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MOST SENSIBLY CONSERVATIVE AND SAFELY RADICAL: OKLAHOMA'S CONSTITUTIONAL REGULATION OF ECONOMIC POWER, LAND OWNERSHIP, AND CORPORATE MONOPOLY

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AND JAMES C. THOMAS†

Fredric Bard, an early Oklahoman, characterized the state's constitutional convention and the men who wrote that document as "the most sensibly conservative and safely radical of all men who ever wrote a constitution."¹ In this brief statement Bard captured the spirit of this new state called Oklahoma, the essence of her people, and the balanced goals of the young men of diverse backgrounds who sought to establish her early laws.

An understanding of Oklahoma's constitutional provisions and the attitudes of her pioneer lawmakers is not only important for insight into current questions of Oklahoma law but important in a far broader sense. For Oklahoma's early experience provides a window through which we can take a backward glance at how one frontier state set a pattern of economic regulation which, in many respects, has since been followed on a national scale while ironically being abandoned within the home state of origin.

Oklahoma is certainly an appropriate state to so study. Angie Debo was right when she observed that Oklahoma was

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¹ Frederick Bard cited in A. ELLIS, A HISTORY OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OKLAHOMA (1923), ix.

"more than just another state" that Oklahoma was "a lens in which the long rays of time are focused into the brightest light." "In its magnifying clarity," she notes, "dim facets of American character stand more clearly revealed. For in Oklahoma all the experiences that went into the making of the nation have been speeded up. Here all the American traits have been intensified." There is more than hyperbole in Dr. Debo's studied observation that "the one who can interpret Oklahoma can grasp the meaning of America"²

In a very real sense Oklahoma is the quintessence of what Daniel Boorstin has called "the American experience." The spirit of this early Oklahoma and the attitudes we are herein seeking to explore were summarized by William Jennings Bryan speaking in 1907 in support of the newly written Oklahoma state Constitution. "You have the best constitution today of any state in the Union, and a better constitution than the Constitution of the United States. This is not extravagant praise," the great commoner orated. "All the other states have stood as your models. I want to compliment the cornfield lawyers of Oklahoma . . . upon having puttied up all the holes shot in the constitutions of other states by trust and corporation lawyers."³

The purpose of this essay is to examine just one aspect of one state's constitutional, legislative, and judicial history. Our central question focuses on state regulation of economic power in Oklahoma but may cast a shadow beyond the narrow history of this nation's forty-sixth state. The original Oklahoma constitutional provisions upon subjects such as land ownership and corporate powers were regarded, at the time, as "radical" enactments designed to preserve family farms and small businesses.⁴ And yet by 1960 the state with such

² A. DEBO, OKLAHOMA: FOOT-LOOSE AND FANCY FREE (1949).

³ Cited in I. HURST, THE 46TH STAR: A HISTORY OF OKLAHOMA'S CONSTITUTIONAL CONVENTION AND STATEHOOD 26 (1957).

⁴ G. FOREMAN, A HISTORY OF OKLAHOMA 316 (1942).

radical limitations reported that all the estimated wealth in the State of Oklahoma was held by 15% of the state's population.⁵

If ever an essay reflects the joint efforts of authors with varied economic, social, and philosophical viewpoints, this is such a work. And yet, both are herein engaged in what Professor Calvin Woodard has described as the challenge "to conjoin changes in law with more general extra-legal movements."⁶ Our undertaking raises two questions. The first: What conditions produced the atmosphere which originally led to the adoption of Oklahoma's regulation of economic power? The second: How and why have these regulations been modified?

HISTORICAL SETTING

Although Oklahoma's provisions of economic regulation have traditionally been viewed as radical, they were, in fact, considering the nature of the historical setting and the state's economic position in 1907, rather, perhaps extremely, conservative. For example, with respect to land ownership, the Oklahoma Constitutional Convention was seeking to preserve, as nearly as possible, a *status quo* ownership and philosophy of land usage. In truth, the regulations enacted by the Oklahoma Constitutional Convention represented a last desperate struggle of the small homestead farmers and Indian nations against what they, as Oklahomans, viewed as the chronic failures in other states. They were guarding against the foreign land barons as in Texas,⁷ the octopus-like monopolies

⁵ R. FRENCH, *WEALTH IN OKLAHOMA* 2, (Bureau for Business and Economic Research, University of Oklahoma, 1970).

⁶ Woodard, *History, Legal History, and Legal Education* 53 VA. L. REV. 121 (1967). Strickland claims to be "sensibly conservative" and Thomas to be "safely radical."

⁷ See generally, J. HALEY, *THE XIT RANCH OF TEXAS* (1967); H. MOTHERSHEAD, *THE SWAN LAND AND CATTLE COMPANY*, (1971); R. ATHEARN, *WESTWARD THE BRITON* (1953); W. JACKSON, *THE ENTERPRISING SCOT* (1968); L. JENKS, *THE MIGRATION OF BRITISH CAPITAL* (1938).

and trusts consuming oil resources as in Kansas,⁸ and their home-grown land hungry real estate speculators and exploiters.⁹

Those who have sought to analyze Oklahoma's laws without regard to this unique historical setting and the specific nature of the state's land tenure and mineral ownership prior to statehood have seen these early enactments regulating economic resources as a radical effort by the "common man" to *seize* control of the resources of the new state. In fact, such laws represent an effort designed to *preserve* a broad based control already generally secured. It was an effort not to *gain* control but to *retain* control, to prevent, in Oklahoma, what had happened in other states. It was a chance to keep land in control and in reach of all men. Was it radical? Or was it conservative? Certainly the laws departed from the established pattern of most other states. Political labelling is, at best, a risky task and subject to the danger of oversimplification. The British social critic Christopher Dawson has reminded us of the pitfalls with respect to defining. "What is liberalism in one country," Dawson notes, "may be conservatism in another and revolution in a third."¹⁰

The Constitutional economic regulations which were thought to be so revolutionary and to bring Oklahoma into the radical vanguard of state control were products of this unique time and place. These provisions included the right granted to the "state to engage in any occupation or business for public purposes" except agriculture;¹¹ prohibition of mo-

⁸ F. SCHRUBEN, *WEA CREEK TO EL DORADO: OIL IN KANSAS* Chapter 5 and sources cited therein (1972).

⁹ See, e.g. In *The Matter of J. H. Beck*, (1894) "Opinions of the Cherokee Supreme Court," Cherokee Nation Papers, Indian Archives, Oklahoma Historical Society.

¹⁰ DAWSON, *The Failure of Liberalism*, in A. PEGIS (ed), *THE WISDOM OF CATHOLICISM* 864 (1949).

¹¹ Okla. Const. art. II, § 31. Citations to the Constitution are, unless otherwise indicated, drawn from R. WILLIAMS, *THE CONSTITUTION AND ENABLING ACT OF THE STATE OF OKLA.* (1912).

nopolies;¹² restrictions on "unlawful restraints of trade";¹³ control of banks and trust companies;¹⁴ prohibition of governmental aid to corporations;¹⁵ prohibition of alien ownership of land;¹⁶ and limitation on corporation buying, acquiring, or dealing in real estate.¹⁷

To understand the forces which bear upon these land tenure and economic regulations one must remember that Oklahoma in 1907 was a vast territory only recently opened to white citizens and historically divided in such a way that it should never have been one state.¹⁸ The eastern half of the state was the old Indian Territory and had earlier sought statehood under its own banner as the Indian state of Sequoyah.¹⁹ Much of the western half of the state had also at an earlier time belonged to these Indian tribes but had been wrested from their control and, after a period of use through lease as cattle range, had been opened for small farm homesteading with only a few scattered Indian areas remaining.²⁰ "Single Statehood" versus "Double Statehood" was widely debated in this area which was popularly known as the "Twin Territories." Oklahoma, as students of this states history certainly know, was formed by the wedding of the old Oklahoma and Indian Territories.²¹

¹² Okla. Const. art. II, § 32.

¹³ Okla. Const. art. V, § 44.

¹⁴ Okla. Const. art. XIV, § 1.

¹⁵ Okla. Const. art. X, § 15.

¹⁶ Okla. Const. art. XXII, § 1.

¹⁷ Okla. Const. art. XXII, § 2.

¹⁸ R. GITTINGER, *THE FORMATION OF THE STATE OF OKLAHOMA* (1939); D. STEWART, *THE GOVERNMENT AND DEVELOPMENT OF OKLAHOMA TERRITORY* (1933); J. DUNN, *INDIAN TERRITORY: A PRE-COMMONWEALTH* (1904); and see articles in *STURM'S STATEHOOD MAGAZINE* and *TWIN TERRITORIES MAGAZINE*.

¹⁹ A. MAXWELL, *THE SEQUOYAH CONVENTION* (1953); and C. ALLEN, *THE SEQUOYAH MOVEMENT* (1925).

²⁰ The case of the loss of the Cherokee outlet is typical. E. PIERCE & R. STRICKLAND, *THE CHEROKEE PEOPLE* (1973).

²¹ Doyle, *Single Versus Double Statehood*, 5 *CHRONICLES OF OKLAHOMA*, 18-41, 117-148, 266-286 (1927).

AGRARIAN and POPULIST

The men who wrote the Oklahoma Constitution were elected from both sections. While they represented a variety of peoples, most Oklahomans were farmers and their representatives were more strongly *pro farmer than anti corporation*. Their concern with antitrust and monopoly was mostly focused on those points at which corporate power might endanger the survival of the rural neighbors, small town shopkeeper, and the family farm as a social unit. For example, there was far greater fear of large-scale ownership of rural land and corporate land speculation than of Standard Oil's regulation of gasoline prices. Both subjects, it should be noted, were objects of considerable debate but the paramount concern of the Oklahoma Constitutional Convention was keeping prime farm land available to all.²²

Within early Oklahoma there were a number of groups which significantly influenced the development of constitutional economic regulation. Among these were the Indian tribes, especially the Five Civilized Tribes located in the Indian Territory, the small farmer-settler of the Oklahoma Territory, the cattleman and rancher, the infant labor movement, and the powerful railroad interests and land-mineral speculators. The Oklahoma constitutional provisions regulating land and economic resources were produced by the interactions, the clashes and compromises, between and among these powerful interests. To understand Oklahoma's regulations one must remember that they were produced when land speculators and Indians and cowboys and dirt farmers and coal min-

²² For the official proceedings of the Oklahoma Constitutional Convention see Transcriptions of Proceedings and Debates of the Constitutional Convention of Oklahoma, Typed Manuscript, Library, Oklahoma Historical Society. (Cited hereafter as OCC Transcriptions.) Another edited version was published in 1908 at Muskogee as PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE PROPOSED STATE OF OKLAHOMA HELD AT GUTHRIE, OKLAHOMA, NOVEMBER 20, 1906 TO NOVEMBER 16, 1907. (hereinafter cited as OCC PROCEEDINGS.)

ers came together to settle on the laws that would control their own use of the resources of the new state to be known as Oklahoma.

If ever there was a group which was populist by nature it was the people of Oklahoma at the time of statehood in 1907. Many were populists without ever having heard the word or even knowing such a "movement" existed. They thought as populists and the Oklahoma Constitutional Convention mirrored their thinking.

The tone of the "Con Con", as the Oklahoma Constitutional Convention was popularly known, was set by the most populist of the populists in the Presidential Address of William H. Murray, the man who had been elected by a coalition of Farmers Union men and Sequoyah Convention delegates.²³ Murray argued strongly in support of programs designed to retain the agrarian basis of the state and he spoke for his own home grown version of populist agrarianism. From the beginning he made it clear that he was not a radical and viewed sound land ownership provisions as an antidote to radicalism. "We should not attempt," he argued, "to correct as our socialist friends have sometimes said, because every citizen has a right to own, buy and control all the property of whatever kind or class subject only to taxation."²⁴

Murray was voicing the general philosophy of the convention in his opening address. That speech summarizes a general attitude which is reflected in the constitutional economic-land regulations ultimately adopted.

²³ For Murray's account of the election and the convention see Murray, *The Constitutional Convention*, IX CHRONICLES OF OKLAHOMA 133-138 (1931) and Murray's autobiographical MEMOIRS OF GOVERNOR MURRAY AND TRUE HISTORY OF OKLAHOMA TOGETHER WITH HIS BIOGRAPHY, PHILOSOPHY, STATESMANSHIP, AND OKLAHOMA HISTORY INTERWOVEN IN THREE VOLUMES (1945).

²⁴ Murray, *Unpublished Manuscripts/Collected Papers*, Indian Heritage Association.

A measure of vast importance will be to provide every possible means to promote home-owning in this country, because its home-owners are its mainstay. All writers of political economy and history have taught us that a nation is weak or strong in proportion to the number of home-owners. That nation is the strongest which has the greatest number of home-owners in proportion to the amount of soil and population. That nation is the weakest which has the fewest number of home-owners in proportion to the amount of soil and population. Ireland, by reason of a few men owning all the land, has had the sympathies of the civilized world poured out to her for a thousand years. This question of home-owning touches more vitally every interest in my section of the state, the Indian Territory, which is settled and cultivated by tenant classes under those holding great bodies of land under lease contracts. It has brought about deplorable conditions in that section. The Indian citizen who lives in the city engaged in some business or profession, is not affected gravely as is the Indian who lives out on his farm and expects to make it his home. If a few men and great corporations are to get control of the lands of the Indian in the Indian Territory portion of the State, the removal of restrictions will not mean happiness and prosperity, but rather the reverse. You will witness the conditions when each town has its land agent, the representative of some alien or foreigner or some foreign corporation with the sole desire of increased rental. They will care little about the society, the moral character or intelligence of their tenants. They might place by the side of the Indian citizen or white homeowner, a Dago or a John Chinaman as quickly as they would a good citizen, because their sole desire is rent; increased rent. Far rather would I be surrounded by the owners of that soil who could become my neighbors and who could assist me in building a school house on every hill and a church in every valley, thus promoting prosperity of the community and the purity of society.

Relative to the land proposition. The evils growing out of the ownership of land are these: Alien ownership, corporate ownership and uncertainty of ownership and expensive transfer of title. In my na-

tive state there is a tract of five million acres of land owned by one British subject. Let us write it into the Constitution that no alien shall own land in the State of Oklahoma.

We must provide in the Constitution that no public service corporation shall own any more land than that which shall be necessary to operate its business.

We must make it unlawful, or at least refuse to charter any corporation for the purpose of buying, selling or speculating in land or acting as land agent. Let the individual do the work. Deny that right to the corporation and then the public service corporation cannot dodge behind the provision prohibiting their ownership of lands and we can wipe out the evils affecting land-ownership and thus promote home-owning in the State of Oklahoma.

Under no circumstances should we allow any transportation company to engage in the coal mining business or oil wells, farming or any other except that of common carrier. We must declare all transportation companies and transmission companies common carriers, and that their charges be fixed by law. We must provide for a railway commission with power to fix and enforce reasonable freight and passenger tariffs, with authority to make a fair and reasonable valuation of their property and prevent the issuance of stocks and bonds by such corporations except for money paid, labor done or property actually received, because there can be no such thing as a reasonable freight rate without a reasonable and fair valuation of the property of the carrier.²⁵

INDIAN INFLUENCES

If there was one group which seemed to have a predominate influence on the attitudes and development of the new Oklahoma government that group was the Five Civilized Tribes of Indians. Foremost among the reasons for this influence was the experience which citizens of the Indian Territory had gained in 1905 at the Sequoyah Constitutional Con-

²⁵ *Id.*

vention, a meeting called for the purpose of preparing for the single statehood of the Indian Territory. Oklahoma historians are in general agreement with Bill Murray that "some of the most important provisions of the [Oklahoma] Constitution derived their inspiration from the Sequoyah Constitution notably Article nine on Corporations."²⁶

One should also remember that by the time of Oklahoma statehood most of the Five Civilized Tribes had been operating, for more than three-quarters of a century, their own constitutional republics within the geographic boundaries of what became Oklahoma. These Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles were, by no means, novices at the political process. The Cherokees, for example, had enacted their first written law almost one-hundred years before the Oklahoma Constitutional Convention in 1808.²⁷

John Swanton, the Smithsonian's distinguished chronicler of Southeastern Indian Life, reminded the people of other states of the unprecedented democratic experience of Oklahoma's Indian population. "Few of those old line Americans who look askance, and withal somewhat superciliously, upon the governmental experiments of certain of our younger states realize that such experiments are by no means new to their

²⁶ *The Constitutional Convention, IX CHRONICLES OF OKLAHOMA* 126 (1931).

²⁷ For the general legal background and developments of the Cherokees see R. STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* (In Press). See also Strickland, *Christian Goetlieb Priber: Utopian Precursor of the Cherokee Government*, *THE CHRONICLES OF OKLAHOMA* XLVII (1970), 264-75; Strickland, *American Indian Law and the Spirit World*, *JOURNAL OF AMERICAN INDIAN LAW* 1 (1973) (In Press); Strickland, *From Clan to Court: Development of Cherokee Law*, XXXI *TENNESSEE HISTORICAL QUARTERLY* 316-327 (Winter 1972); and E. PIERCE & R. STRICKLAND, *THE CHEROKEE PEOPLE* (1973). For a picture of the traditional Cherokee legal system see J. REID, *A LAW OF BLOOD* (1970); and for contract K. LEWELYN & E. HOEBEL, *THE CHEYENNE WAY* (1943).

territory," Swanton writes, "and that five of a much more unique character were initiated and consummated before the present State of Oklahoma came into existence. These experiments consisted in the organization of as many bodies of American aborigines — the Choctaw, Chickasaw, Creeks, Seminole, and Cherokees — into small red republics, voluntarily set in motion, and maintained with a considerable measure of success Of course many other Indian tribes within our borders preserved some form of self-government long after intimate white contact, but, for the most part, these were mere continuations of existing forms. In the case of the Five Civilized Tribes we have attempted to cast Indian minds into new collective moulds which were in large measure of white origin"28

And yet, the Five Civilized Tribes preserved in their own governments much that was Indian in outlook. And many of these aspects of Indianess were preserved, in turn, in the outlook and attitudes of the state of Oklahoma. It is impossible to understand and appreciate the Oklahoma experience of regulation of land and economic resources without an awareness of the absolutely unique experience of the government and operation of the Five Civilized Tribes. For the leaders of the Indian republics became the leaders of the Sequoyah Convention which, as we have noted, in turn, produced many of the leaders of the Oklahoma Constitutional Convention. The mark of Indian attitude in Oklahoma government goes far deeper than the Choctaw name Allen Wright suggested for the home of the redman.²⁹

²⁸ J. SWANTON, *Introductory Note* to G. FOREMAN, *THE FIVE CIVILIZED TRIBES*, at xii (1934).

²⁹ This influence also extends beyond the formative period. The consensus ethic of the Southeastern Woodland Indian tribes survives in Oklahoma politics to this day. The unpublished independent studies of anthropologist Garrick Bailey and political historian Anne Hodges Morgan suggest that this factor has been significant in the national leadership of non-Indian Oklahoma Congressmen and Senators.

A picture of Indian land and resource utilization is necessary in order to understand the land use and regulation tradition which the delegates faced. The entirety of the eastern half of Oklahoma had belonged to the Indian Nations and fee simple title to the land was vested in the tribe itself. Individual title to the land was not fee simple but involved a use fee based upon occupancy and productive utilization of the land. In accordance with the ancient tribal customs and under the specific written statutes there was a common ownership of the land and any tribal citizen was entitled to occupy and utilize as much land as he needed. These were, on the whole, surplus land societies where individual improvements were respected and individual initiative was encouraged. Farms were operated on an individual basis but many of the mineral and timber resources were operated for collective tribal benefit. In a sense, the tribe was holding the land in trust for the people.³⁰

The statutes enacted by the Five Civilized Tribes reflect this common ownership of property. Typical of these laws are those of the Cherokee Nation.

Any person having peaceable possession of private property, obtained through lawful means, and claiming a limited or absolute right in the same, shall be held, in law, to have a prior right of possession thereto, against all persons obtaining possession thereafter, until the right of such person shall expire, or be by him transferred to another for good or valuable consideration, or until his right shall be disputed and invalidated by due course of law. And any person having a prior right of possession of any property, to any other person, and the property being detained by the latter from the former, without his voluntary consent, may recover such property upon suit for possession merely, without regard to, or investigation had by the court, of other or higher title, either in plaintiff or defendant of such suit. But such person

³⁰ F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 206-236, 287-294, 425-446.

may submit to the court as plaintiff, the general question of right, involving the right of possession of the property, or be awarded possession of such property merely as provided above, with the right accruing or answering as defendant in all suits involving the right, title and interest of the parties to such property.³¹

Property shall be held to be in the legal possession and control of any person, when in his actual possession, or in the actual possession of any person in the service or employment of such defendant, temporarily to use or take charge thereof. When property consists of stock, the possession thereof shall be determined as provided by law.³²

Tribal regulation and control of mineral resources had long been a difficult question for the little Indian republics. Even before the arrival in Oklahoma of the main body of the Cherokees, the question of the operation of saltworks or Saline springs had presented a problem to the old Cherokee settlers.³³ The Choctaw coal resources were of such great value that this, rather than oil, was the most prized mineral deposit.³⁴ While, in theory, all such resources were tribal in ownership, licensing to citizens for personal development was the common pattern with the tribe retaining a right to a percentage of the income from the natural resource.³⁵

³¹ *Laws of the Cherokee Nation*, Article XV, Section 136 (1875).

³² *Laws of the Cherokee Nation*, Article XV, Section 139 (1875).

³³ THE CONSTITUTION AND LAWS OF THE CHEROKEE NATION (1852), 84-86. Grant Foreman Typescripts, "Saltworks," Indian Archives, Oklahoma Historical Society; Rogers Files, Indian Heritage Association, Muskogee, Oklahoma.

³⁴ Choctaw Mining Records and Leases, Indian Archives, Oklahoma Historical Society; see generally D. BAIRD, THE CHOCTAW PEOPLE (1973); and A. DEBO, THE RISE AND FALL OF THE CHOCTAW REPUBLIC (1934).

³⁵ The Cherokee law for example contained detailed regulations for timber resources as well as the saltworks and mineral resource provisions. For the full range of such re-

The "Monopoly question" had long been central to the "Indian question" and the two had been almost irretrievably entwined in the land distribution and termination controversy relating to the ending of tribal government. A major argument of those who supported an end to tribal status for the Five Civilized Tribes was that Indian resources were effectively monopolized by a very few wealthy mixed-breed Indians.³⁶

Letters from the Office of the Five Civilized Tribes to the Indian Office, Senator Dawes, and other advocates of the distribution of Indian lands develop the monopoly argument as do the *Annual Reports of the Commission to the Five Civilized Tribes*.³⁷ Professor D. S. Otis reports this in his study of the Dawes Act undertaken for the Bureau of Indian Affairs.

In those days the charge was often made that under the tribal system in Indian Territory certain In-

strictions on economic enterprise see *THE CONSTITUTION AND LAWS OF THE CHEROKEE NATION*, *passim*, (1852); and *A Summary of the Early Laws of the Cherokees*, in R. STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT*, Appendix, (1974).

³⁶ The issue of availability of resources was ignored by advocates of Indian land distribution. Much of the argument was premised on the assumption that the fullblood or traditional Cherokee did not use as much of the public lands as the mixed-blood and therefore the system was discriminatory against the fullblood. And these arguments persisted even when fullbloods memorialized Congress speaking against distribution. It should be noted that these same Indians often refused to be enrolled and continued to fight the allotment system. See Dawes Commission Correspondence, Foreman Typescripts, Indian Archives, Oklahoma Historical Society.

³⁷ To study the process examine correspondence, Foreman Transcripts, Volume 20, Indian Archives, Oklahoma Historical Society, Letters of June 11, 1895; July 11, 1895; July 23, 1895; July 24, 1895; July 25, 1895; October 15, 1895; for the government position see also *Annual Reports of the Commission to the Five Civilized Tribes*, 1894 to 1905.

dians had cornered for their own use large tracts of land and being therefore powerful in their communities they had succeeded in persuading the tribal government to oppose allotment which would redistribute the land.³⁸

Unquestionably the Five Civilized Tribes opposed the allotment of tribal land in severality and they opposed it for good reason.³⁹ But the strategy of the proponents of allotment was to make tribal opposition appear to be totally selfish in nature and centered exclusively among a mixed-breed aristocracy pictured as tyrannizing the fullbloods and monopolizing tribal resources.⁴⁰ Typical of the polemic nature of these pronouncements is the Report of the Commission to the Five Civilized Tribes.

The Commission has heretofore reported how completely the tribal governments have fallen under the control of the mixed bloods and adopted citizens, and have been used by them to secure to the exclusive use and private gain of a few of their own number much of the tribal property in the land, and from other sources everything valuable and capable of producing profit. More than a third of the whole territory of one of the nations is exclusively appropriated and fenced in by barbed wire to the sole use of a few citizens for pasturage. In other of these nations, under similar legislation, vast and rich deposits of coal of incalculable value have been appropriated by a few to the exclusion of the rest of the tribe, and to the great profit of those who operate them and ap-

³⁸ D. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 43 (1973).

³⁹ The most eloquent presentation of the position of the Indian tribes and the soundest evidence of the wisdom of their position is found in Angie Debo's moving study *AND STILL THE WATERS RUN* (1940). Typical of the tribal positions are those outlined in a series of Cherokee memorials and in the editorials and news items in the tribal newspaper *THE CHEROKEE ADVOCATE*. Memorials of the Cherokee are in the collections of the Thomas Gilcrease Institute, Indian Heritage Association, and the Oklahoma Historical Society.

⁴⁰ *Id.*

appropriate their products to their individual use. Similar legislation has enabled private individuals to appropriate the timber of vast pine forests and denude the public domain of this essential element of future development and growth. In short, almost everything of tribal property in which every citizen Indian has of right an equal share has, if of any value, been appropriated to the use and gain of the few, while the real full blood has been left destitute and crowded out upon the mountains and unproductive land, to take care of himself as best he can.

The condition of affairs has not improved since the last report of the Commission. On the contrary, the indications are very manifest that the discussion of the question of a possible change has had the effect of stimulating an unusual activity in efforts to realize as early as possible all available gains arising from this exclusive appropriation of the use of common property. The grasp of those holding power upon the tribal resources has become firmer, and the uses to which the powers of government have been put for the benefit of the few have become more palpable and flagrant. Those thus prostituting the forms of their laws to private gain have become so open and bold in their operations as in many cases to freely avow that the terms upon which they may be corrupted are made more easy in view of the possibility that the opportunity for such gain may be short.⁴¹

Such self-serving statements of the political commission charged with producing allotment have long been taken as a correct representation of the monopoly situation among the Five Civilized Tribes while statements of men like Judge Isaac Parker who declared he never saw a pauper Indian among these tribes have been ignored.⁴² The truth was that intermarried and mixed-blood citizens did possess considerably more resources than fullblood citizens but this was a

⁴¹ *Annual Report of the Commission to the Five Civilized Tribes* Foreman Typescripts, Oklahoma Historical Society.

⁴² Reprinted in J. GREGORY & R. STRICKLAND, *HELL ON THE BORDER: HE HANGED EIGHTY EIGHT MEN 196-199* (1971).

matter of choice and of a desire to utilize opportunities generally available to all.⁴³

The tribes were not monopolistic as the Dawes Commission had suggested but were, in fact, very strongly dedicated to the concept of widespread utilization of resources by all members of the tribe. In fact, the Indian utilization of resources was working remarkably well and the members of the tribes, especially the fullblood, were pleased with their land tenure.⁴⁴ Unfortunately, the biased picture conveyed by the Commission to the Five Civilized Tribes became the orthodox view. A far more objective and historically accurate view is found in Angie Debo's moving book *And Still the Waters Run*. Herein, Dr. Debo attacks the basis of the Dawes Commissions conclusion that the Indian society was a society of monopolization of resources.

These [Dawes statements] were naturally accepted by Congress and the country at large as authentic, and are still generally quoted uncritically by even the most careful students of Indian history; but they are no more objective than the manifestoes issued by the average government before entering upon a war of conquest. Unquestionably land hunger was the real motive behind most of the agitation to terminate the tribal regime, and a fairly good case could have been made out in the name of 'manifest destiny.' They presented a completely unfair picture of the poor Indian crowded back in the hills and living in abject poverty while the rich leaders of the tribe monopolized the productive land that belonged equally to all. [Tribal] public attempts to regulate the size of holdings as the Choctaw pasture limitation and the Creek referendum on proposed enclosures went further in preventing land monopoly than any law ever passed by an American state; and a garbled misrepresentation of the Choctaw's system of public control of natural

⁴³ For a comparison of the holdings see Cherokee Census, 1890, Indian Archives, Oklahoma Historical Society.

⁴⁴ Statement, Redbird Smith, Cherokee Typescripts, Indian Heritage Association.

resources came with especially bad grace from the members of a race that in the short space of a century had seen the greatest natural wealth in the possession of any people pass into private and often rapacious hands. . . . It is evident that . . . they were attempting to hold the Indian to abstract and ideal rather than comparative standards, for certainly the poor Indian had a better chance to become a prosperous farmer than the landless member of the white man's society.⁴⁵

ALIEN AND CORPORATE LAND OWNERSHIP

Albert Ellis, Second Vice-President of the Oklahoma Constitutional Convention, explained the attitudes underlying alien ownership provisions. "There was a desire," he noted, "that the Convention in some form limit the Alien ownership of land in the proposed State. Several propositions having that end in view were submitted to the Convention A [Special] Committee reported a composite proposition which was passed and became a part of the Constitution. Other states, notably California and Oregon have adopted alien ownership of land laws seeking to accomplish the same end as does this provision of the Constitution of Oklahoma."⁴⁶

It was not accidental that the alien ownership of land restrictions, and all of the propositions and proposals relating thereto, were originally referred to the Committee on Agriculture and reported favorably to the whole convention and then to a special committee.⁴⁷ Clearly this was an agrarian proposal addressing a problem which was central to populist thinking. The Texas experience with the British ranching land syndicates stood vivid in the minds of delegates drafting and debating Oklahoma's limitation on alien land owner-

⁴⁵ A. DEBO, *AND STILL THE WATERS RUN* (1940).

⁴⁶ A. ELLIS, *A HISTORY OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OKLAHOMA* 153-154 (1923).

⁴⁷ To place the Oklahoma development in historical perspective read Clements, *British Investment and American Legislative Restrictions in the Trans Mississippi West, 1880-1900*, *MISSISSIPPI VALLEY HISTORICAL REVIEW* 207-228 (1955).

ship.⁴⁸ In speaking to the Convention Alfalfa Bill Murray warned specifically of the Texas problem. "In my native state," Murray orated, "there is a tract of five million acres of land owned by one British subject. Let us write it into the Constitution that no alien shall own land in the State of Oklahoma."⁴⁹

Foreign ownership of the great ranch lands was a way to fortune regularly exploited by the great financial manipulators. The whole operation was wild and speculative. In 1882, for example, John Upton Terrell reports that ten multi-million dollar British-American land syndicates were formed.⁵⁰ W. Scott Morgan, a noted populist speaker, tabulated foreign land holdings at more than 20,557,500 acres. He concluded that "the amount of land in the hands of . . . twenty-seven foreign speculators is equal to a territory as large as Ireland."⁵¹ Oklahomans were determined to prevent this from happening here.

The question of alien ownership of land was but a minor one when compared with the broader issue of trust and corporate ownership and control of farm lands. W. Scott Morgan did not limit his "land monopoly" literature to foreign speculators but attacked all who stood against the small family farm. He had tabulated grants of more than 209,344,233 acres

⁴⁸ In fact, a number of the delegates in addition to President Murray had been citizens of Texas and were familiar with the Texas experience. Biographical Sketches of Delegates at the Oklahoma Constitutional Convention, Grant Foreman Vertical Files, Indian Archives, Oklahoma Historical Society. See Also H. BRAYER, *The Influence of British Capital on the Western Cattle Industry*, IV, WESTERNERS' BRAND Book (Denver) at 1-19 (1948); and R. Clements, *British-Controlled Enterprise in the West Between 1870 and 1900, and Some Agrarian Reactions*, XXVIII AGRICULTURAL HISTORY 132-141 (1953).

⁴⁹ OCC PROCEEDINGS, 18.

⁵⁰ J. TERRALL, LAND GRAB: THE TRUTH ABOUT "THE WINNING OF THE WEST" 220-223 (1972).

⁵¹ W. Scott Morgan cited in THE POPULIST READER (1963), 68.

given to railroads, an amount of land which he tabulated at "almost equal to the thirteen original colonies" and "larger than the whole of England and France." The populist figures were shocking—four million acres in the estate of Colonel Murphy, one million acres owned by Standard Oil, the Diston domain in Florida of two million acres.⁵²

Those Oklahomans who gathered at Guthrie to enact the new constitution were familiar with these populist arguments. In fact, the convention's President, Bill Murray, had written that soon after he had left Texas for the Indian Territory he had decided that the Populist theories were correct.⁵³ And thus Murray and his colleagues put a Populist stamp on the Oklahoma Constitution.

In a way there was something, too, of the cattleman-farmer conflict present in the Oklahoma brand of populism with its conception of land ownership. For prior to the opening of the western portion of the state to settlement by run this had been "cow country" and not "homes for farm folk" as later day state politicians liked to call the newly opened country. The historical clash over economic interests reflected in the opening of tribal lands to white settlement is portrayed by the Dean of Oklahoma's frontier historians the late Edward Everett Dale.

Oklahoma was one of the last of the agricultural states to contain large areas devoted exclusively to grazing. Moreover, it presents perhaps the best example in our history of the changing of considerable regions from one form of agriculture to another by governmental action. When the great Indian reservations were opened to settlement it is popularly believed that the land was taken from the Indian and given to the white man. As a matter of fact the Indian did not use the land and so as an economic factor in the history of the region is negligible. The man who really used these lands was the ranchman, and what

⁵² *Id.*

⁵³ MURRAY, MEMOIRS, I, 308.

really happened in the opening of large reservations to settlement was that the land was taken from the cattleman and given to the farmer, or its use changed by governmental action from grazing stock to the growing of crops. Even after the last Indian lands had been settled there was a considerable production of beef cattle in Oklahoma, but this was by stock farmers rather than ranching, and the passing of the Indian reservation meant, largely speaking, the passing of the ranch cattle industry.⁵⁴

By the time of statehood and the Oklahoma Constitutional Convention the traditional Indian land tenure system had been changed by government action. The Five Civilized Tribes had felt the sting of the Dawes Commission and the Curtis Act. Against their tribal protestations the vast lands formerly held in common by all of the tribe had been distributed. The former tribal domain had been, under federal law, allotted on a per capita basis in fee simple to the individual members of the tribe subject to certain restrictions including limitations on alienability. The process of allotting the lands of the great eastern Oklahoma Indian Nations had set off a land-grab of previously unequalled magnitude.⁵⁵

Speculating in Indian land had led to the formation of land companies whose only purpose was to deal in this recently allotted land; wholesale abuse of the citizens of the Indian Nations was widespread.⁵⁶ An understanding of this

⁵⁴ E. DALE, *THE RANGE CATTLE INDUSTRY: RANCHING ON THE GREAT PLAINS FROM 1865 TO 1925*, 146 (1930).

⁵⁵ Involved was the transfer of the entirety of Eastern Oklahoma from a state of fee simple ownership vested in the Nations of the Five Civilized Tribes to an ultimate state of fee ownership of the land in the hands of individual citizens of the Five Tribes. Those who doubt the complexity of the operation need only examine land titles in the areas formerly owned by the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles.

⁵⁶ The official record can be pieced together from Manuscripts From the Office of the Superintendent for the Five Civilized Tribes in the Indian Archives of the Oklahoma Historical

background clarifies the demand for the regulations in the Oklahoma Constitution preventing corporate ownership and speculation in real estate. Only large corporations and trusts, the delegates at Guthrie felt, could afford to acquire rights in land which, according to federal restrictions, would not become alienable, in many cases, for as long as twenty-five years.⁵⁷

Another concern long building among the Indian delegates and almost as important as the behavior of corporate land companies was railroad speculative activity in townsite development. The citizens of Indian Territory had found railroads to be less concerned with providing transportation than with securing rights in Indian tribal property. The lines were expert in the questionable practice of using the location of a railroad to promote their dubious land dealings as well as generally exploiting mineral, timber, and agricultural re-

Society. The Creek statesman, editor, interpreter, and poet Alexander Posey presented the Indian side of the story in a series of Letters from Fus Fixico. In commenting on the Oklahoma Constitutional Convention Fux Fixico wrote: "Well, guess so," Tookpefka Micco he say, "Alfalfa Bill an' Boss Haskell was put near ready to let their work so shine." An' Hotgun he spit in the ashes an' say, "Well, so, not hardy. It was slow business to get started out right. It was take lots o' time to draw up the plans an' specifications. So, they didn't had non o' the immortal document written yet but the scare headlines, an' they was had a big confusion o' tongues before they got that far." An' Tookpafka Micco he say, "Well, so what was trouble anyhow?" An' Hotgun he go on an' say, "Well, so, they couldn't decide, what name to give the Great Spirit." Then Tokpafka Micco he smoke an' look under the bed an' say, "Well so, Alfalfa Bill an' Boss Haskell an' Henry Asp could settle their differences an' saved lots o' work for the printer an' give general satisfaction if they had recognized Confucius for the Chinaman, an' Budda for the Hindu, an' Mohamet for the Turk, an' Saint Patrick for the Irishman, an' the totem pole for the Eskimo, an' the almighty dollar for the American."

⁵⁷ OCC Transcriptions, Debates, February 4 and February 13, 1907.

sources. Railroad operations had long been a source of bitter internal strife in most of the tribes. Their leaders resented the way in which their own governments and tribal delegations in Washington had been abused by the railroad men and the government functionaries who danced to the tune of the railroad lobby.⁵⁸ So railroads were corporations creating more than the usual fear of monopoly power; railroads had a previous record which many citizens of Indian Territory, including the President of the Convention, Bill Murray, view-as criminal.⁵⁹

To some the Oklahoma Constitutional Convention was seen as an allegorical drama, the classic struggle between the rights of people and the rights of property. Albert Ellis later recalled "it was felt by good men everywhere in the Government that if Oklahoma should write a progressive Organic Law, it would be a step in human progress and wield a beneficent influence throughout the Government. But should Oklahoma adopt a Constitution of the regulation type, guarding more closely the rights of property than the rights of its citizens, a step backward would be taken."⁶⁰

CONTROL OF CORPORATE POWER

The task undertaken at Guthrie was not to "get" corporations but rather to have a way of "getting at" them if need be. We should emphasize that the attitudes were not essentially anti-corporation but, rather, anti-trusts or against

⁵⁸ Memorials of the Five Civilized Tribes against the railroads and especially with references to land right assignments have been collected by the Indian Heritage Association. Railroads exerted tremendous power over the fate of the Eastern Oklahoma Indians as a result of concessions obtained from the tribes following the American Civil War. The influence of the railroad in Indian Territory is reflected in V. MASTERTON *THE KATY RAILROAD AND THE LAST FRONTIER* (1952).

⁵⁹ MURRAY, *MEMOIRS*, III, 349-352, 593-596; *OCC Proceedings*, 20.

⁶⁰ A. ELLIS, *HISTORY OF THE OKLAHOMA CONSTITUTIONAL CONVENTION*, 40 (1923).

evil corporations and corporations acting in an evil and destructive manner. The men at the Constitutional Convention were certainly aware of the importance of corporate organization in the development of the resources of their new state. The debates reflect this recognition and the further recognition of the importance of balancing the growth question with the abuse aspect of large scale business organization and the dangers this created for agriculture.⁶¹

We can conclude that the number one concern motivating economic regulation at the Oklahoma Constitutional Convention was the protection of individual ownership of resources, especially of the preservation and encouragement of individually owned and operated family-style farms. Equally certain is the fact that the number one public enemy and primary corporate villain was perceived to be the Standard Oil Company. And one may further conclude that the regulation of agricultural and business monopolies was seen as a part of the same general issue. The problem was viewed as most critical at that point where the issues were overlapped by corporate domination of public transportation and access to agricultural and timber markets.

Again, the attitude was most clearly summarized in the President's opening address. "We must conserve the public interest in every way possible," Murray noted. "We must shut our ears to the clamor of 'Special Interests' and corporate graft and greed. There is but one interest. I know of no interest save the public interest . . . Let us march forward in solid battalions against the quartette of the railroads, Standard Oil, coal operators, and land grafters whenever they march their forces against the people."⁶²

Charles N. Haskell, soon to become the first governor of

⁶¹ See generally Debates of the Oklahoma Constitutional Convention especially those of early February. OCC Transcriptions.

⁶² Murray cited in OCC PROCEEDINGS, 25.

the State of Oklahoma, moved swiftly by introducing a resolution described by Haskell as designed "to destroy the monopoly of the Standard Oil Company as it exists under the Oklahoma Territory law."⁶³ The power which Standard Oil already exercised in the old Oklahoma Territory, the western half of the proposed new state, was feared by men like Haskell who had been elected from the old eastern or Indian Territory section. The Haskell Resolution is quite specific in purpose. The monopoly of Standard Oil is the villain; Oklahoma is charged under the Haskell wording with destroying the monopoly forever. The resolution is as follows:

Whereas, it appears from the showing made of the existing laws governing oil inspection in the Oklahoma Territory, that said laws are so framed as to exclude all oils except those controlled by the Standard Oil Company from the territorial market by reason of technical rules, wholly without benefit to the consumer, and which result in Oklahoma oil consumers being charged about forty per cent more for the oil that they use than the same company charges for similar oils in the adjoining states; and

Whereas, should this law be extended over the whole state, as it would be under the terms of the statehood bill, unless we otherwise provide, it would destroy the market for the oil produce of our own state in our own market;

Therefore, be it Resolved, that this monopoly of the Standard Oil Company be forever destroyed and prohibited, and to that end the Committee on Commerce shall report a provision substituting the oil test laws of the state of Texas as a substitute for the Oklahoma Territory, such substitute to be and remain the law of the new state until the legislature otherwise provides.⁶⁴

Haskell justified his resolution as follows:

The Oklahoma oil test is a technical test, and it is one that no oil producer or manufacturer in this

⁶³ OCC Transcriptions, Session, February 13, 1907.

⁶⁴ *Id.*

country can comply with excepting the Standard Oil Company, and hence they have an exclusive market, and as a result they are charging 12 cents a gallon for oil in Oklahoma that the same company sells the same oil in three cities of Oklahoma for eight cents a gallon, and I am also informed from the same source that if, under the provisions of the statehood bill, this particular Oklahoma Territory law is allowed to go in force over the whole state, that it would absolutely exclude the home product, although equal in every respect — would absolutely exclude it from our home market.⁶⁵

CORPORATE POWER DEBATE

In the debates on the Haskell Resolution none of the delegates seemed willing to defend the economic practices of Standard Oil although a few were apparently sympathetic and did attack the inefficient performance of the independents. Others reacted strongly to what they viewed as a slur on the laws of the old Oklahoma Territory. Some objected to the use of the Texas oil laws in the interim before the first Oklahoma legislature met and a few attacked specific detailed provisions of the Haskell Resolution. The following excerpts from the debate show that despite the differences over means of regulation, there was a strong anti-monopoly feeling running through the convention and a widespread determination to curb the common practices of Standard Oil.⁶⁶

Mr. Asp: Mr. President, I have no desire to defend a monopoly. I feel, however, that the language of this resolution is not respectful to the territory of Oklahoma, or the legislature that passed the law. . . . Now, what does this Convention know, as a Convention, of the oil test law of Texas? Now, the substitute which I offered is as follows:

“In view of the oil production in Indian Territory and Oklahoma it is desirable that the new state should have from the outset the best possible law relating

⁶⁵ *Id.*

⁶⁶ *Id.*

to the testing and the sale of oils in the state of Oklahoma,

“Therefore, Resolved, that the Committee on Commerce be instructed to investigate the laws relating to the testing of oil from other oil producing or using states, and if the present law in the Territory of Oklahoma is not sufficient, or if a better law can be obtained, to report to this Convention a provision substituting the oil test law of such other state as a substitute for the laws of the Territory of Oklahoma.”

Mr. President, I have been advised, as is stated in this resolution, that nobody can do business in Oklahoma except the Standard Oil Company. I have been advised by the public press and by a common understanding throughout the length and breadth of this land, that nobody does oil business in the state of Texas, except the Standard Oil monopoly, and I have good Democratic authority for this statement. Why is it we should cast or attempt to cast a slur upon the Territory of Oklahoma here when you are going to join hands with the Territory of Oklahoma and help to make the greatest state in this great Union? Now I am not in favor of the Standard Oil. What I want is intelligent action in this connection; what you should have is intelligent action in this Convention. How can we have that but by instructing the Committee on Commerce to investigate this matter. . . .?

Mr. Haskell: It is with the kindest spirit and fellow-feeling that we of the Indian Territory are now joining hands with the oppressed of Oklahoma to contend for honest government. If we have indicted any legislature of Oklahoma, if we have indicted the Standard Oil Company, in this resolution, we are willing to put them upon trial before sentencing them. I am willing, so far as I am concerned, that the following shall be inserted in my resolution. Be it resolved, and then inserted this, “if the above be found true by the Committee on Commerce.” I will state right now, it will be. The following with the resolution as it reads, that this monopoly of the Standard Oil Company be forever destroyed. Mr. Asp will not argue

that if it be found true that it should not be destroyed so far as every portion of this territory is concerned.

Mr. Asp: Will you yield to a question?

Mr. Haskell: Yes, sir.

Mr. Asp: I will not deny that, and I will ask you the question if it also be found true that the Standard Oil Company controls the state of Texas in its grasp, and there can be a better law obtained from some other state, wouldn't you be willing to take the law from some other state in preference to Texas?

Mr. Haskell: Absolutely. I would like Kansas in preference to Texas if it should be as good or better, but I want to say to you that I want anything that will do better than the present Oklahoma Territory law. I will make that amendment, "or the law of such other state as the committee may recommend."

We could convict the Standard Oil Company under most any kind of resolution. . . . The statehood bill extends the law of Oklahoma except where otherwise provided. Now, I just want to otherwise provide as to this oil business; if not you would have about six months of the time in which our people in the Indian Territory would have as rough a deal for us as you people have had over here.

Mr. Tener: . . . Now, sir, Mr. President, I don't want this Constitutional Convention to investigate the Standard Oil Company or any other monopoly in this territory.

Mr. Haskell: The resolution does not direct the investigation of the Standard Oil Company; it directs a comparison of the law of this state with the law of other states — with the law of Texas or Kansas, for example. . . .

Mr. Tener: I am aware of the fact, Mr. President, that there is a monopoly on oil in Oklahoma Territory; I am aware of the fact that you can order oil from Oklahoma City at a little point 18 or 20 miles from that point from an independent oil company and it will take all the way from two to four

weeks to get that order filled. I am aware of the fact that you can order oil from Oklahoma City from the Standard Oil Company, and you can get it delivered at your town by the first train. What I oppose is this, that we now as a constitutional convention assume to investigate the laws of other states and make them applicable to any portion of this state. I believe that both of these resolutions should be voted down. Mr. Graham: This proposition was put in here to prevent corporations from owning property in towns and cities for the reason that where a new line of railroad striking out through a section of country prevents it from buying up land three or four miles from a prosperous county seat and not running the railroad through the county seat and absolutely killing the town. We discussed this very thoroughly before the committee and the committee was of the opinion that corporations should be restricted to owning land within cities and incorporated towns.

Mr. Swarts: I was very much impressed with the remarks of Mr. Haskell on this floor here this morning when he made the statement that corporations when properly organized and properly controlled are a great thing for this or any other country. It seems to be lodged in the bosoms of some people that whenever you mention a corporation you have mentioned something that is gnawing at the vitals of republican principles. It seems to be the impression of some people that whenever you mention corporations it includes everything that is bad in trusts, monopolies and combinations. I want to say to you Mr. Chairman that in the section of territory where I live, and not only in that section, but in many others, the great future of that country depends upon the building up and prosperity of a class of people that we are endeavoring to control under the report of this committee. Mr. Chairman, I believe in making a law to properly control a system of industries like private corporations for the new state of Oklahoma; that this convention ought to take care that in the power of control of those things they do not carry them to such an extent that they become useless. I take it, sir, that

an individual is a good thing for the state properly controlled. We have our penitentiaries in which we incarcerate people that violate the law, and sometimes it becomes necessary for us to resort to more severe means in order to control those whose crimes extend to a graver character, and it seems to me that in the organization of corporations in this new state. We have been talking about the gas situation. My friend Williams inserted two or three provisions the tendency of which is to keep gas within the new state. Do you know who is going to use it? The very people that you are trying to control under the report of this committee is going to use this gas, if it is used at all. Now in my opinion a constitutional provision that governs the corporations of the new state ought to be liberal; it ought to be liberal in the main. However, I take it on the other hand that very severe and stringent measures ought to be placed upon the statute books of this state to control corporations as well as individuals that violate the law and obtain the people's money under false pretenses.

I know of cases and circumstances in which corporations have been enabled to buy up tracts of land in additions to towns; they have been enabled to lay streets, construct electric light and water plants and lay out parks and sell those lots to men who work on an average for fifty to seventy-five dollars a month and thereby enable the people of that town to acquire their own homes. I want to say to you, Mr. Chairman, that whenever a man by reason of his means acquires a piece of property or may desire to acquire a piece of property and pays value received for it and comes into the community and becomes a valuable citizen, whether as a private citizen or a corporation, I am in favor of encouraging that man. I am willing to enforce the old rule that that man is considered innocent until he is proven guilty, and I am willing to concede that that corporation is a good thing to the community until by some violation of the law it shows itself to be something else, and I would be in favor in this report of the committee to not only going to the extent that Judge Maxey is going, but I would be in favor of striking out the

whole section. It occurs to me that it is strictly improper as a constitutional proposition. I take it that a few broad principles laid down in the constitution to form a basis on which the legislature ought to be able to build a statute for the people of the new state is all that is necessary and is as far as I am in favor of going to the control of corporations.

I thought I would say nothing this evening, but hearing what I have here I am thoroughly convinced that there are parties on this floor that have never had much experience in the developing of new countries. I agree with my friend Swartz that it is absolutely necessary to invest capital to build up any city or new country. I agree with my friend Maxey that this amendment and then some should be accepted. I find in a new country that many enterprises come along that are needful that it is impossible for individuals to put on foot and are good for the upbuilding of our country. It is absolutely necessary to have corporations for these enterprises. I find that in these places it becomes necessary some time to deal in land; I find that it is necessary to deal in many things all varying a little from the matter before the house. I find an organization or company are oft times forced to engage in a business that they care not to engage in to save their own interests: For instance an oil mill. They are possibly forced to engage in the grain business; they are possibly forced to buy land or build feeding pens; they are possibly forced to go into the feeding business to utilize their own products. Now I say that in this proposition you are going to enact a measure that will continually cripple our new country. Now as to my friend Maxey's amendment, it becomes absolutely necessary to organize companies to start any great enterprise in this country, and I take it that this provision adopted as it now stands will absolutely prevent it.

President Murray: I want to say in connection with this that the main evil of corporate ownership is not for the purposes ordinarily for which corporations acquire land. The evil lies in the transportation company getting hold of land for the purpose of engaging in some business other than common

carrier. The other evil is the forming of corporations for the purpose of buying large bodies of land.

In the first place, when you permit a railroad or common carrier to own real estate you give them authority to engage in the coal mining business; you give them authority to engage in any other business in competition with the men who are producing the stuff to be transported. I remember distinctly in my section I desired to clear some land as also did one of my neighbors. We had an opportunity to sell the wood off of that land at a high price at Denison, Texas, but by reason of the fact that the railroad was engaged in the coal business and the wood was in competition with the coal business, they refused practically to haul our wood. There were plenty of laborers willing to clear the land for what the wood would bring, but the railroad refused to haul the wood. This is the main evil in corporate ownership. The second is the organization of corporations for the purpose of buying large bodies of land to rent out and draw the rents. Where the ordinary corporation comes along and buys a few hundred or thousand acres of land that don't hurt, and for that reason I introduced a provision in this convention denying the right of any transportation company to own land other than what is necessary to operate its business; then one that further denied them the right to hold land as trustee, or otherwise, and I want to say to you that the clause in this provision that makes an exception to the trust company to hold in trust will defeat the entire object of it. If you want to make it effective and prevent the corporate ownership of land you must provide that they shall not hold it in trust. When you find them with the land in their possession and when you attack them on the possession of the land they will say "we don't hold this land in fee. They will hide under that blanket, and when you make an ironclad rule in your constitution you bring about the vile corporations referred to by the gentleman a while ago. The only thing you can do to my mind is to prevent transportation companies from owning land except necessary for their business, and then provide that they

shall not hold it as trustee or agent or otherwise and they cannot hide under the cover. Leave other corporations to buy land as they please, except that no corporation shall act as land agent or be chartered as a land speculating company. If you take that step you can then take the next step by putting a graduated tax on the excessive owner. If you provide strictly against all, the gentlemen who just left the floor is telling you truthfully that you kill progress and you won't correct the evil that ought to be corrected.

I recognize the necessity of corporations as stated by Mr. Swartz and other gentlemen but I hope you will not make an exception that will absolutely destroy the provision. If you will provide that no transportation company shall own land or act as land agent, and then provide that no corporation shall act as land agent—leave it with the individual—and then put a graduated tax on the large holder, corporation or individual, then you will correct the evil, and leave the ordinary corporation to handle suburban property, and then you will take the ownership of large bodies of land in this country out of the hands of the corporations and get it in the hands of the individual owner and farmer, but you cannot do it by this provision. I apprehend the gentleman who studies this question only studied it surface deep because the very exception in itself destroys it. You must look at this question in every light.

Mr. Baker: At the present and heretofore we incorporated in the Indian Territory for the purpose of buying and selling real estate and there are many corporations engaged in that business down there now and the deed is made to the corporations and you go around and sell that stock and get money on which to incorporate and then you buy land with that money of the business of that corporation. Now what are you going to do with this provision; destroy that business, or will it create a monopoly in that business.

President Murray: I think this convention has the power to draft a provision that will prevent these corporations from

operating. I do not understand that they have a vested right in their franchises. I do not think they could be disturbed in any property they own.

Mr. Baker: Then the new state land company that I own stock in will be wiped off the map?

President Murray: And I say to you they ought to be wiped off the face of the earth, because the continued operation of these people will eventually mean that the Indian Territory will be owned by corporations, and I want the farmers to own that country. I want to say I hope this convention will settle this question and settle it rightly. If you don't do it in this convention we will have a constitutional amendment that the farmer's will carry through this state. The time to do it is before restrictions are removed on those Indian lands. When you understand that the great body of those lands are held by corporations with the restrictions removed today they would be the only people who could buy it. Not a single farmer would think of buying property he couldn't get possession of for several years. Not a single bank or trust company would loan money on land they couldn't get possession of for years to come, and if you don't make some provision the greater portion of these lands will be in the hands of those corporations with all the attending evils.

The reason you say to a corporation that you shall not own land is to prevent the evils of land ownership; it is done for the express purpose of defeating the evils arising out of that ownership and not affecting that corporation directly, because whether they own the land or not they can go ahead with their corporation business.

Mr. R. L. Williams: If we are going to get after corporations we should place a limitation on their power. If we don't prevent corporations from acquiring farm lands in the Indian Territory you are going to make it hard for farmers to buy a home. Under the peculiar conditions in that section of the country a concern is organized and has its paid attorneys and experts and gets hold of the land when the restrictions are

removed, and while it is honorable and I don't believe we ought to make war on the corporations, yet no corporation on earth should be permitted to organize to deal in farm lands. If there are any things here that are too severe when it comes to the question of the cities, let's amend it, but let us never permit corporate greed to fasten itself upon the agricultural lands of this state.

Mr. Lehy: Have you any objection to putting in here that corporations shall not engage in farming?

Mr. R. L. Williams: No, sir, I have not. I am absolutely in favor of that.

Mr. R. L. Williams: At the same time fix it so that when the restrictions are removed in the Indian Territory and the land is thrown on the market that corporate greed will not gather it up and sell it to the home seeker at an enormous price.

Mr. Baker: Do you think under the pretext of limiting the powers of these corporations in the Indian Territory that you can absolutely destroy the business under the pretext of limiting?

Mr. R. L. Williams: If they have already acquired land of course we cannot interfere with their vested rights, but I am in favor of fixing it so that no corporation, after the ratification of this constitution, can acquire a single foot of agricultural land. Let them acquire the land in the cities; I don't object to that. Let them acquire additions and develop the cities. I wouldn't see this convention take a single step to hold back the development of this state. But let me tell you unless you do something to prevent the farm lands of the state from falling in the hands of corporations you will have a state of surfdom. You know the result then. That don't build up good citizenship.

President Murray: We are now not dealing with corporations; we are dealing with the land proposition.

Mr. R. L. Williams: We are dealing with corporations right now.

President Murray: The whole subject deals with "the land question."

Mr. R. L. Williams: Didn't you try to get an amendment in here so they could only be organized for one purpose.

Mr. R. L. Williams: We are dealing with corporations and land here is an incident to that corporation.

Mr. Williams: A trust company under this provision cannot own a foot of land unless it is committing fraud on the state and it would be the duty of the governor to see that it was confiscated and became state property, and if we want to be true to the people we want to seize every opportunity. The graduated tax, that will reach the individual.

Mr. Williams: I wouldn't have any objection to a corporation selling land where there was a nearby city. I don't believe I would like to see people going around over the country and making lots worth five hundred dollars where there is nothing but blue sky, but where we have a town or city already built and where capital is necessary to bring in additions and bring about development, why I can see the necessity for that, but it don't take a corporation to do it.

Mr. Asp: Suppose you are engaged in building a railroad. Your line is surveyed and there are places along the line where towns are platted and there are stations to be located along, do you see any good reason why a corporation should not have a right to buy the land and sell it as a townsite?

Mr. Williams: I tell you why I would be opposed to that. It has been the policy to have a fellow by bonuses virtually build the railroad, and to have somebody else give the town and then let the railroad sell it seems to me not exactly right. It seems to me like the man that bears the burdens of the country ought to have some rights in the premises. If we can vouchsafe the proposition in this country so that a corporation cannot own a foot of farming land somehow or other, the fellows in the cities will be able to take care of themselves.

Mr. Asp: You haven't pointed out what there is in the proposition submitted by the committee that permits corporations to own farm lands.

Mr. Graham: The committee does object to a portion of that, that portion which states that corporations may acquire land for the purpose of laying out new towns, as I understand it. The part that relates to suburban property we are willing to accept.

Mr. Maxey: I accept the amendment of Mr. Graham.

Mr. Graham: You mean to strike out the last part of your former amendment?

Mr. Maxey: Yes, sir.

The Chairman: If there is no objection we will let it go at that.

Mr. Leahy: I have an amendment that I want to offer and the reason I suggest it is this: A corporation may under this section incorporate for the business of going into farming and for that business may acquire all the real estate it wants, and then in the course of another year they may dispose of it if they see fit. I want to make it read as follows: "No corporation shall engage in farming, or acquire, trade or deal in real estate."

Mr. Swartz: Suppose for instance that an organization of capital might desire to go into the poultry business in some part of this state, I would like to know whether property that would come under the definition of farming?

Mr. Leahy: I think it would, yes sir.

Mr. Tenor: I would like to ask if it is the purpose of this section to prevent corporations being organized in this state for the purpose of engaging in the purchase and sale of farm lands for farming, speculation and otherwise?

The Chairman: I understand that is what it means.

Mr. Tenor: I notice the section reads "no corporation shall

receive, acquire or deal in real estate except such as shall be necessary and proper to carry on the business for which it was created. Under this section could not a corporation be created for the express purpose of buying farm lands?

Mr. Leahy: My amendment covers that proposition.

The Chairman: The Leahy amendment reads as follows: Line two, page 4, amend after the words 'shall' by inserting the words: "No corporation shall be organized to engage in farming or acquire or deal in real estate."

Mr. Ellias: I second the amendment.

Mr. Leahy: I want to say that if I can prevent it no corporation is going to be permitted to get hold of the farm lands of this state and prevent the individual citizens from acquiring homesteads here.

Mr. Caudill: Is that what that means?

Mr. Leahy: Yes, sir.

Mr. Caudill: Well, I am with you.

Mr. Kornegay: Suppose two or three of these farmers want to amalgamate their forces. Do you want to cut them off.

Mr. Ellis: Yes.

Mr. Kornegay: All right, go ahead.

President Murray: I think the more the gentlemen think of this the more they will see the difficulty involved in this. I tell you right now we don't want to prevent a corporation from farming, what we want to prevent is corporations buying land and making some other fellow do the farming. You take some industries in the way of agriculture and you can find but few individuals that can engage in it. I have been studying this question for years and I will tell you right now you cannot limit a corporation without locking the wheels of progress, without affecting the very man you intend to benefit. I tell you all you can do is stop common carriers from owning land and then prevent common carriers from acting

as land agent and prevent all corporations from acting as land agent in the state, then in order to reach the other corporations, and the only one that is a danger, is the one that buys for the purpose of renting it out. Now to reach the one that buys a large body of land for the purpose of renting it out to the farmer, while he lives in another state and have streams of rental going out of the state, the way to do away with that evil is to put a limit and put a graduated land tax on it. I am going to move this as a substitute to all amendments that "no corporation shall be chartered for the purpose of dealing or speculating in lands or acting as land agent in this state."

In the end, Oklahoma adopted laws aimed not only at Standard Oil but other trusts as well. The Sherman Act, it is clear, served as a model for the men at Guthrie; the delegates, aware of the difficulties of enforcement and investigation. The Oklahoma Constitution went so far as to grant powers to state officials to operate offending businesses in the name of the state as a public trust or corporation.

GOALS and GENERAL ATTITUDES

Thus we can see the background of Oklahoma's constitutional provisions regulating corporate and business activity and determine, in part, how and why these new laws came into being. We must note there was a remarkable balance to the Oklahoman's efforts to arrive at a set of laws designed both to promote business and industry and to encourage the farmer and the laborer.

In his highly oratorical style Alfalfa Bill set the tone of the Oklahoma Constitution when he outlined the goals of the Convention. "Let us avoid the extremes of radical socialism on the one side and extreme conservatism on the other, the extreme of a few men owning everything on the one side and nobody owning anything on the other."⁶⁷ Such a goal was surely commendable. With a note of almost bitterness Murray noted more than forty years later that the state had not

⁶⁷ Murray cited in OCC PROCEEDINGS, 25.

achieved the goals he and the others meeting in Guthrie had dreamed might be possible. "Every clause of the Constitution," he argued, "should be vitalized because without 'vitalization' the entire benefit, [of the constitution], can never be felt by the people."⁶⁸

THEME OF THE OKLAHOMA LAW

Responding to the national experience, a model and a mirror reflecting the consequences of economic concentration, the drafters of the Oklahoma Constitution sought to create a system under which power that could affect people would be preserved in the hands of the people. One can see, through a careful examination of the Bill of Rights enumerated in the Oklahoma Constitution,⁶⁹ that the drafters were not content with the general expression of rights guaranteed by the Federal Constitution. Alongside the basic rights of free speech and assembly, suffrage, due process, bail, habeas corpus, and others, the drafters of the Oklahoma Constitution also placed provisions to protect the people against excessive encroachment of political and economic power. The first defined right in the Bill of Rights is that:

All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it. . . .⁷⁰

Additionally the Bill of Rights provided strong protection against economic power. Records, books, and files of all cor-

⁶⁸ MURRAY, MEMOIRS, II, 69.

⁶⁹ Okla. Const. art. II. Under the Federal Constitution it is the first ten amendments that are generally referred to as the Bill of Rights. In the Oklahoma Constitution, there are thirty-three enumerations under the classification of Bill of Rights. The last of these, Section 33 provides that: "The enumeration in this Constitution of certain rights shall not be construed to deny, impair, or disparage others retained by the people."

⁷⁰ Okla. Const. art. II, § 1.

porations were made "subject to the full visitorial and inquisitorial powers of the State."⁷¹ The State retained its right "to engage in any occupation or business for public purposes with the exception of agriculture."⁷² Perhaps the most important protection was that:

Perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed. . . .⁷³

The astonishing insight of the men, described by William Jennings Bryan as the "cornfield lawyers of Oklahoma," who drafted the early constitution is reflected in the fact that they recognized the necessity of protecting the people against both political and economic power. Congress in a much later study expressed the same awareness.⁷⁴ In a 1941 study on economic concentration, it was observed that the first and most important tenet of a democratic society is "that all power originates in all of the people and not in any part of them, however numerous, however powerful or able, any given part may be."⁷⁵

Governments are instituted among men to serve men; men were not created to serve government. It is not the function of government nor of those to whom the duties and responsibilities of government are temporarily entrusted to direct and command the activities and the lives of men. It is the sole function of government to produce and preserve that order which will permit men to enjoy to the utmost that free will with which they were endowed by an all-wise Creator.

If, however, the political organization which we call government is called into existence by men for the benefit of

⁷¹ Okla. Const. art. II, § 28.

⁷² Okla. Const. art. II, § 31.

⁷³ Okla. Const. art. II, § 32.

⁷⁴ Temporary National Economic Committee, Investigation of Concentration of Economic Power, S. Doc. No. 35, 77th Cong., 1st Sess. (1941).

⁷⁵ *Id.* at 5.

the entire community, a principle which as Americans we must all acknowledge, it is equally true that the economic organizations, called into existence by men to meet their material needs, are likewise justified only to the degree in which they serve the entire community. If the political structure is designed to preserve the freedom of the individual, the economic structure must not be permitted to destroy it.

Business organization, like government organization, is a creature of man, a tool by which mankind endeavors to advance its material prospects. Like government organization, business organization has no right or function to control the activities and the lives of men.⁷⁶

RADICAL OR CONSERVATIVE?

The line between radicalism and conservatism, as related to the Oklahoma Constitution, is thin, maybe even nonexistent. Nevertheless, compared to the federal laws, Oklahoma's Constitution and early statutes went much farther in checking political and economic power. This may cause some to refer to the state provisions as extremely radical. Others will, however, characterize the differences and the precision of the Oklahoma law as conservative — that is sensibly conservative.

Under our federal system, people are guaranteed the right to petition the government for a redress or grievances.⁷⁷ This same right was inserted in the Oklahoma Constitution;⁷⁸ however, there is also included the more direct protection of the initiative and the referendum.⁷⁹ No attempt will be made, in this paper, to cover the law of the initiative and referendum which permits the people direct participation. It is enough that recognition be given to this check on the exercise of polit-

⁷⁶ *Id.*

⁷⁷ U. S. Const. amend. I.

⁷⁸ Okla. Const. art. II, § 3.

⁷⁹ Okla. Const., art. V §§ 1-8. For the present laws on the initiative and referendum, see: Okla. Stat. tit. 34, §§ 1-66 (1971).

ical power. Our principal concern will be restricted to the controls placed on economic power.

Federal antitrust statutes and their judicial interpretations stood as a model for the drafters of the Oklahoma Constitution. At the time of the Convention the only significant federal antitrust law was the Sherman Act⁸⁰ with its two basic substantive provisions; one making contracts in restraint of trade illegal,⁸¹ and the other making it illegal for any person to monopolize.⁸² Following substantially the language of Section 1 of the Sherman Act, the drafters of the Oklahoma Constitution provided that:

The Legislature shall define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade, and enact laws to punish persons engaged in any unlawful combination, trust, act, or agreement, in restraint of trade, or composing any such monopoly, trust, or combination.⁸³

More important than the federal statutory model was the general economic experiences of the nation. Some of these experiences were reflected in judicial opinions interpreting the Sherman Act, and others in the experiences of neighboring states. Indicative of the general national economic experience known to the drafters of the Oklahoma Constitution is the description offered by Justice Harlan in his dissenting opinion in *Standard Oil Co. v. United States*.⁸⁴

All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery . . . but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery

⁸⁰ 26 Stat. 209 (1890), as amended 15 U.S.C. §§ 1-7.

⁸¹ Sherman Act § 1, 15 U.S.C. § 1.

⁸² Sherman Act § 2, 15 U.S.C. § 2.

⁸³ Okla. Const. art. V, § 44.

⁸⁴ 221 U.S. 1, 83-84 (1911) (concurring and dissenting opinion).

that would result from aggregations of capital in the hands of a few individuals and corporations controlling for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life. Such a danger was thought to be then imminent, and all felt that it must be met firmly and by such statutory regulations as would adequately protect the people against oppression and wrong.

Although the Supreme Court's *Standard Oil* opinion was subsequent to the Oklahoma Convention, the charges against the Company were filed on November 15, 1906.⁸⁵ The alleged antitrust violation of Standard Oil concerned activity of the Company from 1870 to 1906 and included almost every known form of anticompetitive practice, much of which was within the personal knowledge of the men drafting the Oklahoma Constitution. In fact, based on the history of the Convention, the controls placed on economic power were principally directed at railroads and Standard Oil.

With knowledge of the strengths and weaknesses of the federal antitrust laws, the drafters of the Constitution and the early legislators were able to approve laws that would more effectively check the growth and exercise of economic power in the State of Oklahoma. Much of what was done in Oklahoma predates similar provisions subsequently passed by Congress to supplement the Sherman Act.⁸⁶ This alone shows the foresight of the early Oklahoma law makers. But even considering the present state of the federal antitrust laws, the original Oklahoma Constitution and first statutes placed far greater control on economic power. Before discussing the

⁸⁵ *Id.* at 31.

⁸⁶ To place the major pieces of legislation in the proper perspective: the Sherman Act was passed by Congress in 1890; the Oklahoma Constitutional Convention was from November, 1906 to July, 1907; the Sherman Act was supplemented by Congress in 1914 with passage of the Clayton Act and the Federal Trade Commission Act.

substantive controls, it might be beneficial to consider the significant differences between Federal and Oklahoma law.

1. *Investigating Power*: When the Sherman Act was passed in 1890, primary responsibility for enforcement was placed in the hands of the Attorney General. Yet there was no provision for any pre-complaint investigatory power. Recognizing a failure of the Sherman Act to stop the growth of trust, Congress rejected the notion of giving to the Attorney General any investigatory power.⁸⁷ Instead of giving this power to the Attorney General, Congress created and gave broad inquisitorial powers to a Federal Trade Commission.⁸⁸ It was not until 1962 that Congress granted to the Attorney General pre-complaint antitrust investigatory power.⁸⁹

Drafters of the Oklahoma Constitution recognized the need for investigation and provided that corporations at all times were subject to the "full visitorial and inquisitorial powers of the State, notwithstanding the immunities and privileges in the Bill of Rights secured to the persons, inhabitants, and citizens thereof."⁹⁰ Broader investigatory powers were also given to the Corporation Commission created by the Oklahoma

⁸⁷ For an example of this opposition see: 51 CONG. REC. 8845 (1914) (remarks of Mr. Covington); 51 CONG. REC. 8973, 8981 (1914) (remarks of Mr. Willis).

⁸⁸ 38 Stat. 717 (1914), as amended 15 U.S.C. §§ 41-58 (1973). Another reason for creating the Federal Trade Commission was to bypass the technical and influential federal courts, See: 51 CONG. REC. 8973 (1914) (remarks of Mr. Murdock).

⁸⁹ 76 Stat. 548 (1962), 15 U.S.C. 1311-14 (1964). For discussion of power of investigation, see: *Symposium on Antitrust Investigation and Procedure*, 29 ABA ANTITRUST SECTION 49 (1965).

⁹⁰ Okla. Const. art. II S 36. Section 9 of the Federal Trade Commission Act grants to the Commission access to any documentary evidence of any corporation being investigated. Jouett, *The Inquisitorial Feature of the F.T.C. Act Violates the Federal Constitution*, 2 VA. L. REV. 584 (1914); Mueller, *Access to Corporate Papers Under the F.T.C. v. American Tobacco Co.*, 264 U.S. 298, 306 (1924).

Constitution,⁹¹ which power later became a pattern for the United States Congress.

During the 1914 Congressional debates on the bill that would create a Federal Trade Commission, Congressman Murray related his Oklahoma experience on the question of inquisitorial powers over corporations—particularly the large corporation considered to have become impressed with a public use.⁹² Murray observed that under the present state of federal law, you can go to the Treasury Department and get information on banks; you can go to the Interstate Commerce Commission and get information on railroads; but, “you cannot go anywhere and get official information concerning the operations of the Standard Oil Corporation or its allied concerns.”⁹³

Defending the creation of a Commission with inquisitorial powers patterned after the Oklahoma Corporation Commission, Murray pointed out that: “you may rest assured that these corporations will not give you any information except that which they want to give you, unless you compel them to do it.”⁹⁴ According to Murray, it would be “absurd to think that we can wisely legislate for corporation or farmer, for banker or merchant unless we have all the facts about his conditions.”⁹⁵

Our Commission in Oklahoma can walk into any railroad office at any moment and say, “Open up your books: let me see your records.” And they do not hesitate to obey.⁹⁶

It was strongly believed by Murray that this same scope

⁹¹ Okla Const. art. 9, § 18.

⁹² 51 CONG. REC. 9050 (1914) (remarks of Mr. Morgan); 51 CONG. REC. 9052 (1914) (remarks of Mr. Murray).

⁹³ 51 CONG. REC. 8993 (1914).

⁹⁴ *Id.* at 8993.

⁹⁵ *Id.* at 9053.

⁹⁶ *Id.*

of inquisitorial power should be placed in a Federal Commission.⁹⁷

We howl on every stump about the Standard Oil Trust, and yet there is to be found nowhere in any governmental or State records any records to determine anything about their business. And yet they go into the midcontinental oil field of Kansas, Oklahoma, and elsewhere where the independent oil operators are at work, and, under the plea that there is overproduction destroy the independent operators and take possession of their property.

We ought to have the information that will determine the amount of the output of the crude product, of the refined product, of the demand each year of the country and of the world at large, so that we may determine on any day what is the output and determine with certainty whether there is an overproduction or whether this is but a plea of that trust to rob the people of their property. This commission seeks to do that; but it is powerless to do it unless you give the power to the commission itself.⁹⁸

Following the debates, Congress did create the Federal Trade Commission, and vested that agency with investigatory powers as broad if not broader than the powers of the Oklahoma Corporation Commission.⁹⁹

⁹⁷ It should be noted that at this point of the debates, the form of the Commission to be created had not been finalized. References made to the Federal Trade Commission, which was the final form, is only for convenience and clarity. There is no effort made to trace the history of the creation of this agency. The debates are used only for what value they may have on the history of Oklahoma's controls on economic power.

⁹⁸ 51 CONG. REC. 9053 (1914). That the power be given to the Commission itself, was an indictment of the federal judiciary. Murray expressed absolutely no confidence in inferior Federal judges making a reference to them that would shock any person sensitive to civil rights. 51 CONG. REC. 9053 (1914).
.....

⁹⁹ See note 90, *supra*.

2. *Regulation of Corporations*: During the Oklahoma Constitutional Convention, Murray declared in his opening address that: "We must shut our ears to the clamor of 'Special Interest' and corporate graft and greed," and "conserve the public interest in every way possible."¹⁰⁰ One instrument created to protect the public interest against economic power was the Corporation Commission. This Commission was granted power and authority for "supervising, regulating, and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties."¹⁰¹

Although the Corporation Commission was principally concerned with transportation and transmission companies, the Oklahoma Constitution defined the term "Company" to include any company having "power or privileges not possessed by individuals."¹⁰² This power of the Corporation Commission over what might include all corporations becomes significant when considered in light of an early legislative sanction against monopolies.

The Oklahoma Constitution required the Legislature to define an unlawful combination, monopoly, or agreement in restraint of trade, and to enact sanctions.¹⁰³ In response to this mandate and utilizing the power of the Corporation Commission, the Legislature enacted a law defining and controlling a "public business."

Whenever any business, by reason of its nature, extent, or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence or to affect the community at large as to supply demand or price or

¹⁰⁰ See note 90 *supra*.

¹⁰¹ Okla. Const. art. 9, § 18.

¹⁰² Okla. Const. art. 9 § 18 (b).

¹⁰³ Okla. Const. art. 5, § 44.

rate thereof, or said business is conducted in violation of the first section of this article, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business.¹⁰⁴

Congressman Morgan, a Republican from Oklahoma, strongly defended the idea of the "public business" as adopted by the Oklahoma Legislature. According to Morgan, the Federal Trade Commission ought to be granted similar powers.¹⁰⁵ It was argued that "there is a limit to the power that can be safely intrusted to an industrial corporation, and we must restrict that power, or exercise governmental control over their charges and prices."¹⁰⁶ Continuing, Morgan argued that:

Many of our industrial corporations have become impressed with a public use. They are public agencies. They are in every legitimate sense of the word quasi public corporations, and we should by law declare them to be such.¹⁰⁷

Congress did not adopt any provision that would require

¹⁰⁴ Okla. R. L. 1910, § 8235. The first section of this article, made reference to, provided that: "Every Act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this state, which is against public policy, is hereby declared to be illegal." Okla. R. L. 1910, sec. 8220. Section 8235 is now found at Okla. Stat. tit. 79, § 4 (1971).

¹⁰⁵ 51 CONG. REC. 6171 (1914).

¹⁰⁶ 51 *Cong. Rec.* 1871 (1914) (remarks of Mr. Morgan).

¹⁰⁷ 51 CONG. REC. 1872 (1914). For additional comments on this subject by Mr. Morgan, see: 51 CONG. REC. 1868-1871 (1914); 51 CONG. REC. 8854-8857 (1941); 51 CONG. REC. 9265-9267 (1914).

direct governmental control on corporations that violated the antitrust laws or that, because of their nature, became impressed with a public use.¹⁰⁸ On the other hand, Oklahoma did. As indicated above, the Oklahoma Legislature provided that under certain defined circumstances a corporation would be determined to be a "public business" and subject to controls as "to all of its practices, prices, rates and charges."¹⁰⁹

Under the "public business" statute, a corporation could become subject to control if it "has its property in such a position that the public has become interested in its use, and such business is conducted in violation of" the section defining certain anticompetitive and monopolistic practices.¹¹⁰ In *Oklahoma Operating Co. v. Love*,¹¹¹ the Oklahoma Corporation Commission has limited rates for laundry work in Oklahoma City after finding and declaring the Oklahoma Operating Company a monopoly and its business a public one.¹¹² The order of the Corporation Commission was reversed by the Supreme Court, but only for the reason that there was inadequate judicial review of laundry rates set by the Commission.¹¹³

Corporations need not be found to constitute an unlawful trust before becoming subject to control and regulation under the Oklahoma "public business" statute.¹¹⁴ The statute

¹⁰⁸ Congress has, however, been aware of the possible future need of a government takeover of corporations if the trend toward economic concentration continued unchecked. 95 CONG. REC. 11498 (1949) (remarks of Mr. Patman); 95 CONG. REC. 11497 (1949) (remarks of Mr. Boggs); 95 CONG. REC. (remarks of Mr. Celler).

¹⁰⁹ Note 104, *supra*.

¹¹⁰ *Oklahoma Gin Co. v. State*, 63 Okla. 10, 158 P. 629, 630 (1916), *rev'd on procedural grounds*, 252 U.S. 339 (1920).

¹¹¹ 252 U.S. 331 (1920).

¹¹² *Id.* at 333.

¹¹³ *Id.* at 337.

¹¹⁴ *Oklahoma Light & Power Co. v. Corporation Comm'n*, 96 Okla. 19, 23, 220 P. 54, 57 (1923).

provides for the regulation of any business, which, by reason of its nature and extent, or in event of a virtual monopoly therein, is such that the public must use the same."¹¹⁵ A narrow and strict reading of the "public business" statute, in *James v. Oklahoma Natural Gas Co.*,¹¹⁶ might make this statute far less significant as a control of economic power.

In the *James* case, decided in 1937, the court concluded that the plaintiff's petition was defective because it failed to show that the public must use the defendant's business; that the defendant's alleged wrongful acts affect the community at large; or that defendant's business is conducted as an unlawful trust.¹¹⁷ As will be indicated from a review of this problem, as well as other statutory provisions dealing with trusts and monopolies, the courts have become stricter and moved substantially farther from the standards set by the drafters of the Oklahoma Constitution and the early legislators.

The important thing about the historical account of Oklahoma's early controls of economic power is still the giant steps taken ahead of the federal antitrust program. Had the Oklahoma Courts remained closer to the Constitutional and statutory history, a declaration that corporation was a "public business" would have offered substantial protection to the people. Courts have the power to declare that a corporation is a public business; this is a judicial function recognized in the statute as well as judicial opinions.¹¹⁸

¹¹⁵ *Id.* There is a major difference between the word monopoly and the acts going to make up an unlawful trust. A company can have a monopoly without any wrongdoing. In the *Oklahoma Light* case, the company was the only ice distributing company in the area. *Id.* at 22, 220 P. at 56.

¹¹⁶ 181 Okla. 54, 72 P.2d 495 (1937).

¹¹⁷ *Id.* at 56, 72 P.2d at 497.

¹¹⁸ OKLA. R. L. 1910, § 8235. *Oklahoma Light & Power Co. v. Corporation Comm'n*, 96 Okl. 19, 23, 220 P. 54, (1923). Determination of reasonable rates is a legislative function within the power of the Corporation Commission.

3. *Refusal to deal*: What it means when a corporation is declared to be a "public business" by the court or the Corporation Commission is that the corporation must "render its services and offer its commodities or either upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."¹¹⁹ This can reasonably be interpreted to mean that a "public business" cannot refuse to "render its services and offer its commodities." It would also mean that these services and commodities must be furnished at reasonable prices without discrimination.¹²⁰

There appears to be no conditions under which a "public business" could discriminate in price. Price discrimination, without regard to a "public business," was made unlawful "if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition, or restriction of trade."¹²¹ The "public business" provisions presented a substantial difference between Oklahoma and the federal anti-trust provisions. There is even a greater departure if the Oklahoma "public business" could not exercise a long recognized federal freedom to select its own customers.¹²²

4. *Labor exemption*: During the formative years of federal antitrust philosophy, the Sherman Act was an ineffective weapon against the abuses of economic power. This basic anti-

¹¹⁹ OKLA. R. L. 1910, § 8235.

¹²⁰ This might explain why the court in *James v. Oklahoma Natural Gas Co*, 181 Okla. 54, 72 P.2d 495 (1937) declined to rule that the Oklahoma Natural Gas Company was a "public business."

¹²¹ OKLA. R. L. 1910, § 8227.

¹²² *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). These cases recognize a clear right of a seller to refuse to deal with any customer. Section 2 of the Robinson-Patman Act, 15 U.S.C. § 13, also has the specific provisions: "That nothing herein shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

trust statute was however a forceful weapon frequently used against organized labor.¹²³ As a result of this double standard—one for labor and one for trusts—there was a vindictive attack upon the federal courts. Congressman Graham reasoned that:

The accurate struggle between organized wealth and organized labor has found its way to the courts, and there is some reason for believing that the courts, and more especially the Federal courts, consciously or unconsciously, have leaned too much to the side of organized wealth, to the side of property.¹²⁴

Courts, allowing the use of “midnight labor injunctions,” were charged with being “petty judicial tyrants.” It was urged that Congress force the courts to respond to all the people and not to the privileged few.¹²⁵

Congress responded in 1914 to the judicially created imbalance of power between organized labor and organized wealth by enacting in the Clayton Act an exemption from the antitrust laws for labor organizations.¹²⁶ Through the process of strict judicial interpretation, however, this antitrust exemption for labor was effectively eliminated.¹²⁷ Finally, Congress in 1932 passed the Norris-La Guardia Act which removed most of the power of federal courts to issue labor injunctions.¹²⁸ The need for this drastic Congressional action caused Senator Wagner to observe that such need “reflects no glory upon American jurisprudence.”¹²⁹

¹²³ 51 Cong. Rec. 13847 (1914); 51 Cong. Rec. 9173 (1914)—For the few cases filed against economic trusts up to 1914, there had been 101 antitrust cases filed against farmers' and labor organizations.

¹²⁴ 51 CONG. REC. 9250 (1914).

¹²⁵ 51 CONG. REC. 9559 (1914).

¹²⁶ Act of Oct. 15, 1914, ch. 323, § 6, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 17 (1971)).

¹²⁷ Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

¹²⁸ Act of Mar. 23, 1932, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. 101 (1971)).

¹²⁹ 75 CONG. REC. 4915 (1932).

Oklahoma's Constitution and early statutes were written with a clear purpose of retaining an agrarian concept built upon small family farms, and of protecting the rights of labor. The agrarian and labor influence can be seen from the composition of the State seal. Included in the seal are the words "Labor Omnia Vincit" and the symbol showing a sheaf of wheat and a plow.¹³⁰ In the Constitutional Bill of Rights, it was also provided that: "All persons have the inherent right to . . . the enjoyment of the gains of their own industry."¹³¹

Labor's exemption from the antitrust laws in Oklahoma was recognized and upheld in *State v. Coyle*,¹³² a case decided in 1912. Judge Doyle, writing the first opinion in this case, measured the labor exemption on the basis of an equal protection argument — that if organized wealth is subject to anti-trust laws, organized labor must likewise be so subjected. It was stated that:

The character of the rights guaranteed to employees under this section is not to be tested according to the standards adopted in other countries in former times, where labor partook of many of the disabilities of selfdom and peonage. But it is to be judged by the more enlightened conceptions of the present, when the dignity of labor is recognized, and where the equal right of all men to life, liberty, and pursuit of happiness is guaranteed by the fundamental law of a free country.¹³³

Oklahoma's respect for labor over wealth and economic power was expressed in terms even more glowing by Judge Furman who wrote the second opinion in *State v. Coyle*.¹³⁴ A lengthy quote from this opinion will help to measure the temperament of Oklahoma's early law makers and judges.

¹³⁰ OKLA. CONST. art. 6, § 35.

¹³¹ OKLA. CONST. art. 2, § 2.

¹³² 7 Okla. Crim. 50, 122 P. 243 (1912), *rehearing denied*, 8 Okla. Crim. 686, 130 P. 316 (1913).

¹³³ 7 Okla. Crim. at 89, 122 P. at 260.

¹³⁴ 8 Okla. Crim. 686, 130 P. 316 (1913).

The assumption of counsel for appellees is that the rights of capital are equal to the rights of labor. Good morals do not sustain this assumption. While labor and capital are both entitled to the protection of the law, it is not true that the abstract rights of capital are equal to those of labor, and that they both stand upon an equal footing before the law. Labor is natural; capital is artificial. Labor was made by God: capital is made by man. Labor is not only blood and bone, but it also has a mind and a soul, and is animated by sympathy, hope, and love; capital is inanimate, soulless matter. Labor is the creator; capital is the creature. If all the capital in the world were destroyed, a great injury would thereby be inflicted upon the entire human race; but the bright minds, the brave hearts, and the strong arms of labor would in time create new capital, and thus the injury would be ultimately cured. If all of the labor on earth was destroyed, capital would lose its value and become absolutely worthless. The strength and glory of this country lies, not in its vast accumulations of capital, but it depends upon the arms that labor, the minds that think, and the hearts that feel. Labor is always a matter of necessity. Capital is largely a matter of luxury. Labor has been dignified by the example of God. The Savior of mankind was called the "carpenter's son." We are told in the Bible that "the love of money is the root of all evil." This statement is confirmed by the entire history of the human race. The love of money is the cause of the organization of trusts and monopolies. With what show of reason and justice, therefore, can the advocates of monopoly be heard to say that capital is the equal of labor? But if we concede that the assumption of counsel for appellees is well founded, and if we arbitrarily and in disregard of good morals place capital and labor upon an absolute equality before the law, another difficulty confronts them. Capital organizes to accomplish its purposes. Then, according to their own logic, it would be a denial of equal rights to labor to deny to it the right to organize and act without a breach of the peace to meet the aggressions of capital.¹³⁵

¹³⁵ *Id.* at 695-96, 130 P. at 320.

The articulation of Judge Furman, predates the Congressional oratory found in the 1914 and 1932 Congressional Record. As indicated in these debates, timid and biased judges were principally responsible for the plight of the working man. This judicial prejudice, which Senator Wagner said "reflects no glory upon American jurisprudence,"¹³⁶ was identified and criticized by Oklahoma's Judge Furman. He stated that: "[I]t is a fact well known to the legal profession and to the country, that many of our appellate courts, both state and federal, have in the past been largely dominated by men, who, before their elevation to the bench and while they were practicing lawyers, were more or less under monopolistic influences."¹³⁷

Judge Furman, critical of those Judges influenced by monopolies and describing such judges as being exceedingly dangerous, continued by saying that:

It is no secret that corporations and monopolies are active and tireless in their efforts to secure control of the appellate courts of this country and thereby by judicial construction defeat the will of the people as expressed in legislation. As these influences are powerful and well organized, they often succeed in securing the election or appointment of judges who are under obligations to them for past favors. This evil has been carried to such an extent and has become so open and notorious that many good people have almost lost hope and have largely ceased to have confidence in the fairness, impartiality, and integrity of the courts where corporations, trust, and monopolies are concerned. This constitutes one of the most alarming conditions now existing in America. A judge may desire to be entirely honest, yet if he is under influences which are antagonistic to the rights of the people, he will make an exceedingly dangerous judge. We are repeatedly told in the Bible that "a gift doth blind the eyes of the wise and pervert the words of the righteous." . . . So we have the

¹³⁶ 75 CONG. REC. 4915 (1932).

¹³⁷ State v. Coyle, 8 Okla. Crim. 686, 687, 130 P. 316 (1913).

highest possible authority for the statement that, although a judge may ordinarily be a wise and righteous man, yet, if he has been the recipient of favors at the hands of trusts and monopolies, he cannot safely be relied upon to reach just and correct conclusions in cases where their interests are involved, and that in such cases his eyes may become blind to the rights of the people and his judgment may become perverted without his being aware of the fact. It may not be popular in some circles to say this, but we believe that it is the absolute truth and that this is the main cause of the manifest bias of many of our courts against all anti-trust legislation.¹³⁸

Mistakes made by Congress in drafting antitrust legislation was a lesson to the drafters of the Oklahoma Constitution. Many of the deficiencies in the federal system were avoided in Oklahoma because these men had available to them "the American experience." Taking advantage of their time in history, the law makers set a standard that could be fairly understood by the judges who interpret the law.

LOCAL CONTROL

Preservation of local control over the exercise of economic power formed the basis for most of Oklahoma's antitrust laws. From federal experiences, it was thought that political power would be seriously dissipated, perhaps even surrendered, to private economic forces unless adequate controls were enacted.¹³⁹

In *Northern Securities Co. v. United States*,¹⁴⁰ involving the consolidation of previously independent railroad lines, the Court ruled that: "The mere existence of such a combination and the power acquired . . . constitute a menace to, and a restraint upon, the freedom of commerce which Congress intended to recognize and protect."¹⁴¹ Justice Harlan, writing

¹³⁸ *Id.* at 687-88, 130 P. at 316-17.

¹³⁹ *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904); *United States v. Union Pac. R.R.*, 226 U.S. 61 (1912).

¹⁴⁰ 193 U.S. 197 (1904).

¹⁴¹ *Id.* at 327.

for the Court, observed that unless such combination is destroyed "the entire commerce of [an] immense territory . . . will be at the mercy of a single holding corporation, organized in a state distant from the people of that territory."¹⁴² Local control, according to Justice Harlan, was essential for maintaining a vigorous system of free competition.

As local control is destroyed, corporate management has less concern for the people in local communities. Leadership is destroyed, charity is reduced, and relationships become impersonal.¹⁴³ The authors of *Middletown in Transition* described the loss of local control as follows:

Every American city has its successful businessmen, but the American success story has been kaleidosopic in recent years. Local giants, the boys who have grown up with the town and made good, have shrunk in stature as rapid technological changes, the heavy capital demands of nation-wide distribution, and shifts in the strategic centers for low-cost production in a national market have undercut their earlier advantages of location, priority in the field, or energy; and as Eastern capital has advantages of location, priority in the field, or energy; and as Eastern capital has forced them out or brought them out and reduced them to the status of salaried men, or retired them outright in favor of imported management.¹⁴⁴

Looking at the American experience at a later date which evidenced a failure to preserve local control, a Congressional study released in 1941 reveals that "mayors of great cities, and governors of great states, have been forced to look to Washington and the federal government for solutions of local problems. The reason: "the control of even local economic activity had been removed from within the borders of their respective communities."¹⁴⁵ "Local communities and local

¹⁴² *Id.* at 327-328.

¹⁴³ J. UDELL, *SOCIAL AND ECONOMIC CONSEQUENCES OF THE MERGER MOVEMENT IN WISCONSIN* (1969).

¹⁴⁴ R. LYND & H. LYND, *MIDDLETOWN IN TRANSITION* 76 (1937).

¹⁴⁵ TNEC study, *supra* note 74 at 6.

sovereignties" first became "dependent upon centralized economic organization; they were then out of necessity forced into being "dependent upon centralized political organization."¹⁴⁶

Oklahoma has not been spared this dependency upon centralized economic and centralized political organization. It is common knowledge that foreign based corporations have been permitted to gain control of local based corporations.¹⁴⁷ Loss of local control over the states economic resources has not been the result of a lack of laws. In an effort to avoid large foreign corporations from coming into Oklahoma and gaining control over the state's economic resources, definite controls were incorporated in the constitution and early statutes.

Failure of these early laws to achieve the goals of the drafters of the Oklahoma Constitution was noted by Alfalfa Bill Murray in his autobiography written more than forty years after the Constitutional Convention.¹⁴⁸ Murray argued that: "Every clause of the Constitution should be vitalized because without 'vitalization' the entire benefit can never be felt by the people."¹⁴⁹ Vigorous enforcement of the Constitutional and statutory controls on economic power would have prevented the wealth of the State from becoming so concentrated into the hands of so few people.

The drafters of the Oklahoma Constitution incorporated an absolute prohibition against the consolidation of public service corporations having parallel or competing lines, "except by enactment of the Legislature upon the recommenda-

¹⁴⁶ *Id.*

¹⁴⁷ There is not enough space to list all the local companies that have been acquired by corporations based outside of the State. But see: *Mans v. Sunray DX Oil Co.*, 352 F. Supp. 1095 (1971); *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 10th Cir. 1973), *cert. denied*, 411 U.S. 938 (1973).

¹⁴⁸ MURRAY, *supra* note 68.

¹⁴⁹ *Id.*

tion of the Corporation Commission."¹⁵⁰ Railroad, transportation, or transmission companies organized under the laws of Oklahoma were prohibited (without exception) from consolidating "by private or judicial sale, or otherwise" with any such companies organized under the laws of any other state.¹⁵¹

Corporations licensed to do business in the State of Oklahoma were even prohibited from owning, holding or controlling, in any manner whatever, the stock of any "competitive corporation or corporations engaged in the same kind of business, in or out of the state."¹⁵² The penalty for holding stock in violation of the provision was the forfeiture of the corporate charter or license to do business in the State, and a penalty in the form of a fine recovered at the suit of the State in any Court of competent jurisdiction.¹⁵³

Other controls on economic power prohibited aliens who were not bona fide residents of Oklahoma from acquiring title to or owning any land in this State.¹⁵⁴ The Constitution also provided that no corporation could be created or licensed for the purpose of buying, acquiring, trading or dealing in real estate located outside the limits of towns and cities.¹⁵⁵ Corporations were further prohibited from buying, acquiring, trading, or dealing in real estate except as such may be nec-

¹⁵⁰ OKLA. CONST. art. IX, § 8.

¹⁵¹ OKLA. CONST. art. IX, § 9. This section was subsequently amended in 1913.

¹⁵² OKLA. CONST. art. IX, § 41. One limited exception to this was that stock could be held as a bona fide pledge to indebtedness and acquired through foreclosure. But the stock must be disposed of within 12 months. During the period held, there could be no participation in business of the corporation.

¹⁵³ OKLA. R. L. 1910, § 8233, *as amended*, OKLA. STAT. tit. 79, § 31 (1971). These provisions prohibiting stock ownership go much farther than the Federal statute. Clayton Act, 15 U.S.C. § 18 (1971).

¹⁵⁴ OKLA. CONST. art. XXII, § 1.

¹⁵⁵ OKLA. CONST. art. XXII, § 2.

essary and proper for carrying on the business for which it is chartered or licensed.¹⁵⁶

In 1969, the Oklahoma Supreme Court ruled that corporations could acquire and own land used for the purpose of farming.¹⁵⁷ At first glance, this holding of the Supreme Court appears to be contrary to the Constitutional provision prohibiting corporations from acquiring real estate. An examination of the constitutional history of this section, however, reveals only a strong feeling against ownership and the absolute prohibition was never adopted.¹⁵⁸

From the constitutional history of the prohibition of corporate land ownership, one sees the desire to preserve and encourage individually owned and operated family-styled farms. There was a fear that corporations, if allowed to acquire land, would be able to use their economic resources to preclude individual land ownership.¹⁵⁹ Mr. R. L. Williams had in the Convention, urged that: "If we don't prevent corporations from acquiring farm lands in the Indian Territory you are going to make it hard for farmers to buy a home."¹⁶⁰ To make it absolutely clear, Mr. Leaky offered an amendment to the Constitutional land proposition that: "No corporation shall engage in farming, or acquire, trade or deal in real estate."¹⁶¹ President Murray opposed this amendment, stating that "I tell you right now we can't want to prevent a corporation from farming, what we want to prevent is corporations buying land and making some other fellow do the farming."¹⁶²

The final draft of the Constitution did not include any explicit prohibition against corporations owning land for the

¹⁵⁶ *Id.*

¹⁵⁷ *Le Force v. Bullard*, 454 P. 2d 297 (Okla. 1969).

¹⁵⁸ For the Constitutional history, see notes 154-56 *supra*.

¹⁵⁹ OCC PROCEEDINGS, *supra* note 66.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

purpose of farming. It was so held in the *LeForce* case.¹⁶³ Responding to this judicial decision, the Oklahoma Legislature, during its 1971 session, enacted strong restrictions on farming corporations.¹⁶⁴ This action of the 1971 Oklahoma Legislature accomplished the basic purposes and policies of the earlier Constitutional Convention.¹⁶⁵

CONTROL OF MONOPOLISTIC PRACTICES

Standard Oil, and its monopoly control over the oil industry, was one of the main targets of the drafters of the Oklahoma Constitution. Nevertheless, the Constitution as adopted was aimed at all trusts and anticompetitive practices. In the Bill of Rights, monopolies were declared to be "contrary to the genius of a free government, and shall never be allowed."¹⁶⁶ The Legislature was directed to: "define what is an unlawful combination, monopoly, trust, act, or agreement, in restraint of trade."¹⁶⁷ Besides this general direction for the Legislature, the Convention also included a specific prohibition against price discrimination.¹⁶⁸

Responding to its Constitutional mandate, the Oklahoma Legislature provided that: "Every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this state, which is

¹⁶³ *Leforce v. Bullard*, 454 P.2d 297 (Okla. 1969).

¹⁶⁴ OKLA. STAT. tit. 18, § 951-54 (1971).

¹⁶⁵ Foreign Corporations are prohibited absolutely from farming. OKLA. STAT. tit. 18, § 951 (1971). Domestic corporations formed for this purpose are greatly restricted so as to eliminate principally all but the family farm. The intent expressed in the bill is that "it is the considered judgment of the Oklahoma State Senate that the widespread use of rural Oklahoma lands by publicly held corporation is not in the best interest of this state." S. Res. 67, 33d Legis., 1st Sess., Okla. Laws 1055 (1971).

¹⁶⁶ OKLA. CONST. art. II, : 32.

¹⁶⁷ OKLA. CONST. art. V, § 44.

¹⁶⁸ OKLA. Const. art. IX, § 45.

against public policy, is hereby declared to be illegal."¹⁶⁹ This is almost a verbatim reproduction of the Sherman Act, but with two significant differences.¹⁷⁰ With the word "act" included in the Oklahoma statute, the state law is far broader than the federal Sherman Act. Under the Oklahoma law, it would appear that an "act" short of an agreement or combination could be declared illegal if in restraint of trade.

The other difference between this statute and the Sherman Act reduced the scope of the Oklahoma statute. Every contract in restraint of trade is, by the Sherman Act, declared to be illegal.¹⁷¹ According to the Oklahoma statute, the contract in restraint of trade was declared illegal on the condition that it be found to be against public policy. This deficiency in the early statute was corrected by the 1971 Oklahoma Legislature. By amendment, this section now declares that contracts in restraint of trade are against public policy and illegal.¹⁷²

To supplement or strengthen the basic section of the Oklahoma antitrust statute, the Legislature adopted a section more definitive of combinations in restraint of trade.¹⁷³ Section 8232 of the 1910 Revised Laws made it unlawful for any corporation to issue or own trust certificates, or to enter into any agreement with other corporations for the purpose or effect to place control of the corporations in the hands of any trust or trustees, holding corporation or association with the intent or effect of limiting or fixing prices, lessen production or sale.¹⁷⁴ Any person entering into this type of trust agreement

¹⁶⁹ Okla. R. L. 1910, § 8220, *as amended* OKLA. STAT. tit. 79 § 1 (1971).

¹⁷⁰ Compare the Sherman Act, 15 U.S.C. § 1 (1971).

¹⁷¹ This absolute prohibition must of course be read in light of the judicially created rule of reason. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

¹⁷² OKLA. STAT. tit. 79, § 1 (1971).

¹⁷³ OKLA. R. L. 1910, § 8232, OKLA. STAT. tit. 79, § 3 (1971).

¹⁷⁴ *Id.* This section was aimed at the practices of Standard Oil Co., see *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

would be deemed guilty of a conspiracy in restraint of trade; however, it was provided, "that this section shall not be construed to extend beyond the scope of meaning of the first section of this article."¹⁷⁵

Price discrimination between different persons, or different sections, communities or cities of the state is prohibited "if the effect or intent thereof is to establish or maintain a virtual monopoly hindering competition, or restriction of trade."¹⁷⁶ This was the only statutory prohibition against price discrimination as of 1910, and was, it would appear, principally aimed at monopolistic practice although the statute did reach price discrimination that restricted trade. Subsequently, the Legislature enacted more comprehensive laws to define and provide remedies for price discrimination.¹⁷⁷

Instead of a comprehensive review of the statutes, it might be more suitable for purposes of this paper to review the judicial attitude toward the Oklahoma controls on economic power. There are actually only a few cases in which the Oklahoma court has shown a strong inclination to vigorously enforce the State antitrust laws. It is of some interest also that the cases in which the alleged restraint was found and condemned all predate the year 1923.¹⁷⁸

If it is true that contemporaneous exposition is the best

¹⁷⁵ Reference here is to OKLA. R. L. 1910, § 8220, *as amended* OKLA. STAT. tit. 79, § 1 (1971).

¹⁷⁶ OKLA. R. L. 1910, § 8227.

¹⁷⁷ These laws now appear at: OKLA. STAT. tit. 79 §§ 2, 81-87 (1971). See, *Western Lumber Co. v. State*, 17 Okla. Crim. 427, 189 P. 868 (1920); *Greenshields v. Warren Petroleum Corp.*, 248 F.2d 61 (10th Cir. 1957), *cert. denied*, 355 U.S. 907 (1957).

¹⁷⁸ *State v. Coyle*, 7 Okla. Crim. 50, 122 P. 243 (1912), *rehearing denied*, 8 Okla. Crim. 686, 130 P. 316 (1913); *Oklahoma Gin Co. v. State*, 63 Okla. 10, 158 P. 629 (1916), *reversed on procedural grounds*, 252 U.S. 339 (1920); *Oklahoma Light & Power Co. v. Corporation Comm'n*, 96 Okla. 19, 220 P. 54 (1923). This is not intended to be an exhaustive list.

and strongest in the law,¹⁷⁹ these pre 1923 explanations, being closer to the Oklahoma Constitutional Convention, should offer the best evidence as to the meaning of the Constitution and early statutes. In *State v. Coyle*, the defendants, operators of cotton gins, were indicted for violation of the antitrust laws.¹⁸⁰ The indictment charged the defendants with monopolizing the cotton market in Logan County, Oklahoma. About 90% of the cotton gins operating in the county has been brought under the control of these defendants.¹⁸¹

The trial court had sustained a demurrer to the indictment against Coyle, thus the only issues directly involved at the appellate level were the constitutionality of the antitrust laws and the sufficiency of the indictment.¹⁸² After upholding the constitutionality of the statutes and the sufficiency of the indictment, the court, in a separate opinion handed down nearly one year later, denied the defendants motion for a rehearing.¹⁸³ It is in this second opinion that one is able to measure the judicial temperament toward the state antitrust laws.

It is difficult to say for certain that the appellate court was taking aim at the trial judge who had earlier sustained the demurrer to the indictment. The court did openly observe that many people were losing hope and confidence in the courts's impartiality and integrity where corporate monopolistic practices are involved.¹⁸⁴ A serious question was raised about the integrity of existing judicial precedent that had flowed from courts influenced or dominated by trusts and monopolies.¹⁸⁵

¹⁷⁹ *Contemporanea Expositio Est Optima Et Fortissima In Lege.*

¹⁸⁰ *State v. Coyle*, 7 Okla. Crim. 50, 521, 122 P. 243 (1912).

¹⁸¹ *Id.* at 53, 122 P. at 244.

¹⁸² Emphasis was placed on the argument that the antitrust statutes to which labor was exempted violated the equal protection clause.

¹⁸³ *State v. Coyle*, 8 Okla. Crim. 686, 130 P. 316 (1913).

¹⁸⁴ *Id.* at 688, 130 P. at 317.

¹⁸⁵ *Id.*

"[T]rusts and monopolies," it was observed, "always secure the services of the best lawyers obtainable who have the ability to make the worse appear to be the better cause;" consequently, the court was "not surprised at the number and respectability of the authorities supporting the contentions of" Corporate Counsel.¹⁸⁶ To follow the common law precedent urged upon the court would make it impossible to "reach and destroy conspiracies in restraint of trade and commerce."¹⁸⁷ A technical approach to the state antitrust laws would, according to the court, have the effect of deciding that:

In the State of Oklahoma trusts and monopolies are practically above and superior to the law, and that they may at pleasure through their combinations and conspiracies grind the people like grain beneath the upper and nether stone, take from the mouth of labor the bread which it has earned, and divert the stream of wealth produced by hard and honest toil from its rightful channels and pour it into the undeserved and already overflowing coffers of the few.¹⁸⁸

Against the constitutional attack of "void for uncertainty," the court observed that the Legislature did not intend for there to be a fixed definition of trusts and monopolies. Such a fixed meaning would have simply permitted the corporation to shape its business practice so as to place it neatly outside the fixed definition. The court noted that this strict practice would have no doubt been "very gratifying to those persons engaged in such unlawful undertakings."¹⁸⁹

The only way in which they can be reached is by general definitions and the doctrine of a liberal construction of penal statutes, and that is just what we have in Oklahoma; hence the law is going to be enforced and those gentlemen must either abstain from their illegal conduct or suffer the consequences.¹⁹⁰

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 689, 130 P. at 317.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 693, 130 P. at 319.

¹⁹⁰ *Id.* at 694, 130 P. at 319.

By giving the statutes a liberal construction and through a policy of vigorous enforcement, the concentration of economic power, so much feared at the Oklahoma Constitutional Convention, could be avoided. There was, during the early stages of Oklahoma's history, evidence of both. In *Oklahoma Gin Co. v. State*,¹⁹¹ the defendant, ginning companies operating at Chandler, Oklahoma, were charged by the Corporation Commission with forming an unlawful combination in restraint of trade by fixing prices for ginning cotton.¹⁹² Entering an order of guilty against the companies charged, the Corporation Commission declared the companies to be a "public business" subject to the regulations of that agency.¹⁹³ To be declared a "public business," it was enough that the Corporation Commission show that the public had become interested in its use, and that the businesses were guilty of an unlawful combination in restraint of trade.¹⁹⁴

One line of Oklahoma antitrust cases involve attacks on the exercise of governmental power instead of on business practices that restrain trade.¹⁹⁵ "It is axiomatic that the anti-

¹⁹¹ 63 Okla. 10, 158 P. 629 (1916), *reversed on procedural grounds*, 252 U.S. 339 (1920).

¹⁹² *Id.* at 10, 158 P. at 630.

¹⁹³ *Id.* Discussion of "public business" as device to control economic power is in text accompanying notes 100-149 *supra*.

¹⁹⁴ 63 Okla. at 11, 158 P. at 630. *See*, *Oklahoma Operating Co. v. Love*, 252 U.S. 331 (1920); *Oklahoma Light & Power Co. v. Corporaton Comm'n*, 96 Okla. 19, 220 P. 54 (1923). *Compare* *James v. Oklahoma Natural Gas Co.*, 181 Okla. 54, 72 P.2d 495 (1937); *Consumers Light & Power Co. v. Phipps*, 120 Okla. 223, 251 P. 63 (1926).

¹⁹⁵ *Burns v. City of Enid*, 92 Okla. 67, 217 P. 1038 (1923), involving exclusive permit to gather garbage; *Rice v. State*, 108 Okla. 4, 232 P. 807 (1925), use of convict labor to make shirts; *Schwarze v. Clark*, 188 Okla. 217, 107 P.2d 1018 (1940), challenge to state licensing of barbers that provided that student barbers could not charge for their work; *Sparks v. State*, 72 Okla. Crim. 283, 115 P.2d 277 (1941), challenge of state regulating setting minimum prices for barbers; *Cotton Club v. Oklahoma Tax Comm'n*, 195 Okla.

trust laws were directed at business not at the government."¹⁹⁶ There may be times when the exercise of power does not appear to be legitimate state police power which could make the practices involved subject to the federal antitrust laws. The rule seems to depend on whether the state is actually making the decision, or authorizes private groups to make the decision that restrains trade. The former would be exempt; the latter would not.¹⁹⁷

The more relevant line of Oklahoma cases for purposes of the article involves serious restrictions on the scope of the antitrust laws. In *Dell v. City National Bank of Duncan*,¹⁹⁸ the antitrust claim was raised as a defense in an action filed by bank to recover on two promissory notes.¹⁹⁹ The contract complained of, according to the court, was nothing more than a contract to sell 60 furnaces at \$2.25 each. It was noted that the contract restricted the sales to one specified county.²⁰⁰ This was not considered to be an unlawful restraint. However, it was further urged that there was an oral agreement that required the defendant to sell the furnaces for \$5.75. Be-

403, 158 P.2d 707 (1945), challenge to state regulation requiring persons engaged in abstract business to have adequate equipment; *Public Serv. Co. v. Caddo Elec. Coop.*, 479 P.2d 572 (Okla. 1971), state regulation of installation of electric power lines.

¹⁹⁶ ABA, ANTITRUST DEVELOPMENTS 1955-1968, at 211 (1968).

¹⁹⁷ *Id.* at 67 (Supp. 1972).

¹⁹⁸ 85 Okla. 238, 205 P. 753 (1922).

¹⁹⁹ *Id.* at 238, 205 P. at 753. See also *Thomas v. Belcher*, 184 Okla. 410, 87 P.2d 1084 (1939); *Thomas v. Blaylock*, 187 Okla. 258, 102 P.2d 585 (1940). Under federal law, the Supreme Court has separated commercial action to collect debts from antitrust claims. *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947). *But see*: OKLA. R. L. 1910, § 8239, 79 OKLA. STAT. 1971, § 35.

²⁰⁰ 85 Okla. at 239, 205 P. at 754. It took the Supreme Court until 1967 to make this type of vertical restraint clearly illegal. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

cause there was a written contract, however, this evidence was rejected as evidence of a restraint of trade.²⁰¹

Since the *Delk* case, decided in 1922, the Oklahoma Court has moved farther away from the liberal construction of the antitrust laws advocated by earlier courts. Without any clear reasoning, the court in *State v. William Cameron & Co.*²⁰² rejected antitrust and unfair competition charges that the defendant company and others had conspired to destroy competition in the lumber business.²⁰³ The court simply stated that:

The evidence shows conditions existing to be rather the result of an excess in number of those engaged in the lumber and building materials field in Altus which by reason of legitimate competition reacted to lowering the cost therefor to the people purchasing this merchandise in that city.²⁰⁴

The Oklahoma Supreme Court, in 1935, avoided what later developed into a serious federal antitrust problem by ruling that enforcement of the civil provisions of the Antitrust laws was left exclusively to the State Attorney General. In *State v. Griffith*,²⁰⁵ the county attorney initiated a civil antitrust suit against the defendants—charging the defendants with entering into:

An agreement and combination within the State of Oklahoma to drive out all competition to them in the moving picture business in cities and towns in which they owned or operated theaters, and that A. B. Momand who owned a number of theaters in the state, had been driven out of business by the combination which had control of the leasing of films in this state, by unfair and unlawful discrimination against

²⁰¹ 85 Okla. at 239, 205 P. at 754.

²⁰² 147 Okla. 1, 294 P. 104 (1930).

²⁰³ *Id.* at 3, 294 P. at 106.

²⁰⁴ *Id.* We are without the advantage of knowing the exact business practices complained of.

²⁰⁵ 171 Okla. 259, 42 P.2d 861 (1935).

him in the kind of films they permitted him to lease, in the price charged for same, and by other unfair and unjust methods of discrimination.²⁰⁶

The trial court dismissed the charges against Griffith because the acts complained of were in interstate commerce and within the exclusive jurisdiction of the Federal Courts.²⁰⁷ This, of course, is inconsistent with the general assumption that the federal antitrust laws were not intended to pre-empt the field.²⁰⁸ A state law can prohibit action that might not be offensive, and proscribed by federal antitrust standards. It was not, however, necessary for the Oklahoma Supreme Court to reach this issue in the *Griffith* case. Dismissal of the petition was affirmed on a technicality; that civil enforcement was not available to county attorneys.²⁰⁹

It was recognized by the Oklahoma court that the statute could be read to reflect the intent of the Legislature that county attorney's retained authority to enforce both the civil and criminal provisions of the state antitrust laws.²¹⁰ The court, however, declined to make this extension of enforcement authority, and thereby seriously curtailed public enforcement of the state antitrust laws.²¹¹

²⁰⁶ *Id.* at 259, 42 P.2d at 861-62.

²⁰⁷ *Id.* at 260, 42 P.2d at 862.

²⁰⁸ P. ARIEDA, *ANTITRUST ANALYSIS* 56 (1967), *citing*, Note, *The Commerce Clause and State Antitrust Regulation*, 61 *COLUM L. REV.* 1469 (1961); Mosk, *State Antitrust Enforcement and Coordination with Federal Enforcement*, 21 *ABA ANTITRUST SECTION* 358, 367 (1962).

²⁰⁹ OKLA. R. L. 1910 § 8231, OKLA. STAT. title 79, § 30 (1971). "It shall be the duty of the county attorneys of the several counties of this State, as well as the attorney general of the State to prosecute all actions to enforce the criminal provisions of this article."

²¹⁰ 171 Okla. at 260, 42 P.2d at 862 (1935).

²¹¹ *Id.* at 863, *citing*, Board of Commr's v. Huett, 35 Okla. 713, 130 P. 927 (1913), the court in the *Griffith* case stated that "actions of this nature are required to be brought by the Attorney General on information in the Supreme Court..."

The practices of Griffith were subsequently challenged under the federal antitrust laws. On April 28, 1939, the government charged that the practice of Griffith violated Section 1 and 2 of the Sherman Act.²¹² Following the same strict approach that curtailed the scope of the state law in *State v. Griffith*, the federal trial court saw nothing wrong with the practice of using closed towns to gain competitive control of towns in which defendants had competition.²¹³ The Supreme Court disagreed and found monopolization; the case was remanded only for the purpose of determining the effect of this monopoly power on competitors, and to fashion an effective decree.²¹⁴

Need to resort to federal law to correct an abuse of economic power is inconsistent with the direction sought by drafters of the Oklahoma Constitution. Murray, in setting the tone for the Convention, had argued strongly for a home grown version of populist agrarianism.²¹⁵ The draftees of the Oklahoma Constitution had no desire to turn economic problems to federal courts; they were seeking to draft laws effectively drawn from "the American experience."²¹⁶ They were seeking the aid of Oklahoma judges who were not influenced or controlled by the monopolists.²¹⁷

Out of a lack of enforcement and strict judicial interpretation of Oklahomas antitrust laws, the federal laws have be-

(emphasis added). The statute, OKLA. R.L. 1910, § 8221, OKLA. STAT. tit. 79, § 21 (1971), provides that the Attorney General "may file information in the Supreme Court." (emphasis added.)

²¹² *United States v. Griffith Amusement Co.*, 68 F. Supp. 180, 181 (W.D. Okla. 1946), *rev'd*, 334 U.S. 100 (1948).

²¹³ *United States v. Griffith Amusement Co.*, 334 U.S. 100, 104 (1948).

²¹⁴ *Id.* at 109.

²¹⁵ MURRAY, *supra* note 24.

²¹⁶ L. HURST, *supra* note 3.

²¹⁷ *State v. Coyle*, 8 Okla. Crim. 686, 130 P. 316 (1913).

come the more dominant force for economic control.²¹⁸ Consequently, in spite of the great pleas expressed by drafters of the Oklahoma Constitution, economic power in the State of Oklahoma has become highly concentrated.²¹⁹ Professor French, in a report released in 1970, revealed that in 1960, the total estimated wealth in the State, \$14.5 billion in terms of assets, was held by 15% of the State's population.²²⁰ It was further shown in this report that 1.74% of the State's population held an estimated 70% of all the 1960 estimated wealth; and that 0.08% of the population held 43.1% of the wealth.²²¹

CONCLUSION

The drafters of the Oklahoma Constitution, assembled in Guthrie in 1906, had great visions for their new state. They realized the magnitude of the delicate balancing task of promoting industrial enterprise and preserving broad-based economic opportunity. Alfalfa Bill Murray had said: "Let us avoid the extremes of radical socialism on the one side and extreme conservatism on the other, the extreme of a few men owning everything on the one side and nobody owning anything on the other." But by 1946, Murray feared that this laudable dream of the Convention had been lost.

Perhaps it is now too late to recapture the spirit that insures to all men the degree of freedom and liberty sought by Murray and the Oklahoma Constitutional Convention. The laws are still on the books to be enforced when there are men with balanced vision who call for a vitalization of the entire benefits of the Oklahoma Constitution. A sound regulation of economic power, land ownership, and corporate monopoly calls for such balanced views held by men of good will who are both "sensibly conservative and safely radical."

²¹⁸ *Compare*, Petition of Grand River Dam Authority, 320 P.2d 706 (Okla. 1958); *Otter Trail Power Co. v. United States*, 410 U.S. 366 (1973), *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), *FTC v. Sperry & Hutchison Co.*, 405 U.S. 233 (1972).

²¹⁹ R. FRENCH, *WEALTH IN OKLAHOMA* (Bureau for Business and Economic Research, University of Oklahoma 1970).

²²⁰ *Id.* at 2.

²²¹ *Id.*