

FROM: PRAWFSBLAWG

# GETTING LAW REVIEW FANS OUT OF THE CLOSET

LIPTAK ON JACOBS AND WAXMAN

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In a column today,<sup>1</sup> Adam Liptak discusses some familiar criticisms of law reviews. I believe law review articles are often high quality, useful and influential, as is reflected by my recent series of interviews with authors<sup>2</sup> of articles cited in the U.S. Supreme Court. Liptak quotes Second Circuit Judge Dennis Jacobs as saying in 2007 “I haven’t opened up a law review in years. No one speaks of them. No one relies on them.” Former SG Seth Waxman is quoted as saying in 2002 that “Only a true naïf would blunder to mention one at oral argument.” Do not believe either of them for a second; the record suggests that these cynics are closet idealists who regularly enjoy a good law review article.

As for Judge Jacobs, a Westlaw search shows he has cited law reviews dozens of times in his years on the bench. In 2005, he cited a law review article for a point of sentencing law, and then as an “accord,” cited a Stevens and Souter dissent. *See Guzman v. United States*, 404 F.3d 139, 143 (2d Cir. 2005). That is, Judge Jacobs cites the views of two U.S. Supreme Court justices to buttress the conclusions of a law review article. The next year, in *At Home Corp. v. Cox*

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<sup>1</sup> [www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?hp&\\_r=0](http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?hp&_r=0).

<sup>2</sup> [prawfsblawg.blogs.com/prawfsblawg/scholarship-in-the-courts/](http://prawfsblawg.blogs.com/prawfsblawg/scholarship-in-the-courts/).

*Communications*, 446 F.3d 403, 409-10 (2d Cir. 2006), he string-cited three law review articles to explain the realities of leveraged buyouts.

In truth, Judge Jacobs obviously – *obviously* – loves law review articles. How can we tell? He likes to cite articles raising interesting legal wrinkles, but which were not raised or precisely presented by the facts. *See* *Briscoe v. City of New Haven*, 654 F.3d 200, 208 n.13 (2d Cir. 2011) (citing article offering novel reading of a recent Title VII case); *Carvajal v. Artus*, 633 F.3d 95, 109 n.10 (2d Cir. 2011) (citing article raising novel reading of full faith and credit clause); *Pescatore v. Pan Am*, 97 F.3d 1, 13 (2d Cir. 1996) (citing articles dealing with “decades-old controversy over choice of law doctrine”). He also likes empirical work. *See, e.g., United States v. Whitten*, 610 F.3d 168, 201 n.25 (2d Cir. 2010).

Judge Jacobs has cited articles written by students, judges and scholars, century-old chestnuts and brand new work, he cites celebrities like Akhil Amar and William Stuntz writing in the *Harvard Law Review* and the *Yale Law Journal*, and lesser-known scholars writing in less fancy venues. In short, the record shows that he relies on law review articles when he concludes their research and analysis makes them worth relying on, which is exactly what judges should do.

As for Seth Waxman, of course it would be extremely rare for an advocate to mention an article in oral argument, just as it would generally be silly to waste much time emphasizing the fact that a unanimous state supreme court or en banc circuit court agreed with your position. He is quite right if his point is that by the time the case is in the Supreme Court, naked appeals to authority (other than binding Supreme Court decisions) are unlikely to help. And yet, a search of the Supreme Court brief database on Westlaw shows that Waxman authored 149 briefs citing law review articles, and 423 briefs in total. So more than a third of the time, he concluded that citation of a law review article would be more persuasive than simply incorporating the article’s cases and argument in the brief (which would be fair game – briefs and opinions need not be original). His choice to rely on articles is the clearest possible vote of confidence in the utility of scholarly research. On behalf of the legal academy, I say to Mr. Waxman: “You’re welcome.” //