

# Making Sausage: What, Why and How to Teach about Legislative Process in a Legislation or Leg-Reg Course

Deborah A. Widiss

## Introduction

For well over a century, we have been warned that because laws are like sausages, it is better not to see them being made.<sup>1</sup> The contemporary Congress—notorious for its gridlock and dysfunction—might seem to argue this approach all the more strongly. However, many core principles of statutory interpretation are grounded in assumptions about how Congress operates. Agencies charged with implementing a law are often involved in drafting it and advocating for it, and they are well-attuned to the messages Congress sends about its intended meaning and effect. Accordingly, students will be far more effective in using and applying statutory laws if they have a basic familiarity with the process by which laws are enacted.

That said, even now that law schools are increasingly requiring students take a course on Legislation and Regulation (“Leg-Reg”), or simply Legislation, as part of the first-year curriculum,<sup>2</sup> many of these required courses teach very little about the legislative process itself. If students receive only a cursory introduction to the traditional “textbook” process, which suggests an orderly march from committee consideration to floor debate to presidential signature, they will be left adrift when faced with the reality that many major bills follow other paths.<sup>3</sup> Of course, professors constantly make tough decisions about what to cover in the limited time available to teach any course, and the

**Deborah A. Widiss** is Professor of Law, Indiana University Maurer School of Law. My thanks to Jim Brudney and Bill Popkin for helpful comments on earlier drafts, and to Rachel Collins and Lyndsey Mulherin for research assistance.

1. The quote is typically attributed to Otto von Bismarck, but the comparison between laws and sausages may have originally been made by John Godfrey Saxe in 1869. See Fred R. Shapiro, *Quote...Misquote*, N.Y. TIMES MAGAZINE (July 21, 2008), available at [http://www.nytimes.com/2008/07/21/magazine/27wwwl-guestsafire-t.html?\\_r=0](http://www.nytimes.com/2008/07/21/magazine/27wwwl-guestsafire-t.html?_r=0) (last visited 5th May, 2015).
2. See James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?*, 65 J. OF LEGAL EDUC. 3 (2015) (reporting nearly 40 law schools currently require a Leg-Reg or Legislation class, mostly as part of the first-year curriculum); see also Abbe R. Gluck, *The Ripple Effect of “Leg-Reg” on the Study of Legislation & Administrative Law in the Law School Curriculum*, 65 J. LEGAL EDUC. 121 (2015) (collecting data on both required and elective Leg-Reg, Legislation, and Administrative Law classes at the 99 top-ranked schools).
3. See *infra* subpart I.A.

scope of coverage in Leg-Reg courses, in particular, is already quite broad. In this essay, however, I argue that required 1L classes, as well as upper-level Legislation electives, should help students understand how laws are made—and, furthermore, that it is relatively easy to do so.

This essay discusses *what*, *why*, and *how* to teach about the legislative process. First, *what* and *why*. When I advocate teaching about the legislative process, I do not mean that students should be asked to learn the arcane parliamentary procedures that govern the U.S. House and Senate. Rather, as described in Part I, I seek to give students a working understanding of what a bill is—how it is drafted and what it looks like—and the numerous different ways in which bills advance through Congress. As described in Part II, this provides an important foundation for students' future work as practicing lawyers. My primary objective is to show how knowledge of the legislative process informs statutory interpretation by giving students the tools they need to be intelligent consumers of legislative history; to evaluate and respond to critiques of the use of legislative history; and to assess the strengths and weaknesses of canons of interpretation that are premised on assumptions (or misassumptions) about how statutes are debated and drafted. Teaching this material also gives students a window into the many roles that lawyers play in the process and it can make students more informed and involved participants in our democratic society.

And now, *how*. Some professors might agree that it would be good for students to learn about the legislative process but feel they have inadequate knowledge to teach it. Relatively few law professors have worked for—or with—the legislative branch.<sup>4</sup> Fortunately, there are several recently published studies that make congressional practice and procedure far more accessible than they have been in the past.<sup>5</sup> Accordingly, although I draw on my own experience lobbying at both the state and federal level for a women's rights organization, professors who have never directly participated in the legislative process can also teach this material effectively. (For perspective, consider that professors often teach substantive areas of law outside their former areas of practice, and indeed that some professors teaching in law schools have never been practicing attorneys.)

4. See Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 WASH. U. L. REV. 699, 702 (2010) (reporting only 5 percent of professors at elite law schools have worked for a legislative institution at any level).
5. See, e.g., Abbe R. Gluck & Lisa 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 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); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

Part III of this essay discusses specific resources that professors may use. It highlights existing textbooks that effectively introduce how Congress actually operates and identifies supplemental readings that professors may assign to their students or read themselves to provide additional context and nuance. I then describe two credit-fail assignments that I use to deepen student understanding through hands-on learning. The first asks students to debate and then draft a short bill; this simulation, which takes three hours of class time, gives students a taste of legislative negotiation and the challenges of writing clear statutory language. The second assignment asks students to find key legislative history for a statute that interests them. Finally, I discuss my success inviting guest speakers with relevant knowledge to address my classes. In total, I spend nine hours of class time presenting the material on the legislative process discussed below (and then we refer back to concepts frequently during class discussions of statutory interpretation later in the semester).<sup>6</sup> This coverage could be scaled up or down as necessary or desired.

Of course, there is no way that a few class hours within a semester, or even a full semester of classroom instruction, could teach students how Congress, state or local legislative bodies “really” work. For some students, the taste provided in an introductory course may spur an interest in taking upper-level experiential learning offerings, such as legislative clinics, or seeking internships, externships, or post-graduation careers working with or for legislative bodies.<sup>7</sup> For others, it will simply inform their study in the rest of the Legislation or Leg-Reg course, as well as statute-based courses in the upper-level curriculum, and provide a foundation for the statutory research they will do as practicing lawyers. But the fact that the treatment cannot be comprehensive does not mean that it should be ignored. It is essential that students are familiar with the process by which laws are made if they are to have a good understanding of the laws that are yielded by that process.

### **Part I – *What to Teach about the Legislative Process***

Most students come to law school with a vague memory from high school civics (or perhaps the “Schoolhouse Rock” classic “I’m Just a Bill”) of the basic process by which, traditionally, a bill becomes a law. It is introduced, considered by a committee, debated and perhaps amended on the floor, and then, if passed, moves to the other house where the process is repeated; differences are resolved, either by sending the bill back and forth between the houses or in conference committee; and the bill is ultimately presented to the president for his signature. This is helpful as far as it goes, but this bare-bones summary gives students very little context for understanding how the

6. I teach an upper-level Legislation class as an elective in a school that does not have a course on statutory interpretation in the first-year curriculum, but I think the objectives and strategies discussed below could be used effectively in a first-year required course.
7. For examples of experiential learning opportunities in the upper-level curriculum, see Dakota S. Rudesill, Christopher J. Walker & Daniel P. Tokaji, *A Program in Legislation*, 65 J. LEGAL EDUC. 70 (2015).

legislative process *actually* plays out—who writes the bill language? Who reads it? How are hearings structured? What happens in a committee markup? Who writes a committee report? What is in it? Who reads it? What happens in floor debate? And—key for future attorneys—what records of these steps exist that can be consulted afterward? Moreover, in the contemporary Congress, it is increasingly common for bills to bypass one or more of the steps on this path. In other words, students need to be taught how to translate the abstract flow chart that typically illustrates the legislative process into the complex, messy, often frustrating, but ultimately necessary process by which laws are written and enacted.

I try to offer students a window into this world, emphasizing four interrelated aspects of the legislative process that I believe are directly relevant to preparing students to be practicing lawyers: (1) the multiple different paths a bill may take through a legislative body; (2) how bills are drafted; (3) what bills—as opposed to codified statutory law—look like; and (4) the basic parameters of the federal budget process and the important differences between authorization legislation and appropriation legislation. Electronic resources make it relatively easy to locate and read the most important records of the legislative process. Early training can thus lay the groundwork for attorneys who can efficiently and effectively use an understanding of the legislative process to serve their future clients.

A note of context is important. In recent decades, academics and judges have vigorously debated the appropriateness of consulting legislative history when interpreting statutes. Although some judges have taken strong stands against the practice, arguments drawn from legislative history remain important.<sup>8</sup> Likewise, understanding the process by which bills are actually enacted can provide arguments in favor or against certain canons of statutory interpretation. Additionally, agencies rely heavily on legislative history in implementing statutes, and thus understanding these resources can help students who will interact with regulators.<sup>9</sup> Accordingly, as discussed more fully in Part II, whatever position one might take on these contested issues as a scholar, I believe it is appropriate to give our students the tools they will need to make these arguments as advocates.

#### *A. Multiple Paths from Introduction to Enrollment*

Barbara Sinclair has documented over multiple volumes of her seminal book, *Unorthodox Lawmaking: New Legislative Processes in the U. S. Congress*, that what was once unorthodox—that is, bypassing the orderly progression of committee

8. See Nourse, *supra* note 5, at 72 n.1 (2012) (reporting prevalence of discussion of legislative history in recent appellate case law).
9. See James J. Brudney, *supra* note 2, at 17 (discussing the importance of legislative history for agencies); Gluck & Bressman, *Part I, supra* note 5, at 972 (reporting that 94 percent of surveyed congressional staffers indicated “the purpose of legislative history is to shape how agencies interpret statutes”).

consideration, markup, and then floor debate—has become commonplace.<sup>10</sup> It is now entirely routine for major legislation to bypass the committee process in one or both houses.<sup>11</sup> Omnibus statutes—statutes that combine multiple distinct subjects, often originally introduced as distinct bills, into a single mega-statute—have also become increasingly accepted.<sup>12</sup> Both changes have increased the power of party leadership relative to committee chairs. More pertinent for law students, both also shape the legislative history record and, arguably at least, the appropriateness of employing some canons of statutory interpretation. Accordingly, in presenting the legislative process, professors should emphasize the *many* ways in which bills progress through Congress and how this has changed over time, since students will be asked to interpret statutes from many different eras.

Committees have long been central to the process; although their influence is decreased, they continue to play a key role. As described more fully in Part III, using a combination of case studies and background reading, I teach students about how bills are assigned to committees (including strategic drafting decisions to affect such assignments) and the significance of having support from the chair of the committee and any relevant subcommittees. This conversation introduces the key concept of veto gates—the many steps in the legislative process where initiatives may be killed and the power that is yielded by those who control these gateways. We discuss the hearing process and committee markup. We look together at a committee report (and later, as described below, students are required to find committee reports on their own). We talk about how reports are used to inform other members and their staffs about legislation, as well as agencies and later courts,<sup>13</sup> and that their plain-language summaries of bills are generally far more accessible than bill language itself. I emphasize that in the House, bills are often assigned to multiple committees, meaning that there may well be multiple committee reports that should be identified in research. On the other hand, as noted

10. BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (4th ed. 2011).
11. Sinclair reports that in many recent Congresses, over 30 percent of major legislation bypassed committee consideration in at least one house. *See id.* at 147. Building on Sinclair's work, Professors Eskridge, Gluck, and Nourse report that of the 91 acts passed in 2011, only seven—that is, *less than 10 percent*—followed the textbook process of being considered by committees in both houses, and 37 of the 91 acts did not go through the committee process in *either* house. *See* WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA R. NOURSE, *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 681 (2014). It is too soon to know whether the exceptionally low numbers reported from 2011 are an anomaly or the “new normal,” but the general trend toward an increasing numbers of bills bypassing committee consideration is clear.
12. SINCLAIR, *supra* note 10, at 111-12 (reporting “omnibus measures have made up about 12 percent of major legislation in recent Congresses”).
13. *See, e.g.*, Gluck & Bressman, *Part I*, *supra* note 5, at 972-73; Nourse & Schacter, *supra* note 5, at 607.

above, some statutes are enacted without generating committee reports at all.<sup>14</sup> And notably, in the tax area, the staff of the nonpartisan Joint Committee on Taxation regularly prepares an explanation of enacted legislation (known as the “Blue Book”) that is published *after* the conclusion of each Congress;<sup>15</sup> although these reports could be brushed aside as unreliable “subsequent legislative history,” tax practitioners (and sometimes courts) consult them as a handy resource.<sup>16</sup>

Regarding floor debate, I briefly introduce students to key differences between the House and the Senate rules that shape the dynamics of debate. In the House, the Rules committee plays a central role by determining whether amendments may be offered on a bill and if so, under what parameters. Together with the leadership of the majority party, the Rules committee may select specific amendments that may be proposed and disallow other amendments from even being put forward. Such tight control may have implications for later assessments of the significance of failed amendments. In the Senate, the increased use by both parties of filibuster threats means that most legislation now functionally needs 60 votes to pass. Again, though, my emphasis is not the political machinations these rules permit, but rather that they mean that bill language may be changed in significant ways on the floor, and that such post-committee changes are increasingly common.<sup>17</sup> I then connect this discussion back to the discussion of committee reports, cautioning students that they always need to determine whether the relevant text changed after the committee report was generated, and also that in certain instances, they may be able to argue how such changes are themselves significant in supporting a given advocacy position.

I try to teach students how to practically assess the records of floor debate. Speeches made on the floor are often made with an eye toward television cameras or the published record; many floor debates are sparsely attended and key compromises are more typically worked out by members or staff behind the scenes. Some floor exchanges are planned colloquies, rather than open debate. This, however, does not wholly discount their validity—congressional insiders report that if the colloquy is between the chair of the committee and the ranking member of the minority party they typically are intended

14. See SINCLAIR, *supra* note 10, at 18-21, 54-56 (discussing bypassing committees in the House and the Senate, respectively). Similar bills may have been vetted by committees in prior Congresses, and legislative history from these earlier years—if addressing text identical or at least quite similar to what is ultimately enacted—can be helpful.
15. These reports are available at JOINT COMMITTEE BLUEBOOKS, <https://www.jct.gov/publications.html?func=select&id=9>.
16. See generally Michael Livingston, *What's Blue and White and Not Quite as Good as a Committee Report: General Explanations and the Role of Subsequent Tax Legislative History*, 11 AM. J. TAX POL'Y 91 (1994).
17. See SINCLAIR, *supra* note 10, at 147 (documenting that during the 1960s, less than 10 percent of major legislation was subject to post-committee adjustment but that during the 2000s, between 30 percent and 50 percent of major legislation was subject to post-committee adjustment).

to substantiate a deal regarding expected meaning and reach of a statute.<sup>18</sup> Students find it even more surprising that comments may be inserted without ever being uttered on the floor; such later additions are indicated by a bullet or by a different font in the *Congressional Record*. For this reason, it is important to instruct students that they should use electronic resources that provide PDFs of the print edition of the *Congressional Record*; some HTML versions lose these distinctions. This simple point can be invaluable for students who may later seek to discount floor statements that run counter to a preferred advocacy position.

Although conference committees are increasingly rare, for statutes that *do* go to conference, the joint explanatory statement that accompanies the agreed-upon bill is an important resource.<sup>19</sup> Victoria Nourse argues, I think persuasively, that as the final step in the legislative process, these statements from the conference committee merit special weight in subsequent interpretation.<sup>20</sup> But, as she also emphasizes, they focus on the differences resolved between the two houses, which are often particularly controversial portions of a bill.<sup>21</sup> Language on which the two houses agreed will generally not be discussed in the statement, and reference back to the houses' respective committee reports will be appropriate.<sup>22</sup>

Omnibus statutes generally leave a very different paper record. They are typically assembled and promoted by the party leadership, often to give members cover for particular votes by avoiding the need to vote up or down individually on the component parts. Although omnibus bills often do not go through committee review, the component bills, which are frequently readily identifiable distinct titles within the act, may have previously gone through a committee review process. Students accordingly should learn how to identify the component bills and to search for any relevant legislative history that may have been generated before they were combined. As discussed more fully below, the patchwork quality of omnibus bills may also affect the appropriateness of applying various canons of statutory interpretation that assume that the drafting process is coherent or unified.

18. See Gluck & Bressman, *Part I*, *supra* note 5, at 986-87.

19. The "conference report" issued by a conference committee after it completes its work contains only the formal legislative language that the committee has agreed upon and formal statements of procedural actions that the conferees propose one or both houses need to take. See Christopher M. Davis, *Conference Reports and Joint Explanatory Statements*, CONG. RESEARCH SERV. REP. 98-382 (Nov. 7, 2012), available at <http://congressionalresearch.com/98-382/document.php> (last visited 5th May, 2015). The "joint explanatory statement" (sometimes called the "statement of managers") issued by the committee to accompany this report explains the positions on contested issues that each house took in the conference and the rationales for the committee's proposed resolution of disagreements; thus, the joint explanatory statement corresponds to committee reports that are prepared earlier in the process in the House and Senate. See *id.*

20. Nourse, *supra* note 5, at 98-109.

21. *Id.* at 98.

22. See *id.* at 110-11.

### B. The Drafting Process

When considering statutory interpretation by courts or agencies, it is helpful to have an understanding of how bills are actually written. Fortunately, recent scholarship by Abbe Gluck and Lisa Bressman (interviewing committee staffers and legislative counsel) and by Jarrod Shobe (interviewing legislative counsel and attorneys at the Congressional Research Service), as well an earlier study by Victoria Nourse and Jane Schacter (interviewing judiciary committee lawyers and two lawyers in the office of legislative counsel), provide detailed information about the drafting process.<sup>23</sup> My discussion below, as well as my teaching, draws heavily on these sources. As discussed in Part III below, Abbe Gluck and Victoria Nourse, together with Bill Eskridge, have recently published a new textbook that incorporates many of their key findings.<sup>24</sup>

Ideas for new legislation or amendments come from a variety of sources: members themselves; constituents; major donors; agencies; the White House; outside stakeholders (i.e., lobbyists). New laws may respond to fiscal emergencies, natural disasters, or developments abroad—and urgency may shape the drafting and debate process. When working on new legislation, committee staff or legislators’ individual staff, and sometimes the members themselves, typically meet with different stakeholders and experts. Hearings are sometimes held to explore a given subject prior to a specific bill’s being introduced. Staff or members may request assistance from the nonpartisan Congressional Research Service (CRS). CRS, known as Congress’s “think tank,” employs several hundred lawyers, economists, policy analysts, and other specialists.<sup>25</sup> CRS provides members and staff with reports that survey existing legislation, assess the need for new legislation, and analyze the potential impact of various policy proposals.<sup>26</sup> Collectively, these various conversations help members and staff develop the contours for a new bill, usually at a conceptual level rather than working with actual bill language.

The bill text itself is most frequently drafted by lawyers in the House and Senate’s Office of Legislative Counsel, although language may also be drafted by committee staff or personal legislative staff.<sup>27</sup> (Numerous sources agree that the members themselves are involved in making important policy decisions, but that they rarely draft actual bill language.<sup>28</sup>) Although some committee

23. See generally Gluck & Bressman, *Part I, supra* note 5; Bressman & Gluck, *Part II, supra*, note 5; Shobe, *supra* note 5; and Nourse & Schacter, *supra* note 5.

24. See ESKRIDGE, GLUCK & NOURSE, *supra* note II, at 681.

25. See Shobe, *supra* note 5, at 834-43.

26. *Id.*

27. See Shobe, *supra* note 5, at 826-28; Bressman & Gluck, *Part II, supra* note 5, at 737-40. The study by Nourse & Schacter, focusing on lawyers working for the judiciary committee, found that legislative counsel played a more peripheral role, but this may well reflect the particular expertise of judiciary counsel. See Nourse & Schacter, *supra* note 5, at 588-90.

28. See, e.g., Bressman & Gluck, *Part II, supra* note 5 at 737; Nourse & Schacter *supra* note 5, at 585-87.



staff has significant drafting experience, other committee staff, and most personal staff, has little drafting experience. Legislative counsel are considered the drafting specialists. Legislative counsel are required to be nonpartisan, and they view their job as translating policy objectives into legislative language while maintaining “complete neutrality on political issues.”<sup>29</sup> Committee and personal staff, by contrast, is more involved in the political calculations necessary to move a bill. In working on a bill, drafters may consider and incorporate bill language provided by agencies, the White House, or outside lobbyists.<sup>30</sup> Members are not required to send their bills to legislative counsel for drafting or revision; accordingly, some bills are never evaluated by the office. Even if legislative counsel works on a bill early in the process, changes made on the floor or in conference committee may never be vetted. Committee reports (other than those accompanying appropriations bills) are generally written by committee staffers rather than legislative counsel.<sup>31</sup>

Gluck and Bressman’s survey found that many congressional drafters—both committee staff *and* legislative counsel—had rather low levels of familiarity with the canons of construction employed by courts, or that they might recognize the concepts employed but that they did not know them by name.<sup>32</sup> More strikingly, they found some canons were premised on *misassumptions* about congressional practice. For example, courts typically assume that no language within a statute should be superfluous. Congressional drafters, on the other hand, stated that they erred on the side of redundancy or that they inserted language they believed to be superfluous to satisfy political interests.<sup>33</sup> Courts likewise typically assume that words should retain a consistent meaning within a given statute and even across multiple statutes. But drafters emphasized that committees worked in relative isolation, and accordingly that assumptions that terms would be used consistently in language coming out of different committees are unfounded.<sup>34</sup> Nor are legislative counsel likely to mitigate this problem, since they likewise have assigned subject matters and typically develop a deep but narrow expertise.<sup>35</sup>

29. Shobe, *supra* note 5, at 828.

30. See, e.g., Bressman & Gluck, *Part II, supra* note 5, at 738; Nourse & Schacter, *supra* note 5, at 587-88, 610-13; Shobe, *supra* note 5, at 847-51. Staffers report that they thoroughly vet any outside language. See, e.g., Nourse & Schacter, *supra* note 5, at 612-13; Shobe, *supra* note 5, at 848-49. This may well be the case, but in my own personal experience, much of the language I drafted was later introduced without alteration.

31. See Shobe, *supra* note 5, at 862; Gluck & Bressman, *Part I, supra* note 5, at 980.

32. See Gluck & Bressman, *Part I, supra* note 5, at 930-64; Bressman & Gluck, *Part II, supra* note 5, at 744-46.

33. Gluck & Bressman, *Part I, supra* note 5, at 933-36; see also Shobe, *supra* note 5, at 827-28 (describing redundant bills enacted for political reasons).

34. Gluck & Bressman, *Part I, supra* note 5, at 936-37.

35. Bressman & Gluck, *Part II, supra* note 5, at 746-47; Shobe, *supra* note 5, at 823-28.

I do not know of comparable studies that document the bill drafting process at the state or local level.<sup>36</sup> However, such bodies certainly do not have as many trained drafters as Congress. In my own experience working with state legislators, I found that most were happy to accept bill language drafted by outside experts, so long as they agreed with the policy objectives. In state or local legislatures, it is even less likely than in Congress that changes made to facilitate passage will be fully vetted for consistency and clarity. Also, at the state level, use of model bills with minimal or no modifications is common; this means that new language may not fit “properly” into the existing statutory law of a given state. The upside of this reality, which I also emphasize, is that the thinly staffed nature of state and local legislatures means that it is comparatively easy for students or relatively junior attorneys to play a role in making policy.

### C. What Bills Actually Look Like

I also introduce students to what bills *actually look like*—that is, not what they look like once they are codified into the U.S. Code, but what they look like as they are considered in Congress. At a most fundamental level, this is an opportunity to teach, or remind, students about the codification process, and explain that court decisions may reference statutes either by the title or section numbers in the original bill (e.g., § 703 of the Civil Rights Act of 1964) or by their title and section as subsequently codified (42 U.S.C. § 2000e-2).

Beyond this basic lesson regarding terminology, I make a few more substantive points. First, it is not unusual for significant bills in Congress to be hundreds of pages long, and sometimes over a thousand.<sup>37</sup> Because they are so long, it is difficult to ensure that terms are used consistently or to eliminate redundancy (and, as noted above, sometimes redundancy is recognized but deemed necessary for political reasons). These difficulties are compounded if changes are made on the floor or in conference, or otherwise late in the process, or if there are multiple drafters involved. The length of bills may also occasionally permit changes to be “slipped in” undetected.<sup>38</sup> These concerns are even more salient with regard to omnibus statutes.

36. For a more general discussion of the state legislative process, and rules that often govern state lawmaking such as the single-subject rule or the prohibition on substantive law in appropriations bills, see, e.g., WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 1063-70, 1076-1103 (5th ed. 2009). For a guide to finding state legislative history, which also includes links to descriptions of many states’ legislative processes, see MAURER SCHOOL OF LAW, *STATE LEGISLATIVE HISTORY RESEARCH GUIDE*, available at <http://law.indiana.libguides.com/c.php?g=19813> (last visited 5th May, 2015).

37. See, e.g., *Outrageous Bills: Why Congress Writes Such Long Laws*, *THE ECONOMIST* (Nov. 23, 2013) (reporting average length is 20 pages but that much major legislation is much longer).

38. See, e.g., WILLIAM N. ESKRIDGE JR., PHILIP FRICKEY, ELIZABETH GARRETT & JAMES BRUDNEY, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 801-02 (5th ed. 2014) (discussing evidence suggesting changes to a statutory provision were slipped into a bankruptcy bill).

Second, even if lawmakers (or, more realistically, staff) were to try to read the whole bill, bills are often very hard to make sense of. This is particularly true for bills that amend existing statutes, where language to be inserted is presented without relevant context. This is why staff and members typically rely heavily on the plain-language summaries found in committee reports.<sup>39</sup>

Third, bills frequently include findings or purpose clauses that set forth important context for a statutory provision. As courts have been less willing to consider legislative history, it is correspondingly more important to include such provisions in statutory language. This language is passed by both houses and signed by the president, fully satisfying bicameralism and presentment requirements. However, since purpose clauses do not make substantive law, they may not be codified at all, or they may not be codified adjacent to relevant substantive provisions. Thus, in certain instances, it may be important for lawyers to go back to the public act to find such language, rather than simply reading statutes as they are later codified.

#### *D. The Federal Budget Process and Appropriations Legislation*

Finally, I teach students a little about the federal budget process. Budgets are central to much legislative debate, and all policy proposals are assessed for their budgetary impact. This material is somewhat less directly connected to statutory interpretation, but it is crucially important for anyone who works with a legislative body. I imagine my own (I think somewhat atypical) commitment to teaching this material stems, in part, from my prior work where I sought to secure government funding for domestic violence services. The budget process is little considered in most Legislation or Leg-Reg textbooks. However, as discussed more fully in Part III, descriptions of the federal budget process are readily found on the Internet, so it is easy to incorporate this material if professors wish to.

We begin by discussing the general budget process, and the distinct roles played by the president and Congress in setting budget parameters. We define and discuss annual deficits and surpluses, and the (growing and already astronomically large) federal debt. We explore different mechanisms for funding new policies, including raising new revenue, imposing unfunded mandates on the states, cities, or private actors, or simply pushing costs back to future generations. Again, I do not focus on the picayune details of the various budget acts and pay-as-you-go rules that Congress has enacted, or the many strategies that have been developed to work around these rules. Rather, I simply want students to understand that various rules and contemporary politics make it difficult to enact legislation that authorizes new spending without identifying a “setoff” or reduction in other spending. We discuss how the Congressional Budget Office (CBO) “scores” bills for their budgetary impact and how, if new spending is authorized, proponents may employ accounting tricks to lower the overall price tag on a bill.<sup>40</sup>

39. See sources cited *supra* note 13.

40. See Bressman & Gluck, *Part II*, *supra* note 5, at 763-65.

I teach students the differences between discretionary spending and mandatory spending and the relative proportion of each in the federal budget. They learn how discretionary spending must be authorized in a statute that will be under the jurisdiction of a committee with the relevant substantive specialty, but that spending only actually occurs if the money is then appropriated in the annual budget that is under the jurisdiction of the appropriations committees. Furthermore, since congressional rules functionally preclude including regulatory language in appropriation bills, strong arguments may be made for according greater weight to legislative history accompanying appropriation legislation.<sup>41</sup>

## Part II – *Why to Teach about the Legislative Process*

### *A. Statutory Interpretation*

Many of the conventions that courts use to interpret statutes are premised on assumptions about how Congress operates, and the spate of recent empirical work on Congress opens up the possibility of rethinking many of these canons. For example, as discussed above, Gluck and Bressman's findings suggest that the assumptions underlying the rule against superfluities, the whole act and whole code canons, and meaningful variation canons may be misplaced.<sup>42</sup> Additionally, a recent study by Bill Eskridge and Matthew Christiansen demonstrates that decisions that rely on whole act or whole code canons of construction are disproportionately likely to be overridden by Congress, particularly when such tools are employed despite strong legislative history suggesting an alternative interpretation.<sup>43</sup> Both Gluck and Bressman's study and Eskridge and Christiansen's study provide support for claims that courts should offer greater deference to agency interpretations.<sup>44</sup> Gluck and Bressman, like Nourse and Schacter before them, also document that members are more likely to read committee reports than actual statutory text, and that the committee reports are more likely to be written by staff directly accountable to members, whereas bill text is more likely to be written by legislative counsel; they urge that committee reports should accordingly be awarded greater weight.<sup>45</sup> Shobe, who reports the same finding regarding authorship of committee reports, draws the opposite inference.<sup>46</sup>

41. See Nourse, *supra* note 5, at 130-34; Bressman & Gluck, *Part II*, *supra* note 5, at 761.

42. See Gluck & Bressman, *Part I*, *supra* note 5, at Sec. II.

43. See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1401-08 (2014).

44. *Id.* at 1375-80, 1395-96 (reporting that agencies are quite successful at obtaining overrides and that Supreme Court decisions that reject the interpretation adopted by an agency are disproportionately likely to be overridden); Bressman & Gluck, *Part II*, *supra* note 5, at 766-73 (reporting congressional drafters expect agencies to fill in statutory gaps and suggesting revisions to *Chevron* doctrine to better reflect Congress-agency interactions).

45. See Bressman & Gluck, *Part II*, *supra* note 5, at 740-41.

46. See Shobe, *supra* note 5, at 862-65.

Scholars can—and certainly will—debate these normative points. Judges will come down on different sides. The message for students, however, can be far more pragmatic. At times, in their future lives as attorneys, the position they seek to advocate on behalf of a client will be supported by asserting that variation within a statute was meaningful or that no language should be made superfluous. If so, they should argue these canons. But at times, the position that they seek to advocate will be better served by arguing against these canons, and a robust understanding of the process by which statutes are drafted and debated can provide support for such advocacy claims. The same is true with respect to legislative history or agency interpretations.

I think that judicious use of legislative history is appropriate when interpreting statutes, but it is also essential to teach students how to read it intelligently.<sup>47</sup> Students should understand that committee reports and conference reports are generally more reliable than individual statements on the floor.<sup>48</sup> That said, they also need to understand that statutory language can evolve through the process and, as discussed above, parse relevant language to determine whether report language describes the language that was actually enacted. Likewise, as described above, students must understand the various paths that legislation can follow to adequately identify relevant resources and assess the statutory record.

I seek to help students understand that spending the time to locate key legislative history can pay off. I find that a few well-chosen examples can make this point quickly. I share with students my own “aha” moment, which came when I myself was a student in the 1990s. I was working on a paper regarding legal strategies for sanctioning “cybersquatters,” individuals who registered an Internet domain name that was similar to a registered trademark and then set up a website that siphoned off potential consumers or criticized the mark’s holder. Several courts had held that this practice violated a then-recently enacted trademark statute. This was a rather strained interpretation of the relevant statutory language, but courts relied heavily on a floor statement by a sponsor of the bill, Patrick Leahy, that it was “[his] hope that this anti-dilution statute can help stem the use of deceptive Internet addresses,” as evidence of congressional intent.<sup>49</sup>

When I checked the relevant page in the *Congressional Record*, I found that Senator Leahy’s full statement, uttered on December 29, when the Senate

47. Numerous scholars have explored how to understand and employ legislative history. See, e.g., James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CAL. L. REV. 1199, 1226-27 (2010) (discussing traditional hierarchy of reliable legislative history); Nourse, *supra* note 5, (discussing how understanding of congressional rules can inform interpretation of legislative history); Gluck & Bressman, *Part I, supra* note 5, at 988-90 (discussing how their findings affect how judges should use legislative history).

48. The drafters surveyed by Gluck and Bressman overwhelmingly identified committee and conference reports as the most reliable legislative history. See *id.* at 977; see also Brudney, *Shortfalls, supra* note 47, at 1226 (collecting academic and judicial sources that reach the same conclusion).

49. 141 CONG. REC. § 19312-01 (daily ed. Dec. 29, 1995) (emphasis added).

chamber was probably rather empty, and immediately before the bill was passed, was: “*Although no one else has yet considered this application*, it is [his] hope that this anti-dilution statute can help stem the use of deceptive Internet addresses...”<sup>50</sup> The court decisions that cited the sentence consistently excluded the italicized words. Thus, this is a fine example of the way in which legislative history can be distorted. My larger point, however, is far more basic. It took me less than five minutes to look up the full quote—and doing so provided a strong argument against the accepted meaning of the legislative history at issue. We owe it to our students to give them the skills and confidence to do this research for the future clients.

Students should also consider how multiple amendments may lead to distinct challenges with regard to statutory interpretation. Anomalies or “absurd” results may stem from amendments where context was not sufficiently considered; showing a court how a statute has evolved may thus be an important tool in advocacy. Existing precedents may also need to be revisited if the statute is subsequently amended. As I explore in my own scholarship, interpretive issues associated with congressional overrides are particularly complicated.<sup>51</sup>

Understanding the budget process can also be important for statutory interpretation. This can be illustrated by the statutory interpretation classic *TVA v. Hill*, where the question was whether final construction on a dam for which Congress had repeatedly appropriated money had to be abandoned because it would destroy the habitat of the snail darter, an endangered fish, in violation of the Endangered Species Act.<sup>52</sup> The “mixed messages” from Congress make much more sense when one understands that the Endangered Species Act was under the jurisdiction of committees different from the committee that oversaw the appropriations legislation, and furthermore that the committees’ loyalties and expertise are quite different. Even though Gluck and Bressman point out that the Supreme Court’s refusal to consider legislative history associated with the appropriations bill may have been unwarranted,<sup>53</sup> the Court’s decision to defer to the substantive mandate rather than inferring a repeal or exception via an appropriations statute makes good sense.

More generally, as Gluck and Bressman demonstrate, statutes are drafted and redrafted with an eye toward the “score” that the nonpartisan Congressional Budget Office will give the statute; this process in turn affects language that courts will later be called on to interpret.<sup>54</sup> They point out that

50. *Id.* (emphasis added).

51. See Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEXAS L. REV. 859 (2012); Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009).

52. 437 U.S. 153 (1978).

53. Gluck & Bressman, *Part I*, *supra* note 5, at 981-82.

54. Bressman & Gluck, *Part II*, *supra* note 5, at 763-65.

this could argue in favor of interpreting ambiguous language in line with the understanding likely used by CBO, since this was typically a key aspect of the political calculation that moved the statute to enactment, although they also conclude that there might be strong counterarguments.<sup>55</sup>

### *B. Jobs*

Most practicing lawyers today will interpret statutes; it is this reality that has driven the expansion of Legislation and Leg-Reg courses in the required curriculum. A smaller, but still significant, number of lawyers will be directly involved the legislative process itself, and I find that teaching this material to students opens their eyes to a variety of jobs that they may not have considered. Many lawyers work for Congress—as personal staff for a member, committee staff, legislative counsel, or in the Congressional Research Service—or local or state legislatures. Lawyers working in administrative agencies are often involved in drafting bills, advocating for bills, and implementing new legislation. They must be keenly attuned to congressional signals and preferences. Many large law firms have dedicated “government affairs” departments. Lawyers working for nonprofit advocacy organizations are also often involved in lobbying. Lawyers in public or private practice may also be asked to prepare a witness for a legislative hearing or to testify themselves. And finally, lawyers often seek elective office.

### *C. Democratic Engagement*

Legislatures are, of course, the primary makers of policy in our government. In other courses in law school, students are exposed to the transformative potential of impact litigation, where lawyers have been able to use creative interpretations of existing statutes or the Constitution to change governmental policies. But this focus on litigation gives students a distorted picture; frequently, change comes instead through enacting new statutes, amending existing statutes, setting tax policy, or determining how limited government resources will be allocated. Introducing the legislative process within the first-year curriculum will help students develop a more balanced view of advocacy. In recent years, although Congress has been hampered by gridlock, innovative policy reforms—on both ends of the political spectrum—have been implemented by state and local legislatures. It is comparatively easy to become involved in state or local advocacy efforts. Thus, addressing the legislative process can offer students a path toward increased democratic engagement in both their professional and their personal lives.

## **Part III – *How to Teach about the Legislative Process***

### *A. Textbooks and Supplemental Materials*

In working on this essay, I reviewed several of the textbooks that have been developed for required Leg-Reg or Legislation courses to assess the depth and

55. *Id.* at 765.

scope of their coverage of the legislative process. Almost all include a basic description of the “textbook” process of legislative enactment, with greater or lesser detail regarding particular Senate and House rules.<sup>56</sup> This is an important beginning. However, as discussed above, “unorthodox” lawmaking is now increasingly common, and many of the textbooks with brief summaries do not address the variety of processes at all. This may leave students adrift when trying to navigate, for example, the legislative record of an omnibus act that includes several formally distinct bills originating in several distinct committees.

There are some recent textbooks that delve into the legislative process in more detail. The coverage of the subject that is most aligned with my approach to teaching it is the new textbook intended for 1L Leg-Reg courses just published by Bill Eskridge, Abbe Gluck, and Victoria Nourse.<sup>57</sup> Drawing on their groundbreaking scholarship on Congress discussed above, the authors provide a relatively detailed but still readily accessible description of how Congress operates.<sup>58</sup> The discussion of legislative process opens with the detailed and engaging case study on the enactment of the Civil Rights Act of 1964<sup>59</sup> that has long been included in various editions of the legislation textbook originally authored by Bill Eskridge and Philip Frickey. It then introduces, at a manageable level of detail (that is, not too basic, but also not too mired in the kind of arcane details that tend to instill fear, confusion, or boredom among students) the key rules of the House and the Senate, explaining how committee referrals are made and the hearing and markup process within committee. It emphasizes the importance of the Rules committee in the House and the filibuster in the Senate, and the many varied paths that bills now travel through Congress. The narrative descriptions are accompanied by excerpts from key materials, such as the cover of a committee report or a snippet of floor debate; many are reproduced in the original format, so that students get a sense of what the materials they would consult as lawyers seeking to build a legislative history actually “looks like.” Later in the book, the authors discuss the legislative process in more detail, again including helpful excerpts and examples, and connecting it to its implications for statutory interpretation.<sup>60</sup>

56. Several generally excellent casebooks for Legislation or Leg-Reg courses include only a very brief overview of the legislative process. *See, e.g.*, JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION, 22-28 (2010) (introducing the constitutional requirements regarding bicameralism and presentment and a three-page summary of the “typical” progression from committee to floor debate to reconciliation and presidential signature); CALEB NELSON, STATUTORY INTERPRETATION, 236-50 (2011) (similar summary but including more details about specific congressional rules).

57. *See generally* ESKRIDGE, GLUCK & NOURSE, *supra* note 11, at 29-82.

58. *Id.*

59. *Id.* at 33-57.

60. *See* ESKRIDGE, GLUCK & NOURSE, *supra* note 11, at 601-710. This chapter draws heavily on the normative arguments regarding statutory interpretation set forth in Nourse, *supra* note 5 (advocating a reverse engineering approach to statutory interpretation) and Gluck & Bressman, *Part I*, *supra* note 5; Bressman & Gluck, *Part II*, *supra* note 5 (drawing on their



I also find the chapter on the legislative process in the textbook on the regulatory state by Lisa Bressman, Ed Rubin, and Kevin Stack very effective, in part because it (not surprisingly, given the book's larger focus) connects questions regarding statutory drafting and structure to the implementation of statutes by agencies.<sup>61</sup> The authors begin with a good overview of the basic requirements for enacting a law and some variations on the "traditional" process, and they introduce key concepts from the political science literature, such as the role of interest groups and the consequences of strategic voting. They then use the 1966 Motor Vehicle Act as a case study to illustrate the legislative process—and the regulatory process—in action, discussing the advocacy efforts that led to the bill and its progression through Congress, and then including the full text of the law and a significant excerpt from the Senate committee report. They discuss the structure of statutes (i.e., title, purposes, findings, definitions, operative provisions, implementation provisions, etc.) and provide examples of various ways of structuring substantive provisions, highlighting how Congress's level of specificity interacts with the extent to which it delegates decisions to courts or agencies. Finally, the authors discuss the drafting process itself, including a lengthy excerpt from Reed Dickerson's classic work on the subject, from the drafting manuals published by the House and Senate legislative counsel's office, and from the Nourse and Schacter study of drafting.

There are two other books that I reviewed that I think likewise have very helpful discussions of the legislative process. The first is a new supplement for a classic Administrative Law textbook by Jerry Mashaw, Richard Merrill, Peter Shane, and now several other authors, that is intended to facilitate use of the book in Leg-Reg courses.<sup>62</sup> The other is the textbook on Legislation and Regulation, and the related textbook focusing specifically on statutory interpretation, authored originally by Eskridge and Frickey, and now also by Elizabeth Garrett and Jim Brudney.<sup>63</sup> Both discussions focus on the most salient congressional rules and procedures, offering examples that illustrate their role in the negotiation process and effectively integrating insights from the political science literature that probe the power dynamics at play. Both effectively summarize the rapid growth of unorthodox legislating and the many paths that bills now travel. As noted above, the Eskridge, Frickey, Garrett, and Brudney book also includes a helpful case study on the Civil

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survey of drafters to suggest new approaches to statutory interpretation). Since courts have generally not (yet) adopted these approaches to statutory interpretation, some professors might prefer to teach the material in a somewhat different fashion.

61. LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN & KEVIN M. STACK, *THE REGULATORY STATE* 125-222 (2nd ed. 2013).

62. *See generally* JERRY L. MASHAW ET AL., *SUPPLEMENT ON LEGISLATION AND LEGISLATIVE PROCESS FOR ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS* (7th ed. 2014).

63. *See generally* ESKRIDGE ET AL., *supra* note 38, at 1-60. The statutory interpretation specific version is WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON STATUTORY INTERPRETATION* 1-85 (2012).

Rights Act of 1964 and some discussion about how state legislative procedures are similar to and different from congressional procedures.

Finally, the textbook by Abner Mikva, Eric Lane, and Michael Gerhardt that focuses specifically on the legislative process provides (not surprisingly) very detailed coverage of the subject.<sup>64</sup> However, this book would probably not be well-suited for use in a general Legislation or Leg-Reg class because it has comparatively little on statutory interpretation or the regulatory process. It also emphasizes the historical rise of statutory law, and rules and efforts to enforce the rules of legislative procedure, whereas my approach is more focused on the aspects of legislative procedure that are generally applicable to practicing lawyers.

Few Legislation or Leg-Reg textbooks discuss the federal budget. Accordingly, in teaching this material, I have cobbled together materials from a variety of sources. I spend two hours of class time on the subject. The first hour is a general overview of the budget process. I assign introductory material from the Center on Budget and Policy Priorities,<sup>65</sup> as well as snippets of authorization legislation, appropriation legislation, and lobbying materials related to appropriations advocacy. In class, I use slides to share graphs and charts (easily found in a quick Internet search) that illustrate federal spending relative to revenue and deficits and surpluses over time; various sources of revenue in the federal budget; and how the federal budget is allocated.<sup>66</sup> Drawing on my lobbying experience, I then use this context to discuss various approaches to advocating for government support of domestic violence. The second hour of class time is spent discussing the case study on President Clinton's energy tax proposal that was included in prior editions of the Eskridge and Frickey textbook (but is not in the most recent edition).<sup>67</sup>

As discussed above, I think it is important that students see *actual* bills and legislative history. Accordingly, I give my students excerpts of a few different bills, including portions of an amendatory statute—which teaches them just how hard they are to understand—and an appropriations statute. I also provide students a portion of a committee report and a chart that shows how to decipher all the information that the cover contains.<sup>68</sup> (This chart is from the *Congressional Deskbook*, a fabulously helpful resource on congressional rules and procedures in general.) The *Documents Supplement* that accompanies the Eskridge, Frickey, Garrett, and Brudney *Legislation* textbook includes a wealth

64. ABNER J. MIKVA, ERIC LANE, AND MICHAEL J. GERHARDT, *LEGISLATIVE PROCESS* (4th ed. 2015).

65. CENTER ON BUDGET AND POLICY PRIORITIES, *POLICY BASICS: INTRODUCTION TO THE FEDERAL BUDGET PROCESS*, available at <http://www.cbpp.org/cms/index.cfm?fa=view&id=155> (last visited 5th May, 2015).

66. I am happy to share my slides upon request.

67. See WILLIAM N. ESKRIDGE ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 485-508 (4th ed. 2007).

68. JUDY SCHNEIDER & MICHAEL L. KOEMPEL, *CONGRESSIONAL DESKBOOK: THE PRACTICAL AND COMPREHENSIVE GUIDE TO CONGRESS* 251 (6th ed. 2012).

of legislative history material keyed to significant statutory interpretation cases in the book.<sup>69</sup> Additionally, as described below, I then require my students to research legislative history on their own. In teaching this material or working with a law librarian, professors might want to reference a legislative history of the Affordable Care Act compiled and published by a law librarian to educate other librarians about how the rise of unorthodox lawmaking requires rethinking legislative history research methods.<sup>70</sup>

One of the themes of this essay is that there is no “standard” legislative process. I find that this reality is best appreciated by assessing how different *specific* laws have been enacted. To make this point with students, I assign case studies from the Eskridge and Frickey legislation textbook on the enactment of the Civil Rights Act and the Clinton energy tax. Barbara Sinclair’s book on unorthodox lawmaking also includes case studies on recent major laws that could work well with students.<sup>71</sup>

I also have read several books that likewise use the enactment of particular laws as case studies to examine congressional processes more generally. These are too lengthy to assign to students, but they are great for anyone who wishes to dig into the subject more deeply. I recommend books on the Civil Rights Act of 1964,<sup>72</sup> the Emergency Health Personnel Act of 1970,<sup>73</sup> the Family and Medical Leave Act of 1993,<sup>74</sup> and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.<sup>75</sup> It is also informative to consider the process through the role that specific legislators play, whether written by biographers (such as Robert Caro’s monumental account of Lyndon B. Johnson’s years in the Senate)<sup>76</sup> or by legislators themselves (such as Olympia Snowe’s recent

69. See generally WILLIAM N. ESKRIDGE, JR. & JAMES J. BRUDNEY, DOCUMENTS SUPPLEMENT TO CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (2011).

70. See John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 LAW LIBR. J. 131 (2013).

71. See generally SINCLAIR, *supra* note 10 (including case studies on the 2008 and 2009 stimulus bills; the Affordable Care Act; and the Bush Tax Cuts of 2001 and 2003).

72. See generally CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985). There are numerous other histories of this landmark act, including several just published to coincide with the Act’s fiftieth anniversary. See, e.g., TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964 (2014); CLAY RISEN, THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT (2014).

73. See generally ERIC REDMAN, THE DANCE OF LEGISLATION: AN INSIDER’S ACCOUNT OF THE WORKINGS OF THE UNITED STATES SENATE (1973; paperback edition with a new forward and postscript, 2001).

74. See generally RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW (1996).

75. See generally ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA’S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN’T (2013).

76. See generally ROBERT A. CARO, MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON (2002).

memoir discussing how the growth of party polarization hampers efforts to enact moderate bipartisan legislation).<sup>77</sup> This list—garnered from my own bookshelf—is by no means comprehensive. My point is simply that there are a lot of books that let outsiders peek behind the curtain at what happens in Congress.

### *B. Debate and Drafting Simulation*

To make the discussion of legislative process more concrete, I ask students to participate in a simulation in which they debate and ultimately draft a bill providing workers a right to paid sick days.<sup>78</sup> My assignment is modeled in part on a debate and drafting assignment developed by Hillel Levin—and included in his practice-oriented statutory interpretation textbook—that asks students to debate and draft a statute relating to regulation of food in the law school library.<sup>79</sup> I prefer to ask students to engage with a live political issue, but I’m sure that either approach can work effectively with students. I chose paid sick days because it is a relatively easy concept for students to understand even if they have never taken a labor or employment class, and because it is closely related to legislation that I lobbied for and helped draft. This helps me identify resources for the students, answer questions, and ultimately critique the drafts that they generate. I use three hours of class time for the simulation, spread over a few weeks.<sup>80</sup>

On the first day of the simulation, I begin by sharing a (real) constituent letter from an individual who was fired after missing a few days of work. This initiates a discussion of existing federal law, which does not guarantee any paid or unpaid sick days for employees.<sup>81</sup> I then ask students to brainstorm about interest groups that would likely want to be involved in debate of such

77. See generally OLYMPIA J. SNOWE, *FIGHTING FOR COMMON GROUND: HOW WE CAN FIX THE STALEMATE IN CONGRESS* (2013).

78. I am happy to share the materials I use for this simulation upon request.

79. See HILLEL Y. LEVIN, *STATUTORY INTERPRETATION: A PRACTICAL LAWYERING COURSE* 108-112 (2014).

80. At Indiana, I teach three separate one-hour classes a week, and I have used the first class hour for discussing the general issue and what information would be important to gather in a hearing and a second class hour, the next day, to do the actual debate. Then, we use one class hour, a few weeks later, to discuss the students’ drafts. I have also used this simulation at Brooklyn, where I taught two one-and-a-half-hour classes a week, and I used the first day for both the hearing and the debate, and the second day, a few weeks later, to discuss the students’ drafts.

81. The federal Family and Medical Leave Act provides up to twelve weeks unpaid leave for qualifying employees with a “serious health condition,” but it does not cover absences for more routine sicknesses. 29 U.S.C. § 2612 (2015). Additionally, approximately half of the American workforce is not covered under the FMLA, either because they work for an employer with fewer than 50 employees or because they have not worked the requisite number of hours in the year preceding the request for leave. See *Family and Medical Leave Act Regulations: A Report on the Department of Labor’s Request for Information*, 72 Fed. Reg. 35550, 35622 (2007) (reporting 76.1 million of 141.7 million total U.S. employees are eligible).

a bill (e.g., the Chamber of Commerce; Small Business Association; public health advocates; doctors; labor unions; women's groups; educators; AARP) and talk about the relative strength of the interest groups on both sides, tying this conversation back to discussions that we have had on the role of money in politics. We discuss what perspectives would be important to include in hearings—that is, who would be most sympathetic for each side? Who would have relevant expertise? How would one prioritize among different options?—and what questions they would have for witnesses.

I help draw out the wide variety of information that legislators or other bill drafters would want to consider as they weigh the pros and cons of such a bill: How many employees currently lack sick days? Does it vary by income? What would be a reasonable number of days to mandate? What would the costs of a mandate be? What would the benefits be? (We probe this point to draw out how some of the benefits, such as lower turnover, would inure to the employers; some, such as salary for a day off, to employees; and some, such as decreased likelihood of spreading infectious disease, to society more generally.) Are there ways to spread costs across employers or to the general tax base? What models have been tried at the state and local level, and how well are they working? Are there problems with malingering?

After we have this discussion, I provide students with some basic facts regarding the subject and a summary of existing state and local laws regarding paid sick days.<sup>82</sup> I also ask them to read, prior to the actual debate on the bill, a “Legislators’ Guide” written by advocates in support of paid sick days, that lays out many of the key issues that bill drafters need to resolve in drafting a paid sick day law.<sup>83</sup> The students are not required to do any additional outside research on the issue, although sometimes a few enterprising students do.

On the second day (or the final hour of a longer class period), I divide the students into seven-person “Senates” and assign each individual student a role, representing a specific faction of senators with a set number of votes. Although the construct is obviously artificial, students are instructed that they should assume that some kind of paid sick day bill will pass, and that their job is to make it as palatable as possible to the constituency that they represent.

82. For a cost/benefit analysis of proposed federal legislation, see U.S. CONGRESS JOINT ECONOMIC COMMITTEE, EXPANDING ACCESS TO PAID SICK LEAVE: THE IMPACT OF THE HEALTHY FAMILIES ACT ON AMERICA’S WORKERS (Mar. 2010), available at [http://www.jec.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=abf8aca7-6b94-4152-b720-2d8do4b81ed6-89k](http://www.jec.senate.gov/public/index.cfm?a=Files.Serve&File_id=abf8aca7-6b94-4152-b720-2d8do4b81ed6-89k) (last visited 5th May, 2015). For advocacy materials that include numerous helpful statistics, see NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, EVERYONE GETS SICK: NOT EVERYONE HAS TIME TO GET BETTER (July 2011), available at [http://go.nationalpartnership.org/site/DocServer/PSD\\_Briefing\\_Book.pdf](http://go.nationalpartnership.org/site/DocServer/PSD_Briefing_Book.pdf) (last visited 5th May, 2015). For summaries of state and local laws and bills, see National Partnership for Women and Families, *Paid Sick Day Statutes* (Feb. 2015), <http://www.nationalpartnership.org/issues/work-family/paid-sick-days.html>.
83. CENTER FOR LAW AND SOCIAL POLICY, PAID SICK DAYS LEGISLATION: A LEGISLATORS’ GUIDE (2006), available at [www.clasp.org/resources-and-publications/publication-1/0326.pdf](http://www.clasp.org/resources-and-publications/publication-1/0326.pdf) (last visited 5th May, 2015). Some of the background material is now out of date, but the basic contours it introduces remain helpful.

They are told that they must come up with a bill that can garner at least 60 votes to withstand a filibuster threat. The Senates are balanced so that the supporters of the bill will need to make deals with several small constituencies, and persuade undecided moderates to join them, or make a grand bargain with the employer-aligned interests that can garner more general support. During the debate, I go from group to group playing various outside lobbyists, plying candy and making myself available to answer questions; the undecided voters get special attention (and fancier chocolates). The students are required to reach the broad contours of a deal within the class period. As is true in real legislative negotiation under time pressure, the negotiation dynamic often changes dramatically as the class time winds down.

After the completion of the class period, each Senate emails me the broad outlines of the deal their Senate struck, and each class member is required to email me a short statement detailing which faction she represented, how she participated in debate of the bill; and how her constituents were served by her vote on the bill. The following day in class, we spend some time debriefing and discussing the debate aspect of the assignment. The assigned reading for this day typically addresses the legislative process, including excerpts from Gluck and Bressman's and Nourse and Schacter's surveys regarding congressional drafting procedures. I generally find that students are much more sympathetic to the central role that agency personnel or lobbyists with relevant expertise and knowledge may play in developing policy proposals or drafting actual bill language after having engaged in the debate. In some years, I have assigned theoretical reading on legislative negotiation approaches, such as logrolling or strategic voting, and we discuss how aspects of their own negotiation process illustrated these points.

In the week or two after the debate, each individual student is responsible for drafting up her bill, including a title, purposes, and the substantive provisions of the law, including necessary definitions. These assignments are credit-fail. As an aid to their drafting, I assign the brief discussion of bill drafting found in older editions of the Eskridge and Frickey legislation textbook.<sup>84</sup> (Of course, in the real world, a bill would have been drafted before it was debated by the full Senate. However, as noted above, much legislative negotiation—in committee; on the floor; and in back rooms—occurs on a conceptual level, and the ultimate drafting is then handled separately by legislative counsel. In this respect, drafting up a bill's language after the basic contours of the deal have been struck can be a realistic reflection of the process.) The students are then required to read the other versions of "their" law and at least one version of each other Senate's laws prior to our discussion of their drafts in class.

On the day that we discuss the drafts, we start by generally discussing how the titles and purposes sold their bills and some of the strategic choices involved, as well as the extent to which they could have substantive implications.

84. See ESKRIDGE ET AL., *supra* note 67, at 439-46 (4th ed.). Of course, there are numerous drafting manuals available that address the subject in greater detail (several are referenced in this reading), but I find that students are able to handle the basics without additional reading.

Then we focus on the challenges of drafting the substantive provisions and definitions. I ask students to “self-check” their own drafts against a range of common issues that would likely arise under the laws (e.g., how to determine how much pay a worker receives for a sick “day” if her hours fluctuate; if employer size is a factor in the number of days off permitted, how to handle employers with payrolls that vary above and below relevant thresholds; if there is a probationary period prior to an employee being able to claim benefits, how to handle repeat seasonal workers; if the law permits workers to take days off to care for “family” members, how to define who counts as family). They quickly come to understand how difficult it is to anticipate all issues that would arise under a new law. I also pull specific examples from their drafts to highlight some common drafting errors that lead to ambiguity or unclear laws, as well as internal variation within their bills that courts might deem “meaningful” but that they certainly did not intend.

I don’t specifically require that students look at existing statutory models for their laws, but I also don’t preclude it. Some borrow language from state or local paid sick days laws; from the federal Family and Medical Leave Act; from the federal Fair Labor Standards Act; and various other less obvious choices. They generally don’t realize that courts will assume that they are intending to borrow settled interpretations of those laws, and this grounds a discussion of the consequences of this principle of statutory interpretation more generally. We also discuss the possibility that they have used words that are used or defined elsewhere in the federal code without considering whether those meanings would be ascribed to their statute.

Attempting to draft legislation gives my students far more sympathy for why and how statutes contain ambiguities or inconsistencies. Of course, it is reasonable to expect experienced legislative drafters will do a better job than students. Nonetheless, drafters often face extraordinary time pressure, as well as political pressures, and they are dealing with statutes that are much longer and more complex than the bills the students draft. I find that the students and I frequently refer back to the simulation when discussing particular interpretative issues faced by courts.

### *C. Legislative History Research Assignment*

First-year students are unlikely to have ever seen any legislative history; teaching even upper-level students, I find that many have never actually seen a committee report or a record of a floor debate, although they’ve read cases in which courts refer to such sources. Without such context, debates over the appropriateness of consulting legislative history are necessarily quite abstract. Accordingly, I think it important that students dig into legislative history. As noted above, the “Documents Supplement” now available for the Eskridge, Frickey, Garrett, and Brudney legislation book offers a very useful compendium of legislative history for many of the statutory interpretation

cases in the book,<sup>85</sup> and one approach to help students understand what legislative history actually looks like is to assign excerpts from these materials. This has the advantage of being readily available and pre-edited. But such convenience also comes with some limitations. I want to be sure that students can themselves find and sort through legislative history, so that they will be able to effectively use legislative history research as practicing attorneys.

To achieve this objective, I ask students to choose a statute that they are interested in and research its legislative history. Students are required to find any committee or conference reports issued in connection with the bill, and they must read at least one day of floor debate. I provide them materials, prepared by our law library, on how to research legislative history;<sup>86</sup> in a first-year course, this assignment could perhaps be coordinated with a legal research and writing class, or with formal assistance from the law librarians. We collectively troubleshoot how to find legislative history when standard search mechanisms yield nothing, considering whether language in an omnibus bill may have been considered by committees as a stand-alone bill, in a prior Congress, etc. Each semester a few students choose to research a state law, and we discuss the extent to which legislative history is available for state laws and the variability among states in this respect.

They then submit a short paper (two to three pages) describing what they found and how, if at all, it changed their understanding of the law that they were researching. This is a credit-fail assignment. I want students to appreciate the variety in quality of legislative history, both with respect to any given bill and among different bills. I achieve this by devoting a day of class time to a guided discussion of the students' findings. I identify themes that structure the conversation and ask students to share their research. They learn that sometimes what they find will be entirely useless and sometimes it will be extremely helpful. Based on their own research experience, most students conclude that committee or conference reports are more reliable and substantively informative than floor debates, a conclusion that accords with the accepted wisdom of congressional personnel, judges, and academics.<sup>87</sup>

#### *D. Guest Speakers and Engaging Students with Experience*

Finally, I have typically brought in one or two guest speakers with relevant experience to speak to my class. In Indiana, my guest speaker has been Representative Lee Hamilton, a long-term member of Congress and now the director of Indiana University's "Center on Congress." When I taught the course in Brooklyn, I brought in a New York City council member (who was also a former staffer on Capitol Hill) and a practicing lobbyist. In both

85. See generally ESKRIDGE & BRUDNEY, *supra* note 69.

86. See MAURER SCHOOL OF LAW, FEDERAL LEGISLATIVE HISTORY RESEARCH GUIDE, available at <http://law.indiana.libguides.com/fedleghist> (last visited 5th May, 2015); MAURER SCHOOL OF LAW, STATE LEGISLATIVE HISTORY RESEARCH GUIDE, available at <http://law.indiana.libguides.com/c.php?g=19813> (last visited 5th May, 2015).

87. See sources cited *supra* note 48.



locations, I have found it quite easy to identify potential speakers, and both the students and the speakers have reported back that they have found the experience rewarding and informative. Of course, this uses up a class hour that may be in short supply. Professors could also suggest that individuals with legislative experience be brought in as speakers for student-focused programming outside of class, such as programs exploring different kinds of legal careers. In addition to including formal guest speakers, I also encourage students enrolled in the course who have prior work experience with a state or local legislature or Congress to share how that experience may shape how they react to the material.

### **Conclusion**

In Legislation and Leg-Reg courses, students are asked to interpret statutes. They can do this task far more effectively if they have a working understanding of how statutes are made. I have found that a combination of background materials, case studies, actual congressional documents, and hands-on learning experiences can offer students an effective window into the legislative process. Students can then apply this learning in the rest of their Legislation or Leg-Reg course, in the statutory-based courses that they will take in the upper-level curriculum and, most important, as practicing lawyers after they graduate. Moreover, for some of my students, these few class hours spark a passion to become more informed and involved participants in our democratic society. They go on to work directly with legislatures—on the outside or the inside—and thus play their own role in shaping the legislative process for the students of the future.