



2004

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Gregory S. Crespi

Southern Methodist University, Dedman School of Law, gcrespi@smu.edu

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Recommended Citation

Gregory S. Crespi, *The Influence of Two Decades of Contract Law Scholarship on Judicial Rulings: An Empirical Analysis*, 57 SMU L. Rev. 105 (2004)

<https://scholar.smu.edu/smulr/vol57/iss1/5>

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THE INFLUENCE OF TWO DECADES OF CONTRACT LAW SCHOLARSHIP ON JUDICIAL RULINGS: AN EMPIRICAL ANALYSIS

Gregory Scott Crespi*

I. INTRODUCTION

OVER the last two decades, a substantial and diverse body of contract law scholarship has been produced. Some of this work limits itself to applying traditional doctrinal categories and analytical approaches to new problems, while some also engages in economic analysis of various legal regimes, and some is empirical as well as analytical in nature. Much of this work is of a rather theoretical and abstract character. Consequently, one wonders whether this literature has had any discernable impact upon judicial practice, particularly in light of the declarations made by both prominent jurists and leading practitioners that most current legal scholarship has very limited relevance for attorneys and judges,¹ and given recent studies that suggest declining rates of citation of law review articles in judicial opinions.²

Several years ago I published a short empirical article in the *SMU Law Review* analyzing the influence of recent statutory interpretation scholarship on judicial rulings.³ My research led me to several interesting conclusions. First, I found that this body of work has been cited much more extensively by courts than one might expect given the widespread criticism of modern legal scholarship noted above. For example, of the subset

* Professor of Law, Dedman School of Law, Southern Methodist University. J.D., Yale Law School, 1985; Ph.D., University of Iowa, 1978.

1. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 42 (1992); Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313, 320 (1989); Patricia M. Wald, *Teaching the Trade: An Appellate Judge's View of Practice Oriented Legal Education*, 36 J. LEGAL EDUC. 35, 42 (1986); Ellen A. Peters, *Reality and the Language of the Law*, 90 YALE L.J. 1193, 1193 (1981); see also *United States v. \$639,558 in U.S. Currency*, 955 F.2d 712, 722 (D.C. Cir. 1992) (Silberman, J., concurring).

2. See, e.g., Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 684 (1998) ("The number of judicial citations of law reviews in each of the courts surveyed [including federal courts and state supreme courts] declined dramatically from 1975 to 1996."); Louis J. Sirico & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134 (1986).

3. Gregory Scott Crespi, *The Influence of a Decade of Statutory Interpretation Scholarship on Judicial Rulings: An Empirical Analysis*, 53 SMU L. REV. 9 (2000).

of the statutory interpretation articles that I considered in my study that were published five years or more before that study took place, almost half have been cited by at least one judicial opinion.⁴ Second, at least seven of these articles have been fairly extensively cited by courts, receiving between ten and twenty-three citations apiece.⁵ Finally, a closer examination of the nature of judicial use of these seven most heavily cited articles provides support for the legal realist claim that scholarly articles are generally utilized in a superficial manner primarily to add academic authority to decisions ultimately based upon other grounds, rather than playing a significant role in the actual decision-making process.⁶

That earlier study raised but did not address the question of whether the extent and nature of judicial use of statutory interpretation scholarship was broadly reflective of judicial use of legal scholarship in general, or whether instead those findings are unrepresentative.⁷ We now live in an "age of statutes,"⁸ and statutory interpretation is consequently central to much of the work of judges. One might therefore expect the courts to be more broadly cognizant of and influenced by statutory interpretation articles than they would be by work focusing on a particular specialized area of substantive legal doctrine, such as contract law, that may not be of such obvious usefulness in most cases.⁹ This article is intended to explore this question; to determine whether the generalizations that I presented in the earlier study as to the extent and nature of judicial citation of legal scholarship may apply more broadly than the statutory interpretation context from which they were derived.¹⁰

4. *Id.* at 11.

5. *Id.*

6. *Id.*

7. *Id.* at 20-21.

8. *E.g.*, GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1-7 (1982).

9. Crespi, *supra* note 3, at 20-21.

10. As I noted in a prior article, there are of course a number of reasons why a citation-counting study that examines only a few opinions in any depth can provide only a very crude and preliminary assessment of the influence of a body of literature upon the judiciary.

First of all, while scholars have various professional incentives and obligations to cite extensively to the relevant scholarly literature in their articles, judges do not operate under quite the same incentives and constraints. Judicial opinions are, to a significant extent advocacy pieces prepared to serve as a defense of a decision reached, rather than comprehensive and balanced scholarly essays.

A judge may, for example, choose not to cite, in an opinion, an article that influenced his analysis because his ruling is less ambiguously supported by case law or statutory authority. He may also choose not to cite an article that he has read and seriously considered, but that takes a position opposed to that of his ruling; a luxury that is obviously not available to the conscientious scholar. Finally, a judge might not be familiar with a particular article that nevertheless might have a significant impact on the overall "climate of opinion" in legal circles, as legal scholars publicize and explicate its arguments to a broader public, and this climate of opinion may have an important and unacknowledged indirect influence upon that judge in a particular case. For these and other reasons, the extent to which articles are cited by judges may understate their actual influence upon judicial practice. . . .

On the other hand, it is possible that in some instances an article that is cited by a court in support of a decision actually had no influence at all in the

II. THE CITATION SURVEY

A. FREQUENCY OF JUDICIAL CITATION OF CONTRACT LAW ARTICLES

I combined three different lists of contract law articles that have been recently prepared by other scholars to obtain the overall set of 147 articles that I considered in this study. First, I used a set of 71 economics-oriented contract law articles that Professor Eric Posner has compiled, in connection with his recent *Yale Law Journal* article assessing the influence of economic analysis of contract law over the last three decades,¹¹ to serve his need for a reasonably comprehensive list of all such articles that have appeared in one or another of a group of 15 leading law journals—12 student-edited and three faculty-edited—between 1980 and 2001.¹² Those 71 articles and their individual court and law review citation histories are presented in Appendix A at the end of this article. Second, I used a set of 52 different, non-economics-oriented contract law articles published between 1980 and 2001 that Posner has also compiled as a comprehensive set in connection with his *Yale Law Journal* article.¹³ Those 52 articles and their individual court and law review citation histories are presented in Appendix B at the end of this article. Finally, I used a set of 27 empirically-oriented contract law articles that Professor Russell Korobkin has compiled as a reasonably comprehensive list of such empirical articles that have appeared in U.S. law journals during the 1985-2000 period. He assembled that list in connection with his recent *Illinois Law Review* symposium article assessing the scope and merits of empirical scholarship in contract law.¹⁴ Those 27 articles and their individual court

making of that decision, but was simply marshaled after-the-fact in an advocate's fashion to lend support to a decision already reached on another basis. To the extent that this is the case, the frequency of judicial citation of scholarly articles would overstate, perhaps dramatically so, their actual influence on the outcome of decisions. To one of a legal realist bent the ascription of a direct causal relationship between the cited legal authority and the outcome of a judicial decision is highly problematic.

Crespi, *supra* note 3, at 10 & n.9.

11. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 *YALE L.J.* 829 (2003).

12. This list is intended to be a relatively comprehensive list of the economics-oriented contract law articles that appeared between 1980 and 2001 in any of the following 15 leading academic journals: the *California Law Review*, the *University of Chicago Law Review*, the *Columbia Law Review*, the *Harvard Law Review*, the *Michigan Law Review*, the *Northwestern Law Review*, the *New York University Law Review*, the *Pennsylvania Law Review*, the *Stanford Law Review*, the *Texas Law Review*, the *UCLA Law Review*, the *Yale Law Journal*, the *Journal of Law and Economics*, the *Journal of Law, Economics and Organization*, and the *Journal of Legal Studies*. *Id.* at 869 n.96.

13. This second set of 52 articles is intended to be a relatively comprehensive list of the non-economics-oriented contract law articles that appeared between 1980 and 2001 in any of the journals listed *supra* note 12.

14. Russell Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 *U. ILL. L. REV.* 1033 (2002). Professor Korobkin utilized a very broad and inclusive definition of empiricism in assembling this list: "Empiricism . . . is defined here . . . to include any attempt to collect and analyze a set of data for more than anecdotal purposes, whether or not the analysis is quantitative and even if the data set is not a particularly systematic or a clearly representative subset . . ." *Id.* at 1035 (footnotes omitted). However, he defined "contract law" for his purposes rather narrowly to include only articles

and law review citation histories are presented in Appendix C at the end of this article. Three of the articles from the Korobkin list also appeared on one or another of the two Posner article lists, therefore a total of 147 different contract law articles were considered in this study.

The group of 132 statutory interpretation articles that I assembled and considered in my earlier *SMU Law Review* study was intended to be as fully comprehensive a list of U.S.-published scholarship done in this area over the relevant time period as possible.¹⁵ However, the group of 147 contract-law articles here considered does not include all contract law scholarship that has been published in the U.S. from 1980 through 2001, and perhaps does not even include most of that work. For example, the two Posner lists do not include any articles published other than in the very exclusive set of 15 leading journals that he considered, and the Korobkin list, while drawn from the entire universe of U.S. law journals, only includes the most empirically-oriented contract law articles, and only those published from 1985 through 2000. The overall group of 147 articles therefore does not include any contract law articles published between 1980 and 1984 or in 2001 in journals outside of the very restricted Posner journal set, nor any non-empirical contract law articles published outside of the Posner journal set between 1985 and 2000, and may also omit a few contract law articles that properly fall within either the Posner or Korobkin listing criteria, but which may have inadvertently escaped their notice.

While the set of 147 articles here considered therefore likely falls well short of being fully comprehensive of all contract law scholarship that has been published in the U.S. between 1980 and 2001, one would still expect that such a large set of articles selected in this fashion—those appearing in the very top tier of student- and faculty-edited journals, and those having unusually strong empirical content—would be cited by the courts with at least the same frequency that they would cite other contract law articles, if not at a significantly higher rate. In other words, I believe that the citation frequencies identified by this study can be regarded as a reasonable “upper bound” for the average citation frequencies for the unknown number of other contract law articles not here considered. Table I below presents the basic citation data that I obtained concerning the rates of judicial citation of the 147 articles:

that focused upon contract doctrine from a descriptive or normative perspective, and not articles that appeared in the psychology or economics literature that more generally discuss negotiating behavior, or the more specialized legal literature that examines the terms selected by contracting parties in particular industries or situations. *Id.* at 1035-36. He also considered only articles appearing in the 500 or more law journals published in the United States, and not articles published elsewhere. *Id.* at 1036. Given this very broad definition of empirical scholarship, it was striking how few qualifying articles Professor Korobkin was able to locate, even given the topical restrictions that he imposed.

15. Crespi, *supra* note 3, at 11-12.

TABLE I
 FREQUENCY OF CITATION OF THE 147 CONTRACT LAW
 ARTICLES IN FEDERAL OR STATE COURT
 JUDICIAL OPINIONS¹⁶

Number of Judicial Citations	Number of Articles (% of Articles)
0	102 (69.4%)
1	18 (12.2%)
2	8 (5.4%)
3	7 (4.8%)
4-5	2 (1.4%)
6-7	6 (4.1%)
8-15	0 (0.0%)
16-83	4 (2.7%)
0 citations	102 (69.4%)
1 or more citations	45 (30.6%)

Table I demonstrates two major points of interest. First, almost 70% of the articles here considered have never been cited by even a single court opinion! Second, only four of the 147 articles—less than 3% of the sample—have been “extensively cited” even in the very modest sense of being cited by eight or more courts. The 45 articles that were each cited at least one time received a total of only 234 judicial citations,¹⁷ for an average of only 5.2 cites per cited article, and an overall average of only 1.6 cites per article when the 102 uncited articles are also included in the calculation.

Even these low average citation figures are perhaps misleadingly high, however, because they are dominated by the four most heavily cited articles that together received 133 of the citations; an average of 33.3 citations per cited article. One of these articles alone received 83 citations, well over one-third of all citations received by all of these 147 articles combined!¹⁸ The remaining 41 cited articles therefore received only a total of 101 citations; only an average of 2.5 citations per cited article, and only a minuscule overall average of 0.7 cites per article when the 102 uncited articles are also included in the calculation. An average judicial citation frequency of only 0.7 cites/article for the 97%+ subset of 143 of the 147 contract law articles included in this study, which as previously noted are predominantly articles published in top-tier law journals, lends strong support to the claim that modern legal scholarship has very little relevance to the work of courts and practicing attorneys.¹⁹

16. These citation frequencies were obtained through a Lexis search of the “Federal and State Courts” database. The search is current through April 30, 2003.

17. See citation totals *infra* Apps. A, B, C.

18. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980). See *infra* App. A for the citation frequencies for this article.

19. See *supra* notes 1-2 and accompanying text.

As shown above by Table I, 30.6% of the articles here considered have been cited in at least one judicial opinion. Table II below breaks down this citation percentage by year of publication of the articles.

TABLE II
PERCENTAGE OF CONTRACT LAW ARTICLES JUDICIALLY
CITED AT LEAST ONE TIME, BY YEAR OF PUBLICATION²⁰

Year of Article Publication	Percentage of Articles Receiving at Least One Citation
1980	100% (2/2)
1981	40% (4/10)
1982	33% (1/3)
1983	43% (2/7)
1984	83% (5/6)
1985	67% (6/9)
1986	100% (3/3)
1987	40% (2/5)
1988	0% (0/8)
1989	50% (3/6)
1990	20% (2/10)
1991	50% (2/4)
1992	10% (1/10)
1993	40% (2/5)
1994	40% (2/5)
1995	17% (1/6)
1996	33% (3/9)
1997	0% (0/5)
1998	25% (2/8)
1999	0% (0/11)
2000	0% (0/13)
2001	50% (1/2)
1980-1998 average	36.4% (44/121)
1999-2001 average	3.9% (1/26)
1980-2001 average	30.4% (45/147)

Table II shows that the earlier 1980-1998 articles have been cited at a much higher frequency than have the later 1999-2001 articles. There are at least a couple of plausible explanations that can be offered for this fact. It could reflect a judicial perception that the earlier scholarship in this area is more seminal and deserving of recognition in the opinions than is the later work. Alternatively, it could be partially or even wholly due to the simple fact that judges have had more time to become aware of and

20. The citation frequencies were obtained through a Lexis search of the "Federal and State Courts" database. The search is current through April 30, 2003.

reflect upon the earlier work than they have had with regard to the later articles.

The citation frequency of 36.4% for the 1980-1998 period of contract law scholarship is somewhat lower than the 46.4% citation frequency that I found in my earlier article for the subset of my comprehensive list of statutory interpretation articles that had also been published at least five years prior to the publication date of that article. As previously noted, I had suggested in that earlier article that perhaps this 46.4% citation frequency was unrepresentative; that the courts because of their special interest in statutory interpretation issues may have cited those articles at a greater frequency than they have cited scholarship done in most other areas of law.²¹ The findings in this article suggest that this may be the case, though not strikingly so, and that the proportion of scholarship cited may vary significantly from one legal area to another. In addition, it must be remembered that this group of 147 contract law articles that I considered is predominantly a top-tier journal subset of all contract law scholarship published over the 1980-2001 period, and excludes many contract law articles, while the 132 statutory interpretation articles considered in the earlier article was a relatively complete listing of those articles published over the time period there considered. The overall proportion of *all* contract law scholarship published over this 1980-1998 period that has been cited by courts may consequently be significantly below the 36.4% citation rate found for this study, and perhaps much lower than the 46.4% citation rate of the subset of the comprehensive list of statutory interpretation articles published at least five years prior to that study.²²

It is worth considering whether the three different types of contract law articles considered in this article may have been cited by the courts with different frequencies. Table III below presents the citation frequency and overall average number of citations separately for the economics-oriented, non-economics-oriented, and empirical articles respectively.

21. Crespi, *supra* note 3, at 20-21.

22. I am currently engaged in an empirical study that will be published in the *Santa Clara Law Review* that seeks to determine how much effect the professional stature of the law journal in which an article is published has upon the frequency with which the article is later cited by courts or other scholars. My preliminary findings are that courts and scholars cite articles that were published in the top few law journals at much higher rates than they cite articles that were published in mid-level or lower-tier journals, and that the courts virtually ignore altogether scholarship that is published in lower-tier law journals. The normative implications of these findings are unclear, however, because it is uncertain to what extent that disproportionate citation frequency for articles published in top-tier journals reflects author prestige or article quality rather than the locus of publication. Gregory S. Crespi, *Judicial and Law Review Citation Frequencies for Articles Published in Different "Tiers" of Law Journals: An Empirical Analysis*, 44 SANTA CLARA L. REV. (forthcoming 2004).

TABLE III
CITATION FREQUENCIES AND OVERALL AVERAGE
NUMBER OF CITATIONS PER ARTICLE BY TYPE OF ARTICLE

	Economics- Oriented Articles ²³	Non-Economics Oriented Articles ²⁴	Empirically- Oriented Articles ²⁵
Citation Frequencies:	22.6%	46.2%	22.2%
Overall Average Number of Citations Per Article:	0.6	3.5	0.5

When the figures in Table III are compared to the overall 30.6% citation frequency and to the overall average of 1.6 cites per article, it is clear that the group of 52 generally more traditional non-economics-oriented articles are cited much more frequently than are either the 71 economics-oriented or the 27 empirically-oriented articles. This finding likely reflects the naturally closer "fit" between traditional doctrinal analysis and the matters at issue in litigated controversies than exists for economics-oriented or empirical analyses, as well as the relative lack of familiarity on the part of judges with economic analyses or empirical methodology as compared to their facility in applying conventional doctrinal tools.

B. NATURE OF THE CITATIONS OF THE FOUR ARTICLES MOST FREQUENTLY CITED BY JUDGES

Four of the articles that I included in this study have each received at least 16 judicial citations, and in one case as many as 83 judicial citations,²⁶ while as noted in Table I above none of the other 143 articles considered received more than seven judicial citations.

In this section I will very briefly summarize the general character of the judicial citations to each of the four above-noted articles. I will then turn to examination of the citation frequencies for the group of 147 articles here considered shown by scholars in other law review articles, and will then finish this article with a discussion of the conclusions that I have drawn from this study.

1. *The Burton Harvard Law Review Article*

The central premise of the very extensively cited Burton article is that, in determining whether a contractual promisor has discharged its duty of good faith, it is not sufficient to merely consider the effect of the conduct

23. These 71 articles are listed in Appendix A, *infra*.

24. These 52 articles are listed in Appendix B, *infra*.

25. These 27 articles are listed in Appendix C, *infra*.

26. Burton, *supra* note 18 (83 citations); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983) (18 citations); Jay M. Feinman, *Promissory Estoppel and the Judicial Method*, 97 HARV. L. REV. 678 (1984) (16 citations); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COL. L. REV. 217 (1987) (16 citations).

at issue upon the benefits to be received by the promisee, but that it is also necessary to consider its effect upon the costs borne by the promisor, in particular the opportunity cost of alternative opportunities forgone by entering into the contract.²⁷ Burton argues that one form of bad faith performance often overlooked by courts is the exercise of the discretion that is left to the promisor by the terms of the contract in a manner that enables the promisor to recapture alternative opportunities for gain forgone at the time of contract formation.²⁸

The large majority of the 83 opinions that cite the Burton article do so only in support of one or more universally-accepted propositions, such as the principle that there is imposed upon each party to a contract a duty of good faith, and the principle that this duty is understood to limit the discretion of each party to allow it to engage only in actions that are within the reasonable contemplation of the parties at the time of contracting. However, at least 11 of the opinions do cite Burton for his particular insight that acting to recapture opportunities foregone at the time of contracting should be regarded as a form of bad faith performance.²⁹

2. *The Rakoff Harvard Law Review Article*

The Rakoff article is a very comprehensive and ambitious effort to determine the proper application of contract law doctrines in the form contract/contract of adhesion context, and argues at length that the non-negotiated form terms contained in contracts of adhesion should be regarded as presumptively unenforceable.³⁰ Most of the 18 courts that have cited this article do so not with regard to his central claim, but either for its basic definition or general discussion of what constitutes a contract of adhesion,³¹ or for its summary of existing law governing the enforceability of such contracts.³² However, the U.S. Supreme Court has cited this article, along with the work of other commentators, as offering support for Rakoff's normative proposition that it is questionable to enforce contracts of adhesion under traditional contract law doctrines given the lack of knowing consent by the weaker party,³³ and two federal courts of ap-

27. Burton, *supra* note 18, at 372-73.

28. *Id.* at 387.

29. See *FDIC v. LeBlanc*, 85 F.3d 815, 822 (1st Cir. 1996); *Sheehan v. FDIC*, 36 F.3d 1089, 1994 WL 524090, at *2 (1st Cir. Sept. 26, 1994); *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 422 (8th Cir. 1986); *Newman v. Snap-On Tools Corp.*, 1988 U.S. Dist. LEXIS 18385, at *9 (E.D. Va. Feb. 3, 1988); *Three D Dep't, Inc. v. K Mart Corp.*, 670 F. Supp. 1404, 1409 n.4 (N.D. Ill. 1987); *Badie v. Bank of Am.*, 67 Cal. App. 779, 796 (Ca. App. 1998); *Warner v. Konover*, 553 A.2d 1138, 1141 (Conn. 1989); *Tavarozzi v. Emmanuel*, 2001 Conn. Super. LEXIS 402, at *14 (Conn. Super. Ct. Feb. 13, 2001); *Panone v. Grandmaison*, 1990 Conn. Super. LEXIS 1916 (Ct. App. Dec. 5, 1990); *Anthony's Pier Four, Inc. v. HBC Assoc.*, 583 N.E.2d 806, 821 (Mass. 1991); *United States Nat'l Bank of Or. v. Boge*, 814 P.2d 1082, 1092 (Or. 1991).

30. Rakoff, *supra* note 26, at 1176.

31. See, e.g., *Chase Commercial Corp. v. Owen*, 588 N.E.2d 705, 708 (Mass. App. Ct. 1992).

32. See, e.g., *Collins v. Farmers Ins. Co.*, 822 P.2d 1146, 1160 (Or. 1990).

33. *Carnival Cruise Lines, Inc. v. Shute*, 111 S. Ct. 1522, 1531 (1991).

peal have also cited the article in connection with assessing the merits of this proposition.³⁴

3. *The Feinman Harvard Law Review Article*

The Feinman article presents an historical overview of the evolution of the promissory estoppel doctrine, and presses the claim that this doctrine has failed to overcome the contradiction between individualistic and communitarian objectives in classical contract formation law.³⁵ However, none of the 16 courts that have cited this article have cited it either approvingly or critically with regard to the author's ambitious normative claim. The cases instead cite the article either for its succinct restatements of well-established legal principles of promissory estoppel—for example, that equitable estoppel differs somewhat from promissory estoppel,³⁶ or that promises may be implied from conduct,³⁷ or that if promises are too indefinite they will not be enforced under the promissory estoppel doctrine,³⁸ or that promissory estoppel can be invoked to defeat a statute of frauds defense³⁹—or for its uncontroversial discussions of the history of the promissory estoppel doctrine: either the more general discussions⁴⁰ or those focusing upon the contractor-subcontractor context.⁴¹

4. *The Farnsworth Columbia Law Review Article*

Most of the 16 opinions that cite this article cite it in support of general propositions of law relating to preliminary agreements that were well established prior to the publication of the article, such as the proposition that preliminary agreements to negotiate reached by parties may be enforceable even if the parties contemplate reaching a later and more complete agreement,⁴² or that reliance damages rather than expectation damages are usually though not always the most appropriate remedy for the breach of such a preliminary agreement to negotiate.⁴³ Other courts cite it generally for its broad discussions of the uses of preliminary agreements or of the business practices followed in reaching such agreements.⁴⁴ Only a couple of opinions cite this article with regard to its main

34. *Northwestern Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990); *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1121 (1st Cir. 1989).

35. Feinman, *supra* note 26, at 678-79.

36. *See, e.g., Simon v. Simon*, 625 N.E.2d 564, 569 (Mass. App. Ct. 1994).

37. *See Amacher v. Brown-Forman Corp.*, 826 S.W.2d 480, 482 (Tenn. Ct. App. 1991).

38. *See, e.g., Schade v. Diethrich*, 1987 Ariz. App. LEXIS 667, at *32-33 n.24 (Az. Ct. App. Jan. 15, 1987).

39. *Greaves v. Med. Imaging Sys., Inc.*, 879 P.2d 276, 282 n.29 (Wash. 1994).

40. *See, e.g., Kolkman v. Roth*, 656 N.W.2d 148, 152 (Iowa 2003).

41. *See, e.g., Lahr Constr. Corp. v. J. Kozol & Son, Inc.*, 640 N.Y.S.2d 957, 959 (App. Div. 1996).

42. *See, e.g., Dawson v. Gen. Motors Corp.*, 977 F.2d 369, 374 (7th Cir. 1992).

43. *See, e.g., ATACS Corp. v. Trans World Communications, Inc.*, 155 F.3d 659, 666 (3d Cir. 1998).

44. *See, e.g., Watkins & Son Pet Supplies v. IAMS Co.*, 254 F.3d 607, 615 (6th Cir. 2001).

theoretical contribution:⁴⁵ an analysis of whether and under what circumstances courts should go beyond enforcing preliminary agreements to negotiate to impose a general obligation of fair dealing in negotiations even absent such an agreement.⁴⁶

C. FREQUENCY OF CITATION OF THE CONTRACT LAW ARTICLES IN LAW REVIEWS

One of the criticisms made of modern legal scholarship is that it has become too self-referential and insular, and that legal scholars are now writing essentially only for one another and choose topics and styles of exposition that render their work largely useless to judges and practitioners.⁴⁷ Some light can be shed upon this claim by a comparison of the frequency with which the contract law scholarship here considered has been cited by courts with the frequency of its citation by other legal scholars in their journal articles. To do this comparison I calculated the frequency with which the 147 contract law articles here considered had been subsequently cited by other scholars in law review articles. Table IV below sets forth these citation frequencies:

TABLE IV
FREQUENCY OF CITATION OF THE 147 CONTRACT LAW
ARTICLES BY LAW REVIEW ARTICLES⁴⁸

Number of Law Review Citations	Number of Articles (% of Articles)
0	8 (5.4%)
1-5	18 (12.2%)
6-10	22 (15.1%)
11-20	27 (18.4%)
21-30	14 (9.5%)
31-50	17 (11.6%)
51-100	24 (16.3%)
101-150	8 (5.4%)
151-200	6 (4.1%)
201-438	3 (2.0%)
	147 (100%)

Table IV indicates that a full 94.6% of the articles considered in this study were subsequently cited by at least one other law review article, a

45. See *Copeland v. Baskin Robbins U.S.A.*, 96 Cal. App. 4th 1251, 1262 (Ca. App. 2002) (“[Farnsworth’s] criticisms were directed at the theory propounded by some European courts and legal scholars that, even absent a contractual agreement to negotiate, a general obligation of fair dealing arises out of the negotiations themselves.”); *Goodstein Constr. Corp. v. New York*, 548 N.Y.S.2d 393 (N.Y. Sup. Ct. 1989).

46. Farnsworth, *supra* note 26, at 219-20.

47. See sources cited *supra* note 1.

48. The citation frequencies were obtained through a Lexis search of the “Law Reviews, Combined” database. The search is current through April 30, 2003.

far greater proportion than have been cited by the courts, and that a substantial proportion of these articles have been cited fairly extensively in the scholarly journal literature. For example, 41 of the 147 articles—well over 25% of the set—have each received 51 or more law review citations. For all of the 147 articles here considered the total number of law review citations is 6354,⁴⁹ an overall average of 43.2 cites per article. This overall law review citation average figure is somewhat more representative of the set than is the overall average of 1.7 judicial cites per article presented earlier because it is less heavily dominated by a few very extensively cited “outlier” articles, although there is one article by Ian Ayres and Robert Gertner that alone has garnered 438 law review citations,⁵⁰ and three other articles have obtained 264, 206, and 192 citations, respectively.⁵¹

When one calculates the average number of law review citations per article without including the four most heavily cited “outlier” articles noted just above,⁵² so as to obtain an “outlier excluded” figure comparable to the judicial citation frequency that was calculated above without inclusion of the four most heavily judicially-cited articles, one obtains an average of 36.7 citations per article for the remaining 143 articles. The comparison of 36.7 law review citations per article with the similarly-calculated judicial citation rate of 0.7 citations per article is quite striking, although it is not entirely clear what conclusions should be drawn from this wide disparity. Even were legal scholars to make strenuous efforts to make their work more accessible and useful to judges and practicing attorneys, their primary audience would doubtless remain other scholars. In addition, the law review scholarship generally necessitates comprehensive and balanced exposition and extensive citation of the relevant prior scholarship, while judicial opinion writing is guided by much different principles.⁵³ One would therefore expect a typical law review article to be more heavily cited by scholars than by courts, perhaps much more so. But would one expect to find 36.7 law review cites per article compared to only 0.7 judicial cites—more than a fifty-fold difference? Such a huge disparity suggests that the criticisms advanced concerning the extreme insularity of modern legal scholarship may have some merit.

49. See citation frequencies *infra* Apps. A, B, C.

50. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989); see *infra* App. A.

51. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) (264 law review citations); Rakoff, *supra* note 26 (206 law review citations); Burton, *supra* note 18 (192 law review citations).

The fact that the articles considered in this study were disproportionately published in top-tier law journals may, however, have upwardly biased the citation frequency calculation, perhaps significantly so. See *supra* note 22.

52. The Burton and Rakoff articles here considered are each among the four most heavily cited articles both by courts and by the law reviews. The Feinman and Farnsworth articles here considered were not among the four articles most heavily cited by law reviews, and the Ayres and Gertner and Dalton articles were not among the four articles most heavily cited by the courts.

53. See *supra* note 10.

III. DISCUSSION

This study has revealed a number of points of interest. First, the findings lend support to the conjecture I proposed in my earlier *SMU Law Review* study of the citation rates of statutory interpretation scholarship that judicial citation frequencies would likely be lower for scholarship done in specific substantive areas of law than they were for statutory interpretation scholarship. The average citation frequency found here of 36.4% for the 1980-1998 subset of the contract law articles here considered is lower than the 46.4% frequency found for the comparable subset of statutory interpretation scholarship, though not strikingly so.⁵⁴ Second, judicial citation of contract law scholarship is apparently rather infrequent, with almost 70% of the predominately top-tier subset of contract law articles here considered never having been cited by a single court, and only 8.2% of the articles having received more than three judicial citations. If one excludes the small group of four fairly heavily cited articles from the calculation, then the overall average citation frequency for this large set of contract law articles published predominantly in very top-tier law reviews is only 0.7 cites per article.

Third, a single article by Steven Burton concerning the scope of the duty of good faith totally dominates the judicial citation statistics and has received 83 citations—over one-third of all judicial citations to the entire group of 147 articles. Fourth, the average article considered in this study was cited approximately 50 times more frequently by other scholars in law review articles than it was in judicial opinions, bolstering the claims made as to the extreme insularity of modern legal scholarship.

Finally, an examination of the nature of the citations made to the four articles considered in this study that were most heavily cited by the courts reinforces the conclusion I reached in my earlier study that the great majority of judicial citations of legal scholarship appear to have been included in the opinions simply to lend academic authority to the application of a standard, straightforward principle of law that was referred to generally and superficially by the article, and that was well-established long before the publication of that article. The articles are cited only infrequently for their more original, subtle, or controversial claims. This citation practice again suggests that the articles were generally marshaled after-the-fact during the writing of the opinion to lend further support to a decision already reached on other grounds, rather than being influential on their own account in making the decision.⁵⁵ However, one must take some care not to exaggerate this point; some of the opinions do cite articles for their more central or controversial normative claims. For

54. *But see supra* text accompanying note 22 (suggesting that the 36.4% citation frequency found in this study may be unrepresentatively high).

55. Eric Posner is in agreement with this conclusion, at least with regard to the economics-oriented articles here considered: "I read the state and federal court opinions that cite an economics article that appeared in a major law review or faculty-edited law journal since 1980 . . . of those, few discuss rather than cited the article, and none was clearly influenced by the article." Posner, *supra* note 11, at 870.

example, 11 out of the 83 citations to the Burton article did cite it for his innovative view of the scope of the duty of good faith and not merely as academic support for accepted legal propositions. This suggests that these courts may have been influenced to some extent in reaching their decisions by his article. Contract law scholarship, and legal scholarship generally, probably does in fact have some modest influence on at least some judicial decisions,⁵⁶ though far less than one might have expected, or at least hoped for.

56. *See supra* note 10.

APPENDIX A:
ECONOMICS-ORIENTED CONTRACT LAW
ARTICLES (1980-2001), WITH CITATION HISTORY*

1. Abraham L. Wickelgren, *Damages for Breach of Contract: Should the Government Get Special Treatment?*, 17 J.L. ECON. & ORG. 121 (2001).

Federal Courts: 0 State Courts: 0 Law Reviews: 0

2. Jason Scott Johnston, *Should the Law Ignore Commercial Norms? A Comment on the Bernstein Conjecture and its Relevance for Contract Law Theory and Reform*, 99 MICH. L. REV. 1791 (2001).

Federal Courts: 0 State Courts: 0 Law Reviews: 0

3. Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 18

4. G. Mitu Gulati, et al., *Connected Contracts*, 47 UCLA L. REV. 887 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 20

5. Aaron S. Edlin and Benjamin E. Hermalin, *Contract Renegotiation and Options in Agency Problems*, 16 J.L. ECON. & ORG. 395 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 0

6. Robert K. Rasmussen, *Lawyers, Law, and Contract Formation*, 98 MICH. L. REV. 2748 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 0

* As noted above in the text, this chronologically-ordered list of 71 economics-oriented contract-law articles was provided to me by Professor Eric Posner. It is intended to be a relatively comprehensive list of such articles that appeared between 1980 and 2001 in any of the following 15 leading academic journals: the *California Law Review*, the *University of Chicago Law Review*, the *Columbia Law Review*, the *Harvard Law Review*, the *Michigan Law Review*, the *Northwestern Law Review*, the *New York University Law Review*, the *Pennsylvania Law Review*, the *Stanford Law Review*, the *Texas Law Review*, the *UCLA Law Review*, the *Yale Law Journal*, the *Journal of Law and Economics*, the *Journal of Law, Economics and Organization*, and the *Journal of Legal Studies*. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 111 YALE L.J. 829, 869 n.96 (2003). The citation numbers were obtained by conducting Lexis searches in the "Federal and State Cases" and "Law Reviews, Combined" databases (the title of this latter database has since been changed to "U.S. & Canadian Law Reviews, Combined"). While these two databases are not completely exhaustive, they are relatively complete and are certainly sufficient to demonstrate relative citation proportions. The citation history search is current through April 30, 2003.

7. Yongmin Chen, *Promises, Trust, and Contracts*, 16 J.L. ECON. & ORG. 209 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 1

8. Karen Eggleston et al., *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 Nw. U. L. REV. 91 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 3

9. Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 7

10. Sharon Gifford, *Limited Attention and the Optimal Incompleteness of Contracts*, 15 J.L. ECON. & ORG. 468 (1999).

Federal Courts: 0 State Courts: 0 Law Reviews: 1

11. Lucian Arye Bebchuk & Steven Shavell, *Reconsidering Contractual Liability and the Incentive to Reveal Information*, 51 STAN. L. REV. 1615 (1999).

Federal Courts: 0 State Courts: 0 Law Reviews: 0

12. Zvika Neeman, *The Freedom to Contract and the Free-Rider Problem*, 15 J.L. ECON. & ORG. 685 (1999).

Federal Courts: 0 State Courts: 0 Law Reviews: 2

13. Douglas W. Allen & Dean Lueck, *The Role of Risk in Contract Choice*, 15 J.L. ECON. & ORG. 704 (1999).

Federal Courts: 0 State Courts: 0 Law Reviews: 2

14. Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45 (1999).

Federal Courts: 0 State Courts: 0 Law Reviews: 7

15. Fred S. McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131 (1999).

Federal Courts: 0 State Courts: 0 Law Reviews: 10

16. Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1998).

Federal Courts: 0 State Courts: 0 Law Reviews: 8

17. Alexander J. Triantis & George G. Triantis, *Timing Problems in Contract Breach Decisions*, 41 J.L. & ECON. 163 (1998).

Federal Courts: 0 State Courts: 0 Law Reviews: 5

18. Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. LEGAL STUD. 203 (1997).

Federal Courts: 0 State Courts: 0 Law Reviews: 19

19. Alan O. Sykes, *"Bad Faith" Breach of Contract by First-Party Insurers*, 25 J. LEGAL STUD. 405 (1996).

Federal Courts: 0 State Courts: 6 Law Reviews: 12

20. Alan J. Meese, *Antitrust Balancing in a (Near) Coasean World: The Case of Franchise Tying Contracts*, 95 MICH. L. REV. 111 (1996).

Federal Courts: 1 State Courts: 0 Law Reviews: 11

21. Aaron S. Edlin, *Cadillac Contracts and Up-Front Payments: Efficient Investment Under Expectation Damages*, 12 J.L. ECON. & ORG. 98 (1996).

Federal Courts: 0 State Courts: 0 Law Reviews: 0

22. Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481 (1996).

Federal Courts: 0 State Courts: 0 Law Reviews: 28

23. Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249 (1996).

Federal Courts: 0 State Courts: 0 Law Reviews: 24

24. Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283 (1995).

Federal Courts: 1 State Courts: 0 Law Reviews: 35

25. Paul G. Mahoney, *Contract Remedies and Options Pricing*, 24 J. LEGAL STUD. 139 (1995).

Federal Courts: 0 State Courts: 0 Law Reviews: 5

26. Gillian K. Hadfield, *Judicial Competence and the Interpretation of Incomplete Contracts*, 23 J. LEGAL STUD. 159 (1994).

Federal Courts: 0 State Courts: 0 Law Reviews: 20

27. Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993).

Federal Courts: 0 State Courts: 1 Law Reviews: 50

28. Benjamin E. Hermalin & Michael L. Katz, *Judicial Modification of Contracts between Sophisticated Parties: A More Complete View of Incomplete Contracts and their Breach*, 9 J.L. ECON. & ORG. 230 (1993).

Federal Courts: 0 State Courts: 0 Law Reviews: 17

29. Eric Rasmusen & Ian Ayres, *Mutual and Unilateral Mistake in Contract Law*, 22 J.L. STUD. 309 (1993).

Federal Courts: 0 State Courts: 0 Law Reviews: 6

30. Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271 (1992).

Federal Courts: 0 State Courts: 0 Law Reviews: 92

31. Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729 (1992).

Federal Courts: 0 State Courts: 0 Law Reviews: 130

32. Lucian Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of Hadley v. Baxendale (Great Britain)*, 7 J.L. ECON. & ORG. 284 (1991).

Federal Courts: 0 State Courts: 0 Law Reviews: 47

33. Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer - Seller Relationships*, 43 STAN. L. REV. 361 (1991).

Federal Courts: 0 State Courts: 0 Law Reviews: 66

34. Robert E. Scott, *A Relational Theory of Default Rules for Commercial Contracts (Special Issue: The Law and Economic of Risk)*, 19 J. LEGAL STUD. 597 (1990).

Federal Courts: 0 State Courts: 0 Law Reviews: 86

35. Janet Kiholm Smith & Richard L. Smith, *Contract Law, Mutual Mistake, and Incentives to Produce and Disclose Information*, 19 J. LEGAL STUD. 467 (1990).

Federal Courts: 0 State Courts: 0 Law Reviews: 6

36. Philippe Aghion & Benjamin Hermalin, *Legal Restrictions on Private Contracts Can Enhance Efficiency*, 6 J.L. ECON. & ORG. 381 (1990).

Federal Courts: 0 State Courts: 0 Law Reviews: 32

37. Gillian K. Hadfield, *Problematic Relations: Franchising and the Law of Incomplete Contracts*, 42 STAN. L. REV. 927 (1990).

Federal Courts: 1 State Courts: 1 Law Reviews: 65

38. Douglas G. Baird, *Self-Interest and Cooperation in Long-Term Contracts (Special Issue: The Law and Economics of Risk)*, 19 J. LEGAL STUD. 583 (1990).

Federal Courts: 0 State Courts: 0 Law Reviews: 19

39. Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990).

Federal Courts: 0 State Courts: 0 Law Reviews: 102

40. Steven N. Wiggins, *The Comparative Advantage of Long-Term Contracts and Firms*, 6 J.L. ECON. & ORG. 155 (1990).

Federal Courts: 0 State Courts: 0 Law Reviews: 0

41. Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215 (1990).

Federal Courts: 0 State Courts: 0 Law Reviews: 57

42. David D. Friedman, *An Economic Analysis of Alternative Damage Rules for Breach of Contract*, 32 J.L. & ECON. 281 (1989).

Federal Courts: 0 State Courts: 0 Law Reviews: 10

43. Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105 (1989).

Federal Courts: 0 State Courts: 1 Law Reviews: 55

44. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489 (1989).

Federal Courts: 0 State Courts: 0 Law Reviews: 95

45. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

Federal Courts: 5 State Courts: 1 Law Reviews: 438

46. Richard B. Craswell, *Performance, Reliance, and One-Sided Information*, 18 J. LEGAL STUD. 365 (1989).

Federal Courts: 0 State Courts: 0 Law Reviews: 14

47. Stewart Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEGAL STUD. 237 (1988).

Federal Courts: 0 State Courts: 0 Law Reviews: 36

48. Michelle J. White, *Contract Breach and Contract Discharge Due to Impossibility: A Unified Theory*, 17 J. LEGAL STUD. 353 (1988).

Federal Courts: 0 State Courts: 0 Law Reviews: 29

49. Richard B. Craswell, *Precontractual Investigation as an Optimal Precaution Problem*, 17 J. LEGAL STUD. 401 (1988).

Federal Courts: 0 State Courts: 0 Law Reviews: 19

50. Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988).

Federal Courts: 0 State Courts: 0 Law Reviews: 160

51. Benjamin Klein & Kevin Murphy, *Vertical Restraints as Contract Enforcement Mechanism*, 31 J.L. & ECON. 265 (1988).

Federal Courts: 0 State Courts: 0 Law Reviews: 29

52. A. Mitchell Polinsky, *Fixed Price Versus Spot Price Contracts: A Study in Risk Allocation*, 3 J.L. ECON. & ORG. 27 (1987).

Federal Courts: 0 State Courts: 0 Law Reviews: 0

53. Richard A. Epstein, *Inducement of Breach of Contract as a Problem of Ostensible Ownership*, 16 J. LEGAL STUD. 1 (1987).

Federal Courts: 1 State Courts: 0 Law Reviews: 26

54. Linda Curtis, *Damage Measurements for Bad Faith Breach of Contract: An Economic Analysis*, 39 STAN. L. REV. 161 (1986).

Federal Courts: 0 State Courts: 3 Law Reviews: 7

55. Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903 (1985).

Federal Courts: 1 State Courts: 5 Law Reviews: 122

56. Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 CAL. L. REV. 1432 (1985).

Federal Courts: 0 State Courts: 0 Law Reviews: 48

57. William Bishop, *The Choice of Remedy for Breach of Contract*, 14 J. LEGAL STUD. 299 (1985).

Federal Courts: 0 State Courts: 0 Law Reviews: 23

58. Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1 (1985).

Federal Courts: 0 State Courts: 1 Law Reviews: 86

59. Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261 (1985).

Federal Courts: 2 State Courts: 5 Law Reviews: 177

60. Samuel A. Rea, Jr., *Efficiency Implications of Penalties and Liquidated Damages*, 13 J. LEGAL STUD. 147 (1984).

Federal Courts: 0 State Courts: 2 Law Reviews: 20

61. Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341 (1984).

Federal Courts: 0 State Courts: 1 Law Reviews: 70

62. Timothy J. Muris, *Cost of Completion or Diminution in Market Value: The Relevance of Subjective Value*, 12 J. LEGAL STUD. 379 (1983).

Federal Courts: 0 State Courts: 0 Law Reviews: 35

63. Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967 (1983).

Federal Courts: 1 State Courts: 2 Law Reviews: 142

64. A. Mitchell Polinsky, *Risk Sharing Through Breach of Contract Remedies*, 12 J. LEGAL STUD. 427 (1983).

Federal Courts: 0 State Courts: 0 Law Reviews: 44

65. Samuel A. Rea, Jr., *Nonpecuniary Loss and Breach of Contract*, 11 J. LEGAL STUD. 35 (1982).

Federal Courts: 0 State Courts: 0 Law Reviews: 22

66. George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981).

Federal Courts: 0 State Courts: 0 Law Reviews: 118

67. Janet T. Landa, *A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law*, 10 J. LEGAL STUD. 349 (1981).

Federal Courts: 0 State Courts: 0 Law Reviews: 34

68. Jeffrey M. Perloff, *Breach of Contract and the Foreseeability Doctrine of Hadley v. Baxendale*, 10 J. LEGAL STUD. 39 (1981).

Federal Courts: 0 State Courts: 0 Law Reviews: 20

69. Jeffrey M. Perloff, *The Effects of Breaches of Forward Contracts Due to Unanticipated Price Changes*, 10 J. LEGAL STUD. 221 (1981).

Federal Courts: 0 State Courts: 0 Law Reviews: 4

70. Paul H. Rubin, *Unenforceable Contracts: Penalty Clauses and Specific Performance*, 10 J. LEGAL STUD. 237 (1981).

Federal Courts: 0 State Courts: 0 Law Reviews: 10

71. Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980).

Federal Courts: 2 State Courts: 1 Law Reviews: 136

APPENDIX B:
NON-ECONOMICS-ORIENTED CONTRACT LAW
ARTICLES (1980-2001), WITH
CITATION HISTORY*

1. Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 TEX. L. REV. 2021 (2001).

Federal Courts: 1 State Courts: 0 Law Reviews: 6

2. Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 8

3. Roy Kreitner, *Speculations of Contract, or How Contract Law Stopped Worrying and Learned to Love Risk*, 100 COLUM. L. REV. 1096 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 3

4. Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 9

5. Jonathan Yovel, *What is Contract Law 'About'? Speech Act Theory and a Critique of 'Skeletal Promises'*, 94 NW. U. L. REV. 937 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 5

6. Chad McCracken, *Hegel and the Autonomy of Contract Law*, 77 TEX. L. REV. 719 (1999).

Federal Courts: 0 State Courts: 0 Law Reviews: 4

* As noted above in the text, this chronologically ordered list of 52 non-economics-oriented articles was provided to me by Professor Eric Posner. It is intended to be a relatively comprehensive list of such articles that appeared between 1980 and 2001 in any of the following 15 leading academic journals: the *California Law Review*, the *University of Chicago Law Review*, the *Columbia Law Review*, the *Harvard Law Review*, the *Michigan Law Review*, the *Northwestern Law Review*, the *New York University Law Review*, the *Pennsylvania Law Review*, the *Stanford Law Review*, the *Texas Law Review*, the *UCLA Law Review*, the *Yale Law Journal*, the *Journal of Law and Economics*, the *Journal of Law, Economics and Organization*, and the *Journal of Legal Studies*. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 111 YALE L.J. 829, 869 n.96 (2003). The citation numbers were obtained by conducting Lexis searches of the "Federal and State Cases" and "Law Reviews, Combined" databases (the title of this latter database has since been changed to "U.S. & Canadian Law Reviews, Combined"). While these two databases are not completely exhaustive, they are relatively complete and are certainly sufficient to demonstrate relative citation proportions. The citation history search is current through April 30, 2003.

7. David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17 (1999).

Federal Courts: 0 State Courts: 0 Law Reviews: 44

8. David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999).

Federal Courts: 0 State Courts: 0 Law Reviews: 12

9. Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005 (1998).

Federal Courts: 0 State Courts: 0 Law Reviews: 6

10. Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998).

Federal Courts: 0 State Courts: 0 Law Reviews: 25

11. Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821 (1997).

Federal Courts: 0 State Courts: 0 Law Reviews: 15

12. David A. Skeel, Jr., *A Reliance Damages Approach to Corporate Lockups*, 90 NW. U. L. REV. 564 (1996).

Federal Courts: 0 State Courts: 0 Law Reviews: 10

13. David Charny, *Illusions of a Spontaneous Order: "Norms" in Contractual Relationships*, 144 U. PA. L. REV. 1841 (1996).

Federal Courts: 0 State Courts: 0 Law Reviews: 24

14. Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49 (1995).

Federal Courts: 0 State Courts: 0 Law Reviews: 20

15. Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107 (1995).

Federal Courts: 0 State Courts: 0 Law Reviews: 19

16. Gregory S. Crespi, *Good Faith and Bad Faith in Contract Law: Reflections on a Cautionary Tale and Border Wars*, 72 TEX. L. REV. 1277 (1994).

Federal Courts: 0 State Courts: 0 Law Reviews: 4

17. Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127 (1994).

Federal Courts: 1 State Courts: 1 Law Reviews: 12

18. G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433 (1993).

Federal Courts: 1 State Courts: 1 Law Reviews: 62

19. Kirt O'Neill, *Contractual Choice of Law: The Case for a New Determination of Full Faith and Credit Limitations*, 71 TEX. L. REV. 1019 (1993).

Federal Courts: 0 State Courts: 0 Law Reviews: 5

20. A.F. Brooke II, *Great Expectations: Assessing the Contract Damages of the Take-or-Pay Producer*, 70 TEX. L. REV. 1469 (1992).

Federal Courts: 0 State Courts: 0 Law Reviews: 6

21. Mark P. Gergen, *The Use of Open Terms in Contract*, 92 COLUM. L. REV. 997 (1992).

Federal Courts: 0 State Courts: 0 Law Reviews: 25

22. Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358 (1992).

Federal Courts: 1 State Courts: 2 Law Reviews: 15

23. David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991).

Federal Courts: 2 State Courts: 0 Law Reviews: 99

24. Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991).

Federal Courts: 1 State Courts: 3 Law Reviews: 59

25. Leonard Kreynin, *Breach of Contract as a Due Process Violation: Can the Constitution be a Font of Contract Law?*, 90 COLUM. L. REV. 1098 (1990).

Federal Courts: 0 State Courts: 0 Law Reviews: 8

26. Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989).

Federal Courts: 0 State Courts: 1 Law Reviews: 61

27. Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 TEX. L. REV. 103 (1988).

Federal Courts: 0 State Courts: 0 Law Reviews: 33

28. E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 MICH. L. REV. 1406 (1987).

Federal Courts: 0 State Courts: 0 Law Reviews: 16

29. Subha Narasimhan, *Modification: The Self-Help Specific Performance Remedy*, 97 YALE L.J. 61 (1987).

Federal Courts: 0 State Courts: 0 Law Reviews: 24

30. E. Allen Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217 (1987).

Federal Courts: 12 State Courts: 4 Law Reviews: 74

31. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

Federal Courts: 2 State Courts: 0 Law Reviews: 158

32. Peter Meijes Tiersma, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189 (1986).

Federal Courts: 1 State Courts: 0 Law Reviews: 15

33. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

Federal Courts: 1 State Courts: 0 Law Reviews: 264

34. Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5 (1985).

Federal Courts: 0 State Courts: 0 Law Reviews: 63

35. Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109 (1985).

Federal Courts: 2 State Courts: 4 Law Reviews: 38

36. E. Allen Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985).

Federal Courts: 1 State Courts: 2 Law Reviews: 56

37. Michael B. Rappaport, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918 (1984).

Federal Courts: 0 State Courts: 0 Law Reviews: 8

38. Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399 (1984).

Federal Courts: 0 State Courts: 7 Law Reviews: 39

39. Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984).

Federal Courts: 3 State Courts: 13 Law Reviews: 101

40. Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107 (1984).

Federal Courts: 1 State Courts: 0 Law Reviews: 51

41. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

Federal Courts: 8 State Courts: 10 Law Reviews: 206

42. Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983).

Federal Courts: 0 State Courts: 0 Law Reviews: 100

43. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

Federal Courts: 0 State Courts: 0 Law Reviews: 181

44. Ian R. Macneil, *Values in Contract: Internal and External*, 78 Nw. U. L. REV. 340 (1983).

Federal Courts: 0 State Courts: 1 Law Reviews: 79

45. Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365 (1982).

Federal Courts: 1 State Courts: 1 Law Reviews: 42

46. Henry Mather, *Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller*, 92 YALE L.J. 14 (1982).

Federal Courts: 0 State Courts: 0 Law Reviews: 20

47. Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"*, 75 Nw. U. L. REV. 1018 (1981).

Federal Courts: 0 State Courts: 0 Law Reviews: 70

48. Robert Braucher, *Interpretation and Legal Effect in the Second Restatement of Contracts*, 81 COLUM. L. REV. 13 (1981).

Federal Courts: 0 State Courts: 1 Law Reviews: 12

49. Arthur Rosett, *Partial, Qualified, and Equivocal Repudiation of Contract*, 81 COLUM. L. REV. 93 (1981).

Federal Courts: 2 State Courts: 0 Law Reviews: 6

50. Charles L. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52 (1981).

Federal Courts: 0 State Courts: 3 Law Reviews: 52

51. Joseph M. Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37 (1981).

Federal Courts: 0 State Courts: 4 Law Reviews: 20

52. Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

Federal Courts: 40 State Courts: 43 Law Reviews: 192

APPENDIX C:
EMPIRICAL CONTRACT LAW ARTICLES (1985-2000)
WITH CITATION HISTORY*

1. John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 6

2. Daniel Keating, *Exploring the Battle of the Forms in Action*, 98 MICH. L. REV. 2678 (2000).

Federal Courts: 0 State Courts: 0 Law Reviews: 10

3. Robert A. Hillman, *The Unfulfilled Promise of Promissory Estoppel in the Employment Setting*, 31 RUTGERS L.J. 1 (1999).

Federal Courts: 0 State Courts: 0 Law Reviews: 3

4. Fred S. McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131 (1999).

Federal Courts: 0 State Courts: 0 Law Reviews: 10

5. Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580 (1998) (also listed in Appendix B).

Federal Courts: 0 State Courts: 0 Law Reviews: 24

6. Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583 (1998).

Federal Courts: 0 State Courts: 0 Law Reviews: 46

7. Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998).

Federal Courts: 0 State Courts: 1 Law Reviews: 88

* As noted above in the text, this chronologically-ordered list of 27 empirical contract law articles was provided to me by Professor Russell Korobkin. Russell Korobkin, *Empirical Scholarship in Contract Law: Possibilities and Pitfalls*, 2002 U. ILL. L. REV. 1033, 1064-66. The citation numbers for each article were determined by conducting Lexis searches in the "Federal and State Courts" and "Law Reviews, Combined" databases (the title of the latter database has since been changed to "U.S. & Canadian Law Reviews, Combined"). While these two databases are not completely exhaustive, they are relatively complete and are certainly sufficient to demonstrate relative citation proportions. The citation history search is current through April 30, 2003. As noted above in the text, three of these articles are also listed in either Appendix A or Appendix B.

8. Willy E. Rice, *Insurance Contracts and Judicial Discord Over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments—1990-1997*, 47 AM. U. L. REV. 1131 (1998).

Federal Courts: 0 State Courts: 1 Law Reviews: 6

9. Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997).

Federal Courts: 0 State Courts: 0 Law Reviews: 66

10. Daniel Keating, *Measuring Sales Law Against Sales Practice: A Reality Check*, 17 J.L. & COM. 99 (1997).

Federal Courts: 0 State Courts: 0 Law Reviews: 5

11. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

Federal Courts: 0 State Courts: 0 Law Reviews: 41

12. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

Federal Courts: 1 State Courts: 0 Law Reviews: 140

13. Jason Scott Johnston, *The Statute of Frauds and Business Norms: A Testable Game-Theoretic Model*, 144 U. PA. L. REV. 1859 (1996).

Federal Courts: 0 State Courts: 0 Law Reviews: 25

14. Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109 (1995).

Federal Courts: 0 State Courts: 0 Law Reviews: 30

15. J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837 (1995).

Federal Courts: 0 State Courts: 0 Law Reviews: 38

16. Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819 (1994).

Federal Courts: 0 State Courts: 0 Law Reviews: 11

17. Deborah A. Schmedemann & Judi McLean Parks, *Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses*, 29 WAKE FOREST L. REV. 647 (1994).

Federal Courts: 0 State Courts: 1 Law Reviews: 10

18. David Baumer & Patricia Marschall, *Willful Breach of Contract for the Sale of Goods: Can the Bane of Business Be an Economic Bonanza?*, 65 TEMP. L. REV. 159 (1992).

Federal Courts: 0 State Courts: 0 Law Reviews: 7

19. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 114 (1992).

Federal Courts: 0 State Courts: 0 Law Reviews: 170

20. Marcel Kahan & Michael Klausner, *Antitakeover Provisions in Bonds: Bondholder Protection or Management Entrenchment?*, 40 UCLA L. REV. 931 (1993).

Federal Courts: 0 State Courts: 0 Law Reviews: 26

21. Willy E. Rice, *Judicial Bias, the Insurance Industry, and Consumer Protection: An Empirical Analysis of State Supreme Courts' Bad-Faith, Breach-of-Contract, Breach-of-Covenant-of-Good-Faith and Excess-Judgment Decisions, 1990-1991*, 41 CATH. U. L. REV. 325 (1992).

Federal Courts: 0 State Courts: 0 Law Reviews: 15

22. Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1 (1992).

Federal Courts: 0 State Courts: 0 Law Reviews: 45

23. Peter J. Whitmore, *A Statistical Analysis of Noncompetition Clauses in Employment Contracts*, 15 J. CORP. L. 483 (1990).

Federal Courts: 2 State Courts: 1 Law Reviews: 14

24. Nathan M. Crystal, *An Empirical View of Relational Contracts Under Article Two of the Uniform Commercial Code*, 1988 ANN. SURV. AM. L. 293 (1988).

Federal Courts: 0 State Courts: 0 Law Reviews: 4

25. Stewart Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEGAL STUD. 237 (1988) (also listed in Appendix A).

Federal Courts: 0 State Courts: 0 Law Reviews: 36

26. James J. White, *Promise Fulfilled and Principle Betrayed*, 1988 ANN. SURV. AM. L. 7 (1988).

Federal Courts: 0 State Courts: 0 Law Reviews: 11

27. Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake,"* 52 U. CHI. L. REV. 903 (1985) (also listed in Appendix B).

Federal Courts: 1 State Courts: 5 Law Reviews: 122