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Oklahoma Constitutional Law: Highway Robbery: *In re Oklahoma Capitol Improvement Authority*: The Eulogy for Oklahoma Constitutional Debt Limitations

*The practice, therefore, of contracting debt will almost infallibly be abused, in every government.*¹

— David Hume
English Political Philosopher
1711-1776

Introduction

On March 20, 1998, *Taps* sounded across the Oklahoma plains memorializing the demise of state constitutional debt limitations. The death was neither quick nor painless. Conceived in the naïve hope of governmental fiscal responsibility, constitutional debt limitations were borne with legalistic defects and loopholes. Debt limits led a tortuous life as the legislature continually circumvented the limitations and stole the very breath from their bosom by creating exceptions, special funds, and the concept of self-liquidating debt.

The Oklahoma judicial system, whose job it is "to say what the law [and the constitution] is,"² did not save the constitutional provision from a palliative existence. Instead, it joined the Oklahoma legislature in damaging the debt limits even further by judicially approving the techniques of circumvention. Although for some time the Oklahoma Supreme Court prolonged the life of debt limits with an occasional supportive decision, it rendered the fatal blow in a marginal 5-4 decision in the case of *In re Oklahoma Capitol Improvement Authority*.³

In that case, the Oklahoma Supreme Court was asked to decide whether highway improvement bonds, authorized by title 73, section 168.6 of the Oklahoma Statutes,⁴ created a prohibited debt within the meaning of the Oklahoma constitutional debt limitations.⁵ Although the Oklahoma Supreme Court held that the statute was constitutional, the judgment had far wider ramifications.⁶ The decision gave the Oklahoma legislature free reign to create future state debts serviced solely through

1. DAVID HUME, WRITINGS ON ECONOMICS 92 (Eugene Rotwein ed., Univ. of Wis. Press 1955).

2. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

3. 958 P.2d 759 (Okla. 1998).

4. See 73 OKLA. STAT. § 168.6 (2000).

5. See *infra* notes 107-09 and accompanying text.

6. See Editorial, *Good Call*, TULSA WORLD, Mar. 24, 1998, at 8, available in 1998 WL 11130220 (explaining that the length of time the case was before the high court, the slim majority ruling, and the lengthy dissents show that the justices agonized over the decision, which had extensive constitutional ramifications).

diversions of legislative appropriations from the general revenues of the state while circumventing the vote of the populace.⁷ In authorizing this legislative fiscal strategy, the Oklahoma Supreme Court rendered constitutional debt limitations meaningless.

This note focuses on the unique problems of constitutional debt limitations through revenue bond financing in four parts. First, the note gives a brief explanation of the evolution of constitutional debt limitations and the law prior to *In re Oklahoma Capitol Improvement Authority*. Second, the note introduces the facts of *In re Oklahoma Capitol Improvement Authority* and presents an analysis of the Oklahoma Supreme Court's opinion. Third, the note discusses the impact of this decision on Oklahoma constitutional law. Fourth, the note concludes with a discussion of the significance of *Oklahoma Capitol Improvement Authority* and the current state of debt limitations.

I. Law Prior to Oklahoma Capitol Improvement Authority

A. History and Key Aspects to Constitutional Debt Limitations

The concept of constitutional debt limitations is best understood from a historical perspective. With the industrial revolution, Civil War, and continued westward expansion of the Nineteenth Century came an increased need for transportation, primarily by canal and railroads.⁸ These critical modes of transit became imperative to expand trade, wage war, and extend society to the west coast. Most state legislatures borrowed recklessly to finance these capital construction projects.⁹ Debt limitations were enacted to curtail reckless borrowing and balance fiscal responsibility with the need for creating and improving modes of transportation. Despite the passage of time, this remains the crux of the issue today.¹⁰

Before constitutional debt limitations, states began falling deeper into debt, defaulting on loans and facing widespread chaos and financial debacles.¹¹ Eventually, voters moved to curtail future problems by amending their state constitutions to include maximums for aggregate state debt, restrictions rigidly setting the limit of official discretion, and in some cases, outright bans on state debt.¹² As new states joined the Union, they included debt limitations in their

7. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 761.

8. See *id.*

9. See *id.*; see also Comment, *State Aid to Industrial Development and the "Credit Clause,"* 28 MD. L. REV. 411, 415-16 n.30 (1968) (discussing the governmental carelessness in contracting debt for capital improvement projects).

10. See Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1306 (1991) (discussing the origins and history of constitutional debt limitation and its relationship with transportation).

11. See Charles W. Goldner, Jr., *State and Local Government Fiscal Responsibility: An Integrated Approach*, 26 WAKE FOREST L. REV. 925, 927-29 (1991) (discussing the fiscal upheaval created by the defaulting state governments).

12. See *id.* at 926; see also Robert H. Bowmar, *The Anachronism Called Debt Limitation*, 52 IOWA L. REV. 863, 867 (1967) (discussing the voters' inability to accept flexible debt provisions); Sterk & Goldman, *supra* note 10, at 1315-16.

constitutions to avoid the financial embarrassment of their predecessors.¹³ Unwilling to finance their futures on unreliable credit, the states began to restrict themselves to limited industrial progress in order to maintain stable state economies.¹⁴ Thus, most states in the Union created their debt limits in reaction to the adverse financial repercussions caused by their zealous attempt to profit by westward expansion and the industrial revolution.

However, Oklahoma's constitutional debt limitations had an entirely different origin.¹⁵ Having joined the Union in 1907, Oklahoma managed to bypass the impact and repercussions of the industrial revolution.¹⁶ Nevertheless, the "Sooner State" experienced a specific set of circumstances that led directly to public aversion to the legislature's unlimited power to create debt.¹⁷ Hit especially hard by the Great Depression, Oklahoma's government officials attempted to deficit-spend their way out of the economic morass of unemployment, business failures, and bank foreclosures of farmland.¹⁸ The legislature of 1937, dominated by the Democratic Party, passed bills appropriating millions for relief and reform.¹⁹ Tax revenue, however, was not provided to finance the increased spending, leaving the state with massive debt.²⁰

Following the lead of President Roosevelt, Governor Ernest "E.W." Marland proposed a comprehensive agenda that amounted to a "Little New Deal" for Oklahoma.²¹ The Oklahoma legislature ignored the Governor's recommendations, and instead "launched an orgy of spending that earned their session the title of the 'spending sixteenth' legislature."²² Unlike the Governor, the legislature's sole purpose was to bolster its own political power by "record, budget-shattering

13. See C. Robert Morris, Jr., *Evading Debt Limitations With Public Building Authorities: The Costly Subversion of State Constitutions*, 68 *YALE L.J.* 234, 241 (1958-59) (discussing the practice of new states learning lessons from their predecessors and creating constitutional debt limitations upon entering statehood).

14. See generally 64 *AM. JUR. 2D Public Securities and Obligations* § 42 (1972) (explaining that the constitutions of numerous states have made express provision to the effect that the state shall not create any debt or liability, except for certain delineated purposes, and only in monetarily limited form).

15. Note that the uniqueness of Oklahoma started with its birth through the Oklahoma land runs and continued throughout much of its history, to include the reasons for adopting Constitutional debt limitations. See generally JAMES SCALES & DANNEY GOBLE, *OKLAHOMA POLITICS: A HISTORY* 3-40 (1982).

16. See generally JAY J. WAGONER, *OKLAHOMA!* 138-39 (1987) (explaining the time and circumstances of Oklahoma's statehood).

17. See W. DAVID BAIRD & DANNEY GOBLE, *THE STORY OF OKLAHOMA* 297-98 (1994) (explaining the story of the Oklahoma land runs and how Oklahoma earned its nickname the "Sooner State").

18. See ODIE B. FAULK, *OKLAHOMA: LAND OF THE FAIR GOD* 168 (1986) (explaining the legislature's method for solving the problems created by the Depression).

19. See *id.*

20. See *id.*

21. *OKLAHOMA: NEW VIEWS OF THE 46TH STATE* 157 (Anne Hodges Morgan & H. Wayne Morgan eds., 1982) (explaining Governor Marland's economic recovery plan for Oklahoma).

22. *Id.*

appropriations.²³ The immediate consequence of this excessive spending was near bankruptcy for the State.²⁴

In 1939, Governor Leon C. Phillips led the passage of the balanced budget amendment to the Oklahoma Constitution.²⁵ The amendment forbade the state government from appropriating funds in excess of its revenues.²⁶ Although amended several times, the legacy of Governor Phillips remains in the constitution and is a testament to the people's war against runaway government spending.²⁷

Thus, Oklahoma and other states created debt limitations to address the state legislatures' inability or unwillingness to maintain fiscal responsibility and account for the future consequences of their actions.²⁸ Inevitably, the dichotomy between the public's need for capital developments and the "statutorily articulated aversion" toward state debt created conflict.²⁹ The outcome of this struggle was the legislatures' systematic development of a variety of escape devices and technical distinctions that permitted them to avoid the constitutional debt limitations.³⁰ These legal loopholes continued to evolve over the years, until the public viewed their existence as proper and needed.

Some of the escape devices can be classified as the creation of "public authorities," "special fund" financing, and leasing arrangements.³¹ Each legislatively created escape mechanism allowed the characterization of borrowing for certain public projects as outside the scope of the constitutional debt prohibitions.³² Ironically, the state legislatures who created debt limits were able to emasculate their own rules through legalistic subterfuge.³³

Through narrow judicial interpretation of constitutional debt and selective judicial enforcement of debt prohibition clauses, state courts have also embraced the calculated circumvention of constitutional debt limits and have made it their *modus operandi*.³⁴ Restrictive judicial interpretation of what constitutes indebtedness has

23. *Id.*

24. *See id.*; *see also* SCALES & GOBLE, *supra* note 15, at 179-201.

25. *See* W. DAVID BAIRD & DANNEY GOBLE, *THE STORY OF OKLAHOMA* 400 (1994) (describing the passage of the balanced budget amendment).

26. *See id.*

27. *See id.*

28. *See* Sterk & Goldman, *supra* note 10, at 1323-24; *see also* C. Dickerman Williams & Peter R. Nehemkis, *Municipal Improvements as Affected by Constitutional Debt Limitations*, 37 COLUM. L. REV. 177, 177-84 (1937) (discussing the purpose of debt limitation provisions).

29. Comment, *The Judicial Demise of State Constitutional Debt Limitations*, 56 IOWA L. REV. 646, 648 (1970-71) (discussing the opposing desires of prohibiting long-term debt and advancing capital improvements).

30. *See id.*

31. *See* Sterk & Goldman, *supra* note 10, at 1330 (explaining and listing constitutional debt limitation escape devices).

32. *See id.*

33. *See generally* A. JAMES HEINS, *CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT* at vii, 27 (1963) (concluding that state legislatures are generally able to circumvent constitutional debt restrictions).

34. *See* Goldner, *supra* note 11, at 935-36.

created a significant number of non-voter-approved state obligations.³⁵ Judicial interpretation changes over time and is shaped by changing mores, personalities, and politics. Additionally, state judges are not shielded from political influence, and thus are subject to the same demands that influence legislative decision making.³⁶ Because of the Oklahoma Supreme Court justices' appointment and retention process, it is naïve to believe that the court is able to completely avoid the influence of political considerations.³⁷ As in most bond issue cases in the past, the "affected governmental unit's needs were made known to the bench" before it handed down the decision.³⁸ Even the case of *Oklahoma Capitol Improvement Authority* was not immune from political sway.³⁹ As a result of this influence, the justices used strained arguments to disregard clear constitutional mandates in order to meet the political and economic needs of the state. Although the court's decision may not have been improperly influenced, the governor's unrelenting powerful presence created an aura of impropriety.

In the past, the most common way public authorities imaginatively evaded constitutional limitations on debt was to issue revenue bonds, which are bonds backed by the revenue flow created by the project instead of the state's taxing power.⁴⁰ The primary reason for issuing these non-guaranteed bonds was to "circumvent constitutional limitations on guaranteed debt."⁴¹ Courts found that constitutional debt limitations would not apply to obligations for which taxpayers were indirectly liable.⁴² Therefore, it became commonplace for state governments to finance capital improvement projects with repayment of the debt from revenues generated by the projects. However, problems arose when the users of the financed project were government agencies, whose only source of revenue was from general

35. See *id.* at 929.

36. See Sterk & Goldman, *supra* note 10, at 1358.

37. See *id.* at 1359.

38. Bowmar, *supra* note 12, at 890.

39. See Paul English, *State Road Bonds Face Summer Traffic Jam, Adviser Says*, DAILY OKLAHOMAN (Oklahoma City), Feb. 27, 1998, at A3 (stating that the Governor indicated that he had spoken to justices about the bond issue and stressed the importance of the program to them); John Greiner, *Divided Court Upholds State Road Bonds*, DAILY OKLAHOMAN (Oklahoma City), Mar. 21, 1998, at A1 (quoting Governor Keating as stating before appeals were filed, "[a]n adverse ruling would have been calamitous"); Marie Price, *Pair Defends Highway Bond Issue*, J. REC. (Oklahoma City), Oct. 6, 1997, at 1, available in 1997 WL 14397385 (stating that Governor Keating and the legislature overwhelmingly supported the legislation); Memorandum from Governor Keating to Chief Justice Kauger (Mar. 23, 1998) (on file at the Oklahoma Supreme Court) (stating that the Governor is grateful to the Supreme Court for the approval of the bond issue (before the rehearing)); see also Edwin Kessler, *Bonds Set Scary Precedent*, DAILY OKLAHOMAN (Oklahoma City), Jan. 2, 1999, at A4 (noting that the congratulatory letter from Governor Keating to Chief Justice Kauger was sent before appeals were filed).

40. See D. Roderick Kiewiet & Kristin Szakaly, *Constitutional Limitations on Borrowing: An Analysis of State Bonded Indebtedness*, 12 J.L. ECON. & ORG. 62, 69 (1996) (explaining the concept of revenue bonds and their functions). See generally James Mullen, *Municipal Corporations: Validity of Revenue Bond Financing in Oklahoma*, 2 OKLA. L. REV. 522, 523 (1949).

41. Kiewiet & Szakaly, *supra* note 40, at 69.

42. See *id.*

revenue collected from taxpayers. It was not long before these types of complications extended to Oklahoma.

B. Oklahoma Law Prior to Oklahoma Capitol Improvement Authority

Oklahoma's constitutional debt limitation law has evolved considerably since statehood. Like most states, Oklahoma adopted not only exceptions to debt limitations but also exceptions to balanced budget amendments for the goal of achieving sound state fiscal policy.⁴³ Even though the people reserved all power to determine whether or not debt should be incurred, the Oklahoma legislature, like other state courts, eventually created a plethora of escape devices in order to avoid the rules that legislatures had previously promulgated.⁴⁴ As one commentator has noted, "[these] techniques for creating synthetic debt, instruments that look and act like debt but are made up of components that are formally treated as something else, have become sophisticated in recent years."⁴⁵

1. Special Fund & Self-liquidating Debt

In the seminal case *Baker v. Carter*,⁴⁶ the Oklahoma Supreme Court recognized the "special fund doctrine" and self-liquidating debt.⁴⁷ In *Baker*, a statute authorized a public corporation — the Agricultural and Mechanical College of the State of Oklahoma⁴⁸ — to issue certificates of indebtedness to build dormitories with payment from revenues produced from the future rental of the dormitories.⁴⁹ The revenues creating the special fund did not exist prior to the issuance of the obligations; instead, they arose wholly out of the property created by the authorized bonds.⁵⁰ The special fund was not derived from a tax or an existing income-producing property.⁵¹ Because this process did not affect the state's public revenues, the project was said to be self-liquidating.⁵²

The court held that if particular bonds or obligations were secured by and payable only from the revenues to be realized from the property acquired or constructed from the proceeds of the bonds, they do not constitute debts of the state within the constitutional provisions.⁵³ The general taxpayers were insulated from the financial obligation since only the users of the project paid for the construction or

43. See OKLA. CONST. art. X, §§ 23-25; see also 62 OKLA. STAT. § 41.34 (1991) (displaying the exceptions to debt limitations and balanced budget amendments).

44. See Sterk & Goldman, *supra* note 10, at 1329-30.

45. Theodore P. Seto, *Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed To Do (And No More)*, 106 YALE L.J. 1449, 1490 (1997) (discussing the methods of avoiding constitutional debt limitations).

46. 25 P.2d 747 (Okla. 1933).

47. *Id.* at 758.

48. The Agricultural and Mechanical College is now known as Oklahoma State University. See 70 OKLA. STAT. § 3401 (1991).

49. See *Baker*, 25 P.2d at 748.

50. See *id.* at 754.

51. See *id.*

52. See *id.* at 755.

53. See *id.*

improvement. Consequently, constitutional debt limitations need not apply unless the debt is imposed on the populace as a whole.

The court identified two scenarios in which it would find a violation of constitutional debt limitations. First, a violation would exist if the indebtedness created a liability whereby the state or agency may suffer a loss if the special fund was insufficient to pay the obligation incurred.⁵⁴ Second, a violation would exist if the state was compelled to feed the special fund from other revenues in addition to those arising from the special improvement contemplated.⁵⁵ Further, in the second scenario, the court found that "[s]uch a subterfuge, if sanctioned would go far to effectually wipe out the purpose and intent of the constitutional provision."⁵⁶

2. "Restricted" Special Fund Doctrine

The Oklahoma Supreme Court refined and limited the scope of the self-liquidation doctrine in *Boswell v. State*.⁵⁷ The *Boswell* court held that a multi-year obligation for a capital improvement project, which is to be repaid from a special fund, is self-liquidating only if the money for repayment is generated solely from the project and not from state revenues that could be distributed to another public function.⁵⁸ The court limited the special fund doctrine by differentiating between a "special fund" and the "special fund doctrine."⁵⁹ The court defined a "special fund" as a "particular fund derived from a specific tax levied for a specific purpose"; whereas, the "special fund doctrine" describes "a fund partaking of the nature of a trust fund derivable from a self-liquidating project."⁶⁰ Moreover, the *Boswell* court rejected the "expanded special fund doctrine," which applies to obligations that are repaid from the future net income attributable to improvements to an existing property and that provide for the extension or improvement of only state property.⁶¹ In other words, the *Boswell* court found that self-liquidating debt cannot be applied to an expansion or enhancement of state property, even if the property was originally created by the use of general taxation.

Boswell involved facts very similar to those in the *Oklahoma Capital Improvement Authority*. In *Boswell*, the State Highway Commission sought approval of a statutorily authorized bond issue for construction and repair of state highways and bridges to be retired by an excise tax on motor fuel.⁶² Although the Act

54. See *id.* at 757.

55. See *id.*; see also Williams & Nehemkis, *supra* note 28, at 198 ("Consistent with the premise that the special fund contract, in order not to constitute debt, must provide immunity for the taxpayer is the rule that the special fund may not be 'fed' from taxes or the proceeds of taxation.").

56. *Baker*, 25 P.2d at 757.

57. 74 P.2d 940 (Okla. 1937).

58. See *id.* at 949.

59. *Id.* at 946.

60. *Id.* at 950.

61. See *id.* at 947-48 (explaining that the "expanded special fund doctrine" applies to obligations that provide for the extension or improvement of state property, and that those obligations are payable out of the future net income of the property as improved).

62. See *id.* at 941-42 (explaining that motor vehicle registration and license tax revenue was to be diverted into a special fund pledged for payment of the highway revenue anticipation notes).

declared that the revenue anticipation notes (in the sum of \$35 million) were not to be considered debts or general obligations of the state, the *Boswell* court recognized that such declaration was not dispositive of the cause.⁶³ Also, the court held that one legislative assembly could not guarantee the lifespan of its legislation relating to the fiscal affairs of the state beyond the period⁶⁴ of its biennium.⁶⁵

The court rejected the proposed bond issue because the highway improvement project was not self-liquidating. More specifically, the special fund was not created from taxes that constituted a part of the state's general revenue otherwise devoted to a legitimate public use.⁶⁶ Hence, the fund created by the imposition of motor fuel taxes was not a "special fund" within the meaning of the special fund doctrine and violated the state's constitutional debt limitations.⁶⁷

3. Clarifying Self-liquidating Debt

In 1954, the Oklahoma Supreme Court further limited the concept of self-liquidating debt. In *In re Oklahoma Educational Television Authority*⁶⁸ the court held that it is a violation of constitutional debt provisions to authorize a bond issue to be repaid out of revenues accruing to an already existing fund for the sole purpose of retiring such bonds.⁶⁹

In that case, the Oklahoma Educational Television Authority requested approval of a revenue bond issue, to be paid for with money from the Oklahoma Public Building Fund for the construction and operation of public television facilities.⁷⁰ Although the fund was not a state tax revenue fund, it served purposes that if not supported by the state fund, would have to be paid for with tax money.⁷¹ The bonded debt was not self-liquidating because it was made against a permanent state fund and future revenues.⁷²

4. Lease Revenue

Six years later, in *In re Oklahoma Capitol Improvement Authority*,⁷³ the court held that a statutorily authorized bond issue that was to be repaid solely from the

63. *See id.* at 943.

64. Note that the period of Oklahoma's biennium, the period for which appropriations are made, is now an annual session, as opposed to the two-year period that existed when the court made its holding.

65. *See Boswell*, 74 P.2d at 947.

66. *See id.* at 949.

67. *See id.* at 946.

68. 272 P.2d 1027 (Okla. 1954).

69. *See id.* at 1035; accord *In re Oklahoma Turnpike Auth.*, 221 P.2d 795, 804 (Okla. 1950); *In re Oklahoma Planning & Resources Bd.*, 203 P.2d 415, 417 (Okla. 1949); *In re Board of Regents for Okla. Agric. & Mechanical Colleges*, 167 P.2d 883, 883-84 (Okla. 1946); *State ex rel. Kerr v. Grand River Dam Auth.*, 154 P.2d 946, 949 (Okla. 1945); *In re Board of Regents of Univ. of Okla.*, 161 P.2d 447, 448 (Okla. 1945); *Sheldon v. Grand River Dam Auth.*, 76 P.2d 355, 361-62 (Okla. 1938). Each of these cases offer examples of court-approved self-liquidating bond issues in Oklahoma.

70. *See Oklahoma Educ. Television Auth.*, 272 P.2d at 1028-29.

71. *See id.* at 1033.

72. *See id.*

73. 355 P.2d 1028 (Okla. 1960).

rents and revenues of buildings to be erected, did not constitute a violative state debt.⁷⁴ The court found the bonds for state office buildings were self-liquidating because the legislature appropriated to the tenant state agencies sufficient funds to pay the rent that would amortize the bonds.⁷⁵ Further, the court noted that any contract to pay money in the future creates a debt, but contracts payable in installments, if the consideration is also provided in the future, do not violate the constitutional debt provisions.⁷⁶

The court found that use of state funds to pay the rent was a proper expenditure.⁷⁷ The court found no difference between a state agency paying rent through a lease agreement to a private party or to the Authority.⁷⁸ Furthermore, the court found that a multi-year lease agreement did not bind subsequent legislatures to make appropriations to pay the rental of state departments occupying space in the buildings, because consideration that the payor is to receive in return for such payments will be provided in the future.⁷⁹

III. *In re Oklahoma Capitol Improvement Authority*

A. *Background of the Case*

Pursuant to title 73, section 160 of the Oklahoma Statutes,⁸⁰ the Oklahoma Capitol Improvement Authority (OCIA) brought an action to determine the constitutional validity of title 73, section 168.6 of the Oklahoma Statutes,⁸¹ authorizing a highway improvement bond issue for the purpose of building and improving Oklahoma's transportation system.⁸² The OCIA brought the case before the Oklahoma Supreme Court to prevent future parties from challenging the same issue in other courts and potentially delaying issuance of the bonds and commencement of the program.⁸³

74. *See id.* at 1032-33.

75. *See id.*

76. *See id.*

77. *See id.* at 1031.

78. *See id.* at 1032.

79. *See id.* at 1033.

80. *See* 73 OKLA. STAT. § 160 (1991). The statute provides in pertinent part that "[t]he Authority is authorized, in its discretion, to file an application with the Supreme Court of Oklahoma for the approval of any bonds to be issued hereunder, and exclusive original jurisdiction is hereby conferred upon the Supreme Court to hear and determine each such application." *Id.*

81. *See* 73 OKLA. STAT. § 168.6(A) (Supp. 1997). The statute provides in pertinent part that "[t]he Oklahoma Capitol Improvement Authority is hereby authorized to issue bonds or other negotiable instruments or evidences of indebtedness in the principal amount sufficient to generate Three Hundred Million Dollars. (\$300,000,000.00) in proceeds available to fund the construction and improvement of the highway system in this state as set forth in this act.

Id.

82. *See* Bill May, *A Busy Week*, J. REC. (Oklahoma City), Aug. 19, 1997, at 5 (explaining that the statute is in coalition with House Bill 1629, passed in the waning days of the 1997 legislative session; House Bill 1629 provided a mixture of general appropriation funds and bond sales to finance highway construction over the next five years).

83. *See* Brian Ford, *Road Construction Bond Issue Gains*, TULSA WORLD, Sept. 24, 1997, at A8

Although constitutional fiscal responsibility has survived in Oklahoma since statehood, the state provided a balanced budget amendment on March 11, 1941, requiring state-issued bonds to be backed by a dedicated revenue stream.⁸⁴ According to the balanced budget amendment, bonds not approved by the voters and not backed by a dedicated revenue stream violate the constitutional prohibition of state debt.⁸⁵ Consequently, Edwin Kessler, head of the public advocacy group "Common Cause of Oklahoma,"⁸⁶ led the uphill battle⁸⁷ in court to oppose the OCIA in regard to the bond issue.⁸⁸

Originally, the mission of the OCIA was to act as a funding source for construction of state agency offices by acquiring, equipping, contracting, and operating buildings.⁸⁹ To help the OCIA accomplish its mission, the legislature gave the OCIA authority to issue revenue bonds specifically for the construction and equipping of these office buildings and other state facilities.⁹⁰ In 1996, the Oklahoma legislature statutorily broadened the purpose, authority, and powers of the OCIA to include the construction, repair, and maintenance of state highway infrastructure.⁹¹ The amendment provided for certain agreements between the OCIA and the Oklahoma Department of Transportation (ODOT) for issuing evidence of indebtedness or bonds in certain amounts for certain purposes.⁹² In the current case, legislative leaders wanted the proposed bond issue for new state

(explaining motives for bringing the case to the Oklahoma Supreme Court).

84. See OKLA. CONST. art. X, § 23; see also *In re Oklahoma Capitol Improvement Auth.*, 958 P.2d 759, 789 (Okla. 1998) (discussing the purpose of the amendment).

85. See OKLA. CONST. art. X, § 23.

86. See generally C.T. Foster, Annotation, *Presumptions and Burden of Proof as to Violation of or Compliance with Public Debt Limitation*, 16 A.L.R.2d 515, 557 (1951) ("Charges that a proposed public expenditure or bond issue . . . will be or is invalid because violative of the debt limitation imposed by constitution . . . are frequently met with in [sic] actions brought by taxpayers to restrain the public body from incurring a proposed obligation . . .").

87. See *id.* at 523 (explaining that the majority rule is that the party opposing a public obligation has the burden of proving that such obligation violates the applicable debt limitation provision of the law).

88. See Brendan Coffey, *Oklahoma Readies \$300 Million Bonds With No Real Backing*, CAPITAL MARKETS REP., Apr. 14, 1998 (discussing the fight against the bond issue); see also Tim Talley, *Citizens Group Asks High Court To Review OK of Bond Sale*, DAILY OKLAHOMAN (Oklahoma City), Apr. 9, 1998, at 5.

89. See 73 OKLA. STAT. § 152(A) (Supp. 1997) (explaining that the OCIA was designed to develop and improve the Oklahoma capitol area, hence the name); see also *Oklahoma Capitol Improvement Auth.* (visited Aug. 1, 2000) <<http://www.oklaosf.state.ok.us/osfdocs/budget/bb96-105.html>> (providing general information on the OCIA, financial obligations, and missions).

90. See 73 OKLA. STAT. § 152(A); see also John Greiner, *First Steps Taken On Road Bond Issue*, DAILY OKLAHOMAN (Oklahoma City), Aug. 23, 1997, at 6 (listing the membership of the OCIA).

91. See 73 OKLA. STAT. § 161(6) (Supp. 1997). The statute provides in pertinent part that [t]o make and enter into contracts and agreements with the departments and agencies of the State of Oklahoma and/or federal government relating to the rent, amortization of cost and use of the building by such departments and agencies, or relating to the construction, improvement, repair, and maintenance of the highway infrastructure in this state . . .

Id.

92. See *id.*

highways to pass through the OCIA rather than the Turnpike Authority to avoid any chance of the new highways becoming toll roads.⁹³ This procedure of avoiding the Turnpike Authority was a major departure from former legislative actions.⁹⁴ Regardless of which governmental authority controlled the bond issue, the financing concerns remained the same.

The MBIA Insurance Corporation (MBIA) insured the bonds, which already had high credit ratings.⁹⁵ The ratings reflected Oklahoma's payment history on lease-revenue bonds, the weaker security that is contingent on annual legislative appropriation, and the state's credit standing.⁹⁶ OCIA sold the bonds through negotiation to an underwriting team headed by Salomon Smith Barney and secured the bonds by monthly "lease" payments made by the ODOT to the OCIA.⁹⁷ The OCIA-issued bonds were to be retired over a period of ten years from legislatively appropriated funds paid from the ODOT under a leasing agreement to the OCIA. The appropriated funding was to be derived from several sources including: prepaid user fees; direct taxes; Rainy Day Funds⁹⁸ earmarked for the State Transportation Fund;⁹⁹ and general revenues collected for the State Highway Construction and Maintenance Fund.¹⁰⁰ In addition, the OCIA promised to pay the interest payments on the debt on a semiannual basis from these same funds.¹⁰¹

93. See Chuck Ervin, *U.S. 75 Due First Work in Program*, TULSA WORLD, July 3, 1997, at A11; Marie Price, *List of Projects Due for Highway Plan*, J. REC. (Oklahoma City), May 15, 1997, at 3 (discussing the fear of legislative leaders that the issuing agency would be the Oklahoma Turnpike Authority).

94. See Bill May, *Keating Gives "Pep Talk" on Highway Construction Program*, J. REC. (Oklahoma City), June 3, 1997, at 6 (stating that using the OCIA for highway improvement was a significant deviation from standard operating procedures).

95. See *Munis Up 1/8; Latest Supply Torrent Seen at \$2.5 Billion*, CAPITAL MARKETS REP., July 8, 1998 (explaining that the bonds have ratings of single-A2 from Moody's and single-A-plus from Standard & Poor); see also Official Statement of the Oklahoma Capitol Improvement Authority, State Highway Capital Improvement Revenue Bonds, Series 1998, at 23 [hereinafter Official Statement].

96. See *Oklahoma Capitol Imp. Auth. / Moody's — 2: Cash Balances Cited*, CAPITAL MARKETS REP., July 2, 1998.

97. See Paul English, *State Road Bonds Face Summer Traffic Jam, Adviser Says*, DAILY OKLAHOMAN (Oklahoma City), Feb. 27, 1998, at 3; Edwin Kessler, *State Road Plan Raises Questions*, TULSA WORLD, June 7, 1998, at 62 (explaining that the bond underwriting firm was selected noncompetitively); see also Official Statement, *supra* note 95.

98. See Brian Ford & Chuck Ervin, *House Easily Passes \$1 Billion Road Bill*, TULSA WORLD, May 30, 1997, at A3 (explaining that House members compromised by agreeing to use the state's Constitutional Reserves "Rainy-Day" Fund to help pay for the plan).

99. See 69 OKLA. STAT. § 1501.1(A) (1991). The statute states in pertinent part that "[t]he fund shall be subject to legislative appropriation and shall consist of revenues apportioned to such fund by provisions of the Oklahoma Statutes imposing taxes upon various motor fuels and of such other revenues as may be provided by law." *Id.*

100. See 69 OKLA. STAT. § 1501(a) (1991). The statute states in pertinent part that the fund consists of "[a]ll monies received by taxation or otherwise for use on the state highways of this state." *Id.*

101. See Official Statement, *supra* note 95, at 5; see also *Committee Approves Sales of Bonds to Help Fund Construction, Prison Beds*, J. REC. (Oklahoma City), Sept. 2, 1997, at 3 (explaining that a member of the legislative oversight committee noted that the latest projection is that less than \$50 million will be paid in interest and fees); *Oklahoma Panel Approves \$346 Million Highway, Prison Bond Sale*, CAPITAL MARKETS REP., Aug. 29, 1997 (explaining that Edwin Kessler noted that nearly \$100 million

It is noteworthy that the OCIA-issued bonds only provide a portion of the required funding for the state highway project. Under the two-phase funding program, the initial \$700 million three-year funding phase consists of not only the bond issue proceeds,¹⁰² but also additional constitutional reserve funds and general revenue funds.¹⁰³ The state would undertake the second \$300 million contingent funding phase only if the state economy continued to exhibit substantive growth.¹⁰⁴ The legislature created this condition precedent to avoid burdening the state with massive debt and "jeopardiz[ing] the state's ability to raise bonds in the future should [it] have to respond to some unforeseen emergency"¹⁰⁵

B. Question for the Court

The primary issue in *Oklahoma Capitol Improvement Authority* concerned whether highway improvement bonds authorized by title 73, section 168.6 of the Oklahoma Statutes constituted valid obligations or illegal debt under existing balanced budget amendments, election requirements, and debt limitations of the Oklahoma Constitution.¹⁰⁶ In determining whether the proposed bonds violated article 10, section 23,¹⁰⁷ section 24,¹⁰⁸ and section 25¹⁰⁹ of the Oklahoma

in interest and fees would be paid during the ten-year life of the bonds).

102. Note that general revenues and "Rainy Day" funds are being appropriated not only to retire the bonds, but also to serve as additional funding for the first funding phase of the transportation program.

103. See Official Statement, *supra* note 95, at 8; see also Marie Price, *Where Did the State's Money Go?*, J. REC. (Oklahoma City), June 10, 1997, at 1, available in 1997 WL 14394759.

104. See Price, *supra* note 103; see also Chuck Ervin, *Prospects Dim for Road Plan*, TULSA WORLD, May 23, 1997, at A16 (discussing that in order for there to be continued yearly funding there would have to be a six percent annual growth in state revenue and the Contingency Review Board would have to unanimously approve it); John Greiner, *Panel OKs Prison, Road Bond Issues*, DAILY OKLAHOMAN (Oklahoma City), Aug. 29, 1997, at 1 (stating that the Legislature will spend an additional \$300 million if economic conditions remain good).

105. Marie Price, *Legislators Approve Road Program Targeting OKC*, TULSA, J. REC. (Oklahoma City), May 30, 1997, at 11.

106. See *In re Oklahoma Capitol Improvement Auth.*, 958 P.2d 759, 761 (Okla. 1998).

107. See OKLA. CONST. art. X, § 23. The section provides in pertinent part that [t]he state shall never create or authorize the creation of any debt or obligation, or fund or pay any deficit, against the state, or any department, institution or agency thereof, regardless of its form, or the source of money from which it is to be paid, except as may be provided in this section and in sections 24 and 25 of Article X of the Constitution of the State of Oklahoma

Id.

108. See OKLA. CONST. art. X § 24. The section provides in pertinent part that "[i]n addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection or to defend the State in war." *Id.*

109. See OKLA. CONST. art. X, § 25. The section provides in pertinent part that [e]xcept the debts specified in sections twenty-three and twenty-four of this article, no debts shall be hereafter contracted by or on behalf of this State, unless such debt shall be authorized by law for some work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty-five years from the time of the contracting thereof. No such law shall take effect until it shall, at a general election, have been submitted to the people and

Constitution, the court had to resolve four secondary issues. First, the court was required to determine the intent of the constitutional debt limitations. Second, the court was required to interpret whether the bonds were considered debts and legal obligations of the state or simply moral obligations. Third, if the court decided the proposed bonds were debts, then the court faced resolving whether the debts fell within the special fund exception as self-liquidating debt. Finally, the court had to ascertain whether the multi-year lease obligation required self-liquidation or was considered a separate exception.

C. Decision of the Court

The Oklahoma Supreme Court held that the highway improvement bonds issued pursuant to title 73, section 168.6 of the Oklahoma Statutes were constitutional.¹¹⁰ The court found that unless a statute is shown to be fraught with constitutional infirmities, the court was bound to interpret the statute so as to avoid constitutional doubt of the provision's validity.¹¹¹ At no time did the court find that the statute violated debt prohibitions of the Oklahoma Constitution; thus, it approved the bond issue.¹¹²

The court held that, because the statute in question did not bind future Oklahoma legislatures to make the anticipated appropriations, the bonds did not create "debt" within the meaning of the Oklahoma Constitution.¹¹³ The court found that the full faith and credit of the state was not pledged, because there was only the prospect, as opposed to the promise, of future annual appropriations.¹¹⁴ The statute created a "moral obligation" for future legislatures to appropriate funds, but not a "legally enforceable" promise constituting a debt.¹¹⁵

The court further held that even if the bonds could be considered a debt, they are self-liquidating because a prepaid direct and dedicated tax on fuels and user fees, such as vehicle licenses, was specifically earmarked by title 73, section 168.6 of the Oklahoma Statutes to retire the bonds on an annual basis.¹¹⁶ The combination of taxes and fees created a revenue stream directly related to the construction and maintenance of highways, which is the prerequisite for the revenue stream.¹¹⁷

The court further reasoned that because multi-year leasing and bond financing rest upon the same legal foundation, *stare decisis* mandates the approval of the

have received a majority of all the votes cast for and against it at such election

Id.

110. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 761.

111. See *id.* at 763 (quoting *Gilbert Cent. Corp. v. State*, 716 P.2d 654, 658 (Okla. 1986)).

112. See generally *Gruen v. Tax Comm'n*, 211 P.2d 651, 656 (Wash. 1949) ("[A] statute cannot be judicially declared beyond the power of the legislature to enact unless in conflict with some specific or definite provision of the constitution.").

113. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 761.

114. See *id.*

115. *Id.* at 775-76.

116. See *id.* at 764.

117. See *id.*

bonds.¹¹⁸ Moreover, the court reasoned that its prior decisions would not warrant the invalidation of the statute even if the debt were not self-liquidating.¹¹⁹

D. Subsequent History

A petition for rehearing, filed on April 8, 1998, was denied on April 30, 1998.¹²⁰ On May 1, 1998, the respondents filed a notice of intent to appeal to the United States Supreme Court and a motion to stay mandate. Subsequently, on June 23, the motion to stay the effectiveness of the court's decision was denied.¹²¹ Ultimately, the respondents filed a petition for certiorari to the United States Supreme Court, which was denied on October 5, 1998.¹²²

IV. Analysis

The Oklahoma Supreme Court sustained the constitutionality of the highway improvement bond issue on multiple and contradictory grounds. It provided various alternate rationales to support its argument that the debt limitations were not violated. The court was hardly unified. One justice concurred by reason of stare decisis, while three justices concurred specially. Each of the four dissenting justices not only wrote their own opinions, but also joined with each separate dissenting justice.

The court disregarded the seventeen-page dissent, which attacked the majority opinion on the grounds of legislative intent, moral obligations as legal debt, self-liquidating debt, and stare decisis. It ignored scholarly analysis of the "constitutional infirmities"¹²³ inherent in such a transaction and overlooked the constitutional prohibitions to contracting debt without a vote of approval from the people, regardless of whether the debt was of a legal nature or simply a moral obligation.¹²⁴ Although the court's deeply split decision was seemingly policy-based to fulfill the needs of government, its liberal interpretation sounded the death knell to Oklahoma's constitutional debt limitations and balanced budget provisions.¹²⁵

118. *See id.* at 773.

119. *See id.* at 766.

120. *See In re Oklahoma Capitol Improvement Auth.*, 964 P.2d 873, 873 (Okla. 1998); *see also In re Oklahoma Capitol Improvement Auth.*, 69 OKLA. B.J. 2886 (Okla. Sept. 5, 1998) (amended order); Chuck Ervin, *Supreme Court Paves Way For Massive Road Project*, TULSA WORLD, May 1, 1998, at 1, available in 1998 WL 11135804 (discussing the majority and dissenting opinions); John Greiner, *No Obstacles Left for Road Bonds: State Supreme Court Refuses Rehearing*, DAILY OKLAHOMAN (Oklahoma City), May 1, 1998, at 10 (summarizing the opinions of the court and discussing the repercussions of the denial for rehearing).

121. *See Oklahoma Capitol Improvement Auth.*, 964 P.2d at 873.

122. *See Fent v. Oklahoma Capitol Improvement Auth.*, 525 U.S. 874 (1998); *see also* John Greiner, *City Couple to Ask Court to Block Road Bond Issue*, DAILY OKLAHOMAN (Oklahoma City), May 2, 1998, at 6 (discussing the appeal to the United States Supreme Court).

123. *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 779 (5-4 decision) (Opala, J., dissenting).

124. *See id.*

125. *See id.* at 759 (showing that the 5-4 decision actually consisted of the court's decision, three special concurrences, and four dissenting opinions); *see also* Brendan Coffey, *Oklahoma Readies \$300 Million Bonds With No Real Backing*, CAPITAL MARKETS REP., Apr. 14, 1998 (on file with the

A. Legislative Intent

In order to interpret properly the constitutional debt limitation provisions of the Oklahoma Constitution, the court must give effect to the intent of its framers and of the people who adopted it.¹²⁶ The underlying interpretation and construction of these constitutional provisions was a "pay-as-you-go" notion, followed since statehood.¹²⁷ In its wisdom, the Oklahoma populace reserved all power to determine whether debts should be incurred, excepting only those debts rendered under emergency constitutional provisions.¹²⁸ Likewise, the people mandated that the Oklahoma legislature operate within an annual balanced budget and that multi-year debts and obligations are prohibited unless there exists an antecedent vote of approval in a general election.¹²⁹ The obvious aim of the constitutional and statutory restrictions of unauthorized contraction of public debt was to protect the state's fiscal integrity by prohibiting creation of any present indebtedness that would legally or morally require subsequent governmental appropriations.

However, the majority of the court in *Oklahoma Capitol Improvement Authority* concluded that the Oklahoma legislature, not the populace, holds the constitutional power¹³⁰ to determine policy for the state highway system.¹³¹ The court erroneously reasoned that the Oklahoma legislature, which owes specific duties to the transportation system, could sidestep any other constitutional fiscal limitations and concurrently limit the people's reserved legislative power.¹³² In this regard, the court held that the duties of an instrumentality of government take precedence over a vote of the people.¹³³ This holding is in clear violation of article 10, section 25 of the Oklahoma Constitution, which plainly states that "no such law [incurring state debt] shall take effect, until it shall, at a general election, have been submitted to the people [for a vote]."¹³⁴

Oklahoma Law Review) (discussing the main arguments of the dissenting opinions).

126. See *Boswell v. State*, 74 P.2d 940, 942 (1937).

127. See *id.* at 945.

128. See *id.*

129. See OKLA. CONST. art. X, § 25; *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 778 (Lavender, J., dissenting).

130. See OKLA. CONST. art. XVI, § 1 (providing in pertinent part that "[t]he Legislature is directed to establish a Department of Highways, and shall have the power to . . . provide for building and maintaining public roads . . .").

131. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 776 (explaining that article 16, section 1 and article 21, section 1 of the Oklahoma Constitution "reflect the conviction of the framers of the Constitution that the Legislature has more specific responsibilities with respect to the state's transportation and the fashioning of institutional structures for enhancing it").

132. See *Anschutz Corp. v. Sanders*, 734 P.2d 1290, 1292 (Okla. 1987) (explaining that the court may not, through the use of statutory construction, change, modify, or amend the expressed intent of the Legislature); *Witzenburger v. Wyoming Community Dev. Auth.*, 575 P.2d 1100, 1124 (Wyo. 1978) ("A state constitution is not a grant but a limitation on legislative power, so that the legislature may enact any law not expressly or inferentially prohibited by the Constitution of the State.").

133. *But see* H.R.J. Res. 1037, 33rd Leg., 2d Spec. Sess. (Okla. 1972) (showing that although the current bond issue was not allowed a statewide vote, a very similar \$250 million bond issue was disapproved by voters on March 7, 1972).

134. See OKLA. CONST. art. X, § 25.

The court strained to find any viable interpretation of the statute that it could remotely find constitutional.¹³⁵ Once the court found a possible legal construction, it dismissed arguments to the contrary as simply controversy concerning the desirability or practicability of a "modern method of financing."¹³⁶ In *Oklahoma Capitol Improvement Authority*, the court fails to follow its own guidance concerning the "plainly manifested purpose [and intent]" of the people who adopted article 10, section 23 of the Oklahoma Constitution.¹³⁷

In this case, the court's analysis was insufficient. Although the court may have followed the letter of the law, it also should have considered the spirit and purpose of the law.¹³⁸ The court should not obscure the intent of debt limits and instead construe the debt prohibition clause with regard to its purpose of safeguarding the taxpayers from the excesses and mismanagement of the government.¹³⁹ Taken as a whole, the constitutional debt limitation provisions could not be "couched in clearer or more comprehensive terms."¹⁴⁰ In fact, the language is as inclusive and comprehensive as human ingenuity could contrive. By disregarding the spirit and purpose of the constitutional debt prohibition clause, the court avoided the injunction to deficit spending through linguistic jugglery and imperiled the future financial security of the state.

B. Legal Obligations v. Moral Obligations

The definition of a "debt" is not clear from Oklahoma statutory language or prior case law. The Oklahoma Constitution refers to prohibiting "a debt to be contracted."¹⁴¹ However, to hold that contracting a debt undeniably relates to "a legally enforceable obligation" is to restrict unnaturally the general syntax of the word.¹⁴² The general object and purpose of the constitutional debt limitations requires that the word "debt" be given its literal, natural, and full meaning.¹⁴³ In

135. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 763 (quoting *Gilbert Cent. Corp. v. State*, 716 P.2d 654, 658 (Okla. 1986) ("If there are two possible interpretations — one of which would hold the statute unconstitutional, the construction must be applied which renders it constitutional.")).

136. *Id.*

137. *Smith v. State Bd. of Equalization*, 630 P.2d 1264, 1267 (Okla. 1981).

138. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221 (1986) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (quoting *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1849))).

139. See *id.*

140. *Boardman Co. v. Board of Comm'rs of Ellis County*, 276 P. 474, 477 (Okla. 1929).

141. OKLA. CONST. art. X, §§ 24, 25.

142. See *In re Strauss*, 197 U.S. 324, 330 (1905) (stating that words in a constitution "do not receive a narrow contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies"); see also *In re Estates of Donnelly v. Iverson*, 502 P.2d 1163, 1166 (Wash. 1973) ("[W]here the literal interpretation of a particular word is repugnant to the intent of the legislature plainly manifested by the legislation taken as a whole, such interpretation ought not to prevail.").

143. See *Lewis v. Carpenter*, 100 N.E.2d 874, 877 (Ohio Ct. App. 1950) ("[W]ords of a statute . . . will be construed in their ordinary acceptation and significance and with the meaning commonly attributed to them . . . and they are to be given their natural, literal, and full meaning . . ."). But see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How*

some contexts, contracting a debt means simply making an agreement to borrow money.¹⁴⁴ Elsewhere, debt is defined as a "sum of money due by certain and express agreement . . . including not only obligation of debtor to pay but right of creditor to receive."¹⁴⁵ In the past, even the Oklahoma Supreme Court had held that it is not their prerogative "to distort plain language of statute in order that a more plausible or workable result might be obtained."¹⁴⁶ Most importantly, though, the Oklahoma legislature has made clear that all statutory language is "to be understood in [its] ordinary sense."¹⁴⁷

Pursuant to the majority's rationale in *Oklahoma Capitol Improvement Authority*, the state does not create a legally binding obligation against itself because it statutorily disavowed the creation of any such debt in the issuance of bonds by inserting certain "magic language."¹⁴⁸ By simply noting that "the bonds . . . shall not be deemed to constitute a debt of the state or a pledge of the faith and credit of the state," the legislature attempts to eliminate any argument to the contrary.¹⁴⁹ This *reducto ad absurdum* results in the state being able to refute legal obligations with a stroke of a pen. The Oklahoma Supreme Court accepted this fallacy on its face, even though it earlier held in *Boswell* that the determination whether a debt is contrary to constitutional debt limitations is a judicial and not a legislative question.¹⁵⁰ Certainly, the very use of the term "bonds" manifestly interweaves with the idea of obligations, indebtedness, and liabilities.¹⁵¹

Because the current bond issue was a multi-year obligation and the full faith and credit of the state was not pledged, future Oklahoma legislative assemblies were not legally obligated to provide funding to retire the bonds.¹⁵² Notwithstanding the state's moral obligation to continue funding the revenue-raising project, supported by statutory language stating the legislature's intent to maintain funding,¹⁵³ the

Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401 (1950) (explaining that there are two opposing canons on almost every point).

144. See 15 OKLA. STAT. §§ 1, 2 (1991) (stating that a contract is defined as an agreement to do or not to do a certain thing); see also *Troy v. Yelle*, 217 P.2d 337 (Wash. 1950) (viewing constitutional debt as money borrowed).

145. BLACK'S LAW DICTIONARY 403 (6th ed. 1991).

146. *Whittier v. Murrell*, 362 P.2d 694 (1961).

147. 25 OKLA. STAT. § 1 (Supp. 1997); see also *State ex rel. Western State Hosp. v. Stoner*, 614 P.2d 59 (1980) (explaining that the ordinary and common definitions of words are appropriate to determine proper construction).

148. *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 795 (5-4 decision) (Watt, J., dissenting).

149. 73 OKLA. STAT. § 168.6(I) (Supp. 1997).

150. See *Boswell v. State*, 74 P.2d 940, 943 (1937).

151. See BLACK'S LAW DICTIONARY 178 (6th ed. 1991) (defining a bond as "a certificate or evidence of a debt on which the issuing . . . governmental body promises to pay the bondholders a specified amount of interest for a specified length of time, and to repay the loan on the expiration date").

152. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 771 ("[A]ny payment the bond purchasers receive will hinge on the independent decision of future legislatures to make the anticipated appropriations."); see also *In re* Petition of Univ. Hosps. Auth., 953 P.2d 314, 328 (Okla. 1998) (explaining that one legislature cannot bind another to the fiscal affairs of the state beyond its biennium).

153. See 73 OKLA. STAT. § 168.6(H) (Supp. 1997) ("It is the intent of the Oklahoma Legislature to maintain the funding level of the State Transportation Fund as required in order for the Department

court held that the pledge did not rise to the level of a legal commitment.¹⁵⁴ Even so, to default on payment would devastate the state's credit-worthiness and would greatly hinder its ability to borrow money for any future capital project.¹⁵⁵ The economic reality is that Oklahoma would not dare avoid its obligation for fear of damaging its reputation and its ability to borrow on credit.¹⁵⁶ Financial institutions and bondholders fully comprehend and exploit this governmental responsibility. It follows, then, that the state government could not market the revenue bonds to the public if there was not an effective implicit commitment of the state's general taxing power. Although revenue bonds and general obligation bonds are not equivalent, the distinctions are blurred when applied in the manner of the highway improvement bond issue.

According to the court, the state had no legal obligation to repay bondholders, even though the bondholders had conferred a benefit upon the people of Oklahoma by providing the funding for the highway improvement project.¹⁵⁷ Alternatively, the state was obligated to repay the bonds and interest on an equitable basis, if not a legal one.¹⁵⁸

Other authorities disagree that a moral and equitable obligation does not reach a legal imperative. According to the *Ruling Case Law* of 1919, indebtedness, within the meaning of constitutional debt limitations, can arise when there is an equitable or moral obligation to pay a financial obligation to a creditor who has a moral right to constrain the debtor to pay.¹⁵⁹ Even recently, courts have supported this notion. For example, contrary to Oklahoma's ruling, the Wyoming Supreme Court held in 1978:

The essence of a moral obligation . . . appeals to a universal sense of justice and fairness, even though upon such facts no legally enforceable claim can be based. A "moral obligation" justifying the enactment of a state providing for the payment of compensation in a case in which no legal liability exists on the part of the state is such an obligation as would be recognized by men . . . with a real desire to act fairly and equitably without compulsion of law. . . . It is an obligation which,

of Transportation to fully pay any and all obligations incurred.").

154. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 768. But see *City of Ottumwa, Iowa v. City Water Supply Co.*, 119 F. 315, 327 (8th Cir. 1902) ("[A] promise to pay a certain amount, with interest, within a fixed time, out of taxes taken from all the people, including those not benefitted, would seem to most people to be a debt.").

155. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 779 (5-4 decision) (Lavendar, J., dissenting).

156. See *id.* at 794 (Watt, J., dissenting).

157. But see *Hogland v. Merrick County*, 115 N.W. 537, 537 (Neb. 1908) ("A bona fide debt is one that is owing to another, one that could be enforced in a court of justice.").

158. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 793 (5-4 decision) (Watt, J., dissenting).

159. See generally 19 RULING CASE LAW § 276, at 979 (William M. McKinney et al. eds., 1917) (Municipal Corporations) (explaining indebtedness as arising upon a legal or moral contract whether express or implied).

though lacking any foundation cognizable in law, springs from a sense of justice and equity¹⁶⁰

Therefore, the Oklahoma legislature cannot fail to honor its obligation, despite disclaimers to the contrary, when its tacit commitment is tantamount to an express commitment.

When the state "puts itself into such a position that it will forfeit large sums, which it has already expended unless it makes an additional payment, it is indebted in the constitutional sense."¹⁶¹ A valid enforceable obligation exists by virtue of the benefit conferred upon the state, and the fact that an equitable remedy could be available.¹⁶² The court cannot avoid the equitable issue of the moral obligation by narrowly defining the word "debt."¹⁶³ However, this narrow and formalistic definition of debt invites circumvention of constitutional provisions.¹⁶⁴

Moreover, the state incurs a debt through its own instrumentality, the OCIA.¹⁶⁵ In the event of payment default, the MBIA pays the bondholder the principal and then becomes the owner of the principal.¹⁶⁶ The insurance company could then sue the primary obligor, in this case, the OCIA.¹⁶⁷ Because the Authority's liability is directly related to the legislature's appropriated funds, the state would assume responsibility for the debt.¹⁶⁸

160. *Witzenburger v. State ex rel. Wyoming Community Dev. Auth.*, 575 P.2d 1100, 1129 (Wyo. 1978) (quoting 63 AM. JUR 2D *Public Funds* § 70).

161. *Id.*

162. *See* W.K. Warren v. Century Bankcorp., Inc., 741 P.2d 846, 852 (Okla. 1987) (explaining the concept of restitution damages and the use of constructive trusts for unjust enrichment).

163. *See also* City of Lawton v. Morford, 293 P. 1068, 1071 (Okla. 1930) ("To say the transaction does not create a debt is to play with words and deceive oneself in failure to use ordinary understanding while straining at expressions contained in decisions illy considered or not bearing upon the point.").

164. *See* Seto, *supra* note 45, at 1490 (discussing the problems associated with formally defining debt instruments).

165. *See* 73 OKLA. STAT. § 152 (Supp. 1997) (providing in pertinent part that the Authority is an "instrumentality of the state" and that the exercise of its powers are "deemed and shall be held to be an essential governmental function of the state").

166. *See* MBIA Financial Guaranty Insurance Policy, Appendix F, Official Statement of the Okla. Capitol Improvement Auth., State Highway Capital Improvement Revenue Bonds, Series 1998 (on file with the *Oklahoma Law Review*); *see also* *Dow Jones & Company, Inc.*, CAPITAL MARKETS REP., July 8, 1998 (stating that the MBIA insured the bonds).

167. *See* 73 OKLA. STAT. § 152 (Supp. 1997) (providing in pertinent part that the Authority "may sue and be sued"); *see also* Oklahoma Capitol Improvement Auth., Resolution § 8 (Sept. 23, 1997) ("The Authority covenants and agrees . . . that it will promptly pay the principal of and interest on every Bond issued under the provisions of this Bond Resolution . . . [and that] [t]he revenues are hereby pledged to the payment of the Bonds . . ."); Oklahoma Capitol Improvement Auth., Resolution § 18(h) (Sept. 23, 1997) ("All such agreements and covenants entered into by the Authority shall be binding in all respects upon the Authority . . . and all such agreements and covenants shall be enforceable by appropriate action or suit at law or in equity, which may be brought by any holder or holder of Bonds issued hereunder."); *In re* Oklahoma Capitol Improvement Auth., 958 P.2d 759, 775 (Okla. 1998) (explaining that the Authority could only be sued for the money transferred from the ODOT to the OCIA).

168. *See* John Greiner, *Road Program Moves Forward*, DAILY OKLAHOMAN, Aug. 20, 1997, at 6 ("[T]he intent of the legislature' was to permit the issuance of bonds generally known as lease-appropriation bonds, which are dependent on subsequent appropriations to retire the bonds.").

Debt should have only one meaning in regard to constitutional debt limitations. Such a definition must be concrete and well established. To leave ambiguity in such a consequential area and to construct creative definitions in order to fit the situation ignores reality. It is questionable whether courts, in their desire for legal expedience, should "make words mean so many different things"¹⁶⁹ and in doing so perform as interpreting funambulists.

C. Self-liquidation

After painstakingly explaining why the bond issue did not even remotely represent a legal debt, the *Oklahoma Capitol Improvement Authority* court further explained why the "self-liquidating debt exception" should apply to the "non-debt." The self-liquidating exception, also known as the "restricted special fund" exception, would only be relevant if the capital improvement created a multi-year legal debt that is retired solely from revenues generated from the project itself, but was not incurred by the people at the voting polls.¹⁷⁰ The Oklahoma Supreme Court has continually upheld this well-delineated immunity from constitutional debt limitations.¹⁷¹ In the case at bar, the court takes the view that the blend of vehicular user fees and fuel taxes creates a revenue stream associated with the construction and maintenance of highways, and the highways generate the revenue and are thus somehow self-liquidating.¹⁷² In using the self-liquidation argument, the court invalidates its previous contention that the obligation is not a legal debt.

As opposed to toll roads, office buildings, education facilities, and dormitories, public roads cannot be leased, rented, or used as collateral for repayment of the defaulted investment. The capital project cannot create a new "cash flow" by itself from only the users of the highways.¹⁷³ Instead, the obligation must solely rest on

169. THE COMPLETE WORKS OF LEWIS CARROLL 214 (Modern Library ed. 1936) ("When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I chose it to mean — neither more nor less.' 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'").

170. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 780 (Okla. 1998) (Opala, J., dissenting).

In order for there to be a self-liquidating obligation, four basic criteria must be met. First, all proceeds from the sale of bonds must go toward a defined project. Second, the project must generate funds dedicated solely toward retirement of the bonded indebtedness. Third, the funds must be created by the terms of the obligation, and not from preexisting revenue. Finally, the stream generated by project funds must be placed beyond legislative control and dedicated to the retirement of bonds.

Id.

171. See *In re Oklahoma Capitol Improvement Auth.*, 410 P.2d 46 (Okla. 1966); *In re Oklahoma Capitol Improvement Auth.* 355 P.2d 1028 (Okla. 1960) (office buildings to be retired by rental payments); *In re Oklahoma Turnpike Auth.*, 221 P.2d 795 (Okla. 1950) (toll roads to be retired from tolls); *In re Board of Regents for Okla. Agric. & Mechanical Colleges*, 167 P.2d 883 (Okla. 1946); *Board of Regents of Univ. of Okla.*, 161 P.2d 447 (Okla. 1945); (governmental building bonds to be retired from rental payments); *Baker v. Carter*, 25 P.2d 747 (Okla. 1933) (dormitory bonds to be retired by student rent).

172. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 764.

173. Brief for Respondents at 11, *Oklahoma Capitol Improvement Auth.*, 958 P.2d 759 (Okla. 1998) (No. 90,101).

continued general revenues from all Oklahoma taxpayers. The state did not design the self-liquidating fund exception to apply to obligations that were liquidated or retired by an infusion of funds from general revenues.¹⁷⁴ Correspondingly, "revenue bonds" by definition require that the "payments be generated by the project supported by the proceeds from the bonds issued."¹⁷⁵ "Revenue bonds" are retired from revenues derived from operation of a public project and paid by the users of that facility, rather than so-called "revenue" from state taxes.¹⁷⁶ Because the OCIA-created revenue bonds lack the power of self-liquidating annual amortization, they could be more aptly called "tax bonds." However, to use this more appropriate term for the obligations in question would obviously degrade the argument that they are not legal debts and violative of the Constitution.

As in *Boswell*, the special fund is created from specific user fees and taxes, which compose a part of the general revenue of the state that would otherwise be devoted to other public interests.¹⁷⁷ The court in *Boswell* specifically rejected this type of financing. Although six decades have passed since this landmark decision, it has never specifically been overruled and thus is still good law. The Oklahoma Supreme Court should reaffirm its own denial of the Oklahoma legislature's attempt to divert pledged tax revenues that were a "part of the general revenues of the state."¹⁷⁸ As in *Boswell*, the court should recognize that, "it is entirely immaterial whether one or another part of the [state] revenue is drawn upon so long as that revenue could be available for any public purpose which the Legislature may designate."¹⁷⁹ The Oklahoma Supreme Court only has to follow the money to ensure that it doesn't violate its own rule.¹⁸⁰

The *Oklahoma Capitol Improvement Authority* court actually goes farther than mistakenly employing the restricted special fund exception to the bond issue; it implicitly revives the "expanded special fund doctrine" that it previously struck down in *Boswell*.¹⁸¹ In *Boswell*, the court held that if a property already exists and is extended, improved, or otherwise augmented, the state cannot use future income

174. See *In re Oklahoma Educ. Television Auth.*, 272 P.2d 1027, 1035 (Okla. 1954) (stating that the rejected bonds were to be repaid solely from funds accruing to existing permanent funds of the State); see also Marie Price, *Common Cause Seeks Bond Issue Rehearing*, J. REC. (Oklahoma City), Apr. 9, 1998, at 3, available in 1998 WL 11959301 ("Since the bond proceeds are to be used for something in which the issuer has no interest at all, there can be no legal distinction between this and the financing of a state budget shortfall.").

175. BLACK'S LAW DICTIONARY 124 (6th ed. 1991).

176. See *Alan v. County of Wayne*, 200 N.W.2d 628, 699 (Mich. 1972) (explaining that under Michigan's Revenue Bond Act, self-liquidating revenues are not the same as general tax revenues in regard to revenue bonds).

177. See *Boswell v. State*, 74 P.2d 940, 944 (Okla. 1937).

178. *Id.*

179. *Id.*

180. See BARBARA SEBERDICK FEINBURG, *WATERGATE: SCANDAL IN THE WHITE HOUSE* 29 (1990) (explaining the well-known journalistic phrase, "follow the money," made famous by "Deep Throat," a crucial informant during the Watergate conspiracy).

181. *In re Oklahoma Capitol Improvement Auth.*, 958 P.2d 759, 787 (Okla. 1998) (Wilson, J., dissenting).

from that property to retire the obligations.¹⁸² In this case, the vast majority of the highways already exist and are merely being improved; thus, self-liquidation should be deemed inappropriate.¹⁸³

The *Boswell* court cautioned future courts not to let ignorance lead them to an unjustified extension of the restricted "special fund" exception to the constitutional debt limitations.¹⁸⁴ Unfortunately, courts have not heeded the warnings of *Boswell* that the difference between special funds and the "special fund doctrine" could become obfuscated. Due to the court's inability to distinguish between a fiscal principle and legislative financing capital, the special fund and lease-agreement exceptions are rendered purposeless. The "new and improved" law exchanges those cumbersome exceptions with a carte blanche approach to financing long-term debt through creatively diverting annual legislative appropriations.

D. Precedent and Stare Decisis

The court cites years of precedent and stare decisis as justification for its decision in *Oklahoma Capitol Improvement Authority*.¹⁸⁵ The justices contend that the government and its people are entitled to predictability, and holding a multi-year leasing agreement unconstitutional would "reduce certainty and progress with legal chaos" and bring state government financing to a "standstill."¹⁸⁶ The court fails to distinguish between multi-year property leases and a transaction to build and improve public highways. Instead, the court claims that the two rest upon the same legal basis. The current highway improvement bond issue cannot even be considered a classic installment lease agreement because the governmental program not only builds what are fundamentally public roads, but also repairs public roads already in existence.¹⁸⁷ The previously mentioned lease agreement cases are easily distinguished from the present case by the vital fact that the leased property in those cases was not property designed for public use. The property in those cases was tangible property capable of serving as collateral for the existing debt.¹⁸⁸

Although the court has approved self-liquidating projects in the past, the proposed bond issue can be distinguished from those previously validated by the court. In the present case, because the issuance of bonds creates no invested funds that will be used to purchase property that, in turn, will generate funds to retire the bonds, the

182. See *Boswell*, 74 P.2d at 947.

183. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 773.

184. *Boswell*, 74 P.2d at 950.

185. *Accord In re* Petition of Univ. Hosps. Auth., 953 P.2d 314 (Okla. 1998); *Indiana Nat'l Bank v. State Dept of Human Servs.*, 857 P.2d 53 (Okla. 1993); *U.C. Leasing, Inc. v. State ex rel. State Bd. of Public Affairs*, 737 P.2d 1191 (Okla. 1987); *Halstead v. McHendry*, 566 P.2d 134 (Okla. 1977); *Boswell v. State*, 74 P.2d 940 (Okla. 1937) (providing cases that support the court's holdings).

186. *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 773.

187. See Description of Highway Projects, Appendix D, Official Statement of the Okla. Capitol Improvement Auth., State Highway Capital Improvement Revenue Bonds, Series 1998 (on file with the *Oklahoma Law Review*).

188. *Cf. In re Oklahoma Capitol Improvement Auth.*, 355 P.2d 1028, 1031 (Okla. 1960) ("The lease form adopted by the Authority provides for an indeterminate term with rental fixed on a monthly basis with provision for revision in amount to provide funds to retire the bonds.").

bonds are not self-liquidating.¹⁸⁹ Instead, the money is earmarked to improve and construct roads that are dedicated to the public use without means of recovering the principal except for future general revenue appropriations.

Justifying its decision using a comprehensive approach of alternative reasoning, the court further finds that even if the highway proposal were not self-liquidating, preceding Oklahoma Supreme Court decisions would not justify its invalidation.¹⁹⁰ The court draws a fallacious correlation between multi-year lease agreements that were not self-liquidating and the highway improvement bond issue.¹⁹¹ Because the court previously found the lease agreements in *U.C. Leasing, Inc. v. State ex rel. State Board of Public Affairs*¹⁹² and *Indiana National Bank v. State Department of Human Services*¹⁹³ constitutional, the lack of self-liquidation in regard to long-term lease agreements is not controlling.¹⁹⁴ Although both bonds and leases are financial obligations, the similarity ends there. In 1960, the *Oklahoma Capitol Improvement Authority* court distinguished between contracts for long-term debts created by bonds and long-term obligations by leases.¹⁹⁵ In essence, the court made a specific exception for future installments related to future services in a leasing arrangement.

V. Impact of Oklahoma Capitol Improvement Authority on State Constitutional Law

Due to the court's insistence that *Oklahoma Capitol Improvement Authority* simply illustrates a "modern method of financing" supported by "innovative legal measures," the legislature may incur additional deficit spending that may reach beyond the fiscal year indiscriminately without an antecedent vote of approval by the electorate.¹⁹⁶ After years of decisions that diluted the power and ignored the intent of debt limitations, the court finally allowed the exception to swallow the constitutional rule. The court presumed that the framers of the Oklahoma Constitution could not have foreseen, but would have approved, a contemporary and complex financing system in which borrowing money does not necessitate repayment.¹⁹⁷ The court suggests that those who conceived the debt limitation clause only intended a constitutionally preserved right to control deficit spending when a legal loophole could not be found.

The court permitted the urgency of the situation and the insistence of the legislative and executive branches to override the constitutional safeguard against improvidence and the destruction of Oklahoma's economic integrity.¹⁹⁸ The effect

189. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 764.

190. See *id.* at 766.

191. See *id.*

192. 737 P.2d 1191 (Okla. 1987).

193. 857 P.2d 53 (Okla. 1993).

194. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 766-67.

195. See *Oklahoma Capitol Improvement Auth.*, 355 P.2d at 1033.

196. See *Oklahoma Capitol Improvement Auth.*, 958 P.2d at 763.

197. See *id.* at 771.

198. See *supra* note 39 and accompanying text.

of the decision is the constructive repeal of article 10, section 25 of the Oklahoma Constitution as well as the gutting of balanced budget amendments. Future legislatures that utilize the court's rationale may avoid creating a legally binding obligation against itself by simply repudiating the creation of state debt while diverting tax revenue from other sources. Additionally, by implicitly adopting the "expanded special fund" exception and permitting the improved highways to generate motor fuel taxes that will be future net income of the property improved, the court overruled itself and created new law. Appropriation-risk bonds, or "moral obligation bonds" as they are more commonly known, will likely become the future Oklahoma standard of governmental financing. There will be no legal impediment to large-scale deficit financing of capital projects, because the court here removed the obstacle of debt limitations.

In the end, the impact of the precedent set in Oklahoma will resound nationwide. As techniques of circumvention materialize and gain approval, they often spread to other states' courts. Thus, there is every reason to believe that other states will adopt the same logic to place the final nail in the coffin of their respective state constitutional debt limitations. Just as the Oklahoma Supreme Court utilized other states' opinions as authority for their tenuous arguments, other states may use this decision for a similar purpose. This continual borrowing of legal authority among the states may inevitably cause the final demise of constitutional debt limitations across the nation.

VI. Conclusion

In accordance with the Oklahoma constitutional debt prohibitions, a bond issue must be submitted to the electorate for approval at a general election. The state question should provide for a direct annual tax sufficient to pay the principal and interest on the debt. Without a vote of the people, the highway improvement bond issue in question creates a legally binding and unconstitutional debt, violating the debt limitations of the Oklahoma Constitution.

Although the purpose of highway improvement is meritorious,¹⁹⁹ unconstitutional bond financing is inexcusable. Courts cannot sustain the unconstitutional application of this, or any other statute, simply because of the importance of the ends to be furthered.²⁰⁰ To find the bond issue unconstitutional is not to sentence the state to a second-class transportation system; it merely forces the legislature to follow the law as written. As long as the debt prohibition clauses remain in the Constitution unamended or unrepealed, all branches of state government have the responsibility to follow the letter and intent of the law and not to attempt to circumvent the law of the land when it is expedient to do so. The Oklahoma Constitution is the

199. See Brief for Applicant at 7, *In re Oklahoma Capitol Improvement Auth.*, 958 P.2d 759 (Okla. 1998).

200. See 16 AM. JUR. 2D *Constitutional Law* § 58 (1998) ("[A constitution] is the mandate of a sovereign people to its servants and representatives, and no one of them has a right to ignore or disregard its mandates; the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations.").

inflexible will of the people that should not be subject to the changing tides of public opinion and desires, except by proper constitutional amendments.

It is time to put a firm cap on debt limitation escape devices. In the past, Oklahoma, like most states, liberalized its interpretation of debt prohibition to ease the way for governmental progress. As a result, the essence of the debt constitutional prohibitions deteriorated, leaving only a shadow of its former self. The Oklahoma Supreme Court had the opportunity to revive and strengthen the constitutional safeguards that promote fiscal responsibility and an empowered populace. However, when the court came to the fork in the road, it decided to take the road well traveled and constructively repeal any meaningful constitutional debt limitations. Would the framers of the original constitutional debt limitations have approved of this result, or would they believe Oklahoma citizens had been robbed of their constitutional rights?

Brian Edward Wheeler

