

TAKING EMPIRICAL STOCK OF THE BEST CORPORATE AND SECURITIES ARTICLES

Peter B. Oh[†]

Since 1959 the *Corporate Practice Commentator* (CPC) has published an annual compendium of significant corporate and securities law scholarship. Primarily aimed at business executives and transactional lawyers, the CPC canvasses casebooks, journals, speeches, and treatises of the domestic and international, as well as legal and non-legal, variety. The CPC then selects “the most original and useful contemporary writing” within the field of “corporation law and practice” that focuses on “counseling, planning, and preventive law rather than on doctrine, advocacy or curative law,” with “[s]pecial consideration . . . given to trends and new business problems.”¹

Since 1994 the CPC also has conducted an annual survey of the Best Corporate and Securities Articles published and indexed within the past calendar year. Each spring a list of all the eligible articles—providing only author name(s), title, and citation in chronological order of publication—is distributed to corporate and securities law professors.² Respondents are allowed to vote for up to six articles that, in their opinion, are the “best” legal articles in corporate and securities law. The top ten results of this peer-selection process are then announced publicly.³

Designation as one of the Best Corporate and Securities Articles bears some apparent reputational value. Institutions regularly report when their faculty’s articles have been selected,⁴ and when their law review publishes the selected articles.⁵ Faculty member biographies reference the frequency of their articles’ selection.⁶ And the list is reported by popular academic blogs, sometimes arranged by institutional affiliation.⁷

This “fun”⁸ project empirically examines the informational value of the CPC’s Best Corporate and Securities Articles. Specifically, this project seeks to identify determinants of the Best Corporate and Securities Articles, and to analyze their impact on academic papers as well as judicial opinions. This project is animated by three distinct, but not unrelated, phenomena: an engrained belief that peer selection appraises scholarship more reliably than student evaluation;⁹ the proliferation of citation studies

[†] Associate Professor of Law, University of Pittsburgh School of Law. B.A. 1994, Yale College; J.D. 1997, The University of Chicago. E-mail: poh@pitt.edu. All data referenced here are available on request. I am grateful for assistance from Scotland M. Duncan (Pitt Law ’09) as well as from Bryan C. Hare, Marc B. Silverman, Nathan C. Traurig, and Valerie A. Weis of the Barco Law Library—University of Pittsburgh School of Law.

¹ F. Hodge O’Neal, *Foreword*, 2 CORP. PRACTICE COMMENTATOR iii (1960).

² See, e.g., <http://law.vanderbilt.edu/faculty/thompson/2008articles.pdf>.

³ See *infra* Appendix A, *Best Corporate & Securities Law Articles, 1994-2008*; see also <http://law.vanderbilt.edu/faculty/faculty-personal-sites/robert-thompson/index.aspx>. In some years more than ten articles have been selected due to a tie.

⁴ See, e.g., *Henry Hansmann ’74 Article Among Year’s Ten Best*, <http://www.law.yale.edu/news/5067.htm> (last visited May 1, 2009); *Bebchuk, Roe, and Subramanian Honored for Top Corporate Law Articles*, http://www.law.harvard.edu/news/2008/03/10_corplaw.html (last visited May 1, 2009).

⁵ See, e.g., *Coffee, Gordon Honored by Top 10 List of Corporate Articles*, http://www.law.columbia.edu/media_inquiries/news_events/2008/march2008/top_10_list (“In addition, of the 10 honored articles on the 2007 list, three were published in the *Columbia Law Review*. No other law review had more than one article included on the 2007 list.”) (last visited May 1, 2009). The announcement omits that all of the articles were part of a symposium issue.

⁶ See, e.g., <http://www.law.harvard.edu/faculty/directory/index.html?id=445> (“Over the past seven years [Guhan Subramanian] has published more ‘top ten’ articles in corporate and securities law, as selected by scholars in the field, than any other academic in the country.”) (last visited Apr. 1, 2009).

⁷ See, e.g., Posting of Brian R. Leiter to *Leiter Reports*, http://leiterreports.typepad.com/blog/2005/05/top_corporate_1.html (May 13, 2005, 09:15 CST).

⁸ See, e.g., Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1540 (1985) (“Such a project falls somewhere between historiography and parlor game, and I will not claim any more significance for it than is warranted.”) Cf. THIS IS SPINAL TAP (1984) (“It’s such a fine line between stupid, and clever.”) (Michael McKean aka David St. Hubbins).

⁹ See, e.g., Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 125-26 (2002) (“[S]tudents (and indeed any one person) may lack the expertise necessary to evaluate the submissions that cover complex and technical areas of the law . . . [P]eer review, has, at times, important benefits”); Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments*, 75 DENV. U. L. REV. 661, 661 (1998) (observing that “[p]eople in other fields” think the student-edited system is “[c]ompletely loco”, and not so “[s]ecretly . . . shar[ing] their astonishment”); Richard A. Posner, *The Future of the Student-*

as a purported proxy for author, article, or institutional quality;¹⁰ and a revived charge that legal scholarship has become less relevant to the judiciary and practitioners.¹¹

This project examines these phenomena by utilizing three datasets. The primary dataset comprises all 177 Best Corporate and Securities Articles from 1994 up to and including 2008.¹² This dataset was compared against two “control” datasets. The first control dataset comprises all 230 articles published from 1994 up to and including 2007 in the *Corporate Practice Commentator*.¹³ The second control dataset comprises 80 articles published from 1994 up to and including 2008 in arbitrarily selected issues of the *Columbia Law Review*, *Harvard Law Review*, and *Yale Law Journal*—the top three law publications over that time period according to the primary rankings in the Social Science Citation Index (SSCI) and the Washington and Lee (W&L) Law Journals database.¹⁴

These datasets were used to generate three types of estimates:

1. *Article and Author Attributes.* The median and mean attributes of the Best Corporate and Securities Articles were collected against the median and mean attributes of their contemporaries within the *Corporate Practice Commentator*, a peer-selection journal, and the top three student-edited law journals. All of the articles were regressed to determine statistically significant determinants of article selection.

Edited Law Review, 47 STAN. L. REV. 1131, 1132 (1995) (“Given the handicaps of ignorance, immaturity, inexperience, and inadequate incentives, the wonder is not that law reviews leave much to be desired as scholarly journals, but that they aren’t much worse than they are.”). This belief has been asserted most forcefully as to empirical and interdisciplinary scholarship. See, e.g., Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 175 (2004) (“[T]he primary benefit of peer review lies in its objectivity-forcing function: peer review compels the disclosure of important information about empirical research using a common methodological language so that the research may be subjected to critical scrutiny.”).

¹⁰ See, e.g., RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 71-2 (1990) (acknowledging that citations are “an imperfect proxy for reputation,” but that “citation studies remain an attractive tool of judicial evaluation”); Theodore Eisenberg & Martin T. Wells, 27 J. LEGAL STUD. 373, 377 (1998) (“Across many articles and scholars, however, the most often cited articles tend to be regarded as those with the highest quality. . . . Appearing on lists of the most-cited articles is rarely viewed as damning of one’s work.”); Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 753 (1996) (observing “citation obsession in the legal community”). See also Joseph Goldstein, *Commentary*, 100 YALE L.J. 1485, 1485 (1991) (predicting that “ranking by citation counts could become an invidious virus in the world of scholarship”).

¹¹ See, e.g., Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, http://select.nytimes.com/2007/03/19/us/19bar.html?_r=1&oref=slogin (last visited May 1, 2009); Carissa Alden et al., *Trends in Federal Judicial Citations and Law Review Articles*, http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf (last visited May 1, 2009). Judicial criticism about the relevancy of legal scholarship is not a recent phenomenon. See, e.g., *United States v. Six Hundred and Thirty-Nine Thousand Five Hundred and Fifty-Eight Dollars in U.S. Currency*, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring) (complaining that “many of our law reviews are dominated by rather exotic offerings of increasingly out-of-touch faculty members”); Judith S. Kaye, *One Judge’s View of Academic Law Writing*, 39 J. LEGAL EDUC. 313, 320 (1989) (“I am disappointed not to find more in the law reviews that is of value and pertinence to our cases The concern that academics are writing for each other is indeed well founded.”). See also generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998); Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871 (1996). This criticism has been echoed by academics and practitioners. See, e.g., *Legal Education and Professional Development—An Educational Continuum*, A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE B. (Rep. Task Force on Law Sch. & the Prof.: Narrowing the Gap), July, 1992, at 5 (“Practitioners tend to view much academic scholarship as increasingly irrelevant to their day-to-day concerns.”); Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 45 (1936) (charging that “the only consumers of law reviews outside the academic circle are the law offices, which never actually read them but stick them away on a shelf for future reference”).

¹² See *infra* Appendix A, *Best Corporate and Securities Articles, 1994-2008*. The final primary dataset comprised 176 articles because Henry C. Hu, *Heeding Expectations: “Derivative Reality” and the Law and Finance of the Corporate Objective*, was selected in 1995 and 1996. The 1995 article, published in *Texas Law Review*, was retained while the 1996 article, published in *Journal of Corporation Law*, was excluded for aggregate statistics.

¹³ See *infra* Appendix B, *Corporate Practice Commentator Articles, 1994-2007*. These articles, which include some (but not all) of the Best Corporate and Securities Articles, were collected up to and including 2007 because the 2008 issue was not available yet.

¹⁴ See *infra* Appendix C, *Columbia, Harvard, and Yale Articles, 1994-2008*. This dataset includes those articles that also were designated as one of the Best Corporate and Securities Articles.

2. *Article and Author Law Journal Citations.* The number of citations within Westlaw's Journals and Law Reviews (JLR) database for an article or an author was collected.¹⁵ These citations were adjusted to negate the effect of increasing citations over time. Predicted expected citation counts for articles were generated and then compared against actual citation counts, along with statistically significant determinants of superior law journal citation counts.
3. *Article and Author Judicial Opinion Citations.* The number of citations within Westlaw's All Federal & State Cases (ALLCASES) database for an article or an author was collected.¹⁶ These citations were adjusted to negate the effect of increasing citations over time. Statistically significant determinants of superior judicial opinion citation counts then were identified.

These estimates then were compared against the data collected from the two control datasets to determine salient variables.

The limitations of citation studies are well-documented. Most fundamentally, a particular source may be cited for a variety of ambiguous reasons,¹⁷ most of which have no connection with quality:

Since many frequently cited articles are cited because they contain succinct statements of boilerplate propositions of law or of a particular academic approach to some set of issues, or because they fall squarely within a particular academic paradigm whose proponents make a practice of citing each other, the frequency of author's citations has little to do with his influence, much less with the quality of his work.¹⁸

Indeed, Ian Ayres and Frederick Vars have suggested that, with respect to elite journals, examining articles with lower citation counts may reveal more about quality than their higher citation count peers.¹⁹ Further, regardless of which citations counts are analyzed, there are difficulties involving the relationship of citation counts to article age²⁰ and article/author attributes²¹.

¹⁵ The search was conducted on March 27, 2009 for the Best Corporate and Securities Articles as well as the student-edited articles, and on April 1, 2009 for *Corporate Practice Commentator* articles. The precise search consisted of an author's last name within a sentence of the article's full title while excluding any Law Institute publications, which typically are published annually and thus can inflate the citation count; for example, the search for Janet Cooper Alexander's 1994 article was "Alexander /s ("The Value of Bad News in Securities Class Actions") % so("law institute")".

¹⁶ The search was conducted on March 27, 2009 for the Best Corporate and Securities Articles as well as the student-edited articles, and on April 1, 2009 for *Corporate Practice Commentator* articles. The precise search consisted of an author's last name within a sentence of the article's full title; for example, the search for Janet Cooper Alexander's 1994 article was "Alexander /s ("The Value of Bad News in Securities Class Actions")".

¹⁷ See, e.g., Shapiro, *supra* note 8, at 1543 ("Melvin Weinstock has listed fifteen specific motivations, such as paying homage to pioneers, giving credit for related work, providing background reading, and substantiating claims. The most problematic of these reasons for citation are self-citations and negative citations.") (citing 5 MELVIN WEINSTOCK, ENCYCLOPEDIA OF LIBRARY AND INFORMATION SCIENCE 19 (1971)).

¹⁸ Richard S. Markovits, *The Professional Assessment of Legal Academics*, 48 J. LEGAL EDUC. 417, 423-24 (1998); see also Goldstein, *supra* note 10, at 1485 ("[R]anking by citation counts . . . bears no relationship to scholarly merit. It is nondiscriminating in its discrimination. It is not even a reliable indicator that the work cited was read, let alone understood by the citer."); Posting of Brian R. Leiter to *Brian Leiter's Law School Rankings*, http://www.leiterrankings.com/faculty/2007faculty_impact.shtml (Sept. 1, 2007) (describing six types of problems that may "skew the correlation between citation and quality").

¹⁹ Ian Ayres & Fredrick E. Vars, *Determinants of Citations to Articles in Elite Law Reviews*, 29 J. LEGAL STUD. 427, 429 (2000) ("Articles in elite law reviews with few citations, however, are more likely to be of low quality. Finding that a *Harvard Law Review* article has many fewer cites than other articles in the same subject area is hard to square with a hypothesis of excellence."); see also generally Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481 (1983).

²⁰ See, e.g., William M. Landes & Richard A. Posner, *Heavily Cited Articles in Law*, 71 CHI.-KENT L. REV. 825, 826-27 (1996) ("Other things the same, the longer the period of time since an article's publication, the more citations it will accrue."). See also *infra* note 29.

Unlike other citation studies, however, this project does not seek to measure quality. This is because the project features a dataset of articles whose purported quality already has been adjudged by the authors' peers. Although this project proceeds to identify the authors and types of articles that generate superior citation counts, these results should not be understood as any sort of normative ranking of quality, but merely as a positive portrait of the Best Corporate and Securities Articles. Those attributes are identified in relation to those present in other articles published in the *Corporate Practice Commentator* as well as the top student-edited journals merely for the purpose of context.

All of the articles from the three datasets were coded for author information: name, gender,²² home (or, if applicable, visiting) institution,²³ and that institution's U.S. News & World Report Law School Ranking when the paper presumably was submitted for publication review.²⁴ When an institution was ranked only by tier, the median rank for that tier was assigned,²⁵ and when an institution had no law school ranking (e.g., a finance department or law firm), no rank was assigned.

All of the articles also were coded for article information. Whether the article was written in connection with a symposium or submitted for publication review as well as co-authored or solo-authored were noted. Also noted was the article's primary subject; CPC and Best Corporate and Securities Articles were coded for Corporations or Securities Law, a distinction that the CPC abandoned after 1995, while 27 different categories—including Corporations and Securities—were used for the student-edited journals.²⁶

All of the articles then were coded for journal information. For the CPC dataset, the original journal in which the article appeared was used. Whether the journal is general or specialized, peer-review or student-edited, and an author's "home publication" all were collected. The journal's prominence at the time of publication also was collected from two different sources: the Journal Impact Factor from the Social Science Citation Index (SSCI), and the Combined Score from the Washington and Lee (W&L) Law Journals database.²⁷

²¹ See, e.g., Ayres & Vars, *supra* note 19, at 430 ("When we find that a particular attribute is positively correlated with citations to an article, should we conclude that (a) articles with this attribute have higher than average quality, (b) law review editors discriminate against articles with this attribute . . . , or (c) subsequent authors discriminate in favor of citing this type of article . . . ? To this important question, our data speak not.")

²² See, e.g., Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the "Top Ten" Law Reviews* (Aug. 2008) (finding female faculty are underrepresented generally in the "elite" law journals, but that female Business Associations and Securities Regulation faculty are represented proportionally), available at <http://ssrn.com/abstract=1140644>. But see Ayres & Vars, *supra* note 19, at 439 ("White female authors received 57 percent more citations than white men Articles by minority women were the most heavily cited . . . [while] [t]here was no statistically significant evidence of increased citation to minority-authored articles after 1984."). Race was not a category in this project because none of the Best Corporate and Securities Article authors is a minority.

²³ Student authors were given the rank of their school, although this was not terribly distortive as all of their selected papers were co-authored with full-time faculty.

²⁴ The U.S. News & World Report Law School Ranking was used because they include the most comprehensive set of law schools and presumably are the most likely to be used by student-editors, to the extent that institutional ranking is salient. See, e.g., Jason P. Nance & Dylan J. Steinberg, *The Law Review Selection Process: Results from a National Study*, 71 ALB. L. REV. 565, 583 tbl.2 (2008) (conducting a survey of 163 student-edited law journals and finding student-editors tend to place significant weight on whether the "author is employed at a highly ranked law school").

²⁵ For instance, at the time he submitted the article selected in 1994, Stephen Bainbridge was at the University of Illinois College of Law, which was listed simply in "Quartile One" of the 1993 U.S. News & World Law School Rankings; as "Quartile One" then comprised schools from 26 to 44, Illinois was given a 35.0 ranking. In the case of Ronald Gilson, who was at Columbia University School of Law and Stanford Law School when his selected articles were submitted, the average of both institutions' rankings at that time was used.

²⁶ See *infra* Appendix C, *Columbia, Harvard, and Yale Articles, 1994-2008*. See also Ayres & Vars, *supra* note 19, at 437-39 (finding that "articles in the areas of jurisprudence and feminism or Critical Legal Studies (CLS) receive significantly more than the average number of citations In contrast, international law and criminal law articles received significantly fewer citations than the average."). Ayres and Vars found that business articles were relatively neutral. *Id.* at tbl.3.

²⁷ SSCI Journal Impact Factor measures the frequency with which an article in that publication has been cited during a particular year, http://admin-apps.isiknowledge.com/JCR/help/h_impfact.htm, while the W&L Combined Score is a normalized composite of 1/3 weight to impact factor and 2/3 weight to total citations, <http://lawlib.wlu.edu/LJ/method.asp#methodology>. Unfortunately, these rankings are incomplete—the SSCI Journal Impact Factor is available publicly only from 1997 to 2007 (and only for a select number of journals), while the W&L Combined Score is available from only 2002 to 2008.

The data then were arranged by article and by author. For all authors, their frequency in a dataset was discounted by 0.25 for each of the following: co-authorship, placement within a symposium issue, and placement in one's home (or visiting) publication. Discounting for co-authorship reflects the possibility that additional authors may increase the article's prospects for acceptance. Discounting for placement within a symposium issue or one's "home (or visiting) publication" reflects the possibility that non-meritorious factors may be involved in the publication's review process.²⁸ Although controversial, none of these discounts resulted in any material difference within the final results.

Raw citation counts for JLR, SSCI, and ALLCASES were collected, and then adjusted for time. The citation counts simply were divided by the difference between 2009 and the year of publication.²⁹ For authors of multiple Best Corporate and Securities Articles, both the raw and adjusted citation counts simply were divided by the number of total articles.

The project's results will be presented at the AALS Business Associations Mid-Year Meeting, and thereafter posted to BePress and SSRN.

²⁸ See, e.g., Ayres & Vars, *supra* note 19, at 439-40 (describing variables "designed to test for nepotism in the law review selection process"). Ayres and Vars did test for whether an article was placed at a journal for a comparably ranked school as well as where an author had visited recently, but these means were far less significant than whether the article was published at a journal of the author's home institution. See *id.* at 449 tbl.A1. See also Nance & Steinberg, *supra* note 24, at tbl.9 (finding student-editors do place some weight on whether the author is a professor at their school).

²⁹ An alternative time adjustment would be to generate a loglinear regression prediction of net total citations to reflect that the rate increases and then decreases over time. Landes and Posner, for instance, estimate that citations will increase for 11 years after publication and then decline. Landes & Posner, *supra* note 20, at 831. As this is roughly the time span of the present dataset, a simpler adjustment method was used.