A Word from the Publications Chair
CAL Members,
I am honored and excited to serve as the new Chair of the Publications Committee. I want to thank John Bursch for the excellent job he did as Chair. It will be difficult to fill his shoes, but with Professor Evelyn Tombers serving as editor of Appellate Issues and Ben Mesches as the editor of the CAL website, I know the Publications Committee will continue to improve the resources available for CAL Members. The Committee intends to continue with improvements to the website and offer three new and exciting Appellate Issues, the official publication of CAL.

I hope you enjoy this issue. I encourage all CAL members to contribute original and previously published material. We also welcome your comments on any changes or improvements to the website.

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Preventive Medicine For Your Case: Using Appellate Lawyers In Trial

Leane Capps Medford

This article is the second in a two-part series outlining the benefits of using appellate lawyers before appeal. Even the most experienced and talented trial lawyer may fail to preserve error or create the necessary appellate record. It is not an issue of experience or talent. Trial lawyers excel in convincing juries. Appellate lawyers excel in convincing courts. Whereas a trial lawyer complains that the trial court’s ruling is “wrong,” an appellate lawyer recognizes the ruling is harmless. The appellate lawyer is not indifferent to the impact of the erroneous ruling; she just recognizes it will not matter on appeal.

Trial and appellate lawyers experience trial differently. The trial lawyer keeps score with a powerful cross-examination, a compelling closing argument, the reaction of the jury. The appellate lawyer keeps score with the waived objection, the failure to get a ruling, the critical exhibit that was discussed but never admitted.

I have heard far too many defeated trial lawyers tell a client they can appeal when they have no idea if error was preserved or if it is reversible error. Anyone can appeal. What is important is that the client has some idea if it can prevail on appeal.

I advocate that every trial lawyer announce “ready” with a good appellate lawyer by her side. There are so many benefits to involving an appellate lawyer at trial that they cannot all be discussed in this brief article, but there are a few generalizations that can be made.

Your appellate lawyer should be an active member of the trial team.

If a trial lawyer takes an appellate lawyer to trial, she should make the appellate lawyer an active member of the trial team. If the client is paying for an appellate attorney to be present, the trial lawyer should take advantage of their expertise. For example, the appellate lawyer’s expertise can be useful when critical evidentiary issues are argued.

In addition to offering valuable expertise, the involvement of the appellate lawyer in the trial builds the trial lawyer’s credibility with the court that her side knows the law. Once this credibility is established, it can have a substantial impact on the trial. I have routinely seen trial judges defer to the side with an active appellate lawyer when critical issues arise in trial.

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In addition, one of the appellate lawyer’s most critical trial roles is to assist the trial lawyers and the court in compiling the instructions, definitions, and questions to be submitted to the jury. If the trial lawyer effectively involves the appellate lawyer as part of the trial team, the court is more likely to defer to the appellate lawyer on what should be included in the court’s charge at the end of the case.

**Your appellate lawyer insures you have a good appellate record.**

Generally, trials move too fast for trial lawyers to be cognizant of all the issues that could affect the appellate record. There are a number of ways trial lawyers can use appellate lawyers to insure they have an accurate and complete record on appeal.

If the case warrants the expense, I always ask for daily copies of the trial transcript in electronic form. While the trial lawyers are getting ready for the next day of trial, I review each day’s transcript at night. There are a number of benefits that can be obtained from a daily review of the trial transcript.

First, I determine if there were exhibits that were offered and not admitted. Second, I make sure that the transcript of any depositions that were played to the jury were transcribed in the record and were done so correctly. I once worked on an appeal (I was not present at trial) where the trial lawyers assumed the court reporter was taking down the videotaped deposition testimony as it was played to the jury. Not only did the court reporter not take down the testimony, the videotapes were not admitted as exhibits. On appeal, the testimony was not part of the record.

Similarly, I participated in a lengthy trial where the only evidence of justifiable reliance was one sentence in a videotaped deposition. Although that sentence was played to the jury, it was not transcribed by the court reporter. I caught the omission in the daily copy and had the court reporter correct it the next day. For the same reason, I also recommend that any videotaped depositions played to the jury are admitted as separate exhibits. If there is a discrepancy between what was recorded in the transcript and what was played to the jury, the actual testimony is part of the appellate record.

Third, the daily review of the trial transcript allows the appellate lawyer to outline the testimony and exhibits that support a client’s claims to prepare a response to an anticipated motion for directed verdict or a claim of no evidence at the charge conference. In a lengthy or complex trial, the daily marshalling of proof can be critical. I would rather show the court the testimony in response to a motion for directed verdict than ask the court to recall the testimony. A daily review of the transcript may also reveal that additional evidence is needed to support a claim and the trial lawyers can remedy the problem before they rest. Moreover, when the trial is over, the appellate lawyer has already done much of the work needed for post-verdict motions and pleadings.

If there are numerous exhibits, I also suggest the parties agree to split the cost of a copy service coming to the court and scanning a copy of all the admitted exhibits in the event the exhibits are lost or damaged or there is a dispute over what was admitted.
Your appellate lawyer prepares trial motions and briefs.

It is not uncommon for parties to file significant motions and briefs during trial. Including an appellate lawyer in your trial team to prepare or respond to motions and briefs insures that the trial lawyers are not distracted and are able to prepare for the next day of trial. In addition, using an appellate lawyer insures that the motions and briefs are thoroughly researched and that they preserve any appellate issues.

Your appellate lawyer insures preservation of error.

It is surprising how many trial attorneys fail to preserve error. Obviously, one of the most effective uses of an appellate lawyer is to insure the preservation of error. I once participated in a day-long hearing in the middle of trial on the admissibility of a critical report. The opposing lawyers did not involve appellate counsel. When the report was excluded, the opposing lawyers did not offer the admissible portions of the report. The opposing lawyers believed the exclusion of the report entitled their client to a new trial, but they failed to preserve any error. There are too many trial scenarios to list in this article, but including an appellate lawyer in a trial team will increase the likelihood that error is preserved.

Your appellate lawyer runs the charge conference.

Depending on the case and the court, a charge conference can last from one hour to two days. Even if a client will not agree to use an appellate lawyer throughout the case, at a minimum, the client should agree to have an appellate lawyer handle the charge conference. Too many trial lawyers attempt to prepare for closing argument and the charge conference at the same time and the preparation for the conference suffers. Moreover, because trial lawyers are eager to submit the case to the jury, they often lack the patience to make all the arguments and objections necessary to preserve any error in the jury charge.

Using an appellate lawyer to prepare and argue the court’s charge can also substantially increase the likelihood that correct jury instructions, definitions, and questions are submitted to the jury. Appellate lawyers study the law and trends in the law. As a result, they are more aware of changes in the law that could affect the court’s charge and areas where the courts are willing to change, modify, or clarify the law. Some appellate courts are increasingly willing to question pattern or form jury instructions. As a result, a trial lawyer may not be protecting her client by simply relying on the published jury instruction forms.

Your appellate lawyer assists in post-verdict motions and pleadings.

After the jury or court returns its decision, trial lawyers should use appellate lawyers to assist in the preparation of findings of fact and conclusions of law, motions for entry of judgment, motions for new trial, motions to disregard jury findings and for judgment notwithstanding the verdict. These post-verdict motions are critical to preserve error and solidify appellate issues. If an appellate lawyer has been involved from the beginning of the case, the case will be in even better shape in the event of an appeal.
In sum, I urge every appellate lawyer, trial lawyer, and firm to create an active partnership *during trial* between trial and appellate lawyers. It leads to better results, less stress, a better appellate record and cost savings for clients on appeal.
CASANOVA ON APPELLATE PERSUASION

L. Steven Emmert

This is the fourth in our occasional series of interviews with historic figures, focusing on their views on appellate advocacy. Earlier entries in the series include conversations with the Chinese general and strategist Sun Tzu, the Roman consul and orator Cicero, and Nobel laureate Ernest Hemingway.

While modern popular culture remembers Giacomo Casanova only as a libertine, he was actually a Renaissance man of extraordinary talent and accomplishment. In addition to his celebrated and lengthy memoirs, published after his death in 1798, he also authored a book on the history of Poland; several scientific and mathematical papers; and numerous essays, literary criticisms, and works of belles lettres. He was acquainted with numerous illustrious figures of his day, including Voltaire, Benjamin Franklin, Russian Empress Catherine the Great, Rousseau, and Prussian King Frederick the Great.

Over the course of his life, Casanova engaged in a variety of pursuits, besides women and writing. At times, he worked as an engineer, a factory manager, a trustee of the French state lottery, a concert violinist, a spy, and even - -

* * *

A lawyer? You were a lawyer?

Is that so hard to believe?

Well, no one these days ever thinks of you as a lawyer, or anything so mundane as that. Nowadays, everyone knows you as
I know what they think. Even in my day, historians tended to emphasize one aspect of a man’s character, and left all the others in the shadows, making the subject seem unnaturally one-dimensional. It takes a great historian to portray an entire man.

Has anyone ever written such a multidimensional book about you?

Heaven knows, I tried. I labored on the manuscript for Historie de ma vie – you know it as History of My Life – but after I reached a certain point, the task simply became too painful; the memories too sad. I never really finished it.

So, did you hang out a shingle? Maybe take a few divorce cases, and console a few (heh, heh) jilted wives?

Always a comedian. Whenever they want to interview me, they always send a comedian.

You’re right; I’m sorry. Let’s go back to the issue of your legal career.

I wouldn’t exactly say I had a legal career. I was trained in the law, and received a doctorate in civil and canon law when I was 17 years old. Back then, I had my heart set on a career within the Catholic Church –

You’re kidding.

No, I decidedly am not kidding. It will probably come as no surprise to your ever-prurient mind that I was kicked out of the seminary. Choose your next comment carefully.

. . . Okay . . . So if you never really practiced law, I assume you didn’t handle any appeals.

You would not call me an appellate attorney, no.

So what do you have to say for our readers, who want to know about appellate practice and procedure? What can you tell them about how to be a better appellate lawyer?
Well, I can certainly speak authoritatively about persuasion –

[Interrupting] I'll just bet you can.

Well, I'm not blind to the fact that history ignores my real achievements and brands me a single-minded womanizer. But even if the history books were right, I could still teach your readers a thing or two about persuasion. What do you think seduction is, after all?

I see what you mean. But surely the "skills" you employed in talking your way into a lady's boudoir will not help in an appellate court, right?

In a sense, you're right; I certainly don't advocate whispering sweet nothings or composing a sonnet for the benefit of an appellate jurist. But I will say that some of those skills can be translated into the appellate context.

I have to admit, I'm skeptical. But you have been kind to offer your time and advice, and I have probably been something less than gracious with you just now, so I'll be very interested to hear some of your ideas on this subject.

Well, that's one of the secrets right there: Listening. Being willing to listen to my lovers, instead of constantly battering them with my own words, has proven to be an enormously effective approach. Your audience can apply the same secret at an appellate lectern by giving careful attention to a question from the court.

To ensure that you understand the question before answering it?

That's the most important reason, yes. But on another level, every person derives a certain private satisfaction when it is clear that his audience has understood him fully. One of your era's philosophers, Stephen Covey, certainly recognized this when he urged those in search of greater effectiveness to "seek first to understand, then to be understood."

So you're saying that one of the keys of persuasion is to listen?

Exactly. Of course, you must comprehend what you hear. For example, I always paid attention when one of my lovers admired a particular flower. The next time I saw her, I would ensure that a bouquet of that flower preceded my arrival by half an hour.
You had me with you until you mentioned the flowers; now I’m confused. How does something like that translate into the appellate context?

It’s simple; you listen for what your justices like, in a brief or in your oral argument, and then you give it to them.

And I take it that’s something other than sweet nothings.

That’s one part of seduction that does not translate into your court system.

You suggest listening to appellate jurists to get an idea of what they like. When do they announce such things? And how do our readers get an invitation to hear them?

Well, they very rarely step up to a microphone and list the characteristics that charm them. But sometimes they do; appellate jurists are not hermits, and they occasionally address bar associations. Overwhelmingly the topic of those talks is how to do a better job of appellate persuasion. Beyond that, you can read their advice. Sometimes that advice is explicit, such as an article written for a journal; there are lots of those. Other times, you can read between the lines of their judicial opinions, when they point out what they don’t like, and figure out what they do like.

Such as?

Clarity, for one thing. There is no reason to say something obliquely in your brief, when you can say it clearly. That’s readily discernable from some of the court’s written opinions, for example, when they reject an argument as having only implicitly been raised.

Let’s talk about oral argument. What sort of style do you recommend for the advocate who wants to be as persuasive as a Casanova?

Certainly not the public image you have of the language of seduction; that has no place in an appellate court. Fundamentally, there is one thing that these two types of communications share: They’re interesting.

One of the keys to effective persuasion is to be interesting?
Absolutely! But it has to be written the proper context. For example, I was a student of medicine as well as of law. I could talk for hours about medicine, and with considerable authority. But can you imagine my trying to coax a lady with such talk?

No; not unless you’re trying to seduce Florence Nightingale . . .

You should be ashamed of yourself. Seduce an angel of mercy?

It was just a –

I understand exactly what it was. But remember, if in an appellate context, you write a brief that not only addresses the points you need to cover, but is also interesting to read, you will be well ahead of your opponent in the persuasion game. Every human prefers to read or listen to an argument that is interesting rather than dull. The same goes for my paramours; if I had ignored this simple truth, I never would have been able to . . . well, let’s just say I would have been remembered very differently.

How long should an appellate argument, either oral or written, be, to maximize its persuasive effect?

Shorter is better. Never use an epic poem to express what can be said in a couplet. When composing an appellate sonnet, it is decidedly unpersuasive to bludgeon the court with iterated and reiterated arguments, or with what the lawyers of your day call "string cites."

Now you’re talking like a lawyer.

No, that applies with equal vigor to amorous persuasion. If I go on and on in praise of a given lady’s beauty, sooner or later she’s going to perceive that I’m desperate. An appellate court will start to reach the same conclusion if all you do is repeat your principal argument again and again, perhaps tripling the length of your brief. Consider that the next time you’re nervously comparing your brief with the page limits in your rules of court.

What’s the most persuasive way to answer a question from the court during oral argument?

Ah; this goes back to the very first thing we discussed, about giving your lover, or your judge, what she wants.
Okay; what does she want?

An answer, of course. Preferably a straight one. It is painful to watch some oral arguments, where the court asks a pointed question and gets an answer that is evasive or rambling.

Sometimes the lawyer is so afraid of conceding a point that he will stake out a logically indefensible position, or wholly separate himself from the factual record. On the other hand, to be optimally persuasive, you should give the court a direct, straight answer, every time. If you need to explain or qualify it afterwards, that’s fine; but the answer should always precede the explanation.

Have you encountered some appellate oral arguments in which the lawyer goes to great lengths to praise the court, at every opportunity?

Yes; your generation has a term for that. It’s called "kissing up to the bench," and it is decidedly unpersuasive. It might have worked in my day, back in the Eighteenth Century, but only when addressing royalty; never a court.

That’s interesting; did it work with royalty?

You bet it did. In the Nineteenth Century, England’s Queen Victoria was asked to describe the difference between Prime Ministers Benjamin Disraeli (whom she greatly admired) and William E. Gladstone. She replied, "After half an hour with Mr. Gladstone, I am convinced that he is the most interesting person in the world. After half an hour with Mr. Disraeli, I am convinced that I am the most interesting person in the world."

You make Disraeli sound like such a sycophant.

Well, maybe in a sense he was. He himself once wrote, "Everyone likes flattery; and when you come to Royalty you should lay it on with a trowel." The point is that this does not work on appellate jurists. So when you get a query from the court, you should resist the urge to say, "Your Honor, that’s an excellent question." You’re likely to hear in response, "Thanks, counsel; now how 'bout an answer?"

This has been a very enlightening chat, much more so than I had thought when we got started. There’s just one other thing. I figure I may never have this opportunity again, so I’d like your advice. I don’t suppose you could give me a few pointers, you
know, on how to impress the ladies? Surely there is at least one great secret to seduction that you could pass on.

Actually, there is one ultimate secret; something that is guaranteed to turn even the most cold-hearted, resistant subject into a more than willing lover.

There is?

Yes, but I have an inflexible rule: I only teach it to one person in each generation. And George Clooney got here before you did.
What’s going on in CAL’s Committees?

**Pro Se Pro Bono Committee**

**Tom Boyd and Andrew Dhuey, Co-Chairs**

CAL's Pro Se Pro Bono Committee met during the annual conference this fall in Washington D.C. to discuss ways that CAL members can become more active in doing pro bono appellate work in their respective states and among the federal circuits.

Recently, the Committee issued a report on pro bono programs in various appellate courts nationally. That report is available at http://www.abanet.org/jd/ajc/pdf/pro_bono.pdf. While the report was helpful in seeing what is currently available, the Committee is now focusing on helping the federal circuits establish more effective methods of selecting cases appropriate for pro bono help from experienced appellate litigators. Two models that the committee is examining are in the Ninth and Second Circuits.

If anyone is interested in getting involved, or knows of other groups that the committee could look at as examples of effective pro bono appellate programs (either government sponsored or independent), please contact the committee’s Co-Chairs, Tom Boyd (TBoyd@winthrop.com) and Andrew Dhuey (ajdhuey@comcast.net).

**CAL Program Committee**

**Jerry Ganzfried, Chair**

**Matt Lembke, Vice Chair**

The CAL Program Committee is in the midst of vigorous planning for events during the coming year and beyond. In addition to preparations for the ABA mid-year and annual meetings, there is already a high level of activity devoted to the 2008 AJEI-CAL Summit and new events in 2009.

At the ABA mid-year meeting in Los Angeles, CAL will co-sponsor a program on Appellate Practice featuring Dean Ken Starr (Pepperdine Law School), Dean Erwin Chemerinsky (currently a professor at Duke Law School and recently appointed dean of the new law school at the University of California, Irvine) and Judge Consuela Callahan (United States Court of Appeals for the Ninth Circuit). The presentation, co-sponsored by the Judicial Division of the ABA, is scheduled for Friday February 8, 2008. We are also planning a reception for CAL members and prospective members in conjunction with the program at the mid-year meeting.
For the ABA annual meeting in New York City in August 2008, CAL has submitted a proposal for a program on the knotty problems presented by the litigation of state law issues in federal courts, and federal law issues in state courts. We expect to hear shortly whether the proposal will be granted a spot in the agenda. In addition, we are exploring the possibility of co-sponsoring programs of interest to appellate practitioners along with other sections and components of the ABA.

Following the enormous success of the 2007 AJEI-CAL-CASA Summit in Washington, DC, the Program Committee and CAL leadership has been working closely with AJEI on the 2008 Summit in Phoenix. The event is scheduled for November 13-16, 2008. As with prior Summit programs, we expect to have an extensive array of presentations that provide high educational content, great practical value, intellectual challenges, networking opportunities, and an ideal setting in which to enjoy the hospitality of our colleagues in Phoenix and the inter-mountain West.

Looking even further into the future, we are working on the revival of a uniquely exciting program, the Appellate Practice Institute, to be held in Chicago in May 2009. The API provides an extraordinary learning experience for lawyers who receive critiques on briefs and oral arguments from nationally prominent appellate practitioners and judges. Mike King has agreed to lead CAL's efforts in planning this major event.

The Program Committee anticipates that additional programs will be planned, including another Swearing-in Ceremony at the Supreme Court. With this high level of activity, there are many opportunities for CAL members to participate in the work of the Planning Committee. Anyone interested should contact the Program Committee leadership: Jerry Ganzfried, Program Chair, at Howrey LLP in Washington DC, at 202-383-6512, ganzfriedj@howrey.com; Matt Lembke, Program Vice Chair, at Bradley Arant.

**Membership Committee**

**Mark Friedman, Chair**

CAL’s Membership Committee is working on a number of ideas to increase and retain the Council’s membership. The most promising is an e-mail appeal to ABA members who identified themselves on the ABA’s on-line survey as being interested in appellate practice but are not yet members of CAL (or CASA or AJC, the other councils in the Judicial Division). A similar appeal conducted in 2005 resulted in the addition of at least 30 new members.

Besides this "air game," we are pursuing a "ground game" by preparing a hard-copy brochure explaining the many benefits that CAL provides, with a membership application printed on the back. As we did before and during the
AJEI Summit in September, the Committee will also reach out to potential members who might be attending ABA, circuit, and specialty bar conferences during the coming year.
SUPREME COURT PREVIEW: IS THE PAST PROLOGUE?

George T. Patton, Jr.*

Dean John B. Attanasio of the SMU Dedman School of Law moderated a discussion with Kenneth W. Starr, Dean of the Pepperdine University School of Law, Former U.S. Circuit Judge, and Former U.S. Solicitor General together with Professor Michael J. Klarman of the University of Virginia School of Law. The conversation was more preview than review but began with some reflections on the 2006-07 term in the U.S. Supreme Court as a springboard to predictions for the upcoming 2007-08 term.

A statistical summary from the completed term showed:
• 10,256 docketed
  • 2,609 paid cases
  • 7,647 in forma pauper
• 78 decided cases
• 71 hours of oral argument
• 71 opinions
• 2 original matters
• 76 grants of certiorari
  • 69 from U.S. Courts of Appeals
  • 3 from State Supreme Courts
  • 3 from State Intermediate Appellate Courts
• 28 unanimous opinions
• 9 by a vote of 8-1 or 7-1
• 8 by a vote of 7-2 or 6-2
• 3 by a vote of 6-3
• 24 by a vote of 5-4

Professor Klarman used this last figure as a jumping off spot for his four points, the first two of which are generally accepted and the last ones of which are controversial:

First, the Roberts Court is deeply divided with a third of the decisions being decided 5-4. There was no consensus on the interpretative methodology and policy disagreements among the Justices.

Second, everything turns on Justice Kennedy. He was in the majority all 24 times in the 5-4 decision and wrote only two dissents all term. He has assumed the fulcrum position that Justice Powell held earlier.

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Third, the Court has no care for precedent. It will overturn precedent either *sub silento* or expressly as in the case of *Dr. Miles*. Justice Scalia commented on the “faux judicial restraint” in one case and Professor Klarman noted the lack of respect for precedent in the Establishment Clause standing case of *Hein*, the campaign finance case different than *McConnell*, the *Seattle-Louisville School District* case contrary to *Grutter*, and the partial-birth abortion ruling reaching a different result than *Carhart*. Professor Klarman took no position on how deferential to prior precedent the Court should be, but he noted differences between distinguishing a prior case and out-right overruling, but this offers nothing more than the appearance of judicial modesty.

Fourth, and perhaps most controversially, he argued that the Court is activist on both the left and the right. As an example, he pointed out that conservative justices read color-blindness into the constitution and are more likely to invalidate legislation. He again did not take a position on the activism but rather noted that it occurred on both sides of the spectrum. Dean Attanasio had a few questions for Professor Klarman on how the campaign finance case fit his thesis before turning to Dean Starr.

Dean Starr began by noting Professor Klarman’s provocative latter points that had “stirred the pot” dispensing with his prepared remarks so that he could respond. With regard to judicial activism, he said it was important to define the phrase. He reached back into history discussing Federalist period judges’ rulings on Sedition laws. He pointed out that counting by race is a close constitutional question and that the *Seattle-Louisville* school case could be distinguished from *Grutter* on the grounds of elementary versus university levels of education. Justice Breyer’s long dissent, which took 25-minutes to read from the bench, emphasized the closeness of the issue. In concluding on this point, he said that he disagreed with Professor Klarman’s thoughts on judicial activism.

Then Dean Starr turned to *stare decisis*. He urged the Court to be forthright and transparent, to rely on neutral principles of law as Professors Hart and Wexler urged in their Columbia Law Review article. As examples of this, he pointed to the unanimous decisions from the prior term in *Fair v. Rumsfeld* and *Ayotte v. New Hampshire* hoping for a restoration of that agreement. Justice Kennedy, in particular, used the word “respectful” or “respectfully” numerous times to emphasize his views on civility.

Chief Justice Robert is likely to lead the Court until 2040 or 2045; Justice Alito is likewise young, smart and experienced. The disagreement between them is instructive as Chief Justice Roberts carries a Jeffersonian, state-rights view while Justice Alito has a more Hamiltonian, federal view. Dean Starr said that this was an area to watch.

The panel then turned to a preview of the 2007-08 term. So far the docket shows:

- 47 cases granted certiorari, including
  - 15 criminal law
  - 6 employment
  - 2 arbitration
Professor Klarman predicted that the Bush Administration will lose the Guantanamo case, which turns on the suspension of habeas corpus. The legal question turns on the rights as they existed in 1788, at the time of ratification of the Constitution, for aliens within a territory of the U.S. The case may turn upon how the U.S. Court of Appeals for the District of Columbia reviews the combat status review tribunals. Professor Klarman guessed that the Congressionally-mandated review by the D.C. Circuit is not an adequate substitute. The underlying theme he noted was that the President does not get to disrespect the Supreme Court by attempting to overturn *Hamdan* and by quarrelling with *Rasul*. The Court originally denied the petition for writ of certiorari and then granted rehearing to take the case.

Dean Starr talked about a Texas capital case involving the International Court of Justice and the right of access to consulate officials. The Texas Court of Criminal Appeals did not follow the international ruling backed by President Bush. Dean Starr predicted that the President will prevail in the case.

Professor Klarman addressed two election cases, one from Washington and the other from New York. He predicted that the efforts of Washington and New York will both be struck down by the U.S. Supreme Court.

Dean Starr turned to the preemption cases involving Med-Tronics, Dow Agra, and CSX. The question is whether the federalism revolution is alive such that state statutes or regulations will survive.

The first question related to the District of Columbia’s Second Amendment case. Professor Klarman stated that the consensus was that Court would take the case and possibly address three questions: (1) whether the amendment is incorporated against the States and, if so, does that include the District of Columbia; (2) whether the right to bear arms is a collective right of a militia or an individual right; and (3) what reasonable regulations can be imposed on the right to bear arms. The D.C. Circuit looked to common law and found distinguishable the 1939 opinion of the U.S. Supreme Court in *Miller*. Dean Starr also predicted a grant of a writ of certiorari and recommended the D.C. Circuit opinion’s for its academic scholarship.

The second questions related to field preemption. Professor Klarman predicted a 5-4 division on these questions with the Court moving to the right because all appointments since 1970 except for one have been in that direction. He noted that the Court is on the verge of an epic paradigm shift where economic issues take precedence.
over race or free speech. “The conservatives are in control,” he stated, and predicted implementation of conservative decisions. He urged the Court to be transparent about this change.

Dean Starr closed by talking about the unifying vision of the Warren Court versus the Burger Court versus the Rehnquist Court. He sees Justice Kennedy’s soaring vision of liberty to be in control building upon the second Justice Harlan’s reliance upon history and tradition.

Dean Attanasio wrapped up the panel by talking about activism and control of the docket. He recommended a recent interview of Chief Justice Roberts by Professor Jeff Rosen. The Chief Justice stated he was reading about his predecessors and their attempt to create unity and institutional integrity. Dean Attanasio also harkened to Justice Breyer’s goal of respect for the rule of law, independence of the judiciary, and against attacks on judges. In the end, all agreed on the goal of respect for judicial decisions.
Law Affecting the 2008 Presidential Election

Kirsten E. Small*

With the 2008 presidential election looming ever larger on the horizon, attendees of the 2007 AJEI Conference flocked to a panel discussion of recent changes in the law that may affect the election. The panel was moderated by Lynda Dodd, Assistant Professor of Law at American University’s Washington College of Law. Professor Dodd, who received her J.D. from Yale Law School and her Ph.D. in Politics from Princeton University, was joined by Benjamin L. Ginsberg and Joseph E. Sandler, both of whom have extensive experience in election law issues. Mr. Ginsberg served as National Counsel to the Bush-Cheney campaign in 2000 and 2004, playing a central role in the 2000 Florida recount. Mr. Sandler has served as general counsel to the Democratic National Committee and was a member of the core team in Tallahassee, Florida, for the Gore-Lieberman Recount Committee.

The panel began with a discussion of Federal Election Commission v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007), and the likely impact of that decision on advertisements during the 2008 election cycle. WRTL concerned § 203 of the Bipartisan Campaign Reform Act of 2002 (a/k/a “McCain Feingold”), which prohibits corporations from using general treasury funds to pay for any “electioneering communication” during a specified blackout period preceding a federal primary or general election. An “electioneering communication” is any broadcast that refers to a candidate for federal office, when aired during the blackout period; the term thus includes “express advocacy”—broadcasts intended to secure the election or defeat of a particular candidate—as well as “issue advocacy”—broadcasts concerning public issues generally but which mention a candidate. In McConnell v. Federal Election Commission, 540 U.S. 93 (2003), the Supreme Court upheld § 203 against a facial challenge.

In 2004, Wisconsin Right to Life began broadcasting advertisements that urged voters to contact Wisconsin Senators Russ Feingold and Herb Kohl opposing a filibuster of federal judicial nominees. The ad, if aired during the blackout period, would have violated § 203. A five-justice majority of the Court held § 203 unconstitutional as applied to the ad. Chief Justice Roberts, joined by Justice Alito, concluded that an ad should be viewed as the “functional equivalent of express advocacy,” and properly regulated by § 203, “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” WRTL, 127 S. Ct. at 2667. Under this standard, the Chief Justice concluded that § 203 was unconstitutional as applied to the ads. Justice Scalia, joined by Justices Kennedy and Thomas, concurred in the judgment on the basis of his view that McConnell was wrongly decided.

Mr. Sandler predicted that a result of WRTL during the 2008 campaign season will be more issue ads. Groups will be emboldened by the safe harbor of the decision, given that Chief Justice Roberts’s opinion stated that in doubtful cases, the speaker wins rather than the censor.

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Mr. Ginsberg noted that more statutes are being passed regarding political advertisements because legislators don’t like these ads and because there is an increased number of groups that are neither parties nor PACs. This raises the issue of when a group that is not otherwise subject to regulation becomes a PAC. The status of “527” groups such as Swiftboat Veterans for Truth and MoveOn.org was a major issue during the 2004 election cycle, and the issue has not yet been resolved. The FEC has adopted a case-by-case enforcement policy, which means that there is no clear standard.

The panel next turned to a discussion of the ever-advancing primary calendar. Since the mid-1960s, the political parties have set the rules for selection of delegates to the national conventions. Traditionally, Iowa conducted the first caucus and New Hampshire conducted the first primary. In 2000, however, the Republican Party opened the primary “window” to the second Tuesday in February. The Democrats matched this window in 2004. These earlier available primary dates, combined with resentment over the elevated importance of Iowa and New Hampshire in the nominating process, has prompted a rash of “frontloading”—state parties scheduling their primaries for dates early in the process in hopes of greater influence and, consequently, attention from the candidates. In the current election cycle, a number of states have advanced their primaries to dates before the February 5 date sanctioned by the national parties; 21 other states have set their primaries for February 5, creating the so-called “Super Duper Tuesday.”

The consensus of the panel was that there are no easy answers to the problem of frontloading. The Supreme Court has held that the states have a sovereign right to decide how delegates to the national conventions will be selected but that the political parties are not required to accept delegates who are selected contrary to party rules. Thus, the national parties have the power to punish states with early primaries by refusing to accept some or all of the delegates from that state. As of this writing, for example, the Republican National Committee has voted to punish five states with early primaries by refusing to seat half of their delegates at the nominating convention. However, even if the national parties are able to bring the state parties into compliance with the national rules, there remains the fact that 21 primaries are scheduled to take place on the first Tuesday in February. The only way to solve the problem is through cooperation among the parties (which is difficult, at best, to accomplish) or congressional intervention (which is anathema to virtually everyone).

The panel also briefly discussed proposals for reform of the Electoral College, particularly legislation pending in California to assign electors based on a candidate’s percentage of the popular vote. Although such a system would remove the substantial barrier imposed by the current “winner take all” system to third-party candidates, the view of the panel was that the California measure would not pass and that one state simply cannot reform the Electoral College on its own. Therefore, the Electoral College will not change during the 2008 election cycle. In the panel’s view, a third-party candidate can hope to make an impact on the election only if the candidate has enormous wealth and a significant ideological gap exists between the two major party candidates.

Last, the panel considered various attempts to combat voter fraud, particularly voter identification laws. Courts have been divided on the validity of laws requiring a photo i.d. in order to vote, as have the political parties: Republicans tend to favor these requirements as a
means of combating voter fraud, while Democrats tend to oppose them because these measures disproportionately affect the poor and minorities. The panel demonstrated a similar division; Mr. Ginsberg acknowledged that the right to vote is precious, but he maintained that voter i.d. requirements are not burdensome; Mr. Sandler argued that experience shows that the requirements impose fairly substantial burdens.
PETITIONS FOR CERTIORARI: UNDERSTANDING THE HIDDEN PROCESS

John J. Bursch*

Approximately 9,000 petitions for certiorari are filed each year in the United States Supreme Court. It takes skill—and a bit of luck—for your petition to be one of the 70-80 cases selected for briefing and argument. At the 2007 AJEI conference, a distinguished panel of presenters attempted to demystify the process with an insider’s look at how the Court analyzes and selects petitions.

The discussion began with a presentation by Chris Vasil, Chief Deputy Clerk of the U.S. Supreme Court. Chris noted a recent trend among Supreme Court practitioners of timing a cert. petition filing so that it will be considered at a conference assumed to be more favorable to the petitioner. (For example, a petitioner may hope for a January conference, when the Court is trying to fill its April oral argument calendar.) However, because the Court’s docket has been light this year and last, Chris predicted that the Court would be willing to consider any cert-worthy case filed at any time. He encouraged practitioners not to delay their cert. petition filings.

Chris also recommended that parties who prevail in the lower court always (or nearly always) file a brief in opposition to the cert. petition. Although the Court will not grant a cert. petition without requesting a response when one has not been filed, there is a significant danger that a clerk in the cert. pool who believes an unopposed petition should be granted may not be easily swayed from that view by a late-filed submission.

Chris also encouraged parties to quickly file their reply briefs in support of a cert. petition so that the pool memo writer will receive that brief in the same package from the clerk’s office that includes the petition and brief in opposition. Consider sending the Court a .pdf copy of any reply brief, because the off-site security screening process can cause delay. Alternatively, file the reply in the clerk’s office before 2 p.m. and in an open container, and the office will receive it the same day.

Chris observed that the pool memo clerks tend to focus on the following factors when deciding whether to recommend that the Court grant a petition: (1) jurisdiction (finality, independent state grounds, etc.), (2) whether there is an important federal question or a conflict among the circuits, (3) the presence of amici filings, and (4) whether there is another case that may be a better candidate for certiorari than the one under review (if your case is scheduled for a conference, no decision issues, and the Court does not immediately reschedule the case for the next conference, there is a strong possibility the Court is considering whether to take a similar case in its place).

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The panel then turned to Carter Phillips, a partner at Sidley Austin LLP. Carter emphasized that in deciding whether to file a petition, you must always consider your audience.

The truth is that no Justice is likely to even read your cert. petition. The audience is a group of 25- to 27-year-olds who have generally been out of law school for only one year. Moreover, only two sets of eyes will ever view the petition: the eight-Justice pool clerk and one of Justice Stevens’ clerks. You have to capture the clerks’ attention immediately, because the amount of work they have is staggering. Accordingly, you should draft the question in a way that will grab their attention and try to make the petition user friendly.

You must always look for a legitimate way to claim a conflict in the circuits on the point of law relevant to your petition. If there is a clear circuit split, there is no need to use all of the available pages. Spend some time discussing the merits, but not a lot. You can also spend less time discussing the importance of the issue. In the absence of a split, it is crucial to explain why an issue is of national importance.

*Amicus* support at the cert. stage is tremendously important. The best *amicus* for a petition is the Solicitor General, but the office’s practice is not to file a brief in support of a petition unless the Court invites the Solicitor to file. On the other hand, states will often do so, and that is also an important advantage. In Carter’s opinion, it is more important to have an *amicus* brief at the petition stage than on the merits, because it shows the issue is of importance to someone other than the litigants. Carter noted that as a petitioner, he always accedes to a request to file an *amicus*, even if in support of the respondent. Even a hostile brief shows that the case is important enough to warrant an organization spending time and money to oppose it.

In Carter’s opinion, it is risky to ask the Court to summarily reverse. That request suggests there is no split of authority and that the petitioner is simply asking the Court to engage in error correction.

Finally, Carter noted that interlocutory status is not as important when appealing from a federal court, but it is extremely important when appealing from a state court. Unless you have a case from the Supreme Court that decides the issue, generally do not bother filing a petition for certiorari from an interlocutory state court decision.

The next presenter was Assistant Solicitor General Dan Himmelfarb. He noted that while cert. petitions are generally granted at a rate of less than 1%, the Solicitor General’s petitions are regularly granted at a rate in excess of 50%. Last term, for example, the Court granted seven of the Solicitor General’s petitions and denied only two. The Court is likely to give weight to the Solicitor General’s view, and to maintain institutional credibility with the Court, the United States tends to file only when it thinks cert. will be granted. It does not hurt the Solicitor General’s odds that when a federal agency’s work is impaired by a lower court, it tends to always
involve an issue of national importance. The Court is most likely to deny a Solicitor General’s petition only when the lower court has exclusive jurisdiction (e.g., Federal Circuit) and there cannot be an inter-circuit split, or where an asserted split in the circuits is not actually a true split.

Solicitor Himmelfarb also mentioned that the United States waives its right to respond in 80-90% of the cases where an adverse cert. petition has been filed. He noted that although lawyers are often concerned when the Court requests a brief in opposition where one has not been filed, it is still far more likely that the Court will deny the petition rather than grant it.

In Solicitor Himmelfarb’s opinion, a brief in opposition should address the merits but not at great length or in detail. An advocate need not convince the Court that the decision is right, but the advocate must demonstrate that the lower court is not obviously wrong. The most important discussion is whether there is a circuit conflict. If not, the brief in opposition should prominently discuss that fact. If the petition asserts a split: explain that (a) there is no real split, (b) the issue is not of sufficient importance, and/or (c) the case before the Court is not a suitable vehicle for resolving the conflict.

Sometimes the respondent will agree that certiorari should be granted and acquiesce in a petition. The Court will usually grant the petition in those circumstances, but not always. A respondent can also request that the petition be held pending resolution of another case for which the Court has already granted the petition.

Solicitor Himmelfarb noted that the United States is not a typical amicus party. For example, the Court routinely grants the Solicitor oral argument time as an amicus when other amici are not. In addition, the Court often invites the Solicitor General to file an amicus brief at the petition stage. In the past four terms, the Solicitor General has submitted only one amicus in support of the petition without being asked by the Court. The Court agrees with the Solicitor General’s recommendation at the cert. stage more than 50% of the time.

The panel presentation concluded with an address from Professor Orin Kerr of the George Washington University Law School. He emphasized that a pool clerk may not be able to spend much time on a case and accompanying memo, so the petitioner must signal why this petition requires more attention. The question presented should state a clear legal issue and should also note the circuit split. In addition, the petition must be letter-perfect and demonstrate that the outcome will be different if the Court reverses. When measuring the likelihood that a petition will be granted, a published opinion from the court below is far more important than an unpublished opinion. A petition must avoid at all costs the suggestion that it is seeking mere error correction. To do so writes the four-sentence memo recommending denial.

Keep in mind as well that Supreme Court clerks enjoy reading appellate blogs (e.g., How Appealing and SCOTUS Blog); if you can persuade a prominent blog to say that your issue is interesting, that recommendation may serve a purpose similar to that of a supporting amicus brief.
ORAL ARGUMENT: HOW TO USE IT TO WIN YOUR APPEAL

John J. Bursch

Practitioners attending the 2007 AJEI Summit were treated to an exceptional presentation on oral argument from a distinguished panel moderated by noted Supreme Court advocate Jerry Ganzfried and including Principal Deputy Solicitor General Gregory Garre, Georgetown University Law Center’s Professor Richard J. Lazarus, Supreme Court advocate and author David Frederick, and the Honorable Neil M. Gorsuch of the United States Court of Appeals for the Tenth Circuit.

Judge Gorsuch began by advising practitioners not to waste time introducing themselves, the other attorneys, or their clients. Time is a precious commodity. Likewise, do not spend significant time describing the facts or the case. To make a presentation valuable, focus on (1) offense, and (2) defense. Regarding offense, if you can come to the Court with one or two novel observations (not simply reciting the brief) and present them in an immediate and interesting way, you’ve accomplished something. Regarding defense, there should not be a question the Court asks that you have not thought through and can answer by tying the question back to your one or two principal themes. Oral argument does not change the disposition in the vast majority of cases, but it often changes the analysis, and that can be significant.

The panel then turned to the topic of maximizing your oral argument. Mr. Frederick offered the very practical observation that you need to get a good night’s sleep two nights before the argument, because you’re unlikely to sleep well the night before. In his view, the hardest part of oral argument is thinking about what the next case is, i.e., dealing with hypotheticals that arise naturally out of your case. Particularly at the highest appellate levels, the argument is not really about your case at all; it is about the next case.

Solicitor Garre added that preparation is the most important part of the oral argument process. When now-Chief Justice John Roberts presented at the Supreme Court, he spent incredible amounts of time preparing for every oral argument. If the Chief Justice of the Supreme Court feels that this preparation is necessary, than so should the rest of us. For his preparation, Solicitor Garre breaks a case into pieces and then rebuilds it. Decide the principal points you need to emphasize and how to express each in only a sentence or two. Also think about the questions you will most likely hear from the bench and plan how you will answer them in a single sentence. Know the trial record, and winnow everything down to three to five points. If you try to make any more points then five, your argument is unlikely to be successful, at the expense of your most important points.

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Professor Lazarus encouraged practitioners preparing for argument to divide potential questions into three categories: (1) the facts, (2) your legal position or theory of the case, and (3) hypotheticals. Each category is essential to a good oral argument. If you lack a coherent legal position, a test, then trouble is brewing. Prepare a concise answer for each of the most important or likely questions the panel will ask.

Next, the panel discussed the practice of conducting mock arguments. Professor Lazarus said that there are three principal ingredients of a good mock argument: (1) you need to have the right timing—the mock argument cannot be too early or too late, preferably about 3-7 days before the actual argument, to include an hour of formal argument and an hour of informal dialogue and candid conversation; (2) you need to craft an expert panel for your particular case and court, including participants who will be reading the briefs for the very first time; (3) you need candor and blunt honesty from the panelists, not cheerleading. Mr. Frederick added that the mock argument must be for the benefit of the advocate, not to serve as sport for the mock panel. Panel members should be required to listen to at least the first one to two sentences of your answers. Mr. Frederick also observed that a mock argument is sometimes helpful before the briefing is completed to help an appellant shape the reply brief.

Responding to a question, Professor Lazarus opined that a mock opposing side is rarely as helpful as devoting additional time to your own argument. He also noted that the better the advocate, the more change will occur between the mock and the actual argument. It is the less able advocates who tend to stick to what they did the first time.

Mr. Frederick then addressed the subject of final preparation. He noted that oral argument is a performance art. The advocate wants everyone in the Court to think: “I want to listen to that lawyer. He looks like he knows what he’s doing.” Carry that attitude through the courthouse door, through security, and up the elevator. If early in the morning, do some vocal exercises. Chief Justice Roberts always listened to certain military marches to inspire him.

Mr. Frederick said the three keys to a successful argument are to (1) have a plan, (2) listen, and (3) adjust. Plan: From the first sentence, tell the court the two or three points that matter. Listen: This has two components. As Chief Justice Roberts has said, the number one rule for a respondent is to prove you were awake for the petitioner’s argument by responding to it, rather than delivering a prepared speech. At the same time, listen to the Court. Most judges will ask questions about what concerns them; be sure you “listen in the moment,” rather than anticipating what the question might be. Adjust: Know your fall-back position and the best way to get there. Think of your main points as modules: what is your point, how can you educate the court about that point, and how can you use it to link to something else. For example, Chief Justice Roberts has said when dealing with a statutory interpretation issue, you should write your modules on note cards and then mix them up to practice linking the modules in different patterns—plain language, case law, legislative history, policy. Move off your weak modules as quickly as possible and move back to the strongest modules. Also, think about the new insight you can bring to the court that will educate the court about the point you need to make. Do not make a new argument, but present a fresh wrinkle on the issues you have already briefed. Finally, develop a mantra that you can repeat.
Mr. Frederick also addressed the question of what to take to the podium. He uses a binder consisting of an opening paragraph (if given two minutes of uninterrupted time) on the left side of the binder, and the 3-5 affirmative points that need to be made on the right side. On subsequent pages, he has (1) the bullet points for each module relating to an affirmative point, (2) bullet point answers to the other side’s best arguments, (3) the litigation timeline, and (4) the key statute and a key case or two, marked and tabbed with a key passage. Ironically, though Mr. Frederick spends all the time necessary to properly prepare the binder, he rarely looks at it during argument. He also noted that oral argument is not a science; he has seen great advocates use note cards or even legal pads at the podium.

The panel concluded with several miscellaneous observations and answers to questions. Solicitor Garre encouraged practitioners to view questions from the bench as friends, not with hostility. Every question is an opportunity to persuade a Justice or a judge. Also, do not just tell the judges what you think they want to hear. Be careful to give the answer that is consistent with your theory of the case, even if it is not the most persuasive point for the judge asking the question.

Professor Lazarus advised that practitioners use their eyes. If you want to cut off a hostile judge, give a short answer and immediately look to another judge and start talking. Do not look down; it shows a lack of confidence. If you need a particular judge (e.g., Justice Kennedy), pause after the answer and look to show that you are willing to answer any additional questions.

Mr. Frederick commented that rebuttal is all about “home runs.” You have to make a point that is so powerful that the judges leave the courtroom with that point on their minds. Do not try to do too much and dilute the impact of the strongest arguments.
Participants at the 2007 AJEI Summit saw a lively debate between two powerhouses of legal academia, Erwin Chemerinsky, the newly appointed Dean of the UC Irvine Law School, and John Eastman, Dean of the Chapman University School of Law.

Dean Eastman began his opening statement by defining the phrase “judicial independence.” In his opinion, the view of the judiciary as a completely isolated branch, i.e., one with total unaccountability to the other branches, goes too far. The analysis begins with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In *Marbury*, Chief Justice Marshall did not claim judicial supremacy, or even that the Court is the sole arbiter of the Constitution. Quite the opposite, he studiously avoided that result. The modest holding of *Marbury* is that when an act of Congress comes before the Court, the Court is obligated to follow the higher law of the Constitution, consistent with the Justices’ oath. But the members of the other branches take the exact same oath as the Justices; thus, Chief Justice Marshall’s opinion suggests that we are a nation of limited government, and it is only when enforcing those limits that the Court must act. In other words, the judicial department is a constitutional check to ensure the other branches do not overstep the limits of their delegated authority. This is the primary role of the courts.

Consider the debate over the bipartisan campaign finance reform act. Many members of Congress questioned the legislation’s constitutionality, but they voted for it anyway so the courts could decide the question. That is an untenable position if legislators are likewise sworn to follow the Constitution. The President fell prey to the same fallacy by signing the bill even while declaring several provisions unconstitutional and leaving it to the judicial branch to be the final arbiter.

The understanding of the Court’s role in the constitutional hierarchy began to change in *Cooper v. Aaron*, 358 U.S. 1 (1958), a case involving the refusal to comply with the Court’s holding in *Brown v. Board of Education*, 347 U.S. 483 (1954). The *Cooper* opinion redefined the Court’s authority as the exclusive branch for saying what the law is, as opposed to allowing executive and congressional branch members to independently assess constitutionality. This is the beginning of judicial supremacy, and it is a dangerous outcome, not only because it disrupts the separation of powers, but because it allows the other branches to ignore their oaths of office and leave the ultimate resolution of constitutionality to the courts.

In Dean Eastman’s view, every branch has an obligation to uphold the constitution. For example, President Washington would not veto a bill simply because he disagreed with it, but only if he believed the bill was unconstitutional. If Congress disagreed and believed the bill was
constitutional, it had a further check in the form of an override of the veto. The President could then refuse to enforce, and Congress could initiate impeachment proceedings. The Founders envisioned a similar role for the courts.

To view the legislative and executive branches as unaccountable to the Constitution except by ruling of a court is contrary to the notion that we have a limited government with powers that flow from the ultimate sovereign, the People. Thus, that view undermines the very principle of judicial independence.

Dean Chemerinsky’s opening comments took the exact opposite view. He began by noting that the Stalinist-era Soviet constitution is remarkably similar to the U.S. Constitution. The primary difference? Judicial review. Dean Chemerinsky then highlighted three points.

First, throughout American history, especially during times of foreign-based crises, Congress has overreacted, and the courts have generally failed to protect us, even though the restrictions did not make us safer. For example, the courts failed to uphold the Constitution when evaluating the validity of the Alien Sedition Act, the internment of Japanese-Americans during World War II, and the McCarthy-era indictments for teaching the works of Communist leaders.

Second, judicial review to enforce the Constitution is nonetheless essential. That is because there are some disputes that need to be resolved by someone. For example, who ultimately decides when a statute is unconstitutional? It is the province and role of the judiciary. No branch of government should have the power to say whether its own actions are constitutional. Nixon asserted that right in *U.S. v. Nixon*, 418 U.S. 683 (1974), and the Supreme Court correctly rejected that position, citing *Marbury*. It is true that this view gives the courts special powers, but that is not unusual. The executive has the special power to order troops; the legislative has the power to appropriate. The court has the special power to decide constitutionality.

Third, it is essential that courts exercise judicial review to stop the current abuses of power effected by the executive branch of government, such as the authority to detain individuals without judicial review. Consider the case of Jose Padilla. He was arrested in May 2002 but not charged until January 2006. The government said it could hold Padilla without charging him, in violation of the Fourth, Fifth, and Sixth amendments, on the basis that Padilla was an enemy combatant. The Supreme Court correctly rejected that position. Similar abuses by government officials can be seen in the NSA’s massive wiretapping scandal. If the government is permitted to engage in this conduct, it can likely suspend the First Amendment as well. We need the courts to fulfill their role in these situations by striking the unlawful government action.

Deans Eastman and Chemerinsky continued their illuminating point/counter-point debate. While there was no clear winner, all walked away with a much greater understanding of the intricacies that underlie the debate over the scope of judicial review.
FEDERAL PREEMPTION OF STATE AUTHORITY: AN INCREASING TREND?

John J. Bursch*

A distinguished panel of experts addressed the important issue of federal preemption of state authority. Moderated by CAL Chair Sharon Freytag and past-Chair Mary Massaron Ross, the participants included Professor Viet Dinh from Georgetown University Law Center, Professor Samuel Issacharoff from the New York University School of Law, Assistant Solicitor General Sri Srinivasan, and Massachusetts Assistant Attorney General Thomas Barnico.

Professor Dinh began with the 19th Century view of “preemption,” a word that did not enter the judicial lexicon until 1917. In the 19th Century, the conversation in this area of the law focused on the structure of the Constitution and the allocation of power between the federal and state governments. For example, was the Commerce Clause an exclusive and plenary power to regulate? This was also an extraordinarily controversial area of the law. Indeed, one of the hotly debated issues at the Constitutional Convention was the Virginia Plan, which would have given the federal government the affirmative power to strike state laws with which it disagreed. Though ultimately rejected, the Virginia Plan’s supporters believed strongly that without the power to strike state laws, the conflict that defined the Articles of Confederation would continue. Instead, under Article I, § 8 of the Constitution, there is only exclusivity if there is a national imperative where uniformity is important, in which case Congress should have the exclusive authority to regulate in those areas. The initial trend, of course, has been reversed, particularly in the latter half of the 20th Century; advances in the courts’ preemption jurisprudence as well as the expanding view of the federal government’s role in our society have given the federal government an increasingly exclusive role in exercising regulatory power, where the federal government’s role is not that of gap-filler, but rather the preeminent governmental regulator, and it is the state police power that has become interstitial.

Professor Issacharoff contrasted the UCC, which is an example where state law has started to homogenize, with state tort law, which raises the problem of different regulations from one state to another. For example, if a small state decides it will award generous awards against automotive manufacturers for defects, that decision effects a wealth transfer from those states where automotive manufacturing is situated to the small state, and a coordination mechanism is needed. The federal government has stepped in to supply the coordination. In Professor Issacharoff’s view, the difference between the 19th and 20th Century view of preemption is not so much semantics as a new vision of the federal government’s regulatory role. The modern view addresses the problem of the automotive manufacture who sells product to a national market.

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So when the federal government acts, what do manufacturers achieve when they act in conformance with that law? That is the primary question of preemption. For example, as product liability law started to take off in the 1960s, there was concomitant movement in support of regulatory compliance preemption. A manufacturer would say that it should be protected from suit for a particular harm caused in particular circumstances where the manufacturer was acting in accord with federal government regulations. This argument had almost no traction in the state courts, forcing manufacturers to go to the federal courts.

There are three issues to address in this context. The first issue is regulatory mismatch, which occurs when the regulating entity is the wrong size for the scope of the problem. For example, if you want to regulate automotive production (minimum safety features, etc.), who can regulate at that level? Because cars are made all over the world, and sold indiscriminately all over the country, state government regulation is a mismatch for the national market that receives the product. The second issue is the increasing role of federal regulation and whether that regulation is sufficient to protect consumers. The third issue is ensuring that when a federal regulatory scheme is preemptive, it continues to recognize and protect the purposes served by state common law.

Attorney General Barnico concluded that the difficult question in this area of the law is with the fact-driven form of conflict, i.e., “conflict preemption.” For example, in a certain kind of case, it might be clear that Congress has authorized national banks to sell insurance. Congress may have even expressly preempted states from prohibiting that activity. The harder cases arise when the state wants to regulate the provision of that insurance by the banks, e.g., by prohibiting tying of bank and insurance products, or governing how insurance products are presented. The question is whether the federal intent is being frustrated or burdened by the state law. Is that a question that can be answered on summary judgment? Do you need expert testimony? On appeal, are these adjudicative facts or legislative facts? Can the appellate court go outside the record to determine the reasonableness of the state’s action? From the point of view of a judge or the states, some of the conflict analysis comes quite close to the weighing of benefits and burdens in which the federal courts engage in a *Pike*-test analysis involving the federal Commerce Clause.

The “clear statement” rule—the tiebreaker—is often justified in part because it promotes political accountability in Congress. It makes it more likely that Congress will take the harder votes about what the states can or cannot do. For example, the harder vote for Congress is an explicit preemption of state consumer protection laws when authorizing federal banks to sell insurance products. The rule makes it less likely that the troubling conflict analysis lands in the courts.

Solicitor Srinivasan then summarized his analysis of recent preemption cases in the United States Supreme Court. Since 1995, the Court has decided 26 preemption cases, including conflict preemption, frustration of purpose preemption, and clear statement preemption. He cautioned that preemption cases come in all shapes and sizes, so it is very difficult to draw any meaning from them, because they so often turn on case-specific considerations.
Notwithstanding that fact, certain lessons are apparent. The first is that the federal perspective often prevails. Of the 26 cases Solicitor Srinivasan reviewed, the federal government prevailed 23 times. Interestingly, when the federal perspective loses, it loses big: in the 3 losses, the government had a grand total of only four votes. It may be that in a close case, the government gets the benefit of the doubt.

The second lesson is that the federal government does not always advocate for broad preemptive effect. In nearly half of the 26 cases, the government argued against preemption, by and large without a meaningful difference depending on the political party in power.

The third lesson is that there is no appreciable difference in outcome in those preemption cases where a state is a party versus an amicus curiae.

The fourth lesson is that the Court holds in favor of preemption only about one-half of the time, and that the percentage of preemption cases with three or more dissenters (approximately 25-30%) is roughly the same rate as in other areas of the law.
American Constitutional History: How Much Has Judicial Review Mattered?

Charles G. Wentworth

Professor Michael J. Klarman, the James Monroe Distinguished Professor of Law at the University of Virginia, is one of the foremost professors of American constitutional history. He joined the Virginia faculty in 1987, where he teaches criminal law, constitutional law, constitutional theory, and constitutional history. His presentation on September 30, 2007, focused on the role of judicial review in this country’s constitutional history, and this article takes its name from the title of his speech.

Professor Klarman argues that, despite all the present talk of judicial activism and judicial supremacy, judicial review really matters less than one might think. He does not deny that courts have, for better or worse, constitutionalized much more of the landscape than had been viewed at the country’s founding. Instead, he argues that this constitutionalization of the political landscape has had only a marginal effect on the country as a whole, and that it often has indirect and unpredictable results.

In reviewing the impact of judicial review, Professor Klarman argues that Supreme Court cases can be broken-down into three general categories. First, the Court sometimes suppresses outliers, taking norms that are broadly held and converting them to a national standard in order to force a few renegade states into that position. Second, Professor Klarman argues that the Court sometimes decides cases that divide both the Court and the country. In these cases, the Court rarely puts an issue to rest. Rather these decisions become the starting point for a long push-back and series of negotiations leading to a subsequent position not originally taken by the Court. Third, the Court occasionally, although rarely, reaches decisions with which much of the country does not agree. As a result, these opinions are frequently defied or result in a political change that causes the Court to change its mind. Professor Klarman then explained that the Court is particularly good at making issues salient and bringing attention to them, but it is not necessarily effective at resolving controversial questions.

Suppressing Outliers

Professor Klarman’s first category involves cases in which the Court suppresses outliers. He argues that many more cases fit here than are appreciated. One example is *Griswold v. Connecticut,*2 the precursor to *Roe v. Wade*3 in which the Court held that married couples have

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2 381 U.S. 479 (1965).

3 410 U.S. 113 (1973).
the right to use contraceptives in the privacy of their bedrooms. Prior to that decision, only two states made this use of contraceptives a crime.

Similarly, only Oregon prohibited students from attending private schools, and in *Pierce v. Society of Sisters*, the Court held that parents have a right to choose which schools to send their children to. The Oregon Legislature — which had been dominated by the Klu Klux Klan — attempted to shut down entirely the Catholic schools in that state. The Court responded by bringing this single outlier back into conformity with the rest of the country.

Professor Klarman argues that most decisions the Warren Court made were also about suppressing Southern outliers. He suggests that most free speech and criminal cases from that period are actually surrogate race cases. By requiring attorneys for accused felons in *Gideon v. Wainwright*, the Court imposed on the South a norm that had already been accepted by the rest of the country. Indeed, nearly half the states affirmatively supported Gideon’s claims, and only a handful didn’t already provide attorneys for their accused criminals. In mandating this nationally, the Warren Court used an ostensibly non-racial doctrine to make a few states fall in line with an already accepted norm.

The controversial case of *Lawrence v. Texas*, Professor Klarman argues, is another such case. There, the Court overruled its previous ruling in *Bowers v. Hardwick*, holding instead that individuals do have a right to engage same-sex sodomy. In 1960 all states had such prohibitions; by 2003, that had dropped to only thirteen, with only nine forbidding sodomy entirely. In virtually none of these states, however, were the laws even enforced. *Lawrence*, like *Gideon*, *Pierce*, and *Griswold*, was a special case of the Court suppressing those outliers.

Professor Klarman ended the discussion of these cases by noting that, in the end, they did not have that much impact. That is, even if the Court had not forced these outliers to follow a national standard, Congress probably would have. As an example, Professor Klarman notes the constitutional amendment ending poll taxes in federal elections. He also predicts that the Court would continue its trend in this regard by striking down statutes mandating the death penalty for child rape in *Kennedy v. Louisiana*.

*Divisive Cases*

Professor Klarman then moved onto a second set of cases, those where the Court tackles an issue that splits the it, and the country, fairly evenly. As examples of this, Professor Klarman

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4 268 U.S. 510 (1925).
7 478 U.S. 186 (1986).
8 No. 07-343 (cert. petition filed Sept. 11, 2007).
points to *Brown v. Board of Education*,⁹ *Roe v. Wade, Furman v. Georgia*,¹⁰ and *Bush v. Gore*.¹¹ In each of these cases, the country was very evenly split, but in some (such as *Brown*), there had been dramatic changes in the years just prior to the decision. Professor Klarman posits that in those cases, perhaps the justices thought they were reflecting this shift as much as they were supporting it. In each case, however, the Court was subject to renegotiations and pushback — new justices, legislation, and legislatures just thumbing their noses at the Court.

*Brown* is one of the key cases that Professor Klarman uses to support his contention that judicial review really didn’t have that much of an impact. Indeed, opinion polls taken after *Brown* showed that the country was still highly divided on segregation issues. While *Brown* is talked about as the causal case for the civil rights movement, Professor Klarman argues that this view has the “cause and effect” relationship backwards. Instead he argues that *Brown* was a reflection of changes already taking place, that World War II, not that decision, was the watershed event for the civil rights movement. The United States was fighting white supremacy with a segregated army, but African Americans returned home from the war and thought they should experience democracy, too. Many soldiers took their discharge papers and tried to register to vote. Others began migrating north in search of jobs. This, too, had the immediate effect of enfranchising them as blacks could vote without impediment in the North.

Additionally, American racial policy was a huge part of cold war. The Soviet Union and other communist countries argued that a capitalist democracy equaled white supremacy, pointing to the murder of Emmett Till in Mississippi and the Chicago race riots. In its amicus brief in support of the students in *Brown*, the Justice Department wrote that racial discrimination “furnishes grist for the Communist propaganda mills.”

Lastly, Professor Klarman points to all the social changes that had happened before *Brown* was decided. In 1948 President Truman desegregated the army. There were dramatic changes in South, with black voter registration increasing four fold. African Americans started serving on police forces, serving on juries, and baseball was desegregated. All of these changes occurred before *Brown*, and the justices were aware of and remarked on them. Professor Klarman argues that the Court would not have decided *Brown* the way it did had it not seen these changes already going on. Indeed, Justice Blackman said he would have rejected the case in 1940s because country was not yet ready.

Yet despite both the Court’s opinion and these previous changes, ten years after *Brown* only about 2% of children were attending desegregated schools, and there were none in Mississippi until 1964. Rather than being the beginning of change, *Brown* became just another step in a long, national negotiation process that culminated with the Civil Rights Act of 1964. This legislation was necessary in large part because no blacks would bring cases to enforce the Court’s mandate from *Brown* in their local school districts. The Act allowed the Attorney General to bring cases, rather than forcing the NAACP to do so with local support. But even

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¹⁰ 408 U.S. 238 (1972).

then, Professor Klarman argues that the Act was in large measure a reaction to street demonstrations, and not to the relatively little litigation that resulted from *Brown*. While Professor Klarman recognizes the impact *Brown* had, he argues that it was only indirect — and certainly not the watershed it is often made out to be.

*Roe* and *Furman* are similar to *Brown* in that there had been huge changes in the years immediately preceding those decisions with respect to how the country viewed abortion and the death penalty. In each of these cases, Professor Klarman argues, the Court was reflecting, not producing, these changes.

But in each of these cases, Professor Klarman also points out that in the decade following the decisions there was a dramatic shift. In 1970 Senator Packwood (R-Oregon) said that within a few years there would be no more abortion regulation in the United States. It goes without saying, however, that this changed after *Roe* was decided. And in the years prior to *Furman*, only 10% of the country supported the death penalty. Within one year after that case was decided, support had risen to 35%, and by the mid 1970s, thirty-five states had adopted (or readopted) the death penalty.

With both abortion and the death penalty, the Court reacted to these dramatic shifts in public opinion. At the time *Roe* and *Furman* were decided, the Court saw itself as following public opinion. In the following decades, however, it clearly began to acquiesce, ratcheting back the holdings of those two cases through *Gregg v. Georgia*\(^\text{12}\) and *Planned Parenthood v. Casey*.\(^\text{13}\)

**Court Moves Against Public Opinion**

In a very small category of cases the Court reaches an outcome with which 65 to 75% of the country disagrees. Professor Klarman notes that this is very rare, arguing that the Court understands that it has very limited political capital. An early example is *Chisholm v. Georgia*\(^\text{14}\) in which the Court held that states could be sued without their consent. Reaction to this case was very strong; Virginia threatened to execute anyone supporting the case, and huge majorities of 10 to 1 voted to overturn the case by constitutional amendment. Such a strong reaction has only come three times, which indicates to Professor Klarman that the justices have learned their lesson.

In 1937, the Court reversed its own decision from a year earlier, *Morehead v. Tipaldo*,\(^\text{15}\) in which it invalidated a minimum wage statute. But when the same issue returned to it in *West Coast Hotel Co. v. Parrish*,\(^\text{16}\) and the Court saw how thoroughly its previous opinion had been

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\(^{13}\) 505 U.S. 833 (1992).

\(^{14}\) 2 U.S. (2 Dall.) 419 (1793).

\(^{15}\) 298 U.S. 587 (1936).

\(^{16}\) 300 U.S. 379 (1937).
attacked by the public and the other two branches of government, Justice Roberts (who had voted in the majority in *Tipaldo*), switched sides and then voted to uphold the statute. Roberts said that he would not have supported *Tipaldo* had the losing party there not argued that the Court should disingenuously distinguish earlier cases rather than simply overturn them. Whether that is actually true, *West Coast Hotel* was also decided at the same time the Senate was debating President Roosevelt’s “court packing” proposal. Roosevelt had suggested adding as many as six new justices to the Court in order to ensure that his New Deal would survive scrutiny by the Court. After the *West Coast* decision was issued, however, the Senate emphatically voted down the President’s proposal, and Justice Roberts’ vote became known as the “switch in time that saved Nine.”

Professor Klarman’s third example of the Court moving against strong public opinion came with the decision in *Engel v. Vitale*. There, the Court struck down school prayer in the face of nearly 80% popular opinion to the contrary. Although there was strong opposition to this decision, Professor Klarman notes that it came in 1962, after John F. Kennedy had been elected and there had been an emergence of the idea that it was acceptable to be Catholic or Jewish. It was only in this context that the Court struck down these requirements as unconstitutional.

While there is still strong support for voluntary, non-denominational prayer, this backing has since lowered to only about 65%. Surprising, though, is that there has not been a strong and concerted effort to reestablish school prayer through amendment or statute. Professor Klarman suggests that this is because the case has largely been ignored, especially in the South and Midwest. He argues that in many communities it was just never complied with — namely, communities where schools could simply chill dissenters and continue with the prayers anyway.

**What is the Court’s Role?**

Having discussed these three groupings of cases, Professor Klarman then moved on to explain how the Court plays an important, although indirect, role in shaping American political debate. First, the Court is very good at putting issues on the agenda. As *Roe* and *Furman* demonstrate, there are some questions about which no one would care if they had not been made issues by the Court. As another example, Professor Klarman points to *Cruzan v. Missouri Department of Health*, explaining that people are now writing living wills at much higher rates than would have been the case prior to the Court’s holding that the state, in some situations, has the authority to prevent the termination of life support. He makes the same argument with respect to *Brown*, noting that prior to that decision there was little if any discussion about desegregation of schools. Rather, the political debate addressed voting, police brutality, and

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18 It should be noted, however, that there are still efforts to require moments of silence, as indicated by the passage of one such bill over the governor’s veto in Illinois earlier this year. *See* Moment of Silence Mandated in Illinois Schools, Ray Long and Jeffrey Meitrodt, Chicago Tribune Web Edition, October 11, 2007, at http://www.chicagotribune.com/news/local/chi-legis12_weboct12,0,6245540.story (last visited Nov. 27, 2007).

other race issues. After 1952, however, no politician could afford to not have a position on desegregation.

Second, Professor Klarman argues that the court is very good at setting the agenda, and can change or focus particular issues. As just noted, Brown shifted the focus of the race debates. Similarly, the decision of the Massachusetts Supreme Judicial Court in Goodridge v. Department of Public Health\textsuperscript{20} shifted the debate over sexual orientation from the military’s “don’t ask, don’t tell” policy and issues of employment discrimination, to a debate about gay marriage. This, Professor Klarman argues, in turn had profound and unintended effects on state and national politics, resulting in thirteen states (including Ohio) voting on marriage amendments during the 2004 presidential election.

Third, the Court produces backlash. Professor Klarman argues that when the Court goes to far, taking what it perceives to be the “next step” in the political debate, it often puts back the causes that it sought to advance. This can be seen, he suggests, in Brown, Roe, Furman, Goodridge, and other cases.

\textit{Conclusion}

Professor Klarman argues that the Supreme Court, although certainly important in its own right, is not the final arbiter of any issue in the American political landscape. Even when there is strong support for its decisions, the Court’s actions frequently have unintended — and long-lasting — effects on the issues it decides. It refocuses and reshapes the debates, often moving them to places that no one expected. But whether one believes that a given opinion is good or bad, no one can dispute that the Court’s decisions are influential.

\textsuperscript{20} 798 N.E.2d 941 (Mass. 2003).