
LAW REVIEW SCHOLARSHIP IN THE EYES OF THE TWENTY-FIRST-CENTURY SUPREME COURT JUSTICES: AN EMPIRICAL ANALYSIS

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INTRODUCTION

Chief Justice John Roberts recently threw fuel on the fire of the perennial debate about the practical value of American law review articles when he stated that, as a general matter, law reviews are not “particularly helpful for practitioners and judges.”¹ The Chief Justice

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† A corresponding Appendix to this Article is available for download on the *Drexel Law Review* website and is also on file with the author. See also *infra* note 30 and accompanying text (regarding the availability of a spreadsheet containing the list of the 1961 signed opinions analyzed in this Article).

1. Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J. L. BLOG (Apr. 7, 2010, 7:20 PM), <http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more>. He later—perhaps hyperbolically—added in comments to attendees at the Fourth Circuit Judicial Conference in June of 2011: “Pick up a copy of any law review that you see, . . . and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.” Jonathan H. Adler, *Chief Justice Roberts and Current Legal Scholarship*, THE VOLOKH CONSPIRACY (July 23, 2011, 11:07 AM), <http://volokh.com/2011/07/23/chief-justice-roberts-and-current-legal-scholarship>. Other current members of the Supreme Court have been critical of modern law review scholarship as well. See Stephen G. Breyer, *Response of Justice Stephen G. Breyer*, 64 N.Y.U. ANN. SURV. AM. L. 33, 33 (2009) (“[T]here is evidence that law review articles

is the most prominent among an increasing number of critics who have declared that, during recent decades, there has been a growing disconnect between law review articles written by law professors and the needs of the bench and bar in legal scholarship.² Furthermore, there is convincing evidence that a substantial amount of law review scholarship today is not considered useful even by other law professors.³

American law reviews have their twenty-first-century defenders. Virtually all, though, are members of the legal academy,⁴ whose livelihoods depend almost exclusively on publishing law review articles rather than on their teaching prowess or service to the legal community.⁵ Furthermore, despite the general criticism leveled at modern law reviews, many judges—including every current Supreme Court Justice—do believe that at least *some* law review scholarship has value and, in particular, is worthy of citing in judicial opinions.⁶

An analysis of twenty-first-century Justices' citations of law review scholarship—how often they cite articles, the professional identities of authors of the cited articles, and the ranking of the law reviews in which the cited articles appear—provides an excellent prism through which to assess today's law reviews. In addition to having had varied and rich legal careers as practitioners, policy-

have left terra firma to soar into outer space."); Michael C. Dorf, *Justice Scalia Suggests That the Legal Academy Is Out of Touch: Is He Right?*, FINDLAW (Mar. 8, 2010), <http://writ.news.findlaw.com/dorf/20100308.html>.

2. See Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 113–20 (2010) (citing numerous critics of modern legal scholarship); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992).

3. See Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 336 (2007) (finding that 43% of all law review articles contained in the Lexis-Nexis database have never been cited even once in other law review articles or reported cases).

4. Legal scholars will on occasion indeed take up Kant (and there's no shame in that), . . . but more often than not, published law review articles offer muscular critiques of contemporary legal doctrine, alternative approaches to solving complex legal questions, and reflect a deep concern with the practical effect of legal decision-making on how law develops in the courtroom.

Debra Cassens Weiss, *Law Prof Responds After Chief Justice Disses Legal Scholarship*, A.B.A. J. (July 7, 2011), available at http://www.abajournal.com/news/article_prof_responds_after_chief_justice_roberts_disses_legal_scholarship (quoting University of Maryland law professor Sherrilyn Ifill); see also Erwin Chemerinsky, *Foreword: Why Write?*, 107 MICH. L. REV. 881, 885 (2009).

5. See Newton, *supra* note 2, at 133–39.

6. See *infra* Table 1.

makers, and lower court judges, the majority of the current Justices were, at earlier points in their careers, full-time law professors.⁷ Presumably, the Justices are able to separate the wheat from the chaff in the law reviews,⁸ and, increasingly in this era of burgeoning law reviews, find the needles in the hay stack.⁹ With the assistance of the best and brightest young legal minds (the Justices' three dozen law clerks) and cogent and comprehensive briefing and oral advocacy by the Supreme Court bar and *amici curiae*, the Justices operate in a highly rarified intellectual atmosphere that facilitates a thorough, rigorous decisional process. The present study examined whether something meaningful might be gleaned from an analysis of the modern Justices' practice of citing law review articles.

I. METHOD

This Article describes the results of an empirical study of the nearly two thousand signed opinions authored by the Justices—majority opinions, plurality opinions, concurring opinions, dissenting opinions, and hybrid opinions (i.e., opinions that dissented in part and concurred in part) issued after oral arguments—dated between Jan-

7. Justices Kennedy, Scalia, Ginsburg, Breyer, and Kagan were all previously full-time law professors. See *Biographies of the Justices*, SCOTUSBLOG, <http://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices/> (last visited May 1, 2012). In addition, Chief Justice Roberts, Justice Alito, and Justice Sotomayor, while never serving as full-time law professors, served as student editors on their elite schools' law reviews (Harvard and Yale). See *id.*; see also *Sonia Sotomayor's Note*, YALE L.J., <http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/sonia-sotomayor-s-note> (last visited May 1, 2012).

8. Although by no means the only measure of an article's worth, one or more Justices' decision to cite a particular law review article in an opinion (particularly in a majority opinion) is a strong indication of the high value of that article. Countless law professors and law school deans believe this to be true; citation of a professor's law review article in a Supreme Court opinion is a feather proudly and justifiably worn in the professor's cap. See, e.g., *Two UK Law Professors Cited by U.S. Supreme Court*, UK C. LAW (Apr. 22, 2011), available at <http://www.law.uky.edu/index.php?nid=108> (quoting dean of University of Kentucky School of Law who stated his pride in the fact that a law review article written by two law professors at his school was cited in a Supreme Court opinion); *Professor Wildenthal Cited in U.S. Supreme Court Ruling*, T. JEFFERSON SCH. LAW, <http://www.tjls.edu/news-media/2010/527> (last visited May 1, 2012) (quoting law professor's statement that being cited by the Supreme Court is "a thrill and an honor"); *Prof. Outtersen Writes About Health Care Reform for Leading Blog*, B.U. SCH. L. HEALTH NEWSL. (Fall 2011), available at <http://www.bu.edu/law/events/newsletters/healthlaw/2011fall/outtersen.shtml>.

9. See Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 567 (2007) (noting that American law reviews publish 150,000 to 190,000 pages per year); Pierre Schlag, *Essay and Responses: Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803, 805 (2009) ("[A]ll around us, there is more, vastly more, of nothing happening than ever before [in law reviews].").

uary 1, 2001, and December 31, 2011, which cited at least one American law review article.¹⁰ Cases with per curiam decisions and other unsigned opinions or summary dispositions, in-chambers opinions of individual Justices (e.g., orders ruling on applications for stays of judgment), and opinions respecting the denial of certiorari or dissenting from the denial of certiorari were not counted in this study. The study sought to identify opinions that directly cited a law review article.¹¹ Any opinion that merely quoted a prior opinion that in turn had quoted a law review article—but did not otherwise cite or quote the article independently—was not counted as an opinion citing a law review article.

10. Citations to foreign (usually British) law reviews—which occurred very rarely—were not counted. For purposes of this study, I deem a periodical to be a *law review* if it exclusively contains scholarly articles (including student works) on issues related to law and the legal system. With a few exceptions, such periodicals appear in the comprehensive list of law journals indexed by the Washington and Lee University School of Law's law review ranking website. *Law Journals: Submission and Ranking*, WASH. & LEE U. SCH. LAW, <http://lawlib.wlu.edu/LJ/> (last visited May 1, 2012). I excluded articles published in bar association journals, legal newspapers, and similar publications primarily aimed at members of the legal profession. I also did not consider citations to legal scholarship that appeared in treatises or other legal books. Although my review of the Justices' opinions revealed a large number of citations to such legal books, my study is limited to citations to articles appearing in law reviews because the vast majority of law professors limit their legal scholarship to publication in the form of law review articles. See Newton, *supra* note 2, at 114 n.47.

11. In order to maximize the accuracy of the search, a two-pronged approach was taken. First, using the databases on the Supreme Court's website, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov> (last visited May 1, 2012), and the Supreme Court of the United States blog, SCOTUSBLOG, <http://www.scotusblog.com> (last visited May 1, 2012), I identified 792 cases decided after oral argument by a signed opinion between 2001 and 2011. My research assistant and I read each case and sought to identify each citation to a law review article. Second, as a means of quality control, I also employed a Westlaw search query somewhat similar to the one used by another recent empirical study of the Justices' citations to law review articles—"l.j" or "l. j." or "l.rev." or "l. rev." or "j.l." or "j. l." or "law review" or "law journal" or "ct. rev." or "ct.rev." or ("law or l. /3 j.") or ("law or l. /3 rev."), cf. Lee Petherbridge & David Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884462—and reviewed every opinion issued between 2001 and 2011 identified using this search query. My query was broader in scope than the one used by Petherbridge and Schwartz; it added the disjunctive, "(law or l. /3 j.) or (law or l. /3 rev.)." My query identified many citations to articles in law reviews (e.g., *Law and Society Review*), which their query did not. Furthermore, an old-fashioned eyeball review of every case from 2001–2011 revealed many citations to law reviews that were not identified by the computer-aided review. A large number of law reviews cited by the Court do not use the terms *journal* ("j.") or *review* ("rev.") juxtaposed to *law* or *legal* ("l."). Examples include the *Akron Tax Journal* and *Law and Contemporary Problems*. One need only scan the lengthy list of American law reviews on Washington and Lee University School of Law's law review ranking webpage to see which law reviews (in particular, the many specialty law reviews) would be overlooked using the above computer queries.

Opinions were coded to determine the following: (1) whether one or more law review articles (including law student notes or comments) were cited in each separate opinion; (2) which Justices wrote the opinions citing law review articles; (3) the professional status of the articles' authors at the time that the cited articles were published (as a full-time law professor, legal practitioner, judge, law student, or "other"); and (4) the ranking of the law reviews that published the cited articles according to Washington and Lee University School of Law's (W&L) combined-score ranking system.¹² The results of this coding project are on file with the author and are reflected in this Article's Appendix, available on the *Drexel Law Review's* website.

Because there are thousands of American law review articles published annually,¹³ and because the twenty-first-century Supreme Court decides less than one hundred cases per year after oral argument,¹⁴ only a tiny fraction of law review articles could be cited by the Justices annually. Thus, rather than focus on the absolute number of law review articles cited by the Court each year, a better measure is the frequency with which the Court cites law review articles in relation to the total number of opinions written by the Justices at different points in time and, ideally, also in relation to the total volume of law review articles published during the relevant time periods.¹⁵ Just as the number of Supreme Court decisions after oral argument has shrunk in recent decades,¹⁶ the number of American

12. WASH. & LEE U. SCH. LAW, *supra* note 10. All references to the W&L ranking system in the study below refer to the 2010 version, which was the latest version of the W&L rankings at the time that I conducted my research in 2011.

13. See Newton, *supra* note 2, at 114 (noting that there are nearly one thousand American law reviews today that publish between 150,000 and 190,000 pages per year).

14. See Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1367–69 (2006).

15. Regrettably, I was unable to obtain reported information about the precise volume of law review scholarship published annually (i.e., precise page numbers per year) for purposes of comparing it to the changing size of the Court's docket. It can hardly be disputed, though, that the amount of law review scholarship has risen significantly at the very time that the annual number of cases decided after oral argument has decreased. See *infra* note 17.

16. See Starr, *supra* note 14, at 1369 (noting that, in 1930, the Supreme Court decided 235 cases on the merits, while in the first decade of the twenty-first century, the Supreme Court has decided less than ninety cases on the merits each year). Ideally, an empirical analysis would also control for number of words in Supreme Court opinions—which have grown substantially in recent years—just as the number of cases decided on the merits have shrunk. See Debra Cassens Weiss, *U.S. Supreme Court Sets Record for Longest Opinions Ever*, A.B.A. J., Nov. 19, 2010, available at http://www.abajournal.com/news/article/u.s._supreme_court_sets_record_for_longest_opinions_ever/ (noting that the average length of the Court's opinions has increased significantly since the mid-1950s); Ryan C. Black & James F. Spriggs II, *An Em-*

law reviews has grown dramatically during that same time period.¹⁷ It is fair to infer that, if current Justices cite law review articles more or less frequently than past Justices, the practical value of legal scholarship to the Justices has either increased or decreased, respectively.¹⁸ A comparison of the frequency with which the Justices rely on legal scholarship over time—in particular, a comparison of the percentage of opinions citing articles and the average number of articles cited per opinion—is thus important.

The present study demonstrates that the Justices have cited law review articles less frequently since the apex of the 1970s and 1980s, when at least one Justice's opinion in approximately half of the Court's cases cited one or more law review articles. During the first decade of the twenty-first century, on average, one or more Justices cited articles in their opinions in 37.1% of the Court's cases and, on average, the Justices cited 0.52 articles per opinion compared to 0.87 articles per opinion in the early 1970s. Justices considered liberal in their judicial philosophies cited law review articles in their opinions more frequently than did Justices considered judicial conservatives.¹⁹

In addition to looking at citation frequency rates, this study also examined two other issues: (1) the primary professional status of the authors at the time that the cited articles were published;²⁰ and (2) the ranking of the law reviews in which the cited articles were published. With respect to the authors' status, the primary focus was on the percentage of cited articles written by full-time law professors. Considering that America's ten-thousand-plus full-time law profes-

pirical Analysis of the Length of U.S. Supreme Court Opinions, 45 HOUS. L. REV. 621, 635 (2009). The longer the Court's opinions, the more opportunity exists to cite legal authorities, including law review articles. Furthermore, an analysis also should account for the increasing number of separate opinions (concurring and dissenting opinions) per case, the growth of which in recent years has continued unabated. See Adam Liptak, *Justices Long on Words but Short on Guidance*, N.Y. TIMES, Nov. 18, 2010, at A1 (noting a recent empirical study that concluded that the average numbers of concurring and dissenting opinions per case are at a record high in the modern era).

17. See John Doyle, *The Law Reviews: Do Their Paths of Glory Lead but to the Grave?*, 10 J. APP. PRAC. & PROCESS 179, 180 (2009) (discussing the robust growth of American law journals in recent years); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 926-27 (1990) (tracing the significant growth in law reviews from 1937 to 1990).

18. See generally Petherbridge & Schwartz, *supra* note 11.

19. See *infra* Part II.A.

20. Occasionally, an author had two professional identities at the time an article was published (e.g., judge and lecturer at a law school). In such cases, the professional identity that appeared to be the primary one at the time of the publication was chosen.

sors²¹ devote the bulk of their careers to scholarship—while the other types of authors write such articles either as neophytes or as minor parts of their careers—one would expect that the Justices would cite law review articles by law professors at a much greater rate than articles by other types of authors. The results of this study challenge that assumption. As discussed below, nearly four in ten cited law review articles were written by authors who were not full-time law professors.

Finally, the present study analyzed the rankings of the law reviews in which the cited articles were published. This was done because the ranking of a law review in which a law professor publishes his or her work is critically important for purposes of professional advancement. To be hired, promoted, and given tenure at many law schools, professors generally must publish articles in highly ranked law reviews.²² Thus, the leaders in the legal academy (or at least those at the upper echelons of it) obviously believe that a law review article's worth is to be gauged in significant part by the ranking of the law review in which the article appears. If Supreme Court Justices put similar stock into such rankings, then one would expect that the vast majority of the articles that they cite would appear in "tenure-worthy" law reviews. The present study also tests this hypothesis and concludes that, although articles in elite law reviews are cited more frequently than articles in other law reviews, the Justices increasingly have cited articles that likely would not be deemed tenure-worthy at many law schools. Additionally, the Justices have cited articles from higher ranked law reviews at a decidedly decreasing rate since the 1970s.

21. According to the Association of American Law Schools, in the 2008–09 academic year (the last year for which there is reported data), there were 10,965 full-time law professors (including deans and law librarians) employed by the 172 AALS member institutions in the United States. Pati Abdullina, *2008-2009 AALS Statistical Report on Law Faculty*, ASS'N AM. LAW SCHS., <http://www.aals.org/statistics/2009dlt/gender.html> (last visited May 1, 2012). Of those full-time faculty, 505 were listed as instructors or lecturers; the rest were professors (full, associate, or assistant professors), deans (vice, associate, and assistant deans), and law librarians. *Id.* at <http://www.aals.org/statistics/2009dlt/titles.html>. With the addition of full-time law professors employed by both the twenty-eight other ABA-accredited law schools and the many unaccredited law schools throughout the country, the total number of full-time law professors likely exceeds 12,000.

22. See Newton, *supra* note 2, at 133, 139; see also *infra* notes 42–43 and accompanying text.

II. RESULTS AND DISCUSSION

A. Frequency of Justices' Citations of Law Review Articles

The Appendix contains citations to 792 cases decided after plenary consideration (i.e., briefing and oral argument) by the Supreme Court between January 1, 2001, and December 31, 2011, in which the opinions announcing the judgment of the Court were signed by Justices. Per curiam decisions were excluded. The Appendix also includes a detailed list of all the Justices' signed opinions (majority, plurality, concurring, dissenting, and hybrid opinions) that cited one or more law review articles. One or more Justices cited at least one law review article in 294 (37.1%) of the 792 cases. In those 294 cases, the Justices cited law review articles 1023 separate times.²³ Thus, each case in which one or more Justices cited at least one law review article contained, on average, citations to 3.48 articles. The median citation count per opinion was only one law review article.²⁴ Looking at all 1961 opinions written by the Justices between 2001 and 2011, the Justices averaged 0.52 article citations per opinion.

In 169 cases (or 21.3% of the 792 cases), one or more law review articles were cited in the majority opinion. I highlight majority opinions because a law review article would not have necessarily influenced the outcome of a case when it was only cited in a plurality, concurring, or dissenting opinion.²⁵ Focusing on majority opinions is also important because of the continuing growth in the average number of separate opinions (concurring and dissenting opinions)

23. If a particular law review article was cited more than once within the same opinion in a case (typically using *id.*- and *supra*-form citations), that article was only counted once per opinion. In some instances, Justices who issued separate opinions would cite the same article in their respective opinions. In these cases, I counted each citation separately. In addition, there were many instances in which the same law review article was cited in multiple cases. For these reasons, there are fewer than 1023 unique articles cited in this Article's Appendix.

24. The large difference between the mean and median values is explained by the fact that a small percentage of opinions cited a large number of law review articles. For instance, Justice Stevens's dissenting opinion in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3088–120 (2010), cited twenty-three law review articles.

25. In their recent empirical study of Supreme Court Justices' citations of law review articles from 1949–2009, Professors Petherbridge and Schwartz erroneously referred to all Justices' opinions, not just majority opinions, as being “decisions of the Supreme Court.” Petherbridge & Schwartz, *supra* note 11. Except for the rare case in which an opinion concurring in the judgment (providing the fifth vote) on narrower grounds than a more broadly reasoned plurality opinion—in which case the narrower concurring opinion is the holding of the Court—opinions other than majority opinions are not decisions “of the Court.” See *Marks v. United States*, 430 U.S. 188, 193 (1977).

per decision issued in the modern era.²⁶ Law review articles cited in separate opinions, although important, do not possess the same indicium of value as an article cited in an opinion reflecting a majority of the Court.

Although this study was limited to the first decade of the twenty-first century, the results can be compared to similar studies that analyzed the Justices' citation rates in the last few decades of the twentieth century.²⁷ The rate at which the Justices have cited law review articles in their opinions has declined significantly in recent decades, even as the average opinion length and number of separate opinions issued per decision has grown (thus providing more opportunities to cite legal authorities in each case).²⁸ Another recent empirical study of the Justices' citation of law reviews contains similar data regarding this point, although its authors assert that the decrease in recent decades "might be regressing to a mean of just over a full third of reported decisions" in light of the relatively low citation rates in the decades before 1960.²⁹ Whatever the case, it seems clear when considering all the empirical studies together (including the present one) that the twenty-first-century Justices have not cited law review articles with the same relative frequency as they did in the period from roughly 1975 through 1995.

In addition to studying the Justices' overall declining use of law review articles as persuasive or explanatory authority in their opin-

26. See Liptak, *supra* note 16, at A1, A24.

27. See Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971-1999*, 75 IND. L.J. 1009, 1010-13 (2000) (comparing law review citations in the Justices' opinions in four three-year periods—1971-73, 1981-83, 1991-93, and 1996-98—and observing a steady decline of average citations per opinion during those three decades, from 0.87 citations per opinion in the early 1970s, to 0.47 citations per opinion in the late 1990s); see also Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1987) (original study of 1971-73 and 1981-83 periods). Professor Sirico's 2000 study, unlike Petherbridge and Schwartz's 2011 study, "selected the very traditional method of reading all the pages [in the Justices' opinions] without electronic assistance." Sirico, Jr., *supra*, at 1010. As noted above, my own study used both the traditional method and the computer-assisted method, while Petherbridge and Schwartz's study identified opinions citing articles only using a computer-based search (which, as I noted earlier, likely resulted in an undercount of citations).

28. See *supra* notes 16 & 27.

29. See Petherbridge & Schwartz, *supra* note 11. Petherbridge and Schwartz found that the Justices cited law review articles at a greater rate (in at least one opinion in 40-50% of the Court's cases) in the 1970s and 1980s, compared to approximately one-third of cases in the last decade. See *id.* But because their computer-based search was flawed in that it undercounted the actual number of opinions citing law review articles, see *supra* note 11, the actual percentage of opinions citing one or more law review articles in the 1970s and 1980s was likely higher than their findings indicated.

ions, analysis of the individual Justices' citations to law review articles merits discussion. According to the Supreme Court Database,³⁰ the thirteen different Justices on the Court from 2001 to 2011 issued a total of 1961 signed opinions (majority, plurality, concurring, dissenting, and hybrid opinions). Table 1 below lists the number (and percentage) of such opinions citing one or more law review articles based on the total number of opinions authored per Justice, and also lists the average number of cited articles per opinion.

As the data show, on average, liberal Justices have cited law review articles more frequently within and across their opinions than their conservative counterparts. A plausible explanation for this trend is that law review articles, particularly those written by law professors, are more likely to reflect the ideology of the liberal Justices.³¹

Chief Justice Roberts's citations to law review articles are notable in another respect: half of the articles to which he has cited (eleven of twenty-two) are at least two decades old. Excluding these older articles, his citation rate drops to an average of 0.14 articles per opinion. This finding confirms his declaration that he does not have much use for modern law review scholarship.

B. Status of Authors

Of the 1023 cited articles, 61.62% of authors were full-time law professors,³² while 38.38% were law students, legal practitioners,³³ judges, or persons who were not primarily associated with the bench, bar, or legal academy (including researchers with non-academic think tanks or other private research organizations, and

30. THE SUPREME COURT DATABASE, <http://scdb.wustl.edu> (last visited May 1, 2012). A spreadsheet containing the list of the 1961 signed opinions analyzed in this Article is on file with the author.

31. See, e.g., Karen Sloan, *Study: Law School Hiring Skews Liberal, but Liberals Don't Get All the Key Jobs*, NAT'L L.J., July 21, 2010.

32. I define *law professor* very broadly: any full-time professor (or dean) employed by an American law school; whether tenure track, tenured, or non-tenure track; and including experiential professors (e.g., clinical law professors), visiting law professors, and professors emeritus. I also include teaching fellows, visiting assistant professors, and similar short-term legal scholars employed on a full-time basis at a law school.

33. Authors were deemed *practitioners* if they identified themselves (or if other information identified them) as being primarily engaged in the practice of law for a private firm or government agency. Post-graduate judicial law clerks were deemed practitioners. If an author only identified himself or herself as "J.D." or as a member of a state bar, such author was deemed a practitioner unless outside research revealed otherwise.

TABLE 1. JUSTICES' CITATIONS TO LAW REVIEW ARTICLES FROM 2001–2011

	Number of signed opinions citing $\geq$ one article/total number of opinions (percent)		Total number of cited articles/total number of opinions (mean)	
Rehnquist	8/58	(13.79)	20/58	(0.34)
Roberts	13/81	(16.04)	22/81	(0.27)
Stevens	67/273	(24.54)	215/273	(0.79)
O'Connor	17/90	(18.89)	40/90	(0.44)
Scalia	54/278	(19.42)	111/278	(0.40)
Kennedy	40/184	(21.74)	87/184	(0.47)
Souter	30/158	(18.99)	96/158	(0.61)
Thomas	35/263	(13.31)	83/263	(0.32)
Ginsburg	42/182	(23.08)	120/182	(0.66)
Breyer	63/241	(26.14)	163/241	(0.68)
Alito	21/104	(20.19)	53/104	(0.51)
Sotomayor ^a	5/37	(13.51)	7/37	(0.19)
Kagan ^a	1/12	(8.33)	6/12	(0.50)
Total	396/1961	(20.19)	1023/1961	(0.52)
<u>Highest % opinions with citations</u>		<u>Highest average citation frequency</u>		
Breyer	26.14	Stevens	0.79	
Stevens	24.54	Breyer	0.68	
Ginsburg	23.08	Ginsburg	0.66	
<u>Lowest % opinions with citations</u>		<u>Lowest average citation frequency</u>		
Thomas	13.31	Roberts	0.27	
Rehnquist	13.79	Thomas	0.32	
Roberts	16.04	Rehnquist	0.34	

^a Excluded from further analyses because of the small number of opinions authored to date.

full-time professors from university departments other than law schools, such as economists, historians, and political scientists).³⁴ An examination of the authors who were not full-time law professors revealed that the four subgroups each constituted roughly one quarter of the subtotal.³⁵

The identity of the authors is important because, as I have written elsewhere, publishing law review articles is the professional preoccupation of the bulk of today's full-time American law professors.³⁶ Law review scholarship is the *raison d'être* of twenty-first-century law professors—they are hired, promoted, and granted tenure (with the partial exception of the small minority of experiential professors, such as clinicians, at some law schools) based primarily on publishing law review articles.³⁷ Members of the legal profession who write law review articles—practitioners and judges—typically do so primarily out of intellectual curiosity and a desire to contribute their ideas to the legal community more than for professional advancement or remuneration. Neophyte law students publish notes or comments as part of their duties on their law reviews. And “other” authors—typically full-time academics who are employed by university departments other than law schools but whose professional interest is the legal system—publish law review articles as a secondary or tertiary part of their scholarly mission (books or articles in academic journals other than law reviews being their primary mediums of scholarly expression). Thus, comparing the number of cited law review articles written by full-time law professors with the number written by other authors serves as one indicia of the practical value of law review articles written by members of the legal academy. The fact that nearly four out of ten of the authors of the cited law review articles wrote them as an avocation rather than a vocation (as do law professors) is telling about how the Court views legal scholarship produced by the legions of American law professors.

With respect to law review authors whose primary professional identity is not as a law professor, I am aware of no recent data on

34. If an article was co-authored by multiple authors who did not share a single professional identity, each author was assigned a proportionate share of authorship (e.g., an article co-authored by a law professor, practitioner, and law student resulted in each author's professional identity being assigned a value of 0.33).

35. Law students were 27.02%, practitioners 29.96%, judges 17.72%, and “other” 25.30%.

36. See Newton, *supra* note 2, at 133–34, 139.

37. See *id.*

what percentage of all law review articles today are authored by non-law professors. That percentage was substantial in the past, although the number declined significantly from 1960 to 1985.³⁸ A review of recent editions of the top ten law reviews as ranked by the W&L system³⁹ revealed that, of the thirty-four authors and co-authors of published articles (excluding student works), only one was a practitioner (who, as it turns out, was on leave from his full-time job as a law professor in order to serve temporarily as a government attorney). Another author was a law clerk for a federal circuit judge, a third was a federal circuit judge, and a fourth was a professor of medicine and genetics. The primary professional identity of the remaining thirty (88%) was full-time law professor.

By comparison, an analysis of non-student articles appearing in the most recent editions of several randomly selected law reviews (both flagship law reviews and specialty law reviews) at different places in the 2010 version of the W&L rankings revealed a very different profile of authors than that of the articles in the top ten law reviews.⁴⁰ As a general rule, the lower a law review's ranking, the larger was its percentage of authors other than full-time law professors. Most law reviews ranked below one hundred that were surveyed had at least as many authors who were not law professors as authors who were.

Finally, it is significant that, within the "other" category of law review article authors cited by the Justices, the single largest subgroup was composed of full-time professors from university departments other than the law school. Professors of economics, history, and political science predominated in this subgroup. One of the

38. See Michael J. Saks et al., *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK U. L. REV. 353, 365 (1996) (noting the difference between the ratios of judge and practitioner articles to professor articles in 1960 and 1985; in 1960, the ratio of judge and practitioner articles to law professor articles was 1 to 1, but by 1985, the ratio was 1 to 2.24).

39. See *supra* note 12 and *infra* Part II.C. Those law reviews are at the law schools at Harvard, Columbia, Yale, Stanford, NYU, Virginia, Berkeley, Penn, Michigan, and Georgetown. I reviewed the editions available at the law reviews' websites as of October 2011. All but two of the law reviews' editions then available were from June 2011; one was from December 2010, and one was from October 2011.

40. I reviewed recent editions available at the websites of *William and Mary Law Review* (ranked 20th), *Buffalo Law Review* (ranked 90th), *Arizona State Law Journal* (ranked 107th), *Indiana Law Review* (ranked 205th), *Southwestern Law Review* (ranked 302nd), the *Asian American Law Journal* (ranked 370th), the *Texas Journal on Civil Liberties and Civil Rights* (ranked 406th), *North Dakota Law Review* (ranked 462nd), *Nova Law Review* (ranked 507th), *Tulane Maritime Law Journal* (ranked 570th), *Thomas M. Cooley Law Review* (ranked 625th), and *John Marshall Law Journal* (ranked 699th).

major controversies in the legal academy since the 1970s has been whether law professors should focus on interdisciplinary legal scholarship ("law and . . .").⁴¹ The fact that the Supreme Court has cited a substantial number of law review articles written by professors who are not members of the legal academy suggests that many law professors are needlessly working in such areas of scholarship.

C. Rankings of Law Reviews in Which Cited Articles Were Published

It is widely known that today's law professors, particularly at top-tier law schools, are expected to publish articles in prestigious law reviews in order to gain tenure and promotion.⁴² Increasingly, at least at the schools in the upper echelons of the rankings, an aspiring professor must first publish in a highly ranked law review in order to be hired in the first place.⁴³

With the decision by the Justices to cite particular law review articles serving as a strong indicator of article worth (and by association

41. See, e.g., Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1321 (2002) ("Traditional doctrinal scholarship is disvalued at the leading law schools. They want their faculties to engage in 'cutting edge' research and thus orient their scholarship toward, and seek their primary readership among, other scholars, not even limited to law professors, though they are the principal audience."); Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 192 (1991).

42. See David C. Yamada, *Therapeutic Jurisprudence and the Practice of Legal Scholarship*, 41 U. MEM. L. REV. 121, 123–24, 132 (2010) (discussing "rankism" in the article placement process and observing that "the quest for the proverbial 'good placement' has come to dominate faculty discussions of scholarship"); see also Alfred L. Brophy, *The Signaling Value of Law Reviews: An Exploration of Citations and Prestige*, 36 FLA. ST. U. L. REV. 229, 230 (2009) (discussing the legal academy's obsession with law review rankings and prestige, and how evaluators often use journal placement in terms of ranking as a proxy for quality); Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Selection Process: An Empirical Study of Those with All the Power – Student Editors*, 59 S.C. L. REV. 175, 179 & n.11 (2007) (observing that, for new professors, "success in the legal academy may depend on what, where, and how often they publish in the appropriate law journal," and specifically noting that some "promotion and tenure committees . . . [likely have] written or unwritten policies" requiring publication in higher ranked law journals); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 948–49 (1990) ("Besides the life-force craving of promotion and tenure, for many a law professor image is easily as important as substance To be published, even cited, in an Ivy League law review is considered to be a feather in one's professional cap.").

43. See Nora V. Demleitner, *Colliding or Coalescing: Leading a Faculty and an Administration in the Academic Enterprise*, 42 U. TOL. L. REV. 605, 608 & n.15 (2011) (citing several sources in support of the proposition that "calibrating the 'success' of scholarship is difficult [with respect to assessing prospective faculty members], and seems to focus largely on the ranking and name prestige of the law review in which the author publishes"); see also Newton, *supra* note 2, at 133–34.

the worth of the journal in which it appears), an empirical analysis of the law reviews cited by the Justices is important to test the validity of law review rankings. Although there is no consensus among members of the academy about the best way to rank law reviews,⁴⁴ the most widely accepted system of ranking appears to be the W&L system that is based primarily on a complex formula of citations counts (in other law reviews and judicial opinions) during a preceding eight-year period.⁴⁵ Because the overwhelming majority of such citations appear in other law professors' articles published in law reviews rather than in judicial decisions,⁴⁶ this ranking system, although not perfect, is a fairly good barometer of legal academia's view of the worth of a particular law review. Indeed, as Professor Brophy has shown, there is a strong correlation between the *U.S. News & World Report* ranking of a law school and the W&L ranking of the law school's flagship law review.⁴⁷ Thus, the present study analyzed the 2010 W&L system rankings of the law reviews that published articles cited by the Supreme Court during the study period.⁴⁸ Of the 1023 articles cited by the Justices, 1020 appeared in law reviews that were ranked by the W&L system.

The average (mean) W&L ranking of the 1023 cited articles was 92, the median was 21, and the mode was 1. The mode indicates that the top-ranked law review, the *Harvard Law Review*, was cited the most times (102 or 10.1%) among the 1023 total citations. Although elite law reviews were cited disproportionately—articles in the top ten law reviews were cited 384 times (or 37.5% of the 1023 cita-

44. See Ronen Perry, *The Relative Value of American Law Reviews: Refinement and Implementation*, 39 CONN. L. REV. 1 (2006) (discussing the pros and cons of the various methods by which law reviews are ranked).

45. See WASH. & LEE U. SCH. LAW, *supra* note 10.

46. Lasson, *supra* note 17, at 932 ("[A]s a casual glance through *Shepard's Law Review Citations* will disclose, the overwhelming majority of articles are noted not by courts or legislatures, but by one another!").

47. See Alfred L. Brophy, *The Relationship Between Law Review Citations and Law School Rankings*, 39 CONN. L. REV. 43 (2006); Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings 2003–2007*, 78 U. COLO. L. REV. 35 (2007); accord Ronen Perry, *The Relative Value of American Law Reviews: A Critical Appraisal of Ranking Methods*, 11 VA. J.L. & TECH. 1, 34 (2006).

48. A significant problem with a ranking system based on citation counts is that it tends to favor law reviews that publish more articles annually. The more articles published by a particular journal, the more likely one of its articles will be cited. Flagship journals at major law schools (including all of the top-ranked schools) typically publish many more pages annually than flagship journals at lower-ranked schools or specialty law reviews at any school (and the latter typically publish fewer editions annually than flagship journals). The W&L system mitigates this bias to some degree with its *impact-factor*. See *Explanation*, WASH. & LEE U. SCH. LAW, <http://lawlib.wlu.edu/LJ/method.asp#impactfactor> (last visited May 1, 2012).

tions) — the Justices cited over 100 articles appearing in law reviews ranked at 300 or below. The results are somewhat consistent with Professor Sirico's empirical studies of cited law review articles from the 1970s through the 1990s, although the Court in past decades cited top ten law reviews in higher proportion than the Justices have in the first decade of the twenty-first century. His study shows that in the early 1970s, 58.36% of all the Justices' citations were to articles published in the law reviews at Harvard, Yale, Columbia, Penn, Virginia, Chicago, Berkeley, Michigan, NYU, and Georgetown.⁴⁹ A decade later, 56.84% of the citations were to articles in the top ten law reviews (with Stanford having replaced Georgetown at the number ten spot).⁵⁰ By the early 1990s, that figure had decreased to 52.69%, and, by the late 1990s, it had dropped further to 47.97%.⁵¹ As noted above, over the past decade, the Justices cited articles from the top ten law reviews 37.5% of the time they cited to law review articles.⁵²

Professor Sirico's study and the present study, when considered together, demonstrate an increase in citations to lower-tier law reviews by the Supreme Court over the past few decades. His data show that, in the early 1970s, articles published in law reviews constituting the bottom 50% of all law reviews cited by the Court (i.e., non-elite journals) accounted for only 9.03% of all cited articles, while by the late 1990s, articles in such law reviews constituted 16.97% of citations.⁵³ The finding in the present study that the mean W&L ranking for cited articles in the past decade was ninety-two is further evidence that articles in non-elite law reviews are increasingly being cited by the Justices.

There are at least three apparent explanations for this increase in the percentage of the Justices' citations to articles in lower-ranked reviews and the corresponding proportional decline in their cita-

49. See Sirico, Jr., *supra* note 27, at 1014.

50. See *id.* at 1010-11 n.11, 1014.

51. See *id.*

52. Professor Sirico's ranking system was based on the Court's own citation practices (i.e., journals were ranked based on how frequently the Court cited to them). See Sirico, Jr., *supra* note 27, at 1014. Thus, he did not rank the reviews according to some external ranking system, as I did using the W&L system. Nonetheless, his ranking system, while different, closely correlates with the W&L ranking system, particularly for the top ten reviews. The top ten law reviews according to the W&L ranking system were Harvard, Columbia, Yale, Stanford, NYU, Virginia, Berkeley, Penn, Michigan, and Georgetown. Other than the omission of Chicago and addition of Stanford and Georgetown, Professor Sirico's top ten ranking by Court citation frequency was the same.

53. Sirico, Jr., *supra* note 27, at 1014.

tions to articles in elite law reviews. First, recent decades have seen many new law reviews come into being,⁵⁴ and thus, more law review scholarship is available to the Justices. Second, increasingly since the 1970s, the highly ranked law reviews have tended to publish scholarly articles written *by* law professors *for* law professors, rather than for members of the bench and bar.⁵⁵ Third, with the ascendancy of legal databases such as Westlaw and Lexis beginning in the 1980s, the Justices and their law clerks have had more access to non-elite law review articles than in prior years (when they were limited to researching the stacks in the law library and may have gravitated toward the more familiar, highly ranked law reviews). When one researches law review scholarship in a legal computer database using search terms, the search engine does not discriminate based on the rankings of the relevant law review articles.

Whatever the explanation, since the 1970s, the Court has been increasingly citing legal scholarship published in lower-ranked law reviews. The Court appears more receptive to those articles than the professoriate at highly ranked law schools, who dominate the culture in legal academia. It seems highly improbable that most elite law schools would hire, promote, and award tenure to a professor who only published articles in law reviews ranked at or near ninety-two by the W&L system—law reviews such as the *Buffalo Law Review*, *University of Washington Law Review*, *American Business Law Journal*, and *Fordham Urban Law Journal* (ranked ninetieth, ninetieth, ninety-second, and ninety-third, respectively).

CONCLUSION

The present empirical analysis of the twenty-first-century Supreme Court Justices' citation of law review articles, coupled with other similar studies, yields at least three major conclusions:

54. See *supra* note 17 and accompanying text.

55. See, e.g., David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761 (2005); see also Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 36 (1992) ("Our law reviews are now full of mediocre interdisciplinary articles. Too many law professors are ivory tower dilettantes, pursuing whatever subject piques their interest, whether or not the subject merits scholarship, and whether or not *they* have the scholarly skills to master it."); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1132–33 (1995) ("[There] was a time when legal scholarship was understood to be doctrinal scholarship, and the more technical and intricate the doctrine, the better . . . Doctrinal scholarship as a fraction of all legal scholarship underwent a dramatic decline to make room for a host of new forms of legal scholarship—interdisciplinary, theoretical, nondoctrinal . . .").

- (1) The current Justices have cited law review articles less frequently than their predecessors did in the three decades before, which suggests that the current Justices may view current law review scholarship as less useful than the members of the Court did a generation ago.
- (2) Nearly four out of ten cited article authors were not full-time members of the legal academy. Considering that writing law review articles is the primary activity of America's ten-thousand-plus full-time law professors, the fact that the Justices cite so many articles written by other authors suggests that much of the professorate's scholarship may not have value or relevance to the Justices (or to the bench and bar generally).
- (3) The Justices have cited articles from the full gamut of law reviews in the rankings, including many law reviews that are not deemed tenure-worthy, at least from the perspective of the hiring and promotion committees at many elite law schools.

As the present study demonstrates, an examination of legal scholarship through the eyes of the twenty-first-century Justices can provide important insights about the contemporary value of law review articles. The legal academy would do well to take a closer look.⁵⁶

56. Future research on the Court's practice of citing law review articles might examine the following areas not addressed in this Article:

- (1) the purposes for which the Justices have cited articles (e.g., for factual propositions based on data contained in an article or for a legal proposition based on legal arguments made in an article) and whether those purposes have differed over time;
- (2) whether articles cited by the Justices were first cited in the briefs of the parties or *amici curiae*;
- (3) a comparison of the Justices' citations to law review articles with their citations to other secondary sources (e.g., legal treatises and social science journal articles) and whether the ratio between such types of citations has changed over time; and
- (4) the average number of years between the cited articles' publication date and the date of the opinions in which they were cited (providing some perspective on whether older legal scholarship may have more practical value than modern legal scholarship).