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BOOK REVIEW

Introduction: Book Review Syposium on *Inventing American Exceptionalism*

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How, when, and why did Americans become convinced both that our system of civil justice is adversarial through and through and that adversarialism is normatively desirable? Professor Amalia Kessler's highly engaging and dauntingly erudite new book, *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800-1877*, locates the answer to these questions in a number of important nineteenth-century U.S. developments, including transformations in equity proceedings and significant—though now forgotten—experiments with French-derived institutions known as conciliation courts.[1] In the course of explaining the role that lawyers' embrace of civic republican virtues played in a move away from inquisitorial models and the reasons for the failure of alternative experiments, such as that offered by the Freedman's Bureau courts, Kessler places the internal dynamics of the legal system in dialogue with cultural and social developments, rejecting the conventional dichotomy between internalist and externalist approaches to legal history.[2]

The first three contributions to this Book Review Symposium furnish a set of valuable perspectives on Kessler's work, ranging from Professor Mark Tushnet's discussion of the role of lawyers' self-understandings within Kessler's account, to Professor Edward A. Purcell's detailed account of the commonplaces of American legal history that Kessler's book revises, to Professor Richard White's analysis of how Kessler's book speaks to concerns broadly of interest to historians of the nineteenth century.[3] Each of these scholars approaches Kessler's book from a different institutional vantage point;

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1. AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877, at 1-18 (2017).

2. *Id.* at 341-46.

3. Edward A. Purcell, Jr., *Exploring the Origins of America's "Adversarial" Legal Culture*, 70 STAN. L. REV. ONLINE 37, 41-45 (2017) (book review); Mark Tushnet, *The Lawyer/Judge as Republican Hero*, 70 STAN. L. REV. ONLINE 29, 31-33 (2017) (book review); Richard White, *Contextualizing* Inventing American Exceptionalism, 70 STAN. L. REV. ONLINE 23, 23-25 (2017) (book review).

Tushnet as a renowned writer on the U.S. Constitution and constitutional history as well as comparative constitutionalism, Purcell as a foremost scholar of the federal judicial system, and White as a major historian of the American West. That they each highlight a different valuable contribution in *Inventing American Exceptionalism* demonstrates the breadth of the book's relevance and audience.

Tushnet's "The Lawyer/Judge as Republican Hero" develops Kessler's claims about the nature of lawyers' roles within the rise of American adversarial legal culture. As he contends, Kessler relies on "lawyers' self-understandings," and, in particular, their desire to engage in particular forms of republican self-display, to explain several aspects of this development.[4] Rejecting both the traditional account, according to which the mid-nineteenth century "[m]erger [of law and equity] was a step in the rationalization of legal proceedings," and the revisionist one, according to which "[m]erger occurred because lawyers' clients benefited more from the rules being developed in the common-law courts than from the more flexible approaches taken in equity courts," Kessler, according to Tushnet's description, indicates the centrality of lawyers' self-understandings rather than their interests.[5] Calling into question whether the shape of equity and common-law proceedings actually had the effects on lawyers' abilities to engage in self-display that they thought it did, Tushnet reframes Kessler's argument, suggesting that "[i]t was not the reality of the separation of equity and common law that mattered; rather, the lawyers' understandings of that separation mattered. And Kessler shows quite effectively that the proponents of merger *believed* that merger would enhance lawyers' opportunities to show their republican virtue."[6] Tushnet additionally asks how consideration of lawyers' self-understandings fits within the dichotomy between internalist and externalist approaches to the history of procedure.[7]

Purcell further highlights several of the ways in which "Kessler's approach adds to our understanding."[8] Among other things, Purcell suggests that the book's treatment of the landmark case *Ex parte Milligan*,[9] striking down trial by military tribunal while civilian courts were operating, "reveals the pervasive and often subterranean force that race and racism have exerted on ostensibly technical or 'neutral' legal ideas."[10] Likewise, he unpacks Kessler's critique of the notion that "the constitutional status of the jury likely served as 'a significant

4. Tushnet, *supra* note 3, at 31.

5. *Id.* at 32.

6. *Id.* at 34.

7. *Id.* at 31.

8. Purcell, *supra* note 3, at 39.

9. 71 U.S. 2 (1866).

10. Purcell, *supra* note 3, at 39-40.

and early thumb on the scale in favor of adversarialism.'"[11] Against this supposition he musters her evidence that the jury's role actually diminished as lawyers' roles in an adversarial legal culture increased.[12]

Turning more fully to the externalist frame, including the cultural, political, and economic implications of *Inventing American Exceptionalism*, Richard White unpacks the stories of capitalism and liberalism implicit in Kessler's account. In particular, he examines the tensions between democracy and capitalism and how these played in attacks on chancery and equity proceedings.[13] As White indicates, "In the 1830s and 1840s the dominance of liberal lawyers in the attacks on chancery made the entire movement seem liberal," yet "[t]he elimination of chancery courts exposed the larger tensions between market-based liberals and a broader group that treasured and wanted to maintain the robust police power of localities and the states," tensions that "opened a backdoor for the return of equity."[14]

In "Continuities, Ruptures, and Causation in the History of American Legal Culture," Kessler's response to Purcell's, Tushnet's, and White's reviews of her book, Kessler addresses both the causal questions that she finds implicit in Tushnet's piece and the issue of how continuous or discontinuous the nineteenth-century developments she describes are with the longer arc of American history, a question with which both Purcell's and White's contributions are concerned.[15] In doing so, she points toward the Progressive Era, suggesting the possibility of investigating the later history of the dynamics she so compellingly analyzed in an earlier period.[16]

The vigorous dialogue that *Inventing American Exceptionalism* has generated in this Book Review Symposium demonstrates the salience of Kessler's argument to our conception of American adversarial culture as well as our assessments of American history more broadly. It will, I anticipate, set the stage for further discussion of the origins of American adversarialism and its anti-inquisitorial bent for years to come.

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11. *Id.* at 42 (quoting KESSLER, *supra* note 1, at 168).

12. *Id.* at 42-43.

13. White, *supra* note 3, at 24-27.

14. *Id.* at 24, 26.

15. Amalia D. Kessler, Response, *Continuities, Ruptures, and Causation in the History of American Legal Culture*, 70 STAN. L. REV. ONLINE 48, 51-53 (2017).

16. *Id.*