ON THE "ADMINISTRATIVE AND REGULATORY STATE" COURSE AT N.Y.U. LAW

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This is quite a feast that we have here. If we were planning our first-year "Administrative and Regulatory State" course after this symposium, we would tell the curriculum committee that we need the entire first year in order to cover all of the topics that the panelists have addressed so far. N.Y.U.'s new first-year course and this panel take me full circle to the beginning of my law school education and teaching career. I took a legal process course from Al Sacks in law school, and during my first two years of teaching at the Harvard Law School thirty years ago, I taught a seminar on legislation with Stanley Surrey. Stanley was a senior member of the Harvard faculty and a distinguished tax lawyer who had invented the idea of tax expenditure and had worked on tax matters as a senior aide in Congress. That was quite an introduction to this area of study. Stanley said that one could really find out what was going on in the world not by reading *The New* York Times, but by reading the Congressional Record, which he did every day. He said that every important issue finds its way, often in an illuminating fashion, into the Congressional Record. Unfortunately, I find that these days I can't even get through *The New York* Times, so I can't follow his advice.

Let me comment on N.Y.U.'s new required first-year course on the administrative and regulatory state. The other panelists have each in their own way illustrated the basic rationale underlying the course: statutes and the administrative implementation of statutes are a central part of our law, our politics, and the practice of law. The first-year curriculum, however, is focused on courts and on private law. It's still largely 19th century law, perhaps updated in substance, but not in institutional conception. Some schools offer constitutional law in the first year, but we thought that this course would nicely complement the private law and criminal law focus of the first year, because administrative regulation addresses many of the same issues. Environ-

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mental, health, and safety protections, for example, present issues of market failure and private law failure that can't be fully resolved through contract or tort or property or criminal law. Beginning in the late 19th century, these problems have largely been addressed by legislatures through regulatory programs implemented by administrative bodies. These programs don't displace private law and private ordering entirely, but they do change them and supplement them in very important ways.

Thus, we thought that in the interest of balance and realism, students should be exposed to the public law as well as the private law dimensions of these problems. We also thought it was important to prepare students for future careers by providing them with a familiarity not only with legislative materials and procedures, but also with administrative materials and procedures; not only with the Congressional Record, but also with the Federal Register; and with comment rule making, theories of statutory interpretation, and the role of courts not as the primary decision-makers as at common law, but also as secondary reviewers of administrative action.

Additionally, we saw this course not only as a basic building block for a legal career, but also as an important precursor to upper-year courses. Now, students can enter their upper-year classes and instructors will know that their students have had exposure to statutes and their interpretations and the basics of the administrative process and judicial review. This common foundation makes sense not only for students, but also for instructors.

There are some precedents for a required course of this sort in other law schools—Columbia, for example, offers a course in regulation—but I think the particular mix that we have is unique, so far as I know, at major law schools. We are melding a legislation course, an administrative law course, a course on regulation, and a course on statutory interpretation. We are trying to combine those courses to provide students with a basic knowledge of public law institutions and how they work. We are also trying to provide students with the analytical tools lawyers need to work effectively in this field.

The excruciating problem, of course, is how, within the context of a four-credit course, to cover all this without being too superficial and too general. This course was developed in concept by a curriculum committee two years ago. We made some other changes in our first-year curriculum and created space for the new course. We considered a proposal to allow first-years to choose an upper-class elective in the spring semester, but I think that would have wasted an opportunity to build a foundational course. Another proposal to add

an international law course had strong proponents, but we thought that this was the best foundational course that provided the most important skills and materials to all first-year students.

We then decided to have five sections of this course and allow students to elect between the sections. Some of us have elected to take a substantive area of regulation to focus on in the course. I'm dealing with environmental regulation. Peggy Davis is focusing on regulatory protection of child welfare. Rachel Barkow is using communications law. Rick Pildes and Noah Feldman are somewhat more eclectic, borrowing examples from different substantive areas.

There are differences in each approach, but we've tried through meetings last year and ongoing interaction to develop a core concept of the basic coverage of the course, which includes the reasons for the rise of regulatory administration, the limitations of the 19th century legal model, legislative materials and processes, the role of administrative agencies and the constitutional structure, administrative materials and administrative decisionmaking procedures, the basic scope of judicial review of administrative action, and statutory interpretation. I think most of us are including Office of Management and Budget (OMB) review and cost-benefit analysis to illustrate that we not only have the courts reviewing administrative action and providing a measure of accountability, but we also have internal administrative systems doing the same. We also include materials on congressional oversight and accountability, and, in most sections, examine alternative tools of regulation, such as the use of economic incentives versus command and control. I think all of us are covering these basic elements, some with the focus on a given area of regulation, some more eclectic, but all tied together by a common thread.

In addition to these subject areas, there are exciting and interesting theoretical components that cross-cut the materials in all of the sections, including market failure, democracy failure, and distributional inequities. In addition, there are positive theories of legislation, regulation, and the role of courts, including public choice and its focus on positive political theory and institutional roles. We also consider institutional interactions between legislatures, courts, the White House, and agencies, and how those interactions affect the evolution of statutes, administrative policies, and statutory interpretation.

We are relying on our students for a lot of feedback and evaluation in this endeavor. My sense is that the course is going well, the students' spirit is good and that we are all learning and having fun. Obviously we are going to have to modify and refine the course as we go along, but I think the indications thus far are that this is going to be a success and is going to continue.

I am interested in what Chai said about her approach and the possibility of tying the new first-year course with our lawyering program. I would love to use some of Chai's materials and have our lawyering instructors review in smaller groups of students the same things that we're teaching in the lectures, which would reinforce what we're doing with smaller groups of students.

I can't resist telling an anecdote that underscores the need for our new course. One colleague reported as true the story of a recent graduate from Yale Law School who was clerking on the D.C. Circuit. On her first day, the judge told her about the first case she would be working on, and said, "This case involves a really difficult issue of statutory interpretation." And she said, "What's a statute?"

I'm sure that anyone who takes Bill's class at Yale will not have that difficulty. But it is revealing about the state of this subject not just at Yale, but at other law schools as well, where most students do not get systematic training in statutes and their intepretation. They are not taught how to pay close attention to words, and how, as Chai said, to be inventive and creative in dealing with statutes so to promote their client's cause. These skills aren't useful only in the interpretive side either; I've done some work on legislative drafting, which is really fun, wonderful lawyer's work.

I'm very enthusiastic about our new course, and I know my colleagues are as well. We hope in various ways to get the word out about what we're doing, to get some feedback and to draw on what others in the field are doing. Already, today's panel has given us a lot of great ideas that we're going to follow up on.