

THE ROLE OF LEGISLATION IN THE FIELD OF PUBLIC LAW

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INTRODUCTION

Welcome to the 2003 symposium for New York University's *Journal of Legislation and Public Policy*, which is now in its sixth year of publication. This year's symposium topic—"Teaching Legislation"—reflects the revival of interest in legislation as a field of study in law schools.

The Journal has conceived its mission in broad, intellectually engaging terms. Last year's symposium addressed whether a democratic legislature should be viewed as a legitimate source of judgments about rights and the content of rights, a role that many think can be filled only by constitutional courts.¹ The symposium was organized around Jeremy Waldron's book, *Law and Disagreement*,² which is the most serious philosophical engagement with the moral dimensions of the legislative process that has been published in a long time.

This year's symposium is an effort to take stock of the field of legislation as a subject of study and of teaching in law schools following fifteen years of the subject's revival. I date this revival to 1988, when the first significant modern casebook on legislation was published. That year, the casebook was authored by Professors Eskridge and Frickey;³ it is now in its third edition with Professor Garrett as a third co-author.⁴ The publication of that book helped reinvigorate this field and enabled people to teach and think systematically about legislation as a field in law schools. I experienced the benefits of that book very directly because I was teaching a course on these issues at the University of Michigan Law School at the time. It was a daunting

1. Symposium, *Legislatures, Courts, and the Contestability of Rights: A Conversation*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2002–2003).

2. JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

3. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1st ed. 1988).

4. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d ed. 2001).

project to try to figure out how to teach these issues before the casebook came out.

It's not that legislation had never been taught before in law schools. For many years, from the 1930s until about 1970, legislation was, indeed, taught in law schools. But legislation then died off as a subject of study for nearly a generation in law schools. My own view is that this was partly a result of constitutional law's gaining prominence in the late 1960s and 1970s; most of the public law energy in law schools became directed toward constitutional law as a field. But constitutional law has been a less dominant project for a period of time now in the United States, and scholarship has exhausted many of the critical issues in the field. The Supreme Court hears far fewer cases than it once did, and fewer of these involve constitutional issues. Yet the Court continues to issue decisions about the meaning of legislation that have as much significance, in practical terms, as do decisions in the constitutional arena. In addition, the field of legislation and statutes is more open for fresh scholarship than is the field of constitutional law.

The revival of legislation as a field of study in 1988 signaled the continued importance of ordinary legislative policymaking following an era during which the dominant enterprise of constitutional law absorbed all the oxygen in the public law field. However, this revival has been around long enough that we can now start to assess both the teaching and the scholarship in this field. That's what this symposium is designed to help us do, and we couldn't have a better group of people with whom to explore these issues. Welcome to everybody. This is a great topic, and the *Journal of Legislation and Public Policy* deserves a lot of credit for helping us focus on these issues.