



TEXAS ANTITRUST LAW:  
FORMULATION AND ENFORCEMENT, 1889-1903

by

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## Introduction

The drastic changes in the American economy resulting from industrialization can be traced back as far as the 1820s and the “Market Revolution” of that time. But economic development and change accelerated in the post-Civil War period, leading to new developments in manufacturing, finance, and technology that exponentially changed the national economy. Innovations in transportation and communication, most notably railroads and telegraphs, caused shifts in the core economy whose effects rippled across the nation, pulling even the isolated farmer into a national economy for the first time. Perhaps the most significant of the economic developments of the industrial period, the rise of the corporation, gave birth to an issue known in the 1880s as “the trust problem.” As corporations grew in strength and size, they, along with their owners, executives, bankers, and investors, gained unprecedented power over the economy as well as over the financial well-being of most Americans. The agricultural and labor interests of the country feared this accumulation of power in the hands of a few men and launched strong defenses in the forms of unionization efforts, labor strikes, agricultural cooperatives, and third party politics.<sup>1</sup>

The corporations that wreaked so much havoc on the nineteenth-century economy and the lives of everyday Americans were a product of what has been called “classical” economic theory, or “classicism.” This school of thought, which traced its intellectual roots to the laissez-faire, free-market ideas of Adam Smith, particularly flourished in America during the 1830s, owing much of its influence to the policies of Andrew Jackson and his U.S. Supreme Court nominee, Roger B. Taney. As it supplanted the older mercantilist theory,

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<sup>1</sup> Charles Sellers, *The Market Revolution: Jacksonian America, 1815-1846* (Oxford: Oxford University Press, 1991); H. W. Brands, *American Colossus: The Triumph of Capitalism, 1865-1900* (New York: Doubleday, 2010); Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877-1917* (Chicago: University of Chicago Press, 1999).

classical economic theory was accompanied by the rise of classical *legal* theory, which were tied together in the minds of American jurists and intellectuals. According to classicism, business should not be regulated by the state, and state-sponsored monopolies could not adequately generate wealth for the country. Mercantile corporations, or those organized prior to the introduction of classicism, required an act of the state legislature to incorporate. Corporate charters could only be granted by the state legislature, and corporations had to follow the stipulations of the charter or face its revocation and the death of the corporation. The introduction of the limited partnership in the 1830s and 1840s began to change this system by removing the state legislature from the incorporation process. Limited partnerships allowed investors to invest while also limiting their liability should the corporation fail. Also, limited partnerships could be incorporated through application to a state agency rather than by act of the legislature, making them much easier and less expensive to create. Economic changes made business a potentially lucrative and viable alternative to farming while legal changes made businesses much easier to incorporate. Classicist thinkers denounced the state-sponsored monopolies of the mercantilist economic system, and their anti-state-intervention stance led them to conclude that businesses worked best and generated the most national wealth when left alone by government. The excesses of the Gilded Age and the associated societal ills resulted directly from this deregulation mentality.<sup>2</sup>

If courts and legislatures, believing economic intervention to be a mistake, failed to regulate corporations there was no recourse for Americans—no other institution in existence had the inclination or authority to intervene in the national economy. Today, the country has a developed sense of state which invests tremendous authority in the federal and state

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<sup>2</sup> Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge: Harvard University Press, 1991), 1-5, 11-15.

governments to intervene in the economy; this was not the case in the 1830s or even the 1870s. The American state, as modern readers understand it, slowly began taking shape in the 1870s and was not fully developed until approximately 1920. Thus, the early years of corporate growth, the years of railroad development, and the years of agrarian revolt all took place in the absence of a mature American state. Instead, the American state of the period consisted of political party coalitions, which generated a moderate sense of direction and unity throughout the country and throughout the various levels of government, and the judiciary, which could effectively change or uphold various aspects of economic policy.<sup>3</sup>

The precedent of non-intervention in economic matters set by the courts had a snowball effect on American society that was hardly felt at mid-century but became an all-consuming problem within the next thirty years. Corporations, particularly railroad companies and their associated construction and finance companies, grew in power through consolidation, mass production, and corruption. Classicism had succeeded in protecting an amazingly effective system for the creation of wealth, but classicism also failed by holding that the market did not need government intervention. Without any protection from monopolies, price-gouging, and the effects of business lobbying, Americans from the agricultural and labor sectors created organizations and cooperatives large enough to combat corporations. Labor unions and agricultural cooperatives were large enough to engage corporations in the marketplace as equals or near-equals, thus securing better outcomes for their members than individuals could achieve alone. Laborers and farmers eventually formed

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<sup>3</sup> Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge: Cambridge University Press, 1982).

a political coalition within the Democratic Party to oppose the pro-business policies of the Republican Party at the national level.<sup>4</sup>

Unions and cooperatives began with amorphous, non-political associations like the Grange, an agricultural cooperative formed in 1867, and the Knights of Labor, a non-radical union founded in 1869. The organizations founded to protect farmers and laborers became increasingly political, transitioning from “purist” (apolitical) organizations, to fusion organizations (which advocated friendly political candidates from a major party), to viable political parties. The Knights of Labor, Farmers Alliance, and American Federation of Labor each began as purist associations, but grew increasingly political as the nineteenth century wore on. The Farmers Alliance serves best example of the evolution of an organization from an apolitical association to a viable third party. The Alliance, formed in the 1870s, grew in size and political power, eventually spawning the Populist Party in the 1890s. The Farmers Alliance began in Texas and became a powerful lobbying force in state politics. It was the political action of the Alliance and its supporters that ushered in a period of reform and regulation in Texas.<sup>5</sup>

Laborers and farmers made many arguments against corporate power and its associated changes in the national economy. Laborers faced increasingly low wages as manufacturing jobs began calling for unskilled rather than skilled labor. Without an outlet for marketable skills (and sometimes lacking marketable skills), laborers relied ever more on unions to achieve adequate wages and reasonable work hours.

The arguments put forth by farmers often became much more complicated. The commonly accepted “labor theory of value” held that an object had inherent value because a

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<sup>4</sup> Sanders, *Roots of Reform*, 1-9. On railroad corruption, see Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: W. W. Norton & Company, 2011).

<sup>5</sup> Sanders, *Roots of Reform*, 30-33, 105-108, 117-147.

person had spent time and effort to make it. The product, then, was at least as valuable as that time and effort. The crops harvested by farmers held a valuation in accordance with the time, labor, and investment put into them by the farmers. So when a farmer sold his crop to an agent for barely enough money to pay his debts, the exorbitant sum pocketed by the agent upon selling to a European or New York buyer seemed like an injustice. The agent did not increase the value of the crop, yet he resold it for many times the sum given to the farmer as payment. Railroad operations elicited a similar response from farmers who saw the railroads making a greater profit from shipping a crop than the farmer did from harvesting and selling it. Farmers interpreted the actions of the railroad and the agent as a de facto tax on their products. They took the lion's share of the profits without adding to their value.<sup>6</sup>

Proponents of classicism, in light of the outrage of the labor-farmer coalition and the snowballing effects of unfettered corporate power, sought to regulate certain corporations on a case-by-case basis. Classicists sought to regulate as little as possible, and, when regulation was necessary, they sought to regulate as narrowly as possible. The movement toward regulation through a combination of legislative and judicial strategies began in the 1870s with a series of Louisiana court cases revolving around the slaughterhouse industry, the effects of its unsanitary operation, and the closing down of all slaughterhouse facilities save one authorized by the legislature. The state legislature passed a law attempting to resolve the sanitation threat to New Orleans, and the judiciary upheld its validity. This method of effecting regulation on a case-by-case basis was the first step ushering in a reformist or "progressive" period. Over time, though, regulatory efforts by the several states and the federal government became increasingly organized, centralized, and bureaucratic.<sup>7</sup>

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<sup>6</sup> White, *Railroaded*, 109-112; Hovenkamp, *Enterprise and American Law*, 68-69.

<sup>7</sup> Hovenkamp, *Enterprise and American Law*, 105, 116-122.

Initial regulatory efforts through the judiciary employed common law mechanisms prohibiting monopolies. These mechanisms, which ultimately became the foundation for state and federal antitrust laws, referred to monopoly in the mercantilist sense—monopolies approved by the government, such as the East India Trading Company of England. The Texas Constitution of 1876 and all preceding constitutions going back as far as the 1820s prohibited these state-authorized monopolies; the term “monopoly” remained the same, but its meaning changed during the middle years of the nineteenth century. The term evolved to signify, not a state-sponsored monopoly, but a large corporation that did not appear to have any competitors in the market as a result of special treatment from state or federal governments. When the meaning of the word changed, reformers believed that the existing common law and constitutional provisions prohibiting monopolies would suffice in suppressing anticompetitive activity. Reformers put their faith in common law anti-monopoly measures in vain, because common law did not have the substance or the authority to outlaw or indict modern corporations. In fact, until the seventeenth century, English common law protected the property of state-sponsored monopolies rather than prohibiting market monopolization.<sup>8</sup>

With ineffective common law tools, the judiciary could not regulate the industries requiring regulatory attention. The farmer-labor coalition called for new measures to combat the power of corporations. First, reformers called for regulation by bureaucracy, agency, or commission. This apparently modern form of regulation fell in line with the ideas of the nation’s preeminent regulation experts, most notably Charles Francis Adams, Jr., descendant of the second and sixth presidents. Adams declared that railroads could not operate in a free

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<sup>8</sup> William L. Letwin, “English Common Law concerning Monopolies,” *The University of Chicago Law Review* 21, no. 3 (Spring 1954): 355-385; White, *Railroaded*, 111-112.

market and required regulation by state and federal governments. He proposed the “sunshine commission,” a commission which would publish facts and support honest behavior without having much inherent authority. He also suggested government enforcement of railroad pooling agreements, which many Americans objected to in light of the price-fixing activities of railroad pools and cartels. The first federal bureaucratic agency intended to regulate corporations, the Interstate Commerce Commission (ICC), came into existence in 1887 as a result of the Interstate Commerce Act of that same year. Arguments over the commission’s intentions, effectiveness, and alleged corruption often obscure the sheer novelty of such an unprecedented manifestation of federal regulatory power. While the accumulation of state power over corporations, beginning with the railroads in the 1880s, was unprecedented, the regulation impulse constituted a pragmatic response to growing economic problems throughout the country. Commissions with greater power emerged at the state level in the 1890s, most notably the Texas Railroad Commission (TRC), founded in 1892. The TRC’s exceptional power to set intrastate shipping rates and arbitrate disputes far and away exceeded the power of the ICC and the “sunshine” commissions of other states.<sup>9</sup>

A second anti-monopoly measure called for by reformers, particularly farmers and small business operators, was the passage of a law to solve “the trust problem.” Debates on this subject filled the halls of Congress and many state capitol buildings throughout the 1880s, ultimately resulting in the passage of state and federal antitrust legislation in the late 1880s and early 1890s. Antitrust law was essentially regulation by statute; the state (or federal) government passed a law that became a statute, and prosecuting attorneys filed

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<sup>9</sup> Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge: The Belknap Press of Harvard University Press, 1984), 7-56; William R. Childs, *The Texas Railroad Commission: Understanding Regulation in America to the Mid-Twentieth Century* (College Station: Texas A&M University Press, 2005), 24-29, 64-67.

charges against violators. Antitrust law also allowed for private suits in which an injured party could sue the offender without involving a prosecuting attorney. Texas was one of the first states to pass an antitrust law, and Texas antitrust law differed from federal law by being verbose, specific, and rigid. The Sherman Anti-Trust Act of 1890, the first federal antitrust law, took an approach different from that of Texas by encouraging enforcement on a case-by-case basis—an element carried over from classicism.<sup>10</sup>

Only in the study of antitrust do the subjects of classicism and corporate regulation encounter one another. The authors of antitrust laws based them upon common law terms, such as “monopoly,” “conspiracy in restraint of trade,” and “combination in restraint of trade.” Drawing upon common law and investing the judiciary with the authority to regulate business made antitrust a measure that straddled the fence between two opposing systems of thought. The impulse to comprehensively regulate corporations could never harmonize with the fundamental premises of classicism, nor could an all-powerful judiciary, a relic of America’s stateless past, adequately regulate a mature economy. Antitrust law, which left corporate regulation entirely in the hands of the judiciary (operating under an assumption of its competency and insight in economic matters), was a solution to “the trust problem” that fit well within classicist thought and thus also within the established parameters of governmental authority and action. For this reason, antitrust appeared to be the simple solution to a host of economic and social problems. But a regulatory mechanism with one

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<sup>10</sup> Sanders, *Roots of Reform*, 267-282, 312-313; Hovenkamp, *Enterprise and American Law*, 243-249, 267. Hovenkamp distinguishes two forms of antitrust legislation, the structural and the strategic models. Texas regulators employed the structural model, which provided rigid and specific definitions of offenses that could not be overlooked without an exemption that was also rigid and specific. The strategic model, by contrast, was vague enough to allow jurists to make decisions on a case-by-case basis as necessary, effectively empowering them to distinguish between reasonable and unreasonable trade restraints, or as Theodore Roosevelt dubbed them, good trusts and bad trusts. Federal antitrust employed the strategic model and followed the “Rule of Reason” most clearly articulated in the landmark case of *Standard Oil* (1911). Texas retained the structural model long after other states moved toward a strategic model.

foot in the past and another in the present could not adapt in the face of changes to the economic and political systems. In the end, it was the failure of antitrust to achieve the results hoped for by reformers that made the bureaucratic model of regulation appear to be a more viable solution to corporate abuses.

The late nineteenth century was not only a time of growth for corporate regulation—it was also a time of transition. Corporate regulation as a state-sponsored enterprise evolved from primarily a state matter to predominantly a federal one, while also shifting its emphasis from statutory regulation to bureaucratic. Antitrust laws were rigid and enforcing them proved to be time-consuming and expensive; industry-specific commissions, by contrast, had the freedom to be flexible and pragmatic in enforcing state and federal regulations. The resulting growth of regulatory bureaucracy spurred the development of a modern American state—a federal state invested with the authority to create bureaucratic agencies to oversee regulation and a host of other reform-oriented concerns at a nationwide scale. Even though bureaucratic regulation eventually became the standard at both the state and federal levels, very little in the way of federal regulations existed prior to 1900. As a result, nineteenth-century Americans often looked first to the states and to statutory regulation for protection before calling for more bureaucracy or for the centralization of federal regulatory power (one significant exception to this being the nationalization of railroads, a popular idea in some quarters in the late nineteenth century). In the late nineteenth century, the states bore the responsibility of protecting the consumers within their borders, and they found such protection difficult to provide without assistance from antitrust law or regulatory commissions. In Texas, the road to state regulation began with a contest between the state and a powerful railroad pool called the Texas Traffic Association.

### *Classicist Regulation in Texas: Railroads and the Texas Traffic Association*

Texas, a state on the cutting edge of both bureaucratic and statutory regulation efforts, held certain regulatory powers under the Texas Constitution of 1876 that the state's reformers put into action prior to the passing of any significant economic reform legislation. The most significant power of these emanated from the charter regulations of corporations licensed to operate within the state. In order to incorporate in Texas in the 1880s, a company needed only to sign a contract issued by the state that clearly explained the rights, privileges, and responsibilities of the company. These charters limited business operations for the company, reminded the company of its responsibility to the public, and granted the company its right to operate within Texas. When Texans began to fear large corporations as threats to a free and competitive market, the first reaction by state officials was to target the charters of the offending companies. The most notorious of these cases in Texas involved a railroad pool sponsored by the Jay Gould and Colis P. Huntington interests of the state; the Texas Traffic Association and its associated Texas Supreme Court case revealed to Texas reformers just how shaky the foundation of regulation by charter enforcement could be.

Formed in 1885, the Texas Traffic Association consisted of several railway companies, including those owned by Jay Gould and Colis P. Huntington. The pool existed to eliminate "ruinous competition" by setting standard and equal rates among the several lines involved. In a completely unregulated environment, competing railroads frequently built multiple roads in the same general area. Lacking sufficient freight traffic to support these parallel-built roads, companies engaged in cutthroat competition, resulting in the railroads being operated at a loss. Business interests thus argued that eliminating competition was a positive good, and economic theorists like railroad expert Albert Fink similarly argued

that a cartel or pool of competing roads could stabilize the industry by setting standard, reasonable rates that guaranteed prices for shippers while also guaranteeing profits for the railway companies.<sup>11</sup>

The establishment of a pool might have appeared to be a solution to the problem of “ruinous competition,” but roads engaged in pooling faced two significant threats to their arrangements. The first potential problem involved deceitful conduct among other members of the pool. For instance, several roads could form a pool to set rates and divide traffic, but one or more members could undermine the effectiveness of the arrangement by undercutting the prices of the other pool members to steal away traffic and profits. This practice, and the inability of the group to sue its self-interested members in court, caused the demise of many pools throughout the country. Popular discontent at the thought of railroad pooling constituted the second threat to pools’ security. Railroad rate-setting gave advantages to those shipping the most goods over the greatest distances; small scale farmers did not meet these criteria and paid disproportionately high rates compared to large corporations. Texas farmers and their political allies mounted strong attacks against railroad pools under the banner of anti-monopolism, and their greatest champion in the fight was a lawyer and politician named James Stephen Hogg.<sup>12</sup>

Hogg, born in 1851, passed the bar in 1875 and soon began working as a district or county attorney. Already well-known for his dedication to law and order, Hogg won the election for state attorney general only a few years later. As attorney general, Hogg prosecuted the first Texas case against a railroad pool, and he did so without an antitrust law to invoke. Hogg initiated quo warranto proceedings against several members of the Texas

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<sup>11</sup> Alwyn Barr, *Reconstruction to Reform: Texas Politics, 1876-1906* (Dallas: Southern Methodist University Press, 1971), 111-112; Childs, *The Texas Railroad Commission*, 58; McCraw, *Prophets of Regulation*, 48-52.

<sup>12</sup> Childs, *The Texas Railroad Commission*, 19-24.

Traffic Association in 1887. He contended that some of the roads were parallel and competing lines, and that their rate-setting agreement violated the Texas Constitution. Article X governed railway activities in the state, and Section 5 (repealed in 1969) stated that railroads could not own stock in competing or parallel lines and that an officer of one railroad could not act as an officer of another. The pool essentially made its directors the de facto directors of the roads involved, which constituted a clear violation of Article X, Section 5. Hogg won his case in district court, and when the defendant railroad companies appealed to the Texas Supreme Court, the high court upheld the decision in favor of the state.<sup>13</sup>

The prosecution of the Texas Traffic Association members in *Gulf, Colorado, & Santa Fe v. The State of Texas* lasted close to two years, and by the time the Texas Supreme Court issued its ruling in December 1888, the U.S. Congress had already passed the Interstate Commerce Act which declared all railroad pools illegal and unenforceable. Despite the change in jurisprudence, Hogg's victory demonstrated the strength of the state and the people against the collusion of corporations; not satisfied with the existing state laws or the protection of the Interstate Commerce Commission, Hogg and other Texas politicians continued seeking reform and additional police power for the state to prosecute misbehaving corporations. The comment of the Texas Supreme Court that the state would not have the power to file such charges against the railroads had they been chartered outside the state renders the near-paranoia of late nineteenth-century reformists quite understandable. The desire among Texans for further reform manifested itself most clearly in calls for a railroad

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<sup>13</sup> Robert C. Cotner, *James Stephen Hogg: A Biography* (Austin: University of Texas Press, 1959), 5, 70, 103-104, 154-155, 155-159; Texas Const. of 1875, art. X, § 5, <http://tarlton.law.utexas.edu/constitutions/text/IART10.html> 01-25-2013; *Gulf, Colorado, & Santa Fe Railway Co., et al v. The State of Texas*, No. 2947, 72 Tex. 404; 10 S.W. 81; 1888 Tex. LEXIS 1306.

commission and legislation against monopolies, and Jim Hogg would be key player in the passage of both reforms.<sup>14</sup>

Reform-minded Texans began their regulatory efforts in 1889 with the state's first antitrust law. In the years that followed, Texas legislators and attorneys general formulated and enforced multiple antitrust laws designed to cast a wide net across all industries operating in the state. Unlike the TRC which began in 1892 as an industry-specific regulator primarily engaged in the arbitration of disputes, Texas antitrust law presented an opportunity for high-profile prosecutions that could use intimidation or legal force to remove any and all trusts operating in the state. Thus Texas antitrust law formed the state's first line of defense against trusts, monopolies, and out-of-state conspirators believed to be taking advantage of the people of the Lone Star State.

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<sup>14</sup> Cotner, *James Stephen Hogg*, 159.

## **Chapter 1**

### **The Birth of Antitrust Law in Texas**

“Reform” was the word of the day in the late 1880s and early 1890s; during this time period Texans passed one of the first antitrust statutes in history and also created the nation’s most powerful regulatory commission. Far from simple-minded, Texans intent on reform sought comprehensive and unprecedented solutions to the problems posed by large and powerful corporations. Statutory and bureaucratic regulation formed the prongs of a comprehensive, two-pronged regulatory strategy in Texas. The antitrust aspect of this strategy came into existence three years prior to the railroad commission and was in its first round of revision at the time of the commission’s founding. Jim Hogg, attorney general and hero of the Texas Traffic Association prosecution, played an important role in the passage of the Texas Anti-Trust Act of 1889 and also in the creation of the Texas Railroad Commission (TRC) three years later.

Antitrust legislation took its name from the “trust” form of business organization pioneered by Standard Oil in the early 1880s. The lawyers of Standard used a trust, a form of organization intended for use in probate law, to consolidate many separate companies under one umbrella company. The goal in this change was the accumulation of market share and thus market power by the directors of the Standard Oil Company. The corporate trust worked by the umbrella company, the trust itself, issuing trust certificates to stockholders in exchange for their stock. The directors of the trust held the stock “in trust” for the true owners, and made business decisions according to the instructions of the trust certificate owners. In practical terms, the owner of an oil company signed over his stock “in trust” to the directors of the Standard Oil Trust; the directors then issued him trust certificates, but made

decisions for the trust and all of its associated companies based on the instructions of the most powerful members and to the benefit of the trust as a whole. Residents of agricultural states feared that corporations operating in their region might secretly be associated with a trust that engaged in activities like price-fixing or market division. This form of trust, called the stock transfer trust, was the earliest manifestation of the corporate trust. This stock-transfer trust design carefully sidestepped most state charter restrictions prohibiting one corporation from owning stock in another because the trustees did not technically own the stock; but this loophole, found through the creative and daring genius of Standard Oil attorneys, would soon close in many agricultural states. Because the stock-transfer trust was the first manifestation of a corporate trust, it dictated the design and intent of early antitrust statutes. These states, beginning with Kansas and Texas and spreading to another twelve states in the next few years, enacted legislation that prohibited conspiracies or combinations designed to restrain competition and free trade. Kansas, the first state to pass antitrust legislation, directly forbade Kansas-chartered companies from owning or issuing trust certificates. The second antitrust statute, that of Texas in 1889, made no mention of trust certificates, preferring instead to stamp out activities defined as conspiracies or combinations in restraint of trade. Where the state charter prohibited mergers in the form of inter-corporation stock ownership, the antitrust laws outlawed the more loose organizations like trusts, pools, boycotts, and price-fixing. The antitrust laws of Texas, Kansas, and other states proved impressively effective in eliminating the stock transfer trust as a business model. But corporations created new methods of combination that violated the spirit of these laws, but not the laws themselves.<sup>15</sup>

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<sup>15</sup> Hovenkamp, *Enterprise and American Law*, 249-251; Kansas Bureau of Labor and Industry, *Labor Laws and Laws Affecting the Interests of Labor* (Topeka: State Printing Office, 1910), 31-33.

### *The Texas Anti-Trust Act of 1889*

A few short months after the Texas Supreme Court decision in *Gulf, Colorado, & Santa Fe*, the Texas Twenty-first Legislature held its biannual session, and one of the most important measures passed that year was the Anti-Trust Act of 1889. The lawyers and politicians who drafted, debated, and passed antitrust legislation in this era based the laws upon the common law principles of monopoly, conspiracy in restraint of trade, and combination in restraint of trade. These ideas (along with other, more obscure ones such as forestalling or engrossing) came from English common law and the subsequent United States statutes. Common law, as a general rule, was civil law and did not permit a state or sovereign to bring charges against citizens; rather, citizens could call upon the common law in suits against one another unless otherwise specified. The limits of common law were so stringent in the early nineteenth century that innovations had to be made in order to allow corporations to sue and be sued under common law. In order for this to happen, the courts had to declare corporations to be “persons” in the eyes of the law. This innovation, however, did not invest government with the authority to file suit under the common law against corporate persons; only other corporate persons or private citizens could file under the common law. The antitrust legislation of the states and the federal government dramatically changed the scope of these common law offenses by investing the state or federal government with the power to file charges against corporations and individuals violating the antitrust laws.<sup>16</sup>

The Twenty-first Legislature of Texas introduced a total of eight antitrust bills in 1889; of those nine, five were House bills that a House judiciary committee then consolidated into one substitute bill. The committee then reported that substitute bill

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<sup>16</sup> Hovenkamp, *Enterprise and American Law*, 13-16.

favorably back to the House, but the Speaker of the House, on February 6, appointed a House special committee to further review and revise the bill. The state legislators did not have much in the way of precedent to use in drafting their law, so the substitute bill went through several rounds of revision prior to passage. The remaining three antitrust bills, all Senate bills, were dropped in favor of the substitute bill from the House. The House special committee presented a second substitute bill on February 9 which the chamber then passed on February 14.<sup>17</sup>

The House special committee made several key changes to the substitute bill drafted by House Judiciary Committee No. 2. The special committee added a total of five sections to the bill, most of which affirmed the chamber's strong stance against trusts. An amendment specifying illegal behaviors and associated penalties for foreign corporations recommended by Representative Alvin Owsley on the House floor became Section 4 of the second substitute bill. Other newly added sections included Sections 7 and 8, which provided lenient evidentiary rules in establishing the existence of a trust, and Section 9 which attempted to draw out-of-state persons under its purview.<sup>18</sup>

North Texas was the home of some of the most important figures involved in the House's battle over antitrust in 1889. Alvin Owsley of Denton County and Albert Stevenson of Parker County were two of the most adamant spokesmen in favor of the House substitute bill. The sole opponent of the Anti-Trust Act of 1889 in the House of Representatives was J.

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<sup>17</sup> *Texas Journal of the House of Representatives, Twenty-first Legislature, Regular Session, 1889* (Austin: Smith, Hicks & Jones, State Printers, 1889), 1139, 1151, 1154, 1161, 1176; *Texas Journal of the Senate of Texas, Twenty-first Legislature, Regular Session, 1889* (Austin: Smith, Hicks & Jones, State Printers, 1889), 832, 836, 849. Albert Stevenson, Parker County, H. B. No. 9; Jacob Ellison, Caldwell County, H. B. No. 117; Jesse Jenkins, Bosque County, H. B. No. 136; Norton Moses, Burnet County, H. B. No. 192; William Hamby, Travis County, H. B. No. 313; William Woodward, Calhoun County, S. B. No. 47; Jonathan Lane, Fayette County, S. B. No. 82; William H. Pope, Harrison County, S. B. No. 193.

<sup>18</sup> *Texas House Journal* (1889), 348-350; S. H. B. Nos. 9, 117, 136, 192, and 313, Twenty-first Leg. 1<sup>st</sup> C. S. (1889).

W. Jagoe, also a Denton County delegate. Owsley, a California-raised schoolteacher-turned-lawyer and a close ally of Hogg, represented the 32<sup>nd</sup> District and served on Judiciary Committee No. 2, the committee that drafted the first substitute bill upon which the final bill was based. Owsley spent late nights with Attorney General Hogg drafting the substitute bill, adapting Texas Congressman John H. Reagan’s federal antitrust bill to suit state rather than federal purposes. Dr. Owsley also introduced the amendment that would prove so contentious over the decade to come—the exemption for agricultural products and farmers. Stevenson, a Tennessee native and son of a poor farmer, served on Judiciary Committee No. 2 with Dr. Owsley and introduced H. B. No. 9, one of the five bills that the committee combined to form the first substitute bill.<sup>19</sup>

None of the amendments proposed to the substitute bill in the House represented business or “trust” interests; Owsley and Stevenson recommended no fewer than six amendments to the bill, each one of them solidifying an exemption from the law for farmers or strengthening provisions against violations. Stevenson’s four amendments, the most proposed by any single delegate, included provisions to explicitly draw railroad companies under the authority of the bill, and to explicitly exempt *agricultural* products while in the hands of the producer. Stevenson and Owsley both recommended amendments to draw “foreign” or out-of-state corporations under the scope of the law as well.<sup>20</sup>

Following its February 14 passage in the House, the second substitute bill moved to the Senate. In that chamber, the majority of the proposed amendments fell in line with those of Owsley and Stevenson by enhancing the pro-agricultural flavor of the bill. Only one

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<sup>19</sup> Cotner, *James Stephen Hogg*, 163-164; *Texas House Journal* (1889), 319-320, 35; Richard L. Himmel, “Owsley, Alvin Clark,” *Handbook of Texas Online* (<http://www.tshaonline.org/handbook/online/articles/fow05>), accessed March 12, 2013. Published by the Texas State Historical Association; L. E. Daniell, “Albert Stevenson,” *Personnel of State Government with Sketches of Distinguished Texans* (Austin: Smith, Hicks & Jones, State Printers, 1889), 316-318.

<sup>20</sup> *Texas House Journal* (1889), 319-320, 411-412.

amendment presented in the Senate sought to temper what some would have considered the radical nature of the bill. Senator Scott Field, a native of Mississippi who had served under Nathan Bedford Forrest and John Bell Hood in the Civil War before moving to Texas and becoming a lawyer and county attorney of Robertson County, suggested the insertion of the word “knowingly” in Section 7; this addition would only allow conviction of trust members or agents if they acted knowingly on behalf of or in furtherance of an alleged trust. While Section 6 of the bill already required the plaintiff to act “knowingly,” the context of Section 7 made it a much tougher obstacle for a prosecutor or plaintiff to overcome. But Field’s amendment, while passed by the more conservative Senate, did not pass the House and was not included in the final version of the bill. When the House refused Field’s amendment, the Senate opted to kill the amendment, passing the House’s version of the bill on March 27. Three days later, Governor Lawrence Sullivan Ross signed the Texas Anti-Trust Act of 1889.<sup>21</sup>

The ultimate form of the House substitute bills produced by Judiciary Committee No. 2 and later by the House special committee followed the format of a bill introduced by John H. Reagan in the U.S. Congress. Reagan, a reform-minded Texan best known as the former postmaster general of the Confederacy, had introduced several bills in the U.S. House that were set aside in favor bills introduced by Midwestern representatives. First, Reagan promoted an alternative to the Interstate Commerce Act that would have invested the commission with much greater power and authority over railroad companies; then in 1888, he introduced a federal antitrust law that included specific definitions of antitrust violations

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<sup>21</sup> *Texas Senate Journal* (1889), 454; Cotner, *James Stephen Hogg*, 163. Cotner refers to Field’s amendment to Section 6, but the “knowingly” clause was present in that section since the original drafting of the substitute bill presented to the House February 9. See *Texas House Journal* (1889), 348-350. Field’s amendment to Section 7 did not pass the House and was not included in the 1889 statute. See *Texas Senate Journal* (1889), 610, 644; *Texas House Journal* (1889), 818. On Field, see James L. Hailey, “Field, Scott,” *Handbook of Texas Online* (<http://www.tshaonline.org/handbook/online/articles/ffi03>). accessed February 17, 2013.

like “monopoly,” conspiracy in restraint of trade,” and “combination in restraint of trade.” The primary weakness of the Sherman Anti-Trust Act of 1890, the first federal antitrust law, was its vague definition of these terms. Reagan’s remedy of clearly defined terms and violations formed the skeleton of the Texas antitrust statutes; certainly Reagan’s popularity and reputation in the state contributed to the ease with which the substitute bill passed through both houses of the state legislature.<sup>22</sup>

The Texas Anti-Trust Act of 1889 did four key things. First, the law strictly and clearly defined the terms that constituted violations of the law. These definitions included enough caveats that practically any industry would fall under its provisions. Second, the law outlined variable, but strict penalties for violation. Fines ranged from \$50 to \$5,000 while prison terms ranged from one to ten years; furthermore, each day of violation constituted a separate offense. Measures such as these were unsurpassed in their strictness. Third, the antitrust law endowed the attorney general, district attorneys, and county attorneys with the power and obligation to initiate quo warranto proceedings against violators in order to revoke their corporate charters. Fourth, the law provided an exemption for farmers and agricultural organizations. This exemption formed the foundation for later attacks of the law as unconstitutional, and proved to be a contentious issue when later legislatures attempted to amend the law.<sup>23</sup>

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<sup>22</sup> Cotner, *James Stephen Hogg*, 163-167. On Reagan see Ben H. Procter, *Not Without Honor: The Life of John H. Reagan* (Austin: University of Texas Press, 1962).

<sup>23</sup> *Texas House Journal* (1889), 348-350; *The Laws of Texas, 1822-1897 Volume 9*, 1169-1170, Book, 1898; digital images, (<http://texashistory.unt.edu/ark:/67531/metaph6729/> : accessed January 28, 2013), University of North Texas Libraries, The Portal to Texas History, <http://texashistory.unt.edu>; crediting UNT Libraries, Denton, Texas. On the subject of quo warranto proceedings, see *Black’s Law Dictionary*. Quo warranto, Latin for “by what authority,” originated in English common law as a method by which the king could compel his appointed officers to fulfill their duties or lose their titles. Changes in jurisprudence allowed for the government of the state of Texas to initiate quo warranto proceedings against any corporation violating any of the provisions of its state-issued corporate charter.

By including an agricultural exemption, Texas lawmakers protected rural economic interests in their regulatory efforts. They did not seek to place all residents on an equal economic playing field; instead, they placed regulations and penalties upon those residents representing “monopoly” interests while leaving all other citizens free to combine against the “monopoly” interests. Those excluded from the law’s provisions included farmers, local entrepreneurs, and small ranch owners, among others. In 1892 politicians in the Texas House of Representatives claimed that without the exemption many common transactions would become illegal. The most obvious of these was the pooling of resources by farmers. Farmers at this time often engaged in a practice known as “bulking,” in which local farmers could combine their harvests and control the sale and release of the crop. The slow, controlled sale of cotton tended to stabilize the price in the area to the benefit of the local farmers. Without an exemption, this activity would be illegal, and the agricultural organizations promoting it, principally the Farmers Alliance, could be prosecuted by the state or sued by individuals. A host of other activities would also be considered violations of the antitrust law, like making an exclusive purchasing agreement for commodities like butter or cheese. Texas residents feared that forming certain types of agreements, like one to purchase butter in the same quantity and from the same person on a regular basis, would be considered a conspiracy against trade because the price set by the participants might fluctuate above or below the market price for the product. Thus the antitrust law, without proper exemption for average citizens, had the potential to turn every resident into a criminal. The implications of this agricultural exemption would drive the debate about state antitrust law throughout the 1890s because many states followed the example of Texas by adding similar exemptions to their statutes.<sup>24</sup>

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<sup>24</sup> *Texas Journal of the House of Representatives, Twenty-second Legislature, Extra Session, 1892* (Austin:

The only antitrust statute passed prior to the Texas Anti-Trust Act of 1889 was the Kansas Antitrust Law of 1889. Passed only a few weeks after the Kansas statute, the Texas law took a divergent path from its sole predecessor. Rather than outlawing the ownership of trust certificates as the Kansas law did, the Texas law outlawed all activities that fell into certain categories which were clearly defined in the opening section. Both statutes certainly changed the dynamic of corporate law in their respective states, but the Texas antitrust law was actually much more comprehensive than its Kansas counterpart. The Texas law had stricter penalties, broader definitions, and more advantages to the plaintiff or state. Texas law voided all contracts made by or with corporations violating the act; furthermore, Sections 7 and 8 granted tremendous advantages to plaintiffs and prosecutors. They need not enter any evidence of a trust's existence or an individual's membership in it; all that was necessary was the company's reputation as a trust, and any action on the part of the individual associated with the alleged trust. These unprecedented provisions demonstrate the ambiguous and vague nature of trusts as nineteenth-century Texans perceived them. The law was purposefully designed to cast a wide net for catching multiple forms of corporate violations. If Texas lawmakers sensed a threat only from the stock transfer trust organization, then they would have surely enacted a law comparable to that of Kansas, but they did not; they sensed and anticipated multiple, even unknown, threats and worded their law to draw as many potential violations as possible under its purview. The radical flavor of the Texas law reflected the growing radicalism of agricultural politics in Texas at the time; within a few years of the enactment of the Anti-Trust Act of 1889 the agrarian discontent associated with the Farmers

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Henry Hutchings, State Printers, 1892), 120-121.

Alliance and other agricultural organizations would come to a head in the form of Populism.<sup>25</sup>

The Texas Anti-Trust Act of 1889 passed through the state legislature relatively easily. In the House, only one member voted against the bill on its final reading, and it passed unanimously in the Senate. This degree of unity in the opinions of state lawmakers regarding antitrust legislation would not happen again. The railroad lobby feared by Hogg and other reformers certainly existed, but the representatives and senators seem to have been attuned to the desires of the great majority of Texas citizens who called for antitrust legislation. The Farmers Alliance grew tremendously in its membership, and thus in its political power, during the 1880s and 1890s, turning the organization into an important lobby to be appeased by the state legislature. The spirit of anti-monopolism among Alliance supporters manifested itself in the fights against the jute-bagging trust and the beef-and-pork trust, both of which became topics of discussion in the Twenty-first Legislature. Undoubtedly factors other than a consensus among Texans contributed to the swift passage of the Anti-Trust Act of 1889. With no antitrust laws yet on the books and no judicial decisions undermining the effectiveness and spirit of the law, the lack of heated debate that would characterize later antitrust efforts is not surprising. As state and federal precedent in antitrust law matured, all parties involved developed strategies to either bolster or weaken the various antitrust laws.<sup>26</sup>

Upon passage, the provisions of the Texas Anti-Trust Act of 1889 seemed clear and simple, but its enforcement would prove troublesome almost from the start. While the state successfully implemented the new antitrust law in the early 1890s, defense attorneys quickly

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<sup>25</sup> Kansas Bureau of Labor and Industry, *Labor Laws*, 31-33; *The Laws of Texas, 1822-1897 Volume 9*, 1169-1170.

<sup>26</sup> Lawrence Goodwyn, *The Populist Moment: A Short History of the Agrarian Revolt in America* (Oxford: Oxford University Press, 1978); *Texas House Journal* (1889), 412; *Texas Senate Journal* (1889), 644; Cotner, *James Stephen Hogg*, 163. On the jute-bagging trust and the beef-and-pork combine, see *Texas House Journal* (1889), 298-299, 318.

found weak points in its wording and content. The most potent of these defenses was the argument that the agricultural exemption violated the Fourteenth Amendment to the United State Constitution. The Fourteenth Amendment contains the Equal Protection Clause, which guarantees equality of persons before the law and equal rights to due process of law. Defense attorneys claimed that the agricultural exemption created two distinct classes of people—those exempted from the law (farmers) and those subject to the law (corporations and employees). Furthermore, one group received protection at the expense of the other, a clear violation of the Equal Protection Clause. This “equal protection defense” capitalized on the vague and murky nature of the constitutional foundation for antitrust legislation. Texas legislators needed some confirmation of the agricultural exemption’s constitutionality before they could pass any sort of amendment.

The first years of antitrust enforcement also revealed some technical, grammatical errors in the 1889 statute. The penalty provision (Section 6) only made reference to the violations listed and defined in the opening section of the law, which rendered the law technically invalid. The early efforts to amend the law in 1892 and 1893 would have fixed this problem by repeating the terms of violation and their definitions (Section 1) in the penalty provision (Section 6).<sup>27</sup>

These weaknesses in the Texas Anti-Trust Act of 1889 manifested themselves immediately upon enforcement. As a result, state legislators proposed amendments to the law as early as 1891 in the next session of the legislature. Amendment proposals bounced around both chambers of the legislature in each session of the early 1890s, some with more force than others. Most of the bills with any popularity stayed true to the format of the original 1889 statute, and bills of this nature appeared during legislative sessions in 1891, 1892, and

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<sup>27</sup> *The Laws of Texas, 1822-1897 Volume 9*, 1169-1170.

1893. The closest that lawmakers ever came to amending the antitrust law during this window of time was in 1892.

### *Amendment Attempt*

Jim Hogg continued his advocacy of reform and ran for governor in 1890; his platform of reform and creation of a railroad commission struck a chord with Texans that launched him to the governorship in 1891. As promised, he petitioned the legislature for a railroad commission, which was possible only after amending the state constitution to make such a commission legal and authoritative. His plan worked, and in 1892 the legislature endowed the Texas Railroad Commission (TRC) with more power than any comparable commission in the United States. The TRC held the power, not only to veto or set maximum rates, but to set railroad rates within the state for intrastate traffic. This authority was unprecedented for the time, making the TRC a model for later regulatory commissions. The same year that the bureaucratic aspect of the Texas regulatory strategy went into effect, the legislature debated the amendment of the statutory aspect, antitrust.<sup>28</sup>

Governor Hogg called a special session of the Twenty-second Legislature in 1892. The legislature needed to settle several issues for the state, most importantly the decennial redistricting required by the Constitution. But among the other responsibilities charged to the session was the request by Hogg to amend the state's antitrust law. In his opening message Hogg charged the legislature "To re-enact or amend and strengthen chapter 117, General Laws 1889, defining, punishing and prohibiting trusts and conspiracies against trade." The susceptibility of the 1889 law to the "equal protection defense" along with its technical errors necessitated some revision of it in order to make it effective. In the early antitrust cases, state

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<sup>28</sup> Childs, *The Texas Railroad Commission*, 56-67; Cotner, *James Stephen Hogg*, 189-196.

courts often refused to rule on the constitutionality of the agricultural exemption, which left reform efforts in limbo. Furthermore, the precedent-setting cases of the early and middle 1890s had either not yet been filed, or had not yet worked their way to the state Supreme Court. Despite the clear need for amendment, Texas reformers did not reach a consensus about how exactly the law ought to be amended. Those most concerned with constitutionality wanted to remove the agricultural exemption, while others saw such a removal as a direct blow to the well-being of their agrarian constituents.<sup>29</sup>

In 1892 the Senate introduced two bills amending the 1889 law, and the House introduced one. Two senators, William H. Pope (Hopkins County) and J. W. Cranford (Harrison County), each introduced a bill on March 24, 1892. Cranford's bill, S. B. No. 28, was identical to the bill debated in the House (H. B. No. 51), making only a few minor alterations to the Anti-Trust Act of 1889; the most notable change was the elimination of the agricultural exemption. Although Cranford's bill was identical to H. B. No. 51, it did not progress as far in the Senate as H. B. No. 51 did in the House. The bill passed through the Senate Committee on State Affairs, but made it no further. Pope's bill, S. B. No. 26, on the other hand, was a near-total break from the existing antitrust statute. While the senators represented neighboring districts in East Texas, their bills took dramatically different positions on antitrust law.<sup>30</sup>

S. B. No. 26, the reincarnation of S. B. No. 44 from the regular session of the Twenty-second Legislature, deviated from the norm of Texas antitrust bills. Rather than debate the repercussions of the loss of the agricultural exemption, Pope's bill sought to

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<sup>29</sup> *Texas House Journal* (1892), 1-2; See written statements in explanation of votes by House members; *Texas House Journal* (1892), 217-219.

<sup>30</sup> H. B. No. 51, Twenty-second Leg. 1<sup>st</sup> C. S. (1892); S. B. No. 26, Twenty-second Leg. 1<sup>st</sup> C. S. (1892); S. B. No. 28, Twenty-second Leg. 1<sup>st</sup> Called Session (1892).

specifically name only those industries or types of industries that combined to the detriment of farmers. Section 1, rather than being a long, five-part definition of trusts and conspiracies in restraint of trade, simply listed several types of industries that would be prohibited from combining or conspiring; those prohibited from combining included: “any two or more persons . . . engaged in the manufacture or sale of any provisions, wares, merchandise, lumber, or any implement used in tilling the soil or used upon the farm . . . .” Sections 2 and 3 clearly stated that insurance and railroad companies also operated under the rules and regulations of the act. This proposed amendment sought to sidestep the controversy associated with the loss of the agricultural exemption by tailor-making a law to suit the economic needs of Texas farmers. S. B. No. 26 also proposed a foundational change in the penalty provisions of the antitrust statute. Rather than placing all offenses on an equal playing field and calculating varying daily fines, Pope’s bill separated a first offense from a later offense, each one consisting of a hefty fine. Furthermore, someone convicted of violating the law could not be imprisoned for a first offense. Only two pages in length, S. B. No. 26 in a very short space completely upended antitrust law in Texas. The bill passed Senate Judiciary Committee No. 1, but progressed no further in the chamber.<sup>31</sup>

Of all the proposed amendments to the 1889 law, H. B. No. 51 (identical to Cranford’s bill, S. B. No. 28) received the most traction, surviving all the way to its third reading in the House. The bill, introduced by Dallas lawyer William Lyne Crawford, passed House Judiciary Committee No. 1 with not one, but two minority reports. Alvin Owsley, strong advocate of the 1889 measure, served as acting chairman of the committee at the time of its report on H. B. No. 51; he also (along with Walter Gresham of Galveston County)

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<sup>31</sup> S. B. No. 26, Twenty-second Leg. 1<sup>st</sup> C. S. (1892); *Texas Journal of the Senate of Texas, Twenty-second Legislature, Extra Session, 1892* (Austin: Henry Hutchings, State Printers, 1892), 61-62; 258.

authored one of the minority reports advocating that the bill be either amended to include special protection for farmers or else be rejected. The second minority report, authored by Allen Swan (Clay County) and William Hamblen (Harris County), was quite lengthy, giving a detailed account of the failures of the law from their perspective. They listed three significant failures. First, the removal of the agricultural exemption rendered the law “paternal” and a “dangerous precedent” for Texans. Second, the inclusion of average citizens and farmers under the scope of the law made acts considered legal and “honest” to be illegal and “felonious.” These newly illegal acts included, not only cooperative efforts among farmers, but also everyday transactions, illustrated by the minority with the example of a purchase-agreement for butter. The loss of the agricultural exemption rendered common practices and everyday transactions among Texans to be indictable offenses. The third weakness that the minority charged to the bill was its inability to extradite witnesses along with defendants; without the testimony of witnesses from the out-of-state trusts, the courts could not hope to gather enough evidence to convict the defendants extradited to Texas. Crawford’s bill removed the constitutionality problem from the antitrust law, but undermined its central purpose in order to do so. In sum, the loss of agricultural protection made the law more of a threat to average citizens than it was to the trusts for which it was designed.<sup>32</sup>

House members suggested several amendments to H. B. No. 51, and they all had a common purpose: to compensate for the removal of the agricultural exemption by rewording the bill to grant some protection to farmers. For instance, the House accepted the amendment that returned the wording of Section 1 to its 1889 form; this removed a new clause that broadly declared any restrictions in the “free exercise of any avocation” to be illegal. Another

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<sup>32</sup> Texas *House Journal* (1892), 120-121; “Crawford, William Lyne,” *Handbook of Texas Online* (<http://www.tshaonline.org/handbook/online/articles/fcr14>). accessed February 17, 2013.

proposed amendment called for the revision of the definition of “trust,” changing it from “a combination of capital, skill or acts” to “a combination of capital.” Both of these proposals would have removed clauses that could be interpreted as condemnations of accepted behavior among the farmers and average citizens of Texas. But it was Alexander Watkins Terrell of Travis County who introduced the amendment that killed H. B. No. 51; his was the only pro-farmer amendment the House passed, but the ensuing debate over the bill’s efficacy led directly to the death of H. B. No. 51. Terrell proposed inserting Sections 13a and 13b, which would serve to eliminate everyday transactions and collective bargaining from the scope of the bill. Despite the inclusion of Terrell’s amendment, the bill still failed its third reading in the House the following day. Several members gave detailed explanations for their votes against the bill, most of them echoing the sentiments expressed in the minority report from the judiciary committee. The most detailed of the explanations concluded by stating: “We would be glad to vote for a law which would prevent the improper combinations which do in fact work injury to the people, and which would punish the real offenders, but we do not believe that this act would accomplish the results desired, but would in fact inflict greater evils than the trusts themselves.”<sup>33</sup>

The existence of two minority reports, along with the heated debates on the House floor concerning the amendment and passage of the bill, demonstrated the depth of feeling and conviction among the representatives regarding the power and importance of antitrust enforcement in the state. Those who wanted amended, valid legislation desired to proceed without the agricultural exemption, perhaps relying upon the discretion and good sense of prosecuting attorneys to focus their attention on trusts and corporations rather than honest

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<sup>33</sup> H. B. No. 51, Twenty-second Leg. 1<sup>st</sup> C. S. (1892); *Texas House Journal* (1892), 212-213; 217-219. On Terrell see Lewis L. Gould, *Alexander Watkins Terrell: Civil War Soldier, Texas Lawmaker, American Diplomat* (Austin: University of Texas Press, 2004).

citizens. Those who feared the threat posed to the grassroots political movement among farmers preferred no amendment at all to the removal of their protection under the law. In other words, the strength of the Farmers Alliance and other agricultural organizations prevented the passage of any antitrust legislation that might threaten their existence or power. The antitrust laws without the exemption could be used against these organizations to the detriment of thousands of Texas farmers individually, and to the well-being of the state as a whole.

The debates over antitrust legislation reflected the growing complexity of Texas's expanding economy and growing population, as lawmakers struggled to reconcile the competing interests of business and agriculture, urban dwellers and rural folk, and rich versus poor. Some Texans favored investment in the state, even if it came in the form of big businesses or trusts. Their opposites, the politically engaged farmers, sought the elimination of any large or powerful enterprise in favor of a more producerist-oriented state. These forward-thinking farmers formed the core of the Populist Party, and fought to protect their way of life from the encroachment of hard money economics and the corporate state that resulted from the rise of the corporation. Between these opposing forces stood a moderate group of progressives seeking to eliminate corporate abuses without dissuading businesses from investing in the state. The voices of moderation did not win the day in 1892, and the Anti-Trust Act of 1889 went on living in its original form for another three years until the Texas Supreme Court gave the legislature the assurance it needed to amend the law without eliminating the agricultural exemption.<sup>34</sup>

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<sup>34</sup> Lawrence Goodwyn, *The Populist Moment*, 264-322.

## *Conclusion*

Within three years, Texas antitrust legislation evolved from a widely supported, catch-all measure into a contentious subject that pitted radical agrarians against moderate and business-oriented representatives. The shortcomings in the antitrust act gave offenders strong defenses that would soon prove successful in defeating state regulatory efforts. Even in the early stages of enforcement of the Anti-Trust Act of 1889, state lawmakers clearly recognized that the law needed amendment. What they did not know was that their inability to revise the law in the early 1890s would exacerbate the problem. Significant precedent-setting cases worked their way through the state judiciary while legislators tried unsuccessfully to pass amendments; these cases revealed other, deeper problems with the law that would require attention from the legislature as well. These cases threatened the efficacy of the antitrust law in new ways and paved the way for the 1895 amendment to the antitrust act.

## Chapter 2

### Early Antitrust Enforcement and Successful Amendment

While the reform interests in Texas celebrated over the creation of the TRC, the state's antitrust laws faced brutal attacks from the powerful corporate interests that they were supposed to reign in. Two court cases, *Queen Insurance Co., et al v. The State of Texas* and *E. T. Hathaway v. The State of Texas*, demonstrated the shortcomings resulting from the broad and vague construction of the antitrust law in its original form. In the *Queen Insurance* case, the state Supreme Court concluded that the Texas Anti-Trust Act of 1889 did not apply to insurance companies. Meanwhile, the state's failed prosecution of oil executive E. T. Hathaway brought to light the law's inability to reach the latest manifestation of business consolidation—the holding company. Both of these cases resulted in overturned convictions of antitrust offenders and capitalized on the errors of the original statute. The changes in antitrust precedent ushered in by these cases spurred the Texas legislature to attempt yet again to amend the Texas Anti-Trust Act of 1889; but without a clear answer from the state Supreme Court regarding the law's constitutionality, the strivings of reform-minded lawmakers amounted to nothing. The answer so earnestly sought by legislators finally came in 1895 in *Houck & Dieter v. Anheuser-Busch Brewing Association*. With a green light from the state Supreme Court, Texas lawmakers finally passed an amendment that was more far-reaching than earlier proposals. The prosecutorial difficulties discovered in *Queen Insurance* and *Hathaway* made the 1895 antitrust amendment more mature and more effective against holding companies than earlier proposed amendments would have been.<sup>35</sup>

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<sup>35</sup> *Queen Insurance Co., et al v. The State of Texas*, No. 49, 1893 86 Tex. 250; 24 S.W. 397; 1893 Tex. LEXIS 279; *E. T. Hathaway v. The State of Texas*, 36 Tex. Crim. 261; 36 S.W. 465; 1896 Tex. Crim. App. LEXIS 160 (1896); *Houck & Dieter v. Anheuser-Busch Brewing Association*, 88 Tex. 184; 30 S.W. 869; 1895 Tex. LEXIS 454 (1895).

The open-ended wording of the Texas Anti-Trust Act of 1889 made the law applicable to industries other than railroads, even though railroad behavior (pooling) inspired its passage. Each of the precedent-setting cases of the middle 1890s concerned an enterprise other than railroading. Despite its shortcomings, the law theoretically worked well against railroad pools and stock-transfer trusts because they were relatively loose combinations; however, when applied to other industries, like insurance and marketing, prosecutors encountered new theoretical weaknesses in the antitrust law. These theoretical weaknesses derived from the nature of the industry regulated and also from the organizational structure of the corporation prosecuted. The nature of the insurance industry made its regulation through antitrust quite difficult, resulting in special legislation for the insurance industry as well as provisions in the antitrust law specifically designed for insurance. The latest form of corporate consolidation, the holding company, also posed problems for Texas prosecutors as the antitrust law was designed to regulate stock-transfer trusts and loose combinations.<sup>36</sup>

### *Queen Insurance*

A suit filed by the Texas attorney general in Travis County in 1891 against a combination of fire insurance companies, known as the “Texas Insurance Club,” made its way to the state Supreme Court in 1893. The case, *Queen Insurance Co., et al v. The State of Texas*, included fifty-four insurance companies operating in Texas that made an informal arrangement to fix prices for fire insurance along with commission payments to Texas agents. While the case sounded like an easy prosecution for Attorney General Charles A.

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<sup>36</sup> Cotner, *James Stephen Hogg*, 165.

Culberson, the nature of the insurance business along with the possible “equal protection defense” combined to give the defendant insurance companies a solid case before the court.<sup>37</sup>

Fire insurance was an important asset for nineteenth-century Texans. With stores, homes, and barns made of wood, an uncontrolled fire could easily devastate any business or family. Banks typically required fire insurance for property mortgages, which forced people to pay premiums in cash even though cash could be hard to come by. While the late nineteenth century was one of combination among manufacturing industries, it was also a time of consolidation in the financial sector. By the 1890s most of the insurance companies operating in Texas were “foreign corporations” based in other states. Thus Texas residents paid premiums for their insurance, but none of the profit from the enterprise stayed in the state; rather, the profit went to big firms in Eastern and Midwestern cities. But the large insurance companies also benefited the market for insurance in Texas because they brought with them standardization of coverage and stability of premium rates. To some residents, these benefits outweighed any monopolistic activity on the part of the insurers; to others, however, the high premiums served as yet another example of monied interests taking advantage of the producer class. When fifty-four insurance companies operating in Texas set standard premium rates for customers and standard commission rates for local agents, the combination appeared to be a clear violation of the antitrust law (despite its vague wording). In response, Attorney General Culberson filed antitrust charges against the “Texas Insurance Club” in 1891.<sup>38</sup>

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<sup>37</sup> *Queen Insurance*, 1893 Tex LEXIS 279.

<sup>38</sup> *Texas Journal of the House of Representatives, Twenty-fourth Legislature, Regular Session, 1895* (Austin: Ben C. Jones & Co. State Printers, 1895), 47-49; *Texas Journal of the House of Representatives, Twenty-sixth Legislature, Regular Session, 1899* (Austin: State Printer, 1899), 26; Tim Bartley and Marc Schieberg, “Regulating American Industries: Markets, Politics, and the Institutional Determinants of Fire Insurance Regulation,” *American Journal of Sociology* 107 no. 1 (July 2001): 101-146.

*Queen Insurance Co., et al v. The State of Texas* began in state district court in Travis County because foreign corporations had to be indicted in the capital even if they operated throughout the state. The district court ruled in favor of the state, but the defendants quickly appealed to the state appellate court. Like earlier antitrust cases, *Queen Insurance* relied heavily upon the easy defense of invoking the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The attorneys representing the defendant insurance companies argued that the agricultural exemption rendered the entire antitrust statute unconstitutional. Using the “equal protection defense” and the technical errors of the statute, the defense attorneys persuaded the appellate court to rule in favor of the insurance companies; both parties then appealed to the Texas Supreme Court for clarification of the law’s constitutionality and validity. The court decided in favor of the insurance companies, but not for the reasons specified by the appellate court. Where the appellate court gave great weight to the grammatical technicalities and vague wording of the statute, the Supreme Court based its decision on the intent of the legislature, which was clearly to penalize the practices defined in the act. Rather than rule on the constitutionality of the agricultural exemption, the high court assumed the law constitutional, but ruled in favor of the insurance companies anyway. This prevented the case from moving to federal court while also protecting the agricultural exemption from judicial review. Thus, the court left the legislature the opportunity to amend the law in light of the circumstances of the *Queen Insurance* case.<sup>39</sup>

The final decision of the Texas Supreme Court, made in 1893, excluded insurance companies from prosecution under the existing antitrust statute. The court decided that insurance constituted an aid to commerce and could not be considered commerce or trade in the sense implied by the antitrust statute. In other words, “trade” and “commerce” applied

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<sup>39</sup> *Queen Insurance*, 1893 Tex. LEXIS 279, at 29-35.

directly and only to transactions involving labor and tangible goods; insurance, a contingent financial transaction, did not meet these criteria set by the court. Justice Reuben Reid Gaines, in delivering the court's opinion, stated that "Insurance is a mere contract of indemnity against a contingent loss. Though it is an important aid to commerce, it is not a business of commerce, or one in which the public have any direct right."<sup>40</sup>

With this ruling by the Texas Supreme Court, the state's reformers saw the strength and effectiveness of their innovative antitrust law attacked and weakened by the state courts. The grounds upon which the court decided in favor of the insurance companies inspired some of the amendments made to the antitrust law in 1895 and 1899. In those legislative sessions, lawmakers added clauses and provisions designed to specifically draw insurance companies under the authority of the antitrust act.<sup>41</sup>

### *Hathaway*

The Texas Anti-Trust Act of 1889 proved ineffective regarding the insurance industry due to the court's understanding of the nature of that industry as an "aid to commerce." But the antitrust law also proved to be ineffective in regulating holding companies. *E. T. Hathaway v. The State of Texas* demonstrated that, regardless of the nature of the industry in question, corporations engaged in the holding company form of corporate organization could not be held accountable under the Texas Anti-Trust Act of 1889. Texas corporate law did not allow domestic, Texas-based companies to engage in certain behaviors required of holding companies, such as owning stock in other corporations. Texas law forbade inter-corporate

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<sup>40</sup> *Id.*, at 38, 52.

<sup>41</sup> *Texas House Journal* (1899), 14-15; *The Laws of Texas, 1897-1902 Volume 11*, 246-252, Book, 1902; digital images, (<http://texashistory.unt.edu/ark:/67531/metaph6576/> : accessed February 27, 2013), University of North Texas Libraries, The Portal to Texas History, <http://texashistory.unt.edu>; crediting UNT Libraries, Denton, Texas; *The Laws of Texas, 1822-1897 Volume 10*, 112-115, Book, 1898; digital images, (<http://texashistory.unt.edu/ark:/67531/metaph6733/> : accessed February 14, 2013), University of North Texas Libraries, The Portal to Texas History, <http://texashistory.unt.edu>; crediting UNT Libraries, Denton, Texas.

stock ownership, so domestic corporations could not become holding companies. They could, however, be acquired by a holding company because state law did not specifically outlaw ownership of shares in Texas corporations by foreign corporations or individuals. The rise of the holding company in place of the stock-transfer trust testified to the effectiveness of state antitrust efforts, but also exemplified the innovation and creativity of corporate lawyers and business-friendly states in finding new loopholes around state and federal regulations.<sup>42</sup>

The inaction of the Texas legislature in 1892 and 1893 led directly to the overturned conviction of E. T. Hathaway, a regional director for the Waters-Pierce Oil Company, which was a member of the Standard Oil Trust. The case, the first of many rounds fought between Texas and Waters-Pierce, revolved around the same general weaknesses in the law that had plagued prosecutors since its passage, while also introducing new problems for the state. Hathaway's defense attorneys called the law unconstitutional and invalid, and challenged the authority of the state of Texas to indict out-of-state conspirators. These challenges resulted in one of the few overturned indictments in Texas antitrust history, and the loss for the state could not have come at a worse time or against a more formidable foe. Despite the loss, *Hathaway* turned out better than it could have been in that Hathaway's attorneys did not have a strong enough case to induce the court to rule on the constitutionality of the statute.<sup>43</sup>

E. T. Hathaway, a resident of Denison, worked for Waters-Pierce Oil Company, a Missouri company that marketed refined oil products in Texas and surrounding states. Waters-Pierce was in fact a regional marketer for Standard Oil and was a member of the Standard Oil Trust. The company faced little strong competition throughout Texas and the Southwest because Standard had already swallowed up most of the large oil marketing firms.

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<sup>42</sup> *Hathaway*, 1896 Tex. Crim. App. LEXIS 160.

<sup>43</sup> *Id.* at 4-7.

Competition, then, came from smaller, more localized companies. Texas residents and officials did not initially know about the connection between Waters-Pierce and Standard, but when the information came to light, the prosecuting attorney of McLennan County filed charges against those whom he considered to be conspirators, from Regional Director Hathaway all the way up the hierarchy to include Waters-Pierce president Henry Clay Pierce and John D. Rockefeller himself. The only “conspirators” taken to trial in 1894 were those residing in Texas, which included only a few of the many names listed on the indictment. Hathaway’s attorneys succeeded in having his charges severed from those of the others, which was an excellent strategic move on his behalf; Hathaway then pled that he knew nothing of the conspiracy and that he was only a small-time, ignorant participant. The lack of decisive evidence to the contrary worked against the state, despite the lax, vague evidentiary rules designed to benefit state prosecutors.<sup>44</sup>

The court determined that the Anti-Trust Act of 1889 separated offenders into two classes of people—those who formed a trust or conspiracy, and those who worked in furtherance of one without being original or directing members of said trust. For the former group, knowledge of the trust was implied because it would be impossible to design a conspiracy without doing so knowingly or purposefully. For the latter group, knowledge had to be proved by the prosecuting attorney; this protected employees from being held accountable for crimes of which they were unaware. The state made a mistake in its indictment of E. T. Hathaway by treating him as an employee working in furtherance of the trust while also claiming his involvement in the birth of the conspiracy. Yet the prosecution did not adequately demonstrate Hathaway’s knowledge of the trust, nor could it refute the

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<sup>44</sup> Jonathan W. Singer, *Broken Trusts: The Texas Attorney General versus the Oil Industry, 1889-1909* (College Station: Texas A&M University Press, 2002), 22-25.

fact that Hathaway had never met some of his alleged co-conspirators, like John D. Rockefeller and John Archbold. Moreover, the prosecution could not provide any evidence or testimony that Hathaway engaged in monopolistic or abusive business practices in overseeing sales and pricing for his territory. In fact, Hathaway's attorneys submitted testimony by a competing oil marketer from Sherman who stated that Hathaway did not engage in monopolistic activity; he may have operated a monopoly, but he was not monopolizing the market. Without any evidence of malicious activity or knowledge of the Standard Oil connection to Waters-Pierce, the Texas Supreme Court overturned Hathaway's indictment in 1896. The big fish of the conspiracy, like Henry Clay Pierce, never faced extradition to Texas and stood in the way of the Texas attorney general obtaining evidence from the out-of-state offices of Waters-Pierce.<sup>45</sup>

*Hathaway* was a loss for the Texas attorney general's office, and a loss for antitrust prosecution throughout the state. The inability to bring the directors of the trust to justice demonstrated the impotence of the statute in the face of the real threat to competition in the state. Small-time agents like Hathaway did not pose a serious threat to free trade in Texas; the real threat came from the powerful executives of holding companies who orchestrated mergers and combinations from the safety of their out-of-state residences. While *Hathaway* could have gone worse for Texas reformers, the retention of the agricultural exemption was a small victory in the face of a serious loss. The weaknesses in the antitrust law brought to light by *Hathaway* needed to be addressed, but the legislature could reach no consensus until the constitutionality of the agricultural exemption received a definitive ruling by the state supreme court.

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<sup>45</sup> *Hathaway*, 1896 Tex. Crim. App. LEXIS 160 at 29-45; Singer, *Broken Trusts*, 23, 30-31.

*Anheuser-Busch*

While the state legislature debated amendments to the antitrust act in 1892 and 1893, *Queen Insurance* and *Hathaway* worked their way through the state judiciary and further complicated the already tricky business of revising the law. But fortunately for Texas reformers, a civil antitrust suit originally filed in 1890 evoked an official decision by the state Supreme Court on the constitutionality of the agricultural exemption.

*Houck & Dieter v. Anheuser-Busch Brewing Association* began in December 1890 when Anheuser-Busch filed suit against a group of beer dealers in El Paso County, Texas. The beer dealers, a combination of three separate firms known as the El Paso Lager Beer Company, set market shares in El Paso County for each member. The largest and most powerful of the group was the firm Houck & Dieter; the other members were individual beer dealers of El Paso County. The members combined their assets and set portions of beer to be purchased by each member. Houck & Dieter, for instance, was the largest dealer involved in the combination and contributed the most valuable assets to the group; therefore, Houck & Dieter purchased the lion's share of the beer to be resold by the El Paso Lager Beer Company and took home the lion's share of the profits.<sup>46</sup>

Anheuser-Busch had an exclusive purchasing contract with Houck & Dieter prior to the 1890 formation of the El Paso Lager Beer Company. An agent for Anheuser-Busch negotiated to renew the contract with Houck & Dieter in 1890. But when the executives of Anheuser-Busch found out that their contracted dealer in El Paso had entered into a combination in violation of state antitrust laws, the company moved to nullify the contract. Anheuser-Busch claimed that the agent did not have the authority to negotiate a contract with a monopolistic combination, and that if the company had known of the El Paso Lager Beer

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<sup>46</sup> *Anheuser-Busch*, 1895 Tex. LEXIS 454 at 4-12.

Company combination the contract with Houck & Dieter would not have been approved. Houck & Dieter, on the other hand, claimed that the agent knew all along about the combination known as the El Paso Lager Beer Company, and that the contract was therefore valid.<sup>47</sup>

The trial court rendered a judgment in favor of Houck & Dieter, despite the unlawful combination of the El Paso Lager Beer Company. Anheuser-Busch then appealed, and the Texas Court of Civil Appeals decided in favor of the brewing company. Of course, the beer dealers appealed to the Texas Supreme Court, which rendered a decision in the spring of 1895.

The state Supreme Court decided that, in light of the exclusive purchasing agreement between Houck & Dieter and Anheuser-Busch, the brewery was complicit in furthering a monopoly of the sale of its products in El Paso County. In other words, Anheuser-Busch could not complain about a combination of beer dealers in El Paso when the company had already made an agreement that would grant to a single firm a regional monopoly over its products. That being said, the trial court erred in not declaring to the jury that the El Paso Lager Beer Company was indeed a combination in restraint of trade. The court then remanded the case back to trial with the special instruction that the El Paso Lager Beer Company be considered an unlawful combination.<sup>48</sup>

*Houck & Dieter v. Anheuser-Busch Brewing Association* did not appear as though it would solve the constitutionality problems that plagued attempts at amending the Texas Anti-Trust Act of 1889, but it turned out to be just such a solution. The already short Supreme Court opinion in the case included a short paragraph stating subjects upon which the high

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<sup>47</sup> *Id.* at 1-4, 11-14.

<sup>48</sup> *Id.* at 14-15.

court agreed with the appellate court. That short paragraph included a very short and direct sentence concerning the constitutionality of the statute: “For the reasons given by the Court of Civil Appeals, we also agree with them in holding that the act is not in violation of the Constitution.” This sentence, delivered on April 18, 1895, five years after the initial suit filed by Anheuser-Busch, paved the way for antitrust reform in the Texas legislature. The Texas Supreme Court had finally made a clear-cut statement concerning the constitutionality of the agricultural exemption, and the Twenty-fourth Legislature, in session at the time, wasted no time in amending the antitrust act in light of the court’s opinion.<sup>49</sup>

#### *Amendment in 1895*

The regular session of the Twenty-fourth Legislature opened on January 16, 1895 with a message from the governor, Charles A. Culberson, former attorney general of Texas. Culberson delivered an eloquent message to the legislature that included a charge to amend the Anti-Trust Act of 1889. As the session began, consensus concerning the amendment of the act seemed unobtainable, but the delivery of the high court’s opinion on April 18, 1895 in *Anheuser-Busch* became the catalyst for the passage of the first amendment to the act. The House bill that became the 1895 amendment began as H. B. No. 404, introduced on February 2, 1895 by William T. Armistead of Marion County, a former Confederate officer and one-time law partner of Governor Culberson’s father, Congressman David Culberson. The bill, lacking an agricultural exemption, moved slowly through the House, passing its third reading on March 27. Several representatives addressed the potential threat posed to Texas residents should the bill pass without some form of agricultural protection, but H. B. No. 404

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<sup>49</sup> *Id.*; *The Marketing Laws Survey*, ed. A. H. Martin, Jr., vol. 1, *State Antitrust Laws* (Washington, D. C.: United States Government Printing Office, 1940), 718-719.

continued its slow progress through the chamber. Unlike the 1892 debate over antitrust amendment, the drama of 1895 took place in the Senate, not in the House.<sup>50</sup>

The Senate received H. B. No. 404 late in March and took about a month to pass the bill, resorting to a special committee to address the concerns of various groups of senators. The Speaker created and assigned a Senate special committee on April 23, about a week after the delivery of the *Anheuser-Busch* opinion, and the bill still did not have a protective clause for farmers. The following day, the special committee announced its positive opinion of H. B. No. 404 with certain amendments, including the reintroduction of the agricultural exemption. The special committee, composed of five members, presented a majority report and a minority report. The minority report, authored by Emory C. Smith (Denton County) and J. B. Dibrell (Guadalupe County), declared that all types of trusts and conspiracies, even those of farmers, should be considered illegal.<sup>51</sup>

This line of thinking represented a sharp break from antitrust philosophy in Texas in the several years prior to 1895. While some legislators might have agreed with such a statement, they did not have the political capital to vocalize it on the record at that time as Smith and Dibrell did in 1895. Such a change in antitrust theory and implementation was attributable to one of two things: supporters of the elimination of the agricultural exemption either used the argument to advance the interests of big businesses under the guise of justice, or else they truly believed that farmer cooperatives should be illegal. The latter motivation

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<sup>50</sup> *Texas House Journal* (1895), 47-48, 201, 471-473, 588-590. On Armistead, see Legislative Reference Library of Texas, "Legislators and Leaders," ([\)](http://www.lrl.state.tx.us/legeLeaders/members/memberDisplay.cfm?memberID=3502&searchparams=chamber=~city=~countyID=0~RcountyID=~district=~first=~gender=~last=armistead~leaderNote=~leg=~party=~roleDesc=~Committee=), accessed February 17, 2013; Carolyn Hyman, "Armistead, William Thomas," *Handbook of Texas Online* (<http://www.tshaonline.org/handbook/online/articles/far05>), accessed February 17, 2013.

<sup>51</sup> *Texas Journal of the Senate of Texas, Twenty-fourth Legislature, Regular Session, 1895* (Austin: Ben C. Jones & Co., State Printers, 1895), 377, 569-576.

deviated from the line of thought generally accepted in Texas since the late 1880s, that farmers deserved protection in order to combat the power of corporations. In other words, a majority of Texas legislators, declining in number by 1895 but still quite strong, believed that antitrust was more about combating big businesses than about protecting free market competition. The minority report of House Judiciary Committee No. 1 in 1892 (concerning the passage of H. B. No. 51) exemplified this mode of thought when the authors said, “we conclude that it ought not only be the privilege but it is the duty of our people so far as they can to combine for their protection against foreign as well as home trusts and combines and monopolies rather than have their hands tied and be compelled to submit to their wrongs.” Antitrust, at least in Texas, only took the façade of protecting competition; beneath that façade antitrust was a legal method of promoting small business and agricultural interests at the expense multi-state corporations and holding companies.<sup>52</sup>

H. B. No. 404 passed its third reading in the Senate on April 24, and the very next day the House voted to accept the amendments made by the Senate. Passage was swift and easy following the state Supreme Court’s ruling on the constitutionality of the Anti-Trust Act of 1889. Congress approved the bill on April 30, a short six days following the addition of the agricultural exemption. While the retention of the exemption was the most hotly debated part of the passage of H. B. No. 404, the bill included several other important amendments.<sup>53</sup>

The text of H. B. No. 404, nearly identical in text to H. B. No. 51 from 1892, demonstrated the legislators’ general approval of the Anti-Trust Act of 1889. Little of the statute changed from 1889 to 1895 that had not already been recommended in 1892. The technical error of failing to repeat the definitions in the penal provision (Section 6) found its

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<sup>52</sup> Texas *House Journal* (1892), 120-121.

<sup>53</sup> Texas *Senate Journal* (1895), 669-670; Texas *House Journal* (1895), 979.

solution in the 1895 amendment. The bill listed definitions of violations in both Sections 1 and 6, and the definitions were practically identical to those of the original 1889 law. The only significant difference to these definitions was the insertion of a clause, entirely new in 1895, which sought to “prevent restriction in aids to commerce.” This clause specifically targeted the problem raised by the judiciary’s exclusion of fire insurance companies from the scope of the antitrust act in *Queen Insurance*. The court deemed insurance an aid to commerce, not commerce itself, thus excluding price-fixing among insurance companies from the purview of the antitrust law. The insertion of the new clause in 1895 was a quick and easy solution to this problem, but as the debates of the Twenty-sixth Legislature revealed in 1899, it was not a permanent solution to the insurance problem.<sup>54</sup>

The second significant change introduced in the 1895 amendment was the immunity provision for witnesses compelled to testify against antitrust offenders. In *Hathaway* and its associated Waters-Pierce cases the attorney general’s office had discovered a serious weakness in the Anti-Trust Act of 1889. The act did not make any jurisdictional claims on individuals residing out-of-state whose businesses violated the Texas antitrust statute. Thus, Henry Clay Pierce, John D. Rockefeller, John D. Archbold, and other powerful members of the Standard Oil Trust could not be extradited to Texas to stand trial for their offenses under the 1889 statute; only E. T. Hathaway and other in-state employees could be tried. The inability to try the real offenders rendered the antitrust act an ineffective regulatory tool, impotent against holding companies.<sup>55</sup>

State antitrust laws proved effective in eliminating stock-transfer trusts, like the Standard Oil Trust based in Ohio formed by Rockefeller and others in 1882. Provisions in

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<sup>54</sup> *The Laws of Texas, 1822-1897 Volume 10*, 112-115.

<sup>55</sup> *Ibid.*

antitrust laws, particularly of the type enacted by Kansas, which forbade state corporations from issuing trust certificates, successfully stifled the growth and power of stock-transfer trusts. But where a window closed in the Midwest, a door opened in New Jersey. Several state laws issued between 1888 and 1893 turned New Jersey into the most business-friendly state in the country; Standard Oil reincorporated in New Jersey following an adverse court decision in Ohio in 1892. Where a stock-transfer trust consisted of several individuals or corporations pooling together to form a common law trust, a holding company consisted of one corporation purchasing shares in another corporation. This subtle difference in structure had tremendous repercussions on state corporate law in the 1890s. States could prohibit their domestic corporations from purchasing stock in foreign corporations, but few laws existed to prevent foreign corporations from purchasing stock in domestic corporations. Few states had such laws because such a thing was practically impossible until the advent of the holding company in the early 1890s. For example, Standard Oil of New Jersey was a holding company that purchased shares in Waters-Pierce Oil Company for the price of shares in Standard Oil. So Waters-Pierce, a Missouri corporation licensed to do business in Texas, gave up its independence to Standard yet continued to operate as a separate business; in Missouri, its home state, Waters-Pierce had foreign shareholders, but was still a domestic corporation. This technicality in business structure prevented the state of Texas from extraditing principals in the Waters-Pierce and Standard Oil companies to stand trial. The actions under dispute were those of Waters-Pierce, so the penalty for them had to be paid by Waters-Pierce, not another corporation that held shares of stock in Waters-Pierce. The law had to be amended to be made useable against the new holding company structure that left the movers and shakers too distant to be threatened by it. Texas legislators sought to remedy

the problems of indicting holding company executives and extraditing defendants that had proved so troublesome in the prosecution of *Hathaway*.<sup>56</sup>

The Twenty-fourth Legislature went about solving the problems posed by holding company structure by claiming the state's authority to indict and try offenders of Texas law who had residence outside the state. This claim brought men like Henry Clay Pierce, who operated foreign companies, within the authority of the Texas antitrust law. H. B. No. 404 also granted the attorney general the right to compel the testimony of potential witnesses. This included the right to subpoena individuals with knowledge of illegal corporate activity. These witnesses could be forced to testify, but they received immunity from prosecution in exchange. The only weakness of this additional provision was its lack of clarity regarding out-of-state persons; the statute made no mention of the authority of the state of Texas to subpoena and compel testimony from witnesses out-of-state, leaving the state's jurisdiction in such instances open to interpretation.<sup>57</sup>

The passage of H. B. No. 404 was the culmination of three years of work on the part of Texas reformers to correct the problems and weaknesses of the Anti-Trust Act of 1889. The swiftness that marked the bill's passage through the state legislature, particularly following the delivery of the Supreme Court opinion in *Anheuser-Busch*, resulted from the removal of the most contentious point of debate—the constitutionality of the agricultural exemption. Furthermore, the messages from Governors Hogg and Culberson to the legislatures of the early 1890s demonstrated that reform-minded politicians perceived a clear and imminent need for an updated and strengthened antitrust law. Hogg had left a parting address with the legislature in January 1895 that implored the lawmakers to understand the

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<sup>56</sup> Hovenkamp, *Enterprise and American Law*, 257-267.

<sup>57</sup> *The Laws of Texas, 1822-1897 Volume 10*, 112-115.

importance of antitrust enforcement to the well-being of the state and to appropriate sufficient funding to the state's efforts to bring offenders to justice. Upon taking office, Culberson had echoed Hogg's calls for reform, and had even taken the unusual step of sending a mid-session address to the legislature on March 5, 1895, chastising the Twenty-fourth Legislature for its inaction on several subjects including antitrust reform. This sense of urgency, seemingly pervasive among reform-minded Texans, certainly contributed to the swift passage of a bill strengthening the state's antitrust law.<sup>58</sup>

### *Conclusion*

The early and middle 1890s constituted a time of reform and growth of government regulation in Texas. The TRC, founded in 1892, made great strides in mediating disputes between shippers and railroads. Texas legislators finally made the amendments necessary to strengthen the Texas antitrust law. The power of the state to enforce its ideas of economic equality seemed greater than ever. These reforms originated from a vocal group within the Democratic Party led by Jim Hogg. The Hogg Democrats included many politically engaged farmers and Farmers Alliance members, but many of these agriculturalists abandoned the Democrats in favor of the Populist Party. Agrarian agitation was reaching a high point in Texas at this time, and anti-corporate sentiment went hand-in-hand with Populism and grew apace in the mid-1890s. At the height of Populist fervor, 1895-1896, the Texas antitrust law faced its strongest opponent—Waters-Pierce Oil Company.

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<sup>58</sup> Texas *Senate Journal* (1895), 239-241; Appendix A, 38-39.

## **Chapter 3**

### **A New Kind of Antitrust Law**

In 1894, E. T. Hathaway, one of the regional directors for Waters-Pierce Oil Company in Texas, had his antitrust trial severed from that of several other Waters-Pierce employees and associates named in the indictment. Hathaway's attorneys went on to win their case, ultimately succeeding in having the state drop its charges against their client in 1896. But Hathaway's freedom was short-lived because the state filed new charges mere months after dropping the case. These new charges accused the Waters-Pierce Oil Company of engaging in illegal and anti-competitive behavior in the marketing of oil products throughout the state. The antitrust charges against Waters-Pierce in 1896 differed from those against several named individuals in the series of 1894 cases in two important ways. First, the state filed the 1896 charges under the new and improved antitrust amendment of 1895. Second, the charges were against the Waters-Pierce Oil Company, not a conglomeration of individuals as had been the case in 1894. The 1895 antitrust amendment gave the attorney general the authority to indict the company as a whole, granting better access to out-of-state directors of Waters-Pierce. E. T. Hathaway, along with other Waters-Pierce employees and directors (like Henry Clay Pierce, the company's founder and director), faced trial together as representatives of the company. The state had dropped its individual charges against Hathaway, not because the attorney general had given up, but because the 1895 amendment gave the state a second stab at the powerful executives of the Waters-Pierce Oil Company.

This case, which lasted four years and ended up in the U.S. Supreme Court, is one of the better-known antitrust cases in Texas history.<sup>59</sup>

The successful prosecution of the most powerful trust in Texas constituted a major victory for Texas reformers, and the affirmation of the state's police power by the U.S. Supreme Court encouraged supporters of the agricultural exemption. However, a series of legislative amendments and antitrust cases occurring during this same four year window of time undermined the ultimate success of the Waters-Pierce prosecution. While the case was underway, other concerns among Texans led them to pass a new antitrust law, even though the current one had not been adequately tested.

#### *Baker v. Grice and the Risk of Federal Review*

In 1894, Waters-Pierce regional director E. T. Hathaway had his trial separated from several other employees of the company who had been indicted on antitrust charges; one of those employees was William Grice, another regional director for the company in Texas. A jury convicted Grice on antitrust charges, and his attorneys filed an appeal with the State Court of Civil Appeals. However, the court went through two sessions without hearing Grice's case, the judges granting multiple continuances. In response, Grice's attorneys sued for a writ of habeas corpus from a federal district judge in Texas, arguing that the state had held Grice illegally and had violated his right to due process of law. The case, *Baker v. Grice*, began in 1896 but ended in the U.S. Supreme Court in 1898. The details of the case

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<sup>59</sup> Singer, *Broken Trusts*, 22-25; *Hathaway*, 1896 Tex. Crim. App. LEXIS 160; *Waters-Pierce Oil Company v. The State of Texas*, 19 Tex. Civ. App. 1; 44 S. W. 936; 1898 Tex. App. LEXIS 175 (1898); *Waters-Pierce Oil Company v. Texas*, 177 U.S. 28; 20 S. Ct. 518; 44 L. Ed. 657; 1900 U.S. LEXIS 1771 (1900).

caused Texas reformers to fear the power of federal judges and to further protect the state antitrust laws from federal attack.<sup>60</sup>

Like *Hathaway*, *Baker v. Grice* served as an opportunity for corporate lawyers to test the validity of Texas antitrust laws in federal court. With the success of *Hathaway* in view, Grice's attorneys tried a similar strategy to achieve his release. While waiting for his appeal, Grice stayed in the McLennan County jail even though he had initially been released on bail. The attorneys strategized that his incarceration would work to his advantage in allowing him to claim that his right to due process had been violated by the state. So Grice remained in jail, a martyr to the Waters-Pierce cause; the only problem was that the appellate court seemingly refused to hear the case, preventing Grice from following the trail of *Hathaway*. Rather than wait for the appellate court to hear the case, Grice's attorneys appealed to federal district court. Technically, Grice sued J. W. Baker, McLennan County Sheriff, for a writ of habeas corpus. Whether Grice's attorneys anticipated the outcome is unclear, but they received a favorable judgment from federal court.<sup>61</sup>

Grice's attorneys argued the same points used in *Hathaway*: that the 1889 Anti-Trust Act was unconstitutional and therefore void, and that the indictment had an error and was therefore void. However, they used the results of *Hathaway* to their advantage, and argued that Grice, as an original co-defendant with *Hathaway* prior to the severance, should also be released as *Hathaway* had been.<sup>62</sup>

Texas Attorney General Martin McNulty Crane countered the arguments of Grice's attorneys, but the true strength of his case in *Baker v. Grice* came from the details

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<sup>60</sup> *In re Grice*, 2062 Circuit Court N. D. Texas 79 F. 627; 1897 U.S. App. LEXIS 3058 (1897); *Baker v. Grice*, 169 U.S. 284; 18 S Ct. 323; 42 L. Ed. 748; 1898 U.S. LEXIS 1492 (1898).

<sup>61</sup> Singer, *Broken Trusts*, 24, 43-44; *In re Grice*, 1897 U.S. App. LEXIS 3058.

<sup>62</sup> Singer, *Broken Trusts*, 24; 43-44.

surrounding the imprisonment of Grice and the strategy employed by his attorneys. Crane argued that the federal district court did not have the jurisdiction to issue a writ of habeas corpus for a defendant in a state trial; rather, the defendant should be left to the state judicial system and ultimately appeal to the U.S. Supreme Court with a writ of error. Furthermore, Grice chose to remain in prison, a deliberate attempt to challenge the law since a writ of habeas corpus could not be issued for a defendant on bail. He revealed the true motivations of Grice and his legal team hoping that it would work against Grice in court.<sup>63</sup>

Judge Charles Swayne, appointed by Benjamin Harrison in 1889 to be a federal judge in Florida, held the March 1896 term of the federal courts for the northern district of Texas. Swayne heard the case and ruled in favor of Grice on several grounds. First, Grice had the right to challenge the validity of the law by refusing to take advantage of bail. Second, Swayne argued that, while federal courts typically did not hear habeas corpus cases for state defendants, “special circumstances” could render such action necessary or acceptable. Swayne viewed Grice’s case as a special circumstance because Grice would have to bear tremendous burden of time and expense throughout the life of his appeal—an appeal that, according to Swayne’s intimation, had been deliberately stalled by the Texas judiciary. Finally, Swayne declared that the agricultural exemption violated the Fourteenth Amendment of the U.S. Constitution, rendering the entire law void. In one lengthy legal opinion, a federal judge had thoroughly undermined and invalidated nearly a decade’s worth of regulation efforts by Texas reformers.<sup>64</sup>

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<sup>63</sup> Ibid, 43-44; *In re Grice*, 1897 U.S. App. LEXIS 3058.

<sup>64</sup> *In re Grice*, 1897 U.S. App. LEXIS 3058; *Impeachment of Charles Swayne: Evidence Before the Subcommittee of the Judiciary Committee of the House of Representatives*, 58<sup>th</sup> Cong. 341 (1904) (statement of J. H. Finks, Clerk U.S. Circuit and District Courts, Northern District of Texas).

Attorney General Crane filed an appeal with the U.S. Supreme Court, but the high court did not render a ruling on the matter until February 1898, a full year after Swayne delivered his opinion. In the interim, Texas reformers saw firsthand the tenuousness of their antitrust law; it was vulnerable to attack by federal judges, and it would only take one judicial decision to entirely undermine antitrust precedent and bring statutory regulation to a screeching halt.<sup>65</sup>

Fortunately for Crane, the U.S. Supreme Court overturned the judgment of Swayne. The nation's highest court ruled that Grice should be remanded to the custody of the McLennan County sheriff to await his appeal in state appellate court. Crane's arguments concerning Grice's true motivation for remaining in prison held great weight with the court. Furthermore, Justice Rufus Wheeler Peckham, in the written opinion of the court, affirmed previous state and federal decisions which purposefully avoided ruling on the constitutionality of the antitrust law. He stated, "it is almost the undeviating rule of the courts, both state and Federal—not to decide constitutional questions until the necessity for such decision arises in the record before the court."<sup>66</sup>

The Supreme Court decision came at the perfect time for Crane because the appeal for *Waters-Pierce Oil Company v. The State of Texas* was set for March 1898. The ruling of the federal Supreme Court reinforced the precedent of avoiding arguments concerning constitutionality, which gave the state a decided edge in any antitrust contest. So, the strongest argument presented by defendants would continue to be a moot point in appellate judgments. In January 1899, nearly a year after the *Baker v. Grice* decision by the U.S. Supreme Court, Texas Governor Charles Culberson addressed the legislature demanding a

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<sup>65</sup> Texas *Journal of the Senate of Texas, Twenty-sixth Legislature, Regular Session, 1899* (Austin: State Printer, 1899), 11.

<sup>66</sup> Singer, *Broken Trusts*, 43-44; *Baker v. Grice*, 1898 U.S. LEXIS 1492.

new antitrust law. He made a veiled reference to Judge Charles Swayne and the weakness of the law against unfriendly federal judges. Despite the ultimately favorable outcome of the case, *Baker v. Grice* served as a warning to Texas lawmakers that “equal protection defense” constituted a serious threat to the long-term viability of the antitrust law and its amendment.<sup>67</sup>

### *Arkansas Roots*

In the first decade of statutory regulation in Texas, the antitrust bills in the legislature with any traction tended to follow the pattern of the original 1889 statute, which was itself based on the proposal of John H. Reagan in the U.S. Congress. But all of that changed in 1899. Rather than amend the 1889 law again, or amend its 1895 amendment, Texas lawmakers threw out antitrust tradition and passed an entirely new law. This decision was all the more surprising because *Waters-Pierce Oil Company v. Texas* was underway, and the 1895 amendment was holding its own against the most powerful trust in Texas. The seemingly unprecedented Texas Anti-Trust Act of 1899 actually followed a precedent set by the state of Arkansas in that same year. To understand the details surrounding the passage of the Texas Anti-Trust Act of 1899, one must first understand the situation in Arkansas that spurred that state’s lawmakers to pass a sweeping and truly unprecedented antitrust law in March 1899.

The Arkansas Anti-Trust Act of 1889, known at the time as the Rector Anti-Trust Act because of its sponsorship by Elias W. Rector, speaker of the House of Representatives in Arkansas and son of the state’s sixth governor, Henry Massie Rector, was the first such law to be passed in Arkansas. The Rector Anti-Trust Act took a divergent path from existing

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<sup>67</sup> Singer, *Broken Trusts*, 42-43; *Texas Senate Journal* (1899), 11.

state-level antitrust statutes and deliberately drew the insurance industry under its sway. The sweeping text of the act outlawed all trusts or combinations in restraint of trade and made membership in any sort of price-fixing association illegal. Loosely based on a Missouri statute, Rector's bill carried a much broader interpretation of the state's authority to prosecute corporations involved with trusts. Insurance companies of Arkansas saw themselves not only specifically placed under the authority of the antitrust law, but also in conflict with the law by their membership in rating associations.<sup>68</sup>

Most insurance companies at this time belonged to rating associations or rating bureaus that ran calculations to set standardized premium rates based on the degree of risk entailed in a given transaction. In the minds of late nineteenth-century Arkansans (and Texans), these associations were equivalent to railroad pooling associations that fixed prices throughout a region. Unlike railroad pools, however, rating associations did not divide the market amongst members; but this difference meant nothing to Southerners who believed their insurance rates were unacceptably high. Banks typically required fire insurance for any mortgaged property because the insurance protected against not only fire, but also tornados and other weather-related damage—from homes to businesses and barns, new, mortgaged structures required fire insurance. To make matters worse, the vast majority of insurance companies in operation were headquartered in New York City and chartered as holding companies in New Jersey. One Arkansas newspaper estimated that 95% of the insurance written in Arkansas was written by these Yankee holding companies. Thus, residents of rural states, including Arkansas and Texas, saw companies from the northeast forcing standardized, monopoly prices on a necessity of life and sending the proceeds out of the state

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<sup>68</sup> John Gould Fletcher, *Arkansas* (Chapel Hill: University of North Carolina Press, 1947), 252; "Judge Rector's Views," *Dallas Morning News*, April 26, 1899.

and back to New York and New Jersey. The membership in rating bureaus alongside the southern antipathy for large New York and New Jersey corporations led Arkansas legislators in 1899 to pass an antitrust law that sought to decimate the insurance trust in the state.<sup>69</sup>

The opening section of the Arkansas Anti-Trust Act of 1899 declared all companies that “shall enter into or become a member of or party to any pool, trust, combination . . . to regulate and fix prices” to be in violation of the act and subject to prosecution. Rector and Arkansas Attorney General Jeff Davis both agreed that the result of such wording meant any company belonging to any such association was liable to prosecution under the law. The Rector and Davis interpretation took antitrust law a step further than any previous legislation by criminalizing in Arkansas activities conducted anywhere in the world. Corporations owned by a holding company were prohibited from operating in Arkansas based on the nature of a New Jersey charter, not any activities carried on in the state of Arkansas. Insurance companies participating in rating bureaus could be prosecuted, not just for their Arkansas rate-making, but for their membership in the association. In other words, the Rector Anti-Trust Act punished trusts everywhere, whether within or without the borders of Arkansas.<sup>70</sup>

Response to the Rector and Davis interpretation of the antitrust law varied. Reform-minded Arkansans supported the measure as the solution to their insurance problem. Others believed the measure to go too far, posing a threat to the stability of banking, insurance, and property ownership in the state. Insurance companies responded by threatening to withdraw from Arkansas; they made good on their threat and ceased operations in the state in March

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<sup>69</sup> “Mr. Janvier on Trusts,” *Dallas Morning News*, April 30, 1899; “The Old-Line Insurance Companies,” *Arkansas Democrat* (Little Rock, AR), April 27, 1899; “Letters from the People,” *Houston Daily Post*, July 17, 1899.

<sup>70</sup> “Insurance Companies Suspend,” *Dallas Morning News*, April 1, 1899; “Demurrer is Sustained,” *Arkansas Democrat* (Little Rock, AR), April 27, 1899.

1899, the same month that the law passed the Arkansas General Assembly. Texas reformers, whose existing antitrust statute appeared feeble in light of the new Arkansas law, saw the Rector Act as a model to be repeated in Texas.<sup>71</sup>

### *Antitrust Reform in Texas, 1899*

The insurance problem plaguing Arkansas in the late 1890s harmonized with the insurance problems in Texas at the time. Despite the addition of “aids to commerce” in the 1895 definition of monopoly, the insurance industry in Texas continued to be a problem for residents. The industry was subject to corruption and carelessness as some people burned themselves out of their property to cash in on policies and insurance agents became reckless during property booms. Citizens of the Lone Star State also criticized the industry on the grounds that Texas effectively lost millions of dollars annually in the form of insurance premiums paid to the northeastern-based insurance trust. In one particularly scathing newspaper analysis, the Populist *Southern Mercury* even equated the insurance industry with socialism:

“A, B, C, and D and E take out fire insurance policies. E has his property destroyed by fire and the company makes good the loss out of the money contributed by A, B, C, D, E. There is no other way by which the company can make E’s loss good only out of the money paid into the company in premiums. Then, who is it in the final evening up of things that makes good E’s loss? A, B, C and D, every one else who takes out a fire insurance policy. Are we not a curious people? We denounce communism and socialism in theory and practice them in the every day affairs of life!”

Fire insurance certainly constituted an ongoing problem in the Texas financial and property markets. The passage of a new antitrust law proffered not only an opportunity to redesign the

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<sup>71</sup> “Insurance Companies Suspend,” *Dallas Morning News*, April 1, 1899; “Arkansas Anti-Trust Law,” *Dallas Morning News*, April 4, 1899; “Anti-Trust Bill,” *Dallas Morning News*, April, 18, 1899.

statute to combat pro-corporate judges, but also a chance to once and for all remove from Texas the insurance trust and its associated problems.<sup>72</sup>

To further strengthen Texas antitrust law against federal judges sympathetic to the “equal protection defense,” and to hit at the heart of the insurance problem, reform-minded legislators in Texas employed a strategy of piecemeal legislation to accomplish their ends. Passing an entirely new antitrust act would be difficult enough without debates about the agricultural exemption and penal provisions, so the legislature tackled the latter two subjects in legislation separate from the new antitrust law. S. B. No. 323, H. B. No. 97, and H. B. No. 457 each passed the Texas Twenty-sixth Legislature late in its session, and combined to dramatically overhaul the existing antitrust statutes of Texas.<sup>73</sup>

The most significant of these piecemeal measures was S. B. No. 323, a comprehensive antitrust bill mimicking the Arkansas Anti-Trust Act of 1899. Senators Asbury B. Davidson, Simon J. Morriss, and Barry Miller introduced S. B. No. 323 on April 14, 1899, the day before a trio of House members introduced an identical bill (H. B. No. 804). Both bills followed the pattern of the Arkansas Anti-Trust Act that had passed that state’s General Assembly the month prior, and included the troublesome phrase that Rector and Davis had interpreted to reach trusts even outside the state. S. B. No. 323 took precedence over H. B. No. 804, and Senate Judiciary Committee No. 2 endorsed its passage on April 15, 1899. From there, S. B. No. 323 made quick progress, but that progress was tricky and difficult; the legislators had only a narrow window of opportunity to pass the bill

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<sup>72</sup> *Southern Mercury* (Dallas, TX), February 23, 1899; “Anti-Trust Law,” *Southern Mercury* (Dallas, TX), April 27, 1899.

<sup>73</sup> S. B. No. 323, Twenty-sixth Leg. 1<sup>st</sup> C. S. (1899); H. B. No. 97, Twenty-sixth Leg. 1<sup>st</sup> C. S. (1899); H. B. No. 457, Twenty-sixth Leg. 1<sup>st</sup> C. S. (1899).

before the legislative session ended in early June, and the fire insurance companies would not go down without a fight.<sup>74</sup>

Following the report of Senate Judiciary Committee No. 2, S. B. No. 323 became the topic of great statewide debate. Fire insurance companies operating in Texas threatened to suspend operations and leave the state as they had done in Arkansas. To combat the bill, many insurance companies circulated petitions throughout the state and sent them to legislators. Dozens of petitions and memorials flooded the halls of the Texas legislature during the spring of 1899; they came in waves, the first wave in support of the insurance companies, and the second in support of the antitrust bill. Representative Semmes Parish (Robertson County) introduced no fewer than five petitions from his district, and other delegates in both houses introduced multiple petitions as well. Senator Joseph B. Dibrell introduced a memorial from none other than W. C. Duggar of San Marcos, a former employee of Waters-Pierce Oil Company and witness against the company in its 1897 trial. Duggar claimed that the fire insurance companies engaged in deceitful tactics to persuade citizens to sign petitions and that many San Marcos residents regretted signing such petitions. He promised to send a petition to the legislature soon afterward with more signatures than any yet submitted by the insurance companies of the county.<sup>75</sup>

The debate and ruckus caused in the legislature by the content of S. B. No. 323 and the associated threat by insurance companies meant that the bill could not be passed without resorting to a Senate special committee. That committee, appointed on April 18, 1899, returned an endorsement of the new antitrust bill on April 24. S. B. No. 323 then passed its

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<sup>74</sup> *Dallas Morning News*, April 16, 1899; "Demurrer is Sustained," *Arkansas Democrat* (Little Rock, AR), April 27, 1899; *Texas Senate Journal* (1899), 696, 711; *Texas House Journal* (1899), 1527; S. B. No. 323, Twenty-sixth Leg. 1<sup>st</sup> C. S. (1899).

<sup>75</sup> "Oppose the Anti-Trust Act," *Dallas Morning News*, April 19, 1899; "An Anti-Trust Law Should Reach the Tariff as Well as the Insurance Trusts," *Dallas Morning News*, April 23, 1899; *Texas House Journal* (1899), 1099, 1109-1110, 1135, 1180, 1201, 1215, 1243; *Texas Senate Journal* (1899), 728.

original chamber on May 9. In the House, the bill passed with some amendments, but the Senate did not concur with the amendments from the House. Another special committee composed of members from both chambers met and amended the bill to be suitable for passage by both chambers.<sup>76</sup>

The amendments to S. B. No. 323 primarily revolved around agricultural or labor exemptions. The Senate special committee, composed of Calhoun L. Potter, Dr. Levi Lloyd, Charles V. Terrell, Joseph B. Dibrell, and William W. Turney, heard testimony from all parties involved in the matter (at least those willing and able to testify), but few witnesses supported the bill in its original form. John H. Reagan, no longer a U.S. Congressman, testified that he supported the bill in its current state, and the committee gave his opinion great weight. Pro-business parties against the bill claimed that its passage would result in the exit of all stable insurance companies from Texas, an event that would be detrimental to the state economy. Agricultural parties against S. B. No. 323 supported stricter antitrust measures, but argued that the bill's broad construction would place labor unions and agricultural cooperatives under its purview. This threatened both the Farmers Alliance and the "everyday transactions" referred to in the minority report on H. B. No. 51 in 1892.<sup>77</sup>

The special committee responded to these complaints in a report on April 20, 1899. The committee stated that the fire insurance companies need not leave the state if they were in compliance with Texas law, and that the state would be, in the long-run, better off without those companies involved in trusts or pools—after all, the removal of those types of corporations was the primary goal of antitrust legislation. In other words, the exit of trust-related insurance companies was a benefit to the state and served as evidence of the

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<sup>76</sup> *Texas Senate Journal* (1899), 769-770, 871, 1000, 1019.

<sup>77</sup> *Texas Senate Journal* (1899), 769-770; S. O. Young, "An Anti-Trust Law," *Dallas Morning News*, April 23, 1899.

effectiveness of the proposed measure. In response to advocates of a labor or agricultural exemption, the committee claimed that “under the very terms of the bill such organizations [labor unions] are not included. The bill is only intended to reach articles, and things concrete, and does not cover or reach labor organizations as such.”<sup>78</sup>

In its discussion of exempting labor from the bill, the committee unwittingly revealed two key concepts in understanding early antitrust theory. First, the committee used warlike language in its defense of the people of the state against large or foreign corporations. The committee went so far as to claim “that pools and trusts will never be destroyed in this State without a war between them and the people of Texas, and while we regret such a state of affairs we think the sooner it is understood that the Legislature of Texas proposes to stand by the people in such a warfare the better it will be for the country.” Antitrust existed to be a weapon of the people against special interests and the capitalists of the Northeast. In this regard, the theory of statutory regulation put into practice in Texas (and other states) was, if not a direct result of the spread of populist philosophy, certainly in harmony with it.<sup>79</sup>

Second, the committee believed that labor organizations fell outside the authority of the bill because it was “only intended to reach articles, and things concrete.” Pools, trusts, and conspiracies and contracts in restraint of trade are terms and concepts defined by actions, not things; they are founded upon agreements, secret or otherwise, and while they might involve “articles” and “things concrete,” the monopolization of a product is the symptom of unacceptable behavior in the market. Thus, the claim by the committee that the bill could not be interpreted in a way to include labor organizations sounds illogical or silly. Early antitrust theory, however, was able to find harmony in this apparent discord between actions and

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<sup>78</sup> *Texas Senate Journal* (1899), 769-770.

<sup>79</sup> *Id.*

items. Common law interpretation in the nineteenth century drew a line of separation between products necessary for life and luxury products. Deceitful market practices regarding luxury or non-essential items were more acceptable than monopolization of necessity items. For example, the existence of bread-baking monopoly in a town would be punished much more harshly than a monopoly on the sale of butter or honey. Thus, the category of the product or article monopolized made a significant difference to the courts in a common law case. The Senate special committee demonstrated a philosophy of antitrust that broadened this concept, interpreting antitrust regulation to only apply to persons or corporations engaged in a monopoly of particular “articles” or “things concrete.” Labor, a skill or service, would not fall under this definition. The only problem with the committee’s interpretation was that the heart and soul of the Texas antitrust statute was the core phrase in its definition of a trust as “any combination of persons, skill or acts.” An inherent exemption to agricultural products or labor organizations could not long survive alongside this definition, as reformers across the country would discover in a few short years. This seemingly nonsensical interpretation by Texas lawmakers exemplifies the transition of American jurisprudence to accommodate a complex, globalizing economy.<sup>80</sup>

The Texas Anti-Trust Act of 1899 departed from its predecessors, not in its theory or goal, but in its wording. The long-accepted core of the definition of a trust or monopoly as a combination of “persons, skill or acts,” grew to encompass “capital, credit, property, assets, trade, custom, skill or acts, or of any other valuable thing or possession.” The law, through its length and wordiness, tried to drown trusts and monopolies in a sea of verbosity. The

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<sup>80</sup> Id.; Letwin, “English Common Law concerning Monopolies,” 369-370; Hovenkamp, *Enterprise and American Law*. Common law precedent also produced a similar justification for the regulation of railroads as “common carriers” upon which the general public was dependent. William R. Childs refers to the “Medieval roots” of common carrier regulation. See Childs, *The Texas Railroad Commission*, 8.

wordiness was essentially an effort to outlaw as many specific practices as possible so that the law could not be construed in a way that threatened labor or farmer organizations. The most significant innovations in the 1899 antitrust law were the introduction of the affidavit and the prioritization of antitrust cases over most others. The law ordered that all corporations complete an affidavit each year swearing that the company did not belong to a trust or holding company. The affidavit could then be used as evidence in an antitrust case should the state file suit at a later time. This would solve the evidentiary difficulties made manifest in *Hathaway*. The new law bestowed upon the secretary of state the authority to issue and collect these affidavits. With this change, Texas antitrust enforcement, for the first and only time, broadened to encompass a governmental office other than the attorney general's. A second significant innovation in the Texas Anti-Trust Act of 1899 was the prioritization of antitrust cases above all others except criminal cases in which the defendant was remanded to prison. Lawmakers sought to speed up the process of statutory regulation through this new provision, but they would later find this addition to be a curse rather than a blessing. The whole 1899 law, in fact, would prove to be fool's gold.<sup>81</sup>

The second part of the Twenty-sixth Legislature's piecemeal antitrust reform strategy, a labor exemption from antitrust prosecution, sat idly in the House until S. B. No. 323 passed both chambers. Jefferson D. Childs introduced H. B. No. 97 in January, during the opening days of the regular session; while the bill quickly passed the House Committee on Labor, it did not receive any attention until late May, when labor and agricultural advocates struggled to find some concrete protection for their interests. The bill specifically allowed workers to organize into labor unions or other organizations, and also expressly approved of certain behaviors, like employment agreements between workers and employers. H. B. No. 97 also

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<sup>81</sup> *The Laws of Texas, 1897-1902 Volume 11, 246-252.*

stated that the law should in no way affect the power of the state of Texas to prosecute trusts, pools, and conspiracies in the state. A hotly debated issue, this modified working-class exemption, if subsumed by the comprehensive antitrust bill, would probably have killed that bill by preventing its passage through the legislature. A fierce battle pitted Dudley Wooten and Childs against Davis E. Decker and Charles Lane as the former tried to prevent the latter from making the law a dead letter. Decker and Lane both attempted to strike Section 2 from the bill, the enacting clause that declared certain actions on the part of workingmen to be acceptable in the eyes of the law.<sup>82</sup>

A final piece completed the puzzle of antitrust reforms passed by the Twenty-sixth Legislature. H. B. No. 845, introduced by Cecil Smith (Grayson County) on May 15, 1899, amended the penal provisions for the state antitrust statute. Previous legislation determined that for criminal violations, offenders could be sentenced to a prison term ranging from twelve months to ten years along with a fine ranging from fifty dollars to two-thousand dollars for each separate offense. The new provision of H. B. No. 845 applied only to the civil code, which did not include prison time. Each separate civil offense (each day of violation constituting a separate offense) could now be punished by a fine ranging from two-hundred to two-thousand dollars, a significant increase for violators.<sup>83</sup>

By amending the Texas antitrust statute in installments, the lawmakers of the Twenty-sixth Legislature ensured the successful passage of all parts of the antitrust reform strategy. By separating the labor or agricultural exemption from the text of the law, defense attorneys could not use the “equal protection defense” against prosecutions under the Texas Anti-Trust Act of 1899. That being said, the laws of 1889 and 1895 stayed on the books, and suits filed

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<sup>82</sup> Texas *House Journal* (1899), 72-73, 152, 1393-1398; *The Laws of Texas, 1897-1902 Volume 11*, 262.

<sup>83</sup> Texas *House Journal* (1899), 1359; *The Laws of Texas, 1897-1902 Volume 11*, 310.

under those laws continued their journeys through the state and federal judiciary systems. Later federal cases would undermine both the Texas Anti-Trust Act of 1889 and its 1895 amendment, but legislators did not know that in 1899. The outlook for statutory reform in Texas seemed optimistic for the state's reformers in 1899 and 1900 as the experimental antitrust law from Arkansas took effect in Texas and the state's most obnoxious trust, Waters-Pierce Oil Company, continued to find itself on the losing end of both state and federal judicial decisions. But beneath these apparent successes lurked ill fortune for Texas reformers; what seemed to be victory quickly turned into defeat.

### *Miscalculations*

Immediately after the passage of the Arkansas Anti-Trust Act of 1899, Arkansas Attorney General Jeff Davis filed an antitrust suit against several foreign insurance corporations chartered to do business in the state. By this time, the insurance companies had already ceased their operations in Arkansas, causing serious problems for the state's property market and homeowners. To make matters worse, Davis's efforts met repeated defeat at the hands of Arkansas state courts. In *The State of Arkansas v. Lancashire Insurance Company*, Davis appealed all the way to the Arkansas Supreme Court, arguing that the insurance company's membership in an insurance rating bureau in New York constituted a violation of Arkansas law. But the court disagreed, and on May 27, 1899, not even three months after the passage of the Arkansas Anti-Trust Act, the state Supreme Court declared the law to be extra-territorial and invalid against the insurance company. This decision completely undermined the antitrust statute hailed as the solution to the Arkansas insurance trust problem. Davis vowed he would never again file an antitrust suit under the 1899 statute. Unfortunately for Texas reformers, the Arkansas judicial decision did not bode well for the

state of Texas in its antitrust efforts under its 1899 statute. If the Arkansas Supreme Court declared the law inoperative, federal courts would be sure to do the same.<sup>84</sup>

While Arkansas reformers made serious miscalculations in 1899, Texas reformers did the same. Senator George C. Greer, a Dallas corporate lawyer, voiced his misgivings about the law to the Senate. He recommended that the chamber reconsider its passage of S. B. No. 323 in light of the Arkansas Circuit Court decision in *The State of Arkansas v. Lancashire Insurance Company*. But the Senate did not heed his warning, electing instead to continue supporting S. B. No. 323 despite its potential problems. This miscalculation on the part of the Texas legislature by passing the Texas Anti-Trust Act of 1899 was all the more detrimental because lawmakers had weakened a perfectly good antitrust statute that stood up in court against *Waters-Pierce*. Texas had more to lose in its gamble on the experimental antitrust law than did Arkansas, and lose it did.<sup>85</sup>

In 1898, Texas Attorney General Crane argued the state's appellate case against *Waters-Pierce*, and the court decided in favor of the state of Texas. About a year later, in January of 1899, he argued the case before the U.S. Supreme Court; that court also decided in favor of the state of Texas. The nation's high court, however, refused to rule on the constitutionality of the law, declaring its constitutionality to be tangential to the case. *Waters-Pierce*, then, was a sweet victory for Texas reformers and the state antitrust laws made bittersweet by the passage of a questionable replacement before the case even proved the

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<sup>84</sup> *The State of Arkansas v. Lancashire Fire Insurance Co.*, 66 Ark. 466, 51 S.W. 633, 1899 Ark. LEXIS 140 (1899).

<sup>85</sup> *Texas Senate Journal* (1899), 812. *Arkansas v. Lancashire Fire*, 1899 Ark. LEXIS 140. On Greer, see Legislative Reference Library of Texas, "Legislators and Leaders, George C. Greer," (<http://www.lrl.state.tx.us/legeLeaders/members/memberDisplay.cfm?memberID=3323&searchparams=chamber=~city=~countyID=0~RcountyID=~district=~first=~gender=~last=greer~leaderNote=~leg=26~party=~roleDesc=~Committee=>). accessed March 12, 2013. Greer's position as a corporate lawyer probably entailed his antipathy to seemingly radical legislation, like the 1899 antitrust law. That being said, his motivation for killing S. B. No. 323 does not negate the soundness and accuracy of his argument.

strength of the 1895 amendment. But the disappointment of 1900 was not all that was in store for proponents of state antitrust measures; the next few years brought even more disappointment at the hands of federal judges.

## **Chapter 4**

### **Return to Normalcy: Comprehensive Reform**

The Texas Anti-Trust Act of 1899, passed in May of that year, did not take effect until January 1900 in order to provide all corporations in the state of Texas enough time to submit affidavits to the secretary of state swearing nonparticipation in trusts or pools of any kind. The delay also allowed for gradual adjustments as insurance companies and lending institutions modified policies and braced for the economic turbulence to come. In one short decade, from 1889 to 1899, Texas lawmakers had passed three antitrust laws, and the state judiciary worked through countless criminal and civil antitrust cases. Due to the cumulative nature of the state's antitrust laws, prosecutions and civil cases became increasingly difficult to manage during this decade. Because each law subsumed its predecessor rather than replacing it entirely, one legal opinion from an appellate court might have to take into consideration elements of multiple antitrust laws. Furthermore, suits filed under the 1899 antitrust law faced a different set of attacks from defense attorneys than those filed under the initial two antitrust laws. While cumulateness complicated matters in antitrust cases, the problem became much worse when the U.S. Supreme Court made a decision that rendered Texas Anti-Trust Acts of 1889 and 1895 unconstitutional by accepting the argument of the Equal Protection Defense. Where the cumulateness of the three laws was sometimes tricky, removing the state's first two antitrust laws from an indictment made matters more complex by leaving the 1899 statute to stand on its own. While the Texas Anti-Trust Act of 1899 appeared to be invincible in 1899, events in Arkansas and Texas in the following years left Texas lawmakers poised and ready to pass yet another comprehensive antitrust reform in

1903—one that would return to the tried and true methods of the state’s first two antitrust efforts in 1889 and 1895.<sup>86</sup>

### *Connolly and the Agricultural Exemption*

In 1895, an Illinois man named Thomas Connolly used promissory notes to purchase sewer pipe from the Union Sewer Pipe Company. The pipe company, an Ohio corporation, held a permit to operate in Illinois as a foreign corporation. When Union Sewer Pipe tried to collect on the promissory notes used by Connolly to purchase the pipe, Connolly refused to pay, citing the antitrust statute of the state of Illinois. Like Texas, Illinois had a clause in its antitrust statute that nullified any contract involving the participation of a trust or pool. Connolly then claimed his contract with the company to be void and refused payment. Union Sewer Pipe, however, took him to court claiming that the company deserved payment for goods sold to Connolly. The case hinged upon the Freedom of Contract Clause of the U.S. Constitution and the constitutionality of the state’s invalidation of contracts involving trusts, yet the U.S. Supreme Court made its decision in the case on different grounds entirely.<sup>87</sup>

*Connolly v. Union Sewer Pipe Company* began with the pipe company suing Thomas Connolly and ended with a writ of error before the U.S. Supreme Court to decide the constitutionality of the Illinois antitrust statute. The nation’s high court addressed its constitutionality because the case wound its way through federal court rather than state court. The U.S. Supreme Court, in its 1900 decision in *Waters-Pierce Oil Company v. Texas*, had recently demonstrated its opinion that federal courts stand aside in state cases unless absolutely necessary. *Connolly*, however, was another matter because Thomas Connolly

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<sup>86</sup> *The Laws of Texas, 1822-1897 Volume 9*, 1169-1170; *The Laws of Texas, 1822-1897 Volume 10*, 112-115; *The Laws of Texas, 1897-1902 Volume 11*, 246-252; *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540; 22 S. Ct. 431; 46 L. Ed. 679; 1902 U.S. LEXIS 2269 (1902).

<sup>87</sup> *Connolly v. Union Sewer Pipe Co.*, 1902 U.S. LEXIS 2269.

relied upon both state and federal antitrust statutes to defend himself against the pipe company. First, he relied upon the Illinois antitrust statute to argue that his contract was null and void. Second, he used the Sherman Anti-Trust Act of 1890 and its promise of treble damages to those injured by trusts to argue that Union Sewer Pipe owed him money, not the other way around. Also, Union Sewer Pipe Company astutely filed its suit in federal court, which tended to be much more lenient towards corporations in the realm of antitrust than state courts. The audacious arguments made by Connolly threw his case into federal court while also putting federal judges in a position difficult to support him.<sup>88</sup>

The trial court in Connolly's case decided in favor of Union Sewer Pipe Company, so Connolly appealed to the Circuit Court of the Northern District of Illinois. That court dismissed his arguments, and in so doing held the Illinois antitrust statute to be unconstitutional because of its exemption for agricultural workers. This rendered the entire act invalid. Connolly then filed a writ of error with the U.S. Supreme Court hoping that the high court would overturn the decision of the Circuit Court. Connolly hoped in vain because John Harlan, one of the most forward-thinking of the U.S. Supreme Court justices of the time delivered a 7-1 decision in favor of the alleged trust, Union Sewer Pipe Company. Harlan declared that Connolly had no ground to stand on in his assertion that he need not pay for the sewer pipe delivered to him by Union Sewer Pipe Company. The company's potential violation of state and federal antitrust statutes did not prevent the company from exercising its right to file charges in the event of nonpayment. In other words, the right of the company to file a suit was not infringed by its potential antitrust violations. Union Sewer Pipe Company had the right to demand payment, and Connolly had no right to refuse.<sup>89</sup>

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<sup>88</sup> Id.

<sup>89</sup> Id.; *The Marketing Laws Survey*, ed. A. H. Martin, Jr., vol. 1, *State Antitrust Laws*, 719.

Connolly's defense of nonpayment relied heavily upon an Illinois antitrust statute from 1893. Like Texas, the state of Illinois had passed multiple antitrust laws in the 1890s, but this case concerned only the act of 1893 because it was the act in force at the time of Union Sewer Pipe's initiation of the nonpayment suit against Connolly. While the Illinois state legislature had passed an antitrust amendment in 1897, the court did not consider it in rendering its decision. Cumulativeness constituted a problem for antitrust reformers in states other than Texas because an adverse opinion from the U.S. Supreme Court regarding the constitutionality of the 1893 Illinois antitrust law could affect the validity of the state's other antitrust laws passed in 1891 and 1897.<sup>90</sup>

Connolly's reliance upon the Illinois antitrust law opened the door for the justices of the Supreme Court to determine the law's constitutionality. Harlan stated in his opinion that the agricultural exemption of the Illinois antitrust law of 1893 divided the residents of the state into separate classes and conferred special rights to one class and not the other. Agricultural workers or livestock raisers had the advantage of engaging in activity that, were they in another profession, would be considered illegal. Harlan concluded his remarks on the subject of the Illinois statute by saying,

“To declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State . . . and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary.”<sup>91</sup>

The high court's decision dramatically altered judicial precedent in state antitrust cases by providing incontrovertible support for the “equal protection defense” raised by antitrust

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<sup>90</sup> *Connolly v. Union Sewer Pipe Co.*, 1902 U.S. LEXIS 2269.

<sup>91</sup> *Id.*

defendants since the dawn of the state antitrust movement. The agricultural exemption, and, for the time being, state-level statutory regulation through antitrust, was dead. The change in legal precedent would be felt all over the nation as every state with an agricultural or labor exemption would have to rewrite its antitrust laws in order to comply with the U.S. Supreme Court.<sup>92</sup>

The *Connolly* decision affected antitrust enforcement in Texas almost immediately. Within weeks of the decision, Texas courts began using the precedent in deciding their antitrust cases in favor of defendants. The saga of antitrust suits filed between the state of Texas and Waters-Pierce Oil Company and its employees continued into the twentieth century. The 1900 case in which the U.S. Supreme Court stood aside and allowed the state of Texas to remove Waters-Pierce's permit to operate in Texas ended in scandal. That scandal, along with an obscure 1902 antitrust prosecution of the company combined to undermine state antitrust enforcement efforts.<sup>93</sup>

Waters-Pierce acknowledged defeat following its loss in *Waters-Pierce Oil Company v. Texas*, and in May 1900 requested from the secretary of state a new permit to operate in the state as a foreign corporation. Henry Clay Pierce signed for the new permit, and in so doing swore that Waters-Pierce was no longer part of Standard Oil. While on paper he appeared to be telling the truth, a secret deal between Pierce and the executives of Standard meant that Waters-Pierce would remain a Standard subsidiary. Pierce reacquired the Waters-Pierce stock that had been held by Standard, but rather than holding it in his own name, he signed the shares over "in blank." This meant that he renounced these shares, but the deal could not be completed until someone accepted them by signing for them. None of the

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<sup>92</sup> Id.; Singer, *Broken Trusts*, 52.

<sup>93</sup> The State of Texas v. Waters-Pierce Oil Company, 67 S. W. 1057 (1902); "Texas' Anti-Trust Law," *Dallas Morning News*, July 24, 1900.

Standard executives signed for the shares, meaning that they remained the property of Pierce, but Pierce's show of loyalty in signing over the shares continued relations between Waters-Pierce and Standard. Waters-Pierce took its instructions from Standard and sent to the company an amount of its profit proportional to the stock held "in blank" by Standard. Texas reformers, however, would not discover this secret arrangement until several years later, and when they did, another round of antitrust battle between the state and its most-hated trust ensued.<sup>94</sup>

In light of the *Connolly v. Union Sewer Pipe Company* decision, Texas Attorney General Thomas "Honest Tom" Smith could not replicate the 1900 antitrust victory against Waters-Pierce. While the state of Texas filed and won a well-known suit against Waters-Pierce in 1906, a more obscure case from 1902 immediately put into action the new precedent set by *Connolly*. In this case, the state court of civil appeals held the Texas antitrust acts of 1889 and 1895 to be unconstitutional. This loss for Texas reformers became a tremendous victory for Waters-Pierce, which was not successfully prosecuted by the state of Texas again until 1906. By that time, the state's antitrust statutes had recovered from the calamities of *Connolly* and the passage of the Texas Anti-Trust Act of 1899.<sup>95</sup>

The decision in the 1902 case *Waters-Pierce* left the state unable to rely upon the cumulateness of the Texas Anti-Trust Act of 1899; the state's legal code included provisions exempting agricultural workers and laborers, but the 1899 antitrust law itself provided no guaranteed protection for the state's working and farming class. Enforcement of the 1899 antitrust law had its own set of difficulties, and Texas reformers sought new and comprehensive antitrust legislation to avoid them. Until the state legislature could meet,

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<sup>94</sup> Singer, *Broken Trusts*, 55-56; "Texas' Anti-Trust Law," *Dallas Morning News*, July 24, 1900.

<sup>95</sup> *Texas v. Waters-Pierce*, 67 S. W. 1057; "Antitrust Laws," *Dallas Morning News*, April 2, 1902.

however, state prosecutors had to live with an unfriendly legal precedent in antitrust actions. This meant that every antitrust case argued before the court faced a likelihood of dismissal or decision in favor of defendants based on the principle set by *Connolly*. To make matters worse, the still-effective Texas Anti-Trust Act of 1899 made antitrust cases the priority of prosecuting attorneys, second only to criminal cases in which the defendant was not released on bail. Relief came swiftly for state prosecutors as a series of friendly decisions gave them some breathing room until the legislature could meet and pass new antitrust legislation in 1903.<sup>96</sup>

### *Mitigating the Damage in Texas*

A series of antitrust cases from 1902 to 1905 effectively limited the damage done to Texas antitrust law by the precedent from *Connolly*. One case salvaged the state's authority to revoke corporate charters and permits under the Texas Anti-Trust Acts of 1889 and 1895 despite the recent precedent to the contrary, while the other two cases supported the ever-weakening Texas Anti-Trust Act of 1899.

On paper, *The State of Texas v. Shippers' Compress Warehouse Company* appeared to work to the benefit of trusts operating in the state. On closer scrutiny, however, the case was as friendly to antitrust supporters as possible without actually rendering a decision in favor of the state. The case began with a trial and moved to an appellate phase, culminating with a hearing before the Texas Supreme Court in the summer of 1902. In each phase of its life, *Shippers' Compress* ended with a victory for the defendant company, but the state Supreme Court threw a bone to prosecutors by mitigating the damage done by *Connolly* to the 1889 and 1895 antitrust laws.

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<sup>96</sup> *The Laws of Texas, 1897-1902 Volume 11*, 246-252; "Why Our Trust Law is Invalid," *Dallas Morning News*, March 21, 1903.

In 1901, the Shippers' Compress Warehouse Company filed for a domestic charter from the secretary of state. That very same year, the company purchased six cotton compresses in North Texas. The purchase of a handful of cotton compresses might not sound like a clear antitrust violation, but in 1901 only seventy such compresses existed in the entire state of Texas. Furthermore, state law and the Texas Railroad Commission strictly regulated the compressing of cotton. Texas law required railroad companies to pay for the compressing of cotton, an expense passed on to the shipper. Also, cotton had to be compressed at the point of delivery to the railroad; if there was no compress nearby, the cotton had to be loaded onto the train and compressed at the first available stop. Control of these six compresses gave, according to Texas Attorney General C. K. Bell, a monopoly power over the compressing of cotton in several counties in North Texas.<sup>97</sup>

Justice Brown, writing for the Texas Supreme Court, affirmed the decisions of the two previous courts, rendering a decision in favor of the Shippers' Compress Warehouse Company. While the court could have easily decided the case based on the *Connolly* precedent, Brown found another aspect of the case upon which to base his decision. He stated that the purchase of the compresses was not illegal, and the intent of the purchasers could not be assumed by the court because the state had provided no evidence regarding intent. What is more, in avoiding the *Connolly* precedent, Brown stated that the Texas Anti-Trust Acts of 1889 and 1895 could be considered void only insofar as they intersected with the facts of *Connolly*. In other words, the section of the law maintaining the agricultural exemption was void, but the remainder of the law, including its granting to the state of the right to remove a corporate charter or permit, remained fully in force.<sup>98</sup>

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<sup>97</sup> The State of Texas v. Shippers' Compress Warehouse Co., 95 Tex. 603; 69 S.W. 58; 1902 Tex. LEXIS 206.

<sup>98</sup> Id.; *The Marketing Laws Survey*, ed. A. H. Martin, Jr., vol. 1, *State Antitrust Laws*, 719-720.

Aside from the judicial innovation of *Shippers' Compress*, a second benefit to the state of Texas in its antitrust efforts emerged during this time. State and federal courts continued to support the validity and efficacy of the Texas Anti-Trust Act of 1899 despite its cumulateness and its similarity to the voided Arkansas Anti-Trust Act of 1899. The Texas Anti-Trust Act of 1899 could easily have met the same fate as the Arkansas Anti-Trust Act of 1899, which the Arkansas Supreme Court invalidated mere months after its initial passage by the Arkansas General Assembly. Prior to the passage of the Texas Anti-Trust Act of 1899 on May 9, an Arkansas Circuit Court ruled against the Arkansas attorney general, bringing to light the constitutionality problems with the extra-territorial nature of the law. Texas Senator George C. Greer sought to tone down the Texas statute in light of the Arkansas Circuit Court decision, but his fellow senators overruled him. State lawmakers knew that their latest antitrust law had the potential to be a serious problem, yet they had continued with their experiment anyway.<sup>99</sup>

When *Connolly* threw out the foundational aspects of the Texas antitrust statutes, the Texas Anti-Trust Act of 1899 was left to stand on its own two feet, and it did so by the mercy of the courts. While new antitrust legislation could make statutory regulation easier and more effective in the future, the state had to continue its prosecutions initiated under the Texas Anti-Trust Act of 1899. Even after comprehensive antitrust reform in 1903, state prosecutors still had to continue prosecuting trust cases filed under the 1899 law. Two of these cases constituted significant victories for the state and made the processing of the final prosecutions under the 1899 law much simpler. In *The State of Texas v. Laredo Ice*

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<sup>99</sup> "A Trust Victory," *San Antonio Express*, May 28, 1899; *Texas Senate Journal* (1899), 812. For state and federal support of the Texas Anti-Trust Act of 1899, see *The State of Texas v. Laredo Ice Company*, 96 Tex. 461; 73 S. W. 951; 1903 Tex. LEXIS 160; and, *National Cotton Oil v. Texas*, 197 U.S. 115; 25 S. Ct. 379; 49 L. Ed. 689; 1905 U.S. LEXIS 1222. "A Trust Victory," *San Antonio Express*, May 28, 1899; *Texas Senate Journal* (1899), 812.

*Company*, the Texas Supreme Court ruled that the 1899 antitrust law was valid in its own right and that its cumulateness did not render it unconstitutional. The majority declared that the act was severable, and therefore valid. This case proved to be tremendously useful for the state's reformers and prosecutors because it formed the pillar upon which the U.S. Supreme Court based its decision in its review of *National Cotton Oil Company v. The State of Texas*.<sup>100</sup>

The National Cotton Oil Company was a foreign corporation operating in Texas, and the state sought to remove its permit on the grounds that the company engaged in price-fixing activity. The Texas court of civil appeals heard the case and decided against the oil company. National Cotton Oil then appealed to the U.S. Supreme Court, and the court affirmed the previous decision. While attorneys for the oil company contended that the Texas Anti-Trust Acts of 1889 and 1895 violated the Constitution, the constitutionality of the Texas Anti-Trust Act of 1899 became the deciding factor in the case. Texas Attorney General C. K. Bell argued that Texas precedent held the earlier antitrust acts to be invalid only in part. Only the parts out of step with *Connolly* contravened the Constitution; all other aspects, including the right of the state to revoke a charter or permit, remained in force. According to this precedent, the "equal protection defense" raised by National Cotton Oil's attorneys was a moot point—state precedent supported the attorney general's suit to revoke the company's permit. That being said, a U.S. Supreme Court decision declaring the Texas Anti-Trust Act of 1899 unconstitutional due to its cumulateness would have undermined the authority of the state and forced a judgment in favor of the defendant.<sup>101</sup>

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<sup>100</sup> *Texas v. Laredo Ice*, 1903 Tex. LEXIS 160.

<sup>101</sup> *National Cotton Oil v. Texas*, 1903 U.S. LEXIS 1222.

Fortunately for Texas reformers, the U.S. Supreme Court rendered a decision in favor of the state and its interpretation of the effect of *Connolly* on Texas antitrust cases. U.S. Supreme Court Justice McKenna stated, “the laws of the State against combinations and trusts are formed into a harmonious system . . . and that their provisions can be adjusted and reconciled so as to have constitutional operation.” In other words, he agreed with Texas Attorney General C. K. Bell that the Texas Supreme Court’s decision in *Laredo Ice* adequately defended the constitutionality of the 1899 antitrust statute. But Texans had heard support of this kind before; in 1900, the very same court declared it supported the authority of the state Supreme Court in its interpretation of the law only to declare a similar Illinois law unconstitutional only a few years later. The Texas Anti-Trust Act of 1899 remained workable by the magnanimity of the U.S. Supreme Court, but the reform interests of Texas had no need to breathe a sigh of relief. Texas lawmakers had already protected the state in the event of an unfriendly federal court decision by passing new and comprehensive antitrust reform in 1903, over a year prior to the U.S. Supreme Court’s decision in *National Cotton Oil*. Texas reformers had already learned their lesson about relying on the generosity of the U.S. Supreme Court, and they made sure that a federal court would never again arbitrarily nullify the spirit of the state’s statutory regulation efforts.<sup>102</sup>

### *The Texas Anti-Trust Law of 1903*

Immediately following the decisions in *Connolly* and *Waters-Pierce* in the spring of 1902, Texas residents feared for the future of statutory regulation in the state. A wave of trust victories vitiated the Texas antitrust statutes and revealed their ineffectiveness. While the 1899 statute would be salvaged, Texans of 1902 saw only its ineffectiveness and the threat

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<sup>102</sup> Id.

posed to it by changes in federal antitrust precedent. While the Texas Anti-Trust Act of 1899 appeared to be strong, the quick demise of its Arkansas predecessor undermined its potency in the state. Some insurance companies ceased operations in Texas, but many remained. While these foreign corporations continued to operate in Texas, slowly they began threatening to leave. The primary reason for departure was the annual affidavit mandated by the 1899 antitrust law. Regional directors of foreign (particularly European) companies argued that they could not with a clear conscience sign the document because they were not privy to information concerning the practices of the companies in other countries. These departures and threatened departures led to instability in the state's insurance business. For this, and also for the reasons raised by *Connolly*, Texas residents looked to the next legislative session for comprehensive antitrust reform.<sup>103</sup>

The Twenty-seventh Legislature, which met in 1901, did not pass or debate any antitrust bills because the shock to Texas statutory regulation in the form of *The State of Texas v. Waters-Pierce Oil Company* did not come until 1902. The Twenty-eighth Legislature, meeting in 1903, immediately seized upon the issue and debated no fewer than seven antitrust-related bills during the regular session. Of those seven, Governor S. W. T. Lanham endorsed three, and only one passed both chambers—H. B. No. 457.

The governor's message to the Twenty-eighth Legislature included a call to pass a new antitrust law. A later address called the lawmakers to return to the tried and true schema of the Texas Anti-Trust Acts of 1889 and 1895. The governor pointed out that antitrust law to date had been ineffective overall, and that substantial changes needed to be made to render the law operable against holding companies, commonly known as corporations "organized

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<sup>103</sup> "Anti-Trust Laws," *Dallas Morning News*, February 16, 1902; "Why Our Trust Law is Invalid," *Dallas Morning News*, March 21, 1900; "Antitrust Laws," *Dallas Morning News*, April 2, 1902.

under the laws of New Jersey.” To accomplish this end, he recommended passage of three bills. The first, a comprehensive antitrust reform act, broke away from the Texas Anti-Trust Act of 1899 and returned to the definitions and organization of the state’s first two antitrust endeavors. The second and third bills concerned the charter or permit regulations for domestic and foreign corporations. The day after this message, representatives McDonald Meachum of Grimes County and Thomas Connally of Falls County introduced H. B. No. 351, an exact copy of Governor Lanham’s proposed antitrust bill. The duo had already introduced a comprehensive antitrust reform bill, H. B. No. 316, on February 4, 1903. They laid aside H. B. No. 316 in favor of Governor Lanham’s proposal, H. B. No. 351, which eventually died with the Committee on Internal Improvements. In response, Connally and Meachum introduced a third antitrust bill (H. B. No. 457) which was quite similar to the governor’s proposal, but incorporated some aspects of their first antitrust bill (H. B. No. 316).<sup>104</sup>

Of Governor Lanham’s three proposed bills, only the comprehensive antitrust bill passed. The other two bills would have amended the laws regulating the chartering of foreign and domestic corporations. The new charter and permit regulations were essentially preventive measures intended to preclude trusts from receiving a charter to operate in Texas. The bills concerning domestic and foreign corporations did not pass because the new

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<sup>104</sup> Texas *Journal of the Senate of Texas, Twenty-eighth Legislature, Regular Session, 1903* (Austin: State Printer, 1903), 64-65, 289-292, 303-306, 323-324, 479; “Ends April First,” *Dallas Morning News*, February 27, 1903; H. B. No. 316, Twenty-eighth Leg. 1<sup>st</sup> C. S. (1903); H. B. No. 351, Twenty-eighth Leg. 1<sup>st</sup> C. S. (1903). On Meachum, see Legislative Reference Library of Texas, “Legislators and Leaders, McDonald Meachum,” (<http://www.lrl.state.tx.us/legeLeaders/members/memberDisplay.cfm?memberID=2910&searchparams=chamber=~city=~countyID=0~RcountyID=~district=~first=~gender=~last=meachum~leaderNote=~leg=28~party=~roleDesc=~Committee=>). accessed March 15, 2013. On Connally, see Legislative Library of Texas, “Legislators and Leaders, Thomas Connolly,” (<http://www.lrl.state.tx.us/legeLeaders/members/memberDisplay.cfm?memberID=3250&searchparams=chamber=~city=~countyID=0~RcountyID=~district=~first=~gender=~last=connally~leaderNote=~leg=28~party=~roleDesc=~Committee=>). accessed March 15, 2013.

stipulations would only apply to newly formed corporations. Laws against ex post facto ensured that those companies already in existence could not be held accountable under the new regulations. This would omit from regulation all of the trusts and insurance companies already in operation in the state while also placing an extra burden on startup companies. In other words, the regulations could not touch the existing trusts, but disadvantaged their potential competitors. A House minority report from the Committee on Internal Improvements went so far as to claim that “monopolies could well afford to applaud such liberal assistance from the Twenty-eighth Legislature.” For this reason, Texas lawmakers did not pass the domestic and foreign charter regulation bills.<sup>105</sup>

The comprehensive antitrust bill in its original form did not pass muster in the House. But while H. B. No. 351 languished in committee, H. B. No. 457 moved rather quickly through House. Rather than make H. B. No. 457 cumulative like all previous antitrust measures, lawmakers made it a full replacement of all earlier antitrust laws. Despite the failure of H. B. No. 351, H. B. No. 457 remained practically identical to it, for the only aspect of H. B. No. 316 incorporated into H. B. No. 457 was its repeal of all prior antitrust laws. The idea of repeal and starting over with a clean slate was an attractive one to lawmakers who had, over the last fifteen years heard and debated over twenty-five proposed antitrust measures.<sup>106</sup>

The House debated very few amendments to H. B. No. 457. The bill returned to the traditional definition of a trust as “a combination of capital, skill or acts” and several House

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<sup>105</sup> Texas *Journal of the House of Representatives, Twenty-eighth Legislature, Regular Session, 1903* (Austin: State Printer, 1903), 305-306, 425.

<sup>106</sup> “Ends April First,” *Dallas Morning News*, February 27, 1903; H. B. No. 316, Twenty-eighth Leg. 1<sup>st</sup> C. S. (1903); H. B. No. 351, Twenty-eighth Leg. 1<sup>st</sup> C. S. (1903); *The Laws of Texas, 1903-1905 Volume 12*, 119-123, Book, 1906; digital images, (<http://texashistory.unt.edu/ark:/67531/metaph6695/> : accessed March 12, 2013), University of North Texas Libraries, The Portal to Texas History, <http://texashistory.unt.edu>; crediting UNT Libraries, Denton, Texas.

members worried that the inclusion of “skill or acts” might prove detrimental to farmers and laborers. Many of the proposed amendments sought to reword the definition of “trust” so as to protect farmers—none of these amendments passed in the House. A strong contingent believed that the bill passed in 1899 protecting laborers and agricultural workers remained in force and was not threatened or undermined by the *Connolly* decision. The only amendment passed by the House was the inclusion of two sections into the bill that prevented corporations convicted of antitrust violations from selling their assets to a holding company. Many congressmen feared that corporations convicted might simply sell their assets to a trust or holding company, become a member of that trust, and thus circumvent the Texas antitrust statute. Congressman Richard Mays (Navarro County) recommended inserting a section prohibiting this behavior for domestic corporations and another for foreign corporations.<sup>107</sup>

Following the inclusion of Mays’s amendment, H. B. No. 457 passed the House by the remarkable vote of 103-2 on March 23, 1903. The bill then went to the Senate, where the implications of the definition of trust as “a combination of capital, skill or acts” underwent further debate. The Senate went so far as to ask Attorney General Bell what the consequences would be should “skill or acts” be removed from the bill. Bell responded in a letter to the chamber on March 28, firmly telling the Senate that removing the words “skill or acts” would “render it ineffectual to accomplish the purpose for which the law is intended.” Bell informed the Senate that the majority of trust prosecutions hinged upon the phrase “skill or acts,” and that very few corporations could be prosecuted as combinations of capital alone. He further reassured the senators that the passage of H. B. No. 457 would not repeal the protection granted to farmers and laborers in 1899 in H. B. No. 97 of the Twenty-sixth Legislature.

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<sup>107</sup> Texas *House Journal* (1903), 938-942.

After this eye-opening response from Bell, the members of the Senate proceeded to quickly pass H. B. No. 457 with the phrase “skill or acts” intact.<sup>108</sup>

### *Conclusion*

H. B. No. 457, or the Texas Anti-Trust Law of 1903, returned to the tried and true schema of the Texas Anti-Trust Acts of 1889 and 1895; the primary innovations in the 1903 antitrust act were the elimination of the agricultural exemption and the repeal of all previous antitrust acts. While the 1903 antitrust act repealed the earlier three, antitrust cases filed under previous acts that had not reached a terminal court continued in their prosecutions. *National Cotton Oil* was one such case. But within a few years, all cases filed under the 1895 and 1899 acts would complete their appeals, leaving all future antitrust cases to be prosecuted under the Texas Anti-Trust Law of 1903.

The state of Texas won numerous antitrust convictions in the following decades under the new antitrust act, including convictions of Waters-Pierce Oil Company, Standard Oil Company, and Humble Oil and Refining Company. Texas residents filed many civil suits involving banks, cooperatives, and insurance companies as well. After a decade and a half of struggle, Texas lawmakers had finally crafted legislation that protected the people of Texas from combinations in restraint of trade while also passing constitutional muster.<sup>109</sup>

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<sup>108</sup> Texas *House Journal* (1903), 942; Texas *Senate Journal* (1903), 835-845, 930.

<sup>109</sup> *The Laws of Texas, 1903-1905 Volume 12*, 119-123.

## Epilogue

The Texas Anti-Trust Law of 1903 received several minor amendments in the years following its passage. In 1907, the state legislature passed five separate amendments to the statute. This time, rather than rewrite the law entirely, lawmakers passed many small bills which targeted specific sections or clauses in the act. For instance, one bill amended the penalty provision for antitrust violations, making the penalties much heavier. Another bill gave state judges the authority to inquire into the progress of antitrust cases and also appointed a special commissioner to oversee the collection of testimony in antitrust cases. Yet another bill amended the rules regarding the collection of witness testimony. These multiple laws, when taken together, changed many of the details of the antitrust statute, but the core of the law remained the same and would continue to remain so for another eighty years.<sup>110</sup>

At first glance, the significant antitrust amendments of 1907 support the commonly accepted assertion that the Progressive Era in Texas commenced in 1907 under Governor Thomas M. Campbell. However, the 1903 and 1907 antitrust measures, when viewed as the culmination of the state's efforts in statutory regulation, in fact undermine that assertion. The longstanding support throughout Texas for state intervention in and regulation of the market provides strong evidence in the argument favoring a "long Progressive Era" that began percolating in the 1870s and 1880s.<sup>111</sup>

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<sup>110</sup> Texas *Journal of the House of Representatives, Thirtieth Legislature, Regular Session, 1907* (Austin: State Printer, 1907); Texas *Journal of the Senate of Texas, Thirtieth Legislature, Regular Session, 1907* (Austin: State Printer, 1907).

<sup>111</sup> Rebecca Edwards, "Politics, Social Movements, and the Periodization of U.S. History," *The Journal of the Gilded Age and Progressive Era* 8, no. 4 (October 2009): 461-473; Nell Irvin Painter, *Standing at Armageddon: The United States, 1877-1919* (New York: W. W. Norton & Company, 1987).

The multiple revisions and amendments made to the Texas antitrust laws from 1889 to 1907 illustrate the difficulty of enforcing state antitrust law at the turn of the twentieth century. While antitrust was a relatively young method of regulation, it had its theoretical roots in classicism, making it a regulatory method difficult to carry over into the administrative state developing alongside it. In its early years, antitrust precedent was subject to almost-constant reinterpretation, demanding flexibility from a rigid framework and leaving its operation in Texas and elsewhere in flux. The constant questioning of the constitutionality of state antitrust laws led to rulings against their constitutionality, forcing state legislators and jurists to rewrite or reinterpret long-standing statutes. While Texans sought to create a single catch-all defense against trusts and monopolies in the form of antitrust law, Texas antitrust law in its early years failed to deliver the cross-industry protection expected by the state's reformers. This stands in opposition to the success of the TRC in its early years, which so effectively rationalized the state's railroad industry that it received ever-greater regulatory responsibilities from the Texas legislature. Bureaucratic regulation succeeded when statutory regulation brought questionable results.<sup>112</sup>

While Texas lawmakers reworked the state antitrust statute in the first decade of the twentieth century, antitrust as a form of regulation began its transition from primarily a state matter to primarily a federal prerogative. Numerous judgments from the U.S. Supreme Court widened the definition of interstate commerce, effectively collecting most business practices under its definition. The gradual reinterpretation of interstate commerce led to a growth of federal regulatory power, which undermined state antitrust enforcement efforts during and

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<sup>112</sup> Childs, *The Texas Railroad Commission*, 143-144. If increased power and responsibility define success, then the TRC certainly succeeded in its efforts during its first three decades of existence. Childs attributes this success to the growth of consumerism and the development of a national administrative state. These innovations made the "pragmatic federalism" and the "cooperative business-government structure" of commission-style regulation effective tools for rationalizing the American economy.

after the New Deal Era. In spite of this change, the state of Texas continued to rigorously enforce its antitrust laws, but with a much narrower focus than federal regulators empowered to file charges relating to interstate commerce.<sup>113</sup>

The transition from state to federal antitrust regulation had damaging repercussions for proponents of strict enforcement. The “Rule of Reason” employed by federal courts beginning with William Howard Taft in *Addyston Pipe* (1899) and modified in the 1911 federal conviction of Standard Oil, provided a safe haven for trusts or monopolies that fell under its definition. Also, attitudes toward the national economy in the early twentieth century often included shades of Social Darwinism that glorified corporate conglomeration as a sign of vitality. President Theodore Roosevelt, the inappropriately named “Trust-Buster,” certainly increased federal antitrust prosecutions considering the fact that the U.S. attorney general’s office filed zero antitrust suits in the several years prior to his inauguration, but he firmly believed that business consolidation was both inevitable and healthy. In other words, the strong survived and growth promoted efficiency. Large corporations also avoided antitrust prosecutions in light of the popular theory that industrialization had so fundamentally altered the economy that small businesses were incapable of engaging in the marketplace as efficiently as corporate giants.<sup>114</sup>

Federal antitrust prosecutions increased, and the federal government slowly took over prosecution of the nation’s largest corporations. But the growth of federal regulatory power did not confine itself solely to the realm of statutory regulation—in both statutory and bureaucratic regulation the federal government increased its power at the expense of the

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<sup>113</sup> Hovenkamp, *Enterprise and American Law*, 243-244; Moody, “Texas Antitrust Laws,” 121-122.

<sup>114</sup> William L. Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (New York: Random House, 1965), 137-142; Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (Cambridge: The Belknap Press of Harvard University Press, 1977); *United States v. Addyston Pipe and Steel Company*, 175 U.S. 211, S. Ct. 96, 1899 U.S. LEXIS 1559 (1899); *The Standard Oil Company of New Jersey, et al v. United States*, 221 U.S. 1, S. Ct. 502, 1911 U.S. LEXIS 1725 (1911).

individual states. While bureaucratic growth in state and federal government began in the 1880s, it did not gain much momentum until the height of the Progressive Era during the 1910s, by which time the federal government had asserted its preeminence over the states in the realm of corporate regulation through both antitrust and commission. In 1914 the Texas Railroad Commission faced an accumulation of federal power at its expense in a series of cases collectively known as the *Shreveport* rate cases. The U.S. Supreme Court expanded the power of the Interstate Commerce Commission by allowing the federal agency to set intrastate railroad rates, effectively undermining the authority of the TRC to set rates in Texas.<sup>115</sup>

In the same year of the *Shreveport* rate cases and the creation of the FTC, Congress also passed the Clayton Anti-Trust Act. While many states had passed multiple antitrust measures in the fifteen years between 1890 and 1905, the federal government had passed only one. The Sherman Anti-Trust Act of 1890, a short, vague document compared to the statutes of many states (including Texas) would not be amended significantly until 1914 with the Clayton Anti-Trust Act. The Clayton Anti-Trust Act exemplified the transition in federal antitrust law that had taken place over the previous decade. A Progressive document, the law actually included an exemption for agricultural workers and laborers despite the precedent set by *Connolly*. In other words, federal jurisprudence used *Connolly* to deliver a mortal wound to state antitrust enforcement, but gradually reinterpreted the Equal Protection Clause of the Constitution to accommodate a class-based exemption. This reinterpretation served as a

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<sup>115</sup> Childs, *The Texas Railroad Commission*, 124; Skowronek, *Building a New American State*; *Houston, East and West Texas Railway Company v. United States*; *Texas and Pacific Railway Company v. United States*, 234 U.S. 342; 34 S. Ct. 833; 58 L. Ed. 1341; 1914 U.S. LEXIS 1154 (1914). Despite the encroachment of federal power upon both statutory and bureaucratic regulatory efforts, TRC regulators at times took issue with the antitrust laws of Texas and the antitrust sentiment throughout the state. See Childs, *The Texas Railroad Commission*, 168-169.

federal power-grab in the realm of business regulation that could not be undone by state reformers.<sup>116</sup>

Texas legislators continued to amend the Lone Star State's antitrust law throughout the first several decades of the twentieth century, but the law lived on in its essential form until 1983. The Texas Free Enterprise and Antitrust Act of 1983 dramatically changed the existing antitrust statute to more closely mirror federal antitrust law, which provided much more flexibility in the application of antitrust law than the state's early endeavors. By 1983, the rise of the New Right and the deregulation movement had dramatically altered the perception of antitrust efforts in Texas and throughout the nation. The change in the definition of conservatism from one that embraced government intervention to one that spurned it resulted in a pro-business, deregulation emphasis in the law which diametrically opposed the intentions of the state's nineteenth-century reformers. The state of Texas had transitioned from a hotbed of agrarian reform to a bastion of conservatism in one short century.<sup>117</sup>

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<sup>116</sup> The most notorious instance in which a holding company escaped conviction through the "Rule of Reason" is *United States Steel Corporation* (1920), in which the U.S. Supreme Court declared that "the law does not declare mere size an offense." *United States v. United States Steel Corporation*, 251 U.S. 417; 40 S. Ct. 293; 64 L. Ed. 343; 1920 U.S. LEXIS 1630 (1920).

<sup>117</sup> Paul Womack, "Monopolies," *Handbook of Texas Online* (<http://www.tshaonline.org/handbook/online/articles/jtmqu>), accessed March 25, 2013. Published by the Texas State Historical Association; Hovenkamp, *Enterprise and American Law*, 243-249, 267.

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Brennan Gardner was born February 14, 1988, in Slidell, Louisiana. She is the daughter of Randy and Vicky Gardner of Colleyville, Texas. In 2006 she graduated from Bethesda Christian School, Fort Worth. She continued her education at Oklahoma State University, Stillwater, Oklahoma, receiving a Bachelor of Arts degree with a major in History in 2010.

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## ABSTRACT

### TEXAS ANTITRUST LAW: FORMULATION AND ENFORCEMENT, 1889-1903

by Brennan Gardner, M.A., 2013  
Department of History  
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Dr. Gregg Cantrell, Erma and Ralph Lowe Chair in Texas History

This paper examines the early years of antitrust law in Texas, from the multiple antitrust acts passed by the state legislature between 1889 and 1903 to the difficulties encountered by state prosecutors in antitrust enforcement efforts during that time. Texas reformers, hoping that laws prohibiting trusts would solve a host of economic problems, continued to strengthen and improve the antitrust laws in their first fifteen years of operation. A thorough study of the Texas legislative record and precedent-setting antitrust cases reveals the controversy generated by the antitrust laws, and how that controversy was affected by changes in the national economy, American legal theory, and federal state policy. Texas antitrust law is then situated within a wider context of coincident nationwide regulatory efforts as regulation transitioned from a state matter to a federal one while also evolving away from antitrust and toward bureaucracy.