1988

Book Review (reviewing Eskridge, William N., J., Cases and Materials on Legislation: Statutes and the Creation of Public Policy (1988))

Richard A. Posner

BOOK REVIEW

CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY. By William N. Eskridge, Jr. and Philip P. Frickey. West Publishing Co., St. Paul, Minnesota, 1988, 937 pages.

*Reviewed by Richard A. Posner**

The Eskridge and Frickey casebook on legislation is far and away the best set of teaching materials on the subject of legislation that has ever been published. Moreover, it has the potential to alter the law school curriculum; of few casebooks can *that* be said.

The enormous growth of American government in this century has generated an explosion of legislation; as a result, the creation and interpretation of statutes are now paramount concerns of the legal profession. Law schools recognize this to the extent of offering numerous courses built around statutes—courses in antitrust, labor, copyright, bankruptcy, pension law, welfare, employment discrimination, and the like. But about the nature of the legislative process, and about the enormous difficulties of statutory interpretation, the typical law school curriculum is practically silent. Courses that deal with particular statutes, such as the courses I have named, often treat the legislature as a black box out of which a text somehow emerges and treat interpretation as a straightforward process of making the statute conform to some reasonable (the instructor's?) conception of its purposes. That the processes of statutory creation and interpretation might be fascinating and deeply problematic topics in their own right is a possibility rarely glimpsed. Even more troubling, graduates of these courses go on to be law clerks and eventually judges and in these capacities write about legislation and its interpretation with the most astonishing naivete, compounding endless bromides about the will of the people as expressed in legislation with the jejune methods of interpretation embodied in the canons of statutory construction.

What is needed is a good course on legislation. Though there have always been courses on legislation, they have rarely been successful and have never ranked alongside constitutional law or first-year courses in the common law

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School.

fields. There are at least three reasons for this failure. First, few law professors can teach without cases, and it is not obvious how to teach legislation from cases. Second, it is unclear how one can discuss in a single course statutes that belong to different substantive areas of law not all of which the students will have studied. Third, it is unclear what it is that lawyers, as distinct from political scientists or even economists, have to say about legislation.

Eskridge and Frickey are the first authors of teaching materials on legislation to offer credible solutions to all three of these problems. They are able to do this, in part, because the first and third problems are linked. Although little about legislation lends itself to case treatment, statutory interpretation does. And fortunately for Eskridge and Frickey, statutory interpretation is one of the most important topics in legislation. Another bit of good fortune for them is the enormous variety of interesting and accessible theoretical discussions of the legislative process, with the result that the areas of legislation that cannot be taught by the case method can be taught by presenting excerpts from theoretical discussions. Not only are these discussions interesting but they are inconsistent with each other, so that they can easily be presented in a dialogical or adversarial format, the better to hold the reader's interest. There is the interest-group approach of economists and political scientists, there is public choice theory, there is the "New Republicanism" (as expounded by Michelman and Sunstein, for example), there is the radical skepticism of Critical Legal Studies; and at the other end of the political spectrum there is the conservative school of "plain meaning" and "original intentions," there are the literary analogizers (Dworkin, Fish), the philosophers (Gadamer, for example), the legal realists, and others. The skillful casebook editor—and Eskridge and Frickey are skillful casebook editors—can meld these voices into an interesting if atonal chorus that will sound as good as a sequence of appellate opinions. The academic commentaries, moreover, provide illuminating counterpoint to the opinions on statutory interpretation, where judges are seen to be wrestling unself-consciously with the same problems that engage the scholars on a theoretical level. Much like conflict of laws, statutory interpretation is an area where the innovations come mainly from the academy, and where an interesting course can be built around the conflicts between spokesmen for rival academic approaches, as well as around the conflicts between different strains in the case law.

The editors solve the second problem—that students may not know the substantive law at issue in important cases—by including relatively few cases. Regarding the cases they do include, Eskridge and Frickey either provide so extensive a background that the student can feel comfortable without having studied the field, or select opinions the legal setting of which is relatively plain.

Let me describe in slightly more detail how the editors have met the challenges I have set forth. The first 100 or so pages are a masterful introduction to the subject. There is a blow-by-blow description of the deliberations on and enactment of the Civil Rights Act of 1964—a story interesting in itself, resonant for students, and apt for conveying the mechanics of the legislative process. The student is then invited to consider alternative theories of the legislative process, one stressing the role of interest groups, and another taking a more up-beat "public interest" approach. Finally, the student applies his new learning to *United Steelworkers v. Weber*,[1] where the Supreme Court interpreted title VII of the 1964 Civil Rights Act,[2] seemingly in the teeth of the statute, to permit an affirmative action program.

Next comes a longish and, to me, dullish chapter on what might be called the law of legislation—the Voting Rights Act, gerrymandering, regulation of campaign finance, and so forth. There are many interesting issues here, but this part of the book could just as well be a chapter of a casebook on constitutional law, civil rights, or election law. It reads much like a conventional casebook and focuses on problems that are marginal to legislation. As we shall see, the alternation between a chapter dealing with the central problems of the field and a chapter dealing with a peripheral topic rich in cases is a marked feature of the book.

Chapter 3 returns to the themes announced in Chapter 1. It deals systematically with the fundamental question of the authenticity of statutes as sources of public policy. If, as argued by several scholars, statutes merely register the compromises of interest groups, then legislation is hardly a source of wisdom to which courts should resort when faced with new problems outside the narrow compass of a specific statute. And perhaps, if this is so, courts should also be less reluctant than they are now to revise statutory interpretations. Maybe legislatures can not be trusted to engage in constructive dialogue with courts or to correct erroneous judicial interpretations with amendatory statutes. The chapter explores such issues with a judicious balance of cases and theoretical discussion.

Chapter 4, however, is patterned on Chapter 2. It considers constitutional problems in the legislative process—for example, the constraints that the due process clause may place on the procedures of legislatures and on the substance of legislation. What I said about Chapter 2 applies equally here.

Chapter 5 is a fine treatment of the enforcement of statutes, with particular emphasis on administrative regulation and the implication of private rights of action in statutes. These are well-worn topics, of course, but they are freshened up by being approached in the theoretical framework that has

---

[1] 443 U.S. 193 (1979).

[2] 42 U.S.C. §§ 2000e-2000e-17 (1982).

slowly been emerging in the book. Chapter 6, though, returns to the mold of Chapters 2 and 4, being primarily concerned with the constitutional problems involved in the referendum and other experiments in "direct democracy."

Chapter 7 is a huge (some 250 pages—almost thirty percent of the book, exclusive of appendices) and utterly worthwhile treatment of statutory interpretation. Eskridge and Frickey have flawlessly selected these cases, though in fairness it should be mentioned that some of the chapter's best material comes from the section on statutory interpretation in the Hart and Sacks *Legal Process* book,[3] material that Professor Sacks generously permitted Eskridge and Frickey to reprint. In this as in all the chapters, the cases are well edited and the notes are clear, brief, and to the point. A slight disappointment, however, is the omission of philosophical approaches to interpretation. A number of passages (none of excessive length) by Aristotle, Nietzsche, Wittgenstein, Gadamer, E.D. Hirsch, Stanley Fish, and others could have been included with profit.[4] The editors include a fascinating case on whether tomatoes are "fruits" or "vegetables" for purposes of the duties on imported food products.[5] It is natural to suppose that the answer might be found in a book on biology, but that would surely be the wrong place to look and philosophical analysis of the problem of meaning would help show why. In general, philosophy could have received more play in this book than it does, but this is a question for editorial discretion.

Chapter 8 is a minute (fifteen pages), perfunctory, and easily dispensable discussion of statutory drafting. Chapter 9, also brief, deals with suggested solutions to statutory obsolescence: a problem that should win converts to euthanasia.

One senses that the authors ran out of steam after completing their monumental chapter on statutory interpretation. But this is of no importance. The strong and central chapters—Chapters 1, 3, 5, and 7—are quite enough for a course.

---

[3] H. Hart & A. Sacks, The Legal Process 1144-47 (tent. ed. 1958).

[4] See, e.g., Aristotle, Nicomachean Ethics, bk. V, § 10; R.G. Collingwood, The Idea of History 65 (1946); H. Gadamer, Truth and Method 291-94, 471 (1975); E.D. Hirsch, Jr., Validity in Interpretation 124-25 (1967); F. Nietzsche, The Will to Power ¶560, at 302-03 (W. Kaufmann & R. Hollingdale trans. 1967); R. Palmer, Hermeneutics: Interpretation Theory in Scheiermacher, Dilthey, Heidegger, and Gadamer 84-97 (1969); L. Wittgenstein, Philosophical Investigations: The English Text of the Third Edition ¶431, at 128e (G.E.M. Anscombe trans. 1968). In fairness to Eskridge and Frickey, it should be noted that they do include an illuminating passage by the neglected German-American hermeneuticist, Francis Lieber, author of Legal and Philosophical Hermeneutics (1839). See W. Eskridge & P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 574-75 (1988).

[5] Nix v. Hedden, 149 U.S. 304 (1893).

With the Eskridge and Frickey book in print, law schools no longer have an excuse for relegating legislation to the periphery of the law school curriculum. The casebook makes the course teachable; it demonstrates not only that there is much to be said of great interest to the legal profession about the theory of legislation and its interpretation, but also that this material can be conveyed effectively with well-chosen cases and academic commentary. The book has done for legislation what Hart and Sacks did for legal process, or Hart and Wechsler for federal courts: it has demonstrated the existence of a subject.