

THREE FEATURES OF THE LEGAL SYSTEM OF THE UNITED STATES OF AMERICA

Fred L. Morrison
Interim Co-Dean and
Popham Haik Schnobrich/Lindquist & Venum Professor of Law
University of Minnesota Law School

Each foreign student coming to the United States has a different set of expectations, built on a different set of prior learning in the law, based on a different legal system. Each is surprised by some element of the American legal system. One or more of the following doctrines, which are self-evident to American students, usually comes as a complete surprise to visiting foreign students.

1. Judicial review, the Rule of Law and the Courts. As de Tocqueville wrote, more than 150 years ago, Americans have a peculiar ability to transform almost every political issue into a legal issue. Frequently this is a constitutional issue. That means that in the United States the validity of laws and regulations is frequently a question that is ultimately resolved in the courts, rather than in the political process.

The United States created judicial review of legislation. It emerged from *Marbury v. Madison*, decided in 1803. Students from all over the world know of this phenomenon, although even today, judicial review is not available in many countries. For students from countries that do not have judicial review, it is an entirely alien concept. How could a judge—especially a local trial judge—dare to question the authority of the Congress and the President? In other countries judicial review is available only through specialized constitutional tribunals, so the ordinary courts do not examine the constitutional validity of a law. Access to the courts may even be limited by short statutes of limitations or by rules that allow only certain institutional actors to challenge laws. In many of them judicial nullification of a statute only works prospectively. For most foreign students the notion that a group of judges could declare the solemn political acts of Congress and the President to be a nullity, thus protecting an individual who was defying promulgated law, is surprising.

Judicial review of administrative rules is also a new concept for many students. In many ways this parallels the issues surrounding judicial review of legislation. In many countries, a duly issued administrative rule cannot be challenged or can only be challenged in specialized administrative tribunals. Courts sometimes even require an agency to adopt rules. The review of individual administrative decisions in the ordinary courts is also surprising to some of them, especially if they have systems with administrative courts internal to the administration.

This raises the “rule of law” question. Ours is a stratified system of “rule of law,” with constitutional, statutory, and regulatory norms, each having different rank. Each governmental action must be justified under the terms of the higher rules. That justification must be *to the ordinary courts*, not to the political leaders who adopt the law or rule or to specialized constitutional tribunals. Unlike the French, for whom promulgation of a law by the President of the Republic is conclusive, or the British,

for whom enactment by Parliament is final, our system contains another element, judicial review. That, in turn, means that the courts, and the lawyers who present cases in courts, have a far more important role in the United States than in those other countries.

2. Federalism and its implications. The second important difference is federalism. Federalism also seems self-evident to most American students. Most foreign states are unitary. Most foreign federal states follow the German model of administrative or cooperative federalism, in which virtually all substantive legislation is adopted at the national level, while those laws are administered at the local level.

Most foreign systems have a uniform body of criminal law, a uniform body of contract law, a uniform body of corporation law, etc. American law is very different. Every state has its own body of criminal law, its own body of contract law, its own body of corporation law, etc. The federal government only provides a supplement for selected offenses. Murder, for example, is punishable by life imprisonment in my home state of Minnesota, but it is a capital offense in most other states. Only the murder of a federal official (and of certain other specially protected persons) is a federal crime.

This diversity of law between the states leads to two kinds of complexities. One complexity is brought about by in interplay between state and federal law governing the same subject matter. State law governs the organization of a corporation, but federal law governs the issuance of most securities and the accounting practices of many (but not all) corporations. State law governs contracts and real estate, but a separate and unconnected federal law gives relief to some borrowers against sales and unfair credit practices. There is no official integration of these codes; understanding the relationship is a task for the lawyer.

The other complexity involves the laws of different states governing the same conduct. Because Delaware has particularly flexible corporation laws, most major American corporations are incorporated there, even though they have little connection to that state. The Delaware corporation law will apply to the corporation's organization and structure, but the home state law will apply to its ordinary activities. Parties can agree to a "choice of law" clause in a contract providing that the law of another state will govern the transaction.

The interplay of different state laws is involved in litigation, as well. A plaintiff may be able to sue in any one of several jurisdictions. Each of those states will have its own choice of law rules. This means that differing procedural and substantive rules will apply in the litigation. Once a judgment is entered, it can be enforced anywhere in the United States. So the plaintiff's lawyer will look for the jurisdiction in which the law is most supportive of the plaintiff's claim.

These revelations are surprising to students who come from systems in which there is one set of governing norms and one set of adjudicating courts. They also reward the skill of the lawyers in drafting instruments and in litigating disputes.

3. The flexibility of the common law. The third difference that I would emphasize is the flexibility of the common law and the impact of that flexibility on judicial authority. As Justice Oliver Wendell Holmes noted in his book *The Common Law*, “The life of the law has not been logic. It has been experience.” The common law has been responsive to changes in social conditions and changes in technology, even when there is no formal enactment. One example should suffice to demonstrate this phenomenon.

Over the past 50 years, in response to changes in the way that products are produced and distributed, the common law has developed a system of products liability. It has done so by judicial reinterpretation of precedents, rather than by legislative enactment. The courts reinterpreted the contract doctrine of “privity,” and the tort doctrine of “foreseeable harm” to permit those injured by faulty products to recover from the distant and remote producers. This was done by the courts, at the urging of academics and lawyers, with only slight legislative involvement.

More generally, if there is no common law precedent directly on point in their own jurisdiction, state supreme courts frequently look for the “best law” decided by other jurisdictions. This also leads to the progressive development of law without formal legislative intervention. This flexibility is in sharp contrast to most codified systems, in which the courts patiently await legislative change to the governing rules before responding to these issues.

In the United States, the teacher and the student must see law as a living organism, slowly changing in response to the pressures upon it, even without a formal legislative change. To be an effective teacher, one must not only teach what the law *is today* but also what it *is becoming for tomorrow*.

Conclusion. Each of these three features of the American legal system enhances the role of the judiciary. The courts control the constitutionality of legislative acts. The courts often allocate powers between federal and state authorities. The courts are involved in the gradual evolution of common law and even of statutory law. This gives American courts and lawyers an enhanced stature within the constitutional system.

Judges, and the lawyers who argue before them, shape the development of the law in the United States to an extent that is unparalleled elsewhere. Our courts do more than simply apply a set of codes to facts. Through their various powers they also shape the development of the law itself.