

From the Ivory Tower to the Judicial Trenches: Are We Bridging the Divide?

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Brian T. Detweiler, [May It Please the Court: A Longitudinal Study of Judicial Citation to Academic Legal Periodicals](#), 39 **Legal Ref. Servs. Q.** 87 (2020).

Most in legal academia would consider citation of their law review article in a judicial opinion an honor. However, most probably also remember Chief Justice Roberts' 2011 [comment](#) that an article about "the influence of Immanuel Kant on evidentiary approaches in Eighteenth Century Bulgaria or something...isn't of much help to the bar." The Chief Justice's comment may leave you wondering how often judicial opinions have cited law review articles and what factors might make your article into a rare unicorn. Mr. Detweiler answers these questions and more in *May It Please the Court: A Longitudinal Study of Judicial Citation to Academic Legal Periodicals*.

Mr. Detweiler has compiled a list of state and federal court citations to legal academic journals from 1945-2018 and mapped them as a proportion of all reported opinions and by total number annually. He tracks the ebb and flow of citations through the years and makes interesting observations about what may influence increases and decreases in citation frequency. But he doesn't stop there. His research then compares citation frequency from 1970-2018 of articles in *Harvard Law Review* and *Yale Law Journal* with flagship journals from sample schools in each tier of the U.S. News rankings. The article also includes a scan of the history of academic law journals, the first citations of journals, and the explosive growth of journals starting in the 1970s.

The article begins with a brief history of student-edited law reviews and their relatively slow acceptance by the judiciary. Mr. Detweiler notes Chief Justice Taft's complaint about his colleagues "'undignified' use of law review material in their dissents." But change was already underway. The next Chief Justice, Chief Justice Hughes, labeled law reviews as the "fourth estate of the law." Mr. Detweiler then moves on to examine all citations of academic law journals from 1945-2018 in reported state and federal cases. Graphs included in the article illustrate changes over time. The percentage of cases citing law reviews shows a rise from 1.8% in 1945 to almost 5% in the mid-1960s/1970s with a dip mid-decade of about 0.5%. Mr. Detweiler notes that the peak of 4.9% is a 172% increase in citing cases over the rate in 1945. After the peak in the mid-1970s, the percentage of opinions citing articles declines over the next two decades. Since the mid-1990s, the percentage has leveled out some, fluctuating between 1.5% and nearly 2%, reaching 1.8% in 2018. A similar graph models the growth in absolute numbers of opinions citing law review articles with a similar increase and then decline. Mr. Detweiler attributes a portion of the percentage decrease in the early 1980s to the number of reported opinions increasing more quickly than the number of citing cases.

Mr. Detweiler posits several possible causes for the decrease in the percentage of cases citing law reviews from its heyday in the mid-1960s/1970s to its current level. Two of the most compelling are technological advances and changes in the content of academic legal scholarship. Both Lexis and Westlaw launched in the mid-1970s leading to easier access to case law, which was also growing in breadth. Academic law reviews were incorporated more slowly into the legal research systems and didn't have more expansive coverage until the mid-1990s. Judges and their clerks could easily access case law (especially binding precedent) directly instead of relying on scholarly works.

Mr. Detweiler also highlights a shift, beginning in the 1970s, at higher-ranked law schools away from more traditionally doctrinal scholarship toward interdisciplinary work and new areas of scholarship that were not as directly applicable to

the everyday work of attorneys and judges. This point becomes important when we view differences in citation rates between flagship law journals at higher-ranked and lower-ranked law schools.

Part II of the article examines how the percentage of citations varies from elite law schools (represented by Harvard and Yale), top 14 schools, Tier I, Tier II, Tier III, and Tier IV schools. (Mr. Detweiler explains the selection of the exemplar schools in the methodology.) The data shows, unsurprisingly, a strong prestige factor in the law journals cited in cases. *Harvard Law Review* was the clear leader with a significantly higher percentage of citations than the next highest, *Yale Law Journal*. Although the prestige factor is still apparent, the rate of opinions that cited *Harvard Law Review* or *Yale Law Journal* has steadily declined from about 34% in 1970 to approximately 14% in 2018. Similarly, the percentage of opinions citing top 14 law schools fell from 1970 to 2018. During the same period, the percentage of opinions citing Tier 1 law journals stayed relatively stable. The rates of opinions citing Tier II and Tier III schools had more extreme variations from year to year, but the trend has been a gradual increase. Similarly, opinions citing Tier IV flagship law journals have seen a gradual increase over time while still the smallest percentage. The elite advantage is still present but is not as great as it once was.

Why has the gap narrowed? Mr. Detweiler points to some of the same factors highlighted in the decline of the percentage of reported opinions citing academic law journals. One of these is the rise of computer-assisted legal research (CALR) and the ease with which researchers can search and retrieve articles from a pantheon of academic law journals, not just the elite journals. A related point is the explosion in the number of academic law journals. Mr. Detweiler points out that 132 journals were indexed by the Current Index to Legal Periodicals in 1970, but today Lexis and Westlaw have approximately 1000 titles in their law journal databases. He hypothesizes that the increase in the number of journals is diluting the percentage of citing cases that any one journal is capturing.

While discussing judicial citation of academic legal journals, Mr. Detweiler contextualizes changes in citation patterns within changes in the legal academy and the court system. He explains in detail his well-reasoned methodology for each stage of his research, including documenting Lexis search strings longer than most of us have ever contemplated. His article is an interesting foray into academic legal scholarship and its influence, or lack of influence, over judicial precedent.

Author's Note: Mr. Detweiler provides supplemental tables along with the article. Available tables are 1) [Citations to all law reviews](#) ; 2) [Top 14 Law Reviews](#); 3) [Citations to Tier I and Tier II law reviews](#); and 4) [Citations to Tier III and Tier IV law reviews](#).

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