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Ascension to the Bench**

COMMENTARIES ON CHANCELLOR KENT

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Introduction

It is my distinct pleasure to be a part of this symposium on Chancellor James Kent, whose name stands securely alongside the giants of the law.^[1] At this school, which bears his name, you understandably feel a special connection to Chancellor Kent. As Chief Judge of the Court of Appeals of the State of New York—our state's highest court—I too feel a special connection to him. Chancellor Kent's portrait hangs directly over my shoulder as I sit on the bench of our magnificent courtroom in Albany.^[2] Every day during the Court's sessions, he looks out on attorneys presenting issues that were unimaginable 200 years ago when he took the bench, yet he unquestionably contributed greatly to their resolution. In the words of a tablet placed at the Court of Appeals in Kent's honor seventy-five years ago: "He gave to the Common Law in its new home fresh vitality and power. He moulded from feeble precedents a noble system of equity jurisprudence and marked the line of its growth for Commonwealth and Nation."^[3]

Who is this man, and what—apart from his widely-known Commentaries on American Law—was his contribution to the development of the law? I propose, in the succeeding sections, to answer these questions.

Footnote *: Chief Judge of the State of New York; Chief Judge, Court of Appeals of the State of New York. I am indebted to my Law Clerk Jeremy Feinberg—a fine lawyer and genuine history buff—for his superb assistance in the preparation of this article. Our efforts were immeasurably enhanced by the extraordinary research talents of the Court of Appeals Librarian, Frances Murray, Esq.

Footnote 1: See Hampton L. Carson, James Kent: Picture of Man as Lawyer, Judge and Author, 7 A.B.A. J. 662, 662 (1921).

Footnote 2: The walls of our courtroom are lined with portraits of former judges of the Court. Chancellor Kent's is one of the few non-Court of Appeals judge portraits there, although as a former Chief Justice of the New York

Supreme Court (a predecessor of our Court), a Chancellor, and a scholar whose works are important to New York law, he is surely part of the Court of Appeals family. The portraits—including portraits of John Jay, Egbert Benson (Kent's mentor and New York's first Attorney General), and the five men other than Kent to hold the title of Chancellor—in a sense represent a comprehensive history of New York State jurisprudence.

Footnote 3: Francis Bergan, *The History of the New York Court of Appeals 1847- 1932*, at 11 (1985).

I. Kent's Beginnings

James Kent was born near Albany on July 31, 1763, the son of Moss Kent, Surrogate of Renesselaer County.^[4] Like his father^[5] and grandfather,^[6] Kent studied at Yale College, graduating in 1781. As he explained, "I stood as well as any in my class, but the test of scholarship at that day was contemptible. I was only a very inferior classical scholar, & we were not required, & to this day I have never looked into a Greek book but the New Testament."^[7] Kent was actually among the earliest members of Yale's Phi Beta Kappa chapter,^[8] no mean achievement in a class that included several future members of Congress, two United States senators, a minister to Europe, chief justices of Vermont and Connecticut, and three governors of Connecticut.^[9]

Kent traced his interest in law to his independent study of the fourth volume of Blackstone's Commentaries, which he read during periods when Yale classes were suspended due to the Revolutionary War.^[10] He devoted himself to mastering that learned treatise before hostilities in the area subsided and classes resumed.^[11]

There were no professional law schools at the time,^[12] so would-be law students had to "seek out some lawyer of more or less distinction, pay him a fee of perhaps two hundred dollars, and sit patiently at his feet to pick up such scraps of information as the great man in his moments of indulgence might casually let fall."^[13] Fortunately for Kent, his father introduced him to Egbert Benson, with whom he took up the study of law in 1781.^[14] Benson, New York's first Attorney General and later a Puisne (Associate) Justice of the New York Supreme Court,^[15] was at that time an acknowledged leader of the bar with many apprentices.^[16] Under Benson's tutelage, Kent blossomed. After admission to the bar in 1785, he began a law practice in Poughkeepsie with Gilbert Livingston.

Kent's practice—centered on debt cases—did not long hold his interest.^[17] He plainly preferred jurisprudence to jousting.^[18] In 1790, he left his practice to join the state legislature. Kent's position as Dutchess County representative allowed him to travel to New York City, where he was well received by such notable figures as Governor Clinton, Chancellor Livingston, and then-United States Supreme Court Chief Justice John Jay.^[19] He was even lobbied, unsuccessfully, by Attorney General Aaron Burr,^[20] who sought election to the United States Senate and needed the support of New York legislators.^[21] After his own re-election to the New York Assembly as a Federalist in 1792, Kent lent his support to Jay's unsuccessful effort to unseat Governor Clinton in a controversial election.^[22]

Following his own failure to win a seat in the fledgling House of Representatives, Kent moved to New York City, where he was appointed Professor of Law at Columbia College, an undergraduate liberal arts college.^[23] Kent had come highly recommended by Jay and others.^[24] Speaking of his own law lectures, Kent noted:

I read a course in 1794 & 5 to about 40 gentlemen of the first rank in the City. They were very well received, but I have long since discovered them to have been slight & trashy productions. I

wanted Judicial labors to teach me precision. I dropped the course after one term ^[25]

Kent's disparaging description of his own lectures belies their significance, as his introductory lecture on November 17, 1794 indicates:

This power in the judicial, of determining the constitutionality of laws, is necessary to preserve the equilibrium of the government, and prevent usurpations of one part upon another; and of all the parts of government, the legislative body is by far the most impetuous and powerful But the judicial power is the weakest of all, and as it is equally necessary to be preserved entire, it ought not in sound theory to be left naked without any constitutional means of defence. ^[26]

Support for judicial review is hardly noteworthy in itself, but consider that this lecture was delivered by a contemporary of the Framers of the United States Constitution, nearly a decade before *Marbury v. Madison* ^[27] and four years before Kent himself became a judge!

Kent's attempts to teach law at Columbia ultimately proved frustrating and unsuccessful, as they did for his contemporaries at other schools. ^[28] Perhaps the lectures were too complex for a liberal arts student, or perhaps the world was not yet ready for formal legal education at an undergraduate level. Only two students attended Kent's lectures during the second year and none enrolled in the third year. ^[29] In 1797, the Trustees would not accept Kent's resignation; instead they conferred a Doctorate of Laws on him. ^[30] It was only in 1798, when then-Governor Jay appointed Kent to the Supreme Court, ^[31] that Columbia College permitted its first professor of law to leave. ^[32]

Footnote 4: See 1 *The Legal and Judicial History of New York* 332 (Alden Chester ed., 1911).

Footnote 5: See Macgrane Coxe, *Chancellor Kent at Yale* (pt. 1), 17 *Yale L.J.* 311, 311 (1908). For an account of a number of letters exchanged between James Kent and his father while the former was at Yale, see *id.* at 322-25. For a range of Kent's correspondence in his later years, see Carson, *supra* note 1, at 663-70.

Footnote 6: See John Theodore Horton, *James Kent: A Study in Conservatism 1763- 1847*, at 7 (1969).

Footnote 7: Letter from James Kent to Thomas Washington, Esq. (Oct. 6, 1828), in James Kent, *An American Law Student of a Hundred Years Ago*, 2 *Am. L. Sch. Rev.* 547, 548 (1911).

Footnote 8: See John B. Cassoday, *James Kent and Joseph Story*, 12 *Yale L.J.* 146, 146 (1903).

Footnote 9: See Horton, *supra* note 6, at 320; see also Coxe, *supra* note 5, at 334-35 (listing Kent's classmates and their accomplishments).

Footnote 10: See Kent, *supra* note 7, at 548. Yale was so disrupted, according to Kent, that it was "not open and in regular exercise more than half the usual time" during his years there. See James Kent, *An Address Delivered at New Haven Before the Phi Beta Kappa Society, September 13, 1831*, at 41 (New Haven, Hezekiah Howe 1831) [hereinafter *Phi Beta Kappa Address*]. Kent, in fact, witnessed the British troops in the act of landing on the shores of West Haven on the morning of July 5, 1779. See *id.* at 40 n*

Footnote 11: See Horton, *supra* note 6, at 21-22; Kent, *supra* note 7, at 548. Kent's interest may also have been stimulated by the 1781 graduation address given by President Stiles of Yale, who suggested that students should make a study of the law from Roman law to the present and prophesizing that if they did, "There shall arise from our midst a great juristic genius.... With an acumen worthy of Trebonian, with the strength and keenness of the highest talent, with the authority of a vast erudition, he shall give form and system to our laws." ' Horton, *supra* note 6, at 29-30 (quoting Ezra Stiles, President of Yale).

Footnote 12: See Horton, *supra* note 6, at 32.

Footnote 13: *Id.* Of the few legal texts in the colonies, most were taken by lawyers, the vast majority of whom were Tories, as they fled the new post- revolutionary American government. See *id.* at 32-33.

Footnote 14: See Coxe, *supra* note 5, at 329-30.

Footnote 15: See 1 *The Legal and Judicial History of New York*, *supra* note 4, at 371. Benson was a New York Supreme Court Justice in 1798 when two of his former students, Kent and Jacob Radcliffe, were appointed to join him. See Horton, *supra* note 6, at 112; 1 *The Legal and Judicial History of New York*, *supra* note 4, at 371. Kent had an equivalent pleasure some years later, when two of his former pupils—William W. Van Ness and Smith Thompson—joined him as members of his court. See Horton, *supra* note 6, at 150.

Footnote 16: See 1 *The Legal and Judicial History of New York*, *supra* note 4, at 332-33.

Footnote 17: While Kent's practice allowed him to support himself, it was otherwise unexciting. See Horton, *supra* note 6, at 52. Among the collection of Kent's papers archived at the New York State Library, there is this gem: a letter from Kent to a Citizen Genet concerning his representation of Genet in a suit filed by one Cornelius Read for the loss of a vessel due to clumsiness of the skipper. Kent's advice was as follows:

I conclude his claim can be supported in law. I have thought it however due to your character to give you previous information of Mr. Read's Intention as you may possibly have no objection to accommodate with Mr. Read on terms satisfactory to you both, or else to leave the claim to the immediate decision of two or three indifferent men to be chosen mutually between you.

Letter from James Kent to Citizen Genet (July 7, 1795) (on file with the New York State Library, Manuscripts and Special Collections, Accession No. 20231).

Footnote 18: See John F. Dillon, *Chancellor Kent: Concerning Erection of A Monument to His Memory*, 3 *Colum. L. Rev.* 257, 259 (1903). "[Kent] was not fond of the contentions of the Bar, but he never wearied in the study and contemplation of the writings and labors of lawyers and judges of different countries, ancient or modern." *Id.* Indeed, he relished the opportunity to set aside his practice in 1796 when he was appointed a Master in Chancery. See Carson, *supra* note 1, at 664. That position involved responsibilities similar to that of a special referee, as is revealed by a Master's Report prepared by Kent in a case where Alexander Hamilton and Robert Morris were defendants, and Kent fixed the amount of principal and interest due on a bond. See *id.* Kent commented:

"[Being a Master in Chancery] 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. My diffidence, or perhaps pride, was the principal cause of this disgust, since I found that I had not the requisite talents for a popular and shining advocate at the Bar."

Id. (quoting James Kent)

The public's lack of respect for lawyers—hardly unfamiliar to us today—may also have been a factor in Kent's career change. See Horton, *supra* note 6, at 37-38. Indeed, one satirist contemporary of Kent's drew up a mock code of behavior for young advocates "advising them to discard all modesty, and, assuming impudence, thrust themselves forward in the courts, brow-beat witnesses, insult their adversaries at bar, and take a lofty tone to the bench itself." *Id.* at 40.

Footnote 19: Jay and Kent crossed paths many times, with Jay playing a significant role in Kent becoming a professor at Columbia and then an Associate Justice of the State Supreme Court. Jay was the first Chief Justice of the New York State Supreme Court from 1777 to 1779. See 1 *The Legal and Judicial History of New York*, *supra* note 4, at 371. After serving the United States as Minister to Spain and Secretary of Foreign Affairs, Jay was named the first Chief Justice of the United States Supreme Court in 1790 by George Washington. See G. Edward White, *The American Judicial Tradition* 8 (expanded ed. 1988). After an unsuccessful attempt in 1792, Jay was elected Governor of New York in 1795 and resigned as Chief Justice. See 1 Charles Z. Lincoln, *The Constitutional History of New York* 599-600 (1906).

Footnote 20: See Carson, *supra* note 1, at 664. Kent grew to hate Burr; indeed, encountering Burr on Nassau Street some years later, Kent shook his cane in Burr's face and blurted out, "'You are a scoundrel sir!—a scoundrel!'" Cassoday, *supra* note 8, at 152 (quoting James Kent). Burr allegedly bowed, raised his hat, and replied that "'[t]he opinions of the learned Chancellor [of New York] are always entitled to the highest consideration.'" *Id.* (quoting Aaron Burr).

Footnote 21: See Horton, *supra* note 6, at 62.

Footnote 22: See 1 *The Legal and Judicial History of New York*, *supra* note 4, at 333. For greater detail on the controversy surrounding the election and Kent's unsuccessful attempts to right matters, see Horton, *supra* note 6, at 68-73.

Footnote 23: See Carson, *supra* note 1, at 663. Columbia's Law School was originally housed in a building named for Kent. Indeed, Kent Hall still stands on 116th Street off Amsterdam Avenue, where it now serves undergraduates. At present-day Columbia Law School, a handful of students in each year with the highest grade-point average are designated "Kent Scholars."

Footnote 24: See *id.*; see also *supra* note 19.

Footnote 25: Kent, *supra* note 7, at 550.

Footnote 26: James Kent, *An Introductory Lecture to a Course of Law Lectures* (1794), reprinted in 3 *Colum. L. Rev.* 330, 337 (1903) (footnote omitted). The subject of the lecture—the interplay between liberal arts and legal education—offers strong reasons for lawyers to have a broad educational background as well as for the lay public to have at least a rudimentary understanding of the legal system. See *id.*

Footnote 27: 5 U.S. (1 Cranch) 137 (1803). An 1835 letter describes an encounter between Kent and Chief Justice Marshall while the latter was in failing health and spirits. See Letter from James Kent to J. Meredith, Esq. (May 22, 1835), in Carson, *supra* note 1, at 667. Kent had, three years earlier, turned down the opportunity to write a "memoir" of the life of the Chief Justice. See Letter from James Kent to James Heoving (Feb. 28, 1832), in *id.*

Footnote 28: See Horton, *supra* note 6, at 95 (recounting the failures of Judge Parker at Harvard and Judge Wilson at the College of Philadelphia). Kent had other distractions: Jay, who finally became Governor in mid-1795, appointed him Master of Chancery early in 1796. See *supra* note 18. Within a year, Jay appointed Kent

Recorder of the City of New York, a prestigious position at the New York Court of Common Pleas, and urged Kent to hold both positions simultaneously. See Horton, *supra* note 6, at 110-11.

Footnote 29: See Macgrane Coxe, Chancellor Kent at Yale (pt. 2), 17 Yale L.J. 553, 562 (1908); see also William Kent, *Memoirs and Letters of James Kent* 76 (1898).

Footnote 30: See Horton, *supra* note 6, at 95-96.

Footnote 31: Kent would later recount:

"This [appointment] was the grand object of my ambition for several years past. It appeared to me to be the true situation for the display of my knowledge, talents and virtue, the happy means of placing me beyond the crowd and pestilence of the city, of giving me opportunities to travel and to follow literary pursuits...."

J. Hampden Dougherty, 2 *The Legal and Judicial History of New York* 114 n. 2 (1911) (quoting James Kent).

Footnote 32: See Horton, *supra* note 6, at 95.

II. Kent on the State Supreme Court

The New York State Supreme Court was the predecessor of today's high court, the Court of Appeals, which was established in 1847.^[33] Indeed, one of the last Associate Justices named to the Supreme Court in 1845, Freeborn G. Jewett, would only two years later become the first Chief Judge of the Court of Appeals on its formation.^[34] The court Kent joined had only five Justices (rather than the seven Court of Appeals Judges today), and they sat en banc to hear cases in three locations: Albany, Utica, and New York City.^[35] They were also required to sit in the constitutionally-defined circuits, which for Kent meant extensive, arduous travel throughout the state.^[36]

Kent's primary contribution as a Supreme Court Justice came not from any particular decision—although he authored many note worthy opinions^[37]—but rather from a far more fundamental innovation: he introduced to New York the custom of writing opinions on significant matters and collecting them in official, state-sponsored reporters.^[38] As Kent later explained: "When I came to the bench there were no reports or state precedents. The opinions from the bench were delivered ore tenus. We had no law of our own & nobody knew what it was."^[39] Indeed, one searches in vain for a reported decision by Kent's most distinguished contemporaries—such as John Jay, Chancellor Livingston, or Chancellor Lansing.^[40] Moreover, although the situation had improved from Kent's student days, still there were few quality legal treatises. Practitioners of Kent's era could consult Kyd on Bills of Exchange and Promissory Notes or Fitzherbert's *Natura Brevium*, but legal publishing, like the United States itself, was still in its infancy.^[41] As Kent explained:

I could generally put my Brethern to rout & carry my point by mysterious want of French and civil law. The Judges were republicans & very kindly disposed to everything that was French, and this enabled me without exciting any alarm or jealousy, to make free use of such authorities & thereby enrich our commercial law.^[42]

Kent's practice caught on almost as a matter of self-defense—his opinions, filled with citations, forced his colleagues to follow suit or seem ignorant, unprepared, or lazy.^[43] As Kent would later write, "This was the commencement of a new plan, & then was laid the first stone in the subsequently erected temple of our jurisprudence."^[44]

In 1804, George Caines became the state's first official reporter.^[45] Caines' first volume of reports (1 New York Cases in Error)—largely procedure and property cases—left a good deal to be desired. Indexed under "Distress," for example, is "Insurance"; "Robbery" refers the reader to "Executor."^[46] Kent apparently did not have a high opinion of the author of the first official reporter, who Kent described as the "profligate Caines."^[47] As the number of written decisions grew, Kent replaced Caines with his friend William Johnson.^[48]

One of the earliest reported decisions, written by Kent himself, shows the value of enduring written decisions. In *People v. Croswell*,^[49] the defendant was indicted for libel of President Thomas Jefferson. Kent's decision expressed the view, consistent with the common law in the days before the Star Chamber and espoused by

defense counsel Alexander Hamilton,^[50] that the liberty of the press includes a defense of truth to a libel charge. Put differently, the truth should be received into evidence and the jury should judge both the facts and the law.

^[51] By April 6, 1805, Kent's decision had been codified by the legislature and sixteen years later was made part of the New York State Constitution.^[52]

Kent's skill at turning out opinions also had some unintended consequences. As he later lamented:

I gradually acquired preponderating influence with my brethren, & the volumes in Johnson after I became Ch. J in 1804 show it. The first practice was for each judge to give his portion of opinions when we all agreed, but that gradually fell off, but for the two or three last years before I left the bench, I gave the most of them. I remember that in 8th Johnson all the opinions one Term are per curiam. The fact is I wrote them all, & proposed that course to avoid existing jealousy & many a per curiam opinion was so inserted for that reason.^[53]

Although Kent seemed the obvious choice to succeed New York Chief Justice Morgan Lewis when he resigned to run for governor, that appointment presented an interesting wrinkle. Lewis was a strong anti-Federalist, while Kent was an impassioned Federalist.

The story is that on the eve of the election these two gentlemen met and fell into a discussion of the probable result of the election. In the course of the conversation Lewis said to Kent: "Judge Kent, if you will vote for me I will make you Chief Justice if I am elected Governor," to which Kent, recognizing, of course, the true spirit of the remark, promptly replied, "No, sir, personally I admire and respect your character and attainments; but I utterly detest your political principles!" Judge Lewis was elected, and one of his first acts as Governor was the appointment of Judge Kent to be Chief Justice. Would that more of this spirit in judicial appointments by the Executive might be abroad among us at this time!^[54]

Kent's many opinions in his sixteen years as a member of the New York Supreme Court reflect great respect for the English common law, which he incorporated into the burgeoning law of New York and the United States. The combination of his own efforts and the nationwide emergence of the reported decision justify calling Kent the father of American commercial law:

Here questions arose with references to voyages from the Caribbean to the China Sea, and they involved all the principal heads and title of commercial law—bills and notes, charter-parties, bottomry, partnerships, freight, marine insurance. To each question, Kent devoted patient care, and ere he retired from the court a fairly complete code of commercial law had been elaborated. Through this useful achievement the course of trade was smoothed and accelerated as known rules dispelled perplexities and doubts. It was an achievement which won distinction for the Chief Justice and caused his admirers to compare him with Lord Mansfield.^[55]

Footnote 33: "A complete and systematic outline of the Court of Appeals of the State of New York must be traced from the gradual extension of the appellate jurisdiction of the Supreme Court, of which it is the legal emanation." Henry W. Scott, *The Courts of the State of New York: Their History, Development and Jurisdiction* 273 (1909). Although it was the highest judicial tribunal, technically the Supreme Court was not New York's court of last resort. That role fell to the Court for the Trial of Impeachments and Correction of Errors (popularly known as the "Court of Errors"). See Julius J. Marke & Richard Sloane, *Legal Research and Law Library*

Management § 10.01, at 10-5 to 10-6 (revised ed. 1998). The Court of Errors consisted of the president of the state senate, the state senators, the Chancellor, and the Judges of the Supreme Court. See *id.* The Chancellor and Judges were allowed to explain decisions they issued, but were not allowed to vote. See *id.* The Court of Errors could be reversed only by the United States Supreme Court. See *id.*

Footnote 34: See 150th Anniversary of the Court of Appeals, Celebrated on the Steps of the Courthouse, 90 N. Y.2d vii, x (1998). As part of the Court of Appeals' 150th Anniversary celebration in September 1997, Edward Lewis Jewett, the great, great, great, great grandson of Chief Judge Jewett, spoke regarding "The Court, the Jewetts and 150 years." See *id.* at x-xiv.

Footnote 35: See 3 *The Legal and Judicial History of New York*, *supra* note 4, at 45-46. While my colleagues and I today have personal chambers spread throughout the state, we all convene in only one place—Court of Appeals Hall in Albany—in every month but July to hear and decide cases.

Footnote 36: "Judges literally brought the law to the people—a task filled with physical and intellectual obstacles. Circuit riding to county courthouses in back-country settlements was a lonely and arduous practice: time in transit—if the circuit was extensive—often matched time in court." White, *supra* note 19, at 43. Kent held 140 courts and tried 1755 cases in his 16 years of riding the circuits. See Dillon, *supra* note 18, at 261. For a letter demonstrating some of the difficulties of riding the Circuits, see Letter from James Kent to Doctor Morse (July 8, 1806), in Carson, *supra* note 1, at 665.

Footnote 37: For a digest of many of them, see Horton, *supra* note 6, at 152-96.

Footnote 38: See Kent, *supra* note 7, at 551; see also White, *supra* note 19, at 44-45. The practice apparently sprang up in other jurisdictions around the same time. For example, there were written decisions available from the United States Supreme Court as early as Dallas' reports in 1790. See Charles C. Soule, *The Lawyer's Reference Manual of Law Books and Citations* 8 (1884). Before William Cranch, who began publication of that court's decisions in 1804, the Supreme Court's work was not well known by the bar and even less so by the general public. See Elder Witt, *Congressional Quarterly's Guide to the U.S. Supreme Court* 9 (2d ed. 1990). Justice Story has been credited with bringing Supreme Court reports into the mainstream in a joint effort with Henry Wheaton, who was then the Supreme Court's official reporter. See White, *supra* note 19, at 44-45.

Footnote 39: Kent, *supra* note 7, at 551. Kent would later underscore the importance of written decisions in his *Commentaries on American Law*:

They are worthy of being studied even by scholars of taste and general literature, as being authentic memorials of the business and manners of the age in which they were composed. Law reports are dramatic in their plan and structure. They abound in pathetic incident, and displays of deep feeling. They are faithful records of those "little competitions, factions, and debates of mankind" that fill up the principal drama of human life; and which are engendered by the love of power, the appetite for wealth, the allurements of pleasure, the delusions of self-interest, the melancholy perversion of talent, and the machinations of fraud. They give us the skilful debates at the bar, and the elaborate opinions on the bench, delivered with the authority of oracular wisdom. They become deeply interesting, because they contain true portraits of the talents and learning of the sages of the law.

1 James Kent, *Commentaries on American Law* *496.

Footnote 40: See Dougherty, *supra* note 31, at 114 n. 2.

Footnote 41: See Horton, *supra* note 6, at 101, 120-22.

Footnote 42: Kent, *supra* note 7, at 551.

Footnote 43: See Horton, supra note 6, at 150-51.

Footnote 44: Kent, supra note 7, at 551.

Footnote 45: See 1 The Legal and Judicial History of New York, supra note 4, at 370. Coleman's Cases, published in 1801, collected practice cases decided in the Supreme Court from 1794 to 1800, but it was not until the appointment of Caines that there were official reports. See Marke & Sloane, supra note 33, § 10.01, at 10-4.

Footnote 46: See Albert M. Rosenblatt, The Foundations of the New York State Supreme Court (1691-1991): A Study in Sources, 63 N.Y. St. B.J. 10, 13 (1991).

Footnote 47: Horton, supra note 6, at 151 n. 85.

Footnote 48: See id. at 151. This began a long collaboration between the two. Johnson's Reports would, at the Constitutional Convention of 1821, be called "authority in every state from Maine to Florida." Id. at 151 n. 86; see also White, supra note 19, at 44-45 (noting praise for Johnson's Reports in Massachusetts and South Carolina).

Footnote 49: 3 Johns. Cas. 337 (N.Y. Sup. Ct. 1804).

Footnote 50: Kent was particularly impressed with Hamilton's advocacy, noting some years later that a more able and eloquent argument was perhaps never heard in any court. In closing his opinion, he adopted as perfectly correct, "the comprehensive and accurate definition of one of the counsel at the bar (General Hamilton) that the liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals." ' Dougherty, supra note 31, at 98 n. 7 (quoting James Kent). Decades later, Kent wrote of Hamilton, "If I were to select [a] case[] in which his varied powers were most strikingly displayed, it would be the case of *Le Guen v. Gouveneur and Kemble*." ' Judith S. Kaye, Commercial Litigation in New York State Courts, in 2 Commercial Litigation in New York State Courts 4 (Robert L. Haig ed., 1995) (quoting James Kent). That case involved what was at the time a complex commercial litigation and resulted in a \$120,000 verdict for Hamilton's client. See 1 Johns. Cas. 436 (N.Y. Sup. Ct. 1800); Kaye, supra, at 4.

Footnote 51: See Dougherty, supra note 31, at 97; Rosenblatt, supra note 46, at 13.

Footnote 52: See Dougherty, supra note 31, at 97-98; Rosenblatt, supra note 46, at 13.

Footnote 53: Kent, supra note 7, at 551. Kent's dominant role was well hidden, but not from all observers. Justice Story, attending the Court in New York during the May term of 1807, noted of the other judges, that they "interfered very little in the business of the court." ' Horton, supra note 6, at 149-50 (quoting Joseph Story). A review of volume 10 of Johnson's Reports reveals that Kent had 26 signed opinions, Thompson two, Spencer one (as well as a dissenting opinion), and the other Justices none. See id. at 150 n. 82. There were 152 per curiam decisions. See id. at 150. Fmore detailedailed breakdown of the earlier Johnson volumes, see id. at 149 n. 80.

Footnote 54: Coxe, supra note 29, at 558-59 (footnote omitted). Like the lack of public respect for lawyers, see supra note 18, concern over the politicization of judicial appointments also endures to the present day.

Footnote 55: Horton, supra note 6, at 157 (footnotes omitted). Kent himself remarked:

The value of the civil law is not to be found in questions which relate to the connection between the government and the people, or in provisions for personal security in criminal cases.... But upon subjects relating to private rights and personal contracts, and the duties which flow from them, there is no system of law in which principles are investigated with more good sense, or declared and enforced with more accurate and impartial justice.

1 Kent, *supra* note 39, at *547

III. Kent as Chancellor

Kent's reputation on the Supreme Court bench assured that he would not long remain there: those with the power to shape destinies had other plans for him. In 1814, the Council of Appointment unanimously elected him Chancellor of New York's Chancery Court—in a sense, his fourth career. The press hailed Kent's appointment to Chancellor,^[56] although he himself was more pessimistic:

The office I took with considerable reluctance. It had no claims. The person who left it was stupid, & it is a curious fact that for the nine years I was in that office, there was not a single decision, opinion or dictum of either of my two predecessors . . . from 1777 to 1814 cited to me or even suggested. I took the court as if it had been a new institution, & never before known to the U.S. I had nothing to guide me, & was left at liberty to assume all such English chancery powers and jurisdiction as I thought applicable under our constitution.^[57]

It is unclear why then-Chief Justice Kent accepted this appointment. One theory is that at age fifty, he was eager to settle in New York City and conclude his Circuit travels.^[58] He may simply have desired a new challenge worthy of his formidable talents or yearned for the opportunity to write scholarly opinions unencumbered by the views of other Judges.^[59]

Then too, equity jurisprudence, little known to the United States,^[60] was a greatly respected old friend of Kent's. He had studied the authoritative works of Britain's Pear Williams while in Poughkeepsie two decades earlier.^[61] Upon Kent's application in March 1794 for a chancery license—which was constitutionally required of attorneys practicing chancery law^[62]—Chancellor Livingston, apparently aware of Kent's reputation as well as of his familiarity with equity, insisted on admitting him to the practice without the customary examination.^[63] And, of course, in 1796 Governor Jay appointed him a Master in Chancery.^[64]

As was true of his Supreme Court years, Kent's lasting contribution as Chancellor is not tied to any particular decision,^[65] but rests more on three innovations. First, he introduced written opinions to the Chancery Court. One of Kent's first acts as Chancellor was to secure the passage of a statute providing for a Chancery Court reporter, and he installed William Johnson in that position.^[66] Second, as head of New York's equity system, Kent helped to demystify its operation and open its courts. Kent would later write: "I opened the gates of the court immediately, & admitted almost gratuitously the first year 85 counsellors, though I found there had not been but 13 admitted for 13 years before. Business flowed in with a rapid tide. The result appears in the seven volumes of Johnson's Ch. reports."^[67]

Kent's letters provide a snapshot of how, as Chancellor, he went about deciding cases:

My practice was first to make myself perfectly & accurately (mathematically accurately) master of the facts. It was done by abridging the bill, and then the answers and then the dispositions, & by the time I had done this slow tedious process I was master of the cause & ready to decide it. I saw where justice lay and the moral sense decided the cause half the time, & I then set down to search the authorities until I had exhausted my books, & I might once & a while be embarrassed by a

technical rule, but I most always found principles suited to my views of the case, & my object was to discuss a point as never to be teased with it again, & to anticipate an angry & vexatious appeal to a popular tribune by disappointed counsel.^[68]

Finally, Kent's writings and decisions helped to bring together a disjointed body of jurisprudence and gave stability to a branch of law that had previously seemed to depend more on the individual judge than on principles and precedent. Justice Story, who had criticized American equity judges for relying on their own sense of right and wrong, no doubt had Kent in mind when he suggested that there were a few exceptional judges who showed proper respect for precedent and whose examples should be followed.^[69]

In his opinions, Kent again remained true to precedents.^[70] Although often entreated to reach a results-oriented decision, he refused to do so.^[71] Indeed, in one well-known case, Kent remarked, "I should not feel myself at liberty to say, as that case does 'so far as I can go, I shall blot it out forever.' It is the province of the legislative and not of the judicial power to change the law."^[72] Nor did it matter to him that the precedents arose from England, after the Revolutionary War.^[73]

Reliance on English precedent was not for the faint-hearted. The memory of recent conflict with the British made citation of English law unpopular.^[74] However, the theories of the English Chancellors, and Kent's ability to weave them into persuasive decisions, won widespread respect within the legal profession.^[75] It also prompted a number of other states to follow New York in forsaking a result-oriented approach to equity in favor of following English jurisprudence.^[76]

In short, there can be no doubt why one legal journal opined that "[t]he chancery law of the United States may be said to have commenced with [him.]"^[77] Recognizing Kent's wide-ranging efforts, Justice Story said of him:

"It required such a man with such a mind, at once liberal, comprehensive, exact and methodical; always reverencing authorities and bound by decisions; true to the spirit yet more true to the letter of the law; pursuing principles with a severe and scrupulous logic, yet blending with them the most persuasive equity; it required such a man, with such a mind, to unfold the doctrines of chancery in our country and to settle them upon immovable foundations."^[78]

Footnote 56: "The super-eminent talents, the indefatigable industry and stern impartiality which for so many years have distinguished the presiding judge, will continue to exhibit themselves with equal lustre in the Chancellor." ' Horton, *supra* note 6, at 199 n. 8 (quoting N.Y. Evening Post, Feb. 26, 1814).

Footnote 57: Kent, *supra* note 7, at 552 (footnote omitted); see also Horton, *supra* note 6, at 199-200 ("[T]he closing years of the eighteenth, the opening decade of the nineteenth century found chancery doctrines but little understood, the remedies of chancery but infrequently resorted to, and the decisions in chancery causes usually delivered, as those in law had once been delivered, orally and upon the basis of casual and imperfect investigations.").

Footnote 58: See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 *Colum. L. Rev.*

547, 564 (1993). For discussion of Kent's duties in the circuit courts, see Horton, *supra* note 6, at 123-39; and *supra* note 36.

Footnote 59: See *supra* note 53.

Footnote 60: The concept of equity jurisprudence and its relationship to law may not be well understood today either, as the two concepts have long since merged. As explained by one of Kent's biographers:

The difference between these types of jurisprudence had developed at a distant age in the annals of England, where the remedies at law, confined to the recovery of land, of chattels or of money, had become fixed in number, rigid in form and quite inadequate to the needs of justice. To invent novel remedies the judges had displayed a curious reluctance, so that suitors, often failing to obtain satisfaction in their tribunals, had had but one remaining hope for redress, a recourse to the King himself. His Majesty adopted the convenient practice of turning over their causes to the scrutiny and determination of his chancellor.

Horton, *supra* note 6, at 201; see also *id.* at 202-03.

Footnote 61: See *id.* at 200; Kent, *supra* note 7, at 552.

Footnote 62: See N.Y. Const. of 1777, art. XXVII, reprinted in 1 Lincoln, *supra* note 19, at 179-80.

Footnote 63: See Horton, *supra* note 6, at 99. Kent's first equity case as an advocate, a victory in dissolving an injunction, resulted from a contact he had made on the day of his admission. See *id.*

Footnote 64: See Kent, *supra* note 7, at 550. Kent was surprised to learn that he had beaten 16 other applicants for that position. See Carson, *supra* note 1, at 664; Kent, *supra* note 7, at 550; see also *supra* note 18.

Footnote 65: Kent's equity decisions fill seven volumes of Johnson's Chancery Reports. For a thorough digest and discussion of a number of these decisions, see Horton, *supra* note 6, at 204-27.

Footnote 66: See 1 The Legal and Judicial History of New York, *supra* note 4, at 333.

Footnote 67: Kent, *supra* note 7, at 552.

Footnote 68: *Id.* (footnote omitted).

Footnote 69: See Horton, *supra* note 6, at 203-04.

Footnote 70: This did not prevent Kent from at times being reversed by the Court of Errors, see *supra* note 33, much to his frustration. Indeed, after one string of overturned cases, he wrote to Johnson:

"I am discouraged and heartbroken. The judges have prevailed on the Court of Errors to reverse all my best decisions.... After such devastation what courage ought I have to study and write elaborate opinions? I have never felt more disgusted with the judges in all my life, and I expressed myself to Judge Platt in a way to mortify and offend him. According to my present feelings and sentiments, I will never consent to publish another opinion, and I have taken and removed out of sight and out of my office into another room my three volumes of Chancery Reports. They were too fearful when standing before my eyes."

Marke & Sloane, *supra* note 33, § 10.01, at 10-5 to 10-6 (quoting Letter from James Kent to William Johnson (1820)).

Footnote 71: See Horton, supra note 6, at 207-08.

Footnote 72: Manning v. Manning, 1 Johns. Ch. 527, 537 (N.Y. Ch. 1815).

Footnote 73: See Horton, supra note 6, at 209-13 (noting, among others, Cumberland v. Codrington, 3 Johns. Ch. 229 (N.Y. Ch. 1817)).

Footnote 74: See id. at 211.

Footnote 75: Even though Chief Justice Marshall overruled a Kent decision in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), for example, he felt compelled to praise the Chancellor nonetheless. See White, supra note 19, at 39. For a detailed discussion of the procedural history of the case, see Lock. Rev. Cas. 107-12 (1848).

Footnote 76: See Horton, supra note 6, at 211.

Footnote 77: Id. at 211-12 (internal quotation omitted).

Footnote 78: Coxe, supra note 29, at 560 (quoting Joseph Story).

IV. Kent's Other Contributions

In a day when judges played a far greater role in government, Kent lent his time and intellect to a wide range of endeavors beyond the bench. He sat on the Council of Revision—a remarkable body consisting of the Governor and the judiciary, with power to veto acts of the legislature.^[79] Earlier, at the direction of the legislature in 1801, he and colleague Jacob Radcliff collected and revised the earliest statutes—the Colonial Laws of New York—which had by then become an integral part of state law.^[80]

Kent also was frequently called upon by the governor for advice. In 1813, for example, Kent wrote to then-Governor Daniel D. Tompkins discussing the reasons why he believed the State of New York had no jurisdiction in matters concerning Indians on reservations. The case involved the state's apprehension of a member of the Onieda tribe for the murder of a fellow member of the tribe. Kent recommended that the detainee be released unconditionally.^[81]

Chancellor Kent also served as a delegate to the 1821 New York State Constitutional Convention,^[82] which accomplished many reforms, including extending suffrage, strengthening the executive power, and reorganizing the court system.^[83] Kent bitterly opposed enlarging the franchise—he and other prominent jurists such as then-Chief Justice Ambrose Spencer sought to limit voters for the state senate to the landed interest. In his words:

"I wish those who have an interest in the soil, to retain the exclusive possession of a branch in the legislature . . . I wish them always to be enabled to say that their freeholds cannot be taxed without their consent. The men of no property, together with the crowds of dependents connected with great manufacturing and commercial establishments, and the motley and undefinable population of crowded ports, may, perhaps, at some future day, under skillful management, predominate in the assembly; and yet we should be perfectly safe if no laws could pass without the free consent of the owners of the soil. That security we at present enjoy; and it is that security which I wish to retain."^[84]

Despite such opposition, the measure passed overwhelmingly, 100-19.^[85]

On the other hand, Kent was successful in resisting abolition of separate chancery courts—a measure that passed in the next New York Constitutional Convention.^[86] In speaking out against abolishing the Court of Chancery, Kent noted the advantages that followed from a separate equity tribunal and the difficulties that would follow from placing its powers in the hands of the common law courts. "The Court of Chancery," Kent said, "has become too deeply incorporated in our institutions and jurisprudence to be now destroyed as an independent jurisdiction without the utmost inconvenience and hazard."^[87] To his great relief, the measure was defeated.

Ironically, one reform that Kent and the Convention did not implement was to extend—from sixty—the mandatory retirement age for judges.^[88] As a result, Kent was forced to resign as Chancellor just two years later on July 31, 1823.^[89] Kent himself did not resist retirement, but later referred to it as the beginning of a "solemn era in my life."^[90] The reaction from the bar was far less reserved:

His retirement was contemplated by members of the bar with the deepest concern. Those residing in the city of New York appointed a committee to prepare an address on the occasion; this was adopted, and the committee was requested to transmit the report to him at Albany. The address was signed by all the leading lawyers of the city, and expressed their regret that his term of service had expired.^[91]

At a banquet held by fellow Yale alumni, the attendees raised their glasses to "The James Kent—with better machinery, greater force and greater safety than any other boat, yet constitutionally forbidden to take another trip."^[92]

Footnote 79: That two separate branches of government would work together to override the acts of the third branch raised separation of powers concerns, among many, ultimately leading to the Council's dissolution after the 1821 Constitutional Convention, despite a vigorous defense by Kent and Chief Judge Ambrose Spencer. See Dougherty, *supra* note 31, at 83-84; 1 Lincoln, *supra* note 19, at 743-46; see also *supra* note 33 (discussing the senate and judiciary collaboration on the Court of Errors). The Council vetoed a total of 118 items in the 40 years of its existence. See Horton, *supra* note 6, at 233.

While the Council was still extant, Kent played an active role in seeking to veto an 1814 act that would have legalized privateering—allowing civilians to attack and prey on enemy vessels—by an association of five or more individuals and even granted them ordinary corporate powers in furtherance of doing so. See Dougherty, *supra* note 31, at 67. Kent's position was logically and morally sound—"The practice was liable to great disorder, and as its professed object was the plunder of private property for private gain, its tendency was to impair the public morals, to weaken the sense of right and wrong, and to nourish a spirit of lawless ferocity." *Id.* But, his position was highly unpopular. Privateering, after all, had been instrumental in bringing the War of 1812 to a successful close and was viewed by the public as a source of strength. Although the Council's rejection of the law created an uproar, and may have hastened the Council's demise, Kent himself was not singled out for criticism—no doubt due to the respect he had earned. See *id.* at 67-68. Here, again, we see analogues to contemporary problems.

Footnote 80: See Dougherty, *supra* note 31, at 41.

Footnote 81: See Letter from James Kent to Hon. Daniel D. Tompkins (Nov. 1, 1813) (on file with the New York State Library, Manuscripts and Special Collections, Accession No. 20231). Kent rendered several opinions, both as Chief Justice and as Chancellor, on the subject of Indian affairs. See 4 Lincoln, *supra* note 19, at 164-67 (discussing cases); see also 3 Kent, *supra* note 39, at *379-*400. Of course, even today, this is still a complex area of the law. See, e.g., *New York Ass'n of Convenience Stores v. Urbach*, 669 N.E.2d 902 (N.Y. 1998).

Footnote 82: For Kent's words at the time of the 1822 ratification of the amended New York Constitution, see 1 Lincoln, *supra* note 19, at 754-55.

Footnote 83: See Dougherty, *supra* note 31, at 83-84.

Footnote 84: *Id.* at 95 (quoting James Kent); see also 1 Lincoln, *supra* note 19, at 643-49 (recounting most of Kent's speech on suffrage).

Footnote 85: See Dougherty, *supra* note 31, at 95. Kent was consistent in his distrust of the electorate's ability to make an informed and capable decision. In a speech given to the Phi Beta Kappa Society in 1831, Kent called

for increased education of the masses, to avoid the evils of media influence on elections:

In an age, in which the periodical press has become immensely powerful, whether for good or for evil; and in a country in which the right of suffrage is almost universal, nothing can save us from the destructive effects of such tremendous agents, but the correctness and integrity of public opinion. That opinion is liable to be abused, deceived, and misled, and it requires the constant efforts of wise and good men, and the force of enlarged education, to enlighten the public judgment, and purify the public taste.

Phi Beta Kappa Address, *supra* note 10, at 20.

Many of Kent's personal letters, which are preserved and on file in the New York State Library's archives, contain expressions about the popular vote. See, e.g., Letter from James Kent to Hon. Ambrose Spencer (Apr. 18, 1845) (on file with the New York State Library, Manuscripts and Special Collections, Accession No. 20231); Letter from James Kent to Hon. James Hillshouse (June 3, 1830) (same).

Footnote 86: See 1 Lincoln, *supra* note 19, at 680-81. The Chancery Court survived the 1821 Convention, but was abolished in the Constitution of 1846. See 2 Lincoln, *supra* note 19, at 217.

Footnote 87: Horton, *supra* note 6, at 248 (quoting James Kent).

Footnote 88: The limitation had been placed by the Framers as a safeguard against the "senile infirmities" they had once experienced from Chief Justice Horsmanden. See Horton, *supra* note 6, at 250.

William Johnson, Kent's friend and state reporter, was among those expressing outright disbelief that the limitation on age had been continued:

"We might search in vain the history of mankind from the first institution of civil government to the formation of the Constitution of the State of New York for a similar limitation. It is opposed to the opinions of the greatest law-givers, statesmen and political writers in all those states and countries to which we are accustomed to look for the lights of wisdom and the lessons of experience. It is a satire on the intellect of the bar and a standing reproach to the discernment and integrity of those to whom is entrusted the power of appointment to office, for it is almost certain that one fit to be a judge at forty, will be equally if not more competent at sixty years of age."

Dougherty, *supra* note 31, at 113-14 (quoting William Johnson).

Footnote 89: See Horton, *supra* note 6, at 262. Johnson recorded the end of Kent's term with the simple statement at the end of his seventh volume of reports, "This day, the chancellor terminated his judicial labors, having heard and decided every case and motion brought before him." ' See *id.* (quoting William Johnson).

Footnote 90: Kent, *supra* note 7, at 552. One source tells of Kent, more than 80 years old, sitting astride a cherry tree branch on his New Jersey farm. When his son urged him to be cautious in descending, Kent replied, "My son, I am used to elevated stations, and know how and when to descend with dignity." ' White, *supra* note 19, at 38-39 (quoting James Kent).

Footnote 91: 1 The Legal and Judicial History of New York, *supra* note 4, at 334- 35.

Footnote 92: Horton, *supra* note 6, at 265.

V. Kent in Retirement

While many lamented Kent's departure from the bench, little could they have known that the Chancellor would live for another quarter-century^[93] and—only after his mandated retirement for age—make his most famous contribution, his Commentaries on American Law.

After shedding his robes, Kent returned to New York City and Columbia College. He did not initially intend to publish the law lectures he delivered there—Kent credits his son with convincing him to assemble his lectures into the Commentaries.^[94] In undertaking the colossal task of constructing these treatises, he had no true model. No existing work had ever sought to examine the American legal system as a whole. Authors had instead sought to speak to individual legal topics in treatises, and even those were few in number.^[95] Thus, Kent's four-volume work, which he would dedicate to his friend Johnson,^[96] was truly an ambitious project that would become the model for the texts we all rely on today.

There already being ample comment on the Commentaries,^[97] I will not dwell on that subject, but would note that the work was immediately celebrated. With each of the first five editions, all personally supervised by Kent,^[98] readers around the country hailed the Commentaries as a "Law Bible."^[99] As with most things in life, of course there were also dissenting voices. A young but soon-to-be-famous graduate of the Harvard Law School—Oliver Wendell Holmes—was asked to edit the twelfth edition, slated for 1873. "In a letter to John Norton Pomeroy [dated] May 22, 1872[,] Holmes commented: 'I . . . have to keep a civil tongue in my head while I am his [Kent's] valet—but his arrangement is chaotic—he has no general ideas except wrong ones and his treatment of special topics is often confused to the last degree.'"^[100]

As time-consuming as the Commentaries were, they were not the only professional tasks that filled Kent's "retirement" years. Upon his return to New York City, he resumed the practice of law, this time with clients including the most prominent members of the bar, who came to consult the oracle on Pine Street.^[101] The questions submitted to him were among the most novel facing jurists of his day. Daniel Webster, for example, asked Kent, in a January 21, 1830, letter, whether the consent of the Senate was necessary for the President's power of removal.^[102]

Sometimes, Kent's mail concerned weighty issues in another sense. For example, in a personal letter, Justice Story disclosed his misgivings about the future of the United States Supreme Court:

I think it will, & I fear, it must lose, that strong hold of the public confidence which it has hitherto been fortunate enough to secure—when we lost Ch. Justice Marshall we lost our great support, & our truest glory . . . Personally my Brethren are kind to me; & I have not the slightest reason to complain of any want of courtesy—or even of confidence—But I feel daily, that I am among them, without any of the cheering influences of former days—In short, I am sick at heart; & now go to the discharge of my judicial duties in the Supreme Court with a firm belief that the future cannot be as the past. There is much which I could say to you in a private conversation, which I do not, even in a confidential letter, as this is, I do not [sic] venture to write. But I could state facts to you, which would fully satis[fy] you, that you have not exaggerated to yourself [the] evils of the change.^[103]

