Second*, we build on that theme by introducing students to controversies surrounding the control of agencies by the political branches,

including appointment and removal of agency officials and other forms of potential presidential and congressional control of agencies. *Third*, the course introduces students to the procedural framework for agency lawmaking, focusing in particular on the notice-and-comment rulemaking process under the APA, as well as "hard look" judicial review of agency rules under the APA's "arbitrary or capricious" standard. *Fourth*, the course links the material on administrative law with the earlier material on statutory interpretation by spending a fair bit of time on judicial review of agency statutory interpretation (covering *Chevron* doctrine and related topics).

Although we worried about the accessibility of such material to 1Ls, we have found that the foundation in statutory interpretation gives students a feel for analyzing both the constitutional and statutory issues that frame the modern administrative state, as well as a working knowledge of legislative and interest group dynamics. By midsemester, 1Ls steeped in legislation have ample tools to process such questions. We will again try to make this all a bit more concrete by selecting a handful of examples to illustrate how the Leg-Reg course approaches each of the four major administrative law topics outlined above, and then say a few words about how the introduction of Leg-Reg has affected the upper-level Administrative Law course, as well as the upper-level public law curriculum more generally.

A. The Delegation Problem

We have found that the best way to introduce the administrative law component of the course is to focus on constitutional and policy questions about the delegation of lawmaking power to administrative agencies. This works quite well, for three reasons.

First, after the students have spent several weeks learning about the important role of statutes in the contemporary legal universe, and also about the difficulty of passing new statutes, the instructor can introduce the fact that many statutes do not actually specify primary conduct rules, but rather empower an agency, department or commission to make such rules. Getting the basic point across is not hard, and there are many examples to use (such as the rule against insider trading, or most federal environmental regulations). One can point out that such rules ultimately originate in a constitutional grant of the lawmaking power to Congress (such as the power to "regulate Commerce...among the several States"[46]), but that Congress sometimes chooses to exercise that power not to prescribe a rule of conduct, but to authorize an agency to do so under specified criteria.[47] Students see that the agency rules adopted pursuant to these statutes look, feel, and operate just like a statute (and that in some cases can result in criminal sanctions against

46. U.S. Const. art. I, § 8, cl. 3.

47. *See, e.g.*, 15 U.S.C. § 78j(b) (2012) (making it unlawful, in securities transactions in interstate commerce, to use "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission] may prescribe as necessary or appropriate in the public interest or for the protection of investors").

someone who violates the agency rule). Even before getting to the legal issues, many students are instinctively distrustful of this practice, while others will offer a spirited defense of delegation.

Second, the constitutional nondelegation cases—like *J.W. Hampton, Jr. & Co. v. United States*,[48] *A.L.A. Schechter Poultry Corp. v. United States*,[49] and *Whitman v. American Trucking Associations*[50]—allow the instructor to introduce some basic issues in constitutional structure and constitutional interpretation. For most students, this will be their first introduction to structural constitutional law. But, having spent several weeks thinking, at least indirectly, about the constitutional lawmaking process, and gaining familiarity with some standard interpretive techniques (textual exegesis, structural inference, etc.), students can absorb this material.[51] The cases here allow students to grapple with the question of how one identifies the borders among different constitutional powers. (For example: Is rulemaking an example of "executive" or "legislative" power?) The topic also introduces students to all sorts of more general questions about constitutional interpretation, including the relationship between constitutional text and constitutional structure and the role historical practice and pragmatic considerations should play in determining constitutional meaning,

Third, even though students quickly learn that the Supreme Court no longer enforces a meaningful constitutional nondelegation doctrine, the material on delegation nicely sets up the rest of the administrative law material in the course. Instructors can periodically return to the basic tension introduced by this material-the desire to balance the virtues of delegation (speed, expertise, flexibility, a healthy insulation from politics) against the vices (arbitrariness, unlawfulness, evasion of constitutional safeguards, loss of democratic accountability)—and frame much of the rest of our administrative law as an effort to reconcile this tension.

B. Political Control of Administrative Agencies

A natural next topic after delegation is congressional and presidential control of agencies—topics like the legislative veto, appointment and removal of agency officials, and presidential and congressional oversight of agencies more generally. Although some of the more skeptical members of the HLS working group that developed the Leg-Reg course feared this would be too much for 1Ls to handle, we have found that it works quite well once the

48. 276 U.S. 394 (1928).

49. 295 U.S. 495 (1935).

50. 531 U.S. 457, 474 (2001).

51. Although many view statutory and constitutional interpretation as fundamentally different (*see*, *e.g.*, Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 Colum. L. Rev. 606, 619, 624 (2008); Terrance Sandalow, *Constitutional Interpretation*, 79 Mich. L. Rev. 1033, 1046 (1981)), the tools learned in statutory interpretation give students a starting point for thinking about how to discern the meaning of texts, the role of terms of art, purposive adaptation of texts over time, the art of negative implication, and countless other issues that come up in the structural constitutional cases.

groundwork has been laid by the earlier parts of the course. Separation of powers cases—cases like *Chadha*,[52] *Humphrey's Executor*,[53] and *Morrison v. Olson*[54]—might seem daunting, but they follow naturally from the nondelegation cases, both thematically and methodologically.

Thematically, these cases allow one to explore more deeply the tension between, on the one hand, wanting agencies to have a healthy insulation from partisan politics, and, on the other, fearing a lack of democratic accountability. They also allow one to raise questions such as: If Congress chooses to delegate broad policymaking authority to other branches, what strings may it attach to the exercise of those powers? What control does Congress legitimately exercise over delegated power? And is there any practical difference between formal (and proscribed) instruments of control, such as the legislative veto, and more informal (and permissible) means, such as oversight hearings, appropriations strings, confirmations, and the like?

Methodologically, the separation of powers cases nicely build on the delegation cases because they again raise issues of constitutional interpretation, and of the constitutional structure more generally. As was true in the statutory interpretation section of the course, here the most effective way to introduce seemingly complex material is to start with the more straightforward cases —the nondelegation cases—and then build on that foundation to the more complicated material. And because many of the separation of powers cases involve questions of textual exegesis, these cases provide opportunities for cumulative work on the skills and understandings developed earlier in the course.

C. The Rulemaking Process

Clearly a course that purports to introduce students to administrative law must cover the APA. But how much? And what parts? Covering as much of the APA as is typically covered in an upper-level Administrative Law course is not feasible. Working out what the APA component of the Leg-Reg course should include—and what should deliberately be left to the upper-level course—was one of the most challenging questions faced by those of us who participated in the design of the HLS Leg-Reg curriculum. While there is some variation, most of us nonetheless reached consensus that the Leg-Reg course should: (1) provide a brief introduction to the APA and its origins; (2) focus primarily on notice-and-comment rulemaking; (3) include some discussion of the main alternatives to rulemaking and controversies over their legitimate scope; and (4) introduce students to so-called "hard look" review under the "arbitrary or capricious" standard in §706(2)(A) of the APA. In discussing the notice-and-comment rulemaking process, instructors can profitably draw on material from earlier in the course, in several ways.

52. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

53. Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935).

54. 487 U.S. 654 (1988).

First, the prior discussion of the controversies surrounding delegation is quite useful here, as one can frame the APA as an attempt to mitigate the vices of delegation, while preserving its virtues, through *proceduralization*. Here, a recurring theme—which instructors can bring out, and which provokes strong reactions among the students—is the tension between concerns about *over*-proceduralization (manifest in cases like *Florida East Coast Railway*,[55] *Vermont Yankee*,[56] and *Pacific Gas & Electric*[57]) and concerns about *under*-proceduralization (manifest in cases like *Nova Scotia*,[58] *Hoctor*,[59] and *State Farm*[60]). In the context of discussing procedures as a response to concerns about arbitrariness, lack of accountability, and potential agency overreaching, a teacher can also draw out instructive comparisons between the agency rulemaking process and the congressional lawmaking process that students studied in the statutory interpretation part of the course.

Second, because so many of the cases on the APA rulemaking process are, at least formally, statutory interpretation cases—about how the APA's various provisions ought to be construed—students can draw on (and be urged to draw on) the material from the statutory interpretation section of the course when thinking about, for example, how to construe the APA's rulemaking requirements, and how to make sense of open-ended terms such as "arbitrary [and] capricious." Often, the doctrinal interpretive questions and the normative institutional design questions go hand in hand.

For example, the Second Circuit's opinion in *Nova Scotia*—a leading case on the so-called "paper hearing" requirement—raises difficult questions about interpretive theory and about agency lawmaking dynamics. Despite the APA's self-consciously relaxed notice requirements for informal rulemaking (requiring that the agency need only state "the terms or substance of the proposed rule or a description of the subjects and issues involved"[61]), the *Nova Scotia* court held that, in promulgating a rule for the sanitary preparation of various smoked fish, the Food and Drug Administration erred by failing to release the "scientific data" upon which it proposed to rely.[62] And although the APA only requires that a final informal rule needs to be accompanied by a "concise general statement of [the rule's] basis and purpose."[63] The *Nova Scotia* court held that when an agency issues a rule, the accompanying explanatory

55. United States v. Fla. E. Coast Ry. Co., 410 U.S. 224 (1973).

56. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978).

57. Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33 (D.C. Cir. 1974).

58. United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).

59. Hoctor v. U.S. Dep't of Agric., 82 F.3d 165 (7th Cir. 1996).

60. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

61. 5. U.S.C. § 553(b) (2012).

62. *Nova Scotia*, 568 F.2d at 251.

63. *Id.* § 553(c).

materials must respond in detail to any comments of "cogent materiality."[64] Although these new requirements seem hard to square with the APA's text, the court famously used pragmatic and structural arguments to reach its result. Pragmatically, the court emphasized that the APA requires notice *and comment*—and that comments would not be very meaningful if the public did not know the material facts upon which it was commenting. Second, under the APA's judicial review provisions, the court had to determine if the agency rule was "arbitrary and capricious,"[65] a duty that the court could not fulfill if the agency did not give detailed responses to the material comments submitted by the parties.

The court's interpretive moves stimulate many questions by and for the students. The court in *Nova Scotia*—and in many of the other APA cases we cover in the course—adopted a purposive, dynamic approach to reading the APA, heavily influenced by pragmatic considerations (and at least arguably untethered, or only loosely tethered, to the text of the statute and the original understanding of how it would operate). Assessment of that approach again requires students to revisit issues they wrestled with in the "Leg" part of the course, but does so in a way that also requires students to focus on the regulatory dynamics of the administrative state. Quite often students find their earlier intuitions about statutory interpretation unsettled by the APA materials: Some students who gravitated toward more purposivist or pragmatic approaches feel instinctively that courts in cases like *Nova Scotia* went too far; there are also usually some students who self-identified as textualists who would make an exception for the APA. Thus, the discussion of the APA is enriched by the students' exposure to interpretive theory, and vice versa. *Nova Scotia* and other cases in this line also raise interesting questions about the political history of the APA and the nature of legislative compromise.

Furthermore, *Nova Scotia*, along with the landmark Supreme Court decisions in *Vermont Yankee* and *State Farm*, provide opportunities to explore broader questions about the appropriate judicial role in overseeing agency decision-making. For example, the class can discuss the hypothesis that the paper hearing requirement was in part a reaction to research suggesting that agencies might be "captured" by those they regulated. On that view, courts responded by insisting upon greater transparency by agencies and more robust checks upon agency lawmaking by a relatively independent judiciary. This naturally leads into questions not only about the plausibility of the "capture" hypothesis, but about which parties benefit most from greater proceduralization, and whether judges are well-qualified to make judgments as to what procedures would be most suitable. These cases also allow the instructor to introduce concepts such as the "ossification" of rulemaking, the judicial administrability of the "hard look" review approach, and, more generally, about the transaction costs of agency lawmaking, and about the limits of judicial competence.

64. *Id.* at 252.

65. 5 U.S.C. § 706 (1976).

D. Judicial Review of Agency Statutory Interpretation: It All Comes Together

The *Chevron*[66] material neatly brings together themes about statutory interpretation, the delegation of interstitial lawmaking power, and the allocation of constitutional authority among different branches of government. Although different Leg-Reg instructors teach the *Chevron* material at different points in the syllabus, the two of us, and some of our colleagues, have found that it's a great way to pull the course all together at the end.[67] After all, the first section of the course introduces students to the foundational themes, tools, and controversies in statutory interpretation, and the second section of the course introduces students to questions about the appropriate role of agencies and the tension between the desires to empower and to constrain agencies; the *Chevron* material combines those two topics, neatly closing the circle.

Indeed, teaching *Chevron* at the end of Leg-Reg is in some ways easier—and more rewarding—than teaching that material in an upper-level Administrative Law class that lacks a significant standalone statutory interpretation component. This is because many of the most interesting and important *Chevron* questions involve the relationship between *Chevron* deference and other tools and techniques of statutory construction, and the *Chevron* unit allows the instructor to return to those issues again, but in a different context. (This has the collateral benefit of providing some review of the material from the beginning of the course—which 1Ls nervous about finals generally appreciate, particularly if the instructor points this out.) But the instructor can *also* continuously integrate into this discussion themes and questions that were introduced in the earlier administrative law materials, particularly questions about how much of a role courts should have in overseeing agency decision-making.

Again, there are many ways to cover this material, but one of us has found it is particularly helpful to take the issues covered in the statutory interpretation unit, and then move through the same issues, in the same order, in the *Chevron* context, explicitly drawing the parallels as the course proceeds. For example, suppose in the statutory interpretation unit, the instructor chooses to cover: (1) textual/semantic interpretation (dictionaries, etc.); (2) purposive/structural interpretation; (3) legislative history; (4) specialized terms of art; (5) semantic canons of construction; and (6) substantive canons of construction (say, the constitutional avoidance canon). Then, in the *Chevron* unit, after spending a class or two on *Chevron* itself, the instructor can proceed to cover: (1) *Chevron* and "plain meaning" (*MCI v. AT&T*[68]); (2) *Chevron* and purposive/structural

66. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

67. In contrast, our colleague Einer Elhauge believes that "it makes much more sense to teach *Chevron* as part of the statutory interpretation segment, because it is the most important rule of statutory interpretation, and I have found it easy to do so without covering all the other administrative material first." Elhauge email, *supra* note 20.

68. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994).

interpretation (*FDA v. Brown & Williamson*[69]); (3) *Chevron* and legislative history (many possibilities, but perhaps easiest to do with hypothetical variants on *MCI* and *Brown & Williamson*); (4) *Chevron* and specialized terms of art (*Babbitt v. Sweet Home*[70]); (5) *Chevron* and semantic canons (*Babbitt* again); and (6) *Chevron* and the constitutional avoidance canon (*DeBartolo* and *Rust v. Sullivan*[71]). For each "*Chevron* and _____" component, one can press the students on the extent to which *Chevron* makes a difference to the outcome. This entails thinking about both the underlying question of statutory interpretation and the degree to which courts should accept agency interpretations with which they disagree.

E. The Impact on Upper-Level Administrative Law

As noted at the outset, a worry about the introduction of a 1L Leg-Reg course is the impact on the upper-level Administrative Law course. There are actually two concerns here. First, it might seem challenging to design an upper-level course that is both interesting and thematically coherent if so much of the basic administrative law material—delegation, notice-and-comment rulemaking, hard look review, and *Chevron*—has been covered in the first year. Second, student interest in upper-level Administrative Law might plummet if the students perceive Leg-Reg as a substitute. Happily, at HLS neither fear has been realized.[72]

First, with respect to the content of the course, it turned out to be much easier than expected to design an effective, coherent upper-level Administrative Law course that would serve as a follow-on to Leg-Reg, going into more topics and in greater depth than would be possible in a standalone Administrative Law course. Although different instructors approach the upper-level course differently, there are some common themes that those of us who teach the upper-level course generally incorporate. *First*, the upper-level course devotes considerable attention to issues related to administrative adjudication—a topic for the most part deliberately left out of 1L Leg-Reg. These topics include the Due Process issues, the APA provisions on administrative adjudication, agencies' obligations to follow their own precedents, and the like. *Second*, the upper-level course typically revisits issues related to agency legal interpretation (including a brief review of *Chevron*), but covers a broader range of more sophisticated issues, including the relevance, if any, of agency interpretive inconsistency and prior judicial interpretations of the statute (both issues raised

69. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

70. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995).

71. Rust v. Sullivan, 500 U.S. 173 (1991); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988).

72. For thoughtful consideration of the effect of adopting a first-year Legislation or Leg-Reg at other schools, *see* James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?*, 65 J. Legal Educ. 3 (2015); Abbe R. Gluck, *The Real Effect of "Leg-Reg" on the Study of Legislation & Administrative Law in the Law School Curriculum*, 65 J. Legal Educ. 121 (2015).

in the *Brand X* case[73]), the issues of *Chevron*'s domain (or "step zero") raised in *Mead*,[74] statutes administered by multiple agencies, and agency interpretation of the agency's own regulations (*Auer/Seminole Rock* doctrine[75]). *Third*, the upper-level course introduces various ways that agencies engage with outside parties, besides through participation in the adjudicative or rulemaking procedures. Here, the course typically covers transparency statutes like the Freedom of Information Act and the Federal Advisory Committee Act, as well as issues related to sub-delegation or privatization of agency functions. *Fourth*, the upper-level course covers issues related to access to the courts: standing (both statutory and constitutional), exhaustion, ripeness, and statutory preclusion of judicial review.

Second, with respect to student enrollment, although fewer students now take Administrative Law than was the case when Leg-Reg did not exist, enrollment in upper-level Administrative Law remains substantial, with two to four sections needed every year to satisfy student demand.[76] And those students who do enroll in the upper-level course are especially interested in the material and committed to the course. The result is that now all of our students get a basic exposure to administrative law, and those of our students who have a particular interest in the field—say, those who want to work in fields where government regulation is especially important—have at least two semesters of administrative law, and consequently know much more about the topic than, frankly, either of us did when we graduated from law school.[77]

IV. CONCLUSION

In a world in which so much lawmaking takes the form of enacted texts—whether statutory or regulatory—it is hard to deny that a course that focuses on

73. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

74. United States v. Mead Corp., 533 U.S. 218 (2001). Some Leg-Reg teachers include *Mead* at the very end of the course, but others do not; it is one of the topics that our working group concluded should be optional, and also one of those topics to which even students who have seen it in 1L year generally profit from a second exposure.

75. Auer v. Robbins, 519 U.S. 452, 461 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

76. In the past five years, enrollment in Administrative Law has averaged roughly 224 students per class. For the two years before the introduction of Legislation and Regulation, the annual average was 345 students.

77. Our colleague Jody Freeman adds:

> We have several classes that could fit in the category of "advanced admin law" or "advanced administrative state" and I think appetite has been fed by the 1L exposure. In addition, I think it's fair to speculate that student appetite for heavily statutory classes may also have been whet[ted] by early exposure. My students arrive in environmental law much more prepared and much more interested....

E-mail from Jody Freeman, Professor, Harvard Law Sch., to the authors (Nov. 13, 2014, 12:56 EST) (on file with authors).

lawmaking dynamics and textual interpretation is foundational. The question is not whether it would be good for 1Ls to learn what this course has to offer. To us, the question was whether the materials were intuitive and accessible enough for them to do so. In contrast with much about Contracts, Criminal Law, Property, or Torts, there is relatively little about legislative procedure, notice-and-comment rulemaking, deference, and the like that is intuitive to students—that resonates with experiences they have had in life. But, in our experience, the course can be made accessible, in part, by building out from cases or controversies—real-life issues that cut across many areas of law and many kinds of human experience—to the questions of theory and process that frame the decisions. Both of us have found that, if structured in that way, the course works, both for the students and for us.