

Legislation and the Regulatory State

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SECOND EDITION

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CAROLINA ACADEMIC PRESS

Durham, North Carolina

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Print ISBN: 978-1-5310-0558-0
E-ISBN: 978-1-5310-0559-7
LCCN: 2017939784

CAROLINA ACADEMIC PRESS, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

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Foreword

This book addresses two subjects critically important to the practice of law in the twenty-first century: legislation and the regulatory or administrative state. Most students are familiar with the idea of legislation. Each year, Congress and state legislatures enact tens or sometimes hundreds of statutes, which are the major form of positive law in the United States. Approaches to interpreting statutes, and the policy and regulatory choices underlying them, may be less familiar. By the regulatory state, we mean the vast apparatus of governmental bodies, agencies, and institutions charged with implementing and enforcing statutes and executive orders.

Legislation and regulation are central to many aspects of what lawyers do. Among other practice areas, compliance, corporate governance, health care law, securities regulation, consumer law, and criminal practice all require attorneys to understand how legislation is enacted and why, and the relationship between the legislature, administrative agencies, regulated parties, and reviewing courts. Because of its importance to legal practice, many law schools have recently added “LegReg” courses to their curriculum, often as a required course in the 1L year. As this volume went to press, Harvard, NYU, Michigan, Vanderbilt, Wake Forest, Brigham Young, Fordham, Colorado (Boulder), Richmond, Houston, Case Western, Pittsburgh and West Virginia all required LegReg in the first three semesters of law school. Other law schools offer students the option of taking LegReg in the 1L year, offer it as part of specialized degree programs, and integrate elements of LegReg into courses in Administrative Law and Legislation.

Under the principle of dual sovereignty recognized by the Constitution, the federal government and the states share authority to regulate many areas of social life. Legislation and regulation can accordingly be found at the federal, state, and local levels—and for the ordinary American, state and local law is more important than anything the federal government does. When buying a house, starting a business, or seeking permission to drive a car, state legislation supplies the governing law. The individual’s primary contact with government will be with a state agency.

Our focus in this volume is on *federal* legislation and regulation. This is principally because state laws vary. We also believe that an understanding of federal law enables students better to deal with state and local laws, because the principles shaping federal administrative law and statutory interpretation influence the resolution of similar issues under state and local government law.

There are now several casebooks on legislation and regulation and related subjects. Three features distinguish this book. First, a central goal of is to help students develop fluency with the *concepts* and *vocabulary* that are necessary to the practice of law in the modern regulatory state. We have sought to follow Judge Posner’s suggestion that

a text on legislation and regulation should introduce the legislative process, the real-world factors that influence the design and content of legislation, techniques for judicial interpretation of statutes, and the process of researching legislative history.¹ The chapters on administrative agencies and judicial review similarly emphasize the building blocks of administrative law and court oversight of the regulatory state.

Second, we emphasize the creative, pragmatic aspects of lawyering. Legal theory is important but subordinate to the actual considerations lawyers will present and judges will be influenced by. There is no single universally accepted theory of statutory interpretation; we are all promiscuous users of diverse authorities and forms of argument. The notes and questions therefore encourage students to develop the ability to switch back and forth among different perspectives and modes of argument and to make use of different authorities when explaining the meaning of a statute, regulation, agency order, or court decision. This should not be a course in catechism. What courts say is never as important as what they in fact do in the case and holdings can never be assessed without considering to what extent the verbal formulations are necessary to the result. The interpretation of statutes and regulation is “a multifarious enterprise.”²

Finally, while including a healthy dose of statutory interpretation and administrative law classics, the text features a substantial number of recently decided cases. Our sense is that these more recent cases lend the text an immediacy that will resonate with many readers, and help students develop fluency with the forms of analysis and argumentative moves they will encounter the minute they enter practice.

In preparing the volume, we have sought to preserve as much texture of the original sources as possible. To help students understand the mechanics of the legislative process, the documentary appendix contains excerpted legislative histories of two statutes that are the subject of several cases in the main text, the Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, and the Driver’s Privacy Protection Act of 1994, Pub. L. No. 103-322, 108 Stat. 2099. In editing cases, we have preserved many citations and procedural details to give a full picture of the context in which a case was decided.

The principal readings have been closely edited. We omit courts’ analysis of issues and other details not pertinent to the subject at hand, including footnotes rehashing the debates between judges. Where a substantial amount of text has been omitted, the omission is noted with asterisks or a summary of the omitted material. The text does not indicate where citations and footnotes have been omitted, but footnotes retain their original numbering. Footnotes that we have added are indicated by an asterisk or dagger.

1. See Richard A. Posner, *Statutory Interpretation-in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 804 (1983).

2. Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559 (2010).

A course on legislation and the regulatory state is an amalgam of traditional law school courses on legislation and the legislative process, statutory interpretation, administrative law, regulation, and economic analysis of law. We are indebted to the many scholars working in these fields whose work the volume builds upon, and to Rachel Barkow, Rick Hills, Jonathan Nash, Bethany Davis Noll, Bobby Papazian, Ricky Revesz, Dick Stewart, Peter Strauss, and students in courses at NYU and Rutgers for invaluable feedback. Larry Gold deserves special thanks for reading multiple drafts of the manuscript and making countless contributions to the book.

S.E. & D.N.
New York
April 2017

