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JUDGES AND SCHOLARS: DO COURTS AND SCHOLARLY JOURNALS CITE THE SAME LAW REVIEW ARTICLES?

DEBORAH J. MERRITT* AND MELANIE PUTNAM**

Fred Shapiro’s updated compilation of The Most-Cited Law Review Articles demonstrates that legal scholarship commands respect—or at least high citation rates—among other legal scholars.\(^1\) An attention-getting article will attract hundreds of academic citations during its lifetime. Indeed, the most-cited articles may garnish the footnotes of close to a thousand other articles. Legal academics maintain a healthy appetite for the works of other legal scholars.

Outside academia, the reputation of legal scholarship is not as glossy. Several appellate judges have denounced contemporary legal scholarship as increasingly irrelevant to the bench and bar. Judge Laurence Silberman of the United States Court of Appeals for the District of Columbia Circuit complained in a recent opinion that “many of our law reviews are dominated by rather exotic offerings of increasingly out-of-touch faculty members.”\(^2\) Connecticut Supreme Court Justice Ellen Peters concurs that “there is an increasing divergence between the theoretical interests of the aspiring academic lawyer and the pragmatic interests of the successful practitioner.”\(^3\) These

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\(^{3}\) Ellen A. Peters, Reality and the Language of the Law, 90 YALE L.J. 1193, 1193 (1981). See also Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 MICH. L. REV. 34, 42 (1992) (“The growing disjunction between legal education and legal practice is most salient with respect to scholarship. There has been a clear decline in the volume of ‘practical’ [legal] scholarship.”); Judith S. Kaye, One Judge’s View of Academic Law Writing, 39 J. LEGAL EDUC. 313, 320 (1989) (“I am disappointed not to find more in the law reviews that is of value and pertinence to our cases . . . . The concern that academics are writing for each other is indeed well founded.”); Patricia M. Wald, Teaching the Trade: An Appellate Judge’s View of Practice Oriented Legal Education, 36 J. LEGAL EDUC. 35, 42 (1986) (“Too few
judicial expressions of distaste for legal scholarship mirror broader concerns that a "chasm" has emerged "between the legal academy and the real world of practice and public policy." 4

Shapiro's new collection of The Most-Cited Law Review Articles provides an important opportunity to explore the perceived breach between legal scholars and judges. Shapiro identifies the law-related articles most frequently cited in legal and social science journals. Do judges find the same articles cite-worthy? Or would a list of the most frequently referenced articles in judicial opinions look far different from Shapiro's lists?

This article complements Shapiro's research by identifying the ten articles published in each of three recent years (1989-1991) that reaped the most judicial citations. After presenting these lists, we offer some preliminary comparisons between the 1989-1991 articles most frequently cited by judges and the articles published during the same years most favored by academics. Our comparisons are quite preliminary; the limited sample size precludes extensive statistical analysis or firm conclusions. Our tentative observations, however, raise intriguing questions about differences between the articles most cited by judges and those most referenced by academic scholars. We hope these findings will pave the way for more extensive comparisons of citation patterns in judicial opinions and scholarly journals.


These criticisms are not entirely new. In 1936, Fred Rodell bade Goodbye to Law Reviews, 23 VA. L. REV. 38 (1936), complaining that law reviews focused on esoteric topics such as "The Rule Against Perpetuities in Saskatchewan," id. at 42, and that "the only consumers of law reviews outside the academic circle are the law offices, which never actually read them but stick them away on a shelf for future reference." Id. at 45.
Citation studies, as Shapiro and others have recognized, have limited aims. The articles included on our lists are not necessarily the “best” or “most useful” articles published in recent years. They are not even necessarily the works that judges themselves would name as the most influential. Our focus on most-cited articles may obscure patterns that would emerge if we examined citations to articles earning smaller citation totals among scholars or judges.

Our comparison affords only one window on the citation preferences of judges and academics; researchers must combine that perspective with other measures to assay the nature of any divide between courts and the academy.

I. Method

We used Shepard’s Law Review Citations to identify the ten articles published in each of three recent years (1989-1991) that earned the most judicial citations. Shepard’s traces citations to articles published in almost 170 different law reviews, representing most accredited law schools and all regions of the country. Citations to these

5. Shapiro, Revisited, supra note 1, at 753-54; Joseph Goldstein, Commentary, 100 Yale L.J. 1485 (1991); Fred R. Shapiro, The Most-Cited Law Review Articles, 73 Cal. L. Rev. 1540, 1543-44 (1985) [hereinafter Shapiro, Most-Cited].

6. Our research, like Shapiro’s work, omits citations to treatises and other books. Judicial citations to some books far exceed citations to even the most frequently referenced articles. A search of the LEXIS MEGA library, for example, revealed that state and federal courts cited various editions of Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law, almost 300 times between 1989 and 1994. Similarly, state and federal courts cited the first or subsequent editions of Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment more than 1700 times during those six years. During the same time period, the most-cited article on our lists elicited only 45 judicial citations.

In addition to this obvious omission, citation studies provide only a rough outline of scholarly influence. Some writers do not cite articles that profoundly influenced their thinking, while others reference works they have never read. See, e.g., Wade H. McCree, Jr., Partners in a Process: The Academy and the Courts, 37 Wash. & Lee L. Rev. 1041, 1043 (1980); Olavi Maru, Measuring the Impact of Legal Periodicals, 1976 Am. B. Found. Res. J. 227, 230 n.13.

7. We note below, for example, that our lists of the most-cited articles in judicial opinions include only one article discussing any form of sex or race discrimination—despite the fact that articles on these topics figure prominently on Shapiro’s lists of recent articles most often cited in scholarly journals. See infra note 50 and accompanying text. The paucity of articles focusing on sex or race discrimination among the recent articles most cited by the courts might reflect two very different patterns: (1) that judges rarely cite any recent articles discussing sex or race discrimination; or (2) that judges cite a wide array of articles in this field, and no one article has garnered enough citations to reach the most-cited list.

8. In addition, care must be taken in attempting to generalize our lists of articles most cited by judges to other segments of the practicing bar. We counted only citations to law review articles in judicial opinions—and most of those opinions stemmed from appellate courts. The articles most frequently cited by appellate judges may differ from the sources trial judges, courtroom litigators, corporate counsels, and other members of the practicing bar find most useful.

9. The 1990-1995 bound supplement in this Shepard’s series, which provided most of our data, lists citations to articles from 167 distinct journals.
articles are gathered from all federal and state court reporters, as well as from other articles published by the same law reviews.\textsuperscript{10} No other source systematically collects citations to law review articles in judicial opinions.\textsuperscript{11}

All three of our lists are current through the 1990-1995 \textit{Shepard's} bound supplement; they include citations in judicial opinions issued through roughly the third quarter of 1994.\textsuperscript{12} These three lists are analogous to Shapiro's "top ten" lists for articles published in 1989, 1990, and 1991, and we draw several comparisons between Shapiro's inventories and our own findings. To facilitate comparison between the two sets of top-ten lists, we reproduce Shapiro's lists below and note the number of judicial citations for each of the articles on his lists.\textsuperscript{13} Conversely, we recorded the number of law review citations documented by \textit{Shepard's} for all of the articles on our three top-ten lists.

Our 1989-1991 lists differ from Shapiro's lists in at least one important respect: while we drew our lists from \textit{Shepard's}, Shapiro worked primarily from the \textit{Social Sciences Citation Index} ("\textit{SSCI}").\textsuperscript{14} These two sources trace citations to articles drawn from somewhat different pools of journals. \textit{Shepard's} includes almost 170 legal periodicals, while \textit{SSCI} encompasses only about 100 of those journals.\textsuperscript{15} \textit{SSCI}, on the other hand, includes over one thousand social science

\textsuperscript{10} See \textit{Shepard's Law Review Citations} at viii (4th ed. 1990-95 Supp.) (listing publications used to gather citations).

\textsuperscript{11} It is possible to collect citations to an individual article using an electronic database of judicial opinions, but collecting citations in that manner for the entire universe of law review articles would be inordinately time-consuming. We used electronic searches to supplement some of our findings, see infra notes 17-21 and accompanying text, but necessarily relied upon \textit{Shepard's} for most of our data.

\textsuperscript{12} See \textit{Shepard's Law Review Citations}, supra note 10 at viii (listing reporters covered by that volume). In counting citations for our lists, we eliminated duplicate citations to the same judicial opinion appearing in two or more reporters. We also attempted to eliminate multiple citations to the same article appearing on different pages of the same judicial opinion, although we counted citations to an article appearing in different opinions (such as a majority and dissent) in the same case separately. \textit{Shepard's} itself apparently attempts to winnow these duplicate citations; we found relatively few instances of multiple citations within the same judicial opinion.

\textsuperscript{13} A few of the articles on Shapiro's lists appeared in journals that are not tracked by \textit{Shepard's Law Review Citations}. We used \textit{LEXIS} searches to identify judicial citations to each of these articles.

\textsuperscript{14} The lists also cover slightly different citation periods. As noted above, our lists count citations appearing in court opinions through about the third quarter of 1994. See supra note 12 and accompanying text. Shapiro, on the other hand, indicates that his lists count \textit{SSCI} citations through May 1995. \textit{SSCI} is updated weekly, so Shapiro's totals are somewhat more current than ours are.

\textsuperscript{15} See Shapiro, \textit{Revisited}, supra note 1, at 755.
journals that *Shepard's* makes no attempt to embrace, as well as a few prestigious law reviews arbitrarily excluded from *Shepard's*.16

To test the importance of this difference in our databases, and to determine how likely courts were to cite articles from journals omitted from *Shepard's*, we used LEXIS to gather judicial citations to all twenty-five articles mentioned by Shapiro that did not appear in *Shepard's*.17 These articles garnered surprisingly few judicial citations. Ten never have been cited by the courts, and four others possess only a single judicial citation. Among articles published since 1982, only two have reaped more than one court citation, and the most-cited of these has appeared only five times in judicial opinions.18 Neither of these articles would have appeared on our most-cited lists.19

It is possible that courts have cited repeatedly to other articles falling outside *Shepard's* ambit; we may have missed one or more articles that would qualify for our most-cited lists. The low judicial citation rate for the prominent articles identified by Shapiro, however, suggests that *Shepard's* coverage of articles favored by courts is relatively complete.20 Therefore, we feel comfortable comparing Shapiro's lists of the 1989-1991 articles most cited in scholarly journals with our own lists of 1989-1991 articles most cited by courts.21


17. Most of these articles appear on one of Shapiro's most-cited lists. For completeness, however, we also tested six articles that Shapiro mentions but excluded from his own study. *See id.* at 756.


19. Some older articles excluded from *Shepard's* and identified by Shapiro have accumulated a larger total of citations over their lifetimes. R.H. Coase's 1960 analysis of *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1961), for example, has been cited thirty-eight times in the courts. The article's first judicial citation, however, did not occur until 1968. Other frequently cited articles experienced similar delays before obtaining judicial citations. *See infra* notes 39-42 and accompanying text. Even these articles, therefore, probably would not have appeared on a list of articles most cited by courts within six years after their publication—the largest time-frame we tested for articles published between 1989 and 1991.

20. Earlier editions of *Shepard's* apparently excluded student works. *See Shapiro, Most-Cited, supra* note 5, at 1545 n.26. The 1990-95 supplement providing data for our study, however, included student works. Indeed, two student pieces appear on our most-cited lists. *See infra* notes 83-85 and accompanying text.

21. The varying scope of *Shepard's* and *SSCI* also affects the sources from which those citators cull citations. *Shepard's* traces scholarly citations in the same 170 journals it indexes, while *SSCI* includes citations in over two thousand social and natural science journals. On our lists of the articles most cited by courts, we note law review citations as reported by *Shepard's*. To facilitate comparison of those totals with the citation totals reported by Shapiro, we report the number of journal citations in both "law reviews" (drawn from *Shepard's*) and "SSCI"
II. THE 1989-1991 ARTICLES MOST CITED BY THE COURTS

Tables 1-3 display the articles published in 1989, 1990, and 1991 that received the most judicial citations through the third quarter of 1994. The tables also show the number of citations each article accumulated in other law review articles (as measured by Shepard's). The tables suggest that courts cite law review articles at a relatively low rate. The 1989-1991 article most frequently cited by the courts has gathered only forty-five judicial citations, while a mere seven judicial citations qualified an article for our "most cited" list of 1990. In contrast, the most-cited article on Shapiro's 1989-1991 lists has reaped almost two hundred citations in scholarly journals, and articles needed at least forty-five journal citations to qualify for any of Shapiro's recent most-cited lists.

The difference in citation rates among judges and academic authors is particularly striking because courts publish so many more opinions—and thus offer more opportunities for citation—than law reviews publish articles. The higher number of scholarly citations may reflect the tendency of law review writers to burden their articles sources (as reported by Shapiro) for the articles on Shapiro's lists. For articles on Shapiro's lists that do not appear in Shepard's, we searched for law review citations on LEXIS. These searches do not duplicate precisely Shepard's coverage, but are reasonably similar.

The citation totals culled from Shepard's and SSCI usually follow a similar pattern, with the number of law review citations somewhat lower than the number of SSCI citations. A few articles, however, have been much more widely cited in the social science literature than in law reviews (at least as chronicled by Shepard's), while other works have reaped more citations from traditional law reviews than from the journals tracked by SSCI. Kimberlé Crenshaw's 1989 article on "Demarginalizing the Intersection of Race and Sex," for example, has been even more widely cited in the law reviews covered by Shepard's than in the social science journals listed in the Social Sciences Citation Index. Kimberlé Crenshaw. "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," 1989 U. CHI. LEGAL F. 139 (1989). Crenshaw's article, with 93 SSCI citations, ties for seventh on Shapiro's list of the most-cited articles of 1989. If the articles on Shapiro's list were reordered according to their law review citations (as reflected in Shepard's), Crenshaw's article would rank second, with 136 citations. Conversely, Catherine MacKinnon's 1991 article "Reflections on Sex Equality Under Law," 100 YALE L.J. 1281 (1991), has been more widely cited in SSCI journals than in the law reviews covered by Shepard's. With 55 SSCI cites, MacKinnon's article ties for fourth place on Shapiro's 1991 list. If the articles on that list were rearranged according to their law review citation totals, MacKinnon's article would drop to ninth place (with 35 citations).

24. The LEXIS MEGA library contains 186,258 judicial decisions issued in 1994, while the LAWREV library includes only 7,012 law review articles published that year. Both of these figures include sources that Shepard's does not track: the MEGA library contains unpublished judicial opinions and orders, while the LAWREV library includes almost 100 more journals than Shepard's. The raw numbers, however, indicate the magnitude of difference between the number of law review articles and judicial opinions published each year.
with "a camouflaging layer of detailed documentation" or "overwhelming collections of minutiae"—pennants that have elicited strong criticism. Courts, on the other hand, may cite law review articles less frequently than they cite other types of authority; several studies have documented both this phenomenon and a recent decline in the number of judicial citations to law reviews. The relatively low citation totals earned by even the most-cited law review articles in judicial opinions are consistent with these findings.

The fact that courts cite law review articles less frequently than scholars cite those materials does not necessarily mean that academic writing lacks influence in the courts. Judges and academic writers may

The average law review article probably is longer than the typical judicial opinion; we did not attempt to compare the number of pages (and trees) devoured by judges and scholars each year. Additional pages allow more opportunities for citation. This difference, however, is closely related to the rhetorical differences between judicial opinions and law review articles discussed in text.


28. See, e.g., Lawrence M. Friedman, et al., State Supreme Courts: A Century of Style and Citation, 33 STAN. L. REV. 773, 795, 812 (1981) (between 1960 and 1970, 97.1% of state supreme court opinions cited at least one prior case, while only 12% cited any law review articles); William H. Manz, The Citation Practices of the New York Court of Appeals, 1850-1993, 43 BUFF. L. REV. 121, 126, 140 (1995) (the New York Court of Appeals cited an average of 11.5 sources in the text of each 1993 opinion, but only an average of .39 law review articles in the text of each opinion; citation of law review articles declined from .57 in 1990 to .39 in 1993); Sirico & Margulies, supra note 4, at 134 (the Supreme Court cited law reviews 963 times between 1971 and 1973, but only 767 times from 1981 through 1983); Louis J. Sirico, Jr. & Beth A. Drew, The Citing of Law Reviews by the United States Courts of Appeals, 45 U. MIAMI L. REV. 1051-52 (1991) (only ten percent of federal court of appeals opinions issued during 1989 cited a law review article; more than half of those opinions contained just a single reference to a law review article); Bart Sloan, Note, What Are We Writing For? Students Works as Authority and Their Citation by the Federal Bench, 1986-1990, 61 GEO. WASH. L. REV. 221, 230-31 (1992) (estimating that only between 0.74% and 1.25% of federal district court, court of appeals, or Supreme Court opinions contain citations to student-authored law review works).

Any recent decline in judicial citations to law reviews, however, follows a massive increase in those citations between 1900 and 1990. See, e.g., Wes Daniels, "Far Beyond the Law Reports": Secondary Source Citations in United States Supreme Court Opinions, October Terms 1900, 1940, and 1978, 76 LAW LIBR. J. 1, 6 (1983) (Supreme Court opinions rendered during the 1900 Term included only 1 citation to a legal periodical; by the 1940 Term, the number of citations to legal periodicals rose to 35; by the 1978 Term, the number climbed to 343); Friedman, et al., supra, at 812 (percentage of state supreme court opinions citing law reviews rose from an average of 4% between 1945 and 1955 to 12% for the decade 1960-1970); Manz, supra, at 139-40 (New York Court of Appeals citations to law reviews rose from an average of .15 cites per opinion in 1970 to .57 in 1990); Peter H. Schuck, Legal Complexity: Some Causes, Consequences, and Cures, 42 DUKE L.J. 1, 38 n.150 (1992) (citation of law review articles in judicial opinions rose 59% between 1960 and 1985) (citing unpublished empirical work of Michael J. Saks).
use citations for different purposes. Scholars consider themselves part of an academic community in which dialogue with other researchers is highly valued; frequent references to other works prove that a scholar is engaged with the literature and help locate the new contribution within that scholarship.\textsuperscript{29} Courts, on the other hand, are more likely to use citations as rhetorical devices, employed only when the citation itself adds persuasive authority to the court’s opinion.\textsuperscript{30} In other words, scholars may cite works they have barely read, while courts may be influenced by articles they do not cite.\textsuperscript{31}

Table 4 shows the distribution of judicial citations for each of our most-cited articles among six categories of courts: military courts, federal bankruptcy courts, federal district courts, federal courts of appeals, the United States Supreme Court, and state courts. State court totals marked with an asterisk derive from the courts of a single state; other “state” totals are spread among two or more states.

This table reveals that the articles most cited by judges achieve citations among a variety of courts. Twenty-six of the thirty articles on our lists recorded citations in more than one of our six judicial categories. Two-thirds of the articles earned citations in at least three categories, and one-third obtained citations in four different categories. Contrary to some previous predictions, the majority of articles heavily cited by judges qualify for their status by accumulating citations from diverse courts—rather than generating large citation totals from a single court.\textsuperscript{32}

\textsuperscript{29} See, e.g., Herma H. Kay, In Defense of Footnotes, 32 ARIZ. L. REV. 419, 426 (1990) (“The only thing that is important is who cites whom. If you’re cited, that means you’re identified as a player in the game: a scholar of significance.”).

\textsuperscript{30} For a discussion of citations as rhetorical devices, see G.N. Gilbert. Referencing as Persuasion, 7 SOC. STUD. OF SCI. 113 (1977); see also Friedman, et al., supra note 28, at 814-17 (speculating that state supreme courts cite law review articles to buttress doctrinal changes, but otherwise prefer case citations as more authoritative); Charles A. Johnson, Citations to Authority in Supreme Court Opinions, 7 LAW & POL’Y 509, 510-11 (1985) (discussing the theory that courts use citations to confer “legitimacy” on their decisions); Chester A. Newland, The Supreme Court and Legal Writing: Learned Journals as Vehicles of an Anti-Antitrust Lobby?, 48 GEO. L.J. 105, 142 (1959) (concluding that Supreme Court Justices cited law reviews in antitrust cases “to support a view which [the Justice] had arrived at more or less independently of the reasoning in the source referred to”); Sirico & Drew, supra note 28, at 1053 (claiming that judges may cite law reviews rarely because they believe “that legal periodicals offer authority far inferior to that of case law and therefore merit citation only rarely”).


\textsuperscript{32} On the other hand, four articles qualified for our list by obtaining citations exclusively from state courts—and three of those received citations from the courts of a single state. Another article reaped most of its citations from federal bankruptcy courts, although it also obtained one citation from a state court. We discuss these results further below. See infra notes 52-57 and accompanying text.
Table 4 underscores the importance of both state courts and the federal courts of appeals in citing the most frequently referenced articles. State courts generated 252 (57%) of the citations gained by the thirty articles on our lists, while the federal courts of appeals accounted for another 105 (24%) of those citations. Together, these sources accounted for more than four-fifths of the citations recorded on our lists.

The United States Supreme Court, conversely, was relatively unimportant in selecting articles for the most-cited list. That Court spawned only fourteen citations to articles on our lists—less than the number of citations contributed by the federal bankruptcy courts. The federal district courts also yielded relatively few citations, just over ten percent of the citations on our list.

Much of this discrepancy stems from gross differences in the number of opinions published within each judicial category. The United States Supreme Court decides fewer than two hundred cases by full opinion each year,33 while the federal courts of appeals publish almost 7,000 opinions each year,34 and state courts generate well over 100,000 opinions each year.35 The most-cited law review articles appear in a higher proportion of Supreme Court opinions than court of appeals opinions36—but still receive a smaller number of citations from the Supreme Court.

These differences should not obscure the most dominant pattern in table 4, that highly cited articles achieve citations across a spectrum of courts. Separate lists of highly cited articles could be collected for

33. During the 1992 Term, the Court issued full opinions in 111 argued cases, and 4 per curium opinions. L. Ralph Mecham, ANN. REP. OF THE DIRECTOR OF THE ADMIN. OFFICE OF U.S. COURTS, Judicial Business of the United States Courts, 1993, at App. I Table A-1 [hereinafter ANNUAL REPORT]. Supreme Court Justices also author dissents from denials of certiorari and opinions denying or granting applications for stays. These opinions offer some additional opportunities for citation of law review articles. Even with these additions, the number of cases generating Supreme Court opinions is unlikely to exceed 300 each year.

34. Id. at Table S-3 (reporting 6,732 published opinions during the twelve months ending September 30, 1993). The courts issued an additional 18,955 unpublished opinions during the same year. Id. Almost 16,000 of those contained some statement of the court’s reasoning, id., but Shepard’s does not track those unpublished opinions so we have omitted them from our analyses.

35. A LEXIS search of the COURTS file in the STATES library counted 113,427 state opinions issued during 1994. Some of those LEXIS documents may be unpublished opinions, and some may be simple orders rather than full opinions, but the number provides a rough estimate of the number of citation opportunities in state court opinions each year.

36. According to the numbers reported supra notes 33-34 (and using the high estimate of 300 Supreme Court opinions offering opportunities for citation), articles from our lists appear in 4.67% of Supreme Court opinions, but only 1.56% of published court of appeals opinions.
different courts; the majority of articles on our lists, however, achieved citations from an impressive variety of judicial sources.

III. Comparing the Most-Cited Articles in Judicial Opinions with the Most-Cited Articles in Scholarly Journals

Our three “most cited” lists are analogous to the lists Shapiro developed for the 1989-1991 law review articles most cited in scholarly journals. To facilitate comparison of the two sets of lists, tables 5-7 reproduce Shapiro’s 1989-1991 lists. These tables include the number of SSCI citations reported by Shapiro, the number of law review citations documented by Shepard’s, and the number of judicial citations counted by Shepard’s. Articles appearing on both our lists and Shapiro’s lists are printed in boldface in tables 1-7.

The composition of these lists differs dramatically. Only five of the thirty articles on our three lists also appear on Shapiro’s lists. Some of the most-cited articles in scholarly journals, moreover, receive very few citations in the courts. Twelve of the thirty-one articles on Shapiro’s three lists never have been cited in a judicial opinion, although each of these articles has garnered over fifty scholarly citations—and some have attained well over one hundred citations in other articles. More than two-thirds of the articles most cited in scholarly journals have received no more than a single judicial citation.

Conversely, two of the articles most frequently cited by courts have received no scholarly citations. One of these is a student note on DNA Profiling, the other is an article on Worker’s Compensation. Eleven of the most-cited articles in judicial opinions (more than one-third of the total) have received fewer than ten scholarly citations, and eighteen (almost two-thirds of the total) have accumulated fewer than twenty references in other articles. Given the large number of scholarly citations to the most-cited articles on Shapiro’s lists, these are surprisingly low totals.

Some of these differences may reflect the recent vintage of the articles we studied. The differences between the two 1989 lists appear smaller than the differences between the 1990 or 1991 lists. Three of the 1989 articles most cited by courts also appear on Shapiro’s most-cited list for that year. Only one of the articles on Shapiro’s 1989 list

lacked any judicial citations, and half of his 1989 articles had achieved more than one court citation by 1995. It is possible that some law review articles, especially those addressing novel issues or presenting new theoretical frameworks, first find favor with other academics and later influence judicial opinions.

We found some support for this hypothesis when we tested articles excluded from Shepard's for judicial citations. R.H. Coase's leading 1960 article on The Problem of Social Cost did not gather any judicial citations for the first eight years after its publication, although it gained forty-three scholarly citations in journals indexed by SSCI during that period. The article earned just one judicial citation during the 1960s, and only five more judicial citations during the 1970s (a total of just six judicial citations over two decades), but was cited in at least 630 scholarly articles during the same twenty years. Coase's work finally achieved judicial popularity during the 1980s, winning twenty judicial citations during that decade. Several other prominent articles enjoyed similarly delayed recognition in the courts.

If these judicial citation patterns are common among articles frequently cited in scholarly journals, then differences between articles of the same vintage that are most cited by judges and scholars would

39. In contrast, five of the articles on Shapiro's 1990 list lacked any court citations, and only three of those articles had achieved more than a single judicial citation. Six of the articles on Shapiro's 1991 list lacked any judicial citations, and only one of those articles had been cited by more than one court.

40. See supra notes 17-19 and accompanying text.

41. Shepard's does not index the Journal of Law and Economics, so it is impossible to trace references to Coase's work through that source.

42. Alexander Meiklejohn's 1961 article, The First Amendment is an Absolute, 1961 Sup. Ct. Rev. 245, received no judicial citations during its first five years; six judicial citations during the next five years; and nine judicial citations during the following five years. The article was more heavily cited among academics from its initial publication, gaining at least 17 citations in scholarly journals during the first five years after publication; 42 additional citations during the next five years; and another 77 academic citations during the following five years. Harry Kalven, Jr.'s 1964 article, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, followed a similar pattern: 4 judicial citations during the first five years; 12 citations during the next five years; and 10 citations during the next five years. By contrast, the article received 71 citations in academic journals during the first five years after publication. The citation totals for both Meiklejohn and Kalven in academic journals probably underestimate their total number of citations, because the figures are based on SSCI, which indexes a relatively small number of law reviews. See supra note 15 and accompanying text.

See also Manz, supra note 28, at 141 ("[O]lder articles are cited in considerable numbers" in opinions of the New York Court of Appeals. "Almost one-fifth of the works cited in [1991-1993] was [sic] over twenty-five years-old."); Sirico & Drew, supra note 28, at 1055-56, 1056 n.23 (52% of citations to law reviews in U.S. court of appeals opinions were to articles published more than five years previously; 29% of those citations were to articles more than 10 years old); Sloan, supra note 28, at 238-39 (one-third of judicial citations to student works were to works that were more than six years old, while one-quarter of those citations were to works more than 4 years old).
decline over time. The data analyzed here comprise too small a population to test this theory, but it is an intriguing possibility for future exploration.

Even accounting for the possibility that popular, scholarly articles elicit judicial citations after a time lag, the difference between our lists and Shapiro's lists is striking. The two sets of lists show little overlap, and a majority of the articles on each list received few citations in the other category. The recent articles most cited by the courts are quite different from the articles most cited in scholarly journals. We explore this divergence further by examining a number of other differences between the two sets of most-cited articles. These differences include the subject matter of the articles, the theoretical perspectives they employ, the journals in which they appeared, and some characteristics of their authors.

A. Subjects

Shapiro does not analyze the articles on his most-cited lists by subject matter, although he notes that constitutional law articles are more likely than articles in some other fields to reap large numbers of scholarly citations. A glance at the titles appearing on Shapiro's 1989-1991 lists suggests that at least half of those articles concern race or sex discrimination. Other notable clusters of three or more articles discuss issues related to higher education, statutory interpretation, constitutional law, storytelling as scholarship, and corporate finance or control.

The articles on our "most cited" lists share an interest in statutory interpretation. At least six of our articles outline general theories of statutory interpretation, including three of the five articles that overlap with Shapiro's lists. The congruence of most-cited articles in this field supports Judge Posner's observation that "statutory interpretation is an area where the innovations come mainly from the acad-

43. Shapiro, Revisited, supra note 1, at 762.

DO COURTS AND JOURNALS CITE THE SAME ARTICLES?

The heavy concentration of most-cited articles on statutory interpretation also may reflect the Supreme Court's recent attention to the field and an explosion of recent academic writing on the subject.

Constitutional law also surfaces in our lists and accounts for the other two articles appearing on both our lists and Shapiro's lists. The breadth of the constitutional field, however, somewhat diminishes the importance of this overlap. Indeed, apart from the two articles common to both lists, the constitutional law articles on our lists appear to address quite different topics than the ones on Shapiro's rosters.

Storytelling did not generate any heavily cited articles in the courts, and corporate law entered our lists only as an adjunct to a study of settlements. Most surprising, only one article on our lists explicitly addresses sex or race discrimination, and even that article does not focus exclusively on those issues. The failure of recent articles analyzing sex or race discrimination to generate substantial judi-

48. Excluding the articles appearing on both sets of lists, the constitutional law articles on our lists discussed jury issues in criminal cases, the retroactivity of new constitutional rules, confrontation clause issues, and the separation of powers. The constitutional articles on Shapiro's lists (again excluding the two common articles) focus on sex or race discrimination, the right of privacy, and first amendment issues.

50. Albert Alschuler's 1989 article on The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, supra note 47, discusses the problem of race-based peremptory jury challenges at length, but also addresses several other jury-related issues.
cial citations is surprising; the courts surely have continued to grapple with issues of discrimination since 1989. This lacuna may reflect the failure of courts to cite any scholarly analyses in this field; alternatively, it could signal the presence of a large number of cited articles in the area, no one of which has gathered enough citations to penetrate the most-cited list.

Three other subjects—civil procedure, evidence, and criminal law—dominate our lists of the 1989-1991 articles most cited by the courts. Each of these categories accounts for about one-sixth of the articles on our lists, so that the three categories together account for half of the articles on our lists. Within these broad categories, articles dealing with sentencing guidelines, DNA testing, summary judgments, settlements, and the admissibility of evidence in cases of child sexual abuse attracted particular judicial attention. The first two topics each generated three articles heavily cited by the courts, while the remaining three categories yielded two such articles apiece.

Neither these specific topics nor the general categories of civil procedure, evidence, and criminal law appear on Shapiro’s 1989-1991 lists. Nor do these subjects figure prominently on his lists of articles published in other recent years—although a few articles related to civil procedure emerge during the earlier part of the decade he studied. With the exception of statutory interpretation and constitutional law, the subjects addressed in articles heavily cited by the courts


The dominance of criminal law and evidence articles on our lists is consistent with a recent survey finding that judges want law reviews to publish more articles on these topics. See Project, supra note 27, at 1500-01.
Diverge sharply from the topics confronted in articles most cited by academics.

It is noteworthy, finally, that five of the thirty articles on our lists focus on the law of a single state.\(^{52}\) None of the articles most cited in scholarly journals concentrate on the law of a particular state. The five state-law articles on our lists derived almost all of their citations from the courts of a single state;\(^{53}\) in that way, they differed from most other articles on our lists, which gathered cites from a diverse number of courts.\(^{54}\)

In his initial study, Shapiro expressed concern that articles of this nature would distort any list of most-cited articles in the courts.\(^{55}\) The potential distorting effect of articles focusing on the law of a single state, however, is no greater than potential distortions stemming from the increasing percentage of criminal cases in the federal courts (which might enhance citation of articles analyzing criminal law) or the specialized workload of bankruptcy courts (which would favor articles on bankruptcy law).\(^{56}\) Citations in judicial opinions necessarily reflect the workload of the judges who author those opinions. If the courts of a particular state repeatedly cite a scholarly article, then the

\(^{52}\) Bruff, supra note 47 (Texas law); Hall, supra note 51 (same); Hittner & Liberato, supra note 51 (same); Johnson, supra note 38 (Louisiana law); Powers & Ratliff, supra note 51 (Texas law). Bruff’s article focuses on Texas law, but also draws some analogies to federal separation-of-powers principles. Similarly, Hittner and Liberato briefly discuss summary judgment practice in the federal courts, contrasting that practice with Texas procedures.

\(^{53}\) Hittner and Liberato’s article on summary judgments in Texas has been cited in a single Oklahoma decision, as well as in fifteen Texas opinions. Johnson’s article on workers’ compensation in Louisiana has been cited in three federal diversity cases, as well as in nine Louisiana opinions. The other three articles, all focusing on issues of Texas law, have been cited exclusively by Texas courts.

\(^{54}\) See supra notes 32-36 and accompanying text.

\(^{55}\) Shapiro, Most-Cited, supra note 5, at 1545 n.27 (counts of judicial citations “would tend to spotlight articles of parochial importance that repeatedly are cited by the courts of a particular state”). In support of this point, Shapiro noted a 1960 article from the Texas Law Review that had garnered 547 citations from Texas courts. Robert W. Calvert, “No Evidence” and “Insufficient Evidence” Points of Error, 38 Tex. L. Rev. 361 (1960). The distinction between these two points of error under Texas law continues to excite a considerable number of judicial citations. One of the articles on our 1991 list discusses the same issue and builds upon Calvert’s apparently classic (at least in Texas) article. Powers & Ratliff, supra note 51.

\(^{56}\) One of the articles on our 1989 most-cited list analyzes an issue of bankruptcy law and has been cited almost exclusively by the federal bankruptcy courts. Jay L. Westbrook, A Functional Analysis of Executory Contracts, 74 Minn. L. Rev. 227 (1989) (14 citations in bankruptcy opinions; 1 citation in a state court opinion).

Indeed, most articles focusing on the law of a particular state suffer a disadvantage in amassing large citation counts. The federal courts of appeals issue almost 7,000 published opinions each year, providing numerous opportunities for judicial citations to articles on federal law. See supra note 34. Few states publish as many appellate opinions in a single year. A LEXIS search revealed that Texas, one of the largest states, releases only about 3,500 appellate opinions each year. Smaller states probably publish even fewer opinions each year.
article probably touches upon issues frequently litigated in that state and offers information that the courts find useful. The presence of articles on our lists that focus on the law of a particular state is not in itself problematic; state courts decide the vast majority of cases in our country.

Of somewhat greater concern is the fact that four of the five state-law articles appearing on our lists, as well as the article that prompted Shapiro's observation, discuss principles of Texas law. This "Texas phenomenon" suggests either that Texas courts cite law review articles more often than do courts in other states, or that they at least cite particular articles repeatedly. This phenomenon bears further investigation, because it may shed light on citation patterns among state courts. The presence of these articles, however, confirms that state courts constitute an important audience for scholarly articles.

B. Theoretical Perspectives

Shapiro notes that many of the recent articles most cited in scholarly journals analyze legal issues from a feminist, critical race theory, or critical legal studies perspective. He estimates that two-thirds of the most-cited articles published in 1990 or 1991 adopt one of these "outsider" perspectives. In clear contrast, none of the articles on our 1989-1991 lists adopts an explicitly feminist, critical race, or critical legal studies perspective.

Shapiro also notes heavy representation of articles drawing upon economic theory in his most-cited lists, although the dominance of these articles is greater on his "all-time" list than on his lists for more recent years. Our lists of the 1989-1991 articles most cited by the courts show moderate attention to economic principles. Two of the thirty articles on our lists explicitly engage in economic analysis, one draws upon the related field of game theory, one includes discussion of basic economic concepts, and two devote at least some attention

57. The heavy representation of Texas articles on our lists may result partly from the fact that, because Texas is a populous state, its judicial system publishes more opinions than do the courts of other states. It is noteworthy, however, that the courts of other populous states (such as New York and California) have not generated articles for our "most cited" lists.
58. Shapiro, Revisited, supra note 1, at 758.
59. Id. at 759.
60. Fisch, supra note 51; Issacharoff & Loewenstein, supra note 51.
61. Eskridge, supra note 44.
62. Westbrook, supra note 56. It is hard to discuss any issue of commercial law intelligently without drawing upon some economic principles. Westbrook's article exemplifies the difficulty in determining when a commercial law article becomes a "law and economics" article.
to critiquing economic models. Economic principles plainly influenced the recent articles most heavily cited by the courts.

The representation of economic analysis, but not critical perspectives, among the recent articles most frequently cited by the courts is consistent with the hypothesis that new academic perspectives require time to win high citation rates in the courts. Coase's landmark economic critique of Social Costs waited almost twenty years before eliciting a substantial number of judicial citations. Richard Posner's Theory of Negligence earned only three judicial citations during its first fifteen years, then acquired ten additional citations during its next seven years. Feminist and critical race perspectives represent more recent phenomena than the application of economic principles to legal analysis; a time lag in judicial citations may partly explain the absence of these perspectives from our lists of the articles most cited by courts.

On the other hand, the nature of feminist and critical race perspectives may prevent those articles from ever achieving substantial citation rates in the courts. These perspectives pose fundamental challenges to the fairness of legal rules. To do their work, judges must accept many premises of the legal system and attempt to resolve controversies within the bounds of that system. Critical challenges to basic legal assumptions may win favor with academics and policymakers—and may even eventually alter basic assumptions of the legal system—but they are harder to incorporate into individual judicial decisions.

Two other scholarly perspectives appear among the articles on our "most cited" lists: two of these articles report the results of original empirical studies, and three others include detailed digests of medical or psychological literature helpful in resolving particular legal issues. Shapiro does not discuss the extent to which the articles most cited in scholarly journals share these traits. The high citation rates to

63. Alexander, supra note 49; Sullivan, supra note 47.
64. See also Jeffrey L. Harrison, Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law, 1988 ANN. SURV. AM. L. 73, 98 (concluding, based on an empirical study, that "law and economics' has gained a modest degree of recognition by the courts").
65. See supra text accompanying notes 41-42.
67. Skeptics might suspect that some of these most recent citations appear in Judge Posner's own opinions for the Seventh Circuit Court of Appeals. None of the citations, however, appear in opinions of that court. Most of the citations to Posner's article appear in state court opinions. See also Harrison, supra note 64, at 99 (noting that it will take time for the law and economics movement to affect judicial decisions).
68. Alexander, supra note 49; Eskridge, supra note 44.
69. Hoeffel, supra note 37; Myers et al., supra note 22; Thompson & Ford, supra note 51.
these five articles on our lists, however, suggest that legal scholars—or interdisciplinary teams of legal academics and specialists from other disciplines—can play an important role in both providing courts with empirical information about the impact of legal rules and articulating the legal significance of important findings from other disciplines.\textsuperscript{70}

Apart from these particular perspectives, it is noteworthy that many of the articles frequently cited by courts are highly theoretical. In addition to the economic analyses noted above, William Eskridge and Philip Frickey draw upon Aristotle's theory of practical reasoning to propose a theory of statutory interpretation;\textsuperscript{71} Cass Sunstein includes extensive theoretical discussion of the proper relationship between law and administration in his highly cited article about statutory interpretation after \textit{Chevron};\textsuperscript{72} Kathleen Sullivan invokes a variety of philosophical and economic theories to critique unconstitutional conditions;\textsuperscript{73} Richard Fallon and Daniel Meltzer summon jurisprudential theory to analyze the problem of retroactivity across a broad spectrum of constitutional cases;\textsuperscript{74} and Akhil Amar proposes unifying theories for treating the Bill of Rights as a whole.\textsuperscript{75} These and other articles on our lists demonstrate that courts do not eschew theoretical discussions by scholars, as long as they perceive those discussions as helpful in resolving the controversies before them.

\section{Law Reviews}

Shapiro's most-cited articles are concentrated among relatively few journals. The 103 most-cited articles of the decade 1982-1991 appear in just twenty-one law reviews, with the top three journals (\textit{Harvard}, \textit{Yale}, and \textit{Stanford}) accounting for more than half of those most-cited articles.\textsuperscript{76} As Table 8 shows, the same pattern holds for the most recent three years of that decade. The thirty-one articles from Shapiro's 1989-1991 lists appear in fourteen different law reviews, and the top three reviews (\textit{Harvard}, \textit{Michigan}, and \textit{Yale}) again account for more than half of the most-cited articles during those years. Just six

\textsuperscript{70} Several other commentators have suggested that law review articles may fulfill these functions for courts. \textit{See}, e.g., Nard, \textit{supra} note 4; Richardson, \textit{supra} note 31, at 389 (comments by California Supreme Court Justice); Sloan, \textit{supra} note 28, at 226. \textit{See generally} Schuck, \textit{supra} note 4 (encouraging law professors to engage in more empirical research).

\textsuperscript{71} Eskridge & Frickey, \textit{supra} note 44.

\textsuperscript{72} Sunstein, \textit{Chevron}, \textit{supra} note 44.

\textsuperscript{73} Sullivan, \textit{supra} note 47.

\textsuperscript{74} Fallon & Meltzer, \textit{supra} note 47.

\textsuperscript{75} Amar, \textit{supra} note 47.

\textsuperscript{76} Shapiro, \textit{Revisited, supra} note 1, at 763.
reviews (the previous three plus Stanford, Columbia, and Duke) published well over two-thirds of the most-cited articles on Shapiro's 1989-1991 lists.

The most-cited articles in judicial opinions also show some concentration in elite journals, but the concentration appears not as strong. Eighteen different journals published the thirty articles on our 1989-1991 lists (see Table 9). Five journals (rather than three) are necessary to account for half of the most-cited articles on our lists, and eight reviews (rather than six) are needed to account for two-thirds of the articles most cited by courts.77

These differences, and the underlying database, are too small to do more than suggest a possible trend. It is clear that a few prestigious journals published a disproportionate number of the recent articles most cited by both scholarly journals and court opinions. Confirmation of whether the concentration is greater for articles most heavily cited by academics, as appears from this preliminary investigation, must await further work.

A more striking difference between the two lists of journals publishing most-cited articles emerges if we examine the journals that round out both lists. On Shapiro's 1989-1991 lists, the most-cited articles all appear in journals published by law schools commonly ranked among the top twenty-five schools nationwide.78 The most-cited articles in judicial opinions, on the other hand, come from journals published by a wide array of law schools—including such regional schools as Louisiana State, Nebraska, South Carolina, and St. Mary's.

77. In contrast, a study of citations to all law review articles published during the 1978-79 academic year found that citations in both courts and journals were almost identically concentrated in the most elite journals. Articles in 23 journals generated about 50% of the law review citations in both courts and journals, while articles in 54 journals accounted for about 75% of the citations in both sources. Richard A. Mann, The Use of Legal Periodicals by Courts and Journals, 26 Jurimetrics J. 400, 406 (1986).


Shapiro's other most-cited lists demonstrate the same concentration of articles among journals published by the top 25 law schools. In fact, only five of more than two hundred law review articles on Shapiro's lists appeared in legal journals published by schools ranking below the top 25 schools.
Using a prestige scale that one of us developed in connection with previous work, we assigned a prestige rating to the schools publishing each of the journals in which articles from our “most cited” lists appeared and compared those ratings with similar ratings for the articles appearing on Shapiro’s 1989-1991 lists. The mean institutional prestige rating for the journals publishing the thirty articles on our most-cited lists was 2.61 on a 9-point scale that ranges from a low of -4.81 to a high of 4.03. The mean prestige rating for journals publishing articles on Shapiro’s 1989-1991 lists was significantly higher: 3.57 on the same 9-point scale.

In other words, judges resemble academic authors in drawing their most heavily cited articles disproportionately from a few elite journals. Judges, on the other hand, appear more willing to reach beyond the most prestigious journals in citing certain articles repeatedly. The articles most cited by scholars overwhelmingly appear in journals published by law schools with very high prestige ratings, while the articles most cited by judges appear in journals published by a more diverse group of schools.

D. Authors

Shapiro devotes no attention to the professional status of the authors on his lists, perhaps because these authors are almost exclusively law professors. Shapiro’s 1989-1991 lists include one article authored by a Supreme Court Justice, one written by an attorney, and one coauthored by a professor at the University of Chicago’s School of Business. Twenty-nine of the thirty-one articles appearing on Sha-

79. See Merritt, supra note 78, at 409-10. This scale combines the median LSAT of first-year students enrolled at each law school with the academic reputation rank (as reported by U.S. News and World Report) for each school.

80. Social scientists use tests of statistical significance to gauge the likelihood that results observed in their data (such as the difference in means we report above) reflect real patterns in the underlying population rather than stem from some chance process (such as random error in sampling, measurement, or coding). The theory of statistical inference allows social scientists to decide on the level of risk they are willing to take in making an incorrect inference from their data to the underlying universe. By convention, social scientists treat relationships that have a probability of resulting from chance that is five percent or less as “statistically significant.” Results that are significant at smaller levels are even less likely to be the product of chance. See generally HUBERT M. BLALOCK, SOCIAL STATISTICS 115 (2d ed. 1979). The difference in means reported above is significant at the .004 level, meaning that there are only four chances in one thousand that the difference resulted from random processes.

81. See also Manz, supra note 28, at 141 (noting “diversification” of citations to law reviews by New York Court of Appeals).

82. We determined professional status at the time an article was published. It is noteworthy, however, that the Justice appearing on Shapiro’s most-cited lists (Antonin Scalia) taught for many years at the University of Chicago School of Law, while the practicing attorney (Jed Rubenfeld) joined Yale Law School’s faculty the year after publishing the article that appears on
piro's lists were written or coauthored by a law school professor; twenty-eight were produced exclusively by law professors.

Our lists, in contrast, include five articles written or coauthored by judges; two written by law students; six authored or coauthored by practicing attorneys; three written or coauthored by professors from disciplines other than law; and one that includes as coauthors two physicians without academic appointment. Only nineteen of the thirty articles on our lists include at least one law professor as an author; just seventeen bear the exclusive mark of law professors as authors. Overall, law professors contributed to less than two-thirds of the 1989-1991 articles most cited by the courts.

The willingness of courts to cite repeatedly to articles authored by nonacademics—including other judges, practicing attorneys, and students—while academic authors reserve their most frequent citations for other law professors, is noteworthy. It would be useful to know whether this pattern is longstanding or has only emerged during recent years. If the pattern is new, it may signal a decline in the responsiveness of legal academics to the needs of judges—so that the courts now draw increasingly upon the work of nonacademics. On the other hand, further research might reveal that this pattern is longstanding. Judges always may have been more willing than academics to draw heavily upon the work of insightful students, practicing attorneys, and other judges.

Shapiro's list. Both of these authors, therefore, may have possessed an academic aura for the other academics who cited them.

It is not clear whether Shapiro included student-authored works in his study. The most recent supplements to Shepard's Law Review Citations include student works, and SSCI also tracks citations to at least some student work, but Shapiro does not indicate whether he included those in his search. If Shapiro systematically excluded student works, that could explain the absence of student authors from his most-cited lists. On the other hand, it appears unlikely that any student work would have obtained the number of citations necessary to win inclusion on any of Shapiro's recent lists.

83. Once again, we determined professional status at the time an article was published. Some articles fell into more than one of the categories mentioned in the text—for example, three articles were coauthored by judges and practicing attorneys. For other evidence of recent judicial citations to law review articles authored outside law faculties, see Sirico & Drew, supra note 28, at 1054 (sample of federal court of appeal opinions published during 1989 showed 52 citations to law review articles written by students and 169 citations to articles written by faculty or other professionals).

84. The difference between the percentage of articles authored by law professors on our lists and that percentage on Shapiro's lists for the same three years is statistically significant (a < .004). See supra note 80 (discussing tests of statistical significance).

85. One study of United States Supreme Court opinions from the 1965 Term found that student works constituted more than one quarter of the Court's references to secondary sources in majority opinions. Neil N. Bernstein, The Supreme Court and Secondary Source Material: 1965 Term, 57 GEO. L.J. 55, 66 (1968); see also Roger C. Cramton, "The Most Remarkable Institution": The American Law Review, 36 J. LEGAL EDUC. 1, 4 (1986) (it is "acceptable [for a
The authors appearing on our "most cited" lists differed in a second important way from the writers on Shapiro's lists: the recent articles most cited by the courts were more likely to be coauthored than the recent articles most frequently cited by academics. Only three of the thirty-one articles on Shapiro's 1989-1991 lists (10%) are coauthored, and none includes more than two authors. Twelve of the thirty articles on our lists (40%) were coauthored; two included more than two authors.86

The reason for this phenomenon is not clear. It may stem partly from the tendency of courts to cite empirical or interdisciplinary work, which often requires collaboration. Three of the five articles from our lists that report empirical results or distill information from other disciplines were coauthored.87 The high rate of coauthorship on our lists also may derive from the fact that attorneys, judges, and nonlaw academics are more likely to coauthor articles than are law professors. Three of the five articles on our lists that included judicial authors were coauthored, as were four of the six articles listing attorneys as authors and all three of the articles including academic authors from other fields. Even among the seventeen articles on our lists exclusively authored by law professors, however, the incidence of coauthorship (four) is twice as high as that incidence on Shapiro's lists. Further work is needed both to determine if this pattern holds in a larger population of most-cited articles and to identify possible causes for the pattern.

The authors on our "most cited" lists also obtained their law degrees from a somewhat different group of schools than did the authors on Shapiro's lists.88 As Shapiro notes, the authors on his lists earned
their law degrees from a remarkably concentrated group of schools. Just three schools (Harvard, Yale, and the University of Chicago) trained over seventy percent of the authors generating the articles most cited by other academics. The thirty-three authors appearing on Shapiro's 1989-1991 lists received their law degrees from just eight different schools (see Table 10). Three of those schools (Yale, Harvard, and Berkeley) accounted for twenty-six (79%) of the degrees.

In contrast, the thirty-nine law graduates who authored articles appearing on our lists graduated from seventeen different law schools (see Table 11). The list shows some concentration of elite degrees: Harvard awarded degrees to thirteen of the authors on our lists, while Yale graduated eight of the authors, for a combined total of fifty-four percent. The concentration, however, appears less strong than on Shapiro's lists. Overall, moreover, our authors graduated from significantly less prestigious law schools than did Shapiro's authors. Using the same institutional prestige scale described above, the authors of articles most cited by the courts graduated from schools with a mean rating of 2.81, while the authors of articles most cited by academics graduated from schools with a mean rating of 3.52.

Given this difference in the prestige of law degrees earned by the two sets of authors, we also might expect the law professors on Shapiro's lists to teach at more prestigious schools than the professors on our lists. Here, however, no notable difference emerged between the two groups of authors. At least two-thirds of the law-professor authors on both sets of lists were affiliated with schools commonly ranked among the top twenty-five schools (see Tables 12-13). Both lists, however, also included authors affiliated with less prestigious schools—including Hawaii, Rutgers, and American (on Shapiro's lists), and Brooklyn, Davis, Fordham, and McGeorge (on our lists). The law-professor authors on our lists taught at schools with a mean prestige rating of 2.99, while Shapiro's law-professor authors taught at schools with a mean rating of 2.76. This small difference was not statistically significant.

89. Shapiro, Revisited, supra note 1, at 765.
90. See supra notes 79-80 and accompanying text.
91. This difference is statistically significant at the .05 level. See supra note 80.
92. We identified academic affiliation, as Shapiro did, at the time an article was published.
93. Once again, we measured prestige with the scale described above. See supra notes 79-80 and accompanying text.
We did, however, detect one other difference between the law-professor authors on our list and those on Shapiro's lists. Eight of the nineteen articles on our lists (42%) that were authored by at least one law professor included at least one author holding a named professorship or chair at a law school. Only three of the twenty-nine "law professor" articles on Shapiro's lists (10%) included an author with a named professorship or chair.

This pattern, like many of the others we have detected, must be confirmed through exploration of a larger database. As a preliminary matter, however, the difference suggests that courts are more likely to cite frequently to articles authored by senior, academically distinguished professors, while academic authors are somewhat more willing to cite frequently to articles written by more junior scholars.

If this difference exists, it could reflect a number of dynamics. Courts may be more status conscious in their citations, seeking to invoke the most senior academic names to support their points. This explanation would be consistent with judges' apparent preference for citing the work of other judges. On the other hand, the status explanation appears inconsistent with the greater willingness of judges to cite articles produced by students and practicing attorneys, as well as with their willingness to cite articles from less prestigious journals.

Alternatively, the possible preference of judges for the work of chaired professors could reflect the shifting focus of academic scholarship identified by some critics. Professors holding chairs or named professorships tend to be more senior than their colleagues; heavy judicial citation to the work of these scholars may reflect a sense that the work of senior scholars is more relevant to judicial decisionmaking than the work of more junior scholars. Conversely, if academic writers are shifting their attention to new, less doctrinal topics—as some critics have maintained—then relatively junior professors engaged in

94. See also infra notes 98-106 and accompanying text (discussing differences in the sex and race composition of all authors on both lists).
95. This difference is statistically significant at the .01 level. See supra note 80.
96. We also detected a small difference in the likelihood of judges and academics to cite repeatedly to the work of assistant or associate professors. 5 of the 19 "law professor" articles on our lists (26%) were authored or coauthored by an assistant or associate professor of law. In contrast, 12 of the 29 law professor articles on Shapiro's list (41%) were authored or coauthored by assistant or associate professors of law. This difference is not quite as dramatic as the difference we identified in authorship by chaired professors, and it does not reach statistical significance in this small population (a=.29), but it suggests a distinction in citation patterns that could be explored in further research.
97. See supra note 30 and accompanying text (arguing that courts may use citations largely for their rhetorical force).
newer forms of scholarship would debut more easily on lists of the most-cited articles in scholarly journals.

All of these points merit further empirical investigation. Our preliminary comparison of most-cited articles in three recent years, however, suggests that judges are more likely than academics to cite heavily to work produced outside the legal academy; to reference coauthored articles; and to draw their most-cited articles from graduates of less prestigious law schools. Our study also intimates that, when judges do cite the work of law professors, they are more likely than academics to cite heavily the recent works of chaired professors. On the other hand, our investigation suggests that both judges and academics favor articles authored by law professors affiliated with prestigious institutions.

E. Outsiders

Shapiro notes the extraordinary emergence of women and minority scholars on his most recent lists of heavily cited articles; this finding may constitute the most striking result of his study. Women wrote 29 of the 103 articles appearing on Shapiro's 1982-1991 lists, while scholars of minority races authored 19 of those articles. Altogether, women or minority scholars published more than one-third (39 out of 103) of the 1982-1991 articles most cited by other scholars.98 The trend is even more apparent on Shapiro's 1989-1991 lists. Women or minority scholars authored almost two-thirds (19 out of 31) of the articles appearing on those three lists.

We were unable to gather sufficient information about the race of our authors to compare the percentage of minority authors on our lists with the high percentage identified by Shapiro.99 We were, however, able to identify the author's sex for twenty-nine of the thirty articles

98. Shapiro, Revisited, supra note 1, at 758.

99. For authors holding full-time law school positions, we were able to check minority status on the self-reported list of "Minority Law Teachers" in the AALS Directory of Law Teachers. See Association of American Law Schools, The AALS Directory of Law Teachers, 1994-95, at 1241. Two of the 23 professors authoring articles on our lists (9%) appear on that AALS list, a percentage that compares favorably to the percentage of minority law professors teaching in 1990. See Edward A. Adams, Students See Bias on Law School Faculties, N.Y. L.J., Mar. 5, 1990, at 1 (minority professors held about seven percent of law school positions in 1990) (reporting data released by the Association of American Law Schools). Law professors, however, constituted only about half the authors on our lists, and we lacked racial information about most other authors. Gathering additional information about the contributions of minority scholars to the articles most cited by the courts is an important avenue for further research.
on our lists. Examination of these data revealed that women authored a smaller proportion of the articles on our lists than on Shapiro's lists. While women wrote thirteen (42%) of the thirty-one articles on Shapiro's 1989-1991 lists, they authored or coauthored only seven (24%) of the twenty-nine articles we analyzed.

The representation of women on our lists, however, still matches or exceeds their representation among both lawyers and law professors at the time these articles were written. During the 1988-89 academic year, women constituted twenty percent of tenure-track professors at American law schools. At the same time, they accounted for twenty percent of the legal profession. These two groups form the pools from which most law review articles emerge, suggesting that women at least held their own in producing the articles most cited by the courts.

The extraordinary dominance of female and minority scholars on Shapiro's recent lists probably is linked to the primacy of feminist and critical race scholarship on those lists. The absence of those per-

100. We excluded the student-authored project, supra note 86, from the following discussion because a large number of students coauthored that note and information is not available about any of the individual authors.

101. Similarly, women accounted for 10 (23%) of the 44 authors on our lists. These differences in the percentage of female authors do not reach statistical significance at conventional levels (a=.14). This may be due in part to the small population size.


104. We included one student-authored note in these analyses. Women received 42% of the law degrees conferred in 1990, the year that note was published. AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES: Fall, 1991, at 65 (1992). A female student authored the note appearing on our 1990 “most cited” list. Excluding that student-authored piece from our totals, women contributed to six (21%) of the twenty-eight articles authored by professionals.

105. The significance of this link, however, is not clear. It is not apparent whether the intellectual of these scholars has attracted other academics to their writings, and hence to the subjects they discuss; or whether an interest in feminist and racial critiques has generated heavy citation rates to the female and minority authors who disproportionately employ these perspectives. The theoretical nature of feminist and racial critiques may render these works applicable to a wide variety of situations, leading to high citation rates.

Some critics have suggested that feminist and critical race scholars are more likely than other scholars to reference one another's works. See, e.g., Arthur Austin, The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status, 35 Ariz. L. Rev. 829, 834 (1993). An empirical investigation by Richard Delgado, however, suggests that these scholars cite white and minority scholars in an evenhanded manner. See Richard Delgado, The Colonial Scholar: Do Outsider Authors Replicate the Citation Practices of the Insiders, but in Reverse, Chi.-Kent L. Rev. 971 (1996). Scholars, moreover, have raised the possibility that traditional works ignore the contributions of women, minorities, and other outsiders. See, e.g., Richard Delgado, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, 132 U. Pa. L. Rev. 561
perspectives from the articles most cited by courts, conversely, may account for the somewhat lower representation of female scholars on our lists. Against this background, it is particularly noteworthy that women authors are so well represented on our lists. Women matched their representation in the profession on our “most cited” lists, even though some leading female scholars concentrated on scholarly perspectives that found little favor in the courts.\textsuperscript{106}

IV. Conclusio\n and Di\n rection\n for Fu\n ture Re\n esearc\n
We identified numerous intriguing differences, and a few similarities, between the 1989-1991 articles most cited by judges and those most cited by academics. These two sets of articles share an interest in statutory interpretation, as well as some concern with economic analysis. Law professors authoring articles most cited by either courts or journals also teach at similarly prestigious universities. Beyond these similarities, however, articles on the two lists diverge sharply in the subjects they address, the scholarly perspectives they employ, the average prestige of the journals in which they are published, and several characteristics of the authors they represent.

We offer these findings with three caveats. First, our roster of possible differences between the articles most cited by courts and those most cited by scholarly journals signals directions for future research rather than firm conclusions. The population of articles we studied was quite small. Additional work is needed to track citation patterns among judges and scholars for a larger population of articles, and to confirm whether the trends that we distinguished hold for larger populations.

Second, although our tentative findings suggest substantial differences in the citation patterns of courts and scholarly journals, this preliminary study does not reveal whether those distinctions are new. Indeed, we uncovered some evidence of older articles that weathered lengthy delays before gaining substantial judicial citations.\textsuperscript{107} The differences we identified, therefore, do not necessarily support speculation about a recent divide between the bench and academia. Now that we have marked some of the dimensions on which most-cited articles

\textsuperscript{106} Preliminary inquiries suggest that minority authors achieved the same rate of success, see supra note 99, although we lacked sufficient information about the race of our authors to draw any more definite conclusions.

\textsuperscript{107} See supra notes 39-42 and accompanying text.
in courts differ from most-cited articles in scholarly journals, it may be possible to determine whether those differences emerged recently or parallel differences from earlier periods.

Finally, even if subsequent research confirms the tentative differences we found in the citation patterns of judges and academic writers, empirical research cannot determine whether those differences are appropriate to the different roles of courts and universities. Law professors are freer than judges to step outside the legal system, to examine the fundamental premises of that system, and to propose changes that look decades into the future. The fact that these ruminations enjoy no immediate application in courts or law offices is not cause for alarm. Coase's work on *Social Costs* did not lose its value because it languished for twenty years without accumulating a substantial number of judicial citations. Nor is the article less valuable because its lifetime total of thirty-eight judicial citations lags far behind its 1741 references in legal and social science articles. Academic works yielding few judicial citations may influence judges indirectly and may exert even greater influence over legislators and other decisionmakers.

In addition to these caveats, we note that some of the differences we identified between courts and scholarly journals should be cause for celebration rather than despair. The willingness of judges to reach beyond the work of purely academic authors, articles published by graduates of elite law schools, and the journals published by those schools insures that fresh perspectives will continue to infuse the legal system. Recent complaints of a divide between the bench and legal academy often focus on a perceived decline in links between courts and the most prestigious law schools. Our preliminary analyses suggest that these fears are somewhat exaggerated: courts still draw their most-cited articles disproportionately from the graduates of elite schools and the pages of their law journals. The fact that courts ven-

108. *See generally* Richard A. Posner, *Overcoming Law* 81-108 (1995); Richardson, *supra* note 31, at 387 ("It is my thesis that [courts and law reviews] function best when we recognize our limits. In the context of real cases and controversies, it is difficult to have the broader vision of the teacher, the statesman or the philosopher which is necessary for the shaping of society. Our functions differ."); Roger J. Traynor, *To the Right Honorable Law Reviews*, 10 UCLA L. REV. 3, 10 (1962) ("Time is with the law reviews. An age that churns up problems more rapidly than we can solve them needs such fiercely independent problem-solvers preoccupied with long range solutions.").

109. *Cf* Posner, *supra* note 108, at 99 ("A new approach to law, such as the economic approach, may take a generation or more to alter professional thinking . . .; that does not make it useless.").

ture outside those circles, however, represents a healthy receptivity to the work of other scholars and institutions.

The relationship between courts and legal scholarship is complex. This preliminary comparison of citation rates in judicial opinions and scholarly journals invites further empirical work documenting that relationship through citation patterns and other means. We intend to pursue these leads, and hope that others similarly will follow the work begun by Fred Shapiro and the editors of this Symposium.

**Table 1**

**Articles Published in 1989 Most Cited in Judicial Opinions***

<table>
<thead>
<tr>
<th>Article</th>
<th>Court Cites</th>
<th>Law Review Cites</th>
</tr>
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<tr>
<td>Cass R. Sunstein, <em>Interpreting Statutes in the Regulatory State</em>, 103 Harv. L. Rev. 405.</td>
<td>18</td>
<td>143</td>
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<tr>
<td>Robert P. Mosteller, <em>Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment</em>, 67 N.C. L. Rev. 257.</td>
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<tr>
<td>David Hittner &amp; Lynne Liberato, <em>Summary Judgments in Texas</em>, 20 St. Mary's L.J. 243.</td>
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<td>4</td>
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<tr>
<td>Kathleen M. Sullivan, <em>Unconstitutional Conditions</em>, 102 Harv. L. Rev. 1413.</td>
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<tr>
<td>H. Alston Johnson, <em>Workers' Compensation</em>, 50 La. L. Rev. 391.</td>
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* Articles printed in boldface appear on both judicial and scholarly "top ten" lists.
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<tr>
<td>W. Wendell Hall, Standards of Appellate Review in Civil Appeals, 21 St. Mary's L.J. 865.</td>
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<tr>
<td>Cass R. Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071.</td>
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<td>Samuel Issacharoff &amp; George Loewenstein, Second Thoughts About Summary Judgment, 100 Yale L.J. 73.</td>
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<td>Nancer Ballard &amp; Peter M. Manus, Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion, 75 Cornell L. Rev. 610.</td>
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<tr>
<td>William N. Eskridge, Jr. &amp; Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321.</td>
<td>7</td>
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<tr>
<td>Laurence H. Silberman, Chevron—The Intersection of Law &amp; Policy, 58 Geo. Wash. L. Rev. 821.</td>
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<td>Janet C. Hoeffel, Note, The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant, 42 Stan. L. Rev. 465.</td>
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<td>Harold H. Bruff, Separation of Powers Under the Texas Constitution, 68 Tex. L. Rev. 1337.</td>
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* Articles printed in boldface appear on both judicial and scholarly "top ten" lists.
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<td>William Powers, Jr. &amp; Jack Ratliff, Another Look at “No Evidence”</td>
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<td>Less Aggregation, 58 U. CHI. L. REV. 901.</td>
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<td>Richard H. Fallon, Jr. &amp; Daniel J. Meltzer, New Law, Non-</td>
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<td>Retroactivity, and Constitutional Remedies, 104 HARV. L. REV. 1731.</td>
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<td>Edward J. Imwinkelried, The Debate in the DNA Cases Over the</td>
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<td>Foundation for the Admission of Scientific Evidence: The Importance</td>
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<td>of Human Error as a Cause of Forensic Misanalysis, 69 WASH. U.</td>
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<td>William N. Eskridge, Jr., Overriding Supreme Court Statutory</td>
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<td>Bruce M. Selya &amp; Matthew R. Kipp, An Examination of Emerging</td>
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<td>Departure Jurisprudence Under the Federal Sentencing Guidelines, 67</td>
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<td>NOTRE DAME L. REV. 1.</td>
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<td>Jill E. Fisch, Rewriting History: The Propriety of Eradicating Prior</td>
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<td>Decisional Law Through Settlement and Vacatur, 76 CORNELL L. REV. 589.</td>
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<td>Janet C. Alexander, Do the Merits Matter? A Study of Settlements in</td>
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<td>Securities Class Actions, 43 STAN. L. REV. 497.</td>
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<td>The Supreme Court, 1990 Term: Leading Cases, 105 HARV. L. REV.</td>
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<td>Akhil R. Amar, The Bill of Rights as a Constitution, 100 YALE L.J.</td>
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* Articles printed in boldface appear on both judicial and scholarly “top ten” lists.
### TABLE 4

**1989-1991 ARTICLES MOST CITED BY THE COURTS**

**DISTRIBUTION OF CITATIONS BY TYPE OF COURT***

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*Articles printed in boldface appear on both judicial and scholarly “top ten” lists.
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<th>Article</th>
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<td>Joan C. Williams, <em>Deconstructing Gender</em>, 87 Mich. L. Rev. 797.</td>
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<td>Randall L. Kennedy, <em>Racial Critiques of Legal Academia</em>, 102 Harv. L. Rev. 1745.</td>
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<td>Jed Rubenfeld, <em>The Right of Privacy</em>, 102 Harv. L. Rev. 737.</td>
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<td>Kathleen M. Sullivan, <em>Unconstitutional Conditions</em>, 102 Harv. L. Rev. 1413.</td>
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<td>Angela P. Harris, <em>Race and Essentialism in Feminist Legal Theory</em>, 42 STAN. L. REV. 581.</td>
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<td>William N. Eskridge, Jr., <em>The New Textualism</em>, 37 UCLA L. REV. 621.</td>
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<td>Charles R. Lawrence III, <em>If He Hollers Let Him Go: Regulating Racist Speech on Campus</em>, 1990 DUKE L.J. 431.</td>
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<td>William N. Eskridge, Jr. &amp; Philip P. Frickey, <em>Statutory Interpretation as Practical Reasoning</em>, 42 STAN. L. REV. 321.</td>
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<td>Richard Delgado, <em>When a Story is Just a Story: Does Voice Really Matter?</em>, 76 VA. L. REV. 95.</td>
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<td>Michael W. McConnell, <em>The Origins and Historical Understanding of Free Exercise of Religion</em>, 103 HARV. L. REV. 1409.</td>
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<td>Vicki Schultz, <em>Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument</em>, 103 HARV. L. REV. 1749.</td>
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<td>Margaret J. Radin, <em>The Pragmatist and the Feminist</em>, 63 S. CAL. L. REV. 1699.</td>
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* Articles printed in boldface appear on both judicial and scholarly “top ten” lists.
### Table 7

**Shapiro's 1991 Articles Most Cited In Scholarly Journals**

*Articles printed in boldface appear on both judicial and scholarly "top ten" lists.*

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<td>Mari J. Matsuda, <em>Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction</em>, 100 Yale L.J. 1329.</td>
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<td>Mark J. Roe, <em>A Political Theory of American Corporate Finance</em>, 91 Colum. L. Rev. 10.</td>
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<td>Kathryn Abrams, <em>Hearing the Call of Stories</em>, 79 Calif. L. Rev. 971.</td>
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<td>John C. Coffee, Jr., <em>Liquidity Versus Control: The Institutional Investor as Corporate Monitor</em>, 91 Colum. L. Rev. 1277.</td>
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<td>Richard Delgado, <em>Campus Antiracism Rules: Constitutional Narratives in Collision</em>, 85 Nw. U. L. Rev. 343.</td>
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<td>Ronald J. Gilson &amp; Reinier Kraakman, <em>Reinventing the Outside Director: An Agenda for Institutional Investors</em>, 43 Stan. L. Rev. 863.</td>
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<td>Pierre Schlag, <em>Normativity and the Politics of Form</em>, 139 U. Pa. L. Rev. 801.</td>
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### Table 8


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### Table 9

**Law Reviews Publishing the 1989-1991 Articles Most Cited in Judicial Opinions**

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Table 10
LAW SCHOOL DEGREES OF AUTHORS ON SHAPIRO’S 1989-1991 LISTS

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Table 11
LAW SCHOOL DEGREES OF AUTHORS OF 1989-1991 ARTICLES MOST CITED BY THE COURTS

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Table 12
Academic Affiliations of Law Professor Authors
Shapiro's 1989-1991 Lists

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Table 13
Academic Affiliations of Law Professor Authors of Articles Most-Cited by the Courts 1989-1991

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