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The Persistent Treatise

Dana Neacsu
Duquesne University

Paul D. Callister
University of Missouri - Kansas City, School of Law

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The Persistent Treatise*

Dana Neacsu** and Paul Douglas Callister***

The legal treatise remains a pillar of the American legal system and the rule of law, despite claims it might be dying and variations in quantitative citations to treatises over time. Indeed, several treatises evidence increased citation in U.S. Supreme Court opinions during the last several decades. Surprisingly, the U.S. Supreme Court, including the Robert's Court in Dobbs v. Jackson Women's Health Organization*, increasingly sees fit to rely on proto-treatises, such as Bracton, Coke, and Blackstone. This article provides empirical data and qualitative analysis to support this claim, highlighting the sometimes declining but nevertheless significant presence of treatises in case law, briefs, law reviews, and journals over time.*

Implications for Practice

1. Despite the observed decline in their usage, legal treatises remain a significant source of legal knowledge and authority. Legal information professionals should continue to familiarize themselves with key treatises in their field of practice.
2. The evolving citation patterns of treatises in state and federal courts can provide insights into current legal trends and precedents. Professionals should stay updated on these patterns to inform their legal strategies.
3. The U.S. Supreme Court's reliance on treatises, including "proto-treatises" or "institutes," underscores their importance in shaping legal decisions. Professionals should consider these sources when preparing for cases that may reach the Supreme Court.

 We thank the Yale Law Library for hosting the conference, The Legal Treatise Past, Present, and Future, at Yale on March 24, 2023, where this paper was initially presented. We thank the organizing committee lead by Femi Cadmus and Nicholas Mignanelli for leading the effort to organize the conference. We also thank the reviewers at the 15th Annual Conference on Legal Information, Scholarship, and Teaching (Boulder-CoLIST) especially, Kristin McCarthy, an excellent discussant for our paper, and Peter Hook, whose expertise in statistics was invaluable.

** Associate Professor of Legal Research Skills, Duquesne University, School of Law; Director of Duquesne Center of Legal Information and of Allegheny County Law Library, Pittsburgh, Pennsylvania, neacsue@duq.edu, https://orcid.org/0000-0003-3761-8691.

*** Professor of Law and Director of the Leon E. Bloch Law Library, University of Missouri–Kansas City School of Law, Kansas City, Missouri, callisterp@umkc.edu, https://orcid.org/0000-0002-9613-0138.

4. Treatises should be emphasized in the legal curriculum. Educators and students alike should recognize the value of treatises as a foundational element of legal education.
5. The treatise's role in upholding the rule of law highlights its importance in legal practice. Legal professionals should leverage treatises to ensure their practices align with established laws and principles.

Introduction

¶1 This article adds a new layer to the debate about the treatise's alleged demise[1] by asking what jurisprudential role this type of legal writing plays in the common law system. It looks at this question from both quantitate and qualitative perspectives.

¶2 The data cover the wide array of treatise usage: as a finding aid of primary sources, a stand-in for settled law, an explanatory summation or exposition of the law in a particular area, and an in-depth journey through a particular area of law.

¶3 The empirical data gathered for this article cover the citations of 77 treatises over the last six decades. The citations come from cases at the federal and state levels and from trial through courts of last resort. The article also covers citations found in legal briefs and law review articles. The data show that treatise citations have remained significant and healthy—that is to say, treatises *persist*.[2] However, when analyzed, the data,

1. *See* infra note 13 and accompanying text.
2. The word "persistent" bears particular significance in library and information science, which

even at this nongranular level, show a complex story that needs further research and analysis. Indeed, the percentage of all state and federal cases citing treatises shows a gradual decline over time. But this undifferentiated data, when taken apart, show that treatise citations encompass many variables, including authors' reputations, the areas of law, and especially the courts' levels. They also include the political and jurisprudential nature of the cases citing the treatises, whether they follow or break away with stare decisis. In the latter situation, it appears that treatises are cited as authority for what represents the common law tradition of the U.S. legal system.

¶4 Furthermore, in very recent U.S. Supreme Court jurisprudence, this article points out the use of treatises as *evidence* of what the law is, absent other evidence of authoritative sources. It illustrates the qualitative use of treatise citation by the U.S. Supreme Court in two cases: *Roe v. Wade*, establishing a new federal right for women, and *Dobbs v. Jackson Women's Health Organization*,[3] taking that federal right away from women by holding it did not exist in the first place.[4] "We therefore *hold* that the Constitution does not confer a right to abortion. Roe and Casey must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[5]

¶5 Finally, this article supports the argument of the continued prominence of the treatise. It calls for further research to understand the evolving role of legal treatises in the common law tradition, especially given the advent of large-language models and generative artificial intelligence (AI).

Methodology: Presentation of the Data in Citations in State and Federal Cases

Treatise Data Collection—A Brief Explanation

¶6 Writing in the early twentieth century, Yale University Law Librarian and Professor Frederick C. Hicks described legal treatises as literary works containing "logical classification of materials drawn from authentic sources, and systematic discussion

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often studies the lack of persistence in certain medium. *See, e.g.*, Wallace Koehler, *Web Page Change and Persistence—A Four-Year Longitudinal Study*, 53 J. Am. Soc. Inform. Sci. & Tech. 162 (2002); Fatih Oguz, *Document Constancy and Persistence: A Study of Web Pages in Library and Information Science Domain*, 48 Proceedings of the Am. Soc. Inform. Sci. & Tech. 1 (2011). For another argument on treatises of continued importance, *see* Amanda Bolles Watson, *"The Report of My Death Was an Exaggeration"—The Legal Treatise*, 50 J.L. & Educ. 256 (2021).

3. 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

4. The authority of the Court to overturn *Roe* is traced to a singular source:
> Our sole authority is to exercise "judgment"—which is to say, the authority to judge what the law means and how it should apply to the case at hand. The Court has no authority to decree that an erroneous precedent is *permanently* exempt from evaluation under traditional *stare decisis* principles. A precedent of this Court is subject to the usual principles of *stare decisis* under which adherence to precedent is the norm but not an inexorable command. If the rule were otherwise, erroneous decisions like *Plessy* and *Lochne* would still be the law. That is not how *stare decisis* operates. 142 S. Ct. at 2278–79.

5. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022) (emphasis added).

of the state of the law pointing out difficulties, inconsistencies, and defects, and suggesting possible improvements."[6]

¶7 Hicks's definition underlines the technical requirements of the treatise, irrespective of its medium—print or digital—which fits our view of treatises as specific embodiments of techné. This article uses "techné" instead of "technology" to add the philosophical subtleties of *art* and *craft* rather than to emphasize modern notions of industrial and digital technologies.[7] Ontologically, in Greek philosophy techné was used as a complex concept, a knowledge-purveying activity.[8] Techné was needed for knowledge production and communication.[9] Given their complexity and the bridge treatises form between literary works and logical and systematic discussions of the law, techné seems the more appropriate generic concept.[10] Besides being a specific, persistent techné, treatises persist as cognitive authority of the profession.[11] Their persistence may soon be related to their incorporation by vendors like Lexis+ in its case law database, by placing citations to treatises right below most case headnotes (see figure 1).

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6. Frederick C. Hicks, Materials & Methods of Legal Research 121 (2d ed. 1933). To distinguish other forms of legal literature, and because of the process that was used to select treatises for the study below, it is apparent there are other elements that are also relevant in the definition of a treatise. Treatises are not encyclopedias (which also have logical classification systems), but they are expositions of a defined field or topic of law using rational or pragmatic organization and reflective methodology that become part of the *cognitive authority* of the legal profession. Treatises are not written by a committee, like *Restatements of the Law*, but by established authors who are part of the authoritative branding of the work. Treatises endure, or are intended to endure, over time through new editions and updating, and they connect evolving developments in the law to the past in ways that facilitate both stability and flexibility in the law. Generally, they do not consist of works with "contributing" authors each adding their own distinct chapters to the work; rather, if there are joint authors, they merge their contributions into an inseparable and unitary work. Treatises are not guides to the particulars of an attorney's practice of law, such as transactions, sample pleadings, or forms, but they are part of a techné that aids access to and interpretation of the law and, ultimately, in *knowing what the law is*, thereby supporting the rule of law. See our definitional aid in appendix C, https://www.aallnet.org/wp-content/uploads/2024/06/Callister-Appendices-V23_FINAL.pdf [https://perma.cc/3FNG-K6CY].

7. It is "[a]n art, skill, or craft; a technique, principle, or method by which something is achieved or created. Also: a product of this, a work of art." Techne, n., Oxford English Dictionary (3d ed. 2010).

8. Dana Neacsu, *Technology—Revealing or Framing the Truth? A Jurisprudential Debate*, 60 Duq. U. L. Rev. 246, 248 (2022), https://dsc.duq.edu/law-faculty-scholarship/123/ [https://perma.cc/R6N8-V8AT].

9. *See id.* at 249.

10. *See id.* at 248–49 (explaining the Greek roots of the word "techné" and its complex meaning going back to Plato and Aristotle to cover techné as skill, knowledge, and instrumentum).

11. Cognitive authority is a concept derived from social epistemology. *See* Patrick Wilson, Second-Hand Knowledge: An Inquiry into Cognitive Authority, at vi (1983). As a concept, it initially includes an individual's recognition and trust of particular individuals or institutions as authority. *See id.* at 81, 89. Within the field of library and information science, the concept encompasses an individual's trust and recognition of specific texts as authoritative. *See id.* at 166–68 (texts are accepted as authority in several ways—if authored by trusted individuals or groups, by publication record of the publisher, and through repeated revision of a reference work). Robert Berring notes that cognitive authority is not only relevant to the legal profession (as a social group) but that "[f]or most of the twentieth century, the legal world had agreed to confer cognitive authority on a small set of resources." Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 Calif. L. Rev. 1673, 1676 (2000) ("By 'cognitive authority' I mean the act by which one confers trust upon a source.").

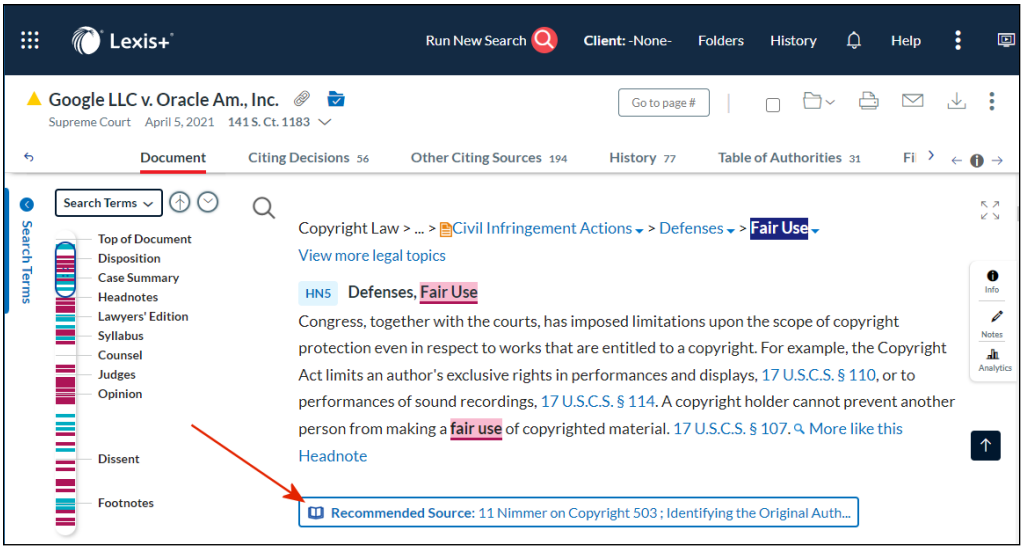

FIGURE 1

Lexis+'s Incorporation of Treatises into Headnotes. Reprinted with the permission of LexisNexis, a division of RELX Inc. LEXIS+ and the Knowledge Burst logo are registered trademarks of RELX Inc., used with the permission of LexisNexis.

Lexis has selected 170 treatises to add to its headnotes.[12] This figure provides additional evidence that treatises are persisting as relevant cognitive authorities and interpretive aids.

¶8 The data collected treatise citations in all state and federal courts going back to 1962 and organized it by decade. The start date was chosen to ensure sufficient time to predate the instruction of Lexis and Westlaw case law searching, which has given rise to the scholarly debate around the role, and especially demise, of legal treatises.

¶9 Forty years ago, A.W.B. Simpson wrote a seminal article on the history of the treatise in relation to other forms of legal publication and its intended role in organizing law around principles.[13] He thought he had identified the "fall" of the treatise with its commitment to finding principles underlying the law in an age defined by legal realism, which had rejected such notions.[14] Rather than treatises and their commitment to

12. LexisNexis, New Secondary Source Recommendations Related to a Specific Headnote (Jan. 5, 2022), https://tinyurl.com/Lexis-Treatise-Headnote [https://perma.cc/8FYD-UZVF].

13. *See* A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. Chi. L. Rev. 632, 665–67, 671, 677–78 (1981), https://chicagounbound.uchicago.edu/uclrev/vol48/iss3/4/ [https://perma.cc/UJP9-KG8P]. Though the legal theory associated with the treatise tradition is still expressed to this day, we suspect there has been a significant decline in the belief that (at least some) legal principles are universally valid; hence the link between the treatise and the belief in natural law has become attenuated. *Id.* at 667. The task of the treatise writer "is to 'unfold the rules, the principles, the reasons, which not only governed form decisions, but are to govern subsequent ones.'" *Id.* at 674, quoting J. Bishop, The First Book of the Law 126 (Boston 1868).

14. Simpson, *supra* note 13, at 677–78; *see also* Watson, *supra* note 2, at 270–72. "The realist position that law is not structured plainly casts doubt on the nature of the treatise since a main feature of the treatise

principles and tradition,[15] Simpson believed that "[a] system of ready access to such material[,] . . . the professional services, and more recently the online computer systems such as LEXIS and WESTLAW, have arisen to meet this need."[16] Perhaps Simpson employed a reductionist and computational view of technology, meaning he thought of technology as a means to turn everything into a consumable,[17] thinking it's out of touch with its true essence grounded in techné. This article views it according to the Greek meaning of techné, the organization and skill where usage can be an aid to reflective thought.[18]

¶10 At about the same time, legal historian Lawrence Friedman characterized Restatement drafting (and presumably treatise writing) as "singularly fruitless" because in the case of Restatements, the authors relied on "reducing [the common law's] principles to a simpler but more systematic form. . . . They took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones."[19] The same criticism might be unjustly made of treatises.[20] However, as shall be shown, treatises continue to thrive, and what this article relies on in its definition is that treatises require a "rational or pragmatic organization and reflective methodology."[21]

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is that it gives organized structure to law. For this discussion, it is not relevant whether the realists are correct. The problematic element for the treatise is not the philosophy itself but the criticism that treatises are not the prestigious publications they were thought to be." *Id.* at 272.

15. Ronald Dworkin, Law's Empire 228–38 (1986).

16. Simpson, *supra* note 13, at 678.

17. Paul D. Callister, *Law and Heidegger's Question Concerning Technology: Prolegomenon to Future Law Librarianship*, 99 Law Libr. J. 285, 296 (2006), https://irlaw.umkc.edu/faculty_works/22/ [https://perma.cc/J2DP-TYZV], ("Indeed, the profession of law speaks of legal information, like other information, as a resource to be mined, harvested, ordered, quantified (in billable units), packaged, marketed, and, ultimately, consumed to some calculated end or purpose, which in turn will serve some other overarching end or purpose."). For a more thorough explanation of calculative thinking, *see id.* at 293 to 297.

18. *See supra* note 7 and accompanying text. For a more detailed explanation of techné, *see, e.g.*, Neacsu, *supra* note 8.

19. *See* Lawrence Friedman, History of American Law 582 (1973) (describing efforts of "massive treatise" authors Samuel Williston and Austin Scott as being in the "strict, conceptual, Langdellian mold." In the same vein, their work on the Restatements produced "arrangements of principles and rules (the black-letter law) followed by a somewhat barren commentary"). *Id.*

20. Indeed, the criticism has been made. *See* Simpson, *supra* notes 13–14 and accompanying text.

21. Rationalism and pragmatism are both epistemologies and ways of knowing. Rationalism requires consistency and is best exemplified by geometry (five basic postulates form the basis for all geometric proofs that always are consistent with one another). *See* Chancey C. Riddle, Think Independently 10–14 (2009); Isaak I. Dore, The Epistemological Foundations of Law 34–36, 255–72, 296–98 (Carolina Academic Press, 2007); and Bernard Williams, Rationalism, 7 Encyclopedia of Philosophy 69–75 (Paul Edwards ed., Collier Macmillan 1967, reprt. ed. 1972). Pragmatism is the simple application of utility. We know something because it works often through repeated experimentation. *See* Riddle, *supra*.; Dore, *supra* at 892–900, 913–16; and Gertrude Ezorsky, *Pragmatic Theory of Truth*, 6 Encyclopedia of Philosophy 427–30 (Paul Edwards ed., Collier Macmillan 1967, reprt. ed. 1972). Our observation as librarians is that all classification systems require the application of rationalism and pragmatism to produce finding aids. This does not require a commitment in natural law or principles that may never be proven. Nor does this article take a position on any other jurisprudential or philosophical stance in the law. What the article notes is that treatise writers continue to find ways to organize the law with taxonomies, finding aides, and tables of content. The article ends its philosophical inquiry here.

Data for Total Citations to Treatises Since 1962 in Case Law Over Six Decades

¶11 The data collected about treatise citations show persistence, something quite different from a trend into irrelevance. At first brush, they show that treatises continue to have a healthy, persistent presence in our legal tradition.

¶12 The data were collected based on the rules listed in Appendix A. We created these rules as we went, constantly asking ourselves what defined a treatise; we then circled back to use them in formulating the definition above.[22] Most important, the rules aided us in choosing a representative, manageable sample of treatises cited in all federal and state cases.[23] Using the dates of January 1, 1962, through December 31, 2021, we looked at 2,516 "Texts & Treatises"[24] on Westlaw Edge, among 32 Practice Areas. We also looked at 2,667 "Treatises, Guides & Jurisprudence"[25] as sources for Lexis+, among 50 Practice Centers. The Practice Areas and Practice Centers with the numbers of works selected as treatises appear in Appendix B.[26]

¶13 With minor exception, this article limits treatises based on Practice Areas and Practice Centers available on Westlaw and Lexis, respectively.[27] The use of Practice Centers becomes important later because the article measures not just the total number of treatise citations but the total number of treatise citations compared to the total

22. *See supra* note 21 and appendix C.

23. One ripe area of study that time and resources did not allow us to include were state-specific treatises (e.g., B.E. Witkin, California Evidence (5th ed., Westlaw Edge updated through 2022)). We were further limited to items available on Lexis or Westlaw.

24. For example, we accessed "Treatises and Texts" on Westlaw Edge by drilling down from "Practice Area" to "Intellectual Property" to "Secondary Sources" and then filtered for "Publication Type" by "Texts & Treatises."

25. We also accessed "Treatises, Guides & Jurisprudence" in Lexis+ by drilling down from "Practice Area" to "Copyright Law" to "All Copyright Law Treatises, Guides & Jurisprudence."

26. The tabulated data about the Westlaw and Lexis "Practice Areas" is available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/, https://www.aallnet.org/wp-content/uploads/2024/06/Callister-Appendices-V23_FINAL.pdf [https://perma.cc/4YT8-9XHN] (scroll to bottom), at tab 1.

27. The article made some exceptions and added four treatises other than through our method of looking at Practice Areas on Westlaw and Practice Centers on Lexis. First, the article added Wright & Miller's Federal Practice & Procedure (but there is no "civil practice" Practice Area on Westlaw). This beloved treatise is highlighted in Kent Olsen's conference paper. Wright & Miller is also the most-cited treatise in Table 1 for downloads from 1962–2021. Second, the article includes McCormick on Evidence (ranked fourth in Table 1), but there is no Westlaw Practice Area for "evidence." Third, the article adds Rotunda & Nowak's Constitutional Law (which ranked 24th in Table 1), but again, there is no Practice Area for "constitutional law" on Westlaw. All three of these omitted Practice Areas exist on Lexis. Finally, in addition to the three exceptions for Westlaw, the article includes Scott on Trusts (Aspen Publishers), which ranks 23rd on Table 1. We include this in part because Scott on Trusts is such a significant and historical treatise and in part because we wanted to get a sense of how prominent treatises from publishers other than Thomson Reuters and Lexis might fare in citations. We made these inclusions using our expertise as librarians (and that of Kent Olsen, our colleague). These treatises are beloved by users, and the numbers show it. Also, by introducing them, we are aware that we are reinforcing the saying that legal research is both art and science. Furthermore, while within the article's methodology we tried to be as objective and uniform as possible, these exceptions show that human expertise needs to always play a role in legal research. It also highlights the interface design limitations of products like Westlaw and Lexis in leading users to some of the most important sources of law, indeed at the core of the legal profession's cognitive authority.

number of cases in a database in a specific Practice Center.[28] Our methodology and rules for identifying treatises (Appendix A), while perhaps missing some things that might be treatises, gave us a representative sampling of 77 treatises to work (Appendix D).[29]

¶14 The decades for the raw number of citations in the tables were selected because of the advent of online case searching in the 1970s and the criticism suggesting irrelevance of treatises during that time.[30]

¶15 The full chart of 77 selected treatises is located in Appendix D. Tables 1 and 2 show a much smaller sample of four treatises. Table 1 gives each by title, rank within the 77 total treatises, and Lexis or Westlaw Practice Area. Table 2 shows a per-decade count of how many times each of the four treatises were cited. Darker shading in table 2 indicates higher numbers. Nimmer, for example, peaked in the decade 2002 through 2011, while *Wharton's Criminal Law* peaked in number of citations between 1962 and 1971. Wharton offers a strong example of how treatises can have tremendous staying power, extending well beyond a century.

TABLE 1

Sample Treatise Citations, 1962–2021, by Title (full table available in Appendix D)

Rank Total Citations 1962-2021	Title, Author and First Publication Date (from OCLC)	(Searched on Lexis - Federal & State Cases)	Practice Area	Platform
1	Federal Practice & Procedure, William Barron (William Webster), 1960?	("Federal Practice" or "Fed. Prac!" or "F. Prac!") /5 (Wright or Miller)	N/A (No "Civil Procedure" Practice Area)	Westlaw
4	McCormick on Evidence, 1972 (1954 for handbook)	Evidence /5 McCormick	N/A	Westlaw
11	Nimmer on Copyright, 1963	Copyright /5 Nimmer	Copyright	Lexis
12	A Treatise on the Criminal Law of the United States, Francis Wharton, 1874, 7th ed.	("Criminal Law" OR "Crim. Law" OR "Crim. L.") /5 Wharton	Criminal	Westlaw

This chart is split in two with the chart in table 2, which continues the chart. This first column lists the ranking of the number of citations between January 1, 1962, through December 31, 2021. The treatise title, with a reference to the original author, is listed in the next, followed by the terms and connectors search to find citations, the "area of practice" for Westlaw or Lexis, and the platform that was the source of the treatise.

28. *See infra* sections *Select Other Treatises as a Percentage of All Cases and Select Treatises as a Percentage of U.S. Supreme Court Cases* and *Briefs in Certain Practice Areas*.

29. Note that no. 4, "Contracts /5 Corbin," picks up more than Corbin on Contracts. There are various state treatises for *Corbin on Contracts*, such as *Corbin on Massachusetts Contracts*, *Corbin on New York Contracts*, *Corbin on Illinois Contracts*, and *Corbin on Ohio Contracts*.

30. *See supra* notes 13–19 and accompanying text.

TABLE 2

Second Part of Table of Treatise Citations in All Federal and State Courts
(full table available in Appendix D)

1962-1971	1972-1981	1982-1991	1992-2001	2002-2011	2012-2021	1962-2021	Total
819	8,944	19,749	21,221	40,580	56,001	147,314	153,103
2,010	4,892	4,174	2,967	2,752	2,662	19,457	20,719
90	289	676	871	1,396	1,249	4,571	4,633
1,160	1,145	784	589	444	432	4,554	9,536

The shading helps spot the highest citations by a particular decade. For example, *Nimmer on Copyright* ranks 11 in total downloads since January 1, 1962, with 4,633 total citations as of late fall 2022. Between January 1, 1962, and December 31, of 2021, *Nimmer* had 4,571 citations. There are citation numbers from all federal and state courts for each decade between 1962 and 2021 and shading to show the peak, which for *Nimmer* was in the decade 2002 through 2011 (1,396 citations, although 2012 through 2021 was a close second (1,249 citations). On the other hand, *Wharton* (which the authors traced back to the 7th edition in 1874) had its peak citations between January 1, 1962 through December 31, 1971 (1,160) and in the final decade (432). Some treatises, like *Wharton's Criminal Law* can have tremendous staying power, extending well beyond a century.

¶16 To understand the strength of treatises in raw numbers of citations per decade, we devised the tabulation chart shown in Table 3.

TABLE 3

How Many Treatises Ranked 1-6 Comparing Their Own Citations Decade by Decade and Including Decades with No Citations[31]

Ranking of Citations by Decade	1962-1971	1972-1981	1982-1991	1992-2001	2002-2011	2012-2021	Sub Total	Number of No Citations	Total
Ranked 1	4	6	22	7	16	22	77	-	77
Ranked 2	5	10	9	16	24	12	76	1	77
Ranked 3	3	4	13	31	15	10	76	3	79
Ranked 4	1	10	26	14	10	8	69	6	75
Ranked 5	6	28	-	4	9	12	59	19	78
Ranked 6	18	-	1	2	2	13	36	40	76
# of No Citations	40	19	6	3	1	-			
Total	77	77	77	77	77	77		Average	77.00

For instance, in 1962–1971, just four treatises of the 77 had the most citations (which would be ranked one) in that decade, but 22 treatises had tied for the most citations in the decade 2012–2021 (tied with 1982–1991), another 12 were ranked second, and 24 treatises peaked in the prior decade (2002–2011). This data does not suggest treatises are dying, but quite the contrary: their use is on the rise (at least for current treatises). Continuing the analysis, 18 treatises had their worst number of citations (ranked 6) in the decade 1962–1971. It is tempting to include the decades with no citations, but that would be misleading since a treatise may have not existed or have just been published. Furthermore, some treatises were not cited in multiple decades; for instance, in 1962–1971 and 1972–1981 deciding which ranks last was problematic. Returning to the table, it does show that rankings 1 and 3, corresponding to the last three decades, were highest in terms of raw citations. Such is the pattern on the other end for rankings 4 through 6, which have the fewest numbers of citations.

¶17 It is curious that the highest-ranking decades form a diagonal. This may be the result of measuring current treatises with older treatises not being carried forward (not that treatise with no citations "#/N/A" on our rankings chart—not depicted[32] occur predominantly in the early decades and then decline. In addition, there are more cases that can cite to treatises in each decade, so with each decade the possibility of more raw citations to treatises grows. These are only guesses as to why the diagonal pattern forms.

¶18 Notice in Table 3 that the number of no citations diminishes rapidly by advancing through the decades to the present. Indeed, the sharp decline of unranked decades, from 40, 19, 6, 3, 1, and 0, evidences the impact that selecting from treatises on Westlaw and Lexis may have, perhaps, also contributed to the diagonal decent. In the end, the

31. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/JDT8-V6SS] (scroll to bottom), at tab 4, cells F82 to O90.

32. See data in table in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/5ZAM-4XTS] (scroll to bottom), at tab 4, cells G82 to O78. No treatise on the chart had zero citations (and thus no ranking) in the latest decade.

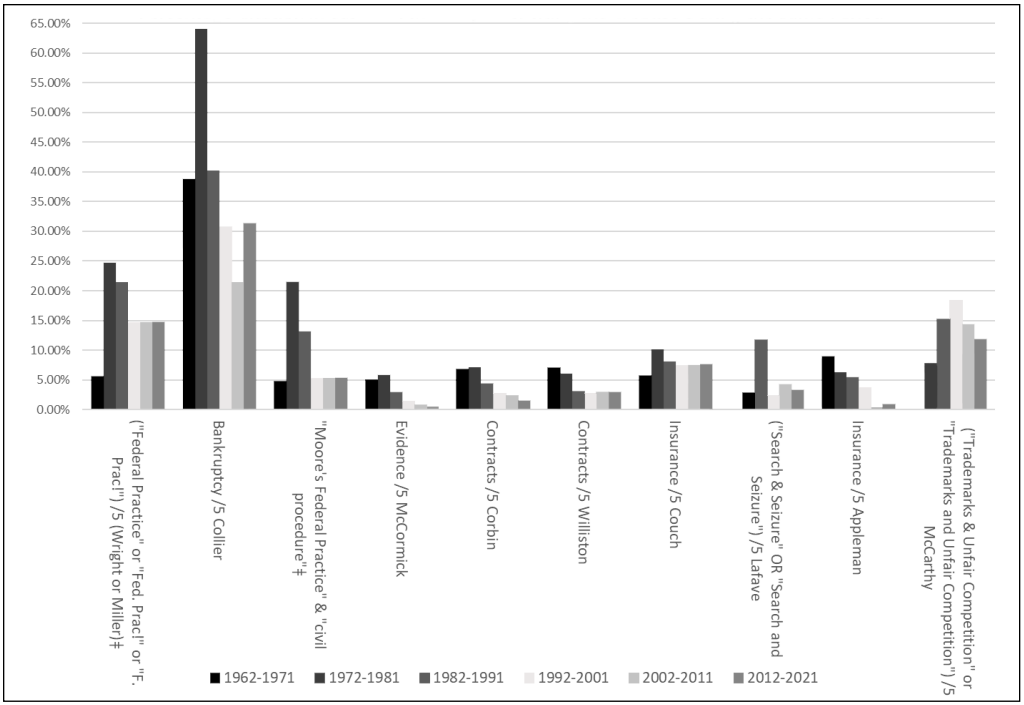
real problem with raw citations is they fail to account for how many cases are before the courts on the topic of a given treatise.

Select Other Treatises as a Percentage of All Cases

¶19 Because of the time it takes to study treatises as a percentage of all cases on the appropriate topic, we studied only the top 10 treatises (in terms of raw citations in all federal and state cases) and a few select treatises outside that range. Also because of limited resources, we restricted our research to the decades beginning in 1962 and later. With few exceptions, from the limited data, there is a noticeable decline in the number of treatises cited per cases on the same subject.

TABLE 4

Top 10 Treatises Based on Total Citations 1962-2021 & Their Percentage Citation in Cases on the Subjects & Citing the Treatise During the Same Period



¶20 While Table 4 depicts the general decline of treatises by decade, some works still received strong support in case law (we considered a benchmark of 5 percent as significant): *Wright & Miller's Federal Practice and Procedure* (14.76%), *Collier on Bankruptcy* (31.2% in the last decade),[33] *Moore's Federal Practice & Civil Procedure* (5.40%), *Couch*

33. Note that *Collier on Bankruptcy* was cited by just over 64 percent of cases on bankruptcy in the decade 1972–1981, probably because of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (eff. Oct. 1, 1979).

on Insurance (7.55%), and *McCarthy on Trademarks and Unfair Competition* (11.85%). That's five of the top 10 based on total citations between 1962 and 2021. Furthermore, Collier's, Moore's, Couch, and Appleman all had varying degrees in uptick (however, slight) in citation as a percentage of cases on subjects during the last decade.

¶21 Because the top 10 treatises might be skewing the results, we looked at a few other treatises (see table 5), restricting the number due to limits on resources and time.

TABLE 5[34]

Select Other Treatises and Their Percentage of Case Citations 1962-2021 for Cases on the Same Subject

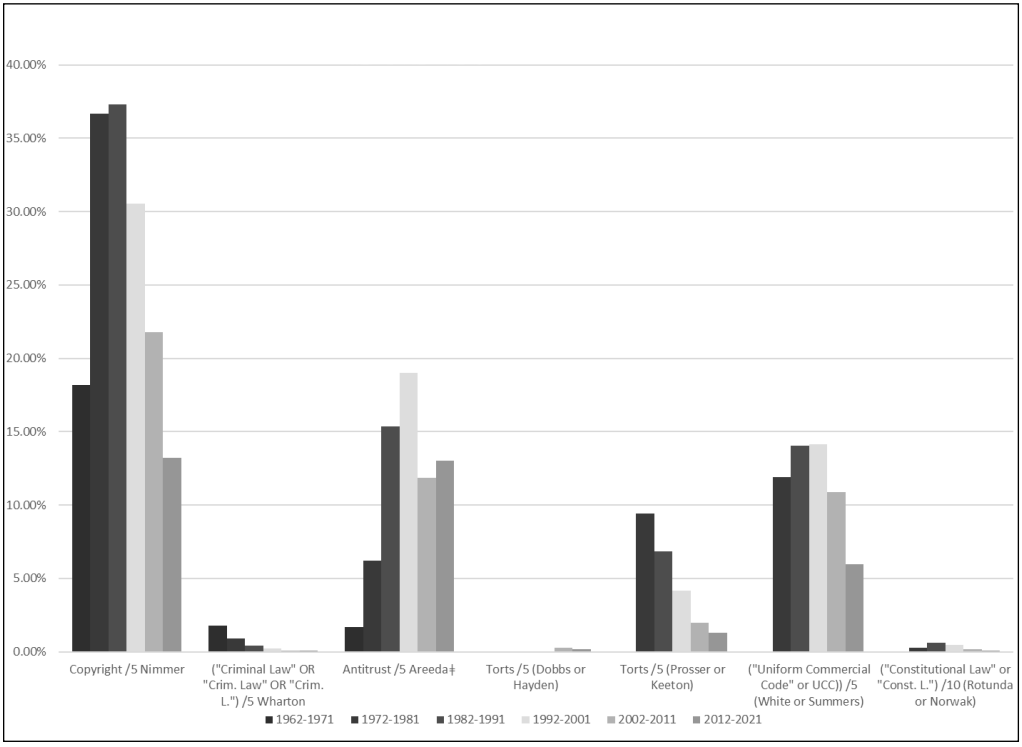


Table 5 shows declining usage for *Nimmer on Copyright* (ranked 11), *Wharton's Criminal Law* (ranked 12), Areeda's *Antitrust Law* (ranked 21), Dobbs & Hayden's *The Law of Torts* (ranked 31), Prosser on Torts (unranked because it is a hornbook, although widely cited in the courts), *White & Summers' Uniform Commercial Code* (ranked 13), and Rotunda & Norwak's Constitutional Law (ranked 23). However, if a threshold of 5 percent is set, *Nimmer on Copyright*, Areeda's *Antitrust Law*, and *White & Summers'*

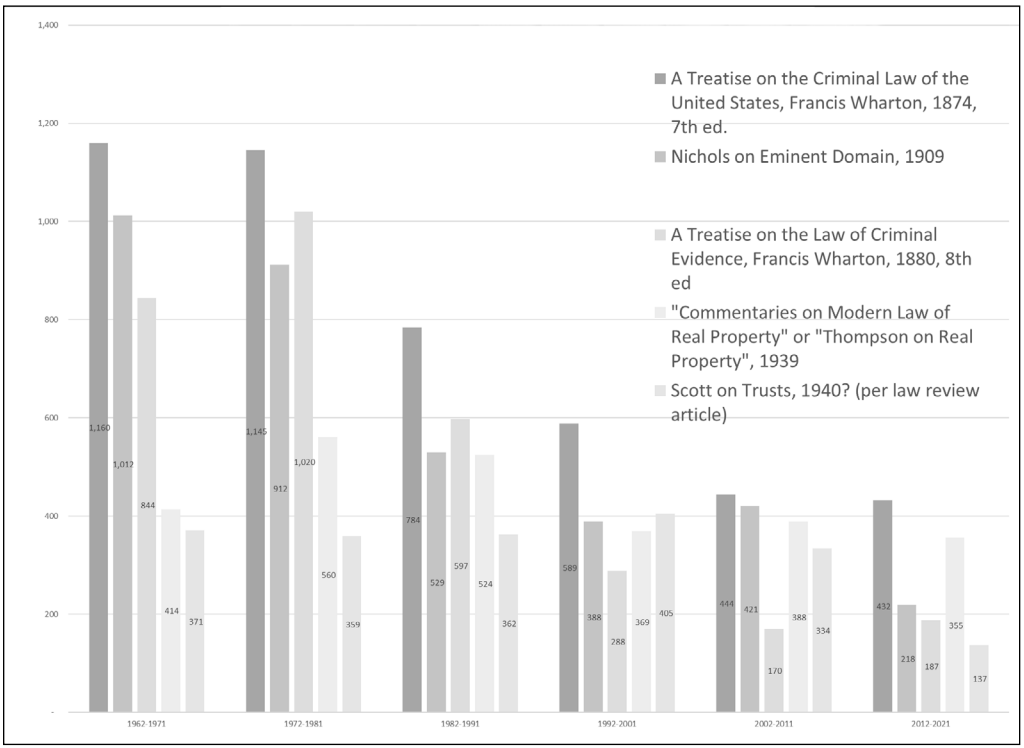
34. The data for this chart are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/JDT8-V6SS] (scroll to bottom), at tabs 5 and 8.

Uniform Commercial Code still have significant usage. Furthermore, Areeda had a slight uptick in the last decade.

¶22 Also studied was the countertrend of the treatises that went into decline. Some of these are mainstays like *Wharton's Criminal Law*, *Wharton's Criminal Evidence*, and *Nichols on Eminent Domain*, which have persisted since the nineteenth and early twentieth centuries but now show diminished usage over the last six decades. The question is why the countertrend, especially as the general pattern shows increased raw citations? Table 6 illustrates some treatises in decline.

TABLE 6[35]

Treatises Declining in Citations in the Last Six Decades



Despite the declining data, perhaps treatises have lifespans, a rise and fall of usage, although some treatises have lifespans that are extremely long, like *Williston on Contracts*.[36] Each declining treatise raises interesting questions that can be studied only treatise by treatise.

35. The data for this chart are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/89YD-6PEW] (scroll to bottom) at tabs 3 and 3b.

36. *See, e.g.*, Samuel Williston & Clarence M. Lewis, The Law of Contracts (Baker, Vorhis & New York 1921-24).

¶23 The rate of change between decades was measured with no discernible pattern to any consistent rate of decline.[37] This emphasizes the unique character of each treatise and its topic. There may be many reasons for decline in treatise citations. However, the data show a consistent pattern of decline since 1962,[38] which may have been influenced by the advent of online case law searching and perhaps the rise of legal realism, a theory that questions principles perhaps necessary for legal treatises.[39] We tend to find more credence with the former explanation but would need to study a prior decade in the twentieth century and include more of our selected 77 treatises before supporting either explanation.

About Methodology for Measuring a Percentage of Cases

¶24 Treatises were identified by searching on Lexis+ Practice Areas. Searches were limited by either core terms or headnotes with terms corresponding to the Practice Area. Subsequently, searches were also run to determine just how many cases there might be in a Practice Area database. The latter became the main denominator and the former the numerator in determining the percentage of cases. Here are two sample searches:

> (core-terms(evidence) or headnotes(evidence)) & (Evidence /5 McCormick)
>
> (core-terms(evidence) or headnotes(evidence))[40]

The first identifies the usage of the treatise in the case law of the Lexis+ Practice Area. The second identifies the scope of the case law database within the Lexis+ Practice Area.[41] However, some instances demanded much more complex searches.

¶25 For instance, to measure the criminal area of practice for *Wharton's Criminal Law*, we had to list a series of terms (which we borrowed from a hornbook or designated ourselves) to measure the breadth of the Criminal Law database.

> (core-terms(criminal or crime or solicitation or conspiracy or murder or homicide or "resisting arrest" or manslaughter or "assisting suicide" or "aiding suicide" or assault or stalking or mayhem or rape or kidnapping or prostitution or theft or trespass or embezzlement or fraud or burglary or robbery or "receiving stolen property" or extortion or blackmail or arson or possession or trafficking or dealing) or headnotes(criminal or crime or solicitation or conspiracy or murder or homicide or "resisting arrest" or manslaughter or "assisting suicide" or "aiding suicide" or assault or stalking or mayhem or rape or kidnapping or prostitution or theft or trespass or embezzlement or fraud or burglary or robbery or "receiving stolen property" or extortion or blackmail or arson

37. The data on rate of change are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/H5B5-JNJ4] (scroll to bottom), at tab 6.

38. *See supra* Table, 4-6.

39. *See supra* notes 13–18 and accompanying text.

40. The data for search terms are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/2HLV-K8A8] (scroll to bottom), at tab 11, cell 3, AD.

41. We did not have any way to definitively determine the number of cases in a Lexis+ Practice Area Case Law database.

or possession or trafficking or dealing)) & ((“Criminal Law” OR “Crim. Law” OR “Crim. L.”) /5 Wharton)[42]

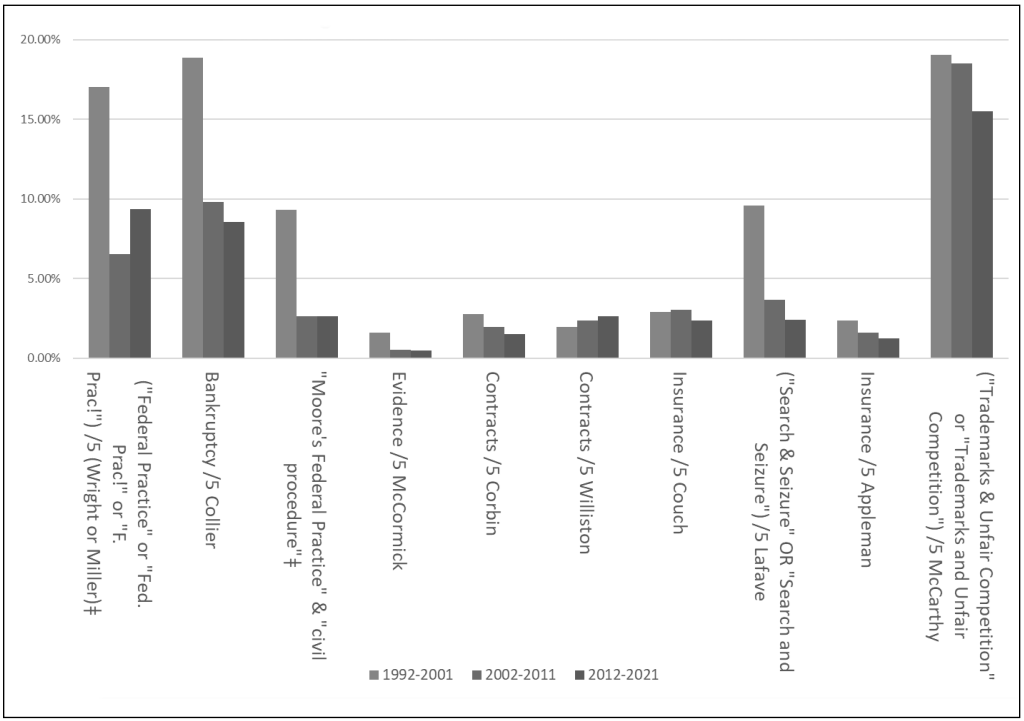
Similar steps were taken for tort law. For studying treaties and briefs, the *atleastN( )* command was used.

Treatise Citations in All Briefs in All State and Federal Cases Since 1962 Over Six Decades

¶26 At first, consider our top 10 treatises for citations between 1962 through 2021 in briefs (see Table 7).

TABLE 7[43]

Top 10 Treatises Based on % Citations 1992-2021
Percentages of Briefs on Topic & Citing the Treatise Per Decade



To ensure the briefs (and later journals) were on the same subject, we used the *atleastN( )* command, such as *atleast5(bankruptcy)*, meaning each brief had to reference

42. The data for search terms are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/3TGU-4PZL] (scroll to bottom), at tab 11, cell 13, AD.

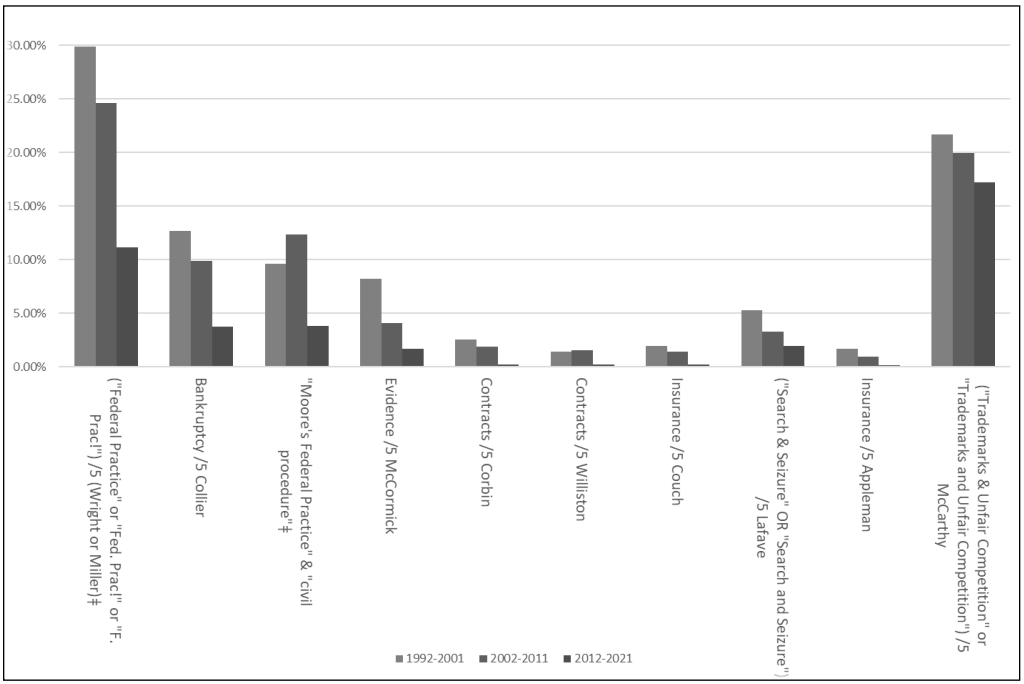
43. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/HTU6-R74N] (scroll to bottom), at tabs 5 and 9.

"bankruptcy" at least five times. Because the number of briefs in Lexis databases shrinks with each descending decade, we limited our search to the last three decades. There is a marked decrease in the use of treatises in briefs. *Collier on Bankruptcy*, and *McCarthy on Trademarks & Unfair Competition*; however, all maintained citations above the 5 percent benchmark. These treatises are quite technical and often code-based fields.

¶28 The same is true of journals, which were limited for the study to 1992–2021.[44] Table 8 shows a clear downward trend for the last three decades. Only two treatises were above the 5 percent citation level, and several treatises dropped below the level during that time. That said, journals still cite Wright and Miller, Collier, and McCarthy at least 10 percent as of 2012–2021.

TABLE 8[45]

Top 10 Treatises Base on Citations in Caselaw & Their Percentage Citation in Journal Articles on Subject for Each Decade from 1972-2021



¶29 It is noteworthy that the treatises that lead among citations in all state and federal court decisions are the same ones that lead in briefs, law reviews, and journals. This suggests wide agreement on what constitutes the cognitive authority of the legal profession.

44. The data for search terms are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/6NMY-U2F2] (scroll to bottom), at tab 11, column AD.

45. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/3JJT-DL8U] (scroll to bottom), at tabs 5 and 10.

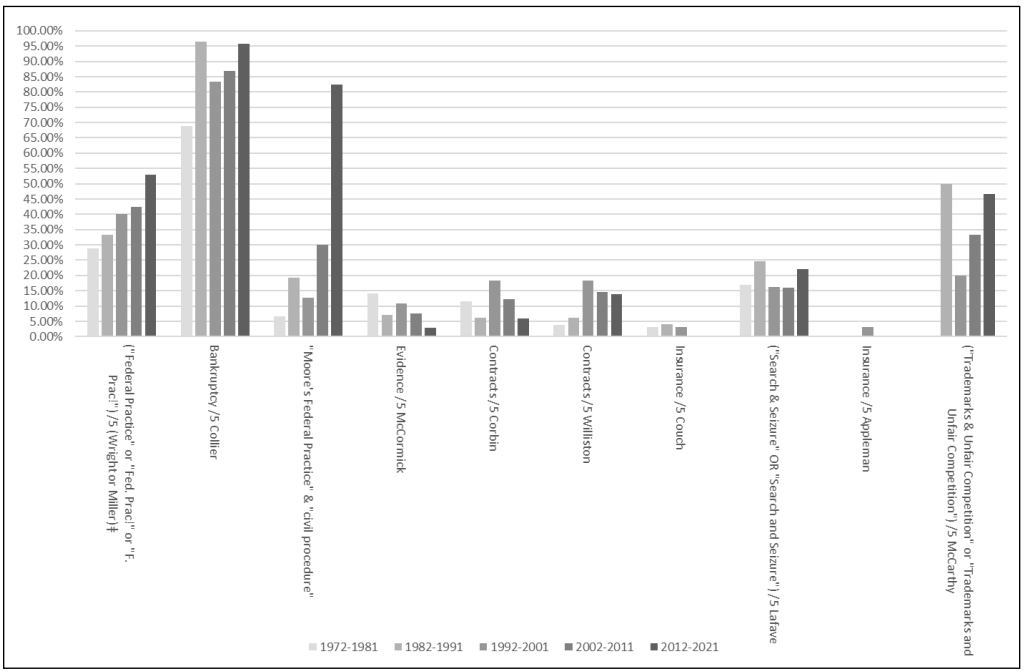
Select Treatises as a Percentage of U.S. Supreme Court Cases and Briefs in Certain Practice Areas

Treatise Citation as a Percentage of Supreme Court Citations on the Same Subject

¶30 The use of treatises by the U.S. Supreme Court continues the trend discussed above, but with some noticeable differences (see Table 9).

TABLE 9[46]

Treatises (Top 10) Cited by Decade as a Percentage of All U.S. Supreme Court Cases in the Practice Area



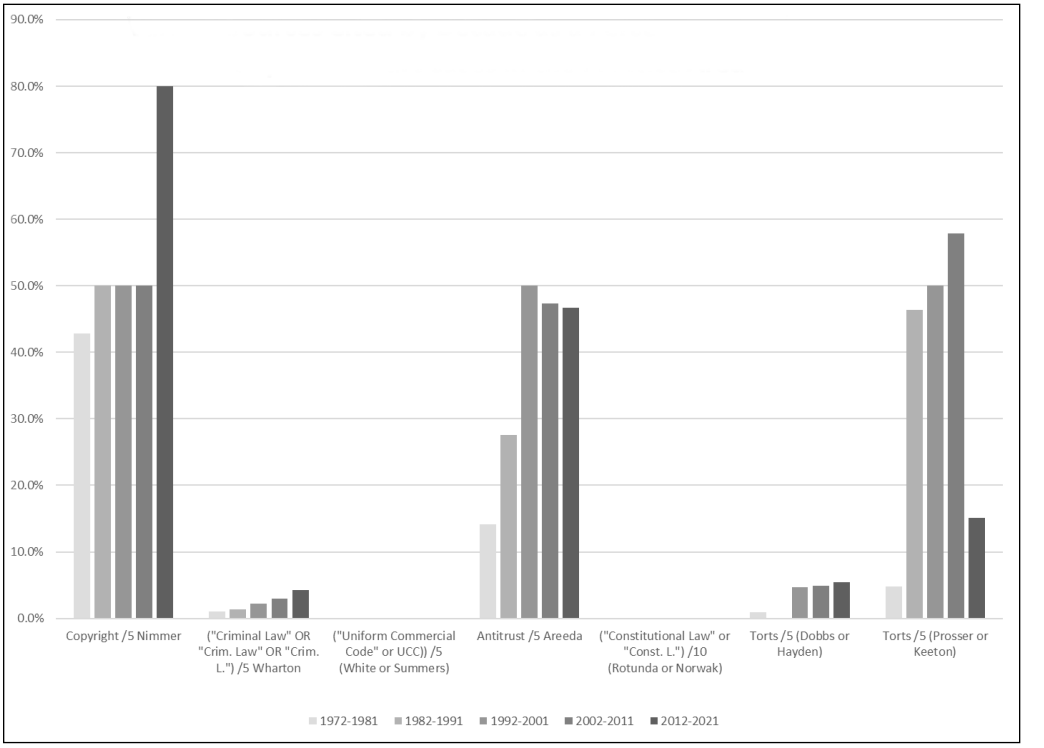
The picture has changed radically when focusing only on U.S. Supreme Court treatise citations. Five of the top 10 treatises actually have upward trend lines over the last few decades, and the Court cited three of the treatises above (or well above) 50 percent of its cases on the subject, and a fourth treatise in about 45 percent of its cases.

¶31 Table 10 shows a few other select sources.

46. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/355E-WMPU] (scroll to bottom), at tabs 11 and 15.

TABLE 10[47]

Various Sources Cited by Decade as a Percentage of All U.S. Supreme Court Cases in the Practice Area



Tables 9 and 10 illustrate that three of the treatises were relied on more than 80 percent of the time in the last decade: *Collier on Bankruptcy* (95.7%), *Moore's Federal Practice and Civil Procedure* (82.4%), and *Nimmer on Copyright* (80%). In Table 9, 7 of the top 10 most-cited treatises (in all federal and state courts) are cited at least 5 percent of the time in the last decade by the U.S. Supreme Court. Five of the 10 had an uptick in total citations comparing the last decade with the prior decade. The U.S. Supreme Court relies on treatises (at least the top 10) to a greater extent than other courts (or at least as indicated in a study of all state and federal courts).

¶32 Why? Perhaps because the cases it receives are cases of law or because they are cases of first impression. It raises the question whether other state and federal appellate courts also rely on treatises to a greater extent than trial courts. Unfortunately, this study could not extend so far. There is more work to be done. Furthermore, law faculty, students, judges, and attorneys need to know of the high use of many treatises in the Supreme Court.

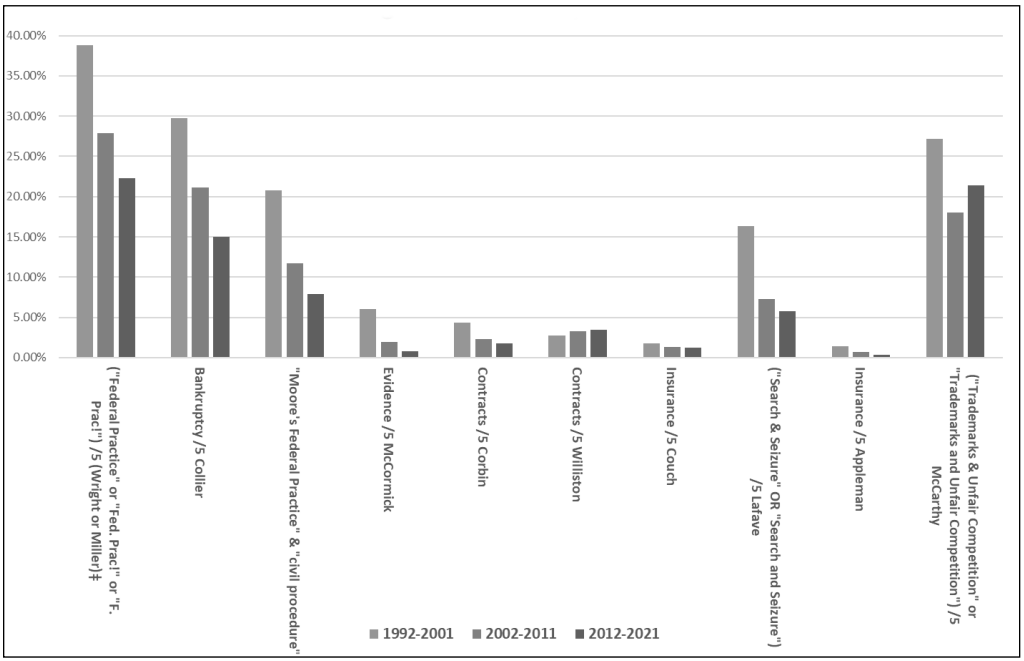
47. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/FVW7-93WL] (scroll to bottom), at tabs 11 and 16.

Percentage of Treatise Citations in Supreme Court Briefs on the Same Subject

¶33 With respect to briefs written for the U.S. Supreme Court, the pattern indicated in Table 11 is more typical of the tables in the prior section of this article.

TABLE 11[48]

Treatises (Top 10) Cited by Decade as a Percentage of All U.S. Supreme Court Briefs



Again, during the last decade, five treatises are cited at least 5 percent of the time: *Collier on Bankruptcy* (14.97%), *Moore's Federal Practice and Civil Procedure* (7.86%), LaFave's *Search and Seizure* (5.72%), *McCarthy on Trademarks and Unfair Competition* (21.38%), and *Nimmer on Copyright* (27.13%). Only two treatises showed an uptick in usage in the latest decade from the prior decade.

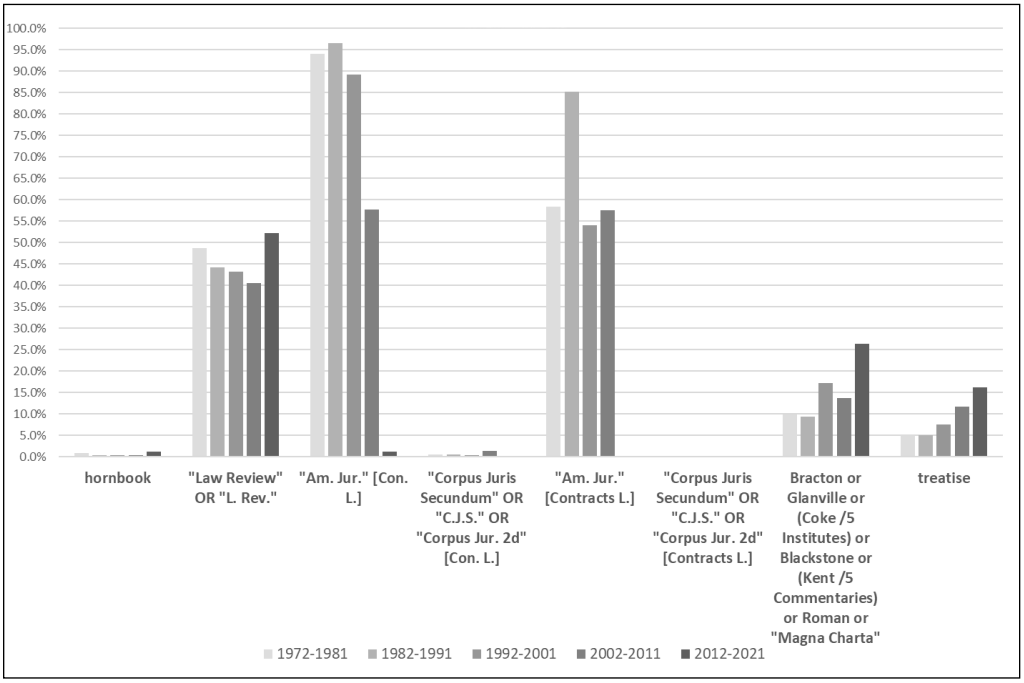
Comparison to Other Secondary Sources in Supreme Court Citations

¶34 We could not discover a conclusive way to study the use of treatises compared to other secondary sources, but we did find that even by searching for the word "treatise" compared to other secondary sources in the U.S. Supreme Court—in some instances limiting the practice area to constitutional law or contracts law—there was some interesting data for review.

48. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/EF9J-VC39] (scroll to bottom), at tabs 11 and 17.

TABLE 12[49]

Use of Various Secondary Sources in U.S. Supreme Court



¶35 In Table 12, the usage of "treatise" is measured in cases from the U.S. Supreme Court. We also searched for hornbooks, law reviews, *American Jurisprudence* (constitutional and contract law cases only), *Corpus Juris Secundum* (constitutional and contract law cases only), and a series of early sources of the law. Perhaps the most interesting takeaway is how frequently the Supreme Court resorted to *American Jurisprudence* (presumably the second) and the role of early sources of law. No real conclusion can be drawn about the use of treatises (in comparison to other resources) because "treatise" is just a categorical name for a great many works that would have been more likely cited by their proper names, omitting the word "treatise" entirely.

Granular Data from a Few Select, Landmark U.S. Supreme Court Cases

History of U.S. Supreme Court Citation to Earliest Treatises or "Institutes" in Case Law Since Its Inception

¶36 Furthering our inquiry, we gathered data that not only show specific U.S. Supreme Court cases but also chart the usage history of certain early treatises and other

49. The data for this table are available in Persistent Treatise Data & Charts Updated072423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/TKA7-XSFL] (scroll to bottom), at tabs 11 and 18.

sources, such as "Institutes,"[50] throughout the history of the Court. One hypothesis for the upsurge in use of these early treatises and sources, starting with the 1980s, is the originalist orientation of recent Supreme Court Justices. The implication is that early law is conservative and reflective of the meaning of the Constitution and origins of U.S. law. Consequently, more conservative, textualist, and originalist Justices are inclined to use the early treatises to find and interpret the law, although as discussed below, liberal judges may use it as well.

A Few Landmark Cases

¶37 In addition to this type of search, for U.S. Supreme Court cases, we also engaged in a more granular data gathering of treatise citations. For instance, as the graphs in Tables 13 and 14 show, we looked at secondary source citations in specific instances. The article arranges six decisions in three groups along the lines of what Supreme Court Chief Justice Roberts recently called "landmark cases overruling prior precedents, [whether because] the passage of time and new developments justified those decisions [or because they] were egregiously wrong on the day they were handed down."[51] Those three groups contain both a landmark case and its subsequent Supreme Court decision overturning precedent: *Plessy* and *Brown v. Board*, *Lawrence* and *Obergefell*, and *Roe v. Wade* and *Dobbs*. We looked at two types of secondary sources cited by each of these six landmark cases. Table 13 shows data for earlier treatises, and Table 14 lists data for treatises, hornbooks, and law reviews.

¶38 In most instances, the case overturning precedent cited more secondary sources in their reasoning (*Plessy* and *Brown* were exceptions). More intriguingly, *Dobbs*, which believed *Roe* "egregiously wrong,"[52] relied most on treatises and other secondary sources. At this point, to understand the role of treatise citations, we engaged in a brief qualitative analysis of the role of those treatise citations.

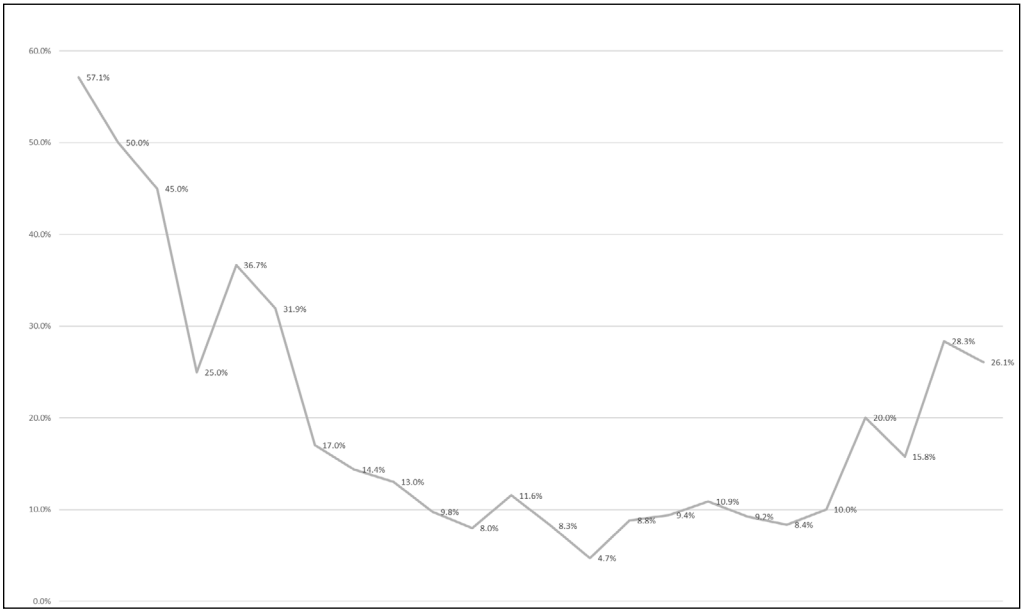
50. *See* the definition and treatment of "institutes" and "institutionalist" in John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 Colum. L. Rev. 547, 585–88 (1993). Generally, institutionalists write on a nationalist scope, defining national legal systems, but there are other distinguishing factors that Langbein outlines.

51. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).

52. *Id.*

TABLE 13[53]

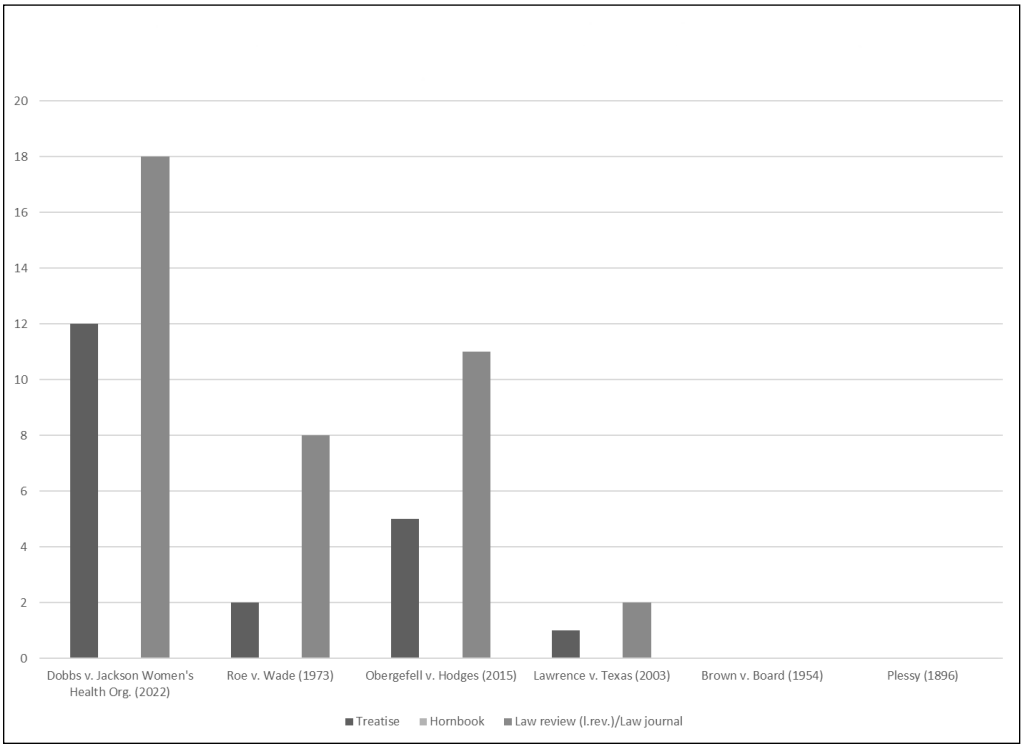
Citation of Early Treatises in Six Key Supreme Court Cases—
Precedent Establishing Cases & the Bases that Overturned Them



53. The data for this table are available in Persistent Treatise Data & Charts Updated 72423.xlsx, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/ZV7W-U7SD] (scroll down to the bottom of the abstract page), at tabs 13 and 14. For a breakdown of the sources searched, *see* tab 12 (Blackstone lead with 487 citations, followed by "Story /5 Commentaries" with 188, and "Kent /5 Commentaries" with 93).

TABLE 14[54]

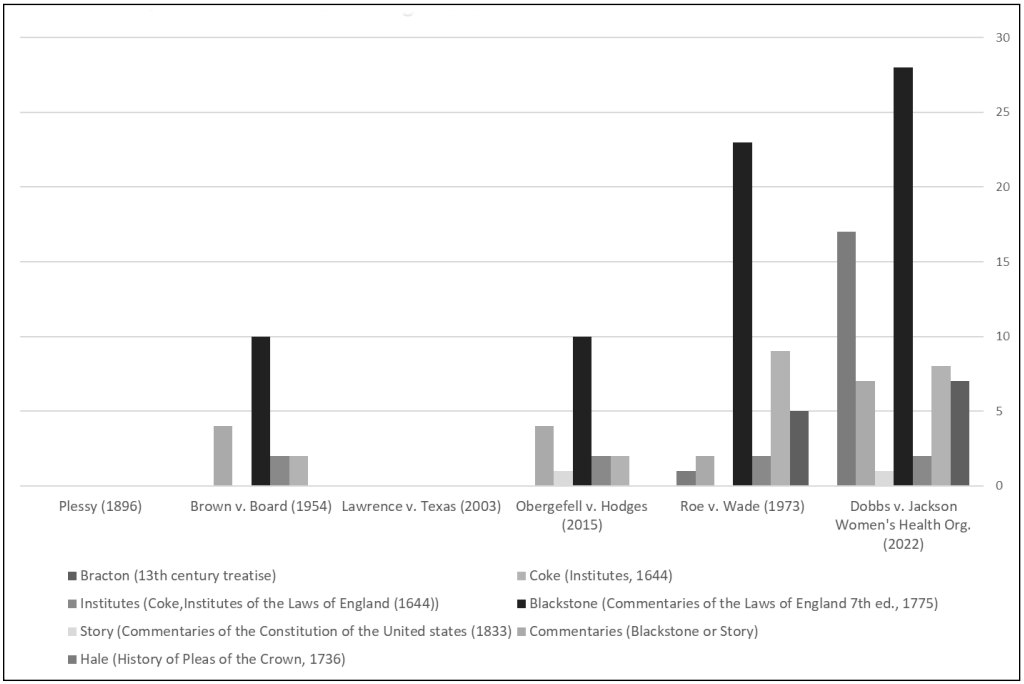
Treatises, Hornbooks, and Law Review/Journal/Article in Six Key Supreme Court Cases



54. The data for this table are available in Persistent Treatise S.Ct. Case Comparison Data from Neacsu.xlsx, tab 4, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/T6ZV-9TMM] (the link to the file is at bottom of the page).

TABLE 15[55]

Citation of Early Treatises in Six Key Supreme Court Cases—Precedent Establishing Cases & the Cases that Overturned Them



Qualitative Interpretation of Data

¶39 We looked at the citation of treatises in six important cases, which were either overruled by precedent (e.g., *Plessy*, *Lawrence*, and *Roe*) or overruled precedent (e.g., *Brown*, *Obergefell*, and *Dobbs*). We noted that the Robert's court in *Dobbs* and *Roe* made use of early treatises, the most from the six Supreme Court cases (see table 15). However, we found that *Roe* and *Dobbs* made use of early treatises in slightly different ways. Both used them for persuading a particular reasoning. Both used them as evidencing trends in common law. But while *Roe* used treatises to evidence views and interpretation of the law, *Dobbs* used them as evidence of the law itself. For instance, Justice Alito relied on "the great common-law authorities—Bracton, Coke, Hale, and Blackstone"[56] to evidence the common law tradition criminalizing "post-quickening abortion."[57] They "all write that post-quickening abortion was a crime."[58] Ergo, it is a crime.

55. The data for this table are available in Persistent Treatise S.Ct. Case Comparison Data from Neacsu.xlsx, tab 3, https://irlaw.umkc.edu/faculty_works/742/ [https://perma.cc/83RR-ZJAL] (the link to the file is at bottom of the page).

56. Dobbs, 142 S. Ct. at 2236.

57. *Id.*

58. *Id.*

¶40 But perhaps the following *Dobbs* quote is the most telling for the treatise's role in current U.S. Supreme Court jurisprudence:

> We begin with the common law, under which abortion was a crime at least after "quickening"—i.e., the first felt movement of the fetus in the womb, which usually occurs between the 16th and 18th week of pregnancy.
>
> The "eminent common-law authorities (Blackstone, Coke, Hale, and the like)," Kahler v. Kansas, 589 U.S. ––––, ––, 140 S. Ct. 1021, 1027 (2020), *all* describe abortion after quickening as criminal. Henry de Bracton's 13th-century treatise explained that if a person has "struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide." 2 De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879); see also 1 Fleta, c. 23, reprinted in 72 Selden Soc. 60–61 (H. Richardson & G. Sayles eds. 1955) (13th-century treatise).
>
> Sir Edward Coke's seventeenth century treatise likewise asserted that abortion of a quick child was "murder" if the "childe be born alive" and a "great misprision" if the "childe dieth in her body." 3 Institutes of the Laws of England 50–51 (1644). ("Misprision" referred to "some heynous offence under the degree of felony." *Id.*, at 139, 127 S. Ct. 1610.) Two treatises by Sir Matthew Hale likewise described abortion of a quick child who died in the womb as a "great crime" and a "great misprision." Pleas of the Crown 53 (P. Glazebrook ed. 1972); 1 History of the Pleas of the Crown 433 (1736) (Hale)). Writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a "quick" child was "by the ancient law homicide or manslaughter" (citing Bracton), and at least a very "heinous misdemeanor" (citing Coke). (1 Commentaries on the Laws of England 129–130 (7th ed. 1775) (Blackstone)).[59]

¶41 Thus, the *Dobbs* Court found abortion of a "quick fetus" to have been a crime, in contradiction of *Roe*. In *Dobbs*, in each instance, the persuasive authority of these early treatises is evident due to the qualifying adjectives such as "eminent" and the verbs "describe" and "writing" and "explained." This use is within Hicks' view of the role of treatises as summarizing the law or may be described as "evidencing" it. However, more intriguing is the *Dobbs*'s sentence following the rather impressive quote mentioned above: "English cases dating all the way back to the thirteenth century corroborate the treatises' statements that abortion was a crime."[60] Is Justice Alito saying that the early treatises are authoritative beyond the persuasive role the legal profession expects? Is the sentence mentioning primary, official sources and cases a minor aberration? Or is it telling of a new change in the U.S. Supreme Court jurisprudence where treatises are used to evidence tradition and, as such, minimize the disruptive effect of not following *stare decisis*, thus breaking with a cherished tradition of our common law system? The Court in *Dobbs* does limit *stare decisis* in constitutional contexts. "We have long recognized, however, that *stare decisis* is 'not an inexorable command,' . . . and it 'is at its weakest when we interpret the Constitution.'"[61] Having given less deference to *stare decisis*, it would also appear, especially from Table 15, that the Supreme Court is reemphasizing the early treatises, institutes, and sources of law to great effect, and in a way

59. *Id.* at 2249.
60. *Id.* (emphasis added).
61. *Id.* at 2262 (citations omitted).

that supports originalism by returning to the texts of the Founders and the early Justices of the Court. Of course, more research needs to be done to analyze the use of particular sources in the Roberts's Court, not only in this particular case.

¶42 Unlike the use by the Robert's court of treatises in *Dobbs*, in *Roe*,[62] treatises were used to evidence views and interpretations of the law rather than the law itself. The qualifiers in Justice Blackmun's opinion were more nuanced. The reasoning relied on the "predominant view, following the great common-law scholars." Coke's words were further qualified as taking a position, which then Blackstone then followed. Those treatise writers did not define what the law was, but, in Blackmun's opinion, they too opined about the law, interpreting it, and leaving room for others to interpret it.

> Whether abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the thirteenth century, thought it homicide. But the later and predominant view, following the great common-law scholars, has been that it was, at most, a lesser offense. In a frequently cited passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision, and no murder." Blackstone followed, saying that while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view. A recent review of the common-law precedents argues, however, that those precedents contradict Coke and that even post-quickening abortion was never established as a common-law crime. This is of some importance because while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, others followed Coke in stating that abortion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor." That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common-law prosecutions for post-quickening abortion), *makes it now appear doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus.*[63]

¶43 Thus, Blackmun found that even destruction of a quick fetus in *Roe* was not a crime. It is his interpretation of the common law sources such as Coke that *Dobbs* overturned. This brief analysis of the use of early treatises in both *Roe* and *Dobbs* is meant to illustrate what we view as another facet of the persistence of treatises as cognitive legal authority. Of course, more research needs to be done.

Conclusion: The Persistence of the Treatise

¶44 As shown here, the persistence of the treatise is a complex research question. Raw numbers of citations in state and federal courts show a general trend upward in the decades since 1962. Some treatises have respectable levels of citations (at least 5 percent in our limited study). Select treatises cited as a percentage of cases in the U.S. Supreme Court show an increased number of citations in many instances. This continued robust presence raises questions for further research in state and federal appellate jurisdictions.

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62. Roe v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), and holding modified by Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

63. Roe, 410 U.S. at 134–36 (emphasis added).

Most significant, there is a pronounced upward trend for the U.S. Supreme Court to cite early treatises, Institutes, and other sources of law that were available to the Founders and early Court Justices.

¶45 On the other hand, treatise citations in law reviews and briefs (whether all states and federal courts or the U.S. Supreme Court) are noticeably down. Furthermore, more study needs to be made of treatises not selected as this article's "top 10," and especially treatises, other than those published by Lexis and Westlaw and its affiliates, need to be studied as well.

¶46 Finally, the study of the Roberts Court's new trend of increased used of early treatises, Institutes, and sources of the law, remains a goldmine for scholars of our Rule of Law. It may be that this trend comports with increased originalism among Justices on the Court, but other scholars may pursue other theories or rationales.