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# CITING SISTERS: A STUDY OF THE OKLAHOMA APPELLATE COURTS

LEE F. PEOPLES\*

## *I. Introduction*

When an Oklahoma appellate court issues an opinion, it is following the longstanding common law tradition of applying the law from previous judicial opinions (and other sources) to the facts of a case before the court. The practice of citing sources in judicial opinions serves a number of functions, including explaining and justifying the reasons for the court's decision, respecting stare decisis, and making the legal system predictable.<sup>1</sup>

The Oklahoma Constitution gives the Oklahoma Supreme Court authority to specify the form of its decisions, as well as those the Oklahoma Court of Civil Appeals issues.<sup>2</sup> The Oklahoma Constitution gives the Oklahoma Court of Criminal Appeals the same authority.<sup>3</sup> But neither the Oklahoma Supreme Court Rules nor the Rules of the Court of Criminal Appeals specify what authority, if any, opinions must rely upon.<sup>4</sup>

Oklahoma appellate opinions are, of course, filled with citations to authority, despite the absence of formal court rules requiring them. Some of these opinions cite the statutes and judicial opinions of jurisdictions from which Oklahoma adopted its early laws. Oklahoma appellate opinions

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1. See Fritz Snyder, *The Citation Practices of the Montana Supreme Court*, 57 MONT. L. REV. 453, 454 (1996).

2. OKLA. CONST. art. VII, § 5.

3. *Id.*

4. See OKLA. SUP. CT. R. 1.11 (noting only that the citation's format must be in accordance with the rules); OKLA. CT. CRIM. APP. R. 3.5(C) (same).

sometimes refer to these cases as coming from “sister state[s].”<sup>5</sup> Other opinions cite authority from states that border Oklahoma, states located in West’s *National Reporter System’s* Pacific region, or from states located within the Tenth Circuit Court of Appeals. Oklahoma appellate courts also sometimes cite cases as persuasive authority, even if those cases come from states that appear to lack any connection to Oklahoma.

While the Oklahoma Constitution allows state appellate courts to determine whether or not to cite authority in their opinions, lawyers are held to a different standard. Appellate advocates are not free to make arguments that are unsupported by citations. The Oklahoma Supreme Court Rules provide that appellate courts will not consider any arguments made in filings unless they are supported by authority.<sup>6</sup>

This Article studies the Oklahoma appellate courts’ citation of judicial opinions from other states, and its goal is to reveal the reasons why Oklahoma appellate courts cite cases from other states. The study examines all opinions of the Oklahoma Supreme Court, Oklahoma Court of Civil Appeals, and Oklahoma Court of Criminal Appeals from 1976, 1996, and 2016 and is intended to benefit citizens, scholars, and appellate practitioners. Patterns and practices of the courts’ citations to other jurisdictions in specific situations should be particularly useful to appellate advocates. Hopefully, appellate advocates may glean valuable insights into when they should cite out-of-state judicial opinions. Further, they will discover which jurisdictions to cite in specific situations.

First, this study reveals that Oklahoma appellate courts frequently cite appellate decisions from neighboring states. Second, all six neighboring states rank among the most frequently cited states. Third, Oklahoma

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5. *Chapman v. Parr*, 1974 OK 46, ¶ 20, 521 P.2d 799, 801 (commenting that Kansas is Oklahoma’s sister state).

6. OKLA. SUP. CT. R. 1.11(k)(1). The Oklahoma Court of Civil Appeals has clarified that when an argument is made without authority the argument may nevertheless be persuasive, stating, “[R]eversal is still possible under two conditions: First, no authority may be available; and second, the error may be apparent without further research for available authority.” 5 HARVEY D. ELLIS, JR. & CLYDE A. MUCHMORE, *OKLAHOMA PRACTICE SERIES: OKLAHOMA APPELLATE PRACTICE* § 13:42 (2018), 5 OKPRAC § 13:42 (Westlaw) (citing *First Okla. Bank v. Sparkman*, 1992 OK CIV APP 159, ¶ 10, 850 P.2d 350, 352). The Oklahoma Court of Civil Appeals has allowed the language of a contract in dispute to count as “authority.” *FDIC v. B.A.S., Inc.*, 1987 OK CIV APP 16, ¶ 9, 735 P.2d 358, 360. “Authority” has been defined “as judicial decisions, statutory law, administrative decisions or regulations, or secondary authorities discussing these authorities.” ELLIS & MUCHMORE, *supra*, § 13:42.

appellate courts frequently cite populous states whose appellate courts produce a high volume of citable precedent: California, New York, Illinois, and Michigan.<sup>7</sup> Fourth, Oklahoma appellate courts follow the national trend of citing fewer out-of-state cases from its *National Reporter System* region. Finally, Oklahoma appellate courts frequently cite neighboring state appellate courts that are also located within the Tenth Circuit Court of Appeals.

This study identified several trends: a reduction in citations to out-of-state opinions over time, a preference to cite recent out-of-state cases, and a preference to cite more prestigious jurisdictions, all despite the widespread use of electronic legal research. Oklahoma appellate courts most frequently cite out-of-state opinions to support their reasoning and distinguish the position that another state's court takes. These appellate court citation practices to out-of-state authority are consistent across jurisdictions.

This Article begins by discussing the origins of Oklahoma law. Part II continues by identifying jurisdictions from which Oklahoma adopted its laws, tracing how Oklahoma imported the common law, and determining the precedential value of judicial opinions from various jurisdictions. Part III provides examples of laws that require Oklahoma courts to consider the laws of other jurisdictions. Part IV explains the methodology and findings of the study.

## *II. The Roots of Oklahoma Law*

In 1890, Congress created the Territory of Oklahoma with the Organic Act,<sup>8</sup> which served as the constitution until Oklahoma achieved statehood in 1907.<sup>9</sup> The Act specified that the laws of Nebraska would govern until the first session of the Territorial Legislature adjourned.<sup>10</sup> In the early days of statehood, Oklahoma, like other young states, borrowed laws from other

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7. These states frequently rank among the most cited out-of-state jurisdictions in other studies of state appellate courts as well. See Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 802 (1981).

8. ORBEN J. CASEY, AND JUSTICE FOR ALL: THE LEGAL PROFESSION IN OKLAHOMA, 1821–1989, at 64 (1989).

9. *Id.*

10. Act of May 2, 1890 (Oklahoma Organic Act), ch. 182, § 11, 26 Stat. 81, 87. The Act also provided that Arkansas law applied in Indian Territory. *Id.* § 31, 26 Stat. at 94–95.

jurisdictions.<sup>11</sup> States from which Oklahoma adopted its laws are hereinafter referred to as “adopted jurisdictions.”

*A. Areas of Law Oklahoma Adopted from Other Jurisdictions*

*1. Civil Procedure*

The Territorial Legislature created a code of civil procedure by copying the civil procedure code of Indiana and supplementing portions from the Dakota General Statutes.<sup>12</sup> But because the Territorial Supreme Court and members of the Territorial bar disliked the early civil procedure code, they quickly replaced it with the Kansas Field Code.<sup>13</sup>

*2. Probate and Wills*

Oklahoma borrowed laws on various subjects from other jurisdictions. While Oklahoma’s early probate procedure and wills succession statutes can be traced to the Dakota Territory Statutes,<sup>14</sup> confusion exists as to whether California statutes may have been the original source.<sup>15</sup> David Field led a New York commission that created several codes, including a civil code that addressed probate, wills, and succession.<sup>16</sup> Dakota adopted the Field civil code in 1865, and California followed in 1874.<sup>17</sup> But California achieved statehood before either North or South Dakota; accordingly, there are more judicial decisions on probate procedure and wills succession from California than from the Dakotas.<sup>18</sup> Two early

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11. Examples of significant bodies of law Oklahoma adopted from other states are listed below. *See infra* Section II.A.

12. CASEY, *supra* note 8, at 66.

13. *See* Flour Mills of Am., Inc. v. Am. Steel Bldg. Co., 1968 OK 15, ¶ 83, 449 P.2d 861, 882 (“[T]he Territorial statute that now appears as 12 O.S. 1961 § 264 was taken in 1893 from the Kansas Civil Code. It is, verbatim, the same as Section 87 of that code.”) (citing Okla. Gas & Elec. Co. v. Lukert, 1906 OK 4, ¶ 6, 84 P. 1076, 1079); *see also* Richard E. Coulson, *Is Contractual Arbitration an Unconstitutional Waiver of the Right to Trial by Jury in Oklahoma?*, 16 OKLA. CITY U. L. REV. 1, 51 (1991) (“These included the Oklahoma Territory Code of 1890, taken from the Kansas version of the New York code.”) (citing CHARLES M. HEPBURN, *THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND* 113 (Cincinnati, W.H. Anderson & Co. 1897)).

14. 1 R. ROBERT HUFF & VARLEY H. TAYLOR, JR., *OKLAHOMA PROBATE LAW AND PRACTICE* § 1.9 (Supp. 2019), 1 OK-PROB § 1.9 (Westlaw).

15. *Id.*

16. *See id.*

17. *Id.*

18. *Id.*

Oklahoma Supreme Court opinions confusingly state that Oklahoma's probate code was adapted from California's and that California Supreme Court probate decisions issued prior to Oklahoma's statehood became law in Oklahoma.<sup>19</sup> The authors of Oklahoma's probate law treatise clarify this morass with the following statement:

The relationship of Oklahoma, Dakota and California insofar as the statutes on probate procedure, will and succession are concerned, is such that in absence of decisions by the Supreme Court of Oklahoma on a particular statute any decision from California or the Dakotas on the same statute should be persuasive.<sup>20</sup>

### 3. *Trust Law*

Oklahoma is a member of a group of states that follow New York trust law "so closely that they are regarded as having the New York system."<sup>21</sup> Judicial opinions from the states of Michigan, Minnesota, North Dakota, South Dakota, and Wisconsin "are strongly persuasive as they are rested upon a very similar statutory basis."<sup>22</sup> Of these states, Oklahoma is most similar to the Dakotas because neither Oklahoma nor the Dakotas adopted the Field version of New York trust law.<sup>23</sup>

### 4. *Property Law*

Oklahoma's statute relating to mortgages is based on the South Dakota statute, which was modeled on the California statute.<sup>24</sup> In the absence of case law from South Dakota on a mortgage law issue, California case law is persuasive.<sup>25</sup>

### 5. *Divorce Law*

Early Oklahoma laws on divorce and alimony were adopted from Kansas.<sup>26</sup> The Oklahoma Supreme Court has subsequently looked to

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19. *Id.* (citing *Lester v. Smith*, 1921 OK 254, 200 P. 780; *Harness v. Myers*, 1930 OK 61, 288 P. 285).

20. *Id.*

21. Henry M. Gray, *The Oklahoma Trust Law*, 7 OKLA. ST. B.J. 218, 220 (1937).

22. *Id.* at 221.

23. *Id.*

24. *Frick Co. v. Oats*, 1908 OK 33, ¶ 13, 94 P. 682, 684.

25. *Id.*

26. *Vanderslice v. Vanderslice*, 1945 OK 188, ¶ 13, 159 P.2d 560, 562.

Kansas judicial decisions in interpreting the adopted laws and considers Kansas case law on the subjects “very persuasive.”<sup>27</sup> In addressing a first impression issue of whether the intrastate forum non conveniens doctrine applies to divorce actions, the Oklahoma Supreme Court looked to “decisions from our sister state of Kansas.”<sup>28</sup>

*B. The Precedential Value of Judicial Opinions from Adopted Jurisdictions*

Understanding the sources of Oklahoma’s first laws may shed light on why Oklahoma appellate courts cite judicial opinions from certain states. Oklahoma appellate courts have held that when Oklahoma adopts a statute from another state, the construction given to that statute by the highest appellate court of that state before adoption is binding on Oklahoma courts.<sup>29</sup> In *In re Estate of Speake*, the Oklahoma Supreme Court faced a question about whether Oklahoma’s renewal statute extended the time period to bring a post-probate will contest.<sup>30</sup> Oklahoma adopted the renewal statute at issue from Kansas, and the Oklahoma Supreme Court explained the issue in the following way:

The construction the Kansas Supreme Court had placed on § 100 before Oklahoma's adoption of the statute is binding on us. The text came to us encumbered by the meaning accorded it in Kansas. Judicial interpretation by a court of last resort impressed on adopted legislation before its reception cannot be changed by jurisprudence of the receiving state.<sup>31</sup>

But the rule that out-of-state jurisprudence construing a statute becomes a part of Oklahoma law upon adoption is not absolute. *Speake* added an

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27. *Woodroof v. Barrington*, 1947 OK 247, ¶ 9, 184 P.2d 771, 773.

28. *Chapman v. Parr*, 1974 OK 46, ¶¶ 1, 20, 521 P.2d 799, 799, 801.

29. *See, e.g., In re Estate of Speake*, 1987 OK 61, ¶ 7, 743 P.2d 648, 650.

30. *Id.* ¶ 1, 743 P.2d at 649.

31. *Id.* ¶ 7, 743 P.2d at 650; *see also* *Bank of the Lakes v. First State Bank*, 1985 OK 81, ¶ 9, 708 P.2d 1089, 1091 (reviewing a banking statute adopted from New Mexico); *Brook v. James A. Cullimore & Co.*, 1967 OK 251, ¶¶ 4–5, 436 P.2d 32, 34 (reviewing a replevin statute adopted from Kansas); *Egleston ex rel. Chesapeake Energy Corp. v. McClendon*, 2014 OK CIV APP 11, ¶ 10, 318 P.3d 210, 215; *Kurtz v. Clark*, 2012 OK CIV APP 103, ¶ 19, 290 P.3d 779, 786–87 (reviewing a derivative suit statute modeled after Delaware corporate law); *Beard v. Love*, 2007 OK CIV APP 118, ¶ 20, 173 P.3d 796, 802 (reviewing the Oklahoma Corporations Act and noting it “is based on the Delaware Corporations Act”) (citing *Woolf v. Universal Fid. Life Ins. Co.*, 1992 OK CIV APP 129, ¶ 6, 549 P.2d 1093, 1095).

important exception to that rule: the “[l]egislative process affords the only effective means for departure from the binding force of the prestatehood Kansas case law.”<sup>32</sup>

Oklahoma appellate opinions have defined various additional exceptions to the adoption of out-of-state jurisprudence into Oklahoma law. For example, Oklahoma will not adopt judicial opinions construing another state’s statute when “there is a conflict in the decisions in the other state”<sup>33</sup> or “where the courts of the adopting state have for many years given the statute their own interpretation.”<sup>34</sup> Further, Oklahoma courts will not adopt decisions from another state “where the construction is contrary to the Constitution or the well-defined legislative policy of the adopting state”<sup>35</sup> or “where the adopted statute exists in many other states and such construction is contrary to the decided weight of authority in such other states.”<sup>36</sup>

What consideration, if any, should Oklahoma appellate courts give to opinions issued by other state courts issued after Oklahoma has adopted a statute from the state? Does codifying the statute also incorporate these opinions into Oklahoma law? Are these out-of-state opinions binding on Oklahoma courts? Or are they merely persuasive authority?

As two cases exemplify, Oklahoma courts may rely on originating state case law to interpret Oklahoma statutes, even if that out-of-state case was decided after Oklahoma adopted its statute. In *Odom v. Penske Truck Leasing Co.*, the Oklahoma Supreme Court answered a certified question of law as to whether Oklahoma’s workers’ compensation act barred an employee from bringing a claim against his employer’s shareholder for independent tortious acts.<sup>37</sup> Although Arkansas’s workers’ compensation law had “a large influence on the drafting and adoption” of Oklahoma’s workers’ compensation law, it is not identical to the Oklahoma law.<sup>38</sup> In answering the certified question of law, the Oklahoma Supreme Court cited opinions from the Arkansas Supreme Court and Court of Appeals of

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32. *Estate of Speake*, ¶ 7, 743 P.2d at 650 (emphasis removed).

33. *State ex rel. Westerheide v. Shilling*, 1942 OK 106, ¶ 0, 123 P.2d 674, 675.

34. *Id.*

35. *Thompson v. Smith*, 1923 OK 1136, ¶ 14, 227 P. 77, 81–82 (quoting *Hutchinson v. Krueger*, 1912 OK 368, ¶ 0, 124 P. 591, 591).

36. *Id.* ¶ 14, 227 P. at 82 (quoting *Hutchinson*, ¶ 0, 124 P. at 591).

37. 2018 OK 23, ¶ 1, 415 P.3d 521, 524.

38. *Id.* ¶ 33, 415 P.3d at 531.



Arkansas,<sup>39</sup> both of which were issued after Oklahoma adopted its workers' compensation statute based on Arkansas law.

In *Watkins v. Hamm*, the Oklahoma Court of Civil Appeals acknowledged that "Oklahoma's corporate law is derived from the corporate law of Delaware."<sup>40</sup> In *Watkins*, the court cited Delaware Supreme Court cases when addressing whether Oklahoma law allows direct actions against corporate officers and directors,<sup>41</sup> even though those Delaware opinions were issued after Oklahoma borrowed Delaware's corporate law statute. Ultimately, the Oklahoma Court of Civil Appeals declined to recognize the direct action theory of liability, noting that "[t]his is not the case to do so, particularly given the current state of Delaware law."<sup>42</sup>

Other Oklahoma appellate opinions have addressed the weight that out-of-state judicial opinions issued after Oklahoma adopted a law from the state should have. Such opinions are generally not binding on Oklahoma courts.<sup>43</sup> For example, in *In re Fletcher's Estate*, the Oklahoma Supreme

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39. *Id.* ¶ 34, 415 P.3d at 531 (citing *Honeysuckle v. Curtis H. Stout, Inc.*, 2010 Ark. 328, at 7, 368 S.W.3d 64, 69; *Stocks v. Affiliated Foods Sw., Inc.*, 213 S.W.3d 3, 4–5 (Ark. 2005); *Zenith Ins. Co. v. VNE, Inc.*, 965 S.W.2d 805, 808 (Ark. App. 1998)). The Oklahoma Supreme Court's citation of the Court of Appeals of Arkansas opinion demonstrates that Oklahoma appellate courts no longer are restricted to examining the jurisprudence of only the highest appellate court of a sister state when examining how sister state courts construe statutes Oklahoma has borrowed. *But see In re Estate of Speake*, 1987 OK 61, ¶ 7, 743 P.2d 648, 650.

40. 2018 OK CIV APP 2, ¶ 11, 419 P.3d 353, 356 (citing *Woolf v. Universal Fid. Life Ins.*, 1992 OK CIV APP 129, ¶ 6, 849 P.2d 1093, 1095).

41. *Id.* ¶¶ 5, 7, 11, 15, 16, 17 & n.4, 20, 21, 23 n.7, 24, 419 P.3d 353, 355–61 (citing *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016); *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); *Feldman v. Cutaia*, 951 A.2d 727 (Del. 2008); *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006); *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766 (Del. 2006); *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004); *Grimes v. Donald*, 673 A.2d 1207 (Del. 1996); *In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319 (Del. 1993); *Lipton v. News Int'l, Plc*, 514 A.2d 1075 (Del. 1986); *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984); *Bokat v. Getty Oil Co.*, 262 A.2d 246 (Del. 1970); *Caspian Select Credit Master Fund Ltd. v. Gohl*, No. 10244-VCN, 2015 WL 5718592 (Del. Ch. Sept. 28, 2015); *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618 (Del. Ch. 2013); *Moran v. Household Int'l, Inc.*, 490 A.2d 1059 (Del. Ch. 1985); *Elster v. Am. Airlines, Inc.*, 100 A.2d 219 (Del. Ch. 1953)).

42. *Id.* ¶ 22, 419 P.3d at 360.

43. *Nat'l Supply Co. v. Dunn*, 1946 OK 287, ¶ 17, 174 P.2d 914, 917 ("While our statute was adopted from Kansas, the two cases cited above were decided long after its adoption, and are not in any way binding upon us."); *Given v. Owen*, 1918 OK 537, ¶ 5, 175

Court recognized that they are “at best . . . persuasive.”<sup>44</sup> Other appellate opinions categorize these out-of-state opinions as “not entirely controlling . . . [but] highly persuasive,”<sup>45</sup> “peculiarly persuasive,”<sup>46</sup> and “very persuasive.”<sup>47</sup>

*C. The Precedential Value of Judicial Opinions from Non-Adopted Jurisdictions*

Oklahoma appellate courts have also cited laws and judicial opinions of states from which Oklahoma did not adopt its laws. In a 1959 opinion, the Oklahoma Supreme Court recognized that in cases of first impression it is proper for the Court to “look to other states for judicial light.”<sup>48</sup> Since 1959, subsequent Oklahoma appellate court opinions have reaffirmed this approach.<sup>49</sup> For example, in interpreting Oklahoma’s robbery statute, the Oklahoma Court of Criminal Appeals examined statutory provisions from sister states to determine its proper meaning.<sup>50</sup>

In *Ochoa v. State* the Oklahoma Court of Criminal Appeals acknowledged the appellant’s decision to cite several out-of-state cases, noting that “[a]lthough these cases are not binding on this Court, the cases indicate how other courts have treated similar problems.”<sup>51</sup> In other instances, Oklahoma appellate courts have been less willing to consider persuasive authority from other states. In *Bison Nitrogen Products Co. v. Lucas*, the Oklahoma Supreme Court commented that the appellants’ decision to cite out-of-state authority was “unpersuasive.”<sup>52</sup>

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P. 345, 346 (mem.) (“The decision was handed down July 8, 1898, long after the adoption of the Kansas Code of Procedure by the territory of Oklahoma; for which reason, and the additional reason that the court rendering the opinion was not a court of last resort in the state of Kansas, this court will not hold itself bound by the construction promulgated.”); *see also* *Sanguin v. Wallace*, 1951 OK 181, ¶ 10, 234 P.2d 394, 397.

44. *Simler v. Wilson (In re Fletcher’s Estate)*, 1957 OK 7, ¶ 25, 308 P.2d 304, 311–12.

45. *Youts v. Tri-State Supply Co.*, 1949 OK 246, ¶ 10, 241, 211 P.2d 1017, 1018.

46. *Vanderslice v. Vanderslice*, 1945 OK 188, ¶ 13, 159 P.2d 560, 562.

47. *Woodroof v. Barrington*, 1947 OK 247, ¶ 9, 184 P.2d 771, 773.

48. *Reed v. Reed*, 1959 OK 63, ¶ 11, 338 P.2d 350, 353.

49. *See, e.g., Franco-Am. Charolaise, Ltd. v. Okla. Water Res. Bd.*, 1990 OK 44, ¶¶ 30–31, 855 P.2d 568, 590–91 (Lavender, V.C.J., concurring in part and dissenting in part) (examining South Dakota and Texas case law).

50. *Traxler v. State*, 96 Okla. Crim. 231, 242–43, 251 P.2d 815, 828 (1952) (“We have done considerable research, having examined the statutory provisions of every other sister state, as well as many of their decisions, bearing on the crime of robbery.”).

51. 1998 OK CR 41, ¶ 22, 963 P.2d 583, 594.

52. 1987 OK 46, ¶ 10, 738 P.2d 147, 150.

At the same time, Oklahoma appellate opinions deciding issues of first impression often cite out-of-state case law. For example, in *In re Marriage of Barnes*, the Oklahoma Court of Civil Appeals cited opinions from out-of-state courts when deciding whether “the right to claim a child as a dependent for tax purposes is related to an award of child support.”<sup>53</sup>

When Oklahoma appellate courts confront issues of first impression and are unable to locate opinions from other states, they have also turned to federal law. In *Kohler v. Chambers*, the Oklahoma Supreme Court noted that neither the court nor the parties could locate decisions from other jurisdictions in a case interpreting the Oklahoma Deployed Parents Custody and Visitation Act.<sup>54</sup> Thus the Court relied on comparable federal statutes as “extrinsic aids” to resolve the statutory question.<sup>55</sup>

As discussed above, case law from non-adopted jurisdictions is merely persuasive authority and is not binding on Oklahoma appellate courts. The next section provides examples of case law from other jurisdictions that may, in some instances, have more than persuasive authority.

#### D. The Common Law

Judicial opinions from other states are sometimes referred to as being part of the common law, and Oklahoma has formally adopted the common law several times throughout its history.<sup>56</sup> In the years leading to Oklahoma’s official statehood, the Indian Territory adopted the common law three times.<sup>57</sup> First, the Organic Act of 1890 referenced the adoption of the common law through “Mansfield’s Digest of the Statutes of Arkansas” and “common and statute law of England.”<sup>58</sup> Second, Oklahoma’s Territorial Legislature adopted the common law in 1893.<sup>59</sup> Third, Oklahoma’s Revised Laws of 1910 include a “reception statute” that is still

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53. *Barnes v. Barnes (In re Marriage of Barnes)*, 2017 OK CIV APP 38, ¶ 5, 400 P.3d 321, 322.

54. 2019 OK 2, ¶ 14 n.8, 435 P.3d 109, 114 n.8.

55. *Id.*; see also *Casey v. Self (In re Estate of King)*, 1990 OK 138, ¶¶ 6–10, 837 P.2d 463, 464–66 (showing the Oklahoma Supreme Court reviewed United States Supreme Court decisions examining other states’ statutes in deciding the constitutionality of an Oklahoma statute).

56. See Matthew C. Kane & Ivan L. London, *The Pride of the Common Law: Oklahoma’s Struggle with the Prima Facie Tort Action*, 52 TULSA L. REV. 41, 51–52 (2016).

57. *Id.* at 51.

58. *Id.* at 51–52 (quoting Act of May 2, 1890 (Oklahoma Organic Act), ch. 182, § 31, 26 Stat. 81, 94–95).

59. *Id.* at 51.

in force today.<sup>60</sup> Unlike reception statutes from other jurisdictions, which include a specific cutoff date for the purposes of incorporating the common law from a certain period, Oklahoma's reception statute does not include a cutoff date.<sup>61</sup> Oklahoma's reception statute provides as follows:

The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object.<sup>62</sup>

The term "common law" can be interpreted narrowly or broadly. A narrow interpretation in a state reception statute refers to only the common law of the state adopting the statute. This narrow view of what constitutes the common law has been described as "positivist"<sup>63</sup> because legal positivism focuses only on laws as enacted "by an existing political authority."<sup>64</sup> The term "Oklahoma common law" is sometimes used when referring to the common law from a narrow or positivist conception.<sup>65</sup>

Alternatively, a broader view of the common law in a state reception statute may permit the state's courts to decide what is (or is not) included in its common law. Sometimes the law of other jurisdictions may fall within this broader definition. This conception of the common law has been referred to as "the general common law"<sup>66</sup> and "American common law."<sup>67</sup>

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60. *Id.* The reception statute was codified in 1910 and is still in effect today. See 12 OKLA. STAT. § 2 (2011).

61. Joseph Fred Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 MO. L. REV. 595, 609 (2002).

62. 12 OKLA. STAT. § 2.

63. John T. Parry, *Oklahoma's Save Our State Amendment and the Conflict of Laws*, 65 OKLA. L. REV. 1, 15 (2012).

64. *Legal Positivism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

65. See Parry, *supra* note 63, at 15; see also *Gomes v. Hameed*, 2008 OK 3, ¶ 1, 184 P.3d 479, 491 (Opala, J., dissenting) (referring to "Oklahoma common law").

66. *Camps v. Taylor*, 1995 OK 23, ¶ 1, 892 P.2d 633, 636 (Opala, J., concurring); see Parry, *supra* note 63, at 15 & n.56 (discussing the interpretation of "the general common law" by the Oklahoma Supreme Court in the following cases: *Merveldt & Son v. Biggs*, 1944 OK 119, ¶ 14, 147 P.2d 146, 148 (discussing a garnishment statute and stating that it "is a declaration of the general or common law as it exists in the absence of specific statutory provision"); *McGee v. Kirby*, 1941 OK 326, ¶ 7, 118 P.2d 199, 201 (distinguishing between "the general common law" and "our general statutes").

This broader approach is similar to the United States Supreme Court's conception of the common law in *Swift v. Tyson*<sup>68</sup> and has been referred to by scholars as "Swiftian."<sup>69</sup>

Over the years, Oklahoma appellate courts have defined the common law both narrowly and broadly. The Oklahoma Supreme Court has at times adopted a "positivist conception," something intrinsic in Oklahoma's sovereign status.<sup>70</sup>

In *Delk v. Markel American Insurance Co.*, the Oklahoma Supreme Court upheld the insurable interest requirement for an insurance contract to be valid.<sup>71</sup> The court relied upon Oklahoma case law and referred to the insurable interest requirement as "part of Oklahoma's common law."<sup>72</sup> Later, when the Oklahoma Supreme Court decided a statute of limitations question, the court distinguished "Oklahoma's common law" from decisions of other courts and the "great weight of modern authority."<sup>73</sup>

Other Oklahoma appellate court opinions have construed the common law more broadly and have found that it includes the "ancient unwritten law of England," as well as "that body of law created and preserved by decisions of courts,"<sup>74</sup> including judicial opinions from other states. One example of a broad construction of the common law can be found in the Oklahoma Supreme Court's opinion in *McCormack v. Oklahoma Publishing Company*, which recognized the tort of invasion of privacy in Oklahoma law.<sup>75</sup> *McCormack* relied in part on a decision of the Nevada Supreme Court and made the following observation: "The common law is not static, but is a dynamic and growing thing and its rules arise from the

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67. *McGehee v. Arvest Tr. Co. (In re Estate of Bleeker)*, 2007 OK 68, ¶ 9, 168 P.3d 774, 778.

68. 41 U.S. (16 Pet.) 1 (1842).

69. Parry, *supra* note 63, at 14.

70. *Id.* at 15.

71. 2003 OK 88, ¶ 8, 81 P.3d 629, 633.

72. *Id.*

73. *Camps v. Taylor*, 1995 OK 23, ¶ 7, 892 P.2d 633, 635 (quoting *Simon v. Wis. Marine Inc.*, 947 F.2d 446, 447 (10th Cir. 1991)); *see also Pribram v. Fouts*, 1987 OK 29, ¶ 14, 736 P.2d 513, 515 (referring to the "common law of Oklahoma").

74. *McCormack v. Okla. Publ'g Co.*, 1980 OK 98, ¶ 7, 613 P.2d 737, 740 (citing *Hogan v. State*, 441 P.2d 620, 621 (Nev. 1960)); *see also Parry*, *supra* note 63, at 15 (quoting *McCormack*, ¶ 7, 613 P.2d at 740).

75. *McCormack*, ¶ 8, 613 P.2d at 740.

application of reason to the changing conditions of society. Flexibility and capacity for growth and adaptation is its peculiar boast and excellence.”<sup>76</sup>

When the Oklahoma Supreme Court addressed a probate case of first impression in *In re Estate of Booker*, the court adopted a new common law rule that allowed “persons other than the estate's court-appointed fiduciary leave to pursue litigation for recovery of estate assets.”<sup>77</sup> In *Estate of Bleeker*, the appellant argued “that nearly every state that has addressed the issue has” permitted beneficiaries to bring actions to recover assets of an estate.<sup>78</sup> The majority opinion, written by Justice Opala, noted that while probate is governed by statute, the common law “need not be drawn exclusively from English precedent, but may also be fashioned by utilizing other sources, including legal norms taken from common-law jurisprudence of sister states.”<sup>79</sup> In adopting the rule the opinion notes, “At this stage of American unwritten law's development and absent any Oklahoma legislative guidance on the point, we are constrained to follow the common law developed by other state jurisdictions over a period longer than a century of jurisprudence.”<sup>80</sup>

The opinion in *Gomes v. Hameed*, decided one year after *Bleeker*, provides additional insight into how laws from other states become incorporated into Oklahoma law.<sup>81</sup> In *Gomes*, the Oklahoma Supreme Court adopted a new common law rule requiring judicial approval of any agreement not to sue that has been negotiated on behalf of a minor.<sup>82</sup> The majority opinion cited a North Carolina case, which addressed a similar agreement not to sue.<sup>83</sup> Although *Gomes* presented a novel issue,<sup>84</sup> the majority opinion reasoned that “[w]e need look no further than our case law and statutes to reach the same result as the [North Carolina] Court.”<sup>85</sup>

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76. *Id.* ¶ 7, 613 P.2d at 740 (footnotes omitted) (citing *Barnes Coal Corp. v. Retail Coal Merchant's Ass'n*, 128 F.2d 645, 658 (4th Cir. 1942); *Hurtado v. California*, 110 U.S. 516, 530 (1884)).

77. *McGehee v. Arvest Tr. Co. (In re Estate of Bleeker)*, 2007 OK 68, ¶ 14, 168 P.3d 774, 781.

78. *Id.* ¶ 9, 168 P.3d at 778.

79. *Id.* ¶ 13, 168 P.3d at 781.

80. *Id.* ¶ 14, 168 P.3d at 781 (emphasis removed).

81. *See generally* *Gomes v. Hameed*, 2008 OK 3, 184 P.3d 479.

82. *Id.* ¶ 1, 184 P.3d at 482.

83. *Id.* ¶¶ 20–22, 184 P.3d at 486 (discussing *Creech ex rel. Creech v. Melnik*, 556 S.E.2d 587, 589 (N.C. Ct. App. 2001)).

84. *Id.* ¶ 19, 184 P.3d at 486.

85. *Id.* ¶ 22, 184 P.3d at 486.

In a dissenting opinion, Justice Opala espoused his theory of how common law norms from other states may be transplanted into Oklahoma law.<sup>86</sup> He posited that they may do so by meeting any of the following criteria: (1) becoming “established . . . by extant state jurisprudence”;<sup>87</sup> (2) being studied by the American Law Institute’s “slow and deliberative” process, which involves “full consideration” of the adopted norm’s impact on the existing legal system;<sup>88</sup> or (3) through “expert testimonial proof of the norm’s general acceptance in the state by long-established and widespread use.”<sup>89</sup> At the same time, common law norms that arise from the English common law need not meet one of these criteria. These norms are considered part of Oklahoma law “without added study” because lawyers are presumed to know English common law norms.<sup>90</sup>

Surprisingly, only one opinion in the data set mentioned the common law as a justification for citing a case from another jurisdiction. In *Powell v. Seay*, when the Oklahoma Supreme Court examined prosecutorial immunity from violations of the federal Civil Rights Act, the court cited an Indiana Supreme Court opinion as the first case to address the issue and noted that “[t]he common-law rule of immunity is thus well settled.”<sup>91</sup>

### *III. Other Instances When Oklahoma Appellate Courts Look to the Laws of Other States*

#### *A. Horizontal Federalism*

When confronting issues that affect fundamental rights, some state appellate courts have looked to decisions from other state courts in interpreting how state constitutions protect those rights.<sup>92</sup> Some courts do this because advocates seek increased protection of civil liberties based on

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86. *See id.* ¶ 2, 184 P.3d at 491 (Opala, J., dissenting).

87. *Id.* ¶ 7, 184 P.3d at 494 (Opala, J., dissenting).

88. *Id.* ¶ 3, 184 P.3d at 491–92 (Opala, J., dissenting) (emphasis removed). “Today’s hasty recognition of a new state common-law norm shortcuts severely the accepted restatement process by adopting into Oklahoma law a new legal norm on the basis of a single state’s jurisprudential development of very recent vintage.” *Id.* (Opala, J., dissenting).

89. *Id.* ¶ 7, 184 P.3d at 494 (Opala, J., dissenting).

90. *Id.* ¶ 7, 184 P.3d at 493–94 (Opala, J., dissenting).

91. 1976 OK 22, ¶ 3, 553 P.2d 161, 167 (Simms, J., supplemental opinion on rehearing) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976)).

92. *See* James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783, 783 (2003).

out-of-state courts' decisions that have "expand[ed] rights under their state constitutions."<sup>93</sup> This activity has been termed "horizontal federalism."<sup>94</sup>

The Oklahoma Court of Criminal Appeals has examined constitutional rulings of out-of-state courts when faced with questions involving fundamental rights. For example, in *Hurt v. Lackey*, the court addressed whether one district court may determine the validity of a sentence issued by another district court.<sup>95</sup> In *Hurt*, the court recognized that it could render a "decision by adopting the interpretation placed upon similar Colorado Constitutional and statutory provisions by the Supreme Court of Colorado."<sup>96</sup> The Oklahoma court noted that while it agreed with the Colorado court, the Oklahoma statute addressing the issue should be determinative.<sup>97</sup>

In *Dunaway v. State*, the defendant urged the Oklahoma Court of Criminal Appeals to find Oklahoma's bogus check statute unconstitutional based on a similar ruling made by the Colorado Supreme Court.<sup>98</sup> The court noted that "while Colorado case law is not binding on this Court, such law would be, at least, persuasive if the statute held unconstitutional was the same as, or at least similar to, the Oklahoma statute under scrutiny herein."<sup>99</sup> While the Oklahoma Court of Criminal Appeals recognized this possibility, it ultimately declined to follow the Colorado case because the statute at issue was not similar enough to the statute the court was examining.<sup>100</sup>

#### *B. Federal or Uniform Law Requires Oklahoma Courts to Apply the Law of Another State*

Even when fundamental rights are not at issue, Oklahoma courts must still apply the law of another jurisdiction when deciding certain classes of cases. The federal full faith and credit and due process doctrines require that Oklahoma courts "apply the law of another state when Oklahoma has

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93. *Id.*

94. *Id.* at 784 (citing Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 992 (1985)).

95. 1962 OK CR 42, ¶ 2, 372 P.2d 50, 52.

96. *Id.* ¶ 11, 372 P.2d at 53 (citing *Cooper v. People ex rel. Wyatt*, 22 P. 790 (Colo. 1889)).

97. *Id.* ¶ 12, 372 P.2d at 53.

98. *Dunaway v. State*, 1977 OK CR 86, ¶ 8, 561 P.2d 103, 106.

99. *Id.*

100. *Id.* ¶¶ 8–9, 561 P.2d at 106.



no legitimate interest in applying its law to a case over which its courts have jurisdiction and which they intend to decide.”<sup>101</sup> Oklahoma courts most frequently face this obligation when deciding cases involving issues related to choice of law,<sup>102</sup> class actions,<sup>103</sup> and products liability.<sup>104</sup>

Because Oklahoma has adopted the Uniform Commercial Code, Oklahoma courts must apply the law of another state when the parties to a contract agree and “a transaction bears a reasonable relation to this state and also to another state or nation.”<sup>105</sup> Title 15, section 162, which concerns the interpretation of contracts, provides that a contract should be interpreted “according to the law and usage of the place where it is to be performed.”<sup>106</sup> Alternatively, where the contract does not indicate where performance will take place, it should be interpreted “according to the law and usage of the place where it is made.”<sup>107</sup> Additionally, should the parties to a contract agree to apply the law of another state, Oklahoma courts may do so.<sup>108</sup>

Two other provisions help exemplify how Oklahoma law has incorporated principles from the laws of other jurisdictions. Oklahoma has adopted the Uniform Interstate Family Support Act,<sup>109</sup> “which provides that the law of the state that issues a support decree will govern most issues relating to enforcement of that decree.”<sup>110</sup> And finally, the Oklahoma

101. Parry, *supra* note 63, at 19.

102. *See, e.g.*, Bohannon v. Allstate Ins. Co., 1991 OK 64, ¶ 28, 820 P.2d 787, 796 (“[C]ourts in Oklahoma may balance and analyze the interests in multistate controversies in deciding the law to be applied, particularly in cases where the extra-jurisdictional law or its effect is contrary to our public policies.”).

103. *See* Lobo Expl. Co. v. Amoco Prod. Co., 1999 OK CIV APP 112, ¶ 6, 991 P.2d 1048, 1051 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985)). The rule is that the Due Process Clause and Full Faith and Credit Clause require “that for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Id.* ¶ 5, 991 P.2d at 1050 (quoting *Phillips Petroleum*, 472 U.S. at 818).

104. *See* 8 VICKI LAWRENCE MACDOUGALL, OKLAHOMA PRACTICE SERIES: PRODUCT LIABILITY LAW § 11:1 (2017 ed.), 8 OKPRAC § 11:1 (Westlaw). The treatise explains that “[p]roducts liability cases will usually have contacts with more than one jurisdiction[, and] [r]arely will the product be manufactured, distributed, purchased, and its defective condition cause injury to the plaintiff in the same state.” *Id.*

105. Parry, *supra* note 63, at 21 (quoting 12A OKLA. STAT. § 1-301(a) (Supp. 2012)).

106. 15 OKLA. STAT. § 162 (2011).

107. *Id.*

108. *See* Parry, *supra* note 63, at 21 (citing 12A OKLA. STAT. § 1-301(b) (2011)).

109. 43 OKLA. STAT. §§ 601-101 to 601-903 (Supp. 2019).

110. Parry, *supra* note 63, at 21 (citing 43 OKLA. STAT. § 601-604).

Supreme Court's interpretation of Oklahoma's uninsured motorists statute allows the law of another state to govern cases that fall outside the terms of the Oklahoma statute's text.<sup>111</sup>

As this Article has shown, many of Oklahoma's earliest laws originated from a patchwork of various jurisdictions. In theory, the jurisdictions from which Oklahoma adopted its laws could continue to influence Oklahoma law if appellate courts frequently cited opinions from the adopted jurisdictions. The study detailed below explores this theory, and others, surrounding Oklahoma appellate court citation practices for out-of-state judicial opinions.

#### *IV. Methodology and Study Findings*

This study examines the citation practices of Oklahoma appellate courts to opinions from other state appellate courts. The study covers a period of forty years, including every opinion of the Oklahoma Supreme Court, Oklahoma Court of Civil Appeals, and Oklahoma Court of Criminal Appeals from 1976, 1996, and 2016. These years correspond with the advent, growth, and maturation of electronic legal research and were selected to provide a random sample of opinions. These years also allow for an examination of the impact that electronic legal research has had on the citation practices of Oklahoma appellate courts.

A group of law student research assistants examined all 1200 opinions issued by Oklahoma appellate courts during the years in question. In examining these opinions, research assistants noted all citations to primary and secondary authority. They further recorded the name and date of each opinion, the underlying jurisdictional basis,<sup>112</sup> and page length. Researchers recorded the total number of citations to opinions from the following courts: Oklahoma judicial opinions, federal district or bankruptcy opinions, federal appellate and bankruptcy appellate panel opinions, United States Supreme Court opinions, tribal court opinions, and non-U.S. judicial opinions.

Each time an Oklahoma appellate opinion cited a judicial opinion from another state appellate court, students recorded the following information

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111. *Id.* (citing *Bernal v. Charter Cty. Mut. Ins. Co.*, 2009 OK 28, ¶ 13, 209 P.3d 309, 316); *see also* 36 OKLA. STAT. § 3636 (2011 & Supp. 2019).

112. The Oklahoma Constitution and various statutes give Oklahoma appellate courts the jurisdiction to hear specific types of cases. *See* ELLIS & MUCHMORE, *supra* note 6, § 1.18. Students received an explanation of the jurisdiction of each Oklahoma appellate court.

for the cited opinion: case name, year of opinion, West reporter region, reason for citation,<sup>113</sup> and whether the state appellate court opinion cited was a majority, plurality, concurring, or dissenting opinion. Researchers also recorded the total number of citations to other positive law in each Oklahoma judicial opinion. All cited sources were counted only once, even if an opinion cited the same source multiple times.

*A. Reduction of Citations to Out-of-State Opinions Over Time*

A century-long study of state supreme courts from 1870–1970 led by Professor Lawrence Friedman identified a gradual decline in citations to out-of-state cases over time.<sup>114</sup> The study examined sixteen state appellate courts and found that, as a whole, 57% of citations from 1870 to 1900 were to out-of-state cases; that number declined to 43% from 1905 to 1935 and continued to fall to 33% from 1940 to 1970.<sup>115</sup> The study found that newer, less populous states cited the most out-of-state cases, especially during the turn of the century.<sup>116</sup> These states had not yet developed much of their own case law and instead cited opinions from larger, more established states that had already produced voluminous legal precedent.<sup>117</sup> As the century progressed, newer states developed their own bodies of law, and their appellate courts cited fewer out-of-state cases.<sup>118</sup>

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113. Students selected from the following reasons for citation: (1) Persuasive Authority in Support of the Court's Reasoning; (2) Persuasive Authority to Distinguish Another State's Position from the Court's Position; (3) To Interpret Laws that Oklahoma Historically Adopted from Another Jurisdiction and an Oklahoma Opinion Mentions that Oklahoma Adopted Laws from the Jurisdiction; (4) Full Faith and Credit or Due Process Require Oklahoma to Apply the Law of Another State; (5) Choice of Law Requires or Allows Oklahoma to Apply the Law of Another State; (6) A Provision of the Uniform Commercial Code Allows the Law of Another State to Govern; (7) Uniform Interstate Family Support Act; (8) Uninsured Motorists with an Insurance Policy Issued in Another State; (9) Parties Contracted to Apply the Law of Another State; (10) Horizontal Federalism; or, (11) Opinion Uses the Words The Common Law When Referring to the Law of Other States.

114. Friedman et al., *supra* note 7, at 802 tbl.8.

115. *Id.*

116. *Id.* at 803 (“At least 70% of the cases cited by the Idaho, Nevada, South Dakota, and Oregon [state supreme courts] in 1870–1900 were from other states.”).

117. *Id.*

118. From 1940–1970 the study found “Nevada, Idaho, and Oregon were the only states which continued to cite more out-of-state than instate cases. Kansas had joined Alabama in looking almost entirely inward; it averaged only 1.7 out-of-state cites per opinion, about 16% of its total case citations.” *Id.*

Following the national trend, all three Oklahoma appellate courts have gradually curtailed their citation to out-of-state courts over time. Table 1 depicts this trend over the forty-year period examined in this study. The Oklahoma Supreme Court and Court of Civil Appeals both cited other state appellate courts at double digit rates in 1976, but by 2016 both courts had reduced their citations significantly—to just 3.5% and 5.1%, respectively.

The gradual reduction in Oklahoma appellate court citations to out-of-state authority mirrors the trend identified in the century long study. As Oklahoma developed its own jurisprudence, appellate courts began to rely upon that body of law and cited out-of-state authority much less often. Although the dates of this study do not align with the century-long national study, both reveal a trend toward state appellate courts citing fewer out-of-state cases as states develop their own bodies of law.

TABLE 1  
OKLAHOMA APPELLATE COURTS CITATION FREQUENCY  
PERCENTAGE OF CITATIONS TO OUT-OF-STATE OPINIONS

<i>Court Name</i>	<i>% of citations to out-of-state (1976)</i>	<i>% of citations to out-of-state (1996)</i>	<i>% of citations to out-of-state (2016)</i>
Oklahoma Supreme Court	18.9%	12.3%	3.5%
Oklahoma Court of Civil Appeals	19.1%	7.3%	5.1%
Oklahoma Court of Criminal Appeals	3.8%	1.9%	0.06%
All Oklahoma Appellate Courts Combined	11.2%	8.6%	3.5%

### *B. Citation Frequency*

Several other studies examining state appellate court citation practices have calculated “citation frequency,” which describes the number of times a court cites any authority, including its own previous judicial opinions or opinions from other state appellate courts.<sup>119</sup> Table 2 depicts the citation frequency for all Oklahoma appellate courts for all years examined in this study.

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119. *See id.* at 795 (describing the citation frequency for the national-scale study conducted).

TABLE 2  
OKLAHOMA APPELLATE COURTS CITATION FREQUENCY  
IN-STATE AND OUT-OF-STATE JUDICIAL OPINIONS COMPARED

<i>Oklahoma Appellate Court</i>	<i>All Citations</i>	<i>Citations to Oklahoma Opinions (Percent of total citations)</i>	<i>Citations to Out-of-state Opinions (Percent of total citations)</i>
Oklahoma Supreme Court	7,750	4,107 (53%)	915 (12%)
Oklahoma Court of Civil Appeals	3,700	1,971 (53%)	311 (8%)
Oklahoma Court of Criminal Appeals	5,331	3,217 (60%)	150 (3%)
All Oklahoma Appellate Courts Combined	16,786	9,295 (55%)	1,376 (8%)

The frequency with which Oklahoma appellate courts cite to other state appellate courts is roughly comparable to the practices of the Ohio and Kansas appellate courts.<sup>120</sup> A study of Ohio appellate court decisions rendered in 1990 found that 71.5% of citations in Ohio appellate court opinions were to Ohio cases, and 9% of citations were to cases from other state appellate courts.<sup>121</sup> A study of Kansas appellate court citation practices in 1995 discovered that 68% of all citations in Kansas appellate court opinions were to Kansas cases while 13.7% of citations were to cases from other state appellate courts.<sup>122</sup>

Other studies demonstrate a variety of citation practices among state appellate courts. The Friedman century-long study of sixteen state supreme courts found that, “as a whole, [state supreme courts] cited almost two home-grown precedents for every cite to an opinion written by a court of

120. Compare Joseph A. Custer, *Citation Practices of the Kansas Supreme Court and Kansas Court of Appeals*, 8 KAN. J.L. & PUB. POL’Y 126, 126–27 (1998), with James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, 86 L. LIBR. J. 129, 136–37 (1994).

121. Leonard, *supra* note 120, at 136–38 & tbl.2 (presenting data in Table 2 showing 625 total cites to Ohio appellate courts and 81 cites to other states’ appellate courts of the 873 total cases cited).

122. Custer, *supra* note 120, at 126, 139 tbl.4, 140 tbl.5 (presenting data in Tables 4 and 5 that allows the calculation of total citations observed in 1995 at both the Kansas Supreme Court and the Kansas Court of Appeals and the computation of cumulative citation practices between the two courts).

another state.”<sup>123</sup> Deviating from the practice of occasional out-of-state case citation is the New York Courts of Appeals. A 2000 study examining the citation practices of the New York Court of Appeals found that the court cites New York cases 77.7% of the time but only cites opinions from other states 3.7% of the time.<sup>124</sup>

### C. Influence of Electronic Legal Research

In part, this study examines cases during the four-decade period in question to explore what impact, if any, the advent of electronic legal research had on the Oklahoma appellate courts’ citation practices. The first year examined in this study, 1976, marks the approximate “dawn of a new era in the field of legal research.”<sup>125</sup>

By the second year examined in this study, 1996, electronic legal research was firmly established as the American Bar Association’s preferred legal research method.<sup>126</sup> During this era, law students gained virtually unlimited access to both Lexis and Westlaw and entered practice with a preference for conducting research online.<sup>127</sup> However, the basic packages that Lexis and Westlaw sold to attorneys in 1996 (and still to this

123. Friedman et al., *supra* note 7, at 796.

124. William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 BUFF. L. REV. 1273, 1277–78 (2001).

125. KENDALL F. SVENGALIS, LEGAL INFORMATION BUYER’S GUIDE & REFERENCE MANUAL 159 (2019). Svengalis uses the term “dawn” in reference to the unveiling of Lexis in 1973. *Id.* Westlaw was introduced in 1975. *Id.* at 168. The year 1976 was selected as the first year examined in this study to allow both platforms a brief amount of time to become established in Oklahoma. Additionally, the author admits a slight bias toward 1976 as it is the year of his birth.

126. The American Bar Association’s Large Law Firm Technology Survey, 1998 found that 62.4% of attorneys preferred to receive legal research materials in electronic formats (online services, CD-ROM, or internet). AM. BAR ASS’N, LARGE LAW FIRM TECHNOLOGY SURVEY, 1998 SURVEY REPORT 67 (1998). Attorneys at large law firms reported that their use of internet legal research resources increased 93.8% from the previous year. *Id.* The American Bar Association’s Small Law Firm Technology Survey, 1997 found that 66.9% of attorneys used the internet to conduct legal research. AM. BAR ASS’N, SMALL LAW FIRM TECHNOLOGY SURVEY, 1997 SURVEY REPORT 123, 134 (1997). Attorneys at small law firms reported that their use of the following electronic research tools increased by the stated percentage compared to the previous year: CD-ROMs 50.1%, Internet 42%, Online services (LEXIS, Westlaw, or other) 22.8%. *Id.*

127. Marilyn R. Walter, *Retaking Control over Teaching Research*, 43 J. LEGAL EDUC. 569, 581 (1993).

day) allow access to out-of-state case law only after subscribers pay additional fees.<sup>128</sup>

Shortly after 1996, insurgents began challenging Lexis and Westlaw's dominance of the legal research market. Casemaker and Fastcase introduced their electronic legal research platforms in 1998 and 1999, respectively.<sup>129</sup> Both offer low, flat-rate pricing that includes access to case law from all fifty states.<sup>130</sup> They also partner with state and local bar associations to provide bar members with reduced-rate access as a benefit included with bar membership. In 2007, the Oklahoma Bar Association announced its partnership with Fastcase to provide access to all OBA members.<sup>131</sup>

The final year selected for this study, 2016, represents the maturation point of electronic legal research. By 2016, Oklahoma-licensed attorneys had enjoyed unfettered access to case law from all fifty states for nine years. Additionally, Google Scholar, Law 360, the Public Library of Law, and other providers offer free online access to state appellate court opinions.<sup>132</sup>

As case law from all fifty states has become easier to find, one might expect a corresponding increase in the number of citations to out-of-state cases in appellate judicial opinions. But as this study and several others demonstrate, the number of state appellate court citations to out-of-state cases has declined over the past forty years. A study of California Supreme Court opinions found that citations to out-of-state authority declined by 69% from 1950 to 2014.<sup>133</sup> The Montana Supreme Court exhibited a similar decline, citing out-of-state cases 50.1% of the time in its opinions from 1914 to 1915, 39% of the time from 1954 to 1955, and only 7% of the time in 1994.<sup>134</sup> A study of the New York Court of Appeals noted that “despite

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128. See SVENGALIS, *supra* note 125, at 168, 170. The Lexis Advance State Primary Package is the entry-level package, providing one attorney with access to case law from only one jurisdiction at \$1,488 per year. *Id.* at 168. Westlaw's Fixed Rate Plan provides access to a single state's primary law for \$1,500 per year. *Id.* at 170.

129. *Id.* at 162, 174–75.

130. *Id.*

131. See generally Jim Calloway, *OBA Launches Fastcase Benefit*, 78 OKLA. B.J. 133 (2007).

132. SVENGALIS, *supra* note 125, at 159.

133. Michael Whiteman, *Appellate Jurisprudence in the Internet Age*, 14 NW. J. TECH. & INTELL. PROP. 255, 262–64 (2017) (reporting 562 out-of-state citations in 1950 and only 177 out-of-state citations in 2014).

134. Snyder, *supra* note 1, at 462.

easy access to . . . other-state cases, the percentage of these opinions cited by the court was actually lower in 1999 and 2000 than in 1970, 1980, 1990, and 1993.”<sup>135</sup>

Oklahoma appellate court citation to out-of-state cases mirrors the decline found in the California, Montana, and New York studies. As Table 1 depicts, the Oklahoma Supreme Court and Court of Civil Appeals cited out-of-state cases at double digit rates in 1976. By 2016, the citation rates to out-of-state cases for both courts fell to only 3.5% and 5.1%, respectively.

#### *D. Age of Cases Cited*

In addition to knowing which cases Oklahoma appellate courts cite, it is also important to know the relative age of those cases. Oklahoma appellate courts prefer to cite out-of-state cases that have been decided in the previous decade. Table 3 depicts the median age of out-of-state cases cited by all Oklahoma appellate courts during the three years examined in this study. The median age of out-of-state cases cited by Oklahoma appellate courts fluctuates but has never exceeded twenty years during the years examined in this study.

Oklahoma appellate courts’ preference for citing more recent opinions aligns with the findings of other studies.<sup>136</sup> A study of the California Supreme Court discovered that its opinions have a “‘citation half-life’ of about seven years”—in other words, a case more than seven years old is 50% less likely to be cited than a case less than seven years old.<sup>137</sup> Similarly, New York Court of Appeals opinions include “a large majority of cited decisions no less than twenty years old.”<sup>138</sup> Ohio appellate courts have “a marked preference for recent cases.”<sup>139</sup> Kansas appellate courts also prefer to cite recently decided opinions, with approximately 75% of cited cases being decided within the last fifteen years.<sup>140</sup> A total of 73.5% of cases cited in Montana Supreme Court opinions were decided in the past

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135. Manz, *supra* note 124, at 1291.

136. *Id.* at 1281.

137. Snyder, *supra* note 1, at 466 (“[T]he probability that any decision of the California Supreme Court will be cited by that court as an authority is reduced by half every [seven] years or so.”) (quoting John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 395 n.11 (1977)).

138. Manz, *supra* note 124, at 1281.

139. Leonard, *supra* note 120, at 139.

140. Custer, *supra* note 120, at 128.



ten years.<sup>141</sup> Arkansas appellate courts primarily cited case law less than twenty years old.<sup>142</sup> While the findings of these studies included all cited cases and were not limited to out-of-state cases, the results are still relevant to the practices of the Oklahoma appellate courts. These studies are relevant because they demonstrate the general trend of state appellate courts to cite more recent opinions.

Several theories explain state appellate courts' preference for citing more recent appellate opinions from all jurisdictions, including their own previous opinions. First, a study of United States Supreme Court precedent found "that the informational value of court opinions depreciates as they age."<sup>143</sup> Second, Judge Richard Posner co-authored an article in which he describes precedent as "depreciat[ing] in an economic sense because the value of its information content declines over time with changing circumstances."<sup>144</sup> Third, an empirical study of the California Supreme Court posited that older opinions may be less relevant to appellate judges because their "social context" is more remote; they are more likely to be "overruled by legislation," and "the legal culture may have changed" since the opinion was decided.<sup>145</sup>

TABLE 3  
MEDIAN AGE OF OUT-OF-STATE CASES  
CITED BY OKLAHOMA APPELLATE COURTS

<i>Oklahoma Appellate Courts</i>	1976	1996	2016
Oklahoma Supreme Court	19 years old	11 years old	13 years old
Oklahoma Court of Civil Appeals	10 years old	12 years old	16 years old
Oklahoma Court of Criminal Appeals	8 years old	1 year old	10 years old

141. Snyder, *supra* note 1, at 466.

142. A. Michael Beard, *Citations to Authority by the Arkansas Appellate Courts, 1950–2000*, 25 U. ARK. LITTLE ROCK L. REV. 301, 318 (2003).

143. Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325, 325 (2013).

144. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 263 (1976).

145. Merryman, *supra* note 137, at 398.

*E. Reasons Oklahoma Appellate Courts Cite Other Jurisdictions*

Researchers examined Oklahoma appellate opinions to determine why they cited out-of-state authority. Law student research assistants categorized cases based on eleven reasons why an Oklahoma appellate court might cite a judicial opinion from another state.<sup>146</sup> Unsurprisingly, courts most frequently cited out-of-state judicial opinions to support their reasoning. The second most common reason why Oklahoma courts cited out-of-state judicial opinions was to distinguish their position from that taken by the other state.

Based on the coding of these citations, Oklahoma appellate courts are much more likely to cite a judicial opinion from another state to support their reasoning than to distinguish another state's position. Roughly 80% of Oklahoma appellate court citations to out-of-state judicial opinions support the court's position. Approximately 20% of Oklahoma appellate court citations to out-of-state judicial opinions are to distinguish another state court's position.

It is not surprising that Oklahoma appellate courts almost always cite out-of-state judicial opinions to support or distinguish the courts' reasoning. Future lawyers learn this technique as first year law students. Legal research texts<sup>147</sup> and legal scholars<sup>148</sup> frequently discuss borrowing "persuasive" authority from other jurisdictions to support a court's reasoning when a state lacks legal authority on an issue of law.

As described in Part II, Oklahoma adopted entire bodies of law from other jurisdictions during the state's infancy. The opinions examined in this study included ten citations to judicial opinions of jurisdictions from which

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146. In addition to the reasons listed in the chart below, pre-selected reasons included: "parties contracted to apply the law of another state"; "case involved an uninsured motorists with an insurance policy issued in another state"; and, "full faith and credit doctrine." The three reasons listed in this note were not included in Table 4 because no opinions examined in this study cited the law of another state for any of these reasons.

147. CHRISTINA L. KUNZ ET AL., *THE PROCESS OF LEGAL RESEARCH* 163 (7th ed. 2008); DARIN K. FOX, DARLA W. JACKSON & COURTNEY L. SELBY, *OKLAHOMA LEGAL RESEARCH* 7 (Suzanne E. Rowe ed., 2013).

148. Rachael K. Hinkle & Michael J. Nelson, *The Transmission of Legal Precedent Among State Supreme Courts in the Twenty-First Century*, 16 ST. POL. & POL'Y Q. 391, 392 (2016) (noting that it is common practice for courts to cite "other courts' precedents when adopting a similar policy or applying a similar rule"). Other legal scholars have documented the practices of courts observing choices made by other jurisdictions and, under certain conditions, adopting those choices into their own jurisdictions. Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 136 (2006).

Oklahoma adopted laws in the state's early days.<sup>149</sup> These opinions specifically reference Oklahoma's historical adoption of laws from the cited state.

*In re Glomset's Estate* provides a prime example of an Oklahoma appellate court citing the case law of a jurisdiction from which Oklahoma borrowed law.<sup>150</sup> In *Glomset's Estate*, Justice Hodges dissented, noting that Oklahoma's pretermitted heir statute was adopted from the Dakotas.<sup>151</sup> His dissenting opinion cites four cases from North Dakota<sup>152</sup> and one case from South Dakota<sup>153</sup> to demonstrate that the North and South Dakota courts have traditionally interpreted the statute to allow extrinsic evidence "to prove that the testator intended to disinherit an omitted child."<sup>154</sup> Justice Hodges cites these cases to support his assertion that Oklahoma should join the majority of jurisdictions that interpret wills using extrinsic evidence without first finding ambiguity in the will at issue.<sup>155</sup>

At first glance, ten Oklahoma appellate court citations to jurisdictions from which Oklahoma borrowed laws from may seem like a negligible amount. However, this number is reasonable given the various limitations that Oklahoma law places on the influence of laws imported from other jurisdictions. When Oklahoma imports a statute from another jurisdiction, Oklahoma also adopts any construction accorded by the other state's highest appellate court at the time of adoption.<sup>156</sup> Exceptions to this rule provide Oklahoma appellate courts with various ways to avoid importing foreign precedent into Oklahoma.<sup>157</sup> And the weight given to out-of-state judicial opinions issued after Oklahoma has adopted a law from the state varies.<sup>158</sup>

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149. See *supra* Section II.B.

150. *Glomset v. Ghan (In re Estate of Glomset)*, 1976 OK 30, ¶ 3, 547 P.2d 951, 954 (Hodges, V.C.J., dissenting).

151. *Id.* ¶ 3 n.3, 547 P.2d at 954 n.3 (Hodges, V.C.J., dissenting).

152. *Id.* (Hodges, V.C.J., dissenting) (citing *Baur v. West (In re Baur's Estate)*, 54 N.W.2d 891 (N.D. 1952); *Lowery v. Hawker*, 133 N.W. 918 (N.D. 1911); *Schultz v. Schultz*, 125 N.W. 555 (N.D. 1910); *Hedderich v. Hedderich*, 123 N.W. 276 (N.D. 1909)).

153. *Id.* (Hodges, V.C.J., dissenting) (citing *Johnson v. Swenson (In re Swenson's Estate)*, 230 N.W. 884 (S.D. 1930)).

154. *Id.* at 954 (Hodges, V.C.J., dissenting).

155. *Id.* (Hodges, V.C.J., dissenting).

156. See *In re Estate of Speake*, 1987 OK 61, ¶ 7, 743 P.2d 648, 650.

157. See *supra* Section II.B.

158. The weight varies from non-binding to persuasive. See, e.g., *Simler v. Wilson (In re Fletcher's Estate)*, 1957 OK 7, ¶ 25, 308 P.2d 304, 312 (noting the construction is "at

The seemingly low number of Oklahoma appellate court citations to out-of-state judicial opinions interpreting laws adopted by Oklahoma may be attributable to the years that this study covers. While Oklahoma adopted most of its laws from other jurisdictions in the early days of statehood, this study examined Oklahoma appellate opinions from the previous four decades. The number of citations to out-of-state opinions interpreting adopted laws may have been higher if this study focused on the years immediately following statehood when most of the legal importing occurred. But as Oklahoma's case law developed holistically over time, and the legislature adopted or amended statutes with preexisting in-state cases, the need to cite interpretations from other state appellate courts has decreased.

This study only categorized Oklahoma appellate opinions as citing cases of jurisdictions from which Oklahoma adopted laws if the opinion referenced Oklahoma's historical adoption of laws from the cited state. Without this limitation, the number of opinions in this category may have been higher. As discussed in Part II, Oklahoma historically adopted laws in ten subject areas from nine different states.<sup>159</sup> Four of these states—Arkansas, Kansas, California, and New York—make up part of the group of most frequently cited states by Oklahoma appellate courts. Oklahoma appellate courts likely continue to cite cases from these nine states to interpret imported laws but without referencing Oklahoma's adoption of laws from the cited state.

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best . . . persuasive"); *Sanguin v. Wallace*, 1951 OK 181, ¶ 10, 234 P.2d 394, 397 (noting that the courts “have not held to the California construction” of the relevant statute); *Nat'l Supply Co. v. Dunn*, 1946 OK 287, ¶ 17, 174 P.2d 914, 917 (“While our statute was adopted from Kansas, the two cases cited above were decided long after its adoption, and are not in any way binding upon us.”); *Given v. Owen*, 1918 OK 537, ¶ 5, 175 P. 345, 346 (mem.) (commenting that the court would not adopt a specific interpretation because the opinion did not come from a court of last resort).

159. See *supra* notes 12–55 and accompanying text.

TABLE 4  
REASONS OKLAHOMA APPELLATE COURTS  
CITED OTHER JURISDICTIONS

<i>Reason for Citation</i>	<i>Oklahoma Supreme Court</i>	<i>Oklahoma Court of Civil Appeals</i>	<i>Oklahoma Court of Criminal Appeals</i>	<i>Total</i>
Persuasive Authority in Support of the Court's Reasoning	752	220	138	1,110
Persuasive Authority to Distinguish Another State's Position from the Court's Position	141	59	12	212
To Interpret Laws that OK Historically Adopted from Another Jurisdiction and OK Opinion Mentions that OK Adopted Laws from the Jurisdiction	6	4	0	10
Choice of Law Requires or Allows OK to Apply the Law of Another State	10	0	0	10
Uniform Interstate Family Support Act	0	12	0	12
UCC Allows Law of Another State to Govern or Other State Has Adopted Same UCC provision as OK	1	16	0	17
Horizontal Federalism	4	0	0	4
"The Common Law" is Invoked When Referring to the Law of Other States	1	0	0	1

*F. Jurisdiction and Citation of Out-of-State Opinions*

The Oklahoma Supreme Court has the broadest jurisdiction of Oklahoma's three appellate courts. The Oklahoma Constitution defines the state Supreme Court's appellate jurisdiction as "coextensive with the State" and extending "to all cases at law and in equity," except criminal cases.<sup>160</sup> The Oklahoma Supreme Court's original jurisdiction extends to control of inferior courts.<sup>161</sup> Cases that come to the court fall within five categories:

160. OKLA. CONST. art. VII, § 4.

161. *Id.*

(1) appeals retained for initial decisions, including those from district court decisions; (2) appeals of decisions of the Court of Civil Appeals; (3) original actions for extraordinary writs; (4) certified interlocutory appeals; and (5) certified questions of law.<sup>162</sup>

The jurisdictions of the Oklahoma Court of Civil Appeals and Oklahoma Court of Criminal Appeals are more limited. The Oklahoma Court of Civil Appeals has general appellate jurisdiction and reviews certified interlocutory orders.<sup>163</sup> And “[t]he [Oklahoma] Court of Criminal Appeals has ‘exclusive appellate jurisdiction in criminal cases.’”<sup>164</sup>

The jurisdictional basis of a case before the Oklahoma Supreme Court does not appear to make the court any more or less likely to cite out-of-state judicial opinions. During the years this study examines, the Oklahoma Supreme Court cited the highest number of out-of-state judicial opinions in petition in error cases (seventy citations), petitions for certiorari (fifty citations), and original proceedings (twenty-five citations). The high incidence of out-of-state citations in these categories of cases makes sense because they are the cases most frequently heard by the Supreme Court. For example, as depicted in Table 5, in 2016, the Oklahoma Supreme Court issued opinions for approximately forty petitions in error, twenty petitions for certiorari, and five original proceedings. The court is more likely to cite out-of-state judicial opinions in these cases simply because it hears more of these cases than any other and has more opportunities to cite out-of-state opinions.

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162. ELLIS & MUCHMORE, *supra* note 6, § 1:18.

163. *Id.* § 1:35.

164. *Id.* § 1:51 (quoting OKLA. CONST. art. VII, § 4). For a discussion of the overlapping jurisdiction of the Oklahoma Supreme Court and Oklahoma Court of Criminal Appeals, see Greg Eddington, *The Jurisdictional Boundary Between the Oklahoma Supreme Court and the Court of Criminal Appeals: Blurred Lines*, 69 OKLA. L. REV. 203 (2017).

TABLE 5  
 JURISDICTIONAL BASIS & NUMBER OF APPELLATE  
 OPINIONS CITING OUT-OF-STATE CASES<sup>165</sup>

<i>Jurisdictional Basis</i>	<i>Total Opinions Citing Out-of-State Cases</i>
<b>Type of Case Before Oklahoma Supreme Court</b>	
Appellate Jurisdiction – Appealable Decision of Another Court	70
Petition for Rehearing	2
Petition for Certiorari	3
Accelerated Appeal	4
Certified Interlocutory Appeal	5
Appeal From a Tribunal Other Than District Court	6
Original Jurisdiction (includes bar disciplinary matters)	7
<b>Type of Case Before Oklahoma Court of Criminal Appeals</b>	
Appellate Jurisdiction – Appeal of District Court Decision	102
Certiorari Appeal – Appeal of Judgment Following Guilty or Nolo Contendere Appeal	2
Appeal by the State	1
Juvenile Appeal	0
Capital Appeal	0
Accelerated Docket Appeal	3
Appeal of Final Judgment Under Post Conviction Procedures Act	7
Original Jurisdiction	10
Other Appeals	5
<b>Type of Case Before Oklahoma Court of Criminal Appeals</b>	
Appellate Jurisdiction	91
Petition for Certiorari	0
Review of Workers Compensation Court Decisions	1

165. Research assistants were not able to verify the jurisdictional basis of all 1,200 cases examined in this study. This chart lists the number of Oklahoma appellate opinions citing out-of-state opinions that research assistants were able to verify the jurisdictional basis of.

The finding that the type of case does not impact the likelihood that an appellate court will cite an out-of-state judicial opinion is consistent with a study of Ohio appellate opinions. That study examined a number of variables present in one hundred Ohio appellate cases published in 1990, including the jurisdictional basis of each case.<sup>166</sup> One of the aims of the Ohio study was to test the assumption that appellate courts engage in “a wide-ranging examination of authorities” when resolving complicated legal issues.<sup>167</sup> The examination of authorities included “the work of sister supreme courts,”<sup>168</sup> but the study determined that the jurisdictional basis of a case “was useless as a litmus for complexity” and rejected jurisdiction as a method of determining whether a case was complex.<sup>169</sup>

### *G. Most Frequently Cited State Appellate Courts*

The Oklahoma Supreme Court cited at least one case from every state in the union during the three years examined in this study. The Oklahoma Court of Civil Appeals cited cases from all but three states,<sup>170</sup> and the Court of Criminal Appeals cited cases from all but five states.<sup>171</sup>

Table 6 depicts jurisdictions most frequently cited by Oklahoma appellate courts in 1976, 1996, and 2016. Nearly half of all Oklahoma appellate court citations to out-of-state courts are concentrated among eighteen states. Only the top three jurisdictions cited by the Oklahoma Court of Criminal Appeals are listed due to that court’s low rate of citations to out-of-state opinions.<sup>172</sup>

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166. Leonard, *supra* note 120, at 132.

167. *Id.* at 129.

168. *Id.* at 137.

169. *Id.* at 148.

170. The Oklahoma Court of Civil Appeals did not cite any state appellate judicial opinions from the District of Columbia, New Hampshire or Vermont in 1976, 1996, or 2016.

171. The Oklahoma Court of Criminal Appeals did not cite any state appellate judicial opinions from South Carolina, Vermont, West Virginia, North Carolina, or New Hampshire in 1976, 1996, or 2016.

172. Jurisdictions ranked below third place received a very small number of citations and multiple jurisdictions were tied for various spots below third place. Meaningful comparisons to the other Oklahoma appellate courts were not possible.



TABLE 6  
MOST FREQUENTLY CITED STATE APPELLATE COURTS

Rank	Oklahoma Supreme Court	# of Citations	Oklahoma Court of Civil Appeals	# of Citations	Oklahoma Court of Criminal Appeals	# of Citations
1st	California	71	California	22	California	15
2nd	Texas	54	Illinois & Kansas	20 (tie)	Texas	10
3rd	Kansas	49	New York	19	Wisconsin	7
4th	Illinois	40	Texas	17		
5th	Minnesota	32	Pennsylvania	14		
6th	Washington	30	Colorado	13		
7th	Arizona	29	Arkansas & Florida	12 (tie)		
8th	New York	28	Washington	11		
9th	Colorado, Michigan, Missouri	25 (tie)	New Jersey	10		
10th	Ohio	24	Arizona	8		

California appellate opinions are those most frequently cited by all three Oklahoma appellate courts. This result is consistent with the findings of other studies of state appellate court citation practices. The century-long national study found California to be the second most frequently cited jurisdiction from 1870 to 1970.<sup>173</sup> California's experience in the areas of probate, wills, and property laws is particularly relevant to Oklahoma jurists because Oklahoma law on these subjects is based, in part, on California law. Additionally, California is the most populous state in the United States, has been a state for fifty-seven more years than Oklahoma, and has a trove of judicial opinions available to cite.

Similarly, it is unsurprising that Kansas is among the most cited jurisdictions by Oklahoma appellate courts. As discussed in Part II, Oklahoma has borrowed laws from Kansas over the years, including the Kansas Field Code of Civil Procedure and divorce laws.<sup>174</sup> Other states from which Oklahoma has borrowed laws and that are among the most

173. Friedman et al., *supra* note 7, at 806 tbl.9. The national study found that New York was the most cited. *Id.*

174. See *supra* notes 13, 26 and accompanying text.

cited jurisdictions include New York, Wisconsin, Minnesota, Arkansas, and Michigan.<sup>175</sup>

During its infancy as a state, Oklahoma borrowed a great deal of law from the Dakotas, including civil procedure, probate, wills, and mortgages.<sup>176</sup> However, only twenty-six combined opinions of the Oklahoma Supreme Court and Oklahoma Court of Civil Appeals cite to North or South Dakota judicial opinions. The lack of citations to opinions from the Dakotas may be a function of the years that this study examines. Oklahoma appellate courts likely cited opinions from the Dakotas more frequently in the years immediately following the adoption of their laws, but the fact that this study did not cover those years may explain the low number of citations.

#### *H. Geographic Proximity Theory*

The geographic proximity of one state appellate court to another has been discussed as a factor that increases the persuasive value of a non-binding appellate judicial opinion. Legal research and writing texts advise that out-of-state judicial opinions may be more persuasive if they are geographically close to the court's home jurisdiction.<sup>177</sup> A 1985 study tested the theory that courts are more likely to cite cases from other jurisdictions when they share a border.<sup>178</sup> The study found statistically significant "correlation[] between proximity and inter-court communication" to indicate "that the courts have tended to cite their immediate neighbors."<sup>179</sup>

More recent studies have confirmed the geographic proximity theory. A 2015 study of Indiana appellate court citation practices found that those states located closest to Indiana consistently received "above-mean

175. Oklahoma borrowed laws relating to trusts from Michigan, New York, Wisconsin, and Minnesota. See Gray, *supra* note 21, at 220–21. Oklahoma's workers compensation law was heavily influenced by Arkansas law. See *Odom v. Penske Truck Leasing Co.*, 2018 OK 23, ¶ 33, 415 P.3d 521, 531.

176. See *supra* notes 12, 14, 23–24 and accompanying text.

177. Kevin Bennardo, *Testing the Geographical Proximity Hypothesis: An Empirical Study of Citations to Nonbinding Precedents by Indiana Appellate Courts*, 90 NOTRE DAME L. REV. ONLINE 125, 125–26 & n.2 (2015) (citing several standard legal research and writing texts for this proposition).

178. Peter Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1870–1970*, 19 L. & SOC'Y REV. 449, 463 (1985) ("The prediction is that the rate of citation will be greater when the two states share a border than when they do not.").

179. *Id.* at 467.

citations” by Indiana appellate courts.<sup>180</sup> A 1996 study found the Montana Supreme Court most frequently cited the neighboring states of Idaho and South Dakota.<sup>181</sup> And another study published in 1998 found that the Kansas Supreme Court frequently cited geographically proximate states.<sup>182</sup>

Oklahoma appellate courts frequently cite the appellate courts of neighboring states. Oklahoma’s southern neighbor, Texas, was the second most cited state by the Oklahoma Supreme Court and Oklahoma Court of Criminal Appeals,<sup>183</sup> and it was the fourth most cited state by the Oklahoma Court of Civil Appeals.<sup>184</sup> Oklahoma’s northern neighbor, Kansas, was the third most cited state by the Oklahoma Supreme Court and Oklahoma Court of Civil Appeals.<sup>185</sup> Three other neighboring states—Colorado, Arkansas, and Missouri—all ranked in the top ten most frequently cited jurisdictions by Oklahoma appellate courts.<sup>186</sup> Oklahoma’s sixth and final neighboring state, New Mexico, joined the ten most frequently cited jurisdictions once citation counts were adjusted to account for judicial output, as described in the next section.

### *I. The Diffusion of Legal Precedent*

A 1985 study of sixteen state appellate courts found that courts located in sparsely populated or rural jurisdictions were more likely to cite courts located in more heavily populated or urban jurisdictions.<sup>187</sup> The study describes this effect as the “diffusion of [legal] precedent.”<sup>188</sup> The

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180. Bennardo, *supra* note 177, at 148. Bennardo’s study ultimately concluded that “geographical proximity in conjunction with a sense of regional identity that translates into heightened persuasive value of nonbinding authorities.” *Id.* at 149.

181. Snyder, *supra* note 1, at 460.

182. Custer, *supra* note 120, at 127–28.

183. The Oklahoma Supreme Court cited fifty-four Texas appellate judicial opinions, and the Court of Criminal Appeals cited ten Texas opinions.

184. The Oklahoma Court of Civil Appeals cited seventeen Texas opinions.

185. The Oklahoma Supreme Court cited forty-nine Kansas opinions and the Court of Civil Appeals cited Kansas opinions twenty times.

186. Forty-one Colorado appellate opinions were cited by Oklahoma appellate courts. Twenty-four Arkansas appellate opinions were cited by Oklahoma appellate courts. Thirty-six Missouri appellate opinions were cited by Oklahoma appellate courts.

187. Harris, *supra* note 178, at 478–79. The diffusion theory was found to not apply to the New York Court of Appeals. Manz, *supra* note 124, at 1279 (finding that “other than New Jersey, none of the factors suggested as influences on the citation of other-state cases, such as population, level of urbanization, and geographic proximity” applied to the New York Court of Appeals).

188. Harris, *supra* note 178, at 478.

population and location of state appellate courts most frequently cited by Oklahoma appellate courts affirms the findings of this study. According to the 1980, 2000, and 2010 censuses, the jurisdictions most frequently cited by Oklahoma appellate courts were all ranked among the top third of the most populous states.<sup>189</sup> And the two states that Oklahoma appellate courts cite most frequently—California and Texas—have been the two most populous states since the 2000 census.<sup>190</sup>

Studies exploring the citation practices of the Kansas and Arkansas appellate courts yielded similar results. The Kansas study examined Kansas appellate opinions from three different years in the previous century.<sup>191</sup> And the state appellate courts that Kansas appellate courts cited most frequently closely tracked Oklahoma's most cited jurisdictions.<sup>192</sup> The Arkansas study examined Arkansas appellate case law at ten-year intervals during the previous century and revealed that Arkansas appellate courts also most frequently cited courts similar to those that Oklahoma appellate courts cited.<sup>193</sup>

Despite these findings, the diffusion of legal precedent theory may suffer from the weakness that it is possible appellate courts located in more populous states may only be cited most frequently because their courts have the biggest dockets.<sup>194</sup> Because these more populous states generate more court decisions, other states have more case law to choose from compared

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189. See U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, NO. CPH-1-1, UNITED STATES: 2010: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 2 (2013), <http://www2.census.gov/library/publications/2012/dec/cph-1-1.pdf> [hereinafter U.S. CENSUS 2010 SUMMARY]; U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, NO. PHC-1-1, UNITED STATES: 2000: SUMMARY POPULATION AND HOUSING CHARACTERISTICS: PART 1, at 2 (2002), <https://www.census.gov/prod/cen2000/phc-1-1-pt1.pdf> [hereinafter U.S. CENSUS 2000 SUMMARY]; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NO. PC80-1-A1, 1980 CENSUS OF POPULATION: NUMBER OF INHABITANTS: UNITED STATES SUMMARY at 1-17 fig.14 (1983), <https://archive.org/details/1980censusofpopu8011uns/page/16/mode/2up>. The previously cited U.S. Census surveys provide the most applicable Census information for the three years examined in this study (1976, 1996, and 2016).

190. See U.S. CENSUS 2010 SUMMARY, *supra* note 189, at 2; U.S. CENSUS 2000 SUMMARY, *supra* note 189, at 2.

191. Custer, *supra* note 120, at 126.

192. See *id.* at 128. The Kansas appellate courts cited judicial opinions from California and New York most frequently followed by opinions from Florida, Illinois, Massachusetts, New Jersey, Ohio, Texas, and Washington. *Id.*

193. See Beaird, *supra* note 142, at 302. The Arkansas appellate courts cited opinions from New York, California, Texas, Missouri, and Illinois most frequently. *Id.* at 317.

194. Bennardo, *supra* note 177, at 137–38.

to less populous states.<sup>195</sup> A 2015 study examining Indiana appellate court citation practices acknowledged this issue, noting that “raw citation counts cannot be the end of the inquiry.”<sup>196</sup> The Indiana study controlled for the high number of citable opinions produced by courts in more populous states by assigning states multipliers based on the number of citations they produced.<sup>197</sup> The study used a Westlaw search to determine the total number of citable opinions that each state produced, and the results ranged from 157 opinions for Hawaii to 11,607 for New York.<sup>198</sup> The mean output across forty-nine states (excluding Indiana) was 1,014 citable opinions.<sup>199</sup> States producing more opinions than the mean “received a sub-one multiplier,” and states that produced fewer opinions than the mean “received an above-one multiplier.”<sup>200</sup> For example, “New York’s multiplier was 0.09,” and Hawaii’s was 6.46.<sup>201</sup>

This study incorporated the Indiana study’s methodology. The number of citations that the Oklahoma Supreme Court and the Oklahoma Court of Civil Appeals made to other state appellate courts in 1996 and 2016 were adjusted using each states’ multiplier from the Indiana study. Indiana was excluded because no multiplier was available, and the Oklahoma Court of Criminal Appeals was excluded because it cited a comparatively low number of state appellate court opinions in 1996 and 2016.

The jurisdictions most frequently cited by the Oklahoma Supreme Court and Oklahoma Court of Civil Appeals shifted when citation counts were adjusted to account for court output. As reported in Table 7, twelve state appellate courts moved into the most cited group, and nine state appellate courts fell out of the most cited group.<sup>202</sup> Adjusting citation counts to account for court output brought New Mexico into the most cited group, which supports the hypothesis that state appellate courts are more likely to

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195. *Id.*

196. *Id.* at 138.

197. *Id.* at 142.

198. *Id.* at 140. The Westlaw search included forty-nine states but excluded Indiana because the study looked at the Indiana Appellate Courts’ citation of other state appellate court opinions. *See id.*

199. *Id.*

200. *Id.* at 142.

201. *Id.*

202. States joining the most cited group include Alabama, Delaware, Hawaii, Iowa, Maine, Maryland, Michigan, Montana, Nevada, New Hampshire, New Mexico, and Ohio. States leaving the most cited group include California, Florida, Illinois, Missouri, New Jersey, New York, Pennsylvania, Texas, and Washington.

cite state appellate courts that are geographic neighbors, within the same federal circuit, or part of the same *West National Reporter System* region. Once citation counts were adjusted to account for court output, Nebraska, Iowa, and Kentucky all joined the most cited group. This result supports the proximity hypothesis because all three states have borders that are contiguous to Oklahoma's immediately adjacent neighbors.

TABLE 7  
MOST FREQUENTLY CITED STATE APPELLATE COURTS ADJUSTED TO  
ACCOUNT FOR THE DIFFUSION OF LEGAL PRECEDENT

Rank	State Cited by Oklahoma Supreme Court	# of Citations 2016 & 1996	Multiplier	Adjusted # of Citations	Rank	State Cited by Oklahoma Court of Civil Appeals	# of Citations 2016 & 1996	Multiplier	Adjusted # of Citations
1st	Iowa	18	4.32	78	1st	Ohio	7	4.53	32
2nd	Ohio	14	4.53	63	2nd	Nevada	4	5.93	24 (tie)
3rd	Kansas	24	1.97	47	2nd	Kansas	12	1.97	24 (tie)
4th	Minnesota	21	2.05	43	3rd	Arizona	8	2.36	19
5th	Nevada	7	5.93	42	4th	New Mexico	6	2.96	18
6th	Arizona	17	2.36	40	5th	Colorado	8	1.89	15
7th	Michigan	16	2.41	39		Delaware	3	4.43	13 (tie)
8th	Alabama	10	3.32	33	6th	Iowa	3	4.32	13 (tie)
9th	New Hampshire	7	4.63	32		Hawaii	2	6.46	13 (tie)
10th	Delaware	7	4.43	31	7th	Michigan	5	2.41	12 (tie)
						Washington	9	1.28	12 (tie)
						Alabama	3	3.32	10 (tie)
					8th	Maryland	6	1.62	10 (tie)
						Montana	4	2.32	9 (tie)
					9th	Arkansas	5	1.82	9 (tie)
						Maine	2	4.03	8 (tie)
					10th	California	15	0.52	8 (tie)

### J. Influence of the West National Reporter System

The West publishing company launched its *National Reporter System* in the 1880s and has impacted the citation practices of state appellate courts ever since.<sup>203</sup> The *National Reporter System* divides the country into seven

203. Bennardo, *supra* note 177, at 128–29.

regions, roughly related to geography, and publishes state appellate court opinions.<sup>204</sup>

Before the advent of electronic legal research, the West *National Reporter System* was the most readily available source of judicial opinions from a judge or attorney's home jurisdiction.<sup>205</sup> The West *National Reporter System* provides access to appellate opinions from other states within the region, and many attorneys and judges may not have had physical access to judicial opinions from outside of their region. If an attorney or judge had access to reporters beyond their home jurisdiction, they likely "[I]ack[ed] the time and energy to scan all of the state and regional reports" and were "likely to perceive the reports of other regions as less salient, not relevant for use in making decisions."<sup>206</sup>

Several studies have documented the impact that the West *National Reporter System* has had on state appellate court citation practices. The Friedman century-long study of state supreme court opinions from 1870–1970 found that state appellate courts were more likely to cite courts located within their region than those from other regions.<sup>207</sup> The preference for citing courts from within one's own region was prevalent before the 1970s.<sup>208</sup> But an article published in 1985 foreshadowed the decline of this practice:

[M]ost lawyers who actually handle appeals before state supreme courts practice in large firms in metropolitan areas and have easy access to a wide variety of reports. Changes in the nature of appellate litigation and improvements in communication (e.g., Lexis) have no doubt blunted the effects of physical access, although I suspect that it may still play a role in the more isolated regions of the United States.<sup>209</sup>

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204. *Id.* at 129; see also Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 181–82 (1985) (noting that West Publishing did "not follow[] traditional usage in allocating a state to one or another region"). For example, Oklahoma is located in the Pacific region and the Southwestern region includes Arizona, Kentucky, Missouri, Tennessee, and Texas.

205. Custer, *supra* note 120, at 121.

206. Caldeira, *supra* note 204, at 181.

207. Friedman et al., *supra* note 7, at 807; see also Caldeira, *supra* note 204, at 190–91.

208. Bennardo, *supra* note 177, at 128–29 (citing Harris, *supra* note 178, at 465–66).

209. Caldeira, *supra* note 204, at 182.

Studies conducted since the advent of electronic legal research confirm the diminished influence that the West *National Reporter System* has had on out-of-state citations.<sup>210</sup> As one study recognized, legal research has “drastically undermined the importance of the physical location of state precedents in one West regional reporter or another.”<sup>211</sup> Another study of Montana Supreme Court citation practices found that by 1994 the court’s preference for citing cases from Montana’s Pacific region had “disappeared,” and judicial clerks frequently made “extensive use of Westlaw in case searching.”<sup>212</sup> A similar study of Kansas appellate courts found that they were no more likely to cite out-of-state opinions appearing in Kansas’ Pacific region than out-of-state opinions from other regions.<sup>213</sup> Finally, a study of Indiana appellate court opinions from 2012 to 2013 found that Indiana courts did not cite state appellate courts from the same region with any more regularity than those outside the region.<sup>214</sup>

Oklahoma appellate court citation practices in recent years follow the national trend of citing fewer out-of-state cases from the same West *National Reporter System* region (the Pacific region). Table 8 depicts the gradual decline in Oklahoma appellate court citations to other state appellate court opinions within the Pacific region as a percentage of the total number of out-of-state citations. For example, the median citation rate to out-of-state judicial opinions appearing in the Pacific region by all Oklahoma appellate courts fell from a high of 18% in 1976 to only 7% in 2016.

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210. A single exception to this trend was identified in Hinkle & Nelson, *supra* note 148. The study looked at every opinion by fifty-two state courts of last resort in 2010 and found that “[s]tates are significantly more likely to cite precedents from courts in the same West region even after accounting for federal jurisdiction and contiguity.” *Id.* at 403.

211. *Id.* at 392.

212. Snyder, *supra* note 1, at 463.

213. Custer, *supra* note 120, at 121.

214. Bennardo, *supra* note 177, at 146 (“[I]nclusion in the same West regional reporter as Indiana did not, on its own, distinguish a state’s rate of citation.”).



TABLE 8  
OKLAHOMA APPELLATE OPINIONS  
CITATIONS TO OUT-OF-STATE APPELLATE OPINIONS APPEARING  
IN THE PACIFIC REPORTER AS A PERCENTAGE  
OF ALL CITATIONS TO OUT-OF-STATE OPINIONS

<i>Court Name</i>	<i>1976</i>	<i>1996</i>	<i>2016</i>
Oklahoma Supreme Court	36%	34%	6%
Oklahoma Court of Civil Appeals	9%	13%	7%
Oklahoma Court of Criminal Appeals	10%	2%	0%
Median Citation to Out-of-State Opinions Appearing in the Pacific Reporter by All Oklahoma Appellate Courts	18%	16%	7%

*K. Influence of State Cases Within Oklahoma's Federal Circuit*

Oklahoma is located in the Tenth Federal Appellate Circuit.<sup>215</sup> When researching an issue of Oklahoma law, researchers who are unable to find on point Oklahoma judicial opinions often look to judicial opinions from state courts within the Tenth Circuit. While those state court opinions can be helpful, federal cases from within the Tenth Circuit interpreting Oklahoma law “are considered highly persuasive in the absence of controlling decisions” from an Oklahoma court.<sup>216</sup>

A 2010 study of all state courts of last resort found that states that are both geographically contiguous with one another and in the same federal circuit were more likely to cite each other.<sup>217</sup> At the same time, “[s]tates that are only in the same federal circuit or are only contiguous are *not* significantly more likely to cite each other.”<sup>218</sup> Oklahoma appellate court citation practices appear to follow the trend identified in the 2010 study. The Tenth Circuit includes Utah, Wyoming, New Mexico, Colorado,

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215. FOX, JACKSON & SELBY, *supra* note 147, at 81.

216. MARK K. OSBECK, IMPECCABLE RESEARCH: A CONCISE GUIDE TO MASTERING LEGAL RESEARCH SKILLS 99 (2010).

217. Hinkle & Nelson, *supra* note 148, at 403.

218. *Id.*

Kansas, and Oklahoma.<sup>219</sup> Of these states, only Kansas and Colorado—those Tenth Circuit states contiguous to Oklahoma—were included in the jurisdictions most frequently cited by Oklahoma appellate courts.<sup>220</sup> When citation counts are adjusted to account for state appellate court output, New Mexico joins Kansas and Colorado as another Tenth Circuit jurisdiction that Oklahoma appellate courts frequently cite.<sup>221</sup>

#### L. The Prestige Hypothesis

According to the prestige hypothesis, state supreme courts are “more likely to cite a more prestigious sister court than a less prestigious sister court.”<sup>222</sup> Prestige can be measured by three factors: legal professionalism, legal capital, and population size.<sup>223</sup> Squire’s Index of State Court Professionalism measures the professionalism of each state court of last resort.<sup>224</sup> The index ranks courts based “on judicial salaries, the number of law clerks, and the extent of agenda control.”<sup>225</sup> Legal capital is defined as “the number of published high court opinions issued between its inception and the end of 2009.”<sup>226</sup> The Oklahoma Supreme Court ranked forty-two out of fifty in Squire’s Index of State Court Professionalism.<sup>227</sup>

The citation practices of the Oklahoma appellate courts examined in this study and reported in Table 9 support the prestige hypothesis. Oklahoma appellate courts are more likely to cite opinions from more prestigious state appellate courts than less prestigious courts, and the professionalism component provided a relevant and useful comparison.<sup>228</sup> A total of 82% of the states that Oklahoma appellate courts most frequently cite were ranked

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219. *General Information*, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, <https://www.ca10.uscourts.gov/clerk> (last visited Feb. 22, 2020).

220. *See supra* Table 6 (listing the total citations of Colorado and Kansas Appellate Opinions by Oklahoma appellate courts).

221. *See supra* Table 7 (listing the total citations of New Mexico, Colorado, and Kansas Appellate Opinions by Oklahoma appellate courts).

222. Hinkle & Nelson, *supra* note 148, at 396.

223. *Id.* at 398. Legal capital was defined as the number of published high court opinions from the court’s creation to 2009, and the size of the state’s population. *Id.* at 397–98.

224. *Id.* at 400.

225. *Id.* at 397 (citing Peverill Squire, *Measuring the Professionalization of U.S. State Courts of Last Resort*, 8 ST. POL. & POL’Y Q. 223 (2008)).

226. *Id.*

227. Squire, *supra* note 225, at 228–29 tbl.1.

228. *Compare supra* Table 6 (listing the state appellate courts most cited by Oklahoma appellate courts), *with* Squire, *supra* note 225, at 228–29 tbl.1 (listing state courts of last resort according to professionalism).

in the top half of states in Squire’s Index of State Court Professionalism.<sup>229</sup> And even the court of last resort for the three remaining states that Oklahoma appellate courts cite most frequently were all ranked as more prestigious than the Oklahoma Supreme Court.<sup>230</sup>

TABLE 9  
PRESTIGE OF STATE COURTS CITED BY OKLAHOMA APPELLATE OPINIONS

State	Salary, Docket Score, and Staff		Salary Premium, Docket Score, and Staff		Salary, Discretionary Score, and Staff		Salary Premium, Discretionary Score, and Staff	
	Rank	Score	Rank	Score	Rank	Score	Rank	Score
CA	1	1.004	1	0.984	1	1.051	2	1.031
MI	2	0.878	3	0.904	3	0.901	3	0.927
PA	3	0.876	2	0.912	2	1.007	1	1.043
WV	4	0.813	4	0.874	7	0.813	4	0.874
SC	5	0.728	5	0.769	4	0.828	5	0.870
NY	6	0.724	11	0.719	6	0.818	8	0.813
TN	7	0.717	6	0.755	17	0.676	20	0.713
NJ	8	0.712	9	0.725	8	0.807	7	0.819
FL	9	0.707	8	0.742	5	0.828	6	0.863
NH	10	0.694	7	0.745	15	0.694	12	0.745
AK	11	0.690	12	0.717	33	0.580	36	0.606
IL	12	0.690	17	0.675	9	0.803	11	0.788
TX	13	0.670	18	0.673	16	0.694	23	0.697
LA	14	0.667	10	0.719	10	0.760	9	0.812
VA	15	0.661	22	0.648	11	0.731	17	0.718
GA	16	0.644	21	0.655	20	0.660	27	0.672
WA	17	0.640	14	0.705	12	0.724	10	0.789
MO	18	0.640	19	0.656	30	0.598	34	0.615
WI	19	0.629	16	0.675	27	0.629	26	0.675
KY	20	0.621	13	0.711	31	0.593	24	0.683
DE	21	0.618	25	0.621	13	0.711	19	0.714
OH	22	0.601	23	0.640	14	0.698	13	0.737
AZ	23	0.598	20	0.621	19	0.669	16	0.728
MN	24	0.586	27	0.607	28	0.627	29	0.648
IN	25	0.578	15	0.676	25	0.638	14	0.732
MA	26	0.575	35	0.562	23	0.648	31	0.635
CT	27	0.571	33	0.584	29	0.620	32	0.633
NE	28	0.562	26	0.620	24	0.641	22	0.700
NC	29	0.548	30	0.599	21	0.654	21	0.706
HI	30	0.532	32	0.587	45	0.394	45	0.449
RI	31	0.530	24	0.631	36	0.518	33	0.618
OR	32	0.526	31	0.590	35	0.546	35	0.610
MD	33	0.513	36	0.553	26	0.631	28	0.671
AL	34	0.513	39	0.540	38	0.451	43	0.479
ID	35	0.512	34	0.582	41	0.436	42	0.506
AR	36	0.506	29	0.603	32	0.583	25	0.680
CO	37	0.485	38	0.544	18	0.671	15	0.730
KS	38	0.477	37	0.548	34	0.574	30	0.645
MT	39	0.473	28	0.605	44	0.401	38	0.533
NM	40	0.466	40	0.533	22	0.650	18	0.717
IA	41	0.460	41	0.524	37	0.457	40	0.521
OK	42	0.445	42	0.523	39	0.441	41	0.518
NV	43	0.407	47	0.451	43	0.407	44	0.451
ME	44	0.406	43	0.500	42	0.436	39	0.530
WY	45	0.394	44	0.491	46	0.347	46	0.444
MS	46	0.360	46	0.456	40	0.438	37	0.535
VT	47	0.352	48	0.446	49	0.297	48	0.392
SD	48	0.336	45	0.468	48	0.304	47	0.436
UT	49	0.329	50	0.318	47	0.321	50	0.310
ND	50	0.253	49	0.358	50	0.267	49	0.372

82% of States Most Frequently Cited by OK Courts Are Ranked in the Top Half of Squire’s Index

50% Point Squire’s Index

Only 8% of Citations are to States Ranked Lower Than Oklahoma

229. See Squire, *supra* note 225, at 228–29 tbl.1. The states and their ranking in Squire’s index are: CA, 1; MI, 2; PA, 3; NY, 6; NJ, 8; FL, 9; IL, 12; TX, 13; WA, 17; MO, 18; WI, 19; OH, 22; AZ, 23; MN, 24. *Id.*

230. *Id.* The remaining three states and their ranking in Squire’s index are: AR, 36; CO, 37; KS, 38. *Id.*

Oklahoma appellate courts infrequently cite appellate court opinions from states whose courts are ranked as less prestigious than the Oklahoma Supreme Court. Oklahoma appellate courts cited less prestigious state appellate courts a total of 116 times,<sup>231</sup> which accounts for just 8% of the total citations discovered in this study.<sup>232</sup>

#### *V. Conclusion*

Oklahoma appellate court citations to out-of-state judicial opinions are remarkably similar to the practices of other state appellate courts. Oklahoma appellate courts most frequently cite California when relying on legal precedents from other jurisdictions. This is unsurprising because a century-long study of state appellate courts revealed that California receives the second most citations from all state courts.<sup>233</sup>

Oklahoma appellate courts prefer to cite judicial opinions from neighboring states. Texas, Kansas, Colorado, Arkansas, and Missouri all ranked in the top ten most frequently cited jurisdictions in Oklahoma appellate opinions. This practice supports the geographic proximity theory and is consistent with studies that have examined the citation practices of the Indiana, Montana, and Kansas appellate courts.<sup>234</sup> When citations are adjusted to reflect court output, Oklahoma's remaining neighboring state of New Mexico joins the ten most cited group. Doing so also places Nebraska, Iowa, and Kentucky in the group of the ten most cited jurisdictions. These three states share borders with states immediately adjacent to Oklahoma, further supporting the geographic proximity theory.

Like appellate courts in other states, Oklahoma appellate courts are no longer compelled by convenience to cite out-of-state cases from within their

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231. State courts of last resort ranked less professional than Oklahoma and the number of times Oklahoma appellate courts cited them are: NV, 23; ME, 8; WY, 15; MS, 19; VT, 6; SD, 9; UT, 19; ND, 17. *See id.*

232. 116 (citations to courts ranked less professional than Oklahoma) / 1373 total citations = 8.4%.

233. Friedman et al., *supra* note 7, at 806 tbl.9.

234. *See* Bennardo, *supra* note 177, at 148 (“The only cluster of states that consistently garners above-mean citations are the Midwest states closest to Indiana, particularly those in Indiana’s Census division (Illinois, Ohio, Michigan, and Wisconsin.)”); Custer, *supra* note 120, at 128 (“Another factor quoted above, geographic proximity, comes to the forefront because Colorado, Iowa, Minnesota, Missouri, Oklahoma and Wisconsin were frequently cited states.”); Snyder, *supra* note 1, at 463 (“The Montana Supreme Court does appear to pay some deference to the supreme courts of its geographical neighbors.”).

West Reporter region.<sup>235</sup> Over the period from 1976 to 2016, Oklahoma Supreme Court citations to judicial opinions from other states within the West *National Reporter System's* Pacific Region fell from 36% to 6%. Despite this dramatic decline, Oklahoma appellate courts are still more likely to cite opinions from other state appellate courts that are located within the jurisdiction of the Tenth Circuit Court of Appeals and share a boundary with Oklahoma.<sup>236</sup>

Oklahoma appellate courts cite more prestigious state appellate courts at a higher rate than less prestigious appellate courts. All of the state appellate courts that this study identifies as the most frequently cited jurisdictions are ranked as more prestigious than Oklahoma appellate courts, and all but three rank in the top half of states.

Oklahoma appellate courts have consistently cited out-of-state judicial opinions less frequently during the years that this study examines. The Oklahoma Supreme Court and Oklahoma Court of Civil Appeals both cited other state appellate courts at double digit rates in 1976, but both courts had reduced their citations significantly—to just 3.5% and 5.1%, respectively—by 2016. This trend mirrors the results of a century-long study of state appellate court practices, which revealed a national decline in citations to out-of-state opinions.

Oklahoma appellate court citation practices are in line with those of other state appellate courts. During the years examined in this study, 8% of citations in Oklahoma appellate opinions were to out-of-state judicial opinions. This rate is roughly comparable to the 8.9% and 13.9% of citations to out-of-state judicial opinions in previous studies of Ohio<sup>237</sup> and Kansas<sup>238</sup> appellate court practices, respectively.

Oklahoma appellate courts are more likely to cite opinions from other states that have been decided in the last decade than older opinions. This

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235. A similar decline in the influence of the West *National Reporter System's* regions on out of state citations was found in studies examining appellate courts in Indiana, Kansas, and Montana. See *supra* notes 212–14 and accompanying text. But see Custer, *supra* note 120, at 127 (“The Kansas Supreme Court cited to other state courts reported in the Pacific West Regional Reporter only 21 times in 1965 but cited to other state opinions a whopping 79 times in 1995 (after the advent of computer-assisted legal research).”).

236. See Hinkle & Nelson, *supra* note 148, at 403 (“[S]tates that are both contiguous and in the same federal circuit are more likely to cite each other.”).

237. See Leonard, *supra* note 120, at 137 (“Decisions from other states accounted for 47 of 528 (8.9%) citations made by the Ohio Supreme Court.”).

238. See Custer, *supra* note 120, at 127 (“[T]he Kansas Supreme Court cited to other state opinions 14.4% in 1935, 5.8% in 1965 and 13.9% in 1995.”).

parallels the practice of six other state appellate courts that also prefer to cite more recently decided out-of-state opinions.<sup>239</sup>

In its infancy, Oklahoma adopted laws from other jurisdictions. Upon adoption of a statute from another state, Oklahoma law incorporates the construction given to that statute by the adopting state's highest appellate court before adoption, and that construction becomes binding on Oklahoma courts. Because these cases are relatively old, and Oklahoma appellate courts generally cite more recent out-of-state opinions, future Oklahoma appellate opinions are not likely cite cases that were decided before Oklahoma adopted laws from those jurisdictions. Despite this rule, Oklahoma appellate courts often cite opinions from other state courts that have been issued after Oklahoma adopted a statute from the states.

This study confirms that Oklahoma appellate court out-of-state citation practices conform to the results of many other studies of state appellate courts. This study lends support to the major theories underlying out-of-state citation practices and may guide appellate advocates in choosing authority to cite when litigating before Oklahoma appellate courts.

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239. *See supra* Section IV.D.