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Policy Analysis

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Legislators in Black Robes: Unelected Lawmaking by the Oklahoma Supreme Court

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"The Oklahoma constitution is an attempt to grasp from the judiciary the power which it has either usurped or been permitted to absorb through the combined weakness and venality of the legislative branches."

- Frederick Upham Adams, The Saturday Evening Post (1906).[1]

Executive Summary

The Oklahoma Supreme Court frequently acts like a super legislature making public policy for the state rather than a court interpreting and applying the law as written. Too often the Court does not say what the law is, but rather what the *justices think it should be*. Such judicial activism is destructive of the rule of law, the separation of powers, and Oklahomans' right to self-government.

Oklahoma's brand of judicial activism is worse than the activism seen in the federal courts because the Oklahoma constitution dictates vastly more judicial restraint than does the US constitution. While the federal constitution limits Congress' power to specifically enumerated areas, the Oklahoma constitution provides that "the authority of the Legislature shall extend to *all rightful subjects of legislation.*"[2] This paradigm has been understood since statehood (for good or ill) as the inverse of the federal model: the federal legislature can act only if it is given the power to do so in the constitution, whereas the state legislature can act in *any manner not denied to it* by the state and federal constitutions. Moreover, the Oklahoma constitution contains an explicit separation of powers clause, whereas the federal constitution's separation of powers is implied from its structure.[3]

Rather than serving as neutral interpreters of the law, the justices on the Oklahoma Supreme Court act as though they are *lawmakers*.

Given the broad sweep of authority granted to the legislature by the Oklahoma constitution—and extensive Court precedent acknowledging the extreme deference that is owed legislative enactments—it should be a rare occasion that the Oklahoma Supreme Court undertakes the drastic action of striking down a state law as unconstitutional. Unfortunately, such action has become all too frequent in Oklahoma.

Rather than serving as neutral interpreters of the law, the justices on the Oklahoma Supreme Court act as though they are *lawmakers*. Besides being undemocratic, this reveals a great irony. Whenever the Court is criticized or reforms are proposed, the Court's defenders in the legal profession piously pontificate about keeping politics out of the judiciary,[4] yet the Court routinely injects itself into the political process. Indeed, judicial reform efforts generally attempt to *restore* the judiciary to its traditional role removed from rough and tumble public policy debates. That is certainly what is proposed in this paper.

The Court has weaponized a handful of legal concepts to achieve its lawmaking goals. Most prolifically in recent years, the Court misuses the Oklahoma constitution's single subject rule[5] and ban on special laws.[6] Additionally, the Court finds a troubling volume of clearly written statutes to be "ambiguous" and bestows on itself the authority to re-write the legislation in a way the Court finds more palatable.[7] It casts this re-writing of the law as a search for the *intent* of the statute rather than applying the *actual* words it contains. Finally, the Court has radically altered the concepts of standing and justiciability to include an amorphous "public interest standing," allowing it to review the constitutionality of virtually *any* law the legislature passes if the Court considers it to present a matter of great public importance.[8]

These Four Horsemen of judicial overreach—Single Subject, Special Laws, Ambiguity, and Public Interest Standing—combine

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to produce an extra-constitutional state of affairs in Oklahoma government.

Perhaps worse than merely increasing the frequency with which it uses these arcane doctrines to strike down valid legislative measures is the Court's highly selective application of the doctrines. This leads to the impression there is something else at play—that the justices have a political or policy agenda that is determined first, with the legal reasoning worked out second and only to justify the pre-ordained outcome. This approach is reminiscent of the Augustinian prayer, "God, help me to understand that which I already believe."[9] While potentially helpful to strengthening one's religious faith, it is no way to run the judicial department of state government.

Likewise, the Oklahoma Supreme Court's activism is more destabilizing than federal court activism because it can strike at any time and on any topic. The Court is abetted in this expansive approach by the use of procedural, rather than substantive provisions of the constitution to achieve its policymaking goals. The justices can apply these procedural devices to virtually any legislation on any topic, greatly expanding the Court's power and effectively crowning itself the final arbiter of any public policy debate it chooses.

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The regretful condition of Oklahoma's legal system is due in large measure to the state's flawed system for selecting judges and justices. Oklahoma's so-called "merit-selection" system operates more as "lawyer-selection," with lawyers and their trade group, the Oklahoma Bar Association, effectively controlling the judicial selection process.[10]

A method of judicial selection and retention should be designed to promote several overarching ends: to produce the most intelligent and highly qualified candidates for judicial office, to ensure the judiciary remains independent, to balance this independence with a measure of democratic accountability, and to promote popular acceptance of the Court's rulings. Oklahoma's judicial selection scheme fails at each goal.

Instead, Oklahoma's judicial selection method primarily serves to *ensure that trial lawyers can select the judges and justices they want hearing their cases*.[11] Given the liability-expanding decisions of the Oklahoma Supreme Court, it has been remarkably successful at achieving this inappropriate result in its five decades of existence.

The elected branches of Oklahoma government can, and should, reign in the Supreme Court. The governor has a role—albeit a severely hampered one—in the appointment of justices to the Court and members to the Judicial Nominating Commission. He should, wherever possible, exercise his authority to appoint individuals committed to upholding the rule of law and who have a modest, rather than activist, view of the judiciary. The governor also helps to set the legislative agenda and can greatly influence public opinion.

The legislature should conduct extensive oversight of the judicial branch, and should legislate with an aim toward restoring the judiciary to its proper role. The final section of this paper recommends policy reforms for the elected branches to consider to restore balance to the separation of powers in Oklahoma government, and 1889 Institute's publication, *Taming Judicial Overreach: 12 Actions the Legislature Can Take Immediately* (forthcoming October, 2019), provides a menu of reforms the legislature can enact by statute, without resort to the difficult process of amending the constitution.

Ultimately, however, the issues described in this paper will not be corrected until Oklahoma changes its method of selecting justices, which requires a constitutional amendment. The fundamental flaw of the current system lies in its very structure: the makeup of the Oklahoma Supreme Court is largely determined by an infinitesimally small group of citizens—lawyers make up less than one percent of the state's population[12]—who are professionally and financially interested in the body they are selecting. The selection committee meets and votes in secret, and is not accountable to the public through elections.

The justices, whose interests align with those who selected them, transform themselves into lawmakers and make policy pronouncements that every citizen in the state must live under, often in direct contradiction to the preferences the people have expressed through their elected representatives. Unsurprisingly, the Court's rulings often favor the trial lawyers who determine the makeup of the Court.[13] There is virtually no recourse once the Court has made such a pronouncement—that is, if the people disagree, they have almost no effective means of changing the policy. This is anything but the republican form of government guaranteed to all American citizens.[14]

The judicial branch in Oklahoma must be reformed if it is to regain its legitimacy and retain its independence. And since the judicial branch appears unwilling to guard its own credibility, the legislature, governor, and the people should act to restore this important institution.

More than Just a Matter of Judicial Activism

The problem with the Oklahoma Supreme Court is more fundamental than the familiar national debate about judicial activism versus restraint: are Supreme Court justices political actors on the public policymaking stage, or are they interpreters of the law? Should justices in Oklahoma be *lawmakers* or law-*interpreters*? Unfortunately for Oklahoma—to the detriment of the core principles of separation of powers and self-government—the justices act as though they are legislators donned in black robes.

The Role of Courts in the American System

In the American system, the judiciary is unique among the three branches in that it is the judge of its own power. As a US Supreme Court Justice described it, "the only check upon our own exercise of power is our own sense of self-restraint."[15] The judicial branch is an independent branch of government, purposefully insulated from direct popular pressure. The reason the courts were set up to be insulated from popular pressure, however, was precisely because *their function was not conceived to embrace policymaking*.[16]

Responsibility for policymaking must reside in those directly accountable to the electorate in order to maintain popular legitimacy.[17] Courts are independent so that they may apply the law

fearlessly, without regard to popular sentiment, but this independence is dangerous if not checked by the elected branches because by definition an independent branch of government is unaccountable to the people. To achieve this balance, the framers of the American constitution placed the power to appoint judges and justices with the elected branches, and gave the judiciary no role in the lawmaking process.[18]

In addition to being less responsive to the popular will than elected officials, the judiciary is also ill-equipped for the policy-making function. Courts are supposed to decide particularized controversies between individual litigants, making them necessarily limited to the facts relevant to a case as presented to them by the interested parties. Legislatures, on the other hand, have expansive fact-finding capabilities that can reach far beyond the narrow interests advanced by the parties to a discrete lawsuit. Properly functioning courts seek to interpret the law to arrive at the correct legal result determining the rights of one party vis-à-vis another party or remedying harm done to one party at the hands of the other.

Legislatures, in contrast, are free to devise comprehensive solutions to societal challenges, taking into account the interests of the broad society. Courts, unlike legislatures, do not engage in the back and forth horse-trading and compromise that promote broad popular acceptance of policies, but rather operate in a cloistered, sterile environment where a decision is handed down as final, regardless of the "buy-in" of the parties, let alone the public. These are features, not bugs, of the judicial system: courts perform a fundamentally different role from legislatures, and one that is not well-suited to policymaking.

Oklahoma's Constitution Requires Greater Judicial Restraint than the US Constitution

"A judge who always likes the results he reaches is a bad judge."
- Justice Antonin Scalia[19]

The Oklahoma Constitution prescribes *more* restraint from the judiciary than does the federal constitution. The Oklahoma Constitution, unlike the federal document, contains an explicit separation of powers clause.[20] It also provides for more expansive legislative authority than in the federal system.[21] While Congress is given limited powers by the US constitution, the Oklahoma Legislature's "authority . . . shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."[22] This paradigm is (for good or ill) the reverse of the federal model: the federal legislature can act *only* if it is given the power to do so in the Constitution, whereas the state legislature can act in *any manner not denied to it* by the state and federal constitutions.[23] As the Oklahoma Supreme Court has held:

> The United States Constitution is one of restricted authority and delegated powers. By contrast our state constitution is not one of limited powers where the State's authority is restricted to the four corners of the document. Rather, the Oklahoma Constitution addresses not only those areas deemed fundamental but also others which could have been left to statutory enactment. While the Congress of the United States may do only what the federal Constitution has granted it the power to do, our state Legislature generally may do, as to proper subjects of legislation, all but that which it is prohibited from doing.[24]

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Acknowledging this fundamental structure, the Oklahoma Supreme Court routinely begins its opinions reciting long-established precedent that it should be extremely hesitant to declare an act of the legislature unconstitutional.[25] The Court explains that it will assess a statute's constitutionality "without regard to our own view of a provision's propriety, wisdom, desirability, necessity, or practicality as a working proposition," and that "a duly-enacted statute will be *presumed* to conform to the state and federal Constitutions and *will be upheld unless it is clearly, palpably and plainly inconsistent with the Constitution.*"[26] Unfortunately, this rehearsal of its constitutional obligations is often mere lip service, as the Court then proceeds to radically overstep its bounds.

Given its broadly deferential standard and the "heavy burden [that] rests on the party challenging a statute's constitutionality,"[27] the Court should rarely strike down legislation as unconstitutional. Unfortunately, such drastic action has become all too frequent in Oklahoma.

The Four Horsemen of Judicial Overreach

The Oklahoma Supreme Court has deployed four otherwise mundane legal concepts in its campaign to undermine the elected branches: the Special Law Ban, the Single Subject Rule, Ambiguity & Legislative Intent, and Public Interest Standing. These arcane doctrines have become the Court's go-to methods for striking down or re-writing laws validly passed by the legislature and signed by the governor. Because the Court has been highly selective in how and when it applies these concepts, it is reasonable to conclude that whether a law survives the Court's review has more to do with the justices' personal policy preferences than with the law's compliance with the constitution or the clarity of its text.

The Oklahoma Supreme Court's activism is more destabilizing than is typically seen in the federal courts, where interpretive battles lines over substantive provisions of the constitution are well-known. Federal court activism, while harmful, tends to happen in gradual increments and regarding predictable subject matter. The Oklahoma Supreme Court's jurisprudence, in contrast, swings haphazardly to and fro, striking unexpectedly in any number of substantive policy areas.

This chaotic jurisprudence is enabled by the Court's use of *procedural*, rather than *substantive* provisions of the constitution. That is, the Oklahoma Supreme Court less frequently strikes down a statute because its *substance* is constitutionally forbidden, but rather invalidates laws via a strained reading of *procedural* clauses in the constitution. A substantive dispute is necessarily rooted in the subject the authors of a constitutional provision were trying to address, even if the judge's activism strays far beyond the

original understanding of the text. The Oklahoma Supreme Court, however, uses procedural devices to accomplish its policymaking, which enables the justices to invalidate or change laws dealing with literally any topic. Accordingly, *any law covering any policy area is brought within the Court's purview*. This represents a spectacular expansion of the Court's power, and is far outside its proper constitutional role.

The Ban on Special Laws: Dancing on the Head of a Pin

Most state constitutions include clauses prohibiting legislatures from passing "special laws"—laws that narrowly apply to particular private interests—as opposed to "general laws" that apply equally to all members of a regulated class.[28] These special law bans were largely adopted in the 19th century in response to perceived domination of politics by narrow bands of economic elites, who would use their economic power to win grants of privilege from state legislatures.[29] It was not uncommon for state legislatures to pass laws granting divorces or name changes for individuals, clarifying the interpretation of a particular person's will, or providing a public benefit to a specific private person or company.[30] Such practice was not only seen as a poor use of the legislature's time, it was an inappropriate way to wield the power of state law. It invited corruption, and states rightly reacted by including bans on such special laws in their constitutions.[31]

Oklahoma incorporated this lesson from other states, including a ban on certain categories of special laws in its constitution.[32] Article 5, section 46 of the constitution prohibits special laws covering 28 enumerated categories.[33] Reflecting the tawdry experience of other states, the provision directs that the Legislature shall not pass special laws "authorizing the adoption or legitimation of children," "granting divorces," or "changing the law of descent or succession," among other items.[34] Like other states' bans, the framers of the Oklahoma Constitution sought to prevent legislative capture by private interests.[35] It was not an expansive prohibition against any law that treats different classes of people differently, as nearly all laws do. It was not originally understood as a state law equivalent of the federal constitution's equal protection clause, which is aimed at ensuring equal treatment (by government) of different classes of individuals. In fact, the Oklahoma Supreme Court has expressly rejected the "equal protection" formulation of the special laws provision that has become common in other state supreme courts.[36] Instead, the Special Law ban was seen as a way to prevent the legislature from doling out political favors to specific powerful individuals and companies.

In the early days of statehood—when 3 of the 5 justices on the Oklahoma Supreme Court were actual framers of the state constitution, having served as delegates to the constitutional convention[37]—the Court took an extremely permissive view of the special law clauses, almost totally deferring to the legislature. In the 1911 case *Chickasha Cotton Oil Co. v. Lamb & Tyner*,[38] the Court held that "the overwhelming weight of decided cases is that the final determination of whether a general law can be made applicable is for the legislature, and that the decision of the legislature upon such question is conclusive upon the court."[39] That is, while the constitution prohibits the legislature from passing certain special laws, the question of whether a law is special or general is a matter for the legislature alone.

The early Supreme Court sketched out a similarly deferential analysis in *Burks v. Walker*,[40] where the Court rejected a special law attack on a statute creating new superior courts for counties having a population of at least 30,000 and a city within the county at least 8,000 in population. The challengers alleged the statute was a prohibited special law because only 5 of the state's 77 counties qualified for the new courts, and thus were singled out for special treatment compared the rest of the "class," which they defined as all counties in Oklahoma.[41] The Court rejected this argument, finding that "in order for a law to be general in its nature and to have a uniform operation, it is not necessary that it shall operate upon every person and every locality in the state. A law may be general and have a local application or apply to a designated class if it operates equally upon all the subjects within the class for which it was adopted."[42] Effectively, the Court defined the class as counties that met a certain population threshold.

The Court described its rule as follows:

> To determine whether or not a statute is general or special, courts will look to the statute to ascertain whether it will operate uniformly upon all the persons and parts of the state that are brought within the relation and circumstances provided by it. And the operation is uniform if it affects alike all persons in like situation. *But where a statute operates upon a class, the classification must not be capricious or arbitrary and must be reasonable and pertain to some peculiarity in the subject matter calling for the legislation.* As between the persons and places included within the operation of the law and those omitted, there must be some distinctive characteristic upon which a different treatment may be reasonably founded and that furnish a practical and real basis for discrimination.[43]

Applying this rule, the Court found the Act establishing new courts to not be arbitrary or unreasonable, but based on the rational desire of the Legislature to relieve overcrowded court dockets in the larger urban areas of the state.[44] Noting that "courts will not lightly declare acts unconstitutional" and "the fact that the legislature has adopted an act carries with it the presumption that it is within the pale of the Constitution," the Court adopted a highly deferential test for evaluating special law challenges: a law passed by the legislature will only be struck down if it creates an arbitrary, capricious, and unreasonable distinction between individuals within a class, and only if there is not some distinctive characteristic justifying treating different individuals within the class differently.[45] This is a high bar for a challenger to meet, and seems to leave room for only the narrowest of applications, like using legislation to grant a couple's divorce (special law), versus passing a law that permits divorces in certain circumstances, such as when one spouse has abandoned the other (general law with special application). Under the original understanding of the special law ban, the former would be unconstitutional and the latter would be permitted.

In recent years the Oklahoma Supreme Court has re-read the special laws clause to strike down numerous statutes validly passed by the legislature. The Court began wielding its new special law jurisprudence in 2006 in a case called *Zeier v. Zimmer*,[46] and continued with increased frequency thereafter. *Zeier* concerned a medical malpractice reform law common across the country, requiring a plaintiff suing her doctor to attach an affidavit to her lawsuit attesting that a qualified expert had been consulted

and issued an opinion sufficient to deem the claim meritorious.[47] The Court struck down the affidavit statute, solidifying a new rule for evaluating special law claims.

The Court declared that "in a special laws attack under art. 5, §46, *the only issue to be resolved is whether a statute upon a subject enumerated in the constitutional provision targets for different treatment less than an entire class of similarly situated persons or things*."[48] This expansive formulation of the rule is a far cry from the original understanding of special law clauses and differs substantially from how other state supreme courts have interpreted similar provisions in their constitutions.[49] Depending on how the Court defines the class, this rule threatens virtually *any* law that distinguishes between categories of individuals or things, no matter how logical the distinction is.

To illustrate the breadth of this construction of the special law ban and the power it places in the hands of the Supreme Court, consider a hypothetical challenge to Oklahoma's so-called "slayer" statute, which prevents an individual convicted of committing murder from inheriting his victim's estate. Slayer statutes are common in the United States, and no one seriously questions the validity of these laws. However, when viewed under the Court's current special law jurisprudence, it's not clear that Oklahoma's statute could survive. Such a law unquestionably "changes the law of descent or succession," an enumerated subject area under Art. 5, Sec. 46.[50]

According to the Court, the *only* question is whether the statute "targets for different treatment less than an entire class of similarly situated persons."[51] The answer to this question depends entirely on how the Court draws the boundaries of the class. If the class is defined as "all heirs to an estate who murder their progenitors," then the law would be general because it applies to all such murderers. If, however, the class is defined as "all heirs to an estate," then the law becomes special because it singles out murderers for different treatment than the rest of the class. Accordingly, it matters *who* defines the class and *how* they define it.

This seemingly extreme hypothetical is not far off from the word games the justices on the Oklahoma Supreme Court have engaged in to find ways to strike down legislation they dislike. The latest example of this strained reasoning occurred just this year, when the Court struck down the legislative cap on noneconomic damages in tort lawsuits.

In *Beason v. I.E. Miller Services, Inc.*, the Court struck down the centerpiece of a broadly popular and bipartisan tort reform law passed by the legislature that capped noneconomic damages for individuals suing for a bodily injury at a maximum of $350,000.[52] The damages cap did not apply to cases where a person is killed instead of merely injured because a separate amendment to the Oklahoma Constitution passed in the 1980's dictates that wrongful death cases not be limited in such a manner.[53]

In conducting its special law analysis, the Court defined the class broadly as persons who sue to recover damages from an injury-causing event.[54] The Court concluded that "the failing of the statute is that it purports to limit recovery for pain and suffering where the plaintiff survives the injury-causing event, while persons who die from the injury-causing event face no such limitation."[55] That the Court could not discern a legitimate difference in category where a person *dies* from an accident and one where he *lives* requires a willing suspension of disbelief. A more reasonable conclusion is that the Court simply drew the class as broad as was necessary to justify invalidating a law it deemed unwise or unfair.

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But it is not the job of unelected justices to announce whether they consider a law unwise or unfair, and it certainly is not their job to contravene the will of the people acting through their elected legislature by transforming the constitution to strike down laws they dislike. The Supreme Court's job is to faithfully apply the law, not to engage in intellectual gymnastics to achieve policy results.

The Court's action in *Beason* is remarkable in scope: the Court has effectively announced that an entire area of law is off limits to the legislature. According to *Beason's* logic, any legislation limiting bodily injury lawsuits is *necessarily* a special law because bodily injury claims and wrongful death claims fall into the same class. Since wrongful death claims cannot be limited under the constitution, the Court has now dictated that neither can bodily injury claims. This sweeping robbery of the legislature's authority over an entire area of the law is extraordinary.

The Single Subject Rule: Peanut Butter Cookies are Still Cookies

Like the Special Law Ban, the Single Subject Rule is well-intended and may even have been a good policy to include in the constitution, but it has been weaponized by the Oklahoma Supreme Court to overturn valid laws passed by the legislature. The Court has repeatedly turned to this device to achieve its policymaking ends. In recent years, the Court has used the Single Subject Rule to strike down laws concerning a wide range of hotly debated topics: immigration, abortion, income tax cuts, tort reform, state appropriations, and issuing bonds for capital projects, to name a few.[56]

The Oklahoma Constitution requires that "every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title."[57] According to the Oklahoma Supreme Court, this Single Subject Rule is intended "to ensure the legislators or voters of Oklahoma are adequately notified of the potential effect of [legislation] and to prevent logrolling."[58]

Logrolling is an old legislative practice where two unrelated matters are combined to obtain passage of a bill, usually where one unpopular provision is attached to a popular or "must-pass" piece of legislation for which it bears no relation.[59] By inserting unpopular provisions into otherwise popular bills, a legislator pressures her colleagues to accept items they might not otherwise support in order to get what they do want. Logrolling happens regularly in the United States Congress, as the federal constitution has no provision prohibiting the practice.[60] The vast majority of states, however, ban logrolling in their state constitutions.[61]

The Oklahoma Supreme Court has been strikingly inconsistent in its application of the Single Subject Rule. In 2009, the Court struck down a law authorizing bonds for three public works projects as violating the rule, apparently requiring that each project be voted on in separate bills.[62] But years before that ruling, the Court upheld similar public works bonds that funded

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separate projects all over the state.[63]

In 2008, the Court declared that a bill appropriating some $135 million in surplus funds to 16 separate state agencies violated the Single Subject Rule, but refused to actually strike down the law as it would cause "confusion in the state's fiscal affairs."[64] Just a few years before that ruling the Court sowed just such confusion, striking down a similar comprehensive appropriations bill in the middle of a fiscal year.[65]

In 2013, the Court declined to hear a Single Subject challenge to a bill authorizing a statewide virtual charter school that also authorized an unrelated $30 million appropriation to public schools.[66] The same year, the Court struck down a comprehensive tort reform law under the rule,[67] but then upheld a similarly comprehensive workers' compensation reform bill.[68]

The Court has invalidated a reform to Oklahoma's drunk driving laws that merely *amended* certain provisions of a previously passed comprehensive law.[69] That is, the Court did not strike down the original comprehensive bill that included a great number of loosely related provisions under the general subject of impaired driving, but *did* strike down some limited amendments to that bill that all dealt with the same subject.[70]

In 2016, the Court rejected a Single Subject challenge to a ballot initiative that included a sales tax increase, changes in teacher pay, and a constitutional restructuring of the appropriations process.[71] Meanwhile, the court has repeatedly ruled that bills dealing exclusively with the topic of abortion violate the Single Subject Rule.[72]

Like the Special Law ban, the most important factor for evaluating whether a law runs afoul of the Single Subject Rule is how the subject of the legislation is defined. If a statute is viewed broadly to consist of a more general subject matter, it is more likely to survive single subject analysis. If, however, the subject is drawn narrowly, it is easier for the Court to point to provisions that do not relate to the main, narrow subject. Thus, whether a law deals with one subject or many subjects lies in the eye of the beholder. This fluidity should cause the judiciary to take a restrained posture towards such laws; in close cases—and regarding topics of intense public debate—the Court should defer to the electorally accountable branches of government.

The Oklahoma Supreme Court takes precisely the opposite approach: it sheaths its single subject sword when it favors the underlying policy in a bill, and wields it in cases the Court views as particularly important or controversial. Lawyers in Oklahoma sometimes defend this tactic as brave and the hallmark of an independent judiciary. They fundamentally misunderstand the meaning of the term.

A *functioning* independent judiciary stands between the citizen and the government to protect against violation of the citizen's constitutional rights, and does so without regard to popular opinion[73]; a *rogue* judiciary substitutes its own will for that of the people, without regard to the constitution. Matters of great importance or great controversy are *more* in need of the democratic process, with its public debate, plurality of interests and perspectives, and accountability at the ballot box. The right to self-government is *more* precious in such contested matters, not less, making Court interference more offensive.[74]

Prior to the last 15 years, the Court had been largely unwilling to invalidate legislative enactments for violating the Single Subject Rule, despite regularly opining that the legislature was running afoul of the rule. The justices issued multiple warnings to the legislature that it needed to be mindful of the rule, but repeatedly declined to actually upend the questioned laws, instead opting to make their rulings effective "prospectively."[75] This enabled the challenged legislation to stand, but supposedly was to provide guidance to the legislature for future enactments.[76] It was only after power changed hands in the legislature that the Court began frequently striking down laws based on the Single Subject Rule. Since the new House majority was sworn-in in 2005, the Court has fully or partially struck down at least nine laws as violative of the Single Subject Rule.[77]

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The framers of the Oklahoma constitution provided insight into what was meant regarding the Single Subject Rule when, at the constitutional convention, they adopted a resolution limiting any propositions at the convention to one subject.[78] Thus, the delegates at the convention made themselves subject to the very rule they later put in the constitution to govern the legislature. *They then proceeded to adopt multiple propositions that would not survive the modern Court's test for whether a statute includes more than one subject.*

To-wit, the convention entertained a single proposal to establish both an income tax and an inheritance tax.[79] It adopted a provision guaranteeing religious liberty, and also banning plural or polygamous marriages.[80] Another provision banned laws impairing contracts, and also banned convictions from working a corruption of blood or forfeiture of estate.[81] Yet another provision requires the legislature to establish boards of health, dentistry, pharmacy, and a pure food commission, and provides for licensing doctors, dentists, and pharmacists.[82] The framers likely viewed each item as relating to public health, but would the creation of four separate state agencies each having different missions pass muster with today's Supreme Court? Clearly, the framers of the Oklahoma constitution took a far more expansive view of what types of measures could be combined into one enactment than the current Supreme Court does.

When the Supreme Court struck down the legislature's 2009 tort reform law, one of the justices offered an analogy she thought would provide guidance to the legislature in the future. She unwittingly illustrated the flaw in the Court's approach to the Single Subject Rule:

> If you make a peanut butter cookie, it is apparent that it is a smooth, one flavor cookie. It is still a peanut

> butter cookie even if you use crunchy peanut butter, because its major flavor is still peanuts. When you add chocolate chips, pecans, coconut, M&M's, raisins, and dried cranberries, the additional discrete ingredients change the homogenous nature of a peanut butter cookie into a jumble of different tastes and textures. It is still a cookie, it is just not a peanut butter cookie. Likewise, the [tort reform law] is still a statute, but it ceased to be a statute for the reform of civil procedure when sections having nothing to do with civil procedure were included.
>
> (J. Kauger, concurring opinion).[83]

Apparently, it never occurred to the justice that the answer to the question "are these things part of the same category?" is determined by how the category is defined. Peanut butter cookies are still cookies even if pecans and raisins are added to them. Cookies and bananas are both food. The critical question the Court ignores is *who* gets to establish whether the relevant category is peanut butter cookies, all cookies, or all food? Is it the electorally accountable branches or the court?

Ambiguity and the Misbegotten Quest for Legislative Intent

> *"The text of the statute isn't mere evidence of what the law is, it is the law, and it is the sole legitimate expression of the Legislature's intent. If the law is not the words that the Legislature enacted, but rather whatever intent resided in the minds of this legislator or that, then we need not bother with statute books because the law resides elsewhere, perhaps up in the clouds where if only we stare long enough we will see the law we want to see."*
>
> - Justice Patrick Wyrick, *McIntosh v. Watkins* (Dissenting Opinion).[84]

The Oklahoma Supreme Court seems to have a difficult time ascertaining the meaning of laws passed by the legislature that do not appear to be unclear to anyone but the justices.[85] Where the average person would see a clear directive in the text of a law, the Court sees ambiguity. Ambiguity is a useful thing for justices to find if they wish to make policy, because if the meaning of the text is ambiguous, the justices can fill in the gaps with their own preferred policy under the guise of ascertaining the legislature's intent.

Conjuring legislative intent from thin air to defeat the plain text of a law is not a new strategy for activist judges, but the Oklahoma Court pushed this practice to its extreme in a case this year, simply re-writing legislation to say things it did not say. In *McIntosh v. Watkins*,[86] the issue to be decided concerned the availability of treble damages in a car crash case where the plaintiff suffered a bodily injury. The statute in question, which had been on the books for decades, was clear: its plain language provided that treble damages could be recovered if the accident only caused vehicle damage, and not if it also caused bodily injury.[87] Since the plaintiff in *McIntosh* had sustained a bodily injury, a plain reading of the statute dictated that he could not recover treble damages.

McIntosh involved three sections of law, each covering a different category of accident. Generally, the sections make it a crime to flee the scene of an accident, but provide for different penalties based on whether there was an injury or just vehicle damage.[88] The first sentence of each section describes the type of accident to which that section applies. The first applies to "accident[s] resulting in a nonfatal injury to any person,"[89] the second applies to "accidents resulting in the death of any person,"[90] and the third applies to "accident[s] resulting only in damage to a vehicle which is driven or attended by any person."[91] Thus, there are three categories of hit and run accidents, each dealt with by a separate section: (1) injury accidents where there is no death, (2) accidents where there is a death, and (3) vehicle damage-only accidents.

In addition to the criminal penalties, the third section imposes a civil penalty that the other two sections do not. It states: "In addition to the criminal penalties imposed by this section, any person violating the provisions of *this* section shall be subject to liability for damages in an amount equal to three times the value of the damage caused by the accident."[92] Thus, a victim of an accident resulting only in damage to a vehicle, and not bodily injury to the victim, is eligible to receive treble damages. The statute's plain language is unmistakable: the treble damages provision applies to "this section," meaning vehicle damage-only accidents, and not to bodily injury accidents.

Despite the law's clear text, the Court declared this statute ambiguous and set about re-writing it to provide the enhanced damages in accidents with a bodily injury. The Court found the law was "susceptible to more than one reasonable interpretation and therefore ambiguous, [requiring] the Court to resort to rules of statutory construction to determine its intent."[93] For this assertion, the Court offered no explanation. The Court then, with little effort at justification, concluded that allowing treble damages for more minor vehicle damage cases but not injury cases would lead to "absurd" results, and therefore could not have been the legislature's intent.[94]

Had the legislature intended treble damages to be available in injury cases, it could have put such language in the sections of law that dealt with injury cases. It did not. The treble damages provision was added in a 1987 amendment to the law.[95] That the legislature went to the trouble of amending the vehicle damage section, but not the others, is actually evidence of its intent that treble damages *not* be available in injury cases.

The legislature could have made treble damages available only in vehicle damage cases and not bodily injury cases for a host of reasons. Perhaps the legislature concluded that the damages available for bodily injury cases were already adequate to deter hit and run drivers, given that such damages can be quite high. Perhaps the legislature judged the risk that a hit and run driver would get away with little consequence in "fender bender" cases greater than injury accidents because the cost of the damages would be small, and therefore targeted the treble damages only to the section that covered that type of accident. Or perhaps the legislature was seeking to purchase deterrence for cheap: in any given accident, the potential hit and run driver generally cannot know whether the victim is injured at the time he makes the decision to stay or run. Therefore, the treble damages provision's deterrent effect extends to every accident, even though it only actually applies to vehicle damage cases. This seems like a reasonable way to achieve the desired deterrent effect—preventing drivers from fleeing accidents—without leading to the litigation bonanza that would result from tripling the damages for every personal injury claim.

Reciting these possible interpretations of the legislature's intent illustrates precisely the reason courts should not indulge in such

crystal ball gazing: the beauty, or ugliness, of a public policy is in the eye of the beholder. It is all too easy for a court to impose its own policy preferences once it begins summoning the spirits of legislative intent. Adhering to the written text of a law, and just the text, is the only way to truly leave the legislating to the legislature. When a court departs from the plain meaning of the text and instead searches for its intended meaning, it becomes very difficult to defend the legitimacy of the court's conclusions.

Public Interest Standing: Season Pass for Judicial Overreach

"We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative and in large measure insulated, judicial branch."

- Justice Powell, *US v. Richardson* (concurring opinion).[96]

If Special Laws, Single Subject, and Ambiguity are the plays the Oklahoma Supreme Court calls from the bleachers to defeat valid acts of the legislature, Public Interest Standing is the season pass that grants the Court admission to any game it desires. That is, the Court's newest innovation deals with what cases it empowers itself to hear in the first place, and provides no discernable limitation. The Court has announced that it will review any legislation it deems "of great public importance." In other words, any legislation it chooses.

Public Interest Standing is the season pass that grants the Court admission to any game it desires.

Justiciability and Standing are Safeguards of the Separation of Powers

The first structural checks on the judicial branch are the rules about what cases should even be decided by courts at all—the rules of justiciability. Justiciable cases are those where a plaintiff with *standing* has a live controversy capable of being addressed by a court.[97] Otherwise, the court lacks jurisdiction to hear the case.[98] The case is nonjusticiable—not able to be judged.

A plaintiff has standing only if he can demonstrate (1) a concrete and particularized injury that is not conjectural or hypothetical, (2) his injury is fairly traceable to the actions for which he sues, and (3) his injury will be redressed by a favorable decision from the court.[99] Likewise, "the party who invokes the court's authority [must] show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant."[100] Thus, the injury must be personal to the party suing, rather than a generalized grievance suffered by the public at large.

Justiciability and standing are critical in demarcating the proper division of power between the courts and the legislature.[101] Courts are not supposed to serve as roving commissions to review acts of the legislature.[102] Instead judges are supposed to limit themselves to deciding disputes presented to them by parties with a concrete and particularized interest in the outcome. The idea is that those suffering only generalized harm should present their grievance to the legislature, seeking redress through the political process.[103] As courts ease standing requirements they assume the burdens and powers of functioning as a legislature. Accordingly, permissive standing doctrines undermine the separation of powers.

The Oklahoma Supreme Court Eliminates Standing as a Check on its Own Power

In a 2017 case, *Hunsucker v. Fallin*,[104] the Oklahoma Supreme Court turned these concepts on their head, creating for the first time in state history a generalized "public interest standing." Until that case, the Court had followed the traditional American rules of justiciability and standing, as required by the constitution.[105] The *Hunsucker* plaintiffs were DUI attorneys who filed a challenge to the legislature's revision of the state's drunk driving laws.[106] The plaintiff-attorneys claimed they had standing because they *might* drive drunk and get arrested in the future and *might* lose future business because of the law.[107] These eventualities were too speculative even for the Oklahoma Supreme Court, so it was forced to come up with some other justification to reach down and strike the law.[108] The Court's solution was to create Public Interest Standing from whole cloth.

Citing "the great number of Oklahoma citizens in all counties of the State subject to the . . . new Act," the Court declared it had "discretion to grant standing to private parties to vindicate the public interest in cases presenting issues of great public importance."[109] The Court further described this newfound discretion as "properly exercised . . . where there are competing policy considerations and lively conflict between antagonistic demands."[110] Putting aside that a court cannot "grant" standing—a party either has standing or does not—this expansive standard allows the Court to transform itself into just the type of roving legislative review commission standing rules are supposed to prevent.

In a scathing dissenting opinion, Justice Wyrick responded to the majority with incredulity:

> Let that sink in. The Court believes it can reduce to nil "the irreducible constitutional minimum" of standing anytime it is presented with two parties disagreeing over important policy considerations. In other words, the Court can disregard constitutional limits on its jurisdiction anytime it is presented with *precisely the type of policy dispute that those constitutional limits are designed to bar it from deciding*. But nothing in our Constitution permits us to assume jurisdiction over a case merely because the issue it presents is "important," and the Court's invocation of [this] standard as a measure of justiciability is without precedent.[111]

He continued:

> Today's decision is an outright abandonment of any pretense that the Constitution limits the Court's jurisdiction in any meaningful way. The Court treats our "irreducible" jurisdictional rules as mere technical requirements that sometimes hamper its ability to be the final arbiter of the thorniest issues facing our State. But when we say that a plaintiff must have standing in order to bring suit, we aren't describing a limitation for limitation's sake; we're talking about a key structural feature of our Constitution designed to maintain the separation of powers between the co-equal branches of government. Our Constitution requires that

> "the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others," and Article VII, Section 4's grant of jurisdiction to this Court to hear "cases" is key to this design. By limiting our jurisdiction to justiciable "cases," the Constitution ensures that the judicial branch stays confined to its role of exercising judicial judgment rather than political will.[112]

Compare the almost limitless approach of today's Supreme Court to that of the original justices of the Court—3 out of 5 of whom were actually framers of the Oklahoma constitution—who shortly after the constitution was drafted denied a request from the governor to issue an advisory opinion.[113] A somewhat unusual holdover law from the territorial days before statehood required that when a defendant was sentenced to death, the case would be forwarded to the governor who was permitted to require an opinion from the Supreme Court or any justice on the Court as to the propriety of the trial court proceedings.[114] This was thought to aid the governor in determining whether he should issue a pardon, and placed significant influence over the process in the hands of the justices.[115] In a 1909 case, the governor made just such a request to the Court.[116]

In a concise, unanimous opinion entitled *In re Opinion of the Judges*, the Supreme Court explained that, despite clear *statutory* authority to do so, it had no *constitutional* authority to weigh in on the matter.[117] The Court's respect for the separation of powers is apparent:

> The powers of the state government are, under the Constitution, divided into three distinct departments—legislative, executive, and judicial—and the duties of each department are distinctly defined. These departments are independent of each other and sovereign within their respective spheres. Neither can exercise the powers properly belonging to the other, and it is the duty of each to abstain from and oppose encroachments on another. . . . Neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial and to be performed in judicial manner. . . . the statute [requiring the Court's opinion] *purports to impose on this court a duty which, if discharged, would amount neither to a judicial act, nor one to be performed in a judicial manner, but one which, in effect, would make the judges of this court, or some one of them, advisers of the Governor.* Such is manifestly inconsistent with judicial duties and repugnant to the Constitution, and for that reason we refrain from acting pursuant thereto.[118]

The original Oklahoma Supreme Court, therefore, struck down a statute that gave it additional authority beyond that found in the constitution. The justices at the time undoubtedly considered the imposition of the death penalty a matter of "great public importance," but unlike the today's Supreme Court justices, they did not believe the importance of the question endowed them with the authority to announce their personal positions on the matter, let alone impose their will on the state. They saw themselves as judges, not as lawmakers or advisors to the governor. Such modesty is sorely absent in the modern Court.

Of, By, and For Lawyers: Oklahoma's Unsound Method of Judicial Selection

Oklahoma's so-called "merit selection" system of judicial selection is not designed to appoint the highest quality legal minds to the Court or to promote public confidence in the legitimacy of the judiciary's rulings; it primarily serves to ensure that a tiny group of trial lawyers can select the judges who will hear their cases. The principle that no man should be permitted to choose his own judge is as old as the common law, but Oklahoma has essentially ignored this idea. Oklahoma's judicial selection method entrenches lawyers and their trade organization, the Oklahoma Bar Association, as the selectors of the judges and justices they will appear in front of. It has been remarkably fruitful for these lawyers in its five decades of operation.

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Oklahoma's Judicial Nominating Commission (JNC)—effectively controlled by the Oklahoma Bar Association and housed within the judicial branch itself—is at the center of this tendentious power structure.[119] The JNC operates as a gatekeeper for judicial nominations, screening candidates in secret[120] and narrowing the available pool to three names, which it presents to the governor to choose from.[121] The JNC is given no criteria from which to evaluate candidates,[122] and the governor has no power to reject the slate of candidates or request more options.[123] The JNC is composed of a mix of lay members and attorney members selected by the Bar Association.[124]

Though active and senior members of the Bar Association make up less than one percent of the population of Oklahoma,[125] the Bar is responsible for selecting 6 out of the 15 JNC members (40 percent).[126] Unsurprisingly, the six lawyer members exercise considerable influence over the lay members, as they can claim subject matter expertise regarding the legal system. As compared to the federal model (executive appoints and legislature confirms) or an election model, Oklahoma's JNC ensures that lawyers' voices are heard more loudly than they would otherwise be.

Moreover, Oklahoma's system—when compared to the alternatives—fails to promote what should be the overarching goals of a judicial system: (1) to ensure the judiciary remains independent, (2) to balance this independence with a measure of democratic accountability, (3) to produce the most intelligent and highly qualified candidates for judicial office, and (4) to promote popular acceptance of the Court's rulings.

Judicial independence—often cited by the Bar Association as the reason for keeping the current system—has little to do with the *method* for selecting judges, but rather is largely determined by how judges are *retained*. If a judge must face re-election, he is more likely to allow public opinion to shape his interpretation of the law. This is why the American founders gave federal judges life tenure,[127] but a similar result could likely be accomplished with

relatively lengthy term limits. Oklahoma's system includes retention elections which, while largely meaningless in practice,[128] theoretically undermine arguments about the status quo being critical to judicial independence. If independence is the goal, Oklahoma should change judicial tenure, not cling to merit-selection.

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Oklahoma's system also dilutes democratic accountability in the selection of judges to the point that the public has virtually no say in the process. Judicial nominations play a large role in federal elections because the winner of the presidential election and majority in the Senate so significantly shape the judiciary. In states where judges are elected, the electorate exercises direct (sometimes too much) accountability over judges. In Oklahoma, if the electorate believes the courts have strayed from their proper role or want to influence the philosophical direction of the judiciary, they have very limited ability to do so. They can vote for governor, who can appoint a few non-lawyers to a secret committee controlled by lawyers. No member of the JNC can be removed or replaced by voters or recalled from service by their appointing authority, and the public cannot even monitor the JNC's work to evaluate its performance. The votes of the members of the JNC are not even recorded and made public.

Regarding its ability to produce highly qualified candidates for judicial office, studies conclude there is no evidence that merit-selection has outperformed the alternatives.[129] Moreover, although the Oklahoma Legislature recently passed a positive reform to eliminate outdated judicial districts for four of the nine Supreme Court seats, the five remaining districts unnecessarily restrict the available talent pool when vacancies arise.[130]

It is unsurprising, then, if public confidence in the Oklahoma judiciary is lacking, risking the loss of popular acceptance of court rulings. When the Court applies constitutional provisions inconsistently it undermines the rule of law—the idea that adjudication is done on the basis of rules previously formulated.[131] Public confidence and acquiescence to court rulings is undermined by the Supreme Court's uneven application of the constitution described in this paper and the sense that the Court is unaccountable to and out of step with the electorate.

Instead, Oklahoma's judicial selection method primarily serves to *ensure that trial lawyers can select the judges and justices they want hearing their cases*.[132] Given the liability expanding decisions of the Oklahoma Supreme Court, it has been remarkably successful at achieving this inappropriate result.

The Elected Branches Should Reign in the Supreme Court

The greatest threat to judicial independence occurs when the courts flout the basis for that independence, exceeding their constitutionally limited role and the bounds of their expertise. When courts fail to exercise self-restraint and instead enter the political realm reserved to the elected branches, they subject themselves to the political pressure endemic to that arena and invite popular attack. It is precisely *because* of the importance of an independent judiciary that judicial restraint is imperative.

By urging courts to observe appropriate restraint and avoid intrusions into the domains of the other branches, the elected branches strengthen, not weaken, the independent judiciary. While the exercise of sound judicial restraint is ultimately the responsibility of the justices themselves, it is incumbent on the other branches to aid in this endeavor.

Proposed Reforms

The legislature should conduct rigorous oversight of the judicial branch, including holding hearings to receive expert testimony about Supreme Court rulings and scrutinizing the Court's budget. Perhaps an review of the Court's organizational or funding structure will reveal incentives for judicial activism or evidence of improper political activity. At a minimum, oversight and criticism will highlight the Supreme Court's overreach, educate the public, and provide a clear message to the judiciary that the legislative branch is co-equal to the judiciary.

The legislature should also adopt reforms that can be accomplished by statute without resort to the more difficult constitutional amendment process. 1889 Institute's publication, *Taming Judicial Overreach: 12 Actions the Legislature Can Take Immediately*, (forthcoming October 2019) provides discrete reforms the legislature can enact by statute to address the problem.

Most critically, the JNC should be eliminated or significantly reformed. Eliminating its role with the Supreme Court would require a constitutional amendment, but only statutory changes for lower courts. This would allow transition to the federal model or elections for judicial selection. The federal system is superior, but elections are often more popular with the electorate. Either is better than the status quo.

Short of a constitutional amendment, the elected branches can significantly reform the JNC. The constitutional provision dictating the makeup of the JNC arguably permits the appointment of the six lawyer members to be altered by statute.[133] While these members would still be required to be attorneys, the power of the Oklahoma Bar Association to appoint them can be eliminated. It should be.

Accordingly, the legislature should pass a statute giving the governor the power to appoint the lawyers on the JNC. The legislature should also make the JNC subject to the Open Meetings Act so it can no longer conduct its business in secret. A narrow exception to enter executive session to candidly deliberate about the candidates could be permitted, but all other business, especially voting, should be done on the record.

Moreover, the JNC should be required to develop written ethical and procedural rules, which it currently does not have, and these rules should be made public. Members should have to disclose

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conflicts of interest and recuse from participating in filling any vacancy where they have such a conflict. The governor's office should develop written guidance for members of the JNC describing the proper role of the judicial branch, the role of the JNC itself, and the type of judges and justices he seeks to appoint to the bench.

Conclusion

It is incumbent on elected officials, lawyers, the press, political observers, and the people themselves, to robustly criticize the Oklahoma Supreme Court. As United States Chief Justice Harlan Stone put it many years ago, "I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."[134]

RECOMMENDATIONS RECAP

1 **Appoint Non-Activists & Give Written Guidance to Appointees**
- Fill judicial and JNC vacancies with individuals who have a modest view of the courts.
- Educate JNC members on the proper role of the judicial branch and the JNC itself.

2 **Make Changes by Statute**
- 1889 Institute's publication, *Taming Judicial Overreach: 12 Actions the Legislature Can Take Immediately* (forthcoming October 2019) provides a menu of statutory reforms.
- The legislature can eliminate merit-selection for all courts below the Supreme Court and Court of Criminal Appeals.

3 **Reform the JNC by Statute**
- Remove or alter the Oklahoma Bar Association's role in JNC appointments.
- Make JNC subject to the Open Meetings Act, with a narrow exception to deliberate about candidates behind closed doors. Require all other business, especially voting, to be done on the record.
- Require JNC to develop written ethical and procedural rules (or impose them by statute), including disclosure of conflicts of interest and recusal when appropriate.

4 **Eliminate the JNC by Constitutional Amendment**
- Elimination of the JNC requires a constitutional amendment, but would permit the state to adopt a judicial selection system akin to the federal model or elections.
- The federal system is superior, but elections are often popular; either is better than the status quo.

End Notes

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1 Irvin Hurst, The 46th Star: A History of Oklahoma's Constitutional Convention and Early Statehood 19-20 (1957).

2 Okla. Const. Art V, Sec. 36 (emphasis added).

3 Okla. Const. Art IV, Sec. 1 ("The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.").

4 *See, e.g., Oklahoma Bar Journal*, Vol. 86, No. 30, "Judicial Reform Study Foretells Future Legislative Actions," (November 21, 2015) (criticizing legislative interim study on judicial reform); Courtfacts.org (Oklahoma Bar Association website supporting merit-selection and opposing reforms); *Insurance Journal*, "Lawyer Group Blasts Oklahoma Tort Reform Bills," (March 19, 2009), available at: https://www.insurancejournal.com/news/southcentral/2009/03/19/98850.htm.

5 Okla. Const. Art. V, Sec. 57 ("Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length: Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof.").

6 Okla. Const. Art. V, Sec. 46 (stating "[t]he Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law" authorizing 28 enumerated categories of laws).

7 *See, e.g., McIntosh v. Watkins*, 2019 OK 6 (2019); *CompSource Mut. Ins. Co. v. State ex rel. Okla. Tax Comm'n*, 2018 OK 54 (creating an ambiguity by injecting the notion of specific versus general references, and then reaching the desired policy goal of tax rebates that the unambiguous text would not have permitted); In re T.H., 2015 OK 26, ¶¶ 9, 11 (finding a statute ambiguous and then "liberally constru[ing]" the provision "to carry out its purpose" (quoting *In re BTW*, 2010 OK 69)).

8 *Hunsucker v. Fallin*, 2017 OK 100 (2017).

9 This prayer is actually a paraphrase of Augustine: "Ergo noli quaerere intelligere ut credas, sed crede ut intelligas," meaning, "Therefore do not seek to understand in order to believe, but believe that thou mayest understand." Tractates on the Gospel of John; tractate XXIX on John 7:14-18, §6 A Select Library of the Nicene And Post-Nicene Fathers of the Christian Church Volume VII by St. Augustine, chapter VII (1888) as translated by Philip Schaff.

10 Benjamin Lepak, *The Oklahoma Supreme Court's Unchecked Abuse of Power in Attorney Regulation*, 1889 Institute (February 2019), https://img1.wsimg.com/blobby/go/8a89c4f1-3714-49e5-866b-3f6930172647/downloads/1d31jh6d1_297471.pdf (last visited Aug 13, 2019).

11 F. Andrew Hanssen, *On the Politics of Judicial Selection: Lawyers and State Campaigns for Merit Selection*, 110 Public Choice 79-97 (2002) (Concluding that the primary reason lawyers and bar associations support merit-selection is that it increases lawyers' profits, and stating "lawyers and lawyers' groups have benefitted in two ways from the merit plan. First, the merit plan significantly expands the influence of the state bar in the judicial selection process; indeed, members of the bar acknowledge that it is their most effective means of influencing the composition of state courts. Second and perhaps even more importantly, merit plan procedures . . . lead to more litigation."); Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 Mo. L. Rev. 675, 686 (2009) ("Not only do lawyers have opinions about public policy they wish to vindicate as much as non-lawyers do, but the lawyers who sit on these commissions also practice in front of the judges they select. It is hard to believe that these lawyers care only about whether the judges who hear their cases issue learned and scholarly opinions; surely these lawyers also care about whether a judicial candidate will be inclined to rule in their favor. Indeed, if a lawyer on the commission is a plaintiff's lawyer who works, as many do, on contingency, his or her very livelihood will be wrapped up in how often, for example, a judicial candidate will be inclined to dismiss cases or reduce damages awards.").

12 Lepak, supra note 10.

13 *See, e.g., Beason v. I.E. Miller Services, Inc.*, 2019 OK 28 (2019) (striking down statutory cap on noneconomic damages in tort claims); *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37 (2013) (striking down comprehensive tort reform law); *Wall v. Marouk*, 2013 OK 36 (2013) (striking down medical negligence reform measure); *Zeire v. Zimmer*, 2006 OK 98 (2006) (same); *Reynolds v. Porter*, 1988 OK 88 (1988) (striking down tort reform law).

14 Amar, Akhil Reed, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Problem of the Denominator*, (1994). Faculty Scholarship Series. 981 ("In a republican government, the people rule. [It] require[s] that the structure of day-to-day government—the Constitution—be derived from "the People" and be legally alterable by a "majority" of them. These corollaries of popular sovereignty—the people's right to alter or abolish, and popular majority rule in making and changing constitutions—were bedrock principles in the Founding, Antebellum, and Civil War eras.").

15 *United States v. Butler*, 297 U.S. 1, 79 (1936) (dissenting opinion).

16 *Id.*

17 Amar, *supra* note 14 at 749, 761 (discussing the federal constitution's promotion of popular sovereignty).

18 *See generally* United States Const. Art. I-III.

19 *See* Saikrishna Prakash, *A Fool for the Original Constitution*, 130 Harv. L. Rev. F. 24, 29 (2016)

(quoting Justice Scalia).

20 Okla. Const. Art. IV, Sec. 1.

21 Okla. Const. Art V, Sec. 36.

22 *Id.*

23 Okla. Const. Art V, Sec. 36.

24 *Fair School Finance Council of Okla., Inc. v. State*, 1987 OK 114, ¶58 (1987).

25 *See e.g., LaFalier v. Lead-Impacted Comtys. Relocation Assistance Trust*, 2010 OK 48, ¶ 15 (2010); *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶18 (2006); *Jackson v. Freeman*, 1995 OK 100 (Okla. 1995) (the Court does not seek to "determine whether the Legislature is authorized to do an act, but rather, to see if the act is prohibited."); *Adwon v. Oklahoma Retail Grocers Ass'n*, 1951 OK 43, ¶ 13 (1951) ("It is only where an act of the Legislature is clearly, palpably, and plainly inconsistent with the terms and provisions of the Constitution that the courts will interfere and declare such act invalid and void."); *Herrin v. Arnold*, 1938 OK 440 (1938) ("[T] he Legislature is primarily the judge of the necessity of the enactment, every possible presumption is in favor of its validity, and though the court may hold views inconsistent with the wisdom of the law, it may not annul the law unless palpably in excess of legislative power.").

26 *Liddell v. Heavner*, 2008 OK 6, ¶16 (2008) (emphasis added).

27 *Id.*

28 Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 Clev. St. L. Rev. 719, 721 (2012).

29 *Id.* at 721, 725-732.

30 *Id.*

31 *Id.*

32 Okla. Const. Art. V, Sec. 46.

33 *Id.*

34 *Id.*

35 Irvin Hurst, The 46th Star: A History of Oklahoma's Constitutional Convention and Early Statehood p. 5-9 (1957).

36 *Reynolds v. Porter*, 1988 OK 88, ¶ 21 (1988).

37 Irvin Hurst, The 46th Star: A History of Oklahoma's Constitutional Convention and Early Statehood p. 44-45 (1957).

38 *Chickasha Cotton Oil Co. v. Lamb & Tyner*, 1911 OK 68 (1911).

39 *Id.* at ¶10.

40 *Burks v. Walker*, 1909 OK 317 (1909).

41 *Id.*

42 *Id.* at ¶23.

43 *Id.*

44 *Id.* at ¶31, 32.

45 *Id.*

46 *Zeire v. Zimmer*, 2006 OK 98 (2006). The Zeire Court cited a 1988 case, *Reynolds v. Porter*, 1988 OK 88 (1988), which could be considered the true beginning of the Court's new special law jurisprudence, but it was only after *Zeire* that the Court began to turn to the tactic frequently to strike down laws.

47 *Id.*

48 *Zeire* at ¶13.

49 *See* Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 Clev. St. L. Rev. 719, 732-48 (2012).

50 Okla. Const. Art. V, Sec. 46 ("The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law . . . changing the law of descent or succession.").

51 *E.g., Zeire* at ¶13.

52 *Beason v. I.E. Miller Services, Inc.*, 2019 OK 28 (2019).

53 Okla. Const. Art. 23, Sec. 7 ("The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.").

54 *Beason* at ¶¶7-8.

55 *Id*. at ¶7.

56 *See, e.g., Hunsucker v. Fallin*, 2017 OK 100 (2017) (invalidating DUI law); *Burns v. Cline*, 2016 OK 1221 (2016) (striking down abortion law); *Fent v. Fallin*, 2013 OK 107 (2013) (striking down tax cut and bonds); *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37 (2013) (striking down comprehensive tort reform law); *Thomas v. Henry*, 2011 OK 53 (striking down immigration law); *Nova Health Systems v. Edmondson*, 2010 OK 21 (2010) (striking down abortion law); *Weddington v. Henry*, 2008 OK 102 (2008) (striking down uniform laws measure); *In Re: Initiative Petition No. 382, State Question No. 729*, 2006 OK 45 (2006) (striking down eminent domain ballot proposition).

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57 Okla. Const. Art. V, Sec. 57 ("Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length: Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof.").

58 *Douglas* at ¶4.

59 Black's Law Dictionary 849 (5th ed. 1979).

60 Stanley R. Kaminski & Elinor L. Hart, *Logrolling versus the Single Subject Rule*, The United States Law Week, 80 USLW 1156, The Bureau of National Affairs, Inc.

61 *Id.*

62 *Fent v. State*, 2009 OK 15 (2009).

63 *Rupe v. Shaw*, 1955 OK 223 (1955).

64 *Fent v. State*, 2008 OK 2 (2008).

65 *Morgan v. Daxon*, 2001 OK 104 (2001).

66 *See Fent v. Fallin*, Case No. MA-111199 (Okla. 2013) (application to assume original jurisdiction denied); The Daily Oklahoman, "Oklahoma Supreme Court Refuses to Take Up Legal Challenge to Charter School, Textbook Law," January 18, 2013, available at: https://oklahoman.com/article/3746853/oklahoma-supreme-court-refuses-to-take-up-legal-challenge-to-charter-school-textbook-law.

67 *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37 (2013).

68 *Coates v. Fallin*, 2013 OK 108 (2013). It should be noted that while the Court declined to rule that the workers compensation reform law was unconstitutional, it all but invited future legal challenges to individual sections of the law. Since then, the Court has slowly whittled away at this successful reform, invalidating individual provisions one at a time.

69 *Hunsucker v. Fallin*, 2017 OK 100 (2017).

70 *Id.*

71 *In Re Initiative Petition No. 403 State Question No. 779*, 2016 OK 1 (2016).

72 *E.g., Burns v. Cline*, 2016 OK 99 (2016) (abortion bill unconstitutional under federal caselaw and single subject rule); *Nova Health Sys. v. Edmondson*, 2010 OK 1 (2010) (abortion bill violates single subject rule).

73 The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the [constitutional] limits assigned to their authority.").

74 Of course, this is not to suggest that individuals' fundamental rights should be subject to a majoritarian process. The Court does not typically deploy the single subject rule in such contexts, but rather does so to involve itself in public policy debates that do not implicate fundamental constitutional rights. This is for a reason: if a fundamental right is implicated, the Court doesn't need the single subject rule to invalidate the law.

75 *See Fent v. State*, 2008 OK 2 (2008); *Campbell v. White*, 1993 OK 89 (1993); *Johnson v. Walters*, 1991 OK 107 (1991).

76 *Id.*

77 *See Hunsucker v. Fallin*, 2017 OK 100 (2017) (invalidating DUI law); *Burns v. Cline*, 2016 OK 1221 (2016) (invalidating abortion law); *Fent v. Fallin*, 2013 OK 107 (2013) (striking down tax cut and bonds); *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37 (2013) (striking down comprehensive tort reform law); *Thomas v. Henry*, 2011 OK 53 (striking down immigration law); *Nova Health Systems v. Edmondson*, 2010 OK 21 (2010) (striking down abortion law); *Fent v. State*, 2009 OK 15 (2009) (partially striking bonds for public works projects); *Weddington v. Henry*, 2008 OK 102 (2008) (striking down uniform laws measure); *In Re: Initiative Petition No. 382, State Question No. 729*, 2006 OK 45 (2006) (striking down eminent domain ballot proposition).

78 Oklahoma Constitutional Convention, Official Proceedings at p 62 (available at https://archive.org/details/proceedingsofcon00oklarich/page/n9)

79 *Id.* at p. 61 (Constitutional Proposition No. 42).

80 *See* Okla. Const. Art. I, Sec. 2 ("Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights. Polygamous or plural marriages are forever prohibited.").

81 *See* Okla. Const. Art. II, Sec. 15 ("No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. No conviction shall work a corruption of blood or forfeiture of estate: Provided, that this provision shall not prohibit the imposition of pecuniary penalties.").

82 *See* Okla. Const. Art. V, Sec. 39 ("The Legislature shall create a Board of Health, Board of Dentistry, Board of Pharmacy, and Pure Food Commission, and prescribe the duties of each. All physicians, dentists and pharmacists now legally registered and practicing in Oklahoma and Indian Territory shall be eligible to registration in the State of Oklahoma without examination or cost.").

83 *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37 ¶ 18 (2013) (Kauger, J., concurring).

84 *McIntosh v. Watkins*, 2019 OK 6 (2019) (Wyrick, J., dissenting).

85 *See, e.g., McIntosh v. Watkins*, 2019 OK 6 (2019); *CompSource Mut. Ins. Co. v. State ex rel. Okla. Tax Comm'n*, 2018 OK 54 (creating an ambiguity by injecting the notion of specific versus general references, and then reaching the desired policy goal of tax rebates that the unambiguous text would not have permitted); *In re T.H.*, 2015 OK 26, ¶¶ 9, 11 (finding a statute ambiguous and then "liberally construe[ing]" the provision "to carry out its purpose" (quoting *In re BTW*, 2010 OK 69)); *Wilhoit v. State*, 2009 OK 83, ¶¶ 10-13 (largely the same, concluding that a statute was ambiguous, leading the Court to "ascertain . . . the legislative intent and the public policy" to ascertain meaning); *In re J.L.M.*, 2005 OK 15, ¶¶ 7, 9-10 (finding a statute ambiguous in order to look at "public policy enunciated" in other jurisdictions as a basis for a finding of "legislative intent"); *Estes v. ConocoPhillips Co.*, 2008 OK 21, ¶¶ 15-25 (answering for the first time a certified federal question about whether the Standards for Workplace Drug and Alcohol Testing Act, 40 O.S. §§ 551--565, would equate breathalyzer tests with "laboratory services" for which an employer must use a licensed testing facility before taking disciplinary action against an employee, and then answering the question of whether the employer's failure to use a licensed facility was "willful" in the affirmative by deeming the relevant statute ambiguous and maligning any other result as "absurd"); *Cox v. Dawson*, 1996 OK 11, ¶¶ 7, 20 (concluding that a statute was "ambiguous because of what it does not say" and then supplying the statutory provision that the Court thought was needed); *Maule v. Indep. Sch. Dist. No. 9*, 1985 OK 110, ¶¶ 10-11 (explaining that because the parties argued the statute is ambiguous the Court was free to find the result that was "fair and efficacious" because "inept or incorrect choice of words in a statute will not be construed and applied in a manner which would destroy the . . . purpose of the statute").

86 *McIntosh v. Watkins*, 2019 OK 6 (2019).

87 *See* 47 O.S. §§ 10-102, 10-102.1, and 10-103.

88 *See id.*

89 47 O.S. § 10-102.

90 47 O.S. § 10-102.1.

91 47 O.S. § 10-103.

92 *Id.*

93 *McIntosh*, 2019 OK 6 at ¶ 9.

94 *Id.* at ¶ 15.

95 *See* 1987 Okla. Sess. Laws, c. 224, § 15 (amending statute to provide treble damages).

96 *US v. Richardson*, 418 US 166, 188 (1974) (Powell, J., concurring).

97 *E.g., Knight ex rel. Ellis v. Miller*, 2008 OK 81 (2008) (explaining "there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it."); *Toxic Waste Impact Grp. v. Leavitt*, 1994 OK 148, ¶ 8 (adopting federal standing rules and citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

98 *Id.*

99 *E.g., Fent v. Contingency Review Bd.*, 2007 OK 27, ¶ 7 (2007).

100 *Hendrick v. Walters*, 1993 OK 162, ¶ 5 n.14 (quoting *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

101 *See Dank v. Benson*, 2000 OK 40 (2000) (Opala, J., concurring at ¶ 6) ("The barriers of justiciability prevent judges from roving outside the judicial role and giving voice to abstract grievances.").

102 *See, e.g., id.; US v. Richardson*, 418 US 166, 188 (1974) (concurring opinion).

103 *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.").

104 *Hunsucker v. Fallin*, 2017 OK 100 (2017).

105 *See, e.g., Fent v. Contingency Review Bd.*, 2007 OK 27, ¶ 7 (2007); *Toxic Waste Impact Grp. v. Leavitt*, 1994 OK 148, ¶ 8 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *Hendrick v. Walters*, 1993 OK 162, ¶ 5 n.14 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)).

106 *Hunsucker*, 2017 OK 100 at ¶ 3.

107 *Id.* at ¶ 4.

108 *Id.* at ¶¶ 4-7.

109 *Id.* at ¶ 6.

110 *Id.* at ¶ 7.

111 *Hunsucker,* 2017 OK 100 at ¶ 9 (Dissenting opinion, Wyrick, J).

112 *Id.* at ¶ 14.

113 *See In re Opinion of the Judges*, 1909 OK 227 (1909).

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* at ¶ 3-4.

119 Benjamin Lepak, *The Oklahoma Supreme Court's Unchecked Abuse of Power in Attorney Regulation*, 1889 Institute (February 2019), https://img1.wsimg.com/blobby/go/8a89c4f1-3714-49e5-866b-3f6930172647/downloads/1d31jh6d1_297471.pdf (last visited Aug 13, 2019).

120 The JNC takes the position that because it is housed within the judiciary, it is covered by the exemption to the Open Meetings Act found at 25 O.S. § 304, which excludes the "state judiciary" from the definition of a public body subject to the Act.

121 Okla. Const. Art. VII-B, Sec. 4.

122 *See* 2016 OK AG 2 at ¶ 20 (interpreting Art. 7B to provide that the JNC selects its own criteria for "choosing" nominees).

123 *See* Okla. Const. Art. VII-B, Sec. 4 (providing that if the governor fails to appoint one of the three nominees within sixty days, the chief justice of the Supreme Court shall appoint from the three).

124 *See* Okla. Const. Art. VII-B, Sec. 3 (providing for the appointment by the governor of 6 non-lawyer commissioners, with no more than 3 from one political party; 6 lawyer commissioners appointed by the Oklahoma Bar Association with no political party restriction; 1 non-lawyer commissioner each from the Speaker of the House and Senate President Pro Tem; and 1 at-large commissioner selected by the JNC itself).

125 Benjamin Lepak, *The Oklahoma Supreme Court's Unchecked Abuse of Power in Attorney Regulation*, 1889 Institute (February 2019), https://img1.wsimg.com/blobby/go/8a89c4f1-3714-49e5-866b-3f6930172647/downloads/1d31jh6d1_297471.pdf (last visited Aug 13, 2019) (citing Oklahoma Bar Association figures).

126 Okla. Const. Art. VII-B, Sec. 3.

127 The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.").

128 In the 50 years since the adoption of retention elections, no justice on the Oklahoma Supreme Court has ever been voted out of office. Given the high rates of incumbent re-election in all spheres of American politics, and the fact that there is only one name on the ballot in a retention election, this result is unsurprising.

129 *See, e.g.*, Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 Judicature 228, 233 (1987) (concluding that merit selection judges do not possess greater judicial credentials than judges in other states after considering type of undergraduate and law school attended, government, judicial and private practice experience, and number of years of legal experience).

130 Laws 2019, HB 2366, c. 154, §2, eff. January 1, 2020.

131 Stephen Presser "Separation of Powers and Civil Justice Reform," 31 Seton Hall L. Rev. 649, 661 (2000).

132 F. Andrew Hanssen, *On the Politics of Judicial Selection: Lawyers and State Campaigns for Merit Selection*, 110 Public Choice 79-97 (2002); Lepak, supra note 10.

133 Article VII-B, Sec. 3(a)(2) provides for "six members, which shall include at least one from each congressional district established by the Statutes of Oklahoma and existing at the date of the adoption of this Article who are, however, members of the Oklahoma Bar Association and who have been elected by the other active members of their district under procedures adopted by the Board of Governors of the Oklahoma Bar Association, **until changed by statute**[.]" This provision appears to permit the appointment of the lawyer members to be altered by statute, but the clause's meaning would ultimately be determined by the Supreme Court, which as has been argued, has a bias in favor of the status quo.

134 Alpheus Thomas Mason, *Harlan Fiske Stone Assays Social Justice*, 99 U. Penn. L. Rev. 887 (1951) (quoting Letter of H.F. Stone to T.R. Powell, May 31, 1935).