

A Century of *TLR* and the Courts

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Criticizing law reviews is something of a judicial sport. Three decades ago, a prominent professor-turned-judge declared that “judges, administrators, legislators, and practitioners have little use for much of the scholarship . . . produced by members of the academy.”¹ More recently, Chief Justice Roberts offered this colorful critique:

Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.²

Some articles in this law review support the Chief Justice’s point. After all, no court has found use for Ken Kress, *Why No Judge Should Be a Dworkinian Coherentist*, 77 TEXAS L. REV. 1375 (1999). Who was the Editor in Chief for Volume 77?³

But a look at judicial opinions tells a different story, casting doubt on the charge that law reviews are publishing little that helps the bench. In two

* Judge, United States Court of Appeals for the Fifth Circuit; Editor in Chief, *Texas Law Review* Volume 77. Credit is due Stephani Michel, Volume 98 Articles Editor and later my law clerk, for her assistance in finding the *Texas Law Review* articles most often cited by courts. With Volume 77 Managing Editor Shawn Raymond providing helpful edits, it felt like old times. And I am grateful that the guru of legal writing, *TLR*’s own Bryan Garner, improved the piece.

1. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992); see also Judith S. Kaye, *One Judge’s View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 320 (1989) (expressing disappointment that as a judge she is unable to “find more in the law reviews that is of value and pertinence to our cases”); *United States v. Six Hundred Thirty-Nine Thousand Five Hundred & Fifty-Eight Dollars (\$639,558) in U.S. Currency*, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring in part and concurring in the judgment) (commenting that “law reviews are dominated by rather exotic offerings of increasingly out-of-touch faculty members”).

2. Chief Justice Roberts, *A Conversation with Chief Justice Roberts at the Fourth Circuit Court of Appeals: 77th Annual Conference*, C-SPAN, at 30:48 (June 25, 2011), <https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts> [<https://perma.cc/DME3-RWQA>].

3. Courts have cited four articles from Volume 77. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2433 n.49 (2019) (Gorsuch, J., concurring) (citing John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEXAS L. REV. 113, 194–95 (1998)); *Elliott v. State*, 824 S.E.2d 265, 274 (Ga. 2019) (citing John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEXAS L. REV. 825, 832 (1999)); *State v. Fortin*, 843 A.2d 974, 1011 (N.J. 2004) (citing William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEXAS L. REV. 605, 650, 671 (1999)); *McConnell v. FEC*, 251 F. Supp. 2d 176, 370 (D.D.C. 2003) (three-judge panel) (Henderson, J., concurring in part and dissenting in part) (citing Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEXAS L. REV. 1705, 1705 (1999)).

recent terms, the Supreme Court cited over 100 law-review articles per year.⁴ A study examining six decades of Supreme Court opinions—from 1949 to 2009—found that almost a third of opinions cite legal scholarship.⁵ Perhaps most surprising is the “long-term trend in Supreme Court use of legal scholarship”—which is “unmistakably upwards.”⁶ And scholarship is not just being cited in the Supreme Court. In the lower court where I sit, the opinions in a recent en banc case cited more than twenty law-review articles!⁷

What accounts for this seeming gap between perception and reality? Both views—that today’s law reviews publish a lot of theoretical pieces unmoored from law practice and that courts still find much in them that is useful—can be true. The sheer quantity of legal scholarship that the proliferation of law-school journals has wrought⁸ leaves room for the Kantian, the Balkan, and the practical alike.

Indeed, my experience on the bench has been that law reviews often contain useful articles that help resolve unsettled issues. I try to repeat the instruction that a legendary Fifth Circuit judge gave his law clerks: “Do not, however, be so brief that you neglect to do a thorough job of research, including research of the law reviews. I like a good article, comment, or note in point—regardless of the source. Do not limit yourself to Harvard, Yale, Stanford, Chicago, and Michigan reviews.”⁹ Consistent with that advice, I often cite articles or notes appearing in this Texas review.¹⁰ Though not for

4. Adam Feldman, *Empirical SCOTUS: With a Little Help from Academic Scholarship*, SCOTUSBLOG (Oct. 31, 2018, 5:22 PM), <https://www.scotusblog.com/2018/10/empirical-scotus-with-a-little-help-from-academic-scholarship/> [https://perma.cc/2LX7-K5XU]. In the Chief Justice’s defense, he found only two articles worth citing in those two years. *Id.* (showing Chief Justice Robert’s citations to law-review articles in the first graph). Justice Thomas cited law reviews the most. *Id.* (noting 79 citations over the two terms).

5. Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court’s Use of Legal Scholarship*, 106 NW. U. L. REV. 995, 998, 1007 (2012).

6. *Id.* at 1007. This uptick could be attributable to the decrease in the number of opinions the Court issues each term and the corresponding increase in the length of the opinions. Lengthier, more in-depth opinions typically cite more authorities.

7. *See* *Brackeen v. Haaland*, 994 F.3d 249, *passim* (5th Cir. 2021) (en banc) (citing various law-review articles while addressing various constitutional challenges to the Indian Child Welfare Act).

8. One study counted “over seven-hundred active law reviews in the United States.” Ronen Perry, *The Relative Value of American Law Reviews: A Critical Appraisal of Ranking Methods*, 11 VA. J.L. & TECH., Winter 2006, at 1, 3.

9. John Minor Wisdom, Tribute, *Wisdom’s Idiosyncrasies*, 109 YALE L.J. 1273, 1278 (2000).

10. *United States v. Lee*, 966 F.3d 310, 324 n.6 (5th Cir. 2020) (citing Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEXAS L. REV. 1351, 1409 (1992)); *T D X Energy, L.L.C. v. Chesapeake Operating, Inc.*, 857 F.3d 253, 257 (5th Cir. 2017) (citing Robert E. Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEXAS L. REV. 391, 393 (1935)); *Schouest v. Medtronic, Inc.*, 13 F. Supp. 3d 692, 701 (S.D. Tex. 2014) (citing Dina McKenney, Note, *Off-Label Drug Promotion and the Use of Disclaimers*, 92 TEXAS L. REV. 231, 231–32 (2013)); *Pittman-Bey v. Clay*, 2013 WL 797415, at *3 (S.D. Tex. Mar. 4, 2013) (citing Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the “Obvious” Hole in Clearly*

lack of trying, I have yet to find a case for which my law-review note—a chronicle of John Marshall’s views on free speech—is relevant.¹¹ At least this mention will help the note’s cite count.

Fortunately, other *Texas Law Review* scholarship has had more luck. And more than just luck: Courts’ citations to a century’s worth of scholarship in these pages serves as a counterpoint to the notion that law reviews have no practical impact. Last year alone, eighty opinions cited *Texas Law Review* pieces.¹² That number includes two Supreme Court dissents¹³ and thirteen opinions from state high courts.¹⁴ These recently cited articles span most of the law review’s existence. The Supreme Court of Texas cited a Volume 7

Established Law, 90 TEXAS L. REV. 1283, 1302 (2012)); *Maples v. Univ. of Tex. Med. Branch*, 901 F. Supp. 2d 874, 879 n.4 (S.D. Tex. 2012) (citing Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEXAS L. REV. 859, 909–17 (2012)).

11. See Gregg Costa, Note, *John Marshall, the Sedition Act, and Free Speech in the Early Republic*, 77 TEXAS L. REV. 1011 (1999).

12. A Westlaw search for 2020 revealed forty-nine federal opinions and thirty-one state-court opinions citing *TLR* pieces (as of November 8, 2021).

13. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1836 (2020) (Kavanaugh, J., dissenting) (citing William H. Rehnquist, Observation, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 700 (1976)); *Baldwin v. United States*, 140 S. Ct. 690, 692 (2020) (Thomas, J., dissenting from denial of certiorari) (citing Duffy, *supra* note 3, at 194).

14. See *Johnson Utils., L.L.C. v. Ariz. Corp. Comm’n*, 468 P.3d 1176, 1182 (Ariz. 2020) (citing Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEXAS L. REV. 399, 404 n.24 (2016)); *State v. Majors*, 940 N.W.2d 372, 394 n.8 (Iowa 2020) (Appel, J., dissenting) (citing Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEXAS L. REV. 799 (2003)); *Eunjoo Seo v. State*, 148 N.E.3d 952, 957, 961 (Ind. 2020) (citing Laurent Sacharoff, *What Am I Really Saying When I Open My Smartphone? A Response to Orin S. Kerr*, 97 TEXAS L. REV. ONLINE 63, 68 (2019)); *Bryan H. Choi, The Privilege Against Cellphone Incrimination*, 97 TEXAS L. REV. ONLINE 73, 74 n.6 (2019); *Commonwealth v. Bohigian*, 157 N.E.3d 59, 77 (Mass. 2020) (Lowy, J., dissenting) (citing Phillip T. Bruns, Note, *Driving While Intoxicated and the Right to Counsel: The Case Against Implied Consent*, 58 TEXAS L. REV. 935, 941–42 (1980)); *Wise v. State*, 242 A.3d 191, 203 (Md. 2020) (citing Charles T. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEXAS L. REV. 573, 577 (1947)); *Mays v. Governor of Michigan*, 954 N.W.2d 139, 172 n.4 (Mich. 2020) (McCormack, C.J., concurring) (citing Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEXAS L. REV. 1269, 1275 (1985)); *Nelson v. State*, 947 N.W.2d 31, 42 n.1 (Minn. 2020) (Chutich, J., dissenting) (citing John H. Blume, Hannah L. Freedman, Lindsey S. Vann & Amelia Courtney Hritz, *Death by Numbers: Why Evolving Standards Compel Extending Roper’s Categorical Ban Against Executing Juveniles from Eighteen to Twenty-one*, 98 TEXAS L. REV. 921, 923–24, 930–36 (2020)); *State v. Andrews*, 234 A.3d 1254, 1269 (N.J. 2020) (citing Sacharoff, *supra*); *State v. Farrington*, 476 P.3d 1231, 1238 (N.M. 2020) (citing Tom Lininger, *The Sound of Silence: Holding Batterers Accountable for Silencing Their Victims*, 87 TEXAS L. REV. 857, 905 (2009)); *State v. Robinson*, 846 S.E.2d 711, 716 (N.C. 2020) (citing Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEXAS L. REV. 1401, 1406 (1983)); *Bush v. Lone Oak Club, LLC*, 601 S.W.3d 639, 649, 656 n.18 (Tex. 2020) (citing Wallace Hawkins, *Title to River Beds in Texas and Their Boundaries*, 7 TEXAS L. REV. 493, 501–02, 508–11, 513–14 (1929)); *id.* at 661 n.1 (Green, J., dissenting) (citing Hawkins, *supra*, at 501–02); *Work v. State*, No. PD-1247-18, 2020 WL 6483888, at *7 n.56 (Tex. Crim. App. Nov. 4, 2020) (citing Michael Davis, *Addiction, Criminalization, and Character Evidence*, 96 TEXAS L. REV. 619, 651 (2018)).

(1929) piece titled *Title to River Beds in Texas and Their Boundaries*.¹⁵ Two articles that courts cited in 2020 are Volume 99 articles that had not yet been published, reflecting the modern internet availability of articles before they appear in a journal and countering the idea that today's journals only contain impractical theory.¹⁶

To demonstrate the impact of *TLR* on the courts, I searched legal opinions to find the ten most cited pieces in the law review's history.¹⁷ The results also offer lessons about the type of legal scholarship that courts find useful. And the list of authors reflects Texas's legal history, with three state supreme court justices (Chief Justices Calvert and Greenhill and Justice Garwood) and two deans of this law school (Deans Keeton and Powers) among the most cited authors. Careful readers will also see a future Attorney General of the United States who coauthored a piece.

Law-Review Articles Most Cited in Judicial Opinions

RANK	ARTICLE	CITES
1.	Robert W. Calvert, "No Evidence" and "Insufficient Evidence" <i>Points of Error</i> , 38 TEXAS L. REV. 361 (1960)	1230
2.	William Powers, Jr. & Jack Ratliff, <i>Another Look at "No Evidence" and "Insufficient Evidence,"</i> 69 TEXAS L. REV. 515 (1991)	186
3.	W. St. John Garwood, <i>The Question of Insufficient Evidence on Appeal</i> , 30 TEXAS L. REV. 803 (1952)	92
4.	Lea Brilmayer, Jennifer Haverkamp, Buck Logan, Loretta Lynch, Steve Neuwirth & Jim O'Brien, <i>A General Look at General Jurisdiction</i> , 66 TEXAS L. REV. 721 (1988)	83
5.	E. Wayne Thode, <i>In Personam Jurisdiction; Article 2031B, the Texas "Long Arm" Jurisdiction Statute; and the</i>	66

15. *Bush*, 601 S.W.3d at 649, 656 n.18 (citing Hawkins, *supra* note 14). Reflecting more humble times, the author of the *River Beds* piece included no star footnote giving biographical information about the author. He is listed at the bottom of the article as "Wallace Hawkins. Dallas." It appears that Mr. Hawkins was a practicing lawyer in Dallas when he published the piece, see *Magnolia Petrol. Co. v. Connellee*, 20 S.W.2d 758, 758 (Tex. Comm'n App. 1929), having previously served as an assistant attorney general, see *Tyler Cnty. State Bank v. Rhodes*, 256 S.W. 947, 947 (Tex. App.—Beaumont 1923, no writ).

16. *In re Nat'l Prescription Opiate Litig.*, 976 F.3d 664, 681 n.9 (6th Cir. 2020) (Moore, J., dissenting) (citing Francis E. McGovern & William B. Rubenstein, *The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders*, 99 TEXAS L. REV. 73, 126 (2020)); *United States v. Garcia*, 974 F.3d 1071, 1081 n.8 (9th Cir. 2020) (citing Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEXAS L. REV. 447, 462–65, 485 (2021)).

17. The search was conducted in the AllStates and AllFeds libraries on Westlaw. The search used the "Texas L. Rev." format and even stooped to using the verboten "Tex. L. Rev." in the interest of comprehensiveness. Compare TEXAS RULES OF FORM: THE GREENBOOK 4 (Texas L. Rev. Ass'n ed., 14th ed. 2018) (citing to "Texas L. Rev."), with THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 312 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020) (abbreviating "Texas" to "Tex." for periodicals). The citation counts in the table reflect the number of cases listed as "citing references" on Westlaw as of November 9, 2021.

	<i>Appearance to Challenge Jurisdiction in Texas and Elsewhere</i> , 42 TEXAS L. REV. 279 (1964)	
6.	W. Page Keeton, <i>Products Liability—Inadequacy of Information</i> , 48 TEXAS L. REV. 398 (1970)	55
7.	Joe R. Greenhill & Thomas V. Murto III, Observation, <i>Governmental Immunity</i> , 49 TEXAS L. REV. 462 (1971)	46
8.	Roger J. Traynor, <i>Is This Conflict Really Necessary?</i> , 37 TEXAS L. REV. 657 (1959)	45
9.	Page Keeton, <i>Products Liability—Liability Without Fault and the Requirement of a Defect</i> , 41 TEXAS L. REV. 855 (1963)	44
10.	Martin H. Redish, <i>Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications</i> , 55 TEXAS L. REV. 759 (1977)	43

I. Procedure, Procedure, Procedure

In terms of subject matter, civil procedure dominates. The top five articles all involve this topic. The first three—essentially a thirty-year conversation on the same subject—address the bread-and-butter issue of appellate standards of review in Texas civil cases. The next two address personal jurisdiction, a staple of civil procedure courses. As its title suggests, *Is This Conflict Really Necessary?* discusses conflicts of law, another transsubstantive subject. So more than half of the most cited pieces focus on civil procedure.

What about the four articles that address substantive topics? Three are torts pieces: two products liability articles by Dean Keeton and a piece (coauthored by then-Texas Chief Justice Joe Greenhill) on the Texas Tort Claim Act’s impact on governmental immunity from tort suits.

Notice something missing? It is not until the final article in the Top Ten that we get to the perennial favorite of law-review editors: constitutional law.¹⁸ Yet even that article, which asks whether medical malpractice reforms raised equal protection and due process concerns, is as much about torts as it is about constitutional law. There is nothing in the Top Ten on popular constitutional law topics like federalism or the First Amendment.

The procedure articles demonstrate how doctrinal pieces can do more than just describe the law; they can shape it. The Supreme Court’s recent reliance on Professor Brilmayer’s piece *A General Look at General Jurisdiction*, the fourth-most-cited *TLR* article, is a recent example. It was cited in the two decisions from the last decade that everyone¹⁹—except

18. Of course, Professor Brilmayer’s article on personal jurisdiction is about the Due Process Clause. But that subject is taught in civil procedure rather than con law.

19. See, e.g., *Lyngaas v. Curaden AG*, 992 F.3d 412, 442 (6th Cir. 2021) (Thapar, J., concurring) (recognizing that *Goodyear* and *Daimler* “clarified that the scope of general jurisdiction was

perhaps the Supreme Court itself—views as having narrowed general jurisdiction by largely limiting it to the states where a corporation is headquartered or incorporated.²⁰ Justice Ginsburg quoted the article as support for the Court’s holding that “domicile, place of incorporation, and principal place of business [are the] ‘paradig[m]’ bases for the exercise of general jurisdiction.”²¹ One scholar has recognized that this “narrowing of general jurisdiction was important and consonant with persistent scholarly commentary” such as the Brilmayer piece that appeared in these pages thirty-three years ago.²²

Why is civil procedure king? I can think of two reasons. The first is obvious. Procedural issues arise in any civil case. Although those increased opportunities for citation are no doubt the biggest reason for civil procedure’s prominence on the list, I think another factor may also be at play. My sense is a perception among judges that, despite procedure’s significant impact on substance, procedure scholarship is less ideological or agenda-driven than that of substantive areas like constitutional law. Take the treatise that federal courts cite more than any other, *Federal Practice & Procedure*,²³ whose senior author is one of the most influential figures in the history of The University of Texas School of Law.²⁴ Judges of all jurisprudential stripes routinely cite Charles Alan Wright.

narrower than many . . . had believed it to be”); Waldman v. Palestine Liberation Org., 835 F.3d 317, 326 (2d Cir. 2016) (describing *Daimler* as having “significantly narrowed the general personal jurisdiction test”); Wm. Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction*, 100 MARQ. L. REV. 375, 400 (2016) (explaining that *Goodyear* and *Daimler* “sharply narrowed” general personal jurisdiction); Bernadette Bollas Genetin, *The Supreme Court’s New Approach to Personal Jurisdiction*, 68 SMU L. REV. 107, 108 (2015) (explaining that the Supreme Court narrowed general jurisdiction in *Goodyear* and *Daimler*).

20. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (citing Lea Brilmayer, Jennifer Haverkamp, Buck Logan, Loretta Lynch, Steve Neuwirth & Jim O’Brien, *A General Look at General Jurisdiction*, 66 TEXAS L. REV. 721, 728 (1988)); *id.* at 151–52 (Sotomayor, J., concurring) (citing Brilmayer, *supra*, at 742); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 924 (2011) (citing Brilmayer, *supra*, at 728, 782).

21. *Goodyear*, 564 U.S. at 924 (quoting Brilmayer, *supra* note 20, at 728).

22. Genetin, *supra* note 19, at 108 & n.10 (citing Brilmayer, *supra* note 20, at 725–26).

23. See Ruth Bader Ginsburg, *In Celebration of Charles Alan Wright*, 76 TEXAS L. REV. 1581, 1583 (1998) (“*Federal Practice and Procedure* is by far the most-cited treatise in the United States Reports; it has been called the procedural Bible for federal judges and those who practice in our federal courts.” (footnote omitted)).

24. See *id.* (celebrating the influence of Professor Wright); William H. Rehnquist, In Memoriam, *A Tribute to Charles Alan Wright*, 79 TEXAS L. REV. 1 (2000) (same); William Powers, Jr., In Memoriam, *Remembering Charles Alan Wright*, 79 TEXAS L. REV. 7 (2000) (same); Harry Reasoner, In Memoriam, *Charles Alan Wright*, 79 TEXAS L. REV. 11 (2000) (same); Geoffrey C. Hazard, Jr., In Memoriam, *Charles Alan Wright*, 79 TEXAS L. REV. 5 (2000) (same); Bryan A. Garner, *The Wit and Wisdom of Charlie Wright*, 76 TEXAS L. REV. 1587 (1998) (same).

II. Don't Forget About State Law

While the most cited *TLR* articles and the Wright & Miller treatise have civil procedure in common, they differ in the source of that law. The six procedural pieces that made the Top Ten all address issues that arise in state-court litigation (general personal jurisdiction, which the Brilmayer piece addresses, is relevant to both state and federal litigation). The pieces on substantive law all address state tort law. Not one article in the Top Ten is focused solely on an issue of federal law. Given the current heavy emphasis of top law reviews, including this one, on federal law, state law's domination of the list may be the most surprising thing about it.

But on deeper reflection it makes sense that *TLR* articles about state law are the ones courts found most helpful. For the first few decades of the review's existence, The University of Texas School of Law "was still essentially a regional institution."²⁵ In the Class of 1955, all but eleven graduates were Texas residents.²⁶ The Texas-centric faculty of midcentury presents an even starker contrast with today's law school: Twenty of twenty-six professors held at least one degree from The University of Texas.²⁷ And most of the articles these Texas-rooted professors published appeared in *TLR*.²⁸ Indeed, a founding mission of *Texas Law Review* was to publish articles about—as a literal reading of the journal's name would indicate—Texas law.²⁹ With many of the articles from *TLR*'s early years focusing on Texas law,³⁰ it makes sense why some of them have been the most cited by courts. The longer an article has been around, the more opportunities there are for citing it.

Age, however, is not the only explanation for the prominence of state-law topics on the Top Ten list. If it were, then we would expect articles from some of the oldest volumes of *TLR*, the heyday of doctrinal Texas-law pieces,³¹ to appear on the list. But Justice Garwood's Volume 30 piece (1952)

25. Douglas Laycock, *Charles Alan Wright and The University of Texas School of Law*, 32 *TEX. INT'L L.J.* 367, 370 (1997).

26. *Id.*

27. *Id.*

28. *Id.* (noting that in the three years before 1955, thirty of the fifty faculty articles appeared in *TLR* and five others appeared in the *Texas Bar Journal*).

29. Among the six purposes Professor Leon Green cited for creating *TLR* were "furnish[ing] a medium of expression for the Texas Bar," "provid[ing] a means of preserving the results of research done by members of the Bar," and "establish[ing] a channel of communication between the Law School and the Bar, mutually beneficial to both." JOHN ROBERT ANTHONY, *THE MISSING FIRST CHAPTER: A HISTORY OF THE FORMATION OF THE TEXAS LAW REVIEW* 10 (1974), <http://texaslawreview.org/wp-content/uploads/2015/07/The-Missing-First-Chapter.pdf> [<https://perma.cc/NX6L-Z9UR>].

30. Thomas R. Phillips, Foreword, *A Law Review for Texas*, 75 *TEXAS L. REV.* 1, 2 (1996) (noting that "[i]n its early years, the *Review* emphasized Texas case and statutory law").

31. *Id.* (recognizing that "[t]he task of analyzing legal developments . . . comprised a large part of the early volumes").

on Texas appellate review of evidentiary sufficiency is the oldest article on the list. Instead of articles from the law review's infancy being the most influential, ones from the journal's middle age populate the Top Ten list. Every article was published during the period beginning with Volume 30 in 1952 and ending with Volume 66 in 1988. In this era, *TLR* hit a sweet spot: it was still publishing many doctrinal state-law pieces but had earned enough of a national reputation that prominent scholars and jurists—like Dean Keeton³² and California Chief Justice Roger Traynor (himself a former professor and dean at Berkeley)³³—were writing those pieces.

If age does not fully explain why state-law articles are the ones most cited by courts, what else does? Paradoxically, the *less* often a topic arises, the *more* likely an article on that topic is to be cited. Consider an issue like free speech. On any given day, a court somewhere in the United States likely is dealing with a free speech issue. If the court takes Judge Wisdom's advice and looks for help in the law reviews, it may have a mountain of articles to sort through. Contrast that cumbersome task with a court looking for a law-review article discussing title to riverbeds in Texas. I doubt there is much more out there besides Wallace Hawkins's 1929 *TLR* piece.³⁴ No wonder it continues to be cited almost a century later.³⁵ It is much easier to become the authoritative piece on a topic when an article is the only one addressing the topic.

The lack of competition for state-law scholarship thus makes such articles especially useful to courts. That is true not just for state courts but also federal courts where diversity-of-citizenship cases make up a significant part of the docket and raise state-law issues on which the federal judges sometimes lack expertise.³⁶ Law reviews wanting to have an impact on court

32. See generally Charles Alan Wright, In Memoriam, *Page Keeton: A Great Dean—With a 1999 Postscript*, 77 TEXAS L. REV. 1369 (1999) (highlighting the professional accomplishments of Dean Keeton); PROSSER AND KEETON ON THE LAW OF TORTS (W. Page Keeton et al. eds., 5th ed. 1984) (noting that Dean Keeton was the lead editor of this foundational text on torts).

33. See Warren E. Burger, In Memoriam, *A Tribute*, 71 CALIF. L. REV. 1037, 1038 (1983) (“In all of his roles as a judge, scholar, and administrator Roger Traynor will be remembered as one of the great contemporary figures of the law.”); Matthew O. Tobriner, *Chief Justice Roger Traynor*, 83 HARV. L. REV. 1769, 1769, 1772 (1970) (noting that Chief Justice Traynor “inspired a dramatic renaissance of the common law” and calling him the “outstanding state court judge of this generation”).

34. Hawkins, *supra* note 14. It turns out there are at least three more articles on the topic; they also appeared in this law review. Kenneth Roberts, *Title and Boundary Problems Relating to Riverbeds*, 36 TEXAS L. REV. 299 (1958); Charles Edward Clark, *Limitation Title—Adverse Possession—Riparian Rights to River Beds*, 26 TEXAS L. REV. 223 (1947); Ross D. Terry, *Waters and Watercourses—Title to Stream Beds and Riparian Lands—Determinable Fees*, 12 TEXAS L. REV. 490 (1934).

35. See *Bush v. Lone Oak Club, LLC*, 601 S.W.3d 639, 649 (Tex. 2020) (citing Hawkins, *supra* note 14, at 508, 510–11, ninety-one years after Hawkins's article was published).

36. See *T D X Energy, L.L.C. v. Chesapeake Operating, Inc.*, 857 F.3d 253, 257 (5th Cir. 2017) (citing Hardwicke, *supra* note 10, at 393).

rulings shouldn't forget or overlook state law. After all, state law governs the vast majority of litigation in this country.³⁷

III. Judges Cite Other Judges

If the strong showing of state-law articles among those most cited by courts is unexpected, the next observation should not be. Judges like to cite other judges. Judges wrote almost half of the articles in the Top Ten³⁸ and two of the top three. Chief Justice Calvert's article is the runaway winner with over a thousand citations in judicial opinions.³⁹ It should come as no surprise that judges tend to write articles that would be useful for other judges. Law reviews would do well to consider more contributions from the bench.

While state supreme court justices appear on the Top Ten list, it is worth noting that the *Review* has published the works of at least eight people who served on the Supreme Court of the United States. Fittingly, the most prolific is the only graduate of this law school to serve on the highest court. Justice Tom Clark wrote four pieces: one before he was a Justice, two during his service on the Supreme Court, and one after he left the Court.⁴⁰ Chief Justice Rehnquist wrote three pieces: two tributes⁴¹ and an oft-cited piece titled *The Notion of a Living Constitution* (spoiler alert: he did not like the notion).⁴² Justice Ginsburg also published three times in *TLR*: two tribute pieces to her friend Charles Alan Wright⁴³ and a piece that put in print a lecture on the Equal Rights Amendment she delivered at the law school the year before she became a federal judge.⁴⁴ Chief Justice Warren⁴⁵ and Justices Barrett,⁴⁶

37. Anisha Singh & Billy Corriher, *State or Federal Court?*, CTR. FOR AM. PROGRESS 2 (Aug. 2016) (noting that more than 90% of cases are heard in state court), <https://www.americanprogress.org/issues/courts/reports/2016/08/08/142438/fact-sheet-state-or-federal-court/> [<https://perma.cc/HB6X-AY9N>].

38. Calvert, Garwood, Traynor, Greenhill.

39. See *Phillips*, *supra* note 30, at 2 (calling the Calvert article a "classic work" that "continues to instruct even today").

40. Tom C. Clark, *National Sovereignty and Dominion Over Lands Underlying the Ocean*, 27 TEXAS L. REV. 140 (1948); Tom C. Clark, *The Supreme Court Conference*, 37 TEXAS L. REV. 273 (1959); Tom C. Clark, Book Review, 44 TEXAS L. REV. 1180 (1966); Tom C. Clark, Observation, *Criminal Justice in America*, 46 TEXAS L. REV. 742 (1968).

41. Rehnquist, *supra* note 24; William H. Rehnquist, In Memoriam, *A Tribute to My Predecessor*, 74 TEXAS L. REV. 207 (1995) (discussing Chief Justice Burger).

42. Rehnquist, *supra* note 13. It has been cited by journals and courts over 550 times.

43. Ruth Bader Ginsburg, In Memoriam, *Charlie's Letters*, 79 TEXAS L. REV. 3 (2000); Ginsburg, *supra* note 23.

44. Ruth Bader Ginsburg, Observation, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEXAS L. REV. 919 (1979).

45. Earl Warren, Observation, *The Advocate and the Administration of Justice in an Urban Society*, 47 TEXAS L. REV. 615 (1969).

46. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEXAS L. REV. 1711 (2013).

Breyer,⁴⁷ Kagan,⁴⁸ and O'Connor⁴⁹ have also published in the *Texas Law Review*.

IV. Briefer Is Better

One thing stands out about the judges' articles I have just discussed: They are succinct. Indeed, a majority of all articles in the Top Ten list—whether written by judges or professors—took up fewer than twenty pages. Chief Justice Calvert's article that was cited more than 1,000 times came in at eleven pages.⁵⁰ He emphasized that his “analysis will be made without extensive comment and with a minimal number of citations.”⁵¹ Justice Garwood's third-place article, the predecessor to the Calvert article by eight years, used just over ten pages.⁵²

Articles in “compact form,” as Chief Justice Calvert put it,⁵³ may be more useful to judges with heavy caseloads who have limited time to digest extra reading. It's a lesson for law reviews, which continue to fight a losing battle against bloated articles.⁵⁴

It's also a lesson I will try to heed. If eleven pages were enough for Chief Justice Calvert to write a seminal piece clarifying appellate review of Texas jury verdicts, then ten should be enough for this piece. But do not let my attempt at brevity obscure the lengthy impact this fine law review has had on the judiciary. For a hundred years, *Texas Law Review* has helped judges fulfill their duty to—as the façade of this great law school reminds all lawyers—“truly and impartially administer justice.”⁵⁵

47. Stephen Breyer, Essay, *Judicial Review: A Practicing Judge's Perspective*, 78 TEXAS L. REV. 761 (2000).

48. Elena Kagan, In Memoriam, *For Justice Marshall*, 71 TEXAS L. REV. 1125 (1993).

49. Sandra Day O'Connor, In Memoriam, *Warren E. Burger: Reflections of a Colleague*, 74 TEXAS L. REV. 209 (1995).

50. Robert W. Calvert, “No Evidence” and “Insufficient Evidence” Points of Error, 38 TEXAS L. REV. 361 (1960).

51. *Id.* at 361.

52. W. St. John Garwood, *The Question of Insufficient Evidence on Appeal*, 30 TEXAS L. REV. 803 (1952).

53. Calvert, *supra* note 50, at 371.

54. See, e.g., *Submissions*, TEXAS L. REV., <https://texaslawreview.org/submissions/> [<https://perma.cc/4SNQ-GSB4>] (“[E]ditors across the country are cognizant of the troubling trend towards longer articles and are exploring how to address it.”); *Volume 131 Submission Guidelines*, Yale L.J., https://www.yalelawjournal.org/files/Volume131SubmissionGuidelinesFINAL_65g4b2mm.pdf [<https://perma.cc/C38B-DJ4B>] (providing length guidelines encouraging authors to write pieces that are “concise and readable”); *Submission of Manuscripts*, WIS. L. REV., <https://wlr.law.wisc.edu/submissions/> [<https://perma.cc/84ED-KVRN>] (“The Wisconsin Law Review gives preference to articles of 30,000 words or less, including text and footnotes.”).

55. *UT School of Law Buildings in Photographs*, TARLTON L. LIBR., (Sept. 1, 2020, 8:03 AM), <https://tarlton.law.utexas.edu/ut-law-buildings/townes-hall> [<https://perma.cc/TF8U-ULRV>]; BOOK OF COMMON PRAYER 74 (The Old Corner Bookstore 1929).