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- *Policy advisor*
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OBJECTIVE:

LAYERS OF LAW & POLICY

Constitutional design

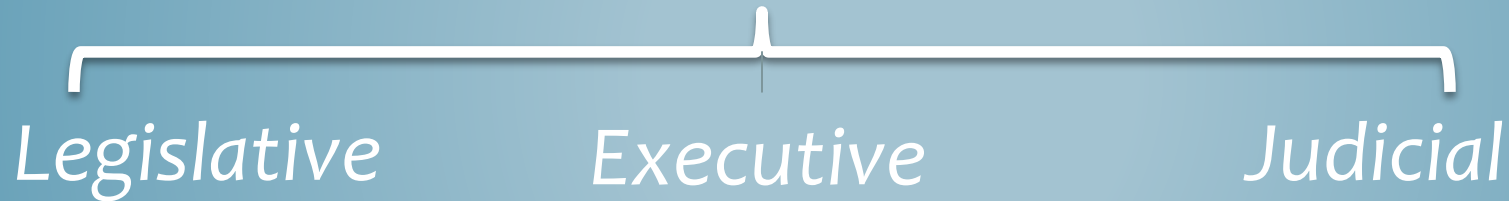
Hierarchy of legal authority

Regional authorities

Stakeholder influence

CONSTITUTIONAL STRUCTURE

Constitution



CONSTITUTIONAL STRUCTURE

Constitution



Legislative

(Congress,
councils,
collective
decision-
makers)

Executive

(President &
prime minister,
secretaries and
ministers,
agencies, etc.)

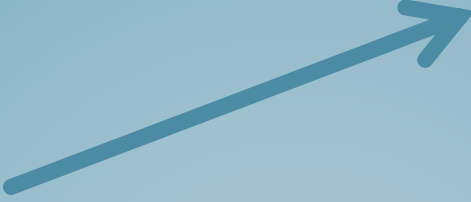
Judicial

(Courts, panels,
adjudicators
truth panels,
etc)

LAW MAKING

- *Legislative Actions:*
 - *Statutes*
 - *Special Laws*
 - *Appropriations (\$\$)*

By Legislatures



By Executive Agencies

By the Judiciary

LAW MAKING

By Legislatures

By Executive Agencies →

- *Agency Actions:*
 - *Rules*
 - *Policies & Guidance*
 - *Orders*
 - *Grey Literature*

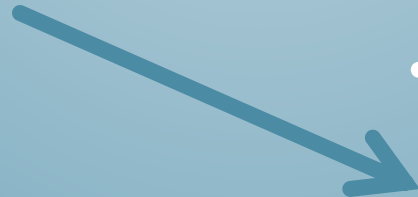
By the Judiciary

LAW MAKING

By Legislatures

By Executive Agencies

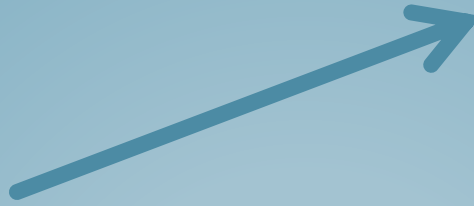
By the Judiciary



- *Judicial Actions:*
 - *Cases*
 - *Advisory opinions (maybe)*

LAW MAKING

By Legislatures



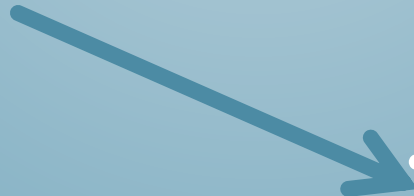
- *Legislative Actions:*
 - Statutes
 - Special Laws
 - Appropriations (\$\$)

By Executive Agencies



- *Agency Actions:*
 - Rules
 - Policies & Guidance
 - Orders
 - Grey Literature

By the Judiciary



- *Judicial Actions:*
 - Cases
 - Advisory opinions

REGIONAL LAW MAKING

- *Federal?*
- *State?*
- *Local?*

REGIONAL LAW MAKING

- *The Clean Water Act*

Federal? – “Cooperative federalism” U.S. Environmental Protection Agency supervises state government

State?

Local?

REGIONAL LAW MAKING

Federal?

State?

- *The Everglades Forever Act*
 - *State Legislation setting environmental policy*

Local?

REGIONAL LAW MAKING

Federal?

State?

- *The Climate Change Compact*

Local?

- *Local government coordination by county governments*

ENVIRONMENTAL LAW & POLICY

Who decides who gets what and why?

ENVIRONMENTAL LAW & POLICY

Substance: Defining Goals	Process: Measuring Goals
Meet Criteria	Regulatory hammer: Review, approve, enforce

ENVIRONMENTAL LAW & POLICY

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Project Completion	Design & construct public works projects

ENVIRONMENTAL LAW & POLICY

Substance: Defining Goals	Process: Measuring Goals
Meet Criteria	Regulatory approval & enforce
Project Completion	Design & construct schedules
Planning & Narrative Ideals	Committee meetings & tasks

ENVIRONMENTAL LAW & POLICY: EXAMPLES

Substance: Defining Goals	Process: Measuring Goals
Meet Criteria: • Clean Water Act Permits	Regulatory hammer: • Review, approve, enforce
Project Completion: • Everglades Forever Act • National Park preservation	Design & construct schedules • Public works projects • Land acquisition
Planning & Narrative Ideals • Climate change adaptation • Environmental restoration	Committees meetings & tasks • Local coordination • Report on benchmarks

PREEMPTION

Supremacy Clause

- *Article VI, Section 2, of the U.S. Constitution provides that the "... Laws of the United States ... shall be the supreme Law of the Land."*

Clear Hierarchy

National government

State government

Local government

PREEMPTION

Judicial interpretations of the Supremacy Clause

- conflicting or inconsistent state exercise of power.

- **Express preemption:**
 - *Nat'l government asserts supremacy*
- **Implied preemption**
 - *National gov't "occupies the field"*

ENFORCEMENT

Ensuring that policy goals are met

ENFORCEMENT APPROACHES

Type of action

Notice / warning

Administrative

Civil / lawsuit

Criminal / arrest

Citizen suits

ENFORCEMENT APPROACHES

Method of resolution
Voluntary settlement
Agency order
Judicial process
Legislative intervention

ENFORCEMENT APPROACHES

Outcome
Required actions
Deadlines
Compensation
Sanctions

ENFORCEMENT APPROACHES

Type of action	Method of resolution	Outcome
Notice / warning	Voluntary settlement	Required actions
Administrative	Agency order	Deadlines
Civil / lawsuit	Judicial process	Compensation
Criminal / arrest	Legislative intervention	Sanctions
Citizen suits		

LITIGATION

Influencing the policy process

THINK BEYOND GOVERNMENT...

Who shapes water resource policy?

THINK BEYOND GOVERNMENT...

Who shapes water resource policy?

Agriculture
Environmentalists
Fishery stakeholders
Developers
Industry
Scientists & engineers
Tribal Nations
Utilities

STAKEHOLDER VALUES

Prof. Alison Fournoy:

- *Vocabulary of environmental values and ethics*
- *Why? To improve understanding ...*

- *The development impulse*
- *The nuisance impulse*
- *The ecological utilitarian impulse*
- *The sustainability impulse*
- *The land / earth ethic impulse*
- *The environmental justice impulse*

*Correlation to
the paycheck?*

- *The development impulse*
- *The nuisance impulse*
- *The ecological utilitarian impulse*
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- *The land / earth ethic impulse*
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VALUES

*Correlation to
the paycheck?*

Resource User Instincts...

- *The development impulse*
- *The nuisance impulse*

Governmental Instincts...

- *The ecological utilitarian impulse*
- *The sustainability impulse*

Advocacy Instincts...

- *The land / earth ethic impulse*
- *The environmental justice impulse*

VALUES CONFLICTS TRIGGER LITIGATION

Types of litigation

- *Challenges to action*
- *Challenges to inaction*
- *Petitions to force action*

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Perspectives on litigation

Strategic tool:

- *Resource users*
- *Advocates*

Obstacle:

- *Resource users*
- *Government*

JUDICIAL REVIEW

The U.S. Administrative Procedure Act

5 U.S.C. Sec. 706

Courts may hold unlawful and set aside agency action, findings, and conclusions found to be:

- arbitrary, capricious, or an abuse of discretion;*
- in excess of statutory authority;*
- without observance of procedure;*
- unsupported by substantial evidence.*

RECORD REVIEW

Judicial review by the courts considers the information used by the decision maker:

- “the full administrative record before the Secretary at the time he made his decision.”

JUDICIAL DEFERENCE

Judicial review is cautious about second-guessing.

*"rational
connection
between the
facts found and
the choice
made."*

*"the court does
not simply
impose its own
construction on
the statute..."*

LOOKING FORWARD: THREE LAWS

Clean Water Act

<http://www.epa.gov/regulations/laws/cwa.html>

Everglades Forever Act

<http://www.dep.state.fl.us/water/wqssp/everglades/efa.htm>

Climate Change Compact

<http://southeastfloridacclimatecompact.org/compact-documents/>

QUESTION:

Why do environmental laws fail to solve the problem?

Examples encouraged.