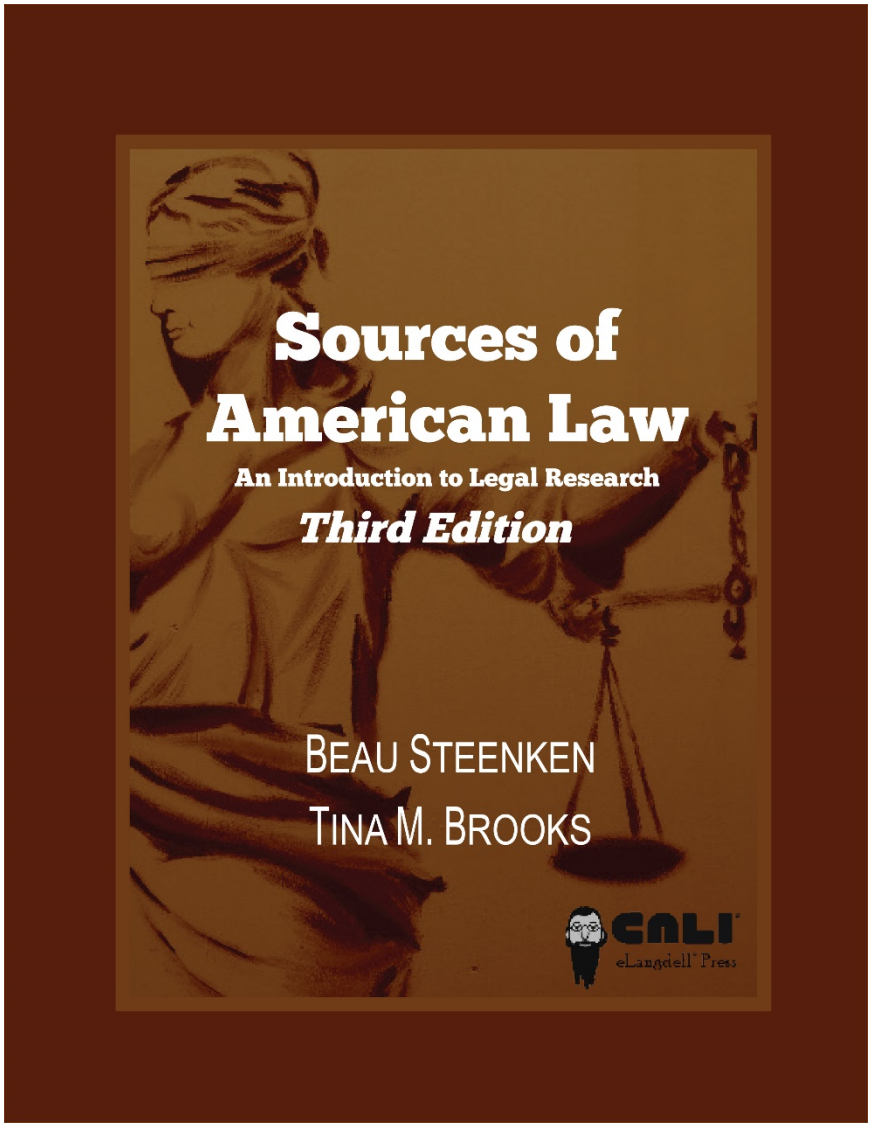
Sources of
American Law
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Beau Steenken
Instructional Services Librarian
University of Kentucky College of Law

Tina M. Brooks
Electronic Services Librarian
University of Kentucky College of Law

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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 such, there exists a long history of publishing the various sources of law. As part of the publishing history, legal sources developed their own information systems. In large part, legal information systems predate the information systems most familiar to

students, like the Dewey Decimal System or Library of Congress Classification. As such, 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 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]

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[1] AMERICAN BAR ASSOCIATION, 2016-2017 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 302(b) (2015).

[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 revolting 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 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

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[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.

[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.

limits the application of federal law-making authority to specific topical competencies.[11] State governments, while subject to federal supremacy in the enumerated 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.

[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, and federal law only, clearly governs copyright[15], a fact familiar to most lawyers off the tops of their heads. However, the federal government's interstate commerce power

[15] U.S. CONST. art I, § 8, cl. 8.

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 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 *fora* 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

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[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.*, KY. REV. STAT. § 515.020 (2014), *available at* http://www.lrc.ky.gov/statutes/statute.aspx?id=19821.

[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).

[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).

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.

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 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

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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).

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

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 to become enacted 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*.

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 2.

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.

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[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.

[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; KY. CONST. § 29.

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

Judicial interpretations of law take the form of judicial opinions, also referred to as cases. As the casebook remains by and large the tool of choice for legal instruction in the United States, law students will tend to be most familiar with this source of law. 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. Thus, 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 3.

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]

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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; KY. CONST. § 109.

[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).

[37] *See, e.g.*, U.S. CONST. art. II, § 3; KY. CONST. § 81.

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 4.

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 pieces 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, not all judicial opinions carry equal weight. Thus, more description is in order.

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 6.

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.

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

[39] *Id.*

[40] *Id.*

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 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. In order to make a determination, first a lawyer must consider choice of law. In order to be binding, a precedent must apply the same jurisdiction's laws as would apply to the controversy for which the research is being conducted.[41] However, choice of law alone does not determine weight of authority.

A lawyer must also 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.

[41] Note that in the event a controversy involves issues from multiple sets of laws, such as federal constitutional defenses to state laws, it would be possible for cases to be binding on some issues but not others.

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 District Court for the Eastern District of Kentucky, mandatory precedents 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.

Of course, even if a lawyer determines a precedent 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, the higher the court the better. 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. 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.