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Articles

AN EMPIRICAL ASSESSMENT OF THE SUPREME COURT'S USE OF LEGAL SCHOLARSHIP

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ABSTRACT—Derogating legal scholarship has become something of a sport for leading figures in the federal judiciary. Perhaps the chief antagonist in recent years has been the Chief Justice of the U.S. Supreme Court, John G. Roberts, Jr., whose most recent salvo includes the claim that because law review articles are not of interest to the bench, he has trouble remembering the last law review article he read. This claim, and others by the Chief Justice, may represent the end of an uneasy détente concerning the topic of the utility of legal scholarship to the bench and bar. At a minimum, Chief Justice Roberts's recent comments represent an invitation to a discussion, which this Article accepts. To that discussion we contribute an empirical study that is based on an original and unprecedented body of data derived from every Supreme Court decision over the last sixty-one years. This study makes two major contributions. The first is evidence describing the amount and patterns of the Supreme Court's use of legal scholarship over the last sixty-one years. The second, and perhaps most striking, contribution of this Article is empirical evidence on the nature and quality of the Court's use of scholarship. This Article provides the first report, as far as we can determine, of evidence that the Court not only often uses legal scholarship, it also disproportionately uses scholarship when cases are either more important or more difficult to decide. It thus presents results that contradict claims that scholarship is useless or irrelevant to judges and practitioners.

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INTRODUCTION

In May 2011, the *New York Times* reported that Chief Justice John G. Roberts, Jr. stated, "What the academy is doing, as far as I can tell . . . is largely of no use or interest to people who actually practice law."[1] About a month after that, in June 2011, Chief Justice Roberts claimed that because law review articles are not of interest to the bench or the bar, he has trouble remembering the last law review article he read.[2] The Chief Justice has also contended that legal scholarship is not "particularly helpful for practitioners and judges."[3]

To be fair, Chief Justice Roberts is not the first judge to claim that legal scholarship is useless or irrelevant. In the past, other judges have been similarly dismissive,[4] as have some legal academics[5] and representatives of

[1] Adam Liptak, *Keep Those Briefs Brief, Literary Justices Advise*, N.Y. TIMES, May 21, 2011, at A12 (quoting Chief Justice Roberts).

[2] John Roberts, Chief Justice, Supreme Court of the United States, Remarks at the Annual Fourth Circuit Court of Appeals Judicial Conference 28:45–32:05 (June 25, 2011), *available at* http://www.cspan.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1; *see also* 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 (contending that legal scholarship is not "particularly helpful for practitioners and judges").

[3] Bravin, *supra* note 2.

[4] *See, e.g.*, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) ("[J]udges, administrators, legislators, and practitioners have little use for much of the scholarship . . . produced by members of the academy."); Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 320 (1989) (expressing disappointment over not "find[ing] more in the law reviews that is of value and pertinence to our cases"); Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y.

the bar.[6] But that debate[7] had reached something of a stasis—a détente, if an uneasy one—well before Chief Justice Roberts arrived on the scene as a critic.

TIMES, Mar. 19, 2007, at A8 ("I haven't opened up a law review in years . . . . No one speaks of them. No one relies on them." (quoting Chief Judge Dennis G. Jacobs)); *see also, e.g.*, United States v. Six Hundred Thirty-Nine Thousand Five Hundred & Fifty-Eight Dollars ($639,558) in U.S. Currency, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring in part and concurring in the judgment) ("I suppose, now that many of our law reviews are dominated by rather exotic offerings of increasingly out-of-touch faculty members, the temptation for judges to write about issues that interest them—whether or not raised by the parties or constituting part of the logic of the decision—is even greater."); Thomas L. Ambro, *Citing Legal Articles in Judicial Opinions: A Sympathetic Antipathy*, 80 AM. BANKR. L.J. 547, 549 (2006) (expressing the concern that law review analysis is "often not only unpersuasive, but even at times at odds with accepted means of analysis"); Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1320–21 (2002) (expressing concern over the length of law review articles and "how unembarrassed the legal writer is to repeat what is well known, how seldom one finds an article that begins with a clear statement of what the author thinks the article adds to the existing literature").

Which is not to say that all judges disdain legal scholarship. Judge John Minor Wisdom, for example, told his law clerks: "Do not, however, be so brief that you neglect to do a thorough job of research, including research of the law reviews. I like a good article, comment, or note in point—regardless of the source. Do not limit yourself to Harvard, Yale, Stanford, Chicago, and Michigan reviews." John Minor Wisdom, *Wisdom's Idiosyncrasies*, 109 YALE L.J. 1273, 1278 (2000); *see also* Alex Kozinski, Judge, Ninth Circuit Court of Appeals, Who Gives a Hoot About Legal Scholarship?, Address at the University of Houston Law Center Fourth Annual Frankel Lecture, *in* 37 HOUS. L. REV. 295, 295 (2000) (joking in his remarks, "Good morning, ladies and gentlemen. I am pleased to be here . . . to speak on the relevance of legal scholarship to the judiciary. I note that whoever came up with the topic did not add the qualifier 'if any,' which shows a commendable degree of confidence").

[5] Professor Erik M. Jensen published a law review article in the *Journal of Legal Education* with the sole text: "This is it." He added in one of his two footnotes:

> A reader suggested to me that this article has insufficient legal content, that 'Res ipsa loquitur' (or some other pompously legal slogan) would serve my purposes better. But it's been decades since law review articles had to have anything to do with the law. For that matter, it's been a long time since law review articles had to have anything to do with anything. This article has as much content as the other stuff in this issue, doesn't it?

Erik M. Jensen, *The Shortest Article in Law Review History*, 50 J. LEGAL EDUC. 156, 156 & n.1 (2000); *see also* 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, 778 (2005) (claiming that the "trend" toward "not merely unhelpful, but useless" legal scholarship is "already apparent" (internal quotation marks omitted)). Others have expressed their concerns somewhat more moderately. *See, e.g.*, Aaron D. Twerski, Irwin & Jill Cohen Professor of Law, Brooklyn Law Sch., Remarks upon Receiving the Robert C. McKay Law Professor Award, *in* MARQ. LAW., Spring 2009, at 55, 56, *available at* http://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2009-spring/Spring09pp55-57.pdf (noting that prestigious law reviews appear less interested in publishing traditional doctrinal scholarship and that "young scholars [engaged in such scholarship] are justifiably afraid that when tenure time comes around their articles will be viewed as pedestrian").

[6] The famous MacCrate Report on the development of practical skills during formal legal education had this to say: "Practitioners tend to view much academic scholarship as increasingly irrelevant to their day-to-day concerns . . . . [M]any practicing lawyers believe law professors are more interested in pursuing their own intellectual interests than in helping the legal profession address matters of important current concern." TASK FORCE ON LAW SCH. AND THE PROFESSION: NARROWING THE GAP, AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT 5 (1992).

By repeatedly going on the record criticizing legal scholarship, the Chief Justice might be attempting to unsettle the détente that has developed around the topic of the utility of legal scholarship to the bench and bar. At a minimum, it seems he has a desire to engage others in a discussion of the utility of legal scholarship.

This Article contributes to that discussion an empirical analysis of an unprecedented body of original data concerning the use of legal scholarship in every Supreme Court decision in the last sixty-one years. It offers a number of novel observations and makes two major contributions.

The first contribution describes the amount and patterns of use of legal scholarship by the Court:

1. Over the last sixty-one years, the Supreme Court has used legal scholarship in 32.21% of its decisions.
2. The Supreme Court, on average, uses more than one work of legal scholarship per decision.
3. The overall trend during the last sixty-one years has been an increase in the use of legal scholarship by the Supreme Court.

The second contribution concerns the nature and quality of the Court's use of scholarship—that is, how the Court uses scholarship. We find evidence that the Court disproportionately uses scholarship when cases are either more important or more difficult to decide as defined by several

[7] The field has something of an ad hoc flavor, but for those new to the field, some useful articles to start with include the following works: Robert J. Hume, *Strategic-Instrument Theory and the Use of Non-Authoritative Sources by Federal Judges: Explaining References to Law Review Articles*, 31 JUST. SYS. J. 291, 298–99 (2010); Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988); Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981); Whit D. Pierce & Anne E. Reuben, Empirical Study, *The Law Review is Dead; Long Live the Law Review: A Closer Look at the Declining Judicial Citation of Legal Scholarship*, 45 WAKE FOREST L. REV. 1185 (2010). For a comprehensive empirical study revealing that the use of legal scholarship by the federal circuit courts has increased since 1950, see David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345 (2011). For some works making the claim that the use of scholarship by courts is on the decline, see Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 660 (1998) (reporting "a 47.35% decline in the use of legal scholarship by courts over the past two decades, the most notable decline occurring in the past ten years"), and Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971–1999*, 75 IND. L.J. 1009, 1010 (2000) (reporting a "continuing decline in [the] number of times the Court cited legal periodicals"). For some articles concerning the role of particular scholarship, courts, or materials, see Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 812–17 (1981) (considering scholarship used by state courts); Robert M. Lawless & Ira David, *The General Role Played by Specialty Law Journals: Empirical Evidence from Bankruptcy Scholarship*, 80 AM. BANKR. L.J. 523, 524 (2006) (summarizing the role of specialty journals); William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267 (2002) (comparing citations in opinions with the use in briefs); and Blake Rohrbacher, *Decline: Twenty-Five Years of Student Scholarship in Judicial Opinions*, 80 AM. BANKR. L.J. 553 (2006) (considering the role of student notes).

criteria. In particular, we present evidence that there are strongly significant predictive relationships between the use of scholarship by the Court and:

1. The number of minority votes attending a decision.
2. Whether a decision alters precedent.
3. Whether a decision issues in June and July, months suspected to include a greater mass of the Court's more important or difficult decisions.
4. Whether a decision declares acts of Congress, state laws, or municipal ordinances unconstitutional.
5. Whether a decision resolves disagreements at the lower court level.

The Article also offers an interpretation of the evidence. Specifically, we conclude that the Court uses legal scholarship rather frequently, and, moreover, uses it systematically to support the decisional lawmaking process. It follows, we suggest, that legal scholarship is neither useless nor irrelevant to the Court.

From here, the Article proceeds in four parts. Part I describes the methodology used to gather and analyze our data. Part II presents the results and discussion. Part III offers some of our thoughts on directions for future work, and the Article finishes with a brief conclusion.

I. METHODOLOGY

Our study concerns the use of legal scholarship by the U.S. Supreme Court. Three definitions are helpful to understanding our study and its implications, those for: "decision," "legal scholarship," and "use."

We generally use the word "decision" in its natural sense: to refer to the Court's entire written work product that attends deciding an appeal.[8] It thus includes majority, dissenting, and concurring, etc. opinions having to do with the Court's disposition on the merits of an appeal.

We use the phrase "legal scholarship" to mean law review and law journal articles. We broadly define law review and law journal articles to encompass all law reviews and journals, including specialty journals.[9] We have not confined our study to merely the "elite" journals. Our definition excludes other works that can be characterized as legal scholarship, such as treatises, hornbooks, and scholarly books.[10]

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[8] Sometimes we may refer to the act of deciding as "using," but where we do, the context makes this obvious.

[9] "Specialty journals" refers to those legal journals that are "devoted to a particular subject as opposed to general journals accepting articles on a wide variety of subjects." Lawless & David, *supra* note 7, at 523 n.1.

[10] Treatises, hornbooks, and scholarly books are excluded from this study because the literature criticizing legal scholarship typically focuses on law review articles and excludes other forms of legal scholarship.

We have assumed that if a work of legal scholarship is cited in a decision, then that scholarship was "used" in the decision. This assumption has several important advantages. Most notably, equating "use" and "citation" makes measurement easier and almost completely objective. It permits us to measure use directly, by examining the content of decisions of the Court.

We recognize that the "citation equals use"[11] assumption is imperfect. Obviously, there are times when a Justice's decisional process is influenced by legal scholarship but the resulting decision does not expressly evince that fact. The Justice may elect not to cite to it, or perhaps the Justice is simply unaware of its influence. Alternatively, the influenced Justice might not be the author of the decision (and consequently has no opportunity to cite the influencing work). For these reasons, we think our measures are very likely to locate *less* use of scholarship than actually occurs.

It is also worth addressing a notion that is often raised when we present work from this project: the notion that the Court might sometimes cite to legal scholarship in dicta, or perhaps for the purpose of "tarting up" an opinion. In other words, the concern is that the Court cites to scholarship when it does not absolutely need to, or perhaps for reasons that are not strongly related to the content of the scholarship. We acknowledge that this happens at some rate but disagree that such citations can be understood as anything other than "use" of the cited scholarship. There is a cost to citing anything in an opinion; indeed, there is some cost to every word added to an opinion. Reported decisions of the Supreme Court are documents evidencing the law, and the decision to cite to scholarship in an opinion thus brings the scholarship into close relationship with the law. Nor are Justices required to cite to legal scholarship in an opinion, so the decision to do so is made in the context of a Justice choosing how to communicate the law.[12] That choice is part of the process of decisional lawmaking, and we think almost indisputably part of the law.

A. The Dataset

To analyze the use of legal scholarship, we use a technique known in social science literature as "content analysis." Content analysis refers to the general method of selecting documents (such as judicial decisions), observing and recording aspects of the content of those documents, and

[11] In the remainder of the Article, unless it is obviously otherwise, we use the terms "use" and "citation" synonymously.

[12] Nor do we think it is of much moment to the concerns of this study if in some cases citations make their way into issued opinions because they are inserted by law clerks into early drafts of opinions. It is the Justices, after all, who are responsible for the content of the opinions of the Court, and the Justices who are the individuals empowered by the Constitution to decide cases and controversies. Nor are we aware of similar criticisms of citations to primary authority that may be initially inserted by law clerks.

analyzing and drawing inferences about the meaning of the observations.[13] In law, content analysis permits scholars to analyze and make empirical observations about large numbers of cases or decisions.[14] These empirical observations have the benefit of being broad-based and objective, and may provide insights well beyond those provided by methods that rely on analyzing noteworthy decisions to determine trends in the law.[15]

Content analysis of judicial decisions also has limitations and potential biases, the most significant of which are unobserved reasoning, selection bias, and strategic behavior.[16] Among the concerns presented by this study

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[13] *See* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 64 (2008).

[14] The use of empirical evidence in legal scholarship has increased in recent years. *E.g.*, Shari Seidman Diamond & Pam Mueller, *Empirical Legal Scholarship in Law Reviews*, 6 ANN. REV. L. SOC. & SCI. 581, 582 (2010) ("[E]mpirical scholarship reported in law reviews has grown over time. . . . [And] it is continuing to grow."); Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 477–78 (2009) ("The legal academy has recently experienced a surge of interest in quantitative empirical analysis."). For a list of examples of content analysis applied to legal studies, see Hall & Wright, *supra* note 13, at 69–73. For recent examples of legal scholarship that have used content analysis as an approach to examining judicial opinions, see John R. Allison & Mark A. Lemley, *The (Unnoticed) Demise of the Doctrine of Equivalents*, 59 STAN. L. REV. 955 (2007) (examining the impact of changing legal rules and legal procedure on the doctrine of equivalents); Christopher A. Cotropia, *Nonobviousness and the Federal Circuit: An Empirical Analysis of Recent Case Law*, 82 NOTRE DAME L. REV. 911 (2007) (examining empirical claims about the role of the suggestions test in considering the nonobviousness requirement of patent law); Lee Petherbridge et al., *The Federal Circuit and Inequitable Conduct: An Empirical Assessment*, 84 S. CAL. L. REV. 1293 (2011) (examining the treatment of inequitable conduct in patent law); Lee Petherbridge & R. Polk Wagner, *The Federal Circuit and Patentability: An Empirical Assessment of the Law of Obviousness*, 85 TEX. L. REV. 2051 (2007) (examining empirical claims about the nature of the nonobviousness requirement of patent law); David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223 (2008) (examining claim construction in patent case appeals); Schwartz & Petherbridge, *supra* note 7 (examining the judicial use of scholarship in circuit court opinions); and R. Polk Wagner & Lee Petherbridge, *Is the Federal Circuit Succeeding? An Empirical Assessment of Judicial Performance*, 152 U. PA. L. REV. 1105 (2004) (examining judicial approaches to claim construction in patent cases before the Federal Circuit).

[15] *See, e.g.*, Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 580–85, 618 (1998) (providing empirical evidence that is inconsistent with the claim by scholars who relied on an analysis of noteworthy cases to "present evidence of a fundamental misunderstanding" that promissory estoppel was the "dominant" ground for enforcing contracts).

[16] *See* Schwartz & Petherbridge, *supra* note 7, at 1355–56; *see also* Hall & Wright, *supra* note 13, at 85–100 (exploring the strengths and weaknesses of content analysis). With respect to our study of the Supreme Court, "unobserved reasoning" could occur if the opinion does not accurately state the facts of the case or the Justices' analysis of those facts. Supreme Court opinions are subject to "selection bias" because the Court has discretion over the cases it hears and the opinions that it writes. The decision to hear a case or write an opinion may be related to factors that affect the content of the Court's opinion. Similarly, Justices may have reasons to elide issues in written decisions, e.g., to wait to discuss the issue until a "better" case for considering the particular matter comes along or because the votes for the authoring Justice's preferred holding on an issue are not present and that Justice might rather have no substantive holding on an issue than one with which the Justice disagrees. The content of the Court's

is that the Supreme Court "uses" legal scholarship more often than we can locate by counting citations[17] and that opinions might evince vel non the use of scholarship for reasons we cannot observe.[18] While these potential limitations should not be completely discounted, it must be realized that they affect not only content analysis, but also the more conventional forms of legal analysis: reading, interpreting, and discussing individual cases. Content analysis thus remains an excellent tool for the purpose of our study. Given that we are interested in considering the Court's use of legal scholarship over an extended period of time, the method permits us to analyze thousands of decisions at once in a manner that is difficult, if not impossible, to achieve using traditional interpretive methods.

The dataset utilized in this study comprises information from all of the Court's decisions from June 27, 1949 (Volume 338) through March 4, 2009 (Volume 555) published in the *United States Reporter*. As a starting point, this study relies on the set of databases contained in "The Spaeth Database."[19] The well-known Spaeth Database—considered the "gold standard" in political science literature[20]—has substantial information about each Supreme Court decision. It populates over fifty variables for each decision, including: the date oral arguments were heard, the date the decision was made, the Court Term, the primary legal issue,[21] the identity of

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opinions may also be affected by "strategic behavior" if Justices are concerned with making the judgments expressed in opinions appear to flow naturally from accepted sources using conventional analytical steps.

[17] *See* Paul L. Caron, *The Long Tail of Legal Scholarship*, 116 YALE L.J. POCKET PART 38, 41 (2006) ("Citations reflect one particular end-use of an article; they do not measure how many times an article is read but not cited by a judge or professor.").

[18] For example, perhaps a Justice writing for the Court might avoid citing legal scholarship, even when consciously (or unconsciously) influenced by it, because a citation to the work is inconsistent with his stated views on statutory or constitutional interpretation.

[19] *See The Genesis of the Database*, SUP. CT. DATABASE, http://scdb.wustl.edu/about.php?s=1 (last visited July 25, 2012). To download the data from the Spaeth Database, see *Current Dataset: 2011 Release 03*, SUP. CT. DATABASE (Aug. 30, 2011), http://scdb.wustl.edu/data.php.

[20] For example, leading law and political science professors have noted that, "[I]n the law reviews, virtually no empirical study of the U.S. Supreme Court produced by political scientists fails to draw on [the Spaeth Database]." Lee Epstein et al., *The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783, 812 (2003).

[21] There has been academic debate over the validity of the coding of certain variables in the Spaeth Database. *See, e.g.*, Shapiro, *supra* note 14, at 490–501, 526–529 (2009) (arguing that the Spaeth Database's coding of legal issues is unreliable and invalid in some instances); Anna Harvey, What Makes a Judgment "Liberal"? Coding Bias in the United States Supreme Court Judicial Database (June 15, 2008) (unpublished manuscript), *available at* http://ssrn.com/abstract=1120970 (arguing that coding of the issues and ideologies in the Spaeth Database may be influenced by the coder's knowledge of the votes of the specific Justices in the case); *see also* Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79 (2010) (empirically testing whether the Spaeth Database's liberal–conservative classification of cases is valid). *But see infra* note 22 (noting political science scholars' confidence in the database). This debate is largely irrelevant to the study we report here because the variables most central to the debate are not material to the analysis we present.

the Justice who authored the decision, and the number of dissenting votes in each case.[22]

We enhanced the Spaeth Database by appending information about the amount of legal scholarship used, if any, in each decision of the Court. To locate decisions using legal scholarship, we executed a carefully constructed query against LexisNexis's (Lexis) Supreme Court database.[23] After executing the query, we manually reviewed the results and compared them to the decisions populating the Spaeth Database. Human coders eliminated "false positives"—cases responsive to the electronic search but that did not use any legal scholarship.[24] Thereafter, human coders recorded the number of unique law review articles used in each decision. Thus, for each decision, our data include how many *distinct* law review articles each decision uses. Overall, our data include 7730 Supreme Court decisions.

We tested the reliability of our coding using Cohen's kappa (*k*), a statistical argument that measures intercoder agreement for categorical observations along a 0–1 interval.[25] For the variables presented in this

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[22] To download a codebook for each of the fields in the Spaeth Database, see *Supreme Court Database Code Book: 2011 Release 03*, SUP. CT. DATABASE (Aug. 30, 2011, 1:59 PM), http://scdb.wustl.edu/_brickFiles/2011_03/SCDB_2011_03_codebook.pdf. The *Supreme Court Database* website indicates that the coding of the variables is of high reliability, continuously updated, and consistently relied upon by political scientists and other scholars analyzing the Supreme Court and its Justices. Harold J. Spaeth, *Online Code Book—Introduction*, SUP. CT. DATABASE, http://scdb.wustl.edu/documentation.php?s=1 (last visited July 25, 2012); *The Genesis of the Database*, *supra* note 19.

[23] We searched in the Lexis database "USLED." The Lexis search query for citation to legal scholarship in each volume "XXX" of the *United States Reports* was:

> CITES(XXX pre/1 "U.S.") and (("L.J." or "L. J." or "L. REV." or "L.REV." or "J.L." or "LAW REVIEW" or "Ct.Rev." or "Ct. Rev.") w/15 (20** or 19** or 18**)) and not (("J.L." w/4 V.) or name((J. w/2 L.) or LJ or JL or "L.J." or "J.L.") or (counsel(LJ or JL or "L.J." or "J.L.")) or ("NAT! L.J." or "NATIONAL LAW JOURNAL")).

For our study, we searched volumes 338 through 555 of the *United States Reports*. The Boolean logic behind this search has been reviewed by others. *See, e.g.*, Iantha Haight, *Court Citation of Legal Scholarship on the Rise?*, THE COMPETITIVE EDGE (Aug. 17, 2010, 3:10 PM), http://blog.law.cornell.edu/library/2010/08/17/court-citation-of-legal-scholarship-on-the-rise (noting that the search query was impressive and is "about as close [to perfect] as you can reasonably get").

[24] There were very few false positives.

[25] *See generally* Jacob Cohen, *A Coefficient of Agreement for Nominal Scales*, 20 EDUC. & PSYCHOL. MEASUREMENT 37 (1960) (describing the logic of the statistical argument and defending its merits). Cohen's kappa (*k*) has the merit of taking into account agreement that occurs by chance, but also tends to underestimate agreement when a category is very commonly present. It is thus, generally speaking, considered to be a conservative measure of agreement. The closer the kappa statistic is to 1.00, the greater the level of agreement. While there is no set *k*-value that signifies "good enough" agreement, magnitude guidelines have been suggested. Richard Landis and Gary Koch suggest that *k*-values of .00–.20 reflect "slight" agreement; .21–.40 reflect "fair" agreement; .41–.60 reflect "moderate" agreement; .61–.80 reflect "substantial" agreement; and .81–1.00 reflect "almost" perfect agreement. *See* J. Richard Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 159, 165 (1977); *see also* JOSEPH L. FLEISS ET AL., STATISTICAL METHODS FOR RATES AND PROPORTIONS 604 (3d ed. 2003) (describing .40–.75 as fair-to-good and over .75 as excellent). In this study, approximately 30% of the measurements were coded by multiple coders to establish

Article (and coded by our coding group), the observed *k*-values across 7730 decisions and 8 different coders ranged from 1.000 (perfect unity) to .863 (almost perfect or excellent).[26]

B. Statistical Arguments

The study reported here uses a number of statistical descriptions and statistical arguments. Most will be familiar to readers, e.g., tabular displays of information such as percentages and counts, and the use of the generalized linear model to define relationships between variables. We use moving averages[27] to describe trends in the Court's use of scholarship over time. Describing the time-series data with a moving average works to smooth out short-term fluctuations and, thus, to highlight long-term trends, which is precisely what we are trying to describe where we apply this technique.[28]

In addition to these well-known techniques, we also use a fixed-effects multiple regression model to explore the nature and quality of the Court's use of legal scholarship. In this model, we take steps to statistically control for the effects of time, the type of legal issue, and the type of law to help isolate decisional characteristics that predict the use of scholarship by the Court.[29]

At times the analysis employs the statistical argument that observations are "significant," a contention that the observations are not simply a product of chance. Significance is indicated by the letter *p*, which stands for probability. Any *p*-value of .05 or lower is considered statistically significant because it indicates that the probability that the observations are

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reliability. *Cf.* Petherbridge & Wagner, *supra* note 14, at 2074 & n.118 (using a 25% sample and noting literature that suggests using at least a 10% sample).

[26] A list of variables used in the study and information concerning intercoder reliability are presented in Appendices 1 and 2, respectively.

[27] Moving averages are calculated by averaging the value of a particular variable across a fixed subset of data entries, then shifting the subset one entry forward in time and averaging again. The averages are recorded and then displayed graphically. For example, the first data point for the 50-decision moving average in Figure 1 was calculated by determining the average number of decisions using legal scholarship for data entries 1–50. The second data point was calculated by determining the average number of decisions using legal scholarship for data entries 2–51. The third data point is the average of 3–52, and so on.

[28] While we think moving averages present the most accurate description of the time trend, there are other possible choices we could have made. For instance, we could have elected to use Term or calendar year. We use moving averages instead because of substantial variation in the number of decisions the Court issued per Term and per calendar year across our data, and because we think the moving averages offer a richer account of the data. Our charts do contain year information, however, for those who are interested.

[29] The purpose is to attempt to statistically account for variation in use of scholarship that is explained by decisional characteristics such as a given Term and the particular Justices. Variations may arise in the Court's general attitude toward scholarship over time or a disproportionate impact of decisions directed to certain issue areas or law types.

due to chance is less than 5%. Values between .05 and .1 are considered marginal, indicating that the probability that the observations are due to chance is between 5% and 10%.

Additionally, our approach relies heavily on what we think is the most natural and generally understandable unit of measure: an individual decision of the Court. For example, we report the average number of decisions using legal scholarship, the average number of articles used per decision, and the moving average for subsets of decisions. Also, the response variable in our central regression is a binary variable that records whether a single decision either does or does not use legal scholarship, though there are other possible measures for use.[30]

The statistical work reported here was performed in Excel, Statplus, or Stata.

II. RESULTS AND DISCUSSION

The analysis of our results begins, in Part II.A, by using the data to provide a foundational descriptive account of the Supreme Court's use of legal scholarship. Part II.B builds from Part II.A by developing evidence about the nature and quality of the Court's use of scholarship. Part II.C sets out a more holistic analysis of the meaning of our results. To give the reader a sense of where that analysis is headed, however, and thus a perspective from which to view the results as they are presented, we think the evidence we have developed establishes the hypothesis that the Court[31] uses legal scholarship rather a lot; and, moreover, uses it systematically to support the decisional lawmaking process.

A. Central Measures and Trends in the Supreme Court's Use of Legal Scholarship

To get a broad perspective on the use of legal scholarship by the Supreme Court, we calculated the proportion of decisions using at least one piece of legal scholarship and found that the Court uses legal scholarship in 32.21% of its decisions, as reported in Table 1. In other words, the Court uses legal scholarship in roughly *1 of every 3 decisions*.

[30] For example, instead of measuring scholarship use by decision, one might measure use by each separate opinion that comprises a decision, by word in a decision, or by paragraph in a decision, or by page in the *United States Reports*. Measures larger than a decision are also possible, for example, use by volume of the *United States Reports*, by Term, or by calendar year. Some argument can probably be made for using any of these different measures.

[31] We do not here make a claim about the extent to which our results are generalizable to, e.g., circuit courts of appeals.

TABLE 1: PERCENTAGE OF SUPREME COURT DECISIONS USING LEGAL SCHOLARSHIP

Court	n = Decisions	Decisions Using	% Decisions Using
Supreme Court (1949–2009)	7730	2490	32.21%

Over the sixty-one-year period studied, the Court issued 7730 reported decisions and (not counting repeated uses of the same article in the same writing) cited law review articles 8152 times. As Table 2 shows below, that means *the Court uses more than one piece of legal scholarship, on average, each time it takes pen to paper* (or fingers to keys as the case may be) to author a reported decision.

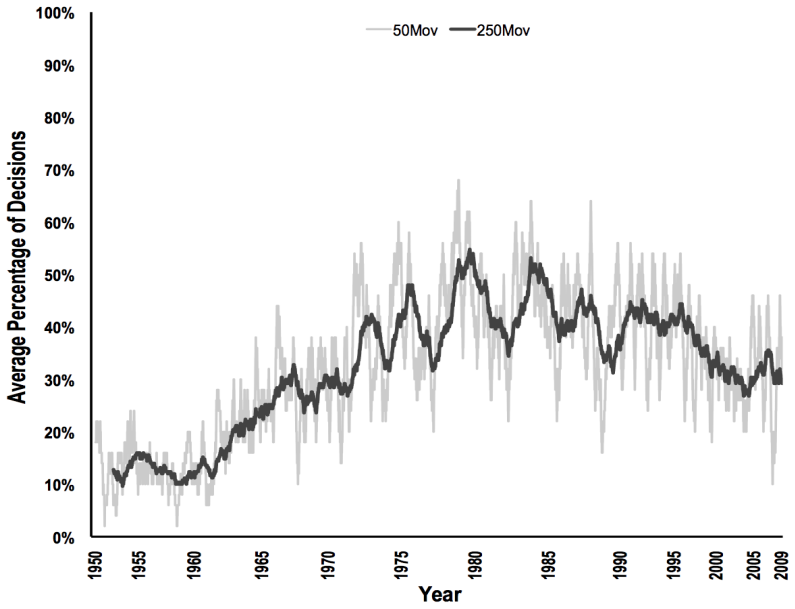
TABLE 2: NUMBER OF DISTINCT ARTICLES USED PER SUPREME COURT DECISION

Court	n = Decisions	Articles Used	Avg. Articles Used/Decision
Supreme Court (1949–2009)	7730	8152	1.05

What are perhaps the most popular empirical studies of the Court's use of legal scholarship claim a "substantial" and "continuing" decline in the frequency with which the Court uses scholarship.[32] We examined that claim. Figure 1 shows the average percentage of the Court's decisions citing legal scholarship over the last sixty-one years. The range of use spans from a low of 2.0% to a high of 68.0% if one uses a 50-decision moving average, and spans from a low of 9.6% to a high of 54.8% if one uses a 250-decision moving average.

[32] *See* Sirico, *supra* note 7 ("We find a continuing decline in [the] number of times the Court cited legal periodicals . . . ."); Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134 (1986) (examining two three-year periods and finding a "substantial" decline in citations to legal periodicals by the Supreme Court); *see also* Hricik & Salzmann, *supra* note 5 (studying the 2003 Term and claiming that the "trend" toward "not merely unhelpful, but useless to the bench and bar" legal scholarship is "already apparent" (internal quotation marks omitted)). For an enterprising student note resisting this conventional wisdom, see Pierce & Reuben, *supra* note 7, at 1202–06.

FIGURE 1: AVERAGE PERCENTAGE OF SUPREME COURT DECISIONS USING LEGAL SCHOLARSHIP: 1949–2009[33]



The most straightforward interpretation of Figure 1 is that the long-term trend in Supreme Court use of legal scholarship is unmistakably upwards.[34] Moreover, while Figure 1 shows that there is variability in the Court's use of scholarship, we do not consider the time trend depicted in Figure 1 as indicative of a "continuing" or "substantial" decline.[35] In fact, when one recalls that the overall average number of decisions using legal

[33] Figure 1 shows the average percentage of reported Supreme Court decisions using legal scholarship from 1949–2009. The ordinate reports both a 50-decision moving average (50Mov) and a 250-decision moving average (250Mov). On the abscissa, the year studied (Year) moves from left to right and gives a sense of the movement in the average percentage of opinions using legal scholarship over time. To further describe the long-term trend, average percentage 50Mov was regressed on time. The slope of the least squares line (the line is not shown to avoid cluttering the figure) is positive and very strongly significant, suggesting an upward trend in decisions using legal scholarship over time. The trend line has the following statistical characteristics: $R^2 = .326$, $t_{obs} = 61.006$, $p < .001$. Moving averages were calculated in Excel, as was the regression. Years are not uniformly spaced across the abscissa because of variation in the number of decisions the Court authored per year during the time studied. In other words, a larger amount of space between two sets of years indicates that the Court issues a greater number of decisions during that timeframe.

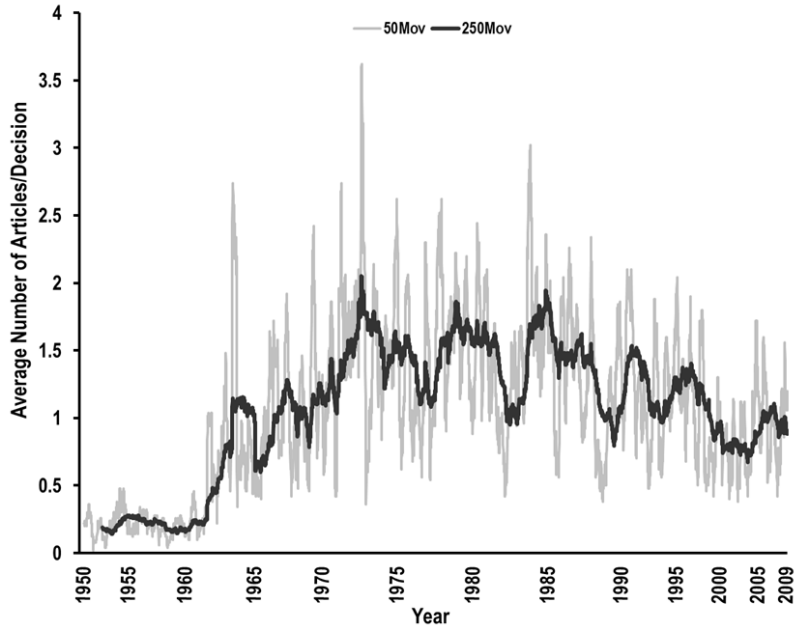
[34] *See also supra* note 33 (reporting the results of regressing of 50Mov on time).

[35] This is so even beginning at 1971, the point at which Louis Sirico and Jeffrey Margulies provide their earliest measurements. *See* Sirico, *supra* note 7; Sirico & Margulies, *supra* note 32. The significant decline reported in earlier studies can be partially attributed to differences in the methodologies used. *See* Pierce & Reuben, *supra* note 7, at 1194–99.

scholarship is 32.21%, we think it possible that Figure 1 depicts a trend that might be varying around a mean of just over a full third of reported decisions.

Similarly, we examined the trend in the average number (not counting repeated uses of the same article in the same opinion) of articles used per reported decision. Figure 2 shows this information for the last sixty-one years. The range of use spans from a low of .02 articles to a high of 3.62 articles for the 50-decision moving average, and spans from a low of .14 articles to a high of 2.05 for the 250-decision moving average.

FIGURE 2: AVERAGE NUMBER OF DISTINCT ARTICLES USED PER SUPREME COURT DECISION: 1949–2009[36]



[36] Figure 2 shows the average number of distinct law review and law journal type articles used per reported decisions by the Supreme Court from 1949–2009. Articles are "distinct" in the sense that they were counted so that the repeated citation to the same article in a Justice's writing was counted only one time. The ordinate reports both a 50-decision moving average and a 250-decision moving average. On the abscissa, the year (Year) studied moves from left to right and gives a sense of the movement in the average percentage of decisions using legal scholarship over time. To further describe the long-term trend, average percentage 50Mov was regressed on time. The slope of the least squares line (the line is not shown to avoid cluttering the figure) is positive and very strongly significant, suggesting an upward trend in decisions using legal scholarship over time. The trend line has the following statistical characteristics: $R^2 = .141$, $t_{obs} = 51.680$, $p < .001$. Moving averages were calculated in Excel, as was the regression.

It is difficult to interpret these data as suggesting a "continuing" or "substantial" decline in the Court's use of scholarship over time.[37] Even if one ignores the first fifteen or so years worth of data, which appears to be a time when the Court used comparatively few articles per reported decision, Figure 2 suggests an even, if variable, trend in use of articles. When one recalls that the overall historical mean is 1.05, the observed pattern might well indicate a trend varying around a mean in the low 1s, perhaps between 1.10 and 1.40—or just over one article cited per reported decision.

B. The Nature and Quality of the Court's Use of Legal Scholarship

In Part II.B, we build on the observations made above in Part II.A by examining the Supreme Court's use of legal scholarship at a more granular level. Our purpose in this Part is to contribute to the knowledge concerning the use of scholarship by courts that is often informally spoken of, but which has almost no content. The information we provide here is directed to "how," beyond mere citation, courts use legal scholarship.

We were concerned in particular with whether scholarship might be systematically used to support the decisional lawmaking process. We reasoned that if the Court did use legal scholarship to support the decisional lawmaking process, scholarship might be most useful—and its use thus most common—in cases that were more important or difficult to decide. Our design examines this hypothesis: It evaluates the content of the Court's jurisprudence for evidence that the Court uses scholarship disproportionately more often when cases are either more important or more difficult to decide. As we discuss below, we used theoretical considerations, and a realistic view of the data we could collect, to identify decisional characteristics that might indicate that a case is more important or more difficult to decide. We then examined the frequency of use of scholarship in cases having those characteristics. To encourage robustness, we explored a variety of decisional characteristics. The analysis is based on a multiple regression model, which allows us to explore the contribution of multiple *variables*—"predictor," "explanatory," or "independent" variables—to an *outcome*—a "response" or "dependent" variable. The outcome of interest is whether a Supreme Court decision uses legal scholarship.

Table 3 reports the decisional characteristics that significantly predict whether a decision expressly evinces the use of legal scholarship.

[37] As above, this is the case even beginning at 1971, the point at which Sirico and Margulies provide their earliest measurements. *See* Sirico & Margulies, *supra* note 32.

TABLE 3: DECISIONAL CHARACTERISTICS THAT SIGNIFICANTLY PREDICT THE USE OF LEGAL SCHOLARSHIP BY THE SUPREME COURT: 1949–2009[38]

Explanatory Var.	Brief Description	% Δ in Odds
1minvote	One minority vote attends decision	73.54***
2minvotes	Two minority votes attend decision	104.36***
3minvotes	Three minority votes attend decision	163.13***
4minvotes	Four minority votes attend decision	224.75***
altersprec	Decision evinces alteration of precedent	177.10***
junedec	Decision issues in June	22.71***
decluncl	Decision declares law unconstitutional	42.10**
lctdissent	Decision indicates lower court dissent	21.30**

1. More Minority Votes Means More Use of Legal Scholarship.—We examined the impact of the number of minority votes attending a decision for a number of reasons. First, we conjectured that the presence of minority votes provides a rough approximation of the level of disagreement about an issue and thus might signal a context in which Justices are marginally more motivated to establish that they are "right," perhaps by resort to legal scholarship. Not exclusive of that reason, we conjectured that minority votes could also indicate cases in which Justices are more at liberty to disagree. In other words, minority votes could locate cases where the range of decisional alternatives is marginally less constrained by existing precedent, making possible the marginally greater use of different kinds of information (e.g., legal scholarship) in the decisional process.

Another reason we considered is that minority votes correlate with dissenting writings. Scholarship could sometimes be used in dissents to create a perception that arguments were fully heard and affected the

[38] Table 3 reports part of a logistic regression model that predicts *bincite*, a variable that is positive when a reported decision of the Supreme Court uses legal scholarship. The set of explanatory variables listed in the first column includes: *#minvotes*—the specified number of minority votes in a reported decision, e.g., *2minvotes* means that two Justices dissented from the merits of an opinion of the Court; *altersprec*—a binary variable that is positive when a reported decision evinces the overruling of the Court's own precedent; *junedec*—a binary variable that is positive when a reported decision issues in the month of June; *decluncl*—a binary variable that is positive when a reported decision declares an act of Congress, a state law, or a local ordinance unconstitutional; *lctdissent*—a binary variable that is positive when the reported decision includes the review of a lower court decision that contains a dissent. Evidence of the direction and magnitude of the effect of a variable on the Court's use of legal scholarship is perhaps most easily interpreted by looking to the "% Δ in Odds" column in Table 3, which reports the percent of change in the odds that a decision uses legal scholarship when the explanatory variable is positive. All of the predictors in Table 3 are strongly statistically significant in view of the convention that $p = .05$ is the threshold for statistical significance. R^2 (Nagelkerke's) = .177, $df = 88$. Indicator variables were used to fix time effects, issue-type effects, and, to some extent, variation in the amount of existing scholarship related to certain issues. A more complete description of the models can be found in the Appendix. Significance is indicated by normal conventions, viz. (†), $p \leq .1$; (*), $p \leq .05$; (**), $p \leq .01$; and (***), $p \leq .001$.

thinking of at least some of the Justices and thus to help soften the blow for parties on the losing side of an issue. We also speculated that minority writings might sometimes be for the benefit of courts (or legislators) in the future. For example, if in time it appears that the majority view is not working well, well-crafted dissents may be useful as support for distinguishing or even formally altering decisional law in the future. Scholarship could play a role in making a dissent more convincing, and therefore more likely to impact the law in the future.

Thus, our rough working hypothesis was that if the Court uses scholarship for the reasons just discussed,[39] we might expect decisions evincing minority votes to predict an increase in the use of legal scholarship. On the other hand, if legal scholarship is useless or irrelevant to decisional lawmaking, then we would expect to see no predictive relationship between minority votes and the Court's use of scholarship. Scholarship might instead be randomly distributed across all decisions, irrespective of minority votes.

We found a very strongly significant relationship between the use of scholarship and the number of minority votes. The "% Δ in Odds" column in Table 3 shows that each additional minority vote made in connection with a decision (*#minvotes*) predicts an overall increase in the odds that the Court will use scholarship in its decision: one minority vote predicts a 73.54% increase; two minority votes predict a 104.36% increase overall; three minority votes predicts a 163.13% increase overall; and four minority votes predicts a 224.75% increase overall.

Table 4 provides another description of how the use of legal scholarship increases as the number of minority votes increases. It depicts the actual increase in use of scholarship predicted by the regression, and is helpful in describing two additional results that were very surprising in the sense that they surpassed our intuitions. The first is a doubling in the percentage of decisions using legal scholarship between opinions that have no minority votes (22.01%) and those that have four minority votes (45.72%). The second surprising result is the incremental increase in use that accompanies each additional minority vote.

[39] Or others that come to mind, such as using an alternative writing to help criticize an opinion for the Court, or even perhaps to help describe the opinion's potential scope.

TABLE 4: USE OF LEGAL SCHOLARSHIP BY THE SUPREME COURT, NUMBER OF MINORITY VOTES: 1949–2009

#minvotes	Not Using	Using	% Using
0	2378	671	22.01%
1	651	285	30.45%
2	773	408	34.55%
3	797	586	42.37%
4	641	540	45.72%
Total Decisions	5240	2490	32.21%

2. Altering Precedent.—We speculated that opinions evincing an overruling[40] of the Court's own precedent are something of a big deal. For example, if the Court has a preference for the appearance of stability and continuity in its jurisprudence,[41] decisions upsetting that appearance may be perceived as being of special importance. They risk upsetting settled expectations, increasing uncertainty,[42] and creating the perception that the Court is unilaterally making up the law.

Because precedent is what is being cast off in decisions that alter precedent, other precedent might be less effective in supporting decisions that likely already require heightened justification and that leave society, the Court, and its jurisprudence vulnerable to the risks just mentioned. In such instances, scholarship might help to manage that risk by serving a sort of evidentiary purpose. The use of scholarship could help show that the change the Court is making, while perhaps disruptive or uncertainty-creating, has been the subject of serious investigation and discussion. Thus the Court might use scholarship to encourage the perception that precedent-altering change is the result of orderly review, as opposed to haphazard disregard or ideologically driven impulse. Somewhat similarly, using legal scholarship might serve the purpose of making the decision seem more

[40] An "overruling" decision should be differentiated from a decision that merely "distinguishes" precedent.

[41] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) ("[T]he very concept of the rule of law underlying our Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. . . . [W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law . . . .").

[42] On the other hand, an affirmative decision overruling past (ambiguous) decisions leads to a perception of clarification of the past decisions that could constrain the flexibility of decisional rationales available to all judges through judicial interpretation and discretionary powers. Some Justices might be chary of relinquishing the decisional flexibility that ambiguous precedent offers. This might suggest a relationship between the number of minority votes and decisions that formally overrule past decisions. But an evaluation for colinearity (an examination of the variance inflation factor (VIF) and tolerances for the relevant variables) suggested the relationship between the two decisional characteristics was weak, perhaps reflecting a compromise between the two sides of decisions involving substantial disagreement.

formal than it might otherwise. In the same vein, legal scholarship might be used as evidence of normative support—"votes" by legal thinkers in favor of the Court's decision to change the law. In other words, scholarship might be used to add heft to a decision.

Consistent with the idea that decisions overruling the Court's own precedent are important, we observed that such decisions are relatively rare, accounting for only 1.88% (145) of all reported decisions between 1949 and 2009 (7730). This relatively small number may highlight our postulate, viz., the marginal importance of such decisions. We thus conjectured that if the Court is using legal scholarship to support precedent-altering decisions, we might expect to find that decisions that evince the overruling of the Court's own precedent predict an increase in the use of legal scholarship. If the Court is not so using scholarship, then we might expect to see no relationship between the decisional characteristic and the use of scholarship by the Court.

We found a very strongly significant predictive relationship between decisions that indicate they overrule the Court's own precedent and the use of legal scholarship. Table 3 shows that decisions that indicate that the Justices have altered precedent (*altersprec*) predict a 177.10% increase in the odds of the use of legal scholarship. Described in terms other than regression coefficients, decisions that overrule existing precedent use scholarship 63.45% of the time—almost twice as much as the overall rate of use across the last sixty-one years.

3. June Decisions.—Based on an informal poll of law professor colleagues, we discovered that, while there is not unanimity of opinion, there is a common thought that the Court issues a greater mass of decisions that are either more important or more difficult to decide during the month of June.[43] The working hypothesis here was straightforward: If legal scholarship aids decisions in important or difficult cases, and the most important or most difficult decisions typically issue in June, then decisions that issue in June might predict the use of legal scholarship.

They do. The Court's use of scholarship does not appear to be randomly sprinkled across all decisions, but—assuming the conventional wisdom is correct—seems to depend on a decision's importance or difficulty. Table 3 shows a strongly significant predictive relationship between June decisions (*junedec*) and the use of legal scholarship by the Court. Table 5 puts this finding in greater relief and shows that more than half (52.65%) of all decisions using legal scholarship are issued in the months of May, June, and July, with the surprising result that the rate of use of scholarship is even more markedly pronounced in decisions that issue in July (55.56%). The findings for May, June, and July stand in sharp contrast

[43] The Supreme Court announces decisions into early July. Thus the theory is that the Court waits to decide the most difficult cases until the very end of the Term.

to those from August, September, October, November, and December, which together account for a grand total of 7.90% of all decisions using legal scholarship, and during which the monthly rate of use of scholarship is well below average.

TABLE 5: USE OF LEGAL SCHOLARSHIP BY THE SUPREME COURT, MONTH OF DECISION: 1949–2009

monthdec	Not Using	Using	% Using
Jan.	553	243	30.53%
Feb.	464	196	29.70%
Mar.	663	304	31.44%
Apr.	587	247	29.62%
May	665	343	34.03%
June	1358	893	39.67%
July	60	75	55.56%
Aug.	1	0	0.00%
Sept.	2	1	33.33%
Oct.	149	1	0.67%
Nov.	328	61	15.68%
Dec.	410	126	23.51%
Total Decisions	5240	2490	32.21%

4. Declaring Laws Unconstitutional.—Depending on the rationale provided, a decision declaring an act of Congress, a state law, or a local ordinance unconstitutional may be a precedent the Court will be faced with for some time. Moreover, when the Court declares an act of Congress or a state law unconstitutional, it is perhaps placing its own constitutional position in greatest jeopardy because it may often be contradicting the will of a majority of Americans and a majority of their elected representatives. Declarations of unconstitutionality may thus represent marginally more difficult decisions and the Court may seek to execute them with special finesse and care. In addition, Justices may perceive decisions on the constitutionality of a law as an important part of their legacy. Either way, decisions characterized by a declaration of unconstitutionality might engender some of the Court's best efforts to fully articulate and justify its rationales.

For reasons largely cumulative to those given for decisions that alter precedent, the conjecture here is: If the Court is using legal scholarship to support declarations of unconstitutionality, we might expect decisions

declaring acts of Congress, state laws, or local ordinances unconstitutional to predict an increase in the use of legal scholarship.[44]

In the 7730 decisions of the Court comprising the data set, 506 declared an act of Congress, a state law, or a local ordinance unconstitutional. When a decision did not declare a law unconstitutional, it used legal scholarship 31.12% of the time, or just under the sixty-one-year average of 32.21%. When an act of Congress was declared unconstitutional, legal scholarship was used 56.41% of the time; when a state law was declared unconstitutional, legal scholarship was used 45.50% of the time; and when a local ordinance was declared unconstitutional, legal scholarship was used 52% of the time. Overall, Table 3 shows that declarations of unconstitutionality (*decluncl*) predict a 42.10% increase in the odds that a decision of the Court will use legal scholarship.

5. Lower Court Disagreements.—Lower court disagreements refer to a fairly specific decisional characteristic: they represent decisions in which the opinion for the Supreme Court—the majority opinion—mentions that there is a dissent in the decision the Court has taken for review. We included this variable primarily because we supposed it might be a marginal signal that the Court viewed the relevant law as unsettled in some way, i.e., there was a legitimate dispute as to its content that could be clarified by its decision.

Accordingly, we speculated that if the Court uses scholarship to reconcile disputes between the lower courts, or the judges within a circuit, as to the content of the law, then lower court disagreements might predict the use of legal scholarship.

Table 3 shows that lower court disagreement (*lctdissent*) is a strongly significant predictor of the use of legal scholarship, increasing the odds of use by 21.30%. In terms of real numbers, when a decision evinces a lower court disagreement, it uses scholarship 39.36% of the time, and when a decision does not, it uses scholarship just 30.35% of the time, a difference of roughly 9%; a decrease from use in 1 of every 2.54 decisions to use in 1 of every 3.29 decisions.

[44] A concern here is that there may be a greater amount of total scholarship directed to constitutional issues as compared to other issues, which might impact the relative rates of use of scholarship in these sorts of cases. We attempted to statistically control for this likelihood using variables that indicated whether the decisions involved aspects of constitutional questions. The variables are Spaeth-coded variables that indicate the type of law involved, including: constitution, constitutional amendment, federal statute, and court rules. *See, e.g.*, *Downloadable Code Book: 2011 Release 03*, *supra* note 22, § 40. We also employed issue area indicator variables. We doubt these controls are perfect, but for many the potential concern of a disproportionate amount of scholarship directed to constitutional issues may not be that important.

C. What Does It All Mean?

We think the most reasonable interpretation of the evidence we have developed is that the Supreme Court not only often uses legal scholarship in decisions it issues, it also disproportionately uses legal scholarship when cases are either more important or more difficult to decide. In fact, we think the evidence reasonably leads to an interpretation of the Court's use of scholarship that is strongly contrary to the claim that courts and practitioners have little use for it. In Part II.C, we explain our interpretation, which we think is empirically robust.

1. The Court Uses a Lot of Scholarship and Uses It to Support Decisional Lawmaking.—Part of our interpretation of the data is that the Court uses legal scholarship "rather a lot." What could that mean? After all, characterizing use as "a lot" or, as has been the case in existing literature, "infrequent,"[45] suggests a reference to some kind of expectation. In addition, we interpret the data to mean that the Court uses scholarship "systematically to support the decisional lawmaking process." While that interpretation is somewhat clearer on its face, it too could be made more useful by relating it to some kind of expectation.

Developing an expectation for the precisely "right" amount and quality of use of scholarship is beyond the scope of this study, and we think the task might be rather difficult, presenting both conceptual and empirical challenges. So instead of coming to rest on precise expectations, we frame our claim qualitatively, in the context of three distinct sources of expectation for the amount and quality of use of scholarship.

a. Judges.—Perhaps the most outspoken members of the federal judiciary have made claims such as the following: "[not] particularly helpful for practitioners and judges";[46] "[of] little use" to "judges, administrators, legislators, and practitioners";[47] "No one speaks of [law reviews]. No one relies on them";[48] and, they are "of no use or interest to people who actually practice law."[49] We think these and similar claims are fairly summarized as: Legal scholarship is useless and irrelevant to the bench, and therefore is not used very much.

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[45] *See, e.g.*, Ambro, *supra* note 4, at 549 (claiming that attempts by the judiciary to locate legal articles "or even to review those cited in briefs" is an "infrequent" occurrence); Hricik & Salzmann, *supra* note 5, at 778 (reporting that judges "infrequent[ly]" use legal scholarship in their decisional process); *id.* at 763 n.7 (complaining that law professors "too infrequently" publish the "much-needed" legal scholarship); Kaye, *supra* note 4, at 320 n.33 ("all-to-infrequent"); Sirico, *supra* note 7, at 1010 (referencing a "group of infrequently cited" legal journals).

[46] Bravin, *supra* note 2.

[47] Edwards, *supra* note 4.

[48] Liptak, *supra* note 4.

[49] Liptak, *supra* note 1.

A comparison of that claim to the empirical evidence gathered from Supreme Court decisions reveals a sharp contrast. Over the last 61 years the Court has used legal scholarship in essentially 1 of every 3 decisions. The overall trend in use has been either upward or, if one ignores the oldest 15–20 years worth of data, perhaps even.[50] And, on average, the Court uses more than one law review article every time it puts pen to paper (or fingers to keys) to author a reported decision.[51]

Moreover, as each additional minority vote attaches to a decision the likelihood of scholarship being used increases significantly and steadily, rising from 22.01% in decisions with no minority votes to 45.72% in opinions that have four minority votes.[52] Decisions that effectively state that they alter precedent also predict a strongly significant increase in the odds of the use of scholarship. In terms of raw numbers, over the period studied, decisions that overrule existing precedent use scholarship at a rate of 63.45%,[53] in roughly 2 of every 3 decisions, while the overall rate of use across the period is only 32.21%.[54] June decisions, suspected to represent the largest number of decisions considering important or difficult issues, are strongly significant predictors of the use of legal scholarship.[55] Decisions that declare acts of Congress, state laws, or municipal ordinances unconstitutional predict an increase in the use of scholarship, and the authoring Justices use scholarship over half of the time in such cases.[56] In addition, decisions that reconcile disputes between the lower courts or the judges within a circuit as to the content of the law also predict an increase in the odds that a decision uses legal scholarship.[57]

In view of these many and varied measures of use, our judgment is that the weight of the existing evidence is against claims that legal scholarship is irrelevant to and not used by the judiciary. Accordingly, by the measure of judicial commentary directed to the uselessness and lack of relevance of legal scholarship to courts and practitioners, it seems to us that legal scholarship is neither useless nor irrelevant, but rather is used—at least by Supreme Court Justices—quite a bit.

b. Literature.—Another point of comparison is the existing literature. That literature evinces a conventional wisdom that there has been a continuing and substantial decline in the use of legal scholarship by the

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[50] *See supra* Figures 1, 2.
[51] *See supra* Table 2.
[52] *See supra* Part II.B.1 and Tables 3, 4.
[53] *See supra* Part II.B.2 and Table 3.
[54] *See supra* Table 1.
[55] *See supra* Part II.B.3 and Tables 3, 5.
[56] *See supra* Part II.B.4 and Table 3.
[57] *See supra* Part II.B.5 and Table 3.

Supreme Court[58] and that legal scholarship is "not merely unhelpful" but "'useless' to the bench and bar."[59]

Our findings are strongly contrary to the literature-created expectations for use of scholarship. The evidence is essentially the same as that described above in connection with judge-authored claims about scholarship: consistent use; use in a third of decisions; an upward trend in use; and increased use in important decisions, such as when decisions are closely decided, when decisions alter precedent, and when decisions determine law or other conduct to be unconstitutional. Accordingly, we think that reasonable people can see the evidence we report here, when compared to the research underlying the existing literature[60] on this topic, as supporting a conclusion altogether different than the conventional wisdom, in particular, that the extent of the Court's use of scholarship far exceeds the literature-advertised expectations both in terms of its amount and quality.

c. History, common sense, and intuition.—Our final argument appeals most directly to the reader's own common sense and intuitions. Figures 1 and 2 indicate a general upward trend in use of scholarship across the period studied. A holistic look at those Figures suggests the interpretation that after some low-use years in the 1950s and 1960s, the Supreme Court has used scholarship at a fairly consistent rate.[61] Indeed, if one ignores the first twenty years of data and focuses on the part of the data from about 1970 to the present, what appears to us is a moving average that might well be varying around a mean that is very close to the Court's current level of use of scholarship, viz., in about a third of all decisions.[62]

Accordingly, we offer the suggestion that the level of use depicted in those Figures reflects a natural level of use that has not changed all that much over time and may, in fact, reflect *the* normative baseline for use of scholarship by the Supreme Court. In any event, Figures 1 and 2 do not strongly suggest that there was a "good old days" when the Court used a lot more scholarship than it does today.[63]

A final point to make in connection with this subpart is to query the common sense and intuition of the reader. Is it really a realistic expectation that the Court will use a law review article in every decision? We think the

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[58] *See supra* note 32 and accompanying text.

[59] Hricik & Salzmann, *supra* note 5 (internal quotation marks omitted).

[60] It is important to note that we reach this conclusion while at the same time accepting that earlier work was faithfully performed and executed. We do not think, for example, that earlier studies made mistakes in terms of counting citations. What distinguishes our work from earlier work is the methodology we have been able to bring to bear and the amount of data we have been able to gather and analyze under the concept analysis model.

[61] *See supra* Figures 1, 2.

[62] *See supra* Figures 1, 2.

[63] Although, depending on the definition of "use" employed, they do not conclusively rule out the possibility.

answer is: Probably not. After all, it is Law 101 that the facts and relevant precedent attending any given legal case are developed through an adversarial process that is supposed to define the scope of what informs a judicial decision. Legal scholarship in the form of law review and law journal articles are not precedent and *should*, at best, be of modest direct assistance to the adversarial process. But even assuming that legal scholarship might be brought to bear on a case on questions of law or policy—and thus have direct, observable influence despite the limitations imposed by the formalistic adversarial process that defines a case—is it so for all cases the Court hears, or just a fraction? And if it is a fraction, what is the fraction? Do you think it is much more than 33%?

d. Other explanations.—Recall that we relied on hypotheses about the relationships between decisional characteristics and the use of legal scholarship to identify decisional characteristics that might be probative of the Court's use of scholarship "beyond mere citation."[64] In our hypothesizing, we were not necessarily able to exclude all other possible explanations for why we might observe a predictive effect for a decisional characteristic.[65] Instead, part of the design was to test an abundance of ideas and potential relationships to develop empirically robust evidence of use beyond mere citation. If even one of the decisional characteristics we associate with importance or difficulty genuinely associates with importance or difficulty, and if one accepts that a heightened use of scholarship in decisions that are more important or difficult is evidence that the Court uses scholarship to support decisional lawmaking, then our hypothesis finds support.

Our interpretation is therefore probably most vulnerable to a single explanation capable of convincingly demonstrating why all of our observations are not related to the importance of difficulty of a decision. Our study design attempts to statistically account for some concerns of this nature by using indicator variables to control for the impact of certain factors that might lead to competing interpretations. For instance, we use indicator variables for the Term in which the decision issued to address temporal effects. We also use indicator variables to attempt to control for the issues involved in decisions and to control for the type of law involved.[66] Accounting for these effects does not change the substance of our results.

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[64] *Supra* Part II.B.

[65] Although it is the case that, in view of the model we plan to use, we believe that if we observed a predictive effect for a decisional characteristic, then the most likely explanation is the use of scholarship to support decisional lawmaking.

[66] We also think that these indicators should have some effect on concerns about the amount of legal scholarship available addressing different issues and types of law.

At bottom, we have not come up with a more reasonable interpretation for our observations than the one we have presented. If we had, we would say so. But empirical work is iterative,[67] and future work should be performed to test, substantiate, and build on our results.

2. What Does the Court Take from Scholarship?—What does the Court take from legal scholarship when using it in a decision? We think our results suggest a number of possibilities, although they are not very helpful in ruling any of those possibilities out. In fact, we think it quite probable that all of the things we set out below happen, at least to some extent.[68]

Among the possibilities is that the Court is taking doctrine or policy changes proposed by the scholarship. The Court might expressly or impliedly incorporate these recommendations into its decisions. Similarly, perhaps the Court discovers in a piece (or pieces) of scholarship its analytical approach to an issue. Also in this category might be the use of scholarship as the source of a straw man or foil against which the Court could rationalize its decision.

Our results are consistent with the possibility that the Court is taking prestige of some sort when it uses legal scholarship. It might take the prestige of the author, e.g., it might cite Kimberly West-Faulcon's article, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*,[69] because she is a prominent constitutional law scholar. Alternatively, it might cite the same article to take the prestige of the publishing law review or the institution affiliated with the law review, in this case, the *University of Pennsylvania Law Review* or the University of Pennsylvania Law School. A similar point is that the Court is taking the "vote" of the piece. In other words, legal scholarship might be used as evidence of normative support—"votes" by legal thinkers in favor of whatever the Court happens to be saying when it makes the use, or perhaps in some cases even in favor of the ultimate conclusion the Court will reach. Here, the prestige of the scholar, publication, or law school is not absolutely crucial, although the greater the prestige perhaps the more desirable the scholarship for this sort of use by the Court. Rather, the reason the Court uses the scholarship is to seem not to be an outlier, to be able to point to at least one other person who agrees with whatever point the opinion writer wants to make. In either event, however, the scholarship might be used mostly to support a specific proposition or to add heft to the general reasoning or analytical process used by a Justice to support a written conclusion.

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[67] A concern ubiquitous to studies of this type is that there may be some problem with the study that we have not detected.

[68] Nor do we think this discussion is exhaustive of all of the things the Court might be taking when it uses scholarship.

[69] *See* Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075 (2009).

Another possibility is that the Court is using legal scholarship to encourage a perception about judicial decisionmaking. More specifically, perhaps the Court cites scholarship due to the fact that it was used as part of the parties' advocacy.[70] The basic idea is that some of the use of scholarship we observed can be explained by differences in the extent to which the bar and interest groups (including law professors at times) use scholarship in connection with advocacy before the Court. For example, when advocates use scholarship, perhaps some of the time the Court "gives it back" to them in the expression of its decision. This interpretation has some intuitive appeal in the sense that the Court might want to create the perception that its decisionmaking is balanced, deliberative, and responsive to the arguments advanced by the parties.[71]

To the extent that the use of scholarship by the bar is driving the Court's citation of legal scholarship in decisional lawmaking, it suggests that scholarship is not just useful to the Court, but also to practitioners of law.[72] Like the other explanations we provide, we think the possibility that the Court uses legal scholarship in response to its use by litigants and advocates[73] may describe a process for how the use of scholarship can happen. But we do not think that *all* of the Court's use of scholarship happens for this reason. To think this process explains all, or most, of what we observe requires explaining how it can be made to depend on the number of minority votes in an opinion so that Justices would use incrementally more scholarship for each additional minority vote. For that to happen, some things would have to come together, but it is not a logical impossibility.

3. Why Derogate Scholarship?—We think the best interpretation of our results is that legal scholarship is not useless or irrelevant to the Court. So why are some leading figures in the federal judiciary derogating legal scholarship? A simple response to this question might be that they are simply unaware of the extent to which courts use scholarship. But if we assume for the moment that empirical claims—such as "[n]o one relies on [law reviews]"; or that law reviews "aren't particularly helpful for practitioners and judges"; or that "[n]o one speaks of [law reviews]"; or that

[70] *See, e.g.*, Manz, *supra* note 7, at 273 tbls.8, 9, & 10, 274 tbls.11 & 12, 274–75 tbl.13, 275 tbl.14 (comparing the numbers and percentages of legal articles cited in briefs and opinions).

[71] *Cf.* Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 132 (1988) (describing what is at least an analogous, if not identical, concept).

[72] This idea suggests that the legal scholarship is at least useful to those practitioners who are attentive to the Court's decisions. For example, those who represent parties before the Court: private attorneys and corporate lawyers, special interest groups, amicus filers.

[73] To the extent that legal scholarship is not used by litigants and advocates, *see supra* notes 5–7, such a trend suggests the Court is finding scholarship on its own—further bolstering the idea that scholarship is neither useless nor irrelevant to the bench.

law reviews are "largely of no use or interest to people who actually practice law"[74]—are not made by accident, then other explanations are needed. Below we suggest a few.

For the most part, federal judges are probably clever, ambitious, and politically savvy individuals. It seems likely, therefore, that their public statements are fairly calculated. Assuming that is true, then it might well be the case that when judges derogate legal scholarship they are doing so because derogating legal scholarship provides some kind of a benefit to them.

What kind of benefit? Well, perhaps when judges derogate legal scholarship, they have a political purpose. Perhaps some judges perceive that their relationship with certain constituencies is improved when they derogate legal scholarship. For example, perhaps judges (or judge-hopefuls) think there is an advantage to be had in their relationship with the "judge makers" by distancing themselves from, or by being perceived as critical of, the legal academy. Since probably the early 1980s, it has likely not been helpful for a judicial nominee, or for sitting judges who might have ambitions to be elevated within the federal system, to appear to be too influenced by legal academics.[75] If this is so, it may be that the political process that picks federal judges selects for judges who are dismissive of legal scholarship.

Another benefit judges might get from talking down legal scholarship could involve their relationship with the bar. Judges might derogate legal scholarship for the time-tested reason that, when attempting to curry favor with one group (e.g., the bar), there is often political benefit in laying criticism or blame for problems on another group (e.g., legal academics). Thus, when a judge sits down with practitioners to discuss concerns about the state of the profession, he might criticize law reviews for the purpose of creating solidarity with practitioners. The thrust of the appeal is that the "disconnected intellectuals" of the academy are doing nothing at all to help with serious issues, while the judiciary is right in the thick of things with the practicing lawyers.

A judge might also derogate legal scholarship to benefit the relationship that judge, or his court, has with the public generally. After all, much of the sustained criticism of the Court's jurisprudence comes from the legal academy. One means of addressing the criticism is to dismiss the academy as a group of disconnected intellectuals who are not really clear on what is at stake and who are not trying hard to advance legal thinking. Once that label gets attached, it becomes rather easy to suggest that criticisms made by legal academics should not be taken very seriously in most cases.

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[74] *See supra* notes 46–49 and accompanying text.

[75] *See* Richard Brust, *The High Bench vs. the Ivory Tower: More Law Reviews Give Professors Places to Publish, but Judges Stick Up Their Noses at Elite and Useless Articles*, A.B.A. J., Feb. 2012, at 50.

Another possibility is that the judges who derogate legal scholarship mean to claim nothing more than that some (perhaps much) legal scholarship is uninteresting and unhelpful to them in deciding cases. This understanding has the merit of assuming that there is at least some empirical basis for the claims derogating legal scholarship. But if this is the explanation, then the claims themselves are intensely subjective and probably also contain significant conceptual limitations or confusion.

One point of conceptual limitation stems from the form of argument. The most direct measure of the utility of scholarship to the bench and bar is how much use those entities make of it—directly or indirectly—and what benefit they get from that use, *not* how much scholarship exists in the world. Measuring the utility of scholarship to the bench and bar by looking at the scholarship they are not, or may not be,[76] using is nothing more than looking for evidence of use and relevance in a place where the seeker is unlikely to find any.

To use a fanciful analogy, we might begin to define how useful and relevant restaurants are to a person by measuring the frequency and the circumstances in which the person eats out. If we observed that the person eats out every third day, and does so in a variety of specific circumstances—e.g., when he is working late, or when the grocery stores do not have the ingredients he needs to prepare a meal himself—we might conclude that restaurants are useful and relevant to that person. Our view would probably not change much if we learned that the person does not often eat at Mexican restaurants. That does not mean it is uninformative to know there are restaurants at which the person does not often eat. One of the benefits of knowing that a person does not eat at, for example, Mexican restaurants is that we are encouraged to consider what forces maintain them. This observation leads to a second and more general point of conceptual confusion surrounding the debate over the utility of legal scholarship.

The debate over the utility of scholarship seems to involve unarticulated—and perhaps unrealized—assumptions about the nature and purpose of legal scholarship. Just because, for example, a judge might flip through a few issues of the *Harvard Law Review* and not find something that he considers helpful to a case he has to decide—or, if he is a practitioner, to a case he is litigating—does not mean that law reviews are useless or irrelevant to judges, practitioners, legislators, or the development of law generally. Indeed, confining the definition of useful scholarship to only scholarship that warrants citation in the decision of a case or in the brief of a lawsuit is to so conceptually restrict the definition of useful scholarship that the conclusion that most scholarship is useless and irrelevant may almost be unavoidable.

[76] Given the discussion of "use," *supra* Part I, it should be evident that this amount is generally unknown.

A person who engages this assumption is able to avoid altogether the notion that the process that produces information that they would probably agree is helpful to deciding a case involves legal thinkers debating and working through complex issues, the resolution of which may advance the law and, thereby, the human condition. In other words, pretty much all scholarship is built on other work, and at least some of the articles that critics of legal scholarship find "useless" and "irrelevant" to deciding cases may well have been very useful and relevant to articles that informed jurists and practitioners, and that are, in some instances, cited in decisions. Additionally, law review-type legal scholarship informs and influences judges and practitioners in many other ways. It helps to inform the content of the treatises to which judges, justices, and practitioners turn to discover the doctrinal law; it contributes to the content of law school classes, where judges, clerks, and practitioners are first taught how to distill and apply the law; it establishes the topics of discussion for Continuing Legal Education classes, for symposia judges and practitioners might attend, and for judge-training classes (for example, in law and economics); it spurs debate and discussion of contemporary policy issues in newspaper editorials, and in television and radio broadcasts; and it contributes directly and indirectly to many of the other forms of information that affect the judgment that judges apply in every case.

Nor are judges, practitioners, and legal scholars the only audience for legal scholarship. Some scholarship is directed to the public and to policymakers. With the growing popularity of blogs, legal scholars have begun summarizing and promoting their scholarship to wider audiences. Blog posts are read by large numbers of people outside of the legal academy, including many nonlawyers. Some blog posts are directly related to the legal scholarship of the author, while other posts are directly or indirectly influenced by debates among legal academics in law reviews.

In addition, while there is almost certainly such a thing as "plug and play" scholarship—scholarship that judges can pick up and inexpensively incorporate directly into their decisional thinking or writing—some scholarship might take more effort. Indeed, part of the value of a piece of legal scholarship to a judge may be that it encourages and directs an effort to grapple with relevant or analogous ideas. Because its utility is in stimulating the mind, such work may not be suitable for citation, and it may only be useful to a judge who is capable of customizing its guidance to the specific, unique legal situation at hand.

In light of this broad scope of examples illustrating the influence of law review-type legal scholarship on aspects only indirectly connected to the citations in opinions and briefs, it seems that at least some claims derogating legal scholarship might simply miscomprehend the denominator—they might make unjustified assumptions about the purpose and content of legal scholarship, its utility and relevance outside the realm of opinion drafting and brief writing, as well as about the effort needed to

use it. Once a rule is applied that every piece of legal scholarship must be useful in deciding or litigating a case, it is dangerously easy upon finding some scholarship not easily applied to that purpose to circle back to the conclusion that scholarship is valueless to the legal system.[77]

* * *

Finally, we note that Chief Justice Roberts, whose criticisms of legal scholarship helped to inspire this project, uses legal scholarship in about a quarter (23.08%) of the opinions he authors. That rate does not differ significantly from the rates of the other current Justices.[78] Table 6 shows the observed rate of use of legal scholarship by the current members of the Court. Table 7 shows the observed rate of use of legal scholarship by the Chief Justices between 1949 and 2010.

TABLE 6: USE OF LEGAL SCHOLARSHIP BY THE CURRENT SUPREME COURT: THROUGH 2010[79]

Justice	Not Using	Using	% Using
J. Ginsburg	100	41	29.08%
J. Alito	24	9	27.27%
J. Scalia	175	60	25.53%
J. Kennedy	161	52	24.41%
C.J. Roberts	30	9	23.08%
J. Breyer	107	26	19.55%
J. Thomas	136	16	10.53%

[77] The discussion also demonstrates another point about this study and the analysis of courts' use of scholarship generally. We have reason to know that, for part of the period studied, the number of law reviews increased. *See* Schwartz & Petherbridge, *supra* note 7, app. (including a variable for number of law reviews collected for each year). We believe that fact means that as time went on, Justices had more articles to select from. But, assuming we are correct, we do not think (except if some extreme, and presently unknown, facts were to be discovered) that fact much matters to the debate over the utility of legal scholarship to the bench and bar. The total amount of scholarship available is mostly irrelevant, and therefore mostly unhelpful, to the analysis—especially when it is used merely to inflate the denominator in an effort to contrast the amount the bench and bar use with the amount they do not. In fact, the only way the increased denominator could be said to reduce the utility of scholarship would be if, as a result of its existence, the bench and bar could not find the scholarship they desired to use. Given the Internet, blogging, and legal databases such as Lexis, Westlaw, and HeinOnline, and accepting that information technology has made searching ever easier, it is a struggle to believe that judges and lawyers cannot locate the scholarship they need to find.

[78] Without including Chief Justice Roberts, the average usage rate for the Justices of the current Court is 22.49%. The adjusted residual for Chief Justice Roberts's is .086, evidence that his use of scholarship does not depart from what independence predicts for the data in Table 6.

[79] The data in Table 6 have been updated through June 29, 2010, and so extend about a year beyond the data used in the rest of this Article's analysis. Justices Sotomayor and Kagan are not included because neither authored a substantial number of opinions—eight and zero, respectively—during the period studied.

TABLE 7: USE OF LEGAL SCHOLARSHIP BY CHIEF JUSTICES OF THE SUPREME COURT: 1949–2010[80]

Chief Justice	Not Using	Using	% Using
C.J. Vinson	36	7	16.28%
C.J. Warren	123	47	27.65%
C.J. Burger	187	71	27.52%
C.J. Rehnquist	393	63	13.82%
C.J. Roberts	30	9	23.08%

III. FUTURE DIRECTIONS

The work presented in this Article suggests a number of avenues for future work. Below, we offer several suggestions that we think should be fruitful in helping to understand the relationship between legal scholarship, the bench, the bar, and perhaps even policymakers.

One of the major contributions of this work is that it provides evidence about how the Supreme Court uses scholarship. But it has not accounted for all measures of how scholarship is used, and future work should employ other measures of how scholarship is used. For example, this work identifies relationships that predict the use of scholarship and in so doing advances some possibilities about what the Court takes from scholarship when it uses it.[81] Future work could focus on what, exactly, the Court uses when it reaches to legal scholarship. It should ask: When the Court uses scholarship, what aspects of the scholarship does it take (and in what proportions)? Such work would be useful to, among others, scholars who want to tailor their research and writing agendas to the Court specifically, or, perhaps, to courts more generally.

Another area for future work is similar, except that it focuses somewhat more intently on scholarship. In particular, what type of scholarship is most useful to the Court? A frequent criticism of legal scholarship focuses on abstract and theoretical scholarship, as well as the "law and" types of scholarship.[82] Future research is warranted into whether these types of articles are, in fact, infrequently used by the Court, and whether other types, such as doctrinal or empirical articles, are used more

[80] Table 7 shows the number of decisions using legal scholarship categorized by identity of the Chief Justice from 1949–2010. The data have been updated through June 29, 2010, and so extend about a year beyond the data used in the rest of this Article's analysis, as indicated *supra* note 79. The relatively fewer number of decisions authored by Chief Justice Vinson can be attributed to the fact that his tenure began earlier than the time period studied (and ended soon after, in 1953). The relatively fewer number of decisions authored by Chief Justice Roberts can be attributed to the fact that his tenure began with the 2005 Term, which means that he has thus far been in office for less than half as long as the tenures of Chief Justices Warren, Burger, or Rehnquist.

[81] *See supra* Part II.C.

[82] *See* Edwards, *supra* note 4, at 34–35.

frequently. With a sufficiently disciplined coding scheme, the articles used by the Court can be classified and systematically analyzed.

Still other future work could use the relationships this Article identifies as instruments to probe more deeply into the Court's decisionmaking process. For example, we report that the Court uses legal scholarship more often when there are more minority votes attending a decision.[83] Why does that happen? Are there patterns in the use of scholarship in opinions for the Court and in dissents that reveal relationships between Justices and issues, and between Justices and other Justices? The relationships we observe might be used as tools to see other relationships, such as between Justices and factors outside of the Court, including: institutional experiences, background, relationships to scholars, or education. Similarly, we observe that scholarship is used more often in decisions that declare laws unconstitutional.[84] Beyond being evidence that the Court uses scholarship, the knowledge that scholarship is used more often in connection with declarations of unconstitutionality might provide a useful tool to begin to understand other relationships that impact the Court's decisionmaking process.

A related area of future work involves how the Court discovers the scholarship that it uses. It could come from any number of places, e.g., party briefing, amici, clerks in the course of research, symposia the Justices recently attended, library circulation, personal contacts (such as law professors or former clerks), independent research on the part of the Justice, and so on. Understanding how the Court locates scholarship (and the proportional contribution of different sources) is, again, useful to scholars who want to tailor their research and writing agendas. But it is also useful in a much more important way: It begins to shed light on how things from outside the judicial process—such as the events of the day, publicly known information, and trends in popular thinking—silently enter the judicial decisionmaking process.

CONCLUSION

This Article provides the results of an empirical study using an unprecedented body of data about the Supreme Court's use of legal scholarship in decisions. It reports several surprising results and makes two major contributions. The first contribution concerns evidence describing the amount and patterns of the Court's use of legal scholarship over the last sixty-one years. The second, and perhaps most striking, contribution of this Article is evidence on the nature and quality of the Court's use of scholarship.

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[83] *See supra* Part II.B.1.

[84] *See supra* Part II.B.4.

This Article provides the first empirical analysis, as far as we can determine, of evidence that the Supreme Court not only often uses legal scholarship, but it also disproportionately uses scholarship when cases are either more important or more difficult to decide.

APPENDIX 1

VARIABLES USED IN THE STUDY

Variable	**Type**	**Brief Description**	**Source**
bincite	binary	indicates whether decision cites any legal scholarship	coded for study
numcites	interval	counts number of citations in a decision	coded for study
minvotes	interval	counts number of minority votes in a decision	Spaeth coded
altersprec	binary	indicates whether a decision evinces the altering of precedent	Spaeth coded (precedentalteration)
junedec	binary	indicates a decision issued in the month of June	calcuated from Spaeth-coded dates of issue
decluncl	binary	indicates a decision that declares unconstitutional an act of Congress or state or local law	Spaeth coded (declarationuncon)
lctdissent	binary	indicates whether decision evinces that lower court judgment contains a dissent	Spaeth coded (lcdisagreement)
partywinning	binary	indicates whether petitioner wins	Spaeth coded (partywinning)
lcdispdir	binary	indicates whether lower court disposition was "liberal"	Spaeth coded (lcdispositiondirection)
decdir	binary	indicates whether Court decision was "liberal"	Spaeth coded (decisiondirection)
issue indicator	category	indicates the issues involved in the decision	Spaeth coded (issuearea)
law indicator	category	indicates legal provisions considered by the Court	Spaeth coded (lawtype)
term indicator	category	indicates Term of a decision	Spaeth coded (term)
majopinwriter	category	indicates author of majority opinion	Spaeth coded (majopinwriter)

APPENDIX 2

KAPPA VALUES AND INTERCODER RELIABILITY

Coders (Terms) and Variables Coded	kappa (k)
PC cf. MR (341–350)	
bincite	.9916
numcites	.9034
MR cf. LF (351–360)	
bincite	.9566
numcites	.9154
LF cf. LL (381–400)	
bincite	.9941
numcites	.8909
LL cf. PC (441–450)	
bincite	.9806
numcites	.8683
AJ cf. LL (450–459)	
bincite	1.000
numcites	.9024
LP cf. GS (491–493)	
bincite	.9417
numcites	.9094
LP cf. LL (491–493)	
bincite	.9707
numcites	.8631

APPENDIX 3

DECISIONAL CHARACTERISTICS THAT PREDICT THE USE OF LEGAL SCHOLARSHIP BY THE SUPREME COURT: 1949–2009[85]

Explanatory Variable (bincite)	**Model 1**	**Model 2**	**Model 3**
1minvote	1.529*** (.129)	1.568*** (.142)	1.735*** (.164)
2minvotes	1.790*** (.137)	1.745*** (.142)	2.044*** (.174)
3minvotes	2.401*** (.171)	2.236*** (.171)	2.631*** (.212)
4minvotes	2.737*** (.206)	2.807*** (.231)	3.248*** (.282)
altersprec	3.351*** (.607)	2.817*** (.526)	2.771*** (.536)
junedec	1.365*** (.074)	1.289*** (.076)	1.227*** (.075)
decluncl	1.760*** (.173)	1.466*** (.159)	1.421** (.160)
lctdissent	1.383*** (.084)	1.226*** (.079)	1.213** (.081)
partywinning	0.971 (.052)	0.965 (.055)	0.910 (.054)
lcdispdir	1.365*** (.071)	1.265*** (.071)	1.080 (.065)

[85] This Table reports a logistic regression model that predicts *bincite*—a variable that is positive when a reported decision of the Supreme Court uses legal scholarship. The explanatory variables include: *#minvotes*—a variable that represents the number of minority votes in a reported decision, e.g., *2minvotes* means that two Justices dissented from the merits of an opinion for the Court; *altersprec*—a binary variable that is positive when a reported decision evinces the overruling of the Court's own precedent; *junedec*—a binary variable that is positive when a reported decision issues in the month of June; *decluncl*—a binary variable that is positive when a reported decision declares unconstitutional an act of Congress, state law, or local ordinance; *lctdissent*—a binary variable that is positive when the lower court decision reviewed by the Supreme Court contains a dissent; *partywinning*—a binary variable that is positive if the decision was favorable to the petitioner; *lcdispdir*—a binary variable that is positive if the direction of the lower court disposition was "liberal"; *decdir*—a binary variable that is positive if the direction of the Supreme Court's decision was "liberal." Indicator variables were used to fix time effects (*term indicator*), issue-area effects (*issue indicator*), law-type effects (*law indicator*), and, therefore, to some extent, variation in the amount of scholarship directed to certain issues. The values reported are odds ratios and (standard errors). Significance is indicated by normal conventions, viz., (†), $p \leq .1$; (*), $p \leq .05$; (**), $p \leq .01$; and (***), $p \leq .001$.

decdir	1.047 (.056)	1.028 (.060)	1.102 (.068)
term indicator			X
issue indicator		X	X
law indicator		X	X
constant	-1.60*** (.070)	-1.58*** (.115)	-2.30*** (.293)
df	11	28	88
R^2	.089	.091	.177
#obs	7730	6529	6529