CHAPTER 4

Common Law, Statutory Law, and Administrative Law

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Harry Homicide captures Gary and hauls him to the Old Abandoned Mill. Inside the mill, Harry sets a plank of wood atop a conveyor belt and ties Gary securely to the board.

"And now, Gary ... my arch-enemy ... I will have my REVENGE," Harry shouts. With a flourish, he presses a large green button marked START. The conveyor belt starts to move. A very large circular blade at the end of the belt begins to turn and cut into the plank. "Bwah hah hah hah!" Harry laughs in triumph.

Gary moves slowly toward the blade. Very, very slowly. Harry Homicide taps his foot. He sighs, frowns, and checks his watch. "Well," he says, "I think it is safe to assume that it's all over for you, Gary. You should never have crossed me. And so, farewell!" Harry makes a dramatic exit.

Gary works at his bonds frantically. He begins to weep. But then—a hiker appears in the doorway! "Hey! Help! Untie me!" Gary shouts. He can't believe his good fortune.

The hiker mumbles something. "What's that?" Gary shouts. "I can't hear you. Help me—hurry!"

The hiker speaks up. "I said I'm not any good untying knots. Never have been."

Gary's mouth drops open. "Fine, that's fine," he says. "Just hit the big red STOP button on the wall next to you, and I'll untie myself."

"Just hit the big red STOP button on the wall next to you, and I'll untie myself."
The hiker looks at the button, then back at Gary.
"I really need to go," he says.
"WHAT?!"
"If I don't get home soon, I'm going to miss *Oprah*."

The hiker looks at the button, then back at Gary. "I really need to go," he says.

"WHAT?!"

"If I don't get home soon, I'm going to miss *Oprah*."

"You can't be serious!"

"I am serious. I find her empathy and common sense refreshing."

"Oh, boy," Gary mutters to himself. Then, louder, "That's fine, just fine. Just punch the button and you can be on your way in two seconds. Please!"

The hiker takes one last look at the STOP button. "I have to go," he says. Without another word, he leaves.

In his last moments, Gary cannot decide whether he is more irritated with the hiker or Harry Homicide.

Common Law

Gary and the hiker present a classic legal puzzle: what, if anything, must a bystander do when he sees someone in danger? We will examine this issue to see how the common law works.

Common law
Judge-made law.

The **common law** is judge-made law. It is the sum total of all the cases decided by appellate courts. The common law of Pennsylvania consists of all cases decided by appellate courts in that state. The Illinois common law is made up of all of the cases decided by Illinois appellate courts. Two hundred years ago, almost all of the law was common law. Today, common law still predominates in tort, contract, and agency law, and it is very important in property, employment, and some other areas.

Stare Decisis

Stare decisis
"Let the decision stand," that is, the ruling from a previous case.

Precedent
An earlier case that decided the issue.

Nothing perks up a course like Latin. ***Stare decisis*** means "let the decision stand." It is the essence of the common law. Once a court has decided a particular issue, it will generally apply the same rule in similar cases in the future . Suppose the highest court of Arizona must decide whether a contract signed by a 16-year-old can be enforced against him. The court will look to see if there is **precedent**, that is, whether the high court of Arizona has already decided a similar case. The Arizona court looks and finds several earlier cases, all holding that such contracts may not be enforced against a minor. The court will probably apply that precedent and refuse to enforce the contract in this case. Courts do not always follow precedent, but they generally do: *stare decisis.*

A desire for predictability created the doctrine of *stare decisis.* The value of predictability is apparent: people must know what the law is. If contract law changed daily, an entrepreneur who leased factory space and then started buying machinery would be uncertain if the factory would actually be available when she was ready to move in. Will the landlord slip out of the lease? Will the machinery be ready on time? The law must be knowable. Yet there must also be flexibility in the law, some means to respond to new problems and a changing social climate. Sometimes, we are better off if we are not encumbered by ironclad rules established before electricity was discovered. These two ideas are in conflict: the more flexibility we permit, the less predictability we enjoy. We will watch the conflict play out in the bystander cases.

Bystander Cases

This country inherited from England a simple rule about a **bystander's obligations: you have no duty to assist someone in peril unless you created the danger.** In *Union Pacific Railway Co. v. Cappier,*[1] through no fault of the railroad, a train struck a man. Railroad employees saw the incident happen but did nothing to assist him. By the time help arrived, the victim had died. The court held that the railroad had no duty to help the injured man:

> With the humane side of the question courts are not concerned. It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men but in [the laws of God].

As harsh as this judgment might seem, it was an accurate statement of the law at that time in both England and the United States: bystanders need do nothing. Contemporary writers found the rule inhumane and cruel, and even judges criticized it. But—*stare decisis*—they followed it. With a rule this old and well established, no court was willing to scuttle it. What courts did do was seek openings for small changes.

Eighteen years after the Kansas case of *Cappier,* a court in nearby Iowa found the basis for one exception. Ed Carey was a farm laborer, working for Frank Davis. While in the fields, Carey fainted from sunstroke and remained unconscious. Davis simply hauled him to a nearby wagon and left him in the sun for an additional four hours, causing serious permanent injury. The court's response:

> It is unquestionably the well-settled rule that the master is under no legal duty to care for a sick or injured servant for whose illness or injury he is not at fault. Though not unjust in principle, this rule, if carried unflinchingly and without exception to its logical extreme, is sometimes productive of shocking results. To avoid this criticism [we hold that where] a servant suffers serious injury, or is suddenly stricken down in a manner indicating the immediate and emergent need of aid to save him from death or serious harm, the master, if present is in duty bound to take such reasonable measures as may be practicable to relieve him, even though such master be not chargeable with fault in bringing about the emergency.[2]

And this is how the common law often changes: bit by tiny bit. In Iowa, a bystander could now be liable *if* he was the employer and *if* the worker was suddenly stricken and *if* it was an emergency and *if* the employer was present. That is a small change but an important one.

For the next 50 years, changes in bystander law came very slowly. Consider *Osterlind v. Hill,* a case from 1928.[3] Osterlind rented a canoe from Hill's boatyard, paddled into the lake, and promptly fell into the water. For *30 minutes,* he clung to the side of the canoe and shouted for help. Hill heard the cries but did nothing; Osterlind drowned. Was Hill liable? No, said the court: a bystander has no liability. Not until half a century later did the same court reverse its position and begin to require assistance in extreme cases. Fifty years is a long time for the unfortunate Osterlind to hold on.[4]

In the 1970s, changes came more quickly.

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[1] 66 Kan. 649, 72 P. 281 (1903).
[2] *Carey v. Davis,* 190 Iowa 720, 180 N.W. 889 (1921).
[3] 263 Mass. 73, 160 N.E. 301 (1928).
[4] *Pridgen v. Boston Housing Authority,* 364 Mass. 696, 308 N.E.2d 467 (Mass. 1974).

Tarasoff v. Regents of the University of California

17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14
Supreme Court of California, 1976

Facts: On October 27, 1969, Prosenjit Poddar killed Tatiana Tarasoff. Tatiana's parents claimed that two months earlier, Poddar had confided his intention to kill Tatiana to Dr. Lawrence Moore, a psychologist employed by the University of California at Berkeley. They sued the university, claiming that Dr. Moore should have warned Tatiana and/or should have arranged for Poddar's confinement.

Issue: ***Did Dr. Moore have a duty to Tatiana Tarasoff, and did he breach that duty?***

Excerpts from Justice Tobriner's Decision: Although under the common law, as a general rule, one person owed no duty to control the conduct of another, nor to warn those endangered by such conduct, the courts have carved out an exception to this rule in cases in which the defendant stands in some special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct. Applying this exception to the present case, we note that a relationship of defendant therapists to either Tatiana or Poddar will suffice to establish a duty of care.

We recognize the difficulty that a therapist encounters in attempting to forecast whether a patient presents a serious danger of violence. Obviously we do not require that the therapist, in making that determination, render a perfect performance; the therapist need only exercise that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [the field] under similar circumstances.

In the instant case, however, the pleadings do not raise any question as to failure of defendant therapists to predict that Poddar presented a serious danger of violence. On the contrary, the present complaints allege that defendant therapists did in fact predict that Poddar would kill, but were negligent in failing to warn.

In our view, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.

[The Tarasoffs have stated a legitimate claim against Dr. Moore.]

The *Tarasoff* exception applies when there is some special relationship, such as therapist–patient. What if there is no such relationship? Remember the *Soldano v. O'Daniels* case from Chapter 1, in which the bartender refused to call the police.

As in the earlier cases we have seen, this lawsuit presented an emergency. But the exception created in *Carey v. Davis* applied only if the bystander was an employer, and that in *Tarasoff* only for a doctor. In *Soldano*, the bystander was neither. Should the law require him to act, that is, should it carve a new exception? Here is what the California court decided:

> Many citizens simply "don't want to get involved." No rule should be adopted [requiring] a citizen to open up his or her house to a stranger so that the latter may use the telephone to call for emergency assistance. As Mrs. Alexander in Anthony Burgess' *A Clockwork Orange* learned to her horror, such an action may be fraught with danger. It does not follow, however, that use of a telephone in a public portion of a business should be refused for a legitimate emergency call.
>
> We conclude that the bartender owed a duty to [Soldano] to permit the patron from Happy Jack's to place a call to the police or to place the call himself. It bears emphasizing that the duty in this case does not require that one must go to the aid of another. That is not the issue here. The employee was not the good samaritan intent on aiding another. The patron was.

And so, courts have made several subtle changes to the common law rule. Let's apply them to the opening scenario. If Gary's family sues the hiker, will they be successful? Probably not.

The hiker did not employ Gary, nor did the two men have any special relationship. The hiker did not stand in the way of someone else trying to call the police. He may be morally culpable for refusing to press a button and save a life, but he will not be legally liable unless an entirely new change to the common law occurs.

The bystander rule, that hardy oak, is alive and well. Various initials have been carved into its bark—the exceptions we have seen and a variety of others—but the trunk is strong and the leaves green. Perhaps someday the proliferating exceptions will topple it, but the process of the common law is slow and that day is nowhere in sight.

EXAM Strategy

Question: When Rachel is walking her dog, Bozo, she watches a skydiver float to earth. He lands in an enormous tree, suspended 45 feet above ground. "Help!" the man shouts. Rachel hurries to the tree and sees the skydiver bleeding profusely. She takes out her cell phone to call 911 for help, but just then Bozo runs away. Rachel darts after the dog, afraid that he will jump in a nearby pond and emerge smelling of mud. She forgets about the skydiver and takes Bozo home. Three hours later, the skydiver expires.

The victim's family sues Rachel. She defends by saying she feared that Bozo would have an allergic reaction to mud, and that in any case she could not have climbed 45 feet up a tree to save the man. The family argues that the dog is not allergic to mud, that even if he is, a pet's inconvenience pales compared to human life, and that Rachel could have phoned for emergency help without climbing an inch. Please rule.

Strategy: The family's arguments might seem compelling, but are they relevant? Rachel is a bystander, someone who perceives another in danger. What is the rule concerning a bystander's obligation to act? Apply the rule to the facts of this case.

Result: A bystander has no duty to assist someone in peril unless she created the danger. Rachel did not create the skydiver's predicament. She had no obligation to do anything. Rachel wins.

STATUTORY LAW

More law is created by statute than by the courts. Statutes affect each of us every day, in our business, professional, and personal lives. When the system works correctly, this is the one part of the law over which "we the people" have control. We elect the legislators who pass state statutes; we vote for the senators and representatives who create federal statutes.

Every other November, voters in all 50 states cast ballots for members of Congress. The winners of congressional elections convene in Washington, D.C. and create statutes. In this section, we look at how Congress does its work creating statutes.[5] Using the Civil Rights Act as a backdrop, we will follow a bill as it makes its way through Congress and beyond.

[5] State legislatures operate similarly in creating state laws.

Bills

Bill
A proposed statute.

Veto
The power of the president to reject bills passed by Congress.

Congress is organized into two houses, the House of Representatives and the Senate. Either house may originate a proposed statute, which is called a **bill**. To become law, the bill must be voted on and approved by both houses. Once both houses pass it, they will send it to the president. If the president signs the bill, it becomes law and is then a statute. If the president opposes the bill, he will **veto** it, in which case it is not law.[6]

If you visit either house of Congress, you will probably find half a dozen legislators on the floor, with one person talking and no one listening. This is because most of the work is done in committees. Both houses are organized into dozens of committees, each with special functions. The House currently has about 25 committees (further divided into about 150 subcommittees) and the Senate has approximately 20 committees (with about 86 subcommittees). For example, the armed services committee of each house oversees the huge defense budget and the workings of the armed forces. Labor committees handle legislation concerning organized labor and working conditions. Banking committees develop expertise on financial institutions. Judiciary committees review nominees to the federal courts. There are dozens of other committees, some very powerful, because they control vast amounts of money, and some relatively weak. Few of us ever think about the House Agricultural Subcommittee on Specialty Crops. But if we owned a family peanut farm, we would pay close attention to the subcommittee's agenda, because those members of Congress would pay close attention to us.

When a bill is proposed in either house, it is referred to the committee that specializes in that subject. Why are bills proposed in the first place? For any of several reasons:

- ***New Issue, New Worry.*** If society begins to focus on a new issue, Congress may respond with legislation. We consider below, for example, the congressional response in the 1960s to employment discrimination.
- ***Unpopular Judicial Ruling.*** If Congress disagrees with a judicial interpretation of a statute, the legislators may pass a new statute to modify or "undo" the court decision. For example, if the Supreme Court misinterprets a statute about musical copyrights, Congress may pass a new law correcting the Court's error. However, the legislators have no such power to modify a court decision based on the Constitution. When the Supreme Court ruled that lawyers had a right *under the First Amendment* to advertise their services, Congress lacked the power to change the decision.
- ***Criminal Law.*** Statutory law, unlike common law, is prospective. Legislators are hoping to control the future. And that is why almost all criminal law is statutory. A court cannot retroactively announce that it *has been* a crime for a retailer to accept kickbacks from a wholesaler. Everyone must know the rules in advance because the consequences—prison, a felony record—are so harsh.

Discrimination: Congress and the Courts

The civil rights movement of the 1950s and 1960s convinced most citizens that African Americans suffered significant and unacceptable discrimination in jobs, housing, voting, schools, and other basic areas of life. Demonstrations and boycotts, marches and counter-marches, church bombings and killings persuaded the nation that the problem was vast and urgent.

In 1963 President Kennedy proposed legislation to guarantee equal rights in these areas. The bill went to the House Judiciary Committee, which heard testimony for

[6] Congress may, however, attempt to override the veto. See the discussion following.

weeks. Witnesses testified that blacks were often unable to vote because of their race, that landlords and home sellers adamantly refused to sell or rent to African Americans, that education was grossly unequal, and that blacks were routinely denied good jobs in many industries. Eventually, the Judiciary Committee approved the bill and sent it to the full House.

The bill was dozens of pages long and divided into "titles," with each title covering a major issue. Title VII concerned employment. We will consider the progress of Title VII in Congress and in the courts. Here is one section of Title VII, as reported to the House floor:[7]

© AP Photo/Bill Hudson

A civil rights demonstrator being arrested by the police.

> Sec. 703(a). It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, or national origin.

Debate

The proposed bill was intensely controversial and sparked argument throughout Congress. Here are some excerpts from one day's debate on the House floor, on February 8, 1964:[8]

> MR. WAGGONNER. I speak to you in all sincerity and ask for the right to discriminate if I so choose because I think it is my right. I think it is my right to choose my social companions. I think it is my right if I am a businessman to run it as I please, to do with my own as I will. I think that is a right the Constitution gives to every man. I want the continued right to discriminate and I want the other man to have the right to continue to discriminate against me, because I am discriminated against every day. I do not feel inferior about it.
>
> I ask you to forget about politics, forget about everything except the integrity of the individual, leaving to the people of this country the right to live their lives in the manner they choose to live. Do not destroy this democracy for a Socialist government. A vote for this bill is no less.
>
> MR. CONTE. If the serious cleavage which pitted brother against brother and citizen against citizen during the tragedy of the Civil War is ever to be justified, it can be justified in this House and then in the other body with the passage of this legislation which can and must reaffirm the rights to all individuals which are inherent in our Constitution.
>
> The distinguished poet Mark Van Doren has said that "equality is absolute or no, nothing between can stand," and nothing should now stand between us and the passage of strong and effective civil rights legislation. It is to this that we are united in a strong bipartisan coalition today, and when the laws of the land proclaim that the 88th Congress acted effectively, judiciously, and wisely, we can take pride in our accomplishments as free men.

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[7]The section number in the House bill was actually 704(a); we use 703 here because that is the number of the section when the bill became law and the number to which the Supreme Court refers in later litigation.

[8]The order of speakers is rearranged, and the remarks are edited.

Other debate was less rhetorical and aimed more at getting information. The following exchange anticipates a 30-year controversy on quotas:

> MR. JOHANSEN. I have asked for this time to raise a question and I would ask particularly for the attention of the gentleman from New York [MR. GOODELL] because of a remark he made—and I am not quarreling with it. I understood him to say there is no plan for balanced employment or for quotas in this legislation .... I am raising a question as to whether in the effort to eliminate discrimination—and incidentally that is an undefined term in the bill—we may get to a situation in which employers and conceivably union leaders, will insist on legislation providing for a quota system as a matter of self-protection.
>
> Now let us suppose this hypothetical situation exists with 100 jobs to be filled. Let us say 150 persons apply and suppose 75 of them are Negro and 75 of them are white. Supposing the employer ... hires 75 white men. [Does anyone] have a right to claim they have been discriminated against on the basis of color?
>
> MR. GOODELL. It is the intention of the legislation that if applicants are equal in all other respects there will be no restriction. One may choose from among equals. So long as there is no distinction on the basis of race, creed, or color it will not violate the act.

The debate on racial issues carried on. Later in the day, Congressman Smith of Virginia offered an amendment that could scarcely have been smaller—or more important:

> Amendment offered by MR. SMITH of Virginia: On page 68, line 23, after the word "religion," insert the word "sex."

In other words, Smith was asking that discrimination on the basis of sex also be outlawed, along with the existing grounds of race, color, national origin, and religion. Congressman Smith's proposal produced the following comments:

> MR. CELLER. You know, the French have a phrase for it when they speak of women and men. They say "vive la difference." I think the French are right. Imagine the upheaval that would result from adoption of blanket language requiring total equality. Would male citizens be justified in insisting that women share with them the burdens of compulsory military service? What would become of traditional family relationships? What about alimony? What would become of the crimes of rape and statutory rape? I think the amendment seems illogical, ill timed, ill placed, and improper.
>
> MRS. ST. GEORGE. Mr. Chairman, I was somewhat amazed when I came on the floor this afternoon to hear the very distinguished chairman of the Committee on the Judiciary [MR. CELLER] make the remark that he considered the amendment at this point illogical. I can think of nothing more logical than this amendment at this point.
>
> There are still many States where women cannot serve on juries. There are still many States where women do not have equal educational opportunities. In most States and, in fact, I figure it would be safe to say, in all States—women do not get equal pay for equal work. That is a very well known fact. And to say that this is illogical. What is illogical about it? All you are doing is simply correcting something that goes back, frankly to the Dark Ages.

The debate continued. Some supported the "sex" amendment because they were determined to end sexual bias. But politics are complex. Some *opponents* of civil rights supported the amendment because they believed that it would make the legislation less popular and cause Congress to defeat the entire Civil Rights bill.

That strategy did not work. The amendment passed, and sex was added as a protected trait. And, after more debate and several votes, the entire bill passed the House. It went to the Senate, where it followed a similar route from Judiciary Committee to full Senate. Much of the Senate debate was similar to what we have seen. But some senators raised a new issue, concerning §703(2), which prohibited *segregating or classifying* employees based on any of the protected categories (race, color, national origin, religion, or sex). Senator Tower was concerned that §703(2) meant that an employee in a protected category could never be given any sort of job test. So the Senate amended §703 to include a new subsection:

> Sec. 703(h). Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer ... to give and to act upon the results of any professionally developed ability test provided that such test ... is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

With that amendment, and many others, the bill passed the Senate.

Conference Committee

Civil rights legislation had now passed both houses, but the bills were no longer the same due to the many amendments. This is true with most legislation. The next step is for the two houses to send representatives to a House–Senate Conference Committee. This committee examines all of the differences between the two bills and tries to reach a compromise. With the Civil Rights bill, Senator Tower's amendment was left in; other Senate amendments were taken out. When the Conference Committee had settled every difference between the two versions, the new, modified bill was sent back to each house for a new vote.

The House of Representatives and the Senate again angrily debated the compromise language reported from the Conference Committee. Finally, after years of violent public demonstrations and months of debate, each house passed the same bill. President Johnson promptly signed it. The Civil Rights Act of 1964 was law. See Exhibit 4.1.

But the passing of a statute is not always the end of the story. Sometimes courts must interpret congressional language and intent.

Statutory Interpretation

Title VII of the Civil Rights Act obviously prohibited an employer from saying to a job applicant, "We don't hire minorities." In some parts of the country, that had been common practice; after the Civil Rights Act passed, it became rare. Employers who routinely hired whites only, or promoted only whites, found themselves losing lawsuits. A new group of cases arose, those in which some job standard was set that appeared to be racially neutral, yet had a discriminatory effect. In North Carolina, the Duke Power Co. required that applicants for higher paying, promotional positions meet two requirements: they must have a high school diploma, and they must pass a standardized written test. There was no evidence that either requirement related to successful job performance. Blacks met the requirements in lower percentages than whites, and consequently whites obtained a disproportionate share of the good jobs.

Title VII did not precisely address this kind of case. It clearly outlawed overt discrimination. Was Duke Power's policy overt discrimination, or was it protected by Senator Tower's amendment, §703(h)? The case went all the way to the Supreme Court, where the Court had to interpret the new law.

Courts are often called upon to interpret a statute, that is, to explain precisely what the language means and how it applies in a given case. There are three primary steps in a court's statutory interpretation:

- ***Plain Meaning Rule.*** When a statute's words have ordinary, everyday significance, the court will simply apply those words. Section 703(a)(1) of the Civil Rights Act prohibits firing someone because of her religion. Could an employer who had fired a Catholic because of her religion argue that Catholicism is not really a religion, but more of a social group? No. The word "religion" has a plain meaning and courts apply its commonsense definition.

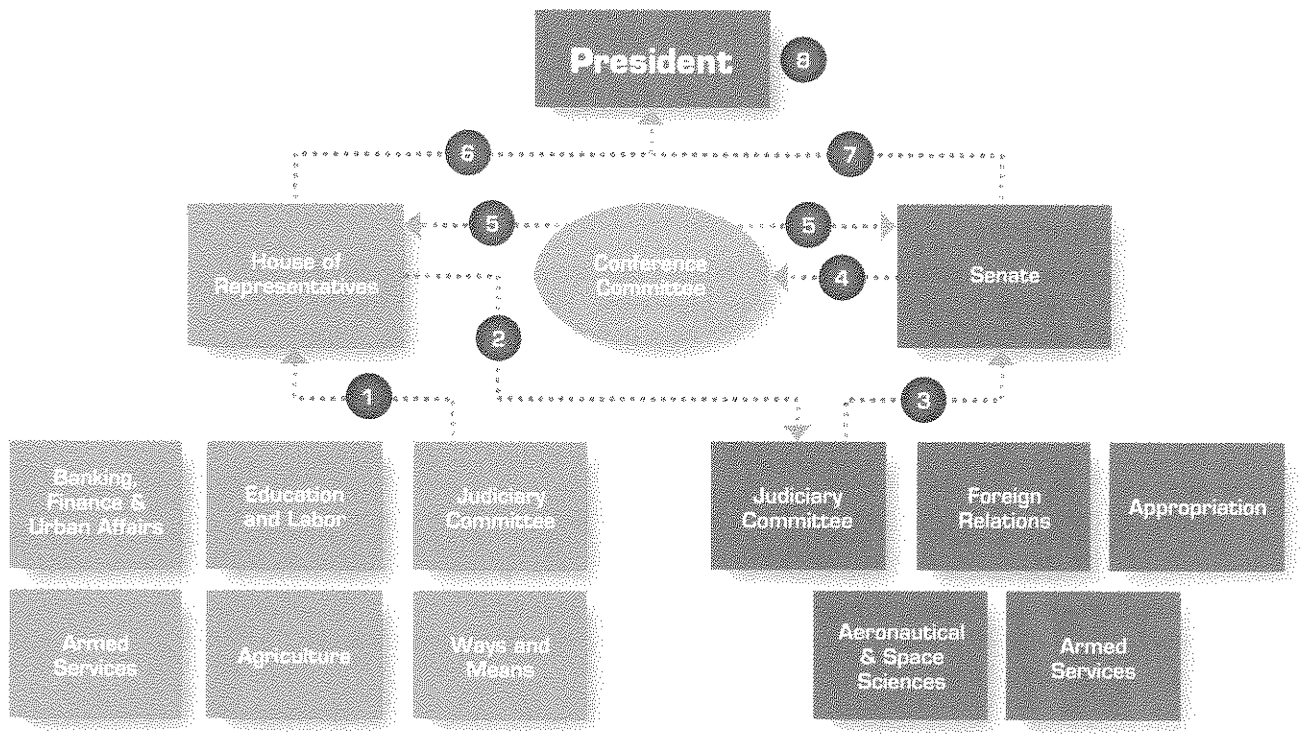


EXHIBIT 4.1 The two houses of Congress are organized into dozens of committees, a few of which are shown here. The path of the 1964 Civil Rights Act (somewhat simplified) was as follows: (1) The House Judiciary Committee approved the bill and sent it to the full House; (2) the full House passed the bill and sent it to the Senate, where it was assigned to the Senate Judiciary Committee; (3) the Senate Judiciary Committee passed an amended version of the bill and sent it to the full Senate; (4) the full Senate passed the bill with additional amendments. Since the Senate version was now different from the bill the House passed, the bill went to a Conference Committee. The Conference Committee (5) reached a compromise and sent the new version of the bill back to both houses. Each house passed the compromise bill (6 and 7) and sent it to the president, who signed it into law (8).

- ***Legislative History and Intent.*** If the language is unclear, the court must look deeper. Section 703(a)(2) prohibits classifying employees in ways that are discriminatory. Does that section prevent an employer from requiring high school diplomas, as Duke Power did? The explicit language of the statute does not answer the question. The court will look at the law's history to determine the intent of the legislature. The court will examine committee hearings, reports, and the floor debates that we have seen.
- ***Public Policy.*** If the legislative history is unclear, courts will rely on general public policies, such as reducing crime, creating equal opportunity, and so forth. They may include in this examination some of their own prior decisions. Courts assume that the legislature is aware of prior judicial decisions, and if the legislature did not change those decisions, the statute will be interpreted to incorporate them.

Here is how the Supreme Court interpreted the 1964 Civil Rights Act.

Landmark Case

Griggs v. Duke Power Co.

401 U.S. 424, 91 S. Ct. 849, 1971 U.S. LEXIS 134
United States Supreme Court, 1971

Facts: See the discussion of the Duke Power Company's job requirements in the "Conference Committee" section above.

Issue: ***Did Title VII of the 1964 Civil Rights Act require that employment tests be job-related?***

Excerpts from Chief Justice Burger's Decision: The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used.

Senator Tower offered an amendment which was adopted verbatim and is now the testing provision of section 703(h). Speaking for the supporters of Title VII, Senator Humphrey endorsed the amendment, stating: "Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and have found it to be in accord with the intent and purpose of that title." The amendment was then adopted. From the sum of the legislative history relevant in this case, the conclusion is inescapable that the ... requirement that employment tests be job related comports with congressional intent.

And so the highest Court ruled that if a job requirement had a discriminatory impact, the employer could use that requirement only if it was related to job performance. Many more cases arose. For almost two decades courts held that, once workers showed that a job requirement had a discriminatory effect, the employer had the burden to prove that the requirement was necessary for the business. The requirement had to be essential to achieve an important goal. If there was any way to achieve that goal without discriminatory impact, the employer had to use it.

Changing Times

But things changed. In 1989, a more conservative Supreme Court decided *Wards Cove Packing Co. v. Atonio.*[9] The plaintiffs were nonwhite workers in salmon canneries in Alaska. The canneries had two types of jobs, skilled and unskilled. Nonwhites (Filipinos and native Alaskans) invariably worked as low-paid, unskilled workers, canning the fish. The higher paid, skilled positions were filled almost entirely with white workers, who were hired during the off-season in Washington and Oregon.

There was no overt discrimination. But plaintiffs claimed that various practices led to the racial imbalances. The practices included failing to promote from within the company, hiring through separate channels (cannery jobs were done through a union hall, skilled positions were

[9]490 U.S. 642, 109 S. Ct. 2115, 1989 U.S. LEXIS 2794 (1989).

filled out of state), nepotism, and an English language requirement. Once again the case reached the Supreme Court, where Justice White wrote the Court's opinion.

If the plaintiffs succeeded in showing that the job requirements led to racial imbalance, said the Court, the employer now only had to demonstrate that the requirement or practice "serves, in a significant way, the legitimate employment goals of the employer.... [T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business." In other words, the Court removed the "business necessity" requirement of *Griggs* and replaced it with "legitimate employment goals."

Voters' Role

The response to *Wards Cove* was quick. Liberals decried it; conservatives hailed it. Everyone agreed that it was a major change that would make it substantially harder for plaintiffs to bring successful discrimination cases. Democrats introduced bills to reverse the interpretation of *Wards Cove.* President George H.W. Bush strongly opposed any new bill. He said it would lead to "quotas," that is, that employers would feel obligated to hire a certain percentage of workers from all racial categories to protect themselves from suits. This was the issue that Congressman Johansen had raised in the original House debate in 1964.

Both houses passed bills restoring the "business necessity" holding of *Griggs*. Again there were differences, and a Conference Committee resolved them. After acrimonious debate, both houses passed the compromise bill in October 1990. Was it therefore law? No. President Bush immediately vetoed the bill. He said it would compel employers to adopt quotas.

Congressional Override

When the president vetoes a bill, Congress has one last chance to make it law: an override. If both houses repass the bill, each by a two-thirds margin, it becomes law over the president's veto. Congress attempted to pass the 1990 Civil Rights bill over the Bush veto, but it fell short in the Senate by one vote.

Civil rights advocates tried again, in January 1991, introducing a new bill to reverse the *Wards Cove* rule. Again both houses debated and bargained. The new bill stated that, once an employee proves that a particular employment practice causes a discriminatory impact, the employer must "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."

Now the two sides fought over the exact meanings of two terms: "job related" and "business necessity." Each side offered definitions, but they could not reach agreement. It appeared that the entire bill would founder over those terms. So Congress did what it often does when faced with a problem of definition: it dropped the issue. Liberals and conservatives agreed not to define the troublesome terms. They would leave that task to courts to perform through statutory interpretation.

With the definitions left out, the new bill passed both houses. In November 1991, President Bush signed the bill into law. The president stated that the new bill had been improved and no longer threatened to create racial quotas. His opponents charged he had reversed course for political reasons, anticipating the 1992 presidential election.

And so, the Congress restored the "business necessity" interpretation to its own 1964 Civil Rights Act. No one would say, however, that it had been a simple process.

EXAM Strategy

Question: Kelly Hackworth took a leave of absence from her job at Progressive Insurance to care for her ailing mother. When she offered to return, Progressive refused to give her the same job or one like it. She sued based on the Family Medical Leave Act, a federal statute that requires firms to give workers returning from family leave their original job or an equivalent one. However, the statute excludes from its coverage workers whose company employs "fewer than 50 people within 75 miles" of the worker's jobsite. Between Ms. Hackworth's job site in Norman, Oklahoma, and the company's Oklahoma City workplace (less than 75 miles away), Progressive employed 47 people. At its Lawton, Oklahoma facility, Progressive employed three more people – but Lawton was 75.6 miles (wouldn't you know it) away from Norman. Progressive argued that the job was not covered by the statute. Hackworth claimed that this distance should be considered "within 75 miles," thereby rendering her eligible for FMLA leave. Even if it were not, she urged, it would be absurd to disqualify her from important rights based on a disparity of six-tenths of a mile. Please rule.

Strategy: The question asks you to interpret a statute. How do courts do that? There are three steps: the plain meaning rule; legislative history; and public policy. Apply those steps to these facts.

Result: In this real case, the court ruled that the plain meaning of "within 75 miles" was *75 miles or less*. Lawton was not 75 miles or less from Norman. The statute did not apply and Ms. Hackworth lost.[10]

Administrative Law

Before beginning this section, please return your seat to its upright position. Stow the tray firmly in the seatback in front of you. Turn off any laptops, cell phones, or other electronic devices. Sound familiar? Administrative agencies affect each of us every day in hundreds of ways. They have become the fourth branch of government. Supporters believe that they provide unique expertise in complex areas; detractors regard them as unelected government run amok.

> **Before beginning this section, please return your seat to its upright position. Stow the tray firmly in the seatback in front of you.**

Many administrative agencies are familiar. The Federal Aviation Administration, which requires all airlines to ensure that your seats are upright before takeoff and landing, is an administrative agency. The Internal Revenue Service expects to hear from us every April 15. The Environmental Protection Agency regulates the water quality of the river in your town. The Federal Trade Commission oversees the commercials that shout at you from your television set.

Other agencies are less familiar. You may never have heard of the Bureau of Land Management, but if you go into the oil and gas industry, you will learn that this powerful agency has more control over your land than you do. If you develop real estate in Palos Hills, Illinois, you will tremble every time the Appearance Commission of the City of Palos Hills speaks, since you cannot construct a new building without its approval. If your software corporation wants to hire an Argentine expert on databases, you will get to know the complex workings of Immigration and Customs Enforcement: no one lawfully enters this country without its nod of approval.

[10] *Hackworth v. Progressive Casualty Ins. Co.*, 468 F.3d 722, 10th Cir. 2006 (10th Cir. 2006).

Background

By the 1880s, trains crisscrossed America. But this technological miracle became an economic headache. Congress worried that the railroads' economic muscle enabled a few powerful corporations to reap unfair profits. The railroad industry needed closer regulation. Who would do it? Courts decide individual cases, they do not regulate industries. Congress itself passes statutes, but it has no personnel to oversee the day-to-day working of a huge industry. For example, Congress lacks the expertise to establish rates for freight passing from Kansas City to Chicago, and it has no personnel to enforce rates once they are set.

A new entity was needed. Congress passed the Interstate Commerce Act, creating the Interstate Commerce Commission (ICC), the first administrative agency. The ICC began regulating freight and passenger transportation over the growing rail system and continued to do so for over 100 years. Congress gave the ICC power to regulate rates and investigate harmful practices, to hold hearings, issue orders, and punish railroads that did not comply.

The ICC was able to hire and develop a staff that was expert in the issues that Congress wanted controlled. The agency had enough flexibility to deal with the problems in a variety of ways: by regulating, investigating, and punishing. And that is what has made administrative agencies an attractive solution for Congress: one entity, focusing on one industry, can combine expertise and flexibility. However, the ICC also developed great power, which voters could not reach, and thereby started the great and lasting conflict over the role of agencies.

During the Great Depression of the 1930s, the Roosevelt administration and Congress created dozens of new agencies. Many were based on social demands, such as the need of the elderly population for a secure income. Political and social conditions dominated again in the 1960s, as Congress created agencies, such as the Equal Employment Opportunity Commission, to combat discrimination.

Then during the 1980s the Reagan administration made an effort to decrease the number and strength of the agencies. For several years some agencies declined in influence, though others did not. Today, there is still controversy about how much power agencies should have.

Classification of Agencies

Agencies exist at the federal, state, and local level. We will focus on federal agencies because they have national impact and great power. Most of the principles discussed apply to state and local agencies as well. Virtually any business or profession you choose to work in will be regulated by at least one administrative agency, and it may be regulated by several.

Executive-Independent

Some federal agencies are part of the executive branch while others are independent agencies. This is a major distinction. The president has much greater control of executive agencies for the simple reason that he can fire the agency head at any time. An executive agency will seldom diverge far from the president's preferred policies. Some familiar executive agencies are the Internal Revenue Service (part of the Treasury Department); the Federal Bureau of Investigation (Department of Justice); the Food and Drug Administration (Department of Health and Human Services); and the Nuclear Regulatory Commission (Department of Energy).

The president has no such removal power over independent agencies. The Federal Communications Commission (FCC) is an independent agency. For many corporations involved in broadcasting, the FCC has more day-to-day influence on their business than

Congress, the courts, and the president combined. Other powerful independent agencies are the Federal Trade Commission, the Securities and Exchange Commission, the National Labor Relations Board, and the Environmental Protection Agency.

Enabling Legislation

Congress creates a federal agency by passing **enabling legislation**. The Interstate Commerce Act was the enabling legislation that established the ICC. Typically, the enabling legislation describes the problems that Congress believes need regulation, establishes an agency to do it, and defines the agency's powers.

Critics argue that Congress is delegating to another body powers that only the legislature or courts are supposed to exercise. This puts administrative agencies above the voters. But legal attacks on administrative agencies have consistently failed for several decades. Courts acknowledge that agencies have become an integral part of a complex economy, and so long as there are some limits on an agency's discretion, courts will generally uphold its powers

Power of Agencies

Administrative agencies use three kinds of power to do the work assigned to them: they make rules, they investigate, and they adjudicate.

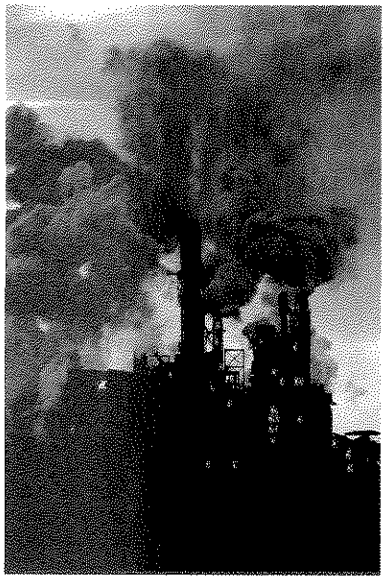
Rulemaking

One of the most important functions of an administrative agency is to make rules. In doing this, the agency attempts, prospectively, to establish fair and uniform behavior for all businesses in the affected area. **To create a new rule is to promulgate it**. Agencies promulgate two types of rules: legislative and interpretive.

Types of Rules: Legislative and Interpretive

Legislative rules are the most important agency rules, and they are much like statutes. Here, an agency creates law by requiring businesses or private citizens to act in a certain way. Suppose you operate a website for young shoppers, aged 10 to 18. Like most online merchants, you consider yourself free to collect as much data as possible about consumers. Wrong. The Federal Trade Commission, a federal agency, has promulgated detailed rules governing any site directed to young children. Before obtaining private data from these immature consumers, you must let them know exactly who you are, how to contact site operators, precisely what you are seeking, and how it will be used. You must also obtain verifiable parental consent before collecting, using, or disclosing any personal information. Failure to follow the rules can result in a substantial civil penalty. This modest legislative rule, in short, will be more important to your business than most statutes passed by Congress.

Interpretive rules do not change the law. They are the agency's interpretation of what the law already requires. But they can still affect all of us. For example, in 1977 Congress amended the Clean Air Act in an attempt to reduce pollution from factories. The act required the Environmental Protection Agency (EPA) to impose emission standards on "stationary sources" of pollution. But what did "stationary source" mean? It was the EPA's job to define that term. Obscure work, to be sure, yet the results could be seen and even smelled, because the EPA's definition would determine the quality of air entering our lungs every time we breathe. Environmentalists wanted the term defined to include every smokestack in a factory so that the EPA could regulate each one. The EPA, however, developed the "bubble concept," ruling that "stationary source" meant an entire factory, but not the individual smokestacks. As a result, polluters could shift emission among smokestacks in a single factory to avoid EPA regulation. Environmentalists howled that this gutted the purpose of the statute, but to no avail. The agency had spoken, merely by interpreting a statute.[11]



An agency's interpretation of an environmental statue may be obscure, but the consequences affect us all.

How Rules Are Made

Corporations fight many a court battle over whether an agency has the right to issue a particular rule and whether it was promulgated properly. The critical issue is this: how much participation is the public entitled to before an agency issues a rule? There are two basic methods of rulemaking.[12]

Informal Rulemaking. On many issues, agencies may use a simple "notice and comment" method of rulemaking. The agency must publish a proposed rule in advance and permit the public a comment period. During this period, the public may submit any objections and arguments, with supporting data. The agency will make its decision and publish the final rule.

For example, the Department of Transportation may use the informal rulemaking procedure to require safety features for all new automobiles. The agency must listen to objections from interested parties, notably car manufacturers, and it must give a written response to the objections. The agency is required to have rational reasons for the final choices it makes. However, it is not obligated to satisfy all parties or do their bidding.

Formal Rulemaking. In the enabling legislation, Congress may require that an agency hold a hearing before promulgating rules. Congress does this to make the agency more accountable to the public. After the agency publishes its proposed rule, it must hold a public hearing. Opponents of the rule, typically affected businesses, may cross-examine the agency experts about the need for the rule and may testify against it. When the agency makes its final decision about the rule, it must prepare a formal, written response to everything that occurred at the hearing.

When used responsibly, these hearings give the public access to the agency and can help formulate sound policy. When used irresponsibly, hearings can be manipulated to stymie needed regulation. The most famous example concerns peanut butter. The Food and Drug Administration (FDA) began investigating peanut butter content in 1958. It found, for example, that Jif peanut butter, made by Procter & Gamble, had only 75 percent peanuts and 20 percent of a Crisco-type base. P&G fought the investigation, and any changes, for years. Finally, in 1965, the FDA proposed a minimum of 90 percent peanuts in peanut butter; P&G wanted 87 percent. The FDA wanted no more than 3 percent hydrogenated vegetable oil; P&G wanted no limit.

The hearings dragged on for months. One day, the P&G lawyer objected to the hearing going forward because he needed to vote that day. Another time, when an FDA official testified that consumer letters indicated the public wanted to know what was really in peanut butter, the P&G attorney demanded that the official bring in and identify the

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[11] An agency's interpretation can be challenged in court, and this one was.

[12] Certain rules may be made with no public participation at all. For example, an agency's internal business affairs and procedures can be regulated without public comment, as can its general policy statements. None of these directly affect the public, and the public has no right to participate.

letters—all 20,000 of them. Finally, in 1968, a decade after beginning its investigation, the FDA promulgated final rules requiring 90 percent peanuts but eliminating the 3 percent cap on vegetable oil.[13]

Investigation

Agencies do an wide variety of work, but they all need broad factual knowledge of the field they govern. Some companies cooperate with an agency, furnishing information and even voluntarily accepting agency recommendations. For example, the U.S. Consumer Product Safety Commission investigates hundreds of consumer products every year and frequently urges companies to recall goods that the agency considers defective. Many firms comply.

Other companies, however, jealously guard information, often because corporate officers believe that disclosure would lead to adverse rules. To force disclosure, agencies use *subpoenas* and *searches.*

Subpoenas

A **subpoena** is an order to appear at a particular time and place to provide evidence. A **subpoena *duces tecum*** requires the person to appear and bring specified documents. Businesses and other organizations intensely dislike subpoenas and resent government agents plowing through records and questioning employees. What are the limits on an agency's investigation? The information sought:

Subpoena
An order to appear at a particular place and time. A subpoena *duces tecum* requires the person to produce certain documents or things.

- Must be *relevant* to a lawful agency investigation. The FCC is clearly empowered to investigate the safety of broadcasting towers, and any documents about tower construction are obviously relevant. Documents about employee racial statistics might indicate discrimination, but the FCC lacks jurisdiction on that issue and thus may not demand such documents.
- Must not be *unreasonably burdensome.* A court will compare the agency's need for the information with the intrusion on the corporation.
- Must not be *privileged.* The Fifth Amendment privilege against self-incrimination means that a corporate officer accused of criminal securities violations may not be compelled to testify about his behavior.

Search and Seizure. At times an agency will want to conduct a surprise **search** of an enterprise and **seize** any evidence of wrongdoing. May an agency do that? Yes, although there are limitations. When a particular industry is *comprehensively regulated,* courts will assume that companies know they are subject to periodic, unannounced inspections. In those industries, an administrative agency may conduct a search without a warrant and seize evidence of violations. For example, the mining industry is minutely regulated, with strict rules covering equipment, mining depths, and air quality. Mining executives understand that they are closely watched. Accordingly, the Bureau of Mines may make unannounced, warrantless searches to ensure safety.[14]

The following case established many of the principles just described.

[13]For an excellent account of this high-fat hearing, see Mark J. Green, *The Other Government* (New York: W. W. Norton & Co., 1978), pp. 136–150.

[14]*Donovan v. Dewey*, 452 U.S. 594, 101 S. Ct. 2534, 1980 U.S. LEXIS 58 (1981).

Landmark Case

UNITED STATES v. BISWELL

406 U.S. 311
Supreme Court Of The United States (1972)

Facts: Biswell operated a pawnshop and had a license to sell "sporting weapons." Treasury agents demanded to inspect Biswell's locked storeroom. The officials claimed that the Gun Control Act of 1968 gave them the right to search without a warrant.

That law says, in part, "the Secretary [of the Treasury] may enter during business hours the premises of any firearms dealer for the purpose of inspecting or examining (1) any records or documents required to be kept by such dealer, and (2) any firearms or ammunition kept or stored by such dealer."

Biswell voluntarily opened the storeroom, and the agent found two sawed-off rifles inside. The guns did not remotely meet the definition of "sporting weapons," and Biswell was convicted on firearms charges.

The appellate court found that because the search violated the Fourth Amendment, the rifles could not be admitted as evidence. It reversed the conviction, and the government appealed to the Supreme Court.

Issue: ***Did the agent's warrantless search violate the Constitution?***

Excerpts from Justice White's Decision: When the officers asked to inspect respondent's locked storeroom, they were merely asserting their statutory right, and respondent was on notice as to their identity and the legal basis for their action. Respondent's submission to lawful authority and his decision to step aside and permit the inspection rather than face a criminal prosecution is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible entry. In neither case does the lawfulness of the search depend on consent; in both, there is lawful authority independent of the will of the householder who might, other things being equal, prefer no search at all.

In the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.

Federal regulation of the interstate traffic in firearms is undeniably of central importance to federal efforts to prevent violent crime. Large interests are at stake, and inspection is a crucial part of the regulatory scheme.

Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.

It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations. The dealer is not left to wonder about the purposes of the inspector or the limits of his task.

We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest, and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute. The seizure of respondent's sawed-off rifles was not unreasonable under the *Fourth Amendment*, the judgment of the Court of Appeals is reversed, and the case is remanded to that court.

Adjudication

To **adjudicate** a case is to hold a hearing about an issue and then decide it. Agencies adjudicate countless cases. The FCC adjudicates which applicant for a new television license is best qualified. The Occupational Safety and Health Administration (OSHA) holds adversarial hearings to determine whether a manufacturing plant is dangerous.

Adjudicate
To hold a formal hearing about an issue and then decide it.

Most adjudications begin with a hearing before an **administrative law judge** (ALJ). There is no jury. An ALJ is an employee of the agency but is expected to be impartial in her rulings. All parties are represented by counsel. The rules of evidence are informal, and an ALJ may receive any testimony or documents that will help resolve the dispute.

Administrative law judge
An agency employee who acts as an impartial decision maker.

After all evidence is taken, the ALJ makes a decision. The losing party has a right to appeal to an appellate board within the agency. The appellate board may ignore the ALJ's decision. If it does not, an unhappy party may appeal to federal court.

LIMITS ON AGENCY POWER

There are four primary methods of reining in these powerful creatures: statutory, political, judicial, and informational.

Statutory Control

As discussed, the enabling legislation of an agency provides some limits. It may require that the agency use formal rulemaking or investigate only certain issues. The Administrative Procedure Act imposes additional controls by requiring basic fairness in areas not regulated by the enabling legislation.

Political Control

The president's influence is greatest with executive agencies. Congress, though, "controls the purse." No agency, executive or independent, can spend money it does not have. An agency that angers Congress risks having a particular program defunded or its entire budget cut. Further, Congress may decide to defund an agency as a cost-cutting measure. In its effort to balance the budget, Congress abolished the Interstate Commerce Commission, transferring its functions to the Transportation Department.

Congress has additional control because it must approve presidential nominees to head agencies. Before approving a nominee, Congress will attempt to determine her intentions. And, finally, Congress may amend an agency's enabling legislation, limiting its power.

Judicial Review

An individual or corporation directly harmed by an administrative rule, investigation, or adjudication may generally have that action reviewed in federal court.[15] The party seeking review, for example, a corporation, must have suffered direct harm; the courts will not listen

[15] In two narrow groups of cases, a court may not review an agency action. In a few cases, courts hold that a decision is "committed to agency discretion," a formal way of saying that courts will keep hands off. This happens only with politically sensitive issues, such as international air routes. In some cases, the enabling legislation makes it absolutely clear that Congress wanted no court to review certain decisions. Courts will honor that.

to theoretical complaints about an agency action.[16] And that party must first have taken all possible appeals within the agency itself.[17]

Standard on Review

Suppose OSHA promulgates a new rule limiting the noise level within steel mills. Certain mill operators are furious because they will have to retool their mills in order to comply. After exhausting their administrative appeals, they file suit seeking to force OSHA to withdraw the new rule. How does a court decide the case? Or, in legal terms, what standard does a court use in reviewing the case? Does it simply substitute its own opinion for that of the agency? No, it does not. The standard a court uses must take into account:

Facts. Courts generally defer to an agency's fact finding. If OSHA finds that human hearing starts to suffer when decibels reach a particular level, a court will probably accept that as final. The agency is presumed to have expertise on such subjects. As long as there is *substantial evidence* to support the fact decision, it will be respected.

Law. Courts often—but not always—defer to an agency's interpretation of the law. This is due in part to the enormous range of subjects that administrative agencies monitor. Consider the following example. "Chicken catchers" work in large poultry operations, entering coops, manually capturing broilers, loading them into cages, and driving them to a processing plant where they ... well, never mind. On one farm, the catchers wanted to organize a union, but the company objected, pointing out that *agricultural* workers had no right to do so. Were chicken catchers agricultural workers? The National Labor Relations Board, an administrative agency, declared that chicken catchers were in fact *ordinary* workers, entitled to organize. The Supreme Court ruled that courts were obligated to give deference to the agency's decision about chicken catchers. If the agency's interpretation was *reasonable* it was binding, even if the court itself might not have made the same analysis. The workers were permitted to form a union—though the chickens were not.

The following case contains vulgar language, so *please do not read it.*

Fox Television Stations, Inc. v. Federal Communications Commission

613 F.3d 317
Second Circuit Court of Appeals, 2010

Facts: "People have been telling me I'm on the way out every year, right? So f*** 'em," said Cher, on a televised Billboard Music Awards ceremony. A year later, on the same program, Nicole Richie asked, "Have you ever tried to get cow s*** out of a Prada purse? It's not so f****** simple." The FCC, which regulates the broadcast industry, received complaints about this and other profanity on the airwaves.

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[16]The law describes this requirement by saying that a party must have standing to bring a case. A college student who has a theoretical belief that the EPA should not interfere with the timber industry has no standing to challenge an EPA rule that prohibits logging in a national forest. A lumber company that was ready to log that area has suffered a direct economic injury: it has standing to sue.

[17]This is the doctrine of exhaustion of remedies. A lumber company may not go into court the day after the EPA publishes a proposed ban on logging. It must first exhaust its administrative remedies by participating in the administrative hearing and then pursuing appeals within the agency before venturing into court.

The FCC declared that these words were *invariably* indecent, explicit, and shocking. Their utterance violated the Commission's decency standards, and the Commission had the right to fine the networks for broadcasting them. The networks protested, arguing that the utterances were fleeting and isolated. They claimed that the Commission had traditionally permitted such sporadic usage, that this new ruling was an arbitrary change of policy, and that it violated the networks' First Amendment free speech rights. The Commission disagreed, declaring that it had the right to prohibit even the *occasional* use of the words. The networks appealed to federal court.

Issue: ***Did the FCC abuse its discretion and violate the First Amendment by prohibiting even the occasional use of profanity?***

Excerpts from Judge Pooler's Decision: In 2001, in an attempt to provide guidance to the broadcast industry regarding enforcement policies, the FCC issued a statement in which it explained that an indecency finding involved the following two determinations: (1) whether the material describe[s] or depict[s] sexual or excretory organs or activities; and (2) whether the broadcast is patently offensive as measured by contemporary community standards for the broadcast medium. The Industry Guidance reiterated that fleeting and isolated expletives were not actionably indecent.

In 2004, however, the FCC's policy on indecency changed. During the 2003 Golden Globe Awards, U2 band member Bono exclaimed, upon receiving an award, "this is really, really, f****** brilliant." In response to complaints filed after the incident, the FCC declared, for the first time, that a single, nonliteral use of an expletive (a so-called "fleeting expletive") could be actionably indecent.

A law or regulation is impermissibly vague if it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." The First Amendment places a special burden on the government to ensure that restrictions on speech are not impermissibly vague.

The Networks argue that the FCC's indecency test is unconstitutionally vague because it provides no clear guidelines as to what is covered and thus forces broadcasters to steer far wider of the unlawful zone, rather than risk massive fines. The FCC argues that the indecency policy in its Industry Guidance, together with its subsequent decisions, give the broadcasters sufficient notice as to what will be considered indecent.

We agree with the Networks that the indecency policy is impermissibly vague. As we stated in a previous opinion:

> Although the Commission has declared that all variants of "f***" and "s***" are presumptively indecent and profane, repeated use of those words in "Saving Private Ryan," for example, was neither indecent nor profane. And while multiple occurrences of expletives in "Saving Private Ryan" was not gratuitous, a single occurrence in the Golden Globe Awards was shocking and gratuitous.

There is little rhyme or reason to these decisions and broadcasters are left to guess.

The FCC's application of its policy to live broadcasts creates an even more profound chilling effect. In the case of the 2003 Billboard Music Awards broadcasts, Fox had an audio delay system in place to bleep fleeting expletives. It also pre-cleared the scripts of the presenters. Ritchie, however, departed from her script and used three expletives in rapid sequence. While the person employed to monitor and bleep expletives was bleeping the first, the following two slipped through. Even elaborate precautions will not protect a broadcaster against such occurrences. In fact, the only way that Fox can be sure that it won't be sanctioned by the FCC is by refusing to air the broadcast live. The absence of reliable guidance in the FCC's standards chills a vast amount of protected speech.

For the foregoing reasons, we strike down the FCC's indecency policy.

Informational Control and the Public

We started this section describing the pervasiveness of administrative agencies. We should end it by noting one way in which all of us have some direct control over these ubiquitous authorities: information.

> A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy—or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power which knowledge gives.
>
> *James Madison, President, 1809–17*

Two federal statutes arm us with the power of knowledge.

Freedom of Information Act

Congress passed the landmark Freedom of Information Act (known as "FOIA") in 1966. It is designed to give all of us, citizens, businesses, and organizations alike, access to the information that federal agencies are using. The idea is to avoid government by secrecy.

Any citizen or executive may make a "FOIA request" to any federal government agency. It is simply a written request that the agency furnish whatever information it has on the subject specified. Two types of data are available under FOIA. Anyone is entitled to information about how the agency operates, how it spends its money, and what statistics and other information it has collected on a given subject. People routinely obtain records about agency policies, environmental hazards, consumer product safety, taxes and spending, purchasing decisions, and agency forays into foreign affairs. A corporation that believes that OSHA is making more inspections of its textile mills than it makes of the competition could demand all relevant information, including OSHA's documents on the mill itself, comparative statistics on different inspections, OSHA's policies on choosing inspection sites, and so forth.

Second, all citizens are entitled to any records the government has *about them*. You are entitled to information that the Internal Revenue Service, or the Federal Bureau of Investigation, has collected about you.

FOIA does not apply to Congress, the federal courts, or the executive staff at the White House. Note also that, since FOIA applies to federal government agencies, you may not use it to obtain information from state or local governments or private businesses.

Exemptions. An agency officially has 10 days to respond to the request. In reality, most agencies are unable to meet the deadline but are obligated to make good faith efforts. FOIA exempts altogether nine categories from disclosure. The most important exemptions permit an agency to keep confidential information that relates to national security, criminal investigations, internal agency matters such as personnel or policy discussions, trade secrets or financial institutions, or an individual's private life.

Privacy Act

This 1974 statute prohibits federal agencies from giving information about an individual to other agencies or organizations without written consent. There are exceptions, but overall this act has reduced the government's exchange of information about us "behind our back."

EXAM Strategy

Question: Builder wants to develop 1,000 acres in rural Montana, land that is home to the Kite Owl. The EPA rules that the Kite Owl is an endangered species, and prohibits development of the property. The developer appeals to court. The EPA based its decision on five statistical studies, and the opinions of three out of seven experts. The court looks at the same evidence and acknowledges that the EPA decision is carefully reasoned and fair. However, the judges believe that the other four experts were right: the owl is *not* endangered. Should the court permit development?

Strategy: What is the legal standard for deciding whether a court should affirm or reverse an agency decision? As long as there is *substantial evidence* to support the factual conclusions, and a *reasonable basis* for the legal conclusion, the court should not impose its judgment. Agencies are presumed to have special expertise in their areas. As the *Fox Television* case tells us, an agency ruling should generally be affirmed unless it is arbitrary and capricious. Apply that standard here.

Result: The EPA made a careful, reasoned decision. The court may disagree, but it should not impose its views. The court must affirm the agency's ruling and prohibit development.

Chapter Conclusion

"Why can't they just fix the law?" They can, and sometimes they do—but it is a difficult and complex task. "They" includes a great many people and forces, from common law courts to members of Congress to campaign donors to administrative agencies. The courts have made the bystander rule slightly more humane, but it has been a long and bumpy road. Congress managed to restore the legal interpretation of its own 1964 Civil Rights Act, but it took months of debate and compromising. The FDA squeezed more peanuts into a jar of Jif, but it took nearly a decade to get the lid on.

A study of law is certain to create some frustrations. This chapter cannot prevent them all. However, an understanding of how law is made is the first step toward controlling that law.

Exam Review

1. **COMMON LAW** The common law evolves in awkward fits and starts because courts attempt to achieve two contradictory purposes: predictability and flexibility. (pp. 77–79)

2. **STARE DECISIS** *Stare decisis* means "let the decision stand," and indicates that once a court has decided a particular issue, it will generally apply the same rule in future cases. (p. 77)

3. **BYSTANDER RULE** The common law bystander rule holds that, generally, no one has a duty to assist someone in peril unless the bystander himself created the danger. Courts have carved some exceptions during the last 100 years, but the basic rule still stands. (pp. 77–79)

4. **LEGISLATION** Bills originate in congressional committees and go from there to the full House of Representatives or Senate. If both houses pass the bill, the legislation normally must go to a Conference Committee to resolve differences between the two versions. The compromise version then goes from the Conference Committee back to both houses, and if passed by both, to the president. If the president signs the bill, it becomes a statute; if he vetoes it, Congress can pass it over his veto with a two-thirds majority in each house. (pp. 80–83)

5. **STATUTORY INTERPRETATION** Courts interpret a statute by using the plain meaning rule; then, if necessary, legislative history and intent; and finally, if necessary, public policy. (p. 83)

EXAM Strategy

Question: Whitfield, who was black, worked for Ohio Edison. Edison fired him, but then later offered to rehire him. Another employee argued that Edison's original termination of Whitfield had been race discrimination. Edison rescinded its offer to rehire Whitfield. Whitfield sued Edison, claiming that the company was retaliating for the other employee's opposition to discrimination. Edison pointed out that Title VII of the 1964 Civil Rights Act did not explicitly apply in such cases. Among other things, Title VII prohibits an employer from retaliating against *an employee* who has opposed illegal discrimination. But it does not say anything about retaliation based on *another employee's* opposition to discrimination. Edison argued that the statute did not protect Whitfield.

Strategy: What three steps does a court use to interpret a statute? First, the plain meaning rule. Does that rule help us here? The statute neither allows nor prohibits Edison's conduct. The law does not mention this situation, and the plain meaning rule is of no help. Second step: Legislative history and intent. What did Congress intend with Title VII generally? With the provision that bars retaliation against a protesting employee? Resolving those issues should give you the answer to this question. (See the "Result" at the end of this section.)

6. **ADMINISTRATIVE AGENCIES** Congress creates federal administrative agencies with enabling legislation. The Administrative Procedure Act controls how agencies do their work. (pp. 87–89)

7. **RULEMAKING** Agencies may promulgate legislative rules, which generally have the effect of statutes, or interpretive rules, which merely interpret existing statutes. (pp. 89–91)

8. **INVESTIGATION** Agencies have broad investigatory powers and may use subpoenas and, in some cases, warrantless searches to obtain information. (pp. 91–93)

EXAM Strategy

Question: When Hiller Systems, Inc., was performing a safety inspection on board the M/V *Cape Diamond*, an ocean-going vessel, an accident killed two men. The Occupational Safety and Health Administration (OSHA), a federal agency, attempted to investigate, but Hiller refused to permit any of its employees to speak to OSHA investigators. What could OSHA do to pursue the investigation? What limits would there have been on OSHA's actions?

Strategy: Agencies make rules, investigate, and adjudicate. Which is involved here? Investigation. During an investigation, what power has an agency to force a company to produce data? What are the limits on that power? (See the "Result" at the end of this section.)

9. **ADJUDICATION** Agencies adjudicate cases, meaning that they hold hearings and decide issues. Adjudication generally begins with a hearing before an administrative law judge and may involve an appeal to the full agency or ultimately to federal court. (p. 93)

10. **AGENCY LIMITATIONS** The four most important limitations on the power of federal agencies are statutory control in the enabling legislation and the APA; political control by Congress and the president; judicial review; and the informational control created by the FOIA and the Privacy Act. (pp. 93–95)

5. Result: Congress passed Title VII as a bold, aggressive move to end race discrimination in employment. Further, by specifically prohibiting retaliation against an employee, Congress indicated it was aware that companies might punish those who spoke in favor of the very goals of Title VII. Protecting an employee from anti-discrimination statements made by a *co-worker* is a very slight step beyond that, and appears consistent with the goals of Title VII and the anti-retaliation provision. Whitfield should win, and in the real case, he did.[18]

9. Result: OSHA can issue a subpoena *duces tecum*, demanding that those on board the ship, and their supervisors, appear for questioning, and bring with them all relevant documents. OSHA may ask for anything that is (1) relevant to the investigation, (2) not unduly burdensome, and (3) not privileged. Conversations between one of the ship inspectors and his supervisor is clearly relevant; a discussion between the supervisor and the company's lawyer is privileged.

Multiple-Choice Questions

1. A bill is vetoed by ____________.
   (a) the Speaker of the House
   (b) a majority of the voting members of the Senate
   (c) the president
   (d) the Supreme Court

2. If a bill is vetoed, it may still become law if it is approved by ____________.
   (a) two-thirds of the Supreme Court
   (b) two-thirds of registered voters
   (c) two-thirds of the Congress
   (d) the president
   (e) an independent government agency

3. Which of the following presidents was most influential in the passing of the Civil Rights Act?
   (a) Franklin D. Roosevelt
   (b) Ronald Reagan
   (c) Abraham Lincoln
   (d) John F. Kennedy
   (e) George W. Bush

[18] *EEOC v. Ohio Edison*, 7 F.3d 541 (6th Cir. 1993).

4. Under FOIA, any citizen may demand information about ____________.
   (a) how an agency operates
   (b) how an agency spends its money
   (c) files that an agency has collected on the citizen herself
   (d) all of the above

5. If information requested under FOIA is not exempt, an agency has ____________ to comply with the request.
   (a) 10 days
   (b) 30 days
   (c) 3 months
   (d) 6 months

Essay Questions

1. Until recently, every state had a statute outlawing the burning of American flags. But in *Texas v. Johnson,*[19] the Supreme Court declared such statutes unconstitutional, saying that flag burning is symbolic speech protected by the First Amendment. Does Congress have the power to overrule the Court's decision?

2. In 1988, terrorists bombed Pan Am Flight 103 over Lockerbie, Scotland, killing all passengers on board. Congress sought to remedy security shortcomings by passing the Aviation Security Improvement Act of 1990, which, among other things, ordered the Federal Aviation Authority (FAA) to prescribe minimum training requirements and staffing levels for airport security. The FAA promulgated rules according to the informal rulemaking process. However, the FAA refused to disclose certain rules concerning training at specific airports. A public interest group called Public Citizen, Inc., along with family members of those who had died at Lockerbie, wanted to know the details of airport security. What steps should they take to obtain the information? Are they entitled to obtain it?

3. The Aviation Security Improvement Act (ASIA) states that the FAA can refuse to divulge information about airport security. The FAA interprets this to mean that it can withhold data in spite of the FOIA. Public Citizen and the Lockerbie family members interpret FOIA as being the controlling statute, requiring disclosure. Is the FAA interpretation binding?

4. An off-duty, out-of-uniform police officer and his son purchased some food from a 7-Eleven store and were still in the parking lot when a carload of teenagers became rowdy. The officer went to speak to them, and the teenagers assaulted him. The officer shouted to his son to get the 7-Eleven clerk to call for help. The son entered the store, told the clerk that a police officer needed help, and instructed the clerk to call the police. He returned 30 seconds later and repeated the request, urging the clerk to say it was a Code 13. The son claimed that the clerk laughed at him and refused to do it. The policeman sued the store. **Argument for the Store:** We sympathize with the policeman and his family, but the store has no liability.

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[19] 491 U.S. 397, 109 S. Ct. 2533, 1989 U.S. LEXIS 3115 (1989).

A bystander is not obligated to come to the aid of anyone in distress unless the bystander created the peril, and obviously the store did not do so. The policeman should sue those who attacked him. **Argument for the Police Officer:** We agree that in general a bystander has no obligation to come to the aid of one in distress. However, when a business that is open to the public receives an urgent request to call the police, the business should either make the call or permit someone else to do it

5. Federal antitrust statutes are complex, but the basic goal is straightforward: to prevent a major industry from being so dominated by a small group of corporations that they destroy competition and injure consumers. Does Major League Baseball violate the antitrust laws? Many observers say that it does. A small group of owners not only dominate the industry, but actually *own* it, controlling the entry of new owners into the game. This issue went to the United States Supreme Court in 1922. Justice Holmes ruled, perhaps surprisingly, that baseball is exempt from the antitrust laws, holding that baseball is not "trade or commerce." Suppose that members of Congress dislike this ruling and the current condition of baseball. What can they do?

Discussion Questions

1. Courts generally follow precedent, but in the *Tarasoff* and *Soldano* cases discussed earlier in this chapter, they did not. Consider the opening scenario at the Old Abandoned Mill. *Should* the hiker bear any *legal* responsibility for Gary's untimely end; or should a court follow precedent and hold the lazy hiker blameless?

2. Revisit the *Fox Television Stations* case. Do you agree with the opinion? What would a sensible broadcast obscenity policy contain? When (if ever) should a network face fines for airing bad language?

3. In 2010, President Barack Obama signed a major health care reform bill into law. Seventeen state attorneys general filed a lawsuit challenging the constitutionality of the new statute. A key argument in the case will revolve around "interstate commerce." The states will argue that a provision in the law that requires Americans to purchase health insurance or face fines should be struck down because the Constitution allows for the *regulation* of commerce but does not allow the federal government to require people to *participate in* commerce; that is, to buy something.

   Does this argument seem sensible to you? Should the government be able to require those who can afford to purchase health insurance to purchase it?

4. FOIA applies to government agencies, but it exempts Congress. Should top lawmakers be obligated to comply with FOIA requests, or would that create more problems than it would solve?

5. Suppose you were on a state supreme court and faced with a restaurant-choking case. Should you require restaurant employees to know and employ the Heimlich maneuver to assist a choking victim? If they do a bad job, they could cause additional injury. Should you permit them to do nothing at all? Is there a compromise position? What social policies are most important?

CHAPTER 5

CONSTITUTIONAL LAW


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The consultant started his presentation to the energy company's board of directors. "So I don't have to tell you that if the Smith-Jones bill ever passes Congress, it will be an utter disaster for your company. The House has already passed it. The president wants it. The only thing that kept it from becoming law this summer is that the Senate was too chicken to bring it up for a vote in an election year.

"Here's the bottom line: to be comfortable, you need three candidates who see things your way to beat current senators who support the bill."

The next slide showed a large map of the United States with three states highlighted in red. "These are your best bets. Attempting wins here would cost $60 million total—not so much for a billion-dollar-a-year operation like yours.

"In state #3, we go negative. Really negative."

"The money would go to saturation advertising from Labor Day to Election Day. I want to buy TV ads during local news programs all day, and during most prime time shows. I want the viewers to see your ads at least a dozen times before they go to the polls.

"In state #1, the challenger—your candidate—is a squeaky-clean state representative, but no one knows much about her outside her own district. She carries herself well, has a nice family. People will like her if they see her. Your money makes sure people will see her.

"In state #2, your guy hasn't really done much. But his grandfather was a hero at Normandy, and his dad was a coal miner. Great-grandparents were immigrants who came through New York with nothing in their pockets—I can see the ad with the Statue of Liberty already. A lot of voters will appreciate his family's story. This strategy will work if we have the funds to tell the story often enough.