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Western Sovereignty for the Twenty-First Century

Carl W. Tobias

University of Richmond, ctobias@richmond.edu

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BOOK REVIEW

WESTERN SOVEREIGNTY FOR THE
TWENTY-FIRST CENTURY:
A BOOK REVIEW OF DANIEL KEMMIS'S
THIS SOVEREIGN LAND

BY
CARL TOBIAS*

*The American West has been a perpetual source of fascination and wonder. The region includes strikingly beautiful landscapes and exotic wildlife that inspire awe and fear. The human need to eke out a living from the arid, inhospitable terrain has perennially conflicted with natural resource protection. A century of exploitation preceded recent interest in conservation and sustainable development, and the values directly clashed. Integral to these traditional debates and their present incarnation are public lands, which comprise nearly half of the western states. The American people own and federal agencies manage these lands. Fights over the lands have become increasingly contentious, even as national administration evinces questionable efficacy. The area's inhabitants, thus, have attempted to solve those problems. The publication of *This Sovereign Land* by Daniel Kemmis offers a fresh, provocative approach. The writer, who is an astute observer of the modern West, implores residents to seize control over the region's destiny by recovering responsibility for the public lands through collaborative local governance.*

*The propositions above mean *This Sovereign Land* warrants analysis. My review undertakes that effort. I initially afford a descriptive assessment of Daniel Kemmis's new monograph,*

* © Carl Tobias, 2004. Williams Professor, University of Richmond School of Law. Thanks to Bret Birdsong and Peggy Sanner for suggestions, Angeline Garbett for processing this piece and Jim Rogers for generous, continuing support. Errors that remain are mine. I have known Dan Kemmis for a quarter century.

ascertaining that the work improves appreciation of the contemporary American West. The second section of the review examines numerous valuable contributions which the volume makes. I conclude by proffering several recommendations for the future.

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I. DESCRIPTIVE ANALYSIS

*This Sovereign Land*¹ is a careful exposition of western history which emphasizes the public lands. The book meticulously explores these lands' century-old "imperial" origins² and local rebellion against that notion,³ the empire's recent decline⁴ and concomitant maturation of the area,⁵ and the potential rise of indigenous democracy which might govern the region by reclaiming sovereignty over the public lands.⁶

Kemmis surveys the "lay of the land" in the "dry core"—the eight public lands states with mountainous topography and exquisite landscapes⁷—that is Indian Country⁸ and has long been considered distinct.⁹ He finds the West fast-growing, which imposes pressures on the land, while newcomers who lack familiarity with local traditions will make the area less politically homogeneous even as regional ingenuity can treat impending change.¹⁰

The author recounts the origins, mythologization, and flaws of "two old stories": national regulation and resource exploitation. Kemmis first revisits the American variant of imperialism, "manifest destiny," that created the West by reserving the public lands and the 1970s federal environmental statutes which affected the area most profoundly; he claims the laws' convergence with conservation in the form of national democracy has tyrannized and colonized many local residents.¹¹ Second, he evaluates the

¹ DANIEL KEMMIS, *THIS SOVEREIGN LAND* (2001).

² *Id.* at 19–44.

³ *Id.* at 45–69.

⁴ *Id.* at 71–92.

⁵ *Id.* at 93–116.

⁶ *Id.* at 117–49.

⁷ *Id.* at xvii–xviii.

⁸ *Id.* at xxi.

⁹ Public lands policy reflects the dominance of the land and the landscape in the West, because so much of that region is owned by the people and managed by federal agencies, GARY C. BRYNER, *U.S. LAND AND NATURAL RESOURCE POLICY 1* (1998), primarily the United States Forest Service and the Bureau of Land Management (BLM), *see id.* at 66–67 (noting that 191.5 million acres are managed by the Forest Service and 268 million acres are managed by BLM).

¹⁰ KEMMIS, *supra* note 1, at xvi–xxiv.

¹¹ KEMMIS, *supra* note 1, at 19–44. Presidents Thomas Jefferson and Theodore Roosevelt, avid naturalists and imperialists, defined the West, making it distinct and conflicted. Political dominion's expansion with the Lewis and Clark expedition clashed with Jefferson the localist, decentralist, and agrarian democrat, while Roosevelt's penchant for empire led him to reserve

100-year resistance to public lands' ownership and management by a distant government in a dissimilar region.¹² The writer details resentment of federal domination that began at the lands' inception and traces restructuring and denationalizing efforts, which failed because of concern that local control would facilitate increased exploitation.¹³ He canvasses recent opposition, namely the Sagebrush Rebellion and the County Movement; however, at century's end, this resistance is no more effective than the centralized system against which it struggles.¹⁴

Kemmis next scrutinizes federal control's potential demise¹⁵ and finds national governments worldwide undermined by globalism, continentalism and regionalism—forces witnessed in the decreasing vitality and legitimacy of public land management agencies and of industrial-era economies and communities.¹⁶ He asserts that global change appears to be prompting renewed interest in, and experimentation with, regionalism, even as the West matures politically or at least displays greater cognizance of a regional identity shaped by its landforms.¹⁷ The author analyzes burgeoning cooperation among ranchers, loggers, miners, environmentalists, and recreationists over public land and natural resource management in particular river drainages and ecosystems.¹⁸ Kemmis articulates numerous serious concerns about the nascent collaboration movement, which he partly assesses by linking the challenges this endeavor and Indian tribes pose for national sovereignty.¹⁹ The writer thus advocates testing at diverse western venues to determine whether the emergent movement or the current scheme's accommodation of new decisionmaking processes is preferable.²⁰ He argues that federal control should cease because the region

millions of western acres as national forests, create the Forest Service, and install Gifford Pinchot as its chief. *Id.*; see generally STEPHEN E. AMBROSE, UNDAUNTED COURAGE (1996) (describing Jefferson's project of exploring the West through the Lewis and Clark expedition); THEODORE ROOSEVELT, AN AUTOBIOGRAPHY (1946).

¹² KEMMIS, *supra* note 1, at 19–44.

¹³ *Id.*, see, e.g., Felicity Barringer, *Bush Seeks Shift in Logging Rules*, N.Y. TIMES, July 13, 2004, at A1 (discussing the recent Bush proposal to replace the Clinton Administration's "roadless rule" with a rule that would give state governors the power to control whether roads are built in the national forests in their states).

¹⁴ KEMMIS, *supra* note 1, at 45–69; see generally WILLIAM ROBBINS, AMERICAN FORESTRY: A HISTORY OF NATIONAL, STATE, AND PRIVATE COOPERATION (1985). *But see* WILLIAM PERRY PENDLEY, WAR ON THE WEST: GOVERNMENT TYRANNY ON AMERICA'S GREAT FRONTIER 187–209 (1995) (describing several grassroots opposition efforts that have effectively kept the federal government from taking greater control of the West's lands).

¹⁵ KEMMIS, *supra* note 1, at 71–176.

¹⁶ *Id.* at 93–116; see also WILLIAM R. DODGE, REGIONAL EXCELLENCE 3 (1996) (noting that regionalism is on the rise the world over).

¹⁷ KEMMIS, *supra* note 1, at 93–116.

¹⁸ *Id.* at 117–49; see generally BARB CESTERO, BEYOND THE HUNDREDTH MEETING (1999) (describing various collaboration efforts in the West); JULIE WONDOLLECK & STEVEN YAFFEE, MAKING COLLABORATION WORK (2000) (analyzing collaboration in the West and providing recommendations for improved collaboration efforts).

¹⁹ Kemmis insightfully evaluates how sovereignty has pervaded the public lands debate. KEMMIS, *supra* note 1, at 151–76.

²⁰ *Id.*

is the ideal locus from which to question—in a profoundly democratic, Jeffersonian, and American way—a steadily deteriorating regime.²¹

The author invokes John Wesley Powell for the notions of cooperation and watershed management, which might guide western self-governance.²² Kemmis proposes that the area adopt the postindustrial age's chief organizing principle of organic, natural land forms related through federal structures.²³ He concretizes this idea by elaborating a site-specific watershed compact.²⁴ Kemmis admits his imaginative suggestion would require a regional political realignment and a national belief in the advisability of local control.²⁵ He urges that Democrats move toward democracy by trusting western management and Republicans embrace true conservatism again.²⁶ Kemmis champions federalism's reinvention and democracy's revitalization to foster regional self-governance, while a more vital, grounded form of democracy on a human scale should replace national control, which was once deemed most democratic and ecologically sound.²⁷ He concludes that affording Westerners responsibility for the area could help recall America to its deepest democratic origins.²⁸

II. CONTRIBUTIONS

This Sovereign Land is a compendium on the West as viewed through the public lands prism. Kemmis's analysis of the phenomena which created the region increases its comprehension. He explains how placing ownership of vast acreages in people and administration in remote, bureaucratic federal

²¹ *Id.* at 176.

²² *Id.* at 177–202; see generally JOHN WESLEY POWELL, REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES (1878); WALLACE STEGNER, BEYOND THE HUNDRETH MERIDIAN: JOHN WESLEY POWELL AND THE SECOND OPENING OF THE WEST 315–16 (1992) (describing Powell's proposals to organize western states' political subdivisions along watershed boundaries); CHARLES WILKINSON, CROSSING THE NEXT MERIDIAN 237 (1992) (noting Powell's proposal that "the government should sponsor local cooperative unions of farmers" to prevent water monopolization).

²³ KEMMIS, *supra* note 1, at 200; see generally STUART KAUFFMAN, AT HOME IN THE UNIVERSE: THE SEARCH FOR THE LAWS OF SELF-ORGANIZATION AND COMPLEXITY (1995); NEAL R. PEIRCE ET AL., CITISTATES (1993).

²⁴ He proffers a "Snake River Compact Proposal," extrapolating from it to a "West-wide compact" to create a fully enforceable trust over BLM and Forest Service lands not devolved to basinwide trusts. KEMMIS, *supra* note 1, at 187–92; see also David H. Getches, *Colorado River Governance. Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573, 578 (1997) (advocating the creation of a "Colorado River Basin Authority" that would "recognize[] and integrate[] the interests and people who are most affected by the outcome of decisions on major Colorado River issues").

²⁵ This national belief will require that those people who live in the West muster the political will and consensus to persuade the country. KEMMIS, *supra* note 1, at 203–33.

²⁶ *Id.* at 229. The latter view made Roosevelt a conservative and conservationist. Kemmis urges leaders to be responsible for major regional issues, such as protecting species at risk, improving relations among Indian tribes and their neighbors, and realizing sustainability in a world environment. *Id.*

²⁷ *Id.* at 203–33.

²⁸ *Id.* at 232–33.

agencies led to persistent, strong opposition.²⁹ Kemmis shows that environmental enforcement duties and large budget cuts have frustrated those entities, thereby accelerating the empire's decline.³⁰ The monograph illuminates western history, but it is no mere period piece. For example, Kemmis assesses evolving homegrown democracy which might enhance governance with local control of public lands.³¹

The book also encourages comparisons among the current, and prior, administrations.³² Timeliness, therefore, is an essential feature of this volume. For instance, President George W. Bush has developed his policies by consulting previous land management and has accorded deference to lawmakers, mainly from the West. The writer thus helps readers gauge modern public lands administration through an historical lens by evaluating Bush's decisions to promote resource extraction, as manifested by support for oil drilling in the Arctic National Wildlife Refuge, and pursue many other initiatives of earlier Republican chief executives.³³

Kemmis's prescription has special cogency. He finds the opposed, traditional methods reveal decreasing efficacy and relies on theory, law, policy, and politics to craft the novel idea that the West recapture control over public lands through cooperative regional governance.³⁴ This measure may prove superior because, for example, it is a pragmatic compromise between extreme nationalism, which federal environmental legislation typifies, and localism, which the Sagebrush Rebellion illustrates. Even if public policymakers, scholars and additional observers ultimately reject Kemmis's provocative concept, the notion could prompt related, creative solutions, and further reflection or scrutiny of present deficiencies and their rectification or amelioration. In short, his description and suggestion provide finely-calibrated mechanisms for judging western governance and public lands management.³⁵

²⁹ *Id.* at 72–73.

³⁰ *Id.* at 74–77, 91–92.

³¹ *Id.* at 230–33.

³² *Id.* at 203–33; see generally John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 288–92 (2001) (describing the history of executive withdrawals of land throughout the last 120 years and noting that only three presidents in the twentieth century chose not to set aside lands as national monuments—Presidents Richard Nixon, Ronald Reagan, and George H.W. Bush).

³³ See, e.g., Kathie Durbin, *Speculation Abounds About How Bush Will Treat NW Resources*, THE COLUMBIAN, Dec. 31, 2000, at A1 (describing thoughts, worries, and hopes of the diverse residents of the Pacific Northwest regarding how Bush would manage the region's prized lands, timber, and fish stocks); Scott Lindlaw, *President Touts Environmental Agenda*, AP ONLINE, May 30, 2001, at 2001 WL 22107021 (describing Bush's environmental policies as "a balance between environmentalism and sound economics" and noting Bush's "backtracking" from some of President Clinton's policies).

³⁴ KEMMIS, *supra* note 1, at 177–202.

³⁵ They should be compared with western resource, cultural, public land, and Indian law work.

III. SUGGESTIONS FOR THE FUTURE

Notwithstanding the numerous perceptive contributions which *This Sovereign Land* makes, I can afford several comparatively minor recommendations for improvement. The monograph also includes aspects that may benefit from elaboration, and there are certain areas in which greater analysis could enhance understanding of the West. Moreover, the author's nuanced descriptive and prescriptive accounts remain controversial, albeit instructive.

Kemmis deserves praise for incisively examining and directly addressing complex and perhaps intractable dilemmas that have plagued the West and for formulating innovative relief. The conventional schemes have not operated well. Therefore, Kemmis's effort to invent remedies is admirable. However, the proponent of any suggestion, which seems as novel as the one espoused for difficulties so ostensibly insolvable as regional governance and public lands' administration, must demonstrate that the idea will work.

His proposal may have insufficient support. For instance, the Supreme Court has eroded, and apparently rejected, the concept of Native American sovereignty³⁶ to which the writer analogizes in justifying his solution.³⁷ Kemmis's dependence on the compact as a basic management tool correspondingly raises legal, political, and practical issues because it has not proved effective in important, related western contexts, such as Indian gaming and water rights disputes.³⁸ His reliance on watersheds for governance could be equally unworkable in certain situations, namely urban areas. The author's call for regional control over resources, exemplified by

³⁶ See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 364 (2001) (holding that tribes, though sovereign, may not regulate the conduct of state officers carrying out investigations on tribal lands); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (holding that tribes lacked the jurisdiction to adjudicate claims against those who are not members of the tribe where the nonmembers, driving through tribal land on a state highway, negligently injure tribal members); Philip Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 28-57 (2000) (describing the Court's narrowing of tribal sovereignty through the years); Philip Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1768-69 (1997) ("Sovereignty connotes authority over a region and the people within it. Recent federal Indian law cases have shown a trend away from conceptualizing tribal sovereignty as including this traditional geographic component."). But cf. KEMMIS, *supra* note 1, at 231-32 (urging selection of Justices attuned to his ideas)

³⁷ KEMMIS, *supra* note 1, at 184-85.

³⁸ See Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 106-09 (2003) (noting the argument that the inflexible water compacts of the West are ill-equipped to handle the changes in western water demand that have occurred since the compacts were ratified); Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 7-8 (1997) (noting the democratic concerns raised by the permanency of the interstate compact); see also PAUL HARDY, INTERSTATE COMPACTS: THE TIES THAT BIND 20-23 (1982) (noting criticisms of interstate compacts); JEROME MUYS, INTERSTATE WATER COMPACTS 323-54 (1971) (evaluating the advantages and disadvantages of interstate water compacts). But see KEMMIS, *supra* note 1, at 177-202.

salmon and grizzly bears, might reflect debatable policy, as local entities may lack the requisite expertise or independence to manage some resources well.³⁹

The economic efficacy of the approach propounded is no clearer. Computerization, globalization, and similar benefits of the modern age could support the region in ways once unthinkable.⁴⁰ Yet Kemmis fails to show persuasively that these or other phenomena will sustain an area which currently experiences rapid growth but often did, and might again, face “boom and bust” cycles.⁴¹ He also devotes little attention to one increasingly significant facet of modern regional life: the metropolitan West.⁴² Urbanites encounter numerous problems, including sprawl and air pollution, unlike difficulties confronted by rural residents.⁴³

Kemmis also musters somewhat limited political support for his remedy. At the federal level, he contends that an alliance, comprising western lawmakers and others with diverse views, would favor the suggestion,⁴⁴ although coalitions analogous to those which passed national environmental statutes could defeat the prescription.⁴⁵ Moreover, Kemmis does not demonstrate that his proposal would enhance the status quo, partly because it might permit excessive resource exploitation. He seems overly sanguine about local governance, pessimistic regarding federal administration, and eager to jettison traditional structures. In the near term, experimentation with measures for ascertaining whether the arguably effective, century-old regime can adapt to modern realities appears

³⁹ Local entities may have limited technical ability and strong fiscal pressures, but federal attempts to protect salmon and other species at risk and treat fires inspire little confidence in national solutions, as shown by Kemmis’s analysis of northwestern initiatives and decades of fire control efforts. See KEMMIS, *supra* note 1, at 71–92; see also William Kittredge, Editorial, *Why Put Out Every Wildfire in the Forest?*, N.Y. TIMES, Aug. 22, 2001, at A19 (discussing the possibility of catastrophic fires that could result from the federal government’s longstanding policy of aggressively fighting wildfires).

⁴⁰ See, e.g., BUSINESS FOR WILDERNESS, *THE BOTTOM LINE: PROTECTING THE VALUE OF AMERICA’S PUBLIC LANDS* (2001) (describing modern economic opportunities for the West in the recreational possibilities the region’s lands afford); see generally MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* (2000).

⁴¹ See, e.g., James Brooke, *Wealth of Mine Barons Turns to Dust at Source*, N.Y. TIMES, Nov. 4, 1997, at A1 (“Boom and bust has marked the West’s economy for generations.”); Patricia Nelson Limerick & Charles Scoggin, Editorial, *Testing the Limits of the Western Dream*, N.Y. TIMES, Feb. 20, 2001, at A21 (“Indeed, the history of the West is characterized by cycles of boom and bust.”). But see KEMMIS, *supra* note 1, at 177–202; Pete Bodo, *The Green Revolution: It’s Also the Color of Money*, N.Y. TIMES, Nov. 18, 2001, at S12 (describing the economics of conservation: local economies reap rewards from recreational opportunities).

⁴² These areas include not only obvious cities, such as Denver, Las Vegas and Salt Lake, but also Boise, Missoula, and Santa Fe. He does accord urbanization some treatment. See KEMMIS, *supra* note 1, at 195–202.

⁴³ They face some similar ones, namely public lands disputes ascribed to urbanization. One putative solution is the Southern Nevada Public Land Management Act of 1988, Pub. L. No. 105-263, 112 Stat. 2343.

⁴⁴ See KEMMIS, *supra* note 1, at 203–33.

⁴⁵ See *supra* note 11 and accompanying text. In contrast, there would probably be much local support.

preferable.⁴⁶ If this endeavor definitively shows that the conventional scheme defies amelioration, rather little will have been lost and Kemmis's untested, comparatively radical notion could be instituted.

Despite these concerns, the defects in the West's current governance which the author so perspicaciously clarifies mean that ideas, such as his, and the enunciation and application of many other concepts might foster improvement. Kemmis's approach deserves serious evaluation for possible implementation or at least consideration for experimentation. In any event, it should provoke new thought about crucial western issues and perhaps lead to additional promising reforms or constructive criticism of existing practices.

IV. CONCLUSION

This Sovereign Land paints an invaluable portrait of the West, so that the region may felicitously delineate where the area should head. Daniel Kemmis trenchantly reviews its past, finds the present management system deficient, and posits a bold model for governing the West, administering the public lands, and increasing the quality of regional life as the twenty-first century opens. His description and recommendation warrant careful assessment.

⁴⁶ Kemmis allows for that possibility. *See supra* note 20 and accompanying text.