University of Richmond Law Review

Volume 6 | Issue 2 Article 26

1972

Book Reviews

Jack S. Shackleton

James R. Saul

Follow this and additional works at: http://scholarship.richmond.edu/lawreview

 Part of the Insurance Law Commons, and the Public Law and Legal Theory Commons

Recommended Citation

Jack S. Shackleton & James R. Saul, *Book Reviews*, 6 U. Rich. L. Rev. 457 (1972).
Available at: http://scholarship.richmond.edu/lawreview/vol6/iss2/26

This Book Review is brought to you for free and open access by UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

BOOK REVIEWS

THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION. By Willmoore Kendall[1] and George W. Carey.[2] Baton Rouge: Louisiana State University Press. 1970, Pp. XI. 163. $6.00.

As the title indicates, the late Professor Kendall and Professor Carey have undertaken to inform us concerning the basic symbols of the American political tradition. What are these symbols? What is the American political tradition? And why are they of any consequence in twentieth-century America? The answer seems to lie in the fact that we cannot really understand ourselves until we know something of our roots—where we have come from and the basic values that have contributed to making us what we are. President Nixon is said to have stated in a recent interview that he thought the fundamental cause of unrest among American youth is not our poverty or prejudices but a sense of insecurity that comes from the old values being torn away.[3] The authors have done an excellent job in showing us from whence these old values have come, in outlining their sources, and in calling our attention to what they term a "derailment" that has shunted us down the wrong track. They maintain that this derailment has been caused by our increasing commitment to a false tradition and a false set of basic symbols.

Few intellectuals or political science scholars would today question the proposition that the Declaration of Independence and the Bill of Rights are fundamental constitutive documents. It is a widely accepted article of faith that all men are created equal, and the commitment to equality has gone so far that there is widespread acceptance of the view that Government should actively pursue policies designed to make all men equal socially, economically, and politically.[4] The authors feel that this is a false conception of the American tradition and that it is a distortion of those basic values that constitute the foundations of the American Republic. In support of their theses they have gone back to the beginning and have made an analysis of the Mayflower Compact, the Fundamental Orders of Connecticut, the Massachusetts Body of Liberties, the Virginia Declaration of Rights, the Constitution of 1789, the Federalist Papers, and the Bill of Rights. The basic symbols of the American political tradition, they say, are to be found in these historical documents.

---

[1] Late Chairman of the Department of Economics and Politics, University of Dallas.

[2] Professor of Government, Georgetown University.

[3] Wall Street Journal, May 4, 1971 at 20.

[4] *See* Kurland, *The Supreme Court 1963 Term*, 78 HARV. L. REV. 143, 145 (1964).

The first four chapters of the book are based on a series of lectures on the American Tradition by Professor Kendall at Vanderbilt University in the summer of 1964. The remaining four chapters are the work of Professor Carey, Professor Kendall's friend and collaborator, who provided certain editing to the Vanderbilt Lectures after Professor Kendall's death, added certain material of his own, and rounded out the entire project into the excellent work that it is.

I. The Mayflower Compact

Going back to Plymouth Rock, the authors remind us that the colonists arriving on the Mayflower in November 1620, before they disembarked upon the desolate New England shores, entered into a solemn compact in which they identified themselves as loyal subjects of the British Sovereign, stated the purpose of the business at hand, and covenanted to combine themselves together into a "civil body politic" for the "better ordering and preservation and furtherance" of certain ends. What they were about to do, they said, was to be undertaken for the glory of God, the advancement of the Christian faith, and for the honor of King and Country. They committed themselves to "enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and offices as from time to time shall be thought most meet and convenient for the general good of the colony." Promising submission and obedience to such laws, the entire group—forty-one in number—signed the compact.

The authors note as basic symbols the strong allegiance to the Christian faith, the sense of cooperation and mutual trust, and especially the spirit of moderation. Here was no revolutionary rhetoric against the British King and no commitment to equality. The overriding commitment was freedom to worship God and the general good of the colony. There was nothing in the compact respecting who was to govern the "Body Politic" or how "the just and equal laws" were to be enacted. But while the compact said nothing about individual equality and nothing about individual rights, by implication it said a good deal about freedom, in that it was an exercise of the right to freely make such a compact and to freely give or withhold consent to such a compact.

II. The Fundamental Orders of Connecticut

Professor Kendall next looks at the Fundamental Orders of Connecticut (1638-39) subscribed to by the inhabitants of the towns of Windsor, Hartford, and Wethersfield, and the land thereonto adjoining, some nineteen years after the Mayflower Compact. The "civil body politic" of the Mayflower Compact had now become a "public state or commonwealth" and the

word "covenant" had disappeared from the formulation. Two new purposes were stated—"to maintain the peace" and "to maintain union." The townsmen also entered into combination and confederation together to "maintain the liberty and purity of the gospel of our Lord Jesus which we now profess as also the discipline of the Churches." The general objectives of the Mayflower Compact had become the more differentiated task of bringing into being an orderly and decent government. The government was to be a government "established according to God" and a government that would maintain peace and union because the word of God required "maintenance of a government" for these purposes. "Civil affairs are to be guided and governed according to such laws, rules, orders, and decrees as shall be made, ordered and decreed as followeth": the inhabitants of each town were to meet and assemble together to elect deputies to the general assembly; the general assembly was to meet twice yearly; procedure for the selection of magistrates and a governor was specified, and other details in the nature of a constitution were provided.

Professor Kendall finds in the Fundamental Orders a whole cluster of new symbols. Here, for the first time in America, we find the creation by the people of a written constitution. Here is provision for a representative legislative assembly. Here is provision for majority vote in elections and majority rule in the enacting of laws. Here the support of the religious order is made the end purpose of the political order, and very significantly the supreme power of the Commonwealth is seen as residing in the legislature. Not yet have we arrived at a proclamation of individual rights nor the symbol that all men are equal. As in the Mayflower Compact the supreme symbol is still self-government by a virtuous people.

III. The Massachusetts Body of Liberties

The Massachusetts Body of Liberties (1641), which the authors next examine, described itself as "the further establishing of this Government," that is, a rounding out of a constitution already in existence. It provided a new symbol, that of "the liberties, immunities, and privileges" that humanity, civility, and Christianity call for as "due to every man in his place and proportion." This seems to be the first American attempt at a bill or declaration of rights, but there were strict limitations on these rights. The freedoms set down were those due to every man in his place and proportion, and the rights were guaranteed against violation only by arbitrary action of a court of law or executive official. The power of the legislative authority or, as it was called here, the General Court, was not restricted. It was provided for instance that:

> No man's life shall be taken away; no man's honor or good name shall be stained; no man's person shall be arrested, restrained, banished, dis-

> membered, nor in any ways punished; no man shall be deprived of his wife or children; no man's goods or estate shall be taken away from him nor any way endamaged under color of law or countenance of authority, unless it be by virtue or equity of some express law of the country warranting the same, established by a General Court and sufficiently published, or in case of a defect of a law in any particular case by the Word of God. . . .[5]

Here again the authors note the overriding supremacy of the legislature. The rights seem to come from the legislature. There is no hint that a man enjoys certain rights because he is a man. One of the high symbols is that "humanity, civility, and Christianity" call for certain things which the Body of Liberties is to deliver. Individual rights are protected against all but that to which a virtuous people acting through its legislative assembly makes exception. The symbols Professor Kendall finds are higher law, supreme representative assembly, deliberation, and virtuous people.

IV. The Virginia Declaration of Rights

The Virginia Declaration of Rights, which is reviewed next, was signed on June 12, 1776, almost a century and a half after the Massachusetts Body of Liberties and just a few weeks before the Declaration of Independence. Much had transpired in the new world during this long interval. "All men," The Virginia Declaration stated, "have certain inherent rights" because men are "by nature free and independent." These rights are such that when men "enter into a state of society, they cannot by any compact deprive or divest their posterity: namely the enjoyment of life and liberty with the means of acquiring and possessing property and pursuing and obtaining happiness and safety." The immediate concern of the signers was with the rights that pertain to the "good people of Virginia" and above all the right of the people to govern themselves. The Declaration did indeed specify rights that are rights of individuals, but these are rights against courts of law and the executive—that is, common law rights. Individual rights as contrasted with rights of the people are "at second remove" as the authors say. To illustrate, excessive bail "ought not to be required;" trial by jury is preferable and "ought to be held sacred;" freedom of the press is "one of the bulwarks of liberty and can never be restrained but by despotic governments." These are more in the nature of statements of good government than defiant statements of rights. While recognizing the importance of religion and the "duty which we owe to our Creator" the Declaration asserted that men are to be free to practice religion according to their own views and not by compulsion. This is a significant change in our symbols from previous

[5] The Mass. Body of Liberties ¶ 3 (1641).

documents. A wedge has been driven between the civil and religious authority, and the church has, in effect, been disestablished. The authors find that two new symbols have been added—the concept of inherent rights to self-government of a free people and the concept of religious freedom. The symbol of a virtuous people is affirmed in this sublime language: "That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."

V. The Declaration of Independence and the Gettysburg Address

The authors next turn to the Declaration of Independence and remind us that its primary purpose was to announce to all the world the severing of those bonds that had until July 4, 1776, tied us morally and legally to Great Britain. The Declaration spoke for the thirteen United States of America. There was no pretense of speaking for one people or one nation. The states at this point were united only for the purpose of declaring their independence. After stating certain self-evident truths regarding the rights of men and the power of government and enumerating a bill of particulars against the outrageous acts of the British King, the Declaration affirmed the ringing truth that these united colonies "are and of right out to be free and independent states."

The authors give particular attention to the clause "all men are created equal" since they believe that this could be the root cause of what they call the derailment. They point out that Lincoln, in his Gettysburg address, dated the beginning of the nation from the date of the Declaration when he said, "*Fourscore and seven years ago* our fathers brought forth on this continent, a new nation, conceived in Liberty, and *dedicated to the proposition that all men are created equal*" (emphasis added). The authors maintain that Lincoln might more appropriately have said, "Three score and fourteen years ago," dating our beginning from 1789, the year of the adoption of the Constitution. This, they say, is a point in history that has a far stronger claim to marking the beginnings of our nation.

The commitment to equality, they say, is highly questionable. The Constitution itself, and the Federalist Papers in which Hamilton, Madison, and Jay attempted to explain and justify it, say nothing of a commitment to equality. Surely it was not meant to be taken literally when slavery was practiced by many of the signers and when property restrictions on voting existed in virtually all of the thirteen states.

Was the equality clause empty rhetoric? Professors Kendall and Carey do not so believe. They state in an appendix that their best guess is that the clause simply asserts the proposition that all peoples who identify them-

selves as one—that is, those who identify themselves as a society, a nation, or a state for action in history—are equal to others who have likewise so identified themselves. This interpretation seems quite plausible in the light of the first paragraph of the Declaration and the passages that follow the equality clause. The authors believe that the Declaration asserted that Americans are equal to the British and the French for instance, and if the British and the French can claim equality among the sovereign states of the world, so too can the Americans.

Lincoln obviously had a different understanding of the equality clause and apparently considered equality a value or goal to be promoted. The authors admit that it is Lincoln's view that has gained wide and uncritical acceptance among contemporary scholars.[6] Those who seize upon and stress the "all men are created equal" clause have slowly fixed upon the symbol of "equality" as supreme. To an increasing number of intellectuals the commitment to equality means that the government has an obligation to use its full powers to bring about equality, socially and economically as well as politically.

The Constitution, which occupies a status of the highest order in the American political tradition, gave us new symbols and new commitments, but equality is not among them. The rich symbols of the Preamble—"to form a more perfect union," "to establish justice," "to ensure domestic tranquility," "to provide for the common defense," "to promote the general welfare," and "to secure the blessings of liberty"—do not proclaim the all-encompassing mandate of using the powers of government to create an egalitarian society. "How can it be," the authors ask, "that in the very preamble which does constitute us as a nation, there is no mention of that which Lincoln and the official literature inform us is our overriding commitment?" [7]

Neither does the Bill of Rights suggest that all men are equal nor proclaim any obligation to promote equality. The authors point out that the addition of a Bill of Rights was far from being the initial concern of those

---

[6] A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 13 (1970) comments as follows:

> The cast of mind [of the Warren Court] is perhaps nowhere more saliently, more ingeniously—or more succinctly—exhibited than in a decisive remark of Mr. Justice Douglas, speaking for the Warren Court in one of the reapportionment cases [Gray v. Sanders 372 U.S. 368 at 381]. Said Justice Douglas, "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person one vote." The key word is *can*, and the sentence is further notable for its references to documents not commonly taken as having legal effect, and to extralegal significance of provisions that do have strictly legal, but circumscribed, application (footnote omitted).

[7] W. KENDALL & G. CAREY, THE BASIC SYMBOLS OF THE AMERICAN POLITICAL TRADITION 103 (1970).

who first met under the authority of the Constitution. They maintain that the Bill of Rights did not alter in any way the basic structural or procedural design of the Philadelphia Constitution nor represent any departure from the basic principles embodied in the Constitution. The Bill of Rights and the First Amendment did not alter the mainstream of the American political tradition which, as the Preamble and the Federalist Papers would have it, comes down to "rule by the deliberate sense of the community."

From the Mayflower Compact to the Bill of Rights "our supreme commitment and symbol has been self-government by a virtuous people," say the authors. "The notion of legislative supremacy has been intimately linked with this symbol," and underlying the whole has been a distrust of an excess of democracy. The result was hopefully to be a stable and abiding republic.

VI. The Derailment

The authors feel that the "philosophical plants of derailment were seeded and began to grow full force sometime between the very early years of the Republic and the Civil War," and that this was why Lincoln's address at Gettysburg contained the language that it did. The derailment symbols, according to the authors, seem to feed upon themselves and to grow ever larger. Thus majority rule, originally understood as an equal capacity on the part of all men to give or withhold consent, was seized upon and exaggerated until it becomes a demand that men must be made equal in every respect at whatever cost to life, liberty, and the pursuit of happiness on the part of others.

The derailment, the authors feel, takes the form of a belief that man is highly perfectable; that he is not a flawed creature who must be restrained by checks and balances and limitations on government powers. Since one man is ideally as good as another, he is entitled to an equal share of the good things of life, regardless of his ability, application, and accomplishment. We see growth of a belief that government is responsible for correcting virtually all of the ills of mankind and, from some quarters, that this must be done instantly.

Alas, it has not worked out as envisioned. In the words of the *Wall Street Journal*, "The [derailment] tracks have ended in the streets of Watts and Detroit and Chicago; at Berkeley and San Francisco State and Santa Barbara; and in a Greenwich Village townhouse." [8] And the end is not yet in sight.

Here is a book that takes us back to fundamentals. It raises great issues and stimulates deep thinking. It should be read by every lawyer, administrator, legislator, and jurist as well as everyone having a serious interest in political science and the art of government. The book may be ignored or

[8] Wall Street Journal, May 4, 1971 at 20.

downgraded by those who accept what the authors call "the official literature" and "the authorized version of the American political tradition." But, if it is given a fair reading by many who are sincerely concerned with present trends, it will undoubtedly contribute towards getting the nation once again on the right rails.

Jack S. Shackleton*

*Librarian, University of Richmond Law School.

BASIC TEXT ON INSURANCE LAW. By Robert E. Keeton.[1] St. Paul: West Publishing Co., 1971. Pp. 712. $12.00.

Professor Keeton's new textbook is a welcome addition to the materials on insurance law. Since the other major hornbook in the field, *Vance on Insurance*, has not been revised since 1951, this work fills the need for an up-to-date single-volume treatment of the subject. It is especially pleasing to see that provision has been made for pocket supplements to this text. As Buist Murfee Anderson pointed out in his preface to the third edition of *Vance*, the changes that are constantly being made by courts and legislatures in this area of the law can cause portions of a book on insurance law to be out-of-date before it comes off the press.

In his textbook, Professor Keeton leaves no doubt as to his broad knowledge in every phase of insurance law. This reviewer, having worked in the claim department of a large casualty insurance company, was particularly impressed with the author's understanding of the problems that can arise in the processing, defense, and disposition of casualty claims. It is a fact that most questions in the field of insurance law arise after a claim has been presented and the insurance company for one reason or another has denied coverage. With regard to liability insurance, more than any other type, the insured's right to coverage and the insurer's right to deny coverage may depend upon acts and omissions which occur after the claim arises as well as before. Chapters six and seven of Keeton's text, in particular, contain an excellent discussion of the rights of each of these parties in conjunction with their duties and responsibilities.

Professor Keeton pays homage to *Vance* by frequent citations to that work. The same is true of Professor Patterson's *Essentials of Insurance Law*. However, he is not adverse to expressing his own perceptive opinion. On occasion *Vance* is cited for the very purpose of taking issue with some statement made in that work. For instance, *Vance* (as do other authorities) seems to take the view that an insurer is not liable on an insurance policy taken out by one who is both the beneficiary and the murderer of the person whose life is insured. Keeton wonders whether a factual analysis of the cases cited in support of this broad proposition would in fact support it. Further, he feels that modern policy provisions should also prevent the insurer from escaping liability altogether. In another section, he disagrees with the explanation in *Vance* for denying subrogation to life and accident insurers while permitting the workmen's compensation insurance carrier to recover from the tort-feasor who caused the death or

[1] Professor of Law, Harvard Law School.

injury of the worker. Such recovery has been permitted in some jurisdictions even in the absence of statutory provision for subrogation. Professor Vance contended that in the case of workmen's compensation insurance, the insurer has a direct right in tort against the third party whose negligence injured the worker. According to Vance, "[t]he loss suffered by the [workmen's compensation] insurance carrier, being fixed by the terms of a public statute, was clearly forseeable by the tort-feasor, and therefore may properly be regarded as a proximate consequence of such negligence." Keeton finds this explanation unpersuasive. He feels that it could apply equally as well to life insurance as to workmen's compensation insurance. He contends that the different treatment, allowing the workmen's compensation carrier to recover in the absence of statutory provision for subrogation, is merely the result of custom and different policy provisions relating to subrogation.

In view of its general approach and limited citations, this volume was obviously prepared primarily for the law student. However, it can also be a ready reference for the members of the bar. The practitioner with a specific problem in this area of the law would do well to turn here to get his bearings before going on to deeper and more detailed research in other materials. However, in spite of the fact that this reviewer can only praise this book, the teacher, law student, or practitioner who uses it should be prepared for some tedious reading. Professor Keeton's scope is even broader than that of Vance, yet he accomplished his task in 583 pages of text as compared to the 1074 pages required in the *Vance* hornbook. Such compression does not lend itself to a free-flowing literary style. Though one might dip into any portion of the text for an example, the discussion in Section 5.5(a)(1) concerning the distinction between "exceptions" and "exclusions" might serve as well as any. There, discussing the system of terminology constructed by Professor Patterson, Keeton says, "an 'exclusion' is distinguished from an 'exception' not on the basis of the place where it appears or the heading under which it appears in the policy form but rather on grounds concerned with the kind of condition of liability it imposes. An 'exception' is a provision limiting the insurer's liability in terms of a cause of the insured event; the cause to which it refers is an 'excepted cause.' An 'exclusion' (aside from exclusions of certain persons or of certain kinds of property) is a provision limiting the insurer's liability in terms of an event; the event to which it refers is an 'excluded event.'" There is further elaboration on this distinction, illustrations are given, and other terminology is discussed, but the fare remains exceedingly rich.

Of course, any new text is expected to give attention to recent developments in the field. This book fulfills that expectation. However, the discussion of both no-fault insurance and uninsured motorist coverage is

rather brief. This is quite reasonable in the case of no-fault insurance. On the other hand, uninsured motorist coverage has been around since the mid-1950's and can be wonderfully complicated to the uninitiated. This reviewer wishes that the author had devoted a little more attention to that particular topic. Even so, Professor Keeton has referred the reader to other sources which will provide the answers to his questions.

Professor Keeton in his preface indicated that his emphasis in this book was on perspective rather than comprehensive detail and that his aim was to serve those who sought a basic understanding of insurance law generally. He has certainly accomplished that.

James R. Saul*

* Lecturer, University of Richmond Law School.