

Legislation and the Regulatory State

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THIRD EDITION

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For Abby, my muse and life partner.—SE

For my family.—DN

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Foreword to the Third Edition

The second edition of *Legislation and the Regulatory State* appeared in 2017, in the chaotic early months of the Trump presidency. The ensuing five years have been a period of both continuity and change in the subjects that this volume covers. The basic questions the volume engages—Why does Congress regulate? What choices does it make in federal regulatory programs? How should courts interpret legislation? What is the appropriate role for agencies in the implementation of statutory policy?—have remained as relevant as ever. Indeed, while the Trump administration broke from some historical norms, many of the central questions that it prompted fell squarely within the questions this volume engages. Congress, for example, debated the need for federal legislation regulating the national health insurance market and the form that such legislation, if any, should take. Courts grappled with how to interpret legislation such as the Civil Rights Act of 1964 in light of changing social norms and mores. In one area after another, challengers on the left and the right argued that agencies exceeded or abused their authority under statutes they administer.

Yet the five years since the last edition appeared have hardly been business as usual. The partisanship and polarization that already characterized national politics only intensified, creating new challenges for lawmakers, administrators, and courts. President Trump entered office critical if not hostile to many programs that executive departments and agencies administer. Unsurprisingly, agencies used their authority to limit the impact of those programs, and, in some cases, undermine them. A number of judges who cut their teeth in the conservative legal movement, and who openly embrace “originalism” and “textualism” in constitutional and statutory interpretation, were appointed to the federal bench. Led by Justice Neil Gorsuch, the new judges appear to be committed to reexamining foundational principles and approaches underpinning the modern regulatory state.

In preparing this edition, we have aimed to situate these developments in the broad structure of federal administrative law, while continuing to provide an accessible introduction to the institutions and procedures of the federal administrative state. Chapter 1 has been updated to include new materials on remedies for the violation of federal regulatory standards. Chapter 2 has been reworked to highlight the Roberts Court’s major statutory interpretation decisions, among them *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), holding that discrimination “because of sex” under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, includes discrimination based on sexual orientation and transgender status. In Chapter 3, we

have highlighted recent challenges to the constitutional position of administrative agencies and the Roberts Court's ongoing project of strengthening the president's power to remove high-level agency appointees. Central to these controversies is the debate over the "non-delegation" doctrine, which has held at least since 1928 that delegations of regulatory authority to agencies are consistent with the Constitution if Congress supplies an "intelligible principle" to guide the agency's actions. Formally, the non-delegation doctrine remains unchanged since the last edition. But there now appears to be a majority of Justices willing to restate the doctrine in a manner that would substantially cabin Congress's ability to delegate. Chapters 4 and 5 have been updated to reflect recent developments in the law governing agency practice and judicial review of agency action. Particularly notable are the decisions in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), holding that a "pre-textual rationale" can establish that agency action is arbitrary and capricious under the Administrative Procedure Act, and *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), which restated the circumstances in which agencies' interpretations of their own regulations will receive so-called *Auer* deference. We have also included coverage of the Court's rejection of the Department of Labor's Occupational Safety and Health Administration's rule requiring employers with at least 100 employees to require employees to be vaccinated against COVID-19 or obtain weekly tests at their own expense.

Looking forward, we are certain that the materials this volume covers will be crucial for lawyers practicing in a variety of areas, and that debates over federal legislation and regulation will continue to be among the most important questions in our law. We are grateful to the many colleagues and students who have shared feedback and corrections with us, as well as to the dedicated team at Carolina Academic Press that has worked hard to bring this volume to press.

Note on the Text

Footnotes in this volume follow the original numbering of the sources in which they appeared. As a result, footnote numbers in court opinions are often non-sequential.

SE & DN
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Foreword to the Second Edition

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 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

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).

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.

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.
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