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THE REGULATORY STATE



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Law & Business

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*For my husband, Michael, and my children,
Zachary, Jacob, and Zoe*

L.S.B.

For my parents, Sabina and George

E.L.R.

For my children, Isabel, Sarah, and Henry

K.M.S.

Preface

This book provides an introduction to the modern regulatory state, which is the collection of federal governmental laws and institutions that determine significant aspects of social and economic policy today. The regulatory state is the dominant feature of our nation's governance system. It has not always been this way. Prior to the modern era, federal regulatory efforts were haphazard. Social and economic policy were largely determined by the forces of supply and demand—in other words, the market. And the common law, which is developed mainly by state judges in the process of deciding cases, provided most of the important rules governing private conduct. But during the past century and a half, this regime has been largely displaced by statutes and regulations. Statutes are laws enacted by legislatures, such as Congress, and regulations are laws issued by administrative agencies, such as the Department of Transportation or the Environmental Protection Agency or the Federal Communications Commission. Statutes and regulations are paramount in this book because they are principal sources of law in the regulatory state. We examine judicial decisions as well, but they play more of a supporting role here than in many other law school books.

Many law school courses involve statutes and regulations, or legislatures and agencies, but they do not routinely step back to consider the fundamental questions about these laws or institutions. How are statutes enacted or regulations issued? What tools do lawyers use to influence the content of statutes and the development of regulations? Who within agencies makes decisions? What institutions or actors outside agencies most directly influence their actions, and how? Even courses that have a significant statutory or regulatory component—such as securities regulation, tax, or even administrative law—do not focus these foundational questions. It is also necessary to consider how statutes and regulations relate to one another, as well as how the various institutions of government interact to produce them. Other courses deal with these issues, including administrative law, constitutional law, and legislation, but not in a manner designed to provide students with a view of the skills that lawyers use to navigate the regulatory state.

That is the overarching purpose of this book. We also intend it to provide information for evaluating the regulatory state. But the principle goal is practical: to provide an introduction to the laws and institutions that lawyers confront in their practices every day. It may come as a surprise, but we are referring to *all* lawyers. Of course, government lawyers often confront such laws and institutions. But they are far from the only ones. When lawyers give legal advice to clients, they often must base that advice on legal rules established by statutes and regulations. When lawyers litigate on behalf of their clients, their arguments often center on the meaning of a statute or regulation. When lawyers negotiate contracts on their clients' behalf, they

must be aware, in almost every field, of the rules established by statutes and regulations. To think like a lawyer, it is necessary to learn how to do so in the context of the regulatory state.

Chapter 1 begins with a brief consideration of the way in which modern government is structured. By modern government, we mean modern *federal* government as contrasted with state or local government, although many of the lessons may translate to those contexts. You probably learned about the federal government in high school, if not before. As we will explain, however, you probably were not taught the whole truth. The standard approach is largely conventional, focusing on the three branches of government enumerated in the Constitution: the legislative, the executive, and the judicial. But this picture does not fully describe the government that we actually possess. In particular, it does not describe the units of government that actually exercise power over our day-to-day lives: administrative agencies. We bring agencies into the picture. Because this is a law book, we will pay a certain amount of attention to the legal rules that govern these institutions, including those established by the U.S. Constitution. Significantly, we also examine the political interactions between agencies and the enumerated branches, as well as with other agencies and non-federal actors. The legal rules and political interactions often work together in the regulatory state.

Chapter 2 addresses the limitations of the common law as a regulatory regime. As we mentioned, judge-made rules were once the primary mechanism governing private conduct. We explore the traditional justifications and explanations for moving away from reliance on these rules toward reliance on statutes and regulations.

Chapter 3 concerns statutes. It describes the process for generating statutes—the legislative process. We then present actual statutes, describing their basic components and demonstrating that they have predictable features. We also set out the steps of legislative drafting. Understanding how statutes are put together is part of understanding how statutes work.

Chapter 4 addresses judicial interpretation of statutes. Statutes are not always easy to read or understand. But even the most straightforward require an act of interpretation because words really have no meaning until they are interpreted by someone. We explore the tools and theories that courts use for interpreting statutes.

Chapter 5 turns to regulations. Statutes often grant agencies the power to make them work in practice, and agencies often issue regulations for that purpose. Like statutes, regulations are generated by a process—the administrative process. We describe that process and present actual regulations. We show that regulations, like statutes, have predictable components. We also devote considerable attention to the tools and analyses that agencies use in deciding how to implement their statutes, and we consider these in some detail.

Chapter 6 discusses political and judicial control of agency action. Agencies do not function in a vacuum. Rather, they are subject to control of

all three branches. For example, the President has both formal and informal means for maintaining ongoing involvement in agency action. Congress also monitors agency action through various means, including oversight hearings as well as less visible and more continuous contacts. Courts are routinely asked to review agency action once it is final. Because agencies are subject to these influences in making their decisions, we could not describe the operation of regulatory governance without discussing them.

Before we begin, we offer some general notes that cut across this book. For ease of reading, we have reordered the footnotes of the judicial decisions and certain other materials. As you will see, the footnotes follow sequentially within each decision or other material. More significantly, we have chosen to focus throughout on one particular statute and one particular regulation. Both concern the issue of auto safety. We have selected this issue to make the material accessible. The problems that agencies handle often are technical and complex, making them difficult to understand. The focus on auto safety will allow you to rely a bit on your own personal experience in digesting some of the more challenging aspects. We could have chosen a statute and a regulation dealing with the production of natural gas or the development of telecommunications policy, but these topics are less familiar. The very familiarity of auto safety is also meant to show you how statutes and regulations can and do affect our daily lives. They govern things that you now take for granted, like the presence of seatbelts and airbags in your car. But remember: The point of the course is *not* to teach you about auto safety. It is to teach you how to understand any federal statute or regulation, regardless of its content.

Further, as you may already gather, this material raises points of connection between politics and law. What our regulatory state looks like—who makes decisions and what decisions emerge—depends on who is in control of the relevant decisionmakers and decisions. This is often a matter of politics. In this respect, politics is an important part of this book. The relationship between politics and law makes the regulatory state an interesting creature to study, quite apart from the enormous power it wields.

Lisa Schultz Bressman
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Nashville, Tennessee
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