

## Book Reviews

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## More About Vermont History

*Compiled by* PAUL A. CARNAHAN

# BOOK REVIEWS

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## *The Rebel and The Tory: Ethan Allen, Phillip Skene, and the Dawn of Vermont*

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By John J. Duffy, H. Nicholas Muller III, and Gary G. Shattuck (Barre and Montpelier: Vermont Historical Society, 2020, pp. 327, \$22.95).

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In the preface of this new study chronicling the birth of Vermont, the authors claim that their scholarship presents “fresh information about serious issues in the early history of Vermont” (p. xiii). Indeed, their work is offered as a challenge to the “bedrock truth” embedded in the traditional narrative of Vermont’s birth. The popular version held that the creation of an independent Vermont, which led to statehood, followed an oft-told tale of conflict between greedy, corrupt Yorkers and freehold-seeking New Hampshire grantees. Aside from Yorker perfidy, the central problem was the undefined frontier border that separated the colonial jurisdictions. This deficiency led to an overlapping of colonial authority made more complex by competing land titles issued by the governors of New York and New Hampshire. The disputed titles first led to litigation and then, in the face of corrupt legal maneuverings by Yorkers, Ethan Allen created a resistance force known as the Green Mountain Boys to defend the righteous claims of the Grants settlers.

For two centuries, historians and antiquarians have held that Vermont was born of the frustrations of good honest Yankee farmers resisting the greed of Yorker landlords. While the quarrels over land titles and the actual location of the border between New York and New Hampshire are certainly well-plowed historical ground, the authors of *The Rebel and the Tory* widened their scope beyond the Lake Champlain/Lake George region. They considered earlier border disputes, which, in their

opinion, fueled the Yorker/Yankee clashes of the 1770s, including the Ejectment Trials. In short, Vermont historians have not given sufficient scrutiny to the multiple conflicts over New York's eastern borders with Massachusetts, Connecticut, and New Jersey. Duffy, Muller, and Shattuck insist that these earlier border conflicts are the precursors, the "lit fuse," that precipitated the tensions that precipitated the birth of the Green Mountain Boys and eventually Vermont. Here is where *The Rebel and the Tory* presents a new interpretation of the actions on both the Yorker and Yankee sides of the fracas. While earlier Vermont historians viewed the actions of Yorkers as the work of "avaricious speculators" aided by a corrupt court system, Duffy, Muller, and Shattuck saw a more measured response that did not easily lean toward partiality for Yorker titles. This view was fostered by the discovery of a cache of New York Supreme Court of Judicature documents and a new understanding of the legal environment of the mid-18th century.

As they examined the documents of the 1770–1771 Ejectment Trials, a very different interpretation of events unfolded and the fable of greedy Yorkers fell apart. Their close reading of the legal history of the trials and precursor events revealed a muddy swamp of overlapping and sometimes conflicting land-holding traditions. Years of benign jurisdictional neglect by New Hampshire and a reluctance on the part of New York landlords to litigate lest the courts rule against them, encouraged Grants settlers to resist Yorker efforts to impose their claims. This led Grants settlers to believe in the superior strength of their demands for fee simple possession of their farms. It was an unbridgeable gap. The legal landscape was further entangled by individual disputes over land ownership that had more to do with personal conflict than a capricious application of boundaries. When the court finally began the Ejectment Trials in June 1770, the Yorkers' legal representatives were James Duane and John Tabor Kempe, an astute litigator with broad experience with the British legal system and a former colonial attorney general for New York, respectively. The Grants proprietors chose Peter Sylvester and Jared Ingersoll, also skilled litigators, but they chose Ethan Allen as an agent to gather the evidence and present their interests in the New York court. Allen did not rise to the occasion. Instead, he mishandled evidence and failed to acquire the documentation needed to pursue a legitimate case. The details of Allen's bungling his part of the process has been glossed over by both his own writing and the subsequent historians' own bias toward the York-

ers. With no real basis to win their cases, the Yankees lost both rounds of the trials. In fear of losing their land, Allen and his constituents responded with violence to defend their claims and the opportunity to negotiate a peaceful settlement with the Yorkers was lost.

In the midst of their troubles, an older scheme championed by Jeffrey Amherst to break off a portion of New York and New Hampshire territory and create a new, separate colony was revived. Here, too, is an underdeveloped and largely ignored part of Vermont history. The Tory in this study is Philip Skene, an ambitious speculator and land baron holding one of the largest and most secure titles to land west of the Green Mountains. Skene's plan, with the cooperation of the Grants settlers and Ethan Allen, would effectively end the land disputes by creating new boundaries and allowing for settlement of land claims within a new jurisdiction. Skene had been privy to the plan to create a buffer colony to serve as a "defense for the southern thirteen colonies" (p. 119). In the wake of the Yankees' failure to succeed in the Ejectment Trials, the notion of calving off the disputed territory began to appeal. From Skene's point of view, creating a new colony with his manor as its civil center and he as its new governor could be a peaceable solution to the crisis. Skene traveled to England to lay the groundwork and was successful, but by the time he was on his way back to Skenesborough, the unrest in the colonies had become outright war. Skene's project "died stillborn" (p. 149). His estate confiscated, Skene resumed his military career with the British. Ethan Allen and the Green Mountain Boys turned their attention to declaring their independence, joining the resistance to British authority, and laying the groundwork for Vermont's entry into the new nation.

The authors of *The Rebel and the Tory* have broadened our understanding of the complex and sometimes confusing saga of Vermont's early history. The introduction of new evidence, skillfully presented, and the inclusion of individuals such as Phillip Skene add nuance and texture to the story. While *The Rebel and the Tory* can be a complex read, it is worth the effort.

SUSAN M. OUELLETTE

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*Equal Is Equal, Fair Is Fair: Vermont's Quest for Equality in Education Funding, Same-Sex Marriage, and Health Care*

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By Allen Gilbert (Burlington, VT: Onion River Press, pp. xi, 120, paper, \$12.99).

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When U.S. Supreme Court Justice Samuel Alito spoke to the Federalist Society in November 2020, he focused on the damage to individual rights that he saw flowing from the various emergency measures enacted to combat the Covid-19 pandemic. These measures, according to Alito, represented unprecedented attacks on freedom of speech and religious liberty.

For the past forty years, this focus on individual rights has been the animating spirit of federal originalist jurisprudence. This is in large part because the United States Constitution and its Bill of Rights lend themselves to such a focus. The Constitution is, after all, a blueprint for a limited federal government, and the Bill of Rights was implemented to block the overreach of such federal power against states and individuals. This focus on individual rights, however, has been transformed into a cudgel in the ongoing fight in this country between expanding or limiting what benefits the government will extend to groups of citizens. As the Court has demonstrated in recent years, asserting individual religious rights is an effective way to put constitutional limits on national health care, reproductive services, and gender discrimination.

State constitutions are different. States are the primary unit of American government, and their founders tended to be more homogeneous than the population of the nation as a whole. The state documents, therefore, tend to reflect both a greater degree of trust from this commonality, as well as a desire to enshrine the “common benefits” and rights of its citizenry. It is no surprise then, that in the 1980s, as federal case law began to turn away from expanding rights and protected benefits, a new wave of judges, lawyers, and scholars began to dig back into their state constitutions.

Allen Gilbert’s book, *Equal Is Equal, Fair Is Fair*, digs into this period of state constitutional jurisprudence and explores the rich successes that marked the high-water period of Vermont constitutional jurisprudence in the late 1990s as well as the major limitations to this strategy in the fight for universal health care.

Gilbert's book rightly begins with the landmark case of *State v. Jewett*, 146 Vt. 221 (1985). In *Jewett*, Justice Thomas Hayes sent out an express invitation and detailed road map for lawyers to use the Vermont Constitution as a separate and unique source for asserting rights and benefits that were distinguishable and immune from the growing originalist jurisprudence on the federal level. Justice Hayes wrote, "We have an opportunity to develop a sound jurisprudence of state constitutional law that will serve not only this generation of Vermonters but those who will come after us in the decades yet to be" (*Id.* at 229).

Several lawyers took up Hayes's challenge, but none were as successful as Bob Gensberg, to whom Gilbert dedicates his book and who led the fight for equalization of school funding in Vermont. The resulting case of *Brigham v. State*, 166 Vt. 246 (1997) put Vermont constitutional jurisprudence on the national map for two reasons. First, it provided a robust and full articulation of the "common benefits" clause in Article 11 as a unique and separate basis for the obligation to equalize school funding on a statewide basis. Second, it took the novel approach of remanding the matter to the General Assembly to craft the actual remedy. As Gilbert notes, this decision was the combined harvest of both a careful legal strategy and a receptive bench.

Gilbert's book is divided into three chapters, which he uses to chronicle a different right and its success within the realm of state constitutional litigation. Following the triumph of *Brigham* in the first chapter, Gilbert discusses the mixed victory of same-sex marriage in *Baker v. State*, 170 Vt. 1894 (1999). *Baker*, which followed *Brigham*'s template, had its flaws. The civil union remedy ultimately fashioned by the legislature—a separate but equal solution that made no one happy—illustrates the problem with letting another branch fashion the remedy. Nevertheless, Gilbert includes an incisive summary of this jurisprudence, which was largely the work of Chief Justice Jeffrey Amestoy who, as Vermont attorney general, had defended the state in *Brigham* but had subsequently been appointed chief justice and wrote the majority opinion for *Baker*. Amestoy recognized the political need in certain cases to include the other two branches of government in fashioning a remedy. Gilbert mines both Amestoy's decisions and his subsequent writing for a great deal of insight into this unusual but largely effective approach, which has been dubbed pragmatic constitutionalism.

Notwithstanding its flaws, the power of *Baker* is that it anchors its decision within a fundamental right and compels the legislature to act. As with *Brigham*, the Court in *Baker* kept jurisdiction of the case and simply gave the legislature the initial opportunity to fashion a remedy.

This ensured that the General Assembly, which can be quite masterful in killing off or delaying controversial legislation, was compelled to act. A summer study committee on marriage equality was not going to satisfy the Court and gave it impetus to act.

Evidence of the power of this type of constitutional pragmatism is demonstrated by its conspicuous absence in the third chapter of the book. Gilbert devotes this part of the book to tracing the history of health care reform in Vermont from the 1920s through the concerted efforts of Governors Howard Dean and Peter Shumlin. In every case, the difficulty, cost, and uncertainty of single-payer health care doomed the efforts as skittish legislators wavered in the face of political pressure. Without a constitutional mandate, health care falls into the category of compelling, but difficult, legislative priorities. Like Act 250 reform, marijuana legalization, or end-of-life care, the goal of health care reform may generate some progress with each legislative cycle. It may even yield something akin to ultimate success. But its journey is likely to be full of false starts and backward steps, and will require years, if not decades, of concerted legislative effort. This is precisely the prolonged and uncertain process that legal champions like Gilbert and Gensberg would seek to avoid through either an outright judicial mandate or a judicially compelled legislative remedy.

This is the problem at the end of Gilbert's book. Historically, health care has never been legally or constitutionally recognized as a fundamental right. Unlike education and marriage, in which state and local governments have long played a major role in either regulating, funding, or promoting, health care is an emerging right, and no matter how generously interpreted, it lacks the foundation within Vermont's constitution to claim a seat as a fundamental right.

An interesting question remains. When does a right like health care become one of the fundamental rights covered by our common benefits clause? At the federal level, the corollary answer is clear, as the Affordable Care Act, to the extent it has survived, has been reduced through successive challenges to its individual mandate and its coverage provisions. It continues as of this writing only by the slenderest of threads. The U.S. Constitution, as interpreted by the current U.S. Supreme Court, is unlikely to find an affirmative, individual right to health care. The right of privacy, which the Warren and Burger Courts of the 1960s and '70s cobbled together to create certain health care rights to contraception and abortion, is in retreat, and the Roberts Court is unlikely to recognize further expansion as a fundamental right. Moreover, the posturing of individual rights in federal jurisprudence is more likely to yield

the opposite—an assertion of individual rights that act as a cap on any effort to expand such benefits.

In this respect, Gilbert’s book is a timely reminder that it is at the state level where the promise of group rights and benefits is the strongest. State constitutions remain the best legal vehicle to compel the recognition of group rights and benefits. Yet, even this promise is undercut by the limits inherent in any constitutional search for rights. Despite its common benefits clause and progressive language, Vermont’s state constitution jurisprudence has not been the wellspring that some envisioned it to be in the wake of *Brigham* and *Baker*. Indeed, the Vermont Constitution is in many ways a conservative document, and its difficult amendment process all but guarantees that it will remain as such. Yet ignoring this powerful tool or simply forgoing it means that the critical and divisive questions of our age will remain entirely subject to the political will of the moment. That is a loss to both groups and individuals.

DANIEL P. RICHARDSON

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### *Politically Defined: Memoir of an Unknown Activist*

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By Dinah Yessne (the Author: 2021, pp. 257, paper, \$16.99).

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At the end of her highly readable and informative account of living in Vermont’s Northeast Kingdom in the late twentieth century, Dinah Yessne reveals that, “Vermont had never really felt like home to me, and part of me was perpetually wondering if there wasn’t somewhere else I was meant to be” (p. 218). After thirty-three years of social service and advocacy for low-income Vermonters, Yessne was still on a quest to find a community of like-minded colleagues that would satisfy not only her desire for a purposeful life, but also her expectations of advancing social justice for all.

Ever since its founding in 1777, Vermont has beckoned Americans seeking new pathways in life. Like many newcomers of the post-World

War II generation, Yessne had imbibed the idealism of the 1960s. In contrast to the migrants of Kate Daloz's *We Are as Gods: Back to the Land in the 1970s on the Quest for a New America* (2017) or Yvonne Daley's *Going Up the Country: When the Hippies, Dreamers, Freaks, and Radicals Moved to Vermont* (2018), Yessne was not a hippie. Yet she joined their retreat to Vermont in search for a more equitable "New America," where "low-income working people and people in poverty" would not have to strive harder than anyone else to make a living (p. 240).

Yessne already knew what it meant to be an outsider. A midwesterner by birth, she tells the story of her political education within a small Jewish community surrounded by Protestant neighborhoods in Minneapolis. Readers learn about Dinah's girlhood exposure to political organizing through her parents' engagement in the progressive wing of the Democratic Party, her education at the campus school of the University of Minnesota, and her exposure to the Civil Rights and antiwar movements while at the University of Wisconsin in Madison. Driven by a desire to "do something socially useful" (p. 56), she took a break from academia in 1966 and spent six months on an Israeli kibbutz. The community solidarity she found there became a guiding light, nourishing her persistent hunger for the perfect place.

Before Vermont became an option, Yessne learned the basics of grassroots organizing in the 1968 presidential campaign of U.S. Senator Eugene McCarthy. That experience catapulted her from exhilarating moments with the "Gene Machine" to crushing defeat at the Chicago Democratic Party convention. Her mother's death from breast cancer and a brief stint in social work in the Bronx, New York City, left the twenty-five-year-old Yessne longing for a new direction as well as the "beauty and peacefulness" she recalled from a trip to Vermont.

With neither family nor friends in tow, Yessne left New York City behind in 1970 and landed in Albany, Vermont, where opportunities to participate in President Lyndon Johnson's "War on Poverty" abounded. Her years working as a caseworker for the Department of Social Welfare, at Vermont Legal Aid, and as a lobbyist for the Low-Income Advocacy Council provide a personal and revealing account of the development of community-based social services in the Northeast Kingdom.

With the focus on her career, Yessne traces her many accomplishments and public service as both an advocate and attorney, but she provides only brief glimpses of her personal relationships. During these years, she married, moved to St. Johnsbury, had two children, and became a lawyer after earning her JD at Vermont Law School. With barely a complaint, she commuted regularly to Montpelier and Royal-

ton in all seasons. Obstacles were few for this committed activist, with the notable exception of childcare, which she overcame with considerable aplomb. Yessne participated in feminist activism briefly in 1972 as a staffer with the National Women's Political Caucus and during Vermont's Campaign for a state Equal Rights Amendment in 1986, but relieving poverty was her life work.

Despite winning many legal cases for her clients and the rewards of providing solutions for those in need, something was missing for Yessne. Her dream of securing a judgeship proved elusive, and she lost two brave campaigns to enter politics—as St. Johnsbury's representative in 1988 and as senator from Caledonia County in 2000—both of which ran up against longtime Republican dominance in the region. In search of family connections and the sense of community solidarity she had experienced in Israel, she explored living in Oregon and later at Arcosanti, a sustainable architecture community in Arizona, both of which offered the openness of the western landscape that Vermont lacked.

In the end, Yessne returned to Vermont and activism. Rather than presiding as a judge, however, she was on the other side of the bench pleading her case after being arrested during a nonviolent protest at the State House with the Poor People's Campaign in 2018. Her story expands our knowledge of a critical time in the state's history beyond the saga of the "hippie invasion," encompassing another brand of newcomer who transformed the social and political culture of Vermont.

MARILYN S. BLACKWELL

*An independent historian, Marilyn S. Blackwell co-authored Frontier Feminist: Clarina Howard Nichols and the Politics of Motherhood (2010) and has published many articles on the history of women in Vermont.*