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2011 Oklahoma Political Science Association

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KEYNOTE ADDRESS

The Politics of the Millennial Generation

Oklahoma Political Science Association

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Let me say thank you for that kind introduction, John.

And also if I may take this opportunity to thank McGraw-Hill, who has sponsored my trip here, especially Gregg Moore, my publisher's representative, who is here today and has been indispensable in arranging my visit. So thank you Gregg.

As John mentioned, I have written an American Government text, *American Democracy Now*. I wanted to talk to you this evening not so much about the book, but rather a little about the paradigm shift that I saw that informed the premise of the book, and compelled me to write *American Democracy Now*. I'd like to tell you a bit about the story behind the book.

I teach at a state university. It is the second largest state university in New Jersey. When I started there in 1994, it had about 10,000 students; today it is bursting at the seams with 23,000. We are not an open enrollment institution, but because of our increasing size, we do face some of the same challenges that open enrollment institutions face

in terms of student-preparedness, the range of student abilities, and John and I and Monique and I have talked about this in great detail over the years.

The campus is located on the top of a mountain (hence the name Montclair), and outside my office is a spot called The Ridge that offers a beautiful view of the New York City skyline, and it was there on the morning of September 11, 2001 that I watched the second tower fall. This is my first visit to Oklahoma City, and today I went to honor the 168 victims of terrorism in the United States at the Oklahoma City National Memorial site. And as I looked out over The Field of Empty Chairs, it occurred to me that perhaps similarities in our personal experiences – if you were here in Oklahoma City in 1995. But you needn't to have been there – or here – to share in the feeling that those events happened to you.

In Montclair in 2001, everyone knew someone; some of us knew too many people who had perished. And so not only the faculty, the administrators, but also our students were faced with losing parents, losing spouses, losing friends, and neighbors. But it was not until I was asked to give a convocation address to the graduating class of 2005 – the students who had started their academic careers with us one week before the tragedy – that I started thinking about the enormous differences between these students and seven or eight years hence.

Despite a multi-front war, despite a polarizing president and a very divided country, the students that I saw emerging were different kinds of students. These were young people who had been transformed in a post-September 11th world. And it turns out that it wasn't just my students, it was yours too. Young people – the Millennial Generation, born between 1980 and 1995 – are a unique population nationally. They were shaped by a post-September 11th socialization process in their crucial formative years, and had not lived through the cynicism-producing events of the 1970s – the war in Vietnam, the Pentagon Papers, and Watergate – that had eroded so much of the confidence Americans had in their government.

After September 11th, 70 percent of Americans say that the attacks were the most memorable event of their lives.¹ Nationally, their impact

¹ <http://www.gallup.com/poll/4909/Terrorism-United-States.aspx>.

would be felt most strongly by young people, the Millennial Generation.

In fact, John Della Volpe, a pollster who helped Harvard University students construct a national poll of young people's views noted that "The attacks of 9/11 . . . changed the way the Millennial Generation thinks about politics. Overnight, their attitudes were more like [those of] the Greatest Generation [the generation of Americans who lived through the Great Depression and World War II]".²

In the aftermath of September 11th, suddenly 60 percent of college students trusted the government to do the right thing.³

Ninety-two percent considered themselves patriotic. ⁴

After September 11th, more than 70 percent of college students gave blood, donated money, or volunteered in relief efforts.⁵

Nearly 70 percent volunteered in their communities (up from 60 percent in 2000).⁶

And Eighty-six percent believed their generation was ready to lead the United State into the future.⁷

Today, there remain significant differences in the political outlook of Millennials compared to other generations. While they are more susceptible to concerns about economic uncertainty, while they acknowledge their personal economic outlook may be bleak, they also are more likely to believe that the government should do more to solve problems. They are more likely to support an "activist government"

² Carl M. Cannon. 2007. "Generation 'We:' The Awakened Giant," *National Journal*. March 9.

³ Institute of Politics at Harvard University. "Attitudes Towards Politics and Public Service: A National Survey of College Undergraduates." April 11-20, 2000. <http://www.iop.harvard.edu/pdfs/survey/2000.pdf>, accessed August 16, 2007.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Op. Cit. Canon.

than older generations with 53 percent of Millennials thinking the government should do more to solve problems, compared with 43 percent of Baby Boomers.⁸

While their opinions of President Obama have declined with the rest of the country, they still rate him more favorably than older generations: President Obama's favorability rating stands at 57 percent.⁹

Though they are still slightly more likely to identify as Independents (38 percent), Millennials nationally are much more likely to be Democrats (37 percent) than Republicans (22 percent).¹⁰

Millennials are more diverse than older Americans. Today, 61 percent of those aged under 30 identify themselves as white, compared with 70 percent of those over those over 30. They are much more likely to be Hispanic, and much more likely to be of more than one race.¹¹

But today's minority youth are different from their older counterparts: increasing proportions of them are voting, even when you compare 2010's mid-term election, which saw a four percent increase in African American youth turnout when compared to 2006's mid-terms. In the 2008 elections, African American youth had the highest percentage of votes of any youth racial or ethnic group since 1972.¹²

And more Hispanic young people are voting too: 15 percent of young voters in the 2010 mid-term elections were Hispanic, whereas only 7 percent of voters over 30 were.¹³

⁸ Millennials: A Portrait of Generation Next. Pew Research Center. February 2010. Chapter 8: Politics, Ideology and Social Engagement. <http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf>.

⁹ Ibid.

¹⁰ Ibid.

¹¹ U.S. Census Bureau. Current Population Survey 2009.

¹² The Youth Vote in 2010: Final Estimates Based on Census Data. CIRCLE. Page 4. <http://www.civicyouth.org/wp-content/uploads/2011/04/The-CPS-youth-vote-2010-FS-FINAL1.pdf>.

¹³ Young Voters in 2010 Election. CIRCLE. Page 2.

<http://www.civicyouth.org/wp-content/uploads/2010/11/2010-Exit-Poll-Fact-Sheet.-corrected-Nov-10.pdf> Young voters: 66 percent white, 14 percent black, 15percent Hispanic, 3percent Asian, 2percent "all others". Also, 7

So, what we know is that Millennials are a bit different than older Americans. As a whole, they are a bit more liberal. They are more diverse. They are more patriotic.

But these differences are more than abstract ideas.

In fact, Millennials are a different type of American citizen, not just in their thoughts, but also in their deeds.

Many of them were part of the first generation to be required to undertake some form of community service as part of their high school or college career. Today, they are the most likely age group to have volunteered in the past 12 months,¹⁴ and 85 percent of them believe that volunteering for community service is an effective way to solve the nation's problems.

Between 2008 and 2010, nearly 11 million Millennials volunteered with an organization and over a quarter of them had donated more than \$25 to charity.¹⁵

Peace Corps applications have increased more than 50 percent in the past five years.¹⁶

Millennials use their purchasing power – whether through their own income or their parents' dollars that they spend – to express their commitments to social and political ideals. Fifty-three percent of them

percent said they were gay, lesbian or bisexual. Voters 30 and older: 80 percent white, 10 percent Black, 7 percent Hispanic, 1 percent Asian, 2 percent "all others". Also, 4 percent were gay, lesbian, or bisexual.

¹⁴ Millennials: A Portrait of Generation Next. Pew Research Center. February 2010. Chapter 8: Politics, Ideology and Social Engagement.

<http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf>. 57 percent of Millennials say they had volunteered in the last 12 months (going back from Feb 2010). 54 percent of Gen Xers said they had, 52 percent of Baby Boomers, and 39 percent of Silent Generation.

¹⁵ Civic Life of Millennials. Civic Life in America- Data on the Civic Health of America. <http://civic.serve.gov/special/Millennials>.

¹⁶ Millennial Momentum: How a New Generation Is Remaking America. Morley Winograd, Michael D. Hais (page 262). Applications jumped 40percent in 2009 after a 16percent increase in 2008.

have bought a product that supports a cause this year (compared to the overall average of 41 percent).¹⁷

Now while all of these characteristics – these changed attitudes, these different actions -- may be interesting, we know that many of these characteristics have been shared with previous generations – the Baby Boom generation in particular.

Socialized by their Greatest Generation parents, the Baby Boomers optimistically sought to change the world. And they did, through the social movements they shaped and through the sheer size of their demographic which has rendered them a political *tour de force* – a determinant of American politics. But that optimism, that idealism, was beaten out of many Boomers by the pervasive cynicism of the scandals of the 1970s that caused a dramatic and what would appear to be irrevocable decline in the trust of public institutions – in Congress, the President, and the Courts.¹⁸

But I would argue to you that the patriotism, the activism, and the optimism of the Millennial Generation represents an enormous potential not so much because of the uniqueness of their views but because of the intersection – the kismet, if you will, between having the political optimism of their generation, a generation socialized to participation, which is sitting on the threshold of a transformative moment where unique tools are newly available to them to articulate and actualize their viewpoints

My friends, in my view we are standing on the threshold of a Gutenberg Moment. It is 1439, and we are witnessing an unstoppable transformation in how people learn. Technology is the Johannes Gutenberg's movable type of the new millennium. And like the mid-1400s, that transformation in the way information was disseminated meant a transformation in how people learned. Then, changing how people learn – and importantly the number of people who are empowered to learn – spawned the Renaissance, the Scientific Revolution, paving the way for the Reformation, the ideals of which

¹⁷ 2010 Cone Cause Evolution Study. Pages 12-13

<http://www.coneinc.com/files/2010-Cone-Cause-Evolution-Study.pdf>.

¹⁸ <http://www.gallup.com/poll/28795/Low-Trust-Federal-Government-Rivals-Watergate-Era-Levels.aspx>.

fostered the notion that people -- rather than those ordained by divine right -- could rule.

The transformative nature that technology is having on our everyday lives and its residual effect on our scientific community, on our world of art, and on political lives makes for this Gutenberg Moment. Until mass-produced movable type, the printed word was an elite commodity available to the select few so that knowledge itself was determined by assets.

Today, we see that the widespread availability of technology -- its decreasing price point, its portability --mean it has the potential to become the great equalizer.

Today, authoritarian governments that attempt to control the flow of information to limit their citizens' availability to communicate and to organize are overthrown on Facebook.

Or even Match.com.

One of my favorite stories of the transformative potential of technology in the political sphere was the story of Omar Mahmoudi, the Libyan businessman who helped organize a revolution by posting coded messages on the Muslim dating site Mawada, to avoid detection by Libyan secret police, who monitored Facebook and Twitter.¹⁹

We all know the role that technology is playing in organizing, mobilizing and fundraising for the Occupy movement; and we know that that strategy will be replicated by other protest organizations in the future.

But technology need not be revolutionary to be transformative.

In New York City, you can use a smart-phone app to pay your water bill, geo-tag a photo of a pothole, or even complain to the mayor. He may respond on YouTube.²⁰

¹⁹ <http://abcnews.go.com/Technology/muslim-dating-site-madawi-seeds-libyan-revolution/story?id=12981938>.

²⁰ Adam Green. 2011. Tech Savvy. *Vogue*. November: 156.

Using Facebook and Flickr, Twitter and Tumblr, cities and states can use technology to communicate with residents during natural disasters, oftentimes even when residents are lacking electrical power. And residents can ask questions of government officials, and get specific answers quickly.

Eventually we will use Foursquare, a location-based social networking site, to check out the health department ratings of nearby restaurants on your smartphone.²¹

One of the largest (and perhaps most interesting area) that will be effected by technological change is in absentee balloting, in which service members and expatriates living throughout the world will be enfranchised using technology. This will prove increasingly important for countries with high numbers of educated citizens living abroad, including India and Turkey and other Diaspora. It is anticipated that technology will enable citizens living abroad to vote using ATM machines by 2014.²²

And of course the role that technology is playing in our own electoral politics is enormous. One of its most important democratizing effects is taking campaigns off of television, and moving them into the less-expensive, more available digital world.

Today, micro-targeting enables campaigns to target specific individuals for a variety of purposes, including votes, fund raising, and grassroots organizing.

For example, E-motive enables a canvasser for a candidate, party, or interest group to load a walk list into a smart phone, integrated with Google maps. The canvasser can enter residents' survey responses into smartphone or I-Pad, where they also can access to already-prescribed talking points or even compelling videos. Canvassers can immediately sign residents up for text or email subscriptions. Once back at headquarters, phone syncs with data bases. Smart phones apps will

²¹ Ibid.

²² Noah Rothman. 2010. "Absentee Voting: A Global Challenge," *Campaigns and Elections Magazine*. Nov 12.
<http://www.campaignsandelections.com/campaign-insider/171782/absentee-voting-a-global-challenge-t.html>.

continue to facilitate increasingly sophisticated targeting operations, and may change how every aspect of politics (from how voter registration to grassroots organizing and fundraising is done).²³

Vote IQ uses algorithms like those on match.com to connect individuals with candidates throughout the country who share viewpoints and ideologies; provides candidates with a potential fundraising source.

Google “remarketing” tracks visit to candidate or issue sites, then advertises membership or solicits funds on a page with Google ads – so for example, you visit Rick Perry’s campaign website and then go to read the newspaper on-line, where a Google ad soliciting donations for Romney’s campaign appears.

And we know how candidates and governments are using Facebook and other social networking sites enable groups or individuals direct communication with “friends” or constituents.

Twitter and other micro-blogging sites enable short communication, oftentimes specifically targeted at on-the-move audiences) or empowering individuals to collect information at opposition events.

QR codes enable individuals who seek information direct access to targeted websites sponsored by political entities.

Microsoft Cloud for Politics may drastically alter the post-2012 political arena by providing one-stop shopping for groups to manage communications; build a Web and social network presence, raise money online; advertise through phone, e-mail, text and organize get-out-the-vote activities.

Having said all this, it is time to tell you what you know. The Millennial Generation is hard-wired to rely on technology. I have three children at home, who are 16, 10, and 8. Though I purportedly have a one-hour of screen time per day rule, it is not unusual to walk in and find my 16-year-old daughter simultaneously working on an assignment on her lap-

²³ <http://www.campaignsandelections.com/campaign-insider/172647/the-politics-online-conference-2010.shtml>.

top, listening to her iPod, collaborating on an assignment with friends via text messaging. I am not even sure how to count the screens.

But what I know is that she, that my students, that your students, are hard-wired to technology in ways previous generations are not.

More than a quarter of Millennials believe that using social media outlets like Facebook and Twitter have *more impact* than in-person advocacy in terms of political campaigning, another quarter thinks it has the same impact.²⁴

More than two-thirds of Americans under 30 use a news aggregation service, some relying on human-determined content like *The Drudge Report* or the *Huffington Post*.²⁵ Others are relying on computer-algorithm generated clustered news found on sites like Google news.

Americans under 30 are twice as likely as older Americans to get political updates via cellphone.²⁶

Three quarters of them have social networking pages, and the majority of them believe that the use of technology brings them closer to their friends and family rather than making them more isolated.²⁷

And so if we now add up the sum of these parts – the differences in political outlook, spawned in the wake of a national tragedy, the predisposition to activism, shaped in a context that values political activism, and add to that the revolutionary news means available to convey those values in a medium in which there are the most comfortable...

²⁴ Harvard Biannual Political Survey- Press Release.
<http://www.iop.harvard.edu/Research-Publications/Survey/Spring-2011-Survey>.

²⁵ <http://isedb.com/20100319-3365.php>.

²⁶ <http://www.rbr.com/tv-cable/20151.html>. 18% of Americans get political updates via phone/mobile device. 18-29 year-olds are twice as likely to do so than those 65 and older.

²⁷ Millennials: A Portrait of Generation Next. Pew Research Center. February 2010. Chapter 4 <http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf>.

Someone recently posted a video on my Facebook that depicted a little baby about a year old, sitting on a patio, touching the pages of her mother's magazine. As she touched and she poked, she became increasingly frustrated. "It doesn't work," she said. Inside, yet another magazine: more pincher grasps, more poking, but still, "it doesn't work." Finally in front of an iPad, the baby poked, the screen lit up, she swooped, the screen changed. "This one works."²⁸

That is her experience; that will be how she learned to turn pages.

Just as novice students of 1450 learned to turn pages of a book printed using mechanical type; just as Gutenberg transformed learning, and science, and religion, and politics.

And like in the mid-15th century, there are those in the discipline today who question the legitimacy of those new forms of learning.

Though written before technology revolutionized learning and politics, Robert Putnam's *Bowling Alone*, which bemoans the decline in social capital in the United States as witness by decreased participation in civic organizations (including bowling leagues),²⁹ misses the transformed and transforming nature of social connections, of civic participation, of the new currency of social capital.

As political scientists, I believe it is imperative that we refrain from acting like the monks of Gutenberg's day, who turned their noses up at movable type books, who sought to protect the status quo because their lives revolved around the hand-written word.

As teachers, I think it is imperative that we recognize that the coalescence of the values of a generation, their strong inclination toward public service, and the transformative means by which they can participate in politics will mean the creation of a new knowledge-based economy, a new Renaissance, if you will.

As both scholars and teachers, I believe that that it is our obligation to recognize the potential transformative value of this coalescence, and

²⁸ <http://www.youtube.com/watch?v=aXV-yaFmQNk>.

²⁹ Putnam, Robert D. 2000. *Bowling Alone: The Collapse and Revival of American Community*. New York: Touchstone.

that we include this as part of our research agenda—that we analyze and understand the importance and the value of new forms of political participation.

It is also my view that as teachers, in nurturing the potentiality of a civically engaged citizenry sitting in our classes, we convey to them, instruct them, in the invaluable tools that they can use to shape political life in their community, in their state, and in their country.

And so that... is the story of the book.

**THE POLITICAL ATTITUDES OF VOTERS
IN EASTERN OKLAHOMA**

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Savage, Min and Aman (2011) examined the political attitudes of Democratic voters in eastern Oklahoma and argued that eastern Oklahoma has not realigned with the Republican Party largely because of a strain of populism among the population there. The results of the analysis supported their arguments. As they acknowledged, however, their data had room to improve. In this paper, we examine whether their arguments are still supported with a better survey data and more rigorous empirical tests. Our analysis supports the argument that a strain of populism, economic progressivism and religious conservatism, primarily accounts for the dominance of the Democratic Party in eastern Oklahoma.

INTRODUCTION

Savage et al. (2011) examined why eastern Oklahoma has remained Democratic despite the well-known partisan realignment in the state, and in the south generally, from the Democratic to the Republican Party. They argued that the Democratic Party remained the dominant party in the region largely because of the region's populism, and that the region's populism could be explained by its poverty. Although voters in the region are as conservative as Oklahomans and southerners in general in regard to religious issues, because of their poverty they are more likely to support the kind of government intervention in the economy that is generally associated with the Democratic Party. This strain of populism primarily explains the Democratic Party's continued dominance in the region.

To empirically test their arguments, they employed a survey that measured the attitudes of Democratic voters in Eastern Oklahoma. The results of the analysis supported their argument that populism has influenced eastern Oklahomans' loyalty to the Democratic Party. As they acknowledged, however, their survey data had room to improve. The survey had only 140 observations and measured only registered Democratic voters in the region. In addition, it did not have enough questions to measure respondents' attitudes on economic and religious issues.

In this paper, we examine whether their arguments are still supported when a better survey instrument and more rigorous statistical tests are employed. In order to examine the political attitudes of voters in eastern Oklahoma, more than 700 potential voters in the 2nd Congressional District (CD2), which encompasses the far eastern part of Oklahoma, were surveyed between September 2011 and February 2012. The survey included several questions asking respondents' attitudes on economic and religious issues.

We will, first, examine respondents' socio-demographic characteristics, ideology, and party affiliation. Then we will investigate respondents' attitudes on economic and religious issues and also examine whether partisans possess different attitudes on economic and religious questions. Finally, we will analyze which variables influence party affiliation in order to rigorously test whether populism influences the continued dominance of the Democratic Party in eastern Oklahoma.

The results of the analysis will show that poverty and economic progressivism primarily explain why the Democratic Party has survived the partisan realignment in eastern Oklahoma.

SOUTHERN REALIGNMENT & EASTERN OKLAHOMA

The American south, made up of the eleven former Confederate states, plus Kentucky and Oklahoma¹, has undergone a well-documented partisan realignment from the Democratic to the Republican Party. From the Civil War era to the 1960s most white voters in the southern United States were loyal to the Democratic Party. The Republican Party was the party of Lincoln, the predominantly northern party that had imposed Reconstruction on the southern states after the Civil War (Grantham 1992, 1).

In the 1960s, however, this loyalty began to wane. When President Kennedy, a Democrat, threw his party's support behind the Civil Rights Movement many white southerners were outraged. In 1968, Alabama's George Wallace, a life-long Democrat, ran for president as an Independent. His Independent candidacy was essentially a protest against the Democratic Party's support of civil rights for southern blacks. A large enough proportion of southern white votes were drawn away from the Democratic presidential candidate that a Republican, Richard Nixon, was able to win the presidency despite a large advantage of registered Democrats over registered Republicans among the two parties' electorates (Aistrup 1996, 26-29).

¹ Although Oklahoma did not achieve statehood until 1907, and thus was not one of the original Confederate states, it is nonetheless, in three main respects, southern. First, during the Civil War most Indian Tribes owned black slaves and sided with the Confederacy. Second, racial relations in the post-Civil War era mirrored those of the southern states. Even after statehood, the use of Jim Crow laws and incidents of racial lynchings in the state were similar to those in such southern states as Mississippi, Alabama and Texas. Third, in terms of partisan loyalties and realignments, Oklahoma followed the same pattern as other southern states in that it was part of the "solid south" post-Civil War attachment to the Democratic Party and is also part of the realignment of southern states from the Democratic to the Republican Party that began in the 1960s.

Over the next four decades the defection of southern whites from the Democratic Party continued unabated. According to many scholars, racial issues remained a major cause of white southern dissatisfaction with the Democratic Party (Glaser, 1994; Glaser, 1996; Kuklinski et al., 1997; Valentino and Sears, 2005), but other issues rose in importance as well. The most salient of the non-racial issues were matters of moral policy (Bass and DeVries 1995, 488-490; Black and Black 1987, 213; Black and Black 2002, 259-265). Abortion was the most important moral issue, but the Democratic Party lost southern support for its positions on other moral issues as well, as more and more southerners turned to the Republican Party for representation of their religious views (Aistrup 1996, 47-59).

Today this realignment is almost complete. Republicans control most of the Congressional seats in the south. Only 40 of 142 congressional seats in the 13 southern states were controlled by the Democratic Party after the 2010 elections.² Republicans control most state legislatures in the 13 southern states as well. One common factor among Democratic congressional districts in the south is poverty. Census data reveal that 65% of southern Democratic congressional districts have a median income below the national average, while that is true of only 27% of southern Republican congressional districts. Eighty-eight percent of southern Democratic districts have a poverty rate higher than the national average of 9.6, while this is true of only 59% of southern Republican districts.³ Support for the Democratic Party in the south thus seems to be tied to the poverty of a district's population.

Another common factor is the presence of minorities. Of the 40 Democratic districts in the south 17 (or 43%) were minority/majority districts⁴; 48% had at least a 40% minority population; 73% had at least a 30% minority population; and all but three, or 93%, had at least a 20% minority population. It was a different story in Republican

² Directory of Representatives, *U.S. House of Representatives*.

<http://www.house.gov/representatives/>

³ Selected Economic Characteristics, 2006-2010 American Community Survey 5-Year Estimates.

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_DP03&prodType=table

⁴ A minority/majority district is one that has been gerrymandered so that a majority of the voters are members of a minority group.

congressional districts in the south. Only 54% had minority populations of greater than 20%, and only 21% had minority populations of at least a 30%.⁵ Clearly Democratic districts in the south are poorer and less white than Republican districts.

Eastern Oklahoma is one of those few regions in the southern United States that has not completed the partisan realignment. Oklahoma's Second Congressional District (CD2) is the only one of the state's five congressional districts to be held by a Democrat. In addition, the Democratic Party is dominant in state legislative representation in the region. For instance, the Oklahoma State Senate has 48 seats. Of those, 33 (or 69%) are controlled by Republicans. In eastern Oklahoma, however, there are eight state senate districts within the area of CD2. Of these eight, seven are controlled by Democrats. This means that 88% of eastern Oklahoma state senators are Democratic while, in the rest of the state, Democrats make up only 20% of the senators (8 of 40). Analysis of the Oklahoma House tells a similar story. Of the 17 House districts in eastern Oklahoma 13 of them (or 76%) are controlled by Democrats. Statewide only 31 of 101 House districts (or less than 31%) are controlled by Democrats. This means that in the rest of the state Democrats hold only 21% (18 of 84) of the remaining seats.⁶

POPULISM IN EASTERN OKLAHOMA

In this paper, populism describes a particular ideological perspective. Specifically, by populism, we mean a set of political attitudes similar to those involved in the populist movement of late 19th century America (Hofstadter, 1955; Goodwyn, 1978; Miller, 1987; Kazin, 1995). It consists of a combination of liberal attitudes in regard to government intervention in the economy and conservative attitudes in regard to religion.

⁵ Acs Demographic And Housing Estimates, 2006-2010 American Community Survey 5-Year Estimates.

http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_DP05&prodType=table

⁶ Oklahoma State Legislature. <http://www.okhouse.gov/> and <http://www.oksenate.gov/> (April 19, 2012).

Miller (1987) describes populists as poor rural people who believe that one of the important functions of government is to prevent the concentration of wealth. At the same time they are an essentially religious people and see their cause as a moral one. Economically, the policy preferences of the historical populists bordered on socialism (Goodwyn 1978, 96), but culturally they were what we would think of today as members of the religious right. The late 19th and early 20th century populists were thus in favor of government intervention in areas related both to religion and economic issues.⁷ Based on these descriptions a modern populist would favor conservative positions on issues such as school prayer, while favoring liberal positions on government programs designed to provide citizens with healthcare at low cost or that are designed to reduce the gap between the rich and the poor.

Historically, populists of this type have been rural, poor and religious. Eastern Oklahomans fit this description well. CD2 in eastern Oklahoma is mostly rural, and is one of the poorest Congressional districts in the United States. Among Oklahoma's five congressional districts CD2 has the lowest median household income and the highest poverty rate. CD2's 15.4% poverty rate is 60% higher than the national average of 9.6%⁸. The only Congressional District with similarly bleak economic numbers in the surrounding region is Arkansas' 4th Congressional District, which was the only district in that state to go Democratic in the 2010 Congressional elections. Of Oklahoma's 77 counties, 34 had a median household income of less than \$30,000. Of those 34 counties, 21 (or 62%) were located in just one of Oklahoma's five congressional districts—CD2. This means that just 20% of the state's population accounted for 62% of its poorest counties.⁹ Accordingly, when it comes to the dominance of the Democratic Party in eastern Oklahoma, where blacks and Hispanics together make up

⁷ See the "National Peoples' Party Platform," in Kramnick's and Lowi's *American Political Thought: A Norton Anthology*.

⁸ Election 2010: Oklahoma 2nd District Profile. <http://elections.nytimes.com/2010/house/oklahoma/2> (March 21, 2011).

⁹ State and County QuickFacts. <http://quickfacts.census.gov/qfd/states/40000.html>. (April 19, 2012).

less than 8% of CD2's population,¹⁰ the existence of poverty could provide a more convincing explanation than the presence of racial or ethnic minorities.

Meanwhile, Oklahoma is one of the most conservative states in the union. According to a Gallup Poll, 47% of Oklahomans identified themselves as conservative and the state of Oklahoma was placed as one of top ten conservative states.¹¹ Although this is a major factor in the realignment of the state to the Republican Party (Copeland et al., 2007) we believe that the importance of religious conservatism has been partially offset in eastern Oklahoma by its economic liberalism.¹² Oklahoma's CD2 is, therefore, both economically poor and evangelically Christian (Savage et al., 2011). We expect to find support for religious conservatism among the responses to our survey, but we also expect to find support for government intervention in the economy.

To the degree that political attitudes are based on economic self-interest, there ought to be a correlation between income and respondent's attitudes to propositions regarding government intervention in the economy. We expect, for example, that support for propositions such as "The government ought to help people get doctors and hospital care at low cost" and "The government ought to take steps to make sure that the gap between the rich and the poor in America is reduced," will be greater among survey respondents with lower incomes than among survey respondents with higher incomes.

We also expect that those who identify with the Democratic Party will be more likely to support these statements than those who do not. We believe that it is common knowledge that the Democratic Party is associated with New Deal entitlement programs, Great Society welfare programs, and tax policies that seek to shift a greater portion of the tax

¹⁰ Oklahoma's 2010 Census Population-Demographic Profile; U.S. Census Bureau, Table DP-1. <http://www.okcommerce.gov/Data-And-Research/Demographic-And-Population-Data> (April 19, 2012).

¹¹ Gallup: State of the State (2011). <http://www.gallup.com/poll/125066/State-States.aspx> (March 30, 2012).

¹² Bissett argued that there was a direct connection between Oklahoma's evangelical Christianity and its economic populism. To get details, see Bissett (1999, 85-104).

burden onto the upper class. It is equally common knowledge that the Republican Party is associated with a pro-business, laissez faire approach to economic issues. Republican officeholders tend to oppose many New Deal and Great Society programs, and oppose tax policies that seek to tax the wealthy at higher rates. To the degree, therefore, that voters are influenced by economic self-interest they should be more inclined to support the Democratic Party if they are poor, and to support the Republican Party if they are wealthy.

Although we believe that economic self-interest remains the most important issue for many voters in eastern Oklahoma, we know that party identification in the region may also be based on religious issues. According to Frank (2004), many Kansas Republicans are poor people who vote against their own economic interests because of their greater concern for moral or religious issues. Prasad et al. (2009) also found evidence that working class Republicans were influenced primarily by moral issues. In light of the fact that Savage et al. (2011) found that a large proportion of eastern Oklahomans are evangelical Christians, we expect partisans of both parties in eastern Oklahoma to support such propositions as “Public schools should be allowed to start each day with a prayer,” and oppose such propositions as “Religion does not belong in the public schools, but rather should be taken care of by the family and the church.”

RESEARCH DESIGN

To empirically test whether the dominance of the Democratic Party in eastern Oklahoma is a reflection of the region’s populism, we employ a survey that measured the political attitudes of respondents 18 years of age or older in the region. A telephone survey of voters in eastern Oklahoma was conducted between the fall of 2011 and the spring of 2012. A group of political science students at Northeastern State University (NSU) in Oklahoma called randomly selected potential voters in eastern Oklahoma. As landlines are not commonly used by the younger voters, a small number of the survey was also given to students in American Federal Government classes in an attempt to broaden the data pool. For the student survey, we asked a respondent’s state and county of permanent residence. We only added respondents whose hometown belongs to CD2 to our data set. The total number of

respondents of the survey is 712. A copy of the survey can be found in “Appendix A.”

The survey examined the socio-demographic characteristics of respondents in eastern Oklahoma. Respondents were asked their gender, race, age, income, and education. Respondents were also asked their ideology and party affiliation. Finally, the survey included questions designed to determine the attitudes of eastern Oklahomans on economic and religious issues. The economic index asked questions on each respondent’s attitudes in regard to government intervention in the economy. The religious index asked questions about each respondent’s level of religious conservatism.

We will, first, examine respondents’ socio-demographic characteristics, ideology, and party identification. Then we will examine respondents’ attitudes on economic and religious issues and also investigate whether partisans have different attitudes on economic and religious questions. Finally, we will run logistic regression analysis to examine which variables influence party affiliation so as to rigorously test whether populism primarily accounts for the continued dominance of the Democratic Party in eastern Oklahoma. The analysis will show that a strain of populism, economic progressivism and religious conservatism, significantly affects party identification and explains why the Democratic Party has survived the partisan realignment in eastern Oklahoma.

RESULTS

Socio-Demographic Characteristics, Ideology, and Party Id

We examine race, income, ideology, and party identification in eastern Oklahoma to see the socioeconomic features of the region. As we see in Table 1, whites (67%) and American Indians (26%) consist of the majority of the respondents of the survey (93%).¹³ Eastern Oklahoma has a relatively small population of blacks and Hispanics (7%). In regard to household income, 39% of the respondents make less than

¹³ The 2010 U.S. Census supports that whites (68%) and American Indians (19%) are two major races living in Oklahoma’s 2nd Congressional District.

\$25,000 annually and 71% of them make \$50,000 or less a year. Only 29% of respondents claimed to make more than \$50,000 per year. Taking into account that the national median income is \$52,175 in 2010, the findings show that eastern Oklahoma is one of the poorest predominantly white regions in the country.

Table 1 Race, Income, Ideology, and Party ID in Eastern Oklahoma

Race		Income		Ideology		Party ID	
White	474 (67%)	Less than \$25,000	258 (39%)	Liberal	163 (23%)	Democrat	386 (55%)
American Indian	187 (26%)	\$25,000-50,000	215 (32%)	Moderate	224 (32%)	Independent	119 (17%)
Other	51 (7%)	\$50,000-75,000	110 (16%)	Conservative	323 (45%)	Republican	201 (28%)
		More than %75,000	89 (13%)				
Total	712	Total	672	Total	672	Total	672

Among respondents to our survey, 55% identified with the Democratic Party compared to only 28% who identified with the Republican Party. According to a 2011 SoonerPoll, 48.5% of Oklahomans identify with the Democratic Party while 47.1% identify with the Republican Party.¹⁴ In a 2011 Gallup poll only 39% of all Oklahomans identified with the Democratic Party and 47% with the Republican Party.¹⁵ In either case, there is a significant difference. If eastern Oklahomans were removed from those figures the difference in party identification between eastern Oklahomans and respondents in the rest of the state would be even greater. The same Gallup poll shows that in the country as a whole

¹⁴ Democratic Party ID declines, Oklahoma follows national trend. <http://soonerpoll.com/democratic-party-id-declines-oklahoma-follows-national-trend/> (August 29, 2012).

¹⁵ Gallup: State of the State (2011). <http://www.gallup.com/poll/125066/State-States.aspx> (March 30, 2012).

44% of potential voters lean Democratic while 40% lean Republican, so the anomalous dominance of the Democratic Party in eastern Oklahoma can hardly be denied.

Regarding ideological self-identification, although about twice as many eastern Oklahomans consider themselves Democrats (55%) as Republicans (28%), we find more conservatives (45%) than liberals (26%). This compares favorably with the aforementioned Gallup poll, which shows that 47% of Oklahomans, as a whole, consider themselves conservative while only 14% consider themselves liberal.¹⁶ The finding thus seems to reflect the impact of religious conservatism on ideological distribution in eastern Oklahoma. Although eastern Oklahomans are still far more likely to identify with the Democratic Party, they are as likely to identify themselves as conservative as Oklahomans in general.

POPULISM IN EASTERN OKLAHOMA

In order to empirically test the arguments that eastern Oklahomans are populists, and that this populism is related to the region's support for the Democratic Party, we included in our poll a number of statements designed to elicit the attitudes of respondents on economic intervention in the economy and on religion. Table 2 reports respondents' attitudes on economic and religious issues in eastern Oklahoma.

In regard to respondents' attitudes on government intervention in the economy, we label as "liberal" those responses that support the statement that the government ought to help people get doctors and hospital care at lower cost, that the government ought to take steps to make sure that the gap between the rich and the poor in America is reduced, and that oppose the proposition that the government should provide fewer services in areas such as health and education in order to reduce spending. Conservatives held the opposite view on each question, and moderates were neither supportive nor in opposition. The results show that a majority of respondents took a liberal position

¹⁶ Gallup: State of the State (2011).
<http://www.gallup.com/poll/125066/State-States.aspx>. (March 30, 2012).

on all the economic questions. Sixty-nine per cent supported government intervention to provide lower cost health care, 53% supported government intervention to reduce the gap between the rich and the poor, and 65% opposed cutting spending on healthcare and education in order to reduce government spending. The findings show that eastern Oklahomans are predominantly economically progressive and suggest that the continued strength of the Democratic Party in the region is potentially due to support for its economic policies.

Table 2 Attitudes on Economic and Religious Issues in Eastern Oklahoma

	<u>Economic Issues</u>			<u>Religious Issues</u>		
	D/H	Gap	H/E	R/P	God	Pray
Lib.	488 (69%)	371 (53%)	455 (65%)	Lib. 203 (29%)	61 (9%)	104 (15%)
Mod.	66 (9%)	92 (13%)	85 (12%)	Mod. 77 (11%)	53 (7%)	73 (11%)
Con.	151 (22%)	239 (34%)	163 (23%)	Con. 423 (60%)	585 (84%)	517 (74%)
Total	705	702	703	Total 703	699	694

Lib.: Liberal; Mod.: Moderate; Con.: Conservative

D/H: The government ought to help people get doctors and hospital care at lower cost.

Gap: The government ought to take steps to make sure that the gap between the rich and the poor in America is reduced.

Concerning respondents’ attitudes on religious issues, we label as “liberal” those responses that support the statement that religion is a private matter that does not belong in the public schools, that oppose the proposition that we will all be called before God at a judgment day in order to answer for our sins, and that oppose the statement that public schools should start each day with a prayer. We can see that a majority of respondents answered in a conservative fashion. Sixty per

cent opposed the statement that religion is a private matter, 84% believed in God's judgment day, and 74% supported public school prayer. The results show that religious conservatism is dominant in eastern Oklahoma.

The overall findings about respondents' attitudes on economic and religious issues in eastern Oklahoma support the argument that eastern Oklahomans are populists. Although they overwhelmingly identify with liberal positions on government intervention in the economy, they identify with conservative positions on religious questions.

Next we examine whether partisans have different attitudes on economic and religious issues in eastern Oklahoma.¹⁷ When it comes to government intervention in the economy, we can find a significant difference between Democrats and Republicans. In regard to the statement that the government ought to help people get doctors and hospital care at lower cost, 82% of those who identified with the Democratic Party agreed (or responded in a liberal manner). Only 43% of those who identified with the Republican Party expressed agreement with the statement. Among Democratic identifiers only 12% disagreed with the statement while 41% of Republican identifiers disagreed. Similar results are found on the other two statements. Sixty-five per cent of Democrats agreed that the government ought to take steps to make sure that the gap between the rich and the poor in America is reduced, while only 27% of Republicans agreed. Finally, in regard to whether the government should provide fewer services in areas such as health and education in order to reduce spending, 73% of Democrats and 51% of Republicans disagreed (or expressed a liberal position). The correlation between economic progressivism and party identification is clear, with Democratic identifiers being far more likely to take liberal positions than Republicans.

¹⁷ To measure partisan differences in eastern Oklahoma in Table 3 – 5, we recoded the variable of Party ID (with seven categories) and created the variable of Partisans with three categories (Democrat, Independent, Republican). The category of Democrat includes three categories of Party ID (Strong Democrat, Weak Democrat, Independent Leaning Democratic), the category of Independent includes one category of Party ID (Independent), and the category of Republican combines three categories of Party ID (Independent Leaning Republican, Weak Republican, Strong Republican).

Table 3 Partisans' Attitudes on Economic Issues in Eastern Oklahoma (%)

D/H	Party ID			Gap	Party ID			H/E	Party ID		
	Dem.	Ind.	Rep.		Dem.	Ind.	Rep.		Dem.	Ind.	Rep.
Con.	12	17	41	Con.	23	24	59	Con.	18	16	37
Mod.	6	9	16	Mod.	12	17	14	Mod.	9	21	12
Lib.	82	74	43	Lib.	65	59	27	Lib.	73	63	51
Total	100	100	100	Total	100	100	100	Total	100	100	100
N	697			N	694			N	695		
Chi2	93.128			Chi2	90.490			Chi2	41.567		
P	0.000			P	0.000			P	0.000		

D/H: The government ought to help people get doctors and hospital care at lower cost.

Gap: The government ought to take steps to make sure that the gap between the rich and the poor in America is reduced.

H/E: The government should provide fewer services in areas such as health and education to reduce spending.

Dem.: Democrat; Ind.: Independent; Rep.: Republican

P: P-value

Unlike their difference in economic issues, however, partisans in eastern Oklahoma show similar conservative attitudes on religious questions. Regarding the statement that religion is a private matter that does not belong in the public schools a majority of both Democrats (56%) and Republicans (71%) disagreed (expressing a conservative position). Seventy-one per cent of Democrats and 84% of Republicans agreed that public schools should be allowed to start each day with a prayer. Finally, 81% of Democrats and 92% of Republicans agreed with the statement that we all will be called before God at the Judgment Day to answer for our sins. The findings show that partisans of both parties in eastern Oklahoma are religiously conservative. Although Democrats are slightly less likely to respond conservatively than Republicans on the religious questions the results suggest that the difference is far greater on economic than on religious issues. Both Democrats and

Republicans are conservative on religious issues, but only Democrats are liberal on economic issues.

Table 4 Partisans' Attitudes on Religious Issues in Eastern Oklahoma (%)

R/P	Party ID			God	Party ID			Pray	Party ID		
	Dem.	Ind.	Rep.		Dem.	Ind.	Rep.		Dem.	Ind.	Rep.
Con.	56	58	71	Con.	81	80	92	Con.	71	70	84
Mod.	11	13	10	Mod.	9	8	4	Mod.	12	11	8
Lib.	33	29	19	Lib.	10	12	4	Lib.	17	19	8
Total	100	100	100	Total	100	100	100	Total	100	100	100
N	695			N	691			N	686		
Chi2	14.751			Chi2	15.197			Chi2	15.793		
P	0.005			P	0.004			P	0.003		

R/P: Religion is a private matter that does not belong in the public schools.

God: We all will be called before God at the Judgment Day to answer for our sins.

Pray: Public schools should be allowed to start each day with a prayer.

Dem.: Democrat; Ind.: Independent; Rep.: Republican

P: P-value

We can see, in Table 5, that there is a clear correlation between household income and party identification, with poorer respondents being more likely to identify with the Democratic Party. The findings suggest that support for liberal positions on government intervention in the economy, which is generally associated with the Democratic Party, could be related to the poverty of the respondents. Recent studies support the impact of poverty on party identification in the south. Abramowitz and Teixeira (2008) found that Republicans have been much more successful in attracting support from culturally conservative upper SES whites than from culturally conservative lower SES whites.

According to Bartels (2008), decline of identification with the Democratic Party is almost twice as fast among middle and upper income groups as among lower income groups in the south. Gelman et al. (2010) found that while the partisan divide is based mostly on social and moral issues in the “blue” states, it is based mostly on economics in the “red” states, like Oklahoma. Thus in southern “red” states income inequality plays a much larger role in party identification than it does in other states.

Table 5
The Relationship between Income and Party Identification in Eastern Oklahoma

Party ID	Income			
	Less than \$25,000	\$25,000- \$50,000	\$50,000- 75,000	More than \$75,000
Democrat	158 (62%)	119 (56%)	49 (45%)	38 (43%)
Independent	48 (19%)	33 (16%)	17 (16%)	13 (14%)
Republican	50 (19%)	59 (28%)	43 (39%)	38 (43%)
N	665			
Chi2 (6)	25.828			
P-value	0.000			

Finally, we run logistic regression analysis to examine which variables influence party affiliation so as to rigorously test whether populism primarily accounts for the continued dominance of the Democratic Party in eastern Oklahoma. The dependent variable of the logistic regression analysis is party affiliation. It is coded 1 if a respondent is affiliated with the Democratic Party and 0 if otherwise.¹⁸ Several

¹⁸ We found, in Table 1, that the majority of people are identified with the Democratic Party in eastern Oklahoma. When it comes to party affiliation in

variables are employed to examine their effects on party identification: race, income, respondents' attitudes on economic and religious issues, ideology, and the socio-demographic variables of gender, education, and age.¹⁹ Table 6 reports the results of the analysis.

The results show that respondents' attitudes on economic issues significantly influence whether they identify with the Democratic Party in eastern Oklahoma. If a respondent supports government intervention in the economy, but takes a conservative position on religious issues, he/she is likely to identify as a Democrat. The results also find that poverty affects respondents' party affiliation. Those who have lower incomes are more likely to identify as Democrats. These findings suggest that economic considerations primarily account for which party the public identifies with in eastern Oklahoma. Finally, we can find the relationship between age and party identification. The older a respondent is, the more he/she is likely to identify as a Democrat. The support of older voters for the Democratic Party could be explained by the generational effect (Mannheim, 1952), which tells

eastern Oklahoma, accordingly, it is appropriate to examine why they support the Democratic Party in the region.

¹⁹ For race, we created three dummy variables: White, Indian, and Other. 'White' is coded 1 if a respondent is a white and 0 if otherwise. 'Indian' is coded 1 if a respondent is an American Indian and 0 if otherwise. 'Other' is coded 1 if a respondent is a black, Hispanic, or Asian and 0 if otherwise. For ideology, Conservative (7=extremely conservative) takes higher numeric values than Liberal (1=extremely liberal). Meanwhile, we created an economic index by accumulating scores on three questions, in Table 2, on government intervention in the economy. A smaller value of the index indicates that a respondent is more economically conservative. We calculated Cronbach's alpha for the economic index to examine the internal consistency/reliability of the scale. The result ($\alpha = 0.6342$) does not show a good internal consistency/reliability but rather acceptable. Finally, we created a religious index by accumulating scores on three questions, in Table 2, about religious issues. A smaller value of the index means that a respondent is more religiously conservative. We calculated Cronbach's alpha for the religious index to examine the internal consistency/reliability of the scale. The result ($\alpha = 0.7333$) indicates an acceptable internal consistency/reliability.

Table 6

Logistic Regression Analysis on the Determinants
of Party Affiliation in Eastern Oklahoma

	b	Odds Ratio
Gender	-.201	.818
Education	.026	1.026
Income	-.156*	.856
Age	.522***	1.685
Ideology	-.690***	.502
White	-.285	.752
American Indian	-.225	.799
Economic Issues	1.024***	1.407
Religious Issues	-.513**	.843
Constant	-.108	-
N	650	
Model chi-square	146.44	
Pseudo R2	.163	

Note: The variable of Other dropped because of collinearity.

***: Statistically significant at .01 level.

**: Statistically significant at .05 level.

*: Statistically significant at .1 level.

us that people's attitudes are subject to long-lasting effects of events that occurred when they were coming of age politically. Eastern Oklahoma voters who lived through the Great Depression are more likely to be loyal to the Democratic Party, which they associate with the New Deal and FDR.

The overall findings support the argument that eastern Oklahomans express a strain of populism. They take a liberal position on government intervention in the economy and take a conservative position on religious issues. The findings also show that the partisan divide in eastern Oklahoma is based on economic class. In eastern Oklahoma, Democratic identifiers are poorer and are progressive on economic issues and conservative on religious issues, while Republican identifiers are wealthier and are conservative on both economic and religious issues. The dominance of the Democratic Party in eastern

Oklahoma is thus primarily a reflection of the region's poverty and economic progressivism among the population there.

CONCLUSION

The purpose of our study was to empirically test the argument that the reason eastern Oklahoma has resisted realignment with the Republican Party is because voters in the region favor the kind of economic policies associated with the Democratic Party. Specifically, they favor government intervention in the economy because of their poverty. Because, however, these same voters are traditional conservatives on religious issues, they are characterized as populists, which take conservative positions on religious issues and liberal positions on economic issues. We sought to rigorously test the argument by using a survey instrument that asked several demographic questions followed by indexes designed to test respondents' attitudes regarding religious and economic issues. Our survey received over 700 responses.

What we found was that the Democratic Party has indeed remained dominant in eastern Oklahoma, and that this is true regardless of whether the 2nd Congressional District continues to be represented by a Democrat. The results of the analysis found that the region is poor and that the poor in eastern Oklahoma are more likely to identify with the Democratic Party. We also found that eastern Oklahomans, despite their much greater identification with the Democratic Party, are as likely to think of themselves as conservative as are Oklahomans in general.

Eastern Oklahomans think of themselves as conservative because of their views on such social issues as religion. In our analysis of the religion index we found that Democratic identifiers were only slightly less conservative than Republican identifiers. Identifiers of both parties responded in a very conservative manner to the statements regarding religion. In regard to the economic index, however, our analysis showed that those who identified with the Democratic Party were far more likely to take a liberal position on government intervention in the economy in order to reduce the gap between the rich and the poor, and to spend on health care and education. The main distinction we found between Democratic and Republican identifiers among eastern

Oklahomans was, thus, income and attitudes toward government intervention in the economy.

These findings support the argument that the reason eastern Oklahoma has resisted the realignment from the Democratic to the Republican Party is mainly because the region is poor—and poor voters are more likely to support the type of economic policies favored by the Democratic Party. These findings are also supported by the research of Abramowitz and Teixeira (2008), Bartels (2008), and Gelman et al (2010), who all found a relationship between income and party identification in the southern states. One interesting, and perhaps important, implication of our conclusion is that, contrary to the arguments of Thomas Frank, in his well-known *What's the Matter With Kansas: How Conservatives Won the Heart of America* (2004), eastern Oklahomans may not always vote against “their economic self-interest in order to vote their religious conscience (168).”²⁰ Economic class, therefore, may not have disappeared as a factor in party identification.

²⁰ Prasad et al. (2009) also found evidence that that working class Republicans were influenced primarily by moral, and not economic, issues.

APPENDIX A

Research Project

We are working on a research project by conducting a survey of potential voters in eastern Oklahoma.

The purpose of the study is to measure political attitudes and may involve what some may consider controversial issues. The entire survey should take around ten minutes. Strict confidentiality will be maintained. The results of the survey will only be presented in summary form. Do we have your permission to continue with the survey?

What is the state and county of your permanent residence?

1. What is your gender?
 - a) Male
 - b) Female

2. Which of the following best describes your race or ethnicity?
 - a) White/Caucasian
 - b) Black/African American
 - c) Hispanic/Latino
 - d) Asian/Pacific Islander
 - e) American Indian
 - f) Other

3. Which statement best describes your education?
 - a) Some H.S.
 - b) H.S. Graduate/GED
 - c) Some College
 - d) College Graduate
 - e) Post Graduate

4. Which statement best describes your household income?
 - a) Less than \$25,000
 - b) \$25-50,000
 - c) \$50-75,000
 - d) More than \$75,000

5. Which statement best describes your age?
 - a) 18 to 29 yrs of age
 - b) 30 to 44 yrs. of age
 - b) 45 to 64 yrs. of age
 - c) Over 65 years of age

6. Are you a registered voter?
 - a) Yes
 - b) No

7. Generally speaking, do you usually think of yourself as a Republican, a Democrat, an independent or what? (IF REPUBLICAN OR DEMOCRAT) “Would you call yourself a strong or a not very strong (REPUBLICAN/DEMOCRAT)?” (IF INDEPENDENT, OTHER OR NO PREFERENCE) “Do you think of yourself as closer to the Republican or Democratic party?”
 - a) Strong Democratic
 - b) Weak Democratic
 - c) Independent Leaning Democratic
 - d) Independent
 - e) Independent Leaning Republican
 - e) Weak Republican
 - f) Strong Republican

8. Which candidate did you vote for in the 2010 Congressional election?
 - a) Dan Boren
 - b) Charles Thompson
 - c) Other
 - d) Did not vote

9. Which one factor mattered most in deciding who you voted for in the last election?

- a) Party loyalty
 - b) Candidate's name recognition
 - c) Candidate's issue positions
 - d) Candidate's character
 - e) Other- specify:
-

10. Which statement best describes the frequency with which you attend church?

- a) Attend church regularly
- b) Attend church occasionally
- c) Do not attend church
- d) Prefers not to answer

11. With 1 being extremely liberal and 7 being extremely conservative, how would you describe your political beliefs?

Now I am going to read you some statements. Please tell me on a scale of 1-9 (with 1 meaning you very strongly disagree and 9 meaning you very strongly agree) what your attitude is in regard to each of the following statements.

12. The business man and the entrepreneur are much more important to society than the artist and the professor.

13. The government ought to help people get doctors and hospital care at lower cost.

14. Immigrants who are currently living in the U.S. illegally should be provided with a way to gain legal citizenship if they pass background checks, pay fines and have jobs.

15. Religion is a private matter that does not belong in the public schools.

16. The government ought to take steps to make sure that the gap between the rich and the poor in America is reduced.

17. The right of Americans to own guns is more important than the need to control gun ownership.
18. We have gone too far in pushing equal rights in this country.
19. I have traditional values about family and marriage.
20. Books that contain dangerous ideas should be banned from public school libraries.
21. The government should provide fewer services in areas such as health and education in order to reduce spending.
22. We all will be called before God at the Judgment Day to answer for our sins.
23. Poverty among African-Americans is really a matter of them not trying hard enough; if they would only try harder, they could be just as well off as whites.
24. Freedom of speech should not extend to groups that may be sympathetic to terrorists.
25. Public schools should be allowed to start each day with a prayer.
26. All Americans should be responsible for their own economic well-being and government should not interfere in order to help those less well off.
27. Police officers should be given more authority to ask for the documents of a person who looks like he or she could be an illegal alien.
28. Women should have an equal role with men in running business, industry and government.
29. Generations of slavery and discrimination have created conditions that make it difficult for African-Americans to work their way out of the lower class.
30. School boards ought to have the right to fire teachers who are known homosexuals.

31. The use of torture against suspected terrorists in order to gain important information can sometimes be justified.
32. The decision of whether or not to have an abortion should be left up to individual women.
33. The U.S. should spend more on education and less on defense.

Thank you so much for participating in our survey.

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**WATER MANAGEMENT AND CONFLICTS IN
OKLAHOMA: REGULATING AND COMPETING FOR
LIMITED COMMON POOL RESOURCES**

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Relying on the theoretical frameworks of the tragedy of the commons and the tragedy of the anti-commons, we argue: 1) the water management approach pursued by Oklahoma's government is likely to contribute to the tragic overuse of groundwater resources and 2) the involvement of large and opposing groups that operate within an environment of competing access rights undermine the emergence of an efficient water management regime for Sardis Lake.

Some people call water the oil of the 21st century. While this description may not be exact, one thing is clear: the availability of water will be a key factor in the development of the world's economy and government policies in the next decade (Alexandra Cousteau, 2011).

Water covers more than 70 percent of our planet. However, 97 percent of that water is found in the oceans; only three percent is fresh water; and, about three-quarters of that fresh water exists in ice sheets. It is the remaining one percent—stored in underground aquifers; flowing in rivers and streams; teaming in freshwater lakes—that represents what human beings use to support life. This small portion is increasingly jeopardized by a combination of climatic variations, accelerated use, and population growth in certain parts of the world, including the American Southwest. In light of these broader challenges, the need for sound fresh water management will also become an increasingly important policy issue for states, such as Oklahoma, where less than two percent of the state’s land mass is “inland” water (Perlman 2012). With a focus on groundwater and freshwater lakes, this study offers an overview and analysis of Oklahoma’s water management approach as well as a case study of a major political conflict over water in the state. On the basis of longitudinal data and archival research, this study seeks to provide a basis for understanding and finding efficient solutions to manage common pool resources, defined as a resource that benefits segments of society, but offer diminishing benefits as individuals pursue their own self-interest (Ostrom 2008).

Oklahoma’s water management approach to groundwater district jurisdiction and the subsequent role of the Oklahoma Water Resources Board (OWRB) provides the policy background to analyze the institutional design of groundwater management and the practices of groundwater permitting since 1990 within the theoretical context of the tragedy of the commons. In addition to this institutional focus and longitudinal analysis of groundwater permitting patterns across the state, cases like Sardis Lake water-storage rights illustrate how controversial water is from the perspective of the anti-commons. Accordingly, the analysis will conclude with a discussion of the political conflict surrounding Sardis Lake. As the longitudinal analysis unfolds within the context of groundwater permitting patterns, we argue that the water management approach pursued by Oklahoma within an unclearly defined water management policy framework is likely to contribute to the tragic overuse of groundwater resources. Finally,

opposing and sovereign groups pursue different interests and operate within an environment of fragmented or competing access rights, thereby, as implied by the anti-commons, undermining an efficient water management regime for Sardis Lake.

WATER RESOURCES AND MANAGEMENT IN OKLAHOMA

Oklahoma is located on the Southern Great Plains. Varying from nearly flat in the west to rolling hills in the central and near east, the plains are intersected by hilly areas that include the Wichita Mountains in the southwest, the Arbuckle Mountains in the south-central and the Ouachita Mountains in the southeast. Given Oklahoma's geographic location, water is not abundant. The spatial distribution of rainfall is characterized by a sharp decrease of precipitation from east to west. Though rainfall may vary considerably on an annual basis and may be extremely heavy in certain areas, average annual precipitation generally ranges from about 17 inches in the far western panhandle to about 56 inches in the far southeast.

The Ogallala, or the High Plains, Aquifer is one of the largest underground sources of freshwater in the world. Formed by ancient sediment from the Rocky Mountains and discovered in the 1890s, the 174,000 square-mile Ogallala Aquifer serves as the primary water resource for a vast agricultural area in the United States that stretches from South Dakota to West Texas, including the Oklahoma Panhandle (Opie 1993; High Plains Associates 1982). Receiving less than an inch of annual freshwater recharge, the amount of water storage in the aquifer varies by state. In 1990, approximately 3.5% was located under Oklahoma's Panhandle counties: Cimarron, Texas, and Beaver. As irrigated acreage has increased dramatically from 11,500 acres in 1950 to 347,665 acres in 2005, these counties are the primary beneficiaries of this groundwater resource (see Map 1). Though the amount of water in the aquifer is enormous, it is quite difficult to recharge. The United Nations in its 1996 Comprehensive Global Freshwater Assessment estimated that withdrawals from the Ogallala Aquifer exceed recharge by approximately a 3 to 1 margin. With 3,250 million acre-feet of drainable water according to the United States Geological Survey (1 acre-foot equals 325,805 gallons), the Ogallala Aquifer has lost a large

volume of this water due to agricultural uses, having dropped by an average of 3.2 feet annually between 1980 and 1999. As the water table continues to drop, reports indicate that the levels of pesticides and nitrates entering the water system have increased (U.S. Water News Online 2009; 2007; Peck 2007; American Groundwater Trust 2002; Guru and Horne 2000; Massey and Sloggett 1984).

Institutional approaches to manage groundwater vary across the United States. Though Congressional directives may supersede state control of water, each state in the United States has the “authority to determine how water will be allocated and administered among its citizens” (Wood 2008, 247). In 1936, the Oklahoma Supreme Court decided in favor of the reasonable use principle or American rule declaring that landowners are entitled to use groundwater on their own land without

Map 1: Ogallala Aquifer



waste (Solanes 1999, 71). Thirteen years later, the first statutory law to regulate groundwater in Oklahoma replaced the common law American rule of reasonable use and imposed the appropriation doctrine with provisions on beneficial use. Deemed as ineffective and too restrictive and faced with the increasing scarcity of groundwater by the late 1960s and early 1970s, the 1949 law was completely replaced by the current Oklahoma Groundwater Law that became effective in 1973. The 1973 allocation law makes a direct connection to land ownership and ownership of groundwater and authorizes the OWRB to regulate the use of both surface and groundwater.

The OWRB is responsible for a wide range of water regulation issues, including the determination of water rights for groundwater and the development of a strategic plan for managing Oklahoma’s water resources. Groundwater has remained a private property matter, giving landowners “the right to develop the percolating ground water flowing beneath their lands” (Roberts and Gros 1987, 536-537). The relevant 1973 law, designed to protect aquifers from depletion based on a utilization policy rather than the preservation of water, directs the Ground Water Division of the OWRB to determine maximum annual yield (MAY) for each groundwater basin in the state and make the hydrologic surveys available to the public (82 Oklahoma Statute § 10210.1-1020.22). Based on hydraulic surveys that determine MAY, the OWRB determines the equal proportionate share (EPS) for each parcel of land dedicated to the permit application and requires a groundwater permit for the irrigation of cropland more than three acres in total size (Ferrell, Adams, Kizer, and Ott 2010). The 1973 Oklahoma Groundwater Law also authorizes the OWRB to issue temporary groundwater permits before the determination of the MAY for a basin. In light of the high costs and limited budgets, studies and determinations of the MAY have not been completed for many basins in the state.

Research indicates that the OWRB’s inability to implement fully the 1973 law stems from limited agency resources and political asymmetries across the state. The lack of financial resources and qualified personnel hamper the OWRB’s ability to complete expensive hydraulic surveys. As a result, the agency routinely resorts to issuing temporary groundwater permits. In addition to these challenges faced by the

OWRB, farmers, especially those in the Panhandle, resist groundwater management by the state. Support for reforms remains concentrated in the eastern, more urban half of the state. However, it is difficult to mobilize urban voters in favor of reform (Roberts and Gros 1987, 540). Consequently, political leaders are neither inclined to undertake serious water management reforms nor strongly advocate reduced water use in the Ogallala.

Equally important is the management of surface water. In 1974, the Oklahoma state legislature passed 82 O.S. §1086.2(1), requiring the OWRB to develop a strategic plan for managing Oklahoma's water resources over the course of the next 50 years (Water Research Institute 2012). Oklahoma's first comprehensive water plan was created in January 1980 (Oklahoma Water Resources Board 1980). More than a decade following its first update in 1995, the Oklahoma Water Resources Research Institute (OWRRI), located in the Division of Agricultural Sciences and Natural Resources at Oklahoma State University, hosted 86 local, regional, and statewide water planning meetings to produce the 2012 updated Oklahoma water plan (Oklahoma Water Resources Board 2012). The current comprehensive water plan proposes upgrades to the state's drinking water and wastewater infrastructures and also includes a resolution on state/tribal water consultation to ensure tribal input in the process (Oklahoma Water Resources Board 2012; Journal Record Staff 2011).

THEORETICAL FRAMEWORK, HYPOTHESES AND DATA

Long-term population growth is problematic in a world where essential resources like fresh water, either beneath or above the surface, is finite. This theme, as exemplified by the inauguration of the Club of Rome in 1968 and the publication of *The Tragedy of the Commons* by Garrett Hardin in the same year, is anything but novel. However, in a world of increased pressures on common resource allocations, it remains more relevant than ever. From a *homo economicus* perspective and acknowledging the increasing pressures on resources exerted by population growth, the classic notion of the tragedy of the commons argues that men will overuse a scarce resource that is held in common. As a result, “[r]uin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom

of the commons” (Hardin 1968, 1244). To prevent the population problem in a world where human interference via welfare state benefits and food aid undermine the corrective influence of natural catastrophes, Hardin suggests that Adam Smith’s invisible hand of the free market must be discarded and replaced with a social arrangement of “mutual coercion mutually agreed upon” (Hardin 1968, 1246).

Though the principal logic of the tragedy of the commons is sound, a number of analytical shortcomings weaken the deterministic nature of it. Hardin’s commons is usually referred to in the literature as a *common-pool resource*, which yields a finite flow of benefits (Ostrom, Gardner and Walker 1994). By relying on Hardin’s argument, initial studies have assumed that the resource under consideration yields a predictable and finite supply of one specific type of resource unit. Moreover, users, homogenous and equipped with all information to make rational decisions, are engaged in short-term and profit-maximizing activities. Unable to change, users are trapped in the dilemma that underpins the tragedy of the commons. To escape this trap and create a situation where all users can benefit from common-pool resources, societies can craft institutional rules aimed at authorizing users (Olson 1965). Studies have demonstrated that users have overcome the free-rider dilemma and crafted institutions to govern their own resources (Somma 1997; McCay and Acheson 1987; Ostrom 1990; 2005; 2008).

With the hope to manage common pool resources successfully, public officials have employed different management approaches. A centralized management approach, as employed in the case of forested land and inshore fisheries, have been disappointing and have accelerated resource deterioration. Ostrom (2008) offers a series of factors that increase the likelihood of developing effective institutions for regulating the use of common-pool resources. They include: 1) low discount rates (most resource users have secure tenure, and plan on using the resource for a long time into the future); 2) homogeneous interests (most resource users share similar technologies, skills, and cultural views of the resource); 3) low cost of communication among individuals; and 4) relatively low cost of reaching binding and enforceable agreements.

In recent decades, research in the area of the tragedy of the commons has also introduced the concept of the anti-commons. Following the

Soviet Union's fall and the transition from a planned economy to a free-market system, storefronts in Moscow remained empty for several years. Rather than explaining this puzzle within the context of new rights, local government corruption, and the lack of a functioning legal framework, Michael Heller (1998) argues that the emergence of such anti-commons property is the result of fragmented property rights across owners. While one owner has the right to sign the lease for a given property, others have the right to sell, receive sale revenue, determine use, and occupy the property. This creates a situation of fragmented property privileges or access rights where one owner can employ his specific property right to block any other party with a property right to use or access a resource. In other words, the anti-commons represents "a type of property regime that may result when initial endowments are created as disaggregated rights rather than as coherent bundles of rights in scarce resources" (Heller 1998, 623). In contrast to the tragedy of the commons, and as a logical consequence of the argument so far, the anti-commons suggest waste and underuse of resources – a situation that can be overcome by "unifying fragmented property rights into a usable bundle" (Heller 1998, 640).

According to 82 Oklahoma Statute § 1020.1, groundwater is defined as "fresh water under the surface of the earth regardless of the geologic structure in which it is standing or moving outside the cut bank of any definite stream" (Ferrell, Adams, Kizer, and Ott 2010). The OWRB serves as the central groundwater management agency responsible for issuing water permits and establishing maximum annual yields for groundwater resources like the Ogallala Aquifer. Given the areas of irrigated acres across the state and the decreasing annual average precipitation from the eastern part of Oklahoma to the west, we expect that there is considerable regional pressure on groundwater. Hence, the number of regular groundwater permits issued by the OWRB is considerably higher for the irrigated and more arid counties located in the west compared to their counterparts in central and eastern Oklahoma. Particularly, the arid climate prevailing in Oklahoma's Panhandle region is likely to yield a higher number of groundwater applications associated with landowners residing in the respective Beaver, Cimarron, and Texas Counties compared to the remaining western, central, and especially eastern regions of Oklahoma. Data to investigate the above propositions within the context of the tragedy of

the commons and for the period between 1990 and 2010 are derived from the monthly board meeting minutes of the OWRB.

The testing of the previous propositions based on simple frequency patterns serve as a stepping stone to focus on the role of the OWRB in the management of groundwater resources. The conduct of hydraulic surveys by the OWRB is essential to manage groundwater resources. Highly complicated and requiring substantial resources, hydraulic studies characterize the water resource contained by an aquifer across a number of aquifer properties and the amount of water entering the basin (recharge) and the amount of water leaving it (discharge). The completion of several hydraulic surveys has not been done and, as a result, we anticipate that the issuance of temporary groundwater permits will remain high compared to regular groundwater permits. Data from the OWRB will serve as the primary data source to investigate the number of temporary permits compared to regular permits between 1990 and 2010.

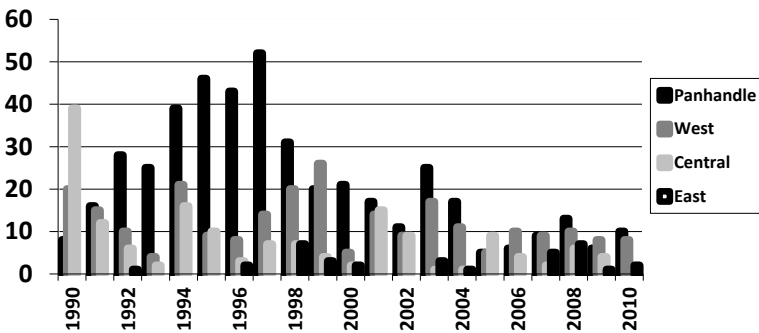
From the perspective of the anti-commons, the second part of the findings section turns to a major political conflict concerning the state's water resources. Sardis Lake, a reservoir in Pushmataha County and Latimer County, has become increasingly complex due to federal and state legal matters as well as the Choctaw and Chickasaw Nations' water rights claims. The tribal dimension is complicated by the broad parameters established by Article I, Section 8 of the U.S. Constitution. The federal government in general and the Congress in particular possess plenary power "to regulate commerce with foreign nations and among the several states, and with the Indian Tribes." Within the context of the legal matters surrounding these intergovernmental relations, we argue that the establishment of an efficient water management regime for Sardis Lake is undermined by the involvement of opposing and sovereign groups that pursue different interests and operate within an environment of fragmented or competing access rights. To investigate this proposition, a number of newspaper archives and other relevant qualitative resources will serve as the primary data sources.

FINDINGS

Groundwater Management and the Tragedy of the Commons

The Ogallala Aquifer, the single largest source of groundwater in the state, underlies the Panhandle and portions of extreme western counties in Oklahoma where annual rainfall ranges from 16 to 28 inches. As the major source of freshwater, the aquifer supports the most extensive agricultural activities in Oklahoma’s Panhandle region, providing fresh water for crops and feeding operations. Within the context of these agricultural activities, longitudinal patterns indicate that these groundwater applications are associated with counties in the western part of Oklahoma and especially those drawing from the Ogallala Aquifer. Figure 1 below illustrates the relatively high groundwater applications originating in the western counties of the state. Covering about one third of the state, the western counties dominate the requests for groundwater applications. Except for 1990 and 2005, groundwater applications from that part of the state clearly outweigh those from the central and especially eastern thirds of the state. This pattern is reinforced further by the number of groundwater applications from the three Panhandle counties of Beaver, Cimarron, and Texas, relying predominantly on the Ogallala Aquifer to satisfy their demand for water.

Figure 1 Number of Regular Groundwater Permit Applications by Region (1990-2010)



The average saturated thickness of the Ogallala Aquifer across the region is 129 feet. However, it varies considerably from nearly zero to 430 feet with the greatest thickness occurring in eastern Texas and northwestern Beaver Counties. Texas, the largest county of the Oklahoma Panhandle and completely dependent upon the Ogallala Aquifer, has 210,826 acres under irrigated acres, while Beaver, the region's smallest county, has 35,264 irrigated acres. As with Texas County, the Ogallala Aquifer underlies the total Beaver county area. With about 101,575 irrigated acres, eighty percent of Cimarron County is directly above the aquifer (Almas, Colette, and Adusumilli 2008). Given these basic characteristics and in an effort to support the growth of wheat, corn, and sorghum, groundwater permit applications associated with these counties have been consistently high, peaking in 1997 with more fifty groundwater applications. Beaver County and especially Texas County dominate and, with the exception of 2005, clearly overshadow the remaining counties in Oklahoma's central and eastern regions. On average, about fifty percent of all groundwater permits originated in the Panhandle between 1990 and 2010 – a declining trend compared to the time period between 1970 and 1989 when more than sixty percent of all groundwater applications can be traced to the three Panhandle counties.

Groundwater remains essential to Oklahoma. According to a technical report produced by the OWRB, more than sixty percent of the total water use in Oklahoma, including almost ninety percent of the state's irrigation needs, comes from groundwater. Moreover, groundwater represents a major source of water for Oklahoma's cities and towns. Stored in basins like the Ogallala, Central Oklahoma, and Rush Springs aquifers, Oklahoma's twenty-three major bedrock and alluvium or terrace-based aquifers contain an estimated 320 million acre feet of water in storage and yield on average between fifty and one hundred gallons per minute. In addition to the major aquifers, more than 60 minor aquifers also yield a significant amount of fresh water (Osborn, Eckenstein and Koon 1998).

For each of these aquifers, the determination of MAY, i.e., the amount of water that can be safely withdrawn from an aquifer to ensure a

minimum basin life of 20 years, falls under the OWRB's responsibility. However, the issue of permits and thus the allocation of groundwater are not determined at the time MAY is specified. As a result, the OWRB cannot decrease the MAY even if updated studies show that too much water could be withdrawn from the basin. The existence or non-existence of hydraulic studies also has a direct impact on the type of permit issued. Landowners who seek groundwater from an aquifer linked to a hydraulic study will be issued a regular permit, but those who want to draw water from an unstudied aquifer can only apply for a temporary permit.

Though the OWRB is often the sole agency conducting the hydraulic studies, it has also reached out to other state and federal agencies in order to complete these studies. Accordingly, the study of the Garber-Wellington Aquifer is a cooperative effort between the OWRB, U.S. Bureau of Reclamation, U.S. Geological Survey, Association of Central Oklahoma Governments, Oklahoma Geological Survey, Tinker Air Force Base, and other state and federal agencies. Tables 1 and 2 below provide an overview of the studied and unstudied major aquifers in Oklahoma. Currently, the OWRB has been able to establish MAY and Equal Proportionate Share (EPS) for a number of aquifers, including Tillman, North Canadian Rivers, Antlers, and Ogallala, etc. However, a substantial number of major aquifers have not been assessed yet or require renewal.

As a result of the relatively high number of aquifers without MAY, the OWRB has issued a substantial number of temporary groundwater permits – a trend that already persisted between 1970 and 1990 when 1,680 regular water permits, but 2,861 temporary water permits were issued. Figure 2 indicates that for that specific time period under consideration, temporary groundwater permits have been generally outnumbering their regular counterparts since 1990. Between 1990 and 2010 the overall trend suggests that temporary permits equaled or outnumbered regular permits. In fact, the data also suggests a widening gap in favor of temporary permits between 1991 and 1997, thereby feeding into the tragedy of the commons. Regional patterns of temporary water permits are equally interesting and reflect that widening gap. As suggested by Figure 3, the western and central regions of Oklahoma were consistently receiving a higher number of these permits compared to the Panhandle counties between 1990 and 2010.

The regional focus also reveals that the eastern region of Oklahoma was the major recipient of temporary water permits between 1990 and 1998, followed by a sharp decline between 1999 and 2002.

Table 1: Studied Major Oklahoma Aquifers

	Aquifer	Location	Study/EPS
1	Tillman	Southwest	1978
2	North Fork of Red River	South	1981
3	Enid Isolated Terrace	Central	1982
4	Elk City Sandstone	West	1982
5	North Canadian River	Central	1983/1990/1995
6	Gerty Sand	Central	1989
7	Washita River	West	1990
8	Vamoosa-Ada	East	1990
9	Antlers	South	1995
10	Ogallala	West	2002

Table 2: Unstudied or No MAY Major Oklahoma Aquifers

	Aquifer	Location	No MAY (@) / Study (†)
1	Blaine	West	@
2	Cimarron River	Central	@
3	Arbuckle-Simpson	Central	@
4	Garber Wellington	Central	@
5	Arbuckle-Timbered Hills	Southwest	†
6	Arkansas River	East	†
7	Canadian River	Central	†
8	Dockum-Dakota Sandstone	West	†
9	Red River	South	†
10	Roubidoux	East	†
11	Rush Springs	West	†
12	Salt Fork of Arkansas River	North	†
13	Salt Fork of Red River	South	†

Figure 2: Total Number of Regular and Temporary Groundwater Permit Applications (1990-2010)

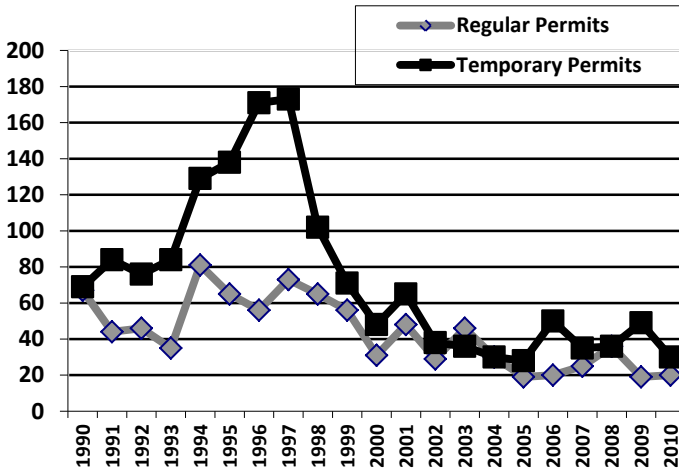
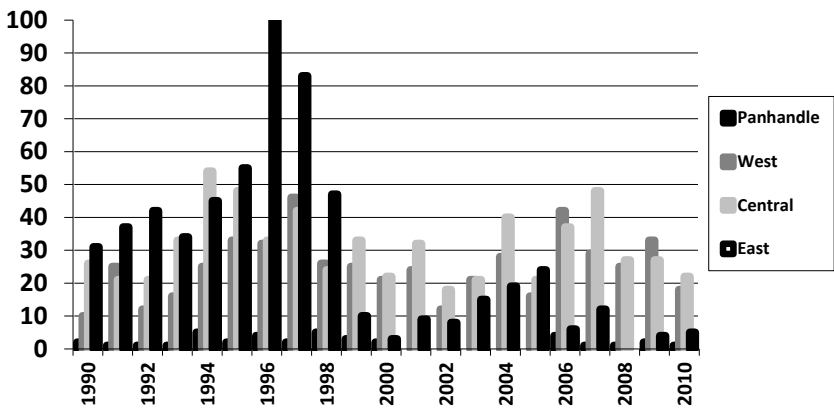


Figure 3: Number of Temporary Groundwater Permit Applications by Region (1990-2010)



Sardis Lake and the Anti-Commons

The complexity surrounding Sardis Lake begins with the development of water policies at the federal and state levels. Early in American and Oklahoma history, water policy was really incremental disaster management for which Sardis Lake may not have existed otherwise. As early as the 1790s, the Federalist economic doctrine focused on internal infrastructure improvements (Shaw 1993). With *Gibbons v. Ogden* in 1824, the federal government was first able to utilize the commerce clause, covering river navigation. A few months later, the General Survey Act was approved by President James Monroe. It allowed for the surveying of the country's infrastructure and ultimately put the U.S. Army Corps of Engineers in charge of that task. These early policy decisions paved the way for the federal government to mitigate flooding, increase water supply, and control erosion through incremental policy making (Clary 1985). Over time, water infrastructure policies were also advanced at the state level. An early Oklahoma proponent of water infrastructure improvements was former Governor and U.S. Senator Robert S. Kerr who served on the Public Works Committee and helped set in motion the development of water infrastructure in the 1950s and 1960s, including the Flood Control Act 1962, which created Sardis (Tennery 2012).

The Flood Control Act instituted that Sardis Lake should facilitate flood control but also recreational use and water supply. Attorney General Larry Derryberry signed the contract for Sardis Lake's construction in 1974; however, construction itself did not begin for another several years (Carter 2010b). At the time, it was actually called Clayton Lake. Presciently, this name became Sardis Lake's first controversy because Clayton was also a neighboring state-maintained lake, a few miles south of the City of Clayton—the same name, thus creating much confusion (U.S. Army Corps of Engineers 2011). Public Law 97-98 in December 1981 changed the name to the current "Sardis Lake" after the town it literally replaced. Today's lake covered what was once the City of Sardis, and the local cemetery is now located on a tiny island connected by a small causeway to the shore. Water itself did not fill the lake until the mid-1980s (Pushmataha County Historical Society 1988; Carter 2010b). Immediately, Sardis Lake created more

controversy as the Choctaw Nation was not convinced of the lake's benefits. "At first, we weren't sure what to do with it," Choctaw Chief Greg Pyle said. "We didn't know exactly what we had" (Carter 2010b).

Sardis Lake construction was certainly not free to Oklahoma as the contract for the lake's construction with the U.S. Army Corps of Engineers in 1974 was actually a 50-year loan bearing interest (Hutchinson 1997). Oklahoma had to pay construction costs, later estimated at about \$16.4 million. By 1997, what Oklahoma owed with compounded interest ballooned to approximately \$38 million and up to \$68 million by 2007 because of lack of payment (Journal Record Staff 2007). In 1983, when construction was finalized, the state owed an initial payment of \$415,000, but without much demand or infrastructure, no market for water sales existed (Carter 2010b). Oklahoma City's needs certainly lacked not only infrastructure at the time, but its growth did not go beyond its current water supply from nearby McGee Creek Lake. By the 1990s, Oklahoma City's take on the need for Sardis Lake still lay in the distant future, an estimated 50 to 75 years, according to Jim Couch, current Oklahoma City manager (Carter 2010b). Without a market to make payments to the Corps, the OWRB was left with the bill, specifically using a state sewer and infrastructure repairs fund. Only two payments were made over the course of the next five years. In 1997, former Oklahoma Environmental Secretary Brian C. Griffin said former Governor Frank Keating facilitated the state legislation to pay for another \$1 million installment, but only \$3.2 million was paid of the original \$16 million, not counting accrued interest.

It is possible that the 16 major FEMA flooding and storm disasters, droughts, as well as population growth in the 1980s and 1990s, prompted not only Oklahoma City to rethink buying out the federal loan on Sardis Lake, but even selling it to Tarrant County, Texas (FEMA 2012; Hutchison 1998). In 1993, State Senator Gene Stipe shepherded a state resolution, allowing OWRB to sell water from Sardis Lake to the North Texas Municipal Water District, which serves cities around suburban Dallas (Bean 1993b). However, the sale of Sardis never happened and the State Senate was authorized to make negotiations at that time. However, loud protests registered in the state legislative chamber because of the Lake's public reputation for great bass fishing and fears that the reservoir would suffer. In opposition, the

OWRB suggested to retire the debt they held a few years earlier (Bean 1993a). Chairman of the Sardis Lake Water Authority Jim Koopman wrote in a letter to State Senator Robert Cullison: “Sardis Lake and Kiamichi River Basin water should go north, south, east, west and be used several times by Oklahomans before we consider selling it to Texas, our economic competitor” (Bean 1993c).

Though opposition to the sale of Sardis Lake water to Texas prevailed, the federal price tag for the lake swelled ten years later to \$68 million (Journal Record Staff. 2007). Later in the year, several cities, including Oklahoma City, Norman, and Edmond, agreed to merge endeavors to obtain water rights to Sardis Lake by founding the Oklahoma Regional Water Utilities Trust (ORWUT). The ORWUT adopted a resolution to evaluate alternatives for buying water and storage rights from Sardis Lake in southeastern Oklahoma (Brus 2007). In 2009, Oklahoma City decided that it was in its best interest to pay the \$42 million. This would gain the city 90 percent of the lake’s water and allow the city to pay off Oklahoma’s debt of \$27 million (Journal Record Staff 2009). A year later, the OWRB gave Oklahoma City permission to move forward with the deal that will likely end up costing the city around \$1 billion in order to build the pipeline infrastructure necessary to pump the water (Estus 2010). In addition to acquiring a water storage contract for 136,000 acre feet of water in Lake Sardis in 2010, the Oklahoma City Water Utilities Trust has already endorsed a five-year water service agreement with the tiny town of Coalgate, Oklahoma, in 2012 (Associated Press 2012; City of Oklahoma 2010). Now that this long-term debt is finally paid off, Sardis Lake area residents fear that the Lake will be “drained and be nothing but a large mud hole” (Carter 2010b).

The Sardis Lake case is particularly complicated because of a tribal dimension that is deeply rooted in legal history. Dealing with the Fort Belknap Reservation in Montana, the U.S. Supreme Court in the landmark case of *Winters v. United States* (1908) ruled that Indian tribes located on federally created reservations were entitled to reserving water rights for current and future use. The decision was important in that, among other things, it eventually helped to elevate the status of tribes to legitimate political actors. Before this ruling, state governments had been seen as the primary actors concerning water rights and water allocation. The Winters Doctrine, as it came to be known, “held that this reservation of water was unaffected by the

subsequent admission of Montana into the Union” (Canby 1998, 403). Later in the case of *Arizona v. California* (1963), the court reaffirmed the findings in *Winters* and further delineated the issue of water usage in favor of tribes. Much of the controversy litigated here dealt with reservations created by presidential or congressional authority. Regardless of their source of origin, the court upheld the right of the federal government to establish reservations. As a result, the water belonging to that land could be reserved for the purposes for which the reservation was established. This meant that the tribes had legitimate claims on water.

Though the Winters Doctrine has now aided tribes to broaden tribal water rights further, state governments have also attempted to reassert their rights. The issue of water rights illustrates one of the fundamental clashes which exist within the U.S. Constitution. On the one hand, the Tenth Amendment would seem to reserve to the states the majority of power to handle water rights. In addition, no specific grant of authority exists within the enumerated powers that would specifically afford the Congress the prerogative to grant water rights to tribes other than perhaps an expansive view of the commerce clause. On the other hand, Article 6 states that the U.S. Constitution, federal laws and the treaties established by the federal government with the tribes constitute the supreme law of the land. Today, many tribes cite treaty obligations which, depending upon interpretation, may or may not include relevant water rights for the tribes.

On August 18, 2011, the Choctaw and Chickasaw Nations filed a lawsuit over the purchase of Sardis Lake (Carter 2011; Barringer 2011a). The Caddo Nation also joined the lawsuit (Carter 2010a). Conversely, the Apache Tribe had another tactic in mind by trying to create a side deal to supply Tarrant County on its own (Barringer 2011b). The origin of this water dispute had been simmering for more than a year when the state of Oklahoma approved the export of water from Sardis Lake to Oklahoma City. The tribes accused the state of depriving them of their water rights which the tribes have held for about 180 years. Specifically, the tribes claim that Governor Fallin and the OWRB erroneously based their water rights to the distant water on state law. However, the tribes argue that federal law governs cases of Indian water rights (Ellis 2011). Accordingly, the Chickasaw and Choctaw Nations oppose the export of water and ask the federal courts to

acknowledge that the tribes hold regulatory authority over water in southeastern Oklahoma under an 1830 treaty and to issue an order that stipulates that their water rights pre-empt state law (Miller 2012).

The impetus of the suit concerned the state's use of water resources on lands guaranteed by the 1830s removal treaties to each of the tribes. Subsequently, tribes have pursued legal actions and arguments to make their case. In *Choctaw Nation* (1970), the Supreme Court agreed that the Choctaw Nation enjoyed certain claims to the riverbed underlying portions of the Arkansas River in Oklahoma. Another primary legal argument that the tribes argue on their behalf concerns so-called state disclaimers. State disclaimers represent an old and important aspect of tribal-state history (Wilkins 1998). They have appeared immediately following the Revolutionary War. In the wake of the American victory against Great Britain, the federal government began to assert its plenary power over Indian affairs. One of the significant aspects of this attempt was to encourage states to extinguish their claims to Indian lands and resources as a way to ensure federal dominance of Indian affairs. An example of this concerns the Compact of 1802 in which Georgia agreed to give up all claims to Indian lands within the state to help establish the state's western boundary. In exchange for this concession, the federal government promised eventually to remove all tribes from Georgia. From time to time, similar arrangements were made with some of the other twelve original states (Prucha 1986).

As new states began to be added to the union, the same problem arose. However, as western territories became states, sometimes significant tribal communities existed within their boundaries. The tribes could not always be removed as they were in the case of Georgia. When states entered the Union, they were required to issue state disclaimers in which the states extinguished title to Indian lands upon entering statehood. In this way, new states forever disclaimed any right to regulate Indian lands, their people and resources. Each of these disclaimers differed, but most tended to reiterate these limitations on state regulation. These disclaimers were sometimes included as territorial pronouncements before a state was admitted. Other disclaimers were inserted into the enabling acts which paved the way for territories to become states. Still, other disclaimers were actually incorporated into various state constitutions. In the case of Oklahoma, Article I, Section 3 of the state constitution contains the wording:

The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any un-appropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

Though Governor Fallin has recently asked the tribes to withdraw their lawsuit against Oklahoma in order to allow for a mediation process, the leaders of the Choctaw and Chickasaw Nations argue that their nations hold substantial water rights protected by federal law and that such disclaimers deny the state of Oklahoma from using water resources on tribal land without their consent or compensation (McNutt and Knittle 2012). Such arguments seem logical and reasonable. However, the opposing view of the state concerns some of the vagaries of the U.S. Constitution. If these disclaimers give federal control over Indian affairs to the federal government, can the federal government not devolve these powers to regulate certain aspects of Indian Country back to the states if Congress so wishes? From time to time, Congress has enacted laws such as the McCarren Amendment in 1952 which limited the federal government's right to reserve water rights by waiving "its sovereign immunity in cases involving the general adjudication of water rights" (Bureau of Land Management 2012). The practical effect of this legislation was to strengthen state claims to regulate water, which in turn makes tribal claims on water more difficult to enforce if the claim to that right is based upon the supposition of federal control.

CONCLUSION

The efficient management of common pool resources like groundwater and freshwater lakes remains particularly important for the American Southwest and Oklahoma in particular. Drawing on the theoretical

frameworks of both the tragedy of the commons and the tragedy of the anti-commons, the study analyzes the impact of Oklahoma's water management approach and the subsequent role of the OWRB and offers a case study analysis of the water conflict surrounding Sardis Lake. Based on a combination of quantitative data provided by the OWRB and qualitative data from various newspaper archives and other related sources, the study argues that within the context of the tragedy of the commons the water management approach pursued by Oklahoma is likely to contribute to the tragic overuse of groundwater resources. Finally, from the perspective of the anti-commons, the involvement of large and opposing groups that operate within an environment of competing access rights to water undermine the emergence of an efficient water management regime for Sardis Lake.

In general, the findings support the propositions. Within the context of climate and precipitation patterns, an overwhelming majority of groundwater applications between 1990 and 2010 originated in the western part of Oklahoma. The Panhandle counties of Beaver, Cimarron, and especially Texas - the primary beneficiaries drawing from the Ogallala Aquifer - dominate. In addition to this regional focus of groundwater permits, many of the major aquifers have not been assessed in terms of their maximum annual yield. This inability to create permanent water permits has resulted in the issuance of a substantial number of temporary ones, thereby representing an additional and increasingly unpredictable pressure on groundwater aquifers across the state. In fact, between 1990 and 2010 temporary permits equaled or outnumbered regular permits, which is illustrative of a tragedy of the commons on our groundwater resources and indicates a lack of sound groundwater management planning for that part of the state.

Starting with the Flood Control Act of 1962, the purpose of Sardis Lake was to serve as flood control, recreation, and water supply. Though water did not fill the lake until 1980, the creation of this state-maintained lake immediately stirred controversy among the Choctaw Nation and on the issue of covering construction costs. Construction loan costs for Oklahoma were initially estimated at \$16.4 million. By 2007, however, that cost, because of lack of payment and compounded interest, increased to approximately \$38 million. Major flooding and storm disasters, droughts, as well as population growth in the 1980s

and 1990s, convinced Oklahoma City to sell water from Sardis Lake to Tarrant County in Texas. Accordingly, State Senator Gene Stipe introduced a state resolution, allowing OWRB to sell water from Sardis Lake to the North Texas Municipal Water District in 1993. As opposition to the sale of Sardis Lake water to Texas prevailed, several cities secured a piece of Sardis, including Oklahoma City, Norman, and Edmond. In doing so, these municipalities both agreed to obtain water rights by founding the Oklahoma Regional Water Utilities Trust and will ultimately have to spend \$1 billion to build the necessary infrastructure with a spending mechanism as yet undetermined.

In addition to these competing access rights, the establishment of an efficient common pool resource for Sardis Lake remains difficult. Within the broader context of the 1908 landmark case of *Winters v. United States*, ruling that Indian tribes located on federally created reservations are entitled to reserving water rights, the Choctaw, Chickasaw, and Caddo Nations filed a lawsuit over the export of water from Sardis Lake in southwestern Oklahoma to Oklahoma City. Pumping water out of Sardis Lake and transporting it to Oklahoma City, the Nations argued, deprived the tribes of their long-standing water rights. Specifically, the tribes claim that Oklahoma erroneously based on state law their water rights to distant water sources, thereby ignoring the supremacy of federal law and a disclaimer in the State Constitution that prevents Oklahoma from using tribal water resources. Because of the complex legal nature and the stakeholders' involvement in litigation, Sardis Lake represents a case of the anti-commons. This case, if water rights are clarified over time, could quickly revert to a tragedy of the commons. Any of these scenarios represent unsustainable uses of a common good or pool resource.

The policy discourse concerned with the sound institutional design and practices associated with the management of common-pool resources such as aquifers and freshwater lakes will become increasingly important in Oklahoma. Based on the findings, the basic trends are clear. The risk of entering a phase of the tragedy of the commons regarding the Ogallala Aquifer and the other major water bodies across the state is increasingly likely. Furthermore, the establishment of efficient common-pool resources remains difficult with respect to Sardis Lake due to competing interests and access rights. These challenges require the discovery of institutional arrangements that strike

a sound balance among management approaches, different interests, and environmental concerns. Possible policy responses include a more active involvement of the federal government promoting grants and incentives to state and private universities for desalinization efforts, dry farming, and other drought- resistance efforts. A reconsideration of Oklahoma's current water plan, which among others, was criticized for the top-down water resources planning process and the exclusion of tribal rights and claims to define water demands, represents another point of departure. Regardless of the policy avenue selected, the pursuit of discovering sound water management policies remains critical. Accordingly, future research should consider a systematic comparison of different water management approaches as well as the collection of additional data to substantiate further the regional overuse of aquifers across the state.

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"DOMESTIC TERRORISTS" VS. "BLACKMAILERS":
UNRESOLVED CONFLICT BETWEEN MUNICIPALITIES
AND RURAL WATER DISTRICTS

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While Congressional intent for rural aid was intended to create harmonious relations between both rural and urban communities, this case study reveals a situation in which ongoing zero-sum game resulting in court battles and millions of dollars in legal fees where one side benefits from federalism and the other from protracted court battles through breaking down "Made service available." More specifically, this study examines creative federalism and role in the *Rural Water Sewer and Solid Waste Management v. City of Guthrie* case study. Also, 79 rural water cases over the last 40 years are examined to determine relative outcomes. This case study is significant as it is not only a practical showcase of the expense both sides pay for this conflict over a natural resource, but also in a theoretical sense as it helps fill the gap in the literature regarding our understanding of conflict in intergovernmental relations, especially between two local entities focused on self-interested growth.¹

¹ I want to thank the editors and reviewers of *Oklahoma Politics* for their helpful comments and making this paper a better one.

On April 23, 1971, in room 318 of the Old Senate Building, Oklahoma's U.S. Senator Henry Bellmon sat in a subcommittee for Rural Development with Senator Hubert Humphrey serving as chairman. Senator Bellmon shared his views on the state of rural development in America. "...[T]here is not a subject confronting the Nation and the Senate," he said, "that will have greater impact on the future of our country than rural development" (Hearing 1971, 49).

The purpose of rural development, according to that subcommittee, is "to help create a nation of greater beauty, deeper satisfactions, and expanded opportunities for all Americans, now and in the future, both in urban and rural areas" (Hearing 1971, 28). As Subcommittee Chair Senator Hubert Humphrey stated, the Agricultural Act of 1970 set the subcommittee's mandate: "The Congress commits itself to a sound balance between rural and urban America" (pg. 1).

Humphrey's observation was derived from his vision of creative federalism; he felt people should have more power and, ideally, "this is made a reality when the government and the people team up and work together" (Garrettson 1993, 236). Creative federalism, a Great Society creation of President Lyndon Johnson, focused more on race and class, but also on the tension between municipalities and rural water districts nationwide.

This paper argues that the legacy of Creative Federalism's transformation into its more coercive form can be seen in the competition between rural and urban water interests fostered by federal preemption of state and local water policymaking authority. The ensuing clash between rural and urban water interests, in which both seek to maximize their self-interest, is illustrated well in the specific case of *Rural Water Sewer and Solid Waste Management v. City of Guthrie* (10th Cir., 2010) and, in general, through the examination of rural water cases in Federal court over the last 40 years.

This battle between municipalities and rural water districts is important for five reasons. First, water rights issues are critical to growing cities. Because of this, the National League of Cities (NLC), proposed

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legislation to remove the monopoly over water use jurisdiction enjoyed by rural water districts. Based on a resolution from the Oklahoma Municipal League (OML), the proposed legislation would amend §1926(b) of the Rural Development Loan Act, the source of jurisdictional protection that rural water districts nationwide claim. The resolution states in part: “municipalities are increasingly frustrated in their efforts to promote economic development on their borders when rural water districts gird municipalities with monopolies on water service” (National League of Cities Resolution 2009). Guthrie, Oklahoma is an example of this problem in development as the rural water jurisdiction surrounds the city limits, inhibiting growth potential of the city.

Second, between 1969 and 2011, more than 100 trials have pitted rural water districts and municipalities against each other.² These legal battles may also become more frequent as emerging exurbs³ bump up against rural water districts. These legal fights are often protracted as municipalities challenge whether “service is made available” by rural water districts. This statutory standard defines when rural water districts can claim jurisdiction instead of municipalities based on rural water’s preemption power under federal statutes (See also *Making Service Available: Breaking down of Preemption*).

Third, these sometimes protracted battles can be filled with animosity instead of the Congressional intent of harmony between the rural and urban. To illustrate, the hostility can be intense: prominent Tulsa attorney, who represents rural water districts⁴ nationwide, goes as far as to call municipalities “domestic terrorists” (Harris 2002, 1).

² Sometimes it is rural water versus other rural water districts or rural water versus counties.

³ The Brookings Institute defines Exurbs as “communities located on the urban fringe that have at least 20 percent of their workers commuting to jobs in an urbanized area.”

http://www.brookings.edu/reports/2006/10metropolitanpolicy_berube.aspx (accessed February 4, 2012). The “A Comprehensive Plan For the City of Guthrie, Oklahoma” (2002), states that 44 percent of Guthrie residents commute.

⁴ Rural water district are also known as “private water associations” or “special water districts” (Hounsel 2001). There is not an agreed upon definition of districts or associations such as this because some are public and others

What drives an otherwise responsible municipal government to engage in domestic terrorism by threatening to terminate the water supply to local citizens, putting the health, safety, and financial well-being of rural residents at risk?

But, the feeling seems to be mutual as Scott Hounsel (2001) in a *Texas Law Review* article claimed that rural water districts act like “blackmailers.”

... the monopoly power of section 1926(b) provider allows for a type of extortion or blackmail of a neighboring city for the transfer of water-service rights and, more importantly, the ability of an owner to develop land more intensely” (pg. 176).

In essence, rural water districts derive their preemption authority from federal legislation and their legal organization from the state,⁵ with municipalities empowered by their respective state constitution. In 2007, there were more than 1,000 rural water districts in Oklahoma, serving more than 10,000 residents each (Stoecker and Childers 2007).

Fourth, this local-local conflict ultimately depends on the U.S. Supreme Court for resolution because Congressional intent and its backing of federal preemption are often unclearly defined. This conflict over control of water has led to brutal court battles costing both rural water districts and municipalities hundreds of thousands of dollars in court costs and legal fees, with potential settlements in the millions of dollars.

Fifth, this protracted litigation illustrates the role of federalism in this unique local-local conflict over water. Water is becoming more of a concern as increased demands for water resources will create more

private. There are actually quasi-governmental as state statutes created these political subdivisions (Leshy 1983).

⁵ The Oklahoma state legislature created the Rural Water Districts Act in 1963 (OWRB 1980). It was established as a public nonprofit to provide for facilities and water for rural residents. By 1979, there were 400 such districts in Oklahoma.

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conflict between rural and urban settings and scholars should study in this area more (Matthews 2010).

BACKGROUND

Most municipalities and rural water entities are not in dispute as they have worked out “good neighbor” relationships through cooperative agreements (“U.S.C. 1926(b) – Solution of Last Resort” 2012). While there are more than 100 cases nationwide that have surfaced in local-local litigation, there were more than 1,000 rural water districts in Oklahoma in 2007 alone, serving more than 10,000 residents each (Stoecker and Childers 2007). The National Rural Water Association (NRWA) represents 28,353 utilities across America.⁶ In context, disputes are not involved in every relationship between rural water and municipalities, but they are in enough of them that often old local rivalries and political disagreements encourage this litigation and cost taxpayers millions of dollars (“U.S.C. 1926(b) -- Solution of Last Resort” 2012).

One major factor driving these disputes is a so-called “bright line rule.” Found (for example) in 7 USC §1926(b), this rule ensures rural water districts are protected against municipal encroachment in order to enable rural district compliance with federal water development loan repayment requirements. According to the National Rural Water Association (NRWA), this statute is important because it makes sure “small and rural communities would be able to repay loans.” This legislation prevents “any portion of a water system to be ‘forcibly’ annexed or ‘cherry picked’ by another system or municipality. Such annexation often results in the remaining customers being solely responsible for repayment of the loan, with fewer customers to share the burden, resulting in a higher cost (hardship) per customer and greater risk of default” (U.S.C. 1926(b) – Solution of Last Resort 2012).

A “bright line” is where Congressional intent is clear and a line not to be crossed is drawn by federal law. Where these conflicts result in legal disputes, courts generally side with rural water districts because they

⁶ National Rural Water Association (NRWA) website. 2012. <http://www.nrwa.org/about/about.aspx>. (Accessed September 7, 2012).

interpret 7 USC §1926(b) as providing preemptive position to repayment of rural water district indebtedness to the USDA. On the other side, municipalities have every incentive to keep the case in court in order to attempt to break down federal preemption by challenging whether rural water districts adequately have “made service available”—a standard set in the law as a pre-condition to establishing rural districts’ preemptive position.

Rural Water Sewer and Solid Waste Management v. City of Guthrie (10th Cir., 2010) is significant not only as a practical showcase of the expense both sides pay for these conflicts, but also in helping to fill the theoretical gap in the literature regarding our understanding of conflict in intergovernmental relations (Clovis 2006) where local jurisdictions derive their powers from both state and federal sources. One entity is the municipality, which is a creature of the state.⁷ The other entity is the rural water district (single purpose jurisdiction) often surrounding a municipality which, by statute, is a local public nonprofit.⁸

Preemption itself is often at the core of these federal-state conflicts, giving rural water districts an advantage in court as long as they can show they are “making service available” (See *Making Service Available: Breaking down of Preemption*). Fundamentally, Creative Federalism intended to create harmonious working relationships between rural and urban governmental entities as well between all levels of government (Garrettson 1993). This case study, involving a municipality and a rural water district, will show it has not done so in this instance, as this case has been mired in court battles that create animosity, not harmony as

⁷ Dillon’s rule holds that local governments are “creatures of the state” and can only undertake activities the state specifically authorizes. See *City of Clinton v. Cedar Rapids and Missouri River Railroad Co.*, 24 Iowa 455-475 (1868) in Judd and Swanstrom (2006).

⁸ Oklahoma Statutes. Title 82. Waters and Water Rights. Chapter 18. Rural Water, Sewer, Gas and Solid Waste Management Districts Act. § 1324.2. 1. "District" means a public nonprofit water district, a nonprofit sewer district, a public nonprofit natural gas distribution district or a nonprofit solid waste management district or a district for the operation of all or a combination of waterworks, sewage facilities, natural gas distribution facilities and solid waste management systems, created pursuant to this act," <http://bradley-ok.us/Water/managementact.html>.

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hoped for by Congressional intent, across the rural/urban and intergovernmental divides.

FEDERALISM

...two of the most difficult problems with which people in the United States must live. One is water, the other is federalism. Both are subjects of fiercely-held emotional attitudes.”⁹

Federalism is about relationships. Elazar (1990) notes the root word from which “federalism” originated—*Foedus*—suggests a covenant, or binding agreement. This state-federal relationship has shifted overtime. The Great Depression altered the balance from Dual Federalism to Cooperative Federalism, a strong national government in cooperating with all governmental levels to implement New Deal programs. Cooperative Federalism suggested that all levels of government would act cooperatively and jointly to resolve common problems, instead of creating separate individual policies (Kincaid 1990). After the Korean War, cooperation became of greater importance to deal with the changes in society, accommodating tensions in race, class, the affluent society as well as city-suburb and urban-rural and divisions (Kincaid 1990).

By the late 1960s, Lyndon B. Johnson's push for a Creative Federalism, a variant of Cooperative Federalism, established a new domestic emphasis on direct federal-local cooperation and on public-private partnerships. This type of federalism focused on national government channeling federal funds to local governments directly in order to deal with problems states could not, or would not assuage. Thus, the federal role expanded to work directly with sub-national local governments through (for example) categorical grants, bypassing the states (National Academy of Public Administration 2006).¹⁰

In 1971, under the Nixon Administration, the revenue sharing program was implemented, including—specifically—ensuring low-interest loans to rural water districts and for other rural needs. Kincaid (1990) argues,

⁹ Corker, Charles. E. quoted in Gerlak, Andrea. 2005, pg. 232.

¹⁰ These categorical grants had the effect of reallocating funds to attain precise functions through strict compliance with a limited range of criteria.

nevertheless, that over time the demand to enlarge national power changed Creative Federalism to what he critically names Coercive Federalism, in which the federal government diminishes reliance on fiscal tools to encourage intergovernmental policy cooperation and amplifies dependence on regulatory tools, such as preemption, to guarantee the supremacy of federal policy. In reaction to these national policy mandates the Reagan administration took a new direction, termed New Federalism, where restrictive categorical grants were transformed to block grants (Gerlak 2005).¹¹

FEDERAL PREEMPTION

Federal preemption is the termination of a state law when it specifically conflicts with Federal law (Hawkins 1992). Preemption has become a central feature of our federal system. Under the supremacy clause of the U.S. Constitution, without preemption the federal government would be a crippled giant; but, like everything else, too much of a good thing can be bad (Hawkins 1992: v). Basically, the doctrine of preemption says “state law is nullified to the extent that it actually conflicts with federal law” (O’Reilly 2006: 15). Conflict arises when “compliance with both federal and state regulations is a physical

¹¹ By the 1970s, there was a reaction to the increase in size of government and an increase in the perception of burdensome taxes-New Federalism. New Federalism gave these administrations new tools, such as revenue-sharing plans and the consolidation of federal aid programs into six revenue-sharing programs. The plan was to reassign responsibility, funds, and authority to states and local governments in an attempt to manage the intergovernmental grant system more efficiently. Although not completely successful, the Nixon initiative did raise the debate on the differing roles of various governmental levels (Gerlak 2005). Gerlak (2005) states that New Federalism is a political philosophy of devolution, which is a transfer of power from the federal government to that of the state. However, since the late 1970s, Shannon and Kee (1989) argue, the U.S. entered a new period of time they call “Competitive Federalism” with federal, state and local governments pitted against each other in a competitive struggle for taxpayer support and resources, which they see as actually a good outcome. In what Shannon and Kee (1989: 6) call a “fend for yourself fiscal environment,” different levels of government compete and acts as an equilibrium between Washington D.C. and state and local governments.

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impossibility.”¹² When it comes to local-local conflict, municipalities and rural water supporters fight over jurisdiction and service, backed up by states for the former and federal preemption with the latter, which undermines an even-playing field in competition for customers.

Municipalities also seek development opportunities, but do not have the same protection. This scenario is not unusual as federal preemption is the doctrine most used in Constitutional law (Gardbaum 1994). “The advocates of expanded preemption seem to regard states as distribution channels for federal dollars or as historical vestiges. Some advocates view the anti-preemption advocates as a reckless minority of guerrilla litigators” (O’Reilly 2006: 35). Alternatively, those against preemption say: “Each time a state law is preempted, an expression of democracy is extinguished. State legislatures find that they have less and less authority to respond to the needs and the demands of their constituents” (National Conference of State Legislatures 2006). “Federal preemption is a political choice, wrapped in a legal device and applied bluntly or subtly to win conflicts between large and small sovereign entities” (O’Reilly 2006: 206).

In the 1992 U.S. Advisory Commission on Intergovernmental Relations study on preemption, state officials acknowledged the importance of federal preemption, but articulated their concern about some of its outcomes. More specifically, federal courts “often imply federal preemption where there is no explicit statutory statement” (Hawkins 1992 p. iii). O’Reilly (2006) concurs. Scholars have noted that Congress often fails to express its actual intent in regards to preemption, especially when 535 people have different perspectives in a specific Congressional session. “Congress is rarely clear about the scope of what is preempted or how particular situations should be handled. Courts must decide what is preempted and this inevitably is an inquiry into congressional intent” (Chemerinsky 2008: 230). “The purpose of Congress is the ultimate touchstone in every preemption case”¹³ (Vladeck 2009). Wolfam and Stevick (2001) argued the concept of an express preemption defense has narrowed and is more defined, while

¹² See *Fidelity Federal Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 152 (1982), quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), in O’Reilly, pg. 15-16.

¹³ See also See *Altria Group*, 129 S. Ct. at 543.

conflict preemption has broadened because it is based on court interpretation. “The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.”¹⁴ Nonetheless, Vladeck (2009) argued since there is a lack of clarity on preemption issues, it is a serious problem for state legislatures and Congress in working to find common ground in the apportionment of regulatory power. Barbash and Keamen (1984), even report that former Supreme Court Justice Justice Blackmun once noted that a Congress member told him “that legislators purposely insert unintelligible language in a statute and let the court ‘tell us what we mean’ ” (pg A42).

Preemption fights blossomed throughout the 1980s up to the present as federal bureaucratic regulations have become more and more centralized (Zimmerman 1993; O’Reilly 2006). Since its founding, 53 percent of the 439 significant preemption statutes passed by Congress were created after 1969 (Hawkins 1992). Davis (2002) found federal preemption is on the increase and an accepted agency norm while those critical of preemption are the exception. It might not be surprising then that all the cases between rural water and municipalities have occurred since 1969.¹⁵

The saying: “Where you stand on it depends on where you sit” (O’Reilly 2006: 20) aptly illustrates how different people view the value of preemption in conflicts over water use. On the one hand, rural water districts and other utilities not only promote rural water development, but also these districts gain greater security for the loans the USDA makes to them.¹⁶ Those entities that are indebted with USDA rural development loans gain federal preemption protection as the courts interpret it in Title 7 U.S.C §1926(b).¹⁷ In *City of Madison v. Bear Creek*

¹⁴ See *Free v. Bland*, 369 U.S. 663, 666 (1962).

¹⁵ My research both online and in Westlaw.

¹⁶ See *Pittsburg County No. 7 v. City of McAlester and the McAlester Public Works Authority*, 358 F.3d at 715.

¹⁷ “The service provided or made available through any [indebted rural water] association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any

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Water Association, 816 F.2d 1057 (5th Cir. 1987) the Court ruled that §1926(b) preempted state and local law in order to protect the federal financial commitment. There are two interrelated goals for federal preemption in §1926(b):¹⁸ protecting rural water associations’ jurisdiction from competitors who might encroach on their territory; and 2) protecting the government’s financial interests by avoiding the reduction of water associations’ financial base needed to ensure loan payback. In addition, the intention of federal protection is also to support rural water development by enlarging the number of potential consumers in rural areas.¹⁹ Water associations, in this case, rural water Logan-1, maintain federal protection and backing through continued indebtedness to the USDA, according to statute, as long as they continue to “make service available” in the area of dispute.²⁰²¹

such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.”

7 U.S.C. § 1926(b) as quoted in *Rural Water Sewer and Solid Waste Management v. City of Guthrie*, (2010) OK 51 Case Number: 107468.

<http://law.justia.com/cases/oklahoma/supreme-court/2010/459740.html>.

¹⁸ 7 Section §1926(b)'s protection serves two goals. See *Pittsburg County*, 358 F.3d at 715. “First, it provides for: greater security for the federal loans made under the program ...By 'protecting the territory served by such an association[s] facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system,' § 1926 protects the financial interests of the United States, which is a secured creditor of the water association, from reduction of the water association's revenue base.” as quoted in *Rural Water Sewer and Solid Waste Management v. City of Guthrie*, (2010) OK 51 Case Number: 107468. <http://law.justia.com/cases/oklahoma/supreme-court/2010/459740.html>.

¹⁹ See *Rural Water Dist. No. 1, Ellsworth County v. City of Wilson*, 243 F.3d 1263, 1270, (10th Cir., 2001); *Scioto County Regional Water Dist. No. 1 v. Scioto Water Inc.*, 103 F.3d 38, 40 (6th Cir. 1996).

²⁰ See *Moongate Water v. Dona Ana Mut. Domestic Water Consumers Ass'n*, (10th Cir., 2005) 420 F.3d at 1084.

²¹ This does not mean the whole disputed area, but only when Logan County Rural Water specifically has a right under state law to provide service and in the past has done so, or can do so in a reasonable time. See *Sequoyab County*, 191 F.3d at 1201-03.

Federal law preemption for water districts, indebted through USDA loans, is important to the agency in two ways: 1) to secure repayment of the federal debt; and 2) reduce the cost of service by expanding the number of customers. In fact, in *North Alamo Water Supply Corporation v. City of San Juan, Texas*, 90 F.3d 910 (5th Cir. 1996) the Court opined: “The service area of a federally indebted water association is sacrosanct. . . . The statute should be liberally interpreted to protect . . . rural water associations from municipal encroachment.”

The purpose of rural development, according to the Congressional subcommittee hearing on rural development in April 1971 is “to help create a nation of greater beauty, deeper satisfactions, and expanded opportunities for all Americans, now and in the future, both in urban and rural areas” (Hearing before the Subcommittee on Rural Development 1971: 28). Rural Development Subcommittee chair Senator Hubert Humphrey stated the Agricultural Act of 1970 set the subcommittee’s mandate: “The Congress commits itself to a sound balance between rural and urban America” (pg. 1). Later in the subcommittee report, he went further: “Rural and urban communities should no longer siphon off one another’s strengths and resources nor shunt problems and burdens from one to the other. They would progress together in a dynamic balance, as partners in the best sense” (pg 48). Oklahoma Senator Bellmon added: “...there is no subject confronting the Nation and the Senate that will have greater impact on the future of our country than rural development” (Hearing before the Subcommittee on Rural Development 1971: 49).

Yet this Congressional intent of harmonization between rural water districts has been undermined by the fact federal conflict preemption pits two competing entities favoring two different policies. Lowi (1972; Dye 1990) designated municipal and rural water policy goals as developmental, while the federal government’s policy is also developmental, but with different objectives. Developmental policies focus on the economic well-being of the community.

CASE STUDY ²²

Rural Water Sewer and Solid Waste Management v. City of Guthrie (10th Cir., 2010) illustrates these aspects of Federalism. The conflict between the Logan County Rural Water District and the City of Guthrie examines the “what” and “how” in understanding the role federal preemption plays in the conflict over water in Oklahoma. First, the *Rural Water Sewer and Solid Waste Management v. City of Guthrie* is examined in a series of court trials, from The Logan County District Court through to the Oklahoma State Supreme Court and the U.S. Federal 10th Circuit Court of Appeals.²³ Then 79 trials, representing 60 cases representing court cases between rural water districts and municipalities are reviewed to establish patterns and broaden our understanding of the research question, specifically on why cases become protracted with lengthy appeals (See Table 1).

CASE STUDY HISTORICAL BACKGROUND

Since 1961, when "Congress amended the Consolidated Farm and Rural Development Act (7 U.S.C. §§ 1921-2009n) to allow nonprofit

²² Yin (1994: 23) describes a case study as a question that empirically examines a current and observable occurrence “within its real-life context.” Case studies are useful when the distinctions between the context and the phenomenon itself are not essentially clear and use more than one source of evidence to examine it. Yin (1994) argues that while it is generally appropriate to say that a case study is generalizable to a larger population, this assumes that it was taken from a random sample of cases, which has been selected from a larger universe of cases. Yin (1994) argues, however, it is false to say that a case study is only a single case study as if it were a single respondent. Sake (1995) argues further for a different way of looking at case studies in which they are centered on a more intuitive, empirically-grounded generalization. He calls it “naturalistic” generalization. This type of generalization is based on the congruent association linking the case study and the reader’s understanding. Sake (1995) argues that the data produced by a case study would often reverberate experientially with a wide range of readers, thereby making it possible for a greater comprehension of the case at hand. Therefore, this case study, I argue, is naturalistically generalizable to a larger population.

²³ A single-site case study creates within a single case a multitude of in-case “observations” which often reflect on interactions, social relations, actions, organizational practices, etc. See Yanow & Freitas 2008.

water associations to borrow federal funds for the conservation, development, use, and control of water . . . primarily serving . . . rural residents"²⁴ rural water districts have had access to the United States Department of Agriculture (USDA)²⁵ loans. A subunit of the USDA, called the Rural Utilities Service (RUS)'s Water and Waste Disposal Direct and Guaranteed Loans²⁶, provides loans to rural entities, such as rural water districts not exceeding 40 years in length and not exceeding 5 percent interest. In fiscal year 2010, approximately \$1 billion was loaned to those who qualify in rural areas (Cowen 2010).

Recently, Congress showed its support for such rural programs when it rebuffed an amendment by Oklahoma Senator Tom Coburn to reduce rural development programs by \$1 billion—his amendment failed 13 to 85 (Casteel 2011). While Oklahoma's Senator Jim Inhofe backed Coburn's amendment, he was critical because it would undermine the ability for rural areas to keep up with federal wastewater and drinking water standards. Senator Inhofe remarked:

I support the overall goal of the amendment to reduce federal spending on duplicative or unnecessary federal programs. However, I would have preferred a more tactical approach that did not include cutting important rural loans that are paid back to the federal government.

The Rural Water, Logan-1 Board attained its first of several rural water loans in 1976, planting the seeds of conflict with the City of Guthrie.

²⁴ See *Moongate Water Co. v. Dona Ana Mut. Domestic Water Consumers Ass'n*, 420 F.3d 1082, 1084 (10th Cir., 2005)(quoting 7 U.S.C. § 1926(a)(1)).

²⁵ *Rural Water Sewer and Solid Waste Management v. City of Guthrie*, (2010) OK 51 Case Number: 107468 State Supreme Court.

<http://law.justia.com/cases/oklahoma/supreme-court/2010/459740.html>

²⁶ The Rural Utilities Service (RUS) is one of its operating units. The RDA was replaced by the Office of Rural Development following the USDA reorganization in 1994 authorized by P.L. 103-354 and yet again with the Federal Agriculture Improvement and Reform Act of 1996 (P.L. 104-127), which increased loan amounts and eligibility to more than 10,000 in population. The RUS program “supports construction and improvements to rural community water systems unable to get reasonable credit in the private market” (Cowan 2010: 33).

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The City of Guthrie is a historic city, Oklahoma’s first capital,²⁷ and serves as an exurb to the Oklahoma City Metro area. Developers see exurbs as attractive places to live (Foreman 2005). In addition, developers often look to the outskirts of town because it is cheaper to develop than in the city itself and more accessible.²⁸

According to Glenn Hayes, Guthrie city manager at the time of the initial lawsuit in 2005, Guthrie planned to extend a water line down Division Street toward the edge of the town to supply water to two developments in the area. The project had been in the works since 2002 – prior to his tenure as the city manager. On June 1, 2004, the Guthrie City Council approved this water line extension project’s funding, which was one of four developmental infrastructure projects (worth \$2.6 million) bundled into one loan project. The project was submitted to the Oklahoma Water Resources Board²⁹ and in process prior to Hayes’ knowledge of the water line’s encroachment into Logan County Rural Water district’s territory. The city manager thought, at the time, the water lines were still within city limits.³⁰ In reality, the water district’s territory stayed the same even though the city’s borders expanded with the annexation of land south of town in to the rural water district’s territory in 1972 (See Appendix 1).³¹ The line itself cost \$155,000, according to Wanda Calvert, Guthrie city clerk.³²

²⁷ See Franks and Lambert. 1997.

²⁸ See “How important is Location When Buying a Home?” 2011. Real Estate Home Edition. <http://www.immrc.org/tag/outskirts-of-town> (accessed February 8, 2012).

²⁹ While the loan package went to the Oklahoma Water Resources Board (OWRB), it was a pass through to access the Drinking Water State Revolving Fund (DWSRF) loan program funds. Guthrie Public Works Authority Minutes, June 1, 2004. More specifically, the OWRB Financial Assistance Division manages two loan programs, providing federal Clean Water Act (CWA) and Drinking Water Act (DWA) funds for community wastewater and water treatment/distribution projects.

See <http://www.owrb.ok.gov/about/divisions/fa/fa1.php>

³⁰ Hayes, Glenn. March 6, 2006. Legal Deposition. *The Rural Water Sewer and Solid Waste Management v. City of Guthrie*.

³¹ Ibid.

³² Calvert, Wanda. 2011. Interview. October 25.

The water line extension happened in the first place through discussions in his office between Hayes and two developers to see if the development was in process. Both Jim McBride, representing the Mission Hills development, and Barry Cogburn, for the Pleasant Hills development, noted in their legal depositions they likely would not have developed if they did not have access to city water. Neither of them had approached the Logan County Rural Water District because no one realized the two proposed developments were actually in Logan County Rural Water's jurisdiction.³³

In 2005, the Rural Water, Logan-1 Board sued the City of Guthrie, asserting the City had encroached on Logan-1's service area. This encroachment infringed on the water district's service area as stipulated in § 1926(b), which protects it from competition when indebted to the USDA.³⁴ ³⁵ The former Guthrie City Manager Glenn Hayes said the city extended water lines [into Rural Water territory] with the "intent for extending the infrastructure south ... to promote growth."³⁶

In 2010, the Oklahoma State Supreme Court, while not deciding whether Guthrie was right or wrong in supplying water to Pleasant Hills Development, did hold that Article 5, section 51 of the Oklahoma Constitution is not violated when a rural water district obtains a loan

³³ See Barry Cogburn December 15, 2005 and Jim McBride June 8, 2006 depositions.

³⁴ The terms of §1926(b) loan agreements had also been authorized by the Oklahoma Legislature pursuant to title 82, section 1324.10(A)(4). See *Rural Water Sys. No. 1 v. City of Sioux Ctr.*, 967 F.Supp. 1483, 1529 (1997), *Sequoyah County Rural Water District No. 7 v. Town of Muldrow* and *Muldrow Public Works Authority* 191 F.3d at 1202, 1202 n.8, 1203, & 1204 n.10).

³⁵ There are actually two Guthrie cases, one on the state level and another on the federal level. Carrie Vaughn, lawyer with Williams, Loving, and Davies in Oklahoma City, represented Guthrie on the state-level case; it started in 2008 in the State District Court of Logan County. In this case, the City of Guthrie won a summary judgment. The important outcomes of the case stipulated whether it was an "essential facility." The Court agreed with Guthrie that it was not an "essential facility," therefore, was not forced to sell water to the Logan County Rural Water district.

³⁶ Hayes, Glenn. March 6, 2006. Legal Deposition. *The Rural Water Sewer and Solid Waste Management v. City of Guthrie*.

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under §1926(b).³⁷ In 2011, the case made it to the 10th Circuit Court of Appeals, where the court noted it would not specifically address the explicit protection of areas currently not served by the water district and where there was no current request for water.³⁸

In June, 2011, the 10th Circuit Court of Appeals dealt with two questions: 1) whether Article 5, Section 51 of the Oklahoma Constitution prevented a rural water district from entering into or enforcing loan agreements that contain protection from competition by other water districts; and 2) whether there was a “police power” or “public safety” exception in the same state Constitutional provision “against exclusive rights, privileges, or immunities” that would validate a rural water district’s loan agreement that included protection from competition during the term of the contract.³⁹ The Circuit Court held in favor of the Rural Water, Logan-1 argument that Article 5, Section 51 has not violated or contradicted its right to a USDA loan, but also that the Oklahoma State Legislature did not grant an exclusive right or franchise to rural water either, which made conflict preemption stand. The 10th Circuit Court of Appeals remanded the case back to the district court to determine what the federal law required for water service, and whether Logan County Rural Water was compliant in their service.⁴⁰

³⁷ Article 5, section 51 of the Oklahoma Constitution says specifically, “Exclusive Rights, Privileges or Immunities. The Legislature shall pass no law granting to any association, corporation, or individual any exclusive rights, privileges, or immunities within this State.”

³⁸ See *Moongate Water Co. v. Dona Ana Mut. Domestic Water Consumers Association*, 420 F.3d 1082, 1089-90 (10th Cir., 2005). Future customers do not factor in because there is not an immediate conflict with them. There needs to be a development plan in the works.

³⁹ See *Rural Water Sewer and Solid Waste Management v. City of Guthrie*, (10th Cir., 2010). No. 107,468. June 29, 2010.

⁴⁰ Court remanded the case back to the district court for further proceedings with respect to what the federal law requires in terms of water service, and for findings on the degree to which Plaintiff was compliant in terms of its service to the City.

MAXIMIZING SELF INTEREST

For Guthrie, this meant extending their infrastructure in hopes that developers would build, bringing in more citizens who would, in turn, buy products and produce sales taxes as revenue in town. Logan County Rural Water district, no. 1, had developmental goals, too; they were trying to extend their lines to ongoing development in their jurisdiction. These two development-directed policy goals created conflict (Dye 1990) as each side tried to maximize their advantage and achieve what was in their own self-interest.

Logan county rural water districts have the ability to develop north and surrounding the northern boundaries of Guthrie, but the city does not have room to develop (See Appendix 1). The rural water district and municipal goals are both oppositional because they are focused on mutually exclusive goals to develop for themselves in the framework of a federalism that fosters conflict, not consensus or competition. Federal preemption places a bias toward rural water districts in order for those entities to pay back their loans.

This maximizing of self-interest, in this case, helps facilitate conflict because of differing policy goals and ambiguous Congressional intent. Deutsch (1972) finds that the most destructive conflicts happen when behavior is created through competitive systems based on self-interest. Matthews (2010) argues that conflicts flare because of the self-interested approach stakeholders have toward their rights.

On top of this, the lawyers in the case have incentives to maximize their interests as well—dragging out court cases means more legal fees. For example, Jim Milton, lawyer from Doerner, Saunders, Daniel & Anderson, L.L.P., said Logan County Rural Water litigation cost estimates were \$337,000 for the rural water lawyer; and at the same time, \$350,000 for Guthrie’s state-level case, according to Carrie Vaughn, lawyer with Lester, Loving, and Davies in Oklahoma City representing Guthrie.⁴¹ Jim Milton estimated the federal case litigation cost Guthrie \$800,000.⁴² Actually, Guthrie will not pay the nearly one

⁴¹ Kerry Vaughn interview. October 21, 2011.

⁴² Jim Milton interview. October 21, 2011.

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million dollars in court costs and attorney fees, instead the City’s legal costs were covered by their liability insurers, the Oklahoma Municipal Assurance Group (OMAG).⁴³ While there is no empirical proof that these cases were extended because of legal incentives to do so, it makes logical sense as more court and arbitration appearances means more money for lawyers who are maximizing their utility⁴⁴. And, by defending the City of Guthrie, OMAG may (possibly) defer future liability in other cities with a win in court for the municipality, thereby, maximizing their utility over time.

MAKING SERVICE AVAILABLE: Breaking Down of Preemption

When courts side with rural water districts they usually win, automatically. This results because of the “bright line” rule, and therefore, conflict preemption, which was reinforced in §1926(b) cases through *City of Madison, Miss v. Bear Creek Water Assn, Inc., 1987*. The case says specifically, “A bright-line rule which prohibits condemnation throughout the FmHA loan term at least creates certainty for the municipal planner and the rural water authority, even if it limits the municipality's options.”⁴⁵

However, 7 USC §1926(b) states:

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor

⁴³ OMAG’s mission is “risk financing and loss prevention service provider for Oklahoma municipalities.” OMAG website: “Mission.”

<http://www.omag.org/> (accessed November 14, 2011).

⁴⁴ Each side has met at least 4 times through the arbitration process without success, according to an interview with Guthrie City Manager, Matt Mueller.

⁴⁵ See *City of Madison, Miss v. Bear Creek Water Assn, Inc.*, 816 F.2d 1057 (5th Cir.1987) in Steve Harris. “1926(b) - What is it? How can it help your water district?” www.ruralwater.org/sec1926b/harrisa.txt (accessed September 25, 2011).

shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.⁴⁶

Since it is unclear what “service provided or made available” means by Congressional intent, the courts have been left to define it. More specifically, according to 7 U.S.C. §1926(b), preemption applies to protect: 1) water or sewer system indebtedness to USDA; 2) customers actually served, and 3) areas where service is “Made Available.” The phrase “Made Available” in the statute though is undefined. The Courts have come up with two main considerations: 1) “Pipes in the Ground” or Physical Ability to Serve (Proximity, Timing, Cost); and 2) Legal Right or Legal Duty to Serve as defined by the correct boundaries and a designated service area or Certificates of Convenience and Necessity (CCN).⁴⁷ Nevertheless, the mere possession of a CCN is not enough; the protection is limited to areas where: 1) the rural water district is already providing service or presently has the physical means to serve;⁴⁸ and they are “within or adjacent to”⁴⁹ 2) unreasonable costs or delays are a factor in making service available;⁵⁰ 3) the sewer loan does not actually protect the water system and its customers;⁵¹ 4) a pre-existing service encroachment is not abruptly alleviated by closing on federal loan;⁵² and 5) there was an inadequate infrastructure and “unfulfilled intent” to provide the service necessary.⁵³

⁴⁶ 7 U.S.C. §1926(b), August 8, 1961.

⁴⁷ To obtain a CCN a utility must show it possess the financial, managerial, and technical capabilities to supply constant and sufficient service and that they are competent to operate water and sewer facilities in compliance with applicable state and federal regulatory requirements. (See Rogers 2004).

⁴⁸ See *Creedmoor-Maha v. TCEQ* 307 SW3d 505 (Tex. 3rd Cir., 2010).

⁴⁹ See *Lexington-South Elkhorn Water Dist. V. City of Wilmore*, Kyl., 93 F. 3d 230(6th Cir., 1996).

⁵⁰ See *Rural Water Dist. No. 1 v. City of Wilson, Kansas*. (10th Cir., 2001).

⁵¹ See *PWS Dist No. 3 Laclede Co.*(8th Cir., 2010).

⁵² Ibid.

⁵³ See *Bell Arthur Water Corp. v. Greenville Utility Commission*, 173 F. 3d 517 (4th Cir., 1999).

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In the *Rural Water Sewer and Solid Waste Management v. City of Guthrie* (10th Cir., 2010), the 10th Circuit Court of Appeals was not persuaded by the argument fire protection should be considered as to whether service is being made available, as the Court held that "Logan-1 was not legally obligated to provide fire protection." The City of Guthrie argued that while there are administrative regulations pertaining to water and fire protection, two different administrative rules apply. One rule addresses a "[w]ater main design for all systems providing fire protection."⁵⁴ While the other rule addresses, "[w]ater main design for systems providing domestic water only," which "applies only to water systems without full fire protection capabilities."⁵⁵ The Court noted that these two regulations apparently foresee that some water systems will provide fire protection service; it rejects Guthrie's arguments on the need for Logan-1 to provide fire protection. Jim Milton, City of Guthrie's lawyer, has petitioned, on the behalf of the City of Guthrie, to the 10th Circuit Court of Appeals for a Petition for rehearing *En Banc*, arguing that because of a subsequent decision in *Eudora*, (see discussion below), fire protection should indeed be considered.⁵⁶ If the case does not obtain a rehearing with new facts, either side is expected to appeal to the U.S. Supreme Court to finally resolve the issue at hand—the first case to be heard there involving a municipal-rural water conflict (if the appeal is accepted). Still to be decided is whether the City of Guthrie had the right to sell water to the developments in 2003 and beyond.

Recently, the September 2011, *Rural Water Dist. No. 4 v. City of Eudora* (10th Circuit 2011) case clarified the relevance of fire protection as an issue in these water jurisdiction conflicts. The 10th Circuit Court of Appeals reaffirmed that the rural water district must: 1) establish that it made service available before the allegedly encroaching association began providing service; 2) and that it must demonstrate that it has adequate facilities within or "adjacent to the area" to provide service to the area within a reasonable time after a request for service is made. However, the 10th Circuit Court also held the rural water district is not required to prove that its charges for providing service are reasonable.

⁵⁴ Okla. Admin. Code 252:626-19-3

⁵⁵ Okla. Admin. Code 252:626-19-4

⁵⁶ Milton, James. 2011. Petition for Rehearing *En Banc* and Alternative Petition for Plane Rehearing by Defendants-Counterclaimants-Third-Party Plaintiffs-Appellants City of Guthrie and The Guthrie Public Works Authority."

Instead, the allegedly encroaching municipality must prove that the rural water district's costs of services are unreasonable, excessive, and confiscatory in order to escape Section §1926(b) protection on this basis. The 10th Circuit Court of Appeals also took a significant step back from its prior holdings that fire protection is irrelevant in §1926(b) cases. The Court determined that fire protection services may be considered on the issue of whether the rural water district's charges for providing water service are unreasonable, excessive, and confiscatory. According to the reasoning in *Eudora*,

Of course, at no time does a water district's decision to provide or forgo fire-protection services affect its ability to establish that it has sufficient 'pipes in the ground' to make service available, and it is up to the party challenging the water district's §1926(b) protection to prove that the water district's costs are unreasonable, excessive, and confiscatory. Moreover, costs must be examined individually for each property. Thus, the relationship between fire-protection services and costs is highly context-specific.⁵⁷

RURAL WATER CASES NATIONWIDE

In a review of 79 trials nationwide, representing 60 rural water versus municipalities cases specifically, rural water districts won 68 percent of the time (41 out of 60 cases). They seem to win because of the aforementioned “bright line” rule. Cases in the late 1980s though, starting with *City of Madison* (1987), broke down the “bright line” rule. Jim Milton, Guthrie’s lawyer in the *Rural Water Sewer and Solid Waste Management v. City of Guthrie* (10th Cir., 2010) said, “We managed to convince the 10th Circuit Court of Appeal’s panel to reject what the court said was a ‘ritualistic or bright line approach in determining a district's exclusive right to serve customers within its geographical boundaries.’” Milton said that this ruling at least gave his side a ‘toe

⁵⁷ In *Eudora*, the justices also found that a city's annexation of territory, by itself, does not cause curtailment under §1926(b).

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hold’ in pulling the protection back.”⁵⁸ Protection breaks down when municipalities can show either the rural water district does not have jurisdiction or they cannot show “service was made available.”⁵⁹ For example, in *Eudora*, the municipalities successfully showed that fire protection could be considered as to whether service is being made available and Jim Milton noted that this would be used on appeal in the *Guthrie* case.⁶⁰

In examining protracted, or prolonged, cases with several trials heard on the Federal Appellate level over the course of several years, cities appear to have incentives to prolong cases because of their ability to win rises. In 11 protracted cases examined,⁶¹ two of which split their decisions, only 38.4 percent favor the rural water district, which is nearly half the likelihood of winning against municipalities when examining the 79 cases (See Table 1). This is important because as expected, the rural water districts using federal preemption win most of the time. However, when the municipality, county, or developer was able to show that the district did not actually “make service available,” the “the bright line” rule breaks down, lengthening the case. Lawyers also benefit from such a system. Consequently, it makes sense to actors to prolong conflict, especially for municipalities in an effort to even the playing field as municipalities focus on breaking down “making service available.” The latest tactic by municipalities is arguing that rural areas

⁵⁸ Milton, Jim. Email correspondence. September 28, 2011. Doerner, Saunders, Daniel & Anderson, L.L.P, Tulsa, Oklahoma.

⁵⁹ “In order to prevail on a § 1926(b) claim, the water association claiming protection must establish the following three elements(1) it is an ‘association’ within the meaning of the Act, (2) it is indebted to the Department of Agriculture (formerly Farmers Home Administration, now RECDs), and (3) it has provided or made service available to the disputed area.”See *Village of Grafton, King, Ltd. v. Rural Lorain County Water Authority et.al.* 419 F.3d 562 (2005).

⁶⁰ See *Rural Water Dist. No. 4 v. City of Eudora* (10th Circuit 2011).

⁶¹ Cases: *Scioto* (1996) 6th Circuit; *Rural Water Dis 1 Ellsworth* (2001)10th Circuit; *Rural Water Sioux* (2000) 8th Circuit; *View Caps* (1983; 84) Texas; *Bell Arthur* (1999) 4th Circuit; *City of Madison*(1987)5th Circuit; *Glenpool* (1988;92) 10th Circuit; *Le Ax* (2003) 6th Circuit; *Melissa* (2001; 2004) Texas; *Moongate* (2002) 10th Circuit; *Pittsburg* (00;03;03;04) 10th Circuit.

do not provide adequate fire service because fire vehicles are not able to access fire hydrants with enough water pressure.⁶²

Table 1: Cases by Winner

CASES (67)	Municipality	Rural Water	Landowner	Second Utility	County	Total n
All cases (n)	19	41	4	8	7	79
Percentage	28%	61%	5.9	11%	10.4%	100%
Only Municipalities and Rural Water (n)	19	41				60
Percentage	32%	68%				100%
Protracted cases only (n)	5	5	0	2	1	13
Percentage	38.4%	38.4%	0	15.3%	7.6%	110%
Protracted cases (Municipalities & Rural water) (n)	5	5				10
Percentage	50%	50%				100%

DISCUSSION

Federalism, especially the emphasis on its fiscal dimensions, involves questions regarding what the optimal distribution of authority (centralized or decentralized) is. It is argued here that when the federal government takes the lead, it tends to give a higher value to the equality of public goods, especially for minority groups—in this case, the rural communities. Conversely, scholars who proffer a more decentralized arrangement argue in favor of allowing some local variation because those on the local level possess a better understanding of their individual preferences and potential alternatives, therefore providing a

⁶² Interview of Matt Mueller, Guthrie City Manager.

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better service to their customers than in a more centralized system (Smith 2011).⁶³

In an economic sense, Blight and Shafto (1989: 63-64) suggest that consumers themselves are rational beings and essentially seek to maximize their self-interest and their short-term economic interests are satisfied in the marketplace through buying “competing economic goods in such a way that the highest possible level of utility is achieved.” Bakker (2003) ⁶⁴argued, however, water itself is hard to define and commodify. It can be treated as either an economic good (private good) or a public good.⁶⁵ Throughout much of the 19th and 20th centuries water was treated as a public good, but has more and more been classified as a private good in the marketplace where utility is maximized (Kaika 2005). *Comanche County Rural Water Dist. No. 1 v. City of Lawton*, stated water is a public good when sold by a city within its city limits, but a private good when sold by a city outside its city limits. Therefore, water outside of a city is subject to competition from other providers which seek development opportunities to maximize their utility.

Some economists assume resources are public goods when they are shared for the benefits of a collection of users (Feldman 1986:141). Feldman argues in favor of the possibility of an assorted collection of decision-makers assembled much like public service utilities, each of which possesses a sizeable degree of independence (pg. 142). Citizens cooperate through the trade of services as well as goods in structured markets, where such collaboration indicates a reciprocal gain (Buchanan and Gordon Tullock 1962). Federalism is portrayed with both positive

⁶³ Granting powers to factions that share preferences for a public service may also enhance efficiency by allowing these factions to create artificially-scarce goods at costs borne only by them (Olson 1969).

⁶⁴ See *Comanche County Rural Water Dist. No. 1 v. City of Lawton*, 1972. OK 117, 501 P.2d 490, 493

⁶⁵ This is because as Bakker (2003) articulated water supply is a “natural monopoly.” It is a natural monopoly because the initial infrastructure costs ensure the biggest supplier in a market, often the first supplier in a market. Therefore, this supplier has an overpowering cost advantage over other actual and potential contenders competing for a market share. Therefore, Bakker (2003) found there was only one market seller.

and negative attributes, demonstrated in the organizational behaviors which, depending on the perspective, “lead to tensions among different levels and entities of government” (Clovis 2006: 9). Clovis is pointing out that each level of government, like individuals, competes for resources to maximize their utility. As Milton Friedman once wrote: “One man's opportunism is another man's statesmanship” (Friedman 1975). Accordingly, competition is essential to increase efficiency and, therefore, not a bad thing. This means that the type of federalism seen in this case study might break down because there really is no competition between the municipality and rural water when Logan, District no. 1 is indebted to the federal government for a rural water loan. In fact, rural water acts like a monopoly under section §1926(b) when protection lasts “during the term” of the loan only (See 7 U.S.C. §1926(b) (1994). Harris (2002) noted rural residents are obligated to sue their local water district for failure to seek damages for a municipal violation of §1926 (b).⁶⁶ And, it makes sense to game the system by not paying off the loan early (or to sell their jurisdiction to a municipality). Rural water districts, thus, find ways to gain advantages for their development over that of others.

Because 1926(b) protection expires when the note is paid (and if no other debt to FmHA exists), it is a good strategy for rural water districts not to pay off their notes any earlier than necessary. The interest expense is a small price to pay for the protection the statute provides. It is also a good reason to apply for another loan (FmHA/RUS) well in advance of the existing loan reaching maturity (p. 12).

Logan County Rural Water district, no. 1 manager Robert Thompson was asked in a deposition: “Was one of the reasons why you wanted that funding was to obtain this federal protection?” in the Logan County Rural Water case, and his answer was “Well, to maintain it, yes, keep it.”⁶⁷ Therefore, in keeping the federal loan, the water district maximizes its organization’s utility.

⁶⁶ (See also *Wayne v. Village of Sebring* 1994).

⁶⁷ Thompson, Robert May 25, 2006. Legal Deposition. *The Rural Water Sewer and Solid Waste Management v. City of Guthrie*.

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In this case there are several participants: 1) Rural Water Board representing the Rural Water District, no. 1 (as well as USDA; Congress) vs. 2) Municipalities (builders and developers). Each party tends to maximize their utility and is self-interested, leading these parties to exploit opportunities to help themselves in the short run. This is similar to Conlan's (2010) idea that, in this way, actors are encouraged to pursue their individual interests over that of the larger community. For example, the Logan County Rural Water District's manager stated in a deposition during the case that his Logan County Rural Water board members are a lot like shareholders in a company where profit is paramount and typically a sole concern.⁶⁸ Furthermore, Congress, while not always clear on how to go about obtaining a harmonization between rural and urban communities, makes it clear that it needs to be paid back.⁶⁹ The municipality also looked at it in self-interested terms.

Conflict occurs when ambiguity of the law is high because of lack of agreement on a set of goals (in this case, by Congress). As discussed before, while Congressional intent supports rural development, there is also Congressional intent to harmonize rural-urban relationships. Conflict preemption means the courts tussle with the unwritten Congressional intent and generally side with rural water districts because the federal government prioritizes that it has to be paid back. In addition, policy conflict exists when organizations view policies as acting directly on their direct interests and when the organizations have incompatible views (Mosier 2007). Actually, Mosier (2007) argues that ambiguity in itself should not be seen as a flaw in policy because such ambiguity can ease agreement. This ambiguity can create opportunity to learn new goals. Then again, ambiguity coupled with incompatible goals, can create miscommunication and conflict.

⁶⁸ Ibid.

⁶⁹ "(1) to encourage rural water development by expanding the number of potential users, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of federally indebted water associations by protecting them from expansion by nearby municipalities." See, e.g., 93 F.3d at 233 (citing *Madison*, 816 F.2d at 1060, in turn citing S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.Code Cong. & Admin. News 2243, 2309).

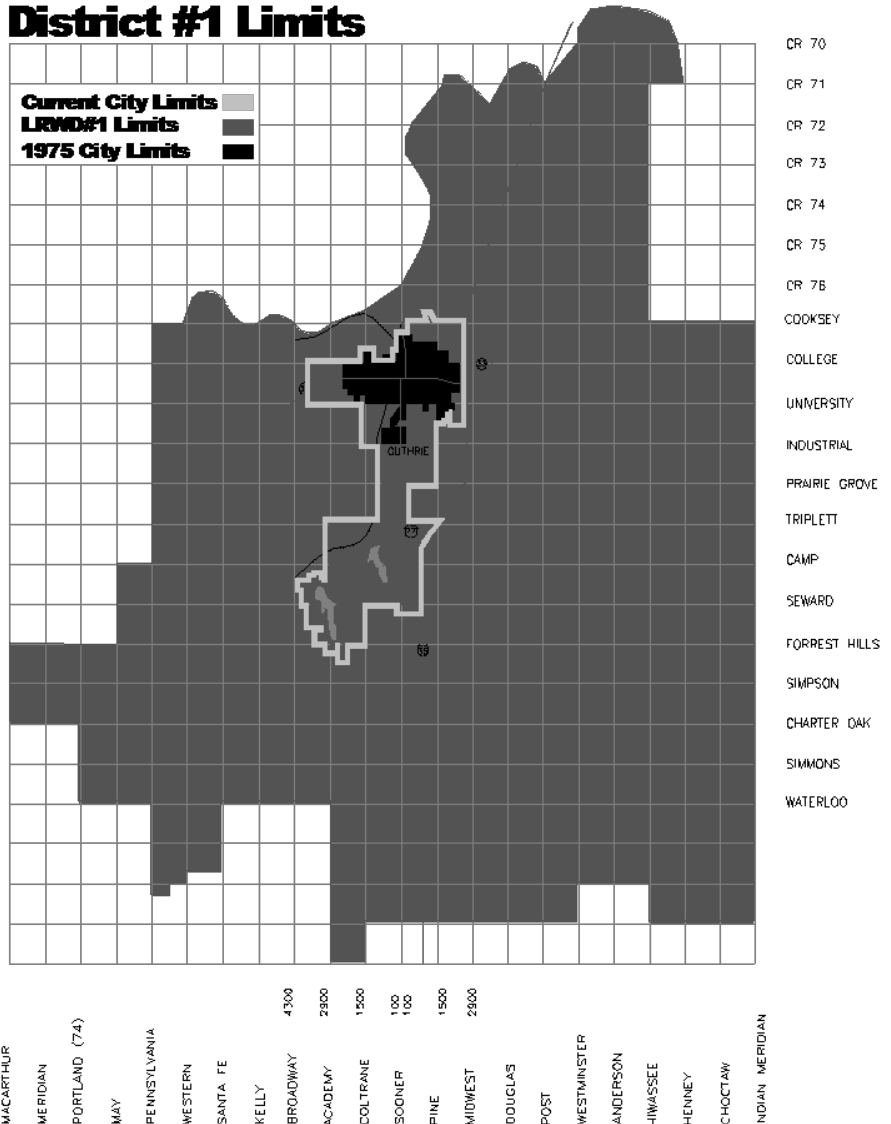
CONCLUSION

This case study, exploring *Rural Water Sewer and Solid Waste Management v. City of Guthrie* (10th Cir., 2010), illustrates both maximizing self-interest by all parties involved and high ambiguity as to the congressional intent—creating conflict in courts. By utilizing the hammer of federal preemption as determined by the courts protracted conflict can result. The 79 trials in last 40 years, over water provision disputes between rural and urban stakeholders examined in this paper, demonstrate that harmony between these entities has not improved much as Senators Humphrey and Bellmon had hoped. While thousands of municipalities and rural water districts do not end up in court, there are many municipalities and rural water districts that are mired in court battles, undermining their respective goals for further developmental growth and the broad Congressional intent for rural development. The federal government’s philosophical shift from cooperative federalism to a more coercive form, in order to ensure ambiguous Congressional goals, has experienced failed results at least in obtaining goals of rural and urban harmony in many locales. Those entities that find themselves in court nationwide, as they fight over an ever more scarce resource, are often passionate in their conflict—as evidenced by the name calling often lobbed on both sides in this local vs. local conflict—unnecessarily pitting so called “Domestic Terrorists” vs. “Blackmailers.” Future research must explore how rural and urban entities may learn to work together to resolve these jurisdictional disputes without generating such intense levels of conflict.

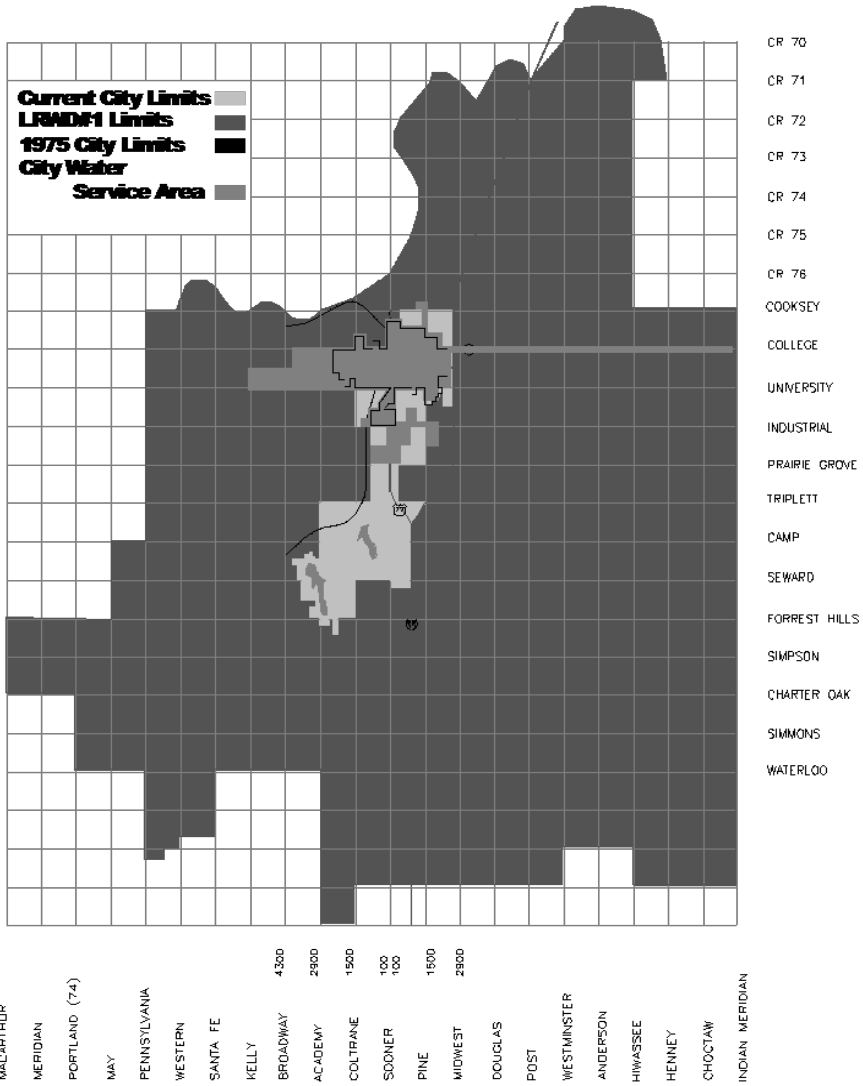
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APPENDIX 1

City of Guthrie - Current City Limits, 1975 City Limits and Rural Water District #1 Limits

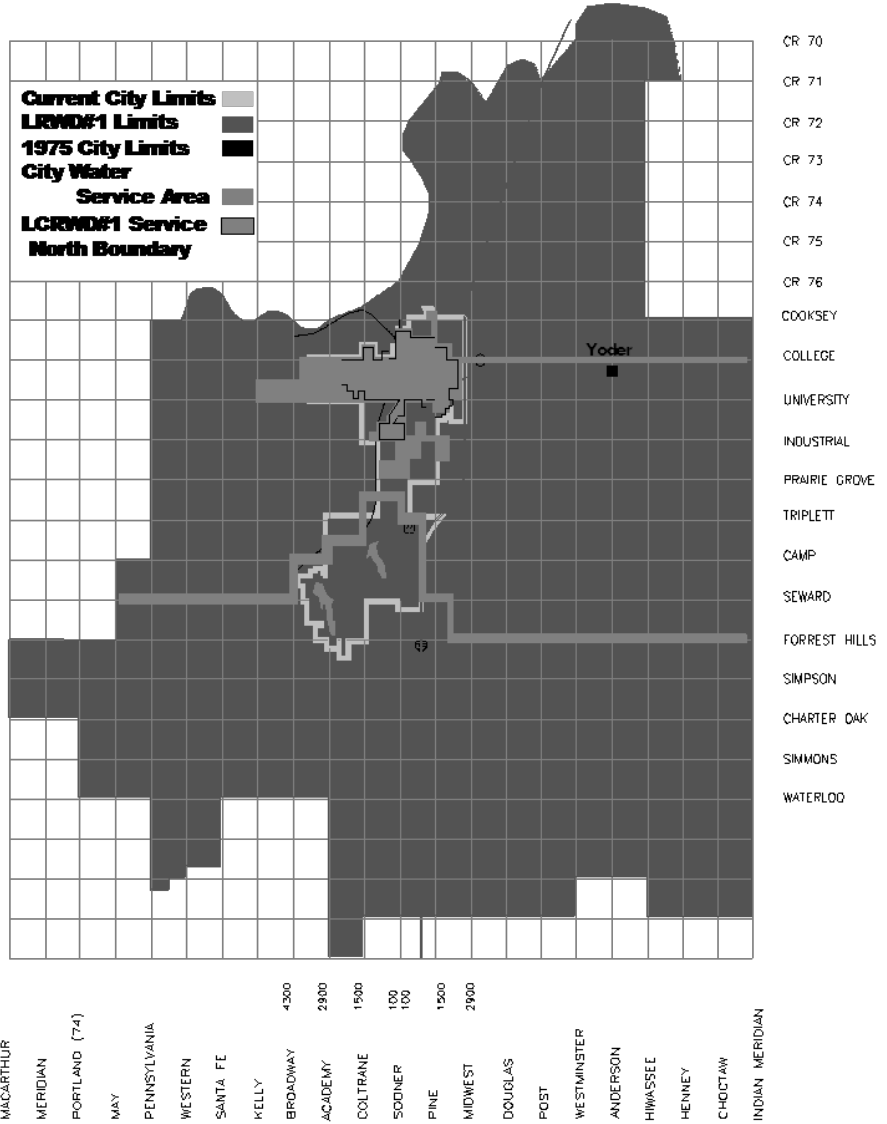


City of Guthrie - City Water Service Area



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City of Guthrie - Northern Boundary of LRWD#1 Water Service Area



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In 2012, Dr. Jeffrey Sachs removed himself from the short list of nominees to be the 13th president of the World Bank in deference to physician, public health professional, and Dartmouth College President, Jim Yong Kim. This speaks volumes about the character of Dr. Sachs, a Columbia University macro-economist who serves as Director of the Earth Institute and special advisor to UN Secretary-General, Ban Ki-Moon on the Millennium Development goals.

Serving as a high level advisor to many governments, his “prescriptions”, often characterized as “clinical economics”, have resulted in the reorganization of the financing for effective disease control in Africa, the release of new currencies to crisis-ridden economies, the economic transition of former communist nations to free-market principles, the resolution of debt crises in poor countries and the easing of hyperinflation in Eastern Europe and Latin America. While some may see *The Price of Civilization* (2011) as a turning away from international economic issues, its focus on the American economy, starting with the election of Ronald Reagan in 1980, is a continuation of his concerns about poverty, in this instance the persistence of poverty in a nation with the world’s largest gross domestic product. This review outlines the contours of Sachs’ book and then applies the analysis to Oklahoma.

Although this book was written for a popular audience, it addresses an issue of deep concern to political scientists: what are the responsibilities of citizens in a democracy? Sachs answers this question by explaining,

from the perspective of a macro economist, the factors that led to the Great Recession of 2008, the paralyzing culture of excess that has gripped the American electorate, and what types of individual and national reforms would ameliorate the situation. The key is a willingness to provide government with the necessary resources to solve the nation's problems.

Ronald Reagan famously contended that the problem with America was big government. Sachs believes that this position was wrong-headed because it prevented Americans from coming to terms with globalization, the "unmet economic challenge of the past forty years." He maintains that the American people were encouraged to look inward thirty years ago when we needed to focus on global transitions or the linking of the world through networks of trade, investment and production.

In the 1970s, three global drivers heralded profound change. The digital electronic age was signaled by the technological revolution in computers, the Internet, and mobile telephony. In addition, East Asia began a spectacular economic rise that reshaped the world economy. And, lastly, the world began to face the ongoing ecological crisis. There has been a massive worldwide shift in incomes, jobs and investments. The most important technologies today are those that facilitate the growth of information, communication and transportation. Computers store and process information, the Internet and mobile telephony transmit it instantly and seamlessly around the world, and containerized ocean transport and worldwide air travel provide low-cost global trade. The world's economies, supported by a global division of labor, have become more tightly interlinked, sophisticated and intricate. All stages of production are complexly achieved by a far-flung global value chain moving from raw materials to final packaging. The primary actors are multinational companies (MNC), some with operations in over a hundred countries. American MNCs make more money in the global marketplace than they do in the United States. Rather than encouraging the development of government policies that could manage this shift in geopolitics, Americans focused on declining interest rates that, in turn, fostered domestic consumer spending on products, made not in the U.S.A. but in China. At the same time, Alan Greenspan's monetary policies unleashed a wildly unstable housing market while it artificially suppressed inflation.

The problem for Americans is that while capital is mobile, labor is not. Countries compete for investment capital. They do this by offering improved profitability compared to other countries. This means they cut corporate tax rates, ease regulation, tolerate pollution, and, sometimes, ignore labor standards. This spiral is what Sachs calls the “race to the bottom.”

As governments engage in a downward spiral of lowered taxation and fewer regulations, all countries lose in the end because these cuts mean diminished education, crumbling infrastructure, and fewer scientific and technological breakthroughs. These are the very areas in which America needs to invest in order to regain long-term competitiveness. In the last thirty years it has become impossible to argue that some sectors in the United States do not approach third-world conditions. Oklahoma is a case in point.

Just as national governments have reduced taxes on the rich and cut government budgets, so have states. In 2012, Oklahoma’s Republican-controlled state legislature and Gov. Mary Fallin hammered out a budget for fiscal year 2012-2013 that very nearly included a massive tax cut that many budget experts contend would have devastated Oklahoma’s public services. This on top of the previous Governor’s two tax cuts that were considered the largest in Oklahoma’s history. Politicians increasingly argue that tax cuts equal growth, a proposition with little in the way of empirical evidence to support it.¹ Oklahoma is already widely regarded as a one of the most competitive or “business-friendly” states with low tax rates and right-to-work laws.

Julie Del Cour, associate editor of the *Tulsa World*, writes that in Oklahoma “state conditions approach third-world status.” While the U.S. languishes near the bottom of child safety and access to health care measures among developed nations, “Oklahoma ranks 40th among states in the teen death rate and 42nd in the percent of teens not in school and not high school graduates...in overall child vulnerability, Oklahoma has ranked near the bottom of the 50 states for years.”²

What do we do about these public problems that tear at the fabric of our society? Sachs quotes Oliver Wendell Holmes who said that “the price of civilization is taxes.” Mickey Hepner, Dean of the College of Business Administration at the University of Central Oklahoma, echoes that sentiment, arguing that “we cannot expect our (Oklahoma)

workers to compete in a global economy unless we give them a world-class education – something that is becoming increasingly difficult to do with funding levels among the nation’s lowest.³ Hepner’s argument is further supported by Dewayne Matthews, vice president of the Lumina Foundation, who calls for workforce development and higher education to work together to help Oklahoman’s complete their college education. “In Oklahoma, 474,747 people attended college but don’t have a degree or certificate to show for it...the No. 1 reason is the financial burden on students and their families.”⁴ What Oklahoma needs is not tax cuts, but bolstered streams of revenue to support investments in health, safety and education. Why is higher education so expensive? Because the Oklahoma state legislature has abrogated its responsibility to provide adequate institutional funding.

Sachs calls for a return to civic virtue. As Americans we could “recommit to contributing to the common benefit and to cooperating for mutual gain.”⁵ Although politically unpopular, paying taxes is “the price of civilization.”

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¹ William G. Gale, “Five Myths about the Bush Tax Cuts,” *Washington Post*, August 1, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/30/AR2010073002671.html>, accessed 5/23/12.

² Julie DelCour, “Mothers and children: State conditions approach third-world status,” *Tulsa World*, May 13, 2012, p. 1G.

³ Mickey Hepner, “Tax cuts don’t make the grade,” *Special to the Edmond Sun*, May 18, 2012.

⁴ Kim Archer, “Report says state falling behind in ‘knowledge-based economy,’” *Tulsa World*, May 12, 2012, p. 10A.

⁵ Jeffrey D. Sachs, *The Price of Civilization: Reawakening American Virtue and Prosperity*, New York: Random House, 2011.

Christopher Hayes. 2012. *Twilight of the Elites: America After Meritocracy*. New York: Crown Publishers. 239 pages.

Accounts of the state of the country's institutions have been a growth industry in the past few years. While a great deal of the literature has been process oriented, a few political observers have attempted to step back and look for broader, more systemic causes of the recent deterioration of American institutions. Christopher Hayes, a senior editor at the progressive magazine *The Nation*, as well as the host of MSNBC's morning political show *Up*, has offered a provocative and counter-intuitive theory explaining what ails American politics and economic life. In *Twilight of the Elites*, Hayes points to Americans' widespread faith in merit as the basis of our recent troubles; rather than provide an objective and morally justifiable criterion for rewarding talent, meritocracy has provoked a kind of "race to the bottom" among American elites, creating a hyper-competitive environment that justifies both disproportionate compensation and an "anything goes" mentality that spawns cascading epidemics of corruption throughout society.

Noting the British (and somewhat portentous) origins of the term, Hayes traces the deep roots of meritocratic thinking in American political culture to the framers. Michael Young, the British parliamentarian and social thinker who coined the term in the 1950s, sardonically argued in a 2001 column that meritocracy originated as a term of the left, "but came to devour it" (p. 46). Hayes' analysis elaborates on Robert Michael's "iron law of oligarchy" to derive what Hayes calls "the Iron Law of Meritocracy":

The Iron Law of Meritocracy states that eventually the inequality produced by a meritocratic system will grow large enough to subvert the mechanisms of mobility. Unequal outcomes make equal opportunity

impossible. The Principle of Difference will overwhelm the Principle of Mobility (p. 57).

The resulting inequality – and the concomitant exertions of elites to succeed or to appear to be succeeding regardless of the consequences – produces a “crisis of authority,” in which people begin to lose faith that the mere replacement of one set of elites by another will actually improve the situation. Once people begin to question a governing elite’s competence or motives, the movement toward a corrosive and thorough-going cynicism brings the legitimacy of the whole system of institutions – be it political, economic, or religious – into question, creating further obstacles to reform. Hayes draws on elaborations of recent scandals – Enron, major league baseball’s steroid scandal, and the child abuse scandal in the Catholic church – to substantiate his conviction that these scandals are endemic to socially distant elites who are convinced that they are not only entitled to their privileged positions, but that they actually overcame enormous obstacles to achieve their status, and that the less fortunate among us are not merely unlucky but are somehow morally deficient. Hayes, for example, holds up Catholic bishops as “the very archetype of a cosseted elite” (p. 194) whose principal loyalty was to the church, and whose care for their parishioners was so remote, so theoretical, as to be safely ignored.

Hayes’ prescription for the ills of meritocracy is fairly straightforward. Higher taxation on the wealthiest both reduces social distance and help fund programs that improve the conditions of lower-income Americans. He accurately notes the correlation in American history between periods of high government spending and the reduction of social inequalities. More important is his recognition that Americans “are more egalitarian than we, ourselves, realize” (p. 228). Essential to the task of securing more equitable policies is to direct “the frustration, anger, and alienation we all feel into building a trans-ideological coalition that can actually dislodge the power of the post-meritocratic elite” (p. 233). Hayes’ discussion of the similarities between the Occupy Wall Street and the TEA Party suggests that the trenchant partisan divide can be overcome. However dubious that particular trans-ideological alliance may be (a progressive-independent alliance may strike the reader as more plausible), Hayes believes that remedies need to emerge soon; otherwise, future crises may yield far more radical and destabilizing programs.

Twilight of the Elites is not without flaws. Hayes' narrative could have been more concisely summarized in strategic places, and parts of his early narrative may strike a reader with a more sophisticated theoretical palate as a bit thin and trite. At the same time, the book is readable and plausible. Anyone concerned with the fate of the American Experiment would benefit from reading this timely book.

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Candice Millard. 2011. *Destiny of the Republic: A Tale of Madness, Medicine and the Murder of a President*. New York: Doubleday.

What most people recall about President James Garfield is that he was assassinated in the early months of his administration by a “disappointed office seeker.” In her recent book, *Destiny of the Republic: A Tale of Madness, Medicine and the Murder of a President*, Candice Millard illuminates the little-known story of the events and people surrounding the death of America’s 20th president. While there is much valuable historical detail in her book, regrettably what is most likely to remain with the reader is the hapless, incompetent medical care given to the wounded president. Among other memorable details are: Thomas Edison’s fruitless scramble to engineer a rudimentary imaging machine that he hoped would locate the unrecovered bullet in Garfield’s body; the delusional and maniacal meanderings of the assassin, Charles Guiteau; and the two-month vigil of the stunned American public, which just sixteen years earlier endured the first political assassination of a U.S. President, Abraham Lincoln, in the midst of the trauma of the Civil War. These are some of the more engrossing parts of history that emerge from *Destiny of the Republic*. However, the most indelibly etched piece relates to the humility, wisdom and strength of will Millard ascribes to James Garfield.

Millard organizes the book around quotations intended to illuminate Garfield’s character, a man she clearly admires. At the beginning of each chapter, she includes a quote from Garfield which relates to the chapter’s theme—selections which it must be assumed are reflections

of the authentic Garfield. The quotations, along with accounts of Garfield's hard-scrabble youth, his native intelligence, and his service to his country in the war and in Congress, are combined with the author's respect for his character, intellect, and humility. In all, they paint the president in Lincolnesque hues, and the quotes Millard offers reinforce this portrait. For instance, this passage reflects his egalitarian view of human potential, as well as a testimony to his own ascent, "I never meet a ragged boy in the street without feeling that I may owe him a salute, for I know not what possibilities may be buttoned up under his coat." Or this, which reveals his orientation to service and his eschewing of the lower aspects of politics: "I love to deal with doctrines and events. The contests of men about men I greatly dislike." And there is his progressive, good-government prescription: "Light itself is a great corrective. A thousand wrongs and abuses that are grown in darkness disappear like owls and bats before the light of day." There appears also the warm and luminously positive human being that emerges from the opinion of so many who knew him well, especially his family, which is wonderfully captured when Garfield writes, "If wrinkles must be written upon our brows, let them not be written upon the heart. The spirit should not grow old."

Millard's book is engrossing for all the examples cited above and many others. The reader learns about the primitive air conditioner rigged up by naval technicians to provide the laboring president with modest respite from the oppressive Washington summer. In addition to the dated medical practices, we are confronted with the obdurate and egotistical character of Dr. Willard Bliss, the principal physician who Millard condemns as being the chief cause of Garfield's death. And, sadly, we find an admirably patient but perhaps too-compliant president, family, and friends, who yielded time and again to the ham-handed ministrations of the dictatorial Bliss. These events and characters make *Destiny* a page-turning read.

Unfortunately for historians and political scientists, there are elements missing from Millard's narrative. The author could easily have sketched some of the momentous trends and confounding excesses of the

Gilded Age, such as the gathering speed of the westward movement, the rapid industrialization and urban growth, the rising tide of immigration, the granting and subsequent deprivation of political rights to recently-freed African Americans, the persistent domination of the political power of the states and the economic interests that controlled most of them, and the cascading waves of corruption in a system dominated largely by a single political party. This kind of context would have aided readers, for example, in understanding why the likes of Roscoe Conkling and James Blaine figure prominently in several chapters. Given Americans' general anti-historical bias, Millard's narrative would have benefited from more background.

Finally, it is hard to understand how *Destiny of the Republic* is an appropriate title. Garfield included the phrase in his 1880 Chicago convention speech because he wished to remind his audience that the people at home, not those in the convention hall, would determine the country's future. In a chapter titled "One Nation" Millard states that the weeks of watching and waiting as Garfield's health slowly deteriorated helped heal Americans' emotional scars from the Civil War. She argues that he was a cathartic figure because he "represented both what they were and hoped to be." She quotes one contemporary's claim that the attack seemed to almost magically unite the nation. If these and similar passages are to serve as a rationale for how Garfield's tragic end somehow transformed the destiny of the republic, then it is unconvincingly argued and not supported by noted Garfield biographers. On the other hand, the book's subtitle (*A Tale of Madness, Medicine and the Murder of a President*) is entirely appropriate, for it clearly represents the story of her book.

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John Paul Stevens. 2011. *Five Chiefs: A Supreme Court Memoir*. Little, Brown and Company. 292 pages.

In *Five Chiefs: A Supreme Court Memoir*, Associate Justice John Paul Stevens shares the front row seat he enjoyed over the course of 35 years of service on the US Supreme Court. The last half of the 20th century has been one of the most tumultuous periods in American jurisprudence especially in terms of how the Supreme Court under Chief Justice Warren expanded application of the 14th amendment. Stevens observed and participated in these changes as a law student, Supreme Court clerk, attorney arguing before the Court, and Justice.

A native of Illinois, John Paul Stevens graduated from Northwestern University after serving in the U.S. Navy during World War II, and settled into private practice from 1949 until 1970, when President Nixon appointed him to the 7th Circuit Court of Appeals. He served there until 1975 when he was appointed to the US Supreme Court by President Ford. Stevens was Ford's one and only appointment, and extending Ford's legacy all the way until Stevens' retirement in 2010.

Justice Stevens organizes his observations in this book based on each Chief Justices of the United States that he personally experienced. He begins with Chief Justice Fred Vinson (1946-1953) because he clerked at the Supreme Court while Vinson was the Chief. Stevens also includes Chief Justice Earl Warren (1953-1969) because he argued cases before the Warren Court. Stevens actually sat with Chief Justices Warren Burger (1969-1986), William Rehnquist (1986-2005) and John Roberts (2005-present).

One point particularly well made is how the channels to a Supreme Court Judgeship have narrowed in the last 50 years. Stevens himself is one of the last who came from a private practice before becoming a federal judge. Presidents are not appointing political figures as often as they had in the past. Stevens notes that chief justice Earl Warren – an Eisenhower appointee -- was “one of the most popular politicians of the day,” (p. 83) giving rise to the observation of how unusual it would be for a political figure to be appointed in this day and age. Being a government lawyer and then Circuit Court judge is the dominant path in the last forty years taken by Justices like William Rehnquist and John Roberts. The first four Justices who had clerked for the Court who ended up serving on the Court are Justices White, Rehnquist, Stevens, and Breyer. Instead of bringing new ideas and freshness to the Court, these carefully groomed and socialized lawyers with very little real-world legal or political experience are at risk of being too insulated. For example, Chief Justice Warren served as a prosecutor for many years. This experience undoubtedly shaped his approach to the *Miranda* opinion which he authored. No Justice currently serving has any elective political experience at all.

Stevens’ legal observations are interesting, although they necessarily skate over the surface of many important issues and conflicts that occurred during this legally tumultuous time. So much more could be said of various pivotal cases that appeared before the Supreme Court in Stevens’ time on the bench... Interestingly, the first case Stevens ruled on was the key campaign finance case *Buckley v. Valeo*. The experience instilled an “extreme distaste for debates about campaign financing” (p. 137) that carried through to one of his last cases, the controversial *Citizens United* case in which he dissented. Of *Brown*, Stevens notes that seeking unanimity was a bad strategy. When the Court wrote that desegregation must occur “with all deliberate speed,” they were “too tentative” and the soft words encouraged delay (p. 100). Of interest to Oklahomans is Stevens’ brief discussion of Thurgood Marshall and *Sipuel v. Board of Regents of the University of Oklahoma*.

Stevens is at his best when discussing Court procedure because there are so few people that are able to provide details about what *actually* happens behind the bench in oral argument or in the conference room.

For example, each side was allowed one hour in oral arguments until the Burger years when it was cut to 30 minutes per side. During oral arguments Justices have access to a vast law library located just behind the bench. By filling out a slip and handing it to a page, any reporter can be fetched instantly. Most intriguingly, metal spittoons are still placed by each Justice's chair. Stevens confirmed what was reported in *The Brethren* that in judicial conference, Chief Justice Burger mis-assigned opinions to Justices who were not in the majority, although Stevens attributes this fact to poor note taking on Burger's part. Also, Court business was not discussed during coffee breaks in judicial conference or during lunch. Collegiality ruled the day.

Stevens' best chapter legally speaking is probably the one on Justice Rehnquist. Stevens was clearly delighted to be freed from Burgers' administrative *faux pas* during conference, including the poor note taking, bad case summaries, interruptions, and assigning opinions incorrectly. In contrast, Rehnquist was efficient to a fault, sometimes shutting down debate when Justices still had things to say. Stevens was also amused by the appearance of gold stripes on Rehnquist's robe, sardonically describing them as "a surprise" to the rest of the Court (p. 169).

Stevens also noted that the Rehnquist Court, for all its professions of judicial restraint, struck down more pieces of legislation (41) than the term of any other Supreme Court chief justice, ruling aggressively on issues like gun rights, state sovereignty, and the legal rights of Native Americans. The Court's ruling in *Seminole Tribe of Florida v. Florida* (1996), in which the Court – with Rehnquist writing for the 5-4 majority – ruled that the Seminole Nation of Florida could not seek damages for violations of its laws from either the state or federal government, is decried by Stevens as "among the Court's most unfortunate [decisions]" (p. 247). He also gently mocked Chief Justice Rehnquist for his stripes and for *Seminole Tribe*: "Like the gold stripes on his robes, Chief Justice Rehnquist's writing about sovereignty was ostentatious and more reflective of the ancient British monarchy than our modern republic. I am hopeful that his writings in this area will not be long remembered" (p. 197).

Five Chiefs is not as scandalous as Woodward and Armstrong's *The Brethren* nor is it as detailed as Jeffrey Toobin's very interesting book *The Nine*. However, Stevens does let his opinion on his Brethren show on a few occasions. For example, he contrasted the "living breathing Constitution" theory favored by judicial activists with a jurisprudence based on original intent:

While Thurgood's jurisprudence reflected an understanding that the Constitution was drafted 'to form a more perfect union' – and thus to accommodate unforeseen changes in society – Justice Thomas's repeated emphasis on historical analysis seems to assume that we should view the Union as perfect at the beginning and subject to improvement only by following the cumbersome process of amending the Constitution" (pp. 187-8).

In his judicial philosophy, Stevens clearly rejected the idea of basing decisions purely on original intent. In writing about the many watershed cases he witnessed as a lawyer and judge, Stevens argued that "reliance on history, even when the interpretation of past events is completely accurate and undisputed, provides an insufficient guide to the meaning of our Constitution" (p. 225).

Stevens' reverence for both the Supreme Court and for rule of law is balanced by his concern for the future direction of the Court. If Lee Epstein and Jack Knight's "strategic model" is correct – and justices are political actors who pursue political goals – then a reader could reasonably conclude that Stevens' ultimate aim is to maintain the Court's legitimacy, preserve collegiality among the justices, and to find efficiency and fairness in decision making.

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