

The Three Most Important Features of the U.S. Legal System that Others Should Understand

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The three most important features of the U.S. legal system that others should understand are as follows:

- i) federalism – one federal system and fifty state systems;
- ii) judicial review and the powerful role of judges; and
- iii) administrative agencies and citizen suits.

The first important feature of the U.S. legal system is its governmental structure – specifically, federalism. The U.S. legal system consists of one federal system and fifty state systems. The U.S. Constitution limits the power of the federal government to those specified in the Constitution, and recognizes the inherent power of the states to exercise all powers not specifically delegated to the federal government. However, the Constitution does make the federal law supreme in the event of conflict with state law. Some commentators have suggested that the federalist structure of the U.S. government was a product of political necessity. Thirteen of the current fifty states were already in existence when the United States achieved independence. Few in the newly independent states would have voted to ratify the Constitution if it did not give states a strong and meaningful role.

Over the last two hundred years, the power of the federal government vis-à-vis the states has increased significantly. Through its Constitutional delegation of power to regulate interstate commerce, Congress has broad authority to regulate almost any activity that has interstate economic impact. Congress has used this power to expand the scope of federal legislation. Where Congress has chosen to legislate, conflicting state law will be displaced pursuant to the supremacy clause of the U.S. Constitution. Nevertheless, many areas of law remain overwhelmingly state law. For example, tort, contract, property, commercial, and family law are almost always state law. States regulate the professions (doctors, lawyers and morticians), and corporations and other business entities are regulated primarily under state law. Most ordinary crimes (murder, assault, larceny, rape) are state crimes. The governmental structure of the states is very similar to that of the federal government. Each state has its own state constitution and its own executive, legislature, and judiciary.

A second important feature of the U.S. legal system is the important role of judges. The U.S. legal system is noteworthy for its system of checks and balances among the three branches

of government (separation of powers) and the important role of the judiciary as a co-equal branch of government. Unlike the practice in many civil law countries, the judiciary in the United States is regarded as an essential check on the power of the legislative and executive branches. Courts have the ultimate power to interpret the Constitution (the supreme law of the land) and to invalidate any legislation or any executive actions that conflict with Constitutional provisions. The power of courts to assess the Constitutionality of executive and legislative actions is known as the power of judicial review, and it was held to be implicit in the U.S. Constitution in 1803 in the case of *Marbury v. Madison*. Judicial decisions interpreting the Constitution can only be reversed by Constitutional amendment. The Constitution protects the independence of federal judges by giving them life tenure and by subjecting them to removal from office only for treason, bribery or other high crimes and misdemeanors – and only after impeachment by the House and conviction by the Senate. The Constitution also protects federal judges from any diminution of salary during their service as judges. The executive branch serves as a check on the power of the judiciary through its power to appoint federal judges. The legislative branch checks the power of the judiciary through its power to confirm the appointment of federal judges and through its control of federal jurisdiction. The structure of the judiciary is pyramidal – with many trial courts (94 federal district courts), a smaller number of appellate courts (11 federal circuit courts, plus the Federal Circuit and District of Columbia Circuit) and one Supreme Court. The states have adopted a similar pyramidal judicial structure.

In addition to their role as arbiters of the Constitutionality of legislative and executive branch actions, U.S. judges are recognized for the important role they play in the development of the law. Even though judges are occasionally criticized for “judicial activism,” it is widely understood that judges are law-makers rather than simply interpreters of the law. While the Constitution and statutes are the major sources of law, gaps and ambiguities in these sources of law require judges to make new law in order to resolve disputes. Judges “make” the law based upon public policy considerations that reflect changing social norms and values. Because the United States is a common law jurisdiction, judicial decisions do not merely resolve past disputes. Rather, pursuant to the principle of *stare decisis* (the requirement that future cases should be decided the same way as past cases), the decision in a particular case is considered binding precedent in future cases. In interpreting the Constitution, statutes and prior judicial decisions, judges are constrained by the obligation to provide a reasoned analysis that is faithful to precedent and reflects high standards of craftsmanship in legal reasoning and opinion writing.

Because judges enjoy such high status in the United States, they are selected as judges after many years of successful legal practice. In other words, judges in the United States do not start out at the bottom of the judicial ladder after graduating from law school and gradually work their way up. Most federal judges have had many years of experience as state court judges. Many were former prosecutors or successful attorneys in private practice. Some became judges after serving for many years as law professors. The average age of a new federal judge in the United States between 48 and 52. Federal judges are nominated by the President and confirmed by the Senate after extensive hearings. State court judges are selected by a variety of methods, including popular election, executive appointment, and selection by state judicial commissions.

Finally, a third and often under-appreciated feature of the U.S. legal system is the

important role of administrative agencies in the day-to-day administration of justice. One of the greatest changes in the U.S. legal system was the growth of administrative agencies beginning in the 1930s. At the request of President Franklin Delano Roosevelt, Congress delegated a great deal of power to administrative agencies to provide the expertise and the swift action needed to regulate the economy in the aftermath of the Great Depression. Today, administrative agencies play a vital role in a wide variety of areas – such as environmental protection, occupational health and safety, regulation of food and drugs, social security, nuclear safety, banking, securities, and labor organizing. These agencies enact legally binding regulations through delegated legislative powers. They have enforcement divisions that are responsible for investigating and prosecuting violations of the law, and they have administrative hearing officers who adjudicate disputes resulting from enforcement activities (subject to subsequent judicial review).

Although administrative agencies have occasionally been referred to as the “fourth branch of government” due to their size and independence, they are subject to executive, legislative and judicial oversight. The President has the power to appoint and remove heads of administrative agencies. At the same time, lower level employees are insulated from presidential influence because they are selected on the basis of a competitive, merit-based civil service system and may only be dismissed for cause. Congress exercises power over administrative agencies through its approval of presidential agency appointments, its control of agency budgets, and its ability to enact legislation governing the substantive obligations of agencies. The judiciary exercises power over administrative agencies through its power to review the legality of administrative agency action.

The right to judicial review of administrative agency action is provided by statute, and has been used by industry and by public interest litigants as a way of ensuring that administrative agencies carry out the responsibilities delegated by Congress. For example, public interest environmental organizations routinely sue administrative agencies that have failed to comply with their statutory and regulatory mandates. These lawsuits have been brought not so much to compensate victims but to proactively improve overall enforcement of statutes so as *prevent* harm to human health and the environment. In this sense, litigants are acting as private attorneys general and are providing a check on agencies that might otherwise shirk their responsibilities due to political pressure or lobbying by regulated entities. Furthermore, because the budget and personnel of federal regulatory agencies are limited, individual citizens and interest groups have dramatically increased the resources available for law enforcement, thus complementing government enforcement efforts. Finally, private enforcement actions have also encouraged novel legal theories and creative approaches to dispute settlement.

Private enforcement actions have played an important role in the development of many areas of law in the United States, including environmental law, antidiscrimination law, and antitrust. Private enforcement actions have also helped build the rule of law in the United States by making government agencies accountable to the public. The availability of attorneys’ fees and expert witness fees for prevailing parties have made this type of litigation feasible. The scope of standing doctrine has also played an important role in determining which plaintiffs could sue.

There are many important features of the U.S. legal system above and beyond the three that I have chosen to highlight. One of the most obvious and well known features is the adversary system and the use of jury trials. Since U.S. legal education is notorious for emphasizing judicial interpretation and devoting far less time to legislation and administrative regulation, I have elected to emphasize the role of administrative agencies and to leave to my U.S. colleagues the task of highlighting the adversary system and the use of jury trials.