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Recommended Citation
Stanford Law Review Online, Vol. 70, pp. 37-47

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Stanford Law Review Online

Volume 70 July 2017

BOOK REVIEW

Exploring the Origins of America's "Adversarial" Legal Culture

Edward A. Purcell, Jr.*

Introduction

Amalia D. Kessler's *Inventing American Exceptionalism* is a tour de force of historical imagination, analysis, and synthesis.[1] Asking fresh questions that open new vistas of understanding, her book illustrates some of the complex ways that social factors shape legal thinking on matters ranging from arcane procedural technicalities to fundamental institutional assumptions. Changing social and economic conditions may force the law to adapt, it explains, but they scarcely determine the particular nature of the reforms that follow.[2] Rather, complex combinations of specific political, cultural, and institutional pressures both guide and limit the changes that can and will be made. Legal change, in other words, is both externally channeled and internally contingent. Thus, the book wisely rejects the false dichotomy between so-called "internalist" and "externalist" approaches to legal history and emphasizes that anyone trying to understand legal developments must methodically employ the techniques and delicately integrate the insights of both.[3]

A study of the rise and triumph of an "adversarial legal culture" in nineteenth-century America, *Inventing American Exceptionalism* illuminates the extent to which ideas and assumptions that seem "natural" or "traditional" are

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1. AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877 (2017). A minor quibble, the book's title is misleadingly overbroad. "Inventing American Legal Exceptionalism" would have been more accurate and informative. Kessler's work is deeply informed by more than a decade of immersion in her subject. *See, e.g.*, Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1202 (2005).

2. *See* KESSLER, *supra* note 1, at 132-35 (doubting connection between rising docket pressures and moves toward adopting oral, adversarial procedures).

3. *Id.* at 8-9; *see, e.g.*, Edward A. Purcell, Jr., National League of Cities*: Judicial Decision-Making and the Nature of Constitutional Federalism*, 91 DENV. U. L. REV. ONLINE 179, 189-90 (2014).

in fact evolving products of history and the result of human efforts—however selflessly conceived or advertised—designed to serve particular social interests. In its probing analyses, moreover, the book readily recognizes the problematic and incomplete nature of the available historical sources and acknowledges the extent to which many of its claims should be regarded as qualified and tentative.[4] It is, in other words, a work of wise cautions as well as bold arguments.

Part I of this review outlines the basic thesis of Kessler's book and notes some of the insights it offers. Part II considers three related arguments she makes in support of that overall thesis. Finally, Part III raises two questions. One is relatively narrow and points to the need for some clarification in her basic thesis, while the other is broader and asks about the normative value of the kind of legal history that *Inventing American Exceptionalism* represents.

I. The Origins and Nature of Adversarialism

Kessler launches her inquiry from a largely unasked question: how did American legal culture come to be "adversarial" (lawyer-driven, open to the public, and based on oral proceedings in judicial forums) as opposed to either "inquisitorial" (judge-driven, relatively closed to the public, and based on written documents, as in traditional equity and civil law courts) or "communal" (informal, private, and nonprofessional, as in varieties of community-based "conciliation courts")?[5] To answer that question she first identifies the "inquisitorial" and "communal" models that existed in early American law, especially the practices in courts of equity, and traces their gradual decline and displacement.[6] Then she identifies the complex roots of the "adversarial" legal culture that supplanted those models and explains its ultimate triumph as the result of a complex variety of factors that reshaped American legal culture from the beginning of the nineteenth century through Reconstruction.[7] Those factors include stunning transformations in the nation's economic and political life; incremental changes in technical equity procedures; and especially the self-serving drive of an expanding lawyer class seeking greater power, prestige, and legitimacy.[8] Most broadly, Kessler argues, the triumph of "adversarialism" was rooted in the successful efforts of the lawyer class to identify its self-empowering "adversarial" procedures with the demands of the nation's burgeoning market-based economy, the proclaimed liberty-protective nature of the common law, and the proud and popular belief in American

4. KESSLER, *supra* note 1, at 274, 292.

5. *Id.* at 4-8.

6. *Id.*

7. *Id.* at 112-262.

8. *Id.* at 13-15, 62, 108-09.

"exceptionalism."[9] In making their case, she adds, the lawyers also exploited nativist and racist prejudices by finding ways to equate rival "inquisitorial" and "communal" procedures with undemocratic European ideas, the foreign and authoritarian nature of Catholicism, and legal efforts during Reconstruction to support the claims of African-American freedmen.[10]

The book's treatment of the Supreme Court's decision in *Ex parte Milligan*[11] illustrates the way Kessler's approach adds to our understanding. Perhaps the most famous case to come out of the Civil War, *Milligan* is commonly recognized as a pivotal decision used to challenge Radical Reconstruction,[12] and scholars have long debated its significance. Some have seen *Milligan* as a resounding affirmation of constitutional principles,[13] while others have questioned its reasoning or stressed its minimal practical impact.[14] *Inventing American Exceptionalism* shows that the focus of those scholars has been too limited. By asking new questions that place *Milligan* in a fresh historical context, it illuminates the decision's broader role in the development of fundamental legal ideas: "procedure" as a realm separate from "substance," constitutional due process as necessarily court centered, and "adversarial" proceedings as fundamental to the nature of American "exceptionalism."[15]

Most striking, the book's examination of *Milligan*'s impact reveals the pervasive and often subterranean force that race and racism have exerted on ostensibly technical or "neutral" legal ideas.[16] While it was the intense hostility of Southern whites and their Democratic allies to Reconstruction and the

9. *Id.* at 7, 9, 62, 108-09, 323.

10. *Id.* at 6-7, 14-15, 235, 265.

11. 71 U.S. (4 Wall.) 2 (1866) (holding that citizens could not be tried by military commissions in areas where the civil courts were open and operating).

12. *See, e.g.*, HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 382 (1982).

13. Charles Warren famously declared *Milligan* "one of the bulwarks of American liberty." 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 149 (1922); *see also* ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 419 (5th ed. 1976) ("[C]ertain jurists and historians were to consider it an historic landmark in American civil liberties.").

14. MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 176, 184 (1991) ("[T]he *Milligan* decision had little practical effect. . . . [Its] "real legacy . . . is confined between the covers of the constitutional history books. The decision itself had little effect on history."). For efforts to recognize both *Milligan*'s importance as a symbol and its relatively insignificant practical impact, see generally BRIAN MCGINTY, LINCOLN AND THE COURT (2008); and Curtis A. Bradley, *The Story of* Ex parte Milligan*: Military Trials, Enemy Combatants, and Congressional Authorization, in* PRESIDENTIAL POWER STORIES 93, 93-132 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

15. KESSLER, *supra* note 1, at 311-22.

16. *Id.* at 15, 322. In an earlier chapter Kessler makes an analogous point, noting how ideas about the nature and value of conciliation courts were influenced by anti-Catholic prejudices. *Id.* at 235.

Freedmen's Bureau that gave *Milligan* its immediate post-war salience, *Inventing American Exceptionalism* argues that it was the nature of the Freedmen's Bureau courts themselves—based in varying degrees and locations on models of "conciliation" and "inquisitorial" courts—that inspired the form and content of the fierce Southern critique.[17] Portraying those courts as "a form of militarily imposed inquisitorial process,"[18] the Southern attack sought to delegitimize them as lawless and un-American by defining the idea of constitutional due process in strictly court-centered "adversarial" terms and by exploiting "the centuries-old tradition linking Anglo-American liberty to adversarial, common law-based procedure."[19] That race-driven Southern campaign against Reconstruction, the book maintains, helped secure the final triumph of America's "adversarial legal culture."[20] Thus, its analysis uncovers yet another telling example of the extent to which race and racism—even on "technical" and formally "non-racial" issues—have influenced the course of American law and legal thinking.[21]

II. Three Supporting Arguments

Inventing American Exceptionalism develops a number of noteworthy arguments supporting its general thesis. One challenges standard ideas about the importance of New York's famous Field Code of 1848. Seeking to make the law intelligible to laypersons, the code sought to reorder the law according to rational principles, abolish the distinction between law and equity, and replace

17. *Id.* at 265, 311, 316, 263-322.

18. *Id.* at 313.

19. *Id.* at 15, 313. On this point, see *id.* at 311-22. While *Milligan* can be read as an indictment of Radical Reconstruction and the Freedmen's Bureau, the Court's opinion seemed to make its holding easily distinguishable from issues involving Reconstruction. The opinion, for example, stated that military courts "can never be applied to citizens in states which have upheld the authority of the government," that in the northern state where the case arose [Indiana] "the Federal authority was always unopposed," and that the local federal court "needed no bayonets to protect it, and required no military aid to execute its judgments." Ex parte Milligan, 71 U.S. (4 Wall.) 2, 121-22 (1866). That court, the opinion continued, "was held in a state, eminently distinguished for patriotism." *Id.* at 122. Subsequently the opinion's author, Justice David Davis, seemed to reject the contention that *Milligan* was even relevant to Reconstruction issues. *See* Bradley, *supra* note 14, at 115 n.103. Thus, *Milligan*'s practical impact was not determined by the Court's opinion but by the way the opponents of Reconstruction used it.

20. KESSLER, *supra* note 1, at 322.

21. The most obvious example of the impact of race and racism on "non-racial" issues in American law is the law of "federalism." *See, e.g.*, EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 65 (2007) ("[T]he history of American federalism could not possibly be understood without recognizing the omnipresent and compelling racial considerations that pervasively shaped its course.").

the technicalities of common-law pleading with simpler fact pleading.[22] In the process it helped transform American civil procedure, especially and most immediately in the newer states of the West.[23] Kessler argues that the Field Code was not, however, as some have claimed, merely a functional response to the technicalities of common-law practice, a "feint" to distract the public from failures of the legal profession, or a turn from "elitism" toward more "democratic" principles.[24] Rather, it was a "lawyer-driven" product designed to place the lawyer class "front and center" in American legal proceedings.[25] The lawyers who pushed the Code were not reacting against the elitism of such anti-codification legal luminaries as Chancellor James Kent[26] and Justice Joseph Story,[27] for example, but against the specific nature of their elitism: their vision of the law as judge centered rather than lawyer centered.[28] Further, the book

22. For a general summary of the Field Code's basic principles, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 293-98 (3d ed. 2005).

23. *Id.* at 295 (noting the rapid adoption of the Field Code in the American West). New York adopted the code but quickly and repeatedly amended it in a variety of substantial ways. Other states, however, were more faithful to the original. By the Civil War, ten other states had adopted the Field Code, and by century's end another twelve had done the same. Of the other original thirteen states only North Carolina and South Carolina had joined the adopters.

24. KESSLER, *supra* note 1, at 9-11, 112-50. For the codification movement, see, for example, MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, at 59-90 (1976); and CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM (1981).

25. KESSLER, *supra* note 1, at 150. Similarly, in importing "adversarial" procedures into early equity practice in New York, "lawyers were the moving force." *Id.* at 62. The lawyers were driven, among other motives, by an "eagerness to exercise more procedural control," and the changes they effected led to a "new dominance of lawyers in chancery proceedings." *Id.* at 102, 108-09.

26. James Kent (1763-1847) was a law professor, New York State Supreme Court judge, and from 1814 to 1823 Chancellor of New York. An ardent Federalist and admirer of Alexander Hamilton, he was a dedicated defender of equity, an ardent opponent of codification, and the author of a highly influential four-volume treatise, *Commentaries on American Law* (1826-30). Through the middle decades of the nineteenth century, Perry Miller wrote, "Kent, for vastness of comprehension and for elegance of style, stood as *the* American equivalent of Blackstone." THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 92 (Perry Miller ed., 1962).

27. Joseph Story (1779-1845) was a lawyer and law professor who was appointed to the United States Supreme Court in 1812, where he served until his death. He was a determined defender of the Union and its authority and a strong advocate of federal judicial power. His opinions on the Court and his many legal treatises, especially his *Commentaries on the Constitution of the United States* (1833) and, to a lesser extent, his two-volume *Commentaries on Equity Jurisprudence* (1835-36) established him as the most prominent American jurist and treatise writer of his day. *See generally* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC (1985) (describing Story's life and career).

28. The elitism of Kent and Story was strongly judge centered. KESSLER, *supra* note 1, at 37-48.

maintains, the substance of the Code was hardly novel.[29] When adopted, "it was by and large a fait accompli, reflecting changes that had already occurred," changes that were largely the result of earlier lawyer efforts to expand their role in equity proceedings.[30] The true importance of the code, then, was that "it recognized and gave content to a theretofore unknown entity: procedure."[31] A profound conceptual innovation, the idea of procedure as an omnipresent and independent area of legal expertise distinct from common law writs and substantive legal rules enhanced the practical power of the rising lawyer class in legal proceedings.[32] It was thus "fundamentally intertwined with the embrace of adversarialism."[33]

A second argument discounts the seemingly obvious idea that the constitutional status of the jury likely served as "a significant and early thumb on the scale in favor of adversarialism."[34] Instead, the book maintains that the actual role of the jury in the rise of "adversarialism" was both less important and quite different. It was less important because the courts were steadily diminishing the role of the jury throughout the nineteenth century while placing ever-broader power in the hands of judges.[35] Thus, the declining role of the jury was to some extent inversely related to the rising prominence of the

29. Previous scholars had recognized that the Field Code drew on the work of various "intellectual forefathers" and "was not a complete bolt from the blue." FRIEDMAN, *supra* note 22, at 294. Kessler extends the point, emphasizing the extent to which many elements of the code had already been introduced and sometimes accepted in the practice of New York equity courts. *See* KESSLER, *supra* note 1, at 112.

30. KESSLER, *supra* note 1, at 112.

31. *Id.* at 10. The code "marked the invention of procedure as a distinct, coherent category, defined in antithesis to the substantive law." *Id.* at 10-11; *see id.* at 142.

32. *Id.* at 12-15, 145-50.

33. *Id.* at 12; *see id.* at 145-50.

34. *Id.* at 168.

35. By the early nineteenth century, for example, courts had rejected the principle common in the colonial period that juries determined both "law" and "fact." Thus, judges became the sole authority declaring and enforcing the properly applicable law. *See id.* at 168-69. Along similar lines, nineteenth-century courts increasingly allowed parties to waive trial by jury, while expanding the power of judges to direct verdicts as a matter of law and to grant motions for new trials when jury verdicts were held to be legally unreasonable. *Id.* On this point, the book relies on long-established scholarship. *Id.* at 396 nn.69-71. Additional prominent sources charting the change include MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 26-30 (1977) (describing how increasing creation of common law precedents increased the role of judges in relationship to that of juries); WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 3-8 (1975) (describing how the pressures of commerce contributed to the revocation of juries' power to find law); and Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 506-08 (1996) (describing how courts' increasing reliance on the new trial device as a way to exercise control over juries paved the way for codes of procedure granted judges even more authority).

lawyers' "adversarial" legal culture. The actual role of the jury in that rise, the book explains, was largely "symbolic," providing an institutionalized public audience for lawyers to demonstrate their importance and their "republican commitment to promoting virtue."[36] Because lawyers saw ideas of "republican virtue" and the techniques of classical oratory as useful instruments of professional ennoblement, the jury came to function for them as "an important mechanism of republican self-display," an institution they could exploit to enhance their status and improve their public image.[37] Both the jury's shrinking practical significance in trials and its new role bearing witness to the displayed virtues of the lawyer class nicely illustrate the relatively "invisible" nature of much legal change—the process whereby legal rules, concepts, principles, and institutions remain unchanged in form and image while evolving over time in both function and significance.[38]

A third supporting argument is that the rising lawyer class remolded the concept of "republican virtue" to serve its own new purposes.[39] From the classical ideal of selfless and disinterested devotion to the commonweal, the concept evolved into a liberal ideal that embraced the virtues of self-seeking behavior and commercial expansion.[40] Early in the century, for example, Kent and Story stood against the rising tide of democracy by appealing "to the widely prevalent discourse of civic republicanism" and insisting that "the welfare of the new nation hinged on the preservation of virtue."[41] At the same time, however, they sought to reshape the law, especially equity jurisdiction, to safeguard property and foster a vibrant and expanding national commerce,[42] thus helping

36. KESSLER, *supra* note 1, at 169.

37. *Id.* "Seeking to justify their claims to social and political leadership, antebellum lawyers rushed to engage in the republican self-display that would prove their devotion to the cause of virtue and thus to the welfare of the republic." *Id.* at 190.

38. For an outstanding example of such "invisible" constitutional change, see DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE 1-5, 324-26 (2016).

39. KESSLER, *supra* note 1, at 152-54, 156-57, 198-99.

40. Providing yet more evidence of the continued influence of classical republican ideas and their gradual merger into subsequent "liberal" ideas, Kessler's book further undermines the position of those who deny the significance of the "civic republican" tradition in American constitutional law and contend that "liberal," market-based ideas dominated the thinking of the Founders. It "is beyond cavil," Kessler writes, "that civic republicanism was one of the founding era's defining ideologies." KESSLER, *supra* note 1, at 153. For the contrary claim, see, for example, RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 3-20 (2014). For a critique of this view, see Edward A. Purcell, Jr., *What Changes in American Constitutional Law and What Does Not?*, 102 IOWA L. REV. ONLINE 64, 66-67, 89-100 (2017) (critiquing Epstein's interpretation of the Founders' thinking).

41. KESSLER, *supra* note 1, at 48.

42. *See id.* at 40-42. Kent and Story, Kessler argues, were transition figures "who bridged the eighteenth and nineteenth centuries." *Id.* at 40.

unintentionally to advance the ideal's transformation.[43] By the mid-nineteenth century, the idea of republican virtue had become largely compatible with the values of a new market-based society as it incorporated ideas about the benevolence of self-seeking behavior, the desirability of unrestrained economic enterprise, and the superiority of the increasingly dominant adversarial legal culture.[44] That adversarialism, the book concludes, "was a product both of a civic republican ideal of lawyering and of efforts to promote a market-oriented conception of American society."[45]

The complex historical processes that blended those contrary ideals may be "initially difficult to comprehend," Kessler continues, for there are "profound tensions between republican, communitarian values on the one hand, and a market-based order on the other."[46] In fact, however, the operations of that historical process are neither unusual nor—when examined closely, as Kessler does—difficult to comprehend. Indeed, that historical blending of "republican" and "market" values merely represents one more example of the way that historical change can subtly but profoundly alter the meaning of the law's most basic concepts, principles, and assumptions.

In her conclusion, Kessler pointedly provides another revealing—and quite contemporary—example of the same process. In the nineteenth century, she comments, advocates insisted that adversarial procedures were justified because they were "vital to market growth" and guarantors of "individual freedom."[47]. Today, however, those same justifications are advanced to deny claimants access to those very same adversarial procedures. Those who defend adhesion contracts that compel individual claimants to use less favorable arbitration forums rather than the regular courts now contend that it is mandatory arbitration and the denial of access to "adversarial" courts that is "vital to market growth" and an instrument of "individual freedom."[48] "That at two different points in time, the same basic arguments could be so effectively deployed to justify such radically different procedural outcomes," Kessler wisely observes, confirming her most general thesis, "is an important reminder of the extent to which procedure is intimately related to social and economic context."[49]

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43. *See id.* at 200-01.

44. *See id.* at 157 ("There are a number of reasons why antebellum lawyers were so drawn to the classical republican model of lawyering, all linked in important ways with issues of professional identity, status, and power.").

45. *Id.* at 200.

46. *Id.*

47. *Id.* at 343.

48. *Id.*

49. *Id.* "[T]he American commitment to adversarialism is not somehow encoded in our DNA but is instead the product of a particular set of socioeconomic, political, and cultural struggles." *Id.* at 354.

III. Lingering Questions

Inventing American Exceptionalism is legal history of the highest order, and among the many questions it raises two seem worth highlighting. One is narrowly historical, and the other broadly normative.

The first involves the relationship between the triumph of Kessler's lawyer-dominated "adversarial" legal culture on the one hand and, on the other hand, the vigorous law-reform efforts through the nineteenth and early twentieth centuries that were designed to magnify the role of judges and protect their authority and independence. Despite basic differences between "law" and "equity," for example, it is not entirely clear how the expansion of the power of judges over juries in the nineteenth century[50] fit with the rise of a lawyer-centered "adversarial" legal culture that sought to reduce the judicial role.[51] To what extent did that increased emphasis on the centrality of the judiciary in American law and government represent a change over time in the nature of the adversarial legal culture? To what extent was it a product of an altered politics forged by the pressures of a new age of industrialism and urbanization? Indeed, to what extent was it essentially only another tactic in the continuing efforts of the lawyer class—or at least of the elite bar—to burnish its own image?[52] Perhaps Kessler's next book will address some of those questions.[53]

The second question worth highlighting is more fundamental. What is the value of such first-rate legal history for "law"? While it surely expands and deepens our understanding of the past, what does it contribute to more strictly "legal" and "normative" concerns?

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50. *See supra* footnotes 34-35 and accompanying text.

51. *See supra* footnotes 25-28 and accompanying text. One area of struggle involving judge-jury relations, for example, involved the issue of the judge's ability to "comment" to the jury about the weight and probative value of the evidence. FRIEDMAN, *supra* note 23, at 103. The results were mixed. "In the nineteenth century, a number of state statutes took away the [state court] judge's right to comment on the evidence. This, to be sure, made it harder for the judge to dominate the jury." *Id.* In contrast, federal judges remained free to comment on the evidence. EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 24 (1992).

52. Stephen Botein has suggested that, beginning in the mid-eighteenth century,

> [E]lite lawyers confronted a bench that mostly failed to meet their professional norms. Nevertheless, the bar in America needed exemplary judges to sustain its professional ideology and was prepared to invent them if necessary. Judgeship, representing an ideal of "primary orientation to the community interest," was an essential ingredient in the symbolic language of the American legal profession.

Stephen Botein, *"What We Shall Meet Afterwards in Heaven": Judgeship as a Symbol for Modern American Lawyers*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 49, 50 (Gerald L. Geison ed., 1983) (quoting Bernard Barber, *Some Problems in the Sociology of the Professions*, *in* THE PROFESSIONS IN AMERICA 15, 18 (Kenneth S. Lynn ed., 1965)).

53. Kessler does suggest the importance of these changes and offers her tentative thoughts about some of them. KESSLER, *supra* note 1, at 334-36.

Some answers are readily apparent. One is that first-rate legal history highlights the analytical importance not only of examining formal legal arguments with the greatest care but also of examining with equal care the practical consequences that follow from specific interpretations of the concepts, rules, and principles on which those arguments rely. Another is that, by juxtaposing legal arguments to the law's actual operations, first-rate legal history helps uncover and identify the masked goals and implicit biases of contending advocates. Thus, it sharpens insight into the role that personal motivations and contending social values and interests play in the law's operations. A third is that first-rate legal history undermines the general pretenses of "originalism" and exposes its inadequacy as a broadly applicable and specifically directive normative methodology. First-rate legal history lays bare the pretexts, complexities, confusions, ambiguities, and disagreements in "original" sources.[54] Further, it highlights the undeniable fact that change has persistently remolded American constitutional law and underscores the yawning gulf that divides past and present in terms of operative contexts, conditions, concerns, understandings, assumptions, and challenges.[55] Indeed, it shows "originalism" to be merely another form of legal argument, deployed by partisan advocates when tactically useful but functioning in actual practice as "a rhetorical trope for those who seek to overturn prevailing meanings and understandings in the name of allegedly older ones."[56]

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54. "[T]he very extent and diversity of the records of ratification give intellectual license to a host of interpretative strategies . . . . From such a body of writings, many an interpretation can be plausibly sustained, few conclusively verified or falsified." JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 133 (1996). There are, moreover, many problems with "originalist" sources. Recent scholarship has shown, for example, that James Madison altered and rewrote parts of his famous notes on the Philadelphia Convention—a major source on the origins of the Constitution—as issues changed over the subsequent years and his own politics shifted in response. *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION 1-16 (2015).

55. For an example of the way constitutional change occurs, see SLOSS, *supra* note 38, at 324-26. The literature demonstrating the inadequacies of "originalism" is vast. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 1-3, 10-13 (2002); KENT GREENAWALT, INTERPRETING THE CONSTITUTION 32-67 (2015); H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 1-7 (2002).

56. Edward A. Purcell, Jr., *The Judicial Legacy of Louis Brandeis and the Nature of American Constitutionalism*, 33 TOURO L. REV. 5, 44 (2017). "Originalist" claims have evolved through many forms over the past decades as varied defenders have sought to respond to lethal criticisms, but in seeking to make originalist approaches more sophisticated and nuanced they have in fact made them more diverse, qualified, and malleable. *See id.* at 41-42; *see also, e.g.*, Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 244 (2009) (characterizing "originalism" as a "smorgasbord of distinct constitutional theories"); Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 627-29 (2012) (examining how political ignorance at the time of the Founding challenges various "originalist" theories). The "results of cases decided using the most

Most fundamentally, first-rate legal history enables us to truly understand "the law," for to truly *understand* the law means to understand how it actually functions, how advocates actually use it, and what results it actually achieves. It means to understand how the meaning and implications of its rules, concepts, and principles shift; how partisan advocates in and out of court reformulate and redirect its authoritative sources; how its supposedly "established" and "traditional" elements have themselves changed over time; and how those elements often tend to bring divergent, unanticipated, and sometimes even perverse practical results as social contexts, economic interests, and cultural values evolve.[57] By showing how different procedures have worked at different times and in different circumstances, first-rate legal history can help provide a sound basis for evaluating the application of authoritative sources, identifying the law's consequent shortcomings, and suggesting desirable and workable practical reforms.[58] First-rate legal history is thus essential, for it is both a solvent of the law's pretenses and an instrument of its noblest goals.

To all of these values of first-rate legal history Kessler's book makes its own first-rate contribution.

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prominent originalist sources suggests that the theory is not a meaningful one in the sense of determining case outcomes. The justices all appear to fit those originalist sources to the support of their preferred resolution of the case. Originalism is commonly manipulated." FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 190-91 (2013).

57. *See, e.g.*, Edward A. Purcell, Jr., *Paradoxes of Court-Centered Legal History: Some Values of Historical Understanding for a Practical Legal Education*, 64 J. LEGAL EDUC. 229, 230-34 (2014).

58. In her conclusion Professor Kessler draws some general lessons from her study and suggests certain limited procedural reforms. *See* KESSLER, *supra* note 1, at 341-54.