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PUB. L. MISC.

*and*

THE JOURNAL OF LEGAL METRICS



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# THE JOURNAL OF LAW

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# THE JOURNAL OF LAW

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Greg Abbott to Kay Bailey Hutchison & John Cornyn, Jan. 5, 2010, 1 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 PUB. L. MISC.) 51 (2011).

Bruce Ackerman, *Beyond Presentism*, 1 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 L. & COMMENT.) 185 (2011).

Alex B. Mitchell & Brian Rock, *2011 Draft Kit: A FantasyLaw Guide*, 1 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (3 CONG. REC., FL ED.) 201 (2011).

Robert C. Berring, *The Great Books: An Introduction to Chapter One*, 1 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 CH. ONE) 315 (2011).

Lawrence B. Solum, *Legal Theory Lexicon: Legal Theory, Jurisprudence, and the Philosophy of Law*, Legal Theory Blog, Apr. 24, 2011, 1 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 THE POST) 417 (2011).

Andrew Weber, *Tops in THOMAS*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 53 (2012).

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## CITE CLUB

Ross E. Davies<sup>†</sup>

This issue of the *Journal of Law* has big news about the journal itself: It is now available on Westlaw. If there is a leading indicator of viability for a new legal periodical, it is availability on a leading online legal research service. After all, lawyers and students who do legal research are doing more and more of it online. So we are happy. One adjustment was necessary, though, to get onto Westlaw: We had to swallow a change to the abbreviation of the journal's name. For citation purposes, the *Journal of Law* is no longer the short and sporty "J.L." From now on it will be "J.L.: Periodical Laboratory of Leg. Scholarship." That adjustment prompted the thought that it might be time for a change in the *Bluebook* as well. It might be time for the *Bluebook* to start formally deferring to Westlaw on the selection of journal abbreviations. This idea is not as odd as it might seem, because in the past the *Bluebook* has had similar policies in similar contexts.

The idea begins with the establishment of the *Journal of Law*. We tried to keep things simple and easy by following the *Bluebook*'s instructions about how we ought to refer to ourselves:

If the periodical you wish to cite does not appear in this list [that is, the *Bluebook*'s 24-page list of periodical abbreviations], structure the abbreviation by looking up each word of the title in this table [that is, table T13] . . .

We looked to table T13, which abbreviates "Journal" to "J." and "Law" to "L." Thus, the *Journal of Law* was "J.L." in *Bluebook* form – an abbreviation that seemed to be available because the *Bluebook* had not assigned it to any other journal – and so that is what we included in our recommended citation form.<sup>1</sup>

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<sup>†</sup> Professor of law, George Mason University; editor-in-chief, the *Green Bag*.

<sup>1</sup> THE BLUEBOOK 444, 454, 456 (19th ed., 1st prtg. 2010) (hereafter "THE BLUEBOOK").

But it was not that simple or easy. “J.L.” already was, and is, Westlaw’s abbreviation for *Jurisprudence logement*.<sup>2</sup> Having two publications with the same abbreviation is unacceptable in databases that are searchable by cite, as many of Westlaw’s (and its competitors’) are. The helpful people at Westlaw fixed the problem by combining “J.L.” with the descriptive phrase that follows “Journal of Law” on the cover of the publication to create a new abbreviation for us: “J.L.: Periodical Laboratory of Leg. Scholarship.” It is not as aesthetically pleasing as the old one, but it has the overwhelming benefit of being both acceptable to and searchable in Westlaw.

Now the question is: When the next edition of the *Bluebook* comes out (or when the online version is updated) will the editors use our Westlaw abbreviation, or go with our original “J.L.,” or opt for something else? The Green Bag, Inc., the publisher of the *Journal of Law*, has been down this road before with another law journal, the *Green Bag*, *Second Series: An Entertaining Journal of Law* (the *Green Bag*, for short). Since its launch in 1997, the *Green Bag* has recommended that it be cited as “Green Bag 2d,”<sup>3</sup> and Westlaw did so when it put the *Green Bag* online.<sup>4</sup> The editors of the *Bluebook* did not – they opted for “Green Bag” without the “2d” and continue to do so now.<sup>5</sup> The result of that inconsistency may be a reflection, on a very small scale, of the state of things in modern law journal publishing.

Basically, the form adopted by Westlaw has prevailed, even among the editors of the *Bluebook*. The journals that compile the *Bluebook* – the *Columbia Law Review*, the *Harvard Law Review*, the *University of Pennsylvania Law Review*, and the *Yale Law Journal* – usually cite the *Green Bag* in their own pages as “Green Bag 2d.” They do rarely follow *Bluebook* form, though only in student-written pieces. All four journals consistently cite the original, first series of the *Green Bag* (a name

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19TH”); see, e.g., *Recommended citation form*, 1 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP no. 1 at iii (2011).

<sup>2</sup> “Example: [1993] J.L. 301.” Try it. Go to the “Find by citation” field on the Westlaw Classic homepage, and enter any numeral followed by “J.L.” followed by any numeral.

<sup>3</sup> See, e.g., *Dealing with Authority*, 1 GREEN BAG 2D no. 1 at ii (Autumn 1997).

<sup>4</sup> LexisNexis did the same when it took on the *Green Bag* shortly thereafter.

<sup>5</sup> THE BLUEBOOK 19TH at 452; [www.legalbluebook.com/T-13-GH](http://www.legalbluebook.com/T-13-GH) (same); see also Ira Brad Matetsky, *GB Meets BB*, 8 GREEN BAG 2D 341 (2005).

which was followed by a variety of descriptive phrases during its life in print, starting with “A Useless but Entertaining Magazine for Lawyers” in 1889 and ending with “An Entertaining Magazine of the Law” in 1914) as “Green Bag.”<sup>6</sup> All of which suggests that they know the difference between the first and second series of the *Green Bag*, know the value of having different abbreviations for citations to different journals, and usually have the good sense to act on that knowledge.<sup>7</sup>

Their behavior strikes me as quite sensible. I suspect that they, like the rest of us, routinely turn nowadays to fairly reliable online sources such as Westlaw for answers to legal questions, including technical ones about citation forms. Yet they, like us, are also drawn by training and habit (and a proper respect for an often-useful tool) to look to the *Bluebook* as well, even when it doesn’t make sense. Indeed, every once in a while I receive an email about this from a perplexed law review editor. The exchange goes roughly like this:

*Law review editor:* We have run into a conflict in citation forms for your journal. The *Bluebook* says “Green Bag” but it is often cited as “Green Bag 2d.” Why is that and what do you recommend?

*Green Bag editor:* Thanks for asking. I do not know. We share the *Bluebook*’s preference for the form that will “allow the reader to efficiently locate the cited source.”<sup>8</sup> We think “Green Bag 2d” does that, but you should use your own best judgment.

*Law review editor:* [after a pause of an hour or a day or a month] OK thanks. We’re going to go with “Green Bag 2d.”

As the *Bluebook* says of itself,

For generations . . . legal professionals have relied on *The Bluebook*’s unique system of citation. In a diverse and rapidly changing legal profession, *The Bluebook* continues to provide a systematic method by which members of the profession communicate

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<sup>6</sup> Westlaw does not currently carry the first series of the *Green Bag*, but you can safely bet your last dollar that when they do, they will use an abbreviation other than “Green Bag 2d.”

<sup>7</sup> Other prominent citers of law journals appear to think the same way. Compare, e.g., *Golan v. Holder*, 132 S.Ct. 873, 888 (2012), with *U.S. v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 545-46 n.23 (1944).

<sup>8</sup> THE BLUEBOOK 19TH at 1.

important information about the sources and authorities upon which they rely in their work.<sup>9</sup>

Generally speaking this is true and probably always will be, so long as the *Bluebook* keeps pace with that changing profession. One big change is the technical side of online research services: Westlaw and its competitors cannot afford to conform to the *Bluebook*'s system when it conflicts with the requirements of their databases for, among things, unique and recognizable abbreviations of the names of publications. And given a choice between following *Bluebook* form and following Westlaw form, readers and publishers are likely to follow Westlaw because that is where readers are doing more of their reading and publishers' products are getting read. The microcosmic experiences of the *Green Bag* and the *Journal of Law* may be a sign of things to come, or even of something that has already arrived.

For generations, *Bluebook* editors have shown an admirable commitment to providing a useful system of citation without regard to base territorial imperatives. For example, in 1926 the 1st edition directed users to "Volume 1 of BOUVIER, LAW DICTIONARY [for] a comprehensive list of abbreviations," while the most recent (19th) edition contains a formidably long list of "Jurisdiction-Specific Citation Rules and Style Guides," some of which require use of guides other than the *Bluebook*. But the best precedents for the idea that the *Bluebook* both should and can adopt Westlaw's abbreviations as its own date from mid-century, before the law review explosion and the *Bluebook*'s development of its own expansive abbreviation expertise in that area. In the 9th edition (1955), users were told, "[f]or abbreviations [of periodicals] not listed, follow the form used in the . . . *Index to Legal Periodicals*," and in the 10th (1959), "abbreviations prescribed herein conform to those used by the *Index to Legal Periodicals* in general."<sup>10</sup> There is more. All of it points in the same direction: When *Bluebook* editors identify a vehicle for enhancing the usefulness of their system of citation, they ride it. For abbreviations of journals that appear on Westlaw, the time may have come for the *Bluebook* to go West.

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<sup>9</sup> *Id.*

<sup>10</sup> THE BLUEBOOK 1 (1st ed. 1926); THE BLUEBOOK 19TH at 30; THE BLUEBOOK 61 (9th ed. 1955); THE BLUEBOOK 47 (10th ed. 1959); see also, e.g., THE BLUEBOOK ii (11th ed. 1967).



The day of the controversialist is happily coming to an end, and of the writer who twists the facts of science to suit a world of his own making, or of that of a group with which he is associated. Theory can now be labelled theory, and fact, fact.

Winston Churchill

*An Essay on the American Contribution  
and the Democratic Idea (1918)*

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# MICRO-SYMPOSIUM

ON ORIN KERR'S  
"A THEORY OF LAW"  
PART 2

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INTRODUCTION TO  
PART 2  
OF THE MICRO-SYMPOSIUM ON

ORIN KERR'S  
"A THEORY OF LAW"

The Winter 2013 issue of the *Green Bag* includes that journal's first micro-symposium, the subject of which is Professor Orin Kerr's article, "A Theory of Law."<sup>1</sup> Unfortunately, the *Green Bag* is a small magazine. It lacks the space to publish more than a small (but representative) fraction of the excellent papers it received in response to the call for papers for the micro-symposium.

The *Journal of Law* has a bit (but only a bit) more flexibility when it comes to page counts and word counts. And so the next few pages of this issue are filled with several more excellent comments on "A Theory of Law" (although still nowhere near all the comments that deserve to be in print).

For more information about the micro-symposium, please read the "Micro-Symposium" section that begins on page 213 of the Winter 2013 *Green Bag*.

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<sup>1</sup> Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

# A THEORY OF LAW, AMENDED & MENDED

*Laura I Appleman*<sup>†</sup>

Good theories of punishment and crime  
Rely on views mortal and divine.  
This schema of Kerr's  
Dramatically errs  
By forgetting to cite all of mine.<sup>1</sup>

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<sup>†</sup> Associate Professor, Willamette University College of Law. Copyright Laura I Appleman 2012.

<sup>1</sup> See, e.g., Laura I Appleman, *The Great Writ*, 9 GREEN BAG 2D 93 (2005); *The Appellate Lawyer's Lament*, 8 GREEN BAG 2D 210 (2005).

## THE UNEASY CASE FOR A THEORY OF LAW

Shawn Bayern & Jeffrey Kahn<sup>†</sup>

It is often said, though we don't know precisely where, that there is very little new legal scholarship. This applies even to Professor Kerr's apparently novel enterprise.<sup>1</sup>

Still, two pieces do not make a crowded field. We are somewhat concerned that Kerr may overstate his case by referring to "extensive scholarship on the point."<sup>2</sup>

Accordingly, recognizing the dialectic nature of scholarship, it seems only fair that where Kerr's article is cited, this article be cited as contrary authority. This article is quite contrary indeed; some of it is false, and it disagrees even with itself.<sup>3</sup>

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<sup>†</sup> Assistant Professor and Larson Professor, Florida State University College of Law. Copyright © 2012 Shawn Bayern and Jeffrey Kahn.

<sup>1</sup> See Patrick M. McFadden, *Fundamental Principles of American Law*, 85 CALIF. L. REV. 1749 (1997).

<sup>2</sup> Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

<sup>3</sup> But see Shawn Bayern & Jeffrey Kahn, *The Uneasy Case for a Theory of Law*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 490 (2012).

# SUPPORTING THE INSUPPORTABLE

## AN INTELLECTUAL HISTORY

*Adam D. Chandler*<sup>†</sup>

Professor Kerr's theory of law, both elegant and audacious, is not written on a blank slate. An earlier citation-fraud scheme debuted in April 1934, when the *Harvard Law Review* ran a back-page ad headlined "Have You Ever Had To Support an Insupportable Proposition?" For "a small sum," the editors would "arrange for the filing in the Harvard Law School library of an 'unpublished thesis' supporting your proposition." Dubious papers on federal jurisdiction were their specialty, as they are for most law students. The price for attaching Professor Frankfurter's name? Available upon request.

And that's precisely how Professor Kerr's theory breaks new ground. It, too, carries the imprimatur of an esteemed scholar – in published form, no less – but it does so at no cost to those who would cite it. Professor Kerr is not in this for the money (only the citations).

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<sup>†</sup> Attorney, U.S. Department of Justice.

## AN ALTERNATIVE CITATION POLICY

*Robert D. Cheren*<sup>†</sup>

Professor Kerr lamented the “common practice among law review editors to demand that authors support every claim with a citation.”<sup>1</sup> But the editors of the *Case Western Reserve Law Review* had already reformulated the journal’s policies to better identify when a citation is required. Rather than demanding authors “support every claim,” we require a citation for every reference.<sup>2</sup> A reference is an assertion of the contents of a document or a statistic. The citation guides the reader to the document or the statistic. Authors may make whatever claims they desire with however so much support as they choose. The rule is simple to administer and – better yet – omitted citations to references can be produced by 2Ls without taxing authors.<sup>3</sup>

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<sup>†</sup> Publisher, Volume 63, *Case Western Reserve Law Review*.

<sup>1</sup> Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> This and every sentence except for the text accompanying notes 1 and 2 have no references and therefore require no citations.

A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

# THE INFINITE CITATION

*Miriam A. Cherry & Anders Walker*<sup>†</sup>

**A**s rain turns to sun  
*Supra*<sup>1</sup> transforms to *infra*<sup>2</sup>  
Editors approve

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<sup>†</sup> Professors of law, Saint Louis University School of Law.

<sup>1</sup> See note 2, *infra*.

<sup>2</sup> See note 1, *supra*.

## THE SERIOUS POINT

*Paul Gowder*<sup>†</sup>

In other disciplines, editors don't demand a footnote for every single factual assertion.

Articles in peer-reviewed journals still have citations because their authors want to be believed, and being believed means substantiating controversial claims. Authors and their intended readers, being experts, know which claims are controversial.

Law reviews are (theoretically) written for a non-specialist audience. But not every article is written for judges and lawyers: when I write a jurisprudence article, only handful of professors in law and philosophy might care. They can tell if I just make things up.

Moreover, there is no *authority* in philosophy, social science, and other non-law disciplines: nobody's words can be cited to definitively establish a claim as true. By contrast, doctrinal areas have authority in that sense (statutes, supreme court rulings, etc.).

Law review editors should demand citations for every claim in doctrinal articles. They should let the author decide in theory articles.

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<sup>†</sup> Associate Professor, University of Iowa College of Law. Copyright © 2012 Paul Gowder.

## A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

# A CONTRARY VIEW

Robert A. James<sup>†</sup>

Professor Kerr's *A Theory of Law* might be criticized as filling a much-needed gap. But the "obsession of the legal community with documenting even the most obvious fact"<sup>1</sup> amply justifies a highfalutin title that can backstop a proposition for which no more specific citation has been found.

Sometimes the converse is true. Authors are frequently compelled to cite a famous and indispensable authority that they vaguely believe is wrong or obnoxious. The busy or lazy writer may wish to cast pale doubt on the authority without bothering to develop the full-blown scholarly apparatus of critique. This article is offered to that end, full in expectation that its citations will forever follow the signal *But see*.

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<sup>†</sup> Partner, Pillsbury Winthrop Shaw Pittman LLP.

<sup>1</sup> Davison M. Douglas, *Attenuated Subtleties Revisited*, 1 GREEN BAG 2D 375, 375 (1998). *But see* Robert A. James, *A Contrary View*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 495 (2012).

## A NON-IDEAL THEORY OF LAW

*Jacob T. Levy*<sup>†</sup>

**T**he Folk Theorem shows that essentially any outcome of a repeated game can be shown to be an equilibrium. The theorem of the second-best shows that, if one variable in an optimization is held at the non-optimal level, the overall optimum is not necessarily approached as the other variable approaches its optimal level. It follows that essentially anything, no matter how counterintuitive, can be justified as a "second-best" outcome.

Orin Kerr's important article supports claims such that, as he puts it, "it is plainly true that the author's claim is correct."<sup>1</sup> Some claims are too counterintuitive for "plainly true" to suffice. If you have been directed to this page by a citation elsewhere, it is *surprisingly* true that the author's conclusion is correct as a matter of the best-attainable second-best.

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<sup>†</sup> Tomlinson Professor of Political Theory, McGill University.

<sup>1</sup> Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

## THE COGNITIVE-CITATION APP<sup>TM</sup>

*Orly Lobel<sup>†</sup>*

Kerr's innovative proposal to establish a one-stop citation for all references is groundbreaking but incomplete. Kerr overlooks a little-known yet invaluable goal of law review citations: the detection of unsupported theories. To this end, I offer a far more advanced mechanism than the Kerr One-Cite System. Bringing legal citation to the 21st century and applying the latest in neuro-tech,<sup>1</sup> the Cognitive-Citation App<sup>TM</sup> (CCA) will allow legal scholars to place a mobile device near the frontal lobe and to thereby digitally confirm (CCA code automatically generates) that the scholar has direct knowledge that the claims made in their article are supported. Claims may be obvious, obscure, or false, but they cannot be unsupported.

The app will also include the Headache Function<sup>TM</sup> allowing legal scholars to provide law review editors support for "major headaches" which Kerr, unsupportedly, claims to occur when demands for citations are made.

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<sup>†</sup> University Professor and Professor of Law, University of San Diego.

<sup>1</sup> See CCA-OL-1.

## A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

# PRACTICAL LEGAL THEORY

*Theodore P. "Jack" Metzler*

In his ground-breaking article, "A Theory of Law," Professor Kerr demonstrates that law review editors often require support in the form of a citation for every claim made in an article.<sup>1</sup> Kerr's contribution in this regard cannot be overstated,<sup>2</sup> but it is also true that repeated citations to a single work of legal scholarship, no matter how important, might make an author's own work appear to be needlessly derivative.<sup>3</sup> Moreover, some claims may appear weaker when supported by a single source.<sup>4</sup> Accordingly, like Kerr, "I offer this page, with the following conclusion: If you have been directed to this page by a citation elsewhere, it is plainly true that the author's claim is correct. For further support, consult the extensive scholarship on the point."<sup>5</sup>

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<sup>1</sup> Orin S. Kerr, A Theory of Law, 16 GREEN BAG 2D 111 (2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; Theodore P. "Jack" Metzler, *Practical Legal Theory*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 498 (2012).

# A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

## ENDING THE WAR

### WHY EDITORS CANNOT QUESTION CITATIONS TO "A THEORY OF LAW"

*Ronak Patel*

Reflecting a war as old as legal scholarship, *A Theory of Law* assumes that unnecessary citation demands derive from editors.<sup>1</sup> But it is tradition that requires this rule; personally, we editors loathe it.<sup>2</sup> Thus, we support Kerr, but need an article justifying its use from our perspective.

But a professor cannot write it, as editors may not trust them on this topic. Instead, a current editor loyal to our community should author it.<sup>3</sup> Scholars can use it to bolster a Kerr citation, and defuse editors' concerns.<sup>4</sup>

Let's end this war.

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<sup>1</sup> Orin Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012); see also Ronak Patel, *Ending The War: Why Editors Cannot Question Citations to "A Theory of Law"*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 499 (2012) (validating Kerr's assertions).

<sup>2</sup> *Id.*

<sup>3</sup> Patel is the *McGeorge Law Review's* Chief Articles Editor.

<sup>4</sup> For an example, see Patel, *supra* note 1, at n.1.

## A PLAUSIBLE BUT NOT DECISIVE OBJECTION

Jeffrey A. Pojanowski<sup>†</sup>

**A** *Theory of Law* is an invaluable – one might say preemptive – contribution that will play a crucial role in a wide array of scholarly inquiry. Prof. Kerr's project nevertheless neglects an important gap in the legal literature, namely the citational completist's impulse to denote disagreement with a proffered proposition, even though discussion of said dissent will be limited to parenthetical summation.

The ideal candidate for this "*but see*" citation is an article by a scholar who is (a) not so formidable in stature so as to cast doubt on the citing author's claim, while (b) not being an obviously fringe figure. A junior professor at a respectable institution fits such a bill;<sup>1</sup> he is even likely to value the marginal appreciation in his citation count.<sup>2</sup>

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<sup>†</sup> Associate Professor of Law, Notre Dame Law School. Copyright © 2012 Jeffrey Pojanowski.

<sup>1</sup> See, e.g., author note, *supra*.

<sup>2</sup> See Jeffrey A. Pojanowski, *A Plausible But Not Decisive Objection*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 500 (2012).

## A COMMENT ON ORIN KERR'S "A THEORY OF LAW"

# ON NARCISSISM

Alexandra J. Roberts<sup>†</sup>

With his recent opus, "A Theory of Law," Orin Kerr endeavors to provide a comprehensive reference for legal scholars. Yet his celebration of self-citation forges a dangerous precedent. While every important thinker cites his own work, his friends' work, and the work of those whose friendship he feigns, Kerr's *see generally* sets legal scholarship afloat on a flume of solipsism.<sup>1</sup> Given the exacting demands of law review editors, such self-citation will soon flank every period and semicolon. From there, a citational maelstrom comprising intra-sentential,<sup>2</sup> fix<sup>3</sup>ational, and p<sup>4</sup>ost-allophonic self-citation will ensue, drowning the professoriate in a sea of *ids*.

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<sup>†</sup> Visiting Assistant Professor at Boston University School of Law.

<sup>1</sup> See DAVID FOSTER WALLACE, CONSIDER THE LOBSTER AND OTHER ESSAYS (2006) 87 n.32 (defining "cannabic solipsism," the adolescent, marijuana-induced "terror that [one's] own inner experience is both private and unverifiable").

<sup>2</sup> See generally Alexandra J. Roberts, *On Narcissism*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 501 (2012).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

## CURSING RECURSION

*Kent Scheidegger*<sup>†</sup>

**R**ecursive subroutine calls are a powerful but dangerous technique in computer programming. Routines regularly call other routines to do various tasks, but a routine can also call itself. If the programmer is not careful, such a recursive call can result in an infinite loop, with the routine calling itself without limit and locking up the computer. Infinite recursion is generally followed by cursing – by the user at the programmer.

After 50 years, more or less, the legal profession has caught up. Professor Orin Kerr has introduced the recursive law review citation.<sup>1</sup> This is a powerful but dangerous technique.<sup>2</sup> Damn him.

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<sup>†</sup> Legal Director, Criminal Justice Legal Foundation. Copyright © 2012 Kent Scheidegger.

<sup>1</sup> See Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

<sup>2</sup> Cf. Kent Scheidegger, *Cursing Recursion*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 502 (2012).



The Panama Canal, 1936.

# PUB. L. MISC.

Volume 2, Number 2, 2012

# PUB. L. MISC.

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*James C. Ho & Trevor W. Morrison, editors*

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# NATURAL BORN PRESIDENTS

*James C. Ho*<sup>†</sup>

**T**he 2012 Presidential campaigns generated more than their fair share of controversies. One particular issue garnered relatively little interest this election cycle, however: Were the two major party candidates for President constitutionally eligible to hold the office?

This stands in stark contrast to four years ago. Remarkably, both major party candidates in 2008 faced persistent questions – and multiple lawsuits – challenging their eligibility to serve as President.

The nature of the challenges differed significantly between the two candidates, however.

For then-Senator Barack Obama, the discussion quickly became fodder for late night comedians and a fixture in our nation’s popular culture. But it turned largely on factual disputes of little interest to the legal academy (not to mention of little merit as well).

By contrast, questions about the eligibility of Senator John McCain implicated genuinely disputed legal issues that scholars have hotly contested for decades.

• • •

**A**rticle II of the Constitution provides that only a “natural born Citizen” shall be eligible to serve as President. But what exactly does that mean?

Must a person actually be born on U.S. soil? Or is any person eligible who was a U.S. citizen at time of birth – whether as a result

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of place of birth, or through the U.S. citizenship of the person's parents? These questions have been debated by constitutional scholars since well before the 2008 election cycle.<sup>1</sup>

Just ask the 2012 Republican candidate for President. His father, former Michigan Governor George Romney, faced questions about his own eligibility when he (unsuccessfully) pursued the Republican nomination for President in 1968. George Romney was born to U.S. citizen parents, and thus entitled to U.S. citizenship at birth – but he was born in Mexico.

Thanks to the 2008 Presidential election cycle, this decades-long debate over the meaning of “natural born Citizen” should now be settled as a practical matter. A major political party nominated an individual for President, and the other major political party accepted that person's constitutional qualifications for the office – even though that person was born outside the United States. As *Pub. L. Misc.* readers well know, constitutional law is not exclusively written by judges. Even “political” precedents can play a significant role in constitutional law.

• • •

But exactly what “precedent” does the McCain nomination establish? This question has generated some confusion.

One might argue, for example, that McCain was eligible for the Presidency based on the traditionally accepted ground that he was in fact born on U.S. soil – namely, on Coco Solo Naval Air Station, a U.S. military installation in the Panama Canal Zone. Others, however, have raised real doubts about this claim, due to ambiguities concerning whether the United States actually exercised sovereignty over the Panama Canal Zone at the time of his birth.<sup>2</sup>

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<sup>1</sup> See, e.g., Isidor Blum, *Is Gov. George Romney Eligible to Be President?*, N.Y.L.J., Oct. 16 & 17, 1967, at 1; Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 Md. L. Rev. 1 (1968); Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty*, 97 Yale L.J. 881 (1988). Indeed, the constitutional debate over McCain's eligibility inspired an entire *Michigan Law Review* symposium devoted to the topic. See *Senator John McCain and Natural Born Citizenship: The Full Symposium*, available at [www.michiganlawreview.org/first-impressions/volume/107](http://www.michiganlawreview.org/first-impressions/volume/107).

<sup>2</sup> See, e.g., *Hollander v. McCain*, 566 F. Supp. 2d 63, 66 (D.N.H. 2008) (noting that “[t]he

So when the United States Senate unanimously approved a resolution deeming Senator McCain eligible for the Presidency, it did not do so because he was born on U.S. soil. Instead, the Senate resolved that McCain was eligible because “previous presidential candidates were *born outside of the United States of America* and were understood to be eligible to be President.”<sup>3</sup> The resolution further pointed out that any other view would be “inconsistent with the purpose and intent of the ‘natural born Citizen’ clause of the Constitution of the United States, as evidenced by the First Congress’s own statute defining the term ‘natural born Citizen’” to cover persons born to U.S. citizens outside U.S. soil.<sup>4</sup>

The Senate resolution came just weeks after the publication of a legal opinion by renowned constitutional scholar Laurence H. Tribe and former U.S. Solicitor General Theodore B. Olson. That letter argued in support of both potential bases for Senator McCain’s eligibility. But it led with McCain’s entitlement to citizenship at birth by virtue of his parents’ citizenship – not place of birth.

To the extent that courts have subsequently weighed in on the issue, they too have sided in favor of the broader conception of Presidential eligibility.<sup>5</sup> But to your humble *Pub. L. Misc.* editors, it is the

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Supreme Court . . . has made contradictory comments in dicta on the status of the Canal Zone” under the Hay-Bunau-Varilla Convention). Mischievously, Congress did not enact legislation conferring citizenship at birth on persons born in the Canal Zone to U.S. citizens until 1937 – a year *after* McCain’s birth. 8 U.S.C. § 1403(a). *See generally* Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, available at [papers.ssrn.com/sol3/papers.cfm?abstract-id=1157621](http://papers.ssrn.com/sol3/papers.cfm?abstract-id=1157621).

<sup>3</sup> S. Res. 511, 110th Cong. (2008), 2 J.L. (2 PUB. L. MISC.) \_\_\_\_ (2012) (emphasis added).

<sup>4</sup> *See* 1 Stat. 103, 104 (1790) (“the children of citizens of the United States that might be born beyond the sea, or out of the limits of the United States, should be considered as natural-born citizens”). It is well established that enactments of the First Congress provide strong context for construing our Constitution. *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983).

<sup>5</sup> *See Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1146 (N.D. Cal. 2008) (finding it “highly probable . . . that Senator McCain is a natural born citizen” due to his birth to at least one U.S. citizen parent, before dismissing case for lack of standing); *Hollander v. McCain*, 566 F. Supp. 2d 63, 66 n.3 (D.N.H. 2008) (noting that “the weight of the commentary falls heavily on the side of eligibility” for persons born outside the U.S. to at least one U.S. citizen parent, before dismissing case for lack of standing); *see also Ankeny v. Governor of Indiana*, 916 N.E.2d 678, 684 n. 10 (Ind. Ct. App. 2009) (noting that “[t]he United States Senate passed a resolution on April 30, 2008, which explicitly recognized Senator John McCain as

non-judicial materials that emerged from Senator McCain's 2008 run for the White House that are more interesting – not to mention less accessible. Accordingly, we are pleased to publish them here – for posterity, and for those who study the Presidency.

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a natural born citizen,” and that “Plaintiffs do not cite to any authority or develop any cogent legal argument for the proposition that a person must actually be born within one of the fifty States in order to qualify as a natural born citizen”).

## PRESIDENTS AND CITIZENSHIP

*Opinion letter by Laurence H. Tribe and Theodore B. Olson*

March 19, 2008

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We have analyzed whether Senator John McCain is eligible for the U.S. Presidency, in light of the requirement under Article II of the U.S. Constitution that only “natural born Citizen[s] . . . shall be eligible to the Office of President.” U.S. Const. art. II, § 1, cl. 5. We conclude that Senator McCain is a “natural born Citizen” by virtue of his birth in 1936 to U.S. citizen parents who were serving their country on a U.S. military base in the Panama Canal Zone. The circumstances of Senator McCain’s birth satisfy the original meaning and intent of the Natural Born Citizen Clause, as confirmed by subsequent legal precedent and historical practice.

The Constitution does not define the meaning of “natural born Citizen.” The U.S. Supreme Court gives meaning to terms that are not expressly defined in the Constitution by looking to the context in which those terms are used; to statutes enacted by the First Congress, *Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983); and to the common law at the time of the Founding. *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898). These sources all confirm that the phrase “natural born” includes both birth abroad to parents who were citizens, and birth within a nation’s territory and allegiance. Thus, regardless of the sovereign status of the Panama Canal Zone at the time of Senator McCain’s birth, he is a “natural born” citizen because he was born to parents who were U.S. citizens.

Congress has recognized in successive federal statutes since the Nation’s Founding that children born abroad to U.S. citizens are themselves U.S. citizens. 8 U.S.C. § 1401(c); *see also* Act of May 24, 1934, Pub. L. No. 73-250, § 1, 48 Stat. 797, 797. Indeed, the statute that the First Congress enacted on this subject not only established that such children are U.S. citizens, but also expressly referred to them as “natural born citizens.” Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 104.

Senator McCain's status as a "natural born" citizen by virtue of his birth to U.S. citizen parents is consistent with British statutes in force when the Constitution was drafted, which undoubtedly informed the Framers' understanding of the Natural Born Citizen Clause. Those statutes provided, for example, that children born abroad to parents who were "natural-born Subjects" were also "natural-born Subjects . . . to all Intents, Constructions and Purposes whatsoever." British Nationality Act, 1730, 4 Geo. 2, c. 21. The Framers substituted the word "citizen" for "subject" to reflect the shift from monarch to democracy, but the Supreme Court has recognized that the two terms are otherwise identical. *See e.g., Hennessy v. Richardson Drug Co.*, 189 U.S. 25, 34-35 (1903). Thus, the First Congress's statutory recognition that persons born abroad to U.S. citizens were "natural born" citizens fully conformed to British tradition, whereby citizenship conferred by statute based on the circumstances of one's *birth* made one *natural born*.

There is a second and independent basis for concluding that Senator McCain is a "natural born" citizen within the meaning of the Constitution. If the Panama Canal Zone was sovereign U.S. territory at the time of Senator McCain's birth, then that fact alone would make him a "natural born" citizen under the well-established principle that "natural born" citizenship includes birth within the territory and allegiance of the United States. *See, e.g., Wong Kim Ark*, 169 U.S. at 655-66. The Fourteenth Amendment expressly enshrines this connection between birthplace and citizenship in the text of the Constitution. U.S. Const. amend. XIV, § 1 ("All persons *born* or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States . . .") (emphases added). Premising "natural born" citizenship on the character of the territory in which one is born is rooted in the common-law understanding that persons born within the British kingdom and under loyalty to the British Crown – including most of the Framers themselves, who were born in the American colonies – were deemed "natural born subjects." *See, e.g.,* 1 William Blackstone, *Commentaries on the Laws of England* 354 (Legal Classics Library 1983) (1765) ("Natural-born subjects are such as are born within the dominions of the crown of

England, that is, within the ligeance, or as it is generally called, the allegiance of the king . . . ).

There is substantial legal support for the proposition that the Panama Canal Zone was indeed sovereign U.S. territory when Senator McCain was born there in 1936. The U.S. Supreme Court has explained that, “[f]rom 1904 to 1979, the United States exercised sovereignty over the Panama Canal and the surrounding 10-mile-wide Panama Canal Zone.” *O’Connor v. United States*, 479 U.S. 27, 28 (1986). Congress and the executive branch similarly suggested that the Canal Zone was subject to the sovereignty of the United States. *See, e.g., The President – Government of the Canal Zone*, 26 Op. Att’y Gen. 113, 116 (1907) (recognizing that the 1904 treaty between the United States and Panama “imposed upon the United States the obligations as well as the powers of a sovereign within the [Canal Zone]”); Panama Canal Act of 1912, Pub. L. No. 62-337, § 1, 37 Stat. 560, 560 (recognizing that “the use, occupancy, or control” of the Canal Zone had been “granted to the United States by the treaty between the United States and the Republic of Panama”). Thus, although Senator McCain was not born within a State, there is a significant body of legal authority indicating that he was nevertheless born within the sovereign territory of the United States.

Historical practice confirms that birth on soil that is under the sovereignty of the United States, but not within a State, satisfies the Natural Born Citizen Clause. For example, Vice President Charles Curtis was born in the territory of Kansas on January 25, 1860 – one year before Kansas became a State. Because the Twelfth Amendment requires that Vice Presidents possess the same qualifications as Presidents, the service of Vice President Curtis verifies that the phrase “natural born Citizen” includes birth outside of any State but within U.S. territory. Similarly, Senator Barry Goldwater was born in Arizona before its statehood, yet attained the Republican Party’s presidential nomination in 1964. And Senator Barack Obama was born in Hawaii on August 4, 1961 – not long after its admission to the Union on August 21, 1959. We find it inconceivable that Senator Obama would have been ineligible for the Presi-

dency had he been born two years earlier.

Senator McCain's candidacy for the Presidency is consistent not only with the accepted meaning of "natural born Citizen," but also with the Framers' intentions when adopting that language. The Natural Born Citizen Clause was added to the Constitution shortly after John Jay sent a letter to George Washington expressing concern about "Foreigners" attaining the position of Commander in Chief. 3 Max Farrand, *The Records of the Federal Convention of 1787*, at 61 (1911). It goes without saying that the Framers did not intend to exclude a person from the office of the President simply because he or she was born to U.S. citizens serving in the U.S. military outside of the continental United States; Senator McCain is certainly not the hypothetical "Foreigner" who John Jay and George Washington were concerned might usurp the role of Commander in Chief.

Therefore, based on the original meaning of the Constitution, the Framers' intentions, and subsequent legal and historical precedent, Senator McCain's birth to parents who were U.S. citizens, serving on a U.S. military base in the Panama Canal Zone in 1936, makes him a "natural born Citizen" within the meaning of the Constitution.



Laurence H. Tribe



Theodore B. Olson

# PRESIDENTS AND CITIZENSHIP

*Claire McCaskill et al., Senate Resolution 511*

April 30, 2008

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## S. RES. 511

Recognizing that John Sidney McCain, III, is a natural born citizen.

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### IN THE SENATE OF THE UNITED STATES

APRIL 10, 2008

Mrs. MCCASKILL (for herself, Mr. LEAHY, Mr. OBAMA, Mr. COBURN, Mrs. CLINTON, and Mr. WEBB) submitted the following resolution; which was referred to the Committee on the Judiciary

APRIL 24, 2008

Reported by Mr. LEAHY, without amendment

APRIL 30, 2008

Considered and agreed to

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## RESOLUTION

Recognizing that John Sidney McCain, III, is a natural born citizen.

Whereas the Constitution of the United States requires that, to be eligible for the Office of the President, a person must be a “natural born Citizen” of the United States;

Whereas the term “natural born Citizen”, as that term appears in Article II, Section 1, is not defined in the Constitution of the United States;

Whereas there is no evidence of the intention of the Framers or any Congress to limit the constitutional rights of children born to Americans serving in the military nor to prevent those children

from serving as their country's President;

Whereas such limitations would be inconsistent with the purpose and intent of the "natural born Citizen" clause of the Constitution of the United States, as evidenced by the First Congress's own statute defining the term "natural born Citizen";

Whereas the well-being of all citizens of the United States is preserved and enhanced by the men and women who are assigned to serve our country outside of our national borders;

Whereas previous presidential candidates were born outside of the United States of America and were understood to be eligible to be President; and

Whereas John Sidney McCain, III, was born to American citizens on an American military base in the Panama Canal Zone in 1936: Now, therefore, be it

*Resolved*, That John Sidney McCain, III, is a "natural born Citizen" under Article II, Section 1, of the Constitution of the United States.

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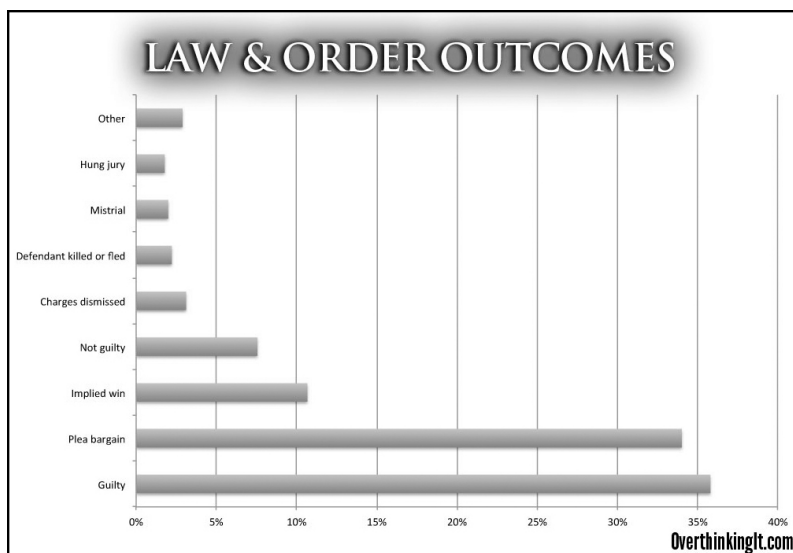
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About the cover

## Law & Order Outcomes

By Matthew Belinkie, [OverthinkingIt.com](http://OverthinkingIt.com). The graph shows the rates at which a variety of episode endings have occur over the past 20 years in the great, long-running cops-and-lawyers television show, *Law & Order*. To learn more, take a look at *The Law and Order Database: All 20 Seasons*, [www.overthinkingit.com/2012/11/13/the-law-and-order-database-all-20-seasons/](http://www.overthinkingit.com/2012/11/13/the-law-and-order-database-all-20-seasons/).

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JL

# INTRODUCTION

*Adam Aft & Craig D. Rust<sup>†</sup>*

With our third and final issue of our first volume, we are very excited to publish two new articles. First, we present *Law Faculty Blogs and Disruptive Innovation*, written by Professor J. Robert Brown, Jr. Second, we are publishing *Top Supreme Court Advocates of the Twenty-First Century*, by Kedar S. Bhatia. Both of these articles are concise and present a significant amount of data in an easy to digest format. In *Law Faculty Blogs*, Professor Brown reviews the impact of legal blogs on legal scholarship, legal scholars, and the legal education market. He has run the numbers and presents a forceful argument that blogs have been a disruptive innovation (and we mean that in a good way!) that are not going anywhere. In *Top Supreme Court Advocates*, Mr. Bhatia seeks to “chronicle the current membership of the elite Supreme Court Bar and analyze its demographic makeup.” During this process he provides a strong case for the importance of this data and the potential for the evolution of the Supreme Court bar in the future.

In addition to introducing our two new articles we also wanted to briefly note our thoughts on corrections, addenda, and errata. We are always striving to improve the scholarship we publish, from the words to the data, accuracy is a goal towards which we constantly strive for perfection. We have received one such correction to an article for our last issue. That correction is in *A Medical Liability Tool Kit*, including ADR, by Michael J. Krauss, 2 *Journal of Law* (1 J. Legal Metrics) 349 (2012), where the author cited *Miner v. Walden* as a case from “New York’s high court” at page 391. The case is from the Queens County session of New York’s Supreme Court, the trial court of general jurisdiction. We are always open to receiv-

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<sup>†</sup> Co-Editors-in-Chief of the *Journal of Legal Metrics*.

ing corrections in anything we publish and are quite appreciative when we do.

As always, we hope you enjoy reading these two articles as much as we have.

# # #

# LAW FACULTY BLOGS AND DISRUPTIVE INNOVATION

*J. Robert Brown, Jr.*<sup>†</sup>

Disruptive innovation usually connotes the introduction of a new technology that eventually destabilizes an existing market.<sup>1</sup> Often, the technology is inferior and not perceived as a threat when first introduced.<sup>2</sup> Over time, however, the technology improves. Migrating from the margin, it eventually displaces the reigning standard.<sup>3</sup>

In legal education, law faculty blogs have been a disruptive innovation. Arising initially in a state of nature,<sup>4</sup> blogs were perceived as an inferior technology used by faculty to convey random, often per-

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<sup>†</sup> Chauncey Wilson Memorial Research Professor of Law and Director, Corporate & Commercial Law Program, University of Denver Sturm College of Law. Professor Brown, along with the student authors on this paper, founded The Race to the Bottom ([www.theracetothetbottom.org](http://www.theracetothetbottom.org)), a blog addressing topics of corporate governance. For a brief history of the Blog, see [law.du.edu/documents/corporate-governance/misc/DuSu07Racetobtm\\_DUI-2004.pdf](http://law.du.edu/documents/corporate-governance/misc/DuSu07Racetobtm_DUI-2004.pdf). Steve Bainbridge, Jack Balkin, Lucian Bebchuk, Al Brophy, Paul Caron, Jim Chen, Peter Conti-Brown, Larry Cunningham, Jeff Hartje, Brian Leiter, Stefan Padfield, and Judge Richard Posner provided comments and not all agreed with the conclusions in the paper. Thanks to Lina Jasinskaite and Sam Hagreen for providing necessary research assistance of this article. Copyright © 2012 J. Robert Brown, Jr.

<sup>1</sup> The term “disruptive innovation” was coined by Clayton M. Christensen in *THE INNOVATOR’S SOLUTION* (2003).

<sup>2</sup> See Dan Yu and Chang Chieh Hang, *A Reflective Review of Disruptive Innovation Theory*, 12 INT’L JOURNAL OF MANAGEMENT REVIEWS 435, 436 (2010) (“[D]isruptive technologies are technologies that provide different values from mainstream technologies and are initially inferior to mainstream technologies along the dimensions of performance that are most important to mainstream customers.”) (citing CLAYTON M. CHRISTENSEN, *THE INNOVATOR’S DILEMMA* (1997)).

<sup>3</sup> *Id.* at 437 (“The market disruption occurs when, despite its inferior performance on focal attributes valued by existing customers, the new product displaces the mainstream product in the mainstream market.”).

<sup>4</sup> An existence described as “solitary, poor, nasty, brutish and short.” THOMAS HOBBS, *LEVIATHAN* (1651).

sonal, views. Over time, however, a recognized class of law faculty blogs has emerged. Widely read,<sup>5</sup> regularly cited,<sup>6</sup> they offer a superior method for the rapid dissemination of some types of legal analysis<sup>7</sup> and “micro-discoveries.”<sup>8</sup> Law faculty blogs have altered the continuum of legal scholarship and reduced the role of traditional law reviews.<sup>9</sup>

Law faculty blogs have also had a disruptive impact on the determination of faculty reputation. Blogging allows law professors to route around the traditional indicia of reputation such as the frequency of publication in elite law journals. Providing a “prominence” dividend,<sup>10</sup> faculty bloggers are able to advertise their expertise through substantive posts and become better known to practitioners, academics, and decision makers.<sup>11</sup> The correlation between sustained blogging and downloads on the Social Science Research Network (“SSRN”), for example, is pronounced.

Blogging can also disrupt law school rankings. With reputation the single largest component in the rankings, blogging can be used by lower-ranked schools to increase name recognition in a cost-

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<sup>5</sup> See Paul L. Caron, *Law Prof Blog Traffic Rankings*, TAXPROF BLOG, [taxprof.typepad.com/taxprof\\_blog/2011/10/law-prof-blog.html](http://taxprof.typepad.com/taxprof_blog/2011/10/law-prof-blog.html) (Oct. 25, 2011) (top blog had over 18 million page views in one 12-month period). For a ranking of blogs based upon page views and visits based upon data in 2011, see [taxprof.typepad.com/taxprof\\_blog/2010/04/law-prof-1.html](http://taxprof.typepad.com/taxprof_blog/2010/04/law-prof-1.html). These rankings are by definition incomplete since many blogs do not include site meters. Moreover, some that do were apparently not included in the rankings. See [professorbainbridge.com/professorbainbridge.com/2012/04/blog-ranking.html](http://professorbainbridge.com/professorbainbridge.com/2012/04/blog-ranking.html).

<sup>6</sup> See *infra* Section II.

<sup>7</sup> See Alfred L. Brophy, *Essay: Mrs. Lincoln's Lawyer's Cat: The Future of Legal Scholarship*, 39 CONN. L. REV. CONNTEMPLATIONS 11, 26 (Spring 2007) (“And while I share others’ great skepticism of blogs as scholarship . . . blogs can help with speedy dissemination of ideas.”), available at [ssrn.com/abstract=997845](http://ssrn.com/abstract=997845).

<sup>8</sup> The term “micro-discoveries” was coined by Eugene Volokh to describe ideas that are significant, but too small to become articles. Eugene Volokh, *Scholarship, Blogging, and Tradeoffs: On Discovering, Disseminating, and Doing*, 84 WASH. U. L. REV. 1089, 1096-99 (2006) (noting that blogs can be a good place for discussing “micro-discoveries”).

<sup>9</sup> See *infra* Section III.

<sup>10</sup> Eugene Volokh suggests that there could be a “prominence” dividend for those who blog but could not find evidence that this was the case. See Volokh, *supra* note 8, at 1092. This article provides evidence. See discussion *infra* Section IV.

<sup>11</sup> See Steven C. Russo & Ashley S. Miller, *Practical and Ethical Issues of Blogging in Environmental Law*, 25 NAT. RESOURCES & ENV'T 31, 31 (Winter 2011) (noting a 2006 study by the ABA in 2006 that showed 57% of lawyers read at least one blog per day).

effective manner. Blogging can also increase an individual law school faculty member's reputation, which redounds to the school.

This article will do several things. First, it will discuss the development of law faculty blogs and the emerging order that has occurred. Second, the article will look at the burgeoning influence of law faculty blogs, something that can be seen from the growing number of citations in court opinions and law review articles. Third, the article will examine the role of law faculty blogs in supplanting some of the traditional functions of law reviews and the unsuccessful efforts of reviews to counter the impact through the development of online companions. Finally, the article will examine the use of law faculty blogs to enhance faculty reputation and law school rankings.

## I.

### THE EMERGING ORDER IN THE STATE OF NATURE: INDEPENDENTS, EMPIRES AND CAPTIVES

Short for "weblog," a blog is little more than a web journal that is regularly updated. The first blogs appeared more than a decade ago.<sup>12</sup> Today, most of the more than 180 million blogs are personal in nature, discussing aspects of the author's particular experiences.<sup>13</sup> Law faculty blogs are different. They are typically centered on legal issues or principles and contain substantive content.<sup>14</sup> Many are neu-

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<sup>12</sup> The precise beginning of blogging is hard to pinpoint. The Wall Street Journal indicates that the first blogs began in 1997. See Tunku Varadarajan, *Happy Blogiversary*, *WSJ*, WALL ST. J., July 14-15, 2007, at P1, c. 2.

<sup>13</sup> By the end of 2011, at least one source reported the existence of 181 million blogs. See *Buzz in the Blogosphere: Millions more bloggers and blog readers*, THE SOCIAL MARKETER (Mar. 8, 2012), [nmincrite.com/?p=6531](http://nmincrite.com/?p=6531). Many blogs contain the "personal musings" of the author. See *State of the Blogosphere 2011: Introduction and Methodology*, TECHNORATI (Nov. 4, 2011), [technorati.com/social-media/article/state-of-the-blogosphere-2011-introduction](http://technorati.com/social-media/article/state-of-the-blogosphere-2011-introduction) (noting that significant number of bloggers do so to provide outlet for "personal musings"). For a discussion of the amorphous definition of blog, see Eric Goldman, *Co-Blogging Law* (Santa Clara Univ. Legal Studies Research Paper No. 06-04, 2007), available at [ssrn.com/abstract=898048](http://ssrn.com/abstract=898048).

<sup>14</sup> Not all of them purport to provide legal analysis. Brian Leiter's blog is self-described as "the perfect medium for circulating information about the academic profession, and news and views about matters of little intellectual substance!" Brian Leiter, *Balkin on Citations to Blogs in Law Reviews*, BRIAN LEITER'S LAW SCHOOL REPORTS (Feb. 1, 2008), [leiterlawschool.typepad.com/leiter/2008/02/balkin-on-citat.html](http://leiterlawschool.typepad.com/leiter/2008/02/balkin-on-citat.html).

tral in approach, although others provide analysis from a discernible point of view.

### A. *The Organization of the Blogosphere*

Law faculty blogs began to proliferate shortly after the new millennium. The first to appear were “Independent” blogs – those neither directly attached to nor supported by a particular law school.<sup>15</sup> These often arose out of a faculty member’s desire to speak to a wider audience about both personal and legal subjects. They were commonly authored by a single professor and operated on Internet platforms distinct from the faculty member’s home law school.<sup>16</sup>

Other law faculty blogs emerged as part of organizations, or “Empires.” There are currently two Empires, Law Prof Blogs<sup>17</sup> and the smaller Jurisdynamics Network.<sup>18</sup> Empires centralize some functions and provide a member blog with administrative support, including standardized URLs and preexisting web sites. The Law Prof Empire, for example, has a single advertising contract and passes along some of the revenue to the member blogs.<sup>19</sup>

Perhaps most importantly, Empires impose qualitative standards on posts. As the Law Prof Blog notes:

Our blogs are not a collection of personal ruminations about the Presidential campaign, the war in Iraq, or what the editor had for dinner last night. Neither do our editors offer their personal views on every policy issue in the news or every new court decision. We leave that terrain to the many existing blogs

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<sup>15</sup> While not emphasizing legal content, Instapundit may have been the first blog started by a law faculty member, Glenn Reynolds. Certainly some of the early bloggers give Professor Reynolds credit for encouraging them to enter the Blogosphere. According to Wikipedia, Instapundit began in 2001. See Wikipedia, *Instapundit*, en.wikipedia.org/wiki/Instapundit (last visited Dec. 2, 2012).

<sup>16</sup> The Volokh Conspiracy began in 2002. See *Archives*, THE VOLOKH CONSPIRACY, [www.volokh.com/~volokhc/volokh\\_archive.html](http://www.volokh.com/~volokhc/volokh_archive.html). So did Larry Solum’s Legal Theory Blog. See LEGAL THEORY BLOG, [lsolum.blogspot.com/2002\\_09\\_01\\_archive.html](http://lsolum.blogspot.com/2002_09_01_archive.html). Jack Balkin wrote his first post on Balkinization in early 2003. See *Friday, January 10, 2003*, BALKINIZATION (Jan. 10, 2003), [balkin.blogspot.com/2003\\_01\\_05\\_archive.html](http://balkin.blogspot.com/2003_01_05_archive.html).

<sup>17</sup> See *Welcome*, LAW PROFESSOR BLOGS, [lawprofessorblogs.com/](http://lawprofessorblogs.com/).

<sup>18</sup> See THE JURISDYNAMICS NETWORK, [jurisdynamics.net/](http://jurisdynamics.net/). The page sets out seven blogs in the Empire. Some of them do not post on a regular basis.

<sup>19</sup> Rumor has it that the pay equals somewhere around a half cent per visit.

with that mission. Instead, our editors focus their efforts, in both the permanent resources & links and daily news & information, on the scholarly and teaching needs of law professors. Our hope is that law professors will visit the Law Professor Blog in their area (or areas) as part of their daily routine.<sup>20</sup>

Similarly, Jurisdynamics espouses a common philosophy shared by all members of the Network.<sup>21</sup>

Empires promote continuity.<sup>22</sup> They have “Emperors” who can appoint replacement faculty whenever a commentator resigns. The writing style and mix of content may change but the blog continues.<sup>23</sup> Empires have also proved capable of occasional expansion<sup>24</sup> and occasional contraction.<sup>25</sup>

“Captive” blogs, a more recent form of law faculty blog, are those directly attached to (and supported by) a particular law school. They invariably include the name of the institution in the blog title and the URL.<sup>26</sup> For the most part, these blogs report on

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<sup>20</sup> *Welcome*, LAW PROFESSOR BLOGS, lawprofessorblogs.com/.

<sup>21</sup> See THE JURISDYNAMICS NETWORK, jurisdynamics.net/.

<sup>22</sup> It is unclear whether participation in an empire produces a significant readership advantage. The Law Prof Empire without a doubt possesses some of the most popular law blogs. Thus, while Tax Prof, Sentencing Law & Policy, Wills, Trusts & Estates Prof Blog, Immigration Profs Blog, Workplace Prof, White Collar Crime Prof Blog, and Constitutional Law Prof Blog, all appear to be widely read, see Paul L. Caron, *Law Prof Blog Traffic Rankings*, TAXPROF BLOG, taxprof.typepad.com/taxprof\_blog/2011/10/law-prof-blog.html (Oct. 25, 2011), the Empire has more than 40 blogs, most of which seem to have modest readerships. For a complete list of blogs in the Law Prof Empire, see *Welcome*, LAW PROFESSOR BLOGS, lawprofessorblogs.com/.

<sup>23</sup> Thus, for example, the M&A Law Prof Blog was ably operated by Steven Davidoff at Ohio State. He eventually departed (but writes for the DealBook at the New York Times. See Steven M. Davidoff, DEALBOOK, dealbook.nytimes.com/category/deal-professor/ (last visited Dec. 2, 2012)) and, after a brief period of inactivity, the cudgel was picked up by Brian Quinn at Boston College. See M&A LAW PROF BLOG, lawprofessors.typepad.com/mergers/ (last visited Dec 2, 2012).

<sup>24</sup> ADR Prof Blog (indisputably.org/), and Sentencing Law & Policy (sentencing.typepad.com/), both began as independent blogs before joining the Law Prof Empire.

<sup>25</sup> Brian Leiter operated an independent blog on law schools but moved it to the Law Prof Empire. He ultimately, however, exited the Empire. In an e-mail to the author, he explained that the shift was over advertising revenues. The Law Prof Empire has also survived several epochs of mass extinction. A number of blogs in the same Empire became inactive in 2009 and again in January 2012.

<sup>26</sup> Law schools that have captive blogs include the University of Chicago, uchicagolaw.typepad.com/; UC-Davis, facultyblog.law.ucdavis.edu/; Houston, uhlawblog.com/; George-

the activities and accomplishments of faculty, unadorned by legal analysis. This allows materials to be posted by administrators, minimizing the time commitment required by faculty.

A few law schools have sought to encourage active faculty commentary on a Captive blog. Not founded by a motivated law professor, however, these law blogs have struggled to develop a sustained source of content. The University of Chicago, for example, created a blog that included substantive posts from faculty.<sup>27</sup> Over time, however, faculty contributions waned.<sup>28</sup>

Another approach to the content issue has been to focus a Captive blog on a specific substantive area. Harvard Law School publishes The Forum on Corporate Governance and Financial Regulation.<sup>29</sup> This blog has addressed the faculty time commitment issue by posting materials from non-law faculty, including practitioners, regulators, business school faculty, and others (who presumably benefit from association with a blog sponsored by Harvard).<sup>30</sup>

### *B. The Demise of the State of Nature*

Some have viewed law faculty blogs as a form of inferior technology. Brian Leiter, a professor at the University of Chicago and

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town, gulcfac.typepad.com/; St. John's, stjlawfaculty.org/; Marquette, law.marquette.edu/facultyblog/; Chicago Kent, blogs.kentlaw.edu/faculty/; Louisville, law.louisville.edu/blog; and Pittsburgh, pittlawfaculty.net/. Some are written by the dean of the law school. See DEAN LOGAN'S BLOG, law.rwu.edu/blogs/3 (last visited Dec. 2, 2012).

<sup>27</sup> THE FACULTY BLOG, uchicagolaw.typepad.com/ (last visited Dec. 2, 2012).

<sup>28</sup> An examination of the Faculty Blog at the University of Chicago on June 1, 2012, showed only three faculty posts since August 2011. Posts by students were more common.

<sup>29</sup> THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION, blogs.law.harvard.edu/corpgov/ (last visited Dec. 2, 2012). For another example, see Info/Law, blogs.law.harvard.edu/infolaw/. For another hybrid example, see RegBlog, law.upenn.edu/blogs/regblog/. The blog focuses on "regulatory news, analysis, and opinion." The blog is student run. The faculty supervisor, Cary Coglianese at the University of Pennsylvania, also writes for the blog, as do other occasional faculty contributors. The blog, however, invites participation from outside experts.

<sup>30</sup> Only Lucian Bebchuk from Harvard submits posts on a sustained basis. Another model is employed at Ohio State. Election Law @ Moritz, moritzlaw.osu.edu/electionlaw/, has a faculty director but otherwise relies on fellows for content. Jurist Forum, a blog supported by the University of Pittsburgh, jurist.org/faq/, relies for the most part on student reporters. See *infra* note 49.

the author of a widely read blog on law school matters, has been a particularly harsh critic,<sup>31</sup> contending that blogs allow any “second-rate scholar” to broadcast his or her “ignorant or confused” opinion to a mass audience.<sup>32</sup>

The criticism mostly misses the mark. The right to broadcast is not coextensive with the ability to influence. Second-rate opinions presumably play a mostly marginal role in the debate. Other forms of scholarship, whether law review articles or papers posted on SSRN suffered from similar problems.

Nonetheless, the criticism did reflect one unquestionable reality – at least while law professor blogs were in a state of nature. Blogging began in an undifferentiated state. There was no structural method of separating the good from the bad. Anyone could start a blog and post. The blogosphere lacked a system of content intermediation, a function provided by students on law reviews.

That, however, has changed. A class of widely recognized and often cited law faculty blogs has emerged.<sup>33</sup> They are regularly cited in court opinions and law review articles. Moreover, these blogs have an incentive to maintain their reputation by ensuring quality.

For Empires and Captives, quality can be promoted through uniform standards imposed as a condition of participation. With respect to Independents, intermediation has arisen from structural changes. While most were probably started by individual faculty members, many Independents have evolved into collective endeavors.<sup>34</sup> Posts are derived from a group of regular, although often

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<sup>31</sup> Brian Leiter, *Why Blogs Are Bad for Legal Scholarship*, 116 YALE L.J. POCKET PART 53, 57 (2006) (“People who run blogs tend to respond badly, indeed harshly, to the suggestion that blogs are not as important as their proprietors think they are. Be that as it may, my sense is that blogs have been bad for legal scholarship, leading to increased visibility for mediocre scholars and half-baked ideas and to a dumbing down of standards and judgments.”).

<sup>32</sup> *Id.* at 53. One professor has referred to blogs as bugged water coolers “outfitted with a giant microphone.” Kate Litvak, *Blog as a Bugged Water Cooler*, 84 WASH. U. L. REV. 1061, 1066 (2006).

<sup>33</sup> See *infra* Section II.

<sup>34</sup> There are a handful of notable exceptions. Professor Bainbridge has been blogging since 2003. See PROFESSORBAINBRIDGE.COM, ProfessorBainbridge.com (last visited Dec. 2, 2012). Professor Berman, who has been blogging since 2004, continues to be the sole commentator on Sentencing Law & Policy. See SENTENCING LAW & POLICY, sentencing.typepad.com/ (last visited Dec. 2, 2012). Nonetheless, most of the independents are col-

shifting, commentators.<sup>35</sup>

The members of the group have an incentive to ensure that their reputation is not harmed by substandard posts. This can be most readily accomplished by avoiding contributions from faculty who do not meet minimum standards of quality. Indeed, blogs often provide contributors with the right to post as a guest, giving permanent members an opportunity to assess quality.

All of this suggests that law faculty blogs are no longer undifferentiated or devoid of intermediation. While anyone can start a blog and post, not all law faculty can access the most widely recognized and cited law faculty blogs. Moreover, content has evolved. The most widely read<sup>36</sup> for the most part eschew personal information<sup>37</sup> in favor of substantive legal analysis, typically in a specific area of law.<sup>38</sup>

## II. LAW FACULTY BLOGS AND INFLUENCE

Law faculty blogs have become more organized. Unsurprisingly, they have also become more influential. This can be seen from the growing number of citations by courts and law reviews. In addition, law faculty blogs are well represented in an assortment of rankings, particularly the annual Top 100 published by the ABA.

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lective blogs.

<sup>35</sup> Perhaps unsurprisingly, independents have a high failure rate. Larry Ribstein's blog, Ideoblog, ultimately ceased when he joined Truth on the Market. Black Law Prof Blog halted publication; so have a number of blogs in the Law Prof Empire. This problem is not limited to law faculty blogs; blogs created by law firms have the same problem. See Greg Lambert, *List of 73 "Dead" or "Dying" BigLaw Blogs*, 3 GEEKS & A LAW BLOG, [geeklawblog.com/2009/12/list-of-73-dead-or-dying-biglaw-blogs.html](http://geeklawblog.com/2009/12/list-of-73-dead-or-dying-biglaw-blogs.html) (Dec. 9, 2009).

<sup>36</sup> See Paul L. Caron, *Law Prof Blog Traffic Rankings*, TAXPROF BLOG, [taxprof.typepad.com/taxprof\\_blog/2011/10/law-prof-blog.html](http://taxprof.typepad.com/taxprof_blog/2011/10/law-prof-blog.html) (Oct. 25, 2011).

<sup>37</sup> There are, of course, exceptions. Professor Bainbridge engages in "mixed blogging," something that includes legal and non-legal matters. See Stephen Bainbridge, *Mixed Blogging versus Bloggership*, PROFESSORBAINBRIDGE.COM (May 23, 2006), [professorbainbridge.com/professorbainbridge.com/2006/05/mixed-blogging-versus-bloggership.html](http://professorbainbridge.com/professorbainbridge.com/2006/05/mixed-blogging-versus-bloggership.html).

<sup>38</sup> PrawfsBlawg writes on "a variety of topics related to law and life." See PRAWFSBLAWG, [abajournal.com/blawg/prawfsblawg/](http://abajournal.com/blawg/prawfsblawg/) (last visited Dec. 2, 2012). Concurring Opinions is a blog "with a broad emphasis on legal topics." See *About the Blog*, CONCURRING OPINIONS, [concurringopinions.com/archives/2005/05/about\\_the\\_blog.html](http://concurringopinions.com/archives/2005/05/about_the_blog.html) (last visited Dec. 2, 2012).

## A. Court Citations

Blogs have appeared in a number of cases. A study done in 2006 chronicled 27 references to blogs in court opinions,<sup>39</sup> including one citation by the U.S. Supreme Court.<sup>40</sup> By June 2012, the number had increased to 88, including a second Supreme Court citation.<sup>41</sup> The blogs cited by courts are:

- 45 Sentencing Law and Policy (43 federal; 2 state)
- 8 Volokh Conspiracy (7 federal; one state)
- 6 Patently-O (6 federal<sup>42</sup>)
- 4 The Confrontation Blog (1 federal; 3 state)
- 3 ProfessorBainbridge (Delaware court opinions)
- 3 Election Law Blog (2 federal; Washington State)
- 2 Becker-Posner Blog (1 federal; California)
- 2 Credit Slips (1 federal; Massachusetts)
- 2 Ideoblog (Delaware court opinions)

In addition, 13 other blogs were cited by courts at least once.<sup>43</sup> Admittedly, a number of citations are to primary materials posted on the site rather than substantive analysis. (Indeed, in one case a court relied on a blog for song lyrics.<sup>44</sup>) Nonetheless, the evidence is in-

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<sup>39</sup> "At the time of this current post (August 6, 2006), there are 32 citations of legal blogs from 27 different cases, with 8 legal blogs being cited." Ian Best, *Cases Citing Legal Blogs – Updated List*, *Law Blog Metrics* (Aug. 6, 2006), 3lepiphany.typepad.com/3lepiphany/2006/08/cases\_citing\_le.html.

<sup>40</sup> See *United States v. Booker*, 543 U.S. 220, 278 (2005) (citing the Sentencing Law & Policy Blog). A study done in 2009 chronicled citations to 89 blogs. The citations were not, however, limited to law faculty blogs. See Lee F. Peoples, *The Citation of Blogs in Judicial Opinions*, 13 TUL. J. TECH. & INTELL. PROP. 39, 43 (2010) (reporting 85 court citations to law blogs). The citation to *The Race to the Bottom* was, however, omitted. *Id.* at 43-44. This is likely not the author's fault. The court citing the blog made a typographical error in the citations. See *Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 917 n.19 (Del. Ch. 2007) (citing "www.thereacetothebottom.org").

<sup>41</sup> See *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1304 (2012) (citing Patently-O).

<sup>42</sup> Including one that referenced the blog but without the URL.

<sup>43</sup> The list is included in Appendix A.

<sup>44</sup> Some courts and some judges appear to read and cite blogs on a regular basis. In Delaware, for example, the Chancery Court has cited blogs on several occasions. In each instance, the posts were written by the same two professors, Larry Ribstein and Stephen Bainbridge. See *Desimone v. Barrows*, 924 A.2d 908, 931 n.83 (Del Ch. 2007) (citing both); *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 593 n.77 (Del. Ch.

disputable that law faculty blogs are being read – and relied on – by state and federal judges and justices.

### B. Law Review Citations

Blogs are also cited regularly in law review articles and other legal publications. A study conducted in 2006 found 489 legal citations to blogs in various reviews and legal periodicals.<sup>45</sup> Two years later, the number had more than doubled.<sup>46</sup> By June 2012, the total had continued to increase exponentially, with blogs accounting for more than 6,340 citations in assorted law reviews and other legal publications.<sup>47</sup> The top 10 most-cited law faculty blogs are:

742	Volokh Conspiracy
426	Balkinization
393	Patently-O
279	Concurring Opinions
272	Sentencing Law and Policy
219	Prawfs Blawg
200	Opinio Juris
179	Lessig Blog
178	Harvard Forum on Corporate Governance and Financial Regulation
171	Conglomerate <sup>48</sup>

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2007) (citing both); *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 195 n.75 (Del. Ch. 2006) (citing Bainbridge). Two of the opinions (Desimone and Trenwick) were written by the same person, (then) Vice Chancellor Strine.

<sup>45</sup> Ian Best, *Law Review Articles Citing Legal Blogs*, LAW BLOG METRICS (Aug. 16, 2006), 3lepiphany.typepad.com/3l\_epiphany/2006/08/law\_review\_arti.html (“There are 489 article citations of legal blogs in this collection, with 75 legal blogs being cited. Several law review articles are listed more than once.”).

<sup>46</sup> The number of law reviews citing law faculty blogs was around 500 in mid-2006. *See Law Review Articles Citing Legal Blogs*, LAW X.0 (Aug. 16, 2006), 3lepiphany.typepad.com/3l\_epiphany/2006/08/law\_review\_arti.html. The number increased to 1300 by early 2008. *See* J. Robert Brown, *Law Faculty Blogs and Influence: The Case of Law Review Citations (Part 2)*, THE RACE TO THE BOTTOM (Feb. 21, 2008), [www.theracetothetbottom.org/blawgs-rankings/law-faculty-blogs-and-influence-the-case-of-law-review-citat.html](http://www.theracetothetbottom.org/blawgs-rankings/law-faculty-blogs-and-influence-the-case-of-law-review-citat.html).

<sup>47</sup> The entire list is included in Appendix B. The search was conducted in the law review and journal file of Westlaw. All citations were counted. A number of law faculty blogs have no citations. This does not, however, mean that they lack readers or influence. *See generally* Paul L. Caron, *The Long Tail of Legal Scholarship*, 116 YALE L.J. POCKET PART 38 (2006).

<sup>48</sup> A list of all blogs and citations is included as Appendix B.

Interestingly, while the number of citations has continued to increase exponentially, the sources cited most often have remained remarkably stable. Seven of the ten blogs on the above list, for example, were among the most cited in a similar study done in 2007.<sup>49</sup>

### C. ABA Rankings

The ABA annually ranks the top 100 law blogs.<sup>50</sup> While the methodology used by the ABA is unclear, selection nonetheless provides positive name recognition. The selected blogs are set out in the ABA magazine and distributed to its membership.

Eighteen of the ABA's top 100 law blogs are sponsored by law faculty. The 2011 list included: Althouse, Blog Law Blog, Election Law Blog, Inside the Law School Scam, Jonathan Turley, Legal Planet, Legal Profession, Patently-O, Prawfsblawg, ProfessorBainbridge.com, The Race to the Bottom, Religion Clause, Sentencing Law & Policy, TaxProf Blog, Technology Marketing Blog, Truth on the Market, The Volokh Conspiracy, and Wills Trusts & Estates Prof Blog.

### D. Observations

There is considerable overlap, as one might expect, among the ABA's top law faculty blogs and the blogs cited by courts and law journals. Seven of the 18 are in the list of blogs cited by courts.<sup>51</sup>

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<sup>49</sup> See J. Robert Brown, *Of Empires, Independents, and Captives: Law Blogging, Law Scholarship, and Law School Rankings* (U Denver Legal Studies Research Paper No. 08-04, 2008), available at [ssrn.com/abstract=1094806](http://ssrn.com/abstract=1094806) (earlier version of this article). The 2007 top 10 did not include Patently-O, the Harvard Corporate Governance Blog, or *Opinio Juris*. The list in 2012 did not include ProfessorBainbridge.com (ranked 15th), the White Collar Crime Blog (ranked 16th), or Jurist-Forum. Jurist-Forum had more than 700 citations. It was only eliminated from the list because the blog mostly reports news and, while it has a faculty sponsor and allows for op-eds from faculty, does not, for the most part, include regular posts by law faculty. See *FAQ*, JURIST, [jurist.org/faq/#whatis](http://jurist.org/faq/#whatis) (last visited Dec. 2, 2012) (noting that the blog "is a Web-based legal news and real-time legal research service powered by a mostly-volunteer team of over 30 part-time law student reporters, editors and Web developers").

<sup>50</sup> The list of the top 100 lawblogs for 2011 is available at [abajournal.com/magazine/article/the\\_5th\\_annual\\_aba\\_journal\\_blawg\\_100](http://abajournal.com/magazine/article/the_5th_annual_aba_journal_blawg_100).

<sup>51</sup> Those seven are: Election Law, Patently-O, Prawfsblawg, ProfessorBainbridge.com, The Race to the Bottom, Sentencing Law & Policy, and the Volokh Conspiracy. See Appendix A.

Twelve of the 18 are within the top 50 blogs cited in legal publications.<sup>52</sup>

To summarize, the above lists of citations and rankings reveal a cluster of law faculty blogs that are generally seen as useful and trusted sources of legal analysis. Somewhat surprisingly, the cluster is dominated by Independents and Empires, with only two Captives.<sup>53</sup> For the most part, the blogs focus on substantive legal analysis, with a majority devoted to a specific area of law. The list does not include blogs started by law faculty that generate significant traffic but do not focus primarily on legal content.

### III. LAW FACULTY BLOGS, DISRUPTIVE INNOVATION AND LAW REVIEWS

As the lists of court and law review citations illustrate, law faculty blogs have grown in influence. The reasons are not hard to understand. In several distinct respects, the blogs represent a superior method for disseminating legal analysis. The most obvious – and most important – is their speed. Faster to press than other forms of scholarship, law blogs are often the first source of analysis on current developments, whether new cases,<sup>54</sup> proposed legislation,<sup>55</sup> or pending rules. Postings are generally also more accessible – shorter, lighter, and punchier.

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<sup>52</sup> Althouse, Election Law Blog, Legal Profession, Patently-O, Prawfsblawg, ProfessorBainbridge.com, The Race to the Bottom, Sentencing Law & Policy, TaxProf Blog, Technology & Marketing Blog, Truth on the Market, and The Volokh Conspiracy. See Appendix B.

<sup>53</sup> The Forum on Corporate Governance at Harvard and Election Law @ Moritz from Ohio State were the only two captives listed among the top 50 blogs by law review citation. Had Jurist Forum been included, see *supra* note 49, there would have been 3.

<sup>54</sup> See Jack M. Balkin, *Online Legal Scholarship: The Medium and the Message*, THE YALE LAW JOURNAL (Sept. 5, 2006), [yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/online-legal-scholarship-the-medium-and-the-message](http://yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/online-legal-scholarship-the-medium-and-the-message) (“[Blogging] allows focused commentaries on recent state and lower federal court decisions that most law professors would not want to spend an entire law review article addressing, and that most student-edited law reviews – which tend to focus on constitutional and other ‘hot’ topics – would not be interested in publishing.”).

<sup>55</sup> See *id.* (“Blogging allows law professors to comment on successive drafts of pending legislation both in Congress and in state governments – something that traditional legal scholarship can almost never do.”).

Conventional law reviews, in contrast, tend to publish at glacial pace, with the final product sometimes out of date by the time of publication. Aware of the advantages that the Internet platform presents, law reviews have themselves begun developing online components. Their contents range from full-length articles to op-ed pieces and blog-style commentary. For the reasons detailed below, however, these efforts have not supplanted the role of law faculty blogs.

### *A. The Problem with Law Reviews*

“Pick up a copy of any law review that you see,” Chief Justice John Roberts recently remarked, “and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”<sup>56</sup> Criticism of the current state of legal scholarship has not been confined to the Chief’s comments.<sup>57</sup> Similar concerns have been raised, for example, over the predilection for “exhaustively exhum[e] unimportant topics or replicat[ing] familiar arguments on important ones.”<sup>58</sup>

Even when the article is on a timely topic, law reviews have a problem with timeliness. They take a long time to write, and then even longer to publish.<sup>59</sup> By the time the hard copy emerges in print, the debate may be over. Congress could have passed the relevant legislation; a court could have established the controlling legal standard; an agency could have adopted the requisite rule.

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<sup>56</sup> See *Law Prof. Ifill Challenges Chief Justice Roberts’ Take on Academic Scholarship*, ACSBLOG (July 5, 2011), [acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%9999-take-on-academic-scholarship](http://acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%9999-take-on-academic-scholarship).

<sup>57</sup> See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) (noting that “judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy”). More recently, Chief Justice Roberts has repeated some of these criticisms.

<sup>58</sup> Deborah L. Rhode, *Law, Knowledge, and the Academy: Legal Scholarship*, 115 HARV. L. REV. 1327, 1340 (2002).

<sup>59</sup> See Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U.L. REV. 563, 574 (2007) (noting that the failure of law reviews to publish in a timely manner is the “stuff of legend”).

The result has been a decline in influence for law reviews.<sup>60</sup> Almost half (43 percent) of all law review articles are uncited.<sup>61</sup> An unknown – but undoubtedly not insubstantial percentage – are unread.<sup>62</sup> And, while the number of journals has proliferated,<sup>63</sup> subscriptions have fallen precipitously.<sup>64</sup>

### B. The Search for Relevancy: Online Companions

Law reviews efforts at reform have largely been incremental, including proposals for peer review, blind submissions,<sup>65</sup> and reduc-

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<sup>60</sup> See Adam Liptak, *Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8 (noting that the Harvard Law Review was cited by federal courts 4,410 times in the 1970s, 1,956 times in the 1990s, and 937 times so far this decade). The current Supreme Court cites law review articles less often than its predecessors. See Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399 (2012).

At least one study, however, has concluded that the use of legal scholarship by judges on the U.S. courts of appeals has not declined. 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, 1352 (2011).

<sup>61</sup> One study placed the percentage at 43 percent. That figure is mentioned here, Tom Smith, *A Voice Crying in the Wilderness, and Then Just Crying*, THE RIGHT COAST (July 13, 2005), [therightcoast.blogspot.com/2005/07/voice-crying-in-wilderness-and-then.html](http://therightcoast.blogspot.com/2005/07/voice-crying-in-wilderness-and-then.html), and discussed more thoroughly here, Thomas A. Smith, *The Web of Law* (San Diego Legal Studies Research Paper No. 06-11, 2005), available at [ssrn.com/abstract=642863](http://ssrn.com/abstract=642863).

<sup>62</sup> Of course, many of those not cited may have been downloaded on SSRN. See Paul L. Caron, *The Long Tail of Legal Scholarship*, 116 YALE L. J. POCKET PART 38 (2006). This suggests that in fact most of them are at some point read.

<sup>63</sup> See Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 38 (1996) ("By 1942, there were fifty-five law reviews. In 1955, there were seventy-eight law reviews."). Today there are more than 1,000. See Steven Keslowitz, *The Transformative Nature of Blogs and Their Effects on Legal Scholarship*, 2009 CARDOZO L. REV. DE NOVO 252, 264-65 n.71 (2009).

<sup>64</sup> See Ross E. Davies, *Law Review Circulation 2011: More Change, More Same*, 2 J.L. (1 J. LEGAL METRICS) 179 (2012) ("In 2011, for the first time since the U.S. Postal Service began requiring law reviews to track and report their circulation numbers, no major law review had more than 2,000 paying subscribers. The Harvard Law Review remains the top journal, but its paid circulation has declined from more than 10,000 during much of the 1960s and '70s to about 5,000 in the 1990s to 1,896 last year."). Of course, the drop in subscriptions may be explained in part by the accessibility of the articles in the legal databases and on SSRN.

<sup>65</sup> See Lee Epstein & Gary King, *Exchange: Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, 69 U. CHI. L. REV. 1, 128 (2002) ("[T]he important point is that the law review would publish only articles that have (1) been reviewed by at least one external expert in a double blind (or at least single blind) peer-review setting and (2) attained the approval of the editorial board."). See also Brophy, *supra* note 7 (noting that University of

tions in the length of articles.<sup>66</sup> With respect to timeliness and topic choice, they have sought to address the concerns through the implementation of online companions.<sup>67</sup>

Online companions facilitate rapid publication.<sup>68</sup> They also promote a more functional form of scholarship. While some online companions continue to publish traditional law review articles,<sup>69</sup> most seek “intermediate” scholarship that discusses current issues<sup>70</sup>

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Alabama Law Review uses a system of “modified peer review”).

<sup>66</sup> Thus, some reviews have imposed page limits on submissions, pushing authors to write shorter pieces. See Daniel J. Solove, *Swiftly Shrinking? Toward the Lilliputian Law Review Article*, CONCURRING OPINIONS (Nov. 22, 2005), [concurringopinions.com/archives/2005/11/swiftly\\_shrinki.html](http://concurringopinions.com/archives/2005/11/swiftly_shrinki.html).

<sup>67</sup> Although law reviews have web sites, a number do not have online companions. This includes: NYU, [law.nyu.edu/journals/lawreview/submissions/index.htm](http://law.nyu.edu/journals/lawreview/submissions/index.htm); Duke, [dlj.law.duke.edu/guidelines/](http://dlj.law.duke.edu/guidelines/); Berkeley, [californialawreview.org/](http://californialawreview.org/); Cornell, [lawschool.cornell.edu/research/cornell-law-review/submissions.cfm](http://lawschool.cornell.edu/research/cornell-law-review/submissions.cfm); and the University of Washington, [law.washington.edu/WLR/Submissions.aspx](http://law.washington.edu/WLR/Submissions.aspx). For an article on online journals, see Matthew T. Bodie, *Essay: Thoughts on the New Era of Law Review Companion Sites*, 39 CONN. L. REV. CONNTEMPLATIONS 1 (Spring 2007).

<sup>68</sup> The Law Review at UVA provides that publication “occurs in as little as one month after finalizing and receiving first drafts of the pieces for an issue.” In *Brief Submissions*, VIRGINIA LAW REVIEW, [virginialawreview.org/page.php?s=submissions&p=inbrief](http://virginialawreview.org/page.php?s=submissions&p=inbrief) (last visited Dec. 2, 2012). See also Lawrence Solum, *Journal Announcement: Northwestern Colloquy*, LEGAL THEORY BLOG, [lsolum.typepad.com/legaltheory/2006/10/journal\\_announc\\_1.html](http://lsolum.typepad.com/legaltheory/2006/10/journal_announc_1.html) (last visited Dec. 2, 2012) (noting that publishing on the web “drastically shorten[s] the amount of time that lapses between the conception of an idea and the possibility of its publication in a major law review from more than a year to less than three months”).

<sup>69</sup> Chicago only went to an online version in 2012 with the publication of a single article. *Volume 79, Issue 1 Online Exclusive: Miriam Kurtzig Freedman*, THE UNIVERSITY OF CHICAGO LAW REVIEW (May 7, 2012), [lawreview.uchicago.edu/news/volume-79-issue-1-online-exclusive-miriam-kurtzig-freedman](http://lawreview.uchicago.edu/news/volume-79-issue-1-online-exclusive-miriam-kurtzig-freedman). The piece was 23 single spaced pages with 122 footnotes and an appendix and consisted of almost 10,000 words. As the review noted: “[T]his contribution marks the beginning of a tradition of expanding our publication of cutting edge legal scholarship by supplementing our print volume with exclusive online content.” *Id.*

<sup>70</sup> The Yale Law Journal Online seeks “original scholarship” of less than 6,000 words. *YLJ Online Submissions*, THE YALE LAW JOURNAL, [yalelawjournal.org/submissions/](http://yalelawjournal.org/submissions/) (last visited Dec. 2, 2012). Pennsylvania (in PENNumbra) encourages “responses” to hard copy articles but does not want pieces with more than 3,000 words. *Article Submissions*, PENNUMBRA, [pennumbra.com/submissions/](http://pennumbra.com/submissions/) (last visited Dec. 2, 2012). “Debates” on issues should be “one to two times the length of an average opinion/editorial newspaper article (i.e., 1,000-2,000 words), and without footnotes.” *Id.* The featured comment on June 1, 2012, consisted of an abstract of 285 words that was linked to a seven-page, single-spaced document in .pdf format with 29 footnotes. See Jean Galbraith, *Response*, [pennumbra.com/responses/04-2012/Galbraith.pdf](http://pennumbra.com/responses/04-2012/Galbraith.pdf). See also *Manuscript Submissions*, GEORGE WASHINGTON UNIVERSITY LAW REVIEW, [gwlr.org/submissions](http://gwlr.org/submissions) (last visited Dec. 2, 2012) (“The Law

or responds to articles in the hard copy journal.<sup>71</sup> The pieces are expected to be “lightly footnoted”<sup>72</sup> and shorter than traditional articles.<sup>73</sup> Some specifically seek “op-ed” or blog-length pieces<sup>74</sup> written

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Review also accepts submissions for its new online companion, Arguendo. Arguendo will publish original articles and essays directly to the web” and “such pieces should be lightly footnoted and no longer than 10,000 words”).

<sup>71</sup> As noted *supra* note 70, Pennsylvania (in PENumbra) encourages “responses” to hard copy articles. The Yale Law Journal Online also seeks responses to printed articles. *YLJ Online Submissions*, THE YALE LAW JOURNAL, [yalelawjournal.org/submissions/](http://yalelawjournal.org/submissions/) (last visited Dec. 2, 2012). The Georgetown Law Journal seeks “formal responses to in-print scholarship.” *Welcome to Ipsa Loquitur*, THE GEORGETOWN LAW JOURNAL, [georgetownlawjournal.org/ipsa-loquitur/welcome-to-ipsa-loquitur/](http://georgetownlawjournal.org/ipsa-loquitur/welcome-to-ipsa-loquitur/) (last visited Dec. 2, 2012). See also *Submissions*, MINNESOTA LAW REVIEW, [www.minnesotalawreview.org/submissions](http://www.minnesotalawreview.org/submissions) (last visited Dec. 2, 2012) (“The Law Review will consider publishing in Headnotes any piece responding to any recent Article, Essay, or Note appearing in our print volume.”); *Responses*, VANDERBILT LAW REVIEW, [vanderbiltlawreview.org/category/en-banc/responses/](http://vanderbiltlawreview.org/category/en-banc/responses/) (last visited Dec. 2, 2012); and Georgetown, *Welcome to Ipsa Loquitur*, THE GEORGETOWN LAW JOURNAL, [georgetownlawjournal.org/ipsa-loquitur/welcome-to-ipsa-loquitur/](http://georgetownlawjournal.org/ipsa-loquitur/welcome-to-ipsa-loquitur/) (last visited Dec. 2, 2012) (encouraging the submission of responses). They may also strengthen the reputation and notoriety of the hard copy review. This may help improve rankings. Some have found a correlation between law school rankings and citations to the law school’s law review. See Brophy *supra* note 7 (describing correlation between law school rankings and citations to law school’s law review).

<sup>72</sup> See also *Arguendo*, GEORGE WASHINGTON UNIVERSITY LAW REVIEW, [gwlr.org/about-us/arguendo-about](http://gwlr.org/about-us/arguendo-about) (last visited Dec. 2, 2012) (“Arguendo primarily seeks pieces that are lightly footnoted”). Harvard seeks pieces that are “lightly footnoted.” See *Forum & Responses*, HARVARD LAW REVIEW, [harvardlawreview.org/forum/](http://harvardlawreview.org/forum/) (last visited Dec. 2, 2012). Stanford specifically defines minimal footnotes as no more than 20. See *Online Essay Submissions*, STANFORD LAW REVIEW, [stanfordlawreview.org/submissions/online](http://stanfordlawreview.org/submissions/online) (last visited Dec. 2, 2012).

<sup>73</sup> Most have a limit of somewhere around 3,000 to 5,000 words. See *supra* note 70. See also *Announcing the Northwestern Colloquy*, NORTHWESTERN UNIVERSITY LAW REVIEW, [colloquy.law.northwestern.edu/main/2006/10/announcing\\_the\\_.html](http://colloquy.law.northwestern.edu/main/2006/10/announcing_the_.html) (last visited Dec. 2, 2012) (“For those who wish to publish pieces that strike a balance between the depth and rigor of a full-length law review article and the speed and brevity of an op-ed, the Colloquy publishes short essays, generally between 3,000 and 5,000 words, inclusive of footnotes.”).

<sup>74</sup> At Michigan, First Impressions seeks “op-ed length articles” designed to permit “quick dissemination of the legal community’s initial impressions of important judicial decisions, legislative developments, and timely legal policy issues.” *Submissions - First Impressions*, MICHIGAN LAW REVIEW, [www.michiganlawreview.org/information/submissions/first-impressions](http://www.michiganlawreview.org/information/submissions/first-impressions) (last visited Dec. 2, 2012). Virginia’s In Brief “prefer[s] pieces written in a newsmagazine opinion/editorial style.” *In Brief Submissions*, VIRGINIA LAW REVIEW, [virginialawreview.org/page.php?s=submissions&p=inbrief](http://virginialawreview.org/page.php?s=submissions&p=inbrief) (last visited Dec. 2, 2012). The Georgetown Law Journal seeks “more informal blog posts.” *Welcome to Ipsa Loquitur*, THE GEORGETOWN LAW JOURNAL, [georgetownlawjournal.org/ipsa-loquitur](http://georgetownlawjournal.org/ipsa-loquitur) (“Pitches and ideas for blog posts to Ipsa Loquitur should be submitted to the Online Managing Editor” and “can range from 250 to 2,000 words and use hyperlinks in place of footnotes.”).

in a “highly readable style.”<sup>75</sup>

Online companions have a number of advantages. They offer some intermediation,<sup>76</sup> including cite checking and editing by students,<sup>77</sup> albeit at a reduced level.<sup>78</sup> Online publication can also benefit from the “good name” of the law school<sup>79</sup> and the inclusion in legal databases.<sup>80</sup>

Online supplements have not, however, succeeded in stemming the influence of law faculty blogs. With respect to op-ed or blog-style pieces, the advantages of online companions in comparison to widely cited law faculty blogs is unclear. The “good name” of the law school has some value, but for online publications, the value is subject to a significant discount.<sup>81</sup> Moreover, the value of the “good

<sup>75</sup> See *Online Essay Submissions*, STANFORD LAW REVIEW, stanfordlawreview.org/submissions/online (last visited Dec. 2, 2012) (calling for submissions “with minimal footnotes (no more than 20)”). Harvard seeks commentary on recent developments that “employ a more informal style and a minimal use of citations.” See *Forum & Responses*, HARVARD LAW REVIEW, harvardlawreview.org/forum/ (last visited Dec. 2, 2012).

<sup>76</sup> Steven Kesioiwitz, *The Transformative Nature of Blogs and Their Effects on Legal Scholarship*, 2009 CARDOZO L. REV. DE NOVO 252, 268 (2009) (“The observation that blawgs, in sharp contrast to law reviews, lacks a viable mechanism for filtering content by means of a sustained, methodical selection and editing process highlights one of the most important differences between traditional legal scholarship and blawg postings.”). This is not true of all blogs, however. The Race to the Bottom has an editorial staff of students who review posts. See Brendan Harrington, *You Say You Want a Revolution*, law.du.edu/documents/corporate-governance/misc/DuSu07Racetobtm\_DU-2004.pdf.

<sup>77</sup> See *About En Banc*, VANDERBILT LAW REVIEW, vanderbiltlawreview.org/enbanc/about-enbanc (last visited Dec. 2, 2012) (“All pieces will be edited by the Vanderbilt Law Review staff.”).

<sup>78</sup> See *YLJ Online Submissions*, THE YALE LAW JOURNAL, yalelawjournal.org/submissions/ (last visited Dec. 2, 2012) (noting that online articles “are subjected to a similar, albeit expedited, editing process as those appearing in print.”).

<sup>79</sup> See Brophy, *supra* note 7, at 27 (noting that publication in online journal over blog occurred in order to gain “the imprimatur” of the law review’s “good name”).

<sup>80</sup> See *YLJ Online Submissions*, THE YALE LAW JOURNAL, yalelawjournal.org/submissions/ (last visited Dec. 2, 2012) (noting that online pieces are “fully accessible on LexisNexis and Westlaw, and available in PDF reprint format as well as on our online companion.”). See also *Forum & Responses*, HARVARD LAW REVIEW, harvardlawreview.org/forum (last visited Dec. 2, 2012) (online pieces “are available on the Lexis and Westlaw databases.”). Some blogs appear in these data bases through Newstex. See NEWSTEX, newstex.com/ (last visited Dec. 2, 2012). They are, however, in the newspaper file, a database that academics likely use less frequently than those containing law reviews.

<sup>81</sup> An issue likely of particular concern to the untenured is the reduced prestige often associated with online publications versus hard copy publications. See Bodie, *supra* note 67, at 6

name” arises at least in part from the rigorous selection, editing, and cite-checking process that precedes publication. For op-ed and blog-like pieces, these services will be less important.

Short posts on online companions may also have less influence. Unlike the material on many law faculty blogs, online companions provide content on a sporadic basis. As a result, they are not likely to attain the sustained traffic associated with the most popular law faculty blogs.<sup>82</sup> Moreover, not typically focusing on a specific area of law, online companions do not generate an audience particularly interested in the content of the blog post or op-ed piece.

### C. Observations

Law reviews play a critical role in the continuum of scholarship. They represent a repository for lengthy analysis on legal topics that are typically written in dense prose and heavily footnoted. To the extent that a legal topic requires detailed and extensive consideration in a non-time sensitive fashion, traditional articles meet these needs. Particularly in common law systems, which grant courts broad policy discretion, there will always be a significant role for thoroughly researched pieces that analyze and bring order to areas of law or that suggest alternative approaches.

But it bears repeating: Traditional law reviews are slow. Months pass between shopping a piece for publication and seeing it in print. Blogs capture these gaps, speeding the production process to mere hours. Online companions similarly attempt to fill the gaps through shorter pieces on current topics that are quickly published.<sup>83</sup> None-

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(“Publishing in the companion is not nearly as prestigious as publishing in the print journal.”). See also C. Judson King, *et al.*, *Scholarly Communication: Academic Values and Sustainable Models* 6 (July 27, 2006), [cshe.berkeley.edu/publications/docs/scholarlycomm\\_report.pdf](http://cshe.berkeley.edu/publications/docs/scholarlycomm_report.pdf) (“Publishing in online-only resources is perceived among junior faculty as a possible threat to achieving tenure because online publication may not be counted as much, or even at all, in review. Despite the fact that written policy indicates that online publications should not be undervalued in consideration of advancement, actual practice may vary.”).

<sup>82</sup> For statistics on law faculty blog traffic, see *supra* note 5.

<sup>83</sup> An example of intermediate scholarship that comments on a possible rule proposal, see J. Robert Brown, Jr., *Dodd-Frank, Compensation Ratios, and the Expanding Role of Shareholders in the Governance Process*, 2 HARV. BUS. L. REV. ONLINE 91 (2011) (commenting on SEC’s rulemaking authority under Dodd Frank), available at [ssrn.com/abstract=1942867](http://ssrn.com/abstract=1942867).

theless, law reviews struggle to obtain concise, ultra-timely scholarship. Faculty may be resistant to producing it.<sup>84</sup> And the approach strains law review resources.<sup>85</sup> Online companions have not, therefore, supplanted the role of law faculty blogs in the scholarship continuum.<sup>86</sup>

Blog posts do not face the same problems as online companions. Avoiding the student intermediation (and, gasp, occasional rejection), they can quickly introduce ideas into an ongoing debate or apply existing ones to new developments.<sup>87</sup> Nor do these posts consist only of unsupported opinion. They frequently refer to legal authority, although in a less dense, more flexible narrative. As a result, the analysis is more accessible to those outside the academic community, including judges, practitioners, and regulators.<sup>88</sup>

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<sup>84</sup> They must identify appropriate topics, draft the articles, and incur the risks of rejection. As one study outside the legal area noted, participation in online journals is hindered by “the lack of ability or time.” See also C. Judson King, *et al.*, *Scholarly Communication: Academic Values and Sustainable Models* 6 (July 27, 2006), [cshe.berkeley.edu/publications/docs/scholarlycomm\\_report.pdf](http://cshe.berkeley.edu/publications/docs/scholarlycomm_report.pdf).

<sup>85</sup> An emphasis on “intermediate” scholarship may also strain the resources of many law reviews. Online pieces will need to be edited and cite checked on an accelerated schedule. To effectively maintain this function, law reviews will probably need to add staff and devote additional resources to the online supplement. The actual content of online supplements reflects these difficulties. They have, for the most part, focused on pieces that respond to articles published in the hard copy version. These can be arranged by invitation and, less time sensitive, do not necessarily require a staff entirely dedicated to the online companion. Finally, they provide additional interest in, and awareness of, the hard copy publication.

<sup>86</sup> Judge Posner, himself a blogger, views blogs as at least a partial solution to some of the problems associated with the system of law reviews. See Richard A. Posner, *Essay: Law Reviews*, 46 WASHBURN L.J. 155, 161 (2006) (criticizing law reviews and noting that he “see[s] one ray of hope on the horizon, and that is the growth of the law-related blog.”). For an example of blogs influencing judicial developments, see PAUL L. CARON, *THE STORY OF MURPHY: A NEW FRONT IN THE WAR ON THE INCOME TAX IN TAX STORIES* (Foundation Press, 2d ed. 2009).

<sup>87</sup> See Walter Olson, *Abolish the Law Reviews!*, THE ATLANTIC, July 5, 2012, available at the [atlantic.com/national/archive/2012/07/abolish-the-law-reviews/259389/](http://atlantic.com/national/archive/2012/07/abolish-the-law-reviews/259389/) (“But when it comes to discussion of timely controversies, slash-and-thrust debates, and other forms of writing that people actually go out of their way to read, there’s no doubt where talented legal academics are headed: to blogs and other shorter-form online publications.”).

<sup>88</sup> Judicial clerks apparently read blog posts, including those at the Supreme Court. See J. Robert Brown, *The Influence of Law Blogs on the Judicial Process*, THE RACE TO THE BOTTOM (Dec. 21, 2009), [theracetothetbottom.com/blawgs-rankings/the-influence-of-law-blogs-on-the-judicial-process.html](http://theracetothetbottom.com/blawgs-rankings/the-influence-of-law-blogs-on-the-judicial-process.html).

Blog commentary is not without weaknesses. Not all of the notoriety generated by a blog post is thoughtful or correct. Some writers may suffer from “blogger’s disease,”<sup>89</sup> a condition that encompasses poor judgment in writing posts and a willingness to opine on subjects outside one’s substantive area of competency.<sup>90</sup> (Student editors, it must be acknowledged, are not an unqualified evil for authors. Faculty may rush out a view or judgment that they will later want to alter.<sup>91</sup>

Nonetheless, the increased intermediation that occurs with respect to the most influential law faculty blogs should reduce the instances of this type of commentary. Well known Independents, Empires, and Captives have an incentive to maintain their reputation by ensuring high quality posts. Yet even if weak scholarship occasionally emerges onto the blogosphere, it is not without value. Bad ideas are still ideas. And many good ideas are inspired by the bad ideas that they are created to respond to.

#### IV. LAW BLOGGING, FACULTY REPUTATION AND DISRUPTIVE INNOVATION

The disruptive effect of law faculty blogs can also be seen with respect to faculty reputation. There is no single measure for determining faculty reputation. Absolute productivity is a factor, including the number and length of articles. Quality productivity – with publications in elite law reviews used as a proxy for actual

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<sup>89</sup> I have borrowed the phrase from Al Brophy at UNC. *Alfred Brophy*, UNC SCHOOL OF LAW, [law.unc.edu/faculty/directory/brophyalfred/](http://law.unc.edu/faculty/directory/brophyalfred/) (last visited Dec. 2, 2012).

<sup>90</sup> Bad judgment can exist, whatever the rank of the law school where the faculty member teaches. Bad judgment can be shown in the language used, the tendency toward *ad hominem* attack, and the willingness to comment on subjects outside any knowledge base or expertise of the author. It can arise out of ignorance, a craving for publicity, and hubris. The views will be noticed.

<sup>91</sup> There also may be other dangers in posting on blogs. Positions taken in the blogosphere may identify a legal leaning or philosophy that effectively forecloses other options in the future. Lani Guinier withdrew from consideration for Assistant Attorney General for the Civil Rights Division as a result of criticism arising from positions taken in law review articles. See Nancy Waring, *HARVARD LAW BULLETIN* (1999), *Lani Guinier: Present and Visible*, [law.harvard.edu/news/bulletin/backissues/spring99/article3.html](http://law.harvard.edu/news/bulletin/backissues/spring99/article3.html). Outspokenness on a law faculty blog can presumably have the same effect.

quality – also counts.<sup>92</sup> Citations are another metric for assessing reputation, as are SSRN downloads.<sup>93</sup> Aside from the quantity of production, however, each of these metrics have a built-in bias that favors faculty from top law schools.<sup>94</sup>

Law blogs, crucially, permit faculty to route around these biases. Moreover, with few barriers to entry, the mechanism is available to law schools without significant resources. Finally, with top schools mostly avoiding the blogosphere, the medium remains dominated by faculty from lower-ranked institutions, at least at present.<sup>95</sup>

### A. Traditional Measures of Faculty Reputation

One strategy for improving faculty reputation is to increase placement of articles in elite law reviews. For faculty at non-elite law schools, however, this is a particularly difficult strategy to implement.

Top law reviews have only a modest number of “prestige slots.”<sup>96</sup>

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<sup>92</sup> See Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 461 (2000) (“As a partial proxy for quality, the study was confined to publications only with the most prestigious journals and presses. More precisely, I looked at per capita productivity in the 10 leading law reviews, determining that list by ascertaining which law reviews are cited most often.”). For an analysis of citation counts as another possible measure, see Gregory C. Sisk et al., *Scholarly Impact of Law School Faculties in 2012: Applying Leiter Scores to Rank the Top Third* (U. of St. Thomas Legal Studies Research Paper No. 12-21, 2012), available at [ssrn.com/abstract=2109815](http://ssrn.com/abstract=2109815).

<sup>93</sup> See Leiter, *supra* note 91, at 468 (“Productivity as a measure of the academic distinction of a faculty is simply too overinclusive to suffice by itself. Scholarly impact, as measured by citations, and subjective reputation help to introduce an important qualitative element that might otherwise be missing.”).

<sup>94</sup> The placement and download bias is discussed in this section. With respect to citations, see Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L. J. 83, 113 (2006) (“Citation counts are also influenced by the “halo effect” of an article’s placement”).

<sup>95</sup> The same phenomena appear to occur with respect to law firms. Most blogs are operated not by the largest firms, but those just below. See Adrian Dayton, *Biggest Firms Still Not Blogging*, THE NAT’L L. J., May 9, 2012 (noting that the top 10 law firms had only 32 law blogs, or one blog for 906 lawyers, and noting that “[t]o see which firms are really catching the vision, you need to look just outside the AmLaw 100”).

<sup>96</sup> Charles A. Sullivan, *Aside: The Under-Theorized Asterisk Footnote*, 93 GEO. L.J. 1093, 1113 (2005) (“While placement in a number of other journals would have equal (would some dare to say ‘superior’?) reputational advantages, the total number of available prestige slots is still very small.”).

These are not awarded on the basis of peer review or blind submission. Instead, they are determined by students who, in the presence of voluminous submissions, rely on a variety of “shortcuts” in the selection process.<sup>97</sup> These include proxies for quality such as the faculty member’s reputation or law school.<sup>98</sup> Top reviews often favor “in house” candidates.<sup>99</sup> The result is a bias in favor submissions from faculty at top, often elite, law schools.

Papers on SSRN to some degree compete with traditional law reviews as evidence of productivity.<sup>100</sup> Posted on the Internet and easily accessible, the papers can be obtained without the use of a library or expensive database. SSRN also keeps count of the number of times an abstract is visited and a paper downloaded, providing a crude method for determining readership.<sup>101</sup>

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<sup>97</sup> See Nathan H. Saunders, Note, *Student-Edited Law Reviews: Reflections and Responses of an Inmate*, 49 DUKE L.J. 1663, 1666 (2000) (“Later, when I was elected article editor and began reviewing articles on my own, I quickly learned the shortcuts to article selection: Review articles from top schools and top professors quickly, not because they are necessarily better, but for practical reasons - that is, because another law review is much more likely to grab them up.”).

<sup>98</sup> For a discussion of these biases, see Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those with All the Power - Student Editors*, 59 S.C. L. REV. 175 (2007). See also Jason P. Nance & Dylan J. Steinberg, *The Law Review Article Selection Process: Results from a National Study*, 71 ALB. L. REV. 565, 612 (2008) (“We found, for example, that Articles Editors like to publish articles from well-known and widely-respected authors.”); Ronald J. Krotoszynski, Jr., *Commentary: Legal Scholarship at the Crossroads: On Farce, Tragedy, and Redemption*, 77 TEX. L. REV. 321, 329 (1998) (“Many law reviews use not only a particular author’s reputation as a shorthand, but also use the author’s institutional affiliation as a convenient proxy for gauging the probable merit of a submission.”); Sullivan, *supra* note 95, at 1113 (“Indeed, Harvard’s Volume 114 had only thirteen articles, and only one of them (Mr. Witt’s) was by someone without both a strong track record of legal scholarship and a current position on an elite law faculty.”).

<sup>99</sup> That is the practice of top schools publishing articles from their own faculty. See Christensen & Oseid, *supra* note 97; see also Leiter, *supra* note 91, at 461-62 (noting that “student-edited law reviews generally give preference to faculty at the home institution”).

<sup>100</sup> See SOCIAL SCIENCE RESEARCH NETWORK, [ssrn.com](http://ssrn.com) (last visited Dec. 2, 2012). SSRN has been in existence since 1994 and “is a closely held, for-profit corporation known for providing ‘eLibraries’ in ten social science disciplines, including the Legal Scholarship Network.” Carol A. Parker, *Institutional Repositories and the Principle of Open Access: Changing the Way We Think About Legal Scholarship*, 37 N.M. L. REV. 431, 456 (2007).

<sup>101</sup> SSRN ranks the top 1,500 law faculty based upon downloads during the prior year and law schools.

Downloads can be influential. Visually compelling, simple to read, and containing the number of papers posted, they can influence the assessment of faculty productivity. They reportedly play a role in the law review placement process<sup>102</sup> and are sometimes used as a “faculty evaluation tool.”<sup>103</sup> At least one study has correlated SSRN downloads with productivity.<sup>104</sup>

Compared with law reviews, SSRN downloads offer a more egalitarian system. Faculty from any school can post papers without student intermediation.<sup>105</sup> As a result, they can “route around” the biases inherent in the traditional law review selection process.<sup>106</sup> Nonetheless, an examination of SSRN downloads shows that faculty at top law schools dominate this system as well.

An analysis of the 140 U.S. law faculty scholars among the top 200 individuals ranked by downloads in the SSRN Top 3,000 law authors as of May 1, 2012 (“Download Rankings”) reveals that most are from the highest ranked law schools.<sup>107</sup> Thirty-three percent of the U.S. faculty in the Download Rankings come from the top 10 schools in the U.S. News and World Report Law School Rankings (the “elite schools”). That increases to 58 percent (81 out of 140)

<sup>102</sup> Parker, *supra* note 99, at 467 (noting reports that some reviews have given offers based upon “posting a paper in SSRN”).

<sup>103</sup> *Id.* at 468 (“There are also reports of repository download counts being used as faculty evaluation tools.”).

<sup>104</sup> See Black & Caron, *supra* note 93, at 125 (“We observe in closing that the correlation between the SSRN downloads measure and the SSRN papers measure is a striking .89 for measures and .93 for ranks. Based on the evidence to date, the best way for a school to do well on both SSRN measures is to have a productive faculty who write a lot and post what they write.”). There are other online repositories such as Berkeley Electronic Press or bepress. They report downloads but do not rank scholars. See Parker, *supra* note 99, at 466 (noting that bepress provides monthly reports on total downloads).

<sup>105</sup> In that regard, SSRN devotes “substantial resources” to an accurate count of downloads and efforts to prevent “gaming” the system. See Matt Bodie, *An Interview with SSRN’s Gregg Gordon*, PRAWFSBLAWG (June 15, 2006), [prawfsblawg.blogspot.com/2006/06/an\\_interview\\_wi.html](http://prawfsblawg.blogspot.com/2006/06/an_interview_wi.html).

<sup>106</sup> See Jack M. Balkin, *Online Legal Scholarship: The Medium and the Message*, 116 YALE L.J. POCKET PART 23, 25 (2006) (“Both online media like the Social Science Research Network (SSRN) and blogging route around the traditional gatekeepers of legal scholarship: law journals.”).

<sup>107</sup> The list appears in Appendix E. The list includes the top 200 in downloads over the prior 12 months. It excludes faculty who teach at foreign law schools and who teach at U.S. institutions but not at a law school.

when considering the top 25 law schools and 72 percent (101 out of 140) when examining the top 50. Law schools outside the top quartile contributed only 28 percent of the U.S. law faculty in the Download Rankings.

Domination by top schools may be a consequence of productivity. Many of these schools operate under a system of rewards that encourage the production of large numbers of papers.<sup>108</sup> Downloads are, however, also likely influenced by some of the same biases that inculcate the law review selection process.<sup>109</sup> Downloads may reflect a pervasive preference for papers written by faculty at elite law schools or published in elite law journals. Moreover, there is likely a marketing component to downloads that favors higher-ranked schools with deep pockets.<sup>110</sup>

### *B. Blogging and Faculty Reputation*

Law blogging represents a method for routing around traditional means of determining reputation. Faculty can increase awareness of their expertise and scholarship without having to obtain “prestige slots” in elite journals. Moreover, with blogs commonly used for authority in law review articles, posts represent a mechanism for increasing the number of faculty citations.<sup>111</sup>

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<sup>108</sup> Among other things, the top law schools provide reduced teaching loads. For a survey of teaching load done in 2005, see Gordon Smith, *Law Professor Teaching Loads*, THE CONGLOMERATE (Apr. 12, 2005), [theconglomerate.org/2005/04/law\\_professor\\_t.html](http://theconglomerate.org/2005/04/law_professor_t.html). See also Leiter, *supra* note 91, at 466 (“Top law schools are productive law schools. This should hardly be surprising: a law school typically acquires and maintains its academic reputation through its scholarly output.”).

<sup>109</sup> See Black & Caron, *supra* note 93, at 113 (noting that SSRN has an established scholar bias and describing this as a bias in favor of “better-known authors at better-known schools”). See also Paul Horwitz, “Evaluate me!”: *Conflicted Thoughts on Gatekeeping in Legal Scholarship’s New Age*, 39 CONN. L. REV. CONNTEMPLATIONS 38, 48 (Spring 2007) (noting that SSRN downloads will “generally favor papers uploaded by scholars who have already been certified by the old gatekeepers”).

<sup>110</sup> Resources are a significant component in the rankings. See Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers? The Advantages of Multiple Rankings*, 81 IND. L.J. 205, 209 (2006). Downloads will increase as papers are actively marketed to non-law school audiences. This can include articles in alumni magazines, e-mail campaigns, or distribution through centers and institutes that focus on the subject area of the paper.

<sup>111</sup> Studies of citations by law faculty have occasionally been undertaken. See Sisk *et al.*,

Evidence of improved reputation can be seen from the correlation between blogging and SSRN downloads.<sup>112</sup> Blogging can increase downloads in two ways. First, articles can be marketed directly through references and links in posts. These references will have a lingering effect. Even after blog posts have disappeared from the main page, they will be subject to subsequent discovery by those searching the Internet.

Second, a sustained presence on the Internet can enhance name recognition. Substantive, high-quality posts will generate increased awareness of particular faculty member's expertise. That, in turn, can stimulate interest in the faculty member's scholarship, even if the articles are not specifically mentioned in posts, resulting in a virtuous circle in which a better reputation leads to more readers, which leads to a better reputation, which leads to a better reputation, and so on.

Anecdotal evidence (and common sense) indicates that the sustained reference to an article in blog posts can affect SSRN downloads. A number of small experiments show this relationship.<sup>113</sup> On July 24, 2007, a paper on SSRN<sup>114</sup> with 199 downloads and about 495 abstract views was prominently mentioned in the first paragraph in a post on the Harvard Corporate Governance Blog.<sup>115</sup> Within 48 hours, the paper, which had largely been inactive in the prior week, received 21 downloads and approximately 29 abstract views.

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*supra* note 91.

<sup>112</sup> See Black & Caron, *supra* note 93, at 122 ("To be sure, downloads are affected by publicity, through blogs and other means. Anecdotal evidence suggests that active bloggers tend to get high downloads.").

<sup>113</sup> See Paul Ohm, *Do Blogs Influence SSRN Downloads? Empirically Testing the Volokh and Slashdot Effects* (U of Colorado Law Legal Studies Research Paper No. 07-15, 2007), available at [ssrn.com/abstract=980484](http://ssrn.com/abstract=980484) (chronicling the impact on downloads of posts on The Volokh Conspiracy and Slashdot).

<sup>114</sup> J. Robert Brown, Jr., *Essay: Corporate Governance, the Securities and Exchange Commission, and the Limits of Disclosure*, 57 CATH. U. L. REV. 45 (2007-08).

<sup>115</sup> J. Robert Brown, *The SEC, Corporate Governance, and the Election of Directors*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (July 24, 2007), [blogs.law.harvard.edu/corpgov/2007/07/24/the-sec-corporate-governance-and-the-election-of-directors/#more-188](http://blogs.law.harvard.edu/corpgov/2007/07/24/the-sec-corporate-governance-and-the-election-of-directors/#more-188).

Similarly, a paper published in 1988<sup>116</sup> was posted in 2007 and was largely inactive for both downloads and abstract views.<sup>117</sup> A weeklong series of posts on the topic of the paper, with a number of references, was run in late November and early December 2007. The series resulted in a significant number of downloads and visits.<sup>118</sup>

Downloads can also increase as a result of enhanced name recognition. This can be seen from the apparent correlation between law blogging and SSRN rankings. The top 200 faculty by downloads on May 1, 2011 (“Download Rankings”) included 39 faculty who taught at law schools outside the U.S. News rankings’ top 50. Of the 39 faculty, a significant number (11) were affiliated with blogs.<sup>119</sup>

This relationship, however, is even more pronounced when comparing faculty at elite law schools with those just outside. Faculty from elite schools who appear in the Download Rankings do not blog. Yale has seven faculty in the top 200; only one blogs. Harvard has 12; only one blogs. At Stanford, Columbia, NYU, Berkeley, Pennsylvania, Virginia, and Michigan, none of the faculty in the Download Rankings blogs on a regular basis.<sup>120</sup>

For law schools ranked immediately outside the top 10, however, the situation is markedly different. Georgetown (ranked 13<sup>th</sup>), has four faculty in the Download Rankings, three of whom blog. Of the three faculty members in the rankings from UCLA (ranked 15<sup>th</sup>), two blog. George Washington University (ranked 20<sup>th</sup>) has six faculty in the Download Rankings, four of whom blog. The two

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<sup>116</sup> J. Robert Brown, Jr., *The Shareholder Communication Rules and the Securities and Exchange Commission: An Exercise in Regulatory Utility or Futility?*, 13 J. CORP. L. 683 (1988).

<sup>117</sup> On November 21, 2007, the paper had 20 downloads and 78 views. Over the period when the posts were run, the number of downloads increased to over 60 and the number of views to over 200.

<sup>118</sup> For evidence of the relationship between blogging and downloads, see Melissa Terras, *The verdict: is blogging or tweeting about research papers worth it?*, IMPACT OF SOCIAL SCIENCES (Apr. 19, 2012), [blogs.lse.ac.uk/impactofsocialsciences/2012/04/19/blog-tweeting-papers-worth-it/#more-6417](http://blogs.lse.ac.uk/impactofsocialsciences/2012/04/19/blog-tweeting-papers-worth-it/#more-6417).

<sup>119</sup> The list is included in Appendix E. The list includes the top 200 in downloads over the prior 12 months.

<sup>120</sup> The statistics are based upon those who are currently blogging. The data does not include faculty from these institutions who may have blogged in the past.

faculty from Washington University (ranked 23<sup>rd</sup>) in the Download Rankings also blog.

The data is suggestive. For faculty teaching at an elite law school, reputation is most likely based upon the status quo. Because they benefit from the existing set of biases, these professors have little incentive to route around the traditional criteria for determining reputation. Faculty outside this group, however, benefit less from the status quo and have greater incentive to embrace mechanisms such as blogging that permit them to route around the status quo.

## V. LAW BLOGGING, RANKINGS AND DISRUPTIVE INNOVATION

Law faculty blogs also have the capacity to disrupt law school rankings. For some schools, particularly those with minimal name recognition, blogging can increase awareness by those filling out the annual reputational survey. Even for those schools already well known but not among the elite institutions, blogging can increase the awareness of the substantive expertise of the faculty and, as a result, elevate the law school's reputational scores.

### A. *The Importance of Reputation*

U.S. News uses a variety of factors to rank law schools. The single largest component is reputation, with 25 percent from other academics and 15 percent from practitioners and judges.<sup>121</sup> These scores are generally thought to depend upon the scholarly reputation of a law school's faculty.<sup>122</sup> Scholarly reputation in turn depends

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<sup>121</sup> See *Law Methodology*, U.S. NEWS & WORLD REP. (Mar. 26, 2008), available at [usnews.com/education/articles/2008/03/26/law-methodology](http://usnews.com/education/articles/2008/03/26/law-methodology). Four faculty at each accredited law school receive and typically return the survey. See Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 516 (2007). About 67 percent of the faculty receiving the surveys returned them for the 2007 survey. *Id.* at 497. Judges and practitioners are less likely to do so. *Id.*

<sup>122</sup> Denis Binder, *The Changing Paradigm in Public Legal Education*, 8 LOY. J. PUB. INT. L. 1, 26 (2006) ("A significant factor in the ranking of universities and law schools is the reputation of the faculty. In short, faculties are measured by their scholarly reputation rather than by teaching ability."). See also Ronald H. Silverman, *Weak Teaching, Adam Smith and a New Model of Merit Pay*, 9 CORNELL J. L. & PUB. POL'Y 267 (2000).

upon the quality and placement of scholarship,<sup>123</sup> something evidenced through publication in elite journals.<sup>124</sup> Reputational rank is notoriously hard to change<sup>125</sup> and generally remains constant over time.<sup>126</sup>

Many of the 202 ABA-accredited law schools are not well known.<sup>127</sup> The reputation of these schools can be based on information unrelated to the actual quality of the law school.<sup>128</sup> Other law schools are well known but nonetheless seek to improve their relative rank. In both cases, law schools engage in marketing cam-

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<sup>123</sup> Nancy B. Rapoport, *Symposium: The Next Generation of Law School Rankings: Other Voices in the Rankings Debate: Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 368 (2006) ("What will change a school's academic reputation score over time is more high-quality research published in more visible, high-status journals, so that the high-quality research can be used (found, read, and cited) by more academics at other institutions."). See also Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY'S L.J. 301, 350-55 (2003).

<sup>124</sup> A number of studies have suggested that law school reputation correlates with law review reputation. See Alfred L. Brophy, *The Relationship Between Law Review Citations and Law School Rankings*, 39 CONN. L. REV. 43 (2006). Law reviews are generally ranked on the basis of citations. At least one commentator has asserted that law review reputation flows from the reputation of the law school and not vice versa. See Ronen Perry, *Commentary: Law School Rankings Response: Correlation versus Causality: Further Thoughts on the Law Review/Law School Liaison*, 39 CONN. L. REV. 77, 83-84 (2006).

<sup>125</sup> So says one former dean. See Rapoport, *supra* note 122, at 368 ("As we've learned in our own strategic planning project, the reputational rankings are very hard to change.").

<sup>126</sup> See generally Richard Schmalbeck, *The Durability of Law School Reputation*, 48 J. LEGAL EDUC. 568 (1998). See also Alfred L. Brophy, *The Emerging Importance of Law Review Rankings for Law School Rankings, 2003-2007*, 78 U. COLO. L. REV. 35, 44 (2007) (describing peer rankings as "famously static"). Consistency is particularly strong for the top schools. "Beyond the top quartile, 'there is modestly less rank congruence in the annual lists. Still, consistency from year to year continues to be the rule.'" Schmalbeck, 48 J. LEGAL EDUC. at 575.

<sup>127</sup> The form merely lists the law schools in alphabetical order, with no additional information about each school. As a result, those filling out the surveys likely pre-judge law schools, presumably based upon their own unique mix of information. See Brophy, *supra* note 7, at 17 (noting that those filling out surveys have "(apparently) pre-judged" the law schools).

<sup>128</sup> Thus, name recognition alone can be a significant factor. See Seto, *supra* note 120, at 518 (discussing name recognition as a factor in reputational rankings and concluding that "[l]aws schools in the Pacific and far western time zones 'appear to be systematically underranked' because, as a 'tentative hypothesis,' 'many such schools lack name recognition on the East Coast.'"). Seto at least surmises that having a strong sports team does not necessarily generate an improved reputational ranking. *Id.* at 519.

paings designed to promote a school's reputation.<sup>129</sup> Expensive,<sup>130</sup> the approach favors those schools with the resources necessary to embark on an effective campaign.<sup>131</sup>

### *B. Blogging and Law School Reputation*

Blogging has the capacity to improve a law school's reputation in two ways. For less well-known schools, blogging can increase name recognition. These law schools can benefit both from blogs that contain substantive posts and blogs that emphasize description over analysis. This might occur, for example, on blogs that focus on timely disclosure of legal developments, something that can attract attention from practitioners, academics, and others seeking to remain substantively current. While these blogs may duplicate functions already performed by non-academics, such as law firms, they provide a useful service that will help elevate awareness of the relevant law school.<sup>132</sup>

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<sup>129</sup> See, e.g., Black & Caron, *supra* note 93, at 87 ("The peer assessment survey has fueled efforts by schools to send glossy promotional material (known as 'law porn') to law faculty elsewhere, in the hope of improving their ranking.") (citation omitted). See also Ariens, *supra* note 122, at 355 ("the school may continue to strive to improve its ranking (or at least offer the pretense of attempting to strive to reach a more selective tier of law school) via the traditionally accepted method of accomplishment and prominent faculty scholarship.").

<sup>130</sup> See, e.g., Patrick T. O'Day & George D. Kuh, *Symposium: The Next Generation of Law School Rankings: Other Voices in the Rankings Debate: Commentary: Assessing What Matters in Law School: The Law School Survey of Student Engagement*, 81 IND. L.J. 401, 404 (2006) ("For example, dozens of law schools send out glossy brochures or lecture notices to academics or appoint partners and judges in order to enhance their reputation in the eyes of those polled by U.S. News. In fact, some schools spend more than \$100,000 a year on marketing before and after the rankings.").

<sup>131</sup> See Rapoport, *supra* note 122, at 361 ("Most of what [top ranked laws schools] have that we don't is money, and lots of it. Many of them have private foundations with large endowments. That additional money enables them to pay larger salaries to professors, to buy more students with scholarship funds, to have larger library collections, to hold more conferences, etc.").

<sup>132</sup> Moreover, this is an improvement over mention in glossy brochures. As Harry Gerla at the University of Dayton School of Law said to me in an e-mail: "A professor quoted in a glossy brochure for a law school is propagandist. A professor quoted by the 'general' media is an expert!" See Harry Gerla, UNIVERSITY OF DAYTON, [udayton.edu/directory/law/gerla\\_harry.php](http://udayton.edu/directory/law/gerla_harry.php) (last visited Dec. 2, 2012).

Law schools already well known will benefit primarily from blogs that emphasize substantive analysis. Particularly when writing for a widely read law blog, faculty can become better known among academics, judges, and practitioners, all of whom fill out the reputational survey circulated by U.S. News. With a significant Internet footprint, they can be located through the use of search engines, something commonly used by the press.<sup>133</sup>

Blogging, therefore, represents a mechanism for promoting the identity of the law school and the quality of the faculty. Both can result in higher reputational scores on the annual U.S. News survey. And reputation, as noted, is the most important component of the rankings.

### *C. Law School Representation on the Blogosphere*

That law schools outside the top 10 can benefit from law faculty blogs is supported by a survey of those who actually blog. The data shows that faculty from non-elite law schools dominate the blogosphere.

On June 1, 2012, there were approximately 302 law school faculty who actively blogged, a number that has been relatively stable over the last six years.<sup>134</sup> For law faculty, the blogosphere is primarily a male preserve. Only 28 percent of the law faculty who blog are women.

Of the law schools represented on the blogosphere, eight percent (23) came from the elite schools. Blogging was far more com-

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<sup>133</sup> This is true, for example, with respect to the press. See Mark Herrmann, *Persuasion: Memoirs of a Blogger*, 36 LITIGATION 46 (Winter 2010) (“[P]erhaps most surprisingly, our blog has received innumerable visits from the press. The mainstream media has an insatiable appetite for both news stories and experts to comment on those stories.”).

<sup>134</sup> See Appendix C. Putting together a list of all law faculty blogs is a surprisingly difficult task. There is no single repository of these blogs. A starting point was a list of law faculty blogs compiled in 2009. See Colin Miller, *2009 Legal Educator Blog Census, Version 2.0 (Alphabetical Blog Listing)*, EVIDENCEPROF BLOG (Sept. 8, 2009), [lawprofessors.typepad.com/evidenceprof/2009/09/alphabetical.html](http://lawprofessors.typepad.com/evidenceprof/2009/09/alphabetical.html). In addition, however, blogs often list multiple contributors, some of whom no longer write. For those, a listed blogger had to write at least four posts since January 1, 2012. For census data through August 2007 on the number of law faculty who blog, see Daniel J. Solove, *Updates to the Law Professor Blogger Census*, CONCURRING OPINIONS (Aug. 6, 2007), [concurringopinions.com/archives/law\\_professor\\_blogger\\_census/](http://concurringopinions.com/archives/law_professor_blogger_census/). That census put the number at 308.

mon for the remainder of the top 25.<sup>135</sup> Schools 11 through 25 contributed 41 bloggers, or 14 percent. Law schools ranked 26 through 50 added 50 faculty or 16 percent to the blogosphere.<sup>136</sup> Thus, the top 50 schools were responsible for 38 percent (114) of the 300 active, full-time law faculty bloggers.

By contrast, most active bloggers taught at schools outside of the top 50. These schools were collectively responsible for 62 percent (188) of law faculty who blogged regularly. Of those, 91 came from schools ranked 51 through 100 and 97 from the third and fourth quartiles.<sup>137</sup>

Most bloggers, therefore, come from law schools outside the top quartile. Moreover, in contrast with SSRN downloads, the elite law schools have at best a modest presence on the blogosphere.<sup>138</sup> The data suggests that these institutions place little if any institutional value on the practice.<sup>139</sup>

In at least some cases, blogging represents a zero-sum game with respect to other types of scholarship.<sup>140</sup> Protracted output on the

<sup>135</sup> Three schools within the top 10 (Stanford, Pennsylvania, and Michigan) had no one who blogged regularly. Only Berkeley (with 5) and NYU (with 4) had a noticeable presence in the blogosphere.

<sup>136</sup> The percentage was 16.55% but rounded down in order to have the total percentage equal 100%.

<sup>137</sup> For a complete breakdown of the number of law bloggers by law school, see Appendix D.

<sup>138</sup> The dearth of blogging at elite law schools likely has a number of explanations. Tenured faculty at elite schools may be older and less willing to experiment with technology. Moreover, those with national reputations may have other outlets for commentary, including high-trafficked sites such as the Huffington Post or Slate.com. Moreover, the statistics in this paper are a snapshot in time and do not pick up faculty at elite law schools who blogged at one time. Larry Lessig at Harvard is an example. See LESSIG 2.0, lessig.org/ (last visited Dec. 2, 2012).

<sup>139</sup> Speaking in terms of institutional preferences may be a questionable approach. The relatively small number of individuals from each law school who blog suggests that the decision to maintain a presence on the Internet is driven by faculty rather than institutional preferences.

<sup>140</sup> Some take the position that blogging results in an increase in scholarship. See Douglas A. Berman, *Scholarship in Action: The Power, Possibilities, and Pitfalls for Law Professor Blogs*, 84 WASH. U. L. REV. 1043 n.25 (2006) ("In my experience, blogging has fueled my traditional scholarship, rather than taken time away from it. . . . Perhaps because I have gained so many new insights and thus have many new things I want to say, I have actually been more productive (and efficient) outside the blogosphere since starting my blog."). Nonetheless,

Internet can reduce the time available for law review articles or papers posted on SSRN. To the extent it is reliable, the data suggests that faculty from non-elite schools see blogging as an important mechanism for participating in the legal debate that, in some cases, is more important than other forms of scholarship.

## CONCLUSION

Blogging is a disruptive innovation, affecting legal scholarship, faculty reputation and law school rankings. The discipline began as an inferior technology that operated in an undifferentiated market. There were no structural mechanisms that effectively reduced the Internet noise coming from the myriad of personal and legal views expressed online. Consumers of blog posts had to determine quality on a post-by-post basis.

As the theory of disruptive innovation posits, however, inferior technology can evolve and supplant the reigning standard. Blogs have become more organized. Independents, Empires, and Captives all have mechanisms for ensuring the quality of blog posts. Moreover, the pattern of citations in law reviews and judicial opinions shows the emergence of a class of law faculty blogs that are routinely relied upon for legal authority.

The presence of these blogs has significant implications for legal scholarship. Law faculty blogs can provide ideas for longer papers or articles and facilitate the integration of empirical observations into scholarly work.<sup>141</sup> More directly, however, they fill a serious gap left in the continuum of scholarship left largely unaddressed by traditional law reviews.

With little delay in publication, law faculty blogs provide a mechanism for rapid dissemination of legal analysis on rapidly moving developments. They also represent a valuable means for discussing micro-discoveries, ideas that might otherwise go unmentioned

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given the time commitment involved, at least some faculty who write regularly on blogs presumably spend less time on other types of scholarship.

<sup>141</sup> To the extent that law blogs analyze current developments, the empirical observations may appear in subsequent scholarship.

and undeveloped in longer articles.<sup>142</sup> The scholarship offered by law faculty blogs can encourage debate, explore legal concepts in an accessible fashion, and assist courts, regulators, legislators, and other decision makers in resolving difficult issues.

Law faculty blogs, therefore, are a quintessential disruptive innovation. What began as an inferior technology has become a fixture in the scholarship continuum. Moreover, their presence effectively reduces the role of traditional law reviews. With blogs a more appropriate mechanism for disseminating some types of analysis, law reviews will be consigned to a niche that is appropriate for longer and more thorough pieces less affected by the need for timeliness.

Law faculty blogs have had other disruptive effects on legal education. They allow faculty to route around biases present in the traditional indicia of reputation. Particularly as online searches continue to be used as a primary tool for identifying expertise, those with a strong Internet footprint from sustained blogging will become better known and easier to locate.<sup>143</sup> In at least some cases, the resulting increase in reputation will come at the expense of faculty who teach at elite institutions.<sup>144</sup>

Law faculty blogs can also have a disruptive influence on rankings. Blogging can positively enhance the name recognition of law schools and improve the perception of their faculty. Moreover, blogging is not limited to law schools with significant resources. With faculty time the most significant barrier to entry, all institutions can encourage participation in law faculty blogs by reducing other responsibilities within the academic community.

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<sup>142</sup> See *supra* note 8.

<sup>143</sup> Thus, for example, the media can more easily find legal “experts” through resort to the Internet and searches. See Balkin, *supra* note 105, at 26 (“Routing around changes the relationship between legal experts and the public, and particularly journalists. Online media make it easier for journalists to find expert coverage of legal events.”).

<sup>144</sup> To the extent blogging allows more law faculty to squeeze into the top 200 in SSRN downloads, they displace others who, but for the blogging, would have been there. Presumably some of this displaced faculty would be professors at elite law schools who rely on non-blogging mechanisms to enhance their reputation.

Law schools just outside the elite ranks have greater incentive to rely on strategies designed to circumvent the status quo. Blogging allows faculty at these institutions to route around any biases inherent in the traditional indicia of expertise and reputation. The correlation between blogging and SSRN downloads suggests that this can be a successful strategy. Similarly, those outside the top tiers can also benefit from blogging through increased name recognition.

In time, blogging will become part of the status quo for all law schools. Elite institutions will encourage faculty to establish a meaningful online presence, something that will shift productivity away from traditional law review articles and papers posted on SSRN. Moreover, top law schools have the resources to poach faculty who have enhanced their reputation through blogging. Eventually, therefore, upper tier schools will likely dominate the blogosphere much the way that they dominate SSRN rankings and placements at top law reviews.<sup>145</sup>

In the short term, however, elite law schools have not targeted blogging. As a result, the opportunity exists for other law schools to gain a first-mover advantage and stake out a strong position on the Internet. That will require an understanding of the unique benefits of law faculty blogs and an internal system of rewards that encourages the activity.

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<sup>145</sup> The opportunity will not last. Ultimately, top ranked law schools with superior resources will muscle their way into the blogosphere. See Horwitz, *supra* note 108, at 48 (noting that “the old gatekeepers will find ways of glomming onto and co-opting the new media”).

APPENDICES<sup>146</sup>

Appendix A:Case Citation Count of Law Faculty Blogs: Lexis-Nexis  
Case File (state and federal)

Appendix B:Law Review Citation Count of Law Faculty Blogs

Appendix C:List of All Faculty Who Blog (June 1, 2012) (including  
name, law school, gender, and relevant blog)

Appendix D:Law Schools and the Number of Faculty Who Blog

Appendix E:Law Faculty Appearing in SSRN Top 200 for Down-  
loads, May 1, 2012 and their Blog Affiliation

Appendix F:SSRN Ranking of Top 200 U.S. Law Faculty by Law  
School

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<sup>146</sup> These appendices are posted on SSRN. See [ssrn.com/abstract=2115587](http://ssrn.com/abstract=2115587).

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# TOP SUPREME COURT ADVOCATES OF THE TWENTY-FIRST CENTURY

*Kedar S. Bhatia*<sup>†</sup>

On December 7, 2011, the Supreme Court heard oral arguments in a somewhat routine case about water rights along the Missouri River.<sup>1</sup> Three well-known Supreme Court litigators presented oral argument: Paul Clement, representing the petitioner, Gregory Garre, representing the respondent, and Edwin Kneedler, representing the United States as amici curiae. Combined, the three advocates had given exactly two hundred oral arguments and had over three decades of experience in the Office of the Solicitor General.<sup>2</sup> It was a remarkable sight to see, and the Justices – the beneficiaries of the best litigating money can buy – had their questions carefully and skillfully answered.

Oral argument in that case and others during October Term 2011<sup>3</sup> reveal an interesting trend in Supreme Court litigation: the growth and revival of the elite Supreme Court bar. There has been much discussion in recent years over the role repeat litigators play in the Supreme Court bar.<sup>4</sup> Repeat players<sup>5</sup> are more likely to have

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<sup>1</sup> *PPL Montana v. Montana*, 132 S.Ct. 1215 (2012).

<sup>2</sup> See Kedar Bhatia, *A Big Little Case*, DAILYWRIT (Dec. 1, 2011), [dailywrit.com/2011/12/a-big-little-case/](http://dailywrit.com/2011/12/a-big-little-case/).

<sup>3</sup> In the case heard immediately before *PPL Montana* on December 7, 2011, the advocates had argued a combined fifty times going into oral arguments. *Id.* Oral argument in *Federal Communications Commission v. Fox* on January 10, 2012, featured Donald Verilli, Jr., Solicitor General at the time, Seth Waxman, a former Solicitor General, and Carter Phillips, a former Assistant to the Solicitor General and one of the most prolific private Supreme Court litigators of the past decade. Together, the three advocates had presented oral argument before the Supreme Court 151 times by the end of oral arguments that day.

<sup>4</sup> *E.g.*, KEVIN T. MCGUIRE, *THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY* (1993); Gregory A. Caldeira & John R. Wright, *Amici Curiae before the Supreme*

their petitions for writ of certiorari granted,<sup>6</sup> are more likely to win on the merits,<sup>7</sup> and are more likely to shape decisions through their amicus briefs.<sup>8</sup> As the Supreme Court's plenary docket dwindles,<sup>9</sup> as the number of individuals vying for business in the Supreme Court increases,<sup>10</sup> and as the Solicitor General participates in a greater number of cases,<sup>11</sup> the role of repeat players is sure to remain a fascinating topic of discussion and scholarly writing.

This Article seeks to make only a humble contribution to the literature on repeat litigators in the Supreme Court. Simply put, it attempts to chronicle the current membership of the elite Supreme Court Bar and analyze its demographic makeup.<sup>12</sup> While advocates

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*Court: Who Participates, When, and How Much?*, 82 AM. POL. SCI. REV. 1109 (1988); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487 (2008).

<sup>5</sup> Repeat litigators can come in many forms and from many sources. Some come from interest groups that develop subject-matter expertise in particular fields, e.g., Bryan Stevenson (Equal Justice Initiative), some are in private practice, where they develop a niche practice as a Supreme Court litigator, e.g., Tom Goldstein (Goldstein & Russell P.C.), and others spend time in the Office of the Solicitor General, the office that represents the federal government in nearly all of its litigation before the Court, e.g., Edwin Kneedler (Deputy Solicitor General).

<sup>6</sup> Lazarus, *supra* note 4, at 1522-39.

<sup>7</sup> *Id.* at 1539-49; see also Richard J. Lazarus, *The Power of Persuasion Before and Within the Supreme Court: Reflections on NEPA's Zero for Seventeen Record at the High Court*, 2012 U. ILL. L. REV. 231, 243-46 (2012) (discussing how advocates of varying skill level contributed to a string of failures for plaintiffs bringing claims under the National Environmental Policy Act).

<sup>8</sup> See Kelly J. Lynch, *Best Friends? Supreme Court Clerks on Effective Amicus Briefs*, 20 J.L. & Pol. 33, 53-54 (2004).

<sup>9</sup> See David R. Stras, *The Supreme Court's Declining Docket: A Membership-Based Explanation*, 27 CONST. COMMENTARY 151 (2009); Margaret Meriweather Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 743-45 (2001).

<sup>10</sup> Stephanie Francis Ward, *Friends of the Court are Friends of Mine*, ABA JOURNAL (Nov. 1, 2007), available at [www.abajournal.com/magazine/friends\\_of\\_the\\_court\\_are\\_friends\\_of\\_mine/](http://www.abajournal.com/magazine/friends_of_the_court_are_friends_of_mine/) ("About three dozen U.S. law firms are trying to set up Supreme Court practices, [Tom] Goldstein says . . .").

<sup>11</sup> Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 753 n.25 (2000) ("[I]n the five decades of our study [1946-1995] (taken in chronological order), the Solicitor General filed amicus briefs in 6.38%, 9.28%, 13.40%, 21.49%, and 28.60% of all cases (for an aggregate total throughout the five decades of 16.14% of all cases).").

<sup>12</sup> Richard Lazarus defined a repeat player as an "expert" in Supreme Court litigation when that litigator had argued at least five times in the Supreme Court or when that litigator was a member of a law office with at least ten collective Supreme Court arguments. Lazarus,

can be classified as elite based on a multitude of factors – or even arguably not elite at all<sup>13</sup> – this Article will use only oral argument tally as a the sole measure of being elite. Thus here, an advocate that has argued five or more times since the beginning of October Term 2000 is considered elite and will be included in the data set.

Raw data about the about the number of cases argued by top Supreme Court advocates is often surprisingly difficult to find, particularly on those individuals who are in the Office of the Solicitor General or who are not currently in private practice.<sup>14</sup> Documenting that information – along with accompanying demographic data such as place of employment, gender, and ethnicity – provides both a fascinating glance at the most experienced members of the Supreme Court bar today and an opportunity to reflect on the contemporary makeup of the nation’s legal glitterati.

This article proceeds by first providing a primer on the history of the Supreme Court bar. It next lays out the methods used to collect data, and then provides a complete list of all individuals who have presented more than five oral arguments before the Supreme Court since the beginning of October Term 2000.<sup>15</sup> It subsequently provides demographic information about those advocates, such as the

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*supra* note 4, at 1503. This definition has become something of a shorthand for scholars discussing the elite Supreme Court bar and, where the definition is not adopted in full, it is often used as a starting point for an adjusted definition. *E.g.*, Matthew Reid Krell, *Raising the Bar: Elite Advocacy in Elite Supreme Court Public Interest Litigation*, 34 J. LEGAL PROF. 275, 282 (2010) (discussing but not adopting Lazarus’ definition). Lazarus’ definition is partially adopted here: This Article classifies a litigator as an expert only if that person has argued in the Supreme Court at least five times since October 2000, imposing a temporal restriction on Lazarus’ definition and omitting any consideration of the experience held by a litigator’s firm or organization.

<sup>13</sup> See, *e.g.*, Emily Bazelon, *Reversal of Fortune*, SLATE, July 5, 2012, [www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/07/paul\\_clement\\_is\\_considered\\_the\\_best\\_supreme\\_court\\_attorney\\_but\\_he\\_lost\\_the\\_two\\_biggest\\_case\\_of\\_the\\_last\\_supreme\\_court\\_term\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/paul_clement_is_considered_the_best_supreme_court_attorney_but_he_lost_the_two_biggest_case_of_the_last_supreme_court_term_.html) (“But doesn’t the obvious point here – lawyers matter less than judges – suggest that the services of the elite Supreme Court bar can be overrated?”).

<sup>14</sup> Even for those currently in private practice or legal academia, online firm or faculty biographies can be outdated, incomplete, or in conflict with other sources, making it difficult to retrieve accurate information.

<sup>15</sup> October Term 2000 began on Monday, October 2, 2000. Therefore, oral arguments presented earlier in that year are not included in this Article, except to the extent that “all-time” oral argument tallies are presented. *E.g.*, Table A.

top female advocates and the top advocates without experience in the Office of the Solicitor General.

## I. THE ELITE SUPREME COURT BAR

Over its long history, composition of the active Supreme Court bar has ebbed and flowed between a small cabal of elite, influential lawyers and a hodgepodge of lawyers from around the nation. In its earliest years, the Court saw many of the same lawyers time and again;<sup>16</sup> it was simply too expensive for most lawyers to make the lengthy trip to swampy Washington, D.C.<sup>17</sup> to deliver oral argument that would often last for days.<sup>18</sup> Common advocates in those days fell into two groups. The first were lawyers who happened to reside in the Washington, D.C. area, making them prime candidates to argue major cases for clients hailing from New York, Philadelphia, and Boston.<sup>19</sup> The second class of advocates was made of congressmen looking to supplement their income:

Many [advocates] were Congressmen and therefore in Washington when the Court sat. They could supplement their incomes handsomely by work in the judicial chamber downstairs from the House and Senate. Frequently a solon of serious mien ducked into the lower chamber, so to speak, for a lucrative

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<sup>16</sup> See David C. Frederick, *Supreme Court Advocacy in the Early Nineteenth Century*, J. SUP. CT. HIST., March 2005, at 1, 4-10; CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 368 (1938) (noting that one-fifth of all cases appearing in the volumes of reporters Henry Wheaton and Richard Peters featured arguments by Francis Scott Key, John Law, Thomas Swann, Walter Jones or Richard S. Coxe).

<sup>17</sup> Lazarus, *supra* note 4, at 1491-92 ("The virtual monopoly that a handful of lawyers possessed over Supreme Court advocacy during that early part of the nation's history was largely the result of geography. Washington, D.C., was literally a swampland, and travel from major cities such as New York City or Boston was too difficult for leading members of their respective bars.").

<sup>18</sup> For example, oral arguments in *McColloch v. Maryland*, 17 U.S. 316 (1819), spanned nine days over two months. Hon. Ruth Bader Ginsburg, Remarks for the American Constitution Society (June 15, 2012) (transcript available at [www.supremecourt.gov/publicinfo/speeches/Remarks\\_for\\_ACS.pdf](http://www.supremecourt.gov/publicinfo/speeches/Remarks_for_ACS.pdf)).

<sup>19</sup> MAURICE G. BAXTER, DANIEL WEBSTER & THE SUPREME COURT 30 (1966) ("Due to difficulty of travel, most attorneys came from nearby cities or, as in the case of [famed Supreme Court advocate Walter] Jones, from Washington itself. Many were from Baltimore.").

hour or two. After all, should those who made the laws help interpret them?<sup>20</sup>

In the late-nineteenth and early-twentieth centuries, the Supreme Court bar diversified. Several factors made it easier for advocates from across the country to argue their case in the Supreme Court, including easier modes of transportation<sup>21</sup> and the expansion of the Court's plenary docket.<sup>22</sup> Whatever the reason, the Supreme Court bar became accessible to a wider swath of the nation's lawyers than it had been previously.

But the change was not universally vaunted. In their review of the Court's 1930 October Term, Felix Frankfurter and James M. Landis lamented the deluge of "inexperienced lawyers" at the Court:

Since the litigation before the Court is now conducted not by a specialized Supreme Court bar, the Court during the last few years has been engaged in educating inexperienced lawyers in the mysteries of federal jurisdiction. If the Court's time continues to be wasted by appeals that ought never to be brought, it will be amply justified in sharpening its admonitions to the bar by a freer use of its power to penalize ignorance regarding the jurisdiction of the Court by appropriate fine.<sup>23</sup>

Although the bar became more diverse and featured a greater number of advocates in the late-eighteenth and early-nineteenth century, it certainly had a few notable personalities who became repeat players. Several Solicitors General left the office in favor of New York

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<sup>20</sup> BAXTER, *supra* note 19, at 31.

<sup>21</sup> MCGUIRE, *supra* note 4, at 19; *see also* Lazarus, *supra* note 4, at 1492 ("Throughout most of the twentieth century, there were similarly only a few identifiable, highly skilled individuals, such as John W. Davis, Charles Evans Hughes, Charles E. Hughes, Jr., Thomas D. Thacher, Thurgood Marshall, Erwin Griswold, and Archibald Cox, who appeared regularly before the Justices. Most lawyers with Supreme Court cases were newcomers, most likely arguing for the first time. But in no event was there a discrete, coherent group of private lawyers dominating the cases before the Court, capable of boasting a sustained, continuous Supreme Court practice.")

<sup>22</sup> ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES 137-41* tbl.9 (1978) (displaying the rise and eventual decline in the number of opinions the Court released each Term).

<sup>23</sup> Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1930*, 45 HARV. L. REV. 271, 280 (1931).

law firms, where they struck up modest Supreme Court practices. Those advocates include Thomas D. Thatcher, who left the Office of the Solicitor General for Simpson & Thatcher, Charles Evans Hughes, Jr., who left for Hughes, Hubbard, and Reed, and John W. Davis, who left for the firm that became Davis, Polk & Wardwell and eventually argued 139 times before the Court in the early-nineteenth century.<sup>24</sup> Nonetheless, few private lawyers through the mid-1980s could be considered repeat players in the Supreme Court.<sup>25</sup>

Now, however, elite members of the Supreme Court bar run the show at One First Street. According to data compiled by then-Judge John G. Roberts, Jr. and the pair of Thomas Hungar and Nikesh Jindal, arguments by non-federal government attorneys who had previously argued at the Court comprised 20% of all arguments in 1980, 44% in 2002, and 58% in 2008.<sup>26</sup> Non-federal government attorneys making their forth or greater appearance comprised 10 percent of the argument positions in 1980, 33% in 2002, and 44% in 2008.<sup>27</sup> If all attorneys are counted – federal government employees and otherwise – attorneys with prior oral argument experience make up 33% of arguments in 1980, 50% in 2002, and 64% in 2008.<sup>28</sup> Lawyers in the quintessential repeat Supreme Court litigation office, the Office of the Solicitor General, made nearly one-

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<sup>24</sup> Lazarus, *supra* note 4, at 1497. The position of Solicitor General was created in 1870. Seth P. Waxman, Solicitor General of the United States, Address to the Supreme Court Historical Society: Presenting the Case of the United States As It Should Be (June 1, 1998), available at [www.justice.gov/osg/aboutosg/historic-context.html](http://www.justice.gov/osg/aboutosg/historic-context.html). The first Solicitors General served in a hybrid position as both a senior deputy to the Attorney General and as the nation's top advocate in the Supreme Court, but they did not enjoy complete control over litigation in the Supreme Court. See Rex E. Lee, *Lawyer in the Supreme Court: The Role of the Solicitor General*, 21 LOY. L.A. L. REV. 1059, 1065 (1988) ("[F]ar from having the near monopoly enjoyed by their modem counterparts over Supreme Court litigation, early solicitors general shared this responsibility in about equal portions with the attorneys general and with the assistant attorneys general.").

<sup>25</sup> Lazarus, *supra* note 4, at 1497.

<sup>26</sup> Thomas G. Hungar & Nikesh Jindal, *Observations on the Rise of the Appellate Litigator*, 29 REV. LIT. 511, 513 (2010) (citing earlier research by John G. Roberts, Jr., *Oral Advocacy and the Reemergence of a Supreme Court Bar*, 40 J. SUP. CT. HIST. 68, 75-76 (2005)).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 514.

third of all oral argument presentations during the most recent Term of the Court.<sup>29</sup> The influence of repeat litigators is not limited to their oral arguments;<sup>30</sup> one projection of overall Supreme Court activity suggests that “[f]or every argument a lawyer has made in the Supreme Court, there are nearly twenty cases at the agenda stage in which he has served as counsel.”<sup>31</sup> Oral arguments may only be one aspect of Supreme Court litigation, but increased activity in that area suggests greater activity elsewhere.<sup>32</sup>

As repeat litigators play a larger part in the Supreme Court’s Term, their collective influence over the Court’s decision will continue to grow. Elite advocates begin to assert influence on the Court’s decision making at the certiorari stage, where their petitions for writ of certiorari get additional attention from the Justices and their law clerks,<sup>33</sup> and are consequently significantly more likely to be granted than the ordinary petition.<sup>34</sup> Repeat players gain some measure of advantage by virtue of their “sheer celebrity” alone<sup>35</sup> but

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<sup>29</sup> Kedar Bhatia, *Oral Arguments — Advocates*, SCOTUSBLOG (June 30, 2012), [scotusblog.com/wp-content/uploads/2012/06/SB\\_advocates\\_OT11\\_final.pdf](http://scotusblog.com/wp-content/uploads/2012/06/SB_advocates_OT11_final.pdf).

<sup>30</sup> Presenting oral argument is certainly the most visible form of Supreme Court litigation, but an advocate can extend significant influence on the Court in a number of other ways. MCGUIRE, *supra* note 4, at 110 tbl. 6.2 (listing “[s]econdary activities of the Supreme Court bar in Supreme Court litigation” such as “[h]elp[ing] prepare an appeal or petition for certiorari,” “[h]elp[ing] prepare on oral argument,” “[f]il[ing] an amicus brief supporting an appeal or certiorari,” and “[s]erv[ing] on a moot court.”).

<sup>31</sup> MCGUIRE, *supra* note 4, at 107.

<sup>32</sup> Ward, *supra* note 10 (“[T]he Supreme Court is accepting fewer appeals, even as more law firms look to establish a presence there, both for recruiting and business development. The decrease in cert grants, lawyers say, coupled with the increase in practice groups, has led to a new emphasis on amicus brief filings. ‘With the shrinking docket, there are too many Supreme Court lawyers chasing too few cases on the merits,’ says [Kathleen] Sullivan, who still teaches and heads Stanford’s Constitutional Law Center. ‘So, many of us who have strong interests in the cases find ways to contribute by filing amicus briefs.’”).

<sup>33</sup> See Lazarus, *supra* note 4, at 1522-38.

<sup>34</sup> The precise advantage elite advocates hold is unclear, but top litigators can have a grant percentage as high as twenty percent, and, in 2005, the Stanford Supreme Court Clinic had its first four petitions for certiorari granted. *Id.* at 1527.

<sup>35</sup> Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89, 94 (2010). Law clerks tend to read petitions and amicus briefs with a famous name on the cover more closely than other petitions or briefs because they receive so many briefs that any visibility matters. *Id.* at 94-95 (“The expert advocates also invariably enjoy an advantage by dint of their sheer celebrity, at least within the confines of One First Street, N.E. The clerks know of the outstanding reputation of these expert advocates for working on important Supreme

litigators who frequently appear before the Court also know how to frame their arguments in the best way, how to encourage support by interested parties that can file amicus briefs, and even occasionally jostle to have national news outlets shine a spotlight on their petitions.<sup>36</sup>

The presence of an elite Supreme Court bar has been well documented, and its influence is growing.<sup>37</sup> But who are the members of this nonpareil fraternity?

### A. Methodology

In order to catalogue the top advocates of the twenty-first century, oral argument tallies were compiled by reviewing each of the oral argument transcripts from October Term 2000 to 2011.<sup>38</sup> All-time tallies were significantly harder to find; some could be drawn from the twenty-first century tally when advocates had only argued in that time span.<sup>39</sup> Many others, however, were drawn from eso-

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Court cases. Many of the clerks hope to and do in fact work for these experts' law firms immediately or soon after their clerkships. And, for no reason more than the appearance of the name of the advocate on the cover of the brief, their petitions will receive more attention and respect. This is not an incidental advantage. In the barrage of petitions under review, visibility alone can make all the difference at the jurisdictional stage, especially when buttressed by multiple amicus briefs supporting plenary review." (footnotes omitted)); Lynch, *supra* note 8, at 53 ("[T]he percentage of clerks claiming to lend additional consideration to an amicus brief authored by a reputed attorney was . . . 88%[.]").

<sup>36</sup> Lazarus, *supra* note 4, at 1522-32.

<sup>37</sup> By Lazarus' measure, "expert" Supreme Court litigators were responsible for 5.8% of petitions granted in 1980, 25% in 2000, 36% in 2005, 44% in 2006, 53.8% in 2007, and a stunning 55.5% in 2008. Lazarus, *supra* note 35, at 90 (citing portions of research from his previous article, Lazarus, *supra* note 4, at 1515-16).

<sup>38</sup> That range spans from October 2, 2000, to April 25, 2012. Transcripts from this range are available on the Court's website. *Argument Transcripts*, SUPREME COURT OF THE UNITED STATES, [www.supremecourt.gov/oral\\_arguments/argument\\_transcripts.aspx](http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx) (last visited Sept. 15, 2012).

<sup>39</sup> For some advocates, it was clear that they had not argued prior to OT 2000 because they graduated from law school in later years. For example, William Jay graduated from Harvard Law School in 2001, making it exceptionally unlikely that he argued in the Supreme Court prior to October, 2000. See William J. Jay, GOODWIN PROTER, [www.goodwinprocter.com/People/J/Jay-William.aspx](http://www.goodwinprocter.com/People/J/Jay-William.aspx) (last visited Sept. 15, 2012). Lawyers must be members of the bar of their state for at least three years prior to receiving membership in the Supreme Court Bar, Sup. Ct. R. 5.1, so individuals who graduated from law school prior to 1997 are also unlikely to have argued before October, 2000.

teric sources, such as online law firm biographies,<sup>40</sup> law faculty profiles,<sup>41</sup> or news reports.<sup>42</sup> Finally, where news reports and biographies were unavailable or unclear, WestLaw or LexisNexis searches were performed to manually tally an advocate's total appearances before the Court.<sup>43</sup> Once the list of top advocates was determined, demographic information – such as clerkships, law school, and minority status – was performed with internet searches and news sources.

### B. Top Advocates

The following table provides a complete list of all advocates who have argued five or more times from October 2, 2000 – the beginning of October Term 2000 – to April 25, 2012 – the last day of oral argument for October Term 2011, as well as their place of employment at the end of that period.

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<sup>40</sup> *E.g.*, Theodore B. Olson, GIBSON DUNN, [www.gibsondunn.com/lawyers/tolson](http://www.gibsondunn.com/lawyers/tolson) (last visited Sept. 15, 2012) (noting that Ted Olson has “argued 58 cases in the Supreme Court”).

<sup>41</sup> *E.g.*, Laurence H. Tribe, HARVARD LAW SCHOOL, [www.law.harvard.edu/faculty/directory/index.html?id=74](http://www.law.harvard.edu/faculty/directory/index.html?id=74) (last visited Sept. 15, 2012) (noting that Laurence Tribe has argued 35 cases before the Court).

<sup>42</sup> *E.g.*, Lyle Denniston, *Argument Recap: For GPS, Get a Warrant*, SCOTUSBLOG (Nov. 8, 2011, 2:12 PM), [www.scotusblog.com/2011/11/argument-recap-for-gps-get-a-warrant/](http://www.scotusblog.com/2011/11/argument-recap-for-gps-get-a-warrant/) (noting that Michael Dreeben was arguing for the eightieth time in *United States v. Jones*); Tony Mauro, *Carter Phillips to Lead Sidley Austin*, BLT: BLOG OF THE LEGAL TIMES (Apr. 30, 2012, 9:01 AM), [legaltimes.typepad.com/blt/2012/04/carter-phillips-to-lead-sidley-aust-in.html](http://legaltimes.typepad.com/blt/2012/04/carter-phillips-to-lead-sidley-aust-in.html) (noting that Carter Phillips argued his seventy-sixth case in April, 2012); Tony Mauro, *Milestone for the New Millennium*, BLT: BLOG OF THE LEGAL TIMES (Mar. 17, 2008, 4:20 PM), [legaltimes.typepad.com/blt/2008/03/milestone-for-t.html](http://legaltimes.typepad.com/blt/2008/03/milestone-for-t.html) (noting that Chief Justice Roberts recognized Edwin Kneedler for his one hundredth oral argument in *Republic of the Philippines v. Pintel* and that Lawrence Wallace had argued 157 times in his career); Tony Mauro, *Paul Clement, 43, Celebrates His 50th (Argument)*, BLT: BLOG OF THE LEGAL TIMES, (Oct. 23, 2009, 12:03 PM), [legaltimes.typepad.com/blt/2009/10/paul-clement-43-celebrates-his-50th-argument.html](http://legaltimes.typepad.com/blt/2009/10/paul-clement-43-celebrates-his-50th-argument.html) (noting that Paul Clement was celebrating his 50th oral argument after arguing on October 14, 2009 and that his debut was in 2001).

<sup>43</sup> This technique was also performed on other advocates where seemingly reliable tallies were already available in order to test the accuracy of online profiles and biographies generally. Official law firm biographies were the most accurate – nearly one hundred percent – but faculty profiles were occasionally outdated. Consequently, tallies drawn from either source were corroborated by other sources, such as WestLaw or a manual count through oral argument transcripts.

TABLE A. ADVOCATES WHO HAVE ARGUED MORE THAN FIVE TIMES  
(OT 2000-2012)

Rank	Name	Current Position <sup>44</sup>	Arguments	
			21st Century	All-Time
1	Paul D. Clement	Bancroft PLLC	62	62
2	Edwin D. Kneedler	Deputy Solicitor General	47	116
3	Michael R. Dreeben	Deputy Solicitor General	45	83
	Theodore B. Olson	Gibson, Dunn & Crutcher LLP	45	58
	Carter G. Phillips	Sidley Austin LLP	45	76
6	Malcolm L. Stewart	Deputy Solicitor General	39	54
7	Gregory G. Garre	Latham & Watkins LLP	35	35
8	Seth P. Waxman	WilmerHale LLP	34	61
9	David C. Frederick	Kellogg, Huber, et al. PLLC	29	37
10	Patricia C. Millett	Akin, Gump, et al. LLP	24	31
	Matthew D. Roberts	Ass't to the Solicitor General	24	30
12	Lisa S. Blatt	Arnold & Porter LLP	22	30
	Thomas C. Goldstein	Goldstein & Russell PC	22	25
14	Irving L. Gornstein	<i>Inactive</i>	20	36
	Sri Srinivasan	Principal Dep. Solicitor General	20	20
16	James A. Feldman	Solo Practice	19	46
	Thomas G. Hungar	Gibson, Dunn & Crutcher LLP	19	25
	Donald B. Verrilli, Jr.	Solicitor General	19	21
19	Jeffrey L. Fisher	Stanford Law School	17	17
20	Jeffrey P. Minear	<i>Inactive</i>	15	56
	Neal K. Katyal	Hogan & Lovells LLP	15	15
22	Jeffrey A. Lamken	MoloLamken LLP	14	20
	Eric D. Miller	Ass't to the Solicitor General	14	14
	David B. Salmons	Bingham McCutchen LLP	14	14
	Nicole A. Saharsky	Ass't to the Solicitor General	14	14
26	Douglas Hallward-Driemeier	Ropes & Gray LLP	13	13
	Deanne E. Maynard	Morrison & Foerster LLP	13	13

<sup>44</sup> This column lists the current position of top litigators *if those litigators remain active in Supreme Court litigation*. If an individual has moved on to a non-litigating position, retired, passed away, or otherwise become unlikely to litigate in the Supreme Court at this time, they are simply listed as inactive. *E.g.*, Beth Brinkmann (now a Deputy Assistant Attorney General); Irving Gornstein (Georgetown University Law Center's Supreme Court Institute); Jeffrey Minear (Counselor to Chief Justice Roberts); Austin Schlick (General Counsel to the Federal Communication Commission); Jeff Sutton (U.S. Court of Appeals for the Sixth Circuit); Lawrence Wallace (retired); Greg Coleman (deceased); Barbara McDowell (deceased). In a few instances, an advocate's most recent position is one that involves litigation, but not one in which they have recently argued before the Supreme Court. For example, William Jay became a partner at Goodwin Procter LLP only weeks before publication of this Article and has not argued in the Court during that narrow window.

# TOP SUPREME COURT ADVOCATES

Rank	Name	Current Position <sup>44</sup>	Arguments	
			21st Century	All-Time
28	Walter E. Dellinger	O'Melveny & Myers LLP	12	23
	Leondra R. Kruger	Ass't to the Solicitor General	12	12
30	Curtis E. Gannon	Ass't to the Solicitor General	11	11
	Dan Himmelfarb	Mayer Brown LLP	11	11
	William M. Jay	Goodwin Procter LLP	11	11
	Daryl L. Joseffer	King & Spalding LLP	11	11
	Barbara B. McDowell	<i>Inactive</i>	11	18
	Kannon Shanmugam	Williams & Connolly LLP	11	11
	Anthony A. Yang	Ass't to the Solicitor General	11	11
37	Maureen E. Mahoney	Latham & Watkins LLP	10	21
	Andrew J. Pincus	Mayer Brown LLP	10	23
	Pratik A. Shah	Ass't to the Solicitor General	10	10
	Barbara Underwood	Solicitor General of New York	10	20
41	Beth S. Brinkmann	<i>Inactive</i>	9	24
	G. Eric Brunstad, Jr.	Dechert LLP	9	10
	R. Ted Cruz	Morgan, Lewis & Bockius LLP	9	9
	Roy T. Englert, Jr.	Robbins, Russell, et al. LLP	9	20
	Kent L. Jones	Sutherland, Asbill, et al. LLP	9	43
	Charles A. Rothfeld	Mayer Brown LLP	9	27
47	Gregory S. Coleman	<i>Inactive</i>	8	8
	John G. Roberts, Jr.	<i>Inactive</i>	8	39
	Paul M. Smith	Jenner & Block LLP	8	14
	Steven M. Shapiro	Mayer Brown LLP	8	30
	Lawrence H. Tribe	Harvard Law School	8	35
52	H. Bartow Farr, III	Farr & Taranto	7	31
	Jonathan S. Franklin	Fulbright & Jaworski LLP	7	7
	Robert A. Long	Covington & Burling LLP	7	17
	Glen D. Nager	Jones Day LLP	7	13
	E. Joshua Rosenkranz	Orrick, Herrington, et al. LLP	7	7
	Kevin K. Russell	Goldstein & Russell PC	7	7
	Austin C. Schlick	<i>Inactive</i>	7	7
	Eric D. Schnapper	Univ. of Washington Law Sch.	7	16
	Jeffrey S. Sutton	<i>Inactive</i>	7	12
	Jeffrey B. Wall	Ass't to the Solicitor General	7	7
	Lawrence G. Wallace	<i>Inactive</i>	7	157
63	Ginger D. Anders	Ass't to the Solicitor General	6	6
	James Bopp, Jr.	Bopp Law Firm	6	6
	Toby J. Heytens	Univ. of Virginia Law School	6	6
	Elena Kagan	<i>Inactive</i>	6	6
	John P. Elwood	Vinson & Elkins LLP	6	6
	Paul R.Q. Wolfson	WilmerHale LLP	6	20
69	Donald B. Ayer	Jones Day LLP	5	19
	Thomas B. Casey	Solicitor General of Michigan	5	9

Rank	Name	Current Position <sup>44</sup>	Arguments	
			21st Century	All-Time
	Douglas R. Cole	Solicitor General of Ohio	5	5
	Miguel A. Estrada	Gibson Dunn LLP	5	20
	Caitlin J. Halligan	Manhattan Dist. Att'y Office	5	5
	Sarah E. Harrington	Ass't to the Solicitor General	5	5
	Benjamin J. Horwich	Ass't to the Solicitor General	5	5
	Pamela S. Karlan	Stanford Law School	5	7
	Scott D. Makar	Solicitor General of Florida	5	5
	Jonathan L. Marcus	<i>Inactive</i>	5	5
	David A. Moran	Wayne State Univ. Law School	5	5
	Melissa A. Sherry	Ass't to the Solicitor General	5	5
	Mark T. Stancil	Robbins, Russell, et al. LLP	5	5
	Bryan A. Stevenson	Equal Justice Initiative	5	5
	Kathleen M. Sullivan	Quinn, Emanuel, et al. LLP	5	7

Table A reveals a number of important trends. First, whether there are many elite Supreme Court litigators or a relatively small number may be in the eye of the beholder. The elite bar has eighty-three members, but several of those members are inactive, such as John Roberts, Elena Kagan and Lawrence Wallace. The elite Supreme Court bar also represents a tiny fraction of all members of the Supreme Court bar – around .05%.<sup>45</sup> That said, there are still a significant number of active litigators competing very actively to get their cases onto the Supreme Court's increasingly small plenary docket.<sup>46</sup>

The second trend that is noticeable from an eyeball glance at the list is that elite advocates are overwhelmingly male and Caucasian. There are only two women within the top twenty advocates, Patty Millett and Lisa Blatt, and there is only one minority advocate, Sri Srinivasan. Those demographics and others are discussed more fully in Part II.

<sup>45</sup> According to statistics featured in the annual journals of the Supreme Court, 173,938 lawyers have been admitted to the Supreme Court bar since 1975. Recent editions of the Supreme Court's Journal are available online. *Journal*, SUPREME COURT OF THE UNITED STATES, [www.supremecourt.gov/orders/journal.aspx](http://www.supremecourt.gov/orders/journal.aspx) (last visited Sept. 15, 2012).

<sup>46</sup> See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1229 fig.1 (2012) (depicting that the Court heard around two hundred cases per Term in the 1940s but heard closer to eighty cases during the 2000s); see also Cordray & Cordray, *supra* note 9, at 740-45 (describing a similarly dramatic decline in the number of cases decided on the merits).

### C. Related Measures of Influence

Influence can be measured in ways other than raw oral argument tally. One useful measurement is the number of times that an advocate argues in a single Term. Lawyers in the Office of the Solicitor General regularly argue multiple times in a single Term<sup>47</sup> but that kind of prolific performance is much less common for litigators in private practice. Only five different advocates in private practice have argued more than five times in a single Term since the October Term 2000, but those five advocates, listed in Table B, have accomplished the feat on twelve separate occasions.

TABLE B. TOP SINGLE-TERM ORAL ARGUMENT APPEARANCES FOR ADVOCATES FROM PRIVATE PRACTICE (OT 2000-2012)

Rank	Name	Arguments	Term
1	Paul D. Clement	9 <sup>48</sup>	OT 2010
2	Theodore B. Olson	6	OT 2008
	Carter G. Phillips	6	OT 2005
	Carter G. Phillips	6	OT 2008
5	David C. Frederick	5	OT 2008
	David C. Frederick	5	OT 2009
	Carter G. Phillips	5	OT 2003
	Carter G. Phillips	5	OT 2007
	Carter G. Phillips	5	OT 2009
	Carter G. Phillips	5	OT 2010
	Seth P. Waxman	5	OT 2002
	Seth P. Waxman	5	OT 2004

<sup>47</sup> The following advocates from the Office of the Solicitor General have argued more than five times in a single term since OT 2000:

- Paul Clement, *Principle Deputy Solicitor General*, OT 2001 (five appearances), 2002 (6), 2003 (6); *Solicitor General*, OT 2004 (8), 2005 (8), 2006 (8), 2007 (7)
- Michael Dreeben, *Deputy Solicitor General*, OT 2003 (5)
- Gregory Garre, *Principle Deputy Solicitor General*, OT 2007 (5)
- Elena Kagan, *Solicitor General*, OT 2008 (6)
- Neal Katyal, *Principle Deputy Solicitor General*, OT 2008 (5); *Acting Solicitor General*, OT 2009 (6)
- Edwin Kneedler, *Deputy Solicitor General*, OT 2000 (5), 2008 (5)
- Theodore Olson, *Solicitor General*, OT 2001 (8), OT 2002 (10), OT 2003 (8)
- Malcolm Stewart, *Deputy Solicitor General*, OT 2008 (5)
- Donald Verrilli, *Solicitor General*, OT 2010 (9)

<sup>48</sup> This Article treats the oral arguments in *National Federation of Independent Businesses v. Sebellius*, 132 S.Ct. 2566 (2012) as four separate oral arguments.

The data in Table B is, in many ways, unsurprising. Carter Phillips is responsible for six of the twelve most dominant single-Term performances, contributing to his status as the advocate with the greatest number of appearances from private practice during this timeframe. He is also tied with Michael Dreeben, a Deputy Solicitor General for more than a decade, and Ted Olson, Solicitor General from OT 2001 to 2003, for the third highest number of arguments since OT 2000, forty-five. Only Paul Clement, sixty-two arguments, and Edwin Kneedler, forty-seven, have more.

While advocates can occasionally have a few particularly successful Terms – or spend a few Terms in high-level positions in the Office of the Solicitor General – another measure of influence is the number of *different Terms* during which an advocate has presented oral argument at least once. There have been twelve full Terms since the turn of the century, and Table C features all advocates who have argued in at least ten of those terms.

TABLE C. APPEARANCES DURING THE GREATEST NUMBER OF TERMS (OT 2000-2012)

Rank	Name	Number of Terms
1	Gregory G. Garre	12
	Edwin S. Kneedler	12
	Michael R. Dreeben	12
	Thomas C. Goldstein	12
	Carter G. Phillips	12
	Malcolm L. Stewart	12
7	Paul D. Clement	11
	Seth P. Waxman	11
9	Lisa S. Blatt	10
	Patricia B. Millet	10
	Theodore B. Olson	10

## II. DEMOGRAPHICS OF THE ELITE BAR

Curating a list of the most active advocates of the past decade provides an opportunity to review the demographics of the top advocates. As expected, the nation's top Supreme Court advocates tend to be men, white, graduates of top law schools, former Supreme Court clerks, and current or past member of the Office of

the Solicitor General. This section will proceed by discussing each of those trends in turn.

### A. Gender

The list of top advocates is also overwhelmingly male. There are only fifteen women on the list (eighteen percent), and only one in the top ten. Notably, however, several of the women are ranked lower on the list, *e.g.*, Ginger Anders, Sarah Harrington, and Melissa Sherry, are very recent law school graduates and could eventually accumulate very high tallies. All but two, Pamela Karlan and Kathleen Sullivan, have spent time in the Office of the Solicitor General and argued an overwhelming number of their cases from that office. For example, Patricia Millett, the all-time leader among female advocates,<sup>49</sup> made twenty-five of her thirty-one total arguments as an Assistant to the Solicitor General. Lisa Blatt, who is second all-time, argued twenty-eight of her thirty cases during a stint in the Office of the Solicitor General.<sup>50</sup>

TABLE D. TOP FEMALE ADVOCATES (OT 2000-2012)

Rank	Overall Rank	Name	Arguments	
			21st Century	All-Time
1	10	Patricia C. Millett	24	31
2	12	Lisa S. Blatt	22	30
3	22	Nicole A. Saharsky	14	14
4	26	Deanne E. Maynard	13	13
5	28	Leondra R. Kruger	12	12
6	30	Barbara B. McDowell	11	18
7	37	Maureen E. Mahoney	10	21
		Barbara D. Underwood	10	20
9	41	Beth S. Brinkmann	9	24
10	63	Ginger D. Anders	6	6
		Elena Kagan	6	6

<sup>49</sup> Joe Palazzolo, *Millett Makes History with 31 Cases Argued in Supreme Court*, WALL ST. J.L. BLOG (Apr. 24, 2012, 5:56 PM), [blogs.wsj.com/law/2012/04/24/millett-makes-history-with-31-cases-argued-in-supreme-court/](http://blogs.wsj.com/law/2012/04/24/millett-makes-history-with-31-cases-argued-in-supreme-court/).

<sup>50</sup> Joe Palazzolo, *A Chat with Lisa Blatt, A Record-Holding Supreme Court Litigator*, WALL ST. J.L. BLOG (Jan. 20, 2011, 3:22 PM), [blogs.wsj.com/law/2011/01/20/a-chat-with-lisa-blatt-a-record-holding-supreme-court-litigator/](http://blogs.wsj.com/law/2011/01/20/a-chat-with-lisa-blatt-a-record-holding-supreme-court-litigator/).

Of the top eleven female advocates, three are not currently active in Supreme Court litigation. Barbara McDowell passed away in 2009, Beth Brinkmann is currently serving as Deputy Assistant Attorney General, and Elena Kagan was confirmed as an Associate Justice of the Supreme Court in 2009. While not completely inactive, Maureen Mahoney recently scaled back her practice stepped down as the head of Latham & Watkins' Supreme Court and Appellate practice group,<sup>51</sup> Several women remain active in the Office of the Solicitor General as Assistants to the Solicitor General: Nicole Saharsky, Ginger Anders, Sarah Harrington, Melissa Sherry, Ann O'Connell, and Leondra Kruger, who served as Acting Principle Deputy Solicitor General when Neal Katyal served as Acting Solicitor General during October Term 2010.

### B. Race

One of the most striking characteristics of elite Supreme Court bar is its overwhelming racial and ethnic homogeneity. For example, when Drew Days appeared before the Court on October 29, 2007, it was the first time in over a year that a "black lawyer in private practice stood at the lecturn."<sup>52</sup>

The lack of diversity within the elite bar is striking and worth properly documenting.<sup>53</sup> As Table E shows, only nine of eighty-three elite advocates have been previously identified as minority lawyers (eleven percent).<sup>54</sup> That number stands to increase as the

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<sup>51</sup> Jeff Jeffrey, *Garre to Succeed Maureen Mahoney as Latham's Appellate Practice Chair*, BLT: BLOG OF THE LEGAL TIMES (Sept. 8, 2009, 1:40 PM), [legaltimes.typepad.com/blt/2009/09/garre-to-succeed-maureen-mahoney-as-lathams-appellate-practice-chair.html](http://legaltimes.typepad.com/blt/2009/09/garre-to-succeed-maureen-mahoney-as-lathams-appellate-practice-chair.html).

<sup>52</sup> Mark Sherman, *Black Lawyers Rare at Supreme Court*, USA TODAY (Oct. 28, 2007), *available at* [usatoday30.usatoday.com/news/washington/2007-10-28-3842117658\\_x.htm](http://usatoday30.usatoday.com/news/washington/2007-10-28-3842117658_x.htm).

<sup>53</sup> Top minority Supreme Court advocates frequently appear on other lists celebrating minority achievement by members of the bar. *E.g.*, *Minority 40 Under 40*, NATIONAL LAW JOURNAL (Oct. 31, 2011), [www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202520661297](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202520661297) (featuring Leondra Kruger and Kannon Shanmugam, identified in this Article as elite advocates, as well as James Ho, another frequent litigator who occasionally appears before the Supreme Court).

<sup>54</sup> The advocates listed in Table E have been identified by other sources as members of ethnic or racial minorities. *E.g.*, Charlie Savage, *Obama Nominates Two for Federal Appeals Court in Washington*, N.Y. TIMES, June 11, 2012, at A17 (noting that Sri Srinivasan was "was born in India" and "the first person of South Asian descent to be nominated to a federal

Office of the Solicitor General continues to hire strong minority applicants. Of the nine minority members of the elite bar, seven – including the top six – made a significant number of their oral arguments while serving in the Office of the Solicitor General. Supreme Court clerkships may also be an especially useful ticket to entry into the elite bar for this underrepresented class; seven of the nine members have had Supreme Court clerkships.

TABLE E. TOP MINORITY ADVOCATES

Rank	Overall Rank	Name	Arguments	
			21st Century	All-Time
1	14	Sri Srinivasan	20	20
2	20	Neal K. Katyal	15	15
3	28	Leondra R. Kruger	12	12
4	30	Kannon K. Shanmugam	11	11
		Anthony A. Yang	11	11
6	37	Pratik A. Shah	10	10
7	41	R. Ted Cruz	9	9
8	66	Miguel Estrada	5	20
		Bryan A. Stevenson	5	5

### C. Legal Education

As a group, top Supreme Court advocates have top-tier legal educations. Forty-nine percent of advocates attended either Yale Law School or Harvard Law School. The vast majority, eighty-one per-

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appeals court”); Aziz Haniffa, *Neal Katyal Honored by the Hindu American Foundation*, REDIFF.COM (Sept. 10, 2010), [news.rediff.com/report/2010/sep/16/neal-katyal-honoured-by-the-hindu-american-foundation.htm](http://news.rediff.com/report/2010/sep/16/neal-katyal-honoured-by-the-hindu-american-foundation.htm) (reporting that Neal Katyal was the recipient of the “Pride of the Community” award by the Hindu American Foundation and quoting a story told by him in which his father immigrated from India); Minority 40 Under 40, *supra* note 52 (recognizing Leondra Kruger and Kannon Shanmugam for being top advocates who are ethnic minorities); *APABA-DC Presents: The Ins and Outs of Appellate Litigation*, APABA-DC, [www.apaba-dc.org/mc/community/eventdetailsPrint.do?eventId=253186](http://www.apaba-dc.org/mc/community/eventdetailsPrint.do?eventId=253186) (last visited Oct. 17, 2012) (including Anthony Yang among a series of speakers at an event for the Asian-Pacific American Bar Association of DC); *Speakers: 2012 NASABA Convention*, NASABA, [www.nasaba.com/?page=SpeakersDOWN](http://www.nasaba.com/?page=SpeakersDOWN) (last visited Oct. 17, 2012) (identifying Pratik Shah, Kannon Shanmugam, and Sri Srinivasan as members of a panel of South Asian lawyers at the North American Bar Association 2012 annual convention); *The 50 Most Influential Lawyers in America*, NAT. L.J. (May 26, 2008), (identifying Ted Cruz as one of the most influential minority lawyers in America); Dahlia Lithwick, *Miguel, Ma Belle*, SLATE (Feb. 27, 2003) [www.slate.com/articles/news\\_and\\_politics/jurisprudence/2003/02/miguel\\_ma\\_belle.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2003/02/miguel_ma_belle.html) (identifying Miguel Estrada as Hispanic).

cent, attended top ten law schools, according to the most recent U.S. News and World Report Rankings.<sup>55</sup> As a general matter, the better the law school, the more likely that school is to produce Supreme Court advocates. A better predictor of a school's likelihood to produce top advocates, however, is its Supreme Court clerkship placement statistics, documented in Table F below.<sup>56</sup>

TABLE F. TOP FEEDER LAW SCHOOLS

Rank	Law School	Top Advocates <sup>57</sup>	Arguments		2012 U.S. News Ranking	Supreme Court Clerkship Ranking
			21st Century	All-Time		
1	Yale	21	246	390	1	2
2	Harvard	20	262	436	3	1
3	Chicago	7	70	99	5	3
4	Michigan	5	51	97	10	8
5	Columbia	4	42	207	4	4
	Stanford	4	46	58	2	5
	Virginia	4	63	132	7	6
8	Georgetown	3	22	32	13	13
	Texas	3	59	75	16	10
9	Berkeley	2	55	68	7	9
	Florida	2	11	11	48	<i>Unranked</i>

In addition to the schools listed in Table F, nine law schools contributed one lawyer to the list of elite advocates.<sup>58</sup> Several top law

<sup>55</sup> *Best Law Schools*, U.S. NEWS AND WORLD REP., grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings (last visited Sept. 15, 2012).

<sup>56</sup> These rankings are drawn from Brian Leiter's useful Supreme Court Clerkship tally of placement from October Term 1996 to October Term 2005. Brian Leiter, *Supreme Court Clerkship Placement, 1996 Through 2005 Terms*, BRIAN LEITER'S LAW SCHOOL REPORTS (Aug. 26, 2006), [www.leiterrankings.com/jobs/1996\\_06\\_scutus\\_clerks.shtml](http://www.leiterrankings.com/jobs/1996_06_scutus_clerks.shtml).

<sup>57</sup> The top advocates from each law school are Malcolm Stewart (Yale), Paul Clement (Harvard), Eric Miller (Chicago), Jeffrey Fisher (Michigan), Donald Verilli (Columbia), Sri Srinivasan (Stanford), Edwin Kneedler (Virginia), Barbara Underwood (Georgetown), David Frederick (Texas), Ted Olson (Berkeley), and Scott Makar (University of Florida).

<sup>58</sup> The schools, along with the advocate hailing from that school, are: American University Washington College of Law (Tom Goldstein), Arizona State University School of Law (Bartow Farr), Boston University School of Law (Irving Gornstein), Duke University School of Law (Michael Dreeben), George Washington University School of Law (Gregory Garre), Northwestern University Law School (Carter Phillips), Ohio State University Mortiz College of Law (Jeff Sutton), University of Minnesota School of Law (Nicole Saharsky).

schools were not represented on the list at all, including New York University (U.S. News ranked #6 in 2012), the University of Pennsylvania (#7), and Cornell University (#15).

As Table E shows, Supreme Court clerkship placement is an even better predictor of success producing Supreme Court litigators than U.S. News ranking. There may be reasons for that phenomenon; a Supreme Court clerkship is the best credential available for someone looking to enter the Office of the Solicitor General, and spending time in that office is often the best way to jump start a career as a Supreme Court litigator.

#### *D. Supreme Court Clerkships*

A Supreme Court clerkship is another common credential shared by many top Supreme Court advocates. Fifty-two out of eighty-three elite advocates, sixty-three percent, have held Supreme Court clerkships in the past. The following chart depicts the top feeder Justices for advocates looking to practice in the Supreme Court.

TABLE G. TOP FEEDER JUSTICES

Rank	Justice	Advocates	Top Advocate
1	Rehnquist	7	Gregory G. Garre
2	Breyer	5	Neal K. Katyal
	O'Connor	5	Sri Srinivasan
	Scalia	5	Paul D. Clement
4	Stevens	4	Matthew D. Roberts
	Thomas	4	Eric D. Miller
7	Blackmun	3	Beth S. Brinkman
	Brennan	3	James A. Feldman
	Kennedy	3	Thomas G. Hungar
	White	3	David C. Frederick

#### *E. Experience in the Office of the Solicitor General*

Service in the Office of the Solicitor General is among the best ways for young lawyers to quickly gain experience litigating in the Supreme Court. Seventy-five percent of the advocates listed in Table A are either currently serving in the Office of the Solicitor General or had experience there. All of the advocates in the top ten had

experience there, including four who have served as Solicitor General.<sup>59</sup> Only two advocates in the top twenty – Tom Goldstein and Jeffrey Fisher – did not have experience in the Office of the Solicitor General.

TABLE H. TOP ADVOCATES WITHOUT EXPERIENCE IN THE OFFICE OF THE SOLICITOR GENERAL (OT 2000-2012)

Rank	Overall Rank	Name	Arguments	
			21st Century	All-Time
1	12	Thomas C. Goldstein	22	25
2	19	Jeffrey L. Fisher	17	17
3	41	G. Eric Brunstad, Jr.	9	10
		R. Ted Cruz	9	9
5	47	Gregory S. Coleman	8	8
		Paul M. Smith	8	14
		Laurence H. Tribe	8	35
8	52	Jonathan S. Franklin	7	7
		E. Joshua Rosenkranz	7	7
		Kevin K. Russell	7	7
		Eric D. Schnapper	7	16

### *F. The Elite of the Elite*

The most elite members of the already elite Supreme Court bar – or at least the ten that have argued most frequently during the twenty-first century – are in some ways representative of the overall group and in some ways very different. Four of ten ultra-elite litigators clerked for Supreme Court Justices, compared to a rate of seven out of ten for overall group. All have served in the Office of the Solicitor General; four served as Solicitor General themselves. Three, Michael Dreeben, Carter Phillips and Gregory Garre, are the only elite advocates from their respective law schools, Duke University School of Law, Northwestern University Law School, and George Washington University School of Law. Nine of the ten advocates are men; Patricia Millett is the only women on the list.

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<sup>59</sup> Seth Waxman (Solicitor General from 1997-2001), Ted Olson (2001-2004), Paul Clement (2004-2008), Gregory Garre (2008-2009). Additionally, Edwin Kneedler, currently a Deputy Solicitor General, served as Acting Solicitor General for three months in 2009.

TABLE J. TOP TEN SUPREME COURT ADVOCATES IN MORE DETAIL

Rank	Name	Advocates		Law School	Supreme Court Clerkship	Solicitor General Experience <sup>60</sup>
		21st Century	All-Time			
1	Paul D. Clement	62	62	Harvard	Scalia	Solicitor General
2	Edwin D. Kneedler	47	116	Virginia	none	Deputy SG <sup>61</sup>
3	Michael R. Dreeben	45	83	Duke	none	Deputy SG
	Theodore B. Olson	45	58	Berkeley	none	Solicitor General
	Carter G. Phillips	45	76	Northwestern	Burger	Ass't to the SG
6	Malcolm L. Stewart	39	54	Yale	none	Deputy SG
7	Gregory G. Garre	35	35	George Washington	Rehnquist	Solicitor General
8	Seth P. Waxman	34	61	Yale	none	Solicitor General
9	David C. Frederick	29	37	Texas	White	Ass't to the SG
10	Patricia C. Millett	24	31	Harvard	none	Ass't to the SG

## CONCLUSION

Today's elite Supreme Court bar is as active and influential as ever. During the latest Term, members of the elite bar argued 102 times in seventy-two cases and represented at least one party in sixty-six of the seventy-two cases argued. Twenty-two oral arguments featured two elite advocates, and seven even featured three. Even when advocates from the Office of the Solicitor General are excepted, lawyers from the elite private bar argued in an over-

<sup>60</sup> Includes only an advocate's most senior position in the Office of the Solicitor General. Several advocates on this list who have served as Solicitor General or Deputy Solicitor General have held several positions within the office. *E.g.*, Paul Clement (Principal Deputy Solicitor General and Solicitor General) and Gregory Garre (Assistant to the Solicitor General, Principal Deputy Solicitor General, and Solicitor General).

<sup>61</sup> Edwin Kneedler's brief term as Acting Solicitor General during the first three months of President Obama's administration is omitted here.

whelming number of cases: Forty-one of seventy-two cases. In eight instances, two elite non-federal government advocates presented oral argument in the same case.

The growth and power of the elite Supreme Court bar should not be understated. If the Court's docket continues to shrink<sup>62</sup> and parties continue to seek out top-notch representation for their cases, scholars and even litigators themselves will have to continue to study the evolving nature of the elite Supreme Court bar.

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<sup>62</sup> It decided fewer signed, merits cases during October Term 2011 than it had during any Term in the last twenty years. Kedar Bhatia, *Final October Term 2011 Stat Pack and Summary Memo*, SCOTUSBLOG (Jun. 30, 2012, 7:59 PM), [www.scotusblog.com/2012/06/final-october-term-2011-stat-pack-and-summary-memo/](http://www.scotusblog.com/2012/06/final-october-term-2011-stat-pack-and-summary-memo/).