Book Review

Saxe's Aphorism

Legislation and Regulation
by John F. Manning and Matthew C. Stephenson.
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Introduction

John Godfrey Saxe was a nineteenth-century poet most famous for retelling the Indian story about the blind men and the elephant.[1] Saxe was a lawyer, who was elected state's attorney in his home of Chittenden County, Vermont, before running twice—unsuccessfully—for Governor of Vermont.[2] He was also a popular speaker, reciting

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1 *See* John Godfrey Saxe, *The Blind Men and the Elephant*, *in* The Poems of John Godfrey Saxe 135, 135–36 (1873).

2 John Buechler, *John Godfrey Saxe: The Poet as Politician, 1859*, 43 Vt. Hist. 44, 45, 57–58 (1975). Saxe ran as a Democrat at a time when that party was disfavored in Vermont. *See id.* at 57 (noting that there was one Democrat in the Vermont State Senate in 1858, and none in 1860); *see also* White Christmas (Paramount Pictures 1954) (joking that, at the time, it would be impossible to find a Democrat in Vermont).

his poems at numerous colleges.[3] It was during one of those talks that Saxe uttered a remark that remains one of the most widely quoted maxims about the making of laws in the twenty-first century: "Laws, like sausages, cease to inspire respect in proportion as we know how they are made."[4]

If Saxe is right, then you should think twice about reading John Manning and Matthew Stephenson's book, *Legislation and Regulation*.[5] Manning and Stephenson are both Harvard Law School professors, and leading scholars in statutory interpretation and administrative law, respectively.[6] They have combined their efforts to produce a book that covers the whole range of the federal lawmaking process.[7] For reasons that I hope to explain here, *Legislation and Regulation* has become an immediate hit in American law schools.[8]

In Part I, my review of *Legislation and Regulation* begins with an overview of the book's approach and its contents. This overview demonstrates that the book achieves precisely the understanding of the lawmaking process against which Saxe warned. The book provides an extremely thorough and thought-provoking account of the theory and practice of statutory interpretation,[9] the status and role of administrative agencies,[10] and the rules governing the relationship between agency decisions, congressional statutes, and judicial review.[11]

Part II of this Review asks whether Saxe was right. Do we think less of our laws once we know how they are made?[12] To answer this question, I use lessons from *Legislation and Regulation* to examine the

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3 Buechler, *supra* note 2, at 44.

4 *News of the Day*, DAILY CLEVELAND HERALD, Mar. 29, 1869, at 1 ("Saxe says in his new lecture: 'Laws, like sausages, cease to inspire respect in proportion as we know how they are made.'"). Often, the saying is attributed to Bismarck. *See, e.g.*, Cmty. Nutrition Inst. v. Block, 749 F.2d 50, 51 (D.C. Cir. 1984) (Scalia, J.) ("This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck's aphorism that 'No man should see how laws or sausages are made.'").

5 JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION (2010).

6 *See John F. Manning*, HARV. L. SCH., http://www.law.harvard.edu/faculty/directory/index.html?id=428 (last visited Mar. 11, 2011); *Matthew Stephenson*, HARV. L. SCH., http://www.law.harvard.edu/faculty/directory/index.html?id=558 (last visited Mar. 11, 2011).

7 *See* MANNING & STEPHENSON, *supra* note 5.

8 Telephone interview with John S. Bloomquist, Editor-in-Chief, Found. Press (Apr. 6, 2011).

9 MANNING & STEPHENSON, *supra* note 5, chs. 1–2.

10 *Id.* ch. 3.

11 *Id.* chs. 4–5.

12 *See supra* note 4 and accompanying text.

Patient Protection and Affordable Care Act ("PPACA"),[13] which was enacted by Congress in March 2010, just before the book was published.[14] The PPACA generated enormous controversy with respect to both its substantive content and the process by which it was passed.[15] Its champions saw it as the fruition of decades of efforts to make heath care available to more Americans.[16] Its opponents attacked it as an unwanted government takeover of the health care system—a claim that ultimately gave rise to the Tea Party.[17] The process through which the PPACA was enacted featured filibusters, the "Cornhusker Kickback," the surprise winner of a special Senate election in Massachusetts, and numerous disputes about how the law should be interpreted.[18] The most controversial assertion, embraced by Sarah Palin on her Facebook profile, charged that the law would encourage "death panels," by which lawmakers and doctors alike could decide which elderly patients should be allowed to live, and which should be left to die.[19] The difficulty in understanding the meaning of the proposed law while Congress debated it was highlighted by Speaker of the House Nancy Pelosi's statement that "we have to pass the bill so that you can find out what is in it."[20] This Book Review examines the dispute concerning the application of the PPACA in Part II from the perspective of the statutory interpretation and administrative law lessons contained in *Legislation and Regulation*.

Regardless of its substantive or procedural merits, the enactment of the PPACA demonstrated the need for a better understanding of the process of U.S. lawmaking in the twenty-first century. Few laws garnered as much public attention, and few laws are likely to demand as many legal services.[21] Yet students in the traditional first-year law school curriculum would have few opportunities to learn anything

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13 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended primarily in scattered sections of 42 U.S.C.), *invalidated by* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. Jan. 31, 2011).

14 *Legislation and Regulation* was published in June 2010. *See* MANNING & STEPHENSON, *supra* note 5, at vii.

15 *See infra* Parts II.A–B.

16 *See infra* Parts II.A–B.

17 *See infra* Part II.A.

18 *See infra* Part II.A.

19 *See infra* Part II.C.

20 Press Release, Nancy Pelosi, Speaker, U.S. House of Representatives, Pelosi Remarks at the 2010 Legislative Conference for National Association of Counties (Mar. 9, 2010), *available at* http://pelosi.house.gov/news/press-releases/2010/03/releases-March10-conf.shtml.

21 *See infra* Part II.

about the issues surrounding the PPACA.[22] The healthcare law may generate a discussion in a constitutional law course, or perhaps offer a few examples in civil procedure, but it is unlikely to fit within the subjects discussed in other first-year courses, such as criminal law, property, or torts.[23] That is why *Legislation and Regulation* is so timely.

I. Legislation and Regulation

Manning and Stephenson's book "is designed for a first-year course on Legislation and Regulation."[24] Harvard Law School has such a course, as do many other law schools.[25] My own institution, the University of Notre Dame Law School, revised its curriculum to provide first-year students the opportunity to take an elective course;[26] I taught a course using *Legislation and Regulation* with those students in mind.[27]

Manning and Stephenson explain that the objective of *Legislation and Regulation* is "to teach students both how federal statutory and regulatory law is made, and how judges and administrative interpreters construe these legal materials."[28] That is a crucial objective for anyone studying U.S. law in the twenty-first century. Guido Calabresi observed nearly thirty years ago that we are living in an "age of statutes."[29] Yet the first-year law school curriculum is dominated by common law courses such as contracts, property, and torts.[30] Statutes are important in several first-year courses, but most such courses decline to consider an overarching understanding of the enactment and implementation of statutes by Congress and administrative agencies, respectively. Only criminal law provides the opportunity to examine statutes in depth, but even then, many criminal law courses emphasize the nature of certain crimes rather than the statutes that codify them.[31]

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22 *See* Curriculum Comm., Am. Bar Ass'n, A Survey of Law School Curricula: 1992–2002, at 25–26 (2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/curriculumsurvey/Curriculum_Survey.authcheckdam.pdf.

23 *See id.*

24 Manning & Stephenson, *supra* note 5, at v.

25 *See* Curriculum Comm., Am. Bar Ass'n, *supra* note 22; *see also* Jonathan D. Glater, *Training Law Students for Real-Life Careers*, N.Y. Times, Oct. 31, 2007, http://nytimes.com/2007/10/31/education/31lawschool.html.

26 *See Juris Doctor Degree*, U. Notre Dame L. Sch., http://law.nd.edu/academic-programs/juris-doctor-degree/ (last visited May 5, 2011).

27 *See Course Descriptions 2010–12*, U. Notre Dame L. Sch., http://law.nd.edu/academic-programs/course-descriptions/course-descriptions/ (last visited May 5, 2011).

28 Manning & Stephenson, *supra* note 5, at v.

29 Guido Calabresi, A Common Law for the Age of Statutes ch. 1 (1982).

30 *See* Curriculum Comm., Am. Bar Ass'n, *supra* note 22.

31 *See, e.g.*, *Course Descriptions 2010–12*, *supra* note 27 (providing the following course

Legislation and Regulation, thus, provides a much-needed exploration of an important legal subject that is currently absent from the first-year law school curriculum.

Legislation and Regulation consists of five chapters: two exploring statutory interpretation,[32] two addressing administrative law,[33] and a final chapter combining statutory interpretation with administrative law.[34]

A. Chapter One: The Legislative Process and Statutory Interpretation

Chapter one begins, wisely, with *Tennessee Valley Authority v. Hill*,[35] the famous dispute involving the endangered snail darter and the nearly completed Tellico Dam.[36] *Hill* illustrates many of the issues that are examined in greater detail in the balance of the book, including the competing roles of text, purpose, and legislative history in statutory interpretation,[37] as well as how to reconcile seemingly contradictory statutory provisions.[38] It also reveals the tension between discretion and constraint on the decisionmaking authority of administrative agencies.[39]

The use of *Hill* to introduce the legislative and regulatory processes would be even more effective had it included additional context. That context would highlight the relationship between a judicial decision, on the one hand, and the entire lawmaking process, on the other, as it is presented in (or absent from) other first-year courses. For example, how would the common law have resolved the conflict between a rare fish and a proposed dam? What is the statutory authority of the Tennessee Valley Authority, the New Deal creation that proposed building the Tellico Dam after already constructing dozens of dams in the region?[40] More importantly, what happened

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description of Criminal Law: "Deals with the basic principles of American criminal law such as the definition of crime, defenses, proof, and punishment, and the basic structure and operation of the American criminal justice system").

32 MANNING & STEPHENSON, *supra* note 5, chs. 1–2.

33 *Id.* chs. 3–4.

34 *Id.* ch. 5.

35 Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978), *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 4.

36 *Id.*

37 *See* MANNING & STEPHENSON, *supra* note 5, at 17–19.

38 *See id.*

39 *See id.*

40 *See id.*; *see also* David Ekbladh, *"Mr. TVA": Grass-Roots Development, David Lilien-*

after the Supreme Court's decision in favor of the snail darter?[41] The aftermath of "the snail darter case" (as Manning and Stephenson describe it) reminds students that statutory and regulatory lawmaking is unlike constitutional law, where the Supreme Court usually gets the last word.[42] In truth, legislatures may change statutes and administrative agencies may change regulations if they do not like what a court has decided.[43]

After *Hill*, *Legislation and Regulation* gives a brief, six-page overview of the legislative process.[44] More would be helpful here. What is missing, specifically, is a more comprehensive discussion of the law governing the legislative process.[45] The book promises to "teach students . . . how federal statutory . . . law is made,"[46] and thus, the six-page "overview" of the legislative process is wanting. This is especially true because many law students are surprisingly unfamiliar with the basics of the federal legislative process.[47] Moreover, additional material explaining the federal legislative process would place the material that follows—regarding statutory interpretation and administra-

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thal, and the Rise and Fall of the Tennessee Valley Authority as a Symbol for U.S. Overseas Development, 1933–1973, 26 DIPLOMATIC HIST. 335, 335–74 (2002).

41 Following the Supreme Court's decision in *Hill*, the saga of the snail darter did not end. First, Congress amended the Endangered Species Act (ESA) of 1973, Pub. L. No. 93-205, 87 Stat. 884, to establish a "God Squad," an administrative body empowered to waive the protections of the ESA when it is in the public interest to do so. *See* 16 U.S.C. § 1536(e), (g), (h) (2006). Next, the God Squad decided unanimously not to grant a waiver to the Tennessee Valley Authority because the Tellico Dam made so little economic sense. *See* Michael A. Bosh, *The "God Squad" Proves Mortal: Ex Parte Contacts and the White House After* Portland Audubon Society, 51 WASH. & LEE L. REV. 1029, 1034 n.20 (1994). But Congress then added an appropriations rider waiving the application of all federal statutes that could apply to the dam. *See* Energy and Water Development Appropriations Act, 1980, Pub. L. No. 96-69, 93 Stat. 437, 449–56 (1979) (codified primarily in scattered sections of 42 U.S.C.). In a last-ditch constitutional challenge, a Cherokee tribe sought—yet failed—to block the dam because the resulting flooding of their sacred sites would interfere with their free exercise of religion. *See* Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1161 (6th Cir. 1980).

42 MANNING & STEPHENSON, *supra* note 5, at 3; *see* Allan Ides, *Judicial Supremacy and the Law of the Constitution*, 47 UCLA L. Rev. 491, 491 (1999) ("[A]lthough the Supreme Court may not be the sole arbitrator of constitutional meaning, the Court would seem to be in its exposition of the law of the Constitution.").

43 *See* Jason Mazzone, *When the Supreme Court Is Not Supreme*, 104 Nw. U. L. REV. 979, 982 (2010) (discussing the "supremacy myth").

44 MANNING & STEPHENSON, *supra* note 5, at 22–28.

45 *See id.* at 26 & n.1 (citing WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS (7th ed. 2007)) ("For reasons of space and presentation, we have simplified the complex process that Mr. Oleszek's excellent book so thoughtfully and thoroughly describes.").

46 *Id.* at v.

47 *See* Pegeen G. Bassett, Virginia C. Thomas & Gail Munden, *Teaching Federal Legislative History: Notes from the Field*, 5 PERSP.: TEACHING LEGAL RES. & WRITING 96 (1997).

tive law—in better perspective. Much recent scholarship addresses such controversial aspects of the legislative process as filibusters,[48] appropriations laws,[49] temporary legislation,[50] and lame-duck sessions.[51] Theories and doctrines of statutory interpretation often depend on contested understandings of how the legislature makes laws, and administrative law shares a similar interest in the details of the statutory lawmaking process.[52] Although more information about the lawmaking process can be gleaned from the materials contained in the balance of the book, it would be useful to provide a longer description of that process at the outset.

Legislation and Regulation hits its stride in the next section of chapter one, in which it moves on to an extended discussion of statutory interpretation.[53] The section focuses on the historic tension between the letter of the law and the spirit of the law.[54] Again, Manning and Stephenson chose cases that are perfectly suited to the task. *Riggs v. Palmer*[55] is a classic dispute in which the New York Court of Appeals, in a 3–2 split, read the state's general estate statute to preclude a murderer from inheriting from his victim.[56] The next case, *Church of the Holy Trinity v. United States*,[57] held that a federal statutory prohibition directed at foreign workers did not apply to an English minister.[58] Finally, the last case in that section, *United States v. Locke*,[59] read a federal land management statute's requirement that annual mining claims be renewed *prior to* December 31 to preclude a renewal that was submitted *on* December 31.[60] As revealed in the

48 *See, e.g.*, Josh Chafetz & Michael J. Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245 (2010), http://www.pennumbra.com/debates/pdfs/Filibuster.pdf.

49 *See, e.g.*, Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party in Government*, 100 COLUM. L. REV. 702 (2000).

50 *See, e.g.*, Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007 (2011) (arguing for legislation that does not contain an expiration date).

51 *See, e.g.*, John Copeland Nagle, *Lame Duck Logic*, 44 U.C. DAVIS L. REV. (forthcoming 2011) (examining lame-duck congressional sessions).

52 *See, e.g.*, MANNING & STEPHENSON, *supra* note 5, at 140–42, 580–88.

53 *Id.* at 28.

54 *Id*.

55 Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889), *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 31.

56 *See id*.

57 Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 38.

58 *See id*.

59 United States v. Locke, 471 U.S. 84 (1985), *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 102.

60 *See id*.

section's rich explanatory notes, each of these cases is featured in the abundant literature analyzing statutory interpretation from a variety of perspectives.[61]

The balance of chapter one considers the nature of statutory text and the use of legislative history in statutory interpretation.[62] Manning and Stephenson tell the roller-coaster story of judicial use of legislative history.[63] During the nineteenth century, the courts were unwilling to consult legislative history.[64] Later, they seemed to prefer legislative history—even to the text—as evidence of statutory purpose.[65] Now, there is a "new synthesis," which relies on limited kinds of legislative history, for some purposes more than others.[66] This section also recites and critiques the recent scholarly literature related to the role of legislative history in statutory interpretation, which engages numerous assertions and normative claims that have broad import, and thus is especially helpful for those who are unfamiliar with the lawmaking process.[67]

B. Chapter Two: Canons of Statutory Construction

Chapter two examines the canons of construction that courts use to interpret statutes.[68] It is the shortest chapter in the book, but it provides a fulsome account of these—often obscure—tools of statutory interpretation. It begins with a 1931 decision in which Justice Holmes asserted confidently that an airplane was not a "vehicle" because "in everyday speech 'vehicle' calls up the picture of a thing moving *on land*."[69] Then, it offers helpful illustrations of a series of semantic canons: *expression unius* (the principle that when a statutory provision explicitly expresses or includes particular things, other things are implicitly excluded);[70] *noscitur a sociis* (the presumption that a word's meaning can be clarified—and often narrowed—by the words around it);[71] *ejusdem generis* (reading lists to encompass "only

61 *See* MANNING & STEPHENSON, *supra* note 5, at 35–38, 44–49, 109–10.

62 *Id.* at 85.

63 *Id.* at 140–201.

64 *Id.* at 142–63.

65 *See id.* at 181–85.

66 *See id.* at 181–93.

67 *See id.*

68 *Id.* at 218.

69 McBoyle v. United States, 283 U.S. 25 (1931), *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 219, 220 (emphasis added).

70 MANNING & STEPHENSON, *supra* note 5, at 224.

71 *Id.* at 234.

things that are similar to the items that are specifically mentioned");[72] the presumption favoring consistent meaning;[73] and the presumption against surplus language.[74] The materials accurately capture the difficulty in identifying when to apply each canon, and what to do when two or more canons point in opposite directions.[75]

The next part of chapter two examines substantive canons.[76] As Manning and Stephenson explain, "these substantive canons ask interpreters to put a thumb on the scale in favor of some value or policy that courts have identified as worthy of special protection (or, equivalently, a thumb on the scale against a result that courts have identified as undesirable)."[77] There are many such canons, but the inability to know precisely which canons exist, and how the courts will apply them, frustrates their intended purposes, as well as their theoretical justification.[78] The book describes three sets of substantive canons to illustrate these problems: (1) reading statutes to avoid serious constitutional questions,[79] (2) reading statutes to protect state sovereignty and autonomy,[80] and (3) reading criminal statutes narrowly in accordance with the rule of lenity.[81] Focusing on these three substantive canons—instead of others that promote different kinds of public values, such as environmental protection or the special status of Native American tribes[82]—is effective because all three reinforce the book's more general focus on the lawmaking process as a whole.[83]

C. Chapter Three: The Constitutional Position of Administrative Agencies

Chapter three introduces administrative agencies.[84] It serves as a transition chapter between the first two chapters, which focus on interpreting the statutes that Congress enacts, and the last two chapters, which focus on the regulatory process and the role of agencies in in-

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72 *Id.* at 249.

73 *Id.* at 233.

74 *Id*.

75 *Id.* at 249–50.

76 *Id.* at 266–356.

77 *Id.* at 266.

78 *See id.* at 337–56.

79 *Id.* at 268.

80 *Id.* at 288.

81 *See id.* at 267.

82 *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978), *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 4.

83 MANNING & STEPHENSON, *supra* note 5, at 267–68.

84 *Id.* at 357.

terpreting statutes. The purpose of this chapter is to review the historical debate about the constitutional location of administrative agencies.[85] Accordingly, the explanatory notes are longer, and the cases are somewhat less frequent.[86] The debate raises a number of questions. What do we make of "the awkward position that administrative agencies occupy in our three-branch federal government?"[87] Are they part of the executive branch, placing them under the direct control of the President? Are they a novel fourth branch of the federal government? Should we prefer a "formalist" or "functionalist" approach to the separation of the federal government's powers?[88]

The proliferation of federal agencies beginning during the New Deal afforded the Supreme Court and legal academics abundant opportunities to reflect on such conundrums.[89] As the book details, a clear consensus has emerged that Congress may delegate rulemaking powers to federal agencies, but the ways in which the President and Congress may continue to control agency powers are less well defined.[90] The chapter also reviews the normative debate about the wisdom of empowering administrative agencies with rulemaking authority to begin with.[91] Instead, why not allow legislators to "acquire their own expertise . . . by dramatically expanding the staffs of the various legislative committees?"[92]

Finally, chapter three examines the ways in which Congress and the President may exercise control over federal agencies through techniques such as the legislative veto, directions on how to execute the law, funding, oversight hearings, the appointment and removal of agency officials, centralized regulator review, and presidential directives.[93]

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85 *Id.*

86 *See id.* at 370–578.

87 *Id.* at 360.

88 *Id.* at 376–78.

89 *See id.* at 583; *see also id.* at 361 (quoting Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492–93 (1987) ("Virtually every part of the government Congress has created—the Department of Agriculture as well as the Securities and Exchange Commission—exercises *all three* of the governmental functions the Constitution so carefully allocates among Congress, President, and Court.")).

90 *See id.* at 360.

91 *Id.* at 381.

92 *Id*.

93 *See id.* at 442–578.

D. Chapter Four: The Regulatory Process

In chapter four, Manning and Stephenson describe the regulatory process.[94] They begin by observing that much of what we call "administrative law," which governs the regulatory process, evolved to address "serious concerns about excessive concentration of power in unelected bureaucrats."[95] Next, they introduce the Administrative Procedure Act ("APA"),[96] which was designed to improve the quality of agency decisionmaking and enhance democratic legitimacy.[97] Federal agencies look to the APA to determine the procedures available to them, and aggrieved parties look to the APA for relief in the event that an agency has exceeded its power.[98] The cases and other materials throughout chapter four illustrate how the APA seeks to achieve its intended goals. For example, in *Chocolate Manufacturers Ass'n v. Block*,[99] we learn about the requirements to which administrative agencies must adhere in promulgating new rules.[100] In that case, the Fourth Circuit Court of Appeals required the Food and Drug Administration ("FDA") to reopen its comment period for a rule that excluded flavored milk from the federal Special Supplemental Food Program for Women, Infants, and Children ("the program").[101] Nothing in the FDA's proposed rulemaking had alerted the trade group supporting chocolate milk that such milk could be excluded from the program by the agency's proposed rule.[102] And the trade group could not be charged with constructive knowledge that a number of program administrators had proposed eliminating chocolate milk from the program.[103] Because the FDA failed to engage in APA-mandated notice-and-comment procedures, the contested rule was invalid.[104]

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94 *Id.* at 579.

95 *Id.* at 580.

96 Administrative Procedure Act (APA), 5 U.S.C. §§ 551–596, 701–706 (2006).

97 MANNING & STEPHENSON, *supra* note 5, at 580–83.

98 *Id.* at 604–17 (describing agencies' notice-and-comment rulemaking procedure, as well as alternatives, such as adjudication).

99 Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985), *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 627.

100 MANNING & STEPHENSON, *supra* note 5, at 604.

101 *Chocolate Mfrs. Ass'n*, 755 F.2d 1098, *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 633–34.

102 *Id.* at 633.

103 MANNING & STEPHENSON, *supra* note 5, at 636–37.

104 *Chocolate Mfrs. Ass'n*, 755 F.2d 1098, *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 634.

The last section of chapter four analyzes judicial review of agency rules.[105] This is a famously challenging and important topic, which Manning and Stephenson explain by recounting the legendary disputes among leading judges on the D.C. Circuit, the extensive scholarly literature surrounding the subject, and the latest leading cases in the area.[106] The detailed account of the debate between D.C. Circuit Judges Leventhal and Bazelon[107] is the highlight of this section, for it presents, in the judges' own voices, the concerns that animated their desire to hold agencies to a higher standard in complying—substantively and procedurally—with the APA.[108] Chapter four concludes with a discussion of the academic writings on modern "hard look" review.[109] The synopsis is particularly thorough and useful in identifying the different concerns that underlie various approaches to judicial review of agency actions.[110]

It would be helpful if Manning and Stephenson supplemented the discussion of judicial review of agency decisions in chapter four with some of the most recent examples of how courts are applying that standard. For example, in *Butte County v. Hogen*,[111] the D.C. Circuit reviewed the U.S. Department of Interior's decision denying the Mechoopda Indian Tribe's application to obtain federal approval to conduct gaming operations in northern California.[112] The court held 2–1 that the U.S. Interior Department failed to provide the minimal explanation required under the APA for denying the tribe's request.[113] Indeed, the agency's response to the tribe's request "had all the explanatory power of the reply of Bartleby the Scrivener to his employer: 'I would prefer not to.' Which is to say, it provided no explanation."[114] The majority in *Butte* stated that the agency's mere assertion that they were "not inclined to *revisit* the matter" was arbitrary given that the agency had not visited the matter in the first instance.[115] For the dissent, though, the agency's response was "self-

105 MANNING & STEPHENSON, *supra* note 5, at 717.

106 *See id.*

107 *Id.* at 720–23.

108 *See id.*

109 *Id.* at 756-90.

110 *Id.* at 775–81 (explaining the costs and benefits of hard look review).

111 Butte Cnty. v. Hogen, 613 F.3d 190 (D.C. Cir. 2010).

112 *See id*. at 191.

113 *Id.* at 194–95.

114 *Id.* at 195 (quoting HERMAN MELVILLE, BARTLEBY, THE SCRIVENER: A STORY OF WALL STREET 10 (Dover 1990) (1853)).

115 *Id.* (internal quotation marks omitted).

explanatory," and thus complied with the APA.[116] A case in which two judges find an agency's decision to be lacking any explanation whatsoever, while another judge finds the same agency decision to be entirely self-explanatory, demonstrates the challenges in applying the APA to contested agency decisions. Chapter four of *Legislation and Regulation* would be even more useful for this generation of law students if it contained more examples of recent applications of judicial review to agency decisions.

E. Chapter Five: Statutory Interpretation in the Administrative State

Chapter five—the book's concluding chapter—combines each of the book's themes by analyzing statutory interpretation in the administrative state.[117] The chapter focuses on the Supreme Court's landmark decision, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[118] but it also provides ample context of jurisprudence both before and after that case.[119] The depiction of the struggle on the Court during the 1940s to settle on a rule governing deference to agency interpretations of a statute, which led to the *Chevron* rule—that an agency's interpretation should receive deference unless it is contradicted by the plain meaning of a statute or unreasonable—is especially enlightening.[120] And the explanatory notes following the *Chevron* opinion, which include a review of the "voluminous scholarly literature debating the normative desirability of *Chevron*,"[121] do an excellent job of summarizing the arguments surrounding that decision.[122]

The next sections of chapter five examine the many—often unsettled—questions regarding the relationship of *Chevron*'s rule of deference to other rules of statutory interpretation, including those that govern textual analysis and the substantive canon of avoiding constitutional questions.[123] In discussing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[124] Manning and Stephenson revisit the debate about the meaning of the Endangered Species Act of

116 *Id.* at 197 (Rogers, J., dissenting).

117 MANNING & STEPHENSON, *supra* note 5, at 791.

118 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

119 MANNING & STEPHENSON, *supra* note 5, at 791–940.

120 *See id.* at 792–814.

121 *Id.* at 824.

122 *Id.* at 821–35.

123 *Id.* at 835, 888.

124 Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687 (1995), *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 854.

1973,[125] the same statute that we saw in chapter one's *Hill*.[126] Thus, not only is *Babbitt* useful itself in demonstrating how *Chevron* deference interacts with other rules of statutory interpretation,[127] it also demonstrates how the Court's approach to statutory interpretation evolved between 1978 (when the Court decided *Hill*)[128] and 1995 (when the Court decided *Babbitt*).[129]

Chapter five concludes with a section on the limits of *Chevron* deference.[130] Specifically, *Chevron*'s limits are borne out by the debate on the Supreme Court in *United States v. Mead Corp.*[131] According to Justice Souter, *Mead* was simply an extension of *Chevron*.[132] According to Justice Scalia, however, *Mead* represented an "avulsive change" that, unwisely, had displaced *Chevron*.[133] By pointing to these contrary impressions of the same doctrine, *Legislation and Regulation* concludes by highlighting the lingering tension and uncertainty surrounding judicial review of agency decisions.

The book delivers on the promise of a detailed, thoughtful review of the contemporary American lawmaking process, which depends on legislation and regulation far more than the common law that remains the core of most first-year law school curricula. It combines the best features of casebooks that address statutory interpretation and those that address administrative law. Manning and Stephenson's book will allow students and other readers to tackle specific statutory and regulatory schemes—such as environmental law—at the same time as they reflect on lawmaking generally.

II. WAS SAXE RIGHT?

Legislation and Regulation teaches about the federal lawmaking process. John Godfrey Saxe believed that, when understood, such knowledge would result in less, not more, respect for the law.[134] Was he right?

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125 Endangered Species Act (ESA) of 1973, 16 U.S.C. §§ 1531–1544 (2006).

126 *See supra* notes 35–39 and accompanying text.

127 *Babbitt*, 515 U.S. 687, *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 854.

128 *See supra* notes 35–43 and accompanying text.

129 *Babbitt*, 515 U.S. 687, *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 854.

130 MANNING & STEPHENSON, *supra* note 5, at 916.

131 United States v. Mead Corp., 533 U.S. 218 (2001), *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 919; *see also* MANNING & STEPHENSON, *supra* note 5, at 934.

132 MANNING & STEPHENSON, *supra* note 5, at 934.

133 *Id.*

134 *See* SAXE, *supra* note 1.

To test Saxe's claim, consider the Patient Protection and Affordable Care Act ("PPACA").[135] This Part examines the controversy surrounding the congressional enactment of the PPACA and the debate about the role of the administrative agencies responsible for implementing the Act. It then focuses on the claim that the PPACA—as proposed in Congress or as actually enacted—authorizes the use of "death panels" that would coerce elderly patients into foregoing additional medical care. These stories confirm the principles outlined in *Legislation and Regulation*, but they leave a surprising number of questions about the scope of the law unanswered.

A. "Health Care for All": The Legislative Process that Produced the PPACA

For decades, every President has pushed Congress to enact some kind of health care reform legislation, but most of those proposals failed to make it through the legislative process.[136] President Clinton, for example, featured health care reform in his presidential campaign, but his "effort ended disastrously for the Democrats" as the party failed to enact a bill, and ultimately lost control of Congress in the 1994 elections.[137] President Obama emphasized health care reform in his election campaign, as well.[138] Once elected, he vowed to learn from the Clinton Administration's mistakes.[139] For instance, he allowed Congress to write its proposed law rather than preparing his own proposal first.[140]

Despite President Obama's efforts to avoid his predecessors' mistakes, the process by which the Obama Administration instituted health care reform was far from smooth. Congress passed the PPACA in March 2010 "after one of the longest, most rancorous and most

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135 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended primarily in scattered sections of 42 U.S.C.), *invalidated by* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. Jan. 31, 2011).

136 *See* Dan Balz, *Introduction* to WASH. POST, LANDMARK: THE INSIDE STORY OF AMERICA'S NEW HEALTH-CARE LAW AND WHAT IT MEANS FOR US ALL [hereinafter LANDMARK] 1, 7 (2010); Ceci Connolly, *The Call of History: "We're Gonna Get This Done," in* LANDMARK, *supra*, at 11, 13 ("'Health care for all' has been the mantra of liberal constituencies for nearly a century, and any Democratic politician with national aspirations must pay homage to the cause.").

137 Balz, *supra* note 136, at 6–7.

138 Connolly, *supra* note 136, at 11–12, 15–16.

139 *Id.*

140 *Id.* at 16.

partisan debates the capital had seen in years."[141] Since its enactment, the PPACA has been described as "dense and complex, much like the sprawling, interlocking, convoluted system that it seeks to reshape."[142] The enactment story begins in the House, which passed its bill by a narrow margin—220 to 215—only after the Democratic leadership made numerous concessions to their moderate and conservative colleagues on issues such as the inclusion of a public health insurance option and federal abortion funding.[143] More than a month of acrimonious debate later, the Senate approved a somewhat different version of the bill in a 60–39 margin, though that margin hides the closeness of the vote.[144] The bill's supporters needed sixty votes to overcome a filibuster in the Senate,[145] a controversial fact of modern congressional practice that merits attention in Manning and Stephenson's book.[146] The deals that were needed to secure those sixty votes became instantly infamous.[147] As a result, the law about which progressives had long dreamed changed dramatically during the House's legislative process.[148]

The trouble did not end there. When the bill went back to the House, Senate Democrats knew that they could no longer defeat a Republican filibuster of a different bill because the voters of Massachusetts had elected Republican Scott Brown following the death of Edward Kennedy.[149] Recognizing this, President Obama became more involved in lobbying undecided House members until the Senate

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141 Balz, *supra* note 136, at 7.

142 Alec MacGillis, *The Best, the Worst, the Future*, *in* LANDMARK, *supra* note 136, at 65, 69.

143 *See* Ceci Connolly, *The House of Pelosi: Deals and Betrayals*, *in* LANDMARK, *supra* note 136, at 29, 29–39 [hereinafter Connolly, *House of Pelosi*]; *see also* Ceci Connolly, *The Power of One: Lieberman Blocks the Way*, *in* LANDMARK, *supra* note 136, at 39, 39 [hereinafter Connolly, *Power of One*] ("The final vote—220 to 215—suggested to some a fragile victory for the president.").

144 Connolly, *Power of One*, *supra* note 143, at 47–48.

145 *Id.* at 39.

146 MANNING & STEPHENSON, *supra* note 5, at 442–60.

147 *See* Connolly, *Power of One*, *supra* note 143, at 42–43. The deals included: (1) the omission of a public health care option at the behest of independent Senator Joseph Lieberman, *id.*; (2) the "Louisiana Purchase" of $300 million in extra Medicaid money to that state to satisfy Senator Mary Landrieu, *id.*; and (3) the "Cornhusker Kickback," upon the demands of Nebraska Senator Ben Nelson, which allowed the Senator to obtain more favorable federal reimbursements for his state, *see* Balz, *supra* note 136, at 5.

148 *See* Connolly, *House of Pelosi*, *supra* note 143, at 29–31 (discussing the "favor file" Pelosi amassed in the weeks before the House voted on the heath care bill, including improving the Indian Health Services, and spending "more money on anti-rejection drugs for transplant patients").

149 *See* Ceci Connolly, *The Rescue: Obama's Last Chance*, *in* LANDMARK, *supra* note 136, at 49, 49.

bill passed the House in March 2010.[150] Soon thereafter, both the House and Senate enacted a final bill, the PPACA, which corrected some of the initial Act's most obvious flaws, including the "Cornhusker Kickback."[151]

B. PPACA Enacted: The Role of Administrative Agencies in Implementing the Law

Manning and Stephenson's book reminds us that the enactment of a statute is the beginning, not the end, of the lawmaking process.[152] The lawmaking process surrounding the PPACA illustrates this phenomenon. Remember that Nancy Pelosi explained that "we have to pass the bill so that you can find out what is in it."[153] The size of the law alone—whose count of 906 pages is often cited—creates uncertainty about what it does, and thus, opens it up to substantial modification through the forthcoming lawmaking process.[154] Not surprisingly, then, the law has been characterized as "a regulatory lawyer's dream."[155] In August 2010, the United States Department of Health and Human Services ("HHS") Secretary Kathleen Sebelius admitted that the Obama Administration had "a lot of reeducation to do" because of the "great deal of confusion about [the PPACA]."[156]

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150 *Id.* at 56–61.

151 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended primarily in scattered sections of 42 U.S.C.), *invalidated by* Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. Jan. 31, 2011).

152 MANNING & STEPHENSON, *supra* note 5, ch. 5 (discussing judicial review of agency statutory interpretation, and the evolution of the *Chevron* doctrine).

153 Press Release, Pelosi, *supra* note 20.

154 *See* Patient Protection and Affordable Care Act, 124 Stat. at 119–1025; *see also, e.g.*, Michelle Singletary, *The Color of Money: 4 Scenarios in the New Health-Care Law*, WASH. POST (Mar. 28, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032605598.html ("It's unlikely that most people will read through the 906 pages of the Patient Protection and Affordable Care Act.").

The uncertainty surrounding the PPACA has also prompted unexpected responses from affected parties, some of which have surprised even the authors of the Act itself. For example, some large businesses have even considered ending health insurance for their employees in response to the PPACA, which would undercut a system on which the law relies. *See* Matthew DoBias, *This Is the Easy Part? The Carefully Phased Introduction of the Health Care Law Has Not Gone as Planned*, NAT'L J. (Oct. 30, 2010, 8:02 AM), http://www.nationaljournal.com/member/magazine/health-law-provisions-meet-resistance-from-business-20101028 ("In its first moves to give life to the new law, [agency] officials underestimated enrollment in a program that expands coverage to the frequently ill. They also appear to have misread how businesses plan to use certain tax incentives.").

155 *See* John Reichard, *Health: After the Win, No Time to Lose*, 68 CQ WKLY. 814, 814 (2010) (quoting Patrick Morrisey) (internal quotation marks omitted).

156 Steven Portnoy, *Sebelius: Time for 'Reeducation' on Obama Health Care Law*, ABC

It is no surprise, then, that during the year since the PPACA was enacted, Congress, the executive branch, and the courts all have played a role in shaping the law.[157] Public dissatisfaction with the substance and process leading up to the enactment PPACA fueled the new antigovernment Tea Party, and helped to defeat numerous Democratic members of the House who had voted for the PPACA.[158] Upon taking office in 2011, the new Republican majority in the House (joined by some Democrats) voted for the Repealing the Job-Killing Health Care Law Act ("Repeal Act"),[159] which—as its not-too-subtle title suggests—was intended to repeal the PPACA.[160]

Although the Repeal Act never made it past the Senate,[161] there are many other ways in which Congress could modify the commands of the PPACA. One study identified fourteen parts of the law that Congress may try to change.[162] The new Congress has also threatened to deny the funding needed to implement the PPACA.[163] The House has held oversight hearings suggesting that the law will harm Medicare beneficiaries, the solvency of the Medicare program, and the economic well-being of the whole nation.[164] The Senate was unlikely to

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NEWS (Aug. 30, 2010, 6:10 PM), http://blogs.abcnews.com/thenote/2010/08/sebelius-time-for-re-education-on-obama-health-care-law.html (quoting HHS Secretary Kathleen Sebelius).

Sebelius would blame the confusion surrounding the PPACA on "misinformation given on a 24/7 basis." *Id.* An alternative explanation blames members of Congress for approving a law that they did not actually read, and the implications of which they did not really understand. *See* JOHN GODFREY SAXE, *Progress: A Satire*, *in* THE POEMS OF JOHN GODFREY SAXE, *supra* note 1, at 235, 235–45 (describing critics who have not read the authors whom they critique).

157 *See supra* notes 144–49 and accompanying text.

158 *See* Shailagh Murray, *Voters Oust Half of House Democrats Who Opposed Health-Care Law*, WASH. POST (Nov. 3, 2010, 3:14 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/03/AR2010110305760.html.

159 Repealing the Job-Killing Health Care Law Act, H.R. 2, 112th Cong. (2011).

160 *See id.*

161 157 CONG. REC. S474-75 (daily ed. Feb. 2, 2011) (recording that the Senate voted against repeal in a 51–47 party-line vote).

162 *See* Rebecca Adams et. al, *Plan of Attack*, 68 CQ WKLY. 2735, 2758–64 (2010) (identifying various political actors, each of whom is taking aim at fourteen different PPACA provisions, such as the 1099 form requirement, comparative effectiveness, the employer mandate, grandfather provisions, health savings account rules, the individual mandate, insurance exchanges, IRS enforcement authority, long-term-care benefit, Medicaid expansion, medical loss ratio provisions, Medicare cuts, the Medicare payment board, and minimum benefit standards).

163 Alex Cortes, *Blueprint to De-Fund ObamaCare*, DEFUNDIT.ORG (Feb. 11, 2011), http://defundit.org/wp-content/uploads/2011/02/Blueprint-to-Defund-ObamaCare.pdf; David Nather, *Eric Cantor: GOP Will Defund Health Care Law*, POLITICO (Feb. 8, 2011, 4:06 PM), http://www.politico.com/news/stories/0211/49104.html.

164 *Hearing on the Health Care Law's Impact on Jobs, Employers, and the Economy*, HOUSE COMMITTEE ON WAYS & MEANS (Jan 26, 2011), http://waysandmeans.house.gov/Calendar/EventSingle.aspx?EventID=220619 (calendar post announcing hearing); *Hearing on the*

confirm Donald Berwick to head the Centers for Medicare and Medicaid Services, so President Obama installed Berwick in that position via a recess appointment.[165] In each instance, Congress was employing the familiar tactics that Manning and Stephenson explain in great detail[166] to control executive agencies.

Meanwhile, the opponents of the PPACA have pressed their constitutional objections to the Act in court. Initially, commentators derided the claim that the PPACA exceeded congressional power as frivolous.[167] But the first federal district court decisions on the matter quickly demonstrated the seriousness of the opponents' arguments. Although three courts upheld the PPACA,[168] one found the individual mandate unconstitutional,[169] and one found the Act unconstitutional in its entirety.[170] The court invalidating the whole PPACA likened it to "a finely crafted watch" whose parts cannot be separated, and thus held that the PPACA's unconstitutional individual mandate could not be severed from the rest of the law.[171]

The executive agencies charged with implementing the PPACA have begun to act, too. As Manning and Stephenson would anticipate, the lawmaking process continued in part because Congress left innumerable questions for agencies to answer once the law was passed.[172] There are 1045 places in the law that say "the Secretary

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Health Care Law's Impact on the Medicare Program and Its Beneficiaries, HOUSE COMMITTEE ON WAYS & MEANS (Feb 10, 2011), http://waysandmeans.house.gov/Calendar/EventSingle.aspx?EventID=223509 (same).

165 *See* Carol Eisenberg & John Reichard, *Dr. Berwick Gets the Treatment*, CONG. Q., Mar. 14, 2011, at 574.

166 *See* MANNING & STEPHENSON, *supra* note 5, at 474–76.

167 *See* Dahlia Lithwick, *Gaming the System: At the Supreme Court, Could Legal Precedent Be Less Important than Popular Opinion?*, SLATE (Feb. 2, 2011 5:32 PM), http://www.slate.com/id/2283415/ ("When the first lawsuits were filed challenging the law in March 2010, the conventional wisdom was that they were little more than a Tea Party stunt.").

168 Mead v. Holder, No. 10-950, 2011 WL 611139 (D.D.C. Feb. 22, 2011) (upholding the PPACA); Liberty Univ., Inc. v. Geithner, 2010 U.S. Dist. LEXIS 125922 (W.D. Va. Nov. 30, 2010) (same); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010) (same).

169 Virginia *ex rel*. Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 788–89 (E.D. Va. 2010).

170 Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822 (N.D. Fla. Jan. 31, 2011).

For competing scholarly views of the constitutionality of the PPACA, compare Mark A. Hall, *Commerce Clause Challenges to Health Care Reform*, 159 U. PA. L. REV. 1825 (2011) (arguing that the law is constitutional), with Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581 (2010).

171 *Bondi*, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822, at *134.

172 *See* MANNING & STEPHENSON, *supra* note 5, at 584 (defining rulemaking—one of the two major types of agency action under the APA—as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy"

shall,"[173] one of which generated one of the first academic discussions of the law after it was passed.[174] The discussion centered on section 1302(b) of the PPACA, which provides that the "Secretary shall define the essential health benefits" that must be provided by private health care plans.[175] Professor Jessica Mantel's analysis of that provision sets forth the concern that HHS will succumb to political pressure when it defines which health benefits are essential, and which are not.[176] Professor Mantel identifies the same executive and legislative influence on agency rulemaking—presidential appointment of agency officials, Executive directives, Office of Management and Budget review, congressional repeal, and appropriations decisions—that Manning and Stephenson describe in their book.[177] Presumably, additional arguments reflecting ways in which the executive and legislative branches will continue to shape the PPACA could surface with respect to HHS's other duties under the law.

C. A Closer Look at the PPACA: The "Death Panel" Claim

The most controversial claim regarding the PPACA—that the health care legislation would give rise to "death panels"—demonstrates the full range of statutory interpretation and agency rulemaking issues covered by Manning and Stephenson. The supporters of the PPACA did not intend to authorize the government to encourage doctors to coerce elderly patients to forego treatment and thus hasten their death, as some commentators fear. But the uncertainty regarding the appropriate tools of statutory interpretation combined with apprehension of the broad authority of administrative agencies to promulgate implementing regulations explains why the "death panel" charges persisted.

(quoting 5 U.S.C. § 551(4) (2006))); *see also* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 7-5700, REGULATIONS PURSUANT TO THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (P.L. 111-148) 10–14 (2010) (setting out nine provisions in the PPACA that "give agencies discretion for whether to issue regulations (as opposed to guidelines or other methods that are not specifically regulations)").

173 John Reichard, *Health: After the Win, No Time to Lose*, 68 CQ WKLY. 814, 814 ("On its own, 'shall' appears 4383 times.").

174 Jessica Mantel, *Settling National Coverage Standards for Health Plans Under Healthcare Reform*, 58 UCLA L. REV. 221, 221–22 (2010).

175 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1302(b)(1), 124 Stat. 119, 163 (2010) (to be codified as amended primarily in scattered sections of 42 U.S.C.), *invalidated by Bondi*, No. 3:10-cv-91-RV/EMT, 2011 U.S. Dist. LEXIS 8822.

176 *See* Mantel, *supra* note 174, at 222–23.

177 *See id.* at 231–32; *see also* MANNING & STEPHENSON, *supra* note 5, at 442–578.

1. *"Death Panel" Claims During the Congressional Debate over the PPACA*

The "death panel" claim emerged as the debate over the proposed PPACA raged during the summer of 2009. The opponents of the bill charged that it authorized "death panels," which could pressure individuals to accept less medical treatment even at the cost of their lives.[178] Betsy McCaughey, the former Lieutenant Governor of New York, and a leading opponent of the Clinton Administration's health care proposals, seems to have raised the concern first.[179] The claim spread quickly and dramatically. Representative Virginia Foxx soon warned that the proposed legislation would "put seniors in a position of being put to death by their government."[180] The claim went viral when Sarah Palin embraced it on her Facebook page in early August.[181] Supporters of the bill, including President Obama himself, went on the defensive.[182] Many of these supporters cited the "death panel" charge as an intentional, blatant lie spread by the PPACA's opponents.[183] Although these supporters repeatedly denied that the

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178 *See, e.g.*, Brendan Nyhan, *Why the "Death Panel" Myth Wouldn't Die: Misinformation in the Health Care Reform Debate*, 8 FORUM, no. 1, 2010 at 6–9.

179 *Id.* at 6–9, 16.

180 155 CONG. REC. H8891 (daily ed. July 28, 2009) (statement of Rep. Foxx).

181 *See* Sarah Palin, *Statement on the Current Heathcare Debate*, FACEBOOK (Aug. 7, 2009, 1:26 PM), http://www.facebook.com/note.php?note_id=113851103434 (attracting over 2000 comments by other Facebook users, as of February 27, 2011); *see also* JOHN AVLON, WINGNUTS: HOW THE LUNATIC FRINGE IS HIJACKING AMERICA 153 (2010) (blaming Palin's Facebook post for "single-handedly" changing the popular debate over health care); PAMELA GELLER WITH ROBERT SPENCER, THE POST-AMERICAN PRESIDENCY: THE OBAMA ADMINISTRATION'S WAR ON AMERICA 273–76 (2010) (describing Palin's claims).

182 *See* Barack Obama, U.S. President, Remarks by the President in Health Insurance Reform Town Hall (Aug. 11, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Town-Hall-on-Health-Insurance-Reform-in-Portsmouth-New-Hampshire/ ("[T]he intention of the members of Congress was to give people more information so that they could handle issues of end-of-life care when they're ready, on their own terms. It wasn't forcing anybody to do anything.").

183 *See, e.g.*, 156 CONG. REC. H7218 (daily ed. Sept. 29, 2010) (statement of Rep. DeFazio) (citing "death panels" as illustrating the Republican approach, "if something passes, lie about it"); *id.* at S7439 (daily ed. Sept. 24, 2010) (statement of Sen. Brown of Ohio) (asserting that the opponents of the bill "lied about death panels"); *id.* at S1841 (daily ed. Mar. 23, 2010) (statement of Sen. Leahy) (contending that "[l]ast summer the American people endured myths about 'death panels' and other falsehoods about what reform would mean for families across the country"); *id.* at H1891 (daily ed. Mar. 21, 2010) (statement of Rep. Price) (asserting that "some of my colleagues have fabricated claims about 'death panels'"); *id.* at H1735 (daily ed. Mar. 16, 2010) (statement of Rep. Garamendi) (describing death panel charges as a "pack of . . . lies"); *id.* at H1509 (daily ed. Mar. 16, 2010) (statement of Rep. Ryan) (describing the death panel charge as a "phony argument"); *id*. at S1159 (daily ed. Mar. 4, 2010) (statement of Sen. Burris) (accusing Republicans of "spread[ing] information about death panels"); 155 CONG. REC. S13800 (daily ed. Dec. 23, 2009) (statement of Rep. Kaufman) (referring to "the bogus charge of death

bill would authorize anything like a "death panel," the House relented and removed the provision that purportedly gave rise to the concern.[184] Ultimately, the PPACA that President Obama signed into law

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panels—which was just named politifact.com's 'Lie of the Year'"); *id.* at S13570 (daily ed. Dec. 20, 2009) (statement of Sen. Whitehouse) (objecting to "a campaign of falsehood[ ] about death panels"); *id.* at H9426 (daily ed. Sept. 10, 2009) (statement of Rep. Ellison) (describing death panel claims as "a myth" and "really a simple lie").

184 *See* Robert Pear, *Obama Institutes End-of-Life Plan that Caused Stir*, N.Y. TIMES, Dec. 26, 2010, at A1.

President Obama identified section 1233—a "provision in one of the House bills that allowed Medicare to reimburse people for consultations about end-of-life care, setting up living wills, the availability of hospice, et cetera"—as the provision that gave rise to accusations of death panels. Obama, *supra* note 182; *see also* America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. § 1233 (as introduced in the House of Representatives, July 14, 2009).

The relevant portions of section 1233 would have added the following provisions to the House bill:

> "(hhh)(1) Subject to paragraphs (3) and (4), the term 'advance care planning consultation' means a consultation between the individual and a practitioner described in paragraph (2) regarding advance care planning, if, subject to paragraph (3), the individual involved has not had such a consultation within the last 5 years. Such consultation shall include the following:
>
> "(A) An explanation by the practitioner of advance care planning, including key questions and considerations, important steps, and suggested people to talk to.
>
> "(B) An explanation by the practitioner of advance directives, including living wills and durable powers of attorney, and their uses.
>
> "(C) An explanation by the practitioner of the role and responsibilities of a health care proxy.
>
> "(D) The provision by the practitioner of a list of national and State-specific resources to assist consumers and their families with advance care planning, including the national toll-free hotline, the advance care planning clearinghouses, and State legal service organizations (including those funded through the Older Americans Act of 1965).
>
> "(E) An explanation by the practitioner of the continuum of end-of-life services and supports available, including palliative care and hospice, and benefits for such services and supports that are available under this title.
>
> "(F)(i) Subject to clause (ii), an explanation of orders regarding life sustaining treatment or similar orders, which shall include—
>
> "(I) the reasons why the development of such an order is beneficial to the individual and the individual's family and the reasons why such an order should be updated periodically as the health of the individual changes;
>
> "(II) the information needed for an individual or legal surrogate to make informed decisions regarding the completion of such an order; and
>
> "(III) the identification of resources that an individual may use to determine the requirements of the State in which such individual resides so that the treatment wishes of that individual will be carried out if the individual is unable to communicate those wishes, including requirements regarding the designation of a surrogate decision maker (also known as a health care proxy).

in March 2010 did not say anything about advance care planning, let alone "death panels."[185]

2. *"Death Panel" Claims Against the Agency Responsible for Administering the Enactment of the PPACA*

The "death panel" controversy persisted even after the House removed section 1233 from the bill that eventually became the PPACA. The issue re-emerged when the PPACA moved from Congress to HHS, the federal agency responsible for administering most of the provisions in the PPACA.[186] In July 2010, HHS issued an extensive proposed regulation to begin implementing various aspects of the PPACA.[187] The end-of-life planning question that gave rise to the "death panels" charge was nowhere in the proposed regulation.[188] But four months later, with no fanfare, HHS issued a regulation authorizing "voluntary advance care planning" under the auspices of the PPACA.[189] The agency explained that it had "received a number of comments from physicians, health care providers, and others urging [HHS] to add voluntary advance care planning" to their regulations.[190] HHS agreed, relying on recent medical evidence, as well as the inclusion of similar consultations in the comparatively uncontroversial "Welcome to Medicare visit."[191] HHS also concluded that voluntary advance care planning would "help the physician to better align the

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185 *See* Pear, *supra* note 184 ("[T]he new law does not mention advance care planning.").

186 *See* Mantel, *supra* note 174, at 229 ("The [PPACA] vests authority for defining the essential health benefits in the secretary of HHS.").

187 Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2011, 75 Fed. Reg. 40,039, 40,040 (proposed July 13, 2010) (to be codified at 42 C.F.R. pts. 405, 409–11, 413–15, 424).

188 *See id.*

189 Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2011, 75 Fed. Reg. 73,170, 73,406 (Nov. 29, 2010) (to be codified at 42 C.F.R. pts. 405, 409–11, 413–15, 424) (defining voluntary advance care planning as consultations in which, inter alia, doctors and patients discuss the following information: "(1) An individual's ability to prepare an advance directive in the case where an injury or illness causes the individual to be unable to make health care decisions. (2) Whether or not the physician is willing to follow the individual's wishes as expressed in an advance directive.").

190 *Id.*

191 *Id.* HHS relied on evidence published in the *British Medical Journal*, which reported that "advance care planning improves end of life care and patient and family satisfaction and reduces stress, anxiety, and depression in surviving relatives." *Id.* (internal quotation marks omitted). The agency also relied on evidence from the *New England Journal of Medicine*, which reported that "data suggests that most elderly patients would welcome these discussions." *Id.* (internal quotation marks omitted). Lastly, HHS cited to a study in the *Journal of the American Geriatric Society*, which found "no evidence that these (advance directive) discussions or completing an advance directive lead to harm." *Id.* (internal quotation marks omitted).

personal prevention plan services with the patient's personal priorities and goals."[192]

The policy's supporters urged others to remain quiet about HHS's proposed rule, lest it provoke the same backlash that had doomed proposed section 1233 in the PPACA itself.[193] Their attempt at discretion, however, was to no avail, as *The New York Times* reported on the regulation the day after Christmas.[194] Immediately, the Obama Administrative distanced itself from the regulation,[195] and in January 2011, HHS withdrew it pending further public comment.[196] The agency purported that it was rescinding the rule's reference to voluntary advance care planning because it had become apparent that the agency "did not have an opportunity to consider prior to the issuance of the final rule the wide range of views on this subject held by a broad range of stakeholders (including members of Congress and those who were involved with this provision during the debate on the [PPACA])."[197]

3. The Lessons from Legislation and Regulation for the "Death Panels" Claim

Does the PPACA authorize "death panels"? Nothing in the text of the law says anything remotely like that.[198] But, as Manning and Stephenson show, congressional enactment of a statute is often the beginning of the federal lawmaking process, not the end.[199] Manning

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192 *Id.*

193 Representative Earl Blumenauer, who had championed the voluntary advance care planning provision that had been removed from the PPACA, wrote an e-mail asking his colleagues to refrain from broadcasting the "accomplishment to any of [their] lists, even if they are supporters." *See* Pear, *supra* note 184 (internal quotation marks omitted). Blumenauer continued, "e-mails can too easily be forwarded . . . . Thus far, it seems that no press or blogs have discovered it, but we will be keeping a close watch and may be calling on you if we need a rapid, targeted response." *Id.*

194 *Id.*

195 *See* Robert Pear, *A Reversal for Medicare on Planning for Life's End*, N.Y. TIMES, Jan. 5, 2011, at A15 (reporting that "it was clear that political concerns were also a factor" in withdrawing the rule because it "threatened to become a distraction to administration officials who were gearing up to defend the health law against attack by the new Republican majority in the House").

196 Medicare Program; Amendment to Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2011, 76 Fed. Reg. 1366, 1366 (Jan. 10, 2011) (to be codified at 42 C.F.R. pt. 410).

197 Pear, *supra* note 195.

198 *See* Nyhan, *supra* note 178, at 8–11. *Cf.* America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. § 1233 (as introduced in the House of Representatives, July 14, 2009).

199 *See* MANNING & STEPHENSON, *supra* note 5, ch. 5.

and Stephenson's concluding chapter explains how the *Chevron* regime gives agencies broad authority to act, unless their actions contradict the plain meaning of a statute or are unreasonable.[200] Accordingly, the text of the PPACA need not explicitly create "death panels" in order to produce that result, and perhaps those who fear "death panels" are justified in believing that such a system might materialize through the continued lawmaking process. So, instead of asking whether the PPACA explicitly authorizes "death panels," the better question is whether the PPACA gives HHS the statutory authority to establish the kind of system that opponents condemn as "death panels."

Those who fear the establishment of "death panels" also fear the sweeping regulatory discretion that the PPACA gave to HHS.[201] But it is necessary to make two assumptions in order for voluntary advance care planning (or anything like it) to become the type of "death panels" these critics fear. First, the argument assumes that the line between "*voluntary* advance care planning," and "*coercive* advance care planning" is indistinct.[202] The Obama Administration's apparent embrace of policies that nudge, rather than push, toward the desired result helps to blur that distinction.[203] Moreover, there is a distinct power differential between a physician and an elderly patient who relies on Medicare for her health.[204] Money affects the dynamic as well.[205] Thus, while it is unlikely that a physician will actively pressure a patient to sacrifice medical treatment near the end of her life, it is conceivable that the patient will interpret the physician's suggestions

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200 *See id.* at 821.

201 *See, e.g.*, Sarah Palin, *Statement on the Current Health Care Debate*, FACEBOOK (Aug. 7, 2009, 1:26 PM), http://www.facebook.com/note.php?note_id=113851103434.

202 Sarah Palin, *Concerning the "Death Panels,"* FACEBOOK (Aug. 12, 2009, 8:55 PM), http://www.facebook.com/note.php?note_id=116471698434 (arguing that, because voluntary advance care planning consultations are authorized "whenever a Medicare recipient's health changes significantly" and "are part of a bill whose stated purpose is 'to reduce the growth in health care spending,'" it is no wonder that "that senior citizens might view such consultations as attempts to convince them to help reduce health care costs by accepting minimal end-of-life care").

203 *Cf.* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

204 *See, e.g.*, Ellen S. Lazarus, *Theoretical Considerations for the Doctor-Patient Relationship: Implications of a Perinatal Study*, 2 MED. Q. 34, 45–46 (2009) (finding that doctors, who control "patient's access to and understanding of [medical] information," often use that control to make decisions about "treatment and how patients should be treated").

205 *See* Palin, *supra* note 202 ("Section 1233 'addresses compassionate goals in disconcerting proximity to fiscal ones . . . .'" (quoting Charles Lane, *Undue Influence: The House Bill Skews End-of-Life Counsel*, WASH. POST (Aug. 8, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/08/07/AR2009080703043.html)).

in such a manner.[206] That would be a misinterpretation,[207] but it would be a misinterpretation born of the sensitive doctor-patient relationship, which can become even more fragile at the end of one's life.

Second, in order for the "death panel" claim to come to fruition, one must assume that cost will be an issue when doctors decide which treatments to provide to their patients approaching the end of life.[208] Indeed, Congress enacted the PPACA to cut health care costs,[209] and in doing so, Congress was specifically concerned about the cost of end-of-life care.[210] Even some supporters of the PPACA seem to acknowledge the potential for cost to play a role in health care decisions. *The New York Times* columnist Paul Krugman blogged that "the eventual resolution of the [U.S.] deficit problem both will and should rely on 'death panels and sales taxes.'"[211]

Although most supporters insist that the PPACA will not result in decisions about end-of-life treatment being made because of cost,[212] their rationale is not as airtight as the denunciations of "death panels" as a myth would suggest. For example, Yale medical bioethicist Dr. Sherwin Nuland argues that "even if there were some provision before Congress that could conceivably be interpreted as establishing a 'death panel,' centuries, if not millennia, of established medical ethics (in addition to existing U.S. law) would prevent its actualiza-

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206 *Accord* Palin, *supra* note 202 ("If the government says it has to control health-care costs and then offers to pay doctors to give advice about hospice care, citizens are not delusional to conclude that the goal is to reduce end-of-life spending." (quoting Eugene Robinson, *Behind the Rage, A Cold Reality*, WASH. POST (Aug. 11, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/08/10/AR2009081002455.html)).

207 *See* Obama, *supra* note 182 (arguing that the purpose of voluntary advance care planning was to "give people more information so that they could handle issues of end-of-life care when they're ready, *on their own terms*" (emphasis added)).

208 *See* Palin, *supra* note 202.

209 *See* Organisation for Econ. Co-operation & Dev., *Economic Survey of the United States 2010*, 15 OECD ECON. SURVEYS 1, 27–30 (2010).

210 *See id.* ("Spending on the federal government's two main health care programmes, Medicare and Medicaid, has grown markedly . . . . Slowing growth in total health-care expenditures . . . is the most important health-policy challenge for the United States. The comprehensive reform legislation should contribute to the achievement of these goals . . . .").

211 Paul Krugman, *Death Panels & Sales Taxes*, N.Y. TIMES, Nov. 14, 2010, http://krugman.blogs.nytimes.com/2010/11/14/death-panels-and-sales-taxes/. Krugman went on to clarify that he was not really advocating "death panels," but merely that "heath care costs will have to be controlled, which will surely require having Medicare and Medicaid decide what they're willing to pay for," requiring "consideration of medical effectiveness and, at some point, how much we're willing to spend for extreme care." *Id.*

212 *See, e.g.*, Sherwin B. Nuland, *Dead Wrong: Sarah Palin, Meet Hippocrates*, NEW REPUBLIC (Sept. 2, 2009, 12:00 AM), http://www.tnr.com/article/politics/dead-wrong.

tion."[213] Note the uncertainty surrounding how the statute "could conceivably be interpreted." Dr. Nuland rests most of his rebuttal of the "death panels" claim on longstanding medical ethics.[214] But Palin and others who are worried about "death panels" do not trust medical ethicists.[215] Instead, they fear that utilitarian considerations are displacing ethical concerns in medical decisionmaking, and that the PPACA will aggravate that tendency.[216] Furthermore, they may be particularly weary of relying on arguments based solely on centuries of established ethical understandings, given the recent displacement of historical moral principles in other controversial contexts, such as abortion and gay marriage.[217] Rather than trusting the discretion of agency officials to adhere to today's ethical consensus, it appears that the opponents of "death panels" would prefer an unmistakably clear legal prohibition. There is, however, no such prohibition in the PPACA,[218] and HHS's proposal to reinstate the same voluntary advance care planning rule that gave rise to the "death panel" claim in 2009 simply compounds the distrust that is already rampant among the "death panel" opponents.[219]

The scenario that Palin and other opponents of "death panels" fear is unlikely to materialize.[220] Thus, it is understandable that supporters of the PPACA took such exception to the charge that a law designed to reform our nation's health care system would actually harm some of our most elderly neighbors. But at the same time, the mere removal of section 1233 from the final version of the PPACA

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213 *Id*.

214 *See id.*

215 *See, e.g.*, Palin, *supra* note 202 (questioning the ethics of Dr. Ezekiel Emanuel, a health policy advisor to President Obama, who "has written that some medical services should not be guaranteed to those 'who are irreversibly prevented from being or becoming participating citizens . . . . An obvious example is not guaranteeing health services to patients with dementia.'" (quoting Ezekiel J. Emanuel, *Where Civic Republicanism and Deliberative Democracy Meet*, HASTINGS CENTER REP., Nov.–Dec. 1996, at 12, 12–13)).

216 *Id*; *see also* Robert French, *Ethics at the Beginning and Ending of Life*, 5 U. NOTRE DAME AUSTL. L. REV. 1, 8–10 (2003) (arguing against utilitarianism for ethics within tragic choice decisionmaking).

217 *See, e.g.*, *The Gay Marriage Decision: Ethics, Morality and Law in Conflict*, ETHICS SCOREBOARD (Feb. 12, 2004), http://www.ethicsscoreboard.com/list/gaymarriage.html (arguing that, in the "absence of any concrete documentation of factors justifying the withholding of equal treatment under the law for gay citizens," states are able to "prohibit[ ] the limitation of marriage to heterosexual couples," even despite the fact that the "absolute condemnation of homosexuality has old roots").

218 *See supra* note 198 and accompanying text.

219 *See supra* note 189–97 and accompanying text.

220 *See supra* note 182 and accompanying text; *see also* Nuland, *supra* note 212.

does not necessarily eliminate the scenario that Palin fears.[221] As one writer puts it, "[i]t is not enough simply to discredit the myth, which is relatively easy; it is necessary to address the underlying anxiety, which is much more difficult, since the source of this anxiety is the well-founded fear of the little guy that those who wield power over him will not be inclined to use it for his benefit."[222]

That is why a full understanding of the legislative and administrative process is essential, contra Saxe. The unique value of Manning and Stephenson's book is that it proceeds beyond statutory enactment and statutory interpretation to consider administrative rulemaking. It is only by combining each of these steps that the "death panel" saga makes any sense, and it is only then that we can learn how to avoid it.

CONCLUSION

It is only because Manning and Stephenson's *Legislation and Regulation* is so comprehensive that it can be used to understand both nineteenth century poets,[223] as well as twenty-first century Facebook posts.[224] The book does not attempt a normative evaluation of the processes it describes, but it certainly provides the tools for doing so.[225] Perhaps Saxe is right that we have less respect for laws once we know more about how they are enacted.[226] But Saxe's general aphorism is not directed at any particular lawmaking process. I doubt that Saxe would prefer the modern Chinese Government (even though it has produced some impressive environmental laws);[227] nor is there anything to suggest that he would adopt the "government by commission" that Professor Mantel recommends to avoid the messy politicization of the implementation of the PPACA.[228]

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221 *See* Medicare Program; Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2011, pt. II, 75 Fed. Reg. 73,170, 73,406 (Nov. 29, 2010) (to be codified at 42 C.F.R. pts. 405, 409–11, 413–15, 424) (illustrating HHS's attempt to reinstate some type of voluntary advance care planning after it was removed from the House bill).

222 LEE HARRIS, THE NEXT AMERICAN CIVIL WAR: THE POPULIST REVOLT AGAINST THE LIBERAL ELITE 7 (2010).

223 *See* SAXE, *supra* note 1.

224 *See* Palin, *supra* note 181.

225 *See supra* Part I.

226 *See, e.g.*, Connolly, *House of Pelosi*, *supra* note 143, at 29–31 (discussing the "favor file" Pelosi was forced to amass in the weeks before the House voted on the heath care bill in order to ensure that the legislation passed).

227 *See* THOMAS L. FRIEDMAN, HOT, FLAT, AND CROWDED: WHY WE NEED A GREEN REVOLUTION—AND HOW IT CAN RENEW AMERICA 429–55 (release 2.0 2009) (proposing that the U.S. become "China for a day" in order to enact needed environmental policies).

228 Mantel, *supra* note 174, at 247–48.

It is likely, on the other hand, that Saxe would appreciate any effort, however messy, to employ the lawmaking process to improve healthcare. Saxe suffered permanent brain damage from a railroad injury in 1875, one year after his younger daughter died of tuberculosis.[229] His wife, his son, his two remaining daughters, and his daughter-in-law died during the next six years.[230] Saxe ultimately died of a heart attack in 1887 after spending his last years in seclusion while suffering from depression.[231]

Besides his famous aphorism, Saxe once wrote a bitter verse lamenting what he believed was afflicting our lawmakers:

> Degraded Congress! once the honored scene
> Of patriot deeds; where men of solemn mien,
> In virtue strong, in understanding clear,
> Earnest, though courteous, and, though smooth, sincere,
> To gravest counsels lent the teeming hours,
> And gave their country all their mighty powers.
> But times are changed, a rude, degenerate race
> Usurp the seats, and shame the sacred place.
> Here plotting demagogues, with zeal defend
> The "people's rights," to gain some private end. . . .
> Here lawless boors with ruffian bullies vie,
> Who last shall give the rude, insulting "lie,"
> While "Order! order!" loud the chairman calls,
> And echoing "Order!" every member bawls;
> Till rising high in rancorous debate,
> And higher still in fierce envenomed hate,
> Retorted blows the scene of riot crown,
> And big Lycurgus knocks the lesser down![232]

Sometimes the lawmaking process still looks like that, as Manning and Stephenson recognize. But *Legislation and Regulation* shows that there is much more than "fierce envenomed hate" that determines our laws. The statutory and administrative system that Manning and Stephenson describe is replete with efforts to make it rational, accessible, fair, and just.[233] Needless to say, it does not al-

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229 AM. COUNCIL OF LEARNED SOC'YS, DICTIONARY OF AMERICAN BIOGRAPHY 399–400 (Dumas Malone ed., 1935).

230 *Id*.

231 *Id.*

232 SAXE, *supra* note 156, at 242–43 (footnote omitted).

233 *See, e.g.*, Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098 (4th Cir. 1985), *as reprinted in* MANNING & STEPHENSON, *supra* note 5, at 627, 626–34 (discussing agency notice-and-comment rulemaking process, which allows parties whose interests are affected by a proposed agency rule to have fair notice of a proposal).

ways achieve those goals.[234] Another book, for another course, should tackle those normative aspirations. What *Legislation and Regulation* accomplishes is the reminder that there is a reason for legislation and regulation. It is not always poetic, but one hopes that even Saxe would welcome it.

234 *See supra* Part II.