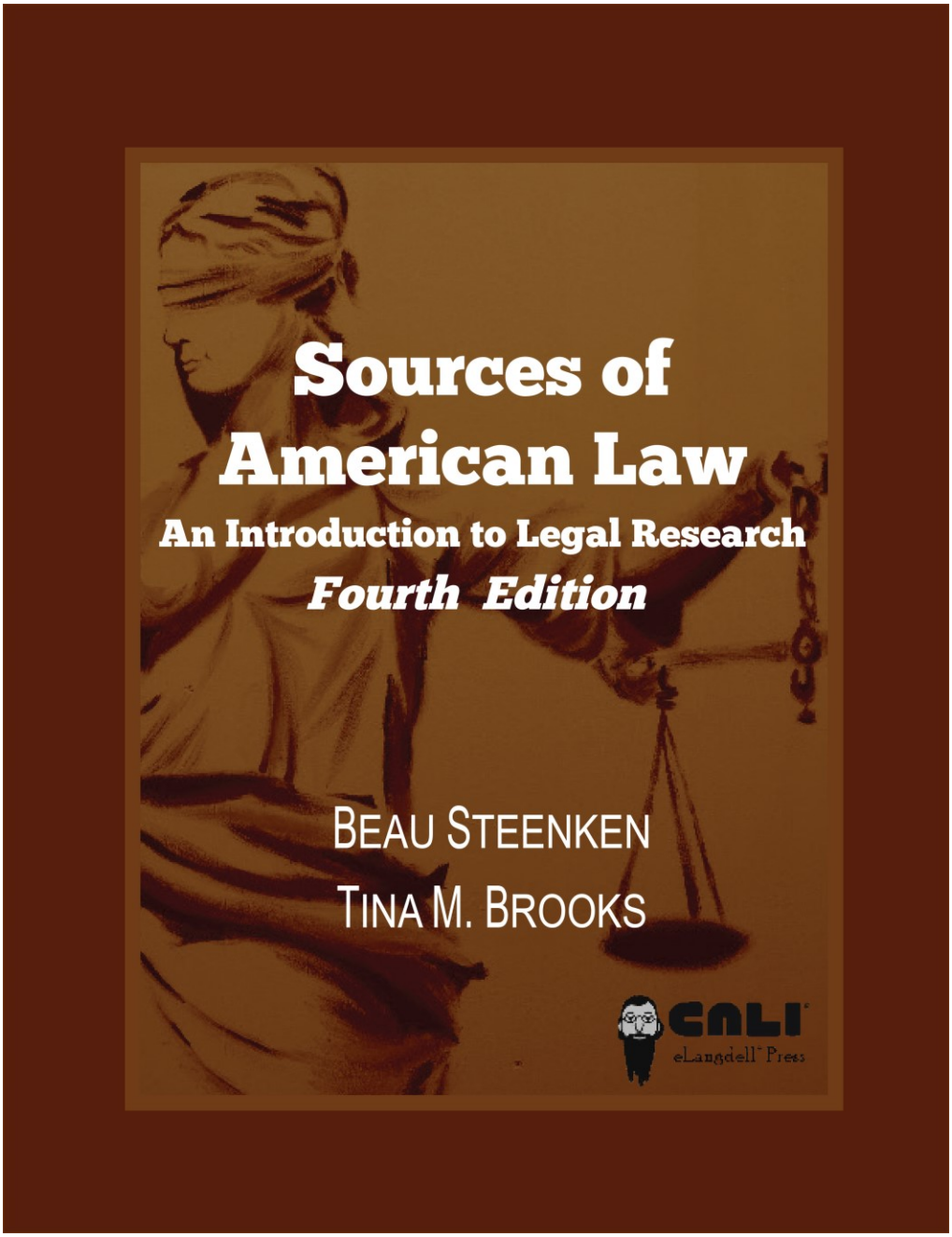

Sources of
American Law
An Introduction to Legal Research
Fourth Edition
BEAU STEENKEN
TINA M. BROOKS
CALI
eLangdell Press

Sources of American Law

An Introduction to Legal Research

Fourth Edition

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CALI eLangdell Press 2019

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Preface

At its most basic definition the practice of law comprises conducting research to find relevant rules of law and then applying those rules to the specific set of circumstances faced by a client. However, in American law, the legal rules to be applied derive from myriad sources, complicating the process and making legal research different from other sorts of research. This text introduces law students to the new kind of research required to study and to practice law. It seeks to demystify the art of legal research by following a "Source and Process" approach. First, the text introduces students to the major sources of American law and describes the forms the various authorities take in both print and electronic form. After establishing this base, the text proceeds to instruct students on advanced uses of electronic tools. Finally, the text illustrates how the different pieces come together in the legal research process.

The text is intended to be used for introductory legal research courses for first year law students with little or no experience with legal sources or legal research. It is the authors' experience that beginning students better understand the role of each source of law in the U.S. system if it is introduced on its own. Students also tend to focus more on efficient processes if the processes are introduced independently of sources of law. The organization of the text, therefore, deliberately introduces the U.S. legal system and electronic search techniques generally before moving on to the individual sources of law. After introducing the individual sources of law, the text covers updating the law, advanced search techniques, the use of secondary sources, and the research process. The authors follow a similar organization in their own research courses but would like to emphasize that they do so for pedagogical reasons specifically with 1Ls in mind.

Chapter 1

The United States Legal System

> The simplest form of remedy for the *uncertainty* of the regime of primary rules is the introduction of what we shall call a 'rule of recognition'… Wherever such a rule of recognition is accepted, both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation. – H.L.A. Hart, *The Concept of Law*

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, 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. – *Preamble to the United States Constitution*

1.1 Learning Objectives for Chapter 1

In working through this chapter, students should strive to be able to:

- Describe key features of the U.S. legal system including:
    - Federalism,
    - Separation of Powers,
    - Sources of Law, and
    - Weight & Hierarchy of Authority.
- Assess how the structure of the legal system frames research.

1.2 Introduction to Researching the Law

The practice of law necessarily involves a significant amount of research. In fact, the average lawyer spends much of her work time researching. This makes sense when one considers that American law as a field is too vast, too varied, and too detailed for any one lawyer to keep all of it solely by memory. Furthermore, the law is a living thing; it tends to change over time. Thus, in order to answer clients' legal questions, lawyers typically conduct research into the laws affecting their clients.

Several things make legal research different from the types of research most law students performed prior to law school. First, rules of law tend to be both highly detailed and highly nuanced, so legal research often includes acts of interpretation even at the research stage. Second, the rules of law derive from a myriad of sources, many of which may be unfamiliar to students. Furthermore, because legal research is so important to the practice of law, the publication of legal materials has long been a profitable field. As part of their long publishing history, legal sources developed their own information systems that predate modern publishing practices. As a result, the organization of legal materials tends to differ from that of other materials. Finally, the process of legal research itself tends to be different. In other fields, researchers often investigate ideas in the abstract. In the law, a researcher must always keep the specific facts of her particular client's situation in mind, as a lawyer must always apply the results of her research to her client's problem.

Because legal research differs so substantially from other types of research, the American Bar Association requires that law schools specifically instruct students in legal research.[1] Typically, research instruction occurs in the context of a Legal Research & Writing (LRW) course. Schools teach legal research and writing together because the two activities (finding/applying the law and then communicating the found application) intertwine. However, legal writing falls outside the scope of this text, which focuses on the research portion of legal practice.

Throwing students into the deep end by having them read cases without explanation or context and then teasing understanding out of them via the Socratic Method remains the educational method of choice for most law classes. This text will not follow that method. In fact, this text seeks to do

---

[1] AMERICAN BAR ASSOCIATION, 2018-2019 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 302(b) (2015).

the opposite, namely to provide enough explanation and context to demystify the art of legal research. By knowing what each of the various sources of law is, and by knowing how the various types of authority interact with each other, law students will avoid being overwhelmed by the level of detail and nuance inherent in the law and will be able to research the law in a calm, efficient manner.

Thus, this text will introduce and explain the major sources of American law one at a time. As it does so, it will provide insight into how publishers arrange the sources of law. Because legal publishers originally developed their methods of organization before the advent of electronics, each source of law will be initially introduced by referencing its print form (*i.e.* actual law books). Once students become familiar with the sources of law—and so will know for what they are looking when they research—the text will proceed to explain the processes of modern legal research, which mostly involves computer-assisted research.

Before introducing the sources and processes involved in legal research, however, a few words must be said about the shape and peculiarities of the United States legal system. After all, it is the unique shape of our system that gives rise to the different sources of law. Furthermore, lawyers conduct research to solve legal problems, and those problems play out in the legal system. You have to know the rules to play the game.

1.3 Federalism

The United States of America employs a federal system of government. As anyone who follows American politics can tell you, federalism means different things to different people. However, the legal definition of a federal state is:

> A composite state in which the sovereignty of the entire state is divided between the central or federal government and the local governments of the several constituent states; a union of states in which the control of the external relations of all the member states has been surrendered to a central government so that the only state that exists for international purposes is the one formed by the union.[2]

---

[2] BLACK'S LAW DICTIONARY 1627 (10th ed. 2014).

The key point to take away from the definition is that in a federal state two separate governments share law-making power, or sovereignty, over the same territory. Of course, federal states differ from one another in precisely how the central and local governments share law-making power. To understand how the federal and state governments share sovereignty in the U.S., one must look to the historical development of federalism in America.

1.3.1 Origins of American Federalism

Prior to declaring independence from Great Britain in 1776, the territory that became the initial United States of America existed as colonies, at first of England and later of Great Britain.[3] Each of the colonies operated as an entity under its own charter as a governing document according to English law. The vast distances of America (especially compared to the relatively smaller scale of England) combined with the slow speeds of pre-Industrial Revolution travel to leave each colony effectively governing itself for large portions of the 17th and 18th centuries.[4]

When the British government attempted to reassert control over the colonies in the latter half of the 18th century, the colonies revolted and eventually won their independence.[5] Because of their history of self-rule, each rebelling colony asserted its own sovereignty (thereby rejecting British sovereignty over America) both during and after the Revolution. However, in order to coordinate the war effort, each colony sent delegates to a "Continental Congress" during the Revolution and eventually adopted the Articles of Confederation[6], which remained in force following British recognition of American independence.

The Articles of Confederation created the United States as a confederation, which resembles a federal state only with a weaker central government and

---

[3] England and Scotland became joined in a "personal union" upon the ascension of James VI of Scotland as James I of England. They did not officially merge into the Kingdom of Great Britain until the Acts of Union of 1707: Union with Scotland Act, 1706, 6 Ann, c.11 (Eng.); Union with England Act, 1707, c.7 (Scot.).

[4] *See generally* JACK P. GREENE, PURSUITS OF HAPPINESS: THE SOCIAL DEVELOPMENT OF EARLY MODERN BRITISH COLONIES AND THE FORMATION OF AMERICAN CULTURE (1988).

[5] For the definitive account of how the increased assertion of central authority by the British Parliament led to the American Independence Movement, *see* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (enl. ed. 1992).

[6] ARTICLES OF CONFEDERATION OF 1781.

more independent local governments.[7] Sadly, it turned out that a weak central government with strong state governments did not adequately administer such a large swath of territory. In particular, the fledgling United States struggled economically.[8] Thus, less than a decade after ratifying the Articles of Confederation, the Founding Fathers reconvened to draft what became the U.S. Constitution.[9]

However, even though the Founding Fathers acknowledged the need for a stronger central government, they remained wary of too strong a central power, as self-rule at the colony/state level had been the whole point of the Revolution.[10] Therefore, while the Constitution creates a strong federal government, it also specifically limits the application of federal law-making authority to specific topical competencies.[11] State governments, while subject to federal supremacy in the specified competencies[12], retain general sovereignty and so enjoy law-making authority over a wider range of topics.[13] Thus, the federal government possesses "enumerated powers," or law-making powers specifically enumerated by the Constitution, while state governments possess "reserved powers," or law-making powers over everything else.[14] Please see Figure 1.3.1 for a list of enumerated federal competencies.

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[7] *See* BLACK'S LAW DICTIONARY 359 (10th ed. 2014).

[8] The revolting colonies borrowed money heavily during the Revolution and so owed huge sums of money to a number of foreign powers, most notably the Dutch.

[9] For a good legal discussion of the motivating factors behind the Constitution, *see* CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS' CONSTITUTION 15-60 (2005).

[10] *See id.* at 100-127.

[11] U.S. CONST. art. I, § 8.

[12] U.S. CONST. art. VI.

[13] U.S. CONST. amend. X.

[14] Please note that it is not always entirely clear whether something is enumerated or reserved, and in fact the definition of each has tended to change over time. For purposes of legal research, just be aware that you will tend to deal with more state law than federal but that federal law can trump state law on certain topics.

Enumerated Federal Power	Constitutional Origin(s) of Power
Taxation (partially shared with states)	art. I, § 8, cl. 1; amend. XVI
Borrowing on Credit of U.S.	art. I, § 8, cl. 2
Regulating Interstate Commerce, and Commerce with Foreign Nations or Indian Tribes	art. I, § 8, cl. 3
Immigration & Naturalization	art. I, § 8, cl. 4
Bankruptcy	art. I, § 8, cl. 4
Coining & Regulating Value of Money	art. I, § 8, cl. 5
Punishing Counterfeiting	art. I, § 8, cl. 6
The Mail	art. I, § 8, cl. 7
Copyright & Patents	art. I, § 8, cl. 8
Creation of Federal Courts (other than the U.S. Supreme Court)	art. I, § 8, cl. 9
Punishing Piracy on the High Seas & Crimes Under International Law	art. I, § 8, cl. 10
War & Armed Forces	art. I, § 8, cl. 11-16
Creating Laws for the District of Columbia	art. I, § 8, cl. 17
"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department of officer thereof."	art. I, § 8, cl. 18

Figure 1.3.1: Enumerated Powers of the Federal Government

1.3.2 Impact of Federalism on Legal Research

The way in which American federalism splits sovereignty impacts legal research in a number of ways. First, for any given territorial point in the United States, a researcher may need to look at two completely different sets of laws, as both federal law and state law will apply throughout the same territory. Sometimes a legal researcher will be able to tell at a glance whether federal or state law will govern an issue, but at other times a

lawyer may need to do initial research just to determine whether to apply federal or state law (or both) to a client's problem. For example, federal law, generally governs copyright[15], a fact familiar to most lawyers off the tops of their heads. However, the federal government's interstate commerce power derives from broader language[16], has expanded over time[17], and may affect areas of law typically reserved to the states. For instance, states typically define and punish crimes, such as robbery, committed inside their boundaries.[18] However, federal law also criminalizes the robbery of banks, as the federal government insures banks through the F.D.I.C. under the commerce power.[19] Thus, any given legal problem may necessitate researching multiple sets of laws.

Of course, American law comprises many more than two sets of laws. While there is only one federal government, each of the fifty states produces its own set of laws. Even 51 is too small a number to describe the sets of laws contributing to the U.S. legal system. The District of Columbia possesses its own laws, as do other Federal territories. Furthermore, American Indian tribes, as "Domestic Dependent Nations," enjoy a limited form of sovereignty.[20] While no legal problem will likely involve all possible sets of laws in the U.S., legal researchers should remain aware of the existence of multiple sets. Because most of the sets of laws present in the U.S. evolved from a common ancestor (namely, the laws of England), even if a jurisdiction's set of laws does not directly apply to a legal problem, it may contain pieces that help a researcher interpret a

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[15] U.S. CONST. art I, § 8, cl. 8.

[16] U.S. CONST. art I, § 8, cl. 3.

[17] *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Wickard v. Filburn, 317 U.S. 111 (1942).

[18] *See, e.g.*, WASH. REV. CODE § 9A.56.200 (through June 11, 2019), *available at* https://app.leg.wa.gov/RCW/default.aspx?cite=9A.56.200.

[19] 18 U.S.C. § 2113 (Legal Information Institute through Pub. L. No. 114-38).

[20] American Indian law is outside the scope of this text. For a good introduction to the subject of American Indian sovereignty, *see* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL (6th ed. 2015).

different jurisdiction's set that does apply.[21] This concept will be revisited a bit later in the discussion on hierarchy of authority in section 1.5.

Federalism impacts legal research not only by providing multiple sets of laws for which researchers must account, but also by providing multiple forums for the settling of disputes about the applications of laws. In other words, in addition to worrying about the possibility of multiple sets of laws affecting their clients, lawyers need to be aware of the options presented by multiple, independent court systems operating over the same geographic area. Sometimes a client may be advantaged by trying a case in federal court as opposed to state court, or *vice versa*.

The matter becomes more complicated when one considers the fact that a jurisdiction's court system does not necessarily always apply its own set of laws. For each controversy that comes before it, a court will determine which jurisdiction's laws should apply. This is known as choice-of-law.[22] A number of factors and guiding principles determine what set of laws a court should apply, but for purposes of legal research it is important to remember that federal courts, while largely interpreting federal law, also sometimes interpret and apply state law. Similarly, while a state's court system most typically interprets the state's own laws, it will sometimes need to apply federal laws, or even the laws of another state.

Choice-of-law matters to the legal researcher because some cases will involve applying bits of multiple sets of laws to the same facts. For example, a criminal defendant facing prosecution under state law may raise a federal constitutional defense. In such a case, the way the bits of law interact with each other changes depending upon which court system tries the case. Before we can cover more detail on the interaction between bits of law, however, we need to examine where those bits, or sources, of law originate by looking at the other key feature of the U.S. Legal System: Separation of Powers.

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[21] There are a few notable exceptions to the proposition that American law evolved from English Common Law. Louisiana's law derived from the French civil law system. Also, a number of states, primarily in the American Southwest, feature elements of Spanish property law, and are known as "Community Property" states. Finally, rather obviously, American Indian legal systems did not evolve from English law.

[22] *See* BLACK'S LAW DICTIONARY 294 (10th ed. 2014).

1.4 Separation of Powers and Sources of Law

At the same time that the Founding Fathers, in drafting the Constitution, limited the central government to enumerated powers, they also broke the federal government into three distinct branches. They did so in the hopes that the various branches would serve as checks and balances on each other and prevent the sort of tyranny that the former colonists rejected from the unified British government.[23] This type of government structure is called Separation of Powers, which is defined as:

> The division of governmental authority into three branches of government—legislative, executive, and judicial—each with specified duties on which neither of the other branches can encroach.[24]

Subsequent to the creation of the federal government with the U.S. Constitution, each of the states in the United States adopted similar provisions in their own constitutions. Indeed, every state government in the U.S. features Separation of Powers.

American government, therefore, features three distinct branches at both the state and federal levels: the legislative branch, the judicial branch, and the executive branch. In the process of governing, each of the branches contributes rules to the body of law of its jurisdiction. The term "sources of law" refers to the different forms the various rules take.[25]. The legislative branch passes statutes, the judicial branch issues opinions, and the executive branch drafts regulations. However, a constitution underpins each of the other sources and serves as the ultimate source of law.

1.4.1 Constitutions

Scholars often describe the United States legal system as a legally positivist system. Legal positivism is a theory of jurisprudence that essentially states that all law is human-made and is only valid in a state because people accept that it is.[26] H. L. A. Hart, a twentieth century British legal philosopher, wrote perhaps the clearest articulation of legal positivism in his seminal

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[23] For the classic account of the Constitutional Convention of 1787, when these decisions were made, *see* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787 (1966).

[24] BLACK'S LAW DICTIONARY 1572 (10th ed. 2014).

[25] *See* BLACK'S LAW DICTIONARY 1610 (10th ed. 2014).

[26] *See* BLACK'S LAW DICTIONARY 1033 (10th ed. 2014).

work, *The Concept of Law*, which was quoted at the beginning of this chapter. Part of Hart's theory of legal positivism involves a "rule of recognition," which alerts citizens of a jurisdiction to the validity of its laws.[27]

For a legal rule in the U.S. to be valid, it must have been created by a process described by the applicable constitution. Thus, in the United States, the U.S. Constitution serves as the rule of recognition for the federal government. Similarly, state constitutions serve as the rules of recognition for their respective state governments. Under positivism, constitutions derive their authority from the will and acceptance of the people. Thus, for the American legal researcher constitutions represent the ultimate source of law.

Of course, our constitutions do flesh out the processes by which our governments may create other sources of law. We have already seen how constitutions separate the various American governments into three distinct branches. Logically enough, the constitutions also provide each branch a method by which it can create legal rules.

1.4.2 Statutes

Under the American system of Separation of Powers as described by the various constitutions, the legislative branch creates laws in the form of statutes. Generally, to create a law, a legislator will introduce a bill into whatever legislative house she belongs; then once the bill receives an affirmative vote in each legislative house and the signature of the jurisdiction's chief executive, it becomes an enacted law.[28]

On the federal level, the legislative branch, known as Congress, consists of the House of Representatives and the Senate. Bills that pass both houses and are signed by the President become enacted and receive the designation "Public Laws." The Government Publishing Office (GPO) publishes all Public Laws of the United States in a multi-volume set called the *Statutes at Large*. The GPO also divides the Public Laws into their constituent parts by topic and fits them into a topically-organized publication of all federal laws in force called the *United States Code*.

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[27] H. L. A. HART, THE CONCEPT OF LAW 94-110 (2d ed. 1994).

[28] This process holds true for the federal legislature and all but one of the state legislatures. Nebraska, the odd state out, features a unicameral legislature, so bills only need pass one house in the Cornhusker State.

State legislatures follow the same process as the federal legislature, but the nomenclature varies. For instance, in Kentucky the legislature is called the General Assembly, which is comprised of the House of Representatives and the Senate. Bills that pass both houses become Acts, which researchers can find in chronological order in the *Kentucky Acts* or in the topically-organized *Kentucky Revised Statutes*. Meanwhile, bills that pass both houses of the Texas Legislature become General Laws published in the *Texas General Laws* before being folded into one of a number of different codes named for the topics they cover. Thus, while the processes resemble each other, each state may call its statutes by slightly different terms.[29]

Because constitutions charge the legislative branches they create with general law-making ("legislative" actually means law-making[30]) ability[31], statutes represent laws in their most basic sense. As such, they are the next most important source of law after constitutions and typically control legal problems over other sources of law. Statutes will be covered in greater detail in Chapter 3.

1.4.3 Judicial Opinions

Although a statute on point would typically control a given legal controversy, it is not always readily apparent how precisely a statute would apply to a specific set of facts, or even whether it would cover the facts at all. This ambiguity occurs because generally legislatures write statutes in broad, abstract terms in order for the statute to cover as many scenarios as possible. Thus, abstract statutes typically require interpretation in order to apply them to specific controversies. Under Separation of Powers, the judicial branch takes on the role of the interpreter of laws.

The judicial branch typically comprises several levels of courts, with a high court at the top, trial courts at the bottom, and one or more levels of intermediate appellate court in between, though the names of the various courts vary by jurisdiction. At the federal level, the United States Supreme Court acts as the high court, District Courts serve as the usual point of entry to the system, and Courts of Appeal (also sometimes called Circuit

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[29] For a thorough list of what each state calls its statutes, *see* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 248-302 tbl.T.1.3 (Columbia Law review Ass'n et al. eds., 20th ed. 1st prtg. 2015).

[30] *See* BLACK'S LAW DICTIONARY 1039 (10th ed. 2014).

[31] *See, e.g.,* U.S. CONST. art. I, § 1; R.I. CONST. art. VI § 2.

Courts) connect the two.[32] Constitutional grants of judicial power generally extend to the respective court system as a whole.[33]

Courts interpret the law by issuing judicial opinions, also referred to as cases. Although subservient to the statutes they interpret, judicial opinions create their own rules of law through the force of precedent.

Precedent works through the principle of *stare decisis* which is defined as:

> The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.[34]

Basically, consistency benefits law, in that it allows those governed by the law to predict what they need to do to comply with the law. Following earlier decisions as precedents leads to greater consistency. If courts begin interpreting a statute in a certain way, society benefits if they continue to interpret the same statute in the same way.

Sometimes judicial opinions create legal rules through precedent even absent a statute. This happens often when courts interpret constitutional sections. It also happens when courts apply legal rules that predate the widespread use of statutes.[35] The term "common law" refers to law made through judicial opinions rather than by statutes.[36] Many common law rules remain in force in American law, particularly in the fields of Torts and Property.

Thus, through the force of precedent, judicial opinions contribute legal rules to the various bodies of American law, both through statutory interpretation and common law. Indeed, many lawyers spend the majority of their research time on case research. Judicial opinions will be covered in more depth in Chapter 4.

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[32] For a state-by-state breakdown of state court systems, *see* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 248-302 tbl.T.1.3 (Columbia Law review Ass'n et al. eds., 20th ed. 1st prtg. 2015).

[33] *See, e.g.,* U.S. CONST. art. III, § 1; MINN. CONST. art. VI § 1.

[34] BLACK'S LAW DICTIONARY 1626 (10th ed. 2014).

[35] The concept of the statute slowly developed in England during the late Middle Ages, but statutes did not achieve primacy until the 16th Century. Furthermore, legislatures tended to operate on strictly part-time schedules well into the 19th century.

[36] *See* BLACK'S LAW DICTIONARY 334 (10th ed. 2014).

1.4.4 Administrative Regulations

The final branch of government formed by constitutions mandating Separation of Powers is the executive branch, which consists of a chief executive and various cabinet departments and agencies that report to the chief executive. At the federal level the President of the United States acts as the chief executive, and at the state level the Governor fills the same role. A constitution usually charges the chief executive with enforcing or executing the laws of its jurisdiction.[37]

Of course, chief executives do not personally enforce all the laws of their jurisdictions. Instead, they delegate the enforcement of different areas of law to different agencies. Often, an agency will need to provide specific rules in order to enforce a broad statute. Rules issued by agencies take the form of administrative regulations. In modern times, legislatures actually delegate regulation-making authority to executive branch agencies by statute, giving regulations the force of law.

While administrative regulations do contribute legal rules to the various sets of American laws, lawyers generally regard them as the weakest of the sources of law. Since regulatory authority comes via legislative delegation, a legislature can remove the authority at any time. Administrative regulations will be discussed in more detail in Chapter 5.

1.5 Hierarchy of Authority

As we have seen, American law comes from many sources. Not only does each branch of government create its own source of law, but each separate jurisdiction within the U.S. possesses its own set of laws. As such, knowing how the different pieces of law interact with each other takes on huge importance for legal researchers (especially if the different pieces of law in any way contradict each other, which is not an unusual occurrence).

Lawyers refer to individual sources of law as authorities and describe their relationship to each other as the hierarchy of authority. As discussed above, the standard hierarchy of authority starts with constitutions as the most authoritative, and then proceeds in order of authoritativeness through statutes, judicial opinions, and administrative regulations. However, this simple hierarchy does not capture the nuance involved when dealing with authorities from multiple jurisdictions or authorities from one jurisdiction being applied by the courts of another. Furthermore,

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[37] *See, e.g.*, U.S. CONST. art. II, § 3; PA CONST. art. IV §2 .

not all judicial opinions carry equal weight. Some additional concepts are therefore necessary to sort and rank authorities.

1.5.1 Primary v. Secondary Authority

Legal authority can be divided into two broad categories: primary authority and secondary authority. Collectively, this distinction is referred to as "type of authority." Primary authority refers to "authority that issues directly from a law-making body."[38] Thus, the four sources of law discussed previously make up primary authority. Secondary authority, therefore, refers to "authority that explains the law but does not itself establish it, such as a treatise, annotation, or law-review article."[39] While lawyers may cite secondary authorities, courts do not view secondary authorities as possessing as much persuasive weight as primary authorities possess. More will be said on secondary authorities and their use in Chapter 8.

1.5.2 Mandatory v. Persuasive Authority

Legal authority can also be divided into mandatory (sometimes called binding) authority and persuasive authority. Collectively, this distinction is referred to as "weight of authority." Mandatory authority refers to an authority that a court considering a case must apply, while persuasive authority refers to "authority that carries some weight but is not binding on a court."[40] Obviously, lawyers benefit from knowing whether a court must apply an authority to a case or whether a court may choose not to apply an authority. Therefore, being able to determine the relative weights of authority is a skill every legal researcher should aspire to acquire.

1.5.3 Determining Weight of Authority

Determining the weight of authority for some sources of law can be quite straightforward. If a jurisdiction's constitution applies to a set of facts before a court, then the constitution acts as mandatory authority. Similarly, if a statute from the jurisdiction in question relates to the facts in controversy, a court must apply it. The same holds true for regulations, though they tend to apply to more narrowly defined sets of facts. In other words, constitutions, statutes, and regulations can never be persuasive; they are either mandatory or irrelevant. Conversely, secondary authority, since it is not actually law but merely interpretation, can never be

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[38] BLACK'S LAW DICTIONARY 159 (10th ed. 2014).

[39] *Id.*

[40] *Id.*

mandatory but only acts as persuasive authority. Thus, a determination of weight for many authorities will be quick and easy.

The weight of authority of judicial opinions, however, depends on several factors. A lawyer must first consider choice of law. In order to be binding, a precedent must apply the same jurisdiction's laws as would apply to the controversy at hand. However, choice of law alone does not determine weight of authority.

Second, the lawyer must consider venue, or the court where her controversy would be heard if it went to trial. In order to be mandatory, an earlier case must have been issued from the same court system as will be adjudicating the controversy to which a lawyer would like to apply the precedent. Furthermore, the earlier case must be from a higher court, in a direct line of appeal, from the current controversy's venue. As state court structures vary, let us look at a hypothetical case in the federal court structure as an example.

As discussed above, the federal court structure consists of trial level courts (District Courts), intermediate appellate courts (Courts of Appeals), and ultimately, the United States Supreme Court. District Courts and Courts of Appeals are grouped into twelve geographic circuits (and one topical circuit). If a lawyer loses a trial in a District Court, she may appeal to the Court of Appeals for whichever geographic circuit contains the District Court that tried her case. See Figure 1.5.3 for a list of which circuits contain which districts.

Federal Circuit	Corresponding District Courts by State in which they Reside
First Circuit	ME, NH, MA, RI, Puerto Rico
Second Circuit	NY, VT, CT
Third Circuit	PA, NJ, DE, Virgin Islands
Fourth Circuit	MD, VA, WV, NC, SC
Fifth Circuit	TX, LA, MS
Sixth Circuit	TN, KY, OH, MI
Seventh Circuit	IN, IL, WI
Eighth Circuit	MN, IA, MO, AR, ND, SD, NE
Ninth Circuit	CA, AZ, NV, ID, OR, WA, MT, AK, HI, Guam, Northern Mariana Islands
Tenth Circuit	UT, WY, CO, NM, KS, OK
Eleventh Circuit*	AL*, GA*, FL*
D.C. Circuit	D.C.
The Federal Circuit	certain appeals determined by subject matter

Figure 1.5.3: The Federal Judicial Circuits
** The Eleventh Circuit split from the Fifth Circuit on October 1, 1981. Therefore, Fifth Circuit Court of Appeals decisions prior to that date are binding upon District Courts in the Eleventh Circuit.*

If a lawyer were trying a case applying federal law in the United States District Court for the Eastern District of Kentucky, mandatory opinions would include opinions from the Sixth Circuit Court of Appeals and the United States Supreme Court. Because cases from the Eastern District of Kentucky may only be appealed to the Sixth Circuit Court of Appeals, opinions from other circuits' Courts of Appeals would merely be persuasive, even though those courts are higher courts. Similarly, if the same lawyer were handling the appeal from the District case in the Sixth Circuit Court of Appeals, only Supreme Court cases would be mandatory, as the Supreme Court is the only court higher than a Court of Appeals in the federal system.

To complicate matters, however, an exception exists if the choice of law and venue do not match, *i.e.* a case in federal court involves state law, or a case in state court is applying federal law or the law of another state as a

choice of law. In this specific case, the court applying a different jurisdiction's laws will treat opinions from the high court of that jurisdiction as mandatory. This is because each jurisdiction's high court acts as the final arbiter of its laws under constitutional principles of federalism. For example, if the United States District Court for the Eastern District of Kentucky hears a negligence case governed by Kentucky state tort law, it will treat opinions from the Kentucky Supreme Court as mandatory.

Of course, even if a lawyer determines an opinion only serves as persuasive authority, she may still choose to use it, particularly if it features facts similar to her controversy. Furthermore, some cases may be more persuasive than others. Generally speaking, opinions coming from higher courts are more highly persuasive. Also, cases from the court system of the jurisdiction whose law has been selected as the choice of law tend to be better than cases from other court systems. In the abstract, more recent cases tend to be favored over older cases, as the more recent cases will be presumed to have been aware of the earlier cases and to have incorporated them into the more recent holding. Finally, although they are not binding because they may technically be overturned, earlier cases from the same court hearing the current controversy would be the highest level of persuasive authority as courts generally try to avoid overturning their earlier decisions.

Although not always an easy task, the evaluation of the hierarchy of authority for a given legal problem is an essential skill for legal researchers to determine what research paths to pursue. Furthermore, a legal researcher needs to be able to recognize the various sources of law that create the rules that govern the problem being researched. For these reasons, legal researchers should keep the structures of the U.S. Legal System firmly in mind as they research.

1.6 Concluding Exercises for Chapter 1

Try your hand at putting legal authorities into hierarchical order! For each of the following fact patterns, put the authorities listed into order from the most authoritative to the least authoritative. Draw a line at the point above which all authorities are mandatory and below which all authorities are persuasive.

1.6.1 Introductory Hierarchy of Authority Exercise

You represent Old Tobias Tobacco Company. Recently, a start-up "guerrilla marketing" firm operating on Old Tobias's behalf may have inadvertently violated federal law. Apparently, the guerrillas started a campaign whereby they were encouraging Facebook users to change their profile pictures to an Old Tobias print ad from the 1950s, an ad which runs afoul of current laws, and now the feds are preparing to file suit in the Middle District of North Carolina (where Old Tobias is headquartered). As a result, you did a little research into the matter. Please rank the authorities you found according to weight and hierarchy of authority:

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000). [United States Supreme Court Case]

Robert J. Baehr, *A New Wave of Paternalistic Tobacco Regulation*, 95 Iowa L. Rev. 1663 (2010). [Scholarly Article About Tobacco Regulation]

15 U.S.C. § 1335 (2012). [Federal Statute]

R.J. Reynolds Tobacco Co. v. Seattle-King County Dept. of Health, 473 F. Supp. 2d 1105 (W.D. Wash. 2007). [Federal District Court Case]

R.J. Reynolds v. Phillip Morris, 199 F. Supp. 2d 362 (M.D.N.C. 2002). [Federal District Court Case]

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). [United States Supreme Court Case]

Consolidated Cigar Corp. v. Reilly, 218 F.3d 30 (1st Cir. 2001). [Federal Court of Appeals Case]

Brown & Williamson v. FDA, 153 F.3d 155 (4th Cir. 1998). [Federal Court of Appeals Case]

1.6.2 Intermediate Hierarchy of Authority Exercise

Dear Associates:

We are representing Ronny Jotten in an upcoming drug possession case in Fayette County Circuit Court in Lexington, KY. Jotten is a graduate student living in university housing. He has his own bedroom but shares a kitchen and common room with three other students. On the morning of August 23rd, Lexington police officers, while looking for Vic Sydney, a known acquaintance of Jotten, entered Jotten's suite without a warrant. The police limited themselves to the common areas and did not enter a bedroom. All residents were away from the flat at the time. However, Mac Shane, an undergraduate living next door to Jotten, entered the flat looking for Jotten. The police, who in the meantime had found a rather large bag of marijuana in between some couch cushions, asked Shane if he knew whose it was. Shane, inebriated at the time and wanting to deflect attention away from that fact, replied that the marijuana was "Ronny's" before waltzing out the door. The police subsequently arrested Jotten.

I'm pretty sure that what the police did was an unlawful search under federal law, but I'm going to need to prove that Jotten had a reasonable expectation of privacy in the common area (as opposed to dorm room) of his suite. Here are some authorities on the matter. Please put the following materials into hierarchical order. Please draw a line between binding and persuasive authority. Thanks. As a reminder, we're arguing federal law in state court.

Regards,

Ms. Partner

United States v. Villegas, 495 F.3d 761 (7th Cir. 2007)

Katz v. United States, 389 U.S. 347 (1967)

Adams v. Commonwealth, 931 S.W.2d 465 (Ky. Ct. App. 1996)

Minnesota v. Olson, 495 U.S. 91 (1990)

Blades v. Commonwealth, 339 S.W.3d 450 (Ky. 2011)

U.S. Const. amend. IV

8 Ky. Prac. Crim. Prac. & Proc. § 18:11 (part of the Kentucky Practice legal encyclopedia set)

United States v. Carriger, 541 F.2d 545 (6th Cir. 1976)

City of Athens v. Wolf, 313 N.E.2d 405 (Ohio 1974)

1.6.3 Advanced Hierarchy of Authority Exercise

You are a staff attorney for Heaven's Doorkeepers, a non-profit legal aid organization devoted to defending death penalty cases in the state of Texas. Your most recent case is that of J.W. Harding, who has been charged with capital murder under Tex. Penal Code ANN. § 19.03 (West 2011). The charges stem from an incident in which Mr. Harding broke into a barn on The Freewheelin' Ranch owned by one Robert Dillon. Mr. Harding proceeded to steal roughly a dozen cattle from the barn. As he was looking for some kind of way out of there, Mr. Harding, driving the small herd of cattle, encountered Mr. Dillon approaching on foot along Highway 61. Mr. Harding prompted the cattle to stampede in an attempt to escape, and the herd trampled Mr. Dillon to death. To make matters worse for Mr. Harding, Mr. Dillon's next of kin, his son Jacob, is suing Mr. Harding for wrongful death. Jacob Dillon resides in Nashville, TN, in a condo with a great view of the skyline. As such, he is suing Mr. Harding in federal court on diversity jurisdiction.

Since Heaven's Doorkeepers is representing Mr. Harding anyway, your supervising attorney has decided to help with the wrongful death suit as well. She is assigning you to explore each of the following legal issues: capital murder as a matter of state law in Texas courts, cruel and unusual punishment as a matter of federal law applied in Texas state courts, and wrongful death civil actions as a matter of Texas state law as applied in federal courts. Please put the following sources into hierarchical order for each issue. Label each source as mandatory or persuasive.

Bear in mind that Texas has <u>two</u> Supreme Courts, the Texas Supreme Court (Tex.) handles civil cases, and the Texas Court of Criminal Appeals (Tex. Crim. App.) deals with criminal cases.

<u>Capital Murder (state law) in Texas</u>

Young v. Commonwealth, 50 S.W.3d 435 (Ky. 2001)

Tex. Penal Code ANN. § 19.03 (West 2011)

Texas v. Cobb, 532 U.S. 162 (2001)

Patrick S. Metze, *Death and Texas: The Unevolved Model of Decency,* 90 Neb. L. Rev. 240 (2011)

Bible v. State, 162 S.W.3d 234 (Tex. Crim. App. 2005)

Kennedy v. State, 338 S.W.3d 84 (Tex. App. 2011)

Paredes v. Thaler, 617 F.3d 315 (5th Cir. 2010)

Devoe v. State, 354 S.W.3d 457 (Tex. Crim. App. 2011)

Cruel and Unusual Punishment (Federal Issue in Texas state courts)

Lawrence Rosenthal, *Originalism in Practice,* 87 Ind. L. J. 1183 (2012)

Gonzalez v. State, 353 S.W.3d 826 (Tex. Crim. App. 2011)

Stringer v. Black, 503 U.S. 222 (1992)

U.S. v. Fogg, 666 F.3d. 13 (1st Cir. 2011)

Garcia v. Texas, 131 S.Ct. 2866 (U.S. 2011)

Turpin v. Commonwealth, 350 S.W.3d 444 (Ky. 2011)

Sama v. Hannigan, 669 F.3d 585 (5th Cir. 2012)

U.S. Const. amend. VIII

Wrongful Death Civil Action (Texas state law in Federal Court, specifically in the M.D. Tenn.)

Ruiz v. Guerra, 293 S.W.3d 706 (Tex. App. 2009)

Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692 (Tex. 2003)

Wackman v. Rubsamen, 602 F.3d 391 (5th Cir. 2010)

Austin Nursing Center, Inc. v. Lovato, 171 S.W.3d 845 (Tex. 2005)

Tex. Civ. Prac. & Rem. Code Ann. § 71.002 (West 2011)

Fry v. Lamb Rental Tools, Inc., 275 F. Supp. 283 (W.D. La. 1967)

Detroit Crude Oil v. Grable, 94 F. 73 (6th Cir. 1899)

Bunt v. Sierra Butte Gold Min. Co., 138 U.S. 483 (1891)

1.7 Recommended CALI Lessons for Further Practice

CALI hosts an impressive number of interactive lessons on its website. The following lessons on the legal system of the United States touch upon material covered in this chapter. They would be a great place to start for students looking for further practice on the concepts introduced in this chapter!

1.7.1 "Where Does Law Come From?" by Diane Murley

Summary: an overview of the branches of the U.S. government and how they make law

Lesson ID: LCS04

URL: http://www.cali.org/lesson/1072

1.7.2 "Legal Research 101: The Tools of the Trade" by Sheri H. Lewis

Summary: an introduction to basic resources for researching the law

Lesson ID: LWR08

URL: http://www.cali.org/lesson/568

Chapter 2

Introduction to Electronic Research

> I think it's fair to say that personal computers have become the most empowering tool we've ever created. They're tools of communication, they're tools of creativity, and they can be shaped by their user. – Bill Gates

Note: The some of the images presented in this chapter and subsequent chapters are from external screencasts of the processes described in the text. Readers are encouraged to watch the screencasts to see the techniques in use. Screencasts may be accessed by clicking on the URL provided in each image's caption.

2.1 Learning Objectives for Chapter 2

In working through this chapter, students should strive to be able to:

- Explore the basic organization of legal platforms.
- Identify the basic processes of online research: searching, browsing, and limiting results through filters.
- Describe how an index and a table of contents differ.

2.2 Introduction to Electronic Research

At its core, the practice of law consists of locating relevant legal authorities, applying the authorities to your client's facts, and then communicating the predicted result of the application. To accomplish this, legal researchers need to be familiar with the most efficient ways of finding the relevant legal authorities. Today, that is often accomplished using online legal research platforms.

Researchers should keep in mind that computers did not achieve prominence until roughly a hundred years after the professionalization of

the practice of law. As a result, major legal publishers originally created their publications and accompanying tools in a strictly paper-based world. When these publishers began to make their publications available electronically, search capabilities were rudimentary compared to what we are used to today, and so the same tools that existed in print were – and continue to be - reproduced electronically. Search capabilities and new electronic tools continue to be developed, so an efficient legal researcher should be proficient not only in search but also in the additional functionality available on legal research platforms.

The current legal research platform business features various market segments. At the top end of the market lie full-service legal platforms such as Westlaw Edge and Lexis Advance that contain primary authorities, secondary authorities, and a variety of tools beyond search to help a researcher locate relevant materials. More recently, Bloomberg L.P. (an electronic resource publisher focusing on news and finance) has branched into the legal information market and now offers Bloomberg Law as a third full-service legal research platform. A key feature of these full-service platforms, beyond their breadth of coverage and proprietary search algorithms, remains the inclusion of human-created value-added content to support basic computer processing. Value added content, such as headnotes in judicial opinions and annotations to statutes, will be addressed in subsequent chapters.

The legal research platform market also features budget model legal platforms, such as Casemaker and Fastcase. Generally speaking, the budget models rely on search algorithms to a much greater extent and include little or no human-generated content or tools. While these services come with a significantly lower price tag than the full-service providers, they require more effort and attention from researchers using them.

In between the top end of the market and the budget models, many publishers offer niche services. For example, Thomson Reuters, the company that produces Westlaw Edge, also produces Checkpoint, an electronic research platform devoted to tax law research. Similarly, Wolters Kluwer provides CCH Intelliconnect, a service also focused on tax. ProQuest's Legislative Insight provides legislative history documents in digital form. Niche electronic legal research platforms vary in the amount of human-generated features they employ.

Despite the proliferation of various types of electronic research platforms, they tend to interact with information in similar ways regardless of specific programming. In this chapter, we will introduce some of the basic electronic processes and tools available on many legal research platforms before speaking about them in relation to specific types of primary authorities in Chapters 3, 4, and 5. For demonstration purposes, we will focus on Westlaw Edge and Lexis Advance as they are commonly used research platforms in legal practice and law schools.

2.3 Basic Electronic Research Processes

Most researchers today possess extensive experience with the Internet. Searching, browsing, and filtering[41] are actions that many of us use daily to navigate around the wealth of information the Internet has placed at our fingertips. These same basic actions will be used for electronic legal research.

This is not to say, however, that the novice researcher already knows how to use electronic resources to research the law effectively. Law is a complex system that encompasses a wide variety of authorities, and so understanding what authorities the search engine is presenting to you and how they relate to your legal problem is critical. The selection and evaluation of appropriate resources for a given problem is sometimes referred to as "information literacy." The subsequent chapters of this book will elaborate on the types of authorities you will encounter on legal research platforms and advise you how to evaluate and utilize them in your research. Keep in mind that it may take several years of experience before a researcher achieves full literacy in the variety of sources that make up the field and is able to identify quickly the most relevant sources to a research problem.

Law involves the interpretation of the meaning of words. Computers' ability to interpret human language is improving rapidly but still requires the researcher to think carefully about the terminology she is employing and often to use tools beyond search that aid in the sorting of information. While the basic processes used for recreational Internet-surfing will be the same as those that are used for legal research, a greater level of precision and efficiency must be employed for the latter lest one be inundated by

[41] "Filtering" is sometimes also referred to as "limiting" or "selecting facets." For purposes of consistency, this text will use the term "filtering."

irrelevant results. For instance, simply typing **common law marriage** into Lexis Advance's search bar returns over 8,000 cases.

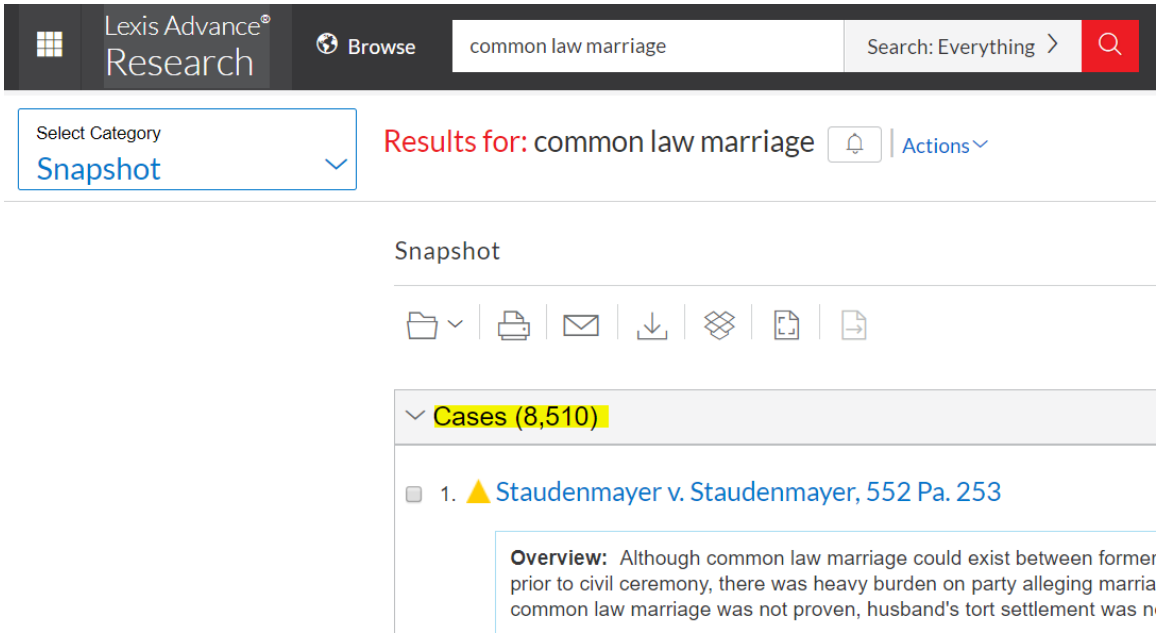


Figure 2.3 A screenshot of a simple keyword search in Lexis Advance brings back thousands of search results.

Too many results can be just as bad for a legal researcher as too few. Not only will she not have time to read through all the results, but they may not all be relevant to her problem. It's just as problematic for a researcher to cite authorities that do not apply to the facts at hand as it is to fail to cite key authorities that do apply. For these reasons, it is of paramount importance that law students work to become precise, efficient researchers.

2.3.1 Browsing

In electronic research, browsing refers to the process of navigating through a website's inherent organization to narrow in on the information the researcher is seeking. Legal research platforms are typically organized according to the concepts discussed in Chapter 1: type of authority, jurisdiction, as well as by legal topic. However, platforms may employ slightly different terminology. For example, Lexis Advance allows researchers to browse by Content Types, which allows users to select types of authority like statutes or secondary sources. It also uses the term Practice Area rather than topic. See the video in Figure 2.3.1 for further

explanation of how Lexis Advance is organized. Westlaw Edge and other legal research platforms are generally organized along similar lines.

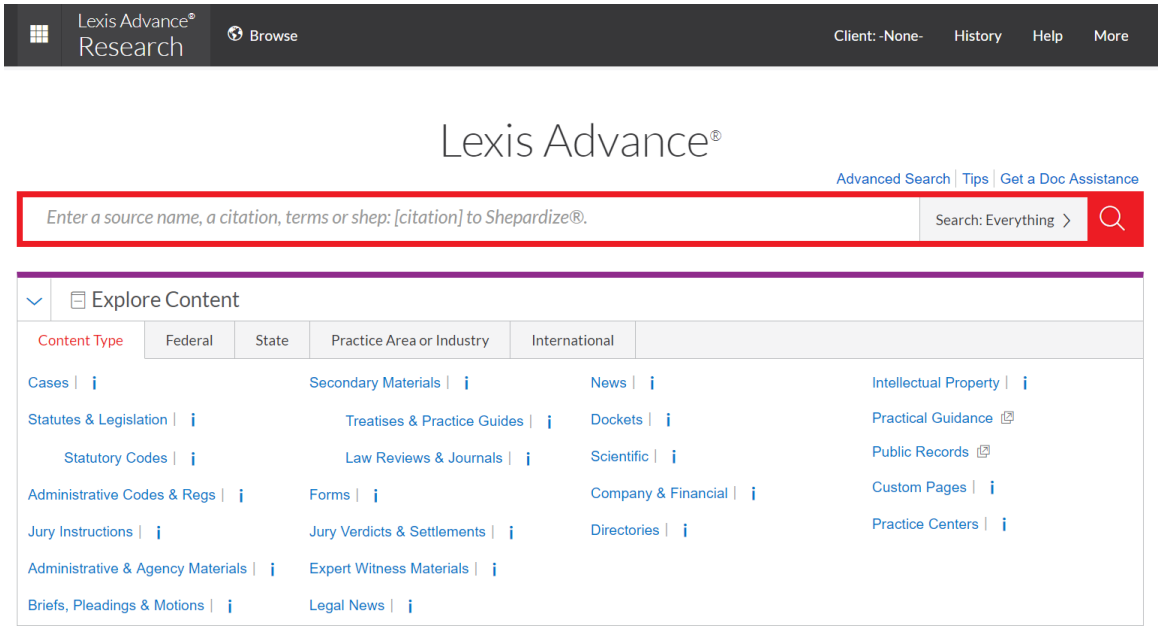


Figure 2.3.1 Browsing on Lexis Advance. Click here for screencast: https://youtu.be/agyNVs1D-XA

2.3.2 Filtering

Filtering is a process by which electronic researchers focus on some search results while excluding others. Information providers assign descriptive information to individual documents which allow researchers to narrow in on the specific information they are looking for. For example, online retailer Amazon has filters that allow customers to find exactly what they are looking for among a multitude of results. So, if one wanted to buy sandals from Amazon, one could search for "sandals" and then filter the results by brand, size, color, and even average customer review, which are all pieces of metadata collected by Amazon and applied to each individual product entry.

Filtering may be the most flexible of the electronic information gathering processes. It can be performed pre-search or post-search. Legal research platforms generally build a number of useful filters into their platforms. Commonly used filters include type of authority (statute, case, secondary source, etc.), jurisdiction, date, and topic (as assigned by editors working for

the information provider). Researchers typically find available filters listed in a box to the left of delivered search results.

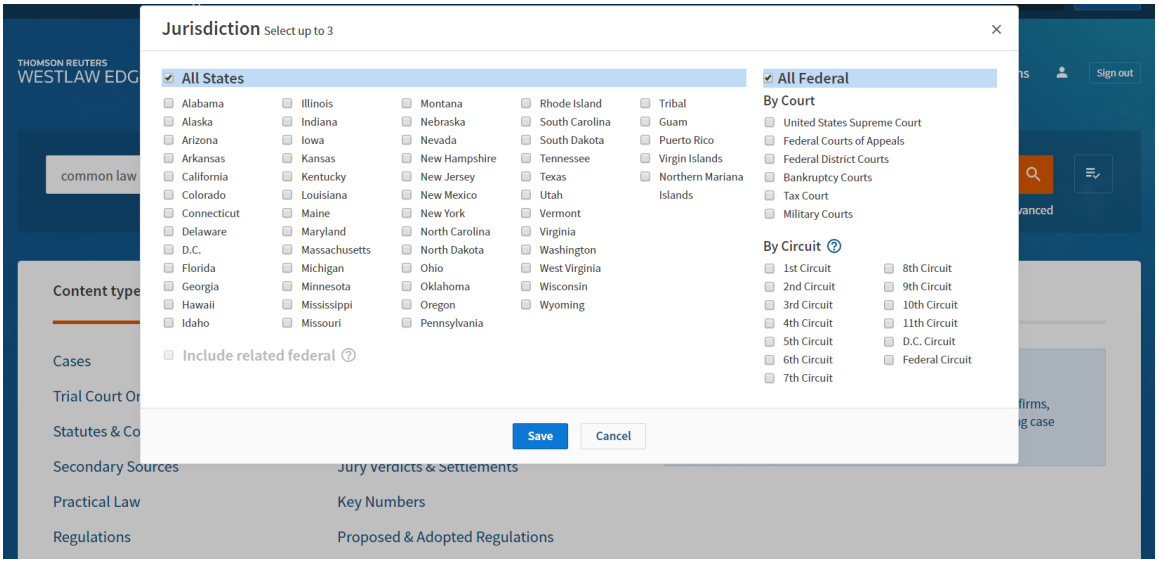


Figure 2.3.2 Filtering in Westlaw Edge. Click here for screencast: https://youtu.be/8JL44vzt2GY

2.3.3 Natural Language Searching

In daily life we tend to retrieve much of our information on the Internet by searching. Even the name of the most widely used search engine is now synonymous with the term "looking stuff up on the internet".[42] At its core, searching is a simple process that consists of typing terms into a search bar and then scanning through the results. For example, if I wanted to find out how to add page numbers to a document, I might search for "page numbers" or use a phrase including more contextual information such as "page numbers in Word 2016" or even ask a question: "How do I add page numbers in Word 2016?" The search engine then uses an algorithm to scan websites and return results likely to give me the information I need.

This type of search is referred to as a natural language search or a keyword search. The researcher is largely relying on the site's search algorithm to retrieve information. When search algorithms were first created, they did not actually comprehend the information that was contained in each search result. They were simply counting terms and other types of data on the

[42] For example: "Let me Google that for you."

search results to rank them on the results page. Today, many sites utilize more sophisticated search algorithms which now employ types of artificial intelligence that can relate search terms with synonyms or even concepts.

The current generation of legal research platforms default to a natural language search, mostly as a response to the rise of Google, and employ artificial intelligence in their search algorithms. While it is possible to use a natural language search as a starting point for legal research, it is still best suited for relatively simple legal questions. Even then, it usually returns a relatively large number of results that will require a researcher with good information literacy skills to be able to recognize which results are most useful. For example, the search pictured in Figure 2.3.3 seeks an answer to the question of whether Vermont recognizes common law marriages, a relatively straight-forward yes-or-no question, and the artificial intelligence tool in Westlaw Edge called Westlaw Answers has defaulted to other states.[43] The search has also returned 94 cases, amongst other types of documents. So, while the algorithm (which Westlaw Edge tailored specifically for legal research) does present authority to answer the yes or no question, it also presents a lot of information that does not answer the question. It is up to the researcher to determine which of the results provide proper legal authority to answer the question. Thus, natural language searching is not always the most efficient way to research complex issues of law, or at least not in isolation.

[43] However, AI algorithms can learn quickly. We had originally used Kentucky for this example, and Westlaw Answers was providing us with the same Maine and New Mexico responses. Two weeks later, after running variations of this search several times for Kentucky and other states, Westlaw Answers was providing us with the correct answer for Kentucky. However, it had also sometimes stopped returning an answers box at all if the question was posed using slightly different language.

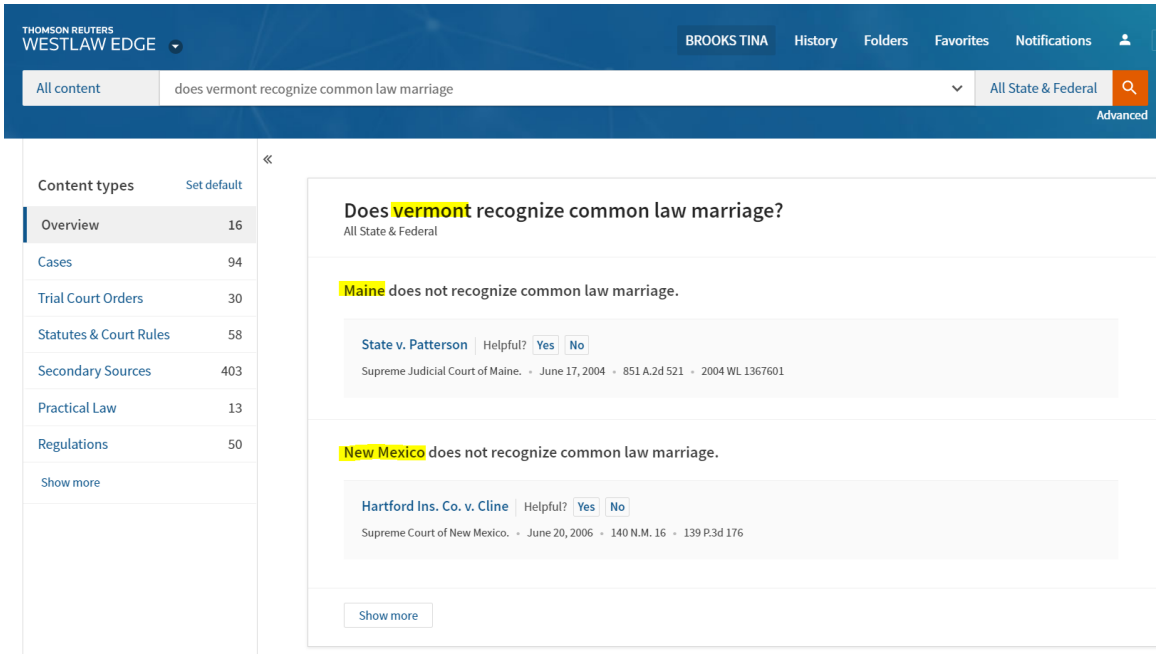


Figure 2.3.3 Screenshot of Westlaw Answers. Westlaw Edge uses artificial intelligence for its Answers feature, but it does not always provide the necessary information.

2.3.4 Boolean Operators

The creators of full-service legal information platforms (and indeed many creators of search engines generally) include in their products tools that enable legal researchers to take greater control of the search in order to achieve more precise results. Programmers call these tools "operators" because they operate upon the basic search function to modify the algorithm used. Researchers can usually find a list of available operators through an "advanced search" interface. The idea behind these operators is not to rely on the search algorithm but to essentially override it by asking for very specific results.

The basic operators supported by many search engines, including those on legal research platforms, are called Boolean operators: **AND**, **OR**, and **NOT**.[44] The use of the **AND** operator between two keywords tells the search engine that you want both keywords in all your search results, which means that the search engine won't bring back any result with only one of

[44] The form the operators take may differ by platform; see Chapter 7 for a chart of search operators on used on Lexis Advance and Westlaw Edge.

the keywords. For example, if you wanted to be sure to find search results mentioning the terms custody and the term divorce, using **custody AND divorce** would force the search engine to pay attention to both terms and it would eliminate any document that doesn't contain both words. The operator has effectively limited your search, which is often what you are aiming for in research. The more search results you have, the more time you will spend evaluating the results.

NOT operates by excluding terms. It tells the search engine to ignore any result with a particular keyword. So, if you were doing research on Apple the company and you are getting search results on apple the fruit, you might use the NOT operator to exclude any search result using the term fruit: **Apple NOT fruit**. This operator again works to limit a search; however, it can be easy to over-exclude results, so it must be used cautiously.

OR, on the other hand, can be used to broaden a search. A typical use of **OR** is when the search algorithm is not returning results containing all the synonyms that you want. If you are searching for legal authorities pertaining to boat ownership, you might use the search **ship OR boat**.

These search operators can be used in combination, and there are many, many more of them that are available to you on research platforms. We will talk about more search operators and how to use them in combination and with other research tools in Chapter 7.

2.4 Finding Aids

The term "finding aid" is employed by some researchers to refer to tools that allowed a researcher to utilize a specific publication or set of information. Two types of finding aids that originated in print can also often be found in an electronic environment: the table of contents and the index. For example, most legal researchers have utilized a print textbook for a college or high school class, and many of these textbooks contain those two finding aids common to non-fiction publications.

A table of contents is generally located at the front of a publication and lays out the physical organization of the book, starting at page 1 and listing the organization to the end of the book. The physical organization of the book is often topical. An introductory biology textbook might have chapters on Animals and Plants and Genetics. Those chapters are likely divided, just as this book is, into more specific sub-topics in sections.

An index is generally located at the back of a publication and is organized alphabetically by more specific topics than a table of contents. Under each topic, subtopics will be specified, along with the page numbers where you can find mentions of those subtopics in the textbook. Humans create indexes, and so they will generally include both terms of art[45] and more colloquial language so that novices can use it as an entry point. An index can help you find specific topics mentioned in multiple places in a book. In a biology textbook, it might help you locate every page on which evolution is discussed and, more specifically, pages that discuss the evolution of cell structures. Before full-text searching, indexes were the best option for locating all pages of a book discussing a specific topic.

Because many legal publications were initially created in print, these finding aids are often still useful either instead of or in conjunction with electronic processes. Most statutes relating to murder are probably located in the same chapter of a statutory code. If the statutes use the term homicide instead of murder, you could still probably look up murder in the index and get to the right statutes. That doesn't change just because statutes are now available online. If a table of contents exists for a legal publication in print form, it is probably also available in its electronic form. Indexes are not as commonly available, but still exist for some sources on some platforms. Further discussion of finding aids will be discussed in subsequent chapters in relation to specific authorities.

2.5 Citing References

When conducting research, it is often useful to know what documents discuss a relevant document that you have already found. For example, if you have an article published in 2010 discussing medical malpractice in California, it might be useful to see a list of documents published after 2010 that cite or refer to your 2010 article to see how the area of law evolved. Such a tool goes by various names like "citing references" or "citator," but most legal research platforms have it available for some types of authorities. Further discussion of citing references and their value in legal research will occur in Chapter 6 and 7. In the meantime, Chapters 3-5 will focus on the individual sources of law that researchers will discover on these legal research platforms.

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[45] "A word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts." *Term of Art*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Chapter 3

Constitutions & Statutes

> Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument. – John Marshall, *Marbury v. Madison*, 5 U.S. 137, 180 (1803)

> All those courts before mentioned are in use, and exercised as Law at this day, concerning the Sheriffes Law dayes and Leets, and the offices of High Constables, pettie-Constables, and Tithingmen; howbeit, with some further additions by Statute laws… - Francis Bacon, *The Elements of the Common Laws of England*

3.1 Learning Objectives for Chapter 3

In working through this chapter, students should strive to be able to:

- Compare the different stages in a statute's life-cycle.
- Evaluate the properties of a code:
    - code organization
    - code annotations
- Use finding aids to find specific statutes in print and online:
    - by citation
    - by topic using the index
    - by popular name
- Recognize the various types of document comprising a statute's legislative history and evaluate how useful each type would be for determining legislative intent.

3.2 Constitutions & Statutes

As discussed in Chapter 1, constitutions act as the highest source of law in the United States legal system. No other law can be valid if it conflicts with a constitutional provision. As such, finding applicable constitutional sections takes on dire importance for legal researchers. Fortunately, constitutions tend to be short. Furthermore, because of their importance, most experienced lawyers will know whether or not a constitutional issue will likely apply without needing to do an overly large amount of research. Because of these factors, and because jurisdictions tend to publish their constitutions in the same place as their statutes, we will cover constitutions and statutes together.

Constitutionally-valid statutes act as the second highest source of law at both the federal and state levels. An applicable statute will control a given legal problem over case-made legal rules. This has been the case in the Anglo legal tradition since the late Middle Ages, as the quote from Francis Bacon at the beginning of this chapter suggests. However, the full primacy of statutes did not occur until the Tudor period in the Sixteenth Century.[46] In fact, at that time England underwent the Reformation and split from the Roman Catholic Church *by statute*.[47] As the development of statutory authority occurred before the founding of the North American colonies, statutes have always enjoyed primacy (subject to written constitutions, an American innovation) in the U.S. legal system.

This is not to say that statutes have always taken the same form. American political and legal institutions have evolved over time. However, we will not cover the complete history of statutory forms since what matters to most researchers is finding and understanding relevant statutes in their current forms. To understand the different forms statutes currently take, however, we must first turn our attention to the life-cycle of a statute.

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[46] For an account of how Henry VIII and his secretary Thomas Cromwell modernized English political and legal institutions, *see generally* G. R. ELTON, THE TUDOR REVOLUTION IN GOVERNMENT; ADMINISTRATIVE CHANGES IN THE REIGN OF HENRY VIII (1953).

[47] Ecclesiastical Appeals Act, 1532, 24 Henry 8, c. 12 (Eng.).

3.3 Life Cycle of a Statute

Statutes, of course, come from legislatures. When a legislator wants to create a new statute, he introduces a bill into whichever house he belongs. Upon introduction, each bill receives a number beginning with a designation of its house of origin. For example, at the federal level, bills introduced into the House of Representatives begin with the letters H.R., while bills introduced in the Senate begin with the letter S. State legislatures follow similar schemes. Bill numbering starts over each legislative session, so researchers need to be aware of which session of a legislature considered a bill. However, bills are not yet statutes, and many never become so.

Upon passing both houses of a legislature,[48] a bill is signed by the executive (barring a veto) and becomes a statute. Different jurisdictions call their statutes by different names, but Acts or Laws are the most commonly used terms. At the federal level, passed bills become known as Public Laws.[49] Public Laws receive a unique number, beginning with the number of the Congressional session in which the law was passed. The Government Publishing Office then immediately publishes each Public Law as a pamphlet or slip law. Slip laws, due to their quick publication, effectively give the public notice of new laws. However, because each slip law contains only one statute in isolation, they are not terribly useful for legal research purposes. In fact, many states do not bother to issue slip laws.

At the conclusion of each legislative session, the printer for the legislature gathers all statutes passed during the session,, also known as "session laws", and publishes them in chronological order as part of a multi-volume set. At the federal level, the set is called the *Statutes at Large*. Different states call their session laws different things. For instance Kentucky calls its session laws the *Kentucky Acts*, while Ohio calls its the *Ohio Laws.*[50]

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[48] Except, of course, in unicameral Nebraska.

[49] For a complete list of what each state calls its statutes, *see* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 248-302 tbl.T.1.3 (Columbia Law review Ass'n et al. eds., 20th ed. 1st prtg. 2015).

[50] For a complete list of what each state calls its session laws, *see* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 248-302 tbl.T.1.3 (Columbia Law review Ass'n et al. eds., 20th ed. 1st prtg. 2015).

Because these collections of session laws feature chronological organization, a legal researcher pursuing a specific topic will not find them terribly useful. However, if a researcher has already found a specific statute and wishes to see earlier versions of that statute, session laws become a valuable resource, as we will see in section 3.4.3.4.

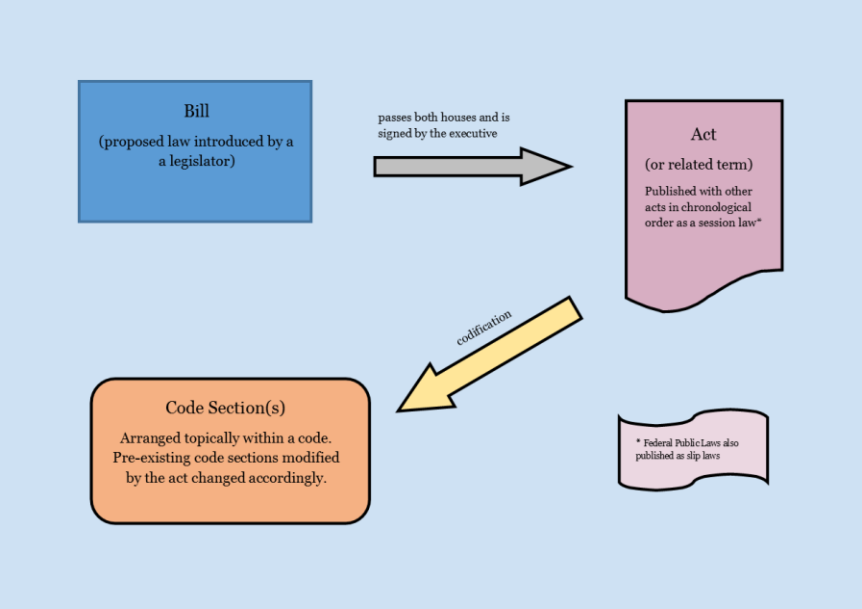


Figure 3.3: Life Cycle of a Generic Statute

Finally, after initial publication, statutes undergo codification, which is:

> The process of compiling, arranging, and systematizing the laws of a given jurisdiction, or of a discrete branch of the law, into an ordered code.[51]

The process of codification thus results in a topically-organized code of statutes in force. The federal government appropriately titles its code The United States Code (U.S.C.). Naturally, as befits the U.S. federal system, state codes vary in name.[52] Note that when a new statute makes changes to the existing statutory code, language is added or removed to the code as necessary to incorporate those changes. Thus, codes constantly change, while session laws serve as repositories of historical laws. Because most

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[51] BLACK'S LAW DICTIONARY 314 (10th ed. 2014).

[52] For a complete list of what each state calls its code, *see* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 248-302 tbl.T.1.3 (Columbia Law review Ass'n et al. eds., 20th ed. 1st prtg. 2015).

legal research involves investigating legal issues that apply to facts, rather than beginning with a specific statute, codes tend to be the statutory source researchers use most often. A jurisdiction's code also typically includes its constitution at the front, so constitutional research would also be conducted with a code.

3.4 Using Codes

Lawyers conduct the bulk of their statute research using the codified versions of statutes (also known as statutory codes) because they contain the statutes currently in force. Legal researchers therefore need the ability to use codes efficiently. Because codes and their finding aids developed during the pre-computer era, we will introduce their use in print format. Of course, electronic legal publishers include codes on their research platforms, but rather than reinvent the wheel, the electronic publishers incorporated many of the tools originally developed for codes in hard-copy. Also, many expert legal researchers prefer codes in print due to the efficient design of these resources.

3.4.1 Codes & Topical Organization

Codes work well for legal research because of their topical organization. A topical organization allows for the easy creation of a topical index, a type of finding aid which researchers can use to find code provisions on a specific topic. Once a researcher finds a code provision on point, nearby provisions may also be likely to be of use because of the way codes group like topics together. In order to see how this works, let us take a closer look at the organization of a typical code.[53]

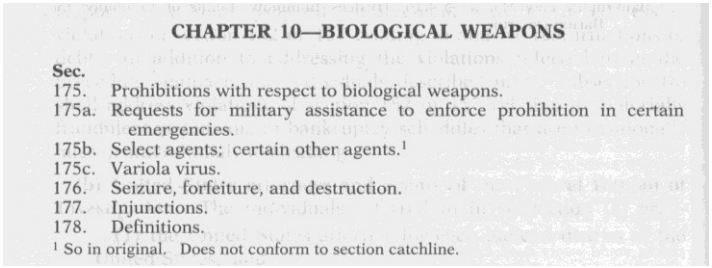
The most basic unit of a code is the section, which provides for a specific legal rule over a set of circumstances. In fact, usually when lawyers refer to "a statute," they mean an individual code section. While sections may feature subsections, the subsections themselves only provide for part of the legal rule created by the section and so cannot really act on their own. Think of code sections as analogous to atoms. While protons, neutrons, and electrons make up atoms, none of those particles will be found in nature on their own, but only clumped together in atoms. Subsections and code sections work in the same way.

Codes then group related sections together into chapters. Sometimes a code will also use sub-chapters if an area of law contains a sufficient level

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[53] As with most authorities in a federal system, exact nomenclature may vary jurisdiction by jurisdiction.

of depth for multiple classifications. For instance, in the United States Code, Chapter 10 of Title 18 contains all of the code sections related to federal criminalization of biological weapons. The individual sections in the chapter address discreet topics such as the prohibition of biological weapons or seizure of biological weapons by the government.[54] Note also the inclusion of a definitions section in the chapter.[55] The definitions contained therein apply to all the other sections in the chapter. A researcher would need to find the definitions in order to apply correctly any of the other sections in the chapter. Luckily, a code's inherent organization makes such a discovery likely. Furthermore, print codes feature a table of contents at the beginning of each chapter to enable researchers to grasp quickly the organization of that particular chapter.



CHAPTER 10—BIOLOGICAL WEAPONS

Sec.
175. Prohibitions with respect to biological weapons.
175a. Requests for military assistance to enforce prohibition in certain emergencies.
175b. Select agents; certain other agents.[1]
175c. Variola virus.
176. Seizure, forfeiture, and destruction.
177. Injunctions.
178. Definitions.

[1] So in original. Does not conform to section catchline.

Figure 3.4.1a: The table of contents for Chapter 10 of Title 18 of the United States Code Annotated.

Codes then group related chapters together into titles. Generally, a title acts as the largest unit of organization in a code, other than the code itself.[56] For example, the U.S.C. houses the chapter on biological weapons in Title 18 with other chapters dealing with different crimes. A table of contents alerts researchers as to what chapters are included in the title. Sometimes titles include definitions or general principles that apply throughout the title. These will usually be found towards the beginning of the title. Similarly, a code itself features a table of contents identifying its constituent titles and may also feature general provisions applicable to the entire code. A lawyer

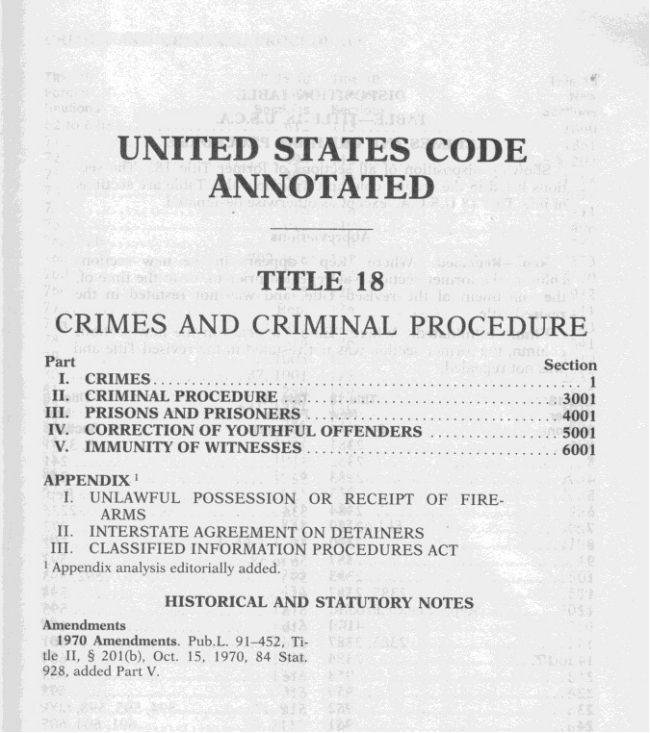
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[54] 18 U.S.C. §§ 175 – 178 (2012).

[55] 18 U.S.C. § 178 (2012).

[56] Sometimes codes also group related chapters into separate parts within a title. Note also that some jurisdictions, notably Texas and California, publish multiple topical codes instead of one unified code. To determine the publication format for a specific jurisdiction, *see* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 248-302 tbl.T.1.3 (Columbia Law review Ass'n et al. eds., 20th ed. 1st prtg. 2015).

would need to find these in order to interpret applicable laws correctly. Fortunately, codes provide enough organization to allow researchers to find the information they need.



UNITED STATES CODE
ANNOTATED

TITLE 18

CRIMES AND CRIMINAL PROCEDURE

Part		Section
I.	CRIMES	1
II.	CRIMINAL PROCEDURE	3001
III.	PRISONS AND PRISONERS	4001
IV.	CORRECTION OF YOUTHFUL OFFENDERS	5001
V.	IMMUNITY OF WITNESSES	6001

APPENDIX [1]
I. UNLAWFUL POSSESSION OR RECEIPT OF FIREARMS
II. INTERSTATE AGREEMENT ON DETAINERS
III. CLASSIFIED INFORMATION PROCEDURES ACT

[1] Appendix analysis editorially added.

HISTORICAL AND STATUTORY NOTES

Amendments

1970 Amendments. Pub.L. 91–452, Title II, § 201(b), Oct. 15, 1970, 84 Stat. 928, added Part V.

Figure 3.4.1b: The table of contents for Title 18 of the United States Code Annotated.

3.4.2 Annotations

Sometimes a jurisdiction publishes its own code as an official version, such as the U.S.C. Often, however, a jurisdiction will designate private entities as the publisher(s) of its code. For instance, in Kentucky two separate private publishers produce the *Kentucky Revised Statutes*: Michie's (Lexis) and Baldwin's (West). Even for jurisdictions that publish their own code, though, private publishers will also publish an unofficial version. For example, West publishes the *United States Code Annotated* (U.S.C.A.), and LexisNexis publishes the *United States Code Service* (U.S.C.S.). Both of these titles are reprints of the official U.S.C., yet their respective publishers are able to sell copies and turn profits because they add value to the code by providing editorial content called annotations.

Annotations lead researchers who have discovered a relevant statute in an annotated code to other authorities that help interpret that statute. Through annotations, researchers may discover cases, secondary sources on point, or other tools useful to the expansion of research from an applicable statute. Figure 3.4.2 shows examples of annotations included for a section from *Michie's Kentucky Revised Statutes*. Annotated codes also feature annotations for constitutional sections.[57]

The publishers of annotated codes employ lawyers as editors to read new legal authorities and to identify which authorities interpret which specific statutes. Obviously, this is a time-intensive and expensive undertaking, but legal researchers willingly pay the costs because good annotations are an efficient way to begin their research.[58]

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[57] Note that publishers usually provide an extremely large number of annotations for constitutional provisions. This makes sense as constitutional provisions tend to be broadly-written and open to much interpretation through caselaw. The result for the researcher, though, is that annotations for a particular constitutional provision may be extremely bulky and not as easy to use as those for statutes.

[58] Also, because the different publishers employ different editors, it may sometimes be beneficial to check multiple versions of a code (if a researcher has cost-effective access to multiple versions) as the annotations may differ.

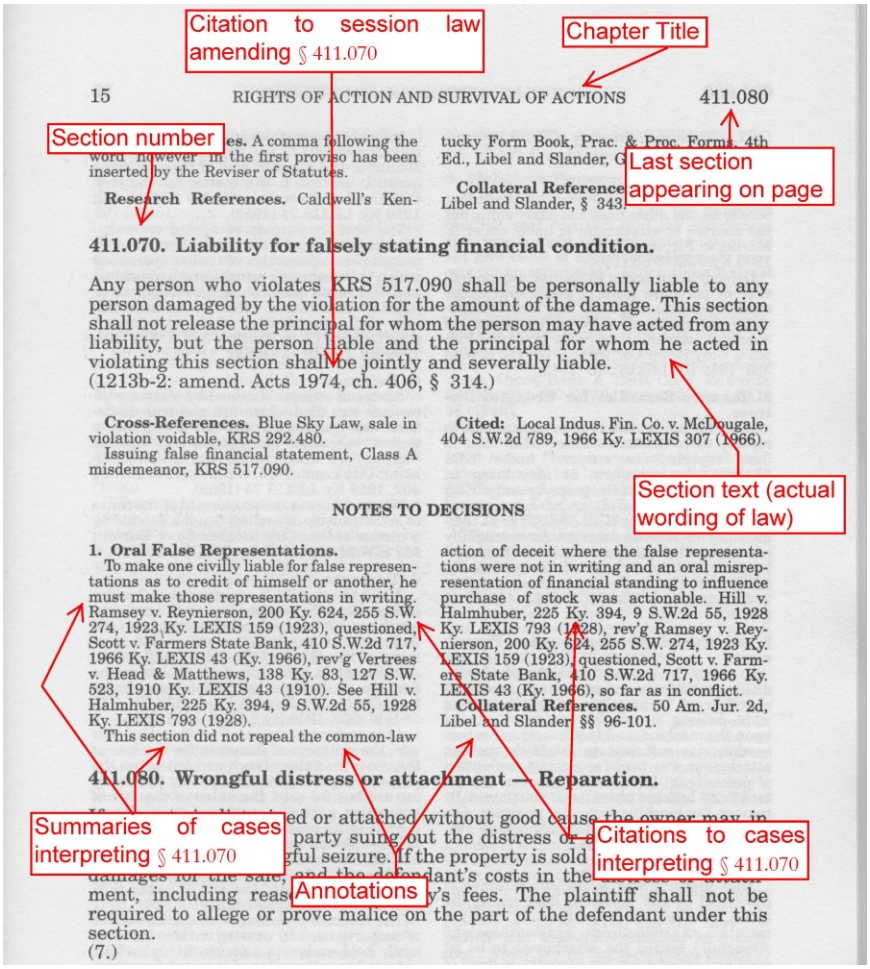


Figure 3.4.2: KY. REV. STAT. ANN. § 411.070 (Lexis 2005) Reprinted from LexisNexis with permission. Copyright 2016 Matthew Bender & Company, Inc., a LexisNexis company. All rights reserved.

3.4.3 Using Codes in Print

Many expert legal researchers find print copies of codes more efficient to use than electronic copies. Often a researcher will need several related sections of a code and so desires the ability to flip back and forth between sections. Also, sometimes seeing a code in print makes it easier to grasp the code's inherent organization. Naturally, when researching in print good legal researchers prefer annotated codes to unannotated codes because of the value added by the annotations.

3.4.3.1 Finding Code Sections by Citation

Before a legal researcher can use annotations, however, he must find the code section(s) relevant to his problem. The easiest way to pull a relevant code section is by citation. A lawyer might know the citation of a code section he needs through other means than research. For instance, a criminal defense attorney may know the citation to the statute under which his client has been charged. If a legal researcher knows the citation of a particular code section, then retrieving that section is simple.

Citation schemes vary from jurisdiction to jurisdiction, but generally speaking, statutory citation begins with a number that references the title in which the section is found, then provides an abbreviation that lets researchers know which code the citation references, and finishes with the specific section number of the section. The federal code follows this format, as do the codes of some states. For example, to pull 7 U.S.C. § 1471(j),[59] a researcher would find the volume of the U.S.C. that contains Title 7 and turn to § 1471(j). As you can see in Figure 3.4.2, codes feature a header on each page that alert researchers to the first (for left-hand pages) or last (for righthand pages) section that appears on that page. Note that code volumes sometimes contain more than one title. This bears emphasizing: **title numbers and volume numbers of print codes do not correspond.** A title is a unit of intellectual organization, while a volume is a unit of physical organization. Researchers should take care to select the correct volume that houses the title for which they are looking.

Not all states follow the federal citation scheme. For instance, in Hawai'i code sections are cited in the following format: HAW. REV. STAT. § 322-1. The citation still features an abbreviation referencing a specific code (in this case, the *Hawai'i Revised Statutes*), but there is no title number. Instead, the citation provides only the specific section number: 322-1. For each section in the Hawai'i code, the digits before the hyphen refer to a chapter, and the ones after the hyphen refer to the specific section. Thus, a researcher would find § 322-1 in chapter 322 of the *Hawai'i Revised Statutes*. Hawai'i serves as only one example, though many states employ a similar scheme. For a

[59] Note that for a full, formal citation when producing legal writing, more information would be required. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 12, 120-134 (Columbia Law review Ass'n et al. eds., 20th ed. 1st prtg. 2015).

complete state-by-state breakdown of citation schema, researchers may consult table 1.3 of *The Bluebook*.[60]

3.4.3.2 Finding Code Sections by Topic

While retrieving a code section by citation is quick and easy, often legal researchers will not know the citation of code sections they will need. Instead, from talking with a client, they will merely have identified some relevant legal issues and will need to find statutes that correspond with those issues. For this reason, print codes provide a couple of methods of accessing information by topic.

First, codes provide a table of contents. Actually, they usually provide a series of tables of contents. At the very beginning of the code, a researcher can find an exhaustive table of contents that lists each title of the code and gives information about what areas of law each respective title covers.[61] Then, at the beginning of each title, a code provides a table of contents for that title, detailing the coverage of chapters within the title. Similarly, individual chapters provide tables of contents with information on their constituent sections. See Figures 3.4.1a and 3.4.1b above as examples. Researchers can browse through the tables of contents to narrow in on a specific section of relevance.

Browsing tables of contents, however, can be time-intensive and does require some knowledge of how specific issues relate to general topics. For instance, a researcher looking for criminal trespass statutes would need to know that those would likely be included near burglary and that burglary as a crime would be found in a penal code. Often, then, researchers turn to the other tool provided by codes for topical research: the index.

Researchers will usually find a comprehensive index in one or more volumes located at the end of a code. A code's index works in typical index fashion: researchers look up specific terms they think apply to their situation, and the index refers them to specific code sections or to other terms in the index (that will then refer the researcher to specific code sections). Note that legal indexes tend to be organized into multiple levels of classification, meaning that sometimes researchers can only find specific terms by looking under general topics. For instance, a researcher looking

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[60] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 248-302 tbl.T.1.3 (Columbia Law review Ass'n et al. eds., 20th ed. 1st prtg. 2015).

[61] Often, the overall table of contents will be reproduced at the front of each individual volume of a code.

for the statutory penalties for harming a bald eagle would first need to look up "bald eagle" as a topic and then scan through the subtopics to find "fines and penalties." Often, the multiple-level organization of code indexes even leads researchers to investigate relevant terms that they would not have thought of on their own! Between the index and the table of contents, legal researchers should be able to find statutes on any given topic, even without knowing a citation beforehand.

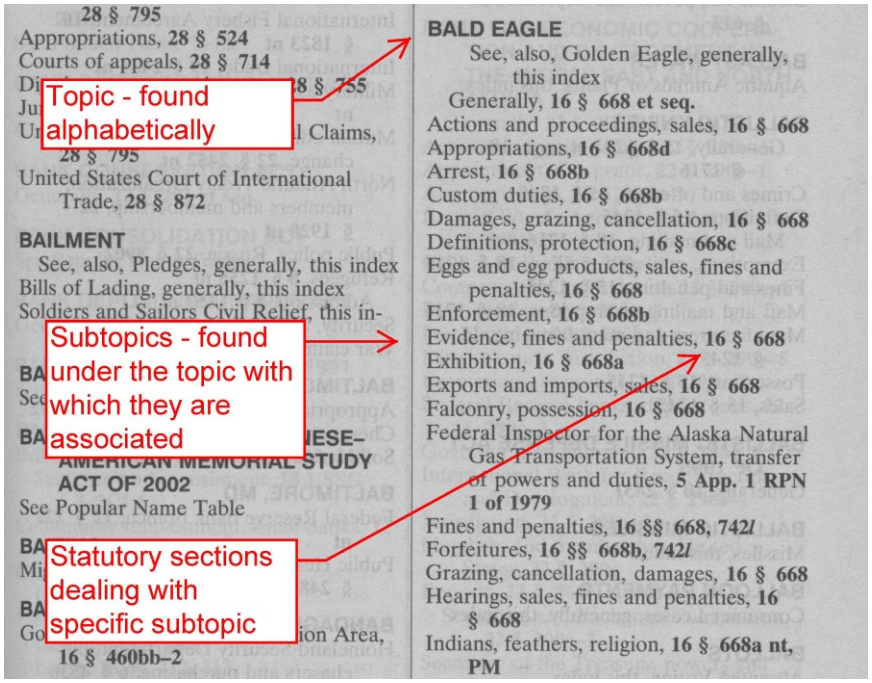


Figure 3.4.3.2: Excerpt from the General Index of West's United States Code Annotated.

3.4.3.3 Popular Names Table & Other Tables

In addition to providing means for researchers to find code sections by topic, codes often provide finding aids that allow a legal researcher to find a code section if he possesses some other piece of information about a statute. For instance, most laws receive "popular names," by which they can be referenced without needing to rattle off a difficult-to-remember citation. For example, the federal Religious Freedom Restoration Act (otherwise known as Public Law No. 103-141) tends to make the news a lot. A lawyer might remember that the Religious Freedom Restoration Act applies to his case but then need to pull the relevant code sections to read the actual statute. By using the Popular Names Table of the U.S.C.A., he

would be able to look up "Religious Freedom Restoration Act" and retrieve citations to the code sections which house the act, as seen in Figure 3.4.3.3.

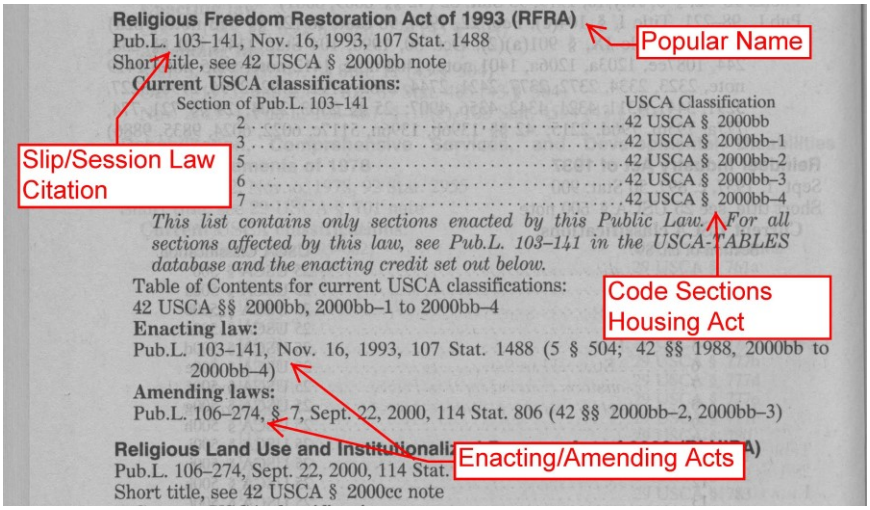


Figure 3.4.3.3: The U.S.C.A. Popular Names Table Entry for the Religious Freedom Restoration Act.

Note that the Popular Names Table also provides researchers with citations to the enacting and amending session laws. Annotated codes also often provide separate tables that convert session law citations to code section citations. The other tables provided by codes work under similar principles as the Popular Names Table.

3.4.3.4 Using Code Sections

Regardless of how a researcher finds a relevant code section, he then needs to apply it to his client's problem. The first thing a good researcher does upon locating a potentially relevant code section is to read carefully the language of the law itself. (Note that annotated codes provide much more information than just the law itself. Please refer back to Figure 3.4.2 for an illustration of the different pieces of information discussed here.) Reading the code section should alert the researcher as to whether or not the code section he found actually applies to his legal problem.

After an initial read, a lawyer should then check to see if the language he just read was in force at the time of the actions that gave rise to his client's problem. He does this by perusing the dates enacted/amended that codes include immediately after the language of each section. Obviously, the earliest date listed refers to the enactment of the law, while later dates refer

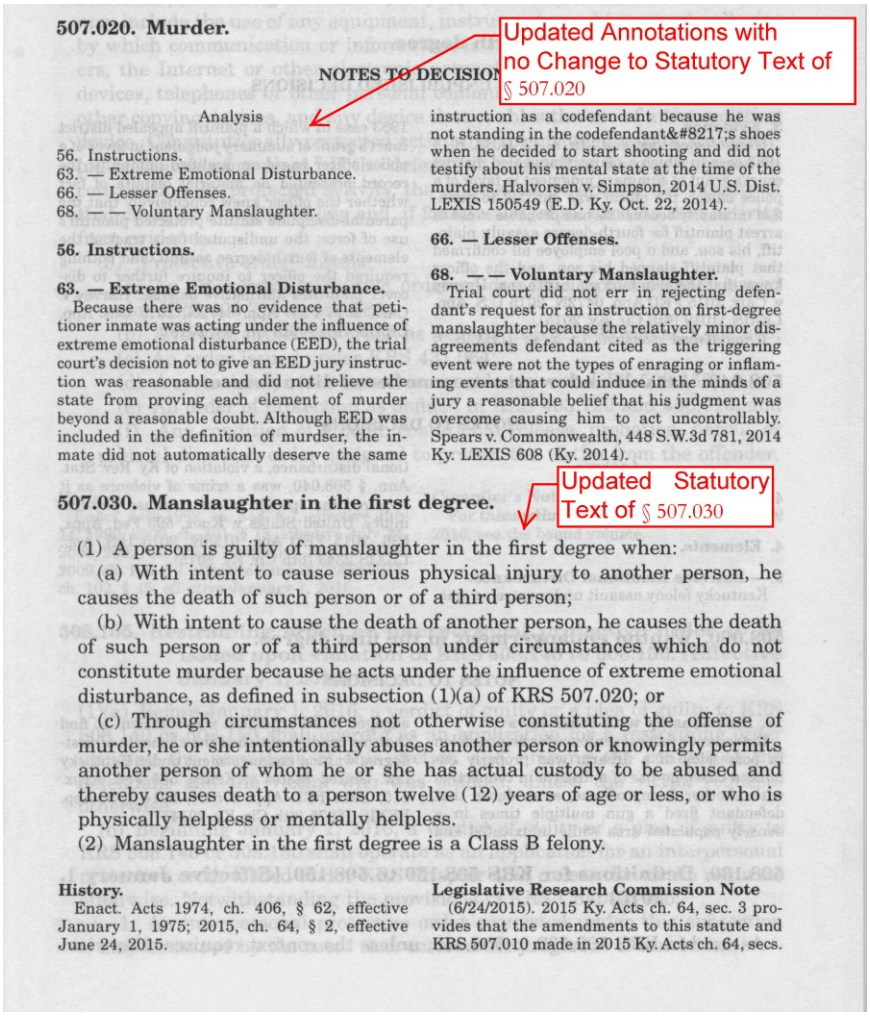
to times later statutes amended the code section. The text of the code section reflects the changes made by the most recent listed amending statute. Therefore, if a client's problem occurred prior to the most recent amendment, a lawyer would need to look at the version of the law in force at that time. Luckily, the dates amended following a code section also provide citations to the session laws that did the amending. The lawyer could then retrieve the appropriate session law by citation, as if he were retrieving a code section by citation, to obtain the law as written at the time of the facts giving rise to his client's problem.

However, looking backwards in time at changes to a code section when researching in print is not enough. A legal researcher must also look forwards in time, or "update" the law. This occurs because books are printed at a definite point in time. Because legislatures frequently pass statutes that amend code sections, invariably some printed code sections will have changed since the date when the volume they are found in was last published. Fortunately, legal publishers are aware of this possibility and have developed a system to alert researchers to changes in the law. They simply issue supplementary volumes containing the new language.

Most annotated codes publish their supplementary updates as pocket parts, which are soft-bound pamphlets which dedicated library workers slide into a pocket at the back of the bound code volume. If enough laws change to the point that a pocket part becomes too thick to fit into a code volume comfortably, a publisher may issue a free-standing supplement (which would be located immediately to the right of its code volume on the shelf), or may simply republish the code volume in question.

Pocket parts present code sections in the same order as their parent volume, but they do not reprint every section of the volume. If a code section does not appear in the pocket-part, then a researcher knows that it has not been updated through the publication date of that pocket part and can rely on the version found in the code volume proper. However, if a code section does appear in the pocket-part, then a researcher knows one of two things: either the text of the law has changed, or the publisher has seen fit to add more annotations to the particular section. If the law has changed, the new text of the code section will be provided in the pocket-part, and the researcher should use that language. If the text of the section itself does not appear, then the section appears in the pocket part because only the annotations have changed. Note that if a new section is added to a code after publication of its volume, it will appear only in the pocket part.

See Figure 3.4.3.4 for an illustration of the two different types of pocket part entries.



507.020. Murder.

NOTES TO DECISION

Analysis

56. Instructions.
63. — Extreme Emotional Disturbance.
66. — Lesser Offenses.
68. — — Voluntary Manslaughter.

56. Instructions.

63. — Extreme Emotional Disturbance.
Because there was no evidence that petitioner inmate was acting under the influence of extreme emotional disturbance (EED), the trial court's decision not to give an EED jury instruction was reasonable and did not relieve the state from proving each element of murder beyond a reasonable doubt. Although EED was included in the definition of murdser, the inmate did not automatically deserve the same instruction as a codefendant because he was not standing in the codefendant’s shoes when he decided to start shooting and did not testify about his mental state at the time of the murders. Halvorsen v. Simpson, 2014 U.S. Dist. LEXIS 150549 (E.D. Ky. Oct. 22, 2014).

66. — Lesser Offenses.

68. — — Voluntary Manslaughter.
Trial court did not err in rejecting defendant's request for an instruction on first-degree manslaughter because the relatively minor disagreements defendant cited as the triggering event were not the types of enraging or inflaming events that could induce in the minds of a jury a reasonable belief that his judgment was overcome causing him to act uncontrollably. Spears v. Commonwealth, 448 S.W.3d 781, 2014 Ky. LEXIS 608 (Ky. 2014).

507.030. Manslaughter in the first degree.

(1) A person is guilty of manslaughter in the first degree when:
(a) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person;
(b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020; or
(c) Through circumstances not otherwise constituting the offense of murder, he or she intentionally abuses another person or knowingly permits another person of whom he or she has actual custody to be abused and thereby causes death to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.
(2) Manslaughter in the first degree is a Class B felony.

History.
Enact. Acts 1974, ch. 406, § 62, effective January 1, 1975; 2015, ch. 64, § 2, effective June 24, 2015.

Legislative Research Commission Note
(6/24/2015). 2015 Ky. Acts ch. 64, sec. 3 provides that the amendments to this statute and KRS 507.010 made in 2015 Ky. Acts ch. 64, secs.

Figure 3.4.3.4: Sample Pocket-Part Entries. Reprinted from LexisNexis with permission. Copyright 2016 Matthew Bender & Company, Inc., a LexisNexis company. All rights reserved.

Once a researcher knows that the text of a statute was current at the time of his client's incident, a good researcher then takes a couple of more steps before moving on with his research. First, he will flip to the beginning of the chapter or sub-chapter that houses the section to see if any definitions, general provisions, or related sections apply to his issue. Second, he will make note of any annotations included for her section of interest. The

annotations may help him interpret or apply the statute he has found. They will also usually give him an entry point into case research, which we will cover in Chapter 4.

3.4.4 Using Codes Electronically

As West and LexisNexis publish the print versions of annotated codes, researchers can find those same codes in electronic form on Westlaw Edge and Lexis Advance. Additionally, the federal and most state governments also provide some sort of free online access to their codes. However, since the electronic codes provided by jurisdictions do not include annotations (which are the intellectual property of the private publishers), law students learning legal research for the first time should stick primarily to the Westlaw Edge and Lexis Advance versions for full functionality.

3.4.4.1 Finding Code Sections by Citation

If a researcher has a citation to a code section, retrieving the section in question is straightforward on both Westlaw Edge and Lexis Advance, as all one needs do is to type the citation into the main search bar, and the platform will usually recognize it as a citation and open the code section cited.

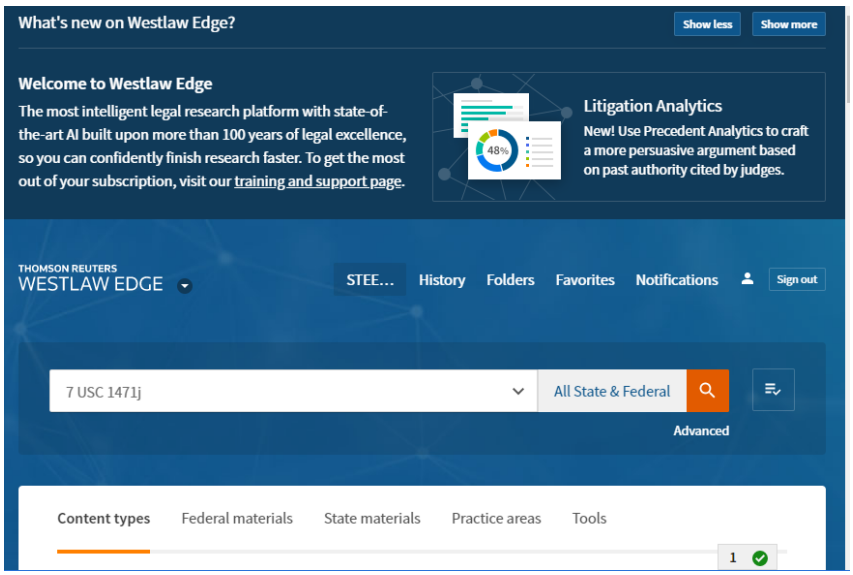


Figure 3.4.4.1a – Retrieving legal documents by citation from legal research platforms. Click here for screencast: https://youtu.be/CQf0z_4r6Z8.

If a researcher types in a citation and the platform does not retrieve the desired document, then most likely one of three things has happened: a typo, the use of an alternative citation form, or the use of an incorrect or outdated citation. The first step in this instance is to check for typos. If there are no typos in the citation entered into the search bar, then there is probably a problem with the citation itself. Sometimes legal researchers come across alternative citation forms (e.g. U.S. Code spelled out instead of U.S.C.). Westlaw Edge and Lexis Advance may not recognize all alternatives of any given citation. Alternatively, the researcher may have come across a citation that was incorrectly made or cited a code section that has since been removed or renumbered. Luckily, Westlaw Edge and Lexis Advance both feature electronic versions of each code's table of contents which can also be used to find a cited section or to determine the non-existence of a cited section. Simply browse to the table of contents of the code cited (the middle part of the citation), select the appropriate title (the first number of the citation), and then skim to the cited section (the final number in the citation), as demonstrated in Figure 3.4.4.1b. If the section cited is present, then it may be accessed despite the unrecognized citation. If the section cited is not present in the table of contents, then the researcher knows it is no longer part of the code.



Figure 3.4.4.1b – Accessing a code's table of contents electronically. Click here for screencast: https://youtu.be/iuLxnrNpOGA.

3.4.4.2 Finding Code Sections by Topic

The major legal research platforms also allow researchers to find relevant code sections by topic through several different means. First, researchers can find code sections on a given topic by using the electronic table of contents much as they could use the paper table of contents as described in Part 3.4.3.2. See Figure 3.4.4.1b for accessing and using an electronic table of contents.

Second, Westlaw Edge generally makes indexes to its code available electronically. Lexis Advance also does so for some jurisdictions, though its coverage is not yet universal. Legal researchers benefit from two advantages in using electronic indexes when available as opposed to jumping right to an electronic search. First, human editors create the indexes so they may be more precise than a computer matching search terms. Second, an index entry will be comprehensive in that it will provide links to all sections in a code relevant to a given topic, even if the related sections do not contain the original search term(s).

To use a code index electronically, first a researcher must access the index. Then, the researcher may either browse alphabetically or search for a term. Search results will show all the separate index entries containing the term and allow the researcher to open the most relevant. Note, however, that the index search function on the platforms tends to be less robust than the general search functions, so researchers may need to try several word variations to find the correct entry. Once an index topic is opened, subtopics will be listed much like a paper index, though the electronic index provides the added benefit of hyperlinked cross references. Figure 3.4.4.2 demonstrates the use of an electronic index.

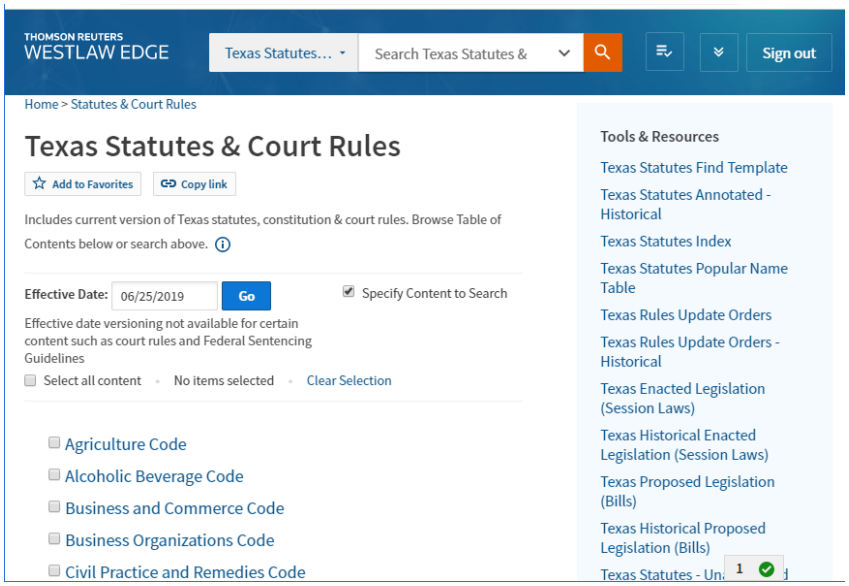


Figure 3.4.4.2 – Using an electronic index. Click here for screencast: https://youtu.be/LPVbaVHP3kg.

In addition to using electronic versions of tables of contents and indexes, legal researchers can also use electronic search capabilities, as discussed in Chapter 2 above, to find code sections by topic when researching statutes on Westlaw Edge or Lexis Advance. Researchers should use care in general searching of statutes, however, as statutory codes often use both controlled vocabularies and cross references, which can make results confusing and lead novice researchers astray. A well-crafted and thought-out search will mitigate these dangers.

3.4.4.3 Popular Names Table & Other Tables

Westlaw Edge and Lexis Advance both provide access to the Popular Names Table and the Tables for the United States Code. Though researchers will find these tables on the online platforms, they will function much as they do in print (though with hyperlinks). On Westlaw Edge, the tables can be accessed from the landing page of the U.S.C. in the same "Tools & Resources" box where one finds the index. On Lexis Advance, the tables are treated as separate resources, but researchers can find them by browsing to the U.S.C.

3.4.4.4 Using Code Sections

Code sections published via Westlaw and Lexis Advance contain all the same information as the print editions each publisher issues. A researcher

will find the text of the section, the section's enactment/amendment history, and editorial annotations that lead the researcher to other helpful sources. On Lexis Advance, one finds this information laid out similarly to the print sources with the enactment/amendment history directly beneath the text of the code section and the annotations further down the page.

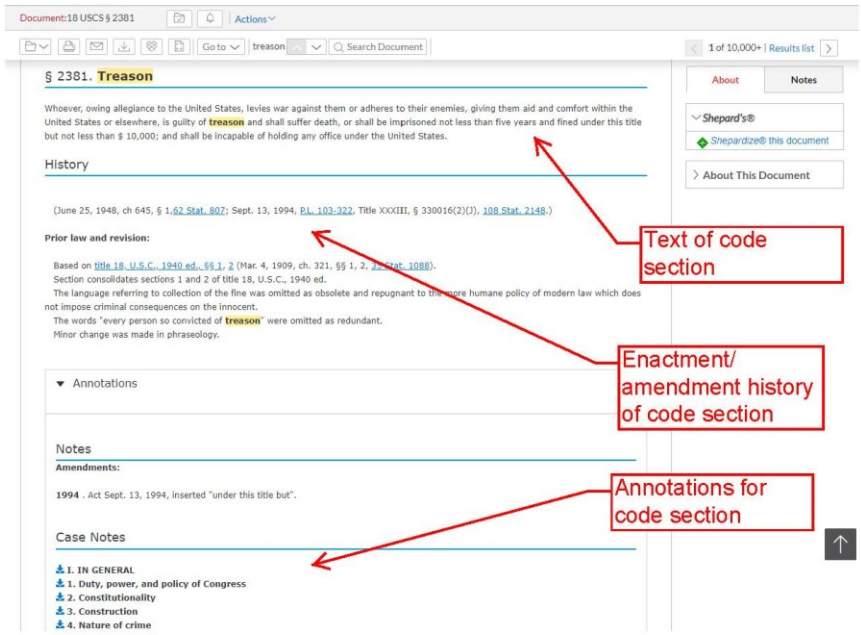


Figure 3.4.4.4a – Elements of a code section on Lexis Advance. Reprinted from LexisNexis with permission. Copyright 2018 LexisNexis. All rights reserved.

Westlaw Edge also provides this information although researchers will find the annotations on separate tabs from the section text and enactment/amendment history, as seen in Figure 3.4.4.4b. In addition to providing the information from the print editions, Westlaw Edge and Lexis Advance also provide mechanisms that allow researchers to mimic the functionality of a print edition. Because researchers will often need to consult multiple related code sections and also will need to be able to find quickly any relevant definitions sections, the ability to flip pages is why many experienced legal researchers view researching statutes in print to be more efficient. However, users of Westlaw Edge or Lexis Advance can similarly jump to nearby code sections by using the hyperlinked excerpt from the table of contents that each platform provides at the top of every code section. Similarly, researchers can use the previous/next buttons to

"flip pages" to code sections immediately preceding or following any given code section.

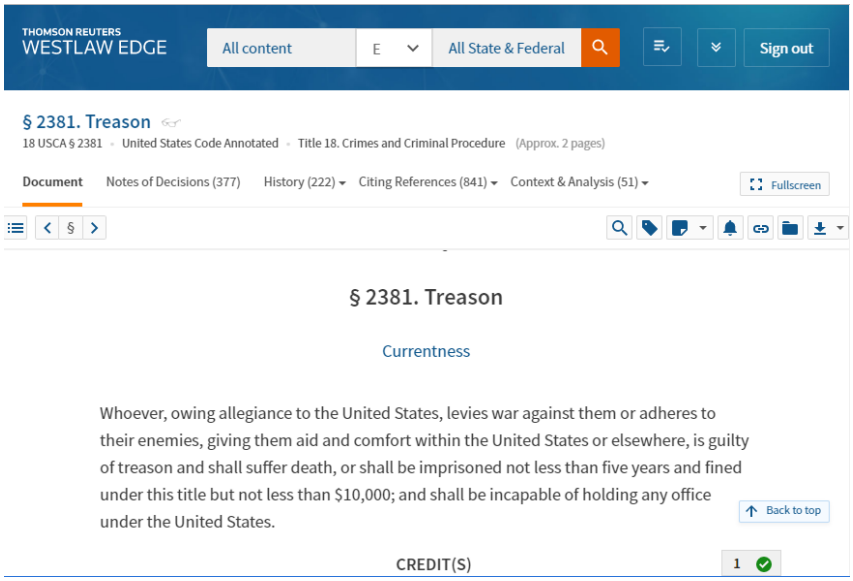


Figure 3.4.4.4b – A code section on Westlaw Edge. Click here for screencast: https://youtu.be/xQzempmPs3w.

3.4.4.5 – Codes on Bloomberg Law

Like the other major legal research platforms, Bloomberg Law includes codes in electronic form. Unlike Westlaw Edge and Lexis Advance, however, Bloomberg does not publish annotated print versions. Thus, researchers will not find true annotations on Bloomberg Law's codes. Bloomberg Law does include a "smart code" feature which approximates annotations by using a computer to pull relevant discussions of the code section from caselaw in a sort of targeted citator search. Other than that, legal researchers will find researching codes on Bloomberg Law similar to using the other two platforms.

3.5 Local Legislation

In addition to creating their own laws, state legislatures also often delegate law-making authority to cities or other local government units within the state. Cities and other local units which have been delegated law-making power by the state are often referred to as municipalities or localities. Individual municipalities create their own processes of legislation in accordance with the state statute(s) creating the municipality. Lawyers refer to local legislation as ordinances rather than statutes.

The major difference between a state statute and a municipal ordinance comes in applicability. A statute carries force of law throughout the state. Conversely, a municipal ordinance carries force of law only inside the boundaries of its municipality.

Another major difference between statutes and ordinances becomes obvious when one compares the publications that house the respective sources of law. While municipal ordinances do tend to be organized topically into codes, the actual publication of physical copies remains less than regular. A couple of commercial publishers publish larger municipalities' codes,[62] but often the codes of smaller municipalities exist only as self-created and promulgated documents. In fact, ordinance codes can be somewhat hard to find, though many larger municipalities will provide them on their websites. Researchers sometimes may need to contact the issuing municipal government directly to find an up-to-date copy, especially for smaller municipalities.

Should a legal researcher get his hands on a municipal code of ordinances, he would interact with it in the same ways he would interact with other codes, as municipal codes typically feature indexes, tables of contents, and good topical organization. Ordinance research is often easier than that involving other codes as a matter of scale, since municipal codes often comprise only a single volume.

Though municipal ordinances can be difficult to find and carry only limited applicability, they do carry the force of law in their municipalities through legislative delegation of authority. As such, lawyers need to be able to find ordinances affecting their clients, as they would statutes. Of course, both statutes and ordinances are subject to interpretation, as are constitutions.

3.6 Interpreting Constitutions and Statutes

As mentioned above, both constitutions and statutes tend to be broadly written in order to apply to a wide range of facts. They often lack specifics, and so lawyers must interpret them and how they will apply to a given set of facts. Often, lawyers look to judicial opinions that have already

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[62] Municode and American Legal Publishing dominate the ordinance-publishing business such as it is. The codes of ordinances published by these two companies do not feature annotations, as both companies generally operate on a low-overhead model.

interpreted a statute for guidance on how to interpret that statute. We will cover finding judicial opinions in Chapter 4.

However, occasionally a lawyer may encounter a statute that has not yet been interpreted by a court, and so may need to look for other sources to aid in interpretation. Similarly, a lawyer may face a situation in which all the judicial opinions side against his client and may be looking for an alternative way to interpret a statute or constitutional provision. In these situations, lawyers sometimes try to argue for an interpretation for an authority based on the intent of the body that created the authority in question. In order to support an intent-based argument, a lawyer will often look to the history of the authority's creation for evidence of intent.

3.6.1 Constitutional History & Framers' Intent

Constitutions typically come from constitutional conventions, which tend to publish records of their work beyond the constitution itself. Furthermore, to become binding as the ultimate source of law for a jurisdiction, that jurisdiction must ratify the constitution. Usually, some form of a jurisdiction's legislature performs the ratification. Under some circumstances, researchers can look to the work product of the constitutional convention or of a ratifying body to help interpret a constitutional provision by attempting to determine the intent of the drafters or framers of the constitution.

For a variety of reasons, most lawyers will never find themselves needing to look to framers' intent. Most of the commonly-litigated constitutional provisions feature a significant number of cases interpreting them. Usually, lawyers prefer to rely on a reported case's interpretation than to infer intent from the work product of a constitutional convention. Still, students may sometimes encounter references to framers' intent in judicial opinions or scholarly works, so we will briefly introduce the major sources here.

The federal constitution came about as the result of a constitutional convention held in Philadelphia during the summer of 1787.[63] In addition to producing the Constitution itself, the convention produced various bits of work product. The bits of work product were later collected by historians and published as compilations. The most comprehensive and widespread of the compilations is Max Farrand's *The Records of the Federal*

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[63] *See* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER, 1787 (1966).

Convention of 1789.[64] Following the convention, the Constitution faced a tough ratification campaign, which saw three of the convention delegates[65] publish a series of essays arguing for ratification. Collectively those essays form the *Federalist Papers*,[66] and judges deem them good expressions of framer intent. Furthermore, a historian named Jonathan Elliot collected documentation from the ratification debates that took place in the various state ratification conventions and published them in a work entitled *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (or *Elliott's Debates* for short).[67] Together, these three works make researching federal framers' intent relatively straight-forward, and researchers may find all three titles on the Library of Congress's website (as well as in virtually every library system in the United States).

State constitutions often feature similar documentations of history in terms of convention proceedings, but the availability of the proceedings may vary by state. Furthermore, many states have adopted different constitutions at different times, and so there may be more than one convention's proceedings available. To research state constitutional history, a researcher should contact a reference librarian in his state of interest.

A complicating factor about constitutions is that, because they are designed to be organic documents, they change over time through the amending process. If the constitutional issue being researched relates to one of the amendments, neither convention nor ratification documents will be of use to a researcher. Fortunately, though, the vast majority of constitutional amendments pass through a more rigorous version of the legislative process, and so their histories can be researched in similar methods to the legislative history of statutes, which we will cover in the next section.

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[64] MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1789 (1911).

[65] Alexander Hamilton, James Madison, and John Jay.

[66] THE FEDERALIST Nos. 1-85 (Alexander Hamilton, James Madison, and John Jay).

[67] JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA IN 1787 (1861).

3.6.2 Legislative History & Legislative Intent

A statute's legislative history can serve as a source that will aid in interpreting the statute. Legislative history refers to the "proceedings leading to the enactment of a statute, including hearings, committee reports, and floor debates."[68] Essentially, everything that happens to a proposed statute procedurally goes into its legislative history. Lawyers can sometimes use the legislative history to investigate the legislature's intent in drafting the statute. A lawyer would then argue that the legislative intent indicates a particular interpretation of the statute.

As the exploration of legislative intent is usually the end goal of researching legislative history, researchers will find some pieces of legislative history more helpful than others. After all, the legislative process typically involves several distinct steps in two separate houses, so finding something that indicates the intent of the legislature as a whole can be challenging. We will briefly introduce the types of documents researchers of legislative history are likely to encounter in order from those generally the most helpful for inferring intent to those less often used.

3.6.2.1 Types of Legislative History Documents

In order to appraise the relative weight of a piece of legislative history, a researcher needs to understand the basic legislative process. First, a legislator introduces a draft statute as a bill. Upon introduction of the bill, the leadership of the legislative house in which the bill was introduced assigns it to a relevant committee of that house for evaluation. The committee will look at the bill in some detail and may hold hearings to investigate the bill's purpose or commission studies about specific effects the bill may have. If the committee passes the bill, it returns to the full legislative house for debate and consideration. After a bill passes one house, it will be introduced in the other legislative house to follow the same process.[69] Because bills are subject to amendment at pretty much any time of the process, it is unlikely that a bill will pass each house with the exact same language intact. To resolve differing language, legislatures generally form special committees with members from both houses, called

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[68] BLACK'S LAW DICTIONARY 1039 (10th ed. 2014).

[69] Note that legislative procedures vary and also tend to be flexible. For instance, sometimes different, or even identical, versions of a bill may be introduced simultaneously in both houses. If they both pass, the legislature then can combine them instead of starting the process anew.

Conference Committees. Once a Conference Committee agrees on a reconciled version, each house must pass the final, reconciled version of the bills they have already passed. Only then will the bill be sent to the executive to be signed into law as a statute.[70]

Given that legislatures contain multiple legislators all with their own beliefs and motives that can affect the steps of the process, speaking of legislative intent as a singular force may strike one as somewhat specious. In essence, every piece of legislation passed represents a compromise. Therefore, the intent expressed during the compromise stage of the process will be the strongest expression of intent a researcher will be able to find. For this reason, researchers of legislative history often look to Conference Committee materials first. Indeed, Conference Committee Reports detailing the actions taken by the Conference Committee on a particular statute usually provide the strongest expression of legislative intent.[71]

Sadly, Conference Committees do not create reports for every statute they consider, and not every statute requires a Conference Committee. Therefore, a researcher may or may not find a Conference Committee report for a given statute. If no Conference Committee Report is available, he should then try a Committee Report from one of the standing committees. Because the committee to which a bill is assigned looks at a bill more closely than the legislative house at large, the committee itself often expresses intent in recommending the bill to the rest of the legislative house. Furthermore, legislatures such as Congress tend to have their own procedural rules requiring that standing committees be made up of members of both parties. As such, Committee Reports generally reflect the views of both the majority and minority parties on the committee and so may provide insight into the compromise that best embodies intent. However, because the committee will have considered an earlier, pre-conference version of a bill, researchers should ensure that any discussion

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[70] Note that the executive possesses the options of not signing or vetoing the bill, in which case it would not become a statute, barring a veto override.

[71] Note that intent-inferring value does vary document by document. A researcher may find a Conference Committee Report that offers little interpretive value for a particular statute, while a different legislative history document for the same bill contains an express statement of intent. Generally speaking, though, a Conference Committee Report containing evidence of intent would be more persuasive than other documents, since the Conference Committee will have dealt most closely with what became the final version of the statute.

of intent in a Committee Report refers to a portion of the bill that remained in the bill as it passed into law.

Researchers may also encounter statutes for which there are no Committee Reports available from any legislative committee. Other pieces of legislative history may still provide glimpses of legislative intent. At the Federal level, Congress publishes a journal of its proceedings called the *Congressional Record*, which often preserves transcripts of debates on particular bills, as well as voting records on the same bills. By putting these two pieces of information together, a researcher might be able to determine which argument carried the day and then ascribe intent to that argument. Alternatively, a researcher might find multiple versions of a bill along with suggested amendments and attempt to infer intent from the changes made to the bill. Finally, a researcher may examine published Hearings or Committee Prints (studies commissioned by the committee considering a bill) in order to see what information Congress considered before passing a bill or to see what the stated purpose of a bill was. While it is somewhat tenuous to infer intent from Hearings or Prints, they may be able to show whether or not Congress considered a specific issue and may also describe the legislation's general goal in the abstract. Note that all of the legislative documents described in this paragraph require inference and assumption in order to determine intent as it applies to the specific language of a statute. As such, these materials are much weaker than Committee Reports.

Type of Legislative History Document	Brief Description	Utility for Determining Intent
Conference Committee Report	Official report of the committee which reconciles differences between the bills passed by each house	High – often contains express intent as related to the version of the bill that actually becomes a statute
Committee Report	Official report of whatever committee reviewed initial bill	Medium – contains views of both parties and may contain express intent, though not usually as related to the final version of the bill
Congressional Record/Legislative Journal	Official journal of the legislature which may contain records of debates or statements regarding a bill	Low – may contain express statements of intent, but statements only attributable to individual(s) making statements; inference required to attribute to legislature at large
Hearings	Transcripts of hearings held by legislative committees studying particular bills	Very low – will show an issue was brought to the legislature's attention but intent about specific statutory language difficult to infer
Committee Prints	Published reports on an issue commissioned by legislative committees studying particular bills	Very low – will show an issue was brought to the legislature's attention but intent about specific statutory language difficult to infer
Signing Statement	Statement issued by the executive when signing bill into law	Very low – not actually from legislature

Figure 3.6.2.1 – Types of Legislative History Documents

In addition to the documents produced by the legislature, researchers of legislative history may sometimes also encounter signing statements. In order for a bill to become law, it not only must be passed by the legislature but must also generally receive the signature of the executive. When the executive signs a bill, he sometimes issues a signing statement, which is an expression of the executive's understanding of legislative intent behind the new law. While this may seem like a strong, express statement of intent, note that it does not, in fact, come from the legislature. As such, it is not as good for a legislative intent argument as something actually produced by the legislature.

Researchers of federal legislative history will encounter the types of materials described above somewhat regularly. However, states vary in the amount of legislative work product they publish. In fact, many states publish only a legislative journal and no reports of any sort. Therefore, before engaging in research of state legislative history, students should contact reference librarians from their state to determine what actually is available.

Before a researcher can use legislative history to determine intent, she must first find what legislative history exists for the statute in question, so let us now turn to methods for finding legislative history documents.

3.6.2.2 Finding Legislative History Documents

We have good news and bad news about researching legislative history. On the bad news side, a researcher never knows whether a legislature will have produced any legislative history documents for a given statute. Thus, researching a statute's legislative history may sometimes prove fruitless. On the good news side, because a researcher will typically be looking for legislative history to help interpret a statute, he will have a logical starting point to his research. The statute itself will naturally limit the scope of his research.

In order to conduct legislative history research on a statute, a researcher will need the session law or slip law citation for the statute in question. As discussed above, researchers typically find statutes via a topically organized code. The reason that codes do not work so well for legislative history is that most statutes produced by a legislature get divided into pieces in order to fit topically into the code. However, when the legislature considered and ultimately passed the statute, all the topical bits would have been considered together. Therefore, researchers will need the version of the

statute as it passed in order to pull all its associated legislative history documents. Luckily, the code itself provides citations to the session laws that enacted or amended a code section at the end of each code section.

Once a researcher has obtained the citation information for the slip law or session law version of a statute, he can proceed in a couple of ways. First, he may find a compiled legislative history for his statute. Compiled legislative histories are similar to the compilations of historical constitutional documentation referenced in Section 3.6.1. Compiled legislative histories may exist as stand-alone works on a single topic,[72] but researchers may also find works that collect and publish multiple compiled legislative histories. Such collections—at least for Federal legislation--exist both in print and electronically.[73]

The dominant print source for compiled legislative histories is West's *United States Code Congressional and Administrative News* (USCCAN). Before computers, USCCAN was the easiest way to locate federal legislative history.[74] Researchers would look up federal statutes by Public Law number, and the USCCAN entry for the Public Law in question would contain a selection of the more useful legislative history documents as chosen by a West editor. Note that USCCAN only provides select (as opposed to comprehensive) legislative histories and only on select statutes. Despite these limitations, USCCAN is useful and ubiquitous enough that it remains the Bluebook preferred source for many citations to legislative history.[75]

In addition to finding them in print, researchers can also find compiled legislative histories electronically. For instance, West includes an electronic

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[72] *See, e.g.,* BERNARD D. REAMS AND CHARLES R. HAWORTH, CONGRESS AND THE COURTS: A LEGISLATIVE HISTORY, 1787-1977: DOCUMENTS AND MATERIALS REGARDING THE CREATION, STRUCTURE, AND ORGANIZATION OF FEDERAL COURTS AND THE FEDERAL JUDICIARY (1978).

[73] For a comprehensive bibliography of available compiled legislative histories, *see* NANCY P. JOHNSON, SOURCES OF COMPILED LEGISLATIVE HISTORIES: A BIBLIOGRAPHY OF GOVERNMENT DOCUMENTS, PERIODICAL ARTICLES, AND BOOKS (2d ed. 2012).

[74] Note that in addition to its print form, USCCAN is now also published electronically on Westlaw. It remains a trusted and useful source for legislative history research in the computer era.

[75] *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 13.4, at 138, R 12.6, at 127-128, (Columbia Law Review Ass'n et al. eds., 20th ed. 2015).

version of USCCAN on its Westlaw Edge platform. Similarly, HeinOnline provides a number of compiled legislative histories in electronic format.

Unfortunately, compiled histories are not available for every statute. In the event that a researcher needs to investigate the legislative history of a statute without an available compiled history, he will need to compile the materials himself. The amount, type, and format of legislative documents available vary greatly by jurisdiction. At the Federal level, the Government Publishing Office produces a large selection of legislative documents that researchers can find in print or on microfiche[76] at a Federal Depository Library.[77] Legislative history documents for more recent statutes may also be found online at Congress.gov.[78] Westlaw Edge and Lexis Advance also sometimes provide links to individual pieces of legislative history in the annotations to code sections. Alternatively, the private publisher ProQuest provides digitized Congressional documents from as early as 1789 through electronic subscription services.[79] Researchers can use the same basic searching, browsing, and filtering techniques discussed above in Chapter 2 to retrieve legislative history documents from either Congress.gov or the ProQuest databases.

State governments tend to publish significantly fewer legislative documents than the federal government, but the specific publication schemes vary by jurisdiction. To conduct legislative history research on a state statute, we encourage students to contact a law librarian in the relevant state.

The legislative history documents described in this section can aid lawyers in interpreting statutes, the source of law created by the legislative branch. In the next chapter, we will turn our attention to another source of law: judicial opinions, which themselves often interpret statutes.

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[76] In the event that students find themselves needing to consult microfiche or microfilm, just ask a reference librarian for help.

[77] The GPO maintains a list of libraries participating in the Federal Depository Library Program at https://catalog.gpo.gov/fdlpdir/FDLPdir.jsp.

[78] Congress.gov includes finding aids for legislative documents from 1973 onwards that would make finding them in a Federal Depository Library easier, but only contains the full-text of documents from 1993 onwards.

[79] ProQuest's subscription databases, such as Legislative Insight, are marketed mostly to research universities. The libraries of major public universities typically allow on-site use of subscription databases.

3.7 Concluding Exercises for Chapter 3

Now that we have covered the basics of using codes for research, let's try to do some actual legal research!

3.7.1 Introductory Exercise on Code Research

You are an associate at a mid-size law firm in Washington, D.C. Your managing partner comes to you to say that a client, an extremely wealthy woman who inherited an alcohol-distribution company, stopped in to request that the firm initiate divorce proceedings on her behalf. Apparently, her significantly-older husband has become increasingly cantankerous and erratic following some failed political ambitions. In your client's own words, "he's just become *too* much of a maverick." Upon being asked in which state the matrimonial residence was located, the client confessed that the couple often spend time apart but rotate monthly to dwellings in the following locales:

Kahului, Hawaii

Sedona, Arizona

Key West, Florida

Arlington, Virginia

You have been tasked with finding statutory grounds for divorce in each of the jurisdictions listed. Please find the relevant code sections.

3.7.2 Intermediate Exercise on Code Research

Dear Associates:

We have recently been engaged by Bernard Brown, proprietor of Brown Books, to defend him in a misdemeanor prosecution in the state of Georgia. Brown Books is located in suburban Atlanta and carries a variety of new and used books. Recently, Mr. Brown sold a number of copies of D.H. Lawrence's *Lady Chatterley's Lover* to students at the local high school, who ranged in age from 14 to 16 years of age. Some of their parents got upset and the State of Georgia charged Mr. Brown with selling harmful materials to minors. This despite the fact that according to Mr. Brown (who emigrated from Ireland), "the bloody school assigned the bloody book! It's art! It's literature! The school library has a copy for Pete's Sake!"

Above all, Mr. Brown would like us to get an acquittal.

I need you to:

- Find the statute provision that prohibits the sale of harmful or obscene materials to minors. Does the Georgia code define "harmful materials"?
- See if there is anything in the code that provides special protection for libraries.
- Do you think we will be able to defend Mr. Brown successfully?

Thanks,

Mr. Partner

3.7.3 Advanced Exercise on Code Research

Hello Team:

We have been retained to represent Mr. Tyler Sangman in his upcoming federal criminal trial in the Northern District of Ohio. Mr. Sangman, a professional lobbyist and environmental activist, stands charged with the federal crime of committing an "attack to plunder a vessel." The vessel in question, the *S.S. Umlaut*, was carrying replacement parts across Lake Erie for a chemical plant operated in western New York by industrial giant BADCO, Inc. Mr. Sangman allegedly used an inflatable motorboat to intercept the *Umlaut* off the coast of Ohio in order to disable its propeller system with plastic explosives. Unfortunately, the explosives were more powerful than intended, and the *Umlaut* sank to the bottom of Lake Erie. Using the *United States Code Annotated*, I need you to find the following information:

- Look up the federal code section criminalizing attacking vessels to plunder them under the piracy laws of the U.S. Would Sangman's alleged actions qualify as a crime under the text of this code section?
- Look at the annotations. Do any suggest a case that might answer whether it matters that Sangman didn't intend to profit from his actions?
- Do any annotations indicate whether we would be able to challenge federal jurisdiction over the crime, since the action occurred in waters adjoining Ohio?
- I know you'll need to read the cases from the annotations for a definitive answer, but just going from the statute and its annotations, do you think we'll have good news or bad news for Mr. Sangman?

Thanks,

Mr. Partner

3.8 Recommended CALI Lessons for Further Practice

CALI hosts an impressive number of interactive lessons on its website. The following lessons on constitutions, statutes, and codes touch upon material covered in this chapter. They would be a great place to start for students looking for further practice on the concepts introduced in this chapter!

3.8.1 "How to Research American Constitutional Law" by Brian Huddleston

Summary: an overview of researching federal and state constitutional law.

Lesson ID: LR113

URL: http://www.cali.org/lesson/9024

3.8.2 "Introduction to State and Federal Statutes" by Mary Rumsey and Suzanne Thorpe

Summary: a review of the different forms of publication statutes take

Lesson ID: LWR15

URL: http://www.cali.org/lesson/576

3.8.3 "Forms of Federal Statutory Publication" by Elizabeth G. Adelman and Kristina L. Niedringhaus

Summary: a review of the four publication forms of federal statutes

Lesson ID: LWR30

URL: http://www.cali.org/lesson/589

3.8.4 "Codification" by Bill Taylor and Tina S. Ching

Summary: an in-depth look at the code form of publication of statutes

Lesson ID: LWR16

URL: http://www.cali.org/lesson/577

3.8.5 "Finding Statutes" by Kit Kreilick

Summary: a review of the methods by which researchers find statutes.

Lesson ID: LR23

URL: http://www.cali.org/lesson/857

3.8.6 "Updating Federal and State Statutes" by Rebecca S. Trammell and Ashley Krenelka Chase

Summary: an overview of the processes by which researchers ensure that discovered statutes are up to date and still valid.

Lesson ID: LWR24

URL: http://www.cali.org/lesson/584

3.8.7 "Statutory Interpretation" by Ronald Benton Brown

Summary: an introduction to the processes involved in interpreting state and federal statutes once found.

Lesson ID: LCS03

URL: http://www.cali.org/lesson/1058

3.8.8 "Researching Federal Legislative History" by Nancy P. Johnson

Summary: an introduction to the federal legislative process and the various congressional documents in a legislative history. Students will be introduced to free legislative databases on the Internet. Through various cases, students will see how the courts use congressional documents to interpret laws.

Lesson ID: LWR14

URL: http://www.cali.org/lesson/575

3.8.9 "Federal Legislative History Research – Compiled Legislative History" by Lee Peoples

Summary: an introduction to the use of compiled legislative histories, both in print and electronically.

The lesson builds on the lesson in "Researching Federal Legislative History."

Lesson ID: LR41

URL: http://www.cali.org/lesson/860

3.8.10 "Reading Legislative History" by Lorelle Anderson

Summary: an overview of how to read legislative history materials once gathered, with an eye towards determining or inferring legislative intent for a particular statute.

Lesson ID: LR137

URL: http://www.cali.org/lesson/10765

Chapter 4

Judicial Opinions & Common Law

> The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. – Oliver Wendell Holmes, Jr., *The Common Law*

> It is a maxim among these lawyers, that whatever hath been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. – Jonathan Swift, *Gulliver's Travels*

4.1 Learning Objectives for Chapter 4

In working through this chapter, students should strive to be able to:

- Appreciate how judicial opinions create legal rules through precedent.
- Evaluate judicial opinions' varying weight of precedential authority.
- Use reporters to look up opinions by citation.
- Evaluate the editorial content added to opinions by publishers of reporters.
- Explain how the West Key Number/Digest System functions.
- Use digests and reporters in combination to reconstruct the common law on a given subject.
- Evaluate continued utility of editorial content when researching cases via electronic means.

4.2 Judicial Opinions and the Common Law

As discussed in Chapter 1, both constitutional and statutory provisions generally consist of language too broad to be applied to specific facts without an act of interpretation. In the U.S. legal system, the judiciary serves as the primary interpreter of the law.

Courts issue their interpretations as judicial opinions, which then act as precedent to create lasting legal rules. Sometimes (maybe even most of the time) lawyers will refer to opinions as cases. However, "opinion" is a more precise term, as a single case can feature more than one opinion. Multiple opinion cases occur when not all the judges[80] hearing a case agree on the result. (Most appellate cases use panels of judges rather than a single judge.) If a majority of judges agree, they will designate one of their members to issue a majority opinion, which is the strongest form of judicial precedent. If an individual judge disagrees with the majority opinion, she may issue a dissenting opinion. Similarly, if an individual judge agrees with the end result of a case, but not the legal reasoning that led to the result, she may issue a concurring opinion. Both dissenting opinions and concurring opinions may be cited as persuasive precedent, but neither will be as strong a precedent as a majority opinion.

To further complicate matters, judges may "join" the opinions of their colleagues. In fact, the way a researcher can tell that a majority opinion is a majority opinion (other than by the fact it comes first in the write-up), is by seeing that a majority of the judges have joined it. Judges may also join dissents or concurrences instead of issuing their own. Furthermore, judges sometimes only join parts of an opinion, if they only agree with certain issues. After all the judicial maneuvering is said and done, sometimes a court will be left without a majority opinion but will have to issue a plurality opinion instead. Plurality opinions act as much weaker precedent than majority opinions. Thus, when a legal researcher finds a relevant opinion, she should pay attention as to its origins.

Once issued, judicial opinions act as precedent for later courts, thus opinions provide their own legal rules that become part of American law. Lawyers call such judge-made rules "common law." Common law can develop from a statute or constitutional provision by creating a standard interpretation of the same, or it can develop independently of

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[80] Courts very as to whether they style their members as "judge" or as "justice." For purposes of this chapter, "judge" will be used throughout.

constitutions and statutes. Miranda Rights serve as an example of the former. The Fifth Amendment, in rather broad language, guarantees people accused of crimes the right of "due process."[81] *Miranda v. Arizona*, a U.S. Supreme Court case, interpreted due process as requiring police to inform a suspect in custody of her constitutional rights before interrogating her.[82] Later cases applied that opinion as precedent and developed the law further by discussing what exactly qualifies as "custody" or "interrogation."[83] Thus, judicial opinions have created specific legal rules as a common law of the Fifth Amendment.

Judge-made rules also exist independently of constitutional or statutory interpretation. Typically, these rules were developed by judges prior to the widespread use of statutes. Most such rules were part of the body of English law that American colonists originally brought with them from the Old Country. Indeed, "common law" can also be used to refer only to the traditional, customary laws that developed in England.[84] Many English common law elements still persist in American law, especially in the fields of Torts and Property.

Regardless of whether working on problems of statutory interpretation or application of historic common law rules, legal researchers tend to spend much of their time conducting case-based research. Researching judicial opinions tends to take more time than researching codes, as cases tend to be longer than statutes and also do not benefit from the inherent organization provided by the process of codification. Let us thus turn to how one goes about researching cases.

As with statutes, the information systems for publishing judicial opinions came about before the advent of computers. When the legal publishers began providing electronic content in the latter part of the twentieth century, they imported the existing information systems to the new format. Thus, as we did with statutes, we will here introduce judicial opinions in their print format before proceeding to the materials' reproduction in electronic format.

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[81] U.S. CONST. amend. V.

[82] Miranda v. Arizona, 384 U.S. 436 (1966).

[83] *See, e.g.,* Maryland v. Shatzer, 559 U.S. 98 (2010); Rhode Island v. Innis, 446 U.S. 291 (1980).

[84] For the multiple meanings of "common law," *see* BLACK'S LAW DICTIONARY 334-335 (10th ed. 2015).

4.3 Case Reporters

The practice of republishing judicial opinions for dissemination and use has existed since medieval times.[85] However, prior to modern times, only select cases on pre-identified topics tended to be published.[86] Also, reports of opinions that were published tended to focus on limited geographic areas, leaving lawyers with far fewer precedents with which to work. The modern system of publishing judicial opinions began in the late nineteenth century when John B. West systematically collected appellate-level opinions and published them in multi-volume sets he termed "reporters." West Publishing continues to be the dominant publisher of American judicial opinions in print.

4.3.1 Types of Reporters

West, and to a lesser extent its competitors[87], produce several broad types of reporters. Simplest are jurisdictional reporters, which publish reported cases from a single jurisdiction. For instance, West's *Kentucky Decisions* includes reported opinions from Kentucky state courts. Sometimes, the publisher limits the scope of jurisdictional reporters to opinions from a specific judicial level, as West does with its various reporters for federal cases. *The Supreme Court Reporter*, for example, republishes opinions only from the United States Supreme Court. Likewise, the *Federal Reporter* publishes opinions from federal Courts of Appeal, and the *Federal Supplement* publishes select cases from U.S. District Courts.[88] Some jurisdictions publish their own opinions in "official" reporters, the most

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[85] *See, e.g.,* HENRICI BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE (c. 1260).

[86] The official *United States Reports* was an exception to this trend, as it has always included every Supreme Court opinion issued.

[87] Because the term "lion's share" does not even begin to do justice to West's dominance of publishing judicial opinions, most of the discussion in this chapter will focus on West publications.

[88] Note that not all district court opinions are published. Trial level opinions, because they mix application of law with finding of facts, do not make as good a precedent as appellate opinions. Therefore, West only includes particularly significant district court opinions in the *Federal Supplement*. West also publishes the *Federal Appendix* which includes cases originally passed over for publication. Opinions in the *Federal Appendix* do not count as fully published opinions, *per se*, and so legal researchers should not rely on them as precedent.

notable being the *United States Reports* containing opinions issued by the Supreme Court of the United States and published by the Government Publishing Office. Official reporters generally work similarly to West's jurisdictional reporters although without the helpful editorial material that West provides.[89]

In addition to jurisdictional reporters, West also publishes reporters that gather opinions from several different states into one series, called regional reporters. Please note that regional reporters exist as a publishing contrivance only. Therefore, just because two states' judicial opinions appear in the same reporter, it does not mean that the opinions are in any way related. For instance, cases from Kentucky and cases from Texas both appear in the *South Western Reporter*, but opinions from Kentucky would carry no more weight in Texas than opinions from Maine, which are found in the *Atlantic Reporter,* would.

[89] Similar to statutes, researchers often find West's unofficial reporters to be more useful than official reporters, due to the extra editorial content.



Figure 4.3.1: A Map of West's Regional Reporter System

Beyond regional reporters, another instance exists in which legal researchers might find cases from multiple jurisdictions within a single reporter set. Sometimes publishers will create topical reporters, which gather opinions from all U.S. jurisdictions that touch upon the reporter's central theme. For instance, West publishes the *Education Law Reporter*, which contains a variety of state and federal cases dealing with issues of law as applied to the education profession.

Note that legal researchers may often find the same judicial opinion in any number of reporters. For instance, a case dealing with education law from the Kentucky Court of Appeals could probably be found in the *Kentucky Decisions,* the *South Wester Reporter,* or the *Education Law Reporter*. Nothing about the opinion changes from reporter to reporter. In other words, it does not matter where a legal researcher finds a needed precedent, just that she does so.

4.3.2 Finding an Opinion in a Reporter

As with statutes and codes, a legal researcher most easily retrieves an opinion from a reporter if she has a citation in hand. Unlike codes, however, reporters do not impose a topical organization upon the legal authorities they contain. Instead, reporters publish opinions in chronological order as courts hand them down. Therefore, obtaining a citation to a case takes on paramount importance. Luckily, before engaging in case research, a good legal researcher will have checked for controlling statutes and made note of key case citations found in a relevant statute's annotations, so it is not unusual to begin case research with a citation in hand.

Case citation works very similarly to code citation. A citation to a case begins with a number, proceeds to an abbreviation, and then ends with another number. The first number in a case citation refers to the volume of the reporter in which the case appears. The abbreviation alerts researchers as to which reporter contains the case[90], and the final number signifies the page of the reporter volume on which the case begins. For example, *Rose v. Giamatti,* 721 F. Supp. 906 (S.D. Ohio 1989) begins on page 906 of volume 721 of the *Federal Supplement*. Often, the first page number of a case will be immediately followed by a comma and a second page number. The second page number acts as a "pin-cite" referring the reader to the specific page of the case on which the issue being cited is discussed. Going straight to a pin-cite may save a researcher time, though the whole case should be read for context, of course.

[90] See Figure 4.3.2 for a list of abbreviations to common reporters.

Abbreviation	Reporter	Cases Contained
U.S.	*United States Reports*	U.S. Supreme Court (official version)
S. Ct.	*Supreme Court Reporter*	U.S. Supreme Court (West version)
L. Ed.	*Supreme Court Reporter, Lawyer's Edition*	U.S. Supreme Court (LexisNexis version)
F.	*Federal Reporter*	federal Courts of Appeals
F. Supp.	*Federal Supplement*	federal District Courts
So.	*Southern Reporter*	state courts from LA, MS, AL, FL
P.	*Pacific Reporter*	state courts from AK, HI, CA, OR, WA, ID, NV, AZ, UT, MT, WY, CO, NM, KS, OK
S.W.	*South Western Reporter*	state courts from TX, AR, MO, KY, TN
A.	*Atlantic Reporter*	state courts from ME, VT, NH, RI, CT, NJ, DE, MD, DC, PA
N.E.	*North Eastern Reporter*	state courts from IL, IN, OH, NY, MA
N.W.	*North Western Reporter*	state courts from ND, SD, NE, MN, IA, WI, MI
S.E.	*South Eastern Reporter*	State courts from WV, VA, NC, SC, GA

Figure 4.3.2: Commonly Used Reporters

Note that when we speak of citations, we speak of them as referring to cases, not opinions. This is because all opinions issued in a case are published together as one unit in the reporter. Typically, however, a citation to a case will be alluding to the majority (or plurality, if that is the case) opinion of the court unless it specifically identifies a concurrence or dissent.

A couple of other unique circumstances affecting case citation bear mentioning. First, sometimes cases appear in more than one reporter.

Thus, a legal researcher may encounter parallel citation, in which one case citation refers to multiple reporters. In this case, the researcher may pull the desired case from whichever of the referenced reporters strikes her as most convenient. Second, because book spines feature limited space, when a reporter set reaches 999 volumes, rather than try to squeeze an extra digit onto the spine, the publisher starts the numbering over. To avoid confusion when this happens, the reporter enters its "second series" (or third series in the case of an exhausted second series). Citations to reporter series other than the first include a notation to that effect next to the abbreviation of the reporter title. For example, F.2d refers to the second series of the *Federal Reporter*. Thus, citations truly make it easy for researchers to pull cases from reporters.

4.3.3 Using a Reported Opinion

Once a legal researcher locates a case in a reporter, she will, of course, be able to read all opinions issued in the case. However, reading full cases can be a time-consuming process. To increase the efficiency of legal research, West includes valuable editorial content for cases in its reporters, much as publishers of annotated codes do.[91] Figure 4.3.3 illustrates the editorial content provided by a West reporter.

The first thing to note about a reported case (as lawyers call cases that appear in reporters) is that the actual judicial opinion does not start right away. In fact, the opinion will sometimes not start for pages! This happens because West places its editorial content before the opinions. This information is often introductory and allows the researcher to more quickly parse the content of the actual opinion.

[91] Note that the editorial content merely helps explain or interpret the case; it does not itself act as precedent. As such, lawyers never cite to editorial content but rather use it to understand and cite the case it accompanies.

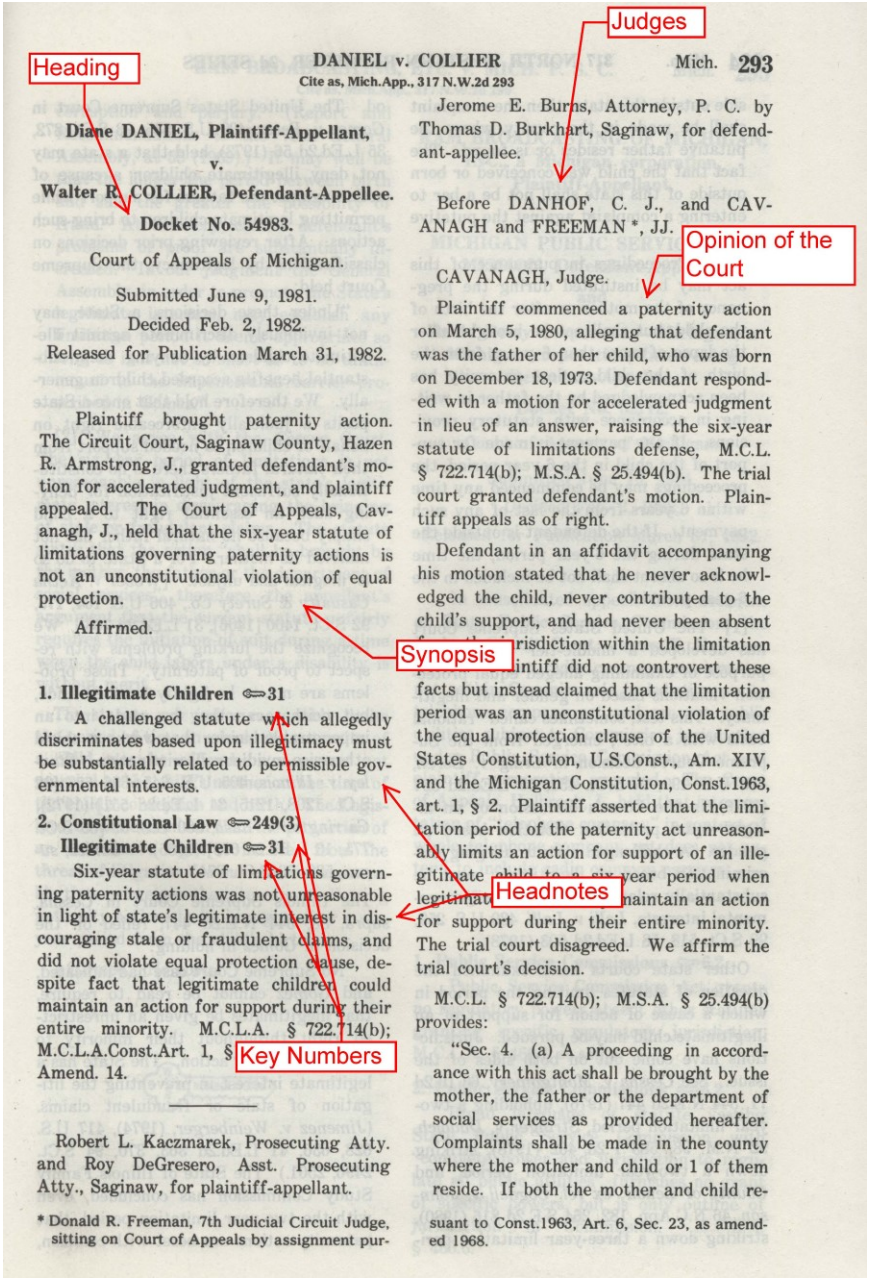


Figure 4.3.3: A Case as it Appears in a West Reporter

The first bit of information a reported case gives to a researcher comes in the heading of the case. The heading includes the case name, the name of the court that heard the case, the docket number assigned by the court, and any relevant procedural history for the case. A short synopsis of the case,

including the holding of the majority opinion, immediately follows the heading. Thus, before reading an entire opinion, a legal researcher can make an advance determination as to its worth by scanning the heading and synopsis.

After the synopsis, West provides the most useful of the editorial content included in reporters: headnotes. Headnotes identify specific legal issues addressed in the opinion(s) of the case. Thus, a researcher can tell at a quick glance whether the issues she wants were considered in a case. Furthermore, West includes notes within the text of the opinion(s) indicating where in the opinion(s) the court considered the specific issues described by the headnotes.

In addition to helping the researcher identify legal issues within an opinion, West's headnotes provide the ability to find other cases that discuss the same issue. West assigns a "topic and key number" to every headnote its editors create. Each key number refers to a specific legal issue found in the jurisprudence of its accompanying topic. Different judicial opinions that discuss the same issue will all receive the same corresponding topic and key number. To find other cases with the same topic and key number, a legal researcher turns to the other major type of West publication for case research: the digest, which we will discuss in section 4.4.

4.3.4 Unreported Cases & Court Dockets

Not all cases heard in the United States make it into a reporter. Cases will be passed over for inclusion in a reporter for a variety of reasons. First, cases from trial-level state courts tend to focus more on findings of fact rather than on determinations of law, and so are usually not published.[92] Second, sometimes a judge, even at the appellate level, will indicate in an opinion that it is not for publication. She may do this if the case breaks no new ground legally and so adds nothing to the precedents on which it was decided. Alternatively, the facts in the case may be unique or bizarre enough that the judge thinks creating a precedent from the case might cause havoc with other precedents. Whatever the reason behind not being included in a reporter, though, lawyers deem opinions issued in unreported cases to be "unpublished" and do not view them as having full precedential value. Note that West's *Federal Appendix* reports cases that were originally passed up for

[92] The same holds true for some federal district court cases, though West publishes federal district opinions that do make determinations of law in the *Federal Supplement* as discussed above in section 4.3.1.

publication in West's other reporters. As such, researchers should view cases from the *Federal Appendix* as unreported, and should view their opinions as unpublished, to be used only with extreme caution.

In fact, until relatively recently, courts only allowed citation to unpublished opinions in very limited circumstances. However, with the advent of computer-assisted legal research, unpublished opinions have become somewhat easier to find. As a result, in 2006, the Supreme Court of the United States adopted a rule permitting the citation of unpublished federal opinions in federal courts, provided that the unpublished opinions were issued in 2007 or later.[93] Most states now make similar provisions, though the exact details vary. Researchers should check the court rules of their jurisdiction before using an unpublished opinion to ensure doing so is permissible.

The reason that courts traditionally treated unpublished opinions with skepticism derives from the difficulty in finding unpublished opinions prior to the electronic research era. Because the primary way of finding precedent in print was through the use of the reporter and digest system, any case not included in a reporter would have been overlooked by the majority of researchers.[94] In fact, prior to the computer age, the primary way of obtaining an unpublished opinion was to retrieve it from the court docket at the court that heard the case.

Court dockets are records kept by the court of proceedings in a particular case. For the legal researcher, dockets can be a treasure trove of information because they typically note all the documents, or court filings, submitted by parties or produced by the court related to that case. In addition to the final opinion, a researcher may be able to see the briefs (written arguments) submitted by both parties, the motions they made in court, exhibits presented, court orders on motions, any final court orders regarding the proceedings, and more.

An enterprising researcher can explore other uses for dockets beyond gathering more information about an individual case. She can use dockets to find examples of motions, arguments, and other documents related to a particular legal issue and use them to inform her own legal documents. If

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[93] Fed. R. App. P. 32.1.

[94] Cases appearing in the *Federal Appendix* can be found via a print digest, but these represent a very small percentage of the unpublished cases out there and do not, of course, include any state cases.

a case involves a corporation, sometimes it must reveal information to the court that they otherwise would never disclose to the public. A researcher could potentially use documents submitted to the court to find out about financial issues within the company, confidential information regarding patents, or other useful information.

Nowadays many courts provide online access to their more recent dockets, and researchers can generally find court filings electronically using the major legal research platforms. However, some states do not put their dockets online, or sometimes a researcher may wish to look at a docket that predates electronic filing. In order to obtain materials from a docket unavailable electronically, a researcher should contact the clerk of the court that heard the case in question.

Generally speaking, though, published opinions are much more valuable to a legal researcher than unpublished opinions or court filings. Let us now turn to the tool that allowed lawyers to find published opinions on particular topics prior to the invention of computers: the digest.

4.4 Digests

Digests, though themselves large multi-volume sets, act as topical indexes to the even more voluminous reporter sets. Remember, reporters themselves lack topical organization—the lengthy nature of judicial opinions would make any such internal organization highly impractical—and instead work with the external organization provided by digests. Likewise, digests do not reproduce judicial opinions, but provide short summaries of cases and citations to the same organized by topic. Thus, both reporters and digests are of limited use without the other.[95]

4.4.1 Types of Digests

For the most part, West publishes the same types of digests as it does reporters, though there are some key differences in coverage between the two types of publication. Like reporters, digests come in jurisdictional, regional, and topical varieties. Additionally, West publishes general digests that can potentially lead researchers to opinions issued in any jurisdiction in the U.S.

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[95] Note, however, that a digest can also be used effectively with an electronic database of cases. The basic steps would be the same except that instead of pulling a case from a reporter, the researcher would retrieve the case by entering its citation into a legal research platform.

Legal researchers probably use jurisdictional digests more than any other type. West publishes jurisdictional digests for most individual states and the District of Columbia.[96] State digests, unlike state reporters, include references to both state cases and related federal cases that originated in the state in question. In addition to individual state digests, West publishes a number of federal digests. Some, like the *Supreme Court Digest*, index cases from a single court. However, the *Federal Practice Digest* leads researchers to published opinions issued by any federal court, regardless of level.

West also publishes several regional digests that mostly correspond to the regional reporters. Note, however, that not every regional reporter benefits from a companion regional digest.[97] Regional digests lead researchers to opinions issued by state courts for the same states covered by the corresponding reporter.

As West publishes topical reporters, so too does it publish topical digests to accompany the reporters. For example, lawyers working for a university might consult the *Education Law Digest* in combination with the *Education Law Reporter*.

In addition to the types of digests corresponding to types of reporter, West publishes the *General Digest*, which can potentially lead researchers to opinions from any U.S. jurisdiction. Because of the sheer amount of information involved in such an undertaking, West periodically publishes the *Decennial Digest*.[98] When a new edition of the Decennial Digest appears, the General Digest then starts anew. Thus, if depending on a one-stop-shop approach to researching with digests, lawyers must consult both the *Decennial* and *General Digests*.[99]

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[96] West does not publish a digest for Delaware, Nevada, or Utah. To find opinions from these jurisdictions using only print sources, researchers would need to consult the relevant regional digest or the general digest.

[97] West never published a digest for the *South Western Reporter*. Furthermore, West has discontinued the *North Eastern Digest* and the *Southern Digest*. Researchers in jurisdictions covered by those regions would need to consult the relevant state digest or the general digest in order to find opinions using print sources.

[98] Although the period between publications of the *Decenniel Digest* used to be 10 years, as suggested by the title, in modern times of heavy case loads, West now publishes it more often.

[99] Indeed, they should probably consult the *Centenniel Digest*, which predates the *Decenniel Digest*, as well.

Fortunately, all of West's digests use the same system, the topic and key number system. Thus, once an aspiring legal researcher learns to use one digest, she will be able to use all of them.

4.4.2 Using Digests to Find Opinions

As discussed above in section 4.3.3, West editors assign a topic and key number to every headnote they create upon reading cases. Each key number corresponds to a specific legal issue within its topic, and judicial opinions that discuss the same issue will feature the same topic and key number. Please note that each topic in the system begins with key number 1. In other words, West reuses numbers, so knowing key numbers without knowing the corresponding topics does researchers little good. For example, key number 106 under the topic of Torts helps a researcher find opinions discussing the nature and elements of torts in general, while key number 106 under the topic of Criminal Law leads researchers to opinions dealing with the nature of venue in criminal prosecutions. The two issues are unrelated; West has simply reused the number 106 in each of the topics.

If, however, a legal researcher knows the topic and key number that correspond to the issue for which she is looking, she can simply look up the topic and key number in a digest and retrieve a list of cases that have considered the issue in question in the jurisdiction(s) covered by that digest. Furthermore, the digest provides brief summaries of each case so that the researcher can make an informed decision as to which cases she wants to pull from their respective reporters first. Figure 4.4.2a provides an example of a typical digest entry.

As a *caveat*, many West digests have started over in new series, much like the West reporters. For instance, the *Kentucky Digest 2d* continues the *Kentucky Digest*. Similarly, the *Federal Practice Digest* is now onto its 5th series.[100] The key fact to remember about digest series is that they are not cumulative. Therefore, in order to find judicial opinions from the whole range of years available, a researcher must consult all the various series of a particular digest. West publishes an editorial note at the beginning of each volume of a digest providing researchers with notice of the year-range covered by that particular series of the digest.

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[100] The *Federal Practice Digest 5th* is actually the sixth series of the title, as the original *Federal Practice Digest* replaced the precursor *Federal Digest*.

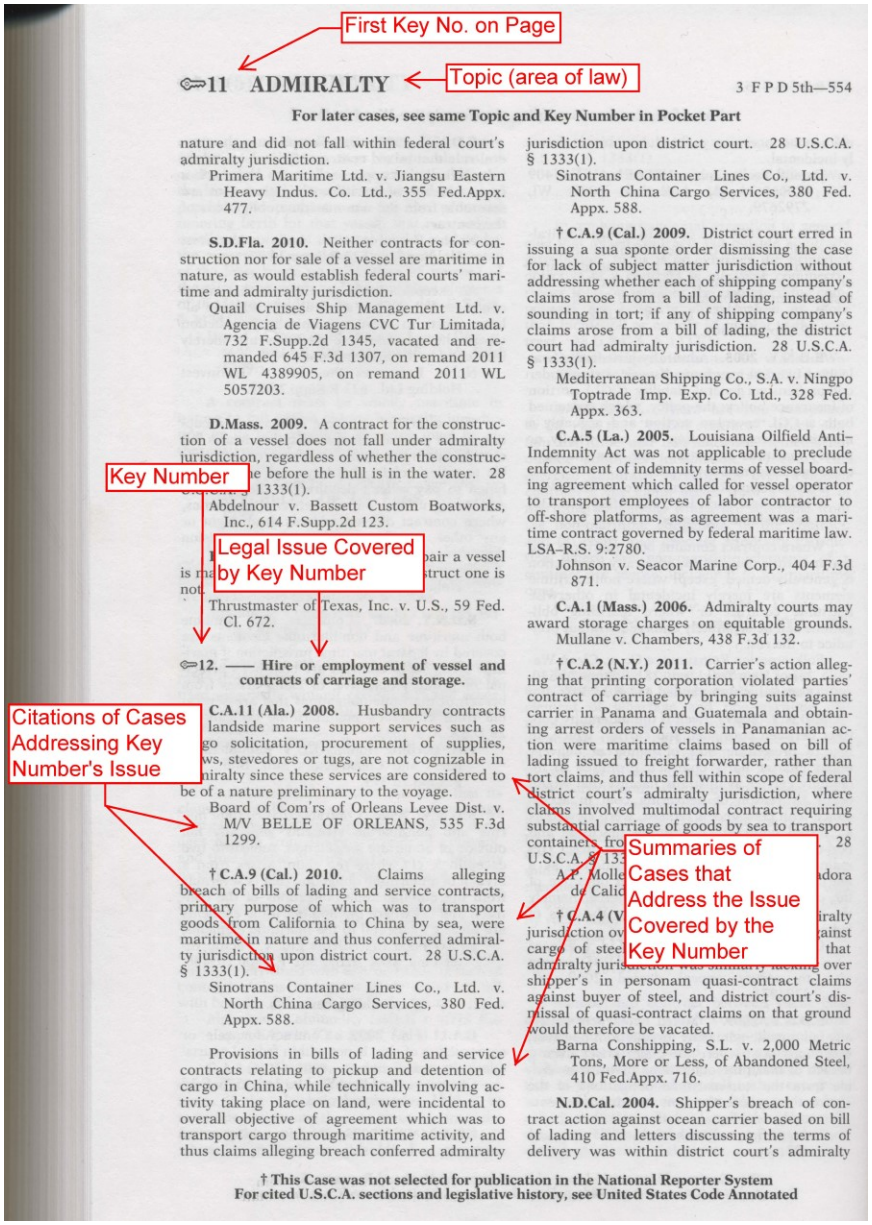


Figure 4.4.2a: Sample Entry from the Federal Practice Digest 5th

Digests act as a powerful tool for finding judicial opinions, but to use them a legal researcher must know the topic and key number that correspond to the legal questions he wants answered. Fortunately, appropriate topics and key numbers can be discovered in several ways.

First of all, as discussed above, every headnote attached to a West-reported case features a corresponding topic and key number. Therefore, if a researcher has discovered one opinion on point, she can lift topics and key numbers from headnotes of interest to discover other cases addressing the same point of law. Similarly, if a researcher has found a relevant statute in an annotated code published by West, then the annotations will likely alert her to any relevant topics and key numbers.

Fortunately, even if a researcher does not already have a topic and key number in mind, West digests provide ways to find topics and key numbers of interest. First, at the end of every digest, a researcher will find an index, termed the Descriptive Word Index, which works almost identically to the indexes accompanying codes. A researcher would look up a general term that covers the legal issue in question. Instead of code sections, however, a digest's index lists topics and key numbers for the various issues and sub-issues. Once a researcher has looked up a term in the index to discover its topic and key number, she can then look up that topic and key number in the corresponding main volume of the digest for a list of cases related to the issue. Note that the index itself does not provide case citations; it must be used in conjunction with the main volumes of the digest.

In addition to providing indexes for digests, West divides all of American law into topics, which it fits into an overarching Outline of the Law. Indeed, the topics from this outline are the same that accompany key numbers, and West places the key numbers themselves onto the outline. West publishes its general outline of the law at the beginning of digest volumes. Additionally, in front of each topic in the digest, West provides a more detailed outline of that specific topic. Thus, legal researchers possess the option of browsing through West's outlines to narrow in on a specific issue's topic and key number, much as researchers might use a code's tables of contents to narrow in on specific sections. Figure 4.4.2b gives readers an idea of what West's Outline of the Law looks like.

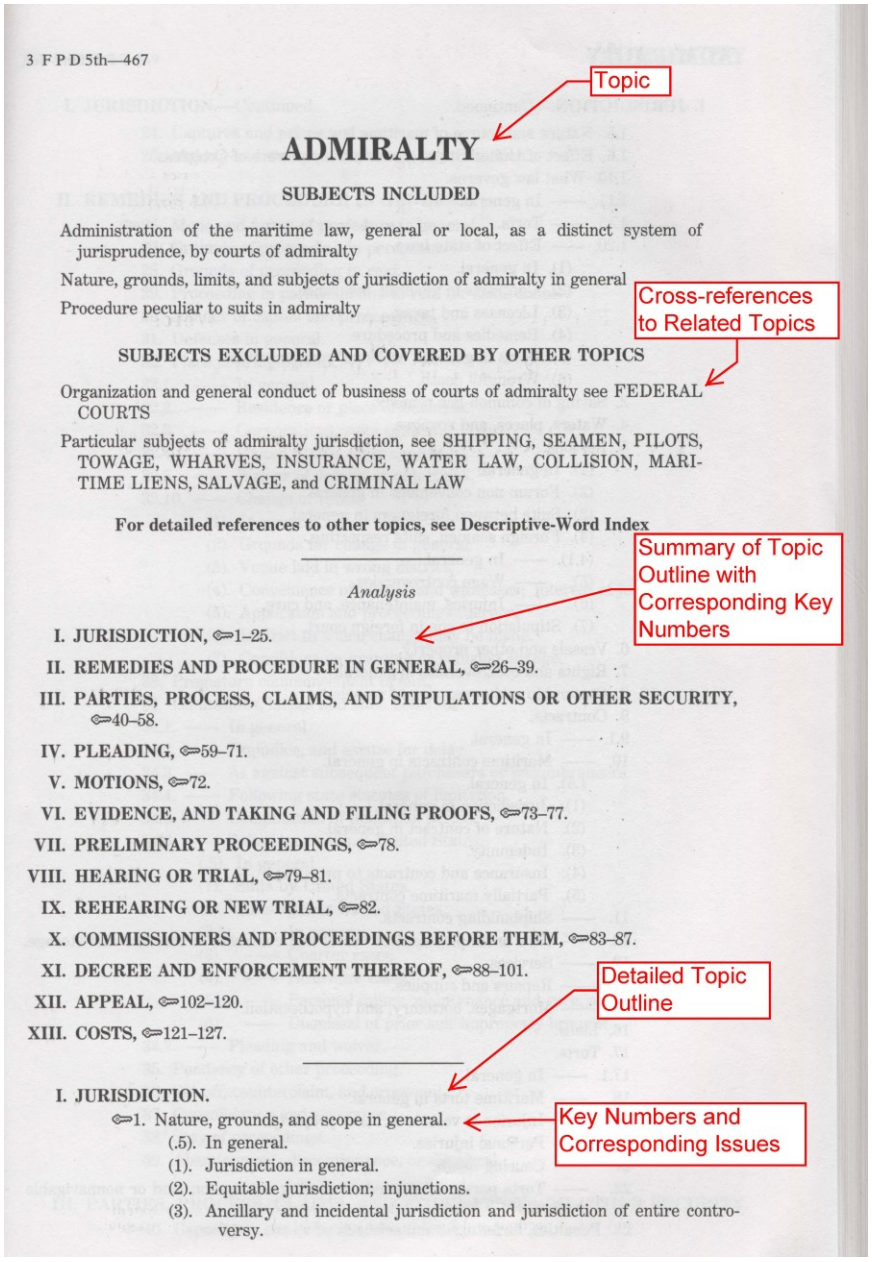


Figure 4.4.2b: An Excerpt of West's Outline of the Law as found in the Federal Practice Digest 5th

By using the Descriptive Word Index or the Outline of the Law, researchers can identify relevant topics and key numbers they can then use to find case citations, which in turn would allow the researcher to pull relevant judicial opinions. Of course, the opinions themselves may lead the researcher to

additional topics and key numbers of interest through the headnotes provided by West. Researchers may then look up the additional topics and key numbers in a digest in order to find additional cases. Thus, the topic and key number system provides a powerful tool for researchers to find judicial opinions.

West digests also provide a couple of other ways to find cases in addition to the topic and key number system. First, digests contain Tables of Cases volumes that allow researchers to look up cases by the name of either party. Second, digests contain Words and Phrases volumes, which allow researchers to look up a specific word or phrase to find opinions using that exact word or phrase. Both Tables of Cases and Words and Phrases volumes, unlike the topic and key number volumes, will provide case cites in addition to the topics and key numbers assigned to the case. While a researcher would need more starting information to use either of these types of volumes, they do provide an alternative access point to caselaw for print researchers and demonstrate the comprehensiveness of West's digest and reporter system.

In fact, as discussed above in section 4.3.4, West's digest and reporter system acted as the sole means of finding precedent for so long that courts deem opinions not published in one of West's reporters to be less than fully precedential. In the modern era of electronic legal research, lawyers more often encounter such "unreported" opinions. Lawyers need to react to such opinions with caution and to avoid using them as key precedent. Indeed, most courts will only consider unreported opinions under certain circumstances. To determine if a court will consider an unreported opinion, legal researchers should consult the court rules for the jurisdiction in question.[101] Thus, understanding West's reporter and digest system remains important even when conducting electronic legal research.

4.4.3 Updating Digests

When a researcher uses a print edition of a digest, she should keep in mind that, like all print materials, individual digest volumes describe the state of the law at a particular moment in time. By its very nature, however, American law constantly changes with every new judicial opinion

[101] Commercial legal publishers generally provide a jurisdiction's Court Rules at the end of its code. Legal researchers may thus find specific court rules by the same methods, described in Chapter 2, with which they would find code provisions.

published. Thus, it becomes necessary for legal researchers to update the information found in print digests.

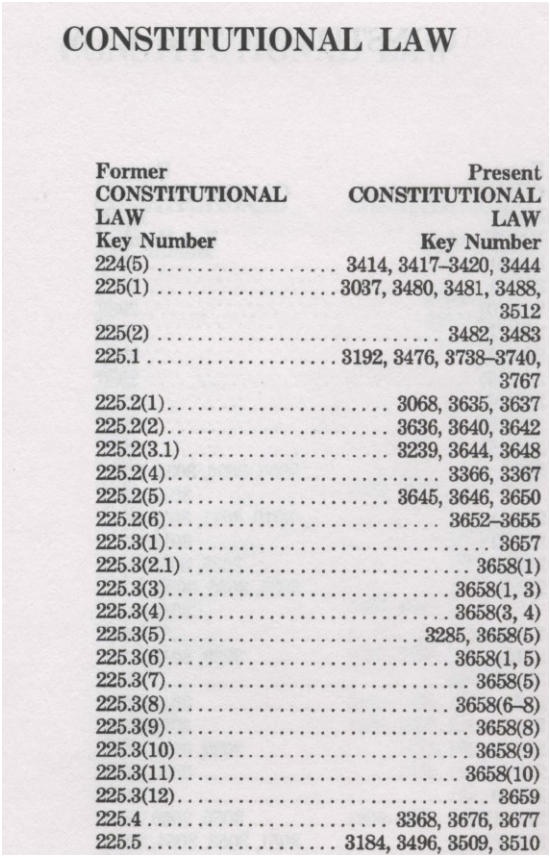
Because lawyers desire consistency in legal publishing, just as they desire consistency in the law, the primary means of updating the information in digests takes the same form as the primary means of updating the information in annotated codes: the pocket part. In fact, pocket parts for digests work in exactly the same way as pocket parts for codes.[102] If a topic and key number appears in the pocket part, then something about it has changed since publication of the main volume. If a topic and key number does not appear in the pocket part, then nothing changed since the publication of the main volume. Additionally, West may have created a new topic and key number since publication of the main volume. In this instance, the topic and key number will appear in its entirety in the pocket part and not at all in the main volume.

West actually updates the Outline of the Law governing the topic and key number system quite frequently. Legal rules or issues may fall out of use, and so key numbers may be dropped. More often, opinions introduce new rules or issues, resulting in the addition of new key numbers. Furthermore, sometimes judicial opinions take a rule from an earlier opinion and expand upon it, or break it into multiple rules. When this happens, West may need to adjust its numbering. When an area of law changes sufficiently, West may even renumber an entire topic.

Renumbered topics often confuse aspiring legal researchers. Feelings of frustration may occur when a researcher has identified a relevant topic and key number from an old case headnote only to discover that the digest no longer contains that topic and key number. Researchers should not panic when this occurs, though, because West includes key number conversion charts at the beginning of every topic which has been renumbered.

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[102] Also like pocket parts for codes, pocket parts for digests will be replaced by softbound supplements should they become too big to fit in a bound volume. Eventually the bound volume itself will be replaced.



CONSTITUTIONAL LAW

Former CONSTITUTIONAL LAW Key Number	Present CONSTITUTIONAL LAW Key Number
224(5)	3414, 3417–3420, 3444
225(1)	3037, 3480, 3481, 3488, 3512
225(2)	3482, 3483
225.1	3192, 3476, 3738–3740, 3767
225.2(1)	3068, 3635, 3637
225.2(2)	3636, 3640, 3642
225.2(3.1)	3239, 3644, 3648
225.2(4)	3366, 3367
225.2(5)	3645, 3646, 3650
225.2(6)	3652–3655
225.3(1)	3657
225.3(2.1)	3658(1)
225.3(3)	3658(1, 3)
225.3(4)	3658(3, 4)
225.3(5)	3285, 3658(5)
225.3(6)	3658(1, 5)
225.3(7)	3658(5)
225.3(8)	3658(6–8)
225.3(9)	3658(8)
225.3(10)	3658(9)
225.3(11)	3658(10)
225.3(12)	3659
225.4	3368, 3676, 3677
225.5	3184, 3496, 3509, 3510

Figure 4.4.3: Excerpt from West's Key Number Translation Table for Constitutional Law

Note that one old key number often becomes multiple key numbers in renumbered topics. Researchers should look at each of the new topics to understand how the law has changed. Note also that West includes key number conversion charts that operate in the reverse direction, *i.e.* new key numbers to old key numbers. West does so because, to find older cases on an issue, a researcher may need to consult earlier series of a digest, since digests are not cumulative. Naturally, the older digest series would not use the new numbering scheme.[103]

[103] Although exceptions exist, West typically does not continue to issue pocket parts for non-current digest series.

4.5 Cases on the Legal Research Platforms

Since West created the national reporter system, researchers can naturally find the cases, complete with headnotes and key numbers, reproduced on Westlaw Edge. Lexis Advance and Bloomberg Law also feature all the opinions found in the reporter system. However, as the editorial material is the intellectual property of West, researchers will not find key numbers on either Lexis Advance or Bloomberg Law. Lexis Advance does feature its own headnote system which functions similarly to West's key number system, albeit without numbers. Bloomberg Law being newer to the game generally does not feature headnotes but merely the opinions themselves.

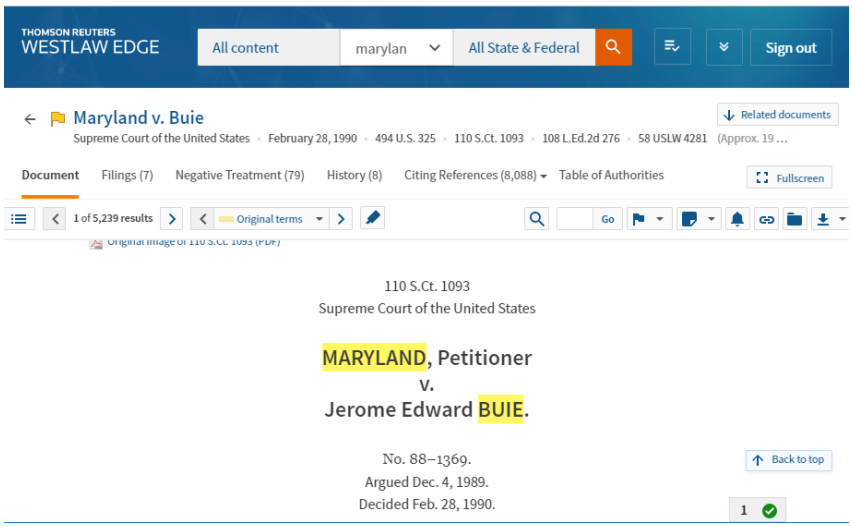


Figure 4.5a – Anatomy of a case on Westlaw Edge. Click here for screencast: https://youtu.be/doJf7MEVQ5Q.

A key difference between cases on the legal research platforms and those in print is that the electronic versions lack pages. While the pageless format is generally good for reading (scrolling allows more continuous reading than having to load a new document for every new page), it is not so good for citation. To allow researchers to provide pin cites to cases, the legal research platforms each provide notations of where new pages would start in print. The notations take the form of page numbers preceded by an asterisk and are commonly called "star pagination." Examples of star pagination can be seen in the screencast accompanying Figure 4.5a.

Another difference in conducting case research electronically is that researchers will not find digests on the legal research platforms. Rather, clicking on a key number (or headnote topic on Lexis Advance) and

selecting a desired jurisdictional filter will directly retrieve all the cases from the selected jurisdiction that the editors have recognized as containing issues related to the topic covered by the key number (or headnote topic).

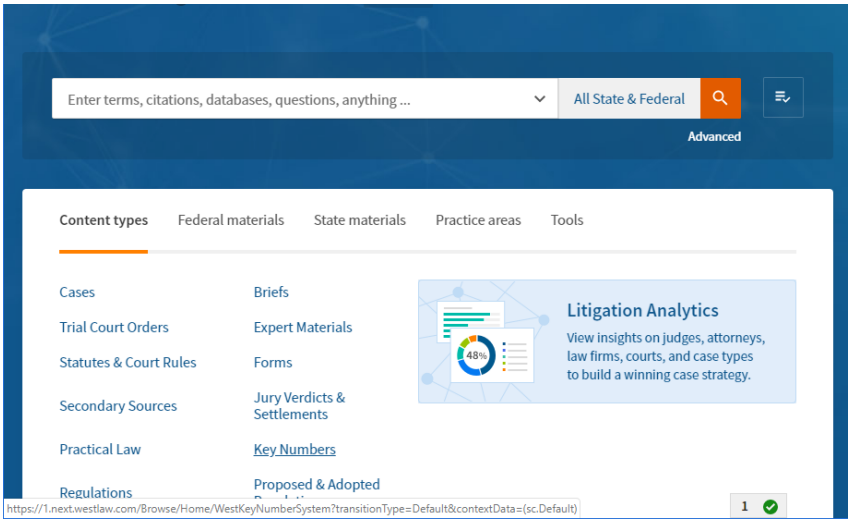


Figure 4.5b – Using topics and key numbers on Westlaw Edge. Click here for screencast: https://youtu.be/gRxe-A2GGlU

The legal research platforms also provide new ways to find relevant judicial opinions that were not possible in the print age. First, legal researchers can enter search terms and have the computer pull opinions related to the terms searched. Researchers also have the option to "search within" results of earlier searches. Note however that overly broad searches, whether from the general search bar or the "search within' search bar, will return too many results to be useful. While all the legal research platforms recognize natural language searching, legal researchers often tailor their search queries by using search operators to pull only the most relevant results. We will go over how to craft well-tailored searches in Chapter 7.

4.6 Concluding Exercises for Chapter 4

Now try your hand at using digests and reporters to find relevant judicial opinions.

4.6.1 Introductory Exercise on Case Research

Hello Team:

We have been retained by Molly Lancaster-Ferguson, owner of Awesome Antiques, to defend her from a pending Federal prosecution. The federal charges stem from an isolated incident in which Ms. Lancaster-Ferguson sold an original 1861 Enfield Rifled Musket (a single-shot, muzzle-loading rifle manufactured in Enfield, England, and imported/smuggled in large quantities to arm Confederate troops during the Civil War), which she had found at a garage sale, to an undercover federal agent posing as an online buyer. To the extent of her recollection, the incident in question is the only time that Ms. Lancaster-Ferguson has ever sold a firearm, and she was unaware that it was illegal to do so. The federal authorities have nonetheless charged her with violating a federal law that requires all dealers of firearms to be properly licensed. She is set to be tried in the Eastern District of Kentucky.

Use the *Federal Practice Digests* (potentially more than one series) to look into the following:

1) Find me a case, preferably binding, on whether an individual who does not know dealing in weapons without a license is against the law can be convicted of the same.

2) Are there any federal cases, binding or persuasive, that have held that one isolated gun sale does not amount to "engaging in the business of dealing in firearms without a license"?

3) Based on your findings, do you think it is likely that we can ultimately get an acquittal?

Thanks,

Ms. Partner

4.6.2 Intermediate Exercise on Case Research

Hello Team:

One of our best clients, Robert Standersen, has made a slightly unusual request of us. Normally, we handle corporate law issues for his orthodontist practice. However, he has asked that we defend his twin children, Brian and Yvette in a criminal conspiracy action being prosecuted by the Commonwealth of Kentucky.

Brian and Yvette are seniors at Tates Creek High School. They were arrested while playing hacky-sack in the parking lot of Henry Clay High School last Thursday night at 11:30 pm. Two other Tates Creek High students, Vic Vandal and Hal Hooligan, were also arrested at approximately the same time. Vandal and Hooligan were caught exiting the locked building of Henry Clay High School in possession of crowbars and several soccer championship trophies stolen from display cases in the school's hallway.

Neither Vandal nor Hooligan implicated the Standersen twins in the burglary, so the state's case of conspiracy to commit burglary against the twins consists solely of the following pieces of circumstantial evidence:

- Brian and Yvette are classmates of Vandal and Hooligan at Tates Creek High School and were found at the scene of the crime.
- Tates Creek and Henry Clay are soccer rivals. Their annual game occurred the night after the incident in question.

The Commonwealth's Attorneys are advancing the theory that Brian and Yvette were "standing watch" for Vandal and Hooligan. I need you all to find post-1974, **binding** caselaw (Kentucky's current penal code was enacted in 1974) to answer the following questions:

1. Is circumstantial evidence alone enough for a conspiracy conviction in Kentucky?
2. Is merely being present at the scene of a crime sufficient for a conspiracy conviction in Kentucky?
3. Is the Commonwealth likely to succeed in its prosecution? Why or why not?

Thanks,

Ms. Partner

4.6.3 Advanced Exercise on Case Research

Hello Team:

As you are no doubt aware, we represent Bob "Bubba" Hicklin (founder and CEO of Black Sky Coal) for most of his legal needs. One of Mr. Hicklin's hobbies is breeding and training Bluetick Coonhounds. Seventeen years ago, he purchased a large tract of land along the Tennessee-North Carolina border which he has used since then as his dogs' breeding/training ground. Unfortunately, Mr. Hicklin did not survey his lands correctly (he did it himself, another hobby), and the rather large kennel he built at great cost actually lies on lands owned by the Cherokee Nation of North Carolina.

The Cherokee have now initiated a legal action against Hicklin for the land and the kennel in the U.S. District Court for the Western District of North Carolina. While the Cherokee Nation does appear to hold title to the land in question, I would like to be able to use the doctrine of adverse possession as a defense. However, I'm not sure if I can use North Carolina's adverse possession laws against the Cherokee as tribal lands fall at least partially under federal jurisdiction. I need you to:

1. Find me a case from the past 30 years or so (we don't want anything decided before the Indian Civil Rights Movement in the 70s), preferably binding over the Western District of North Carolina, which answers whether or not a state adverse possession defense can be used against Indian lands?
2. Assuming that you find a relevant case, does it tip you off to any other topics/keynumbers that we might want to look at that pertain specifically to Indians and land title? (Keep in mind that nobody at the firm has an expertise in Indian law, so basic definitions might be helpful.) What topics and keynumbers will be most useful to us?
3. Applying relevant authorities to our facts, are we ultimately likely to succeed? Why or why not?

Thanks,

Ms. Partner

4.7 Recommended CALI Lessons for Further Practice

CALI hosts an impressive number of interactive lessons on its website. The following lessons on researching cases in print touch upon material covered in this chapter. They would be a great place to start for students looking for further practice on the concepts introduced in this chapter!

4.7.1 "Anatomy of a Case" by Brian Huddleston

Summary: an introduction to cases as they appear in reporters.

Lesson ID: LR47

URL: http://www.cali.org/lesson/834

4.7.2 "How to Find Case Law Using the Digests" by Brian Huddleston

Summary: an overview of researching in print using the digest and reporter system.

Lesson ID: LWR29

URL: http://www.cali.org/lesson/588

Chapter 5

Administrative Regulations

> I'm not the smartest fellow in the world, but I can sure pick smart colleagues. – Franklin Delano Roosevelt

> Let us never forget that government is ourselves and not an alien power over us. The ultimate rulers of our democracy are not a President and senators and congressmen and government officials, but the voters of this country. – Franklin Delano Roosevelt

5.1 Learning Objectives for Chapter 5

In working through this chapter, students should strive to be able to:

- Describe the origins and authority of administrative regulations as a source of law.
- Assess the primary publications of federal administrative legal materials: the *Code of Federal Regulations* and the *Federal Register*.
- Appreciate the similarities and differences between federal administrative regulations and state administrative regulations.
- Evaluate the various pieces of information provided in regulatory publications.
- Evaluate the use of administrative notices, administrative decisions, and other administrative materials in interpreting administrative regulations.

5.2 Delegated Rule-Making Authority

As discussed in Chapter 1, each branch of government under a Separation of Powers system creates its own source of law. In Chapters 3 and 4, we covered the sources of law that most lay-people would recognize as law: constitutions, statutes, and judicial opinions. However, in the American legal system, the executive branch also contributes rules to the body of law.

Executive-made rules take the form of administrative regulations, which various executive departments, agencies, and commissions issue under an explicit delegation of rule-making authority from the legislature. Essentially, the legislature passes a statute with a broad aim, and then delegates a particular agency of expertise to provide more specific rules aimed at achieving the broad goal. Lawyers call a statute that creates an agency to regulate a particular area an "organic statute" or "organic act."[104] Similarly, an "enabling statute" delegates additional authority to an already existing agency.[105] Both organic statutes and enabling statutes establish broad aims desired by the legislature and create mechanisms for agencies to provide the details. As such, regulations tend to be much more specific in nature than statutes.

Executive agencies possessing delegated legislative authority have existed in the Anglo-American legal tradition at least since the 1530s, which happens to be when people also first began recognizing the primacy of legislative rule-making authority to begin with.[106] Since their introduction in Tudor times, however, executive branches tended to exercise delegated rule-making authority somewhat sparingly for the next four centuries or so.

Then, in response to the Great Depression in the U.S., the creation of executive agencies and the use of administrative regulations exploded with the New Deal of the 1930s. The Roosevelt administration pushed for the creation of a veritable "alphabet soup" of federal agencies, partially as an act of job creation, but partially as a way of modernizing the U.S. economy.[107]

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[104] *See* BLACK'S LAW DICTIONARY 1634 (10th ed. 2014).

[105] *See* BLACK'S LAW DICTIONARY 1634 (10th ed. 2014).

[106] *See generally* G. R. ELTON, THE TUDOR REVOLUTION IN GOVERNMENT; ADMINISTRATIVE CHANGES IN THE REIGN OF HENRY VIII (1953).

[107] For a riveting account of Roosevelt's life and Presidency, *see* H. W. BRANDS, TRAITOR TO HIS CLASS: THE PRIVILEGED LIFE AND RADICAL PRESIDENCY OF FRANKLIN DELANO ROOSEVELT (2008).

However, increasing the amount of regulatory output under delegated authority raised concerns about democracy and due process. After all, many of the experts who draft rules for agencies are directly hired by the agency in question and were not elected by voters. In order to assuage these concerns, the federal government developed a unique system of publication of regulations that allows citizens to comment on proposed regulations before they go into effect. The publication system became formalized by statute in 1946.[108]

State executive branches likewise often issue copious amounts of regulations in the modern era. Furthermore, state publication of administrative regulations tends to follow the federal model, albeit on a more limited scale. As the federal system of regulation promulgation remains the most sophisticated, we will begin by taking a closer look at federal regulations.

5.3 Researching Federal Regulations

As discussed above, the federal government follows a regimented publication procedure for administrative regulations in order to comport with due process. In fact, the federal Government Publishing Office (GPO) issues three separate publications related to regulatory research: the *Code of Federal Regulations* (C.F.R.), the *List of Sections Affected* (L.S.A.), and the *Federal Register* (F.R.). Of the three publications, the C.F.R. allows legal researchers to look up regulations by topic most easily, while the F.R. contains the most background information beyond the regulations themselves. The L.S.A. is used primarily to update C.F.R. sections; think of it as a multi-volume pocket part. The federal government also creates electronic copies of the C.F.R. and F.R., but as the system developed in print, we will introduce it in print in order that students may easily see the interactions between the various pieces of the system.

5.3.1 The C.F.R.

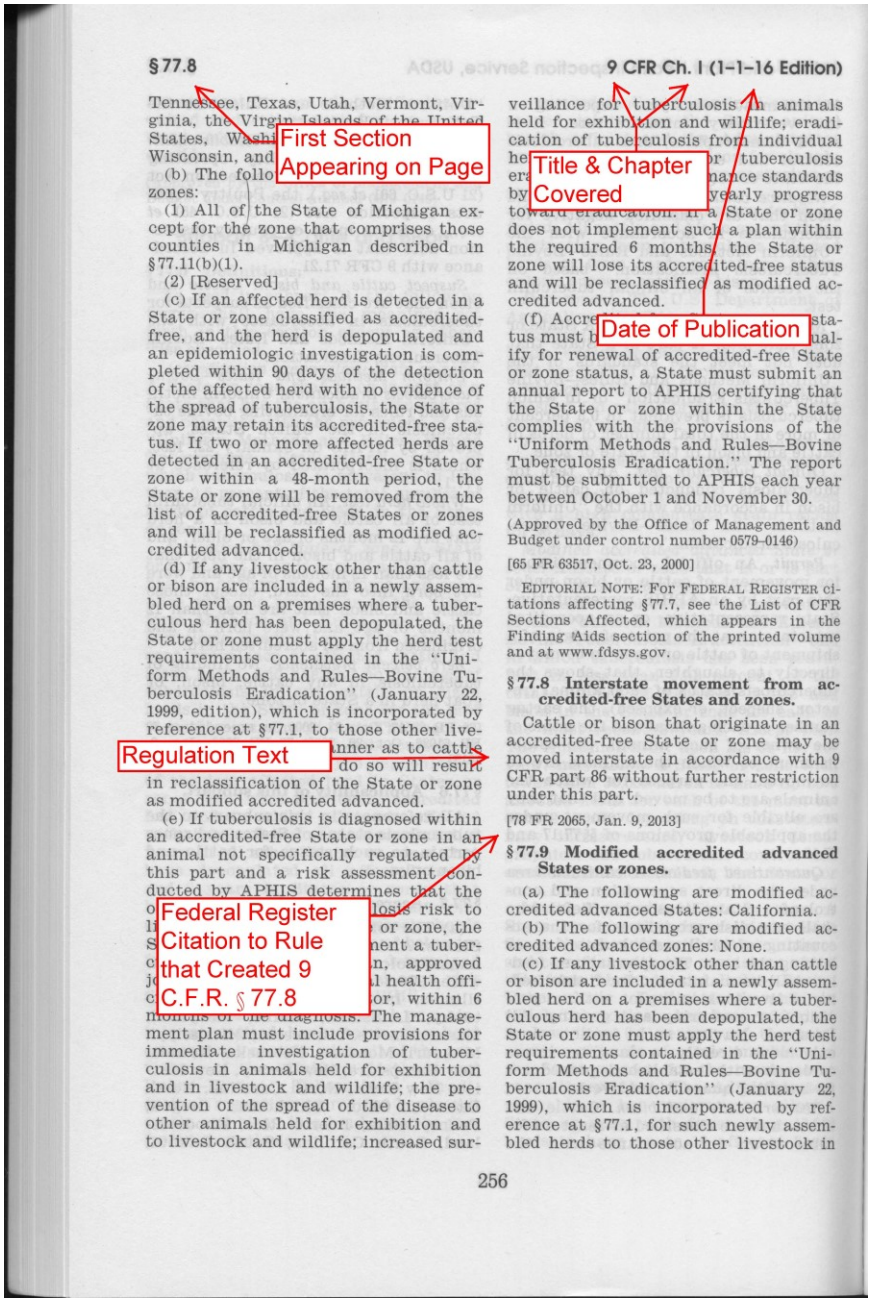
As the use of the word "code" in its title implies, the C.F.R. contains all federal regulations currently in force, neatly arranged in topical order. What the U.S.C. is for federal statutes, the C.F.R. is for federal regulations. In fact, the two publications share the same basic structure: sections as

[108] Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2012)).

building blocks, housed in chapters/sub-chapters, which in turn get grouped into titles. However, because of the dense nature of regulations, the C.F.R. makes use of an additional unit of organization in between the section and chapter levels. This unit is called a "part." (Sometimes "subparts" will also be included.) Nonetheless, the citation of a federal regulation looks substantially similar to the citation of a federal statute: title number, C.F.R., section number. A researcher would pull a regulation by citation just as he would pull a statute by citation.

Legal researchers also go about finding regulations on a specific topic in the same ways they would go about finding statutes on a specific topic. Like the U.S.C., the C.F.R. features a series of increasingly-detailed tables of contents. Also like the U.S.C., the C.F.R. includes an index that researchers may use to look up specific terms, though researchers should remember that sometimes a specific term will be located as a subset under a more general index term. Thus, though the source of law differs, researchers should generally use the same methods of research covered in Chapter 3 for codes to discover a specific section within the C.F.R.

However, once a researcher has opened a C.F.R. section, he will note some key differences, as well as some similarities. Figure 5.3.1a provides an excerpt from the C.F.R. The first thing the reader probably notices about the regulation is the incredible level of detail provided, especially compared to typical statutory language. This language is typical in regulations. Second, note the lack of annotations. Because regulations change quickly and possess such a high level of detail, commercial publishers do not reprint them, and thus no one provides editorial content. Finally, note that, like the U.S.C., the C.F.R. provides researchers with citations to each section's creating and amending documents. In the C.F.R., these cites refer the researcher to the *Federal Register*, which will be discussed in section 5.3.3 below.



§ 77.8 9 CFR Ch. I (1–1–16 Edition)

Tennessee, Texas, Utah, Vermont, Virginia, the Virgin Islands of the United States, Wash... Wisconsin, and...

(b) The follo... zones:

(1) All of the State of Michigan except for the zone that comprises those counties in Michigan described in § 77.11(b)(1).

(2) [Reserved]

(c) If an affected herd is detected in a State or zone classified as accredited-free, and the herd is depopulated and an epidemiologic investigation is completed within 90 days of the detection of the affected herd with no evidence of the spread of tuberculosis, the State or zone may retain its accredited-free status. If two or more affected herds are detected in an accredited-free State or zone within a 48-month period, the State or zone will be removed from the list of accredited-free States or zones and will be reclassified as modified accredited advanced.

(d) If any livestock other than cattle or bison are included in a newly assembled herd on a premises where a tuberculous herd has been depopulated, the State or zone must apply the herd test requirements contained in the "Uniform Methods and Rules—Bovine Tuberculosis Eradication" (January 22, 1999, edition), which is incorporated by reference at § 77.1, to those other live... ...nner as to cattle ... do so will result in reclassification of the State or zone as modified accredited advanced.

(e) If tuberculosis is diagnosed within an accredited-free State or zone in an animal not specifically regulated by this part and a risk assessment conducted by APHIS determines that the ...losis risk to ... or zone, the ...ment a tuber... ...n, approved ...l health offi... ...or, within 6 months of the diagnosis. The management plan must include provisions for immediate investigation of tuberculosis in animals held for exhibition and in livestock and wildlife; the prevention of the spread of the disease to other animals held for exhibition and to livestock and wildlife; increased surveillance for tuberculosis ... animals held for exhibition and wildlife; eradication of tuberculosis from individual he... ...or tuberculosis er... ...nance standards by ... ...yearly progress toward eradication. If a State or zone does not implement such a plan within the required 6 months, the State or zone will lose its accredited-free status and will be reclassified as modified accredited advanced.

(f) Accre... ...sta... tus must b... ...ual... ify for renewal of accredited-free State or zone status, a State must submit an annual report to APHIS certifying that the State or zone within the State complies with the provisions of the "Uniform Methods and Rules—Bovine Tuberculosis Eradication." The report must be submitted to APHIS each year between October 1 and November 30.

(Approved by the Office of Management and Budget under control number 0579–0146)

[65 FR 63517, Oct. 23, 2000]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 77.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.fdsys.gov.

§ 77.8 Interstate movement from accredited-free States and zones.

Cattle or bison that originate in an accredited-free State or zone may be moved interstate in accordance with 9 CFR part 86 without further restriction under this part.

[78 FR 2065, Jan. 9, 2013]

§ 77.9 Modified accredited advanced States or zones.

(a) The following are modified accredited advanced States: California.

(b) The following are modified accredited advanced zones: None.

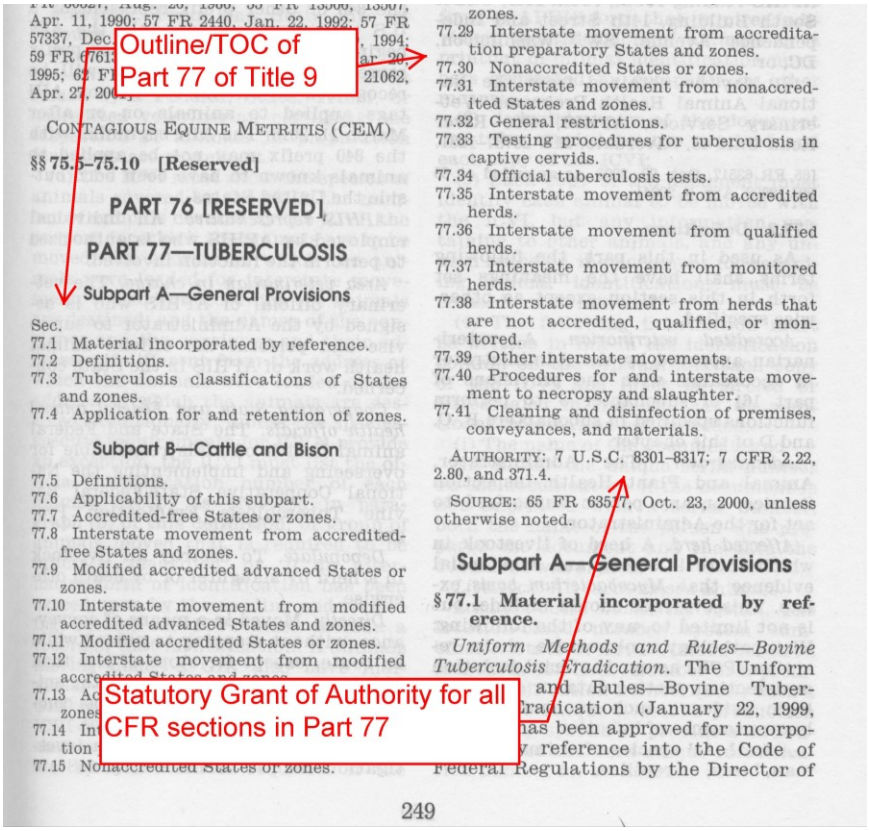
(c) If any livestock other than cattle or bison are included in a newly assembled herd on a premises where a tuberculous herd has been depopulated, the State or zone must apply the herd test requirements contained in the "Uniform Methods and Rules—Bovine Tuberculosis Eradication" (January 22, 1999), which is incorporated by reference at § 77.1, for such newly assembled herds to those other livestock in

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Figure 5.3.1a: Excerpt from the Code of Federal Regulations

Upon locating a relevant regulation, a good researcher will then flip to the beginning of the part in which it appears. For instance, the regulation in

Figure 5.3.1a, 9 C.F.R. § 77.8, may be found in Subpart B of Part 77 of Subchapter C of Chapter 1 of Title 9 of the *Code of Federal Regulations*.[109] An excerpt from the beginning of said Part 77 appears in Figure 5.3.1b. A good researcher would then do two things. First, he would scan the part's table of contents for other sections that may affect his client, including any definitions or general provisions section. Second, he would look for the statutory grant of authority for the regulations in question. Remember, regulations are issued upon delegated authority. The organic and enabling statutes that did the delegating provide additional necessary avenues of inquiry when researching situations governed by regulations.



Apr. 11, 1990; 57 FR 2440, Jan. 22, 1992; 57 FR 57337, Dec. , 1994; 59 FR 67613, ar. 29, 1995; 62 FR 21062, Apr. 27, 200

CONTAGIOUS EQUINE METRITIS (CEM)

§§ 75.5–75.10 [Reserved]

PART 76 [RESERVED]

PART 77—TUBERCULOSIS

Subpart A—General Provisions

Sec.
77.1 Material incorporated by reference.
77.2 Definitions.
77.3 Tuberculosis classifications of States and zones.
77.4 Application for and retention of zones.

Subpart B—Cattle and Bison

77.5 Definitions.
77.6 Applicability of this subpart.
77.7 Accredited-free States or zones.
77.8 Interstate movement from accredited-free States and zones.
77.9 Modified accredited advanced States or zones.
77.10 Interstate movement from modified accredited advanced States and zones.
77.11 Modified accredited States or zones.
77.12 Interstate movement from modified accredited States and zones.
77.13 Ac zones.
77.14 In tion
77.15 Nonaccredited States or zones.

zones.
77.29 Interstate movement from accreditation preparatory States and zones.
77.30 Nonaccredited States or zones.
77.31 Interstate movement from nonaccredited States and zones.
77.32 General restrictions.
77.33 Testing procedures for tuberculosis in captive cervids.
77.34 Official tuberculosis tests.
77.35 Interstate movement from accredited herds.
77.36 Interstate movement from qualified herds.
77.37 Interstate movement from monitored herds.
77.38 Interstate movement from herds that are not accredited, qualified, or monitored.
77.39 Other interstate movements.
77.40 Procedures for and interstate movement to necropsy and slaughter.
77.41 Cleaning and disinfection of premises, conveyances, and materials.

AUTHORITY: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

SOURCE: 65 FR 63517, Oct. 23, 2000, unless otherwise noted.

Subpart A—General Provisions

§ 77.1 Material incorporated by reference.

Uniform Methods and Rules—Bovine Tuberculosis Eradication. The Uniform and Rules—Bovine Tuber- radication (January 22, 1999, has been approved for incorpo- reference into the Code of Federal Regulations by the Director of

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Figure 5.3.1b: Front matter to Part 77 of C.F.R. Title 9, showing the statutory grant of authority and a portion of the table of contents, or outline, for Part 77.

[109] Readers have been warned, repeatedly, about the highly dense and technical nature of regulations. The same also applies to C.F.R. organization.

Thus, the C.F.R. provides a mostly self-contained means to research federal regulations currently in force. Although the G.P.O. publishes each title of the C.F.R. annually, as a print source it captures only a specific moment in time. Because regulations tend to change rapidly, legal researchers should make sure to update any applicable regulations using the second of the federal regulatory publications: the L.S.A.

5.3.2 The L.S.A.

As mentioned above, the *List of Sections Affected* essentially functions as a giant pocket part to the C.F.R. In fact, the L.S.A. really does what its name suggests; it lists sections of the C.F.R. that have been affected by regulations issued after the last printing of the C.F.R. title in which the section appears.[110] An excerpt from the L.S.A. appears in Figure 5.3.2.

[110] Each title of the C.F.R. gets published annually, but the exact date of publication varies by title: Titles 1-16, January 1; Titles 17-27, April 1; Titles 28-41, July 1; Titles 42-50, October 1. Also, by "1" of each month, we mean the first business day of each month.

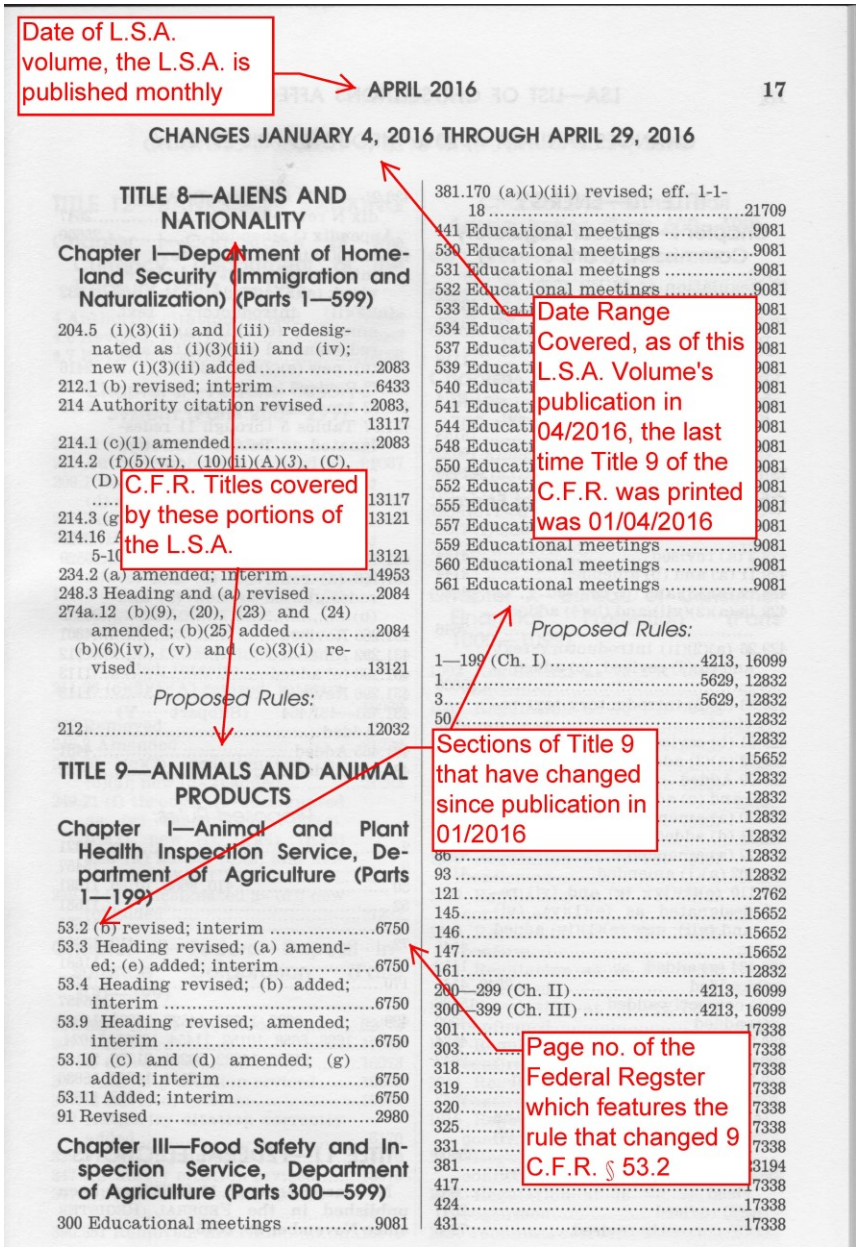


Figure 5.3.2: Excerpt from the List of Sections Affected

Note that only C.F.R. sections that have indeed been affected by subsequent regulation appear in the L.S.A. Thus, if a C.F.R. section does not appear in the L.S.A., then it has not changed and a researcher is free to rely upon the version discovered in the C.F.R. itself.

Note also that if a C.F.R. section does appear in the L.S.A., meaning that the text of the regulation has changed since publication, the L.S.A. does not actually reproduce the updated text of the changed regulation.[111] Rather, the L.S.A. refers the researcher to the number of the page upon which the researcher can find the updated text. These page numbers refer to pages of the third of the federal regulatory publications, the *Federal Register*.

5.3.3 The F.R.

The *Federal Register* contains much more information than the other federal regulatory publications. It also predates the C.F.R. by more than a decade and serves as the primary means by which regulations satisfy due process. The GPO publishes the F.R. daily.[112] The F.R.'s pages number consecutively per year, meaning that the F.R. issue published on January 2 begins with page 1, while page numbers in December issues often approach 6 digits. The consecutive pagination is what allows the L.S.A. to cite the F.R. solely by page number. Other citations to the F.R. proceed as normal: volume number (each year's run constitutes a separate volume), F.R., page number.

When a federal administrative agency wishes to change a regulation or issue a new regulation, it first issues the regulation as a Proposed Rule in the *Federal Register*. Proposed rules provide details on why the regulatory change is needed and give citizens the opportunity to comment upon the proposed rule. Thus, the *Federal Register*'s primary purpose is satisfying due process. The F.R. features its own index which can be used to find rules by topic. Figure 5.3.3a provides an excerpt from a proposed rule. Please note, however, that most proposed rules comprise multiple pages.

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[111] This is where the pocket part analogy breaks down.

[112] Meaning, of course, business days.

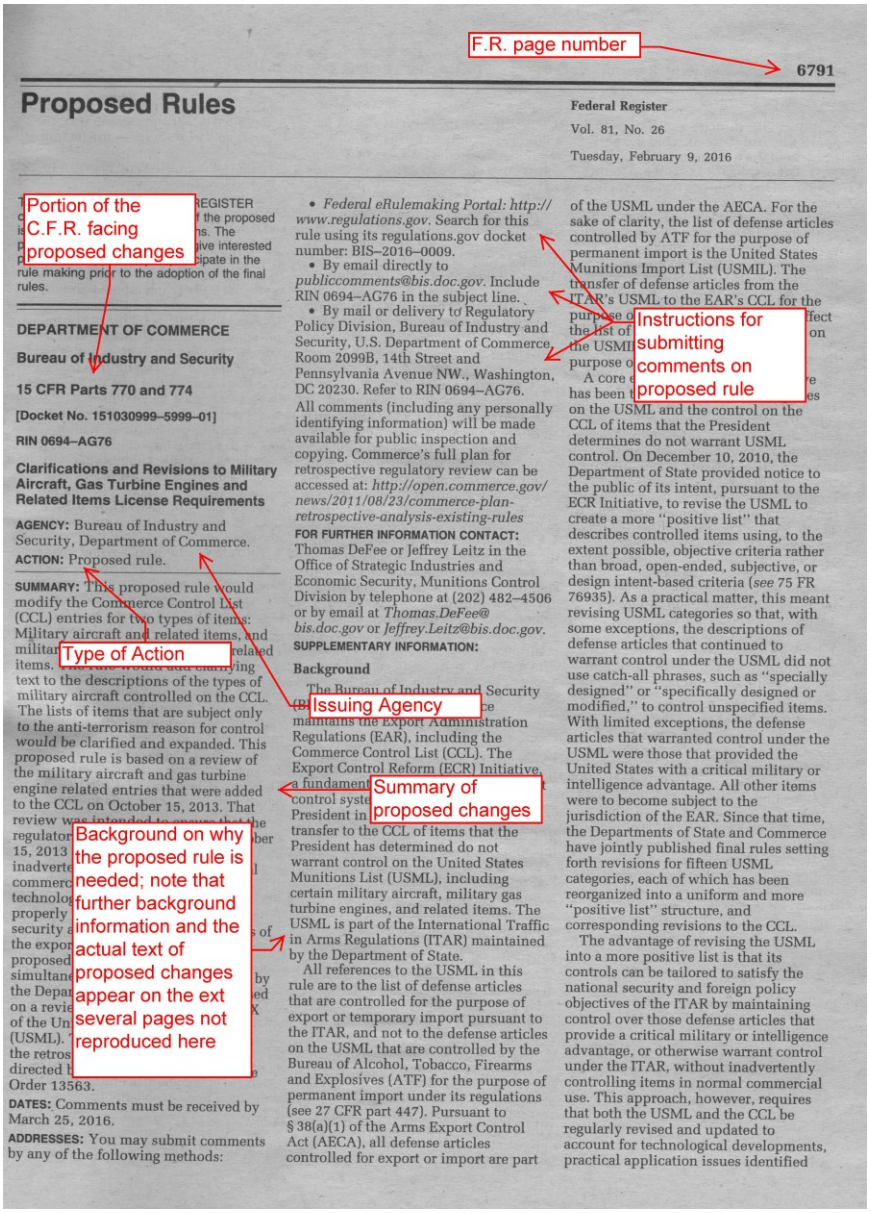
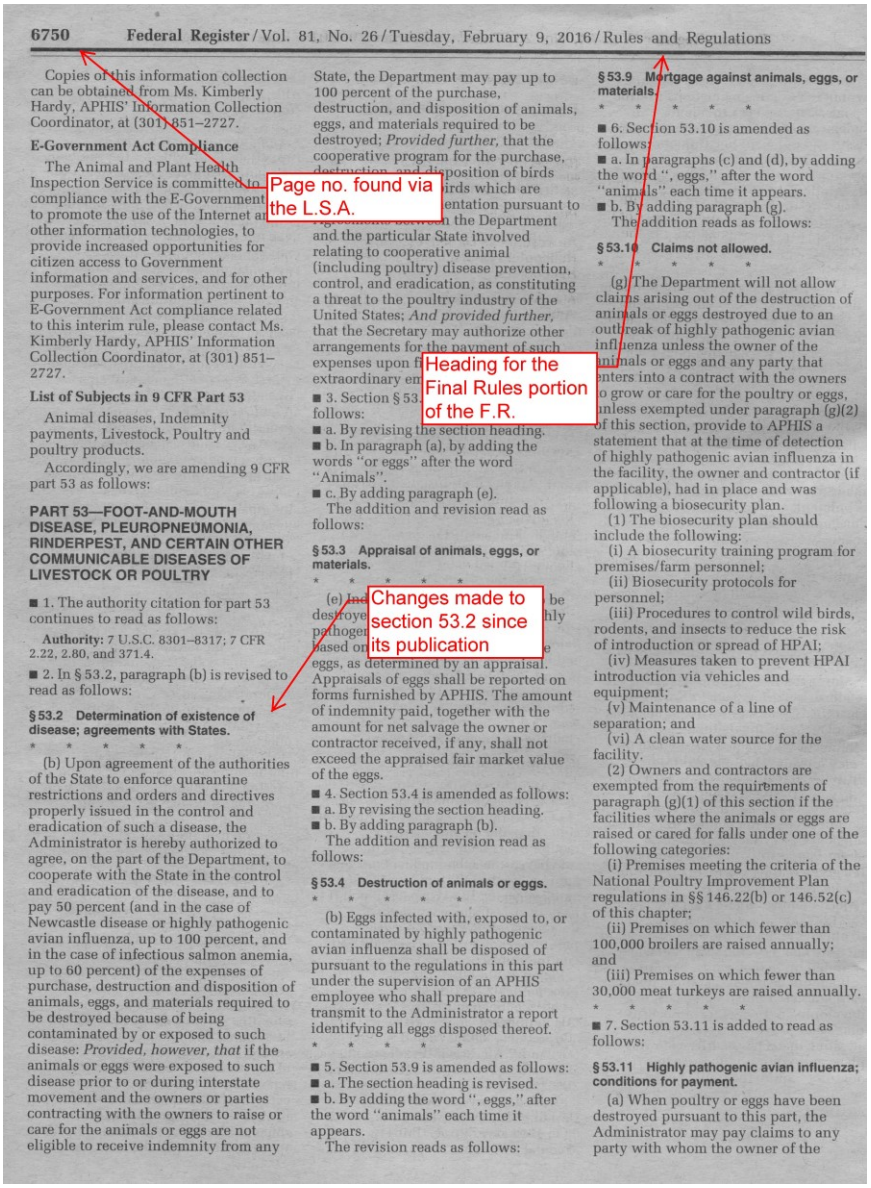


Figure 5.3.3a: Excerpt from a Proposed Rule in the Federal Register

In addition to proposed rules, agencies also publish final rules in the *Federal Register*. For instance, after an agency assesses all the comments submitted on a proposed rule, it will make necessary changes and issue it as a final rule. Final rules are then incorporated into the C.F.R. at the appropriate section as regulations. Because the F.R. publishes the final rules, it works in

conjunction with the L.S.A. to update C.F.R. sections. Figure 5.3.3b shows the final rule in the F.R. alluded to by the L.S.A. in Figure 5.3.2.



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Copies of this information collection can be obtained from Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2727.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this interim rule, please contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2727.

List of Subjects in 9 CFR Part 53

Animal diseases, Indemnity payments, Livestock, Poultry and poultry products.

Accordingly, we are amending 9 CFR part 53 as follows:

PART 53—FOOT-AND-MOUTH DISEASE, PLEUROPNEUMONIA, RINDERPEST, AND CERTAIN OTHER COMMUNICABLE DISEASES OF LIVESTOCK OR POULTRY

■ 1. The authority citation for part 53 continues to read as follows:

Authority: 7 U.S.C. 8301–8317; 7 CFR 2.22, 2.80, and 371.4.

■ 2. In § 53.2, paragraph (b) is revised to read as follows:

§ 53.2 Determination of existence of disease; agreements with States.

* * * * *

(b) Upon agreement of the authorities of the State to enforce quarantine restrictions and orders and directives properly issued in the control and eradication of such a disease, the Administrator is hereby authorized to agree, on the part of the Department, to cooperate with the State in the control and eradication of the disease, and to pay 50 percent (and in the case of Newcastle disease or highly pathogenic avian influenza, up to 100 percent, and in the case of infectious salmon anemia, up to 60 percent) of the expenses of purchase, destruction and disposition of animals, eggs, and materials required to be destroyed because of being contaminated by or exposed to such disease: *Provided, however, that* if the animals or eggs were exposed to such disease prior to or during interstate movement and the owners or parties contracting with the owners to raise or care for the animals or eggs are not eligible to receive indemnity from any State, the Department may pay up to 100 percent of the purchase, destruction, and disposition of animals, eggs, and materials required to be destroyed; *Provided further,* that the cooperative program for the purchase, destruction, and disposition of birds which are entation pursuant to the Department and the particular State involved relating to cooperative animal (including poultry) disease prevention, control, and eradication, as constituting a threat to the poultry industry of the United States; *And provided further,* that the Secretary may authorize other arrangements for the payment of such expenses upon f extraordinary en

■ 3. Section § 53 follows:

■ a. By revising the section heading.

■ b. In paragraph (a), by adding the words "or eggs" after the word "Animals".

■ c. By adding paragraph (e).

The addition and revision read as follows:

§ 53.3 Appraisal of animals, eggs, or materials.

* * * * *

(e) In be destroye hly pathoge e based on eggs, as determined by an appraisal. Appraisals of eggs shall be reported on forms furnished by APHIS. The amount of indemnity paid, together with the amount for net salvage the owner or contractor received, if any, shall not exceed the appraised fair market value of the eggs.

■ 4. Section 53.4 is amended as follows:

■ a. By revising the section heading.

■ b. By adding paragraph (b).

The addition and revision read as follows:

§ 53.4 Destruction of animals or eggs.

* * * * *

(b) Eggs infected with, exposed to, or contaminated by highly pathogenic avian influenza shall be disposed of pursuant to the regulations in this part under the supervision of an APHIS employee who shall prepare and transmit to the Administrator a report identifying all eggs disposed thereof.

* * * * *

■ 5. Section 53.9 is amended as follows:

■ a. The section heading is revised.

■ b. By adding the word ", eggs," after the word "animals" each time it appears.

The revision reads as follows:

§ 53.9 Mortgage against animals, eggs, or materials.

* * * * *

■ 6. Section 53.10 is amended as follows:

■ a. In paragraphs (c) and (d), by adding the word ", eggs," after the word "animals" each time it appears.

■ b. By adding paragraph (g).

The addition reads as follows:

§ 53.10 Claims not allowed.

* * * * *

(g) The Department will not allow claims arising out of the destruction of animals or eggs destroyed due to an outbreak of highly pathogenic avian influenza unless the owner of the animals or eggs and any party that enters into a contract with the owners to grow or care for the poultry or eggs, unless exempted under paragraph (g)(2) of this section, provide to APHIS a statement that at the time of detection of highly pathogenic avian influenza in the facility, the owner and contractor (if applicable), had in place and was following a biosecurity plan.

(1) The biosecurity plan should include the following:

(i) A biosecurity training program for premises/farm personnel;

(ii) Biosecurity protocols for personnel;

(iii) Procedures to control wild birds, rodents, and insects to reduce the risk of introduction or spread of HPAI;

(iv) Measures taken to prevent HPAI introduction via vehicles and equipment;

(v) Maintenance of a line of separation; and

(vi) A clean water source for the facility.

(2) Owners and contractors are exempted from the requirements of paragraph (g)(1) of this section if the facilities where the animals or eggs are raised or cared for falls under one of the following categories:

(i) Premises meeting the criteria of the National Poultry Improvement Plan regulations in §§ 146.22(b) or 146.52(c) of this chapter;

(ii) Premises on which fewer than 100,000 broilers are raised annually; and

(iii) Premises on which fewer than 30,000 meat turkeys are raised annually.

* * * * *

■ 7. Section 53.11 is added to read as follows:

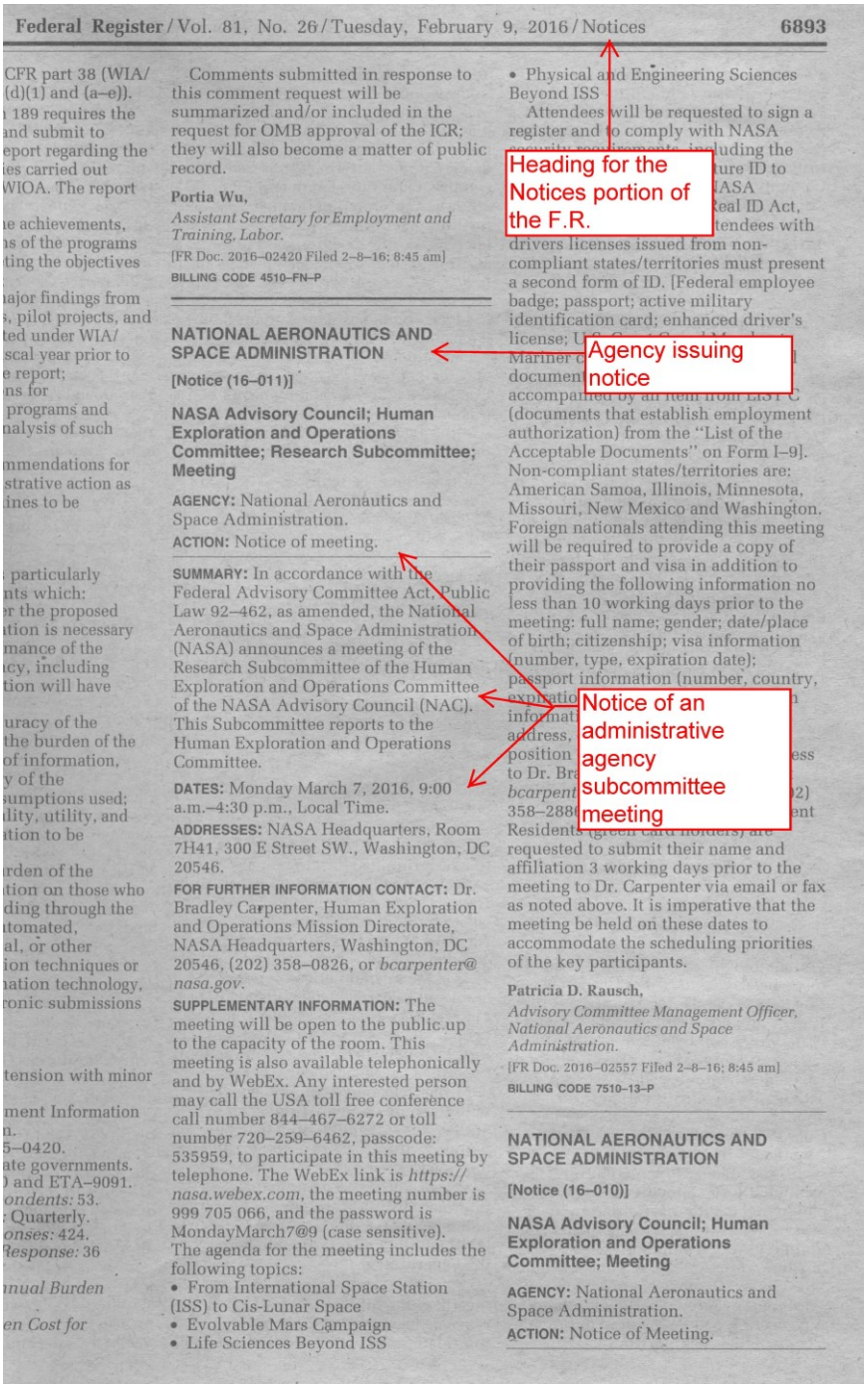
§ 53.11 Highly pathogenic avian influenza; conditions for payment.

(a) When poultry or eggs have been destroyed pursuant to this part, the Administrator may pay claims to any party with whom the owner of the

Figure 5.3.3b: A Final Rule in the Federal Register

Because of the publication of final rules, researchers may also use old editions of the *Federal Register* to find former versions of federal regulations, much as researchers may use session laws to find former versions of statutes.

In addition to proposed and final rules, the *Federal Register* also allows administrative departments and agencies to publish "notices" if they want the public to be aware of a particular issue. Often notices describe administrative hearings or orders, but agencies can use them to provide the public with materials that detail the application of administrative rules. Notices themselves do not carry the force of law but can often offer researchers helpful guidance as to how an agency applies its regulations. Figure 5.3.3c shows an example of a notice in the *Federal Register*.



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Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

Portia Wu,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2016–02420 Filed 2–8–16; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (16–011)]

NASA Advisory Council; Human Exploration and Operations Committee; Research Subcommittee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–462, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Research Subcommittee of the Human Exploration and Operations Committee of the NASA Advisory Council (NAC). This Subcommittee reports to the Human Exploration and Operations Committee.

DATES: Monday March 7, 2016, 9:00 a.m.–4:30 p.m., Local Time.

ADDRESSES: NASA Headquarters, Room 7H41, 300 E Street SW., Washington, DC 20546.

FOR FURTHER INFORMATION CONTACT: Dr. Bradley Carpenter, Human Exploration and Operations Mission Directorate, NASA Headquarters, Washington, DC 20546, (202) 358–0826, or *bcarpenter@nasa.gov*.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the capacity of the room. This meeting is also available telephonically and by WebEx. Any interested person may call the USA toll free conference call number 844–467–6272 or toll number 720–259–6462, passcode: 535959, to participate in this meeting by telephone. The WebEx link is *https://nasa.webex.com*, the meeting number is 999 705 066, and the password is MondayMarch7@9 (case sensitive). The agenda for the meeting includes the following topics:

- From International Space Station (ISS) to Cis-Lunar Space
- Evolvable Mars Campaign
- Life Sciences Beyond ISS
- Physical and Engineering Sciences Beyond ISS

Attendees will be requested to sign a register and to comply with NASA security requirements, including the [illegible] ture ID to [illegible] NASA [illegible] Real ID Act, [illegible] tendees with drivers licenses issued from non-compliant states/territories must present a second form of ID. [Federal employee badge; passport; active military identification card; enhanced driver's license; U[illegible] Mariner [illegible] document[illegible] accompanied by an item from LIST C (documents that establish employment authorization) from the "List of the Acceptable Documents" on Form I–9]. Non-compliant states/territories are: American Samoa, Illinois, Minnesota, Missouri, New Mexico and Washington. Foreign nationals attending this meeting will be required to provide a copy of their passport and visa in addition to providing the following information no less than 10 working days prior to the meeting: full name; gender; date/place of birth; citizenship; visa information (number, type, expiration date); passport information (number, country, expiration[illegible] information[illegible] address, [illegible] position[illegible] [illegible]ess to Dr. Bra[illegible] *bcarpent*[illegible]2) 358–288[illegible]ent Residents (green card holders) are requested to submit their name and affiliation 3 working days prior to the meeting to Dr. Carpenter via email or fax as noted above. It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants.

Patricia D. Rausch,

Advisory Committee Management Officer, National Aeronautics and Space Administration.

[FR Doc. 2016–02557 Filed 2–8–16; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (16–010)]

NASA Advisory Council; Human Exploration and Operations Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Meeting.

Figure 5.3.3c: A Notice in the Federal Register.

Thus, the *Federal Register* allows compliance with due process, provides a means of updating C.F.R. sections, and publishes a wealth of information lawyers can use for regulatory interpretation.

5.3.4 Federal Regulations Online

In addition to issuing the official print versions of the C.F.R. and F.R. to depository libraries, the federal government also maintains electronic versions of both the C.F.R. and the F.R., the former at www.ecfr.gov, and the latter at www.federalregister.gov. Additionally, the commenting system has been moved online to www.regulations.gov, a site which also allows researchers to search comments on proposed rules that an agency has received.

Researchers can use the basic processes of searching, browsing, and filtering to retrieve information from the three sites. However, when doing so, there are a few things to keep in mind. First, the eCFR provides the code as currently in force. Furthermore, the eCFR is updated regularly as changes made by the F.R. are incorporated with only the delay of a day or two, which removes the necessity of consulting the L.S.A. Finally, the electronic version of the F.R. only includes issues from 1994 onwards, so for earlier information when tracing a regulation's history researchers will need to consult either the print edition or an edition on a commercial legal research platform.

In addition to the government sites, Westlaw Edge, Lexis Advance, and Bloomberg Law all provide electronic versions of the C.F.R. Westlaw Edge and Lexis Advance also provide the F.R., and importantly, electronic indexes to the C.F.R. For this reason, researchers may prefer using the legal research platforms to the government sites when researching federal regulations.

5.3.5 Administrative Decisions & Guidance

The federal regulatory publishing system described above is comprehensive in that it contains regulations and some supporting materials from all federal agencies. However, the *Federal Register* does not contain all of the work produced by federal agencies, many of which publish their own titles containing supplemental information. Furthermore, commercial publishers will sometimes gather and publish administrative materials on certain topics. The publications available for administrative materials vary by agency and topic, but researchers can

consult Table 1.2 of *The Bluebook* to determine which publications are available for any particular federal agency.[113] Alternatively, www.govinfo.gov provides a comprehensive list of federal government publishers from all three branches.

Legal researchers tend to think of supplementary materials produced by administrative agencies in two broad categories: administrative decisions and administrative guidance. While neither of these types of publications create binding rules of law, researchers often use them to help interpret regulations that do possess the force of law. Let us first look at administrative decisions.

Administrative decisions resemble judicial opinions, except that they are issued by agencies' own hearings or review boards that lack the force of precedent and therefore do not generate common law.[114] This is because administrative adjudicative bodies derive their authority from Congressional delegation and thus are generally treated as "Article I Courts" after the article of the Constitution providing for Congressional power.[115] Only "Article III Courts," those courts whose authority derives directly from the Constitutional article granting power to the Judiciary, act as common law courts.[116]

Researchers may find administrative decisions in a variety of places. First, many individual agency publications contain decisions, and these publications can generally be found in print at libraries participating in the Federal Depository Library Program. For example, decisions of the Interior Board of Indian Appeals appear in *Interior Decisions*, the reporter of administrative decisions compiled by the Department of the Interior and sent to Federal Depository Libraries by the GPO.

However, visiting a Federal Depository Library and/or enlisting the aid of a government documents librarian can be time consuming. For this reason, the full-service legal search platforms all include at least some

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[113] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 236-248 tbl.T.1.2 (Columbia Law Review Ass'n et al. eds., 20th ed. 1st prtg. 2015).

[114] Note that terminology varies from agency to agency. Some agencies may have "boards" to hear administrative cases, while others may have "panels" or use some other term. A common thread is that members of agency adjudicative panels are referred to as ALJs or Administrative Law Judges.

[115] *See* BLACK'S LAW DICTIONARY 134 (10th ed. 2014).

[116] *See* BLACK'S LAW DICTIONARY 135 (10th ed. 2014).

administrative decisions. The websites of agencies themselves also often link to their administrative decisions. Researchers should consult the *United States Government Manual*[117] for an official listing of all federal agencies, and USA.gov provides links to the agency websites. Regardless of how a researcher finds administrative decisions, he may use them to help interpret regulations but should not rely on them as common-law precedent.

In addition to issuing decisions actively applying their regulations to controversies, most agencies also produce manuals and other internal documents that researchers can use to determine how an agency is likely to interpret its own regulations. These materials are referred to as "administrative guidance." For example, the Internal Revenue Service (I.R.S.) publishes the *Internal Revenue Manual*,[118] which describes how the I.R.S. conducts its business. While administrative guidance materials vary from agency to agency, researchers should be able to find them in similar ways to administrative decisions: in Federal Depository Libraries, in commercial databases, or on agency websites. Regardless of the form the materials take, researchers can use them to help interpret and apply federal administrative regulations as a source of law.

5.4 State Regulations

State executive agencies also issue binding administrative regulations, though not to the same extent as federal agencies. At first this may strike the reader as counterintuitive. If federal competency is limited to enumerated powers only, would one not expect to find less, rather than more federal regulations? The answer to this quandary lies in two facts. First, administrative regulations often target complicated commercial and industrial activities, and so regulating interstate state commerce requires numerous and detailed regulations in a variety of areas. Second, state budgets tend to pale in comparison to the federal budget. Thus, federal agencies tend to be more numerous and better staffed than state agencies.

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[117] *The United States Government Manual* is the official handbook of the federal government and provides a detailed description of the three branches of government and the offices that comprise them. Print copies may be found in Federal Depository Libraries, and the manual is also available electronically at http://www.usgovernmentmanual.gov/.

[118] The *Internal Revenue Manual* can be found in print at Federal Depository Libraries and electronically at http://www.irs.gov/irm/.

Nonetheless, state executive branches do regulate certain activities within their states.

In format, administrative regulations will vary state by state to a certain degree, but they often mimic the form of federal regulations. For example, Figure 5.4 shows an administrative regulation from Kentucky. Note the explicit reference to the statutory grant of authority, just like federal regulations contain. Also, if a researcher flipped to the beginning of either the chapter or title that house the particular regulation (Chapter 10, and Title 902 respectively), he would find a table of contents for that particular unit of organization. Also, most state administrative codes include a topical index at the end. Thus, legal researchers interact with state administrative codes in the same ways they would with the C.F.R.

Furthermore, citation of state administrative regulations tends to resemble that of federal regulations, though of course this varies depending upon the state.[119] Typically, though, lawyers cite state administrative codes in the standard title number-code abbreviation-section number format.

[119] For a complete list of state administrative regulation citation schemes, see THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 248-302 tbl.T.1.3 (Columbia Law review Ass'n et al. eds., 20th ed. 1st prtg. 2015).

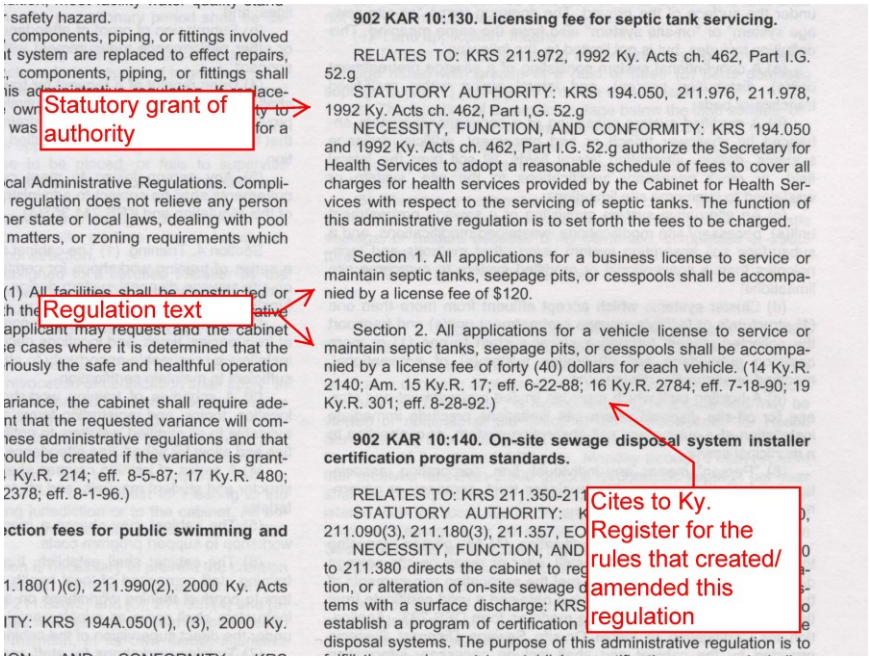


Figure 5.4: 902 KAR 10:130

Most states also publish administrative registers, in the style of the *Federal Register*. However, most state administrative registers amount to very poor imitations of the F.R. (mostly because the states themselves are much poorer entities than the federal government). For instance, Kentucky's administrative register is published monthly (as opposed to daily) and contains far less information. It still provides citizens with notice of proposed rule changes, and researchers still can use it to update administrative code sections, though state administrative codes usually are not big enough to require a separate list of sections affected. (Affected sections instead typically appear in list form in part of the administrative register.)

Also like federal agencies, state agencies both hold hearings that lead to administrative decisions and create internal documentation that researchers can use for administrative guidance. As with the other administrative materials, the availability of administrative decisions and guidance varies state by state and tends to be less prevalent at the state level than the federal level. Students interested in conducting state administrative research should contact a law librarian in their state to learn what sources are available.

Thus, legal researchers typically interact with state administrative materials in the same ways with which they interact with federal regulatory publications. Indeed, the major differences between federal and state regulatory publications are differences of scale. It is important that aspiring lawyers learn to interact with regulations at both the state and federal levels, as regulations act as the source of law for the executive branch and often govern commercial activities in their jurisdiction.

We have now introduced students to all the building blocks of modern legal research. Let us now turn our attention to updating those basic sources to ensure their continued validity.

5.5 Concluding Exercises for Chapter 5

Try your hand at conducting regulatory research!

5.5.1 Introductory Exercise on Researching Regulations

Hello all,

We have been engaged to advise Giovanni "Jonny" Camminatore on a business venture he plans to undertake as a retirement career.

Mr. Camminatore, an amateur distiller, wants to bring his most recent attempt at whiskey to market as "Erba Azzurie Bourbon." I will need you to do the following:

- Find the regulations in the C.F.R. that deal with labeling and advertising of liquors. Is there a regulation that defines "standards of identity" for different types of spirits?
- According to the regulation you found, what steps must Mr. Camminatore take in his whiskey-production process in order to label it as "bourbon"?

Thanks,

Mr. Partner

5.5.2 Intermediate Exercise on Researching Administrative Guidance

Dear Team:

We have been engaged by Sinclair Upton, a research scientist and product developer for Bow Chow Industries, Inc., a pet food manufacturer. Dr. Upton is concerned about some of the additives that Bow Chow puts into one of its lines of canned dog food. He is considering whistle-blowing on the company to the F.D.A. as a confidential informant. Before he does, however, he would like assurances that the F.D.A. will preserve his anonymity. I need you to find some F.D.A. guidance documents (preferably the F.D.A. manual) that outline their procedures for interviewing informants and protecting the anonymity of confidential informants in the context of the F.D.A.'s inspection procedures related to animal food additives. Let me know what you find.

Regards,

Mr. Partner

5.5.3 Advanced Exercise on Researching Regulations

Hello all,

Last week when I was having my annual check-up, my allergist, Dr. Billie Mayes, mentioned that she's been working on a new generic inhaler (tentatively to be marketed as "The Wheeze-Whacker") which I currently take the designer version of. Unfortunately, she told me that she could not get it to work without using an ozone-damaging aerosol, and that she is afraid the FDA, under the influence of the EPA, will not allow the inhaler to go to market. The generic would potentially save individual asthma sufferers between six hundred and twelve hundred dollars a year, so I told her I'd have my people look into it.

Dr. Mayes describes the Wheeze-Whacker as a "super short-acting, rescue bronchodilator extraordinaire." Each unit consists of 200 metered doses with an extra 4 "priming doses." The active moieties in the inhaler are flunisolide and albuterol.

I would like you to answer the following:

1) Find a federal regulation on using aerosols that damage the ozone in drugs, specifically asthma inhalers.
2) Assuming such a regulation exists, does it prohibit the use of said aerosols, and if so, does it include any exceptions? (Asthma drugs are life-savers; surely there are exceptions for things of that nature!)
3) Would the Wheeze-Whacker, in its specific make-up, qualify under a necessity-type (or however they phrase it) exception? What authority supports your answer?
4) What statute(s) grant(s) authority to the FDA to regulate the use of ozone-damaging aerosols in drugs such as inhalers?

Thanks,

Mr. Partner

5.6 Recommended CALI Lessons for Further Practice

CALI hosts an impressive number of interactive lessons on its website. The following lessons on researching administrative law touch upon material covered in this chapter. They would be a great place to start for students looking for further practice on the concepts introduced in this chapter!

5.6.1 "Introduction and Sources of Authority for Administrative Law" by Deborah K. Paulus-Jagric and Clare Willis

Summary: an introduction to agencies' powers within the constitutional scheme and the regulatory process.

Lesson ID: LWR33

URL: http://www.cali.org/lesson/765

5.6.2 "Rulemaking: Federal Register and CFR" by Katie Brown and Deborah K. Paulus-Jagric

Summary: an overview of the rulemaking process and the publication of the same.

Lesson ID: LWR19

URL: http://www.cali.org/lesson/580

5.6.3 "Researching Federal Administrative Regulations" by Sheri H. Lewis

Summary: an overview of researching federal regulations using print sources.

Lesson ID: LWR06

URL: http://www.cali.org/lesson/566

5.6.4 "Agency Decisions and Orders" by Marcia Baker and L. Elliott Hibbler

Summary: an introduction to the process of researching federal agency decisions. You should expect to encounter: overview of agency regulatory powers; types of agency decisions; how to find them; how to update them; and their precedential value.

Lesson ID: LR57

URL: http://www.cali.org/lesson/1223

5.6.5 "Internal Agency Materials" by Al Dong and Edwin Greenlee

Summary: an introduction to finding administrative guidance materials on the internet.

Lesson ID: LR50

URL: http://www.cali.org/lesson/1061

5.6.6 "Government Documents" by Alicia Brillon

Summary: to familiarize the user with the range of documents produced by the Federal government, where they can be found, and how they can be used in a law practice. The lesson focuses on issues surrounding government documents including: authenticity, how to find and use government documents, and statistics.

Lesson ID: LR96

URL: http://www.cali.org/lesson/8457

5.6.7 "Attorney General Materials" by Marcia Baker and Maureen H. Anderson

Summary: an introduction to federal and state attorney general materials, which are a particular form of administrative guidance.

Lesson ID: LR44

URL: http://www.cali.org/lesson/862

5.6.8 "Researching Federal Executive Orders" by Sara Burriesci

Summary: an introduction to researching federal executive orders, which direct executive agencies to take certain actions or approaches to regulation.

Lesson ID: LWR22

URL: http://www.cali.org/lesson/583

Chapter 6

Updating Sources of Law

> Law grows, and though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression, I call it progression of human opinion. – Samuel Taylor Coleridge

6.1 Learning Objectives for Chapter 6

In working through this chapter, students should strive to be able to:

- Assess the necessity of updating individual sources of law by examining their subsequent treatment by other, later sources of law.
- Evaluate how the totality of a case's subsequent treatment affects the case's value as a precedent.
- Describe situations in which a statute or regulation may no longer hold the force of law despite remaining on the books.
- Develop strategies for using citators to determine a source of law's subsequent treatment.
- Develop strategies for using citators as research tools to find additional sources of law.

6.2 Introduction to Updating Sources of Law

As discussed in Chapter 4, the common law system, by its very nature, constantly changes over the course of time. As new precedents adapt, expand, contract, or otherwise alter legal rules from earlier precedents, the law evolves and morphs, a process which allows it to continue to order a constantly changing society. While the Common Law's adaptability acts as one of its greatest strength, it does pose a challenge for legal researchers.

Individual sources of law are issued at discrete points in time, but events that occur later in time can affect their continuing value and applicability. Thus, legal researchers need to be able to conduct research to examine the "subsequent treatment" of sources of law in order to determine each source's actual value. Lawyers refer to the process of researching an individual source's subsequent treatment as "updating" that source of law.

Luckily, legal publishers have long recognized the importance of providing means for researchers to find efficiently the subsequent treatment of a source of law and provide tools for doing so. In fact, the brand name of the dominant print-based tool, *Shepard's Citation Service* became so prevalent that "Shepardizing" became a synonym for "updating" much as "googling" has become a synonym for online searching. Legal researchers collectively refer to *Shepard's* and similar products as "citators."

While citators originally developed in print, the advent of computers made them much more powerful and much more efficient to use, and lawyers and other researchers now use them almost exclusively in online versions. *Shepard's* still exists, although it was purchased by LexisNexis and serves as the citator for Lexis Advance. Westlaw Edge and Bloomberg Law also feature citators, termed KeyCite and BCite, respectively. In addition to allowing researchers to investigate subsequent treatment, online citators also represent powerful research tools for discovering new sources of law. Before we turn to citators as research tools, though, let us examine their original use in updating each source of law.

6.3 Subsequent Treatment of Judicial Opinions

As we have seen, the precedential weight of judicial opinions varies. Furthermore, subsequent treatment of an opinion, by later opinions or by legislatures, often affects the continuing utility of the rules contained in the opinion. Thus, finding and reading an opinion merely represent the first steps in case-based research; a lawyer must also evaluate an opinion's applicability to her client's circumstances in light of the treatment the opinion has received since it was issued.

6.3.1 How Subsequent Treatment Affects Opinions

Subsequent treatment of an opinion ranges from positive to negative. On the positive side, later opinions may discuss, explain, or cite an earlier opinion. If a later court cites an opinion on a specific point, it has implicitly approved the legal rule from the earlier opinion. Such positive citations tend to increase the precedential value of opinions.

Judicial opinions also sometimes suffer negative subsequent treatment. For instance, a holding may be overturned in whole or in part by a higher court. Furthermore, appellate courts may overturn their own earlier decisions. A famous example of this occurred when *Brown v. Board of Education* overturned the earlier Supreme Court decision, *Plessy v. Ferguson*.[120] Sometimes, a later court may limit or abrogate an earlier opinion without explicitly overturning it. Similarly, if a legislature dislikes a rule from a particular judicial opinion, it can pass a statute changing the law that the opinion had interpreted. The amended statute would then take precedence over the opinion. Lawyers refer to opinions thus affected as having been superseded by statute.

Finally, later judicial opinions may "distinguish" an earlier case. Distinguishing lies somewhere in between positive and negative treatment. An opinion that distinguishes an earlier opinion essentially recognizes the rule from the earlier opinion as valid but goes on to state that the rule should not apply in the current case because of different material facts. On the one hand, the rule from the earlier opinion remains valid. On the other hand, the rule now only applies to an at least somewhat limited set of facts. The more times an opinion has been distinguished, the narrower its factual application tends to be. Legal researchers who discover a distinguished opinion should carefully evaluate whether their clients' facts fall closer to the original opinion or closer to the distinguishing opinion.

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[120] Brown v. Board of Education, 347 U.S. 483, 494-495 (1954) (overruling Plessy v. Ferguson, 163 U.S. 537 (1896)).

Common Editorial Phrases Describing Negative Subsequent Treatment	Description
Abrogated:	The citing case effectively, but not explicitly, overrules or departs from the original case on at least one legal issue.
Criticized by:	The citing opinion criticizes the original case in some significant way, although the citing court may not have the authority to materially affect its precedential value, or may not be quite ready to completely overrule the original case on the issue.
Declined to extend by:	The citing case has declined to extend the ruling of the original case to that particular set of facts; functionally very similar to distinguished by. Like "distinguished", this may have the effect of narrowing the original case's ruling.
Distinguished by:	The citing case differs from the original case either because of different facts or a different application of the law. May have the practical effect of narrowing the original case's ruling by stating a scenario in which that ruling does not apply. The more citing cases distinguishing themselves from the original case on a particular legal issue, the narrower the application of the original case tends to be.
Overruled:	The citing case expressly or effectively overrules at least one legal issue in the original case.
Superseded:	A new or amended statue or constitutional provision has rendered the original case inapplicable. Note that for events occurring before the enactment/adoption of the new provisions, the original case would still be valid precedent.
Validity questioned by:	The continuing validity or soundness of a ruling from the original case is questioned because of intervening circumstances, such as a change in judicial law or the passage of time.

Figure 6.3.1: Common Editorial Phrases Describing Subsequent Negative Treatment of Judicial Opinions

6.3.2 How to Determine Subsequent Treatment

As discussed above, each of the major legal research platforms features a citator. Furthermore, the respective legal publishers have each fully integrated their citator into their platform so that researchers can effortlessly shift between primary research and updating. The integration also provides symbols so that researchers can tell at a glance what tone the subsequent treatment of a particular case has taken.

When a researcher encounters a legal authority on Westlaw Edge, Lexis Advance, or Bloomberg Law, she may see a brightly-colored symbol next to the title of the authority.[121] These are the subsequent treatment symbols provided by each platform's citator that alert the researcher that an authority has received subsequent treatment. The color scheme further alerts the researcher as to *how* the original authority has been impacted by the subsequent treatment. Generally, citator symbols follow a traffic-light scheme wherein red means to stop because of severe negative treatment, such as an overruling, while yellow indicates caution for some subsequent criticism, and green gives the all clear for only positive subsequent treatment.[122] Thus, a researcher can tell at a glance whether a source is likely still good law. Note, however, that a good legal researcher will actually read the negative subsequent treatment, as even cases overruled on one issue (thereby receiving a red subsequent treatment symbol) may still be good law on a separate issue.

Researchers should keep in mind that each of the publishers discussed above employs a team of attorney-editors to help determine how a case's subsequent treatment has affected its precedential value. Because these determinations are judgment calls, it is not uncommon for researchers to find a case receiving a red symbol on one platform but a yellow or orange symbol on another. Furthermore, the publishers, as private entities, in no way are making official determinations. Thus, researchers rely on the determinations at their peril. Rather the determinations are just an added research tool; researchers may use the tool but must still perform their own research and make their own determination.

If a researcher encounters a case bearing a symbol indicating negative or cautionary treatment, she should first investigate the negative treatment. A researcher can access the negative treatment by clicking on the subsequent treatment symbol, which features a shortcut link. Alternatively, researchers can access the full list of subsequent treatment by clicking on the

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[121] On Westlaw, the symbols for the most part take the form of flags. On Lexis Advance, the symbols are different shapes, and Bloomberg Law uses colored squares with different shapes inside them.

[122] BCite offers more nuanced categories than the other two services, and thus splits what would be red on West or LexisNexis into Red and Orange levels for different types of negative treatment. Similarly, while West and LexisNexis consider distinguishing to warrant a cautionary yellow, Bloomberg uses blue for distinguishing treatment and reserves yellow for more direct criticism. The basic pattern remains the same, however.

"*Shepardize*® this document" link (on Lexis Advance), the "Citing References" tab (on Westlaw Edge), or the "BCITE ANALYSIS" icon (on Bloomberg Law) and filtering to negative or cautionary treatment.

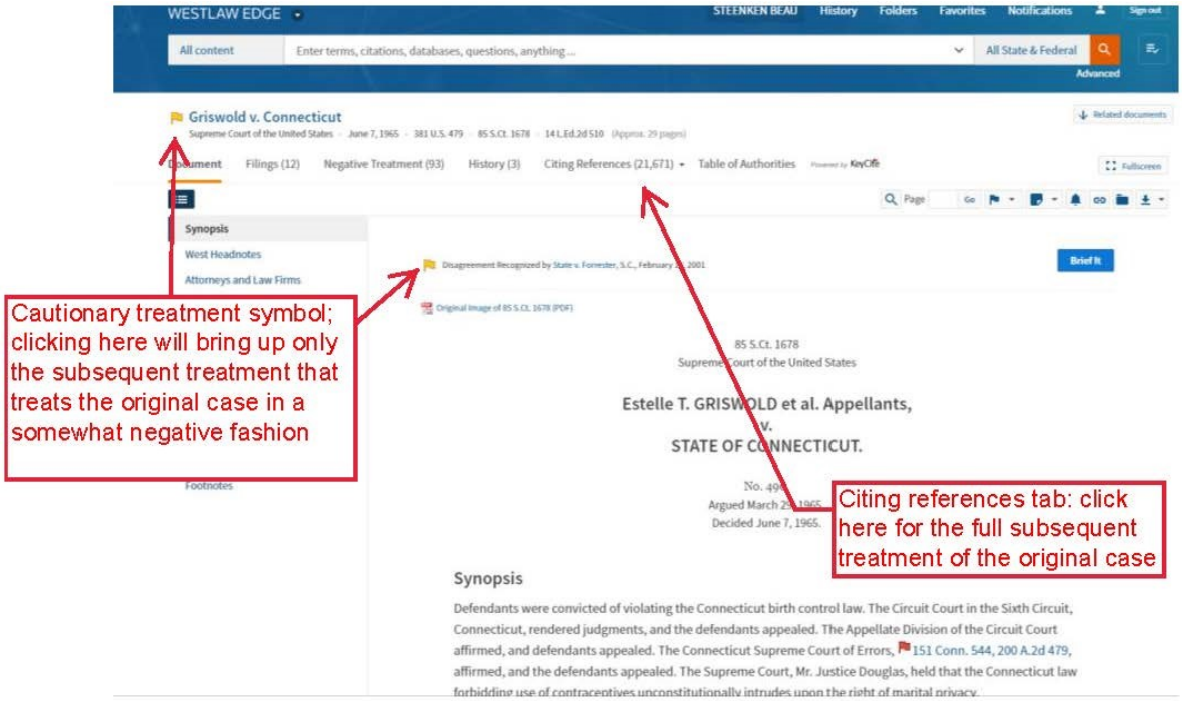


Figure 6.3.2a: Accessing a case's subsequent treatment on Westlaw Edge.

Once a researcher has accessed the potentially negative treatment, she should use filters to look at the most negative treatment (particularly that featuring a red symbol) first, and then proceed to look at the other potentially negative treatment (that bearing orange or yellow symbols. Researchers can also use the filters to narrow the list down further to only those sources that will affect the continued validity of the original case for the purposes of the legal issue being researched. In particular, jurisdictional, topical, and reported/unreported filters may be useful.

In terms of jurisdiction, a researcher generally only cares about negative treatment from the jurisdiction being researched, and most importantly from sources that would be binding upon the court that would hear the researcher's problem. For instance, if investigating a point of Nebraska law, a researcher would be concerned about Nebraska state court opinions that have deal with the original case negatively, and could use the appropriate

jurisdiction (or court) filter to limit results to those cases. Conversely, if investigating a point of federal law, a researcher can limit results to federal courts and even levels of court that are higher and in the same circuit as the original case. Furthermore, trial level courts mix finding of fact with finding of law, and as such can never be mandatory authority, and so researchers should feel comfortable using filters to restrict results to appellate cases when updating a case.

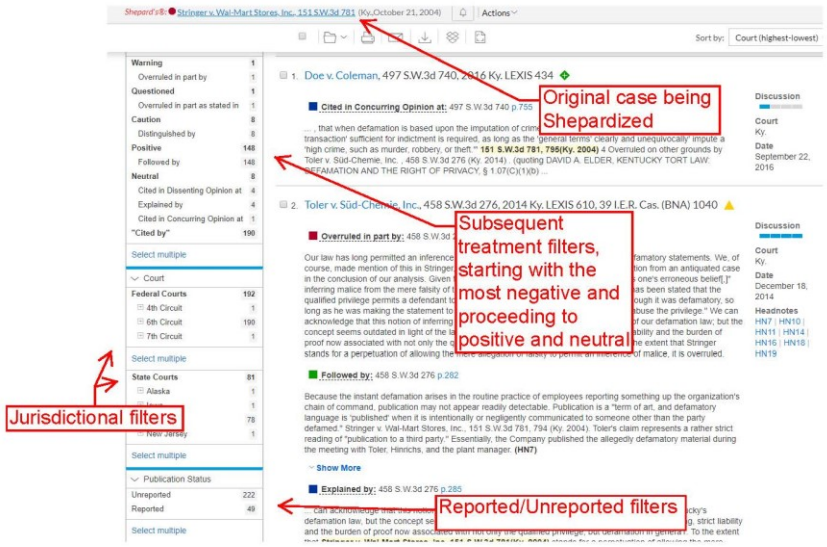


Figure 6.3.2b – Screenshot of a Shepard's Report and its available filters on Lexis Advance. Reprinted from LexisNexis with permission. Copyright 2019 LexisNexis. All rights reserved.

Topical filters are useful because cases often deal with more than one legal issue, so if an opinion has received negative treatment on one issue, its value as precedent on other issues may remain unaffected. Thus, researchers should focus on negative treatment on point to their particular issue of interest. Similarly, unreported cases are not deemed to have full precedential value, and so when determining the continued validity of an opinion, researchers should filter out unreported cases from their negative subsequent treatment.

Once a researcher has filtered the negative subsequent treatment by jurisdiction, topic, and/or reported status, she should then carefully read the resulting sources. It bears repeating that the symbols provided by the legal research platforms are unofficial judgment calls of editors employed

by the publishers, and so researchers must make their own determinations as to how later authorities affect the original opinion being updated.

Once a researcher has made an initial determination on the negative treatment, she should then balance it with positive and neutral treatment using the same set of filters. Including an analysis of positive and neutral subsequent treatment can give the researcher a good feel for how subsequent sources tend to follow the original opinion. Comparing the number of cases, legal specifics, and dates of positive and negative subsequent treatment may help a researcher decide upon which cases to rely. After all, *some* negative treatment is not a disqualifier, especially if balanced with a large amount of positive treatment. Regardless, of the amount of subsequent treatment, however, researchers **must** take this step before relying on a judicial opinion.

6.4 Subsequent Treatment of Statutes and Regulations

Citators also allow researchers to gather subsequent treatment materials for statutes and regulations. While statutes and regulations are not subject to the same level of nuanced treatment as cases—no one distinguishes a statute or regulation; they are either relevant to the facts or not—their continued validity can still be affected by subsequent events.

Most obviously, statutes and regulations both face periodic amendment by their issuing legislatures/agencies. However, since both statutes and regulations are published in codes, and codes contain only language currently in force, researchers generally do not need to take extra steps to account for amendments that have already gone into force. Note, however, that the research platforms will attach yellow caution symbols to code sections facing potential amendment, either through an introduced legislative bill or through a proposed rule published in an administrative register. Researchers should pay attention to proposed changes if advising a client on future action, but proposed changes will not affect statutes or regulations being used to answer a legal problem stemming from facts that have already occurred.

In addition to amending by their issuing bodies, the enforcement of both statutes and regulations may be prohibited by judicial decisions of competent courts. Courts may hold that statutes that conflict with constitutional principles are unconstitutional. In addition to the constitutional question, federal courts can hold federal regulations to be "arbitrary and capricious" and therefore invalid under the Administrative

Procedure Act.[123] State regulations are subject to similar judicial review by state courts. Any of these actions will result in a red warning symbol, and researchers should take care to investigate the symbol fully.

Researchers can investigate the subsequent treatment of statutes and regulations by the same methods as they would cases. However, in doing so, researchers should pay particular attention to the dates of the subsequent treatment compared to the dates of amendment of the original statute or regulation. Legislatures and agencies will often (though not always) amend unconstitutional statutes or regulations to comply with court rulings. Thus, if the original source has been amended more recently in time than the issuance of the opinion that resulted in the red warning symbol, a researcher should pay close attention to the change in language between the new statutory language and that held to be unconstitutional. This generally involves a close and detailed reading of multiple versions of the statute or regulation and equally close and detailed readings of the opinions constituting the negative treatment.

6.5 Citators as Research Tools

In addition to allowing researchers to gather an original source's subsequent treatment, citators allow researchers to find new authorities on point as a research tool. For instance, if a researcher has found a case on point, she can Shepardize it to gather all the later cases that have cited the original case. Cases generally cite cases with similar issues to the ones they are facing, so this can be an effective way of quickly expanding your research, especially if you use relevant jurisdictional and topical filters. The research platforms also provide "depth of treatment" filters that allow researchers to focus on only those later cases that discuss the original source in depth. Additionally, a researcher can construct her own filter by using the "search within" box, which allows searching for factual as well as legal terms. Figure 6.5 demonstrates the use of citators and filters to expand research.

The use of citators as a research tool is particularly effective for statutorily-controlled problems. When applying a statute to a problem, a lawyer will supplement the statutory language with judicial opinions interpreting any ambiguities in the statutory language. Any opinion interpreting a statute will invariably cite that statute, so running a statute through a citator will give a researcher the complete universe of cases that have interpreted that

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[123] Administrative Procedure Act, Pub.L. 79-404, 60 Stat. 237 (codified at 5 U.S.C. §§500-504).

particular statute. Researchers can then search within the results for the particular statutory language of interest. This process also works with regulations.

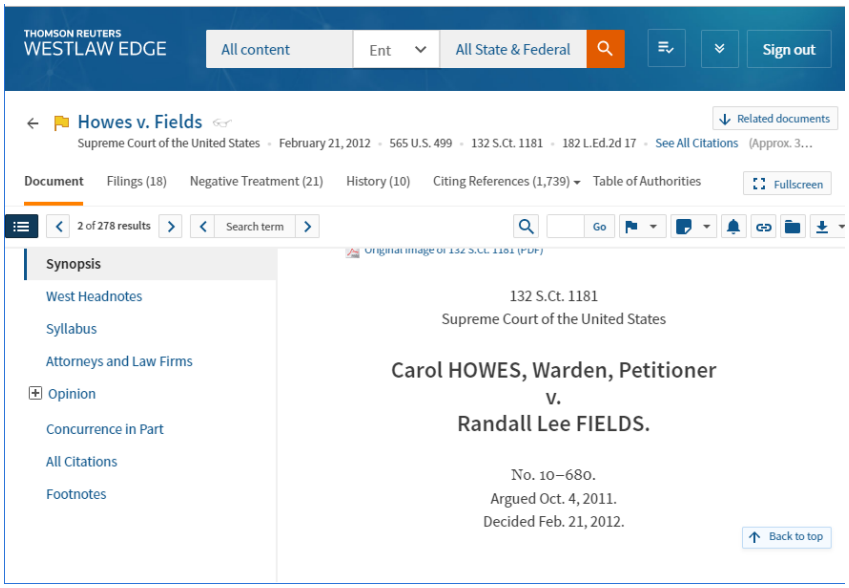


Figure 6.5: Using a citator as a research tool on Westlaw Edge. Click here for screencast: https://youtu.be/ZDL1Rl8Irlg.

Thus, electronic citators are powerful tools both for updating sources of law as well as for conducting additional research. In the next chapter, we will look at other powerful research tools afforded by electronic research platforms.

6.6 Concluding Exercises for Chapter 6

Try your hand at updating sources of law!

6.6.1 Introductory Exercise on Updating Sources of Law

Dear Team:

We have been engaged by the Casablanca Community School District (CCSD) in Casablanca, IA to advise them on various legal matters. Recently the CCSD, under the leadership of its superintendent, Dr. Victor Laszlo, with the quiet support of Casablanca mayor, Richard Blaine, adopted an official policy of allowing students to use restrooms corresponding to gender identity and presentation rather than to physical sex at birth. Dr. Laszlo subsequently received what appears to be a piece of hate mail from Henry Strasser, who has two children attending the district. Apparently, Strasser does not want non-birth-gender-conforming students sharing a restroom with either his son or daughter. Amidst the personal threats directed at Dr. Laszlo, Strasser threatened a lawsuit and cited Plessy v. Ferguson, 163 U.S. 537 (1896).

We have referred the personal threats to the Casablanca Police Department (Captain Louis Renault of the CPD assured us that Strasser has been on their radar "for quite a while"), but Dr. Laszlo would like our assurances that the lawsuit would be frivolous. Please run Plessy v. Ferguson through a citator and answer the following questions:

- Has Plessy v. Ferguson received negative treatment?
- Has it received positive treatment?
- When did the positive treatment occur in relation to the negative treatment?
- Is Plessy v. Ferguson still a valid precedent?

Thanks,

Ms. Partner

6.6.2 Intermediate Exercise on Using Citators as Research Tools

Hello Team:

We are representing Mr. Nathaniel Bumppo who is being charged with first degree burglary under KY. REV. STAT. § 511.020. Mr. Bumppo admits to breaking into Magua's Diner in Fort William Henry, Kentucky. Apparently, Mr. Bumppo believed that the proprietor of the diner had assaulted his girlfriend, Cora Munro, and so Mr. Bumppo broke into the diner with a hatchet to leave a warning for Mr. Magua to leave Ms. Munro alone. However, Mr. Bumppo tripped an alarm and was arrested by police at the scene while still "armed" with the hatchet.

Since no one was hurt during the break-in, to be convicted under KY. REV. STAT. § 511.020, Mr. Bumppo will need to have been found by a jury to be armed with a deadly weapon. The Commonwealth is alleging that the hatchet amounts to a deadly weapon, but I believe this is a misreading of the statute defining deadly weapon in Kentucky, KY. REV. STAT. § 500.080(4).

I would like you to Shepardize the statutes in question to pull all of the cases that have interpreted the statutory provisions. Do any of the cases refer to a hatchet, and if so, can it legally be considered a deadly weapon in Kentucky?

Thanks,

Ms. Partner

6.6.3 Advanced Exercise on Using Citators

Our firm represents Fionn and Siobhán Ó Brádaigh, primary shareholders of Emerald Herbs, an herbal health supplement shop in southeast Lexington, KY. Emerald Herbs also features an online retail site and operates its own herb-growing facilities. Emerald Herbs is organized as a closely held corporation and employs a total of 56 individuals full-time. The herbal supplement business is surprisingly lucrative, and the Ó Brádaighs are very good clients of ours. Unfortunately, they are currently locked in a legal dispute.

It seems that in addition to working for Emerald Herbs, the majority of employees also belong to the Jessamine Grove of the Reformed Druids of North America (RDNA), a neo-pagan religious organization. Siobhán Ó Brádaigh, in fact, serves as the Arch-Druid of the Jessamine Grove. Amongst the tenets of the Jessamine Grove is that its members are "to cut no living tree." This tenet conflicts with a Lexington ordinance requiring trees to be trimmed to 7' clearance above sidewalks. Several trees in Emerald Herbs' parking lot feature branches that extend to only 5' above the neighboring sidewalk. Lexington's authority to create ordinances stems from the Kentucky legislature through KRS ch. 67A on consolidated urban-county governments.

1. A federal law was enacted in 1993, the Religious Freedom Restoration Act (RFRA), that was intended to prevent government from passing laws substantially burdening an individual's free exercise of religion. Please find the federal statutes comprising the RFRA. Does it currently apply to state laws? Did it ever apply to state laws?

2. Is the statute you used to answer Q1 still good law? Why or why not?

3. What are our clients' chances of successfully using the RFRA to escape enforcement of Lexington's tree ordinance?

6.7 Recommended CALI Lessons for Further Practice

CALI hosts an impressive number of interactive lessons on its website. The following lessons touch upon material covered in this chapter. They would be a great place to start for students looking for further practice on the concepts introduced in this chapter!

6.7.1 "Updating/Validating Case Law Using Citators" by Rebecca S. Trammell and Ashley Krenelka Chase

Summary: an overview of the use of citators. Covers print citators, which were alluded to in this chapter, as well as common electronic citators, which we will cover in Chapter 5.

Lesson ID: LWR35

URL: http://www.cali.org/lesson/858

6.7.2 "Using Citators as Finding Tools" by Brian Huddleston

Summary: an overview of how to use citators as a research tool to find similar authorities to ones already discovered. The lesson covers print citators alluded to in this chapter, as well as electronic citators, which we will cover in Chapter 5.

Lesson ID: LR104

URL: http://www.cali.org/lesson/8875

Chapter 7

Advanced Electronic Research

> The good news about computers is that they do what you tell them to do. The bad news is that they do what you tell them to do. – Ted Nelson

7.1 Learning Objectives for Chapter 6

In working through this chapter, students should strive to be able to:

- Explain the function of advanced search operators.
- Assess the value of using advanced search operators both individually and in combination.
- Construct well-tailored searches with terms and connectors.
- Use the basic processes of online legal research, online finding aids, and advanced search operators together for efficient research.

7.2 Importance of Efficient Electronic Research

The previous chapters have introduced you to the basics of electronic research and shown you how to locate primary authorities on legal research platforms. However, to research effectively, knowledge of advanced search techniques and the ability to combine research methods is critical. Remember that for any attorney, time equals money. If an attorney spends too much time researching a single case, that limits the time she can spend on other aspects of legal practice and the time at her disposal to conduct research on other cases ongoing simultaneously. Researchers will encounter copious amount of legal information on legal research platforms; using various research methods and advanced research techniques in conjunction with one another can help target the necessary information more efficiently.

7.3 Advanced Searching

While some basic search operators were described in Chapter 2, full-service legal research platforms have many other operators available. They also provide forms and accompanying commands that allow researchers to target their search to specific parts of a document. Effective utilization of these methods requires a researcher to have a solid understanding of the legal authorities she is looking for and at least a basic understanding of the legal issue she is researching.

7.3.1 Search Operators

Connectors and expanders are both categories of advanced search operators.[124] Connectors alert the research platform that the researcher would like to limit results to pieces of information that contain specific search criteria; they effectively narrow the search results. The Boolean operator **AND** mentioned in Chapter 2 is a type of connector. Recall that **AND** would be used to specify that two keywords both appear in every search result. To further narrow the search results, **/p** could be used between two terms to tell the research platform that not only would the researcher like the results to contain both terms but that she would like both terms to occur in the same paragraph.

While connectors work to limit the search results, expanders work to broaden the search results. The Boolean operator **OR** discussed in Chapter 2 is a type of expander. On Westlaw Edge, the **!** functions as a root expander. This means that a researcher could use an exclamation point to retrieve multiple variations of a word that stem from a common root. For instance, searching for the term **declar!** would return results that begin with the root *declar*, which would include the following words: *declare*, *declaring*, *declarant*, *declaration*, etc. While connectors tend to limit results, expanders will sometimes yield more results but will eliminate the need for multiple searches if searching for a term that exists in multiple variations.

Keep in mind that when using advanced search operators, the search engine will usually follow your specific commands and only bring back results using the criteria you specified. This means you must think carefully and

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[124] Legal researchers may encounter the phrase "terms and connectors" when constructing advanced search queries on legal research platforms. Technically, the word "connectors" refers to the search operators while "terms" refers to the researcher's individual search terms, but the phrase is often used more generically to mean an advanced search.

critically about the language and operators you utilize in the search query. We are used to relying on search engines to automatically bring us back synonyms and variations of words. However, if you are constructing an advanced search query, you will have to be specific about *all* the criteria you want your search results to contain.

One way to be specific in a search query is to use quotation marks to signal that you want a series of words to be found together in exactly that order. For example, intentional infliction of emotional distress is a specific kind of tort. But you can imagine those words being used in a variety of ways in legal documents. So if you only want documents containing that exact phrase, rather than all documents that contain those words just somewhere in the document, you would use quotation marks to signal that to the search engine: **"intentional infliction of emotional distress"**

Different platforms sometimes recognize slightly different operators but usually a researcher will be able to find a list of recognized connectors and expanders via a link on the research platform itself. On Westlaw Edge, for example, click "Advanced" below the search button for a list of connectors; on Lexis Advance, click "Advanced Search" just above and to the right of the search box on the home page. Figure 7.3.1 provides a list of commonly recognized search operators.

Expert legal researchers will combine search terms, connectors, and expanders into a single search to get a concise list of relevant results. When constructing advanced searches using multiple operators, it is sometimes helpful to break your search query into chunks with parentheses. At one point in time the parentheses were necessary to tell the search engine the order in which the operators should be applied (much as parentheses work in algebraic equations). Today, most legal research platforms no longer need the parentheses, but it can be helpful to the researcher to identify visually the order in which the operators will be applied.(FN Refer to the help documentation on the legal research platforms for more information about the order of operators. For example, if I wanted to use Westlaw Edge to find the Oregon cases in which embryos are discussed as property in a divorce, I might craft the following search:

embryo! /p property /p (divorce OR "dissolution of marriage")

The search query above contains a series of operators, as well as four terms that I think are integral to my legal problem. The operator **!** after embryo tells Westlaw Edge that I am interested in results with the term embryo with various endings since I want to retrieve cases that discuss one embryo

as well as those that discuss multiple embryos. The operator **/p** tells Westlaw Edge that I want the search terms **embryo!** and **property** to appear in the same paragraph, since if the terms appear in proximity to one another they are probably being discussed in relation to one another. I've then specified that I also want in that same paragraph either one of two synonyms for the concept of divorce. I've also put the phrase **"dissolution of marriage"** in quotes to indicate that I want results with that exact phrase, not just the term dissolution appearing in one paragraph and the term marriage appearing twenty paragraphs later.[125] By using these operators, I have narrowed my results to those likely to address my specific problem, though I will still need to try additional research methods to make sure I've located all the relevant primary authorities.

[125] Notice that I did not include the type of authority (cases) or the jurisdiction (Oregon) since I can use filters and/or browsing to more precisely target documents conforming to that criteria.

Operator	Effect	Example
AND	Returns only documents containing both terms.	budget and deficit
OR	Returns documents containing either term. Often used with synonyms.	ship or vessel or boat
NOT	Returns documents containing the first term but excludes any documents that also contain the second.	apple not fruit
/s	Returns documents with both terms in the same sentence.	sanction /s frivolous
/p	Returns documents with both terms in the same paragraph.	custody /p child
" "	Returns only documents that contain the entire phrase found within the quotes.	"attorney of record"
!	Root expander; will return documents containing any variation of a root word.	acqui! Finds *acquire*, *acquisition*, *acquiring*, etc.
*	Universal character; the computer will treat the * as all letters.	Useful if looking at alternate spellings, *e.g.* defen*e if looking at both English and American cases.

Figure 7.3.1: Commonly Used Connectors and Expanders

7.3.2 Field Searching

Field searching represents another way to target and limit research results. When legal research platforms upload authorities to their electronic platforms, they often divide the source document into different segments or fields. Researchers may then search each of these fields individually.

Different types of authority may contain different fields. On Westlaw Edge, for instance, codified statutes are broken into nine fields: preliminary, caption, preliminary/caption (in other words, the first two fields combined), citation, annotations, credit, statutory text, historical notes, and words & phrases (a specific finding aid originally produced as a print publication). Meanwhile, the same provider divides published cases into twenty-four separate fields: date, party name, citation, synopsis, digest, synopsis/digest, judge, attorney, court name/prelim, docket number, background, concurring, court abbreviation, dissenting, full text, headnote, holding, lead notes, opinions, panel, topic, words & phrases, and written by. Though the fields vary, a researcher can use any individual field to increase the precision of a search.

Some of the fields mentioned above correspond to value-added content, such as headnotes, that Westlaw Edge adds to primary source documents. The replication of these print-based information systems, when combined with the ability to field search, gives legal researchers the ability to narrowly tailor their searches to be as precise as possible. For example, if you are looking for cases with specific facts, it might be useful to use the synopsis/digest (aka SyDi) field to search only the Westlaw Edge editorial content of cases than do a full-text search of cases. Westlaw Edge editors will usually only mention facts related to the legal issues discussed in the case, so a search of that field will eliminate facts mentioned solely as background or in relation to cases mentioned in passing in the opinion.

To conduct a fielded search, a researcher may either enter an advanced search interface and type terms into the appropriate boxes or add field commands to a hand-crafted advanced search. Different publishers may create different fields for different types of documents, so you must be familiar with the fields available on the platform you are using. Furthermore, the abbreviated field search commands vary from platform to platform, so it may be a good idea for novice researchers to investigate the advanced search interface or click on a help button when conducting a field search. Expert researchers often use field searches in combination with advanced search operators. Refer to Figure 7.3.2 for a demonstration.

Finding out what part of the document each field is referring to can be a challenge. Fortunately, both Westlaw Edge and Lexis Advance provide an annotated image of each kind of document to tell you which field corresponds with which part of the document. On either platform, navigate to the type of authority you want to research in (*e.g.* cases or statutes), and then to the advanced search page.

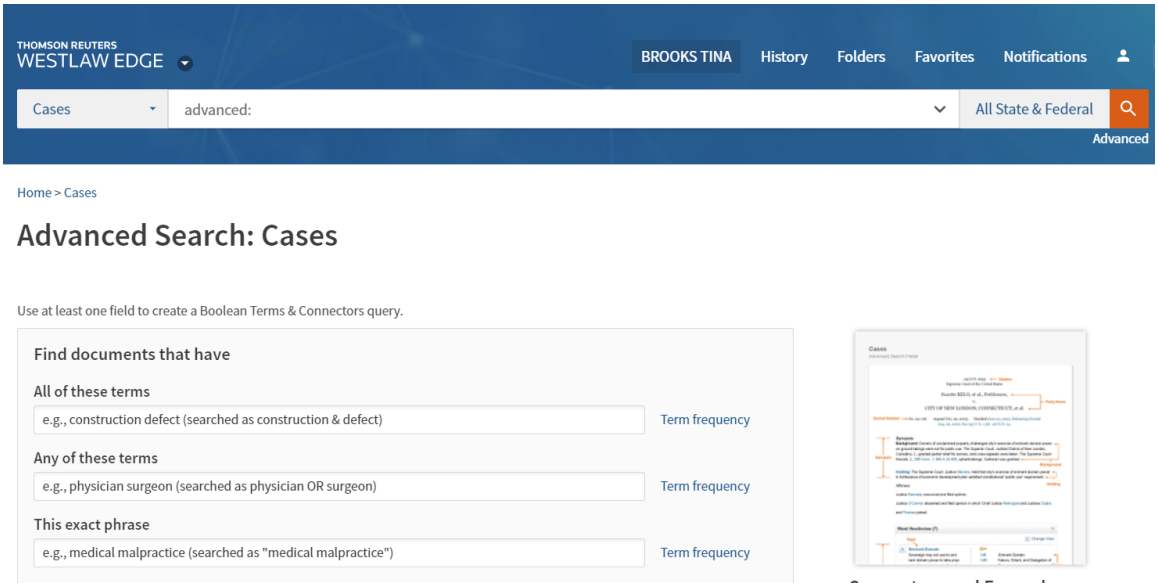


Figure 7.3.2 Field searching in cases in Westlaw Edge.
Click here for screencast: https://youtu.be/ws0XyOW3ujU

7.4 Combining Process for Efficiency

While a researcher can use any of the processes discussed thus to find at least some relevant results, efficient researchers often combine the processes to find the most relevant results efficiently. This is true of all electronic information gathering to a certain extent, whether for formal research or personal use. For example, if I wanted to download a new fantasy book to read for some old-fashioned escapism, I might use a variety of basic processes on Amazon.com. First, I would browse through Amazon's internal organization to get to Kindle eBooks. Next, I would enter a search term, such as "urban fantasy." Finally, I would apply a filter for an average customer review of 4 stars or higher (there is a lot of bad fantasy out there).

As the example above illustrates, web navigation that most people would probably regard as routine regularly combines searching, browsing, and filtering. Of course, the more complex the research task, the more important it is to research efficiently. Unfortunately for aspiring legal researchers, American law tends to be one of the more complex subjects to research. Complex subjects often require advanced search techniques, so in the following sections we'll explore a few ways to combine electronic research processes and tools described thus far.

7.4.1 Browsing, filtering, and advanced search operators

Browsing, filtering, and advanced search operators are frequently employed in conjunction with one another. For novice legal researchers learning about various types of authority for the first time, and even for experienced researchers who know exactly what they are looking for, it is sometimes helpful to browse down to the type of authority you are looking for before running a search. For example, to find case law on Lexis Advance to determine how embryos are treated as marital property in divorce proceedings in Oregon, I would start by browsing to the type of authority – Cases.[126] From this screen, I would construct a well-formed advanced search, previously identified in 7.3.1:

embryo! /p property /p (divorce OR "dissolution of marriage")

This well-crafted search yields a workable number of cases, but for good measure I would add filters for more precise results. Specifically, I would apply the publication status filter so that I am only viewing reported cases, and then the jurisdiction filter to specify only Oregon cases. Between these two filters I have limited myself to only one mandatory case. After I read the controlling case, I can always expand my research to persuasive cases by removing filters.

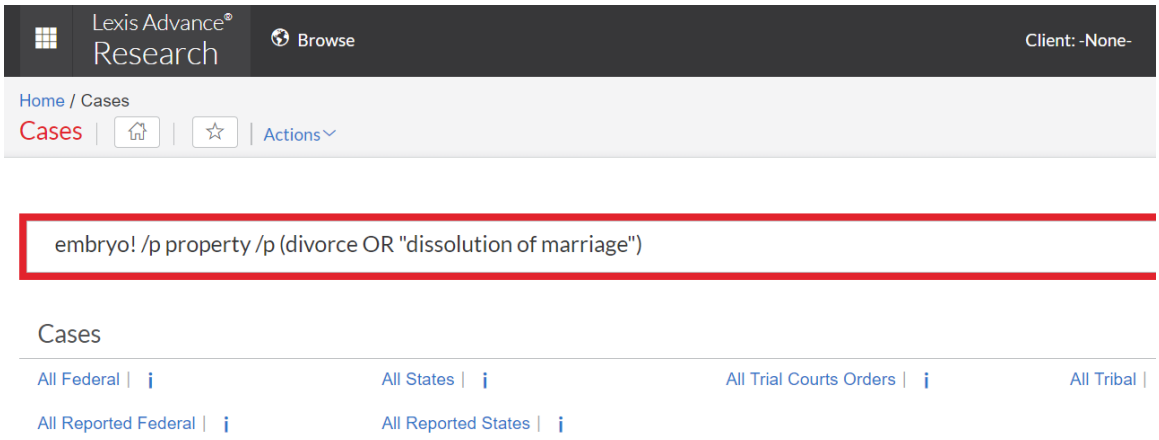


Fig. 7.4.1 *Browsing, filtering, and advanced search operators in Lexis Advance. Click here for screencast: https://youtu.be/evpvTj2ZW94*

[126] I could accomplish the same goal by running a search and then using the appropriate filter, but this order focuses the researcher's attention on only the desired type of authorities.

7.4.2 Advanced searching within citing references

In Chapter 6, Figure 6.5, we looked at an example using the citing references to the *Howes v. Fields,* 565 U.S. 499 (2012) opinion to narrow in on cases regarding the legal issue of whether an individual was in custody for purposes of needing a Fifth Amendment *Miranda* warning. This video is a good example of combining research processes using citing references and filtering by jurisdiction and legal topic. At the end of the video, we used the search within filter to narrow the citing cases to specific type of fact that we were looking for. However, we can use advanced search operators here as well to broaden or narrow that search. For example, we might want to make sure that we are finding mentions of home specifically in relation to the concept of custody, so we might search within using an advanced search of **home /p custody**. This would help exclude cases where the term *home* was merely mentioned as part of the background facts of the case rather than in relation to the legal issue. Alternatively, if we wanted to be sure we were being thorough in our coverage of synonyms in the search query, we might use **home OR hous! OR apartment.** The **!** covers variations of words beginning with *hous*, such as *house* or *housing*, while the **OR** encompasses synonyms of *home*. And we could combine the two search queries just mentioned to be even more precise:

(home OR hous! OR apartment) /p custody

7.4.3 Advanced search operators with key numbers or Lexis Topic

In Chapter 4, we discussed how to use the key number system on Westlaw Edge to pull up a list of cases related to a specific key number. Recall that each key number corresponds to a specific legal issue. However, it may be that within a listing of cases under a specific key number, a researcher would want to run a keyword search for an opinion with particular facts. Unfortunately, when we are on a key number page, neither the search bar at left nor the one at the top of the page searches the full text of the opinions listed on the page; these search boxes *only* search the headnote summaries listed on the page. To search the full text of opinions within a specific key number, we can use the key number itself as a search term.

For example, the key number that relates to the legal concept of what constitutes custody for the purposes is **Criminal Law k411.21**. The topic of Criminal Law also has a number – 110. That means we can write the key number using almost entirely numbers – **110k411.21** – which makes it easier

to use as a search term. The key number then functions as a stand-in for the legal issue in our search query. If we were interested in cases discussing the legal concept of what situations constitutes custody in which a person was located in their home, you might construct the following:

110k411.21 & (home OR hous! OR apartment)

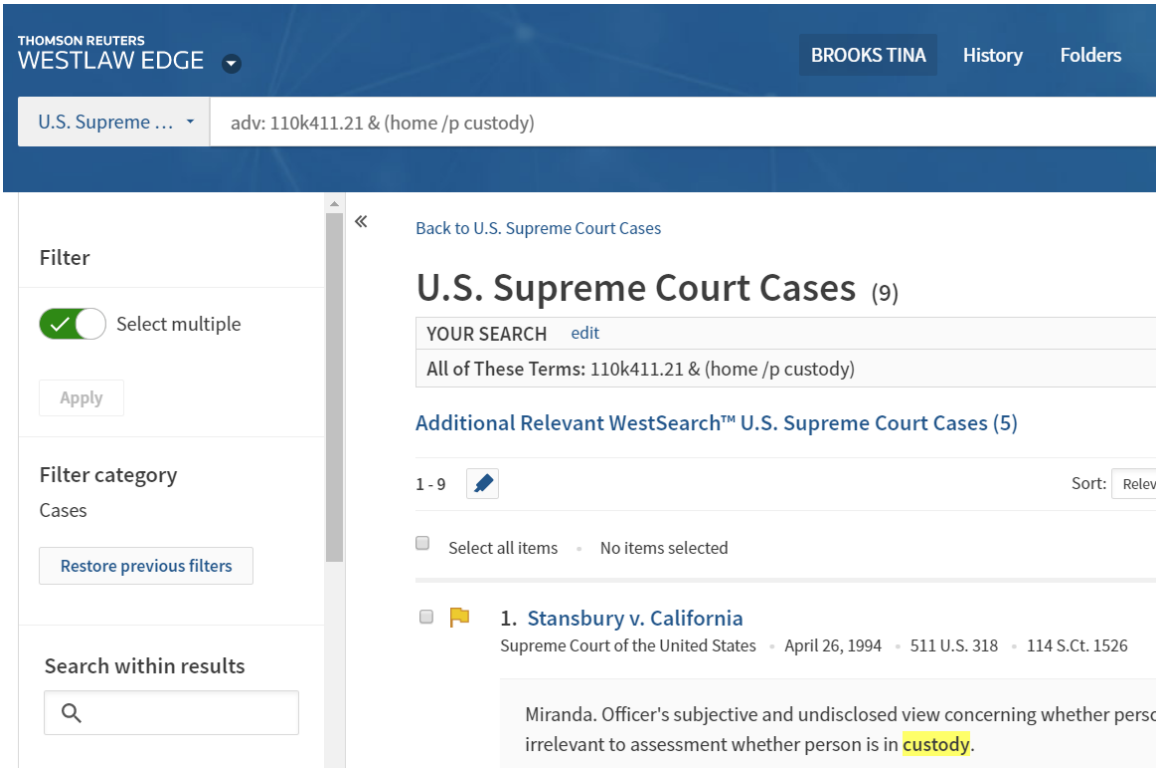


Figure 7.4.3a Using key numbers as a search term in Westlaw Edge. Click here for screencast: https://youtu.be/zzI6bXCU9t8

Lexis Topics makes this process easier. If we look at the headnotes to a case related to the legal issue, such as *Howes*, we can find the Lexis Topic **Criminal Law & Procedure>…>Miranda Rights>Self-Incrimination Privilege>Custodial Interrogation**.[127]By clicking in the

[127] The ellipses mean that there are more subtopics that have been omitted here for the sake of length.

triangle/arrowhead next to the topic, we get a dropdown where we can select "Get Documents" to take us to a list of all cases related to that legal topic (see the screenshot in Figure 7.4.3b). For the legal topic page, we can run a full-text search of those documents using the search within filter on the left side of the page. However, note that Lexis Topics are often broader than key numbers. This Topic is combining the more specific legal topics of custody and interrogation, which means there will be more cases associated with it, so you might need to craft a more specific search query to effectively limit your results.



Figure 7.4.3b *Screenshot of Headnote 5 of* Howes v. Fields, *565 U.S. 499 (2012) in Lexis Advance and its associated Lexis Topics*

7.5 Limitations to Electronic Research

The shift from research being conducted in print to being conducted via computers was – and continues to be – a game changer for conducting research of any kind. However, it is not without its limitations. Many of the high-end legal research platforms charge for their content via cable-like subscription packages.[128] For example, an attorney at a small firm in Ohio may pay for access on Lexis Advance to Ohio state primary authorities and state-specific secondary authorities. If, however, his long-time client has a case where Kentucky state law applies, he may have to either pay to access documents outside his subscription on Lexis Advance, use free resources or budget legal platforms to supplement his pricier Lexis Advance subscription, or go to a nearby county or academic law library to access their print materials or electronic subscriptions.

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[128] Whenever you first start using electronic research platforms at your place of employment, ask about how organization is billed for using them. Some platforms charge by each search run or each document accessed rather than a subscription model, and there are other billing variations, so inquire before you inadvertently run up a bill of hundreds or even thousands of dollars.

Another limitation to electronic research is that not all information that was originally published in print has been digitized. As an example, if you are trying to complete a legislative history of a statute that was originally enacted in the 1960s, such documents may not have been digitized and may require contacting a government agency or library for access to print materials. Or if you are trying to track down a secondary source cited in a case from the 1980s, many of those have not been digitized and may require that you track down a print copy of the book.

Even if a document was initially created electronically, it may not have been made available for purchase or to the public in any form. You may need to contact administrative agencies for an internal document or a court for a specific court filing. The publisher of a secondary source may make it available for purchase but only in print form, or they may make it available in electronic form but not license the content to a platform that you subscribe to, so it would be an additional cost to access.

7.6 Concluding Exercises for Chapter 5

Hone your skills by completing the following exercises on all the legal research platforms available to you.

7.6.1 Introductory Exercise on Electronic Research

1. Find the United States Supreme Court case in which Justice Jackson argued that, "Compulsory unification of opinion achieves only the unanimity of the graveyard."
2. Find a 1971 case in which Satan was sued in federal court.
3. Find a pre-1990 Massachusetts case in which a goldfish is considered an "animal" for the purposes of enforcing a statute.
4. Find a 5th Circuit Court of Appeals Case from December 2010 regarding identity theft.

7.6.2 Intermediate Exercise on Electronic Research

Against your better judgment, shortly after graduating and passing the Kentucky bar, a heretofore slacker friend of yours, Joe Stoner, convinces you to sign on as General Counsel for his newly formed video game development company, Rockabilly Star Games, incorporated in South Dakota. Honestly, you just agreed to be G.C. to stop Joe from pestering you while you looked for a more legitimate job. You never expected him actually to produce a single game. Contrary to your expectations, however, Joe has found his true calling in life and is nearing launch of the company's new centerpiece, *Mary Jane's Marauding Moppets,* in which puppet-like, anthropomorphic versions of common woodland animals engage in the illicit marijuana trade. (Some of the challenges of the game include: a mini-game on DEA Dodging, a social-networking style mini-game on Crop Watering/Farm simulation, and a supply and demand business distribution simulator. Joe swears the game will "like, destroy preconceived notions of genre, man.") Rockabilly Star Games is also offering a limited edition of the game that ships with a hollow, ceramic figurine of one of the woodland animal characters. The figurines look suspiciously like bongs. You decide that as General Counsel, you had better do some research.

1. Find a United States Supreme Court case from 2011 that struck down a California law regulating the sale of violent video games on First Amendment grounds.
    a. Has it received any negative treatment? Describe that treatment in general terms.
    b. Has any South Dakota state court decision cited this case?
2. Find the U.S.C. provision prohibiting the sale of drug paraphernalia.
    a. Do you see anything that might affect the validity of this statute?
    b. Have there been any federal cases in the 8th Circuit Court of Appeals that discuss this statute?

7.6.3 Advanced Exercise on Electronic Research

We represent Mr. Cobain, a resident of Seattle, WA. Mr. Cobain was convicted of second degree assault by King County Superior Court following an incident in which Mr. Cobain confronted his neighbor Mr. Vedder.

Mr. Cobain and Mr. Vedder have a history of minor confrontations mostly stemming from noise complaints, as Mr. Vedder has often complained of sounds of domestic disputes emanating from Mr. Cobain's residence. In the incident that led to Mr. Cobain's conviction, Mr. Cobain had been arguing with his girlfriend, Ms. Love, when Mr. Vedder belligerently approached Mr. Cobain's residence, banged on his door, and screamed, "Enough with this racket! Come out here and I'll show you who the better man is!" Accompanying Mr. Vedder was his dog, a boxer-mix named Jeremy.

Following Mr. Vedder's intervention, Mr. Cobain opened his door and noted Mr. Vedder's aggressive posture and the presence of Jeremy, who was now growling. Mr. Cobain then called for his dog Polly to come to his aid. Polly, a Giant Schnauzer weighing approximately 100 lbs., bounded down the stairs (she had been upstairs in the bath having earlier become doused in mud, which was the source of the argument between Mr. Cobain and Ms. Love) and launched herself at Mr. Vedder, who turned and ran back to his house. Jeremy was able to slow Polly down enough to enable Mr. Vedder to escape unscathed, though eventually Jeremy too fled before the Schnauzer's wrath.

Despite the fact that Mr. Vedder suffered no physical injuries, he pressed charges against Mr. Cobain for assault, and Mr. Cobain was convicted of second degree assault on the theory that he used Polly as a weapon. During trial, we introduced evidence that Mr. Cobain only called Polly in self-defense, but the judge did not allow a self-defense instruction to go to the jury. We are appealing Mr. Cobain's conviction to the Washington Court of Appeals, Division 1, and I need you to do the following, using an electronic search platform of your choice:

1. Find the Washington statute that criminalizes assault in the second degree. Does the statute expressly state that the victim needs to suffer physical harm if a weapon is used?

2. Find the definitions section for Washington's criminal code. What is the statutory definition of the weapon called for by the statute on assault in the second degree?
3. Have there been any reported cases interpreting the definitions statute you found that hold that a dog can be a weapon for purposes of the statute(s)?
4. Have any binding Washington state cases addressed the issue as to whether a defendant is entitled to a jury instruction on self-defense due to the presence of the victim's dog? Make sure you only look at cases that have occurred since 1975 (when Washington adopted its current criminal code).
5. Based on what you have found so far, do you think it likely that we will be able to have Mr. Cobain's conviction overturned? Support your answer with citations to authority.

Thanks,

Ms. Partner

7.7 Recommended CALI Lessons for Further Practice

CALI hosts an impressive number of interactive lessons on its website. The following lessons on electronic research touch upon material covered in this chapter. They would be a great place to start for students looking for further practice on the concepts introduced in this chapter!

7.7.1 "Introduction to Search Logic and Strategies" by Sarah E. Gotschall

Summary: an introduction to searching and using search operators.

Lesson ID: LR59

URL: http://www.cali.org/lesson/1121

7.7.2 "Cost of Legal Research" by Lauren Michelle Collins and Emily Janoski-Haehlen

Summary: an introduction to the costs associated with using full-service legal search providers and strategies that can be used to mitigate those costs.

Lesson ID: LR49

URL: http://www.cali.org/lesson/1065

7.7.3 "Internet Legal Resources – Free Resources" by Resa Kerns, Cindy Shearrer, and Todd Venie

Summary: an introduction to free electronic legal resources available outside of the major legal research platforms.

Lesson ID: LR18

URL: http://www.cali.org/lesson/856

7.7.4 "Evaluating Web Sites" by Susan Llano and Erin Murphy

Summary: provides a practical framework for improving information literacy, especially as it relates to sites on the open web.

Lesson ID: LWR39

URL: http://www.cali.org/lesson/817

Chapter 8

Secondary Sources

> If I have seen farther, it is by standing on the shoulders of giants. – Sir Isaac Newton

8.1 Learning Objectives for Chapter 8

In working through this chapter, students should strive to be able to:

- Describe various types of secondary sources.
- Assess when to use a general secondary source vs. an in-depth, topical secondary source.
- Find an appropriate secondary source for any discrete legal issue.
- Use secondary sources in print or online to research a specific legal issue.

8.2 Overview of Legal Secondary Sources

This text has so far discussed primary legal authorities and the methods for locating them. Now we turn our attention to secondary authorities, also called secondary sources, which are the sources researchers often use to begin their research. Legal secondary sources are texts that provide commentary and analysis of the law for the benefit of the reader. Secondary sources come in a variety of forms; they can be general or detailed, cover a specific jurisdiction, and they are written for a wide range of audiences. Different secondary sources may be employed at different stages of the research process; the choice of secondary source may also rest on the researcher's prior knowledge of the topic. This chapter will describe the most common types of secondary sources the researcher is likely to encounter, when they should (and should not) be used, and a variety of methods for locating them.

8.2.1 Common Types of Secondary Sources

Law students and aspiring legal researches will likely encounter a broad range of secondary sources. In the following sections, we briefly describe some of the common types of secondary sources used by legal researchers. Figure 8.2.1 provides a quick-glance summary of the strengths and weaknesses of each type of secondary source described.

Secondary Source	Advantages & Disadvantages
Legal encyclopedias	More breadth and less depth; a very general introduction to many legal topics. Low citability.
Practice Series & Materials	Breadth and depth vary by source, as does the amount of commentary. Citability thus varies; typically low. Useful in jurisdiction-specific research.
American Law Reports (ALRs)	More breadth and less depth; annotations contain summary but not analysis. Useful to start research on narrow topics and for jurisdictional comparisons. Low citability.
Restatements	Highly credible and thus highly citable. In-depth coverage on areas of traditional common law.
Model Codes & Uniform Acts	Focus on areas governed by statutory law and provide extensive annotations to relevant caselaw.
Treatises	Treats a subject in depth but breadth varies. Citability sometimes high but varies depending on the reputation of the treatise.
Form books	Useful for identifying the pieces necessary to a type of legal document.
Law Review & Journal Articles.	In-depth treatment on a narrow area of law; not updated once published. Quality and thus citability varies.

Figure 8.2.1: An Overview of Secondary Source Types

8.2.1.1 Legal Encyclopedias

Legal encyclopedias are the most general of secondary sources. They have more breadth than depth and so can provide an introduction to a wide range of legal topics. If the researcher is unfamiliar with an area of law and needs a list of the major primary authorities in the area as a starting point for further research on the issue, legal encyclopedias are a solid place for him to begin his research. They are, as one would expect from the term

"encyclopedia," organized alphabetically by topic. *American Jurisprudence 2d* (Am. Jur. 2d) and the *Corpus Juris Secundum* (C.J.S.) are two of the most widely known legal encyclopedias. Some states have jurisdiction-specific legal encyclopedias, such as *Ohio Jurisprudence 3d.*

8.2.1.2 Practice Series & Practice Materials

Practice series resemble legal encyclopedias in that they cover a variety of legal topics, though perhaps not as many as a legal encyclopedia, and they tend to be jurisdiction-specific. They are usually written by practitioners or scholars specializing in that jurisdiction and may contain descriptions of the current state of the law, some analysis of the law, and possibly forms relating to a particular topic. They tend to be organized by topic and can be one volume or many.

Other practice materials may be form books, discussed further in section 6.2.1.7, or process-oriented guides as to how litigation on a topic normally proceeds. Materials in the latter category may explain how litigation on a topic proceeds and the court filings and documentation typically seen in such cases.

Practice series and other practice-oriented materials can sometimes resemble treatises in their depth of coverage on specific topics. In fact, whether an item should be deemed a "treatise" or a "practice material" can be a gray area, and these sources are often found using similar methods that will be discussed later in this chapter.

8.2.1.3 American Law Reports (ALRs)

The American Law Reports is a set of hundreds of volumes which are filled with articles called "annotations." ALRs provide an odd combination of breadth and depth; the number of topics covered is vast but those topics are much more specific than those in an encyclopedia. The annotations summarize caselaw on those narrow topics across jurisdictions; the function is more of a report on the current state of the law rather than an analysis of the law as one would find in a topical treatise. Each annotation contains a table of the relevant primary authorities described in the annotation organized by jurisdiction which can be a quick reference for finding primary authorities on that topic across jurisdictions. There are six series of the ALRs covering state law, the most recent being the ALR 6th. The ALR Federal covers federal topics and is on its second series.

8.2.1.4 Restatements & Principles of Law

Restatements are publications by the American Law Institute (ALI) that clarify and organize the existing state of caselaw on a given topic, or, in other words, restate the law. The restatements contain analysis on an area of law, summarize and refer to caselaw across jurisdictions, and may offer suggestions on how the legal system could clarify an area of law going forward.

Because the ALI is composed of a large number of legal scholars and practitioners who are the experts in their fields, the restatements are generally considered to be among the most persuasive of the secondary sources of law. In fact, they are often cited by judicial opinions, particularly when there is no binding authority on point.

Many of the restatements are on their third series and are published by topic. Some of the more well-known restatements are those covering the laws of agency, contracts, property, torts, trusts, and unfair competition. A complete list of topics may be found on the ALI website.

The ALI also publishes recommendations on areas of the law that need to be updated; these publications are called "Principles" and cover a wide variety of legal topics. These can be useful to a practitioner looking for guidance on how to present to the court on an area of unsettled or outdated law.

8.2.1.5 Model Codes & Uniform Acts

The ALI and the Uniform Law Commission both publish model codes and uniform acts to advocate standards or to improve organization in certain areas of the law. Just as the name implies, these publications are written in the form of model statutes that jurisdictions can adopt in part or whole into their own statutory codes. Examples that are familiar to first year law students are the *Uniform Commercial Code* and the *Model Penal Code*; a full listing can be seen on the Uniform Law Commission website and the ALI website. These publications contain annotations detailing how these model statutes have been adopted and implemented in various jurisdictions and thus can be a rich source of primary authority for a researcher.

8.2.1.6 Treatises

Treatises are comprehensive texts on a narrow legal subject. They generally provide much more discussion and analysis of the legal topic than a legal encyclopedia or ALR annotation while also leading the researcher to primary authorities through references and citations. They

may or may not be jurisdiction-specific and can vary in length from one to dozens of volumes.

Treatises are often named after their authors, *e.g., Nimmer on Copyright*, *Farnsworth on Contracts*. Some treatises are highly reputable in a given field, but the quality can run the gamut. Consulting a subject-specific research guide or a research expert may be the quickest method to locate the most credible title for a specific legal topic.

8.2.1.7 Form Books

While each legal problem is distinct and each client unique, often the output of legal practice takes standardized forms. For instance, partnership agreements, while differing in the details, are generally structured in the same way. On the litigation side, while motions will employ unique arguments depending on the circumstances, the motions themselves will follow a standard format. Thus, one of the more useful types of secondary source in practice are form books, which publish blank templates or forms that lawyers can use in crafting their own legal documents. Usually, some explanatory text, similar to what you would see in a treatise, accompanies the templates.

Form books may be either jurisdiction specific or neutral; they may also be topical specific or cover a wide variety of subjects. *West's Legal Forms* is an example of a general, jurisdiction-neutral form set. Published sets of pattern jury instructions, on the other hand, are topically specific and are often published for specific jurisdictions.

8.2.1.8 Law Reviews & Journals

Law reviews and journals contain scholarly articles primarily written by law professors on various specialized areas of law. Journals are published periodically and may contain articles on a particular subject area (*e.g. Harvard Journal on Racial and Ethnic Justice*) or articles in a wide variety of subjects (*e.g. Harvard Law Review*). Individual articles, however, usually address a very narrow area of the law. Furthermore, they tend to focus on underdeveloped or rarely-visited areas of the law and thus often contain information not found elsewhere. For this reason, they can be a rich resource for identifying not only relevant primary authority on that narrow topic but also secondary authorities on point. For the same reason, they are occasionally cited as persuasive authority by judicial opinions.

8.2.2 Uses of Secondary Sources

As indicated above, different secondary sources are employed for different research scenarios. Typically the researcher will use a secondary source to educate himself on an unfamiliar area of law, unfamiliar jurisdiction, or as a method to quickly identify relevant primary authorities on a given topic. Sections 8.2.2.1 and 8.2.2.2 address these uses in more detail.

While secondary sources are extremely useful tools for the research process, the researcher will not ordinarily cite to them in formal memorandums or court documents. He should never rely on a secondary source's analysis of a primary authority; he must always review the primary authorities and conduct his own analysis relative to the specific facts of the legal issue that he is researching. Additionally, some areas of the law change rapidly and secondary sources vary widely in their currency; a researcher will always need to perform additional research to make sure he is working with the most recent primary authorities on the issue. There are, however, exceptions to every rule, and section 6.2.2.3 describes scenarios in which citing to secondary authorities may be appropriate.

8.2.2.1 For an Overview

A researcher may need to consult a secondary resource for an overview of an unfamiliar area of law, of an unfamiliar jurisdiction, or of an overdeveloped area of law.

When researching an unfamiliar area of law or jurisdiction, a secondary source will give the researcher a quick overview of the state of the law in a specific legal area or in a specific jurisdiction. For an unfamiliar area of law, a general resource such as a legal encyclopedia may be the best place to start; once the researcher has a basic introduction, he may move on to a treatise or practice guide. A jurisdiction-specific legal encyclopedia would be beneficial for the researcher working with the law in a state in which he does not typically practice. A jurisdiction-specific practice series may be beneficial both for gaining an understanding of the topic in the researcher's home jurisdiction, or he may want to identify a practice series in a new jurisdiction to see how it differs from his.

When researching in an overdeveloped area of the law, the researcher may find that he is overwhelmed by the number of primary authorities available on a particular topic. Separating the most relevant authorities from the multitude can be a time-consuming process, but a topic-specific secondary source may give the researcher a head start. A treatise on the topic will

highlight the most important primary authorities in a given area, saving the researcher the time of identifying them himself.

In any of the above scenarios, the secondary source will also yield another important resource: relevant terminology to the topic. A different jurisdiction may use legal phrases to which the researcher is unaccustomed; an unfamiliar or overdeveloped area of law may have sub-topics or concepts previously unknown to him. The secondary materials will help the researcher grasp the appropriate terminology and concepts. Armed with the appropriate vocabulary, he can then pursue primary authorities using the methods described in earlier chapters.

8.2.2.2 As a Pathfinder

One of the most useful features of secondary sources is that they direct researchers to primary authorities, and sometimes other secondary authorities, on the topic. An ALR article may summarize cases on a narrow topic across jurisdictions; a treatise will not only summarize the cases but provide detailed analysis of opinions on a particular legal issue; a jurisdiction-specific practice series will highlight the critical cases on the topic in that state. For underdeveloped areas of law, a scholarly article on point can direct the researcher to a wealth of excellent materials. That scholar has likely performed months, if not years, of research, identified the most relevant primary authorities, and consulted the most authoritative secondary sources on the topic.

8.2.2.3 To Cite as Persuasive Authority

There are scenarios in which it is appropriate to cite to persuasive authority in your legal writing. Typically, this occurs in areas of law that are either underdeveloped or overdeveloped.

When an area of law is overdeveloped, the amount of relevant primary authority to be found can be staggering. It may be difficult to narrow down the appropriate cases to cite to support a particular legal proposition. In such a scenario, it may be prudent to cite a Restatement instead of hundreds of cases that have developed a particular proposition. If that Restatement is cited in precedent from your jurisdiction, it is an indication that it may be appropriate to use it for the same purpose. Some treatises are held in similarly high regard and used in a similar manner.

Citing to secondary authority may also be appropriate in the opposite scenario: when an area of law is new or underdeveloped in a particular jurisdiction. Persuasive authorities, including secondary sources, are used

more often when primary authorities on point are scarce. If your legal problem is a case of first impression in a jurisdiction, *i.e.* there are no precedents, a suggestion from a law review article or a restatement on how to resolve the issue may be suitable.

8.3 Researching Secondary Sources

Now let us turn to how legal researchers find and utilize secondary sources.

8.3.1 Finding an Appropriate Secondary Source

Because secondary sources vary widely in type and format, and often have similar or nondescript titles, finding an appropriate source for the legal issue at hand can be challenging. Ideally the researcher will want to start with a resource that identifies secondary sources by topic, type, or both.

8.3.1.1 Browsing by Topic or Jurisdiction on a Full-Service Legal Information Platform

Some online legal research platforms, such as Bloomberg Law, Westlaw Edge, or Lexis Advance, allow the researcher to browse their secondary resources by topic and perhaps the types of secondary sources on that topic. Such categorization may be broad or narrow. For example, one platform may have a single category for Intellectual Property, while another may further sub-divide that subject area into Copyright, Unfair Competition, Trademarks, and Patents.

Some platforms will also allow the researcher to browse the secondary sources available that relate to a specific jurisdiction. On Lexis Advance, the Browse Sources screen provides filters to narrow the list of titles by category or type of resource, jurisdiction, and practice areas and topics. These filters are indicated by arrows in Figure 8.3.1.1.

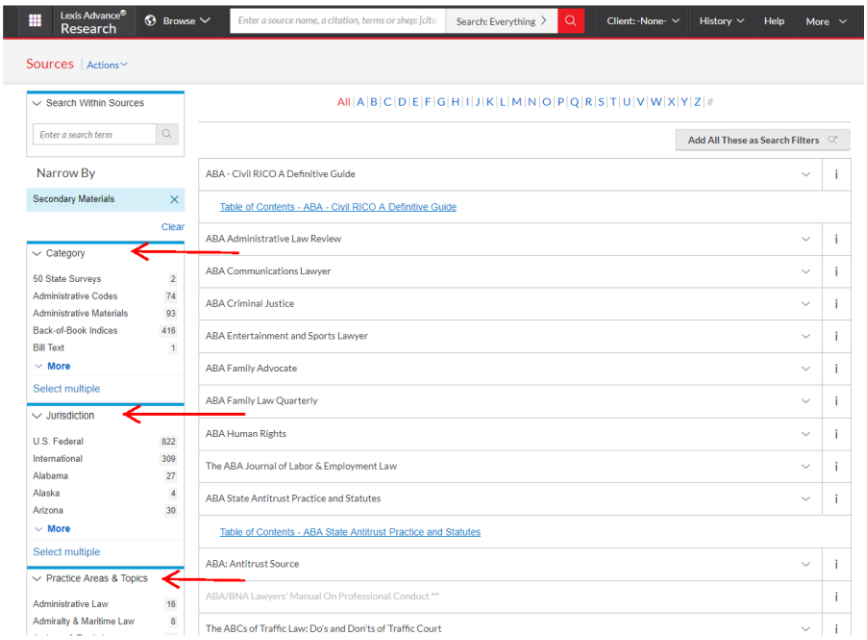


Figure 8.3.1.1: Filters for Narrowing Sources in Lexis Advance. Reprinted from LexisNexis with permission. Copyright 2019 LexisNexis. All rights reserved.

Once the researcher has browsed and narrowed down the platform's secondary sources to those on a particular topic, he can either use the finding aids to work with a specific source or use the standard search techniques to search across the topical sources.

The secondary sources available on the three major legal research platforms vary widely as they each produce, or own publishers that produce, different titles. Some major titles (*e.g.* ALRs, Restatements) are available on multiple platforms due to licensing arrangements, but specific treatises and practice materials typically are not. If a researcher has access to more than platform, he may need to check more than one to find appropriate secondary sources on point.

8.3.1.2 Online Catalogs

Online catalogs are another starting point for finding both print and electronic resources on point. For law students, the law school library will have an online catalog containing records of its print and electronic resources. Most importantly, each record will have one or more Library of Congress subject headings associated with it. The researcher can search

the subject headings directly in a fielded search, or he can search the catalog by keyword and then browse the subject headings found on records that appear to be relevant. Records for print resources will provide him with call numbers for locating the item in the library's physical collection; records for electronic resources will contain links directly to the resource online.

These catalogs can be useful for practitioners as well. A law firm may have its own catalog the researcher can use as a starting place to identify resources held by your firm. If an organization does not have its own catalog, researchers can use collaborative catalogs such as Worldcat to identify resources. Because libraries from all over the world contribute their records to Worldcat, it can be an excellent starting point to identify the world of resources available on a given topic. A researcher may then check to see if his organization has access to those resources or use Worldcat to identify the libraries nearby that may provide access to those resources.

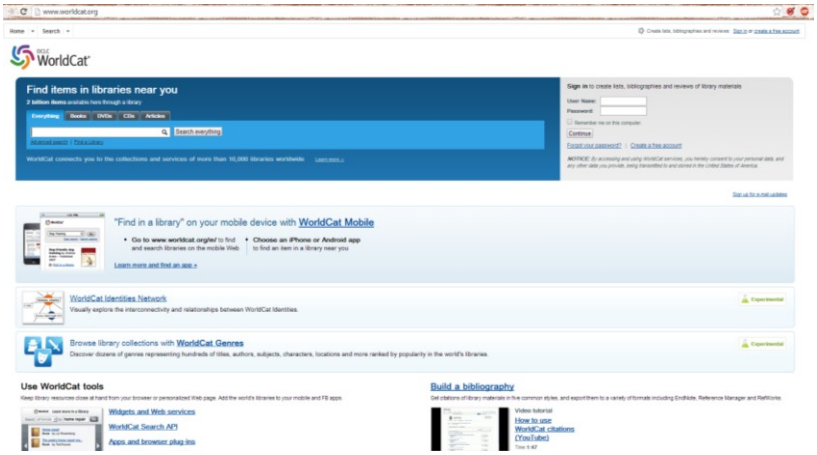


Figure 8.3.1.2: Using Worldcat to find a Treatise. Click here for screencast: http://youtu.be/jPzthzsGyxk

8.3.1.3 Online Research Guides

Another excellent starting point for finding topical secondary resources are research guides created by law librarians. Most university law libraries feature designated webpages to guide researchers to the items in the library's collection relating to particular legal subjects. These guides may identify the most highly-regarded secondary sources on topic, give instructions for how to use particular resources, and discuss methods for further research for primary and secondary authorities on point.

There are a few ways to find these online research guides. One strategy would be to look at the law library websites for the law schools in the jurisdiction in which you are researching. Those websites will list their research guides and may well provide jurisdiction-specific information.

Another strategy would be to utilize Google or another web search engine to search research guides across institutions. By using the **site:.edu** search operator on Google, you may restrict your search query to look only at educational websites. If you include the legal topic you are researching and the term "legal research," the search results will primarily be from research guides developed by law school librarians. For instance, the following search will return librarian-produced research guides that will lead researchers to products liability treatises:

site:.edu AND "products liability" AND "legal research"

Of course, if you have access to one, even better than consulting a librarian-produced research guide would be consulting an actual librarian.

8.3.1.4 Asking a Reference Librarian or an Information Professional

In the current era, so much information is available in just a few clicks online we sometimes forget that asking a knowledgeable individual for assistance remains an option. However, as many of the strategies discussed in this book indicate, the amount of information that is a few clicks away can be the problem. Asking a reference librarian or another individual, such as a practicing attorney, knowledgeable about the area in which the researcher is investigating is sometimes the quickest way to find relevant materials on point. Reference librarians are the people most familiar with their collections, whether that be a law school library or the library of a private organization. They are experts in utilizing many of the systems described in this text and those specific to their own institutions. Their jobs are not only to be familiar with those systems and resources but also to help others navigate them. If the researcher is unsure of where to begin his research or has reached a roadblock after pursuing a variety of leads, a reference librarian, an attorney specializing in that area of law, or other legal information specialist may be able to guide him to resources to propel him forward.

8.3.2 Using Secondary Sources in Print

Like codes, secondary sources tend to possess an inherent topical organization. Thus, expert researchers often find the use of print secondary

sources to be more efficient than electronic versions. We will briefly discuss the chief methods of use of secondary sources in print.

8.3.2.1 Organization & Finding Aids

Some print secondary sources are organized chronologically, but most are organized by topic. A legal encyclopedia is organized alphabetically by general topic; a subject treatise is organized in a logical progression of sub-topics; a practice series may be organized by general subject area and then specific subtopics. Skimming the table of contents can be a quick way of identifying the major topics covered by the source. A secondary source set consisting of a large number of volumes may have different levels of tables of contents much as a statutory code does: a table of contents for the entire set, a table of contents for a chapter, or even more granular levels. Article-based secondary sources such as ALRs or legal encyclopedias will usually have a table of contents at the beginning of an article.

Even with multiple levels of tables of contents, the index is often the researcher's best starting point. Indexes alphabetize in detailed lists the topics and sub-topics covered by the source; they are far more detailed than even the most specific table of contents. Most secondary sources will have an index published at the end of the volume or in the last volume of the set if the source consists of multiple volumes.

Secondary sources may also include tables listing primary authorities along with references to where the authorities are discussed in the text. This can be useful if the researcher has a citation to a particular source of law on which he is interested in finding further analysis. Such tables are usually also located at the end of a volume or set and may be called a Table of Cases or Table of Authorities.

For the secondary sources organized chronologically, the utilization of the relevant finding aids is critical. For example, the annotations in ALRs are published in chronological order. There may be more than one article on divorce and child custody, but they will not be found in close physical proximity the way they would be in a practice series. The only way to identify annotations that discuss a particular topic is to use the available index. Law reviews and journal are also published chronologically; relevant finding aids are discussed in section 8.3.4.

8.3.2.2 Updating in Print

Topical secondary sources in print may be published either in bound volumes or in loose-leaf fashion. As discussed with digests and statutory

codes earlier, hardbound volumes are expensive to produce and so hardbound secondary sources are updated in a similar manner to their primary authority counterparts. Pocket parts are used to update individual volumes and will be found in a pocket at the back of a volume; supplements may be stand-alone soft-bound publications relating to an individual volume for a particular set or may be an update to the set as a whole.

Loose-leafs are an alternative publication format that makes integrating updates into the text somewhat easier. "Loose-leafs" is the term used to refer to treatises or practice materials that are published in a binder rather than a bound volume. To update loose-leafs, the publisher of a title sends pages to replace those that have become dated. The old pages are removed and the new pages inserted; the table of contents, index, and other finding aids of the volume may be updated as well to reflect the new content. This method of updating eliminates a step for the researcher; there is no need to consult additional parts in the set to update the material, as required with hardbound sets. The disadvantage to this updating method is that it can be hard to track down what that secondary source said at a given moment in time, as a researcher might need to do when tracking down secondary sources cited in older documents.

Every print title has a slightly different updating schedule and process, whether in hardbound or loose-leaf format. If a researcher needs assistance in updating a resource, he should contact a reference librarian for assistance.

8.3.3 Using Electronic Secondary Sources

Using electronic secondary sources gives researchers an additional finding aid: keyword searching. Many of the legal research platforms allow you to perform a keyword search across the content of the entire platform. As a practical matter, this is often not the best approach to finding relevant secondary sources. A general keyword search is likely to bring back thousands of results from a wide variety of sources. Sorting through the results of such a general search to determine what type of source the material came from and if it is on point or merely mentioning the topic of interest in passing can be time-consuming. Narrowing the search first by browsing as described in section 8.3.1.1 to find materials on point and then searching across materials on the topic or searching within a specific title is usually more efficient. Alternatively, the researcher may be able to perform a keyword search and then use post-search filters to narrow the

results list before perusing them. Researchers can utilize many of the same search strategies described in Chapter 7.

While keyword searching is an additional finding aid for accessing secondary sources, it is not necessarily a superior option to the traditional finding aids. Often the researcher is using a secondary source to become familiar with an area of law and to begin building a vocabulary to be used in primary source research. So, if the researcher does not yet know the appropriate vocabulary to the topic, keyword searching may not get him very far.

Though the temptation to search is there, do not overlook a source's inherent organizational structure. Browsing the table of contents can be as effective in the electronic universe as it is in print, particularly if the researcher is unfamiliar with the relevant terminology used for the topic.

In addition to the table of contents, the legal research platform or publisher may reproduce other finding aids that are useful in print. Check to see if an electronic version of the index has been included; again, the index is extremely useful when one is unfamiliar with the terminology that would allow you to search. Sometimes such an index may be just a reproduction of the print, requiring you to search the document via the Find feature in your browser (control+F or command+F). For some sources, the index may be searchable on the platform.

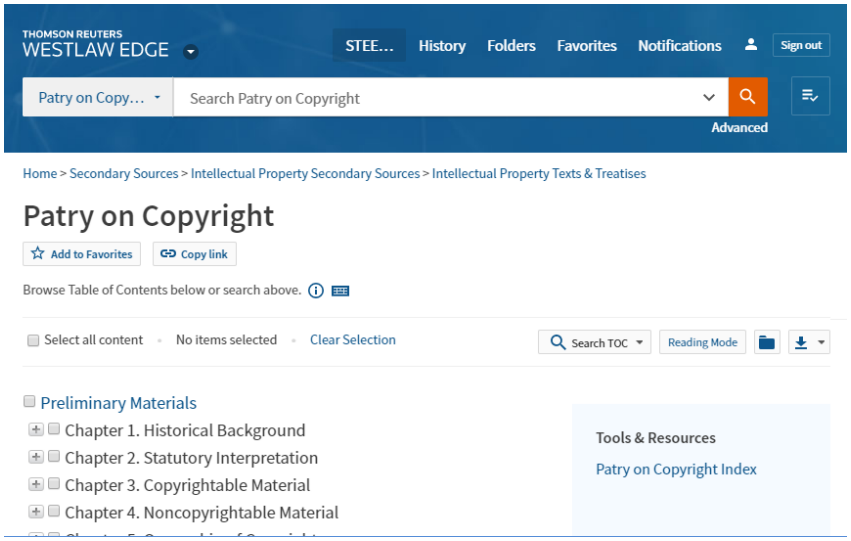


Figure 8.3.3: Using an electronic index. Click here for screencast: https://youtu.be/So25ZHDAG94.

8.3.4 Law Review & Journal Articles

Scholarly legal journals publish articles on many topics but lack any internal topical organization. Luckily, researchers may use several electronic tools to find articles on topics of interest.

8.3.4.1 Indexes

Finding relevant law review and journal articles is a somewhat different task than finding other secondary sources described in this chapter. Thousands of law reviews are published every year across hundreds of individual publications. Checking each title for articles on a topic is impractical. Fortunately, there are publications that index those thousands upon thousands of articles by topic. There are two such general indexes in print: *Index to Legal Periodicals and Books* and the *Current Law Index*. Like Shepard's Citator, however, these publications are often no longer carried by libraries, as their online incarnations are superior tools. The electronic versions are the commercial databases *Index to Legal Periodicals & Books* (ILP), now available through EBSCO, and *LegalTrac*, available through Gale Cengage, respectively. Most university law libraries subscribe to one or both. These indexes cover roughly 1980 to the present; to research older articles you need to use a separate index, the *Index to Legal Periodicals Retrospective*. There are also indexes that cover specific legal practice areas, such as the *Index to Foreign Legal Periodicals* (on HeinOnline).

These electronic indexes allow the researcher to search their records by keyword, author, or subject. Depending on the subscription, these indexes may provide full-text of some or none of the articles. If the latter, a search may provide the researcher only with an abstract and a citation; he will need to find the full-text article by using another resource such as those described in the next section.

8.3.4.2 Full-text Commercial Platforms

Apart from indexes, there are several legal information platforms that allow researchers to perform full-text searches across all the journal articles available on the platform. HeinOnline is the platform with the most comprehensive coverage of law school reviews and journals, though it sometimes will not contain the most recent issues. Westlaw and Lexis Advance also have selections of journals on their platforms and are more likely to contain the most recent issues. Again, the researcher can utilize many of the search techniques described in Chapter 7 when searching on these platforms.

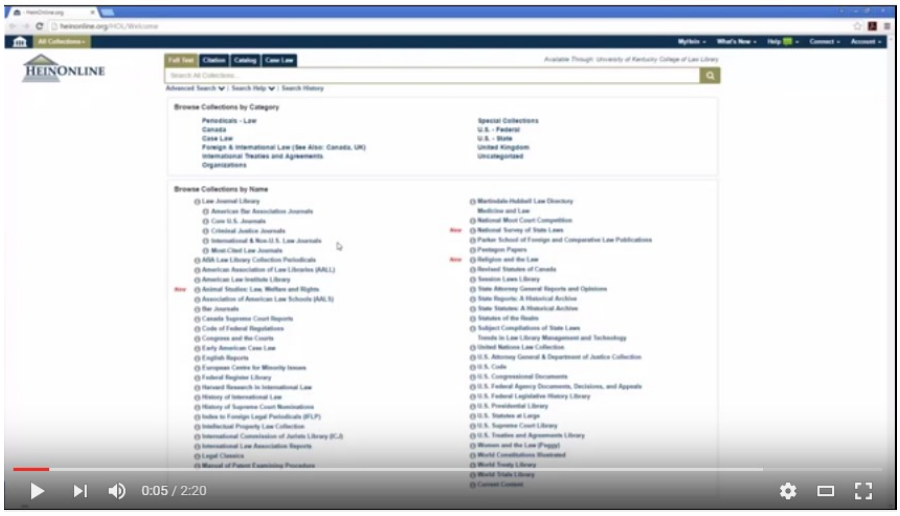


Figure 8.3.6: HeinOnline and journal research. Click here for screencast: https://youtu.be/veZPohr1OWY.

8.3.4.3 Free Resources

There are also free resources available online for searching scholarly legal publications. Many universities promote their faculty by participating in open access repositories and are thus making their faculty scholarship available for free online. There are several ways to find such materials; this text will highlight three.

Many law professors post their published articles and works in progress on SSRN, or the Social Science Research Network. SSRN makes these works freely available to the public. The site can be searched and browsed down to specific legal areas of research, but it can be slow and difficult to use.

Digital Commons is a platform used by many universities to host and provide free public access to their faculty's scholarship. BePress, the creator of Digital Commons, has created a publicly available search engine called the Digital Commons Network to search across all the universities that are hosting their scholarship using Digital Commons. The Network even provides a faceted search to drill down by topic, publication year, and more.

Finally, the Google product Google Scholar utilizes the company's powerful search algorithms to search only scholarly materials rather than all content on the web. It searches the scholarly content made available for free by universities as well as the records of some subscription databases such as HeinOnline and LexisNexis. Google Scholar pulls in only citations

rather than full-text articles from those subscription databases. An additional limitation of Google Scholar is that it will also pull in materials from the Google Books database with no easy way of filtering those materials out of the results.

With the wide variety of free and paid secondary sources available, a legal researcher can become overwhelmed with the amount of information accessible to him while still not quite finding the piece of information he needs. Knowledge of the types of the secondary sources and where and how to look for them will help the researcher be more efficient when beginning his research. And he should never forget the most direct way to find a resource on point: *ask someone* with knowledge of the legal topic or legal resources.

8.4 Concluding Exercises for Chapter 8

Now try your hand at using secondary sources in print or online with the following exercises:

8.4.1 Introductory Exercise on Secondary Sources

Our client, Mary Smith, was adopted by the Smith family as an infant in California and would like to find her birth parents. You are a novice not only to adoption but to family law generally and need to educate yourself on this area of law. Please find the following:

1. A California practice guide or treatise on family law.
2. An AmJur 2d article that relates to whether an individual who was adopted can view her adoption records now that he's an adult.

8.4.2 Intermediate Exercise on Secondary Sources

Our client, Lexington Online Inc., has published the names and phone numbers of all of Verizon's Lexington subscribers in an online directory that is freely available on the Internet. Verizon is suing our client for, among other things, copyright infringement. Verizon says that they (Verizon) were the original authors of that information and Lexington Online's directory is thus violating copyright. Our client says that they (Lexington Online) have just published facts and those are noncopyrightable.

Please find a reputable treatise on copyright and use it to perform some preliminary research on the following questions:

1. Please find a section that discusses authorship and originality. Which primary authorities are analyzed in this section? According to this treatise, what makes a work "original" in terms of authorship?
2. Please find a second section that discusses whether facts can be protected under copyright. Can facts be protected under copyright? Why or why not, according the treatise's analysis?
3. Based on the information you've found so far, is it likely that Verizon will succeed on the copyright infringement claim?
4. What research avenues might you pursue after utilizing this treatise for preliminary background information?

8.4.3 Advanced Exercise on Secondary Sources

Our clients, Ina and Mal Washburn, are being sued for vicarious liability in a traffic accident because they negligently entrusted the use of their car to their 16 year-old-daughter, Kaylee. Kaylee rear-ended another driver while driving down Highway 34 near the Washburns' home in Pierre, South Dakota, while talking on her iPhone. The plaintiff, Diane Riker, is suing under the theory that the Washburns knew their daughter to be a reckless driver, as she has been ticketed for traffic incidents in the past and consistently talks on the phone while driving. The Washburns insist that none of Kaylee's prior traffic incidents involved her smartphone.

Your supervising attorney is unaware of any South Dakota caselaw on point and would like you to find authorities on point from other jurisdictions.

1. Find a relevant ALR annotation regarding liability, smartphones, and car accidents.
2. Does this annotation list any primary authorities from South Dakota?
3. What section(s) of the annotation seems most applicable to our situation? What primary authorities does that section(s) refer to?
4. Does this article refer you to any additional secondary sources that might be worth pursuing? If so, which ones would you start with and why?

8.5 Recommended CALI Lessons for Further Practice

CALI hosts an impressive number of interactive lessons on its website. The following lessons on secondary sources touch upon material covered in this chapter. They would be a great place to start for students looking for further practice on the concepts introduced in this chapter!

8.5.1 "Introduction to Secondary Resources" by Brian Huddleston

Summary: an overview of secondary resources used in legal research. Secondary resources are books and other material ABOUT legal subjects and issues: they discuss and explain primary resources such as cases and statutes and can be useful in assisting our understanding about specific areas of law. The student will learn about the different types of secondary resources and what secondary resources are most useful for specific types of legal research tasks.

Lesson ID: LWR35

URL: http://www.cali.org/lesson/721

8.5.2 "Legal Encyclopedias" by Brian Huddleston

Summary: an introduction to understanding and using the two most common legal encyclopedias, American Jurisprudence 2d and Corpus Juris Secundum.

Lesson ID: LWR40

URL: http://www.cali.org/lesson/859

8.5.3 "American Law Reports" by Kimberli M. Kelmor

Summary: an introduction to using the American Law Reports (ALRs).

Lesson ID: LWR21

URL: http://www.cali.org/lesson/582

8.5.4 "Subject Specific Treatises" by Lisa Goodman

Summary: an introduction to identifying and using subject specific treatises.

Lesson ID: LR105

URL: http://www.cali.org/lesson/16370

8.5.5 "Using the Restatements of the Law" by Sara Burriesci

Summary: an overview of what the Restatements of the Law are and why one would use them for legal research, their major features, how to search them, and how to use them to find cases.

Lesson ID: LWR38

URL: http://www.cali.org/lesson/769

8.5.6 "Researching Uniform and Model Laws" by Beth DiFelice

Summary: an overview of how uniform laws are created and shows researchers how to locate uniform laws, drafters' commentary, state versions of uniform laws, and cases interpreting them.

Lesson ID: LWR25

URL: http://www.cali.org/lesson/762

8.5.7 "Researching and Working with Procedural Forms" by Shaun Esposito

Summary: an overview of the use of procedural forms designed to assist in litigation practice.

Lesson ID: LR107

URL: http://www.cali.org/lesson/8994

8.5.8 "Researching and Working with Transactional Forms" by Morgan Stoddard

Summary: an introduction to locating and utilizing transactional forms.

Lesson ID: LR103

URL: http://www.cali.org/lesson/8991

8.5.9 "Periodicals Indexes, and Library Catalogs" by C. Andrew Plumb-Larrick

Summary: an overview of two of the most important external finding tools--periodicals indexes and library catalogs--that you can use to help find secondary sources relevant to your research.

Lesson ID: LWR34

URL: http://www.cali.org/lesson/766

Chapter 9

The Research Process

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. – The American Bar Association, MODEL RULES OF PROFESSIONAL CONDUCT R. 1.1

> In order to conduct legal research effectively, a lawyer should have a working knowledge of . . .the process of devising and implementing a coherent and effective research design. – MacCrate Report

9.1 Learning Objectives for Chapter 9

In working through this chapter, students should strive to be able to:

- Describe the steps of the research process.
- Assess which research techniques are best utilized at each step of the process.
- Understand the recursive nature of the research process.
- Describe techniques a researcher can employ when faced with too much or too little information.

9.2 Essential Steps of the Research Process

So far in this text we have discussed primary and secondary sources of American law and techniques for locating them in print and online environments. Now we will turn our attention to how to integrate those discrete techniques into a strategic process. The steps for researching most legal problems will follow a logical progression:

1. Familiarize yourself with the specifics of the legal problem.
2. Define the scope of the research.
3. Construct search queries.
4. Gather primary authorities.
5. Analyze and update primary authorities.

Let us look at each step in turn and explore the most efficient techniques, or combination thereof, that the researcher can use at each step of the process. At the end of the chapter, we will address some common concerns that researchers have once they have begun the research process.

9.2.1 Familiarize Yourself with the Legal Problem

Legal research does not exist in a vacuum. Lawyers engage in research to answer a question of law about a specific problem. The researcher must know intimately the facts of that underlying problem, as this is essential to being able to judge what legal authorities will apply to it.

The researcher may begin to ask some questions of the legal problem at this stage of the research. Who are the people or entities involved in the problem? What is their relationship? Are there any obviously missing pieces of information from the scenario forming the basis of the problem? The researcher will likely return to the facts of the client's legal problem repeatedly over the course of the research process in an effort to determine which facts are critical to answer the problem, but at this initial stage the researcher must do his best to internalize the basic story structure to facilitate revisiting those facts at a later stage.

The organized researcher should also ask some additional questions to frame the process of the research at this stage. Whether the legal problem comes directly from a client, a supervising attorney, or a professor, the researcher should clearly understand what work product is expected at the end of the research process and when that work product must be completed. This will aid the researcher both in his final selection of

primary authorities and help him establish a timeline for which to progress through the various stages of research.

Last but not least, the researcher should always note if any primary or secondary authorities have been recommended as a place to begin his research. A supervising attorney or professor may well refer to primary or secondary authorities related to the problem; the researcher can use both to find additional primary authorities on point as described later in this chapter. Such recommendations may save the researcher much time in the initial stages of gathering primary authorities.

9.2.2 Define the Scope of the Research

Once the researcher has familiarized himself with the facts of the legal problem and has an idea of the timeline to which he must adhere, he then must define the scope of the research. An easy mistake to make early in the research process is defining the problem too broadly and simply researching any legal topic or terminology that comes to mind; the result is typically that the researcher is overwhelmed by the number of primary and secondary authorities identified and has no clear idea if the legal problem has actually been addressed. In order to find relevant authorities quickly and efficiently, the researcher needs to form a clear picture of what he needs to find from the onset of his research. To narrow the scope of the problem, the researcher should consider the following:

- **Choice of Law:** Which jurisdiction's law applies to the problem?
- **Venue:** Which court would any legal action relating to the problem be (or has already been) filed in?
- **Area of Law:** Do the facts of the problem suggest a particular area of law (*e.g.* criminal law, contracts, etc.) on which the researcher will want to focus his attention?
- **Issue statement:** Can the researcher identify a clear question that the research must seek to answer? Such an issue statement need not be phrased in specific legal terminology such as one would find in a brief or memorandum at this point, but the formulation of the question will still serve as a limiting factor on the research.
- **Hierarchy of Authority:** At this point, the researcher may also want to sketch out what sorts of authorities will be mandatory authority for the problem.

Sometimes this information will be readily apparent from the legal problem; other times some initial research may be involved.

9.2.2.1 Techniques for Defining the Scope of Research

Secondary sources can be key at this stage of the research process. A treatise may inform the researcher whether the issue is one of state or federal law; a practice series may specify related areas of law or aid in formulating the issue statement. The appropriate secondary source to use at this stage will vary with the researcher's prior knowledge of the legal topic to be researched. Thus, the researcher may need to use a series of secondary sources for guidance, starting with a more general resource like a legal encyclopedia and moving on to a source that discusses the area in more detail. Review Chapter 8 for an overview of the various types of secondary sources and methods useful for locating them.

If in the early stages of the process the researcher has been informed about relevant primary authorities, he can use those authorities to find relevant secondary authorities. Citators are useful tools for this purpose. As the reader may recall from Chapter 6, citators can be used to find a listing of all the primary and secondary authorities available on a particular research platform that cite back to the original authority under investigation. This is a quick way to see a list of treatises, practice materials, and law review articles on the platform that may relate back to the topic. The researcher can narrow these results by using searching and filtering functions provided by the citator. Statutory annotations may also lead a researcher to useful primary and secondary materials.

9.2.3 Construct Search Queries

Once the researcher has limited the scope of his research to a specific area of law from a specific jurisdiction, he will still need to research that jurisdiction's area of law to find specific authorities applicable to the problem at hand. To do this, the lawyer will need to generate specific terms for which to look in primary or secondary sources. Constructing this keyword list is often the first major hurdle in the research process, but it is a useful tool for proceeding in both print and electronic research. Search terms may be general at this stage, *e.g.* the name of the relevant jurisdiction or a broad area of law, or they may be more specific, *e.g.* facts from the initial problem or legal terms of art already provided.

9.2.3.1 Techniques for Constructing Search Queries

The researcher may need to think critically about the terminology employed as a means of either broadening or narrowing his research. For

instance, if the researcher is investigating a defense against a copyright infringement claim, the researcher may identify "copyright" as the relevant area of law to investigate. However, depending on how a given primary or secondary source is organized, the researcher may need to broaden or narrow that terminology. Copyright is a subset of an area of law more broadly termed Intellectual Property, and a legal research platform may organize their secondary sources under the broader category rather than the narrower one. On the other hand, a common defense to copyright infringement claims is the defense of fair use, and it has a substantial amount of secondary literature in its own right. So, the researcher may want to narrow that initial term of "copyright" to the more specific term of "fair use." In print or electronic format, an index may help the researcher narrow these terms by having specific sub-headings under a more general topic heading. As a general rule, if the search terms the researcher is utilizing are yielding too many results, try narrowing the search terms; if yielding too few results, try broadening.

One way to broaden a search is to incorporate synonyms of terms on the initial list. If a critical fact of the legal problem involves a dorm room, perhaps opinions discussing buildings with similar characteristics be useful for analogies, *e.g.* an apartment or a duplex. If a case involves a motorcycle, perhaps that vehicle shares materially relevant features with other types of automobiles. Such synonyms can be useful not only for reminding the researcher of options he should be aware of while using topical indexes but also in formulating advanced search queries discussed in Chapter 7.

Recall from Chapter 8 that one of the most valuable uses of a secondary source is introducing the reader to the appropriate vocabulary of the legal topic it covers. The commentary and analysis or even the organization and finding aids of a secondary source may assist the researcher in determining the relevant terminology. Such sources may assist in generating broader or narrow terms by looking at the index or table of contents, and the cases discussed in the secondary source may suggest relevant synonyms or fact patterns worth adding to the search term list.

The researcher may also pose questions to the facts of the initial legal problem to help construct the keyword list: What is the relationship between the parties of the legal matter? Are there things or places that are in dispute? Have any legal terms of art been discussed? Have legal claims or defenses been identified? The answers to these questions may well have been identified in the first two stages of the research process and can now be incorporated into a list of search terms.

9.2.4 Gather Primary Authorities

Now the researcher must employ the search terms and queries generated to gather primary authorities. The researcher must take care to find not only the most relevant primary authorities but also those that could be relevant. It is a constant balancing act to make sure the search queries are not too broad or too narrow as discussed in the prior section; the researcher will improve his balance with experience. Generally, as indicated throughout this text, it is in the researcher's best interest to start narrow and then broaden so as not to be overwhelmed by the number of authorities identified. At the same time, the researcher must not develop tunnel vision and limit his research too far. A common mistake to new legal researchers is to focus too narrowly on the specific facts of the case. However, there may not be an opinion with facts extremely similar to those of the researcher's legal problem. Thus, he should not discount materials on the applicable legal principle simply because the facts do not align directly with the legal problem in front of him.

One way of narrowing the initial research pass into primary authorities is to focus on gathering those authorities that are binding on the legal problem. If the researcher is working on a legal problem governed by federal law that will be filed in the Southern District Court of Texas, he should not start by researching cases in the Sixth Circuit Court of Appeals or investigating Oregon state court opinions. Persuasive primary authorities should be pursued only after the researcher has determined that the binding authorities do not sufficiently address the legal problem. However, the astute researcher will note persuasive authorities that seem particularly relevant if stumbled upon during the search for mandatory authorities; such a note would save the researcher time in the event that persuasive authority proves to be a necessary avenue of inquiry.

9.2.4.1 Techniques for Gathering Primary Authorities

At this step, the researcher will employ a combination of many of the research techniques described in previous chapters to thoroughly investigate primary authorities for relevant materials. Below is a suggested progression of research techniques. Remember that not all legal problems are governed by all sources of law. Secondary sources will often alert the reader as to which sources of law govern in an area of law, but a thorough researcher will perform his own investigations on the topic to verify.

1. **Secondary sources:** Utilize secondary sources to identify the key primary authorities on a legal topic. See Chapter 8 for a discussion of secondary sources and techniques for locating them.
2. **Constitutional provisions, statutes, and regulations**: Investigate relevant constitutional provisions, statutes, and regulations by using the search terms previously identified to search, browse, and filter through electronic research platforms or browse the table of contents or indexes in print as described in Chapter 3. Do not forget that finding aids such as indexes and tables of contents may serve the researcher as well in the online environment as in the print.
    a. If the researcher identifies relevant constitutional provisions, statutes, or regulations, he should investigate the annotations for references to relevant primary and secondary authorities.
    b. Remember that researchers can use citators to trace a legal issue forward in time; a citator will identify other primary and secondary authorities citing back to the original constitutional provision, statute, or regulation under discussion. Review Chapter 6 for a more thorough discussion of the uses of citators.
3. **Judicial Opinions:** Investigate judicial opinions by using the search terms previously identified to search, browse, and filter through electronic platforms or to browse the relevant digest as described in Chapter 4. Do not forget to utilize any topical organization system available either in print or electronic format. Once the researcher has identified some relevant cases, he can employ them to find more authorities on point:
    a. Look at the headnotes of the opinion for relevant topics and/or key numbers. Use them to find further primary authorities on point.
    b. Use a citator to trace the issue forward in time and find more recent primary and secondary authorities on point.
    c. Investigate the authorities to which the opinion itself cites and on which it bases its analysis. The citator may include a Table of Authorities for the case which will list all the primary authorities mentioned in the opinion.

9.2.5 Analyze and Update Primary Authorities

This is perhaps the most time-consuming and challenging piece of the research process. After gathering the relevant primary authorities, a researcher should read each authority carefully to understand the legal issues being discussed and the relevant facts. Such analysis must include updating each authority through the use of a citator. The researcher must then analyze each authority on its own and how it relates to the other authorities to synthesize rules relevant to the problem at hand. This step is where research and writing become inseparable; the researcher's analysis of the primary authorities and rule-formation will create a framework for the final written product.

9.2.5.1 Techniques for Analyzing and Updating Primary Authorities

Topical secondary sources providing in-depth treatment of a legal subject, such as treatises or law review articles, may provide analysis that will aid the researcher in her understanding of the primary authorities. Refer to Chapter 8 for a discussion of which secondary sources tend to offer such treatments.

Citators will alert the researcher to any negative treatment of a primary authority as explained in Chapter 6. An authority will be marked accordingly if it has received negative or cautionary treatment by other authorities. For opinions, citators will typically also indicate the level of analysis the opinion received in the citing opinions; the analysis of the case by other courts may also inform the researcher's analysis. The citator may indicate which legal issue in the original opinion was treated negatively by the citing opinions. The researcher can use this feature to determine which citing opinions must be analyzed to place the original opinion in the appropriate overarching context of the legal issue.

9.2.6 Research and Writing as a Recursive Process

Though the research steps above progress in a logical fashion, the process is not always as linear as the steps may indicate. Research and writing is often a recursive process; the more information the researcher gathers and analyzes, the more he may need to revisit earlier assumptions or fill in gaps that were not apparent in the first research pass. Any of the steps of the research process may be utilized at various points on the research timeline. For instance:

- A researcher may find after consulting some secondary authorities that he has not correctly identified the relevant areas of law or which jurisdiction's law should be applied, thus prompting a re-evaluation of the scope of the problem and the search terms employed.
- Issue statements may be refined as more information is gathered, which may lead to more tailored search queries that yield a different line of primary authorities.
- A researcher may begin to write up his analysis of the gathered materials and find that he is making statements that his authorities do not explicitly support. He must then revisit primary authorities overlooked at the beginning stages of research.
- Facts that did not appear relevant in the initial stages of research may be highlighted in opinions as crucial pieces of the puzzle; the researcher will then need to add them to the list of search terms for further investigation.

All of these scenarios and more are possible during the research and writing process; revisiting earlier stages of the research process is a normal and natural occurrence.

9.2.6.1 Recurring Research Techniques

Much as the steps of the research process may be revisited over the course of the investigation, the finding aids and electronic research techniques are often utilized repeatedly at different stages of the research process. A researcher will likely use the features of a citator on every primary authority found. He will note topics and key numbers mentioned in secondary and primary authorities that may be found at different stages of the process. The index of a useful treatise may be referred to frequently as the researcher discovers new legal terminology and concepts from the treatise itself or in the primary authorities. These techniques are tools to be utilized during the myriad iterations of the research process rather than static, individual actions.

9.3 Common Research Concerns

Even with a logical research process and recommendations regarding techniques to use to perform the research, the researcher may still find himself asking questions about when to stop his research or what to do if

he has found too much or too little information. The final part of this chapter recommends criteria and actions to consider in these scenarios.

9.3.1 When to Stop Researching

"How do I know when to stop?" is a very common question among novice researchers. Unfortunately, there is no singular sign that will indicate to the researcher that he has completed his task; the answer will vary not only by problem but by the time the researcher has in which to create the end work product. Generally, if the researcher has found authorities that answer the initial issue statement and subsequent issues that have come to his attention during research, if he has pursued the relevant avenues of research discussed in this text, and if he is seeing the same authorities referred to over and over again, he is in a good position to stop.

9.3.2 Not Finding Enough Relevant Authorities

If a researcher cannot find enough, or any, relevant authorities, he may need to revisit some of the earliest steps of the research process.

- Refer back to the initial information received about the legal problem and make sure you understand the information given to you. Are you overlooking any critical information or was any critical information missing from the information you received?
- Return to the secondary sources you identified initially or find different secondary sources on point. Read the materials carefully to be sure you understand the material presented.
- Rethink your search terms. You may need to broaden the terminology or concepts for which you are searching.
- If you have exhaustively searched the mandatory primary authorities, you may want to try searching persuasive primary authorities, focusing first on highly persuasive authorities.
- Consult with a reference librarian or another legal information specialist as described in section 8.3.1.4. Be prepared to describe in detail both the legal problem and the steps you have taken to research the problem. This individual may be able to suggest sources or research techniques you have overlooked or help you modify the techniques you have been using.

9.3.3 Finding Too Many Relevant Authorities

If the researcher is overwhelmed with authorities, the techniques to be employed are similar to those utilized when one is underwhelmed as described section 9.3.2.

- Refer back to the initial information received about the legal problem and make sure you understand the information given to you. Are you overlooking any critical information or was any critical information missing from the information you received?
- Return to the secondary sources you identified initially or find different secondary sources on point. Read the materials carefully to be sure you understand the material presented.
- Rethink your search terms. You may need to narrow the terminology or concepts for which you are searching. If you are using electronic resources, be careful about filtering information appropriately. You may also want to perform searches within the initial results lists.
- If you had broadened your search to primary persuasive authorities, refocus on primary mandatory authorities or only the most highly persuasive authorities.
- Consult with a reference librarian or another legal information specialist as described in section 8.3.1.4. Be prepared to describe in detail both the legal problem and the steps you have taken to research the problem. This individual may be able to suggest sources or research techniques you have overlooked or help you modify the techniques you have been using.

9.4 Concluding Remarks

It is an oft-quoted maxim that research is an art, not a science. Much as with painting, the novice must work diligently at developing his basic skills by practicing with the tools of his trade; repetition and exposure to new materials accretes those skills into the knowledge necessary to create detailed works of art. This text has outlined the basic tools available to the legal researcher and described skills he should strive to develop; time and practice will evolve the researcher's skills into experience and allow him to competently address the legal problems that will come his way.

9.5 Recommended CALI Lessons for Further Practice

CALI hosts an impressive number of interactive lessons on its website. The following lessons on research methodology touch upon material covered in this chapter. They would be a great place to start for students looking for further practice on the concepts introduced in this chapter!

9.5.1 "Legal Research Methodology" by Wendy Scott and Kennard R. Strutin

Summary: a series of tutorials lead students through situations and problems commonly given to new attorneys and student interns. Each section contains questions that test the students' responses to different situations and their understanding of the reasons behind legal research. The exercises use realistic research problems and demand that students begin to think logically and practically about legal research.

Lesson ID: LWR07

URL: http://www.cali.org/lesson/567

9.5.2 "Hold 'em, Fold 'em, Walk Away or Run: When to Stop the Search" by Yolanda Jones

Summary: Knowing when to stop is important for efficient and cost effective legal research. This exercise will cover several factors which you may wish to consider.

Lesson ID: LWR31

URL: http://www.cali.org/lesson/763