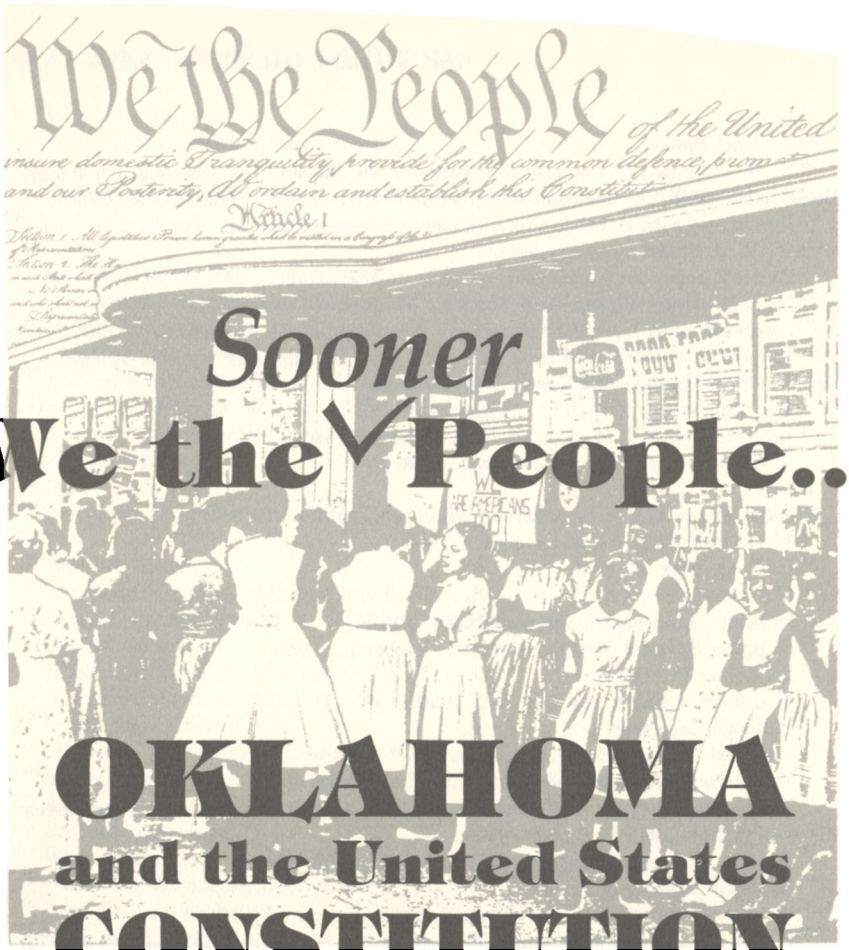


Sooner We the People...

OKLAHOMA and the United States CONSTITUTION

By Anne Million

Two hundred years ago representatives from twelve of the original American states gathered in a hot, steamy Philadelphia for the purpose of revising the Articles of Confederation and unifying a new nation. On September 17, 1787, they emerged from closed doors with a document that laid the foundation for a democratic society and for a federal form of government—the Constitution of the United States of America.

Those who live close to the "Cradle of Liberty" and on the eastern seaboard can readily identify with the Constitution and celebrate the historic role their states played in the framing of the document. The history of the Constitution, however, is much more than the drafting and adoption of that document. Even more important, perhaps, is its interpretation and application over the years. As a living document, it has profoundly affected, and been affected by, American society. Natives or residents of states which came into the Union in the nineteenth or twentieth centuries, being less aware of the relationship between their states and the Constitution, must look to the events and issues which for two centuries have shaped and altered this basic document of American government. Oklahomans, during the bicentennial year of the Constitution, took renewed interest and pride both in that venerable document and in their state by looking at the role which Oklahoma has played in constitutional development.

Soon after the Constitution was adopted, several decisions of the Supreme Court influenced the subsequent development of the Indian Territory and Oklahoma. The first case, *Cherokee Nation v. Georgia*, arose because the Georgia legislature claimed ownership of all Cherokee territory within the state and extended its laws to include the Cherokee Nation.[1] The Court, declining to take jurisdiction in the matter, held that it was not the proper tribunal in which such alleged rights should be asserted. The main issue, whether the tribe had standing as a foreign state under the Constitution to bring the case, was addressed in the Marshall opinion; that opinion is chiefly known for its definition of the legal status of Indians with regard to the federal government—that of a domestic dependent nation in a state of pupilage rather than that of a foreign nation. The Court's position encouraged the State of Georgia to exercise sovereignty over Cherokee territory and led to a second case, *Worcester v. Georgia*.[2]

Samuel A. Worcester, a Vermont missionary, was condemned to hard labor in a Georgia penitentiary for residing in the Cherokee Nation without the requisite license or permit. Reversing itself, the Supreme Court declared that the Cherokee Nation was subject to the United States government, a relationship well established in the Constitution. Because Georgia's laws interfered with that relationship, they were unconstitutional. When the Georgia government defied the Court and refused to release Rev. Worcester, President Andrew Jackson made no attempt to enforce the Court's decision. His policy had consistently been one of removing the Indians wherever they were an obstacle to white settlement and government, and in

this he had the support of Congress.[3] The actions of both Georgia and the President were a thorough repudiation of federal authority under the Constitution.[4] The way thus was paved for the removal of the southeastern Indians, a tragic episode in American history, now part of Oklahoma's heritage.

Indians had been treated since colonial times, if not as fully sovereign nations, then almost as if they were. Treaty-making continued to be conducted as a legitimate function of Congress under the Constitution. One observer claimed, however, that the term treaty was just as likely to be applied to a meeting between Indians and whites as to any formal agreement arising from such a meeting; therefore, in the strictest sense, such a thing as a treaty was an anomaly since treaties presuppose the parties have equal standing.[5]

Treaty-making under the Constitution figured prominently in determining early Oklahoma history. During a fifty-year period, from 1816 to 1866, Congress negotiated and signed over a dozen treaties with the Indians of future Oklahoma.[6] Removal treaties during the early years between 1816 and 1828 brought several tribes east of the Mississippi to land that was to become the Indian Territory. The treaties negotiated during the administrations of Jefferson to Adams differed somewhat in character from the later removal treaties.[7] Many of the Indians were agreeable to moving westward in order to secure more hunting lands and freedom to preserve their social, cultural, and political traditions. The earlier period of federal Indian policy has been described as mainly one of peaceful persuasion and negotiation by way of contrast with the later policy of coerciveness. This is not to say that there had not been some element of force and intimidation in all administrations.[8]

The Cherokees in 1817 agreed to settle west of the Mississippi in exchange for land in the East. The Choctaws secured the land north of the Red River by treaties in 1816, 1820, and 1825. Meanwhile the Creeks, despite being sharply divided on the question of western migration, accepted lands in the West under treaties in the two years following the ill-fated Indian Springs treaties in 1821 and 1825. The Cherokees in Arkansas, the most numerous of the tribes transplanted in the West up to that time, were induced by terms of an 1828 treaty to migrate westward and were joined by some eastern Cherokees.

The election of President Jackson brought a period of coercive and massive Indian removals. In 1830 the principal treaty for the removal of the Choctaws was signed at Dancing Rabbit Creek. Two years later

In 1870 these representatives of the Five Civilized and other tribes in the Indian Territory emulated the U.S. Constitution and adopted the "Okmulgee Constitution" (Courtesy OHS).

a treaty was negotiated for the remainder of Creek territory in Alabama. The Chickasaws, having lost their Kentucky and Tennessee ranges, saw the inevitability of losing their lands in Mississippi as well, but through clever negotiation and shrewd timing managed to secure in 1832 perhaps the most favorable of all removal treaties. The Seminoles in Florida were the next subject of removal, which occurred under a treaty in 1833. Those who did not move west or escape into the Florida swamps were forcibly removed after the Seminole War of 1835–42. The most heartless and heart-rending removal occurred after the remaining Cherokees in Georgia were forced to cede their lands by the Treaty of 1835. Those who had not left voluntarily in 1838 were evicted, and their sufferings during the removal became known as the Trail of Tears.[9]

During this time several treaties had to be negotiated with the Plains Indians to make room for those Indians migrating or being removed from the eastern region of the country. Treaties with the Osages and Quapaws between 1822 and 1825 enabled the Creeks to settle in the western lands. In 1835 a great conference of Indian tribes with representatives of the federal government was held to negotiate

a treaty that further stabilized relations between the Southeast and Plains Indians and between the Indians and the United States. After the Civil War, as more tribes migrated to the territory from other states, additional agreements had to be negotiated with the Plains Indians. The 1866 treaties provided, among other concessions, for a good portion of Indian territory to be ceded to the federal government, ostensibly because of Indian sympathy with the Confederacy. It was not many years before the last vestiges of Indian autonomy were negotiated away because of growing interest in and pressure for bringing the Indian Territory and Oklahoma Territory into the Union. This was accomplished by enactment of the General Allotment Act of 1887 and the establishment of the Dawes Commission in 1893 with the intent of negotiating with the tribes to extinguish tribal titles in exchange for individual allotments and tribal laws and courts in favor of federal administration of the territory. The terms of agreement were embodied in the Curtis Act of 1898.[10] By this time the Indians were but a small minority in the land that was by terms of these many treaties to be theirs forever.[11]

Early Oklahoma history is also significant constitutionally because of a major boundary controversy that engendered national, as well as international, interest. Both extensive treaty-making and several Supreme Court decisions mark the Red River boundary dispute and figure prominently in constitutional history. It is hard to find an issue more interesting and complicated than border disputes, all the more so where rivers are involved. The Red River not only encompassed the normal complications of a river boundary—the changing river bed, the altering of banks by erosion and accretion, and inadequate or challengeable surveys—but its river valley was the focus of competing interests as well. Its fertile soil was of prime importance to farmers, Indians, and cattlemen. Its mineral resources, especially oil and gas, were of great concern to Texas, Oklahoma, and the United States. Even after the river was no longer important for travel to the West, the question of navigability remained a lively issue because of the federal government's involvement in dam construction and power generation.[12]

The first treaty involving the Red River boundary was between the United States and Spain in 1819. It constituted the basic reference for subsequent claims, no matter who the principals were at the time. After gaining independence from Spain in 1821, Mexico negotiated a treaty with the United States in 1832 that was based on an earlier, unratified treaty. It had a short life as a result of Texas's indepen-

dence in 1835. New treaties were negotiated with Texas in 1838 and 1842. Throughout this period treaties also were being made with various tribes as to their rights and interests in the area north of and adjoining the Red River.[13]

The case history of the Red River boundary is especially lengthy. Texas and the United States were parties to a suit before the Supreme Court in 1896, which defined the boundary according to the Melish map and made Greer County subject to the federal government.[14] Oklahoma and Texas became litigants in a series of cases after 1920, in which the United States was named intervener to protect its own interests and those of Indian allotees. A 1920 case established a boundary between the two states on the south bank of the river, but the question as to what constituted the south bank remained unresolved.[15] By then oil had been discovered along the river and even under the river bed. Property owners, state governments, and the federal government all had vital interests in the river bed. The 1921 decision affirmed the boundary along the south bank, defined the terms bank and bed, and attempted to apply doctrines of erosion, accretion, and avulsion to the boundary. All manner of scientific data and expert opinions were massed as evidence for one side or the other.[16]

In 1922 the Court addressed issues of navigability of the river, particularly in relation to the federal government's rights in the river bed and to Indian allotments and grazing interests.[17] By Court decree in 1923 a commission was set up to locate and mark the disputed area; it recognized the Texas claim to land cut off from the south bank.[18] The fourth report of the boundary commissioners was finally accepted and confirmed by the Supreme Court in 1927.[19] This settlement brought the boundary controversy to a close, except for some minor adjustments made by the Court. Such major decisions only hint at the rest of the knotty questions which involved the Court a total of 37 times.[20] It is hard to quarrel with the comment: "After perusing the record of this litigation who will not commend the wisdom of the makers of the Constitution in creating a tribunal to settle and compose quarrels between the states. . . ?"[21]

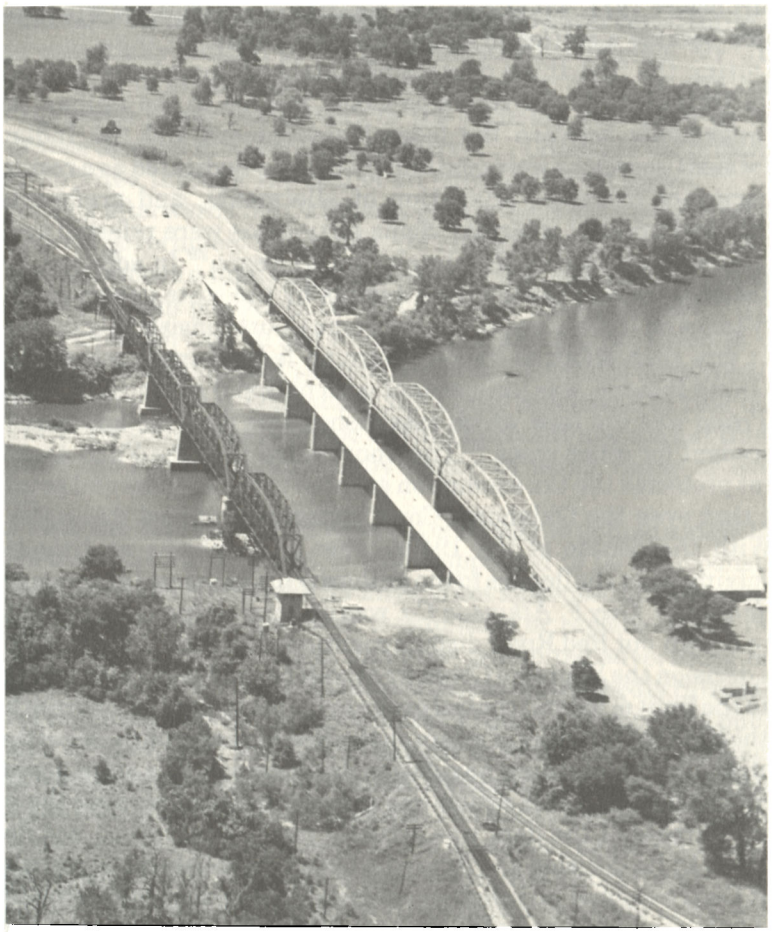
Another interesting aspect in early state history of Oklahoma's relationship to the United States Constitution is the extent to which the national document was emulated in the state. All the five Civilized Tribes of Indian Territory adopted written constitutions, except the Seminoles, who had an unwritten code embodying many of the same principles.[22] The Cherokees, being foremost in this as in so

many other ways, adopted as early as 1827 the first written constitution of the Five Tribes. The Creek Constitution was relatively short and, among its unique features, contained a foreword modeled on the Preamble to the United States Constitution. All the constitutions had a bill of rights, that of the Choctaws being particularly elaborate. Other distinctive features that displayed a blend of Indian and white traditions included provisions for the separation of government powers and offices, liberal rules of eligibility for holding office, the fundamental right of citizens to change their constitution, equality of free citizens, and a voting age of 18 for males.[23] All these constitutions antedated the state constitution, and serve as a reminder that "a tradition of creative constitution-writing was well established in the Sooner State long before the Oklahoma Constitutional Convention gathered at Guthrie."[24]

The Oklahoma Constitution owes much to those Indian constitutions, as well as to others written in the formative years of the nation. As one of the longest and most detailed in the country, the state constitution bears little resemblance to the national one. Yet, the delegates to the 1906 state constitutional convention were very mindful of the 1787 document. A separate bill of rights was incorporated into the state constitution, but the delegates added many other rights, most of which were designed as guarantees against the excessive encroachment of political and economic power. Special provisions were drawn up to protect individual ownership of resources and to regulate agricultural and business monopolies. In this the state founding fathers were influenced by other state constitutions, as well as the populist reform mood of the state during that period. The provisions regulating economic power, land ownership, and corporate monopoly were regarded as radical by some at the time, but were historically rather conservative.[25] In fact, far from being the radical departure from American principles and practice that some observers claim, "every important clause of the Oklahoma constitution," in the view of one scholar, "has been tried out in the experience of one or more of the older commonwealths."[26]

Soon after statehood a major constitutional question arose—"equality of states" under Article IV. It was common for Congress to attach conditions to statehood enabling legislation. Oklahoma's statehood act of 1906 stated that the capital should remain in Guthrie until 1913, during which time money could not be appropriated for erecting public buildings.[27] There was strong popular sentiment for relocating the capital, and the voters decided on Oklahoma City in an

election held on June 11, 1910. As might be expected, the citizens of Guthrie protested and sued to prevent the move. They won in the district court, but the decision was overturned by the state supreme court. Meanwhile, the legislature passed a bill on December 7, 1910, declaring Oklahoma City officially the state capital and appropriating $600,000 for public buildings. The case, *Coyle v. Smith*, was appealed to the United States Supreme Court, which found the act



Interpreting the U.S. Constitution has impacted the history of Oklahoma through contests over boundary disputes, mineral rights, and navigation along the Red River (Courtesy OHS).

constitutional.[28] The opinion stated that Congress did not have any judicial sanction to impose conditions on the admission of new states. The principle had been generally accepted and often written into the enabling legislation that new states were admitted on an equal basis and therefore competent to exercise all sovereign powers not delegated to the federal government. It is remarkable that, even though conditions to statehood had been imposed as far back as 1802, the question of their binding nature was not brought to the Supreme Court before 1911; with *Coyle*, the doctrine of the political equality of states became a settled principle and precedent.

During the first three decades of statehood, most cases appealed from Oklahoma to the Supreme Court related to the unique land arrangements between the federal government and the Indians. Allotment questions were continually being adjudicated as a result of inheritance disputes, alienation of allotments, and preferential rights and mineral interests. Some forty cases were referred to the Supreme Court during the state's first 21 years.[29] In addition, constitutional conflict arose over attempts by the state government to levy taxes on Indian lands. The Supreme Court consistently declared that any such effort to impose taxes on federal instrumentalities, meaning Indians, was inconsistent with national supremacy. *Choate v. Trapp* was the case which established this doctrine and was the precedent for other cases.[30] The Court ruled that the Fifth Amendment protected the tax exemption granted to the Indians and pointed out that even the Oklahoma Constitution guaranteed this right.

With the decade of the 1940s came an emphasis on litigation involving state challenges to the authority of the federal government. *Oklahoma v. Guy F. Atkinson Co.* was an interesting epilogue to the long drawn-out Red River dispute mentioned earlier.[31] In the *Atkinson* decision the Supreme Court went well beyond ideas hitherto held as to the limit of federal control over navigable streams. Congress had authorized the building of a dam on the Red River for purposes of flood control and maintaining navigation downstream. The state government charged that this action was unconstitutional because the primary purpose of the dam was actually power generation, not flood control. In its decision the Supreme Court established the principle that Congressional jurisdiction extended to non-navigable stretches and tributaries of navigable streams, thus enlarging the legitimate scope of Congress's commerce power.

Another expansion of interstate commerce powers occurred as a result of the Court's ruling in *Oklahoma Press Publishing Co. v.*

Walling.[32] In upholding the federal circuit court of appeals against the district court, the Supreme Court found that a Department of Labor administrator was fully authorized under federal law to subpoena all records of a newspaper publishing corporation in order to investigate employment conditions and practices. Neither the Fourth Amendment against unreasonable searches and seizures nor the Fifth Amendment against self-incrimination were found to be violated. This milestone in the ever-expanding field of administrative law did raise some concern over the granting, however constitutional, of an essentially judicial power to administrative officials. Mr. Justice Murphy, in his dissent, put it quite strongly: "Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty . . . Liberty is too priceless to be forfeited through the zeal of an administrative agent."[33]

Not long afterwards the Oklahoma government lost a case in which the federal government withheld state highway funds when the state refused to remove a highway commissioner who had actively participated in partisan politics in contravention of the Hatch Act.[34] This was a companion case to one which settled another provision of the Hatch Act that prohibited political activities of federal employees.[35] Later, in *Broadrick v. Oklahoma*, the Court was asked to rule on a state statute which was modeled on the Hatch Act and did not find it violated the First Amendment by reason of being vague or overbroad.[36]

In 1955 the Supreme Court went out of its way to uphold a state law which even the Justices had to admit appeared to be monopolistic. The statute made it unlawful for anyone not a licensed optometrist or ophthalmologist to fit lenses or to duplicate or replace lenses into frames without a prescription, and even prohibited advertising and promoting sales of eyewear. Such restrictions unabashedly raised the cost of replacing broken frames or lenses without any apparent public benefit or need. Yet, the Court thought that the legislature had a right to pass unreasonable and unfair legislation, and the remedy lay with the legislators and the electorate. The Court frequently referred to its decision to typify its disposition in economic regulatory cases in fairly strong terms: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of the business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[37]

If the Oklahoma Constitution was radical in its reform character

and its economically and politically progressive tone, it was at the same time conservative towards civil rights. Shortly after statehood political expediency as much as racial prejudice resulted in the passage of an amendment to the state constitution containing the so-called "grandfather clause," a device to disenfrancise black voters. The clause required a literacy test in order to register to vote, the test being ability to read and write portions of the state constitution,

State sovereignty and the U.S. Constitution has been tested several times in Oklahoma, affecting regulation of industries such as cotton ginning (Courtesy OHS).

which could be made as difficult as election officials wished. An exemption was made for lineal descendants of persons eligible to vote on January 1, 1866. Of several devices employed in the South to control black votes, this was one of the first to be held unconstitutional. The 1915 Supreme Court decision in *Guinn and Beal v. United States* destroyed the validity of such laws.[38] Even so, registration laws disenfranchised all those not already eligible to vote who failed to register within a brief twelve-day period. It took almost 25 years for this to be challenged, but the Court in its *Lane v. Wilson* decision had no difficulty in finding this subterfuge equally repugnant to the Constitution.[39]

Not long before, a case had been appealed to the Supreme Court as part of the movement nationally to protest the exclusion of blacks from juries, particularly in cases where the defendant was black. Jess Hollins, a black defendant, was sentenced to death by an all-white

jury for rape and denied a court-appointed legal counsel. The Supreme Court called for a new trial and in a memorandum opinion established the principle, cited frequently thereafter, that trial and conviction of a black by an all-white jury, from which qualifying blacks had been excluded solely on account of race or color, was a denial of equal protection under the Fourteenth Amendment.[40] Ironically, the jury in the new trial also consisted of twelve white men, who compromised on a life sentence instead of death. The question of actual justice remained, but Jess Hollins apparently accepted the verdict rather than let another jury gamble with his life.[41] "Like many other black defendants, both celebrated and unknown, he proved more realistic than his idealistic defenders."[42] He had won, however, four constitutional principles for Oklahoma blacks: the right to trial by a jury of one's own peers; the right to face one's accusers; an assurance of proper counsel; and a trial in a recognized courtroom.[43]

In the area of black-white relations, the doctrine of "separate but equal" was generally accepted by the courts in the South and in the border states. As long as public accommodations were provided for blacks where available to whites, the courts did not inquire into the equal aspect of the facilities. In 1914, however, the Supreme Court did begin to show some concern for equality, even though it was not yet ready to attack the discriminatory nature of separateness. In *McCabe v. Atchison, Topeka and Santa Fe Railway*, the Court upheld the right of the state to require railroad accommodations for blacks (citing *Coyle v. Smith* as authority) but declared that the state failed to require equal accommodations by permitting the railroad to furnish sleeping, dining, and chair cars for white use but none for black use.[44]

It was in the area of higher education that the first real challenge to the "separate but equal" doctrine arose. In 1946, Ada Lois Sipuel, a black citizen and honor graduate of the all-black Langston College, applied for and was denied admission to the white law school at the University of Oklahoma. The district court rejected her suit because she had not exhausted the remedy of appealing to the state regents for separate black law school facilities. This decision was upheld by the state supreme court, but when appealed in 1948, the United States Supreme Court declared that she was entitled to a legal education "at the same time as any other citizen."[45] The state responded by establishing an "instant" law school for blacks at the state capitol as an adjunct of Langston. The three part-time teachers and use of the

capitol law library without the benefit of a regular student body constituted unequal treatment and was openly criticized. This educational inequality was appealed in a second case to the Supreme Court, which ruled that Ada Lois Sipuel would have to be admitted on an equal basis to the existing white University of Oklahoma Law School.[46]

During this time several other black applicants to the University were rejected solely on account of race. One, George W. McLaurin, sought to study for a doctorate in education and brought suit in the district court to have the state law declared unconstitutional. The legislature then amended the law to admit blacks to white educational institutions, but only when comparable programs were not available at black schools, and then only on a segregated basis. This latter restriction meant that George McLaurin was assigned isolated seats in the classroom, the library, and the cafeteria. When the district court refused to remove these conditions, the United States Supreme Court declared that any black admitted to a state graduate school must receive equal treatment, since to do otherwise impaired the ability to receive an equal education.[47]

These two cases brought new meaning to equal protection of the laws under the Fourteenth Amendment. Both are historically significant not only because the "separate but equal" doctrine was challenged by the National Association for the Advancement of Colored People for the first time, but also because innovative sociological arguments were used in the trials.[48] A turning point was reached, and attention began to be paid to the quality side of "equal facilities," paving the way for the landmark *Brown* decision four years later.[49]

Once desegregation had been accepted at the level of higher education, and especially after *Brown*, efforts to attack discrimination in public schools were accelerated. A 1969 Oklahoma case, *Dowell v. Board of Education of Oklahoma City*, received wide recognition because of the use of a blue-ribbon panel of experts to devise a school desegregation plan.[50] The Supreme Court, however, was not in a mood to wait and declared that changes in the school attendance zones should be permitted pending adoption of the comprehensive desegregation plan. Further delay, it said, was intolerable. Delay had been a common form of resistance to desegregation, in the absence of more violent reactions, but 1969 was the year that the Court ended use of the "with all deliberate speed" loophole.

The next decade brought a change in civil rights emphasis. Gender-based discrimination was under attack, and an Oklahoma case drew

particular attention for its charge of discrimination against males rather than females. A state law required males to be 21 but females only 18 to buy 3.2 beer, which the Court held unconstitutional because it denied equal protection of the laws to males between 18 and 21.[51] During the trial statistical evidence was presented showing a correlation between teenaged males and their drunk driving arrests and traffic injuries. The Court questioned the "statistically measured but loose-fitting generalities" of the survey; declaring it inapplicable, the Court gave preference to rights under the Fourteenth Amendment over those under the Twenty-first Amendment. The Court addressed an important constitutional issue by introducing a new intermediate standard into the two-tier system by which equal protection of the laws cases were judged—that middle or gray area between the rational relationship test and the compelling state interest or strict scrutiny test.[52]

Sit-ins and demonstrations, such as this gathering in downtown Oklahoma City, hastened the Constitutional enforcement of desegregation (Courtesy Oklahoma Publishing Company).

Individual rights regarding property were at issue in several significant Oklahoma cases. In *Oklahoma Natural Gas Co. v. Oklahoma*, the utility company charged its customers the maximum rate based on the quantity of gas furnished.[53] The Corporation Commission required the company to reduce its bills or make refunds to compensate for poor service because under the company's franchise it was required to render efficient service to the public. The company

charged a deprivation of property without due process, but the Supreme Court upheld the lower court and rejected the claim.

Two subsequent cases related to the right to do business and were precedent-setting. An Oklahoma law required a person to prove a public necessity for a cotton gin before being granted a license to do business. However, the law did not require cooperative associations to show any public need in order to obtain a license. As a result, a licensed cotton gin operator named Frost sought to enjoin a cooperative association in the neighborhood on the grounds that the exemption denied him his Fourteenth Amendment rights. The Supreme Court agreed and overruled the state court.[54]

At the same time, another state law required anyone engaging in manufacturing, selling or distributing ice, which was a public business, to procure first a license from the state corporation commission. The New State Ice Co. brought suit against Liebmann for setting up an ice plant without first obtaining a license. The Supreme Court, this time agreeing with the lower courts, found that the regulation violated the Fourteenth Amendment because in effect it denied or curtailed the right to engage in a lawful business.[55] These cases reflected the trend of Supreme Court decisions in the 1920s and 1930s which justified striking down state regulation of business practices by resorting to a business-affected-with-a-public-interest doctrine.[56]

The Oklahoma courts, by contrast, generally put a narrower construction on individual rights in relation to criminal justice. Their decisions were seldom subject to challenge in the high court. However, with the advent of increased federal judicial control over the states' criminal justice systems in the 1960s, the state courts were more likely to be overruled by the Supreme Court.

One wartime case drew national attention largely because of its historical context. In 1942 Arthur Skinner was convicted of three separate crimes, once for chicken-stealing and twice for armed robbery.[57] He was in the penitentiary when the state enacted the Habitual Criminal Sterilization Act. Having committed "more than two felonies involving moral turpitude," Skinner met the definition of a habitual criminal and was directed to be sterilized. The lower courts affirmed the sterilization order, but were overruled later on appeal to the Supreme Court. The Court judged that because other classes of felonies, such as the "white collar crimes" of embezzlement and political offenses were not covered by the law, equal protection of the laws was denied. The Oklahoma law was one of more than twenty such sterilization laws, but the *Skinner* case severely damaged the

punitive aspect of these state laws.[58] The danger of sterilization as an instrument of government policy was obviously on the minds of the Justices at a time when the Nazi theory of a master race presented a frightening specter to the world. In *Skinner* the Court laid a doctrinal foundation for two of the most important constitutional developments of the twentieth century—expansion of the equal protection clause and re-emphasis on substantive due process as a guarantee of personal freedoms. This case was the forerunner of the "strict scrutiny" test and an early precedent in the development of the right of privacy doctrine.[59]

Two years later the question of voluntary confession was refined in the *Lyons* case.[60] With a previous record of chicken-stealing and burglary, Lyons was charged with three murders, plus arson with intent to conceal the crime. He made an oral confession after two interrogations involving intimidation. Subsequent interrogations that apparently did not involve threats resulted in a written confession by Lyons. The Supreme Court sustained the guilty verdict and upheld the state criminal court of appeals because the effect of prior coercion in the first confession had dissipated before the second confession. No overt racial issue was involved in the case, but it was the first major defeat for Thurgood Marshall, who as lawyer for the NAACP was handling the case.[61]

Another case in which the Supreme Court upheld the Oklahoma courts was one in which the defendant, Williams, was given a life sentence for murder.[62] In a subsequent trial, he was charged with kidnapping in the same crime and, pleading guilty, was sentenced to death. The Court rejected the double jeopardy plea and affirmed that the sentence did not violate the Due Process Clause of the Fourteenth Amendment because under Oklahoma law kidnapping and murder were separate and distinct offenses.

In later criminal cases several state judicial decisions were overturned by the high court. In *Barber v. Page*, two men were charged with armed robbery, but one, Woods, waived his privilege against self-incrimination and testified against the petitioner, Barber, in a preliminary hearing in which he was not cross-examined.[63] At the time Barber was being tried in Oklahoma, Woods was in a Texas prison. The state made no attempt to obtain Woods's presence at the trial, but claimed he was unavailable and introduced his preliminary testimony. The Supreme Court upheld Barber's right of confrontation and found that the state had not made a good faith effort to obtain the witness's presence. This resulted in a new and narrower dimension to

the use of unavailability as a legal argument and made the introduction of such hearsay evidence increasingly difficult.[64]

Another state habitual offender law was found unconstitutional in *Hicks v. Oklahoma*.[65] The petitioner, Hicks, was a twice-convicted felon and, upon a third conviction, received a jury-imposed sentence of forty years, which the state law mandated. The Oklahoma Court of Criminal Appeals had declared this provision unconstitutional in a previous case, but nonetheless affirmed Hicks's conviction. The Supreme Court, however, found that Hicks was denied the right to a proper jury sentence.

In a 1985 murder case, Glen Burton Ake was found competent by a hospital psychiatrist to stand trial, provided he continued to receive medication. His conviction was overturned by the Supreme Court on the ground that an indigent criminal defendant was entitled to the assistance of his own psychiatrist at state expense.[66] The Court rejected the argument that providing this assistance could cause economic hardship for the state. This decision was bound to impact on other states, few of which provided indigents with such expert consultants.[67]

During the period of the 1950s, Oklahoma, like several other states, required state employees to sign a loyalty oath. The oath included a statement that the person was not and had not been for the preceding five years a member of any communist or subversive organization. The Supreme Court overturned the state court's ruling on its constitutionality, declaring that the oath made no presumption of innocence; such oaths must not class innocent with knowing association with a subversive organization as a basis for precluding employment.[68] Justice Frankfurter's concurring opinion has been acclaimed for its well-reasoned exposition of the penumbra theory applied to the extension of the First Amendment to freedom of association and academic freedom.[69]

All of these episodes from Oklahoma history are important constitutionally and provide insight into the changes that have taken place in American society and in the way the Constitution is interpreted. They are a reflection of national problems, and often part of the solution to those problems or a forerunner of change. From Indian relationships and boundary controversies to the balancing of governmental powers and relations and the reinterpretation or refining of civil rights, the United States Constitution has spoken, and continues to speak.

Choosing one instrument by which the Constitution speaks—the Supreme Court—does not deny or diminish the role of others. In fact,

whenever the Court fails to address the Constitution, as when it refuses to hear a case or to decide a case on salient constitutional points, it nonetheless influences constitutional law. Decisions of the lower courts, especially the federal courts, also influence constitutional doctrine. Underlying this legal framework, moreover, are the political climate and public policy of the nation, which affect how the Constitution is interpreted. Still, a look at the landmark Supreme Court cases that arose in Oklahoma may promote greater understanding of the Constitution as a vital, living document and highlight the significant role that Oklahoma and its citizens have played in shaping that document, whose two hundredth birthday was celebrated in 1987. Not surprisingly, the words of one of Oklahoma's foremost chroniclers, Angie Debo, come to mind:

> For in Oklahoma all the experiences that went into the making of the nation have been speeded up. Here all the American traits have been intensified. The one who can interpret Oklahoma can grasp the meaning of America . . .[70]

ENDNOTES

* Anne Million is an Assistant Professor of Bibliography, Reference Department, University Libraries, University of Oklahoma, Norman.

[1] 5 Peters 1 (1831).

[2] 6 Peters 515 (1832).

[3] The Indian Removal Act of 1830, 4 Stat. 411.

[4] *United States Constitution*, Article I, Sec. 8 and Article II, Sec. 2.

[5] G. E. E. Linquist, "Indian Treaty-Making," *The Chronicles of Oklahoma* 26 (Winter 1948–49), 419.

[6] Charles J. Kappler, *Indian Affairs: Laws and Treaties*, Vol. II (Washington: Government Printing Office, 1904).

[7] For a detailed narrative of these treaties, see: Edwin C. McReynolds, *Oklahoma: History of the Sooner State* (Norman: University of Oklahoma Press, 1954).

[8] George Dewey Harmon, *Sixty Years of Indian Affairs: Political, Economic, and Diplomatic, 1789–1850* (Chapel Hill: University of North Carolina Press, 1941), 171 ff.

[9] For excellent accounts of the removals, see: Arrell M. Gibson, *Oklahoma: A History of Five Centuries* (Norman, Oklahoma: Harlow Publishing, 1965); Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes of Indians* (Norman: University of Oklahoma Press, 1932); Angie Debo, *The Road to Disappearance* (Norman: University of Oklahoma Press, 1941).

[10] Kappler, Vol. I, 90–101.

[11] McReynolds, 312.

[12] Primary source material can be found in several theses by Joseph S. Clark, N. W. Gant, Dale McKinney, Cleo Rains, and Claud A. Welborn. The dispute has been an extremely popular subject with graduate students, particularly at Southwestern colleges.

[13] A well documented account appears in Claud A. Welborn, *The Red River Controversy* (n.p.: Nortex Offset Publishers, 1973).

[14] 162 U.S. 1 (1896).

[15] 252 U.S. 372 (1920).

[16] 256 U.S. 70 (1921). An idea of the magnitude of technical data is found in Isaiah Bowman, "An American Boundary Dispute," *Geographical Review* 13 (April 1923), 161–89.

[17] 258 U.S. 574 (1922).

[18] 260 U.S. 606 (1923).

[19] 274 U.S. 714 (1927).

[20] George C. Lay, "The Red River Valley Controversy Between the United States, Texas and Oklahoma," *American Law Review* 63 (1929), 180; Carl Newton Tyson, *Red River in Southwestern History* (Norman: University of Oklahoma Press, 1981).

[21] Lay, 199.

[22] *The Oklahoma Red Book*, Vol. I (Oklahoma City, Oklahoma, 1912).

[23] McReynolds, 191–96.

[24] Gibson, 234.

[25] Rennard J. Strickland and James C. Thomas, "Most Sensibly Conservative and Safely Radical: Oklahoma's Constitutional Regulation of Economic Power, Land Ownership and Corporate Monopoly," *Tulsa Law Review* 9 (Fall 1973), 168.

[26] Charles A. Beard, "The Constitution of Oklahoma," *Political Science Quarterly* 24 (March 1909), 114.

[27] 34 Stat. 267.

[28] 221 U.S. 559 (1911). A firsthand account is Fred P. Branson, "The Removal of the State Capital," *The Chronicles of Oklahoma* 31 (Spring 1931), 15–21.

[29] Norman J. Futor, "Federal Review of Oklahoma Supreme Court Decisions" (Unpublished M.A. Thesis, University of Oklahoma, 1939).

[30] 224 U.S. 665 (1912).

[31] 313 U.S. 508 (1941).

[32] 327 U.S. 186 (1946).

[33] *Ibid.*, 219.

[34] *Oklahoma v. U.S. Civil Service Commission*, 330 U.S. 127 (1947).

[35] *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947).

[36] 413 U.S. 601 (1973).

[37] *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

[38] 238 U.S. 347 (1915).

[39] 307 U.S. 268 (1939).

[40] *Hollins v. Oklahoma*, 295 U.S. 394 (1935).

[41] Roger W. Cummins, " 'Lily-White' Juries on Trial," *The Chronicles of Oklahoma* 63 (Summer, 1985), 183.

[42] Charles H. Martin, "Oklahoma's 'Scottsboro' Affair: The Jess Hollins Rape Case, 1931–1936," *South Atlantic Quarterly* 79 (Spring 1980), 188.

[43] Cummins, 184.

[44] 235 U.S. 151 (1914).

[45] *Sipuel v. Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948).

[46] Larry Stephenson, "The Sipuel Case," *Sooner Magazine* 20 (January 1948), 5, 26; Ruth E. Swain, *Ada Lois: the Sipuel Story* (New York: Vantage Press, 1978).

[47] *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950).

[48] There are numerous good accounts of the social and educational context of these cases: William E. Bittle, "The Desegregated All-White Institution . . . The University of Oklahoma," *Journal of Educational Sociology*, 32 (February 1959), 275–82; Michelle

Celarier, "History of Public Opinion on Desegregation in Oklahoma Higher Education," *The Chronicles of Oklahoma* 47 (Autumn 1969), 268–81; George L. Cross, *Blacks in White Colleges: Oklahoma's Landmark Cases* (Norman: University of Oklahoma Press, 1975); John T. Hubbell, "The Desegregation of the University of Oklahoma, 1946–1950," *Journal of Negro History* 57 (October 1972), 370–84 and "Some Reactions to the Desegregation of the University of Oklahoma, 1946–1950," *Phylon* 34 (June 1973), 187–96; Earnestine B. Spears, "Social Forces in the Admittance of Negroes to the University of Oklahoma," (Unpublished M.A. Thesis, University of Oklahoma, 1951).

[49] *Brown v. Board of Education I*, 347 U.S. 483 (1954).

[50] 396 U.S. 269 (1969); John S. Detweiler, "The Negro Teacher and the Fourteenth Amendment," *Journal of Negro Education* 36 (Fall 1967), 403–409.

[51] *Craig v. Boren*, 429 U.S. 190 (1976).

[52] The significance of the third tier analysis is discussed in: "The Search for a Standard of Review in Sex Discrimination Questions," *Houston Law Review* 14 (March 1977), 721–34; "Gender-based Discrimination and Equal Protection: The Emerging Intermediate Standard," *University of Florida Law Review* 29 (Spring 1977), 582–93; and "Important Governmental Objective: A Third Equal Protection Test," *Baylor Law Review* 29 (Spring 1977), 423–29.

[53] 258 U.S. 234 (1922).

[54] *Frost v. Corporation Commission*, 278 U.S. 515 (1929).

[55] *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

[56] Sheldon Goldman, *Constitutional Law and Supreme Court Decision-Making; Cases and Essays* (New York: Harper and Row, 1982), 266–67.

[57] *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

[58] Donald K. Pickens, "The Sterilization Movement; The Search for Purity of Mind and State," *Phylon* 28 (1967), 87.

[59] Kenneth L. Karst in the *Encyclopedia of the American Constitution*, Vol. 4 (New York: Macmillan, 1986), 1686.

[60] *Lyons v. Oklahoma*, 322 U.S. 596 (1944).

[61] The Oklahoma cases argued by Thurgood Marshall before the Supreme Court are described in Randall W. Bland, *Private Pressure on Public Law: The Legal Career of Justice Thurgood Marshall* (Port Washington, N.Y.: Kennikat Press, 1973).

[62] *Williams v. Oklahoma*, 358 U.S. 576 (1959).

[63] *Barber v. Page*, 390 U.S. 719 (1968).

[64] "Evidence—A New Restriction on an Exception to the Hearsay Rule," *Tulsa Law Journal* 6 (March 1970), 186.

[65] *Hicks v. Oklahoma*, 447 U.S. 343 (1980).

[66] *Ake v. Oklahoma*, 470 U.S. 68 (1985).

[67] "An Indigent's Constitutional Right to Expert Psychiatric Assistance: *Ake v. Oklahoma*," *Southwestern Law Journal* 39 (November 1985), 973.

[68] *Wieman v. Updegraff*, 344 U.S. 183 (1952); for a history of these oaths and the significance of the Court's ruling, see: "Loyalty Oaths . . . . . How Far?" *Albany Law Review* 17 (June 1953), 266–82.

[69] *Edward S. Corwin's The Constitution and What It Means Today*, Revised by Harold W. Chase and Craig R. Ducat (Princeton: Princeton University Press, 1978), 388.

[70] Angie Debo, *Oklahoma: Foot-loose and Fancy-free* (Norman: University of Oklahoma Press, 1949), vii.