

**IS LEGAL SCHOLARSHIP OUT OF TOUCH?  
AN EMPIRICAL ANALYSIS OF THE USE OF SCHOLARSHIP  
IN BUSINESS LAW CASES**

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**ABSTRACT**

*Commentators have observed two apparent trends in the use of legal scholarship by the judiciary. First, judges now cite law review articles in their opinions with less frequency. Second, despite this general decline in the invocation of legal scholarship, judges now cite articles in specialty journals with more frequency.*

*Some commentators attribute the apparent decline in the courts' use of legal scholarship to the increasingly theoretical and impractical nature of that scholarship. A few studies even suggest that the increasing use of specialty journals by the courts reflects the gap between the content of legal scholarship in general law reviews and the practical needs of the judiciary. Others defend the academy, taking the position that academics continue to write meaningful doctrinal articles and that theoretical and interdisciplinary pieces encourage broader intellectual discourse regarding legal issues.*

*The study underlying this article analyzes and counters the claim of the diminishing role of legal scholarship in the context of business law cases. Specifically, the study focuses on the use of legal scholarship by Delaware state courts from 1997 to 2007, as well as on an interval basis dating back to 1965. The study detects no general downward trend in the use of legal scholarship in business law cases. Moreover, the study undertakes a detailed analysis of factors predicting a court's likelihood to cite legal scholarship. Overall, the study provides a unique insight into when, why, and how courts invoke legal scholarship in business law cases and, consequently, may help inform future scholarship intended to influence court decisions in this discipline.*

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## INTRODUCTION

Does legal scholarship matter outside of the academy? The answer to this question may in part depend on whom you ask. Some commentators assert that legal scholarship is too theoretical or impractical and, consequently, adds little value from the perspective of the general legal profession.<sup>1</sup> Others defend the academy, taking the position that academics continue to write meaningful doctrinal articles and that theoretical and interdisciplinary pieces encourage broader intellectual discourse regarding legal issues.<sup>2</sup>

The debate has, for the most part, concentrated on articles published in the “elite” law reviews and citation counts in opinions issued by the United States Supreme Court or the federal courts generally.<sup>3</sup> Several studies suggest that courts now cite law review articles in their opinions with less frequency.<sup>4</sup> At least two studies find that, despite this general decline in the invocation of legal scholarship, judges cite articles in specialty journals with *more* frequency.<sup>5</sup> Many studies attribute the decline in judicial citation counts to the increasingly impractical nature of legal scholarship.<sup>6</sup>

We take a different approach in the study underlying this article. We concentrate on a legal discipline in which academics may choose to write

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<sup>1</sup> See *infra* Part II.

<sup>2</sup> See *infra* Part II.

<sup>3</sup> For example, Judge Harry Edwards argued that “many law schools—especially the so-called ‘elite’ ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.” Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992). Studies tend to use the term “elite” law schools or law reviews to refer to schools or reviews consistently placed in the top ten of one or more of the various rankings. See, e.g., Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971–1999*, 75 IND. L.J. 1009, 1110–11 (2000). See also *infra* Part II.

<sup>4</sup> See *infra* Part II.

<sup>5</sup> See Robert M. Lawless & Ira David, *The General Role Played by Specialty Law Journals: Empirical Evidence from Bankruptcy Scholarship*, 80 AM. BANKR. L.J. 523, 24 (2006); Cardozo Law Review Staffers, Court of Appeals for the Second Circuit: Roundtable Discussion, *Trends in Federal Judicial Citations and Law Review Articles*, (Mar. 8, 2007), [http://graphics8.nytimes.com/packages/pdf/national/20070319\\_federal\\_citations.pdf](http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf).

<sup>6</sup> See e.g., David I. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. (forthcoming 2011), available at <http://ssrn.com/abstract=1640681> (explaining criticism of academic scholarship and the dismissive attitude of some judges and practitioners towards such scholarship) (collecting sources); Edwards, *supra* note 3, at 36 (“[T]oo few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners, too many important social issues are resolved without the needed input from academic lawyers.”); see also *infra* Part II.

for judges or practitioners and can target a relatively small, specialized judiciary. Specifically, we focus on the use of legal scholarship by Delaware state courts and consider not only academic articles but also other types of academic scholarship that judges and practitioners might invoke.<sup>7</sup> Our primary hypothesis is that the courts' use of legal scholarship in the business law context is less susceptible to the ebb and flow found in general judicial citation studies.

Although the scope of our study is limited, the data analyses have broader implications.<sup>8</sup> For example, the data suggest that there are exceptions to the generalized findings of other authoritative studies, and the utility of legal scholarship may depend on the targeted audience and legal issues in controversy.<sup>9</sup> The data also suggest that, regardless of the number of judicial citations, courts do rely on legal scholarship when it counts most—when they are facing complex or novel legal issues.<sup>10</sup> Consequently, academics still play a critical role in the development and application of the law.

Part I of this article summarizes the primary hypothesis and key data analyses in our study. Part II provides historical context for our hypothesis and its contribution to the larger debate concerning the utility of legal scholarship for the judiciary and practitioners. Part III explains our methodology and the components of our study. Part IV then analyzes the data using a variety of statistical tools, including multiple regression analysis to identify factors predicting the extent and nature of scholarship use. Part V offers general observations regarding the data and analyses. The article concludes by noting the continued role for legal scholarship in judicial opinions and encourages additional research on means to strengthen that role.

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<sup>7</sup> The study uses Delaware state court decisions because Delaware is a key jurisdiction in the development of corporate law and is the state of incorporation for a majority of U.S. companies. See, e.g., Lawrence Hamermesh, *How We Make Law in Delaware, and What to Expect from Us in the Future*, 2 J. BUS. & TECH. L. 409, 10 (2007) ("Delaware certainly does 'prescribe' and 'interpret' national corporate policy, and has done so for quite a long time."); see also Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 593–96 (2003) ("Delaware also has a specialized, highly regarded judiciary, acting without a jury. The judges take pride in keeping up with business trends, having good business sense, knowing their own limits, and reacting quickly as professionals.") (discussing the status of Delaware in context of state corporate law).

<sup>8</sup> See *infra* Part V.

<sup>9</sup> See *infra* Part IV.

<sup>10</sup> See *infra* Part IV.B.

## I. SUMMARY OF STUDY AND KEY DATA ANALYSES

We designed our study to evaluate two key questions: how courts use legal scholarship in their judicial opinions addressing business law issues, and whether their use of scholarship in this context has changed over time. The study itself involved three separate but related components. First, we conducted an extensive review of 200 business law decisions rendered by the Delaware state courts from 1997-2007.<sup>11</sup> Second, we supplemented this ten-year review with an additional 157 cases pulled from two-year intervals dating back to 1965. We used this second component of the study to assess the general claim discussed above; that judicial use of scholarship has declined in recent years. Finally, we administered a written survey regarding the use of legal scholarship in judicial opinions to judges currently serving on the Delaware state bench. The results of the survey complement the data collected from the courts' dockets.

The data suggest that, contrary to the more general trend, the Delaware state courts' use of legal scholarship in the business law context has not changed significantly during the past forty years.<sup>12</sup> This same result emerged in a more focused analysis of the courts' use of only traditional academic scholarship during that period.<sup>13</sup> The data also highlight some interesting trends with respect to legal scholarship. For example, the Delaware state courts' percentage use of academic, non-doctrinal articles in judicial opinions increased significantly during 2006 and 2007.<sup>14</sup> Similarly, we noted a significant trend in the courts' percentage citation of academic authors. For example, in 2004, 2005, 2006, and 2007, the courts were more likely to cite academic authors, while in 2000, 2001, 2002, and 2003, the courts were more likely to cite practitioner authors.<sup>15</sup>

Regarding the type of publication, treatises are cited most frequently, particularly within rulings on motions for summary judgment and opinions after trial.<sup>16</sup> As noted above, we also analyze courts' use of more traditional academic publications, such as general university law reviews and specialized university law reviews. The data suggest that general

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<sup>11</sup> For a more detailed description of methodology, see *infra* Part III.

<sup>12</sup> See *infra* Part IV.C.

<sup>13</sup> See *infra* Part IV.D.

<sup>14</sup> See *infra* Part IV.B.3.

<sup>15</sup> See *infra* Part IV.B.4.

<sup>16</sup> See *infra* Part IV.B.2.

university law reviews are cited significantly more frequently when there is a motion to dismiss as compared to all other publication types.<sup>17</sup>

The overall data did not show a significant preference for specialty law reviews over more general law reviews.<sup>18</sup> Nevertheless, all fifteen specialized university law review citations stemmed from opinions focused on corporate governance (internal affairs) issues.<sup>19</sup> These issues typically involve more complicated fact patterns and may be sensitive to outside developments, such as the Enron and Worldcom corporate scandals that were uncovered during the period of the core study.<sup>20</sup> This result also corresponds to a response submitted by one of the Delaware judges to the judges' survey, who indicated that he or she finds articles published by specialized university law reviews more useful than those published by general law reviews because the "[d]iscussion is more in depth and relevant to emerging issues."<sup>21</sup>

Our study not only contradicts the more general citation trends in the context of business law cases, but it also goes further than prior studies and provides a detailed analysis of factors influencing the use of legal scholarship by courts. Specifically, the data analyze a number of factors that might predict a court's use of scholarship, including the identity and number of parties involved in the litigation, the type of pleading, the causes of action asserted in the pleadings and the outcome of the dispute. The data confirm, in many respects, anecdotal evidence and general intuition. For example, the data show that the courts invoke legal scholarship in complex litigation involving a greater number of parties and cases seeking resolution prior to trial (e.g., at the motion to dismiss or summary judgment stage).<sup>22</sup> In addition, the general preference of the opinion writer weighs heavily in the decision to cite scholarship.<sup>23</sup>

Our general conclusions are supplemented by the results of a written survey soliciting the perspective of judges currently serving on the Delaware state bench. The survey data confirm that the decision to cite scholarship is largely based on the preferences of the individual judge; no

<sup>17</sup> See *infra* Part IV.B.2.

<sup>18</sup> See *infra* Part IV.E.2.

<sup>19</sup> See *infra* Part IV.B.2.

<sup>20</sup> See, e.g., Ann M. Scarlett, *Confusion and Unpredictability in Shareholder Derivative Litigation: The Delaware Courts' Response to Recent Corporate Scandals*, 60 FLA. L. REV. 589, 590-95 (2008) (describing perceived changes in courts' evaluation of shareholder derivative litigation after corporate scandals like Enron and WorldCom).

<sup>21</sup> See *infra* Part V.

<sup>22</sup> See *infra* Part IV.A.

<sup>23</sup> See *infra* Part IV.A.1a.

one circumstance exists that would motivate all of the surveyed judges to use scholarship.<sup>24</sup> The survey data also show that, even if judges do not cite legal scholarship, they or their law clerks may, nevertheless, use scholarship in researching issues raised in their cases.<sup>25</sup> This result captures a utility of legal scholarship not susceptible to observation in the data pulled from the courts' dockets (whether in this or other studies). Moreover, although the surveyed judges note source reputation as the primary factor in deciding whether to cite scholarship, results from the core study suggest a secondary factor—tenure and reputation of the author—weighs heavily in that decision.

In sum, our study offers a focused analysis of not only citation trends, but also the circumstances affecting a court's decision to cite legal scholarship in business law cases.<sup>26</sup> This in-depth analysis of trends and predictive factors distinguishes this study from prior studies.<sup>27</sup> The multi-level analysis also permits this study to make a meaningful contribution to the general debate regarding the utility of legal scholarship. It suggests, among other things, that scholars who desire to influence judicial decisions may maximize their impact by focusing on controversial and complex legal issues in their discipline—issues that go beyond the content of general treatises, and really shape the future direction of the law. For many scholars, this result dovetails nicely with the broader purpose of academic scholarship.

## II. BACKGROUND AND PRIOR STUDIES

In 1992, Judge Harry Edwards sparked a lively and ongoing debate regarding the utility of legal scholarship.<sup>28</sup> Judge Edwards criticized the increasingly impractical nature of legal scholarship and posited that, as a

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<sup>24</sup> See *infra* Part IV.E.

<sup>25</sup> See *infra* Part IV.E.

<sup>26</sup> Admittedly, citation studies have their limitations. See, e.g., RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 71 (The University of Chicago Press 1990) ("Citations are . . . an imperfect proxy for reputation . . ."); Fred R. Shapiro, *The Most Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 85 (1991) ("[R]anking by citation counts . . . bears no relationship to scholarly merit . . . It is not even a reliable indicator that the work cited was read, let alone understood by the citer.") (citing commentary of Joseph Goldstein); see also Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 53 (1996).

<sup>27</sup> See *infra* Part II.

<sup>28</sup> See Edwards, *supra* note 3, at 34. For an excellent discussion of this debate and insightful commentary on legal scholarship generally, see Erwin Chemerinsky, *Foreword: Why Write?*, 107 MICH. L. REV. 881 (2009).

result, “judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.”<sup>29</sup> Notably, Judge Edwards did not suggest that theoretical or impractical scholarship had no value; rather, he urged the integration of doctrine and theory and questioned the quality of purely theoretical legal scholarship.<sup>30</sup>

Not surprisingly, many commentators refuted Judge Edwards’ charges and defended the increasing use of theoretical and interdisciplinary analysis in the academy.<sup>31</sup> For example, Lee Bollinger argued that Judge Edwards’ “diagnosis of a highly contagious and debilitating disease of ‘theory’ in our major law schools, and of its supposed effects, is seriously overdrawn—even to the point of being a fundamental mischaracterization.”<sup>32</sup> In addition, although agreeing with some of Judge Edwards’ critiques, Judge Richard Posner expressed concern regarding, among other things, “the production of legal scholarship [that] is artificially encouraged by restrictions on entry into the legal profession.”<sup>33</sup> He noted, “[p]erhaps the ultimate criterion of all scholarship is utility, but it need not be utility to a particular audience.”<sup>34</sup>

Even before Judge Edwards’ 1992 article, several commentators focused on the courts’ perspective on, and use of, legal scholarship.<sup>35</sup> For example, in 1986, Louis Sirico and Jeffrey Margulies conducted a study of the United States Supreme Court’s use of legal scholarship in judicial opinions during the 1971–73 and 1981–83 terms.<sup>36</sup> The data showed several interesting trends, including an increasing decline in the Court’s citation of legal scholarship. Sirico then conducted a follow up study in 2000, adding the 1991–93 and 1996–98 terms, and reached the same

<sup>29</sup> *Id.* at 35.

<sup>30</sup> *Id.* at 35–36.

<sup>31</sup> See Chemerinsky, *supra* note 28, at 884–86. For an interesting empirical study of the types of articles cited by judges as compared to those cited by academics, which was conducted in part in response to the critiques of Judge Edwards and others, see Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871 (1996).

<sup>32</sup> Lee C. Bollinger, *The Mind in the Major American Law School*, 91 MICH. L. REV. 2167, 2168 (1993).

<sup>33</sup> Richard A. Posner, *The Deprofessionalization of Legal Training and Scholarship*, 91 MICH. L. REV. 1921, 1928 (1993).

<sup>34</sup> *Id.*

<sup>35</sup> See Sirico, *supra* note 3, at 1009 n.1 (identifying several studies conducted both before and after the publication of Judge Edwards’ 1992 article).

<sup>36</sup> See Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986).



general conclusion regarding legal scholarship citations.<sup>37</sup> This latter study also evidenced a decline in the Court's reliance on articles from law reviews generally regarded as elite.

In 1998, Michael McClintock surveyed the use of legal scholarship by the United States Supreme Court, federal circuit courts of appeal, federal district courts, and state supreme courts during 1975–76, 1985–86, and 1995–96.<sup>38</sup> McClintock reached a conclusion similar to that of Sirico and Margulies; he found a continuing decline in the courts' citation of legal scholarship in opinions issued during the study period. Specifically, “there was a 47.35% decrease in overall citations by the federal courts and state supreme courts combined.”<sup>39</sup> Moreover, “[c]itations in the United States Supreme Court, while increasing slightly in the 1980s, plummeted 65.0% over the next ten years for an overall decrease of 58.6% for the twenty-year period.”<sup>40</sup>

Most studies suggest an increase in judicial citations to legal scholarship during the 1960s and 1970s then a significant decline in those citations after the 1980s.<sup>41</sup> Nevertheless, a 2010 study by David Schwartz and Lee Petherbridge posits an increase in judicial use of legal scholarship in the past twenty years.<sup>42</sup> Although these studies frequently focus on the United States Supreme Court or the federal courts, a few studies have surveyed select state courts, typically state supreme courts.<sup>43</sup> In addition, a study by Robert Lawless and Ira David considered the contributions of specialty journals to federal bankruptcy court decisions.<sup>44</sup> Interestingly, that study concluded that “not only do specialty journals outperform

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<sup>37</sup> See Sirico, *supra* note 3.

<sup>38</sup> See Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659 (1998).

<sup>39</sup> *Id.* at 684.

<sup>40</sup> *Id.* at 684–85.

<sup>41</sup> See McClintock, *supra* note 38; Sirico, *supra* note 3; Sirico & Margulies, *supra* note 36; Court of Appeals for the Second Circuit, *supra* note 5.

<sup>42</sup> See Schwartz & Petherbridge, *supra* note 6 (“Here the data provide evidence of a rather surprising result: over the last 59 years—and particularly over the last 20 years—there has not been a decline in the use of legal scholarship; rather, there has been a marked increase in the use of legal scholarship in the reported opinions of the circuit courts of appeals.”).

<sup>43</sup> See, e.g., Joseph A. Custer, *Citation Practices of the Kansas Supreme Court and Kansas Court of Appeals*, 8 KAN. J.L. & PUB. POL'Y 126 (1998); Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981) (citation practices of sixteen state supreme courts); William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850–1993*, 43 BUFF. L. REV. 121 (1995); McClintock, *supra* note 38 (citation practices of, among others, state supreme courts).

<sup>44</sup> See Lawless & David, *supra* note 5.

general law reviews overall [in bankruptcy court citations], but lower-ranked general law reviews outperform law reviews from more highly ranked law schools.”<sup>45</sup>

General judicial citation studies are very useful in considering the big picture and overall trends in judicial citation patterns. They are limited, however, in their ability to distinguish between legal disciplines, the complexity of the legal issues in controversy, and the preferences of individual judges.<sup>46</sup> All of these factors are important in the citation pattern of a particular court. Our study attempts to account for some of these factors in analyzing data and the resulting citation trends.<sup>47</sup>

Notably, our study does not purport to assess the optimal or even preferred substance, style, or tone of legal scholarship that may be invoked by the courts. Rather, it attempts to catalog, for purposes of objective analysis of those topics, the types of legal scholarship used by courts in the corporate context. The data provide an overview of when and how courts rely on that scholarship. The data in turn may help corporate scholars in future writings designed to influence decisional law.

### III. OVERVIEW OF STUDY AND METHODOLOGY

Our primary hypothesis is that the Delaware state courts’ use of legal scholarship in business law cases is less susceptible to the ebb and flow evidenced by general judicial citation studies. We based this hypothesis in part on anecdotal evidence. For example, scholars writing about business law issues often challenge or address legal doctrine that potentially impacts both the boardroom and the courtroom. This is not to say that corporate scholarship is purely doctrinal; it is not. Corporate scholarship does, however, frequently tackle issues being addressed by the courts, specifically the Delaware state courts.<sup>48</sup> Moreover, members of the

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<sup>45</sup> *Id.* at 542.

<sup>46</sup> In addition, our study uses a broader definition of scholarship than most prior studies. *See infra* Part III.A. Nevertheless, to provide a more complete picture and permit some comparison with prior studies, this article also analyzes individual types of scholarship (e.g., academic articles).

<sup>47</sup> Our study is nonetheless subject to the same caveats applicable to most citation studies. For example, we analyze citation counts and resulting trends; we did not attempt to measure the quality or merits of any particular piece of scholarship. Moreover, because of the observational nature of our study, we may not account for all confounding or relevant variables. For example, we could not quantify academic scholarship read but not cited by judges in their opinions. *But see* discussion of judges’ survey *infra* Part IV.E.

<sup>48</sup> For examples of meaningful discussions by judges of scholarship addressing timely corporate legal issues, see, for example, *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 195 n.75 (Del. Ch. 2006) (citing Stephen M. Bainbridge, *Much Ado About Little? Directors’ Fiduciary*

Delaware Supreme Court and Court of Chancery tend to interact with the academy, either by teaching, lecturing, or writing on corporate legal issues.<sup>49</sup> As described in further detail below, the data support our primary hypothesis.

We conducted the study in three separate parts. First, we collected data from Delaware state court decisions involving business law issues during 1997–2007 (the “core study”). Second, we collected data to analyze similar Delaware state court decisions over a forty year period by sampling cases in two-year intervals dating to 1965 (the “interval study”). Finally, we administered a written survey to the judges presently serving on the Delaware state bench (the “judges’ survey”). Our methodology for collecting and analyzing all data follows.

#### *A. Methodology for Core and Interval Studies*

To obtain a randomly selected sample of Delaware business law cases in a ten year span, we used the Lexis Nexis Total Research System Delaware Corporate Cases database.<sup>50</sup> One thousand six-hundred fifty-five cases emerged from the selected time period of January 1, 1997 to December 31, 2007. It should be noted that these are not likely 1,655 individual cases. Rather, cases reported at the trial court, appellate court, and Delaware Supreme Court level all likely contribute.

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*Duties in the Vicinity of Insolvency*, 1 J. BUS. & TECH. L. 335 (2007)); see also *Chesapeake Corp. v. Shore*, 771 A.2d 293 (Del. Ch. 2000) (noting that Delaware Supreme Court adopted term “substantive coercion” from the article, Ronald Gilson & Reinier Kraakman, *Delaware’s Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 267 (1989)); Thomas L. Ambro, *Citing Legal Articles in Judicial Opinions: A Sympathetic Antipathy*, 80 AM. BANKR. L.J. 547, 550 (2006) (Judge Ambro explains that he “felt [he] had found the Rosetta Stone” upon uncovering Mary Elisabeth Kors’ article *Kors, Altered Egos: Deciphering Substantive Consolidation*, 59 U. PITT. L. REV. 381 (1998)).

<sup>49</sup> For example, Justice Jacobs serves as an Adjunct Professor of Law at the New York University School of Law, at the Widener University School of Law and at the Columbia University School of Law; Vice Chancellor Leo Strine participated as a moderator in the Chancery Court Program at the University of Pennsylvania Law School and as a speaker at the 2009 Association of American Law Schools Mid-Year Meeting and Conference on Business Associations. For additional examples of this possible connection, see *infra* note 62.

<sup>50</sup> We selected the LEXIS database both because of the coders’ familiarity with the database and because, after informal testing, it appeared to be the most comprehensive of the on-line databases with respect to the subject matter of this study. The Delaware Corporate Cases database is, if anything, overinclusive as it includes all Delaware state court cases involving some aspect of business law.

To prevent a biased selection of cases, we utilized the Research Randomizer<sup>51</sup> to obtain 20 random cases for each individual year, for a total of 200 cases. For example, Lexis listed 157 cases matching our criterion for the year 1997. The Research Randomizer then provided a list of 20 random numbers between 1 and 157. We then matched the random numbers to the cases in the list to obtain our random sample (i.e., if the random numbers were 3 and 91, the third and ninety-first cases listed by Lexis became Case 1 and Case 2 for our sample).

We contemplated a strategy where 200 cases would be randomly selected from the 1,655 but found that this strategy would not help us meet our research objectives. Although there is great benefit in this more random method, this strategy would likely result in an uneven number of cases from each year and prohibit some statistical analyses. Accordingly, we used the stratified random selection method described above. We used the same selection method for the interval study of years 1965-66, 1975-76, 1985-86, 1995-96, and 2005-06.<sup>52</sup>

The primary focus of our study was legal scholarship. We did not limit our study, however, to traditional academic scholarship. Rather, we invoked a very broad definition of “scholarship” and coded any reference materials explaining or describing legal concepts, other than case and statutory law, as a form of scholarship. We excluded dictionaries, thesauruses, newspapers, and other general sources. We excluded these latter sources because we determined that they generally did not serve as alternatives to academic scholarship. This broader definition and analysis of scholarship allowed us to better understand the types of sources the courts consider in their decisions and allowed us to examine whether these sources are used differently or more often than others.

We used nine different categories to code our broad definition of scholarship, and we searched for materials within these categories both in the footnotes and the text of decisions. These nine categories are: general law review or journal (university), specialized law review or journal (university), legal periodical or journal (non-university), business journal or periodical (non-university), treatise, textbook, educational materials (such as ALI course materials), articles on SSRN without a current publication citation, and Restatements. The prevalence of citations to Restatements warranted them receiving their own category outside of treatises. We refer to this variable as the “source” of the scholarship.

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<sup>51</sup> Research Randomizer, [www.randomizer.org](http://www.randomizer.org) (last visited Aug. 25, 2010).

<sup>52</sup> Past citation studies also have invoked this type of interval analysis in detecting trends in judicial citation patterns. See, e.g., McClintock, *supra* note 38; Sirico, *supra* note 3.

To further refine our analysis, we identified eight types of scholarship that potentially could define the character and purpose of the scholarship. These eight types are: doctrinal, normative, case study, interdisciplinary, legal theory, empirical, comparative, and historical.<sup>53</sup> Recognizing that scholarship often invokes a combination of these eight characteristics, we coded both the primary approach of the scholarship as well as all approaches used in the particular piece. We also identified objective traits common to each type of scholarship to foster uniformity in the coding of this variable. We refer to this variable as the “type” of scholarship.

In addition to the source and scholarship type, we also coded variables relating to the underlying case and scholarship usage, if any, within the decision. For the underlying case, our variables included the date of the decision, the number of plaintiffs and defendants, the identity of the moving party, the relief requested and granted or denied, and the judge rendering the decision. To examine scholarship usage, our variables included the number of scholarship cites, the author and his or her affiliation, the date of the scholarship, the primary relation between the scholarship cite and the decision (e.g., procedural issue versus substantive issue), and whether the court quoted from the scholarship.

We tested and obtained inter-coder reliability under the following process.<sup>54</sup> Three coders received ten cases at a time to code for every variable. When finished, coders compared their results and resolved all discrepancies. The coders then received an additional ten cases to code individually and then compare. This initial process continued until coders obtained 90 percent reliability in individual coding for all of the variables. The coders then proceeded to code the 200 randomly selected cases for the core study and the additional 157 randomly selected cases for the interval study.

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<sup>53</sup> Recognizing that several of the terms used to code the “type” of scholarship have multiple definitions, we developed detailed definitions for the coders to use solely for purposes of this study. For example, “doctrinal” was defined as scholarship that explains and analyzes existing law (e.g., what the law is, why it is that way and general observations or critiques about existing law). The term “normative” was defined as scholarship that assesses whether existing law corresponds to the author’s normative views about the law (e.g., what the law should be and what doctrinal changes, if any, are necessary to meet that standard). The term “theoretical” was defined as scholarship that discusses the author’s normative views or theory in the abstract with little, if any, discussion of existing law or legal doctrine (e.g., theory divorced from existing doctrine). The study does not suggest that these are the appropriate or only ways to define different categories of scholarship; their use was intended to provide clarity and consistency to categories coded within the study.

<sup>54</sup> In addition, we worked to identify objective measures and definitions to guide the coding of variables that could invoke coder bias such as the type of scholarship and the judge’s agreement or disagreement with the scholarship.

*B. Methodology for Judges' Survey*

To supplement the core and interval studies, we designed a written survey to solicit more subjective, qualitative data from the judges deciding at least some of the cases included in the data set described above. Specifically, we sent the survey to fifty-three judges presently serving on the Delaware bench.<sup>55</sup> This sample included twenty-five judges who wrote opinions included in our core study database. The survey was administered on an anonymous basis to foster full and candid participation by the judges. Of the fifty-three judges receiving the survey, twenty judges responded to the survey (the “participating judges”) for a response rate of approximately 38 percent. Sixteen of the participating judges (80 percent) indicated that at least part of his or her docket included business law cases.

The survey questions asked the judges about their general use of academic scholarship in judicial opinions, and whether this use differed when deciding business law cases. The survey defined “academic scholarship” as law review or law journal articles written by full-time law faculty. The survey also sought to gain insight into how judges identify and select reference sources, such as academic scholarship, and whether judges consult or find use for these reference sources even when not cited in the judicial opinion itself.

**IV. DATA REPORT AND ANALYSES**

Our study involved many stages and distinct components. Accordingly, this Part presents the key statistical analyses in three sections. The first section concerns the 1997-2007 sample of 200 cases. Initial analyses focus on which factors predict whether the case opinion cited scholarship and, if appropriate, the amount of scholarship cited. Additionally, the analyses consider whether judges cite different types or sources of scholarship or authors more frequently than others. The second section explains how these analyses differ from the interval study that adds to the 1997-2007 sample cases dating back to 1965. The third section analyzes the judges’ survey to supplement the hard data with inside information from the individuals writing the opinions.

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<sup>55</sup> We distributed the survey to all judges serving the Delaware State Courts as of February 2009. This distribution included the Delaware Supreme Court, Court of Chancery, Superior Court, Family Court, and Court of Common Pleas. A total of fifty-three judges were identified, excluding the Chief Magistrate for the Justice of the Peace Courts.

### A. Factors Predicting Use of All Scholarship in Core Study

We sought to determine any significant relationships between the individual case factors, and whether the case cited any scholarship as defined by the nine categories.<sup>56</sup> Of the 200 cases in the core study, 92 (46 percent) cited at least one piece of scholarship. For these analyses, we ran Analysis of Variance (ANOVA) and Chi-squared statistical analyses with scholarship represented as a binary variable (0 = no scholarship; 1 = scholarship cited). In addition to tracking whether a case cited scholarship, we also considered the number of scholarship pieces cited.

Of the opinions citing scholarship, 17 percent cited one piece of scholarship; 14 percent cited two; eight percent cited three; four percent cited four; and four percent cited more than four with one case citing seventeen different pieces of scholarship. The mean number of scholarship cites was 1.13,  $SD = 1.92$ . Because of the quantitative nature of this variable, these analyses rely on not only ANOVA and Chi-squared analysis but also correlation matrices, when appropriate, to determine linear relationships between the number of scholarship citations and other quantitative variables (such as number of plaintiffs, defendants, cases and opinion pages). To more clearly present the findings, the following sections first analyze the binary (yes/no) variable then the quantitative (how much?) variable.<sup>57</sup>

#### 1a. Trends in Scholarship Use

Starting with our primary hypothesis, we found that there is no significant overall trend regarding the citation of scholarship in Delaware business law cases between 1998 and 2007 ( $p = .385$ ).<sup>58</sup> This counters previous empirical findings that showed a decrease in the use of scholarship.<sup>59</sup> We then performed post-hoc analyses, in particular the least significant difference (LSD) method, and found that the case opinions in 1998 and 2004 were significantly less likely to cite scholarship than the other years. No other differences between years emerged. However, to

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<sup>56</sup> See *supra* Part IIIA (defining nine categories of scholarship).

<sup>57</sup> In the following analyses, we generally present only the significance values ( $p$ -values) for each measure, with some occasional  $F$ -values and  $r$ -values included as necessary. Readers interested in effect sizes are welcome to contact the second author, Jason A. Cantone, for more developed statistical information on the correlations, Chi-square tests, ANOVAs, post-hoc analyses, and multiple regressions performed. In addition, the authors considered effect sizes and statistical power when assessing the interpretability of significant results.

<sup>58</sup> See *infra* Table 1.

<sup>59</sup> See McClintock, *supra* note 38.

stop at this blunt conclusion would discount the important and significant trends in scholarship that did emerge and that may aid academics interested in influencing decisional law through their scholarship.

**Table 1. Overall Scholarship Usage in 1998-2007 Sample**

Year	Cited Scholarship (# citing law reviews)	Did Not Cite	Percentage Citing Scholarship
1998	6 (4)	14	30%
1999	9 (2)	11	45%
2000	12 (2)	8	60%
2001	8 (3)	12	40%
2002	11 (1)	9	55%
2003	11 (3)	9	55%
2004	5 (2)	15	25%
2005	10 (1)	10	50%
2006	11 (4)	9	55%
2007	9 (5)	11	45%
<b>Total</b>	<b>92</b>	<b>108</b>	<b>46%</b>

Mixed results emerged regarding the court issuing the opinion. Overall, the issuing court was not a predictive factor in whether or not the opinion cited scholarship ( $p = .378$ ). However, post-hoc analyses found that significant differences did exist between individual issuing courts. For example, the twenty cases from the Superior Court of Delaware-New Castle were significantly less likely to cite scholarship than the overall case sample (only 30 percent cited scholarship, as compared to the overall average of 46 percent). No other individual court significantly differed from the overall average.<sup>60</sup>

Case opinions ranged from two to eighty-nine pages long, but case opinions featuring scholarship were significantly longer than case opinions not featuring scholarship ( $p < .001$ ).<sup>61</sup> In addition, case opinions

<sup>60</sup> Because the study looked to all courts in the state of Delaware dealing with corporate issues, some courts appeared no more than five times in the overall sample. Accordingly, additional analyses regarding the issuing court had small effect sizes and are not reported herein. While future research examining any differences between courts could randomly selected cases for each issuing court, the goal of this research—looking to the overall use of scholarship over a ten-year period (core study) and forty-year period (interval study)—is best accomplished by randomly selecting cases within the selected years.

<sup>61</sup> ( $M = 20.26$ ,  $SD = 14.87$ ); ( $M = 24.31$  pages,  $SD = 16.53$ ); ( $M = 16.82$  pages,  $SD = 12.38$ ).



featuring scholarship included significantly more cites to cases ( $M = 20.01$  cases,  $SD = 13.22$ ) than case opinions without scholarship ( $M = 12.00$  cases,  $SD = 10.18$ ) ( $p < .001$ ). This makes intuitive sense, as individual judges writing longer case opinions might also be more likely to include law review articles, journals, and cases to support his or her opinion. Whether longer case opinions demand scholarship support or whether case opinions citing scholarship tend to then become longer, is a question beyond this research but interesting to the researchers and worthy of further review through a study into *how* judges make their decisions. Whether longer case opinions citing more scholarship involve more complex issues and final decisions is, however, a question discussed *infra*.

To further analyze predictive factors, we examined the authors of the opinions. There were 35 different named authors (along with memorandum and no author mentioned opinions); nevertheless, Justice Jacobs, Chancellor Chandler, and Vice Chancellors Lamb, Strine, and Noble combined to provide 117 (59 percent) of the case opinions. Although only 45 percent of the 200 cases cited scholarship, Vice Chancellor Strine included scholarship in 71 percent of his opinions, more than any judge in the analyses. Chancellor Chandler, on the other hand, included scholarship in just 31 percent of his cases, significantly lower than the overall average. Justice Jacobs and Vice Chancellors Lamb and Noble all cited at the overall average level (53 percent, 53 percent, and 50 percent, respectively).<sup>62</sup>

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<sup>62</sup> Justice Jacobs, Chancellor Chandler and Vice Chancellor Strine serve as adjunct and visiting professors of law at several different law schools, publish articles in law reviews, and participate in academic symposia. See, e.g., William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Debate: A Mediation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067 (2002); William B. Chandler III, *Thoughts on the North Dakota Publicly Traded Corporations Act of 2007*, 84 N.D. L. REV. 1051 (2008); William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. PA. L. REV. 953 (2003); Jack B. Jacobs, *The Vanishing Substance-Procedure Distinction in Contemporary Corporate Litigation: An Essay*, 41 SUFFOLK U. L. REV. 1 (2007); Leo E. Strine, Jr., Lecture, *Human Freedom and Two Friedmen: Musings on the Implications of Globalization for the Effective Regulation of Corporate Behaviour*, 58 U. TORONTO L.J. 241 (2008); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673 (2005). For biographical information on the judges, see also Del. State Courts, *Judges*, <http://courts.delaware.gov/Courts/> (last visited Feb. 19, 2010). Their active participation with the academic community may explain in part their greater tendency to cite academic scholarship. Nevertheless, the weight to accord this correlation should be balanced by factors such as some judges who cite academic scholarship more frequently do not appear to be as active in the academic community (i.e., Vice Chancellor Noble and former Vice Chancellor Lamb) and other judges who do not cite academic scholarship as frequently do in fact publish articles

In light of the past literature, we also sought to answer whether citations to law review articles significantly changed during the 1998 to 2007 time period.<sup>63</sup> Only 13 percent of case opinions cited a law review article (either general or in a specialized journal), and 29 percent of the overall cited scholarship were law review articles. We found that law review citation patterns have not significantly changed over this time period ( $p = .557$ ).<sup>64</sup> This continues to counter past research. However, law reviews represented 40 percent of the cited scholarship in 1998 and 36 percent of the cited scholarship in 2007. The year 1998 is particularly noteworthy because it is also one of the two years (2004 being the other) where scholarship was least likely to be cited.<sup>65</sup> Thus, in 1998, case opinions particularly relied on law reviews.<sup>66</sup>

### *1b. Trends in Scholarship Amount*

We also analyzed *how much* scholarship a case opinion cited. More recent cases cited marginally more scholarship than older cases in the ten year span ( $p = .058$ ). However, post-hoc analyses found that an outlier year likely causes this marginal trend. Opinions in 2006 used significantly more scholarship than 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, and 2007.<sup>67</sup> 2006 was the only year that significantly differed from other years in the span. As such, it is not likely an overall trend for more scholarship but, rather, because of an outlier year for scholarship toward the end of our analysis period.

As with the binary scholarship variable, we found no overall significant effect regarding the issuing court ( $p = .503$ ). Interestingly,

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in law reviews themselves (e.g., Chief Justice Steele and former Chief Justice Veasey). See, e.g., Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1 (2007); E. Norman Veasey, *An Economic Rationale for Judicial Decisionmaking in Corporate Law*, 1 DEL. L. REV. 169 (1998).

<sup>63</sup> See *supra* Part III.

<sup>64</sup> See *supra* Table 1.

<sup>65</sup> The overall citation rate for academic scholarship is very low. Although this level has not changed over time, it still may cause concern for scholars who target the bench and bar in some or all of their scholarship. Nevertheless, as discussed *infra* Part V, the types of cases that use academic scholarship, as well as the indication that judges consult academic scholarship even if they do not cite it in their opinions, may provide some encouragement for these scholars.

<sup>66</sup> As with scholarship overall, case opinions that were longer ( $p < .001$ ) and cited more cases ( $p < .001$ ), cited more law review articles and neither the issuing court ( $p = .354$ ) nor the author of the opinion ( $p = .680$ ) was a significant predictor of whether the case opinion cited a law review article.

<sup>67</sup> Opinions in 2006 cite significantly more scholarship than 1998, 1999, 2000, 2001, 2004, and 2005 at the  $p < .01$  level and significantly more scholarship than 2002, 2003, and 2007 at the  $p < .05$  level.

cases decided in the Court of Chancery-New Castle averaged 1.40 pieces of scholarship,<sup>68</sup> while no other court averaged higher than .89 pieces. All seven cases in the sample that cited more than five pieces of scholarship came from the Court of Chancery-New Castle.

More scholarship was cited in longer case opinions ( $p < .001$ ) and opinions citing a larger number of cases ( $p < .001$ ), consistent with the binary scholarship variable findings. In addition, some individual judges used scholarship more frequently than others. Although the average number of pieces cited was 1.13 across all cases, Vice Chancellor Strine averaged 3.19 pieces while Chief Justice Steele averaged .64 pieces. This result is consistent with the above suggestion that Vice Chancellor Strine is more likely to use scholarship. Thus, we detected individual differences not only in *whether* a judge uses scholarship, but also in *how much*.

#### 2a. Parties Involved in Cases

The parties involved in a controversy might influence a judge's decision to cite scholarship. Accordingly, we coded and considered the identity of litigants. Opinions that cite scholarship have significantly more plaintiffs ( $p < .05$ ).<sup>69</sup> However, there is no significant difference in the number of defendants.

Whether the plaintiff, defendant, both, or neither party is a corporation or business entity does not significantly affect scholarship citation overall ( $p = .170$ ). Yet, it is interesting to note that fifty two percent of case opinions with the defendant as a corporation or business entity cited scholarship. This slips to 42 percent when both the plaintiff and defendant are corporations or business entities and to 30 percent when only the plaintiff is a corporation or business entity.

In addition, the court is marginally less likely to cite scholarship when the defendant is the moving party (37 percent cite) or both are moving parties (39 percent cite), than when the plaintiff is the moving party (49 percent cite) ( $p = .075$ ). This variable looks across all motions, including motions for summary judgment.

We then created a new interaction variable that combined who is the *corporation* and who is the *moving party* to determine whether citation patterns stem from corporate status, moving party, or an interaction of both. Cases with the defendant as a corporation or business entity and the plaintiff as the moving party were significantly more likely to cite

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<sup>68</sup>  $SD = 2.25$ .

<sup>69</sup>  $M \text{ cite} = 5.09; M \text{ no-cite} = 1.79$ .

scholarship (59 percent did  $p < .05$ ). None of the cases with the plaintiff as the corporation and defendant as the moving party cited scholarship. Thus, predicting scholarship usage should take into account both corporate status of the parties and who is the moving party.<sup>70</sup>

Focusing specifically on law review articles, case opinions that cited at least one law review article had significantly more plaintiffs ( $p < .01$ ) and defendants ( $p < .05$ ).<sup>71</sup> This is a noticeably stronger effect than for overall scholarship use. Which party is a corporation and which party is the moving party did not significantly affect whether the case opinion cited a law review article. However, thirteen (48 percent) of the case opinions citing a law review article involved the plaintiff as a shareholder or stockholder in the corporation; whereas only sixty-three (32 percent) of all cases involved a plaintiff shareholder or stockholder.

### *2b. Identity of Parties and Amount of Scholarship*

If the identity of litigants influences whether scholarship is cited, then it might also affect the amount of scholarship. While opinions citing scholarship have only marginally more plaintiffs, there is a significant correlation between amount of scholarship and number of parties, such that opinions with more plaintiffs ( $p < .001$ ) and more defendants ( $p < .05$ ) cite more scholarship. Cases with plaintiff corporations cited fewer pieces of scholarship compared to when the defendant, both parties, or neither party is a corporation ( $p < .05$ ).<sup>72</sup> The moving party and type of plaintiff or defendant did not significantly affect the amount of scholarship cited.

This result regarding plaintiffs is particularly notable because opinions in 2006 (the year that resulted in significantly more scholarship cited) also

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<sup>70</sup> We also analyzed the 135 opinions with individual, named plaintiffs to determine their role in relationship to the corporation (i.e. director, shareholder, partner, creditor) and whether particular types of plaintiffs appeared more often in opinions citing scholarship. The most common plaintiff role was shareholder/stockholder, in sixty-five (48%) of the case opinions naming an individual plaintiff. Within these cases, 46% of the opinions cited scholarship, about the overall average for all cases. No significant effects emerged regarding types of plaintiffs. Analyzing the 124 opinions with individual, named defendants, directors were the most common role, in sixty-one (49%) of case opinions naming an individual defendant. Forty-four percent of these case opinions included scholarship, again about the overall average. While only 33% of opinions with a defendant stockholder/shareholder cited scholarship, too few of these cases appeared to provide the necessary statistical sample size for further analysis.

<sup>71</sup> Plaintiffs ( $MLR = 9.67$ ;  $MNO LR = 2.30$ ); defendants ( $MLR = 6.93$ ;  $MNO LR = 4.45$ ).

<sup>72</sup> Plaintiff corporations ( $M = .46$ ,  $SD = .87$ ); defendant corporations ( $M = 1.19$ ,  $SD = 1.68$ ); both corporations ( $M = 1.20$ ,  $SD = 2.54$ ); neither ( $M = .85$ ,  $SD = 1.21$ ).

involved significantly more plaintiffs ( $p < .05$ ) and were marginally longer in page number ( $p = .064$ ). Accordingly, it appears that both the number of plaintiffs and whether the plaintiff is a corporation affect scholarship usage. Overall, the 2006 case opinions were significantly more likely to involve a breach of contract (in 40 percent of 2006 case opinions versus 24 percent of all case opinions).<sup>73</sup> As will be explained in the next section, case opinions regarding a breach of contract often include citations to relevant Restatements and treatises, which could help explain the increased use of scholarship in 2006.

### 3a. Case Controversy

The final category of data analysis involved the relationship between scholarship usage and the type of pleading filed or cause of action asserted. The most common type of motion was a motion for summary judgment, in 27 percent of the cases.<sup>74</sup> In these opinions, 54 percent cited scholarship, not significantly different from the overall average. Opinions concerning a motion to dismiss all claims (35 percent cited) and motions for preliminary injunctions (36 percent cited) were both significantly less likely to cite scholarship than the overall average ( $p < .05$ ).

To analyze cause of action, we utilized a three-tiered approach. First, to better understand cases with multiple causes of action, we recorded and analyzed the prominent cause of action in each case. Cases primarily focused on breach of contract claims were significantly more likely to cite scholarship (70 percent did). This makes sense, as breach of contract cases almost always cited the relevant Restatement or treatise. All other causes of action either showed no significant differences or did not provide enough cases for a reliable analysis.

Second, we recorded all of the causes of action involved in the case. To clarify, the first analysis considered the total number of cases (200) and

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<sup>73</sup> Cases in 2006 did not significantly differ from the other years (overall) in number of defendants, type of plaintiff or defendant, number of cases cited, which party filed the pleading, which party was a corporation, or court issuing opinion. Cases in 2006 were marginally more likely to name an individual as a party ( $p = .059$ ). See *infra* note 90 and accompanying text.

<sup>74</sup> Regarding the type of motion/action being considered, in order of frequency rank, they were: motion for summary judgment (27%), motion to dismiss all claims (19%), pleading after trial (i.e. set aside, reconsider) (17%), "other pre-trial motion" (12%), non-motion case decision (the judge decided the case itself and was not acting on a motion of any type by either party) (9%), post-trial motion (8%), and motion for preliminary injunction (6%). Motion to certify a class, motion to dismiss some claims, and "other" each represented 2% of the sample. Some motion types were not in a sufficient number of case opinions to offer a large enough effect size for effective analysis.

focused on one prominent cause of action for each; the second analysis considered each individual cause of action separately (311 total within the 200 cases).<sup>75</sup>

Sixty-eight percent of case opinions involving fraud and mismanagement issues and 63 percent of case opinions involving breach of contract cited scholarship. These causes of action were the most likely to cite scholarship. Furthermore, Chi-squared analysis found that opinions involving a breach of contract claim<sup>76</sup> were significantly more likely to cite scholarship ( $p < .001$ ).<sup>77</sup> This confirmed the first-tier and second-tier findings. Opinions including inspection right issues and discovery issues were significantly less likely to cite scholarship (38 percent and 0 percent cite, respectively; however, there were only three cases in the sample with discovery issues).

Third, given our focus on business law cases, we split the causes of action into internal affairs (e.g., corporate governance and related issues), external affairs (e.g., other business law issues), and other (e.g., non-business law issues).<sup>78</sup> No significant difference emerged based upon this distinction ( $p = .56$ ).

We then analyzed what the court decided in each opinion and for whom. Regarding what was decided, the opinion was significantly less likely to cite scholarship when the pleading was granted in full (38 percent did) or when it was denied in full (41 percent did) than when it was granted or denied in part ( $p = .053$ ). This finding hints at the fact that more complex cases with multiple issues warranting “in part” judgments might require more scholarship citation to resolve them effectively.<sup>79</sup>

The type of motion being considered, the cause of action, who the court found for, and what the court found did not significantly differ between opinions citing law review articles and those which did not.

In summary, while there is not an overall trend supporting a decline in scholarship as shown by other empirical research, our study found individual variables within the cases that significantly predict the use of

<sup>75</sup> The coders did not code all causes of action or claims asserted by the parties in the litigation. Rather, they focused on and coded those causes of action and claims that garnered substantive review by the court in the judicial decision included in the database.

<sup>76</sup> Coded 1 = includes claim; 0 = does not include.

<sup>77</sup>  $X^2(1) = 6.92$ .

<sup>78</sup> For a general discussion of the internal affairs doctrine, see Theresa A. Gabaldon, *The Story of Pinochio: Now I'm a Real Boy*, 45 B.C. L. REV. 829, 840 (2004); Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33, 44–46 (2006); see also Roe, *supra* note 7, at 596–98.

<sup>79</sup> Opinions that affirmed lower court judgments were significantly more likely to cite scholarship (sixty-four percent cited scholarship).

scholarship. It is likely that an opinion that (1) is longer in page number, (2) includes more case citations, (3) is authored by Vice Chancellor Strine, (4) features more plaintiffs, (5) involves the plaintiff as a moving party, (6) is against a defendant corporation, (7) involves breach of contract issues, and (8) affirms a lower court judgment will be most likely to cite scholarship.

We then performed a multiple regression with these eight factors. The overall model with all eight variables significantly predicted whether the case opinion cited scholarship.<sup>80</sup> However, only the number of cases cited ( $p < .01$ ) and whether the case involved a breach of contract claim ( $p < .01$ ) were significant predictors within the model.<sup>81</sup>

### *3b. Case Controversy and Amount of Scholarship*

The overall type of motion or cause of action did not significantly affect the number of scholarship pieces cited. However, as compared to the other types of motions, opinions concerning a motion for preliminary injunction cited significantly fewer pieces of scholarship.<sup>82</sup> In analyzing the primary cause of action, we followed the same three-tiered approach. First, we examined whether the primary cause of action resulted in differential use of scholarship. There was no overall effect, but breach of contract claims averaged the most pieces of scholarship.<sup>83</sup> These results add increased support that motions for preliminary injunctions were significantly less likely to cite scholarship, and breach of contract claims were significantly more likely to cite scholarship. No significant differences emerged regarding the individual causes of action or in the internal affairs doctrine split.

Additional analyses revealed that case decisions finding for the plaintiff in part cited significantly more scholarship than cases resulting in a finding for the plaintiff in full ( $p < .05$ ). No other significant differences emerged regarding the case decision. Still, the suggestion that a finding in part corresponds with significantly more scholarship contributes to the idea that more difficult cases warrant more scholarship support.

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<sup>80</sup>  $F(8, 187) = 4.00, p < .001, R^2 = .15$ .

<sup>81</sup>  $B = .308; B = .193$ . A reduced model with just these two variables also significantly predicted use of scholarship,  $F(2, 197) = 16.23, p < .001, R^2 = .14$ , and both breach of contract ( $B = .189, p < .01$ ) and number of cases cited ( $B = .327, p < .001$ ) remained individually significant. Thus, both the type of claim (breach of contract, in particular) and case citation preference of the opinion writer (in number of cases cited overall) most significantly impact the use of scholarship.

<sup>82</sup>  $M = .45, SD = .69$ .

<sup>83</sup>  $M = 1.78, S = 1.87$ .

In summary, an opinion that (1) is longer in page number, (2) includes more case citations, (3) is authored by Vice Chancellor Strine, (4) features more plaintiffs, (5) features more defendants, (6) involves breach of contract issues, and (7) finds for the plaintiff in part (as opposed to in full) will likely cite more scholarship.<sup>84</sup>

We then performed a multiple regression with these seven factors. The overall model significantly predicted whether the case opinion cited scholarship.<sup>85</sup> As with the binary scholarship variable, the number of cases cited ( $p < .001$ ) and whether the case involved a breach of contract claim ( $p < .01$ ) were significant predictors within the model, but number of plaintiffs was also an independent significant predictor in this model ( $p < .01$ ).<sup>86</sup> A reduced model with just these three variables also significantly predicted use of scholarship.<sup>87</sup>

Consequently, the type of claim (breach of contract), number of plaintiffs, and decision of the opinion writer (in number of cases cited overall) most significantly alter how much scholarship is used, while the type of claim and number of cited cases best predict overall use of scholarship. However, what about the articles themselves? What guidance do they provide regarding scholarship usage?

### *B. The Type and Source of Scholarship Cites in Core Study*

Overall, 221 pieces of scholarship were cited in the 200 cases in the core study. We then utilized set standards for defining the scholarship as doctrinal, normative, or other.<sup>88</sup> It is important to recognize that throughout this article we classify type of scholarship based on the primary focus of, or most often used approach, in the particular piece of scholarship. Admittedly, scholarship can and often does reflect more than one approach, and the lines between approaches can be blurred. We worked to account for these factors in our analysis.

<sup>84</sup> It is interesting to focus again on the 2006 case opinions, which involved significantly more scholarship. In 2006, as stated *supra* Part IV.A, case opinions were marginally longer, involved significantly more plaintiffs, and were significantly more likely to involve a breach of contract. These are three of the seven influential factors put into the multiple regression.

<sup>85</sup>  $F(7, 188) = 29.73, p < .001, R^2 = .29$ .

<sup>86</sup>  $B = .444; B = .180; B = .175$ .

<sup>87</sup>  $F(3, 197) = 25.23, p < .001, R^2 = .28$ ; breach of contract ( $B = .166, p < .01$ ); number of cases cited; ( $B = .446, p < .001$ ); number of plaintiffs ( $B = .167, p < .001$ ).

<sup>88</sup> See *supra* note 53 (definitions of doctrinal, normative, and other categories of scholarship used in coding process).



Of the 221 articles, a staggering 167 (75.6 percent) were coded as *primarily* doctrinal while 49 (22.2 percent) were *primarily* normative. Others (combined for 2.3 percent) consisted of comparative pieces, empirical interdisciplinary works, and case studies. Just as we were concerned that a case's primary cause of action does not accurately portray whether individual causes of action within the case have a significant role in scholarship usage, we also assessed whether the piece of scholarship cited had *any* doctrinal, normative, or other components that could warrant significant differences. Even this broader definition resulted in a large disparity, with 219 (99.1 percent) articles citing a doctrinal component and 63 (28.5 percent) citing a normative component.

### 1. Overview of Doctrinal/Non-Doctrinal Distinction

It is clear that opinions cite doctrinal articles more often, but do these opinions differ from those that cite normative or other scholarship types? Because of the overwhelming dominance of doctrinal scholarship, further analyses classified the type of scholarship as either doctrinal or non-doctrinal.

Using an analyses of variance (ANOVA) design, we found that cases citing doctrinal scholarship are significantly shorter ( $p < .05$ ), have significantly fewer defendants ( $p < .001$ ), cite significantly fewer cases ( $p < .001$ ), are more likely to have a corporate defendant ( $p = .051$ ) and cite scholarship pieces significantly more often within the same opinion ( $p < .05$ ) than cases citing non-doctrinal articles. Doctrinal scholarship is also more likely to be cited across every year studied ( $p < .05$ ), as compared to non-doctrinal scholarship, with the notable exception of 2006, where only 56 percent of scholarship was doctrinal. As stated above, 2006 is also the year in which significantly *more* scholarship was cited.<sup>89</sup> It appears that this increased scholarship usage resulted in not just more of the same, but also a more diverse sampling of scholarship and an increased reliance on non-doctrinal scholarship.<sup>90</sup>

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<sup>89</sup> See *supra* Part IV.A.1b.

<sup>90</sup> Notably, 2006 was an active period for the development and refinement of crucial corporate law principles. For example, the Delaware Supreme Court decided *In re the Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006), which provided extensive analysis of breach of fiduciary duty claims against corporate directors and certain other parties in litigation spanning almost ten years, and *Stone ex rel. AmSouthBancorp. v. Ritter*, 911 A.2d 362 (Del. 2006), which clarified the obligation of good faith under Delaware law, as described in *Walt Disney*, and revisited director liability for failure to monitor claims, commonly referred to as *Caremark* claims. The Delaware Chancery Court also resolved several unsettled issues, including the liability of directors for

Opinions cited doctrinal scholarship more often, regardless of the motion considered by the court ( $p < .001$ ). Among the 54 pieces of scholarship associated with cases involving a motion to dismiss, 25 (48 percent) were non-doctrinal. This is a significantly higher percentage of non-doctrinal pieces than in the other categories, such as motion for summary judgment (14 percent non-doctrinal) and non-motion case decisions (5 percent non-doctrinal). Across the causes of action, cited scholarship is significantly more likely to be doctrinal ( $p < .05$ ) but there is a more even split within the breach of duty causes of action (where 42 percent of cited scholarship is non-doctrinal).

Regarding the primary type of scholarship and the cause of action (internal affairs; external affairs; other), a marginal effect emerged ( $p = .067$ ) such that non-doctrinal scholarship was more likely to be used in internal affairs cases. Eighty-six percent of the non-doctrinal scholarship was in internal affairs cases, while 57 percent of the doctrinal scholarship was in internal affairs cases.

Individual differences among the opinion writers again emerged. Although the judges were overall more likely to use doctrinal pieces of scholarship ( $p < .01$ ), 34 (42 percent) of the pieces of scholarship cited by Vice Chancellor Strine were non-doctrinal and four (66 percent) of the pieces of scholarship cited by Judge Holland were non-doctrinal. The other thirty judges showed a significant preference for doctrinal pieces of scholarship.

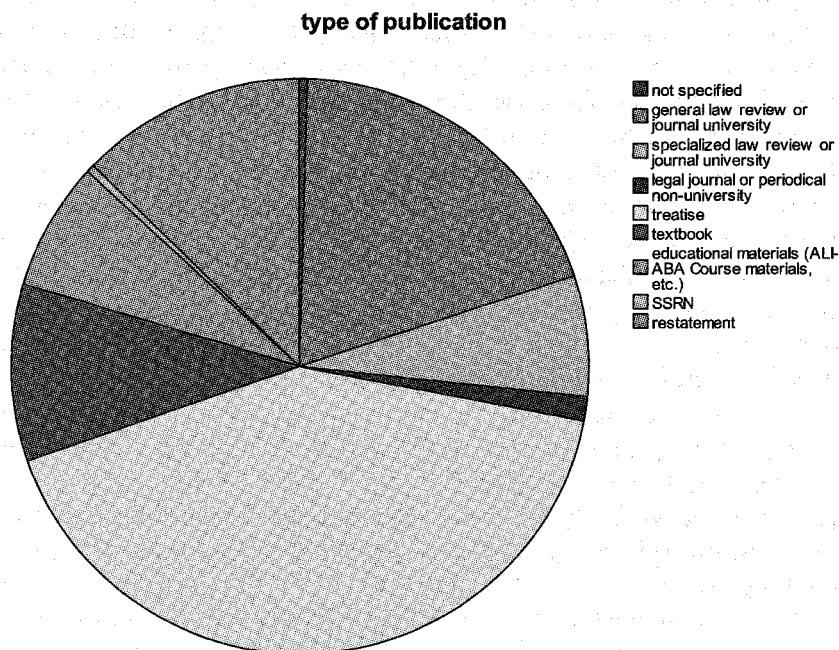
## 2. Source of Scholarship

We then examined the type of publications cited across the sample and determined that 44 (20 percent) came from a general university law review or journal, 15 (7 percent) from a specialized university law review or journal, three (1 percent) from a non-university legal journal or periodical, 92 (42 percent) from a treatise, 22 (10 percent) from a textbook, 16 (7 percent) from educational materials (e.g., ALI-ABA course materials), one (0.5 percent) from an article on SSRN, and 28 (13 percent) from a Restatement.<sup>91</sup>

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deepening insolvency claims and the interplay of state and federal law with respect to shareholders' rights to approve a sale of substantially all of a company's assets. See, e.g., *Trenwick Am. Litig. Trust v. Ernst & Young LLP*, 906 A.2d 168 (Del. Ch. 2006) (deepening insolvency claim); *Esopus Creek Value LP v. Hauf*, 913 A.2d 593 (Del. Ch. 2006) (shareholders' rights).

<sup>91</sup> See *infra* Figure 1.



**Figure 1**

The 59 law review article citations represented 39 different articles, after accounting for repeated articles. We then coded for the rank of the law review.<sup>92</sup> As opposed to expectations, the majority of law review articles cited were not from the top 10 law reviews; rather, eleven (28.2 percent) came from the top 10, seven (17.9 percent) from 11-25, six (15.4 percent) from 26-50, ten (25.6 percent) from 51-100 and five (12.8 percent) were not from the top 100 law reviews.<sup>93</sup>

Treatises are cited significantly more often than any other type of scholarship, and this is particularly true within motions for summary

<sup>92</sup> We used the combined ranking (which is the “normalized weighted combination of both the journal’s impact factor and total cites received”) from the Washington and Lee University School of Law. Washington & Lee Univ. Sch. of Law, *Law Journals: Submissions and Ranking*, <http://lawlib.wlu.edu/lj/index.aspx> (last visited Feb. 25, 2010).

<sup>93</sup> This data contradict the findings of some studies, but generally support the findings in the Lawless & David study. See *supra* notes 44-45 and accompanying text. For a general discussion of citation studies and the elite law reviews, see Ian Ayres & Fredrick E. Vars, *Determinants of Citations to Articles in Elite Law Reviews*, 29 J. LEGAL STUD. 427, 429 (2000) (“Articles in elite law reviews with few citations, however, are more likely to be of low quality.”).

judgment (33 (59 percent) are treatises) and opinions issued after trial (21 (51 percent) are treatises). Coders then determined whether the cited scholarship was in agreement, disagreement, or neither with the ultimate opinion decision. For example, if the law review article focused on how there should be no fiduciary duty in a particular type of case, but the opinion author disagreed and used the citation as a counter cite to the ultimate finding that a fiduciary duty does exist, it would be coded as "disagree." As expected, treatises were most often cited in agreement with the opinion's decision (in 82 (92 percent of the time)). General university law reviews or journals were marginally more likely to be cited *neither* in agreement nor disagreement with the opinion than the other publication types ( $p = .063$ ).<sup>94</sup>

When scholarship is cited in an opinion regarding a motion to dismiss, it is significantly more likely to be a general university law review or journal (22 (41 percent) were), as compared to all other publication types. A general university law review or journal is also the only type significantly more likely to be cited when the defendant files the pleading at issue in the opinion ( $p < .05$ ), as compared to when the plaintiff is the moving party.

Type of scholarship also significantly corresponded with the cause of action ( $p < .05$ ). This effect emerged in part because breach of contract cases were significantly more likely to cite treatises or Restatements than any other cause of action. In addition, external issues cases were significantly more likely to cite a treatise than any other publication type ( $p < .001$ ). Interestingly, all fifteen specialized university law review or journal publications and sixteen of seventeen textbook citations stemmed from opinions focused on internal affairs issues.<sup>95</sup>

Significantly longer case opinions were more likely to cite specialized university law reviews and journals ( $p < .001$ ) and cite more cases overall ( $p < .01$ ). This correlation does not presuppose the direction of the effect; again, longer case opinions might cite more cases or the need to discuss additional cases might warrant a longer opinion.<sup>96</sup>

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<sup>94</sup> No effect emerged regarding the placement of the citation (e.g. in footnote, text, both) by type of publication ( $p = .096$ ). In addition, no effect emerged regarding the purpose of the citation (e.g. background, procedure, substantive issue, tangential issue) ( $p = .283$ ) or whether an exact quote was taken ( $p = .849$ ).

<sup>95</sup> Individual differences based upon the opinion writer emerged such that Chancellor Chandler was significantly more likely to cite general university law reviews or journals than (1) any other publication type and (2) any other opinion writer, and Vice Chancellor Lamb was significantly more likely to cite a treatise than any other publication type ( $p < .001$ ).

<sup>96</sup> See *supra* Part IV.A.1a.

No publication type significantly correlated with the number of plaintiffs ( $p = .172$ ), but opinions citing specialized university law reviews and journals had significantly more plaintiffs than cases citing textbooks, educational materials, or Restatements ( $p < .05$ ). Cases citing university law reviews and journals (both general and specialized) have significantly more defendants ( $p < .001$ ) than cases citing other types of publications. These results might stem from judges using law reviews to explain more complex issues that involve significantly more parties and require significantly longer opinions to explain the opinion's finding.

### 3. *Doctrinal Versus Normative Articles*

University-based publications were significantly more likely to be normative ( $p < .001$ ). Thirty (68 percent) of the general university law review or journals and eleven (73 percent) of the specialized university law reviews or journals cited were primarily normative. Only 22 percent of the cited scholarship overall was primarily normative.

We sought to further examine the differential usage of doctrinal and normative articles, as compared to doctrinal and normative other pieces of scholarship. Of the 221 pieces of scholarship we examined, 41 (19 percent) were doctrinal articles in university-based law reviews and journals, 41 (19 percent) were normative articles in university-based law reviews and journals, 126 (57 percent) were doctrinal pieces in other publication types, and 8 (3 percent) were normative pieces in other publication types. The other types of scholarship accounted for a combined five (2 percent) of the pieces and, thus, are not further analyzed. To better understand how academics' work is utilized by the Delaware judiciary, we then created a variable of doctrinal article, non-doctrinal article, doctrinal non-article, and non-doctrinal non-article to assess relevant mean differences.

Non-doctrinal articles are cited in significantly longer opinions than cases citing doctrinal non-articles ( $p < .05$ ). Additionally, cases citing non-doctrinal articles have significantly more defendants than cases citing doctrinal articles or doctrinal non-articles ( $p < .001$ ). Opinions citing more cases were significantly more likely to cite non-doctrinal articles and non-doctrinal non-articles, as compared to doctrinal articles or doctrinal non-articles ( $p < .001$ ).

Opinions resolving motions for summary judgment and case decisions were significantly more likely to cite doctrinal non-articles, while opinions about motions to dismiss cited non-doctrinal articles and doctrinal non-articles evenly ( $p < .001$ ). Opinions overall cited doctrinal

non-articles most often, but this trend ebbs for case opinions when the pleading is granted in part, or denied in part ( $p < .05$ ).<sup>97</sup> Again, these results contribute to the possible theory that more complex cases result in more scholarship citations.<sup>98</sup> More complex cases might use articles in particular to explain novel or controversial aspects of the various issues or present different approaches to resolving those issues.

While doctrinal non-articles were significantly more likely to be cited across the ten-year period, non-doctrinal articles were more likely to be cited in the later years of the span ( $p < .01$ ). Specifically, non-doctrinal articles were significantly more likely to be cited in 2006 and 2007 than in any other year ( $p < .01$ ). Although 21 percent of the overall cited scholarship was non-doctrinal articles, they accounted for 40 percent of the scholarship cited in 2006 and 35 percent of the scholarship cited in 2007. This recent increasing trend to cite non-doctrinal articles could stem from the unique attributes of the 2006 opinions discussed *supra*. Even with this caveat, it still presents a sharp contrast to 2004 and 2005 where non-doctrinal articles constituted 25 percent and 5 percent of the overall scholarship cited, respectively. This is encouraging news for academics seeking to contribute to the resolution of business law issues in Delaware.

#### 4. *Author of Scholarship*

Additionally, we sought to examine not only *what* the courts cite but *whom* they cite. Of the 221 pieces of scholarship cited, 2 (1 percent) were written by assistant professors, 8 (4 percent) by associate professors, 27 (12 percent) by full professors, 41 (19 percent) by full named or chaired professors, 4 (2 percent) by law students, 1 (0.5 percent) by a lawyer-associate, 69 (31 percent) by a lawyer-partner, 7 (3 percent) by a judge, and 11 (5 percent) by a lawyer-unspecified. Despite intensive research, fifty-one (23 percent) of the authors did not result in a classification. Overall, it appears the opinions favor pieces written by lawyer-partners over all other groups.

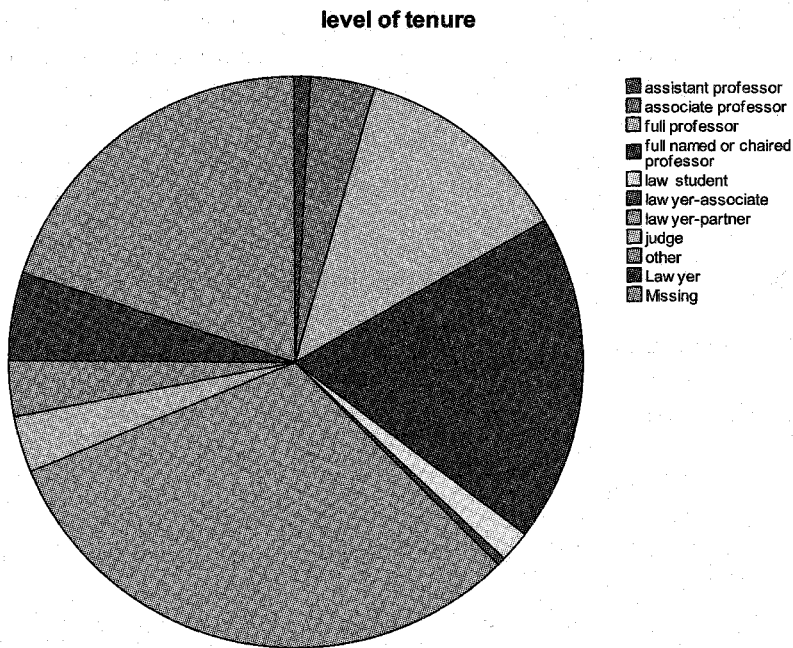
An interesting trend emerged regarding the tenure of the author. While ten (90 percent) of cited pieces written by assistant and associate professors were non-doctrinal, fifteen (55 percent) of the cited pieces

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<sup>97</sup> 13/75 = doctrinal articles; 21/75 = non-doctrinal articles; 35/75 = doctrinal non-articles; 6 = non-doctrinal non-articles.

<sup>98</sup> In addition, non-doctrinal articles were significantly less likely to agree or disagree with the decision ( $p < .001$ ) than other types of scholarship.

written by full professors were non-doctrinal, and only six (14 percent) of the cited pieces written by full named or chaired professors were non-doctrinal. The data suggest that this result relates, at least in part, to full named or chaired professors authoring well-respected treatises or textbooks that are primarily doctrinal and frequently cited by courts. It also may relate to courts seeking out doctrinal pieces by more tenured faculty. To better understand these findings, we created a new author variable that separated academic (assistant, associate, full, named professors) from practitioner (lawyer, judge) authors.<sup>99</sup>

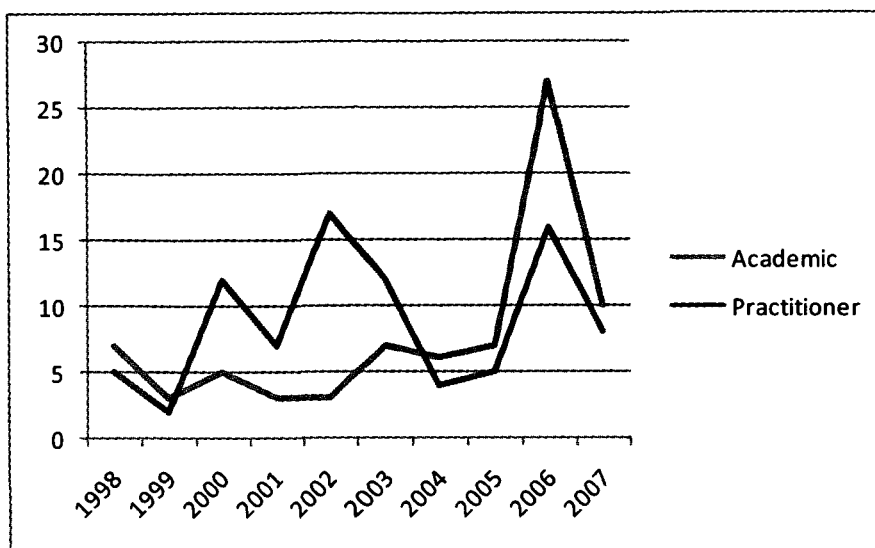


**Figure 2**

A significant trend regarding the year of the decision emerged ( $p = .022$ ), such that academic authors are significantly more likely to be cited in more recent years. For example, in 2004, 2005, 2006, and 2007, the courts were more likely to cite academic authors, while in 2000, 2001, 2002, and 2003, the courts were more likely to cite practitioner authors.<sup>100</sup>

<sup>99</sup> See *infra* Figure 2.

<sup>100</sup> See *infra* Table 2.



**Table 2. Academic and Practitioner Authored Articles Over Time**

Opinions citing pieces by academic authors contained significantly more defendants than opinions citing practitioner authors ( $p < .001$ ).<sup>101</sup> Although the articles overall were significantly more likely to be doctrinal, normative articles were significantly more likely to be written by academics ( $p < .05$ ).

As expected, academics were more likely to write articles than non-articles ( $p < .001$ ). In fact, 87 percent of scholarship pieces written by partners in law firms were doctrinal non-articles and 90 percent of scholarship pieces written by assistant or associate professors were non-doctrinal articles. Scholarship pieces by full professors were two (7 percent) doctrinal articles, fifteen (56 percent) non-doctrinal articles, and ten (37 percent) doctrinal non-articles; none were non-doctrinal non-articles. Scholarship pieces by full named or chaired professors were thirteen (32 percent) doctrinal articles, four (10 percent) non-doctrinal articles, twenty-two (54 percent) doctrinal non-article, and two (5 percent) non-doctrinal non-articles.

Furthermore, pieces by practitioner authors were more often used when the defendant was a corporation ( $p < .05$ ) than when the plaintiff was a director of the corporation ( $p < .01$ ). Regarding the type of motion

<sup>101</sup> Academic authors ( $M = 8.03$ ,  $SD = 7.13$ ); practitioner authors ( $M = 4.94$ ,  $SD = 5.01$ ).



being considered, academic authors were cited more often in motions to dismiss all claims (twenty-nine (69 percent)), while practitioner authors were cited more often in motions for summary judgment (twenty-nine (62 percent)) ( $p < .05$ ). For case outcome, court decisions for the plaintiff were significantly more likely to cite articles by practitioners, but court decisions for the defendant were significantly more likely to cite articles by academics ( $p < .001$ ). For example, 69 percent of the articles written by practitioners were included in cases finding for the plaintiff. No effect, however, emerged regarding *what* the court found (e.g., affirmed, reversed) ( $p = .89$ ).

No overall effect emerged regarding individual opinion authors ( $p = .09$ ). However, follow-up analyses showed that Chancellor Chandler was significantly more likely to cite academic authors, while other judges split their citations equally (e.g., Vice Chancellors Lamb and Strine both citing the same number of academic and practitioner-written articles). Again, the issues involved in the controversy, as opposed to the type or source of scholarship, appear to drive a judge's decision to cite scholarship.

### C. Results of Interval Study Dating Back to 1965

Prior studies regarding the use of legal scholarship are not limited to the last ten year period. Thus, to better understand the trends suggested in the core study, we performed the same analyses in an interval study dating back to 1965. As with the core study, these 157 cases were randomly selected from 1965, 1966, 1975, 1976, 1985, 1986, 1995, and 1996 using the random number generator and independent coders to assure reliability of the data. The purpose of this section is not to perform all of the above analyses *de novo* but, rather, to determine whether the trends suggested in the core study also emerge in the interval study.<sup>102</sup>

#### 1a. Trends in Scholarship Use

Of the 157 cases in the interval study, 67 (42.7 percent) cite scholarship, not significantly different from the result in the core study (that 92 of 200, or 46 percent, cited scholarship). This result continues to question previous findings regarding an overall decrease in scholarship over time. Analyzing the number of scholarship pieces cited, 19 percent cited one piece of scholarship; 13 percent cited two; 4 percent cited three;

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<sup>102</sup> As in the core study, this Part first analyzes the binary (yes/no) variable and then the quantitative (how much?) variable. See *supra* Part IV.A.

1 percent cited four; 4 percent cited five; and 2 percent cited six or more, including one opinion citing fourteen different pieces of scholarship. The mean number of scholarship cites was 0.96, lower, but not significantly different from the 1.13 average in the core study.<sup>103</sup>

Case opinions in 1995 were significantly less likely to cite scholarship (only 21 percent did) than the other years. In addition, case opinions in 1966 were significantly more likely to cite scholarship (with 65 percent citing scholarship). While this trend seems to support prior empirical studies about the decrease in scholarship, there was no significant trend over the entire interval period ( $p = .196$ ). In fact, these two years might be outliers, as the years in the study surrounding 1966 cited scholarship significantly less than in 1966 (45 percent of opinions in 1965 and 38 percent of opinions in 1975).

The issuing court made a difference in whether scholarship was cited in the interval study ( $p < .01$ ). Case opinions from the Supreme Court of Delaware were significantly more likely to cite scholarship (69 percent did, as compared to the overall average of 43 percent), as compared to any other court. Only 32 percent of the opinions from the Court of Chancery-New Castle cited scholarship. These two courts combined to provide 124 (or 79 percent) of the overall cases in the sample. Accordingly, we lacked a statistical power to analyze all of the issuing courts.

Case opinions ranged from two to twenty-nine pages long.<sup>104</sup> As in the core study, case opinions featuring scholarship were significantly longer than case opinions not featuring scholarship ( $p < .01$ ), and case opinions citing scholarship also cited significantly more cases than opinions not citing scholarship ( $p < .01$ ).<sup>105</sup> Case opinions in the interval study were significantly shorter and cited significantly fewer cases than those in the more recent years in the core study (where the average case opinion was just over twenty pages and cited more than fifteen cases).

Overall, the 27 individual opinion authors did not differentially cite scholarship in the interval study ( $p = .883$ ). This is a smaller number of different authors than in the core study (with thirty-five different authors) but also a more widespread distribution of authorship; no author in the interval study provided more than nine opinions to the sample.<sup>106</sup>

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<sup>103</sup>  $SD = 1.74$ .

<sup>104</sup>  $M = 9.70, SD = 5.10$ .

<sup>105</sup>  $M = 10.93, SD = 6.01; M = 8.80, SD = 4.09; M = 3.31, SD = 2.26; M = 1.99, SD = 1.19$ .

<sup>106</sup> While not statistically interpretable due to the low sample size, it is of note that Chancellor Chandler cited scholarship in half (2 of 4) of his opinions in the interval period, slightly above the overall

Although some empirical authorities suggest that past years were the hey-day of legal scholarship from law reviews, cases at least in the business law context have not significantly changed their usage of law review articles over time. As with the core study, law reviews are neither the most cited nor most relied on type of scholarship.

### *1b. Trends in Scholarship Amount*

When looking to *how much* scholarship a case opinion cited, no overall trend emerged ( $p = .818$ ). The core study showed a marginally significant effect likely caused by an outlier year, but no year in the interval study provided significantly more or less scholarship cited than in any other year.

As with the binary scholarship variable, there was a significant effect regarding the issuing court ( $p < .05$ ), likely here because opinions from the Supreme Court of Delaware are significantly more likely to cite at least one piece of scholarship. In addition, opinions citing more scholarship were longer ( $p < .001$ ) and cited more cases ( $p < .001$ ), consistent with the findings for the binary variable in the interval study and both the binary and quantitative findings in the core study. Again, the opinion author did not overall significantly affect the amount of scholarship used.

### *2a. Parties Involved in Cases*

We then considered the parties involved in the controversy. The number of plaintiffs and defendants did not impact whether scholarship was cited ( $ps = .30, .21$ , respectively). In addition, it did not matter if the defendant or plaintiff was a corporation or business entity ( $p = .11$ ) or which party filed the pleading in dispute ( $p = .19$ ).<sup>107</sup>

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average. In the core study, Chancellor Chandler was the one author who cited scholarship significantly less often.

<sup>107</sup> We also analyzed the type of plaintiffs and the type of defendants involved. While the type of plaintiffs did provide a significant effect ( $p < .05$ ), the small effect size associated with this finding ( $r = .009$ ) and the small number of cases with each type of plaintiff hinder any reports of statistical significance. As in the core study, shareholder/stockholders were the most common type of individual plaintiff, in 77 of 112 (69 percent) cases with a named plaintiff. The type of defendant also provided a significant effect in the interval study ( $p < .05$ ) but, again, corresponded with a very small effect size ( $r = .003$ ). As in the core study, the most common type of named defendant was a director, in 44 of the 83 (53 percent) cases with a named defendant.

### *2b. Identity of Parties and Amount of Scholarship*

Case opinions citing more scholarship had significantly more plaintiffs and more defendants in the core study, but no significant effects emerged in the interval study regarding the number of plaintiffs ( $p = .474$ ) or defendants ( $p = .724$ ). Furthermore, whether the plaintiff, defendant, both, or neither party was a corporation or business entity provided no effect ( $p = .572$ ), nor did the identity of the moving party ( $p = .954$ ).

Analyzing the type of plaintiff suggested that case opinions with plaintiffs as shareholders/stockholders cited significantly more scholarship ( $p < .001$ ). This result is limited by the fact that 77 of the 112 named, individual plaintiffs across the interval study were shareholders/stockholders. The next most common types of individual plaintiffs were director and purchaser, plaintiffs in 5 case opinions each. A similar effect emerged regarding the type of defendant ( $p < .001$ ), with the high proportion of defendant directors biasing the statistical effect.

### *3a. Case Controversy*

No significant relationship between the type of motion and scholarship usage emerged. The most common type of motion was a pleading after trial (such as motion for reconsideration or to set aside the judgment), which appeared in 18 percent of the opinions. The second most common type was a motion for summary judgment, in 15 percent of the cases. These two types of motions cited scholarship in 48 percent and 46 percent of cases, respectively. These results are not significantly different from the overall average of 43 percent.<sup>108</sup> Opinions which decided the case itself, and did not concern a motion, were significantly less likely to cite scholarship, at 32 percent of cases. Motions to dismiss all claims and motions for preliminary injunctions did not differ from the overall average, as they did in the core study.

As in the core study, we utilized a three-tier approach to analyze cause of action. However, no significant effects emerged. While it is of note that breach of contract cases were more likely to cite scholarship (64 percent did), only eleven of the overall cases concerned breach of contract issues.

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<sup>108</sup> In the core study, pleadings after trial were in a similar 17% of the case opinions studied. However, 27% of the core study case opinions concerned motions for summary judgment, about twice as high as the proportion in the interval study.

We then analyzed the impact of the court's decision (both what was decided and for whom). The party that the court found for did not significantly impact the use of scholarship, but what was decided did provide a significant effect, ( $p < .05$ ) such that opinions affirming a lower court's opinion were significantly more likely to cite scholarship (65 percent), and motions or complaints granted in part and denied in part were significantly less likely to cite scholarship (29 percent). This result regarding affirmations is in line with the core study but the latter is in direct opposition. In the core study, opinions were significantly more likely to cite scholarship when the decision was to grant or deny in part. Here, the opposite is true.

After closer inspection, the data suggest that, in the core study, 147 (73.5 percent) of case decisions were for the plaintiff or defendant in full, while 38 (19 percent) were for the plaintiff or defendant in part. The remaining 15 decisions were for some, but not all defendants or plaintiffs, or for neither party. The interval study provided similar findings, such that 123 (78.3 percent) of case decisions were for the plaintiff or defendant in full and 22 (14 percent) were for the plaintiff or defendant in part, with the 12 remaining cases for some, but not all defendants or plaintiffs, or for neither party. While it warrants closer scrutiny, this result might stem from the fact that, in the core study, case decisions were more likely to grant the pleading in full than to deny the pleading in full (in 37 percent of overall core study opinions vs. 23 percent). However, in the interval study, case decisions were more likely to deny the pleading in full than grant the pleading in full (in 34 percent of overall interval study opinions vs. 26 percent). This shift in case decisions could correspond with a shift in the use of scholarship to support such decisions.<sup>109</sup>

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<sup>109</sup> Several commentators suggest that Delaware courts are sensitive to the political and economic environment in rendering decisions. Some attribute this sensitivity to Delaware's desire to remain a prominent national authority on corporate law and, consequently, to fend off jurisdictional competition from the federal government and other states. For a thoughtful analysis of those and related issues, see Roe, *supra* note 7, at 617-27. For example, Professor Roe notes: "In the early 1980s, Delaware was looked upon suspiciously as a state in which to incorporate: 'Corporate lawyers recommended against Delaware incorporation ... [because] Delaware's judiciary was too 'moralistic'.'" Roe, *supra* note 7, at 617 (citations omitted). Professor Roe then describes various events occurring in the 1980s and 1990s, such as "creeping federal preemption" and developments in takeover law and corporate privatization, that arguable influenced the Delaware courts' approach to business law cases. *Id.* at 617-27. The courts' varying use of scholarship in "in part" decisions observed between the core and interval studies may relate to this sensitivity and a conscious or unconscious move to invoke scholarship in more complex disputes.

### *3b. Case Controversy and Scholarship Amount*

Regarding the type of motion, cause of action, and amount of scholarship cited, no overall effect emerged ( $p = .88$ ;  $p = .21$ ). As in the core study, follow-up analyses found that breach of contract claims cited an average of 1.45 pieces of scholarship, higher than the the overall average of 0.96 pieces.<sup>110</sup> No significant differences emerged regarding the individual causes of action or in the internal affairs doctrine split.

No significant effects emerged regarding *whom* the court found for ( $p = .942$ ). Opinions finding for the plaintiff in part cited significantly *less* scholarship than opinions finding for the plaintiff in full ( $p < .05$ ). Regarding *what* was decided, cases affirming an earlier court's decision cited significantly more scholarship than the average, and when the court granted the motion in part, and denied the motion in part the court cited significantly less scholarship ( $p < .05$ ).<sup>111</sup> These findings confirm the results regarding if scholarship was cited in the interval study but, again, contradict the core study results that cases finding for the plaintiff in part cited the most scholarship.

#### *D. The Type and Source of Scholarship Cites in Interval Study*

Overall, the 157 opinions in the interval study cited 150 pieces of scholarship. Of the 150 articles, 139 (93 percent) were coded as primarily doctrinal, while 7 (5 percent) were primarily normative and 4 (2 percent) were case studies. This is a significantly higher percentage than the already staggering 76 percent of scholarship coded as primarily doctrinal in the core study. We again coded to see whether the piece of scholarship had any doctrinal or normative components and found that all 150 pieces had a doctrinal component, while 17 (11 percent) had a normative component.<sup>112</sup>

##### *1. Overview of Doctrinal/Non-Doctrinal Distinction*

The large number of doctrinal scholarship pieces in the interval study prohibits some analyses even if we coded all scholarship into either

<sup>110</sup>  $SD = 1.57$ ;  $SD = 1.74$ .

<sup>111</sup>  $M = 1.92$ ;  $M = 0.63$ .

<sup>112</sup> As explained in the context of the core study, our classification of type of scholarship focused on the primary or more prevalent approach used in the scholarship but recognized the potential for multiple and often overlapping approaches in any particular piece of scholarship.

doctrinal or non-doctrinal.<sup>113</sup> ANOVA analyses found that doctrinal scholarship appears marginally more often in longer case opinions and case opinions citing marginally more cases.<sup>114</sup> Cases with fewer defendants are more likely to feature doctrinal scholarship ( $p < .001$ ).<sup>115</sup> These findings all confirm results from the core study. However, as opposed to the findings in the core study, cases with corporate defendants are not more likely to feature doctrinal scholarship ( $p = .453$ ).

More recent opinions were significantly more likely to cite normative scholarship ( $p < .01$ ). This effect is likely due to an outlier year, 1986, where “only” 71 percent of scholarship cited (17 of 24) was doctrinal.<sup>116</sup> No other year had less than 90 percent of cited scholarship classified as doctrinal.

Again, doctrinal scholarship was more likely to be cited across all motions considered by the court, but motions for preliminary injunctions were significantly less likely to cite doctrinal scholarship (only 61 percent did (11 of 18)), as compared to the overall (93 percent average) ( $p < .01$ ). In addition, 70 percent of opinions resolving motions to dismiss all claims featured doctrinal scholarship. These findings are particularly notable because non-doctrinal scholarship appeared *only* in cases focused on these types of motions. They also support the data in the core study suggesting that cases involving motions to dismiss rely more heavily on academic scholarship.<sup>117</sup>

Across the causes of action, non-doctrinal articles were significantly more likely to appear in cases focused on fraud or mismanagement (50

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<sup>113</sup> Accordingly, these analyses will include the  $F$ -values as well as the  $p$ -values for better interpretation of the results. However, for additional detailed findings included  $F$ -values and effect sizes, interested readers are encouraged to contact the authors.

<sup>114</sup>  $F(1, 148) = 3.13, p = .078; F(1, 148) = 3.43, p = .066$ .

<sup>115</sup>  $F(1, 146) = 12.71$ .

<sup>116</sup> Similar to 2006 discussed in the core study, the Delaware courts addressed several complex cases in 1986 that might account for the reliance on more non-doctrinal scholarship. See *supra* note 68. For example, the Delaware Supreme Court decided *Revlon, Inc. v. Macandrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986) and the Delaware Chancery Court decided *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584 (Del. Ch. 1986), and *Katz v. Oak Industries, Inc.*, 508 A.2d 873 (Del. Ch. 1986). Each of these cases involved complex fiduciary duty issues and, in each of these cases, the court cited academic scholarship. See, e.g., *Katz*, 508 A.2d at 879 (Chancellor Allen discusses the fiduciary duty of directors to pursue the objectives of shareholders and questions whether that pursuit is really done “at the expense” of bondholders, noting the “deeper implications of consent in the establishment of legal norms and citing new academic articles) (citing Richard Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Robin West, *Authority, Autonomy and Choice: The Rule of Consent in the Moral and Political Vision of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985)).

<sup>117</sup> See *supra* Parts IV.B.1-2.

percent, four of eight were non-doctrinal) ( $p < .001$ ). However, no effect emerged regarding breach of contract cases, as it did in the core study. There were also no significant trends regarding the author of the opinion.

### 2. *Source of Scholarship*

Regarding the type of publication, sixteen (11 percent) came from a general university law review or journal, seven (5 percent) from a specialized university law review or journal, three (2 percent) from a non-university legal journal or periodical, ninety (60 percent) from a treatise, five (3 percent) from a textbook, eleven (7 percent) from educational materials (e.g., ALI-ABA course materials) and eighteen (12 percent) from a Restatement. These numbers are fairly consistent with the core study findings, with a greater reliance on treatises and a lesser reliance on textbooks in the interval study.

Although treatises are cited significantly more often than any other type of scholarship, this is particularly true within opinions issued after trial (27 (77 percent) are treatises) and in non-motion case decisions (eight (73 percent) are treatises). Treatises were cited in agreement with the opinion's decision less in the interval study (in 71 percent of cases citing a treatise) as compared to the core study (in 92 percent of cases citing a treatise).<sup>118</sup> Type of scholarship did not have a significant effect regarding the cause of action ( $p = .103$ ), but, as in the core study, breach of contract cases cited treatises or Restatements almost exclusively.<sup>119</sup>

As in the core study, specialized university law reviews and journals and general university law reviews and journals were significantly more likely to appear in longer cases ( $p < .001$ ) and cases citing more cases overall ( $p < .01$ ), as compared to any other publication type. Non-university business journals and periodicals were more likely to be cited in cases with a larger number of plaintiffs ( $p < .01$ ), while non-university journals and periodicals were more likely to be cited in cases with a larger number of defendants ( $p < .001$ ).

### 3. *Doctrinal Versus Normative Articles*

As in the core study, general university law reviews or journals were significantly more likely to be normative ( $p < .001$ ) (44 percent were

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<sup>118</sup> No effect of publication type emerged regarding who brought the pleading.

<sup>119</sup> Breach of contract cases cited a treatise ten times, a Restatement four times, and educational materials one time.



primarily normative). No other type of publication provided more than one primarily non-doctrinal piece of scholarship. This heavy reliance again focused on the use of treatises and Restatements. To split up the pieces of scholarship into the doctrinal article, non-doctrinal article, doctrinal non-article, and non-doctrinal non-article categories from the core study would not provide sufficient sample size for interpretable results. However, the results thus far in the interval study offer support for the core study finding that case opinions in more recent years are more likely to include non-doctrinal pieces of scholarship, again good news for academics seeking to offer legal academia more normative works.

#### 4. *Author of Scholarship*

We additionally sought to examine not only *what* the courts cite, but *whom* they cite. Of the 150 pieces of scholarship, 93 of the scholarship pieces had discernible authors. Of these, two (2 percent) were written by assistant professors, one (1 percent) by associate professors, 13 (14 percent) by full professors, 31 (33 percent) by full named or chaired professors, seven (8 percent) by law students, three (3 percent) by a lawyer-associate, 26 (28 percent) by a lawyer-partner, three (3 percent) by a judge, and two (2 percent) by a lawyer-unspecified. While the core study favored lawyer-partners over all other groups, the interval study preferred more established professors and lawyers.

The interval study confirmed the core study results regarding author tenure. While three (100 percent) pieces of scholarship written by assistant and associate professors were non-doctrinal, only two (5 percent) of the cited pieces written by full professors and full named or chaired professors were non-doctrinal. This is an even stronger finding than in the core study.

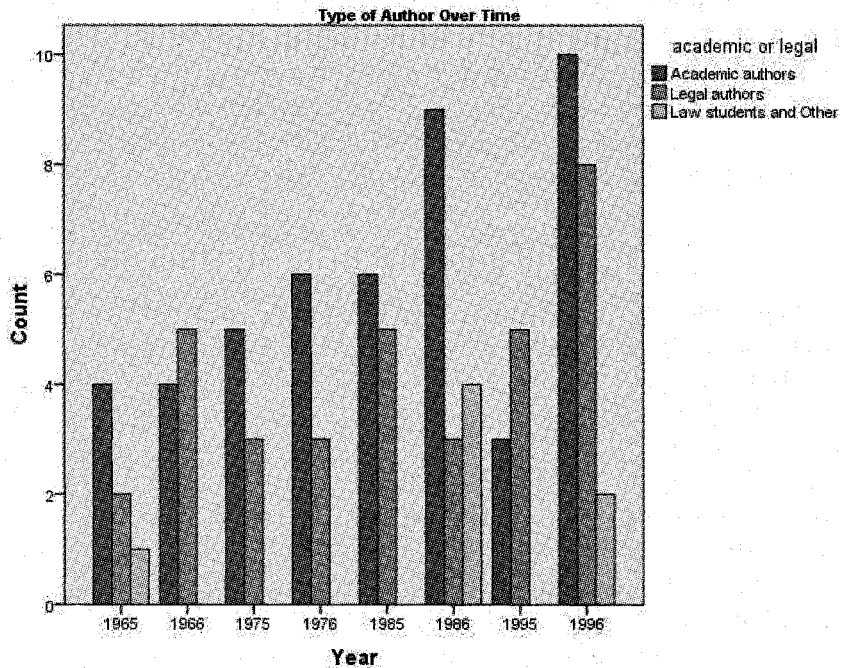
To better understand these variations, we created a new author variable that separated academic (assistant, associate, full, named professors) from practitioner (lawyer, judge) authors. A third category was created for the law student and “other” authors. As opposed to the core study results, type of author did not significantly predict scholarship type ( $p = .393$ ). However, as shown in Table 3, there is a noticeable trend of increasing academic authorship over time, with the exception of 1995.<sup>120</sup> This trend is particularly noticeable in 1986, where 56 percent of articles were written by academic authors, while only 19 percent were written by

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<sup>120</sup> See *infra* Table 3.

legal authors. The remaining 25 percent were either from law students or authors who fit neither category.

**Table 3. Academic and Practitioner Authored Articles Over Time**



As in the core study, opinions citing pieces by academic authors involved more defendants than opinions citing legal practitioner authors ( $p < .01$ ).<sup>121</sup> It might be that more complex cases with more defendants require the opinion writers to search through more academic articles and go beyond the usual suspects of academia and legal practitioners. Still, there was only a marginal effect of author on length of case opinion ( $p = .071$ ) and no effect on the number of plaintiffs ( $p = .23$ ) or the total number of cases cited ( $p = .23$ ).

The core study found that pieces by academic authors were less used when the defendant was a corporation, but this effect was not significant in the interval study. However, opinions focused on motions for preliminary injunctions were significantly less likely to cite academic authors, as compared to other types of motions (38 percent of scholarship in these opinions came from academics, 38 percent from legal

<sup>121</sup>  $M = 5.51, SD = 6.78; M = 4.76, SD = 3.99.$

practitioners, and 25 percent from those outside either category ( $p < .01$ ). Final case decision (for *whom*) did not correspond with authorship of the scholarship ( $p = .25$ ), as it did in the core study. Opinions with motions granted in full were marginally more likely to cite scholarship by legal practitioners ( $p = .07$ ), and motions granted in part and denied in part were significantly more likely to cite scholarship by academic authors ( $p < .05$ ). It could be that more difficult cases with more complex decisions are more likely to rely on academic scholarship.

### *E. Results of Judges' Survey*

To better understand the opinions and experiences of the Delaware judiciary, we first present the frequency results of the survey in order. We then explore these results to determine whether the respondent's experience impact the answers.

When asked if they cite academic scholarship in their judicial opinions, five (25 percent) judges stated they did not, while seven (35 percent) stated they did in 10 percent or fewer of cases, seven (35 percent) stated they did in 11-50 percent of cases, and one (5 percent) stated he or she did in 51-75 percent of cases.<sup>122</sup> When asked if they rely on academic scholarship to reach holdings, seven (35 percent) judges said they did not, while eight (40 percent) said they did in 10 percent or fewer of cases, and five (25 percent) said they did in 11-50 percent of cases.

Slightly more (sixteen or 80 percent) judges stated they consulted academic scholarship in researching or considering legal issues than those who stated they cited academic scholarship (fifteen or 75 percent), or relied on academic scholarship to reach holdings (thirteen or 65 percent). Of these, eight (40 percent) stated they consulted academic scholarship in 10 percent or fewer of cases, five (25 percent) in 11-50 percent of cases, one (5 percent) in 51-75 percent of cases, and two (10 percent) in more than 75 percent of cases.<sup>123</sup>

When asked if their citation or use of academic scholarship has changed over time, fifteen (75 percent) of respondents reported no

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<sup>122</sup> A significant effect emerged such that those who have served *less* time on the bench cite academic scholarship less frequently ( $p < .05$ ). A significant effect also emerged regarding secondary use of scholarship, such that more experienced judges are more likely to use academic scholarship to provide support for a new legal standard ( $p < .05$ ).

<sup>123</sup> When asked to identify a *primary* reference source (other than case law, statutes, or controlling authority), nine (45%) chose Restatements, two (10%) chose practitioner-written articles, one (5%) chose judge-written articles, four (20%) chose academic-written articles, and four (20%) chose none of the above.

material change, while three (15 percent) reported increased usage, and one (5 percent) reported decreased usage. One (5 percent) did not answer.

### 1. *How and Why Scholarship Is Used*

The survey sought to identify how judges identify relevant scholarship. In response to this question, five (25 percent) of respondents said the *primary* source was their own research, ten (50 percent) stated it was in research by their law clerks, two (10 percent) said it stemmed from briefs submitted by the parties, and two (10 percent) reiterated that they did not use academic scholarship.<sup>124</sup> It also asked judges to identify their primary purpose for citing scholarship. In response to this question, nine (45 percent) stated it is to provide background on legal issues raised in the case, four (20 percent) stated it explains existing legal standards applicable to substantive legal issues, three (15 percent) stated it provides support for resolving a split in judicial authority, and one (5 percent) stated it provides support to create a new legal standard.<sup>125</sup> The indication that judges use academic scholarship for background or informative purposes corresponds to the data in the core study suggesting that general university law reviews were more likely to be cited in the context of the opinion writer neither agreeing, nor disagreeing with the cited proposition.<sup>126</sup>

The survey then provided respondents with different types of academic scholarship, and respondents identified sources that would be considered “most helpful.” Three (15 percent) selected scholarship that primarily explains existing legal standards, ten (50 percent) selected scholarship that explains existing legal standards and then analyses and raises issues with those standards, seven (35 percent) selected comparative scholarship, seven (35 percent) selected scholarship with a historical analysis of legal issues, three (15 percent) selected empirical scholarship, two (10 percent) selected scholarship that analyzes existing legal standards

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<sup>124</sup> One (5%) did not answer. When asked the *secondary* source of academic scholarship, six (30 %) stated their own research, five (25%) said research by law clerks, one (5%) stated discussion with academics on legal issues, and five (25%) stated briefs submitted by the parties. Again, two (10%) re-iterated they did not use scholarship and one (5%) did not answer.

<sup>125</sup> Three (15%) stated they did not use academic scholarship. When asked to identify a secondary purpose, six (30%) stated it provides background, six (30%) stated it explains existing legal standards, two (10%) stated it provides support to resolve a split, two (10%) stated it provides support to create a new legal standard, and two (10%) stated they do not use academic scholarship.

<sup>126</sup> See *supra* note 94 and accompanying text.

but primarily discusses alternatives to those standards, one (5 percent) selected scholarship primarily discussing legal theory, one (5 percent) selected interdisciplinary scholarship, and three (15 percent) found none of these types helpful. These results correspond to the data in the core study suggesting that courts invoke primarily doctrinal scholarship or doctrinal scholarship with a normative component.<sup>127</sup>

## 2. *The Decision to Consult*

When asked what factors affect the decision to consult academic scholarship, nine (45 percent) selected the tenure and reputation of the author, five (25 percent) selected solely the reputation of the author, ten (50 percent) selected the reputation of the source, and seven (35 percent) selected none of these factors.<sup>128</sup> When asked what factors affect the decision to consult practitioner scholarship, five (25 percent) selected the position (e.g. partner, of counsel) and reputation of the author, five (25 percent) selected solely the reputation of the author, eight (40 percent) selected the reputation of the source, and nine (45 percent) selected none of these factors. Notably, the judges' survey suggests a greater emphasis on source reputation than the data in the core study.<sup>129</sup> Nevertheless, consistent with the core study, author tenure/position and reputation are important factors.<sup>130</sup> This slight difference may suggest disagreement between sources viewed as reputable by the bench and bar and those viewed in a similar vein by academics.<sup>131</sup>

Thirteen (65 percent) of respondents stated that they did not find articles written by practitioners more useful than those written by academics. However, those who stated they did find practitioner articles to be more useful stated such things as "often, academic articles are written for other academics rather than for the legal profession generally" and that practitioner articles are "more likely to focus on [the] issue at

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<sup>127</sup> See *supra* Part IV.B.

<sup>128</sup> Interestingly, post-hoc analyses revealed that judges who have served less time on the bench are more likely to consider the reputation of the author and the publication source in deciding whether to cite scholarship.

<sup>129</sup> See *supra* Part IV.B.2.

<sup>130</sup> See *supra* Part IV.B.4.

<sup>131</sup> Similarly, disagreement may exist regarding what constitutes quality or relevant scholarship. For a thoughtful and interesting study of the reputational value of corporate scholarship citations, see Peter B. Oh, *Taking Empirical Stock of the Best Corporate and Securities Articles* (Univ. of Pittsburgh Legal Studies Research Paper Series, Working Paper No. 2009-16, 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1400238](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400238).

hand” and be “less esoteric and theoretical.”<sup>132</sup> The sentiments expressed by the judges in the survey may support the general conclusion above regarding differences in sources viewed as reputable by judges versus academics.<sup>133</sup>

Twelve (60 percent) of respondents stated that they did not find articles published by specialty law reviews or journals more useful than those in general law reviews or journals. Those who did find specialty law reviews or journals more useful said this is because they “are more timely,” “assist in addressing specific application,” and have a “more in depth and relevant” discussion.<sup>134</sup> The judges’ statements in support of using specialty law reviews correspond to the data in the core study suggesting that such law reviews were cited in cases dealing with internal affairs issues, which generally include corporate governance and stakeholder disputes that can raise very timely and complex legal issues.<sup>135</sup>

Finally, seventeen (85 percent) of respondents stated they did not use academic scholarship any differently in business law cases than in other opinions. One respondent who stated otherwise said it is because “business law cases tend to present more cutting edge issues.”<sup>136</sup>

### 3. Business Law Issues on Courts’ Dockets

Four (20 percent) of those surveyed reported that none of the cases on their docket involve business law issues. Of the 80 percent who do hear business law cases, six (30 percent) hear these issues in 10 percent or fewer cases, eight (40 percent) in 11-50 percent of cases and two (10 percent) in 75 percent or more cases.<sup>137</sup>

A significant effect emerged regarding the identification of academic scholarship by law clerks for the respondents’ purpose, such that law

<sup>132</sup> *Judges’ Survey* (on file with authors).

<sup>133</sup> *See supra* Part IV.B.2.

<sup>134</sup> *Judges’ Survey* (on file with authors).

<sup>135</sup> *See supra* Part IV.B.2.

<sup>136</sup> *Judges’ Survey* (on file with authors).

<sup>137</sup> Most cases involving business law issues in Delaware are decided by the Delaware Supreme Court, the Delaware Court of Chancery, and the Delaware Superior Court. *See supra* notes 58–62 and accompanying text. This description of the Delaware courts corresponds to the cases in the study database. For example, in the core study, 124 (62 percent) case opinions were from the Court of Chancery- New Castle, with 20 (10%) from the Superior Court of Delaware- New Castle, 17 (9%) from the Supreme Court of Delaware, 11 (6%) from the Superior Court of Delaware-Kent, 9 (5%) from the Court of Chancery-Sussex, 8 (4%) each from the Court of Chancery-Kent and Court of Common Pleas of Delaware, 2 (1%) from the Superior Court of Delaware-Kent, and 1 (0.5%) from the Court of Common Pleas-Sussex.

clerks are more likely to identify academic scholarship for judges with a *lower* percentage of business law issues on the docket. Thus, academic scholarship might be seen as more relevant and helpful to law clerks on non-business issues, warranting future research. A significant effect also emerged where judges with 75 percent or more business law cases are most likely to see academic scholarship through submitted briefs, those judges with no business law issues, or 11-50 percent of cases with business law issues, are most likely to identify academic scholarship through law clerks' research and those judges with 10 percent or less of cases with business law issues are evenly likely to identify relevant scholarship through law clerks or their own research ( $p < .01$ ).

No overall effects emerged regarding the factors affecting the decision to consult academic or practitioner scholarship. However, post-hoc analyses regarding the use of practitioner scholarship found that those who see business issues in 11-50 percent of their cases are significantly more likely to rely on the position (e.g. partner, of counsel) and reputation of the author ( $p < .05$ ) than those who see business law issues in 75 percent or more of their cases.

## V. GENERAL OBSERVATIONS

Overall, the data contain good and bad news for corporate scholars. On the one hand, the data show no general downward trend in the courts' use of legal scholarship in the business law context. This is particularly good news given prior studies that suggest at least some usage decline.<sup>138</sup> On the other hand, the number of judicial decisions invoking legal scholarship is remarkably small. As discussed above, only 46 percent of the cases in the core study database cite any legal scholarship, and only 13 percent cite academic scholarship.<sup>139</sup>

Moving beyond citation counts, the data produce useful information regarding when and how courts use legal scholarship.<sup>140</sup> This information highlights factors that may help scholars better understand when courts find it helpful to use academic scholarship as opposed to purely doctrinal sources, such as treatises and Restatements. For example, academic scholarship is cited more frequently in longer opinions that involve more parties, review more extensive case law, and result in an "in part" decision

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<sup>138</sup> See *supra* Part II.

<sup>139</sup> See *supra* Part IV.A.1a.

<sup>140</sup> See *supra* note 26 (discussing weaknesses in citation studies).

(i.e., finding only in part for the moving party).<sup>141</sup> A reasonable inference from this data is that courts rely on academic scholarship in more complex litigation. This conclusion is also supported by the fact that courts cite more academic scholarship in the motion to dismiss context, which often involves disputed governance issues between the corporation, its board and its shareholders.<sup>142</sup> These cases can raise both complex and novel issues that would compel a judge to look beyond the applicable treatise.<sup>143</sup>

Similarly, the data suggesting that courts turn to specialty law reviews in these types of complex, corporate governance cases underscore the motivation of courts using academic scholarship when a doctrinal recitation of applicable law is insufficient.<sup>144</sup> As with the prior study performed by Lawless and David in the bankruptcy context, the courts' use of specialty law reviews in business law cases is likely enhanced by the number of specialty law reviews devoted to business law issues.<sup>145</sup> Notably, the data does not suggest a move by courts addressing business law issues to specialty law reviews in lieu of general law reviews (or any other type of scholarship for that matter).

Although the data from the judges' survey largely complements the data from the core study, some of the narrative responses suggest a lingering concern that academic scholarship is disconnected from the issues raised in practice.<sup>146</sup> The courts' willingness to use scholarship in certain circumstances, however, indicates a continuing role for scholars who wish to write for that audience. In fact, the growing presence of specialty law reviews may assist these scholars because judges who have observed a disconnect between academic and practical work also noted the contribution of specialty law reviews to the discipline.<sup>147</sup> This inference likely confirms the existing suspicion of scholars who target publication in specialty law reviews for that very reason.

Another noteworthy observation is the relation between the data in the judges' survey indicating judges' willingness to consult academic scholarship, even if they do not cite it in the resulting opinion, and the data in the core study showing citation to academic scholarship in a

<sup>141</sup> See *supra* Part IV.B.2.

<sup>142</sup> See *supra* Part IV.B.2.

<sup>143</sup> See also *supra* note 90 and accompanying text (discussing the increased citation of scholarship in 2006 and the corresponding complex nature of the business litigation decided by Delaware courts that year).

<sup>144</sup> See *supra* Part IV.B.4.

<sup>145</sup> See Lawless & David, *supra* note 5, at 523-24.

<sup>146</sup> See *supra* Part IV.E.

<sup>147</sup> See *supra* Part IV.E.



neutral context.<sup>148</sup> The realization that courts are not frequently relying on academic scholarship to reach their holdings may be disheartening for some scholars, but it does evidence the informative role that academic scholarship can play.<sup>149</sup> The court may not necessarily agree with the conclusion or proposal of the scholar, but the reasoning and analysis contained in the article may still inform the court's decision.

### CONCLUSION

Overall, our data suggest that courts addressing primarily business law issues do reference academic scholarship, but they do so selectively and on an as-needed basis. This finding is consistent with the following general observation by Judge Thomas Ambro:

When do [judges] want help from an article? The answer: when an issue is difficult. The desire for "outside" help becomes altogether acute when the briefs underperform. It is here that articles often give the best guideposts for decision. But even assuming the briefs (including those of *amici curiae* counsel) are well-crafted, tough issues come freighted with doubt. To dispel that doubt, we leave no reputable source of information unreviewed.<sup>150</sup>

Moreover, our data did not detect any declining trends in the courts' use of scholarship over either the ten-year period included in the core study or the forty year period included in the interval study. This finding may relate in part to the somewhat controlled nature of the types of disputes included in the study and, as a result, the nature and scope of secondary sources relevant to those disputes. It also may stem from the

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<sup>148</sup> See *supra* Parts IV.B.2, IV.E.

<sup>149</sup> This data also correspond with anecdotal evidence that Delaware courts are in touch with academic scholarship and positions articulated by corporate scholars. For example, in *Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009), the Delaware Supreme Court held that corporate officers owe the same fiduciary duties to shareholders as corporate directors. This position was strongly endorsed by Professors Lyman Johnson and David Millon in several articles pre-dating the *Gantler* decision. See, e.g., Lyman P. Q. Johnson & David Millon, *Recalling Why Corporate Officers are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1601-02 (2005); see also Usha Rodrigues, Posting to *Delaware Supreme Court: Officers Are Fiduciaries*, The Conglomerate (Jan. 30, 2009), <http://www.theconglomerate.org/2009/01/delaware-supreme-court-officers-are-fiduciaries.html> (suggesting that the *Gantler* decision vindicated the work of Professors Johnson and Millon).

<sup>150</sup> Ambro, *supra* note 48, at 549.

small and relatively constant group of judges issuing the decisions. Notably, these judges appear to be relying on academic scholarship more frequently as the issues they face become increasingly more novel and complex.

Although interesting, the results of the study may not be surprising to those who research and write in the corporate law discipline. As disclosed above, our primary hypothesis was based in part on the knowledge that corporate scholars can and do target a fairly identifiable bench and bar in their scholarship and have done so with some success.<sup>151</sup> Nevertheless, the study confirms those suspicions and uncovers factors that influence the courts' use of scholarship. In addition, the data suggest that the courts' use of scholarship in other specialized disciplines may not or need not follow the downward trend of general citation studies, warranting additional research.

Corporate scholars who desire to influence decisional law should not be discouraged by general citation studies. Many cutting-edge issues—i.e., issues that make for interesting scholarship and likely would encourage a judge to turn to secondary sources—arise in the Delaware state courts or one of the several other states that have specialized business courts. Moreover, given the recurring corporate scandals and ever-increasing complexity of the global business economy, the trend toward more complex business law cases and, in turn, greater reliance on academic scholarship evidenced by the study likely will continue. In fact, the landscape appears to be primed for more meaningful collaboration among all involved in the corporate law discipline.

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<sup>151</sup> See *supra* Part III.