

## CHANCELLOR KENT AND THE HISTORY OF LEGAL LITERATURE

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Those of us who live much of our lives in or near law libraries tend to take our law books for granted. If, however, we pause to look, we find that our law reports, statute books, treatises, practice manuals, encyclopedias, legal periodicals, and the rest are the products of a long and fascinating history. The forms of legal literature undergo ceaseless cycles of innovation, maturation, and decay.

We are living through an age of extreme flux in the character of American legal literature. The genre of legal literature that epitomized the later nineteenth and early twentieth centuries, the treatise, is in propitious decline. The law school casebook, which a century ago was a pristine collection of appellate cases, has metastasized into what is sometimes called the coursebook, a cross between casebook and treatise. The law reviews, which originated to serve practicing lawyers and judges, are now largely directed inward toward the greatly expanded audience in legal academia. New forms of literature have burst upon us—in particular, the loose-leaf services and electronic databases—that are transforming our ideas about law reporting and legal research. These changes in the character of our legal literature are intimately connected to changes in the practice and administration of the law, to changes in legal education and legal theory,<sup>1</sup> and to the astonishing advance of new information technologies.

This Article is devoted to an earlier cycle of the history of American legal literature, the period that Roscoe Pound aptly called “the formative era.”<sup>2</sup> My purpose is to examine the role of that legen-

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\* Chancellor Kent Professor of Law and Legal History, Yale; B.A., Columbia, 1964; LL.B., Harvard, 1968; Ph.D., Cambridge, 1971. I am indebted to several archivists for helping me use their collections, especially Billy Aul at the New York State Library in Albany; Whitney Bagnall at Columbia Law Library; and Nancy Lyons at Yale University, Sterling Library, Manuscripts and Archives. I am grateful for references and suggestions from John Cairns, Morris Cohen, Robert Gordon, Fred Konefsky, Klaus Luig, William E. Nelson, Mark Ouweleen, Donald Roper, Fred Shapiro, Peter Stein, Alan Watson, and Ruth Wedgwood. Regarding the citation practices used in this article for manuscript and other antiquarian sources, see *infra* note 14.

1. On the connections between legal theory and legal literature, see A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. Chi. L. Rev. 632 (1981).

2. Roscoe Pound, *The Formative Era of American Law* 3 (1938) [hereinafter Pound, *Formative Era*]. See especially Pound's chapter on “doctrinal writing,” *id.* at 138–72.

dary figure, Chancellor Kent, in the origins of American legal literature. James Kent has long been a figure of renown, especially at Columbia, where his appointment as professor of law in 1793 inaugurated legal education at the University. Kent reworked his second set of lectures, presented at Columbia in the 1820s, into the *Commentaries on American Law*,<sup>3</sup> the most influential American law book of the antebellum period. Columbia derived enormous luster from the success of Kent's *Commentaries*, and the Columbia Law School has ever since burnished its link to Kent, for example, through the school's former seat in Kent Hall, the designation of outstanding students as Kent Scholars, Columbia's Kent professorship, and the archival holdings of Kent's books and papers that figure centrally in this Article.

Long before Kent put pen to paper for the *Commentaries*, however, he was already a famous figure in American law. Indeed, writing the *Commentaries* was a project that Kent undertook in his mid-sixties after a quarter-century on the New York state bench. His reputation then rested upon what we continue to regard as the most characteristic genre of Anglo-American legal literature, the printed law report. In ways that I shall explain in Part III of this Article, Kent had much to do with establishing what has become the vibrant tradition of law reporting in America.

As for Kent's book, the *Commentaries*, I shall ask you to see it in an unconventional light. I shall link it to another type of legal literature, called institutional writing. This genre came to its highest expression on the European Continent in the seventeenth and eighteenth centuries, but its roots stretch back almost two thousand years to the *Institutes* of Gaius. I shall explain in Part IV of this essay why I think it is illuminating to understand Kent's *Commentaries* as one of—indeed, perhaps the last of—the great institutionalist works.

### I. WHO WAS CHANCELLOR KENT?<sup>4</sup>

James Kent was a vigorous person. Although physically small, he

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3. James Kent, *Commentaries on American Law* (New York, O. Halsted 1826–30) [hereinafter *Commentaries*] (4 vols.). Kent's lectures at Columbia are discussed *infra* notes 56–63, 86–90 and accompanying text.

4. See generally 10 *Dictionary of American Biography* 344–47 (Dumas Malone ed., 1933) (brief biographical sketch of James Kent). Kent is about due for a serious biography, something with the range of Newmyer's life of Story. See R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (1985). The closest we have is the adulatory narrative by John T. Horton, *James Kent: A Study in Conservatism 1763–1847* (photo. reprint 1969) (1939). Horton's narrative biography is based upon the Kent Papers in the Library of Congress. That collection is discussed *infra* note 14. Horton overlooked important sources. For example, he did not locate the trove of Kent's papers and diaries that Kent's descendants held until 1964, when the materials were deposited in Columbia University, Butler Library, Rare Book and Manuscript Library. Horton seems also to have been unaware that much of Kent's law library survived in Albany and at Columbia, see *infra* note 41; these books contain

was blessed with good health and immense energy. He was long-lived in an age when few people were. Kent was born in 1763 in the tiny village of Doanesburg, New York, in what is now Putnam County, near the Connecticut border in the Poughkeepsie region of the Hudson Valley.<sup>5</sup> His life spanned the French and Indian War, which was concluded by the Treaty of Paris in the year of his birth; the American Revolution, whose military engagements disrupted his youth; the formation of the Union, from which he emerged an ardent Federalist; the War of 1812, a war that he bitterly opposed; the organizing jurisprudence of John Marshall's Supreme Court, which Kent largely supported; the Jacksonian Age, which he detested; the opening of the American West; and the drift toward Civil War.<sup>6</sup> Kent died in 1847, vigorous into his eighties.<sup>7</sup> Across his long life, he tried his hand at a

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manuscript material and marginalia. Quite apart from shortcomings in Horton's sources, the major drawback to his book is that, because it is insensitive to the main currents of American legal history, it does not relate Kent's work to the doctrinal issues and institutional developments of the time.

The work by Kent's great-grandson, William Kent, *Memoirs and Letters of James Kent, LL.D.* (Boston, Little, Brown & Co. 1898) [hereinafter *William Kent, Memoirs*], remains quite valuable. It reprints a number of the most interesting documents contained in the Kent Papers collected in the Library of Congress.

Valuable biographical detail about Kent appears in George Goldberg, *James Kent, The American Blackstone: The Early Years, in Law-Making and Law-Makers in British History: Papers Presented to the Edinburgh Legal History Conference, 1977*, at 157 (Alan Harding ed., 1980).

5. See William S. Pelletreau, *Birthplace of Chancellor James Kent: His Interesting Letter of Reminiscence*, 17 *Mag. of Am. Hist.* 245 (1887); see also Horton, *supra* note 4, at 10 n.31 (Kent's birthplace was part of Dutchess County prior to the formation of Putnam County in 1812).

6. An autobiographical chronology in the Kent Papers in the Library of Congress is reproduced in Macgrane Coxe, *Chancellor Kent at Yale*, 17 *Yale L.J.* 311, 330 n.3 (1908) [hereinafter *Coxe*; document hereinafter *Coxe, Chronology*]. Kent's opposition to the War of 1812 is discussed in Horton, *supra* note 4, at 196. On his opposition to the Mexican War, see *Letter from James Kent to Simeon Baldwin*, New York City (Sept. 18, 1847) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series 1, Box 26, Folder 300). As early as 1830-31 Chancellor de Saussure of South Carolina wrote to Kent about the temper toward disunion on account of tariff policy: "I fear for the safety of the Union." See, e.g., letters reprinted in *William Kent, Memoirs*, *supra* note 4, at 223-26.

7. Writing in his eightieth year, Kent told a correspondent in 1842 that "I get hold of every law report in the U.S. that I can and read it and make notes to be used in the 5th edition of my Commentaries if ever I should issue one." (He did.) *Letter from James Kent to Ambrose Spencer*, New York City (Mar. 21, 1842), reprinted in Hampton L. Carson, *James Kent*, 7 *A.B.A. J.* 662, 668 (1921). Carson compiled a massive collection of legal literature, manuscripts, and illustrations, including various items of correspondence from Kent that are reproduced in the 1921 article. Carson's collection is now housed in the Free Library of Philadelphia. For the 1842 letter quoted above, see 2 *Catalog of the Hampton L. Carson Collection 1769* (1962). Kent weakened in the last months of his eighty-fifth year. See Horton, *supra* note 4, at 325-26. Kent kept diaries in the last years of his life, which survive in Columbia University, Butler Library, Rare Book and Manuscript Library. The deterioration of Kent's handwriting at the end of his life is apparent in the last volume.

dazzling array of legal careers—attorney, state legislator, trial and appellate judge, master in equity, chancellor in equity, statutory compiler, law professor, and juristic writer.

### A. *Family and Schooling*

Kent's grandfather, the Rev. Elisha Kent, was a Presbyterian clergyman who graduated Yale College in the Class of 1729.<sup>8</sup> Kent's father, Moss Kent, who graduated Yale College in the Class of 1752,<sup>9</sup> was a marginal lawyer<sup>10</sup> and farmer.<sup>11</sup> James Kent's mother died when he was seven years-old.<sup>12</sup> Kent had a younger brother, Moss Junior (1766–1838), to whom he remained devoted throughout his life. Moss Junior became an upstate New York lawyer and later a Congressman.<sup>13</sup> James and Moss Junior corresponded in candor for fifty years, and much of what we know about Kent's personal life comes from their letters, which survive in the Kent Papers in the Library of Congress.<sup>14</sup>

At age five, Kent was boarded with his maternal grandfather in

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8. See 1 Franklin B. Dexter, *Biographical Sketches of the Graduates of Yale College* 384–85 (New York, Henry Holt & Co. 1885–1912).

9. See 2 *id.* at 287–88.

10. See Horton, *supra* note 4, at 10 & n.29, 15. A volume of colonial New York legislation, 2 *Laws of New-York From the 11th Nov. 1752 to 22d May 1762* (W. Livingston & W. Smith, Jr., eds., New York, William Weyman 1762), inscribed "Moss Kent his book" at the flyleaf is shelved with the portion of James Kent's law library that came to rest in the New York State Library, Manuscripts and Special Collections, Albany. The work may have passed from father to son. The Albany holdings of James Kent's law books are described *infra* note 41.

11. Moss Kent's finances never recovered from the dislocations of the Revolutionary War. See Horton, *supra* note 4, at 15.

12. See 2 Dexter, *supra* note 8, at 288.

13. See *Biographical Dictionary of the United States Congress 1774–1989*, at 1303 (Bicentennial ed. 1989).

14. Kent's son, William (1802–1861), discussed *infra* note 38, assembled the collection, according to Kent's great-grandson, also William (1858–1910). See William Kent, *Memoirs*, *supra* note 4, at viii. The younger William and others deposited the collection in the Library of Congress during the years 1904–14. See *Typescript Guide*, in 1 *The Papers of James Kent* (Library of Congress, Manuscript Division) (1974). The Kent Papers have been microfilmed and copies are held at the Columbia and Yale law libraries. Yale also holds a multi-volume bound positive photocopy from the microfilm.

I continue in this Article certain conventions that I have established in prior work for adapting law review citation practices to the difficulties of antiquarian and manuscript sources. In quotations from manuscripts as well as from published antiquarian sources, I modernize and Americanize the spelling. Words that are abbreviated in the originals, or rendered in part in superscript, have been written out. Obvious misprints or misspellings in the originals are corrected without mention. When the original source uses a colon, semicolon, or dash to end a sentence, as was common in manuscript material of the time, I render the terminal punctuation as a period. In citing printed works I have left archaic orthography in the titles unaltered, which makes it easier for researchers to locate works cataloged under the original spellings. I have, however, applied modern conventions of initial capitalization to titles. When citing printed sources that may be exceptionally rare, I disclose the library and shelfmark of the exemplar that I consulted.

Norwalk, Connecticut, where he attended school for four years. Thereafter, he studied for several years at a Latin School in Danbury and privately with tutors.<sup>15</sup> Kent entered Yale College in September 1777 at the age of 14. There were 27 men in Kent's class of 1781, including Simeon Baldwin (1761–1851),<sup>16</sup> grandfather of the better known Simeon E. Baldwin (1840–1927).<sup>17</sup> Kent maintained a lifelong friendship with the elder Simeon Baldwin; the two corresponded for 65 years, and they were the last survivors of the Class of 1781.<sup>18</sup> When Kent looked back on his education at Yale from a distance of about 50 years, he remembered that he stood at the top of his class, but he deprecated that achievement on the ground that “the test of scholarship at that day was contemptible.”<sup>19</sup>

Long Island Sound was a major theater of military operations during the first years of the Revolutionary War, and the war repeatedly

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15. The school in Danbury was operated by the Rev. Ebenezer Baldwin (1745–76), a former tutor at Yale College. See 3 Dexter, *supra* note 8, at 4–8; Horton, *supra* note 4, at 12–13. Among Kent's fellow students at Baldwin's little academy was Ebenezer Baldwin's younger brother, Simeon, see *infra* text accompanying notes 16–18, who became Kent's college classmate and lifelong friend. See William Kent, *Memoirs*, *supra* note 4, at 9–10. Ebenezer Baldwin died of disease while serving as a chaplain in the revolutionary army in 1776. See James Kent, *An Address Delivered at New Haven Before the Phi Beta Kappa Society, September 13, 1831*, at 31–34 (New Haven, Hezekiah Howe 1831) [hereinafter Kent, *Phi Beta Kappa Address*]. Years later Kent recollected that Ebenezer Baldwin had buried Kent's mother. See Letter from James Kent to Ebenezer Baldwin, [son of Simeon Baldwin], New York City (Nov. 24, 1834) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series 1, Box 19, Folder 217). After Ebenezer Baldwin's death Kent studied for another year with other tutors in Danbury and Stratfield until he entered Yale.

16. See 4 Dexter, *supra* note 8, at 178–80.

17. Professor of Law at Yale, Governor of Connecticut, Justice of the Connecticut Supreme Court, a founder of the American Bar Association. See 1 *Dictionary of American Biography*, 544–47 (Allen Johnson ed., 1928).

18. Kent lamented “the Devastation that time has made in the wide circle of my collegiate Friends and acquaintances. You and I are the only spared monuments of God's Providence in our class . . . .” Letter from James Kent to Simeon Baldwin, New York City (Sept. 18, 1847) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series 1, Box 26, Folder 300).

19. Letter from James Kent to Thomas Washington, New York City (Oct. 6, 1828). Although this document has been reprinted in several places, I cite what I think is the most convenient version, published under the title, “An American Law Student of a Hundred Years Ago,” in 1 *Association of American Law Schools, Select Essays in Anglo-American Legal History* 837, 838 (Boston 1907) [hereinafter Kent, 1828 Letter].

In fairness to Yale, let it be said that Kent was a tough critic. Late in life, Kent recollected that United States Supreme Court Justice Smith Thompson, who had apprenticed under Kent in Poughkeepsie in the 1790s, had been “nominally educated” at Princeton. See Donald M. Roper, *Justice Smith Thompson: Politics and the New York Supreme Court in the Early Nineteenth Century*, 51 *N.Y. Hist. Soc'y Q.* 119 (1967). The passage from Kent regarding Thompson is extracted in William Kent, *Memoirs*, *supra* note 4, at 56.

interrupted Yale College during Kent's undergraduate career.<sup>20</sup> During Kent's freshman year, classes were relocated for safety to towns in the center of the state, away from the war zone along Long Island Sound.<sup>21</sup> Back at Yale for his junior year, Kent witnessed British troops land in West Haven and capture New Haven on July 5, 1779. During the same campaign, British forces burned the house of Kent's grandparents in Norwalk. Speaking at his fiftieth college reunion in 1831, Kent was still indignant about this torching of his childhood home.<sup>22</sup>

### B. *Legal Education*

In the eighteenth century, organized legal education for the common law scarcely existed, either in England<sup>23</sup> or in America.<sup>24</sup> The Regiuschairs at Oxford and Cambridge were dedicated to Roman law.<sup>25</sup> Blackstone devised his course of lectures on English law for Oxford undergraduates in the 1750s, but more with a view toward giving civics lessons than training legal professionals. American university law schools were, for all practical purposes, nineteenth century foundations.<sup>26</sup> Thus, on either side of the Atlantic in the eighteenth century, if you meant to become a lawyer, you did it by combining personal study with some form of apprenticeship.<sup>27</sup>

Kent entered upon the study of law the way most Americans of his time did, by reading Blackstone. He later recalled: "When the College was broken up and dispersed in July 1779 by the British, I retired to a country village, and finding Blackstone's *Commentaries*, I read the 4th volume. . . . [T]he work inspired me at the age of 16 with awe, and I fondly determined to be a lawyer."<sup>28</sup> In November of 1781, a few

20. "[T]he College was not open and in regular exercise more than half the usual time." Kent, Phi Beta Kappa Address, *supra* note 15, at 41.

21. See Letter from Simeon Baldwin to William Kent [Kent's Son] (Feb. 1848), reprinted in William Kent, *Memoirs*, *supra* note 4, at 10, 12 [hereinafter Baldwin Letter].

22. See Kent, Phi Beta Kappa Address, *supra* note 15, at 40-41 n.

23. See 12 William Holdsworth, *A History of English Law* 77-91 (1938) [hereinafter Holdsworth, H.E.L.].

24. Regarding late eighteenth-century stirrings toward legal education, notably under George Wythe at the College of William and Mary and James Wilson at the University of Pennsylvania, see Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 *Wm. & Mary L. Rev.* 527, 533-38, 546-50 (1990). Wilson's course of lectures, presented at the forerunner of the University of Pennsylvania in 1790-91, has been published in *The Works of James Wilson* (Robert Green McCloskey ed., 1967) (2 vols.).

25. See Harold G. Hanbury, *The Vinerian Chair and Legal Education* 5-6 (1950).

26. See Robert Stevens, *Two Cheers for 1870: The American Law School*, in *Law in American History* 405, 407-16 (Donald Fleming & Bernard Bailyn eds., 1971) [volume hereinafter Fleming & Bailyn].

27. See Paul M. Hamlin, *Legal Education in Colonial New York* 35-55 (1939) (apprenticeship); *id.* at 56-72 (recommended curricula).

28. Kent, 1828 Letter, *supra* note 19, at 838. Blackstone's Volume Four is devoted

months after leaving Yale, Kent commenced an apprenticeship in Poughkeepsie with Egbert Benson, a prominent lawyer who was then serving as the state attorney general.<sup>29</sup> Benson's next-door neighbor in Poughkeepsie was John Jay, the future Chief Justice of the United States and Governor of New York.<sup>30</sup> Jay would figure prominently in advancing Kent's career. Through his clerkship with Benson, Kent made his first acquaintance of the great figures of the day, including Jay, Alexander Hamilton, Aaron Burr, George Clinton, and even George Washington.<sup>31</sup>

Kent's clerkship with Benson lasted somewhat more than three years. During this time, Kent studied the standard English legal literature—Coke, Hale, and various "old books of practice"; he read parts of Blackstone "again and again."<sup>32</sup> Flailing around these raw materials without the guidance of organized legal education was a frustrating way to learn, even for somebody as clever and ambitious as Kent. A few months into his studies he complained to his friend Simeon Baldwin about having to sort through this "voluminous rubbish."<sup>33</sup>

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to criminal law and procedure. See 4 William Blackstone, *Commentaries on the Laws of England* (Oxford 1765–69) (4 vols.).

29. See Kent, 1828 Letter, *supra* note 19, at 838. Benson was then 35 years old. If we are curious about how a 35-year-old could have ascended to the attorney generalship of New York, part of the answer is that the Revolution just ending in 1781 had decimated the bar. Many members of New York's pre-Revolutionary bar had bet on the British to win the war and were in consequence unwelcome at the post-colonial bar. It is said that when Kent began his clerkship, there were ten lawyers still admitted in good standing before the New York Supreme Court; Benson was one. See Goldberg, *supra* note 4, at 161.

Benson and Kent remained life-long friends. See Donald Roper, *The Elite of the New York Bar as Seen from the Bench: James Kent's Necrologies*, 56 *N.Y. Hist. Soc'y Q.* 199, 218 (1972) [hereinafter Roper, *Necrologies*]. Kent owned a copy of Egbert Benson's *Memoir Read Before the Historical Society of the State of New York*. Kent recorded on the title page overleaf, "Judge Benson died at Jamaica on Long Island August 24, 1833, aged 87 . . . I attended his funeral." See Egbert Benson, *Memoir Read Before the Historical Society of the State of New-York* (New York, 1817) (Columbia Univ., Butler Library, Rare Book and Manuscript Collection).

30. See Goldberg, *supra* note 4, at 162.

31. See William Kent, *Memoirs*, *supra* note 4, at 20 (quoting a letter written by Kent in 1847).

32. Kent, 1828 Letter, *supra* note 19, at 838–39.

33. Letter from James Kent to Simeon Baldwin, Poughkeepsie (Oct. 10, 1782) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series I, Box 2, Folder 30); see Goldberg, *supra* note 4, at 161–62. "Law I must frankly confess is a field which is uninviting and boundless, notwithstanding it leads forward to the first stations in the state. The study is so encumbered with voluminous rubbish and the baggage of folios that it requires uncommon assiduity and patience . . ." *Id.* Expression of frustration with the apprenticeship made of legal education were commonly voiced in the eighteenth and nineteenth centuries. For comments by William Livingston, Josiah Quincy, and Daniel Webster, see 1 *The Papers of Daniel Webster: Legal Papers* 1, 3, 6–7 (Alfred S. Konefsky & Andrew J. King eds., 1982).

### C. *Early Career*

Kent was admitted to the bar in 1785 at the age of 21.<sup>34</sup> He promptly entered a partnership in Poughkeepsie with Gilbert Livingston, who was related to the great New York landowning family. The partners' law practice emphasized conveyancing and collecting debts, the staple work of country lawyers.<sup>35</sup> Kent also married in that year, to Elizabeth Bailey (1768–1851),<sup>36</sup> who was then 16. She was the daughter of the house in which he had lodged while clerking for Benson. Kent's papers are full of expressions of his devotion to her.<sup>37</sup> When Kent died in 1847, their marriage was in its sixty-third year. They had four children, of whom three survived to adulthood. Their son William (1802-61) became a New York lawyer and judge, and in 1846, the year before Kent died, William briefly succeeded Joseph Story as professor of law at Harvard.<sup>38</sup>

Kent had a life-long knack for turning disappointment to advantage. When the disruptions of the Revolutionary War shut down Yale College, Kent curled up with Blackstone and found himself a career. During his law partnership in Poughkeepsie, this pattern of profiting from adversity recurred. The partners' practice was only modestly successful, and Kent had time on his hands throughout the later 1780s and into the 1790s. Kent seized upon this underemployment to develop himself as a man of letters,<sup>39</sup> launching upon a prodigious and disciplined program of self-instruction that covered not only English and

34. See Kent, 1828 Letter, *supra* note 19, at 839.

35. See Goldberg, *supra* note 4, at 163. The Library of Congress is said to possess the partners' account book, "which is valuable as illustrating [Kent's] early professional practice." Horton, *supra* note 4, at 328.

36. See *id.* at 326.

37. See, e.g., William Kent, *Memoirs*, *supra* note 4, at 263; Kent, 1828 Letter, *supra* note 19, at 839.

38. In 1846 Kent wrote Simeon Baldwin that his son "has accepted the appointment of law professor at Cambridge, made vacant by the death of Judge Story." Letter from James Kent to Simeon Baldwin, Summit, New Jersey (Aug. 3, 1846) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series I, Box 25, Folder 291). Story had been the Dane professor at Harvard. On Story's death Greenleaf moved from the Royall chair to the Dane chair, and William Kent became the Royall Professor. See Arthur E. Sutherland, *The Law at Harvard* 149 (1967).

A year later, in James Kent's last letter to Baldwin, he reported: "My son has resigned his office of professor of law in Cambridge" and returned to New York to help the declining father. Letter from James Kent to Simeon Baldwin, New York City (Sept. 18, 1847) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series I, Box 26, Folder 300). After Kent's death in 1847, William took over the job of publishing updated editions of the *Commentaries*, publishing the 6th (1848), 7th (1851), 8th (1854), 9th (1858) and 10th (1860) editions. William died in 1861 at the age of 59.

39. For the story of how contact with Edward Livingston, later the Louisiana codifier, stimulated this course of study, see Kent, 1828 Letter, *supra* note 19, at 839–40. Kent corresponded with Livingston in later life, when Livingston was



Continental law, but also classical and modern literature. Kent divided his day into an early morning session for Greek and Latin, then he attended to "law and business," and he concluded the day by reading French and English literature.<sup>40</sup> Kent would in due course bring this immense learning to bear on his judicial work and in the writing of his *Commentaries*. He observed in 1828 as he was completing the *Commentaries* that his personal library had come to number above 3,000 volumes, and that almost every book cited in the *Commentaries* "has a place in my own library."<sup>41</sup>

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producing the Louisiana codes. Irritated by a section of Livingston's projected penal code, Kent wrote him:

I beg leave to question the necessity of laws making it penal to attack the liberty of the Press in any way not already provided by the comprehensive provisions of the common law. I have lived long enough to believe that the Press flourishes sufficiently in all the vigor of wantonness, without any new stimulus to its action.

Letter from James Kent to Edward Livingston, New York City (Feb. 17, 1826), at 2 (Princeton Univ. Library, Edward Livingston Papers).

40. See Kent, 1828 Letter, *supra* note 19, at 840. Kent recalled having "mastered the best of the Greek, Latin and French classics, as well as the best English and law books at hand." *Id.* On the tradition of high culture and literary accomplishment among the leaders of the bar in Kent's generation, see generally Robert A. Ferguson, *Law and Letters in American Culture* (1984). On Kent's place in this tradition, see *id.* at 27-28, 66-68.

41. Kent, 1828 Letter, *supra* note 19, at 840. Kent compiled a manuscript "Catalogue of my library made November 1842," which survives in Columbia Univ., Butler Library, Rare Book and Manuscript Collections [hereinafter Kent, 1842 Library Handlist]. Kent bequeathed his library to his son, William. See Will of James Kent, Aug. 22, 1846 (with Surrogate's office probate certificate dated Dec. 24, 1847 attached) (Columbia Univ., Butler Library, Rare Book and Manuscript Collections) [hereinafter Kent, Last Will].

Portions of Kent's library are divided between two Columbia libraries. The Columbia Law Library holds most of Kent's law books, about 750 volumes that "were donated to the Law Library by Edwin C. Kent, a great-grandson of James Kent," in 1911. Letter from Whitney S. Bagnall, Librarian for Special Collections in Law, Columbia Law School Library to John H. Langbein (Jan. 9, 1992) (on file with author).

The Butler Rare Book and Manuscript Collections hold several hundred volumes from Kent's library on topics of foreign and domestic travel, geography, antiquities, history, politics, theology, poetry, foreign affairs, Latin classics, and English literature. There are half a dozen law titles mixed in. These works also appear to have come to Columbia from Edwin C. Kent. See New York Historical Society Library, "Inventory of the Library of Chancellor James Kent, 1938" at 1 (n.d.) (typescript) (shelfmark Z997/.K37) (title page records: "This library was sold to Columbia University").

The University of Michigan's Clements Library holds a fuller copy of this typescript inventory. The Michigan version includes a section listing 2,051 political and other pamphlets from the 1780s through the 1840s. It appears from a note filed with the Michigan typescript that the collection of Kent's books and pamphlets passed through the hands of Edward Eberstadt, a New York bookseller, in 1940. A photocopy of the Clements Library typescript inventory is now on deposit in the Yale Law Library. (I wish to acknowledge the help of Margaret Leary, University of Michigan Law Librarian, in arranging for the deposit.)

The New York State Library in Albany holds a further 200 or so volumes from

#### D. *The Federalist Connection*

During the period that Kent was underemployed in his law practice in Poughkeepsie, he seized the opportunity to forge personal and political links to the great figures of the Federalist Party in New York, above all Jay and Hamilton. These relationships resulted in his rapid preferment to the New York bench a decade later. Kent recalled that he “commenced in 1786 to be a zealous Federalist and read everything on politics. I got the Federalist [Papers] almost by heart, and became intimate with Hamilton.”<sup>42</sup> Kent survived Hamilton by four decades and revered him all his life.<sup>43</sup>

In 1787 the Constitution makers in Philadelphia promulgated their wondrous text and sent it to the states for ratification. The New Yorkers met in convention at Poughkeepsie in June and July of 1788. Decades later Kent recalled the convention in a letter to Alexander Hamilton’s widow:

It formed the most splendid constellation of the sages and patriots of the Revolution which I had ever witnessed, and the intense interest with which the meeting of the Convention was anticipated and regarded can now scarcely be conceived and

Kent’s law library, including Kent’s copies of the New York law reports, especially Caines and Johnson, that are discussed in Part III of this article. The Albany holdings are described in John T. Fitzpatrick, *Chancellor Kent’s Law Library*, 21 L. Libr. J. 9, 9–11 (1928). The Kent collection in Albany includes another 100 or so volumes that were added by Kent’s son, William. See *id.*

The Harvard Law School Library owns five books from Kent’s library, acquired between 1889 and 1938. Letter from David Warrington, Librarian for Special Collections, Harvard Law School Library to John H. Langbein (Jan. 17, 1992) (on file with author).

I infer from this pattern of holdings that Kent’s library was dispersed piecemeal after the death of his son.

42. Kent, 1828 Letter, *supra* note 19, at 841. Elsewhere Kent wrote that he began to watch Hamilton in action in court while Kent was an apprentice and a young lawyer and that he was first introduced to Hamilton at a dinner at the home of Hamilton’s father-in-law, General Schuyler, in Albany, on the occasion of the October 1787 term of the Supreme Court. See William Kent, *Memoirs*, *supra* note 4, at 281, 301 (quoting Letter from James Kent to Elizabeth Hamilton (Dec. 10, 1832)). Hamilton was then writing the Federalist Papers. See *id.* at 301–02.

Kent wrote his friend Simeon Baldwin excitedly in September 1787 that “I am what we understand here to be a *federal man* and God grant that no demon may ever rescind the Union of these states, or prevent a *firm and equal compact* . . .” Letter from James Kent to Simeon Baldwin, Poughkeepsie (Sept. 7, 1787) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series I, Box 4, Folder 56).

43. A quarter-century later, writing the *Commentaries*, Kent digressed from his account of the progress of maritime law to reminisce about what a learned and effective commercial lawyer Hamilton had been. See 2 *Commentaries*, *supra* note 3, at 527–28. Kent figured personally in the slur that provoked the duel between Burr and Hamilton in 1804 that cost Hamilton his life. See Letter from Alexander Hamilton to Aaron Burr, New York (June 20, 1804), reprinted in 26 *The Papers of Alexander Hamilton* 247–48 (Harold C. Syrett ed., 1979); William Kent, *Memoirs*, *supra* note 4, at 33–36.

much less felt. As I then resided in that village, I laid aside all other business and avocations, and attended the Convention as a spectator, daily and steadily, during the whole six weeks of its sessions, and was an eye and an ear witness to everything of a public nature that was done or said.<sup>44</sup>

Soon Kent tried his hand at elective politics on behalf of the Federalists. In April 1790 and again in 1792, he won a seat in the New York State Assembly from Dutchess County.<sup>45</sup> Kent sided with the Federalists in the bitterly disputed gubernatorial election of 1792 between Clinton and Jay. The contest was thrown into the legislature and decided for Clinton on a shabby pretext that effectively reversed the electoral will,<sup>46</sup> but the future would be kinder to Jay, and Jay would repay Kent's support. The Federalists nominated Kent for a seat in Congress, but in January 1793 the anti-Federalist candidate, who was in fact Kent's wife's brother, defeated him at the polls.<sup>47</sup>

#### E. *The Columbia Professorship*

It was at this point that Kent made the riskiest decision of his life. He decided to throw over his life in Poughkeepsie and start again in New York City, dissolving his partnership with Livingston.<sup>48</sup> The move began disastrously. Kent did not attract law business,<sup>49</sup> and like many another newcomer to New York City he found the expenses of city life, even for staples, to be ruinous.<sup>50</sup> As he was struggling to establish his career, his firstborn child, a two-year-old daughter whom he adored, died of small pox. In a grieving letter, Kent told his brother: "I have been visited with a most dreadful calamity. My precious lovely daughter was buried yesterday. It has almost broke [her mother's] heart, and

44. William Kent, *Memoirs*, supra note 4, at 303.

45. See Coxe, *Chronology*, supra note 6, at 330-31 n.3.

46. See Goldberg, supra note 4, at 169-71.

47. See Coxe, *Chronology*, supra note 6, at 330-31, n.3; Goldberg, supra note 4, at 171.

48. Political and personal tensions had developed between the two men, and Kent later recalled: "The partnership with Mr. Livingston had by this time become a heavy and mortifying burden, and this was my principal inducement to quit Poughkeepsie and remove to New York, the last of April, 1793." William Kent, *Memoirs*, supra note 4, at 50-51 (quoting Kent).

49. "My first summer in New York was very gloomy. I was poor and had but little business and lived in a narrow, dirty street, and a thousand times recalled with eagerness the country beauties and domestic pleasures of the preceding year." *Id.* at 52 (quoting Kent). "I have as yet scarcely any business," he wrote to his brother in July 1793. Goldberg, supra note 4, at 173 (quoting Kent).

50. Later in that year Kent complained to his brother about the "great and uncommon expenses since I have been here, and the total stop to business which my removal occasioned . . ." William Kent, *Memoirs*, supra note 4, at 54 (quoting Kent). For Kent's alarm at the cost of staples, see *id.* at 54-55. "He managed to pay his first year's rent by accepting a clerk, whose father paid the £100 fee in advance." Julius Goebel, Jr., *A History of the School of Law Columbia University 12* (1955) [hereinafter cited as Goebel, *Columbia*].

mine also. I feel myself bereft of all human comfort. . . . I have lost all consolation."<sup>51</sup>

It was at this juncture, undoubtedly the ebb tide of his life, with his family devastated and his career in seeming tatters, that Kent's fortunes began to revive. In December 1793, the trustees of Columbia College, a strongly Federalist lot that included Alexander Hamilton and John Jay,<sup>52</sup> appointed Kent to be the first incumbent of a new professorship of law.<sup>53</sup> Kent later attributed the appointment to his Federalist connections.<sup>54</sup> The post brought with it a secure annual income of £200, which came as a financial godsend.<sup>55</sup>

Kent prepared a course of lectures for delivery in the 1794-95 academic year. He presented the lectures twice a week for 13 weeks. Since university law schools did not yet exist, the intended audience for Kent's lectures would have been the undergraduate youths of Columbia College, together with auditors from among the practicing bar and their apprentices.<sup>56</sup> Blackstone's course for the young gentlemen at Oxford was doubtless an important model. The full text of

51. Letter from James Kent to Moss Kent, New York City (May 29, 1793), in 1 *The Papers of James Kent* (Library of Congress, Manuscript Division).

52. See Goldberg, *supra* note 4, at 175; Goebel, *Columbia*, *supra* note 50, at 13-14.

53. For a succinct account of Kent's efforts at Columbia and of the refounding of the Columbia Law School under Theodore Dwight, see Goebel, *Columbia*, *supra* note 50, at 3-29. On the background to the creation of the professorship, which was funded with state money paid in partial reparation for war losses, see *id.* at 11. The trustees' certificate reciting Kent's nomination to the position is preserved in Meeting of the Trustees of Columbia College (Dec. 2, 1793), in 1 *The Papers of James Kent* (Library of Congress, Manuscript Division). Goebel reprints the certificate in Goebel, *Columbia*, *supra* note 50, at 13. Kent's actual appointment was effected on December 24, 1793. See *id.*

54. See William Kent, *Memoirs*, *supra* note 4, at 58.

55. Kent wrote his brother, exulting that the salary would commence at once, whereas his lectures would not be due until November 1794. Furthermore, Kent hoped that the professorship might brighten his prospects in the consulting markets. "[T]he appointment [is] not only honorable and profitable," he wrote his brother, "but will even aid my professional practice at the Bar." Letter from James Kent to Moss Kent, New York City (Jan. 7, 1794), in 1 *The Papers of James Kent* (Library of Congress, Manuscript Division). It is difficult to get a picture of the kind of law practice Kent had in New York in the 1790s. Isolated documents survive, for example, a letter from Kent to Charles E. Genet (1763-1834), on behalf of Kent's client, Cornelius Read, threatening suit for the loss of a vessel caused by the negligence of Genet's pilot, and offering to arbitrate. See Letter from James Kent to Citizen Genet, New York (July 7, 1795) (New York State Library, Albany, Manuscripts and Special Collections, James Kent Collection, single accession 20231, No. 1140); see also Goebel, *Columbia*, *supra* note 50, at 12-13 (Kent on retainer for a real estate speculator in the future Washington, D.C., in 1793-94).

56. When Kent's lectures proved unsuccessful, his friend of this period, Elihu Hubbard Smith, discussed *infra* text accompanying notes 161-164, complained of the failure of "the principal lawyers, in this city" to encourage their apprentices to attend Kent's course. Letter from Elihu Hubbard Smith to John Allen (Jan. 24, 1796), in *The Diary of Elihu Hubbard Smith (1771-1798)*, at 126, 127 (James E. Cronin, ed., American

Kent's lectures appears not to have survived,<sup>57</sup> but we do have the text of the first four lectures and a syllabus for the rest.<sup>58</sup> Kent's course commenced with some generalities of civics, including the law of nations, then advanced to the federal and state constitutions, and then took up property law.<sup>59</sup> Kent's initial lectures of the 1790s strike the modern reader as simplistic,<sup>60</sup> and that seems to have been the contemporary judgment as well. Kent initially thought that the lectures were a success,<sup>61</sup> but he soon learned that they were a flop. He later recounted the saga of this first teaching career:

I read that season twenty-six lectures (two a week) and was honored by the attendance throughout the [1794-95] course of seven students and thirty-six gentlemen, chiefly lawyers and law students who did not belong to the college.<sup>[62]</sup> During my second course, commencing November, 1795, I read thirty-

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Philosophical Society 1973) [hereinafter Smith Diary]. Smith may have been reflecting Kent's own disappointment at the low turnout of clerks.

57. Years later Kent deprecated the lectures as "slight and trashy productions," Kent, 1828 Letter, *supra* note 19, at 841, which invites the surmise that he destroyed them. By contrast, from Kent's second professorship at Columbia in the 1820s, we have both the *Commentaries* and some sets of student notes. See *infra* notes 89-90.

58. See James Kent, An Introductory Lecture to a Course of Law Lectures Delivered Nov. 17, 1794 (New York, Francis Childs 1794), reprinted in 3 Colum. L. Rev. 330 (1903) [hereinafter Kent, Introductory Lecture]; James Kent, Dissertations: Being the Preliminary Part of a Course of Law Lectures (New York, George Forman 1795) (next three lectures, outline of projected course). The pamphlets reprinting the lectures bombed on the marketplace as thoroughly as the original lectures. Regarding the difficulty that Kent's friend Elihu Hubbard Smith had in helping Kent sell the pamphlets, see Smith Diary, *supra* note 56, at 126-27; *id.* at 102.

59. These same subjects would hold the center stage three decades later in the new lectures that Kent would prepare for his *Commentaries*. Writing to his brother in March 1795, Kent explained that he had hoped to cover personal property but ran short of time; he hoped to add that subject for the next course in November. See Letter from James Kent to Moss Kent, New York City (Mar. 1, 1795), in 2 The Papers of James Kent (Library of Congress, Manuscript Division).

60. See Goldberg, *supra* note 4, at 176-80. "The second lecture dealt with elementary American history in a manner which might have been all right for young children or immigrants . . . [T]he third lecture, on international law, was even worse." *Id.* at 179-80. Julius Goebel was more forgiving about the lectures. "Probably the difficulty was that Kent's lectures were too professional in content for undergraduate students of the arts, while too academic to attract apprentices at law steeped in the tradition of office study." Goebel, Columbia, *supra* note 50, at 17. James Wilson's course of lectures, delivered a couple of years earlier in Philadelphia, exhibits a similar proclivity for generalities of civics, and Wilson also slights the detail of the legal doctrine and legal administration of his day. See 1 Wilson, *supra* note 24, at 42.

61. Kent wrote his brother that the lectures "meet with as much encouragement as I could have expected." Letter from James Kent to Moss Kent, New York City (Jan. 12, 1795), in 2 The Papers of James Kent (Library of Congress, Manuscript Division). Kent wrote his brother several weeks later that "I am satisfied that my Lectures have been well received . . ." Letter from James Kent to Moss Kent, New York City (Mar. 1, 1795), in 2 The Papers of James Kent (Library of Congress, Manuscript Division). This letter is substantially reprinted in William Kent, *Memoirs*, *supra* note 4, at 74.

62. Columbia was then located on lower Broadway, hence close to legal New York.

one lectures, in my office, and had only two students besides my clerks. The next season I attempted another course, but no students offering to attend, I dismissed the business, and in May, 1797, sent a letter of resignation to the trustees.<sup>63</sup>

In the light of hindsight, it seems that the failure of Kent's first undertaking in legal education was a failure in concept, perhaps in aspiration. University legal education was still a novelty in the Anglo-American world, and Kent had few models beyond Blackstone for what the enterprise might be about. Kent's instinct in 1794 was to simplify and popularize, but he aimed too low. Three decades later, when Kent next undertook a course of lectures, they were more substantial. The trustees of Columbia may have thought that the failure lay more with the idea of university legal education than with Kent's course, for when he resigned, Columbia let the professorship expire.

#### F. *Path to the Bench*

However badly Kent flopped in his maiden voyage as a law professor, the appointment to Columbia was the turning point in Kent's career. It bestowed legal-professional distinction upon him at a time when his law practice was not well-established. The stipend gave him financial security and freed up his other resources for real estate speculation, an endemic activity of the age.<sup>64</sup>

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Kent lectured "in the College Hall at the corner of Murray Street and West Broadway . . ." Goebel, *Columbia*, supra note 50, at 14.

63. William Kent, *Memoirs*, supra note 4, at 77 (reproducing the text of a note that Kent penned in the flyleaf of his copy of the pamphlet edition of his first lecture).

Kent was forthright with the trustees of Columbia about the failure of his course. When resigning the professorship, he told them how steeply the attendance had declined in his second year and that, for his third course, "no student appeared to countenance the attempt . . ." William Kent, *Memoirs*, supra note 4, at 77-78 (reprinting Kent's letter of May 2, 1797). Kent concluded with the hope that Columbia's experiment with legal education would be renewed "under abler professors . . ." *Id.* at 78. Kent's friend Elihu Hubbard Smith also spoke freely about the failure of Kent's lectures, blaming the bar for not encouraging young lawyers to attend. See Smith *Diary*, supra note 56, at 126-27.

The trustees waited a year to accept the resignation, and Kent did read the lectures in his office to a group of "six or eight" students in the winter of 1797-98. See William Kent, *Memoirs*, supra note 4, at 77 (quoting Kent); Goebel, *Columbia*, supra note 50, at 17.

64. Kent wrote his brother that:

I am very considerably engaged in new land speculations. This, however, is a circumstance to be kept private. You know of the success of my former ones . . . I expect great profit from what I am now concerned in. If I am lucky I shall be able in two or three years to retire into the country.

Letter from James Kent to Moss Kent, New York City (Mar. 1, 1795), in 2 *The Papers of James Kent* (Library of Congress, Manuscript Division). This letter is substantially reprinted in William Kent, *Memoirs*, supra note 4, at 74, 75; see also Goldberg, supra note 4, at 189 (Kent speculating on Dutchess County lands with income from his mastership in chancery). The mastership is discussed *infra* note 66 and accompanying text.

During the mid-1790s, events were occurring that propelled Kent to the New York bench. John Jay made a second, and this time successful, run for the Governorship of New York, and thereupon resigned the Chief Justiceship of the United States in 1796. As Jay was taking office in New York, there broke out the celebrated controversy over the unpopular "Jay Treaty" with Britain that Jay had negotiated on behalf of the United States. Kent actively defended Jay in the public prints.<sup>65</sup>

No sooner did Jay take office in New York than the spoils of gubernatorial favor descended upon Kent. In 1796 Jay appointed Kent to the office of master in chancery. This post was sufficiently remunerative to allow Kent to escape private law practice, which, he later confessed, "I always extremely hated."<sup>66</sup> The following year Jay appointed Kent to a part-time municipal court judgeship, as the Recorder of New York City. Jay intervened to see to it that Kent was able to keep both offices,<sup>67</sup> with the result that, as Kent happily wrote years later, "I made a great deal of money that year."<sup>68</sup>

A year later, in 1798, Jay appointed Kent, who was then 35 years old, to a vacancy on the New York Supreme Court. As Kent prepared to move back to Poughkeepsie and then to Albany to take up the judgeship, he reflected with evident satisfaction upon his five-year career in New York City, a career that had begun so disastrously:

[S]o rapid a change in so short a space of time few persons have met with. I went to New York poor, without patronage [sic; "patrimony"?] . . . . In five years I had run through several honorable offices and attained [in the Supreme Court judgeship an office] of the highest respect in the community. I had collected not only a large and valuable library, and a neat and valuable stock of furniture, but I returned say at least £1000 richer than when I went.<sup>69</sup>

The judgeship, he wrote, had been "the grand object of my ambition for several years past," and would allow him, he hoped, to "display . . . my knowledge, talents and virtue . . . ." <sup>70</sup> He could not have known

65. See *Vindication of the Treaty of Amity, Commerce and Navigation with Great Britain (New York 1795)* (authored by James Kent & Noah Webster); Goldberg, *supra* note 4, 182–83. On the politics of the treaty see Alfred F. Young, *The Democratic Republicans of New York: The Origins 1763–1797*, at 445–67 (1967). Kent was also carrying Federalist legislative baggage at this time. In 1796 the Federalists arranged to have Kent elected from New York City to a safe seat in the New York State Assembly, which he reluctantly accepted. See Roper, *Necrologies*, *supra* note 29, at 209. Kent sat in the legislature's winter 1797 session. See Goebel, *Columbia*, *supra* note 50, at 17.

66. Goldberg, *supra* note 4, at 187 (quoting Kent). "This office promised me a more steady supply of pecuniary aid (of which I stood in need), and it enabled me in a degree to relinquish the practice of an attorney which I always extremely hated." *Id.*

67. See William Kent, *Memoirs*, *supra* note 4, at 98–99.

68. Kent, 1828 Letter, *supra* note 19, at 842.

69. William Kent, *Memoirs*, *supra* note 4, at 109 (quoting Kent).

70. *Id.* at 108.

that he was embarking upon a 25-year judicial career that would change American law forever.

### G. *The New York Courts*

The New York Supreme Court that Kent joined closely resembled the English common law courts of the day.<sup>71</sup> The Supreme Court was a collegial court of five judges, that although based in Albany, also sat in full session twice each year in New York City.<sup>72</sup> The court discharged routine trial work outside those cities by having the individual judges of the court ride circuit around the vast extent of New York State. Statute required these circuit courts to be convened in each county at least once a year.<sup>73</sup> The Kent Papers contain letters from Kent to his family describing his travels by stage or on horseback as he rode circuit.<sup>74</sup> These circuit tours could endure for several months at a stretch.<sup>75</sup>

Unlike the New England states and Pennsylvania, New York emerged from the American Revolution with a separate court of equity.<sup>76</sup> In New York, as in England, Chancery was a one-judge court.

71.

The various powers exercised by the three great courts for the administration of justice in England, viz. the king's bench, the common pleas, and the plea side of the court of exchequer, are all, in this state, united together, and reposed in one tribunal, called from its extensive jurisdiction, the supreme court of judicature.

William Wyche, *A Treatise on the Practice of the Supreme Court of Judicature of the State of New-York in Civil Actions* 1 (New York, T. & J. Swords, 2d ed. 1794).

72. See *id.* at 2, 10.

73. See *id.* at 11.

74. See Horton, *supra* note 4, at 123–39. Kent reckoned that he rode circuit for 16 years and tried 1,755 cases, of which 8 were murders. See *id.* at 135 n.43 (citing William Kent, *Memoirs*, *supra* note 4, at 123). For a pamphlet account of one of the murders, see *The Trial of Stephen Arnold for the Murder of Betsy Van Amburgh, a Child of Six Years of Age; Before the Court of Oyer and Terminer and General Gaol Delivery, for the County of Otsego, at the Court-House in Cooperstown: June 4th, 1805* (Cooperstown, n.d. [1805]) (Yale Law Library shelfmark Closed S/Trials B/Ar 65).

75. See William Kent, *Memoirs*, *supra* note 4, at 128. “Appeals from the [circuit] courts were taken to the court *en banc*.” John H. Moore, *One Hundred Fifty Years of Official Law Reporting and the Courts in New York*, 6 *Syracuse L. Rev.* 273, 278 (1955). As with the English assize system on which it was patterned, New York’s circuit system facilitated local processing of fact disputes before local juries while reserving matters of legal consequence for the full Supreme Court. “The result . . . was to funnel any question of moment to the full court.” Donald Roper, *The New York Supreme Court and Economic Development: 1798–1823*, at 58, 61 (1979), in *Law and Economic Development: Papers from the Fall 1979 Regional Economic History Conference* (Eleutherian Mills-Hagley Foundation) [hereinafter Roper, *Courts*]. Roper’s study may also be found in 3 *Working Papers from the Regional Economic History Research Center No. 3* (1980).

76. See 1 *The Law Practice of Alexander Hamilton: Documents and Commentary* 167–83 (Julius Goebel, Jr. ed., 1964) [hereinafter Goebel, *Hamilton*]; Henry W. Scott, *The Courts of the State of New York: Their History, Development and Jurisdiction* 259–62 (1909); Stanley N. Katz, *The Politics of Law in Colonial America: Controversies*



The Chancellor had his permanent seat in Albany but convened the court twice a year in New York City.<sup>77</sup> Appeal lay from either the Supreme Court or the Chancery to the Court of Errors, which was composed of the New York Senate together with the judges of the Supreme Court and the Chancellor. Combining upper-house legislators and judges into an appellate court imitated the English system of appellate review to the House of Lords.<sup>78</sup>

The Supreme Court judges and the Chancellor sat with the Governor of New York on a remarkable body known as the Council of Revision. The Council was responsible for reviewing bills enacted by the state legislature and for rejecting not only those that were constitutionally deficient, but also those that were, in the words of the Constitution of 1777, "inconsistent with the public good."<sup>79</sup> The Council of Revision thus enmeshed the judiciary in state legislative politics. Appointive judges, holding office until the constitutional retirement age of 60, exercised veto-like powers.<sup>80</sup> This messy confusion of legislative and judicial functions endured almost to the end of Kent's judicial career. The New York Constitutional Convention of 1821 abolished the Council.<sup>81</sup>

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over Chancery Courts and Equity Law in the Eighteenth Century, in Fleming & Bailyn, *supra* note 26, at 257, 273–82.

77. To his copy of 1 Johnson's Chancery Reports (1816), Kent appended an undated manuscript "Memorandum of the length of my New York Terms," in which he recorded the dates of all his sittings in New York City from 1814 when he became Chancellor through 1823 when he left office. The pattern was two sessions of approximately three weeks each, the first held sometime between May and July, and the second occurring between October and December. See Kent, Manuscript entry at iii (n.d.), located in Kent's copy of 1 William Johnson, Reports of Cases Adjudged in the Court of Chancery of New-York (Albany, E.F. Backus 1816) (New York State Library, Albany, Manuscripts and Special Collections, James Kent Law Book Collection).

78. In an appeal against a judgment of the Supreme Court, its judges did not vote in the Court of Errors; likewise, the Chancellor did not vote when his decision was the subject of the appeal. See Roper, Courts, *supra* note 75, at 61, 80 n.20. The proper title of the court was Court for the Trial of Impeachments and the Correction of Errors of the State of New York.

79. Donald Roper, James Kent and the Emergence of New York's Libel Law, 17 *Am. J. Legal Hist.* 223, 224 (1973) (quoting Article II of the 1777 Constitution).

80. See Roper, Courts, *supra* note 75, at 59–60.

81. The verbatim transcript of the 1821 convention was published as Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New-York (Nathaniel H. Carter et al. eds., Albany, E. & E. Hosford 1821). The 1821 convention dealt with many other topics, including the extension of suffrage, which Kent opposed, see *id.* at 219–22. Kent's copy of this work survives in Columbia Univ., Butler Library, Rare Book and Manuscript Collections. Kent pasted in a newspaper clipping that reports the outcome of the 1832 federal presidential election in New York. The Jacksonian candidates for the electoral college defeated Kent and the other anti-Jacksonians by a margin of about two to one. Kent writes in ink, "This Election in 1832 is a Sample of what I anticipated in my Speech, *supra* page 221, under the operation of universal Suffrage in the City of New York."

### H. Judge and Jurist

Kent served on the New York Supreme Court for sixteen years, from 1798 to 1814. Six years into his term, in 1804, he became chief justice of the court. A decade later, in 1814, Kent left the Supreme Court to accept an appointment as Chancellor of New York.<sup>82</sup> Not much is known about why the appointment was offered or why Kent accepted it. Part of the attraction for Kent, who was then 50 years old, may have been the opportunity to escape the rigors of riding circuit in the wilderness. Kent served as Chancellor of New York for nine years. He left office against his wishes in July 1823 on his sixtieth birthday.<sup>83</sup> For reasons to be discussed, Kent's tenure in Chancery was particularly influential, and he continued to be known as Chancellor Kent throughout his life.

Like many other involuntary retirees, Kent resented being forced from office and fretted about what to do with himself. He toyed with the idea of setting up a proprietary law school in Albany modelled on Tapping Reeve's school in Litchfield.<sup>84</sup> Once again, Columbia intervened at a down moment in Kent's life, inviting him to be professor of law in Columbia College, a post that had not been filled since Kent resigned in 1797.<sup>85</sup> Kent leapt at the job.

Kent moved back to New York City and began lecturing in February 1824.<sup>86</sup> He also set up a consulting law practice that flourished.<sup>87</sup> Within a few months, Kent was mulling the idea of publishing his lectures in the work that became Kent's *Commentaries on American Law*.<sup>88</sup> He revised the lectures, presented them once more in the

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82. On Kent's dates of judicial service, see Kent, 1828 Letter, *supra* note 19, at 842-45.

83. See Horton, *supra* note 4, at 260-62.

84. See Letter from James Kent to William Johnson, Albany (Sept. 27, 1823), in 5 *The Papers of James Kent* (Library of Congress, Manuscript Division). On Reeve's remarkable proprietary law school, see generally Marian C. McKenna, *Tapping Reeve and the Litchfield Law School* (1986).

85. There survives in the Kent Papers a wonderful document, an extract from the minutes of the trustees of Columbia dated November 3, 1823. It recites not only Kent's election to the professorship, but also a particular inducement, for which I surmise Kent negotiated strenuously: "that the Professor be not obliged to attend the meetings of the [Columbia] Faculty . . ." Meeting of the Trustees of Columbia College (Nov. 3, 1823), in 5 *The Papers of James Kent* (Library of Congress, Manuscript Division) (filed immediately after the letter to William Johnson cited *supra* note 84).

86. See Goebel, *Columbia*, *supra* note 50, at 20.

87. See Kent, 1828 Letter, *supra* note 19, at 846, describing himself as "Chamber Counsellor." A number of his opinions to clients from the 1830s and 1840s survive in Columbia Univ., Butler Library, Rare Book and Manuscript Collections.

88. Kent wrote Joseph Story about the project in January 1825. He reckoned that the first 20 lectures treating "the law of nations and the constitutional jurisprudence of the United States . . . would fill a large volume of 700 pages." Letter from James Kent to Joseph Story (Jan. 17, 1825), in 14 *Proc. Mass. Hist. Soc'y* (2d ser.) 398, 415 (Charles C. Smith ed., 1901) (emphasis omitted) [hereinafter *Kent/Story Letters*]. These subjects

1825–1826 academic year,<sup>89</sup> and never again lectured at Columbia. In the published *Commentaries*, Kent emphasized in the preface that the work originated as lectures at Columbia, and he numbered his units in “lectures” rather than “chapters.”<sup>90</sup>

Volume One of the *Commentaries* appeared in 1826, Volumes Two, Three, and Four in 1827, 1828, and 1830.<sup>91</sup> The work was a huge commercial success. Kent took the book through five revisions in his own lifetime, and various editors updated it after his death.<sup>92</sup> Oliver Wendell Holmes prepared the twelfth edition in 1873.<sup>93</sup> The fourteenth and last edition appeared in 1896.<sup>94</sup> Kent had a variety of abridged editions produced for the student market.<sup>95</sup> In the 1840s,

did indeed comprise the first 21 chapters (called “lectures”) of Kent’s *Commentaries* and required just over 400 printed pages.

89. See Goebel, *Columbia*, supra note 50, at 20. Two sets of student notes survive from Kent’s lectures: Charles R. Alsop, *Preliminary Drafts of Notes of Lectures Delivered by Chancellor James Kent in Columbia College, 1824–25* (unpublished notes) (Yale Law Library, Mss B/C72/1824 and C72/1824a), and Charles McVean, *Notes of Lectures Delivered at the City of New York by James Kent Esquire Commencing Oct. 24th 1825* (New York State Historical Ass’n Library, Cooperstown) [hereinafter *McVean’s Notes*].

90. *McVean’s Notes*, supra note 89, allow one to reconstruct some of the stages through which the lectures became the *Commentaries*. The student notes and the *Commentaries* have mostly identical chapter (“Lecture”) headings, with the revisions resulting in a variation of one or two lecture numbers. Thus, Lecture 31 on corporations in the student notes becomes Lecture 33 in the *Commentaries*. See 2 *Commentaries*, supra note 3, at 215. The final lecture in *McVean’s notes*, Lecture 35, primarily on fisheries, becomes Lecture 51 in Volume Three of the *Commentaries*. See id. at 321. Thus, Kent’s course at Columbia appears to have lapsed with the material on persons (status) that extends into Volume Two of the *Commentaries*. The material on contract and maritime law (personal property) in Volumes Two and Three and on real property in Volumes Three and Four was written expressly for publication, and was not part of the Columbia lecture series, although Kent continued to call his chapter divisions “lectures.” The preface to the later volumes of the *Commentaries* corroborate that Kent was writing as he was publishing—he twice predicted wrongly that the next volume would be the last. See 2 id. at iii; 3 id. at iii.

Not only did the book grow beyond the lectures in the first edition, it grew in later editions. See, e.g., Alan Watson, *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws 27–37, 87–89* (1992) (discussing Kent’s increased coverage of conflicts in second edition).

91. See supra note 3.

92. For editions and abridgments see 293 *American Library Ass’n, National Union Catalogue: Pre-1956 Imprints*, at 475–78 (1973) [hereinafter *NUC*]. Kent’s son prepared the early posthumous editions. See supra note 38.

93. James Kent, *Commentaries on American Law* (Oliver W. Holmes, Jr. ed., Boston, Little, Brown & Co. 1873). For brief accounts of Holmes’ work on the twelfth edition, see Liva Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes 209–12* (1991); 2 Mark De Wolfe Howe, *Justice Oliver Wendell Holmes: The Proving Years 1870–1882*, at 10–23 (1963).

94. James Kent, *Commentaries on American Law* (John M. Gould ed., Boston, Little, Brown & Co. 1896).

95. Kent sought Story’s advice on whether to prepare “a cheap and abridged edition for our Western schools, academies, and colleges,” adding that he has been

Kent's *Commentaries* was generating royalties of \$5,000 per year, stupendous sums in those days. Contemporary opinion had it that no American book had ever earned so much money,<sup>96</sup> and Kent died rich enough to be included by the tax assessor on the list of New York's wealthiest persons.<sup>97</sup>

## II. THE STRUGGLE FOR LEARNED LAW

In the first decades of American independence there occurred a titanic struggle about the character of American law, especially at the state level. Arrayed on one side were people who were hostile to lawyers and legal doctrine. They viewed the legal system as serving an essentially arbitral function: Ordinary people, applying common sense notions of right and wrong, could resolve the disputes of life in localized and informal ways.<sup>98</sup> Opposing this vision of folk law were those who understood that the intrinsic complexity of human affairs begets unavoidable complexity in legal rules and procedures. With legal complexity comes legal professionalism. Specialists accumulate knowledge and skill in applying the law, and they assist clients both in the conduct of litigation and in the shaping of transactions to avoid litigation. The legal professionals insisted that law had to be, in this special sense, *learned*.

We know from the light of hindsight that the professionals won this contest between nostalgia and professionalism. The professionals had to make some concessions, such as popular election of judges and the entrenchment of civil juries.<sup>99</sup> In the end, however, American law

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warned that if he does not do it others might. Letter from James Kent to Joseph Story (May 29, 1839), in *Kent/Story Letters*, supra note 88, at 418. Story encouraged him. See Letter from Joseph Story to James Kent (June 1, 1839), in *id.* at 423. For examples of the genre, see J. Eastman Johnson, *An Analytical Abridgment of Kent's Commentaries on American Law: With a Full Series of Questions for Examination* (New York, Halsted & Voorhies 1839); Asa Kinne, *The Most Important Parts of Kent's Commentaries Reduced to Questions and Answers* (New York, W.E. Dean 2d ed., 1840).

96. See 2 *The Diary of Philip Hone 1828-1851*, at 645-46 (Allan Nevins ed., 1927); Horton, supra note 4, at 303-04 (citing Hone Diary). Kent's forerunner, Blackstone, had a somewhat comparable financial success in England. At Blackstone's death, it was reckoned that he had made £14,000 from his *Commentaries*. See Gareth H. Jones, Introduction, *The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England ix* (1973). Kent knew that his book was a gusher, and in his last will and testament, which was written the year before he died, he made careful provision for his son to manage the copyright and to divide the proceeds among Kent's three children. See Kent, *Last Will*, supra note 41, at 2-3.

97. "In 1845 Kent's taxable wealth in New York City was assessed at between \$45,000 and \$100,000." Donald M. Roper, *The Elite of the New York Bar as Seen from the Bench*, 56 N.Y. Hist. Soc'y Q. 199, 204 n.9 (1972) (citing Edward Pessen, *The Wealthiest New Yorkers of the Jacksonian Era: A New List*, 54 N.Y. Hist. Soc'y Q. 145, 168 (1970)).

98. This theme is richly developed in Perry Miller, *The Life of the Mind in America* 99-116 (1965).

99. Although the civil jury was preserved, the scope of its authority would be cut

came to be learned law, a body of law so strongly patterned on the learned English law that we still for many purposes think of the English and American legal systems as comprising an inseparable entity called Anglo-American law.

Chancellor Kent's reputation arises from this epoch in which legal professionals succeeded in defining the character of American legal institutions.<sup>100</sup> Kent and his contemporary and friend, Joseph Story, were the largest figures in this triumph of the learned law. Their triumph was all the more remarkable for having been achieved largely during the period—culminating in the Jacksonian age—in which the temper of American politics was hostile to their enterprise.

When Kent joined the New York Supreme Court in 1798, he found that the other judges were, in his view, "very illiterate as lawyers."<sup>101</sup> At least, however, the New York judges were lawyers, for not all American high court judges were.

Two of the three justices of the highest court of New Jersey during the Revolution were not lawyers. Of the three justices in New Hampshire after independence, one was a clergyman and another a physician. A blacksmith sat on the highest court of Rhode Island from 1814 to 1818, and a farmer was chief justice of that state from 1819 to 1826.<sup>102</sup>

There was an occasion in which one of the farmer justices of the New Hampshire Supreme Court, sitting as a trial judge, instructed a jury that whereas the lawyers in the pending case "want to govern us by the common law of England . . . , common sense is a much safer guide for us. . . . A clear head and an honest heart are worth more than all the law of the lawyers."<sup>103</sup>

Mixed in with this belief in the legal capabilities of the common citizen was a strong sentiment of hostility to things English. The

back during the nineteenth century, in the direction of the English fact/law distinction. For a discussion of the law-finding powers of eighteenth-century American civil juries, see William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 Mich. L. Rev. 893, 904-17 (1978). Regarding the later trend to remove the jury from law-finding, see Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 Yale L.J. 170, 173-85 (1964) (civil and criminal jury practice).

100. As early as 1785, when Kent was just arriving at the New York bar, we find him explaining in a letter to Simeon Baldwin that the affairs of free and commercial societies require numerous and subtle distinctions in the law, which is why the law "must become a *distinct Science* . . ." Letter from James Kent to Simeon Baldwin, Poughkeepsie (Feb. 1, 1785) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series I, Box 3, Folder 43). Kent speaks again of "the Science of American Jurisprudence" when writing to Baldwin in July, 1786. Letter from James Kent to Simeon Baldwin, Poughkeepsie (July 18, 1786) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, Group 55, Series I, Box 3, Folder 48).

101. William Kent, *Memoirs*, supra note 4, at 58 (quoting Kent).

102. Pound, *Formative Era*, supra note 2, at 92 (footnotes omitted).

103. Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* 115 (1971) (quoting John Dudley).

Americans had just fought the Revolutionary War to defeat English rule. Why, then, should Americans obey those pronouncements of English judges that were called the common law? The clearest expression of this sentiment came in various state statutes, such as a New Jersey act of 1799 that prohibited lawyers from citing in court any legal decision, opinion, commentary, digest, or lecture made or written in Great Britain since July 4, 1776.<sup>104</sup>

Kent devoted much of his career to overcoming populist impulses in legal administration<sup>105</sup> and to justifying the continued validity of the English common law in the new republic. Kent subscribed to the standard caveat that American courts should not apply English law in circumstances in which American conditions rendered it inappropriate. For Kent and persons of his persuasion, however, the presumption lay strongly with the inherited English law.<sup>106</sup> Writing to Simeon Baldwin

104. See Pound, *Formative Era*, supra note 2, at 32 n.5 (citing Act of June 13, 1799, § 5, Patterson's Laws of the State of New Jersey 436 (Newark, Matthias 1800)); see also David W. Raack, "To Preserve the Best Fruits": The Legal Thought of Chancellor James Kent, 33 Am. J. Leg. Hist. 320, 334 (1989) (noting a similar Kentucky statute); Ellis, supra note 103, at 115 (noting that "[o]ther states" had passed similar laws).

105. When publishing the *Commentaries*, Kent rebuked a proofreader for suggesting that ordinary readers would be helped if the Latin phrases were rendered in English. "[W]e don't want every man to be his own lawyer, and he could not be, even if all the Latin was in the plainest possible English. What kind of legal protection would you have if every man could be a lawyer?" William Kent, *Memoirs*, supra note 4, at 199-200 (quoting Kent).

Professional financial interests also motivated Kent's concern to restrict the practice of law to the elite. Writing Simeon Baldwin from Poughkeepsie on February 1, 1785, the youthful Kent broods lest

popular prejudice . . . penetrate into the legislature and control them. I mean the notion of either so far restricting the profits of the practice or of rendering the admittance to the bar so easy that the pursuit will not be alluring to men of genius and education, it will then fall into the hands of needy and ignorant persons and become a *contemptible profession*.

Letter from James Kent to Simeon Baldwin, Poughkeepsie (Feb. 1, 1785) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series I, Box 3, Folder 43).

106. In *Goix v. Low*, 1 Johns. Cas. 341 (N.Y. Sup. Ct. 1800), Kent bristled at counsel's argument that the principle expressed in a certain line of English case law should be disregarded as the manifestation of mere British state interests: "The dignified character of their courts of justice, (I speak of their higher courts of law and equity) which have maintained their integrity, and protected right to a degree never before witnessed in the history of civil society, is sufficient to repel the force of such an unfounded insinuation." *Id.* at 345.

Kent undertook to instruct his friend Simeon Baldwin, an intending law student, about the force of English law in immediate post-colonial New York:

[T]he English common law is part of the law of this State and can only be discovered and known by searching into the decisions of the English courts, which are the only evidence of the common law, and these decisions are regarded with us as *authentic evidence* of the common law and therefore are cited as *precedents binding* with us even down to the year 1776.

Letter from James Kent to Simeon Baldwin (n.p.) [Poughkeepsie] (July 18, 1786) (Yale

in 1786, the youthful Kent disclosed that he had "a much higher veneration for [the English common law] than for our own decisions because . . . [the English decisions] were pronounced by Judges of vastly higher erudition and skill in the knowledge of the common law."<sup>107</sup>

Nearly thirty years later, sitting in the New York Court of Chancery, Kent took the same tack: "[T]he dignity or independence of our Courts is no more affected by adopting [English judicial precedents], than in adopting the English language . . . ."<sup>108</sup> For Kent, therefore, English law was as free of imperial taint as English grammar. Kent maintained that the common law of England should apply in America because the principles it embodied were universal. Kent's universalism was, of course, a natural-law theory,<sup>109</sup> and in the *Commentaries* he said as much, characterizing judicial decisions as "the application of the dictates of natural justice, and of cultivated reason, to particular cases."<sup>110</sup>

Both in his judicial opinions and in the *Commentaries*, Kent resorted incessantly to foreign law, especially to the French and Dutch juristic writers, and to the Code Napoleon.<sup>111</sup> Kent's impulse to consult foreign law is commonly mentioned as evidence of his great learning,<sup>112</sup> but the use of Continental legal materials served a strategic role in Kent's campaign to legitimate the English common law. Kent invoked

Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series I, Box 3, Folder 48). Portions of this document are reproduced in Goebel, Hamilton, *supra* note 76, at 50 n.50.

107. Letter from James Kent to Simeon Baldwin (n.p.) [Poughkeepsie] (July 18, 1786) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series I, Box 3, Folder 48).

108. *Manning v. Manning*, 1 Johns. Ch. 527, 531 (N.Y. Ch. 1815) (emphasis omitted). For further discussion of this well-known passage, see James Brown Scott, *James Kent: 1763-1847*, in 2 *Great American Lawyers* 491, 511-14 (William Draper Lewis ed., 1907); see also Raack, *supra* note 104, at 344 (citing passages from *Manning* tending to indicate that Kent felt bound by English common law).

109. On the natural-law propensities of the nineteenth century American treatise tradition see A.W.B. Simpson, *supra* note 1, at 671-74.

110. 1 *Commentaries*, *supra* note 3, at 439.

111. See, e.g., *Gardner v. Trustees of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816). Kent read French but neither Dutch nor German; he knew the Dutch and German authors from Latin originals, or in a couple of instances, from English or French translations. As of 1842, Kent owned works by Argou, Domat, Grotius, Heineccius, Hubner, Kames, Montesquieu, Pothier, Puffendorf, Vattel, and Vinnius, as well as the modern French codes. See Kent, 1842 Library Handlist, *supra* note 41.

112. See, e.g., Scott, *supra* note 108, at 516.

"The most casual reader of Johnson's Chancery Reports has doubtless observed that Chancellor Kent received his inspiration from the juridical writings of almost every nation in Europe, ancient and modern; the compilations of the Justinian era, the French jurists, Domat, D'Aguesseau, Fournel, Emerigon, Pothier, and Valin; the Swiss publicists, Burlamaqui and Vattel; the Dutch juridical writers, Grotius, Vinnius, Voet, and Bynkershoek; the German writers, Puffendorf, Heineccius, and Strykius. From these, and many like sources in addition to the English jurists, Chancellor Kent illustrated the true scope and province of equity tribunals."

foreign examples primarily to show that the foreign source was congruent with the result that the English common law reached.<sup>113</sup> This argument was another way of justifying the use of English judicial precedents. If the French and the Dutch and the Germans reached the same result, the result must flow from natural justice rather than from any peculiarly English circumstances or from English political authority.<sup>114</sup> Indeed, Kent was so enamored of this idea that it led him to assert a serious historical error: He repeatedly contended that English law was derived from Roman law.<sup>115</sup>

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Id. (extracting Fowler, *Observations on the Particular Jurisprudence of New York*, 23 Alb. L.J. 285, 288 (1881)).

In a recent paper, however, Alan Watson has shown that Kent's references to foreign law are frequently "inaccurate, and one is forced to wonder whether he has always consulted the sources he cites." Alan Watson, *Chancellor Kent's Use of Foreign Law*, in *Studies in Continental Influence on American Law* (Mathias Reimann ed., forthcoming 1993). Watson tracks some of Kent's citations. He shows in one instance, in which Kent cites the Justinianian Digest, that Kent "took his references at second hand from the articles he cites from Pothier." See *id.* Watson shows in another instance that Kent took his Roman law from Blackstone rather than from the cited Roman-law texts. *Id.* Watson concludes that while Kent "usually shows a firm knowledge of the foreign law he uses, . . . he sometimes cites works that he has either not consulted or, at least, not on that occasion. And it is possible for him at times to make almost unbelievably egregious mistakes." *Id.* Some years ago Peter Stein reprinted a letter that Kent wrote late in life, in which Kent deprecated research into the "logical *minutiae* of the German Philosophers and Jurists. . . . I find sufficient in the texts of the Institutes and the Pandects for all the illustrations of the principles of the Roman jurisprudence that I care for . . ." Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 Va. L. Rev. 403, 433-34 (1966) (quoting Kent in 1841).

113. See Watson, *supra* note 112 ("Many of [Kent's] citations are mere window dressing when there was already sufficient English or American authority.").

114. Kent may have been the most prominent figure pushing this idea, but he was hardly alone. Professor Richard Helmholz recently read virtually the entirety of American reported decisions from the period 1790-1825, with a view to detecting the influence of Roman and European law. See Richard Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 Tul. L. Rev. 1649, 1651-52 (1992). He found that civilian sources were most often cited in areas in which the English common law was relatively primitive, especially maritime law, marine insurance, and other topics of commercial law. See *id.* at 1657-58. Occasionally, the civilian sources filled outright gaps in the common law, but "[n]umerically at least, such cases were dwarfed by those in which common law and civil law were basically the same, but in which authorities from both were adduced to support a rule or a decision." *Id.* at 1677.

115. Kent told the Law Association of the City of New York in 1836:

The writings of Bracton afford decisive proof that [the English common law] had also been nurtured and strengthened by touching the living fountains of the Roman law. We are then at liberty fondly to trace its descent in the collateral line, from the great civilians of the Roman forum, whose writings compose the immortal *Pandects*, the grandest monument extant of ancient wisdom, applied to the business of civil life.

James Kent, *An Address Delivered Before the Law Association of the City of New York* (New York, G. & C. Carvill & Co. 1836), extracted in 16 Am. Jurist 471, 474 (1837).

We can trace the wishful idea that common law was Roman law back into Kent's



## III. KENT AND THE LAW REPORTS

In the campaign to make American law a “learned law” rooted in the English common law, Kent and his friend Story were artists who worked in three media—the published judicial opinion, juristic writing, and legal education.<sup>116</sup> Whereas legal education was a weak suit for Kent, he was hugely influential with his opinions and his *Commentaries*.

Kent left a memoir of sorts, written in 1828, in which he described the conditions that prevailed on the New York Supreme Court at the time of his appointment in 1798. “When I came to the bench there [were] no reports or State precedents. The opinions from the bench were delivered [orally],”<sup>117</sup> and thus largely lost to recollection, although in some states opinions were recorded in manuscript reports that were copied and circulated at the bar.<sup>118</sup> Early in his judicial career, Kent set out to overcome these features of New York law. He wanted to produce written opinions and get them reported.

A. *Written Opinions and Law Reports*

Because we are today so accustomed to the written opinion as the authoritative version of a judicial decision, we need to remind ourselves

youth. Writing to Simeon Baldwin in 1786, as a 25-year-old starting lawyer, Kent links the scientific quality of English law to Roman law.

[T]he Science of the Law is a Study of prodigious extent & requires proportionable talents & application as well as the most — [illegible] Perseverance. The English Lawyers I find too were equally masters of the Civil Law and the Law of Nations. They [that is, the civil law and the law of nations] are interwoven in fact with the Body of the English Law.

Letter from James Kent to Simeon Baldwin, Poughkeepsie (July 18, 1786) (Yale Univ. Manuscripts and Archives, Baldwin Family Papers, General Correspondence, Group 55, Series I, Box 3, Folder 48). Kent does, however, admit that Roman law had less influence in England than in the Continental systems. See *id.*

116. Kent and Story were primarily judges and writers, but their connection to legal education is far from incidental. A main reason that Kent at Columbia and Story at Harvard (as well as James Wilson at the University of Pennsylvania, George Wythe at William and Mary and David Hoffman at the University of Maryland) wanted to place legal education in the universities was for the purpose of associating the law with other recognized bodies of learning. That is also one reason why Kent, Story, and the others speak incessantly about law as a science.

117. Kent, 1828 Letter, *supra* note 19, at 842–43. Kent further claimed that “We had no law of our own, and nobody knew what it was.” *Id.* at 843. Donald Roper quite correctly calls that a “distortion,” pointing to the works of Julius Goebel and others, which depict the sophistication of colonial New York law and the substantial continuity of colonial law into the early national period. See Roper, *Necrology*, *supra* note 29, at 209–10 & n.18 (1972). Goebel was also unamused at this line of Kent’s. See 1 Goebel, *Hamilton*, *supra* note 76, at 7–8.

118. See, e.g., *Miscellaneous Virginia Law Reports 1784–1809* (W. Hamilton Bryson ed., 1992) (recently published collection of manuscript reports of Virginia cases); William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830*, at 180–81 (1975) (citing Massachusetts sources).

that the written opinion was a novelty in the later eighteenth century. In the English courts of that day, judicial decisions were rendered extemporaneously—indeed, modern English courts continue to render oral opinions at the close of the evidence. The great difference between the English and the American courts of 1798 was that in England there were systematic arrangements for law reporters to be present to record what the judges were saying.<sup>119</sup> The English reports were published under the names of the reporters,<sup>120</sup> hence the term “nominate reports,” and were available as precedents in later cases. The nominate reports circulated in America as well as in England.<sup>121</sup>

Kent insisted upon preparing written opinions in every case that came before the full Supreme Court of New York.<sup>122</sup> His opinions were emphatically “learned,” in the special sense that I have been using that word. When New York and American authorities were unavailable, as was frequently the case, Kent drew mainly upon English law reports and juristic literature, but also, as I have explained, on Continental sources. Kent recollected in a memoir that one of the reasons that he undertook to produce written opinions was to intimidate the other judges into acquiescing in his views.<sup>123</sup> Obviously, Kent had only one vote out of five, and it was easy enough for him to be outvoted in circumstances in which other members of the court genuinely differed with him. What Kent wanted most was to get control of the business of stating New York law on issues that were not particularly divisive. New York was the premiere American commercial jurisdiction, yet it had almost no reported case law of its own. Kent saw a golden opportunity to formulate a body of learned precedent.

Kent needed to do more than merely produce written opinions. He had to arrange for his opinions to be preserved and circulated. In short, he needed a series of law reports. In colonial America “the reporting of any decision was unusual,”<sup>124</sup> and this state of affairs lasted

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119. On the history of law reporting in England in the eighteenth century see 12 Holdsworth, H.E.L., *supra* note 23, at 116–17. See generally, John W. Wallace, *The Reporters* (Boston, Soule & Bugbee, 4th ed. 1882) (surveying English law reports up until the late nineteenth century).

120. For a convenient listing of the nominate reports, see Sweet & Maxwell’s *Guide to the Law Reports* 39–66 (4th ed., 1962).

121. See generally Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries 1700–1799* (1978) (cataloguing law reports and treatises).

122. The idea that American judges ought to produce written opinions was current at the time. In 1785, Connecticut enacted legislation that required the judges to write and retain their opinions on law matters. See Erwin C. Surrency, *A History of American Law Publishing* 42 (1990).

123. See Kent, 1828 Letter, *supra* note 19, at 843.

124. 1 Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 6 (Oliver Wendell Holmes Devise History of the Supreme Court of the United States 1971) [hereinafter Goebel, *Antecedents*]; Raack, *supra* note 104, at 346 n.131.

well into the early national period. When Kent ascended the bench in 1798, there existed only a few volumes of American law reports.<sup>125</sup> Ephraim Kirby published a volume of Connecticut reports in 1789<sup>126</sup>—the first American reports—and a trickle of further Connecticut reports appeared in the 1790s.<sup>127</sup> Alexander Dallas put out a volume of Pennsylvania reports in 1790,<sup>128</sup> and another in 1799.<sup>129</sup> When the United States Supreme Court commenced operations in Philadelphia, Dallas included some of its decisions in his Pennsylvania series—and by this happenstance became the first Supreme Court reporter.<sup>130</sup> George Wythe published a volume of Virginia chancery reports in 1795,<sup>131</sup> and Bushrod Washington produced two further volumes of Virginia civil cases in 1798.<sup>132</sup> William Coleman published a volume of New York cases from the 1790s in the year 1801;<sup>133</sup> the work is rare and it may not have been well-marketed or well-received.

Thus, at the time Kent joined the New York bench, the impulse toward law reporting was traceable in several of the American states, but the individual state legal professions were small and the market for reports was relatively uninviting. A quarter-century after the outbreak

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125. See Wallace, *supra* note 119, at 561–91; see also Note, American Reports and Reporters, 22 *Am. Jurist* 108, 110 (1839) [hereinafter American Reports] (providing bibliographical accounts of American reports, beginning with United States Supreme Court's February 1790 term reported by James Dallas).

126. See Wallace, *supra* note 119, at 571 n.2 (discussing Reports of Cases Adjudged in the Superior Court of the State of Connecticut (Litchfield, Collier & Adam 1789) and noting that another reporter may have predated Kirby by a few months). See generally Alan V. Briceland, Ephraim Kirby: Pioneer of American Law Reporting, 1789, 16 *Am. J. Legal Hist.* 297 (1972) (discussing life of Ephraim Kirby and his contribution to American law). In 1784 Connecticut enacted legislation requiring judges to supply written reasons for their decisions. See Craig Joyce, The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy, 83 *Mich. L. Rev.* 1291, 1297–98 (1985); American Reports, *supra* note 125, at 118.

127. See Wallace, *supra* note 119, at 571.

128. See Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania Before and Since the Revolution (Philadelphia, T. Bradford 1790).

129. Kent recorded that he read Dallas' volume two immediately in 1799. See Horton, *supra* note 4, at 147 n.73 (reproducing Kent's legal reading list for the years 1799–1805).

130. On Dallas, see Joyce, *supra* note 126, at 1294–1306. The story of the Supreme Court reportership continues in G. Edward White, The Marshall Court and Cultural Change, 1815–35, at 384–426 (3–4 Oliver Wendell Holmes Devise History of the Supreme Court of the United States 1988).

131. See Decisions of Cases in Virginia, by the High Court of Chancery (Richmond, Thomas Nicolson 1795).

132. See Reports of Cases Argued and Determined in the Court of Appeals of Virginia (Richmond, Thomas Nicolson 1798–99) (2 vols.). See generally W.H. Bryson, Law Reporting and Legal Records in Virginia, 1607–1800, in *Judicial Records, Law Reports, and the Growth of Case Law* 319–29 (John H. Baker ed., 1989) (5 Comparative Studies in Continental and Anglo-American Legal History) (describing early legal recordkeeping in Virginia).

133. See Cases of Practice Adjudged in the Supreme Court of the State of New York (New York, I. Collins 1801).

of the American revolution, most American jurisdictions still depended almost exclusively on English law reports.<sup>134</sup> The Americans had not been able to organize an indigenous system of law reporting.

In 1804 New York and Massachusetts hit upon what was to become the American solution. The state legislatures provided for the designation of official reporters, who were paid stipends that effectively subsidized the reports.<sup>135</sup> Although this was a period in which Kent had close relations with the New York legislature, we are unable to say whether Kent had a hand in provoking the New York legislation. He had held a Federalist seat in the Assembly as late as 1797, on the eve of his judgeship. In 1800–1801 the legislature commissioned Kent and his fellow Supreme Court judge, Jacob Radcliff, to undertake a recompilation of all the New York State statutes, which the legislature enacted in 1801.<sup>136</sup> Moreover, the judges of the Supreme Court sat with the

134. Goebel remarks upon the Americans' "utter dependence upon English case law. The reason for this dependence was not alone the availability of published abridgments and reports, but also the deference colonial lawyers were ready to pay to the opinions of courts regarded as peerless." Goebel, *Antecedents*, supra note 124, at 6. Kent's letter to Baldwin in 1786, extracted supra note 106, exemplifies this attitude.

135. See Moore, supra note 75, at 273–74 & n.1. William Johnson, discussed infra text accompanying notes 145–169, acknowledges the importance of the subsidy in the preface to *1 Johns. v* (1807). Other states came to emulate this practice; the unsigned note on American law reporting in the *American Jurist* for 1839 identifies on a state-by-state basis the date when subsidies were instituted. See *American Reports*, supra note 125, passim.

136. Kent describes this event in a manuscript note to his copy of the edition of New York statute law that his work rendered obsolete. Kent recalls that by an act of March 28, 1800, the legislature empowered Kent and Radcliff to revise the statutes. The two judges

were allowed two years and their compensation was to each \$1,000. They commenced the work in August 1800, and transmitted to the legislature the completion of their revision on the 12th March 1801. They drew but 115 revised acts, and which were taken from and comprise the substance of about 400 statutes. They left 76 public acts unrevised, as they had never been altered or amended by any subsequent law, and made a list of a great number of acts relating to particular subjects and to corporate rights, and which being partly executed could not be properly reenacted. A long list of acts deemed obsolete or private was also made. The most laborious and difficult part of their task was to abridge and improve the style, and to note imperfections on the former acts, and especially in those, which in the preceding revision, had been taken from the old English Statutes. The laws thus revised they were directed by another act of 8th April 1801 to publish, and were allowed each \$850 for superintending the press, making index, etc. They were published in 2 volumes octavo and the first volume appeared in January 1802 and the second volume in April following.

Kent, Manuscript entry at flyleaf (n.d.), located in Kent's copy of *1 Laws of the State of New-York* (Samuel Jones & Richard Varick eds., New York, Hugh Gaine 1789) (New York State Library, Albany, Manuscripts and Special Collections, James Kent Law Book Collection). The Kent/Radcliff recompilation of New York statute law was published as

members of the New York Senate in the Council of Revision.<sup>137</sup> Hence, it is a good surmise, but only a surmise, that Kent used his legislative connections to arrange for the creation of the reportership he desperately wanted.

In 1804 a lawyer named George Caines won the new post of official law reporter for the New York Supreme Court. He published a three-volume set entitled *Caines' Reports*.<sup>138</sup> Kent's copies of *Caines' Reports* survive in the New York State Library in Albany. By the time Caines' first installment of 107 pages appeared, Kent had concluded that Caines was incompetent. Kent wrote on his copy of the advance sheets that "the work is too full of mistakes."<sup>139</sup>

Laws of the State of New-York (Albany, Charles R. & George Webster 1802-1812) (2 vols.).

Kent soured on Radcliff. Political differences at the 1821 Constitutional Convention put them at cross purposes, and Kent came to view Radcliff as "a sad example of bad temper and perverted ambition . . ." Roper, *Necrologies*, supra note 29, at 236-37 (quoting Kent).

137. See supra text accompanying note 78.

138. See George Caines, *New-York Term Reports of Cases Argued and Determined in the Supreme Court of That State* (New York, Isaac Riley & Co. 1804-06) (3 vols.) [hereinafter *Caines' Reports*].

139. *Caines' Reports* were probably issued in pamphlet installments, at least to the judges, and then bound up when all the installments of a volume had been published. Kent identifies the contents of the first installment as running "From May Term 1803 to February Term 1804, both inclusive." Kent, Manuscript entry at title page (n.d.), located in Kent's copy of 1 *Caines' Reports*, supra note 138 (1804) (New York State Library, Albany, Manuscripts and Special Collections, James Kent Law Book Collection). At the end of the installment, page 107 of the volume, Kent wrote:

I think the reporter does not take notes very correctly and that the work is too full of mistakes. The decisions of the Court when in writing, as most of them are, appear correct and this source of accuracy stamps the whole value on the book, for without that aid, I should have no reliance on the reporter. His own annotations in the margin might well be spared. However, as *the first essay*, the work deserves great indulgence.

Kent, Manuscript entry (n.d.), located in *id.* at 107.

Kent's annotations on his copies of *Caines' Reports* indicate that Caines managed to blunder in every aspect of the reporter's work. Kent wrote in his copy of the second volume of the second edition of *Caines' Reports* that Caines had botched the report of Alexander Hamilton's argument in the case of *Vandervoort v. Smith*, 2 Cai. R. 155 (N.Y. Sup. Ct. 1805): "General *Hamilton* spoke for 4 hours, and made a most forceful argument, and it is very imperfectly reported. It was the *last* argument he ever made at the Bar of the Supreme Court . . ." Kent, Manuscript entry at flyleaf (n.d.), located in Kent's copy of 2 *George Caines', New-York Term Reports* (New York, Isaac Riley & Co., 2d ed. 1814) (3 vols.) [hereinafter *Caines' Reports* 2d] (New York State Library, Albany, Manuscripts and Special Collections, James Kent Law Book Collection). In his copy of *Caines' Reports*, Kent writes in the margin alongside the report of *Spencer v. Webb*, 1 Cai. R. 118 (N.Y. Sup. Ct. 1803): "This case is very badly reported," and he explains why. Kent, Manuscript entry at flyleaf (n.d.), located in Kent's copy of 1 *Caines' Reports* 2d, supra (New York State Library, Albany, Manuscripts and Special Collections, James Kent Law Book Collection).

Kent was scathing about Caines even after Caines was in his grave. Kent wrote in his copy of *Caines' revised edition* that Caines died poor in 1825, "and since he ceased

## B. *The Role of the Law Reporter*

The idea that a law report can be full of errors may not strike the modern lawyer as particularly likely. Among the things lawyers worry about in the study and practice of the law, the fidelity of law reports is not included. It is hard to see how a law reporter can botch. Today's American reporter is a ministerial entity, an organization that scoops up whatever the judges drop in the reporter's in-basket. The reporter usually adds headnotes, such as those in the West Key Number system, but otherwise the reporter does little more than supervise publication of a product that has emerged in final form from the judge's chambers.

In the eighteenth century, however, the reporter had a much larger role than we now expect in the production of the reported opinion. Consider, for example, the most influential law reports of the years when Kent joined the New York bench, the King's Bench Reports of Charles Durnford and Edward Hyde East.<sup>140</sup> Durnford and East's so-called *Term Reports* display a number of striking differences from modern reports. The West Publishing Company exercises virtually no discretion in the selection of its cases. By contrast, in the age of the

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to be Reporter in 1805, he had never been prosperous nor greatly respected either for sound judgment or pure morals." Kent, Manuscript entry at flyleaf (n.d.), located in Kent's copy of 1 Caines' Reports 2d, supra (New York State Library, Albany, Manuscripts and Special Collections, James Kent Law Book Collection). This passage is reproduced in full in Roper, *Necrologies*, supra note 29, at 212-13. Roper observes that Caines may have raised Kent's ire by having attempted to regain the reportership in 1823, when Johnson left office along with Kent. See id. at 213 n.23. On Johnson's dismissal, see infra notes 168-169 and accompanying text.

140. See *Term Reports in the Court of King's Bench* (London, J. Butterworth 1794-1802) (8 vols.). There was a successor series by East alone, for the years 1801 to 1812, which numbered 16 volumes. See *Reports of Cases Argued and Determined in the Court of King's Bench* (London, J. Butterworth 1801-18) (16 vols.). Of Durnford & East, Wallace writes: "None of the modern Reports exceed these for the care and accuracy of finish, including great propriety of style, which they everywhere maintain." Wallace, supra note 119, at 529-30 n.2. Kent records having read "7th Durnford" in 1799 and "8th Durnford" in 1801, doubtless the last two volumes of Durnford & East. See Kent, "Books read in 1799," etc. (n.p.) (n.d.), in 3 *The Papers of James Kent* (Library of Congress, Manuscript Division) (filed after letter from Elizabeth Kent to James Kent, Albany, Nov. 16, 1806). In the same source Kent records reading the first seven volumes of East's Reports as they appeared, one or more a year, in the years 1802-06. See id. Horton purports to reproduce the legal entries from this document, but deletes without disclosure Kent's entries for "Durnford," that is, for Durnford & East's Reports. See Horton, supra note 4, at 147 n.73.

William Johnson commences the preface to 1 Johnson's Reports (1807) by locating his New York reports in what he reckons as the five-hundred-year tradition of law reporting in England. "If works of this nature have been found so indispensable in that country, they are far more necessary in our own, where new questions every day arise, in the decision of which English adjudications cannot always afford a certain guide." 1 Johns. iii. Johnson discloses that, "[w]ithout bestowing much thought on the best possible plan for a work of this kind, I have adopted the manner of the most approved English Reporters, because it was familiar to every lawyer, and possessed the authority of experience in its favour." Id. at vii.

nominate reporters like Durnford and East, it was the reporter and not the judges who had the final say about which cases would be reported.

A reported English case from the end of the eighteenth century has a format nearly as stylized as the movements of an eighteenth-century concerto: facts, argument, opinion. The report begins with a statement of the facts of the case. The reporter, not the judge, supplied this statement—based on what the reporter heard in court and what he read in the pleadings. Next comes the reporter's account of the arguments of counsel—something we have ceased to care about in our modern American reports. Part of the explanation for the interest in counsel's arguments is that, in a procedural system in which pleading could still be of decisive importance, the lawyers' courtroom moves were potentially more consequential than in modern litigation.

Finally, after the facts and the arguments comes the opinion. Because judges were still rendering their opinions orally, the reporter quite literally wrote the report. Accordingly, the reporter needed shorthand or other note-taking skills to capture accurately what the judges said, as well as considerable legal knowledge in order to decide which of the judges' observations to preserve. The nominate reporter supplied what today would be called headnotes, often printed in the margins, identifying the main questions being discussed in the case. The reporter also felt free to insert additional annotations in footnotes or in marginalia, supplying references or authorities beyond those mentioned by the court.

In a style of law reporting that remitted so much discretion to the reporter, it mattered desperately that the reporter be competent. The various English nominate reporters from the seventeenth and eighteenth centuries have reputations as distinctive as Bordeaux vintages, ranging from the widely admired to the greatly disparaged.<sup>141</sup>

Perhaps the attribute of the nominate law reports that the modern lawyer finds most striking is that, even after judges assumed responsibility for writing their own opinions, it was still the reporter rather than the judges who formulated the published statement of facts. By contrast, in modern practice we regard the statement of facts as a critical part of the judge's opinion. Edward Levi's famous account of the dynamic of the common law starts with the insight that our notion of precedent depends on the court's control of the fact statement.<sup>142</sup> A

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141. Wallace's dissection of the multi-volume, multi-reporter series entitled *Modern Reports* provides an example. See Wallace, *supra* note 119, at 347–90.

142. [T]he scope of a rule of law, and therefore its meaning, depend upon a determination of what facts will be considered similar to those present when the rule was first announced. The finding of similarity or difference is the key step in the legal process. . . . [T]he judge in the present case may find irrelevant the existence or absence of facts which prior judges thought important.

Edward H. Levi, *An Introduction to Legal Reasoning* 2 (1949).

modern court carefully matches its legal rationale to its version of the facts.<sup>143</sup> How, then, could our judicial ancestors have relegated this vital work to reporters?

The answer, I think, has to do with the origins of the reporting tradition at common law. Judicial opinions began as extemporaneous oral explanations rendered immediately at the close of proceedings. When the opinion was addressed to the parties and to the lawyers who had just presented the facts to the court, there was no point in the judges restating the facts to people who were already fully conversant with them. The reported statement of facts was originally produced for readers who came to know the case only as a result of the reporter's intervention; telling them what the case was about was the reporter's job.

It was well into the nineteenth century, as the quantity of law reports mushroomed and other attributes of the system of large-scale administration of justice fell into place, that the modern conception of the law report came to prevail. The function of the judicial opinion changed. The modern judge addresses an opinion only incidentally to the parties and to the lawyers who argued the case. Especially for appellate judges, the primary audience is the readership of the published report. The main job is not explaining the outcomes to the immediate participants, but rather, generating precedents to guide future conduct and adjudication. Across the nineteenth century, Anglo-American judges came to sense this change, and they reacted to it by taking over from reporters the job of stating the facts.<sup>144</sup> That stage of development had not been reached during Kent's quarter-century on the bench. In Kent's day, the reporter remained a figure of great consequence—the person who selected the cases, stated the facts, summarized the views of counsel, summarized the views of those judges who gave oral opinions, and supplied annotations of his own.

### C. *William Johnson*

Within about a year of his appointment as the first official law reporter for New York State, George Caines was out of the job. Just how Kent got rid of Caines we do not know, but it was Kent who arranged in

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143. Lord Halsbury's account in *Quinn v. Leathem*, 1901 App. Cas. 495, 506 (H.L.) (appeal taken from Ir.), is prominent:

[E]very judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

144. In the preface to the second edition of his Reports, George Caines discloses that it was his practice sometimes "to discard from the opinions of the judges the statements of facts, by which they were, when delivered, in general preceded." 1 Caines' Reports 2d, *supra* note 139, at v.



1805 for the appointment of Caines' successor, William Johnson.<sup>145</sup> Johnson held office throughout the remainder of Kent's judicial career, and the collaboration of Kent and Johnson had a deep influence on antebellum American law. As reporter for the New York Supreme Court, Johnson produced the 20 volumes of *Johnson's Reports* that cover the period from 1806 to 1823;<sup>146</sup> Kent ceased to appear in this series after Volume 11, when he left the Supreme Court to become Chancellor in 1814. In 1808 Johnson cobbled together a three-volume retrospective series of Supreme Court cases, known as *Johnson's Cases*,<sup>147</sup> which cover the years 1799 to 1803, roughly the period from Kent's accession to the bench until the start of *Caines' Reports*. Apparently as part of the deal by which Kent moved to Chancery in 1814, the legislature authorized the creation of an official Chancery reporter,<sup>148</sup> and Johnson assumed that position in addition to the Supreme Court reportership. He produced seven volumes of *Johnson's Chancery Reports* covering the years 1814–1823.<sup>149</sup> Kent was the only judge in Chancery in this period, and the Kent-Johnson collaboration reached its zenith in the Chancery Reports.

As Johnson's stream of New York reports grew, there arose a market for a reference work that would allow the legal researcher to locate relevant authority within the many volumes of reports. To meet this need, Johnson, in 1815, published a one-volume *Digest* of his and Caines' Supreme Court case reports;<sup>150</sup> in 1825 he produced a two-

145. In the preface to the final volume of Johnson's Chancery Reports, Johnson recalls that it was at Kent's "friendly solicitation [that Johnson] undertook to report the decisions of the Supreme Court, in which [Kent] then presided . . ." 7 William Johnson, Reports of Cases Adjudged in the Court of Chancery of New-York 3 (Philadelphia, E.F. Backus, 2d ed. 1816–1824) [hereinafter Johnson's Chancery Reports] (7 vols.). Correspondence survives in which Johnson thanks Kent for Kent's "attention to my pecuniary interest in this appointment." Letter from William Johnson to James Kent, New York City (Dec. 23, 1805), in 3 The Papers of James Kent (Library of Congress, Manuscript Division). This letter is partially reproduced in William Kent, *Memoirs*, supra note 4, at 125–26.

146. See William Johnson, Reports of Cases Argued and Decided in the Supreme Court of Judicature . . . in the State of New-York (New York, Isaac Riley & Co. 1807–24) (20 vols.) [hereinafter Johnson's Reports].

147. William Johnson, Reports of Cases Adjudged in the Supreme Court of Judicature of the State of New-York from January Term 1799 to January Term 1803 (New York, Isaac Riley & Co. 1808–12) (3 vols.). Johnson explains in the preface how he compiled these reports:

[T]he facts in each cause are stated from the *cases* and *paper-books* delivered to the judges on the argument, and from the affidavits and records filed with the clerks of the court. The opinions of the judges are taken from their own manuscripts, and, in almost every case, are given exactly as they were pronounced. . . . For obvious reasons, the arguments of counsel, except in a very few instances, are not inserted.

I *id.* at iv.

148. See Act of Apr. 15, 1814, ch. 193, 1814 N.Y. Laws 243.

149. See Johnson's Chancery Reports, supra note 145.

150. See William Johnson, *A Digest of the Cases Decided and Reported in the*

volume *Digest* that updated the work to 1823 and incorporated material from the *Chancery Reports* as well.<sup>151</sup> Johnson's *Digest* is in the abridgment tradition, those subject-indexed law finders that trace back to Statham's *Abridgment* in the 1480s and Fitzherbert's *Abridgment* in 1514.<sup>152</sup> The book served as a crude encyclopedia of New York decisional law, with titles in alphabetical order covering the major doctrinal and procedural topics, from "accords" to "writs."

Johnson's *Digest* was a tangible marker of how far Kent's campaign to create a state decisional law had progressed. Recall Kent's claim that when he went on the bench, "we had no law of our own, and nobody knew what it was."<sup>153</sup> Kent took immense pride in the accretion of precedents reflected in Johnson's *Digest*. He wrote in the flyleaf of his copy of the 1815 edition: "I was on the bench and took a part in every case and point decided in this volume . . ."<sup>154</sup> Contemporaries such as Joseph Story understood and remarked upon the importance of the Kent-Johnson collaboration.<sup>155</sup> Kent felt himself so deeply in

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Supreme Court of Judicature and the Court for the Correction of Errors, in the State of New-York, from January Term 1799 to October Term 1813, Inclusive (Albany, E.F. Backus 1815) [hereinafter Johnson, 1815 Digest].

151. See William Johnson, *A Digest of the Cases Decided and Reported in the Supreme Court of Judicature, the Court of Chancery, and the Court for the Correction of Errors, of the State of New-York from 1799 to 1823* (Albany, E.F. Backus 1825) (2 vols.).

152. See generally John D. Cowley, *A Bibliography of Abridgments, Digests Dictionaries and Indexes of English Law to the Year 1800* (Selden Society) (1923) (tracing history of case law abridgments from late 14th century to late 17th century). On the abridgment tradition in the eighteenth century, see 12 Holdsworth, H.E.L., *supra* note 23, at 162-75. The great American exemplar was published just before Johnson's second edition. See Nathan Dane, *A General Abridgment and Digest of American Law with Occasional Notes and Comments* (Boston, Cummings, Hilliard & Co. 1823) (8 vols.).

153. Kent, 1828 Letter, *supra* note 19, at 843. This portion of the letter is also quoted *supra* note 117.

154. Kent, Manuscript entry at flyleaf (n.d.), located in Kent's copy of Johnson, 1815 Digest, *supra* note 150 (emphasis omitted) (New York State Library, Albany, Manuscripts and Special Collections, James Kent Law Book Collection).

155. Joseph Story wrote to Johnson in 1821 that "you have conferred the highest honor on [New York] State; and [] its judicial character abroad has been greatly elevated by your excellent Reports." Letter from Joseph Story to William Johnson (Nov. 11, 1821), in *1 Life and Letters of Joseph Story* 405, 407 (William W. Story ed., 1851) [hereinafter *Story Letters*]. In 1824, on Johnson's retirement, Story wrote him: "your thirty volumes of Reports will form an era, not merely in the jurisprudence of New York, but of America." Letter from Joseph Story to William Johnson (May 16, 1824), in *Story Letters*, *supra*, at 428, 429. These sources are noticed in G. Edward White, *supra* note 130, at 106 & nn.129-30. In a correspondence stimulated by Daniel Webster, Story wrote Kent in 1819, when Kent was still sitting in the New York Court of Chancery and Story was riding circuit for the U.S. Supreme Court:

At an early period of my professional life, I read the New York Reports with zeal and care, and I felt how much you had contributed to enlarge our commercial law, by liberal drafts from the civil law and foreign jurists; and our

Johnson's debt that he dedicated the *Commentaries* to Johnson.<sup>156</sup>

Because Johnson was a central figure in the early history of American law reporting and in the saga of Chancellor Kent, I have struggled to learn more about Johnson. It has, alas, been tough going. Johnson left no memoirs, and he appears to have destroyed his papers.<sup>157</sup> Scattered correspondence to and from Johnson survives in the Kent Papers and in a few other manuscript collections, but on balance it seems unlikely that much will ever be known about Johnson. He was born in 1769, six years after Kent. He graduated Yale College in the Class of 1788.<sup>158</sup> He came from Middletown, Connecticut, but settled in New York City. He became a practicing lawyer,<sup>159</sup> but he was not particularly successful. He seems to have had enough time on his hands in the year before his appointment to the reportership that he was able to translate from the French and publish an 800-plus-page edition of Azuni's treatise on *The Maritime Law of Europe*.<sup>160</sup>

By 1794 Johnson was sharing lodgings in New York City with Elihu Hubbard Smith, a physician who graduated Yale College two years

common law, by a habit of tracing every principle to its original foundations, through all the shifting authorities.

Letter from Joseph Story to James Kent (Aug. 21, 1819), in *Story Letters*, supra, at 330, 330.

156. "You have reported every opinion which I gave . . . during the five and twenty years that I was a Judge at Law and in Equity, with the exception of the short interval occupied by Mr. Caines' Reports." 4 *Commentaries*, supra note 3, at iii.

157. See Letter from William Johnson to William Wetmore Story, son of Joseph Story (June 6, 1846) (New York, Massachusetts Hist. Soc'y) ("[H]aving previous to my removal to my present residence destroyed all letters and papers the preservation of which was not deemed necessary in regard to the interests or affairs of others or of myself."). I acknowledge the kindness of Ruth Wedgwood, who brought this document to my attention.

158. See 4 *Dexter*, supra note 8, at 607-08.

159. The dramatist William Dunlap, mentioned *infra* text accompanying note 163, records in his diary for January 29, 1798, that he was employing Johnson to defend him in a piece of commercial litigation. 1 *Diary of William Dunlap (1766-1839): The Memoirs of a Dramatist, Theatrical Manager, Painter, Critic, Novelist, and Historian* 215 (N.Y. Hist. Soc. 1930) (3 vols.) [hereinafter *Dunlap Diary*].

160. Domenico Alberto Azuni, *Droit maritime de L'Europe* (Paris 1805) (2 vols.), translated as *The Maritime Law of Europe* (William Johnson trans., N.Y., Isaac Riley & Co., 1806) (2 vols.) [hereinafter *Azuni*]. The French edition from which Johnson worked was itself a translation of Domenico Alberto Azuni, *Dizionario universale ragionato della giurisprudenza mercantile* (Nice, Presso de la Societa tipografica 1786-88) (4 vols.). In the same letter in which Johnson writes to thank Kent for arranging for the terms of the reportership, supra note 145, Johnson tells Kent that he prepared the translation the previous summer. See Letter from William Johnson to James Kent, New York City (Dec. 23, 1805), in 3 *The Papers of James Kent* (Library of Congress, Manuscript Division). Johnson did not identify himself as the translator on the title page of the English-language edition, but he disclosed his hand in the work by identifying himself as the copyright owner. See 1 *Azuni*, supra, at iv. Kent refers to Johnson as the translator when citing Azuni in 2 *Commentaries*, supra note 3, at 512 n.e.

before Johnson.<sup>161</sup> Smith moved in a circle of cultured New York professional and business people, many of them Yale alumni, and Johnson may have found access to this world through Smith. A dozen or so of these people, including Smith, Johnson, and James Kent, had, by 1794, coalesced into a group that called itself the Friendly Club and met at each other's homes on Saturday nights to discuss literature and public affairs.<sup>162</sup> Two of the Friendly Club members, Smith and the dramatist and theatrical producer William Dunlap, kept diaries during these years.<sup>163</sup> These diaries establish that Kent and Johnson were in constant association from the mid-1790s, a decade before Kent summoned Johnson to the Supreme Court reportership.<sup>164</sup>

Judging by the diary entries, Johnson was a very self-effacing person. He is mentioned hundreds of times, yet neither diarist finds anything of note to say about him—no reflections, no adventures, no bon mots.<sup>165</sup> Kent clearly knew what he was doing when he installed Johnson as his law reporter. Johnson was learned and genteel, diligent but unambitious, a Federalist by disposition<sup>166</sup> and hence politically congenial, yet recessive in the extreme—in short, an ideal minion. Kent had found his Boswell, happily named Johnson.

As their working relationship developed across the years, Kent placed ever greater trust in Johnson, yielding to his criticisms and soliciting his advice about what to say in his opinions.<sup>167</sup> The two men were so closely identified that when Kent retired in 1823 in some political

161. See 4 Dexter, *supra* note 8, at 508–11.

162. Kent's membership in the Friendly Club is noted in Goldberg, *supra* note 4, at 184. "[T]he Friendly Club was organized some time during the twelve months following September, 1793." James E. Cronin, *Elihu Hubbard Smith and the New York Friendly Club, 1795–1798*, 64 *Publications of the Mod. Language Ass'n of Am.* 471, 472 (1949). For a description of a similar institution in Boston, the Friday Evening Club, see Alfred S. Konefsky, *Law and Culture in Antebellum Boston*, 40 *Stan. L. Rev.* 1119, 1155–56 (1988) (book review). Cronin observes that in New York City "during this period there were clubs without number," and he lists a dozen. James E. Cronin, *Introduction to Smith Diary*, *supra* note 56, at 15.

163. Regarding Dunlap, see 5 *Dictionary of American Biography* 516–18 (Allen Johnson & Dumas Malone eds., 1943). The diaries are *Dunlap Diary*, *supra* note 159; *Smith Diary*, *supra* note 56.

164. See, e.g., *Smith Diary*, *supra* note 56, at 161 (entry for May 1, 1796) ("Kent, Johnson and I took a long and very pleasant walk into the country.").

165. James E. Cronin, who edited the *Smith Diary* for publication, noticed that Johnson's "relationship with Smith is strange in that, although he is mentioned scores of times in the 'Diary,' he does not appear to have expressed his opinion on much of anything, at least nothing that Smith felt like recording." *Smith Diary*, *supra* note 56, at 44 n.59 (note of James E. Cronin, ed.).

166. In a letter written in 1806, Johnson makes passing mention of his Federalist disposition. "We have had a very contested election here; although the federalists have lost it, they have shown that much may be done by exertion. They drove the democrats so hard, that many of them really despaired of success . . ." Letter from William Johnson to William P. Beers, New York City (May 2, 1806) (Columbia Univ., Butler Library, Rare Book and Manuscript Collections, X973/C72/vol. 7, at 114).

167. Because Johnson was based in New York City and Kent in Albany, their

disfavor,<sup>168</sup> Johnson fell with him. Kent tried to protect Johnson from being replaced but could not. Kent wrote him on this occasion that “you retire with my gratitude, love, and admiration. If my name is to live in judicial annals, it will be in association with yours.”<sup>169</sup>

Of Johnson’s three series of reports that chronicle Kent’s judicial work, the Chancery Reports were undoubtedly the most influential. Because Chancery was a one-judge court, Kent had the stage to himself. His judicial style was fully mature. Equity courts had emerged from the American revolution under a taint for several reasons, including their association with unpopular colonial governors and their jury-free civil procedure.<sup>170</sup> Even in England, much of the detail of equity law, including trusts and succession, had only recently developed.<sup>171</sup>

collaboration required correspondence, and some of it has survived in the Kent Papers in the Library of Congress.

Writing Johnson to enclose opinions for the first volume of the Chancery reports, Kent tells him that “I am only afraid of reporting *too much*, and I shall stand in need of your judgment on that point, seeing I am alone in my Court and have no other aid, and I shall place more reliance on your judgment than my own.” Letter from James Kent to William Johnson, Albany (Apr. 8, 1815), in 4 *The Papers of James Kent* (Library of Congress, Manuscript Division).

Toward the end of his chancellorship, Kent writes Johnson in response to a letter from Johnson that has not survived, in which Johnson questioned something Kent had written about the Roman law of Societas.

I subscribe entirely to all that you say, and I am satisfied on a moment’s reflection that what I wrote was unnecessary, and that I was contesting a shadow. The observations in my opinions respecting incestuous marriages, and that a surety cannot have recourse even against his principal before a default, are self evident, and the learning I had collected was misplaced and ostentatious, and I will request that these opinions be entirely suppressed unless there be something in the cases separate from these points. . . . The opinions now sent I — [illegible] are true Business opinions and I am not too much hurried. I should like to revise and prune them, and you would gratify me if you would strike out in every case any thing that does not conform to the model I have suggested.

Letter from James Kent to William Johnson, Albany (Mar. 2, 1821), in 5 *The Papers of James Kent* (Library of Congress, Manuscript Division).

168. Regarding Kent’s involvement on the losing side in the politics of constitutional revision in New York State in 1821, events which appear to have led to his downfall in 1823, see Horton, *supra* note 4, at 245–63. At a banquet held in Kent’s honor at Harvard shortly after his retirement in 1823, someone led a toast with the observation that “[t]he Athenians banished Aristides for excess of virtue . . . . It was reserved for an American state to banish a great man for the excess of learning.” *Id.* at 266.

169. Letter from James Kent to William Johnson, Albany (Apr. 29, 1823), in 5 *The Papers of James Kent* (Library of Congress, Manuscript Division).

170. See Katz, *supra* note 76, at 262–84 (discussing association of unpopular colonial governors with equity courts); Perry Miller, *supra* note 98, at 171–72 (1965) (“Popular distrust arose first of all from the fact that it dispensed with juries.”).

171. See 12 Holdsworth, H.E.L., *supra* note 23, at 257–85 (discussing the development of substantive equity under Lord Hardwicke (1737–1756)). Roscoe Pound observed of the early period of American independence: “The system of equity was not yet complete in England and absorption of the law merchant was still going forward. . . .

Kent relished the opportunity to lay down the law on a fresh slate. He later recollected that when he was appointed Chancellor in 1814 there was no indigenous equity law: “[N]ot a single decision, opinion or dictum of either of my two predecessors . . . from 1777 to 1814 [was] cited to me or even suggested. I took over the court as if it had been a new institution, and never before known to the U.S.”<sup>172</sup> Kent remarked that his object in preparing his Chancery opinions “was to discuss a point so as never to be teased with it again.”<sup>173</sup>

Kent’s Chancery decisions exemplify his campaign to entrench English decisional law as the foundation of American law. Within his first year on the Chancery bench, Kent trumpeted this theme anew: “The system of equity principles, which has grown up and matured in England . . . is a scientific system, being the result of the reason and labors of learned men for a succession of ages.”<sup>174</sup> Accordingly, Kent says, it is his duty to “endeavor to transplant and incorporate all that is applicable in that system into [American law].”<sup>175</sup> Johnson’s *Chancery Reports* were the only specialized American equity reports of their time, greatly enhancing their influence in other American states.<sup>176</sup>

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Our courts had to complete the development of equity and the taking over of the law merchant concurrently with the English courts.” Pound, *Formative Era*, supra note 2, at 20. Regarding Lord Mansfield’s use of civilian sources in building the English commercial and maritime law, see Christopher P. Rodgers, *Continental Literature and the Development of the Common Law by the King’s Bench: c. 1750–1800*, in *The Courts and the Development of Commercial Law 161–94* (Comparative Studies in Continental and Anglo-American Legal History) (Vito Piergiovanni ed., 1987).

172. Kent, 1828 Letter, supra note 19, at 844.

173. *Id.* at 845. He explains that he worked very hard on his opinions in Chancery in order to forestall review and reversal in the “Senate & court of Errors.” *Id.* at 844. “[M]y object was . . . to anticipate an angry and vexatious appeal to a popular tribune by disappointed counsel.” *Id.* at 845.

174. *Manning v. Manning*, 1 Johns. Ch. 527, 529 (1815).

175. *Id.*

176. Story wrote Kent in 1819 that

I read your Chancery decisions with the greatest pleasure and instruction. This is a branch of law in which, as you may well suppose, from the want of State Chancery Courts in my Circuit to aid my studies and reduce my investigations to practice, I must necessarily be very deficient. . . . I make it a rule in my circuit to adopt the practice of your Court wherever it can be applied; and I hope hereafter to build up, if I can awaken the ardor of the Bar, a system of Chancery Jurisprudence for the States included in my circuit. To you we shall be most deeply indebted, and from your Reports we shall draw most amply.

Letter from Joseph Story to James Kent (Aug. 21, 1819), in *Story Letters*, supra note 155, at 331. With Story’s protestations of naivete regarding equity, contrast Roscoe Pound’s judgment of Story’s ultimate influence on American equity. See Pound, *Formative Era*, supra note 2, at 156–57.

It was said in the 1830s that “‘no English books of chancery decisions are more frequently or more respectfully cited in the courts of South Carolina than the seven volumes of Mr. Johnson’s reports of Kent’s decisions.’” Horton, supra note 4, at 211 n.38 (quoting 6 *London Law Magazine* 132 (1831)).

Hampton Carson thought that Kent’s influence was immensely buttressed by the fact that his opinions as Chancellor were

## IV. THE COMMENTARIES AND THE INSTITUTIONALIST TRADITION

Kent's *Commentaries* is a work that is commonly lumped together with Story's treatises and thereby placed at the relative beginnings of the grand nineteenth-century tradition of American treatise writing.<sup>177</sup> There is, indeed, a treatise-like depth to some portions of the *Commentaries*, and as a consequence, certain segments of the work were stripped out and sold as freestanding topical treatises. Kent's chapters on the law of nations, for example, were peddled in England under the title of Kent's *Commentary on International Law*.<sup>178</sup> Kent's chapters on American constitutional law were packaged as a one-volume work in North America and also translated for German,<sup>179</sup> Argentinean,<sup>180</sup> and Mexican editions.<sup>181</sup> Most remarkably, a selection of Kent's chapters on partnership, agency, contract and commercial law, insurance and maritime law, bailments and servitudes was published in Scotland in 1837 under the title, *A Practical Treatise on Commercial and Maritime Law*.<sup>182</sup> This Scottish edition supplies a wonderful demonstration of the point that Kent's *Commentaries on American Law* was at least as much a commentary on English law,<sup>183</sup> consistent with Kent's lifelong mission to entrench English law as the basis of a learned American law.

A. *The Institutional Tradition*

Notwithstanding the evident connections between Kent's *Commentaries* and the dawning treatise tradition, I think that the *Commentaries* is a work that is better understood as belonging to a differ-

published and bound in exclusively Equity Reports and not mixed as they were in Pennsylvania, where no separate Chancery existed, with common law matters. Kent's administration of Equity forms an epoch in the judicial history of New York and the seven volumes of Johnson's Chancery Reports are classics of the profession.

Carson, *supra* note 7, at 670.

177. See, e.g., Pound, *Formative Era*, *supra* note 2, at 140-41.

178. Kent's *Commentary on International Law* (J.T. Abdy, ed., Cambridge, Deighton, Bell & Co. 1866) (2d ed. 1878).

179. Friedrich Bissing, *Das Verfassungsrecht der Vereinigten Staaten Nord-Amerikas nach James Kent* (Heidelberg, G. Reichard 1836).

180. James Kent, *Del gobierno y jurisprudencia constitucional de los Estados Unidos* (Alejandro Carrasco Albano, trans., Buenos Aires, Imprenta de Buenos Aires 1865).

181. James Kent, *Comentarios a la constitucion de los Estados Unidos de America* (J. Carlos Mexia, trans., Mexico City, Imprenta Poliglota de Carlos Ramiro 1878).

182. James Kent, *A Practical Treatise on Commercial and Maritime Law*, with a Chapter on Incorporal Hereditaments (Edinburgh, Thomas Clark 1837). This work is quite scarce. I have used University of Virginia Law Library, shelfmark T/.K374p/1837. The book was published during Kent's lifetime, and he owned a copy of it. See Kent, 1842 Library Handlist, *supra* note 41, at 52.

183. On the relative recency of the absorption of commercial and maritime law into the English common law of the day, see *supra* note 171. For extensive recent discussion, see generally 1 James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (1992).

ent genre of legal literature, called the *institutes of national law*. This genre flourished on the European Continent in the seventeenth and eighteenth centuries.<sup>184</sup> Most of the European legal systems produced one or two prominent institutionalist writers. My suggestion is that the American legal system also produced an institutionalist work, namely Kent's *Commentaries*. In other words, it is instructive to see Kent's *Commentaries* not so much as an early treatise, but as a late institutionalist.

There are four major attributes of institutionalist legal literature. The most prominent feature is the breadth of subject matter. The distinguishing trait of institutionalist writing is the effort to be comprehensive, to describe the private law of an entire legal system in a single work. This breadth of field contrasts sharply with the treatise writer's effort to delimit a single topic in exhaustive depth.

Second, the institutes of national law are devoted to the task of defining national legal systems. The impulse to write these works in the seventeenth and eighteenth centuries came from the breakup of the European *ius commune* and the rise of the national legal systems.<sup>185</sup> The institutional writers identified the main elements of the private law of the particular state. They frequently struggled with the task of articulating the relations between older customary law, primarily the Roman law of the European *ius commune*, and the law of the nation-state. In countries such as France, the Netherlands, and Spain, the institutionalists were also attempting to unify divergent bodies of customary law. You will perhaps recall Voltaire's remark that, in journeying through France by stagecoach, the traveller was obliged to change laws as often as he changed horses.<sup>186</sup> Institutional writers undertook to unify divergent local customs in a variety of ways, most importantly by finding reasons for treating one body of regional law as presumptively superior. The French institutionalists gave this sort of primacy to the *coutume de Paris*, the Dutch used Holland, the Spanish writers used the law of Castille.<sup>187</sup> Thus, the institutionalist works commonly served the purpose of helping to create and to unify national legal systems.

Third, the institutes of national law have a pronounced didactic purpose. They are works of instruction, introducing neophytes to the

184. There are three superb modern studies of Continental institutionalist writing: Alan Watson, *Roman Law and Comparative Law* 147-81 (1991) [hereinafter Watson, *Roman Law*], a portion of which derives from Alan Watson, *The Making of the Civil Law* 62-82 (1981); John W. Cairns, *Institutional Writings in Scotland Reconsidered*, 4 J. Legal Hist., Dec. 1983, at 76 [hereinafter Cairns, *Institutes*]; and Klaus Luig, *The Institutes of National Law in the Seventeenth and Eighteenth Centuries*, 17 *Jurid. Rev.* (n.s.) 193 (1972) [hereinafter Luig, *Institutes*], an English-language version of Klaus Luig, *Institutionenlehrbücher des nationalen Rechts im 17. und 18. Jahrhundert*, 3 *Ius Commune* 64 (1970).

185. See Luig, *Institutes*, supra note 184, at 194-98.

186. 7 *Francois M.A. de Voltaire, Oeuvres de Voltaire* 5 (Paris 1838).

187. See *id.* at 201-02.



law.<sup>188</sup> They speak not only to intending legal professionals, but to the educated classes in general. Sometimes these works arose in connection with formal university education, but commonly they were meant to serve in place of organized university education or in advance of it. The institutionalist writers often worked in the vernacular, whereas Latin had been the ordinary language of European law into the seventeenth century;<sup>189</sup> the use of the vernacular greatly enhanced the didactic power of these books.

Fourth, the institutes of national law are systematic works, and in a special way. Decisional law and legislation get accreted in bits and pieces as circumstances call them forth, but one cannot learn the law exclusively from the raw sources. The law has to be organized around categories and principles. This need to systematize was not a novel one, even in the seventeenth and eighteenth centuries. Rather, it had been faced in classical Roman law, in the textbook called the *Institutes of Gaius*,<sup>190</sup> which was written about the year 160 A.D.<sup>191</sup>

Gaius hit upon a scheme of organization that worked. Although his scheme was flawed, it proved adequate and became immensely influential. Gaius divided the law into three grand categories: persons, things, and actions. Under "persons" fell questions of status, including guardianship and family law. Under "things" Gaius dealt with property, succession, contracts, and tort. And under "actions" Gaius treated civil procedure. In 533 the emperor Justinian arranged for the publication of a comparable work, known as the *Institutes of Justinian*, which served as the officially authorized schoolbook companion to Justinian's compilation of Roman sources in the *Digest*.<sup>192</sup> Justinian's *Institutes* carried forward Gaius' system of organization—persons-things-actions—prefacing it with some observations about natural law and about the law of nations.<sup>193</sup>

From the time that Roman law began to be recovered and employed as the basic raw material of European private law in the eleventh century, Justinian's *Institutes* was the elementary text that was studied

188. See Watson, Roman Law, supra note 184, at 147-50.

189. See Cairns, Institutes, supra note 184, at 77-78.

190. The Institutes of Gaius (Francis de Zulueta, trans. 1946-53) (Latin text and English translation) (2 vols.). A recent translation is The Institutes of Gaius (W.M. Gordon & O.F. Robinson trans., 1988). The full text of Gaius was rediscovered in Kent's lifetime. This event caused great excitement in legal intellectual circles; Kent refers to it in I Commentaries, supra note 3, at 501.

191. See H.F. Jolowicz & Barry Nicholas, Historical Introduction to the Study of Roman Law 386-90 (3d ed. 1972).

192. See Watson, Roman Law, supra note 184, at 15. For an English translation of the work, see The Institutes of Justinian (J.B. Moyle trans., Oxford, Clarendon Press 1883) [hereinafter Justinian]. For discussion of the continuity from Gaius to Justinian and the importance of Justinian's Institutes, see Watson, Roman Law, supra note 184, at 147-49.

193. See Justinian, supra note 192, at 3-6.

everywhere in Europe. It is not, therefore, surprising that Justinian's *Institutes* should have supplied a model to the learned writers of the seventeenth and eighteenth centuries who were undertaking to do for their legal systems what Justinian's *Institutes* had done for Roman law. These European writers did not imitate every attribute of Justinian's *Institutes*, but the basic format of persons-things-actions prevails through this body of literature.

### B. *The Later European Institutionalists*

The burst of institutional writing began in France with Guy Coquille's *Institution au droit français* in 1607.<sup>194</sup> There were several subsequent French works, including Gabriel Argou's *Institution au droit français* in 1692<sup>195</sup> and Claude Serres' *Les institutions du droit français* in 1753.<sup>196</sup> In Holland, Grotius published his *Introduction to the Law of Holland* in 1631.<sup>197</sup> Other Dutch works of this character were published by Simon van Leeuwen in 1652, and Ulrich Huber in 1686.<sup>198</sup> In Scotland, where the law was deeply influenced by association with the Dutch, there appeared the three famous works,<sup>199</sup> Lord Stair's *Institutions of the Law of Scotland*, published in 1681;<sup>200</sup> Sir George Mackenzie's *Institutions of the Law of Scotland*, published in 1684;<sup>201</sup> and John Erskine's *Institutes of the Law of Scotland* in 1773.<sup>202</sup>

Within the German states there were many works that qualify as

194. Guy Coquille, *Institution au droit français* (1st ed. Paris 1607), republished in 2 *Les Oeuvres de Maître Guy Coquille* (Paris 1665). Regarding Coquille, see Luig, *Institutes*, supra note 184, at 204–06; Watson, *Roman Law*, supra note 184, at 150–51.

195. Gabriel Argou, *Institution au droit français* (Paris 1692). Regarding Argou, see Cairns, *Institutes*, supra note 184, at 87–88. Kent's copy of the 1773 edition is in the Columbia Law Library. Kent wrote on the flyleaf of his copy of the 1773 edition of Volume 1: "Chancellor D'Aguesseau speaks of . . . the Institutes of M. D'Argou as a proper introduction to the study of the droit francois." Kent, Manuscript entry at flyleaf located in Kent's copy of Gabriel Argou, *Institution au droit français* (Paris 1773) (2 vols.) (Columbia Law Library, Special Collections).

196. Claude Serres, *Les institutions du droit français* (Paris, Caveller 1753).

197. Hugo Grotius, *Inleidinge tot de Hollandsche rechtsgeleerdheid* (s'Gavenhage, Hillebrant 1631).

198. Ulric Huber, *Heedensdaegse rechtsgeleertheit* (Leuwarden 1686) (rough translation: "contemporary legal learning"); Simon van Leeuwen, *Paratitula juris novissimi, dat is, een kort begrip van het Rooms-Hollandtsrecht* (Leyden, P. Leffen 1652) (roughly: "Titles of the new law, that is, a short version of Roman-Dutch law"). I follow Watson, *Roman Law*, supra note 184, at 153, in directing attention to these Dutch works.

199. For an extensive discussion, see Cairns, *Institutes*, supra note 184, at 88–98.

200. James Viscount of Stair, *The Institutions of the Law of Scotland* (Edinburgh, Anderson 1681). There is a modern scholarly edition: James D. Stair, *The Institutions of the Law of Scotland* (David M. Walker ed., 1981) [hereinafter Stair, 1981].

201. George Mackenzie, *Institutions of the Law of Scotland* (Edinburgh, John Reid 1684). On Mackenzie, see Alan Watson, *Some Notes on Mackenzie's Institutions and the European Legal Tradition*, 16 *Ius Commune* 303 (1989).

202. John Erskine, *Institutes of the Law of Scotland* (Edinburgh, J. Bell 1773).

national institutes—Sebastian Khraisser's *Institutes* of Bavarian law in 1644<sup>203</sup> is an early example.<sup>204</sup> The works by Georg Beyer in 1718<sup>205</sup> and Johann Gottlieb Heineccius in the 1730s<sup>206</sup> were especially influential. In the Italian states, where resentment of Roman law was not so pressing, the institutionalist tradition was less prominent, but one can find examples: for Venice, in 1697, the work of de Pozzo;<sup>207</sup> for Naples, the works by Francesco Rapolla in 1746<sup>208</sup> and Oronzio Fighera in 1766.<sup>209</sup> In Scandinavia there was a comparable work on Swedish law by David Nehrman in 1729<sup>210</sup> and on Danish and Norwegian law by Laurids Nørregaard in 1784–99.<sup>211</sup> In Spain the major work was the *Institutions of the Civil Law of Castille* by Asso and Manuel, published in 1771.<sup>212</sup> Perhaps the last of the acknowledged institutionalist books was one written for Hispanic America by José Maria Alvarez, under the title *Institutes of the Royal Law of Castille and the Indies*. The first edition

203. Sebastian Khraisser, *Institutiones iuris Romano-Bavarici electoralis* (Augsburg, Weh 1644).

204. See Watson, *Roman Law*, supra note 184, at 160.

205. Georg Beyer, *Delineatio juris Germanici* [Outline of German Law] (Halle, Gribner 1718). Beyer is cited in Luig, *Institutes*, supra note 184, at 209; Watson, *Roman Law*, supra note 184, at 162.

206. Johann Gottlieb Heineccius, *Elementa iuris Germanici* [Elements of German Law] (Halle, Orphanotrophi 1736–37). Gottlieb is discussed in Luig, *Institutes*, supra note 184, at 209; Watson, *Roman Law*, supra note 184, at 163. Regarding the renown of Heineccius in the eighteenth century, see M.H. Hoeflich, Edward Gibbon, *Roman Lawyer*, 39 *Am. J. Comp. L.* 803, 807–08 (1991).

207. Julius Marchio de Pozzo, *Paraphrasis Institutionem italica cum legisbus Venetis collata* [Summary of Italian Law Collated with the Venetian Statutes] (Venice 1697). This work is noticed in Luig, *Institutes*, supra note 184, at 223 n.227.

208. Francesco Rapolla, *Commentaria de iure regni Neapolitani* [Commentaries on Royal Neapolitan Law] (Naples 1746). Rapolla is cited in Luig, *Institutes*, supra note 184, at 225 n.235.

209. Oronzio Fighera, *Institutiones iuris Regni Neapolitani* [Institutions of the Royal Neapolitan Law] (Naples 1766). Fighera is cited in Luig, *Institutes*, supra note 184, at 225 n.236.

210. David Nehrman, *Inledning til den Swenska jurisprudentiam civilem* [Introduction to Swedish Civil Law] (Lund, Decreaux 1729). Nehrman is discussed in Luig, *Institutes*, supra note 184, at 219–20.

211. Laurids Nørregaard, *Forelaesinger over den danske og norske private Ret* [Lectures on Danish and Norwegian Private Law] (Copenhagen 1784–99). Nørregaard is discussed in Luig, *Institutes*, supra note 184, at 217–19.

212. Ignacio Jordán de Asso y del Río & Mignel de Manuel y Rodríguez, *Instituciones del Derecho Civil de Castilla* (Madrid, Francisco Xavier Garcia 1771). See also Cairns, *Institutes*, supra note 184, at 82–83 (briefly describing the work of Asso and Manuel and noting their “determination to distinguish Castilian law from the Roman”). There is an English translation, *Institutes of the Civil Law of Spain* (Lewis F.C. Johnson trans., London, J. Butterworth & Son 1825). The translation was reprinted in the United States. See Joseph M. White, *A New Collection of Laws, Charters, and Local Ordinances of the Governments of Great Britain, France, and Spain . . . To Which Is Prefixed Judge Johnston's Translation of Azo [sic] and Manuel's Institutes of the Civil Law of Spain* (Philadelphia, T. & J.W. Johnson 1839).

appeared in Guatemala in 1818-1820;<sup>213</sup> further editions were published in Cuba, Mexico, and elsewhere as the young nation states of Latin America took shape.<sup>214</sup>

### C. Blackstone's *Commentaries*

Recent scholarship has come increasingly to the view that Blackstone's *Commentaries on the Law of England*, which appeared in the years 1765-1769,<sup>215</sup> deserves to be seen as part of the institutionalist tradition.<sup>216</sup> Blackstone differs from the Continental and Scottish writers in important respects. English law did not need to be disentangled from antecedent Roman law, having developed since the Middle Ages on a path separate from the European *ius commune*. Moreover, English law did not require national unification.<sup>217</sup> The English traveler did not change laws when changing horses. Thanks to the precocious development of the medieval English monarchy and its administration, customary law in England had the character of national law, rather than the regional or provincial law that prevailed in France and elsewhere in Europe.

Blackstone did, however, have an organizational job to do that at least echoes the structural work of the Continental institutional writers. Blackstone wrote at a time when English law required redefinition. The medieval common law had been organized around the writs—that is to say, organized procedurally—but by the later seventeenth century the writ of trespass had captured most of private law, making the inherited writ-based scheme of organization obsolete. Much of what Blackstone achieved was a reorientation of the categories of English law away from

213. José María Álvarez, *Instituciones de derecho real de Castilla y de Indias* [Institutes of the Royal Law of Castille and the Indies] (Guatemala City, I. Beteta 1818-20). Álvarez is discussed in Watson, *Roman Law*, supra note 184, at 164.

214. See id.

215. See Blackstone, supra note 28.

216. See, e.g., Michael Lobban, *The Common Law and English Jurisprudence: 1760-1850*, at 19-26 (1991); Watson, *Roman Law*, supra note 184, at 165-81; John W. Cairns, *Blackstone, An English Institutionist: Legal Literature and the Rise of the Nation State*, 4 *Oxford J. Legal Stud.* 318 (1984). An earlier version of Watson's argument can be found in Alan Watson, *The Structure of Blackstone's Commentaries*, 97 *Yale L.J.* 795 (1988).

217. It should, however, be observed that a variety of local and special-purpose courts had survived into Blackstone's day outside the main common-law courts. Blackstone devotes Chapter 6 of Book 3 to these courts. His theme is that they are archaic, and that the main common-law courts "have a concurrent jurisdiction with these, or else a super-intendency over them . . ." 3 Blackstone, supra note 28, at 81. Further, purporting to follow the views of Sir Edward Coke, Blackstone urges hostility to these enclave courts: "[T]hese particular jurisdictions, derogating from the general jurisdiction of the courts of common law, are ever taken strictly, and cannot be extended farther than the express letter of their privileges will most explicitly warrant." 3 id. at 85.

the writs and toward modern notions of substantive law.<sup>218</sup> In the substantive categories he used, Blackstone was strongly influenced by the institutionalist tradition. Blackstone was deeply versed in Roman law, and the first three volumes<sup>219</sup> of Blackstone's *Commentaries* adhere straightforwardly to the persons-things-actions format. Contemporaries understood Blackstone's debt to the institutionalist tradition. Thomas Jefferson, for example, thought that Blackstone's *Commentaries* "rightfully tak[es] its place by the side of the Justinian Institutes."<sup>220</sup>

#### D. Kent's *Commentaries*

Blackstone supplied the inspiration both for the title of Kent's *Commentaries* and for the organization, although Kent made major departures from Blackstone in coverage. Kent was well-acquainted with Blackstone: Kent's Damascus, his conversion to a legal career, came about through his reading of Blackstone's *Commentaries*.<sup>221</sup> Across his lifetime Kent had also studied many of the Continental institutional writers, especially the French and the Dutch. In 1813 Kent wrote his brother Moss, the Congressman, who had some pending contact with a traveler to Europe, seeking Moss's help in obtaining a copy of Heineccius.<sup>222</sup> Kent prepared a list of his library in the 1840s that survives among the Kent manuscripts at Columbia.<sup>223</sup> Among the Continental institutes of national law that Kent owned were those of Argou, Huber, Heineccius, and Erskine, as well as many of the European works on natural law and the law of nations.<sup>224</sup>

If you are sensitive to the traits of institutionalist legal writing, you will have no difficulty detecting the main attributes in Kent's *Commentaries*. First, Kent's *Commentaries* has the characteristic breadth of an institutionalist work. It purports to treat American law in its en-

218. See S.F.C. Milsom, *The Nature of Blackstone's Achievement*, 1 Oxford J. Legal Stud. 1, 9-12 (1981).

219. Volume Four is devoted to criminal law. See 4 Blackstone, *supra* note 28.

220. Quoted in Cairns, *supra* note 216, at 340. Cairns discusses the relation of Blackstone's *Commentaries* to the institutionalist tradition, see *id.* at 340-52, and cites, among others, Wood's civil law *Institute* as an influence on Blackstone's work. See *id.* at 343. On Wood, see Robert B. Robinson, *The Two Institutes of Thomas Wood: A Study in Eighteenth Century Legal Scholarship*, 35 Am. J. Legal Hist. 432 (1991) (discussing place of Wood's work in civil and common law traditions of English legal scholarship in the eighteenth century). Regarding the early seventeenth-century institutional works by Cowell and Finch, see David J. Seipp, *The Structure of English Common Law in the Seventeenth Century*, in *Legal History in the Making: Proceedings of the Ninth British Legal History Conference Glasgow 1989*, at 61 (W.M. Gordon & T.D. Fergus eds., 1991).

221. See *supra* text accompanying note 28; text accompanying note 32 (Kent recalls that as a student he read Blackstone "again and again").

222. See Letter from James Kent to Moss Kent, Albany (Feb. 6, 1813), in 4 *The Papers of James Kent* (Library of Congress, Manuscript Division).

223. Kent, 1842 Library Handlist, *supra* note 41.

224. See *supra* note 111.

tirety, although Kent in fact excluded many topics, as had the European writers. In Volumes Two, Three, and Four of the *Commentaries*, Kent started down the path toward the conventional persons-things-actions format, but, because he declined to cover procedure, he never got to actions. Kent also replaced the label “things” with the categories of “personal property” and “real property.”

Volume One of Kent’s book will throw you off the scent slightly if you are looking for the institutionalist tradition. Volume One contains a unit of just under 200 pages on the law of nations, and another 200-page unit on American constitutional and federal law. There was, of course, a vibrant European tradition of writing about the law of nations, beginning with the sixteenth-century Spaniards and continuing with the Dutch and other writers of the seventeenth and eighteenth centuries.<sup>225</sup> Kent merged his account of this subject within an otherwise institutionalist work. Recall, however, that the institutionalist tradition was not without precedent for this step. The preface to Justinian’s *Institutes* touches on the law of nations, although quite perfunctorily,<sup>226</sup> as do various later institutional writers.<sup>227</sup>

Kent’s inspiration to include a substantial account of American constitutional and federal law may have come from Blackstone’s Volume One.<sup>228</sup> Half of Blackstone’s book on the law of persons is devoted to the monarch, parliament, and executive powers.<sup>229</sup> This confusion of governmental functions with the law of persons may have suggested to Kent the further refinement of placing a unit on the structure of government in the front of an institutionalist work. Kent’s treatment of constitutional law is not particularly insightful; and Story’s three-volume treatise on the Constitution, published in 1833,<sup>230</sup> effectively superseded Kent’s account for serious students. However, Kent’s decision to cover the Constitution in an institutionalist work for the United States was clever, because it allowed him to root his *Commentaries* in a topic that was unmistakably American. The coverage of federal law offsets to some extent Kent’s determined reliance upon English law.

The case for treating Kent’s *Commentaries* as the last of the institutes of national law rests upon a host of features. Like the Continental institutes, Kent’s book arose in close proximity to legal education—as lec-

225. See generally James B. Scott, *The Spanish Origins of International Law* (1934).

226. See *supra* text accompanying note 193.

227. See, e.g., Stair, 1981, *supra* note 200, at 79–80.

228. Another influential forerunner was Swift’s treatise on Connecticut law, whose citations acknowledge its debt to Blackstone. Swift’s Book 2 (persons) and Book 3 (things) are preceded by Book 1 on powers of government. See Zephaniah Swift, *A System of the Laws of the State of Connecticut* (Windham, John Byrne 1795) (2 vols.).

229. 1 Blackstone, *supra* note 28, at 142–326.

230. See Joseph Story, *Commentaries on the Constitution of the United States* (Boston, Hilliard, Gray & Co. 1833) (3 vols.).

tures given at Columbia.<sup>231</sup> Kent's book exhibits the characteristic breadth of the institutionalists. As the title proclaims, the work purports to cover "American Law." Kent's *Commentaries* shares, even though it does not wholly replicate, the distinctive persons-things-actions format of the institutionalist works. And like many of the European institutes, Kent's book is centrally concerned with the relationship between the law of the new nation-state and the older customary law. The difference is that the European writers were trying to sort out the relationship between the national law and the Roman law, while Kent was working mainly on the relationship between American law and English common law. Above all, what Kent's *Commentaries* shares with the European institutes of national law is the auspicious enterprise of giving character and definition to the law of a newly self-conscious nation. The United States was among the last of the nation-states to emerge from the breakup of the *ancien régime*, and appropriately, Kent's *Commentaries* was among the very last of the institutionalist books.

The institutionalist tradition is today extinct. As a genre, the institutional book on national law was an inherently transitional form. Once the job was done, it did not bear much repeating. The concept that there was a unified and well-delimited national legal system passed into the political and cultural consciousness of the people, and, therefore, did not require fresh elaboration. As for the didactic purpose of institutional writing, these do-it-yourself books were no match for the power of specialist legal education. University instruction in national law spread everywhere in the wake of the institutionalist tradition. Finally, within the realm of doctrinal writing—that is, for the work of ordering and explicating the continuing life of the national law—the institutionalist genre could not withstand the competition from later forms of legal literature. Doctrinal writing can be done better when it is separated from the need for schoolbook simplicity that characterizes the institutionalist tradition. Breadth is the enemy of depth, and when breadth is no longer needed, depth will prevail. As a result, everywhere in the Western legal systems, the institutes gave way to the treatise, and that is what happened in the United States. Nobody ever again wrote a book like Kent's *Commentaries*, because nobody needed one. Kent gave way to the treatises of Story and Greenleaf in his own day, and in the next century, to the megatreatises<sup>232</sup> of Corbin, Powell, Scott, Wigmore, and Williston.

#### CONCLUSION

The year 1993 marks the two hundredth anniversary of Kent's ap-

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231. Recall that Kent titles the chapters of the *Commentaries* "lectures," and that the preface to Volume One identifies the work as the fruit of Kent's appointment as professor of law at Columbia. On the connection between lectures and *Commentaries*, see *supra* text accompanying notes 86–90 and note 90.

232. See Simpson, *supra* note 1, at 674 (discussing main American treatise writers).

pointment as professor of law at Columbia, effectively the bicentennial of legal education at Columbia. The connections between the history of legal education and of legal literature are often intimate, as Kent's career illustrates. His enduringly influential *Commentaries*, which emerged from Columbia's lecture hall, paved the way to the legal treatise. The treatise became the characteristic medium of juristic writing in the United States during the century or so after Kent's death, as the new legal professorate took up the enterprise.

Kent's other great contribution to the history of legal literature was his role in instigating the system of official, state-supported law reporting in New York in the early nineteenth century. Versions of this system spread widely among the other American states. Judicial decisions, mainly appellate decisions, were methodically preserved. The growth of American law reporting contributed the raw materials for the treatise tradition. Part of what drove the enterprise of treatise writing was the felt need to systematize the ever-growing corpus of reported decisions.

By the end of the nineteenth century, the flow of American law reports altered the character of American legal education. The restless youths who heard Kent deliver his first lectures at Columbia in the 1790s were college students. By the later nineteenth century the university law schools were training intending professionals. The main medium of instruction became what it has remained, the study of reported appellate decisions, selected and republished for the purpose in casebooks.

Kent embarked upon his legal career at a time when professionalism in the administration of justice was still derided. Kent made his career stand for the learned law. His involvement with law reporting, with juristic writing, and with legal education should be seen as common manifestations of his hugely successful campaign to make American law a learned law.