Chapter 1

Overview of the US Legal System

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Key Concepts

- *Checks and balances*: Governmental power is divided between the national government and the states, and between the executive, legislative, and judicial branches, to avoid any one group wielding excessive power.
- *Enumerated powers*: The federal government is a government of limited powers, having only those powers explicitly granted it by the Constitution.
- *Law*: There are various kinds of "law" that come from multiple sources.

The purpose of this chapter is to provide an introduction to the American legal system, governmental structures, and sources of law. The concepts discussed here are fundamental to all American law; they are not unique to environmental law. But these fundamentals provide a context for understanding environmental law.

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THE STRUCTURE OF AMERICAN GOVERNMENT

The United States was created—or "constituted"—in 1789 by a document called the Constitution. The document was drafted by chosen representatives and then approved by the original thirteen states. At the time, this was a unique new phenomenon—a government created by, rather than imposed on, the governed. The people of America had very recently won their independence from England, and they were eager to protect their independence. Above all, they shied away from power concentrated in too few hands, which they saw as a recipe for tyranny.

The founders—the drafters of the Constitution—sought to establish a government strong enough to govern and defend the country while at the same time protecting the rights of the states and the people. They invented a system of government based on a new idea: separation and **balance of powers**. Power is divided among separate segments of government, as a check against abuse of power by any one segment. This idea, often called **checks and balances**, is a hallmark of American government.

balance of powers
The balance achieved by separating governmental powers among multiple entities, to avoid abuse of power by any single entity

checks and balances
A strategy of dividing power among separate segments of government to avoid abuse of power by any one segment; this is a hallmark of the American system

SEPARATION OF POWERS: FEDERAL AND STATE

The Constitution created a unique federal system, consisting of a central—federal—government existing alongside sovereign individual states. The Constitution lists—or "enumerates"—specific powers allocated to the federal government, for example, the powers to declare war and print money. All other powers are reserved to the states and the people. Thus, the federal government is often called a government of **enumerated powers** or "limited powers." The federal government exists in parallel to the state governments, now grown to fifty in number. Their structures and laws are largely similar, but not identical, to the federal government's structure described below. This separation of powers between the federal government and the states—often referred to as a vertical separation of powers—is one of the checks and balances introduced by the Constitution to protect against tyranny (see table 1.1).

enumerated powers
Powers explicitly given to the federal government by the Constitution

In practice, the division between federal and state power is not quite as neat as in concept. The enumerated powers are explicit, but subject to interpretation. As a result, disputes are not infrequent as to whether a particular federal law crosses the line and encroaches on the powers reserved to the states. This is the theoretical question in debates over **states' rights**. The ultimate arbiter is the US Supreme Court. Because the Court is a part of the federal government, you might think that states would always lose the dispute. But that is not so. At times in

states' rights
A sobriquet for powers constitutionally reserved to the states rather than conferred on the federal government

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TABLE 1.1 Separation of Powers between National Government and States

National Government	States
Enumerated Powers	**Reserved Powers**
Delegated by Constitution	**Any Powers Not Delegated to National Government**
Includes: • Regulate interstate and foreign commerce (*authority for federal environmental laws*) • Establish foreign policy • Print money • Etc.	Includes: • Environmental protection • Protection of public safety and welfare • Regulate *intra*state commerce • Create local governments • Etc.

Note: The authority of national and state governments overlaps in many areas, including environmental protection.

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our history, the Court has interpreted enumerated powers broadly—stretching the language like elastic—but at other times it has interpreted federal powers narrowly, ruling in support of states' rights.

Separation of Powers: Branches of Government

In addition to the vertical **separation of powers** between the federal and state governments, the Constitution created what is often called a horizontal separation of powers within the federal government. There are three fundamental powers or functions of government: legislative, executive, and judicial. Historically, in other nations, all of these powers were exercised by one sovereign individual or group. By contrast, the US Constitution divided these functions in the federal government among three separate and independent branches: Congress, the executive branch, and the judiciary (the courts). This horizontal separation of powers is another of the checks and balances introduced by the Constitution to protect against the risk of tyranny that comes with concentration of power in too few hands (see table 1.2).

separation of powers
The division of governmental powers among multiple entities, intended to avoid abuses by any single entity

Legislative Branch

Legislation is the adoption of **statutory law**—what most people think of when they hear the word "law." Congress is the federal branch vested with legislative power. It consists of two elected houses—the Senate and the House of Representatives. The Senate consists of two senators elected from each state. Thus, all states have equal weight in the Senate, regardless of population. By contrast, the number of representatives elected to the House from each state is proportionate to its population. America's *bicameral* (two-house) legislature provides a layer of

statutory law
Laws enacted by Congress or a state legislature

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TABLE 1.2 Branches of Government

Legislative Branch	Executive Branch	Judicial Branch
Congress Consisting of: • Senate • House of Representatives	**President** Assisted by: • Vice president • Heads of agencies	**Federal Courts** Consisting of: • US Supreme Court • Circuit Courts of Appeal • District Courts

Note: This table is intended to emphasize that the branches of government are independent and equal. Although the table specifically depicts the federal branches, it could equally serve to illustrate the branches of a state government.

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power-balancing. A bill (proposal) cannot become law unless approved by a majority of both houses.

Executive Branch The federal executive branch consists of the president, vice president, and various departments and agencies. The head of each department (usually called the secretary) and the heads of some of the agencies (called administrators), along with a few other officials, comprise the president's cabinet. The president and vice president are elected. The heads of departments and agencies are appointed by the president, but must be approved by the Senate (another example of balancing powers).

Judicial Branch The federal judiciary forms a pyramid with three tiers. The large bottom tier is the trial court level, called the US District Courts. The term "District" here refers to state-based geographic areas, for example, the Western District of Pennsylvania. The narrower middle tier is the appellate level, called the US Courts of Appeal, often referred to as "Circuit Courts." The term "circuit" refers to a geographic area covering several states (see figure 1.1). For example, the Third Circuit encompasses Pennsylvania, New Jersey, and Delaware, so the US Court of Appeals for the Third Circuit presides over all the District Courts in those three states. The peak of the pyramid is the United States Supreme Court. A decision of an appellate court, such as the Third Circuit Court of Appeals, is binding only on the courts within its own circuit—that is, its own "jurisdiction." But, if persuasive, its decision might be followed by courts in other circuits. Decisions of the Supreme Court are binding on all federal courts in all circuits. The Supreme Court agrees to hear relatively few cases each year. One major reason the Supreme Court might agree to accept an appeal is if there is a conflict among the decisions of two or more Circuit Courts of Appeal.

Federal judges are not elected. When there is a vacancy on a court, a new judge is appointed by the president, subject to confirmation by the Senate. The requirement of Senate approval, as with executive department heads, is another example of that hallmark American concept, the separation and balance of powers. The concept is carried even further with the federal judiciary. New executive department heads are appointed by each new president, and they can be removed by the president. By contrast, federal judges are appointed for life. They may not be involuntarily removed from office unless impeached by Congress. The reason is to protect the independence of the judiciary from the political branches—the legislature and executive. Courts often have to decide cases whose outcome could

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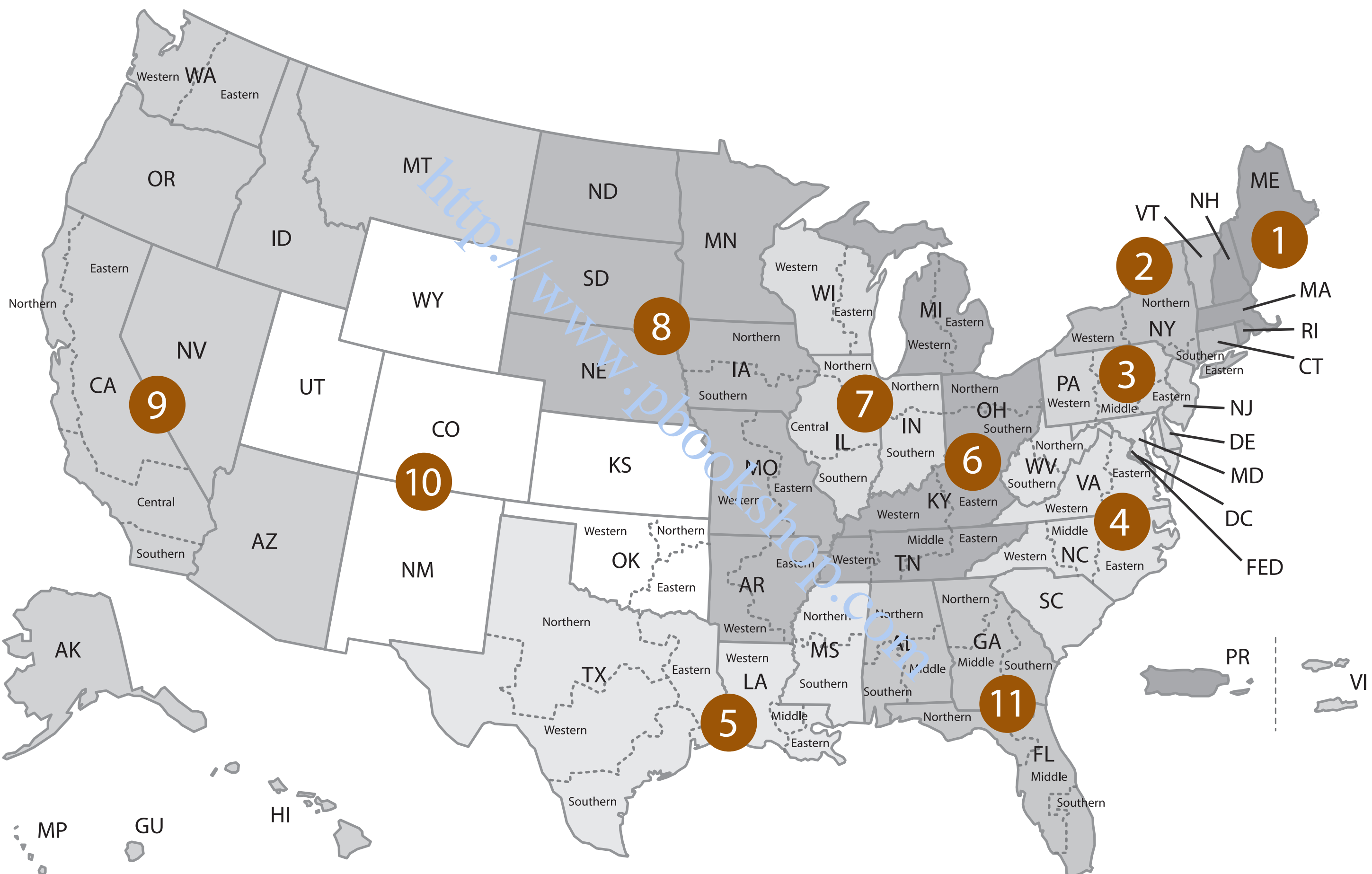
FIGURE 1.1 Geographic Boundaries of United States Courts of Appeal and United States District Courts



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be adverse to the wishes of those other branches. Judges could not be expected to rule impartially if they risked being fired every time their decisions displeased the other branches.

State Governments States do not derive their power from the federal government; each state is a sovereign government. Yet each state government is very similar in structure to the federal government. This structure is not imposed on the states by federal law. Rather, everybody does it because it works. Each state has its own constitution establishing the branches of government and how they are constituted and selected.

State legislatures almost all have two houses, just like Congress. (The sole exception is Louisiana, which has just one house.) Each state's constitution provides how many legislators serve in each house and how they are chosen. The names vary; for example, a state might call its legislative houses the Senate and Assembly.

The governor of each state is its chief executive officer, corresponding to the office of president in the federal government. There may also be an officer called lieutenant governor, or something similar, corresponding to the vice president. Each state has executive entities called departments or agencies or commissions that do the daily work of government, similar to the departments and agencies at the federal level. Typically, a state has a Department of Environmental Protection—or similarly named entity—corresponding to the federal Environmental Protection Agency.

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States commonly have a three-tiered judicial structure—trial courts, intermediate appellate courts, and a supreme court—just like the federal judiciary. States vary considerably, however, in the methods of selecting judges—for example, whether they are appointed or elected, and how that is accomplished. The term of office served by judges also varies from state to state.

Local Governments Local governments are not sovereign; they are created by and derive their authority from the state. They have varying degrees of authority and autonomy, delegated by the state. Local governments come in various shapes and sizes, and they have various names—for example city, county, borough, and township. Local governments often play an important role in environmental protection—through zoning, planning, issuance of permits, enforcement, and in many other ways.

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Who Takes Care of Health and the Environment?

Attention in this book will focus mainly on the **Environmental Protection Agency (EPA)**. The EPA is responsible for administering most federal environmental legislation, and its sole mission is environmental. But other executive entities also play an important role in environmental protection, and many programs involve the work of multiple agencies in cooperation. For example, the Department of Energy's (DOE) mission includes extensive environmental aspects, such as current energy production issues and dealing with the contamination of former atomic bomb production sites. The DOE and the EPA both are designated to participate in a Nuclear Response Team under the leadership of the Department of Homeland Security (DHS), in case of a nuclear or radiological incident. The Federal Emergency Management Agency (FEMA), an agency within the Department of Homeland Security, plays a leadership role in disaster planning and response, often working closely with the EPA. Later chapters of this book discuss the roles of the Occupational Safety and Health Administration and the Food and Drug Administration in environmental health protection. The Department of Justice provides legal counsel to the EPA (and other agencies), as well as representing it in litigation.

Environmental Protection Agency (EPA)
The federal agency that implements and enforces most federal environmental acts

In addition to EPA, FDA, and OSHA, other federal, state, and local agencies have statutory roles in responding to human health threats related to the environment, to food safety, and to the workplace. Sorting this out can be bewildering in any given instance, but recognizing the roles of these public health agencies is essential to understanding the response. A number of federal organizations focusing specifically on environmental health issues are part of the Department of Health and Human Services. The National Institute of Environmental Health Sciences (NIEHS) is part of the National Institutes of Health. NIEHS funds research on environmental health issues; is the lead federal agency for the **National Toxicology Program**; publishes the leading journal in the field, *Environmental Health Perspectives*; and, under CERCLA, runs Superfund research centers and hazardous waste worker programs. The Centers for Disease Control and Prevention (CDC) of the US Public Health Service includes the Center for Environmental Health (CEH). CEH is the primary federal response agency for environmental public health issues, working closely with the EPA. CEH also performs public

National Toxicology Program
An interagency program, led by NIEHS, that scientifically evaluates chemicals and other agents of concern to public health

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health surveillance related to environmental issues, including a long-term survey of blood levels of over a hundred environmental agents. Another CDC component, the **Agency for Toxic Substances and Disease Registry (ATSDR)**, overlaps organizationally with CEH. As described in the chapter on CERCLA, ATSDR provides the health component to the Superfund program. It is also the source of easily read as well as comprehensive "toxicological profiles" which are excellent sources of information about individual chemicals.[1] The National Institute of Occupational Safety and Health, which works with OSHA, is also a CDC component.

Agency for Toxic Substances and Disease Registry (ATSDR)
A part of the federal Centers for Disease Control, whose research and evaluation of public health risks is relied on in many contexts

Although this book talks mainly about federal agencies, a large proportion of the people who take care of health and the environment work for state agencies. These agencies play a big role in carrying out federal law, as well as implementing their own state laws. Congress has also given the EPA the authority to provide funding to state programs that innovate better approaches to environmental control. One example is the Pollution Prevention Act of 1990, which focuses on ways to reduce pollution at the source, such as green chemistry initiatives.[2] As with the environment, there is no specific constitutional delegation of public health functions to the federal government. Thus, states have the primary responsibility for public health. When the EPA was formed in 1970, the Division of Water Pollution and the Division of Air Pollution, along with their legal mandates, were moved from the US Public Health Service into the EPA. Similarly, in response to the awakening of the environmental movement, most but not all states developed a separate environmental agency which to a variable degree subsumed functions previously held by their health departments. States also differ in the extent to which their public health functions are delegated to municipal and county health departments, and this may vary even within a state. For example, in Pennsylvania the Allegheny County Health Department, which includes Pittsburgh in its jurisdiction, retains air pollution control functions that for other Pennsylvania counties are run by the state Department of Environmental Protection.

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SOURCES OF AMERICAN LAW

There are multiple sources or types of American law, including environmental law. The most fundamental type of law is constitutional law, the source of which is the constituents—that is, the people. The types of law that will receive most attention in this book are legislation, executive regulations, and judge-made law.

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Constitutions

There is a constitution of the United States and, in addition, every state has its own constitution. A constitution is a document that creates a government, designates and allocates fundamental governmental powers, identifies and protects fundamental rights. The US Constitution was originally drafted at a constitutional convention, convened specifically for the purpose, and composed of representatives from the original thirteen states. Each of the original states ratified the US Constitution, as did all the states that later joined the Union. Each state also has its own state constitution, generally drafted at a special constitutional convention. Constitutions generally deal in broad, important principles reflecting values that are deeply held and not to be changed lightly. By design, therefore, it is difficult to amend a constitution. Amendment generally requires a new constitutional convention or other intentionally laborious process.

Commerce Clause
The constitutional provision giving the federal government power to regulate interstate commerce, it has become the source of authority for most federal environmental legislation; also called the *Interstate Commerce Clause*

Authority to protect and regulate the environment is not explicitly included in the federal powers enumerated in the US Constitution. Most federal environmental acts rely for their constitutional justification on the **Commerce Clause**, which gives Congress the authority to regulate interstate and foreign commerce: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . ."[3] As with many constitutional provisions, this language has proven elastic, its interpretation gradually evolving to support a large role for the federal government in environmental protection.

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Unlike the US Constitution, several state constitutions contain explicit environmental provisions. As an example, the Pennsylvania Constitution provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[4]

Because states have broad retained powers, a special constitutional provision is not needed to establish a state's authority in the environmental sphere.

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Nonetheless, such a provision can be important as a declaration of state policy, which can be called upon in support of legal or political action to protect the environment.

One other provision of the US Constitution is important to introduce here, namely the **Supremacy Clause**:

Supremacy Clause
The constitutional provision that, within its enumerated powers, federal law takes precedence over state law

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[5]

This means that, within its enumerated powers, federal law is supreme; it cannot be countermanded or undermined by the states. Federal law is said to **preempt** (essentially trump) state law within those borders. Congress may explicitly bar states from lawmaking in some areas, making federal *preemption* complete. Or a court may infer from circumstances that Congress intended its legislation to be the only law on a particular matter. But for the most part, the enumerated powers are not off-limits to states. A state can enact laws, so long as they do not conflict with federal law. In the environmental context, this means that a state may impose a stricter environmental standard, but it may not allow a laxer standard than that set by federal law.

preempt
The superseding of state law when it conflicts with or otherwise is disallowed by federal law

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Legislation

Laws enacted by a legislature are called statutes. When most people think of environmental law, they think of federal statutes such as the Clean Air Act and Clean Water Act, enacted by the US Congress. Statutory law is formal written and codified law; it applies to everyone or to broad categories, not to specific individuals; and it is prospective—that is, it sets rules for the future. The term “act,” as in the Clean Water Act, generally connotes a coherent compilation of statutory law addressing a unified topic.

Federal Environmental Legislation

Congress sets the national environmental agenda, its authority limited only by the Constitution. Congress decides what problems to address and how to address them. The president or others may

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propose new laws, but the decision whether to enact them lies with Congress. For example, when Congress determined that smog had become a serious problem, it enacted the Clean Air Act with the intention of regulating ambient air pollution and protecting public health.

Most of the major federal environmental acts were enacted between 1969 and 1980. Accordingly, the 1970s are often referred to as the "environmental decade." Congress has made various amendments to these acts over the years. Sometimes Congress has discarded old approaches if experience has proved them ineffective. Sometimes it has tightened controls if new technology makes it possible or new science makes it appear necessary for safety and health. One important message here is that statutory law, like all law, is not static. Lawmaking can be seen as a governmental effort at problem solving. It can and does change over time.

Environmental acts can be confusing, and not just because they deal with complex matters. To be enacted, a bill (the proposed act) must be approved by a majority vote of both houses of Congress. Often, the final version is the product of negotiation. The give-and-take needed to get enough votes can result in final language that may be garbled or internally inconsistent.

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Balance of Power at Work Congress's lawmaking power is subject to checks and balances by the other two branches. The president has the power to veto a bill enacted by Congress. Congress, in turn, has the power to override the president's veto. But that requires a two-thirds vote by each house, rather than a simple majority. As a further rein on Congress's power, the courts have the power to declare a law unconstitutional—essentially nullifying it. The president does not need a particular reason to justify a veto. But a court can strike down legislation only if it exceeds Congress's enumerated powers or otherwise conflicts with the Constitution. Ultimately, of course, voters provide another check on legislative powers. If senators or representatives perform unsatisfactorily, they can be voted out at the next election.

State Legislation Each state of the United States also has its own state statutes enacted by its own legislature. Within its own borders, a state's legislature has broad lawmaking powers, but there are certain limits. Most of those limits are analogous to the federal system. The state governor typically has power to veto legislation. The state legislature can typically override a veto by a super-majority, commonly two-thirds of each house. In further analogy to the federal system,

ANATOMY OF A FEDERAL ENVIRONMENTAL ACT

Most environmental acts consist of broad goals and standards, with authority delegated to a specified agency—usually the Environmental Protection Agency—to implement and enforce the act. Although each act is different, certain common features are written into most federal environmental acts:

Articulation of *national policy*, for example, the protection of human health and the environment.

The *problem* to be addressed, for example, air pollution from increased population, urbanization, and industrialization.

Constitutional authority for the act—that is, which of its constitutionally enumerated powers Congress is relying on to enact the statute. For environmental acts, this is usually the Commerce Clause, which gives Congress the power to regulate foreign and interstate commerce.

The *goal*, for example, controlling pollution in order to protect health and the environment.

A *mandate* to a designated executive agency to implement the goal. A legislative "mandate" refers to both meanings of the word. It is both a *mandatory directive* and a *delegation of authority* to the agency, which would otherwise have no power to act.

The *standard* the agency is to meet. This is frequently stated in broad, general terms, for example, directing the agency to regulate air emissions so as to "protect public health" with "an adequate margin of safety."

The *target* community or entities subject to regulation, such as industrial sources emitting more than a specified number of tons per year of pollutants into the ambient air.

Methods of *enforcement*, for example, mandatory monitoring and reporting.

Penalties for violations.

Definitions: Anyone working with an act needs to pay attention to the Definitions sections, because many ordinary-sounding words are given specialized, and even counterintuitive, meanings in statutes.

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courts can strike down a state statute that conflicts with either the state or federal constitution. There is one additional ground for a court to strike down a state statute—if it is preempted by federal law under the Supremacy Clause.

Subject to those limits, states can and do enact legislation pertaining to all aspects of our lives, particularly concerning protection of public health, safety, and welfare. State legislatures are an important source of environmental law. Some state laws provide more protective standards; some cover contaminants or other things not reached by federal law. Sometimes states develop new programs or approaches that work well and serve as a model for new federal legislation. Even when state environmental laws are carbon copies of federal law, they provide another layer of enforcement and protection.

The federal government encourages state participation in enforcement of environmental law. For example, if a state enacts laws adequate to meet federal requirements under the Clean Air Act, the EPA can authorize the state to essentially take over implementation of the federal act. The same is true of most major environmental statutes.

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Executive Lawmaking

The executive branch makes law in the form of agency (or departmental) regulations and executive orders.

Regulations In each federal environmental act, Congress delegates to a designated agency—usually the EPA—the task of implementing the act. The agency must translate the act's broad goals and directives into concrete rules and standards, which are codified in enforceable regulations. To accomplish this task, the agency engages in policymaking, scientific analysis, and risk assessment. For example, if an act says to control a pollutant so as to protect public health, the agency must interpret those words. Does "protect" mean the goal is zero excess cases of a disease—so that exposure to the pollutant will not add even one asthma attack to the background level of asthma from other causes? Or perhaps no more than one excess illness per million population? Or something else? This is one example of a policy decision. Once it decides the act's intended goal, the agency must determine how much of the pollutant can be allowed and still meet that goal. Most statutes also require the EPA to weigh potential benefits against costs. Ultimately, the agency must develop clear, detailed rules, including

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numeric limits—for example, how much of a specific pollutant a factory may discharge into a river. Unless the requirements are clear, even a willing factory won't know how to comply, and the act will be unenforceable.

Regulations are a form of lawmaking by executive agencies. Whereas Congress's authority to enact laws is limited only by the Constitution, there are two additional major limitations on an executive agency's rulemaking power—one substantive and one procedural.[6]

Substantively, an agency cannot exceed the authority delegated by Congress in the statute. This means an agency may promulgate only those regulations reasonably necessary to carry out the intent of the act. This legislative delegation is the sole source of the agency's power. The scope of the agency's authority may be gray around the edges—that is, there may be debate about the act's intent and about what is "reasonably necessary" to accomplish it. But it is unquestionably the act that sets the boundaries, and the agency has no authority to act outside those boundaries.

The other limitation is procedural. In order to issue valid regulations, the agency must follow certain procedural steps, often referred to as **notice and comment process**. These procedural requirements are intended to promote **transparency** and responsiveness to the public—another hallmark of the American system of government. The basic requirements, which may vary slightly depending on the context, are as follows:

- *Notice of proposed regulation*: The agency must publish the text of proposed regulations and related material in the **Federal Register**. For environmental regulations the related material includes, for example, the scientific data and analysis on which a pollution standard is based. The Federal Register is not everyday reading for most people. But enough organizations read it—including industry, environmental groups, and the media—to get the word out to interested **stakeholders**.
- *Opportunity for comment*: The agency must allow a reasonable time for interested persons to submit written objections and comments. In matters of substantial

notice and comment process
Short name for the procedural requirements executive agencies must follow in issuing regulations or taking other formal actions

transparency
The concept that officials should conduct the business of the public in full public view—not in secret

Federal Register
The official federal organ for publication of any notices or other material that must be published

stakeholders
People and entities with an interest in a particular matter; commonly connotes those who should be included at the table when issues are discussed and decided

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importance, public hearings may be held at which interested persons may present their arguments. For proposed environmental regulations, comments often contain detailed scientific data and analysis. The agency is supposed to consider all comments. Sometimes the agency revises a proposed regulation in response to comments. If the revision is significant, the agency must give notice of the new draft and allow opportunity for further comments; thus, the process can be an iterative one.

- *Notice of final regulation*: Once the agency approves a regulation in final form, it must give public notice, again by publication in the Federal Register.
- *Record*: The agency must compile and maintain a record of the rulemaking process. Much of this record must be published with the final regulation, including the scientific data and analysis justifying the regulation, the comments received, and the agency's response to those comments.

Administrative Procedures Act
The federal act that prescribes procedural requirements for executive agency rulemaking and other formal actions; it applies except where more specific requirements are established in a specific act, such as the Clean Air Act

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Requirements for agency rulemaking are specified in most federal environmental acts. Absent specified requirements, a federal law called the **Administrative Procedures Act** establishes the default procedural requirements. States have similar procedural acts. All of these procedural statutes are intended to ensure that the government's work be done in plain view of the public, with opportunity for public participation.

Agency regulations are subject to judicial review, meaning that someone opposed to the final regulation may challenge it in court. The basic grounds for challenging a regulation are threefold: that it is unconstitutional; that it is not within the scope of authority delegated by the statute; or that the agency did not follow required procedure. (Judicial review will be discussed further later in this chapter and in chapter 2.)

Executive Orders In addition to agency regulations, the executive branch makes law in the form of executive orders. These are orders issued by the president essentially in his role as chief executive officer of that very large organization, the federal government. The orders apply directly to the federal executive branch, but indirectly they can have a much larger effect. In the environmental context, for example, the president could issue an order requiring that all federal offices use recycled paper, or that the federal government purchase only vehicles with hybrid engines. With even broader effect, the president can issue orders affecting federal

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contractors—for example, that alternative energy use by bidders be included in the criteria for awarding government contracts.

States similarly have state regulations issued by state agencies and executive orders issued by their governors.

PRESIDENTIAL DIRECTIVES

Although their authority comes from legislative delegation, the manner in which agencies use that authority is guided by presidential policy. Agency and departmental heads are appointed by the president, and they have a political imperative to follow his lead. Before agency regulations and other actions are undertaken, they must have White House approval. For example, proposed regulations are routinely subject to review by the White House Office of Management and Budget (OMB). The OMB also issues OMB Circulars which give agencies guidance on subjects as diverse as the rules and regulations allowing federal agencies to give technical support to states, and the appropriate methods for federal agencies to perform economic cost-benefit analyses justifying a regulation.[7]

Presidential directives are one instrument for guiding agency action. The concept of these directives arose after World War II for intelligence and defense matters, and they have been used ever since. Each president gives them a different name, such as Presidential Decision Directive (PPD), Homeland Security Presidential Directive (HSPD), or National Security Presidential Directive (NSPD). After the terrorist attacks of September 11, 2001, these directives have been heavily utilized to direct agency action in areas affecting national security—including environmental matters.

Presidential Decision Directive 63 issued by President Clinton in 1998 (as well as the successor Homeland Security Presidential Directive 7 issued December 17, 2003, by President Bush) deals with the protection of critical infrastructure.[8] It divides federal responsibility for various sectors or functions (roads, hospitals, communications, banking, and so forth) among agencies. The EPA was assigned lead responsibility for the drinking water sector. Several other PPDs assign specific responsibilities to EPA, such as directives concerning preparedness, chemical threats, and biological threats.

The September 11, 2001, attacks were the catalyst for the EPA to be given new authority and responsibilities, but these are not uniquely related to terrorist incidents. National security is affected by accidents and extreme weather events, for example, not just by terrorist events.

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Judge-Made Law

Courts play an important role in making law, including environmental law. Unlike Congress, the judiciary cannot set its own agenda. A court's function is to decide issues raised by the parties to a lawsuit. Absent a lawsuit, an American court cannot make decisions or issue orders about the environment or any other subject. The idea is that when there is a genuine "case and controversy," the opposing sides will present all the relevant issues and arguments so that the court can make an informed decision.

Stare Decisis It is through decisions in individual lawsuits that courts make law. Judge-made law differs from statutes and regulations in that it is not codified; it is not intended as an organized and sweeping treatment of a broad issue such as air pollution; and it is not directly applicable to broad segments of society such as industrial polluters. Rather, a court's judgment applies only to the parties before it and addresses only the specific questions those parties raised in their lawsuit. So how do such judgments have any real impact? Because of their precedential value. The court's decision in one case sets a precedent to be followed in future cases. This is the doctrine of **stare decisis**, which is Latin for "stand by the decision," and which reflects the value placed on fairness and predictability in law. In future cases, courts apply the precedent—tweaking as needed to fit different facts—and their decisions in turn become precedents. Decisions in individual cases gradually accumulate into a body of law. *Stare decisis* is not an absolute rule. But a court will not depart from precedent without strong reasons. Usually, the tendency is toward slow evolution rather than abrupt changes in judge-made law. This situation is similar at both the federal and state levels.

stare decisis
"Stand by the decision"—the concept of following precedent in deciding cases in order to promote consistency and fairness

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Common Law Most Americans have some familiarity at least with the concept of constitutions, statutes, and regulations. But there is another body of law—a very large body of law—entirely independent of any constitution, statute, or regulation. This is called **common law**. The common law is an accumulation of judicial precedents with roots dating back centuries, which came to us originally from England. Common law largely predated statutory law. In America, each state has its own common law which has evolved and

common law
A body of common legal principles that has developed from years of accumulated precedents, and which courts use to decide new cases

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continues to evolve. Common law (like statutory law) is not identical from state to state, but generally there are more similarities than differences. Common law is primarily state law. Federal common law is limited to subjects of national concern, which includes some major environmental issues.

Common law is particularly well developed in the areas of property law, contract law, and tort law, because there was no statutory law governing these matters until fairly recent times. Common law is still in effect today except where expressly preempted by statutory law. A later chapter will discuss common law and its important role in the environmental context (see chapter 14).

Judicial Review Courts are the ultimate authority in interpreting and applying the Constitution and all other law. When disputes come before it, a court exercises this authority to decide the validity of laws adopted by the other branches. This function is called **judicial review**. The criteria for reviewing—and potentially invalidating—a law depend on whether it is a statute or an agency regulation. A statute can be invalidated only if the court determines it is unconstitutional.

judicial review
Review by a court of a contested action or decision of a lower authority; the context could be a challenge to an executive regulation or an appeal from the judgment of a lower court

We can assume Congress considered the statute to be constitutional, or it would not have been enacted. But with respect to the meaning of the Constitution and the extent of the enumerated powers, Congress's opinion is trumped by the courts. Where possible, though, courts will try to mitigate the disruption that can result from striking down a major piece of legislation. Where feasible, a court will carve out the particular portion that violates the Constitution, thus preserving the rest of a legislative act. If a statute is ambiguous, a court will choose the interpretation consistent with the Constitution. As with common law, judicial decisions interpreting statutes and constitutional provisions are accorded precedential value under the doctrine of *stare decisis*.

A regulation can be invalidated not only if it is unconstitutional, but also if it exceeds the authority delegated by statute or if procedural requirements were not met. As with statutes, courts will preserve regulatory programs where possible, by carving out a severable portion or by attributing a meaning that can be upheld.

It is customary for a court to give substantial weight to the views of an agency, both in the interpretation of statutes the agency is responsible to implement and in factual issues involving the agency's expertise. This is commonly referred to as

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judicial deference to agency expertise. While customary, judicial deference is not absolute. The court has ultimate authority to decide the validity and meaning of the law. (Judicial review of agency regulations and other actions will be covered further in chapter 2.)

judicial deference
The custom of courts to respect and defer to the expertise of an executive agency on certain issues

binding precedent
A principle of law already decided by a higher court; it *must* be followed by any lower court under the higher court's jurisdiction

influential (or persuasive) authority
A principle of law decided by one court that *may* be adopted by another court because of its persuasive reasoning; it doesn't matter if the original court is in a different jurisdiction or is a lower level court, as long as its decision is convincing

Binding versus Persuasive Authority How much precedential value does a court's decision actually have? That depends on what court we're talking about. A court's ruling is **binding precedent** (or *binding authority*) only for the courts below it. But a well-reasoned judicial decision may persuade courts in other jurisdictions as well. Although nonbinding, such decisions may be cited as **influential (or persuasive) authority**. A ruling by the US Supreme Court on federal law is binding in all federal circuits. Similarly, a ruling by a state appellate court is binding on the state courts below it, but can also be persuasive to courts in other states. State court rulings can also influence federal courts and vice versa, depending on how persuasively they are reasoned.

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CONCLUSION

The American governmental system was an experiment, designed by a people who were unwilling to entrust anyone with unchecked power. They therefore divided power among multiple entities, each balanced by and subject to checks from the others. On the one hand, the result can sometimes be sloppy, inefficient, and frustrating. But on the other hand, this system has evolved and adapted reasonably well to changing needs and values over the years. So far, nobody has devised a better plan.

KEY TERMS

Administrative Procedures Act

Agency for Toxic Substances and Disease Registry (ATSDR)

Balance of powers

Binding precedent

Checks and balances

Commerce Clause (or Interstate Commerce Clause)

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Common law
Enumerated powers
Environmental Protection Agency (EPA)
Federal Register
Influential (or persuasive) authority
Judicial deference
Judicial review
National Toxicology Program
Notice and comment process
Preempt
Separation of powers
Stakeholders
Stare decisis
States' rights
Statutory law
Supremacy Clause
Transparency

DISCUSSION QUESTIONS

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1. If you were founding a new government, how would you organize it? Who would have what rights and powers?
2. Do federal agencies have to jump through too many procedural hoops in order to issue regulations? Why are there more procedural requirements for agency regulations than for Congress to enact legislation?
3. A nonelected branch of government (the Supreme Court) has the power to overturn laws enacted by Congress, an elected branch. Is this good or bad? Why?
4. The size and composition of our population has changed dramatically since the country was founded. How well has the governmental structure created by the Constitution accommodated those changes? Are there more adaptable approaches?

NOTES

1. www.atsdr.cdc.gov/toxprofiles/index.asp.
2. www.epa.gov/greenchemistry/pubs/epa_gc.html.
3. Constitution of the United States, Article I, Section 8.
4. Constitution of the Commonwealth of Pennsylvania, Art I, Sec 27.
5. Constitution of the United States, Article VI, Section 2.

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6. The EPA, as well as state agencies, often publishes policies that do not have the force of law. They may describe the form in which a permit applicant should provide necessary reporting or the preferred measurement techniques. Although using alternative approaches may be legal, if the applicant wishes a rapid and sympathetic response it is usually preferable to follow agency policy.
7. www.whitehouse.gov/omb/circulars_default.
8. Available at www.fas.org/irp/offdocs/pdd/pdd-63.htm; www.dhs.gov/homeland-security-presidential-directive-7.

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