Did You Know?

Law reviews: An undervalued resource

by Jared Klaus

Law reviews are getting a bad rap. *New York Times* reporter David Segal, in a November 2011 article criticizing the current state of legal education, wrote that "citable law review articles are vastly outnumbered, it appears, by head scratchers," "intra-academy tiffs," and "high-brow edu-tainment," none of which are "of much apparent help to anyone."[1] United States Supreme Court Justice Stephen G. Breyer said in a 2008 speech that law reviews "have left terra firma to soar into outer space."[2] And Chief Justice John Roberts, as quoted in a May 2011 *New York Times* article, said that legal scholarship "is largely of no use or interest to people who actually practice law."[3] Ouch.

This criticism is nothing new for law reviews. Some legal writing professors teach their students to use them much as a gourmet chef would use instant mashed potatoes—only when you have nothing else. In their book *Making Your Case: The Art of Persuading Judges*, Supreme Court Justice Antonin Scalia and Bryan Garner write that you should not "expect the Court, or even the law clerks, to read your secondary authority."[4]

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But recent studies (published, ironically, in law reviews) have begun to cast doubt on the current thinking. Law professors Lee Petherbridge and David Schwartz analyzed 7,730 U.S. Supreme Court decisions going back 61 years and found that the Court "uses legal scholarship in roughly 1 of every 3 decisions."[5]

So how does the Supreme Court of Ohio view legal scholarship? I conducted a study to find out, searching the Court's opinions over the last 10 years for every instance in which the Justices cited to a law review.[6] By no means was this study an exhaustive or scientific analysis on the scale of the Petherbridge and Schwartz study, but the results are no less illuminating.

Not only does the Supreme Court of Ohio cite to law review articles in its opinions, but the Justices (or their clerks) actually read and engage with the articles. This observation is apparent from cross-referencing the Court's opinions with the briefs in each case. In most instances where law review articles are cited in the opinion, the Justices cite to articles that the parties and amici never mention. Even when the briefs do cite law reviews, the Justices frequently cite to different ones in their opinions. But there are also occasions when a law review cited by one of the parties is instrumental in shaping the Court's opinion. In the 2006 case *Arrington v. DaimlerChrysler Corp.*, Justice O'Connor's majority opinion upholding the use of videotaped trials cited six times to an *Ohio Northern University Law Review* article cited in the appellee's brief.[7] In short, my research shows that law reviews are an underexploited and valuable resource to be mined in the Supreme Court of Ohio.

As with any other valuable commodity, however, law reviews must be used wisely and sparingly. Among the hundreds of opinions it issues each year, the Court cites to law reviews in only a handful of them. But a closer look at that handful of opinions shows that there are certain types of cases in which the Court is very likely to cite to legal scholarship. Cases involving issues of first impression or on which the lower courts are split are prime candidates. When precedent does not provide a clear answer, the Justices do not hesitate to look to academia for guidance. Take, for example, the 2004 case *Danziger v. Luse*, in which the Court for the first time confronted the issue of whether shareholders of a parent company have the right to inspect the books of a subsidiary.[8] The appellants, the shareholders suing for inspection rights, cited no law reviews in their briefs. In his majority opinion holding for the appellants, though, Justice Pfeifer cited five law review articles.

The Court is also likely to cite law reviews in cases involving issues of significant societal importance. In fact, the number of law review articles the Court cites in an opinion seems to directly correspond to the weightiness of the issue. In the 2006 case *Norwood v. Horney*, the seminal eminent domain decision holding takings for solely economic development reasons unconstitutional, the majority opinion by Justice O'Connor cited 13 law review articles.[9] Two of these cites came from amicus briefs, but the rest were cited for the first time in her opinion. Surprisingly, the appellants, who prevailed in the case, did not cite to any law review articles in their briefs.

Law reviews are, of course, still worth citing in those tough cases where authority is stacked against you. Even when it is likely that the majority may rule against your client, a citation to a law review article that disagrees with a statute or precedent may make its way into a dissent or concurring opinion, creating a spark that may fuel an eventual change in the law. In the 2011 case *State v. Lang*, Justice Stratton cited three law review articles in her concurring opinion urging the General Assembly to ban execution

of defendants who were mentally ill when they committed their crimes.[10] In the 2002 case *State ex rel. AFL-CIO v. Ohio Bureau of Workers' Compensation*, Chief Justice Moyer cited five law review articles in his sharply worded dissent arguing that the Court's decision in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* was wrongly decided.[11]

So what law review carries the most weight at the Supreme Court of Ohio? Harvard? Yale? One might think so. Scalia and Garner write that "the force of the persuasion will vary directly with the prominence of the author."[12] But my research shows that the Justices of the Supreme Court of Ohio are none too enamored with the Ivies. In the last decade, the Justices cited the *Akron Law Review* more than any other journal. ■

Author's Bio

Jared Klaus is an associate in Porter Wright's litigation department and a member of the firm's appellate practice group. He holds several honors, including a CALI Award in criminal law and the Joshua Dressler Award for Excellence in Criminal Law. Jared graduated first in his law school class and has a master's degree in journalism.

Endnotes

1. David Segal, "What They Don't Teach Law Students: Lawyering," *New York Times*, Nov. 19, 2011, at a1.
2. Id.
3. Adam Liptak, "Keep the Briefs Brief, Literary Justices Advise," *New York Times*, May 20, 2011, at A12.
4. Antonin Scalia and Bryan A. Garner, *Making Your Case: The Art of Persuading Judges,* 127, Thomson West (2008).
5. Lee Petherbridge, Ph.D. and David L. Schwartz, "An Empirical Assessment of the Supreme Court's Use of Legal Scholarship," p. 11, draft work in progress, available at http://ssrn.com/abstract=1884462; see also Michelle M. Harner and Jason A. Cantone, "Is Legal Scholarship Out of Touch? An Empirical Analysis of the Use of Scholarship in Business Law Cases," 19 *U. Miami Bus. L. Rev. 1* (2011) (analyzing the use of legal scholarship by Delaware state courts).
6. We ran the following Westlaw search using the "terms and connectors" option in the Ohio Cases database: CO(High) & "L.J." "L. J." "L. Rev." "L.Rev." "J.L." "Law Review" "Ct.Rev." "Ct. Rev." This was substantially the same search ran by Petherbridge and Schwartz. Petherbridge & Schwartz, supra note 4, at 8–9 fn.19.
7. 109 Ohio St.3d 539.
8. 103 Ohio St.3d 337.
9. 110 Ohio St.3d 353.
10. 129 Ohio St.3d 512.
11. 97 Ohio St.3d 504; 86 Ohio St.3d 451.
12. Scalia and Garner, supra note 4, at 127.