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The American Law School & The Rise of Administrative Government

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THE AMERICAN LAW SCHOOL & THE RISE OF ADMINISTRATIVE GOVERNMENT. By *William C. Chase*. Madison and London: University of Wisconsin Press. 1982. Pp. x, 182. $18.50.

William Chase[1] has joined the ranks of those who bewail Christopher Langdell's introduction of the case method into legal education. His thesis is that the case method discouraged the use of a judicial model for administrative decisionmaking by leaving little room for the study of administrative law (p. ix).[2] This omission but-

14. *Cf.* I. BALBUS, MARXISM AND DOMINATION 56 (1982) (emphasis in original):

> If we did not assume that there were compelling reasons for the proletariat to define *its* interest as the interest in transcending capitalist alienation, then there would be no warrant for characterizing its failure to so define its interests as false, and we should rather perhaps conclude that Marx's theory is false. The entire problematic of false consciousness is based on a search for the causes of an absence. That this absence should be a problem worth pursuing, however, rather than a nonproblem, assumes that it is an absence of a presence that is reasonable to expect. But this is precisely what Marx has been unable to demonstrate. This suggests, once again, that it is Marx's theory, rather than working-class consciousness, that must be called into question.

1. J.D., Ph.D., Harvard University.

2. Administrative decisions constitute "internal" law, which concerns the formulation of specific policies. Internal law is an " 'unfixed obligation,' " p. 61 (quoting B. WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW 13 (1903)), that varies according to the dictates of expediency. It thus lacks those "attributes which make it 'law' in the sense that it is fit to be treated by judges and legal scholars, or to be taught in law schools." P. 61.

Chase suggests that because the case method only permits inquiry into actual cases, the study of administrative law in law school is limited to examination of appellate court cases reviewing agency decisions. These cases are often restricted to questions revolving around whether the agency has properly exercised its congressionally granted jurisdiction — an issue of *external* law. P. 62. *See generally* B. WYMAN, *supra*. According to Chase, courts have avoided reviewing the substance of decisions because in doing so they would

> come to be increasingly concerned with, and perhaps dominated by, issues of industrial and social regulation arising out of administrative controversies; and the law school would experience something like a revolution in its curriculum and its scholarship. Therefore, the only acceptable conclusion . . . had to be that the substance of administrative

tressed the traditional view that courts are passively to assist private parties in ordering their affairs and thus delayed the emergence of our "modern" sense of the judicial function, which views the judge as an "aggressive public 'policy planner and manager' " (pp. 3-4). According to Chase, this blow to legal development weakened "the exercise of both administration and the judicial function in modern America" (p. ix).

Chase argues that although Langdell hoped to impart to students a scientific knowledge of the law by using the case method to explore legal decisions systematically (pp. 28-29), no such comprehensive "science of law" ever materialized (p. 30). The case method survived anyway, he suggests, because by the time its failure became apparent a class of law professors with a personal stake in its perpetuation had emerged (p. 34). According to Chase, professors wanted to preserve the value of their years of work in collecting and compiling cases (p. 34). They also had a psychological investment in the case method. Law professors reaffirmed their own academic worth each time they rewarded students who excelled under the very system that had rewarded them. The companion of the case method, the Socratic method, also enhanced the professors' emotional satisfaction (p. 35). Of course, Harvard required a more sophisticated justification for retaining the case method and so, according to Chase, it put forth the argument that if law students could not learn all the law under the case method, at least they would learn to think like lawyers (p. 36).

Contrary to Chase's thesis, one might view the widespread acceptance of the case method as an indication that it at least appeared to have some merit. Chase, however, rejects this argument. Instead, he suggests that Harvard bullied other law schools into accepting its approach by exporting "legal missionaries for the case method" to other law schools that wanted to expand their programs and increase their prestige (p. 43).[3] It also cornered the casebook market, so schools "wishing to sample the case method . . . had to swallow Harvard whole" (p. 44). Finally, Chase contends that Harvard suppressed potential competition from an alternative teaching method styled on the continental approach to legal education (pp. 46-59). This method, according to Chase, would have focused on a comprehensive survey of the legal order (pp. 46-47) and would have emphasized administrative rather than case law. In support of this proposition, Chase relates that when Joseph Beale, a Harvard professor, became dean of Chicago's embryonic law school he all but

adjudication was not reviewable, that the administrator's decision was final within the scope of his authority.
Pp. 67-68.

3. *See* R. STEVENS, LAW SCHOOL 36 (1983) (reviewed in this issue) (discussing the tremendous influence that Harvard and other elite legal institutions have had in shaping legal education); Feinman & Feldman, Book Review, 82 MICH. L. REV. 914 (1984).

dismissed Professor Ernst Freund, who had attempted to establish such a competing method of legal instruction there (pp. 53-59).

Unfortunately, Chase's reasoning is not completely persuasive. He does not clearly outline the propositions upon which his thesis rests. Further, once the reader discerns the necessary propositions, she must still locate the support for them in Chase's disjointed presentation. For example, one point that Chase tries to establish is that psychological factors motivated law professors to preserve the case method. Yet Chase's argument that the method endured because of the egotism of a few Harvard professors is unconvincing. Certainly educators at other schools were not, at that point, clearly interested in pursuing the case method. Something besides perversity must have persuaded those professors that Harvard's approach had value. Chase's suggestion that Harvard simply misled many eminent scholars seems implausible, especially because those scholars had a number of other reasons to adopt the case method, the most important of which is that it is arguably an effective mode of legal instruction.[4]

Similarly, Chase does not convincingly establish the superiority of the "modern" sense of the judicial function. As a result, it is unclear why anyone should fret if administrative law's failure to adopt a judicial model delayed the emergence of a more aggressive judicial role. Chase's argument on this point amounts to little more than a bald assertion that courts are good instruments for implementing public policy because they seem to be "articulate, purposeful, and relatively immune to petty political influence" (p. 3). He fails to address counterarguments,[5] such as those which suggest that judges may not remain immune to political influence once they become a more visible part of the political process or those which argue that judges are not qualified to perform the sort of fact finding necessary to effect public policy decisions. Chase's thesis is further weakened by his failure to respond to the contention that even if judges could determine public policy, the consciously negotiated character of their policy decisions might destroy the public sense that courts impartially apply law.

Although Chase does not argue well for his thesis, his book does offer some insight into the historical treatment of administrative law in the law school curriculum, the scholarly debates about the proper role of the judicial function in administrative law, and the techniques that advocates on different sides of that issue have used to

4. *See* Chase, Book Review, 67 MINN. L. REV. 844, 850-51 (1983). Another possible explanation is that the case method has the financial advantage of allowing for large classes and a high faculty-student ratio. *See* R. STEVENS, *supra* note 3, at 63.

5. The counterarguments are presented in Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1309 (1976).

advance their views. One must wonder, however, whether Chase's zeal has led him to ignore material and arguments that do not support his thesis.[6] At best, this book is only likely to provoke some thought about the plight of administrative law; it is hardly likely to persuade a critical reader that its conclusions have merit.[7]

6. Chase has been criticized for his failure to mention important works such as the writings of Eliot and Langdell and Harvard's *Annual Reports*, *see, e.g.*, ANNUAL REPORTS OF THE PRESIDENT AND TREASURER OF HARVARD COLLEGE 1894-95 (1895), which provide a commentary on the early history of the case method. Chase, *supra* note 4, at 847-48.

7. Chase, to some extent, recognizes this himself: "I realize that when an author forsakes a comprehensive narrative of his subject he also forsakes the means to persuade his readers that his conclusions are ironclad." P. x.