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Amalia D. Kessler. *Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877*. New Haven: Yale University Press, 2017. 449 pp. Illustrations, appendix, notes, bibliography, and index. $35.00.

Amalia Kessler's task in *Inventing American Exceptionalism*, which she performs exceedingly well, is to challenge the idea that adversarialism was always a feature of American courts. She does this by tracing the development of our court system between 1800–1877 and showing that there were different models of courts and procedures throughout this period. She describes the rise and fall of courts that even many proceduralists are unlikely to have extensive knowledge of, including equity courts, conciliation courts, and the Freedmen's Bureau courts. In uncovering this fascinating history, Kessler explains the role that lawyers played in helping courts of law (also known as common-law courts) gain in popularity, as well as lawyers' contribution to the demise of equity courts.

Not only does Kessler show that courts were more varied than students of the American court system might expect, but also that lay participants played a role in each of these types of courts. In our own day, professional judges preside over courtroom proceedings; however, in the period that Kessler examines, lay participants also performed judicial functions in equity courts, conciliation courts, and Freedmen's Bureau courts. Kessler's study of these various courts reveals that the demarcation between professional judge and lay participant, which is so pronounced in our own time, was far less clear in various types of courts in the nineteenth century.

Kessler begins her exploration with equity courts, which she describes as "quasi-inquisitorial" rather than adversarial in nature (p. 5). These courts, also known as chancery courts, were headed by a chancellor and marked by proceedings that were reduced to writing and conducted in secret and were adversarial only to the extent that the parties initiated them. Witnesses answered questions, which were written down by an examiner and the testimony was not revealed until there was a decision. Witnesses were examined only once (on the theory that otherwise they might be tempted to alter their

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testimony). The documentary evidence was submitted to the chancellor, who was supposed to decide the case based on his "powerful moral intuition" or "refined moral sensibility" and to "pursue the outcome that was *procedurally* just" (p. 38, 53). The equity judge was viewed, at least according to two main proponents of equity courts, Chancellor of New York Court of Chancery James Kent and U.S. Supreme Court Justice Joseph Story, as "a kind of Romantic hero" (p. 43). Initially, lawyers had little role to play in these courts, which served primarily the elite, but lawyers transformed their role over time.

Kessler focuses on the way in which lawyers incrementally created a role for themselves in chancery court, and in doing so, helped to transform chancery court so that its proceedings became oral and adversarial rather than written and quasi-inquisitorial. She uses the New York Chancery as her focal point. Equity courts were under pressure from a growing population, an increase in commercial activity, and greater democratization. Meanwhile, chancery staff remained minimal: there were examiners, who were full-time court officials and wrote down witnesses' testimony; masters, who helped resolve disputed facts; commissioners, who were lay people whose task was to examine witnesses and who were hired on an ad hoc basis and were paid by the parties to perform their task, and the chancellor, who decided the case on the documentary evidence prepared by examiners, commissioners, and masters and who could ensure specific relief. Instead of increasing the chancery staff to grapple with changes in society, chancery court began to embrace the oral and adversarial procedures lawyers urged. As masters moved from written interrogatories to oral testimony because it was quicker (a move that was eventually upheld by Chancellor Kent), it opened the door to lawyers performing this function. Over time, lawyers were able to assume responsibility for questioning witnesses orally and for shaping the questioning to the benefit of their client. Procedural power shifted from masters and examiners to lawyers, and with the involvement of lawyers, the masters' and examiners' roles receded into the background.

Kessler shows that equity courts fell out of favor well before the Field Code of 1848, which constituted the formal merger of law and equity in New York. In the 1820s and 1830s, equity courts were under attack by governors, legislators, constitutional convention delegates, and lawyers. In a time of growing democratization, chancery court was seen as elitist and undemocratic. The chancellor and his staff were seen as having excessive power and the chancellor was criticized for being a "one-man court" especially when compared to common-law courts, which relied on juries (p. 117). The chancellor was also seen as being remote because the New York Chancery Court was located in Albany, New York. This meant that litigants had to pay for their lawyer to travel to Albany or to hire additional counsel in Albany to supplement the services that local counsel provided. In the late 1830s, the chancery court

was seen as part of a spoils system in which loyal party members were given positions. It was also seen as a court that could not keep up with its growing docket. In 1846, the New York Constitution abolished chancery and provided for a single court system that had jurisdiction in law and equity.

Kessler then focuses on the very interesting question of what motivated lawyers to transform equity proceedings into an oral, lawyer-driven process that typified the adversarialism in common-law courts. Her explanation is that lawyers embraced civic republicanism in which they saw themselves as civic leaders who worked for the public good. Oratory was an important tool for moving the public toward civic virtue. Lawyers saw their oratory as helpful in defining the national character. Cross-examination, in particular, was an important component of this oratory. Kessler describes cross-examination as "a mechanism of republican self-display" (p. 166). In courts of law, this display took place before the jury, which "was embraced as a key component of the lawyer's audience" (p. 167). The courtroom in a court of law also included members of the public and other lawyers, and they constituted part of the lawyers' audience as well. Kessler makes use of the personal diaries of New York lawyer Henry Vanderlyn, who kept two sets of diaries between April 1827–March 1857, and who expressed concern in his diaries about his own speech-making abilities. Kessler focuses on Vanderlyn and describes his self-conception as "a virtuous republican lawyer" and his efforts to maintain his independence and to keep free from corrupting influences (p. 181). Yet, the reader needs to maintain some skepticism about Vanderlyn, who portrays himself and his achievements in the best possible light.

During the nineteenth century, other countries, such as France, Spain, Denmark, and Prussia, turned to conciliation courts, and some states, such as Florida and California, which had been under Spanish or Mexican rule, retained a form of conciliation court, albeit briefly. However, these courts valued communal harmony above the rights of individuals and were eventually rejected. Between 1815–1848, there were changes in the United States in mass production, employment relations, consumer practices, and transportation. Conciliation courts were a less expensive and less time-consuming way to end a dispute and to restore the peace. A number of European countries had adopted this model of court. In Spain, for example, an *alcalde*, or local judge, served as a conciliator alongside two "'good men'" named by each party, and this court suggested a resolution "'appropriate for ending the litigation'" (p. 212). In France, the *justice de paix*, like the Spanish *alcalde*, was not supposed to have legal training or to apply the law. Instead, the main requirement of a *justice de paix*, like the *alcalde*, was his standing in the community. Florida, which had once been under Spanish rule, had local *alcaldes*. In 1823, there was a debate in Florida about proposed legislation that would implement conciliation courts. Kessler followed this debate in letters to the editor and

other newspaper pieces. The legislative council ultimately voted against the enactment of conciliation courts. Opponents of the conciliation courts worried that such courts were "contrary to the American spirit of liberty" (p. 221). California, which became a U.S. state in 1850, inherited conciliation courts when it was part of Mexico and before that part of the Spanish Empire. However, the California judiciary decided that such courts were incompatible with American legal culture and declared them obsolete. One explanation is that conciliation courts dispensed personal justice, but not the rule of law; another was that they put too much power in the hands of *alcaldes*. New York delegates discussed conciliation courts during the state's constitutional convention in 1846. They agreed on a constitutional provision to authorize the legislature to establish conciliation courts, but did not provide for structure or function. Most state legislatures failed to act on new constitutional provisions authorizing them to create conciliation courts, perhaps because conciliation courts were viewed as antithetical to American values.

However, the Freedmen's Bureau did manage to establish a form of conciliation court in the South after the Civil War, though it was short-lived (lasting only four years). The Freedmen's Bureau, which was a quasi-judicial, quasi-administrative agency established by statute on March 3, 1865, was supposed to provide justice to the former slaves. The idea was that the Freedmen's Bureau courts would teach the freed people about established law and help them to become self-sufficient. The challenge was that these courts had to resolve disputes not only between freed people, but also between freed people and whites. In interracial disputes, a conciliation court consisted of an agent from the Freedmen's Bureau, a person chosen by the freed man, and a person chosen by the Southern white. All three were lay people (though the agent could be a state magistrate) tasked to resolve the dispute, rather than to apply the law. There also seemed to be great variation in whether the parties had counsel, whether the proceedings were public, and how many lay judges were used. Although the freed men viewed the courts favorably for the most part, the Southern whites saw them as an unconstitutional extension of the federal government's authority and resisted them.

Kessler's book uncovers courts with which even proceduralists might be unfamiliar. They might know the names of some of these courts, such as chancery courts or Freedmen's Bureau courts, but probably have little knowledge about how they were constituted and the procedures they followed, much less how they changed over time. Kessler provides a wealth of information about these courts. Her research is meticulous and she draws from a vast array of sources, including archives, cases, newspaper articles, treatises, letters, diaries, and photos. Although the book is full of rich detail, she does not let it obscure her underlying themes. She tells the fascinating story of the rise and fall of equity courts and the role that lawyers carved out for themselves in these

courts. She also describes lawyers' embrace of courts of law because such courts provided them with a venue that was well suited to their civic republicanism. They were able to engage in cross-examination in a public setting before an audience consisting of jurors, members of the public, and fellow attorneys. Although Kessler seems to place a lot of weight on civic republicanism as an explanation for how and why lawyers transformed their role, she develops her argument with care and from a close reading of a variety of sources.

Kessler might not have set out to explore the use of lay participation in these different courts, but in her delineation of these courts, she has provided a wealth of information for jury scholars. She has pointed us to equity courts to see how lay participants were used as commissioners and she has directed us to conciliation courts in Florida and California to show us how lay people served as lay judges. *Alcaldes* served in this capacity, not through any knowledge of the law, but as a result of their standing in the community. Because they were well regarded in their community, they were able to resolve disputes and restore harmony. Kessler also leads us to the Freedmen's Bureau courts, which were a form of conciliation court, consisting of laymen who were unfamiliar with the law. One goal of these courts was to assist freed people, which they seemed to do. Another goal was to resolve disputes between freed people and white Southerners, which they did less successfully.

Throughout Kessler's book, the jury stands as a symbol of American liberty and justice, even as judges began to wrest some power away from juries during the nineteenth century. The lack of a jury in chancery court contributed to its reputation as a court for the elite. In contrast, the presence of juries in courts of law supported the idea that this type of court embodied American democracy in ways that equity courts, with their all-powerful chancellor and their secret proceedings, could never do. Courts of law enabled lawyers to perform in public before a jury and to perfect their oratory so that they could engage in effective jury argument and adversarial cross-examination that would make clear the strength of their case and their cause. Kessler might be overly optimistic about the power that civic republicanism exerted on lawyers in the nineteenth century, but it is important for lawyers in the twenty-first century to know about the roots of their profession's commitment to working for the public good.

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