Socko v. Mid-Atlantic: Restore the Supremacy of Statutory Text

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ABSTRACT

At first glance, *Socko v. Mid-Atlantic* appears to be a simple ruling by the Pennsylvania Supreme Court concerning the enforceability of non-compete provisions in employment agreements. The court ruled that a non-compete agreement, entered into between employer and employee after employment began, was unenforceable. While this is arguably a sensible policy decision meant to keep employers from imposing coercive agreements on existing employees, the court made this decision in opposition to a clear Pennsylvania statute. The Uniform Written Obligations Act is a Pennsylvania statute stating that no written agreement can be found invalid or unenforceable due to lack of consideration if the signor expresses an intent to be legally bound. The court spends a significant portion of its majority opinion trying to avoid this statute, but the clear application of the statutory text requires the opposite outcome. No matter what the issue or desired policy outcome, judges need to properly interpret statutes, regardless of their policy preferences, and let the lawmakers make law.

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I. INTRODUCTION

Decisions by appellate courts—particularly in recent decades—have sparked debate about the proper methods of judicial interpretation. Questions arise, such as: Was the statutory language sufficiently clear that the decision should have rested on textual interpretation alone? Should courts consider legislative history when interpreting statutes? Should judges consider the policy implications of their decisions? Admittedly, unanimous answers to these questions are impossible to obtain; each judge has his or her own education, philosophy, and experience; each case contains unique facts; laws are often ambiguous and subject to interpretation. Difficult cases will naturally lead to controversial outcomes.

But sometimes a case is not difficult and the outcome should not be controversial. The work of the Federalist Society and other organizations has made "judicial activism" the subject of much public discourse. As a result, judicial rulings on hot button issues are often debated and criticized in the public square. For example, in the weeks before the November 2020 election, the Pennsylvania Supreme Court in *Pennsylvania Democratic Party v. Boockvar*[1] held that the Secretary of the Commonwealth could extend the deadline to receive mail-in ballots by three days.[2] The Court ignored the clear statutory requirement that, except in cases of military or overseas ballots, "a completed mail-in ballot must be received in the office of the county board of elections *no later than eight o'clock P.M. on the day of the primary or election.*"[3] Although this Article does not intend to explore the counter-textual judicial legislation of the Pennsylvania Supreme Court attempting to justify this decision, a paradigm of policy choices supplanting statutory interpretation appears to be present when a court can read a statute that says "on the day of the . . . election" and interpret it to mean three days after the day of the election.

Perhaps more disturbing are the cases that constitute blatant judicial activism but do not enter the public discourse because the subject matter does not interest the average person.[4] For example, in *Socko v. Mid-Atlantic Systems of CPA, Inc.*,[5] the Pennsylvania Supreme Court ignored

1. Pa. Democratic Party v. Boockvar, 238 A.3d 345 (Pa. 2020).
2. *Id.* at 371.
3. 25 PA. STAT. § 3150.16(c) (2022) (emphasis added).
4. By contrast, the *Boockvar* decision was widely discussed following its issuance. *See, e.g.*, Sam Gringlas, *Pennsylvania Supreme Court Extends Vote By Mail Deadline, Allows Drop Boxes*, NPR (Sept. 17, 2020, 5:50 PM), https://n.pr/3HNurms; J. Christian Adams & Kaylan L. Phillips, *State Court Docket Watch: Pennsylvania Democratic Party v. Boockvar*, THE FEDERALIST SOC'Y (Nov. 5, 2020), https://bit.ly/3f5OFeI.
5. Socko v. Mid-Atlantic Systems of CPA, Inc., 126 A.3d 1266 (Pa. 2015).

the plain language of a statute by citing "our Commonwealth's long history of disfavoring restrictive covenants, and the mandate that covenants not to compete entered into after the commencement of employment must be accompanied by new and valuable consideration . . . ."[6] Political and legal commentators have expressed fears about the judiciary sneaking policy choices into legal decisions under the guise of interpreting ambiguous texts.[7] But, regardless of policy preferences, courts deciding cases based on those preferences despite a clear, unambiguous statute is cause for great concern. The concern is not about the policy outcome–there may be no problem with laws disfavoring non-competition agreements, especially if there is no valuable consideration in exchange for the agreement. But all people who believe our liberties are protected by the constitutional separation of powers, regardless of political affiliation, must speak out against judges side-stepping and re-writing the law to accomplish what they think is best.

II. CANONS OF STATUTORY INTERPRETATION

Among the most fundamental canons of textual interpretation is the supremacy-of-text principle: If the words of a text are clear and unambiguous, those words in their proper context explain what the text means. Specifically, "the words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."[8] This principle should be obvious, self-explanatory, and of prime concern for anyone who takes the legal and legislative processes seriously. In cases where text is unambiguous, the history of what led to the writing of the text, the intent of the writers, the general purpose of the text, or anything other than the words themselves are irrelevant.

In cases where the words of a statute are unclear or ambiguous, courts must use sources outside of the text to interpret the meaning of the words. But, in the absence of such ambiguity, courts are forbidden to look outside the four corners of the document. And while the prohibition of extra-textual sources is an integral unwritten rule in many jurisdictions, Pennsylvania went further, codifying the canon as a statutory requirement: "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."[9]

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6. *Id.* at 1268.

7. *See, e.g.*, Clint Bolick, *The Proper Role of "Judicial Activism,"* 42 HARV. J. L. & PUB. POL'Y 1, 1 (2019); John Yoo, *Taming Judicial Activism: Judge Robert Bork's Coercing Virtue*, 80 U. CHI. L. REV. ONLINE 257, 259 (2013), https://bit.ly/3FHcggR.

8. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 56 (2012) [hereinafter, READING LAW].

9. 1 PA. CONS. STAT. § 1921(b) (2022).

When the letter of the law is clear, no statutory purpose or policy preference is relevant to the interpretation and application of that law.

Two other canons of textual interpretation are also implicated by the imposition of policy preferences on statutory interpretation: the presumption against change in the common law and the avoidance of construing statutes to achieve particular policy outcomes. First, in the presumption against change in the common law, historically, statutes in derogation of the common law are to be strictly construed.[10] But that is a relic of the courts' history of hostility to the emergence of statutory law. The better view is that statutes will not be interpreted as changing the common law unless they effect the change with clarity.[11]

The crucial distinction is this: the body of common law passed down by generations of legal precedents, with its traditions and policy preferences, is only binding in the absence of conflicting statutory law. Courts may decide to strictly construe statutes in a way that minimizes changes to the common law. But even that strict view recognizes that a statute that clearly alters the common law does so validly.[12] Thus, the wisdom of centuries of legal thought can be altered when a publicly-elected legislature passes a law contrary to that wisdom.

Second, courts must avoid policy preferences influencing statutory interpretation because a court's job is not "to do justice."[13] Although such a notion may seem preposterous to some, it is imperative if the rule of law and the separation of powers are to be maintained. Nearly one century ago, Justice Cardozo reiterated the Court's job, noting "[w]e do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take the statute as we find it."[14] Justice Kennedy's majority opinion in *Lamie v. United States Trustee* instructed: "Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."[15]

Statutes must not be pushed aside in the name of achieving abstract notions of justice or "the good." Allowing the judiciary to put a policy-weighted thumb on the scales of justice sets a dangerous precedent. As the rule of law is bent and broken—even with the best intentions—crucial

10. *See* READING LAW, *supra* note 8, at 318
11. *See id.*
12. *See id.*
13. *See id.* at 347.
14. Anderson v. Wilson, 289 U.S. 20, 27 (1933).
15. Lamie v. United States Trustee, 540 U.S. 526, 538 (2004).

legal protections are subtly diminished. Robert Bolt's Thomas More famously proclaimed the great danger of cutting down laws in the name of achieving one's subjective notion of justice:

> **Roper:** So now you'd give the Devil benefit of law?
> **More:** Yes. What would you do? Cut a great road through the law to get after the Devil?
> **Roper:** I'd cut down every law in England to do that!
> **More:** Oh? And, when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast – man's laws, not God's—and, if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.[16]

This warning should be heeded by leaving lawmaking to the lawmakers rather than allowing the judiciary to replace black letter law with policy judgments.

III. *SOCKO* ANALYSIS – MAJORITY AND DISSENT

A. Majority Decision

The majority opinion in *Socko* begins by framing the question as "whether the enforcement of an employment agreement containing a restrictive covenant not to compete, entered into after the commencement of employment, may be challenged by an employee for a lack of consideration . . . ."[17] If that were the entire legal question, the ruling and reasoning of the Court would not present a major problem; the question would be a matter of common law contract theory and the enforceability of a contract lacking consideration. The second half of the question, however, creates the need for an entirely different analysis: ". . . where the agreement, by its express terms, states that the parties 'intend to be legally bound,' which language implicates the insulating effect of the Uniform Written Obligations Act ('UWOA')."[18] In these opening remarks, the Court already announces the legal issue as one of statutory interpretation rather than common law analysis by admitting that the statute creates an

16. ROBERT BOLT, A MAN FOR ALL SEASONS 26 (1960), https://bit.ly/3L4poAk.
17. Socko v. Mid-Atlantic Systems of CPA, Inc., 126 A.3d 1266, 1268 (Pa. 2015).
18. *Id.*

"insulating effect" on the contract at issue.[19] The Court, however, quickly forecasts its departure from the statutory text:

> In light of our Commonwealth's long history of disfavoring restrictive covenants, and the mandate that covenants not to compete entered into after the commencement of employment must be accompanied by new and valuable consideration—a benefit or change in employment status—we conclude an employee is not precluded from challenging such an agreement executed pursuant to the UWOA.[20]

The Court highlights the factual question and the relevant statute, then immediately references a "long history" and a nebulous "mandate" that somehow invalidate the plain meaning of the statute.[21] The reasoning sounds enticing, but the reality is the Court used its policy opinion—that restrictive covenants are disfavored—to ignore the applicable statute. Although the majority's reasoning will be examined below, the preceding sentences alone are sufficient to cause alarm.

The facts of the case are fairly straightforward. David Socko was a salesperson employed by Mid-Atlantic.[22] While already employed with the company, Socko signed a non-competition agreement, replacing and superseding his initial employment agreement.[23] Socko resigned and went to work for a competitor but was terminated when Mid-Atlantic informed the competitor about the restrictive covenant.[24] Socko filed suit against Mid-Atlantic; both parties agreed that Socko was an existing employee and did not receive any consideration at the time he signed the restrictive covenant.[25] Mid-Atlantic's argument for the enforceability of the restrictive covenant was not that Socko received consideration but rather that "the UWOA did not allow Socko to challenge the validity of the terms of the Agreement on the basis of a lack of consideration."[26]

Contrary to what the majority's analysis suggests, the statutory language is simple. It provides: "A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid

19. *See id.*
20. *Id.*
21. *See id.*
22. *Id.*
23. *Id.*
24. *Id.* at 1268–69.
25. *Id.* at 1269.
26. *Id.*

or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound."[27] The mandate of the statute is clear: an agreement may not be found to be invalid or unenforceable for lack of consideration if (1) there is a written promise, (2) which is signed by the promisor and (3) includes an intent to be legally bound. The employment agreement at issue in *Socko* was a written release or promise that was signed by the party promising to be bound (Socko) and that included an intent to be bound, which made the UWOA applicable. Therefore, the plain meaning of the statute should require the Court to find that the employment agreement shall not be invalid or unenforceable for lack of consideration. The majority opinion in *Socko* makes policy points and waxes poetic about the common law distaste for restrictive covenants in employment agreements. But, despite the flowery language, the Court simply failed to apply the applicable statute to the facts before it.

Socko's argument was that because "the boilerplate language that the parties 'intend to be legally bound' appears in almost every contract in Pennsylvania, the practical effect of Mid-Atlantic's interpretation of the UWOA would be the elimination of the consideration requirement for restrictive covenants."[28] That is correct. Perhaps that outcome would be harmful or undesirable, but it is what the statute clearly demands. The *Socko* Court's reasoning for its decision, seemingly rooted in a fear of this policy outcome, was unacceptable judicial activism.

To avoid defeating an activist strawman, however, a more comprehensive interpretation of the Court's ruling must be undertaken. To understand the Court's reasoning, one must understand its acceptance of

> the well-established principle that a restrictive covenant entered into after the commencement of the employment relationship is *not enforceable — that is, is void as against public policy* — if it lacks valuable consideration. Socko provides that restrictive covenants historically have been disfavored by the courts, as they are viewed as a restraint of trade preventing a former employee from earning a living.[29]

The Court's purported reasoning, therefore, is not that the UWOA does not apply because the policy outcome is distasteful. The argument seems

27. 33 PA. STAT. § 6 (2022).
28. *Socko*, 126 A.3d at 1272.
29. *Id.* at 1271 (emphasis added).

to be that such agreements are void as against public policy and therefore cannot be saved by the UWOA—a statute enacted by a duly elected legislative body.

Even the initial explanation of the public policy issue, however, reveals logical holes. The Court begins by citing the precedent that "[i]t has long been the rule at common law, that contracts in restraint of trade made independently of a sale of a business or contract of employment are void as against public policy regardless of the valuableness of the consideration exchanged therein."[30]

Two problems are evident with the Court's reasoning. First, the Court immediately backpedals. After citing precedent stating that such restraining contracts are void as against public policy regardless of the valuableness of the consideration exchanged, the very next sentence of the opinion recognizes that "[w]hile generally disfavored, Pennsylvania law, however, has recognized the validity and enforceability of covenants not to compete in an employment agreement, assuming adherence to certain requirements."[31] Here the "void as against public policy argument" has already been undermined, since the precedent cited to support it is not actually applied as cited to the restrictive covenant at issue. The precedent cited by the Court voids restrictive covenants regardless of consideration. The *Socko* Court, however, claims to rely on this precedent to void restrictive covenants only where there is inadequate or no consideration. The *Socko* Court's reasoning does not actually apply the public policy it attempted to use against the restrictive covenant.

Second, and more importantly, a rule at common law cannot and does not take precedence over a statute; statutory law that clearly displaces the common law must be construed to do what it intends to do.[32]

Had the *Socko* Court chosen to boldly follow the precedent to its logical conclusion, the result would have been more logical. If "contracts in restraint of trade made independently of a sale of a business or contract of employment are void as against public policy regardless of the valuableness of the consideration,"[33] then the Court could have held that restrictive covenants in employment agreements are void as against public policy, period. In such a case, the Court could hold that Pennsylvania law

30. *Id.* at 1274 (quoting Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838, 845 (Pa. 1957)).

31. *Id.*

32. *See* READING LAW, *supra* note 8, at 318.

33. *Socko*, 126 A.3d at 1274 (quoting *Morgan's Home Equip. Corp.*, 136 A.2d at 845).

treats such restrictive covenants as void and unenforceable, just as the common law treats contracts to perform some illegal action.[34] Then, the Court could simply hold that the inclusion of UWOA language in the agreement was irrelevant because the common law precedent held the restrictive covenant unenforceable.

The Court, however, did not apply the common law precedent it cited.[35] Instead, the Court took the common law precedent, chose not to follow it, left intact a vague common law principle discouraging restrictive covenants, and used that vague principle to override a clear statute. Not a single sentence in the *Socko* majority opinion changes the simple fact that the *Socko* court used a policy preference to override the UWOA. Once the *Socko* Court affirmed that "an agreement containing a non-compete clause will be upheld if, among other considerations, it is supported by adequate consideration,"[36] it became clear that the only reasonable interpretation would be that a restrictive covenant in an employment agreement is a legitimate written agreement under Pennsylvania law.

Given the explicit text of the UWOA, the only reasonable application would be to find that restrictive covenants in employment agreements are subject to its provisions and cannot be unenforceable for lack of consideration. As Justice Eakin pointed out in his dissent, discussed below, that should be the end of the analysis.

B. Dissent

Justice Eakin's dissent succinctly identifies the crucial mistake of the *Socko* majority: "[t]he Majority likens the UWOA's 'legally bound' language to a seal, which imports consideration into an agreement. . . . However, contracts under seal have their origin in the common law, which evolves through case law."[37] Because the UWOA is a "creature of statute," it "may not be rewritten by the courts."[38] Justice Eakin points out that clear and unambiguous statutory language may not be disregarded under the pretext of pursuing the spirit of the law.[39]

Justice Eakin rightly concludes that the issue is not whether a restrictive covenant in an employment agreement requires valuable

34. *See* RESTATEMENT (FIRST) OF CONTRACTS § 512 (AM. L. INST. 1932).
35. *See Socko*, 126 A.3d at 1274 (citing *Morgan's Home Equip. Corp.*, 136 A.2d at 844–45).
36. *Id.* at 1275.
37. *Socko*, 126 A.3d at 1279 (Eakin, J, dissenting).
38. *Id.*
39. *See id.* (citing 1 PA. CONS. STAT. § 1921(b) (2022)).

consideration.[40] The reality is "the Act simply prevents a signer who expresses the intent to be legally bound from later challenging the agreement for lack of consideration; the signer forfeits his right to this remedy."[41] The brief, three paragraph dissent ends with the only conclusion consistent with proper interpretation of the UWOA: "[w]hether or not Socko's continued employment was valuable consideration, he was precluded from arguing there was no consideration."[42]

Justice Eakin's dissent excoriates the majority for spilling pages of ink only to miss the point. The UWOA contains clear statutory language that applies to any written promise where the signor intends to be legally bound and states clearly that any such written promise under Pennsylvania law cannot be held invalid or unenforceable for lack of consideration.[43] The majority decision in *Socko* erred by holding such a written promise (the restrictive covenant) unenforceable because of a lack of consideration.

IV. THE PROBLEM: NOBODY NOTICED

Legal observers regularly criticize the legal opinions of judges. This is an efficient and healthy way to ensure that all participants—judges, lawyers, and others affected by the law—become aware if bad methods of adjudicating are being used. Any textualist with a shred of humility will read the *Socko* majority's blatantly untextualist legal opinion and assume that sufficient ink has already been spilled on the subject by good textualist scholars. As described above,[44] the *Socko* majority clearly abuses the process of applying a statute to a set of facts. Surprisingly, few scholars have discussed the Court's blunder at all.

Further, what scholarship has been penned involving Socko has been mere shallow acknowledgement of the decision, most of which fails to grasp the decision's impact. For example, the University of Pittsburgh Law Review published a student note that does little more than state the ruling of *Socko*.[45] The note praises the "common sense argument" accepted by the *Socko* court to remedy the unequal bargaining power of the employee.[46] The author briefly refers to the position of "detractors" of the court's ruling, but refers only to arguments that the holding in *Socko*

40. *See id.*
41. *Id.*
42. *Id.* at 1280.
43. 33 PA. STAT. § 6 (2022).
44. *See supra* Part III.
45. *See* Joshua Sallmen, Note, *Non-Competes, Consideration, and Common Sense: A Temporarily Revocable Arrangement to Preserve "Afterthought" Agreements in At-Will Employment*, 79 U. PITT. L. REV. 543, 547–48 (2018).
46. *See id.* at 554–55.

violates the right of at-will termination.[47] There is no mention of the statutory requirement found in the UWOA that the *Socko* court ignores.

Additionally, an article published in the Federalist Society Review merely cites *Socko* in a paragraph mentioning the status of non-compete law in Pennsylvania.[48]

Fortunately, at least one student note, referring to *Socko* in passing in a note about personal guarantees, realized there was a problem:

> The court, in what it considered a matter of first impression, cited conflicting district court decisions and a Pennsylvania Supreme Court case from 1867 in declining to enforce the agreement, regardless of the fact that it contained the language necessary to comply with the Uniform Written Obligations Act.[49]

This comment appears to be the only instance where someone—other than Justice Eakin in his dissent—even acknowledged that the ruling in *Socko* directly contradicts the applicable statutory language of the UWOA.

The lack of scholarship on the *Socko* decision is an oversight. A prominent legal opinion, written by the highest court of a large and influential Commonwealth, used an activist method of legal interpretation to avoid applying a plain, clear statute. And no one even seemed to notice.

V. CONCLUSION

The system of checks and balances is meant to limit the power of one branch of government and ensure that duly-elected legislatures make the law, while courts interpret the law. The *Socko* decision undermines that system. It is understandable that a court may disfavor restrictive covenants; it is also understandable that reasonable minds believe that the UWOA creates bad policy outcomes; it is unacceptable, however, for a court to attempt to fix bad policy by failing in its duty to apply the law as written.

The policy issue addressed by *Socko* could easily be addressed by the legislature. The legislature could amend the UWOA so that it does not

47. *See id.* at 555.

48. *See* J. Gregory Grisham, *Beyond the Red-Blue Divide*: *An Overview of Current Trends in State Non-Compete Law*, 18 FEDERALIST SOC'Y REV. 82, 86 (2017).

49. Joseph F. Cudia, Note, *Personal Guarantees: Recent Cases Setting Dangerous Precedent*, 10 OHIO ST. BUS. L.J. 1, 23 (2015).

apply to restrictive covenants in employment agreements, or it could repeal the UWOA all together as a now-unnecessary relic of the past. Conversely, the legislature could double down and amend the UWOA to explicitly state that it covers all agreements, including restrictive covenants in employment agreements.[50] Either way, the Pennsylvania legislature ought to take some action to amend, remove, or clarify statutory language any time a judicial decision attempts to rewrite the law. A legislative response is necessary to reclaim the authority of the legislature as the policy-making branch of government.

Admittedly, it is difficult to insist that courts ought to simply interpret the law as written, even when the results are extremely undesirable. But courts must constrain themselves. A court may disregard or correct a statutory provision if it is absurd, meaning no reasonable person could approve of the result.[51] Short of absurdity or unconstitutionality, courts must allow legislation to stand as passed. If a court strongly disapproves of the policy outcome of a clear reading of the statutory text, the court should explain its reasoning in its opinion while upholding the result of the law as written**.** Courts have every right to explain their decisions, including the undesirability of the outcome. That right does not extend, however, to changing the undesirable outcome by failing to uphold the statute as written.

There is a compelling argument to be made that the policy outcome of *Socko* is good. It is completely reasonable to prefer that employers not be allowed to impose new restrictive covenants on employees after employment has begun. It is reasonable to insist that those restrictive covenants must be negotiated prior to the start of employment or consented to only for substantial consideration. The statutory reality in Pennsylvania, however, is that the UWOA allows an expressed intent to be legally bound to prevent any written agreement from being challenged on the grounds that there was no adequate consideration.[52]

Lawyers, judges, scholars, and legislators must do everything in their power to preserve the separation of power, even if the failure to do so seems harmless or even beneficial. The founders of this country understood well the dangers of concentrated power and made clear that the

50. Granted, this suggestion should be completely unnecessary because the UWOA already applies to all written agreements. But the Court's failure to apply the UWOA may justify amending the statute to strengthen the already-clear language. Doing so would nullify the activist judicial decision in *Socko* and reassert legislative authority.

51. *See* READING LAW, *supra* note 8, at 234.

52. *See* 33 Pa. Stat. § 6 (2022).

success of the American Experiment required that no branch of government

> ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.[53]

This advice ought to be taken seriously. "[P]ower is of an encroaching nature,"[54] and if courts are allowed to take the power to override statutes enacted by the legislature and signed by the executive, courts become much more powerful than the separation of powers allows. Danger is imminent if courts have "overruling influence"[55] over the legislature beyond the valid ability to overrule statutes that are unconstitutional.

As long as courts are willing to make such decisions, lawyers, understandably, will continue to make creative policy arguments to persuade judges to override statutes. But judges must constrain themselves to interpret law and not create policy. Voters in the Commonwealth of Pennsylvania ought to elect judges and justices who will respect the role of the legislature. And legal scholars ought to continue to keep a close watch on judicial opinions and criticize any decision where a court has encroached on the power of the legislature. The good of the Commonwealth and the Republic requires citizens to pay careful attention to every act of our government lest any branch of government inappropriately usurp "an overruling influence"[56] over another.

53. JAMES MADISON, THE FEDERALIST NO. 48 (1788).
54. *Id*.
55. *Id.*
56. *Id*.