



Fall | Winter 2016

OKLAHOMA  
**HUMANITIES**

Culture | Issues | Ideas



**DEMOCRACY**



ANN THOMPSON  
Executive Director

## E Pluribus Unum

Out of many, one. As we go to print with this issue on democracy, these words spring to mind—in this case as a testament to the many and diverse people that have called themselves U.S. citizens over time.

Authors, journalists, academicians, and just everyday folk are commenting on the state of our nation in 2016 as one of the most divided political periods since the Civil War. Discourse has often been hateful, debate impossible, and tolerance absent. The very pluralistic society upon which America was founded is being tested.

One could argue this is not new to our country. The Chinese Immigration Act, the House Committee on Un-American activities, slavery, Jim Crow, and anti-Irish nativism all point to the struggles that have marked our sometimes unflattering, awkward, yet forward growth as a nation. But wiser heads have prevailed, indeed triumphed

at times, as the rights of all citizens, every single one, have been supported through legislation and social change. We'll never be perfect but the better angels of our nature can lead us onward to a society where the democratic rule of law—law that protects all citizens—rules the land.

Each of us can move our country toward a more collective, inclusive

Each of us can move our country toward a more collective, inclusive future.

future—by being better-informed citizens, by taking the high road when coarse and hateful

speech lures us to disrespect others, and by being thoughtful listeners. Civil discourse has always been an essential part of the humanities, dialogue that is fundamental to understanding ourselves and others. It is our hope that this model of respectful conversation and empathetic listening can be further employed as our nation experiences this unsettling time.



# OKLAHOMA HUMANITIES

Culture | Issues | Ideas

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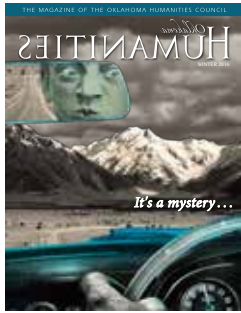
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ON THE COVER: Detail, art at the U.S. Capitol. The Carol M. Highsmith Archive at the Library of Congress contains thousands of images donated by distinguished photographer Carol Highsmith, who has documented sites across the U.S. and donated the image rights to the American people for free public access. View the collection at [loc.gov](http://loc.gov). CONTENTS: U.S. Capitol dome, July 4, 2012. Architect of the Capitol, [aoc.gov](http://aoc.gov)

Reader Feedback



Interesting article on the Spook Light ["The Spook Light Mystery—Solved! (Sort of.)," Winter 2016]. I have property on Spook Light Road and,

while I've never seen it and I don't subscribe to ghost stories, the headlight explanation doesn't explain why the light has appeared on my property at various times in front of my wife, her grandpa, and her uncles. These sightings were behind a thick tree stand where no visibility of the road is possible. I've always been inclined towards foxfire as an explanation.

—James Fiddler, via Facebook

We would like to express our appreciation for the magazines donated to veterans at Norman Veterans Center. We are continually inspired by the dedication and generosity of those like you who answer the call to give again and again.

—Jay Horne, Administration  
Oklahoma Dept. of Veterans Affairs

Oklahoma Humanities is an exceptional periodical and I look forward to every issue.

—Susanna Fennema, via Facebook

GIVE VOICE TO YOUR IDEAS, opinions, and suggestions. Email the editor: carla@okhumanities.org, or comment via Facebook, Twitter, or Instagram.

Results from 2015 Readers' Survey

Oklahoma Humanities magazine is making a big impact on readers. To assess their feedback, it's helpful to know what we strive to instill and inspire with our content. Beyond explorations of the human experience, we hope to motivate action and reaction in readers: to cultivate knowledgeable, informed citizens who are

open-minded about perspectives other than their own, and to equip readers for productive civil discourse and civic engagement. It's a tall order, but readers say we're hitting our marks.

An overwhelming number of readers (95% of those surveyed) say they value the magazine as a forum for differing viewpoints. They share the content with others (83%) and feel better informed to engage in civic life (89%). Though a fraction of a percent say that our content is "drivel," the majority of readers (93%) say Oklahoma Humanities influences them to be more open-minded and willing to consider ideas and opinions other than their own.

Perhaps most notable are the written comments (see a few below), which positively inspire us. To all those who took time to participate, we can't thank you enough.

—Carla Walker, Editor

The single most important reason that keeps me reading Oklahoma Humanities:

- "Thought-provoking writing about significant topics with contemporary relevance."
▪ "Oklahoma Humanities challenges my thinking."
▪ "Perspectives I probably would not have encountered otherwise."
▪ "The WWI issue in particular was one of the best things I have read in some time."
▪ "One of the few magazines I read cover to cover. The subjects are timely, often controversial, and covered from multiple points of view."

On interactions with diverse people and perspectives (as a reader of Oklahoma Humanities):

- "I have described myself as a 'world citizen' for many years. I find that Oklahoma Humanities magazine offers continued nourishment to that goal."
▪ "It certainly has made me question some of my opinions about people and perspectives that are not part of my experience."
▪ "At times, I have even changed my perspective!"

On participation in civic life (as a reader of Oklahoma Humanities):

- "I look to the magazine to keep me abreast of important issues."
▪ "This has opened doors to new people and opportunities."
▪ "It certainly has made me a better informed participant."

LET US HEAR FROM YOU. Participate in our next online survey, open for your responses October 1-31(okhumanities.org).

2016 Magazine Awards

Oklahoma Humanities magazine continues its award-winning track record. In recent competition, we swept two categories—first, second, and third places for inventive covers and outstanding writing—winning a total of seven awards, more than any year before. Thanks to all who contribute their talent and gifts of support—we couldn't be a winning publication without you!



1st Place | General Writing
"The Stranger"
By James McGirk | Fall 2015

2nd Place | General Writing
"Being ME (Middle Eastern)"
By Ibtisam Barakat | Fall 2015

3rd Place | General Writing
"Of the Skin of the Earth"
By Brian Doyle | Summer 2015

1st Place | PR Publication Cover
Planet Earth | Summer 2015

2nd Place | PR Publication Cover
Internationalism | Fall 2015

3rd Place | PR Publication Cover
Romance | Winter 2015

2nd Place | Best PR Publication
Internationalism | Fall 2015



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*Oklahoma Humanities* magazine is an award-winning collection of culture, issues, and ideas—a rich mix of humanities scholarship, insightful narratives, informed opinions, and beautiful images, for a read that is smart, balanced, and entertaining. Subscribe online: okhumanities.org or call (405) 235-0280.

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*Oklahoma Humanities* awards include twenty-one Oklahoma Society of Professional Journalists awards, including multiple first place honors for Best Writing, Best Cover, and Best PR Publication; five Great Plains Journalism awards, including firsts for best Magazine Feature Writing and best Magazine Page Design; three Central Oklahoma IABC Bronze Quill Awards; the State Historic Preservation Officer's Citation of Merit; and an Oklahoma Heritage Distinguished Editorial Award.

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OKLAHOMA  
HUMANITIES

## The New OKLAHOMA HUMANITIES Not Just Another Pretty Face

Have you noticed our new look? The new masthead and redesign of the magazine is just one part of an organization-wide update for the Oklahoma Humanities Council. We have dropped the word “Council” from our name, putting the emphasis on the humanities that are open to all, not just a select “council” of people. Now you’ll know our organization and magazine by the same name: Oklahoma Humanities.

Our new headquarters in the Oklahoma City arts district, is near the Downtown Library, Oklahoma City Museum of Art, and Civic Center Music Hall. Our airy, street-level offices on Colcord Drive face the fountain and grounds of the City Municipal Building. Greeting your entry is our colorful new logo, shown above. The design underscores our mission: the central letter “H” denotes the humanities at the heart of all we do, encircled by the letter “O” inviting *everyone* to participate in the common sphere of culture, ideas, and civic life.

OH programs are growing, too. One of our most popular and enduring programs, *Let’s Talk About It, Oklahoma*, is adding three new reading and discussion themes featuring Pulitzer Prize-winning

books. Our next Smithsonian traveling exhibit, *The Way We Worked*, begins in February 2017 and will tour the state for a year. Find host sites, dates, and a calendar of all OH-sponsored events at: okhumanities.org.

And, not least, we’ve updated the design and publishing schedule for *Oklahoma Humanities* magazine. Our most recent readers’ survey reveals that the magazine is making a big impact. We want to grow that impact—more content for an expanded audience. To that end, the magazine will mail biannually, March and September, with 50% more pages, allowing a deeper exploration of important issues and ideas. Our new focus is committed to ad-free content, stellar writing, thoughtful analysis, and beautiful images that add meaning to each feature. The magazine will be offered—for free—to as many Oklahomans as we can serve—at home, at school, at work, in libraries, in veterans centers, and in correctional facility libraries. We’re the same publication you’ve come to admire—just more of it—in what we hope is a fresh, reader-friendly format.

On paper, in programs, and in purpose, we *are* Oklahoma Humanities.

# The Editor's Desk

CARLA WALKER  
carla@okhumanities.org



Three women looking through a book of registered voters at a polling place, Nov. 5, 1957. Photo by Thomas J. O'Halloran, *U.S. News and World Report*. Library of Congress

The presidential election season is upon us—and, with it, a cacophony of campaign rhetoric, pundit speculation, and media minutia. Where is a voter to turn for meaningful information? By what measure can we judge who best will serve the country? The complexity of world events requires leadership grounded in wisdom, ethics, and critical thinking—the valuable byproducts of studying the humanities. And none of us can fulfill the responsibilities of citizenship, much less governing, without a basic understanding of democracy.

Since 1893, it has been the annual tradition of Congress to mark George Washington's birthday by reading aloud his Farewell Address. In it, Washington calls for broadly-dispersed education. "If we are to structure a government that pays heed to public opinion," he reasons, then "it is essential that the public opinion should be enlightened."

To that end, we begin our studies long before colonists called America "home." Congressman Tom Cole, a proud member of the Chickasaw Nation, gives insight on the often misunderstood concept of tribal sovereignty, a form of government that preexisted the one fashioned by our Founders. Tribal sovereignty has not only endured, an inseparable thread woven throughout American history, it has been reinvented and reinvigorated.

The common good is a recurring theme in our issue as authors examine some of our most prized democratic rights and ideals. Kevin Butterfield examines the right to free speech from the perspective of Founders George Washington and Thomas Jefferson, who were wary of group speech and the pitfalls of "special interests."

Joshua Sellers observes that the "right" to vote is not prescribed by the U.S. Constitution, but is rather directed by public and private institutions that

dictate not only if we can vote but also the time, place, and identification requirements. The freedom to vote is all-important, he emphasizes, because it *ensures all other liberties*.

Art LeFrancois draws our attention to the Fourth Amendment and its protections against "unreasonable searches and seizures." It is a powerful check on government, but the continued advance of technology presents ever new issues of privacy and security, necessitating continual reexamination by the Supreme Court.

Another check on government is freedom of the press, sometimes called the Fourth Estate because it is essential to informing citizens of the actions of our three branches of government: executive, legislative, and judicial. In my interview with Sebastian Junger, I ask him about the free press and its role in civil discourse. Elaine Kamarck and Ashley Gabriele report on the changing nature of media—once reliant on TV broadcasts and newspaper editorials, now buoyed by thousands of online citizen-driven conversations—and the effects on our democracy.

Wrapping up this look at democracy, we hear from a career public servant who has worked in all three branches of government—Robert Henry, former Chief Judge of the Tenth Circuit Court of Appeals and current president and CEO of Oklahoma City University. His "Postcards from Public Service" is an insider's view of our republic at work and the qualities needed to participate in a democracy, regardless of title—be it legislator, attorney general, judge, or private citizen.

We hope your takeaway is this: vote, stay informed, and participate in your community. As Robert Henry, our lead writer, notes, "'We the People' are responsible for and the beneficiaries of our republic's future."

# T O G E T H E R

*Tribal sovereignty is not a partisan issue—  
it's an American issue.*

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CONGRESSMAN TOM COLE



*Te Ata, Bearer of the Morning, G. Maillard Kesslère*

The story of our nation's republic is the continual struggle to measure up to the lofty goals established in our founding documents. While the Declaration of Independence, U.S. Constitution, and Bill of Rights sum up who we aim to be, our history has certainly been marked by a combination of trials, mistakes, and successes along the way. And even today, we have not reached perfection or eliminated all shortfalls. The effort to fully realize and live up to the principles prescribed at our founding remains a work in progress at every level and in every branch of government.

While often overlooked, misunderstood, or even intentionally undermined, we would be remiss to forget that in addition to federal, state, and local governing authorities there is another level of government that pre-exists the very nation in which we live. The enduring presence of tribal nations and lasting recognition of their sovereignty is not only significant in Oklahoma, but to all Americans. It is important for us to understand how tribes have shaped and contributed to our way of governing.



First Encounter, Tom Phillips

## A Rich Heritage

Without question, tribal heritage is part of our culture in Oklahoma. We appreciate and recognize the richness of tribal heritage that exists around us. Across the nation, there are more than 530 federally recognized tribes, with the highest concentration existing in Alaska, California, Oklahoma, and Arizona. In our state alone, there are 39 sovereign tribes. I consider it a great privilege to be a citizen of the Chickasaw Nation of Oklahoma.

Growing up in Oklahoma, I was fortunate to not only live in a state brimming with tribal heritage, but I was surrounded by family members who were actively involved in tribal affairs and who sought to preserve our unique history and culture. My great-great-grandfather served as clerk of the Chickasaw Supreme Court, and my great-grandfather was treasurer of the Chickasaw Nation. My great-aunt

Te Ata Thompson Fisher was a gifted actress, entertainer, and Native American storyteller whose talent took her all over the world. And I am especially proud that my mother, Helen Cole, was the first Native American woman ever elected to the Oklahoma State Senate.

At an early age, I remember my mother instilling in my brother and me the importance of our tribal heritage and passing down our family's compelling history. She taught us to know and understand that it was a remarkable gift to not only be American, but, as Native Americans, we belonged to a special and unique group of people. A significant figure in her own right and the person I admire most to this day, I never doubted that my mom was indeed right that we have a lot to be proud of as Native Americans.

## Tribal Identity

Tribal heritage is a source of great pride for me and others across Indian Country, but knowing one's family history

is not what makes Native Americans unique in our culture. Being indigenous and, more importantly, being tribal is unique by nature.

Being indigenous is as much an historical identity as it is an anthropological or cultural identity. Tribal identity transcends being "Native American" and rests within the specific tribe to which one belongs. In discussing tribal identity, it helps to understand what constitutes a "tribe." It is not a genealogical association or fraternal society. While lineage and ancestry are certainly factors, tribal identity is not strictly a matter of bloodline.

A tribe is a living, breathing entity that exists organically. Its purpose is to improve the lives and preserve the identities of its members. If a tribe fails at this, it eventually ceases to exist. Tribes are recognized as sovereign entities in the U.S. Constitution. That means that membership in a tribe gives one



a political identity as well as a cultural heritage. And the political identity that exists collectively for tribes has long been shaped by the events before, during, and since the founding of the United States. It was initially determined by how the first Europeans and American settlers chose to treat Native Americans and how Native Americans demanded they be treated in return.

### Recognizing Sovereignty

Before the birth of our republic, Native Americans were treated as and dealt with as tribal people who belonged to specific tribal units. That is, tribes were seen as pre-existing sovereign and separate entities. Sometimes those entities were conquered or destroyed, but over time their political legitimacy inside the whole of the nation was recognized and enshrined in both law and legal precedent.

This process of dealing with Native Americans as tribal people and units has led to what is called “tribal sovereignty.” That is, as recognized by the U.S. Constitution, these citizens enjoy a unique status and their tribes possess a right to a measure of self-governance within our larger American political system.

Though not without flaws, the system of dealing with tribes was rightly founded on the understanding that the first Americans had and should retain existing rights. This status was not granted nor did Europeans or early Americans create tribes; it was a status that was simply recognized. And that recognition of tribal sovereignty instituted a framework and defined a process that has guided the relationship between the United States and tribal nations. As told by an often mixed history, it hasn’t always been smooth sailing.

### Sovereign but Separate

Viewing tribes as pre-existing, sovereign entities has not always been an advantage to tribal nations, nor was it

meant to be an advantage. By recognizing someone as belonging to a sovereign entity, the federal government could deny Native peoples the right to American citizenship. It even denied them the right for personhood—to be viewed as a human being—until the 1870s. And for most tribal citizens, the right to vote did not come until 1924.

While the federal government saw an advantage in keeping Native Americans essentially outside American society, tribes did not necessarily view separation as a disadvantage. Collectively and traditionally, Native Americans did not want to abandon the right of tribal self-governance but instead wanted to hold onto that special identity and live within the community and culture of their tribes. In fact, during the early years of the nation, many tribes were uninterested in assimilation into the larger culture if it required them to abandon their tribe’s traditional way of life, including the right to speak in their native languages and run their own affairs.

Without question, the darkest days in the relationship began in the 1830s with the forced removal of Native Americans from their historic lands. Disregarding sovereignty and claiming authority under the Indian Removal Act, President Andrew Jackson notoriously told southeastern tribes to assimilate or turn over their lands to white settlement in exchange for unknown lands to the west. As history unfortunately reminds us, citizens of the five predominant tribes in the southeast who chose to stay together were transferred along the “Trail of Tears” and removed to Oklahoma, then called Indian Territory. After brutal journeys with great losses, the Choctaw, Chickasaw, Creek, Cherokee, and Seminole tribes tried to settle once again. In similar circumstances, other tribes were forcibly moved to Oklahoma and elsewhere in the United States to exist on reservations.

But that did not mark the end of troubles for Native Americans nor eliminate attempts by the federal government to weigh in on their affairs, eradicate tribal culture, or ignore sovereignty altogether. The abrogation of treaties, the confiscation of territory, and the erosion of tribal sovereignty in Oklahoma and elsewhere continued well into the twentieth century.

After more than a century of failed policy, a resurgence in the midst of the Civil Rights Movement reasserted Native American rights to tribal sovereignty and self-determination. In the 1970s, President Richard Nixon specifically called for an end to efforts to terminate tribes. In response, Congress passed the Indian Self-Determination and Education Assistance Act of 1975, pledging to help preserve and assist tribal nations.

### Politics and Perspective

Despite a checkered past, an important relationship still exists between tribal nations and the federal government, and I truly believe there will be improvement in the future. Indeed, in recent years tribal sovereignty has been enhanced, tribes have been given new resources and powers, and some restitution for the wrongs of the past have been rendered to Native American nations.

Beyond managing their own affairs, there is an ever-growing awareness among Native Americans that they should be involved in the broader politics of our country. Determining what that participation looks like can be challenging; state and local governments often resist the exercise of tribal sovereignty.

As an American lawmaker who identifies strongly with my Chickasaw heritage, I have visited with many tribal groups and citizens about the role they should and can play in political affairs. Remembering my forebearers who fought for preservation of the tribal sovereignty affirmed at our nation’s founding, I believe

that all Americans stand to benefit when tribes and their members are politically active and recognized for their unique perspective and their many contributions to American society.

### A More Perfect Union

It is an extraordinary time in which we live—for Indian Country and the broader culture of our nation—a time of tribal renaissance and self-determination. In Oklahoma, tribal governments are helping drive the economy, creating tens of thousands of jobs, and generating hundreds of millions of dollars for the state government. There is amazing vitality in Native American culture and a great deal of interest and respect for Native Americans that is uncharacteristic of our history.

Without question, I believe tribal sovereignty must be defended; but more than that, it often needs to be explained. As I remind my fellow lawmakers in Congress, the same oath we take to uphold the Constitution is an oath to defend tribal sovereignty. Just as Congress has the power and responsibility to regulate trade between other countries and states, so too must we maintain and protect relations with Native American tribes that have been recognized as sovereign entities since before our nation's birth—in our founding documents and in hundreds of treaties and government-to-government agreements between Native nations and the United States.

If I were to identify and preserve what is special about Native American culture, it would be the very unique identity that pre-exists our country and forever allows tribes a measure of self-governance and control over their affairs. New threats to tribal sovereignty will arise, but we must remember that tribal sovereignty is not and cannot be a partisan issue. It is an American issue that requires true partnership and cooperation on both sides of the aisle and across the political and philosophical spectrum.

The United States did not grant tribes their rights. It recognized that those rights existed before the founding of America. While U.S. recognition of tribal sovereignty was initially meant to separate tribes from the larger society, time has reinvented, redefined, and reinvigorated that

sovereignty. It does not mean we have achieved a perfect relationship between tribal, state, and federal governments. One thing we know as Americans is that sometimes we stumble and sometimes we fall. But we always get back up, dust ourselves off, and try again—together—working always to create a more perfect union. In America, that union recognizes, encourages, and protects the existence and sovereignty of tribal nations.

TOM COLE was elected to the U.S. House of Representatives in 2002 and is currently serving a seventh term for the Fourth District. Prior to Congress, he served as a member of the Oklahoma State Senate and as Oklahoma Secretary of State. Cole is recognized as a top GOP political strategist, serving in many key leadership positions. He holds a Ph.D. in British history from the University of Oklahoma and is a member of the Congressional Advisory Board to the Aspen Institute.



Rep. Tom Cole

G. MAILLARD KESSLÈRE (1894-1979) earned degrees in painting and science, after which he moved to New York and opened a photography studio. He built a substantial career, noted for his portraits of major entertainment personalities. Kesslère also collaborated on pictorial book projects such as *Radio Personalities* (1935) and *Women of Achievement* (1940).

THOMAS E. PHILLIPS was a member of the Chickasaw Nation and studied at Phillips University, the Colorado Springs Fine Arts Center, and the Kansas City Art Institute. After twenty years as a commercial illustrator, Phillips devoted his work to recording the authentic history of Native Americans. *Oklahoma Humanities* acknowledges the assistance of the Chickasaw Nation and the generosity of Mark Anstendig and Michael Schaefer in granting permission to print Tom Phillips' art.

#### EXTRA! READ | THINK | TALK | LINK

- Our Documents Initiative. Read texts of the Declaration of Independence, the U.S. Constitution and Bill of Rights, and President Andrew Jackson's "On Indian Removal" address. [ourdocuments.gov](http://ourdocuments.gov)
- "The Color of Blood," Joe Starita, *Oklahoma Humanities* magazine, Summer 2014. A moving narrative on Ponca Chief Standing Bear's pursuit of "personhood" under U.S. law. [okhumanities.org/archives](http://okhumanities.org/archives)
- Bureau of Indian Affairs, U.S. Dept. of the Interior. Information on American Indian rights, the meaning of tribal sovereignty, and the relationship between tribes and the federal government. [bia.gov/FAQs](http://bia.gov/FAQs)
- The Chickasaw Nation. View more of Tom Phillips' paintings and read about their historical context. [chickasaw.net](http://chickasaw.net)



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Inquiring minds want to know more. Explore the **EXTRA!** entries throughout this issue for links to articles, videos, online exhibits, and archives—ideas that click!



Tim Hetherington

# DEMOCRACY, the Free Press, and the Meaning of TRIBE

INTERVIEW BY CARLA WALKER

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## A Conversation with Sebastian Junger

Just in time for the launch of Sebastian Junger's book *TRIBE*, the buzzword for polarization in American politics is "tribalism." The association isn't new, but media's infatuation with the idea is suddenly ubiquitous. Pulitzer-winning author Marilynne Robinson observes that tribalism makes productive civil discourse near impossible: "Things have deteriorated to the point that it is as if it's morally wrong to have an attitude of presumptive respect toward someone you disagree with." Columnist Robert Reich, who served in three national administrations, fears that rival factions of conservatives and liberals are "pulling America apart, often putting tribal goals over the national interest."

Ordinarily, tribalism indicates a strong loyalty to one's group, "sticking together," as it were. But American politics has ratcheted beyond a devotion to beloved ideals. Some legislators halt the work of governing by defending the party stance at all costs: *To compromise is to capitulate—which we will not, will not, will not do.*

Sebastian Junger examines a very different aspect of "tribe": the tribe of *us*—all of us. He notes that, for millennia, native tribes and tribal culture remained relatively unchanged: members living in small groups, depending on each other for survival, governing with a cooperative egalitarianism that made everyone equal and deeply loyal—much like the conduct and expectations he observed in military platoons.

Junger embedded with U.S. troops in Afghanistan's Korengal Valley, chronicling soldiers in a dangerous outpost called "Restrepo." He saw soldiers at their best and worst: eating and sleeping together in close quarters, sheltering in remote areas with little more than sandbags and ammunition, fighting emotional swings from boredom to terror. Whether native peoples or army infantry, Junger came to see that tribal mentality, "for the good of all," was the difference between life and death.

But what happens when veterans return home to what Junger calls a “fundamental lack of connectedness”? When soldiers transition from close-knit brotherhood to a society built on fierce American individualism, is it any wonder they have difficulty?

On a larger scale, how can we make decisions on the collective good when we so vociferously defend and deride the issues that divide us? And, baffling as it is, why do we so readily *unite* when times are dire—from natural disasters to acts of terrorism? These are the ideas Junger explores.

First, my conversation with Sebastian Junger; then, on page 15, an excerpt from *TRIBE: On Homecoming and Belonging*.

**Sebastian, you're a terrific writer and I enjoyed reading *TRIBE* very much. Congratulations.** Thank you, I appreciate that.

**As the 2016 presidential election approaches, I want to ask you about freedom of the press and how it works as a basic tenet in our democracy. From your perspective as a journalist, why is a free press important and how do you see your role?** I don't think there's a free society without a free flow of information. A free society and a free press are completely interdependent. A free press monitors government and makes sure that it doesn't break its own laws and ideals. It is government's duty—a government that espouses democratic ideals—to *ferociously* defend the freedom of the press to do its job. Where things get dicey is when market forces unite many media outlets under one corporate banner. It's not some dark conspiracy, just market forces that push television networks, which are a source of news for most people, toward presentation of the news that's determined by ratings. So there are these other processes that shape the news in ways that aren't necessarily good and accurate.

But on a legal and political level, there is an incredible freedom of the press in this country and I really value it.

**How does our freedom of the press compare with the media you've encountered in other countries?** Even compared with other Western democracies, our freedom of the press is extraordinary. From embedding with American forces and knowing journalists from other countries—France, Holland, the U.K.—who have embedded with their countries' forces, universally I've been told that the access that is enjoyed by not only American journalists but journalists from *any* country—including networks like Al Jazeera—the access the U.S. military gives these journalists completely outstrips anything they know from their own armies.

One U.K. journalist said that if you do an embed with the British military, before you leave the base the public affairs officer goes through your camera and deletes photos he doesn't like. That's inconceivable in the U.S. military. As a general principle it's extremely open, it's amazing. Certainly in my experience in filming *Restrepo*, we shot some very, very problematic footage—dead American soldiers, soldiers weeping on the battlefield, dead Afghan civilians from a U.S. air strike—and nobody blinked. It was completely accepted that we were doing our job and that it was important.

**Having access to trusted news sources and being informed are absolutely essential for us to be effective citizens. Where do we go to find balanced news and how do we recognize it?** Balanced news is where you cannot detect the political opinions of reporters. Both sides, conservatives and liberals, don't entirely rise to this high standard. I watched a couple of FOX news hosts discussing the GOP primary in Virginia and one of the hosts said, “Don't

forget, we lost Virginia in 2012,” referring to the Republican Party. I just thought: *she's a journalist*. You don't say “we.” It's not your business to signal your political views to your viewers; you don't have a horse in this race if you're a journalist. Privately, personally you do, but you never reveal that.

And FOX is not alone; there are many liberal and conservative media outlets that do that. Personal opinion in the news is an oxymoron—suddenly it's not the news. If you have a citizenry that trusts the news to give them an unbiased look at the world and you insert your personal opinion into it, you're depriving people of the chance to form their own opinions, you're manipulating the public. That, left unchecked, is not democracy.

**Where do you, personally, go to find balanced news?** I don't think you can get completely balanced news from any one source. I read *The New York Times*. They are exceptionally professional. Overall, I think they're a pretty straight-shooting source of news. *The Economist* is really good. I read *The Wall Street Journal*—I completely disagree with a lot of their editorials, but I think their reporting is exemplary. So, I try to watch and read a variety of sources so that I get a balanced view.

**Oklahoma Humanities partnered with the Metropolitan Library System earlier this year to host a public conversation with you in Oklahoma City. You made the audience sit up and take notice when you said, “The use of contempt in public speech is more dangerous than ISIS.” What did you mean by that?** I mean that the use of contempt in public speech, in political speech, undermines our democratic values. Expressing contempt for our president, for example. How *dare* you speak with contempt for our president? Government and citizens



that speak with contempt are very, very powerful. It really does undermine our democracy. ISIS is not going to undermine a democracy.

I've heard you say, "I love this country very much," and it's clear that you are deeply patriotic. But in **TRIBE**, you say: "We live in a society that is basically at war with itself." Do you see this contempt in our language, politicians openly vilifying each other for having different views, as a destructive force in our society? Let me be clear: private citizens can do whatever they want. Powerful people who are in public positions—presuming to run our country, presuming to ask for our votes, media leaders who have access to

millions of listeners, viewers, readers—they use contempt, a very specific tone, a way of speaking that should always be reserved for the *enemy*. You don't speak with contempt about someone inside the wire, in your own camp, in your own outpost, in your own country. Someone you may have to depend on. Someone who may have to depend on you. If you want to disagree with them, great. If you want to debate and argue with them, if you want to dislike them, no problem. But that use of contempt is deeply un-tribal, it's deeply undemocratic. Is that a destructive force in this country? I've never seen it like this in my fifty-four years. I think it's worse than destructive, I think it's dangerous.

**While you were embedded with troops, you observed that there is a certain protocol about what you do and don't do, what you say and don't say about fellow soldiers. Tell us about that code of conduct.** As one guy said, "Some of us hate each other, but we'd all die for each other." It's a high ideal, I know, but it's attainable—at least by twenty-year-old men and women. Surely our leaders in this country should be able to ascribe to that kind of unity. What I saw at Restrepo were the conflicts of any group in a tense situation. They're humans, they had problems with each other; but I never heard anyone speak with contempt about the guy in the foxhole next to them, a tone that suggests that the guy doesn't deserve

to be in the group. That tone *has* been used in this recent election campaign. It's been used about our president as if he doesn't deserve to be president, even though he was elected by a popular majority. It's not democratic. It's not right. It really undermines the ideals of our country.

**From your research, what would you suggest that we do to improve public discourse? What would unity and community look like?** I think we can start by socially sanctioning against that kind of disrespectful speech. Racist speech is protected under the First Amendment, but fifty years ago it was an acceptable form of discourse in public life—it no longer is. If you publicly say something racist, you will be sanctioned by society: it's not okay, it's not all right. Likewise, contemptuous speech should go the way of racist speech in our public and political discourse. Freedom of speech is a legal matter; sanctioning socially unacceptable speech is a social matter.

**One of my favorite parts of TRIBE is about a conversation you had with your dad when you received your Selective Service card. Would you relate that story for our readers?** I grew up during Vietnam and every adult I knew was against the war. The draft was a widely reviled reality in the '60s and '70s. When my Selective Service card came, I had to sign up with my government so they would know where to find me if they wanted to draft me in whatever war lay in our future. I just thought: *I'm not doing that*. It's not that I would be unwilling to fight if it was a morally necessary war. It's not that I'm unwilling to sacrifice for my country. It's that I didn't trust my country to send me to a war that made any sense.

My father grew up in Europe, in Spain and France, and his world was saved from totalitarianism by the U.S. military. He said, "There's thousands of graves of American boys, American soldiers in France, soldiers who gave their lives to keep the world free. You don't owe your country *nothing*, and you may even owe it your life. Hopefully not, but you're going to sign that draft card, and if there's a war you think is immoral, don't fight it. It's just as important to refuse an immoral war as it is to fight a moral

one, you can make that decision at the time. But right now you're going to give your government your name in case they need you, because you owe your country your service if needed."

**It seems that your father was encouraging you to think about the larger good, the good of the country. In TRIBE you say: "The beauty and tragedy of the modern world is that it eliminates many situations that require people to demonstrate a commitment to the collective good." You note that we have opposing forces in our country—American individualism that grates against our care for a common good. How do we contend with that?** We can choose as a society to espouse ideals that promote the common good. Right now, our society actively espouses ideals that elevate individual interests above all else. When you dismantle laws that protect workers, labor advocates argue that you're undermining the common good. Other people say having more wealthy people in this country generates jobs, and with trickledown economics that's a valid theory. It all depends on how you define the common good.

Benjamin Franklin did not take out a patent on the Franklin stove because he felt that anything that was that good for humanity should be owned by humanity. Thomas Paine, basically the first bestselling author in the New World, donated every penny of his royalties to the Continental Army so they could buy mittens. The inventor of the polio vaccine did not take out a patent, didn't want to personally profit from something that humanity needed. Those ideals are really scarce now. It's a shame.

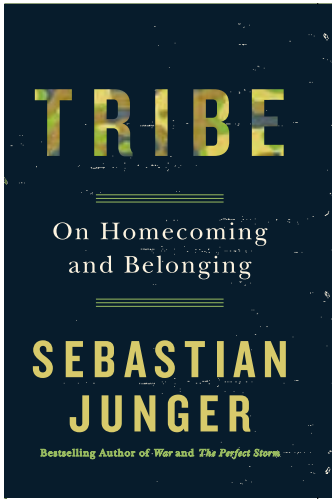
**The larger theme of your book is about the meaning of "tribe"—how loyalty and a sense of belonging integrate people into the greater community. You observe that modern society is utterly separated from that kind of community, and it's one reason why veterans have difficulty in transitioning from soldier to civilian. Would you explain the correlation and how it ties to the book's subtitle, "On Homecoming and Belonging"?** Veterans are going from a situation of very close, personal connection to a society that

JUNGER | cont. p. 45



OKLAHOMA  
HUMANITIES

**DID YOU KNOW** that 165,630 Oklahomans participated in our programs in 2015? Or that we invested over \$230,000 in grants and reading-discussion programs that resulted in 835 events across the state? Check our calendar for an Oklahoma Humanities event near you. [okhumanities.org/calendar](http://okhumanities.org/calendar)



## EXCERPT

Today's veterans often come home to find that, although they're willing to die for their country, they're not sure how to live for it. It's hard to know how to live for a country that regularly tears itself apart along every possible ethnic and demographic boundary. The income gap between rich and poor continues to

widen, many people live in racially segregated communities, the elderly are mostly sequestered from public life, and rampage shootings happen so regularly that they only remain in the news cycle for a day or two. To make matters worse, politicians occasionally accuse rivals of *deliberately* trying to harm their own country—a charge so destructive to group unity that most past societies would probably have just punished it as a form of treason. It's complete madness, and the veterans know this. In combat, soldiers all but ignore differences of race, religion, and politics within their platoon. It's no wonder many of them get so depressed when they come home.

I know what coming back to America from a war zone is like because I've done it so many times. First there is a kind of shock at the level of comfort and affluence that we enjoy, but that is followed by the dismal realization that we live in a society that is basically at war with itself. People speak with incredible contempt about—depending on their views—the rich, the poor, the educated, the foreign-born, the president, or the entire U.S. government. It's a level of contempt that is usually reserved for enemies in wartime, except that now it's applied to our fellow citizens. Unlike criticism, contempt is particularly toxic because it assumes a moral superiority in the speaker. Contempt is often directed at people who have been excluded from a group or declared unworthy of its benefits. Contempt is often used by governments to provide rhetorical cover for torture or abuse. Contempt is one of four behaviors that, statistically, can predict divorce in married couples. People who speak with contempt for one another will probably not remain united for long.

The most alarming rhetoric comes out of the dispute between liberals and conservatives, and it's a dangerous waste of time because they're both right.

The perennial conservative concern about high taxes supporting a nonworking "underclass" has entirely legitimate roots in our evolutionary past and shouldn't be dismissed out of hand. Early hominids lived a precarious existence where freeloaders were a direct threat to survival, and so they developed an exceedingly acute sense of whether they were being taken advantage of by members of their own group. But by the same token, one of the hallmarks of early human society was the emergence of a culture of compassion that cared for the ill, the elderly, the wounded, and the unlucky. In today's terms, that is a common liberal concern that also has to be taken into account. Those two driving forces have coexisted for hundreds of thousands of years in human society and have been duly codified in this country as a two-party political system. The eternal argument over so-called entitlement programs—and, more broadly, over liberal and conservative thought—will never be resolved because each side represents an ancient and absolutely essential component of our evolutionary past.

So how do you unify a secure, wealthy country that has sunk into a zero-sum political game with itself? How do you make veterans feel that they are returning to a cohesive society

that was worth fighting for in the first place? I put that question to Rachel Yehuda of Mount Sinai Hospital in New York City. Yehuda has seen, up close, the effect of such antisocial divisions on traumatized vets. "If you want to make a society work, then you don't keep underscoring the places where you're different—you underscore your shared humanity," she told me. "I'm appalled by how much people focus on differences. Why are you focusing on how different you are from one another, and not on the things that unite us?"

SEBASTIAN JUNGER is *The New York Times* bestselling author of *War*, *The Perfect Storm*, and *A Death in Belmont*. Together with Tim Hetherington, he directed the documentary *Restrepo*, which was nominated for an Academy Award and won the Grand Jury Prize at Sundance. He is a contributing editor to *Vanity Fair* and has been awarded a National Magazine Award and an SAIS Novartis Prize for journalism. Watch video of his appearance on "TED Talks: War & Peace" (PBS) at: [sebastianjunger.com](http://sebastianjunger.com). From *TRIBE: On Homecoming and Belonging* © 2016 by Sebastian Junger. Reprinted by permission of Twelve/Hachette Book Group, New York, NY. All rights reserved. [twelvebooks.com](http://twelvebooks.com)

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WE LIVE IN A SOCIETY THAT  
IS BASICALLY AT WAR WITH  
ITSELF.

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"One person, one vote," a rallying cry for the Civil Rights Movement, was brought to mind when the Court agreed to hear *Evenwel v. Abbott*, a case exploring Texas redistricting plans and the Equal Protection Clause of the Fourteenth Amendment. Art Lien, 2015

# State of the Vote— Your “Right” Revealed

JOSHUA S. SELLERS | ART BY ART LIEN

**Voting is a vital sign of  
a healthy democracy—  
but is it a constitutional  
inheritance?**



Writing in *The New Yorker* in 1943, E.B. White described democracy as “the recurrent suspicion that more than half of the people are right more than half of the time.” Considered today, White’s clever remark reads as aspirational. In recent presidential election years, only fifty to sixty percent of those eligible have cast a vote. Voter turnout rates for midterm elections are a dismal forty percent on average. Here in Oklahoma, according to the United States Elections Project, voter turnout during the 2012 elections was under fifty percent (49.20%), ranking the state third to last in the nation.

One might assume nonvoters are slothful, too preoccupied with mundane affairs to visit the polls. Or perhaps they are principled dissenters, exercising a kind of conscientious objection to an increasingly farcical political process. It’s also conceivable that they view the practice as unnecessary, given that most political contests are uncompetitive. (Why vote for a Democrat in an overwhelmingly Republican state—or vice versa?) Some percentage of the voting population may simply remain oblivious to election days, as with minor holidays.

Whatever the merits of these theories, each of them presumes an unqualified, robust right to vote—at least for individuals who have reached the age of eighteen and whose citizenship is uncontested. But to describe the right as one inherent to our liberty would be inaccurate. One could argue that it is inaccurate to describe it as a *right* at all. The U.S. Constitution, a model of democracy for much of the world, does not provide anyone the right to vote. In truth, voting is mediated by a plethora

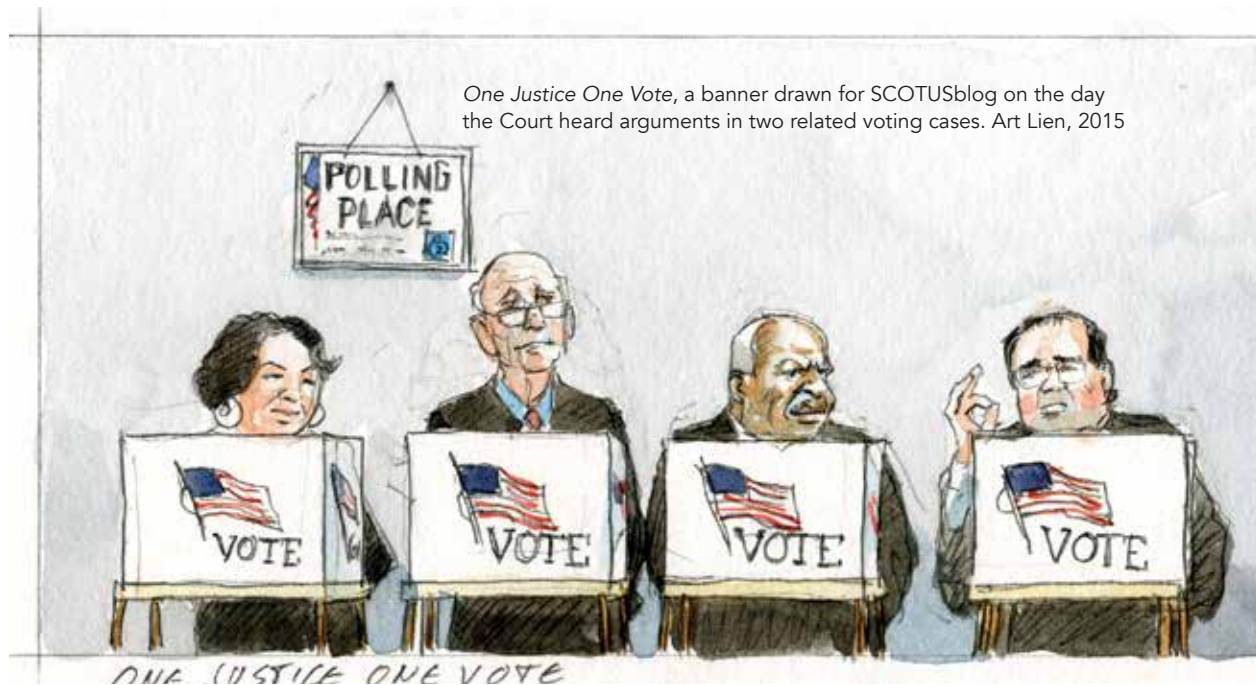
of public and private institutions, each dictating in part whether we can vote, and also when, where, and how.

### **STATE MANDATES, FEDERAL OVERSIGHT**

States have great latitude in designing electoral districts, selecting voting machines, designating the number of early voting days, and other choices pertaining to the “Times, Places and Manner of holding Elections,” as noted in Article I of the Constitution. As prescribed, members of Congress are to be chosen by voters possessing “the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.” In other words, your right to vote for a member of Congress depends entirely on whether you’re qualified to vote for a member of your state legislature. And who determines whether you’re qualified to vote for a member of your state legislature? State officials of course.

The Founding Fathers’ curious scheme, making voting contingent upon state mandates, helps explain the profusion of assorted voting requirements throughout our history. Property and taxpaying requirements were prevalent in the early nineteenth century. Poll taxes and literacy tests were also standard in many states, until the Supreme Court and Congress, respectively, outlawed those barriers in the mid-twentieth century. In contrast, residency requirements limiting the vote to those who have lived in a state for a minimum period remain commonplace, as do laws barring convicted criminals from voting.

If a right to vote exists, it is a right with notable exceptions.



One Justice One Vote, a banner drawn for SCOTUSblog on the day the Court heard arguments in two related voting cases. Art Lien, 2015

States, in turn, must comply with federal requirements. The federal government has often played the role of noble scold, most markedly with the 1965 Voting Rights Act, a landmark law that prevents states from denying citizens the right to vote based on race or ethnicity. (The Fifteenth Amendment, ratified in 1870, under which citizens may not be denied the vote “on account of race, color, or previous condition of servitude,” had proven inadequate in that regard.) Nor are states permitted to systematically and intentionally design electoral districts that marginalize racial and ethnic minority groups, making it impossible for them to elect candidates of their choice. The intricacies of this prohibition are complex and the implications profound, but none can deny the federal government’s—in particular the Department of Justice’s and the federal courts’—influence in ensuring minority representation. Through provisions of the Voting Rights Act, these entities forced the creation of electoral districts that effectively guaranteed the election of minority candidates.

More recently, Congress sought to remedy a variety of election-related problems through passage of the National Voter Registration Act of 1993 and, in the wake of the Supreme Court’s highly controversial *Bush v. Gore* decision, the Help America Vote Act of 2002. These laws aimed to increase voter registration,

**Absent an impregnable right to vote, many other rights are threatened, particularly for those who lack the ability to form a governing majority.**

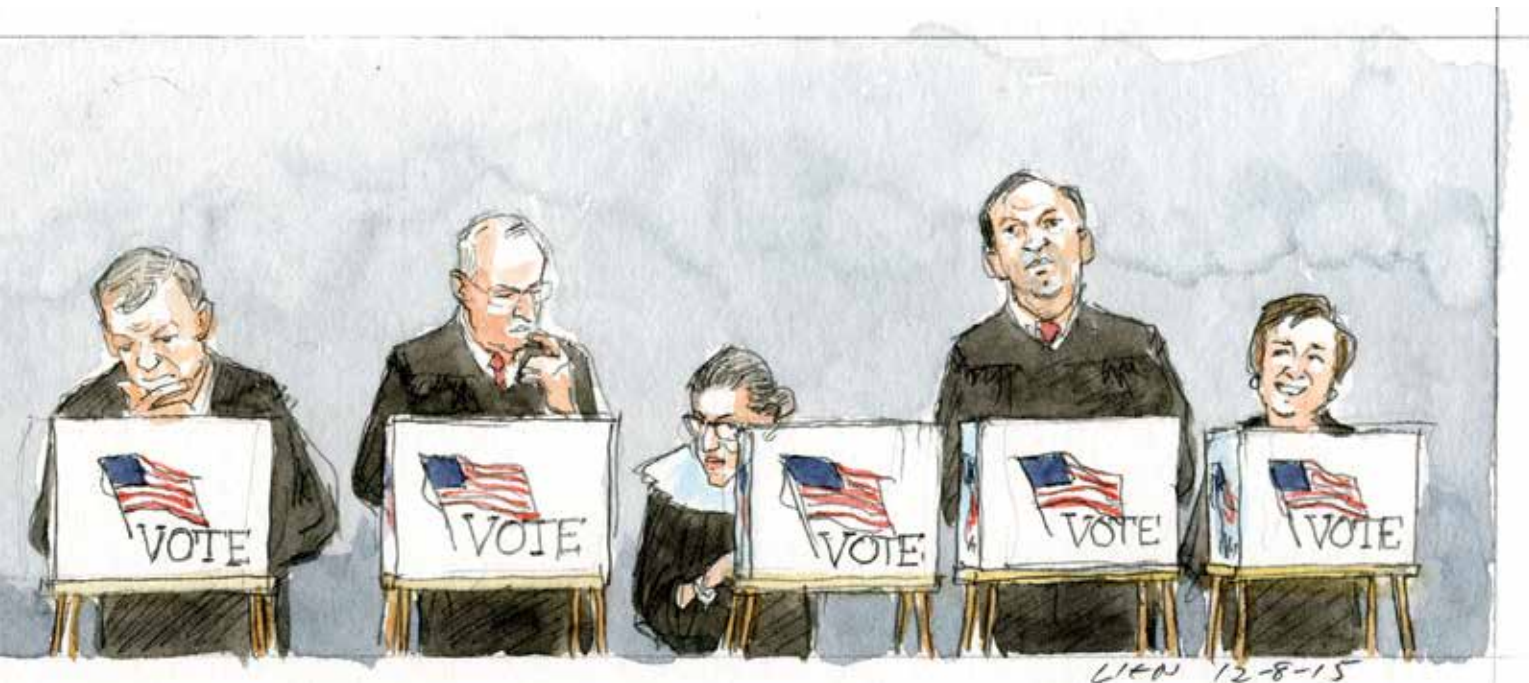
standardize election procedures nationally, and distribute grant money to states to update their voting technology. Though the laws’ overall record of success has been mixed, they have undoubtedly brought about positive developments. For example, just last summer, in lieu of potential litigation, Oklahoma officials reached a settlement agreement with several community groups, ensuring that voter registration applications are

available at public assistance agencies, as required under the 1993 law.

**PARTY RULES**

What about private institutions’ relationship to the right to vote? Political parties, despite the fact that they are inextricable from public democratic outcomes, are private entities. As such, they are afforded First Amendment protection and are largely free to conduct their affairs as they see fit. The primary election process, a decidedly private proceeding, exemplifies this independence.

Consider a 1986 Supreme Court case, *Tashjian v. Republican Party of Connecticut*. The case arose after the Connecticut Republican Party elected to open its primary elections to unaffiliated Independents (voters who opt not to align with a political party). To that point, Connecticut law codified a “closed primary” system expressly limiting primary election participation to those formally registered with each specific political party. The Connecticut Republican Party challenged the law on First Amendment grounds, claiming that its associational rights were being



violated. A majority of the Court agreed, concluding: “The Party’s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.” The logic of the decision has since been relied on by dozens of courts in granting political parties autonomy over all sorts of so-called “internal party affairs,” including determining who may run for office under a party banner.

Yet political parties, despite their independence, are also regulated. Take *Clingman v. Beaver*, a 2005 Supreme Court case arising from Oklahoma. The case involved Oklahoma’s “semiclosed primary” system, which, in contrast to the law overturned in *Tashjian*, permits primary election participation by both those formally registered with a party and those who have registered as independents—if a party consents. For example, this year, for the first time in history, the Oklahoma Democratic Party permitted unaffiliated Independents to vote in its primary. *Clingman* raised a related issue: The Libertarian Party of Oklahoma objected to the state’s refusal to

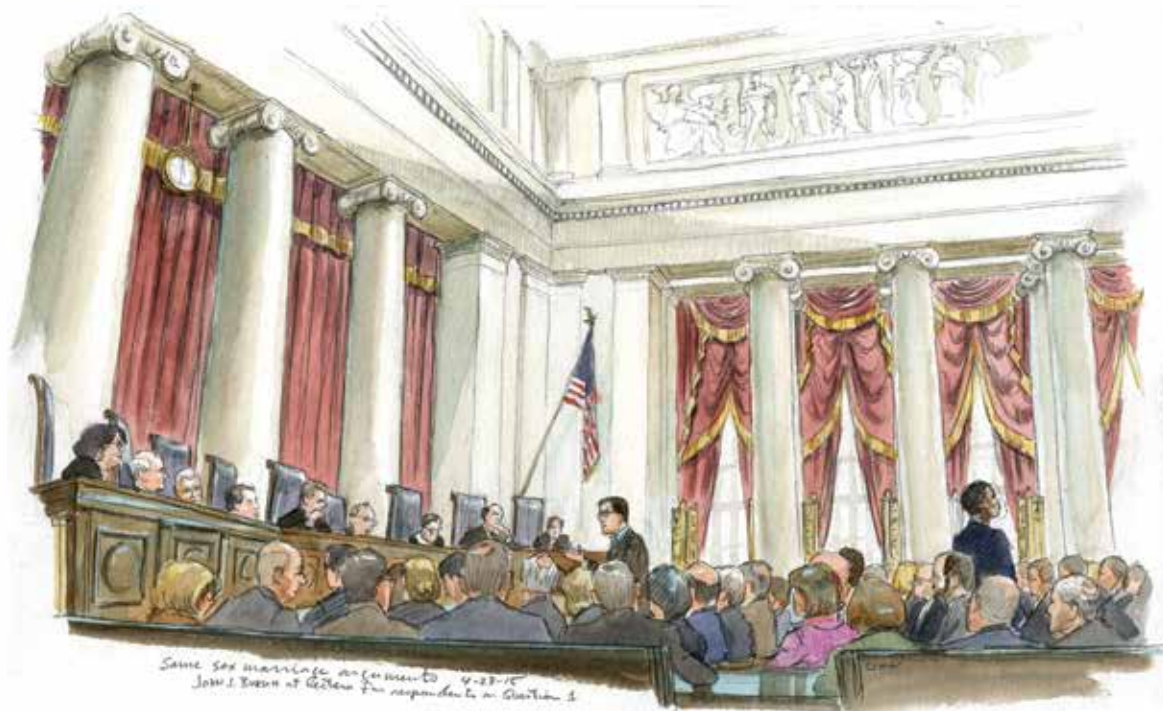
allow those formally registered with other political parties (e.g., Republicans and Democrats) to vote in its primaries. A majority of the Court found Oklahoma’s system constitutionally sound, noting that “Oklahoma reasonably has concluded that opening the LPO’s primary to all voters regardless of party affiliation would undermine the crucial role of political parties in the primary process.”

As a result, though political parties have great leeway to manage their activities, their rights do not include the ability to invite registrants of other political parties to vote in their primaries. Those registered with other political parties can’t participate unless they properly switch affiliations. Notably, some states do have “open primary” systems that allow eligible voters to freely choose which party primary they will participate in. The point here, and following *Clingman*, is that parties cannot insist on such a permissive approach. Regardless of the primary system in effect in a state, individuals’ votes appear patently contingent on institutional decisions.

#### LIBERTY LIMITED

Perhaps the conditional nature of the right to vote is unsurprising; few, if any, rights are absolute. One cliché example is the prohibition against falsely yelling “Fire!” in a crowded theater, a seeming violation of our right to free speech. Graver, more consequential examples are readily discernable: The right to bear arms is currently bound by restrictions and background checks. The protection against unreasonable searches and seizures does not, according to the federal government, include absolute privacy in our phone communications and online activities. These examples raise questions about whether unrestricted rights are necessarily a good thing, and where the lines between permissibility and impermissibility should be drawn.

Should voting be free of restrictions? As announced by the Supreme Court in *Yick Wo v. Hopkins* (1886), voting is “preservative of all rights.” Absent an impregnable right to vote, many other rights are threatened, particularly for those who lack the ability



*Obergefell v. Hodges*, same sex marriage arguments, John J. Bursch at lectern for respondents, April 28, 2015. Art Lien, 2015

## A Sketch Artist's Day at the Court

BY ART LIEN

Art Lien has been a courtroom sketch artist for forty years and the U.S. Supreme Court is his regular beat. He creates visual journalism where, even in this modern age, no cameras are allowed to go.

My day at the Court begins early. Arriving a couple hours before I have to take my seat in the courtroom allows me time to warm up with a quick sketch or two. It may be lawyers lining up to be admitted to the bar, or Justice Kagan getting her morning coffee in the cafeteria.

At 9:30 I take my seat in one of the alcoves to the left of the bench. From there I'll see lawyers standing and greeting each other; I'll see visitors looking up at the friezes. Very often I'll use this time to get a head start on the "wideshot"—the scene-setting sketch of the entire bench, columns, lawyers, press, and public. As reporters begin to file in and take their seats, I add them to the wide shot.

If there are opinions, I'll sketch a partial bench highlighting the Justice delivering the opinion. If a Justice reads a dissent from the bench I'll capture that as well. The real work is covering arguments. I need sketches of each lawyer, certain Justices, and bench shots depicting Justices' body language. I've come to realize that questions from the Justices make the story.

After the arguments, I still have a good two or three hours of work to finish the drawings, adding color and making sure I got Justice Sotomayor's silver bangles or the right jabot on Justice Ginsburg. All of the male Justices get red ties all the time—that's artistic license. (Excerpted from SCOTUSblog.com)

See Art Lien's work on NBC News, SCOTUSblog, and on his website, [courtartist.com](http://courtartist.com), where he posts drawings and links to news stories about Court cases and opinions—a treasure trove of decisions that have steered the course of American history.

to form a governing majority. As the Court further acknowledged in *Wesberry v. Sanders* (1964), “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”

It is this distinction—that the right to vote preserves *all* liberties—that makes recent efforts to curb individuals’ voting rights so controversial. Voter identification laws are a prevalent example. As of last year, thirty-three states had passed some form of identification law requiring voters to show a driver’s license, passport, or other government-issued photo ID before casting a ballot. Opponents claim that such laws unconstitutionally burden those who lack IDs or will be unable to obtain them. Supporters claim that they are essential to prevent voter-impersonation fraud, though examples of such fraud are virtually nonexistent. As put by prominent federal judge Richard Posner, “[The] one form of voter fraud known to be too rare to justify limiting voters’ ability to vote by requiring them to present a photo ID at the polling place is in-person voter impersonation.”

How difficult is it to get the necessary ID? Quite difficult if you are elderly and have a hard time in traveling to the requisite distribution site or no longer have a birth certificate to establish your identity. The poor may encounter the same issues, along with prohibitive costs and fees. And what of those who, for religious reasons, object to being photographed?

Similarly dubious are several states’ cutbacks to or elimination of early voting periods that allow voters to cast their ballots prior to Election Day, a privilege that eases the burden on election administrators and mitigates long lines at the polls. Nationally, many churches and voter registration organizations have relied on early voting periods to mobilize people to participate. In Ohio, for instance, the early voting period in 2008 was thirty-five days. Several states, including Ohio, have since reduced or eliminated these periods. Various experts have shown that these changes have the effect

of reducing participation, particularly among African-American voters. The trend is troubling. There is something disjointed about denominating a right as “fundamental” and then saddling it with onerous bureaucratic stipulations.

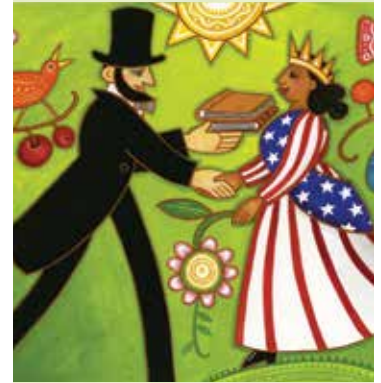
### PRESERVE, EXPAND, PROTECT

Voter identification requirements and cutbacks to early voting are but two voting rights issues that are currently being litigated in courtrooms across the country. Cases in North Carolina and Texas are ongoing and could possibly be resolved by the Supreme Court. These issues are of immense importance—to those directly affected and, more broadly, as metrics of the health of our democracy. Whatever follows, individuals still won’t have a *right* to vote. What we do have, though, is a privilege worth fighting for, preserving, and giving as expanded an interpretation as possible. It’s your vote—use it.

JOSHUA S. SELLERS is Associate Professor of Law at the University of Oklahoma College of Law. He holds a J.D. and Ph.D. in political science from the University of Chicago and specializes in Election Law, Legislation, Civil Procedure, and Constitutional Law. [jsellers@ou.edu](mailto:jsellers@ou.edu)

### EXTRA! READ | THINK | TALK | LINK

- “Introduction to Federal Voting Rights Laws,” U.S. Department of Justice. Describes the historical disenfranchisement of African American voters, Congress’s decision to enact the Voting Rights Act, and immediate effects of the legislation. [justice.gov](http://justice.gov)
- “Supreme Court Invalidates Key Part of Voting Rights Act,” Adam Liptik, *The New York Times*, June 25, 2013. Outlines the Supreme Court’s decision in *Shelby County v. Holder* invalidating part of the Voting Rights Act, and the divided views of the Justices. [nytimes.com](http://nytimes.com)
- “*Shelby County*: One Year Later,” Tomas Lopez, Brennan Center for Justice, June 24, 2014. Report on voting changes implemented across the country after the *Shelby* decision and the “lasting, harmful consequences.”
- Oklahoma State Election Board. Information on voter registration, political parties, primary elections, and locating your polling place. [ok.gov/elections](http://ok.gov/elections)



### How Do You Choose?

Uncle Al once told me  
you can judge a man  
by his shoes.  
Practical?  
Sturdy?  
Or shiny and slick?

But of course it’s not enough  
to look at shoes  
when you’re choosing  
a president.

Really.

We need a close look  
at the socks, too.  
—Janet Wong

From *Declaration of Interdependence: Poems for an Election Year* © 2012 by Janet Wong. Author Janet Wong worked as a lawyer before deciding that she “wanted to do something more important with her life—and couldn’t think of anything more important than working with kids.” She has written almost 30 books, speaks at schools and conferences, creates The Poetry Friday Anthology series with Sylvia Vardell (Pomelo Books), and volunteers with children’s literature groups. [janetwong.com](http://janetwong.com)



# IDEAS OR INTERESTS?— THE FOUNDERS ON FREE SPEECH

Does “free speech” apply to groups?  
The Founders’ views might surprise you.

KEVIN BUTTERFIELD | PHOTOS BY GAGE SKIDMORE

**IN** *Citizens United v. Federal Election Commission* (2010), the U.S. Supreme Court ruled that groups such as corporations and labor unions have a First Amendment right to free speech. Such organizations have long enjoyed a variety of legal and constitutional protections—protections against, say, illegal seizure of property. Now, the Court has declared, each organization (that is, the group itself and not just its individual members or stockholders) also has a fundamental, constitutionally enshrined right to free speech, a right to have its corporate voice heard in our American democracy. In short, such groups cannot be the target of legislation that limits how much money they, as an organization, might spend on political advertising to express their views, to advocate for or to declaim against a politician or a party.

One result of that decision was the injection of ever-larger sums of money into the electoral process. More money buys more time on greater media platforms; thus, some would argue, corporate groups can now speak “louder” or with more influence than individual citizens. In a hearing on the aftermath of *Citizens United*, Senator Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee, noted that Congress had enacted campaign finance laws to ensure American citizens a voice and fair participation in the political process and “to keep powerful, moneyed interests from swamping individuals’ voices and interests.”

Interestingly, some of the Court’s Justices place great weight upon the “original meaning” of the Constitution and the “original intent” of its Framers. But would the Founding generation, the drafters of



Replacing the British flag with an American flag as the British fleet departs New York Harbor, Nov. 25, 1783. By Pictorial War Record, ca. 1883. Library of Congress

that document, have agreed with the Court’s interpretation in *Citizens United*?

Perhaps the freedom of speech, which has long been a right that belongs to individuals, ought now to be extended to include corporations and private associations. I am no lawyer, and I have no legal grounds to doubt the five Supreme Court Justices who formulated the decision and know infinitely more about the law than I do. But as an early American historian, one who spends nearly as much time (mentally, that is) in the late eighteenth and early nineteenth centuries as he does in the twenty-first, I can say without hesitation that many of the leading figures in the Founding era would have been incredulous.

We might gain a new perspective on *Citizens United* if we try to understand what members of the Founding generation believed about organized groups and their place in the democratic process. George Washington and Thomas Jefferson disagreed about a great deal and wound up on opposite sides as America’s first political parties took shape in the 1790s—but on one point

they clearly agreed: private groups, as groups, had neither a valid nor (at least for Washington) a particularly valuable role to play in the American experiment in self-government. Some of the conclusions they drew seem to be as relevant today as they were more than two hundred years ago.

### FRATERNITY OR FACTION?

American independence was declared to the world as the act of “one people” dissolving “the political bands which have connected them with another.” Under that vision, we were not a nation of competing interests and viewpoints, riven by faction. (Next to “tyranny,” the word “faction” might have been the most hated in political parlance.) We were united. The first generation of Americans was quite optimistic that this “commonwealth” ideal could be realized. But what happens when some of the people determine that the nation is losing its way or that their views are being ignored and their interests trampled upon?

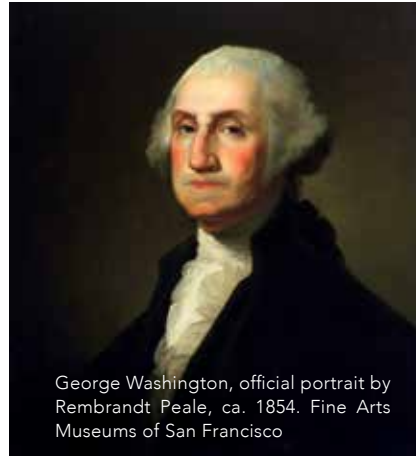
They organize.

Many Americans had done just that in the run-up to the Revolution, forming groups like the Sons of Liberty, which became the nucleus of the struggle for independence. After independence was won and a new federal constitution put in place, some men began organizing political clubs and societies. From the nation’s largest cities to the backcountry of Kentucky and South Carolina, more than fifty societies were formed in the 1790s. These “Democratic-Republican” societies, as they came to be called, saw themselves as indispensable, observing the government, calling

out bad policies, and disseminating helpful information to their fellow citizens. Despite allegations that they were inappropriately attempting to replace elected legislatures as the representative voice of the people, members insisted they were doing nothing wrong; they were simply joining together to make their views more influential in the body politic.

Indeed, as seen from the twenty-first century, these groups were akin to what we now see as not just commonplace but downright beneficial to democracy. Civic advocacy organizations—such as Greenpeace, AARP, and chambers of commerce—are an ordinary part of contemporary politics. We can scarcely imagine our democracy without such groups.

For President George Washington, though, they were the first step to the fall of the American republic. Organized groups working to make their collective



George Washington, official portrait by Rembrandt Peale, ca. 1854. Fine Arts Museums of San Francisco

Washington believed, honestly and firmly, that The People's voice was *already* heard—in every election and in every elected body, from city councils to state assemblies, from town meetings to the halls of Congress. There was no need for people to organize outside of their elected governments, and any effort to do so was evidence that theirs was a partial, factious, selfish goal.

## INDIVIDUAL V. COLLECTIVE SPEECH

By the early nineteenth century, the idea that the American nation would always be one of diverse viewpoints and rival interests had become increasingly accepted by people across the political spectrum. When the more conservative Federalist Party found that their Jeffersonian Republican opponents had effectively seized control of elected governments throughout much of the nation, they, too, would see the value in having private associations protected by law. They soon formed political clubs nearly identical to the Democratic Republican societies, calling themselves “Washington Benevolent Societies” in honor of the father of their country. (He would not have approved.)

In time, even full-blown political parties were somewhat grudgingly accepted. Over the course of the 1790s and 1800s, the first two political parties

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### For President George Washington, organized groups working to make their collective voices heard ran against the ideal of common values and a common vision.

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voices heard ran against the ideal of common values and a common vision. Washington publicly condemned what he called “self-created societies.” Such “combinations and associations,” he noted in his Farewell Address of 1796, “serve to organize faction” (that hateful word). He warned that the “will of the nation” might be supplanted by a small, temporarily popular, minority:

They are likely . . . to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the power of the people and to usurp for themselves the reins of government, destroying afterwards the very engines which have lifted them to unjust dominion.

The emerging opposition party, with leaders like Thomas Jefferson and James Madison, were astonished that Washington and his supporters were so willing to condemn contrary viewpoints. Didn't a republic depend on the active involvement of the people, and weren't those people likely on occasion to disagree? Members of the societies defended political clubs as “the great bulwark . . . against the artful designs of men.” They weren't claiming to speak for the people, they argued, but simply expressing their own particular points of view. If these voluntary associations “speak only for themselves, on public measure,” asked one Massachusetts Constitutional Society writer, “where is the crime?” (*Independent Chronicle*, Sept. 8, 1794; *Independent Chronicle*, Dec. 8, 1794).

became an influential and fixed force in American politics—so influential, in fact, that a Twelfth Amendment was added to the Constitution to accommodate their existence. Political organization was no longer taboo.

But that doesn't mean that Americans in the first years of the nineteenth century had fully embraced the idea that formal associations ought to be allowed into political conversations. Though political parties, clubs, and societies coordinated the multiple voices of citizens, it was still those *individual* citizens' voices that mattered. The idea that the groups themselves had constitutional rights to speak remained almost unthinkable. To be sure, like-minded men could join ranks behind the same banner, supporting

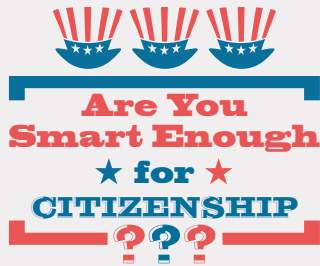




# ELECTIONS



## BY THE NUMBERS



Following are sample questions from the civics portion of the U.S. Naturalization Test. Applicants for citizenship must answer up to 10 random questions from 100 possible questions, and answer at least 6 out of 10 questions correctly. Would you pass the test? (See answers at the bottom of the page.)

1. What are two rights in the Declaration of Independence?
2. What is the supreme law of the land?
3. What do we call the first ten amendments to the Constitution?
4. Name one branch of the federal government.
5. We elect a U.S. Senator for how many years?
6. Name your U.S. Representative.
7. What is the name of the current U.S. Speaker of the House?
8. What is one power of the federal government?
9. Who was President during World War I?
10. Name one U.S. territory.
11. Why does the U.S. flag have 13 stripes?
12. What ocean is on the West Coast of the United States?

### EXTRA! READ | THINK | TALK | LINK

- U.S. Citizenship and Immigration Services. Info on requirements for citizenship, test questions and answers, and videos on U.S. civics lessons. Don't miss *The Citizen's Almanac*, a downloadable booklet highlighting the rights and responsibilities of citizenship, patriotic symbols, famous historical speeches, and texts of the Constitution and other important documents of American democracy. [uscis.gov](http://uscis.gov)
- Presidential Election Process. Learn about primaries and caucuses, national political conventions, the Electoral College, and requirements to become president. For kids, download the infographic "How to Become the President of the United States." [usa.gov/election](http://usa.gov/election)

## PRESIDENTS ELECTED WHO LOST THE POPULAR VOTE

# 4

- 1824 John Quincy Adams (Jackson)
- 1876 Rutherford B. Hayes (Tilden)
- 1888 Benjamin Harrison (Cleveland)
- 2000 George W. Bush (Gore)

Source: National Archives and Records Administration: [nara.gov](http://nara.gov)



- 270 # of electoral votes necessary to win 2016 presidential election
- 7 # of Oklahoma electors (states get same number of electors as its congressional delegation)
- 24 # of states with no laws binding electors to a specific candidate



## CAMPAIGN

## FINANCE



**\$136 MILLION**

Taxpayer dollars spent on the two major political party conventions in 2012 (2014: legislation passed to end public funding of national political conventions)

**\$1.46 MILLION**

Campaign dollars spent, on average, by U.S. House of Representatives winners, 2014

**\$9.65 MILLION**

Campaign dollars spent, on average, by U.S. Senate winners, 2014

**\$1.14 BILLION**

Overall dollars spent by Obama presidential campaign 2012

**\$1.25 BILLION**

Overall dollars spent by Romney presidential campaign 2012

Sources: The Campaign Finance Institute ([cfinst.org](http://cfinst.org)) and Center for Responsive Politics ([opensecrets.org](http://opensecrets.org))

## BY THE CALENDAR

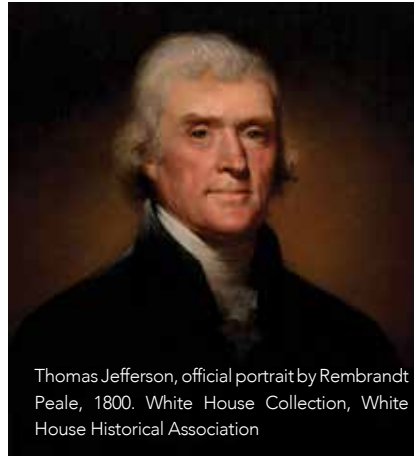
NOV. 8, 2016	ELECTION DAY!
DEC. 19, 2016	ELECTORS MEET IN THEIR STATES TO VOTE FOR PRESIDENT & VICE PRESIDENT
JAN. 6, 2017	CONGRESS MEETS IN JOINT SESSION TO COUNT THE ELECTORAL VOTES
JAN. 20, 2017	INAUGURATION DAY—NOON

Source: National Archives and Records Administration: [nara.gov](http://nara.gov)

Answers: (1) Life, liberty, pursuit of happiness. (2) The Constitution. (3) The Bill of Rights. (4) Congress (13 original colonies). (5) Six. (6) Find out at: [house.gov](http://house.gov). (7) Paul Ryan. (8) Print money, declare war, create an army, make treaties. (9) Woodrow Wilson. (10) American Samoa, Guam, Northern Mariana Islands, Puerto Rico, U.S. Virgin Islands. (11) Stripes represent the thirteen original colonies. (12) Pacific Ocean.

politicians of a shared viewpoint. Political competition made coalitions necessary. In places where political contests were especially heated, as in Philadelphia, the parties formed committees to organize supporters at the ward, city, and county level. But in the eyes of Founding-era leaders, these groups—as groups—had no voice of their own.

In 1803, when a Philadelphia ward committee presumed to speak collectively in a letter to President Thomas Jefferson, he clearly communicated that he had no interest in hearing what it had to say. The group, which included the influential printer William Duane, wrote to express its view about Jefferson's policies on removals from federal office. While Jefferson did not respond



Thomas Jefferson, official portrait by Rembrandt Peale, 1800. White House Collection, White House Historical Association

of his ward committee individually. “The opinions offered by *individuals*, and of right,” he wrote “are on a different ground; they are sanctioned by the Constitution.” Members could reach out to him as citizens, but Jefferson believed

human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

This is not a new position. Chief Justice John Marshall’s view, expressed in *Dartmouth College v. Woodward* (1819), is the best summation of the idea that corporations have no legal rights above what common law or their charter grants them: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.”

People who have criticized the Court’s conclusions in *Citizens United* (on the grounds of “corporations aren’t

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Members could reach out to him as citizens, but Jefferson believed [groups] had no right under the American constitutional system to speak with a collective, corporate voice.

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to the organization, he did write directly to Duane to explain why:

I cannot restrain the desire they [the group’s members] should individually understand the reasons why no formal answer is given: That they should see it proceeds from my view of the Constitution and the judgment I form of my duties to it, and not from a want of respect [and] esteem for them, or their opinions, which *given individually* will ever be valued by me (July 24, 1803, emphasis added).

Jefferson described the committee as among “those bodies whose organization is unknown to the Constitution.” To admit their group views, he noted, would change the machinery of the Constitution by allowing a new voice to enter the public exchange of ideas. Jefferson was happy to respond to Duane and other members

they had no right under the American constitutional system to speak with a collective, corporate voice (a view diametrically opposed to the Justices’ majority opinion in *Citizens United*).

Though comfortable with the idea of political organizing to a degree that Washington never was, Jefferson still held strong objections to groups speaking as a single, collective voice.

#### IDEAS OR INTERESTS?

Does looking back at the broad expanse of American history help us as we think about corporate speech in American democracy today? There certainly have been many efforts to debunk corporate (artificial) personhood—the idea that corporations are entitled to the privileges and rights of natural (human) persons. The most notable was Justice Stevens’s dissent in *Citizens United*:

Corporations help structure and facilitate the activities of

people”) may have a sound argument, but it’s not a terribly enlightening one. It tells us very little about *why* we might find corporate speech problematic in a functioning democracy. Washington’s and Jefferson’s concerns can help us to think through some of these issues.

Washington held an idea that the American republic should not so willingly let itself be parceled up and sectioned off into competing interests and advocacy groups. His trepidations can tell us a lot about the goals and aspirations of the Founding generation, even if those hopes—that the people would always, at the end of the day, share a vision of their common good—flitted away in the last years of his life and the end of the eighteenth century.

Jefferson’s thinking is more complicated. He based his political creed on the idea that people were capable of reasoning, of governing themselves. He



Gage Skidmore

hoped for a nation that, while not free of political organizing, would unite around the ideal of the independent, free, and autonomous citizen—the voice that mattered. It was to better hear and respond to that voice that the whole republican experiment had been attempted.

Many political theorists today still hold to Jefferson's ideal—that democracy utterly depends on deliberation, on the open and free exchange of ideas. As historian Johann Neem observes, the *Citizens United* decision reduces elections to a competition of interests; therefore, in the Court's view, any person or group with an interest should have the ability to speak. Neem counters that it is the *exchange of ideas*—conversation about the common good—not the *clash of interests* that is the foundation of the First Amendment:

Democracy depends on deliberation. . . . Deliberation depends on dialogue, on conversation. . . . It requires people capable of reasoning. Corporations, however, do not reason. . . . Their minds cannot be changed; their presuppositions cannot be challenged; they cannot enter a town hall and engage in discussion with their fellow citizens (*The Seattle Times*, Nov. 3, 2010).

Neem's argument certainly echoes Jefferson's reservations. We may live in a nation of competing and antagonistic interests, despite the hopes of Washington and many of his generation for *one-mindedness*. But there may be more at stake in enshrining a constitutional protection for

groups, as groups, to spend and speak freely. It may be adding voices to the chorus of our constitutional and political debates that the Founding generation had deliberately opted to exclude. Jefferson and Washington, at least, would have had no interest in hearing what they had to say.

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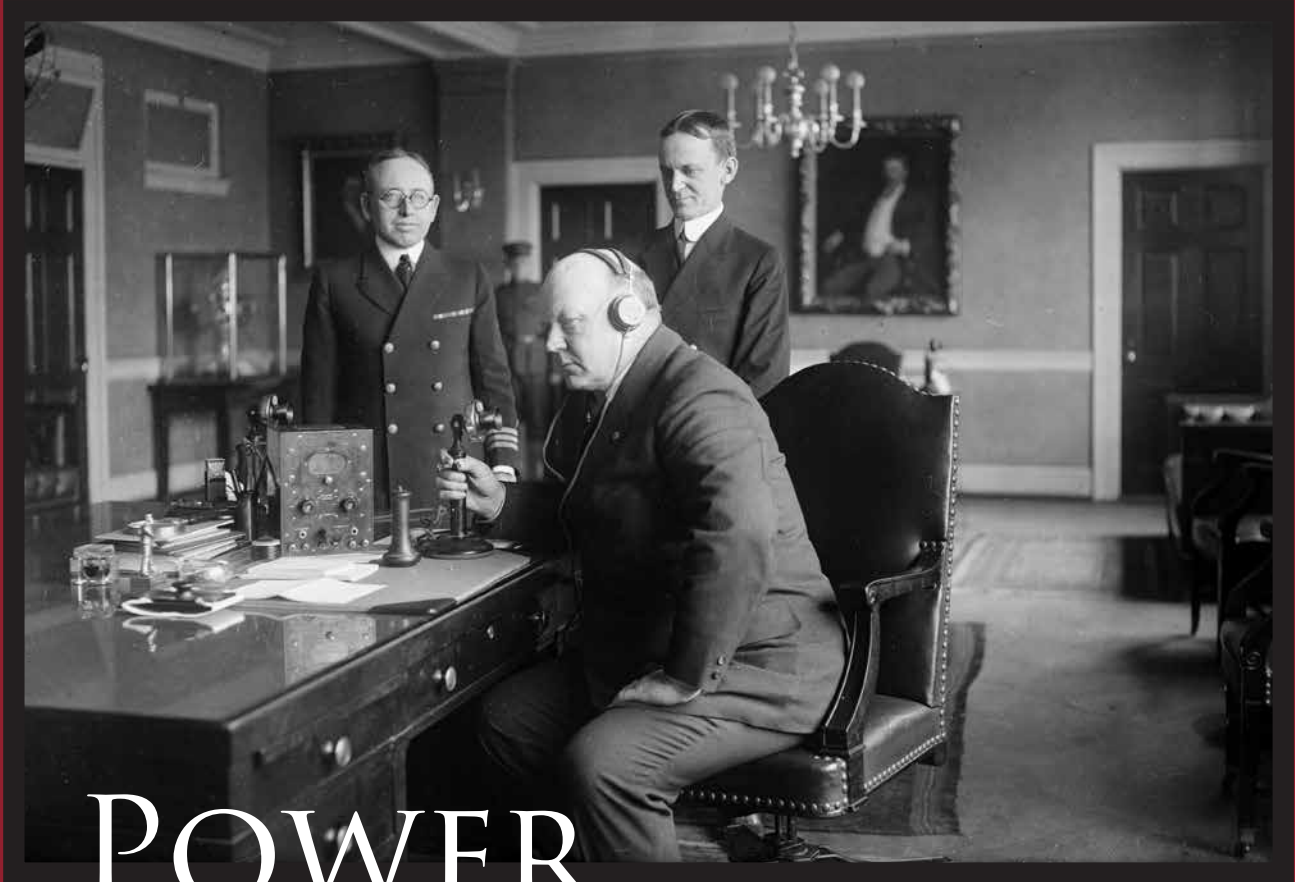
**EXTRA!** READ | THINK | TALK | LINK

- "Citizens United v. FEC in Plain English," Lisa McElroy, Supreme Court of the United States (SCOTUS) Blog, Jan. 22, 2010. A concise explanation of the Court case. scotusblog.com
- "Individuals and Organizations Have a Constitutional Right to Unlimited Spending on Their Own Political Speech," *Intelligence Squared*. Experts debate issues of campaign spending and free speech. intelligencesquaredus.org
- "6 Years Later, the Impact of Citizens United Still Looms Large," Libby Wilson, Sunlight Foundation Blog, Jan. 21, 2016. Short summary of campaign finance trends following *Citizens* decision. sunlightfoundation.com
- "Democratic-Republican Societies," Anthony Di Lorenzo. Short essay outlining George Washington's distaste for partisanship. mountvernon.org



**OKLAHOMA HUMANITIES**

**Oklahoma Humanities** partners with the Smithsonian Institution to bring national exhibits to rural communities and underserved urban neighborhoods. Since 2009, we have reached 24 communities with themes of migration and immigration, foodways, American roots music, and sports. *The Way We Worked* exhibit will begin touring in February 2017, with stops in Perry, Grove, Broken Arrow, Waurika, and Poteau. Visit a piece of the Smithsonian here in our state. [okhumanities.org/museum-on-main-street](http://okhumanities.org/museum-on-main-street)



Harris & Ewing Collection

"Listening in" on a wireless phone, 1922.

# POWER, PRIVACY, *and the* FOURTH AMENDMENT

GOVERNMENT OVERREACH—DOES  
THE CONSTITUTION PROTECT US?

ARTHUR G. LEFRANCOIS | IMAGES FROM THE LIBRARY OF CONGRESS

**I**n reflecting on American democracy and the Constitution, we might not think the Fourth Amendment has much pride of place. And yet it is there that the constitutional framers sought to answer one of the most fundamental questions regarding the relationship of the governed and those who govern: When can government seize or search its citizens and their property? Government may have no more profound a power.

### INFORMED BY REVOLUTION

First, a quick bit of history. The Fourth Amendment was drafted against the backdrop of America's fight for independence. English citizens were subjected to searches and seizures by the king's agents, who were empowered by "general warrants" that did not require grounds for suspicion or specification of what could be searched or seized. Some leading eighteenth-century English judges decried

them. Massachusetts lawyer James Otis, Jr.'s impassioned plea against the use of such warrants in the colonies helped stir revolutionary fervor.

The Fourth Amendment's framers, informed by this background, sought to constitutionally enshrine protections from arbitrary and otherwise unjustified interference in citizens' lives. The amendment they crafted is short and to the point.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

How does this centuries-old language apply today? How is search and seizure law affected by advancing technology? What Fourth Amendment concerns are implicated when a police officer walks his drug detection dog to the front door of a home, when a person puts trash out for curbside collection, or when people share an automobile ride? How might race feature in Fourth Amendment analysis? To understand such questions, and to get a glimpse of their sometimes surprising answers, let's get a sense of how the Supreme Court has interpreted the Fourth Amendment.

### **MAKING THE FOURTH AMENDMENT MATTER**

In 1953, President Dwight Eisenhower nominated fellow Republican Earl Warren as Chief Justice of the United States Supreme Court. Warren had served as a district attorney and as California's attorney general and governor. He served the Court until 1969, leading what has been described as a



New York 1943, by Gordon Parks

rights revolution. Among the many cases decided by the Warren Court, several stand out for our purposes. The first was *Mapp v. Ohio* (1961), which ruled that evidence obtained in violation of the Fourth Amendment must be excluded (the "exclusionary rule") from not only federal but also state criminal trials. Prior to *Mapp*, state law enforcement had little reason to adhere to the Fourth Amendment, since violating it typically had no evidentiary consequence. After *Mapp*, the Fourth Amendment mattered.

### **FROM PROPERTY TO PRIVACY**

Before 1967, the Court defined searches in terms of property intrusions. Thus, in *Olmstead v. United States* (1928), over a vigorous dissent by Justice Louis Brandeis, the warrantless wiretapping of suspected bootlegger and former rising star of the Seattle Police Department Roy Olmstead's telephones was held neither a search nor a seizure, since it involved no physical intrusion of him, his home, or his effects (since the intercepting wires were placed without any "trespass upon any property of the defendants"). According to this property theory of the Fourth Amendment, "There was no searching. There was no seizure." Justice Harlan Stone, who as the nation's attorney general had

banned Justice Department wiretapping as unethical, dissented along with Justices Holmes, Brandeis, and Butler.

Four decades later, in *Katz v. U.S.* (1967), the Court undid *Olmstead's* property-oriented definition of search, opting for a new definition focused on privacy. Charles Katz had used a pay telephone to illegally transmit wagering information to out-of-state associates. The FBI, without a search warrant, captured his end of the conversations by using an electronic device attached to the outside of the phone booth. Confronted with the fact that there was no physical intrusion into the booth, and thus no property invasion, the Court overturned *Olmstead* and held that the Fourth Amendment protected privacy, not property, and that a person was searched so long as she had a reasonable expectation of privacy that the government invaded. The Court's search jurisprudence thus shifted from concern with intrusions on property to invasions of privacy.

*Katz* did not mean the government could not electronically eavesdrop. It simply meant that such eavesdropping was a search (an invasion of a reasonable expectation of privacy), and so required a warrant. Fourth Amendment cases are rarely about whether the government can do what it did; they are typically about whether the government needed a justification (a warrant or probable cause, for example) for what it did. The eavesdropping in the *Katz* case was unlawful only because the government did not secure a warrant beforehand.

### **SURPRISING OUTCOMES**

The "reasonable expectation of privacy" test has led to some surprising results. In 1988, the Court ruled that repeated warrantless rummaging by police through trash bags Billy Greenwood left in his trash can, which



ABOVE New York City agents pour liquor into sewer following a raid during the height of Prohibition, ca. 1921. NYWTS Photograph Collection. LEFT Bookies taking bets at horse races, Warrenton, VA, 1941. Photo by Marion Post Wolcott. BELOW Narcotics agents with over 400 lbs. of marijuana, 1963. NYWTS Photograph Collection



When can government seize or search its citizens and their property?

was placed curbside, were not “searches.” The Court, reversing California courts’ decisions finding a violation of the Fourth Amendment, reasoned that Billy lacked a “reasonable expectation of privacy” in the can’s contents, since most anyone could look inside it as it sat by the curb, and since he had left the trash there so a third party (the refuse collector) could take it. The point was that no search at all had occurred. The Court characterized the repeated careful police examinations of the trash bags’ contents in an oddly passive way, equating police combing through garbage bags to look for evidence with not “avert[ing] their eyes from evidence of criminal activity.” And an exploring government was equated, for Fourth Amendment purposes, with “animals, children, scavengers, snoops, and other members of the public.”

The surprises go on. The Supreme Court has held that passengers in an automobile lacked a reasonable expectation of privacy in the car; that the owner of a well-observed greenhouse lacked a reasonable expectation of privacy from a helicopter flyover that allowed a sheriff’s officer to look through two missing roof panels; and that users of residential telephones (prior to the cell phone era) had no expectation of privacy in the numbers dialed from their home, and so the use of a device to record those numbers did not constitute a search. Again, these cases were not about the legality of the underlying governmental conduct. They were about the government not needing a warrant, or any level of suspicion, before it engaged in all of the conduct outlined above.

### THE PERILS OF SHARING

One of the doctrines developed by the Court to explain such results, relevant in the residential telephone case just mentioned and in Billy Greenwood’s case, was also used to determine that sending a “wired” undercover agent into a home to purchase marijuana was not a search. Charles Katz may have had a reasonable expectation of privacy in the phone booth, but not so for James White, who unknowingly allowed an electronically transmitting government agent (an informer) into his home and conversed with him there. Why did the government need a warrant

to eavesdrop on Mr. Katz in the phone booth but not Mr. White in his home? Because Mr. White's eavesdropper (the wired informant) was visible to him. White shared information with the (visible) informer and, in doing so, assumed the risk that the informer was just that—an agent of the government. Mr. Katz, in the phone booth, assumed no such risk.

The decision in *U.S. v. White* (1971) was not without contention. Justice Douglas, dissenting, noted Franklin Roosevelt's observation that electronic eavesdropping by the government is "almost bound to lead to abuse of civil rights." Although White's case was decided forty-five years ago, Douglas was able to marshal arguments about technology that sound contemporary, or nearly so. He cited Professor Arthur Miller, who had argued that "sensing" technology combined with newly developed computer capacity meant that "there seem to be no physical barriers left to shield us from intrusion." Justice Harlan dissented as well, arguing that warrantless electronic eavesdropping would chill free expression and reduce people's sense of security.

The upshot of cases like *White*, disturbing to civil libertarians, was that when we shared information with one another, we lost our privacy, our security, from governmental intervention. Again, the government's ability to use wired informants in citizens' homes wasn't the issue. Whether the government needed any underlying justification, such as a warrant, was.

## **BALANCING TECHNOLOGY AND PRIVACY**

So advances in technology have presented Fourth Amendment challenges. *White*, after all, treated a wired agent as no different from a non-wired agent.

From these early cases involving public and private telephones and wired agents, the Court has gone on to consider (all without warrants) tracking by electronic beeper, tracking by a GPS device, scanning a home by thermal imaging, using drug detecting dogs, and searching smartphones as an automatic incident to arrest. The Court has sometimes been tentative in answering such questions, and some Justices have suggested that they would prefer legislative intervention on the matter of technology and search and seizure law.

In the GPS case, the Court actually reverted to the pre-1967 property theory of a search that was thought to have been abandoned in the *Katz* case, and it did essentially the same thing the following year in a case involving a police officer who walked a drug detecting dog to the front porch of a home. In the GPS case (*U.S. v. Jones*, 2012), the Court found that placing the device on a vehicle constituted a trespass, and was therefore a search that required a warrant. While this disposed of the legal issue, it will hardly prove helpful in cases where the government simply tracks one's GPS-equipped cell phone or uses cell tower location data. In the case of the drug dog on the porch (*Florida v. Jardines*, 2013), the Court ruled that police conduct was a search because it physically intruded on the home's curtilage, and therefore required a warrant. (In cases not involving the home, the Court has found that drug sniffs are not searches.)

In the "beeper monitoring" cases, the Court held that the government needed no warrant to use the devices to monitor movements on public roads (*U.S. v. Knotts*, 1983) but did need a warrant to monitor movements within a home (*U.S. v. Karo*, 1984). As for the

thermal imaging of a home, carried out in an effort to detect indoor marijuana cultivation, the Court decided that such conduct was a search and therefore required a warrant (*Kyllo v. U.S.*, 2001). The Court sought to be sensitive to the problem of protecting citizens from newly-developing invasive technology, but also balanced this sensitivity with an acknowledgement that if such technology was "in general public use," our reasonable privacy expectations regarding such technology would accordingly be reduced. The smartphone case (*Riley v. California*, 2014) centered on the issue of whether the police could search the phone's contents as a warrantless incident to an arrest (as is permissible with other items carried by an arrestee). The Court was sensitive to the wealth of information contained in a smart phone, and unanimously found the warrantless search unlawful.

Cases continue to arise in the lower courts that present issues at the intersection of technology, privacy, and security, such as the FBI's recent efforts to compel Apple Inc. to develop a method to unlock an iPhone recovered from one of the shooters in the December 2015 San Bernardino terrorist attack. Apple refused, asserting that such a method would imperil the security of iPhones everywhere. The FBI subsequently unlocked the phone with a method developed by a third party.

## **STOP AND FRISK, AND RACE**

There is a last Warren Court decision to consider, authored by Warren himself. It has proven central to the practice of our democracy. In 1968, in the midst of the Civil Rights Movement, the Court held that it was permissible to seize and search people on less than probable cause. Police officers were given discretion to briefly stop citizens if the police had "reasonable



ABOVE Traffic, Washington, D.C., 1913. Harris & Ewing Collection. MIDDLE Seven boys line up on fence as they are frisked by a policeman, 1956. Photo by Orlando Fernandez, NYWTS Photograph Collection. BELOW Joseph X talking to cop, showing him court order to take possession of house, 1965. Photo by Orlando Fernandez, NYWTS Photograph Collection.

suspicion” that criminality was afoot and to conduct a frisk (pat down the outer clothing) if there was reasonable suspicion the citizen was armed and dangerous. Warren’s opinion is both fraught with angst about race relations and informed by a kind of resignation to sad realities. It will do no good to use the exclusionary rule in cases of racial harassment, Warren says for the 8-1 majority, because the object of such conduct is not to secure conviction in court, but simply to harass:

The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.

Stop and frisk practices in New York City, Chicago, Newark, and elsewhere have since come to be seen as sites of racial profiling, and as partly responsible for higher rates of arrests and convictions of people of color, particularly African Americans. The more discretion police officers have to stop and frisk, the more room there is for the operation of conscious and unconscious racial bias. Among the legacies of the Warren Court and its rights revolution is thus a practice that has complicated the quest for racial justice.

*Utah v. Strieff*, decided just this past June, exacerbates these concerns. The Court found there that evidence gained after an unconstitutional stop (for which there was not even “reasonable suspicion”) could be admitted at trial, so long as the defendant had, unknown to the police officer, an outstanding arrest warrant (in this case, for a traffic violation). This holding

weakens the “exclusionary rule” established in *Mapp v. Ohio* (the first case described above, about making the Fourth Amendment matter) and so increases law enforcement incentives to stop people without any lawful justification, hoping that they might get lucky.

The chances of such luck are not remote. As Justice Sotomayor points out in her dissent, there are 180,000 outstanding misdemeanor warrants in Utah alone, and of the 21,000 residents of Ferguson, Missouri, 16,000 have outstanding warrants. It is hard to see how legal doctrines that seek to isolate themselves from such realities enrich, or even serve, our democracy.

ARTHUR G. LEFRANCOIS has taught at Oklahoma City University School of Law since 1979, where he has won a number of teaching and scholarship awards. He graduated from Beloit College and the University of Chicago Law School.

**EXTRA!** READ | THINK | TALK | LINK

- Oyez, IIT Chicago-Kent College of Law. Multimedia archive includes summaries of Supreme Court cases, searchable audio of Court proceedings (dating from Oct. 1955 forward), a panoramic tour of the Supreme Court building, and detailed information on every justice throughout American history. [oyez.org](http://oyez.org)
- Annenberg Classroom, Leonore Annenberg Institute for Civics. Video discussions with Supreme Court justices on constitutional issues; links to related news stories; a guide to the Constitution, Articles, and Amendments; and free downloadable e-books on democracy, justice, and rights. [annenbergclassroom.org](http://annenbergclassroom.org)
- The Supreme Court Historical Society. Video interviews with justices marking anniversaries of important Court decisions, scholar lectures on Supreme Court history and how the Court works, and interviews with authors writing about the Court. [supremecourthistory.org](http://supremecourthistory.org)





Speed Shift, David Holland

## THE NEWS TODAY: Seven Trends in Old and New Media

Will the future of journalism change our democracy?

ELAINE C. KAMARCK AND ASHLEY GABRIEL  
ART BY DAVID J. HOLLAND | PHOTOS BY GAGE SKIDMORE

**Twitter. Tumblr. Facebook. Digg. MySpace. BuzzFeed.** It's enough to make a baby boomer's head spin. And enough to make a millennial say, "So?"

Like every major technological revolution, from the printing press to radio and television, the Internet revolution's impact on society has been greeted with pessimism by some and optimism by others. Nowhere is this more true than in journalism and media. For instance, President Obama's 2015 State of the Union had fewer TV viewers than ever. But it was noteworthy for the live commentary it generated on Facebook and Twitter, and for the live online streaming coming from the White House that contained graphs, charts, and other data designed to make it easy for viewers to share via social media. So what does that mean? Are citizens less engaged because fewer watched the speech? Or are they more engaged because they interacted with their fellow citizens in a conversation about the speech (or parts of it)?

As the entire communications landscape morphs into the digital age, it is important to ask: What exactly has changed? And what does it mean? When it comes to journalism and its future, the health of the “fourth branch” of government (as it has been called) is critical to the future of democracy. Here (and in our full report at [Brookings.edu](http://Brookings.edu)), we present a picture of the old and the new so that others can speculate how it might impact the future of democratic governance.

Here’s our list of seven things we know to be true of old and new media:

1. Print newspapers are dinosaurs
2. Hard news is in danger
3. Television is still important
4. And so is radio
5. News is now digital
6. Social media allows news (and “news”) to go viral
7. For the younger generation, news is delivered through comedy

## #1 Newspapers Are Dinosaurs

The first item on our list comes as no surprise. Newspaper circulation is down. Fewer people today receive a newspaper than in years past, even though the population has grown in the last seventy years. When adjusting for population growth and recalculating newspaper circulation per capita (using data from the Newspaper Association of America), the full extent of the decline becomes apparent. In the 1940s, somewhere over one third of Americans received a daily newspaper. By the end of the first decade of the 21<sup>st</sup> century, readership was down by about half to less than 15 percent.

As circulation has plummeted, so has the number of newspapers. There were 1,749 American newspapers in 1945 and by the end of 2014, the number had shrunk to 1,331. Once again, when converted to per capita numbers, the trend is even more dramatic. We now have many fewer papers serving a much bigger population.

Of course a decline in newspapers and circulation doesn’t necessarily predict a decline in newspaper readership if, in fact, people are simply choosing to read the paper on their computers or on their mobile devices instead of in print. But, according to the latest data from the Pew Research Center’s State of the Media project, this isn’t happening nearly as much as some would think. Newspaper reading still happens mostly in print.

And yet, other data collected by Pew finds that, for the top newspapers at least, digital readership substantially tops their circulation numbers. Pew responds as follows: “Why this discrepancy? One clue lies in the time spent. The average visit to *The New York Times*’ website and associated apps in January 2015 lasted only 4.6 minutes—and this was the highest of the top 25 digital newspapers. Thus, most online newspaper visitors are flybys, arriving perhaps through a link on a social networking site or sent in an email.” And so, when individuals are asked about this, they may not think of this experience as “reading a newspaper,” but simply browsing an article online.

These trends are occurring across the board. Americans today are more educated than they were in the past, but the decline in readership has occurred at every educational level including the most educated. What all of this means for citizens’ ability to participate in their democracy is a topic that needs some more sorting out. Headlines on the topic run from “The Fading Newspaper” (Bloomberg, Jan. 16, 2014, updated Mar. 29, 2016) to “Maybe the Internet Isn’t Killing Newspapers After All” (*Chicago Magazine*, Oct. 1, 2014). To a certain extent, news has simply migrated from one platform to another. And yet, there is counter evidence suggesting that all Americans consume less news than they once did.

There is more clarity, however, around what this has meant for the business and employment side of the news business.

## #2 Hard News Is In Danger

While the impact of declines in circulation on citizen engagement and knowledge may still be a topic of debate, there is no debate on the effect on revenue and on newsrooms. First and foremost is the dramatic drop in advertising revenue. Pew research indicates that revenue from digital consumption of the news hasn’t begun to replace lost revenue from the decline in print circulation.

Declines in ad revenue have sparked a debate over whether or not information age media can find a business model that works for them. In addition to meager ad sales, various newspapers have tried to establish “pay walls” in order to get some income from their online viewers. But this has not been universally successful, with some papers trying it for a few weeks, discovering that their readership has dropped and then reversing course. At the same time, however, there is evidence that plenty of serious journalism is going on but it is going on behind pay walls. As John Heltman points out in an article in *The Washington Monthly*, paywall journalism provides excellent coverage of the government but “the audiences for these publications are lobbyists, corporate executives, Hill staffers, Wall Street traders, think tank researchers, contractors, regulators, advocacy group and trade association policy wonks, and other insiders who have a professional interest in up-to-the-second news on the policy issues and whose institutions can afford subscription prices that run thousands of dollars per year.”

Many journalists who once worked for general audience newspapers now find themselves working in specialty presses due to the fact that the dramatic



drop in ad revenues for general readership papers has had its most severe impact in the newsroom. According to the American Society for Newspaper Editors, total newsroom employment in 1978 was 43,000; by 2015, it had dropped to 32,900. These raw numbers are significant in themselves, but they are more dramatic when increases in population are taken into account. The number of people employed in ferreting out the news has decreased per capita. We now have half the number of people reporting on the news than we did approximately four decades ago.

These trends have left many people wondering who will collect hard news for the general public. While the Internet world has made it possible for everyone to express their opinion widely—whether they know anything or not—it has also confused readers. In the absence of supposedly neutral intermediaries such as reporters, fact-checkers, and editors, readers are having a hard time judging the credibility of what they read. In 2009, Howard Schneider, former editor of *Newsday*, established a “news literacy” program at Stony Brook University on Long Island, New York. The purpose of the program was to educate a generation of young people in how to read and understand news in an era when

**When it comes to journalism and its future, the health of the “fourth branch” of government (as it has been called) is critical to the future of democracy.**

the “gatekeepers” of traditional media were rapidly disappearing. “Over time,” wrote Schneider and Professor James Klurfeld, “the gatekeepers have been replaced in some cases by algorithms, and the wisdom of the crowd, tallies of ever-mounting ‘likes’ and ‘retweets’ which risk equating popularity with credibility” (“News Trends,” Brookings, June 2014).

Two big questions arise from these trends. Is the media’s traditional role as a check on government power eroded because fewer people are engaged in collecting hard news? And second, in an era when everyone has the ability to express their opinion and to repeat so-called “facts” (whether or not they are true), how can citizens know what to believe and how to react?

### **#3 Television Is Still Important**

People are still watching television for news, especially local news. In contrast to newspaper circulation, TV news viewership has remained fairly steady over the past few decades, and while ad revenue has fallen, it hasn’t fallen as much for television as it has for newspapers. Local news dominates,

followed by network and cable news.

The big difference in television over the years is the fact that the dominance of the evening newscasts has virtually disappeared. For much of the television era, news consisted of one broadcast in the evening by each of the three big networks. Americans interested in the news had a severely circumscribed set of options: They could tune in to ABC, CBS, or NBC and get fairly similar coverage of the day’s top stories.

And while older citizens are more likely to watch the evening news than their children and grandchildren, over the past two decades the decline in viewership has occurred in every age group. The days when network news anchors were famous and trusted arbiters of the news are gone forever. These days most people don’t even know who the news anchors are and the addition of overtly partisan networks like Fox and MSNBC has made the news as polarized as the country.

### **#4 And So Is Radio**

Radio is the oldest broadcast medium we have and, thanks to Americans’ continuing love affair with the

automobile, it has suffered less than newspapers. Traditional AM and FM radio still dominate the airwaves and enjoy a broad audience, even though the radio landscape is changing to include online outlets like Pandora and Slacker Radio. Talk radio also remains strong, with the number of news/talk radio stations growing and then leveling out in recent years.

But the impact of radio compared to other news sources and media platforms is low. The number of people getting their news from radio has also declined.

To think about it differently, the number of all-news radio stations devoted entirely to news coverage informs a meager one percent of radio listeners. So although Americans still turn on the radio during drive-time, they are opting for non-news radio, Internet radio, podcasts, and talk radio.

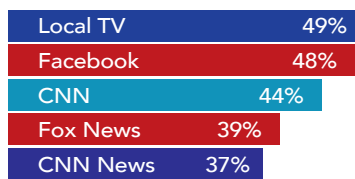
## #5 News Is Now Digital

One of the biggest questions facing those who seek to understand what the changing media landscape may mean to democracy is whether or not traditional media is simply migrating to new platforms without any diminution in the quantity and quality of news citizens receive. More and more Americans get news from online and digital sources as traditional media sources fall. There is also a trend among the digital news audience of moving away from personal computers only and onto mobile devices. Out of the top 50 digital news entities, 39 have more visitors from a mobile device than a desktop computer.

We've already speculated that digital news consumers—especially those on a mobile device—might be “flyby” readers. Whether or not this shift in news consumption to online platforms diminishes or improves citizen engagement is yet to be fully understood.

## #6 Social Media Allows News To Go Viral

Before we jump to the conclusion that the younger, tech-savvy generation is less well-informed than their parents and grandparents, we need to look at the role social media is playing in the dissemination of news. The following chart shows that Facebook is virtually tied with local television among “web users” when asked where they get their news about government and politics. In other words—news is still getting to people, just not through the traditional means. Millennials aren't necessarily less avid news consumers than generations past, but their news preferences and sources have shifted.



Source: Pew Research Center

There are upsides and downsides to the role of social media in news. On the one hand, the ability to “share” on Facebook or “retweet” on Twitter allows for the rapid dissemination of news and can prompt a deeper involvement in the news through discussions with friends and the broader online universe. On the other hand, it can also lead to fake or inaccurate “viral” news. For instance, Klurfeld and Schneider highlight the case of how Reddit users falsely identified the Boston Marathon bombers:

Reddit asked its followers to help find out who was responsible for the bombing. Reddit users vacuumed up every photo they could find on Facebook, Twitter and Instagram combined with vague police statements, and crowd sourced a photograph of the two bombers. *The New York Post* then picked up the photo

and plastered it on its front page. A great example of the value of social media . . . except for one problem: it was wrong. The two young men in the photo were completely innocent (“News Literacy,” Brookings, June 2014).

## #7 For the Younger Generation, News Is Delivered Through Comedy

One final data point that may be cause for concern. Or not. In 2012, most young people (here defined as aged 18-29) reported getting their news from two comedy shows, *The Colbert Report* and *The Daily Show*, both of which have left wing tendencies and are not the neutral sources for news that were associated with network news programs years ago. Steven Colbert has now gone on to host a late night television show and Jon Stewart has handed the host job of *The Daily Show* over to Trevor Noah, who has had an interesting career spanning educational TV, soap opera, and gossip TV. Although younger people also rely on non-satirical sources of news, we have to wonder—will the younger generation continue to get their news in comedy form or will they move to more traditional forms of news?

## What Does It All Mean?

It behooves us to ask whether or not any of this matters to the health of our democracy. We assume that an intelligent and informed citizenry is critical to the ability to make wise choices at the ballot box and to engage in meaningful civic activity. Has the Internet revolution degraded this ability, enhanced this ability, or simply moved it from one platform (traditional media) to another (digital, 21<sup>st</sup>-century technology)?

The pessimists will focus on the decline in newspaper readership, network television, and the number of professionals collecting hard news as proof



CLOCKWISE FROM TOP LEFT: President Barack Obama. Senator Jeff Flake (R-AZ). Senator Marco Rubio (R-FL) with talk-show host Sean Hannity. News anchor Jorge Ramos interviewing Senator Bernie Sanders (I-VT).

that there are serious consequences to citizen knowledge as a result of the Internet revolution. The optimists will point out that news is reaching people in new and unexpected ways and that the absence of traditional “gatekeepers” with the biases that all humans have (no matter how much they try to be neutral) has broadened the landscape of knowledge and opinion to which the public is exposed—with positive effects for democracy. They will also point out that the new technology allows for a two-way engagement with the news in ways that the old never did.

Or is it possible that we just don’t know yet?

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DAVID J. HOLLAND holds a BA in art from Oklahoma City University. *Speed Shift* (the opening image) is from

Holland’s “Modern Life” series, which illustrates how rapid changes in society and technology affect our lives and wellbeing. His work is exhibited across the Midwest, including the Oklahoma City Festival of the Arts and the Governor’s Gallery at the Oklahoma State Capitol. [davidhollandartist.com](http://davidhollandartist.com)

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- The above article was adapted with permission from the Brookings Institution, which published the original article in November 2015. See the full report, graphs, and research links at [brookings.edu](http://brookings.edu) (search: *The News Today*). View a “response” discussion with a panel of experts including Elaine Kamarck, E.J. Dionne, and others. (search: *New Media’s Influence on Old School Politics*)
- “The News IQ Quiz,” Pew Research Center. Test your knowledge of prominent people and news. [pewresearch.org](http://pewresearch.org)
- “When It Comes to Politics, the Internet Is Closing Our Minds,” *Intelligence Squared*. Experts debate whether the Internet and social media are broadening or narrowing worldviews. [intelligencesquared.us.org](http://intelligencesquared.us.org)
- “Long-Form Reading Shows Signs of Life in Our Mobile News World,” Amy Mitchell, Galen Stocking, and Katerina Eva Matsa, *Journalism & Media*, May 5, 2016. Report on how mobile users interact with news. [journalism.org](http://journalism.org)



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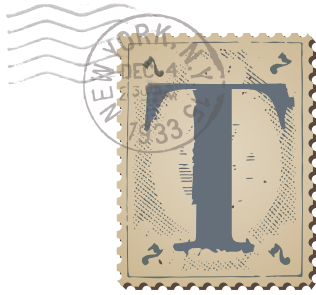
A portrait of Chief Judge Robert Henry, an older man with short grey hair and glasses, wearing a black judicial robe over a white shirt and a patterned tie. He is standing in a study or library, leaning on a wooden chair with a red upholstered seat. Behind him are bookshelves filled with books. To his right, there is a framed picture of a white horse with a red saddle, a framed calligraphic piece, and a lamp with a white shade. In the foreground, his right hand rests on a stack of books.

# POSTCARDS FROM PUBLIC SERVICE

REFLECTIONS ON A LIFETIME OF  
CIVIC PARTICIPATION

ROBERT H. HENRY, LEAD WRITER | PORTRAIT BY MIKE WIMMER

Official portrait, Chief Judge Robert Henry



he good folks at *Oklahoma Humanities*, with whom I often associate, have observed that I am something of a career public servant. Between state and federal offices, I have “served time” in all three branches of government. They asked me to write about this personal experience for a magazine issue on “Democracy.” Now, I’m getting old enough to ruminate, and lawyers are supposed to know how to tell stories, so I offer these thoughts—postcards, if you will—from each branch, along with some comments about citizenship, because every American can and should help “rule” this country.

*Democracy* comes from the Greek words *demos* (“common people”) and *kratos* (“rule”). The idea of democracy has come to mean (according to the tiny print of the Oxford English Dictionary): “That form of government in which the sovereign power resides in the people as a whole and is exercised either directly by them . . . or by officers elected by them.”

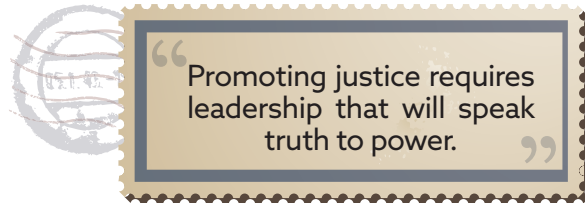
I have always felt that it was my calling to be one of those officers elected by the people. For at least three generations, the Henry family has stressed getting involved in government if one could find the time and convince the folks to elect you. Following are a few anecdotes that show my great fortune in being allowed by forgiving citizens to participate in all branches of our governmental tree—legislative, executive, and judicial—as listed in order of primacy in the framers’ minds and recorded in our remarkable Constitution of 1789.

### Recollections of a State Representative

American cartoonist Kin Hubbard once wrote, “Now an’ then an innocent man is sent t’ th’ legislature.” That’s exactly what happened in 1976. I had graduated from college in three years, taken overloads, and planned to graduate from law school in December. My uncle, who was serving in the Oklahoma legislature, called me into his law office to advise me that he was not seeking reelection and if I was still interested in politics, he thought I should run.

He felt that our family name was strong and that he had done a good job, and most likely no one would run against me. In fact, three people were preparing to run against him and two more got into the fray when I entered. I was 23; the oldest candidate was 53. It was a donnybrook, as those of us with Irish blood are wont to say. When the smoke cleared, I barely came in second in the primary, thus squeaking into a runoff.

Meanwhile, law school had reconvened in mid-August. Professor Eugene Kuntz was the preeminent oil and gas scholar of his day and author of the best treatise on the subject. I visited Professor Kuntz and explained my dilemma, that I had *planned* to be elected by acclamation but the voters simply hadn’t complied. I told him that



I’d like to take his class, but if he took attendance I would have to drop it, as the runoff required campaigning until the end of September.

I will never forget his reply, at which I still wonder: “Young man, it is more important to have the law of oil and gas ‘represented’ in the legislature than for you to have to attend my class. You will have to pass this course on your own—with at least a Gentlemen’s ‘C,’—for that would qualify you to practice oil and gas law.” I missed a lot of class, but I got elected. I lost fifteen pounds campaigning in the summer heat. (Maybe I should run for office again.)

Professor Kuntz’s admonition underscored part of why I ran for office. I wanted to do the right thing. I wanted our laws to make sense. I sort of intuitively understood Roscoe Pound’s antinomy that “the law must be stable, but it must not stand still.” And I was interested in promoting both good law and justice, although I felt I knew a bit more about the former than the latter. Defining “justice” is beyond the scope of these postcards, but I think it is a bit like Justice Potter Stewart’s famous definition of pornography: we can’t define it, but we know



Voting as a seasoned state representative, Sept. 1983. Photo by Bob Albright, OPUBCO

it when we see it. It's fairness. Children have a sense of it.

Long after I left the State House, I visited a good friend who is a federal judge in Arizona. We began discussing bills pending in our state legislatures that gave us cause for concern. She led with Arizona immigration laws. I followed with Oklahoma proposals to allow firearms on college campuses. She noted an Arizona bill creating a legislative committee to determine which federal laws it would enforce. I countered with our state's persistent efforts to exclude any usage of foreign law, religious law, and (even more inexplicable) international law in Oklahoma. Without international law we'd have to, for example, close Will Rogers World Airport!

Though I did not have to deal with these questions as a legislator, I see a pattern across our country utilizing sharia law (a religious legal system used by some members of the Islamic faith) to advance a decidedly un-American agenda. Admittedly, sharia law is widely misunderstood. But in the United States, one does not get to choose the law under which one is prosecuted; if one could, he or she most likely would *not* choose Oklahoma criminal law. The only use of

sharia law that opponents can cite is that it has been used in arbitral settings (like canon law is used by some Catholics or Jewish law is used by some Orthodox Jews in different cultures to resolve disputes). But isn't it okay for parties to decide, within constitutional constraints, that religious laws may decide a religious question by agreed-upon arbitration?

The unstated theme of anti-sharia legislation, and the organizations behind it, is simply anti-Islamic. It is a means to strike at Islam, to reduce religious freedom in America. In a state referendum, seventy-one percent of Oklahoma voters supported the amendment banning both sharia and international law. It's worth noting the irony of this legislative hate speech. Foreign law is bad, we are told, because it does not grant "the same fundamental liberties, rights, and privileges granted under the United States and Oklahoma Constitutions." *Like the liberty to demean Muslims?* Our country has long recognized international law, the "law of nations." The Declaration appeals to that law and the Constitution (art. I, sec. 8, cl. 10) specifically refers to it. Foreign law has been used from the very founding when appropriate and applicable.

Legislators are confronted with

many choices and too often they make the wrong ones. Although obligated to support, obey, and defend the federal—and, in state legislatures, the state—constitution, most have not read either. (Oklahoma's constitution is the size of a classic Russian novel.) Issues of justice require both preparation and deliberation, things that do not always occur in the legislative process.

Promoting justice requires leadership that will speak truth to power, leadership that will stand up to *ad populum* propositions that subvert justice. The "power" lawmakers need to stand up to certainly includes moneyed interests. But sometimes it even includes the folks back home. As Edmund Burke said to the Electors of Bristol: "Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion." It's tricky to stand up to those who elect you. A short word for it is courage.

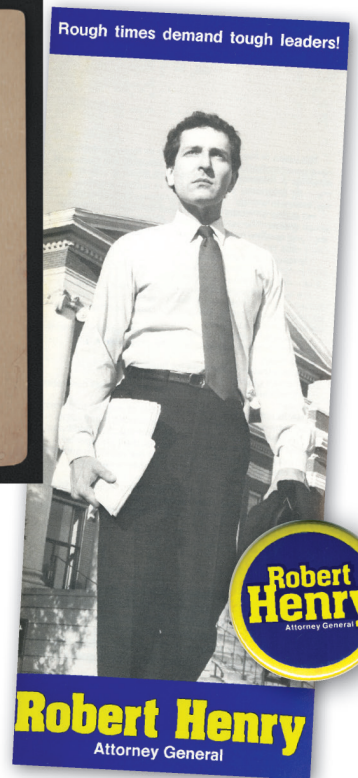
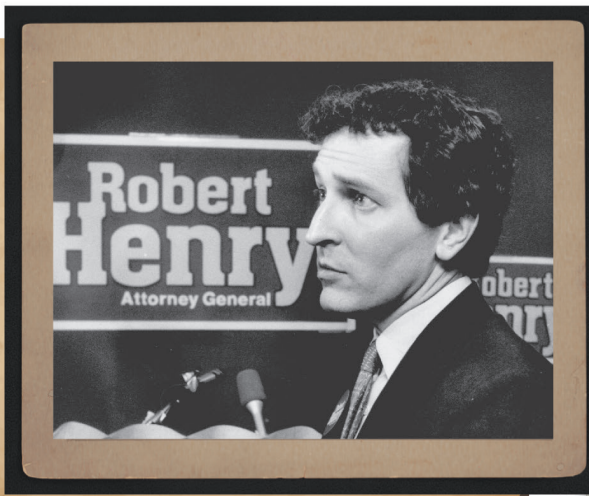
### Annals of an Attorney General

After a decade in the State House (I am a slow learner), I decided that my group of self-identified progressives could not make headway, and if I wanted to change some things





NEAR RIGHT On the campaign trail, running for Oklahoma Attorney General. Photo by George R. Wilson, OPUBCO. FAR RIGHT "Rough times demand tough leaders," says Henry in his bid for State Attorney General, 1986. Photo, campaign brochure, and button images courtesy Oklahoma Historical Society.



in Oklahoma, I was going to have to do it individually. I decided to run for statewide public office; the offices of governor or attorney general seemed to have the most promise. I opted for "top-cop," as the office of A.G. was popularly called. I had an idea of how the A.G.'s office should run, and it was a fascinating job. One area, though, was particularly difficult.

I had supported the death penalty in the legislature; I thought the death penalty deterred murder. I helped pass a bill providing for lethal injection (the first state to adopt this method) instead of our ghastly electric chair. In my newfound role as "the people's lawyer," I was called upon, one surreal evening in 1990, to facilitate a part of Oklahoma's first execution since the Supreme Court outlawed our capital punishment statute in 1972. Facts presented to the Tenth Circuit showed that while Charles Troy Coleman was burglarizing a home, the homeowners walked in and he murdered them; he also had a lengthy rap sheet of very violent assaults. He was convicted of first-degree murder and sentenced to death in 1979.

The evidence was overwhelming, and I was absolutely convinced that Mr. Coleman was guilty. State and federal

appeals all concluded that reversal of the death penalty was not justified. Even so, carrying out a lethal injection was, to understate it, not easy.

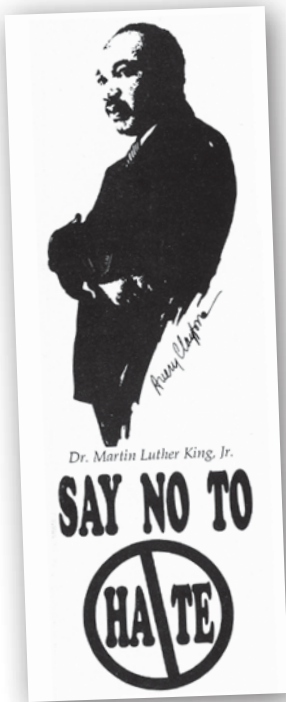
For some odd reason, executions were always scheduled at midnight. Policy required me to be in the governor's office with his legal counsel. We had two telephone lines open: one to the prison warden, where the execution was to be held, and another to the governor, who was across the street in the governor's mansion. At the given point, when the warden asked for orders, the governor was to order the execution. A no-nonsense wheat farmer and decorated Marine Corps veteran who had survived Iwo Jima, Governor Henry Bellmon was also thoughtful, brave, and tough. Now in his second stint as governor, Bellmon championed education reform and simplifying government. He supported the death penalty and had carefully reviewed the Coleman file.

Midnight came and went. Coleman's veins had diminished, making it difficult to get the needle inserted. Finally, the warden asked for orders. The governor said, "Let the execution begin. May God have mercy on his immortal soul." Though not for publication, it was the governor's prayer. It was mine, too.



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LEFT Bookmark from the “Say No to Hate” campaign. Courtesy Oklahoma Historical Society. RIGHT Swearing in ceremony for Henry’s first term as State Attorney General, Jan. 1987. Photo by George R. Wilson, OPUBCO. Courtesy Oklahoma Historical Society

It was lonely leaving the capitol that night at around 2:30. It was unreal. I did not feel good, or totally bad, but I still *felt*. I had done my duty as I saw it, but I wondered if the state had done the right thing. I still do.

Law school taught me much, but I may have learned the most about the simple majesty of the rule of law from a tragedy that occurred while I was attorney general. I received a call relating that Temple B’Nai Israel and Emanuel Synagogue, Oklahoma City’s two Jewish synagogues, had been desecrated, broken into at night and painted with hateful epithets. The president of Temple B’Nai Israel knew that I had been active in interfaith dialogue. He asked to bring the rabbis and community members to meet with me so that we could decide on a response. I readily agreed and convened a meeting with religious leaders from other faiths and Governor Henry Bellmon, who characteristically put his influence to work on the problem.

The result was a statewide “Say No to Hate” campaign. Our coalition held lectures and prayer meetings, produced essays and articles, distributed bumper stickers and religious newsletters, raising the vision of the state markedly, I believe. When African-American churches were desecrated, one of the rabbis led a coalition response. I will never forget seeing him on his knees, cleaning off the slogans painted on the small church’s wall.

The culmination of our campaign was a meeting in Tulsa, Oklahoma. The penultimate speaker

was a local African-American minister, a powerful orator as well as a greatly respected civic and religious leader. In the mighty rhetorical tradition of Dr. Martin Luther King, blending his dynamic voice with rhythm, alliteration, and biblical reference, he surged to his peroration: “We have just got to learn to love each other; we must learn to love each other.” It was persuasive and moving.

I wondered how the rabbi who was to close our meeting would be able to follow such a speech—because he was not an orator. He was of slight build, spectacled, scholarly, bookish. He was a teacher to the core, and I learned from him every time he spoke. I wondered what he could possibly say to close effectively and keep the momentum. He walked to the podium, with his hand on his chin, still deep in thought about what he had just heard. “We’ve got to learn to love each other,” he repeated softly. “Hmmm . . . That’s a wonderful aspiration—but it won’t work. I, for one, would be satisfied if we would just *follow the law*.”

It was one of the most powerful statements I have ever heard. The good rabbi did not disagree with the aspiration to love, but reminded us to use the principle we already had to help us come together as a community: Follow the law.

### Chronicles of a Chief Judge

Bill Clinton was still governor in 1987 when Oklahoma filed suit against Arkansas to protect the Illinois River from wastewater discharge by

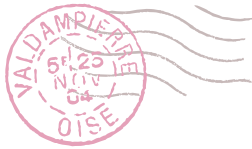
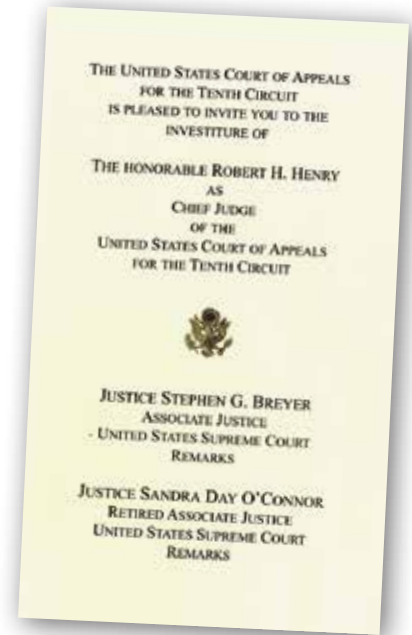


PHOTO Robert Henry with former Supreme Court Justice Sandra Day O'Connor, his esteemed friend who delivered remarks, noted in the engraved invitation at right, for Henry's investiture as Chief Judge of the U.S. Court of Appeals for the Tenth Circuit. Seal, at left, and invitation courtesy Robert H. Henry Archives, Oklahoma Historical Society; photo, Henry personal collection.



the city of Fayetteville. Despite the fact that I had “sued” him while A.G. of Oklahoma, later-President Clinton nominated me and I was appointed to the Tenth Circuit Court of Appeals.

Having just recently taken the monastic judicial ermine (I had been a federal judge only about a year and a half), I had a rare opportunity to address a conference in the Republic of Belarus, a former state of the Union of Soviet Socialist Republics, the USSR. Sponsored by an American Bar Association initiative, the conference was dedicated to establishing the rule of law in Belarus. It was organized by a courageous group of Belarussian lawyers, judges, and law professors who boldly challenged their president's authoritarian attempts to have judges serve “at his pleasure.”

While I felt that I had the professional freedom to speak out against the persecution of judges in Belarus, I was less sure about my personal security. The Orwellian images I had of the country that engendered the founder of the KGB were exacerbated by the starkness of the airport. Nevertheless, I found the Belarussian people to be warm and friendly, and our embassy folks assured me that even an opinionated fellow like me would in all likelihood be okay. I perhaps tested my limits in a “Kitchen Debate” with the president's representative at a social event our ambassador hosted. My Belarussian adversary's good sense of humor, coupled with a few well-placed jokes and conviviality-producing elixirs, made the evening

pleasurable and provocative. He even forgave my quote from Oklahoma socialist Oscar Ameringer: “Socialism grows where all other crops fail.”

As our plane lifted off the runway at Minsk, I must admit to an immense feeling of pride in the American Bar Association, an organization to which I belong but with which I have frequently disagreed and sometimes viewed as a turf-protecting interest group. In that moment, I saw the ABA's efforts in Europe for exactly what they were: a heroic, altruistic, and costly struggle to export the best of our legal principles. Key among these principles, as noted by former Chief Justice William Rehnquist, is “an independent judiciary with the authority to finally interpret a written constitution,” a legacy he called “one of the crown jewels of our system of government.”

My heady feeling did not last long. Shortly after my return, the press began to publicize attacks directed at Federal District Judge Harold Baer, Jr., for his initial decision to suppress what he viewed as improperly obtained evidence in a drug case. It is neither uncommon nor inappropriate for a judge's rulings to be criticized. What was uncommon was the suggestion that the judge should resign or be impeached because of a controversial ruling.

A few days later, attacks on judges gained new meaning for me. A former clerk faxed a copy of a conservative journal, *The Weekly Standard*, in which I had “made it big.” I had written a Court opinion, the magazine ominously reported, in favor



Robert Henry, President of Oklahoma City University

A handwritten signature in black ink that reads "Robert Henry". The signature is written in a cursive, flowing style.

of one Josephine Brown, a transsexual inmate who argued that Colorado's refusal to provide her with estrogen and other medical therapy necessary to maintain of her gender identity constituted cruel and unusual punishment. *Business Week* wrote: "[The Brown case] symbolizes what Republican strategists bemoan as the decline of American values." The author neglected to add that the opinion was a *panel* decision of three judges, joined by one of our Court's most conservative judges.

certainly didn't mandate that. It simply said that Mr. Brown had validly pleaded a claim that he needed treatment and remanded for the district court to examine that claim.

Judges should feel free to apply the law, even to controversial cases—not that Mr. or Ms. Brown's case ever should have been conceived as controversial. If a judge can be attacked, not for faulty application of precedent but because the litigants are unpopular, the pressure to shortcut rights will increase. The real danger is that political criticism will be successful in intimidating judges from doing their jobs.

*New York Times* columnist Anthony Lewis, twice winner of the Pulitzer Prize, defended judicial independence twenty years ago with words that still ring true:

A graphic featuring a quote in a serif font, enclosed in a decorative border with a scalloped edge. To the left of the quote is a stylized American flag with stars and stripes. The quote reads: "The real danger is that political criticism will be successful in intimidating judges from doing their jobs."

“The real danger is that political criticism will be successful in intimidating judges from doing their jobs.”

Haley Barbour, Chairman of the Republican National Committee, observed: “In Colorado, Clinton appointee Judge Robert Henry ruled in favor of a transsexual prison inmate who sued because the prison system refused to give him estrogen to make his body more like a woman’s.” (Parenthetically, let me pause to say Chairman Barbour was completely wrong—I was in *Oklahoma* when I issued that opinion!)

The characterizations of the opinion by those who discussed it in print completely and intentionally misstated the ruling to promote a preconceived political agenda. The holding had very little to do with whether transsexuals should receive estrogen and

It is a glory of America that anyone, however powerless or unpopular, can look to the courts for protection against an overweening government. That feature of our constitutional order has been envied by people around the world—and widely copied in recent years.

You would never know that from the rhetoric of our political leaders these days. Republicans and Democrats are competing in attacks on judges. The effect, and perhaps the intention, is to intimidate the judges on whom we all depend for our freedom.

Was it John Stuart Mill who said the larger threat to freedom of speech comes not from despots but from one another? I think it was. And I think he was right. Judicial independence

is constitutionally protected, but good citizens need to speak out and defend that independence which, as our current presidential election has revealed, is still under attack.

### Postscript to The People

These are just a few snapshots of my direct participation in our democracy. The rewards are many, so, if I may, let me encourage *you* to exercise the responsibilities of citizenship. If the people are to rule, we need to step up to the task.

Civic participation must include voting, and hopefully altruistic voting for the commonweal. It includes jury service, when called upon. And for those adventurous souls who want to experience democracy deeply, citizenship may involve public service in arenas from school boards (the bravest task of all), to city councils, to running campaigns or even running *in* campaigns.

Being a good citizen certainly does not mean that one must sample each branch of government as a participant. But surely our democracy does require a good citizen to participate with an eye toward the common good; for example, to “establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty.”

Our kind of democracy, a federal republic, works best when the people who choose the rulers choose wisely. “We the People” are responsible for and the beneficiaries of our republic’s future.

ROBERT HENRY, former Chief Judge of the United States Court of Appeals for the Tenth Circuit, is currently President and CEO of Oklahoma City University. He also conducts mediations and consults on a wide variety of legal matters. His wife, Jan, and his two cats, Joullian and Zoe, reside in a house with over 8,000 books. This article was adapted from remarks given for the Mark P. Robinson, Jr. Lecture at UC Irvine School of Law.

MIKE WIMMER is Chair of the School of Visual Arts at Oklahoma City University. He has illustrated fourteen children’s books and has been featured in OETA’s Emmy Award-winning *Gallery* series. His artwork includes some of the world’s largest corporations (e.g., Disney, Proctor & Gamble, RJR Nabisco, and Kimberly Clark), some 300 covers for almost every major publisher in the U.S., and he has painted the portraits of some of America’s most prestigious citizens. [mikewimmerportraits.com](http://mikewimmerportraits.com)

SPECIAL THANKS to staff at the Oklahoma Historical Society’s John & Eleanor Kirkpatrick Research Center and the Chickasaw Nation Law Library at Oklahoma City University School of Law for giving us access to archives and kindly scanning photos and ephemera for this article.

#### EXTRA! READ | THINK | TALK | LINK

- Citizenship University. TED-ED videos on voting, civic responsibilities, how power works in a democracy, and how you can amplify your own power to effect change. [citizenuniversity.us](http://citizenuniversity.us)
- “Reimagining Citizenship” video, The Aspen Institute. Moderator Eric Liu and a distinguished panel explore how to renew and reinforce a culture of strong citizenship. [aspensideas.org](http://aspensideas.org)
- National Constitution Center. Video library, audio podcasts, and blog posts with constitutional experts debating and exploring civil liberties, democracy, and interpretations of the U.S. Constitution. [constitutioncenter.org](http://constitutioncenter.org)

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JUNGER | from p. 14

doesn’t have much community; there’s nothing to return to that’s communal in nature. Peace Corp volunteers and people coming out of prison have the same problem. They’re going from very, very tight communal situations to a modern society that’s extremely individualistic. People don’t function as neighborhoods, they don’t function as communities, they don’t recognize groups outside of their family or at least not in the sense as a group of people they would make sacrifices for. That’s a real shock for returning vets.

You propose bringing veterans together, even if it’s only one time a year on Veteran’s Day so that vets have an opportunity to talk about their experiences. Is the benefit in “the telling” or in “the gathering” of community—or both? Veteran town halls, which are described in my book, would be very beneficial for veterans; but, to me, the real payoff is for the rest of us. The act of coming together and hearing our veterans tell their stories will have a more constructive effect on our sense of community than it will have on veterans and their sense of coming home. That process will really give people a sense of belonging. And if we all have a sense of belonging, veterans might think that there’s something to belong *to*. That’s the first step to bringing them home in a healthy way.

It has been a true pleasure to talk to you, Sebastian.

## FROM THE BOARD OF TRUSTEES

Susan McCarthy, Chair



As Chair of the Board of Trustees, I couldn't be more pleased to share with you our annual report and the list of our many donors from 2014-2015. Among them you will notice the names of our board members, each one of whom makes a significant financial contribution to Oklahoma Humanities. In addition, many of us host fundraising events and go on fundraising visits with staff members. Also among the list of donors are former board members, several who have been giving faithfully for decades—as well, of course, as so many others of you, our loyal constituents.

Please know how much each of us who serve on this board appreciates your gifts. Thanks to your donations, Oklahoma communities are strengthened by humanities programs that encourage individuals to learn about the human experience, understand new perspectives, and participate knowledgeably in civic life. It's wonderful to know that our donors share with us a commitment to lifelong learning and informed citizenry. Thank you!

### 2014-2015 ANNUAL REPORT

Financial Summary for the year ending October 31, 2015

REVENUE AND OTHER SUPPORT	
National Endowment for the Humanities	\$686,800
Program Support	24,908
Annual Campaign	38,371
Other Income	29,783
Investment Income	29,115
<b>Total Revenues and Other Support</b>	<b>\$808, 977</b>
EXPENSES	
Council-Conducted Programs	\$135,157
Council Grants (Regrants)	165,429
Fund Development	63,522
Programs Services	326,105
General Management	190,912
<b>Total Expenses</b>	<b>\$881,125*</b>

\*Expenses reflect one-time, atypical audit adjustments in previous year's grant payments and unrealized losses.

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and the Smithsonian Institution's traveling exhibit program for rural communities.

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NEXT UP: POETRY | Spring/Summer 2017

Calling all close-minded cynics! In our next issue, we'll search for something to love (or at least not hate) about that most dreaded of literary genres—poetry. With essays on "Poets Hating Poetry," cowboy poets in the American West, N. Scott Momaday on the mystery of language, Naomi Shihab Nye on the simple joy of listening—and, yes, a few poems too—we'll suspend doubt and give poetry a chance.