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American Jurisprudence

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Constitution of The United States of America

1.1 Introduction

Using the famous preamble to the United States Constitution is fitting to begin this chapter, and this entire text, for several reasons. The first and most important reason is because the Constitution is the supreme law of the land in the USA, and all laws must be in accord with this charter. Another reason for using the preamble is because it shows the intent of the founding fathers. All of the words not usually capitalized in the middle of a sentence, such as People, Justice and Tranquility, indicate a higher level of importance placed on these concepts by the founders. Finally, the British spelling of the word “defence” is used instead of the US English spelling of defense. This spelling hints at the origins of US Law that lie in Great Britain.

In Chapter 1, we will consider the basic theory behind US Law. This basic theory or philosophy of law is known as *jurisprudence*. These theories are typically debated in US law schools at the commencement of a student’s course of study. They form the foundation for understanding why judges apply laws in a particular way. The process used by judges applying law to a case is one component of a larger skill set used by judges and attorneys, referred to

as *legal reasoning*. Although deceptively simple sounding, the student is urged not to underestimate the importance of understanding legal reasoning and the resulting legal argument. Briefly, legal reasoning involves understanding what specific issue is at hand; knowing what legal theory governs this type of issue; knowing which facts are relevant to this legal theory and applying the legal theory to the facts.

At the end of this chapter the following student learning outcomes are expected:

- Discuss the concept of “law”.
- Recognize the specific functions it serves.
- Describe how law is made.
- Explain how law is implemented.
- Define the components of the US Legal System.
- Explain the formal dispute resolution process.

1.2 Definition

Defining law as it is used in the US legal system is so problematic that even our best efforts fall short. In one aspect the law is a set of rules used to maintain peace and order in society. It is also a state-recognized notion or principle such that failure to follow it can bring about punishment. Additionally, it is a set of community standards necessary for us to recognize acceptable behavior.

To get around this problem, textbook authors describe what the law does, or how the law is applied. In light of the goal of this textbook, we shall follow suit and describe the law’s main functions, what the law and those who practice law hope to accomplish, and how it is applied to the built environment.

1.3 Functions

Figure 1.1 depicts the three major functions of the law. In studying US law, we see that, for the law to have existed over hundreds of years, it must serve some function useful to society. These functions can be as varied as the individuals who rely on the law. However, three functions tend to be of the most significance; namely the functions of regulator, facilitator and dispute resolver. In its regulatory function, the law controls behavior so that society can function smoothly. As a facilitator, the law is a catalyst for action by deciding whether a question is best decided by a court, another body of government such as the legislature, or not subjected to judicial review at all. Finally, the function most familiar to us all is the law’s dispute resolution function, useful in settling various types of disagreements without violence.

Functions of the Law		
Regulation <i>Supports stability and certainty</i>	Facilitation <i>Organizes system, maintains balance</i>	Dispute Resolution <i>Peaceful means of settlement</i>

Figure 1.1 The three major functions of US law.

The law as regulator serves to keep individuals within the accepted customs of society, thereby ensuring a smoothly functioning civilization. Without this function another system for maintaining accepted customs would be necessary. If you have ever been a part of the formation of a new club or informal social group, you have experienced the need for this regulatory function.

For example, in social media environments there are written or expressed customs and unwritten customs generally expected of members. A written custom, for example, may be that each individual may only have one account and can only post messages that are non-offensive. An unwritten custom may be the preference for short, pointed statements and the use of initialisms such as “LOL” that are understood by most members without the need for explanation. The software designer easily regulates these customs by writing computer code that limits the number of accounts at registration and controls the number of characters a user can use in a post. In this instance, the software designer, using the “law” of computer code is serving as a regulator. As in many instances across society, this regulatory function speaks to the members’ sense of fairness and seeks to control excesses that may undermine the entire purpose of the community.

In the greater society, regulatory laws are plentiful and include controls on many areas of industry, from laws against insider trading, to laws controlling fire retardant standards in children’s sleepwear. The regulation function promotes an ordered society where citizens can predict the consequences of their actions. If an entrepreneur can predict the consequences of her decisions, she is able to easily assess risks and being able to assess risks allows for economic stability.

Much more subtle is the law’s function as a facilitator. Since the legal system in the USA is an actual system of governmental bodies and not just one entity, it requires a facilitator to assign roles and decide which of those bodies should speak to a decision. The different branches of government perform specific and unique duties. This structure allows for the equal division of power and control among three branches of government: judicial, executive and legislative. Additionally, deciding whether or not a matter should be taken up in a state or a federal court is the job of the facilitating function of the law.

Though this function is subtle, parties resolving a dispute within the rules set up by the law serving as facilitator can fully rely on decisions made by the courts. This function will be further explained in Chapter 2 when we discuss state and federal jurisdiction, and the role these play in legal decisions and legal strategy.

The law's dispute resolution function is easily understood in the context of courts making judgments for or against a party involved in a disagreement with another. This major function serves society by attempting to settle disputes in a peaceful manner. It allows people with distinct interests the opportunity to assert claims and resolve differences peacefully. This function is closest to the idea of the law as a series of rules, called the *black letter rule of law*. Even in the law's dispute resolution function, the regulating and facilitating functions also operate in the background.

While this short summary provides an overview of what the law is used for, it is important to remember that the functions of the law are as varied as the individuals who rely upon it. The other functions of the law will be discussed when appropriate in the hopes of demonstrating the earlier assertion made. That is, the law is not simply a list of rules to be used for dispute resolution.

1.4 Sources of law

In the instance of US laws, the source of law has a direct relationship to how the law impacts Facility Managers. The creation of law is a by-product of governing citizens. This is why it is often said that the USA is a nation of laws since the act of governing can also be an act of making law. In the US federal system, power is shared between the federal and state governments. This arrangement gives local entities some autonomy to deal with parochial issues while also protecting numerically minority populations from domination by the majority. Allowing a state like Rhode Island to control its driving age laws for its own citizens gives an amount of independence to the smaller state. Teenagers living in rural areas may require the ability to drive earlier than teenagers living in New York City. Not subjecting citizens in Rhode Island to the driving age laws of a city in New York State protects this independence.

In this system there is recognition that a central government is still necessary to govern certain issues on behalf of all citizens. It would be a confusing situation if, for example, each state independently controlled currency, foreign relations and defense of the nation. In contrast, issues such as building codes and sales tax are better controlled at the state level.

1.4.1 United States Constitution

The creation of any organization requires a basic set of rules to provide a framework for operation. This concept applies to all systems including the

system of the US Government. The governing charters for the USA include the Declaration of Independence, the Constitution and the Bill of Rights. The US Constitution regulates power among the federal government and government branches, federal government and the states, and all governments and the people.

This basic framework – this Constitution of the United States – also comprises the primary law in the USA. It and its amendments enumerate the basic rights of the citizens of the United States, and detail the three chief branches of the Federal Government and their jurisdictions. Figure 1.2 illustrates the Legislative, Executive and Judicial branches, how they relate to the Constitution and each other, and which government officials are connected to the various branches.

In addition to being a major source of US law, the constitution is also important for understanding the structure of the government, its basic goals and how these goals are achieved.

However historically noteworthy, constitutional law does not play a significant role in the day-to-day operations of the built environment. Notable exceptions to this blanket statement include issues involving public contracts and timeliness of the application of certain human rights. In addition, each state has its own constitution, which directs the separation of powers among the state legislative, state executive and state judicial branches of government, and the protection of state citizens from the abuse of power by citizens of other states.

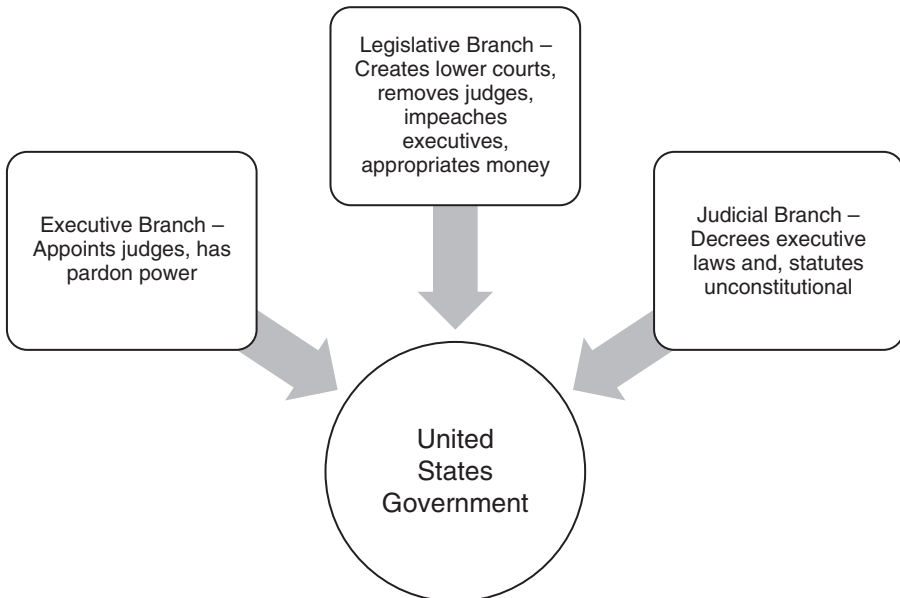


Figure 1.2 Branches of US Government.

1.4.2 Statutory law

Because of growth, there is sometimes the need for expanding and updating the Constitution. This modification to our laws can be accomplished by several means, one of which is enacting legislation by a representative congress elected by the people. In addition to modifying the law by amending the Constitution, congress also enacts legislation. The word “legislation” is used interchangeably with Statutory Law. Proposed new ideas or bills that are approved according to the rules set by the Constitution become statutory law and are also identified as statutes. Figure 1.3 depicts a high level flowchart of the path an idea takes to become a law in the federal legislative process. Other levels of government have their own processes but many are similar to the federal process.

Each year, legislation proposed by congress has, and continues to add to, rules in the constitution. This expands the total number of laws and creates an additional source of law, called “statutes”, in the US system. There are many more statutes than there are distinct laws in the constitution. Both the constitution’s rules and the rules contained in statutes have the weight of law and are applied by the courts in dispute resolution.

Even though legislation is used to expand the constitution, these laws are limited by the US government’s system of checks and balances. Judges, to make sure they comply with the rules of the constitution, check statutes. This check prevents Congress from making a law that runs counter to the constitution’s spirit and intent. Unsurprisingly, whether or not a statute runs counter to the constitution can be hotly debated. The federal and state courts weigh in on this debate and decide on the constitutionality of statutes. If examined closely, this check by the court seems almost circular (see Figure 1.4). Courts determine if a statute enacted by the legislature to expand the constitution is, in fact, constitutional.

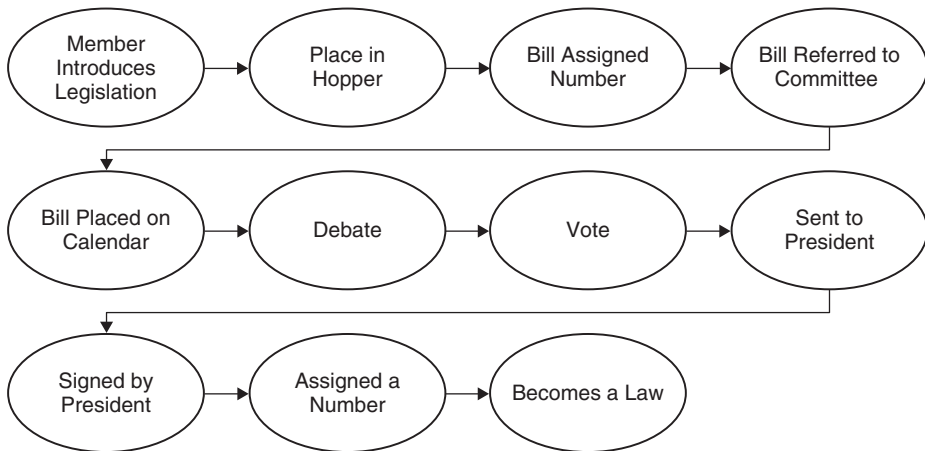


Figure 1.3 Pathway from idea to law.

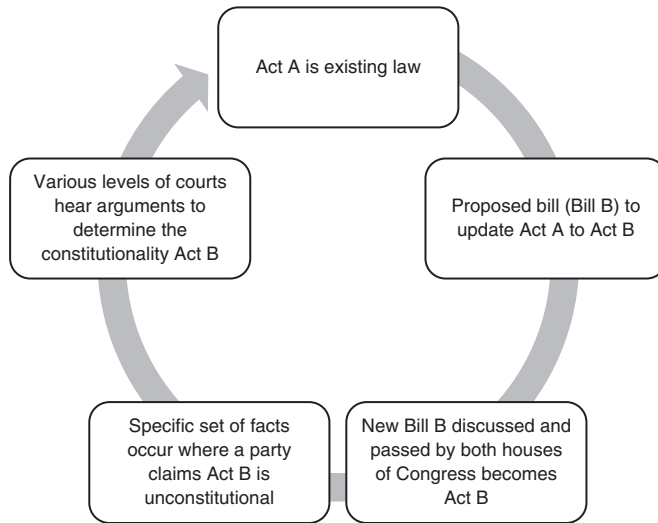


Figure 1.4 Illustration of court’s constitutionality check.

The power to deem a statute unconstitutional can potentially permit the courts to control the political desires of the citizens by allowing the courts to decide that action taken by duly elected representatives, in the form of a statute, is unconstitutional. One only has to look as far as the recent court decision in *National Federation of Independent Business v. Sibelius*, decided in 2012. In this case the Supreme Court of the United States upheld major provisions of the Patient Protection and Affordable Care Act (PPACA) and the Health Care and Education Reconciliation Act (HCERA), even though there were a considerable number of elected officials arguing that requiring citizens to buy private insurance was unconstitutional. If the people elect a representative in Congress who passes a statute, which is in turn deemed unconstitutional by a court of non-elected judges, what power does Congress genuinely have?

Protection for Congress to curb a court’s power exists for this very reason. These protections include the executive appointment of key judges, and a rule stating that a court can only get to the question of constitutionality of a statute if, and only if, there is an identifiable party involved in a real dispute against another identifiable party, and the specific court has jurisdiction. This means that if a citizen simply disagrees with a statutory law and desires to use the court system to theoretically decide on its constitutionality, this may be considered an improper use of the court system. There are times, however, when the courts make exceptions and rule on the constitutionality of a statute under specific circumstances. These circumstances will be discussed later in Chapter 3. In most cases, there must be a valid dispute with parties who stand to win or lose something of value to have a full hearing requiring the court to make a decision. This legal concept of requiring a real dispute is an example

of the law’s facilitating function and also stops the system from being clogged up with theoretical questions. This concept is discussed later in Chapter 3.

With its authority to restrict the power of the courts, Congress’s power does not go unfettered. The executive branch, consisting of the president (in the federal system), governors and some mayors (in the state systems), serves as a check on potential statutes through the power to veto legislation. Figure 1.5 illustrates this web of checks by the three branches of government as applied to the legislative process.

1.4.3 Executive orders

Additional sources with the weight of law include the chief executive’s power to issue executive orders to those under their control. Historically, executive orders were issued for simple administrative matters and usually internal operations of federal agencies. Recently, presidents have used executive orders to carry out legislative policies and programs. These orders do not need the approval of Congress, making the use of them highly controversial.

There are many examples of presidents using the executive order authority. President Roosevelt issued an executive order to mandate the confinement of Japanese-Americans to internment camps following the bombing of Pearl Harbor. (Exec. Order No. 9066). President Jimmy Carter used the power to stop the US Attorney General’s investigations and indictment of Vietnam War draft evaders (Exec. Order No. 11 967). President Bill Clinton used executive order power to order the reserve military into active duty to augment operations in Bosnia. (Exec. Order No. 12 982).

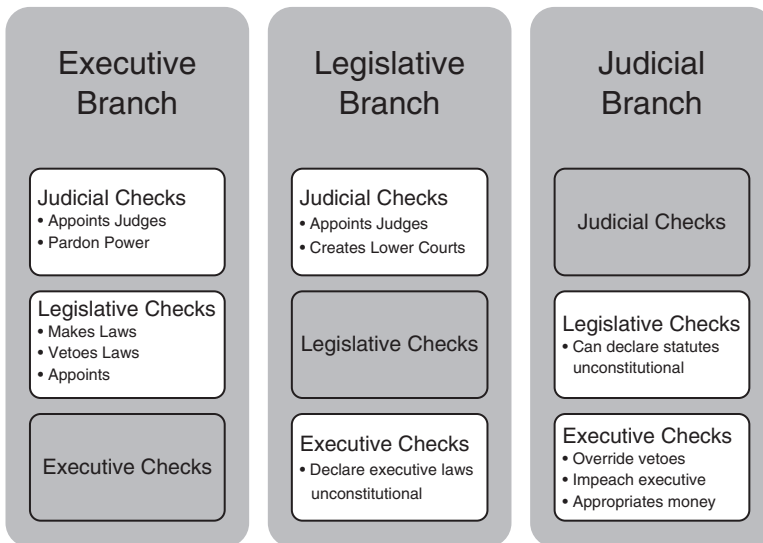


Figure 1.5 Checks by three branches of government.

In the past, Congress has taken action to counter executive orders, including passing legislation in conflict with the order, and refusing to approve funding necessary to carry out the order. As with any legislation, the president can veto this counteractive legislation, but with two-thirds majority vote the president's veto can be overridden. Because of the high requirement of a two-thirds majority vote, some believe that currently an executive order is nearly impossible to override (Koh 1990).

In the built environment industry several executive orders issued over the years impact upon the Facility Manager. For example, Executive Order (EO) 13423 requires federal agencies to implement plans to reduce their greenhouse gas emissions. Also, and a bit more controversial, EO 13502 encourages federal agencies to use union-only project labor agreements (PLAs) on construction projects, exceeding \$25 million. A PLA is a union collective bargaining agreement that all contractors must sign to work on a construction project. The text of all current Executive Orders appears in the daily Federal Register when the Executive Order is signed by the President and received by the Office of the Federal Register. The text of Executive Orders beginning with Executive Order 7316 of March 13, 1936, also appears in the sequential editions of Title 3 of the Code of Federal Regulations (CFR). Additional information can be found in an index called Executive Order Disposition Tables, which are compiled and maintained by the Office of the Federal Register Editors.

1.4.4 Administrative law

A sometimes controversial but important source of law is the law of government agencies, known as *administrative law*. Focus of administrative law usually includes making rules and regulations and enforcement of a specific regulatory area, such as the environment. Considered the fastest growing source of US law, administrative law governs the activities of the administrative agencies of government, such as the Department of Education, the Environmental Protection Agency and others. Administrative law is different from legislation because directors appointed by the chief executive, not representatives elected by the people, lead agencies. This source of law exists at the federal, state and local levels.

Administrative law is considered a branch of public law and was created in response to the increasing complexities of modern society. Law was developed in response to perplexing questions such as, how can a politician keep the public from nuclear harm without detailed knowledge of the nuclear industry? How can Congress devise regulations that are both fair to the financial interests of industry and safe for the citizenry? Congress thought experts in those industries best regulated the special activities of industries. They created Agency Law to serve this purpose.

The guiding policy for these agencies is the actual legislation creating the agency. Therefore, these agencies are created by the legislature and the same body oversees their activities. To keep checks and balances in place, the chief executive is usually the person who appoints the top agency officials with the consent of Congress, and any action taken to enforce the agency regulations is subject to judicial review. It is interesting to note that the Constitution created Congress, which created a statute, which created an agency that created the administrative law.

Agencies issuing regulation of significant interest to the built environment industry include: the Occupational Safety and Health Administration (OSHA), the Environmental Protection Agency, and local agencies controlling land use and construction quality.

1.4.5 Common law

Common law is at the same time a rule and a legal reasoning process. Taking the time to appreciate what common law is and how it is made will help you understand the process of legal reasoning. Common law is also referred to as “judge-made law” and considered to be a different source of law from constitutional law and statutory law. Understanding common law requires an understanding of how it came to be. Judges make law when they apply legal principles, or current laws to actual cases. By reading a judge’s written decision, you can follow the logical steps taken by the judge to get from a generic rule to applying that rule to a specific set of facts in a case. This process made by judges is essentially legal reasoning and defined as the use of established law on a given set of facts. The established law, and how the court in a particular situation applies it, is also one working definition of common law. Therefore, common law is the work of the trial court judge in addition to being a distinct set of rules. These decisions, written by a judge in law books called *reporters*, explain exactly how a court interpreted the law giving reasons for its decision.

In the instance of common law, for us to know what the law is in a particular situation, we must know how judges decided similar disputes in the past. This is why we say US courts follow precedent. Precedent is a decision by a judge that has occurred in an earlier case. This decision is considered authority for identical situations that come after the initial decision is provided. Understanding prior cases, rationale and decisions is important because future judges will decide similar cases in the same way. Precedent then, is a rule of law established for the first time by a court and thereafter referred to in deciding similar cases.

Using precedent is required under an important legal theory called *stare decisis*, which is a policy followed by judges to stand by previous cases or precedents. This allows the US system stability and serves to protect a settled point of law. Generally when a judge has once laid down a principle of law as

applicable to a certain set of facts, other judges will adhere to that principle and apply it to future cases where the facts are the same. This use of precedent under the policy of *stare decisis* is why we often refer to the judge's decision more definitively as a "decision by the court" and not a specific person. So in the future, even if the same judge is not hearing a similar case, since the judge acts for the government, prior decisions are considered already decided by the court and must be followed. Referring to the judge's decision as a "decision by the court" also implies impartiality and the notion that what the court has settled is the rule of law.

It is hopefully obvious that court decisions, in addition to the amendments of the US Constitution, Statutory Law written by Congress, Executive Orders and Agency laws, are all distinct sources of law. What may not be obvious is that these sources are also constantly being updated creating new laws. In sum, the sources of US law include: common law, the constitution, statutes, executive orders and administrative law.

1.5 Chapter summary

Understanding the definition of law presented in this chapter should help further the argument that law is not simply a list of rules to be followed. The labyrinthine structure of the US Government and how it operates is as important in understanding the law as an understanding of the principles set out by the US Constitution. One way of learning the law is by sorting it into categories. Law can be categorized in several ways such as: source of law, application of law and knowledge of its specific function. Knowing the operation of government helps in learning the law also. All of these connections should help the student to better understand the expression by James Harrington made more famous by John Adams that the USA is a nation of "laws and not of men".

1.6 Questions

1. Using your own words, how would you define the word *jurisprudence*?
2. How is common law made?
3. How is administrative law connected to the US Constitution?
4. Who makes administrative law and under what authority?
5. Why is there a need for both common law and statutory law? Explain your answer.
6. Are executive orders "legal"? Explain your answer.
7. Which branches "make" law?

8. Why would the US Constitution insist on checking the power of the three different branches?
9. How is the executive power to issue executive orders checked by the courts?
10. Using your school's resources, find a copy of a constitution from another country. Summarize the commonalities and differences with the US Constitution. Reflect on your findings.

References

Koh, H. *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (Yale Fastback Series). Yale University Press, 1990.