An Introduction to United States Law for Technologists (Working draft, January 2023)

Andrew Sellars[1]

This guide is meant to introduce technologists interested in law and policy to the very basic architecture of United States law, and some the values and concepts the law embodies. The guide should help you get a general sense of the legal landscape and sharpen your thoughts on appropriate legal or technology-based policy interventions.

This document is meant for audiences that are more accustomed to engineering and computer science than law. As legal readers will know, the topics discussed here are intricate and contentious. A large degree of generalization is inherent in such a short summary. But even so, one should begin to see the nuance and complexity in how different legal forces operate and some of the key differences between law and more computationally oriented domains.[2] Those include:

- The law in a constitutional democracy like ours foregrounds *human* and *social* behavior. We rely on people at every step of the process — human legislators to create the law, human judges to interpret the law, human prosecutors and plaintiffs to decide when to enforce the law, and humans to elect many of the positions in the legal system. This is not as different from technology as one may assume. As a growing body of literature demonstrates, we frequently overlook just how human an endeavor the development and deployment of technology is and what consequences follow from the human design of systems.[3] But you will likely find this influence even more pronounced in law.
- Law relies heavily on *text* and textual interpretation. The United States prides itself on being a "government of laws, and not of men."[4]

---

[1] Clinical Associate Professor of Law, Boston University School of Law. This guide was prepared for the course "Law and Algorithms," jointly taught between School of Law and the Faculty of Computing and Data Sciences at Boston University. Thanks to my past and present co-teachers, Ran Canetti, Aloni Cohen, Gabriel Kaptchuk, and Mayank Varia for their input.

[2] This guide does not even begin to explore the more complicated sociotechnical space in which law resides, and how it interacts with other regulatory powers like social norms, markets, and technology itself. A classic examination of these different regulatory forces can be found in Lawrence Lessig, Code and Other Laws of Cyberspace, Version 2.0 (2006). To help familiarize you even further with the behavior and language of lawyers, I am largely following the "Bluebook" form of citation in this guide, which is how most lawyers are accustomed to citing sources.

[3] Some recent highlights include Ruha Benjamin, Race After Technology (2019); Julie Cohen, Between Truth and Power (2019); Safiya Umoja Noble, Algorithms of Oppression (2018); Meredith Broussard, Artificial Unintelligence (2018); Cathy O'Neil, Weapons of Math Destruction (2016).

[4] Quoting Justice John Marshall in one of the most famous United States court cases of all time for legal audiences, Marbury v. Madison, 5 U.S. 137 (1803). This citation,

But underneath that gendered platitude is a whole lot of ambiguity and lively debate. For one, "law" comes from a wide and somewhat contested array of sources. For another, how we *interpret* this text is one of the liveliest debates in all legal scholarship. This extends to *how to define* the words used, as words are an imperfect way of capturing one's ideas and rely on shared cultural context to effectively communicate across people. But this also goes further to what *meaning we should give* to the words in light of the word's function in a statute, regulation, constitution, or other legal document.[5]

- Legal outcomes are *heavily procedural* subject to much more *extrinsic review* than intrinsic checks that you may see in fields like computer science. There is no checksum in a legal decision. Instead, we move legal issues through different organizations that may weigh in or correct the decision of another. To take an easy example, if you have a dispute in a court, most of the time you can *appeal* that decision to a different, higher court. That new court then reviews the earlier court's decision (with some complicated rules about deference to aspects of earlier decisions) and can alter its results. Or in the legislative arena, a legislature can pass a law, a court can then interpret what the law means, and then if the legislature doesn't like that interpretation, they can pass a new version of the law that supersedes that interpretation. This heavy emphasis on procedure has some benefits (it is often cited as a major reason people view laws and the legal system as legitimate[6]), and some costs (it takes considerable time for the law to "play out").
- Relatedly, law in the United States generally follows an *adversarial model* of dispute resolution. Rather than have a single body empowered to investigate what happened and then apply rules to the facts it finds,[7] the legal system leaves it to the parties on each side of a dispute to investigate the facts and then present their findings and arguments to a neutral body who then hears the case. There are a lot of procedural and evidentiary rules that facilitate that process along and ensure some cross-party information sharing (and daily disputes between lawyers about how honorably each side is doing under those rules), but we leave most of the labor to each side to build and present their case.

---

by the way, is the classic Bluebook format in which a lawyer cites a case, first with the party names (here, Marbury and Madison), the volume and page in a "reporter" that collects and publishes cases of note (here, page 137 of volume 5 of the United States Reports, which collects the cases of the United States Supreme Court), and the year of the decision (1803). As you will see later the citation will also include the specific court that issued the decision for reporters that include cases from multiple courts.

[5] To see some of that debate in action, read ROBERT A. KATZMAN, JUDGING STATUTES (2014) and ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

[6] *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

[7] These sorts of systems are sometimes called "inquisitorial legal systems."

- The answers to legal questions usually consider a wide range of *sources of authority*. As the sections that follow show, there are many different sources of what we could call "law." This includes statutes, court opinions, regulations, state and federal constitutions, legal literature from scholars, and even more informal things like statements of policy from key legal bodies. Understanding how these different sources relate to one another, and which take precedence over others, will be important as you develop your technology law and policy views. These different sources of authority are explored more in the following sections.

The "Common Law" System of the United States

The Common Law Tradition and the Importance of Legal Opinions

The easiest entry point into understanding current United States law may be to first understand its history. As a former colony of England, the United States draws much of its legal system from the English tradition. This includes the *three branch* structure of government—having a legislative branch that drafts laws, an executive branch that sees the law enforced, and a judicial branch that resolves disputes.[8] It also includes what is known as the "common law" system.[9] The United States adopted England's general approach to the law and (except for the parts the Founders decided to change as part of the revolution) the actual substance of the law in effect in England in the late 1700s. Of course, the intervening years have changed that substance considerably.

At its most abstract level, the "common law" approach means that the way in which disputes within the law are decided *generates new sources of law* that are then used in future decisions. This comes primarily through *legal opinions* issued by courts. In our system we follow an *adversarial process* through which each side in a dispute argues in writing (and often, orally) before a neutral judge why they should win the case. Courts hear those arguments, issue written rulings, and those rulings in turn can be cited as precedent in future disputes. In this way, legal opinions become a bit like the glue that holds the rest of the sources of law together. They provide authority on how to interpret the language of statutes, the meanings of constitutional provisions, whether an agency stayed within the bounds of its delegated powers, and so forth. Rather than being designed and built from scratch, our law evolves out over the centuries as the courts interpret it. Legal opinions become the common thread throughout.

[8] The separate, church-based ecclesiastical court system of England was not brought over.

[9] The State of Louisiana is an outlier in this approach, following more closely to its French heritage and the "civil law" system, but this guide will focus on the approach of the other 49 states.

A great place to begin your understanding legal opinions is Orin Kerr's essay aptly named *How to Read a Legal Opinion*. As Kerr explains, "[t]he opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other."[10] Their structure varies, but an opinion usually starts by restating the facts that led up to the dispute, as well as any prior history of the case. It will then address what law the court applies to the case. It will then usually summarize some of the arguments raised by the parties and explain which arguments the court found persuasive and which it rejected. And then it will conclude by saying what action in the litigation will follow in light of the opinion.

The lawyers for the two parties will pour over every word of a legal opinion the moment it issues, as it will have a direct impact on the lives of their clients and what will happen next in their case. But for those outside of the dispute, the important question is how this legal opinion will influence our *future* understanding of the law. To understand that, two other concepts need to be reviewed: (1) how to understand the "holding" of a case, and (2) the hierarchy of courts.

The "Holding" of an Opinion

The "holding" of the opinion is the part of the opinion that states what the future rule stemming from the case will be.[11] The part of the opinion where the court explains how the law applies to the facts before it is the holding (both in process an result) becomes the "holding" of the case, and lawyers and law students read opinions to both see what the ultimate outcome was and the rule the court followed to reach that outcome.

To help illustrate this, what follows is an annotated excerpt of a legal opinion from a federal appeals court.[12] The case involves a now-defunct website, Jerk.com, which hosted a database of profiles of individuals. On each page, users could vote to say whether that person was a "jerk" or "not a jerk." If you have any familiarity with online reviews, you can probably guess what happened next: a lot of people now had a website calling them a jerk.

The website advertised that for a $30 membership fee a person could dispute the information on the page about them. But the Federal Trade Commission (or "FTC," the federal agency responsible for consumer protection issues) received several reports from users who paid for these "memberships" and claimed that the website did not actually give members anything. After an investigation, the FTC launched an administrative hearing against the company and its founder, John Fanning. The FTC alleged that Jerk.com's

[10] Orin S. Kerr, *How to Read a Legal Opinion*, 11 Green Bag 2d 51, 51 (2007).
[11] *See* Kerr, *supra* note 10, at 60–61.
[12] The federal appeals courts operate at the second of three tiers of authority in the federal court system, as explained in the following subsection.

actions violated the federal law that prohibits "unfair or deceptive acts or practices in or affecting commerce."[13]

The administrative law judge heard from the both FTC and Jerk.com and sided with the FTC that this was an unlawfully "deceptive act or practice." Displeased with this result, Fanning invoked a procedure in the law to have a federal appellate court review this decision.[14] (You see already here how procedural the law is, and how many different bodies become involved in the application of the law.) Fanning was in Massachusetts, so he specifically petitioned the United States Court of Appeals for the First Circuit, the federal appellate court that presides over cases coming from this state.

After briefing by the FTC and Fanning's lawyers, the First Circuit issued a legal opinion. What follows are some annotated excerpts from the case:

Excerpts from Fanning v. FTC, 821 F.3d 164 (1st Cir. 2016)	**Notes**
Before TORRUELLA, LYNCH, and BARRON, Circuit Judges. OPINION TORRUELLA, Circuit Judge. Defendant-Appellant John Fanning petitions this court for review of the Federal Trade Commission's ("the Commission") summary decision finding him personally liable for misrepresentations contained on the website Jerk.com in violation of the Federal Trade Commission Act ("FTC Act"). We agree with the Commission's findings that Jerk.com materially misrepresented the source of its content and its membership benefits. […] We affirm the finding of liability and the remedial order recordkeeping provisions and order acknowledgment requirement. [We] remand for proceedings consistent with this opinion. […]	We start with the names of the judges who heard the case, and the author of the opinion, Judge Juan R. Torruella. We next see a summary of what the case decides. From this you already know what the end result of the case will be – the court agreed with the FTC that Jerk.com violated the law against "deceptive acts or practices in or affecting commerce." In an omitted part of the opinion, the court disagreed with the FTC on a particular aspect of the remedy that was ordered, so it is sending the case back to the FTC—*remanding*, in the language of law—for further analysis of what the consequence of Fanning's violation should be.

[13] 15 U.S.C. § 45(a)(2). More on citation to legislation below.
[14] This is called a "petition for review," and is permitted according to 15 U.S.C. § 45(c).

Jerk.com was a self-proclaimed reputation management website. Its homepage greeted users by asking them if they were "[l]ooking for the latest scoop on a world filled with jerks" and stated that "millions" of people "use[d] Jerk for important updates, business, dating, and more." The homepage listed several benefits Jerk.com offered, including tracking one's own and other people's reputations, "enter[ing] comments and reviews for [other] people," "[h]elp[ing] others avoid the wrong people," and "prais[ing] those who help you." […] Jerk.com also had a "Remove Me!" page, which stated that individuals could "manage [their] reputation and resolve disputes" regarding content on their profile pages through a paid subscription. The "Remove Me!" page contained a link to a separate subscription page where users could enter their billing and credit card information to purchase a $30 membership. The subscription page reiterated that only paid members could "create a dispute" about the content of a profile. […]	We next get a summary of the facts underlying the case. The court noted in a footnote that the facts in the case were largely undisputed, but if they were in dispute you would also likely see the differing views on what the facts were.
In April 2014, the Federal Trade Commission's enforcement arm ("FTC") filed [an] administrative complaint charging [Jerk LLC and its founder John] Fanning with engaging in "deceptive acts or practices in or affecting commerce" in violation of section 5(a) of the FTC Act. 15 U.S.C. § 45(a)(2). [The FTC] alleged that Jerk.com misrepresented the benefits of purchasing a $30 membership.	We also get some of the procedural history of the case, as well as a citation to the specific law that was alleged to have been violated, 15 U.S.C. § 45(a)(2).
The FTC moved for summary decision (the administrative equivalent of summary judgment) … in September 2014. The Commission granted the motion … and found Fanning personally liable … for Jerk's misrepresentations. Fanning … filed this timely petition. […]	The court references "summary judgment," which is a way that courts resolve a case where the facts are not in dispute, and the only question is how the law plays out under the facts. This means we avoid the complicated step of figuring what the actual facts are, which normally is done through a trial.

The FTC Rules of Practice and Procedure allow the Commission to grant "summary decision," which is reviewed under the same standard as summary judgment before a district court. See 16 C.F.R. § 3.24(a)(2)…. Under the summary judgment standard, we "draw all reasonable inferences in favor of the non-moving party," but disregard "conclusory allegations, improbable inferences, and unsupported speculation." *Méndez-Aponte v. Bonilla*, 645 F.3d 60, 64 (1st Cir. 2011) …. This court then asks whether a reasonable decision maker could conclude there was no "genuine issue of material fact" that "may affect the outcome of the case." *P.R. Aqueduct* [*v. EPA*, 35 F.3d 600, 605 (1st Cir. 1994)]. Nonetheless, judicial review of FTC findings is deferential. See *Kraft, Inc. v. FTC*, 970 F.2d 311, 316 (7th Cir. 1992). "[T]he Commission is often in a better position than are courts to determine when a practice is 'deceptive'" and "the Commission's judgment is to be given great weight by reviewing courts." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). […] In determining whether a defendant has engaged in deceptive acts or practices, the Commission uses a three-part test considering (1) "what claims are conveyed;" (2) "whether those claims are false, misleading, or unsubstantiated;" and (3) "whether the claims are material to prospective consumers." *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015); *see also Kraft*, 970 F.2d at 314. […]	Here we see the standards the court will use as it reviews this decision. Note that the standards are coming from a few different places: agency rules (indicated by the citation to a section of "C.F.R.," which is the Code of Federal Regulations), as well as earlier cases. And what is the rule for how the court reviews a case? Well, in a "summary decision" like this the facts are not supposed to be meaningfully in dispute; this should only really be about how the law applies to those facts. That said, the court recognizes that there may be some ambiguity in what actually happened—and indeed, Fanning argues in a little bit that the facts *are* in dispute. So the court says that if there is room for ambiguity the court assumes that whatever ambiguity favors Fanning (the "non-moving party" here). But when it comes to applying the law, the court is going to show some deference to the FTC, as the FTC has some subject matter expertise on consumer deception. As you can see, we place different weights on the different parties for different things, all with the goal of helping to ensure the best result. (How well we do at that is constantly debated.) And here we see the rule the court is using the decide the case. Remember that all the statute said is that a person cannot engage in "deceptive acts or practices in or affecting commerce." What *defines* a "deceptive act or practice" comes from a 2015 case from another court, *POM Wonderful, LLC v. FTC*, which echoes an earlier case from 1992 with that standard, *Kraft, Inc. v. FTC*. If you were to look up the *Kraft, Inc.* opinion you will see even earlier cases that cite test, going back to an FTC "Policy Statement on Deception" from 1984, which was requested by a Committee in Congress in 1983. By searching these earlier authorities and seeing what they cite, we trace the evolution of the law and how many different legal bodies worked off of each other to reach the test the court cites today.

We … agree with the Commission that Jerk.com contained material and false statements about the benefits of its $30 paid membership. Jerk.com's "Remove Me" and "billing information" pages stated that a $30 paid membership would allow users to "manage [their] reputation" and "create a dispute" about the content of a profile page. As the Commission found, Jerk.com expressly represented that a $30 membership would allow users to contest and potentially remove negative reviews on their profile pages.	Now we see the court go through and apply the first one of these factors, what exactly was claimed. The court finds that Fanning and Jerk.com did convey the idea that a person who paid the $30 would be allowed to contest negative reviews at the very least. The court is not doing its own investigation into that, it's looking at the facts that have already been dug up (the facts "*in the record*").
Fanning has failed to create a genuine dispute about the falsity of this claim. Two FTC investigators paid the $30 membership fee and never received any communication from Jerk. The FTC received numerous complaints stating the same. Fanning adduces no evidence showing Jerk.com provided services to (or even communicated with) users who paid the membership fee. … Fanning … fails to cite any evidence to the contrary…. […]	Here's the second factor, that the claim was false or misleading. We also see Fanning's (failed) defense. Note that he tried to argue a somewhat subtle point here: not that the FTC was wrong, but that *the facts were in dispute* as to whether Jerk.com gave these memberships or not. And because they were in dispute, "summary decision" against him is improper—in short, this dispute should go to a trial instead. But the court doesn't buy it.[15]
We also conclude Jerk.com's misrepresentation was material. … The Commission … found ample evidence that the misrepresentation affected consumer behavior, as reflected in the numerous complaints from consumers stating they paid the membership fee so that they could have their profiles (or reviews contained therein) removed. We find summary decision proper ….	And finally we have the third factor, that this false statement was "material" – that is, consumers paid the $30 *because* they thought they were going to get the dispute tools that Jerk.com ended up not providing. Here again, the court looks at the evidence in the record and finds it sufficient. And because the court found all three factors to favor the FTC, they uphold the FTC's decision.

This excerpt illustrates a lot of the classic elements of a legal opinion. We have a bit of the factual history, a bit of procedural history, the rule the court uses, and how the court applies the rule to the facts of the case.

[15] Underneath all of this we are seeing an interesting question a law student would spend a lot of time: whose *burden* is it to produce the evidence arguing one way or the other? In short, under the standards of a "summary disposition," the FTC had the initial burden to produce evidence that this was false, which it did through a combination of consumer reports and its own investigation. The burden then *shifted* to Fanning to produce evidence that puts this in dispute. He failed to do so, so the court credits the FTC's evidence and moves on.

So what part is the "holding?" Different lawyers may see it slightly differently, but one could say that the holding of this case is this: If a website that claims to allow people to remove or edit content with a fee, but then does not actually provide those services when a user pays the fee, the site violates consumer protection law by engaging in a "deceptive act or practice." Future courts will use this when considering similar websites, and lawyers advising clients will caution them to avoid doing this to their users (i.e., either provide the service that you promise, or don't make the promise in the first place).

And in this example we see all of the attributes of the legal system mentioned at the beginning of this document on display:

- A lot of *humans* were involved in reaching this result. Investigators at the FTC fielded complaints and investigated what the company was doing. A person within the FTC served as the "administrative law judge" to review the allegation and hear evidence from both the investigators and the website operator. Three other humans, circuit court judges, then heard arguments as to whether the FTC did a good job, and the one of them (working with their human law clerks, no doubt) wrote up the reason why Fanning was wrong and the FTC was right.
- The *text* of the law is at the center of the case—there is a statute that says one cannot use "unfair or deceptive acts or practices in or affecting commerce." But to understand what that means, the court had to do a lot of interpretation, and relied on a number of other legal sources to do it.
- We see a lot of *procedure*, and some complicated rules as to how different legal bodies consider their role each step of the way. Probably the most complicated paragraph in the excerpt above is the one toward the beginning, where the court explains exactly how they were going to review the underlying facts and legal conclusions that came to them from the FTC.
- The facts and legal arguments were developed through an *adversarial model*. On the one side we had the FTC gathering evidence and presenting an argument as to why Jerk.com violated the law. On the other side we had Fanning gathering his own evidence (less successfully) and casting doubts on what the FTC argued. And hearing all of this were neutral parties, including an "administrative law judge" from the FTC[16] and three judges from the United States Court of Appeals for the First Circuit.

[16] Just how "neutral" an administrative law judge can be is the subject of debate within the field of administrative law, but they are meant to be, and the procedures for appointment and reporting structure within the agency endeavor to provide a degree of neutrality. *See Administrative Law Judges: An Overview*, CONG. RESEARCH SERV. (April 13, 2010).

Note that this approach also illustrates how changes in the law can be *incremental*. This case answers how to think about a "deceptive act or practice" in one situation. But imagine a new website that had a similar structure. Let's say the new website also offered a $30 membership option, but this time they *did* provide some ways to contest a negative review. But let's further imagine that consumers were dissatisfied with it—not because the services didn't exist, but because in the minds of the consumers they were worth the money. Could the FTC bring a successful action against the new website? Is a bad effort at these services treated the same as no effort at all? Lawyers work to predict how a court would respond based on this and other precedents, but we don't have a certain answer.

Hierarchy of Courts

While the holding of the opinion will tell *what aspects of the opinion are binding* on future cases, there is also the question of *which courts are bound* by another court's opinion. This, like all these other topics, is a large field of discussion in law, typically referred to by the Latin phrase *stare decisis*. That roughly translates to "to stand by things already decided," but usually is used to describe the general system by which we give predictability to court decisions by requiring courts to reach the same outcomes when considering similar facts and similar laws.[17]

To answer this question, you need to know a little bit about the hierarchy of courts. There is a lot of structural variation and different names used across the federal and state legal systems, but courts generally are arranged in a hierarchy that begins with courts where cases originate (usually called "trial courts" or "district courts") and ends at the system's "supreme court." Most often a case starts at the lowest court, and any trials to ascertain the facts are all held there. Parties then have the option to *appeal* a decision from the lower courts up through the system, where the higher courts will review the actions of the lower court and determine if the law was applied correctly. And as the Jerk.com case shows, you can also have cases that start in administrative tribunals or specialty courts, and then higher courts can be petitioned to review what the administrative tribunal did.

To put this all together in the federal system:

- At the lowest level we have the United States District Courts. There are 94 of them, each covering different geographic areas across the 50 states and territories. Some states like Massachusetts have one district court that governs the entire state. Other states like New York

[17] When and how often courts—especially the highest courts in a legal system—should honor this principle of consistency is, you guessed it, subject to academic debate. This debate was in the spotlight last year, when the Supreme Court ignored *stare decisis* to overrule longstanding abortion rights precedent in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

have multiple courts, each covering a different geographic region within the state.

- Next up are the intermediate courts, the United States Courts of Appeals or "Circuit Courts."[18] There are thirteen of them: 11 of cover large geographic regions of District Courts, one covers cases from the District of Columbia, and one only hears a few specific types of more technical cases. You can appeal a District Court case to the relevant Circuit Court.
- Above those Circuit Courts is United States Supreme Court. The Supreme Court has the discretion to hear cases from the Circuit Courts, but not an obligation to do so. It typically takes on a case if there has been disagreement between the Circuit Courts on how to approach an issue, or if the issue has special national significance. If the Supreme Court declines to hear the case, the Circuit Court decision is the final word.

Here's why the hierarchy matters: a legal opinion issued by a higher court is *binding authority* on the courts below it, but not binding on other courts. That's why decisions from the United States Supreme Court are followed with such anticipation; they are the highest court in the federal system, so their decisions become the rule in all other cases. In Massachusetts we also follow closely the decisions of the First Circuit, because that is the intermediate court that has authority over our district court.[19] You can see this in the Jerk.com case above, when the First Circuit cites *FTC v. Colgate-Palmolive Co.*, a 1965 Supreme Court case to note the deference the court will give to the legal interpretations of the FTC. The First Circuit has to follow that case, as it is binding authority from a higher court.

A case that is not binding is usually called a *persuasive authority*. A court can follow the logic of the case if it agrees with the approach, but it is not required to do so. We see this again in the case above, where the First Circuit cites a case called *Kraft, Inc. v. FTC* from the Seventh Circuit. The Seventh Circuit is another intermediate court at the same level as the First Circuit, governing cases that come from the federal courts in parts of the Midwest. The First Circuit is not required to follow the *Kraft* opinion, but it decided to use it to reach its conclusions in, no doubt because the court found it relevant and persuasive.

---

[18] So called because, instead of being their own courts, judges from other courts used to "ride the circuit" between the different district court houses to hear appeals. *See* Jake Kobrick, *A Brief History of Circuit Riding*, Fed. Judicial Ctr. (last accessed Jan. 13, 2022).

[19] There are further nuances to this hierarchy. Some courts, for example, have mechanisms to declare some of their cases "unpublished" or "non-precedential," and lawyers are instructed not to cite those cases as binding authority in other disputes. This is usually reserved for cases that are resolved in a quick way, without a detailed legal opinion. Administrative and specialty courts can also have their own rules about whose authorities they deem binding. But for most cases and court systems, this general framework holds.

There is another form of persuasive authority that can arise in cases that are heard from multiple judges, like the panel of three judges that heard the case above. When the judges on the panel do not all agree, they will usually issue multiple opinions explaining their disagreement. Whatever opinion has the support of a majority of the court is called the *majority opinion* and becomes the one that operates as law going forward, binding on the courts below it. A judge who was on the panel but disagreed with the majority may write a *dissenting opinion*, explaining their disagreement. Judges may also write a *concurring opinion* if they agree with the majority but may have additional thoughts to add or a slightly different way of viewing the dispute.[20] Courts that are not directly bound by the majority opinion may take the view of these concurring or dissenting opinions if they think this is the better way to view the law.[21]

As for the interplay between state courts and federal courts, that is the topic of the following section.

Federalism

Another key ingredient to the United States legal system is the relationship between state law and federal law. Here, too, a little bit of history can help explain the arrangement. Before there was a United States, the English colonies had each established their own colonial governments, with their own laws, legislatures, courts, and executives. After the Revolutionary War the question became how much of that governing power would remain at the (soon-to-be-named) "state" level, and how much would be brought into the power of the new United States government. After a bit of a false start with the Articles of Confederation of the late 1770s, we reached the bargain reflected in the United States Constitution, which went into effect in 1789.

The Constitution spells out the relationship between the state and federal government, but what we understand that relationship to be is the subject of constant debate and a long evolution. A very rough summary of the current situation follows next.

First, it is quite clear that where there is conflict between the state and federal law, the federal law wins. That is because of what's known as the *Supremacy Clause* of the Constitution, which declares the Constitution itself and the laws enacted under it the "supreme Law of the Land."[22] This area of

---

[20] You can also have *concurring in judgment* opinions, where the judge agrees with the ultimate result but would have taken an entirely different analytical path to reaching it, as well as *plurality opinions* in courts that have higher numbers of justices, when no single opinion captures the agreement of a majority of the court. None of these would be binding, but could be cited as persuasive authority in other disputes.

[21] There are still further variations on this, including some complicated rules around when a court has to follow *its own* opinions in a future case.

[22] U.S. CONST. Art. VI, § 2.

analysis is generally known as *preemption*. This preemption is sometimes explicit, such as when Congress expressly states that the statute that they're enacting supersedes all contrary state law. There are also some areas of law where the federal government intentionally exercises sole control as a general matter. Patent law—the law that gives an exclusive right to inventors to make and use their inventions if they disclose them publicly—is one such domain. It was important for there to be a unified, national system of patent law, so the federal government has used its supremacy to block any state attempt to create its own version of patent law.[23]

Second, and on the other hand, the federal government was designed to have *limited jurisdiction*. In the Constitution there is a list of areas where Congress can pass laws,[24] and some supplemental sections have been understood to give the federal government the power to pass related laws generally around those articulated areas.[25] It's a very broad list, and includes powers like the power "[t]o regulate Commerce … among the several States," which can justify a whole lot of regulation. But outside of those areas, only the states have power.

And to make things just a little more complicated, disputes under state laws are not always heard in state court, and disputes under federal laws are not always heard in federal court. The Constitution gives the federal courts the power to hear cases that concern state laws when the two sides of the dispute live in different states. (This is known as a federal court exercising *diversity jurisdiction* over a case.) And very often a single dispute will present a variety of different legal claims—some state and some federal—and out of a desire to resolve cases expediently we allow a single court to hear all of them at the same time.

So which court's legal opinions should be treated as binding when a federal court must interpret a state law, or vice versa? There has been an evolution here, too, but on the federal side the courts have developed what is known as the *Erie Doctrine*, named for the 1938 U.S. Supreme Court case *Erie Railroad Co. v. Tompkins*. Lawyers and law students know how complicated this doctrine can be, but as a very rough summary: federal courts will follow state courts on the *substance* of state laws and treat the state's supreme court as the final authority on how to interpret the state law. But for any *procedural* issues that arise, the federal court will follow its own rules.[26] This can get very messy in practice, especially when legislatures try to give *substantive*

---

[23] For much more on this, see *Federal Preemption: A Legal Primer*, Cong. Research Serv. (July 23, 2019).
[24] U.S. Const. Art. I, § 8.
[25] For example, the "Necessary and Proper Clause" of the Constitution grants power to Congress to pass "To make all Laws which shall be necessary and proper for carrying into Execution" the other powers granted.
[26] There are similar rules going in the other direction; state courts interpreting the substance of federal law will follow the interpretation provided by the United States Supreme Court.

benefits to parties by giving them special *procedural* rights in disputes. But in general, this means one should look to federal courts for authority on how to interpret federal laws, with the United States Supreme Court being the final word, look to state courts for authority on state laws, with the state's supreme court being the final word.

Sources of Law in the United States

With this general understanding of legal opinions and the overlap between the state and federal systems, we can turn to the actual sources of law that you are likely to encounter when studying United States law and policy. This section is designed to answer a uniform set of questions about each of these areas of law:

- *Where can I find it?* How do you "look up" the law and understand what it says? Where does this law come from?
- *Who enforces and interprets it?* What happens when a person violates this law? Who has the power to start a legal process against that person? Where do they do that? Who gets to resolve how the law applies to a particular enforcement action? Who weighs in on what the law means?
- *How can it change?* Say you do not like the current state of this law. What can be done about that? What legal bodies can change what the law means?

Constitutional Law

This area of law runs at the center of our legal system. Constitutional law means the law that emanates directly from the United States Constitution or a state's constitution. We are a constitutional democracy, after all. And because the federal law takes supremacy over contrary state laws, the United States Constitution is the single most authoritative document in our entire legal system. That also makes the highest court that interprets it, the United States Supreme Court, the final word on the document's scope and meaning.[27]

There are generally two major types of questions that are resolved by constitutional law. The first is *structural* or *"separation of powers"* questions, which can come up when different legal bodies disagree over their respective roles in the legal system. The second major area of constitutional law is

[27] The structure that placed the Supreme Court at the very top of our system was not a given at the time of the Constitution's enactment. Way back in footnote 4 we saw the case Marbury v. Madison, 5 U.S. 137 (1803). This was the case where the Supreme Court first asserted its highest job was to interpret the constitution and strike down contrary government actions. The decision holds 219 years later. As Justice Robert Jackson famously put the Supreme Court's position, "[w]e are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443 (1953) (Jackson, J., concurring).

individual rights questions. The United States Constitution and state constitutions all place limits on the ability of the government to behave in certain ways or to limit certain behaviors. At the federal level, these are most famously expressed through the "Bill of Rights," the Constitution's first ten amendments, which set limits on the ability of Congress to pass laws impairing certain individual activities—freedom of speech, freedom from unreasonable search and seizure, and so forth.

Where can I find constitutional law?

Is it too glib to say, "in the Constitution?" It is. But reading the federal constitution is a good place to begin. The whole document, with amendments, is shorter than this guide. Some state constitutions, like the Constitution of Massachusetts can run considerably longer on account of the number of amendments they have—120 in the case of Massachusetts, compared to the 27 federal amendments.

But there is much more to constitutional law than just its text. To get a full sense of the law one must look at the many, many legal opinions that have interpreted these terms and applied them to different situations, as the section above on the common law system explains.[28] There are plenty of books, guides, and websites one can use to get a handle on the current view of these documents, but a good free summary on the federal side can be found at Constitution Annotated, a website by the Library of Congress. In it you can browse clause-by-clause and see a summary of the key Supreme Court cases on point. If you would like to grab a (fairly pricey) book on the topic, many law students like to keep a copy of Erwin Chemerinsky's Constitutional Law: Principles and Policies handy while they study.

There are significantly fewer guides that can give you a summary of state constitutional law. You can check to see if your state has a legal library or government website that can give you an overview. The State Library of Massachusetts website can help you get started here in the Commonwealth. One other common reference for this and all areas of Massachusetts law is the Handbook of Legal Research in Massachusetts, prepared by MCLE New England, but it does not give much of a review of contemporary substance of the law. You may find it easiest to look up the relevant constitutional provisions within the context of the other areas of law below.

Who enforces and interprets constitutional law?

There is no single body responsible for enforcing constitutional provisions, and it often enters cases indirectly. It is usually left to the person who was harmed—maybe because of a decision made by a government body with dubious structural authority to act in that way, or maybe because a

[28] The techniques used for constitutional interpretation are beyond the scope of this piece, but for an introduction to them *see* Brandon J. Murrill, *Modes of Constitutional Interpretation*, Cong. Research Serv. (March 15, 2018).

government action infringes their rights protected by the constitution—to go to court to challenge the action as being unconstitutional. Courts will then use legal opinions through the hierarchies explained above, with the United States Supreme Court having the final word on interpreting the federal Constitution, and state supreme courts having the final word on their respective state constitutions. In individual rights cases, courts have developed some elaborate frameworks to help evaluate whether laws violate the constitution.[29]

The legislative and executive branches also create take a role in viewing the proper scope of the constitutional powers and rights, at times completely independent of court action. Consider the Fairness Doctrine, a longstanding rule by the Federal Communications Commission that television and radio broadcasters had an obligation to use broadcast time to address issues of national political importance and do so in a way that was balanced between different political points of view. Broadcasters long detested the rule, and brought challenges asserting that this was a control of content that violated their First Amendment rights. The courts did not think so; the Supreme Court upheld the regulation in 1969 against a First Amendment challenge.[30] But about ten years later, the FCC itself decided that *it* thought the doctrine was unconstitutional and repealed it.[31] The FCC did so based on their own read on the Constitution's obligations. Legislatures have also used their powers to supplement or further their own views of what should be required for constitutional rights.[32]

Finally, scholars including Larry Kramer have also long studied what is called *popular constitutionalism*, or the way in which the public itself exerts its democratic power and pressure to push the government to view the constitution a certain way. Concerns about constitutional rights and freedoms are regular subject of popular discourse, and because the public elects its legislators, governors, and presidents (and in some state systems, judges), candidates may promise to take certain views on these rights and powers questions once in office. This political influence can directly or indirectly

---

[29] In some areas of law judicial review of government action often follows a *tiered scrutiny* model which varies the deference that the court gives the other legal body. For questions that implicate core constitutional rights, the court will adopt *strict scrutiny*, requiring the other governmental body to show a compelling interest in regulating the activity and that they adopted the least restrictive means of doing so, which the government rarely ever can do. At the other end of the spectrum is *rational basis review*, a very deferential standard that just requires the government to show that the government had a plausible reason for acting in the way they did. In the middle is, aptly named, *intermediate scrutiny*, reserved for areas where the government is regulating in a space that implicates but does not seek to directly control constitutional rights.

[30] Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969).

[31] This decision was challenged, but was upheld by a federal appellate court. Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

[32] For more on this in the freedom of speech context, *see* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299 (2021).

change the minds of those in legal bodies, and thus can also be a force to move our interpretations in different directions.

How can constitutional law change?

While constitutions run at the core of our legal system, the documents can be changed. The various state and federal constitutions all provide mechanisms that allow for amendments to their constitutions.[33] It's not easy. At the federal level this can either be done by Congress proposing an amendment (by a vote of two thirds of both the House and the Senate), or by a so-far-never-used mechanism that allows the legislatures of two thirds of the states calling for a new constitutional convention to propose amendments. Amendments proposed by Congress are ratified by three fourths of state legislatures before they go into effect. Getting the political will to send changes to the constitution through multiple legal bodies with supermajority votes is extraordinarily difficult.[34]

A more regular change in constitutional law has come from how the text has been interpreted by courts over time. As noted above, under the doctrine of *stare decisis* the Supreme Court says its policy is to avoid departing from its prior interpretations of law absent and important reason. But this general preference has not prevented it from taking a notably evolving view of constitutional law over the years, nor does it prevent them from adopting other views in the future. New Justices seem willing to conveniently ignore the doctrine when they seek to move constitutional interpretation in a new direction.[35] This may be the single greatest reason why new appointments to the Supreme Court are treated with such sharp scrutiny on all political sides. A new Justice brings with them new views on how to interpret constitutional provisions, which can change the Constitution in ways far easier than the amendment process.

Statutes

The most common source of law comes from state and federal legislatures. Legislatures can enact statutes that create new laws, compel actions from agencies (described more in the Administrative Law section below), convene other bodies for other business, and sometimes provide private relief to

---

[33] A helpful guide to the different state procedures for constitutional amendment can be found at *Amending State Constitutions*, BALLOTPEDIA (last accessed Jan. 13, 2022).
[34] The last time this was done was in 1992, approving an amendment on limiting Congress's ability to give itself raises which was first submitted as part of the original Bill of Rights in 1789. U.S. CONST. Amend. XXVII.
[35] Legal commentators—and most famously the hosts of the podcast Strict Scrutiny Leah Litman, Melissa Murray, and Kate Shaw—have popularized the phrase "*stare decisis* is for suckers" to characterize the apparent view of the doctrine under the current Supreme Court, in light of its recent aggressive turn on several constitutional questions. *See* Richard Re, *Is "Stare Decisis … for Suckers?"*, PRAWFSBLOG (March 24, 2020).

individual aggrieved persons who have no other legal remedy.[36] With the exception of Nebraska, all state legislatures in the United States have two chambers. The usual path for a law begins with a legislator proposing a bill in one chamber, the leadership of whom then assign consideration of the bill to a committee or set of committees. They consider it, and if they pass it the bill goes to the full chamber for a vote. After it passes, it then goes to the other chamber. If the bill makes it through that whole process it is presented to the chief executive (either the President or Governor) who can sign the bill into law or veto it. If the bill is vetoed, there is usually a procedure by which that veto can be overruled by supermajorities in the two legislative chambers.

Trying to understand the law by looking bill-by-bill and reading every enacted bill in sequence would be incomprehensible. Fortunately, there is a better way. At both the state and federal level bills are *codified*, or arranged into comprehensive collections presented in a logical order by topic. Most lawyers do not even know how this process happens, but in the federal system there is an office called the Office of the Law Revision Counsel that determines which laws should be codified into the *United States Code*, a 54-volume set of statutes that become the common way federal laws are cited. These are usually cited as <<volume>> U.S.C. § <<section>>, so "18 U.S.C. § 1030" stands for section 1030 of title 18 of the United States Code. Massachusetts goes through a similar process of codifying the laws of its legislature into the *General Laws*. These are usually cited as M.G.L. Ch. <<chapter>> § <<section>>, so M.G.L. Ch. 266 § 120F is section 120F of chapter 266 of the Massachusetts General Laws.[37]

Note, though, that not all laws are codified, and on occasion you will need to look at the underlying enacted bills to find important information. For example, Congress can use a law to reverse a decision made by a federal agency, without changing any other aspects about the agency's authority. You will not find that looking at the relevant sections in the United States Code—unless you are a savvy enough researcher to look at the "editor's notes" that accompany each section of the Code.

Where can I find statutes?

The United States Code can be found on the website of the Office of the Law Revision Counsel, though the most popular collection of these statutes can be found at Cornell Law School's Legal Information Institute, who has exerted

[36] At the federal level this "private law" power has largely given way to administrative remedies, and there have been only a handful of passed private laws over the past decade. *See Private Bills: Procedure in the House*, Cong. Research Serv. (May 15, 2019).

[37] Lawyers may not know this is the process of how bills become the codified sections that they then cite, but legislatures sure do. A lot of the bills that pass Congress specifically provide line-by-line edits to the Office of the Law Revision Counsel, e.g. "Section 1030(3) of title 18, United States Code, is amended in paragraph (2) by striking 'or' at the end and by adding the following…," and so forth.

considerable energy and resources to maintain a free and useful online collection of laws. Most states provide similar collections through their government websites, including the Massachusetts legislature, confusingly and anachronistically named the General Court of the Commonwealth of Massachusetts.[38]

As you understand by now, though, reading these statutes can only provide a partial understanding. To truly understand the law's scope, you also have to consider how such laws have been interpreted and applied in the courts. For that, you are probably best served by consulting the topic-by-topic guides for state and federal laws. Books like the "In A Nutshell" series published by West Academic are fairly cheap and accessible introductions to a wide array of substantive topics. There are numerous websites that collect the law around different topics as well. I contributed to one such resource that ran from 2007 to 2014 called the Digital Media Law Project. A good collection of Massachusetts topic-by-topic guides is published by MCLE New England, whose publications can be found in most university and local libraries, as well as the Trial Court Law Libraries.

Who enforces and interprets statutes?

Statutes sometime create new bodies called "agencies" to enforce and interpret the laws they enact or delegate such power to existing agencies, and the actions of those bodies are examined in the later section on Administrative Law. This section focuses on the usual way statutes get interpreted: directly by the courts when resolving disputes over whether laws have been violated.

Recall we have an *adversarial system*, where aggrieved parties raise their issues before the courts as a neutral tribunal. So where the enforcement of a statute "begins" is usually with someone who is harmed by someone who violated a statute. In cases of *criminal statutes*,[39] we have—in the famous words of the TV show *Law & Order*— two separate but important legal bodies: police (and other forms of law enforcement), who investigate violations of criminal law, and prosecutors, who decide when to bring legal actions against defendants.[40] Prosecutors have very broad power and discretion as to when to bring such actions, and this power is rightly subject

[38] This name dates back to the days of the Massachusetts Bay Colony, when the General Court had both a legislative and judicial function.
[39] That is, statutes where the legislature has determined that a person who violates the statute should be fined by the government or imprisoned.
[40] Most of the concepts of *criminal procedure*, including when and how the police can execute search warrants, arrest suspects, and otherwise conduct their investigations, are outside the scope of this guide, although there are many, many technology policy issues that are ripe for analysis in that field.

to intense debate.[41] Victims of violations of criminal statutes can also get involved. This is usually done by reporting to law enforcement, but in some jurisdictions, they can also file an *application for a criminal complaint* to initiate a legal process. This power typically does not extend far beyond the filing of the application. Some other legal body usually reviews these complaints and determines whether the case should proceed.

In cases of *civil law*,[42] a party who suffers some harm because another person violated a statute can often initiate a lawsuit by filing a *complaint*. Complaints largely are a formalized version of an allegation, they state what the aggrieved party believes the other side did and what law they violated. Note that there is no check on the merits of such an allegation at the beginning of the lawsuit. Anyone can sue anyone for anything, but the system strives (with mixed results) to keep bogus lawsuits from staying active for too long. Courts also have developed some elaborate rules around *standing* to make sure that the parties who initiates a lawsuit are the right parties to argue the issue before the court. To go back to the Jerk.com case discussed above, I personally may not like how Jerk.com conducted itself, but if I was not a Jerk.com customer or the target of one of Jerk.com's posts it's unlikely that I would have standing to go to court and complain about it.

Regardless of how they begin and what motivates their arrival, most civil and criminal matters soon find their way into the court systems described in the first section of this guide. By using the binding authority of higher courts and persuasive authority from other courts, the court will analyze the situation and determine whether the statute was violated. Courts also have the power to strike statutes down in a few contexts, including when the statute violates the constitution (discussed in a prior section) or if a state statute is preempted by a contrary federal law. And these opinions become part of the common law, and binding on future courts in the ways described above.[43]

How can statutes change?

This is one of the easier pieces to understand about statutes; the same actions that create them can also change them. If Congress changes its mind about a law, wishes to expand the reach of a law, seeks to fix a defect in the law that caused it to be ruled unconstitutional, or wants to signal its approval or

---

[41] Some significant recent works include Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 Dickinson L. Rev. 589 (2019); Jesse Eisinger, The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives (2017); Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor (2007). Prosecutors also have authority around many other decisions along the way, including what offenses to charge, when to take a plea bargain, and most other major decisions about how to conduct a criminal case.

[42] That is, laws that do not include fines or imprisonment, and instead give individuals the right to sue other individuals.

[43] For a very thorough review of the techniques that are used to interpret statutes, *see* Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*, Cong. Research Serv. (Sept. 24, 2014).

disapproval with how courts have interpreted a law, they can pass a new law that makes such adjustments.[44] For laws that are codified, these adjustments often read like an editor's comments on the United States Code itself: strike this section, add this phrase, and so forth. And the public, of course, can exercise influence on what legislators by who they endorse and elect.[45]

Substantive Common Law

Because the United States follows the common law system it inherited from England, it also carries with *substantive common law* —a body of law that cannot be found in any statute or constitution, but instead from the centuries of court opinions stretching back before the founding of the United States. This sometimes is referred to as "general common law," to help contrast it from "interstitial common law," or the common law developed by courts when defining and applying statutes and constitutional provisions that in turn define their meaning to other courts.

No surprise, substantive common law tends to be in very old areas of law, and rarely exists today without some overlapping statutes that provide their own authority. Much of our law around contracts and torts[46] began as common law, and the common law understanding of these legal concepts extends today. There even are some areas of criminal law that are still only understood as common law. The definition of what constitutes murder in Massachusetts remains defined solely by common law, for example.[47]

Substantive common law typically only operates at the state level. Congress was a newly conceived of body of government and only given limited powers when it was created in the late 18th century, and did not inherent a body of common law at its inception. Congress has, though, recognized some common

---

[44] There are limits to a legislatures ability to do this with retroactive effect. For more on that, *see Retroactive Legislation: A Primer for Congress*, Cong. Research Serv. (Aug. 15, 2019).

[45] There is, of course, a library of research that calls into question whether legislators actually respond to the stated interests of their constituents. Philip D. Waggoner, *Do Constituents Influence the Work of Legislators?*, LegBranch.org (April 3, 2018).

[46] *Torts* are likely a new concept for many technologists. These are laws that govern the circumstances where you can sue someone for injury they cause you, outside of the two of you having a contractual relationship. This can include someone harming you from their own negligent behavior, if they trespass onto your land, if they harm your reputation by defaming your character, if they defraud you out of money, if they assault or batter you, and a pretty wide array of other ways to ruin someone else's day.

[47] This was mentioned again most recently in a case from the high court in Massachusetts, the Supreme Judicial Court, which also reaffirmed that the common law crime of "interference with a police officer" remains in effect. Commonwealth v. Adams, 482 Mass. 514 (2019).

law concepts in its own statutes,[48] and federal courts have created a significant amount of "interstitial common law" used to interpret federal statutes and constitutional provisions.

Where can I find substantive common law?

So where does one find a body of law that was never written down in a statute? Fortunately, because common law usually exists today in tandem with statutes that provide additional support or context, it is usually best to research these laws by substantive topic, rather than looking up the common law in effect. The resources in the above section on where to find statutes are all good places to begin.

The other major area to find summary and analysis of substantive common law are in what are known as the *Restatements* drafted by the American Law Institute. The ALI is a prestigious organization comprised of judges, lawyers, and legal scholars, and drafts these summary "Restatements" in a variety of topics through a long process involving input from many legal professionals. Like codification of statutes, the published Restatements put bodies of substantive common law a coherent structure and framework, which then are often cited and referenced by judges applying the common law.

These Restatements do not, however, perfectly capture the law, and are criticized by some for operating more as an aspirational view of the common law, instead of a reflection of what the law presently is.[49] They also may include substance that is directly out of step in a given state. A common example in technology law comes from the "privacy torts," recognized in the Restatement (Second) of Torts §§ 652A–652E, which collected four distinct forms of invasion of privacy that had evolved out of the common law.[50] Massachusetts, however, does not recognize one of them (§ 652E, the tort of "false light"), which you see from reading cases or secondary literature on Massachusetts privacy law.[51] Looking just at the Restatement, therefore, gives you an inaccurate understanding.

Who enforces and interprets substantive common law?

The common law arises out of legal opinions in cases, which in turn arise out of legal disputes, so much of what was said in the legislation section above about who is likely to go to court to enforce civil and criminal law applies to

---

[48] An example of this is the federal statute on wire fraud, which takes the common law tort of fraud and uses it to define a federal crime of conducting fraud using a television, radio, or other electric or electronic communication. 18 U.S.C. § 1343.
[49] A summary and response to that criticism can be found in Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 Ind. L. Rev. 205 (2007).
[50] Much of the credit for developing this four-part conception of the right of privacy is due to William Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).
[51] *See, e.g.*, Ayash v. Dana-Farber Cancer Institute, 443 Mass. 367 (2005); *Massachusetts: False Light*, Digital Media Law Proj. (last accessed Jan. 13, 2022).

this section as well. There is no meaningful difference when in court between actions under common law and actions under statutes.

Following the common law system discussed previously, courts are influenced by the binding and persuasive legal opinions in their jurisdiction, as well as the Restatements and other scholarly works that seek to synthesize and harmonize prior court decisions into coherent bodies of law, or argue for their reinterpretation or a new perspective or understanding. The right of privacy itself was one such area where courts were famously heavily inspired by legal scholarly literature. A law review article by Samuel Warren and (future Supreme Court Justice) Louis Brandeis advocated for recognizing its existence based on elements of a variety of other areas of common law, and many state courts did so in turn.[52]

How can substantive common law change?

Beyond the evolution of common law stemming from the courts and the legal opinions that they issue over the years, legislatures also have a significant role in shaping, amending, or superseding common law. Under our legal system, statutes will override contrary common law, and thus the legislatures have the power to recast the law in whole or in part. All statutes in some way do this, but the most famous example of a legislative effort to recast the common law may be the Uniform Commercial Code, a project by the American Law Institute (the people that gave you the Restatements) and the Uniform Law Commission to rewrite a wide array of common law as it related to standard commercial transactions like the sale of goods. All 50 states have now adopted some version of the Uniform Commercial Code.

Administrative Law

A final source of law is the law that comes from state and federal agencies. While its roots in the law go back further, this area of law is generally a product of the past century and how the legal system responded to industrial and post-industrial society. Legislatures realized that our increasingly specialized and complex world would likely require rules that were also more specialized, flexible, and rapidly developed than what can be done through the elaborate process for statutes. So, they used their statutory power to create *agencies* and delegated to those agencies the power to create specific rules within the general framework set by a statute. Because the executive branch of government (the branch headed by the President or Governor) is generally responsible for seeing the law enforced, many of these agencies are fully staffed and controlled by the executive branch, and sometimes referred to as *executive agencies*. When Congress wants the agency to show greater stability and non-partisanship, it has also created what are sometimes called *independent agencies*, with more complicated procedures around staffing and

[52] See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

removal of agency officers to shield the agency from the shifting political winds.

While they are created by legislatures, these agencies sit somewhere in between the traditional "three branches" of government. They have some legislative powers, and usually can create their own *regulations* that effectively operate in the same way as statues. They also have executive powers, as agencies often have the authority to investigate whether parties are following the regulations they set.[53] We saw this in the Jerk.com case above, when the FTC had its own agents pose as Jerk.com customers to see if they were given the ability to manage posts like the website had promised. And they also can serve a judicial function and mediate disputes. We saw this in the Jerk.com case as well, when the enforcement division of the FTC went to an administrative law judge, also within the FTC, to hold the website responsible for its deceptive practices.

All of these powers are in play when considering the regulation of technology, and for different agencies you will likely want to focus on different functions. You will also need to know some of the general rules that all agencies are expected to follow. At the federal level, that's set by the Administrative Procedure Act, or APA. The APA sets some standards for how regulations are made, and the ways in which courts can review the actions of agencies.

One important aspect of the APA to know about—in part because it provides one of the best opportunities for technologists to participate—is the process of *rulemaking*, or how an agency creates new regulations. Congress frequently provides federal agencies the latitude to create new rules within the agency's general area of authority, and the APA in turn provides a framework for how that is supposed to happen.[54] This is typically done as what's called an *informal rulemaking*, or a "notice and comment" process. The agency will post a notice in the Federal Register called a "Notice of Proposed Rulemaking," setting out what issues and policies agency intends to consider. (Agencies sometimes precede this with a "Notice of Inquiry" that may ask more general questions or seek an overall opinion, before going to the proposed rulemaking.) The agency then accepts comments from the public about the planned rule. These comments can range from very formal arguments that read more like briefs one would file in a court, or be more personal statements, like a constituent may write to their legislator.

After these comments are in, the agency then reviews the comments and issue a statement along with the final version of the rule that explains how

[53] This can even include issuing subpoenas for information, all the way through surprise inspections of regulated facilities.
[54] The creation of rules is meant to be different from the *adjudication* of particular disputes under those rules, and for some agencies Congress has placed additional criteria on how rules are done. For more on both of these, see Todd Garvey, *A Brief Overview of Rulemaking and Judicial Review*, Cong. Research Serv. (March 27, 2017).

the agency factored in the comments into their final rule. The agency does *not* have to respond to every comment, follow the proposal of the majority of comments, or accept the legal arguments presented therein. They only have to show that they engaged with the "significant" relevant comments.[55] Agencies regulating on technical matters often appreciate the input of technologists as subject matter experts, and the cost of involvement usually only goes as far as drafting and submitting the comment.

Where can I find administrative law?

What the "law" of an agency is can be a little heterogeneous across different agencies. Some agencies are heavy regulators, and understanding the law they generate largely means reading the text of regulations, which read a lot like statutes and are compiled into uniform codes in some of the same ways that statutes are codified. Federally that's the Code of Federal Regulations compiled by the Office of the Federal Register, and in Massachusetts there's the Code of Massachusetts Regulations.

For other agencies, lawyers tend to look at more informal documentation and statements, even if they don't have the full force of law. For example, the Food and Drug Administration approves all medical devices that are marketed and sold in the United States. As part of that review, the FDA places performance expectations on those devices. Some of those expectations can be found in regulations, but a lot of them come from guidance documents that the FDA posts on its website.[56] Even though these documents will often say that they are not changing the scope of the law, most practitioners will take great care to comply with such advisory materials.

For other agencies, the most important place to look is their enforcement history. The FTC issues some regulations, but if you want to understand how they police companies in, say, consumer privacy, the real question is how they have *exercised* their general power to enforce against "unfair and deceptive" trade practices (the provision of law we saw in the Jerk.com case).[57] The FTC posts these enforcement actions on its website and compiles annual reports

---

[55] And, as you may expect, there are variations within this general format. Congress sometimes requires agencies to do a "formal" or "on the record" rulemaking process, which resembles a legal trial. For non-controversial or ministerial rules the agency can also sometimes engage in "direct-final" rulemaking where a rule will go into effect immediately unless the agency receives a comment opposing the move. Congress has also removed some agency actions from the notice-and-comment process entirely. *See* Garvey, *supra* note 55.

[56] The FDA is careful to include the public in the development of these documents, in part out of some of the concerns about agency power discussed in this section. For an example of one such document from the technology realm, see *Content of Premarket Submissions for Management of Cybersecurity in Medical Devices*, FDA (Oct. 2014).

[57] Scholars have gone as far as to argue that the FTC has effectively created its own "common law" around privacy, through its enforcement of this authority. *See* Daniel Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583 (2011).

reviewing some of their cases. Private collections of cases can also be helpful, like the "FTC Casebook" maintained by the International Association of Privacy Professionals.

No matter the preferred method of regulation, most agencies (perhaps due to their joint regulatory and enforcement functions) have a strong interest in making sure that people adhere to the rules they issue, and thus make an extra effort to communicate their laws to the public. An excellent place to begin when researching administrative law is the website of the agency in question itself.

Who enforces and interprets administrative law?

As illustrated in the Jerk.com case, agencies themselves are the usual enforcers of their own regulations. This can be through an adjudication process within agencies, like we saw in the case above. When the agency brings an action in an internal proceeding, the result of the proceeding is almost always reviewable, sometimes within the agency itself as a first step, and then almost always by a court. Agencies can also be plaintiffs in lawsuits brought in federal court, when the statutes that created them provide them with that power, and usually the Department of Justice will serve as the agency's attorneys in that process.[58] Several past presidential administrations of both parties have pressured agencies to also engage in informal negotiation and resolution of regulatory issues, and a lot of agency enforcement happens through negotiations and settlement with regulated parties.[59]

When a federal court does review an agency action, they have several different considerations that they weigh, largely dictated by the APA. For one, courts will look to the authority given to the agency by Congress, and whether the agency's actions exceed that authority.[60] Courts will also review to ensure that agency actions did not violate the Constitution, either because they infringe upon individual rights, or because the structure or actions of the agency violate the Constitution's "structural" or "separation of powers" provisions. Very often agencies are challenged under these arguments—perhaps because the design takes too much power away from the executive, or because it puts Congress into roles that take it out of the traditional function of passing bills into laws, or because the agency does not

[58] The FTC, for example, can either conduct an internal adjudication or bring a lawsuit in a district court against companies who engage in unfair or deceptive acts or practices. 15 U.S.C. §§ 45(b), 45(m).
[59] Once again, the specific rights and procedures used gets extraordinarily complicated and agency-specific in practice. *See Informal Administrative Adjudication: An Overview*, Cong. Research Serv. (Oct. 1, 2021).
[60] To take one example, the Supreme Court last prevented a COVID-19 vaccination requirement for larger employers set forth by the Occupational Safety and Health Administration (OSHA) from going into effect. The Court held that this vaccine mandate went beyond what Congress authorized OSHA to regulate when it passed the Occupational Safety and Health Act. NFIB v. OSHA, 142 S. Ct. 661 (2022).

provide for adequate review by the judicial branch. Courts have even debated whether Congress can delegate some of its powers to agencies at all.[61]

Courts will also strike provisions if they violate the procedures of the agency or the APA (like the "notice and comment" process for rulemaking set forth above), and will sometimes overrule an agency if they feel that the agency did not have substantial evidence for doing what it did. They can also disagree with an agency on how the law should apply to the facts of an administrative adjudication, but there are some elaborate rules that have developed over the years as to exactly how much deference a court will give an agency in interpreting the law around which it operates.[62]

How does administrative law change?

Agencies can change on their own by following some of the same procedures for the creation of administration law noted above, such as through enacting new regulations, changing enforcement priorities, or issuing new guidance materials and documents. Agencies have to be careful to show a reasoned basis for changing things—one common way to get a court to strike an agency regulation is to show that it is "arbitrary and capricious" in violation of the APA,[63] and a change in policy without a change in reasoning or circumstances is a good way to suggest that an agency is acting arbitrarily.

Congress and state legislatures have considerable power over agencies. Interventions are sometimes direct. When Congress does not like what an agency has done it may pass a law that simply undoes the agency action.[64] For more drastic reforms, legislatures can revise the statutes that created them, modifying their structure (like was done to create the Department of Homeland Security out of several of parts of other agencies in 2002), or abolishing them entirely. On a more subtle level, Congress has considerable power over the funding of agencies though its general power to control the budget of the United States government. This can be employed drastically (such as through defunding particular aspects of an agency program that

---

[61] This is sometimes called the debates around the "nondelegation doctrine," though whether it even still exists as a doctrine is also debated. *See Congress' Authority to Influence and Control Executive Branch Agencies*, Cong. Research Serv. (last updated May 12, 2021) [hereinafter "*Congress' Authority*"]. The Supreme Court introduced a variant on this last year its adoption of a long-discussed "major questions doctrine." *See The Major Questions Doctrine*, Cong. Research Serv. (Nov. 2, 2022).

[62] This is sometimes called the debate around "*Chevron* deference," a reference to the Supreme Court case Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). For much more on that, see Valerie C. Brannon & Jared P. Cole, *Chevron Deference: A Primer*, Cong. Research Serv. (Sept. 17, 2017).

[63] 5 U.S.C. § 706(2)(A).

[64] An example of this that you may remember is the Unlocking Consumer Choice and Wireless Competition Act of 2013, which undid a copyright law regulation from the Library of Congress (which contains the United States Copyright Office) that had barred "jailbreaking" of smartphones to change mobile carriers.

congress dislikes) and more subtlety (through "appropriations riders" that condition funding on the agency taking certain actions).[65]

And because the executive has a great deal of power to decide how to staff an agency (especially the "executive agencies"), every change in administration brings with it some big changes in agency priorities and enforcement focus. Most agencies have officers that are appointed by the President, and under the Constitution the more senior officers are appointed only with the "advice and consent" of the United States Senate. Congress may also set some qualifications for officers in agencies—especially with "independent agencies"—to help ensure a degree of independence from the presidency.[66]

Other Sources of Law

There are some other sources of law as well—from the ordinances created by cities or towns all the way to international treaties entered by the federal government with other nations—but the bulk of the legal work you are likely to encounter is captured in the material above. And as you can see from the above, within our system of law and the range of authorities on which it relies there are numerous opportunities for intervention, depending on one's specific regulatory goals.

It is a complex system—perhaps you find yourself ending this summary with a newfound respect for what lawyers and law students do—but the system is ultimately meant to be a democratic one. You are meant to understand how the system works and how it can be changed, and you certainly don't need to be a lawyer to change its course or propose solutions. And hopefully now you can do so from a more-informed place.

---

[65] See *Congress' Authority*, *supra* note 57.
[66] For more on that, see *Appointment and Confirmation of Executive Branch Leadership: An Overview*, Cong. Research Serv. (March 17, 2021).