EMPIRICAL STUDY

THE LAW REVIEW IS DEAD; LONG LIVE THE LAW REVIEW: A CLOSER LOOK AT THE DECLINING JUDICIAL CITATION OF LEGAL SCHOLARSHIP

INTRODUCTION

"I haven't opened up a law review in years . . . . No one speaks of them. No one relies on them."[1] This, according to Chief Judge Dennis G. Jacobs of the United States Court of Appeals for the Second Circuit.[2] Judge Jacobs is not alone in his opinion of the current state of law reviews. Judge Harry Edwards famously disparaged the usefulness of law reviews in his article *The Growing Disjunction Between Legal Education and the Legal Profession*.[3] In that article, Judge Edwards explained that "[o]ur 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."[4] And it is not just judges who warn of declining judicial interest in law reviews. In 1998, attorney Michael McClintock published an empirical study in the *Oklahoma Law Review* that backed up the general sense of decline with hard numbers ("*Oklahoma Study*").[5] The *Oklahoma Study* found that there was a 47.35% decline in the use of legal scholarship by courts from 1975 to 1996.[6] A more recent study by the *Cardozo Law Review* found that, in the 1970s, federal courts cited to the *Harvard Law Review* 4,410 times; that, in the

1. Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8 (internal quotation marks omitted).

2. *Id.*

3. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35–36, 42–57 (1992).

4. *Id.* at 36.

5. *See generally* Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998).

6. *Id.* at 660. The *Oklahoma Study* found that from 1975 to 1976, courts cited the top forty law reviews 7,131 times. *Id.* app. I, at 689. From 1995 to 1996, the same group of law reviews was cited 4,018 times. *Id.* This data actually reveals a 43.65% decline, rather than the reported 47.35% decline. That is: (7131–4018) ÷ 7131 x 100 = 43.65%. Regardless, this error was relatively small in comparison to the alarming size of the overall decline in citation.

1990s, the number of citations dropped by more than half to 1,956; and that the precipitous decline continued well into the first decade of the twenty-first century.[7]

The institution is not, however, without its defenders. The feeling of Judge Stanley Fuld, expressed in 1953, that some judges "admire the law review for its scholarship, its accuracy, and, above all, for its excruciating fairness"[8] is still shared by some practitioners.[9] Judge Dolores Sloviter of the United States Court of Appeals for the Third Circuit recently published a thoughtful defense of law reviews:

> To practitioners and judges, law reviews can provide an expeditious vehicle by which to receive a comprehensive introduction to an unfamiliar field of law written by scholars who have studied and taught in the field or by experienced practitioners who are personally involved with that subject. Law review articles, and even student notes, may offer useful insights on unresolved issues, particularly when there is more than one point of view. The point-counterpoint of an article, response, and other commentary can be useful as well as entertaining for those seeking an entree into the most sophisticated thinking on the latest issues and trends.[10]

The answer to whether the institution is a crumbling relic or a vibrant source of legal illumination lies, as is often the case, somewhere in the middle. Our hypothesis is that the theories underlying—and therefore, the basic methodology employed by—the recent citation studies are fundamentally flawed and that by altering the methodology, a different, less dire picture will emerge. It turns out that our hypothesis has merit. Our data indicate that judicial citation of law reviews might not be in decline at all, and that in some cases, just the opposite might be true.[11]

Our presentation will proceed in five Parts. In the interest of providing context for the subsequent Parts, Part I offers a short, general history of law review citation by courts, including the debate surrounding its decline. Part II describes a ten-year update to the

7. CARISSA ALDEN ET AL., TRENDS IN FEDERAL JUDICIAL CITATIONS AND LAW REVIEW ARTICLES, Roundtable Discussion app. A, at 6 (2007), *available at* http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf.

8. Stanley H. Fuld, *A Judge Looks at the Law Review*, 28 N.Y.U. L. REV. 915, 918 (1953).

9. *See, e.g.*, Max Stier et al., Project, *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 STAN. L. REV. 1467, 1468 (1992) (finding, in a survey of practitioners, that "[n]otwithstanding the frequent criticisms of law reviews, readers give them positive ratings for success at achieving a variety of goals").

10. Dolores K. Sloviter, *In Praise of Law Reviews*, 75 TEMPLE L. REV. 7, 7 (2002).

11. *See infra* Part IV.

1998 *Oklahoma Study*, using the same methodology as was employed in that study. Part III then highlights and discusses several possible explanations for the apparent decline in judicial citation of law reviews. Part IV compares the traditional citation study methodology with our methodology and explains how our methodology attempts to account for the explanations provided in Part V. Part V analyzes our results and reflects on them. Finally, the Study concludes by considering the institution of the law review in light of our results and by asking how law reviews might adapt to the changing legal landscape to ensure their continued vitality.

I. A SHORT HISTORY OF JUDICIAL CITATION OF LAW REVIEWS[12]

Until the turn of the eighteenth century, legal news was mostly confined to general circulation newspapers.[13] Around that time, legal magazines began to publish articles on legal topics and recent court decisions.[14] The first of these was the *American Law Journal and Miscellaneous Repertory*, published in Philadelphia in 1808.[15] By 1850, about ten such magazines existed,[16] and in 1852, the journal that today survives as the *University of Pennsylvania Law Review* was first published.[17] After the *Harvard Law Review* published its first issue in 1887,[18] other prominent schools—notably Yale, Columbia, and Michigan—quickly realized the value of the student-edited law review and began to publish their own journals.[19] Once law reviews were established at the leading schools, it was inevitable that other schools would follow suit, and by 1930, forty-three schools boasted law journals of their own.[20]

It was not until 1897, however, that the Supreme Court of the United States legitimized the student-edited law review by first

12. For a much more detailed account of the history of law reviews, see generally Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739 (1985).

13. *Id.* at 750–51.

14. *Id.* at 751–52.

15. *Id.* at 751 (citing FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 202–04 (3d rev. ed. 1942).

16. *Id.* at 754.

17. *See* Joseph P. Flanagan, Jr., *Volume 100*, 100 U. PA. L. REV. 69, 69 (1951). It was not until 1896, however, that the journal became student-edited. *Id.* The very first student-edited journal was published by the Albany Law School in 1875. Swygert & Bruce, *supra* note 12, at 764. Since the Albany Law School Journal survived for only a year, the Harvard Law Review can rightfully claim to be the oldest continuously published student-edited law review.

18. *See Notes.*, 1 HARV. L. REV. 35, 35 (1887).

19. Swygert & Bruce, *supra* note 12, at 779.

20. *Id.* at 786–87 (citing Douglas B. Maggs, *Concerning the Extent to Which the Law Review Contributes to the Development of the Law*, 3 S. CAL. L. REV. 181, 181–82 (1930)).

citing a journal article.[21] Even then, the citation appeared only in the dissent, and it took another three years for the Court to cite, in a case concerning contract consideration, a law review article in the majority opinion.[22] From there, judicial citation of law review articles increased quickly.[23] The *Oklahoma Study* found that from 1975 to 1976, the Supreme Court of the United States, the United States courts of appeals, the United States district courts, and the state supreme courts, combined, cited law review articles more than seven-thousand times.[24] According to the *Oklahoma Study*, that era was near the height of judicial reliance on law reviews.[25] Since then, despite more cases being heard by courts every year,[26] the *Oklahoma Study* and studies like it show that judicial opinions cite fewer and fewer law review articles.[27]

Often, with increased popularity comes increased criticism, and law reviews have not been immune. Although his prediction of the death of law reviews may have been a bit premature, Professor Fred Rodell, in 1936, pointed out many of the issues that practitioners describe today.[28] Professor Rodell described law review authors as "among our most adept navel-gazers," and noted that the work that goes into writing a law review article "would be a perfectly harmless occupation if it did not consume so much time and energy that might better be spent otherwise."[29] Fifty-four years later, Professor Kenneth Lasson commented that "articles . . . are often overwhelming collections of minutiae, perhaps substantively relevant at some point in time to an individual practitioner or two

21. Swygert & Bruce, *supra* note 12, at 788; *see also* United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 350 n.1 (1897) (White, J., dissenting).

22. Swygert & Bruce, *supra* note 12, at 788 (citing Chi., Milwaukee & St. Paul Ry. Co. v. Clark, 178 U.S. 353, 365 (1900)).

23. *See* McClintock, *supra* note 5, at 665–67.

24. *See id.* app. I, at 689.

25. *See id.* at 684–85.

26. This fact—that courts hear more cases every year—could, of course, partly explain the phenomenon that is the subject of this article. *See* Sloviter, *supra* note 10, at 9 ("Another, and probably equally important, reason is the lack of free time to browse through the pages of law reviews. Our court's library circulates copies of the contents pages of all the law reviews we receive, and I occasionally mark articles I would like to read but I almost never get to them. I believe most academics have no appreciation of the time pressures under which conscientious federal appellate judges are working these days. One of my senior colleagues, who has published numerous articles and well-received books, never tires of telling us that when he came on our court he was responsible for only a small fraction of the cases that now come before an active federal judge on my court. Given all the other demands on our time, reading law review articles, particularly those that are long, dense, and obscure, is not high on our list.").

27. *See, e.g.*, McClintock, *supra* note 5, at 684–85.

28. *See* Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936).

29. *Id.* at 43.

way out in the hinterlands—and that almost entirely by chance."[30] Much of the debate surrounding the usefulness of law reviews centers around academics' supposed growing dissociation from the day-to-day happenings in the "real world" of the law.[31] In other words, there is an apparent increase in "theory wholly divorced from cases."[32] Judge Harry Edwards recounted an exchange he had with a renowned professor at a prominent law school, during which the professor explained it to the judge this way:

> I suppose that we both agree that there is an ever-increasing split between the academy and practicing judges (not to mention practicing lawyers). . . . I presume that a good illustration of the split would be [an article of mine]. . . . Although a couple of cases are mentioned, it is in no serious sense meant to be a contribution to the discussion of any of the contemporary doctrinal issues of undoubted importance to our society.
>
> . . . Though I am always delighted to discover that a judge has [read] anything I have written . . . I can't honestly say that I expect many judicial readers nor am I willing to redirect my writing in ways likely to increase the number.[33]

Judge Edwards's response was blunt: "I am still astonished by the professor's frank admission that he is 'unwilling to redirect' his writing in useful ways, since he prefers to study whatever 'fascinates' him."[34] According to Judge Edwards, "[t]he law schools *should* have interdisciplinary scholars, but not scholars whose work serves no social purpose at all. We do not give tenure to stamp collectors, or to light readers."[35] Judge Renna Raggi of the United States Court of Appeals for the Second Circuit was less harsh, but still noted that "[i]f the academy does want to change the world . . . it does need to be part of the world."[36] Even some academics who take issue with Judge Edwards's opinion on the current state of affairs believe that law reviews are

> undoubtedly cranking out a good deal of useless blather: articles that seem to have hardly anything to do with addressing or understanding any legal problem, articles clotted with hermetic jargon or puffed up with self-indulgent posturing, [and] articles borrowing intellectual fashions that

30. Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 930 (1990).
31. *See* Edwards, *supra* note 3, at 36.
32. *Id.* at 46 (internal quotation marks omitted).
33. *Id.* at 36 (alterations in original).
34. *Id.*
35. *Id.*
36. Liptak, *supra* note 1, at A8 (internal quotation marks omitted).

would be better off never having been invented.[37]

The upshot is that some practitioners believe that there is a substantial surfeit of narrowly focused, purely conceptual, theoretical legal scholarship.[38]

Making matters worse is the fact that, as demonstrated by Judge Edwards's exchange with the anonymous professor, many scholars just do not care.[39] Indeed, some academics have suggested that the problem lies not with themselves but with practicing lawyers and judges who might lack "the intellectual curiosity to appreciate modern legal scholarship."[40] Professor Michael Dorf of Columbia Law School believes that "[t]he claim by judges that they have no use for law review articles seems to me an anti-intellectual know-nothingism that is understandable but regrettable."[41] Judges are not blind to these sentiments. Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit believes that "some academics have almost a disdain for judicial interest in their work—or for whether and how their work will influence the outcome of cases."[42]

This debate is, naturally, alarming. The urgency of the situation is highlighted by recent studies showing that if law reviews continue to travel the present curve, they are doomed to disappear from judicial opinions altogether.[43] Judges are frustrated with scholars for writing conceptual nonsense, and scholars are scornful of judges for relegating their hard-thought articles to the category of conceptual nonsense.

It is our opinion that the current state of affairs is not as dire as the above debate and studies would suggest. After all, even back in 1936, Professor Fred Rodell was excoriating law reviews for having little application in the real world.[44] Law reviews did not die a lonely death after that article, nor were they injured by the popular criticisms that Justice Cardozo explained in 1931[45] when he noted an articulable "distrust" of the academic scholar based on the "belief that man thinking is less efficient than man doing."[46] Despite those

37. Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground*," 91 MICH. L. REV. 2075, 2076–77 (1993).

38. *See* McClintock, *supra* note 5, at 670–76.

39. *See* Edwards, *supra* note 3, at 36.

40. Liptak, *supra* note 1, at A8.

41. *Id.* (internal quotation marks omitted).

42. Judge Alex Kozinski, Who Gives a Hoot About Legal Scholarship?, Address at the Fourth Annual Frankel Lecture: The Relevance of Legal Scholarship to the Judiciary and Legal Community, *in* 37 HOUS. L. REV. 295, 297 (2000).

43. *See supra* notes 5–7 and accompanying text.

44. *See* Rodell, *supra* note 28, at 38.

45. Benjamin N. Cardozo, *Introduction*, *in* SELECTED READINGS ON THE LAW OF CONTRACTS FROM AMERICAN AND ENGLISH LEGAL PERIODICALS, at vii–viii (Ass'n of Am. Law Schs. ed., 1931).

46. *Id.* at viii.

long-ago criticisms, the institution did not crumble. Indeed, the institution went gangbusters during the next fifty years.[47]

II. THE UPDATED OKLAHOMA LAW REVIEW STUDY

Twelve years ago, the *Oklahoma Study* tested the hypothesis that legal scholarship had "become less relevant to the practice of law."[48] The study analyzed the number of judicial citations to law reviews between 1975 and 1996 and found a 47.35% decrease in overall citations by federal and state courts combined.[49] Before fully explaining our Study's contrary theory (that legal scholarship is not as irrelevant as the *Oklahoma Study* suggests), it is helpful to update the *Oklahoma Study* to determine if, in the ten years following that study, the rate of judicial citation to law reviews continued to steadily decrease.

Subpart A, through close replication of the methodology of the *Oklahoma Study*, seeks to provide a baseline for an inquiry into whether previous studies ignored factors that could explain the apparent decreasing judicial interest in law reviews.

A. *Methodology of the* Oklahoma Study

In updating the *Oklahoma Study*, we used the same list of forty leading law journals that the *Oklahoma Study* used as its representative sample.[50] Mimicking the *Oklahoma Study*'s use of three, two-year periods spaced ten years apart to demonstrate a twenty-year trend,[51] we overlapped the last two periods of the *Oklahoma Study* (1985–1986 and 1995–1996) and added an additional two-year period covering the years 2005–2006.

Then, we searched Westlaw for the name of each journal three times, one time for each two-year period. Just as in the *Oklahoma Study*, the search for citations of each law review was conducted in Westlaw in the United States Supreme Court database (SCT), the United States circuit courts of appeals database (CTA), the United States district courts database (DCT), and the state supreme court database (ALLSTATES).[52] In conducting each search in the four databases, the law reviews were searched for based on their designated *Bluebook* format,[53] with minor variations to account for

47. *See supra* note 24 and accompanying text.

48. *Id.* at 684.

49. *Id.*; *see also supra* note 6 (discussing the mathematical error in this result).

50. McClintock, *supra* note 5, at 683; *see also* Colleen M. Cullen & S. Randall Kalberg, *Chicago-Kent Law Review Faculty Scholarship Survey*, 70 CHI.-KENT L. REV. 1445, 1452 tbl.I (1995). The same list of journals was used in the interest of consistency.

51. McClintock, *supra* note 5, at 682–83.

52. *See id.* at 683–84.

53. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 349–372 tbl.T.13 (Columbia Law Review Ass'n et al. eds., 18th ed. 7th prtg. 2008).

spacing changes resulting from online reproduction and changes in the names or abbreviations of certain journals. In order to replicate the *Oklahoma Study* as closely as possible, our Study used the law review search terms and variations on those terms provided in Appendix II of the *Oklahoma Study*.[54] As the *Oklahoma Study* recognized, this updated version of the study is "not presumed as qualitatively perfect . . . . The survey is, however, sufficiently accurate to generally compare law reviews and to get a sense of the trend of decreasing citation."[55]

B. Results and Analysis

Based on the results of the *Oklahoma Study*,[56] our ten-year update could be expected to reflect the same steady decline in judicial citations to law reviews. It did. As seen in Figure 1, below, which shows an overall 60% decline in the number of judicial citations to law reviews by federal and state courts between 1985 and 2006, our updated version of the study shows that judicial citations to the 1996 *Chicago-Kent Law Review* list of the top-forty law reviews have decreased over the past twenty years. When the results for each specific court are analyzed, as shown in Table 1, an even more startling picture emerges: U.S. Supreme Court citations declined 79.4%, while U.S. circuit courts of appeals citations declined 77%. Only the relatively small declines in the U.S. district courts (31.7%) and state supreme courts (61.1%) balanced out the overall result.

54. *See* McClintock, *supra* note 5, app. II, at 695.

55. *Id.* at 684.

56. The *Oklahoma Study* found a decline of 58.6% by the Supreme Court of the United States, 56.0% by the courts of appeals, 24.8% by the Federal district courts, 46.8% in the state supreme courts, and an overall 47.35% decline by all courts combined. *Id.* at 684–85.

FIGURE 1[57]

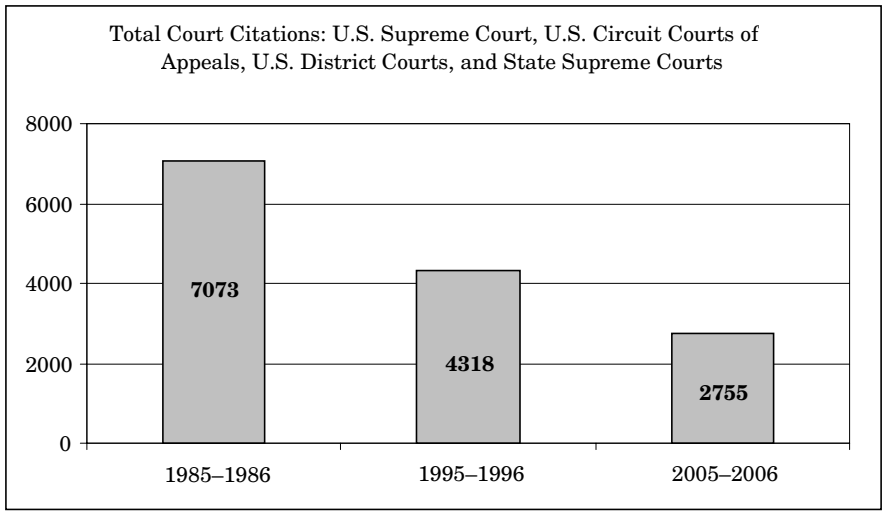


TABLE 1

Decline in Court Citations to Law Reviews by Court: 1985–2006			
	1985–1996	1995–2006	Total: 1985–2006
SCT Decline	58.80%	50.00%	79.40%
CTA Decline	44.90%	58.30%	77.00%
DCT Decline	14.90%	19.80%	31.90%
ALLSTATES Decline	41.70%	33.40%	61.10%

Obviously, these results are concerning for law reviews. While most scholars accept the *Oklahoma Study* as evidence that legal scholarship has become less relevant to the practice of law,[58] it is still often the case that such studies "invariably underestimate utility."[59] This critique, along with Judge Edwards's observation

57. See Tables 9–12 and Figures 4–7 in the Appendix for further tables and charts illustrating each court database's total numbers.

58. *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, 762 & n.4 (2005) (noting "the disconnect between many law faculty articles and the actual practice of law" and citing the *Oklahoma Study*); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 998 & n.4 (2006) (noting that judges rarely read legal scholarship and citing the *Oklahoma Study* as support); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1324 n.25 (2002).

59. Edwards, *supra* note 3, at 45.

that citation studies do not distinguish between "practical" articles and "impractical" articles,[60] spawned our interest in examining the purported demise of law reviews.

Accordingly, we formulated an alternative hypothesis. In order to accept this hypothesis, one must deconstruct the broad assumption that a decrease in judicial citations to *certain* law reviews equates to a decrease in the relevance of the *law review as an institution*. Thus, the alternative hypothesis, and the focus of Parts III through V, is as follows: there are explanations—apart from simple judicial disdain and disregard—for the apparent decline in law review citation, and it is possible to construct a citation study that accounts for these reasons and provides a more accurate depiction of the status quo.

III. REASONS, UNRELATED TO JUDICIAL DISDAIN, FOR THE APPARENT DECLINE IN JUDICIAL CITATION OF LAW REVIEWS

There are two categories of reasons for the apparent decline of law reviews. The first category, the "subjective" reasons, were discussed above.[61] Those reasons include scholars' move from the doctrinal to the purely theoretical, increased interdisciplinary focus, and obscurantist writing styles. The other category of reasons can rightly be described as "objective reasons"—reasons that are not influenced by the personal feelings, interpretations, or prejudices of judges, practitioners, or scholars. These reasons derive from the fact that the law and the world in which the law functions are ever changing. These objective reasons, in turn, reveal two methodological oversights embedded in past citation studies. In other words, by not accounting for the objective reasons, past studies have made the situation appear worse than it actually is.

A. The Objective Reasons

One reason for the apparent reduction of judicial reliance on law reviews is the fact that, with the emergence of the Internet, judges and their clerks have easy, instant access to reams of case law. It used to be that law reviews served as an easy research tool for judges.[62] A judge, before he or she wrote an opinion, would use a law review to do just that—review the law. With the advent of the Internet, it makes sense for a judge to cut the middleman out of the research process.[63]

But the most glaring objective reason for the decline is the

60. *See id.*

61. *See supra* notes 28–42 and accompanying text.

62. *See* Liptak, *supra* note 1, at A8 ("'Before search engines,' said Marci A. Hamilton, a law professor at Cardozo, 'if you wanted to figure out what all the cases on a given topic said, you went to a law review.' Now you punch some words into Lexis or Westlaw.").

63. *See id.*

explosion in the number of journals, particularly specialty law journals. In 1999 (the year after the *Oklahoma Study*) Tracey George and Chris Guthrie counted 330 specialized law journals being published by law schools.[64] A closer look revealed that "nine new specialized journals [emerged] in the 1950s, twenty-seven in the 1960s, sixty in the 1970s, ninety-one in the 1980s, and a stunning 137" during the first eight years of the 1990s.[65] One possible effect of the increasing number of specialty journals is the simple "diffusion" of judicial citation. With more articles being published in more journals, it follows that the old guard of the law review world—such as the forty law reviews examined in the *Oklahoma Study*—would see an ever-smaller share of judicial citation.[66] In addition, some data indicate that specialty journals are actually "filling a gap" created by the more established general law reviews.[67] The theory is as follows:

> As general law reviews have become increasingly dominated by law professors writing for the attention of each other, the specialty journals have been publishing articles that provide information more likely to be of use to the bench and the bar. It could be said that the general law reviews specialize in the academy just as the specialty journals could be seen as specializing in the bench and the bar. Practitioners tend to publish in the specialty journals where academics tend to publish in the general law reviews. Specialty journals also carry more co-authored articles, which may be more likely to be empirical or doctrinal in nature.[68]

If both of these observations are true, one would *expect* to see a decline in judicial citation of traditional law reviews and not entirely for the reasons discussed in Parts I and II. To draw a common-sense analogy, just because fewer people are watching network television does not mean that fewer people are watching television as a whole.[69]

64. Tracey E. George & Chris Guthrie, *An Empirical Evaluation of Specialized Law Reviews*, 26 FLA. ST. U. L. REV. 813, 822 (1999).

65. *Id.* at 818.

66. The *Oklahoma Study*, for instance, searched Westlaw for the same forty top-ranked law reviews during the 1970s, 1980s, and 1990s. *See* McClintock, *supra* note 5, app. I, at 689.

67. Robert M. Lawless & Ira David, *The General Role Played by Specialty Law Journals: Empirical Evidence from Bankruptcy Scholarship*, 80 AM. BANKR. L.J. 523, 542 (2006).

68. *Id.* at 542–43.

69. *See* Lisa Lapan, Comment, *Network Television and the Digital Threat*, 16 UCLA ENT. L. REV. 343, 354 (2009) ("A Nielsen Media study published in November 2008 found that television use is at an all-time high. . . . Unfortunately, while overall TV viewership is up, the networks are capturing a shrinking percentage of viewers, who increasingly spread their attention over hundreds of available cable channels. Primetime network viewership has declined by 49% in the past twenty years . . . .").

The final objective reason that law reviews are apparently experiencing a decline in judicial citation is equally straightforward: the law is increasingly settled.[70] Gone are the "'good old days' when even the leading law reviews confined themselves to topics like 'The Meaning of Fire in an Insurance Policy Against Loss or Damage,' or 'The Law of Icy Sidewalks in New York *State*.'"[71] There is no longer a real need for a journal to review the basics of consideration for contracts or any other fundamental legal concept because that law was settled long ago. Law reviews must keep publishing, however, so rather than rehash old and well-settled law, authors branch into unexplored or obscure areas or points of minutiae or interdisciplinary "law and" articles. By the same token, there is no need for a judge to cite to an article about contract consideration when the judge has volumes of (often binding) case law from which to draw. So, rather than cite a law review article to support the proposition that the judge is offering, the judge will cite case law.[72] Accordingly, "the opinions most likely to rely on the works of academics are those written in the gray areas of the law where precedent doesn't provide a clear-cut answer."[73] In this gray area:

> Modern courts can be innovative, but judges are reluctant to pick ideas entirely out of thin air. It's always much safer to follow some precedent, preferably an opinion by a prestigious court or at least a well-known judge. But, alas, there is a point in the development of any legal doctrine where there is no judicial precedent; some court has to be the first. That is a very uncomfortable position for a judge to be in: You write an opinion and have nothing to cite. Paradoxically, opinions are not supposed to be a matter of opinion; they are supposed to reflect the law, and this means at least someone out there who does law is supposed to agree with you.[74]

So while law reviews are certainly useful to a judge when a case involves a new or unsettled area of the law, there is, quite simply,

70. Here, we mean "settled" in the sense that there is a greater quantity of case law that answers the questions with which judges are presented. Judges do not spend their time puzzling over the basic questions of law—their predecessors did that work for them.

71. Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1329 (2002) (citing Edwin H. Abbot, Jr., *The Meaning of Fire in an Insurance Policy Against Loss or Damage by Fire*, 24 HARV. L. REV. 119 (1910) & Loran L. Lewis, Jr., *The Law of Icy Sidewalks in New York State*, 6 YALE L.J. 258 (1897)).

72. *Compare* Chi., Milwaukee & St. Paul Ry. Co. v. Clark, 178 U.S. 353, 365 (1900) (discussing contract consideration, and citing James Barr Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515, 521 (1899)), *with* E.C. Styberg Eng'g Co. v. Eaton Corp., 492 F.3d 912, 917–18 (7th Cir. 2007) (discussing contract consideration, and citing Alligood v. Procter & Gamble Co., 594 N.E.2d 668, 669 (Ohio Ct. App. 1991)).

73. Kozinski, *supra* note 42, at 296.

74. *Id.* at 307.

little need for a judge to support his or her opinion with a law review article if there is a case on point. Accordingly, this Study reasons that (1) in order to get an accurate picture of the state of law reviews, one must account for the explosion in the number of law journals, and (2) a decline in "relevance" based on a reported decline in judicial citations to legal scholarship[75] fails to recognize the manner in which some subset of legal scholarship is able to continually influence judicial decision making in unsettled areas of law.

These final two "objective" reasons for the declining judicial citation of law reviews are not only good explanations for the observance of the phenomenon by the recent citation studies, but they also indicate methodological oversights that make the situation appear worse than it actually is.

B. The Methodological Oversights

The first methodological factor has to do with the basic method used in searching for journals. As previously mentioned, the 1998 *Oklahoma Study* tracked the decline of law review citation over the course of twenty years by observing only the top-forty law reviews.[76] This method involved searching the Westlaw database for the names of those individual journals.[77] For instance, if the target journal was Harvard Law Review, the *Oklahoma Study* searched for various iterations of the abbreviated journal title as it might appear in court citations.[78] While this method does reveal some information about citation trends, it does not take into account the increasing number of journals from which a judge has to choose. As such, a search for "Harv-L-Rev" performed on cases from the 1970s and matched against a search for "Harv-L-Rev" from the 1990s does not actually show a declining judicial reliance on law reviews. Such a search only tends to show a declining judicial reliance on the *Harvard Law Review*.

In addition, the results of such a study are further obfuscated by a methodology that does not take into account the increasingly settled nature of the law. If the study does not confine its searches to anything but the names of eminent law reviews, there is no way to determine if there was any good reason for a judge to have consulted a law review. Thus, in a world of settled law and opinions that cite other opinions that cite other opinions, such a methodology presents an overly dire picture of the state of law reviews. Accordingly, this Study is built around principles that account for these oversights.

75. *See supra* Part II.B.
76. *See* McClintock, *supra* note 5, app. I, at 689.
77. *See id.* at 695.
78. *See id.*

IV. AN IMPROVED METHODOLOGY

Because we hypothesize that the increasing number of available journals has contributed to the apparent increase in judicial disregard for law review, we sought a database search method that would reveal law review citation without regard for the rank or the type of law review. The most obvious solution to this problem is to run a distinct search for each and every individual journal name. However, it would be remarkably time consuming to run searches for every journal name in *The Bluebook*[79] in every group of courts for a fifty-year span. Accordingly, we built our searches around the letters that many law reviews, across the spectrum from top tier to bottom tier, have in common: "L.J." and "L. Rev."[80] For instance, Table 13 in the eighteenth edition of the *The Bluebook* reveals that Harvard boasts a total of eleven journals.[81] Of that group, seven contain either the letters "L.J." or "L. Rev." in the given citation.[82] Along the same lines, *The Bluebook* shows that the University of Miami has seven journals, five of which include the letters "L. Rev."[83] Of Wisconsin's four journals, all four contain either the letters "L.J." or "L. Rev." in the given citation.[84] Our hypothesis is that this search method will account for the explosion in the number of journals that judges have at their disposal and will paint a different picture than did the *Oklahoma Study*.

The second part of our methodology attempts to account for the increasingly settled nature of the law. Once again, our Study draws on Judge Edwards's commentary on the usefulness of law reviews, particularly his thoughts about when a judge needs "outside" assistance.[85] In his article, Judge Edwards provides an example in which a judge seeks to resolve a complex procedural problem of "first impression."[86] He notes that the judge will inevitably seek a source that will help him to both understand the relevant provisions of the Rules of Civil Procedure and assist him in answering the particular legal question.[87] By the very nature of this sort of case of first impression,[88] a judge is called on to resolve a conflict for which no

79. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 349–72 tbl.T.13 (Columbia Law Review Ass'n et al. eds., 18th ed. 7th prtg. 2008). The eighteenth edition of The Bluebook contains more than twenty pages of journal names, with each page containing approximately forty entries. *See id.*

80. A quick scan of the journal names in Table 13 of The Bluebook reveals that this form of citation is common. *See id.*

81. *See id.* at 357–58 tbl.T.13.

82. *See id.*

83. *See id.* at 370–71 tbl.T.13.

84. *See id.* at 372 tbl.T.13.

85. Edwards, *supra* note 3, at 53.

86. *Id.*

87. *Id.*

88. *Black's Law Dictionary* defines the term as "[a] case that presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jurisdiction." BLACK'S LAW DICTIONARY 243

binding legal authority exists. Thus, cases of first impression could provide an ideal lens through which to examine an apparent decline in judicial citation of legal scholarship.

In order to grind this lens, we merely altered our already-constructed "search strings" so that we could examine the results for evidence of increased judicial reliance on law reviews in the gray areas of the law. We accomplished this by adding the term "first impression" to our search strings, based on the hunch that this phrase would overwhelmingly appear in judicial opinions that were dealing with issues of first impression.[89] Our hypothesis was that searches restricted in such a manner would reveal a higher-than-normal judicial reliance on law reviews.

A. Detailed Explanation of Methodology and Partial Results[90]

First, in the interest of providing a more expansive picture of the situation, this Study broadens the span of time searched from a twenty-year period[91] to a fifty-year period. Then, in order to provide manageable data points, the fifty-year span is broken down into ten separate five-year blocks.[92]

In addition, the court system is broken down into its natural component parts: the United States Supreme Court, the United States courts of appeals, the federal district courts, and the state supreme courts. Then, the Study attempts to achieve a "baseline" that represents the total number of opinions issued by each component court during the course of a given five-year period. Throughout the Study, the baseline was achieved by restricting a search to a particular five-year period, selecting the component courts' Westlaw database, and then searching the "headnotes" of cases for the words "a" or "court" or "law." Thus, a search of Supreme Court cases for the years 1960 to 1964 would look like this:

HE(a court law) & da(aft 1959 & bef 1965)

(9th ed. 2009)

89. If our results revealed a large difference in the number of citations to law reviews in opinions containing the words "first impression," then the logical conclusion would be that the reason for the increase is that judges needed some additional support for their reasoning. *See* Kozinski, *supra* note 42, at 296 ("[T]he opinions most likely to rely on the works of academics are those written in the gray areas of the law where precedent doesn't provide a clear-cut answer.").

90. See the Appendix for full results.

91. McClintock, *supra* note 5, at 660.

92. This choice of methodology relates to a perceived flaw in the use of the two-year time period as representative of a decade's trend. Such a model could over- or underestimate law review citation because of the limited two-year time period. For example, within any given two-year time period, judicial citations to legal scholarship may be far fewer than the median number of citations for the representative decade, presenting an exaggeration of the overall percentage of decline.

While appearing ungainly, this search method limits the results to cases that include "headnotes," and thereby excludes many results that are simply grants or denials of certiorari, rulings on motions, and other similar documents.[93] In this way, the search results approximate the actual number of written opinions that the Supreme Court published in the *United States Reports*.[94] The words "a," "court," and "law" were chosen for their common appearance in headnotes, such that the maximum number of legitimate results would be returned. Using this method, the following baseline numbers were achieved:

TABLE 2

Total Number of Supreme Court Opinions with Headnotes in the Westlaw Database During Five-Year Periods: 1960–2009	
Years	Total SCT
1960–1964	644
1965–1969	604
1970–1974	741
1975–1979	783
1980–1984	795
1985–1989	678
1990–1994	532
1995–1999	423
2000–2004	386
2005–2009	369

While this "headnote method" is not perfect, it does tend to return fair results. The following chart compares the results returned using the "headnote" search method with the actual number of signed opinions issued by the Supreme Court for a given set of years:[95]

93. For instance, a search for "a court law & da(aft 1959 & bef 1965)" in the Westlaw Supreme Court database returns 12,963 results. A similar search, restricted to the "headnotes," returns 644 results—much closer to the actual number of written opinions from those years.

94. *See infra* Tables 3 and 5.

95. This "signed opinion" data is available in LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 84–85 tbl.2-7 (2d ed. 1996). While our Study could have incorporated the data found in *The Supreme Court Compendium*, we chose to adhere to our chosen methodology here and throughout the Study. This was because data about signed Supreme Court, courts of appeals, and district court opinions that are *actually available* on Westlaw appear to be nonexistent and because we wanted to keep the baseline consistent.

TABLE 3

Actual Number of Supreme Court Signed Opinions Compared to Westlaw Search Results: 1975–1994				
Years	1975–1979	1980–1984	1985–1989	1990–1994
Total SCT	783	795	678	532
Actual	653	705	692	492

The same method returned similarly fair results for the federal courts of appeals:[96]

TABLE 4

Actual Number of Courts of Appeals Opinions Compared to Westlaw Search Results: 1975–1994				
Years	1975–1979	1980–1984	1985–1989	1990–1994
Total CTAR	21,003	26,949	27,700	29,768
Actual	18,108	24,863	28,948	30,722

The next step incorporated the "L.Rev." and "L.J." methodology change that is discussed above.[97] Accordingly, the new search string included either "L.Rev." or "L.J." (and *excluded* its counterpart) in the following manners:

HE(a court law) & da(aft 1959 & bef 1965) & L.Rev. % L.J.

or

HE(a court law) & da(aft 1959 & bef 1965) & L.J. % L.Rev.

Then, a final search was run to look for cases that included *both* "L.Rev." and "L.J."[98]

96. The data on courts of appeals signed opinions can be found in RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 170 tbl.6.2 (1996).

97. *See supra* Part III.B.

98. This was done in order to avoid double-counting cases in the results. If we had simply searched for "L.Rev." without excluding "L.J.," the returned results would include some cases that included both L.Rev. and L.J. Those same cases would turn up in the results when we searched for L.J. without excluding L.Rev. For instance, say that there are ten total cases in a given set of years, three of them including only L.Rev., three of them including only L.J., and two of them including both terms. A search that does not look exclusively for one term or the other would find five cases that included L.Rev. and five cases that included L.J., for a total of ten cases—when in actuality there were only eight cases that included L.Rev. or L.J. Our method finds three cases that include L.Rev. and three cases that include L.J. The other two cases turn up when we search for cases that include both L.Rev. and L.J. Thus, an accurate total of eight cases is returned.

HE(a court law) & da(aft 1959 & bef 1965) & L.Rev. & L.J.

Using this method as a means of discerning the total number of opinions on Westlaw that *also* contained either "L.J." or "L.Rev." during a given five-year span, the following results were achieved:

TABLE 5

Total Number of Supreme Court Opinions Citing to Either a Law Review, a Law Journal, or Both: 1960–2009			
Years	L.Rev.	L.J.	L.Rev. & L.J.
1960–1964	26	39	18
1965–1969	29	61	16
1970–1974	32	61	34
1975–1979	50	61	26
1980–1984	67	57	39
1985–1989	58	50	21
1990–1994	56	49	23
1995–1999	75	20	37
2000–2004	70	17	26
2005–2009	59	20	37

At this point, we decided to express the rate of judicial citation, not as a bare number, but as a percentage of overall cases, such that a fluctuating number of opinions from year to year would be accounted for.[99] This step involved simple mathematics. The total number of "L.Rev. only," "L.J. only," and "L.J. and L.Rev." results were added together and then divided by the "baseline" number, and then multiplied by one hundred to get the percentage of Supreme Court cases in which the Court cited law review articles. In this manner, the following table was generated:

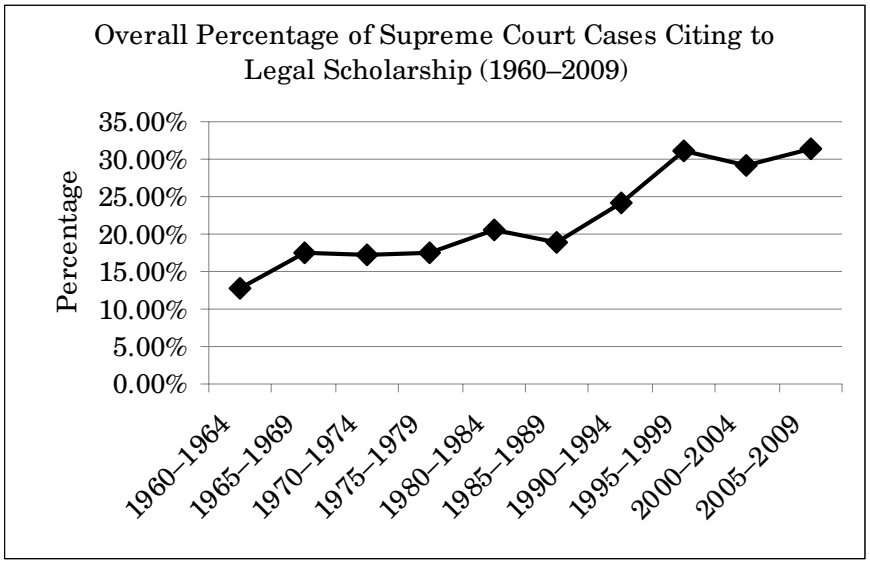
99. For instance, in 1973 the Supreme Court issued 141 signed opinions, while in 1993 the Supreme Court issued only 84 signed opinions. *See* EPSTEIN ET AL., *supra* note 95, at 85 tbl.2-7. Moreover, from 1970 to 1974 the Court issued 642 signed opinions while the years 1990–1994 saw only 492 signed opinions. *See id.* at 84–85 tbl.2-7. Not accounting for these year-over-year changes returns artificially inflated or deflated results.

TABLE 6

Overall Percentage of Supreme Court Opinions Citing Legal Scholarship: 1960–2009						
Years	Total SCT (see Fig. 3)	L.Rev.	L.J.	L.Rev. & L.J.	Total	% SCT
1960–1964	644	26	39	18	83	12.9
1965–1969	604	29	61	16	106	17.5
1970–1974	741	32	61	34	127	17.1
1975–1979	783	50	61	26	137	17.5
1980–1984	795	67	57	39	163	20.5
1985–1989	678	58	50	21	129	19
1990–1994	532	56	49	23	128	24.1
1995–1999	423	75	20	37	132	31.2
2000–2004	386	70	17	26	113	29.3
2005–2009	369	59	20	37	116	31.4

These percentages are more easily visualized in graph form:

FIGURE 2



The next step was to examine the second part of our hypothesis—that a court is more likely to consult a law review when the court is treading in unfamiliar territory.[100] This entailed adding the words "first impression" to the basic search string in order to achieve a baseline of "first impression" cases. Thus:

100. *See supra* Part III.A.

HE(a court law) & da(aft 1959 & bef 1965) & "first impression"

These searches returned the following results:

TABLE 7

Total Number of Supreme Court "First Impression" Opinions: 1960–2009	
Years	First Impression
1960–1964	11
1965–1969	17
1970–1974	20
1975–1979	17
1980–1984	18
1985–1989	12
1990–1994	15
1995–1999	8
2000–2004	3
2005–2009	8

Next, "L.Rev." or "L.J." was added to the "first impression" baseline search string as such:

HE(a court law) & da(aft 1959 & bef 1965) & "first impression" & L.Rev. % L.J.

or

HE(a court law) & da(aft 1959 & bef 1965) & "first impression" & L.J. % L.Rev.

Then, just as above, a final search was done to look for cases that included *both* "L.Rev." and "L.J."[101]

HE(a court law) & da(aft 1959 & bef 1965) & "first impression" & L.J. & L.Rev.

In this manner, the following results were returned:

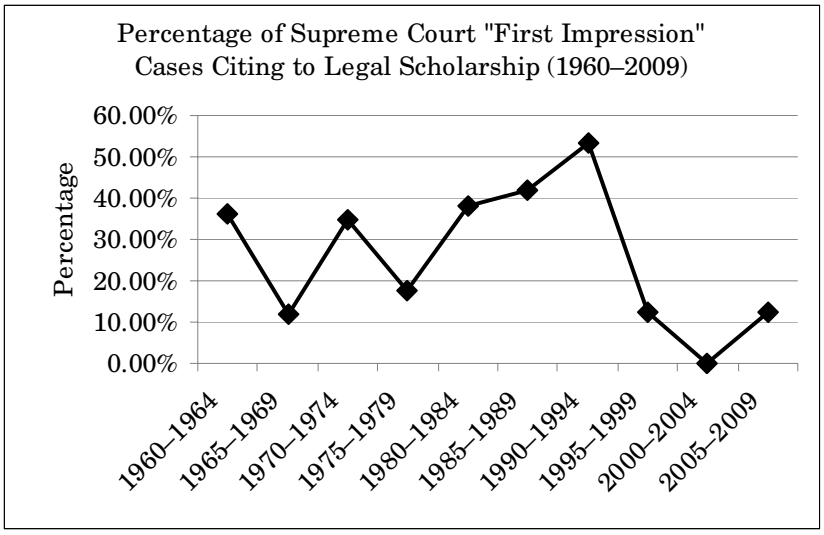
101. *See supra* note 98 and accompanying text.

TABLE 8

Total Number of Supreme Court "First Impression" Opinions Citing Either a Law Review, Law Journal, or Both: 1960–2009					
Years	First Impression & L.Rev.	First Impression & L.J.	First Impression & L.Rev. & L.J.	Total	% First Impression
1960–1964	2	1	1	4	36.4
1965–1969	0	2	0	2	11.8
1970–1974	2	2	3	7	35
1975–1979	2	0	1	3	17.6
1980–1984	3	2	3	7	38
1985–1989	4	0	1	5	41.7
1990–1994	2	3	3	8	53.3
1995–1999	1	0	0	1	12.5
2000–2004	0	0	0	0	0
2005–2009	1	0	0	1	12.5

Once again, after crunching the numbers, a graph of percentages was generated:[102]

FIGURE 3



102. We concede that the number of "first impression" cases is low enough that it is difficult to draw conclusions from the resulting data. We show the numbers here in the interest of consistency and to aid the reader in understanding the "first impression" methodology.

V. RESULTS AND ANALYSIS

As with other citation studies, this Study "is not presented as qualitatively perfect."[103] We do, however, believe it to be sufficiently accurate to demonstrate our point. As Figure 2 demonstrates, constructing Westlaw searches in a manner that accounts for the realities of the modern law review landscape reveals that the situation is not as critical as other citation studies have shown. In short, there *is no decline* in judicial citation of legal scholarship. In the 1960s, only about 15% of Supreme Court cases cited to an "L.J." or "L.Rev."[104] In the five years from 2005 to 2009, however, *nearly 32% of Supreme Court opinions cited to one of those two types of journals*.[105] Likely, this stems from the fact that in the 1960s there simply were not as many journals from which the Supreme Court could choose.[106] A study that searches for only the top forty journals over a span of decades will produce skewed results as a consequence of ignoring this fact. Again, one would not assume that people are watching less television just because the major networks have seen a decline in viewership.

Our second hypothesis—that law reviews are more heavily relied on in areas of unsettled law—is also supported by the results. While the results from the SCT database appear erratic because of the relatively small number of cases in the Supreme Court,[107] it appears from Table 8 and Figure 3 that the Court is generally more likely to cite a legal journal in a case in which it mentions the words "first impression."[108] For example, during five of the examined time spans, the Court cited journals in greater than 35% of the cases in which it also mentioned the words "first impression."[109]

103. *See, e.g.*, McClintock, *supra* note 5, at 684.

104. *See supra* Figure 2.

105. *See id.*

106. It also partly stems from the fact that the Supreme Court hears fewer cases now than it did in the past. *See supra* Table 2. So, comparing bare numbers, rather than percentages, presents a false picture of the situation.

107. Although the results may appear erratic in Figure 3, the number of "first impression" cases that cite to legal scholarship achieved through this search does not differ significantly from the number expected to exist by chance within the entire population of Supreme Court cases. In other words, the chi square test indicates the results are not totally erratic. In performing a one-way chi-square test for significance, at a .05 confidence level, our results do not indicate a significant difference from expected results (chi-square = 9.50, critical value = 16.919).

108. In testing our data against the hypothesis that the rate of legal citation in first impression cases is higher than the rate of legal citation in Supreme Court cases as a whole, a two-proportion Z-test was performed to test whether the difference in the rates was statistically significant enough to support our claim. The Z-value for the Supreme Court data is 2.4693, indicating that the difference in rates is significant. Any Z-value over 1.96 is significant at a .05 confidence level (CTAR Z-value = 24.7404; DCTR Z-value = 21.1576; ALLSTATES Z-value = 77.3236).

109. *See supra* Figure 3 and Table 8.

The data from the courts of appeals is similarly comforting.[110] Table 13 and Figure 8 in the Appendix show that in the early 1960s, the courts of appeals cited "L.J." and "L.Rev." at about a 3.3% clip.[111] In the 1970s the percentage increased to nearly 5.6%, and in the 1980s, the rate dropped slightly to around 4.2%.[112] In the late 1990s, the rate of citation was comparable to the rate in the 1970s, sitting comfortably at a bit over 5.4%.[113] And in the last five years, the rate was *higher than any other five-year span save 2000–2004*.[114]

Further, the courts of appeals, like the Supreme Court, are more likely to cite a journal in a case of "first impression."[115] As Table 14 and Figure 9 in the Appendix show, with the exception of an outlier in the 1970s, the rate of citation in "first impression" cases has mostly hovered between 9% and 14% over the course of the last fifty years, and the rate during the most recent five-year span is within 2% of the rate during a five-year span in each of the 1960s, 1970s, 1980s, and 1990s.[116]

The pattern is similar in the Federal district courts. Table 15 and Figure 10 show that the overall rate of citation has risen and

110. Note that the CTAR database comprises only reported cases from the federal appellate courts. The total number of opinions in the CTAR data may seem slightly curious in that the number of opinions climbs steadily from the 1960s but then declines from 29,776 during 1990–1994 span and to 25,917 during the 2005–2009 span. However, even though court dockets are increasingly crowded, the increased use of unpublished opinions has led to a decline in the number of published opinions. *See* Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 718 (2004) ("The percentage of [unpublished opinions] varies by circuit but has increased significantly over time in all circuits."); Stephen L. Wasby, *Unpublished Opinions in the Federal Courts of Appeals: Making the Decision To Publish*, 3 J. APP. PRAC. & PROCESS 325, 325 (2001) ("There has been a substantial increase in the caseloads of the United States Circuit Courts of Appeals, which has outpaced the increase in district court filings and has also risen more rapidly than has the number of appellate judges. This burgeoning caseload has caused a problem for these mandatory jurisdiction courts, as they must rule on all appeals brought to them, even if the issues are elementary and the answers obvious. What should they do? They have thus far rejected formal adoption of discretionary jurisdiction, but they have used a type of triage by sorting out cases for differing types of treatment. For close to thirty years, to aid in coping, they have issued 'unpublished' opinions . . . ." (footnote call numbers omitted)). So why not include unpublished opinions in this Study? First, and most obviously, because unpublished opinions are not available in consistent numbers on Westlaw. Second, because such opinions "[are] considered binding only on the parties to the particular case in which it is issued," and thus do not shape the law in the same way that published opinions do. *See* BLACK'S LAW DICTIONARY 1202 (9th ed. 2009).

111. *See infra* Table 13 and Figure 8.

112. *See infra* Table 13 and Figure 8.

113. *See infra* Table 13 and Figure 8.

114. *See infra* Table 13 and Figure 8.

115. *See infra* Table 14 and Figure 9.

116. *See infra* Table 16 and Figure 11.

fallen slightly during the past fifty years, with a low of 2.2% during 1960–1964 and a high of 4.7% during 2000–2004.[117] But the rate of citation is certainly no lower now than it has been in the past. Once again, the rate of citation in "first impression" cases is higher than that in non-first impression cases, and the past two five-year spans saw the highest rate of citation of any in the last fifty years.[118] The same pattern exists in the state supreme courts, but those figures seem to reflect an even stronger upward trend than does the data from the other component courts.[119]

It appears, then, that the methodological oversights discussed in Part III.B. are the *real* culprits in the apparent decline in judicial citation of law reviews. In fact, the apparent decline is only that: apparent. It is not actual—not when a study is constructed in a manner that accounts for the facts that (1) the number of journals has increased dramatically over the last fifty years and (2) law reviews tend to be more useful in areas of unsettled law.

CONCLUSION

The outcome of this Study is not a reason for the institution of law reviews to rest on its laurels. Lest "the dialogue between practitioners, judges, and academics, which began in 1875 in the first student-edited journal . . . , come to an end,"[120] law reviews should account for the fact that the law and the world in which it operates are dynamic.

To that end, legal scholarship must fully embrace the Internet. To some extent, of course, it has.[121] Websites like *The Volokh Conspiracy*[122] and *Balkanization*[123] take a modern approach to legal rumination by regularly updating their websites with up-to-the-minute reflections on the law. Such law blogs (affectionately: "blawgs"[124]) are increasingly mainstream and accepted as a legitimate form of legal scholarship.[125] Take, for instance, *The Volokh Conspiracy*'s experience with its own blog:

> Consider the number of times that the phrase "Volokh

117. *See infra* Table 15 and Figure 10.

118. *See infra* Table 16 and Figure 11.

119. *See infra* Tables 17–18 and Figures 12–13.

120. McClintock, *supra* note 5, at 660.

121. *See, e.g.*, BALKINIZATION, http://balkin.blogspot.com (last visited Sept. 7, 2010); THE VOLOKH CONSPIRACY, http://volokh.com (last visited Oct. 7, 2010).

122. THE VOLOKH CONSPIRACY, http://volokh.com (last visited Oct. 7, 2010).

123. BALKINIZATION, http://balkin.blogspot.com (last visited Oct. 7, 2010).

124. *See, e.g.*, Blawg Directory, ABA Journal, http://www.abajournal.com /blawgs/ (last visited Oct. 7, 2010).

125. *See* Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 116–17 (2007); *see generally* Brian A. Craddock, Comment, *2009: A Blawg Odyssey: Exploring How the Legal Community Is Using Blogs and How Blogs Are Changing the Legal Community*, 60 MERCER L. REV. 1353 (2008).

> Conspiracy" and/or "volokh.com" appeared in the [Westlaw] database. (Usually, although not always, these phrases reflect a citation to a particular post appearing in a law journal.) In 2005, the phrases appeared 24 times in the JLR database. The year 2009 isn't over yet, with roughly 20–30% of issues schedule [sic] for a 2009 publication not yet out and on Westlaw. Still, the phrases have appeared *108* times so far in the JLR database. That's a lot of cites. Out of curiosity, I did a quick check of my own citations—vain, sure, but at least to an interesting end—and I would estimate that about 25% of the citations to my own work in the last year have been to my blog posts rather than traditional journal articles.[126]

While blogs can, and do, provide a valuable resource for practitioners,[127] they do not necessarily produce the same sort of thoroughly researched and edited work that the traditional student-edited law review provides. Nancy Rogers, the President of the Association of American Law Schools, expressed the dangers that come with counting blogging and online postings as legal scholarship.[128] She stated that "[t]he speed carries risks in terms of thoughtfulness [and] the lack of an intermediary to select articles and to verify sources may result in difficulty assessing the postings' value as scholarship."[129] Thus, while blogs are an important form of communication between academics and practitioners and the forum should be embraced as a seedbed of ideas, it is apparent that there is room for *something* to fill in the editorial gap between law blogs and traditional print law reviews.

This gap ought to be filled by "online companions" to print law reviews.[130] Such publications tend to allay Nancy Rogers's concerns

126. Orin Kerr, *Rethinking Blogging-as-Scholarship*, THE VOLOKH CONSPIRACY (Dec. 1, 2009, 7:16 PM), http://volokh.com/2009/12/01/rethinking-blogging-as-scholarship.

127. *See id.* ("I now think blogging actually *does* provide an effective way to present new scholarly ideas in many cases. . . . The main reason my view has changed is that I think the legal academic culture has changed. In the past five years, legal blogs have become an acknowledged and accepted part of the world of legal scholarship. Exactly *why* is open to debate. It might be because more law professors are blogging. It might be because our experience has been that what profs say on their blogs is usually the same as what they say in their articles. . . . Whatever the reason, there seems to be more of a convergence between scholarly blogging and 'traditional' law review articles today than existed 4 or 5 years ago. That convergence encourages more scholarly blogging and recognizes its value.").

128. Nancy Rogers, President, Ass'n of Am. Law Sch., Presidential Address Before the House of Representatives: Reassessing Our Roles in Light of Change (Jan. 2007) (transcript available at http://www.aals.org/services_newsletter_presfeb07.php).

129. *Id.*

130. *See, e.g.*, EN BANC, http://www.vanderbiltlawreview.org/enbanc (last visited July, 21 2010); THE YALE LAW JOURNAL ONLINE, http://www.yalelawjournal.org (last visited Sept. 7, 2010); WAKE FOREST LAW REVIEW FORUM, http://lawreview.law.wfu.edu/ (forthcoming Jan. 2011).

about legitimacy of blogs as legal scholarship. Online companions generally offer easy access not only to the full text of law review articles, but also to "short forms" of legal scholarship. The articles published in online companions are often limited to three-to-five-thousand words,[131] which means that busy practitioners, and judges will have a better chance of reading and digesting these articles than they would a thirty-thousand-word article with 350 footnotes. Further, online companions are often characterized by faster editorial turnaround times, and they encourage responses to previously published articles in order to facilitate debate on controversial topics.[132] These characteristics, in the end, expedite and ease the "search for truth."[133] Finally, one must not ignore the "Google effect" that results from these articles being posted on the Internet for all to see. It is very simple: if all a judge or practitioner must do to find the latest scholarly articles on an unsettled area of law is to run a Google search, it is more likely that those articles will be put to judicial use. Thus, not only does the forum offer open access to an author's scholarship and increase the speed with which works can be distributed, but it also safeguards against the characteristics that tend to make blogs less reliable as legal scholarship. It seems then, that online companions strike a happy balance between the responsiveness and digestibility of blogs and the careful editing of traditional law reviews.

Because of the recent emergence of these online companions, it has not yet been determined whether judicial reliance on such legal scholarship is increasing. As practitioners begin to rely on online material in their briefs and courts begin citing this material in their opinions, a comprehensive empirical study should be conducted to measure the actual impact of this promising evolution of legal scholarship.

The point is this: legal scholarship as a means for shaping the law is not a thing of the past but that reality is not a reason for law reviews to rigidly maintain the status quo. The simple fact that so much attention has been devoted by both judges and scholars to ensuring that the legal scholarship supply is meeting the judicial demand demonstrates a continuing need for academic commentary on particularly relevant topics. This need can be filled by a combination of traditional law reviews and their online companions.

During the Renaissance, upon the death of their leader, the French would shout "*Le Roi est mort. Vive le Roi!*" (The King is

131. *See, e.g.*, *About YLJ Online*, THE YALE LAW JOURNAL ONLINE, http://www.yalelawjournal.org/about-us (last visited Oct. 7, 2010).

132. *See id.*

133. *See* Joseph Scott Miller, *Foreward: Why Open Access to Scholarship Matters*, 10 LEWIS & CLARK L. REV. 733, 737 (2006) (noting that "[o]pen access scholarship, by virtue of its openness on the web, can spark the creation of a new social layer of metadata that connect and comment on that scholarship").

dead. Long live the King!) to signify the death of the old king, the coronation of the new king, and the perpetuity of the *dignitas*.[134] *Dignitas*, roughly, referred to everything *apart from the physical body* that made the king the king.[135] In the world of law reviews, it appears that, while the traditional print "body" of the institution is weakened,[136] the *dignitas* of law review—scholarly thought and analysis—remains vibrant and useful. So let us say it together: *Law review is dead; long live law review!*

Whit D. Pierce*

Anne E. Reuben**

134. *See* ERNST H. KANTOROWICZ, THE KING'S TWO BODIES 409–12 (1957).

135. *See id.* at 383–86.

136. *See, e.g.*, Ross E. Davies, *Law Review Circulation*, *in* GREEN BAG ALMANAC AND READER 2009, at 164, 164–68 (Ross E. Davies ed., 2009) (discussing the decline in law review circulation numbers).

* J.D. Candidate, May 2011, Wake Forest University School of Law. The author would like to thank Professors Ronald Wright and Ahmed Taha for their contributions to this Study, the *Wake Forest Law Review* editors for their excellent work, and, as always, C.

** J.D. Candidate, May 2011, Wake Forest University School of Law. The author would also like to thank Professors Ronald Wright and Ahmed Taha for their insight and guidance, the *Wake Forest Law Review* staff for their tireless effort, and her family for their endless support.

APPENDIX

TABLE 9: UPDATED *OKLAHOMA STUDY* SUPREME COURT DATA

Chi-Kent Rank	Law Review	SCT '05–'06	SCT '95–'96	SCT '85–'86	Total Citations
1	HARV. L. REV.	0	15	56	71
2	YALE L.J.	10	18	31	59
3	MICH. L. REV.	4	6	13	23
4	COLUM. L. REV.	3	5	38	46
5	VA. L. REV.	6	4	15	25
6	STAN. L. REV.	1	3	15	19
7	U. PA. L. REV.	5	6	17	28
8	U. CHI. L. REV.	0	6	17	23
9	CAL. L. REV.	0	0	0	0
10	DUKE L.J.	1	0	6	7
11	TEX. L. REV.	2	6	10	18
12	S. CAL. L. REV.	3	5	4	12
13	CORNELL L. REV.	0	0	5	5
14	GEO. L.J.	4	1	6	11
15	BUS. LAW.	0	2	2	4
16	UCLA L. REV.	1	6	6	13
17	WIS. L. REV.	2	0	0	2
18	VAND. L. REV.	1	1	4	6
19	OHIO ST. L.J.	1	0	3	4
20	CHI.-KENT L. REV.	1	1	0	2
21	NW. U. L. REV.	0	5	2	7
22	N.Y.U. L. REV.	5	7	10	22
23	N.C. L. REV.	1	4	3	8
24	MINN. L. REV.	0	4	11	15
25	ALA. L. REV.	0	2	0	2
26	NOTRE DAME L. REV.	2	0	1	3
27	WM. & MARY L. REV.	2	3	1	6
28	TUL. L. REV.	1	3	3	7
29	B.U. L. REV.	2	3	1	6
30	U. FLA. L. REV.	0	0	0	0
31	SAN DIEGO L. REV.	0	0	1	1
32	BROOK. L. REV.	1	1	2	4
33	U. CIN. L. REV.	0	1	1	2

34	HASTINGS L.J.	1	0	4	5
35	MD. L. REV.	0	0	2	2
36	U. MIAMI L. REV.	1	0	0	1
37	GA. L. REV.	0	0	7	7
38	U.C. DAVIS L. REV.	1	3	0	4
39	U. PITT. L. REV.	0	1	3	4
40	IOWA L. REV.	1	4	6	11

FIGURE 4: UPDATED *OKLAHOMA STUDY* SUPREME COURT DATA

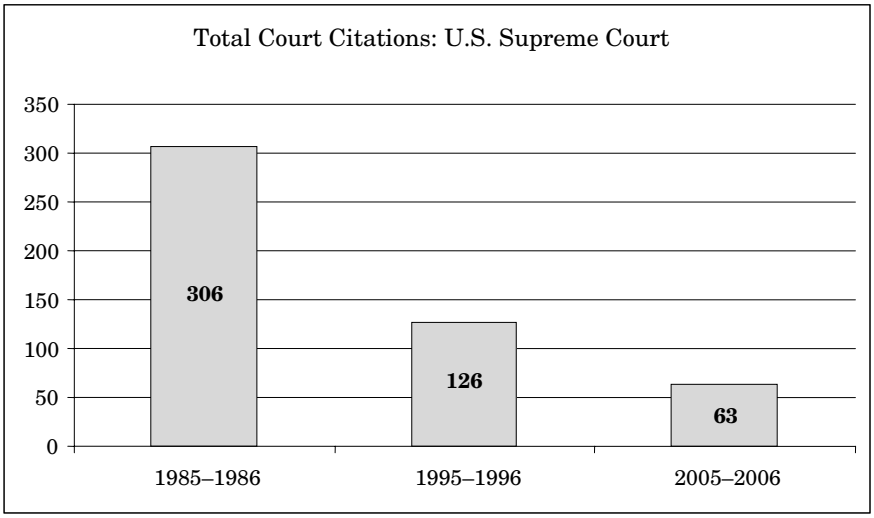


TABLE 10: UPDATED *OKLAHOMA STUDY* U.S. COURTS OF APPEALS DATA

Total Citations by the U.S. Courts of Appeals					
Chi-Kent Rank	Law Review	CTA '05–'06	CTA '95–'96	CTA '85–'86	Total Citations
1	HARV. L. REV.	2	104	352	458
2	YALE L.J.	48	103	149	300
3	MICH. L. REV.	13	46	77	136
4	COLUM. L. REV.	20	64	147	231
5	VA. L. REV.	23	31	63	117

6	STAN. L. REV.	0	22	48	70
7	U. PA. L. REV.	19	39	89	147
8	U. CHI. L. REV.	0	47	107	154
9	CAL. L. REV.	16	19	16	51
10	DUKE L.J.	8	24	42	74
11	TEX. L. REV.	24	34	57	115
12	S. CAL. L. REV.	6	13	7	26
13	CORNELL L. REV.	12	29	42	83
14	GEO. L.J.	23	17	38	78
15	BUS. LAW.	14	9	20	43
16	UCLA L. REV.	10	27	23	60
17	WIS. L. REV.	8	7	8	23
18	VAND. L. REV.	1	20	36	57
19	OHIO ST. L.J.	4	11	11	26
20	CHI.-KENT L. REV.	8	4	0	12
21	NW. U. L. REV.	13	29	28	70
22	N.Y.U. L. REV.	14	47	42	103
23	N.C. L. REV.	11	18	14	43
24	MINN. L. REV.	17	26	43	86
25	ALA. L. REV.	3	6	3	12
26	NOTRE DAME L. REV.	8	15	10	33
27	WM. & MARY L. REV.	7	8	17	32

28	TUL. L. REV.	1	16	38	55
29	B.U. L. REV.	7	12	22	41
30	U. FLA. L. REV.	0	1	6	7
31	SAN DIEGO L. REV.	2	0	4	6
32	BROOK. L. REV.	2	8	10	20
33	U. CIN. L. REV.	3	8	8	19
34	HASTINGS L.J.	9	12	18	39
35	MD. L. REV.	1	8	6	15
36	U. MIAMI L. REV.	3	5	3	11
37	GA. L. REV.	4	8	22	34
38	U.C. DAVIS L. REV.	4	2	6	12
39	U. PITT. L. REV.	0	10	10	20
40	IOWA L. REV.	16	12	30	58

FIGURE 5: UPDATED *OKLAHOMA STUDY* U.S. COURTS OF APPEALS DATA

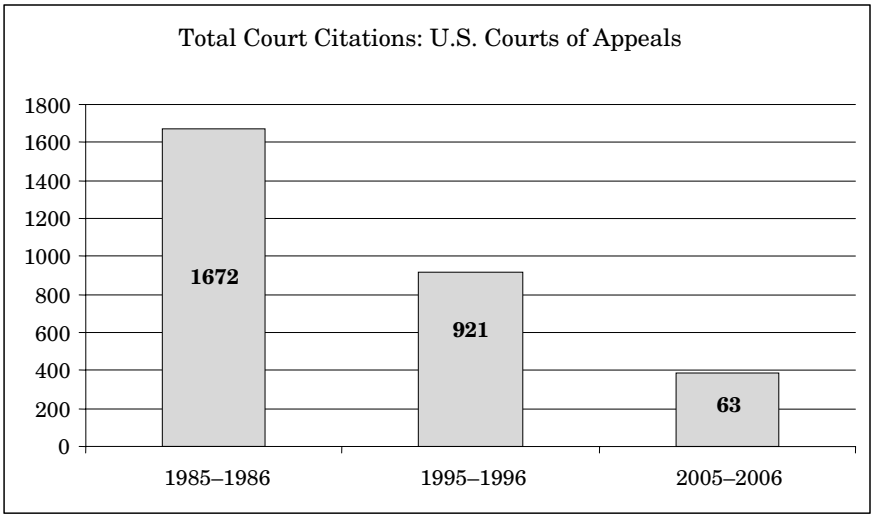


TABLE 11: UPDATED *OKLAHOMA STUDY* U.S. DISTRICT COURTS DATA

Total Citations by the U.S. District Courts					
Chi-Kent Rank	Law Review	DCT '05–'06	DCT '95–'96	DCT '85–'86	Total Citations
1	HARV. L. REV.	21	150	217	388
2	YALE L.J.	83	62	86	231
3	MICH. L. REV.	36	49	38	123
4	COLUM. L. REV.	41	77	112	230
5	VA. L. REV.	36	29	45	110
6	STAN. L. REV.	8	36	28	72
7	U. PA. L. REV.	33	21	62	116
8	U. CHI. L. REV.	6	40	44	90
9	CAL. L. REV.	36	22	39	97
10	DUKE L.J.	21	17	14	52
11	TEX. L.	36	37	32	105

	REV.				
12	S. CAL. L. REV.	17	12	9	38
13	CORNELL L. REV.	35	15	16	66
14	GEO. L.J.	28	26	31	85
15	BUS. LAW.	19	36	32	87
16	UCLA L. REV.	17	27	20	64
17	WIS. L. REV.	14	11	8	33
18	VAND. L. REV.	2	27	31	60
19	OHIO ST. L.J.	8	13	7	28
20	CHI.-KENT L. REV.	6	0	6	12
21	NW. U. L. REV.	18	14	13	45
22	N.Y.U. L. REV.	32	23	38	93
23	N.C. L. REV.	22	14	17	53
24	MINN. L. REV.	30	33	32	95
25	ALA. L. REV.	2	6	3	11
26	NOTRE DAME L. REV.	15	13	5	33
27	WM. & MARY L. REV.	9	11	5	25
28	TUL. L. REV.	5	26	17	48
29	B.U. L. REV.	14	11	15	40
30	U. FLA. L. REV.	1	1	3	5
31	SAN DIEGO L. REV.	7	2	2	11
32	BROOK. L. REV.	1	10	8	19
33	U. CIN. L.	20	9	3	32

	REV.				
34	HASTINGS L.J.	24	15	14	53
35	MD. L. REV.	8	10	8	26
36	U. MIAMI L. REV.	5	1	1	7
37	GA. L. REV.	13	11	22	46
38	U.C. DAVIS L. REV.	7	6	2	15
39	U. PITT. L. REV.	0	11	3	14
40	IOWA L. REV.	23	12	23	58

FIGURE 6: UPDATED *OKLAHOMA STUDY* U.S. DISTRICT COURTS DATA

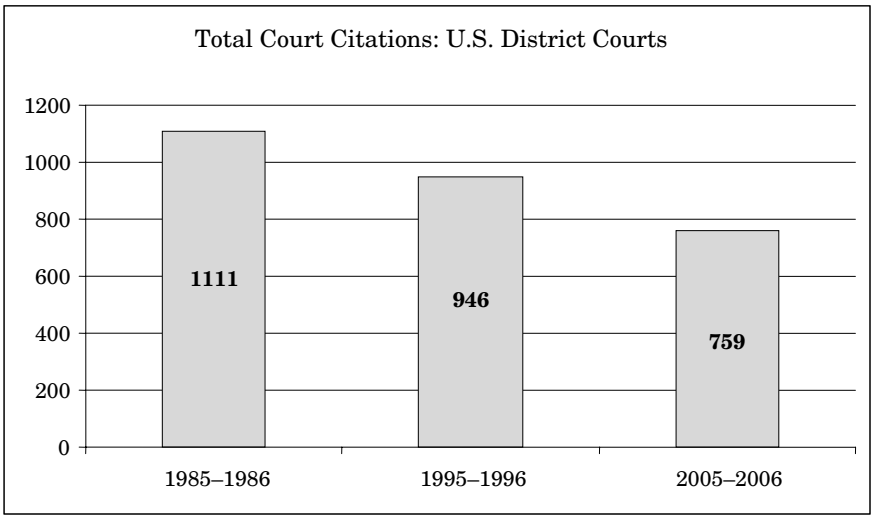


TABLE 12: UPDATED *OKLAHOMA STUDY* STATE SUPREME COURTS DATA

Total Citations by State Supreme Courts					
Chi-Kent Rank	Law Review	STATE '05–'06	STATE '95–'96	STATE '85–'86	Total Citation
1	HARV. L. REV.	31	248	548	827
2	YALE L.J.	86	160	282	528
3	MICH. L. REV.	65	93	156	314
4	COLUM. L. REV.	79	155	279	513
5	VA. L. REV.	116	71	112	299
6	STAN. L. REV.	13	61	103	177
7	U. PA. L. REV.	78	81	111	270
8	U. CHI. L. REV.	9	60	94	163
9	CAL. L. REV.	69	107	240	416
10	DUKE L.J.	22	40	47	109
11	TEX. L. REV.	149	174	263	586
12	S. CAL. L. REV.	42	53	96	191
13	CORNELL L. REV.	42	51	64	157
14	GEO. L.J.	42	40	73	155
15	BUS. LAW.	39	24	32	95
16	UCLA L. REV.	42	59	97	198
17	WIS. L. REV.	51	54	55	160
18	VAND. L. REV.	7	75	123	205
19	OHIO ST. L.J.	37	28	57	122
20	CHI.-KENT L. REV.	8	10	18	36
21	NW. U. L. REV.	26	39	46	111
22	N.Y.U. L. REV.	52	62	101	215
23	N.C. L. REV.	40	58	97	195
24	MINN. L. REV.	47	90	151	288
25	ALA. L. REV.	18	15	38	71
26	NOTRE DAME L. REV.	28	30	9	67
27	WM. & MARY L. REV.	24	25	25	74

28	TUL. L. REV.	18	55	98	171
29	B.U. L. REV.	30	23	40	93
30	U. FLA. L. REV.	9	14	27	50
31	SAN DIEGO L. REV.	20	17	26	63
32	BROOK. L. REV.	16	21	23	60
33	U. CIN. L. REV.	19	24	24	67
34	HASTINGS L.J.	44	64	133	241
35	MD. L. REV.	25	22	42	89
36	U. MIAMI L. REV.	21	1	17	39
37	GA. L. REV.	22	17	38	77
38	U.C. DAVIS L. REV.	17	18	37	72
39	U. PITT. L. REV.	2	22	30	54
40	IOWA L. REV.	44	64	132	240

FIGURE 7: UPDATED *OKLAHOMA STUDY* STATE SUPREME COURTS DATA

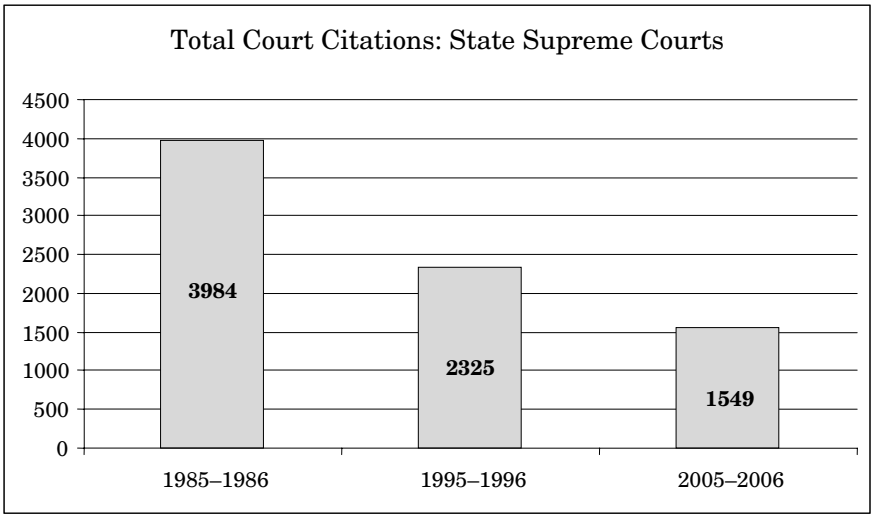


TABLE 13: CTAR CITATION DATA

Overall Percentage of U.S. Circuit Court of Appeals Cases Citing Legal Scholarship: 1960–2009						
Years	Total CTAR	L.Rev.	L.J.	L.Rev. & L.J.	Total	% CTAR
1960–1964	11,977	151	186	63	400	3.3
1965–1969	16,178	230	357	77	664	4.1
1970–1974	21,571	431	447	144	1022	4.7
1975–1979	21,003	512	503	153	1168	5.6
1980–1984	26,949	687	634	201	1522	5.7
1985–1989	27,700	553	496	122	1171	4.2
1990–1994	29,776	468	370	89	928	3.1
1995–1999	27,768	939	345	202	1486	5.4
2000–2004	26,503	1148	315	248	1711	6.6
2005–2009	25,917	1062	270	212	1544	6

FIGURE 8

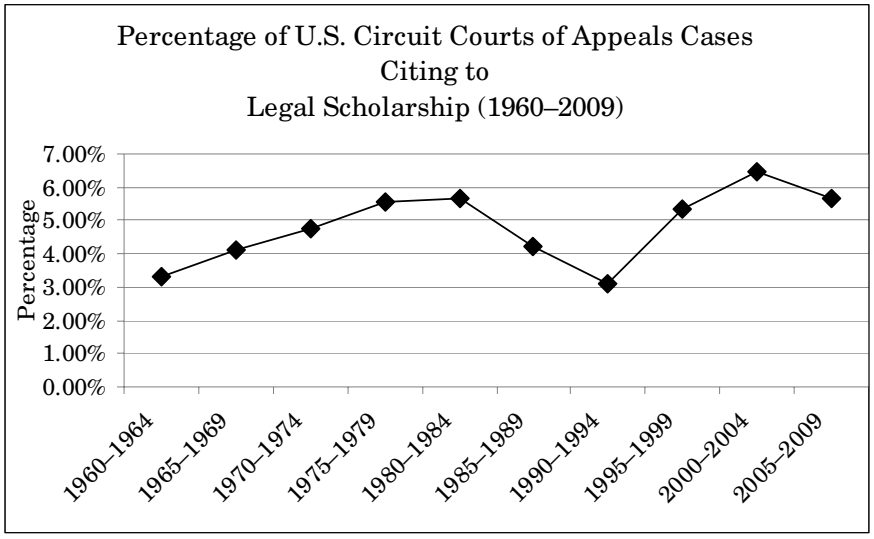


TABLE 14: CTAR "FIRST IMPRESSION" DATA

Overall Percentage of U.S. Circuit Courts of Appeals "First Impression" Cases Citing to Legal Scholarship: 1960–2009						
Years	First Impression	First Impression& L.Rev.	First Impression& L.J.	First Impression& L.Rev. & L.J.	Total	% First Impression
1960–1964	109	4	3	3	10	9.2
1965–1969	164	8	12	2	22	13.4
1970–1974	259	15	25	13	53	20.5
1975–1979	420	21	24	6	51	12.1
1980–1984	776	39	38	25	102	13.1
1985–1989	895	41	27	11	79	8.8
1990–1994	1064	32	28	10	70	6.6
1995–1999	1501	95	36	24	155	10.3
2000–2004	1534	113	26	60	199	13
2005–2009	1600	124	24	18	166	10.4

FIGURE 9

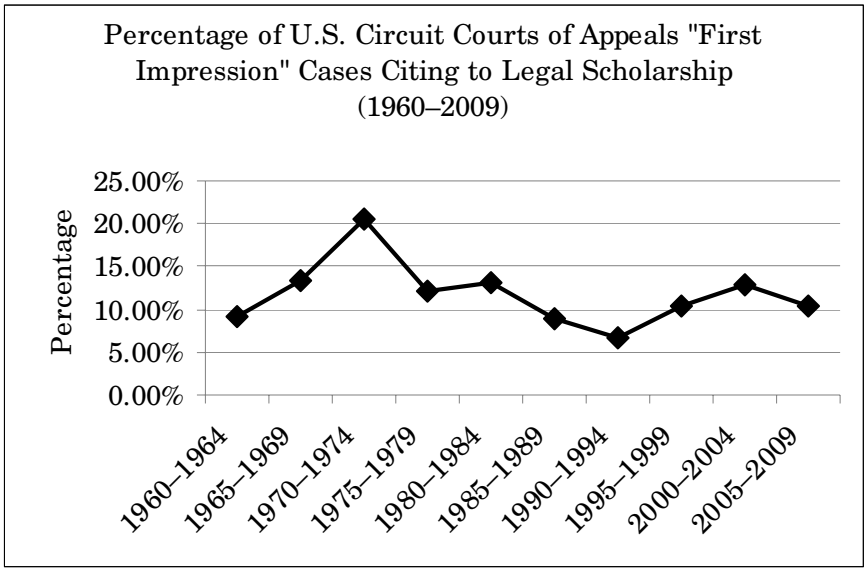


TABLE 15: DCTR CITATION DATA

Overall Percentage of U.S. District Court Opinions Citing to Legal Scholarship: 1960–2009						
Years	Total DCTR	L.Rev.	L.J.	L.Rev. & L.J.	Total	% DCTR
1960–1964	10,082	66	136	24	226	2.2
1965–1969	13,154	159	245	37	441	3.4
1970–1974	18,084	296	307	74	677	3.7
1975–1979	18,863	355	327	73	755	4
1980–1984	24,318	447	350	79	876	3.6
1985–1989	26,583	445	294	61	800	3
1990–1994	30,573	401	329	55	785	2.6
1995–1999	36,625	765	340	145	1250	3.4
2000–2004	34,721	1073	345	207	1625	4.7
2005–2009	37,257	1074	346	216	1636	4.4

FIGURE 10

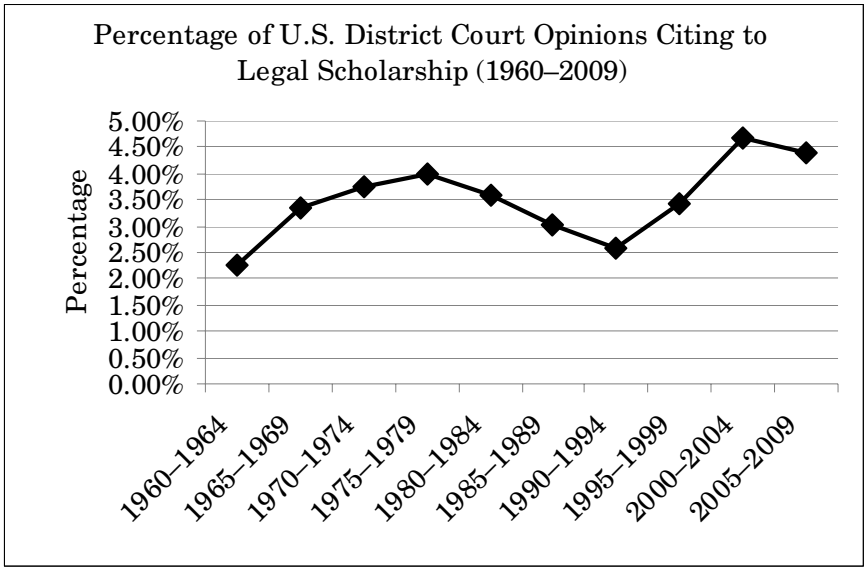


TABLE 16: DCTR "FIRST IMPRESSION" DATA

Overall Percentage of U.S. District Court "First Impression" Cases Citing to Legal Scholarship: 1960–2009						
Years	First Impression	First Impression & L.Rev.	First Impression & L.J.	First Impression & L.Rev. & L.J.	Total	% First Impression
1960–1964	136	3	2	0	5	3.7
1965–1969	181	5	6	5	16	8.8
1970–1974	362	10	13	6	29	8
1975–1979	493	12	25	5	40	8.5
1980–1984	648	31	17	5	53	8.2
1985–1989	831	29	12	5	46	5.5
1990–1994	939	28	27	5	60	6.4
1995–1999	1220	57	29	18	104	8.5
2000–2004	1035	66	25	21	112	10.8
2005–2009	1103	77	20	19	116	10.5

FIGURE 11

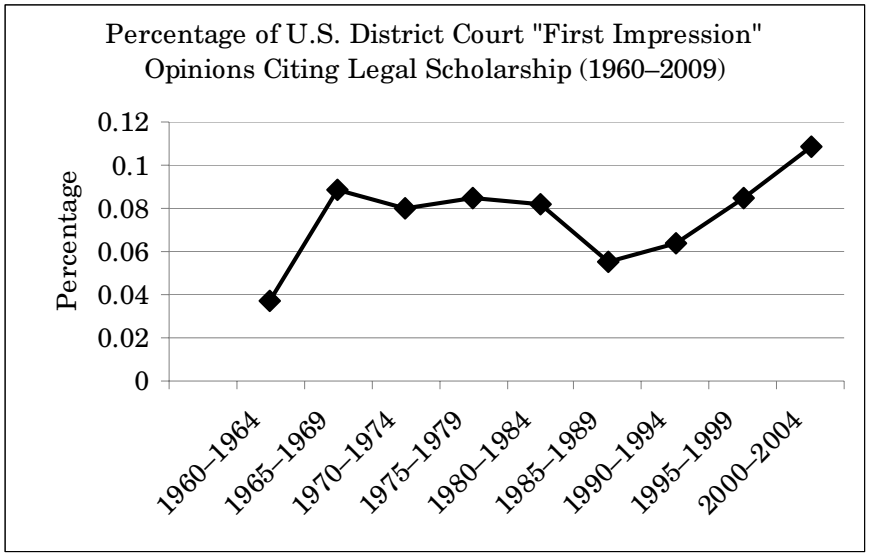


TABLE 17: ALLSTATES CITATION DATA

Overall Percentage of State Court Opinions Citing to Legal Scholarship: 1960–2009						
Years	Total ALLSTATES	L.Rev.	L.J.	L.Rev. & L.J.	Total	% ALLSTATES
1960–1964	82,602	477	669	114	1260	1.5
1965–1969	90,317	756	841	170	1767	2
1970–1974	115,991	1294	1203	252	2749	2.4
1975–1979	147,017	2193	1511	481	4185	2.9
1980–1984	164,726	2622	1619	493	4734	2.9
1985–1989	148,766	2320	1273	394	3987	2.7
1990–1994	149,844	1845	1140	292	3277	2.2
1995–1999	151,090	2961	958	480	4399	2.9
2000–2004	190,077	3981	964	686	5631	3
2005–2009	192,213	3664	897	550	5111	2.7

FIGURE 12

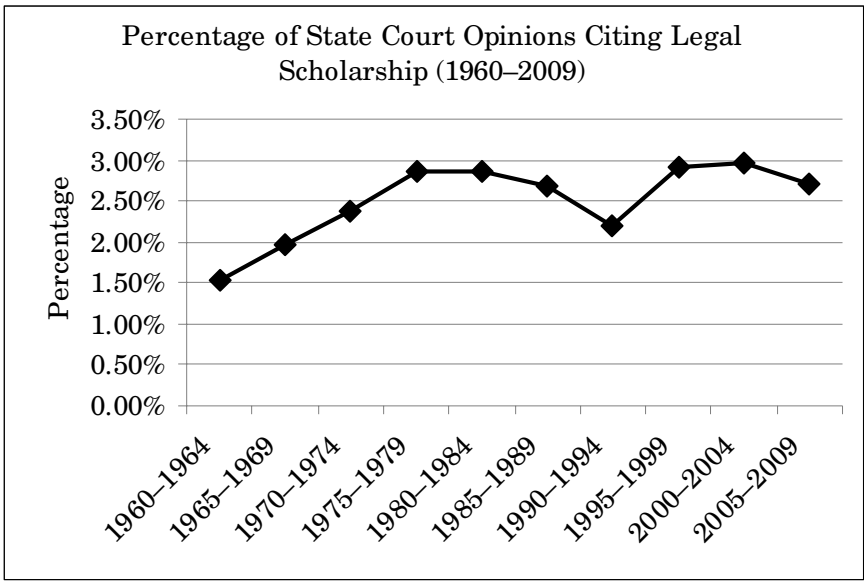


TABLE 18: ALLSTATES "FIRST IMPRESSION" DATA

Overall Percentage of State Court "First Impression" Opinions Citing to Legal Scholarship: 1960–2009						
Years	First Impression	First Impression & L.Rev.	First Impression & L.J.	First Impression & L.Rev. & L.J.	Total	% First Impression
1960–1964	781	21	17	6	44	5.6
1965–1969	1050	32	18	9	59	5.6
1970–1974	1596	59	48	24	131	8.2
1975–1979	2510	125	79	43	247	9.8
1980–1984	3188	165	83	45	293	9.2
1985–1989	3044	153	75	33	261	8.6
1990–1994	3384	140	65	37	242	7.2
1995–1999	5080	282	90	74	446	8.8
2000–2004	6263	495	111	106	712	11.4
2005–2009	6012	446	100	98	644	10.7

FIGURE 13