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THE DEVELOPMENT OF POLITICAL INSTITUTIONS ON THE PUBLIC DOMAIN

JOHN D. MCGOWEN¹

In the development of institutions there is always a conflict between customs and necessity. Through custom people cling to old traditions and try to perpetuate them by adapting them to new conditions, but necessity argues the case in its merit without much regard for precedent. Out of the conflict comes a compromise in which the old is modified and adapted.

This article involves a study of the development of political institutions on the public domain. The study of political institutions is always surrounded with a good deal of difficulty. In such a study there is never a

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Professor John D. McGowen died February 29, 1944, at the age of 38. His work was thus early terminated, as well as interrupted by ill health. Yet he had already outlined a project of considerable proportions in his combined field of law and political science; and it is fortunate that recognition of this project can be made in the form of publication of one or two of his preparatory papers.

Mr. McGowen was strongly rooted in Wyoming, though born in Nebraska. He was a graduate of the Lander, Wyoming, high school, and of the University of Wyoming (A.B. and LL.B. with honor). He engaged in private law practice for a time in Laramie and in California. He studied one summer at the University of California and spent a winter at Cornell. He became definitely associated with the University of Wyoming in 1935, teaching in the College of Law and in the Department of Political Science. At the time of his death he was on leave, serving as counsel at the Heart Mountain relocation center near Cody, Wyoming.

Though Professor McGowen had published articles in law reviews ("The Battle of the Processes," *Calif. Law Rev.*, March, 1940; "An Economic Interpretation of the Doctrine of Delegation of Governmental Powers," *Tulane Law Rev.*, February, 1938), his interest turned increasingly to the history and development of typical western institutions, such as grazing laws, water rights and land uses, especially as these had emerged from pioneer practice and experience in a land unique in regional character. As is the case with research, he found himself thus led into a variety of subjects; and his studies were thus preliminary to a larger, rounded view of the whole Rocky Mountain area, its climatic, economic, agricultural, political, legal, and cultural institutions.

Thus the present paper investigates the development of political institutions of a special nature out of pioneering experience in homesteading and mining in a new land. This was intended as a preface to a more special study of western grazing land problems and water rights issues, as they appeared in the semi-arid region. He planned a thorough study of the history and development of stock associations in the Rocky Mountain region. The link, therefore, with the next paper, which he liked to call "Cowboy Joe, Administrator," is not hard to envisage. There is also a further paper preliminary in nature, since he found it necessary to investigate and summarize the ecological character of this region, as a dominant factor to mould man into a special pattern of adjustment.

It was Professor McGowen's intention to lay a foundation from available material, but chiefly to pursue a new course in filling out for the first time the history of the stockman's rise and his own political and cultural pattern. His students uniformly attest to his original, pioneering enthusiasm for this field of his choice. Nevertheless, he paid full tribute to such studies as those of E. S. Osgood, W. P. Webb, the University of Oklahoma studies, the valuable reports of the U. S. Department of Agriculture, and the like; and it is unfortunate that the copy of the present paper comes to the editors without its original bibliography. Some of the references are clear from the context, but the original full footnotes were somehow separated from the copy available to us. A word should also be added on Professor McGowen's great interest in maps of all kinds, ecological, geological, rainfall maps, National Forests maps, and the like.

proper beginning, or for that matter an intelligent ending. Indeed, one institution blends into another institution with such artistry that it is difficult to draw any intelligent line of demarcation. So it is with the political institutions of the public domain. New England gave birth to that famous old American institution, the Town Meeting. Early pioneers going westward over the Allegheny Mountains into the Ohio Valley became "squatters" on the unsurveyed and unsettled public domain. In order to better adjust themselves with their physical and cultural environment they formed land clubs or claim associations. These associations consisted in part of traditions of local self-government that came from the town meeting, and in part of certain practices necessitated by the nature of the raw country in which they lived. Later these claim associations were to evolve into another famous American institution—the homestead.

Rugged forty-niners in the Sierra Nevada Mountains of California were confronted with a different environment, and in order to meet the needs of government in this new environment they established the mining districts which contained some characteristics of the New England Town Meeting and other characteristics of the claim associations, together with certain practices that were necessitated by the new environment and a different economic order. Eventually the rules and regulations worked out in the mining districts with regard to the disposition of mining claims were to be incorporated into the Federal Statutes, and the water system worked out in these districts was to become the irrigation law of the arid west. More recently stockmen were to locate on the mountains and plains region of the west and establish livestock associations. These livestock associations adopted some of the characteristics of the Town Meeting, some of the features of the claim associations, other practices followed in the mining districts, and certain other customs necessitated by the peculiarity of the stock business and the land on which it operated. These early stock associations were eventually to evolve into the controlled grazing districts as we know them today.

Each of these developments was in itself quite separate and distinct. Yet in many respects they had much in common and no doubt exercised much influence upon each other. Each one in its turn represented man's efforts to adjust himself to his cultural and physical environment as he found it. As one institution gave way, another was to arise. The new was something like the old and yet it was something entirely different. The greater part of the public domain gradually dissolved into private ownership, and as it did, the necessity of certain governmental institutions was eliminated. But finally the time was to arrive when land was to cease passing from public to private ownership and hence at least one political institution, the grazing institution, was to evolve further and to take on current significance.

I

THE EVOLUTION OF THE HOMESTEAD

The United States came into possession of its vast public domain through conquest, cession, and purchase. It has disposed of it primarily through two principal devices, sale and homestead. For the most part, our public land policies have not been policies at all. Rather, the public domain has been disposed of as an integral part of other political developments. Alexander Hamilton and the statesmen of his day established the sale policy not with the idea of encouraging settlement of the public domain but rather to raise revenue with which to take care of a badly depleted treasury. Vast tracts of land have since been given away to encourage development of railroads and other public improvements. Land policies have been loosened from time to time at the instance of organized labor, so that the pressure on the over-crowded industrial labor market might be somewhat relieved. Other large tracts have been disposed of in the encouragement of education. Indeed, at one time land was given as an inducement to military service. That there was a public land policy at all seems to the observing student to be more of an accident than a plan, for indeed even the homestead laws were largely wrapped up in the stresses and strains of the Civil War period.

The fact that something like a public land policy did develop is probably due to the everlasting ingenuity of man who is never content to settle down and wait for some one to formulate a plan for him. Rather he blunders ahead, finds certain ways that seem suitable to his needs, and in due time sees these ways evolve into laws. Such was the case in the instance of the homestead laws. A homestead law as such did not reach the statute books until 1862. However, the pioneers of Iowa, Wisconsin, and Kansas and to some extent of other states in that area, had devised a technique that served their purpose quite well, not only without benefit of statute law but, indeed, in the face of and contrary to statute law.

Reference has previously been made to the sales policy as advocated by Alexander Hamilton and subsequently passed by Congress. After considerable modification of this law it became possible for a settler to purchase an eighty-acre tract of land from the federal government for \$1.25 an acre or \$100 for the tract. Most of the lands in the State of Ohio were settled under this law. Many strong interests in the United States favored this method of disposing of the public lands. However, there was another strong group of people, namely, the settlers themselves, who urged that the greatest value to be derived from the public domain was from settlement by true home-makers rather than sale to persons who were as often as not more interested in speculation than they were in settlement. This latter group felt that they were entitled to "free land" in return for the risks and efforts involved in pioneering the community.

In any instance, the actual settlers were generally far ahead of the debate. From the very earliest times in American History there had been

complaints about people settling ("squatting") on the public lands without legal right. This practice caused considerable difficulty. The squatters invariably preceded the public survey and frequently preceded the time when the government could obtain a clear title to the lands from the Indians. The existence of the settlers in and among the Indians did much to embarrass the government in entering into treaty relations with the Indians. All this finally led Congress to pass a number of acts making it unlawful for people to "squat" on the public domain. But people continued to settle on the land faster than the government authorities could eject them. It seems doubtful that many of the squatters ever heard of these acts. They were encouraged by the never-ceasing demands for free lands, and so they went forth by the thousands onto the unsurveyed and unplotted areas to make their homes. It has been said that there were over ten thousand squatters in the State of Iowa alone in 1836 when the surveys were started.

The life of the squatter was neither easy nor secure. Establishing a home in an unsettled territory was hazardous at best. There were always the elements of nature to contend with, the loneliness to overcome, and the tremendous amount of hard work to be performed. Not infrequently there were the Indians to fight and numerous lawless elements to be subdued. These people not only had to put up with all of the usual hardships of pioneers but once their home was established they also took the risk of losing it at the hands of the land speculator. The settlers felt that without their efforts the land would have been practically worthless, and that accordingly they were certainly entitled to credit for the increase in value that occurred as a result of their labor. Not only had they expended labor but they also had expended most if not all of their available cash in making the improvements that gave the land its value. This gave the land speculator all the odds at the public auction. He was frequently able to purchase the improved land at the minimum price of \$1.25 an acre; and the settler lost everything.

The settler took possession of his land without benefit of law. Indeed, he took possession of the land in defiance of law. Yet he was by no means an outlaw. He was of good New England background. He believed in law and order, in schools and churches, and all things that go to make his life worth while. If he did not obey the law in this instance it was because he felt that it was a cruel unjust law superimposed upon a helpless people by a group of "easterners" who saw nothing more than a monetary value in the public domain. He was encouraged in this view by pungent editorial writings of more than one "western" paper. His cause had been urged almost constantly in Congress, but for reasons extraneous to this study no relief had ever been granted. In the meantime his numbers had grown so numerous that there was real demand for local government and for schools and churches. With all of these forces playing upon them the people organized themselves into "land clubs" or claim associations to

protect their interest in their land and to bring about law and order in the community. These claim associations are among the most interesting developments to be found in the history of our public domain.

No one knows how many claim associations existed. In any instance, there were a great many of them in the several midwestern states. No two of the associations were identical. In a general way, however, they tended to follow a rather uniform pattern. They were organized along the lines of the typical Anglo-American formal organization. There was in almost every instance a constitution, a set of by-laws, a president, a vice-president, and a secretary and claim recorder. The following features were quite characteristic of all claim associations:

First: The area over which the associations purported to exercise jurisdiction was specified. Usually this was limited to one township.

Second: Membership was made open to bona fide residents. As a rule, the time necessary to acquire residence was definitely stated. Frequently a three months' period was required. One had to become a claim holder before he was entitled to voting powers.

Third: The associations were controlled by the typical democratic meeting in which all claim holders were given the privilege of voting. Officers' powers were inevitably limited to the simplest of ministerial functions. In this respect these associations resembled the New England Town Meeting.

Fourth: It was frequently provided that "principles of honor and fairness were to prevail at all times."

Fifth: There was always the provision that the claimant should file a description of his claim with the recorder who would record it for a nominal fee. This procedure was sometimes extended to cover sales, mortgages, and other forms of conveyances—all of this in spite of the fact that the claimant did not have title to the land.

Sixth: There was generally the provision for some kind of a court to settle disputes that might arise between the members of the associations over boundary lines and occupancy.

Seventh: Each claim holder was entitled to only a limited amount of land—quite frequently a quarter section.

Eighth: The claim had to be a real home. A continuous residence and constant improvements were invariable among the requirements of the associations.

Some of the associations such as the Johnson County, Iowa, Association, about which the late Professor Shamabaugh has written, had very elaborate constitutions and by-laws. Other associations were governed under less formidable documents.

While the associations did much to maintain peace and order within the groups, still their principal purpose was to protect the claim holder

from the operation of what he considered an oppressive and unjust law. The General Land Office would from time to time offer a township or more for sale at public auction to the highest bidder. If the settler had the money, he was as a rule quite willing to purchase his claim for the minimum price of \$1.25 an acre. But there were large numbers of settlers who would not have the money and who were not ready to purchase their claims at any price at the particular time that the land office decided to hold an auction. It was these people that fell prey to the land speculator who, had it not been for the claim associations, would frequently have been able to purchase quite well developed farms for the minimum price. In order to meet this situation, the claim associations hit upon a rather simple device for keeping everyone except their own members from bidding at the public auction. The association would select one man to do all the bidding for the association. The official bidder would prepare a plat of all the lands to be sold at the particular auction with the names of each claim holder desiring to purchase his claim listed on the plat. When the time for the auction arrived, the official bidder would do all the bidding for the association, while its members formed a tight circle around the auctioneer maintaining complete silence while the sale was proceeding. If anyone except the official bidder dared so much as to open his mouth during the sale, his voice was instantly smothered and his body rudely ejected from the premises. In this fashion, claim holders were able to hold their claims indefinitely without fear of loss at the instance of the land speculator and without the inconvenience of securing the money to make the necessary purchase from the federal government. It was, to state it in plain fashion, a device for obtaining "free land," an objective that was soon to become perfectly legal and eventually to receive the blessings and praise of all patriotic American people.

The government officials frequently worked in harmony with the claim associations. On one occasion a large company of squatters had gone to the land office at Dubuque, Iowa, to attend a sale. They had chosen a "bidder" and an "assistant bidder." The assistant bidder described the sale as follows:

The bidder and assistant bidder had furnished themselves with large plats of the two townships to be sold, with each claimant's name plainly written on the subdivision which he wished to purchase. When the time came for the sale to begin, the crier stepped out on the platform, and inviting the bidder and assistant to take places on the platform beside him, took hold of one side of the plat, and . . . began at section No. 1, and called out each eighty-acre subdivision as rapidly as he could speak. When he came to a tract with a name written on it, he would strike his hammer down and give the name to the clerk. He thus proceeded, taking the sections in numerical order. The two townships were offered in less than thirty minutes. During this time the claimants stood in a compact semi-circle in front of the platform in breathless silence, not a sound being heard except the crier's voice.

The life of a "claim jumper" was a hazardous one. In the eyes of the claim holder he was a thief and a parasite of the lowest type and they did not hesitate to deal with him accordingly. Hibbard gives us this unusually amusing description of the operation of "claim association justice:"

The usual mode of procedure in case a claim was bought by a 'land pirate' was to visit the purchaser in case he were not too far distant, taking along a justice of the peace armed with a 'warrant' deed ready for the offender's signature, which would constitute his conveyance of the land in question to the aggrieved squatter; the justice would then acknowledge the instrument. It was not unusual for the members of this committee to carry guns and ropes and to indulge in remarks calculated to stimulate the claim jumper in his tendency toward a speedy and amicable settlement. Very rarely did he resist vigorously, but once in a while it required heroic measures to overbalance his greed. The story is told of one 'jumper' who resisted, and addressed the committee in irreverent terms, daring them to do him physical injury, and threatening to bring the strong arm of the law down violently upon their heads. The committee exhausted their verbal arguments in vain; then, putting a rope around the waist of the culprit, led him to a pond, cut a hole in the ice, and immersed him. He was soon drawn out, but, being still in a combative and profane frame of mind, was treated to another ducking, and on his second coming out was unable to continue his side of the debate; so the negative was declared closed, and, after returning to the house, the dripping defender of that side set his signature to the papers and with uplifted right hand swore that it was his 'voluntary act and deed.' The squatter usually agreed to refund the money advanced by the 'jumper' but custom allowed him to take his time to do it and no interest was paid.

In these clubs is to be found the beginning of the famous American homestead. They existed for a long time, not only without benefit of law but even in spite of and in the face of the law. They constituted laws made by the people for themselves, and as such were in line with the needs and requirements of the frontier peoples. They probably constituted the only really true land policy of the times regardless of what might have appeared on the Statute Books as formulated by Congress. They made it possible for settlers to go upon the public domain (surveyed or unsurveyed) and establish homes without the expense of paying for the land. They enabled the settler to make improvements on his claim and dispose of it as improved, or if the settler desired, to purchase it for the minimum price. They offered the settler a security in the land without fear of molestation either from the government, the newcomer, or the speculator. But above all else, they made it possible for a settler to go on the land and improve it and retain it indefinitely without the payment of the purchase price. In other words, they made it possible to obtain *free land*. In securing the settler in the right of *free land* the claim association also established certain fundamental principles of the American land policy. First, in

order to obtain the benefit of *free land*, the settler had to be a bona fide and continuous resident—in other words, a home-maker. Second, he had to make constant improvement upon his claim. Third, the protection of the claim association was extended to only a *limited* amount of land. These characteristics of the claim associations formed the nucleus around which the Federal Homestead Act was formulated by the Federal Congress some twenty-five years after the homestead was to exist in reality.

The land policy as thus perfected was to become the classic American frontier political institution. In the end, settlement of the public domain was to prevail over purchase and speculation. Theories and institutions thus formulated were to dominate American political thinking for many decades to come. Under the homestead as thus evolved, settlement was to continue westward until well after the turn of the century and was to sweep across the Great Plains area and to the very eastern edge of the Rocky Mountains. There, strangely enough, and because of a changed physical environment, this typical Iowa institution was to prove inadequate to the needs of the existing frontier and a different institution was to arise, but the latter was to draft heavily upon the former. Indeed, it would be impossible to consider the latter institution without first having obtained an understanding of the former institution.

II

THE DEVELOPMENT OF THE MINING DISTRICTS

While the squatters were busy establishing claim clubs in the Mississippi Valley and Great Plains region, another group of hardy Americans was busy pioneering the rugged Sierra Nevada Mountains of California. Like the pioneers of the midwest, these people were also trespassers upon the public lands. They were venturing into an almost unknown wilderness, a land that the United States had scarcely obtained title to, and over which it had not as yet established any real governmental authority. The Mexican jurisdiction over the territory had been brought to an end and the state government had not yet been established. Situated as they were in this rugged physical environment, and far distance from all established law and order, these people were to develop another typical American political institution. While this latter institution was to resemble the claim association in many respects, still the changed nature of the economic process and the vastly different physical environment caused it to assume many entirely new and different characteristics. Some of these new characteristics were to evolve into highly important features of our modern land use policy on the public domain.

In January of 1848, two Americans, John A. Sutter and James T. Marshall, while building a sawmill on the American River in the mountain regions of California discovered gold in the mill race. Soon more gold was discovered in the neighboring regions and by midsummer of 1848, the magic word, the word that was to start the greatest migration of people

this land has ever known, had been spread across the continent. By the following year the famous "gold rush of '49' was on." People who could afford to do so went by steamship to California "around the horn." The less fortunate hit out in great caravans of covered wagons, across the great American desert, which at that time included everything west of Omaha, Nebraska. The overland movement has been described as "like the march of an army." Mr. Justice Fields of the United States Supreme Court who was himself a part of the history of gold in California reported that within a period of two or three years the population of California increased from two or three thousand people to two or three hundred thousand people.

These people descended upon the various mining camps like swarms of bees. They would scatter themselves about the gulches and ravines and work for a few days until the word would reach the camp that a bonanza had been discovered elsewhere. The rush would again be on. They would disappear almost as fast they appeared, only to resound like an army upon another camp. And so they traveled, hither and thither—all to the magic word of *gold*. So magnetic was the attraction that people who had claims that were actually paying them thirty to forty dollars a day would rush off with the group with every expectation of finding far greater rewards. "The miners were a nomadic race, with prospectors for advance guard."

Gradually an adjustment took place. People settled down into the multitude of mining camps with some degree of permanency. Some became miners and mine operators, some remained prospectors, some became store-keepers, saloon keepers, hotel keepers, or restaurant and boarding house operators. The picture would be lacking in color if one failed to mention that others—yes, many others—were to become gambling den and honky tonk operators. The people worked by day, and by night, they drank and they gambled and they played and they shot. These were lawless communities, and yet in their very lawlessness they furnished a nucleus around which law was to develop.

The early prospectors, "the advance guard," roamed over the land barely scratching the surface here, there, and everywhere. They seldom came into direct contact with one another and hence the need of rules adjusting and fixing their rights was at a minimum. There was no need of staking off a claim or filing notice of discovery. When the prospector made a strike he stayed on it and worked it to the greatest extent possible. If he had occasion to be absent from his claim for a time, he would leave his tools on the ground and these would serve as notice to all that the particular strike had been appropriated. When dispute did arise, the gun proved to be an entirely adequate method of adjustment. Indeed, the early prospectors were very reluctant to stake out their claims or to make any pretense of fixing boundaries or serving notice to the world that they claimed the strike as their own. Such publicity would naturally result in the attraction of thousands of people to their "diggins." To avoid such

an attraction they preferred to work in secrecy. This gave them the advantage of being able to work over a fairly large area and thus obtain the "mother lode" without molestation from or competition with others. They were content to gamble the chance of finding even more gold against the possibility of losing all upon the arrival of the mob. This tendency prevailed among prospectors long after laws had been passed making it compulsory to file a notice of claim with designated authorities within a limited number of days after discovery had been made.

However, the easy ways of the prospector were to meet an abrupt change with the rush of '49. Some of these mining regions were so overpopulated that there was scarcely ground for one in a thousand. The earlier arrivals had tended to monopolize the available or known resources, frequently to an extent far in excess of their ability to work them. This situation naturally had its repercussions. The less fortunate were bound to be dissatisfied. Their reasoning was logical enough. After all, the land did not belong to any one person. Indeed, *no* person had legal right to go on the land, since it belonged to the Federal Government. They were all trespassers. The governmental authority had so stated. Why then should one trespasser have any greater right to a particular discovery than another trespasser? This type of reasoning, brought on of course by the crowded economic condition, naturally led to a tremendous number of claim disputes, claim jumpings and private wars, and to lawlessness and disorder of the worst kind. It became apparent that if any one was to reap any gains whatsoever from the public domain it would be necessary to establish some form of law and order.

Yet, in spite of the lawlessness that prevailed in the early mining camps, these people were at heart law abiding citizens. After all, the greater part of them had come from well-established, orderly, and peace-loving communities of the mid-continental region, and they by no means lost all sense of justice in their new environment. The situation is well stated in Bancroft's *History of California* as follows: "Conspicuous arms added to the unfavorable impressions of language and appearance, but strange to say, I never saw a more orderly congregation of such good behavior in such bad company."

The conditions which these people confronted are well summarized by Professor Walter Prescott Webb as follows:

1. They were within the jurisdiction of the United States, but for the time beyond the reach of the established law.
2. They were engaged in an occupation that was new to them and to the country from which they came. There were no established customs of mining and no recognized laws; consequently the miners were, for the time being, thrown upon their own resources to work out customs which later, after a struggle, were to obtain legal sanctions.
3. The land on which they sought and found gold belonged to the government and not to the individual, and there was little

desire on the part of the individual to acquire the land. The land was to all intents and purposes free, and the manner of taking and using it was left to the custom agreed upon. In one sense *the miners were transgressors, or "mineral squatters," on the public domain.*

One more problem might be added to this list. The people were confronted with a personal lawlessness and disorder that was perhaps almost as abhorrent to them as was the economic distress that arose from the lack of law.

The solution of these rather grave problems would have been a comparative simple matter under an established legal system. Under such a system, the miners could have appealed to the legislature for legislation affecting mining. The legislature would have referred the matter to a committee for study and for hearing, and in this manner proper legislation would have been forthcoming. Likewise, had there been an established court system, many of the problems could have been referred to the courts, and the courts in turn would have been able to develop a system of common law suitable to the needs of the industry. But these facilities were not available. Under such circumstances the people took matters into their own hands, made their own laws, established their own courts, and created the necessary executive officers to enforce the laws so made.

In the solution of their legal problems the miners relied heavily upon their Anglo-Saxon heritage. In each community they called mass meetings which were in reality "town meetings" of the Sierra Nevada Mountains. At these meetings, the rules and regulations that were to govern the mining communities were worked out through the use of the typical democratic process. While the rules thus established varied in detail from camp to camp, still they tended to follow a rather uniform pattern. In most instances they contained the following provisions:

First: There was inevitably a rule establishing the boundaries of the community. Usually the description was of the meets and bounds variety, that is, from Jones Gulch to Smith Creek and then to the big rock, and from there back to the starting point. The region so described was generally given a formal name such as, for example, "The Gold Hill District." In some instances the word *diggins* was used instead of *district* but the latter term was soon to prevail.

Second: Each district elected a group of officers. There was a chief executive, frequently called an "Alcalde," a secretary, and a claim recorder. Besides these officers there was a set of civil officers such as a justice of the peace and a sheriff. These officers were elected by popular vote in mass meetings called once each year for that purpose. Notice of election usually had to be posted in conspicuous places some ten days or more prior to the election.

Third: All mining districts made definite regulations regarding the size and number of claims to be held by a single person. The size varied

a good deal from district to district, depending largely upon how many "unemployed" there were in the particular district at the time. Since a majority rule prevailed, the size of the claims was in some instances reduced to scarcely fifty feet square. In other instances a claim several times as large was permitted. A monopoly on claims was under no circumstance to be allowed.

Fourth: Each claim was to be clearly staked out. In some instances the claim holder was compelled to dig a ditch around his claim. The claim holder was required to record his claim with the district recorder; otherwise it would be subject to appropriation by another.

Fifth: The right to hold a mining claim was based upon discovery. The man who first discovered gold on the claim was entitled to the first use of the claim, provided of course that he fulfilled other requirements placed upon him.

Sixth: The right to retain the possession of a claim was based upon a continued working of the claim. As a general proposition, the miner was compelled to spend from three to four days of labor each week on his claim in order to retain it. If he failed to work the claim for a given period of time, it was said to be abandoned and hence subject to entry by others.

Seventh: Many of the better organized districts worked out a criminal code with punishment varying in degree from a whipping to banishment or "such other punishment as the jury may determine."

Eighth: Some kind of a court system was usually established. In some camps the court system was a rather elaborate affair but in most instances provision was made for calling a miners' jury if and when dispute should arise.

Ninth: Nearly all districts required that matters of any particular importance should be referred by the officers to a meeting of the community as a whole, which was to be held from time to time.

It has been said that the mining regulations as thus drafted were for the most part a reenactment of the Mexican mining laws. A glance at the Spanish code would tend to support the claim. Still there are reasons to believe that this was untrue. In the first place, the miners of '49 were a clannish lot. They did not like the Spaniard and they never missed an opportunity to chase him away. In the second place, although the codes as framed in California do resemble the Spanish mining code in many respects, they also differ in one or two very important respects. The Spanish Government claimed title to all mineral lands. It granted a license to the individual to work the mines on a royalty basis. In the California jurisdictions, the districts never claimed title to the mines. They merely worked out a system whereby their members might use the land of another in a peaceful and orderly way. The one is distinctly an American type of procedure. The other is definitely foreign to American politics and jurisprudence. A more reasonable view of the problem is that similar physical and geographical environments led to the development of laws that were

somewhat similar and quite independent of any historical connection.

But the California mining districts were crude affairs indeed compared with the mining districts that were to develop in Colorado some ten years later. The Colorado districts were organized under circumstances quite similar to the California districts. Indeed, many of the inhabitants of the Colorado districts are said to have come from California; hence, it seems quite likely that these people brought their laws with them. But the Colorado districts were to develop far more elaborate codes than the California districts. The codes of the Colorado mining districts would compare favorably with those of many a western territory of their time. Many of the Colorado districts even went so far as to develop elaborate court systems with a complete set of rules for practice. Some of the districts abolished all distinctions between law and equity. Provisions were made for all of the common law and code remedies. Indeed, a reading of some of the regulations of the several mining districts in Gilpin County would lead one to suspect that they had adopted the greater part of the several *Field Codes*.

But the advance of the Colorado district over the California district was by no means limited to law. For instance, gambling and drinking were frequently censored. Also, the Colorado districts took advantage of every available means to discourage people from rushing into the districts and populating them beyond the means of support. Especially did they attempt to discourage the speculator and those with the delusion that gold was something that was to be picked up on the ground and put in the pocket, thus making a fortune between morning and night. Rather they tried to point out that mining was a serious business to be indulged in only by those who had capital and were willing to make it a lifetime work.

Mining districts were to be found in most of the western states. It seems doubtful, though, that many of the districts ever reached the high degree of perfection that was reached in Colorado. For the most part, these districts were rather spontaneous affairs that would spring up here and there with the discovery of a showing of gold and would pass out of existence almost as soon as they were formed. In any instance, there is little evidence of any very elaborate, or for that matter, continued existence. Like the mining industry from which they arose, these districts seem to have gotten their start in California and reached their maturity in Colorado. In the meantime, however, they were to supply a tremendous need for government on the public domain for a period of approximately a quarter of a century.

In due time, the rules and regulations as worked out in the mining districts were to become the American Law of Mines and Mining. The state courts and legislatures in those jurisdictions wherein the mining districts were situated gave them almost immediate recognition. But the Federal Government delayed action on the matter until 1866, at which

time Congress finally got around to passing an act which provided in part: "The mineral lands of the public domain, both surveyed and unsurveyed are hereby declared *to be free and open to exploration and occupation* by all citizens—*subject also to the local customs or rules of miners in the several mining districts. . .*"

A vast and intricate field of mining law was to develop from these few simple rules as adopted in the early California mining districts. For a quarter of a century and more, mining laws was the most significant field of law in the West. But the mining districts are of current significance not only because of the law of mining but also because of the law of water which owes its origin to them. A good many of the mines in California were placer mines. Water is essential to the operation of a placer mine. But a great many of these placer mines were situated a considerable distance from the stream and frequently entirely beyond the drainage of the stream. Just as there were not enough mines for all the people, there was not enough water for all the mines. Now the Anglo-American doctrine or riparian water rights was established on the premise that water belonged to the owner of the land adjacent to the stream and that while each land owner had a right to use the water still he was obligated to return it to the stream undiminished in quality and quantity for his neighboring riparian owner immediately below him on the stream. Such a law was of course worked out to meet the economic needs of a group of eastern factory owners and mill operators. It was a law made in a damp moist country, and simply did not fit the needs of the western miners. Hence, they were again thrown upon their own resources to work out a system wherein the greatest amount of good could be obtained from the limited amount of water.

The miners met this problem just as they met the problem of adjusting the right to use a limited number of mines among a multitude of people. They applied the doctrine of prior appropriation to the water just as they did to the mining claims, and they limited the amount of water each person could use to the amount that he originally appropriated from the stream to operate his mine. The size of the ditch was used to determine the quantity of water originally taken. They also decreed that a failure to use the water for a given time worked an abandonment of the right to take the water just as a failure to work the mine worked an abandonment of the mine.

It was soon discovered by those who went to farm that the water law as worked out by the miners was much more appropriate to their needs in such a arid country than the riparian rights which their ancestors had worked out in the humid East. Hence, the law of water, as originally worked out in the mining districts of California was soon to become the water law of the entire arid west.

Thus though the mining districts were in existence for little more

than a quarter of a century, they served a tremendous need in their time and left no small heritage to the future. Some of their major accomplishments may be listed as follows:

First: They made it possible for human beings to work in the wild wilderness of the West with some degree of personal security.

Second: They enabled these people to trespass upon the public domain and expend their energies and their money, if they had any, without fear of molestation from a fellow trespasser, or claim jumper, as these were called.

Third: They definitely established the principle that the prior appropriator or public owned land and water shall have prior right to use the property without regard to location.

Fourth: They also established the principle that he who attempts to claim a right to use the public domain or the water on it must constantly use it; otherwise, it will be subject to appropriation by others.

Fifth: They gave us our present law of western water rights.

And so another great frontier political institution was established. People blundered ahead, either ignorant of or defiant of congressional enactments. The duly enacted laws would not protect them, so they formulated ways and means of self-protection. These ways or manners proved to be in the interest of the economic enterprise in which they were engaged, and in adjustment with the physical environment in which they labored. Ultimately, these ways, worked out by actual experience on the site of the enterprise, were to become a part of the laws of the public domain.

These two great frontier political institutions, the claim association and the mining district, were to become the basis of both the past and the present public lands policy. The claim associations established the principle of *free land* to actual settlers. Under this policy, all of the "more humid" public lands situated east of the face of the Rocky Mountains were to pass into private ownership and become known as the "bread basket" of America. On the other hand, the miners working in their mining districts established the equally important principle that the first to occupy have the prior right to use both the land and the water of the public domain, regardless of location or other attending circumstances. It was under this doctrine, that people were able to put to profitable use all of that great portion of the public domain which was too high and too cold and too arid to support the existing American tax structures.