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BOOK REVIEW

# Contextualizing *Inventing American Exceptionalism*

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Amalia Kessler's *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800-1877* is a stunning legal history that is even richer than the author may have intended.[1] I would not have thought that an analysis of the oral adversarial tradition in American law could provide the larger insights that her book does. This is a perceptive legal history, but it is also a superb social, cultural, political, and economic history that has much to teach about the nature of American governance and the rise of American capitalism.

Amalia Kessler notes that Americans have connected the adversarial tradition with liberty, "competitive individualism," and a market based anti-statist society—all quintessentially small 'l' liberal values.[2] This tradition stands against the hierarchical and corporatist conceptions of society that liberals opposed and thought embodied in the equity tradition of chancery courts. Liberals associated equity with authoritarianism while embracing the more "liberty-promoting" common law.[3] But Professor Kessler rejects this appeal to ahistorical values. It might seem that the adversarial tradition would be simply another route to Louis Hartz's liberal tradition and the American exceptionalism in her book's title, but she takes a more circuitous and revealing journey.

Like any good historian, Amalia Kessler mines the past for possibilities, paths not taken, complications, and contingencies. She finds them. She searches for a history that accounts for adversarialism, and the wider constellation of ideas of which it is a part, while leaving open possibilities for the way things might have been—and might yet be.

The not so hidden paradox of *Inventing American Exceptionalism* is that in its focus on the New York Court of Chancery it is as much or more about the rise, decline, and persistence of equity proceedings as it is about the adversarial

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

2. *Id.* at 7.

3. *Id.* at 159.

tradition of the common law. In their ideal, never-realized form, chancery courts were distinguished by the power of the judge—the chancellor, who was supposed to be both a scholar and a man of refined moral sensibilities—the de-emphasis of the lawyer's role, and the absence of a jury. These courts produced evidence through *written* testimony and interrogatories taken in secret. The chancery courts also differed in the appointment of a master who reported to the chancellor and who took charge of gathering evidence. The goal of equity proceedings was to check and correct the inequities of the common law.

The chancery courts did not offer a stage for the oral and performative aspects of the American legal tradition that Professor Kessler stresses, and she attributes the downfall of courts of equity and much of the success of the rival adversarial tradition to lawyers who presented themselves as "modern-day Ciceros, engaged in public-serving advocacy."[4] They proclaimed democracy and saw juries as its embodiment. They celebrated the triumph of common law procedures as a victory for truth telling, fairness, liberty, and justice. Fairness came to be the domain of procedure, which was separated out from substantive law. As embodied in the Field Code, whose uniform set of procedures she paints as the logical culmination of decades of legal, political, and economic struggle, due process was oral and adversarial.

In making this argument Professor Kessler combines the internalist approach, which focuses on the creation of law by legislators, judges, and lawyers, and externalist approach, which emphasizes the larger economic, social, and political context in which these changes arise, so adroitly that I could not disentwine them. She sees legal culture in the broadest sense as a component of civic republicanism. Lawyers enacted the pursuit of truth and virtue and the trampling of vice and lies.

Professor Kessler's major themes connect, both explicitly and implicitly, with changing interpretations of capitalism and governance in the nineteenth-century United States. Given that the United States was a commercial and increasingly capitalist society, the equity courts, which addressed the needs of a commercial society and particularly the needs of the elite of such a society, should have been relatively impervious to attack, but the opposite proved to be true.

American society was becoming democratic as well as capitalist, and the two were not always aligned. Several things made the chancery courts vulnerable to democratic attack. Both the extraordinary power embodied in the figure of the judge and the procedures of the court created an inviting target. She also mentions, but puts less stress upon, the fee-based nature of the courts of equity. These fees provide the bright thread that sows the courts to larger changes in American governance.

In the 1830s and 1840s the dominance of liberal lawyers in the attacks on chancery made the entire movement seem liberal. David Dudley Field, the

4. *Id.* at 95.

author of the Field code, was a leading liberal and brother of Stephen Field, the Supreme Court Justice who did so much to shape Gilded Age jurisprudence. Theodore Sedgwick attacked chancery as a tool of monopoly and unequal access. Liberalism and what became antimonopolism, both of which sprang from similar roots, had not diverged as they would after the Civil War.[5]

The connection between the decline of the chancery courts and the fears of abuse they raised and the newer scholarship on fee-based governance remains implicit rather than explicit in Professor Kessler's analysis. Fee has become a very significant word in histories of American governance. Historians, led by William Novak, have argued that the nineteenth-century American state, far from being a weak state of courts and parties, was invested with considerable power.[6] Initially this power rested on local and state levels; after the Civil War it gravitated to the federal level. The state *seemed* weak because it lacked the attributes of European states, which Max Weber marked as a trained bureaucracy and a standing army. The American state lacked administrative capacity. Instead Americans resorted to fee-based governance. Officials collected fees from those either getting a service or those convicted of wrongdoing. The result was an alternative non-Weberian mode of state power that was marked by corruption and inefficiency but also by low taxation.[7]

Complaints about fees appear everywhere in the attacks on chancery. The chancellors of the New York Court of Equity controlled subordinate offices, and those officers collected fees, which were lucrative and easy to disguise. Fees marked special privileges of court officials and the possibility of corruption. The reliance on fee-seeking officials helped to make the chancery courts deeply unpopular. The masters and examiners lived on the remunerative fees they earned; this reliance, and the opportunities for corruption that it presented, formed the Achilles heel of the courts. The reaction against them became part of a larger reaction against fee-based governance that took place over the course of the century.

The issue of fees can easily be lost amidst the seemingly unified democratic attack on the chancery courts, but this unity proved to be an alliance of convenience. It included both liberals, who saw the market as the model for society and adversarial competition as the basis for litigation, and others,

5. I discuss this in my forthcoming book: RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE (forthcoming 2017).

6. *See generally* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (documenting the United States' long history of government regulation).

7. Key pieces of this analysis are JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012); NICHOLAS R. PARILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013); William Novak, *The Myth of the 'Weak' American State*, 113 AM. HIST. REV. 752, 752-72 (2008).

particularly evangelical reformers, who harbored doubts about whether all social relations should be reduced to competition and markets. These evangelical reformers and other social reformers would eventually reconsider the advantages of aspects of equity, but they would not lose their aversion to fees.

In the larger context over the framework of American governance, the attacks on chancery and its fee-seeking officials that Amalia Kessler describes can seem like an episode in the wider attack on fee-based governance.[8] But in regard to fees, the attacks on chancery proved only a partial and ironic victory. The abolition of courts of equity did not eliminate fees. Officers of the court—judges, clerks, and sheriffs—continued to collect fees, but the most significant fees fell into the pockets of lawyers. They were the price of admission for those seeking access to the courts.

The 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.[9] These tensions opened a backdoor for the return of equity. The opening became visible in debates over European conciliation courts, and reformers spirited equity proceedings through it when they establish the courts of the Freedmen's Bureau following the Civil War. Professor Kessler's wonderful analysis of these courts demonstrates how they used equity proceedings to attempt to regulate relations between employers and workers, and between freed people themselves, in the Reconstruction South.[10]

At issue was a "debate over virtues and vices of market-based social order."[11] The Freedmen's courts represented a form of "moderated free enterprise," as Amalia Kessler calls it.[12] Liberals, of course, saw the courts as providing a kind of free-labor pedagogy and a step toward liberal contract freedom, but as Gregory P. Downs has persuasively argued in *Declarations of Dependence*, the courts could in practice be a manifestation of an alternate American tradition of hierarchy and dependency.[13] They involved appeals to powerful sponsors to resolve difficulties.[14]

Liberals remained devoted to contract freedom and market relations, but other reformers pulled away trying to hold onto the regulatory possibilities of

8. For the key work in the recent emphasis on fee-based governance, see generally PARILLO, *supra* note 7.

9. For a discussion of police power, see generally NOVAK, *supra* note 7.

10. For more on black Southerners' access to the court system post-Civil War, see generally Melissa Milewski, *From Slave to Litigant: African Americans in Court in the Postwar South, 1865-1920*, 30 LAW & HIST. REV. 723 (2012).

11. KESSLER, *supra* note 1, at 219.

12. *Id.* at 220.

13. GREGORY P. DOWNS, DECLARATIONS OF DEPENDENCE: THE LONG RECONSTRUCTION OF POPULAR POLITICS IN THE SOUTH, 1861-1908, at 82-91, 126-27, 145-46 (2011).

14. *Id.* at 1-14, 75-100.

*salus populi* on the one hand and the hope of forging a cooperative alternative to market competition on the other. Within the larger crisis of governance of the nineteenth-century, both groups continued the democratic attack on chancery courts while resurrecting aspects of equity courts.

Liberals who attacked chancery courts before the war adopted values associated with equity proceedings after the Civil War to attack the democratic politics they once promoted. The quintessential liberal organization following the Civil War was the American Social Science Association. Liberals embraced experts, impartial investigation, and the curtailing of popular participation. Interestingly, for all their focus on civil service reform, they did they not aggressively attack fee-based governance. They were more concerned with how officials obtained their office than in how they were remunerated.

Professor Kessler rightly denies that the antebellum United States was a laissez-faire society, but she seems to hedge on the Gilded Age society, which I would argue was also not laissez faire. She considers workers in her account of the antebellum period and identifies "workplace relations" as very much a "key source of contemporary anxiety."[15] She cites the lack of workers' enthusiasm for conciliation courts as one cause of the failure of those courts to become a means to address that anxiety.

Yet it seems to me that after the Civil War antimonopolists and workers, too, embraced elements of equity. Both pushed for fact-finding—a Bureau of Labor Statistics—and the drive for binding arbitration as an alternative to strikes. Although I had not thought of this before reading Amalia Kessler's book, both these developments have roots in equity. Because they fall outside her time span, she does not pursue organized labor's enthusiasm for "impartial" fact-finding and arbitration. Both seem like arguments for conciliation courts, but ones with different roots than the religious enthusiasm for conciliation before the Civil War.

Like the Freedmen's courts, the push for labor arbitration and later the Interstate Commerce Commission, which also contained elements of equity, were gutted by the courts. Yet the need to defeat them demonstrated equity's lingering power. Its legacy was, as Amalia Kessler indicates, mixed. She does not deny the dark side of equity. In eliminating equity courts, the Field Code retained injunctions, and government by injunction became both a fruitful source of judicial power and governmental injustice in the late nineteenth-century.

The more benign inheritance of equity was arbitration, of the kind that nineteenth-century workers sought, but it, too, presents difficult problems. In her fascinating account of our current situation, she recognizes that any return to equity and arbitration will confront problems similar to those that produced the attacks on equity in the early nineteenth century. One problem is vesting so much power in a judge and another is the funding of an investigatory apparatus

15. KESSLER, *supra* note 1, at 206.

in a nation so leery of taxation and so distrustful of expertise. As she points out, one of the ways that equity survives is in the figure of the expert witness. I have served as an expert witness, and I am not ashamed of my service, but I also recognize that I have become part of a fee-based system of governance that I find otherwise distasteful. As Professor Kessler recognizes, in a world of private prisons, private security forces, and privatization of critical public services in general, forced arbitration can take us to the dark side. And this resurrects the original powerful arguments against chancery.