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Symposium—Judge Posner and Contract Law

Introduction: Posner by the Numbers*

Michael P. Malloy**

Richard A. Posner, a leading figure in the field of law and economics,¹ has been identified as the most cited legal scholar of the twentieth century,² and perhaps the present century as well.³ But he is also an American jurist whose opinions have taken economic analysis into the real world of legal precedent. The series of papers presented here explores the varied aspects of Judge Posner's impact on contract law.

Professor Robert Brain examines Judge Posner's approach—one is tempted to call it an “attitude”—toward statutory interpretation issues.⁴ As is evident from Posner's opinions as well as his academic writings, Posner seems to give little regard to rules, statutes, or even constitutional provisions. He wants what he views as a sensible resolution of a dispute, whatever the authorities might seem to dictate. Professor Brain explores this mindset through an examination of Posner's opinion in *Wisconsin Knife Works v. National Metal Crafters*,⁵ which takes a very restricted view of waivers of contract clauses requiring modifications to be in writing. This decision, which was not subjected to any further judicial review, has attracted a great deal of attention both in subsequent case law and in the secondary literature.⁶

Iconic as such cases may now seem, Professor Deborah R. Gerhardt provides an important nudge in a new direction.⁷ The almost classical style of Posner's brand of law and economics must be retrofitted, or at least reconsidered, in light of

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1. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 117–120 (4th ed. 1992) (considering fundamental principles of contract damages in terms of opportunism and economic efficiency).

2. Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 (2000).

3. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1503 (2012).

4. Robert Brain, *Judge Posner, a Modern Day Chancellor in Equity: An Explanation of Wisconsin Knife Works v. National Metal Crafters*, 50 U. PAC. L. REV. 321 (2019).

5. 781 F.2d 1280 (7th Cir. 1986).

6. My ongoing empirical review indicates that as of this writing, *Wisconsin Knife Works* has been cited in 910 cases and 178 secondary sources. Cf. *Wisconsin Knife Works v. National Metal Crafters* Citing References, [https://1.next.westlaw.com/RelatedInformation/Ib58b2c6294c711d993e6d35cc61aab4a/kcCitingReferences.htm?originationContext=documentTab&transitionType=CitingReferences&contextData=\(sc.Default\)&docSource=641819f9703048b8a9fd07735eee08a3&rulebookMode=false](https://1.next.westlaw.com/RelatedInformation/Ib58b2c6294c711d993e6d35cc61aab4a/kcCitingReferences.htm?originationContext=documentTab&transitionType=CitingReferences&contextData=(sc.Default)&docSource=641819f9703048b8a9fd07735eee08a3&rulebookMode=false) (last visited Jan. 29, 2019) (on file with *The University of the Pacific Law Review*).

7. Deborah R. Gerhardt, *A Behavioral Economics View of Judge Posner's Contracts Legacy*, 50 U. PAC. L. REV. 349 (2019).

important advances in behavioral economics, and the growing recognition that economic behavior is not necessarily rational. I was particularly struck by Professor Gerhardt's analysis of Posner's "behavioral economics pattern," which reveals heuristic aspects to his judicial approach not entirely consonant with his pronouncements about the rational actor and markets.⁸

A focused examination of iconic Posner opinions is also at the heart of the article by Professor Victor P. Goldberg.⁹ He considers what may be Judge Posner's most notable contribution to contract law, the concept of "efficient breach," which gave a forceful basis for considering the appropriate application of contract remedies in terms of their economic function and effects.¹⁰ Professor Goldberg considers *Northern Indiana Public Service Co. v. Carbon County Coal Co.*¹¹ (rightly decided mostly, according to Professor Goldberg), *Empire Gas v. American Bakeries*¹² (rightly decided, according to applicable statutory provisions), and *Lake River v. Carborundum*¹³ (wrongly decided, according to Professor Goldberg).

The data has much to tell us about the impact of Posner's approach to contract law, both as a scholar and a judge. Professor Jeffrey L. Harrison provides us with a rigorous and objective empirical analysis specifically designed to determine the extent to which the views expressed in Posner's scholarship and judicial opinions have been adopted by courts outside of the Seventh Circuit.¹⁴ This study is a source of great interest to me, as I am engaged in an ongoing project to assemble the data on Posner's judicial output specifically concerning contract law-related cases,¹⁵ to determine whether that output achieves *stare decisis* or remains *tantum obiter dicta*.

Over the course of more than 36 years on the Seventh Circuit, Judge Posner participated as a member of the panel in some 575 contract-related cases, more often than not authoring the court's opinion.¹⁶ Certain patterns emerge in these

8. *Id.*

9. Victor P. Goldberg, *Three by Posner*, 50 U. PAC. L. REV. 363 (2019).

10. *Id.*

11. 799 F.2d 265 (7th Cir. 1986).

12. 840 F.2d 1333 (7th Cir. 1988).

13. 769 F.2d 1284 (7th Cir. 1985).

14. Jeffrey L. Harrison, *Fingerprints: An Impressionistic and Empirical Evaluation of Richard Posner's Impact on Contract Law*, 50 U. PAC. L. REV. 373 (2019).

15. In this context, I use the term "contract-law related case" to include not only cases in which the central question for decision was a contracts issue, but also those case in which a contract or contracts would seem to be frequently referred to. This has led me to date to a total of 634 contract-related opinions during the full years of Posner's tenure on the Seventh Circuit (1982-2017), from which we must discount 59 cases in which the appearance of "contract" is gratuitous. This leaves a total of 575 contract-related cases, or a mean average of approximately 15.97 per year. *See generally infra* Figure 1 (sampling incidence of contract-related cases).

16. *See, e.g.*, *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005 (7th Cir. 1982) (Posner, J., majority) (holding *inter alia* that the district court was without jurisdiction over claim by contractor against subcontractor); *Tate & Lyle Americas LLC v. Glatt Air Techniques Inc.*, 863 F.3d 569 (7th Cir. 2017) (Posner, J., majority) (holding *inter alia* that buyer's attorneys' fees were not special damages, which it was barred from recovering under its contract with seller).

cases, illustrated by the first two full years of his tenure. (See Figure 1, *infra*) In the overwhelming majority of the cases in these two years, the circuit court panel decision was the terminus of the litigation. In those cases where further review was pursued, the decision was usually upheld without further review on the merits.

What is even more interesting for our purposes is the extent to which these cases have had an impact beyond the immediate litigation. (See Figure 2, *infra*.) The sample of cases from the first two full years of Judge Posner’s judicial tenure indicates a robust rate of citation in later cases at all levels and marked attention in subsequent scholarly literature. The trend is fairly even as between citations in cases and scholarly literature, which would seem to suggest that not only are his opinions of interest to scholarly specialists but that his opinions have also had a practical impact in litigation. With that in mind, readers are well advised to turn their attention to the views presented by the scholarly specialists in these pages.

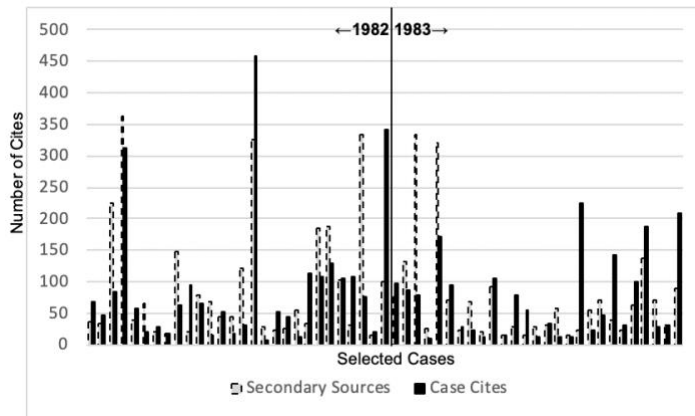
**Figure 1: Sampling Incidence
Posner Contract Cases 1982-1983**

	Out of 575 total cases*	Majority Opinion	Concurring Opinion**	Dissenting Opinion
1981-1982 Cases	55	46	4	3
en banc denied	7	7	0	0
upheld en banc	0	0	0	0
vacated	1	1	0	0
cert. denied	14	10	2	0
affirmed	1	0	0	1
overturned	0	0	0	0

* Totals include cases in which Judge Posner was on the panel but did *not* write an opinion.

** In those cases in which Judge Posner wrote a separate opinion concurring in part and dissenting in part, the opinion is accounted as a concurring opinion for sake of simplicity.

Figure 2: Cite Recognition of Posner Contract Cases



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