

University of Minnesota Law School Scholarship Repository

Minnesota Law Review

2016

The Most-Cited Articles from the Minnesota Law Review

Fred R. Shapiro

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>

 Part of the [Law Commons](#)

Recommended Citation

Shapiro, Fred R., "The Most-Cited Articles from the Minnesota Law Review" (2016). *Minnesota Law Review*. 213.
<https://scholarship.law.umn.edu/mlr/213>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Article

The Most-Cited Articles from the *Minnesota Law Review*

Fred R. Shapiro[†]

The 100th anniversary of the *Minnesota Law Review* provides an opportunity to assess its legacy and importance. The very fact of having a centennial is impressive in itself; not that many human institutions last that long. There is also available to us a method of assessing, in a relatively objective way, the impact that this hundred-year-old law review has had on legal scholarship and on the larger world. That method is citation analysis.

Sociologists of science have demonstrated that there is a high degree of correlation between the number of citations to an article, journal, or author and “judgments by peers of the ‘productivity,’ ‘significance,’ ‘quality,’ ‘utility,’ ‘influence,’ ‘effectiveness,’ or ‘impact’ of scientists and their scholarly products.”¹ Citations are equally revealing in law. Indeed, they may be more important in the legal realm than in science, since science publications and their interconnections are byproducts of the research enterprise, while in law publications and their interconnections are at the very heart of the discipline. As long as it is kept in mind that citation counts measure a “quality” that is socially defined, based on the usefulness of the writings to other scholars or to judges, rather than necessarily measuring intrinsic merit, such counts may offer valuable insights into the influence and history of legal scholarship.

Articles and journals that receive large numbers of citations are very likely to have exerted significant influence. And

[†] Associate Librarian for Collections and Access and Lecturer in Legal Research, Yale Law School; Editor, *Yale Book of Quotations* and *Oxford Dictionary of American Legal Quotations*. Copyright © 2016 by Fred R. Shapiro.

1. Stephen M. Lawani & Alan E. Bayer, *Validity of Citation Criteria for Assessing the Influence of Scientific Publications: New Evidence with Peer Assessment*, 34 J. AM. SOC'Y FOR INFO. SCI. 59, 61 (1983).

so we can conclude that *Minnesota Law Review* and many of its articles have had a very substantial impact, because the citation data for that review have been truly impressive. I will demonstrate the impressiveness of that data in this study.

In Table I below I list the fifty (in reality fifty-two because of a three-way tie for fiftieth place) *Minnesota Law Review* articles that have been most often cited by other law review articles. In Table II I list the ten articles most cited by judicial opinions.

The methodology for compiling these most-cited articles lists involved searching on the HeinOnline database. HeinOnline, produced by the William S. Hein Company, includes the great majority of the English-language legal periodical literature since the early nineteenth century. I ran searches calculated to retrieve all of the *Minnesota Law Review*'s articles, and then sorted the articles by "Number of Times Cited by Articles" and "Number of Times Cited by Cases." The powerful capability of HeinOnline to perform these sorts thus enabled me to create thorough and accurate rankings.²

As I have explained in previous "most-cited" enumerations, such lists are skewed in a number of ways and should thus be taken with a grain of salt. One bias is chronological. Since it generally takes decades to accumulate enough citations to make an all-time most-cited ranking, it is almost impossible for a very recent article to make the cut. Very old articles may also be disfavored, since the size of the citing literature was smaller and footnoting was less extensive in the early and mid-twentieth century. There is also a subject bias. There are more opportunities to be cited in fields, such as constitutional law, procedure, contracts, property, torts, and criminal law, that have more extensive literatures. Fields like corporate law, family law, intellectual property, and international law have smaller literatures and thus fewer opportunities to be cited.

With the above caveats, I believe that the two lists in Tables I and II are the most objective guides possible to the history and influence of the first century of *Minnesota Law Review* articles. As suggested above, the lists demonstrate an extraordinary record of success in publishing notable scholarship.

The first table, *Minnesota Law Review* Articles Most Cited by Other Legal Periodical Articles (Table I), is headed by the landmark 1974 article by Anthony G. Amsterdam, *Perspectives*

2. The HeinOnline searches were run on September 5, 2015.

on the *Fourth Amendment*,³ which has garnered 1415 citations. Other research I have done tells me that this is the eighteenth most-cited article of all time among all law reviews (cited by other articles).⁴ Amsterdam has been a tremendously important scholar and advocate in criminal law and constitutional law, as well as being the pioneer of clinical legal education. He successfully argued the case of *Furman v. Georgia* before the United States Supreme Court in 1972,⁵ leading to a temporary moratorium on capital punishment throughout the country. *Perspectives on the Fourth Amendment* stemmed from Amsterdam's Oliver Wendell Holmes Devise Lecture, delivered at the University of Minnesota Law School. This brilliant article conceptualized the theory of the Fourth Amendment by distinguishing between two approaches to the Amendment, one viewing it as creating atomistic spheres of personal privacy, the other viewing it as regulating government conduct of searches and seizures. The importance and broad influence of the article is emphasized by the fact that, in addition to its ranking eighteenth among all articles cited by other articles, it is the twelfth most-cited article of all time among all law reviews in terms of citations by judicial opinions.

In second place among the most-cited *Minnesota Law Review* articles (cited by other articles) is William L. Prosser's 1966 piece, *The Fall of the Citadel (Strict Liability to the Consumer)*.⁶ This too figures in the overall most-cited list among all law reviews, ranking thirty-sixth on that all-encompassing list. Prosser, who graduated from the University of Minnesota Law School in 1928, taught at Minnesota from 1931 to 1940, then at Harvard, Berkeley (where he was dean), and Hastings. He published several very highly cited articles and the classic treatise *Prosser on Torts*.⁷ He is considered to have been the preeminent American tort law authority and the leading scholar in the development of strict liability for products injuries. In *The Fall of the Citadel*, he chronicled the "fall" of the "citadel" of privity of

3. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

4. This assertion, and others I make below about rankings of articles from all law reviews, derives from unpublished results of HeinOnline searching performed in September 2015.

5. 408 U.S. 238 (1972).

6. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

7. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1941 and subsequent editions).

contract as a requirement for products liability. Like the Amsterdam article, the Prosser piece transcended the world of scholarship and is the thirteenth most-cited article of all time among all law reviews in terms of citations in case law.

The third most-cited *Minnesota Law Review* article, measured by citations in other law review articles, is Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*.⁸ The Freeman article also makes the “top 100” all-law-review ranking, placing as the eighty-ninth most-cited on that overall tabulation. The author taught at the University of Minnesota Law School (1971–1982) and the SUNY Buffalo Law School. This article was an important precursor of the “critical race theory” movement, arguing that antidiscrimination law actually legitimized racial discrimination.

There are many extremely renowned scholars on the top-fifty “cited by other articles” list. To name only some of them, in addition to Amsterdam and Prosser, there are Vern Countryman, Edmund M. Morgan, Monrad Paulsen, Daniel Farber, Carol Rose, Charles Alan Wright, Yale Kamisar, Arthur Miller, Felix Cohen, Charles McCormick, Richard Ravesz, Philip Frickey, and Archibald Cox. Prosser is the only author with three articles included. Paulsen, Farber, and the coauthor team of William B. Lockhart and Robert C. McClure have two articles each. A great variety of topics are covered by the listed pieces. Constitutional law and criminal law are the most frequently appearing subjects, followed by civil rights, torts, and civil procedure.

My second list, *Minnesota Law Review* Articles Most Cited by Judicial Opinions (Table II), is perhaps even more remarkable than the first. It is headed by Vern Countryman, *Executory Contracts in Bankruptcy: Part I*,⁹ with an extraordinary 476 citations in case law. That 476 total is the second-highest among all law review articles in all law reviews over all time. Arguably, Countryman’s piece should actually be considered to be number one, since the sole article with more judicial citations is a citation magnet that is very anomalous, cited routinely for a specific procedural point by the Texas courts and has never

8. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

9. Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439 (1973).

been cited even once by the courts of any other state.¹⁰ Vern Countryman was a professor at Yale and Harvard law schools and dean of the law school at the University of New Mexico. He was the leading bankruptcy scholar of his time, and the *Executory Contracts* article discussed the treatment of unperformed contracts.

Tables I and II show the *Minnesota Law Review* in a superlative light relative to other law reviews. The three *Minnesota* articles in the nationwide “100 most-cited by other law review articles” ranking are the most by any law review other than *Harvard Law Review*, *Yale Law Journal*, *Stanford Law Review*, *Columbia Law Review*, and *Michigan Law Review*. The three articles near the top of the “most-cited by judicial opinions” ranking (Countryman¹¹ at number two, Amsterdam¹² at number twelve, and Prosser¹³ at number thirteen) are the most dominant showing by any law review other than *Harvard*. It is plain that *Minnesota Law Review* has cast a very long shadow on both the legal academy and the practical and doctrinal work of the courts.

In closing, I will note that the success of *Minnesota Law Review*, demonstrated by the citation data, is not just a historical achievement over the course of a century. It is also a current phenomenon. The law journals ranking website of the Washington and Lee University School of Law Library,¹⁴ which tabulates citation counts exhaustively, has *Minnesota Law Review* in eleventh place among all law reviews for the most-recent ten-year period available (2003–2013). To be more precise, *Minnesota* is eleventh over that period in citations per article, thirteenth in total citations, and eleventh in Washington and Lee’s combined scoring. If specialized journals are not included and only the main “flagship” law reviews of each school are compared, *Minnesota* is ninth in citations per article.

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

11. Countryman, *supra* note 9.

12. Amsterdam, *supra* note 3.

13. Prosser, *supra* note 6.

14. *Law Journals: Submission and Rankings*, WASH. & LEE U. SCH. OF L. LIBRARY, <http://lawlib.wlu.edu/LJ> (last visited Mar. 12, 2016).

TABLE I MINNESOTA LAW REVIEW ARTICLES MOST
CITED BY OTHER LEGAL PERIODICAL ARTICLES

1. 1415 Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).
2. 999 William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).
3. 721 Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).
4. 506 Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).
5. 456 Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439 (1973).
6. 362 Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).
7. 322 Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).
8. 299 Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955).
9. 272 William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).
10. 255 E. M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949).
11. 252 William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).
12. 250 Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964).

13. 239 Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992).
14. 231 Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997).
15. 219 David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999).
16. 218 F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697 (2001).
17. 215 Monrad G. Paulsen, *Fairness to the Juvenile Offender*, 41 MINN. L. REV. 547 (1957).
18. 213 Thomas S. Schrock & Robert C. Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974).
19. 204 Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988).
19. 204 D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some “Striking” Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1 (1976).
21. 202 Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129 (1998).
22. 198 Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).
23. 194 William B. Lockhart & Robert C. McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 MINN. L. REV. 295 (1954).
24. 192 Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981).
25. 188 Yale Kamisar, *Some Non-Religious Views Against Proposed “Mercy-Killing” Legislation*, 42 MINN. L. REV. 969 (1958).

| | | | |
|------|-----|---|-----------|
| 1742 | | <i>MINNESOTA LAW REVIEW</i> | [100:1735 |
| 26. | 186 | Arthur R. Miller, <i>The Adversary System: Dinosaur or Phoenix</i> , 69 MINN. L. REV. 1 (1984). | |
| 27. | 182 | Herman Walker, Jr., <i>Modern Treaties of Friendship, Commerce and Navigation</i> , 42 MINN. L. REV. 805 (1958). | |
| 28. | 181 | Stephen Daniels & Joanne Martin, <i>Myth and Reality in Punitive Damages</i> , 75 MINN. L. REV. 1 (1990). | |
| 29. | 178 | Glen O. Robinson, <i>The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation</i> , 52 MINN. L. REV. 67 (1967). | |
| 30. | 175 | Felix S. Cohen, <i>Original Indian Title</i> , 32 MINN. L. REV. 28 (1947). | |
| 31. | 173 | Barry C. Feld, <i>The Transformation of the Juvenile Court</i> , 75 MINN. L. REV. 691 (1991). | |
| 32. | 172 | Edward G. Jennings, <i>Tort Liability of Administrative Officers</i> , 21 MINN. L. REV. 263 (1937). | |
| 33. | 166 | Phyllis Goldfarb, <i>A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education</i> , 75 MINN. L. REV. 1599 (1991). | |
| 34. | 161 | Harriett R. Galvin, <i>Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade</i> , 70 MINN. L. REV. 763 (1986). | |
| 35. | 160 | Charles T. McCormick, <i>Counsel Fees and Other Expenses of Litigation as an Element of Damages</i> , 15 MINN. L. REV. 619 (1931). | |
| 36. | 155 | Vincent Blasi, <i>Toward a Theory of Prior Restraint: The Central Linkage</i> , 66 MINN. L. REV. 11 (1981). | |
| 36. | 155 | Brett M. Frischmann, <i>An Economic Theory of Infrastructure and Commons Management</i> , 89 MINN. L. REV. 917 (2005). | |
| 36. | 155 | Monrad G. Paulsen, <i>The Persistence of Substantive Due Process in the States</i> , 34 MINN. L. REV. 91 (1950). | |

36. 155 Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383 (1988).
40. 154 Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997).
41. 148 Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992).
41. 148 Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999).
43. 147 Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1983).
43. 147 David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).
43. 147 Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998).
46. 145 Charles L. B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932).
47. 144 Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963).
48. 139 Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991).
48. 139 William L. Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936).
50. 138 Archibald Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959).

50. 138 Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219 (1987).
50. 138 Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

TABLE II. *MINNESOTA LAW REVIEW* ARTICLES MOST
CITED BY JUDICIAL OPINIONS

1. 476 Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439 (1973).
2. 210 Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).
3. 204 William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).
4. 67 William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960).
5. 63 Vern Countryman, *Executory Contracts in Bankruptcy: Part II*, 58 MINN. L. REV. 479 (1974).
6. 59 Millard H. Ruud, "No Law Shall Embrace More Than One Subject," 42 MINN. L. REV. 389 (1958).
7. 49 Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).
8. 45 Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).
8. 45 Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803 (1961).
10. 42 John Stewart Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119 (1978).