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A Work in Progress: Perspectives on the Evolution of American Legal Culture

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REVIEW ESSAY

A Work in Progress

Perspectives on the Evolution of American Legal Culture

"Esteemed Bookes of Lawe" and the Legal Culture of Early Virginia
Edited by WARREN M. BILLINGS and BRENT TARTER
Charlottesville: University of Virginia Press, 2017
248 pp.

Thomas Jefferson, Legal History, and the Art of Recollection
MATTHEW CROW
Cambridge: Cambridge University Press, 2017
282 pp.

Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877
AMALIA D. KESSLER
New Haven: Yale University Press, 2017
464 pp.

In the mid-1820s, Winchester, Virginia, law student Charles James Faulkner penned an essay on the distinctiveness of American law. He reviewed the history of Virginia's settlement and the English law that his forebears brought to the colony. Colonial Virginians considered themselves to be Englishmen, complete with the same rights and laws as those who remained in England. "By a kind of fiction," Faulkner asserted, Virginians "merely extended the bounds of that Empire where this law was to exercise its full influence & operation." It seemed very simple, the way that young Faulkner described it. English migrations extended the bounds of the British Empire, and the colonists carried with them an Anglo-American cultural identity that they associated with their parent country's law. But in reality, the work of establishing their own polities and laws was complicated and laborious. The tasks grew more difficult as the colonies expanded

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and set out on their own after the Revolution. Historians too numerous to mention have traced the formation of Anglo-American law from the first colonial settlements onward, and in recent years, scholars such as Mary Sarah Bilder, Alexander Haskell, Daniel Hulsebosch, David Konig, and William Offutt have brought this subject into a transatlantic context that blends culture, society, politics and law into more nuanced depictions of early American legal culture. The three works reviewed below contribute to the historiography of Anglo-American law by providing a deeper understanding of the ways that Americans grappled with the complex enterprise of blending English and indigenous law into an Americanized legal culture. Conceptions of Anglo-American identity through the lens of the law inform each of these works.

Beginning with the seventeenth-century origins of Virginia law and moving into the early national period, the authors in Warren M. Billings and Brent Tarter's excellent anthology, *"Esteemed Books of Lawe" and the Legal Culture of Early Virginia*, follow the arc of Virginia's early legal culture through the study of law books and libraries. This close study of law books and the men who owned and wrote them gives us another perspective on Virginia's evolution from English colony to a mature member of the new United States. In this carefully curated volume, the essays weave a pattern of professional relationships, networks, and change over time to create a coherent whole. The authors bring attention to the oft-neglected importance of legal practitioners and their books in the shaping of identity in early America.

The anthology's first two essays reprise pathbreaking work originally published in the 1970s. Coeditor Warren M. Billings's essay on English legal literature's influence on seventeenth-century Virginia's law and practice, originally published in 1979, and W. Hamilton Bryson's *Census of Law Books in Colonial Virginia* (1978) opened doors to the history of the law book in colonial Virginia. Billings examines the men who were responsible for adapting English law to the exigencies of the newly established English outpost, their education, and the sources that they used to guide them in this unprecedented undertaking. Bryson's valuable inventory of colonial Virginia libraries, revised for the purpose of this essay, reveals not only the contents of the libraries but also the objectives and priorities of the owners of these collections. Both Billings and Bryson observe that throughout Virginia's formative years, most clerks of court, justices of the peace, sheriffs,

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burgesses, and councilors did not receive formal education beyond apprenticeship for their trade, but they were not ignorant of the law. Regardless of their level of education, the most useful works consisted of, as Billings puts it, "how-to-do-it" manuals that instructed readers on the duties of clerks, sheriffs, and justices of the peace and offered advice on how to plead cases, write wills, and convey property, among other legal processes. Billings and Bryson found among the more popular works Michael Dalton's *Countrey Justice* and Henry Swinburne's *Briefe Treatise of Testaments and Last Wills*, both "superior examples of the genre" (Billings 20). These works not only instructed officials on discharging their duties but also helped to lay the foundation for local law and custom. By the end of the seventeenth century, Virginia's legal system had developed enough to resemble English legal culture, but Billings points out that it was "different enough in certain aspects to claim a nearly unique distinctiveness" (Billings 22). Virginia law practitioners tried to emulate English legal traditions, but because they were "laymen in the law," they did not always share English lawyers' devotion to procedure and forms. In Billings's words, "substance was more important than form," because they had to attend to the practical aspects of applying the law to their distinctive societies (21–22).

Bryson extends his survey of law books into the eighteenth century, where he finds that ownership was widespread, indicating that Virginians took their knowledge of the law seriously. Bryson calls the scope of legal literature available to eighteenth-century Virginians "deep and broad," showing that "the common law of England was more than just a theoretical concept" in colonial Virginia (35). He echoes Billings's findings on the popularity of how-to-do-it manuals. Bryson also points out that the prevalence of works on wills, conveyances, and real property reflected the importance of landed property to status and wealth in colonial Virginia. Well-stocked libraries contained editions of statutes, case reports, abridgments, digests, and treatises, as well as works on legal theory, such as John Fortescue's *A Learned Commendation of the Politique Lawes of England*, a work written to instruct Prince Edward on legal custom in 1471, and Edward Coke's *Institutes of the Laws of England*. Later in the eighteenth century, legal practitioners made sure to purchase Sir William Blackstone's *Commentaries on the Laws of England*, an indispensable distillation of English law first published in 1765–69. Virginia's legal practitioners and elected officials also participated in networks of friends, colleagues, and neighbors

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who loaned or sold books to one another in an exchange that gave even laymen access to law texts.

Virginians also enjoyed access to the Library of the Council of Virginia in Williamsburg, which, as coeditor Brent Tarter shows in the third essay, boasted an impressive collection. The contents of the library reflected interests and needs of Virginia's lawyers and statesmen and demonstrated that Virginians "lived in a sophisticated and complex legal and political culture and clearly understood the importance of legal reference works for the proper functioning of the government and the economy" (53). The library originated in the early seventeenth century, when the first settlers began to collect titles to help them establish their settlement's legal institutions. Governors and council members, county court judges, and other officials referred to the works as they conducted their business. Again, Dalton's *Countrey Justice* proved to be a staple, along with other useful guides for court proceedings and forms for writs, deeds, and other processes. Council members and clerks continued to replace destroyed or damaged works and to add new volumes as legal procedures changed. For example, a 1770 list of books to be ordered for the library included recently published English law books, reports, and journals, parliamentary debates and proceedings, and laws for each English colony. As Bryson points out, perhaps the most important request on this list was Blackstone's *Commentaries*, which "almost immediately became an essential text for every attorney and for every library of law books" (46). Tarter also observes that the list included histories of England, which alongside histories of Virginia published in the eighteenth century revealed Virginians' interest in placing their own history in the context of England and its colonies. Tarter speculates that by the Revolution the library also contained works published in Virginia, including George Webb's *Office and Authority of a Justice of Peace* (1736), which superseded Dalton's *Countrey Justice*. By the early nineteenth century, the library held at least 659 titles, 1582 volumes, and several maps. About half the titles were classified as law books, and the rest were books on political economy, history, biography, agriculture, horticulture, and other miscellaneous subjects. The Library of the Council became the Library of Virginia after the Revolution, but during its existence in Williamsburg, it met the needs of the lawyers, judges, and statesmen who served the colony.

In addition to Virginians' reliance on English legal treatises and procedural manuals, John Ruston Pagan points out in his contribution in the

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fourth essay that Virginia lawmakers depended on English statute books as references for adoption of their own laws. He explores the ways in which law practitioners in the transatlantic legal culture "managed to construct a legal regime that coherently blended imported and indigenous legislation" (79). While the Crown occasionally required Virginians to enforce acts of Parliament, for the most part the imperial government allowed colonists to enact legislation tailored to their own needs, provided those statutes were not contrary or repugnant to English law. Pagan observes that the transatlantic constitution valued pragmatic application of legal principles, thus striking "a workable balance between local autonomy and central control" (59). Because the colonies lay outside parliamentary jurisdiction, English statutes did not automatically apply, unless the Crown approved extending statutes to the colonies. However, creating a new body of law for Virginia would have been impossible in the early years of settlement, so Virginians selectively introduced English statutes, or parts thereof, to build an effective legal system in their new society. Virginia judges also filled gaps in Virginia laws by voluntarily applying English statutes on an ad hoc basis. Interactions between Whitehall and Virginia's Assembly did not always go smoothly, however. The Crown sometimes rejected the Assembly's legislation, and Pagan describes Virginia's occasional dissatisfaction with measures directed at the colonies, such as the limitations that the Navigation Acts of the 1660s placed on colonial trade. Despite occasional tension, the presence of English statute books gave Virginians a foundation on which to frame their own legal culture.

The next three essays consider the roles that books played in the intellectual and professional lives of three law practitioners and scholars. In the fifth essay, Bennie Brown writes about John Mercer, who as a young merchant acquired the handful of texts considered essential for the study of law, passed the licensing examination, and eventually served as a county court judge. A rather salty fellow with a biting wit and violent temper, Mercer ran afoul of the General Assembly and was suspended from practicing law twice in the 1730s. He used his suspensions to compile and update a comprehensive digest of Virginia law, which proved to be a useful, Virginia-specific tool for lawyers and laymen. The volumes were small and portable for county court lawyers who traveled from courthouse to courthouse. Mercer stands apart from most bibliophile lawyers in colonial Virginia, in that he left detailed records, papers, business accounts, and other

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documents that Brown plumbed to reveal Mercer's book-buying habits. His library of approximately eighteen hundred volumes included more than law books. He also purchased Shakespeare's works, histories of England and its colonies, and poetry. Mercer participated in local, informal book exchange networks by selling or lending books to his neighbors. In fact, after Mercer's death, his son and executor, James Mercer, published notices pleading for the return of about four hundred volumes that his late father had loaned to colleagues.

Another participant in the formal and informal exchange of legal knowledge in Virginia was George Wythe, signer of the Declaration of Independence, judge, and law professor. In the sixth essay, Linda Tesar observes that Wythe's extensive library "both reflected and shaped the unique qualities of the man himself" (115). He used his books as sources of inspiration for his law practice, opinions from the bench, and political writings during the Revolution. He also believed in a broad reading curriculum for the young men like Thomas Jefferson and James Monroe who read law with him, and for his law students at William and Mary, where he served as the college's first professor of law and police from 1779 to 1789. Tesar estimates that Wythe owned 490 titles, but legal literature comprised only 42 percent of the books known to have been in Wythe's library. Tesar observes that Wythe collected the typical subjects for a learned man of his time, such as political and philosophical works by John Locke, Charles de Secondat, Baron de La Brede et de Montesquieu, David Hume, and Michel de Montaigne. He collected works on geography, travel, Shakespeare and Milton, dictionaries, books on language and Enlightenment-era science, and history, especially English and Virginia history. Most distinctive among the volumes in his library was the section devoted to the classics. Tesar observes that his Greek and Latin collections "substantiate the long-standing reputation of their owner" (126). Most educated eighteenth-century Americans were familiar with the classics, but even the more learned men read the works in English. Wythe, whose mother taught him Greek and Latin, read them in their original language, and he "rigorously devoured" the works, using his knowledge of the classics to inform his legal arguments and judicial decisions (127).

In contrast to Wythe's deep love of books as inspiration for his intellectual and professional pursuits stands the example of noted orator Patrick Henry, whom Kevin Hayes describes in the seventh essay as the kind of

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lawyer whose knowledge and insight came from natural intuition rather than books. A planter-turned-lawyer, Henry claimed that his one-month course of study for the bar examination consisted of reading only the laws of Virginia and *Coke upon Littleton*, a common approach to the law profession in the British colonies. The texts gave him enough of an education to pass the bar, and he promised George Wythe and John Randolph, the two examiners who signed his license, that he would continue his studies. True to his word, Henry acquired many works, although his collection tended to lean toward the utilitarian, without the theoretical frills of some of his colleagues. Among those works he found most useful were English reports, Thomas Wood's *Institute of Laws of England*, and Sir William Blackstone's *Commentaries*, which he heavily annotated and recommended to others as the finest and most comprehensive explication of British constitutional thought. Henry also acquired a copy of Samuel von Pufendorf's *Of the Law of Nature and Nations*, which helped to prepare him for arguing the case for natural rights on the eve of the Revolution. Although Henry collected the basic works needed to practice law, Hayes observes that "Henry had no desire to assemble a great library," and held on to a book only as long as it was useful for him (148). When he no longer needed it, like many of his colleagues, he gave or loaned it to someone else. He borrowed freely from his friends and neighbors as well, giving him access to many more books than he owned.

The final essays in the anthology introduce us to three treatises specifically created for Virginia law practitioners' use in the eighteenth century. The eighth essay, Warren Billings's second contribution to the collection, offers the story of the first law book of its kind to be published in Virginia, George Webb's *Office and Authority of a Justice of the Peace* (1736). Billings asserts that this work is particularly important for tracing the development of legal literacy and the spread of legal knowledge in Virginia. Webb cited fifty-seven works, revealing the variety of works available to Virginia's legal scholars by the 1730s. Chances are Webb did not own all of the titles he cited, but as other authors in the anthology have demonstrated, he could have borrowed from his neighbors, or he could have consulted the Library of the Council of State. Some of the works were written in Latin or law French, indicating Webb's breadth of learning and familiarity with these languages, a "rather uncommon skill for a Virginia magistrate of his generation" (163). He wrote almost entirely in the vernacular, however, making

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his work more accessible than English manuals. He published the work at a time when increases in Virginia's population necessitated the creation of more courts, justices of the peace, and lawyers, and new practitioners welcomed his important guide. Webb identified the English legal terminology of civil and criminal procedure and English precedent that Virginians appropriated. He also addressed subjects unique to Virginia law, such as Indian affairs, the militia, county formation, and labor relations. Webb's discussion of the relationship of colonial statutes to acts of Parliament reveals Virginians' perceptions of their relationship to England as they gained more confidence in their maturing society. Billings observes that Webb implied "a certain equality between English and colonial legislation," an assertion that reflected the opinions of many of his colleagues in eighteenth-century Virginia, but not necessarily that of Parliament (167).

Webb's *Virginia Justice* remained the most reliable tool for justices of the peace until 1795, when William Waller Hening published *The New Virginia Justice*. In the ninth essay, R. Neil Hening explores the important contributions his ancestor made to a growing body of post-Revolutionary legal literature. William W. Hening, a Charlottesville lawyer and member of the House of Delegates, was appointed clerk of the Court of Chancery for the Richmond District in 1810. Between 1794 and 1826 he published approximately thirty legal manuals, guides, court reports, and early Virginia laws. The most prominent of his publications, the *New Virginia Justice*, superseded the manuals already in use, including Webb's guide. Revisions in legal codes during and after the Revolution made pre-Revolutionary guides obsolete, and Hening added an appendix that described the duties of Virginia justices of the peace under the new federal laws, such as local officials' responsibilities with regard to fugitives from justice. His goal was to provide justices of the peace with a plain and easy guide and, like Webb, Hening made the work accessible to those not trained in the law by avoiding Latin and law French and providing useful forms for laymen. With this popular manual, Hening helped to inspire a growing wave of post-Revolutionary legal literature.

Perhaps the most important piece of legal literature to come out of this transformative era was St. George Tucker's Americanized edition of Sir William Blackstone's *Commentaries on the Laws of England*. In the tenth essay, Charles Hobson, the editor of Chief Justice John Marshall's papers, as well as Tucker's law reports, offers a summary of Tucker's career as

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judge, law professor, and annotator of the *Commentaries*. Like his mentor, George Wythe, Tucker's love of books led him to acquire an impressive library, numbering in the hundreds of volumes. In fact, his collection mirrored Wythe's choices. Approximately 40 percent of the works dealt with the law and the remainder represented his interests in history, science, geography, travel, poetry, and classics. He served as judge of the General Court and on the Virginia Court of Appeals from 1788 to 1811, and in 1813 he was appointed U.S. District Court judge for Virginia. In 1790, he succeeded Wythe as professor of law and police at William and Mary, and it was during his time as law professor that he annotated Blackstone's *Commentaries* for his law school lectures. While Tucker considered Blackstone a safe, reliable text, the Revolution made portions of the *Commentaries* irrelevant to American legal culture. Therefore, Tucker gathered sources of Anglo-American law, collections of Virginia and other state statutes, proceedings, federal statutes, histories of England and Virginia, and other materials to craft an American version of Blackstone. He prepared original lectures on subjects not covered in the *Commentaries*, such as the US and Virginia Constitutions and the laws of slavery. After several years of soliciting publishers' interest, Tucker finally succeeded in publishing the treatise in 1803. Its five volumes included Tucker's annotations to Blackstone's original version, alongside appendixes containing his original lectures. Hobson argues that Tucker "ultimately shaped Virginia law" after the Revolution, and even more broadly, Tucker's treatise emerged as the central reference on American law until James Kent's *Commentaries on American Law* and Joseph Story's *Commentaries on the Constitution of the United States* appeared in the 1820s and 1830s (197) .

Taken together, this essay collection offers a wealth of information beyond the books, teaching us much about the lesser-known lawyers and scholars who helped to build Virginia's legal culture in the colonial and early national eras. While a certain more famous Virginia lawyer receives only passing mention in Billings and Tarter's anthology, Matthew Crow places Thomas Jefferson at the center of his monograph, *Thomas Jefferson, Legal History, and the Art of Recollection*. Crow examines Jefferson through the lens of legal theory, using the ways that Jefferson deployed legal history in his political writings and activities. He begins his work with some rather dated notions about American legal historiography, accusing historians of isolating the law in an "autonomous zone," rather than recogniz-

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ing "conjunctions of law, politics and history" as equal contributors to the formation of legal culture (29). Indeed, for quite some time legal historians have accepted, as Stanley Katz put it in 1984, "that the history of law is inextricably entwined in the fabric of general social behavior," such that no present-day historian would try to isolate the law (477). Crow also implies that Jefferson was unique in his employment of history when, in fact, colleagues such as John Adams, St. George Tucker, James Wilson, James Kent, and Zephaniah Swift also used history in their legal treatises and other works to defend adoptions of English common law and to justify the changes and additions that Americans made to English law. Crow need not raise these issues, as his novel approach to Jeffersonian intellectual history stands as an important contribution in itself. He argues that Jefferson adopted a singular method for gathering history and "finding new uses for it," and that his approach to law itself as a series of collected and constructed histories allowed Jefferson to confront questions of race and political participation in unique ways (3).

Crow's introductory chapter reviews the English legal contexts from which Jefferson drew his ideas about intersections between law and history. He identifies legal and political theorists such as Edward Coke, Francis Bacon, Thomas Hobbes, Algernon Sidney, and, of course, John Locke as important to Jefferson's framing of Revolutionary politics as "a question of the affirmation and possession of a collective history" (25). He asserts that as Jefferson grappled with the creation of an appropriate historical consciousness for a new republic, he "was compelled to think creatively about law and about the question of in whose hands it could be trusted" (25). Crow argues that Virginians, including Jefferson, employed the strategy of creating their own histories in order to establish their status in the empire. As several of the authors in the Billings and Tarter collection point out, Virginia's legal scholars and practitioners searched for a balance between dependence on English law and creation of their own legal culture. Jefferson, like his colleagues, recognized that some pieces of English law fit Virginia's local needs, but in other instances Virginians established their own practices and institutions to fit local circumstances. Crow argues that elite Virginians considered their law a "fragile assemblage" of common law, equity, and ecclesiastical jurisdictions, in contrast to the more mature separate branches that existed in England (42). In response to criticisms of provincial law as less mature and therefore inferior, men like Robert Beverley and

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William Byrd II mined colonial records to write histories that established the legitimacy of their laws and governments. While Virginians emulated English legal culture, their means of organizing "legal knowledge" meant that they created their own unique, provincial character (45).

In one of Crow's most intriguing chapters, he closely reads Jefferson's *Notes on the State of Virginia* (1795), with regard to the problems of plurality and the history of Native Americans and Africans in America. Crow deems this work a rigidly racialized and gendered project, "as well as a profoundly anxious and insecure one" (180). The author explores Jefferson's intriguing use of nature and natural history in his discussions of Native Americans, Africans, law, and identity. He argues that in *Notes*, Jefferson worked "in a conceptual world where nature had become historical" (145). When he addressed the question of whether Africans could live within the law that Virginians created for their polity, Jefferson leaned on natural history and "on memories and the capacity to actively reform or break out of given models of thought and action" (153). Jefferson depicts the slave as subject to nature and without the capacity for self-governing recollection.

Crow identifies historical depictions of Native Americans as critical to Jefferson's goals for national expansion. In his *Notes*, according to Crow, Jefferson walked "a fine line between the depiction of Indians in North and South America as naked savages and the considerable evidence amassed by early modern European ethnographers that the original inhabitants of the Americas were in full possession not only of a self-consciously natural but a civil history" (166). By the time he was elected president, Jefferson had become a follower of the commercial arguments for imperial expansion and dispossession of Native Americans, as he became convinced that commerce could help bind the American republics together as they grew in size. This expansion had to be at the expense of the First Peoples, but Jefferson suggested that as white settlers migrated into Indian lands, the Native Americans would assimilate by learning Anglo-American modes of agriculture and commerce. However, the late eighteenth century brought a revival of traditionalism among the Native American tribes that generated considerable resistance to Jefferson's plan for assimilation. Crow argues that Jefferson defaulted to the "early modern historiographical paradigm of barbarism." Because the First Peoples refused to change their customs, Jefferson considered them "mentally encircled by their own history," and therefore incapable of progress (217).

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Crow argues that as Jefferson moved toward retirement, he turned away from commerce as a linchpin in the American identity and embraced the well-educated citizen as the center of local governance and the protector of liberty. His final chapter examines Jefferson's dedication to the education of American citizens, in order to ensure the success of the Republic. For example, he opened his library to William Waller Hening for the compilation of Hening's *Statutes at Large*, which Jefferson considered an important contribution to the project of preserving and publishing Virginia's historical records. Jefferson's seldom-discussed *Parliamentary Pocket-Book* and *Manual for Parliamentary Practice* demonstrated his conviction that a citizen's engagement in government required as much practical knowledge as possible. Crow argues that the *Pocket-Book* and the *Manual*, products of years of entries about parliamentary law, represented "histories of usage intended as guides for present and future action" (247). Even Jefferson's editions of the New Testament were pedagogical exercises, in which he treated religion as a historical phenomenon.

Crow asserts that Jefferson's ideas about the utility of equity for localizing judicial power also grew from his understanding of history. He sees the influence of Coke and Henry Home, Lord Kames, in the Declaration of Independence, wherein Jefferson argued that equity must be put in the hands of the people in order to preserve property rights and to enable commercial progress. As we know from other works on Jefferson's applications of his political theories, his failed constitutional proposals housed considerable power in the citizenry. Because he understood the citizen as a "self-owning and self-governing, cultivated subject," he proposed the expansion of juries through all legal levels, broad white male suffrage, and a guaranty of the right of the public to secure and maintain property ownership (105). Jefferson also viewed equity as a way to involve a broader sector of the citizenry in the law. Chancery practice had, historically, softened the feudal constraints of the common law, especially regarding real property and inheritance. While some Americans, like Jefferson, embraced the concept of equity, others objected to the potential for equity judgment to rest on "little but the conscience of the particular judge" (78). Equity's position in the newly established United States remained tenuous.

While Jefferson believed that equity could serve to democratize the courts, some of his contemporaries considered equity a tool of elitism. Amalia Kessler's *Inventing American Exceptionalism: The Origins of Ameri-*

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can Adversarial Legal Culture, 1800–1877 focuses on debates over equity to trace the evolution of procedure that brought the United States to marginalize equity in favor of an "American adversarial legal culture" (1). Kessler explains that adversarial legal culture, the opposite of an "inquisitorial" culture, relies on lawyer-controlled proceedings conducted orally and in public, relatively unhindered by judicial supervision (2). She argues that, while the adversarial processes won out over "more judge-empowering, quasi-inquisitorial procedure" in America, these more inquisitorial processes, grown from the English equity tradition and borrowed from continental European conciliation courts, also existed alongside the adversarial culture (4). These inquisitorial processes included judicial control over proceedings, especially with fact finding; reliance on written proceedings; and preference for undertaking the fact-finding process in secret. Quasi-inquisitorial bodies such as the European conciliation courts employed lay judges selected from among community leaders who were not necessarily educated in the law to help reconcile disputes among citizens of that same community.

In the late nineteenth and early twentieth centuries, Americans identified adversarial procedure and the common law with the characteristic of "liberty-promoting," adding those values to the "grand narrative of American exceptionalism" (6). Adversarialism seemed perfectly compatible with the emergent competitive, commercially oriented American society. Kessler uses the nineteenth-century New York Chancery and experiments with institutions molded after European conciliation courts to follow the cultural, social, and political forces that influenced the rise of adversarialism as part of American exceptionalism.

Kessler first lays out the roles of equity and common law courts in the Anglo-American colonies. Many American colonists looked upon courts of equity with suspicion, a legacy of the English revolution, during which parliamentarians depicted equity courts and their powerful judges as under the influence of the royal will. In the first decades of the nineteenth century, equity flourished in a few places, including New York. Supporters of equity in America argued that it fit the needs of a growing commercial society, but this tie to the commercial elite also engendered suspicion. Some places never created separate courts of equity, and among those that did, most were abolished by the early twentieth century, although equity's influence is still apparent in a few corners of American law.

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The quasi-inquisitorial process of equity began with the filing of a bill of complaint, compelling the defendant to appear and file an answer under oath, to which the plaintiff could reply. The parties gathered documentary evidence and examined witnesses, and the party calling a witness drafted written interrogatories, while the opposing party drafted cross-interrogatories. Kessler identifies three key features of equity procedure for testimony. First, the testimony in equity was largely written, rather than taken down from oral interviews. Second, the testimony was taken privately, in a closed room, rather than in open court. This practice originated in the theory that witnesses would be less likely to alter their testimony or be influenced by others' testimony if the results of all interviews were kept secret. Finally, lawyers did not have a central role in the process of discovery because they did not examine witnesses. After all witnesses had testified, the record was revealed to both parties, after which no further examinations were permitted. Once all evidence was gathered, the parties presented it to the judge at a hearing, and the judge entered a final decree resolving the dispute, or he ordered further proceedings. This process required considerable labor, and when the evidence was too burdensome for the chancellor to review by himself, he hired a master in chancery, whose fee was paid by the litigants. These masters oversaw any necessary discovery, including ordering parties or witnesses to submit to examination under oath.

The two most important figures in the preservation of courts of chancery in the new nation, New York chancellor James Kent and US Supreme Court justice Joseph Story, served as promoters and protectors of the institution, even in the face of strident criticism. Kent is widely credited with reaffirming the English tradition of equities in American law, and Story transmitted Kent's vision of equity across the nation. In New York, the Court of Chancery operated continuously from 1711 to the Revolution, and although some New Yorkers associated Chancery with the "high-handed monarchy," it was a highly influential institution in that colony (34). John Lansing, Jr., Kent's predecessor, adhered to English tradition when he drafted the first post-Revolution rules of equity procedure for New York. Under Kent, who was chancellor from 1814 to 1823, New York's Chancery followed the quasi-inquisitorial procedure that required gathering testimony in written form, preserving secrecy, and limiting the role of lawyers. Kessler asserts that Kent "served, in essence, as a systematizer, advocat-

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ing more rigid adherence to all aspects of the English quasi-inquisitorial model and working assiduously . . . to publicize this model across the country" (36). While he remained on the bench, he successfully preserved core components of equity despite the legislature's repeated efforts to disband the Chancery.

With the publication of his treatise on equity jurisprudence in the mid-1830s, Joseph Story helped to preserve and publicize chancery courts, while contributing to an idealized image of equity judges. Holding Chancellor Kent as his model, Story asserted that equity judges did not merely consider narrow rules but also relied on moral intuition in instances when they meted out justice where common law failed to do so. In Story's opinion, these duties rendered equity judges superior to common-law jurists. The ideal equity judge merged Enlightenment pursuits of science, artistic and literary talents, and appreciation of commerce with "Romantic notions of natural genius" (40). Kessler argues that this depiction of a heroic, learned judge enhanced the reputation of American law in an era when England and continental Europe considered American legal culture backward and immature.

Despite Kent's efforts to maintain equity traditions, lawyers began to infiltrate the testimony process in New York equity courts during the early nineteenth century, and Kessler observes that Kent himself authorized this change in an 1817 court decision. Kent did not intend to undermine tradition, rather he wanted to make equity procedure more efficient and less costly. Equity's complicated interrogatory process necessitated that lawyers anticipate all the responses witnesses might make and draft follow-up questions ahead of time, which sometimes produced irrelevant cross-interrogatory questions. Kent may have thought that lawyers' presence during questioning would increase efficiency, but he did not foresee that lawyers would seek to exercise more control of the examination of witnesses by assuming the role of interrogator. As use of oral testimony grew more frequent, lawyers took control over the gathering of testimony, and examiners' power diminished. Court officials also found that, rather than oral testimony increasing efficiency, witnesses could be called to testify several times, thus adding to delays. Moreover, as oral testimony became more common, Americans came to perceive procedural fairness as more compatible with oral, public testimony. This transition was influenced by English jurist Jeremy Bentham's ideas about the courtroom as a powerful

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institution of democratic self-government, which demanded greater public access and transparency in judicial decision making.

Kessler also examines the culture of oratory as an important cultural distinction in America that contributed to the framing of American identity and influenced the move toward adversarialism. The privileging of oral testimony and the public nature of litigation originated in the discourse of civic republicanism. Although they had suffered from reputation problems in the colonial era, by the Revolution lawyers had gained some social authority. They wanted to build on their elevated stature by portraying themselves as virtuous citizens and statesmen who put the interests of the public before their own. The procedural tools of the common law helped to advance that image. In rhetoric and oratory, American lawyers found a skill that gave them an advantage over the English. Because American-style oratory "called on the passions," it was considered superior to English oratory and closer to the classical model (161). English lawyers' oratory was considered dry, dull, and unfeeling in contrast to Americans, who prided themselves on "highly dramatic republican self-display by virtuously bringing to light those malefactors who had engaged in perjury and were otherwise unworthy of the public trust" (164). The increase in jury trials also fed this desire for persuasive oratory skills, and lawyers played to the public, who attended court sessions to see the drama of litigation. Not only did this dramatic style enhance the reputations of those lawyers who mastered this skill, but their oratorical style reinforced their distinctive American identity.

By the 1820s and 1830s, the democratization of politics in New York and lawyers' drive for more control over procedure caused a backlash against Kent and the court of equity. Members of the Democratic Party called for procedural change in order to rid themselves of what they labeled an elitist court. They directed criticisms against Kent and his Federalist vision, and after Kent retired, the Whigs and the Democrats continued to criticize Chancery. Opponents associated the equity court with the political spoils system and the market revolution's commercial and financial elites, who they believed posed a threat to American democracy. The New York constitution of 1846 abolished Chancery as a separate court and specified that there was to be a single Supreme Court with general jurisdiction in law and equity. All testimony was to be taken in the oral, adversarial manner of the common law. After they merged the two courts, officials created the

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1848 Field Code of Procedure, a unified manual that joined law and equity, reduced the court's powers of discovery, and extended the right to jury trial in many cases that formerly fell within the jurisdiction of an equity judge. Kessler argues that these measures marked "a key moment in the rise of 'procedure' as the sum total of rules—distinct from the substantive law—required to initiate and move forward litigation" (142). The changes also marked the decline of equity as a "distinctive quasi-inquisitorial tradition" (17).

After examining the decline of equity in nineteenth-century New York, Kessler turns to another, lesser-known mode of justice, the conciliation courts. These tribunals, common in parts of continental Europe, were lawyerless venues in which respected local authorities were appointed to help disputing parties come to compromise. Although these institutions never took hold in America, debates over the establishment of conciliation courts took place in Florida and California at the moment that these territories were acquired (1821 and 1848) and in New York during the state's 1846 constitutional convention. While under Spanish rule, Florida and California used forms of conciliation courts, and proponents for their retention argued for their expediency in dispute resolution, because they eschewed litigation and lawyers. Opponents claimed that conciliation courts threatened liberty by denying people immediate access to litigation and by subjecting them to the influence of the conciliating judge rather than to the rule of law. In Florida, officials settled on a hybrid model in 1823, in which all small claims within the jurisdiction of a justice of the peace could appear before the justice with arbitrators chosen by each party, but they used this process only for very small disputes. Although California used *alcaldes*, or local judges, as conciliators under Spanish rule, this process was found to be incompatible with American market-oriented liberty.

At the time of their debates over conciliation courts, Florida and California were "remote backwaters," but New York, among the most sophisticated legal systems in the nation, also considered implementing a form of conciliation court (236). Kessler explains that the idea appealed to New Yorkers who resented the increasingly powerful legal profession. Reactions to market forces and economic change also influenced these debates, as did the Second Great Awakening. Reformers called for moderation in a lot of cultural corners, and they believed that litigation asserted self-interest and encouraged conflict, while conciliation courts could promote neighborli-

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ness and harmony, thus softening the edges of market-driven competitiveness. Opponents argued that the legal conflict brought by market forces was a source of productive change for the economy. Although New Yorkers briefly experimented with a tribunal of conciliation during the Civil War, it was short-lived, and Kessler could not locate records of the proceedings.

On the federal level, however, Kessler identifies one example of a form of conciliation court, the tribunals of the Freedman's Bureau, which was established after the Civil War to help former slaves assimilate into American society. The bureau's defining mission was to reshape labor relations in the South so that they conformed to northern free labor standards. Its architects also envisioned the bureau as a pedagogical tool and as a form of social control by promoting instruction on obedience to the established law while offering an extralegal mode of dispute resolution. While historians have assumed that the bureau structure was built on the military commission model, Kessler suggests other origins, including French versions of conciliation courts. The bureau tribunals were not exact replicas of conciliation courts, and their structures varied. In fact, there were so many variations that one wonders whether they fit the mold of conciliation courts at all. Some jurisdictions used a single-judge model. In others, the bureau employed a three-judge model that involved both bureau officials and laypersons. Many disputes were resolved without lawyers, and parties sometimes represented themselves. However, in other cases, parties opted for the adversarial approach, including representation by legal counsel. Some cases were presented informally and orally, and others were presented in written complaints. The records are unclear about whether the courts followed the tradition of secrecy in proceedings, but ordinarily bureau court proceedings took place in public. Although bureau tribunals do seem to have borrowed certain elements from conciliation courts, they also echo the practices that the authors in the Billings and Tarter anthology describe for colonial Virginia. Once again, at the end of the Civil War, Americans followed the example of colonial settlers by finding pragmatic solutions to unprecedented problems. They adopted and improvised laws and practices that seemed reasonable under the circumstances by borrowing from what they knew and inventing the rest.

These three works each make important contributions to American legal historiography. Each offers unique perspectives on the ways in which American law navigated complicated relationships with its English ances-

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tor, while also opening new avenues of inquiry for future scholarly explorations. The authors in Billings and Tarter's anthology invite similar comparisons of available legal literature and its value in other colonies. Crow proves that there is always some new angle to take on even the most famous of our founders, although more careful editing and proofreading may have helped the author articulate his ideas more effectively. Kessler offers the most provocative challenge to further inquiry in her final chapter, where she draws her subject into the present. She concludes that the absence of a conciliatory alternative to this nation's formal, adversarial judicial process has left many Americans with no access to an affordable forum in which to seek redress. She challenges scholars of many disciplines to explore alternatives to our adversarial legal processes. These three outstanding books are welcome reminders of just how knotty an undertaking the creation of American legal culture has been, and continues to be.

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