RICE UNIVERSITY

BLESS THE PURE AND HUMBLE: TEXAS LAWYERS
AND OIL REGULATION, 1919-1936

by

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ABSTRACT

Bless the Pure and Humble: Texas Lawyers and Oil Regulation, 1919-1936
by Nicholas George Malavis

The legal history of petroleum regulation illustrates the multi-faceted legal, economic, and political roles lawyers played when serving both private and public interests. Historians' interpretations have largely ignored these complex interactions, and, in analyzing lawyers' functions, stressed economic or political perspectives. Given the primacy of the rule of law in the American constitutional polity and the private ownership of most of America's petroleum resources, attempts of public authorities to regulate petroleum production were subject to judicial review. Therefore, the problem of petroleum became a complex constitutional as well as legal issue to be defined by lawyers. But attorneys did more than shape petroleum law. They influenced business decisions of their clients, legislation, and administrative policies, as well as judicial rulings. The role of lawyers in shaping the outcome of the petroleum problem undermines the simplistic view that attorneys perform only legal tasks separate from business, politics, and society, and suggests that lawyering transcends neat boundaries separating economics, politics, and law.
ACKNOWLEDGEMENTS

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I am eternally indebted to my parents, George and Jennie Malavis for their love and devotion. To them, I dedicate this work.
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<tr>
<td>AIMME</td>
<td>American Institute of Mining and Metallurgical Engineers</td>
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<td>ALI</td>
<td>American Law Institute</td>
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<td>API</td>
<td>American Petroleum Institute</td>
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<td>ETOLA</td>
<td>East Texas Oil Landowners' Association</td>
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<td>FOCB</td>
<td>Federal Oil Conservation Board</td>
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<td>FTB</td>
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<td>Federal Trade Commission</td>
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<td>IOC</td>
<td>Interstate Oil Compact</td>
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<td>IPAA</td>
<td>Independent Petroleum Association of America</td>
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<td>IPAOM</td>
<td>Independent Petroleum Association Opposed to Monopoly</td>
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<td>IPAT</td>
<td>Independent Petroleum Association of Texas</td>
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<td>NIRA</td>
<td>National Industrial Recovery Act</td>
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<td>NRA</td>
<td>National Recovery Administration</td>
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<td>OSAC</td>
<td>Oil States Advisory Committee</td>
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<td>PAB</td>
<td>Petroleum Administration Board</td>
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<td>PCC</td>
<td>Planning and Coordinating Committee</td>
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<td>TOGCA</td>
<td>Texas Oil and Gas Conservation Association</td>
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<td>VE</td>
<td>Vinson &amp; Elkins</td>
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INTRODUCTION

The problem of petroleum was rooted in an 1875 decision by the Pennsylvania Supreme Court. Lacking any legal precedents or knowledge of the peculiar nature of subterranean petroleum, the judges compared oil and gas to wild game. The analogy to animals *ferae naturae* was based mainly on the judges' individualistic conception of the ownership rights of adjacent landowners in a common oil reservoir without concern for the public interest. Courts in other oil-producing states subsequently adopted the "rule of capture" to define legal rights in petroleum. The capture theory awarded title to whoever first appropriated the underground oil and gas without regard to conservation or the uses which were made of the petroleum after its extraction. The rule of capture was discredited and partially abandoned in the early twentieth century, but not before inciting the same ruthless exploitation that characterized the taking of wild animals where game laws were non-existent. An inestimable amount of America's vital and unreplenishable oil and gas reserves were wasted in the process.

The rule of capture imposed no production restraints and merely required landowners to extract oil or gas through wells drilled on their land only. To secure their share and protect their property interests, landowners competed with each other to produce as much oil and gas as possible regardless of market demand. Excess supply was needlessly wasted, forcing prices down below operating costs. Scientific and technological advances in the early
twentieth century debunked the capture theory by proving that subterranean petroleum did not migrate like wild animals but maintained its status until expelled by pressure through artificial openings in the reservoir. But this evidence had outpaced the ability or willingness of legislators and judges to formulate adequate laws to sanction the application of scientific production methods to alleviate the inefficiency, waste, and instability wrought by the rule of capture.

Court decisions through the early 1930s refused to recognize new scientific and engineering principles of petroleum production. Early-twentieth-century jurists viewed evidence refuting the capture theory through the prism of their late-nineteenth-century background and legal education. Efficient production methods could not be implemented without legal sanction thereby perpetuating waste and instability in the petroleum industry. The discovery of several prolific oil fields in the late 1920s, topped by the East Texas field in October 1930, accentuated the overproduction problem to a crisis. After failing to resolve the problem through voluntary cooperation, oilmen reluctantly opted for state and federal regulation.

II

Government regulation of petroleum production has been interpreted as an enlightened policy congruent with the national interest. This theory recognized a paramount state interest in the conservation and proper utilization of petroleum resources to prevent waste. By the 1920s, petroleum had become strategically and economically vital and was a source of government tax

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revenue. From another perspective, oilmen supported conservation to rationalize their true objective of evading the pressures of competition. Government regulation was not perceived as a neutral force balancing the interests of consumers, independent producers, and major integrated oil companies. Public policy was allegedly constructed under the influence of large producers to restrict production in order to alleviate oversupply and raise prices.\(^2\) Despite some variations, the foregoing interpretations have considered the petroleum problem from an economic perspective.

The problem of petroleum has also been analyzed from a political perspective. David F. Prindle evaluated a half century of public policy choices by the Texas Railroad Commission and their effect on the state's oil and gas industry. He focused on the political processes that led to important decisions by the Commission and how these decisions affected Texas and the rest of the United States. Robert Engler attempted to show how the economic power of petroleum influenced the American political system, especially foreign policy. In a recent publication, Daniel Yergin portrayed oil as a commodity intertwined with national strategies and global politics and power.\(^3\)

Previous studies thoroughly and adequately analyzed two interrelated issues of the problem of petroleum--economic and political--but failed to address the legal concerns. Given the primacy of the rule of law under the


American constitutional system, voluntary and state regulation of the production of privately owned petroleum was subject to judicial review. Although economic and political considerations influenced public policy toward petroleum conservation, no regulation could be affected without judicial sanction. Therefore, petroleum was primarily a legal problem to be solved by lawyers.

III

The legal battle over petroleum illustrated the tension between the persistence of nineteenth-century concepts of law and economics and the Progressive faith in the application of scientific solutions to political, social, and economic problems. Issues entailing private versus public interests, competition or monopoly, states' rights and federal power, and legislative opposed to executive power were inherent in the legality of state regulation of petroleum production during the 1920s and 1930s. The primacy of private property in Anglo-American jurisprudence made the conflict between private and public rights and states' rights versus national power the two most contested legal issues involving petroleum. Landowners defended their "vested" traditional common law right to exploit privately owned petroleum against the exercise of state police power to enforce conservation. They employed states' rights doctrine to resist federal regulation of intrastate production in order to protect the national interest in vital and unreplenishable petroleum reserves. These hotly contested legal issues were ultimately decided by the courts based on lawyers' arguments.⁴

James Willard Hurst, Stanley Kutler, and Morton Horowitz are among
legal historians who have argued that nineteenth-century judges shaped public
law doctrines to promote economic development. Hurst and Kutler described
the development of nineteenth-century American law in terms of the "release of
creative energy," meaning entrepreneurial energy, to facilitate economic growth
and prosperity. Horowitz agreed with Hurst and Kutler that courts gave
preference to "dynamic" over "static" property rights to encourage
entrepreneurial activity and innovation, but he maintained that the release of
creative energy enhanced the privileges of the already wealthy and powerful
instead of spreading economic benefits among the greatest number of people. 5

The legal contest over regulation of petroleum production fits the
ideological interpretations of Arnold M. Paul and Herbert Hovenkamp more
neatly than the instrumental thesis [that law is shaped to promote economic or
social ends]. 6 Paul argued that the judiciary emerged in the 1890s as the
interference. The authors stated (23), "Chief Justice Lemuel Shaw of the Massachusetts
Supreme Judicial Court, a peer of Marshall, Story, and Taney, originated the [police power]
doctrine in Commonwealth v. Alger (1851), where he defined the police power as 'the power
vested in the legislature to make...all manner of wholesome and reasonable laws...not repugnant
to the constitution, as they shall judge to be for the good and welfare of the commonwealth.'"
They argued (53), "The public law of Jacksonian America played a central role in assigning rights
and duties, privileges and handicaps, among the varying groups of American society. One
dominant trend appeared as midcentury approached: law, especially judge-made law, promoted
the interests of investors in order to encourage the accumulation of investment capital." Harry N.
(March 1984): 217-251. Scheiber argued (219) that it would be a mistake "to limit our
understanding of rule of law in our constitutional and legal history so as to confine it altogether to
notions of private claims against government." He contends that "American judges and legal
commentators have given sustained, explicit, and systematic attention to the notion that the
public, and not only private parties, have 'rights' that must be recognized and honored if there is to
be true rule of law." 5

5James Willard Hurst, Law and Conditions of Freedom in the Nineteenth-Century United States
(Madison: University of Wisconsin Press, 1967); Stanley I. Kutler, Privilege and Creative
Destruction: The Charles River Bridge Case (Philadelphia: J. B. Lippincott, 1971); Morton J.
University Press, 1977); Horowitz, The Transormation of American Law, 1870-1960: The Crisis of
6Arnold M. Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895
(Ithaca, N.Y.: Cornell University Press, 1960); Herbert Hovenkamp, Enterprise and American Law,
principal bulwark of conservatism and transformed the due process clause of the Fourteenth Amendment into a substantive check upon legislative regulation. It was part of a late-nineteenth-century, conservative-oriented constitutional revolution which expanded the scope of judicial supremacy. Paul noted two main streams of legal conservative thought which influenced judicial decision-making: laissez-faire, drawing heavily on the antipaternalism of Herbert Spencer and dedicated to the utmost freedom for economic initiative with the least legislative interference; and the desire to accord the highest protection to private property and to manage and control the forces of popular democracy. Late-nineteenth-century conservative jurists seized upon the treatises of Thomas M. Cooley and Christopher G. Tiedeman who argued that state regulation in the broad public interest was dangerously intruding upon vested property rights, individual liberties, and the right to conduct personal business with little governmental interference.7

Hovenkamp contended that classical economics dominated American economic thought from the Jacksonian era to the New Deal and that economic theory placed judicial decision-making above crass interest group politics. Classical economics pursued wealth maximization at the expense of redistributive concerns, thereby insulating itself from blatant political manipulation by interest groups. Hovenkamp emphasized that American judges were familiar with at least the rudiments of classical economics, which they consciously employed in their decision-making. He explored the mounting

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tension between classical economic theory's abhorrence of redistributive state regulation and the late nineteenth-century economic phenomena that urgently demanded state regulation to deal with problems like monopolies. Judges incorporated dominant economic models into judicial decision-making as long as they maximized wealth. When they ceased doing so, the judges shifted to emerging models that promoted wealth maximization. Contrary to Horowitz, Hovenkamp argued that all wealth-maximizing judicial decision-making in the late-nineteenth century was politically neutral and not influenced by any particular interest group.

IV

Ideology, rather than economics or politics, guided judicial decision-making regarding petroleum rights from the inception of the rule of capture in 1875 until the Connally Hot Oil Act of 1935. The courts that ultimately resolved conflicting legal rights to petroleum between 1875 and 1935 were dominated by jurists who received their legal training in the late-nineteenth-century. As Paul demonstrated, they were imbued with the predominate jurisprudential attitude of the era which put a primacy on the protection of private property against unwarranted governmental intrusion. And as Hovemkamp suggested, they were guided more by the laissez-faire approach of classical economic theory than by interest group politics. Throughout the legal battle over regulation of petroleum production, from the rule of capture through the New Deal petroleum code, the courts consistently favored the private over the public interest.

Lawyers became key role players in the legal contest over regulation of petroleum production. In arguing for or against production controls, lawyers either defended traditional common law property rights against unwarranted governmental interference or advocated the exercise of state police power to
regulate privately owned petroleum in order to promote the public interest in conservation. The effects of judicial decisions in key petroleum cases, especially during the early 1930s, illustrated how judges were guided more by ideology than economics or politics. By overturning state and federal production controls, judges protected traditional private property rights against what they perceived to be unreasonable and dangerous state interference, regardless of the political consequences or the economic cost in terms of wasted petroleum reserves. In this context, lawyers and judges shaped the law which, more so than economics and politics, determined the outcome of the petroleum problem.

Law firm records offer the most primary and illuminating evidence of the role of lawyers in defining legal issues, influencing the outcome of lawsuits, and shaping the development of law. Leading law firms like Baker & Botts and Vinson & Elkins [VE] of Houston, Texas, have recently afforded historians access to their archives. Yet, the problem of client confidentiality remains the biggest obstacle to scholars' access to the archives, lawyers, and staff of law firms. Lawyer-client confidentiality is one of the lawyer's most important professional responsibilities. The confidentiality rule applies not only to matters communicated in confidence by a client to the lawyer, but to all information relating to the lawyer-client relationship regardless of its source. Lawyers are ethically and legally responsible to shield clients' interests from intrusive third parties, including historians. Failure or negligence in upholding this fiduciary duty to clients subjects lawyers and/or law firms to serious sanctions by the bar
and malpractice suits by clients. Legal and professional liabilities justify lawyers' and law firms' denying historians access to their records and staff.\(^8\)

Several proposals have been set forth for reconciling the mandate of lawyer-client confidentiality with historians' need to gain a better insight into the legal process. One proposal suggests that attorneys obtain waivers from clients to permit third-party access to relevant records. Another proposes that lawyers distinguish between open and closed cases and living and deceased clients. With the passage of time, after some cases have been adjudicated to finality, issues become moot and clients have either died or no longer possess a legitimate claim to sensitivity. The American Law Institute (ALI) has recommended that lawyers be allowed to open clients' files to historians after passage of a "long and discreet interval" of time as long as there is "no reasonable likelihood of risk" to clients or counsel.\(^9\)

The legal history of lawyers and law firms like VE shows how lawyers assume a plurality of roles, legal, economic, and political, in serving both private and public interests. VE generously afforded access to all of the Pure Oil Company files I requested. These files contained important correspondence

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between lawyers and clients, memoranda of law on vital legal issues, briefs of
landmark court decisions, transcripts of Texas Railroad Commission hearings,
and other source material relating to all aspects of the petroleum industry. This
material provided a "magic mirror" revealing the critical legal issues affecting
regulation of petroleum production and the multi-faceted roles lawyers played in
shaping oil and gas law. It illuminates the historian's understanding of how
lawyers influenced solutions to marketplace and legal problems petroleum
posed. Further, this data allows researchers to revise and expand past
interpretations which have analyzed these complex interactions primarily from
economic and political perspectives to the exclusion of law. Even more
important, it suggests a broader, multidimensional perspective of the function of
lawyers in lieu of the simplistic stereotype of lawyers as hired-guns who serve
clients' narrow economic dictates. Lawyers are pressured by clients. But
attorneys' professional duties and responsibilities also simultaneously shape
lawyers' defense of their clients' interests. Attorneys also try to influence and
shape court decisions, legislative law-making, and legal and political
ideology.

10Kermit Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press,
1989), p. 3, quoted Justice Oliver Wendell Holmes, Jr., "This abstraction called the Law is a magic
mirror, wherein we see reflected, not only our own lives, but the lives of all men that have been!"

11David Sugarman, "Simple Images and Complex Realities: English Lawyers and Their
Relationship to Business and Politics, 1750-1950," *Law and History Review* 11 (Fall 1993): 257-301,
suggested closer attention to "the cultural, political, and economic dimension's of lawyers' work" and argued that the "history of lawyers in business undermines the tenet of legal formalism
that only those distinctly 'legal' tasks, separate from 'society,' 'business,' and 'politics' are what
lawyering is all about"; Recent analyses which illuminate the interrelationship between law,
economics, and politics include: R. W. Gordon, "Legal Thought and Legal Practice in the Age of
the American Enterprise, 1870-1920," in G. Geison, ed., *Professions and Professional Ideologies in
Legal Profession* (Ithaca, N.Y.: Cornell University Press, 1992); Stuart M. Speiser, *Lawyers and
the American Dream* (New York: M. Evans and Company, 1993), passim, explained how lawyers
are "equalizers" who breathe life into the right to *equal justice under law* and achieve that
American dream for their clients and themselves.
CHAPTER I

LAW OF THE JUNGLE IN THE "NEW FUEL" AGE

The good old rule...the simple,
plan, That they should take who
have the power, And they should
keep who can.

Samuel B. Pettengill

"Petroleum has revolutionized industry and transportation...created untold wealth...and has altered man's way of life throughout the world," testifies the inscription on a monument commemorating the fabulous Spindletop gusher near Beaumont, Texas. Spindletop ushered in an oil boom that transformed the predominantly agrarian Texas economy into an industrial one and spurred technological innovations and improvements in petroleum exploration, production, transportation, and refining that boosted the oil industry into the forefront of manufacturing. Petroleum production soared from 69 million barrels in 1901 to over a billion barrels by 1929. Spindletop also fueled the vertical growth of independent producers like Humble, Gulf, Phillips, and the Texas Company into wholly integrated oil companies who challenged the dominance of the grand dame of American petroleum, Standard Oil, in the "new fuel" age.¹

In the decade following World War I, the strategic importance of oil and the automobile were the impetus behind the petroleum industry's rapid ascendency. Gasoline-powered automobiles afforded a quick and relatively inexpensive means of reducing distance as a factor driving America down the road to industrial supremacy, forever reshaping its landscape and reordering its society. Petroleum also fueled tractors and motor-driven farm equipment, locomotives, seagoing vessels, airplanes, and factories and plants. A fourfold expansion in domestic motor fuel sales, a two-and-one-half-fold increase in fuel oil distribution, and a 75 percent rise in the production of lubricants testified to petroleum's emerging importance as a major energy source.²

American tanker carrying capacity. Pratt argues that Spindletop's size, its proximity to the sea, and Texas laws banning the open entry of Standard into the state, allowed "other [oil] companies...a chance to grow without directly competing with the dominant firm in the industry."; Prindle, *Petroleum Politics*, pp. 12-14, distinguished between major integrated oil companies and independent operators. According to Prindle, "There are many methods of distinguishing the majors from the rest of the industry." Generally, a major is any oil company that integrates all four basic activities of the petroleum industry--producing, transporting, refining, and marketing. Independents are generally what is left over after the majors have been subtracted from the industry. Of the four main activities, independents perform no more than two or three. However, Prindle points out that independents vary in shape and size. Some produce, transport, and refine and are large enough to share the majors' economic perspective. Most independents concentrate on production and their small size has affected their perspective toward regulatory policy. Independents are the risk takers and therefore do not generally value stability or corporate order. In contrast, majors with vast industrial agglomerations, a bureaucratized structure, and substantial capital investments seek order and stability in lieu of risk. See James W. McKie, "Market Structure and Uncertainty in Oil and Gas Exploration," *Quarterly Journal of Economics* 74 (November 1960): 547.

Greater convenience and lower cost accounted for a shift from coal to fuel oil in maritime transportation. Maritime fuel oil consumption rose from 41 million barrels in 1919 to nearly 106 million barrels in 1929. In 1904 the United States Navy Fuel Oil Board had recommended that American war vessels convert to oil. Ten years later Secretary of the Navy Josephus Daniels reported that all American battleships and destroyers were burning fuel oil. Annual sales to the United States Navy increased from 5.8 million to 7.4 million barrels between 1919 and 1929. Petroleum products comprised approximately two-thirds of the cargo shipped from the United States to Europe during World War I. The Allies used 39,000 barrels of gasoline daily as they "floated to victory upon a wave of oil." The United States Navy was entirely oil-burning by the early 1930s, attesting to petroleum's vital significance in modern warfare.3

As the petroleum industry grew in size and significance, so did its complexity. Specific matters, especially legal problems, had to be handled by specialized professionals. Legal issues involving property rights, patents, corporate organization, antitrust regulations, and taxation required the advice and assistance of lawyers. Both the petroleum industry and the lawyers' role therein underwent a transformation during the first two decades after World War I. From the industry's inception in the mid-nineteenth century until the 1920s, disputes over land titles comprised the bulk of oil-related litigation. This changed in the late twenties when overproduction forced the lawyers to focus most of their energy and attention on government regulation. Throughout the entire period lawyers played an indispensable role in blazing new trails through

unknown frontiers of oil and gas law.4

The validity of titles became the initial legal problem facing the petroleum industry. Oil producers had to get permission from landowners to drill. Many Texas landowners were poor farmers who had spent their entire lives struggling to eke out a bare existence from unforgiving soil. They could hardly resist strangers offering cash advances with the promise of a one-eighth profit, or royalty, of all the oil produced in exchange for simply letting them drill a well on their land. These rather simple and crude transactions became known as drilling leases. Land titles of prospective leases had to be examined to assure oil producers, refiners, and retailers that they were dealing with legitimate landlords. They wanted to ensure that they were purchasing crude oil from the rightful owner to avoid liability for wrongful conversion to third parties claiming ownership of the leases. Lawyers played an instrumental role because determination of the legitimacy of land titles entailed property law.5

Large producers and major oil companies could afford to retain competent and respectable legal counsel. For example, the Texas Company retained the Houston law firm of Baker & Botts in 1917 to examine land titles

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4 Lipari and Pratt, Baker & Botts, p. 88.
5 Lipari and Pratt, Baker & Botts, p. 88; For discussion of the lawyer’s title work pertaining to oil and gas leases see, Lewis G. Mossburg, Jr., Handbook on Petroleum Land Titles (Oklahoma City: The Institute for Energy Development, 1976); Max W. Ball, This Fascinating Oil Business (New York: Bobbs-Merrill, 1940), pp. 85-97, (86) noted, “Imagine that all the treasure of Captain Kidd, Morgan, and Jean Lafitte were reported to be buried deep in the back yards of a Nantucket village and that you were given the job of getting from each of two hundred villagers a right to explore for it and dig it up. Imagine further that a dozen rivals might learn of the treasure at any time and try to obtain the same rights. Think of the bickering and dickering you would have to do, and the speed and discretion with which you would have to do it. No villager would have the least idea of the methods and costs of such an operation, everyone would be hoping to make a better deal than his neighbor and fearful his neighbor would make a better deal than he, and each would be sure most of the treasure was in his yard and afraid he might not get his full share. The average landowner knows as little about finding and producing oil as the villagers would know about digging for treasure, and for shrewd trading ability the average farmer or small-town banker is equal to any citizen of Nantucket. Ponder such a situation, and then think of the lease man, to whom such an assignment is routine business...To get from every landowner, so far as possible, and before a rival lease man thereon, and produce therefrom all the oil and gas that may be found.”
and prepare leases and contracts for oil exploration and drilling. By the early 1920s, Baker & Botts was amassing an impressive oil-related clientele including Sinclair, Atlantic, Continental, and Standard oil companies. Preoccupied with major oil company clients, Baker & Botts had no time to represent the young, unestablished, and unrespectable pioneers of the Texas oil industry called wildcatters. These rugged individualists who gambled their future in pursuit of "black gold," turned to smaller local law firms like VE in Houston.  

The history and growth of VE paralleled the rise of petroleum in Texas and illustrates the significant role that lawyers played in shaping oil and gas law. Founded in 1917 by William A. Vinson and James A. Elkins, the "Gold Dust Twins," VE was a young law firm when the oil boom struck Texas in the 1920s. At the time it represented local lumber and insurance businesses without any major oil company clients. That soon changed. In keeping with Texas tradition, VE lawyers were down-to-earth, common-sense characters who realized that hard work and persistence were the only way poor country boys from Texas with a heavy drawl could beat the "Ivy Leaguers" in the courtroom. This appealed to mavericks like Colonel Albert E. Humphreys, an independent oil producer with considerable lease-holdings in the Mexia field in Limestone County [North Central Texas]. His oil business had outgrown the capacity of a local small-town, sole-practitioner and he wanted to retain a respectable law firm. By chance, in 1921 Humphreys met Elkins in Houston and told him about his difficulties in getting the Texas Company to pay him for some crude oil purchases. Elkins persuaded the Texas Company to pay Humphreys that same

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day. Impressed, Humphreys retained VE to represent the Humphreys-Mexia Oil Company. The relationship blossomed into a marriage that propelled VE into Texas's premier oil and gas law firm.7

II

VE was immediately put to test. Numerous lawsuits had been filed contesting the validity of Humphreys's oil leases in Limestone County. Elkins and a team of VE lawyers including Clyde Sweeton and former Texas Attorney General Claude Pollard spent a lot of time in Mexia handling these cases. The oil boom had far outstripped available office space in little Mexia, forcing the legal legion from VE to bivouac in a barn outside of town. Here, they labored over the tedious task of examining land titles amidst the chatter and scent of their four-legged roommates.8

Land title litigation had been virtually nonexistent in Limestone County

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before 1921. But the oil boom in Mexia unearthed skeletons from the past. Distant relatives claiming to be heirs of the original landowners in the Mexia oil field bombarded the Limestone County Courthouse with lawsuits attacking the validity of existing claims. After the Civil War, emancipated slaves had acquired much of the land in question. A legal determination of their legitimate heirs hinged on the legality of slave marriages. Even though Texas law had prohibited slave marriages, some masters had encouraged and permitted their slaves to marry. They hoped that marriage would promote strong family ties and make the slaves more obedient, industrious, and less likely to run away. The legitimacy of slave marriages became the crucial issue in many of the land title suits in Mexia to be untangled by lawyers.9

VE defended Humphreys in a suit involving forty acres of land in the Mexia oil field originally owned by a slave couple, Felix and Mattie Dancy. After the discovery of oil on the Dancy land, several individuals alleging to be the "forgotten" children of Felix's "other wives" claimed a share of the estate. John Lindley alleged to be the son of Felix and Marzella Brown. Ella Baker claimed to be the daughter of Felix and Julie Whittaker. She contended that Felix had acquired the forty acres during his marriage to Julie, making it community property entitling her, as their daughter, to a share. The Limestone County

9Shepherd Interview, pp. 3-4; For background and history on slave marriages and family life see John W. Blassingame, *The Slave Community: Plantation Life in the Antebellum South* (Oxford: Oxford University Press, 1972); After emancipation, the United States Congress legitimized slave marriages that had been consummated according to slave rituals. Contrary to myth, the slave marriage ceremony was not always performed by having the bride and groom jump over a broomstick. Slave marriages usually consisted of obtaining the master's permission to live together. Sometimes masters had a white minister perform a marriage ceremony followed by festivities. Blassingame argued that "thousands of slaves were married in Southern churches between 1800 and 1860" and that the broomstick ceremony was not part of the ceremony, but rather a post-nuptial ritual whereby masters and slaves determined whether a newly-wed husband or wife would rule the household. (166-69). Regardless, Shepherd noted that Texas courts utilized the broomstick ceremony as the standard for determining the legitimacy of slave marriages.
Courthouse had burned down in 1873 leaving no surviving records of this marriage. Marvin Johnson claimed that Julie had given birth to him out of wedlock in 1882, entitling him to a one-fourth undivided interest in the estate.\(^\text{10}\)

Sweeton spent many long, hot Texas days taking depositions to sort the whole thing out. Humphreys stood to lose some $1,500,000 in damages for wrongful conversion to the rightful heirs if it had obtained its leases from and paid royalties to illegitimate landowners. Pure Oil Company also stood to lose between $250,000 and $400,000 in damages since it had acquired an ownership interest in Humphreys in 1922. The case finally went to trial on 9 March 1925 in the 77th State Judicial District Court in Limestone County with Judge John H. Sharp presiding.\(^\text{11}\)

Contradictory testimony, based largely on depositions, turned the trial into a circus-like spectacle. Witnesses testified that Marzella Brown and Julie Whittaker were "bad women" that ran around with "a lot of men." Willis Medlock, a local minister, testified that a "colored man" and a white man had offered him some money to change his testimony. Medlock stated that he refused their offer for fear of going to Hell. He accused Julie Whittaker of having "loose morals" and described Marzella Brown to be "as bad a woman as ever lived in this county and she died that way." Sam Medlock testified that he had never before heard of Felix's marriage to anyone else but Mattie until the discovery of oil in Mexia. Ella Baker testified that at Felix's funeral, Mattie assured her that she would never inherit any of the estate.\(^\text{12}\)

\(^{10}\)Shepherd Interview, pp. 3-4; Plaintiffs' Petition, 1 May 1924, Mattie Dancy File, VEA, C. F. 7588; Second Amended Answer filed by John Lindley, VEA, C. F. 7588; Cross-Action filed by Marvin Johnson, VEA, C. F. 7588; Transcript, Statement of Facts, VEA, C. F. 7588.

\(^{11}\)Shepherd Interview, p. 4; Leon Lusk to Sweeton, 5 December 1924, VEA, C. F. 7588; Elkins to B. G. Dawes, 10 March 1924, VEA, C. F. 5238.

\(^{12}\)Depositions of Queen Maynard, Willis Medlock, Sam Medlock, Ben Thomas, Kissi Casteelle, and Ramon Casteele and Ella Baker taken by Clyde Sweeton, 5 December 1924, Limestone
The jury decided the case by answering several special issues. It determined that Felix and Marzella Brown had never been married and that John Lindley was not their child. The jury further found that Felix and Julie Whittaker had never been married, but that Ella Baker was their daughter. It decided that the forty acres was the community property of Felix and Mattie. Felix had died intestate [leaving no written will] in 1902, leaving as his surviving heirs, his wife Mattie and three children Celester Bluitt, Enes Carter, and Ella Baker, who were awarded the estate. The verdict, upheld on appeal, was favorable to Humphreys and Pure since their leases had been acquired from the legitimate heirs. Humphreys and Pure escaped liability due to the efforts of VE lawyers.

There was nothing novel in the law governing land titles. Sweeton and the other VE lawyers felt their way through a thicket of legal complexities involving the family relations of slaves. Sweeton painstakingly located and questioned many ex-slaves who were likely illiterate or semi-literate to determine the rightful heirs of the Dancy estate. Their depositions were crucial in influencing the verdict as well as persuading other litigants to settle out of court for substantially less than they had asked for. These settlements saved Humphreys and Pure substantial money in legal fees and potential damages.
had they have lost the cases. The outcome enhanced VE’s reputation in Texas oil and gas circles.\textsuperscript{15}

III

The rapid growth of the petroleum industry in the 1920s led to new and more complex legal problems because of the unworkable legal foundations of oil production. During the first two decades of the twentieth century speculation grew among oil industry leaders and public officials that the "new fuel" would soon run out. The gap between consumption and production in the United States widened from 9 million barrels in 1915 to 78 million barrels in 1920. Even though the importation of Mexican crude had narrowed the margin, domestic production had not kept pace with demand. In 1919, United States Bureau of Mines director Van H. Manning warned the Council of National Defense that drastic measures, including governmental intervention, might be necessary to assure adequate production and avert an oil shortage. Prairie Oil and Gas Company president J. E. O’Neal forecast imminent shortages without the discovery of abundant new oil reserves. Standard Oil of New Jersey president Walter Teagle mused that pessimism over crude supplies had become a chronic malady in the oil business. But the wheel began to turn when new discoveries in California, Oklahoma, and Texas during the twenties doubled proven oil reserves and swelled annual production from 442.9 million to nearly a billion barrels.\textsuperscript{16}

\footnotesize{\textsuperscript{15}The out-of-court settlements are evidenced by the following correspondence: A. C. Scurlock to Sweeton, 22 December 1924, VEA, C. F. 7588; Sweeton to Scurlock, 31 December 1924, VEA, C. F. 7588; M. B. Harrell to Sweeton, 16 January 1925, VEA, C. F. 7588; Lusk to Elkins and Sweeton, 20 March 1925, VEA, C. F. 7588.}

\footnotesize{\textsuperscript{16}Clark, \textit{Century}, pp. 129-33, noted that Texas and Oklahoma production accounted for 74.4 percent of the nation’s proven reserves had accounted for 70 percent of all oil production in the United States from 1859 to 1955. Domestic production increased by 294 percent between 1918 and 1941, from 355,928,000 barrels a year to 1,402,228,000 barrels per year; Williamson, et al., \textit{American Petroleum Industry}, pp. 302-04, noted that "on average, for each barrel of crude}
Behind this decade of expansion lay the dynamics of flush field development. Leading experts including petroleum economist Joseph E. Pogue and Bureau of Mines official F. G. Cottrell recognized that the steady depletion of oil reserves did not preclude periodic gluts when production would exceed demand. Short-term oversupply was to be expected with improved recovery techniques and new refining technologies.

A vicious cycle was set into motion. Concerns about running out of petroleum gave way to worries over declining crude oil prices. Overproduction wrought overabundance and cheaper prices. Cheaper prices encouraged consumption and demand which raised prices and stimulated production until the market was again glutted and prices fell. Free market forces did not respond quickly enough to ensure a prompt and smooth transition during periodic fluctuations between supply and demand. Oilmen ideally wanted to keep production in line with demand to stabilize prices while the federal government wanted to conserve unreplenishable petroleum resources so vital to national defense. The public demanded a cheap and reliable source of petroleum products. Since oilmen could not agree over whether or how to control production, government regulation seemed the next logical step. But produced during the 1920-1929 period there were 1.8 barrels of newly discovered reserves, a replacement ratio roughly one-eighth barrel smaller than in the previous ten-year period; Teagle quoted in, George Sweet Gibb and Evelyn H. Knowlton, History of Standard Oil Company (New Jersey), vol. 2, The Resurgent Years 1911-1917 (New York: Harper & Brothers, 1956), p. 485; John Ise, United States Oil Policy (New Haven, Conn.: Yale University Press, 1926), passim, traced the history of domestic oil production up until the early 1920s.

17Flush development or production is a technique whereby oil wells are operated at capacity or wide open. Under such uncontrolled operation, an oil reservoir yields the major part of its ultimate recovery in a relatively short period of "flush production." This is usually followed by a prolonged interval of low rates of production from individual "stripper" or "marginal" wells as they are called during this latter stage of low productivity. See Stuart E. Buckley, ed., Petroleum Conservation (New York: American Institute of Mining and Metallurgical Engineers, 1951), p. 182.

government regulation of privately owned American petroleum reserves had to be reconciled with due process restraints and traditional notions of free enterprise. For this reason, regulation of petroleum production became primarily a legal problem to be resolved by lawyers.19

IV

In law, the "rule of capture" had governed legal relations in the petroleum industry since the late-nineteenth century. This put a premium on unrestrained production regardless of market demand. Absolved of liability by the capture theory, every lessor, lessee, royalty owner, and driller raced to beat their neighbors out of all the oil they could get before someone else did. The rule's genesis lay in the pre-nineteenth century common law of property, a static agrarian conception which put a premium on an owner's undisturbed and peaceful enjoyment of his land. The concept had originated in a feudal-agrarian environment where all available land was either in use or assigned to particular owners. English common law allowed landowners to use their estates as they desired with one limitation--*Sic utere tuo ut alienum laedus* -- that they inflict no irreparable harm on neighboring landowners' respective property rights.20


Traditional English common law rules were gradually transformed in America. A vast resource-laden frontier afforded opportunities for continental expansion and industrialization which demanded a more dynamic concept of law. Land and water usage illustrate how American courts generally ruled in favor of development, balancing the economic good of the community against the inconvenience or injury to individual landowners. In a static agrarian society the "first in time, first in right" principle protected certain activities initiated by one property owner, that were natural to the land, against interference from projects subsequently begun by a second landowner. "Natural" meant the the normal use of the land and its appurtenances like water. The courts employed a balancing test to retard or advance new uses of land or water made possible by technological innovations. A priority rule gradually supplanted the natural use doctrine as first illustrated in the legal controversies generated by the use of water power for economic development.21

Under traditional common law, water flowing in its natural channel was held to be inviolable and any interference with it was unnatural. All riparian landowners--those who owned land abutting a flowing stream--could use the water as they desired as long they did not diminish their neighbors' corresponding rights. A riparian owner could divert as much water as necessary for irrigation, mill dams, or whatever without liability if the diversion had been

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established prior to a neighboring landowner's use. The priority doctrine proved impractical in America where the need to develop a vast frontier and exploit abundant resources called for the release of creative energy.22

In 1783, the Supreme Judicial Court of Massachusetts held in Shorey v. Gorell that a landowner who had not established his rights through long usage could not prevent a newcomer from obstructing a stream in order to build a mill dam. In Palmer v. Mulligan in 1805, the New York Supreme Court upheld an upstream owner's right to dam the stream, noting that riparian owners had to suffer little inconveniences for the sake of the greater good. Thirteen years later in Platt v. Johnson, the New York Supreme Court first introduced the principle that the right to develop land for commercial purposes was an inherent right of land ownership. The Court balanced the traditional doctrine of sic utere against the benefits that accrued to the community through economic development.23

Some jurists disapproved of this departure from common law tradition. Joseph Angell severely criticized the Palmer decision in his 1824 treatise on


Watercourses. Three years later United States Supreme Court Justice Joseph Story’s circuit court opinion in *Tyler v. Wilkinson*, while somewhat ambiguous, seemed to confirm traditional limits on water diversion. Developmental-mined judges used Story’s criterion of "reasonable use" as a permissive departure from strict common law rules to justify extensive diversions.24

The riparian cases illustrated how nineteenth-century American courts transformed traditional English common law rules of property to meet local economic conditions. They also show how Americans adapted the common law to a unique and peculiar problem never before encountered; the reconciliation of competing private property rights in petroleum. Colonel Edwin L. Drake’s discovery well at Titusville, Pennsylvania, in 1859 spurred the commercial exploitation of petroleum. The rising demand for oil enhanced its value and instigated more lawsuits between landowners asserting competing claims to common petroleum reserves underlying their estates. There were no direct legal precedents to guide lawyers and judges since ownership disputes over oil and gas had been virtually nonexistent prior to the mid-nineteenth century. As a result, lawyers and judges grappled for some analogy in other areas of property law to support their respective arguments and decisions.25


Some of the earliest oil litigants based their ownership claims on the common law rule which recognized a landowner's absolute dominion over everything above and below his landed estate including the underlying minerals. They argued that oil and gas were minerals constituting part of the physical aggregate of the land. But the absolute ownership theory did not apply neatly to petroleum. Unlike solid minerals such as coal and iron, oil and gas are fugacious. Undisturbed in its natural state, petroleum is held stationary within the pores and crevices of the surrounding rock strata by natural gas pressure. The extent of one of these oil-bearing rock structures makes up a petroleum reservoir. In this natural state, petroleum cannot move or "migrate" unless the reservoir is punctured releasing the gas pressure. The force of the escaping gas propels the oil through the puncture opening. Under ideal production methods, this natural gas pressure can be harnessed to recover 90 to 95 percent of the oil. Conversely, flush production is akin to removing a cap from a well-shaken bottle of carbonated beverage. The gas pressure dissipates before most of the liquid is propelled out of the bottle. This unique physical attribute rendered the absolute ownership theory unworkable for oil and gas and posed a dilemma for lawyers and judges who struggled to reconcile competing ownership claims to subsurface petroleum.26

By the late 1920s, petroleum's growing economic importance was collateral to the legal question of ownership. Until the law settled overlapping title claims, America's vital petroleum resources could not be exploited without

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potential legal liabilities. A landowner held absolute title to the subsurface petroleum if the courts applied the traditional common law. But petroleum's fugacious nature prohibited one landowner from exercising his absolute right to extract his petroleum without infringing on his neighbor's respective right. The courts had to figure out a way to allow two or more landowners to enjoy their property rights in petroleum without destroying these rights.27

If the law classified oil and gas as minerals constituting part of the realty, then one landowner could not exercise his right to use them without interfering with his neighbor's correlative right to do likewise. By classifying petroleum as res communes,28 the law would have discouraged production of a newer and cheaper energy source to fuel America's burgeoning industrial base. The courts took an instrumentalist approach to resolve the dilemma in a manner that would facilitate petroleum production. They unwittingly opened up a Pandora's Box of competing legal issues involving private property versus the public interest, competition and monopoly, states' rights opposed to national power, and legislative against executive authority.29

V

In 1875, the Pennsylvania Supreme Court addressed the first in a trilogy

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28Res communes are those things, like air and water, which cannot be exclusively appropriated by an individual because they are necessary for human existence and must be shared by all. Unlike fixed and inanimate objects, they have the power to move on their own volition. This principle passed from Roman law into the English common law. See Wier, "Running Water," 190-92; Angell, "Law of Water Privileges," 25-38.

of cases which culminated in the rule of capture. James E. Brown had sued to eject J. J. Vandergrift from a 30-acre tract. Brown had leased the land to Vandergrift to produce oil. Noncompliance with any of the lease provisions constituted a forfeiture allowing the lessor to eject the lessee. Brown alleged that Vandergrift had forfeited the lease by failing to commence drilling within a stipulated time period. Vandergrift responded that he had avoided a forfeiture by paying a monthly rental fee in lieu of drilling.30

The Court ruled that petroleum's fugitive nature made its precise location and quantity uncertain making drilling speculative and requiring new methods of leasing land. Landowners executed leases covering as much of their land as possible to enhance the probabilities of striking oil. Since the oil might be here today and gone tomorrow, landlords added lease provisions requiring lessees to drill without delay or face forfeiture and ejectment. The Court likened petroleum to wild animals stating:31

Water and oil, and still more strongly gas, may be classified by themselves, if the analogy be not too fanciful, as minerals *ferae naturae*. In common with animals, and unlike other minerals, they have the power and the tendency to escape without the volition of the owner.

The Court had previously upheld lease forfeiture clauses on the ground that lessees had no ownership rights to the oil and gas *in situ* since their fugitive and wandering nature rendered them incapable of being owned until captured and reduced to possession. The Court either overlooked or sidestepped the apparent inconsistency of this ruling with *Funk v. Haldeman* where it

recognized a landowners' title to petroleum *in situ* and confined its ruling to the validity of lease forfeiture clauses. Since time was of the essence in oil leases, it held that equity protected a lessor against the harm inflicted by a lessee's indifference and delay. The payment of a monthly rental fee did not alleviate, but rather perpetuated the harm and injustice. The Court decided that Vandergrift had forfeited the lease and could thereby be ejected from Brown's property.32

In the second case in 1889, Westmoreland Natural Gas Company sought to restrain DeWitt [first name unknown] from producing gas from one of its leases. DeWitt claimed that the lessor had leased the land to him after Westmoreland had forfeited its rights by failing to drill or pay monthly rental fees. Westmoreland maintained that it had complied with the lease terms by drilling a well that only needed "a turn of the control valve" to start producing gas. On appeal the Pennsylvania Supreme Court decided two legal issues: whether Westmoreland had forfeited the lease; and who was entitled to the gas.33

The Court qualified its ruling in *Brown v. Vandergrift* which classified oil and gas *in situ* as minerals constituting part of the real estate. It now determined that petroleum's fugacious nature rendered it unamenable to legal precedents governing property rights in solid minerals and fashioned a new rule:34

[Oil and gas] belong to the owner of the land, and are a part of it, so long as they are on it, and are subject to his [owner's] control; but when they escape and go into other land, or come under

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33 Westmoreland Natural Gas Company v. DeWitt, et al., 130 Pa. St. 235, 18 Atl. 724 (1889); Simonton, "Has A Landowner Any Property in Oil and Gas in Place?," 292.
34 Westmoreland v. DeWitt, 249.
another's control, the title of the former is gone. Possession of the land therefore, is not, necessarily possession of the gas. If an adjoining or even a distant owner, drills his own land, and taps your gas, so that it comes into his well and under his control, it is no longer yours, but his.

By way of analogy, the Court applied legal precedents governing ownership of wild animals and underground water to oil and gas in situ. Henceforth, Pennsylvania recognized actual possession as the only valid ownership claim to petroleum. The Court held that DeWitt had a possessory interest in the lease, but not to the gas until he captured it. It found that Westmoreland had not forfeited its lease since it had already drilled a well which simply needed to be turned on to allow gas to flow. Since this gave Westmoreland possession of the gas, the Court awarded it title thereto.35

In Barnard v. Monongahela Gas Company in 1907, the Pennsylvania Supreme Court decided that there was no way to ascertain the the precise amount or location of oil and gas under any given land-tract. It mistakenly assumed that petroleum migrated through the porous rock strata thereby "fully justifying" a rule giving every proprietor an opportunity to drill and produce wherever he pleased on his own land. The Court admonished aggrieved litigants who complained of drainage to "Go thou and do likewise." Subsequent scientific discovery proved that petroleum was held inert by the gas pressure and did not migrate until the reservoir was tapped and the releasing pressure propelled the oil toward the puncture. Conceding that the rule was not the best, the Court invited the legislature or some "higher court" to do better, but refused

to impose the equitable remedy of injunction to stay any potential harm. The Keystone State’s high judicial priests admittedly applied the law of the jungle to petroleum. So came to be the rule of capture.36

Courts in other oil-producing states subsequently adopted Pennsylvania’s novel capture theory and permitted landowners to produce at will without liability. As long as they confined drilling within the parameters of their own land, the courts deemed any resulting harm to their neighbors oil rights as *damn num obsque injuria*. The twisted logic of trying to mix petroleum with water and wild animals could only be rationalized as a judicial compromise. Late-nineteenth century judges had to reconcile the historical primacy of private property rights in Anglo-American law with the desire to promote development of a new energy source to fuel the ever-growing and expanding American economy. Without established legal precedents or advanced scientific and technological knowledge, nineteenth-century judges grappled to resolve competing ownership claims to petroleum. Logically, and by habit, they scoured the common law for some analogy to apply to oil and gas. They settled upon the law of wild animals and water as a convenient escape from their dilemma. By attempting to weave petroleum into the fabric of traditional common law, the Pennsylvania Supreme Court legalized the caveman instinct. "The extension of the Rule of Capture to oil and gas flunked,"

36*Barnard v. Monongahela Gas Company*, 216 Pa. St. 362, 65 Atl. 801 (1907); J. Howard Marshall and Norman L. Meyers, "Legal Planning of Petroleum Production," *Yale Law Journal* 41 (November 1931): 40-42; Summers, "Property in Oil and Gas," 175-78; Robert E. Hardwicke, Jr., "The Rule of Capture and its Implications as Applied to Oil and Gas," 396-97; Veasey, "The Law of Oil and Gas," 450-52; Summers, "Legal Interests in Oil and Gas," 17-18; See *Kelly v. Ohio Oil Company*, 57 Ohio St. 317, 49 N.E. 399 (1897), where the Ohio Supreme Court denied relief to a landowner seeking to recover damages from a neighbor for draining the oil and gas underlying his property and to enjoin future production to prevent further injury. The Court held, "Whatever gets into the well belongs to the owner of the well no matter where it came from...no one can tell to a certainty from whence the oil, gas, or water which enters the well came, and no legal right as to the same can be established or enforced by an adjoining landowner."
said Judge Richard Posner, "and was replaced [albeit through legislative rather than judicial action] by efficient rules."37

Whether late-nineteenth jurists intended the rule of capture to protect private property rights in petroleum or to release creative energy, or both, is debatable. Petroleum's novelty as a commercial commodity and the lack of legal precedent dealing with the subject made it ripe for an equitable remedy. Judges could have utilized equity to resolve competing ownership claims and to balance private versus public interests in petroleum. But existing technology had not convinced the judges that shares in a petroleum reservoir could be fairly divided among common tenants. Overproduction was not then a problem, oil and gas litigation in the late-nineteenth century concerned neighbors' competing claims to a common supply source rather than government regulation of private property. The capture theory was the easiest way to protect private property interests in a manner that encouraged rather than discouraged production and fit the instrumentalist theme of law promoting economic development. But the instrumentalist view fails to explain why most judges in the early twentieth century stubbornly adhered to the rule of capture after it had encouraged wasteful overproduction and had been debunked by recent scientific and engineering advances. Contrary to instrumentalism, the petroleum

37Richard A. Posner, The Problems of Jurisprudence (Cambridge: Harvard University Press, 1990). Quotation cited from p. 362. Posner is a judge of the United States Court of Appeals for the Seventh Circuit. Posner discussed "legal reasoning as practical reasoning" including judicial use of analogies as authority. He stated, "The use of analogy...an hence 'precedent' in the nonauthoritative sense is inevitable in fields where theory is weak...I merely question whether [it]...deserves--the hoopla and reverence that members of the legal profession have bestowed on it...anology may...have persuasive force in a psychological sense. (89-92). Posner cited Howard R. Williams and Charles J. Meyers, Oil and Gas Law, 1, Sections 203.1 and 204.4 (1988), where the authors maintained that the Rule of Capture made sense when applied to things that were not scarce, like rabbits and foxes, but not to scarce resources like oil and gas. The capture theory created an incentive to exploit petroleum resources as quickly as possible, which was too quickly. See Richard J. Pierce, Jr., "State Regulation of Natural Gas In A Federally Deregulated Market: The Tragedy of the Commons Revisited," Cornell Law Review 73 (1987): 15, 20-23.
problem illustrates how judges were guided more by ideology in sanctioning the release of destructive rather than creative energy to protect sacrosanct private property rights against government intrusion.\textsuperscript{38}

VI

The rule of capture served its purpose at a time when America was concerned about finding and producing enough petroleum to fuel its future. With its help, petroleum toppled "King Coal" from its mighty throne as the world's major power source in the twentieth century. Petroleum contributed substantially to the Allied victory in World War I and laid the basis for America's postwar transformation into a "Hydrocarbon Society." As its rose to preeminence, petroleum moved beyond a simpler past where the rule of capture settled disputes between neighboring landlords toward a multi-faceted legal, political, and economic struggle pitting rugged individualists against monopolists and government and states' rightists against advocates of national power. Under the American constitutional system which made law the final word, lawyers played a key role in fashioning new rules to dictate the future course of petroleum. French Senator Harry G. Berenger, director of France's Comite General du Petrole, prophesied in 1918, "As oil had been the blood of war, so it would be the blood of the peace."\textsuperscript{39}

\textsuperscript{38}See Peter Charles Hoffer, \textit{The Law's Conscience: Equitable Constitutionalism in America} (Chapel Hill: University of North Carolina Press, 1990), pp. 7-12. Equity is a concept in Anglo-American jurisprudence that comprehends legal issues left remediless by the common law and guides judges in fashioning fair remedies. Hoffer cites Joseph Story as an example of how judges could fashion legal rules without precedent as a guide that were plain enough to follow and gave fair cognizance to both individual and the public interests.

An oil man is a barbarian with
a suit on.

Edward L. Doheny

Spectacular new oil discoveries in Texas, Oklahoma, California, and New Mexico between 1920 and 1930 transformed the problem of petroleum from one of scarcity to abundance. Prolific production led to a chronic imbalance between supply and demand. As stocks increased the price of crude oil declined from a high of $3.50 per barrel in 1920 to $1.25 a barrel by 1930.

The rule of capture had forced operators to produce regardless of market demand in order to protect their property rights. Wasteful production went unabated. Oilmen who thrived on the competitive spirit and the attraction of new fortunes rode roughshod over weaker neighbors' rights and resisted any attempts to restrain their right to produce when and where they pleased.¹

Waste in petroleum production had captured the attention of scientists and engineers sooner than most oilmen. In the 1920s, scientific study of the

behavior of underground oil made possible more efficient production methods which reduced uncertainty in the search for new reserves, supplanting the "mere hunch" practice which had persisted since Drake's discovery well in 1859. In 1917, the United States Bureau of Mines established an experimental station at Bartlesville, Oklahoma, to study new ways of improving production methods. Station director James O. Lewis's significant study emphasized the importance of natural gas as an energy drive in crude oil production. In 1919, the Bureau of Mines estimated that 80 percent of the recoverable underground petroleum was being lost under flush production methods.²

The use of geophysical science to search for new oil reserves aroused the oil industry's interest in scientific approaches to production. During the 1920s a growing number of independents and major oil companies added geology departments and geophysical units to their operations to minimize the risk and enhance the success at finding new deposits. The majors seized any opportunity to ascertain beforehand the probabilities of finding oil in various locations before risking heavy capital investments in the venture. They initially welcomed improvements and innovations in exploration and drilling which contributed to additional oil discoveries and production at a time when scarcity was their main concern. But by the late 1920s, technological progress had

invited rapid growth and expansion in excess of corresponding increases in
market demand. As supply exceeded demand and prices fell, production control
became necessary to restore stability and profitability.³

III

The presumed diminution of domestic reserves and wasteful recovery
practices, coupled with attendant periods of glut, fluctuating prices, and the
growing economic and strategic importance of petroleum underlay conservation
efforts in the twenties. The National Petroleum War Services Committee,
established during World War I to mobilize the petroleum industry behind the
war effort, carried over into peacetime as the American Petroleum Institute [API].
The API became the oil industry's leading representative organization.⁴ One of
its directors, Cities Service Company president Henry L. Doherty, warned that
the oil industry was operating in a way that undermined its future health. He
hammered away at one theme: elimination of the rule of capture.⁵

Oil Company (New Jersey), vol. 2, The Resurgent Years 1911–1917, pp. 428–32; Andrew M.
⁴Engler, The Politics of Oil, pp. 59–60, stated the purposes of the API were: (1) "To afford a
means of cooperation with the government in all matters of national concern"; (2) "To foster
foreign and domestic trade in American petroleum products;" (3) "To promote in general the
interests of the petroleum industry in all its branches"; and (4) "To promote the mutual
improvements of its members and the study of the arts and sciences connected with the
petroleum industry." The API served as a forum for the petroleum industry. It has separate
divisions for production, transportation, refining, and marketing, finance and accounting, and
governmental and public relations. Engler contended that the API's policies, financial
contributions, and leadership have been dominated by the major integrated oil companies and
that its position generally reflects their interests; Clark, Oil Century, p. 190, stated that the API
"became the greatest single agency sponsoring the interests of the oil industry."
⁵Zimmermann, Conservation in Production of Petroleum, p. 122; Yergin, The Prize, p. 220;
Knowles, The Greatest Gamblers, pp. 147-52, described Doherty as a self-educated
"engineering genius" who dropped out of school at age twelve. He subsequently obtained 140
patents covering his inventions and processes in the oil, gas, cement, chemical, coke, smelting,
and home-heating industries. Doherty built an industrial empire of electric and gas utilities known
as the Cities Service Company. See Thomas M. Smiley, "Henry L. Doherty Owes His Rise to Grit,"
Oil and Gas Journal 29 (25 December 1930): 31, 98, portrayed Doherty as a tough, resourceful
businessman who cherished his reputation as the "intellectual gadfly" of the petroleum industry.
Doherty's ambition and tenacity elevated him to the directorship of some 150 companies
including his own Cities Service Company. He became involved in the oil business when one of
his companies struck oil while drilling for gas in Kansas.
Doherty criticized "extremely crude and ridiculous" production methods which prematurely exhausted reservoir pressure and trapped oil underground that might otherwise be recovered. He cited petroleum's strategic importance as ample legal authority for federal intervention to eliminate waste. "If the federal government has no power to conserve oil and prevent waste," Doherty argued, "then our plan of government is defective, because the power is not vested any place for us to do that which may be necessary for our national defense." He advocated federally sanctioned cooperative development, or unitization, of American oil fields as a solution to the overproduction problem. As an alternative, Doherty suggested state laws, patterned after irrigation and drainage districts that regulated water problems in the western states, requiring unit development of oil fields under the supervision of oil districts staffed by landowners. All land or lease owners in a common field would agree to combine their resources and jointly develop the reservoir. Expenses and profits would be divided according to the size of individual land or lease holdings. Doherty emphasized how unitization reconciled science and law by

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6Unitization is the joint, coordinated development of oil fields by individual owners and operators. Optimal recovery of oil and gas and efficient, low-cost operations can be realized through such cooperative agreements and efforts by individual owners and operators. Compulsory unitization statutes were advocated as a means of avoiding the often difficult problem of obtaining unanimous approval of voluntary unitization by all landowners and producers in a field. Jacqueline Lang Weaver, Unitization of Oil and Gas Fields in Texas: A Study of Legislative, Administrative, and Judicial Policies (Washington: Resources for the Future, 1966), pp. 1-2; See Leonard M. Logan, Jr., Stabilization of the Petroleum Industry (Norman: University of Oklahoma Press, 1930), pp. 171-72 for detailed definition of unitization; Hardwicke, Antitrust Laws, p. 13, pointed out that Doherty was not the first to recognize and advocate unitization. As early as 1916, William F. McMurray and James O. Lewis of the United States Bureau of Mines had recommended unitization in a technical paper entitled, "Underground Wastes in Oil and Gas Fields and Methods of Prevention." Chester Gilbert and Joseph E. Pogue later suggested the same solution in their book, America's Power Resources: The Economic Significance of Coal, Oil, and Water Power (New York: Century, 1921), as did Max W. Ball in, "Adequate Acreage and Oil Conservation," Address delivered at the 19th Annual Convention of the American Mining Congress, 16 November 1916.
circumventing the rule of capture to promote the greatest economy in lieu of the irrational and wasteful flush production.7

Texas Company president Amos L. Beaty, an attorney and API officer, responded that compulsory unitization violated the due process and contract clauses of the United States Constitution. He argued that oil districts would interfere with lease provisions obliging producers to exercise due diligence in drilling and capturing the lessor's oil before a competitor did. Beaty considered Doherty's proposal as a radical threat to private enterprise which would convert the oil industry into a public utility. The conservative lawyer agreed with the pragmatic oilman that oil production had to be stabilized, but disagreed about means. Doherty viewed Beaty's plan as a half-hearted attack on the problem depending as it did on voluntarism by oilmen. He believed that coercive state or federal laws were the only way to force a majority of oilmen to control production.8

The API's directors had mixed feelings about Doherty's ideas. Some shared his views while others denied that anything was wrong with the industry and regarded Doherty as "that crazy man" who had betrayed his colleagues. Most of the directors shared the attitudes of oilmen who abhorred any compulsion, especially by the federal government. Oilmen had an idealized conception of laissez-faire capitalism and believed the state should not interfere with private enterprise. Experienced oilmen viewed with contempt politicians who lacked practical knowledge of the petroleum industry they sought to regulate. Doherty fought back. In a letter to President Calvin Coolidge on 11

8Nordhauser, Quest for Stability, pp. 14-16.
August 1924 he recommended federal regulation of the petroleum industry if oil-producing states failed to enact conservation laws. Petroleum engineer Mark Requa, who had served as federal oil czar during World War I, supported Doherty's position.9

On 19 December 1924 Coolidge created the Federal Oil Conservation Board [FOCB] to formulate a plan to safeguard national security through oil conservation. Even though the conservative Coolidge shared oilmen's distaste for government regulation of business, he noted that "present methods of capturing our oil deposits is [sic] wasteful to an alarming degree." The FOCB conducted public hearings in 1926. Virtually every oilman, with the exception of Doherty, testified that nothing was radically wrong with their industry and opposed government intervention. They wanted immunity from antitrust prosecution to facilitate industrial cooperation. Professional experts recommended unitization as the most efficient way to curb wasteful overproduction. To the chagrin of oil industry leaders, in contrast to the API's finding that waste had been "negligible," the FOCB determined that flush production and uncontrolled escape of natural gas prematurely dissipated reservoir pressure, leaving too much underground oil unrecovered.10

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The API’s position had been formulated by its Committee of Eleven. Established in 1925 to investigate conditions in the oil industry and forestall possible federal oil legislation, the committee, headed by Teagle, was composed mostly of major oil company executives. To allay fears of an imminent oil shortage, the committee issued a report in May 1925 citing new discoveries in California, Oklahoma, and Texas in addition to one billion unexplored acres in the nation containing some 30 million barrels of petroleum. The report noted only negligible waste in petroleum production and emphasized a laissez-faire approach of allowing free market forces and competition to dictate policy. The API report lacked conservationist sentiment and was faithful to traditional laissez-faire economics.\(^{11}\)

On 27 May 1926 former United States Supreme Court Justice Charles Evans Hughes, now representing the API, offered the FOCB a strict constructionist critique of the petroleum problem. "The Government of the United States is one of enumerated powers and is not at liberty to control the internal affairs of the states...such as production," he argued, "...through assertions by Congress of a desire either to provide for the common defense or to promote the general welfare." Hughes doubted that the federal government possessed any legal authority to control petroleum production and questioned the legality of any statute authorizing a majority of producers to negotiate a unitization agreement which would be binding on the minority. He recommended relaxation of antitrust laws to permit voluntary cooperation

among producers without governmental interference as the best solution to the oil industry's problems. Hughes maintained that the evils wrought by the rule of capture were either exaggerated or could not be remedied under existing constitutional law.\footnote{Williamson, et al., \textit{American Petroleum Industry}, pp. 310-19; Clark, \textit{Oil Century}, pp. 190-91; FOCB, \textit{Public Hearings}, p. 23 quoted Teagle; \textit{Ibid.}, p. 20, recorded address by Charles Evans Hughes, Counsel for the American Petroleum Institute.}

Critics of the API's position charged that existing production rates painted a false picture of great abundance when oil reserves were actually limited and irreplaceable. Scientists and engineers accused the API of narrowly measuring waste against short-term business profits. The Rocky Mountain Association of Petroleum Geologists unanimously questioned the API's findings. E. J. Fohs, a consulting engineer and member of the American Institute of Mining and Metallurgical Engineers [AIMME], argued that excessive waste typified domestic petroleum production operations. D. N. Killefer, secretary of the New York section of the American Chemical Society, predicted the exhaustion of gasoline supplies within twenty years. George Otis Smith, head of the United States Geological Survey and technical advisor to the FOCB, criticized the API's claim as "a gross exaggeration" and warned that without conservation, the nation would soon face an oil shortage. The American Association of Petroleum Geologists echoed Smith's view. While many oilmen publicly denied the occurrence of wasteful production, they privately conceded its existence, but blamed the rule of capture for retarding the application of new production methods and technologies.\footnote{Nash, \textit{United States Oil Policy}, pp. 88-89; Nordhauser, \textit{Quest for Stability}, p. 24.}

In its report to the President on 6 September 1926 spokesmen for the FOCB explained that federal authority to regulate petroleum production was
limited to public lands unless the states failed to prevent waste to a degree that
imperiled national defense. The FOCB rejected compulsory unitization in favor
of relaxing antitrust laws to permit voluntary unit agreements. The Coolidge
administration never seriously contemplated intervening in the oil industry,
preferring that it regulate itself through the medium of trade associations. During
the 1920s conservatives lauded industry self-regulation through trade
associations as a rational model of enlightened competition and a panacea to
the primitive practices of cutthroat competition. The FOCB report allayed
oilmen's fears of federal intervention and encouraged them to explore
alternative solutions.²

IV

In August 1927 Secretary of the Interior Hubert Wok addressed the
Mineral Law Section of the American Bar Association. He diagnosed the oil
industry as "sick" and proposed the creation of a Committee of Nine consisting
of three representatives each from industry, the federal government, and the
legal profession to explore ways to circumscribe antitrust laws to permit
cooperative agreements among oil producers to limit output during times of
overproduction. The federal government had already required unit development
of petroleum reserves in public lands.²

¹⁴Hayden, Federal Regulation of the Production of Oil, pp. 8-10; FOCB, Report of the Federal Oil
Conservation Board to the President of the United States (Washington, 1926), Pt. 1, pp. 14-15;
Rostow, A National Policy for the Oil Industry, p. 19. For the trade association movement see,
¹⁵Engler, Politics of Oil, p. 137; Clark, Energy and the Federal Government, p. 209; Hayden,
Federal Regulation of the Production of Oil, pp. 10-13; Wok's address before the American Bar
Association published in the Oil and Gas Journal 26 (1 September 1927): 57, 64; Nordhauser,
Quest for Stability, p. 35, stated: "The Committee of Nine was staffed by men with a material
interest in the oil industry; only one of the ABA representatives, Henry Bates, Dean of the
University of Michigan Law School, was not associated with a major oil firm. The other two ABA
appointees were Warren Olney, a lawyer for Shell Oil and James A. Veasey, and attorney for an
affiliate of Standard Oil (New Jersey)."
Attorney James A. Veasey addressed the issue of private versus government control of petroleum production. Expounding on the issue of federal regulation, Veasey argued that the United States Supreme Court's decisions in the Child Labor cases erased doubts concerning congressional power, through the indirect route of the commerce clause, to regulate matters local to the states such as mining, manufacturing, or other production. The Court had held that federal regulation of a purely national matter like interstate commerce did not destroy local powers reserved to the states by the Tenth Amendment. Since the power to regulate oil production resided within the states' police power, Veasey explained, it had to be determined at what point state regulatory statutes must yield to the private property guaranties of the Fourteenth Amendment.16

He cited an Indiana Supreme Court decision, State v. Ohio Oil Company, in which the state's attorney general had sought to restrain the Ohio Oil Company from wasting natural gas by permitting it to escape into the open air during oil production operations. An Indiana statute passed in 1893 provided that neither oil nor gas should be permitted to flow or escape into the open air for a period longer than two days. After this period, oil and gas had to be safely and securely confined in wells, pipes, or other receptacles. The legislature recited the critical economic importance of natural gas to the welfare of the state's citizens. Ohio Oil claimed that it could not produce oil without wasting gas and compliance with the statute constituted a taking of property without due process.17

The Indiana Supreme Court upheld the constitutionality of the statute on the grounds that it did not unduly interfere with private property because title to oil and gas did not vest in anyone until the substances had been reduced to possession. It found an absolute analogy between natural gas, wild animals, and fish, and that the state, in its sovereign capacity, owned the gas before it was reduced to possession. The Court based its decision squarely on the proposition that the statute had been designed to promote the public welfare, ignoring the issue of correlative rights and obligations among owners in a common pool. It rebuked anyone who "recklessly, defiantly, persistently, and continually" wasted a vital natural resource like gas as an "enemy of mankind." The Court deemed Ohio Oil's economic interest to be of "small consequence" compared to the "calamity which it mercilessly and cruelly held over the heads of the people of Indiana" by telling them that the gas "is my property to do as I please...[and] help yourselves if you can. Its ruling implied that the state had unlimited power to regulate the taking of natural gas to abate a public nuisance.\(^\text{18}\)

The decision was appealed to the United States Supreme Court. Justice Edward Douglas White delivered the majority opinion repudiating the Indiana Supreme Court's position that the statute had been designed to abate a public nuisance. Owing to the fugacious character of oil and gas, White held that the surface owners had a co-equal right in the common source of supply. He upheld the statute as a proper exercise of state police power to abate a private,

\(^{18}\)Veasey, "Constitutional Obstacles to Oil Law," 95; Ford, "Controlling the Production of Oil," 1179-80; State v. Ohio Oil Company, 24-29.
rather than a public, nuisance by protecting the surface owners from waste of their common oil and gas property.19

White rejected the analogy between petroleum and things _ferae naturae_ which underlay the rule of capture. He distinguished between things _res communes_, like wild animals, which are owned by no one, and private property like petroleum. The state could either forbid or permit the capture of things _ferae naturae_, but not so with oil and gas because only the surface owners, rather than the entire public, had an exclusive right to reduce them to possession. Accordingly, the state could not regulate the capture of petroleum, like it did wild animals or water, without infringing on private property rights. White held that the state could only regulate oil and gas production to abate a private nuisance by protecting the correlative rights of all surface owners against the unfair taking or destruction of their property by another owner in a common pool.20

The _Ohio Oil v. Indiana_ decision provided precedent supporting the exercise of state police power to abate a private nuisance such as protecting a landowners' property rights in petroleum from an unfair taking or destruction by another. The federal Supreme Court, however, had not yet developed satisfactory rules governing state regulations, like petroleum conservation laws, designed to abate public nuisances.

By the early twentieth century, the Court had established a pattern of reviewing the particular facts and circumstances of each state regulation of

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20_Ohio Oil Company v. Indiana_, 208-12.
private property to determine if it bore a direct and reasonable relation to a legitimate and compelling public interest. If not, the Court found the intrusion offended the due process clause of the Fourteenth Amendment. The different attitudes of the Justices toward such issues made it difficult to predict how they would rule in cases involving the constitutionality of police measures designed to promote the social and economic welfare of the people. Conservative-minded justices would be inclined to favor due process while their more progressive-minded brethren would tend to rule in favor of the public interest.21

To survive judicial scrutiny, Veasey believed that petroleum conservation statutes intended to prevent wasteful production or to protect reservoir pressure had to be designed to safeguard either landowners' correlative rights or a legitimate and compelling public interest. He predicted that the courts would strike down conservation statutes of a broader scope.22

No one at the time seemed to notice that, in the case of petroleum,

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21Maurice H. Merrill, “Stabilization of the Oil Industry and Due Process of Law,” Southern California Law Review 3 (June 1930): 403, noted that in 1920, the United States Supreme Court upheld a Wyoming statute restricting the use of natural gas for domestic and industrial fuel and prohibiting its use for producing carbon black as a valid exercise of state police power. See Walls v. Midland Carbon Company, 254 U.S. 300 (1920). The Supreme Court of Montana, however, refused to follow the United States Supreme Court’s decision in Walls and struck down an identical Montana statute as violative of the due process clause of the State Constitution; Ford, “Controlling Oil Production,” 1181-85, cited Lindsley v. Natural Carbonic Gas Company, 220 U.S. 61 (1911), involving a New York statute which forbade the wasteful or unreasonable pumping of mineral water, having an excess of carbonic acid gas, for the purpose of extracting or selling the gas as a commodity separate from the water. The statute was challenged by a landowner as depriving him of his private property without due process of law. On appeal, the United States Supreme Court ruled that the mineral water and carbonic gas existed in a commingled state in the underlying rock and neither could be extracted without the other. Influenced by the greater demand for gas, some landowners pumped out the water to collect and sell the gas, allowing the water to run to waste. The Court found that these pumping operations resulted in an unreasonable and wasteful depletion of the common water supply and in a corresponding injury to others equally entitled to use it and upheld the New York regulatory statute as consistent with due process of law. See Gas Products Company v. Rankin, 63 Mont. 372, 207 Pac. 993 (1922); Veasey, “Constitutional Obstacles to Oil Legislation,” 103-104, noted that, between 1868 and 1912, the United States Supreme Court struck down 6 percent of the cases it heard involving the constitutionality, under Fourteenth Amendment due process clause, of state legislation of a social or economic character. From 1913 to 1920, 7 percent were declared unconstitutional and between 1921 and 1927, 28 percent were held unconstitutional.

22Veasey, “Constitutional Obstacles to Oil Legislation,” 159-61.
regardless whether or not a conservation statute had been designed to abate a private or public nuisance, the effect would be the same; i.e., production could be limited to prevent waste. By 1927 two distinct immediate solutions to the evils of petroleum overproduction had emerged; the exercise of state police power to restrict output or voluntary operators’ agreements. Of the two, Veasey preferred unitization because the oil business was “too individualistic [and] too technical to be controlled by statute.” At the same time, he reminded oilmen that “their supreme duty is to the American public and the American government” and if they failed to put their house in order, there would be an insistent and irresistible demand for government control of the petroleum industry.²³

The Committee of Nine reported in January 1928 recommending revision of state and federal antitrust laws to permit cooperative agreements between producers, state enforcement of compulsory unitization in the event voluntary agreements failed, and creation of an interstate compact to assure common state action. The committee’s findings mirrored the views of the API and most major oil company executives. This was not surprising since most of the committeeemen represented major oil company interests. independents expectedly blasted the committee’s report, particularly the relaxation of antitrust laws.²⁴

V

The accumulation of research conclusions convinced more progressive-minded oilmen that Doherty was not so crazy after all. Humble Oil & Refining Company president William S. Farish²⁵ had scorned Doherty’s ideas in 1925,

²³Veasey, “Constitutional Obstacles to Oil Legislation,” 159-61.
²⁵William Stamps Farish was born in Mississippi in 1881, of English and Irish ancestry and the son of a lawyer and grandnephew of Jefferson Davis. He received a law degree from the University of
but thanked him three years later for opening the industry's eyes to improved production methods. Farish became a zealous crusader for petroleum conservation and unitization. But Doherty, Farish, and other conservationists were ahead of the game. Traditional-minded oilmen like Sun Oil Company president J. Howard Pew and Gulf Oil Company president G. S. Davidson clung to classical economics and preferred voluntary cooperation and self-regulation without governmental interference in their business affairs. Pew vowed that "timber reserves would be depleted and the world's rivers would change course" before petroleum ran out. He boasted that his father had been "one of the pioneers in the oil industry" and that oil shortages had been predicted ever since he was a small boy. Spectacular new oil discoveries in Oklahoma and Texas in 1926 had washed away gloomy predictions of a shortage and made Pew a more credible prophet than Doherty. But the stock market crash of 1929 and the subsequent economic depression soon humbled many diehard individualists.26

The oil boom unleashed a production frenzy which led to an unprecedented glut that ironically shifted more support toward Doherty's conservationist views. An increasing number of oilmen converted to conservation, not to save oil, but to alleviate the ruinous overproduction that had

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violently shaken crude oil prices. They still disagreed over whether the situation should be controlled through voluntary self-help or under state or federal government aegis. New Jersey Standard president Walter Teagle favored voluntary controls while Farish considered the oil industry powerless to help itself and in need of government assistance. Teagle advocated intra-industry cooperation and elimination of federally imposed obstacles to industrial growth like the antitrust laws. He feared that the oil industry would become the scapegoat if a joint-cooperative plan between business and government failed, further politicizing the issue of government regulation of business. Farish countered, "There is no one in the industry today who has sense enough or knows enough" to solve the problem.27

Although federal regulation seemed reasonably out of the question by 1929, most oil industry leaders realized that cutthroat competition engendered by the rule of capture had incurred waste and instability. API president E. W. Clark challenged his peers to accept the "ideals of coordination, of cooperation, of understanding, [and] of confidence rather than suspicion." Oilmen's options had been narrowed to three possibilities: self-help; state regulation; or federal control. Which alternative they finally accepted and employed would assuredly be challenged in the courts, adding a legal wrinkle to be ironed out by lawyers.28

27Yergin, The Prize, pp. 223-24; Larson and Porter, History of Humble Oil, pp. 253-55, 307-09. 28For a discussion of the effect of the rule of capture on the petroleum industry see Hardwicke, "The Rule of Capture and Its Implications as Applied to Oil and Gas," 391-422; Larson and Porter, History of Humble Oil, p. 302 quoted Farish; Weaver, Unitization of Oil and Gas Fields in Texas, p. 53, pointed out that, as a member of the API's Committee of Eleven in 1925, Farish had opposed government regulation of petroleum production. Recent scientific and technological advances in petroleum production methods influenced Farish's support for unitization in 1926; Clark, Energy and the Federal Government, pp. 163-64.
VI

Without legal sanction or precedent, Humble took the first step in blazing the trail toward unitization of oil and gas fields in Texas. Farish and Humble's legal staff, headed by Edgar E. Townes,\textsuperscript{29} piloted unitization through the shoals of Texas antitrust law. Townes warned of rough sailing ahead unless the Texas Legislature immunized unitization agreements from existing state antitrust laws. He doubted that the state could compel landowners to pool their properties for oil and gas development and could therefore only sanction voluntary unitization agreements. Without legislative approval, Townes advised that separate ownership interests would have to be merged before developing an oil and gas field as a unit to avoid the strictures of antitrust law. With Farish's blessing, Humble's legal department drafted a pooling agreement for "exploration only," with operations to be unitized only should oil be discovered. Townes assured that this was antitrust proof because separate ownership interests would be merged before the land proved to contain oil. Humble's model became a blueprint for subsequent unitization agreements in Texas oil fields.\textsuperscript{30}

\textsuperscript{29}Edgar E. Townes was the son of John C. Townes, a district judge and dean of the University of Texas Law School. He headed the law firm of Townes, Foster, and Hardwicke in Beaumont, Texas in 1917 when, at the age of 28, he drew up the original charter of Humble Oil Company and became its first general counsel. Townes served on Humble's board of directors from 1933 to 1943 and as vice-president from 1933 to 1943. He retired from Humble in 1943 and entered private law practice. Townes founded South Texas College of Law and served as its dean for 26 years. Cited from \textit{Houston Chronicle}, 9 December 1991, 11:1; Herman Paul Pressler, III, 3 December 1982, VEOH Interview 40, p. 2, VEA, PID: 052615-050.

\textsuperscript{30}Larson and Porter, \textit{History of Humble Oil}, pp. 302-03, cited Townes's memoranda of 26 April and 6 July 1927, located in the Humble Oil & Refining Company records in Houston, Texas. Larson and Porter pointed out that Humble's legal staff relied upon the work of other oil and gas lawyers like private practitioners Robert E. Hardwicke, Jr. and John Kilgore, and corporate counsel Lewis Foster of Sun Oil Company, W. O. Crane of the Texas Company, W. P. Z. German of Skelly Oil Company, and James A. Veasey of Carter Oil Company. Attorney Hines H. Baker joined Humble's legal department in 1919 and, after serving an apprenticeship doing title work, was assigned responsibility for studying and rendering advice on the legal aspects of petroleum conservation. This experience broadened Baker's understanding of petroleum reservoirs and underground waste and its relevance to oil and gas law. Baker's close working relationship with scientists, engineers, and operators influenced his support of oil conservation legislation. Humble's lawyers also consulted independent operators to learn more about the problems of
Humble's unitization scheme did not suddenly jump out of Townes's magic hat. It evolved from the slow and tedious process of years of experience, study, and debate. Humble attorney Hines H. Baker had chief responsibility within the company's legal staff for studying conservation law. Rex G. Baker, who did title and contract work, assisted in the discussions and debates. Humble's legal department worked closely other attorneys who specialized in oil and gas law like private practitioners Robert E. Hardwicke and John E. Kilgore and company counsels such as Lewis Foster of Sun Oil, W. O. Crane of the Texas Company, W. P. Z. German of Skelly Oil, and James A. Veasey of Carter Oil. The lawyers also worked closely with operators and engineers to gain a better understanding of the practical and engineering problems of petroleum production.\(^3\)

Baker recalled, "There was a lot that wasn't known about the producing business in the oil industry...everything was in a developing stage" and "the question of conservation,...producing at high rates, dissipating the gas energy pool, and lowering the final recovery from the reservoir...were [all] tied into the law." He blamed the rule of capture for prodding oilmen into a mad rush to secure an advantage in production regardless of market demand or waste. Since the fugacious nature of oil and gas could not be changed and vested property rights could not be constitutionally eliminated, Baker singled out unitization as the best legal and practical solution to the problem. He preferred voluntary unitization agreements, but realized the improbability of securing unanimous cooperation and consent among all landowners in a common oil pool. They would expectedly disagree over the relative value of their respective

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\(^3\)Larson and Porter, *History of Humble Oil*, pp. 302-03.

*Larson and Porter, History of Humble Oil,* pp. 302-03.
properties and particular production techniques and feared antitrust prosecution. Baker suggested the removal of antitrust barriers and enactment of a compulsory unitization statute to force recalcitrant landowners to respect their neighbors' correlative rights as well as the public interest in eliminating waste in petroleum production. He favored state laws in lieu of federal control.32

Baker asked for more than mere cooperation among private operators and state action. He called for an interstate compact among the oil-producing states. The compact would serve several key functions: act as a fact-finding agency to determine the nature and extent of overproduction; assign production quotas to each state to keep supply in line with demand; and provide a channel through which the states might agree to remove antitrust barriers to unitization. Baker hoped that Congress would follow suit and ease federal antitrust restrictions to facilitate the development of oil fields as single units similar to the mining and manufacturing businesses. This would promote conservation by permitting the more efficient and orderly production of vital and unreplenishable petroleum resources. To supplement the interstate compact, Baker recommended the enactment of state oil conservation laws authorizing a regulatory agency to enforce production quotas designed to eliminate waste. Ideally, he hoped that the oil industry and the states would cooperate in working out a practical solution to the problem with minimal government interference.33

32Hines H. Baker, 10 December 1982, VEOH Interview 21, p. 11, VEA, PID: 052815-304; Larson and Porter, History of Humble Oil, pp. 303-05; Rex Gavin Baker, 3 December 1982, VEOH Interview 20, p. 5, VEA, PID: 052815-305, noted the importance of lawyers' title work. Humble was buying a lot of oil and wanted to ensure that it paid the right owners; For a chronological history of compulsory unitization statutes see J. Frederick Lawson, "Recent Developments in Pooling and Unitization," Institute on Oil and Gas Law and Taxation (Albany, N.Y.: Matthew Bender, 1972), p. 213; Twenty-seven states eventually adopted antitrust exemptions for voluntary unitization agreements. See Howard R. Williams and Charles J. Meyers, Oil and Gas Law 6 (Albany, N.Y.: Matthew Bender, 1980), sec. 911.
33Larson and Porter, History of Humble Oil, pp. 305-06.
Humble's lawyers had formulated a legal cure to immunize the oil industry against the crippling effects of the rule of capture. It containing three significant ingredients: (1) the exercise of state police power in lieu of federal regulation to control petroleum production; (2) the restriction of production to market demand; and (3) the creation of an interstate compact as the most practical and equitable method of distributing total production among individual states. Farish endorsed the antidote warning that some day the oil industry would "have to answer for the uneconomic and wasteful way in which oil and gas are being used."34

VII

In 1927, Oklahoma oilman Ernest W. Marland joined Humble's oil conservation crusade telling producers and refiners that if they could not overcome the negative effects of overproduction through "the ruthless and inexorable law of supply or demand working through the price factor," then to do so "by [the] intelligent curtailment of output." National Organization of Independent Producers president H. H. Gray wanted to limit output by curtailing exploration and imposing some system of production controls. Teagle thought that Farish and Humble were moving too quickly. He supported conservation as long as industry regulated itself without any governmental interference. F. C. Proctor, Gulf Oil Company's spirited legal counsel and a "dyed-in-the-wool" individualist, denounced Humble's unit plan as a "nostrum worthy of a blatter skite politician, but not of the leaders of a great industry." API legal counsel Hughes doubted that overproduction could be solved without better educating oilmen and obtaining broader consensus support from the oil industry. He believed that the states lacked both the constitutional authority and the ability to

34Larson and Porter, History of Humble Oil, pp. 305-06.
curb overproduction. Hughes opposed governmental interference in private business, but preferred federal over state regulation if push came to shove. He agreed with Farish that the oil industry was "powerless to help itself" and needed "government help, permission to do things we cannot do today [unitization], and perhaps government prohibition of those things [waste] that we are doing today."\textsuperscript{35}

Despite his convictions, Farish realized that many oil industry leaders needed a great deal of education before they could be persuaded to agree on a single conservation plan. Disillusioned, he concluded "that there are more individual fools in the petroleum business...[who]...do not know the meaning of cooperation and teamwork." Farish relaxed his efforts to affect petroleum conservation legislation in Texas and settled for more popular alternatives like voluntary unitization which appealed to oilmen's rugged individualism and distaste for government control. Petroleum engineers had praised unitization as the most efficient means of producing oil. Unitization not only afforded neighboring landowners a legal method to improve the efficiency of their oil production operations and lessen costs, but it also protected them against the

\textsuperscript{35}Knowles, \textit{The Greatest Gamblers}, pp. 191-203, 324, stated that Ernest W. Marland came from a wealthy family and attended the University of Michigan where he distinguished himself as a poker player. His gambling instinct led him into oil wildcatting in Pennsylvania where he made and lost a fortune. Marland came to Oklahoma from Pittsburgh in 1908 and was living on borrowed money. He established the Marland Oil Company and eventually became Governor of Oklahoma. Like many of his contemporaries, Marland believed that wealth was a privilege which should be displayed in the form of palaces, private railroad cars, yachts, art objects, and elaborate parties; F. C. Proctor quoted in Hardwicke, \textit{Antitrust Laws}, p. 39; Hughes offered a somewhat contradictory view to the one he had expressed in the public hearing before the FOCB on 27 May 1926 when he stated: "The Government of the United States is one of enumerated powers and is not at liberty to control the internal affairs of the states, respectively, such as production within the states, through assertions by Congress of a desire either to provide for the common defense or to promote the general welfare." Quoted in Clark, \textit{Oil Century}, p. 191; Larson and Porter, \textit{History of Humble Oil}, pp. 307-08, noted that Hughes reconciled the apparent inconsistency in his views by insisting that federal regulations be limited to prohibiting interstate shipments of oil produced under circumstances involving waste.
"carefree wildcatter" who exhibited little concern for the market's capacity to absorb more oil.36

Certain difficulties with voluntary unitization had to be overcome. Owners of land tracts with natural structural advantages would unlikely agree to a plan that reduced the value of oil and gas which they could recover by "going it alone." Confident that oil would continue migrating toward their tracts, these landowners could employ the tactic of delay in negotiating a unitization agreement to improve their bargaining position. Some landowners would assuredly remain skeptical of the plan's profitability. Holdouts could get a "free ride" without sharing the costs of unit development because more efficient operation would increase reservoir pressure and force more oil to migrate toward their land tracts. Farish and other proponents wanted compulsory unitization laws to eliminate this kind of "profitable obstructionism." They cited eminent domain as one source of legal authority to support state laws compelling reluctant landowners to join a unit development plan in return for a fair share of the profits.37

36Larson and Porter, History of Humble Oil, pp. 309-10; Weaver, Unitization of Oil and Gas Fields in Texas, pp. 25-27, explained that unitization improves each operator's cost efficiency by eliminating the need to drill unnecessary wells thereby lowering production costs and minimizing loss of reservoir pressure allowing more oil to be recovered. At pp. 45-46, Weaver cited Farish's belief that unitization would allow 50 percent more oil to be produced at one-fourth the cost of competitive drilling. For a thorough analysis of the economic efficiency derived from unitization, see Stephen L. McDonald, Petroleum Conservation in the United States: An Economic Analysis (Baltimore: Johns Hopkins University Press, 1971), pp. 59-110.

A lack of widespread support from oil industry leaders and public officials stymied the implementation of voluntary unitization. Until 1928, the post-World War I demand for petroleum had boosted crude oil prices as high as $3.00 a barrel and increased oilmen's confidence in the indefiniteness of the economic prosperity of the "roaring twenties" and their laxity toward conservation. Oilmen also remained skeptical about the soundness of petroleum conservation from scientific, technological, and legal standpoints. During the late 1920s, Humble and other progressive-minded oil companies like Pan-American [Indiana Standard], Roxanna [Shell], and Marland became convinced that improved production techniques lowered operating costs, enhanced ultimate recovery, and helped adjust output to market demand.38

Farish touted unitization as "the only method of reducing costs to a point where we can meet the competition of cheap foreign oil, itself the product of oil pools owned and operated as individual units." Many oilmen still worried that unitization agreements were vulnerable to prosecution under state or federal antitrust laws. Gulf's Proctor, opposed any government interference in private business affairs. Speaking not "as a lawyer, but as a businessman," Proctor dared Farish and other unitization enthusiasts to disregard legal uncertainties and risk prosecution. Farish accepted the challenge. In the hot, desolate, rattlesnake-infested West Texas county of Pecos, Farish gambled that his bold and extra-legal exploit would remain beyond the reach of the law's long arm long enough to vindicate what he and other forward-thinking oilmen like

38Larson and Porter, History of Humble Oil, pp. 310-12, noted that Farish served on the API's Gas Conservation Committee which recommended the cooperative development of oil and gas pools and the enactment of laws to prevent the waste of natural gas. Farish was also a member of the API's Committee of Seven which disseminated the latest findings and developments in oil reservoir science and technology. See Hardwicke, Antitrust Laws, pp. 41-46.
Doherty had been saying; cooperation was the key to the future viability and
success of the American petroleum industry.39

CHAPTER III

SLEEPING WITH STRANGERS

If you've got a big [oil] field and...a whole bunch of different ownerships, ...
[cooperation] becomes an enormously complicated thing.

Robert A. Shepherd, Jr.

On 9 November 1927 "Judge" James A. Elkins presided over a general partnership meeting of his Houston law firm, Vinson & Elkins. Among the topics of discussion was a proposal for one of the firm's most important clients, Pure Oil Company.

1Founded in 1917 by William A. Vinson and James A. Elkins, the Houston law firm of Vinson & Elkins [VE] initially represented local lumber and insurance businesses. The firm had no major oil company clients. In 1921, Colonel Albert E. Humphreys, an independent oil producer, with considerable lease-holdings in the Mexia oil field near Mexia, Texas, was looking to retain the services of a respectable law firm. His oil operations had outgrown the capacity of a local small-town, sole-practitioner. By chance, Humphreys met Elkins in Houston. Elkins persuaded the Texas Company to pay Humphreys some money it had owed to him for recent crude oil purchases. Humphreys was impressed with Elkins and, on 1 January 1922, retained VE to represent the Humphreys Oil Company for a fee of $35,600 per year. Humphreys was the largest retainer VE had received to date. The relationship led to bigger things. In 1924, Pure Oil Company bought out Humphreys's producing interests in the Mexia field and retained VE to handle its legal business in Texas. By the 1930s, oil and gas law comprised about 80 percent of VE's legal business. VE represented many of Texas's independent oil producers, a group of rugged individuals appropriately called "wildcatters." See Shepherd, A Short History of the Firm, p. 9; Shepherd Interview, p. 2, VEA, PID: 052615-391; William S. Elkins, 15 November 1982, VEOH Interview 10, pp. 14-15, VEA, PID: 052615-407; Raybourne Thompson, 20 September 1982, VEOH Interview 5, p. 19, VEA, PID: 052615-138; Original Retainer Contract between Vinson & Elkins and Humphreys-Mexia Oil Company, 1 January 1922, James A. Elkins Personal Correspondence File—Mexia, 1918-1926, Folder 1, File H, VEA, Closed File 8001 [hereafter C. F.]. For history and background of Mexia oil field and Albert E. Humphreys see Knowles, The Greatest Gamblers, pp. 180-183, 210-215; Moore, "Mexia Well Making Slow But Steady Progress," 20; "Texas Brazos Trail," Texas Monthly 19 (May 1991): 73-83; Mexia Evening News, 20 November 1920, 1:3, 26 November 1920, 1:3, 3 December 1920, 1:3, 9 May 1921, 1:2; Fort Worth Star-Telegram, 9 May 1921, 13:5.
Oil Company, to form a partnership with several other oil companies in order to consolidate and manage production in the Yates oil field in Pecos County, Texas. Farish had presented this idea to a group of fifteen oil producers in the Yates field at an August meeting in Houston. Humble owned the only pipeline in that part of West Texas and agreed to extend it into the Yates field and purchase 30,000 barrels of oil daily if producers unitized their operations. An advocate of unitization, Farish lectured the Yates oilmen on the evils of overproduction, the high costs of storing production in excess of market demand, and for producers lacking storage facilities, the attendant waste. Farish also warned that uneven withdrawal would permit intruding water to bypass much of the oil leaving it trapped underground. This resulting waste would inflict financial loss on producers and deprive the public of vital petroleum resources. Humble had large quantities of oil in storage. It would decline in value if overproduction at Yates drove prices lower. The Houston meeting accomplished little, but the producers agreed to meet again in Fort Worth in early September.2

II

Farish's unitization dream coincided with a chaotic boom era in American petroleum history. The discovery of the Yates oil field in late 1926, the "Queen of the Pecos," further undermined an already dire situation. But the black gold underlying the barren soil had dealt a winning hand to some humble West Texas ranchers and the University of Texas, which owned 184,960 acres in Pecos County. Thanks to wildcatter and U. T. alumnus, Robert R. Penn, the Pecos field was spewing 192,000 barrels of crude oil a day by September 1927. But there was no pipeline outlet to carry all that oil to refineries. Penn

2Minutes of General Firm Meeting, 9 November 1927, VEA; Minutes of Committee Representatives of Oil Companies Operating in the Yates Pool [hereafter Minutes of Yates Committee], 2 September 1927, VEA, C. F. 29159-D.
never had to deal with the problem because a gun in his car "accidentally" discharged, ending his short career in oil. So Farish stepped in and made his conservation pitch to a throng of surly West Texans.3

On 2 September, Farish invited the Yates producers to Fort Worth. He explained the physical and economic dangers posed by intensive drilling and flush production. Since they lacked a pipeline and an adequate market to handle existing output, Farish offered to buy and transport 30,000 barrels of Yates oil each day if the operators agreed to unitize their operations. The Yates oilmen formed a committee to study Farish's proposal. W. A. Moncrief, president of Marland Oil Company of Texas, chaired the committee which agreed to reconvene on 8 September and render its decision.4

The committee appointed three attorneys to go to Austin and solicit the Texas Attorney General's opinion concerning the legality of unitization. James Elkins, Hines Baker, and Tom Knight comprised the trio who trekked to the state capital. The attorney general refused to commit for or against the plan, but, should the Yates operators proceed by its terms, he promised not to prosecute them "without notice." The attorney general's comments did not sit well with Elkins. Experience had taught him not to bank on prosecutors' promises. Elkins told VE partners that he believed unitization violated Texas antitrust law and that he was advising the firm's client, Pure Oil, against joining the Yates


4Minutes of Yates Committee, 2 September 1927, pp. 1-2, VEA, C. F. 29159-D.
operators' agreement. He also reminded Pure that its share of unit production might be inadequate to meet its existing contractual obligation to supply purchasers with a specified amount of crude oil. Elkins assured Pure management that it would be illegal for the other Yates operators to attempt to force the company to join a unit plan which impaired outstanding contracts.5

The Yates operators' committee reconvened on 8 September and agreed to a tentative unitization plan. The written agreement stipulated that production in the Yates oil field had exceeded that amount which could be readily stored, transported, or marketed and that output had to be restricted. Essentially, the unit agreement allocated a share of total pipeline capacity and market demand to each partner according to "well potential."6 A "general committee" was created to represent unit members and administer the plan along with a three-member "executive committee" to supervise unit operations. On a designated date, representatives of unit operators jointly gauged production from each individual lease to determine potential production. The representatives signed "gauge tickets" which were forwarded to the chairman of the executive committee. On the 15th and last day of every month, each operator notified the chairman of the quantity of oil he intended to store or dispose of other than delivery to a pipeline. The executive committee then

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5Minutes of Yates Committee, 2 September 1927, p. 2, VEA, C. F. 29159-D; Minutes of General Firm Meeting, 9 November 1927, p. 1, 16 March 1928, pp. 1-2, VEA [no PID].
6Memorandum of Joint Operating Agreement for the Yates Oil Field [hereafter Yates Operators' Agreement], 8 September 1927, p. 1, VEA, C. F. 29159-D, defined potential production (pp) as the amount of oil which the completed wells on a given lease, regardless of number, produce on any given date. The potential production of the entire field (ppf) is the sum of the potential production of individual leases. The field's outlet (ol) is the total amount of oil that the operators agree to produce each day. A production fraction or percentage (pf) is determined by dividing the total outlet (ol) by the total field production (ppf). The production of an individual lease is determined by multiplying potential production (pp) by the production fraction (pf). The resulting amount is the quota assigned to each operator.
assigned production quotas to each operator. Operators could appeal their quota assignments to the general committee.7

The unit partners shared the operating expenses and profits in proportion to their respective production quotas. Ironically, the operators expressed their intent not to limit or fix the amount of oil each one could produce, store, or market. The unitization agreement expired ninety days after 1 October 1927 and could be renewed for successive ninety-day periods. All the Yates operators signed the agreement with the conspicuous exception of Gulf and Pure Oil Companies.8 Gulf vice-president Underwood Nazro and company attorney F. C. Proctor had already opposed unitization. Instead of basing quotas on individual well-potential, Proctor complained that the Yates plan allocated production to each producer according to the ratio of output his acreage bore to the entire field. He pointed out that even a fool realized he could increase his quota by drilling more wells, thereby defeating the object of the plan. But the Yates unit partners feared that tighter production controls would trigger antitrust prosecutions. Gulf likely held out because it needed to produce additional crude oil to feed its refineries.9

On 12 September, B. S. SoRelle, manager of Pure’s Texas Producing Division, forwarded a draft of the Yates unitization agreement to company vice-president R. W. McIlvain in Chicago and to Elkins in Houston. SoRelle solicited Elkins’s advice about legal problems like antitrust violations. As noted, Elkins believed that the Yates agreement violated Texas antitrust laws. Even though he did not expect the attorney general to prosecute, Elkins warned that his

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7Yates Operators’ Agreement, pp. 1-4, VEA, C. F. 29159-D.
8Ibid.
policy "would not be binding upon his successors in office and the statute of limitation does not run against violation of the antitrust laws" indefinitely subjecting the unit partners to prosecutions, fines, and penalties. SoRelle notified Elkins that Pure would not join the Yates unit. Thanking him for his "legal wisdom," SoRelle offered Elkins his houseboat on Sweet Lake "where you will have a cook to take care of your physical needs and a good boatman to take you around over the lake to the best places for fishing...you will be clear out of touch of everything."10 The Yates unitization agreement did not remain in force long enough to face any legal tests. On 1 July 1928 the Texas Railroad Commission [TRC] for the first time exercised its authority under a 1919 statute to regulate oil production in the state.

III

The TRC was the product of agrarian discontent in the late nineteenth century. Angry farmers and merchants complained that railroads were discriminating against them by charging exorbitantly high freight rates. The Texas Farmers' Alliance, organized in 1875, spearheaded the drive for state regulation of railroad rates. Congress had already responded to alleged railroad abuses by enacting the Interstate Commerce Act in 1887. At its 1890 state convention in Houston, popularly called the "Farmers' Alliance Picnic," the Texas Democratic Party included a plank in its platform calling for the creation of a state railroad commission to regulate freight and passenger rates and nominated James Stephen Hogg for governor. As state attorney general, Hogg had successfully prosecuted the railroads to recover excessive land grants which were then used to support public education. He campaigned for governor

10SoRelle to McIlvain, 12 September 1927, VEA, C. F. 10974; SoRelle to Elkins, 12 September 1927, VEA, C. F. 10974; Elkins to SoRelle, 19 September 1927, VEA, C. F. 10974; SoRelle to Elkins, 22 September 1927, VEA, C. F. 10974.
pledging his support for a railroad commission. On 5 November 1890 Texans elected Hogg governor and ratified a state constitutional amendment authorizing the legislature to create a railroad commission. The Texas Legislature established the three-member TRC in April 1891.\(^{11}\)

From its inception, the TRC was mired in legal troubles. During the debates over its creation, lawyers argued that regulatory commissions were unconstitutional because they unduly interfered with private property rights. On 3 April 1892, the Farmers' Loan and Trust Company, acting as trustee for the bondholders of five Texas railroads, sued to enjoin the TRC from enforcing its railroad rates. Farmers' alleged that the TRC's rates were too low to allow the railroads to recoup operating costs and pay interest on bonded indebtedness thereby forcing them into default and decreasing the value of the bonds. John F. Dillon, legal counsel for the railroads, argued that the act creating the TRC was unconstitutional because it empowered a state regulatory agency to confiscate private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. The Attorney General responded that the trustees had conspired with the railroads to create a fictitious financial loss to defraud bondholders and blame the TRC's rates for being unreasonably confiscatory. United States Circuit Judge A. P. McCormick issued an injunction

restraining the TRC and the Attorney General from regulating railroad rates. The United States District Court in Austin upheld the order on 23 August 1892. State authorities appealed to the United States Supreme Court.¹²

On 26 May 1894 Justice David J. Brewer announced the Court's decision upholding the constitutionality of the state act delegating legislative regulatory power to a commission. Brewer cited the *Railroad Commission Cases* in validating the exercise of state police power to regulate railroad rates subject to judicial review to determine whether such regulations or rates unreasonably confiscated private property without due process of law. Brewer struck down the TRC's rate schedules as unreasonably low and depriving the bondholders of their private property without due process of law.¹³

Instead of offering evidence to prove a conspiracy between the trustees and the railroads, the Texas Attorney General demurred to the unreasonableness of the TRC's rates and rested the State's case on the constitutionality of the enabling act. Had he proven that the trustees had collaborated with the railroads to create a false debt, the Supreme Court might have upheld the TRC's rate schedules as reasonable. The Attorney General apparently believed that the case hinged on the constitutionality of the enabling act since the Supreme Court had never before struck down regulatory rates established under legislative fiat. Despite the Attorney General's miscalculation, the State achieved a moral victory in getting the nation's highest legal tribunal to bestow its blessing upon the TRC.¹⁴

¹⁴Spratt, *Road to Spindletop*, p. 222.
IV

The subsequent history of TRC railroad regulation is irrelevant to how it became involved in regulating petroleum production. The Texas Legislature passed the state's first petroleum conservation act in 1899 designed to prevent the physical waste of oil and gas by regulating drilling and production methods. It required oil and gas wells to be cased off to prevent the intrusion of water into the oil sand or oil and gas into fresh water sands, provided for the plugging of all abandoned wells, forbid the flambeau burning of escaping gas, and prohibited the escape of natural gas into the open air.\(^\text{15}\)

The development of Spindletop and subsequent oil fields elevated Texas to the world's number one petroleum producing province by 1929 as total production surpassed two billion barrels.\(^\text{16}\) This dramatic increase further accentuated the need for conservation. The Texas Legislature followed the 1899 act by enacting statutes in 1905, 1913, and 1917.\(^\text{17}\) The 1917 statute statute empowering the TRC to administer state petroleum conservation laws. Texans also approved a constitutional amendment in 1917 which declared "that conservation and development of all of the natural resources of this State...are each and all hereby declared public rights and duties, and the Legislature shall


\(^{16}\)Rister, *Oil: Titan of the Southwest*, p. 412.

pass all such laws as may be appropriate thereto." The 1917 amendment furnished the legal authority for state enforcement of petroleum conservation.  

V

There was little opposition or litigation with respect to these early oil conservation statutes and regulations since they pertained purely to the mechanics of production and were aimed solely at prevention of physical waste. Moreover they applied equally to everyone and did not deprive one individual or group of certain rights and privileges to the advantage of others. Petroleum-related litigation at this time dealt primarily with disputes over ownership rights like the Texas case in 1911 where William H. Thomas sought to prevent George H. Herman from drilling on an adjacent land-tract. Since he could not afford to drill an offset well, Thomas alleged that Herman was confiscating some of his oil. On appeal, the Texas Fourteenth Court of Civil Appeals in Galveston applied the rule of capture and held that the oil belonged to whoever first appropriated it.  

The court's ruling overlooked a conflict in Texas law. Texas courts recognized landowners absolute title to oil, gas, and other minerals underlying

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18Harclwicke, "Legal History," p. 217-18; Texas Constitution, Article XVI, Section 59(a); Available evidence does not indicate precisely why the Texas Legislature delegated authority to an existing agency, the TRC, rather than creating a new and separate commission for enforcing state petroleum conservation statutes. The legislature probably desired to save tax dollars to gain the favor of Texas voters who had ritually opposed government spending and taxation. Familiarity with its members and their track record might have been another reason why the legislature chose the TRC to enforce oil conservation. Most likely, the legislature desired to have petroleum conservation administered by an agency "which at least had had the opportunity by continuous and extensive experience and study to become experts and specialists with the needs and demands of the industry. For the purpose of efficiency...it was advisable to have the Legislature only indicate the broad outlines of the [TRC's] policies...leaving all matters of detail to those who make a specialty of the study of the problems involved. Not only does the [TRC] have the advantage of specialization, but it also has the advantage of a continuity of action." Harl, "Oil, the Courts, and the Railroad Commission," pp. 307-09; See Elton M. Hyder, Jr., "Some Difficulties in the Application of the Exceptions to the Spacing Rule in Texas," Texas Law Review 27 (1949): 482-83, for speculation on reasons why the Texas Legislature assigned the TRC responsibility for enforcing state petroleum conservation laws.

their land while, at the same time, applying the rule of capture.\textsuperscript{20} They apparently overlooked, or ignored, the Supreme Court's \textit{Ohio Oil v. Indiana} decision which held that things \textit{ferae naturae} could not be owned by anyone. Texas courts failed to recognize the contradiction between upholding a landowner's absolute title to petroleum and then ruling, as it did in \textit{Herman v. Thomas}, that the oil and gas belong to no one until captured. Intermediate appellate courts in Texas had uniformly held that production leases did not pass title to the minerals in place despite language to the contrary in the instrument of transfer. In 1915, the Texas Supreme Court decided otherwise.\textsuperscript{21}

W. H. Daugherty had leased land in Wichita County to the Texas Company to produce oil and gas. In the lease agreement, Daugherty specifically conveyed his ownership interest in the oil, gas, and other minerals to the Texas Company for valuable consideration and royalties. He deducted the value of the minerals from the tax he owed on his land. The state factored in the underlying petroleum in assessing land values for tax purposes. State tax officials determined that Daugherty had conveyed ownership of the minerals in the lease and levied a tax on the Texas Company for the value of the oil and gas. The Texas Company argued oil and gas were incapable of being owned until captured and reduced to possession. If damages for draining oil and gas \textit{in situ} could not be proven, then how could state authorities determine the value of underlying petroleum for tax purposes?\textsuperscript{22} The Texas Company claimed that it

\begin{itemize}
\item \textsuperscript{20}Bender v. Brooks, 103 Tex. 329 (Tex.S.Ct. 1910); See Greer, "The Ownership of Petroleum Oil and Natural Gas in Place," 178-79.
\item \textsuperscript{21}Ohio Oil Company v. Indiana, 177 U.S. 190 (1900).
\item \textsuperscript{22}In \textit{Murphy Oil Company v. Burnet}, 287 U.S. 299 (1932), the United States Supreme Court approved the Commissioner of Internal Revenue's valuation of the amount of oil and gas under a given land tract for purposes of assessing income taxes. The Court held that the Commissioner's finding was based upon engineering reports and amounted to more than "mere theory and speculation." In \textit{Utah Power and Light Company v. Post}, 286 U.S. 299 (1932), the Court noted that there were many questions arising in daily business affairs which could not be answered with
\end{itemize}
held a mere license to extract petroleum from Daugherty's land in return for a share of the profits.\textsuperscript{23}

The Texas Supreme Court attempted to reconcile the rule of capture with the absolute ownership theory. It held that oil and gas in situ were part of the realty and when conveyed in that condition, an ownership interest in them likewise passed. A purchaser of oil and gas in situ assumed the risk of their escape, but this possibility did not alter the property interest in them. The Court reaffirmed a landowner's absolute title to oil in gas in situ which could be conveyed to another. It ruled that Daugherty had conveyed an ownership interest in his oil and gas to the Texas Company, making it liable for applicable taxes. The ruling meant that Texas courts conveniently applied the rule of capture to deny damages or injunctive relief to landowners who complained of losing their oil to neighbors' drainage while applying the absolute ownership theory for tax purposes.\textsuperscript{24}

The Court cited Justice White's opinion in \textit{Ohio Oil v. Indiana} that the analogy between things \textit{ferae naturae} and oil and gas was limited. White held that, unlike things \textit{ferae naturae} which were public property, oil and gas were private property belonging to the owner of the overlying surface land. Landowners sharing a common reservoir owed a duty to respect each others' correlative rights and not extract more than a fair share of the underlying oil and gas. White tried to emphasize the difference between petroleum and wild animals to show that the rule of capture and the absolute ownership theory were irreconcilable, thereby exposing the fallacy of the analogy between

\textsuperscript{23}Texas Company v. Daugherty, 176 S.W. 717, 718 (Tex.S.Ct. 1915).
\textsuperscript{24}Ibid, 719-22.
petroleum and things *ferae naturae*. This was a vital point which the Texas Supreme Court either overlooked or misread when it cited the opinion to support its attempt to reconcile the capture and absolute dominion theories.25

VI

The obvious ambiguity of Texas law governing ownership rights in petroleum had little effect on production. By 1919, new oil discoveries at Burk Burnett, West Columbia, Ranger, Desdenoma and other Texas fields accentuated the overproduction problem necessitating more stringent measures to prevent waste. In response, the Texas Legislature enacted a comprehensive petroleum conservation act in 1919 which specifically prohibited waste of oil and gas and conferred broad regulatory powers upon the TRC to enforce the statute. University of Texas Law Professor George C. Butte organized and supervised the TRC's oil and gas division to study petroleum production and conduct public hearings to gather evidence concerning the development of specific rules and regulations. Butte's experience and reputation as an expert in oil and gas law had been a prime consideration in his selection for the task and attested to lawyers' significant influence in shaping petroleum regulation policies. Based on the oil and gas division's recommendations, the TRC issued thirty-eight rules and regulations designed to minimize waste in oil and gas production, most notably Rule 37.26

Rule 37 prohibited the drilling of wells within 150 feet of each other or closer than 300 feet to the lease boundary line. Prior to the spacing rule's


promulgation, operators could drill as many wells they pleased and produce each well to capacity. Rule 37 was generally endorsed by large land and lease owners who wanted to produce their oil at a minimum expense of drilling wells. Small land and lease owners opposed the rule because it deprived them of the opportunity of drilling additional wells to produce as much as the larger tracts. They argued that the rule of capture gave each operator the correlative right to drill as many wells as he pleased to recover as much oil as possible. After a lengthy legal battle, Texas courts upheld Rule 37. But Rule 37 did not engender any serious opposition from most majors and independents since it did not limit oil production from any well or field and because the TRC generously granted exception permits where the rule affected a substantial hardship.27

VII

Against this background, the TRC assumed responsibility for regulating petroleum production in Texas. Rule 37 did not apply neatly to the Hendrick oil field in Winkler County. The predominance of small five to ten-acre tracts leased to small independent producers, who far outnumbered the major oil companies' owners who wanted to produce their oil at a minimum expense of drilling wells. Small land and lease owners opposed the rule because it deprived them of the opportunity of drilling additional wells to produce as much as the larger tracts.

27 Oil and Gas Conservation Law and Rules and Regulations for the Conservation of Crude Oil and Natural Gas, "Oil and Gas Circular No. 13" (Austin: Railroad Commission of Texas, 1923), p. 19; in Pure Oil Company—Proration Matters File, VEA, C. F. 11726, where Rule 37 states: "No well for oil and gas shall hereafter be drilled nearer than three hundred (300) feet to any other completed or drilling well on the same or adjoining tract or farm; and no well shall be drilled nearer than one hundred and fifty (150) feet to any property line; provided, that the Commission, in order to prevent waste or to protect vested property rights, will grant exceptions permitting drilling within shorter distances than as above prescribed, upon application filed fully stating the facts, notice thereof having first been given to all adjacent lessees affected thereby. Rule 37 shall not for the present be enforced within the proven fields of the Gulf Coast; Hart, "Oil, the Courts, and the Railroad Commission," pp. 309-10; Hardwicke, "Legal History," pp. 218-19, cited the following leading Texas cases upholding the validity of Rule 37: Humble Oil & Refining Company v. Strauss, 243 S.W. 528 (Tex.Civ.App.—Amarillo [7th Dist.] 1922, no application for writ of error); Oxford Oil Company v. Atlantic Oil Producing Company, 16 F.2d 639 (5th Cir. 1927, petition for writ of certiorari denied, 277 U.S. 585, 48 S.Ct. 433, 72 L.Ed. 1000); Railroad Commission of Texas v. Bass, 10 S.W.2d 586 (Tex.Civ.App.—Austin [3rd Dist.] 1928, writ of error granted, then dismissed, 51 S.W.2d 1113); Gilmore v. Straughan, 10 S.W.2d 589 (Tex.Civ.App.—Austin [3rd Dist.] 1928, no application for writ of error); State v. Jarmon, 25 S.W.2d 936 (Tex.Civ.App.—San Antonio [4th Dist.] 1930, application for writ of error dismissed).
lease holdings operators, forced the TRC to grant numerous exception permits which resulted in excessive drilling. Daily production in the Hendrick field reached 50,000 barrels by December 1927. By March 1928, Hendrick crude oil was selling for ten cents a barrel. In addition to falling crude oil prices, over half the wells became saturated with water. Engineers employed by major companies to study the situation were shocked by the attitudes of small independents who reacted to the problem by pumping as much oil as possible to beat the onrushing water. The engineers argued that increased production would only hasten water intrusion by prematurely decreasing reservoir pressure. As the water crept forward, the independents finally succumbed and realized that it was in their best interest to curtail production.28

In February 1928, representatives of the Hendrick operators met with the TRC in Fort Worth. A six-member committee, chaired by TRC member R. D. Parker, to work out some method to curtail production. The committee hammered out a proration29 plan in April. Due to the predominance of small land holdings, the Hendrick field was divided into forty-acre units. One-half of the field's total allowable, as established by the TRC, would be apportioned equally to each unit while the remaining half would be allocated according to

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28H. H. King, "Hendrick Extension Starts Big Offset Campaign," *Oil Weekly* 48 (9 March 1928): 40; King, "Peculiar Water Trouble Develops in Hendrick Field," *Oil Weekly* 48 (13 January 1928): 23; E. N. Van Duzee, "Effects of Choking Wells in Winkler County," *Oil Weekly* 53 (12 April 1929): 43; Larson and Porter, *History of Humble Oil*, pp. 318-19, stated that Humble had invested some 25 million dollars in pipeline facilities in West Texas and was purchasing half the oil produced there, paying the highest posted prices. Humble could not continue paying a higher price than its competitors for West Texas crude oil and then incur additional expenses for storage, which added 75 cents a barrel to costs. Humble offered to share its pipeline with other producers if they agreed to limit production so that everyone received a fair share of the market without flooding it and driving down prices.

29Wallace F. Lovejoy, "Conservation Regulation: The Economic and Legal Setting," in Lovejoy and I. James Pikl, Jr., eds., *Essays on Petroleum Conservation Regulation* (Dallas: Southern Methodist University, 1960), p. 20, defined prorationing as the limitation of petroleum production below capacity output. Production quotas are allocated to each oil field in a state, which are then distributed among individual producers and wells within a given oil field.
each unit's percentage of the total production. Unit shares would then be divided among individual operators therein. With the exception of minor revisions to the allocation formula, the plan had been modeled after the Yates operators' agreement. The TRC appointed a "field umpire" to administer and supervise the plan with the assistance of an "advisory committee" made of operators. At the end of April, the TRC issued its first proration order limiting production in the Hendrick field to 150,000 barrels a day.30

Prorationing held back the tide of Hendrick oil, but did not nothing to silence West Texas wildcatters. The TRC had restricted Hendrick production to one-fifth of the field's capacity output. Many small producers crowded into a single forty-acre tract complained about receiving too small a share to enable them to profit. Their only recourse under existing regulations was to drill more wells to enhance unit potential and qualify for a bigger share of the field allowable. But the costs of that option were prohibitive for small operators. The TRC's order also disturbed larger independents like Tom Cranfill who had contracted to deliver specific quantities of crude oil to major company purchasers. With their production cut, they stood in possible breach of contract. Despite these complaints, after a year of prorationing in the Hendrick field, the price of West Texas crude oil stabilized and engineers estimated that the reservoir-life had been prolonged by 20 to 50 percent.31


Like cornered felines, Hendrick wildcatters defied the TRC's orders and continued producing at will. They argued that the TRC lacked legal authority to regulate the use of their private property and prevent them from selling their oil at whatever price they pleased. As long as independents could market their oil, Cranfill asked, "Where was the waste?" Under protection of two injunctions restraining the TRC from enforcing its proration order, the Dallas-based Murchison Oil Company continued to pump 5,400 barrels of oil daily from its Hendrick wells. Regulation of petroleum production, voluntary or state-enforced, was still in its infancy and without judicial blessing, the TRC could only beseech producers to comply with its regulations. The problem was further complicated by the diverse attitudes of oilmen. Major oil companies generally supported conservation, although some like Gulf did not. The views of independents toward production controls varied with their size, business interests and strategy, and financial position. Various reactions to prorationing in the Hendrick field demonstrated the lack of consensus in the oil industry and that size alone did not necessarily determine on which side of the conservation fence oilmen lined up.32

VIII

With mixed results at Hendrick, the TRC hoped to fare better in the Yates oil field where operators had been voluntarily controlling production through unitization. Although they detested government interference, Yates producers probably welcomed TRC regulation as a means of maintaining the relative


stability they had so far achieved without the risk of antitrust prosecution. In addition, the unit's allocation formula had a major flaw. The initial plan which allocated production according to well potential encouraged each producer to increase his share by boosting potential output. Yates operators revised the formula in January 1928 to determine allowables according to the amount of each producer's proven acreage within the field. But this plan benefitted large companies like Humble who held larger tracts than smaller producers who lost out on the scheme. The new formula also encouraged more drilling on the perimeter of the field where producers attempted to prove up their undeveloped leases in order to increase their allowables. For these reasons, the TRC banked on smooth sailing at Yates. The TRC divided the field into 100-acre units and figured production quotas one-fourth on an acreage basis and three-fourths on well-potential.

The regulation of oil production in the Yates field, initially through operators' voluntary cooperation and later by TRC proration order, marked a watershed in the legal history of petroleum. Although less than ideal, the Yates unitization agreement represented the earliest attempt by individual oilmen to regulate production through voluntary cooperation. From a scientific and engineering perspective, it demonstrated the feasibility of employing more efficient production methods to conserve reservoir energy and maximize ultimate recovery. The Yates experiment also illustrated the economic advantage of limiting output to market demand as opposed to wasteful flush production. One petroleum engineer credited unitization for allowing Yates operators to produce oil at four cents a barrel oil and still profit by selling it at ten

cents per barrel. Despite its questionable legal status, the Yates unit plan offered the most equitable method of regulating oil production in way that protected both the public's interest in conservation and landowners' correlative property rights. Moreover, the Yates unitization experiment afforded the TRC some justification for prorating production under the 1919 act. Voluntary unitization still remained susceptible to sudden death under Texas antitrust law.34

IX

By 1929, regulation of petroleum production, either through operators' voluntary cooperation or state supervision, in the interest of conservation was gaining momentum in both the private and public sectors. The API urged oil-producing states to limit their 1929 production to a level matching output during the last nine months of the preceding year. It established five regional committees [Pacific Coast, Interior, Atlantic Seaboard, Gulf Coast, and Mexico-South America] to study the feasibility of unitization and the kind of regulation best suited to a particular region. The API also formed committees to ascertain the need for federal intervention, and if so, what type. In June 1929, President Herbert Hoover summoned the governors of oil-producing states, major oil company officials, and trade association representatives to Colorado Springs, Colorado to discuss uniform state legislation for petroleum conservation. The idea of an interstate oil compact was shelved because independents from Texas and Oklahoma refused to sanction a "super commission."35

34Larson and Porter, History of Humble Oil, pp. 317-20; Weaver, Unitization of Oil and Gas Fields in Texas, p. 46.
Speaking on behalf of the Southern Oklahoma Oil and Gas Association, Wirt Franklin feared "that in the name of conservation a compact may [vest] absolute authority in a commission, which might fall under the domination of the major[s]." Tom Slick voiced his fellow small independents vehement opposition to any regulation when he thundered, "No state corporation will tell me how to run my business." Most independents demanded an oil tariff and the exclusion of imported oil. Major oil companies with large overseas production operations opposed the proposal. Disunity and ill-will between majors and independents broke up the conference without accomplishing anything except the creation of the Independent Petroleum Association of America under Franklin's leadership [IPAA]. The IPAA became a leading voice for independent oilmen.36

The fiasco at Colorado Springs epitomized the oil industry's divisiveness in the face of impending crisis. This did not deter Farish from again touting unitization. Humble promoted passage of a bill in the Texas Legislature to amend the 1919 oil conservation statute giving the TRC authority to enforce voluntary unitization agreements endorsed by a majority of field operators. A tough legislative battle ensued. The main opposition came from smaller independents who feared that larger independents and majors would use their size-advantage to dominate unit operations. They also opposed unitization because it tied up capital for longer periods and delayed payoffs. Supporters of the measure wanted to add a provision granting antitrust immunity to unitization agreements. The legislature passed a bill in March 1929 authorizing the TRC to prevent waste in petroleum production, but omitted a provision for unitization.

Although it did not define waste, the new act specified that it not be construed to mean economic waste, clearly implying that the TRC could not limit production to market demand. The 1929 Act failed to sanction unitization as Humble had desired, but broadened the TRC's authority to eliminate waste in petroleum production.  

The 1929 law reflected the legislature's desire to conserve petroleum without stirring up a hornets nest. Small independents' unfairly accused Humble and other major companies of masking their monopolistic aims under the guise of unitization. Humble was a "low-cost" producer who could have outlasted small independents during a prolonged period of low crude oil prices. Higher prices would arguably encourage more drilling and production which would defeat Humble's aim of achieving order and stability. Even though controlled production would raise prices, Farish believed that as long as petroleum products remained affordable to consumers, the public would bear higher costs if it truly promoted conservation and guaranteed a reliable and long-term supply at a reasonable price. He argued that "he public interest and the correlative rights of all parties operating in a pool [justified] intelligent controlled production." By limiting production to conserve reservoir pressure and enhance ultimate recovery, unitization promoted the same end as the 1929 Act in alleviating physical waste.

37 Prindle, Petroleum Politics, pp. 30-31; Humble's position toward the 1929 Act published in the Oil and Gas Journal 27 (21 January 1929): 34, (14 February 1929): 102; Weaver, Unitization of Oil and Gas Fields in Texas, p. 54; Hardwicke, "Legal History," 220, fn. 9; Text of the 1929 Act published in General and Special Laws of the State of Texas Passed by the Forty-First Legislature at the Regular Session (1929), ch. 313, pp. 694-96; Houston Post-Dispatch, 27 March 1929, 1:1, 1 April 1919, 1:1, reported that the act passed the House by a vote of 101 to 16 and the Senate by a vote of 26 to 2.

38 Weaver, Unitization of Oil and Gas Fields in Texas, p. 55; Larson and Porter, History of Humble Oil, p. 325, cited part of Farish's "Memorandum Concerning Conservation and Production Policy." Farish summarized Humble's policy toward oil conservation stating, "We are interested in conservation,...proration, [and] other forms of cooperative development and production whether
Humble's failure to secure legislative sanction for unitization did not dampen Farish's enthusiasm for order and stability in the oil patch. At a meeting of the AIMME's Petroleum Division in October 1929, he assured that unitization would solve the overproduction problem plaguing the oil industry. But the fear of antitrust prosecution still frightened many majors and large independents from jumping on the unitization bandwagon. Farish nevertheless forged ahead staking Humble's fortunes and reputation, as well as his own, gambling on unitization. He rolled the dice again, this time in the rolling prairies of Van Zandt County in North-Central Texas. The major oil company executive ironically found himself playing the wildcatter's tune.39

Farish hoped to unitize in an oil field near Van, a small Texas town about twenty miles northwest of Tyler. The Van field had been discovered in the summer of 1927 by a Pure Oil Company seismograph crew who detected the probability of oil by analyzing sound waves produced from underground explosions. Pure acquired extensive lease-holdings in the field and struck oil on 14 October 1929. Daily production averaged 144,000 barrels. The Van discovery set off another Texas oil boom luring wildcatters and every other breed of fortune-seeker in quest of black gold. Pure possessed production rights to four-fifths of the 5,800-acre Van field while Humble, Sun, Shell, and the Texas oil companies held most of the remainder. Like a lonely wolf in a prairie, crusty old dirt-farmer J. A. Bracken stood his ground in the middle of the prolific oil field. He had spurned repeated offers, as high as $500,000, by major

voluntary or compulsory; we are interested in unit operation, ... in producing our oil at the lowest cost under the best engineering practices [to get] the maximum amount of oil per acre.39

39 Larson and Porter, History of Humble Oil, p. 315; Weaver, Unitization of Oil and Gas Fields in Texas, p. 54.
companies to lease his land. Bracken had ideas of his own. He managed to sink a few wells and overnight went from rags-to-riches. Bracken's status had little noticeable effect and, much to his major-company neighbors' consternation, he remained as stubborn and surly as ever. Unitization was not in Bracken's vocabulary. Farish gave up on Bracken, but had better luck peddling his idea to the majors.  

Amidst the Great Crash, cost-conscious major oil company executives sought more than ever to avoid the added expense of competitive leasing and drilling. With general economic depression looming over the horizon, the tsars of Sun, Shell and the Texas companies overcame their antitrust phobia and leaped aboard Farish's unitization train. Baker teamed up with VE attorney Robert A. Shepherd, Sr. to transform Farish's unitization dream into reality. The two legal brain-trusts employed Townes's formula for by-passing the troubled sea of antitrust law. Since most of the Van field had not yet been explored and produced, they drafted a unitization agreement to take effect only after it became generally known that the remainder of the field contained oil.
Under the agreement, the five unit partners—Humble, Pure, Sun, Shell, and the Texas Company—consolidated their Van lease-holdings and agreed to share expenses and profits in proportion to the size of their leases. They conveyed their lease-rights to each other and created a joint-partnership giving each partner an undivided interest in the whole unit. Pure owned a lion's share of 81.7 percent followed by Humble with 7.75 percent, the Texas Company's 4.51 percent, Sun's 3.57 percent, and Shell's 2.47 percent. Production would be allocated to each partner according to the size of their respective lease-holdings during the initial two-and-one-half year period. An engineering and geological study of the reservoir would be conducted to determine the production potential of individual leases and wells. Based on those findings, a new and more equitable allocation formula would be devised. As the partner with the largest interest, Pure managed the unit operation.42

Pure vice-president R. W. McIlvain solicited Elkins's advice about possible antitrust violations. Elkins looked into the matter personally and believed that the unit agreement did not violate antitrust laws because each of the unit partners had transferred and assigned their respective interests to each other to become tenants in common. "While this specific fact situation has not heretofore been presented to our appellate courts, similar fact situations have been presented and," Elkins advised, "...our higher courts have held that the right to convey property in whole or in part, or to impose restrictions upon its use, are inherent rights incident to the ownership of property and do not

gas largely increased by a joint development and operation of said area for the production of said products."

42Van Oil Field Operating Agreement, pp. 1-6, VEA, C. F. 29159-D; Office Memorandum from Robert A. Shepherd to James A. Elkins, November 1929, VEA, C. F. 29159-D. Shepherd apprised Elkins of the details of the allocation formula to be employed in the unit development plan at Van as well as how the plan affected their client's [Pure Oil Company] rights, obligations, and duties.
transgress the antitrust statute." Based on these precedents, Elkins confidently assured McIlvain that the Van unitization agreement would not violate Texas antitrust laws.\textsuperscript{43}

In addition to avoiding antitrust problems, Elkins believed that the Van unitization agreement was in harmony with state oil conservation policy by promoting efficiency in petroleum production and minimizing waste. He told McIlvain that "no single subject [had] demanded or received so close study from the legislature as the conservation of oil and gas" which had been "a matter of paramount importance to the whole state." Elkins pointed out how the legislature had vested the TRC with broad and comprehensive powers to restrict oil and gas production in order to prevent waste. He interpreted the Van unit plan as accomplishing the same purpose and benefiting the public interest without government assistance.\textsuperscript{44}

With Elkins's blessing, the Van unitization agreement took effect on 1 November 1929. Farish's dream had come to fruition with the indispensable assistance of the highly-competent and innovative legal talent at Humble and VE. Baker and Shepherd forged a cooperative alliance of five substantial and highly competitive major oil companies to show the rest of the oil industry how to achieve and maintain order and stability through self-help free from government interference. The tireless efforts of the legal team from Humble and VE along with Farish's persistence saved the Van oil field from the disorder, instability, waste, lawlessness, and vice that had plagued other Texas oil fields. Thanks to unitization, fewer dry holes were drilled and Van's reservoir pressure

\textsuperscript{44} Ibid, pp. 3-4.
was adequately conserved, prolonging production in paying-quantities by another decade.45

The lawyers had a bit of luck come their way when the TRC issued its first statewide proration order on 27 August 1930. Van's antitrust worries were soon buried beneath a pile of lawsuits challenging the legality of the TRC's order. The ensuing litigation consumed a decade touching upon a multitude of fundamental constitutional rights. Under the protective umbrella of injunctions restraining enforcement of TRC proration orders pending the outcome of litigation, Texas oil fields ran amuck while peace and stability reigned at Van due to unitization which had negated the need for TRC regulation. To stave off future TRC control, the Van unit partners made very attempt to conduct their operations in way that met the TRC's approval. SoRelle assured TRC oil and division supervisor, R. D. Parker "that out men will be glad to accord you every courtesy and render you every service in making an inspection of our operations." The Van operators were summoned to the bar. In true wildcatter fashion, Farish had won a high-stakes poker game.46

XI

Voluntarism at Yates at Van had made an impressionable impact on many oilmen. Self-help appealed to rugged individualists who detested authority especially from the government. Most significant, more oilmen realized that uncontrolled production was wasteful and that the state government would step in if they failed to control the situation. They also noticed how unitization at Yates and Van had kept excessive crude oil from flooding the market at the

45Hardwicke, "Legal History," pp. 222-23, discussed the TRC's first statewide proration order issued on 27 August 1930; Warner, Texas Oil and Gas Since 1543, p. 71; SoRelle to Parker, 25 November 1929, VEA, C. F. 29159-D.
46SoRelle to Parker, 25 November 1929, VEA, C. F. 29159-D.
wrong time and driving prices down. Unitization advocates like Farish hoped that the relative success at Yates and Van would encourage more oilmen to voluntarily cooperate in controlling production and avert the need for government regulation. But rough waters were ahead.47

CHAPTER IV

TO HAVE AND SHARE ALIKE

The public will be obliged to
bear the cross carried so long
upon the shoulders of the
independent producer.

Joseph C. Danciger

The 1930s was a trying decade for the American petroleum industry. Until 1928, the post-World War I demand for petroleum products had boosted the price of crude oil to $3.00 a barrel. Confidence in the permanence of the economic boom of the "roaring twenties" contributed to producers' laxity about conservation. Crude oil prices did not follow the precipitous decline in other commodity prices in 1929, a fact prompting the oil industry and federal and state governments to leave well enough alone. But the ill effects of the market crash of 1929 soon caught up with the oil industry. Few oilmen perceived the effects of unrestrained competition. The early thirties witnessed a critical transition era in American petroleum as oilmen battled state and federal governments to preserve their absolute dominion over privately owned petroleum. Issues involving traditional private property rights opposed to the public interest, monopoly or competition, states' rights against national power, and legislative
versus executive authority, became intertwined in the ensuing legal battle over petroleum.¹

With Farish at the helm, Humble Oil had pioneered the effort in Texas to alleviate inefficient and wasteful overproduction. Economic self interest remained the primary motivating factor in oilmen's support of conservation. Regulation of petroleum production also promoted the public interest by diminishing waste of an essential and unreplenishable natural resource. Spearheaded by Humble, the Yates unitization plan illuminated a practical way to control production and conserve reservoir pressure, and, ultimately to achieve stability and conservation which would benefit producers and the public. But too many oilmen refused to clean house. The rule of capture still fed their fierce competitiveness which brought the American oil industry to the brink of economic disaster. The ensuing drama was packed with too much frontier-style action to be staged anywhere else but Texas.²

II

In January 1930, Humble cut its posted price for crude oil purchases in an attempt to force producers to curtail output. Coming soon after he had disclaimed the existence of overproduction, Farish attributed the price cut to excessive stocks which had forced a drop in gasoline prices. Independent producers who had banked on Humble's promise to maintain the posted price of crude oil if they cut back production were confused, upset, and downright angry. Farish released company records to the Mid-Continent Oil & Gas


Association to convince independents that "competing units operating on the seaboard," not Humble, had caused the problem. Humble agreed to purchase more oil from West Texas producers, even at the expense of reducing its own production, but its reputation among independents, never high, was further tarnished. Many independents were more convinced than ever that Humble was selfish, unscrupulous, ruthless, and untrustworthy and they retaliated by seeking regulatory legislation.4

The IPAA asked Congress to impose a $1.00 per barrel tariff on imported oil. The IPAA and the Mid-Continent Oil and Gas Association blamed overproduction on excessive imports of crude oil by major companies like New Jersey Standard. Independents of all sizes and shapes found common ground in their support of an oil tariff. The IPAA encouraged independent oilmen to organize on the state level. The Independent Petroleum Association of Texas [IPAT] organized at Fort Worth on 22 February 1930 and elected Tom Cranfill as its first president. Its newsletter, The Texas Independent, proudly proclaimed that the IPAT had "no major company affiliations" and was strictly "an organization of the 'little man.'"5

The IPAT pledged to wage an offensive against major oil companies and to resist prorationing. Although they favored higher prices and stabilization,
independents mistrusted any form of production control as a ploy to allow large integrated companies to import more oil from their overseas connections. They argued that domestic production cuts would not alleviate overproduction without reducing imports which were depressing prices low enough to drive them out of business. By eliminating competition, independents warned, the majors would monopolize the oil business and control prices to their advantage. The IPAT asked the Texas Legislature to pass a common purchaser law to reclassify pipelines as public carriers requiring them to purchase or transport a ratable share of oil from all producers without discrimination. Independents viewed the measure as a means of forcing the majors to buy more domestic oil in lieu of imports. On 30 March 1930 the Texas Legislature enacted the Common Purchaser Act.6

The Common Purchaser Act designated owners and operators of oil storage facilities and pipelines as public utilities and authorized the TRC to establish appropriate rules, regulations, and rates. Purchasers who owned or were affiliated with a pipeline had to buy crude oil ratably from all producers and fields without discrimination. The law was designed to prevent major companies from using their monopoly over pipeline transportation to take unfair advantage of smaller operators by denying them equal access to the market. In signing the bill, Texas Governor Dan Moody stated that low oil prices injured the public interest by decreasing tax revenues and royalties in the public school fund. Although independents viewed the new measure as punishment for Humble, Farish regarded it as providing better legal machinery for controlling

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6Larson and Porter, History of Humble Oil, pp. 322-24; Weaver, Unitization of Oil and Gas Fields in Texas, pp. 55-56; Olien and Olien, Wildcatters, p. 55; Hardwicke, "Legal History," pp. 221-22; "Drastic Change in Pipe Line Laws Before Texas Legislature," Oil Weekly 56 (7 March 1930): 21; The vote in the Senate was 22 to 4; in the House by viva voce; General and Special Laws of the State of Texas Passed by the Forty-first Legislature, Fifth Session, 1930, ch. 36, pp. 171-75.
ruinous production. By requiring common purchasers to purchase ratably, he believed that production would have to be prorated to give each producer a fair share of the market. Since Humble had been purchasing more oil ratably than other companies, Farish thought that the new act would permit it to shift some of its excess connections to other purchasers. Despite the high expectations of independents and majors alike, the TRC exerted little effort in enforcing the act.7

III

As legal counsel to large independents like Humphreys and Pure, VE lawyers were busy staying abreast of new changes in Texas oil and gas law. The TRC had asked Texas producers to appoint a six-member committee to propose rules and regulations under the pipeline act for its approval. Vinson was especially concerned over section 6 of the new act which required common carriers to file monthly reports with the TRC detailing the amount of petroleum stored, received, or delivered and available storage space. Ben H. Powell, an Austin attorney and former judge who kept VE apprised of Texas legislative matters, told Vinson that the TRC was making no effort to enforce the act. Since "no particular rules or regulations are required for its enforcement," he advised Vinson to have his clients "offer to comply with [section 6] at once." Powell had confirmed Vinson's suspicion that the TRC would do little or nothing to promulgate and enforce rules and regulations under the new act.8

7Section 8 of the Common Purchaser Act defined a common purchaser as "every person, association of persons or corporation who purchases crude oil or petroleum in this State, which is affiliated through stock-ownership, common control, contract, or otherwise, with a common carrier by pipeline, as defined by law, or is itself such a common carrier. The act was amended in 1931 to include gas. Cited in Vernon's Texas Statutes (Kansas City, Mo.: Vemon Book Company, 1948), pp. 1655-56; Hardwicke, "Legal History," p. 221; Larson and Porter, History of Humble Oil, pp. 323-24; Weaver, Unitization of Oil and Gas Fields in Texas, pp. 55-56.

To goad the TRC into action, Humble dropped a bombshell shortly before the Common Purchaser Act was to take effect in June. Effective 1 July, Farish announced that Humble would discontinue purchasing crude oil in seven North Texas counties. Described by the *Oil and Gas Journal* as an "unprecedented move for a major oil company," Farish gambled that the TRC would get serious about enforcing the new law. He hoped the TRC would prorate production so that output would not exceed Humble's pipeline capacity. Representatives from various oil and gas associations asked the TRC to prorate production under the Common Purchaser Act. Convinced of their sincerity and good faith, Humble resumed purchasing North Texas crude. But the action came too late to quell a pack of angry wildcatters, one of whom reminded Farish that "God still rules the Universe."9

With tempers flaring hotter than the July sun in Texas, representatives of the IPAA, the Mid-Continent Oil and Gas Association and other large independent groups met in Dallas to discuss the situation. They called upon the state government to use "every means possible" to deal with the "grave emergency" and pledged their full cooperation toward "equitable and effective enforcement" of oil production controls. "Delay in putting into effect restrictions throughout the state," the delegates warned, would "result not only in actual waste but in economic loss." Implicit in their plea was a conviction about conservation's beneficial effect on the price of crude oil. Large independents, as opposed to their smaller counterparts, recognized that some form of production control was necessary to stabilize the oil industry. Voluntary solutions

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notwithstanding, they accepted state regulation as the best alternative to federal controls.\(^\text{10}\)

Despite some similarities, the differences between various Texas oil fields made state regulation more feasible. Voluntary unitization was easier to employ in an oil field like Van where the majority of leases were owned by majors and large independents who shared the same attitude toward conservation. It was virtually impossible to persuade the multitude of small independents who controlled the East Texas field to become the unit partners of the majors and large producers they mistrusted and despised. Unitization was also highly susceptible to antitrust attack. State-enforced prorationing, pioneered by Oklahoma and experimented with by the TRC in the Yates and Hendrick oil fields, appeared to be the only legally defensible alternative to voluntary production controls which had neither legislative nor judicial sanction.\(^\text{11}\)

Texas independents formed a central prorationing committee, chaired by Dallas oilman Robert R. Penn, to alert the TRC to the fact that "petroleum is one of the great natural resources of the State of Texas...[whose]...production...has been...in excess of the ready market demand." It noted how the "development of geophysical devices and new and improved drilling machinery...[had]...hastened the transformation of the business of producing oil from a gambling basis to a scientific basis." The committee credited scientific and engineering advances for the discovery of "new, prolific pools...in advance

\(^{10}\)L. E. Bredberg, "Texans Approve Further Curtailment," *Oil and Gas Journal* 29 (17 July 1930): 31, 153; For effects of prorationing in Oklahoma see W. A. Spinney, "Proration Effective in Oklahoma," *Oil and Gas Journal* 29 (31 July 1930): 68.

of their probable discovery by old methods...[and]...enlarg[ing] the capacity of a barrel of petroleum to supply the demands of customers." It beseeched the TRC to implement and enforce adequate rules and regulations "to take care of...future generations...and to prevent the actual waste through reckless and prolific production of this great natural resource."12

The TRC held a hearing in Austin to solicit data from producers regarding the number of producing wells, drilling activity, storage facilities, oil in storage, and market outlet. Two hundred Texas oilmen gathered in the state capital to present their information. Opinions varied as much as the Texas landscape as each operator pleaded his case with the ferocity of a local twister. Penn summed up the views of many independents who accused the major oil companies of trying to "exterminate" them. "If the pipeline law is a failure," Penn testified, "find it out now [and] have the governor and the state legislature...make a law to help the oil situation."13

IPAT member Claude Wilde called for an investigation to determine who was responsible for excessive drilling and the level of oil imports. Phillips Petroleum executive Don Emory proposed that producers in each oil field select their own proration committees to advise the TRC. T. D. Strong of the Yount-Lee Oil Corporation argued that Gulf Coast production should not be reduced because producers in that region were marketing all of their oil and none of it was being wasted. He said it was unfair for "anybody or any commission...to take advantage of one area and give to another area" which could not market all of its oil. "Reduction," Strong added, "should come in fields where

12Petition to the Railroad Commission of Texas (unsigned), 30 July 1930, Humphreys-Proration Matters File, VEA, C. F. 11726.
overproduction exists." Penn asked Strong to consider the effect on the price of Gulf Coast crude if other Texas oil fields were turned loose to flood the market.14

Most of the witnesses testified that any fair proration plan had to apply equally to all Texas oil fields. Even though independents generally detested production controls, an increasing number seemed willing to suffer a little now to keep the bottom from falling out later. Barnsdall Oil Company president R. F. McArthur urged fellow independents to form local prorationing committees to report to Penn's central committee which would then advise the TRC. Local committees would appoint field umpires to cooperate with the central committee and the TRC in devising a fair and acceptable proration plan. Farish pledged Humble's support warning that it would be "Texas's own fault if proration fails and we suffer." He assured independents that Humble's parent company, New Jersey Standard, had reduced its imports of foreign oil. Representatives of Gulf and Shell also testified that their companies had cut oil imports.15

Austin attorney Charles L. Black told the TRC that his client, the Big Lake Oil Company, a West Texas independent producer, opposed any proration plan designed to do anything but prevent physical waste. He explained that Big Lake could not reduce its production because it had already contracted to sell its entire output. Black argued that West Texas producers deserved special consideration since the University of Texas derived royalties from the sale of their oil. But that university's Board of Regents chairman, R. L. Batts, told the TRC, "The Texas University is a permanent institution and it matters little whether the oil is recovered now or one-hundred years from now."16

15Ibid.
16D. A. Stevenson, "Difficulties Over Texas Proration Plan," Oil and Gas Journal 29 (14 August 1930): 37, 149-50; Houston Post-Dispatch, 8 August 1930, 3; 9 August 1930, 10.
Independent producers operating in the Pettus oil field met in Houston to discuss prorationing. They were particularly concerned about prorationing's effect on the production, storage, and marketing of their oil. Each producer was asked to propose a fair and equitable method of curtailing production to eliminate physical waste and promote conservation. A committee representing Gulf Coast producers submitted a recommendation to the TRC on 14 August. Committee chairman Paul C. Murphy asked the TRC not to reduce production in the Gulf Coast field by more than 15 percent pending further study of individual tracts to avoid injustice and unfair discrimination to any producer. Murphy explained that Gulf Coast producers were already operating their wells at the lowest capacity without damaging them. He advised Gulf Coast producers to agree not to drill any more wells than were absolutely necessary to comply with lease obligations.17

Houston independent J. S. Abercombie and the Harrison Oil Company challenged the TRC's constitutional authority to prorate oil production. They alleged that any regulation designed to curtail output deprived them of their private property without due process of law. Abercombie and Harrison claimed that they could market all the oil they produced without waste and objected to any proration plan designed to fix prices and criticized the TRC for "wasting time."18

The TRC planned to issue its first statewide proration order by the end of August. VE assumed an active interest in prorationing since its client, Pure,

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stood to gain or lose by the order. Proration notwithstanding, the Common Purchaser Act was the only state regulation that potentially affected Pure’s Texas production. Even though Pure had production and pipeline operations in Texas, Elkins advised company management that, since it did not purchase oil from any other Texas producers, Pure was not a common purchaser and therefore immune from the act. Pure had the pipeline capacity and the market to handle additional oil production from Van. It hoped to increase Van production to supply an expanded market depending on how it was affected by the TRC’s anticipated proration order.19

IV

On 9 August 1930 Shepherd briefed Elkins on the legal, economic, and scientific aspects of prorationing not knowing that he was creating ammunition for the subsequent legal battle over oil production controls. Proration was a novelty. Neither the lawyers nor the courts had ever heard of it. There were no legal precedents or rules to guide lawyers in advising their clients. Hence, lawyers like Shepherd were blazing new trails in petroleum law. He noted technological advances in exploration and the development of scientific instruments like the torsion balance and the seismograph which permitted drilling to unheard of depths and contributed to overproduction. Shepherd explained that prorationing could be enforced either through voluntary operators’ agreements or by TRC orders. He preferred TRC enforcement for the following reasons: first, Texas’s strict antitrust laws might adversely affect voluntary production controls; second, it would be difficult to obtain the consent of all operators to limit their output; and third, TRC proration orders would shield

19 Houston Post-Dispatch, 12 August 1930, 2, reported that the TRC planned to issue a statewide proration order by 25 August; Powell to Elkins, 10 December 1930, VEA, C. F. 10605.
operators from liability for breach of contract to royalty owners for failing to drill and produce leases to the upmost.20

Shepherd dispelled doubts over the TRC's authority to prorate oil production. He believed that prorationing was inherent in the TRC's statutory power to conserve the state's oil and gas resources and to prevent purchasers from discriminating against producers. Texas courts had not yet construed the meaning and extent of the TRC's authority under the conservation or common purchaser acts. To survive judicial scrutiny, Shepherd believed that TRC proration orders could eliminate only physical, not economic, waste.21

According to TRC guidelines, no proration order could issue without ten days notice to all affected parties and a public hearing. The TRC recommended the appointment of "field umpires" to handle the details of administration and enforcement in each oil field. Field operators would select an eleven-member "advisory committee" to advise and assist the field umpire. The field umpire would be paid by the operators due to the TRC's limited financial appropriations. The TRC willingly appointed any qualified candidate recommended by the operators as field umpire. Advisory committees or producers could appeal any decision of the field umpire to the TRC. Shepherd


21 Shepherd, "Methods of Proration," pp. 2-3, Shepherd distinguished between physical and economic waste. Physical waste was of two types, above and below ground. Above-ground waste entailed unnecessary storage of large quantities of oil with the consequent loss by evaporation, leakage, or fire. Below-ground waste occurred from premature dissipation of reservoir pressure and rapid water encroachment which materially lessened ultimate recovery of underground oil. Economic waste involved the loss of profit due to excessive production costs and low crude oil prices; See "Texas Maximum Set at 750,000 Barrels," Oil and Gas Journal 29 (21 August 1930): 37, 73, for a thorough discussion of waste in petroleum production as defined by Texas law.
underscored the importance of selecting the "proper person" as field umpire, for on his shoulders rested the success or failure of prorationing.22

The TRC's statewide proration quota had to be allocated among individual oil fields and each field's allowable had to be further distributed among individual producers. Individual leases within each field were divided into twenty-acre units with fractional units to handle any remaining acreage. Larger units were utilized in areas like West Texas where land tracts were sectionalized while smaller units were employed where tracts had been cut up into small leases. The next step involved gauging selected oil wells in each field to determine potential production. From an engineering standpoint, Shepherd believed it would be more practical to allow advisory committees and field umpires to devise a method for gauging wells in their respective oil fields in lieu of a uniform formula.23

Shepherd's memorandum and the legal uncertainty of prorationing heightened Elkins's anxiety. He appreciated the significance of advisory committees and field umpires in affecting producers' interests. In July, Pure had just completed a new 211-mile, ten-inch pipeline to transport its crude oil from the Van field to its refinery at Smith's Bluff on the Gulf Coast and to a storage terminal near Nederland. Six pumping stations had been constructed along the pipeline with three more in the planning stages. The Pure-Van Pipeline could carry up to 45,000 barrels of crude oil a day. The TRC's proration order could put a damper in Pure's expansion plans if it reduced Van production. Pure stood to lose a substantial amount of money unless Van production was at least

22Shepherd, "Methods of Prorationing," pp. 3-8; See Houston Post-Dispatch, 14 August 1930, 7:1, for a brief outline of the procedure followed by the advisory committee for the Gulf Coast oil field.  
23Ibid.
maintained at its existing level. But every other producer at Van would also be seeking to maintain their production levels. Pure could hardly expect them to suffer a bigger cut so to permit it to maintain its existing output. As a result, Elkins was concerned over prorationing as well as the selection of advisory committeemen and field umpire.24

Elkins suggested the appointment of J. S. Young, an independent oilman from San Antonio, as Van field umpire. R. D. Parker, supervisor of the TRC's Oil and Gas Division, told Shepherd that the TRC would appoint whoever the operators wanted as their field umpire. Based on his personal conversation with Parker, Powell assured Elkins that "an umpire will be named in line with [your] recommendation." On 15 August, Powell notified Elkins of Young's appointment as Van field umpire in addition to the selection of an advisory committee in accord with his recommendations. After Young was disqualified for lack of experience, Elkins's second choice, R. E. Andrews, got the nod.25

On 14 August, the TRC issued its first statewide proration order to take effect at 7 a.m. on the 27th. The order would remain effective for ninety days during which time total oil production in Texas would be limited to 750,000

24Neil Williams, "Oil Running Through Pure-Van Line," Oil and Gas Journal 29 (31 July 1930): 56, 213; L. E. Bredberg, "Unitization Wrought Change in Van," 39, 111; Houston Post-Dispatch, 24 August 1930, reported that the Van Zandt County treasurer was reaping a harvest in the way of property taxes as a result of the discovery of oil in the county. Total taxable property value as of 1 January 1931 was some $3,500,000. The next rendition was expected to be four times as large; Powell to Elkins, 11 August 1930, VEA, C. F. 10605. Powell told Elkins, "I do not want the Commission to conceive of the notion that we are trying to shut off others...Parker told me...that he had carefully read our proposed rules for the Van field and that they are satisfactory to him...and he [was] thoroughly convinced that [they] are fair and just in every way."

25Shepherd to Powell (undated), VEA, C. F. 10605; Powell to Elkins, 11 August 1930, VEA, C. F. 10605; Elkins to McIlvain, 1 September 1930, VEA, C. F. 10605; McIlvain to Elkins, 1 September 1930, VEA, C. F. 10605; SoRelle to Parker, 2 September 1930, VEA, C. F. 10605; Elkins to Powell, 2 September 1930, VEA, C. F. 10605; Powell to Elkins, 2 September 1930, VEA, C. F. 10605; J. A. Rauhut to Elkins, 3 September 1930, VEA, C. F. 10605; Unidentified newspaper clipping, 2 September 1930, VEA, C. F. 10605.
barrels a day. The TRC cited its legal authority under state oil conservation statutes to restrict production in order to prevent physical waste and denied any intent to raise crude oil prices. Acknowledging its "keen interest in the economic welfare of the large group of...citizens whose capital is devoted to the production of oil," the TRC refused to "be the guardian of their pecuniary interests." Since "the functions assumed by our government cannot include that of an economic dictator," the TRC disclaimed its authority to "limit the production of oil...through any proration order upon any other basis than...necessary to insure conservation of the resources." The TRC was dancing a Texas two-step around the statutory proscription against restricting oil production to prevent economic waste.26

Texas producers lost no time in registering their protests against the TRC's new order. Their objections fell into three general categories: (1) small producers who believed that marginal wells should be exempt from prorationing; (2) producers who could market all of their oil and opposed any restraints; and (3) producers who opposed any kind of regulation. Houston attorney Elwood Fouts, representing Abercombie and Harrison Oil, denounced the TRC's order. Attorneys George E. B. Peddy and Will Orgain argued that their Gulf Coast producer-clients should be exempt from prorationing because their oil had a unique quality which supplied a special market unaffecting or

26Order of the Railroad Commission of Texas, Oil and Gas Division, "Conservation and Prevention of Waste of Crude Petroleum and Natural Gas in the Various Fields in the State of Texas, and the Prevention of Discrimination by Common Purchasers in the Purchase of Oil Therefrom," Oil and Gas Docket No. 112, 14 August 1930. Copy in the Humphreys-Proration Matters File, VEA, C. F. 11726. In addition to prorating oil production, the TRC's order gave each producer a pipeline connection and a fair share of the market at the posted price of crude oil; "Texas Maximum Set at 750,000 Barrels," 37, 73; Houston Post-Dispatch, 15 August 1930, 1:1, 26 August 1930, 1:1; See Kai Bird, John J. McCloy, The Chairman: The Making of the American Establishment (New York: Simon & Schuster, 1992), p. 626, stated, "For decades, the global price for oil generally mirrored the production quotas set by the Texas Railroad Commission, which was run as an unofficial industry association."
unaffected by other Texas oil markets. Orgain explained that the Yount-Lee Oil Company had reduced its production from 3,150,000 to 1,350,000 barrels a quarter during the past sixteen months and any further reductions would jeopardize the company's ability to fulfill contractual obligations to purchasers. Farish responded that "the greatest waste in the United States" had occurred in the Gulf Coast field where "oil had been covering acres and acres of ground."27

Pure appeared content with the TRC's order. "The order as finally entered announces exactly the rules which we submitted," Powell informed Elkins, and "the umpire you suggested has been appointed as well as the advisory committee." Not all Van producers shared Pure's elation. C. Andrade accused Pure and its unit partners of monopolizing production at Van. "We have spent a lot of time and money [fighting]...Pure...and Humble...before your Commission," Andrade told Parker, and "then we spend a lot of money fighting them in court." He complained that the major companies at Van had "used...'bull-dozing' tactics...to keep the few independents, who have several small strips, from developing them." Andrade claimed that the majors "have it in for me" and that a Pure representative told one purchaser "not to fool with my oil." He explained how the "major companies are going ahead with their development work [while] hollering" about overproduction. "What chances had a man got with a strip 80, 90, 100, or 200 feet wide?", Andrade asked. "I am not a 'curbstone' broker or a 'shoe-string' trader," he insisted, "and have never failed to carry out a contract that I have made."28

A. J. Broderick, George Calvert, and other small Van producers echoed Andrade's protest. Rumblings resounded from the Pure camp as well. Elkins

28 Andrade to Parker, 22 August 1930, VEA, C. F. 10605.
was upset that "someone" on the TRC had recommended the appointment of Gene Germany and Tom Cranfill to the Van advisory committee. "I cannot see that they have any place on this committee as neither of these gentlemen are producers," Elkins told Powell, "they have been the greatest nuisance and disturbing element we have had" and "if there is any way you can keep them off the advisory committee please do so." Elkins feared that Germany and Cranfill would give control of the Van field to small operators like Andrade who owned less than 1 percent of the leases. He recommended the appointment of B. S. SoRelle, Pure's Texas production manager, to the committee as well as F. C. Sealy of the Texas Company, John R. Suman of Humble, M. B. Sweeney of Sun, and M. G. Allen of Shell to insure control of the Van field by Pure and its unit partners.29

To ensure its future growth, Pure sought permission from the TRC to increase Van's daily production quota from 35,000 to 50,000 barrels. Powell advised Elkins that Pure had to prove that additional production would not damage reservoir pressure, that its wells were being pinched in under existing levels of output, and that it had a market outlet for additional oil. The TRC scheduled a hearing on 10 December to consider the matter. Small producers were expected to protest Pure's request. Powell assured Elkins that they could "never defeat us in the courts," but the difficulty would be in "getting the commissioners to see that we are not selfish in wanting to increase our production while everybody else is striving so hard to get along on a decreased allowance." Even though he expected opposition from Governor Pat Neff,

29Broderick and Calvert to TRC, 30 August 1930, VEA, C. F. 10605; Powell to Elkins, 3 September 1930, VEA, C. F. 10605; Elkins to Powell, 8 September 1930, VEA, C. F. 10605; Elkins to SoRelle, 8 September 1930, VEA, C. F. 10605; Elkins to Smith, 8 September 1930, VEA, C. F. 10605; Elkins to SoRelle, 8 September 1930, VEA, C. F. 10605.
Powell believed that they could "straighten him out...without any trouble." Texas Company president Ralph C. Holmes warned Pure president Henry M. Dawes to go slow. Sensing a major battle in the brewing, the TRC mercifully postponed the hearing until 10 January 1931 to allow everyone to enjoy a peaceful and merry Christmas.30

VI

Storm clouds gathered over the Texas oil patch as the new year approached. The TRC discovered that it was one thing to issue orders and quite another to enforce them. The mere idea of government regulation to achieve some semblance of stability aroused the suspicion and ire of small independent producers. They viewed prorationing as nothing more than a conspiracy between government and major companies to drive them out of business and foster monopoly in the oil industry. Local federal judges apparently shared the same suspicions as they freely granted injunctions restraining enforcement of TRC proration orders. Some operators, too proud to tolerate any external interference in their personal business without a fight, simply ignored the TRC's orders and continued producing at will.31

The situation was further aggravated by the surge of drilling and production activity that followed in the wake of Columbus M. "Dad" Joiner's oil discovery on the Bradford farm near Kilgore in East Texas on 3 October. Joiner had unwittingly opened a Pandora's box. The yellow pine forests of East Texas became instantaneously transformed into thickets of wooden oil derricks towering above a vast 140,000-acre oil reservoir that stretched 45 miles from

30Powell to Elkins, 22 November 1930, 29 November 1930, 10 December 1930, VEA, C. F. 10605; Holmes to Dawes, 8 December 1930, VEA, C. F. 10605; Elkins to Dawes, 11 December 1930, VEA, C. F. 10605.
north to south and 12 miles from east to west. Estimated to contain
approximately 5 1/2 billion barrels of crude oil, the East Texas field was the
largest of the world's known petroleum reservoirs at the time and accounted for
one-third of the nation's total oil production. This was good news to many local
inhabitants who had been hard hit by the onslaught of the Great Depression.
The discovery of oil under their drought-stricken land offered economic
salvation to many small East Texas farmers who could no longer adequately
supplement their income from cotton production by raising and selling poultry,
fruit, and truck crops. Now they could pay their debts, keep their land, and
perhaps even gain salvation from their economic misery.32

"I believe this is the biggest oil field I ever saw in the making, and it has
not yet been scratched," remarked Harry F. Sinclair, chairman of the board of
the Sinclair Consolidated Oil Corporation. Independent operators and major
companies agreed. The leviathan East Texas field lit the arid countryside with
excitement. The roaring gushers awakened sleepy rural crossroads towns. A
stampede of land agents, petroleum prospectors, speculators, machinery
merchants, well drillers, pipeline constructors, and others sought their fortunes
in oil. The fresh country air became permeated with foul hydrocarbon odors that
nonetheless were more fragrant than Tyler roses to those who could cash in on
the boom. People who had never possessed more than a few dollars
purchased new clothes and paid off mortgages and other debts. Long suffering
from overextended credit in the declining cotton market, banks gained new
leases on life. Real estate values skyrocketed, rents doubled and tripled, new

32Presley, Saga of Wealth, p. 136; Roster, Oil: Titan of the Southwest, pp. 306-10; Clark, Oil
pp. 3-15; Joe L. White, "Columbus Marion 'Dad' Joiner and the East Texas Oil Boom," East Texas
Historical Journal 6 (1968): 20-21; Dallas Morning News, 5 October 1930, 13:3, 6 October 1930,
I, 8:2, 4 February 1931, 4:4; New York Times, 5 July 1831, VIII, 11.
hotels and merchandise stores sprung up, and builders scrambled to keep pace with soaring housing demand. By the spring of 1931, hard-shelled East Texas Baptists were inundated by gamblers, prostitutes, and profit seekers. A local minister gathered his flock to pray for divine favor on an oil well sunk in the church yard. When the well struck oil, the minister once again summoned the devout to thank and praise the Lord, who was beseeched for "oil, more oil!"  

The East Texas oil boom arrived at an opportune time for local residents, but spelled economic disaster for the petroleum industry. Convinced that the area contained no oil, major companies initially showed little interest in East Texas. Humble and Mid-Kansas Oil were the only majors with leases in the East Texas field, but were not in a dominant position to control production as they had done at Van. Small operators had an unparalleled opportunity to corner leases and shoot for the big time. Overproduction soon glutted and already saturated crude oil market. Crude oil selling for $1.10 a barrel in October 1930 plummeted to 25 cents in early 1931. Declining prices had a negative impact on oil producing fields throughout the country. Small farmers could not be persuaded to cut back production. Like their late-nineteenth-century agrarian counterparts, small producers could not comprehend and adjust to the paradox of a market economy where a more bountiful harvest often reaped lower prices and reduced family income. The problem was further complicated by diverse opinions, attitudes, philosophies, and personalities among independents and majors alike. These divergences hindered voluntary and cooperative efforts. The TRC, upon whose shoulders responsibility for alleviating overproduction had fallen, hoped that prorationing would succeed where voluntarism had

33 Rister, Oil: Titan of the Southwest, pp. 312-14; Clark, Three Stars for the Colonel, pp. 7-9; New York Times, 5 July 1931, VIII, 11; L. E. Bredberg, "All Roads Seem to Lead to East Texas," Oil and Gas Journal 29 (5 February 1931): 22-23, 111.
failed. State government regulation of private property interests in petroleum [unique in the United States] was legitimized as a necessary exercise of state police power to protect the public interest in a vital and strategically important natural resource. Small independent producers were unimpressed.34

Oil-starved independents, depression ridden cotton farms, and the chambers of commerce of unprosperous towns voiced their vociferous opposition to production controls. They organized groups like the East Texas Lease, Royalty and Producers Association backed by Estes, the fiery newspaper editor from Tyler. That outspoken advocate of opportunities for impoverished farmers to profit from the discovery of oil on their land, called a meeting in Fort Worth on 15 January to discuss prorationing. Small independents like Wilde and Cranfill blamed the lack of pipeline and storage facilities for forcing them to sell their oil at any price just to get a connection. The major companies took advantage of the situation to buy up cheap oil for their refineries. Some independents started refining their own oil into cheap gasoline which competed with the majors' more expensive premium grades. The majors deplored this practice which undercut their market and further depressed prices.35

Humble again seized the initiative in trying to restore order and stability. Farish announced Humble's offer to lay the first major pipeline in East Texas


and purchase ratably from all producers if they agreed to divide the field into twenty-acre units, each sharing a ratable portion of total production. "In the absence of any orderly program of development and production," Farish explained, "it would be foolish for the Humble company to attempt to serve the area generally." Humble held nearly 16,000 acres of leases in East Texas containing 13 percent of the field's proven oil reserves. A Humble research team had gauged the bottom-hole pressure [pressure at the bottom of an oil well] of selected East Texas oil wells to determine the ideal productive capacity in terms of efficiency and conservation. Farish believed that the only way to prevent waste was to control production, and the only to do that fairly, was to allocate output for individual wells according to their productive potential and acreage. Humble had successfully employed this formula in the Yates, Hendrick, and Van oil fields.36

Farish failed to rally a majority of small East Texas operators behind Humble's proposal. Caught in the middle, the TRC hesitated to wield its authority against such overwhelming and vociferous opposition in East Texas. East Texans proved to be less cooperative than the Yates and Hendrick operators who welcomed TRC assistance in maintaining the order and stability they had already achieved under voluntary production controls. Baker believed the TRC had "yielded to political pressure" in exempting the East Texas field from its proration order and freely granting exception permits to the spacing rule. It allowed small East Texas operators to "drill a well on an acre or a tenth of an acre," Baker complained, "and get as much allowable as a man who drilled on the twenty acre" tract. He criticized the TRC's policy as "outrageous" and responsible for "the drilling of a great number of unnecessary wells and the

taking of oil in vast quantity by the fellow who had wells on closely spaced acreage compared with a man who had one well on twenty acres." Farish announced that Humble would not enter the East Texas field as a common purchaser and would construct its own private facilities for handling the company's East Texas production.37

VII

The legal uncertainty of prorationing fomented a spirited debate between small producers who opposed any controls and large independents and major companies who supported any oil conservation program that respected the correlative rights of all operators in a common reservoir. Opponents of conservation argued that every oil well was a problem unto itself to be handled individually. Some wells produced more than others, but the imbalance could not be corrected without hurting someone. For that reason, anti-conservationists believed that well-spacing and prorationing were impractical and unfair. Conservationists responded that operators in a common pool shared an interest in regulating production to guarantee each one a fair share of the total output.38

Baker likened the problem to a bunch of kids sticking their straws into a shallow, sloped bowl filled with soda pop. Straws near the bowl's outer edge drained it faster than straws in the middle. Kids on the shallower outer edge of the bowl ran out of soda before those in the middle. The latter got more. Situated on a subterranean incline, the East Texas oil field presented a similar situation, except that it drained from the bottom-up due to the underlying water which pushed the oil to the surface. Producers on the shallower outer edges of the field drained their oil leases before those in the deeper middle section. "The

38Baker Interview, pp. 20-22.
fellow at the top can take oil as long as there is any oil being pushed up," Baker explained, "its just the reverse of the soda pop." He believed that existing technology was advanced and sophisticated enough to formulate a more equitable method of production, but that too many diehard independents, protected by the rule of capture, insisted upon their right to produce as much oil they pleased in order to keep their neighbors from getting it. 39

Baker theorized that there was no irreconcilable conflict between the common law absolute ownership doctrine and the rule of capture. Landowners "still owned the oil and gas in place beneath [their] land," he explained, but could not get to it without drilling and producing. He viewed the rule of capture as simply a convenient tool, auxiliary to the absolute ownership theory, to give landowners the means to protect their correlative property rights in oil and gas in the absence of state police power. The state only regulated production, Baker maintained, to ensure that each landowner did not take advantage of the capture theory to destroy his neighbors' rights by grabbing an unfair and inequitable share of petroleum. "I don't see why we have to argue with that," Baker insisted, "but that's been the subject of more antagonism, more bitterness, and more trouble in the business than most anything connected with the production of oil." 40

VIII

The legal issues generated by the crisis in the Texas oil industry in the 1930s symbolized what historian Morton Keller has identified as a tension between the persistence of nineteenth-century laissez-faire ideology and the growth of a Progressive faith in governmental intervention to maintain a stable

40 Ibid.
economy during the first three decades of the twentieth century. The tensions—between equality and liberty, between the desire for freedom opposed to demands for social order, between hostility to the state versus dependence on government, and between localism and nationalism—which Keller found to persist from the late nineteenth century through the early twentieth-century American polity could all be found in the legal battle over oil prorationing in Texas during the early 1930s.41

Scientific and technological advances during the 1920s and 1930s were transforming the American petroleum industry into a more highly organized and complex business dominated increasingly by professionals. Relationships were strained between older, more traditional-minded independent oilmen clinging to a classical economic ideology, and younger, more progressive-thinking oilmen, petroleum engineers, and scientists who wanted to take advantage of the latest knowledge and technology to solve what they believed were counterproductive tendencies (such as overproduction) which free market forces had inadequately balanced and corrected. Small independent oilmen decided to take a stand against what they perceived to be an unpatriotic attempt by "liberal reformists" to undermine traditional Anglo-American rights and liberties, especially private property rights, for the sake of "order" and "efficiency."42

41 Keller, Affairs of State, p. vii; Keller, Regulating a New Economy, passim.
42 Hovenkamp, Enterprise and American Law, 1836-1937; Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business (Cambridge: Harvard University Press, 1977), passim, argued that modern business enterprise replaced market mechanisms in coordinating the activities of the economy and allocating resources. In many sectors of the American economy, Chandler maintains, the "visible hand" of management replaced what Adam Smith called the "invisible hand" of market forces. Chandler deals with problems and issues that were relevant to the petroleum industry such as structural innovation, integration, monopoly, and antitrust problems.
Distrustful and uncompromising, conservationists and anti-prorationists in 1930 experienced another "impending crisis" leading to civil war.43 Joseph C. Danciger fired the first shot in a long and costly legal battle which was fortunately fought in the courtroom rather the battlefield using words rather than bullets, and illustrating the critical role played by lawyers in shaping the outcome of this classic confrontation between old and new values.

CHAPTER V

IN THE LOVING ARMS OF THE STATE

...oil men are no better or worse than
the average run of humanity. We can't
expect a man, who has every reason,
from a selfish standpoint, to want the
prisoner at the bar to decrease his
production, to give fair consideration
to his claims for an increase.

Henry M. Dawes

Joseph Danciger, a North Texas independent oil producer and refiner, fired the first shot in the legal war over prorationing when he filed suit in the State District Court of Travis County to restrain the TRC from limiting production from his wells. He argued that the TRC's proration order bore no reasonable relation to the prevention of physical waste, but aimed at curtailing production in order to raise crude oil prices in violation of state law. Danciger claimed that he
could market all the oil he produced and that the TRC's proration order deprived
him of his private property without due process of law.¹

State District Judge George Calhoun granted a temporary injunction
restraining the TRC from prorating Danciger's production in the Panhandle oil
field until a trial on 2 February 1931. Danciger amended his petition to attack
the TRC's revised proration order of 23 January which reduced statewide
production from 750,000 to 644,253 barrels a day. Daily production in the
Panhandle field was cut from 64,616 to 40,000 barrels. Danciger had 42 wells
with a daily productive capacity of 5,200 barrels apiece. His lawsuit posed a
critical legal challenge to the exercise of state police power to regulate the
production of privately owned petroleum.²

The hearing occurred in Austin on 2 February before State District Judge
Charles A. Wheeler. Attorneys Charles L. Black of Austin, S. A. L. Morgan of
Amarillo, and I. J. Ringolsky of Kansas City comprised Danciger's legal team.
Hines Baker represented Humble who intervened in the suit as a pipeline
carrier for some of Danciger's oil. Fort Worth attorney Robert E. Hardwicke, Jr.
and John E. Kilgore of Wichita Falls assisted Texas Attorney General James V.
Allred in defending the TRC. They were joined by Assistant Attorney Generals
Maurice Cheek and Fred Upchurch.³

Black argued that the TRC lacked statutory authority to restrict
production to market demand and that none of the oil which Danciger produced
created fire hazards or was being wasted or stored. He reiterated that

¹Danciger to the presidents, banks of Texas, 8 July 1931, Proration Matters-Correspondence,
1931 File, VEA, C. F. 10605; Houston Post-Dispatch, 14 February 1931, 7; Hardwicke, "Legal
²"Texas Proration Test Begun Before Court," Oil and Gas Journal ²9 (5 February 1931): 119;
³Ibid.
enforcement of the TRC's order would deprive Danciger of his property without due process of law by preventing him from producing enough oil to fulfill outstanding contractual obligations, making him liable for breach of contract. Allred responded that the TRC did not have to prove actual physical waste to prorate production and that its order bore a reasonable relation to possible waste. By operating his wells at capacity, Allred countered, Danciger had forced other Panhandle producers to drill offset wells, resulting in needless and wasteful overproduction. He maintained that prorationing promoted conservation and protected producers' correlative property rights by preserving reservoir pressure that enhanced ultimate recovery.4

Judge Wheeler's verdict on 13 February, upheld the constitutionality of the 1929 Act and the TRC's proration orders. He agreed with Allred that prorationing bore a reasonable relation to the prevention of physical waste and that any effect on the price of crude oil was merely incidental to the undisputed power of the state to enforce conservation.5

Danciger's appeal put a dampener on conservationists' victory celebrations. It prolonged the legal uncertainty of prorationing in Texas. Small independents continued producing at will adding to the acute overproduction in the feverish East Texas field where most wells pumped an average of 15,000 barrels a day. The economic depression impelled small East Texas farmers to extract as much oil from their land as possible. The legality of an equitable

prorationing program based on sound engineering principles had to await the outcome of the Danciger appeal. In turn it hinged, in large part, on whether the court accepted recent scientific advances in petroleum production techniques as more than mere theory and speculation. "The East Texas field," according to Henrietta M. Larson and Kenneth W. Porter, "had, perhaps, been discovered too early for the normal processes of democracy to have prepared the ethical codes and institutional methods capable of dealing with so large and important a field." 6

Danciger had thrown a potent first punch on behalf of small independents who believed that the majors and large independents had manipulated the TRC into increasing their production allowances at small operators' expense. The situation resembled present-day professional sports where ball club owners must satisfy the salary demands of individual athletes while keeping their total team payroll within the prescribed budget cap. No single player can receive a raise without cutting another athlete's salary. The result often produces more antagonism and disunity rather than cooperation and good will. An analogous situation confronted the TRC as it attempted to allocate a limited amount of oil production among individual producers. One Texas independent felt that small producers were being treated like "slaves ready to go the slaughter house," adding, "you have as bold and as blood thirsty a set of pirates running these big oil companies as ever scuttled a ship." 7

By limiting Van production to 35,000 barrels a day, the TRC's proration

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order also adversely affected Pure. As the largest lease-holder with 92 wells in the Van field, Pure was allocated 27,500 barrels of the 35,000-barrel allowable. This was not nearly enough oil to enable Pure to satisfy its existing and future needs. In addition to supplying its own refineries in Texas and Pennsylvania, Pure had contracted to sell 15,000 barrels of crude oil daily to Humble, who in turn, delivered it to a huge Standard refinery recently constructed in Baton Rouge, Louisiana. Humble had built a ten-inch, 93 mile long pipeline connecting the Van field to Standard's pipeline at the Louisiana border. By 1931, Humble's pipeline network reached into all Texas oil-producing regions enabling it to move large quantities of crude oil to its Gulf Coast loading terminals at Texas City and Ingleside, to refineries at Baytown and Baton Rouge, and to smaller company-owned and independent refineries throughout the state. Without additional production, Pure could not supply Humble's [and Standard's] demands and expand its own operations. The upshot was that Pure had to persuade the TRC to raise its Van production allowable to at least 50,000 barrels a day. The TRC could not raise Pure's production quota without increasing the statewide allowable and upsetting the entire oil conservation program unless it cut smaller producers' shares. As elected officials, TRC members recognized the powder keg they were sitting on.8

Pure had the option of pursuing its quest through the TRC's administrative hearing process or, like Danciger, through the courts. Neither option offered Pure great probability for success, the first because of Texas's volatile political situation, and the second due to the existing legal uncertainties

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of prorationing.

Pure turned to its vaunted legal counsel, VE, for advice. Elkins preferred the mayhem of politics to the uncertain outcome and cost of protracted litigation. Although he was an able attorney, Elkins's skills as a political "fixer" were of immeasurable value to VE clients including Pure. Politics combined with law influenced decisions by elected public officials including the railroad commissioners.

Elkins and his close friend, Houston banker Jesse H. Jones, were politically potent in Texas. Elkins and Jones became the preeminent leaders of the Houston business community by promoting a stable, conservative political climate that fostered economic growth and prosperity. As a banker and lawyer, Elkins offered his clients a wide range of skills and services. Politically, financially, or legally, Elkins was always ready and willing to serve his clients' needs. He exhibited this readiness by helping Pure win concessions from the TRC that other Texas producers had failed to obtain during the initial prorationing struggles in Texas in the early 1930s. Elkins's representation proved to be of immeasurable value to Pure's growth and prosperity. It illustrated the complex roles lawyers played in shaping petroleum law.9

9Joe R. Feagin, Free Enterprise City: Houston in Political-Economic Perspective (New Brunswick, N.J.: Rutgers University Press, 1988), p. 124; Marguerite Johnson, Houston: The Unknown City, 1836-1946 (College Station: Texas A & M Press, 1991), pp. 198-99, 288, 385-87; Thompson Interview, p. 26, where Thompson stated, "Elkins wanted good government, he wanted conservative government, and he was unselfish with the firm's money as he was with his in trying to get good people elected." Thompson added, "He [Elkins] was sort of the ex-officio chairman of the group that got behind the various candidates for public office"; Gertrude Peddy Cornwall, 26 July 1982, VEOH Interview 6, p. 10, VEA. PID: 052615-176, where, according to Ms. Cornwall, Elkins was a close personal friend of Texas Governor William P. Hobby. When asked about other people in public office who were close friends with Elkins, Cornwall said, "All of them...The Railroad [Commissioners]...He had all of them in his pocket...Coke Stevenson and Jimmy Allred, and all of them [Texas governors from Hobby through Preston Smith]; Lois O'Brien, 10 June 1982, VEOH Interview 4, p. 21, VEA, PID: 052615-179, where Ms. O'Brien recalled, "All these political figures came in to see Judge...Lyndon Johnson, Senator [John] Tower, and Jimmy Allred"; Dana Blankenhorn, "James A. Elkins, Sr.: For Half a Century, 'The Judge' Held Reigns of Houston Power," Houston Business Journal (12 March 1979): 1-2, notes that Elkins held a
Elkins instructed Powell to petition the TRC for an increase in Pure's Van allowable at the 10 January hearing. Powell did not anticipate as much opposition from the TRC as from other producers. But Elkins knew better. Pure had a contractual obligation to obtain the agreement of its unit partners at Van--Humble, Shell, Sun, and the Texas Company--to increase and share production. Pure had leased fourth-fifths of the 5,800-acre Van unit while its four partners collectively held the remaining leases. Therefore Pure would receive the greater share of any additional production. The other unit partners had to weigh the benefit of a relatively meager production gain for themselves against the cost of enhancing Pure's interests while aggravating the already hostile small independents at Van and incurring the TRC's wrath. Major oil companies had been decrying overproduction and advocating prorationing. They would appear hypocritical if they now pleaded for an increased allowance. "I rather think that we work against our own interests" in seeking to increase production, Texas Oil Company president Ralph C. Holmes warned Dawes, and "I am only hopeful that...compromises can be worked out...[to]...make it possible for us to continue working together for improvement and stability in the general situation." Dawes responded, "Pure...has left nothing undone to protect the industry and [has] subjected [itself] to every conceivable form of harassment and...will receive support not simply because we deserve it, but because it is in the best interests of industry."10

succession of public offices in Huntsville, Texas between 1901 and 1905, culminating in a brief stint as Walker County Judge (from late 1904 until early 1905). From that time on, Elkins was respectfully and affectionately referred to as "Judge." The practice of assigning titles, like colonel, major, captain, judge, senator, etc., was rooted in the antebellum South. It was not necessary for the titleholder actually to have served in the military or have held public office. Titles were ascribed to a person as a gesture of respect and affection. See John Hope Franklin, *The Militant South, 1800-1861* (Cambridge: Harvard University Press, 1956), pp. 190-92.

10Powell to Elkins, 26 November 1930, 29 November 1930, 10 December 1930, VEA, C. F. 10605; Elkins to Powell, 29 November 1930, VEA, C. F. 10605; Holmes to Dawes, 8 December 1930, VEA, C. F. 10605; Dawes to Holmes, 12 December 1930, VEA, C. F. 10605.
Sun vice-president J. Edgar Pew told Dawes that he opposed increases in the Van allowable because existing market demand was insufficient to justify additional production. "If the industry is to escape utter demoralization," he explained, "it must adhere to a program of some kind, and the larger producing companies must make such sacrifices as are necessary to accomplish this."

Pew feared that increasing Pure's allowable would upset the entire oil conservation effort because other operators would demand like consideration. "I do not agree with you that there is any injustice being done to Van over other similar fields of the same age [and] I do not think the royalty interests at Van are being discriminated against," he told Pure vice-president R. W. Mcllvain, "but on the other hand I believe if you were to open this thing wide they would be very much the losers because of the less amount they would get for their oil." Pew asked Mcllvain to reconsider Pure's position as it would only stir up a hornet's nest and warned, "Don't do it now."11

Meanwhile Dawes wrote Elkins that, "Our [in-house] lawyers seem to feel that if the Commission did not grant us our application...for [a 50,000 barrel daily allowable], we could enjoin them to do so." Elkins replied that Dawes should maintain a firm posture before the TRC, but be prepared to file a lawsuit if necessary. So advised, Dawes regrettingly told Pew that he could not modify his position because "the proration movement [could] not be sustained solely on the basis of emotional appeal." He vowed that Pure would "pursue the present application to its ultimate logical conclusion" believing that "the best interests of the general situation would be better served if the operating companies were to give us their support." Pure asked "for nothing in return for the sacrifices [it had] already made," Dawes explained, and the industry would "be better served by

11Pew to Mcllvain, 10 December 1930, VEA, C. F. 10605.
reasonable cooperation with [Pure] on the part of those with whom we are not only associated in this field but with whom we have cooperated to the limit of our abilities in the general interests of the industry."\(^{12}\)

Elkins assured Dawes that he had explained Pure's position to Pew fairly and concisely and that none of the other Van unit partners, except Sun, could, in good conscience, protest. Pure could always resort to legal action, but Elkins cautioned its president, "I do tremble sometimes when I think about the [Pure Oil] Company taking the responsibility of breaking up and destroying proration."

Elkins concluded that Pure should not sue "except where the Company's demands are such to absolutely require this action."\(^{13}\)

New Jersey Standard supported Pure's position because it relied on 15,000 barrels of Van crude oil daily to feed its Baton Rouge refinery. E. J. Sadler, Standard's vice president for production, told Dawes that he thought it was "entirely reasonable to accord the [Van] field such an outlet as it will now receive through the Pure Oil Company [pipe] line and the [Humble] line just completed to Shreveport" and that he considered "any other view...entirely unsound." Elkins discounted protests by small independents like Andrarde who refused to cut back production for the sake of conservation while majors and large independents like Pure increased their output. He could not "conceive of a place where a small increase would be less disturbing...except sentimentally [and]...when it comes to sentiment, there is a very strong feeling that reasonable equity must be observed as between producers." Small independents must

\(^{12}\)Dawes to Elkins, 11 December 1930, VEA, C. F. 10605; Elkins to Dawes, 11 December 1930, VEA, C. F. 10605; Dawes to Elkins, 12 December 1930, VEA, C. F. 10605; Dawes to Elkins, 27 December 1930, VEA, C. F. 10605; Dawes to Elkins, 27 December 1930, VEA, C. F. 10605; Dawes to Pew, 27 December 1930, VEA, C. F. 10605.

\(^{13}\)Elkins to Dawes, 3 January 1931, VEA, C. F. 10605.
have been pleased to hear Elkins echo their battle cry that "reasonable equity must be observed."\textsuperscript{14}

Shell refused to back Pure. Shell president U. de B. Daly reminded Dawes that Van production was already equivalent to that of other Texas oil fields of similar size and potential. Daly predicted that other producers would demand higher quotas if the TRC increased Pure's Van allowable thereby undermining prorationing and accentuating overproduction. Asserting that additional production would exhaust the natural gas pressure of the Van field and induce excessive water intrusion, Daly, assuming a conservation and economic perspective, preferred to maintain the existing output at Van. He recommended that additional production be delayed until the industry got "on its legs again" so that greater profits could be derived from higher prices. And Daly informed Dawes that, from an operational standpoint, Shell could not support Pure's petition to increase the Van allowable.\textsuperscript{15}

To recapitulate, Pure's four major oil company unit partners at Van, Sun and Shell opposed its petition for a production increase while the Texas Company remained leery of the idea. Humble was forced to go along with its parent company's [New Jersey Standard] support of Pure's plan. The cleavage among the Van unit partners signified a crack in the majors' solid front behind prorationing. Standard was encouraging Pure to increase production at a time when other major oil companies were arguing that output should be reduced to alleviate waste and stabilize prices.

When viewed from Standard's perspective, however, Standard had expended considerable capital constructing a huge new refinery at Baton

\textsuperscript{14}Sadler to Dawes, 30 December 1930, VEA, C. F. 10605; Elkins to McLlvain, 2 January 1931, VEA, C. F. 10605.
\textsuperscript{15}Daly to Dawes, 2 January 1931, VEA, C. F. 10605.
Rouge to process high volumes of crude oil. To realize an adequate return on its capital outlay, Standard had to ensure a steady flow of oil to the refinery. Standard and its subsidiary, Humble, had built pipelines connecting the Baton Rouge refinery to the Van field. The negative effect of additional production on crude oil prices was not Standard's immediate concern since most of its capital was tied up in petroleum transportation and refining. A crude oil shortage was Standard's chronic fear. An adequate supply of cheap crude was more crucial to Standard's fortunes than scarce, high-priced oil. In this context, Standard's support of Pure's position is understandable.16

The Texas Common Purchaser Act of 1930 also affected Pure's chance of gaining an increased allowable. In part, the Act guaranteed every Texas oil producer a fair market share by prohibiting crude oil purchasers who owned pipelines from discriminating against operators who lacked their own transportation facilities. The act required companies like Pure and Humble, which produced and shipped oil through their own pipelines, to purchase and transport a fair portion or ratable share17 of oil from smaller operators. Small independents argued that Pure lacked adequate pipeline capacity to transport additional Van production without discriminating against them by buying and shipping less of their oil. Elkins responded that the Common Purchaser Act required a purchaser in a field "to take ratably from all the producers in that field and that if such company is a common purchaser throughout the State it has to

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16Sadler to Dawes, 30 December 1930, VEA, C. F. 10605; Larson and Porter, History of Humble Oil, p. 153.

17Ratable share means that each operator in a field produces only a stipulated proportion of the oil which his wells are capable of producing. In some cases, individual wells are allowed to produce a straight percentage of their full productive potential. In other instances, production rates are determined by the amount of acreage drained by each well. A third method takes into consideration acreage, reservoir pressure, and other factors in addition to well potential. As applied to pipeline operators, ratable taking refers to the percentage of total oil production purchased from each producer in a given field. See Ball, This Fascinating Oil Business, p. 147.
take ratably from all the fields." He claimed that this latter provision did not apply to Pure since it purchased only Van oil ratably from all producers in that field. Elkins was confident that Pure could "conclusively demonstrate" that additional Van production would not go to waste, giving the TRC no reason to deny its petition.\textsuperscript{18}

As the TRC hearing approached, Powell kept Elkins apprised of events in the state capital. Parker did not favor Pure's request for additional production at a time when the TRC was asking other Texas producers to sacrifice, Powell warned, and suggested that Pure purchase the additional oil from marginal producers in order to rescue them from certain ruin.\textsuperscript{19} Parker accused Pure of disguising its true intention. It wanted to produce more oil to sell to Humble which would in turn supply Standard's Baton Rouge refinery, he alleged. If Pure quit this practice, Standard would be forced to purchase more oil from small marginal producers. Writing Parker, Powell told him that he was unaware of what Humble did with the crude it purchased from Pure, but that the TRC lacked jurisdiction after the oil left the state. He asked Elkins to come to Austin to persuade Parker to see things the Pure way, but to be prepared: to prove that Pure could produce 50,000 barrels daily at Van without incurring subsurface or aboveground waste; Elkins should procure a geologist to testify about the danger of Pure losing wells when daily production was less than 100 barrels; to show that Pure had not purchased oil from any other Texas fields except Van; and to demonstrate, as a matter of equity, that even with an increased allowance, Pure would still be producing much less of its potential at Van.

\textsuperscript{18}Elkins to A. C. Harvey, 5 January 1931, VEA, C. F. 10605.

\textsuperscript{19}Ollen and Ollen, \textit{Wildcatters}, p. 218, defined a marginal producer as one with "marginal" or "stripper" wells that each produce less than 10 barrels of oil a day or whose output is less than in paying quantities.
compared to production in other Texas oil fields. "I want us to insist on this allowance," Powell concluded, "even if we have to go to court...we can get the relief in court and it might be a very good thing to teach these people a lesson."20

Dawes warned Parker that if the TRC stopped Pure's oil shipments to Standard's Baton Rouge refinery, "it would simply be robbing the State of Texas of [an] outlet for that oil without in any way affecting conditions in the West." If the TRC rejected Pure's petition for an increased allowance, Dawes claimed, it would be discriminating against Texans and penalizing them for the benefit of other producing regions. Without additional Van production Pure would have to purchase oil outside of Texas or be forced to shut down its Smith's Bluff refinery. Dawes did not understand how the TRC could "put itself in the indefensible position of robbing its own people of markets in favor of any indefinite ideas they may have of remedying world conditions."21

Land and royalty owners at Van swung into action to protect their interests. They retained state senator Tom Pollard as legal counsel. Additionally, some Fort Worth land and royalty owners retained the law firm of Trammel, Sizzum & Price to defend their interests at Van. Elkins told Dawes that these land and royalty owners accused Pure of cheating them out of higher profits by failing to produce more oil from their Van properties. Unless Pure increased its Van production, Elkins warned that it would face "undesirable litigation" having "far reaching effects" on the future of prorationing in Texas.22

Offering a mixed blessing for Pure, the land and royalty owners' suit would be moot if the TRC allowed Pure to increase its Van production. If the

20Powell to Elkins, 6 January 1931, VEA, C. F. 10605.
21Dawes to Elkins, 7 January 1931, VEA, C. F. 10605.
22Elkins to Dawes, 8 January 1931, VEA, C. F. 10605.
TRC did not, Elkins planned to use the TRC’s rejection as a defense to the disgruntled land and royalty owners' lawsuit. Anticipating a heated contest, the TRC again postponed the 10 January hearing until the 22nd.23

Dawes tried to use the land and royalty owners' threatened lawsuit to win Pew’s support. He advised Pew that Pure merely desired to put Van in a position of "measurable equality" with other Texas oil fields. "You know what we have to combat in this effort," Dawes said, and "if the people in this field, through the indifference or weaknesses of the operators, feel that they are being discriminated against, they will take the matter in their own hands." He warned Pew that "five different persons or corporations...are prepared to bring suit in case" the TRC denied Pure's petition. "It is the Pure Oil Company who, so far, [has] prevented this and kept the situation in hand," Dawes reminded Pew, "but I am obliged to say to you, as one of our associates in the unit, that we have come to the end of our string."24

III

As the 22 January hearing neared, forecasts were for rough weather for Pure. On 21 January, VE attorney George Peddy sent Elkins a scouting report from the state capital saying, "I do not feel that we can get the increase with the influence which has been and is now being exerted upon those in authority against granting [the] same."25 Peddy's dispatch cast an ominous shadow over

23Elkins to Dawes, 8 January 1931, VEA, C. F. 10605.
24Dawes to Pew, 15 January 1931, VEA, C. F. 10605; Dawes to Elkins, 20 January 1931, VEA, C. F. 10605, where Dawes notified Elkins that Pew had agreed to support an increase of not more than 2,500 barrels a day in Pure’s Van allowable up until 1 March 1931. Pew claimed that that was the amount Elkins had deemed satisfactory and that he would support a further increase of 1,000 barrels daily if proven necessary. Dawes thanked Pew for his gesture of support, but believed that Pew had misunderstood Elkins and that Pure would adhere to its demand for an initial increase in its Van allowable to 35,000 barrels a day until 1 February 1931, followed by monthly increases of 5,000 barrels until a 50,000-barrel a day allowable had been achieved.
the Pure camp. Pure faced a more formidable foe than it had anticipated. In desperation, Pure management leaned on their ace legal strategist to outmaneuver the enemy.

Pure's fate rested in Elkins's hands. Pure was VE's larger and more important retained clients. The outcome of Pure's pending confrontation with the TRC bore significant potentials for the relatively young Houston law firm's [founded in 1917] reputation as well as the future success of prorationing in Texas. A loss of prestige would undermine Elkins's ambition to transform VE into a regional legal powerhouse and stifle Pure's future growth. But odds were that even Elkins's dynamic, domineering personality could not salvage what appeared to be a lost cause for Pure.26

Assuming personal command of Pure's forces, Elkins sped to the Austin battleground. On 22 January he reported to Pure headquarters that "conditions [had] crystallized against any increase whatever until this morning when the [central proration] committee [headed by Dallas oilman R. R. Penn] found out that the royalty owners had employed former Governor Dan Moody to represent them in this hearing." Desperately, Elkins forged a last-minute alliance with Penn's committee in order to reinforce Pure's position in the pending showdown against the formidable force led by the former Texas governor. As the opposing forces lined up for battle, Penn volunteered to lead the new alliance of majors and independents into combat. Back at company headquarters, Pure management anxiously awaited the results.27

26 See Blankenhorn, 1-2, for brief profile of Elkins's background and personality.
27 Elkins to Mcllvain, 22 January 1931, VEA, C. F. 10605; Thompson Interview, p. 15, Thompson recalled that during the 1930s, at least 80 percent of Vinson & Elkins's law practice was oil and gas related. On p. 20, he noted that Pure Oil Company was one of the firm's major oil and gas clients.
As chairman of the central proration committee, representing an allied group of independents and majors, Penn had hailed the TRC's proration program as an "achievement of pride. Asking the TRC to clamp down on producers in the Big Lake oil field where the University of Texas owned substantial acreage, Penn claimed that wasteful overproduction at Big Lake was costing the university thousands of dollars weekly. He urged the TRC also to reduce production in East Texas while recommending that it increase Van's daily allowable by 5,000 barrels each month until total output reached 50,000 barrels a day. Penn assured the TRC that additional Van production would not be wasted due to the expected rise in gasoline demand with the opening of the tourist season and farm work in April.28

The climax came when Elkins quietly rose in the rear of the hearing chamber and asked for an opportunity to be heard. He demanded that Pure be permitted to produce 50,000 barrels of Van oil at once, citing the company's ready market for the additional oil. It would not be needlessly stored or wasted. Noting that the TRC's 14 August proration order had limited Pure's 92 Van wells to 27,500 barrels per day despite a productive potential of 1,000,000 barrels a day, Elkins specified that on 1 November 1930, Pure had 194 wells at Van with a daily productive potential of 2,775,000 barrels. Further pointing out that the 27,500-barrel allowable divided among Pure's 194 Van wells reduced the ratio of each well's output to less than one-third of the allowable of wells in other Texas oil fields, Elkins complained that this was "not right when there is an open market." Posturing now as a defender against the oil giants, he asserted that "We refused to pinch down some of the smaller fellows because it would ruin

their wells." Elkins predicted that by 1 April there would be some 233 wells at
Van without a barrel of additional allowable making it "wrong,...unsound and
unjust" to limit each one to an "average of 110 barrels" a day. "We are
producing with tubing and choke on all wells...[with]...so much back
pressure...that the gas escapage is large," Elkins explained. He offered to pay
the TRC's expenses to "make a personal inspection [of the Van field] and hold
hearings on the ground to get the facts.29

The TRC acquiesced. Effective 23 January, until 1 April, statewide
production would be limited to 644,253 barrels per day. Although the TRC
reduced output in all Texas oil fields except Van and East Texas, it increased
Van's daily production by 5,000 barrels per month until it reached 50,000
barrels a day. The TRC scheduled a special hearing to determine the East
Texas allowable.30 Elkins sped the news of victory to Pure headquarters. Pure's
management greeted the victory with enthusiasm. Mcllvain elatedly thanked
Elkins for "the most welcome and...best news we have had in many a day,"
adding "this had gotten to be so serious, and the strain, both inside and out, was
so great that we are all very glad it is over...hope you take a weeks vacation."
Mcllvain attributed the success of Pure's mission "almost entirely to the speech
he [Elkins] made for it forestalled completely any inquiries into our basic facts
supporting our claimed potential."31

Dawes also complimented Elkins. "I presume the consciousness of
accomplishment is more valuable than kind words," he told Elkins, expressing

29"Allowable Production in Texas Reduced by New State Order," 169-70; Houston Post-
Dispatch, 23 January 1931, 4:1; Tyler Morning-Telegraph, 23 January 1931, 1:1, copy in Pure
30"Allowable Production in Texas Reduced by New State Order," 169-70; Houston Post-
Dispatch, 23 January 1931, 4; Elkins to Mcllvain, 22 January 1931, VEA, C. F. 10605.
"how grateful we all are to you. You had to fight a lone battle and had nothing on your side except a just cause and your own natural abilities," adding, "it was a vital matter to the Company, and it is a great relief to have it definitely out of the way. I congratulate you most sincerely."32

Elkins received many accolades for his personal role in saving the day for his corporate client. By "sending...Judge Elkins to Austin," Estes wrote, "Pure's action is...indeed commendable and merits the appreciation of us all and other corporations might well emulate it."33

Thirteen Pullman carloads of East Texas operators, represented by Moody, did not fare as well before the TRC. They had arrived in Austin on 24 February for the TRC hearing. Sparks and fisticuffs were certain to fly whenever majors and independents came within arms length of each other. Penn refused to answer Moody's question about his connections with major oil companies. Moody responded, "It's necessary to tell the truth!" Penn retorted, "You mean to insinuate that I'm not?" Chomping at the bit, Estes shouted, "If you want to fight somebody, fight me, you big bully!" The gallery cheered as emotion and irrationality prevailed.34

IV

Distressed by conditions in Texas which threatened to upset the entire domestic oil conservation effort, representatives from Texas, Oklahoma, Louisiana, Arkansas, Kansas, California, New Mexico, Colorado, and Wyoming, including several governors, met in Fort Worth on 9 March to discuss ways to correlate their respective state regulatory efforts to establish fair production

32Dawes to Elkins, 23 January 1931, VEA, C. F. 10605.
quotas and restore crude oil prices to a profitable level. They formed an Oil States Advisory Committee [OSAC] and called for immediate market-demand prorationing in the East Texas field. At a Washington, D.C. meeting in April, Colorado's representative accused oilmen of being "short-sighted and...selfish" and incapable of visualizing "the public interest." The OSAC recommended the restriction of unnecessary drilling and unitization to protect the interests of both independent producers and the public.35

V

Amidst stormy protests, the TRC issued a proration order for the East Texas field to take effect on 10 April. It limited daily production to 90,000 barrels, to be increased by 15,000 barrels every two weeks, until 130,000 barrels were reached by 1 July when the order expired. Moody and Estes immediately filed suit challenging the TRC's order. State District Judge J. D. Moore issued a temporary injunction restraining enforcement of the TRC's order. On 13 April, Assistant Attorney General Upchurch ruled that Moore's injunction decree applied only to Estes's 72 acres in the East Texas field. The TRC revised its order twice, on 22 and 29 April, and delayed its inception until 1 May in order to mollify angry independents. But many East Texas operators simply ignored the TRC and continued to drill 317 more wells and produce the 817 existing wells at capacity. Humble reacted by lowering its posted price for East Texas crude by twenty cents a barrel. Farish warned that "the price of East Texas oil will control the price of all competitive crudes." One report noted, "East Texas is the independent spirit in its most violent expression; and violent is not too strong a word to describe the most vocal leader, Carl Estes, an eccentric and temptuous

newspaper man." As editor of the _Tyler Courier-Times_, Estes voiced the sentiments of the local "plain folk" by denouncing the "big boys" and "slick lawyers" who were moving in to steal their oil.\(^\text{36}\)

A "Red Scare" added to the chaos, excitement, and anxiety in the East Texas oil patch. In a "confidential" letter addressed to the executives of thirty-eight oil companies operating in Texas, Texas Ranger Frank Hamer, of "Bonnie and Clyde" fame, warned of an imminent Communist plot to blow up refineries, pipelines, and storage tanks in East Texas. Hamer refused to divulge his information source and became upset when the letter's contents were leaked to the public, but insisted that it was his "duty" to warn oil company officials about "Reds" in the oil field. He claimed that saboteurs had stolen a large quantity of nitroglycerine from oil field storehouses.\(^\text{37}\)

East Texas production soared as the TRC's regulatory authority lingered in the courts. "It takes time to finally dispose of those cases, sometimes six months and often one ore two years," TRC chairman C. V. Terrell complained, "so these operators who bring suit can with impunity run their wells wide open, get neighbors' oil and soon bring in water and soon ruin the field." The mere filing of numerous injunction suits stifled the TRC's ability to impose some semblance of orderly production in the East Texas field. "No matter how far the Railroad Commission stretches allowances," the _New York Times_ reported, "it appears to be impossible to satisfy oil-thirsty East Texans...[who]...demand all


their oil and will not listen to the old adage about eating one's cake and having it too."

VI

With the courts as a forum for combat and the law as the weapon of choice, lawyers were gladiators for the warring factions who dueled over oil. Pure found a suitable champion in the co-founder of VE. By the 1930s, Elkins's influence as a leader of the Houston business establishment with close ties to influential patrons like Jesse Jones was unsurpassed. Pure retained Elkins as its strong man to do everything possible to ensure that it got what it wanted. His performance before the TRC hearing in January 1931 illustrated Elkins's ability to influence politicians and businessmen alike to further his clients' interests without resorting to the uncertainty, delay, and high cost of litigation which Moody and his East Texas clients were forced to do. In a single day, Elkins had journeyed from Houston to Austin and back and turned impending defeat into victory for his client. His power derived largely from his magnetic personality, his endless political connections, and the legal agility he and other VE lawyers wielded.39

38A similar wave of Red hysteria struck the Seminole oil field in Oklahoma. Seminole police chief Jake Sims dismissed it as a rumor and attributed oil field vandalism and thefts to "common thieves." Houston Post-Dispatch, 15 June 1931, 1:3; New York Times, 5 April 1931, III, 5:1.
39Cornwall Interview, pp. 10-11, where Ms. Cornwall recalled that Elkins told her that Texas governors never made an important appointment, such as railroad commissioners and judges, without first checking with him. Cornwall, then Ms. Erwin, had been a secretary in Governor William Hobby's office while she attended the University of Texas from 1916 to 1921. In 1921, she married George Peddy, a future VE attorney, who unsuccessfully campaigned for the United States Senate in 1922 and 1948. Following Peddy's death in 1951, she married Barry Cornwall. Ms. Cornwall came to VE in 1924, when William A. Vinson hired her. She soon became Elkins's personal secretary; Thompson Interview, p. 8, where Thompson attributed VE's success to Elkins and the acquisition of Pure Oil Company as a client. On p. 13, Thompson recalled how Elkins devoted all his time to handling oil regulation matters for Pure. At pp. 26-27, Thompson states that Elkins "was very instrumental in providing Mr. [Oscar] Holcombe [Houston mayor] with an awful lot of financial help in his elections...[and]...Judge and Jesse Jones were very close...along with Governor Hobby. Judge was Governor Hobby's campaign manager."
Elkins possessed a charisma and charm that left others spellbound. He drew upon his inherent talents to forge an alliance with Penn, thereby gaining for his client the support of the powerful central proration committee. Elkins then used shrewd arguments and his compelling manner to sway the TRC into agreement. The impact of Elkins's alliance with Penn's committee and his personal testimony before the TRC on the outcome of Pure's petition can be gauged by the bleakness of Pure's situation prior to Elkins's arrival in Austin, where he turned impending defeat into victory. Measured by a client's expectations of his lawyer, to obtain the desired result, Elkins was a smashing success. He obtained for Pure all that it had wanted. In this context, Elkins fulfilled what he believed to be a lawyer's ethical obligation to serve a client's needs to the client's satisfaction. Moreover, Elkins's service to his client had a substantial effect on broader issues involving oil depletion and public regulation of the oil industry in the region. The role that Elkins and his Houston law firm played on behalf of clients like Pure provides a vivid and colorful insight into the impact of Texas lawyers on petroleum law and politics in early twentieth-century America.
CHAPTER VI

THE LONG HOT SUMMER

To legalize proration, with all its iniquities...would be most unwise and would be beneath the dignity, judgment and good common sense of any legislator of this State.

Joseph C. Danciger

By the summer of 1931, Texas's first experiment prorating petroleum production had run into a legal stonewall. Lower federal courts had enjoined enforcement of TRC orders permitting small operators in East Texas and elsewhere in the state to drill and produce with impunity. As lawyers and judges wrangled with relevant constitutional issues, Texas production exceeded twice the limit set by the TRC. Statewide production reached a million barrels a day and crude oil prices plummented to ten cents a barrel. East Texas production alone could supply one-third of the domestic demand for petroleum which negatively affected prices in other oil-producing regions of the country. Small independents operating on borrowed capital felt pressed to produce more oil, regardless of price, to pay-off outstanding debts. Never enamored to big
business and monopolies, cheap oil enabled small Texas operators like Danciger to compete with larger and better-capitalized major companies.1

Danciger epitomized the frontier-style rugged individualism of small independents who exhibited a penchant for hard work, upward mobility, and resistance to authority. Law enforcement officials in East Texas labeled some of them as "the worst criminals in the United States" who committed "three or four robberies with firearms every night...and...a murder out in the woods." Texas Rangers were dispatched to Kilgore to quell the rampant lawlessness and to roundup the "underworld characters" who made it perilous to walk the streets or travel the highways after dark. Daring gunmen robbed work crews on oil rigs. Nicknamed "The Law," Texas Ranger Manuel T. Gonzaulles patrolled the area atop his shiny black horse, brandishing a pair of fancy revolvers. Shouts of "here comes 'The Law'" reportedly sent the bad guys fleeing.2

Vice was rampant. Attorney Olga Lapin remembered waking at two-thirty one morning to arrange bail for twenty-five naked women arrested during a raid on a dancehall performance entitled the "Midnight Rambler." Some thirty prostitutes were regularly lodged in the Kilgore jail. Unscrupulous operators cheated many poor and illiterate white and black landowners, who were

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2 Johnson, "Oil in the Pea Patch," 38-39; Clark and Halbouty, *The Last Boom*, pp. 135-37, described Texas Ranger Sergeant Manuel T. Gonzaulles as the most feared and respected man in Texas. He bore the scars of gun battles fought in other Texas oil boom towns and along the cattle trails near the Mexican border. Gonzaulles was notorious for drawing his pistols with "blinding" speed. He played judge, jury, and jailer to thieves, robbers, and con men. Since Kilgore lacked a jail, one night Gonzaulles secured some three-hundred arrestees to a chain marched them to a local Baptist church which had been vandalized. There, he fastened the chain-bound prisoners in front of the church to be displayed, identified, and fingerprinted. "Lone Wolf's Trotline" was dreaded by local misfits. Gonzaulles offered to let his prisoners off the trotline if they got of town in four hours. A common joke related how "Lone Wolf gave them four hours and they gave three hours and fifty minutes of it back to Lone Wolf."
bewildered by complex oil and gas leases, out of their "royal tea." The oil bug even infested local churchmen. Recognized "pillars" of religious congregations compromised their devotion to God by paying more attention to oil. One observer noted how everyone, "caught in the maelstrom of boomtime confusion, found themselves working on Sunday, or if not at work, so worn and weary from the long and strenuous days of the week past that they were compelled...to take the day for rest."3

Despite hardships and crime, the East Texas oil boom offered opportunity for young, poor farm youth who found gainful employment in the numerous stores, hotels, and cafes which sprung up to service the needs of many new customers. A local resident recalled, "Those were the days when people worked...they didn't mooch or march." Another remembered how much fun it was "just to drive around over the country...and see the derricks...how thick they were and wondering...how they managed to get thick." One observer was awestruck by the glowing gas flares that lit the pine forests at night. Kilgore newspaper publisher Tom E. Foster described the East Texas oil field as the "California gold rush and Alaska thrown into one," certain that "there will never another like it in my lifetime." Streets in downtown Longview were congested with vehicles and pedestrians fifteen to eighteen hours a day. The Gregg County sheriff said, "It was just a sight to see, people were everywhere and the cars were stacked." After striking oil on her land, one elderly lady boasted, "Now I can go to town and buy all the chewing gum and bacon I want." Many East Texans looked forward to going to the post office to pick up royalty checks instead of bills.4

4Ibid.
Not all East Texas producers shared the boom mentality. Those not compelled by poverty or immediate financial pressure to produce more oil at any price understood the long-term advantages of restricting output to conserve reservoir pressure, thereby enhancing ultimate recovery and profits. Local businessmen recognized that a "feast today--famine tomorrow" approach undermined long-range prosperity. Many consumers even realized that a lot of cheap gasoline today meant less and more expensive gasoline tomorrow.5

II

Overproduction in East Texas became a national issue. A price of ten-cent--or less--a barrel of oil depressed crude oil prices in other parts of the country. As crude oil prices fell far below production costs fear and demoralization gripped the American petroleum industry. Shell Oil director Frederick Godber encountered unmitigated gloom in his meetings with senior managers of major oil companies. He described the chairman of Indiana Standard as "very depressed, almost panicky, and...nervous." Teagle of New Jersey Standard was "very pessimistic." Godber attributed the oil industry's problems "to known causes over which individuals have little or no control and which cannot be remedied until laws are passed in various producing states permitting enforcement of laws preventing waste and excessive drilling." But, he concluded, "There is much prejudice to overcome, particularly in Texas."6

The TRC blamed the "many [law]suits...contesting orders especially as to the East Texas field" for preventing the imposition of "penalties...for

violations...[while] operators are producing as they please." It "took months before the Supreme Court [could] decide the legal questions involved." The TRC warned Sterling that "waste should be prevented for the time will come when our oil and gas reserves will be greatly depleted or exhausted" and "the price will be prohibitive, and if no cheap substitute is available, the calamity will be too serious to contemplate." Commissioners complained of inadequate authority to bypass injunctions and enforce production controls while lawsuits were pending.7

The uncertain legal status of prorationing had undermined the TRC's ability to enforce production controls. The ease with which producers obtained injunctions further undermined the TRC's authority and encouraged many operators simply to ignore regulations and continue producing at will. Politics also eroded the TRC's power. By the 1930s, the TRC had become a sinecure for Texas politicians nearing the twilight of their public careers. A seat on the TRC allowed them to retain political influence with patronage at their disposal. Customarily, the governor would appoint a senior Democratic Party faithful to a vacancy on the TRC, giving the new appointee the advantage of running as an incumbent in the next election. This process was standard fare in the one-party politics prevalent in the South at the time. The system ensured maintenance of the status-quo since incumbents were a shoe-in for reelection as long as they did not rock the boat. Most of the electorate remained disenfranchised. This explains, in part, why the three Railroad Commissioners in 1931--Terrell, Smith,

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7C. V. Terrell, Lon A. Smith, and R. D. Parker to Governor Ross S. Sterling, 19 May 1931, VEA, C. F. 10605.
and Neff—responded in blase fashion to the pandemonium in the East Texas oil field.\(^8\)

The TRC's lackadaisical pace was compounded by the traditional spoils system so endemic to Texas politics. Each of the three commissioners hired one-third of the TRC's employees often on the basis of personal acquaintance rather than merit. Ability to "pull the right strings" helped ensure employment with the TRC. Usually, a father would ask a friend in public office, such as a judge, legislator, or commissioner, to help procure a job for a son recently graduated from college or law school. Rooted in tradition, the process illustrated the persistence of antebellum southern social customs like paternalism, patronage, and *noblesse oblige* in the early-twentieth-century South. It was evidenced in the hiring practices of Texas law firms like VE and contributed to the kind of power and influence that Elkins wielded to benefit clients like Pure. Although patronage opened the door to upward mobility for many young aspirants, it did not always promote the best and brightest to the top. For example, in 1930, the TRC employed only one engineer and not a single geologist intelligently and competently to evaluate the technical data submitted by staff experts of major companies. Underpaid field inspectors earned less than two-hundred dollars per month. Some accepted bribes. Incompetence and corruption eroded the respect the TRC needed to command before it could even begin trying to enforce state oil conservation laws. As elected politicians, the Railroad Commissioners walked a tightrope between political suicide and popular activity. The TRC's precarious position was aggravated by the

\(^8\)Hardwicke, "Legal History," p. 232; Olien and Olien, *Wildcatters*, p. 59; Prindle, *Petroleum Politics*, pp. 31-32, described the three Railroad Commissioners in 1931 as: sixty-nine year old Charles V. Terrell had served as a judge, state treasurer and legislator; sixty-one year old Lon A. Smith was a former state legislator and comptroller; and fifty-eight year old Pat Neff had been Governor of Texas; *ibid*, pp. 145-81, analyzed and discussed the political aspects of the TRC.
commissioners' refusal to part with the patronage that undermined their claim on general public confidence.\(^9\)

Concern mounted as the price of East Texas crude fell to two cents a barrel. Farish attributed the problem to the lack of market-demand prorationing. Large East Texas independents like Charles F. Roeser, Tom Hunter, and J. S. Bridwell cooperated with the majors in promoting market-demand prorationing. They endorsed a bill introduced by Representative A. M. Howsley of Albany near the end of the regular session of the Forty-first Legislature to legalize market-demand prorationing [H. R. 1052]. Howsley bragged that 98 percent of Texas producers supported his bill, but news correspondents reported that he never received that much support.\(^{10}\)

East Texas Lease, Royalty & Producers' Association chairman Carl Estes led the attack on Howsley's bill. It would make the TRC "the executioners of every little independent operator in Texas." San Antonio Independent Petroleum Association president Harry Pennington also denounced Howsley's bill as an "economically unsound attempt at price fixing." Cranfill voiced the same concern on behalf of the IPAT. In a personal letter addressed to Texas independents, Danciger declared, "It is inconceivable...to believe the oil industry is old enough to harbor any members who could have got so dumb in so short a time as to believe that House Bill No. 1052 is a good thing for the

\(^{9}\)Prindle, *Petroleum Politics*, pp. 32-34, provided a thorough discussion on the political dilemma facing the TRC; Clark and Halbouty, *The Last Boom*, p. 217, stated that respect for the TRC was undermined by instances like the time when the attorney-son of Commissioner Lon A. Smith was allowed to represent certain East Texas oil operators before TRC hearings, even after Smith's son had been indicted for attempting to bribe a TRC employee; For a scholarly and colorful account of antebellum southern patriarchalism, see Drew Gilpin Faust, *James Henry Hammond and the Old South: A Design for Mastery* (Baton Rouge: Louisiana State University Press, 1982); Eugene D. Genovese, *Roll, Jordon, Roll: The World the Slaves Made* (New York: Random House, 1974).  

\(^{10}\)New York Times, 27 May 1931, 44:2; Houston Post-Dispatch, 7 May 1931, 1:2, 16 May 1931, 1:1, 27 May 1931, 1:1.
independent producer.” He denounced any proration plan as “a racket to control every honest oil producer in the State, and eliminate competition.” Strong opposition to the bill prevented its passage during the waning days of the regular legislative session.11

Flagrant violations of TRC proration orders continued. Low crude oil prices spoiled the “easy money” dreams of many die hard anti-prorationists. Disillusioned, they joined IPAA president Wirt Franklin in appealing to Texas Governor Ross Sterling to call a special session of the state legislature to enact a more stringent oil conservation statute.12 Sterling hesitated in order to give East Texas operators a chance to work out a voluntary solution. In a last-ditch attempt to stave off more government control, Cranfill promoted the “Texas Plan” to limit East Texas production to 200,000 barrels a day, to be increased up to 500,000 barrels daily as market demand permitted. Each twenty-acre tract would be allowed to produce 300 barrels a day regardless of the number of wells. To help small producers, wells completed before 10 June could produce 300 barrels a day regardless of acreage, except on tracts under twenty acres, which would be limited to 600 barrels per day. A seven-member East Texas Oil Arbitration Committee would supervise the plan.13


12 Clark, Three Stars for the Colonel, p. 65, noted that Ross S. Sterling was elected Governor of Texas in 1930 and took office in January 1931. Sterling and his brother Frank helped organize the Humble Oil & Refining Company in 1911. Sterling resigned as company director in 1925 after Standard Oil Company of New Jersey purchased a majority of Humble’s stock. He purchased the Houston Post and the Houston Dispatch and merged the two into the Houston Post-Dispatch. Sterling sold the newspaper when he became chairman of the Texas Highway Commission. He served on the Highway Commission until being elected governor in 1930.

13 New York Times, 27 May 1931, 44:2, 18 June 1931, 47:2; Houston Post-Dispatch, 27 May 1931, 1:1, 2 June 1931, 1:5, 4 June 1931, 1:2, 16 June 1931, 1:6, reported that the East Texas Arbitration Committee would be composed of three representatives of the independent operators, two representatives of the East Texas Land, Royalty & Producers’ Association, and two representatives of the major oil companies to be chosen by the other five committeemen; Houston Chronicle, 11 June 1931, 1:1; Oil and Gas Journal ’30 (28 May 1931): 11, 24.
Advocates touted the Cranfill plan as a way to allow East Texans to regulate themselves without government interference. Initiated in East Texas on 20 June, the plan never, however, received enough support to ensure its long-term success. Operators with tracts of five acres or less refused to place their trust in an arbitration committee. Producers favoring lower production allowables demanded a market-demand prorationing statute. Roeser pointed out that the largest lease-holder in the field, Arkansas Fuel Company [a Cities Service subsidiary], had not agreed to comply with the plan. Texas Oil Emergency Committee chairman W. L. Todd argued that the plan violated state antitrust laws. Roeser, Todd, and Penn called for a special session of the legislature to deal with the problem.¹⁴

Penn told the API's Division of Petroleum Production, meeting in Dallas on 7 June, "We have come here to sit at the bedside of a very sick patient." Discussion focused on whether Sterling should call a special legislative session to take corrective action. Anti-conservationists wanted to be left alone to produce as much oil as they pleased, confident that they could still earn a profit regardless of low prices. Conservationists argued that state government had to do something to stop the reckless waste of irreplenishable petroleum resources that formed the nation's "economic backbone."¹⁵

Despite mounting pressure to call a special session of the legislature, Sterling believed it would be politically imprudent to take precipitate action

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¹⁴C. P. Burton to The East Texas Arbitration Committee, 16 June 1931, reported to Governor Sterling that "after consulting with thirty-eight...violators, we have the assurance of 90 percent of these gentlemen that they will close their wells into 300 barrels production per day starting at 7:00 A.M. June 20th. Three of the 10 percent have expressed themselves as being in favor of the plan, but would have to work out a few minor details"; Roeser to Parten, 16 June 1931, J. R. Parten Papers, cited in Day, "The Oil and Gas Industry and Texas Politics, 1930-1935" p. 100; *Houston Post-Dispatch*, 16 June 1931, 1:6, 18 June 1931, 1:2, 22 June 1931, 7:1; .

¹⁵*New York Times*, 7 June 1931, III, 5:6
since he had amassed a "great fortune" as past president of Humble. The matter was further complicated by what one observer called "the unrelenting passion for quick money that seems to rule among some people in Texas." Emotions ran high among thousands of small East Texas producers and land, royalty, and lease owners who resisted any attempt to restrict their oil production. They were especially suspicious of major oil companies which had entered the East Texas field only after the wildcatters had discovered oil where the majors' geologists insisted none existed. Estes turned their cause into a moral crusade. In a democracy, a landowner could use his property as he pleased without governmental interference, he declared. It was "high time" that independents "had their inning." Estes reminded Texas politicians, "Every one of you to a man was bawling around from every stump in this state, preaching the doctrine of retrieving the little man, the home, and small farmers and busting the trusts, Well," he added, "this is your opportunity to make good on those sweet-sounding promises."\(^\text{16}\)

On 2 July, the TRC issued a new proration order embodying many features of the Cranfill plan. The East Texas allowable was increased to 250,000 barrels a day to be distributed among individual producers according to acreage. Forty-acre units, as utilized in the Van field, were essentially substituted for twenty-acre tracts.\(^\text{17}\)

How this came about is unclear, but probably Elkins had a hand in the change. At Elkins's request, Powell had asked Denny Parker, Chief Supervisor of the TRC's Oil and Gas Division, to approve a change in the size of production units at Van from twenty to forty acres. It is uncertain why Elkins wanted the

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\(^{16}\text{New York Times, 7 June 1931, III, 5:6.}\)

\(^{17}\text{New York Times, 4 July 1931, 21:1; Houston Post-Dispatch, 4 July 1931, 1:8, 5 July 1931, 1:5.}\)
change, but Parker soon notified him that the TRC had approved it, saying, "I hope that the amended rules are just what you wanted." Elkins possibly hoped that larger production units would reduce the proliferation of wells on smaller tracts which undermined the stability of Pure's unit operation at Van by necessitating costly offset drilling. The TRC likely acceded to Elkins's request without question because, by this time, it was willing to try anything to reduce drilling and production. The matter illustrated Elkins's ability to further his clients' interests without resort to the kind of protracted and costly litigation that added to the instability in the East Texas field.18

III

While Van remained relatively stable and calm, Alfred E. MacMillan carried the fight of small East Texas producers into federal court. He filed suit in a lower federal court in Austin to restrain enforcement of the TRC's proration order. MacMillan probably chose a federal over a state forum because the state district court in Travis County had sole jurisdiction over suits against the TRC, and that court had already upheld a TRC prorationing order in the Danciger case. Since MacMillan challenged the constitutionality of the state oil conservation statute, a three-judge federal court had to be impanelled. The trial took place in Austin on 24 June.19

On behalf of MacMillan, Austin attorney Charles L. Black attacked the constitutionality of prorationing. He argued that the TRC's order deprived MacMillan of his property without due process of law in violation of the

18Powell to Elkins, 9 March 1931, 31 March 1931, 13 April 1931, VEA, C. F. 10605; SoRelle to Elkins, 10 March 1931, 14 March 1931, VEA, C. F. 10605.  
19Rister, Oill: Titan of the Southwest, pp. 318-19, noted that United States District Judge Duval West of the Western District for Texas [Austin] called upon Fifth Circuit Judge Joseph C. Hutcheson, Jr. and District Judge Randolph Bryant of the Eastern District of Texas [Tyler] to comprise the three-judge panel.
Fourteenth Amendment, impaired obligations under contracts, unduly interfered with interstate commerce, and bore no reasonable relation to the statutory intent to prevent physical waste in oil production. He maintained that the TRC had arbitrarily restricted production to market demand, in violation of state law, to raise the price of crude oil. Black alleged that prorationing had had a negative impact on market conditions in the East Texas field and he asked the court to enjoin enforcement of the TRC's orders against all operators there. The court recessed for thirty days.20

With the outcome pending, on 8 July, Humble cut its posted price for East Texas crude oil to ten cents a barrel. The next day, Shell slashed its price to six cents a barrel followed by Sinclair, Stanolind, and Indiana Standard. Antiprorationists denounced the price cuts as a conspiracy by major oil companies to achieve monopolistic control. Sterling instructed Texas Land Commissioner James H. Walker to refuse royalty payments due the state based on the reduced crude oil prices. Declining oil prices wrecked state tax revenues and posed a budget deficit, a prospect that finally persuaded Sterling to call a special session of the legislature to convene on 14 July.21

Conservationists urged the legislature to pass a market-demand prorationing statute. Pennington asked Sterling to abandon his call for a special legislative session and to encourage majors and independents to work out a voluntary solution. He warned that passage of another conservation law would set off an "avalanche" of lawsuits. Estes pressed his crusade against

prorationing by asking Attorney General Allred to investigate the "real" causes of falling crude oil prices, reminding Allred that he "was elected on a platform as a 'trust-buster' and the current situation should give him some food for thought." All sides in the controversy prepared to wage what promised to be a heated battle in the forthcoming special legislative session.22

The legislative battle broadened the debate over prorationing. Now the contest aimed to win legislators, lawyers, judges and the general public, many of whom were not well versed in the peculiar problem of oil, to support the more disciplined approach to production. Their ignorance posed a serious obstacle to the oil industry's effort to gain legislative sanction for some kind of production controls. Suspicions concerning the real intent of oil conservation had not been allayed. Anti-conservationists played upon Texans' traditional hostility to big business and government regulation. Texans generally welcomed the strong arm of the law only to restrain monopolistic tendencies of big corporations, to aid agriculture, to promote better working conditions and health, or to keep blacks and Hispanics "in their place." Farmers in non-oil-producing regions of the state opposed anything that raised gasoline prices while wheat and cotton prices remained depressed. In short, classical economics remained popular especially among small independent oilmen. They responded to the warning that unrestrained competition would eventually kill them off by proudly proclaiming, "not as long as a single independent lives and breathes."23

A highly emotional state of affairs greeted the Texas Legislature when it convened in special session on 14 July. One poll indicated that a majority of

22Houston Post-Dispatch, 6 June 1931, 1:5.
legislators favored more stringent oil conservation laws, but disagreed over the specifics. Sterling wanted a new conservation commission clothed with broad powers to enforce state regulations in all natural resources. Senator Walter C. Woodward and Representative R. M. Wagstaff Bill introduced identical bills which provided for a new natural resources commission and specifically authorized market-demand prorationing. The Woodward and Wagstaff bills were supported by large producers and major companies like Humble. Their spokesmen argued that market-demand prorationing was absolutely essential to any sound and effective oil conservation program. Small independents attacked the bills as a mere monopolistic, price-fixing scheme to promote the interests of large producers.24

As a major oil producer in Texas, Pure had a vested interest in the pending legislation and relied on VE for advice. Shepherd briefed Elkins on the matter. He summed up the legislative proposals as "entirely too drastic, and giving the Railroad Commission too much power over private business interests" such as the authority "to issue practically any order and assume practically any power with reference to the production, transportation, and marketing of oil and gas." Shepherd specifically objected to provisions allowing the TRC "to inquire into market requirements in...determining how much production shall be allowed" which effectively empowered it to "fix the price of

24Hardwicke, "Legal History," pp. 230-31; New York Times, 19 July 1931, III, 5:3, 30:5; Houston Post-Dispatch, 17 July 1931, 1:1; "Texas Legislature for Conservation," Oil and Gas Journal 30 (16 July 1931): 17, reported that a proposed bill prepared by the Texas Oil Emergency Committee retained the TRC as the state agency responsible for oil conservation, but redefined waste as "every kind of physical waste in excess of reasonable market demand." Another bill prepared by Al Guiberson, Dan Moody, Carl Estes, and other members of the "East Texas Bloc" provided for a new six-member conservation commission with each commissioner representing a separate district of the state. The governor would appoint the six commissioners from a list of candidates submitted by oil producers and royalty owners from each district. Sterling opposed this proposal because he believed it was unconstitutional and impractical. Neither bill provided for conservation of any natural resources except petroleum.
oil and gas and" to regulate "the refining and manufacturing ends of the business." He was particularly concerned about another provision protecting marginal wells. Shepherd warned Elkins that the TRC could use this power to cut Pure's Van allowable in half to allocate more production to small producers "on the ground that...it will not hurt the [larger producing] wells to cut down their production and keep the oil in storage underground, while if the small pumpers are shut in, they will be ruined or abandoned and the oil which could have been recovered from them will be lost forever." He advised Elkins, "I do not believe the Commission should have such powers."25

Shepherd was also concerned about a proposed law to prevent the filing of a supersedeas bond to stay the effect of any TRC rule or order, upheld by a trial court, pending the outcome of an appeal. He believed it "might work a considerable hardship in some cases and is manifestly unfair" because it gave a trial court judgment the effect of an injunction pending the appellate court's final decision. The proposed bills further required that production in excess of any TRC order subsequently upheld by the courts must be deducted from the violator's future allowable. Shepherd feared that one provision giving operators the right to sue each other for violating TRC orders "would certainly increase the hazard of vexatious litigation...against any operator who...was thought to have violated any rule of the Railroad Commission." Regardless of how hard operators tried to comply with the TRC's orders, he explained that it was often impossible to keep from violating them and "any operator...could give any other operator a world of trouble and put them to considerable expense." Since any law giving the TRC adequate regulatory authority would be objectionable in

25Office Memorandum from Shepherd to Elkins, 13 July 1931, VEA, C. F. 10605.
some way, Shepherd told Elkins that their decision to support the bill depended on whether Pure favored statewide proration.26

A majority of legislators appeared to favor market-demand proration. But a minority who opposed it successfully employed the tried-and-true tactic of calling for an investigation as a means of delay and to cloud the issues. On 16 July, the legislature adopted a resolution directing the attorney general to investigate all phases of the Texas petroleum industry for possible antitrust violations. The House, acting as a committee of the whole, conducted its own investigation and summoned oil industry leaders for questioning. Alvin Richards, Pure's in-house legal counsel, asked Elkins to advise him as to "what is actually going on as distinguished from what is reported in the press." Elkins assured Richards that he was "keeping in close touch with legislative matters relative to proration" and that "the Governor has informed leaders of the Senate and House that he is utterly opposed to any bill which has the effect of price-fixing." He also told Richards that "little can be done by the legislature...except to strengthen the penalties for violation of our present law unless the legislature in effect repeals the antitrust laws of this state," which he did not think it would do. Elkins predicted that the legislature would "throw as many safeguards as possible around the prevention of actual waste with the provision that it is not contemplated that such bill shall relate to or affect economic waste." Richards reminded Elkins that "the oil industry wants only such legislation as will protect it in times of distress and leave it free during ordinary times."27

26Office Memorandum from Shepherd to Elkins.
27Richards to Elkins, 16 July 1931, VEA, C. F. 10605; Elkins to Richards, 16 July 1931, VEA, C. F. 10605; Elkins to McIlvain and SoRelle, 21 July 1931, VEA, C. F. 10605, where Elkins said, "Confidentially, [the] attorney general is making an investigation against Humble with the [view] to institute a suit."
The legislative probe, as expected, was filled with emotion and prejudice. One legislator referred to Farish, a keynote witness, as "the little boy of the Standard Oil Company of New Jersey." Farish denied charges that major oil companies had conspired to fix prices and monopolize the petroleum industry. He favored the creation of a new conservation commission composed of businessmen and technicians with experience in the oil business. Danciger spoke up for small producers, belittling engineers and geologists as mere "theorists and fourflushers." He reiterated his opposition to prorationing in favor of regulation by the law of supply and demand.28

In the midst of the brouhaha over oil, Judge Joseph C. Hutcheson, Jr, announced the decision of the three-judge panel in the MacMillan case on 24 July. He sidestepped the constitutionality of the state oil conservation statute in ruling that the TRC lacked authority to consider economic factors in prorating production. "When a subordinated body like the railroad commission of Texas undertakes to deal in a broadly restrictive way with the right of the citizen to produce oil which under the laws of the State he owns," Hutcheson held, "it must be prepared to answer the imperious query: 'Is it not lawful for me to do what I will with my own?'" Under the "thinly veiled pretense of going about to prevent physical waste," he found the TRC had, "in cooperation with persons interested in raising and maintaining prices of oil and its refined products, set on foot a plan...to control the delicate adjustment of market supply and demand, in order to bring and keep oil prices up." Hutcheson struck down the TRC's

28Houston Post-Dispatch, 25 July 1:5; Oil and Gas Journal 30 (30 July 1931): 21, reported that Farish presented the legislature with an analysis of production in the East Texas oil field. He showed that some 252 small operators owned 10 percent of the proven acreage and 47 percent [542] of the total oil wells in the field. These 542 wells produced 1.7 million barrels of oil, 48 percent of total East Texas production. Farish categorically denied a rumor spread around Austin concerning his alleged power to make or destroy values by a single stroke of the pen.
proration order for the East Texas field as bearing no reasonable relation to the prevention of physical waste and for usurping undelegated legislative power to arbitrarily "control the output, price, and market for crude oil by reducing the supply of oil to the demand for it." 

Hutcheson's ruling, in effect, was premised on Black's contention that the state could enforce conservation laws as long as it did not unreasonably interfere with the mechanics of the free market. His bias toward classical economics notwithstanding, Hutcheson's opinion was not well-reasoned. He acknowledged the chaotic condition of the oil industry as evidenced "...in hearing after hearing before committees, public bodies, and courts in oil-producing states...and daily appearing in countless articles and interviews," adding, "Indeed, so importantly has...proration as the cure for market glut been advanced, so currently and so widely debated as a matter of public concern has the necessity for its adoption been, so known to every man, that this court could fairly take judicial cognizance of the matters disclosed by the evidence." Yet, in spite of taking judicial notice of the peculiar problem of oil and scientific and technological advances in petroleum production which prevented physical waste by prolonging reservoir life and enhancing ultimate recovery, Hutcheson dismissed such evidence as "largely theory and speculation." How did Hutcheson arrive at such a contradictory conclusion?

Hutcheson was "in many ways a man of the nineteenth century, believing implicitly in the importance of the individual and individual rights." Admitted to the bar in 1900, he became a lawyer when, according to Arnold M. Paul, the judiciary emerged as the principal bulwark of laissez-faire conservatism. "By the

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30 Ibid.
1890s...in a time of social crisis, when rampant populism might threaten the established order," Paul wrote, the judiciary acted as a counterweight to increasing legislative power and as defender of minority rights against majority will as far as protecting individual private property against the overreaching arm of the state. Due process of law, once primarily procedural, became a substantive check against government regulation and "promot[ed] the advancement of judicial supremacy and...the enshrinement of laissez-faire philosophy in constitutional law." Paul maintained that the "neo-Federalism" of the 1890s paved the way for judicial obstructionism in succeeding decades.31

The Supreme Court's landmark decision in *Swift v. Tyson* in 1842 permitted federal judges to decide cases according to common law, absent state statutes. Federal judges thereby gained the power to shape decisions according to their own ideologies and conceptions of the common law. Hutcheson's ruling in the *MacMillan* case is easier to understand in this context. Although he took judicial notice of the severity of oil overproduction and the state's power to enforce conservation, Hutcheson's late-nineteenth-century judicial ideology obligated him strictly to scrutinize the TRC's regulations. They must impose no unreasonable governmental restraints on the use of privately owned petroleum. When push came to shove, jurists like Hutcheson generally favored private property over the public interest in regulation except in dire emergencies.32

The situation illustrated the classic tension between constitutional guarantees of private property rights and government action to safeguard the

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public welfare. Judges like Hutcheson recognized and respected both doctrines as protecting basic rights and fashioned the rule of "reasonableness" to reconcile conflicts between the two. They struck down regulations which they believed arbitrarily and unreasonably interfered with private property. Without a precise or statutory definition of reasonableness, the judges had broad leeway to resolve conflicts between private and public rights according to their own ideology. Hutcheson's *MacMillan* decision illustrates how often judicial attitudes strayed from reality and used the power of judicial review to the detriment of the public interest. In *MacMillan*, Hutcheson's personal ideology, and possibly his ego, led him to dismiss scientific and technological progress as mere theory and speculation. But he took judicial notice of evidence to the contrary, in a costly example of the way judicial arrogance and vanity facilitated the irrational waste of an inestimable amount of the nation's vital and unreplenishable petroleum natural resources.\(^{33}\)

Texas Company attorney Jacob F. Wolters interpreted the *MacMillan* decision to ban market-demand prorationing in Texas without specific statutory authority. He noted that Hutcheson had not ruled against the validity of market-demand prorationing, but only that Texas law had not authorized the TRC to consider economic factors in regulating petroleum production. Wolters believed that Hutcheson's ruling clearly implied that the Texas Legislature could revise the state oil conservation statute to authorize market-demand prorationing.

"Such a provision does not provide for the fixing of price, it merely endeavors to prevent an economic waste as the result of which thousands of small oil wells

must shut down with consequent permanent loss of oil," he pointed out, and "the bankruptcy of producers, the loss of millions of dollars in revenues of the State, and the consequent increase of taxes on other sources in order that the public schools, higher institutions of learning, eleemosynary institutions and the departments of the State may continue to function."34

IV

As the dog days of August 1931 neared, the MacMillan decision did nothing to cool flaring tempers in the legislature. As runaway production continued in the East Texas field, Governor Sterling took his cue from Hutcheson and threatened to veto any market-demand prorationing bill. "If our laws permit the Railroad Commission to prohibit the production of oil in excess of market demand," the Governor declared, "it would tend to bring about a condition where the oil interests in this state might create a monopoly." Former Humble president Sterling realized that his veto threat ran counter to the philosophy he shared with his former colleagues at Humble. Major oil company executives had long advocated market-demand prorationing as the only viable way to limit production so that supply did not exceed demand and result in waste. They countered charges of price-fixing by explaining that any effect on prices was merely incidental to the more important goal of conservation.

34Oil and Gas Journal 30 (30 July 1931): 155; Houston Post-Dispatch, 4 August 1931, 1:2, 7:3; Clark and Halbouty, The Last Boom, pp. 168-69, described General Jacob F. Wolters as a balding, burly, sixty year old man who was reputed to be a good lawyer, but whose success as a politician never measured up to his ambition. Wolters was elected county attorney and state representative, but lost an election for the United States Senate. He loved the law and the military. Wolters served as a first lieutenant in a Texas cavalry unit he helped organize during the Spanish-American War, but never went overseas. In June 1919, he and his troops were dispatched to Longview to quell racial violence between whites and blacks. Later that year, Wolters commanded a militia force in hurricane-ravaged Corpus Christi. When martial law was declared in Galveston in 1920 following a violent shipping strike, Wolters commanded a militia force sent there to restore peace and order. He commanded other militia units sent to Mexia in 1922 and Borger in 1926 to assist local law enforcement officers in dealing with the disorder in those oil boom towns. In 1931, Wolters became general counsel for the Texas Oil Company as well as a brigadier-general in the Texas National Guard.
Moreover, Humble had advanced Sterling a $175,000-bonus on a lease and $250,000 in deferred royalties right before his election campaign in 1930.35

V

The fortunes of the entire petroleum industry were riding on the outcome of the Texas special legislative session, little consolation given the legislature's reputation for infighting and delay. Deep and bitter divisions in both houses killed the Wagstaff-Woodward bill. Representative J. C. Duvall of Fort Worth cited an opinion by Assistant Attorney General Upchurch declaring the Wagstaff-Woodward bill unconstitutional, particularly the provision prohibiting pipelines from accepting oil in excess of market demand. The Senate rejected the Wagstaff-Woodward bill and adopted a substitute measure submitted by Senator Frank Rawlings. The Rawlings bill omitted market-demand prorationing and the provision for expediting litigation and reduced the TRC's enforcement powers. Wagstaff predicted that passage of the Rawlings bill would invite continued lawlessness in the East Texas field.36

Exasperated, Sterling hinted that he might declare martial law in the East Texas field "to protect the oil people from having the conservation laws trampled under foot." He threatened to veto the Rawlings bill because it was too weak and "wholly unacceptable" and denounced the legislature's rejection of the Wagstaff-Woodward bill as "a blow to the state." Sterling reminded legislators that they had been called into special session to strengthen, not weaken, state

36Houston Post-Dispatch, 4 August 1931, 1:2, 7:3, 5 August 1931, 1:5; "Texas Legislature Fails to Take Action: Deadlock on Measures Between Houses Brings Veto Threat from Governor Sterling to Use Militia as Last Resort," Oil and Gas Journal 30 (13 August 1931): 13, 134; James V. Allred to M. E. Foster, editor, Houston Press, 28 August 1931, Allred Papers, Cont. 66.
conservation laws and that "the nation is looking anxiously to Texas to remedy the chaotic situation existing within her borders." He produced one hundred telegrams bearing five hundred signatures from oilmen and chambers of commerce throughout Texas opposing the Rawlings measure in favor of the Wagstaff-Woodward bill and commending his promise to restore order in the East Texas field through martial law if necessary.37

J. F. Cunningham of Abilene, whose son Oliver was a state senator, raised the lone cry against the constitutionality of invoking martial law to control oil production. Independent oilman Sam Kruger of Wichita Falls asked Sterling to "stop [the] thieving of East Texas oil." Oklahoma Governor Murray sent former state attorney general Charles West to ask Sterling what he planned to do to stop the reckless overproduction in East Texas. Murray had imposed martial law in the Oklahoma City and Seminole oil fields on 4 August. West advised Sterling that the common law and implied executive powers furnished adequate legal authority to declare martial law. Joseph M. Dixon, acting Secretary of the Interior, blamed the oil industry's problems entirely on "Texas, its Legislature, and selfish and irresponsible interests operating in the East Texas pool" and noted how every oil-producing state except Texas had curbed overproduction. He assured that the federal government would not intervene in oil fields placed under martial law because its hands were tied.38

37 New York Times, 11 August 1931, 23:4, 12 August 1931, 27:5, reported that total domestic oil production for the first week in August averaged 2,555,550 barrels a day, compared to 2,500,650 barrels during the preceding week. East Texas production rose by 56,650 barrels to a record high of 654,200 barrels during the same time period. H. H. Carmichael, Assistant Adjutant General of the Texas National Guard, arrived in Kilgore to survey the area to select quarters for troops in case Sterling declared martial law; "Texas Legislature Falls to Take Action," 13, 134; Presley, Saga of Wealth, p. 140; Olien and Olien, Wildcatters, p. 59, noted that some 1500 East Texas producers petitioned Sterling to declare martial law in the East Texas oil field to control overproduction.

As pressure and criticism mounted, the legislature referred the Rawlings bill to a conference committee for resolution. Wagstaff warned that the bill undermined the TRC's authority and relegated Texas oil fields to "those dissipating gas into the air in incredible quantities." Wolters told legislators, "When news goes that this legislature had refused to permit proration against overproduction, 300,000 stripper wells will shut down and be destroyed forever," adding, "Texas will see dark days...[and]...120 counties will default their bonds." Gulf general counsel John E. Green reiterated his company's opposition to government regulation of the petroleum industry.39

VI

Lawyers played prominent roles in advancing the interests of their oil clients in the legislature, accentuating existing prejudices and emotions, and ensuring that the ensuing drama over oil production controls would be played out in stereotypical Texas brouhaha style. As legal counsel to a group of independents opposed to prorationing, Moody accused conservationists like Penn of being stooges of the major oil companies. Penn took offense and challenged Moody to a fist fight. Estes, never shy about taking a shot at the "big boys" and "slick lawyers," undeterred by his age or an ulcerated stomach which reduced him to crutches, waved one at Penn and shouted, "Come on you son-of-a-bitch, I'll knock your brains out!"40

Elkins kept apprised of legislative matters since Pure's Van production would likely be affected by any new oil conservation law. Market-demand prorationing, Pure general counsel Alvin Richards feared, "would...clothe [the


39"Texas Legislature Fails to Take Action," 13, 134.

TRC] with absolute authority...to absolutely control and run the oil business for some time to come." He told Elkins that government meddling in the oil industry had convinced him of the need to eliminate political influence as soon as possible. He believed that legislative investigations of the oil industry diverted too much of the legislature's time and attention from careful consideration of the problem.41

Allred investigated Pure's Van unit operation for possible antitrust violations. Voluntary unitization agreements, *per se*, violated the Texas Antitrust Act, which had not been revised since its enactment in 1889. Elkins delivered copies of the Van unitization agreement to Allred as requested. To ease Allred's suspicions, he explained that the unit agreement neither limited production nor attempted to affect or influence crude oil prices. Elkins claimed that the unit operation merely guaranteed each partner a proportionate share of the production allowable assigned by the TRC. To prove that everything was "on the level," Elkins offered to furnish Allred the minutes of the operating committee's proceedings and any other information relative to the Van unit operation. He assured Allred that he would be "very glad to have the privilege of discussing" any questions. Allred thanked Elkins for his cooperation and told him that he had decided not to review the operating committee's minutes. Allred never pursued the investigation. Elkins had saved the day again for Pure.42

41 Richards to Elkins, 22 July 1931, VEA, C. F. 10605.
42 Elkins to Allred, 3 August 1931, VEA, C. F. 10605; Allred to Elkins, 5 August 1931, VEA, C. F. 10605; Van Field Unitization Agreement, located in Pure Oil Company, Van Field Operating Agreement & Assignment File, VEA, C. F. 29159-D; SoRelle to Elkins, 3 August 1931, VEA, C. F. 10605; Elkins to SoRelle, 8 August 1931, VEA, C. F. 10605. On 3 August 1931, Elkins telephoned B. S. SoRelle, Pure's Texas operations manager, and requested copies of the minutes of the Van District Operating Committee meetings. SoRelle forwarded them to Elkins stating, "There was one meeting held in Chicago, the minutes of which were, through oversight, not written down. This meeting was held in Chicago for the accommodation of J. Edgar Pew who lives in Pittsburgh, Pennsylvania, and was for the purpose of checking into our proposed locations on the various leases belonging to the Unit other than the Pure Oil Company. Mr. Pew had felt that we were drilling more wells than was necessary and thought that he could show us a
Not so for other companies. Allred filed an antitrust suit on 12 November 1931 against fifteen major oil companies operating in Texas. He charged that these companies had conspired to systematically acquire all independent filling stations in Texas by fixing the prices of wholesale gasoline and service station equipment in order to eliminate competition and monopolize the marketing branch of the petroleum industry. Allred alleged that the "code of fair practices" approved by the Federal Trade Commission [FTC], and under which the companies operated, was illegal.43

Although company executives scoffed at the suit and accused Allred of seeking publicity to further his gubernatorial ambition, many Texans were pleased by his attacks on the big oil companies. In response to API president Amos L. Beaty's claim that major oil companies had been operating under a code of trade practices approved by the FTC, Allred declared that the FTC had no authority to approve violations of Texas antitrust laws. He noted that this was not the first time that a "bunch of Republicans in high federal office" had sanctioned illegal activities like the "looting of Teapot Dome." New York Times

43New York Times, 13 November 1931, 4:2, named the fifteen defendant-corporations as: Standard Oil Company of New Jersey; Standard Oil Company of New York; Standard Oil Company of California; Shell Union Oil Corporation; Humble Oil & Refining Company; the Texas Company; Gulf Refining Company; Paso-Tex Petroleum Company; Continental Oil Company; Sinclair Refining Company; Magnolia Petroleum Company; Simms Oil Company; Shell Petroleum Corporation; Cities Service Oil Company; Texas Pacific Coal and Oil Company; Texas Petroleum Marketers Association, and the American Petroleum Institute; Houston Post-Dispatch, 13 November 1931, 1:8; Allred's Second Amended Petition, 15 April 1932, copy in Allred Papers, Cont. No. 233.
correspondent Irvin S. Taubkin reported that Allred was merely following traditional Texas politics by "shaking the big stick at the 'trusts."\(^{44}\)

Even though the major companies eventually won the lawsuit in November 1932, the significance of the case lies in Allred's decision not to prosecute Pure. Pure had been supplying crude oil to Standard's subsidiary, Humble, who was also one of Pure's Van unit partners. Pure probably escaped antitrust prosecution because Allred's suit was aimed at marketing activities. Pure had none in Texas. Elkins's political ties to Allred played some part in influencing the latter's decision not to prosecute Pure. Elkins would be a formidable ally or enemy in Allred's quest for the governorship. In this context, Allred's antitrust suit provides another example of how Elkins's subtle influence benefitted clients like Pure.\(^{45}\)

While lawyers and legislators exchanged blows over proposed oil conservation laws, conditions in the East Texas field continued to degenerate. One observer was appalled by "shyster lawyers, two-bit politicians, and other home-grown scalawags" who cheated and connived gullible East Texas farmers out of their croplands and fortunes and then "framed, maligned, and even plotted the murder of anyone bold enough to stand up to their unprincipled drive for wealth and power." The ensuing mania generated more wild drilling that accentuated the overproduction problem. With each passing day and each new well, crude oil prices dipped lower as small operators produced more in a self-defeating attempt to stay financially afloat.\(^{46}\)

\(^{44}\) *New York Times*, 13 November 1931, 4:2, 14 November 1931, 20:4, 22 November 1931, III, 5:3; Some of the letters of support Allred received included; J. Emmor Harston to Allred, 12 September 1932; Will L. Barbee to Allred, early 1932, Allred Papers, Cont. No. 233-37.


\(^{46}\) Clark, *Three Stars for the Colonel*, pp. 7-10, described conditions in the East Texas oil field during the summer 1931.
On 11 August 1931 the legislative conference committee hammered out a compromise oil conservation bill that passed both houses and was signed into law by Governor Sterling. The so-called Anti-Market Demand Act eliminated the provision for a new conservation commission and strengthened the TRC's authority to eliminate virtually every conceivable kind of physical waste in petroleum production. It defined physical waste to include excessive gas-oil ratio, underground waste caused by water intrusion, waste of natural gas, and waste incident to inequitable utilization of the natural gas and water drive resulting from inequitable production. But the new act specified that waste "...shall not be construed to mean economic waste, and the Commission shall not have the power to attempt, by order or otherwise, directly or indirectly, to limit the production of oil to equal the existing market demand for oil, and the power is expressly withheld from the Commission." It retained the maximum $1,000 per day fine for violations.47

The Anti-Market Demand Act provided that any violation of a TRC order sustained by the courts subjected the violator to receivership. Any party suffering harm could sue a violator for damages. To alleviate the judicial backlog of proration cases, the new act prohibited injunctions against TRC orders without notice and provided for a court hearing at which the judge would set bond for a complainant sufficient in amount to indemnify all persons who might suffer damages. Suits against the TRC and appeals from its judgments would be advanced for trial as expeditiously as possible. Elkins advised Pure

management that the new provision requiring notice to all interested parties before any TRC order was enjoined had obviously been designed to prevent small operators from securing injunctions from local elected judges in ex parte hearings.48

The extent to which the *MacMillan* decision and Sterling's veto threat influenced the anti-market demand feature of the new act is uncertain. To be sure, the Anti-Market Demand Act acceded to both Hutcheson's ruling and Sterling's desire to eliminate economic considerations from regulating petroleum production. Sterling never comprehended the relationship between limiting oil production to market demand and preventing physical waste despite recent rulings by Oklahoma and Texas courts finding such a nexus. Market-demand advocates were pessimistic about the probable success of the new law unless judges like Hutcheson revised their attitude toward scientific and technological progress. They hoped that appellate courts would review TRC orders by the same standard as other cases with conflicting evidence and to accord any benefit of doubt to the TRC. Major oil companies viewed the Anti-Market Demand Act as a mixed blessing. While less stringent than they had hoped, it was also less susceptible to invalidation in the courts. An anonymous major oil executive hailed the new act as "the most helpful single item toward stabilizing the oil industry that has taken place this year," adding, "...it seems reasonable to expect that within the next thirty days we should have fairly satisfactory prices for both crude oil and refined products." East Texas

48*Houston Post-Dispatch*, 13 August 1931, 1:8, 10:4; Elkins to McIlvain and SoRelle, 12 August 1931, VEA, C. F. 10605.
production was expected to be reduced by a much as 300,000 barrels a day while total state production would be cut by 20 percent.49

Farish denigrated the Anti-Market Demand Act in failing to provide "direct authorization...to effectively prorate any individual field." His concern was well-founded. The new act not only prohibited statewide prorating but annulled all prior oil conservation statutes. Until the TRC issued new rules and regulations under the guidelines of the new statute, Texas oil fields were free from all production controls. During the week of 16 August 1931, Texas production exceeded a million barrels a day and the TRC did not expect to issue new proration orders before 1 September. Still, Farish and other leading oilmen were willing to give the new law a chance to succeed.50

Pure management was less optimistic. SoRelle expressed concern over the legal status of field umpires and advisory committees under Section 18 of the Anti-Market Demand Act. Upchurch advised Parker that Section 18 mandated the use of regular state employees to enforce TRC rules and regulations in the field. This meant that the TRC would no longer rely on

49 Memorandum on Proration Laws of Texas, pp. 9-10, VEA, C. F. 10923; New York Times, 16 August 1931, II, 7:3; Giebelhaus, Business and Government in the Oil Industry, pp. 200-01; Hardwicke, "Legal History," pp. 231-32, stated, "Beyond doubt, the opinion in the MacMillan case had a great deal to do with the character of legislation which was passed at the Special Session of the Legislature of 1931. Governor Sterling...adopted the viewpoint of the judges in the MacMillan case, and declared that he would veto a bill which authorized limitation of production to reasonable market demand, since he was interested only in preventing physical waste, and he could not see how limitation of production to reasonable market demand had the effect of preventing such waste"; See Hardwicke, "Limitation of Oil Production to Market Demand: Review of Legislation Shows Confusion," Oil and Gas Journal 31 (6 October 1931): 54-55; In Julian Oil and Royalties Company v. Capshaw, 145 Okla. 237, 229 Pac. 811 (1930), the Oklahoma Supreme Court upheld market-demand prorating as a reasonable and effective means of preventing physical waste in petroleum production. The Court further held that any effect on price or other economic considerations was merely incidental to elimination of physical waste and promotion of conservation. A state district court in Austin, Texas rendered the same decision in the Danciger case.

privately subsidized field umpires and advisory committees to enforce prorationing. Parker doubted that the state-employee pay scale was sufficient enough to retain existing umpires and committeemen. Since the TRC had not yet formulated a hiring policy, he suggested that existing umpires and committeemen continue as usual. Oilmen were upset at losing their influence over those responsible for administering and enforcing prorationing who were about to become paid agents of the state. This loss of influence, individual oilmen feared, would affect negatively their respective production allowables. Elkins's apparent silence indicated that perhaps he sensed some advantage for his Pure client under the new law.51

VIII

By mid-August, East Texas production averaged one million barrels a day, one-third of total domestic needs. On 15 August, there were 1,600 oil wells on 93,000 proven acres in the East Texas field. The *MacMillan* decision had eased producers' fears of incurring legal liabilities and penalties for violating TRC proration orders as they ran their wells wide-open. Major oil companies quit posting prices for East Texas crude, but American producers could boast of one accomplishment; domestic oil was now cheap enough to undersell Russian crude in foreign markets. No immediate relief was in sight while oilmen anxiously awaited issuance of new TRC orders under the Anti-Market Demand Act. As the August heat wore on, tempers flared into unrest. Threats proliferated

51 SoRelle to Elkins, 17 August 1931, VEA, C. F. 10605; Parker to All Proration Advisory Committees, 14 August 1931, VEA, C. F. 10605; Parker to All Umpires, 14 August 1931, VEA, C. F. 10605.
of dynamiting oil wells and pipelines. One disgruntled operator complained, "Hell, I sell a barrel of ten cents and a bowl of chili costs me fifteen."52

IX

The glut exacerbated a difficult situation in Oklahoma. Governor Murray announced that martial law would remain in effect in Oklahoma City and Seminole oil fields until the price of crude oil rose to a dollar per barrel. A group of East Texas producers sent a congratulatory telegram to Murray lamenting "that the same fine character of leadership and courage has not been shown in the State of Texas." They were joined by many other operators who were alarmed over increasing threats to blow up wells, pipelines, and storage tanks in their field.53

On 14 August, 1,200 petroleum producers and land, lease, and royalty owners gathered in Tyler for what acting chairman Captain J. F. Lucey hailed as the most important oil industry meeting ever held in Texas. They debated whether to ask Sterling to invoke martial law in the four East Texas oil-producing counties of Gregg, Rusk, Smith, and Upshur. A heated discussion degenerated into outbursts of disorderly and violent conduct. S. A. Guiberson, Jr., the "shutdown movement" steering committee chairman, denounced the sale of millions of barrels of East Texas crude oil at ridiculously low prices as the "largest steal in the history of the industry." He posed three alternatives for controlling production: by law; through state administrative regulation; or "by a governor with a backbone." Guiberson singled out martial law as a last resort.

should normal legal remedies fail to restore order. API executive vice-president W. R. Boyd, Jr. told East Texas producers that they were part of a larger international picture. He warned that persistent overproduction would wreck the entire oil industry and bankrupt 95 percent of the nation's independent producers. Judge W. N. Stokes, whose Slick Oil Company had voluntary shut down 111 oil wells in the Oklahoma City field, urged Texas producers to do likewise until crude oil prices recovered.54

Mexia District Attorney Sam McCorkle advised that the new Anti-Market Demand Act empowered the state attorney general to enforce TRC proration orders. He advised producers to form partnerships and to market their oil collectively at higher prices. McCorkle assured the audience that this arrangement would not violate Texas antitrust law. Dallas oilman H. L. Hunt, of later fame, then the chairman of the curtailment committee, opposed martial law to shut down the East Texas field. He possessed substantial lease acreage in the field and would be adversely affected by a complete cessation of production. Hunt desired to give the TRC another chance to restore order under the new oil conservation statute. Despite his plea, the convention unanimously adopted a resolution asking Sterling to invoke martial law in the East Texas field.55

As pressure mounted on Sterling to act, the TRC held hearings in Austin to solicit information and advice on formulating a new proration plan for East Texas. The Oil States Advisory Committee postponed a meeting scheduled on 24 August in Denver, Colorado until the TRC issued a new order. While the TRC deliberated, a flood of petitions from within and outside the state convinced

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55 Ibid.
Sterling to take immediate drastic action. He declared martial law in the East Texas oil field. Effective at 6 A.M. on 17 August, all oil wells in Gregg, Rusk, Smith, and Upshur counties would be completely shut down. Brigadier-general Jacob F. Wolters, the Texas Company's legal counsel, commanded a 1,300-man militia unit that took charge of the East Texas field.56

Sterling defended his martial law decree on the grounds that "a state of insurrection, tumult, and riot and breach of peace exist [in East Texas]...which threaten to spread to other oil and gas fields where operators are still obeying the law." He cited the existence of "an organized and entrenched group of oil...producers in [the] East Texas oil field...who are in a state of insurrection against the conservation laws of the state" and "in open rebellion against the efforts of constituted civil authorities...to enforce such laws." Sterling displayed nineteen petitions signed by 1,000 East Texas oilmen requesting martial law. Local sheriffs had complained to the Governor about the lack of sufficient legal authority and manpower to enforce prorationing. Sterling hoped that martial law would buy the TRC time to issue a new proration order.57


57Warren E. Mills, Jr., Martial Law in East Texas (Indianapolis: Bobbs-Merrill, 1960), pp. 23-28; Hardwicke, "Legal History," p. 233; Prindle, Petroleum Politics, p. 31; Clark and Halbouty, The Last Boom, pp. 167-69; New York Times, 16 August 1931, 1:4, 17 August 1931, 6:3, 18 August 1931, 1:5; Olien and Olien, Wildcatters, pp. 59-60, noted that attempts to enforce prorationing in East Texas in the early 1930s instigated "howling confrontations," dynamiting of oil wells, and vigilantism; "Troops Shut Down East Texas Field," Oil and Gas Journal 30 (20 August 1931): 15, 104, further quoted Sterling as saying, "By reckless, unlawful and criminal handling of producing wells in [East Texas]..., water is rapidly being drawn into the oil sands, thereby creating enormous physical waste of crude oil and over one billion cubic feet of gas as well as the loss of revenue to the state which effects the welfare of education...and each and every department of state government, resulting in increased taxation of the state's citizens." Sterling estimated that 1/4
Wolters wasted no time. At 7:16 A.M. on 17 August, the first contingent of 1,104 soldiers and 99 officers in Texas National Guard Troop A of the 124th Cavalry marched into the anxiously awaiting East Texas town of Kilgore. They bivouacked outside of town on "Proration Hill." There were no reported hostilities as word spread like prairie fire throughout the 2,815 square miles of oil country that all wells had to be shut down by noon 18 August. Wolters warned a crowd of producers: "It's jail for those who haven't quit." He reminded them that "ignorance of the law was no excuse" for ignoring the shutdown and boasted that his authority was "beyond the courts." Wolters vowed that violators would be arrested and incarcerated until the lifting of martial law since, "It would be folly to release prisoners of war and let them go back to the firing line." 58

As a goodwill gesture, Wolters ordered a military band to perform in towns and oil camps to cheer the local populace saying, "I trust our wives and sweethearts are busy at home knitting sweaters and making fudge." He was disturbed by certain "painted women" gallivanting around in "beach pajamas" distracting militiamen who had "their duties" to perform. Wolters banned the attire frequently worn by local prostitutes pointing out that the nearest beach was over a hundred miles away. Young lovers who courted near the Tyler airfield complained about gawking soldiers who were supposed to be guarding

million dollars' worth of casinghead gasoline and some 1 1/2 billion cubic feet of fuel gas was being wasted every day in the East Texas field to produce only $105,000 worth of crude oil daily. 58L. E. Bredberg, "East Texas Fields Under Military Rule," Oil and Gas Journal 30 (27 August 1931): 13, 106, 109, "Troops Shut Down East Texas Field," 104; Lawrence E. Smith, "Troops Occupation of East Texas Fields Marked by Order and Efficiency," National Petroleum News 23 (26 August 1931): 32-33; Clark and Halbouty, The Last Boom, pp. 168-69; New York Times, 18 August 1931, 1:5, 23 August 1931, 17:2, reported that national guardsmen and Texas Rangers were placed on guard in Kilgore following an outburst of incendiary fires and threats of more. A Presbyterian and a Methodist church were both destroyed by "mysterious" fires within two hours of each other. Later that day, gasoline-soaked rags were used to start fires at a seed house, a gin, and a wholesale grocery store; ibid, 31 August 1931, 2:4, reported that Wolters ordered the militia to "shoot at the waist line" following the burning of a combination rooming house-morgue and a grain warehouse in Kilgore. Wolters blamed "Reds" for the arson.
military aircraft. Wolters informed them that "the war could not bend itself to the whims of the lovelorn." 59

Sterling claimed that a majority of letters, telegrams, and petitions from oilmen commended the imposition of martial law. API vice-president Boyd lauded the Governor's action as "that of a statesman and...he is to be congratulated." API president E. B. Reeser told Sterling, "The personal feelings and selfish interests of a comparatively few operators had completely demoralized the industry, resulting in great physical as well as economic waste." Elkins also congratulated Sterling and assured him of his support and cooperation because the results justified the means. Standard executive Teagle insisted that Sterling's martial law decree was necessary to curb overproduction in the East Texas field and reverse its negative impact on the prices of crude oil and petroleum products. 60

Small independents had a different view which they expressed vociferously. The lost income from the shutdown barred them from drilling additional wells that might offset the majors' and large independents' greater production on their larger acreage. Landowners missed royalty payments which quit coming during the shutdown. Wolters banned secret protest meetings which were being held to avoid detection by the militia. Hundreds of defiant operators gathered near Palestine to hear a speaker protest, "...with the national guard on duty...like watchdogs...the major companies are drilling night and day to sink new wells into the pool that the independents discovered and developed." Small refiners protested that that they would be forced out of

business unless production was immediately resumed. Representative Bailey Hardy of Dallas introduced a resolution in the Texas House demanding that Sterling cite legal authority for his martial law decree. He hinted at possible impeachment proceedings against the Governor. Representative Pat Dwyer of San Antonio accused Hardy of "just trying to get newspaper notoriety" as the House voted down his resolution amidst a chorus of "Noes."61

With the East Texas field under military occupation, the TRC issued a new proration order on 2 September. Total field production was limited to 400,000 barrels a day. Individual wells were allocated a maximum of 225 barrels production per day. Commissioner Neff opposed the per well allocation formula fearing it would "start a race to see could drill wells the fastest" and result "in an orgy of drilling day and night." Sterling believed the TRC's order would put "the little fellow out of business because he hasn't the money like big operators to drill more wells" and vowed that it would not go into effect without his approval. The Governor had been informed that some 250 new wells per week would be added to the existing 1,750 wells in the East Texas field should the TRC's order take affect.62

Despite Sterling's opposition, the TRC's order took effect at 7:00 A.M. on 5 September and was enforced by military rule. The valves on some 1,800 East Texas wells were turned on and oil flowed once again, but at a reduced rate of 225 barrels per well each day. Under controlled conditions, the price of East Texas crude rose from a low of two cents to 85 cents a barrel. A similar trend

was experienced throughout the country as crude oil prices rose while total
stocks declined. But the calm and order did not last long. As critics predicted,
the TRC's flat per-well allocation formula, which omitted consideration of
acreage and well-potential, unleashed a wild drilling spree. The TRC tried to
correct the problem by issuing one revised proration order after another
reducing the daily per-well allowable, first to 185 barrels on 18 September, and
then to 165 barrels on 13 October. Despite the presence of troops, defiant
operators managed to produce oil in excess of TRC orders.  

The TRC's authority and prestige had been tarnished by allegations of
corruption. In compliance with the new regulation requiring field umpires and
advisory committeemen to be state employees, the TRC sent "special
investigators" into the East Texas field to search for violators. Small operators
resented these investigators who they suspected of being bribed by big oil
companies. Honest investigators had second thoughts after noticing some of
their colleagues "riding around in big cars and carrying substantial bank
accounts...[having] the respect of their superiors and the men with whom they
associated." One TRC investigator felt "like a dumb cluck" until "the next hot oil
runner who asked me to look the other way and slipped me a big bill found me
looking the other way. From then on my income was never less than five
hundred a month." Majors and independents accused each other of bribing
corrupt officials. Even though some independents were unquestionably defying
production quotas, the majors' hands were not as clean as they appeared. Tired
and disgusted of charges of corruption, in December the TRC washed its hands

63“East Texas Cut to 165 Barrels Per Well in Revised Order," *Oil and Gas Journal.* 30 (15 October
Hardwicke, "Legal History," p. 233; McLean and Haigh, *The Growth of Integrated Oil Companies,*
p. 590.
of the affair and abdicated responsibility for enforcing oil production controls to
the military.64

X

Complications in the East Texas field had overshadowed conditions in
other Texas oil fields where operators who realized that overproduction would
only worsen a bad situation appeared to be obeying the TRC's orders. Even
with corruption and enforcement problems in the East Texas field, martial law
had curtailed production sufficiently to halt the decline in reservoir pressure and
boost crude oil prices. Texas oilman generally applauded the results, but still
looked forward to the end of military occupation and a resumption of TRC
control.65

Others less accommodating would take the TRC, the Governor, and the
military to court. Depressed and dispirited by the proration battle, an
independent seeking solace in church dozed off to be awakened by the
preacher's exhortation, "Oh, Lord, bless the Pure and Humble." The startled
independent jumped up and shouted back, "Hold on there, parson! Us
independents are still in this fight and I want you to put in a word for us."66

64"East Texas Cut to 165 Barrels Per Well in Revised Order," 13; New York Times, 24 September
1931, 36:1; Prindle, Petroleum Politics, p. 31; Hardwicke, “Legal History,” p. 233; McDaniel,
Some Ran Hot, pp. 206-07.
66Memorandum on Proration Laws of Texas, p. 11, VEA, C. F. 10923, stated that lawsuits were
immediately filed contesting Governor Sterling's authority to declare martial law under the existing
circumstances in the East Texas oil field; Anonymous independent quoted from Clark and
Whatever the final judgment of legal
technicians may be, public sentiment
is disposed to react favorably to its
rulers who regard the obligations to
observe the functions of the State of
greater moment than forms and
technicalities of law.

Earl Oliver

The year 1932 promised to be as bleak as its predecessor for the
petroleum industry. Irreconcilable differences between large and small
producers had led to martial law in the East Texas oil field with the legal status
of prorationing still uncertain. Overproduction would have been easier to solve
had most American petroleum resources been state-owned or under the control
of a totalitarian government. Under the American constitutional and legal
system, due process of law protected life, liberty, and property [including
petroleum] against overreaching by arms of states. Judicial review of legislative
and executive actions made regulation more difficult and slower to effect,
especially where it intruded on private property rights. Americans nevertheless
preferred this system to dictatorship as they relied on lawyers to guide them through the maze of legal due process.¹

Acute overproduction in the East Texas field in 1931 and the attendant waste of petroleum and social disorder was comparable in magnitude to Chicago's fire, San Francisco's earthquake, and Galveston's hurricane, but less spectacularly noticeable to most observers. Public interest was not easily aroused over natural gas escaping into the open air or the daily loss of underground oil equivalent to a thousand burning gushers. Confounded by unique legal and technical issues, lawmakers imposed inadequate solutions. The problem was further complicated by numerous lawsuits filed by oil producers who objected to governmental interference in their private business affairs. Ensuing litigation posed legal obstacles to state legislative efforts to alleviate overproduction. The problem got so out of hand that Governor Sterling called out the militia to restore order in East Texas.²

II

An increasing number of oilmen and public officials realized that existing laws inadequately dealt with the magnitude and uniqueness of the petroleum problem. New laws would be subject to review by judges who had to balance conflicting public and private interests. Modern scientific and engineering advances in petroleum production technology filled the pages of trade and legal journals and local newspapers. But these accounts failed to impress judges like Hutcheson who maintained the law's status quo. With the East Texas field

¹Earl Oliver, “Lawyers Hear of Industry's Problems,” Oil and Gas Journal 30 (24 September 1931): 22, 122. Oliver was a lawyer who served as chairman of the American Institute of Mining and Metallurgical Engineers in 1931. This article was a republication of Oliver's address to the Mineral Section of the American Bar Association at Atlantic City, New Jersey on 16 September 1931.
²Ibid.
under martial law, oilmen debated whether the sword or the constitution would rule their household.³

Attorney Earl Oliver pointed to communism and fascism as "mere present day examples of the direct action that society takes, and has always taken, to correct its ills when the regular established procedure becomes too slow and cumbersome." He preferred change through due process of law, but warned that mob action would supplant legal procedure if the law lagged behind society's need for change. The crisis in the East Texas oil field demonstrated the necessity for radical state action to avert complete chaos and the destruction of vital petroleum resources. "Before we condemn indiscriminantly all assumptions of dictatorial power," Oliver said in reference to martial law in East Texas, "it is well that we ascertain whether there are in fact existing due processes of law by which grave crises might be avoided." He asked, "What is a chief executive to do when faced with such a situation?"⁴

One answer was Dawes's suggestion. In lieu of the finders-keepers "law of the jungle" occasioned by the rule of capture, he recommended unitization of all oil fields like Pure had successfully done at Van. Continental Oil president D. J. Moran saw unitization as the key to the industry's future stability and prosperity. He complained that too many oilmen living in the past did not realize, or refused to admit, that petroleum had "passed through a revolution...in which brains and science [had] vanquished luck and brawn." API president E. B. Reeser argued that free market forces did not apply neatly to petroleum. It could not be reproduced like cotton, wheat, sugar, rubber, and other natural resources

if an entire crop was wasted or destroyed. The API advocated prorationing as the most plausible and equitable solution to petroleum overproduction.5

Farish asserted that prorationing would permit the oil industry to march in step with the public interest beyond the immediate concerns of a few selfish and misguided oilmen. He criticized Sterling for threatening to veto a market-demand bill, warning that Texas "might have to go through the terrific pressure of low prices again in order to get the necessary legislation." But Farish appreciated the difficulties in persuading skeptical oilmen and lawmakers of the need for rational planning. "If an inhabitant from Mars, assuming the Martians to be rational creatures, were to visit us," he explained, "he could hardly escape a feeling of bewilderment if not actual dismay at the manner we earthlings carry on this great enterprise, so essential to our convenience and welfare." Farish believed "our hypothetical celestial visitor" would be astonished by the vast excesses of supply being poured into a surfeited market regardless of legitimate demand. "Possibly we could explain," Farish surmised, "but try as we might we could never justify to our friendly observer this irrational condition." He called for adequate laws "requiring the performance of those things which science and engineering have found to be essential to conservation, to efficient oil production, and to the protection of the correlative rights of the common owners of an oil pool."6

Sun vice-president J. Edgar Pew offered a more down-to-earth view. He rejected the notion of "survival of the fittest" which produced "no peace in a war

of extermination." Anyone who believed "that by ruthlessly crushing the weaker units the excesses of production can be curbed is tragically mistaken," Pew argued, "It would drive out all those splendid forces of adventure, initiative, individual effort, and bull-necked courage on which the industry depends for finding the hidden stores of crude." He added, "To seek salvation that way, would be about as wise as Noah would have been if, instead of building the Ark, he had started work on an irrigation system." Pew repeated "the parable of the swine that got some distorted notions into their heads and hurled themselves into the sea" to illustrate the need to police the "surviving remnants of traditional classical economics" to "save them from legislative rape and judicial mayhem."^{7}

According to Pew, the theory that demand determined supply and that the two eventually balanced each other was "a good enough generalization for the economist thinking in the absolute zero of a perfect vacuum." He asked, "Whose demand caused East Texas to drown the industry?" Pew believed the oil industry had been straddled by statutes and injunctions that were as responsive to supply and demand "as Sir Isaac Newton's apple was to the gravitational pull of the planet Neptune." The time was ripe for an alternative to the rule of capture since science had proven that "the only 'rivers of oil' in motion under a property [were] those created by the extraction of oil itself." Pew could not understand how reasonable-minded, twentieth-century oilmen could contenance "legalized piracy." Game laws restricted hunters to preserve wildlife. "Should not the game hog in oil, who is destroying hundreds of millions of dollars in value likewise be controlled?" Pew likened the rule of capture to a

"Frankenstein which bids fair to ruin its creator and destroy a most important national resource." He concluded: "It is no longer of any use to inveigh against governmental interference with business, or to denounce as revolutionists any who disagree with us" for "the country, the world, looks upon us as trustees for a vital resource."8

J. R. Parten, who succeeded Tom Cranfill as IPAT president in 1932 and led the association through the crucial thirties, believed that prorationing had more to do with helping the majors manipulate price through production control than conservation. Claiming to speak for a majority of large and small independents, he insisted "that the only way to the return of prosperity and normalcy in the oil business is through the medium of free operation of that time honored economic law that supply and demand must govern." Although they favored higher prices and stabilization, Parten and his independent followers opposed state and federal production controls fearing that they would lead to monopoly by large integrated oil companies. The IPAT drew a line in the sand against production controls and portrayed itself as the protector of the "little man" against corporate wealth and power.9

The Texas Oil and Gas Conservation Association [TOGCA] represented Texas independents who supported the majors' demand for market-demand prorationing. Organized in Dallas on 12 September 1931, TOGCA attracted small and large independents from all over the state who blamed their economic woes on low crude oil prices depressed by overproduction in the East

9Day, "The Oil and Gas Industry and Texas Politics, 1930-1935" pp. 137-40, noted that Parten entered the oil business in Louisiana upon his return from World War I. In 1922, he helped organize the Woodley Petroleum Company and served as its president and general manager from 1927 until 1960. In the 1930s, Woodley moved its headquarters to Texas where it held oil properties throughout the state including the East Texas field. Parten became a leading spokesman for independents.
Texas field. They were disenchanted with the IPAT which had become an organ
of independent resistance to market-demand prorationing, and compulsory
unitization. IPAT spokesmen wanted a new agency to supersede the TRC's
responsibility for regulating oil and gas production. TOGCA spread its message
through a bimonthly newsletter, the Conservationist. TOGCA president Charles
Roeser condemned the TRC for "writing the worst law possible" for the East
Texas field and called for the creation of a new appointed oil and gas
commission. IPAT and TOGCA became embroiled in a free-for-all to become
the key spokesmen for independents. Rather than a struggle of all majors
versus all independents, Roeser viewed the fight as between some
independents and some majors who desired order and stability against other
independents and majors who opposed any form of conservation.10

"Now is the time to stop preaching" and to change the law to permit
market-demand prorationing, declared Robert Penn. He attributed the oil
industry's plight to the rule of capture. Penn cited a passage from John Stuart
Mill's Principles of Political Economy, to describe the legal mentality behind the
capture theory:11

10L. E. Bredberg, "Five East Texas Associations Affiliate In One Organization," Oil and Gas
Journal 30 (17 September 1931): 13, 32, reported that the Texas Oil and Gas Conservation
Association was organized by merging five associations of Texas independent oilmen: the Texas
Oil Emergency Committee; the East Texas Steering Committee; the North Texas Oil and Gas
Association; the San Antonio Petroleum Club; and the East Texas Home and Land Owners
Association; Bredberg, "Texans Organize to Conserve Oil and Gas," Oil and Gas Journal 30 (12
November 1931): 156; Larson and Porter, History of Humble Oil, p. 465, noted that TOGCA's
membership reached 5,000 in June 1932, but the association broke up in 1933 apparently over
disagreements among members regarding state versus federal regulation of petroleum
production; "IPA of Texas Opposes Present Proration Rules," Oil and Gas Journal 31 (15
11Earl Oliver, "Changes Needed In Oil Ownership Law," Oil and Gas Journal 30 (23 July 1931):
15, 181, cited quotation from Mills. See Robert Penn's address to the Production Division of the
American Petroleum Institute meeting in Dallas, Texas in June 1931, published in Pettengill, Hot
Oil, pp. 97-98.
With the unwise practices of men as with the convulsions and
disaster of nature, the longer they remain unrepaired the greater
become the obstacles to repairing them, arising from the
aftergrowths which would have to be torn up or broken through...
A bad law or usage is not one bad act in the remote past, but a
perpetual repetition of bad acts as long as the law or usage lasts.

Penn wanted the law to afford as much protection to the public interest in
petroleum as it did to private property.¹²

Tulsa attorney Henry M. Gray blamed the petroleum problem on greed,
ignorance, and an inadequate legal system. He charged that state judges were
"perhaps more concerned with local crowd emotion and the next election than
with the correctness of the law, or the good of the state, and nation" and were
thwarting efforts to enforce petroleum conservation. "Were it not for the doubtful
wisdom of men long since dead," Gray said, "society could protect itself by any
measures believed to be expedient." Judges had wide latitude to interpret
constitutional restraints, framed in broad and general language, according to
their personal ideologies. As Hutcheson had demonstrated in the MacMillan
case, the more novel the remedy, the less likely it would survive judicial
scrutiny. Gray believed that experimentation was as essential to the progress of
law as anything else.¹³

Prior court decisions sustained municipal zoning laws. Therefore, Gray
insisted, constitutional law did not bar public authorities from restricting the use
of private property that harmed the public interest. City zoning ordinances and
wartime rent controls were approvable temporary laws designed to cope with

¹²Oliver, "Changes Needed In Oil Ownership Law," 15, 181.
temporary situations. Peace had its dangers as well as war, Gray argued, and petroleum was vital to the nation's defense and economic well-being. The oil industry affected a public interest and thereby subjected the former to government regulation.14

Federal regulation was inevitable, Gray predicted, if the states failed to devise oil conservation laws capable of being sustained by the courts. He deplored the numerous injunctions restraining enforcement of production controls and hoped that "society [was] not so helpless against the local judge menace that it [could] not prevent legitimate power from degenerating into a matter of arbitrary license." Gray advocated unitization as the most effective and practical remedy to overproduction. He believed that the constitutionality of compulsory unitization statutes could be upheld on the same basis as irrigation, drainage, and municipal public improvement districts. Supreme Court rulings in Ohio Oil Company v. Indiana, upholding use of state police power to protect owners' correlative property rights in a common pool, and in Munn v. Illinois, sustaining government regulations designed to protect a public interest, gave ample authority for regulating petroleum production. Moreover, in Marrs v. City of Oxford, the Eighth Circuit Court of Appeals had upheld a Kansas city ordinance permitting only one oil well on each city block and providing for the division of royalties among individual lot owners and lessees. The ordinance clearly required unit development to protect the public interest in petroleum conservation rather than the private property interests of individual lot owners.15

14Gray, "Need Extension of Conservation Laws," 24, 98, cited the following United States Supreme Court decisions: Block v. Hirsch, 256 U.S. 135 (1921); Levy Leasing Company v. Siegel, 258 U.S. 242 (1921), where the Supreme Court held, "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."
15Ibid, cited Ohio Oil Company v. Indiana, 177 U.S. 190 (1900); Munn v. Illinois, 94 U.S. 113 (1876); Marrs v. City of Oxford, 24 F.2d 541 (D.C.-Kansas 1928), affirmed in 32 F.2d 134 (8th Cir. 1929).
W. P. Z. German, general counsel of the Skelly Oil Company in Tulsa, Oklahoma, argued that prorationing could be justified as an exercise of state police power to protect the public interest in petroleum conservation and to safeguard private property rights by ensuring an equitable distribution of a common pool among individual owners. He agreed with Gray that prior Supreme Court decisions furnished ample legal precedent to sustain state regulation of petroleum production. Washington attorney Peter Q. Nyce encouraged engineers and lawyers to cooperate in formulating a viable oil conservation policy. Humble engineer John Suman believed that prorationing and unitization offered the best means of eradicating a rule that awarded oil "to the man who reduced it to possession." 16

Fort Worth lawyer Robert E. Hardwicke, Jr., maintained that American oil and gas law had not kept pace with the latest facts and principles established by petroleum engineers and geologists. He blamed inconsistent and contradictory petroleum laws, "replete with property rules based upon assumptions of fact which had been disproved," for the instability in the oil industry. Unlike the wild animals which nineteenth-century jurists had likened to petroleum, oil and gas remained stationary in a state of equilibrium until penetration of the reservoir released natural gas pressure and caused movement. Hardwicke pointed out that the analogy between petroleum and water was inappropriate because water movement was not affected by gas pressure and, unlike oil and gas, was replenishable. 17

16 Oliver, "Changes Needed In Oil Ownership Law," 15, 81.
Hardwicke exposed the rule of capture as a legal anamoly inspired by nineteenth-century judges' inability to ascertain the precise location and quantity of underground petroleum. Yet, these same judges accepted proof of the source and extent of subterranean oil and gas, to the near-exact barrel or cubic foot, in awarding damages to lease and royalty owners against producers for delinquent drilling. Regardless, Hardwicke argued that the overriding public interest in conservation justified the exercise of state police power to prevent wasteful petroleum production. He believed that scientific knowledge had advanced far enough to employ production controls that guaranteed each owner an equitable share of the whole.18

Reponding to criticism that prorationing was a price-fixing scheme, Hardwicke argued that it was "perfectly obvious" that limited production would impact price, but that physical waste did not always equate to economic waste and vice-versa. He noted the use of high grade petroleum for settling dust as an example of physical, but not economic, waste. The relevance of economic waste to conservation, he explained, was a matter of policy rather than a legal issue. Hardwicke cited a Supreme Court decision upholding a Wyoming statute banning the use of natural gas to produce carbon black to show that states could regulate production of an important natural resource in order to raise the price and discourage consumption or less beneficial uses.19

Hardwicke posed a hypothetical situation whereby a refiner or retailer, by evading payment of state gasoline taxes, gained an advantage of four cents a gallon over a competitor who paid the tax. The tax evader could thereby cut

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prices and still earn a profit. To remain competitive, the taxpayer could either reduce prices or lose business, and therefore insisted that the tax law be rigidly enforced. "Surely a court would not be justified in declaring the law unconstitutional on the ground that economic motives were involved," Hardwicke argued, "or because the enforcement officers gladly stopped the tax evasion knowing that the price of gasoline would likely be increased by such act." His point was that states should be able to regulate petroleum production to market demand regardless of the economic consequences. Hardwicke admitted that conservation laws designed to protect private correlative rights rather than the public interest would have a better chance of being sustained by the courts.20

Opinions and attitudes concerning the causes and solutions of the petroleum problem varied like the Texas weather. Yet, most oilmen and lawyers agreed that legal issues, especially the rule of capture, posed the main obstacle to alleviating wasteful overproduction. The courts refused to sanction the kind of radical state action that they had sustained in putting down labor strikes during the late-nineteenth century for the sake of restoring order and stability to the oil business. For this reason, in part, Sterling concluded that martial law was the only viable alternative. Unlike many state and federal judges in Texas, Sterling admitted that existing laws were inadequate to cope with the magnitude of destruction in the oil patch. More progressive-minded jurists could have applied equitable remedies to deal with a twentieth-century problem rather than the disproven nineteenth-century analogy between petroleum and wild animals. The failure of the legal system to respond quickly enough to change resulted in the same ruthless and inane exploitation of

20Hardwicke, "Limitation of Oil Production to Market Demand," 54.
America's petroleum as its wildlife and other precious natural resources, restricted only by the maxim that the hunter stay on his own land.21

America's vital petroleum resources became hostage to a legal duel between rugged individualists who adhered to the Darwinian notion of survival of the fittest, confident in their own ability to come out on top, and progressive-minded professionals who believed that the increasing complexity of twentieth-century industrialization demanded a new modus operandi to ensure peace, order, and stability. Efforts by scientists and engineers to educate judges and laymen about the need to revise the law to sanction sound operating methods like prorationing and unitization, and to achieve and maintain efficient and stable oil production, had been muddied by propaganda. Anti-conservationists redefined the issue as a struggle involving: individual liberty against government control; private property rights opposed to the public interest; competition or monopoly; and states' rights versus national power. Conservationists responded that "nothing...will destroy him [the individual] more quickly than perpetuation of the law of the jungle under which the industry is now being operated." By the 1930s, both sides had gained a greater appreciation for the significant role of law in promoting their agenda. They realized that the courts ultimately decided whether equity or "might-makes-right" as the fate of the petroleum industry hung in the balance.22

III

While the debate raged, the continued military occupation of the East

21 Oliver, "Why Adequate Oil Legislation Failed," 15, 100; William E. Forbath, Law and the Shaping of the American Labor Movement (Cambridge, Mass.: Harvard University Press, 1991), p. 94, stated, "By the mid-1890's, both federal and state high courts had made plain that the law was implacably opposed to broad unionism and the kinds of aggressive, industry-, community-, and class-based tactics it often entailed." Forbath noted (118), "In all, federal troops were employed in more than 500 disputes between 1877 and 1903, or nearly once every sixty strikes." 22 Oliver, "Why Adequate Oil Legislation Failed," 15, 100.
Texas oil field stemmed the violence which had become as commonplace on country roads as gang wars on Chicago streets. Fortunately, words were exchanged more often than gunfire. The Gladewater *Gusher* [a local newspaper that lasted only a week] took verbal pot-shots at "the pompous jelly-bellied representatives of this terrible thing called the oil industry" and accused Sterling of "high treason" and of being "a tyrant and an enemy to constitutional law." It called for an end to martial law and Sterling's impeachment even though the shut down of the East Texas field had helped raise crude oil prices to nearly a dollar per barrel.23

Sterling warned East Texas operators of "the folly of sinking more wells...causing the allowable in wells already completed to be reduced" as low as fifty barrels apiece to keep total field production within the 400,000-barrel daily allowable. He failed to dissuade some small independents from bootlegging oil out of East Texas in spite of martial law. Tank trucks of the day carried from 500 to 1,000 gallons of gasoline and drivers willing to incur the risk could earn as much as 100 dollars a night hauling bootleg gasoline. Runners devised elaborate tactics to elude roadblocks and military patrols. Decoy trucks distracted guards while convoys of tank trucks proceeded unmolested to their destination. Independent oilman Tom G. Patten earned notoriety for outmaneuvering authorities. He drilled three oil wells on a one-fourth-acre lot along the main street of London, Texas. Patten erected a one-room "penthouse"

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atop one of the wells, declared it his legal homestead under state law, and
obtained an injunction to keep soldiers away, boasting, "It's my oil, and if I want
to drink it, that's none of your damned business."24

Patten needed a market for his oil and negotiated a deal with Jack D.
Wrather, a small independent refiner in Kilgore. Under cover of darkness, he
laid an underground pipeline to Wrather's refinery. Militiamen discovered the
pipeline with a metal detector and severed it. Patten defiantly constructed
another pipeline using firehose made of nonmetallic fabric. The militiamen
eventually discovered and destroyed it. Patten laid another subterranean
pipeline which remained undetected for four months allowing him to run about a
million barrels of bootleg oil to Wrather's refinery. Tired of the tug-of-war with the
military, Wrather and his partner, Eugene Constantin filed suit in federal district
court on 13 October to enjoin the TRC, the military, the governor, and other state
officials from restraining their production. They alleged that the TRC had
conspired with major companies, under color of enforcing oil conservation, to
arbitrarily limit production to raise prices which deprived them of their property
without due process of law. Sterling responded that the issue involved states' rights and that the federal courts should not "throttle the will of the people."25

Federal District Judge Randolph Bryant, sitting in Tyler, issued a
temporary injunction restraining the militia from interfering with Constantin's and
Wrather's production until a hearing before a three-judge panel on 29 October.

24Sterling quoted in, Oil and Gas Journal 30 (15 October 1931): 13; Clark and Halbouty, The Last
Boom, pp. 172-79; Presley, Saga of Wealth, pp. 141-42.
25Harry Harter, East Texas Oil Parade (San Antonio: Naylor Company, 1934), pp. 110-14; Clark
and Halbouty, The Last Boom, pp. 173-79, 182-83; Presley, Saga of Wealth, p. 142; Petition for
Injunction filed by E. Constantin and J. D. Wrather, In the District Court of the United States for the
Eastern District of Texas, Tyler Division [Hereafter cited as Plaintiff's Petition], 29 October 1931,
Pure Oil Company--Legal Committee, Legal Opinions, Etc. File, VEA, C. F. 14963-6; Sterling
Under protection of the injunction, Constantin and Wrather resumed full-scale production of some 5,000 barrels per well daily. Confident that the court would grant a permanent injunction, other East Texas operators ran their wells wide open. Sterling was not named in Bryant's injunction decree and he boasted, "They enjoined the wrong fellows," as he ordered Wolters to continue enforcing the 165-barrel per well daily limit with the exception of Constantin and Wrather. Bryant held Wolters in contempt of court, but delayed further legal action until a three-judge federal court heard the case. But TRC engineer E. O. Buck impatiently took matters into his own hands and had cement poured into a pipeline feeding Wrather's refinery, knocking it out of commission for sometime thereafter.26

IV
Judge Hutcheson presided over a three-judge federal court which heard the Constantin case on 29 October.27 Joseph Bailey, Jr. of Dallas represented Constantin and Wrather. He argued that the TRC's authority contravened the contracts clause of Article I, Section of the Texas Constitution and the due process clause of the Fourteenth Amendment of the United States Constitution. The TRC restrictions had inflicted at least $1,500 a day in irreparable damages

26Rister, Oil: Titan of the Southwest, p. 321; Olien and Olien, Wildcatters, p. 60; Oil and Gas Journal 30 (15 October 1931): 13; "Martial Law Needed in East Texas," Oil and Gas Journal 30 (22 October 1931): 14, 96, reported that Wolters had advised Sterling that an injunction had been issued restraining enforcement of the TRC's proration orders against Constantin's and Wrather's five oil wells. He further advised Sterling that, in his judgment as a military officer in charge of law enforcement in a military district, disorder and violence would immediately result if the oil wells were allowed to run wide open. Sterling ordered Wolters to limit production from each of Constantin's and Wrather's five wells to 165 barrels daily as ordered by the TRC; New York Times, 15 October 1931, 2:4; Presley, Saga of Wealth, pp. 142-43; Clark and Halbouty, Last Boom, pp. 173-79, 182-83; Harter, East Texas Oil Parade, pp. 110-14.

27A three-judge court, consisting of two district court judges and one circuit court judge, was impanelled to decide the constitutionality of a state law. Its decision could be appealed directly to the United States Supreme Court. See Joseph C. Hutcheson, Jr., "A Case for Three Judges," Harvard Law Review 47 (March 1934): 795-826. In the Constantin case, the three-judge court consisted of; Fifth Circuit Chief Judge Joseph C. Hutcheson, Jr. [Houston, Texas], and District Court Judges Randolph C. Bryant [Sherman, Texas] and William I. Grubb [Birmingham, Alabama].
on Bailey's clients who insisted that they could market all of the oil they produced without waste. 28

During the trial, the militia attempted to restrain Constantin, Wrather, and other East Texas operators from resuming full production under protection of Bryant's injunction. As Governor acting under the war powers of the Texas Constitution, Sterling claimed that he had authority to use military force to put down insurrection and riot. Wolters warned that if martial law was lifted, law-abiding East Texans would resort to armed force to shut down illegal production. Sterling likened the situation to a state of war which put him and the militia beyond the law's reach. He issued Special Order 48, appointing a board of inquiry composed of military officers, to investigate violations of proration orders. A special military court would try violators under military law. Constantin and Wrather amended their original petition, challenging the constitutionality of the TRC's proration orders, to attack the Governor's martial law decree as an arbitrary and tyrannical deprivation of their property rights without due process of law.29

29Ibid, 99, quoted Sterling and Wolters. Wolters further stated, "It is evident that the people of Texas have never fully understood the real situation in the East Texas oil field. The military forces did not arrive one day too soon to prevent outraged land and royalty owners from taking possession of the field and by force of arms shutting down the wells that were running wide open. The operation of the oil field in an orderly manner and under proration since that time has convinced not only the royalty and land owners, but 95 per cent of the independent operators that to again permit the wells to run wide open would result in the destruction of their oil resources and irreparably injure and damage them, as well as impose a very great loss to the State of Texas and its revenues...The talk is more or less openly made that if the wells cannot be held down by the State of Texas, that they will be shut in by citizens, and if this cannot be done by reason of guards around them, the pipe lines and storage tanks will be blown up so that there will be no place to put oil, and therefore by that means force a shut down...On August 7 when the military forces took charge of the field oil was under the charge of 5 cents...Today oil is selling for not less than 68 cents in the East Texas field. The imposition of martial law has saved not only the landowners and the operators, but is bringing into the State treasury approximately $3,500 per day from the production tax alone, and the royalty owners are now being paid their royalties"; Under Special Order 48, Major C. E. Parker was named president of the special military court. Other members were Captains C. K. Davis and McCord McIntyre. Representative of the provost marshal, Colonel L. S. Davidson and A. B. Capers,
Paul Page and E. F. Smith assisted Moody in defending Sterling. They responded that state constitutional and statutory law authorized Sterling's action. Sterling had not suspended any laws or the writ of habeas corpus and civil authorities in the four East Texas counties [Gregg, Rusk, Smith, and Upshur] affected by martial law continued to function. Page argued that the Governor's martial law decree was conclusive and unlike the situation in *Ex Parte Milligan* where military authority had been asserted in a peaceful locality where no executive, pursuant to constitutional and statutory authority, had proclaimed a state of riot or insurrection. "Tacitly it has been conceded by all," he explained, "that the Milligan case does not apply where martial law has been declared and is operative under lawful sanction.”

Page cited "decided cases from the Supreme Court of the United States to the District Courts of Texas" upholding a governor's declaration, pursuant to constitutional and statutory authority, of a state of war or insurrection. The
insurrection in the East Texas oil field had been "as real as if every pine tree in that [field] hid an armed man and every derrick stood above a dead one," Page maintained, and a governor's authority to determine the existence of riot or insurrection necessarily implied the power to take appropriate action to suppress or head it off. Although a governor could not violate every provision of the state or federal constitutions, like suspending the writ of habeas corpus, he could seize property, if necessary, without violating due process of law. Quoting Supreme Court Justice Oliver Wendell Holmes that, "Public danger warrants the substitution of executive process for judicial process," Page explained that the situation in East Texas warranted Sterling's martial law decree.31

Moody and Smith argued that the courts lacked jurisdiction to enjoin a governor's martial law decree. State constitutional and statutory provisions empowered the governor, not the courts, to take necessary action to protect public peace and safety. The public interest was no more vitally concerned or affected in any way than by the oil industry. As America's largest producer of crude oil and natural gas, the Texas state government derived substantial revenue from various forms of petroleum taxes and royalties from state-owned oil-producing lands.32

Sterling's lawyers cited Chief Justice Joseph Story's ruling in Martin v. Mott, upholding a governor's authority to determine the existence of an

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31 Defendants' Argument by Page, pp. 17-42, VEA, C. F. 17771.
32 Argument for Defendants Ross S. Sterling, W. W. Sterling, and Jacob F. Wolters by Dan Moody and E. F. Smith, In the District Court of the United States for the Eastern District of Texas, Tyler Division [hereafter Defendants' Argument by Moody and Smith], E. Constantin, et al. v. Lon Smith, et al., 29 October 1931, Pure Oil Company--Briefs, Legal Opinions, Etc. File, VEA, C. F. 17771. Moody and Smith also challenged the court's jurisdiction to hear the case on the ground that the Eleventh Amendment to the United States Constitution barred suits by citizens against a state. Constantin and Wrather responded that Sterling had acted beyond the scope of his official duties as governor by illegally declaring martial law which placed the case outside of the strictures of the Eleventh Amendment.
emergency and the need to use military force to restore order and peace. Story refused to inquire into the discretion of a chief executive officer and to substitute his judgment therein. Citizens claiming injury from abuse of executive discretion could sue for damages after the emergency had passed and military operations had ceased. Violation of criminal laws subjected an offending official to indictment by a grand jury or impeachment by the legislature. Moody and Smith maintained that frequent elections allowed citizens to remove offending public officials and that the Guarantee Clause of the Constitution protected the people from "a tyrant who fills the office of chief executive officer...and by his acts and conduct deprives the state of a republican from of government."

The two lawyers also asked, "Would any court have attempted to substitute its judgment for that of the President [Grover Cleveland] as to what steps were necessary to suppress the insurrection and outlawry that existed during that great [Pullman] strike?" They compared Sterling's response to the East Texas crisis to the Dorr Rebellion in Rhode Island in 1842. In Luther v. Borden, Supreme Court Chief Justice Roger B. Taney refused to question the actions of the government of Rhode Island which had "deemed the armed opposition so formidable...as to require the use of its military force and the declaration of martial law." Whether Constantin's and Wrather's property was impaired or temporarily taken was immaterial, Moody and Smith maintained, because individual rights could not impede the government's necessary and implied powers to preserve the public welfare. As Judge Thomas M. Cooley held in Weimer v. Bunbury, "...nothing...implies that due process of law must be judicial process" and "much of the process by means of which the government

is carried on and the order of society maintained is purely executive or
administrative, sometimes necessitating temporary deprivations of liberty or
property by ministerial or executive officers. Moody and Smith insisted that
Sterling had acted within his constitutional and statutory powers by invoking
martial law in the East Texas oil field after determining the existence of a state of
insurrection, riot, tumult, and breach of the peace.34

Hutcheson announced the court's decision on 18 February 1932. He
cited only two theories of state action could deprive the court of jurisdiction: that
the Governor was ad hoc the State and could not be sued; or, that a
declaration of martial law superseded the Federal Constitution as supreme law
of the land and placed the Governor and military beyond judicial review.
Hutcheson found that Sterling and Wolters had acted illegally as individuals
under color of law to deprive Constantin and Wrather of their constitutional
rights in violation of the supreme authority of federal constitutional and statutory
law. He reiterated a long-standing principle that a state could never immunize
officials from the superior authority of the United States.35

Invoking the federal courts' chancery jurisdiction, "exercised uniformly
throughout the nation unaffected by statutes, usages, or customs of the several
states," Hutcheson proceeded to review the Constantin case to determine
whether it presented a matter of equitable cognizance.36 He did not question a

governor's power to take appropriate action, including use of armed force, to protect the public welfare, but rejected the notion that state officials could, by proclamation or otherwise, insulate their actions from judicial review.\footnote{Constantin v. Smith, 233-40, cited 28 U.S.C.A., Section 380; “No Injunction Issued in East Texas,” 13, 94.}

Hutcheson rejected the theory that Texas constitutional and statutory law gave the Governor power to override judicial authority during emergencies. He interpreted Article I of the Texas Constitution as expressly forbidding the Governor from suspending constitutional law, even in an emergency, as long as the civil courts remained open and functioning. "Martial law, the law of war, in territory where courts are open and civil processes run," Hutcheson held, was "totally incompatible" with constitutional provisions written by "men who had suffered under the imposition of martial law, with its suspension of civil authority, and the ousting of the courts during reconstruction in Texas" and by those, who in 1689, "wrote limitations upon the power of the crown to suspend laws."\footnote{Ibid.}

Conceding a governor’s power to invoke martial law in times of emergency, Hutcheson explained that this power derived from the civil law base their decisions on a national common law which existed independently of state court decisions. Federal judges could apply their own conceptions of the common law to decide cases even if the result was in opposition to precedents established by state court decisions on similar issues. This power effectively made federal district courts as an alternative forum to state courts. Federal judges had the power to interpret the law as they saw fit. For example, federal judges employed the Swift doctrine to protect large corporations from local discriminatory regulations. The result fostered economic growth and domination of large corporations in the twentieth century. The Swift doctrine was overturned by the Supreme Court in \textit{Erie Railroad Company v. Tompkins}, 304 U. S. 64 (1938). See Freyer, \textit{Forums of Order: The Federal Courts and Business in American History} (Greenwich, Conn.: Jai Press, 1979); Zelden, "Regional Growth and the Federal District Courts: The Impact of Judge Joseph C. Hutcheson," pp. 89-90, stated, "The power of the federal district courts at this time were broad, and Hutcheson never hesitated to use them. He also used the considerable force of his personality to underscore his ideas of justice. He did not like disrespect for the law at any time, and when his own decisions were not heeded he was swift to act. A contemporary described him as, ‘...an old-time Southern hot-head, and a real overstepping of his ideas of right and wrong, and particularly his ideas of fairness and justice, was like monkeying with a naked bolt of lightening.' Hutcheson’s opposition to those who ignored the law shows up at its most extreme in the 1932 case of \textit{Constantin v. Smith}.”
making the governor and militia civil officers whose conduct never rose above judicial review. "Ours is a government of civil, not military, forces," he pronounced, in which "soldier and citizen stand alike under the law" and "both must obey its commands and be obedient to its mandates." Citing Ex Parte Milligan, Hutcheson ruled, "Martial law and civil law are mutually contradictory; they may not coexist" and that martial law could never supplant the courts unless they had been incapacitated. He cautioned that martial law was drastic and oppressive and should not be imposed except under dire circumstances and then only to rehabilitate, not destroy, the courts or usurp their powers.

Hutcheson found no legal precedent to support Sterling's martial law decree. He noted that Luther v. Borden arose before passage of the Fourteenth Amendment and involved a damage suit over an arrest made under the authority of a legislative act declaring martial law during a rebellion and civil war in Rhode Island. Without the Fourteenth Amendment, the Supreme Court was bound by the law of Rhode Island. Hutcheson believed that Louisiana Judge Rufus Foster, while sitting in the Southern District of Texas, had incorrectly ruled that a governor, in addition to possessing power to declare martial law, could set aside the laws and institute a military government in lieu of civil law. He insisted that military dictatorships could never be established by executive fiat under the American constitutional system.39

39Constantin v. Smith, cited, Luther v. Borden, 7 How. 1 (1849), a damage suit involving an arrest during the Dorr Rebellion in Rhode Island. The case was subsequently cited as affirmative authority for the legality of martial law. However Taney held that whichever of two factions constitute the legitimate government of Rhode Island was a political question. He did not hold that the necessity for martial law was a political question. Taney's opinion in Luther v. Borden was generally interpreted to mean that the Supreme Court would tolerate martial law rule in times of emergency. Taney took precisely the opposite view in his opinion as Circuit Justice in Ex Parte Merryman, 17 Fed. Cas. No. 9,487 (1861). See Hyman, A More Perfect Union, pp. 81-98; United States v. Wolters, 266 Fed. 69 (S.D. Tex. 1920), involved a petition for writ of habeas corpus for release from imprisonment in default of payment of a fine imposed by a military court set up in Galveston after martial law had been proclaimed. Some of the civil magistrates had been removed from office and a military court set up in their stead. The relator conceded the governor's power to
Hutcheson concluded that Sterling and Wolters had, "without warrant of law," illegally deprived Constantin and Wrather of their private property. He found no proof of insurrection, riot, and tumult in the East Texas field with the exception of producers trying to get their oil out of the ground. Hutcheson suspected that the militia might have been taking orders from major oil companies since its actions [which raised crude oil prices] fit their needs. The fact that Sterling had been Humble president did nothing to ease the judge's suspicion. Hutcheson held that Sterling had overstepped the bounds of legitimate executive power and issued an injunction restraining enforcement of martial law against Constantin's and Wrather's properties.\textsuperscript{40}

The injunction did not apply to the TRC since Constantin and Wrather had not pressed their case against the agency. Hutcheson took judicial notice of the enormous production capability of the East Texas field and the potential for waste as well as the TRC's authority to enforce state conservation laws. He implied that producers could not resume full production until the TRC had an opportunity to determine how much oil could be produced without waste and issued new proration orders. Sterling and Wolters appealed to the United States Supreme Court.\textsuperscript{41}

Commissioner Terrell announced that the TRC would temporarily withhold issuance of a new proration order for the East Texas field pending the outcome of the appeal. Sterling had fifteen days to secure a stay of the injunction decree. Considerable confusion abounded. Smith had advised

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\textsuperscript{40} Constans v. Smith, 240-42; "No Injunction Issued in East Texas," 94-95; \textit{New York Times}, 19 February 1932, 26:2.

\textsuperscript{41} \textit{Ibid.}
Sterling to restrain the militia from interfering with production on the Constantin-Wrather properties. Hutcheson told Smith that "any fourteen year old child could understand that no injunction" would take effect until Constantin and Wrather had presented an order for the court to sign. Until then, no court decree was in effect. Sterling immediately ordered the militia to seize control of Constantin's and Wrather's wells.42

V

On 25 February, the TRC resumed regulation of the East Texas field and limited daily production to 75 barrels per well. Upon expiration of the order on 15 March, the field allowable would be reduced to 325,000 barrels a day to prevent premature dissipation of the reservoir's natural gas pressure. The TRC retained its flat per-well allocation formula which only encouraged additional drilling. Sterling announced that martial law would continue except on the Constantin-Wrather properties since the court finally signed the injunction order on 26 February. Sterling ordered the militia to refrain from enforcing prorationing but to remain in East Texas to maintain peace.43

Rebellious operators took advantage of the uncertainty and ambiguity of protracted litigation and resumed full-scale production. The TRC's flat per-well allocation formula dissatisfied many producers because it failed to account for variations in the productive potential of individual wells or acreage. Some operators simply ignored the TRC and continued producing at will while others filed nineteen lawsuits attacking the validity of the new proration order on the ground that it violated the Anti-Market Demand Act and challenging the per-well

allocation formula as discriminatory. The Anti-Market Demand Act reinforced the legal position of its opponents who argued that market-demand prorationing bore no reasonable relation to physical waste. It also provided a convenient way for jurists like Hutcheson to avoid overturning "time-honored" legal precedents in the face of recent scientific and technological advances which had rendered past decisions obsolete.44

As a large independent with production and refining operations in Texas, Pure had an interest in the upcoming lawsuit. If the courts upheld market-demand prorationing, the Texas Legislature could revise the Anti-Market Demand Act accordingly. Market-demand prorationing foreshadowed reductions in production quotas, depending upon consumptive demand. Pure had to maintain a 50,000-barrel daily allowable at Van in order to service existing outlets and wanted to increase production to expand its market-share. Market-demand prorationing would have a detrimental impact on Pure's expansion aims unless Elkins finessed the TRC again as he had done in 1931. This was highly unlikely given the state of affairs in East Texas. Without an increased allowable, Pure might benefit from market-demand prorationing if the TRC held its competitors' allowables to existing levels and if crude oil prices stabilized. Pure needed all the allies it could muster to achieve its goal.

As if by divine intervention, a potential ally came at an opportune time from a least expected source, the church. In February, W. F. Bryan, Presiding Elder of the Tyler District of the Texas Conference of the Methodist Episcopal Church, reminded Pure management that a majority of the company's Van leases were on land belonging to members of the local Methodist church. Due

to an error in drawing and ratifying the original Van leases, it was necessary to secure new leases on certain properties. In return for Pure's $1,000 contribution to each of the two Methodist churches in Van, the ministers had induced the parishioners to ratify the original leases, in spite of being offered more money by others to repudiate them. Bryan indicated that a "substantial donation" would ensure the continued happy union between religion and oil. Elkins advised Mcllvain to make the requested contribution since the church members' cooperation had enabled Pure to avoid costly litigation. Even though he appreciated the church standing behind the deal, Mcllvain protested, "It seems rather strange that we are asked to contribute to the church on the basis of their having done the right thing." He grudgingly, but prudently, heeded Elkins's counsel and approved the donation. The two Baptist churches in Van subsequently consolidated and asked Pure to donate a more modest $400 towards building a new church. Mcllvain suggested that Pure work out a budget for all the churches in Van then prorate it equally adding, "This church business can get to be a very heavy burden."

The TRC failed to command as much respect as the Methodist church from small producers who charged that the TRC's flat per-well allocation formula discriminated against them. This alleged inequity exposed the TRC's orders to lawsuits. Regulation of petroleum production either to prevent physical waste or to stabilize prices seemed impossible without statutory authority for limiting output to market demand. But the legislature had already done its deed

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45W. F. Bryan to The Pure Oil Company, 15 February 1932, Pure Oil Company--Proration Matters, Correspondence, 1932, VEA, C. F. 10605; Elkins to Pure Oil Company, 16 February 1932, VEA, C. F. 10605.
46Elkins to Mcllvain, 16 February 1932, VEA, C. F. 10605.
47Mcllvain to Elkins, 17 February 1932, VEA, C. F. 10605.
48Mcllvain to SoRelle, 5 January 1934, Pure Oil Company--Proration Matters, Correspondence, 1934 File, VEA, C. F. 10963; SoRelle to Elkins, 9 January 1934, VEA, C. F. 10963.
during the long, hot summer of 1931 and the ball bounced back into the courts. While lawyers wrangled with the problem, hot oil continued to pour out of the East Texas piney-woods. Thieves and outlaws even stooped to robbing oil from the First Baptist Church of Gladewater.\textsuperscript{49}

VI

By 1932, the fifty-year reign of the rule of capture had brought the oil industry to a point of near collapse. The courts had invited state legislatures to do better, but they had the final word and what they gave they took away. Legislators and jurists knew little or nothing about the physical characteristics of petroleum or oil reservoirs and too many of them, moored to their nineteenth-century roots, failed to absorb and comprehend the latest scientific and technological discoveries which had proven the absurdity of the capture theory. As Hutcheson and Bryant had demonstrated in Texas, local federal judges persistently thwarted legislative attempts to alleviate the inefficiency and waste in petroleum production occasioned by judge-made law. Judicial obstinacy had relegated the oil patch to the law of the jungle while a younger generation helplessly witnessed the plunder of an inestimable amount of their natural resource inheritance by "legalized piracy." Farish mused, "We can never grow a new crop of this commodity." As the problem of petroleum bounced back and forth like a ping-pong ball between the legislatures and the courts, it remained a legal issue to be worked out by lawyers and judges.\textsuperscript{50}

\textsuperscript{49}Hardwicke, "Legal History," p. 236; Prindle, Petroleum Politics, pp. 32-33; Clark and Halbouty, The Last Boom, p. 217.

Meanwhile, chaos continued to plague the East Texas oil field as lawyers prepared to argue the *Champlin* case in the United States Supreme Court on 23 March. At issue was the validity of Oklahoma's market-demand act. Questions from the bench indicated that the Supreme Court might uphold the Oklahoma statute. The 23rd also marked the announcement of the decision by the Texas Court of Civil Appeals at Austin in the *Danciger* case. These two decisions bore significant legal implications for regulation of petroleum production and prorationing. The Ides of March had descended upon a tumultuous and crisis-strewn oil industry.51

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