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Kermit L. Hall

University of Florida

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THE LEGAL CULTURE OF THE GREAT PLAINS

KERMIT L. HALL

The great prairie lawyer Abraham Lincoln once said of an opposing legal counsel's argument, "He caught on to something, but only by the hind leg."¹ Lincoln's observation applies with equal force to our current understanding of the legal culture of the Great Plains, and even that characterization is generous. Take, for example, the literature on the region's history of public and private law and legal institutions. It is pitifully small. Bits and pieces are scattered through specialized journals and state history periodicals, but there is nothing like a systematic body of scholarship.²

The major bibliographic guide to the literature in American constitutional and legal his-

tory lists, during the past twenty years, only six articles dealing with the subject and no books. These numbers stand in sharp contrast to the more than sixty entries and two major books on southern legal history and the more than twenty articles devoted to the legal culture of the Rocky Mountain and Pacific states.³ Our ignorance about the legal culture of the Great Plains is even more sobering when we realize that in the past century scholars of American constitutional and legal history have produced more than twenty thousand books and articles, with more than four thousand of those published in the 1980s. While the Great Plains economies have regularly gone through cycles of boom and bust, scholarship about the region's legal culture has never even taken off. Indeed, there is not even an agenda for such scholarship.

So an important threshold question is why this neglect? In part, it is an accident of location. The major centers of learning about legal history have not been in the plains states; there has been no Willard Hurst or Lawrence Friedman to make the region a historical laboratory for testing various hypotheses about legal culture. Instead the nation's legal history has been

A professor of law at the University of Florida and one of the foremost legal historians of the day, Kermit Hall includes among his many publications a seven-volume Comprehensive Bibliography of American Constitutional and Legal History (1984 and 1991) and The Magic Mirror: Law in American History (1989).

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drawn, at least until quite recently, from the East and from New England, especially. If Willard Hurst, perhaps the greatest American legal historian, had lived in Nebraska instead of Wisconsin, chances are good that we would know more today about its legal culture than we do. Even native Nebraskan Roscoe Pound, who had strong historical interests, drew his examples from England and New England rather than the Plains.⁴

Second, while scholars have churned out an impressive body of literature about the Great Plains, they have seldom thought to analyze law and legal institutions as reflections of the region's assumptions about society, culture, and economy. When they have turned to the law, historians of the Great Plains have usually taken climate and geography as both the beginning and the ending point of analysis, failing to probe the ways in which modes of economic production and social organization on the Plains have shaped and been shaped by the law. Historians of the Great Plains have not approached law as a social and cultural artifact; instead, they have typically viewed it as a closed system chained by environmental determinism.⁵

There is a third reason for the slight attention paid to the region's legal history. For the national community of jurists, the Great Plains has been a legal backwater. Judges and treatise writers in the nation's other regions have paid slight attention to legal developments on the Plains. Studies by Peter Harris, Lawrence Friedman, and Rodney Mott on the reputations of state supreme courts over the past century and a half leave little doubt about this matter.⁶ Peter Harris measured citations by sixteen state supreme courts of cases from other state supreme courts for the period 1870-1970. The two Great Plains states included in his study—Kansas and South Dakota—have persistently lacked citation power. Indeed, the states of the Great Plains ranked even lower than the often maligned state courts of the South, including Alabama, North Carolina, and Virginia. In Harris's study, nobody cited two state supreme courts as authority—Delaware and South Dakota.⁷ Of course, citation is not the same as influence, and there

is reason to believe, according to the studies of Rodney Mott, that the high courts of Kansas and Nebraska in the early twentieth century achieved some distinction. But no appellate court on the Great Plains has ever achieved the reputation enjoyed by its counterparts in California, New York, and Massachusetts.⁸

This status reflects the fact that the states with the richest and most complex economic, social, and cultural settings are also likely to produce the richest legal environment.⁹ But it is also true that the Great Plains states have been net importers of legal talent. A collective survey of the 420 judges who served on the highest courts of appeal in the ten states between 1870 and 1970 reveals as much.¹⁰ Until the mid-1930s a majority of plains state judges received their legal educations outside the region, a condition that suggests that legal education there lagged behind developments elsewhere. Only in the last fifty years have the Great Plains states developed a high proportion of judges trained within the region.

There is a fourth and final reason why legal historians have showered so little attention on the Great Plains. Lincoln, once again, captured the spirit of things. In describing an especially spirited wrestling match, he observed that the opponents had struggled so fiercely that they got inside one another's coats. More often than not, legal historians have simply swallowed up the Great Plains as part of the general legal history of the West.¹¹

That the legal culture of the Great Plains has been ignored does not mean, of course, that it should be ignored or that it is unimportant. We should also recognize that our lack of attention to law and legal institutions on the Great Plains only abets the skewed vision that we have of American legal development as an emanation exclusively of New England.¹²

Having said all of this, we arrive at the central question. Has the Great Plains had and does it now have a distinctive legal culture? By legal culture we mean the ideas, attitudes, values, and opinions about law held by people in a society.¹³ The assumption is that these ideas and attitudes influence legal behavior, especially the

kind and level of demands placed on the legal system. In raising the question of legal culture, we are asking when and why and where people have turned to law and government. The assumption is that if we understand legal culture we can, in turn, better appreciate the role of law in society.

We can grasp the implications of this relationship between social change and the law by resorting to a somewhat stereotypical perspective. As one sage has observed:

In Germany, under the law, everything is prohibited except that which is permitted.

In France, under the law, everything is permitted, except that which is prohibited.

In the Soviet Union, under the law, everything is prohibited, *including* that which is permitted.

In Italy, under the law, everything is permitted, *especially* that which is *prohibited*.

And in the United States, under the law, everything is *both* permitted *and* prohibited, because Americans are forever deciding the law but nothing ever seems to get decided.¹⁴

We should remember, however, that particularity is not the same thing as legal culture. The Great Plains, like all regions of the nation, has certainly generated unique demands that have, in turn, produced laws and legal institutions different from those of other areas of the country. How different these changes really have been, both as a matter of inter- and intraregional comparison, is something worth paying attention to, but we should remember that uniqueness and adaptation of older legal forms to newer circumstances does not necessarily herald a new legal culture. It is the attitudes, values, ideas, and opinions behind those changes that really count, and they can, of course, be exactly the same even if they are expressed in different ways. The other important point is that legal culture is not static; it evolves over time as the nature of social demands and expectations change. As Roscoe Pound once observed: "The law must be stable, but it must not stand still."¹⁵

REGIONALISM AND LAW

Our interest in the legal culture of the Great Plains is further evidence of the renewed vigor of regional history generally, especially in legal history.¹⁶ After more than forty years of neglect, regional studies of all stripes are once again on the rise, in part because they appear to offer certain comparative advantages not found in local, state, or national studies. Legal historians have in fact shown increasing sympathy toward regional studies over the past decade. David Bodenhamer, Gordon Bakken, James W. Ely, Jr., Paul Finkelman, John Reid, and David Langum, to name but a few, have argued that generalizations drawn from regional patterns of legal organization and behavior are of greater comparative significance than generalizations drawn from community or national studies alone.¹⁷ Regional studies, they contend, have allowed scholars to identify more precisely that which is merely local and to control for its effects. Similarly, proponents of regional studies insist that their findings offer the best test of attitudes and behavior that purport to be truly national.

In order to have a regional legal history, however, one must first have a region. In the case of the Great Plains, the matter of definition is a good deal more complex than might first appear. The simplest and most commonly used definition is environmental. Its leading proponent was Walter Prescott Webb, who believed that physical geography and climate unified the region. Webb's book, *The Great Plains*, first published in 1931, remains today the single most widely read history of the region. In it he approached the Great Plains as an environment unified by its flatness, lack of trees, and semiaridity. For our purposes, this plains environment can be narrowed to what constitutes the heart of the region—portions of the ten states of Montana, Wyoming, Colorado, New Mexico, North and South Dakota, Nebraska, Kansas, Oklahoma, and Texas. Webb argued that once immigrants crossed the eastern boundary of the Great Plains at the ninety-eighth meridian all of the institutions they had known in the East were, in his words, "either broken or remade or else greatly altered."¹⁸

This environment, Webb insisted, produced not only a unique body of law but a legal culture entirely distinct from that in the East. "The Easterner, with his background of forest and farm," Webb observed, "could not always understand the man of the cattle kingdom."

One went on foot, the other went on horseback; one carried his law in books, the other carried it strapped round his waist. One represented tradition, the other represented innovation; one responded to convention, the other responded to necessity and evolved his own conventions. Yet the man of the timber and the town made the law for the man of the plain; the plainsman, finding this law unsuited to his needs, broke it and was called lawless.¹⁹

Webb also pointed to the democratic nature of the Great Plains, giving special attention to the development of women's suffrage. In short, according to Webb, the legal culture of the Great Plains resonated to the values of innovation, individualism, democracy, and lawlessness present in the region's general culture. The great open skies of the Plains, it seems, provided almost boundless opportunities for individuals, so much so that individuals often took the law into their own hands.

Historians, geographers, and anthropologists have subjected Webb's environmental determinism to often withering criticism, but it retains considerable vitality, as any reader of Ian Frazier's similarly titled recent book on the region will appreciate.²⁰ Moreover, of all the historians who have written on the Great Plains, Webb provides by far the most coherent, if ultimately clipped, assessment of the law and legal institutions. Thus, both as a way of assessing the region's legal culture and as a means of dealing with the coherence of the Great Plains as other than a geographic fact of life, Webb's thesis of individualism, innovation, and violence seems an appropriate place for the infant field of Great Plains legal history to begin.

TESTING WEBB'S THESIS

Much of Webb's argument about the inventiveness and individualism of the Great Plains rested on his analysis of property law in three important areas: land, livestock, and water. But how well do his arguments hold up?

Take, for example, the open-range cattle industry in the Great Plains. The fact that fencing materials were scarce in the treeless plain led cattlemen to demand that the English common-law requirement to fence livestock be abrogated and the burden of fencing be placed upon crop farmers. Plains legislators passed open-range statutes that placed the burden to fence on the farmer. If damage to crops by livestock were litigated, then the farmer had to prove he had maintained a legal fence around his crops to collect money damages from the cattle owner. Yet there was considerable borrowing; fencing-out statutes were hardly unique to the Plains. Borrowing legal doctrine from the East was one of the common features of the Great Plains, and even in an area so seemingly unique as the cattle industry, cultural memories about law were often long. John Reid has made the same point about migrants crossing the Great Plains in the 1850s.²¹

What gave visibility to the fencing statutes on the Great Plains was not their novelty but the fact that they sought to resolve conflicts among farmers, free-grass cattlemen, and barbed-wire ranchers. Hence the legal culture of the Great Plains resonated far more to the economic pressures associated with a shift on the Plains from the nineteenth-century economics of pastoral stock raising to the twentieth century practice of farming. In short, the law as it affected cattle and fencing had more to do with competing modes of economic production than it did with innovation as a paramount value.²²

There seems little doubt that the law of property rights in the West was highly instrumental where issues of economic development were involved. Initially land on the Great Plains was not a scarce resource although it eventually became so. For much of the 1860s and 1870s "squatter sovereignty" was sufficient for settling

land ownership questions.²³ The range was open and there was little in the way of an exclusive right to own and use it. Cattlemen did not own the land; they exercised instead "range rights" that neighbors recognized but that the law did not enforce. To secure these accustomed rights, ranchers ran claim advertisements in local newspapers. By the 1880s, however, competing agricultural groups on the Plains often had conflicting claims to the same land without any enforceable mechanism to settle them. The result was a prolonged struggle among different kinds of land users. Cattlemen, for example, organized in an effort to persuade state and territorial legislators to pass statutes that punished those who drove their stock from the accustomed range, but by the 1880s stock growers associations had persuaded several state legislatures to enact statutes that restricted entry onto the range through control of access to the limited water supplies. The entire movement in land law in the Great Plains at the end of the nineteenth century was from communal to exclusive ownership, a development that had long been under way in the East and that has continued unabated even today as more and more of Great Plains land and productive capacity has been placed in fewer and fewer hands.²⁴ While often advertised as protecting individual property rights, these developments have actually produced a consolidation of landholding that mocks the notion of the small, self-reliant farmer. Once again, the generally inefficient small livestock and farming enterprises yielded before large, well capitalized agricultural businesses.

Much the same has happened with water law, an area to which Webb pointed to underscore the inventiveness of Great Plains legal culture. As with land and livestock, however, water regulation on the Plains seems less innovative and distinctive than Webb imagined.²⁵ From the outset, access to and control of water was the most crucial economic consideration on the Plains. Initially western settlers adopted the riparian system of water rights, which meant that the right to use water accrued to the one who owned the bank of the stream. That such ri-

parian water rights, whether implicit or explicit, were adopted by the frontiersman is not difficult to understand. Indeed, it was not until settlement was well under way, as Donald J. Pisani has shown, that water law began to change significantly, granting to the first appropriator of it an exclusive right and to later appropriators rights conditioned upon the prior rights of those who had gone before them.²⁶ The new rules also permitted the diversion of waters to non-riparian lands, the extinguishment of rights in water if not used, and the transfer of water rights from one person to another.

As with land and livestock, the pattern in the development of water law on the Great Plains was from common to exclusive rights. Yet even in this seemingly most unique area, the states of the Great Plains were borrowers, as Robert G. Dunbar has shown. The states did not build their own system of water law *de novo*; instead they borrowed lavishly from the California legislature and supreme court, whose decisions in *Irwin v. Phillips*, *Lux v. Haggin*, and *Katz v. Walkinshaw* became models adopted in the plains states.²⁷ Colorado, for example, which led the states of the Great Plains in dealing with the issues of multiple uses of water, drew heavily from the California experience to fashion what became known as the Colorado Doctrine—a doctrine that protected vested users in their rights to water.²⁸

Moreover, there were significant differences within the Great Plains. Much like Lincoln's wrestlers, Webb often let the status of water law in the Great Plains get swallowed up in his description of the West as a whole. The trend toward exclusivity was strongest in those states—Montana, Wyoming, Colorado, and New Mexico—where rainfall averaged less than fifteen inches a year, while in states with somewhat greater amounts of rainfall—North and South Dakota, Nebraska, Kansas, Oklahoma, and Texas—the common law was retained in a modified form, one that followed the lead of California in recognizing *both* riparian *and* appropriative rights. Furthermore, the long term pattern has not been to serve the individual small water user but to reward the heavily cap-

itized businesses that make modern agribusiness work.

There is no doubt that innovation was an important feature of the Great Plains legal culture, but it was neither unique nor deterministic. Property rights were sometimes treated in different ways than they were in the East, but that did not mean that easterners, in other areas of economic development, such as the fellow servant rule, assumption of risk, and contributory negligence, were incapable of innovating on their own. The reasonable use doctrine, which became an important part of water law on the Great Plains, was also applied to stream courses and water power in the East as a way of expediting the development of manufacturing.²⁹ In the end, felt economic needs, not geography and climate, were the real inducements to legal innovation—in the Great Plains or elsewhere.

LAWLESSNESS AND VIOLENCE

Interregional differences in legal culture and the habit of borrowing were evident in two other areas: lawlessness and violence and the legal/political status of women. The Great Plains, according to commentators as different in outlook as Webb and Patricia Nelson Limerick, was a rough and tumble place, in which violence and extralegal behavior figured prominently in the underlying culture. Truman Capote, of course, crystallized the notion of the violent Plains in his book *In Cold Blood*. Capote captured the essence of what frightens us most about violence on the Plains—it was random, remorseless, methodical, and suffered in a remote Kansas farm house. There were, of course, other kinds of violence on the Plains; some of it, like that associated with Bat Masterson and Wyatt Earp, involved conflict resolution, while other violence, such as that associated with ecotage and the Earth First! movement, was directed at authority itself.³⁰

Let us, however, concentrate only on one kind of crime—homicide. One of the reasons that Capote's book so shocks our conscience is that it is the exception and not the rule. Every

recent study of violence and crime finds the Great Plains states lagging far behind the national leader—the South. The white male homicide rates from the late nineteenth century up to today reveal that no Great Plains state, including that seeming bastion of violence—Texas—, ranks in the top twenty, with most of the states of the Plains scattered over the middle or lower end of the spectrum.³¹ In more recent times, Texas and New Mexico have shown a higher rate of homicide, but even they lag behind Louisiana, Mississippi, Alabama, Georgia, South Carolina, and Florida. The other Great Plains states rank very low.³²

These figures also caution us against thinking about the Great Plains in an exclusively North-South fashion. Cultural interpreters of the Plains, such as Earl Pomeroy and Robert Berkhofer, have argued that in many instances such an alignment does not make sense.³³ Homicide rates suggest as much. The culture of North Dakota, for example, more closely resembles that of Minnesota than that of Nebraska and Kansas. The southern Plains, on the other hand, have much more in common with Arkansas and Tennessee than with the northern Plains. According to many geographers, folklorists, and linguists, it is the East-West patterns of settlement and interregional migration flows rather than environmental attributes that define the Plains.³⁴

In the case of homicide and suicide that was certainly true. Where the influx of southern immigrants was greatest—Texas, New Mexico, and Oklahoma—the incidence of violence was the highest. Where the flow of population included more Scandinavian and Yankee stock, as was true in the northern tier of the Great Plains states, homicide has been less frequent. In short, as Raymond D. Gastil's study of cultural regionalism reveals, the presence of *southerners* on the Great Plains has historically been the best predictor of violence. At the same time, the incidence of suicide has been highest in the northern Plains, with its strong Scandinavian origins.³⁵ Any characterization of the Great Plains as violent always has to be framed comparatively, since there are fairly significant inter- and intraregional variations.

LEGAL AND POLITICAL STATUS OF WOMEN

The same can be said of the legal and political status of women. We are only beginning to have some idea of the historical development of family law on the Plains. There is a working hypothesis that marital matters in farming communities tend to be conservative, with little room for women to escape. Yet if we look beneath this relationship, as Paula Petrik is doing in her on-going study of divorce law in the West, we find a mixture of morality and economic expediency. Here as elsewhere, Great Plains lawmakers seemed sensitive to economic necessity, crafting the law in instrumental ways so as to protect the integrity and earning power of the family. Take, for example, the case of Nebraska. Its divorce law included grounds of desertion, adultery, extreme cruelty, intemperance, and an omnibus provision of other but less utilized causes, including impotency, conviction for a felony, and the like. In this regard Nebraska divorce law mimicked developments elsewhere in the country. But in those plains states with large numbers of homesteaders, Petrik has also discovered that a "dower" clause was attached to most divorce statutes. It entitled a wronged wife to her dower right (one-third of the property) should her spouse be blamed for the dissolution of the marriage.³⁶ The dower clause, in short, complicated divorce in late nineteenth-century Nebraska and demonstrated the influence of homestead-based land ownership on divorce in the upper Great Plains. The dower clause probably helped to account for the higher number of settlement and alimony cases that came to the highest appellate courts of the northern Plains, which were faced with the task of constantly refining the boundaries of spousal support.

The dower clause also apparently influenced husbands. We know, for example, that more men than women filed for divorce in Nebraska, employing a preemptive strike strategy to shift blame to their wives and protect their farms from execution. There is also evidence, according to Petrik, that the highest appellate

courts of the northern tier of the Great Plains states were increasingly pressed to give clearer and clearer definitions of extreme cruelty and desertion—normally "women's" charges in a divorce proceeding. The Montana Supreme Court in *Albert v. Albert* in 1885 defined extreme cruelty as a single incident of physical abuse and set the stage for the lower courts' use of mental cruelty. The Wyoming legislature in 1899, however, threw in the towel and simply provided that divorces could be granted as a result of any "indignities" that rendered the marriage "intolerable."³⁷ For a short period in the 1870s and 1880s the lenient divorce and residency laws in North and South Dakota made them havens for migratory divorces. The pattern, however, was much different in the southern Plains, where Texas, Oklahoma, and New Mexico made divorce harder.³⁸

There were also differences in the legal provisions governing property rights of married women. While Texas and New Mexico adopted the civil law system of community property, the other Great Plains states embraced the common law system. Several of these states also wrote some degree of protection for married women's property rights into their constitutions, with Texas in 1845 and Kansas in 1859 leading the way. The expansion of land ownership by women gave these acts special significance, with Wyoming giving married women separate control over their earnings during marriage and equal custody of their children.³⁹

Wyoming, of course, also led the way in granting women suffrage. In 1869 the territory granted women the right to vote, which also gave them access to the jury box and service in other positions formerly reserved for men. Esther Morris, a Wyoming suffragist, served as the first female justice of the peace in the United States. Yet by 1900 only one other Great Plains state—Colorado—had followed Wyoming's lead. By 1914 Montana and Kansas had extended the franchise, but the other states in the region did not follow until shortly before passage of the nineteenth amendment in 1920.⁴⁰

These developments underscore the problems of thinking of the Great Plains as a legal

unity. It is clear, of course, that a change in women's status was far more welcome there than in the East, but the motives were mixed at best. Where married women's property rights were involved, the pattern seems to have been more uniform, since giving women access to the economic mainstream was beneficial to economic growth. Why this was so in the Plains rather than the East is a question that, if answered, would tell us as much about developments there as on the Great Plains.

In the case of suffrage the motives behind the legal and constitutional reforms were more varied. In the East, entrenched political structures prevented broader social change; in lonely Wyoming there were no established political machines and accordingly there was no established opposition to the idea of women's suffrage.⁴¹ In Colorado there is some evidence—though far from conclusive—that its radical labor movement and strong populist roots led to acceptance of the related movement for female equality.⁴² In Kansas, women's rights were tied to women's religiosity and the hope that the women's vote would promote temperance and other moral causes. There were, once again, important intraregional and as well as interregional variations.⁴³

ECONOMICS AND LAW

For all of its seeming democratic and individualistic tendencies, the legal culture of the Great Plains reflects back to us strong tendencies toward regulation of that most important of all areas of human endeavors—the creation of wealth. While seemingly professing the cowboy ideal of “don't fence me in,” Great Plains lawmakers were more than willing to regulate and redistribute wealth.

While geography and climate may well have shaped the agriculture practiced on the Plains, it was distant eastern and world markets that most influenced the wealth that residents of the Plains could generate from crops and livestock. Even so adamant an environmentalist as the sociologist Carl Kraenzel concluded that the Great Plains had been exploited by eastern

manufacturers and railroads in such a way as to turn it into a kind of third-world economy that depended on agricultural exports in order to attain eastern credit and technology.⁴⁴ These developments, Kraenzel and others argue, accelerated in the last quarter of the nineteenth century and gave birth to first the Granger and then the Populist political movements.

With the exception of a brief boom during the 1880s, the prices of agricultural commodities grown on the Plains plunged, with wheat, for example, falling by more than half its value, to \$63 a bushel in 1897. Great Plains farmers attributed this collapse to the monopolistic practices of grain elevator and railroad operators, who in turn charged that the farmers had brought it on themselves by overproduction. Whatever the truth of the matter, the plains farmers concluded that they were badly abused, cheated by elevator owners, robbed by railroad barons, and overcharged by eastern manufacturers.⁴⁵ Thus political action became the means to redress these woes, first in individual states, which passed antitrust and regulatory legislation involving railroads and elevators, and later in the movement for similar legislation in Washington. The Granger movement of the 1870s was especially strong in Kansas and Nebraska where small town merchants and businessmen, who also suffered from predatory pricing policies, joined with farmers. Yet even on these important issues of economic regulation and redistribution, the states of the Great Plains were not pioneers. The four upper Mississippi Valley states—Illinois, Iowa, Wisconsin, and Minnesota—were models of regulation, in large measure because the Republican and Democratic parties were evenly balanced there and hence vulnerable to political pressure from the Grange.⁴⁶

Eventually, however, the political activism of these older states spilled over into the Plains. In the 1880s the boom in demand for plains foodstuffs brought an enormous infusion of speculative capital. Land values skyrocketed; speculation was rampant; every tiny hamlet began to think itself a metropolis. Fifteen Kansas towns installed streetcar systems during the boom, all

paid for by speculative eastern capital. Farmers committed the fatal sin of overmortgaging their property, and when the weather turned dry at the end of the 1880s the farm economies of the Plains collapsed.⁴⁷

The depression of the late 1880s was so sweeping in its destruction that it forced many plains farmers, at least those who stayed, to rethink their relationship to the political and legal system. Between 1888 and 1892 half the population of western Kansas moved out, most of it back to the East. The farmers that remained were not only overmortgaged but they quickly fell into a vicious cycle of going deeper into debt each year in order to sell more goods at lower prices. This sweeping economic disaster brought new attention to the rights of debtors and the powers of creditors to seize and hold property in default, issues that deserve far closer attention among legal historians than they have received. This cumulative economic frustration eventually ignited the Populist Revolt.

THE POPULIST REVOLT

Populism on the Plains was not so much a political movement, although it was certainly that, as it was a quasi-religious revival, in which the farmers rallied to seek through law solutions to the crushing debt and the burdensome taxes that they faced. The agrarian revolt in 1890 produced startling legal results on the Plains.

The Populist revolt also ushered in the most important period of legal innovation on the Plains, and these developments came at a time when the Plains had, in turn, the greatest impact on national law. While the Populist revolt spread far beyond the boundaries of the Great Plains, its farmers nonetheless symbolized its strength. At the 1892 convention of the People's Party in Omaha, Nebraska, the delegates agreed on what became for the next third of a century the major elements of reform politics in America: the creation of a flexible currency; honesty, economy, and greater openness in government; a graduated income tax; postal savings banks; government ownership of railroads and telegraph lines; abolition of alien land holdings;

and reclamation of all lands held by railroads and other corporations in excess of their needs. The Populists insisted in the preamble to their 1892 Omaha Platform that "wealth belongs to him who creates it."⁴⁸

The Populist program looks mild by today's standards, but it was thoroughly radical in its own day. The legal and economic readjustments called for by the Populists had class conflict overtones, so much so that employers retaliated against many members by threatening them with wage cuts and layoffs if they voted for William Jennings Bryan in 1896. Bryan, of course, lost to the Republican William McKinley, although Bryan did carry all the Great Plains states except North Dakota.

In defeat the Populists were ultimately vindicated. They succeeded in securing from plains state legislatures debt relief legislation that became a model for agricultural states outside the region. They wanted progressive constitutional and governmental reforms: the conservative Theodore Roosevelt gave them railroad regulation, the reactionary William Howard Taft postal savings banks, and the liberal Woodrow Wilson a more flexible currency through the Federal Reserve System. The initiative and referendum the Populists desired, and the recall they considered too radical to ask for, were in general used not only in the Plains but throughout the nation by 1912. The seventeenth amendment, allowing a federal income tax, came shortly afterward.

THE FEDERAL IMPACT

These developments also help place the Plains within American federalism. The Populist Revolt sought through the power of the federal government to restore a semblance of balance between producers and consumers, one in which the exporting states of the Plains would have an opportunity to compete effectively in the national marketplace. Hence in the twentieth century the Great Plains states have been the beneficiaries of enormous government largess. In 1974 Governor Richard Lamm of Colorado echoed sentiments a century old when he en-

dorsed an OPEC-like organization of energy-rich western states against proposed federal controls. "We're saying," Lamm asserted, "that there are certain things that happen to colonies—whether they are in Colorado or the Congo—if there is not some assertiveness on the part of their leaders. And we are not going to be colonized."⁴⁹

Beneath such rhetoric lurks a profound reality: On a per capita basis, no other region of the country in this century has been better supported by the federal government than the Great Plains, through massive agricultural subsidies, land and water reclamation projects, military bases, and most recently a futile effort to develop coal gasification and synthetic fuels projects. Between 1850 and 1950, the federal government poured more than \$150 billion into the region, and it has long since been the largest single employer in two of the plains states: North Dakota and New Mexico.⁵⁰ The distribution of this federal largess was neither simple nor automatic, depending as it has on a complicated network of federal, state, and local administrative agencies staffed by thousands of bureaucrats. The relationship between the federal administrative process and administrative law, on the one hand, and the economic development of the Great Plains, on the other, is certainly one of the least understood aspects of the region's legal culture. Many of the plains states have resisted this federal involvement at the same time that they have benefited from it. Indeed, many residents of the Great Plains seem to love to hate the federal dollars that they love to receive.

CONCLUSION

While the general drift in twentieth-century legal culture has been to secure individual rights through government-sponsored social welfare and economic opportunity programs, most of the region's states, especially in the upper Plains, have resisted. Moreover, for a region that prides itself on individualism and autonomy, its lawmakers have, like those in other sections of the nation, displayed a nasty tendency to strike out

against those that it fears. Thus, as Paul Finkelman explains in his study of *Meyer v. Nebraska*, powerful nativist tendencies have frequently shaped the culture of rights on the Plains.⁵¹ Surely legal historians can do much to understand the interplay of economic imperative and racial and ethnic prejudice on the Plains. Much work remains to be done, as well, on what rights meant on the Great Plains in the context of white and Native American relations, although we have made a beginning of sorts.⁵²

At least on first impression, those qualities that seem to set the Great Plains apart—individualism, innovation, democracy, and lawlessness—appear on closer inspection to be more dimly reflected in the region's legal culture than Webb and other environmentalists believed. It may well be, as Patricia Nelson Limerick has argued, that as often as not these frontier qualities dissolved into surface-skimming waste, brash overconfidence, and reckless speculation.⁵³ She may well be right: the inhabitants of the Great Plains have been too absorbed in their own pursuit of wealth to pay much attention to the needs of society. The plains states have been, throughout their history, strongholds of political conservatism, despite outraged cries of easterners about plains radicalism. The periodic protests raised on the Plains have usually been leveled against change, with the region's residents preferring the maintenance of an agrarian social order against an increasingly industrialized and interdependent world economy. Ironically this seems to have been the motivation of farmers who in the 1930s shifted the center of conservative Republicanism to the upper Plains in their vain effort to check a "New Deal" that held forth the best promise for farm supports, relief to the victims of the dust bowl, and programs to address the cataclysmic effects of massive land erosion. More recently, the Plains have given support to Richard Nixon and Ronald Reagan, doing so in the apparent belief that private enterprise and individual effort alone would solve national problems.

Taken together, these developments warn us about the elusive nature of our quest for the

legal culture of the Great Plains. It may exist, but more as a paradox than as a bundle of values and attitudes associated with a clear geographical area. Scholars disagree about whether there is—or was—a Great Plains and whether the widely accepted environmental definition of region gains coherence at the expense of distorting the East-West cultural similarities that sing through the Plains.

As is true with all regional approaches to legal culture, we must be careful not to confuse the description of an area with the motive forces that bring about legal change in the first place. Even if we find, in the end, a strong correlation among geography, climate, and law, we may not be much further along in understanding the region's legal culture, because to grasp the values and attitudes that shape law on the Great Plains or elsewhere we must necessarily look at those issues of law and society where they are most likely to appear—in the ways in which law mediates among competing modes of production and in the role it has played in defining and sustaining gender, class, and race relations. My suspicion is that when we approach the issue of legal culture in this way we are likely to find that the Great Plains was far more like the rest of American legal culture than it was different from it. Differences between the Plains and other regions tended to be those of timing, pace, and manner, not differences in fundamental social attitudes.

There is, of course, no such thing as *the* legal culture of the Great Plains, or of the South or the West for that matter. In an area as diverse as the Plains, there are all sorts of attitudes and opinions about law, and we should be prepared to understand them. But on a broad scale the standard shibboleths about individualism, innovation, democracy, and lawlessness seem overwrought. We may be skillful and, yes, lucky, enough to be able to divine certain broad tendencies, ones that would help, if identified, to shape our understanding of not just the law—the statutes, the judicial pronouncements, the organizational schemes—but of the connection between it and social change. If we understand such connections, then we will certainly have

a much better idea about whether what goes on through the legal process in this region can actually be analyzed as a coherent legal culture.

These are of necessity only surface impressions about the legal culture of the Great Plains. Perhaps there is more that is distinctive to it than seems to be the case. There may well be some yawning gulf that separates attitudes and values about the law in, say, South Dakota, from those in California or New Jersey. To find out we simply must learn more about law on the Great Plains.

NOTES

1. As quoted in David Hackett Fischer, "Models of Intellectual Change in the Antebellum South and North: A Comparative Perspective," paper presented at the Southern Intellectual History Circle Conference, Gainesville, Florida, 21 February 1991, p. 4.

2. See Kermit L. Hall, *Comprehensive Bibliography of American Constitutional and Legal History*, 5 vols. (Millwood, New York: Kraus International Publications, 1984); and Hall, *Comprehensive Bibliography of American Constitutional and Legal History Supplement 1980-1987*, 2 vols. (Millwood, New York: Kraus International Publications, 1991).

3. See, for example, Kermit L. Hall and James W. Ely, Jr., eds., *Constitutionalism and the History of the South* (Athens: University of Georgia Press, 1989) and David J. Bodenhamer and James W. Ely, Jr., *Ambivalent Legacy: A Legal History of the South* (Jackson: University Press of Mississippi, 1984). A good introduction to most of the recent writing on the legal history of the Rocky Mountain region and the Far West is Gordon Bakken, *The Development of the Law on the Rocky Mountain Frontier: Civil Law and Society, 1850-1912* (Westport, Connecticut: Greenwood Press, 1983); and Bakken, *Rocky Mountain Constitution Making, 1850-1912* (Westport, Connecticut: Greenwood Press, 1987). Suggestive of some of the work on the Pacific states is Arthur F. McEvoy, *The Fisherman's Problem: Ecology and Law in the California Fisheries 1850-1980* (Berkeley: University of California Press, 1986). There are no comparable volumes for the Great Plains.

4. Kermit L. Hall, "The Magic Mirror: American Constitutional and Legal History," *The International Journal of Social Education* 1 (Autumn 1986): 22-48; James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Madison: University of Wisconsin Press, 1984); Roscoe Pound, *The Formative Era of American Law* (Boston: Little, Brown, 1938).

5. The best example is Walter Prescott Webb, *The Great Plains* (New York: Grosset & Dunlap, 1931), pp. 385, 398-431, 496-502. More recent studies give only slight attention to legal and constitutional developments and most often they emphasize the lawless nature of the region. See, for example, Ray Allen Billington and Martin Ridge, *Westward Expansion: A History of the American Frontier*, 5th ed. (New York: Macmillan, 1982); and Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York: Norton, 1987).

6. Peter Harris, "Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1870-1970," *Law & Society Review* 19 (1985): 449-86; Lawrence M. Friedman, Robert Kagan, Bliss Cartwright, and Stanton Wheeler, "State Supreme Courts: A Century of Style and Citation," *Stanford Law Review* 33 (May 1981): 787; Rodney Mott, "Judicial Influence," *American Political Science Review* 30 (March 1936): 295-322.

7. Harris, "Communication of Precedent" (note 6 above), pp. 476-77.

8. Mott, "Judicial Influence" (note 6 above), pp. 300-302.

9. Harris, "Communication of Precedent" (note 6 above), p. 470.

10. Robert A. Kagan, Bobby D. Infelise, and Robert R. Detlefsen, "American State Supreme Court Justices, 1900-1970," *American Bar Foundation Research Journal* (Spring 1984): 371-408. This conclusion is supported, moreover, by studies such as John D. W. Guice, *The Rocky Mountain Bench: The Territorial Supreme Courts of Colorado, Montana, and Wyoming, 1861-1890* (New Haven: Yale University Press, 1972); Michael W. Homer, "The Territorial Judiciary: An Overview of the Nebraska Experience, 1854-1867," *Nebraska History* 63 (Fall 1982): 349-90; and Robert A. Heiberg, "Social Backgrounds of the Minnesota Supreme Court Justices: 1858-1968," *Minnesota Law Review* 53 (1969): 901-37. The same pattern was observed in Washington Territory by John R. Wunder in *Inferior Courts, Superior Justice: A History of the Justices of the Peace on the Northwest Frontier, 1853-1889* (Westport, Connecticut: Greenwood Press, 1979).

11. See, for example, the excellent articles edited by David Langum in the special issue of *Journal of the West* 24 (January 1985) devoted to legal history.

12. James W. Ely, Jr., and David J. Bodenhamer, "Regionalism and American Legal History: The Southern Experience," *Vanderbilt Law Review* 39 (April 1986): 540-48.

13. Lawrence M. Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985), pp. 30-34.

14. Newton Minnow, quoted in *National Law Journal*, 4 February 1985, p. 4.

15. Roscoe Pound, *Introduction to the Philosophy*

of Law, rev. ed. (New Haven: Yale University Press, 1954), p. 10.

16. Ely and Bodenhamer, "Regionalism and American Legal History" (note 12 above), pp. 539-40.

17. See, for example, Ely and Bodenhamer, "Regionalism and American Legal History" (note 12 above); Bakken, *Rocky Mountain Constitution Making* (note 3 above); Paul Finkelman, "Exploring Southern Legal History," *North Carolina Law Review* 64 (November 1985): 77-116; John P. Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (San Marino: Huntington Library, 1980); and David J. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846* (Norman: University of Oklahoma Press, 1987).

18. Webb, *The Great Plains* (note 5 above), p. 8.

19. *Ibid.*, p. 206.

20. Ian Frazier, *Great Plains* (New York: Penguin Books, 1989).

21. Terry L. Anderson and P. J. Hill, "The Evolution of Property Rights: A Study of the American West," *Journal of Law and Economics* 18 (April 1975): 172-76; Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), p. 46; Reid, *Law for the Elephant* (note 17 above), pp. 210-20.

22. This argument is also treated in Kermit L. Hall, "The 'Magic Mirror' and the Promise of Western Legal History at the Bicentennial of the Constitution," *Western Historical Quarterly* 18 (October 1987): 429-36 and Donald Worster, "New West, True West: Interpreting The Region's History," *Western Historical Quarterly* 18 (April 1987): 141-56.

23. Anderson and Hill, "Evolution of Property Rights" (note 21 above), pp. 169-72.

24. Frazier, *Great Plains* (note 20 above), pp. 121-25.

25. Anderson and Hill, "Evolution of Property Rights" (note 21 above), pp. 176-78.

26. Donald J. Pisani, "Enterprise and Equity: A Critique of Western Water Law in the Nineteenth Century," *Western Historical Quarterly* 18 (January 1987): 15-21.

27. Robert G. Dunbar, *Forging New Rights in Western Waters* (Lincoln: University of Nebraska Press, 1983); *Irwin v. Phillips*, 5 Cal 140 (1855); *Lux v. Haggin*, 69 Cal 255 (1886); and *Katz v. Walkinshaw*, 141 Cal 116 (1902).

28. Robert G. Dunbar, "The Adaptability of Water Law to the Aridity of the West," *Journal of the West* 24 (January 1985): 60-62.

29. Morton J. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977), pp. 34-42.

30. Webb, *The Great Plains* (note 5 above), pp.

496-502; Limerick, *The Legacy of Conquest* (note 5 above), pp. 169-75; Truman Capote, *In Cold Blood: A True Account of a Multiple Murder and Its Consequences* (New York: Random House, 1965).

31. Raymond D. Gastil, *Cultural Regions of the United States* (Seattle: University of Washington Press, 1975), pp. 97-116.

32. Hugh Davis Graham and Ted Robert Gurr, *Violence in America: Historical and Comparative Perspectives*, vol. 2 (Washington, D. C.: Government Printing Office, 1969), pp. 392-93.

33. Earl Pomeroy, "Toward a Reorientation of Western History: Continuity and Environment," *Mississippi Valley Historical Review* 41 (March 1955): 581 and Robert Berkhofer, Jr., "Space, Time, Culture, and the New Frontier," *Agricultural History* 38 (January 1964): 24-30.

34. Frederick C. Luebke, "Introduction," in Brian W. Blouet and Frederick C. Luebke, eds., *The Great Plains: Environment and Culture* (Lincoln: University of Nebraska Press, 1979), pp. ix-xxv.

35. Gastil, *Cultural Regions* (note 31 above), pp. 108-37, 293.

36. Paula Petrik, "Women and the Law on the Great Plains," paper presented at the Center for Great Plains Studies Symposium, "Law, the Bill of Rights, and the Great Plains," Lincoln, Nebraska, 6-9 March 1991, pp. 10, 7.

37. Ibid. and Lawrence M. Friedman and Robert J. Percival, "Who Sues for Divorce? From Fault through Fiction to Freedom," *Journal of Legal Studies* 5 (1976): 63-65.

38. Robert L. Griswold, *Family and Divorce in California, 1850-1890: Victorian Illusions and Everyday Realities* (Albany: State University of New York Press, 1980), p. 25.

39. Mari J. Matsuda, "The West and the Legal Status of Women: Explanations of Frontier Feminism," *Journal of the West* 24 (January 1985): 50, 51.

40. Ibid., pp. 51-54.

41. Ibid., p. 53.

42. Billie Barnes Jensen, "Colorado Woman Suffrage Campaigns of the 1870s," *Journal of the West* 12 (June 1978): 182-90.

43. Eleanor Flexner, *Century of Struggle: The Women's Rights Movement in the United States*, 7th ed. (Cambridge: Belknap Press, 1982), pp. 178-80.

44. Carl F. Kraenzel, *The Great Plains in Transition* (Norman: University of Oklahoma Press, 1955), p. 283. See also the discussion of Kraenzel's work in Luebke, "Introduction" (note 34 above), pp. xiv-xvi.

45. Berkhofer, "Space, Time, Culture" (note 33 above), p. 24.

46. Billington and Ridge, *Westward Expansion* (note 5 above), pp. 669, 680-81.

47. Ibid., p. 671.

48. Ibid., p. 677.

49. Quoted in Harry N. Scheiber, "Xenophobia and Parochialism in the History of American Legal Process: From the Jacksonian Era to the Sagebrush Rebellion," *William & Mary Law Review* 23 (Summer 1982): 660.

50. Gerald D. Nash, "Bureaucracy and Reform in the West: Notes on the Influence of a Neglected Interest Group," *Western Historical Quarterly* 2 (July 1971): 295-305.

51. Paul L. Finkelman, "German Victims and American Oppressors: The Background and Legacy of *Meyer v. Nebraska*," paper presented at the Center for Great Plains Studies Symposium, Lincoln, Nebraska, March 1991, p. 10.

52. See, for example, John R. Wunder, *Retained by the People: A History of American Indians and the Bill of Rights* (New York: Oxford University Press, forthcoming 1992).

53. Limerick, *Legacy of Conquest* (note 5 above), pp. 17-32.