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## Court Review: Volume 38, Issue 2 - Against Footnotes

Richard A. Posner

*U.S. Court of Appeals for the Seventh Circuit*

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# Against Footnotes

Richard A. Posner

**B**ryan Garner has done yeoman work in the uphill battle to improve the writing of lawyers and judges. Most of his suggestions for improving that writing are excellent, and he has urged them with skill and tenacity. But I am not persuaded by his suggestion that judges place the citations in their opinions in footnotes. There is some merit to the suggestion, but not enough to offset its negative features.

The obvious objection to footnotes is that they force the reader to interrupt the reading of the text with glances down to the bottom of the page. They prevent continuous reading. In doing so they make the reader work harder for the same information. In articles, which are (in law anyway) usually much longer than judicial opinions, and *a fortiori* in books, bringing citations into the text would elongate the text unduly. But opinions, as I say, usually are short; the two opinions of mine that Garner quotes from in his article are only 1,300 and 2,700 words respectively, while a law-review article of 20,000 words would be considered short. If an opinion does become very long or clogged with citations, the author always has the option of putting some of them in footnotes, though I myself have never found that either necessary or appropriate; I do not use any footnotes in my opinions, and never have during my 20 years as a judge.

A second objection weighed heavily with me in my decision not to use footnotes in opinions. Footnotes are the very badge of scholarly writing, and so they give a spurious air of scholarship to judicial opinions. Judges are not scholars, and judicial opinions are not scholarship, and these are important points that footnotes in opinions obscure.

The objections to footnotes in opinions are strong enough to shift to the proponent of footnoting citations, that is, to Garner, the burden of persuasion. He makes three arguments in an effort to carry his burden. The first is that it would make the opinions more readable, especially by lay persons, who are not accustomed to seeing citations in text rather than in footnotes. This is not a weighty argument. Legal professionals are accustomed to reading citations in text; moving citations to footnotes will not make reading opinions any easier for them. On the contrary, it will make it harder for them. Just compare the original to the Garner-revised version of the search-warrant opinion of the Nebraska Supreme Court; the original is the more readable.

As for lay persons, very few of them read judicial opinions or ever will do so. The principal exceptions are lay persons who have a professional interest in the law, such as economists, political scientists, and historians who do scholarly research on law, and these people, too—who are not really lay persons—have no difficulty reading citations in text; it is hardly a knack that takes a long immersion in reading judicial opinions to

pick up. When opinions are published or excerpted by the media, the citations are edited out by legal journalists, all of whom are either law-trained or habituated by their job to the judicial opinion style.

Garner's second argument for footnoting citations has slightly greater merit; it is that the "thickening" of a paragraph of judicial prose with citations makes the paragraph less transparent to its author and so impedes his efforts to express himself clearly. But this problem is easily overcome by the opinion author's deciding to write his initial draft without citations, or with citations relegated to footnotes. When he has finished and polished his draft, he can restore the citations to the text and so spare the reader having to glance up and down, up and down, up and down in order to absorb the entire opinion.

In support of his second argument Garner confuses two separate questions. The first is whether a judge should strive to write an opinion that would make sense to a nonlawyer; the second is whether a judge should strive to write an opinion that a nonlawyer would actually read. The answer to the first question is yes, but to the second no. A judge should try to make sense of the law, and one test of sense is whether the judge's arguments would be convincing to a lay person; if not, the judge may have gotten tangled in some absurd technicality, and should cut the Gordian knot. But having satisfied himself that his opinion does make sense, the judge doesn't have to go the next step and rewrite the opinion so that it will attract a lay audience. Nothing he does to the opinion will do that.

Garner has a third, subsidiary argument for his proposal, that it will enable judges to include longer string citations in their opinions. But, first, there is a downside in encouraging judges to cite more, and, second, as I suggested earlier, a judge who really thinks a very long string citation is necessary can put that string in a footnote without feeling obliged to put *all* his citations, or even the bulk of them, in footnotes.

Garner has made the case for his proposal seem stronger than it is by editing the paragraphs from judicial opinions that he quotes in his article beyond merely shifting the citations to the footnotes. The result is an illegitimate comparison. A paragraph that has the citations in the text is compared to a *different* paragraph that has the citations in footnotes, a paragraph that Garner has edited to make it read better irrespective of where the citations are. He has done this with two paragraphs from opinions of mine, and in the process has altered their meaning. In the paragraph he quotes from my opinion in *Wright v. Pappas*,<sup>1</sup> by changing my parenthetical ("including local taxes") into a new sentence ("We have held that this includes new taxes") he has created an ambiguity: It is unclear from his editing whether the exception to which the next sentence refers (the exception for the case in which the taxpayer

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1. 256 F3d 635 (7th Cir. 2001).

lacks an adequate state remedy) is limited to local taxes (it isn't). By another editing change, Garner has created a doubt unintended by me as to whether the Fifth, Ninth, and Tenth Circuits are in step with the Supreme Court.

Or consider what he's done to my other opinion, *Builders Association of Greater Chicago v. County of Cook*.<sup>2</sup> By putting the *Croson* case into a footnote preceded by "But see," he gives the misleading impression that I am treating this aspect of *Croson* as contrary to prevailing law, rather than, as I intended and as is clear in the original version of my opinion, as a statement of that law. And he does this—so dogmatically committed is he to putting citations in footnotes—by means of a textual footnote, though he's opposed to textual footnotes and this one (as so often) makes the argument of the opinion difficult to follow. He also attributes to me the view that "whether nonremedial justifications for 'reverse discrimination' by a public body are ever possible is unsettled in" my circuit, creating a contradiction with the next sentence of the edited opinion. (The insertion of "Meanwhile" in the following sentence introduces additional confusion concerning the state of the law.) The mistaken attribution is based on a misunderstanding of my opinion in *McNamara v. City of Chicago*<sup>3</sup> as holding that the issue of the possibility of nonremedial justifications for

reverse discrimination is unsettled in my circuit. In fact the opinion makes clear that the issue is unsettled in some other circuits and in the Supreme Court but that the Seventh Circuit has held that such justifications *are* possible.

These are details. The important point is that if Garner wants to demonstrate that a paragraph of judicial prose is clearer even to a law-trained reader if all the citations in it are relegated to footnotes, he should print side by side the original version with the footnoted version without changing a word of text. Otherwise comparison is impossible.



*Richard A. Posner is a judge on the U.S. Court of Appeals for the Seventh Circuit and a senior lecturer at the University of Chicago Law School.*

2. 256 F3d 642 (7th Cir. 2001).

3. 138 F3d 1219, 1222 (7th Cir. 1998)

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