

# COMMON LAW, STATUTORY LAW, AND ADMINISTRATIVE LAW



Jason observes a toddler wander onto the railroad tracks and hears a train approaching. He has plenty of time to pull the child from the tracks with no risk to himself, but chooses to do nothing. The youngster is killed. The child's family sues Jason for his callous behavior, and a court determines that Jason owes—nothing.

“Why can't they just fix the law?” students and professionals often ask, in response to Jason's impunity and countless other legal oddities. Their exasperation is understandable. This chapter cannot guarantee intellectual tranquillity, but it should diminish the sense of bizarreness that law can instill. We will look at three sources of law: common law, statutory law, and administrative law. Most of the law you learn in the course comes from one of these sources. The substantive law will make more sense when you have a solid feel for *how* it was created.

## COMMON LAW

Jason and the toddler 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.

**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 of bystander liability is all of the cases on that subject decided by Illinois appellate courts. Two hundred years ago, almost all of the law was common law. Today, most new law is statutory. But common law still predominates in tort, contract, and agency law, and it is very important in property, employment, and some other areas.

We focus on appellate courts because they are the only ones to make rulings of *law*, as discussed in Chapter 2. In a bystander case, it is the job of the state's highest court to say what legal obligations, if any, a bystander has. The trial court, on the other hand, must decide *facts*: Was this defendant able to see what was happening? Was the plaintiff really in trouble? Could the defendant have assisted without peril to himself?

### STARE DECISIS

Nothing perks up a course like Latin. **Stare decisis** means “let the decision stand.” It is the essence of the common law. The phrase indicates that once a court has decided a particular issue, it will generally apply the same rule in future cases. Suppose the highest court of Arizona must decide whether a contract for a new car, 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 apply that precedent and refuse to enforce the contract in this case. Courts do not always follow precedent but they generally do: *stare decisis*.

Two words explain why the common law is never as easy as we might like: *predictability* and *flexibility*. The law is trying to accommodate both goals. The need for 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 need for predictability created the doctrine of *stare decisis*.

Yet there must also be flexibility in the law, some means to respond to new problems and changing social mores. As we enter a new millennium, we cannot be encumbered by ironclad rules established before electricity was discovered. These two ideas may be obvious but they also 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*,<sup>1</sup> through no fault of the railroad, a train struck a man, severing an arm and a leg. Railroad employees saw the incident happen but did nothing to assist him. By the time help arrived, the victim had

<sup>1</sup> 66 Kan. 649, 72 P. 281 (1903).

died. In this 1903 case 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 simply to scuttle it. What courts did do was seek openings for small changes.

Eighteen years after the Kansas case of *Cappier*, the 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.<sup>2</sup>

And this is how the common law 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.<sup>3</sup> 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 that same state supreme court reverse its position and begin to require assistance in extreme cases—a long time for Osterlind to hold on.<sup>4</sup>

In the 1970s, changes came more quickly.

If this tranquil canoe trip turns perilous, a bystander has no obligation to respond. Is the common law rule a moral one?



## C A S E S U M M A R Y

### 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?

<sup>2</sup> *Carey v. Davis*, 190 Iowa 720, 180 N.W. 889 (1921).

<sup>3</sup> 263 Mass. 73, 160 N.E. 301 (1928).

<sup>4</sup> *Pridgen v. Boston Housing Authority*, 364 Mass. 696, 308 N.E.2d 467 (1974).

**Decision:** Yes, Dr. Moore had a duty to Tatiana Tarasoff.

**Reasoning:** Under the common law, one person generally owes no duty to control the conduct of another or to warn anyone who is in danger. However, courts make an exception when the defendant has a special relationship to a dangerous person or potential victim. A therapist is someone who has just such a special relationship with a patient.

It is very difficult to predict whether a patient presents a serious danger of violence, and no one can be expected to do a perfect job. A therapist must only exercise the reasonable degree of skill, knowledge, and care ordinarily possessed by others in the field. In this case, however, there is no dispute about whether Dr. Moore could have foreseen violence. He actually predicted Poddar would kill Tatiana. Once a therapist determines, or reasonably should determine, that a patient poses a serious danger of violence to someone, he must make reasonable efforts to protect the potential victim. 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? The 1983 case of *Soldano v. O'Daniels*<sup>5</sup> arose when a patron in Happy Jack's bar saw Villanueva threaten Soldano with a gun. The patron dashed next door, into the Circle Inn bar, told the bartender what was happening, and urged him to call the police. The bartender refused. The witness then asked to use the phone to call the police himself, but the bartender again refused. Tragically, the delay permitted Villanueva to kill Soldano.

As in the earlier cases we have seen, this case 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.

Do these exceptions mean that the bystander rule is gone? *Parra v. Tarasco*<sup>6</sup> provides a partial answer. Ernesto Parra was a customer at the Jiminez Restaurant when food became lodged in his throat. The employees did not use the Heimlich maneuver or any other method to try to save him. Parra choked to death. Was the restaurant liable? No, said the Illinois Appeals Court. The restaurant had no obligation to do anything.

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

<sup>5</sup> 141 Cal. App. 3d 443, 190 Cal. Rptr. 310, 1983 Cal. App. LEXIS 1539 (1983).

<sup>6</sup> 9230 Ill. App. 3d 819, 595 N.E.2d 1186, 1992 Ill. App. LEXIS 935 (1992).

exceptions will topple it, but the process of the common law is slow and that day is nowhere in sight. Indeed, the following article demonstrates that new forces make bystanders even less likely to get involved.



In the past, emergency medical technician Angela Favors often asked bystanders to step aside at accident scenes so she could take over life-saving procedures they had initiated. But in the last year or so, the Grady Memorial Hospital emergency worker has rarely had that problem.

“Now we don’t have to worry about telling anyone to move back,” said Ms. Favors, a five-year employee. “I’ve seen times lately when the person has bled out and is by themselves. Everybody standing around can tell you what happened, but nobody has helped.” Fewer good Samaritans are stepping forward to assist at accidents or other emergencies—apparently because of a growing fear of AIDS and Hepatitis B, metro Atlanta emergency medical personnel say.

The HIV virus, which causes AIDS, and Hepatitis B are blood-borne diseases that are contracted through intimate contact, primarily sexual. Both viruses have been found in saliva, although there are no documented cases of anyone contracting AIDS through saliva. One can contract Hepatitis B through saliva, however, health officials say.

During one recent accident in Doraville, bystanders discouraged others from helping a bloodied, dying victim until paramedics arrived, because of the fear of AIDS, according to one witness.<sup>7</sup> ●

Yes, apathy and anxiety abound—but so does courage.



As the freight train rumbled through rural Indiana, conductor Robert Mohr looked ahead and saw what seemed to be a puppy. Then the “puppy” sat up straight and shook her blond curls. Nineteen-month-old Emily Marshall had wandered away from her mother and was playing on the tracks, dead ahead. Engineer Rodney Lindley jammed on the brakes, but could not possibly stop the 96-car, 6,000-ton train. There was no time to jump off and sprint ahead to the girl. Mohr, aged 49, hustled onto the engine’s catwalk and clambered forward, as Lindley slowed the train to 10 miles per hour. Gripping a guard rail, Mohr leaned perilously far forward, waited until the engine loomed directly above the child—and deftly booted her to safety. Emily bounced up with nothing worse than a chipped tooth and forehead cuts, and Mohr, the merrier, was a Hoosier hero. ●

## STATUTORY LAW

Most new law is statutory law. 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 local legislators who pass state statutes; we vote for the senators and representatives who create federal statutes. If we understand the system, we can affect the largest source of contemporary law. If we live in ignorance of its strengths and pitfalls, we delude ourselves that we participate in a democracy.

As we saw in Chapter 1, there are two systems of government operating in the United States: a national government and 50 state governments. Each level of gov-

<sup>7</sup> Susan Laccetti, “AIDS Awareness,” *Atlanta Journal and Constitution*, Nov. 12, 1991, §C, p. 4. Reprinted with permission from The Atlanta Journal and The Atlanta Constitution.

ernment has a legislative body. In Washington, D.C., Congress is our national legislature. Congress passes the statutes that govern the nation. In addition, each state has a legislature, which passes statutes for that state only. In this section we look at how Congress does its work creating statutes. State legislatures operate similarly, but the work of Congress is better documented and obviously of national importance.<sup>8</sup>

## BILLS

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**. 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.<sup>9</sup>

### Committee Work

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 27 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.

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 to employment discrimination.
- *Unpopular Judicial Ruling.* If a court makes a ruling that Congress disagrees with, the legislators may pass a statute “undoing” the court decision.

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<sup>8</sup> See the chart of state and federal governments in Chapter 1. A vast amount of information about Congress is available on the Internet. The House of Representatives has a Web page at <http://www.house.gov/>. The Senate’s site appears at <http://www.senate.gov>. Each page provides links to current law, pending legislation, votes, committees, and more. If you do not know the name of your representative or senator (shame!), the Web page will provide that information. Most state legislatures have Web sites, which you can reach from links found at <http://www.ncsl.org/public/sitesleg.htm>. These sites typically permit you to read statutes, research legislative history, examine the current calendar, and note upcoming events. For example, the Web site <http://housegop.state.il.us/> brings you to the Republican caucus in the Illinois House of Representatives, while the site <http://www.housedem.state.il.us/> will take you to the same body’s Democratic caucus. Many of these Web sites enable you to e-mail your local representatives.

<sup>9</sup> Congress may, however, attempt to override the veto. See the discussion below.

- *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



A civil rights demonstrator being arrested by the police.

The civil rights movement of the 1950s and 1960s convinced most Americans that African Americans continued to suffer relentless 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 to African Americans in these areas. The bill went to the House Judiciary Committee, which heard testimony for 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 blacks, that education was still 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:<sup>10</sup>

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 angry argument throughout Congress. Here are some excerpts from one day’s debate on the House floor, on February 8, 1964:<sup>11</sup>

MR. WAGGONER. 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.

<sup>10</sup> 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.

<sup>11</sup> The order of speakers is rearranged, and the remarks are edited.

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.

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 and 25 Negroes. Do the other 50 Negroes or anyone of them severally 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.

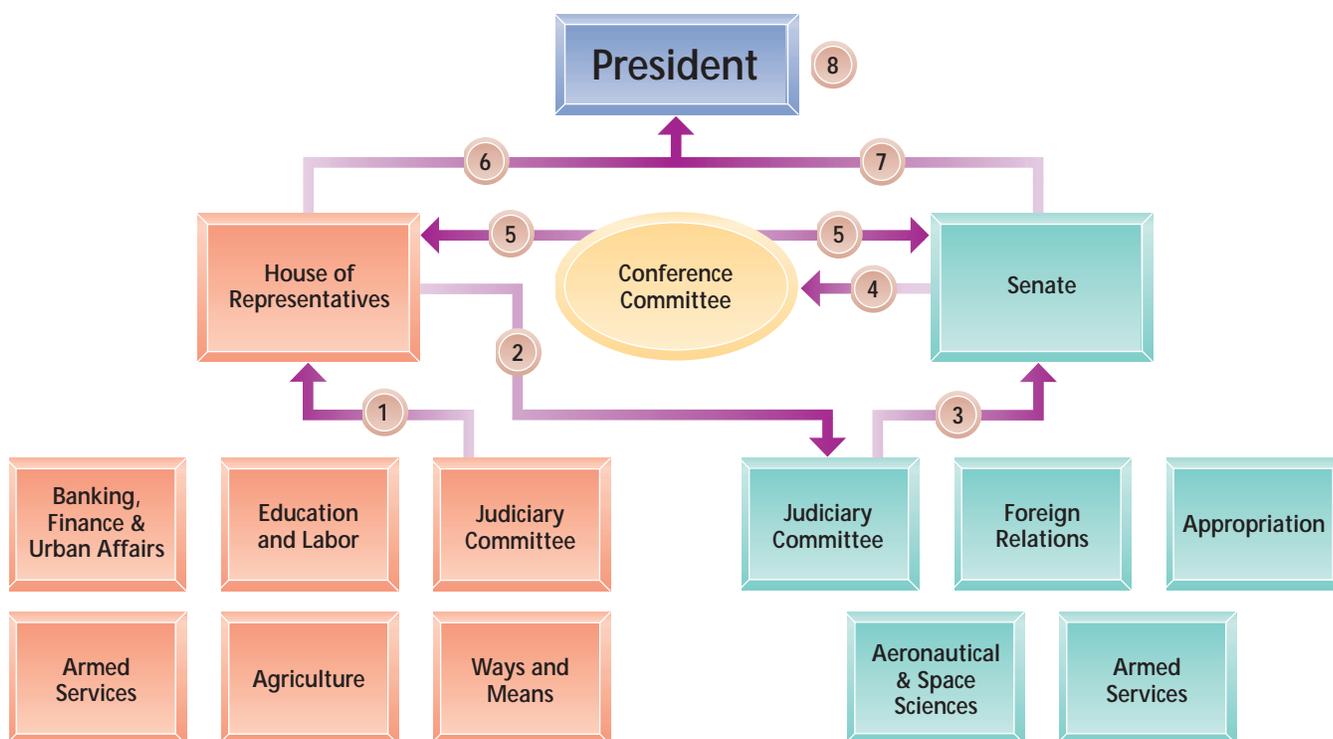
## Conference Committee

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 3.1.

Title VII of the Civil Rights Act obviously prohibited an employer from saying to a job applicant, “We don’t hire blacks.” 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.

**Exhibit 3.1**

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).

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.

## STATUTORY INTERPRETATION

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.

- **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.

## C A S E S U M M A R Y

### GRIGGS v. DUKE POWER CO.

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

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

**Decision:** Yes, employment tests must be job related.

**Reasoning:** Congress’s goal in enacting Title VII is plain from its language: to achieve equality of opportunity and remove barriers that have favored whites. An employer may not use any practice, procedure, or test that perpetuates discrimination. This is true not only for overtly discriminatory behavior, but also for conduct that appears fair yet has a discriminatory effect.

The key is business necessity. An employment test or restriction that excludes blacks is prohibited unless required to do the particular job. In this case, neither the high school completion requirement nor the general intelligence test are related to job performance and, therefore, neither is permissible. ●

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*.<sup>12</sup> The plaintiffs were nonwhite workers in salmon canneries in Alaska. The canneries had two types of jobs, skilled and unskilled.

<sup>12</sup> 490 U.S. 642, 109 S. Ct. 2115, 1989 U.S. LEXIS 2794 (1989).

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 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.

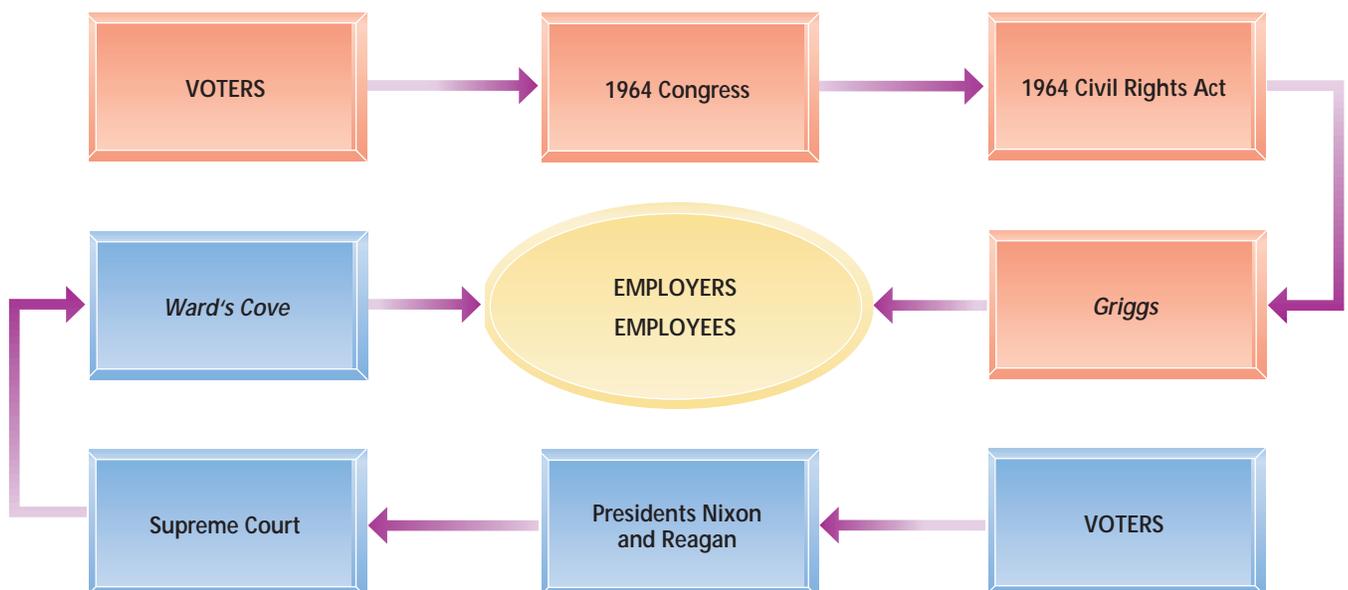
If the plaintiffs succeeded in showing that the job requirements led to racial imbalance, said the Court, the employer now only had to demonstrate that the requirement or practice "serves, in a significant way, the legitimate employment goals of the employer. . . . [T]here is no requirement that the 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. Why had the Court changed its interpretation? Because the *Court* was different. The Court of the 1980s was more conservative, with a majority of justices appointed by Presidents Nixon and Reagan. And so, the voters' political preference had affected the high Court, which in turn changed the interpretation of a statute passed in response to voter concerns of the 1960s. See Exhibit 3.2.

### Exhibit 3.2

Statutory interpretation can be just as volatile as the common law, because voters, politicians, and courts all change over time.



Democrats introduced bills to reverse the interpretation of *Wards Cove*. President 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, but it had not been mentioned since.

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 re-pass 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.

## THE OTHER PLAYER: MONEY

No description of the legislative process would be complete, or even realistic, without mentioning money. Congress has made a few attempts to limit campaign contributions and spending, but to date the efforts are a failure—and a scandal. In 1971, Congress passed the Federal Election Campaign Act (FECA), which limited how much of his own money a federal candidate could spend. Three years later, the statute was amended to place two more limitations on federal campaigns: how much a campaign as a whole could spend, and how much anyone *else* could spend to promote a candidate. One goal was to reduce the power and influence of donors, who gave money expecting favors in return; another purpose was to permit candidates of modest means to compete with millionaire office seekers.

In 1976, the Supreme Court unsettled things in *Buckley v. Valeo*,<sup>13</sup> by ruling that mandatory *spending* limits violate the First Amendment. The Court permitted Congress to limit campaign *contributions*, from individuals and groups, but not to cap the amount that a candidate could spend. This decision was a windfall for wealthy candidates, who could now spend as much of their own money as they chose. It is no coincidence that most members of Congress are very rich.

In 1979, Congress amended the FECA to permit unlimited donations to *political parties* for use in “party building.” Initially, party building meant only minor activities like get-out-the-vote drives and distribution of bumper stickers and buttons. Both parties, however, eventually discovered that it was easy to use party-building money in ways that would directly benefit candidates. These funds came to be known as *soft money*. Since the law placed no limit on soft money, the parties went after it feverishly, raising and spending hundreds of millions of dollars every election, effectively destroying any distinction between party building and campaigning. No one writes a \$1 million check just to buy bumper stickers, and the influence of donors has grown apace with their contributions. Before the parties can spend the money, they must raise it, and all politicians, both incumbents and outsiders alike, now devote a high percentage of their time to fund-raising.

What do donors expect for their contributions? Access. Corporations, unions, advocacy groups, and rich individuals make large political donations on the assumption that they will later be able to speak directly with powerful politicians about issues that interest them. A corporation seeking to build an oil pipeline in Central Asia might give heavily to a senator with influence in foreign affairs, counting on the contribution to smooth international negotiations. A labor union trying to protect American manufacturing jobs could write a large check, expecting to earn opportunities to speak personally with powerful members of Congress.

A newer route for money to enter politics is through *issue ads*. Increasingly, businesses, labor unions, and advocacy groups run their own political campaigns, creating television and radio ads designed to support or oppose a given position. As long as the ads do not specifically endorse the election or defeat of a candidate, they are arguably outside the statutory limits on contributions.

Between the candidate’s own assets, soft money, and issue ads, it is safe to say that giving and spending on many elections are largely uncontrolled. Some states have passed reform legislation, designed to limit contributions and spending by candidates for statewide office, but Congress has refused to reform federal elections. Various nonprofit, nonpartisan groups vigorously oppose the corrosive effect of campaign money. The nonprofit Center for Public Integrity has brought to light many money scandals in Washington. To see what a sharp spotlight will reveal, glance at the Center’s Web page <http://www.publicintegrity.org/main.html>. Common Cause, which you can visit at <http://www.commoncause.org>, works hard for campaign finance reform. The Center for Responsive Politics, at <http://www.crp.org/>, includes in its Web site a dollar-by-dollar description of recent elections, demonstrating which candidates took how much from whom.



As described above, campaign law currently permits wealthy individuals, unions, corporations, and interest groups to funnel large sums of money to political campaigns. Are the contributions ethical? Suppose that you work for a corporation, union, or interest group that contributes heavily. Would you participate in that effort? Would you expect greater access to a politician because of campaign donations? What is the dividing line between legitimate contributions and bribes? ●

<sup>13</sup> 424 U.S. 1, 96 S. Ct. 612, 1976 U.S. LEXIS 16 (1976).

## 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 radios, CD players, or other electronic equipment. 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.

Many administrative agencies are familiar. The Federal Aviation Agency, which requires all airlines to ensure that your seats are upright before takeoff and landing, is an administrative agency. The Internal Revenue Service haunts 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 the Immigration and Naturalization Service: no one lawfully enters this country without its nod of approval.

### BACKGROUND

By the 1880s, the amazing iron horse criss-crossed 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. As we begin a new century, there is still controversy about how much power agencies should have, but there is no doubt that administrative agencies are a permanent part of our society.

## 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 invariably fail. Courts acknowledge that agencies have become an integral part of a complex economy. As long as there are some limits on an agency's discretion, a court will uphold its powers.

### The Administrative Procedure Act

This Act is a major limitation on how agencies do their work. Congress passed the Administrative Procedure Act (APA) in 1946 in an effort to bring uniformity and control to the many federal agencies. The APA regulates how federal agencies make rules, conduct investigations, hold meetings and hearings, reach decisions, and obtain and release information. How much power should agencies have? How much control should we impose on them? These are two of the major questions that businesses and courts face as we enter a new century.

## 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.

**Legislative Rules.** These are the most important agency rules, and they are much like statutes. Here, an agency is changing the law by requiring businesses or private citizens to act in a certain way. For example, the Federal Communications Commission promulgated a rule requiring all cable television systems with more than 3,500 subscribers to develop the capacity to carry at least 20 channels and to make some of those channels available to local community stations. This legislative rule has a heavy financial impact on many cable systems. As far as a cable company is concerned, it is more important than most statutes passed by Congress. Legislative rules have the full effect of a statute.

**Interpretive Rules.** These 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.

In 1977, Congress passed 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 certain "stationary sources" of pollution. The definition of "stationary source" became critical. This is about as technical and unsexy as law can get, yet the outcome is critical: it will determine what air goes into 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.<sup>14</sup>

**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.<sup>15</sup>

**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 rule-making 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



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

<sup>14</sup> An agency's interpretation can be challenged in court, and this one was.

<sup>15</sup> 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.

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 of 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 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.<sup>16</sup>

**Hybrid Rulemaking.** In an effort to avoid the agency paralysis made famous in the peanut butter case, some agencies use hybrid rulemaking, following the informal model but adding a few elements of the formal. The agency may give notice and a comment period, deny the right to a full hearing, but allow limited cross-examination on one or two key issues.

## Investigation

Agencies do an infinite 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 United States 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. (For an up-to-the-minute report on dangerous products and company compliance, proceed carefully to <http://www.cpsc.gov/index.html>.)

Other companies, however, jealously guard information, often because corporate officers believe that disclosure would lead to adverse rules. To obtain this information, 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:

- 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 obtain such documents.
- Must not be *unreasonably burdensome*. A court will compare the agency's need for the information with the intrusion on the corporation.

<sup>16</sup> 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.

- 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.

In the following case, a federal agency investigating a married couple demands thousands of documents from their children and over a *million* documents from hospitals where the couple work. Is the agency entitled to the information?

## C A S E S U M M A R Y

**FEDERAL DEPOSIT  
INSURANCE  
CORPORATION v. GARNER**  
126 F.3d 1138, 1997 U.S. App.  
LEXIS 25268  
Ninth Circuit Court of Appeals,  
1997

**Facts:** The American Commerce National Bank was dangerously close to default, prompting the Federal Deposit Insurance Corporation to investigate. The FDIC concluded that bank directors might have made illegal loans to friends and relatives, causing millions of dollars in losses. The FDIC issued broad subpoenas *duces tecum* to Gerald Garner and his wife, Joan, both of whom were bank directors, seeking personal financial information. The FDIC also subpoenaed the Garners' children, whose trust funds had allegedly benefited from illegal bank practices, and several hospitals where the Garners were corporate officers. To support its subpoenas, the FDIC submitted a declaration from its senior attorney, Playdon, explaining the evidence accumulated thus far. The Playdon Declaration stated that the subpoenas were intended to discover whether the Garners or others had made illegal loans or fraudulent transfers, and whether the Garners had sufficient assets to make litigation cost effective.

The Garners and the hospitals refused to furnish much of the information requested, claiming that the subpoenas were overbroad, and that they invaded the privacy of family members who were not targets of the investigation. The FDIC petitioned the United States District Court, which issued an order enforcing the subpoenas. The Garners appealed.

**Issue:** Were the FDIC's subpoenas valid?

**Decision:** Affirmed. The District Court correctly decided to enforce the subpoenas *duces tecum* against all parties.

**Reasoning:** A properly issued subpoena should be enforced unless the party being investigated demonstrates that the inquiry is overbroad or unduly burdensome. The Garners and the hospitals claim that these subpoenas are unfair for both reasons. They point out that courts do not permit "fishing expeditions," that is, wide-ranging investigations based on mere suspicion of wrongdoing. It is also true that the FDIC subpoenas are very broad. However, the FDIC has offered specific evidence of serious misconduct by all affected parties, and a detailed explanation of how and why this information would be helpful. The Garners and the hospitals, in turn, offer no support for their allegations that this is a "fishing expedition." The subpoenas should be enforced. ●

**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, transport and safety structures, air quality, and countless other things. Mining executives know that they are closely watched, and for good reason: mine

safety is a matter of life and death, and surprise is an essential element of effective inspection. Accordingly, the Bureau of Mines may make unannounced, warrantless searches to ensure safety.<sup>17</sup> Today, it is a rare case that finds a warrantless search by an administrative agency to have been illegal.

## 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.

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.

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 has the power to make a **de novo decision**, meaning it may ignore the ALJ's decision. A party unhappy with that decision 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 APA 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.

<sup>17</sup> *Donovan v. Dewey*, 452 U.S. 594, 101 S. Ct. 2534, 1980 U.S. LEXIS 58 (1981).

## JUDICIAL REVIEW

An individual or corporation directly harmed by an administrative rule, investigation, or adjudication may generally have that action reviewed in federal court.<sup>18</sup> The party seeking review, for example, a corporation, must have suffered direct harm; the courts will not listen to theoretical complaints about an agency action.<sup>19</sup> And that party must first have taken all possible appeals within the agency itself.<sup>20</sup> **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 factfinding. 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, as the following case illustrates.

### C A S E S U M M A R Y

#### HOLLY FARMS CORP. v. NATIONAL LABOR RELATIONS BOARD

517 U.S. 392, 116 S. Ct. 1396, 1996 U.S. LEXIS 2801  
United States Supreme Court, 1996

**Facts:** Holly Farms was a vertically integrated poultry producer, meaning that the company performed many different operations to produce commercial chicken. The company hatched broiler chicks and delivered them to independent farms, where they were raised. When the broilers were seven weeks old, the company sent its live-haul crews to reclaim the birds. The crew included chicken catchers, forklift operators, and “live-haul” drivers. At the farms, the chicken catchers entered the coops, manually captured the broilers, and loaded them into cages. The forklift operator lifted the caged chickens onto the bed of the truck, and the live-haul driver returned the truck, with the loaded cases and the crew, to Holly Farms' processing plant. After that, the chickens . . . well, never mind.

A group of Holly Farms workers organized a union, and the National Labor Relations Board permitted the union to include the company's “live-haul” employees. Holly Farms objected to the new union, claiming that these laborers were actually agricultural workers, who by law were outside the Board's authority.

<sup>18</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> 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.

Labor law defines agriculture this way:

Agriculture includes . . . the raising of livestock, bees, fur-bearing animals, or poultry, and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Several United States Courts of Appeals had split over the issue of whether the NLRB's jurisdiction reached live-haul workers, and the dispute reached the United States Supreme Court.

**Issue:** Did the NLRB accurately interpret labor law by ruling that live-haul workers were employees rather than agricultural workers?

**Decision:** Affirmed. Live-haul workers are employees.

**Reasoning:** The Board has concluded that the live-haul work, even though it is done on a farm, is really part of the slaughtering and processing operations of Holly Farms. This is a reasonable interpretation. The live-haul crews work independently of the growers who raise the chickens. When the broilers are seven weeks old, the growers' responsibility ends. The live-haul crews must catch and load the chickens with no help from the growers.

The Board's conclusion is consistent with its earlier decisions and with the Secretary of Labor's interpretation of the statute. The Board does not have to prove that its construction is the best way to read the statute, only that it is a reasonable one. The Board has done that, and the decision is affirmed.

**Dissent:** If the intent of Congress is clear, both the agency and the courts must follow it. Labor law defines agriculture as "farming in all its branches," including "the raising of poultry," as well as "any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." This is perfectly plain language. Chicken catchers and forklift operators are agricultural workers. In this case, the Board's conclusion does not deserve any special respect, and its ruling should be overturned. ●

## 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, 1809–1817*

Two federal statutes arm us with the power of knowledge.

### Freedom of Information Act

Congress passed this landmark statute (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. For a step-by-step guide explaining how to make a FOIA request, see <http://www.aclu.org/library/foia.html>. For dramatic proof of FOIA’s power, see <http://www.gwu.edu/~nsarchiv>, a Web site devoted to government documents that have been declassified as a result of FOIA requests.

**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.”

## CHAPTER CONCLUSION



“**W**hy 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.

## CHAPTER REVIEW

1. *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.
2. The common law evolves in awkward fits and starts because courts attempt to achieve two contradictory purposes: predictability and flexibility.
3. 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.
4. 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.
5. Courts interpret a statute by using the plain meaning rule; then, if necessary, legislative history and intent; and finally, if necessary, public policy.
6. Campaign contributions and spending are largely uncontrolled.
7. Congress creates federal administrative agencies with enabling legislation. The Administrative Procedure Act controls how agencies do their work.
8. Agencies may promulgate legislative rules, which generally have the effect of statutes, or interpretive rules, which merely interpret existing statutes.
9. Agencies have broad investigatory powers and may use subpoenas and, in some cases, warrantless searches to obtain information.
10. 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.
11. 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 Freedom of Information Act and the Privacy Act.

## PRACTICE TEST

1. **RIGHT & WRONG** 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?

**2. YOU BE THE JUDGE—WRITING PROBLEM** An off-duty, out-of-uniform police officer and his son purchased some food from a 7-11 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 7-11 clerk to call for help. The son entered the store, told the clerk that a police officer needed help, and told 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. 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 prosecute *and* sue those who attacked him. **Argument for the Policeman:** 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.

**3.** You sign a two-year lease with a landlord for an apartment. The rent will be \$1,000 per month. A clause in the lease requires payment on the first of every month. The clause states that the landlord has the right to evict you if you are even one day late with the payment. You forget to pay on time and deliver your check to the landlord on the third day of the month. He starts an eviction case against you. Who should win? If we enforce the contract, what social result does that have? If we ignore the clause, what effect does that have on contract law?

**4.** 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 a congressman dislikes this ruling and dislikes the current condition of baseball. What could he do?

**5.** Until recently, every state had a statute outlawing the burning of American flags. But in *Texas v. Johnson*,<sup>21</sup> 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 ruling?

**6.** Whitfield, who was black, worked for Ohio Edison. Edison fired him, but then later offered to rehire him. At about that time, another employee, representing Whitfield, 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 rescission of the offer to rehire was in retaliation for the other employee’s opposition to discrimination. Edison defended by saying that Title VII of the 1964 Civil Rights Act did not protect in such cases. Title VII prohibits, among other things, an employer from retaliating against *an employee who has opposed* illegal discrimination. But it does not explicitly prohibit an employer from retaliating against one employee based on *another employee’s* opposition to discrimination. Edison argued that the statute did not protect Whitfield. Outcome?

**Background for Questions 7 through 9.** The following three questions begin with a deadly explosion. 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 minimum 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. *Public Citizen, Inc. v. FAA*.<sup>22</sup>

**7.** Explain what “promulgated rules according to the informal rulemaking process” means.

**8.** 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?

<sup>21</sup> 491 U.S. 397, 109 S. Ct. 2533, 1989 U.S. LEXIS 3115 (1989).

<sup>22</sup> 988 F.2d 186, 1993 U.S. App. LEXIS 6024 (D.C. Cir. 1993).

9. 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 the data in spite of FOIA. Public Citizen and the Lockerbie family members interpret FOIA as being the controlling statute, requiring disclosure. Is the FAA interpretation binding?

10. Hiller Systems, Inc. was performing a safety inspection on board the M/V *Cape Diamond*, an ocean-going vessel, when an accident occurred involving the fire extinguishing equipment. Two men were killed. 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 were there on what OSHA could do?

### INTERNET RESEARCH PROBLEM

Research some pending legislation in Congress. Go to <http://www.senate.gov>, and click on *bills*. Choose some key words that interest you, and see what your government is doing. Read the summary of the bill, if one is provided, or go to the text of the bill, and scan the introduction. What do the sponsors of this bill hope to accomplish? Do you agree or disagree with their goals?

You can find further practice problems in the Online Quiz at <http://beatty.westbuslaw.com> or in the Study Guide that accompanies this text.