

## WHERE HAVE YOU GONE, JUDICIAL PROCESS?\*

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Understanding how case law is made, what it means, and how courts and other legal actors apply it should be an essential component of a basic American legal education. The United States has, after all, a legal system founded on the common law, and “[c]ourts are the exclusive arbiters of what the common law means.”<sup>1</sup> Perhaps more importantly, the United States also has a legal system in which “interpretive” judicial decisions—i.e., decisions by various courts as to the meaning of hierarchically superior laws (primarily constitutions, statutes, and administrative regulations)—have taken on a preeminent role. This is so because such cases are not simply cases; rather, they result in definitive determinations of the meanings of such laws,<sup>2</sup> at least with respect to those bound thereby (other courts, parties, etc.).<sup>3</sup> It is for these and other reasons that the typical law school textbook traditionally has been—and continues to be—dominated by cases.<sup>4</sup> Somewhat ironically, this seems to be true even as to textbooks purporting to deal with subjects not based (at least by name) on common law, such as constitutional law<sup>5</sup> and statutory interpretation.<sup>6</sup>

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\* With apologies to Simon & Garfunkel. See SIMON & GARFUNKEL, *Mrs. Robinson, on BOOKENDS* (Columbia Records 1968) (“Where have you gone, Joe DiMaggio? Our nation turns its lonely eyes to you.”).

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1. James J. Brudney, *Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?*, 65 J. LEGAL EDUC. 3, 5 (2015); see also *id.* at 3 (observing that the American law school first-year curriculum traditionally has consisted of courses “focused heavily on judge-made common law”); *id.* at 7 (“The pre-eminence of statutory and regulatory law does not mean that traditional common law subjects have faded into irrelevance.”).

2. See, e.g., *id.* at 5 (observing that “federal courts have become the primary arbiters of what the Constitution means”).

3. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (recognizing that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system”).

4. Indeed, many such textbooks are actually called “casebooks.” Incidentally, this prominence (if not preeminence) of case law also seems to be reflected in the minds of the public writ large. For example, the *New York Times* and *Washington Post* seem to be much more interested in the latest decisions by the Supreme Court than the latest acts of Congress.

5. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* (4th ed. 2013).

And yet surprisingly, case law interpretation seems to play almost no role in the modern law school curriculum. To be sure, first-year legal writing-type courses typically introduce students to some basic principles along this line. But such courses do not have the time for a full exploration of these issues, thus leaving many questions either unanswered or inadequately answered. The same is true of doctrinal courses, which tend to be preoccupied with other matters (principally, the underlying doctrine in question) and therefore approach case law interpretation only haphazardly. There might be some emphasis on close or even critical reading, but probably little in the way of true interpretation, as the meanings of the featured cases largely have been settled.<sup>7</sup> As a result, most law students today simply do not know how to read a case—that is, *really* read a case—or fully understand how it might apply to future cases. Their understanding of case law *qua* law is more as a layperson, not as a lawyer.

A course (or substantial portion of a course) devoted to case law interpretation would solve this problem. What might such a course include, specifically? Though the list of potential topics is broad and fluid, it probably would include at least some combination of the following:

- The various parts of a typical judicial decision (including the identification of those parts prepared by the deciding jurist(s) as opposed to those things added by other court personnel or by a private publisher), the distinction between the court’s holding and its judgment, and the role of formal logic;
- The various types of judicial opinions, particularly with respect to multi-judge courts (e.g., majority opinions, concurrences and dissents, the possibility of a holding even in the absence of a majority opinion, etc.);
- The precise meanings of and distinction between holding and dicta;
- The concept of precedent and related issues (i.e., the various aspects of vertical and horizontal stare decisis, the precedential status of decisional methodology, the certification of issues to other courts, etc.);
- Means of avoiding precedent and related issues (such as the failure to recognize overrulings by implication, the practice of vacatur, and the status of “unpublished” decisions);
- The use of persuasive authority, including the use of foreign law;
- The purpose and value of oral argument;

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6. See, e.g., CALEB NELSON, STATUTORY INTERPRETATION (2011).

7. See Brudney, *supra* note 1, at 16 (concluding that principles of this nature “cannot be conveyed interstitially by professors teaching other 1L courses” or “be readily integrated through piecemeal detours undertaken by professors teaching upper-level substantive subjects”). This might be more controversial, but I also doubt that all (or even most) such other professors—regardless of what they might believe—fully understand case law interpretation principles. Courses (ideally) should be taught by experts in those fields, and no one is an expert in everything.

- The need (or not) to provide reasons for decisions;
- Challenges to our adversarial system (sua sponte decision making, amicus curiae practice, etc.);
- The retroactive and prospective application of judicial decisions;
- The concept of relative institutional competence, both within the judiciary (for example, the propriety of deciding issues for the first time on appeal) and between the judiciary and the other branches (for example, judicial versus legislative resolution);
- The need for judicial impartiality; and
- Accessibility issues (such as the use of cameras in courtrooms).

These topics (and others) encompass important issues that are not just theoretical, but that also arise continually and across all areas of practice. For example, on January 25, 2016, the U.S. Supreme Court decided six cases.<sup>8</sup> Though all judicial decisions involve one or more of these issues, three of these cases—*James v. City of Boise*,<sup>9</sup> *Montgomery v. Louisiana*,<sup>10</sup> and *Musacchio v. United States*<sup>11</sup>—actually *turned* on such issues. In *James*, the Court (in a per curiam decision) decided whether a state court is bound by Supreme Court decisions that interpret federal law.<sup>12</sup> In *Montgomery*, the Court decided whether another Supreme Court decision applied retroactively to state cases on collateral review.<sup>13</sup> And in *Musacchio*, the Court decided whether the lower court correctly applied the law-of-the-case doctrine,<sup>14</sup> as well as whether a statute of limitations argument could be raised for the first time on appeal.<sup>15</sup> All of this happened in just one day. Many (if not most) lawyers probably are oblivious to the notion that there is “law” in these areas, resulting in missed opportunities for argument or, worse, adverse rulings on these issues. It should go without saying that most law school graduates today are ill-equipped to deal with—or even recognize—such issues, particularly when they reach higher levels of sophistication.

This was not always the case.<sup>16</sup> Once upon a time there were courses—variously named, but generally falling under the umbrella “Legal Process”—dedicated to the study of the “basic functions of each lawmaking body and its interaction with the others,” including the “processes by which law is created in the three forums, and later elaborated and applied by courts

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8. See *James v. City of Boise*, 136 S. Ct. 685 (2016); *Musacchio v. United States*, 136 S. Ct. 709 (2016); *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016); *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016); *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016); *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016).

9. 136 S. Ct. 685 (2016).

10. 136 S. Ct. 718 (2016).

11. 136 S. Ct. 709 (2016).

12. See *James*, 136 S. Ct. at 686.

13. See *Montgomery*, 136 S. Ct. at 727.

14. See *Musacchio*, 136 S. Ct. at 716.

15. See *id.* at 716–18.

16. Pun intended.

and agencies.”<sup>17</sup> Naturally, Legal Process-type courses of that era included a large amount of what might be termed “Judicial Process”-type materials.<sup>18</sup> For example, the great Legal Process materials created by Harvard Law School Professors Henry M. Hart, Jr. and Albert M. Sacks,<sup>19</sup> which gained wide popularity in the late 1950s and early 1960s,<sup>20</sup> devoted 307 of their approximately 1380 pages specifically to case law development and interpretation.<sup>21</sup>

Regrettably, for a number of reasons, Legal Process—as a course if not also as a movement—eventually waned in popularity.<sup>22</sup> Fortunately, in recent years, courses of this general nature have made something of a comeback, their virtues having been rediscovered.<sup>23</sup> Curiously, though, the course that is offered at most law schools today bears only a slight resemblance to that envisioned by Professors Hart and Sacks. “Legislation and Statutory Interpretation,” certainly another important component of Legal Process, has become the centerpiece (if not the focus) today.<sup>24</sup> But Judicial Process for the most part has been brushed aside.<sup>25</sup> In its place, the “Administrative State” seems to have become the most popular complement, thus giving rise to hybrid “Leg-Reg” courses encompassing both legislation and regulation.<sup>26</sup> So the rise, fall, and rise again of Legal Process now seems destined for a happy (albeit incomplete) ending. One

17. Richard B. Cappalli, *The Disappearance of Legal Method*, 70 TEMP. L. REV. 393, 399 (1997).

18. Some courses (and textbooks) of this nature were even given this name. *See, e.g.*, RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS* (2d ed. 1996).

19. *See* HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (formal publication of the original 1958 “tentative edition”).

20. *See id.* at cii–cvi.

21. *See id.* ch. 3 (entitled “The Courts As Places of Initial Resort for Solving Problems Which Fail of Private Solution”). I say “specifically” because this figure does not include an additional 270 pages devoted (tellingly) to “The Role of the Courts in the Interpretation of Statutes” (a chapter separate from that devoted to “Legislatures and the Legislative Process”) and numerous other references to courts and judicial lawmaking in other chapters. *See id.* ch. 7.

22. *See id.* at cxviii–cxxxv.

23. *See generally* 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) (describing the current state of legislation and legislation-regulation (“Leg-Reg”) courses at ninety-nine top American law schools).

24. *See id.* at 126–28.

25. My own review of all American Bar Association-accredited law school websites reveals only a handful of courses (again, variously named “Elements of Law,” “Legal Process,” “Legal Method,” etc.) that appear to consist of or include Judicial Process. Incidentally, this trend extends beyond an empirical survey of law school curriculums to legal academia more generally. For example, although The American Association of Law Schools has an “Academic Section” on “Legislation & Law of the Political Process,” not one of the other eighty-such sections (including Federal Courts) appears to deal with Judicial Process as a subject, at least not principally. *See Sections, ASS’N AM. L. SCHS.*, <http://www.aals.org/services/sections/> (last visited Apr. 25, 2016) [<https://perma.cc/7L9N-HKK3>].

26. *See generally* John F. Manning & Matthew Stephenson, *Legislation & Regulation and Reform of the First Year*, 65 J. LEGAL EDUC. 45 (2015) (describing the authors’ experience with such a course at Harvard Law School).

cannot help but wonder, though, why Judicial Process seems to have fallen by the wayside. Certainly, constitutions, statutes, and administrative regulations do not interpret themselves, and hence the perceived need to devote courses (or substantial portions of courses) to these topics. But why would we think that judicial decisions are in any less need of interpretation and study? Particularly when those interpretations of constitutions, statutes, and even regulations of greatest concern are those by courts? Given its importance, the absence of Judicial Process in this modern reincarnation seems both striking and inexcusable.

What are we to do? Before answering that question, some perspective might be in order. Though Legal Process-type courses are in fact gaining in popularity, they are by no means universal, and many still are not required. There are probably many reasons why, but perhaps the most significant is that such courses are facing new, perhaps unprecedented, challenges. “Experiential learning,” in all of its various forms, is demanding more space in the law school curriculum.<sup>27</sup> Increased attention to bar passage has resulted in some decrease in available credits for non-bar tested courses.<sup>28</sup> Accelerated, dual-degree, and “certificate” programs are adding similar pressures.<sup>29</sup> So as legal academicians are well aware, law schools today are facing some very difficult curricular choices.

Thus, with respect to anything resembling Legal Process, it seems that the first question might be whether any such a course—in whatever form—can be justified. Though reasonable minds might disagree, I believe that the answer to this question is clearly “yes.” For one thing, as discussed previously, the Legal Process horse seems to have already left the proverbial barn, probably rendering this question moot as a practical matter. Regardless, it seems that Legal Process-type issues are simply too important, too fundamental, and arise too frequently to be ignored. Moreover, Legal Process, somewhat akin to Legal Research & Writing, has the virtue of being a “meta”-type course that spans a wide variety of practice areas and thus benefits virtually all law students. This last aspect is particularly helpful in the current environment of shrinking credits.<sup>30</sup> In sum, there appears to be little doubt that at least some Legal Process is a lot better than none and (hopefully) broad consensus that anything worth

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27. This is likely due in part to recent changes to the American Bar Association’s law school accreditation standards requiring at least six credit hours of experiential learning. See *Managing Director’s Guidance Memo: Standards 303(a)(3), 303(b), and 304*, AM. BAR ASS’N (Mar. 2015), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/governancedocuments/2015\\_standards\\_303\\_304\\_experiential\\_course\\_requirement\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_standards_303_304_experiential_course_requirement_authcheckdam.pdf) [https://perma.cc/MXX5-CPXY].

28. See generally Donald H. Zeigler et al., *Curriculum Design and Bar Passage: New York Law School’s Experience*, 59 J. LEGAL EDUC. 393 (2010).

29. See generally Delece Smith-Barrow, *Weigh 3 Factors Before Pursuing an Accelerated B.A.-J.D. Program*, U.S. NEWS & WORLD REP. (Oct. 31, 2013, 9:30 AM), <http://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2013/10/31/weigh-3-factors-before-pursuing-an-accelerated-ba-jd-program> [https://perma.cc/AZ48-BFVX].

30. See *supra* notes 27–29 and accompanying text.

teaching is worth teaching thoroughly and systematically.<sup>31</sup> The alternative—a Legal Process “Whitman’s Sampler” courtesy of professors in other courses—is not an appealing prospect.<sup>32</sup>

But even proponents of Legal Process-type courses face some difficult curricular decisions. Perhaps the most important questions here are these: (1) Should such a course be required, or should it merely be an elective? (2) Where should such a course be placed: In the first year or later? (3) What should be included in such a course? Should the course consist of Legislation and Statutory Interpretation only? Legislation and Regulation? Or Legal Process more broadly—and specifically, should it also include at least some Judicial Process?<sup>33</sup>

Professor James J. Brudney has very ably made the case for a required, 1L course in Legislation and Regulation.<sup>34</sup> I do not disagree with his conclusion, other than that I believe Judicial Process should be part of the equation. But I also do not read his position as precluding alternatives, in that I presume he would agree that a required upper-level Legal Process-type course—though perhaps inferior to the 1L version—would be better than no such required course and that an elective Legal Process-type course would be better than no course at all. I also have no reason to believe that he (and others sharing his viewpoint) are hostile to Judicial Process, at least so long as its inclusion resulted in no significant diminution in its treatment of Leg-Reg-type topics. So the ultimate issue here might well be whether Legal Process, in its highest form, should consist of Legislation and Statutory Interpretation, Leg-Reg, or Legal Process more broadly defined—i.e., including at least some Judicial Process.

I believe that American law schools today should adopt a Legal Process-type course—more broadly defined—for several reasons. Most obviously,

31. See, e.g., Brudney, *supra* note 1, at 17 (stressing the importance of understanding Legal Process-type topics “in a systematic way and to examine [them] in critical terms” and that “students need a well-ordered and comprehensive approach”).

32. Cf. FORREST GUMP (Paramount Pictures 1994) (“My momma always said, ‘Life was like a box of chocolates. You never know what you’re gonna get.’”).

33. Two additional questions that seem to draw less attention but might deserve more are: (4) Should all law schools offer the same Legal Process-type course—i.e., might there be significant differences in student aptitude, curricular needs, et cetera across all “tiers” that justify (or even demand) different types of Legal Process courses? (5) Should, and to what extent should, such a course include “Regulation,” particularly given the history and stature of Administrative Law as a stand-alone course? Does the existence of Administrative Law mean that such principles should not be covered in a Legal Process-type course? How much Administrative Law reasonably can be covered in a course not devoted solely to this subject? If the coverage is limited, is the argument that some Administrative Law is better than none? If so, what sorts of (limited) things should be covered? And finally, is Administrative Law even a very good fit with either Legislative Process or Judicial Process? Perhaps the early success of Leg-Reg is due primarily to the undeniable importance of each of these topics individually (it also benefits from a somewhat catchy name). But just because these subjects are good separately does not necessarily mean that they are good together, or that this particular combination is better than other, reasonable alternatives. By comparison, for example, Legislative Process and Judicial Process, particularly in view of the importance of statutory interpretation, seems like a much better and more natural fit. If only it had a catchier name: “Congress & Courts,” anyone?

34. See generally Brudney, *supra* note 1.

Judicial Process is simply too important to be left behind, to the point where it seems necessary to a proper understanding of other Legal Process-type issues.<sup>35</sup> A broader course likely would be more appealing than a narrower course; it comports with what law students think law is about and lessens the pressure to cover similar material in other courses. Though this might result in some reduction in the amount of time that could be devoted to other Legal Process issues, the same dilemma is presented when one considers a move from Legislation and Statutory Interpretation to Leg-Reg.<sup>36</sup> A more general Legal Process-type course also would allow for some curricular flexibility depending on who was teaching the course and the sophistication of the cohort—i.e., it could permit different teachers to emphasize or delve into different areas in greater or lesser detail.

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Under the Constitution, the U.S. government consists of three branches: the legislative, the executive, and the judicial.<sup>37</sup> A Legal Process-type course devoted to the making and application of law by each of these branches makes eminent sense. Should not, then, Legal Process include more than the Legislative Process, or the Legislative Process plus the Regulatory Process?<sup>38</sup> Should it not also include the Judicial Process? A Legal Process course without Judicial Process seemingly is like a one- or two-legged stool. It is destined to fail—or at least to be much less useful than it otherwise could be.

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35. *See, e.g., id.* at 10 n.28 (“The case method remains an integral part of Leg-Reg pedagogy . . .”).

36. Of course, there are probably other, better ways of solving this “problem.” For example, more credit hours could be devoted to the Legal Process course. Alternatively, Legal Process could become more of a survey course, which then could be supplemented with higher-level electives (or even seminars) on related but more focused topics.

37. If one considers the independent agencies as another branch, it has four. But the point here is the same.

38. It also might be observed that there is some executive branch lawmaking aside from that conducted by administrative agencies that also might be included.