

Preface

This book provides an introduction to the regulatory state, the system of federal laws and institutions that determine the major part of our nation's social and economic policy today. This system is a relatively new one. 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 rules governing private conduct. 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, 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 also examine judicial decisions, but they play more of a supporting role, as they do in our contemporary legal system. Many law school courses involve statutes and regulations, legislatures, and agencies, but they do not routinely step back to consider the fundamental questions about these laws and institutions that we address in this book. How are statutes enacted or regulations issued? What tools do lawyers use to influence their content and development? Who makes decisions within regulatory agencies? How do statutes and regulations relate to one another, and how do the various institutions of government interact to produce them? What institutions or actors outside those agencies most directly influence their actions, and how do they do so? Even courses that have a significant statutory or regulatory component—such as tax, securities regulation, or environmental law—do not focus these foundational questions. Other courses, including administrative law, constitutional law, and legislation, that deal with such questions are not designed to provide students with a vision of the basic and essential skills that lawyers use to navigate the regulatory state.

The overarching purpose of this book is to provide that vision. In addition, we offer information and ideas for evaluating the regulatory state. But the principal goal is practical: to provide an introduction to the laws and institutions that lawyers confront on a daily basis. It may come as a surprise, but we are referring to *all* lawyers. Of course, government lawyers must deal regularly with such laws and institutions. Yet they are far from the only ones. When lawyers give legal advice to private clients, they must often 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 by addressing the limitations of the common law as a regulatory regime. As we mentioned, judge-made rules were once the primary mechanism for governing private conduct. We explore justifications for this reliance and explanations for why the government has turned to statutes and administrative agencies as primary regulators of private action. Chapter 1 then provides 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 into those contexts. The standard approach to learning about our government is largely conventional, focusing on the three branches enumerated in the Constitution: the legislative, the executive, and the judicial. 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 those agencies into the picture.

Chapter 2 concerns legislation. 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 basic steps of legislative drafting. Understanding how statutes are put together is a crucial step toward understanding what they mean and how they function.

Chapter 3 introduces 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 have developed for interpreting statutes. This chapter focuses on courts because courts have been interpreting statutes for many centuries, well before the advent of the regulatory state, and the tools and theories they have developed are well-established and familiar features of our legal system.

Chapter 4 presents a case study of the regulatory process. It is intended to capture a fuller picture of the institutions and laws that we discuss throughout this book as they come together to solve a particular social problem. This example demonstrates that the various actors do not operate in isolation but are responsive to one another and that there may be more to a regulatory story than meets the eye.

Chapter 5 turns to agency implementation of statutes. 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 notice-and-comment rulemaking process. We describe that process and present examples of actual regulations. We show that regulations, like statutes, have predictable components. We then consider in some detail the tools and modes of analysis that agencies use in deciding

how to implement their statutes. We also introduce some other ways in which agencies implement their statutes, including trial-type hearings called formal adjudication and advice often called guidance.

Chapter 6 discusses political and judicial control of agency action. In implementing their statutes, agencies are subject to control by all of the three constitutionally enumerated branches. For example, the President has both formal and informal means for maintaining ongoing involvement in agency action, including the power to remove certain officials from office and issue executive orders requiring agencies to conduct certain modes of policy analysis. Congress monitors agency action through various means, such as oversight hearings, and retains authority to amend legislation governing agency action. Courts are routinely asked to review agency action, developing and applying particular judicial doctrines for that purpose. Because agencies are subject to these influences in making their decisions, the operation of regulatory governance cannot be fully described without discussing them.

Before we begin, we offer some general notes that cut across this book. We have chosen to focus on one particular statute and one particular regulation, which both concern the issue of auto safety. We have selected this issue to make the material accessible. The problems that agencies handle often are highly 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 your efforts to digest some of the more challenging aspects of the regulatory process. The familiarity of this subject is also meant to show you how statutes and regulations can and do affect our daily lives. We use an example that you may now take for granted—the decision to require airbags in cars—but the learning extends to evolving issues—electric cars, self-driving vehicles, and beyond. At the same time, the point of the book 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.

Finally, as you may already gather, this book raises points of connection between politics and law. In our regulatory state, who makes decisions and what decisions emerge depends on who is in control of the relevant decision makers and decisions. This is often a matter of politics. Lawyers cannot navigate the regulatory state without an appreciation of the relationship between politics and law.

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