THE LAW REVIEW AND THE JUDICIARY

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Only a short twenty years ago I helped review and select law review submissions to the *University of Colorado Law Review*. As Managing Editor, I was principally responsible for recommending to the *Review's* Editor-in-Chief[1] articles that I thought would be useful to our "constituency." One of our primary goals was to publish articles that would influence the development of the law—i.e., influence judges.

As an advocate in the courts for the next twenty years I took my *Law Review* lessons to heart. Many of the cases I handled on appeal were cases of first impression. That gave the judges plenty of maneuvering room in addressing the precedent, the facts, and the policy considerations raised by an appeal. I assumed that judges, like anyone else, were looking for a good idea, persuasively presented, and well documented. I found in my appellate practice that a timely and relevant article made up for a dozen cases less persuasively presented from courts around the country. While the majority opinions did not frequently cite to the secondary authority, I could find the threads of thought suggested by a thoughtful article.

Now I am on the other side of the Bench. Do law reviews matter? The answer, not surprisingly, is yes.

I must first briefly mention how the *University of Colorado Law Review* mattered on a surprisingly (to me) personal level before I became a judge. In 1997, I participated in the Byron R. White Center for American Constitutional Study symposium addressing the 1996 United States Supreme Court decision in *Romer v. Evans*.[2] I represented the State of Colorado in the case. Opposing counsel, Jean Dubofsky, who represented the plaintiffs/appellees, was a co-panelist at the symposium, among a half dozen academics from around the country. My presenta-

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2. 517 U.S. 620 (1996).

tion and subsequently published article described the state's legal arguments during the history of the case, its written and oral presentation to the Supreme Court, and the Court's 6-3 holding.[3] Like all of the presenters at the Symposium, I and my co-authors analyzed the Court's majority and dissenting opinions.

In 2003 my article generated far more attention than I ever could have imagined, especially when the *Review* published it in 1997. The article was cited nine times by senators in my confirmation hearing, one senator commenting "I do want to ask you a bit about what perhaps goes beyond the zealous advocacy for your client, and this is the article that we are discussing, the 1997 *University of Colorado Law Review* . . . ." One of the senators believed the article to be "extraordinarily critical of the Supreme Court's decision" and concluded his examination of my article:

> I mean, let's just call a spade a spade. You were writing a Law Review article, and you wrote very strong language. You weren't saying "others said." You were the author, and you said "[the *Romer* decision] is another example of ad hoc activist jurisprudence without constitutional mooring." I am not asking if others agreed or disagreed. I am just asking, was that your opinion.

Imagine a lawyer strongly commenting on the result and analysis of the Supreme Court in a case he handled. But so it goes in the contemporary judicial confirmation hearing process.

The lesson one learns, I suppose, is to not use forceful, analytical, or critical language in your law review articles, even if it describes a case you litigated and know quite well. Who knows when someone may try to use it to criticize your judicial temperament? My larger point is that even scholarly writing can be used or misused in ways not intended by the author. Many contributors to law reviews aspire to the bench and one hopes that the modern confirmation process does not discourage these potential future nominees from submitting provocative and thoughtful articles. I cannot offer a solution to the problem at this time, but one sees the interesting and quite unforeseen connection between the law review and the judiciary,

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3. Timothy M. Tymkovich, John Daniel Dailey & Paul Farley, *A Tale of Three Theories: Reason and Prejudice in the Battle over Amendment 2*, 68 U. COLO. L. REV. 287 (1997).

albeit by way of the advise and consent process in the United States Senate.

Setting aside senate hearings, how else do law reviews matter? State and federal judges in this Country are generalists. Each new judge brings to the Bench his or her particular legal background and expertise. For me, it was civil litigation and appeals, principally in the area of constitutional and administrative law. Other judges on the Tenth Circuit bring experience from law school teaching, prosecution, water law, state trial bench, and private practice. But no one judge has done it all in this era of specialization. In fact, many senior judges assumed the Bench before significant developments in state and federal regulatory matters. Judges need to learn (or re-learn) these areas of law as they are presented with new cases. The parties, of course, brief these issues in a spirit of advocacy, but judges also need the kind of objective and comprehensive analysis that the best law review articles provide. Both the junior and seasoned judge can thus be seen scouring the law reviews, especially when a new and thorny issue confronts them on appeal.

Many judges look for law clerks with law review experience. It should surprise no one that newly minted clerks—fresh out of law school and the proud parent of a recently published article—will be especially attuned to academic scholarship. The pride of authorship, however, has come at the expense of proliferation. The handful of law reviews has become a bushel-full. It is nearly impossible to keep up with legal scholarship in a general way. I receive monthly a lengthy summary of the tables of contents of leading legal journals. The volume is such that I can only rarely skim the summaries looking for new ideas or relevant material. Westlaw and Lexis have simplified our lives in some ways, but have done nothing to diminish the sheer volume of potentially relevant materials. The computers make it easier to find materials; the quality of the mass of resource is quite another problem. The bottom line, unfortunately, is that the quantity of scholarship is obscuring the quality articles, making them harder and harder to find. Having said that, the rare gem we find can greatly influence our thinking on an issue.

Count me as a voice for the continuing vitality of the law review. Many disagree. A voluminous literature (ironically, entirely contained in law reviews) has arisen criticizing the law review system at American law schools and its baleful conse-

quences.[4] One criticism is that for the number of law review articles published each year, very little of it actually matters to practicing judges. As I have said, some evidence and personal experience does indeed support this criticism. Courts rarely cite law reviews in their opinions. Common sense, moreover, tells us that judges already have so much to read in the briefs, record, and direct authorities pertaining to any one case that, with a few heroic exceptions, we have little time left over to look at secondary materials.

These considerations, however, underestimate the actual influence of law reviews on judicial opinions. For one thing, just because a judge does not actually read a law review in preparing an opinion does not mean that he is not thinking of them. On the contrary, judges do not write merely for the parties in a case, or for the benefit of lower court judges, or to assist practitioners, or even to win the esteem of their colleagues on the bench. They also write for a scholarly audience, in the hope, however slim, that their opinions may engender helpful criticism—or, in the case of some judges, controversy—from the academics, who remain the chief arbiters of good legal discourse. Indeed, some opinions read like scholarly articles, and, unfortunately, often have as many footnotes.

For another thing, just because judges do not rely on law review articles in most cases does not mean that they do not rely upon them to a significant extent in at least some cases. We are all familiar with Oliver Wendell Holmes, Jr.'s epigram that the "life of the law is not logic but experience." In other words, judges cannot always deduce inexorable outcomes from the materials presented to them; sometimes, rather, they have to make difficult choices. It is in deciding the "hard case" that law reviews become important, if not indispensable. No jurist or lawyer, no matter how brilliant, can master a difficult issue in the relatively short time given to him to consider a case as well as a competent scholar aided by a team of bright law review editors. Indeed, history furnishes examples in which it took generations of brilliant judges to fully realize the implications of a certain doctrine or case. Judges, like everyone else,

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4. *See, e.g.*, Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1937); Arthur D. Austin, *The "Custom of Vetting" as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1, 4 (1990); John G. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 J. LEGAL EDUC. 14, 14 (1986); James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 527 (1994); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131 (1995).

sometimes need others to do their thinking for them; it is a simple matter of comparative advantage.

Consider the area of constitutional law. It is no secret that our state and federal constitutions these days govern innumerable areas of American life. Indeed, I can say, without exaggeration, that I can think of few, if any, areas of public and private action that constitutions do not in some way regulate. But the United States Constitution is a relatively short document, thanks to the taste for concision of the Framers. The disparity between the pithiness of the text and the vastness of its implications is more than any one judge can successfully digest. Judges face difficult constitutional issues constantly, and to understand any one of them requires a scholar's dedication. On these issues, law reviews continue to be indispensable.

And besides, even if judges are not reading law reviews, their clerks still do so. Sometimes a law review article will influence a decision and not even be cited—indeed a judge under the sway of a law review article may not even be aware that it exists, for it sometimes happens that a clerk reads an article that helps him form an opinion about a case, which opinion later influences the way in which the judge approaches the resolution of the conflict.

Law reviews are not only a place to test and analyze the law. They are a useful training ground for the judge's chief legal assistant—the law clerk. The increasing case load of judges has made the law clerk even more indispensable than before. The Law Clerk Handbook prepared by the Federal Judicial Center states that an appellate law clerk's primary responsibility is to research issues of law and fact in an appeal and to draft a working opinion for the judge.[5] In addition to this considerable task, clerks typically also prepare bench memoranda for use by the judge during oral argument, draft orders, edit and proofread the judge's orders and opinions, and verify citations. Considering the enormous amount of legal writing this entails, it is unsurprising that judges place a premium on law review experience when searching for the people on whom they will depend in performing their judicial duties.

I think most of my colleagues would agree that membership on law review is an excellent supplement to a legal education. The primary task undertaken by law review members—writing a case note or comment—gives those students the op-

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5. *Function and Role of a Law Clerk*, Law Clerk Handbook, Federal Judicial Center, at 1 (Sept. 1989).

portunity to research and write on a legal topic of their choice, an experience generally unavailable in standard law school courses. A seminar paper is a useful, but not perfect, substitute for the attention to detail that goes into a published article. Thoroughly researching a circuit split or defining an issue in an emerging or evolving area of law, such as telecommunications, intellectual property, and certain areas of criminal law, teaches law review members advanced research techniques that an appellate clerk benefits from knowing. Moreover, learning to synthesize case law and to distinguish cases along factual lines is a skill that all legal writers must learn and at which law clerks especially must be adept. Perhaps most importantly, however, writing a persuasive article necessarily involves a brush with legal reasoning that, with any luck, teaches the student author how to craft a clear, concise argument.

Participation in law review also exposes students to the all important editing process. For student editors, it is an unparalleled chance to interact with prominent legal scholars; in testing the thesis advanced in a law review submission, student editors often challenge a law professor's underlying assumptions, point out logical gaps in their argument, and suggest ways to better support the conclusions of their article. For student authors, it is a chance to have your ideas tested by your peers and for the author to get accustomed to receiving constructive criticism—including both substantive and stylistic suggestions—not to mention seeing a lot of red marks on the paper. Whether you are the person doing the editing or the one being edited, the process of exchanging drafts with another legal thinker will immensely improve one's writing.

Finally, law review teaches familiarity with the Bluebook, the bane of law review editors-in-chief and appellate law clerks alike. Learning proper citation format on law review indoctrinates students with a general attention to detail that is extremely valuable as an appellate clerk. After all, appellate clerks are responsible not only for writing their own opinions but for editing and cite checking their co-clerks drafts as well. I myself, having painfully learned the Bluebook as a law review editor, expect my clerks to give me error-free drafts.

The *University of Colorado Law Review* should be proud of its history in helping train young lawyers and educating the Bench and the bar. Its seventy-five years of scholarship is an enormous accomplishment. This judge, for one, will be looking to future articles for education and assistance.