

# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## FOREWORD

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### CHANGE

When I graduated from law school twenty years ago, the Rehnquist Court was in its final months, although I certainly did not know it. My law school experience was rooted in the Rehnquist Court, which had been together for eleven years, longer than any previous Court. As students we could speculate with a decent degree of certainty on what cases the Court would take and how they would decide issues. We had eleven years of past precedent to guide us. But that all changed. Justice O'Connor's resignation, followed by Chief Justice Rehnquist's passing would bring two new members to the Court. President Obama, Trump, and Biden would make further changes to the Court.

Now, twenty years later, the only remaining Justice on the Court from my law school years is Justice Thomas. And with the passing of Justice Souter in May, Justice Thomas, Justice Breyer, and Justice Kennedy are the only members of the Rehnquist Court that are still alive. And the cases that the Court will take, and how it will decide issues, has changed.

Broadly speaking, this issue addresses change. We start with a heartfelt tribute to the late Justice Souter by two of his colleagues on the First Circuit—Chief Judge David J. Barron and Senior Circuit Judge Jeffrey R.

Howard. The tribute reflects on Justice Souter's service on the First Circuit after he retired from the United States Supreme Court. As Chief Judge Barron and Senior Judge Howard note, Justice Souter did not "retire[] from judging," he "simply changed courts."

The next change this issue tackles is the Supreme Court's changing Second Amendment jurisprudence. Another First Circuit judge, Senior Judge Kermit V. Lipez, takes a detailed look at how the Supreme Court's Second Amendment jurisprudence has evolved from the 1930s to the present. He offers a critique of the Court's current test and highlights the uncertainty that the *Bruen* test will pose for future cases.

From changing Supreme Court precedent to changing technology, the next article explores how AI will impact the work of judging. Retired Texas Supreme Court Justice John G. Browning takes a close look at how state and federal courts have addressed (or really most courts have *not* addressed) the use of AI by judges, clerks, and court staff. Justice Browning then examines ethics opinions that relate to judicial use of AI, and he speculates on whether judges' attitudes toward AI might be changing.

The issue then moves to writing advice, which ironically never changes. Professor Brian C. Potts shares thirty-five tips for lawyers gleaned from Ernest Hemingway's pseudo-memoir, *A Moveable Feast*, which was published after Hemingway's death. This beautifully crafted essay is a feast in itself. Enjoy!

The next essay explores how courts should structure opinions when a majority of the court cannot agree on how to decide a case. Professor Jonathan L. Entin looks at a recent Ohio Supreme Court decision that failed to garner a majority opinion because the justices could not agree on a result. He then provides two different approaches that the court could have taken to decide the case and explains how a changed approach would have provided more clarity and guidance to lower courts.

The next change that the issue addresses is the change in citation format. Professor Peter W. Martin, a longtime advocate for public, non-proprietary case citations, traces the history of the non-proprietary citation movement and surveys which jurisdictions are using non-proprietary case citations and how such citations are used beyond the adopting jurisdiction.

The final piece has an interesting backstory. Several years ago, I published a book review of Lisa Sarnoff Gochman's book, *At the Altar of the Appellate Gods*. Ms. Gochman's book recounts her experience arguing the *Apprendi* case before the U.S. Supreme Court. When Justice John Paul Stevens, the author of the *Apprendi*, opinion passed away and his papers became public, I asked Ms. Gochman if she was going to view the papers on *Apprendi* and if she would be willing to write an essay on the experience. The answer was yes on both accounts, and this final essay shares her experience.

I hope that you enjoy this issue. I am grateful to the authors, editors, and student support that helped make it, and every issue, a reality.

TLD

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