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February 2019

The Oklahoma Supreme Court's Unchecked Abuse of Power in Attorney Regulation

By Benjamin M. Lepak

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."

– The Federalist Papers, No. 47 (J. Madison).

Oklahoma has endured a silent constitutional fissure for nearly 80 years relating to the licensing and regulation of attorneys and the practice of law. With the stroke of a pen in 1939, the Oklahoma Supreme Court usurped from the legislative and executive branches the power to regulate attorneys and the practice of law. In response to this judicial invasion into their reserved constitutional spheres, the other two branches fell silent. This, even though both had recently taken definitive action in the area of attorney regulation.

Not content to merely control the regulation of attorneys, the Court then used its newly discovered power to impose a form of licensing on attorneys more onerous than that of any other occupation in the state.[1] Attorneys are both comprehensively regulated *and* compelled to join and pay dues to a private trade association, the Oklahoma Bar Association.

The pernicious nature of this regulatory scheme is manifest in three ways. First, the Court disregarded lawyers' First Amendment freedoms of speech and association by compelling them to join and pay dues to a private trade association. Second, the Court deputized this trade association to write legislation regulating lawyers, and to punish lawyers who run afoul of these regulations. Third, the Oklahoma Bar Association and the Court have swept within their regulatory reach activities that could be performed by non-lawyers, and historically were, enlarging the scope of the attorney monopoly.

To make matters worse, the Oklahoma Bar Association substantially controls who is chosen to sit on the Supreme Court, resulting in a situation of the tail wagging the dog. Unsurprisingly, this has resulted in a Supreme Court that too often weights the perspective of the Bar more heavily than it should, which undermines the rule of law.[2] It has also produced an ideological skew in the Oklahoma judiciary that bears little resemblance to the political preferences of the state's electorate.[3]

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This paper analyzes the history and substance of Oklahoma's attorney regulatory regime and proposes that the current Supreme Court reverse course. It also proposes that the elected branches of government—the legislative and the executive—reassert their constitutional standing vis-à-vis the judiciary.

I. The Oklahoma Supreme Court's Control of Attorney Regulation

Which branch of government should have the authority to define and regulate the practice of law? More particularly, what is the proper application of the Oklahoma Constitution's doctrine of separation of powers to the regulation of attorneys? With respect to every other occupation in Oklahoma,[4] this authority resides squarely within the legislative and executive branches. The legislative branch sets the rules and the executive enforces them. Until 1939, attorneys in Oklahoma were treated substantially the same as other occupations in this regard. But in a case entitled *In re Integration of the State Bar of Oklahoma*,[5] the Oklahoma Supreme Court stepped outside its traditional role and assumed this power for itself. Oklahoma has the dubious distinction of being an early adopter of this newly found judicial power, preceded only by Nebraska in 1937.[6]

A. First Principles: The Separation of Powers

The doctrine of separation of powers is foundational to the American form of government, and was incorporated in virtually every state constitution, including Oklahoma's.[7] The doctrine is fundamentally intended as a guarantor of individual liberty. It is concerned with the threat of tyranny that results when two or more of the basic powers of government are consolidated in a single branch.[8] The doctrine also aspires to instill institutional competence by ensuring that each governmental function is exercised by the branch best designed for that task, as determined by its organizational structure, its mode of action, and its method for selecting members.[9]

The liberty interest protected by the separation of powers is best illustrated in the criminal context. For a person to be deprived of his liberty for committing a crime, a legislature must first make a law prohibiting the act. Next, the executive must decide, within its prosecutorial discretion, that the person has violated the law and should be prosecuted. Finally, the courts perform the adjudicatory function of deciding whether the law has been properly applied to the specific person and circumstance. This division of responsibilities is a structural check on government power, because any one of the three branches can prevent government force from acting on the citizen. This only works if each branch can exercise its power independently of the other branches. It is this principle of inter-branch independence that is codified by the separation of powers clauses in state constitutions, including Oklahoma's.[10]

Judicial regulation of attorneys violates this liberty principle because it concentrates the powers of rulemaking, enforcement, and adjudication all in one branch. Currently in Oklahoma, the Supreme Court performs the legislative role by promulgating the rules that govern attorneys and the practice of law, such as the Rules of Professional Conduct.[11] It then deputizes the Oklahoma Bar Association, a private entity the Court controls, to pursue the executive function of enforcing those rules.[12] Examples of this executive activity include disbarment proceedings against lawyers and prosecutions of non-lawyers for the unauthorized practice of law. Finally, the Court sits as the final adjudicatory body that determines the outcome of such cases.*

Judicial regulation of attorneys frustrates the institutional competence principle, as well, because a court is poorly designed to act as a regulatory body.[13] Within the competence framework, a legislature is the best branch for making general laws because it is large, bicameral, deliberative, and accountable to the people. The executive, on the other hand, as the unitary head of a hierarchical branch, may take decisive action with few procedural limitations. This coherence in decision-making makes it the ideal branch for pursuing enforcement.

A well-functioning judiciary remains independent of political pressure, dedicating itself to application of the rule of law to resolve individual cases and controversies instead of seeking to broadly implement the will of the people. This is by design. Courts are not as well-equipped as the executive branch in deciding when to act, but rather are passive institutions that sit idly until litigants come forward with a particular case that demands judicial resolution. Also, in contrast to judges, legislators are held accountable to their constituencies via relatively frequent elections. In this way, legislatures (and most executives as well) are more responsive to the people and can more legitimately claim to speak for the people on matters of public policy.

* An obviously analogous structure is that of the administrative state. That the administrative state also violates the principle of separation of powers is no defense for the judiciary. Moreover, judicial regulation of attorneys lacks even the minimal constitutional protections that, ironically, courts have imposed on the administrative state. Chiefly, that the legislative branch must provide guidance to administrative agencies in the exercise of their duties, and that individuals regulated by administrative agencies have a right to judicial review of agencies' determinations.

B. Oklahoma's Unique History of Attorney Regulation

Until 1939, all relevant actors in Oklahoma—the Legislature, the Supreme Court, the Executive, and the Bar itself—believed that the power to regulate the practice of law resided primarily with the Legislature. The Legislature passed various regulations covering the practice of law from statehood until 1939, and reformers aimed their arguments for change in this area at persuading the Legislature to change policy.[14] The judicial branch played a limited role, concerning itself primarily with regulation of the judicial process itself, not the broader regulation of the practice of law.[15] Oklahoma was not an outlier in this regard, but rather was consistent with the national norm regarding attorney regulation.[16] It was only in 1939 that the Oklahoma Supreme Court suddenly discovered its own "inherent authority" to regulate attorneys and the practice of law.

The Supreme Court's assumption of this power took place against the backdrop of a political fight over whether lawyers should be required to join the Oklahoma Bar Association in order to practice in the state. That is, whether Oklahoma would have a voluntary or mandatory bar association. The problems connected to a mandatory bar association (also referred to as an integrated or unified bar) is explored in more detail in section II.B, but for present purposes can be defined simply as the legal requirement that attorneys join and pay dues to the state bar association as a precondition to obtaining and maintaining a license to practice law.[17]

Membership in the Oklahoma Bar Association was first made mandatory by legislative action in 1929, when the State Bar Act of 1929 was enacted.[18] Before then, the Oklahoma Bar Association was, like all bar associations in America, a purely voluntary organization.[19] Negative public opinion of attorneys, already strong in the state, reached a crescendo in the 1920s, and leaders of the voluntary bar recognized the need to clean up the occupation's image.[20] To achieve this, leaders proposed mandatory membership in the Oklahoma Bar Association.[21] The Legislature eventually consented and passed the 1929 Act, becoming one of the first mandatory bar states in the country.[22]

From its inception, the mandatory bar faced opposition. According to the Oklahoma Bar Association itself, the Legislature considered repealing or modifying the State Bar Act of 1929 every year after its original passage with the exception of 1937.[23] Even in 1937, however, the Legislature sought to weaken the Bar Association's grip on the licensure of attorneys by passing legislation that, had it not been vetoed by the Governor, would have automatically admitted any state legislator who completed three terms as a lawmaker.[24]

When 34 of 54 applicants failed the December 1938 bar examination, those opposed to the mandatory bar "no doubt remembered the Bar leadership's frequent references to the oversupply of lawyers," and concluded that the primary purpose of the Bar Association was to limit competition from new lawyers.[25] In 1939, after a raucous floor debate that included escalations bordering on physical confrontation,[26] the Legislature enacted the State Bar Act of 1939.[27] The Act repealed the Act of 1929, dissolving the mandatory bar, and returned the organization to the voluntary status it had enjoyed for most of its history.[28]

The legislative debate over whether to return the bar to voluntary status was intense. *Harlow's Weekly* described the effort as the most significant action of the 1939 legislative session for its "suddenness of action, bitterness displayed in its consideration, effectiveness in its elimination of a major professional control and close division as expressed by votes in both Houses."[29] *Harlow's* recounted a split among lawyers on the question, both inside and outside the Legislature. Several legislators contended that a majority of lawyers in the state either secretly or openly opposed the mandatory bar.[30]

Leaders of the Bar Association gave no quarter in defending their empire. After belatedly recognizing they were under threat, Bar leaders descended on the capitol to lobby against the repeal bill.[31] The most dramatic moment of the debate occurred when the Speaker of the House accused members of the Bar of trying to buy the votes of certain legislators who were also law students by guaranteeing them admission to the Bar without examination if they voted against the repeal measure.[32] The Speaker produced a telegram in support of this allegation that he described as a threat.

The 1939 Act replaced the extensive 1929 Act with just two substantive provisions regarding the practice of law. The first provision placed the authority for determining the standards for admission to practice primarily with the Oklahoma Supreme Court, but reserved for the Legislature the right to further legislate admission standards.[33] The legislation did not provide for wholesale regulation of the practice of law by the Court, but rather simply empowered the Court to determine admission standards and standards of conduct in front of the courts, as had mostly been the practice prior to passage of the 1929 Act. Little did the Legislature understand the door it was opening to the judiciary with this small section of text.

Next, the legislation made the Court's authority over

admissions subject to a second provision, which provided that any applicant to the bar who graduated from a "Grade A" law school—as defined by various established institutions—would be automatically admitted to practice without the necessity of an examination.[34] This provision appears to have been largely aimed at ensuring students from the University of Oklahoma Law School would be admitted to practice upon graduation.[35] As the Governor, Leon Phillips, saw it, "If these graduates are not properly qualified to practice law without examinations, we should either close up the school or rejuvenate it."[36]

In response to the Act of 1939, the Oklahoma Bar Association petitioned the Supreme Court to review the matter.[37] The Court directed the Association to appoint a committee to study the question, which unsurprisingly concluded that the bar should remain mandatory, and that the Supreme Court should take for itself the regulation of attorneys and the practice of law.[38] The Court obliged, announcing in its 1939 decision, *In re Integration of the State Bar of Oklahoma* (from this point forward, shortened to *Integration* for ease of reading) that it had discovered its own inherent power to regulate the practice of law.

C. The Court's Reasoning was a Radical Departure from its Prior Jurisprudence

The Oklahoma Supreme Court's jurisprudence prior to 1939 gives no indication that the Court ever fathomed that it had the expansive authority it claimed in *Integration*. Rather, the Court had taken a far narrower view of its power, concerning itself only with the regulation of attorneys as it pertained to the proper functioning of the judicial system. That is, the judiciary would only make rules related to attorneys' admission to and conduct *in front* of the courts. This is more accurately described as regulation of the judicial process, not regulation of attorneys and the practice of law, writ large. Indeed, the Court actually held fewer than 10 years prior to *Integration* that the power to enact regulations on the practice of law resided nearly completely with the Legislature, when it upheld the Legislature's 1929 State Bar Act.

Early Cases

Early in the state's history, the Supreme Court recognized that its authority over attorneys was co-extensive with the Legislature's authority. The Oklahoma Legislature, for example, enacted statutes dictating the circumstances under which an attorney could be disbarred, and the Oklahoma Supreme Court upheld those statutes.[39] In 1913, the Court considered a disbarred attorney's challenge to the legislation that allowed his disbarment.[40] While the Court acknowledged the judiciary's power under the common law to admit—and therefore suspend or disbar—attorneys *in the absence of any legislative or constitutional regulation to the contrary*, the Court held that this power was (1) exercised by the Court as a power that was adjudicatory, not legislative, in nature, and (2) could only be exercised for conduct related to the judicial process, akin to the Court's contempt power.[41]

Accordingly, the Court did not claim for itself the *exclusive* power to regulate attorneys, but rather approached the question as an area where the legislative and judicial power overlapped. The Court explained, "the power to disbar is inherent in the courts in the sense that the power to punish for contempt is inherent in them," but "cannot be taken as authority for the proposition that the Legislature has no power to limit the courts with respect thereto."[42] The Court then cited approvingly to the California Supreme Court, holding that "In the plenitude of its power . . . the Legislature of the state has plainly defined the causes for which an attorney may be deprived of his right to practice. This it had the right to do, and its specification of such causes is, in our judgment, conclusive on this court."[43] This restrained approach to attorney regulation is consistent with the Court's other early decisions.[44]

More remarkably, after passage of the 1929 State Bar Act the Supreme Court reinforced its restrained view of its own power. Two lawyers challenged the 1929 State Bar Act as an unconstitutional infringement on the judicial power by the Legislature in *State Bar of Oklahoma v. McGhee*.[45] The challengers asserted that the power to regulate attorneys—specifically the power to admit and disbar attorneys—was an inherent and exclusive power of the Supreme Court, and therefore the Legislature's action creating grounds for disbarment and an executive body to prosecute disbarment was unconstitutional.[46] In short, these challengers advanced the precise reasoning the Court would later deploy in *Integration*. In *McGhee*, the Court rejected this argument.

Reversing the lower court,[47] the Oklahoma Supreme Court in *McGhee* once again concluded that the authority to regulate the practice of law resided as much with the Legislature as with the judiciary. Noting that legislation regulating attorneys had existed in the state reaching back prior to statehood, the Court found that the Legislature had essentially delegated its authority for determining attorney qualifications and discipline to an administrative agency, but that the power to regulate, nonetheless, remained a legislative power.[48] The Court refused to strike down the 1929 Act as unconstitutional, and emphasized that lawyer regulation was an "unnecessary burden" and not a function for which the Court was primarily created.[49]

The Court Takes Over: In re Integration and In re Bledsoe

The touchstone Oklahoma case on judicial regulation of attorneys, *Integration*, consists of more assertion than legal reasoning. In reaching its conclusion, the Oklahoma Supreme Court relied heavily on and quoted extensively from a virtually identical case decided by the Nebraska Supreme Court, the first instance of a state high court creating a mandatory bar purely by judicial decree.[50]

The Oklahoma Supreme Court began its opinion with a dubious, sweeping premise that predetermined the outcome it sought. The Court acknowledged that "There is no express grant of power in the Constitution of Oklahoma giving to any of the three departments of government the right to define and regulate the practice of law," but "the very fact that the Supreme Court was created by the Constitution gives it the right to regulate the matter of who shall be admitted to practice law before the Supreme Court and inferior courts, *and also gives it the right to regulate and control the practice of law within its jurisdiction.*"[51] (emphasis added)

For this latter assertion, the Court offered no authority in statute, common law, or the Constitution. The Court's premise, that the mere existence of the Supreme Court endows that court with the power to regulate and control the entire practice of law, is found nowhere in Oklahoma jurisprudence prior to its discovery in the 1930's. After declaring this power of the judiciary to be self-evident, the Court then engaged in a sleight of hand to justify its conclusion by citing to cases from around the country related to courts' power over admission to practice in those courts.* That is, the Court found it was an inherent power of a court to determine who would be permitted to practice before that court (the question of admission *to that court*), but then greatly expanded the concept to find for itself the authority to regulate and control the entire practice of law in the state and to compel lawyers to join an organization in order to engage in their occupation.[52]

Quoting from the Nebraska case, the Court declared, "The practice of law is so ultimately connected and bound up with the exercise of judicial power in the administration of justice that the right to define and regulate its practice naturally and logically belongs to the judicial department of our state government."[53]

With this, the Supreme Court for the first time claimed *exclusive* authority over the regulation of attorneys and the practice of law, no longer viewing its authority as existing alongside that of the Legislature. Having swept aside the traditional legislative power, the Court then adopted "rules creating, controlling, regulating, and integrating the State Bar of Oklahoma."[54] In these rules, the Court placed itself in charge of the Bar,[55] set the amount of mandatory dues lawyers would be required to pay,[56] and provided for expenditure of those funds.[57] In one all-encompassing declaration, the Court completely removed the legislative branch from the question of regulating an entire occupation. *In essence, the Court enacted a piece of legislation.*

In one all-encompassing declaration, the Court completely removed the legislative branch from the question of regulating an entire occupation.

Less than two months after deciding *Integration*, the Court struck down as unconstitutional the provision of the 1939 State Bar Act that conferred automatic admission to practice to graduates of Grade A law schools in a case called *In re Bledsoe*.[58] This case involved a graduate of a Grade A law school who made application to the Supreme Court for admission to practice without examination, as permitted by the 1939 Act. The Court denied his application, declaring that the Legislature had acted "in excess of the legislative power" by attempting to legislate an admission standard.[59]

The reasoning in *Bledsoe* should be seen as an effort to harmonize the conclusion in *Integration* with the Court's prior, contradictory cases. Under the Court's holding in *Integration*, the question of bar admission standards would be exclusively the province of the judiciary. Under prior precedent, however, the Court had recognized legislative regulation of attorneys. To square this circle, the Court confusingly concluded that the only permissible legislative action in the space would be legislation designed to aid the Court in fulfilling its duty to regulate the practice of law.[60] The Court held up the 1929 State Bar Act as an example of such a law that had as its purpose aid in the administration of the practice of law. Any law that attempted, instead, to invade the judiciary's newly discovered regulatory power was unconstitutional.[61] Of course, whether a piece of legislation was designed to aid the judiciary's regulation of attorneys

* As has been noted, this paper does not dispute that courts historically regulated attorneys' admission to practice *in the courts*. Where the Court was breaking new ground was in its assertion of the authority to regulate the entire occupation, including office lawyers who never set foot in the courtroom.

was to be determined by the Court itself.

In *Bledsoe*, the Court in effect announced a one-way ratchet: the Legislature could act to strengthen the Court's grip over the regulation of attorneys, but it could not act to loosen it, for example, by creating an alternative path to obtaining a law license from that set out under the Court's rules. The Court struck down the provision as an unconstitutional attempt at the latter.

An Outcome Seeking a Rationale?

What conclusion should be drawn from the Oklahoma Supreme Court's inconsistent interpretation of its inherent power under the Oklahoma Constitution? A charitable reading would take account of the fact that the membership of the Court over the relevant period of time changed substantially, possibly resulting in new members who did not feel bound by the Court's precedent, or simply disagreed.[62] However, the more likely explanation is that the Court was simply more dedicated to a policy outcome—a mandatory bar association the Court could control—than to the separation of powers principles it was charged to uphold. The policy outcome of both *McGhee* and *Integration* was a mandatory bar, with *McGhee* holding that the Legislature had the authority to create it, and *Integration* standing for the proposition that the judiciary, and not the legislative branch, was the final authority on the matter.

It is worth meditating on the sweeping power the Oklahoma Supreme Court claimed for itself with its decisions in *Integration* and *Bledsoe*. *Contrary to all separation of powers principles*, the Court found for itself the power to **(1)** enact legislation comprehensively regulating a major industry in the state, **(2)** compel attorneys to join a hitherto private organization against their will, **(3)** accomplish both of these objectives in direct contradiction to the will of the people as expressed through the Legislature, **(4)** assess a tax on lawyers, and **(5)** spend that tax revenue without legislative appropriation. It is difficult to overstate the audacity of this maneuver by the Court.

D. Oklahoma as an Unfortunate National Leader

After Nebraska opened the gate to judicial regulation of the practice of law, and Oklahoma walked through it, several other state supreme courts followed suit in relatively quick succession.[63] It is unsurprising that once the trail bypassing the legislative branch was blazed, other courts found their way to it. Today, after decades of living under this system, many legal scholars treat the question of the judiciary's power to regulate the practice of law as simply a given.[64] Those who question whether the judiciary ever properly had this power are dismissed as living in a bygone era.[65] Given the state of legal scholarship on the question, it is easy to view the actions of the Oklahoma Supreme Court—and the inaction of the other branches—as merely one data point in an inevitable march toward a judicially controlled regulatory scheme. But to do so misses the importance of the failure of the actors of 1939.

Consider how different the landscape would be today had the Oklahoma Legislature asserted itself against the Supreme Court's action. It is possible that decisive action at the time to hem in the judiciary would have stemmed the coming nationwide tide, or at least caused other states to more carefully consider their actions before pressing forward. State policy in the United States is not made in a vacuum. The states observe each other and learn from the battles that are waged in other states. This goes for supreme courts, as well as legislatures.

Moreover, the fact that other state supreme courts saw an opportunity after Oklahoma's acted does not make Oklahoma's policy any more wholesome. One is reminded of the lesson taught to children about friends jumping off bridges: just because everyone else is doing it doesn't make it wise.

II. What the Court Wrought: A Tour of Oklahoma's Oppressive Attorney Regulatory System

As destructive of constitutional principles as the Oklahoma Supreme Court's takeover of the regulation of attorneys was, it was made considerably worse by the oppressive regulatory regime the Court chose to set up with its newly discovered power. The Court put in place a scheme that manages to be simultaneously heavy-handed towards lawyers, conflicted against the public interest, and ubiquitous in scope. That is, the Oklahoma regulatory regime violates attorneys' first amendment freedoms, deputizes a conflicted private organization to write the rules and enforce its provisions, and creates a monopoly in the provision of services by taking a very expansive view of what it is authorized to regulate.

A. Current Licensing Requirements

To obtain a law license in Oklahoma, an individual must meet a number of expensive and time-consuming requirements. He must graduate from an American Bar Association accredited law school, pass the Oklahoma bar examination, pass a character and fitness examination conducted by the Oklahoma Bar Association, pay fees, and

of course, join the Bar Association.[66]

Once admitted to practice, an attorney in Oklahoma faces cumbersome and strict regulations in order to maintain the license. Attorneys must complete mandatory continuing legal education courses each year, pay annual dues to the Bar Association, and keep track of a dizzying array of so-called ethics rules that often bear little intuitive resemblance to what society would consider necessary to a code of moral conduct.

A short sampling of these often-illogical rules demonstrates how disconnected they are from mainstream notions of personal ethics. For example, an attorney seeking to start his own law firm is ethically prohibited from securing investors in the new business.[67] If an attorney manages to overcome this obstacle and actually open her doors, she is severely limited in her ability to advertise her services to potential customers.[68] If a client happens to stumble upon the attorney, a whole new set of "ethical" considerations come into play. An implied attorney-client relationship may be found to have been created even if the lawyer never agreed to it, so long as the client believed he was being represented.[69] A lawyer can be disciplined for not possessing the requisite expertise in a case he takes on,[70] but can also be disciplined for remedying the inadequacy by bringing on more experienced co-counsel.[71]

Moreover, lawyers are ethically bound to be roving state informers against their fellow lawyers. That is, the rules of professional conduct require that an attorney report to the Bar Association if he becomes aware of violations of the rules by another lawyer, whether by opposing counsel, a social acquaintance, or even his own employer.[72] For failing to report such an offense, an otherwise innocent lawyer can be punished. It may be reasonable to expect individuals to report clearly unethical conduct to a regulator, but when the rules are as extensive and ambiguous as the rules governing lawyers, such a requirement is onerous. Such an omnipresent state enforcement regime is more fitting of Cold War East Berlin than an American occupational licensing system.[73]

B. Compulsory Membership and Dues Payment Violates the First Amendment*

". . . to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." [74] – *Thomas Jefferson*

The United States Supreme Court has strongly indicated that the mandatory bar violates attorneys' First Amendment freedoms. Attorneys have long challenged the constitutional legitimacy of the mandatory bar as contrary to their freedoms of speech and association, but recent developments have bolstered their argument. It appears more likely than ever that the nation's high court will finally, in the coming years, rule that requiring attorneys to join and pay dues to a state bar is unconstitutional.

In order to practice his profession, an attorney in a mandatory bar state is required by law to join the bar association and subsidize its speech with mandatory dues payments. The United States Supreme Court held in *Keller v. State Bar of California*[75] that such compelled speech necessarily burdens a lawyer's First Amendment rights. Accordingly, the Court required mandatory bar associations to provide attorneys with safeguards that are carefully tailored to protect their rights.[76] Specifically, mandatory bar associations are prohibited from expending mandatory dues on activities not "germane" to the state's interest in regulating the legal profession and improving the quality of legal services.[77] Under *Keller*, only expenditures "necessarily or reasonably incurred" in service of these limited state interests can be funded with mandatory dues.[78] Moreover, Supreme Court precedent requires affirmative consent by an attorney-member before his dues can be spent on non-germane activities (he must "opt-in"). Consent must not be presumed (requiring the attorney to "opt-out").

The Oklahoma Bar Association openly violates its obligations under the First Amendment. The Bar Association's procedures place the burden on attorneys to "opt-out" of non-germane spending by filing a written objection to each and every Bar expenditure to which they disapprove.[80] Attorneys must accomplish this within an unreasonably short window of time, and it can be difficult to decipher where, and on what, the Bar is spending money.[81] Moreover, attorneys are not given the option to simply notify the Bar Association that they wish to categorically opt out of all non-germane activities. Instead, attorneys must opt out of each objectionable expenditure individually.[82] By requiring attorneys to opt out, the Bar Association *presumes* lawyers' acquiescence in the violation of their own fundamental rights. Accordingly, the Bar Association's procedures are not carefully tailored to protect those rights and serve the state's interest in regulating attorneys.

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* This topic is worthy of its own extended discussion, and indeed has been covered by many legal scholars. This paper does not attempt to cover every intricacy of this debate, but rather provides a brief summary to illustrate that Oklahoma's licensing regime is constitutionally offensive. For a rich discussion of the First Amendment issues at play, *see, e.g.*, Charles W. Sorenson Jr., *Integrated Bar and the Freedom of Nonassociation—Continuing Siege*, 63 NEB. L. REV. (1984); Larry J. Rector, *Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis*, 66 NEB. L. REV. (1987) Jacob Huebert and Timothy Sandefur, *Wall Street Journal*, "Lawyers Have Rights, Too," (December 20, 2018).

Most egregiously, the Oklahoma Bar Association routinely expends attorneys' compelled dues engaging in political advocacy that is anything but germane to regulating the practice of law. As noted in Section III, the Bar Association vigorously opposes any effort at reforming the method of selecting judges and justices in Oklahoma.[83] When the Legislature considered a tort reform law in 2009, the Oklahoma Bar Association lobbied hard for its defeat, describing the effort as "an assault on the judiciary."[84] The Bar Association maintains a "legislative monitoring committee" that seeks to influence the policy choices of the Legislature. Among this committee's annual events is its Legislative Reading Day,[85] where members of the Bar Association lobby legislators on proposed bills that impact the practice of law.[86] All of this political activity is subsidized by the forced dues of attorneys who may disagree or wish to remain silent on these issues. This type of practice brazenly violates the First Amendment.

Recently, following the landmark free speech decision *Janus v. AFCSME*,[87] which made clear that a public sector union was prohibited from compelling the membership of government employees, the Court has indicated that the same reasoning applies in the context of the organized bar.[88] Challenges are already working their way through the federal courts.

However litigation over the mandatory bar turns out, it remains a mystery why an association of attorneys, engaged in a line of work dedicated to protecting individual rights, would continue to engage in such a constitutionally dubious practice. Mandatory bar associations can no longer pretend the constitutionality of compelled dues is anything but suspect. Even if these bar associations disagree with the ultimate conclusion that compelled membership violates the First Amendment, they must at least acknowledge that it is a close enough question to merit serious consideration by the United States Supreme Court. Given that there are far less restrictive means of regulating lawyers that do no such damage to attorneys' liberty, it is puzzling that associations dominated by attorneys would countenance the risk of systematically violating cherished constitutional principles.

Furthermore, observation of the 18 voluntary bar states indicates that attorneys can be effectively regulated without compulsory bar membership. Indeed, bar associations might be strengthened by becoming voluntary.[89] Voluntariness would force these bar associations to pursue long overdue reforms in order to attract and maintain membership. Even the Oklahoma Bar Association has acknowledged that competition in the area of continuing legal education has forced improvement.[90] This is for the better for both the public and attorneys. Moreover, bar associations would be freed from the dissenting voices of attorneys who prefer to not be in the bar association in the first place, making them a more effective advocate of the positions of their members. That is, the association could truly speak with one voice.

C. The Oklahoma Bar Association has an Incurable Conflict of Interest

The Oklahoma Bar Association is a trade association for lawyers.[91] By definition, trade associations do not represent the public, they represent their members.[92] For this reason, a trade association should have no role in deciding who enters an occupation or in adjudicating conflicts between its own members and the public.

When the Supreme Court deputized the Oklahoma Bar Association, it effectively farmed out protection of the public interest to a group that is primarily concerned about its members' interests, not the public's. This is not intended as a criticism of the character of the leaders of the Bar Association. Rather, it is a commentary on the necessary orientation of a membership driven organization. Such an organization is primarily aligned toward the concerns and perspectives of its members, and secondarily toward what is good for society at large.

While dominance of an occupational licensing authority by members of the regulated occupation is not unique to attorneys,[93] it is more extreme in the context of attorney regulation. Ideally, a regulatory board will include substantial participation by lay members to ensure that the public interest is at least considered. The Oklahoma Bar Association disciplinary body has very limited involvement from non-lawyers, and there is no non-lawyer involvement in the Bar's rulemaking processes.

If any group should be sensitive to concerns about inherent conflicts of interest, it should be attorneys. When it comes to rules of professional conduct, lawyers impose on themselves extensive conflict of interest restrictions. But like the mandatory bar's imposition on lawyers' First Amendment freedoms, it seems that lawyers have a blind spot when it comes to the conflict of interest in how they are licensed.

D. The Attorney Monopoly

The Oklahoma Bar Association and Oklahoma Supreme Court have created and fed an attorney monopoly in the state. This monopoly is maintained through policies that (1) limit the supply of lawyers by erecting barriers of entry into the field, and (2) encompass a wide range of activities that could be, and historically have been, performed by

non-lawyers. Basic economics teaches that any monopoly eventually results in increased costs to the consumer, reduction in quality, and stifled innovation in the provision of services.

Limiting the Number of New Lawyers

Prior to 1939, attorney licensing standards in Oklahoma reflected the national norms of the time, which were quite minimal. For most of the state's early history, the major prerequisite for taking the bar examination was two years of "regular and attentive law study," which could be completed at home or under the supervision of an attorney.[94] Oklahoma was not an outlier in this regard; as late as 1927, no state in the union required attendance at a law school to sit for the bar examination.[95]

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Mandatory bar advocates in Oklahoma were quite explicit that one of their primary motives was limiting the supply of lawyers in order to keep prices to the consumer high. Reformers argued that there were simply too many lawyers practicing in the state, which created too much competition and kept prices for legal services too low for the average attorney to make a comfortable living.[96] In this respect, the effort was successful.

Within 2 years of the bar first becoming mandatory in 1929, the number of attorneys listed on the Oklahoma Supreme Court's roll of attorneys fell from 8,000 to 3,569.[97] The historical record is sparse, but part of this reduction appears to have consisted of mere housekeeping, purging the rolls of the dead and those who no longer resided in the state.[98] It is unlikely, however, that the number of attorneys on the rolls was cut by more than half simply by removing those no longer living in the state. More likely, it seems that the bar stepped up its enforcement efforts regarding dues payment and admission standards.

Likewise, opponents of the mandatory bar also recognized that the effort was primarily about limiting the number of attorneys in the state. Governor Leon Phillips alleged in 1939 that "there is a group making up about one-third of the bar of the state that is trying to maintain control so that the number of new lawyers is greatly reduced."[99] A former legislator whose son had failed the bar examination charged that the Bar had "deliberately cut down on the number of new attorneys to be admitted to practice and competition."[100]

Defining the Practice of Law Broadly

More significantly, the attorney monopoly in Oklahoma is sustained by an ever-expanding definition of what is considered to be the practice of law, by adding ever more services to the category of activities that lawyers, and only lawyers, can do. This is primarily accomplished through rules prohibiting the unauthorized practice of law, which make it a criminal offense to commercially provide certain services without a law license.[101] Importantly, what constitutes the practice of law is determined principally by an association of attorneys, with no involvement of the Legislature, and little more than cursory review by the Supreme Court.

The malleability of the concept of what constitutes the "practice of law" makes this tool especially effective at eliminating competition from non-lawyers because the law touches virtually every aspect of life. The Oklahoma Supreme Court has held, for example, that individuals and companies that sell municipal bonds,[102] prepare routine documents such as deeds and mortgages,[103] and collect debts,[104] are engaged in the unauthorized practice of law. Consider the case of an "I love you" will, wherein the maker of the will leaves her entire estate to her spouse. Nearly any layperson can understand the main thrust of such a document, and it does not take comprehensive legal training to identify when an individual's estate is sufficiently complicated to make its use inappropriate. And yet, a person who offers to provide such a simple document for sale could be faced with prosecution in Oklahoma.

It is worth noting that the law reserves for individuals the right to serve as their own lawyer on virtually any issue. While not necessarily wise, a person can legally draft his own will, negotiate his own contracts, and even represent himself in a criminal prosecution. What is it, exactly, that the unauthorized practice of law rule is seeking to protect him from by preventing his real estate agent from charging him a small fee for preparation of a contract to sell his house?

E. Has this System even been Effective?

For its state constitutional shakiness, its First Amendment offensiveness, and its monopolizing tendency, has the attorney licensing system at least produced a better quality of attorney or improvement in the provision of legal services? There is scant evidence that this vast regulatory

regime has made any appreciable qualitative difference.[105] While it is difficult to definitively know what the landscape in Oklahoma would look like had the current system never come into being, one can gain insight from comparing Oklahoma to states that have a voluntary bar, as well as to the historical record.

The 18 voluntary bar association states license attorneys in the same manner as other professions, such as physicians. That is, attorneys typically must graduate from an accredited law school, pass an examination, and obtain a license from the state, but are not required to join an association. Despite not being mandated by law, bar association membership rates in the voluntary states are quite strong. For example, the voluntary Iowa Bar Association reports that approximately 90 percent of licensed attorneys in the state have joined the Bar Association.[106]

Among the voluntary states are New York and Ohio, whose respective voluntary bar associations boast rich histories, significant influence in the legal profession and in public affairs, strong financial health, and active civic engagement, as well as high membership rates.[107] One suspects it would be a surprise to attorneys in the voluntary states to learn that a mandatory bar was necessary in order to maintain professionalism and adequate quality among attorneys.

Likewise, it is not obvious that Oklahoma's licensing regime has enhanced the quality of attorneys when compared to the historical record. American history is replete with brilliant attorneys who did not complete anywhere near the requirements necessary to obtain a law license in Oklahoma today. Thomas Jefferson, James Madison, and the rest of the lawyer founding fathers come to mind, as does Abraham Lincoln.[108] Oliver Wendall Holmes and Clarence Darrow each attended just one year of law school. For a more recent example, consider that it was not until William Rehnquist was sworn in as Chief Justice in 1986 that the United States Supreme Court was presided over by an attorney who obtained his law license in a mandatory bar state.[109] As recently as 1954, the Supreme Court had at least one member who had not obtained a law degree.[110] This is not to suggest that any of these individuals would experience any great difficulty in, for example, passing Oklahoma's bar examination or receiving a law degree. Rather, it illustrates that Oklahoma's licensing requirements have more to do with erecting procedural obstacles to the entry of new lawyers than to protecting the public from incompetent practitioners.

III. Of, By, and For Lawyers: Judicial Selection in Oklahoma

Perhaps nowhere is the circular relationship between the regulator and the regulated more evident than in Oklahoma's process for the selection of judges and justices. The people of the state approved a constitutional amendment in 1967 implementing a so-called merit selection system in reaction to an infamous bribery scandal involving multiple Supreme Court justices.[111] Incidentally, two of the justices implicated in bribe-taking had been on the Court and voted to take over attorney regulation in 1939.[112] Oklahoma's merit selection system centers around the Judicial Nominating Commission (JNC), a board that screens candidates to fill vacancies in the courts, and presents three candidates for each vacancy to the governor. The governor then nominates from this list of three.[113]

The Oklahoma Bar Association wields outsized influence over the selection of judges and justices in Oklahoma, selecting 6 of the 14 JNC members.[115] Moreover, the members selected by the Bar Association effectively serve as the tie-breaking votes, ensuring that the Bar maintains substantial influence over the selection of judges and justices. 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 otherwise would be.[116]

The overriding structural flaw in the system is that the Bar Association effectively controls the JNC, the JNC selects justices to sit on the Supreme Court, and those justices control the Bar Association. Each part of this iron triangle bolsters the others.* Nothing mobilizes the Oklahoma Bar Association more quickly or to greater hysteria than a proposal to alter the method of selecting judges.[117] The Bar Association maintains a website (www.courtfacts.org) that is dedicated to preserving the current system and vigorously lobbies to defeat any proposed reform to the system, however slight.[118]

The Bar Association understands that its very existence as a mandatory bar is dependent on a friendly Supreme Court that would never revisit *Integration*. The lawyers on the JNC are often active in the functions and leadership of the Bar Association and would not be in such a position of power

* This argument is not intended to impugn the character of the individuals who serve in these positions, but rather to point out the perverse incentives created by the system. Indeed, a close relative of the author currently serves on the JNC and does so with the utmost professionalism and probity.

but for a strong Bar Association with the power to dominate the JNC. Moreover, attorney JNC members have a strong incentive to recommend judges and justices who are friendly to attorneys, as their professional interests are at stake. Finally, members of the Supreme Court surely remember how they were selected for the Court, and therefore are more likely to harbor a bias in favor of the existing system.

IV. Recommendations for Reform

A. The Supreme Court Should Reverse *In re Integration* and its Progeny

The current Oklahoma Supreme Court is in the best position to repair the attorney licensing system in Oklahoma. The Court should reverse *Integration* and its progeny and return to the Legislature the regulation of attorneys and the practice of law (or at least the regulation of attorneys who do not appear in court, i.e., office lawyers). At a minimum, the Court should make membership in the Oklahoma Bar Association voluntary in order to move the system to firmer First Amendment ground. If the Oklahoma Supreme Court fails to act on its own in this regard, it is increasingly likely this decision will be made for it by the United States Supreme Court.

Moreover, it is in the Oklahoma Supreme Court's own interest to reform this flawed system. Voluntarily restoring balance to the separation of powers would be one of the healthiest actions the Court could take, and of the available reforms, would result in the least amount of discord in Oklahoma politics. Doing so would bolster the Court's credibility as a body that stands for the rule of law. Furthermore, shedding the responsibility for regulation and enforcement—activities for which the judiciary was not designed—would permit the Court to better focus on its proper functions. Most importantly, judicial restraint on this question would significantly bolster the Court's objective of preserving the independence of the judiciary.

Advocates of the current system often rank judicial independence as their highest priority and are concerned at proposals to choose Supreme Court justices by popular election. But they fail to understand how the current system makes such proposals more likely. When the public feels ever more disconnected from the government—and the government appears to be ever less accountable to the people—it is only a matter of time before the people take action. Do the justices on the Supreme Court truly doubt how Oklahomans in 2018 would vote on a ballot proposal to allow voters—instead of attorneys—to select justices?

Self-reform of this nature is not entirely unprecedented. When challenged in 2013, the Nebraska Supreme Court—Oklahoma's lodestar on the judicial takeover of attorney regulation—significantly reformed its mandatory bar.[119] It would be fitting if, after following Nebraska into the abyss in 1939, Oklahoma now followed it back out.

B. The Other Two Branches Should Reassert their Authority

Unfortunately, when it comes to the attorney licensing system in Oklahoma, the normal legislative process is largely futile without judicial cooperation because of the Supreme Court's position as reviewer of last resort. In our system of checks and balances, the Court effectively has the final say on interpretation of the Constitution. This scenario demonstrates precisely how dangerous that branch of government can be when it takes an immodest view of its power. It is exceedingly difficult to check the Supreme Court when it strays from its traditional role. But the power of the judiciary is not without limits, and the elected branches are not without recourse. The Legislature and Executive have methods to reassert their constitutional authority, and should deploy them. Accordingly, the following actions should be taken.

The Oklahoma Legislature should enact legislation implementing a private certification system for lawyers who do not appear in court.[120] This approach would create a distinction akin to that found in the British system of solicitors (office lawyers) and barristers (court lawyers), with only the latter being required to possess a state-issued license.* If the Legislature does desire to require a license for office lawyers, it should take a "light touch" approach, keeping requirements minimal. In any event, such legislation should make clear that the judiciary's authority over attorneys does not extend beyond the courthouse steps. That is, the Supreme Court may determine who is permitted to appear in courts in Oklahoma, but has no authority to regulate the rest of the occupation.

Such a system would also strike a blow against the creeping expansion of the definition of the practice of law. The practice of law should be defined narrowly, including activities that truly only should be performed by an

* The British system has its own flaws, despite significant reforms made in recent years. It is not recommended that Oklahoma copy the British system in toto, but merely should make a distinction between lawyers who appear in court and those who don't.

individual with more advanced qualifications. The Legislature could also re-enact the provision contained in the 1939 State Bar Act that admitted graduates of the University of Oklahoma Law School without examination. According to the school, approximately 95% of its graduates pass the bar exam on their first try anyway, meaning that requiring the exam functions more as an inconvenience than a screening tool.[121] Furthermore, the Legislature could allow individuals without a law degree to take the bar examination, so long as they apprentice under a practicing attorney. Seven states currently allow this in some form.[122]

These proposed reforms are consistent with the traditional understanding of the legislative and judicial roles in the regulation of attorneys. Accordingly, it would give the Supreme Court the opportunity to return its jurisprudence to more solid ground while still protecting its interest in the proper functioning of the judicial process. Any challenge to the proposed legislation would end up in front of the Oklahoma Supreme Court, who could take the opportunity to clarify that it will only concern itself with the practice of attorneys in its courts, leaving regulation of the remainder of the occupation to the Legislature.

If the Court insists on maintaining complete control of the practice of law by striking down the reform legislation, the Legislature should use its constitutional powers to check the Court. Such powers include the power of the purse and the legislative power of investigation and oversight. The Legislature also has the power to legislate regarding the jurisdiction of the courts, so long as it does so consistent with the jurisdictional provisions contained in the Oklahoma Constitution.

Finally, the Legislature should propose a constitutional amendment settling this matter definitively by a vote of the people. The amendment would clarify that the regulation of all occupations, including attorneys, resides with the Legislature and not the Supreme Court.

Conclusion

The law touches virtually every aspect of life. Oklahoma's method of regulating the practice of law creates a monopoly that ill-serves the state's citizens by unnecessarily reducing competition, driving up costs, and stifling innovation. Moreover, this system has violated attorneys' First Amendment rights for long enough.

Achieving positive reform begins with restoring the proper balance of powers between the three branches of Oklahoma government. The first step is for the elected branches to recognize that the Supreme Court has undermined the constitutional structure of the state. The Oklahoma Legislature should begin by passing a law creating a distinction between lawyers who appear in court and those who do not. For office lawyers, the Legislature should define the practice of law narrowly, leaving non-lawyers free to engage in activities that do not require specialized skill. Moreover, rather than requiring a state-issued license for office lawyers, the Legislature should permit private certification. The Legislature should then utilize its oversight power and leverage over the judiciary's budget to restore its co-equal position relative to the Court. To definitively settle the matter, the Legislature should propose a constitutional amendment making clear that it is the Legislature's duty, not the Court's, to regulate occupations, including lawyers.

End Notes

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[1] See Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1,2 ("The protracted nature of the debate [over attorney licensing] is all the more remarkable when one stops to think that in modern times no other American profession has seriously considered the same organizational form."); Byron Schlomach, *The Need to Review and Reform Occupational Licensing in Oklahoma*, The 1889 Institute (September, 2016) (overview of occupational licensing schemes in Oklahoma); The 1889 Institute's Directory of Occupational Licensing, available at http://www.1889institute.org/licensing.

[2] Perhaps the clearest example of this admittedly sharp allegation is the Court's 7-2 decision declaring the tort reform law of 2009 unconstitutional. The legislation was bipartisan (supported by members of both parties in the Republican Legislature, and signed by a Democratic Governor), passed with overwhelming legislative majorities (86-13 in the House, and 42-5 in the Senate), and was popular. Finding a way to kill the law required the Court to take a very expansive view of the Oklahoma Constitution's "single subject rule." The dissenting justices noted that the Court had never before entertained this understanding of the single subject rule. The dissenters argued the "Court should adopt a more deferential approach toward the rule. Based on the majority's present opinion, statutes that were enacted in a comprehensive bill, and that have remained as law for years could be found unconstitutional. The Legislature will have wasted its time in working on any comprehensive legislation. Such legislation may be declared unconstitutional immediately, or worse, after a few years codified in the official state statutes a whole comprehensive bill will be struck and cause the chaos that will inevitably follow this opinion. Court opinions containing an overly restrictive interpretation of the single-subject rule will likely have a chilling effect on the legislative process. The result will be an exponential number of bills filed along with an expanded legislative process but with no greater assurance the legislation will pass the single-subject test.." *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37, ¶9 (Winchester, J., dissenting).

[3] *See* Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 VAND. L. REV. 1729, 1752 table 1 (2017) (Finding by empirical analysis that the Oklahoma judiciary skews nearly 40% more to the political left than does the electorate in the state).

[4] *See, e.g.*, Schlomach, *supra* note 1 (overview of occupational licensing schemes in Oklahoma); The 1889 Institute's Directory of Occupational Licensing, available at http://www.1889institute.org/licensing.

[5] 19 OK 378, 95 P.2d 113 (Okla. 1939).

[6] *In re Integration of the Bar*, 133 Neb. 283, 275 N.W. 265 (Neb. 1937).

[7] *See* G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 NYU ANN. SURV.. AM. L. 329, 337 (2003) (states included explicit separation of powers clauses in their constitutions); Okla. Const. Sec. 1, art. 4 ("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.").

[8] *See, e.g.*, Chris Fox-Lent, *By the Courts, for the Bar: Judicial Exemption of Lawyers from the Scope of Consumer Protection Laws*, 37 NYU Rev. L. Soc. Change 513, 531 n.94 (2013) (noting that these two rationales have been the basis for separation of powers since the principle was set out by Montesquieu); C. MONTESQUIEU, THE SPIRIT OF THE LAWS (T. Nugent trans. 1949).

[9] *Id.*

[10] *Id.*

[11] Oklahoma Rules of Professional Conduct, OKLA. STAT. Tit. 5, Ch. 1, App. 3-A, Preamble et seq.

[12] Rules Governing Disciplinary Proceedings, OKLA. STAT. Tit. 5, Ch. 1, App. 1-A, Rule 1 et seq.

[13] Fox-Lent, *supra* note 5, at 533-535.

[14] Orben J. Casey, AND JUSTICE FOR ALL: THE LEGAL PROFESSION IN OKLAHOMA, 1821-1989, 167 (1989 Western Heritage Books) (citing Oklahoma State Bar Association, *Proceedings, Twenty-First Annual Meeting*, 99.).

[15] *Id. See infra*, notes 37-39.

[16] Judicial oversight of the admission of attorneys was the standard, although not uniform, practice. In several jurisdictions, attorneys were admitted to court practice by act of the Legislature. Stephen E. Kalish, *The Nebraska Supreme Court, the Practice of Law and the Regulation of Attorneys*, 59 NEB. L. REV. 55, 561, n.20 (1980).

[17] *E.g.*, Charles W. Sorenson Jr., *Integrated Bar and the Freedom of Nonassociation—Continuing Seige*, 63 NEB. L. REV. (1984) ("The integrated bar, also referred to in some states as the unified, organized, state, or incorporated bar, can be broadly defined as an official state organization to which all attorneys must belong and pay dues as a precondition to the practice of law within a state.").

[18] Casey, *supra* note 11 at 173; OKLAHOMA STATUTES 1931, *The State Bar Act*, Vol. 1, Art. 2, Sec. 4210, *et seq.* (1931 Harlow Publishing Company).

[19] Casey, supra note 11 at 164.

[20] *Id.* at 164-171.

[21] *Id.*

[22] *See* Sorenson, supra note 14 at 35 ("The first state to integrate, North Dakota, did so by statute in 1921. Integration next occurred in Alabama in 1923 and Idaho in 1925. By 1940 twenty states had adopted integrated bar associations by either statute or court rule.") (internal citations omitted).

[23] 8 OKLA. B.J. 200 (January, 1938).

[24] Casey, *supra* note 11 at 179.

[25] *Id.* at 180.

[26] *Tulsa Daily World*, "House Members Vote to Repeal Bar Board Act," April 21, 1939. The Tulsa newspaper reported "[a]t one time one lawyer member of the body charged another with a bottle in his hand." *Id.*

[27] OKLAHOMA SESSION LAWS of 1939, Ch. 22, Sec. 1-4 (1939).

[28] *Id.*

[29] *Harlow's Weekly*, "Legislative Money Debate Delays Final Adjournment," April 22, 1939, at p.9.

[30] *Id.* at 9-10.

[31] *Id.*

[32] *Id.*

[33] OKLAHOMA SESSION LAWS of 1939, Ch. 22, Sec. 1,2 (1939).

[34] *Id.* at Sec. 4.

[35] *Harlow's Weekly*, "Bar Compromise Defeated," May 6, 1939, at p.7.

[36] *Harlow's Weekly*, "Governor Hits Bar and Law School," May 13, 1939, at p.6-7.

[37] *In re Integration of the State Bar of Oklahoma*, 1939 OK 378, ¶¶1-3.

[38] *Id.*

[39] S*ee, e.g., State Bar Commission ex rel. Williams v. Sullivan*, 1912 OK 527, 131 P. 703 (Okla. 1912) (upholding statute that provided three grounds for suspension or disbarment of lawyer); *In re Saddler*, 1913 OK 179 (Okla. 1913) (upholding disbarment statute); *In re Evans*, 1919 OK 104 (Okla. 1919) (holding the Court's inherent power to disbar was subject to reasonable regulation by the Legislature).

[40] *In re Saddler*, 1913 OK 179 at ¶1.

[41] *Id.* at ¶8-13.

[42] *Id.* at ¶9.

[43] *Id.* at ¶10 (quoting *In re Collins*, 147 Cal. 8, 81 P. 220 (Cal. 19__).

[44] *See, e.g., Sullivan*, 1912 OK 527 (Okla. 1912) (enforcing 1909 disbarment statute); *In re Evans*, 1919 OK 104 (Okla. 1919) (holding that Court's inherent power to disbar was subject to reasonable regulation by the Legislature).

[45] *State Bar of Oklahoma v. McGhee*, 1931 OK 161 (Okla. 1931).

[46] *Id.* at ¶1

[47] *Id.* at ¶49. Interestingly, the lower court in *McGhee* made a compelling argument against the delegation of authority to the administrative state. As the court saw it, the Legislature was not constitutionally permitted to say to an undemocratic agency "[p]rescribe by law the qualifications of those who seek admission to the bar, examine them with a view to ascertaining their qualifications, set any standard you desire, and change it at will, convene as a lawmaking body, and write into the laws of the land such provision as you deem expedient concerning the admission of lawyers to the bar as well as causes for revoking their licenses; when charges are preferred adjourn as a legislative body, reconvene as a court and give the man a fair and impartial trial. When you have reached a decision, execute your orders." Id. at ¶4. The lower court was touching on a similar separation of powers argument as this paper, albeit as regards the three powers of government being concentrated in an executive agency rather than the judiciary. The point is well taken.

[48] *Id.* at 19, 27-30, 36, 42.

[49] *Id.* at at ¶42.

[50] *In re Integration of the Bar*, 133 Neb. 283, 275 N.W. 265 (Neb. 1937).

[51] *In re Integration of the State Bar of Oklahoma*, 1939 OK 378, ¶5 (emphasis added).

[52] *Id.* at ¶¶6-10.

[53] *Id.* at ¶10.

[54] *Id.* at ¶¶12-14.

[55] *Id.* at ¶14, art. 15.

[56] *Id.* at ¶14, art. 5.

[57] *Id.* at ¶14, art. 7.

[58] 1939 OK 506 (Okla. 1939).

[59] *Id.* at ¶11.

[60] *Id.* at ¶¶5-6.

[61] *Id.*

[62] Orben J. Casey, AND JUSTICE FOR ALL: THE LEGAL PROFESSION IN OKLAHOMA, 1821-1989, 171 (1989 Western Heritage Books) (noting that of the nine justices who sat on the Supreme Court in 1928, seven lost reelection; an eighth declined to run again when his term expired in 1932).

[63] By 1972, high courts in 7 jurisdictions had followed Oklahoma's lead, making bar membership mandatory purely by judicial fiat. A number of others created a mandatory bar through a combination of statute and court rule. Jeffrey Parness, *Citations & Bibliography on the Unified Bar in the United States*, a compilation for AMERICAN JUDICATURE SOCIETY (1973). Perhaps because of the relative ease of integrating the bar through the courts, as opposed to through the Legislature where oppositional lobbying campaigns could be mounted, legislative integration all but ceased after the Oklahoma Supreme Court's Action in 1939. Sorenson, *supra* note 14 at 35.

[64] *See, e.g.*, Eli Wald, *Should Judges Regulate Lawyers*, 42 MCGEORGE L. REV. 149, 153 (2016) ("To some, questioning judicial regulation of lawyers amounts to not only challenging a well-justified core aspect of attorney regulation, but also constitutes heresy."); Charles W. Wolfram, Lawyer Turf and Lawyer Regulation - the Role of the Inherent powers Doctrine, 12 U. ARK. L. J. 1, 19-23 (1989) (arguing that courts ought to share the power to regulate lawyers with the legislative and executive branches).

[65] Wald, *supra* note 61 at 153-54.

[66] Rules Governing Admission to the Practice of Law in the State of Oklahoma, adopted and promulgated by the Supreme Court of Oklahoma, accessed at http://www.okbbe.com/Resources.

[67] Oklahoma Rules of Professional Conduct, Rule 5.4 – Professional Independence of a Lawyer. It is the height of irony that the self-regulated profession described in this paper considers this rule imperative to prevent conflicts of interest and undue influence.

[68] *Id.* at Rule 7.1-7.5. These requirements are more relaxed than they were in the past, where attorneys were not expected to speak of themselves "in more than a whisper," but the rules are still quite restrictive. Moreover, they can be ambiguous and therefore subject to arbitrary enforcement.

[69] *See* Restatement (Third) "The Law Governing Lawyers" at 14 (ALI, 2000)

[70] *Id.* at Rule 1.1.

[71] *See State v. Lindmeier*, 788 N.W.2d 555 (Neb. 2010). This attorney received a potentially career-ending disciplinary sentence of six months suspension for splitting his fee in a criminal case with an experienced criminal lawyer, a field which the attorney had no experience in. This, despite the fact that the client *agreed* to retaining the more experienced lawyer as co-counsel.

[72] *See* Oklahoma Rules of Professional Conduct, Rule 8.3.

[73] *See Der Spiegel*, "East German Snitching went far beyond the Stasi." (July 10, 2015) (available at: http://www.spiegel.de/international/germany/east-german-domestic-surveillance-went-far-beyond-the-stasi-a-1042883.html) (accessed January 16, 2019).

[74] Larry J. Rector, *Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis*, 66 NEB. L. REV. 762 (1987) (citing I. BRANT, JAMES MADISON: THE NATIONALIST 354 (1948)).

[75] *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

[76] *Id.* at 14.

[77] *Id.* at 13-14.

[78] *Id.* at 14.

[79] *See id.* at 14; *Knox v. Service Emps. Int'l Union*, 132 S. Ct. 2277, 2290–93 (2012)

[80] *See* "OBA Dues Claim Form," (available at: https://www.okbar.org/wp-content/uploads/2018/05/Dues-Claim-Form.pdf). Making this process even more burdensome is OBA's requirement that "a separate claim form must be used for each objectionable budgetary expenditure." *Id.*

[81] *Id.* The claim form explains that "[o]bjections must be in writing postmarked not later than 60 days after approval of the annual budget by the Oklahoma Supreme Court or January 31 of each year, which ever shall occur first." This complaint period is unreasonable when one considers that a member may object to proposed or actual expenditures. By its terms, this forecloses the possibility of objections to actual expenditures incurred more than 60 days after the approval of the annual budget.

[82] *Id.*

[83] *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).

[84] *Id.* The author of the legislation, himself a member of the Bar, accused the Bar of improper lobbying and taking a political position. He added "I think [the Bar's] focus is greed and lining their own pockets." *Id.*

[85] The author asked to be appointed and recently attended a meeting of the Legislative Monitoring Committee. Interestingly, the members of the committee elected to remove all references to the mandatory nature of the Bar in a letter they had previously drafted to send to legislators. In the course of the discussion, members of the committee reviewed the *Fleck* case (infra note 88) and the possibility of being sued on first amendment grounds. (Firsthand account of Author).

[86] The Bar Association insists that this annual session is informational only, but the Bar's position on each of the proposed bills is understood, if not openly stated.

[87] *Janus v. Am. Fed. of State, County, and Municipal Empl., Council 31*, No. 16-1466, 585 U.S. ___ (2018)

[88] *Fleck v. Wetch*, US Supreme Court Case No. 17-866, Petition granted, judgment vacated and case remanded to the U.S. Court of Appeals for the 8th Circuit for further consideration in light of *Janus v. State, County, and Municipal Employees* on December 3, 2018.

[89] *See* Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35, 58-68 (1994).

[90] 90 OKLA. B.J. No. 1, p.55 (January, 2019). A message "From the President" noted that "[s]ince 1986, the OBA has been the market leader in CLE in Oklahoma. While still the market leader, its market share decreases each year. There are several hundred competitors in the CLE marketplace with a good number of those providing credit hours at no charge or providing programming much less expensive than the OBA." *Id.*

[91] Kay A. Ostberg, *The Conflict of Interest in Lawyer Self-Regulation*, PROF. LAW., Summer 1989, at 6, 7 (characterizing state bar associations as "trade organizations charged with advancing the interests of lawyers" and concluding that "[b]ecause trade associations do not represent the public, they should have . . . no role in deciding who enters the profession or in deciding conflicts between its own members and the public."). Mandatory bar associations seem to have an identity crisis when it comes to deciding whether they are private organizations or organs of the state government. *See* Smith, *supra* note 89, at 39-42 ("The debate over the merits, morality, and constitutionality of the unified bar has been heavily influenced by three distinct, and often conflicting, visions of the bar: the bar as private association; the bar as a state agency; and the bar as a professional union."). In Oklahoma, the Bar Association and Supreme Court have conveniently left enough ambiguity on this question to enable the organization to describe itself differently in different contexts. The Bar Association does not consider itself subject to the Open Records Act, indicating it sees itself as private, but the Supreme Court Rules declare that the Bar Association "is an official arm of this Court, *when acting for and on behalf of this Court in the performance of its governmental powers and functions.*" Rules Creating and Controlling the Oklahoma Bar Association, Art. I, Sec. 1. This enables the Bar, on one hand, to remain exempt from antitrust laws, but on the other hand, is useful in defending against First Amendment litigation.

[92] *Id.*

[93] *See* Byron Schlomach, *The Need to Review and Reform Occupational Licensing in Oklahoma*, The 1889 Institute (September, 2016) ("The vast majority of the time, the government agency in charge of issuing the permission slip is a board dominated by members of the occupation the board is charged with regulating.")

[94] Orben J. Casey, AND JUSTICE FOR ALL: THE LEGAL PROFESSION IN OKLAHOMA, 1821-1989, 165 (1989 Western Heritage Books).

[95] Bradley A. Smith, *The Limits of Compulsory Professionalism: How the Unified Bar Harms the Legal Profession*, 22 FLA. ST. U. L. REV. 35, 66 (1994).

[96] Casey, *supra* note 84, at 177-179 (describing difficulties making a living as a lawyer and noting that "[b]ar officials with mounting frequency began to blame the profession's problems on a surplus of lawyers.").

[97] *Id.* at 176.

[98] *Id.*

[99] *Harlow's Weekly*, "Governor Hits Bar and Law School," May 13, 1939, at p.6.

[100] Casey, *supra* note 84, at 180.

[101] George W.C. McCarter, *The ABA's Attack on "Unauthorized" Practice of Law and Consumer Choice*, The Federalist Society: Engage, vol. 4, issue 1.

[102] *R.J. Edwards, Inc. v. Hert*, 1972 OK 151 (Okla. 1972).

[103] *Latson v. Eaton*, 1959 OK 124 (Okla. 1959).

[104] *State Bar v. Retail Credit Ass'n*, 1934 OK 691 (Okla. 1934).

[105] *See* Smith, *supra* note 85 at 58-68.

[106] Figure reported by the Iowa State Bar Association. Available at: http://www.iowabar.org.

[107] See Smith, *supra* note 85 at 58-68.

[108] Walter Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 1, 8 (1976) ("Abraham Lincoln recommended the reading of five named books as "the best way" to enter the learned profession of the law—though he did graciously add that no serious damage would be done if one were to continue reading after having begun practicing.").

[109] Chief Justice Rehnquist was first licensed to practice by the mandatory Arizona Bar Association.

[110] Justice Robert H. Jackson, who left the Court in 1954, attended one year of law school but never obtained a degree.

[111] Casey, *supra* note 84, at 190-97.

[112] *Id.*

[113] OKLA. CONST., Art. 7B.

[114] *Id.* at Sec. 3.

[115] The JNC is composed of a mix of lay members appointed by various political officials, and attorney members elected by members of the Bar Association (a final member is selected by vote of the JNC itself). However, only the lay members are subject to a partisan restriction that guarantees a split between the two political parties. The attorney members have no such restriction. Regardless of the party in power, therefore, the ideological makeup of the Bar members will always tip the balance.

[116] Though active and senior members of the Bar Association make up approximately one third of one percent of the population of Oklahoma, the Bar is responsible for selecting 6 out of the 14 (43 percent) JNC members.

[117] *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)

[118] Id. For example, the Bar Association has opposed even updating the JNC districts created in the 1960's to account for population changes. As a result, more than two-thirds of Oklahoma Bar Association members reside in the JNC districts covering Oklahoma City and Tulsa. Accordingly, the vanishingly small numbers of attorneys located in the rural districts wield astonishingly high comparative influence. The three smallest districts each contain less than 1000 lawyers, comprising approximately 7%, 5%, and 7% of the total attorneys eligible to vote in JNC elections. The remaining district comprises approximately 12% of total eligible attorneys.

[119] *In Re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska*, Neb., No. S-36-120001 (Neb. 2013).

[120] Byron Schlomach, Christina Sandefur, and Murray Feldstein, *A Win-Win for Consumers and Professionals Alike: An Alternative to Occupational Licensing*, The 1889 Institute and The Goldwater Institute (November, 2018) (proposal for private certification as an alternative to occupational licensing) (available at: https://img1.wsimg.com/blobby/go/8a89c4f1-3714-49e5-866b-3f6930172647/downloads/1d0kmu3dp_669551.pdf)

[121] Oklahoma Law School website, Melissa Caperton, "OU Law Graduates Earn High Bar Passage," (2017) (available at: http://www.ou.edu/web/news_events/articles/news_2017/ou-law-graduates-achieve-highest-bar-passage-rate)

[122] California, Vermont, Virginia, and Washington allow apprentices who have never attended law school to sit for the bar examination. New York, Maine, and Wyoming allow apprentices who have completed some law school but did not obtain a degree, to sit for the bar examination. A number of other states allow graduates of non-accredited law schools to sit for the examination.