

INTRODUCTION TO
UNITED STATES LAW
& LEGAL RESEARCH

Dana Neacșu

Digital Edition

Table of Contents

Acknowledgments to the Print Edition.....[ix](#)
Acknowledgments to the Digital Edition.....[x](#)
Non-Exhaustive Glossary of Terms.....[xi](#)

Introduction.....[1](#)

 A. The Ubiquitous Nature of American Law and Its
 Dual Role of Product and Producer of Popular
 Culture.....[2](#)

 B. What This Book Offers.....[8](#)

Chapter 1	
A Dynamic Legal System Shaped by Long-Lasting Principles.....	<u>14</u>
A. Introduction.....	<u>15</u>
B. American Law Has Both an Abstract and a Concrete Facet; Only the Latter Constitutes the Object of Legal Research.....	<u>19</u>
C. Individual Norms Are Open to Change.....	<u>26</u>
D. Legal Norms Are Open to Judicial and Congressional Scrutiny.....	<u>32</u>
1. Judicial and Congressional Review of Statutory Rules.....	<u>33</u>
2. Judicial and Congressional Review of Court Decisions.....	<u>39</u>
3. Judicial Review of Administrative Decisions.....	<u>43</u>
E. The Abstract Facet of American Law Is Similar to That of Any Domestic Legal System.....	<u>45</u>

Chapter 2	
The U.S. Legal System and Its Lawmaking Institutions.....	57
A. The U.S. Legal System-A Common Law System.....	58
B. The Lawmaking Branches of the Government.....	62
1. Federal and State Legislatures.....	63
2. Federal and State Courts.....	65
a. Federal Courts.....	66
b. State Courts.....	69
3. The Executive Branch, Independent Administrative Agencies.....	70
a. The President.....	71
b. The Vice President.....	72
c. The Cabinet.....	73
d. Independent Agencies.....	75
C. Conclusion.....	78
Appendix 1: The Structure of the Federal Judiciary.....	79
Appendix 2: The Structure of the N.Y.State Judiciary.....	80
Appendix 3: The Congressional Law Making Process.....	82
Appendix 4: The Structure of the United States Judiciary.....	83

Chapter 3	
Basic Principles of Legal Research.....	86
A. Introduction.....	87
B. On Secondary Sources.....	91
C. Secondary Sources: The How, When, and Why of Each Type of Secondary Sources.....	95
1. Using Research-Aid Tools.....	95
a) Before You Research, Make Sure that You Understand the Terminology: Legal Dictionaries.....	95
b) Before You Research, Make Sure that You Understand the Citation: Citations Guides.....	96
c) Before Your Research, Make Sure that You Understand How to Research: Legal Research Guides.....	99
2. Using Finding-Aid Tools.....	100
a) Library Catalogs and More.....	100
b) Index to Legal Periodicals and More.....	101
3. Using Legal Scholarship and Other Legal Commentaries and Analyses...	104
a) Treatises and Other Legal Monographs.....	104
b) Law Review Articles.....	105
c) Other Sources of Legal Commentary and Analysis.....	106
D. On Primary Sources.....	109
E. Primary Sources & Their Repositories: The How, When, and Why of Each Type of Primary Source Repositories.....	111
1. Finding Repositories of Primary Sources.....	111
2. The Federal Constitution and Its Multiple Repositories.....	112
3. Repositories of Federal and State Statutory Law and of Muncpal Ordinances.....	113
4. Locating Repositories of Federal or State Case Law.....	116
5. Locating Repositories of Administrative Rules, Regulations, and Decisions.....	120
F. Identifying Specific Primary Sources Within Specific Legal Repositories...	123
G. Completing Your Research.....	127

Chapter 4	
Statutory Law:	
What It Is, Where It Is, and How You Find It.....	128
A. Introduction.....	129
B. The Legislative Process and Its Constitutional Boundaries.....	131
C. The Legislative Process. Brief Review.....	133
D. Identifying the Sources of Statutory Law.....	140
1. The Constitution of the United States.....	140
2. Federal Statutes.....	143
3. State Statutes.....	144
4. Municipal Ordinances.....	145
E. Applying Legislation: Interpreting Statutes.....	147
1. The “Plain Meaning Rule”.....	148
2. Interpreting Statutes in Light of Their Legislative History.....	149
3. The Purposive Analysis: The “Social Purpose” Rule.....	152
F. Repositories of Statutory Law.....	154
1. The Constitution of the United States.....	154
2. Federal Statutes.....	154
3. State Statutes.....	156
4. Municipal Ordinances.....	158
G. How to Locate Specific Primary Sources of Statutory Law	159
H. Completing Your Research: The U.S. Legal System— A System of Ever-Evolving Statutory Law.....	162

Chapter 5

Case Law:

What It Is, Where It Is, and How You Find It.....[169](#)

A. Court Opinions: The End Result of a Lawsuit.....	170
1. The Pleading Stage.....	172
2. The Discovery Stage.....	173
3. The Trial Stage.....	175
4. The Verdict.....	176
5. The Appeal Stage.....	177
B. Case Law-The Principle of <i>Stare Decisis</i>	179
1. How the Principle of <i>Stare Decisis</i> Works: Finding the Decision Within a Court Opinion.....	180
2. How Does the Principle of <i>Stare Decisis</i> Work?.....	185
3. Problems with <i>Stare Decisis</i>	186
a. The Structure of an Opinion Is a Gray Zone.....	187
b. Identifying the Factually Similar Cases.....	189
C. Repositories of Decisional Law or Case Law.....	191
D. How to Locate Specific Primary Sources of Case Law.....	196
E. Completing Your Research: The U.S. Legal System— A System of Ever-Evolving Case Law.....	205
Appendix: The Geographic Map of the Federal Circuits.....	209

Chapter 6	
Administrative Law:	
What It Is, Where It Is, and How You Find It.....	211
A. Introduction.....	212
B. Administrative Rulemaking or Rule Promulgation.....	215
C. Administrative Adjudication.....	218
D. Repositories of Administrative Law.....	220
E. How to Locate Specific Primary Sources of Administrative Law.....	223
F. Completing Your Research: The U.S. Legal System— A System of Ever-Evolving Administrative Law.....	228
 Conclusion: Is This All?.....	 236
 Index.....	 240

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-D.N.

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It represents the result of a long process of rethinking the content and making it relevant to the fast-paced changes the world of legal research has endured. Translating my updating process into an e-book started in Spring 2009, as an independent project taken upon by [Bacilio Mendez II](#), then a Pratt-SILS student. It continued until Spring 2011, when I finally finished it with the same unmitigated digital help from Bacilio, now a student at New York Law School.

The cover translates visually this book's philosophy that justice has been neither blind nor blindfolded, and when it happens, it happens usually to those with knowledge about the law. Bacilio reinterpreted a picture he took of the statue "Miss Justice," in Augusta, Georgia, so the copyright of the cover page art is his.

Of course, without the love and support of my family, my husband, Mickey, and my dearest little girls Zoe (Zouzou), and Isadora (Izzie), nothing would have been possible.

-D.N.

Non-Exhaustive Glossary of Terms

A

Act – An alternative name for statutory law. *See Statutes.*

Action – An alternative name for lawsuit: the process that starts with a demand (through a document named complaint) for state intervention that one party (named plaintiff) makes in order to have her status quo restored and the other party (named defendant) punished physically (in a criminal action) or financially (in both criminal and civil action).

Adjudication – The formal ending of a lawsuit by a court and of a dispute by an administrative agency.

Adjudicative Hearings – Proceedings held by administrative agencies similar to trials held in courts of law.

Administrative Agency – A governmental body that issues rules and regulations and even adjudicates disputes between parties, according to powers delegated to it by the legislature (whether federal or state).

Administrative Rules and Regulations – The law issued by (federal or state) administrative agencies according to the powers delegated to them by legislatures that usually further details rules contained in (federal or state) statutes.

Annotations – Brief summaries of court decisions and other editorial explanations that the commercially published codes feature at the end of each statutory section. The written document (pleading) the defendant files in response to plaintiff's complaint.

Attorney – Members of a profession regulated by state laws. One of their areas of expertise is to represent other people's legal demands for relief in courts for a fee.

Authority – *See Binding Authority and Persuasive Authority.*

B

Bill – A legislative proposal that has not been enacted as law.

Binding Authority – The authority statutes command on disputes involving issues within their subject matter, and the authority higher courts decisions have on factually similar disputes brought to lower courts from the same jurisdiction.

Brief – (1) the alternative name for documents that attorneys file in support of their client’s legal demands;
(2) a summary of a court’s opinion.

C

Case – *See Lawsuit.*

Case Law – Alternative name for common law in its narrow meaning of ‘Judge-made law,’ different from statutory or regulatory law.

Cause of Action – The legal grounds for a civil action.

Citation – (1) reference to authority supporting one’s legal argument;
(2) the form used for legal reference.

Civil Law – (1) the other major world legal system (unlike common law it does not officially recognize the precedential value of earlier decisions from higher courts from the same jurisdiction);
(2) the body of law that covers non-criminal matters.

Claim – A formal demand for state redress raised in an action.

Code – (1) a topical compilation of statutes or administrative rules and regulations;
(2) primary source of law.

Common Law – (1) the other major world legal system (unlike civil law it officially recognizes the precedential value of earlier decisions from

- higher courts from the same jurisdiction);
(2) an alternative name for case law—the body of law that includes only court decisions.

Complaint – The document that starts a civil action.

Constitution – (1) the fundamental law of most national jurisdictions (written or not);
(2) primary source of law.

Controversy – *See Lawsuit.*

Court Decision – *See Judgment and Opinion.*

D

Damages – Monetary compensation ordered by a court to restore plaintiff's status quo.

Defendant – The person against whom the plaintiff (the initiating party) brings an action.

Digital Repositories of Law – Repositories of law available online.
See Print Repositories of Law.

Doctrine – (1) a widely accepted legal principle;
(2) the product of writings of professors and other scholars that has a pervasive influence on both the making and application of civil and international law.

Due Process of Law – Constitutional guaranty of a person's enjoyment of her rights provided by the [Fifth](#) and [14th Amendment](#) of the [United States Constitution](#).

E, F, & G - Intentionally Left Blank

H

Hearings – See Adjudicative Hearings and Investigative Hearings.

Holding – The conclusion of law reached by a court in deciding a case or controversy.

I

Injunction – A court's order that the defendant does or refrains from doing a certain act.

Investigative Hearings – Proceedings held by congressional committees prior to enactment of legislation.

J

Judgment – The formal conclusion of a case or controversy. See also Opinion.

Jurisdiction – (1) the geographical area in which law (in all its forms as court decisions, statutes and administrative rules and regulations) is binding;
(2) the boundaries of authority given to all law-making bodies to make law (decide cases, enact legislation or adopt rules and regulations).

L

Law – A double-meaning concept:

- (1) a human ideal of order and predictability—see Rule of Law;
- (2) the entire system of rules that materialize that ideal of order and whose enforcement may be state-imposed.

Law Review Articles – One type of secondary sources. Law review articles are usually published by law schools and are student–edited. They contain writings about the law. What distinguishes law review articles from treatises is their narrower scope, its more in depth treatment of the specific legal issue, and its more often acknowledged partisan view.

Lawsuit – A criminal or civil proceeding taking place in a court.

Legislative History – Documents that record the history of a statute from its introduction as a bill sponsored by a legislator to its enactment as a piece of legislation.

Litigate – Asking the state (usually by bringing a lawsuit) to sanction one’s demands to restore one’s status quo.

Litigant – A party to a lawsuit. *See also Pro Se Litigant.*

M

Motion – A formal request a party to a lawsuit makes to adjudge during the lawsuit.

O

Opinion – The document that records the conclusion reached by a court or administrative agency adjudicating a lawsuit. All court opinions have a well–set structure that contains a heading: the name of the parties, that of their attorneys and the judge issuing the opinion, as well as the name of the court in which the opinion was held down and the date it was pronounced. In addition, court opinions summarize the facts of the case, the legal issues involved in the parties’ claims, and the reasons on which the court’s conclusions are reached.

P

Persuasive Authority – The authority case law from other jurisdictions and secondary sources command.

Plaintiff – The person initiating the lawsuit.

Primary Sources – The repository of law, whether it is case law (e.g., reporters), statutes (e.g., codes), or rules and regulations (e.g., codes).

Print Repositories of Law – Repositories of law, which are available in print format.
See Digital Repositories of Law.

Procedural Law – The body of law that covers the rules governing the administration of justice (the operation of the legal system) as opposed to substantive law, which covers the rules that provide the rights and obligations that enable society to function.

Pro Se Litigant – A party to a lawsuit that has no professional legal representation.

R

Reporters – (1) primary source;
(2) alternative name for reports;
(3) collections of court decisions, usually arranged loosely by period of time and the court making the decision.

Reports – (1) primary source;
(2) collections of court or administrative agency decisions.

Repository – (1) resource containing primary sources (for example reporters are case-law repositories);
(2) source of individual rights (for example, the Constitution is the repository of our main freedoms).

Rule of Law – A fundamental legal principle of the American legal system.

S

Secondary Sources – The repository of legal writings about the law that command only persuasive authority (such as law review articles and treatises).

Stare Decisis – Common law principle which states that old cases from higher courts in the same jurisdiction are the bases for new court decisions within the same fact pattern.

Statutes – Acts of a legislature.

Substantive Law – The body of law that covers the rules that provide the rights and obligations that enable society to function, unlike procedural law that cover the rules regarding the administration of justice—how to restore or preserve status quo through litigation of rights and obligations.

T

Treatise – (1) secondary source;
(2) comprehensive legal writing on an area of law, although less detailed or critical than a law review article.

W

Writ – (1) the form in which complaints were originally addressed to English courts;
(2) Writ of certiorari refers to the discretionary device used by the U.S. Supreme Court to hear cases.

X, Y, & Z - Intentionally Left Blank

Introduction

For I think it an undeniable position, that a competent knowledge of the laws of that society, in which we live, is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education.

—*Blackstone's. The Study, Nature, and Extent of the Law*

A. THE UBIQUITOUS NATURE OF AMERICAN LAW AND ITS DUAL ROLE OF PRODUCT AND PRODUCER OF POPULAR CULTURE

When you start studying American law it is useful to be aware of all potential hindrances. Some of them are related to the current nature of American law as both a product and a producer of popular culture, and, as such, students unfamiliar with this aspect of it may fall prey to unfounded assumptions. Its ubiquitous presence in everybody's life causes that many basic explanations about the law be absent from law classes, because American students already have an idea about the bigger picture of the legal system and how it works. On the other hand, such heavy presence may induce you to memorize legal information that comes from sources that lack proper authority, and improperly rely on it, for example, instead of developing a critical approach to legal information.

Other obstacles are related to the origins of American law and the ways in which the sources of American public law create specific legal norms. For example, while, from the outside, the American legal system seems to change very little, the reality is that American law is very dynamic. Its dynamism relies on a rhetoric of individual rights that perhaps is little known to you. Additionally, while American students know that the federal structure of the American government is mirrored by the legal system, you may not be familiar with the American political system. Thus, it may be easier for native American students to understand that federal and state laws are not covered by one source of law, but instead such laws are located in distinct repositories of statutory and decisional law, whether at the federal or

state level. Thus, becoming familiar with these idiosyncrasies of American law is a prerequisite to both successful legal studies and research. In other countries, interest in law usually surfaces at times of political crises. For example, it is understandable that political circumstances of this time make exposure to law a daily occurrence. The fact that America was attacked and is currently engaged in military action raises legal issues that ask for everybody's opinion and understanding. For example, John Walker Lindh, an American citizen, fought for the Taliban, while knowing that the United States was engaged in hostilities against the Taliban. Looking beyond one's gut feelings, can we define his actions as treason? Is there a definition of treason under the U.S. legal system? Where can it be found: in a compilation of federal statutes or in a reporter of Supreme Court cases? How can it be located? (See Fig. 1)

Fig. 1
Treason is defined in the
United States Code:

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than \$10,000; and shall be incapable of holding any office under the United States.

[18 U.S.C. § 2381 \(2006\).](#)

However, American law is everywhere today mostly because of its double nature of both a product of popular culture and a creator of popular culture. Whether reading a Grisham novel, watching NBC's "Law and Order," driving faster than the legal speed limit, or drinking McDonald's hot coffee, law is never far away. You are exposed to law as a product of popular culture-in novels and TV shows-and you are exposed to law as a producer of popular culture. Here, trials of famous people become TV news shows. When you watch CNN or Fox News, and you hear the entertainer of the day has just been indicted by the Grand Jury, you are indirectly exposed to law as a producer of popular culture. However, you will be ill-advised to give such knowledge more weight than you would to any other TV shows. To the extent that American law has become both a product of popular culture and a creator of popular culture, everybody who lives in the United States or studies law in America is exposed to it. As a result, your first encounter with the American law is likely to be mediated¹: Whether it comes from television and radio broadcasts, newspapers, periodicals, or Internet sites, be aware that like everywhere else, mediated information uses concepts defined according to the views of the show's writers and producers or the creators of the printed material. Thus, faced with the flood of mediated legal information, developing a critical approach to legal information before you start studying law becomes a worth while enterprise. As an example of American law's dual role as producer and product of popular culture, let's take a look at the film "Monster,"

¹ For a more detailed discussion of law as a product of popular culture and a producer of popular culture, *see* Richard K. Sherwin, *WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE* (2000).

which many of you might have seen because it won a 2004 Oscar in the Best Actress category. The movie depicts the life of young woman who, in 2002, was convicted and then executed for the killing of seven men. From watching this movie one learns that homicide is defined by each state's law, that the Florida penalty for multiple homicide is the death penalty, and that Florida administers it through lethal injection. In this instance, law-rules regarding the execution of a convicted felon-produced popular culture-the celebrated movie and popular culture-the movie-further produced legal knowledge about those issues. Such information may be unreliable. Nevertheless, this shows the extent to which legal knowledge is part of the ordinary Americans' general knowledge. To that extent, you too will benefit from understanding how American law works. It goes without saying that unless you study American criminal law, such mediated legal knowledge is and remains passive, and it rarely stirs the audience's interest in questioning the legal issues and their outcomes-the crimes at hand and the way American society deals with them. Certainly, it is not intuitive to inquire into the legality of the death penalty although the American constitutional system prohibits inhuman punishment. (See Fig. 2)

Fig. 2

Constitutional Amendment VIII

Ratified on 12/15/1791 Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Everybody comes in involuntary direct contact with the law at birth, when they become entitled to rights and freedoms automatically, as well as at death when those entitlements end. Many of you are already aware of the extent to which the idea of “legal rights” has become an intrinsic value that is widespread in the American culture. In no other legal system will you encounter this almost religious belief that a rights claim produces a universal and categorical entitlement. The only way to understand the value of such belief is by identifying the right itself, whether it is mentioned by the Constitution, a statute, or issued by a court, and then by searching its historical interpretation and application by courts.

Applying for a driver’s license, signing a lease, or marrying, like everybody else, you encounter law directly and voluntarily, too. If you apply for a driver’s license, you need to know that each state has its own specific rules, regarding paying a fee and furnishing proofs of identity. Those requirements under New York law are contained both in *Vehicle and Traffic Law* and in the rules issued by the Commissioner of Motor Vehicles². Under New York State law, that requirement is available from a statutory compilation which is easily identifiable through its “citation:” [N.Y.VEH. & TRAF. Sect. 502](#). Deciphering such mysteries should be easy once you finished reading this book.

² See [N.Y. COMP. CODES R. & REGS. tit. 15 § 7.1 et seq.](#)

For Further Reading

Martha Albertson Fineman. Introduction, in *AT THE BOUNDARIES OF LAW. FEMINISM AND LEGAL THEORY* (M.A. Fineman & N.S. Thomadsen eds., 1991).

In-Class Exercises

1. Why do you think people should know how the legal system is organized?
2. What would be the best way to learn how to research the law, in your opinion?
 - a. What about free-of-charge databases?
 - b. How would they compare with fee-based databases?
 - Do you know any such databases?

B. WHAT THIS BOOK OFFERS

This book is intended to help you obtain a solid introduction to the complex realm of American law by exposing you to both its esoteric and tangible aspects. Its premise is that you cannot study law if you do not know how to find the law, and vice-versa you cannot find the law if you do not have some minimal understanding of what the law is.

Like any abstract body of knowledge that rests on both tangible and intangible constructs of human intellect, studying law requires understanding both its abstract and concrete facet. Law is a discourse, a process of power, and tangible norms that make it all possible. Aside from theology, a body of knowledge about God's word, all the other subjects explain something tangible: whether they are natural or man-made constructs. Linguistics builds on language. Musicology ultimately rests on tangible music sheets. Legal knowledge builds on the social function of law to ensure social order and stability. This goal is achieved through a myriad of legal norms that govern our social behavior. The abstract facet of law is far from uniform. It encompasses the ideal of order and predictability as well as the discourse of individual rights, for example. The ideal of order is translated into legitimate order by the requirements imposed by the "rule of law" on the tangible aspect of law-its innumerable norms that constitute different bodies of law, such as torts law, business law, criminal law, or intellectual property law. Studying law rests on understanding the social function of the concrete legal norms, and studying the different bodies of law-torts, intellectual property, etc.-requires being able to study

the concrete norms that constitute them as well. Those rules are tangible. Using the appropriate legal strategy, they can be found and analyzed accordingly.

Saying that understanding legal concepts is connected to one's ability to research the law is not unique. In critical legal thinking it resonates with any dialectical approach to study theory through practice. As intimated earlier, due to its social importance, studying law should be of interest to all. The interconnection between the ends-legitimate order-and the means-legal activity-becomes apparent only when you have access to both the concepts and their tangible normative source. Additionally, effective American legal research is not possible absent a minimal understanding of the American legal system and of its major idiosyncrasies. Legal systems-through their concrete legal norms-are meant to forge social legitimate order. As societies are dynamic entities, governing them is a dynamic task as well. Concrete norms by their nature, thus, have finite life. They need to change in order to accommodate a society's social and political needs, moral standards, and sense of justice. The American ideal of legitimate order has remained unchanged for a few centuries. However, when you study different areas of American law, you see that norms change continually. Thus, when researching the law you need to always update your research, but you also need to remember that those changes are limited in nature: they must conform to the core American cultural values that the "rule of law" defends. For example, on one hand, because all statutes are open to judicial review, and during that process courts may even alter or annul statutory provisions by declaring them unconstitutional, when you search for statutes you also need to search

for case law. On the other hand, knowing that that change has a limited nature will make it easier for you to accept the lack of results that updating your legal research will often produce. This book aspires to offer an intellectual point of view about American law, by laying down the foundation of life-long critical legal thinking skills. It aspires to guide you to always remember that irrespective of its abstract appearance, law has a tangible facet. How do you reach the goal of legitimate order? Why is a federal or state statutory approach favored? These are questions that will always be with you in your studies of the diverse bodies of law. It also aspires to direct you in your legal search to the appropriate sources, which help you understand the limits of your research. How do you know the value of this individual right? Where do you search for it? Is this the appropriate source you should use? Is this the only source you should check? Is this enabling norm still good law? These are all questions that you should become familiar with during your legal research. During your studies you will discover that sometimes it is easier to gain knowledge of American law in its abstract facet than in its concrete representation. Legal research is heavily dependant on your financial resources. For example, this book will point out to you the numerous free-of-charge repositories of law. However, it will also point out that you cannot update your search reliably unless you have access to fee-based electronic databases, such as Lexis and Westlaw, and within the last year, Bloomberg.

This book will make it easier for you to be aware of both the strengths and weaknesses of your legal research. This book will briefly describe the meanings of law in American legal studies. It will also explain the sources of American public law.

Thus, you will learn about the branches of the government and how they all make American law: Congress passes statutes, courts hand down decisions, the President issues Presidential orders, and administrative agencies issue regulations. You will learn about the repositories of American public law. You will learn that statutes are collected in codes, court decisions in reporters, and agency regulations in codes as well. It will become apparent that while the sources of law are accessible to the public both in paper and electronic formats, you need to choose a specific repository according to your legal research query. The information you have when you start your search will control your choices. Thus, this book will bring you up to speed and fill in the gap between your understanding about American law and that of a native student. It will bring you to the same level of understanding of American law as any American law student. This book will help you understand all these and more about the sources of law.

Naturally, understanding American law is a long process. It takes law practitioners years of study and practice. However, like learning any other subject, when studying law one starts with the ABC's. It makes a difference how any first class is taught. If the teaching process is not right, it can discourage people from pursuing the subject any further. Hopefully this book is the right beginning of what could become a lifetime interest in American law-starting with the way in which it works, and ending with how and whether law can be an instrument of justice, for example. However, do not browse through this book hoping to find the equivalent of a legal cook-book, a "how-to" manual. You need to have a minimal understanding

of the social functions of American law, and then about how concrete legal norms work. There are ways to locate specific norms as there are ways to make sure that they are still good law. This book will provide answers to all these questions. However, there are no recipes worth following in doing legal research other than a few major principles that will be further detailed. From a theoretical point of view, it will always depend on what you know when you start your research, and what you want to have learned by the end of the process. From a practical point of view it will always depend on your time availability and finances. Researching American law reliably can be expensive at both levels: its finding component may require some time exclusively devoted to locate the law, while its updating component relies heavily on fee-based databases. This book is structured into six chapters. Chapters 1 and 2 will talk about law and explain what it is. They will attempt to decipher the double meaning of law as an ideal of a temporal order, where the rule of law strives to make sure that the concrete temporal rules achieve. They will also provide an understanding of the limits within which concrete legal norms may change in order to help you successfully strategize your legal research. Chapter 3 will lay down the foundation of the process of finding the law. It will emphasize the role of scholarly publications as ways of finding the specific legal rules and of understanding their scope within our democracy. It will also talk about the sources of law and the governmental institutions that devise public law. It will explain where the law is while it will give you a sense of how American law emerges and works. It will briefly point out the repositories of law: those sources of law that represent the published manifestations

of the law. In legal research those are called “primary sources.” It will bring law closer to you as it talks about the various print and online repositories of law. It will pay distinct attention to the online repositories that can be freely accessed from any computer with Internet access. Through this chapter, it will become apparent that there are many ways to access American legal norms. The next three chapters of the book will talk about each major source of public law in the United States. Chapter 4 will focus on statutory law. It will explain what it is, and where and how you find it. Chapter 5 will focus on decisional law. Similarly, it will explain what it is, where it is, and how you can find it. Chapter 6 will follow the same pattern while focusing on administrative law. These chapters will draw on the information presented in Chapters 1, 2, and 3 and will detail the sources for each type of law.

Chapter 1

A Dynamic Legal System

Shaped by Long-Lasting Principles

[...] law is a rule of civil conduct [...] commanding what is right and prohibiting what is wrong. Blackstone's *The Study, Nature, and Extent of the Law* When we study law we are not studying a mystery [...] The means of the study are a body of reports; of treatises, and of statutes, in this country and in England, extending back for six hundred years [...]

O.W Holmes, fr. "The Path of the Law"
[10 *Harvard Law Review* 457, 457 \(1897\)](#)

A. INTRODUCTION

It has often been remarked that the American people have an “uncanny reverence for law.”¹ Lawyers breed in large numbers, and we are maybe the most litigious nation on earth. One reason may be that we are never too far from law or legal discourse. Talks about individual rights and due process of law thrive in school, at home, on TV, and even MTV. Legal concepts generate perhaps more popular culture (including songs and movies) than they do academic writings. American general culture often covers legal knowledge. Many know that state law defines murder and manslaughter, and many know that intention tells them apart. Of course, few know what state law is or how to find those statutes, such as the Pennsylvania ones,² that define those felonies, and distinguish between intentional and involuntary homicide (See Fig. 3).

In the same way European high school students learn about Bergson, and other little known philosophers,³ for their graduation examination—which the

Fig. 3

[18 PA.CON.S.TAT. ANN. Sect 2501 \(2009\)](#): “A person is guilty of criminal homicide [murder in the first degree, defined in [2502\(a\)](#)] if he intentionally ... causes the death of another human being.”

¹ Daniel J. Boorstin, *AMERICA AND THE IMAGE OF EUROPE: REFLECTIONS ON AMERICAN THOUGHT* vi-vii (1960).

² See, e.g., Pennsylvania law: under Pennsylvania law [18 PA. CONS. STAT. ANN. § 2501](#) “A person is guilty of criminal homicide [murder in the first degree, defined in [2502\(a\)](#)] if he intentionally ... causes the death of another human being.”

French call *le baccalauréat*—Americans take civics classes and learn about law. American high school graduates often know that the U.S. Supreme Court has been the guarantor of our individual freedoms, and phrases such as “You are breaking the law” and “I will take you to court” are part of the popular vocabulary. Indeed, unlike other nations, we can say that the Supreme Court gave us the right to purchase contraception⁴, and the right to have a private sexual relationship with a same-sex partner.⁵ For example, in 1965, in a case called [*Griswold v. Connecticut*](#), the U.S. Supreme Court recognized a zone of intimate privacy for married couples, which covered the woman’s right to decide whether her marital sexual conduct was reproductive or not.⁶ In 2003, in another case [*Lawrence v. Texas*](#), the Court similarly recognized a zone of intimate privacy for same-sex couples.⁷ Americans also know about the impact the Secretary of the Interior’s listing of a species as endangered has on the future of industrial projects within the area where that species cohabitates. Indeed, here, the snail darter put an end to a dam project as a result of a Supreme Court decision.⁸

In 1978, in a case called [*TVA v. Hill*](#), the U.S. Supreme Court recognized that “the snail darter is a living entity which is genetically distinct and reproductively isolated from other fishes” according to a federal statute known as [*The Endangered Species Act*](#)

³ In 1994 the French high school students were tested in Saint Augustin, Bergson, and Spinoza. See *Les annales du baccalauréat—épreuve de philosophie juin 1994*. To access the document go to <http://www.adminet.com>

² [*Griswold v. Connecticut*, 381 U.S. 479 \(1965\)](#)

³ [*Lawrence v. Texas*, 539 U.S. 558 \(2003\)](#)

⁴ [*Griswold v. Connecticut*, 381 U.S. 479 \(1965\)](#)

⁵ [*Lawrence v. Texas*, 539 U.S. 558 \(2003\)](#)

Fig. 4

[*TVA v. Hill*, 437 U.S. 153 \(1978\)](#) (“the Secretary [of the Interior] formally listed the snail darter as an endangered species on October 8, 1975. [40 Fed. Reg. 47,505-47,506](#); see [50 C.F.R. part 17.11\(i\) \(1976\)](#). In so acting, it was noted that “the snail darter is a living entity which is genetically distinct and reproductively isolated from other fishes.” [40 Fed. Reg. 47,505](#)).

of 1973. The U.S. Supreme Court thus prohibited TVA, a federal agency, from finishing the construction of the Tellico dam on the Tennessee River, although it was virtually completed, because it would have eradicated the snail darter population. (See Fig. 4)

How does this widespread legal knowledge affect you? It suffices to say that if you have a good understanding of basic concepts of American law you will avoid making inaccurate assumptions. Understanding the nuances of the legal jargon will only help you be effective in strategizing legal research. Once you are able to identify concepts you can easily identify the sources of American public law: how they make the law, where the law is located, and how you can find it. Only then you will have freed your intellectual prowess to concentrate on the specific legal subjects of American law, on their rich subtleties, and study and research them proficiently.

⁸ See [*TVA v. Hill*, 437 U.S. 153 \(1978\)](#) (“the secretary [of the Interior] formally listed the snail darter as an endangered species on October 8, 1975. [40 Fed. Reg. 47,505–47,506](#); see [50 C.F.R. § 17.11\(i\) \(1976\)](#). In so acting, it was noted that “the snail darter is a living entity which is genetically distinct and reproductively isolated from other fishes.” [40 Fed. Reg. 47,505](#)).

For Further Reading

DANIEL J. BOORSTIN, AMERICA AND THE IMAGE OF EUROPE:
REFLECTIONS ON AMERICAN THOUGHT (1960).

In-Class Exercises

1. Find the U.S. Supreme Court opinions mentioned in this section.
2. Where would you go (databases) to find them?
3. Skim those U.S. Supreme Court opinions
 - a) Can you understand their language?
 - b) If not, underline the concepts you have problems understanding.

B. AMERICAN LAW HAS BOTH AN ABSTRACT AND A CONCRETE FACET; ONLY THE LATTER CONSTITUTES THE OBJECT OF LEGAL RESEARCH

That both “law” and “laws” are concepts with multiple meanings may not come as a surprise to you. In any legal system, law is often viewed as the means to reach an ideal of legitimate order, while laws are specific types of recorded legal norms that make that ideal possible. Law is also a branch of knowledge that studies the rules governing people’s behavior in relation to each other.⁹ Law is both discourse about power and power in action. The discourse studies legal rules¹⁰ from a multitude of perspectives. If legal philosophy, in its wider sense promotes “general reflection on the nature of legal institutions,”¹¹ legal methods and legal research explain how those institutions (the legislative, executive, and administrative branches) work and how we can research their products (statutes, cases, and administrative rules, regulations, or decisions). Thus, if law, including American law, aims¹² at “making society more stable and enabling people to flourish,”¹³ then in legal philosophy you study how that goal is reached—the end of the process—and in legal research you learn how to locate the means to reach that end—the concrete norms of conduct that the state enforces when they are violated.

For example, society maintains order by enforcing particular rules. If you do not pay your rent, the landlord can evict you, and if you refuse to leave the

⁹ John Corbin, *FIND THE LAW IN THE LIBRARY. A GUIDE TO LEGAL RESEARCH* (1989).

¹⁰ *Id.*

¹¹ Morris R. Cohen, *AMERICAN THOUGHT: A CRITICAL SKETCH* 135. (1954).

¹² Tony Honoré, *ABOUT LAW. AN INTRODUCTION* 1 et seq. (2000).

¹³ *Id.* at 1.

premises, the sheriff-or another law enforcement officer-will forcibly move you and your belongings out into the street. Those rules can easily become the object of legal research. Some of the rules we obey in our daily activities are known under the term “laws.” They are man-made because they are passed by citizens organized in assemblies and thus different from the laws of nature that one studies in physics, biology, or chemistry classes. As often observed, unlike the laws of nature or society, which describe natural or social phenomena, legal norms prescribe our conduct and make our future predictable. For example, legal norms divide our actions in lawful and unlawful. Legal norms also identify which unlawful actions are criminal, and which ones are punished with loss of liberty, or even with loss of life. To the extent that the severity of the punishment is rationalized as a necessary social deterrent of that activity, legal sanctions create legal obedience, and a predictable tomorrow. In all legal systems the abstract and the concrete aspect of the law are interconnected. The degree varies from system to system. Generally, if you think about constitutional rights and principles, within the frame of the American legal system, you will first tend to define them abstractly. But rights do not exist abstractly. They can be found only in “historical constitutions and political systems.”¹⁴ Furthermore, such rights are interpreted and “actualized”¹⁴ in the context of a given society and its legal order. The right to own property has very specific meanings from one historic period to another and from one social class to another.¹⁵

¹⁴ Jurgen Habermas, *BETWEEN FACTS AND NORMS. CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 194 (1996).

¹⁵ *Id.*

Moreover, like all domestic legal norms, American legal norms also are expected to make the ideal of legitimate social order feasible. As W. Friedmann remarked, every legal system is supposed to implement a just legal order whose meaning, of course, changes from one historical epoch to another and from one society to another.¹⁷ Friedmann's "purposeful enterprise"¹⁸ remains open to change. Thus, norms in his view mirror all changes societies encounter: changes in people's needs as well as changes in their mores and in their perception of social ideals. While the ideal of legitimate order remains constant, its meaning changes in time.

What constitutes legitimate today is different from its 19th century meaning, and, as shown below, what was legitimate in the 18th century lost that status in the 19th century. For all these reasons, in this book, law is approached as a concept, a

Fig. 5

[Constitution of Massachusetts: Declaration of Rights, art. 30 \(1780\). Art. XXX.](#) In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.

¹⁶ On the rights of the American lower class, also known as the "underclass," see, e.g., Christopher Jencks, *RETHINKING SOCIAL POLICY. RACE, POVERTY, AND THE UNDERCLASS* (1992).

¹⁷ W. Friedman, *LEGAL THEORY* 21 et seq. (5th ed. 1967).

¹⁸ *Id.* at 21.

signifier, with two meanings. Law signifies both the ideal of order and predictability in any given society and the concrete legal norms that make it feasible. The American ideal of order is often perceived under the guise of the role of the “rule of law.” Perhaps it is easier to explain how legal norms help achieve this ideal if we explain the role played by the “rule of law.” Technically the “rule of law” can be regarded as a principle of sovereignty of the laws over men. Many of you must have heard the famous but cryptic phrase describing the aspirations of the American Founding Fathers to create “a government of laws and not of men.”¹⁹ (Fig. 5)

More simply, the American ideal of government requires a legal system that reduces the impact of human whims in the government to a minimum. Think about the rule of law as a fundamental political ideal for the Anglo-American notion of good government, as the intermediary between the concrete legal norm and the ideal of order that norm is supposed to achieve. The rule of law is supposed to shape the American legal system according to the political ideals of social stability and predictability. While the rule of law is a controversial political ideal, and its requirements are not set in stone, they can be nevertheless summarized. For example, Michael Moore identified six values of the rule of law—separation of powers, equality and formal justice, liberty and notice, substantive fairness, procedural fairness, and efficient administration.²⁰ On the other hand, F. A. Hayek, more conservatively,²¹ identified only two main requisites—generality and predictability.²²

¹⁹ [Constitution of Massachusetts: Declaration of Rights, art. 30 \(1780\)](#).

²⁰ Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 277 (1985).

²¹ Steven J. Burton, *Particularism, Discretion and the Rule of Law* 36 NOMOS 178, 180 (1994).

²² F.A. Hayek, *THE ROAD TO SERFDOM* (1944).

Though the rule of law is a debatable concept, few deny its role as a legal watchdog. The rule of law implements this role through its procedural and substantive requirements. The procedural requirements impose restraints in the way government exercises its legal authority, and the substantive requirements impose constraints on the content of the exercised legal authority, so that they do not violate a vital core of American cultural values, which translate into the American ideal of legitimate order and predictability. Those values are, of course, vastly inspired by the British ones, due to the historical development of the American society—a former British colony. When a body of concrete rules becomes perceived by the majority as illegitimate, the system replaces them, because one of the constraints the “rule of law” imposes on the American legal system is preserving legitimate order. Of course, there are many problems with the concept of legitimate order. Nevertheless, its very existence emphasizes what is commendable about the American legal system. Its purpose is to minimize individual whims and create a social order accepted by the many and not imposed by the few. The requirements imposed by the rule of law affect the concrete norms to the extent that those, which do not comply, are “rejected.” Additionally, as mentioned before, legal norms govern human behavior, which is open to constant change. Within the U.S. legal system, legal norms exist only to the extent they ensure the American ideal of social order and stability. This ideal mirrors the socio-political needs of each historical period, as well as its sense of justice and moral standards. Concrete norms, which cannot play that role, are changed, amended, or replaced with others more suited to promote the society’s

ideal of stability. The next example is sufficiently dramatic to exemplify the interplay between the abstract and concrete facet of American law. It will illustrate the nature of the dynamism of this legal system. It will show how the rule of law acts as a constraint on the American legal system to dispose of those norms whose content ceases to promote a legitimate order according to core Anglo-American values. This complex nature of the American legal system should translate into your constant need to update your legal research to make sure that your concrete findings are still part of the legal system, in other words, are still good law. Additionally, if you understand that all changes must come within a well-defined cultural frame you will freely accept the often lack of or the meek results of your updating efforts.

For Further Reading

JOHN CORBIN, FIND THE LAW IN THE LIBRARY. A GUIDE TO LEGAL RESEARCH (1989).

MORRIS R. COHEN, AMERICAN THOUGHT: A CRITICAL SKETCH (1954).
TONY HONORE, ABOUT LAW. AN INTRODUCTION. (2000)

JURGEN HABERMAS, BETWEEN FACTS AND NORMS. CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996).

CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY. RACE, POVERTY, AND THE UNDERCLASS (1992).
FRIEDMANN, LEGAL THEORY. (5th ed. 1967).

[Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 \(1985\).](#)

[Steven Burton. *Particularism, Discretion, and the Rule of Law*, 36 NOMOS 178 \(1994\).](#)

F.A. HAYEK, THE ROAD TO SERFDOM (1944).

In-Class Exercise

What connection can you see between the rule of law and legal research?

C. INDIVIDUAL NORMS ARE OPEN TO CHANGE

The rule of law has been identified with the values promoted by Western democracies, and especially with the Anglo-American ones. Within these cultural limits, the rule of law promotes social stability. Understanding how the rule of law works is understanding the core Anglo-American values as well.

For example, the American and English cultures and values remained similar even after the American colonies gained their independence from the British Empire. They are rooted in liberal individualism. Liberal individualism has both a religious and a secular component. Its religious facet has been explained as relying on the Protestant Reformation's emphasis on faith and individual contact with God, instead of a mediated-by-Church divine contact. Its secular element relies on modern secular philosophy, which focuses on the needs of the individual instead of those of the community. Moreover, it is ingrained in the classical *laissez-faire* economics of unrestrained competition;²³ it does not value communitarian approaches to life, and thus it mostly relies on individual rights against the government. As a result of these common ideals, American and English political institutions have remained similar even after the American colonies gained their independence. There is one notable exception, however. America lacks the lawmaking institution of the monarchy. The two legal regimes differ also. For example, England's legal system does not have a judicial institution at its pinnacle. Nevertheless, the American legal system continued its British

²³ Morris R. Cohen, *THE FAITH OF A LIBERAL*, at 59 et seq. (1946).

“common law” tradition. Both systems have come to rely on judge-made law (court decisions) as a better-suited means to promote their cultural values, rather than on assembly-made law (statutory law), which traditionally defines the “civil law” system—the other major Western legal system. A common law approach to law, unlike the civil law one, emphasizes gradual, almost individualistic, legal change. By its very own nature, judge-made law relies on solving the conflict of the interested parties that brought the specific lawsuit; each court decision is binding upon the parties to the lawsuit. Of course, due to the precedential value of court decisions in common law systems, a court decision from a superior court is expected to dictate the ways in which similar factual cases are decided by inferior courts. Still, absent a new decision, the subsequent parties are not bound directly by the precedent. Unlike judge-made law, whose effect is incremental by nature because it binds only the few parties to the litigation, a statute is binding upon large populations from the moment of its enactment.

This similarity survived at least one major institutional difference. For example, until late into the 19th century, almost a century after the American colonies liberated themselves from the English yoke, there were quite a few American states, including Delaware and Kentucky,²⁴ which held human beings as property, as slaves.

American law contained complex property rules, which held the slave as the “absolute property of his owner.”²⁵ At the federal level the institution of slavery was used to allot more Congressional representation to the states that recognized it. Article I, Section 2, paragraph 3 of the Constitution implicitly sanctioned the

²⁴ *Id.* at 281.

²⁵ Robert Shaw, *A LEGAL HISTORY OF SLAVERY* 157 (1991).

institution-although never by name: it counted slaves as three fifths taxable citizens.²⁶ Because a state which recognized slavery had more representatives in Congress than a state that had the same number of voters but no slaves, it can be argued that the Constitution protected and certainly did not discourage slavery.

The English legal system never recognized the institution of slavery. In fact, “A slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in his enjoyment of his person, and his property,” Blackstone wrote in 1765.²⁷

Eventually the American legal system abolished this institution. It is worth mentioning that the change did not affect the existing principles of liberal individualism, which persisted. Notwithstanding slavery, the American and the English societies and their legal systems remained similar. How do we explain the similarity and its stability? First it should be noted that to the extent slavery was part of the American property rules, it had a limited role in promoting social stability and predictability, according to the contemporary social values. To the extent that slavery was a body of legal norms, like all such norms it was open to change according to both the social and political context surrounding that human behavior and the views that the majority held about it. When slavery ceased to correspond to the American ideal of legitimate order, as viewed by the majority, it stopped promoting social stability within the core of contemporary social values. When the majority decided that slavery needed to

²⁶ 6 ENCYCLOPEDIA OF AMERICAN CONSTITUTION Appendix 3, at 2957 (2d ed.).

²⁷ EHRlich's BLACKSTONE, at v and 71 (1959).

be abandoned, America faced a bloody civil war. Indeed, despite President Lincoln's insistence that the Civil War was only "a struggle against secession"²⁸ and not one to end the institution of slavery, the war had the effect of constraining the confederate states to accept constitutional amendments that made slavery illegal. The 13th Amendment "upgraded" the American legal system: it outlawed slavery. As a result, it mirrored the contemporary moral standards. On December 18, 1865, the 13th Amendment's ban on slavery and involuntary servitude within "any place subject to [the United States] jurisdiction" became effective.²⁹ By ridding itself of unjust laws, the system promoted order and stability.³⁰ As a result, circumscribed in legal normativism, slavery, as an institution, was dissolved within the legal system. This change in the American legal system can be explained as the result of the requirements imposed by the rule of law.

The rule of law requires that all legal norms correspond to certain procedural and substantive constraints. Otherwise, they cannot promote social order and stability within the chosen type of democratic government. When legal norms lose their aura of legitimacy, they are replaced according to well-established procedures. Similarly, when legal norms are the result of legitimate exercise of power, and their content does not violate the core social values that define the social ideal of order, despite their arguable merit, those rules are not replaced. The next three examples will further illustrate the dynamic nature of the American legal system within the well-

²⁸ Robert Shaw, *A LEGAL HISTORY OF SLAVERY* 157 (1991).

²⁹ *Id.* at 282.

³⁰ Ian Shapiro, *Introduction*, in *NOMOS*, at 1 (1994).

established political limits of the rule of law. Although apparently at random, legal norms are changed only when the institutions in charge of overseeing the functioning of the legal system perceive it necessary. Statutes are declared unconstitutional only when aggrieved parties raise that issue and courts find the argument persuasive. Court decisions are superseded by statutes or overruled by other court decisions also when they do not fit within the legal values promoted by the American legal system. Administrative rules and decisions are open to change by the issuing administrative body, statutes, or courts. The next examples will illustrate a few of the contemporary idiosyncrasies of the American legal system that you should be aware of in your legal studies. Legal norms are open to change, but change comes within cumbersome procedures. Often social and legal change depends on the existence of an aggrieved party willing to start the process. However, unlike in a civil law system, where researching includes updating by the very nature of the system-the codified statute will mention its most recent amendment-in a common law system, such as the American one, researching does not include updating. Statutes are open to change that comes from courts. Sometimes the codified version of federal statutes will include the most recent court opinion that bears on that statute. But there is no foolproof assurance about that. Moreover, statutes are collected in separate repositories from court opinions. Aside from these mechanical aspects of legal research, you need to develop a “feeling” for it that rests on a clear understanding of how the systems work.

For Further Reading

MORRIS R. COHEN, THE FAITH OF A LIBERAL (1946).

ROBERT SHAW, A LEGAL HISTORY OF SLAVERY (1991).

ROBERT SHAW. A LEGAL HISTORY OF SLAVERY (1991).

EHRlich'S BLACKSTONE (1959).

In-Class Exercises

1. How would you define the rule of law in your own terms?
2. How can the rule of law be understood? Is it part of the abstract or tangible aspect of law?

D. LEGAL NORMS ARE OPEN TO JUDICIAL AND CONGRESSIONAL SCRUTINY

The United States is a federation of 50 states. Its governing body combines a centralized federal body and 50 state governments. At both levels, each branch of the government makes law that conforms to the requirement of the rule of law. They are both procedural and substantive restraints. The rule of law requires any legal system to be stable. Only stable systems can aspire to satisfy the requirements of generality and prospectivity. So, once an assembly has properly enacted a statute, absent an aggrieved party, there is no judiciary recourse, and absent judiciary process, it often makes more political sense to leave it untouched. The sign of a good government is the diversity of its norms that cover as many political interests as possible. Norms that may not necessarily achieve any regulatory effect, and thus may not be an example of legal normativism, may, nevertheless, represent specific interests uncovered by other statutes. Through such norms, the legal system is able to represent a large constituency, which is needed in any representative democracy. Again, they will rarely be changed. The next examples should also introduce you to another important aspect of the American legal heritage: the interplay between the legislative and the judicial branches. For more than a century, the judiciary has been at the pinnacle of the American legal system deciding what the Constitution is and what rules violate the Constitution. The American judiciary is in charge of interpreting the law enacted by the legislative branch, and sometimes courts minorities-have overruled statutes that mirror majoritarian positions. Thus, you always need to make sure that your legal research covers court decisions. The examples below illustrate that to the extent

each lawmaking governmental branch respects procedural restraints and exercises publicly justifiable power, the norms they make will rarely be questioned or changed, irrespective of their social merit as long as their content does not defy the values promoted by the rule of law.

When you study American law, this observation will help you understand why some U.S. Supreme Court decisions are still good law or why others are being incrementally changed. When you do legal research, the above observation will help you remember that while you constantly need to update your results often, there is nothing out there affecting your research results. The next three examples will hopefully make it easier for you to see the interplay between legal stability and change, which is only another facet of the interplay between the abstract and concrete facet of American law. They should both emphasize the need for updating and the difficulty of ending your research when you may not find anything new to add. Sometimes, you feel that there should be something more and there is not. Developing a sense of confidence in your research results is also part of the complexities of American legal research. When you become aware of these idiosyncrasies of the American legal system you will also understand how to better strategize your legal research.

1. Judicial and Congressional Review of Statutory Rules

When Congress passes a statute following the usual congressional procedure, and it thus exercises publicly justifiable power, we accept the rule contained in that statute as being law, or, in the words of the renowned legal philosopher

Hart, we recognize it as valid, as legitimate, and we obey it. Few inquire into the merits of a piece of legislation and even fewer challenge it, even though its merits may be arguable, as long as it does not violate any constraints imposed by the “rule of law.” Nevertheless, a thorough researcher will update his statutory results with a search for all relevant court decisions. For example, in an effort to change the culture of alcohol consumption on college campuses, in December 1997, in the U.S. House of Representatives, Representative Joseph P. Kennedy II proposed a resolution aimed at changing the campus culture and at supporting healthier student choices about alcohol. That was the [“Collegiate Initiative to Reduce Binge Drinking,”³¹ House Resolution 321](#), and it called on all college and university administrators to adopt a code of principles designed to create a campus environment that deemphasizes the role of heavy drinking in student life. Initially, the resolution was advertised as not creating “a legally binding requirement for college campuses, and as not requiring any formal voting.”³² (Fig. 6).

Fig. 6

Alcohol Policies Project
<http://www.cspinet.org/booze/janalert.htm>

³¹ [H.R. Res. 321, 105th Cong. \(1997\)](#).

³² Alcohol Policies Project, *at* <http://www.cspinet.org/booze/janalert.htm>

However, soon afterwards a Senate resolution was introduced,³³ and a legislative measure followed suit. Within a year since its introduction, Congress passed the “Collegiate Initiative To Reduce Binge Drinking and Illegal Alcohol Consumption” as a binding statute.³⁴ (Fig. 7)

No one challenged this act in court. A lot of good-will press coverage ensued. The students’ response to the legislative proposal was quick and swift. It criticized Congress’s attempt to change college culture through legislation. It pointed out its limits: all this legislation did was to outline ways to fight binge drinking in its manifestations, while it failed to address its societal or cultural causes.³⁵ The legislation identified the national high drinking age as being the culprit.³⁶ Some may say that there is no way to enforce that piece of legislation, and there is no clear data to gauge whether it had any real effect in making students stop heavy drinking—defined according to the 1997 study published by Harvard’s School of Public Health.³⁷ (Fig. 8)

Furthermore, the Resolution notes that:

- many college presidents rank alcohol abuse as the number one problem on campus;
- alcohol is a factor in the three leading causes of death for 15-24 year olds; alcohol is involved in a large percentage of campus rapes,

³³ [S. Res. 192, 105th Cong. \(1998\)](#). *Expressing the Sense of the Senate to Change the Culture of Alcohol Consumption on College Campuses*.

³⁴ [Higher Education Assistance Act, 20 U.S.C. §§ 1011h, 1011i \(2000\)](#), superseding [Drug-Free Schools and Communities Act of 1989 20U.S.C. §§ 1145g, 3224a. Pub. L. No. 89–329. tit. I, § 119 added by Pub. L. No. 105–244, tit. I, § 101\(a\), 112 Stat. 1596 \(Oct. 7, 1998\)](#).

³⁵ Matthew Blumenstein, *Binge drinking can’t be curbed by politics* Stanford Daily Online (Feb. 13, 1998). To access the document go to <http://www.stanforddaily.com>

³⁶ *Id.*

³⁷ Henfry wechsler et al., *College Binge Drinking in the 1990s: A Continuing Problem Results of the Harvard School of Public Health 1999 College Alcohol Study*, at http://www.hsph.harvard.edu/cas/Documents/monograph_2000/cas_mono_2000.pdf See also <http://www.hsph.harvard.edu/cas>

- violent crimes, student suicides, and fraternity "hazing" drinking;
- almost half (44 percent) of all students qualify as binge drinkers; and
- heavy drinking causes problems for students who drink and has "second hand" effects for other students. Heavy drinking is defined as "the consumption of at least five drinks in a row for men or four drinks in a row for women."

No one can measure whether the change in the drinking behavior, if any, was a direct result of a toothless statute, which only called upon universities to appoint a task force made up of administrators, faculty, students, and greek system representatives to work toward reducing alcohol problems on campuses. Perhaps, the norm needed to have required universities to take anti-drinking measures and to have attached financial implications to those requirements instead of encouraging universities to take steps in that direction. Nevertheless, the legislation encountered only slight initial opposition. Congress passed it as a sign that the existing culture of a well-identified segment of the population needed to be changed. It may be inept, but there is no requirement under the "rule of law" that all American legal norms be efficient. Furthermore, this law promotes drinking responsibly, which is part of the American Protestant values, and the culture promoted by the rule of law.

That being said, finding this piece of statutory law will not end your research. Due to the role played by the judiciary in American law, you will always need to make sure that there is no court decision interpreting that statute, which may adversely affect the result of your research. At the same time, there are instances when updating your research will not produce any additional documents. You need to become comfortable with that result despite your own feelings about the merits of a particular piece of legislation.

Fig. 7

Higher Education Assistance Act, [20 U.S.C Section. 1011h, 1011I \(2000\)](#), superseding *Drug-Free Schools and Communities Act* of 1989, [20 U.S.C. Section. 1145g, 3224a. Pub. L. No. 89-329, tit. I, Sect. 119](#), added by [Pub. L. No. 105-244, tit. I, Sect. 101\(a\), 112 Stat. 1596 \(Oct. 7, 1998\)](#) (excerpt):

112 STAT. 1596, PUBLIC LAW 105–244—OCT. 7, 1998

“SEC. 119. BINGE DRINKING ON COLLEGE CAMPUSES.

“(a) SHORT TITLE.—This section may be cited as the ‘Collegiate Initiative To Reduce Binge Drinking and Illegal Alcohol Consumption’

“(b) SENSE OF CONGRESS.—It is the sense of Congress that, in an effort to change the culture of alcohol consumption on college campuses, all institutions of higher education should carry out the following:

“(1) The president of the institution should appoint a task force consisting of school administrators, faculty, students, Greek system representatives, and others to conduct a full examination of student and academic life at the institution. The task force should make recommendations for a broad range of policy and program changes that would serve to reduce alcohol and other drug-related problems. The institution should provide resources to assist the task force in promoting the campus policies and proposed environmental changes that have been identified.

Fig. 7(cont.)

- “(2) The institution should provide maximum opportunities for students to live in an alcohol-free environment and to engage in stimulating, alcohol-free recreational and leisure activities.
- “(3) The institution should enforce a ‘zero tolerance’ policy on the illegal consumption of alcohol by students at the institution.
- “(4) The institution should vigorously enforce the institution’s code of disciplinary sanctions for those who violate campus alcohol policies. Students with alcohol or other drug-related problems should be referred for assistance, including on-campus counseling programs if appropriate.
- “(5) The institution should adopt a policy to discourage alcoholic beverage-related sponsorship of on-campus activities. It should adopt policies limiting the advertisement and promotion of alcoholic beverages on campus.
- “(6) The institution should work with the local community, including local businesses, in a ‘Town/Gown’ alliance to encourage responsible policies toward alcohol consumption and to address illegal alcohol use by students.

Fig. 8

Henry Wechsler et al., Binge Drinking on College Campuses
<http://www.cspinet.org/booze/collfact1.htm>

2. Judicial and Congressional Review of Court Decisions

Courts are the ultimate arbiter of justice in American law. As a result, when you research statutory or administrative law you need to check how the courts have interpreted it. Additionally, when you research case law, you need to check more recent decisions from the appropriate superior courts, or the courts of last resort from each jurisdiction as well. As shown later in this book, the federal government has a federal judiciary branch and each state government has its own state judiciary, and case law from the courts of each jurisdiction may be reversed and remanded by the court of last resort from that jurisdiction.

The U.S. Supreme Court is the ultimate legal arbiter. Its decisions, which follow the Court's well-established procedure, are seldom overruled by the Court or questioned by Congress in subsequent legislation. To the extent the content of its decisions corresponds to our contemporary values, and the Court exercises publicly justifiable power, the rule of law does not require them to be discarded, although they may be, arguably, a wrong statutory interpretation. Nevertheless, sometimes the Court decides not to follow its own precedents and reverses itself, or a congressional

statute may supersede a Court’s decision and render it inapplicable. As a result, while apparently rarely necessary, you still need to update and check the status of your research of Supreme Court decisions. For example, in 1990, Congress passed the “[Gun-Free School Zones Act of 1990](#),”³⁸ which declared it unlawful for any individual to possess a firearm in a school zone. Congress limited the offense to the type of firearm. In Section 922(j)(2)(A) Congress stated that:

It shall be unlawful for any individual knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone.³⁹ (emphasis added)

Alfonso Lopez., a 12th-grade student, who went to Edison High School in San Antonio, Texas, carrying a concealed .38-caliber handgun and five bullets, was charged with violating the statute. He challenged the federal statute’s constitutionality, and filed a lawsuit in the appropriate federal court. The U.S. Supreme Court accepted a review of the decision, by granting a writ of certiorari, and held that Congress did not have the authority to make firearms’ possession a federal offense. In deciding the case—whose title became [United States v. Lopez](#),⁴⁰ after the name of the parties involved—the Court ignored the provision underlined above and held that:

The Act neither regulates a commercial activity nor *contains a requirement that the possession be connected in any way to interstate commerce*. We hold that the Act exceeds the authority of Congress “[t]o regulate Commerce ... among the several States.” (emphasis added)

³⁸ [18 U.S.C. § 922](#)

³⁹ [18 U.S.C. § 922\(j\)\(2\)\(A\)](#)

⁴⁰ [514 U.S. 549 \(1995\)](#)

The Court did not see any specific commercial qualification on the type of firearm involved, although it may reasonably be argued to the contrary. Its decision has remained unchallenged in Congress. While a bill to reauthorize the ban on undetectable firearms was introduced in the House in 2004⁴¹ (Fig. 9), the statutory provisions of the [*Gun-Free School Zones Act of 1990*](#) continue to remain unconstitutional and thus not binding. When the Supreme Court decides the unconstitutionality of a statute, the only recourse is for Congress to address that finding by passing another statute that incorporates the Court’s suggestion.

Fig. 9

[H.R. 3348 \(2004\)](#). [Pub. L. No. 104-104, 110 Stat. 133](#)
(codified as amended at [47 U.S.C. § 223 \(Supp. II 1996\)](#)).

Here is another example. In 1996, Congress passed the [*Communications Decency Act \(CDA\)*](#)⁴², which criminalized using any computer network to display “indecent” material unless the content provider uses an “effective” method to restrict access to that material by anyone under the age of 18. The U.S. Supreme Court, in [*Reno v. American Civil Liberties Union*](#), declared the statute unconstitutional.⁴³ (Fig.

⁴¹ [H.R. 3348 \(2004\)](#).

⁴² [Pub. L. No 104–104, 110 Stat. 133](#) [codified as amended at [47 U.S.C. § 223 \(Supp. II 1996\)](#)].

⁴³ [Reno v. ACLU, 521 U.S. 844, 859–60 \(1997\)](#).

Fig. 10

[*Reno v. ACLU*, 521 U.S. 844 \(1997\)](#)
<http://supreme.justia.com/us/521/844/>

10). In response to the Court's decision, in 1998, Congress passed the [*Child Online Protection Act \(COPA\)*](#)⁴⁴ in what can be called a follow-up to the Supreme Court's invalidation of CDA (Fig. 11).

Fig. 11

[*COPA*, 47 U.S.C. Sect. 231\(a\)\(1\) \(2000\).](#)
[47 U.S.C. Sect. 231 \(e\)\(6\) \(2000\).](#)
See also,
[http://en.wikipedia.org/wiki/Child Online Protection Act](http://en.wikipedia.org/wiki/Child_Online_Protection_Act)

COPA, unlike CDA, targeted only commercial Web sites and only indecent material that was “harmful to minors.”⁴⁵ Nevertheless, in [*Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 \(2002\)](#), the Court did not give its stamp of approval to the revamped legislative version, and enjoined the state from enforcing it while it remanded the case for further examination by the lower court.⁴⁶ When the lower court's opinion reached the Supreme Court in [*Ashcroft v. American Civil Liberties*](#)

[Union, 542 U.S. 656 \(2004\)](#),⁴⁷ the Court held that “the statute likely violates the First Amendment”⁴⁸ and, again, refused to enforce it. But the CDA/COPA example does not reflect the average situation. Usually Congress accepts the Supreme Court’s interpretations of its statutes. Due to the position of the Supreme Court at the pinnacle of the American federal legal system, no legal research is ever finished without a comprehensive search for a Supreme Court decision on point. Of course, often such a decision does not exist. Nevertheless, your research needs to include this part of the process as well.

3. Judicial Review of Administrative Decisions

This final example will briefly focus on the interplay between administrative and decisional law. It will illustrate that administrative rules and decisions, which conform to the requirements of the rule of law and the society’s ideal of stability, although open to judicial review, are rarely reversed. However, the need for updating remains, as it remains the need to develop a sense of confidence in your research results when you do not find anything more.

This time we will look at the product of administrative lawmaking: an agency decision. For example, the Federal Communications Commission (FCC), upon a complaint from a father that his son heard an offensive monologue broadcast by a radio station, decided in its memorandum opinion that the “Filthy Words” monologue by comedian George Carlin contained words that depicted sexual and excretory activities. Therefore, it condemned it as indecent, according to an applicable statutory provision.⁴⁹ Arguably, the FCC decision can be described as illegal censorship, and the federal court

of appeal that reviewed it reversed it on those grounds.⁵⁰ The Supreme Court granted the writ of certiorari and agreed to review the decision. The Supreme Court reversed the lower court's decision and upheld the FCC's ban. In its decision, abbreviated as [FCC v. Pacifica Foundation](#),⁵¹ 438 U.S. 726 (1978), the United States Supreme Court held that:

The FCC was warranted in concluding that indecent language within the meaning of Sect. 1464 was used in the challenged broadcast. The words "obscene, indecent, or profane" are in the disjunctive, implying that each has a separate meaning. *Though prurient appeal is an element of "obscene," it is not an element of "indecent," which merely refers to nonconformance with accepted standards of morality.*⁵² 438 U.S. at 727 (emphasis added)

The Court let us see its reasoning; it upholds administrative decisions that do not offend the core American values, and it will reverse the ones that violate them. Those values are rooted in morality, justice, and liberal individualism. It is the role of the rule of law to preserve a legal system that promotes those values. It is not the role of the rule of law to advance a perfect legal system. However, to the extent that such a principle works, concrete norms are open to various types of change according to the demands of the rule of law that requires all legal norms to promote legitimate order of an ever-changing social body. This potential change and the hierarchical structure rooted in the common law features of the American legal system demand that you update all your research endeavors and make sure that your search has covered appropriate court decisions as well.

⁴⁴ [47 U.S.C. § 231\(a\)\(1\) \(2000\).](#)

⁴⁵ [47 U.S.C. § 231\(e\)\(6\) \(2000\).](#)

⁴⁶ [Ashcroft v. ACLU, 535 U.S. 564, 585 \(2002\).](#)

⁴⁷ [124 S. Ct. 2783 \(2004\).](#)

⁴⁸ *Id.*

⁴⁹ [18 U.S.C. § 1464.](#)

⁵⁰ [FCC v. Pacifica Found., 556 F.2d 9 \(1977\).](#)

⁵¹ [FCC v. Pacifica Found., 438 U.S. 726 \(1978\).](#)

⁵² *Id.* at 727.

E. THE ABSTRACT FACET OF AMERICAN LAW IS SIMILAR TO THAT OF ANY DOMESTIC LEGAL SYSTEM

Studying and researching law are heavily influenced by the basic characteristics of each legal system and by the extent you master them. If you remember that there are many common elements among all domestic legal systems, you may be able to focus on the idiosyncrasies of the American legal system faster and achieve better results in your legal studies. First of all, all domestic legal systems have an abstract and a concrete facet. They all promote social order through concrete norms. For example, the discourse about the “rule of law” belongs to the historical discourse about the constraints all legal systems face. However, the constraints exercised by the rule of law are emphatically secular, and they are of relatively recent origin. The rule of law functions as a constraint on the American legal system. Perhaps its functions are not familiar to you. But you already know that all legal systems have known various societal constraints that made possible the preservation of every given type of state-based social organization. For example, the Soviet legal system was shaped by constraints, which one may regard as similar in nature to those imposed by the rule of law. Due to them, the legal system contained only norms that mirrored the Soviet societal values. For example, Soviet law did not allow private ownership of the means of production, such as an enterprise.⁵³ To the contrary, American law does not recognize the Soviet-type of property, and the only property norms that it contains are those focused on private property. The difference in their property laws underscores the difference between the social values the two societies herald as

fundamental. Such basic understanding of how all-legal systems work will let you form appropriate expectations in your legal studies. Especially if you research law using non-authoritative sources available through the Internet, understanding this basic principle will assist your research and signal that you should discard those results that do not fit within the American society's general values, for example. Thus, think about the rule of law as the intellectual reminder of your need to update your research. If courts are the ultimate arbiter of what violates the requirements imposed by the "rule of law," then you always need to know how the courts have interpreted any statutory or administrative law.

As mentioned above, legal systems have always faced constraints.⁵⁴ Whether they are summoned under the "rule of law" or studied separately as legitimacy, morality, and justice, they are known to you to a large extent. People freely obey those concrete norms if they view them as legitimate, moral, and just. The American rule of law is aware of these demands imposed on legal systems and incorporates those values within its substantive requirements. A brief review of these constraints will further make the similarities between the American legal system and your own legal system more transparent. At the same time, the rich and multifaceted nature of the American legal system will become more obvious and, with it, the idiosyncrasies that spring from it. Among those is a comparatively complex research and updating process.

⁵³ For a generally accepted analysis of the cultural differences between a socialist and a capitalist society, *see, e.g.*, F.A. Hayek, *THE ROAD TO SERFDOM* 32 et seq. (1994).

⁵⁴ For an explanatory debate about the limitations on government in the Middle Ages and the Legal limits of the "Prince," be them even those of the will of God, *see, e.g.*, Brian Tierney, [*"The Prince Is Not Bound by the Laws."* *Acursius and the Origins of the Modern State*, 5 *Comp. Stud. In Soc'y & History* 378, 379, 388, and 289 \(1963\).](#)

First we will briefly focus on legitimacy. There are many ways to define legitimacy. For example, it has been explained through the source of legal norms: God, nature (the natural order of things), or the state of people. The Christian natural law tradition was based on the obvious superiority of God as the legitimizing source of law. The civic republican natural law tradition emphasized the state of nature as the ultimate legitimizing source of law, while the positivist tradition emphasized the state-the political human institution-as the ultimate source of legitimacy. The classic legal theories that focus on legitimacy are natural and positive law theories.⁵⁵

All natural law theories legitimize a legal system through divine or natural power. At their core is that idea that legal principles simply exist as they manifest themselves to the universal conscience of mankind. Of course, they all acknowledge differences among domestic legal systems (human laws), but those are explained as due to differences in legal cultures, or using Hegel's expression, to the ways humans mediate the divine principles of law.⁵⁶ Of course, there are many variations within this classical school of thought. Positive law theories focus on legitimacy also. They emphasize the state (historically, the city-state⁵⁷) as the ultimate source of law. This does not mean that there are no other theories focused on this issue, including

⁵⁵ This does not mean that there are no other theories focused on this issue, including sociological theories of law, utilitarianism, etc.

⁵⁶ G.W.F. Hegel, *PHENOMENOLOGY OF SPIRIT* 287 (A.V. Miller trans., 1977) (Human law in its universal existence is the community, in its activity in general is the manhood of the community, in its real and effective activity is the government). *See also* Simone Goyard-Fabre, *LES FONDEMENTS DE L'ORDRE JURIDIQUE*, at 37 (1992).

⁵⁷ Richard W. Mansbach & Yale H. Ferguson, *POLITIES: AUTHORITY, IDENTITIES, AND CHANGE* (1996).

sociological theories of law, utilitarianism, etc. “La loi, [wrote Carre de Malberg] est le fait etatique positif,”⁵⁸ which can be translated as “Law is the existing positive law.”

The American legal thought has also dealt with legitimacy issues from both a natural and positive law perspective. For example, Thomas Jefferson justified the American Revolution on the illegitimate nature of British law, which had violated unalienable rights of the people.⁵⁹ Later, in the 18th century, James Wilson further explained the legitimacy of the American legal system as residing in God and the will of the people. Unlike monarchist theories, which legitimized legal norms through the divine connection between the king and God, American legal thought always thrived on the principle of legitimacy derived from the sovereign people. For example, James Wilson insisted that:

The supreme power or sovereign power of the society resided in the citizens at large; and that, therefore, they always retain the right of abolishing, altering or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient.⁶⁰

American legal thought continued the major progress added by English legal theories. Both the natural and positivist English legal thought viewed the man-made laws more than mere commands from God translated by men into laws. It viewed legal norms as rooted in the social compact made between the government and its sovereign people. Briefly, the American natural legal thought was originally built on Locke’s social contract, and not on the classical and Christian explanation of the

⁵⁸ Cities—Polis, are the oldest forms of political organizations. Simone Goyard-Fabre, *LES FONDEMENTS DE L’ORDRE JURIDIQUE*, at 99 (1992) (internal quotes omitted).

⁵⁹ David Richards, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 18-30 (1989).

⁶⁰ 1 *THE WORKS OF JAMES WILSON* 17 (1804).

Fig. 12
The Preamble to the U.S. Constitution

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, 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.

<http://www.gpoaccess.gov/constitution/pdf2002/010.pdf>

origin of the state.⁶¹ Locke's social contract was limited: Its players—the sovereign people and the government—had limited powers. The sovereign people gave up certain rights so that the government could be able to function within restricted boundaries.

As a result, the U.S. Constitution forged a limited federal government. Under the guise of “federalism” the sovereign people delimited federal government power. (Fig. 12) The people preserved their inalienable or natural rights. The constitutionally recognized fundamental rights were the right to life, liberty, and property. This combination of inborn right to individual liberty and vested property has characterized the role of the rule of law within the American legal system from its revolutionary beginnings. In fact, the American Revolution can be viewed as a response to an illegitimate act of the legislatures to restrain such a fundamental act.

⁶¹ Discussing the American natural law theorists that followed the Christian explanation of the origin of state, see James McClellan, *Joseph Story's Natural Law Philosophy*, 5 BENCHMARK 85 (1994).

The Stamp Act can be viewed as a non-legitimate property law statute that attempted to take property from the Americans-by taxing them-and give it to the English.

Morris Cohen noted last century a direct nexus between the American Revolution and the American legislatures' impotence in regulating property rights. It took them a long time to be able to legitimately pass statutes that restrained those fundamental rights.⁶² Briefly, the American positivism comes through Hobbes. It is worth noting that Hobbes viewed the law as the command of the monarch and thus its primary source was the collection of king's Christian explanation of the origin of state.⁶³

Although debatable in the 17th century⁶⁴ Britain, today, indeed, statutes seem to prevail as the primary source of law in the American legal system, despite its strong common law features. Both natural and positive law theories continued to be developed in the Anglo-American legal tradition, as questions about the reasons beyond our obedience of the legal rule only increased in our days.

Lon Fuller, for example, talked about the interplay between the need for a legitimate source of law: the sovereign law-making authority, which itself is determined by law, and the law itself.⁶⁵ From a natural law perspective, Fuller focused on law as a particular means to an end, an enterprise of governing human conduct, and on the "internal morality" of the law.⁶⁶ He viewed the latter the reason for legal

⁶² Morris R. Cohen, *AMERICAN THOUGHT. A CRITICAL SKETCH* 142 (1954).

⁶³ *DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* 53 (1994).

⁶⁴ J.H. Hexter, [Thomas Hobbes and the Law](#), 65 *Cornell L. Rev.* 471, 471–478 (1979–80).

⁶⁵ See, e.g., Lon Fuller, *THE PROBLEMS OF JURISPRUDENCE* (1949).

⁶⁶ Lon Fuller, *THE MORALITY OF LAW* (1964).

⁶⁷ H.L.A. Hart, *The Concept of Law* (2d ed. 1997).

⁶⁸ *Id.* at 100–10.

obedience. At the opposite theoretical end, H.L.A. Hart in *The Concept of Law*,⁶⁷ for example, propels the discussion about law to legal validity,⁶⁸ which offered additional explanations for legal obedience.⁶⁹ Hart's explanation starts with Max Weber's observation about coercion (avenging the norm's violation⁷⁰) and goes further connecting the traditional legal value of justice (the result of appraisal) to non-law values such as fairness.

Rooted in positivism is the main American school of legal thought: realism, and its late 20th-century heir, critical legal studies (CLS). Both see law as a state product, except for the private rules such as those used in the common law tradition of contractual free bargaining, for example.⁷¹ However, as Oliver Wendell Holmes, Jr., Karl Llewellyn, or John Dewey pointed out, American realism is less interested in issues of legitimacy of the source of law as the reason for our legal obedience than in studying the social role of the law. American realism, as Harvard Professor Duncan Kennedy stated, is about what the law "is" instead of what the law "ought" to be. The greatest achievement of the realists was the emphasis on the fact that law was a means to social objectives and law needs to be measured by its social consequences.

Legitimacy, thus, can be related to the sources of public law and the ways those sources exercise their authority. Understanding the discourse of natural and positive rights in American law allows you to be more flexible and search for

⁶⁹ For a concise but enlightening discussion regarding the "Hart-Fuller Debate" that materialized in the *Harvard Law Review* (1958), see Brian Bix., *Natural Law Theory*, 8, 13–15 in *Philosophy of Law* (Joel Feinberg & Jules Coleman eds., 7th ed. 2004).

⁷⁰ Max Weber, *LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., 1954).

⁷¹ Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 *Harv. L. Rev.* 1685, 1763 (1975–76).

statutory, decisional, or administrative law to support your argument. Furthermore, when there is nothing authoritative on point, as the Supreme Court has stated, then, any persuasive source is useful within certain limits. For example, the way in which the rule of law works allows one to argue in favor of a new fundamental right, in addition to those mentioned by the Constitution. This argument rests on a two-fold claim: on the one hand, the American fundamental rights are not limited to the ones mentioned by the Constitution, and, on the other hand, all rights that qualify as inherent rights, for example, may become fundamental.

The individual decision becomes thus justified, as the American Ronald Dworkin noted,⁷² by its coherence within the “existing” law.⁷³ From your perspective, such decisional flexibility points out the commonality between the American legal system and the civil law system. The latter one thrives on this type of argument. The ideals of morality and justice have also placed constraints on legal systems, and the American rule of law uses them as similar constraints too. For example, not all legitimate rules, which come through the proper channels, are or ought to be obeyed as law. In fact, the rules that do not answer the ever-changing social circumstances are often not obeyed. In those situations, order and predictability depends on that society’s ability to formulate new rules that are more apt to reflect those changes. In other words, another reason for updating your research is the changes in the majoritarian definition of justice or morality that might have caused new statutes to be enacted or different decisions to be issued.

⁷² R. Dworkin, *TAKING RIGHTS SERIOUSLY* (1978).

⁷³ Jurgen Habermas, *BETWEEN FACTS AND NORMS. CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 210 et seq. (discussing Dworkin’s theory of law) (1996).

From our first democratic beginnings, Americans believed that the people had a right to change the law when it seemed to them unjust. Legal theoreticians use that belief, for example, to explain the Americans' constitutional right to the judiciary (access to courts and to a jury of one's own peers).⁷⁴ The rule of law inspires respect in our laws because it promotes more than social stability. It promotes justice, often regarded as "a matter of public interest."⁷⁵ However, often justice has been viewed as a procedural value, by contrast with arbitrary exercise of power. For example, the right to jury trials in criminal matters has been viewed as "a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."⁷⁶ It is interesting to note that while justice is easily accepted as a universal concept that transcends cultures, the rule of law has often been defined as local, because enforcing entities have traditionally been local. A cross-cultural definition of justice with which you may already be familiar resides with the Greek philosopher, Aristotle, in his *Nicomachean Ethics*.⁷⁷

Aristotle first spoke about distributive justice, which covers the way in which a society is organized, corrective justice, which helps understand the ways in which undesired changes to the social organization are corrected, retributive justice, which addresses the types of retribution a society favors, and commutative justice.⁷⁸

Talking about commutative justice, it should be said that the American views of what that is change dramatically in time. For example, property rules ensure that

⁷⁴ Morris R. Cohen, AMERICAN THOUGHT. ACritical SKETCH 143 (1954).

⁷⁵ 7 Timothy O. Lenz, CHANGING IMAGES OF LAW IN FILM AND TELEVISION CRIME STORIES 8 (2003).

⁷⁶ [*Duncan v. Louisiana*, 391 U.S. 145, 158–59 \(1968\)](#).

⁷⁷ Aristotle, NICOMACHEAN ETHICS (D. Ross trans., 1925).

⁷⁸ Id. at 1129–34.

individuals (persons or corporations) can own property. While “highly deserving security,”⁷⁹ the revolutionary American politicians, like Wilson, also underlined the principle that property should be a democratic end not a means in itself.⁸⁰ Property rules are thus expected to change from one epoch to another, according to the majority’s political views about what can be held as property. As detailed above, when [Amendment XIII](#) abolished slavery, the body of the American property rules changed dramatically. However, the individual nature of property rules did not change: private property remained the core of our property rules. Only the object of that ownership changed in order to adjust to the majority’s views of what was moral to be held in property. Similarly, when the majority regards as immoral holding Mickey Mouse in quasi-perpetual copyright ownership, Congress will act accordingly, and adjust the copyright law to that view, and stop extending the copyright protection for Disney’s monopoly over Mickey, Minnie, and Goofy.

This chapter briefly explained how law exists because humans need structured societies. Social order is achieved through concrete temporary rules that conform to each society’s values. Each society develops its own constraints over legal norms. Those constraints mold legal norms so that they become an effective legal system that corresponds to the society’s governing needs. When those needs change or disappear then the rules change or disappear, too. All legal norms have a clear role. They promote legitimate order. Legislative and administrative norms, as well as decisional law, govern our future and make sense of our conflict for today and tomorrow. Of

⁷⁹ 1 THE WORKS OF JAMES WILSON 30 (1804).

⁸⁰ *Id.*

course, law depends on other enduring ideals as well. Prime among them are legality of rules and justice. However, while law aspires to be perceived as atemporal, you should avoid falling prey to such an assumption.

Ultimately law is a social tool that has a concrete role and a concrete lifespan, and, when it needs to be changed, it should be changed to avoid letting it become a social oppressor. Perhaps the Civil War could have been avoided if slavery rules had been abandoned and deemed illegal at an earlier phase in American history. For a researcher, the temptation to believe that law is atemporal may cause deficient studies. For a practitioner, such a belief produces incomplete results, and incomplete results are tantamount to professional malpractice. American law is an abstract human construct to the extent that all law is an abstract human construct. However, its ideal of legitimate order rests on concrete legal norms that mirror specific societal needs. When they do not satisfy those needs anymore, and thus are unable to promote legitimate order, they are amended or replaced.

The American legal system is thus dynamic, and understanding its dynamism helps you both strategize your studies and your legal research. The next chapter will go a step further in explaining how the concrete, definite rules of law are created by legislation, judiciary, and administrative bodies. Thus, you will be able to identify the sources of American law, locate their repositories, find the specific legal norms you may want to research, and then update them.

For Further Reading

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Chapter 2

The U.S. Legal System and Its Lawmaking Institutions

A. THE U.S. LEGAL SYSTEM A COMMON LAW SYSTEM

Talking about American law in terms of its abstract and concrete facets has the advantage of -, we did it because clarifying the dual nature of the process of understanding how the U.S. legal system functions and how you are supposed to study and research it. For example, you come in touch with the abstract facet of American law when you study law as the code that steers political power into administrative power.¹ Furthermore, you come in contact with both the concrete and the abstract facet of the law when you study individual rights. From a conceptual standpoint, individual rights can be viewed as powers of law conferred on the individual by the legal order through concrete legal norms, such as statutes or court decisions. Those rights and the norms that confer them will inherently mirror the fundamental values of each society. Some individual rights are common to all societies (and legal systems) that have a similar cultural tradition, such as private property rights are common in all societies today. Other individual rights are more contingent culturally. The individual right to health care or euthanasia are among such specific rights, as are such individual entitlements as welfare.³

From a pragmatism point of view, individual rights go beyond their power of symbolism of empowerment. Rights are what you can do with them. For a

¹ For a further discussion on this topic, see e.g., Jurgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law And Democracy* (1996).

² Id. at 85.

³ For a discussion about welfare entitlements in the American legal system, see, e.g., Lucy Williams, *Welfare and Legal Entitlements: The Social Roots of Poverty, in The Politics of Law. A Progressive Critique* 569 et seq. (D. Kairys ed., 3d ed. 1982).

member of the upper class, property rights surely have the making of a fundamental right. For a member of the underclass, expectedly so, things are totally different; such rights will have lesser value. The U.S. legal system belongs to the common law tradition and it shares its principles and the core of its legal norms with the other common law systems. It is a development of the old English common law, which was aptly described as “the cumulative rules about law as expressed and altered from case to case, from precedent to precedent.”⁴ This official use of cases from precedent to precedent distinguishes it from the other legal systems, such as those that belong to the civil law tradition. Those officially deny any precedential value to court cases and theoretically rely only on parliamentary laws, usually collected in codes. Moreover, our sole reliance on laws whose majority come from different governmental lawmaking institutions, distinguishes our common law tradition-as well as the civil law one-from the various Islamic legal systems whose principal source of law is the Koran, or “the word of God as given to the Prophet.”⁵

As you know, there are major differences among the legal systems that belong to the different traditions mentioned above. Additionally, differences can also be found between the American and the English system, despite their common law roots. For example, England has no written Constitution and, after the Glorious Revolution of 1688, the English Parliament became and has remained the supreme lawmaking institution in England, and it has been its duty to respect the inalienable

⁴ Beryl Harold Levy. *Anglo – American Philosophy of Law. An Introduction to Its Development and Outcome* 12 (1991).

⁵ Steven Vago, *Law and Society* 15 (15th ed. 1997)

rights of the individual. The United States has a written Constitution, which arguably divided the lawmaking duties among the three branches of the government, but it is through sheer common law precedent that we have established the Supreme Court as the supreme lawmaking institution in the United States. In the 19th century, in the famous case of *Marbury v. Madison*,⁶ Chief Justice Marshall established the Court's prerogative-with regard to both statutes and case law-of declaring what constitutes binding law in the United States.

Within the same system, there are various legal norms. Some are called substantive because they are perceived as substantially governing our behavior. Substantive laws are supposed to tell us what our rights and duties are, and we are expected to act accordingly. However, procedural rules do the same thing, with the only difference being that they regulate our behavior vis-à-vis the court system, where we go to protect our rights or clarify our duties. Another distinction has been between laws that govern our behavior vis-à-vis the state (public laws such as constitutional law) and laws that govern our behavior vis-à-vis each other and nongovernmental entities (private corporations). The distinction this book follows is that determined by the source of the legal norm: the lawmaking body that issues it. Statutory law, also known as legislation or "enacted law," is law made by legislatures. Case law, also known as decisional law or "Judge-made" law, is law enacted by judges. Case law usually designates the decisions from intermediate (appellate) courts and courts of last resort. Finally, administrative law covers both rules issued by administrative bodies and decisions reached by them.

⁶ 5 U.S. 137 (1863).

The next section may seem exceedingly simplistic by comparison to the previous one. It will cover the American lawmaking bodies both at the federal and state level. While the information covered there is already known to an American college student, it may be surprisingly new to you. It will provide you with the fundamental terminology you need to start your legal studies of American law. For the rest of this book we will focus on the concrete facet of American law. We will talk about the specific types of legal norms, about how they are created, how you can locate them, and, of course, how you can be sure that what you have located is still binding (good) law.

B. THE LAWMAKING BRANCHES OF THE GOVERNMENT

American law is a system of concrete rules that come from a variety of private and public sources. This chapter will focus on the public lawmaking institutions—the legislative, executive, and judicial branch. Those lawmaking institutions function both at the federal and state level. This chapter will briefly describe how the legislative branch passes statutes, the judiciary branch adjudicates cases and controversies, and how the executive branch and administrative agencies issue rules and adjudicate disputes. If you understand how public law is created and where it is recorded, you will be able to effectively study and research the law of your interest. You will be able to identify the appropriate repositories of law and find what you need. Then you will be able to strategize the most effective way of comprehensively updating your research. You know already that the U.S. government is a federation composed of 50 states. You may also know that the U.S. government is one of separated powers. The voice of the “pure, original fountain of all legitimate authority”⁷ behind this government is the American people. However this fountain has an inherently ambiguous source, as it can be state legislations, federal legislation or the mob—the people itself. Eventually, this ambiguity became clarified: the sovereign people delegated the necessary power to govern to both the state and the federal government. If the people represent the source of legitimacy of public law, both at the federal and state level, nevertheless, the powers of the federal and the state

⁷ A. Hamilton, *The Same Subject Continued (Other Defects of the Present Confederation)*, *The Federalist* No. 22, at 184 (L. Kramnick ed., 1987).

government do not interfere. One of the Founding Fathers stated that “[t]he federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.”⁸

Although separate, the governmental powers exercised through federal and state institutional structures are practically identical. Furthermore, they are open to identical congressional and judicial scrutiny. First, due to its internal-bicameral-organization, legislative bodies successfully make the tyranny of the majority impossible, and make the passage of unconstitutional statutes quasi-impossible. Then, as further detailed below, the judiciary exercises its control over both state and federal legislation every time an aggrieved party brings a lawsuit.⁹

1. Federal and State Legislatures

With one notable exception, Nebraska, both the federal and the state legislative bodies are bi-cameral. For example, the New York legislative body is composed of the State Senate and Assembly.¹⁰

At the federal level, the two congressional chambers are called the Senate and the House of Representatives. Originally, the two chambers had different constituencies and bi-cameralism was supposed to diffuse the eventual tyranny of the

⁸ J. Madison, *The Influence of the State and Federal Governments Compared*, *The Federalist* No. 46, at 297.

⁹ For an in-depth treatment of federalism, see Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425 (1986-1987).

¹⁰ For more information on how to research New York statutory law, see e.g., Ellen Gibson, *New York Legal research Guide* I-28 (2nd ed. 1998).

¹¹ J. Madison, *The Alleged Tendency of the New Plan to Elevate the Few at the Expense of the Many Considered in Connection with Representation*, *The Federalist* No. 57, at 343-47.

majority (mob) and prevent it from legislating against the minority interests.¹¹ The majority was supposed to speak through representatives, and the minority through senators. Unless the two chambers agree on its content, as shown below, no statute can be enacted. Today, there are no institutional concerns regarding the original role of bi-cameralism—that of removing the legislative power from the mob.

From a structural point of view, the composition of the two chambers is different. First, the number of state representatives in the lower chamber changes after each census, and states with growing populations gain representation. However, each state has only two senators to represent its interests in the Senate. Thus, unlike representatives who represent a specific part of the state's constituency, each Senator represents the whole state. Second, while all the representatives are elected at the same time, only one third of the senators are elected at any given time.

From a lawmaking point of view, there are few differences between the two chambers. Members of each one can introduce a bill that they want to become a law. A committee of that chamber will study the bill and recommend passage with or without changes. If it reports back to its chamber with recommendations, further action is taken, and the bill goes to the floor for debate. If the bill passes the debate, it is sent to the other chamber where similar debates are expected. When there are proposed amendments, both chambers of Congress must agree on them. When the houses cannot agree on the content of a bill, the bill is referred to a special committee whose role is to resolve differences between the two legislative houses on the wording of a bill. Unless a bill passes both houses in the same form, it cannot be sent to the President for further legislative action.

At this point in the lawmaking process, the President has a few options. The President can sign the bill into law. The President can do nothing. Then, if Congress is in session, the bill becomes law automatically after ten days. If Congress is not in session when the ten-day period expires, the bill does not become law. The President can also veto the bill. Then, unless Congress overrides the veto by a two-thirds vote of both houses, the bill does not become law either. Once the bill is signed into law, it becomes binding federal statutory law. See [Appendix 3](#).

At the state level, the process is almost identical. A legislator introduces a bill, and then the bill is referred to the appropriate standing committee of the house where it was introduced.¹² When the bill passes both houses, it is sent to the governor's office. Like the President, a governor can sign bills into law, veto them, or take no action on them. Once the bill is signed into law, it becomes binding state statutory law.

2. Federal and State Courts

Generally speaking, the U.S. court system is divided into federal and state courts.¹³ For a comprehensive view of the judiciary, see [Appendix 4](#). Both at the federal and state level, the court system is structured hierarchically. At a minimum, it comprises two types of courts: trial courts and courts of appeal. These are courts of general jurisdiction and can hear any type of case or dispute between two parties. Their responsibility is to explain and interpret the laws and thus solve the litigants' claims on the rights guaranteed to them in the Constitution and by law.

¹² See footnote 11, I-27 et seq.

¹³ See [Appendix 1](#) at <http://www.courts.state.ny.us/courts/structure.shtml>

(a) Federal Courts

The Supreme Court is the highest court within the federal judiciary. It is the only court that was established by the Constitution. Congress can only determine its composition and jurisdiction. The Court reviews federal appeals and state appeals that bear on a federal issue. (See Fig. 13)

As shown in [Appendix 1](#), the Circuit Courts of Appeals are a step below, and their establishment is provided both by the Constitution and later congressional statutes. Theoretically, federal appellate decisions can be further appealed to the U.S.

Fig. 13 Supreme Court Glossary

- All Supreme Court judges are called justices.
- Since 1868, the Court has consisted of nine justices: one “Chief Justice of the United States,” and eight associate justices.
- The number of justices has varied: the Court had as few as five and as many as ten.
- The Supreme Court reviews cases as a matter of right and of discretion. However, in practice, the Supreme Court reviews cases as a matter of discretion, by granting a writ of certiorari. Certiorari means “bring up the record.”¹⁴
- In 2001 the U.S. Supreme Court reviewed 2,210 petitions for a writ of certiorari (requests for review) and granted 82, less than 4 percent.¹⁵

¹⁴ William Burnham, *Introduction To The Law and Legal System of The United States*, at 176 (1996).

¹⁵ Jane Ginsburg, *Legal Methods* at 16 (2d ed. 2004).

Supreme Court,¹⁶ but due to the limited number of certiorari the Supreme Court grants every year, an appellate ruling represents the final decision in most cases.

There are 12 regional circuits. They are organized geographically so that each circuit court of appeals serves more than one state. Each circuit has a court of appeals. For example, the Court of Appeals for the Second Circuit serves three states: Connecticut, New York, and Vermont. Thus, New York is covered by the second regional circuit, and its intermediary court is called the Court of Appeals for the Second Circuit.

In addition there are specialized courts that can hear only appeals in specialized cases. For example, the Federal Circuit Court handles appeals that involve patents as well as appeals from the Claims Court and the Court of International Trade.¹⁷

A court of appeals hears appeals from both the district courts located within its circuit, and from decisions of federal administrative agencies.¹⁸ For example, the appeals of the federal administrative agency called The National Labor Review Board (NLRB), will be heard either by the court of appeals of the place of the violation or that of the place of the NLRB's headquarters.

Each court of appeals covers one or more district courts. The district courts are the lowest level of federal courts. There are 94 federal judicial districts. Each state, including the District of Columbia and Puerto Rico, is covered by at least one federal district. Three territories of the United States-the Virgin Islands,

¹⁶ [Appendix 2](http://www.courts.state.ny.us/courts/structure.shtml), at <http://www.courts.state.ny.us/courts/structure.shtml>

¹⁷ U.S. Courts, at <http://www.uscourts.gov/courtsofappeals.html>

¹⁸ Id.

Guam, and the Northern Mariana Islands-have district courts that hear federal cases as well.¹⁹ There are four district courts that cover New York. The federal district court that covers Manhattan is called the U.S. District Court for the Southern District of New York.²⁰

The district courts are courts of general jurisdiction that can hear all cases under the federal Constitution or a federal statute and controversies between citizens of different states. They are not restricted by law to hear only disputes limited to a specific subject matter. District (trial) courts are the place where a lawsuit is brought and tried. Aggrieved individuals (persons or corporations) file their complaints there, explaining both the factual and legal issues that entitle them to relief from the courts. The party against the lawsuit, the defendant, attempts to contradict the plaintiff's narrative. The defendant joins the plaintiff in court and presents evidence to persuade the fact finder, either the jury or the judge, about the factual issues at hand in the lawsuit. Upon hearing the evidence and the arguments made by each party's lawyer, the jury finds in favor of one of the parties, according to the instructions about the applicable law given by the judge.

District court decisions are open to changes in appeal. The appeal stage may involve two levels of scrutiny: one from an intermediary court and another from the court of last resort. At the federal level, the court of last resort is the Supreme Court. However, unlike in civil law countries, the appeal in the American legal system involves only a

¹⁹ For more information, see U.S. Courts, at <http://www.uscourts.gov/districtcourts.html>

²⁰ See <http://www.nysd.uscourts.gov/>

review of the law and not of the facts. Thus, the district court has the last word in factual matters. Additionally, in light of the very small number of appellate courts, it is obvious that only a small percent of the district court decisions are appealed. Thus, the reality is that often district courts hold the last word in questions of law as well. Courts make law through the decisions they issue as part of well-argued opinions. As you will see in Chapter 3, opinions have a rigorous structure and through exercise one can identify their ruling. Usually federal case law designates the decisions that benefit of precedential value and come from appellate courts and the court of last resort. However, although depleted of precedential value, district court decisions, when not appealed, constitute the final law in a case and thus are worth recording and researching.

According to the level of the court that issues them, decisions differ in their authority to dictate future courts to follow the same decision in similar factual contexts. Their authority-precedential value-varies according to the doctrine of stare decisis, which is further detailed in Chapter 4.

(b) State Courts

Each of the 50 states of the United States has its own system of courts, whose structure mirrors the federal court system.

While the court nomenclatures differ from state to state, they follow the same common law principle like the federal court system. State decisions from the “lower” (or trial) courts have to follow the precedent established by similar decisions from higher ranking courts (appellate courts and courts of last resort). In New York, disputes that involve state law-either statutory or case law-will be tried in trial courts, which are known as the “Supreme Court.” Those decisions can be appealed to the Appellate Divisions of the Supreme Court. The court of last resort in New York, unlike in most other states, is the Court of Appeals.²¹ All court opinions are collected in court reporters: federal court opinions are collected in federal reporters and state court opinions are collected in state and regional reporters. These are accessible in print and on line.

3. The Executive Branch Independent Administrative Agencies

The executive branch has a significant lawmaking component both at the federal and the state level. The federal executive branch is headed by the President of the United States, and it is composed of the Vice President, the Cabinet, and the independent agencies. Each has special powers and functions, and each is authorized to issue binding rules.

²¹ See [Appendix 2](http://www.courts.state.ny.us/courts/structure.shtml) at <http://www.courts.state.ny.us/courts/structure.shtml>

(a) The President

The President is elected every four years from a limited pool of presidential candidates who are chosen by their political parties in the months before the election. Usually the election is between a Republican and a Democratic candidate, because the Republican and Democratic parties are the largest political parties in the United States. It is worth noting that people in each state vote indirectly for their choice for President. The people only vote for the electors who form the electoral college. Each state has a well-established number of electors, which is the same as the number of representatives plus the number of senators representing the state in Congress. The electors will meet after the November election, and vote for the President. Their choice will echo that of the largest number of people in their state.

After F.D. Roosevelt's presidential tenure, the Federal Constitution was amended to impose presidential term limits.²² Since 1951, a President may serve only two terms of four years.²³

The President exercises considerable lawmaking powers. The President exercises them directly, by signing federal bills

²² [Amendment XXII](#) - Presidential Term Limits - was passed by Congress on March 21, 1947, and then ratified on February 27, 1951.

²³ Id.

into law or vetoing them, enforcing the treaties of the United States or by issuing executive orders. Through executive orders Presidents may establish administrative agencies for the purpose of administering a specific piece of legislation, or a specific social and economic problem. According to the presidential prerogatives decreed by Congress in Chapter 9, title 5 of the United States Code, for instance, President Nixon established the Environmental Protection Agency (EPA) in 1970 through a reorganization plan that consolidated several existing agencies.²⁴ The President's lawmaking powers may be also exercised indirectly, by appointing the Cabinet members, the heads of independent agencies, as well as the Supreme Court justices and the federal courts judges.

(b) The Vice President

The Vice President presides over the Senate and votes in case of a tie. The Vice President becomes President if the President is disabled or otherwise cannot serve.

²⁴ 3 U.S.C. CAN., 91st Cong., 2d Sess. (1970).

²⁵ Office Of The Federal Register.
National Archives And Records Administration,
The United States Government Manual (2009/10),
<http://www.gpoaccess.gov/gmanual/index.html>

(c) The Cabinet

The Cabinet is “a creation of custom and tradition dating back to George Washington’s administration, functions at the pleasure of the President.”²⁵

It includes the Vice President and the heads of the executive departments, which usually are called Secretaries. Those departments carry out government policies that ensure the functioning of our government. During George Washington’s Presidency, there were only four Cabinet members: Secretary of State, Secretary of Treasury, Secretary of War, and Attorney General. Today, under Barak Obama’s Presidency there are 16 cabinet members (See Fig. 14).

Fig. 14

<http://www.whitehouse.gov/administration/cabinet>

VICE PRESIDENT OF
THE UNITED STATES

Joseph R. Biden

[http://www.whitehouse.gov/
administration/vice-president-biden](http://www.whitehouse.gov/administration/vice-president-biden)

DEPARTMENT OF STATE

Secretary

Hillary Rodham Clinton

<http://www.state.gov>

DEPARTMENT OF THE TREASURY

Secretary

Timothy F. Geithner

<http://www.treasury.gov>

DEPARTMENT OF DEFENSE

Secretary

Robert M. Gates

<http://www.defense.gov>

DEPARTMENT OF JUSTICE

Attorney General

Eric H. Holder, Jr.

<http://www.usdoj.gov>

DEPARTMENT OF THE INTERIOR

Secretary

Kenneth L. Salazar

<http://www.doi.gov>

Fig. 14 (cont.)

<http://www.whitehouse.gov/administration/cabinet>

DEPARTMENT OF AGRICULTURE

Secretary

Thomas J. Vilsack

<http://www.usda.gov>

DEPARTMENT OF

TRANSPORTATION

Secretary

Ray LaHood

<http://www.dot.gov>

DEPARTMENT OF COMMERCE

Secretary

Gary F. Locke

<http://www.commerce.gov>

DEPARTMENT OF ENERGY

Secretary

Steven Chu

<http://www.energy.gov>

DEPARTMENT OF LABOR

Secretary

Hilda L. Solis

<http://www.dol.gov>

DEPARTMENT OF EDUCATION

Secretary

Arne Duncan

<http://www.ed.gov>

DEPARTMENT OF HEALTH AND

HUMAN SERVICES

Secretary

Kathleen Sebelius

<http://www.hhs.gov>

DEPARTMENT OF VETERANS AFFAIRS

Secretary

Eric K. Shinseki

<http://www.va.gov>

DEPARTMENT OF HOUSING AND

URBAN DEVELOPMENT

Secretary

Shaun L.S. Donovan

<http://www.hud.gov>

DEPARTMENT OF HOMELAND

SECURITY

Secretary

Janet A. Napolitano

<http://www.dhs.gov>

Cabinet members are similar to European ministers who form any given government. Additionally, President Barack Obama has accorded Cabinet-level rank to other administrators. They are listed in Fig 15.

Fig. 15

<http://www.whitehouse.gov/administration/cabinet>

The following positions have the status of Cabinet-rank:

WHITE HOUSE CHIEF OF STAFF

Rahm I. Emanuel

<http://www.whitehouse.gov/administration/staff/rahm-emanuel>

UNITED STATES TRADE REPRESENTATIVE

Ambassador

Ronald Kirk

<http://www.ustr.gov>

ENVIRONMENTAL
PROTECTION AGENCY

Administrator

Lisa P. Jackson

<http://www.epa.gov>

UNITED STATES AMBASSADOR
TO THE UNITED NATIONS

Ambassador

Susan Rice

<http://www.usunnewyork.usmission.gov/>

OFFICE OF MANAGEMENT
AND BUDGET

Director

Peter R. Orszag

<http://www.whitehouse.gov/omb>

COUNCIL OF ECONOMIC ADVISERS

Chair

Christina Romer

<http://www.whitehouse.gov/administration/eop/cea/>

(d) Independent Agencies

The independent (administrative) agencies differ from departments. First, their scope is more limited in substance. Second, at least theoretically, they are intended to be temporary.²⁶

²⁶ For a list of current federal agencies, see Federal Agencies and Commissions, at http://www.usa.gov/Agencies/Federal/All_Agencies/index.shtml

²⁷ *Government Agencies*, 184 (Donald R. Whitnah ed., 1983).

²⁸ Id. 243

²⁹ Id. xxvi

Administrative agencies are the result of an ever-expanding government that tries to represent as many interests as possible. Their role is to deal with a complex existing or rising social and economic problems. As a result, often, they both issue binding rules of general application and solve particular disputes within their jurisdiction.

In light of their purpose, administrative agencies are authorized to implement their enabling statute or presidential order. Accordingly, they issue rules and regulations, and sometimes even solve disputes that arise within their jurisdiction. For example, the Environmental Protection Agency (EPA) acts under several enabling statutes.²⁷ Its lawmaking functions include both adopting rules and regulations, which further detail environmental statutes, and initiating litigation to promote the statutory standards established by those statutes, such as those provided by the Clean Air Act of 1955 and Safe Drinking Water Act of 1978. The creation of the Federal Trade Commission (FTC) was enabled by the Federal Trade Commission Act of September 1914. Its purpose is to promote fair competition in the economy, by instituting anti-trust cases and intervening in consumer and business affairs.²⁸

Early in the 20th century, if big business necessitated the Securities and Exchange Commission (SEC), then “burgeoning labor and its troubles with business resulted in the National Labor Relations Board (NLRB).”²⁹

The NLRB³⁰ was created by the National Labor Relations Act of 1935.³¹ It is among the most important administrative agencies “not only because of its widespread effect on administrative law, but also because of its major role in making

and implementing national labor policy.”³² Finally, another major agency is the Securities and Exchange Commission (SEC)³³ which was created by the Securities and Exchange Act of 1934, out of a national need to curb fraudulent stock and investment practices after the Great Crash of 1929.³⁴

Similarly, at the state level, the executive branch is in charge of implementing state legislation. Furthermore, the governors, not unlike the President, function as “catalytic agents in the legislative process”³⁵ by structuring support through interest groups and party leaders for different pieces of legislation within the legislative bodies. Additionally, it should be noted that at the local level too, the executive branch is complemented by state agencies in charge of dealing with existing or rising social and economic problems statewide.³⁶

³⁰ <http://www.nlr.gov/>

³¹ http://www.nlr.gov/about_us/overview/national_labor_relations_act.aspx

³² *Government Agencies* 338 (Donald R. Whitnah ed., 1983).

³³ <http://www.sec.gov>

³⁴ *Government Agencies* 474

³⁵ Steven Vago, *Law and Society* 125 (1997).

³⁶ For a list of all state agencies, see <http://www.statelocalgov.net>

C. CONCLUSION

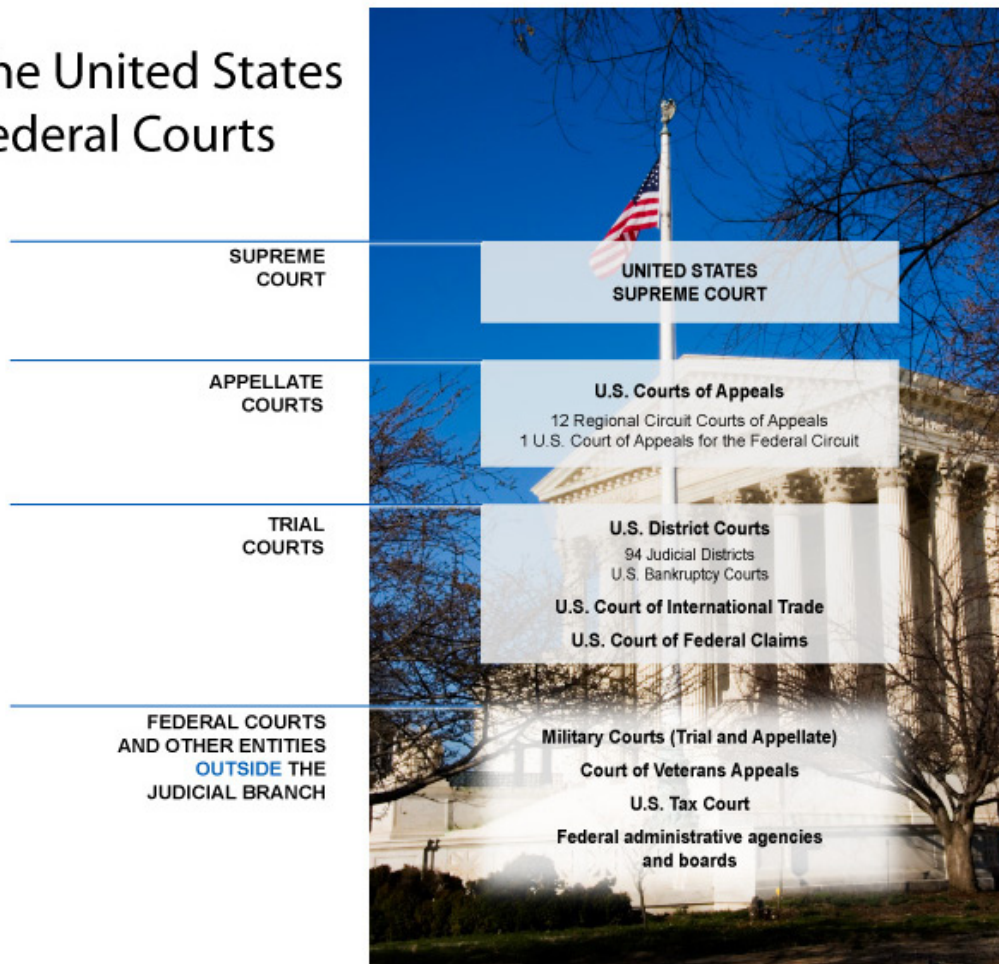
This chapter identified the lawmaking bodies of American public law. Later on you will learn how they work and where and how you can find the product of their rule making and decisionmaking authority. By now you know that the U.S. legal system has the same social, economic, political, and moral constraints as any other legal system, and that the function of the American legal system is to promote legitimate order according to the core cultural values of individual liberalism. While the core cultural values remain the same, society and the way it understands them change. Thus, the American legal system is dynamic within well-established limits: those imposed by the rule of law. Understanding these idiosyncrasies will help you adjust quicker to the demands imposed on you by the study of law in its dual, concrete and abstract, aspect.

Next let's take a more in-depth look at each type of public norm-legislation, case law, and administrative law. You know that they are all open to judicial and congressional scrutiny. You also know that they survive it only if they are the result of legitimate exercise of public authority and their content does not violate the requirements imposed by the rule of law. Next, you will learn how they differ, and how that affects your studies and legal research. You will see how judicial and congressional scrutiny happens differently for each type of norm, and that will affect the way in which you will strategize your studies and research.

APPENDIX 1

THE STRUCTURE OF THE FEDERAL JUDICIAR

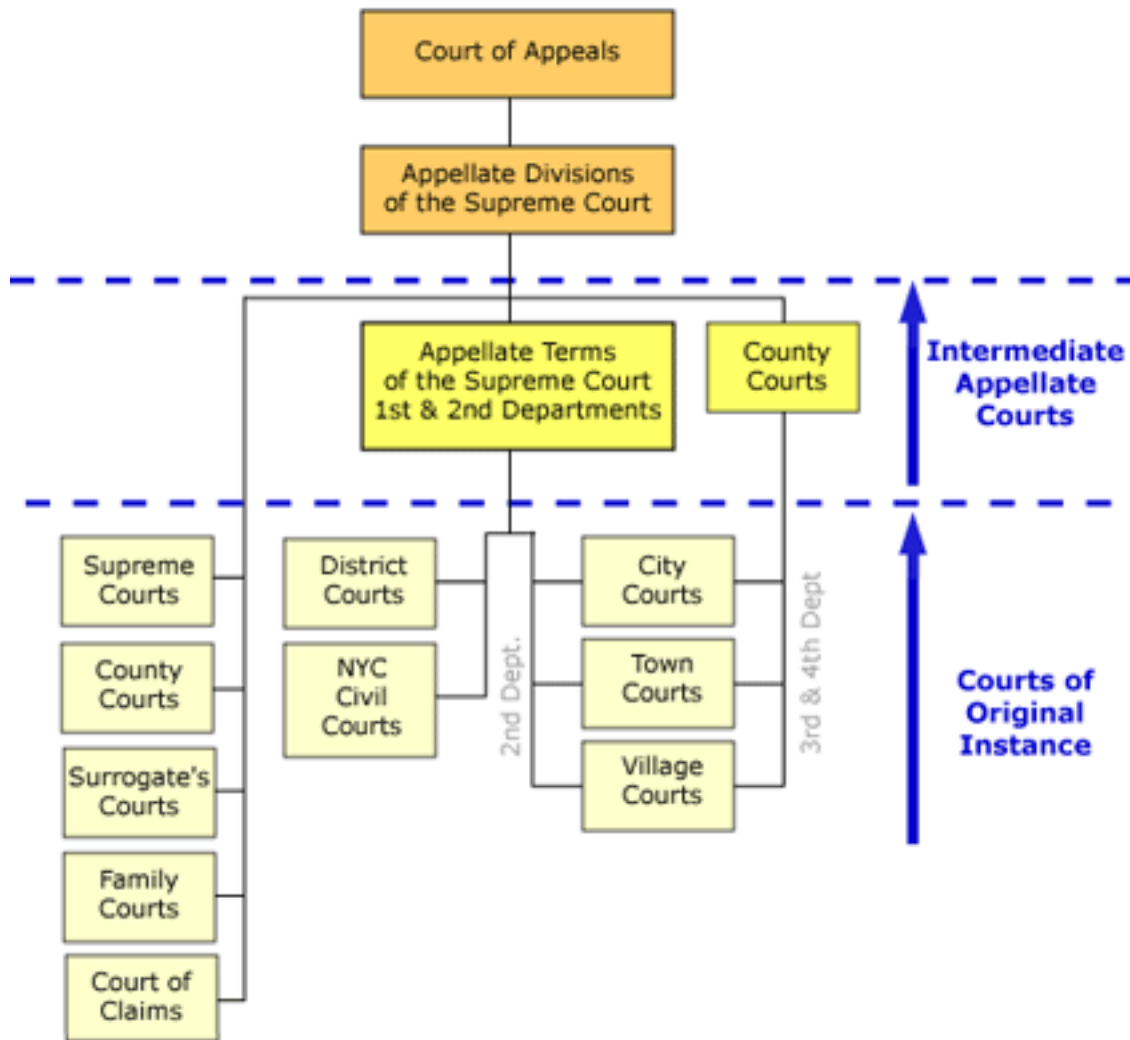
The United States Federal Courts



<http://www.uscourts.gov/outreach/structure.jpg>

**APPENDIX 2
THE STRUCTURE OF THE N.Y. STATE JUDICIARY**

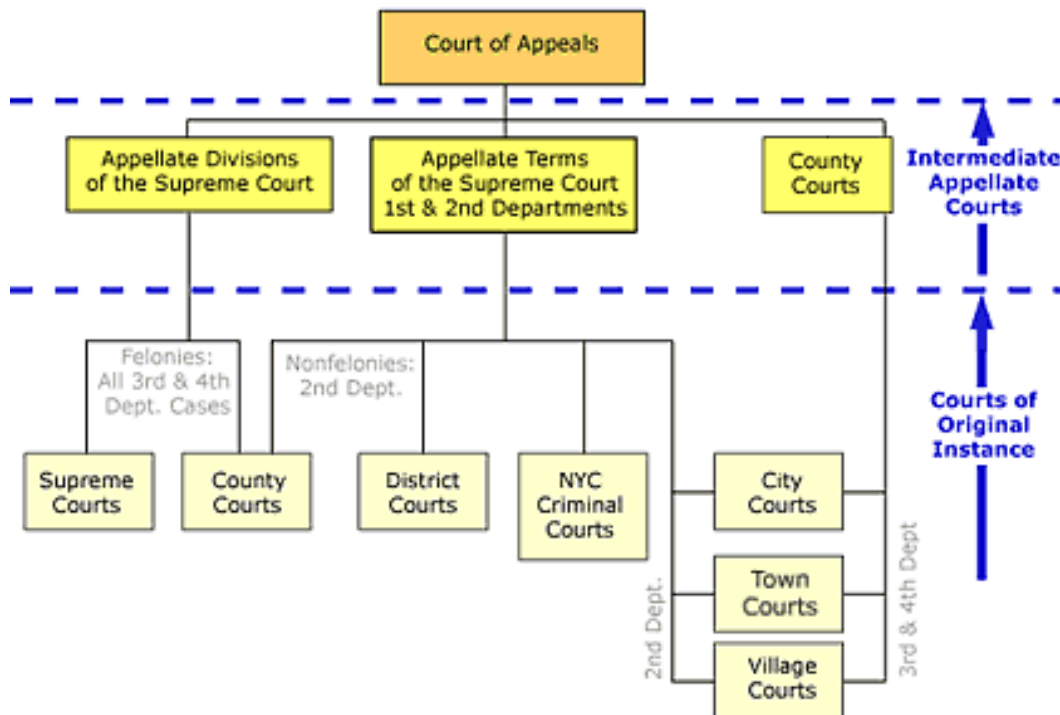
CIVIL COURT STRUCTURE



<http://www.courts.state.ny.us/courts/structure.shtml>

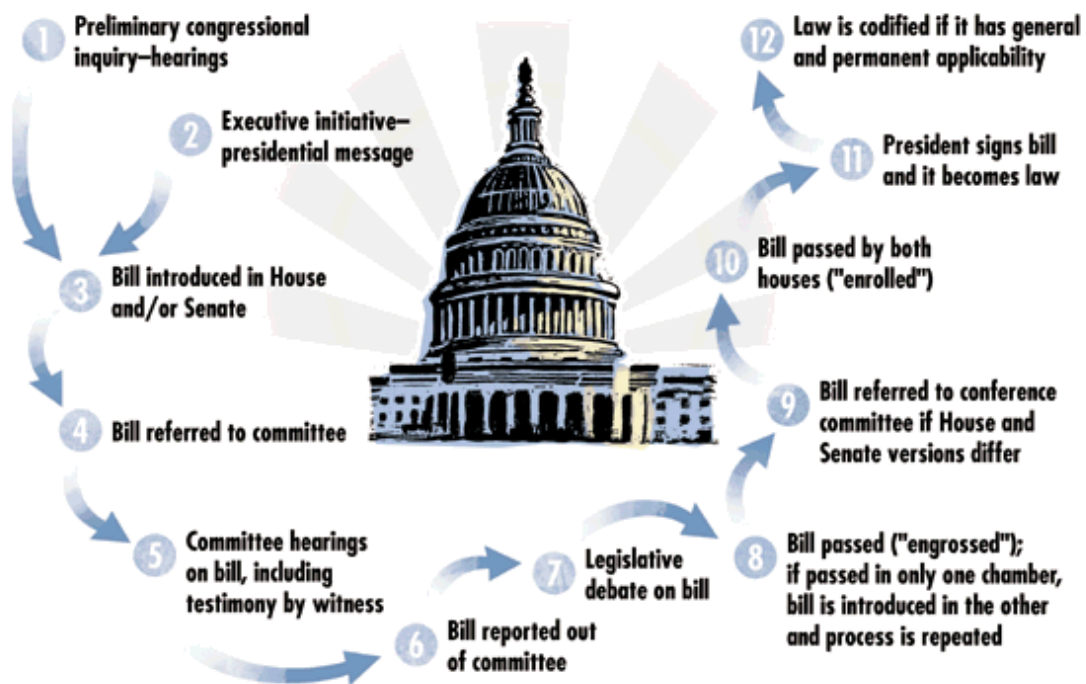
APPENDIX 2 THE STRUCTURE OF THE N.Y. STATE JUDICIARY

CRIMINAL COURT STRUCTURE



<http://www.courts.state.ny.us/courts/structure.shtml>

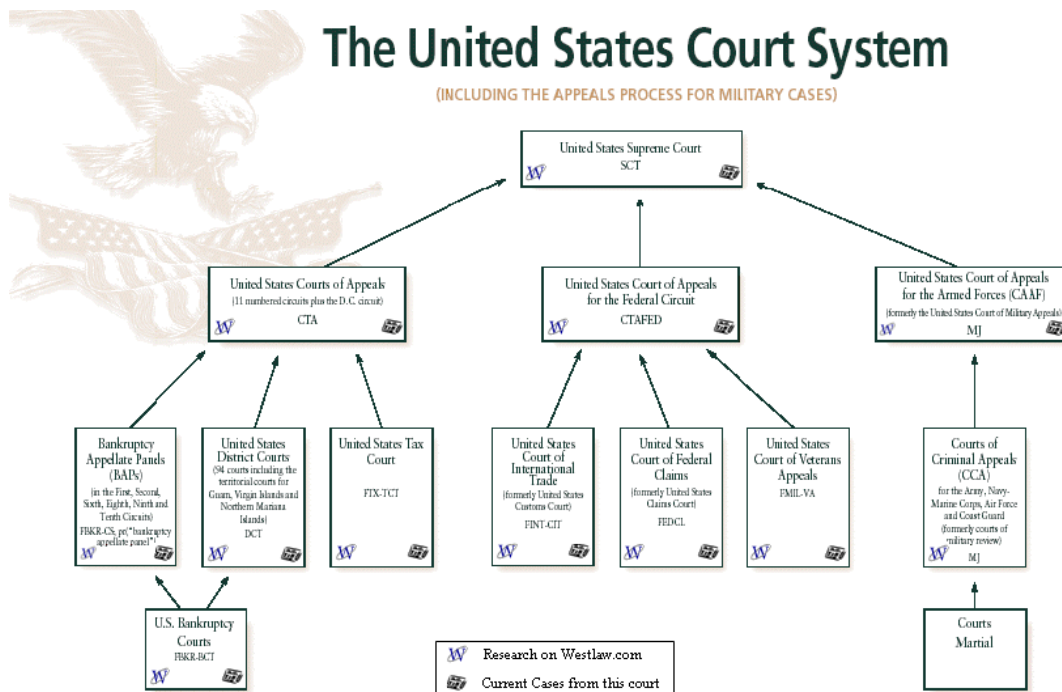
APPENDIX 3 THE CONGRESSIONAL LAW MAKING PROCESS



<http://west.thomson.com/signup/newsletters/keypoints-state/2009-mar/article1.aspx>

APPENDIX 4

THE STRUCTURE OF THE UNITED STATES JUDICIARY



<http://wlwatch.Westlaw.com/aca/west/images/uscrtsys.gif>

For Further Reading

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In-Class Exercises

1. How would you define case law, statutory law, and administrative law?
2. What do you consider to be the main difference between case law and statutory law?
3. What do you see as the connection between statutory and administrative law?

Chapter 3

Basic Principles of Legal Research

A. INTRODUCTION

Chapters 1 and 2 explained American law as a human construct, which aims to promote legitimate order through its myriad of concrete temporal norms. Those norms may be public or private. The public norms are: legislation, decisional, or administrative law. Chapters 1 and 2 also gave you a sense of how American law emerges and works. They identified the institutions of public lawmaking. It became apparent that all three branches of the government make law both at the federal and at the state level, although lawmaking powers may not be expressly provided for in either the federal Constitution or its state counterparts. The federal Constitution states that all legislative powers are vested in Congress (Article I, Section 1)¹, and that the judicial power vested in the Supreme Court covers cases and controversies (Article III, Section 2)². Indeed, legislatures, through elected representatives, whether in Congress, State Assemblies or City Councils, enact statutes. The judicial branch—the federal and state court system—is responsible for solving specific disputes.

However, in the process of applying the law and solving a dispute, courts make law. Each decision, through the doctrine of *stare decisis*, will further govern similar cases in the lower courts within the same jurisdiction. Theoretically, the way in which a court applies a statute becomes the way next time a lower court within the same jurisdiction, when faced with a similar fact pattern, will be expected to interpret and apply that statute. To this extent, the meaning of a statute is a court construct.

¹ See Constitution Of The United States And The Declaration Of Independence, Pocket Edition. (2002), available at <http://www.gpoaccess.gov/constitution/index.html>

² Id.

The executive branch also makes law. While it is theoretically charged with enforcing the statutes, in doing so it issues its own legally binding rules. The President, like all state governors, issues executive orders. The federal and state agencies issue specific regulations that further detail the rules contained in their enabling statutes. Additionally, upon private complaints, agencies may conduct quasi-trials, which are called hearings, and issue decisions, which are similar to a court's decisions.

Learning about law is also learning to research its specific norms. You may have different interests that will prompt you toward learning about the law, but notwithstanding them, there are specific principles that apply to any legal studies and research endeavor. They will be further discussed here. First, researching the U.S. legal system rarely is a simple task. You have realized by now that law is often written in a jargon that is not user-friendly, and the most effective way to be sure that you found what you want is by identifying a “secondary source” or a commentary on that rule that will explain it to you.

Before you start searching for a specific piece of legislation, case law or administrative regulation, in other words a primary source, you should find a commentary about it, or if the research question is multi-faceted, perhaps you need to come up with a research plan. A research plan encourages you to organize the information you know and focus on how you can use what you know to find what you do not know. The steps of an easy research plan are mentioned on the page that follows, Fig. 16.

Fig. 16
The Research Plan

- restate the research question with an eye for research terms and legal repositories of law (primary sources) and legal commentaries (secondary sources)
- identify the secondary sources you believe would more helpful;
- think about how you would use them;
- identify the potential repositories of primary sources;
- remember the research terms you may want to use to locate your answer within those repositories; and
- make sure to plan to verify the status of your answer, whether it still is good law.

Often, your resources and specific needs may dictate your research strategy. Especially from outside the United States, your search may be circumscribed to electronic, free-of-charge databases. But, free electronic databases, such as the official, government-sponsored, databases, are not always as often and as remain the same, the strategy you will employ to update your results are different than that used by a researcher who uses fee-based databases.

For example, federal statutes are available for free, but finding the most recent version of the relevant statute may require full-text search strategies that are easily elusive to many. Similarly, many court opinions are available free-of-charge from various web sites, but only fee-based databases can ensure, whether the court opinion

you are interested in is still good law, or has been reversed, or otherwise changed by the court of a higher rank within the same jurisdiction. As shown here, while many aspects of legal research are a click away, that click can be prohibitively expensive. That is why, once you have a good research plan in place, get into the habit of keeping a blog-like record of your research steps, so you will not go twice to the same repository of law, or repeat a mistake research query.

To help you prepare for the research process, let's start by identifying the role of secondary and primary sources, their repositories, and how specific primary and secondary sources can be located within various repositories.

B. ON SECONDARY SOURCES

In legal research, secondary sources are concepts with multiple meanings, but their main role is well-settled. Secondary sources help the researcher find the answer, the primary sources. How that role is performed depends on many factors, and most importantly perhaps, their meaning.

In their narrower meaning secondary sources represent narratives which explain the meaning of primary sources, of the law. As such, secondary sources have a somewhat lesser role in American law, than the pervasive role the doctrine, “la doctrine” or “la dottrina” has in both international law and in civil law systems. The doctrine is the product of writings of professors and other scholars, which both explains and evidences the law. In American law, they only persuade judges to accept a certain interpretation of a statute, or certain case as the precedent to be followed.

REMEMBER

- Sources are only persuasive when they are not binding and cannot influence a court directly.
- All secondary sources and primary sources from another jurisdiction are persuasive.

Within their broader sense, secondary sources have a more complex supporting role, as shown in Fig. 17, below.

Fig. 17
Using Secondary Sources in Legal Research to:

- identify relevant legal scholarship (indexes)
- identify legal meanings for polysemic concepts (dictionaries)
- identify the correct repositories of law (research guides)

Among secondary sources, as further defined here, legal scholarship, the American version of legal doctrine, has a more nuanced role (see Fig 18), which stems from that initial plan of action all researchers encounter, whether they are aware of it or not.

Fig. 18
The Role of Scholarship in Legal Research To:

- explain the research question
- explain research options
- focus the researcher's attention to a specific legal area
- identify potentially relevant primary sources

Typically, secondary sources are useful because they function as a finding-aid tool. They help locate relevant legal scholarship (indexes) or even relevant primary sources (legal scholarship). For a student of law, because they summarize, restate, review, analyze, and interpret the law, secondary sources, especially legal scholarship, may often represent both the beginning and the end of the legal research process.

For example, if you write a paper about the New York law regarding non-criminal “unconscious aiding and abetting,” reading some piece of legal scholarship may be all you need to do. There are many strategies to find what you need in the most effective way. If you deem that the issue is esoteric enough, then rather than consulting a book, an article, such as a law review article, may be the fastest way to find what you need. Once you identify the best index to locate relevant law review articles, you use it to perform a search for articles. In this instance, you may find that a law article, such as the one identified as 16 *TOURO L. REV.* 25 (1999)³, offers you the information you need.

Legal practitioners look at a secondary source in a different way than a non-practitioner. Secondary sources help them start the legal research process, and may help them frame a legal argument when they present their client’s case in front of a judge. When practitioners cannot find a binding primary source, then they look for sources of persuasive authority. Thus, for practitioners, whether attorneys, or law librarians, secondary sources rarely represent the end of the legal research process. By their very essence, they are a commentary on specific legal rules, and not the law itself.

³ Dana Neacșu, [Concert of action by substantial assistance: what ever happened to unconscious aiding and abetting?](#), 16 *TOURO L. REV.* 25 (1999).

In addition to not being the law, and consequently not the correct source to rely on when giving a client legal advice, there are many technical and cultural aspects that make secondary sources secondary in importance. However, many of those reasons have changed since this book was first published.

First, secondary sources used to have built in them, by their very own nature, time gaps. From the moment any author produced a commentary and a publication published it, many primary sources could have changed their status: statutory amendments or court appeals could have taken place. Certainly, with the new movement toward [open publishing](#), the time from finalizing a secondary source and its public accessibility is substantially minimized. Nevertheless, if this reason has disappeared, their biased content remains an obstacle to using secondary sources alone in formulating an objective opinion on the applicable law. As further detailed below, the largest part of legal scholarship is represented by law review articles, which not only interpret and explain the law, but also promote a particular point of view.

Despite these arguable flaws, and despite the progress the fee-based databases, such as WestlawNext, which aim to present the researcher an integrated approach to legal research where primary and secondary sources are amassed in one relevant-looking answer, secondary sources remain the pivotal starting point in legal research. Below, are some of the reasons for mastering secondary sources. I will start with what Bob Berring calls “research-aid tools,” then move to finding-aid tools, and end with legal scholarship and practitioners’ tools.

C. SECONDARY SOURCES: THE HOW, WHEN, AND WHY OF EACH TYPE OF SECONDARY SOURCES

1. Using Research–Aid Tools

(a) Before You Research, Make Sure that You Understand the Terminology:

- Legal Dictionaries

Depending on how versed you are in law, a legal dictionary may be the first secondary source you need before tackling your legal query. Aside from basic English legal jargon, American law still contains Latin phrases, which need specific translations. For example, our *writ of certiorari* - through which the Supreme Court decides to review lower courts' decisions - comes from the Latin *certiorari*. According to *Black's Law Dictionary*, arguably the best legal dictionary of American law, and available on [Westlaw](#), *certiorari* means “to be more fully informed.”⁴ Whether knowing its Latin meaning helps you understand how the institution functions may be arguable. Nevertheless, using a legal dictionary, if it becomes a habit, may help you stay focused and avoid desperate moments of unnecessary confusion.

Aside from *Black's Law Dictionary*, there are other legal language reference works. Some of them are more modest in content. They are focused on a specific legal area, such as Lee's *Dictionary of Environmental Legal Terms*, which defines the terms according to the specific environmental legal rule that contains them. For example, “acid rain program” is defined according to the administrative regulation that established it, 40 G.F.R. Section 72.2 (2002),

⁴ BLACK'S LAW DICTIONARY 242 (8th ed. 2004).

as “the national sulfur dioxide and nitrogen oxides air pollution control and emissions reduction program.”⁵

(b) Before You Research, Make Sure that You Understand the Citation

• Citations Guides

Another research-aid tool that should get even more spotlight than it does, is citation guides. Citation guides make sense of the most prominent, but immensely obscure elements of legal identifiers: citations.

The main identifier for legal information is a condensed citation. Earlier in this book you came across citations of both secondary and primary sources. 16 TOURO L. REV. 25 and 40 C.F.R. Section 72.2 (2002) represent such legal citations. The first one identifies a law review articles. The second one identifies an administrative regulation. They use specific rules of citations, whose purpose are briefly mentioned below in Fig. 19.

Fig. 19 The Identifying Role of Legal Citations

- identify the type of the document, whether it is a primary or secondary source
- and*—
- within that typology, what hierarchical place it occupies (whether it is a case, statute, or an administrative regulation)

⁵ C.C. LEE, DICTIONARY OF ENVIRONMENTAL LEGAL TERMS 5 (1997).

For example. The “16 TOURO L. REV.25” refers to a secondary source. More precisely it identifies an article that was published in the 16th volume of the Touro Law Review at page 25. reading 40 C.F.R. Section 72.2 (2002) tells the researcher that the document is a primary source. C.F.R stands for THE CODE OF FEDERAL REGULATIONS, a codification of all federal rules and regulations broken down by subject matter. The number that precedes the abbreviation, “40” indicates the title of the C.F.R to which the administrative regulation relates (e.g., title 40 concerns environmental protection), while the number that follows the abbreviation, “72.2,” indicates the section number of the regulation. The year, “2002,” is the last time that regulation was updated. Thus, although you may not know its name, you know its address, so it will be easy to locate once you choose the repository of administrative regulations you want to use: in print or online.

Unlike any other citation rules, legal citation incorporates a lot of substantive legal knowledge. It both conveys knowledge to the reader and lives on assumed knowledge. This double cognitive role enables legal citations to perform an additional function: they signal the reader how much value the source they are consulting has in their legal research process. The more the reader knows about primary and secondary sources, the more information the reader extracts from the citation. A law review article is as important as the publication it carries it. An administrative regulation is as important as the statute enabling it or the opinion referring to it.

There are a few sources that would help you make sense of any legal citation. Peter Martin’s *Introduction to Basic Legal Citation*⁶ is easily accessible online.

However it is not meant to be comprehensive. It does not cover the meaning of every single abbreviation of American law sources: either primary or secondary.

However, *Bieber's Dictionary of Legal Abbreviations*, edited by Mary M. Price, assistant director of the Law Library at Vanderbilt Law School, and available on [Lexis](#), provides extensive coverage of all legal abbreviations within the U.S. legal system. It thus helps you understand the abbreviations for titles, terms, and names used in American legal literature.

The legal academe relies on the citation rules contained in *The Bluebook: A Uniform System of Citation*⁷. All legal scholarship uniformly relies on the Bluebook rule. In addition to citation rules, the Bluebook is also useful because it lists all federal and state primary sources, and identifies them both by their full title and their legal abbreviations. For example, if you are interested in learning the name of the repositories that cover the Supreme Court decisions, all you need to do is go to the section of the Bluebook called the “Table on United States Jurisdiction” (T.1) and search for the names of the Supreme Court reporters. In addition to their names, you will also learn the time frame covered. For example, just by using the Bluebook, you find out that the name of one of the reporters is the United States Reports, that it covers all opinions starting with those decided in 1790, and that its abbreviation is “U.S.”

⁶ See <http://www.law.cornell.edu/citation>

⁷ Available online at <http://www.legalbluebook.com>

**(c) Before You Research, Make Sure that You Understand
How to Research:**

• Legal Research Guides

Starting on the right foot is what a legal guide should be able to do for you. If that legal guide is authored by a law librarian, you should find yourself fortunate. For example, one of the pre-research daunting tasks is to know where you can go and find the best starting point for your legal research. Law reference librarians at Georgetown Law Library have pre-empted your effort by posting such a library guide. <http://www.ll.georgetown.edu/guides/secondary.cfm>

**• A few basic reasons for choosing a specific type
of legal scholarship**

Legal scholarship is authored by members of the academe, whether faculty members, or students, members of the academe auxiliary, law librarians, or even practitioners to explain what the law is in a particular area. They have an academic audience in mind (the pool that produced the authors), but can be used by practitioners as tools of persuasion.

If you know that you have a good grasp of the issues in question, and that you understand them sufficiently that searching for secondary sources will be meaningful and bring you a responsive source that covers your topic, then the next step is to learn how you can locate those commentaries about the law.

2. Using Finding–Aid Tools

(a) Library Catalogs and More

Legal scholarship, as well as many sources of legal analysis published in book-format as can and should be located through online library catalogs, because they are free-of charge, and unlike [Google Books](#), a catalog search has the benefits of an index search conceived by a legal expert. Law library catalogs index their collection and offer the researcher a quick access to their highly specialized holdings. For example, through a “title,” or “keyword” field restrictions, and furthermore, a geographical location restriction, an index can quickly give the researcher an idea of the best starting point because of the substantive expertise of the legal academia and the information management expertise of the librarian.

For example, [Pegasus](#), the online 2nd generation catalog of the law school library at Columbia Law School, whose features I know best because I worked conceiving them with some excellent cataloguers, offers the researcher the advantage of quickly locating the most popular treatises on any general subjects such as “contracts” or “torts,” through a title and limited-collection search. By typing “contracts” in the title field and limiting the search to “Third Floor Reserve,” the researcher obtains only ten (10) hits. They represent those treatises and other legal monographs that the Columbia Law School faculty found to be the most relevant as of the date of the search, which, librarians located in the most selective part of the library, the third floor reserves.

If in a catalog-search I advise users to avoid the search option in the “Subject” field, because the choices within that field are restricted to a controlled

vocabulary according to the subject headings designated by the Library of Congress, subject should be highly used through Google Books. For example, if you look for introductory monographs on legal research, by typing “introduction” in the title field and “legal research” in the subject field, should be sufficiently limiting and comprehensive to produce a solid list of relevant material. You will be well-advised to start with the well-established authors in the field, and the most recent edition. In legal research, we always want the law applicable the day of the inquiry.

Both [Lexis](#) and [Westlaw](#) have searching features similar to the field search offered by any library catalog. For example, if you know the title of the treatise you want to locate you may do so through “Find a Source” on [Lexis](#), or “Find a Database” on [Westlaw](#). [BloombergLaw.com](#), offers a “secondary sources” option which can be further limited by expanding it to more specific secondary sources, including their version of *American Law Reports*, *Bloomberg Law Reports*.

(b) Index to Legal Periodicals and More

There are thousands of law review articles published yearly. Unlike authors of treatises who are limited by their small profession, the academe, there is no such limit when it comes to authors of law review articles. They can be members of the academe, practitioners, or even students. Because of their gigantic number, law review articles cannot and are not cataloged in any library catalog. There are fee-based electronic databases that either index or contain the full text of recent law review articles. The best approach to a manageable and reliable search of law review articles is by using a legal index.

The Index to Legal Periodicals and Books, often referred to as *ILP* or *Wilson Web*, depending on the access platform used, is the most commonly used legal index. It is usually available from many universities' Web sites, as well as from the prestigious fee-based electronic databases [Lexis](#) and [Westlaw](#). The advantage of using an index is that, if lucky, in a limited amount of time, you only obtain results that discuss your issue in depth, as opposed to the results you obtain from a full-text database, which may only mention your research terms in passing in a footnote.

For example, if you search for articles on the “tragedy of commons,” within the “keyword” field you will obtain tens of results that have the advantage of going back in time for almost two decades and cover in-depth treatment of your issue in varied areas: from environmental law to international law and intellectual property. If you were to type the same phrase in the search box within any of the fee-based databases, you may obtain a relatively small number of results, but they may not necessarily be on that topic.

A free-of charge search for law review articles is available through [Google Scholar](#). Due to its current partnership with the electronic database, [Heinonline](#), which covers, *inter alia*, a large amount of law review articles, though not necessarily the most recent publications, a Google Scholar search can be remarkably relevant.

In addition to [Lexis](#), [Westlaw](#), and [BloombergLaw.com](#), both [Lexis](#), [Westlaw](#), offer more limited versions, *LexisNexis Academic Universe*, and *Westlaw Campus*, which contain a lesser number of law review articles than their more comprehensive, parent databases. In addition to this limited version of the main legal databases,

American Universities offer their non-law patrons access to scholarly databases, such as JSTOR or ProQuest, which contain a limited number of law journal articles.

However, a full-text database is not the best first step when you do not know too much about your topic, especially if the topic, though specific, it is relatively generic. Through a full-text search you will obtain too many results and it is hard to handle the hits in a meaningful way. If you try to limit it by the date of the publication you may eliminate your seminal results without even knowing it. A much better way to manage your results is the different authors' credentials. A quick Google search will provide you with sufficient information.

If full-text databases may not be the best first step in your search for law review articles, nevertheless they may be excellent retrieving sites, when you have all the information you need to locate an article. For example, if you look for Eben Moglen's *Considering Zenger: Partisan Politics and the Legal Profession in Colonial New York*, and you know either its title or its citation—94 Colum. L. Rev. 1495 (1994)—going to [Lexis](#), [Westlaw](#), or even to their more limited versions, such as *LexisNexis Academic*, or *Westlaw Campus* is the most efficient way of locating it. However, sometimes other fee-based electronic databases, such as [Heinonline](#), may be a better source than either Lexis or Westlaw, especially when the article is published in a more obscure publication or earlier than 1980s. Usually, [Heinonline's](#) licensing agreements involve a “moving wall,” which makes available only law review articles from the first issue prior to a set number of years before the present date.

3. Using Legal Scholarship and Other Legal Commentaries and Analyses

(a) Treatises and Other Legal Monographs.

Treatises are books written by well-established members of the legal academe.

Treatises are used when (1) the research fits within a traditional area of legal doctrine, and (2) the researcher is not comfortable with a specific legal area. Treatises have the advantage of explaining issues in a larger context. For example, if you are interested in nuisance start with a treatise. Start with a treatise on torts, such as *Prosser and Keeton on the Law of Torts*, if your interest is common law nuisance, because this treatise will briefly but comprehensively explain the different types of nuisance. If you are interested in environmental law nuisance, you will find it easier by starting with an environmental law treatise, such as Grad's *Treatise on Environmental Law*. You will be exposed to public nuisance as an environmental tort.

Treatises are extremely useful because they summarize court decisions, and give you an insightful view of the development of our common law system based on a complex interplay of court decisions, statutes, and administrative regulations. While all treatises are useful, those usually identified as “hornbooks” are of special value because they are written for students, albeit law students, and not legal practitioners. Like Prosser's Law of Torts, they are more likely to give an overview of the area in a more comprehensive way. Similarly useful, for those who need to learn fast about a legal subject, are those treatises published by West in its nutshell series. For example, if you are interested in a quick and reliable overview of the U.S. patent system, *Miller and Davis's Intellectual Property: Patents, Trademarks, and Copyright in a Nutshell* will be the right place to start your search.

Aside from its practicality, the mere reference to a well-known treatise will lend professional prestige to any legal papers. For example, mentioning *Nimmer on Copyright* signals knowledge and sophistication in copyright issues.

As the trend towards digitization continues, more and more secondary sources are available through [Lexis](#) and [Westlaw](#). For example, if *Nimmer on Copyright* is available from [Lexis](#), other copyright secondary sources are available from [Westlaw](#).

(b) Law Review Articles

If you find yourself doing research in a more esoteric area of law, a law review article that expounds on the primary source of your interest may be a better starting point. Those articles are authored by members of the academe, practitioners, and law students. They follow a well-established practice of analyzing and discussing the chosen topic so that the reader can get an accurate view of what the law is in the very specific and often quite narrow area that constitutes the topic of that article. Law review articles, or law journal articles, have the advantage of covering obscure areas in more detail than a treatise. For example, if *Prosser's Law of Torts* explains the different standards for concert of action by substantial assistance, it does not explain state law subtleties. To the contrary, a law review article, such as Neacșu's [*Concert of Action by Substantial Assistance: What Ever Happened to Unconscious Aiding and Abetting*](#)⁸ will devote its entire content to explaining that issue according to a specific state law,

⁸ 16 TOURO L. REV.25 (1999).

New York law. If treatises have the advantage of explaining the law that covers a larger body of legal norms-torts, environmental law, criminal procedure, etc.-then law review articles, have the advantage of advocating a point of view that may be similar to that of the reader, and thus offer ready-made support for an argument. Treatises mostly refrain from challenging any given status quo.

As expected, law review articles are available both through the fee-based databases, [Lexis](#), [Westlaw](#), and [BloombergLaw.com](#), and through free-of-charge databases. To the extent that they are available for free, law review articles are available through the journal's web site and through Google Scholar searches.

(c) Other Sources of Legal Commentary and Analysis

Both [Westlaw](#) and [Lexis](#) contain a large variety of legal commentary. Law students and practitioners are well-versed in the benefits of legal encyclopedias, such as *American Jurisprudence* and *Corpus Juris Secundum*, or the *American Law Reports*, and a number of practitioners' texts, such as those produced by the Practising Law Institute.

The newest kids on the block of legal research are: [BloombergLaw.com](#), a fee-based database which has impressed its users with its menu-driven approach, collaboration features, and docket search functions, and [Spindle Law](#), which is a free-of-charge database conceived as a loose-leaf treatment of the law. Both contain legal commentaries written by practitioners and with the practitioner in mind, though [BloombergLaw.com](#), as a fee-based database, has much more content. Depending on the researchers' needs and knowledge of the law, a practitioner-authored or just oriented legal commentary may be more user-friendly, because its purpose is strictly

functional: to inform the reader rather than promote the academic status of the author.

There are free-of-charge specialized portals, such as [FindLaw](#), [SSRN](#), [Bepress](#), or [Spindle Law](#), that may provide you access to legal information authored by legal practitioners, or even law professors. Some authors, such as Eben Moglen in the intellectual property field, have their own Web sites. Here are a few words on when you would use some of these sources of legal information.

- **[FindLaw Professionals](#):
Legal News and Legal Commentaries**

“[FindLaw Professionals](#)” present themselves as a “group of well-respected authorities in their legal practice areas.” Their legal summaries are advertised to help any “individual legal consumer” learn more about the legal system. Since this book was first published, the database has improved both its search capabilities and its content. Now, you can search for both legal analysis, called a law firm article or a legal news article, and a legal commentary. The latter seems to be a blog-like commentary, whose usefulness is mostly given by its currency.

- **SSRN: A Recipient of Legal Secondary Sources**

The Social Science Research Network, SSRN, available at [ssrn.com](#), is another way to locate texts on current and obscure issues of law. [SSRN](#) is composed of a number of specialized research networks in social sciences, including law. The [SSRN](#) eLibrary consists of a Full Text and an Abstract Database. Each houses over 200,000 articles

and scholarly working papers, as of 2010-03-01. This library is accessible by title, author's name, journal or topic.

- **Secondary Sources Accessible Through the Authors' Personal or Institutional Web Sites**

More and more members of the academe make their published law review articles available from their own web sites. That is why, even simple searches using Google.com, or Bing.com may often bring useful information as a starting point. However, the less sophisticated the research technique the more attention you need to pay to the results. Probably you are well-advised to disregard all legal analysis, or what you deem to be legal analysis, unless it comes from an education site (identified by the edu in the URL).

D. ON PRIMARY SOURCES

Primary sources are potentially binding legal norms. Authors have also identified them as the official pronouncement of the governmental lawmakers.⁹ If violated, the government can enforce them. Primary sources represent the tangible aspect of American law. They are the main object of your legal research, and are the product of the three branches of the federal and local government.

Statutes are the primary source of law that comes from the legislature—statutory law. Statutes are compiled in various statutory collections, which can be accessed in different ways, according to the information needed. Case law is the primary source of law that comes from courts—decisional law. Case law can be found in the compilations of court opinions. Administrative law is the primary source of law that comes from the executive branch and administrative agencies. Administrative law can be found in the compilations of presidential executive orders, those of administrative rules and regulations, and the compilations of administrative decisions.

All compilations of primary sources are publicly available whether in print or electronically within certain limits. Some are available for a fee while others are available free-of-charge. However, before you start choosing a specific repository, think about a “plan of action,” which should bring you from planning your entire research approach to performing the search itself.

⁹ MORRIS L. COHEN & KENT C. OLSEN, *LEGAL RESEARCH IN A NUTSHELL* 7 (8th ed. 2003).

Fig. 20
“Plan of Action”

- What primary sources do I need to access?
(i.e., statutes, cases, administrative regulations)
- What do I need from those sources?
(e.g., a statute as passed by Congress on a specific date, or the statute and its amendments, as of the date of your research)
- Why do I need that specific primary source?
(depending on the answer to this question, you may consider taking a different course of action)

As shown earlier, the overall research plan will help you figure out whether you need to start with a secondary source, a commentary about the primary rule, which will give you a better understanding of what you are searching, in the first place, or whether you can go ahead using a repository of primary sources.

E. PRIMARY SOURCES AND THEIR REPOSITORIES: THE HOW, WHEN, AND WHY OF EACH TYPE OF PRIMARY SOURCE REPOSITORIES

1. Finding Repositories of Primary Sources

Usually, legal research has a clear progression which stems from its very nature. You start with a plan which maps out your understanding of the question, and how you think you should answer it. Then, you identify the secondary sources which you believe are most relevant to your research. Finally, once you understand the contextual background information, you move from secondary sources to primary sources, to the law itself: the statute, case law, or administrative rule you move.

But legal research is not a mere mechanical process. It involves a continuously revolving door from secondary to primary sources, and then from one repository of primary sources to another. Often you start with a treatise then you read a case, then a law review article and locate another case. The question I will tackle in this section is finding the most reliable collection of primary sources, in the most efficient way. I call those collections of primary sources, repositories, because I want to emphasize their tangibility.

Legal information is highly hierarchical, thus I will start by identifying legal repositories according to their authoritative role in the American legal system: the federal Constitution; federal or state statute, or municipal ordinance; court decisions; and administrative rule, regulations, and decisions. Some repositories contain only one type of legal norms. Others are an amalgamation of primary sources and even

secondary sources. More noteworthy, only some repositories have the built-in features to allow the researcher to update the results, and check whether they are still good law. Because updating is the last necessary step of any reliable legal research process, choosing a repository is often the result of its research features.

2. The Federal Constitution and Its Multiple Repositories.

The federal Constitution is our fundamental law. In its current embodiment is available by itself both in print as well as online.¹⁰ Historical versions of the Constitution are available as part of the official federal statutory collections, the *United States Statutes at Large* commonly known as *Statutes at Large*, which compiles all statutes in chronological order. From that repository, the Constitution, as of 1789, is available in vol. 1, at page 10.¹¹

The federal Constitution is available from free-of charge repositories that contain the law of the land, as it comes from the federal legislative body, the United States Supreme Court, and federal agencies, or a variety of federal and state primary sources. For example, [GPOAccess](#), the site of the U.S. Government Printing Office and disseminates official information from all three branches of the Federal Government, naturally contains past and current versions of the Constitution.¹² The free-of-charge legal portal [FindLaw](#), which contains both federal and state primary sources, also provides free access to the federal Constitution.¹³

¹⁰ <http://www.gpoaccess.gov/constitution/index.html>

¹¹ The first volumes of that collection are available from <http://www.constitution.org/uslaw/sal/sal.htm> and the Library of Congress, <http://memory.loc.gov/ammem/amlaw/lwslink.html>

Of course, the fee-based, mega amalgamations of legal information: [Lexis](#), [Westlaw](#), and [BloombergLaw.com](#) contain the federal Constitution as well. Currently, information from [Lexis](#), [Westlaw](#) can be accessed only after choosing a specific library or folder, such as “federal statutes,” while information BloombergLaw.com can be accessed by starting a search within the entire database, similar to a Google search. It seems that the next research platform from [Westlaw](#), WestlawNext, will resemble the Bloomberg search approach. WestlawNext will enable searches to be performed as soon as the user is logged in Westlaw, without expecting the user to designate a repository of information (i.e., “federal statutes”) as a conduit for the search algorithm.

3. Repositories of Federal and State Statutory Law and of Municipal Ordinances

Federal statutes are available both in print and online. Because of their large number, statutes are officially collected chronologically, in the order they are passed by each Congress, and by subject matter, according to 50 subject matters identified numerically in 50 titles. The official chronological collection is called the *United States Statutes at Large* commonly known as *Statutes at Large*, abbreviated *Stat.* The official codified version, which contains federal statutes published by subject matter, is called the *United States Code*, and it is abbreviated U.S.C.

¹² <http://www.gpoaccess.gov/constitution/index.html>

¹³ <http://www.findlaw.com/casecode/constitution/>

The *Statutes at Large* contains every law, public and private, enacted by Congress in order of the date of its passage from 1789. Each *Statutes at Large* volume is numbered sequentially. To access the entire collection of *Statutes at Large* free-of-charge, you need to have access to both a library that carries the print collection, and to the Internet, in order to access the electronic collection, because it is not available in its entirety in a single format. The print collection of the *Statutes at Large* does not contain the most recent statutes.

The electronic free-of-charge coverage of the *Statutes at Large* is limited to the very old and very recent statutes, including those that are not yet available in the print collection. The first 18 volumes of the *Statutes at Large*, which contain laws enacted from 1789 to 1875, are available from the Library of Congress's full-text electronic database, [American Memory](#). Similarly, the volumes of the STATUTES AT LARGE collection which contain laws enacted after 1995, are available from a different digital repository of by the Library of Congress, [Thomas.loc.gov](#). The free-of-charge [GPOAccess](#) contains only a small selection of relatively recent federal statutes published chronologically.

Only fee-based databases cover the entire collection of *Statutes at Large*. [Lexis](#), [Westlaw](#), and [Heinonline](#) offer electronic coverage to the entire collection of the *Statutes at Large*.

Unlike the *Statutes at Large*, the *United States Code* contains only the general and permanent public laws of the United States organized by subject matter, according to 50 numbered titles. A title may be made up of a few bound volumes.

For example, federal statutes on education are located in title 20 of the *United States Code*. Currently there are six volumes of statutes that make up title 20.

Moreover, unlike the Statutes at Large, the United States Code's function is more than recording federal statutes: it is to ensure easy access to the applicable law. Thus, in addition to its topical (50 topics) organization, it is periodically updated to include all subsequent amendments. Every six years there is a new edition of the U.S. CODE.

There are a few free-of-charge e-legal repositories which contain federal statutes in their codified version. For example, the 1994, 2000, and the 2006 editions are also available online from the full-text database offered by [GPOAccess](#). The *United States Code* is also available electronically from [Thomas.loc.gov](#), which connects you with the version published by the [Office of the Law Revision Counsel of the U.S. House of Representatives](#). This version is also available from [The Public Library of Law](#), the free arm of [Fastcase](#), [FindLaw](#), another free-of-charge portal, and [Cornell University Law School – Legal Information Institute](#) (LII), a free-of-charge legal information database.

State statutes are available for free from each state official site, and from [FindLaw](#), [The Public Library of Law](#), and [LII](#). Topical access to state statutes is also available from various organizations. For example, the Children's Bureau and the U.S. Department of Health and Human Services have put together an [information gateway](#) site, which is a portal to all state statutes focused on child welfare.

All three fee-based databases, [Lexis](#), [Westlaw](#), and [BloombergLaw.com](#) contain the *United States Code*. Similarly, they all contain all the current version of all state statutes. [Lexis](#) and [Westlaw](#) also contain historical versions of some of those statutes.

At the municipal level, ordinances are similarly difficult to find on the World Wide Web as through the fee-based databases [Lexis](#) and [Westlaw](#). In this instance, library guides to municipal ordinances are the best starting point to identify those repositories¹⁴.

4. Locating Repositories of Federal or State Case Law

Case law is law created by courts through their court decisions. A court decision is usually included in the written opinion that marks the end of the legal dispute. Opinions have been collected in “court reporters”—usually in a West publication—for hundred of years. In print, in order to locate a specific reporter, first you need to know its name. The *Bluebook*—as mentioned before—is a useful tool in identifying the correct name of each reporter. We will further talk about case law repositories in Chapter 5. Once you know the title, and especially the abbreviation of the reporter, you can easily locate its print version by using any library catalog, in the same way you would search for any book or monograph.

Those reporters are also available electronically. They are available from both free-of-charge and fee-based databases. The free-of-charge legal repositories and portals are [Google Scholar](#), which has incorporated [AltLaw.org](#), [The Public Library of Law](#), [spindlelaw.com](#), [LexisOne](#), and [FindLaw](#).

- a) [Google Scholar](#) has incorporated [AltLaw.org](#), and perhaps formed a better product, especially in light of the fact that it contains the print reporter's pagination (even if it is West reporter). [AltLaw.org](#) brought to the mega search engine its database of United States Supreme Court case law (1803 to the present); and United States Circuit Courts of Appeal case law (published cases from 1950 to the present and unpublished cases from 1996 to the present)¹⁵.
- b) [The Public Library of Law](#) (PLol), created by [Fastcase](#), is a free public resource with searchable American case law from 2004 and Supreme Court cases back to 1754.
- c) [Spindlelaw.com](#) is a legal wiki. Its case law is available from the free-of-charge databases mentioned here.
- d) A more comprehensive free of charge database is [LexisOne](#). [LexisOne](#) has always been the free online service of the other fee-based mega publisher LexisNexis. From the beginning it has required users to create a free account in order to view the full text of their research results. [LexisOne](#) was launched in July 2000 by LexisNexis, a member of Reed Elsevier PLC, which is owned equally by Reed International PLC (NYSE:RUK) and Elsevier NV (NYSE:ENL). [LexisOne](#) “a unique Web community” is available at <http://www.LexisOne.com>. [LexisOne](#) is the electronic database for federal and state (decisional) case law. It

¹⁴ See e.g., http://www.law.columbia.edu/library/Research_Guides/handouts/municipal

¹⁵ <http://www.altlaw.org/v1/about/coverage>

covers all the U.S. Supreme Court cases from 1790 to present and the last five years of published opinions from lower state and federal courts. Unlike the court opinions accessed from or through [FindLaw](#), [LexisOne](#) contains paginated opinions, as shown below.

Unlike the other free-of-charge databases, [LexisOne](#) identifies the cases in its library through parallel citations to the official reporters, as well as to the commercial reporters. For example, on [LexisOne](#), the U.S. Supreme Court case identified as *Miranda v. Arizona*, 384 U.S. 436 (1966) is a document which contains both the internal LexisNexis pagination and the parallel citations from all the U.S. Supreme Court in-print reporters: the official *United States Reports* (abbreviated as U.S.), and the two commercial reporters: the West-published reporter, *Supreme Court Reporter* (abbreviated S. Ct.) and the *Lawyers' Edition* reporter (abbreviated L. Ed.)

e) [FindLaw](#) is an online service, a portal, or a legal Web site, which is available at <http://www.findlaw.com>. It is both an online depository of law, because it provides legal resources on the Internet for both laymen and lawyers, and a portal to other online sources. [FindLaw](#) was started in 1995 by two attorneys as a list of Internet resources compiled for a workshop of the Northern California Law Librarians. Since then, both its content and its research capabilities have developed and currently it is part of the West legal publishing empire. Currently, [FindLaw](#)

provides more than the original list of Internet resources, which were already freely available online. An impressive portal to both federal and state law, [FindLaw](#)'s list contains more than 50,000 human-edited legal site listings.

[FindLaw](#) also provides access to its own legal electronic archive. [FindLaw](#) put together its own electronic depository of Supreme Court decisions that goes back to 1893. They are electronic copies of the decisions published in the official United States Reports. For example, the [FindLaw](#) text for *Roe v. Wade*, 410 U.S. 113 (1973), is that of the United States Reports. However, it does not include the *United States Reports* pagination. [FindLaw](#) contains opinions issued by the California Supreme Court and by the California Appellate Court since 1934 with the pagination from the official California state reporters.

f) Recent court opinions are available also from each court's Web site.

Federal courts tend to be better equipped to deal with electronic archiving of their opinions than state courts. The United States Supreme Court site is accessible directly [from the web](#), from the Court's web site <http://www.supremecourtus.gov/> or from [GPOAccess](#). To the list of those e-source mentioned before, I will add Oyez, available at <http://www.oyez.org/>. The Oyez Project is a multimedia archive which "aims to be a complete and authoritative source for all audio recorded in the Court since the installation of a recording system in

October 1955,” in addition to free access to the Court’s cases. Another e-resource for the Court’s cases is Justitia, <http://supreme.justia.com/> powered by Google.

Of course, the fee-based databases [Lexis](#), [Westlaw](#), and [Bloomberglaw.com](#) cover federal and state case law. With the advent of [BloombergLaw.com](#), the competition has only accelerating, with [Westlaw](#) trying to incorporate the menu driven features of Bloomberglaw. A somewhat recent alternative to case law research is [Fastcase](#), which charges only a fraction of what the other proprietary databases charge for downloading or printing a case (\$5). The future will tell how many fee-based databases American lawyers can support financially.

5. Locating Repositories of Administrative Rules, Regulations, and Decisions

For more than half a century, federal administrative rules and regulations have been published in two official publications: The *Federal Register*, and the *Code of Federal Regulations*. Since 1936, the *Federal Register* has been the official daily publication of rules, proposed rules, and notices of federal agencies and organizations. Additionally it publishes executive orders and other presidential documents. Each year a new volume of the *Federal Register* is published. The current volume is 75. The last 17 volumes are available electronically from [GPOAccess](#), and through [FindLaw](#).

Unlike the *Federal Register*, the *Code of Federal Regulations*, like the *United States Code*, is divided into 50 topics. However, the topics of the two codified

compilations do not necessarily correspond. For example, the 17th topic in both compilations is called “title 17.” However, in the *United States Code* title 17 covers statutes on copyrights, while in the *Code of Federal Regulations* title 17 covers rules and regulations on commodity and securities exchanges. Thus, if you are interested in learning how statutory provisions regarding copyright arbitration have been further detailed by administrative agencies, going to the C.F.R. volumes that cover title 17 would be a mistake. The rules and regulations regarding copyright arbitration are available in title 37 of the *Code of Federal Regulations*, which is entitled “Patents, Trademarks, and Copyrights.” The *Code of Federal Regulations*, starting with some titles of the 1996 volume, is available electronically free of charge from [GPOAccess](#), as well as through [FindLaw](#). You can view the topic each title covers since 1996 at [GPOAccess](#).

Some agencies have the authority to solve disputes and issue administrative decisions. Administrative decisions of the federal government and federal agencies are available both in print and online, though not necessarily in both formats. While older decisions may be available in print, more recent ones are available electronically free-of-charge from their official Web site. For example, since 1942, the U.S. Department of Agriculture publishes the decisions issued by its administrative judges in Agriculture Decisions. Its post-2000 decisions are also available on its Web site. However, the administrative decisions issued by both the Office of Hearings and Appeals of the Department of Education and the Secretary of Education are more difficult to find. As another example, the decisions issued by the U.S. Securities

and Exchange Commission are available both in commercial as well as in official publications, in print-*Decisions and Report*-and electronically. The Commission's Opinions and orders issued from 1996 onward are available electronically free-of-charge from its official web site.

In addition to the free-of-charge databases, all three fee-based databases, [Lexis](#), [Westlaw](#), and [BloombergLaw.com](#), contain both the *Code of Federal Regulations* and the *Federal Register*. Both Lexis's and Westlaw's coverage of the *Federal Register* starts with the *Federal Register* volume published in 1980. However, Westlaw contains historical volumes of the *Code of Federal Regulations* starting with the 1984 volume. Additionally, part of Lexis's main library- *Federal Legal-U.S.*-is the *Federal Agency Decisions, Combined*. It covers decision from all U.S. departments, as well as decisions from many federal agencies. Its time coverage varies. Moreover, both [Lexis](#), and [Westlaw](#) cover administrative decisions that are republished through various commercial publications of the Bureau of National Affairs (BNA). Federal administrative decisional law is also available through the official Web sites of each agency. However, their coverage is limited, as their electronic publication does not go back more than a few years.

State administrative rules and regulations, as well as state administrative decisions have a more limited availability. Usually, the official state web site and the fee-based databases are the best starting points. Of course, each state has depository libraries which will house those materials in print, fiche, or offer access to their electronic version.

F. IDENTIFYING SPECIFIC PRIMARY SOURCES WITHIN SPECIFIC LEGAL REPOSITORIES

Once you have identified the appropriate legal repository, you are closer to the end of your journey. Once you have identified the correct repository of primary sources, you need to find the particular piece of legislation, or case law, or administrative law that answers your question. Again, this step depends on the information you have at hand. If you found a citation, you need to translate it correctly within that repository, whether it is electronic or imprint. If you know the name of the specific statute, or of one of the parties involved in the lawsuit, you need to use the appropriate finding aid tool within that repository.

When you start your search with a citation at hand, you need to interpret it. Fig. 21 will provide you with the abbreviations for the federal repositories briefly discussed above, and identify each part of the abbreviation for a document contained in each of those repositories.

Any legal citation identifies a document as part of a print multi-volume legal collection, whether you will use a print version of the document or its online counterpart. Thus, it is usually composed of three parts: a number that precedes the abbreviation, and which identifies the number of the volume of the collection, the abbreviation of the collection, and a number that follows the abbreviation and which identifies the page where the document starts. For example, if the citation you have is 78 STAT. 252 that means that you are looking for is a public law that is published in the 78th volume of the *Statutes at Large* and it starts on page 252.

Fig. 21
List of Abbreviation of Federal Primary Sources
Citing Federal Sources

1. Federal Statutes

a) *Statutes at Large*

• STAT

- 78 STAT. 252 (P.L. 88-352)

↑ ↑ ↑

vol.# abbr. pg.#

b) *United States Code*

• USC

- 42 U.S.C. § 2000d

↑ ↑ ↑

title.# abbr. §#

2. Court Opinions. Supreme Court Opinions

a) *United States Reports*

• U.S.

- *Alexander v. Sandoval*, 532 U.S. 275 (2001)

↑ ↑ ↑
vol.# abbr. pg.#

3. Administrative Rules and Regulations

a) *Federal Register*

• F.R.

- 65 F.R. 39775

↑ ↑ ↑

vol.# abbr. pg.#

b) *Code Of Federal Regulations*

• C.F.R.

- 34 C.F.R. § 100.1

↑ ↑ ↑

title# abbr. §#

Sometimes a citation will contain more than the three parts mentioned above. For example, the citation of a court's opinion contains the name of the parties, as well as the abbreviation of the reporter where it is published that is preceded by the volume number and followed by the page where the opinion starts, and then by a parenthetical which contains the year when the case was decided. Those situations will be explained later, when we will discuss in detail how to find each type of legal document.

When you start your legal research without a citation, you need to fully use the information you have. For example, if you know the name of the statute and the number of the Congress that passed it, then it becomes manageable to locate it in the Statutes at Large. Each volume contains a list of the statutes it houses and it identifies them by their public law number and their name. For example, for the Civil Rights Act of 1964 you will go to the volumes of the 88th Congress, and browse through the lists. Thus, you will find out that the statute was published in the 78th volume and it starts on page 240.

If you want to read only a part of the Civil Rights Act on 1964 in its current version, then you should use the *UNITED STATES CODE* and its General Index. For example, if you want to read its Title VI which focuses on the prevention of discrimination in federally assisted programs on racial grounds, then you go the General Index C-D, and search under the "civil rights" heading for "federal aid" and for "exclusion for participation ...on grounds of race."¹⁶ You will find that that statutory provision is codified in the 42nd Title of the *United States Code* in section 2000d. Of course, you can find the codified

section by going to the electronic version of the CODE, either directly to the [GPOAccess](#) page¹⁷, or through [FindLaw](#). You will follow the instructions from the CODE's page that explain what type of Boolean search will more effective.

Similarly, when you do not have the citation of a case, but you know where the case was adjudicated and the names of the parties involved, then by choosing the appropriate court, within the limits explained below, you will be able to run a successful search in either [LexisOne](#) or [FindLaw](#). The print reporters are multi-volume sets that do not have indexes that accompany each set. Without even a partial citation that will identify the reporter and the volume where the opinion is published you cannot locate it. Of course, almost all reporters have their own separate finding-aid tools that require special knowledge to use them. Those finding-aid tools are known as digests, and unless you search for older lower courts' cases, either [LexisOne](#) or [FindLaw](#) is a better place to search.

Both the *Federal Register* and the *Code of Federal Regulations* have finding-aid tools. So whether you know the citation of the document—65 F.R. 38775, or 34 C.F.R. 100.1—or only its subject matter, you should be able to locate it easily. Both the *Federal Register* and the *Code of Federal Regulations* can be accessed on line either directly from the [GPOAccess](#) page or from [FindLaw](#).

Next we will talk about the final step in your plan and research log, updating. Depending on your financial resources, this step may require a lot of planning, or, if you have the resources, very little effort. Nevertheless, you need to remember that legal research does not end without it.

¹⁶ United States Code (2006 ed). General Index C-D, at 138.

¹⁷ <http://www.gpoaccess.gov/uscode/index.html>

G. COMPLETING YOUR RESEARCH

The last step of legal research requires you to make sure your findings are still good law.

The big problem with legal research is related to the porous nature of law. Often in law there is no clear answer. There is no rock to be located as in geology or a new insect to be described as in entomology. When do you know that what you have is the answer to your query? What represents the law? Is it a statute, a case, an administrative rule, or all of them? Is there a Supreme Court decision that has declared your findings unconstitutional? All these questions are pertinent and because of their intrinsic value this book offers you a few research tips.

Assuming that you have decided what the correct answer to your question is, the final question remains, is it still binding? Is it still the law of the land?. Has the Supreme Court held it unconstitutional? Has it been amended or reversed?

All these questions will be further addressed when we discuss researching the law in more detail. We will talk about updating each type of legal research – statutory, case law, and administrative - in those particular sections. This book focuses on legal research that is free-of-charge. Lawyers use [Lexis](#), or [Westlaw](#), or even [BloombergLaw.com](#) to perform legal searches and update their legal research. Each commercial database has developed its own updating service: [Lexis](#) uses Sheard's, [Westlaw](#) uses KeyCite, and [BloombergLaw.com](#), B-CITE. For a fee, those services will reliably update the source whose citation you type in the appropriate search box in a matter of seconds. However, this book will point out ways in which the status of the law can be verified free-of-charge. Also, this book will point out to what extent we can rely on such searches.

Chapter 4

Statutory Law:

What It Is, Where It Is, and How You Find It

Statutes have either general or special application, public or private. A general or public act is an universal rule, that regards the whole community; and of this the courts of law are bound to take notice judicially without the statute being particularly pleaded.

—*Blackstone's. The Study, Nature, and Extent of the Law*

A. INTRODUCTION

Often scholars start their introduction to American law with decisional law—judge-made law—because, historically, courts have been the first resort for solving problems of civil cohabitation among people. “Courts are regularly open for the settlement of disputes, as legislatures are not.”¹ But, today “decisional law [case law] stands below legislation in the hierarchy of authorities and case law is subject to change by statute.”² Statutes have binding authority over issues within their statutory subject matter, and courts must apply them to all disputes involving such issues. Furthermore, “legislation has so increased in quantity and importance in the United States during the past century”³ that it only makes sense that we start our incursion in the study of tangible legal norms with legislation.

Legislation, which comprises both federal and state statutes, is also known as statutory law. Through statutes legislative bodies attempt to ensure social stability and make our future predictable. Legislation represents a major component of legal normativism. Unlike case law, which is driven by particular controversies, legislation is the result of perceived public needs that require a solution for the future. The source of statutory law is statutes and ordinances.

Statutes are the result of a legislative process that takes place at the federal, state, and even municipal level. The legislative process includes drafting bills and

¹ Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process, Basic Problems*, in *THE MAKING AND APPLICATION OF Law* 163 (1994).

² E. ALLAN FARNSWORTH, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES* 37 (3d ed. 1996).

³ *Id.* at 61.

their passage through the legislative body and ends with the bill becoming a public or private law, a statute.⁴

Once a statute governs a specific social activity, every time a dispute arises within that area of activity, courts will interpret the statute and solve the dispute according to the applicable statutory provision. In that process, the parties' attorneys will offer their own interpretation of the statute to the court, hoping that theirs will prevail. Interpreting statutes, as further shown below, is a complex process, because often words do not translate into a single meaning.

In order to better understand how statutory law works, we will first briefly describe how statutes are enacted and then identify the primary sources of statutory law: (a) the Constitution; (b-c) statutes enacted by Congress and the legislatures of the states; and (d) the ordinances issued by municipal bodies. Then we will talk about locating the appropriate repositories and a few basic techniques for finding specific statutory provisions. Finally we will talk about completing your research process and making sure that what you found is still good law.

⁴ [See Chapter 2. Appendix 3.](#)

B. THE LEGISLATIVE PROCESS AND ITS CONSTITUTIONAL BOUNDARIES

The U.S. Constitution defines the federal legislative body. Article 1, Section 1 states that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”⁵

In Article 1, Section 8 also identifies the areas—such as interstate commerce—over which Congress has legislative powers, and its enacted statutes are binding.⁶

Additionally, Article I, Section 8 empowers Congress to “make all [other] Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”⁷ This wording has caused many legal battles that often ended up in courts. As the result of such a legal battle, the Supreme Court may declare a federal statute unconstitutional. One such example was discussed earlier in the Supreme Court case of *United States v. Lopez*.⁸

In those areas, federal legislation takes precedence over conflicting state legislation; it is said that federal legislation preempts state legislation. For example, any “state cause of action securing to an author an exclusive right to copy a tangible expression clearly interferes with federal regulation [the Copyright Act] and is preempted.”⁹ The Copyright Act is codified in title 17 of the *United States Code*, and the preemption provisions are included in Section 301.

⁵ <http://topics.law.cornell.edu/constitution/article1>

⁶ *Id.*

⁷ *Id.*

⁸ [514 U.S. 549 \(1995\)](#).

⁹ ARTHUR MILLER & MICHAEL DAVIS, *INTELLECTUAL PROPERTY, PATENTS, TRADEMARKS AND COPYRIGHT*, at 416 (2007).

Similarly, at the state level, each state Constitution defines that state's legislative body. For example, Article III of the New York Constitution vests the state's power to pass statutes in a bi-cameral body made up of the Senate and Assembly.¹⁰

¹⁰ [N.Y. CONST. art III, § 1](#) (“The legislative power of this state shall be vested in the senate and assembly.”).

C. THE LEGISLATIVE PROCESS. BRIEF REVIEW

All statutes start as a bill.¹¹ Very few bills become statutes.¹²

Passing a statute is not an easy process. It requires a lot of human energy and financial prowess to support the congressional members' interest in the statute. Sometimes the lobbying interests pushing for the passage of a bill are obvious; other times they are less obvious. For example, The Copyright Term Extension Act- Sonny Bono Copyright Term Extension Act¹³—extended the copyright term for works created on or after January 1, 1978, from life of the author plus 50 years after the author's death to life of the author plus 70 years after death. The act extended most other current copyrights for an additional 20 years.¹⁴ The entertainment industry interests at work there are thus obvious. Other times those interests are not so clear.

Nevertheless, there are ways to speed up a bill on its way or obstruct its advance to become a statute.¹⁵ Some will become apparent from the discussion below. Also, there are ways to influence the ways in which a court will later apply a statute. Many of the records of legislative deliberations, which are often used to decipher statutory rules, should be regarded with suspicion when you interpret a statute, because they could

¹¹ See Chapter 2, Appendix 3.

¹² Senate Bill S.1290 "To Amend Title 36 of the United States Code to establish the American Indian Education Foundation, and for Other Purposes." S. 1290 was introduced in the Senate on June 28, 1999. For the text of the bill as introduced in the Senate, see <http://thomas.loc.gov/cgi-bin/query/z?c106:S.1290.IS>; was eventually voted and passed by Senate and then sent to the House for similar legislative action. For the text of the bill as passed by the Senate, see <http://thomas.loc.gov/cgi-bin/query/z?c106:S.1290.ES>;

¹³ [Pub. L. No. 105-298, 112 Stat. 2827 \(1998\)](#).

¹⁴ For a record of all legislative action taken by the Senate propelling S.505 on its way to become a statute, go to, <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:SN00505:@@@S>

¹⁵ For a record of all legislative action taken by the Senate on bill S.1290, see <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:S.1290:@@@X>

have been inserted in the legislative record *post-factum* (after the debate itself) for the purpose of manipulating the reader's statutory interpretation.

As you all know the federal Congress is the body that makes federal statutes. Although, as mentioned before, its constitutional powers are limited, Congress is expected to legislate today on diverse issues, such as tariffs, public lands, currency, transportation, housing, education, foreign aid, and preemptive war. On the one hand, “[s]ources of ideas for legislation are unlimited.”¹⁶ On the other hand, Congress has a rigid procedure it follows to change those ideas into statutes. Of course, “proposed drafts of bills [may] originate in many diverse quarters.”¹⁷ Usually a member of Congress (representative or senator), will draft a bill and introduce it in one or both chambers of Congress. That member of Congress becomes the bill's sponsors. It is a senator for a bill introduced in the Senate and a representative for those introduced in the House of Representatives.

For example, Senator Daniel Inouye introduced a bill to amend title 36 of the United States Code to establish the American Indian Education Foundation, on June 28, 1999, in the 106th Congress.¹⁸ A related bill was introduced in the House, by representative Kildee on October 14, 1999.¹⁹

¹⁶ Charles W. Johnson. *How Our Laws Are Made*, S. Doc. 105-14 (1997). http://books.google.com/books?id=1-9ekjSO0bsC&printsec=frontcover&dq=charles+w.+johnson+how+our+laws+are+made&hl=en&ei=7hXATaW2GIXfgQeVIPHrBQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CDgQ6AEwAA#v=onepage&q&f=false

¹⁷ *Id.*

¹⁸ <http://hdl.loc.gov/loc.uscongress/legislation.106s1290>

¹⁹ House Bill H.R.3080 “To Amend the Indian Self-Determination and Education Assistance Act to Direct the Secretary of the Interior to Establish the American Indian Education Foundation, and for Other Purposes”. H.R.3080 was introduced in the House on October 14, 1999. For the text of the bill as introduced in the House and for the summary of the legislative action taken by the House on H.R.3080, see <http://thomas.loc.gov/cgi-bin/bdquery/z?d106:H.R.3080:@@X>

The *Index to the Congressional Record of the Congress* is the publication that keeps track of the action taken with every bill introduced. Thus, the *Index to the Congressional Record* of the first session of the 106th Congress is the place to search for a summary of the actions taken on a bill. This Index is available free-of-charge from gpoaccess.gov.²⁰ In addition, bill tracking services are also available free of charge through the Library of Congress', "Search Bill Summary & Status."²¹

Most sponsors will insert an explanatory statement about their bills in the Daily Digest of the Congressional Record. Both, Senator Daniel Inouye inserted his explanations, and Representative Kildee, his,²² when they introduced the bills. Once introduced, like any other bill, this bill also was referred by the Speaker to the appropriate House standing committee for consideration and by the President Officer to the appropriate Senate committee. For example, the bill sponsored by Senator Daniel Inouye was referred to the Committee on Indian Affairs, and the bill sponsored by Representative Kildee was referred to the Committee on Resources. After introduction and reference, all proposed bills are given a number and sent to the Government Printing Office. The next morning, printed copies are available in the Senate and House document rooms. All bills have a designation. The bill introduced in the Senate will have the letter "S," which stands for Senate, followed by the bill number, while the bills introduced in the House will have "H.R.," which stands for House of Representatives, followed by the bill number. The Senate bill to

²⁰ <http://www.gpoaccess.gov/cri/index.html>

²¹ <http://thomas.loc.gov/home/LegislativeData.php?n=BSS>

²² To find those remarks, perform an Index search at <http://www.gpoaccess.gov/cri/index.html>, within the appropriate congress.

amend title 36 of the United States Code was given the designation S. 1290, while the House bill received the number H.R. 1380. All bills have a title that succinctly states the subject or aim of the legislation. The short title of both the Senate bill S. 1290 and the House bill H.R. 1380 was the “American Indian Education Foundation Act of 1999.” Most bills also contain a section that will explain the purpose of the bill, and another that will contain definitions of the terms they use. All bills contain standard clauses that will further detail the content of the bill. For example, S. 1290 identifies its purpose in its title: “to establish the American Indian Education Foundation,” whose own purpose is further itemized in Section 21602. Similarly, H.R. 3080 identifies its purpose in its title and further details the scope of the American Indian Education Foundation in Section 501(e). The committee in charge of the future of a bill may hold hearings or may obstruct that process. When they hold hearings, that process ends with the committee writing a report that will accompany the bill when it is sent out to the Chamber’s floor. During those hearings, members of the Congress, as well as representatives of interest groups and other private persons may be heard.

All those statements will become part of the “legislative history of the bill.” At the committee level, there is considerable opportunity for delay and defeat of the bill. The Senate and House committee reports are published in a publication called the *United States Congressional Serial Set*, or the *Serial Set*. For definitions of the documents available in the Serial Set, go to http://www.access.gpo.gov/su_docs/fdlp/history/sset/ssetbdef.html.

Selected documents from the Serial Set volumes from the 23rd through the 64th Congress, or from 1833 through 1917, are available free-of-charge on the Library of Congress Web site, at <http://memory.loc.gov/ammem/amlaw/lwsslink.html>. Though in the public domain, the congressional documents which constitute the legislative history of federal statutes are mostly available through proprietary databases, such as Readex, a division of NewsBank, inc., ProQuest, or LexisNexis.

Returning to our random example, the Senate Committee on Indian Affairs held hearings on bill S. 1290, and published its report, as Senate Report 106-197. Afterward, the Senate unanimously voted on the bill and informed the House about its action. The House referred bill H.R. 3080 to the House Committee on the Judiciary. This committee further referred it to the Subcommittee on Immigration and Claims. Because our example is relatively recent, its legislative history, the documents Congress produced along the bills' passages in the two chambers are available free-of-charge from Thomas.loc.gov.²³

Not all bills are voted by a chamber as they are originally introduced in that chamber. For example, bill H.R. 3080 was voted in the House, but as part of another bill, H.R. 5528, Omnibus Indian Advancement Act.

A bill may be defeated on the floor of one of the chambers as well. For example, members of Congress may engage in making lengthy speeches intended to prevent or defeat action on the bill. This tactic is known as "filibustering," and it is recorded in a publication called the *Senate Journal*.

²³ From Thomas.loc.gov., select "Bills, Resolutions" (http://thomas.loc.gov/home/bills_res.html), then, select the appropriate congress, in this case, the 106th Congress, and search for the bill by name or number.

While the *Senate Journal* is the official Senate publication, all Congressional floor proceedings are recorded-with noted inaccuracy-in the above-mentioned publication called the *Congressional Record*. The *Congressional Record* is published daily while Congress is in session, and each daily edition has a digest that summarizes the floor and committees' activities for that day. A separate volume is published for each calendar year.²⁴

Both representatives and senators may be interested in a bill's legislative history and there are cases when sponsors have inserted self-serving statements in the final version of the *Congressional Record*.²⁵ Thus, researchers are well-advised to understand the difference between the two versions of the *Record* and use it accordingly.²⁶

When a bill is approved in identical form by both the House and the Senate, the amendments are incorporated and the so-called "enrolled bill" is sent to the President for signature. The President has ten days in which to decide what action to take on the bill. The President may sign the bill or leave it unsigned and, if Congress is still in session, the bill becomes law in either case. However, the President may also refuse to sign the bill into law. The presidential refusal is called a "veto," and it may be overridden by a two-thirds vote of those present in both the Senate and the House-which has to be a quorum. If Congress overrides the veto, the bill becomes law. Once the bill becomes law, it is transmitted to the General Services Administration for publication. When the bill is published it will be given a Public Law number (Pub. L. No.), which contains the

²⁴ Starting with volume 140 from 1994, The Congressional Record is available free-of-charge from [gpoaccess.gov](http://www.gpoaccess.gov), <http://www.gpoaccess.gov/crecord/search.html>

²⁵ There are stylistic differences between statements made at the time of the debate and those inserted later. For example, bullets precede the Senate statements introduced later in the Record. See, e.g., JANE GINSBURG, *LEGAL METHODS: CASES AND MATERIALS*, at 56 (2d ed. 2004).

²⁶ *Id.*

number of the enacting Congress and a number indicating the order in which the bill was adopted as compared with other enactments by the same Congress. The Omnibus Indian Advancement Act (the Act) was passed on December 27, 2000, and it became Public Law No. 106-568, or P.L. 106-568 (2000). Those numbers mean that the 106th Congress passed the Act as its 568th statute. There are some stylistic differences between statements made at the time of the debate and those inserted later: bullets precede the Senate statements introduced later in the Record.

The new law used to be published in its entirety with other new laws in a bound volume of the *Statutes at Large*, which for a period of time was also available online at the “United States Federal Legislative information service on the Internet,” called Thomas.loc.gov, and on the Government Printing Office Web site, at gpoaccess.gov. Today, all researchers rely on the Adobe Portable Document Format (PDF) version of the statute published on-line, in the identical format of the by-gone print version.

The Omnibus Indian Advancement Act of our example was published in volume 114 of the *Statutes at Large*, and it starts at page 2868. This Act may be identified by the location of the statute in the official publication as 114 Stat. 2868 (2000). Thus, the original American Indian Education Foundation bill has become statute and gained binding authority upon all disputes involving related issues, as part of the Omnibus Indian Advancement Act, which is identified as Pub. L. No. 106-568, 114 Stat. 2868. The Omnibus Indian Advancement Act was incorporated in title 25 of the Code, which is called “Indians.” The statute’s codified version is identified as 25 U.S.C. Section 4101 et seq.

D. IDENTIFYING THE SOURCES OF STATUTORY LAW

You now have a good idea of how statutes are enacted. Next let's identify all primary sources of statutory law. We include the Constitution as well.

1. The Constitution of the United States

If we were to view the American federal statutory system as a pyramid, then the Constitution of the United States will be its pinnacle. Furthermore, all legal rules of the land have to fit within the Constitution, as interpreted by the Supreme Court of the United States.

The Constitution is the highest law in our society because, although a very brief document, it spells out the structure of the federal government, and it regulates how our government works. Chiefly, it sets out the norms that govern the distribution of political powers among the branches of government.

The U.S. Constitution, whose binding authority does not include the Declaration of Independence of July 4, 1776, is more recent than the Constitutions of many of the American states, which started being adopted as soon as we declared our independence from the British Empire. The federal Constitution was signed by the delegates to the Constitutional Convention in September 1787. Then it was submitted to the Continental Congress and became effective upon its ratification by two-thirds of the states, in July 1788.²⁷

There were a few constitutional innovations presented in the federal Constitution that no other similar act has ever envisioned. Although the act itself is

²⁷ See *Documents from the Continental Congress and the Constitutional Convention, 1774-1789*, available at <http://memory.loc.gov/ammem/collections/continental/>

very short, only a few pages—as we mentioned before, the Constitution delineates the structure of the new government.²⁸ The first three articles identify the branches of the government: one for each branch, and enumerate each branch’s duties. In plain terms, it states that the federal government has limited powers. Article 1 of the Constitution limits the powers of the federal legislative body vis-à-vis the states of the Union. The principle of separation of powers was not new, Montesquieu described it in *The Spirit of the Law*,²⁹ but it had not been previously embedded in a written Constitution.

The Constitution does not mention whether one branch will have the role of checking the use of power invested in the others, either. However, because the principles of separation of powers was so scrupulously translated into separate articles describing the functions of each branch of the government, the check-and-balance function of the branches was easily assumed and, furthermore, the judiciary easily appointed itself the branch that checks the exercise of powers by the other branches.

Originally the Constitution contained only seven articles, with the last one dedicated to the ratification procedures. Despite suggestions from various members to the 1787 Federal Convention in Philadelphia that the federal Constitution include a bill of rights that would secure some guarantees of personal liberty vis-à- vis the federal government, the Constitution did not include such a declaration of rights. It only mentioned some guarantees of what we consider today basic human rights-

²⁸ The Constitution is available free-of-charge at <http://www.gpoaccess.gov/constitution/index.html>

²⁹ CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (DE L'ESPIRIT DE LOIS) (G. Dublin, A. Ewing & G. Faulkner, 1751).

regarding access to courts and trial by jury (Art. III, § 2).³⁰ In the end the well-spread suspicion of the federal government prevailed, and by 1789, ten additional provisions were added. Known as the Bill of Rights, they empowered individuals against the power of the federal government. In its new version the federal Constitution was (re-)sent to the states to be ratified.³¹

Aside from these first ten amendments, the Constitution has known 17 more amendments.³² The 27th amendment became effective in 1992 and regards the compensation for services by senators and representatives.

The federal Constitution, like any piece of legislation is a dynamic document. Initially, it was mostly focused on the federal government and its powers vis-à-vis the states and the individuals. However, by incorporating the Bill of Rights, and especially after the adoption of the Reconstruction Era Amendments, 13th, 14th, and 15th Amendments in the years following the Civil War, the Constitution has become our main guarantor of individual freedoms and liberties. It imposes limits on both the federal and the state governments. For example, the Fourth Amendment guarantees our freedom from unwarranted searches and seizures, protecting us from unreasonable intrusion by both the federal and state governments.

³⁰ Art. III, § 2

Clause 3: The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

CONSTITUTION OF THE UNITED STATES, http://avalon.law.yale.edu/18th_century/art3.asp

³¹ For a timeline of the ratification process, go to Yale's Avalon Project, 18th Century Documents : 1700 – 1799, available at http://avalon.law.yale.edu/subject_menus/18th.asp. See also, CREATING THE BILL OF RIGHTS. THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991).

³² *Id.* at 23-34.

Nevertheless, the Constitution is only the repository of our main individual freedoms. It is the duty of the U.S. Supreme Court, as the highest court in the country to give meaning to those rights and make sure that no statute or administrative rule violates our fundamental law. In other words, although the Constitution does not explicitly delegates that power to the courts, the judicial branch is the ultimate arbiter of constitutionality because it is the branch which applies the law, including the Constitution, to various cases and controversies. This is why we argue that it is not the Constitution itself, but the United States Supreme Court's interpretation of it that establishes the standard of legality in our system. Consequently, the nomination of the United States Supreme Court Justices remains a highly important process of our democratic safeguards. Ultimately, those justices determine the limits of our individual and collective freedoms.

2. Federal Statutes

Article I, Section 1 of the Constitution of the United States identifies the federal legislative body and states that “all legislative Powers herein granted shall be vested in a Congress of the United States.” Article I empowers Congress to pass statutes, which are the source of legislation. Article VI, paragraph 2, of the Constitution establishes that federal legislation occupies the next place in the hierarchy of our legal system, next to the Constitution itself. This article is usually referred to as the “supremacy clause:”

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, 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.³³

Federal statutory law is not formally limited to domestic statutes. It also includes treaties concluded with other countries. In our system, any foreign treaty to which the United States is a party is not automatically binding. Congress must approve it, through the process of ratification that ends with Congress incorporating the treaty into a domestic statute.

3. State Constitutions and Statutes

Every state has its own Constitution. Those legislative acts resemble and differ from the Federal Constitution.

Like the federal Constitution, state constitutions identify each state's legislative body and its prerogatives. The state legislative bodies enact state statutes, which have a limited geographical application, and, of course, will govern social activities other than those governed by federal statutes. State statutes are subject to challenge in state courts on state constitutional grounds and in federal courts on federal grounds. For example, issues related to obtaining your driver's license will be tried in state courts. On the other hand, issues related to the constitutionality of such procedures will be tried in federal courts.

Unlike the federal Constitution, state Constitutions are quite detailed. For example, the Constitution of the State of New York, Art. 9, § 2 set the limits of

³³ See also, http://avalon.law.yale.edu/18th_century/art6.asp

municipal power. The constitutional “home rule” grants municipalities, including the City of New York, authority to act with respect to specific local matters.

Each state has its own legislative body, which legislates in matters of public interest in a manner similar to the federal legislative body. For example, like all other state legislative bodies, the New York legislatures have a well-publicized Internet presence. However, the statutory text and its legislative history is more difficult to located free-of-charge on line.

4. Municipal Charters and Local Laws or Ordinances

Within the powers given by states, each municipal unit has its own fundamental law or charter and, of course, its own legislative branch. The municipal legislative bodies enact rules that deal with diverse issues of local importance, such as collecting the garbage, parking fines, or noise. Such rules of local legislative origin are commonly called “ordinances.” For example, the New York City’s legislative branch is called the City Council. The New York City Council is the primary legislative body at the local level. It consists of 51 council members³⁴ and enacts local laws or ordinances.³⁵ A recent N.Y.C. local law amended the existing rule about roof coating standards. Both its text and its legislative history are available free-of-charge from the City Council’s site.³⁶

Describing local lawmaking bodies as part of the legislative branch defines the unique character of our legal system. In many countries which follow the civil

³⁴ <http://legistar.council.nyc.gov/DepartmentDetail.aspx?ID=6897&GUID=CDC6E691-8A8C-4F25-97CB-86F31EDAB081&Mode=MainBody>

³⁵ For the most recent New York City local laws, go to <http://legistar.council.nyc.gov/Legislation.aspx>

³⁶ <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=775430&GUID=ACD8FDE7-B0AF-4321-B340-6CAB2B3725A5&Options=Advanced&Search=>

law system, such as France, for example, these local branches of the government are circumscribed to the administrative branch. This lack of conceptual uniformity transpires in the proprietary databases, as shown below in some detail.

At this point you should have a good understanding of all sources of legislation: federal, state and municipal. However, before I detail the legislative repositories, I will spend a few moments on what you need to locate in your legislative research. Earlier I mentioned that courts are the final arbiter of our legal system. Below I will briefly explain the reason for that statement.

E. LEGISLATION AS A DYNAMIC LEGAL RULE: INTERPRETING STATUTES

Once enacted, statutory provisions are binding on all activities within their boundaries. In case of a dispute, courts are required to follow the statutory provisions, and legal researchers are asked to provide the text of that legislation. For example, when a former employee sued the Bureau of Indian Affairs alleging wrongful termination of his employment, the court had to apply the applicable statutory provision. In *Bear Robe v. Parket*,³⁷ the court applied the “Indian Child Protection and Family Violence Prevention Act”-as amended on December 27, 2000, by the Omnibus Indian Advancement Act of 2000³⁸ - which stated that the employee’s previous conviction for voluntary manslaughter was an absolute bar to employment in a position that involved regular contact with Indian children. The Act did not say anything about the potential mitigating factor of the employee’s “successful employment at the school.”³⁹ However, the court interpreted the act as an absolute bar to employment. It explained its ruling stating that:

Congress has adopted a bright line rule that persons who fall within the Act’s proscriptions are not to be employed in positions that involve regular contact with children in federally funded Indian schools.⁴⁰

Despite the fact that the Eighth Circuit Court of Appeals decided in this case that the statutory language was clear, a different interpretation of the provision

³⁷ 270 F.3d 1192 (8th Cir. 2001).

³⁸ Pub. L. No. 106-568, § 814; 114 Stat. 2868, 2918 (2000).

³⁹ 270 F.3d at 1194.

⁴⁰ *Id.* at 1195.

is not farfetched. In fact the plaintiff in *Bear Robe* started his lawsuit because he (or his attorney) did not think that the statutory provision was crystal clear. How is this ambiguity possible? What language constitutes the binding rule?

In order to apply a statute to a specific factual situation, courts read the statutory provision, interpret it, and apply it accordingly. Legal researchers also need to both find statutes and their applications when do statutory research. They do so because courts are the ultimate arbiter of legislative law, and because what represents the binding statutory language is often unclear.

There is no clear understanding about how statutes should be interpreted. “The interpretative status quo is cacophonous. Every judge and scholar has his own theory of how best to interpret statutes, and this diversity renders the interpretative project unpredictable.”⁴¹ However, that said, there are a few rules that may guide the process of interpreting statutes. Three of them are briefly explained here.

1. The “Plain Meaning Rule”

As its title suggests, the gist of this rule is that “the words alone suffice.” This rule rejects the need to look beyond the words of the statute as passed by Congress. It rejects the need to look at the records created during the passage of the bill in the legislature to what is known as the legislative history of the bill-in order to ascertain what the legislature “intended.”

This rule is sometimes mentioned by state statutes. For example, according to the New York statutes: “Where words of a statute are free from ambiguity and

⁴¹ Nicholas Quinn Rosenkrantz, Federal Rules of Statutory Interpretation, 115 HARV. L. REV. 2085, 2088 (2002).

express plainly and clearly and distinctly the legislative intent, resort may not be had to other means of interpretation.”⁴² Sometimes, courts adopt it and incorporate it in their decisions, holding that that “the act is clear upon its face.”⁴³ However, this rule of interpretation has an obvious weakness: words have rarely one meaning; they are hardly ever transparent. Words rarely say what they mean. “A word is not a crystal, transparent and unchanged,” Justice Holmes rightly observed “it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”⁴⁴

2. Interpreting Statutes in Light of Their Legislative History

Another guiding rule for interpreting statutes is by using the record created during the legislative process when the statute was born. Formally speaking, there is a difference between inquiry into the language of a statute and inquiry into the legislature’s intent. The goal remains the same: what does the statute say? The approach is different. The proponents of this rule believe that because words are imperfect symbols of communication, the most accurate way of determining the meaning of legislation is finding the preexisting understanding of its legislators regarding specific issues covered in the legislation. They believe that the records that trail the legislative process contain that preexisting understanding, and they access the records according to their probative value.

⁴² N.Y. STAT. LAW § 76. See also §§ 71-424.

⁴³ Brown J., in *Hamilton v. Rathbone*, 175 U.S. 414 (1899).

⁴⁴ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

It is commonly accepted that the legislative committee reports are of greatest importance, because they contain written assessments of the legislation by members of Congress that have studied it, heard testimony and arguments for and against it, and eventually voted to send it to the floor for a vote. Of a value equal to committee reports are statements of individual legislators responsible for the preparation or drafting of the bill. Statements in debates on the floor of Congress are considered less persuasive, because they can be inserted in the legislative record at a later time. Among the Supreme Court Justices, Justice Scalia is the strongest opponent of the use of legislative history in interpreting statutes. Rightfully so, Justice Scalia opposes using statements of individual legislators, because they are ordinarily addressed to a virtually empty room or concocted to influence courts, which are later called on to interpret the statute.⁴⁵ Instead, Justice Scalia favors the “plain meaning rule” in its “originalist” version. He justifies his reliance on the “originalist” fiction by believing that concepts have no history and thus can be interpreted within the meaning they had at the time they became legislation.⁴⁶

The problem with the legislative history approach is often a misunderstanding of the role of “legislative purpose.” Of course, legislators had a purpose when they passed a specific piece of legislation. That purpose is to govern a specific social interaction for the future. Of course, that purpose may be transparent if we read the records of the statute’s legislative history. But if we are to interpret the statute for the

⁴⁵ See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 391 (2000) (Scalia, j., concurring) and *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989).

⁴⁶ R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, But the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY’S LJ. 1051, 1058-59 (1994-1995).

future and not for the past, we have to accept that our interpretation is appropriately flawed. If the statute is still needed, it is because it can answer present needs, and those needs could not have been answered at a time when they did not exist. In other words, if we cannot make sense of a statute's meaning in the social, economic, and political context of the present, past explanations will only encumber our process instead of helping it. For example, due process of law had a specific limited meaning for the Founding Fathers. It clearly did not encompass women and African-Americans. It did not encompass the entire spectrum of human behavior within the protected race and gender: white males. That meaning has naturally evolved, and today's Supreme Court justices have come to realize and eventually held that, for example, substantial due process prohibits qualifying anal sex between same sex partners as deviate sex as long as identical sexual practices between heterosexuals are not considered "deviate."⁴⁷ This dramatic example shows how difficult an endeavor is to predict legal meaning, and how disconnected legal concepts are even within our short history.

Even if we were to go back and read everything that can illuminate our understanding of the Founding Father's own understanding, reality is that whatever the Supreme Court justices decide today, will govern the meaning of due process of law today. Finally, the records of legislative history are documents that ultimately are read today with today's understanding, and the entire exercise of going back in time and pretending that we apply some legislators' intent to deciphering those documents and not our own understanding seems to be nothing more than mere legal fictions necessary to legitimize the ultimate result.

⁴⁷ *Lawrence v. Texas*, 539 U. S. 558 (2003). 60 490 U.S. 504 (1989).

3. The Purposive Analysis: The “Social Purpose” Rule

The final rule presented here is the “social purpose” rule, which could also be called the “common sense” rule. Under its purview, a statute will be construed to accomplish the social purpose it was designed to accomplish, even if that reading would contradict its literal reading. For example, in *Green v. Bock Laundry*,⁴⁸ the Supreme Court declined to read the Federal Rule of Evidence literally, partly because a literal reading would have made unintended absurd distinctions. A literal reading of the word “defendant” in Federal Rule of Evidence 609(a) would have meant that in a civil case, evidence of a prior criminal conviction could be introduced to attack the credibility of the defendant but not that of the plaintiff. The Court found that distinction irrational. The Court thus gave priority to a reading that emphasized the purpose of the legislation.

Justice Ruth Bader Ginsburg favors this statutory interpretation. During her confirmation hearing she emphasized the fact that the meaning of constitutional concepts needs to and does evolve over time. Then she Ginsburg pointed out the absurdity of refusing such an approach when courts interpret the general concept of equality. The concept can be found in the Declaration of Independence, as well as in the 14th Amendment, she noted, but at none of those times did either the Founding Fathers or the Framers of the Equal Protection Clause of the 14th Amendment have equal rights for women specifically in mind. However, today such a historically correct interpretation seems clearly absurd.⁴⁹

⁴⁸ 490 U.S. 504 (1989).

⁴⁹ *The Supreme Court: Excerpts from Senate Hearings on the Ginsburg Nominations* N.Y. TIMES: July 21, 1993, at 12. For a general commentary, see also R. Randall Kelso, *The Natural Law Tradition on the Modern Supreme Court: Not Burke, But the Enlightenment Tradition Represented by Locke, Madison, and Marshall*, 26 ST. MARY'S LJ. 1051, 1069-70 (1994-1995).

Statutes govern a large part of our legal realm. They are dynamic and applied to cases and controversies in manners hard to predict, more often closer to the respective judge or justices' personality than anything else. Thus, all statutory research will comprise two parts: Locating the statute is only the beginning of the process. Locating the cases applying it complements it. Before we reach that second phase, the next section will identify the repositories of statutory law at the federal, state and municipal level.

F. REPOSITORIES OF STATUTORY LAW

1. The Constitution of the United States

The federal Constitution is available both in print and electronically free-of-charge. It is also accessible through the two official statutory compilations: *Statutes at Large* and the *United States Code*, both in print and online. The mimeographed collection of historic Statutes at Large, and thus the Constitution, is available through the Library of Congress's Web site, A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774-1875. The most recent version of the Constitution is available electronically, as part of the United States Code, from the full-text database offered by GPO Access, a service of the U.S. Government Printing Office.⁵⁰ Additionally, the Constitution is also available from the commercial federal statutory databases, both in print and electronically. They will be further discussed below.

2. Federal Statutes

Both state and federal legislation are published in two ways: chronologically and topically. The federal statutory compilation organized chronologically is called, as you know by now, *Statutes at Large*.⁵¹ It contains all laws passed by Congress, whether they are public laws or private laws. Each volume has a table of contents that lists the statutes passed by that Congress in that specific session by their title and their public or private number.⁵²

⁵⁰ See <http://www.gpoaccess.gov/uscode/index.html>

⁵¹ The first 18 volumes of the *Statutes at Large*-from 1789 through 1875-are available on the Library of Congress's Web site, at <http://memory.loc.gov/ammem/amlaw/lwslink.html>

Additionally, the general and permanent laws of the United States are also published in a multi-volume collection that is organized by subject matter. This codified version is called the *United States Code*. Until recently, this topical compilation of federal public laws was organized in 50 numbered titles which cover broad areas, such as “Hospitals and Asylums” (title 24) or “War and National Defense” (title 50). On December 18, 2010, once again underlying the dynamic aspect of our legal system, Pub. Law 111–314, 124 STAT. 3328, established the codification of laws related to “National and Commercial Space Programs,” into a new title, title 51.

As mentioned before the *Statutes at Large* and the *United States Code* are the official statutory collections because they are published by the government. They are both available in print and electronically. In addition, the codified version of the federal statutes is also published in commercial publications. The current dominating proprietary databases are those belonging to the West Group, LexisNexis, and [BloombergLaw.com](http://www.bloomberglaw.com). Once again I will repeat their names, and their abbreviations. The West product is called the *United States Code Annotated*. The [Lexis](http://www.lexis.com) product is called the *United States Code Service*. The BloombergLaw.com version retains the name of the official statutory compilation, though without identifying the year of its currency.

The *United States Code* is abbreviated U.S.C. The *United States Code Annotated* is abbreviated U.S.C.A., and the *United States Code Service* is abbreviated

⁵² Public and private laws are prepared and published by the Office of the Federal Register (OFR), National Archives and Records Administration (NARA). GPA Access contains the text of public and private laws enacted from the 104th Congress to the present. They can be accessed at <http://www.gpoaccess.gov/plaws/>. The Library of Congress also houses Public Laws from the 93rd Congress onward, at <http://thomas.loc.gov/>.

U.S.C.S. Thus, you may see references to 42 U.S.C. § 2000d as 42 U.S.C.A. § 2000d or 42 U.S.C.S. § 2000d. They will contain the same statutory provision. The only difference is that the commercial publications belonging to [Westlaw](#) and [Lexis](#) have editorial enhancements: annotations that provide reference to cases and administrative rules and even administrative decisions, if any. Please remember that most of the information provided in annotations, cases, and administrative rules and decisions, is government-authored information and it can be found in some free legal databases. Of course, for lack of resources, the free databases are much harder to navigate, and without excellent research skills, their information risks to be outdated.

3. State Statutes

Like the federal statutes, state statutes are published both chronologically and topically. The chronological publication carries different names from *North Carolina Session Laws*, to *Laws of Illinois*, or *Kentucky Acts*. Usually, each state has one official publication of session laws and one or more commercial publications. The most current edition of the official publication of session laws is usually available from the state legislature's Web site free-of charge. For example, the current *North Carolina Session Laws* are available on the state legislature's Web site, at <http://www.ncleg.net/statutes/statutes.asp>. Similarly, the *Laws of Illinois* are available on the state legislature's Web site, at <http://www.legis.state.il.us/legislation/publicacts/default.asp>. The *Kentucky Acts* are available on the state legislature's Web site, at <http://lrc.ky.gov/acts/mainacts.htm>.

The commercial publications of state session laws are usually available from the commercial service associated with the publishing company, either [Westlaw](#) or [Lexis](#). For example, the official version of session laws for the state of New York is called, *Laws of New York*. The commercial publications are *McKinney's Session Laws of New York*, published by West, and available from [Westlaw](#), and *New York Consolidated Laws Service Session Laws*, published by [Lexis](#), and available from [Lexis](#).

While the federal code is published both by governmental and by private publishers, the state statutory codes are usually published only by private publishers. For example, while the New York statutes used to be published in an official statutory compilation called *The Consolidated Laws of New York*, currently, there is no official codification in print.⁵³ However, the consolidated laws of New York are available from the state legislature's Web site.⁵⁴

Most state codes are published by all three major proprietary databases: [Westlaw](#), [Lexis](#), and [BloombergLaw.com](#). The codified statutes of Kentucky, for example, are available in three commercial versions: *Baldwin's Kentucky Revised Statutes Annotated*, which is published by West, and *Michie- Kentucky Revised Statutes Annotated*, published by Lexis. [BloombergLaw.com](#) offers access to this statutory codification under the name: *Kentucky Statutes*.

A few states, like New York, have four commercial versions of their codified statutes. *McKinney's Consolidated Laws of New York Annotated* is published by West and available on [Westlaw](#). *New York Consolidated Laws Service* is published by [Lexis](#)

⁵³ ELLEN GIBSON, NEW YORK LEGAL RESEARCH GUIDE I-68 (2d ed. 1998).

⁵⁴ <http://public.leginfo.state.ny.us/MENUGETF.cgi?COMMONQUERY=LAWS+&TARGET=VIEW>

and available on [Lexis](#). *Gould's Consolidated Laws of New York* is published by Gould Publications. Finally, New York Statutes is available from [BloombergLaw.com](#).

4. Municipal Ordinances

As mentioned earlier, each municipal unit has its own charter—fundamental law—and its own legislative branch. New York City's legislative branch is called the City Council, and its predecessor was the Common Council.⁵⁵ The City Council enacts local laws in annual council sessions. Although, often, there are no published session laws similar to the state collection, the municipal local laws are available both in print and electronically.⁵⁶ The New York City local laws are published in the New York City Legislative Annual and, starting with the 1998 session, online, at The New York City Council's Legislative Research Center.⁵⁷

In many situations, municipal law can be accessed for free. Interestingly, commercial databases do not offer more or better coverage than the free-of-charge ones. In fact, [Lexis](#) has quite an extensive municipal codes library which covers municipalities from 35 states on the free web, available as <http://www.municode.com/Library/Library.aspx>! Even more interestingly, if the strength of commercial databases resides in their ability to offer up-to-date results, when it comes to municipal laws, that service does not work with local laws.

As you can see, legislation is not hard to find for lack of repositories: Each type of legislation has its own multiple-format repositories. However, they rarely come together, and it is useful to know how to identify each in order to find what you need. The next section will contain some useful research tips.

⁵⁵ ELLEN GIBSON, *NEW YORK LEGAL RESEARCH GUIDE II-6* (2d ed. 1998).

⁵⁶ The most recent New York City local laws can be accessed online at <http://www.nycouncil.info/issues/index.cfm>

⁵⁷ <http://legistar.council.nyc.gov/Legislation.aspx>

G. HOW TO LOCATE SPECIFIC SOURCES OF STATUTORY LAW

Once you have identified the statutory law repository you want to use, the next step is to locate the specific statutory provision you need for your research.

Many times you already know what you need to locate, because you have the citation of the statute, such as 42 USC § 1983. If this example is rather clear, there are instances when you need to decipher the meaning of the citation, and especially the abbreviation of the repository. In those instances, make sure that you have a copy of the *Bluebook* handy in order to avoid wild goose chases.

For example, if your citation reads N.Y.C.R.R., do not think that the abbreviation is that of a collection of New York City rules and regulation. Use the *Bluebook* and learn its correct meaning, that of the *New York Code of Rules and Regulations*, the New York State repository of administrative law. Once you deciphered the abbreviation of the title of the repository, decide what repository you will use to find the sought-after answer. Use this book or even Google the citation to find what the rest of the citation means: whether you go to the volume of the *Statutes at Large*, or the Title of the *United States Code*. If you want to use the print repositories, as you know a session laws citation will contain the number of the *Statutes at Large* volume, the abbreviation, and the number of the page where the statute starts, while a citation to the *United States Code* will contain the number of the title containing the provision, the abbreviation of the compilation, and the number of the section of the statutory provision within that title. ([See Chapter 3, Fig. 21.](#)) Of course, if you decide to use

electronic repositories, you can just type the citation in the designated search box and obtain the much needed document.

When you need to find the statutory provision governing a specific topic, then you should use the statutory topical compilation from the appropriate jurisdiction: federal or state. For example, if you want to search for the topic on copyright preemption, then you need to use the *United States Code*, the federal statutory compilation organized by subject matter. If you want to use print sources, you may use the Index to any of the versions mentioned earlier. If you want to use electronic sources, then you can choose an index search within the commercial databases or a full-text search from any of the digital versions available free of charge. One such version is available free-of-charge from the legal portal FindLaw.com. If you choose FindLaw, click on the tab “Searching Cases and Codes,” then choose the link that directs you to the U.S. Code. Once there, type “copyright preemption” in the keyword search box. Of course, if you know the citation from some prior research, then type 17 U.S.C. § 301 in the appropriate search box. Please note that while the United States Code is available online at the GPO Access site in its 2006 version (which is the edition of its print publication), on FindLaw your result is not clearly dated.

Similarly, if you want to search state law, follow the same steps: if you have access to the citation to one of the statutory compilations, decipher it by using the *Bluebook*. Then find the appropriate statutory compilation and use it in print or online. If you need to find a statutory provision governing a specific subject matter, then use the topical statutory compilations within the jurisdiction of your interest.

All codified compilations have indexes, and the commercial codifications come with indexes both in print and on line. If you use free-of-charge digital sources, then your statutory research will have to be limited to a full-text search or a citation search, for lack of finding aid tools, such as indexes.

Municipal law research does not necessarily fit within the paradigm delineated above. Those sources may be easier to find or to the contrary, more obscure than regular statutory provisions. However, remember that there often is a published index for municipal law in your local public library and that recent municipal ordinances are searchable online. An annual index of the New York local laws is located in the *New York City Legislative Annual*. Similarly, to a certain extent [Lexis](#), [Westlaw](#), and [BloombergLaw.com](#) cover municipal law, and a search using those databases, though expensive, will have the same virtues exposed so many times here.

H. COMPLETING YOUR RESEARCH: THE U.S. LEGAL SYSTEM— A SYSTEM OF EVER-EVOLVING STATUTORY LAW

The U.S. legal system consists of norms that continue to adapt to social-economic changes and, of course, to our ever-changing mores. When the source of those norms is statutory, your final research step is two-fold. This process is further outlined below.

A statute is still good law when it is still binding authority over the area it is supposed to regulate. Statutes may fall into desuetude. The activities they are called upon to regulate either disappear or become normal, when once considered deviant, and there is no desire to enforce the statute. For example, changes in mores change the way statutes are enforced. While adultery is still a crime in some states⁵⁸ (although not a capital one any longer⁵⁹), rarely is one prosecuted for it.⁶⁰

Statutes and their rules may sometime be declared unconstitutional. Some may take decades to be held unconstitutional; others may be declared as such within a few years. For example, Virginia's Racial Integrity Act of 1924 required registration of race at birth and criminalized marriage between white and non-white persons. Like adultery, interracial marriages stopped being prosecuted as the Act little by little fell in desuetude. However, because its racism, the Supreme Court chose to declare

⁵⁸ BLACK'S LAW DICTIONARY (9th ed. 2009), defines adultery as:

Voluntary sexual intercourse between a married person and someone other than the person's spouse.

- In many jurisdictions, adultery is a crime, but it is rarely prosecuted. In states that still permit fault divorce, proof of adultery is a ground on which a divorce may be granted. A court may also use proof of adultery as a reason to reduce the offending spouse's marital-property award in a property division. Judges traditionally viewed adultery as a reason for denying the offending spouse primary custody of a child in a child-custody dispute. But today, only the deleterious effect of immoral behavior on the child is typically considered relevant. — Formerly also termed spouse-breach; avowtry. Cf. fornication; infidelity. [Cases: Adultery Key Number 1; Divorce Key Number 26.] — adulterous, adj. — adulterer, adulteress, n.

the Act unconstitutional in 1967, in *Loving v. Virginia*, and thus left no doubt about its illegality.⁶¹ Virginia was only one of 16 states in which interracial marriage was deemed illegal.

Another example where a statute's life is cut short by the U.S. Supreme Court is *Griswold v. Connecticut*,⁶² where the Court declared unconstitutional a Connecticut criminal statute. That statute had been revised only a few years previously, in 1958, criminalizing the activity defined as "preventing conception."⁶³

In *Griswold*, the Court found the 1958 revision unconstitutional⁶⁴ on grounds that it violated "several fundamental constitutional guarantees" that the Court defined as one's "zone of privacy" or "area of protected freedoms." The Connecticut statute was repealed (never applied) after the Court decision. The Connecticut statute reflected Connecticut's sense of social order and reproductive interests as existed in the 1950s. The Supreme Court decision mirrored a different sense of order, at the national level. Indirectly, the Court decision deemed the Connecticut statute unable to reflect the social needs of the present. It found it inappropriate for its role of governing Connecticut reproductive relationships within the realm of marriage for the future.

⁵⁹ Dana Neacsu, *Tempest in a Teacup or the Mystique of Sexual Legal Discourse*, 38 GONZ. L. REV. 601, 613 (2002/03) ("the Puritans of the Massachusetts Bay Colony used laws to punish extra-marital sex and they chose to do so by defining adultery as a capital crime. It should be noted that people remained undeterred despite such a threat.").

⁶⁰ For a well-publicized case of adultery, that of Lt. Kelly Flinn, see, e.g., James M. Winner, Capt, USAF, *Beds with Sheets but No Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOYOLA L. REV. 1073 (1998).

⁶¹ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁶² 381 U.S. 479 (1965).

⁶³ CONN. GEN. STAT. § 53-32 (1958). This provision was added to those on attempting miscarriage or encouraging the commission of abortion. CONN. GEN. STAT. § 7-1155 (1902); CONN. GEN. STAT. § 7-1157 (1902).

With *Griswold*, the Supreme Court legitimized the needs of a segment of the population of the United States that was becoming more and more active on the political arena: middle-class women. With that decision, the Court further established its role in the cultural war that still continues between the social liberals and the social conservatives,⁶⁵ and, of course, its role of defining our social order.

There are other decisions that marked our current legal system equally dramatically. *Brown v. Board of Education (I)*⁶⁶ remains one of our most influential law-making and change-conducive decisions, with perhaps only *Roe v. Wade*⁶⁷ arguably approaching that level of social and political influence.

The U.S. Supreme Court may not assert its power this dramatically often, but it remains our main institution of checks and balances, and no statute is safe from constitutional review. There are situations when statutes have had their constitutionality examined more than once. For example, twice the Court focused on the *Child Online Protection Act*,⁶⁸ which sought to protect children from exposure to commercial pornography placed on the Internet. The case examining the constitutional breadth of the act's restriction became *Ashcroft v. American Civil*

⁶⁴ CONN. GEN. STAT. § 53-32 (1958).

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or by both fined and imprisoned.

⁶⁵ For a more detailed discussion about social liberal and social conservative agendas and how they are furthered today, see, e.g., Dana Neacsu, *Tempest in a Teacup or the Mystique of Sexual Legal Discourse*, 38 GONZ. L. REV. 601 (2003/2003).⁶¹ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁶⁶ 347 U.S. 483 (1954).

⁶⁷ 410 U.S. 113 (1973).

⁶⁸ 47 U.S.C. § 231 (1998).

⁶⁹ 542 U.S. 656 (2004)

⁷⁰ 534 F.3d 181 (3rd Cir. 2008), cert denied, 129 S.Ct. 1032 (2009).

Liberties Union.⁶⁹ Due to its sensitive subject matter, Congress did not abandon the act. To the contrary, it incorporated the Court's holding and adjusted the Act. Its second reiteration was again challenged in court and found unconstitutional.

That being said, the two-step approach to finalize statutory research covers a search for legislative material which might have impacted your statutory answer and a search for cases which might have held your statutory answer unconstitutional. In other words, your statutory research needs to end with verifying whether the appropriate legislative body amended the statute or whether the judiciary declared it unconstitutional.⁷⁰

If the codified version of your statute predates 2006, the most recent codification of federal statutes, then you need to check it in the most recent version of the *United States Code*, the 2006 edition, and then further follow the steps delineated here. To check whether there are any amendments, you will perform a search in the annual supplements and the *Statutes at Large* database which covers all Congresses subsequent to the most recent annual supplement you can locate and search. Then, you need to search for all cases decided past the statute's enactment. That process is further described in the [following chapter](#).

If your statutory provision comes from the most recent version of the *United States Code*, then all you need to do is to update your results through a search in the electronic database that covers the annual supplements and the *Statutes at Large*. Similarly, if your search brought up a statute enacted since the last codification, you will update your statutory search part of your updating process by using only the *Statutes at Large* database.

The statutory search of your updating process can be done through the free-of-charge governmental databases mentioned earlier. As a research principle, you need to abandon the citation search and perform this segment of your search as a topical search instead of a citation search. For example, if your research is about the scope of subpoenas for records of electronic communications, as amended by Pub. L. 107–56 § 210 (2001), your research task does not stop with the location of the federal statute identified above. The next step is to check its codified version in the most recent publication of the *United States Code*. Using the information contained in the statute itself you find out that its codified version resides at 18 U.S.C. § 2703(c)(2). The most recent version of the *United States Code* is dated 2006. There are several free-of-charge electronic repositories which could help you locate that information. Once you do that, next you need to check whether any amendments occurred between 2006 and the date of your research. You could use the annual supplements and then for the period of time left outside the purview of the annual supplements, the *Statutes at Large* collection. However, you are one step away from accomplishing your research task. Once you have all the available information pertaining to any legislative changes, you need to make sure that there are no judiciary decisions related to the statutory provision of your research. This very final step, as detailed in [Chapter 5](#) is more tricky.

This book is not focused on teaching you how to use any proprietary database. It teaches you how to perform legal research by understanding why and what type of information you seek, which is what legal researchers call binding or “good” law. Free-

of-charge legal research could be very demanding, and it is only relatively accurate. All sophisticated researchers can find out whether federal, state, or municipal statutory law has been modified by the appropriate legislative body. Similarly, they can locate whether the United States Supreme Court has declared any of those provisions unconstitutional. However, only the most sophisticated researcher can find out whether there is additional case law which might impact the statutory provision of their search, as that will be detailed in [Chapter 5](#).

Often, legal researchers will prefer proprietary databases to free-of-charge digital resources. [Lexis](#) or [Westlaw](#) provide excellent updating services, and the principle behind using Shepard's or KeyCite is a citation search, which is quite intuitive and minimally challenging to perform. All one needs to do is type the citation in the appropriate search box. However, reading the updating results is often a confusing exercise, because in their attempt to simplify the process, both [Lexis](#) and [Westlaw](#) have incorporated a cacophony of colors and shapes as identifiers. The distinctions between a yellow triangle or a green hexagon are such ambiguous that researchers need to read the legal information each icon identifies and make their own judgment about the validity of that piece of information, which levels the field with the full-text search free-of-charge databases offer. [BloombergLaw.com](#) has yet to offer an updating service for statutory research, which will provide both statutory amendments and cases applying any given statutory provision.

The next chapter focuses on decisional law. It describes the ways in which judges make law, the ways in which you can discern what part of an opinion contains the legal ruling, and how decisions become law through the principle of *stare decisis*. It also explains about decisional law research and the ways in which you can update it.

For Further Reading

Justiss, Laura K. *A Survey of Electronic Research Alternatives to LexisNexis and Westlaw in Law Firms*. 103 LAW LIBRARY JOURNAL Vol. 71 (2011)

In-Class Exercise

Compare browsing the *United States Code* on the free-of-charge databases, such as Gpoaccess.gov, and on proprietary databases. What is the major difference between the two browsing experiences?

Chapter 5

Case Law:

What It Is, Where It Is, and How You Find It

[...] to accomplish the redress of [...] injuries, courts of justice are instituted in every civilized society, in order to protect the weak for the insults of the stronger, by expounding and enforcing those laws, by which rights are defined and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice that is, by civil suit or action. The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly 'without consideration. Upon the whole, however, we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law."

—*Blackstone's. The Study, Nature, and Extent of the Law*

A. COURT OPINION: THE END RESULT OF A LAWSUIT

Court opinions are the primary source of decisional (case) law, but they represent the end result of a very complex process. If we visualize the court as “the place wherein justice is judicially administered,”¹ then a court opinion can be described as the final expression of the administered justice.

Justice is administered through a well-defined procedure which is mirrored in court documents. Those court documents are part of the case docket. Because they are filed with the courts, they are open to the public, unless the judge in charge decides otherwise.

The docket can be accessed through the court clerk’s office. To the extent that the filings are done through electronic submission, those documents can be accessed electronically, through different databases, including Pacer (restricted to federal courts), [BloombergLaw.com](#), [Westlaw](#) and [Lexis](#).

As mentioned above, ontologically, court opinions define the end of a complex procedural process, the lawsuit. Opinions do not require the human and financial cost the passing of any statute requires, because they usually represent an individual endeavor, rather than a collective undertaking. However, from the perspective of the individuals or corporations involved in the lawsuit—the “parties to the lawsuit”—opinions are very hard to reach. Often, the best interest of both parties demands a private settlement.

¹ EHRlich’s BLACKSTONE, at 465 (1959).

To understand how opinions come into existence, next I will briefly explain their enabling process. First, you should view lawsuits as human activities, and like the majority of our daily activities, they too are governed by legal norms. Unlike the legal norms which grant individuals and corporations rights and duties and disclose the circumstances in which a court may be expected “to grant redress to one person against another,”² the norms governing lawsuits have a different content. The norms which spell out our rights and duties are considered rules of substance and make the body of substantive law.

However, those norms are sufficient to enable the enjoyment of our present state of social, political, and economic freedom. The other necessary half represents those which govern the process of enforcing the first set of norms, when and if they are violated. Usually, the enforcing norms are identified as procedural in their nature. For example, the norm which states that A has the right to lawful employment, and the norm which states that if A is denied such employment, A is entitled to a judgment of a court to recover money damages from B are both substantive legal norms. They inform A of her rights, and B of his duties.

However, they do not inform A of how to obtain a judgment if B violates her rights. Other norms will explain A what she needs to do in order to recover the money damages from B. Such procedural rules make the body of civil procedure, or civil litigation. In other words, procedural law prescribes “the procedures by which persons may bring disputes before courts”³ and by which they unfold. Because the

² RICHARD H. FIELD ET AL., CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE at 3 (8th ed. 2003).

³ *Id.* at 4.

principle of this book is first understand your topic and then research it, below I briefly describe the stages civil litigation usually follows.

1. The Pleading Stage

When people or corporations have a dispute, they usually go to a lawyer who will change it into a lawsuit. The parties involved in a lawsuit are litigants. Sometime, they start lawsuits without the help of a lawyer. Then they become *pro se* litigants.

Often, prospective litigants visit lawyers. Upon listening to the facts, lawyers may decide to represent them. From prospective clients they become “clients.” In exchange for legal representation, lawyers usually charge their clients an hourly wage. Sometimes attorneys may accept a contingency fee representation and the client will not incur any pecuniary loss because the attorney is paid a percentage of the damages won in the case. Very rarely, lawyers represent clients on a *pro bono* basis and do not incur any pecuniary gain for their services. Each state has its roster of organizations providing *pro bone* services. They are usually understaffed and insufficient. Also, it is often very difficult to obtain such representation because prospective clients have to prove that their “family is at or below 250% of federal poverty level”!⁴

The document that starts a civil action is a complaint, and it contains causes of action that explain the legal grounds for the action. When a private wrong, an act violating an individual’s right, is sought to be remedied, then a civil action is started. On the contrary, when a public wrong, an act violating the public rights of or the duties

⁴ See, e.g., <http://apps.americanbar.org/legalservices/probono/directory/newyork.html>

due to the whole community, is sought to be corrected, then the state will commence a criminal case. Unlike a civil case, a criminal case often attempts to secure obedience to the state's laws through the physical punishment of the lawbreaker.⁵

The party who starts the lawsuit is called the plaintiff. The party against whom a remedy is sought will become the defendant. The remedy sought in a civil action is usually a pecuniary one—the payment of money. In addition to damages—request for a money payment—the plaintiff may also seek equitable relief. Seeking equitable relief is asking the court to issue an injunction that will order the defendant to do or not to do something.

Once the complaint is filed, the alleged wrongdoer—the defendant—is informed about the legal action taken against it. The defendant will be served with the necessary legal papers that will offer support for building a defense. In response, the defendant may choose to answer or serve a counter-complaint.

2. The Discovery Stage

Following the pleading stage is the discovery stage. This is the more time consuming phase of a civil trial. This stage follows procedural rules according to the court where the litigation started: state or federal. They are statutory in nature and codified in each state's statutory compilation.

The federal rules of civil procedure are also located within the statutory codified compilation. Their basic purpose is to ensure that the parties to civil

⁵ RICHARD H. FIELD ET AL., CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE at 2.

litigation “could obtain disclosure of all relevant information in the possession of any person before trial, unless the information was privileged.”⁶

The amount of discovery in civil cases depends on the parties’ financial prowess. Discovery means labor hours for attorneys. During this stage, lawyers for both parties will try to discover facts that will substantiate their clients’ allegations-of injury, for the plaintiff, and of non-feasance for the defendant. An easy scenario is the one in which the defendant answers with strong counterclaims and moves to have the court dismiss the plaintiff’s case for failure to state a cause of action. Such a strong reaction may intimidate the plaintiff and induce it to tell its attorney that it does not want to prosecute the case any longer. That often ends the case with an out-of-court settlement.

But, usually, discovery is a process that takes months because each party’s attorneys try to procure proof for their clients’ allegations. In perhaps clearer words, discovery means gathering the information needed to build a winning case in court. It involves discovery requests by asking the other party to provide as much information as possible through a large array of documents. Those documents have specific names and their use during the pretrial stage is strictly regulated by procedural rules. For example, the *Rules of Federal Procedure—Federal Rule of Civil Procedure 26* (published in Title 18 of the *United States Code*)—require that all disclosures, requests for discovery, and responses to discovery requests be signed by the party’s attorney.

⁶ LARRY TEPLY & RALPH WHITTEN, *CIVIL PROCEDURE*, at 740 (2d ed. 2000).

Among the most popular discovery means are “interrogatories,” and “depositions.” Interrogatories are questions addressed to the other party that need to be answered under oath. Depositions involve recording testimony of a party or a witness. Depositions are usually used to record the parties’ initial position about the facts in dispute or to record the testimony of a witness that may not be available at the trial stage. If the parties persist, at the end of the discovery process, the lawsuit reaches the trial level.

3. The Trial Stage

At the trial level, the parties present the evidence collected during discovery to a jury or a judge. When the party has the right to a jury trial, the party must exercise it and demand a jury in the original pleading. The original pleading is either the complaint (for the plaintiff) or the answer (for the defendant)—*Federal Rule of Civil Procedure (Fed. R. Civ. P.)* 38.

Jury trials start with the selection of the jury “from a panel of potential jurors called for jury duty.” This process ends with the jury being impaneled.⁷

Next, the party who alleged the wrongdoing, the plaintiff, and who has to meet its burden of proof, makes an opening statement explaining its position. The plaintiff has the burden of proof because the plaintiff has the duty to prove the statements made in the complaint, which remain mere allegations until proved true.

The opposing party will answer with its own statement, and then the plaintiff, because it has the burden of proof, will present evidence in support of its allegations.

⁷ *Id.* at 826.

Then it will rest and the opposing party will have a chance to present its own evidence, and rest. The plaintiff offers proof in support of its allegations. This process is known as presenting the case in chief. The defendant offers its own proof and rebuts the case.

When all the evidence has been presented, the parties will have a second opportunity to make statements to the jury. The statements party make at the end of the trial are called closing arguments.

The trial ends with the judge's instructions to the jury. The judge will instruct the jury on the applicable law and, sometimes, will also summarize the evidence.

For example, for each cause of action the judge will instruct the jury as to what legal rule applies. After the judge delivers her instructions the jury retires for deliberations.

4. The Verdict

After deliberations, the jury usually brings in a verdict: "We the jury find for the plaintiff in the sum of..." "The jury may find either for the plaintiff and award a dollar amount or for the defendant. This is called a "general verdict." Upon that verdict, the judge enters judgment. Judgment is the culmination of litigation at the trial court: it decides on matters subject to litigation.⁸

The judgment thus ends the controversy. When a money judgment is not paid voluntarily, the defendant's assets may be seized and sold to satisfy the judgment.⁹

⁸ *Id.* at 874 et seq.

⁹ *Id.* at 875.

The judgment, unless it is appealed, definitively settles the issue: it achieves *res judicata* status. This is a defense to a second lawsuit on the same claim. The English translation of the Latin's *res judicata* is “a thing adjudicated.”¹⁰

5. The Appeal Stage

When the losing party believes that the trial court made mistakes in applying the law, it appeals. The thumb-rule of appeal is that the prevailing party cannot appeal.

Unlike in civil law countries, in our common law system, the facts are not contested on appeal. No additional testimony is taken, nor is new evidence submitted. The opinions of the appellate courts rest on the trial record and the memoranda of law that the lawyers submit when asking for the appeal (or defending themselves against the appeal). The two basic functions of appellate courts are to review the trial court record and establish whether a reversible error occurred at the trial level.¹¹ Harmless errors are not grounds for appeal. Thus, “When the plaintiff has been granted all available relief, any error that the plaintiff complains of is harmless.”¹²

The court of appeals' opinions are written by the assigned judge, but are filed as the opinion of the court. Usually they end the controversy (as very few reach the court of last resort, especially at the federal level) and establish the precedent for following cases. Thus, judge-made law, also known as decisional law, or case law, does not mean the totality of our court opinions. It rarely means decisions found in trial

¹⁰ *Black's Law Dictionary*, at 1336 (8th ed. 2004).

¹¹ LARRY TEPLY & RALPH WHITTEN, *CIVIL PROCEDURE*, at 882 (2d ed. 2000).

¹² *Id.* at 893.

court opinions. In other words, judge-made law covers all final court decisions and is built on previous decisions through the principle of *stare decisis*, which requires courts in subsequent decisions to follow the holding in previous cases.

By now you know that case law is decisions that come from intermediary courts and the courts of last resort. Because these decisions cannot be challenged any further, they have the authority to resolve the dispute that caused them once and for all. In addition, they have the authority to regulate the future in similar circumstances. That authority rests on policies of security and certainty that are translated in law under the doctrine of *stare decisis*. Regulating the future through court decisions is a unique feature of the common law system due to its cornerstone principle—*stare decisis*.

B. CASE LAW-THE PRINCIPLE OF *STARE DECISIS*

Case law covers the opinions from appellate courts and courts of last resort. Thus, it seems reasonable to try to understand how court opinions become case law. What is the role the principle of *stare decisis* plays? First, it should be said that this basic American legal principle comes from the royal courts of England and was received in the United States, which thus became a “common law” country as opposed to a “civil law” country—such as France or Germany—which does not formally accept this principle of subservience to older decisions.¹³ Additionally, it should be noted that the hierarchical structure of the U.S. court system has fundamental implications for the degree of authority that precedent commands. The higher in the hierarchy a court is, the larger the scope of its prior decision’s authority is.

The principle of *stare decisis* ensures that past judicial decisions are formally “binding” on factually similar present controversies within the same jurisdiction (a kind of geographical limitation). In other words, when a court has established a principle of law as applicable to a certain state of facts, that court and lower courts will follow that principle in all future cases in which the facts are substantially the same. Thus, the principles of *stare decisis* gives precedential value to past court decisions within well-established geographical and factual limits.

For example, a decision of the Supreme Judicial Court of Massachusetts is a precedent and so generally binding in future “like” cases in that court

¹³ For a discussion of the differences between the common law and civil law system, see ARTHUR VON MEHREN, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (2d ed. 1977).

and the other “lower” Massachusetts courts, such as the “intermediary court” named the “Massachusetts Appeals Court,”¹⁴ but it is not binding on any future cases arising in the courts of Georgia or California or some other state. U.S. Supreme Court decisions are not binding upon state court decisions, unless the state decisions regard a legal federal question. A federal question is an issue that regards the interpretation of a federal statute, federal regulation, or of the Constitution of the United States. A state’s highest court has the last word on issues of that state’s law.

1. How the Principle of *Stare Decisis* Works: Finding the Decision Within a Court Opinion

Finding the relevant case law is a very difficult process. Most researchers need a lot of practice before they become proficient, and this learning curve [Westlaw](#), [Lexis](#) and [BloombergLaw.com](#) are attempting to curtail with their new research platforms inspired by the Google research mystique. This book has no ambition that it can speed up that process, but because it demystifies the research process and points out its stages, it may achieve that unachievable goal as well.

The first step is to understand the source of case law: court opinions. This book will help you identify the repositories of court opinions. Once you find the court opinion you need to read you should understand that what matters is the principle of law that it stands for, and not its entirety.

¹⁴ A map of the Massachusetts Court System is available at www.mass.gov/courts/courtsandjudges/courts/structure_color.pdf.

Fig. 22
Finding Judge Made Law
Briefing a Court Opinion

Often the most successful way to understand a case, though perhaps not the fastest, is writing a “brief” of the case. If you need to brief your case follow the format below:¹⁵

- (a) Heading
- (b) Facts
- (c) Procedural History and Outcome
- (d) Legal Issue
- (e) Holding (the decision)
- (f) Reasoning
- (g) Separate Opinions (Dissenting opinions)

A court opinion often has a very complex structure. It often confuses rather than simplifies issues. That is why we will quickly discuss below how you should read a case. (See Fig. 22.)

Understanding a case often requires a specific type of engagement with its text: rather than a mechanical reading, you should summarize or “brief” the case. Briefing a case helps you understand the rule issued by that court in that specific case, because it forces you to spot the questions or the issues the rule is meant to answer.

Before you engage in this process, remember that there are no perfect ways to do it, because there is no perfect brief: writing a brief is a rather dull exercise in

¹⁵ EVA H. HANKS ET AL., ELEMENTS OF LAW, 81-92 (1994).

spotting the issues the court will analyze and then resolve in its ruling. However, they all are very well structured texts which attempt to mirror the structure of cases.

(a) Heading

Each opinion has a title and it can be identified by the reporter where it is reported. For example, *Brown v. Board of Education* (I) is the title of the Supreme Court case that covered ten appeals, one of which being the Kansas case against the Board of Education of Topeka. In the Kansas case, *Brown v. Board of Education*, the plaintiffs are what the court identifies them, *Negro* children of elementary school age—“minors of the Negro race”—who reside in Topeka. They brought this action in the U.S. District Court for the District of Kansas to enjoin enforcement of a Kansas statute that permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students.

It is standard practice that the title of a case consists of the last name of the individual plaintiff and the last name of the individual defendant, or an abbreviation of their corporate names separated by the abbreviation “v.” for the Latin word “versus,” which means “against.” The title of the case is always followed by the location of the opinion: the abbreviation of the compilation of opinions preceded by the volume of that compilation and followed by the page number where the opinion starts. At the end, more information regarding the year of the decision is usually added. Thus, the full citation for *Brown v. Board of Education* (I) is *Brown v. Board of Education* (I), 347 U.S. 483 (1954).

As you might suspect, this means that the full opinion in *Brown* can be

found in the 347th volume of the *United States Reports*, and it starts at page 483. The opinion was decided by the U.S. Supreme Court in 1954. As explained earlier, because the U.S. Supreme Court opinions can be found a quite a few print and online repositories, the citation presented above is only one of the many such citations. Make sure that you follow the rules of citation preferred by the person who gave you the assignment.

(b) Facts

The facts – or the fact pattern of the case -- will help you understand the case. In *Brown v. Board of Education*, the plaintiffs, “minors of the Negro race,” sought admission to the public schools of their community on a non-segregated basis. Depending on the type of assignment you are working on or the more concrete reason for understanding this case, your facts can occupy one or more paragraphs. However, try to remain brief in your writing, to achieve the purpose of the exercise, which is to produce a writing product which is easy to review and remember.

(c) Procedural History

Summarizing the procedural record of the case, such as the decisions rendered by the lower court or courts, helps you understand the authority of the opinion you are reading. It streamlines your analysis and thus understanding. Additionally, it helps you focus on the issues raised on appeal. For example, first you learn about the very complex nature of the *Brown* case. Next you learn that in each of the ten cases before the Supreme Court in *Brown*, other than the Delaware case:

a three judge federal district court denied relief to the plaintiffs on the so-called “separate but equal” doctrine announced by this Court in *Plessy v. Ferguson* [...]. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.¹⁶

(d) Legal Issues

These are the questions of law that the court is asked to decide. In the *Brown* opinion, the court was asked to find whether segregated public schools deprived the plaintiff of the equal protection of the laws under the 14th Amendment. You could write it as question: Does segregated public education violate the 14th Amendment?

(e) Holding or Decision

The holding is usually described as the answer the court gives to the legal issues it analyzed in the opinion. Thus, in this instance the holding to the issue raised above becomes: Yes. The U.S. Supreme Court held that public education violates the 14th Amendment. You could add the Court’s language, stating that in *Brown*, it held that:

in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. [...] We have now announced that such segregation is a denial of the equal protection of the laws.¹⁷

¹⁶ 347 U.S. 483, at 487 (1954).

¹⁷ 347 U.S. 483, at 495 (1954).

(f) Reasoning or Dicta

If the holding usually takes a few lines, aside from the summary of the facts, reasoning makes up the largest party of any opinion. It consists of the reasons a judge used in deciding that case in a certain way. In this instance you would have to summarize the reasons, the explanation the U.S. Supreme Court gave before reaching the conclusion that segregated education violates the 14th Amendment.

(g) Separate Opinions (Dissenting Opinions)

In *Brown*, there are no separate opinions. Chief Justice Warren delivered the decision of the Court.

Of course, sometimes you may read a case without needing to focus on all of the aspects mentioned above. Keep in mind that you brief a case according to your own specific interests, and this is only one way in which you can read a case. It functions as an exercise in finding the decision within an opinion.

Very succinctly, this is the process American law school students use to deconstruct opinions and locate decisions. Next let's see how, through the principle of *stare decisis*, decisions become case law.

2. How Does the Principle of *Stare Decisis* Work?

Case law generates rules that rely on prior decisions within the boundaries established by the doctrine of *stare decisis*. As the name "case law" suggests, a particular decision, or a collection of decisions, generates law-that is, rules of general application.

Case law is sometimes used as synonym with "common law," and it covers all

judicial decisions that have precedential effect upon later decisions from the same jurisdiction. Sometimes both terms are used to contrast with statutory law—law that is contained in the body of legislative acts. While both at the federal or state level the legislative body has the power to abolish or modify common law as it sees fit, courts have the ultimate say in deciding what a statute is.

Case law is also synonymous with judge-made law. Judges “make” law when they decide a case. This is more apparent when they decide a case that is not exactly controlled by precedent or by a statute—“an issue of first impression”—and less obvious when they apply prior case law. However, either way, it is unavoidable that judges will transplant in their decisions their own understanding of the role of the law, public policy, and the mores of their times. Law is not an “antiseptic product of logic”¹⁸ said Justice Holmes, as it is not a “brooding omnipresence in the sky.”¹⁹ Case law, Justice Holmes explained, is the result of the judges’ understanding of the “necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men.”²⁰

3. Problems with *Stare Decisis*

The principle of *stare decisis* assumes that the decision in a case should govern the decisions in all like cases that come from the same court or lower courts within the same jurisdiction, within the same factual configuration. For example, let’s

¹⁸ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (dissenting).

¹⁹ *Id.*

²⁰ JUSTICE OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1-2 (1881). For a more detailed explanation, see WILLIAM BURNHAM, *INTRODUCTION TO THE LAW AND LEGAL SYSTEMS OF THE UNITED STATES*, at 43 et seq.

assume that highest court in New York State decides that environmental nuisances are grounds to grant an injunction to stop the nuisance. Then, according to the principle of *stare decisis*, when a plaintiff brings a complaint against a cement factory's owner because the cement pollution causes plaintiff to suffer partial eviction from its property adjacent to the cement factory, that plaintiff has a high expectation that under New York law defendant's factory will be closed, unless the pollution can be averted.

However, this principle is not set in stone. In fact there are quite a few problems with making it work, because (a) it is as hard to identifying the binding rule, as (b) it is to identify factually similar cases.

a. The Structure of an Opinion Is a Gray Zone

In order to solve the first problem we have to become aware of the fact that all court opinions have a complex structure. Some parts are easier to identify than others. The introductory elements that identify the name of the parties, attorneys, and the judge that wrote the opinion of the court, as well as the statement summarizing the case and its procedural posture are such examples. Although all decisions contain a description of the facts (the factual dispute), as well as a summary of the legal issues (the legal face of the dispute), those may be more difficult to spot and often opaque to interpretation.

Opinions thrive on their decisions (holding) and the reason on which they rest that decision. The reason given for the holding is also part of what is known as "dicta." Only the holding is binding. But how does one know what the holding is? How can one formulate the rule of law established by each case?

The job of stating a reasonable rule of law—of predicting the decision of the court on the new facts—is not easy; it is an art rather than a science and as such is primarily a matter of feel [...] The key to the determination is policy. What was the policy (or policies) underlying the earlier decisions? Are there facts in the new case that raise different policy considerations? Of course, if the court believes the policy of the original decision was wrong, it may overrule it or [...] “confine it to its special facts.”²¹

From where I stand, *stare decisis* is a myth and like any myth it has its attraction. We, the people, need it in order to function as a specific type of democracy. Judges need it in order to legitimize their decisions. Justices O’Connor, Kennedy, and Souter make a magisterial use of this myth in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, (*Casey*),²² which they present as following the rule of *stare decisis* and retaining the “essential holding of *Roe v. Wade*.”²³

The myth of *stare decisis* assumes that there is a limit, sometimes called “the painfully obvious sophistry,” which will enable one to distinguish the holding or the decision of the case from the dicta of the case, and thus reliably apply the so-called “precedent.” The reality is that applying the principle of *stare decisis* is a gray zone exercise where no one knows what the court will do until it decides, and only then, in hindsight, can one make the argument of *stare decisis*. Going back to the nuisance example, a holding will never become the law of the land in the abstract. Cement factories did not get closed because their pollution could not be controlled with that moment’s technology, as *Boomer v. Atlantic Cement Co.*,²⁴ shows. The New

²¹ JANE GINSBURG, LEGAL METHODS: CASES AND MATERIALS, at 121 (2d ed. 2004).

²² *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992).

²³ *Casey*, 505 U.S. at 846

²⁴ 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

York Court of Appeals, the highest court in New York State refused to grant the injunction the neighbor sought. Instead, it recognized that the pollution minimized the neighbor's enjoyment, which the court translated into damages. Thus, for the plaintiff's loss of property rights, the court ordered defendant to pay a specific amount of money.

There was *stare decisis* in this area of law, but the *Boomer* Court refused to apply it. It did acknowledge that *stare decisis* is only a guiding principle for judges. No court will ever state that, because *stare decisis* gives us a sense of stability and order that we cherish and use. The Court did not find opposite "sayings of learned text-writers" more persuasive either. Instead, the *Boomer* Court found the present factual circumstances closer to a "persuasive" case from another jurisdiction (Indiana) than to any New York "binding" cases.

The present cases and the remedy here proposed are in a number of other respects rather similar to *Northern Indiana Public Service Co. v. W. J. & M. S. Vesey*, 210 Ind. 338, 200 N.E. 620 decided by the Supreme Court of Indiana. The gases, odors, ammonia and smoke from the Northern Indiana company's gas plant damaged the nearby Vesey greenhouse operation. An injunction and damages were sought, but an injunction was denied and the relief granted was limited to permanent damages 'present, past, and future' (p. 371, 200 N.E. 620).²⁵

b. Identifying the Factually Similar Cases

In order to apply the principle of *stare decisis*, one needs to find the law that is binding. As the *Boomer* example showed, this is a very difficult task. That law is the

²⁵ *Boomer*, 26 N.Y.2d at 227.

holding of all similar cases. However, similar cases may mean the facts itself were similar or the issues were similar, or even that the courts perceived them as similar despite substantial differences. For example, the plaintiff in *Roe v. Wade* was a woman who sought an abortion in Texas when Texas had a statute that prohibited abortion. In *Casey*, the plaintiff was a not-for-profit “Planned Parenthood” that challenged five Pennsylvania statutory provisions that made abortion more burdensome than before their enactment. Despite these differences, the *Casey* court stated that it relied and upheld the “essential holding in *Roe v. Wade*.”²⁶

Here we briefly explored how case law works so we understand why legal research takes the form it does. You should have a fairly good understanding of how judges make law. Similarly, it should be clearer to you to what extent “holdings” or “decisions” represent the primary sources of case law.

The next section describes the repositories of case law and explains how to locate specific case law within those repositories. Because we are experiencing a moment of transition in legal research, where the existing duopolies are facing competition from newcomers both at the proprietary and at the free-of-charge level, this book becomes that much more valuable to you: instead of preaching learn the existing databases to understand how to do research, its mantra is: understand how law works and where it resides, or it could reside so you can do the most efficient, and comprehensive legal research possible. Finally, this chapter will end like the preceding one with steps you need to take to complete your legal research and make sure that what you found is still good law.

²⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

C. REPOSITORIES OF DECISIONAL LAW OR CASE LAW

Court decisions reside in the written opinions which mark the end of the legal dispute. For centuries, some of those opinions have been published in book-format bound volumes called “reporters” or “case reports,” but that practice is bound to change.

Case reporters contain loosely organized information. They may contain cases organized chronologically by jurisdiction, or geographically, but their organization is not useful unless you know the proper citation of the case in which you are interested. The three currently competing fee-based databases—[Lexis](#), [Westlaw](#), and [BloombergLaw.com](#)—cover all cases printed in a reporter and often publish so-called “unreported” cases.

The free-of-charge electronic databases are more limited in their coverage. That flaw makes it very difficult for a legal researcher of limited means to perform a comprehensive case law research. Finally, that same content flaw makes it very difficult to update research results with a free-of-charge case law search. All those issues will be further discussed in this chapter.

However, many of these problems are solved by the fact that “case law” often describes appellate decisions, which are found in appellate opinions. These decisions are easier to find because to the extent they are published they are covered in one or more print reporters. Those reporters are available in public libraries.²⁷ Many of those decisions are also freely available online.

It is interesting to note that the percentage of appellate court opinions that are published varies widely and has, in general, been declining in recent years as the

number of appeals has increased. Among the federal courts of appeal, fewer than half of their decisions are published. The judges who decided the case make the decision whether to release their decision for publication.²⁸

Case reporting began informally and selectively. It became more systematic when the states as well as the U.S. Supreme Court decided to start publishing their decisions in “official” reporters. For a long time, the U.S. Supreme Court opinions have been published in three print repositories. These are: (1) the official reporter—*United States Reports*—published by the U.S. Government Printing Office since 1790, and two commercial reporters, (2) the *Supreme Court Reporter*, which is published by West Publishing Company, and (3) the *Lawyer’s Edition*, which is published by [Lexis](#). All U.S. Supreme court decisions are available electronically, either free-of-charge from [LexisOne](#), Google Scholar, and within certain time limits from the Court’s website²⁹ or for a fee from [Westlaw](#), [Lexis](#), [BloombergLaw.com](#), and a series of lesser expensive databases, usually offered through state bar associations, such as Casemaker.³⁰

West Publishing Company, currently a multinational private company part of West Thomson, began compiling those cases in the 1880s.³¹ Today it publishes both federal and state court opinions. It publishes the Supreme Court opinions and all federal opinions from both intermediate and trial courts. It also publishes all state court opinions from the courts of last resort in a set called the National Reporter System. The National Reporter System contains seven regional reporters. (See Fig. 23.) Currently, West has two corporate competitors, LexisNexis,³² and [BloombergLaw.com](#),³³ and their reporting is reserved to online access.

²⁷ The New York City Public Library branch which carries legal information in print is Science, Industry and Business Library (SIBL). For a brief description of the scope of its specialized collections, see <http://www.nypl.org/locations/sibl>.

Fig. 23
West's National Reporter System

1. Southern Reporter
 - Alabama • Florida • Louisiana • Mississippi
2. South Eastern Reporter
 - Georgia • North Carolina • South Carolina • Virginia
 - West Virginia
3. Southwestern Reporter
 - Arkansas • Kentucky • Missouri • Tennessee
 - Texas • Mississippi • California • Kansas • Oklahoma
 - Wyoming • Colorado • Montana • Oregon
4. Pacific Reporter
 - Alaska • Arizona • Hawaii • Idaho
 - Nevada • New Mexico • Utah • Washington
5. Atlantic Reporter
 - Connecticut • Delaware • District Of Columbia
 - Maine • Maryland • New Hampshire • New Jersey
 - Pennsylvania • Rhode Island • Vermont
6. Northeastern Reporter
 - Illinois • Indiana • Massachusetts • New York • Ohio
7. Northwestern Reporter
 - Iowa • Michigan • Minnesota • Nebraska
 - North Dakota • South Dakota • Wisconsin

²⁸ WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND THE LEGAL SYSTEM OF THE UNITED STATES 73-79 (3d ed. 1995).

²⁹ The Supreme Court decisions from 1991 onward are available on the Court's Web site, at <http://www.supremecourtus.gov/>. From 1991-2001 the decisions are PDF copies of the decisions contained in the United States Reports (vols. 502-537).

For the last few years, all federal courts have had their own pages available through a site maintained by the Administrative Office of the U.S. Courts on behalf of the U.S. Courts. This Office functions as a clearinghouse for information from and about the judicial branch of the U.S. government. Through this Web site, <http://www.uscourts.gov/>, the most recent opinions of our federal judicial branch can be freely accessed.³⁴

The trend toward electronically free access has included state courts as well. However, the situation is more diverse at the state level, because each state has its own court system and makes its own decisions about publishing their opinions online. For example, all New York state courts have their most recent two years' opinions online available through the New York State Unified Court System, at <http://www.courts.state.ny.us/courts/>. Over 140,000 decisions are available dating back to 2001, for many New York Supreme Court civil cases.

Opinions are available electronically from different databases and through different portals. Very little has changed since the print edition.

[LexisOne](#) remains by far one of the best free-of-charge databases, because its case presentation, coverage, and ease of access. Google Scholar hits would come up with [LexisOne](#) results, too. [LexisOne](#)'s coverage has continued to grow. It now offers free access to all the reported state and federal court opinions decided in the past ten years, and to the Supreme Court cases from 1781 to present.

³⁰ Casemaker is in partnership with your State Bar, and 27 other state bars, whose mission is to provide you with the highest level of primary legal research and knowledge discovery. Because of the combined strength of the consortium's aggregated members and customized data, the Casemaker Consortium is working to expand the depth and breadth of content and services in order to meet your full knowledge discovery needs. Strategic partnerships, such as treatises from the ABA, are expanding your ability to search publications and journals with just one click. <http://www.lawriter.net/>.

As explained above, each court's Web site posts its most recent dockets and opinions so they are free available to the public. These opinions will also be accessible through FindLaw, the free branch of [Westlaw](#). In addition to being a portal to cases, FindLaw also covers all the United States Supreme Court opinions from 1893 to present.

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- ³¹ John B. West founded West Publishing more than 135 years ago to support the needs of legal professionals. This foundation remains an integral component and a driving force behind Thomson West today. [...]
1876: John B. West and his brother, Horatio, establish West Publishing in St. Paul, Minnesota. [...]
1882: [...] West publishes the North Western Reporter, with opinions from both Minnesota and Wisconsin courts. It also introduces another innovation: editorial enhancements, summarizing and classifying key points of law in court opinions. [...]
1887: West creates The National Reporter System. [...]
1940: West Publishing acquires Foundation Press. [...]
1975: West Publishing launches Westlaw. [...]
1998: West launches westlaw.com. [...]
2001: West acquires FindLaw. [...]
Thomson/West, Company History, at <http://west.thomson.com/about/history/default.aspx>.
- ³² LexisNexis Group is the global legal publishing arm of Reed Elsevier, the Anglo-Dutch world-leading publisher and information provider. See about LexisNexis, at <http://www.lexisnexis.com/about/>.
- ³³ Bloomberg Law is the first real-time legal research system that integrates innovative search technology, comprehensive legal content, company and client information, and proprietary news all in one place. It's an innovative set of tools that provides the practice-specific information you need, tailored to the way you work. Bloomberg Law provides an edge that helps you counsel your clients more effectively, and grow your practice. http://www.bloomberg.com/solutions/business_solutions/law/.
- ³⁴ Of course, the most developed Web site belongs to the U.S. Supreme Court, and it is available at <http://www.supremecourt.gov/>.

D. HOW TO LOCATE SPECIFIC PRIMARY SOURCES OF CASE LAW

It is the philosophy of this book that legal research is a process shaped essentially by what the researcher already knows and by what she needs to know. Everything else is a subsidiary decision. Here are a few scenarios which should better explain the above statements.

1. The researcher has a citation, even an incomplete citation and needs to find the opinion the citation identifies.

The steps to find the case identified by citation are the following. First, make sure that you have a correct, or at least a proper citation. When you have a good citation you can use the Bluebook, now in its 19th edition, to identify all available case law repositories. The list of abbreviations for the reporters which cover the United States Supreme Court cases, federal cases, and state cases from each state court's of the last resort posted below (See [Fig. 24.](#)) will further explain the connection between citations and case law repositories.

All case law citations contain at least four elements: (1) a number which indicates the volume of the case reporter, and which precedes the abbreviation of the reporter, (2) the abbreviation of the reporter, (3) the number of the page where the opinion starts and which follows the abbreviation and (5) and a parenthetical. Sometimes the parenthetical will contain only the year when the case what decided. Other times, as in the example of the state court decision in *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001), (See [Fig. 24.](#)), the parenthetical contains additional

information regarding the court that issued the decision, which will help you see whether that decision is helpful from a precedential point of view.

In another example of a parenthetical which contains more information than the year of the decision, think about federal appellate cases reported in the *Federal Reporter 3rd Series* (F.3d). F3d collects court cases from all federal courts of appeal. In order to know what court issued what case, the citation's parenthetical will contain information identifying the court. The proper citation for *United States v. Aguilar*, is 295 F.3d 1018 (9th Cir. 2002). The parenthetical identifies both the court and the year. Based on that information, the reader of *Aguilar* understands even before skimming the opinion, that *Aguilar* is a precedent in the Ninth Circuit Court system, which geographically includes the district courts located in California.

The [Appendix to this chapter](#) provides a quick view of the geographical location of the circuit courts. This image in the appendix is available at http://www.uscourts.gov/Court_Locator.aspx.

Second, once you have a proper citation, choose the case law repository to which you have access. If your citation refers to a United States Supreme Court case, your task is fairly easy. As mentioned many times in this book, there are many electronic places where you could find your case. Those free-of-charge repositories have different search engines. By far, the best one remains [LexisOne](#).

Third, once you have settled on what repository you want to use, follow the search steps that specific repository asks: locate its search box, choose the search by citation option, and finally type your citation in the search box.

Fig. 24
Citing Court Decisions

1. U.S. Supreme Court Reporters

a) *United States Reports* (official reporter)

- U.S.

- *Lawrence v. Texas*, 539 U.S. 558 (2003)

↑ ↑ ↑ ↑
vol.# abbr. pg.# (year decided)

b) *Supreme Court Reporter* (commercial reporter)

- S.Ct.

- *Lawrence v. Texas*, 123 S. Ct. 2472 (2003)

↑ ↑ ↑ ↑
vol.# abbr. pg.# (year decided)

c) *Lawyer's Edition*

- L. Ed.; L. Ed. 2d

- *Lawrence v. Texas*, 156 L. Ed. 2d 508 (2003)

↑ ↑ ↗ ↑
vol.# abbr. pg.# (year decided)

2. Federal Court of Appeals Reporters

- *Federal Reporter*

- F., F.2d, F.3d

3. Federal District Court Reporters

- *Federal Supplement*

- F., F.2d, F.3d

Fig. 24
Citing Court Decisions (cont.)

4. West's Regional Reporters of State Courts Opinions
(West's National Reporter System)

a) *Southern Reporter*

- So., So. 2D

b) *South Eastern Reporter*

- S.E., S.E.2D

c) *South Western Reporter*

- S.W., S.W.2d, S.W.3d

o *Lawrence v. State*, 41 S.W.3d 349 (Tex. App. 2001)

↑ ↑ ↑ ↑ ↑
vol.# abbr. pg.# (court & year decided)

d) *Pacific Reporter*

- P., P.2D, P.3D

e) *Atlantic Reporter*

- A., A.2D

f) *North Eastern Reporter*

- N.E., N.E.2D

g) *North Western Reporter*

- N.W., N.W.2d

Finally, make sure that the result to your query is the correct one. Then choose the method of delivery: email; save to your computer; or print.

2. The researcher has the name of the parties and needs the case identified.

The steps to find cases identified by the names of the parties are pretty similar to the ones identified above, minus the directions about making sure that your citation is correct. Unless you have access to proprietary databases, if you have the names of the parties, you are better off using [LexisOne](#) as mentioned above.

3. The researcher needs to find cases on a specific topic for a specific court.

The steps to find cases on a specific topic vary with the degree of knowledge the researcher has about the topic. Both [Lexis](#) and [Westlaw](#) offer intuitive ways to start with an area of practice or a topic identified by a “key number.” More recently, both [Lexis](#) and [Westlaw](#), like [BloombergLaw.com](#) encourage a Google approach to topical research: choose your court and type the research terms into the research box.

[LexisOne](#) offers a more targeted approach to finding cases on a specific topic; through their newer product, LexisNexis Communities, available at <http://law.>

Lexisnexis.com/webcenters/LexisOne/. They encourage researchers to:

Sign-up today and gain access to the largest collection of Legal Blogs written by leading legal professionals, listen to one of the 1,600 Legal Podcasts featuring legal luminaries, view Top Cases, get caught up with Emerging Issues, sign-up to receive a daily newsletter with updates to content of interest to you, and keep current with the latest Legal News.

Find your practice area of interest: Bankruptcy, Copyright-Trademark, Corporate & Securities, Emerging Issues,

Environmental & Climate Change, Estate Practice & Elder Law, Insurance, International & Foreign Law, Patent, Real Estate, Rule of Law, Tax, Torts, UCC, Commercial Contracts and Business and Workers Compensation.³⁵

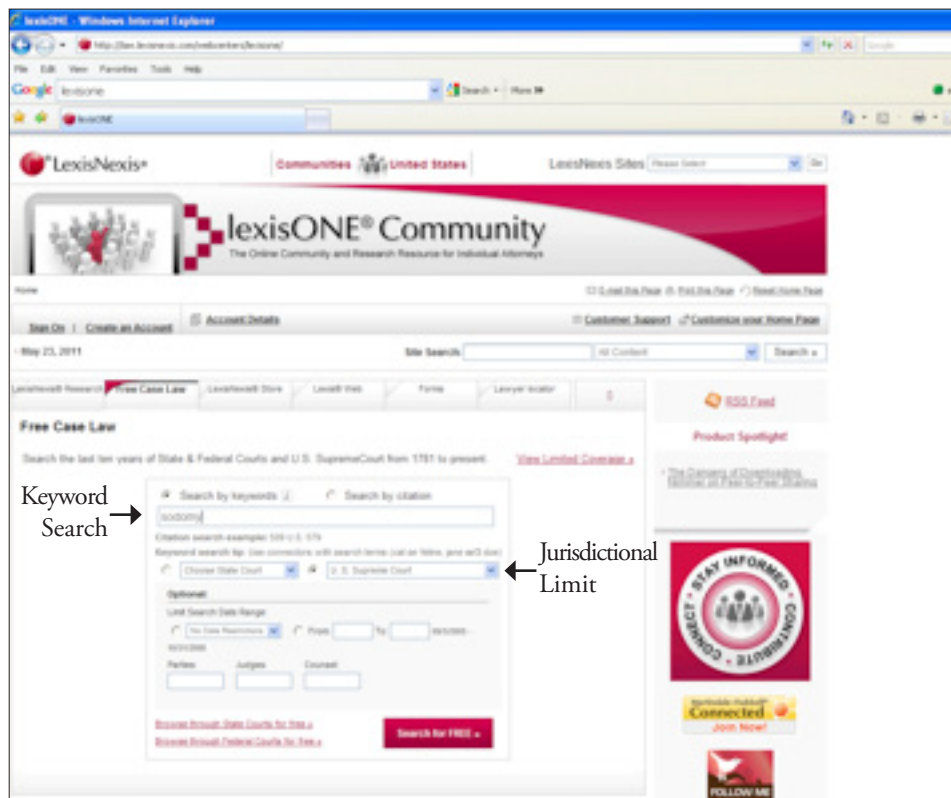
Through this product, the steps to find cases on a specific topic are less set in stone, as the “holistic” approach to research seems to be preferred. This holistic approach is based on reading narratives produced by the [Lexis](#) staff, and only subsequently a targeted search for cases.

Of course, researchers are still able to use the old [LexisOne](#) search approach. For example, if you want to find the Supreme Court case that decriminalized consensual sexual relations between same sex partners, you can always do a keyword search for “sodomy” in the Supreme Court cases library. You go to [LexisOne](#), at www.LexisOne.com, log in, and choose the “Free Case Law” database. As Fig. 25 shows, the search is very simple: (1) type the keyword in the search box, (2) choose a keyword search; and (3) then limit your search to the database that covers the specific court whose cases you want to search, in this instance, the Supreme Court cases.

The big question when you perform such a loose-end search is “How do you know which case is the relevant one?” Unless you have preliminarily used secondary sources, or a legal news database, you will not be able to pick the seminal case. That is why you should always do a preliminary so-called contextual search so you have enough information about what you want beforehand.

³⁵ <http://law.lexisnexis.com/webcenters/lexisone/>

Fig. 25
LexisOne Search



Such an imperfect search will produce many results; on May 23, 2011 it produced 62, but the 6th hit was *Lawrence v. Texas*, 539 U.S. 558 (2003).

Especially in the wake of WestlawNext and LexisAdvance, a legal researcher without any understanding of the subject matter at hand is even more handicapped than before. The [Westlaw](#) Digest System organized legal information and offered a research crutch to the uninitiated. Moreover, the Westlaw Result Plus service

provided useful information even in the event of an acknowledged butchered research query. Unfortunately, the new versions of the major research platforms encourage a “Google-type” mentality: the researcher should always expect results, whose filtering remains a hybrid process, a cooperation between the proprietary algorithm and the researcher’s existing knowledge about the research. In a legal world where there is no bad search query, navigating the results will become more a result of substantive knowledge than mechanical research skills. At a minimum, the new developments will reward those who spend a lot of time with their research tools.

For example, a court’s Web site remains a very useful place to start locating opinions. The recent opinions of the United States Supreme Court (from 2006 onward) are available digitally from the [Supreme Court of the United States’ Web site](#).³⁶ A researcher who studies the U.S. Supreme court docket and opinions regularly has a better understanding of the US Supreme Court jurisprudence and thus knows both how to construct a research query using more targeted research terms, and what to expect when he performs a targeted search in a proprietary database. Of course, there are more sophisticated ways to improve one’s research efficiency. Again, we focus on the most reliable free-of-charge methods.

For over a century, topical case law research has often been done using West’s reporters’ own indexing tool, The Digest. Most of that time, researchers used the paper product, which connects one number with a “Major Topic” and another number, the so-called Key Number, with a detailed subtopic, also known as headnote

³⁶ The Court’s web site, <http://www.supremecourt.gov/opinions/boundvolumes.aspx>, also contains mimeographed copies of 49 volumes of the official *United States Reports*, which cover opinions decided from 1991 to 2006.

or “point of law.”³⁷ For example, the Major Topic number for “Charities” is “75.” The Key Number for the headnote or point of law “charities’ beneficiaries” is 35. If you choose to locate cases using the paper digest, all you need to know is your Major Topic number and the Key Number (“k”) within your topic. Similarly, this is what you need to know if you want to perform your search on line. On [Westlaw](#), you need to type the following sequence “75k35,” in the digest search box. Of course, if you want to find cases on this point within a specific jurisdiction, you would need to limit your search accordingly (to federal or a specific state cases).

On [Lexis](#), topical case law can be performed by accessing the different areas of law, and then through more specific “emerging topics.” For example, within the area of law “General Business,” there is a more specific “Emerging Issues,” tab – though its description does not specify what the [Lexis](#) editors packed under that label.

³⁷ See the Westlaw description of their Digest system, at <http://lawschool.westlaw.com/knumbers/default.asp?mainpage=16&subpage=4>.

E. COMPLETING YOUR RESEARCH: THE U.S. LEGAL SYSTEM— A SYSTEM OF EVER-EVOLVING CASE LAW

Like any other domestic legal system, the U.S. legal system consists of dynamic norms which reflect social-economic changes as well as our changing mores. As with statutory law, the final research step for case law research is making sure that subsequent court decisions have not affected what you have deemed to be the applicable or just relevant decision.

A decision is still good law when it is still binding authority within its jurisdiction. Unlike statutes, decisional law has a different life span: it does not expire at a specific date in time, but it can be reversed, or modified by a subsequent decision from the same or a superior court. The first occurrence is the one that absolutely invalidates your legal research. The latter one only raises issues of concern.

For example, the U.S. Supreme Court held in *Roe v. Wade*,³⁸ that all women had a “fundamental right” to choose to terminate their pregnancies absent a “compelling state interest.”³⁹ The fundamental right to choose put together by the Supreme Court in *Roe v. Wade*⁴⁰ was comprised of three components, for each trimester of pregnancy. The women had complete control over their pregnancy until viability-during their first trimester of pregnancy. Afterwards, during the following two trimesters of pregnancy, upon showing a compelling interest in the pregnancy, the state was allowed to interfere and issue

³⁸ 410 U.S. 113 (1973).

³⁹ 410 U.S. at 155 et seq.

⁴⁰ 410 U.S. 113 (1973).

different state regulation that could have adversely impacted a woman's right to decide the future of her pregnancy.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go as far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.⁴¹

However, the *Roe v. Wade* right to choose did not last long. The Court substantially altered it 20 years later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴² In its new embodiment, the woman has no absolute right to choose during any time of the pregnancy: states could regulate a woman's pregnancy and interfere with her own wishes before the viability point. In *Casey*, the Court held that a woman could still terminate her pregnancy before viability,⁴³ whether "viability occurs at approximately 28 weeks, [or] at 23 to 24 weeks,"⁴⁴ but that she had lost her complete control over her pregnancy during that period of time. The Court allowed the state to interfere and obstruct her potential desire to abort the fetus. The only limit the Court imposed was that the state could not pass legislation that would create requirements that would likely become a "substantial obstacle to the woman's exercise of the right to choose."⁴⁵

⁴¹ 410 U.S. at 163-64.

⁴² 505 U.S. 833 (1992).

⁴³ The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce. 505 U.S. at 871.

⁴⁴ 505 U.S. at 860.

⁴⁵ 505 U.S. at 877.

If under *Roe*, the woman had more control, and the state's interference was more limited, under *Casey* the woman's prerogatives became less while the state's interference increased. The state could pass rules about an informed consent requirement, mandatory 24-hour waiting periods, etc., meant to discourage women from aborting. However, remember that the United States Supreme Court case law is the law of the land. U.S. Supreme Court cases are open to few changes. Either the Supreme Court reverses itself,⁴⁶ as it did with the *Cumming*⁴⁷ case in *Brown v. Board of Education*,⁴⁸ or, in more often occurrences, it changes its approach to an issue, as it did with *Roe* in *Casey*.⁴⁹ In very rare occasion, as explained in the previous chapter, Congress will enact a statute that will invalidate a Court's decision.

There are fast, fee-based, and easy to use ways which can help researchers make sure that their results is still good law. The fastest, most expensive and most reliable updating services are three: Shepards ([Lexis](#)), KeyCite ([Westlaw](#)), and, at a much cheaper rate, BCite ([BloombergLaw.com](#)). Cheaper case law databases also provide a similar service by pointing out the cases citing your choice. It is then your duty to read all those citing cases and decide their subsequent validating impact on your research.

Unfortunately, not all state and federal cases are aggregated in one place.

[LexisOne](#) offers free access to federal appellate cases and appellate state cases.

Furthermore, it is almost impossible to verify the status of a case, because although

⁴⁶ For a list of subsequently overruled Supreme Court decisions, see Supreme Court Decisions Overruled by Subsequent Decision, at <http://www.gpoaccess.gov/constitution/pdf/con041.pdf>.

⁴⁷ *Cumming v. Board of Education*, 175 U.S. 528 (1899).

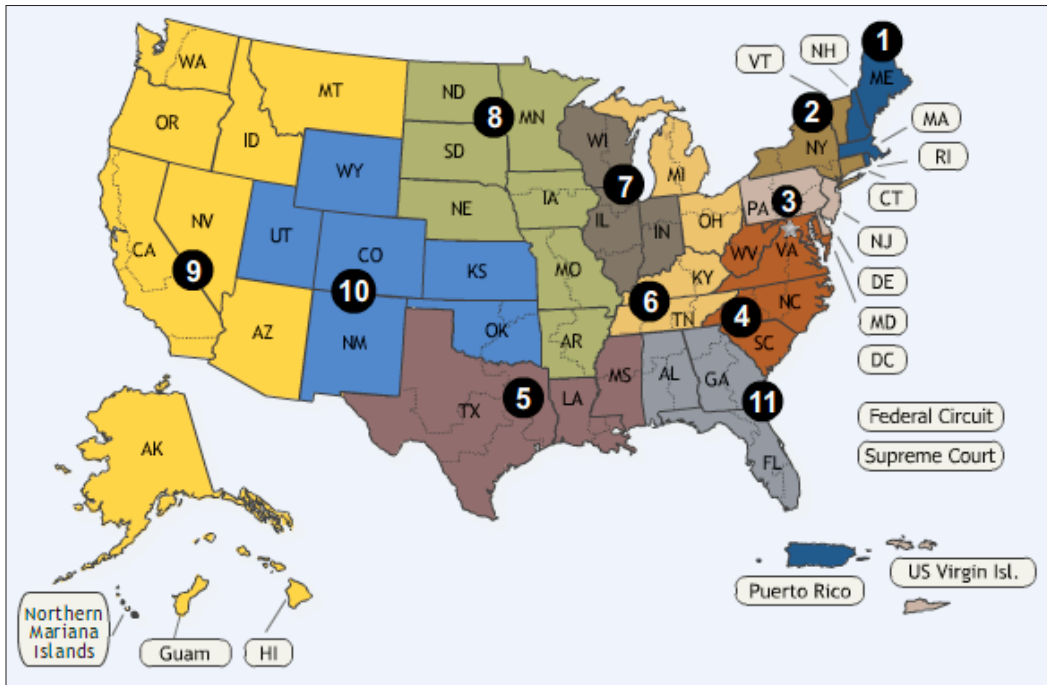
⁴⁸ 347 U.S. 483 (1954).

⁴⁹ 505 U.S. 833 (1992).

[LexisOne](#) does contain the official citation identifying the case, the search engine does not allow a “keyword” type search for all cases citing your research result. That is why more need to be done by researchers in terms of collaborative efforts to harvest cases which are freely available on court website, and aggregate them in one searchable database. Until then, the proprietary databases have a great advantage over any free-of-charge enterprise.

The next chapter will focus on the last governmental lawmaking branch: the executive branch and the administrative agencies. It will explain the two components of administrative law: administrative rules and regulations, which can be viewed as the administrative counterparts of statutory law. In addition, it will also discuss administrative decisions, which can be viewed as the administrative counterpart of decisional law.

APPENDIX THE GEOGRAPHIC MAP OF THE FEDERAL CIRCUITS



Geographic Boundaries of United States of Appeals and United States District Courts
Source: http://www.uscourts.gov/Court_Locator.aspx.

For Further Reading

Mark A. Hall and Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CAL. L. REV. 63 (2008).

In-Class Exercise

Go to the website of your state's court of last resort. Search for posted opinions. What research options do you have? How would you like to improve that site?

Chapter 6
Administrative Law:
What It Is, Where It Is, and How You Find It

A. INTRODUCTION

It is this book's philosophy that if the reader understands how administrative law works, she will be able to do excellent legal research as well. Thus, let's get started, and see what administrative law is and how it works. This approach will also make it easier for the foreign student of American law, because it promotes understanding based on the similarities and differences between American administrative law and the body of law the civil law countries, for example, call administrative law. Only then, it will make sense to locate repositories of administrative law and describe techniques of how to become a proficient administrative law researcher.

Article 1 of the Federal Constitution delineates the congressional legislative powers to well defined, specific socio-economic areas, such as interstate commerce. Within those areas the congressional legislative powers are absolute. This means that Congress adopts all necessary laws for their proper functioning.

Congress discharges itself of these duties directly, by enacting statutes, or indirectly, by delegating its powers to other governmental entities: federal agencies. Federal agencies have a long history in this country, and they date back to the 19th century.¹

Why does Congress delegate its legislative powers? There are a few answers equally valid to this question. First, Congress is in session a limited number of days each year, and when in session Congress can regulate only those issues that were brought to its attention. Then, as shown in Chapter 4, there are limited ways in which Congress can

¹ See, e.g, the Act of March 3, 1849, 9 Stat. 395; R.S. 471, which authorized the Commissioner of Pensions, to supervise veterans' compensation matters.

initiate legislative action. Furthermore, even when it acts, Congress is not able to pass sufficiently detailed legislation that will answer all the public needs accordingly.

Today, governing is a complex process that requires detailed rules. Think about the level of detail securities, and immigration regulations, to name only a few, need. For that reason, for instance, the normative power of the federal statute known as *The Fair Credit Reporting Act*, P.L. 104-208, codified at 15 U.S.C. 1681 et seq., was further detailed in scores of norms² issued by the federal agency authorized with such a regulatory power, the *Securities Exchange Commission*.³ Similarly, *The Immigration Act of 1990*, P.L. 101-649, codified at 8 U.S.C. 1151 et seq., was passed “to stimulate ‘new seed’ immigration from parts of the world that are under-represented in the U.S.”⁴ Its provisions mention temporary workers and trainees, Visa H-1B nonimmigrants (section 205). There were over 300,000 petitions filed in 2004.⁵ The filing procedures, for example, are too specialized and too concrete for Congress, so in such an instance Congress authorizes a federal agency (today that is Homeland Security⁶) to further detail statutory provisions in specific rules and regulations.⁷

Within the last decades, on a regular basis, in the areas in which Congress is authorized to pass legislation, it usually delegates its regulatory powers to an agency.⁸

² <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;sid=1154461653ea3b5175a8b8e71f6d3c26;rgn=div5;view=text;node=17%3A3.0.1.1.8;idno=17;cc=ecfr>

³ See, <http://www.sec.gov/>.

⁴ <http://www.immigrationpolicy.org/just-facts/diversity-visa-system-fact-sheet>

⁵ http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/h1b04annual_08_7.pdf

⁶ See, <http://www.dhs.gov/index.shtm>.

⁷ See., e.g., <https://www.usaimmigration-support.com/us-visas/h1b-work-visa.html#payment> and <http://www.h1base.com/visa/work/New%20USCIS%20H1B%20Visa%202011%20Application%20Filing%20Process%20Proposal%20ref/1549/>.

Congressional statutes empower federal agencies, such as the Securities Exchange Commission⁹ or the Food and Drug Administration,¹⁰ to deal with issues within their delegated powers in two ways: through rulemaking¹¹ and through adjudication.

As mentioned here, the transfer of power occurs under the delegation doctrine. This doctrine requires that the enabling statute details the role of the regulatory agency in precise terms that will make supervision by the legislature meaningful. Aside from legislative control, agencies that have judicial powers, in addition to their legislative attributes, are also supervised by the courts, and thus open to judicial review.

Agencies develop cumbersome procedural rules that they follow during both rulemaking and adjudicatory process. However, there are some common features that they follow and they will be briefly described below. After March 1, 2003, the Immigration and Naturalization Service (INS) has been incorporated into the Department of Homeland Security, the Directorate of Border and Transportation Security (i.e., U.S. Customs and Border Protection and the U.S. Immigration and Custom Enforcement), the U.S. Citizenship and Immigration Services (USCIS), the Office of Shared Services, and the Office of Immigration Statistics.

⁸ For example, near “the turn of the [last] century, agencies like the Interstate Commerce Commission and the Federal Trade Commission were created in an attempt to control the anticompetitive conduct of monopolies and powerful corporations.” However, in a reverse of the original trend, new powers are given to bureaucracies in a desire to answer to create a political agenda rather than answer public demands for action and redress social problems. For a brief description of how the U.S. Citizenship and Immigration Services (USCIS) rules are made, see Immigration Legal Research, at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1015&context=way2research>.

⁹ <http://www.sec.gov/>

¹⁰ <http://www.fda.gov/>

B. ADMINISTRATIVE RULEMAKING OR RULE PROMULGATION

As explained earlier, agencies entrusted with lawmaking activities by their enabling statute, can act as if they were mini legislative bodies. The number of administrative agencies continues to rise as the complexity of running a government has increased. When the first edition of this book appeared, almost one hundred of federal agencies functioned. Some of them work as independent agencies and government corporations.¹² Others function as more or less separate branches within cabinet departments.¹³ All are now involved in the regulation of business and other private activities.¹⁴

Usually the rulemaking process starts with a simple notice and comment process. Agencies are required by the Administrative Procedure Act to notify interested parties of the rules they intend to adopt. Those interested may send their comments about the proposed rule to the agency, and the agency is required to take them into consideration. Again, when the agency passes its final rule, it must give notice of the rule to all affected by it. In that end, the agency publishes its final rules.

Acts of Congress require publication of administrative regulations in a daily and official gazette called the Federal Register, and further require that regulations be systematically arranged and codified, by a continuing process, in the Code of Federal Regulations.¹⁵

¹¹ *The Administrative Procedure Act*, § 551 (4), defines a rule as an agency statement with future effect that is designed to implement or prescribe law or policy.

¹² <http://www.usa.gov/Agencies/Federal/Independent.shtml>.

¹³ <http://www.usa.gov/Agencies.shtml>.

¹⁴ 4 JANE GINSBURG, *LEGAL METHODS: CASES AND MATERIALS* 64 (2d ed. 2004).

¹⁵ *Id.*

The date of the publication of the final rule marks the beginning of the grace period at the end of which the persons affected by the rule will be found in violation of the specific policy. For example, Congress passed the Immigration and Nationality Act (INA in 1952).¹⁶ Since then, Congress amended it a few times, including in 2002 through the Homeland Security Act.¹⁷ According to their delegated powers, related agencies further developed and implemented the act and adopted specific rules.

More recently, under the authority of the Homeland Security Act, the Department of Homeland Security adopted an interim final rule regarding the disclosure of records and information. This rule was published on January 27, 2003. Note that although the rule became effective on the date of its publication, January 27, 2003, written comments were welcome until February 26, 2003.¹⁸ The rule was published in the *Federal Register* volume for 2003 (which is the 68th volume) and it started at page 4,056. Its citation thus becomes 68 Fed. Reg. 4,056.

In another example of detailed rule making activity, the Clean Air Act¹⁹ authorized the Environmental Protection Agency (EPA) to regulate hazardous air pollutants. Under that authority, EPA proposed new air rules to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule). The rules require 29 Eastern states and the District of Columbia to reduce emissions from some pollutants.²⁰ The EPA published its proposed Interstate Air Quality Rule in the

¹⁶ Pub. L. No. 82-414.

¹⁷ *Homeland Security Act of 2002*, Pub. L. No. 107-296.

¹⁸ See www.dhs.gov/xlibrary/assets/FOIA_FedReg_Notice.pdf.

¹⁹ Section 112 of the Clean Air Act Amendments of 1970 at 42 U.S.C. § 7412 (2006).

²⁰ Those pollutants are sulfur dioxide (SO₂), nitrogen oxides (NO_x), and mercury (Hg).

²¹ The rule is available from <http://www.gpoaccess.gov/fr/advanced.html>.

Federal Register on January 30, 2004. The rule was published in the Federal Register volume for 2004 (which is the 69th volume) and it started at page 4,566. Thus, it can be cited as 69 Fed. Reg. 4,566-4,650.²¹

The rule's purpose was to minimize the cause of acid rains. Its aim was to reduce emissions of sulfur dioxide (SO₂), and nitrogen oxides (NO_x) by 2015. Unlike statutory provisions, administrative rules are very detailed. For example, the Interstate Air Quality Rule states that SO₂ emissions must be reduced by 3.6 million tons in 2010 (approximately 40 percent below current levels) and by another 2 million tons per year when the rules are fully implemented (approximately 70 percent below current levels). Similarly, it aims for NO_x emissions to be cut by 1.5 million tons in 2010 and 1.8 million tons annually in 2015 (about 65 percent below today's levels).²²

In addition to their rulemaking power, administrative agencies also solve various controversies. While the procedure varies from agency to agency, there are some common elements among all agencies involved in administrative adjudication.

²² Clean Air Interstate Rule, at <http://www.epa.gov/CAIR/basic.html>. The text of the proposed rule and the technical data behind it, can be access at <http://www.archive.org/details/AirQualityDataAnalysisTechnicalSupportDocumentForTheProposed>.

C. ADMINISTRATIVE ADJUDICATION

Unlike the common perception, courts are not the main instrumentalities for the disposition of controversies. More and more controversies are resolved before administrative judges, within the scope of power of various administrative agencies.

For example, in addition to its rulemaking tasks, the EPA has adjudicating functions. The Toxic Substances Control Act requires any chemical manufacturer, who learns that a product presents “a substantial risk” of health or environmental harm, to inform the EPA, and thus it delegates adjudicating authority to the EPA for all instances of corporations failing to do so.

For instance, a few years ago, the EPA filed a complaint against the DuPont Corporation for failing to inform the agency about the toxic effects of a soap like material²³ DuPont uses to make stain- and stick-resistant surfaces and materials for a wide array of products, such as Teflon frying pans.²⁴ The present EPA complaint was the result of pressure by the Environmental Working Group, a private advocacy group, and by Ohio and West Virginia residents.²⁵

Administrative adjudication has grown both at the federal and state level. At the federal level, for example, adjudication takes the form of a trial—usually called an administrative hearing—and informal adjudication—often described as the administrative process that is neither rulemaking nor a hearing.²⁶

²³ Perfluorooctanoic acid which is also known as C-8.

²⁴ Teflon is the DuPont brand name for Polytetrafluoroethylene (PTFE), a synthetic fluoropolymer of tetrafluoroethylene that finds numerous applications, including providing material for non-stick pans.

²⁵ Eventually, the EPA settled with DuPont. See, e.g., <http://yosemite.epa.gov/opa/admpress.nsf/0/fdcb2f665cac66bb852570d7005d6665?OpenDocument>. However, EPA has removed the consent agreement and proposed final order from its page; <http://www.epa.gov/compliance/resources/cases/civil/tsca/cabmemodupontpfoasettlement121405.pdf> is now a dead link.

²⁶ WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW, at 133 (2d ed. 1992).

For example, when a person disputes federal retirement benefits, she will first have to raise that dispute with the Social Security Administration of the Department of Health and Human Services, which will issue an order or decision. If the aggrieved person is still unhappy with the outcome, she will seek next a court's intervention. Under the Administrative Procedure Act, all administrative decisions are subject to judicial review in courts. The scope of judicial review is limited, and it does not constitute a retrial of the case. Its scope is similar to that of judicial appeal of trial court decisions. While many agencies announce their decisions, there is no statutory requirement for their publication similar to the statutory requirement to publish both the agency's proposed and the final rules. As shown in the next section, this creates a rather cumbersome situation for those interested in finding agency decisions. Federal agencies have excellent Web sites that contain their recent rulemaking and decisional law, but nothing mandates them to keep those documents available to the public.²⁷ Additionally, the two major fee-based electronic services, Westlaw and Lexis, cover many of those decisions, while well-established publishers, such as Commercial Clearing House (CCH), which specializes in publishing administrative decisions, have entered the digital realm with various degrees of success.

²⁷ See *supra* note 25 on the EPA and DuPont settlement.

D. REPOSITORIES OF ADMINISTRATIVE LAW

Federal administrative rules and regulations, as well as executive orders and other presidential documents, are published in two official publications: The *Federal Register (F.R.)*, and the *Code of Federal Regulations (C.F.R.)*. State administrative rules and regulations are also published in similar collections.

The *Federal Register (F.R.)* is the official daily publication of rules, proposed rules, and notices of federal agencies and organizations. Additionally it publishes executive orders and other presidential documents. All daily issues published in a given year constitute a single volume.

Each *F.R.* volume is paginated consecutively. Each year a new volume of the *Federal Register* is published. Its most recent volumes, including the current one, the 76th, are available electronically from GPO Access,²⁸ and through FindLaw.²⁹

The *Code of Federal Regulations (C.F.R.)* republishes the general and permanent rules already published by the *F.R.*, and organizes them by 50 broad topics, such as “Housing and Urban Development” (title 24) or “Wildlife and Fisheries” (title 50). Those topics, as mentioned before, do not necessarily correspond to those used by the *U.S. Code* to organize federal statutes. Thus, you cannot use your knowledge about a title of the *U.S. Code* to substitute for searching for the appropriate title in the *C.F.R.* Remember: title 34 of the *C.F.R.* covers copyright issues, not title 17, although it is under title 17 of the *U.S. Code* that you will find copyright status.

²⁸ <http://www.gpoaccess.gov/fr/>

²⁹ http://www.findlaw.com/cascode/fed_register.html

The 50 titles of the *C.F.R.* are issued on a quarterly basis, so that the *C.F.R.* is completely revised each year. Starting with its 1996 volume, the *Code of Federal Regulations* is also available electronically from GPO Access,³⁰ as well as through FindLaw.³¹

Usually, state administrative rules and regulations are also published chronologically, in a codified version, and topically, in a daily publication. A list of the title of those compilations is available in the *Bluebook*. Once you know their title, you can easily locate them in a library catalog, or online. For example, the name of the New York chronological compilation is the *New York State Register (Register)*. It is a weekly publication, and starting with its 2003 volume is electronically available free-of charge.³² Those rules are also published in a codified compilation, the *Official Compilation of Codes, Rules & Regulations of the State of New York*. While there is no free access to this official compilation of administrative rules, through Thomson West, users can access the West compilation, which is abbreviated, NYCRR.³³ Additionally, parts of the official compilation are available through that department's Web site. For example, the environmental rules and regulations are available through the Web site of the New York State Department of Environmental Conservations.³⁴

To the extent federal agencies have the authority to solve disputes, their decisions need to be recorded. The decisions issued by the U.S. Securities and Exchange Commission, for example, are available both in commercial as well as in official publications, in print—*Decisions*

³⁰ <http://www.gpoaccess.gov/cfr/>

³¹ <http://www.findlaw.com/cascode/cfr.html>

³² <http://www.dos.state.ny.us/info/register.htm>

³³ <http://government.westlaw.com/linkedslice/default.asp?SP=nycrr-1000>

³⁴ <http://www.dec.ny.gov/>

and Reports—and electronically. For example, the Commission’s Opinions and orders issued from 1996 onward are available electronically free-of-charge from its official Web site.³⁵

As mentioned before, both Lexis and Westlaw, and to a more minimal degree, Bloomberglaw, cover federal and state administrative law. Lexis’ coverage of the *Federal Register* starts in 1970, and Westlaw’s in 1981. Bloomberglaw’s coverage starts with the 1937 volume of the *Federal Register*. All three proprietary databases mentioned above offer access to the current version of the *Code of Federal Regulations*.

Another proprietary database which covers federal administrative rules extensively is [HeinOnline](#)’s Administrative library. The product of a digital company which has been in the business of digitizing print,³⁶ [HeinOnline](#)’s coverage of the *Federal Register* starts goes back to its inception (1936), and that of the *Code of Federal Register* extends from 1938 to date. [Lexis](#), [Westlaw](#), and [Bloomberg Law](#) also cover all states’ administrative rules and regulations.

[Lexis](#), [Bloomberg Law](#), and [Westlaw](#) also offer access to administrative decisional law. Lexis covers the officially published decisions of all state departments, and many federal agencies. Both [Lexis](#) and [Westlaw](#) cover federal decisional law reprinted in commercial publications available through them, and their decisional coverage has only improved since this book’s print publication. [Bloomberg Law](#) contains “an extensive and continuously growing collection of documents, news, rulings, filings, forms, manuals, reports and other publications issued by major US federal regulatory bodies including the Federal Reserve Board, US Treasury Department, SEC, CFTC, FDIC, OCC, OTS, NCUA, FFIEC, USPTO, FERC, EEOC, NLRB, NMB, MSPB, IRS, and others.”

³⁵ <http://www.sec.gov/litigation/opinions.shtml>

³⁶ <https://www.wshein.com/about/history/>

E. HOW TO LOCATE SPECIFIC PRIMARY SOURCES OF ADMINISTRATIVE LAW

Again, the same research principle exposed earlier in the book applies in this area of legal research: If you understand the piece of legal information you are searching for, its role and how it is published, it is easier for you to locate it. There are also mechanical steps you can take when you have specific information to find your source.

1. When you know the citation of the document you want to locate.

First, remember that it is impossible to search for an in-print document whose citation you have unless you first locate the appropriate compilation. Online it also helps to first locate the appropriate database, because a mere Google search may not always produce the desired result.

Use the *Bluebook* to identify the appropriate repository. For example, if you have the following citation, 69 Fed. Reg. 4,566-4,650, use the *Bluebook* to refresh your memory about the meaning of the citation. *Fed. Reg.* stands for the *Federal Register*, and “69” is a volume number. The last two numbers are the page range containing the document. Locating the information, you find that this is the proposed EPA rule regarding the Interstate Air Quality Rule published on January 30, 2004. With that citation you can access the EPA’s proposed rule both online and in print. As you know by now, that volume of the *Federal Register* volumes is available both in print and online.

Similarly, if your citation reads 40 C.F.R. § 1500 et seq., go to the *Bluebook* to refresh your memory about its meaning. Like all legal citation, this one can be easily translated also.

The first number represents the title (40) where the rules have been codified, the abbreviation sends you to the codified compilation of administrative rules, the Code of Federal Regulations, and the section number tells you where the rules starts. Again, assuming that you want to see the current version of those rules, you can access them both in print and online. Once you locate them, you see that they regard the implementation of the National Environmental Policy Act of 1969 through the Environmental Quality Council.

Finally, when you search for state administrative rules or regulations, make sure that you use the Bluebook and learn the name of the appropriate compilation. For example the following citation: 6 N.Y.C.R.R. § 1.25 refers to a permanent rule contained in the *Official Compilation of Codes, Rules & Regulations of the State of New York*, while a citation that mentions N.Y.S. Reg. refers to a document published in the *Register*. The latter may refer to a notice, a proposed rule, or a final rule.

Once you have deciphered the legal citation of the rule you are interested in, of course, the easiest way to locate it - as with the majority of legal citations - is to use [Lexis](#), [Westlaw](#), or [Bloomberg Law](#) and type it in the “Get a Document-,” “Find-” or “Search-” box.

2. When you want to locate a specific type of administrative regulation.

If you want to locate any proposed federal rule, then your search has to be limited to the *Federal Register*. The *Federal Register* is the only source which publishes proposed federal rules and regulations. Remember that the print version of the *Federal Register* has both quarterly and annual subject matter indexes, and its electronic equivalent has a search engine. For such an electronic search, you may use either the electronic portal FindLaw, or the full-text database available on GPO Access.

3. When you look for final administrative rules and regulations on a specific topic.

When you do not know the citation to your document, but have a clear topic to research, the search strategy changes. If you search a final federal rule, use the index to the C.F.R., whether you search the print or the online repositories. The only free-of-charge index is in print, and available in public libraries.

A digital topical search for a final rule can be done free-of-charge or for a fee using proprietary databases. You may use either the GPO database, or FindLaw, which is a portal to administrative law, and will automatically link you to the official electronic version of the Code, published by the Government Printing Office, and available at [GPO Access](#). If you choose FindLaw, for example, go to www.findlaw.com and choose the “Federal and State Codes” database. Then you limit your search to the Code of Federal Regulations. There you can do a keyword search for “arsenic” and “water.” Your search will bring up the “national primary water drinking regulations” that are cited as 40 C.F.R. 141.

Unlike federal administrative law research, state administrative law research can be very taxing when done free-of-charge. State law databases are hard to search using Boolean search strategies. They are easier to navigate if you know the date when the rule or the executive order³⁷ was passed. Sometimes the only way to locate a rule is searching through a department’s Web site.³⁸

³⁷ If you search for “Executive Order No. 113.74: Continuing the Suspension of Certain Provisions of Law,” you may use the Google search engine and perform a word search. You will obtain the order you seek without any problems. See www.dos.state.ny.us/info/register/2004/jan28/pdfs/executiveorders.pdf.

³⁸ For the New York rule regarding deer hunting in Gilbert Lake State Park, you need to do a mere Google search, which will bring up the rule 6 N.Y.C.R.R. § 1.25

Of course, the easiest way is to perform topical administrative law research is by using the three proprietary databases mentioned through this entire book. Both Lexis and Westlaw offer a digital index to the C.F.R., though Westlaw's Index is vastly more detailed and thus superior to the Lexis product, a digitized version of the official one-volume official product.

4. When you look for an administrative decision

Searching for administrative decisions is an unpredictable exercise when performed both in print and online, for free or for a fee. If you have a citation to a printed reporter, once you decipher the meaning of the abbreviation, then you can easily find the title in a library catalog, and knowing the structure of any legal citation, locate the decision. For example, the following citation "Keller Ford, Inc., 336 NLRB 722" holds no mysteries once you have identified the full name behind the abbreviation "NLRB." NLRB stands for the National Labor Relations Board. The citation, which contains the name of a corporation, is likely to designate a decision. The National Labor Relations Board publishes its own reporter whose title is Decisions and Orders of the National Labor Relations Board. Thus, you can easily find the decision cited above if you recollect that "336" is the volume number, and "722" is the number of the page where the decision starts.

As with all other types of legal information, if you do not know the citation, you may use the agency's web site or the appropriate full-text library within Lexis, Bloomberglaw or Westlaw and locate the document through a "key word" search. If the agency decision you are interested in dates from the last century, the only way to locate it may be either from a looseleaf service which covers that agency decisional

law, or by calling the agency and see if they have some organized archive you can search or have searched.

Making full use of the information you have when you start your research will help you identify the source that contains the legal norm you need. Once you have located it, you still have to go one more step. You need to make sure that your findings are still good law.

F. COMPLETING YOUR RESEARCH: THE U.S. LEGAL SYSTEM— A SYSTEM OF EVER-EVOLVING ADMINISTRATIVE LAW

Administrative law is an integral part of the U.S. legal system. It consists of rules, regulations, and decisions issued by the executive body at the federal and state level, and federal and state agencies.

Administrative rules are issued by agencies according to clear statutory provisions that enable the agency to fill in the gaps left by a statute. Thus, administrative rules may not hold a dramatic place in the hierarchy of social order, but without them, much of our government would not be able to function.

Administrative rules have a well-defined life. From one administration to the other, rules contained in presidential executive orders are often terminated.³⁹ But the short life span of administrative rules goes beyond those covered in executive orders. As shown below, administrative rules are often changed or replaced by the issuing agency. For example, in *Abbott Laboratories v. Gardner*,⁴⁰ a seminal case that discusses ripeness—when a dispute is sufficiently mature to be decided in a court of law—the Court also touched upon the issue of the viability of administrative rules, when it discussed whether the administrative rule in dispute was issued in excess of the agency’s authority. The Federal Food, Drug and Cosmetic Act as amended by the Drug Amendments of 1962 (FFDCA)⁴¹ authorized the Food and Drug Administration Agency (FDA) to promulgate

³⁹ Presidents tend to define their political agenda through executive orders. For example, the decision to support an international gag rule on abortion issues on recipients of federal money had been supported by Presidents Reagan and Bush H. and Bush W., and opposed by President Clinton. See discussion in Dana Neacșu, “Imposing Sexual Restraint Abroad,” L. REV. MICH. ST. U. DET. C. LAW. 885 (2002).

⁴⁰ 387 U.S. 136 (1967).

⁴¹ 52 Stat. 1040 and 76 Stat. 780, 21 U.S.C. § 301 et seq.

necessary rules to implement its provisions. The statute required manufacturers of prescription drugs to print the “established name” of the drug “prominently and in type at least half as large as that used thereon for any proprietary name.”⁴² The FDA acted accordingly, and issued a rule for the “efficient enforcement” of the FFDCA Act that required the established name to be used any time the proprietary name was used.

Apparently, FFDCA sought to remedy a practice, followed by pharmaceutical manufacturers, of discouraging the sale of generic drugs, by promoting brand names among health care professionals and large-scale advertising, which led to instant recognition of the brand name to the detriment of the generic drug and its manufacturers.

FFDCA required manufacturers of prescription drugs to print the “established name” of the drug “prominently and in type at least half as large as that used thereon for any proprietary name.” In *Abbott Laboratories*, the Supreme Court acknowledged the rule’s legitimate birth-within the power allocated by statute to the agency.⁴³ Nevertheless, the rule⁴⁴ did not survive for long afterwards. It was subsequently amended. On paper it lasted a decade: from the original publication in the 1963 volume of the *Federal Register*,⁴⁵ through the 1974 volume of *Code of Federal Regulations*.⁴⁶

⁴² This was the name given by the government, then the Secretary of Health, Education and Welfare, see 387 U.S. at 137-38. The proprietary name was the trade name under which its manufacturer advertised the product—its brand name.

⁴³ For a more detailed explanation of the case, see WILLIAM FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW, at 279 et seq. (2d ed. 1992).

⁴⁴ 30 21 C.F.R. § 1.104(g).

⁴⁵ The 1964 volume of the *Code of Federal Regulations* republished it in title 21 allocated to public health issues.

⁴⁶ This does not mean that there are no more rules that require manufacturers to identify the ingredients present in their drugs. See title 21 of the *Code of Federal Regulations*.

This example is meant to explain the need to and the reason for updating your research. It is this book's approach that if you understand the dynamic feature of U.S. legal system, then you will never forget to update your research.

Administrative decisions, although committed to agency discretion, are open for judicial review, and thus often know a short life span. The following example will make you aware of their frailty, but also of the transient nature of the specific norms that build our legal system as well. In *The Matter of Hearts Publications, Inc. and Los Angeles Newsboys Local Industrial Union No. 75, C.I.O.*, 28 NLRB 1006, the National Labor Relations Board (Board) had to decide whether full-time newsboys selling the newspapers published by Hearst Publications were entitled to the protection offered by the National Labor Relations Act (Labor Act), and thus to union representation. Hearst Publications alleged that its relationship with the newsboys was that of vendor and vendee.

The Board's primary task was to interpret the statutory definition of "employee." The Labor Act does not offer any explicit guidance in terms of categories of employment. It states that "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer."⁴⁷ The Board reviewed the facts in the case and found that the publication (a) has "control and direction of the manner and means in which the newsboys perform their selling activities,"⁴⁸ (b) hires them by the allotment of corners and spots, (c) controls the number of papers delivered for sale daily; (d) at will discharge them, transfer them to new

⁴⁷ The National Labor Relations Act § 2(3), codified at 29 U.S.C. § 152(3).

⁴⁸ 28 NLRB at 1023.

locations, and lay them off as disciplinary measures, and finally (e) although does not carry them on the payrolls, the newsboys” are an integral part” of the publisher’s distribution system and organization.⁴⁹ The Board thus concluded that the full-time newsboys, who sold the paper at established spots, were “employees” as defined by the Labor Act, and they were entitled to collective bargaining and union representation in their relationship with Hearst Publications.

The company refused to bargain with the union, and petitioned the appropriated federal court of appeals to review the NLRB’s decision. In *Hearst Publications v. NLRB*,⁵⁰ the court of appeals set aside the Board’s order. It viewed the relationship between the newsboys and Hearst Publications in different terms than the Board. Based on the standards used by courts to distinguish between an employment and a mere contractual relationship, it concluded that the publisher had “at best a limited control over the activities of the newsboys inadequate to constitute it an employer,”⁵¹ and that the newsboys did not work for wages, but for “the variance between the wholesale and retail price of the commodity he vends [the paper].”⁵²

This decision was appealed to the Supreme Court, which granted certiorari. In *NLRB v. Hearst Publications*,⁵³ the Court further analyzed the relationship between the full-time newsboys and Hearst Publications and reiterated that the main legal issue was whether the newsboys were employees within the statutory

⁴⁹ *Id.*

⁵⁰ 136 F.2d 608 (9th Cir. 1943).

⁵¹ *Id.* at 613.

⁵² *Id.* at 614.

⁵³ 322 U.S. 111 (1944).

definition contained in the Labor Act Section 2(3). Absent an explicit definition, the Court reviewed the Board's decision primarily in light of the statute's purpose and legislative history, and then in light of the standards the Court used to distinguish between "employees" and "independent contractors." The Court upheld the Board's decision and order and reversed the lower court's decision.⁵⁴ Additionally, the Court emphasized the principle of judicial deference to the agency's interpretation of the statute over which it has administering power.⁵⁵

The new economic and policy standard used by the Court in interpreting the statute created congressional reaction. As a result, Congress passed an amendment to the Labor Act, the Labor Management Relations Act of 1947, in order to offer explicit guidance to the courts when they need to construe the term "employee." In the new version, the Labor Act states that the "The term 'employee' [...] shall not include any [...] individual having the status of an independent contractor."⁵⁶

The above example made it rather clear that any time your research evolves around administrative law, whether administrative rules or decisions, you need to update your results by searching the statutory and case law databases for provisions

⁵⁴ *Id.* at 131-32.

In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit. Stating that 'the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act,' the Board concluded that the news boys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion

⁵⁵ *Id.* at 131.

that amended, changed, or had an impact on your findings. The good news is that part of this updating process can easily be done online for free.

For any changes to existing federal regulations which you have located, go to the electronic version of the *Federal Register*, which will provide you with changes to administrative rules that took place within that calendar year. Of course, you need to check whether the overseeing agency has given any recent interpretation to that administrative provision, and for that you may go to the agency's Web site. A similar strategy applies for state administrative rules: use the state's official Web site and the respective agency's official Web site

For potential federal statutory changes that may affect your administrative law research, follow the steps detailed in [Chapter 3](#). Similarly, at the state level, search the daily publication of administrative rules, and its statutory provisions. Unlike federal law research, state law research is more labor intensive and even more elusive. However, major public libraries will carry guides to state law research including administrative law, as collected in state print and electronic compilations.

The most difficult part of the updating process involves finding cases which may affect your administrative law research. The analysis presented in [Chapter 5](#) applies in this instance. There is a slight difference between updating the status of a case and that of an administrative rule and decision, in terms of the usefulness of the

⁵⁶ The Labor Management Relations Act, 1947, H.R. Rep. No. 510. *See* 1947 U.S. CODE CONG. SERV. 1135. *See also* 93 CONG REC. 6441-6442, 2 LEG. HIST. OF THE LABOR MANAGEMENT RELATIONS ACT 1537 (1947). *SEE ALSO* H.R. REP. NO. 245, 80TH CONG., 1ST SESS., 18, 1 LEG. HIST. OF THE LABOR MANAGEMENT RELATIONS ACT 309 (1947); R.R. CONF. REP. NO. 510, 80TH CONG., 1ST SESS., 32-33, 1 LEG. HIST. OF THE LABOR MANAGEMENT RELATIONS ACT 536-37 (1947).

proprietary databases. Their updating services: Shepards, KeyCite, and BCite have limited value in this instance. The magic of typing a citation in the search engine provided by these services is limited to *C.F.R.* citations. For all other results, you need to perform a full text key-word search in the appropriate database, in this instance, case law database.

By now you have a good idea about the U.S. legal system, what it is and how it works. You also know that each governmental branch makes law and you know how to search for those specific legal provisions. Furthermore, remember that all different substantive branches of law, such as commercial law, torts law, or intellectual property law are nothing more than statutory, decisional, and administrative law, and their study and research can be approached according to the same above principles.

For Further Reading

Richard Pierce, ADMINISTRATIVE LAW TREATISE (5th ed. 2010) (Kluwer Law).

In-Class Exercise

Go to the website of your state's court of last resort. Search for posted opinions. What research options do you have? How would you like to improve that site?

CONCLUSION: IS THIS ALL?

TV shows —“Law and Order,” “Judge Judy,” or “N.Y.P.D. Blue”—and even books of legal fiction answer many of the Americans’ questions about law. Each, in its way, promotes a social view that supports the actual status quo of an ordered society. Decades of school attendance, and unrestrained consumption of popular culture, have taught the American people that their only liberty is ordered liberty,⁵⁷ and made them instinctively aware of “the problem of collective order.”⁵⁸

By now you too know the advantages and the weaknesses associated with the American law within the current postmodern society where law produces popular culture and is a product of popular culture.

You also know what the U.S. legal system is, and you also know the tension between the role of the rule of law and each and every legal norms that composes the U.S. legal system. You also have the basic techniques necessary to locate legal norms and make sure that they are still good law. You can find any legal rule you need to study.

This book introduced you to the U.S. legal realm in its untarnished abstract beauty. Law is a concept, true, which is used to ensure the current organization of any Western-styled society. Law is the foundation upon which today’s societies are built: their government, family, property, inheritance system, and so forth. Emphatically, through the concept of order, we can understand how concrete rules that reside in statutes, court decisions, etc., work.

⁵⁷ See *Palko v. Connecticut*, 302 U.S. 319 (1937).

⁵⁸ Christopher Kutz, Parliamentary Self Government, in 1 LEGALAND POLIT. ICAL PHILOSOPHY. SOCIAL, POLITICAL, & LEGAL PHILOSOPHY 39 (Enrique Villanueva ed., 2002). For more on this issue, see HENRY M. HART, JR., & ALBERT M. SACKS, THE LEGAL PROCESS. BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1-181 (1994) (Chapter 1. An Introduction to the Nature and Function of Law).

There are many introductory law books. Most of them are quite interesting, although often limited in their point of view. They focus on reviewing the abstract world of the law (introduction to jurisprudence or theory of law), on a specific aspect of the law based on specific sources of law (what case law is and how it should be read) or on how you can find the law, by analyzing statutes, case decisions, etc. Each relies on complimentary introductory books that will explain the part of the law that they had left untouched. None has this book's organic approach to law, as they rely on and encourage an incremental approach to studying law. Such an approach is only to be expected, especially today, when all scholarly disciplines are in the midst of losing their provincial allure and structure. Interdisciplinary research and teaching seem to thrive and, with them, revising the methods and philosophy used in developing each one.⁵⁹ Unlike them, this book starts from a different premise, as it wants to give its readers a critical approach to U.S. law.

Chapters 1 and 2 explained the double meaning of law. It is an abstract atemporal human construct, known as the rule of law, but it is also concrete legal rules, because the rule of law comes to fruition through published manifestations: statutory norms, decisional law, and administrative rules, regulations or decisions.

⁵⁹ TOWARD A EUROPEAN IUS COMMUNE IN LEGAL EDUCATION AND RESEARCH 41 (Michael Faure, Jan Smits & Hildegard Schneider eds., 2004).

[In law after] internationalization has completed its victory over Ihering's provincialism, a new challenge will be that of interdisciplinary research. Already at the present time there is much talk of interdisciplinary education and research, but traditional legal education and research remain highly mono-disciplinary. The new approach will require law faculties to give up the idea that their law students should know every single part of the main parts of the curriculum. Without doing away completely with knowledge, methods and philosophy will gain in importance.

For example, some legal norms lie in statutes and together are known as “statutory law” or “legislation.” Statutory law is the product of people organized according to specific legal rules in federal and state assemblies. Congress, at the federal level, is such an assembly, and its functioning is governed by our Constitution. Statutory law governs a large part of our lives. It establishes the life span of Mickey Mouse under the guise of copyright, and defines Indian reservations. It allows free postage for armed forces personnel and authorizes programs that encourage the consumption of fluid milk by children.

For you, it is apparent that statutory law is something everybody should be familiar with, and with patience, this book showed you the way. Statutory law is not as abstract as it sounds. It stems from statutes, and all those statutes can be easily found. Naturally, reading and applying statutes to your own research problems is another issue; this book does not pretend that you will know how to do everything by its end. You also know that understanding statutory law requires, at a minimum, understanding statutes, how they are passed, where you can locate them, and finally how they can be read.

Similarly, case law and administrative law spring from concrete sources of law. Case law mostly rests in the decisions of the U.S. Supreme Court. The nine Supreme Court Justices write opinions that cover diverse areas of our social lives. Administrative law resides in agency rules, regulations, and decisions. All these sources of law can be found, read, and then interpreted.

Further developing this process, Chapter 3 briefly pointed out the basic techniques of legal research. It emphasized the distinctions between primary sources-

repositories-of law, and secondary sources. It pointed out the reasons and the ways of using each one. It hopefully brought law closer to you as it talked about the various print and online repositories of law and the ways to access them. Because it is this book's intention to ensure your unlimited access to the various forms of law, it paid distinct attention to the online repositories that can be freely accessed from any computer with Internet access. Finally, Chapter 3 finalized this ambitious project of popularizing the law without debasing it intellectually and punctuated how legal rules can be identified within those repositories.

Chapters 4 through 6 further examined law according to its specific sources: the legislative, executive, and administrative bodies. Then, they scrutinized techniques of legal research, according to each source.

On this note, it should be said that there are many ways of approaching law. It can even be tackled musically. Law is very operatic. It often spawns uncontrolled emotions supported by very little logic. (Think only about election campaigns or custody battles.) As there are many ways to start one's love affair with opera, for example: Alban Berg's *Lulu* for the buffs of atonality, Georges Bizet's *Carmen* for those of soft rock, or Giacomo Rossini's *Il Barbiere di Siviglia* (*The Barber of Seville*) for all musically inclined, there are many ways to start one's intellectual encounter with law.

This book wants to be the right first step in the study of law for all. It wants to cajole you into thinking about rights and duties, and discovering what they are and how you can learn about them. Hopefully, by now your legal undertakings will know only one limit: your very specific legal interests and needs. Good luck! ■

Index

A

- ABA — 194
- Abbott Laboratories v. Gardner — 228
- Abbreviations — 99
- Act — *xi*, 16, 35, 37, 40, 41, 42, 51, 77, 78, 126, 131, 133, 134, 136, 137, 139, 147, 162, 163, 164, 165, 212, 213, 215, 216, 218, 219, 224, 228, 229, 230, 231, 232, 233
- Action — *xi*, *xii*, 106, 111
- Adjudication — *viii*, *xi*, 51
- Adjudicative — *xi*, *xiv*
- Administrative adjudication — 218
- administrative agencies — *xi*, 11, 63, 68, 77, 110, 122, 208, 215, 217, 218
- Administrative law — 110, 228, 238
- Administrative Procedure Act — 215, 219
- African-Americans — 151
- against — *xiii*, 3, 26, 29, 64, 69, 142, 150, 171, 173, 177, 182, 187, 218
- Agency — *xi*, 73, 75, 77, 123, 216, 228
- Alban — 239
- Amar — 63, 85
- Amendment — *xiii*, 5, 29, 43, 55, 71, 142, 152, 184, 185
- American Indian Education Foundation Act of 1999 — 136
- American law — *ix*, 2, 3, 4, 5, 8, 9, 10, 11, 12, 17, 19, 24, 27, 33, 36, 39, 47, 53, 56, 59, 62, 63, 88, 92, 96, 99, 110, 129, 185, 212, 236
- American legal thought — 49, 50
- American political system — 2
- Annotations — *xi*
- Appeal — *vii*, 118, 177
- Aristotle — 53, 54
- Article — 27, 88, 131, 132, 141, 143, 212
- Ashcroft v. American Civil Liberties Union — 42, 164
- Attorney — *xi*, 73, 76
- Authority — *xi*, *xii*, *xvi*, 47, 143

B

- Bacilio Mendez II — *x*
- BCite — 207, 234
- Berg — 239
- Bergson — 15, 16
- Bieber's Dictionary of Legal Abbreviations — 99
- Bill — *xii*, 133, 134, 135, 142
- Bill of Rights — 142

binding authority — 129, 139, 140, 162, 205
Bizet — 239
Black's Law Dictionary — 96, 177
Blackstone — 1, 14, 28, 128, 169
Blanchard v. Bergeron — 150
Bloomberg Law — 102, 195, 222, 224
Blumenstein — 35
Boolean search strategies — 225
Boorstin — 15
Brief — *vi, xi, xii*
Brown v. Board of Education (I) — 182
Burnham — 66, 85
Burton — 22, 25

C

Carlin — 43
Case — *v, vii, xii, 61, 110, 117, 169, 179, 185, 186, 191, 192, 201, 238*
Case law — 61, 110, 117, 179, 185, 186, 238
case law research — 121, 191, 203, 205
cause of action — 131, 174, 176
CCH — 219
Certiorari — 66
Child Online Protection Act — 42, 164
Christian natural law — 48
Citation — *v, xii, 97*
Civil Law — *xii*
Civil Rights Act of 1964 — 126
Civil War — 29, 56, 142
Claim — *xii*
Claims Court — 68
Class — 7, 18, 25, 31, 86, 168, 210, 235
Clean Air Act — 77, 216
Clinton — 73, 228
Code of Federal Regulations — 98, 121, 122, 123, 127, 215, 220, 221, 222, 224, 225, 229
Codes — 6, 160, 221, 224, 225
Cohen — 19, 26, 50, 51, 53
Collegiate Initiative to Reduce Binge Drinking — 34
Commercial Clearing House — 219
Common Law — *iv, xii*
Communications Decency Act — 41
Complaint — *xiii*
concert of action — 106
Congress — 11, 28, 33, 35, 36, 37, 39, 40, 41, 42, 43, 55, 65, 66, 67, 71, 72, 73, 88, 102, 111, 113, 114, 115, 126, 130, 131, 134, 135, 136, 137, 138, 139, 140, 142, 143, 144, 147, 148, 150, 154, 155, 165, 207, 212, 213, 215, 216, 232, 238

Congressional — *iii, iv, 27, 33, 39, 135, 136, 138, 154, 214*
Congressional Record — *135, 138*
Constitution — *v, vi, xiii, xvi, 6, 21, 22, 27, 28, 32, 49, 50, 53, 60, 67, 69, 72, 88, 112, 113, 114, 130, 131, 132, 140, 141, 142, 143, 144, 154, 180, 212, 238*
Constitution of Massachusetts — *21, 22*
Controversy — *xiii*
COPA — *42, 43*
Copyright Term Extension Act — *133*
Corbin — *19*
Court decisions — *30, 33, 40, 99, 120, 180, 191, 193, 207*
court opinions — *xv, 30, 71, 90, 110, 119, 120, 170, 177, 178, 179, 180, 187, 191, 192, 194, 195*
Crosby v. National Foreign Trade Council — *150*

D

Damages — *xiii*
Davis — *105*
decision — *xvi, 16, 27, 36, 40, 41, 42, 43, 44, 53, 68, 70, 88, 117, 123, 128, 163, 164, 179, 181, 182, 185, 186, 187, 188, 192, 196, 197, 205, 207, 219, 226, 228, 231, 232, 233*
Decision — *vii, xiii, 180, 184, 207*
decisions — *xi, xii, xiii, xiv, xvi, xvii, 11, 19, 27, 30, 32, 33, 34, 39, 40, 43, 44, 45, 54, 59, 61, 67, 68, 69, 70, 71, 89, 96, 99, 105, 110, 112, 117, 120, 122, 123, 149, 156, 164, 166, 167, 169, 177, 178, 179, 180, 183, 185, 186, 187, 188, 190, 191, 192, 193, 194, 205, 207, 208, 219, 221, 222, 226, 228, 230, 232, 236, 237, 238*
Decisions — *iii, v, 39, 43, 121, 122, 123, 198, 199, 207, 221, 226*
Decisions and Orders of the National Labor Relations Board — *226*
Declaration of Independence — *140, 152*
Defendant — *xiii*
Depositions — *175*
Dewey — *52*
dicta — *187, 188*
Dicta — *185*
Digest — *135, 202, 203, 204*
Discovery — *vii, 173, 174*
Dissenting opinions — *181*
Doctrine — *xiii*
Drug-Free Schools and Communities Act of 1989 — *35, 37*
Due Process of Law — *xiii*
Duncan — *51, 52, 53, 74*
Duncan v. Louisiana — *53*
Dworkin — *52, 53*

E

Education — 37, 74, 122, 133, 134, 136, 139, 164, 182, 183, 207, 229
Ehrlich — 28
English Parliament — 60
Environmental Protection Agency — 77, 216
EPA — 73, 77, 216, 218, 219, 223
Equal Protection Clause — 152
executive orders — 73, 89, 110, 121, 220, 228

F

facts — xv, 69, 172, 174, 175, 177, 179, 183, 185, 187, 188, 190, 213, 230
Faure — 237
FCC — 43, 44
FCC v. Pacifica Foundation — 44
FDA — 228, 229
Federal Communications Commission — 43
Federal Convention — 141
Federal Court — 198
Federal Courts — 198
federal courts of appeal — 192, 197
Federal Food, Drug and Cosmetic Act — 228
Federalism — 63, 85
Federal Register — 72, 121, 123, 125, 127, 155, 215, 216, 217, 220, 222, 223, 224, 229, 233
Federal Reporter — 197, 198
Federal Supplement — 198
Federal Trade Commission Act of September 1914 — 77
fee-based electronic services — 219
Ferguson — 47, 184
“Filthy Words” monologue — 43
FindLaw — 108, 113, 116, 117, 119, 120, 121, 122, 127, 160, 195, 220, 221, 224, 225
Fineman — 7
Food and Drug Administration Agency — 228
Founding Fathers — 22, 64, 151, 152
Fox — 4
F.R. — 17, 96, 97, 98, 122, 125, 127, 220, 221, 223, 225, 226, 229, 234
Free-of-charge — 166
Friedmann — 21
Fuller — 50, 51, 52

G

Gibson — 63, 85
Ginsburg — 66, 85, 152

Glorious Revolution of 1688 — 60
God — 8, 26, 46, 48, 49, 50, 60
Google Scholar — 103, 107, 117, 118, 192, 194
Google search — 104, 114, 223, 225
Goyard-Fabre — 47, 48
GPO Access — 154, 160, 220, 221, 224, 225
Grad — 105
Great Crash of 1929 — 78
Griswold v. Connecticut — 16, 163
guides — 93, 97, 100, 117, 233
Gun-Free School Zones Act of 1990 — 40, 41

H

Habermas — 20, 52
Hamilton — 62, 85, 149
Hamilton v. Rathbone — 149
Hart — 34, 50, 51, 52, 129
Hayek — 22, 46
heading — *xv*, 126
Hearings — *xi*, *xiv*, 122, 152
Hearst Publications v. NLRB — 231
Hegel — 47, 48
HeinOnline — 222
Henry M. — 129
Hexter — 50
Higher Education Assistance Act — 37
H.L.A. — 50, 52, 57
holding — 3, 55, 149, 165, 178, 184, 185, 187, 188, 190
 Holding — *xiv*, 181, 184
Holmes — 14, 52, 149, 186
Homeland Security Act — 216
House bill — 136
House of Representatives — 34, 64, 116, 131, 134, 135
H.R. — 34, 41, 135, 136, 137, 233

I

Immigration and Nationality Act — 216
independent agencies — 71, 75, 215
Index — *v*, 102, 103, 126, 127, 135, 160, 226
Index to Legal Periodicals — *v*, 102, 103
Index to the Congressional Record — 135
Injunction — *xiv*

Inouye — 134, 135
Intellectual Property: Patents, Trademarks, and Copyright in a Nutshell — 105
Internet — 4, 13, 47, 115, 119, 120, 139, 145, 164, 239
interpreting statutes — 148, 149, 150
Interrogatories — 175
Interstate Air Quality Rule — 216, 217, 223
Investigative — *xiv*
Izzie — *x*

J

Jefferson — 49
Joseph P. — 34
judge-made law — 27, 129, 177, 178, 186
Judgment — *xiii*, *xiv*, 176
judicial review — 9, 43, 214, 219, 230
judiciary — *ix*, 32, 36, 39, 54, 56, 63, 64, 67, 141, 165, 166
Jurisdiction — *xiv*, 99
Justice — 49, 61, 66, 73, 149, 150, 152, 170, 185, 186
Justices — 143, 150, 188, 238

K

Kairys — 58, 85
Kelso — 150, 152
Kennedy — 34, 51, 52, 188
KeyCite — 128, 167, 207, 234
Keyword — 202
Kildee — 134, 135
Koran — 60
Kramnick — 62, 85
Kutz — 236

L

Labor Management Relations Act of 1947 — 232
Law — *ii*, *iii*, *iv*, *v*, *vi*, *vii*, *viii*, *ix*, *xii*, *xiii*, *xiv*, *xv*, *xvi*, *xvii*, 1, 4, 6, 8, 14, 19, 20, 22, 25, 49, 50, 51, 52, 53, 58, 59, 77, 96, 98, 99, 100, 101, 102, 105, 106, 107, 108, 114, 116, 117, 118, 119, 128, 129, 138, 139, 141, 142, 143, 150, 152, 155, 168, 169, 177, 181, 186, 195, 201, 211, 222, 224, 225, 235, 236, 239
Lawrence v. Texas — 16, 151, 198, 202
Law review articles — *xv*, 106

lawsuit — *xi, xv, xvi, 27, 40, 64, 69, 124, 148, 170, 172, 173, 175, 177*
Lawsuit — *vii, xii, xiii, xv*
Lawyer — *192, 198*
legal issues — *xv, 3, 5, 69, 184, 187*
Legal norms — *20, 30*
Legal research — *10, 63*
Legislation — *vi, 129, 145, 158*
legislative action — *65, 133, 134, 213*
Legislative History — *vi, xv, 149*
Legislatures — *iv, 64*
Lexis — *10, 99, 102, 103, 104, 106, 107, 114, 115, 117, 121, 123, 128, 155, 156, 157, 158, 161, 167, 170, 180, 191, 192, 200, 201, 204, 207, 219, 222, 224, 226*
LexisNexis Academic Universe — *103*
LexisOne — *117, 118, 119, 127, 192, 194, 197, 200, 201, 202, 207, 208*
liberal and polite education — *1*
Liberal individualism — *26*
Library of Congress — *102, 113, 115, 135, 137, 154, 155*
Lincoln — *29*
Litigant — *xv, xvi*
Llewellyn — *52*
Loving v. Virginia — *163, 164*

M

Madison — *61, 63, 85, 150, 152*
Malberg — *49*
Manning — *85*
Marbury v. Madison — *61*
Marshall — *61, 150, 152*
McKinney's Consolidated Laws of New York Annotated — *157*
Mickey Mouse — *55, 238*
Miller — *47, 57, 105*
Minnie — *55*
minorities — *32*
Moglen — *104, 108*
Moore — *22, 25*
Morris R. — *19, 26, 50, 53*
Motion — *xv*

N

NARA — *155*
National Archives and Records Administration — *155*
National Environmental Policy Act of 1969 — *224*

National Labor Relations Act of 1935 — 77
National Labor Review Board — 68
natural law — 48, 49, 52
New York City Council — 145, 158
New York Code of Rules and Regulations — 159
Nicomachean Ethics — 53, 54
Nimmer on Copyright — 106
Nixon — 73
NLRB — 68, 77, 222, 226, 230, 231
Norms — *iii*, 20, 32, 52, 58
NYCRR — 221

O

O'Connor — 188
Omnibus Indian Advancement Act — 137, 139, 147
Opinions — *vii*, 117, 123, 125, 170, 181, 185, 187, 194, 199, 210, 222
Ordinances — *v*, *vi*, 114, 145, 158

P

Pacer — 170
Palko v. Connecticut — 236
parties — *xi*, *xv*, 27, 30, 40, 67, 69, 72, 124, 126, 127, 130, 170, 172, 173, 174, 175, 176, 187, 200, 215
persuasive authority — *xvii*, 94
P.L. — 125, 139, 213
Plaintiff — *xvi*
Planned Parenthood of Southeastern Pennsylvania v. Casey — 188, 190, 206
Pleading — *vii*, 172
Plessy v. Ferguson — 184
positivism — 51, 52
President — *iv*, 11, 29, 65, 66, 67, 71, 72, 73, 74, 75, 76, 78, 89, 135, 138, 228
Primary sources — 110
Primary Sources — *v*, *vi*, *vii*, *viii*, *xvi*, 112, 125
private law — 130
producer of popular culture — 2, 4
product of popular culture — 4, 236
property rules — 27, 28, 55
Prosser and Keeton on the Law of Torts — 105
Protestant values — 36
public law — 2, 10, 11, 12, 13, 17, 53, 63, 64, 79, 126
Purposive Analysis — *vi*, 152

Q

R

Racial Integrity Act of 1924 — 162
Reagan — 228
realism — 52
reasoning — 44, 185
Reasoning — 181, 185
Reconstruction Era Amendments — 142
Reno v. American Civil Liberties Union — 41
Reporters — *xvi*, 198, 199
Rights — 21, 22, 52, 59, 126, 142
Roe v. Wade — 188, 190, 205, 206
Roosevelt — 72
Rossini — 239
Rule of Law — *xiv*, *xvi*, 22, 25, 201
Rules — *iii*, *v*, *xi*, 33, 121, 125, 148, 159, 174, 221, 224
rules and regulations — *xi*, *xii*, *xiv*, *xvi*, 77, 98, 110, 121, 122, 123, 208, 213, 220, 221, 222, 224, 225

S

S. — *iv*, *vi*, *vii*, *viii*, *xvii*, 3, 7, 16, 17, 18, 22, 23, 25, 33, 34, 35, 39, 40, 41, 42, 43, 44, 49, 50, 53, 57, 59, 60, 63, 66, 67, 68, 69, 74, 79, 89, 99, 105, 113, 116, 119, 120, 122, 123, 125, 131, 133, 134, 136, 137, 140, 143, 149, 150, 151, 152, 154, 156, 160, 162, 163, 164, 179, 180, 182, 183, 184, 185, 186, 188, 189, 190, 192, 194, 195, 198, 202, 203, 205, 206, 207, 212, 213, 214, 220, 221, 224, 228, 229, 230, 231, 233, 234, 236, 237, 238
Safe Drinking Water Act of 1978 — 77
Scalia — 150
Secondary Sources — *v*, *xvii*, 93, 108, 109
Securities and Exchange Act of 1934 — 78
Securities and Exchange Commission — 77, 78, 122, 221
Senate — 35, 64, 65, 76, 131, 132, 133, 134, 135, 136, 137, 138, 139, 152
Senate bill — 135, 136
separate opinions — 185
Sexual — 163, 164, 228
Shepards — 207, 234
Slavery — 27, 29
Social Science Research Network — 108
Souter — 188
Soviet legal system — 46
Spindle — 107, 108
Spinoza — 16
SSRN — 108

Stamp Act — 51

state — *xi, xii, xiv, xv, 2, 3, 5, 6, 10, 15, 19, 28, 32, 39, 42, 46, 48, 49, 50, 51, 52, 61, 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, 77, 78, 81, 82, 83, 88, 89, 99, 106, 112, 113, 116, 117, 118, 119, 120, 121, 123, 129, 131, 132, 142, 144, 145, 146, 148, 153, 154, 156, 157, 158, 160, 167, 171, 172, 173, 174, 179, 180, 186, 189, 192, 194, 196, 204, 205, 206, 207, 210, 218, 221, 222, 224, 225, 228, 233, 235, 238*

state codes — 157

state legislature — 156, 157

Statutes — *vi, xi, xvii, 30, 110, 113, 114, 115, 116, 124, 125, 126, 128, 129, 139, 143, 144, 149, 153, 154, 155, 156, 157, 158, 159, 162, 165, 166*

Statutory law — 61, 238

Substantive Law — *xvii*

T

The Cabinet — *iv, 76*

Thomas.loc.gov — 115, 116, 137, 139

Torts — 105, 106, 201

Towne v. Eisner — 149

Toxic Substances Control Act — 218

Treatises — *v, 105, 107*

Trial — *vii, 142, 175*

U

Underclass — 21

United States Code — 3, 73, 114, 115, 116, 117, 121, 122, 125, 126, 127, 131, 133, 134, 136, 154, 155, 159, 160, 165, 166, 168, 174

United States Code Annotated — 155

United States Code Service — 155

United States Constitution — *xiii*

United States Reports — 99, 119, 120, 125, 183, 192, 193, 198, 203

United States Supreme Court — 44, 113, 118, 120, 143, 167, 195, 196, 203, 207

United States Supreme Court Justices — 143

updating — 10, 12, 24, 30, 33, 36, 43, 48, 54, 63, 113, 127, 128, 165, 166, 167, 207, 230, 233, 234

U.S. — *iv, vi, vii, viii, xvii, 3, 16, 17, 18, 23, 33, 34, 39, 40, 41, 42, 43, 44, 49, 50, 53, 57, 59, 60, 63, 66, 67, 68, 69, 79, 89, 99, 105, 113, 116, 119, 120, 122, 123, 125, 131, 140, 143, 149, 150, 151, 152, 154, 160, 162, 163, 164, 179, 180, 182, 183, 184, 185, 186, 188, 190, 192, 194, 195, 198, 202, 203, 205, 206, 207, 213, 214, 220, 221, 228, 229, 230, 231, 233, 234, 236, 237, 238*

U.S.C. — 3, 35, 37, 40, 41, 42, 44, 72, 114, 125, 139, 155, 156, 160, 164, 166, 213, 216, 228, 230

USC — 125, 159

U.S.C.A. — 155, 156

U.S.C.S. — 156

V

Verdict — *vii, 176*
versus — *182*
Vice President — *iv, 71, 73, 75, 76*

W

Warren — *185*
Washington — *76, 193*
Weber — *51, 52*
Web site — *119, 120, 122, 137, 139, 154, 156, 157, 193, 194, 195, 203, 221, 222, 225, 233*
web sites — *90, 109*
Wechsler — *39*
Westlaw — *10, 84, 96, 102, 103, 104, 106, 107, 114, 115, 117, 121, 123, 128, 156, 157, 161, 167, 168, 170, 180, 191, 192, 195, 200, 202, 204, 207, 219, 222, 224, 226*
WestlawNext — *95, 114, 202*
West Publishing Company — *192*
West's National Reporter System — *193, 199*
West Thomson — *192*
World Wide Web — *117*
Writ — *xvii*
writ of certiorari — *40, 44, 66, 96*

X

Y

Yale H. — *47*

Z

Zoe — *ix, x*