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Recommended Citation

77 Md. L. Rev. 712 (2018)

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**INTERPRETATION AS STATECRAFT:
CHANCELLOR KENT AND THE COLLABORATIVE
ERA OF AMERICAN STATUTORY INTERPRETATION**

FARAH PETERSON*

A fundamental institutional dilemma lies behind our debates over theories of statutory interpretation: what can judges do when lay legislatures, out of ignorance, inattention, or democratic zeal, enact statutes that threaten the working structure of specific areas of law or contravene deep-rooted rule of law principles? During the first decades of the nineteenth century, the question of what a judge could do to rein in a runaway legislature was particularly urgent because of the enormous amount of authority legislatures were given under the first American constitutions. In an overreaction to colonials' decades of experience with corrupt governors and judges who took their cues from their masters in London, the first state constitutions gave legislatures broad powers without practical limits. In many states, the legislative branches actually controlled the judicial branches through appointment and removal authority, the ability to change tenure length, and salary dependence. It wasn't long before many Americans regretted these original grants of authority.

Legislatures fell into popular disfavor after only a few years of incompetence and inconsistency, hated by both those who thought them too radical and redistributionist and those who thought them too firmly under the sway of the propertied few. As Jack Rakove observed, it took only "a decade of experience under the state constitutions to expose . . . that the abuse of legislative power was more ominous than arbitrary acts of the executive" and "that the true problem of rights was less to protect the ruled from their rulers than to defend minorities and individuals against factious popular majorities acting through government."¹ Some of the problematic legislation of those early days seemed to have been passed in bad faith, including *ex post facto* laws

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1. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 290 (1996).

and takings of property in patent violation of state constitutions.² But a lot of bad legislation was the result of simple incompetence—statutes written so confusingly they could not be executed, statutes that conflicted with each other, and statutes that added rights, duties, and causes of action in piecemeal fashion to preexisting laws. As a result, as Gordon S. Wood put it, Americans began to have “serious second thoughts about their earlier confidence in their popularly-elected legislatures and were beginning to reevaluate their former hostility to judicial power and discretion.”³

The result was a moment of opportunity for the judiciary. The late 1790s through the early 1820s saw a high point in what contemporaries called “equitable interpretation” of legislation—interpretation that allowed courts to mold statutes in conformity with common law precedent and background legal norms. When the problem of irresponsible legislation became central to late eighteenth-century politics and constitution making, equitable interpretation was the jurisprudential response. This period of judicial collaboration in the legislative process represents an important stage in early American legal development. It was a moment in which influential judges like James Kent of New York wrote statutory interpretation opinions as equal partners with their legislatures, rather than inhabiting the more expected (rhetorical) roles judges claim for themselves today, either as legislatures’ mechanical agents or dutiful disciplinarians.

Legal historians have paid little attention to statutes and statutory interpretation. The historiography is instead focused on the rise of a muscular judiciary willing to use the common law to shape society. In the 1950s, Willard Hurst thought up the paradigm that historians have been writing with and against ever since—the idea that American judges began to prioritize the “release of [productive] energy” over tried-and-true English precedent.⁴ Hurst’s thesis provides an organizing principle to explain American changes to property, contract, and labor law, as well as the law of corporations. In the 1970s, Morton Horwitz, a historian in dialogue with Hurst, took it a bit further, arguing that American judges were not just displaying a new cultural orientation toward their work, case-by-case (as Hurst’s description seemed to suggest), but rather, that judges saw themselves as social engineers.⁵ Horwitz quoted common law cases in which precedent gave way to concerns about economic efficiency and social welfare in order to show that “by 1820

2. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 409–23 (1969).

3. Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 791 (1999).

4. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 3–32 (1956).

5. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 2 (1977).

the process of common law decision making had taken on many of the qualities of legislation.”⁶

But in their focus on common law decision making, these historians have emphasized power *shifting*. The basic idea is that judges muscled in on legislative territory. This starts with the unexamined assumption that early American legislative and judicial branches had the same clearly defined roles as our modern institutions. What those historians did not discuss, and what is more telling than developments in the common law, is not power shifting between the legislative and judicial branches but power *sharing*, which is what we find when we look at Chancellor Kent’s generation of judges and their methods of statutory interpretation. In part because of those cultural shifts that led to what Hurst called the “release of energy” in common law jurisprudence, some nineteenth-century judges brought an aggressive new approach to statutory interpretation. Indeed, the 1800s through 1820s saw novel political and constitutional offices that formally blended what we would think of as judicial and legislative responsibilities.

That is not to say that equitable interpretation has gone unnoticed. Legal scholars have rediscovered equitable interpretation and debated its implications for modern theories of interpretation. Some members of the Legal Process School hailed what they saw as a model for their own era, finding in equitable interpretation an example of how purpose-driven interpretation could work within the American constitutional framework.⁷ But as this Article will discuss, while there is some resonance between the approach of the Legal Process scholars and Kent’s generation, the practical and constitutional differences between the America of the early nineteenth century and the America of the twentieth limit the extent of those similarities.

More recently, Bill Eskridge rediscovered the use of equitable interpretation in the post-ratification decades and held it up as a challenge to the textualist doctrine of modern formalists, a group whose members also tend to adhere to original meaning as a guide to jurisprudence.⁸ John Manning took

6. *Id.* Another historian in the same intellectual tradition explained, the legislative responsibility of lawyers and judges for establishing a rule of law was far more apparent than it [would be] in later years. It was as clear to laymen as it was to lawyers that the nature of American institutions, whether economic, social, or political, was largely to be determined by the judges.

Mark DeWolfe Howe, *The Creative Period in the Law of Massachusetts*, 69 PROC. MASS. HIST. SOC’Y 232, 237 (1947–1950).

7. *See, e.g.*, James McCauley Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 214–18 (1934); *see also* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400–01 (1950).

8. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1523–24 (1998).

up that challenge and argued that equitable interpretation was merely “a doctrinal artifact of an ancient English governmental structure, one that had blended governmental powers” and that had not “translate[d] well into a U.S. Constitution marked by separated powers.”⁹ After examining the “relatively few federal statutory cases . . . [in] the early volumes of case reports,” Manning found it “safe to say that the equity of the statute never gained a secure foothold.”¹⁰ Eskridge published a rejoinder, which read a wide range of early American legal sources, including the ratification debates and John Marshall’s jurisprudence, to embrace diverse interpretive tools, including equitable interpretation and a more contextual, text-based analysis of statutes than that approved by modern formalist doctrine.¹¹

I believe that both scholars missed the point. Busy grappling with the question of how early American judges reached across the divide between the judicial branch and the legislative, they did not stop to consider how that divide may have changed over the intervening two hundred years. Insofar as Manning explains equitable interpretation as the product of an English system in which “legislative and judicial functions merged” in a way that “minimize[d] the distinction between legislative and judicial functions,”¹² I show that, instead of the break from this heritage he finds by examining a limited set of purely federal sources, the mingling of legislative and judicial functions continued in important state jurisdictions. Manning’s observations that the federal Constitutional Convention rejected a Council of Revision, for example,¹³ and that the convention decided to “vest[] ultimate judicial authority in an independent Supreme Court, rather than in the upper house of the legislature”¹⁴ seem less significant when one considers that legislative high courts and councils of revision were not uncommon at the state level. The very conditions, therefore, that Manning agrees make it “fairly easy to see why [English] judges might also conceive of themselves as partners in making statute law more coherent and just” obtained at the state level in America during this formative period.¹⁵ Eskridge countered Manning with evidence

9. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 8 (2001).

10. *Id.* at 9.

11. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 995–98 (2001).

12. Manning, *supra* note 9, at 44, 46.

13. *Id.* at 59 n.237.

14. *Id.* at 60.

15. *Id.* at 46. For that matter, this Article also calls into question Justice Scalia’s reliance on Kent as an authoritative source for his formalist principles of interpretation. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 295 (2012) (introducing a canon of construction by citing James Kent’s use of it, while explaining that Kent was “one of the chief 19th-century expositors of American law”); see also *id.* at 252.

that judges frequently used equitable interpretation, but Eskridge didn't explore the more interesting question: what was a "judge" at that time? And what did Americans expect judges to do? As I will show, the fact that an early nineteenth-century judge used a particular methodology provides little authority to the modern judge—who may occupy a very different office—to behave the same way.

Furthermore, both Eskridge and Manning were looking for their evidence in the wrong place. There is, I think, very little the early federal reporters can teach us about the "original meaning" of judicial power. In a sense, federal courts were not even "courts" for much of this time. Their jurisdiction was tiny, and what jurisdiction they had was so freighted with non-legal pressure that their decisions provide little helpful data for understanding the development of statutory interpretation as a legal, rather than diplomatic, activity. Under their original 1789 Act,¹⁶ federal courts could hear cases in admiralty and cases dealing with citizens of different states, penalties and forfeitures under the laws of the United States, and the small number of federal crimes. They could not even hear all cases arising under the federal laws or Constitution. The Judiciary Act of 1801¹⁷ both increased the number of federal judges and expanded their jurisdiction, but outgoing Federalists had passed that Act primarily to pack the courts with their own appointees. The federal courts were thereby thrust into party politics and confirmed as dangerous havens for a partisan philosophy that quickly waned in influence. The Jeffersonians repealed the 1801 Act in 1802, and the federal courts' jurisdiction shrank again. Federal courts subsequently gained jurisdiction only in order to play highly unpopular and politically dangerous roles. For example, they received jurisdiction under a temporary provision after the War of 1812 so that federal tax collectors could remove their enforcement actions from state courts. They also gained jurisdiction under the 1832 Force Bill in order to allow for suits to enforce tariffs on secessionists in South Carolina. Again, they received jurisdiction under the 1850 Fugitive Slave Act to enforce slave owners' property rights in the North. In other words, lower federal courts' most important roles were as outposts of a foreign and resented power or as sites of diplomacy for states with opposing interests.

In short, if we want to know what Americans of the post-ratification era expected of their judiciary, we have to look at the states. That is why, in an Article that professes to discuss the most influential jurists of the first decades of the nineteenth century, I do not cite Chief Justice John Marshall once. This may seem strange if you believe, as Willard Hurst did, that "on the bench,

16. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. §§ 1330–1360 (2016)).

17. Judiciary Act of 1801, Ch. 4, §§ 1–7, 2 Stat. 89, 89–91 (repealed in 1802).

Marshall alone” exerted “individual influence” over the direction of legal change.¹⁸ Yet, looking at Marshall in the context of his time and not just as the genius of the present day, one sees that his vision for the nation had fewer and fewer adherents as his career went on. Justice Story kept his legacy alive, but Marshall needed the Union army to confirm his legacy.¹⁹ A jurisprudence that requires civil war to assert itself may have little value as a guide to the legal culture of the Antebellum past. And, quite simply, if one is looking for the history of statutory interpretation, Marshall’s Supreme Court is not where the main action takes place. In his own time and for the generation that followed, James Kent’s jurisdiction was more important to American law than John Marshall’s.

This Article concerns the first three decades of the nineteenth century and shows state judges in power-sharing arrangements with their legislatures. In the statutory interpretation cases I describe, judges work to incorporate statutes into existing background common law norms and precedents in ways that show a large degree of legislative power. Although these power-sharing arrangements were short-lived, the brief marriage of these two types of law-making created a powerful tool for framing American jurisprudence. And a review of how the great judges of the early nineteenth century saw their work shows, in turn, that the hard boundaries between branches of government, so central to the modern understanding of American constitutional structure, is a newer concept than is generally believed. The place that these judges claimed for themselves represents a lost world of republican governance—a way that republicanism could have worked, and did work for a time, before anything like the modern understanding of separation of powers achieved dominance.

This Article focuses on New York, which went the furthest of the states in blending branches of government, by establishing three institutional ways judges participated with legislators: first, a Council of Revision—made up of the judges of the New York Supreme Court, the chancellor, the governor, and the president of the Senate—empowered to veto legislation on policy or constitutional grounds; second, the Court for the Correction of Errors—the state’s highest court—made up of both senators and judges; and, finally, although this was not in its constitution, a practice of periodically commissioning judges to review and revise the accumulated body of legislation. New

18. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 17–18 (1950).

19. See R. Kent Newmyer, *Harvard Law School, New England Legal Culture, and the Antebellum Origins of American Jurisprudence*, in *THE CONSTITUTION AND AMERICAN LIFE* 154–75 (David Thelen ed., 1988).

York's high level of interrelation between the judicial and legislative functions of government was not typical of the new states and much of it ended with New York's Constitutional Convention of 1821. Short-lived and special as it was, however, New York's early system of government had an important impact on the legal development of all of the states. Historian Daniel Hulsebosch has shown that New York provided a "fount of legal ideas in the early Republic" and that its way of thinking about law and constitutions was "[i]ts most important cultural export."²⁰ New York's success at exporting a new legal culture was in part due to its status as a commercial and cultural hub and the center of great political debates, including one of the most important debates on ratification. But it was also in part because of the force of one particular New Yorker's written work. One could argue that the primary significance of New York's transitory and unique early constitution was that it was only in its context that James Kent, the great American Institutional²¹ and New York's famous Chancellor, could have emerged.

James Kent is remembered as a great judicial mind, and he was that. But he could also be called a great legislator. His contributions to revising New York's statutory code and his decades on New York's courts, carefully steering those statutes into legally coherent channels, exerted an enormous influence on the law of all the states. His work was not only some of the most admired but also the best publicized judicial writing in the country. When he was pushed out of office in 1821, Kent retired to write his *Commentaries*, which read in parts as a continuation of his work as a reviser and interpreter of statutes. Through the *Commentaries*, Kent's ideas on the proper interrelation of areas of legislative concern with the common law, and on the manner in which legislatures should proceed on subjects under their purview, formed the basis of the education of several generations of American lawyers.²²

As a result, Kent did much to answer the problem of legislation—the central dilemma of how to ensure that a democratically elected legislature, which included as many laymen as lawyers (and sometimes more), wrote laws in conformity with the system of laws that made a republic possible. He provided the direction required to guide American judges and legislators in

20. DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 1 (2005). So successful was this export that Hulsebosch credits New York's legal culture with "provid[ing] a glue of union," which endured in spite of the states' geographic distance and demographic diversity. *Id.* at 305.

21. See John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 592 (1993) (making the point that Kent's *Commentaries* should be seen as the last in the great tradition of Institutional writings).

22. See 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (Boston, Little, Brown & Company 1873) [hereinafter 1 KENT]; 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (Boston, Little, Brown & Company 1896) [hereinafter 2 KENT].

their quest for a government of laws, not men. Populists decried Kent's emphasis on erudition in all branches of government as classist and anti-democratic, and brought an end to his public career. But the work Kent did while on the bench and in New York's Council of Revision created the legal framework within which the broadly applicable public and administrative statutes of the later nineteenth century could flourish.

Kent was one of America's great judges, but his record shows such a diversity of offices and duties that it poses a challenge to the conventional understanding of what it means to be a judge. In this sense, Kent is representative of a small category, with perhaps a dozen members, of important early nineteenth-century jurists. Like George Wythe and Edmund Pendleton, Judges of the Virginia Supreme Court of Appeals, Kent collected and revised the statute law of his state²³ and then, as a judge, interpreted and applied those statutes. Just as Wythe did, Kent became a law professor while a judge, teaching and summarizing the law for new practitioners and, perhaps as a result, he showed a special concern for professional standards and often challenged and encouraged practitioners from the bench in a spirit of mentorship.²⁴ Like Nathaniel Chipman, Chief Judge of Vermont's Supreme Court, Kent served as a member of the Council of Revision of his state (in Vermont, the Council of Censors), a position that allowed him to review statutes for constitutionality before they became law.²⁵ Like Jeremiah Smith, Chief Justice of New Hampshire's Supreme Court, James Kent initiated the first publication and dissemination of judicial opinions in his state.²⁶ And like Zephaniah Swift, Chief Judge of Connecticut's Supreme Court, and Henry William De Saussure, Chancellor in South Carolina, James Kent published a commentary on the law of his state, which helped to systematize the law while also justifying Jeffersonian critics in their accusations that judges wanted the permanence and supremacy of a code for judge-made law.²⁷ These judges each had an outsized influence on the development and professionalization of the law of their states, garnering not only the accolades of

23. Thomas Jefferson explains this revision, and both Wythe's and Pendleton's parts in it, in 1 THOMAS JEFFERSON, *THE WRITINGS OF THOMAS JEFFERSON* 42–44 (Washington, D.C., Taylor & Maury 1853). See generally 1 DAVID JOHN MAYS, *EDMUND PENDLETON, 1721–1803: A BIOGRAPHY* (1952) (describing Pendleton's life and work).

24. For Wythe's teaching career, see IMOGENE E. BROWN, *AMERICAN ARISTIDES: A BIOGRAPHY OF GEORGE WYTHE* 220 (1981).

25. DANIEL CHIPMAN, *THE LIFE OF HON. NATHANIEL CHIPMAN, LL.D.* 153–55 (Boston, Charles C. Little & James Brown 1846).

26. JOHN PHILLIP REID, *CONTROLLING THE LAW: LEGAL POLITICS IN EARLY NATIONAL NEW HAMPSHIRE* 160–61 (2004) (recounting Smith's efforts to achieve publication of judicial opinions in New Hampshire).

27. 1 HENRY WILLIAM DESAUSSURE, *REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF CHANCERY OF THE STATE OF SOUTH-CAROLINA, FROM THE REVOLUTION TO DECEMBER, 1813, INCLUSIVE* (Columbia, Cline & Hines 1817); 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* (Windham, John Byrne 1795).

their contemporaries and immediate successors but also a place in American intellectual history. These are the judges that Karl Llewellyn spoke of when he celebrated what he called the “Grand Style” of early American opinion writing,²⁸ and their names are continually included in historians’ lists of the “great judges” of early American law—including, among others, Roscoe Pound’s list,²⁹ Lawrence Friedman’s,³⁰ and John Phillip Reid’s.³¹

I have not chosen to focus on Kent because he was perfectly representative of this group. He is not. While he shared with this cadre a sense that he stood as a guardian of the legislature and while each jurist took a broad view of his responsibilities to the people and the institutions of his state, in both of these characteristics, Kent was at an extreme. He was also privileged in that he worked in a jurisdiction where his efforts to professionalize the law were not politically contentious and under a constitution that allowed him to hold offices, at times simultaneously, granting him broad powers of mixed judicial and legislative character. I nevertheless focus on Kent because, as the most respected and the most productive of this first generation of eminent American judges, he became a Napoleonic figure in American law. He influenced the development of American jurisprudence in the generations that followed, not just in his own state but nation-wide. It was in large part because of his *Commentaries* and because of his opinions in New York’s *Johnson’s Reports* that this period, during which judges viewed themselves as collaborators with legislatures, had a lasting impact on American law.

I. STATUTES AND LAW IN THE EARLY REPUBLIC

In the years Kent served as Justice, Chief Justice, and then Chancellor of New York, many lawyers and judges felt that legislatures met only to create exceptions to rules and distribute favors to individuals. A glance at legislative session minutes shows why. Most statutes in the early republic were private bills rather than broadly applicable rules. When a town needed a new road or a debtor needed more time to pay his creditors, or even when the sheriff of a county needed more time to collect taxes, the legislatures would act on the individual case. Broad statutes setting forth standards—for divorce or fixing the circumstances under which a lottery could be held to raise money—did not yet dominate the business of legislation.³²

28. Llewellyn, *supra* note 7, at 396.

29. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 30–31 (reprint 1960) (1938).

30. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 88 (3d ed. 2005).

31. REID, *supra* note 26, at 7–8.

32. Even when legislatures did pass generally applicable statutes, they were often redundant or badly thought-out. As Chief Justice Jeremiah Smith of New Hampshire observed,

Today, a case turning on the interpretation of a statute is mainly concerned with discerning what the legislature intended. Not so in Kent's day. The prevalence of private bills created a certain wariness toward legislatures—a sense among professionals that legislative work should always be regarded with suspicion. “[Statutes] are of a political rather than a civil nature,” wrote Chief Justice Jeremiah Smith of New Hampshire. He continued,

Of those which prescribe rules of civil conduct to the citizens, rules for making and expounding contracts, principles of decision on the questions daily agitated in our courts of justice, the number is small; indeed, it may be a question, whether our system of jurisprudence would suffer an injury by their total repeal.³³

As another lawyer explained in 1809:

The common law, legislates by *principles*; the statute law, in *detail*. The former covers a multitude of cases, under a general rule, well digested; and explained, applied and universally known by a long practice. The latter, by attempting to provide for every particular case, and excluding every thing not expressly provided for, necessarily omits many cases, and would leave them destitute of any rule of decision, if the Judges had not the common law to fly to, to repair and supply the imperfect work of special legislation.³⁴

One finds this theme again and again in the words of early judges and lawyers: what legislatures of the time did was “not law.” Court decisions, which rested on principles rather than exceptions, were “law.” This, then, was the prevailing view among members of the elite bar and bench: legislatures were not in the practice of creating law, and they were not good at it.

This conviction clearly animated the period's most famous work of advocacy, Daniel Webster's argument in *Trustees of Dartmouth College v. Woodward*.³⁵ The controversy arose when New Hampshire tried to modify the terms of the Dartmouth College charter.³⁶ Webster argued that “the law of the land” did not permit a legislature to change the terms of a contract by fiat, and he explained:

No man acquainted with the common law . . . can look into our statute-book, and not see that the framers of the statutes, in many cases, were ignorant that the common law contained precisely the same provision; and in many cases, a provision different and better adapted to the wants of society.

Id. at 100.

33. *Id.* at 160.

34. JOSEPH HOPKINSON, *CONSIDERATIONS ON THE ABOLITION OF THE COMMON LAW IN THE UNITED STATES* 29 (Philadelphia, William P. Farrand & Co. 1809).

35. 17 U.S. (4 Wheat.) 518 (1819).

36. *Id.* at 539.

By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, [i.e., a statute] is not therefore to be considered the law of the land. If this were so . . . [t]here would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law or to administer the justice of the country.³⁷

The horrible of horrors that judges might sit only to execute the legislative will proved Webster's argument. So much for the deferential parsing of legislative intent!

Webster's *Dartmouth College* argument also revealed a particular vision of the role lawyers and judges played in the constitutional structure. If statutes could be called "the law of the land," Webster argued, "[s]uch a strange construction would render constitutional provisions of the highest importance completely inoperative and void."³⁸ It would empower assemblies to reverse convictions, summarily transfer property from one citizen to another, or pass bills of attainder, he said. Lawyers stood in the breach, interposing the Constitution between individual freedom and legislative tyranny.

Many lawyers described this part of their work as one of the prizes of national independence. In England, the people had "constitutional rights," but if Parliament overstepped its bounds, there was no power that could enforce those rights. This infirmity of the British system came sharply to the fore during the Stamp, Sugar, and Navigation Act crises in the lead-up to the Revolution. In the United States, by contrast, "the courts are always in fact *interfering* with the government!" bragged Richard Rush, a prominent Republican lawyer.³⁹ He continued:

Pass but an embargo law; pass but an act for the enlistment of minors; let the legislature venture to . . . touch with only the pressure of a hair the supposed rights of the citizen, and you will soon see what a storm will be raised about the ears of their supposed sovereign authority.⁴⁰

37. 1 DANIEL WEBSTER, SPEECHES AND FORENSIC ARGUMENTS 128 (Boston, Tappan, Whittemore & Mason 1843).

38. *Id.*

39. RICHARD RUSH, AMERICAN JURISPRUDENCE 11 (Washington, D.C. 1815).

40. *Id.*

In Rush's vivid metaphor, drawn from the War of 1812, the lawyer became the American defender against invasion. "The [*U.S.S. Constitution*] with captain Hull in her, did not come down upon the *Gurriere* in a spirit of more daring and triumphant energy than the Philadelphia or New York lawyers will sometimes do upon a statute that happens to run a little amiss!"⁴¹ The American lawyer's ability to challenge a statute marked a sharp difference between British and American jurisprudence, a "burst[] of intellectual and forensick rebellion . . . having [its] seat in the very soul of liberty."⁴²

Many judges, too, expected to "interfere" with government. Indeed, some judges found it difficult to see how legislatures could do their work without intervention. Vermont jurist Nathaniel Chipman explained, "[J]udges, from the nature of their official employment, are informed of the difficulties, which arise in the interpretation of the laws, and of those cases, in which they prove deficient, unequal, or unjust in their operation. Such information is highly necessary to the legislative body."⁴³ Poorly drafted, inconsistently publicized, and redundant statutes complicated the administration of justice, said St. George Tucker, and "render[ed] a complete acquaintance with the laws of this country, one of the most difficult of human acquirements."⁴⁴ Apart from these practical considerations, the threat of unconstitutional statutes was always present. Supreme Court Associate Justice James Wilson explained that although "provision has been made," in both the Pennsylvania state constitution and the federal Constitution, "to prevent or to check precipitancy and intemperance, in the exercise of the all-important power of legislation" yet there is "too much reason to apprehend that . . . the people, at once subjects and sovereigns . . . [will be] tempted to alleviate or to alter the restraints, which they have imposed upon themselves."⁴⁵ With these challenges in view, judges did not expect to remain passive. As Justice Wilson put it:

Far be it from me to avail myself of the abuse [of the legislative power], and to urge it against the enjoyment of freedom. But while I prize the inestimable blessing highly as I do, I surely ought, in every character which I bear, to suggest, to recommend, and to perform everything in my power, in order to guard its enjoyment from abuse.⁴⁶

41. *Id.* at 13 (emphasis added).

42. *Id.*

43. NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT 126 (Rutland, J. Lyon 1793).

44. ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 11 (1999).

45. 2 JAMES WILSON, THE WORKS OF JAMES WILSON 55 (Chicago, Callaghan & Company 1896).

46. *Id.* at 56.

It is impossible to know whether lawyers in general held such views or whether these were the opinions of the few who left voluminous papers recording their thoughts on law and society. But among those we can survey today, this mistrust of legislatures and the related view of the role of the legal profession was not limited to lawyers and judges who held a particular political orientation—at least not at first. That Daniel Webster and Richard Rush would have agreed on this issue, even though they were vocal supporters of opposing parties, suggests that these views cannot be dismissed as “political.” Like many of his generation, Kent never gave up this essential wariness of legislative work. It does not mark Kent an extremist, therefore, that he almost invariably narrowed, invalidated, or interpreted with creative license the statutes that were at issue in cases before him.

II. CHANCELLOR KENT, STATUTORY REVISION, AND STATUTORY REVIEW ON THE COUNCIL OF REVISION

James Kent once wrote in the strongest terms about the importance of separation of powers. A free government like that of New York State must show “a marked separation of the legislative and judicial powers,” he said.⁴⁷ “[T]he power that makes is not the power to construe a law” because “the union of these two powers is tyranny.”⁴⁸ Looking over his life’s work, though, it is clear Kent meant something different than what we would mean if we were to repeat these maxims today.⁴⁹

While in public office as a judge, Kent also served New York in two essentially legislative capacities: as a reviser of New York’s statutes and, throughout his public career, as a member of the Council of Revision (despite the similarity of the titles, the two jobs have nothing to do with one another). When redrafting New York’s statute law and while on the Council, sending statutes back to the legislature to be rewritten, Kent’s tone was anything but deferential. He did not seem at all worried that he was stepping over a sacred boundary line—quite the contrary.

Kent had been in public office for just a few years when the legislature asked him to assist in the revision of New York’s code. But he brought to

47. *Dash v. Van Kleeck*, 7 Johns. 477, 508 (N.Y. Sup. Ct. 1811).

48. *Id.*

49. One feels the same sense of unreality reading Edmund Pendleton’s statement on the importance of separation of powers in *Turner v. Turner’s Ex’x.*, 8 Va. (4 Call) 234 (1792). In a case that asked him to consider the application of a statute which he had helped to draft, he wrote, sternly,

It is the business of legislators to make the laws; and of the judges to expound them. Having made the law, the legislative have no authority afterwards to explain its operation upon things already done under it. They . . . cannot prescribe a rule of construction . . . [This is a] power to be deprecated, as oppressive and contrary to the principles of the constitution.

Turner, 8 Va. (4 Call) at 237.

the task the expansive vision and sense of statesmanship that would characterize all his life's work. He also brought a certain audacity: not only did he think he knew what was best for New York in all areas of public concern but he seemed to feel it was his special duty to see his vision realized. One reason for this is surely the attitude toward legislatures discussed in the preceding section. But it may well have been exactly what the legislature expected of him. New York was a developing polity—its legal and political infrastructure was not yet in place. Perhaps the legislature thought—as Kent certainly did—that specially trained legal minds were needed in order to shape the body of New York's written law and put the state on the right track. Kent would say, more than once, that “[l]egal learning is . . . indispensable to all persons who are invited to . . . *make*, amend, and digest the law of the land.”⁵⁰

In 1800, the legislature commissioned Kent and his fellow New York Supreme Court Justice, Jacob Radcliff to revise New York's statutes. This sort of statutory spring cleaning occurred in most states every few decades in the nineteenth century as legislators, realizing that a mass of antiquated, redundant, and unworkable legislation had piled up, cast around for someone they could trust to clear out the old and identify more clearly which laws were actually in force.⁵¹ This work concerned the public acts—that minority of laws on the statute books that were generally applicable—rather than legislative grants to individuals or corporations. Kent said that he and Radcliff,

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.⁵²

They reduced the original 400 statutes to a final compilation of 115.⁵³

Kent and Radcliff had been commissioned to do the work of revision together, but Kent performed the majority of the work himself, revising sixty-

50. JAMES KENT, AN ADDRESS DELIVERED BEFORE THE LAW ASSOCIATION OF THE CITY OF NEW-YORK, OCT. 21ST, 1836, at 6 (New York, G. & C. Carvill & Co. 1836) (emphasis added).

51. The process of revision sometimes introduced difficult questions into statutory interpretation cases. Judges seeking the intent of the legislature had to also inquire about whether ambiguities or new meanings introduced by revisers formed part of the legislative intent or might be ignored as clerical errors. See, e.g., *White v. Wilcox*, 1 Conn. 347, 349 n.a (1815) (“Whether the committee of revision in digesting the materials of the present statute, or the legislature in giving it their sanction, intended to vary the act of 1744 in substance, or only to adapt its phraseology to its new connexions [sic], must, at this day, rest upon conjecture.”).

52. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 574 n.136 (1993) (quoting James Kent, Manuscript entry at flyleaf (n.d.), located in Kent's copy of 1 LAWS OF THE STATE OF NEW-YORK (New York, Hugh Gaine 1789) (New York State Library, Albany, Manuscripts and Special Collections, James Kent Law Book Collection)).

53. *Id.*

three statutes to Radcliff's twenty-seven.⁵⁴ This labor-intensive task required Kent to comprehend the details of every kind of legislative concern including, among other things, land use, crime, master-servant relations, morality, bankruptcy, taxation, as well as the regulation of highways, various New York industries, professional licensing, and the procedural rules of the state's courts. It also required an intimate understanding of the origin of these laws and sensitivity to how the social, political, or economic realities of the present day might necessitate amendments.

Kent recalled that "[t]he 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."⁵⁵ This characterization significantly understates his role. Kent's amendments did include some updates that were merely stylistic, or obviously necessary, and which could be termed "abridgments," "improvements in style," or the correction of "imperfections." In many cases, however, Kent also revised the law to suit his opinions about good policy, the public welfare, and what due process required.

At first glance, some revisions might seem to fit the description "mere corrections." For example, many statutes, borrowed directly from England, were medieval in origin and needed updating to better reflect New York's cultural context. But as perfunctory and mechanical as fixing an anachronism may seem, one example suffices to show that even these required Kent to alter the law substantially. "AN ACT for the better apprehending of felons," was a medieval law requiring any witness to a felony to raise a hue and cry.⁵⁶

54. James Kent, Manuscript entry at back flyleaf (n.d.), located in Kent's copy of 1 LAWS OF THE STATE OF NEW-YORK (Charles R. & George Webster eds., 1802) (Columbia Law School Library, Manuscripts and Special Collections, James Kent Law Book Collection). Kent notes which of the acts in that volume he worked on:

Mem. Of the Acts of the 24th Session in this Vol. commonly called the *revised acts* those which were drafted by me and culled and digested from the former Acts, were those designated by Chapters - 8, 9, 11, 18, 26, 27, 28, 29, 31, 32, 34, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 58, 59, 60, 62, 63, 65, 66, 69, 70, 72, 73, 74, 75, 78, 87, 88, 90, 91, 92, 98, 105, 113, 116, 121, 124, 130, 131, 133, 137, 138, 146, 158, 164, 165, 166, 167, 169, 170, 173, 184, 186, 189. Those which were drafted by Judge Radcliff, were those designated by Chapters—10, 13, 24, 25, 30, 33, 43, 44, 61, 64, 77, 79, 110, 115, 125, 135, 147, 155, 156, 174, 176, 178, 180, 183, 185, 187, 188.

Id. Radcliff consistently took responsibility for the statutes dealing with elections—methods of counting votes, district divisions, and the qualifications and duties of various elected offices. He also took some of the cases dealing with judicial business, including, for example, the jurisdiction of the probate court. Kent took most of the statutes dealing with the judiciary and almost everything else. And when Radcliff strayed outside of his two areas of expertise, he sometimes left inconsistencies or gaps that Kent would have to smooth away when those statutes came before the court at trial. *See, e.g.,* Link v. Beuner, 3 Cai. 325 (N.Y. Sup. Ct. 1805).

55. Langbein, *supra* note 52, at 574 n.136 (quoting Kent, *supra* note 52, at flyleaf (n.d.)).

56. An Act for the Better Apprehending of Felons, ch. 20 (Feb. 14, 1787), *reprinted in* 2 LAWS OF THE STATE OF NEW YORK PASSED AT THE SESSIONS OF THE LEGISLATURE HELD IN THE YEARS

Once the call of “thief!” or “arson!” had gone up, the statute required all “lawful men” to chase after the felon.⁵⁷ To ensure that there would be enough chasers to immediately apprehend the wrongdoer, the statute required all men to keep themselves armed and ready for immediate pursuit or face a fine. This type of statute dated from an age before professional policing when “citizens had to undertake the core law-enforcement functions that we now delegate to police forces, including immediate pursuit of criminals.”⁵⁸ But in nineteenth-century New York, this system, relying on citizen-vigilantes, was unnecessary, antiquated, and more of a threat than support to civil order. Kent’s version replaced the hue and cry with posted notices, and only professional police—“sheriffs, coroners, constables, marshals,” and anyone specifically summoned by those officers for the purpose—could be liable for failing to make the effort to apprehend the offender.⁵⁹ This kind of amendment may have merely replaced an outdated law with a law describing what actually occurred when felonies were discovered in Kent’s New York. But the fact that it was Kent and not the legislature who finally made this alteration shows how much faith the legislature placed in Kent and just how much such updates would require.

Other revisions were motivated by Kent’s sense of practicality, but even on their face, these could not be mistaken for mere “improvements in style.” Even practical amendments required a kind of decision making that we would think of today as part of the legislative prerogative. For example, the original version of “An ACT to regulate the Practice of Physic and Surgery in this State” imposed stringent licensing requirements on all medical practitioners in New York, requiring them to apprentice for a number of years and receive a license attesting to their qualifications from a court of record.⁶⁰ The only exception in the original law was for out-of-state physicians who received a request for assistance from a physician licensed in New York.⁶¹ Kent’s revised version expanded the exception in the law to allow *patients* to hire out-of-state doctors to treat their ailments in New York, and it allowed those out-of-state physicians three months to practice in New York before licensure

1785, 1786, 1787 AND 1788, INCLUSIVE 390–91 (Albany, Weed, Parsons & Company 1885). To see its roots in medieval law, see 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I* 578–80 (2d ed. 1898).

57. An Act for the Better Apprehending of Felons, ch. 20 (Feb. 14, 1787).

58. JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 22 n.2 (2009); see also H. R. T. Summerson, *The Structure of Law Enforcement in Thirteenth Century England*, 23 AM. J. LEGAL HIST. 313, 317 (1979).

59. 1 LAWS OF THE STATE OF NEW-YORK 218 (Albany, Charles R. & George Webster 1802).

60. Act of Mar. 23, 1797, ch. 45, 417–19 (1797), reprinted in 4 LAWS OF THE STATE OF NEW YORK PASSED AT THE SESSIONS OF THE LEGISLATURE HELD IN THE YEARS 1797, 1798, 1799 AND 1800, INCLUSIVE 61–63 (Albany, Weed, Parsons & Company 1887).

61. *Id.* at 63.

laws would begin to apply.⁶² The new law may have suited a lawmaker primarily concerned with patient autonomy, but the original version may well have reflected a greater concern for public safety, addressing the fear that out-of-state practitioners might not live up to New York standards. The original version of the law may have made it harder for a patient to obtain treatment from the doctor they preferred, but it ensured that foreign practitioners would be under the supervision of a locally licensed doctor. Or, the old law may have reflected the lobbying influence of local physicians, who wanted a shield from out-of-state competition. So Kent's revision may have implicated a policy choice—downplaying a concern for public safety in an unregulated market for medical services out of preference for the value of maximum patient choice. Or, it may have reflected Kent's decision to reduce the influence of a powerful constituent group. Either way, these are exactly the kinds of concerns *legislatures* debate and struggle over before passing law and which we would consider to be in the core of their purview.

Then there were changes justified neither by historical change nor practicality but instead merely by Kent's own ideas of how society should be run. In his amendments to "AN ACT to prevent excessive and deceitful Gaming,"⁶³ which the 1788 legislature had copied directly from the English statute,⁶⁴ Kent got rid of excess words and anachronistic references to specific games and changed the currency of the fines from pounds to dollars—all minute and uncontroversial amendments.⁶⁵ But Kent also changed the penalty for cheating at games of chance from corporal punishment to six months imprisonment.⁶⁶ This was in keeping with other recently reenacted criminal statutes, which had eliminated most instances of corporal punishment. But it was also an expression of Kent's belief, as he put it, that public whipping was a punishment "calculated not to reform but to harden offenders, because it covers them with indelible disgrace" and that it was "injurious to the spectators, because [it] naturally excites disgust in some, and hardens sensibility in others."⁶⁷ Not every member of New York's legislature shared Kent's views

62. 1 LAWS OF THE STATE OF NEW-YORK 450–52 (Charles R. & George Webster eds., 1802).

63. An Act to Prevent Excessive and Deceitful Gaming, ch. 35 (Feb. 20, 1788), *reprinted in* 2 LAWS OF THE STATES OF NEW YORK PASSED AT THE SESSIONS OF THE LEGISLATURE HELD IN THE YEARS 1785, 1786, 1787, AND 1788, INCLUSIVE 662–53 (Albany, Weed, Parsons & Company 1885).

64. *See* Act for the Better Preventing of Excessive and Deceitful Gaming 1710, 9 Ann. c. 19 (Eng.).

65. An Act to Prevent Excessive and Deceitful Gaming, ch. 46 (Mar. 21, 1801), *reprinted in* 5 LAWS OF THE STATES OF NEW YORK PASSED AT THE SESSIONS OF THE LEGISLATURE HELD IN THE YEARS 1801, at 70–72 (Albany, Weed, Parsons & Company 1887).

66. *Id.*

67. ALFRED B. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK 348 (Albany, William Gould 1859) (providing James Kent's opinion on the pending legislation, "An act relative to certain crimes therein mentioned").

on whipping. In fact, at least two statutes imposing corporal punishment passed in the legislature subsequently, although these acts did not survive the Council of Revision veto.⁶⁸

Some of Kent's amendments showed that he believed his task included changing statutes borrowed from English law to conform to the republican context in which they would now be used. He made several substantive amendments to the "Act relative to Treason," which had been identical to the English Act of 1695–1696.⁶⁹ One of his changes was a new provision specifying that the penalties imposed on the convicted traitor would not extend to his kin and that the convicted traitor's wife would not forfeit her dower.⁷⁰ Kent described dower as "a right or title which . . . the wife acquired at the time of her marriage, and which continues indefeasible unless she be divested of it by her own act or consent."⁷¹ He believed that forfeiture of the wife's dower upon the husband's conviction "[took] away a legal right already attached and vested" and constituted "a violation of the rights of property . . . contrary to the spirit of the Constitution."⁷² The legislature disagreed, however. Only four years later, a new bill was proposed, restoring the forfeiture penalty in cases of treason. Kent warned the legislature the law was,

unjust because it is retrospective in its nature, and creates disabilities arising from crimes after they have been once tried and punished; and it is unlawful because it is . . . [an] *ex post facto* law, and because it inflicts new punishment for acts committed during the late war, contrary to the spirit and letter of the treaty of peace.⁷³

The bill passed over these objections with a majority sufficient to defeat Kent's Council of Revision veto.

The dower law was one instance in which the legislature specifically disapproved of one of Kent's alterations, but it was a rare exception. What Kent did when he revised the statutes was quintessentially legislative, and he did it with the legislature's permission and gratitude. After this work was completed, he maintained a sense of ownership over these statutes. His copy of the book of revised laws shows that he kept notes on amendments and

68. *See id.* at 332.

69. *See* Act for regulateing of Tryals in Cases of Treason and Misprision of Treason 1695–1696, 7 & 8 Will. 3 c. 3 (Eng.).

70. 1 LAWS OF THE STATE OF NEW-YORK 216 (Charles R. & George Webster, eds., 1802).

71. STREET, *supra* note 67, at 333 (providing James Kent's opinion with respect to "An act relative to dower in certain cases therein mentioned").

72. *Id.*

73. *Id.*

interpretations of all of the laws, but he was particularly diligent about annotating the statutes he had redrafted.⁷⁴

He also kept close watch over those statutes from his position on the Council of Revision. The Council of Revision, composed of the governor, the three justices on the New York Supreme Court, and the chancellor, met to review legislation before it became law and had the power to veto statutes as unconstitutional or as against public policy. When it voted to strike down legislation, the Council would send its decision to the legislature with a memorandum explaining the reasons motivating the veto. The Senate and Assembly could override that veto with the votes of a two-thirds majority.⁷⁵ Like his work as a reviser, Kent's position on the Council gave him power over legislation, but unlike the ad hoc work of revision, this role had been created by the state's constitution. Here, Kent's sense of ownership over statutes and his wariness toward the legislature seem like natural outgrowths of his explicit responsibility to guard against legislative overreaching and thoughtlessness. But it is nevertheless surprising to read Kent's memoranda, which are sometimes written to the legislature in the tone of an exasperated schoolmaster. It is also surprising to see just how legislative his role actually was: Kent was a member of the Council *because* he was a judge—first a justice, then chief justice of the New York Supreme Court, and then chancellor—but only rarely did his memoranda draw on his judicial expertise.

More often, the expertise Kent displayed was that of the statute reviser, not that of a mere interpreter. Having put together New York's "Act to Reduce the Laws Concerning Wills into one Statute," for example, he took every opportunity to impede private bills by which the legislature threatened to obscure the clear lines he had drawn. For example, an 1820 private bill, "An act relative to the Roman Catholic Benevolent Society in the city of New York," sought to establish that a devise contained in the will of a recently deceased New Yorker deeding his house and lot to St. Peter's Church, in trust for the use of an orphanage, was "valid and effectual in the law."⁷⁶ In his memorandum to the legislature, Kent pointed out,

the devise here alluded to is either valid or not valid If valid, then the provision in the bill is entirely useless. If not valid, as the bill evidently supposes, then the house and lot . . . either descended to his heirs at law, or escheated to the State for the want of competent heirs.⁷⁷

74. See notations throughout Kent's copy of 1 LAWS OF THE STATE OF NEW-YORK (Charles R. & George Webster eds., 1802) (Columbia Law School Library, Manuscripts and Special Collections, James Kent Law Book Collection).

75. STREET, *supra* note 67, at 5–6.

76. *Id.* at 388.

77. *Id.* at 388–89.

If the property had escheated to the state, the legislature was free to give the property for the use of the orphanage. But if the deceased New Yorker had heirs, “the Legislature cannot divest those heirs of the estate for any purpose whatever, without their consent, or without making them just compensation.”⁷⁸

In another case, Kent chided the legislature for passing a private bill that appointed trustees to sell the property of infant heirs of another deceased New Yorker.⁷⁹ He reminded the assembly, “[t]he general law of the land vests the estate of the ancestor in his heirs, and it ought not to be taken from them without their consent, unless under peculiar and strong circumstances really existing and duly disclosed.”⁸⁰ He found the circumstances of the bill in question suspicious, insofar as:

[t]he trustees named in this bill are left to dispose of the real estate of the children . . . without any direction as to the time and mode of the sale, and they are left to deduct their reasonable costs and charges without any tribunal to guide their discretion or to determine what costs and charges are reasonable.⁸¹

He believed that this kind of bill could only be “dangerous to the rights of property, and pernicious as a precedent.”⁸² In both cases he managed to persuade the legislature not to pass the bills, and he continued to keep a close watch on this area of legislation. “[T]he law of descent is so vast and so constant in its operations,” he warned in another memorandum to the legislature, “that it ought not to be disturbed for any light or transient cause.”⁸³

His expertise as a reviser was also on display when he prevented the Senate, more than once, from reenacting statutes from the eighteenth century. Kent had worked with those laws and knew them intimately. In one instance, he criticized the Senate’s attempt to reenact a vast, obsolete eighteenth-century property law in order to get the benefit of two short provisions of that law. To reenact the law in total would be improper, he counseled, “for by the first section of the bill there is a very formal abolition of estates in tail; which would imply that such estates still existed,” among other reasons.⁸⁴ He also had occasion to scold the legislature for enacting redundant laws, as he did in 1813, over “An act limiting the period of bringing claims and prosecutions

78. *Id.* at 389.

79. *Id.* at 358–59 (providing James Kent’s opinion on “An act for the relief of the heirs of Thomas H. Taylor, deceased”).

80. *Id.* at 359.

81. *Id.*

82. *Id.*

83. *Id.* at 374 (showing James Kent’s views on “An act concerning joint tenants and tenants in tail, regulating descents and abolishing entails”).

84. *Id.* at 373.

against forfeited estates.”⁸⁵ The act “appears to have been intended to be a revised bill . . . reenacting the statute of . . . 1797,” but, he explained,

whereas that law had never been altered or amended, and was not within the purview of the general revision of the laws, and being a permanent statute affecting a very extensive portion of real estate, it is at least useless, and may be injurious to the stability of these rights to repeal and reenact it.⁸⁶

He was also vigilant against the reenactment of statutes that he, as the reviser of New York’s statute books, had decided to drop from the books.⁸⁷

Although many of Kent’s memoranda from the Council of Revision showed his expertise as a statute drafter and reviser, Kent was not, nor did he pretend to be, a mere technician. While on the Council of Revision, many of Kent’s arguments against statutes were neither legal nor practical—they were based on his opinions about the legislature’s policy choices. His decisions on policy issues show a broad involvement in the governance of the State of New York. For instance, one important debate in the Council concerned whether to allow legislation creating the Erie Canal to go forward, or to veto it in order to keep money in reserve in case of a military emergency. Kent cast the final vote in favor, explaining, “[I]f we must have a war, or have a canal, I am in favor of the canal! I vote for the bill!”⁸⁸ Not every policy discussion in the Council of Revision dealt with such grand matters of state as the choice between allocating resources for infrastructure or militarization. But throughout his career, Kent occupied roles in which he was partner with the legislature in every way. He revised legislation and then worked to make sure the legislature understood and preserved the laws as revised. He sat in review of the legislature’s work, and not just for constitutionality. He took positions on the future of New York state policy in areas of legislative concern and, together with the other members of the Council of Revision, he exercised a veto power over the legislature when it passed bills in disagreement with his views.

A. *Kent’s Style of Statutory Interpretation*

Kent believed that statutory law was meant to track the ways in which the legal needs of a young republic, and of New York in particular, differed from England. In interpreting these enactments in legal cases, Kent could

85. *Id.* at 376.

86. *Id.*; see also *id.* at 367 (objecting to an 1812 bill as “totally useless, an adequate remedy being provided by the seventh section of the act entitled ‘an act concerning idiots, lunatics and infant trustees’”).

87. *Id.* at 333.

88. WILLIAM KENT, MEMOIRS AND LETTERS OF JAMES KENT, LL.D., LATE CHANCELLOR OF THE STATE OF NEW YORK 170 (Boston, Little, Brown & Company 1898).

not set aside his experiences as a statute drafter or as a policymaker on the Council of Revision. Therefore, he didn't hesitate to toss English precedents aside when they clashed with his understanding of the practical requirements of New York governance or republican values. He felt free to do so even when the New York legislature had adopted English statutes wholesale. In a much-cited case in which he decided that filing in a mortgage registry constitutes notice to subsequent purchasers of land, he said, defiantly, a "contrary doctrine would shake the foundation of all mortgage security, and lead to every species of fraud."⁸⁹ He was so certain of this, he said, "[n]o decisions of the *English* Courts, upon the *English* registry acts . . . could induce me to change my opinion on the construction of our statute."⁹⁰

Indeed, in statutory interpretation cases, one finds that Kent rarely rested on *stare decisis* unless he could rely on a previous opinion of his own.⁹¹ He felt "at liberty to give [New York statutes] such a construction as will best accord with the obvious dictates of its policy" whether he found precedent to support that construction or not.⁹² Without this freedom, he would have been unable to create a consistent jurisprudence in various areas of law. Nor, as we shall see, did he feel much bound by any other source of earthly authority. While he did occasionally say "[i]t is the province of the legislative, and not of the judicial power, to change the law,"⁹³ he nevertheless almost always found the law he was looking for hidden in the text that the legislature provided.

This is perhaps the most telling thing about Kent's method of statutory interpretation: while employing it, he almost never read a statute whose meaning he disapproved of. And when he did disapprove of a statute, he always found himself able to cheerfully invalidate the law on constitutional grounds and grant an injunction to the plaintiff pending a legislative amendment. This is not entirely explained by the multiple hats he wore in New York governance. His success in always reading the law he wished to read is partly explained by his ambition to anchor New York's jurisprudence in consistent principles and secure its constitutional values—an ambition he realized by taking on a role that can be best described as nation-building, and

89. *Parkist v. Alexander*, 1 Johns. Ch. 394, 398 (N.Y. Ch. 1815).

90. *Id.*

91. This contrasts with his treatment of cases arising under the common law, in which he did follow the guidance of English precedent with regularity. Therefore, when Kent's biographer celebrates how Kent "seldom in equity [or] in law, allowed his course to be deflected from the beaten English paths," he is at least half right. JOHN THEODORE HORTON, *JAMES KENT: A STUDY IN CONSERVATISM, 1763–1847*, at 204 (1969); *see id.* at 207 & nn. 29–30 (citing cases in which Kent followed the English *common law* precedent despite personal misgivings).

92. *Parkist*, 1 Johns. Ch. at 400.

93. *Manning v. Manning*, 1 Johns. Ch. 527, 534 (N.Y. Ch. 1815).

it is partly explained by his attitude, a sometimes sanctimonious sense of prerogative which he armored with erudition. And it is partly explained by methods of statutory interpretation, including “equitable interpretation” which, as we have seen, Kent’s contemporaries would not have seen as outlandish.

By the early nineteenth century, some of the most respected jurists of Kent’s day insisted that judges were *required* to use their equitable powers when interpreting statutes in order to take into account the spirit of the laws they were interpreting and to supply whatever details the legislature may have overlooked. In his celebrated law lectures at what would become the University of Pennsylvania, constitutional framer and Associate Supreme Court Justice James Wilson described all proper statutory interpretation as an exercise in “equity”:

By Aristotle, equity is thus defined—“the correction of that, in which the law is defective, by being too general.” In making laws, it is impossible to specify or to foresee every case . . . in interpreting them, those cases should be excepted, which the legislator himself, had he foreseen them, would have specified and excepted. Such interpretation . . . is drawn from the *spirit of the law*, or the motive which prevailed on the legislature to make it. When equity is taken in this sense, every court of law is also a court of equity. When equity is taken in this sense—and, applied to the interpretation of law, this is its genuine meaning—it is an expression synonymous [sic] to true and sound construction.⁹⁴

Kent’s methods were therefore not unique, and he brought special insight to the task of interpretation. Kent had thought more deeply than anyone else in New York State—members of the legislature included—about the *spirit* of New York’s statute laws. He knew how related laws fit together to express unified policy and governance objectives, because he had decided on those objectives and shaped the laws to bend toward those goals, both through the process of revision and in his ongoing role as a member of the Council of Revision. His style of interpretation, therefore, could not help but borrow from this expertise and continue that work.

In this Section, I will first look at Kent’s style of interpretation when the statutes at issue created private rights. This shows how Kent used canons of construction and how Kent’s use differed from how modern judges use the same tools. I then look at how Kent interpreted public acts. Kent’s interpretation of public acts gives us some measure of how far the office of his judgeship differed from that of a modern judge, especially given that some of the

94. 2 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, LL.D. 260 (Philadelphia, Bird Wilson 1804) (emphasis added) (footnote omitted).

cases before him involved statutes that he also vetted while sitting on the Council of Revision.

B. Kent's Interpretation of Acts Creating Private Rights

When interpreting a private act, Kent's work was closest in style to what modern lawyers might expect from a judicial opinion. Like a modern judge, Kent began with the text of the statute, parsing the plain meaning of the terms relevant to the dispute before him. But this was the end of any similarity between his methods and modern interpretive jurisprudence. That is because Kent believed, as he would make clear years later in his *Commentaries*, that the mere *letter* of an act—even where it yielded an unambiguous plain meaning—could not displace the judges' understanding of what the legislature must have (or ought to have) intended.⁹⁵

But if not from the letter of the act, how was a judge to know what the legislature intended? As one mid-nineteenth-century judge explained:

[I]t is also a well settled rule in construing statutes, that the occasion and necessity of the law, from the mischief felt and the remedy in view, are to be considered: for, from these may be collected the intention of the lawgiver, which, when discovered, is to be followed, although it may lead to a construction seemingly contrary to the letter.⁹⁶

Like other judges of his day, Kent relied on the “mischief rule” first articulated in *Heydon's Case* in 1584 and catalogued in Mathew Bacon's 1736 *New Abridgement of the Law*.⁹⁷ In doing so, Kent did not seek the legislature's purpose in the records of legislative debates or other circumstantial evidence that might have revealed the legislators' actual intent. Instead, he focused his analysis on what the legislature *should* have intended, using as a guide his own sense of the background law and what he believed were proper legislative goals. Once he had identified a statute's purpose this way, Kent relied on two other principles of construction. First, Kent often started from the presumption—commonly invoked in nineteenth-century opinions—that “[s]tatutes made for the public good, and for general and beneficent national

95. 1 KENT, *supra* note 22, at 432.

96. *Humbert v. St. Stephen's Church*, 1 Edw. Ch. 308, 312 (N.Y. Ch. 1832) (citing 1 KENT, *supra* note 22, at 432); *see also* *Woodruff v. State*, 3 Ark. 285, 285 (1841) (“Such a construction ought to be put upon a statute as may best answer the intention the makers had in view; and this intention is sometimes to be collected from the *cause* or *necessity* of making the statute, and sometimes from other circumstances. When discovered, the intention ought to be followed with reason and discretion in the construction of the statute, although such construction seems contrary to the letter [of the statute].” (emphasis added)).

97. *Heydon's Case* (1584) 76 Eng. Rep. 637, 639; 3 Co. Rep. 7 a, 8 a; 4 MATHEW BACON, A NEW ABRIDGEMENT OF THE LAWS OF ENGLAND 647–48 (4th ed. London, 1786).

purposes, are to receive a very liberal construction”⁹⁸ while, conversely, statutes for private benefit ought to be read narrowly. We will see him use this canon both to narrow and to broaden statutory language. Second, he sought to situate the statute before him in the context of other enactments that were either *in pari materia*—that is, regarding the same subject matter—or, as was more common with private acts, helpfully analogous. But if this approach seems familiar to us today, its application in Kent’s opinions is nevertheless remarkable because he was often able to rely for analogy on statutes that he himself had rewritten during his years revising New York’s code.

Kent’s decision in *Belknap v. Belknap*⁹⁹ illustrates his application of these tools where private interests were at stake. The statute at issue in *Belknap* was not a private act, but it had been passed to benefit only a handful of citizens. The Act “for draining swamps and bog meadows, in the counties of Orange and Dutchess” enabled one or more of the proprietors of wetlands in those counties to have the wetlands drained at the joint expense of all the proprietors.¹⁰⁰ The Act set up an administrative procedure, providing for the appointment of inspectors and assignment of jurisdiction to a court, to determine the best method for draining a particular piece of land, and it contained a section specifying the notice to be given to the other proprietors.¹⁰¹ The only mention of non-proprietors was in the sixth section, which provided that in case the inspectors found it:

necessary “to *continue* such ditch or ditches through lands *adjoining* any such tracts of swamp or bog meadow, for the purposes of draining the same more effectually, they are authorized to agree and settle with the owner or owners of such lands, for such damage as is likely, in their opinion, to be sustained by such owner or owners, by reason of such ditch, &c.; and if they cannot agree, the inspectors are to apply to the Court to appoint appraisers.”¹⁰²

Belknap arose out of a controversy under this section of the act.

The defendants in *Belknap* owned a piece of swampland that adjoined a large pond. The inspectors had plotted a course through the swampland for a ditch terminating at the pond, but this ditch alone would not be enough to drain the swamp because the pond’s water level was too high. At the opposite end of the pond from the swamp, the pond let out into a stream. The inspectors proposed to cut a ditch to widen this outlet, which would lower the level of the water considerably. Widening the outlet would also, however, destroy

98. *Jerome v. Ross*, 7 Johns. Ch. 315, 342 (N.Y. Ch. 1823).

99. 2 Johns. Ch. 463 (N.Y. Ch. 1817).

100. *Id.* at 463–64.

101. *Id.* at 463.

102. *Id.* at 469 (emphases added).

the value of the pond and its outlet as a source of water for the use of the mills downstream.¹⁰³

The plaintiffs, all downstream mill owners, brought suit to enjoin the ruination of the pond's outlet. In answer, the defendants held up a report by the inspectors, asserting: "we find it *necessary* to *continue* the first-mentioned main ditch through lands *adjoining* said tract of swamp or bog, for the purpose of draining the same more effectually, viz. through what is called the outlet of the great pond."¹⁰⁴ The question before Chancellor Kent was whether the ditch through the outlet could truly be said to "continue" the drainage ditch through "adjoining" land, as required under the statute.

Kent started with the language of the act. He believed that the defendants were misusing the word "continued":

To continue a line or ditch, does not, in the ordinary or grammatical sense, admit of any intervening substance to break the continuity. It implies uninterrupted connection; and the ditch cannot properly be said to be *continued*, by terminating it at the north end of the pond, and by deepening the outlet of that pond at the south-east corner. We cannot suppose it without indulging in the same poetical fiction by which the river *Alpheus* was continued from *Greece* to *Sicily*: *occultas egisse vias subter mare*.¹⁰⁵

He also sided with the plaintiffs on the plain meaning of the word "adjoining": "[t]he ditch was to be continued through lands *adjoining*, that is, through lands next to, and which touched, the swamp or bog meadow; but none of the lands of the plaintiffs adjoin the great swamp where the main ditch terminates."¹⁰⁶

Like a modern judge interpreting a statute, Kent started with the text—so far, his opinion looks familiar. But this unequivocal plain meaning analysis, finding that "cutting down the outlet is not within the letter of the permission under the act" was merely the beginning of Kent's opinion.¹⁰⁷ Kent still felt it necessary to explain why the court was "not warranted, in this case, to construe the power liberally, and to extend it by equity" to cover the defendants' proposed ditch.¹⁰⁸

103. *Id.* at 463–64.

104. *Id.* at 470 (emphases added).

105. *Id.* at 470–71 (quoting 1 THE WORKS OF VIRGIL TRANSLATED INTO ENGLISH PROSE 351 (1794) ("Tis said, that Alpheus, a River of Elis, hath hither worked a secret Channel under the Sea: Which *River* . . . is now blended with the Sicilian Waves.")).

106. *Id.* at 471.

107. *Id.*

108. *Id.*

His first step was to assert that private acts (or, in this case, acts granting rights to a select group of citizens) should be narrowly construed. Kent explained that “[t]his permission to continue the ditch through adjoining lands, without the consent of the owner, ought to be strictly construed, and not carried beyond the plain letter of the act” because the defendants’ claim did not “concern[] the public, but [was a matter] of mere private convenience and profit.”¹⁰⁹ He pointed out that the preservation of the outlet in its current form was as useful to the plaintiffs as the widening of the outlet was to the defendants, and “the interest of each party has an equal claim on the protection of the government; one interest ought not to be made subservient to the other.”¹¹⁰ These words contrast with the tone of his opinions, discussed in more detail below, interpreting statutes authorizing great public works like the Erie Canal.

Kent also spent part of his opinion discussing what the legislature must have intended by the act. Again, this sounds familiar, but it is not the same as what modern judges do when they ask the same question. It would not have made any sense to Kent to search the legislative record to find out what the bill’s sponsor said on the floor of the Senate when he introduced it, or to read which compromises and deals among assemblymen resulted in the final language of the act. Kent’s version of “what the legislature intended” was not concerned with what the actual legislature actually intended. Instead, Kent’s mischief rule concerned what an idealized legislature, schooled in and respectful of the background law on the subject, and wishing only to correct imperfections in that law as applied, *would have intended* by the language of the act.

The act in *Belknap*, on its face, seemed to give the inspectors the authority to widen the outlet and lower the pond if that is what they judged necessary to drain the wetlands. But this would have been a substantial departure from the background legal norm that one private citizen’s property rights and desire for private gain are not more valuable or more deserving of the law’s protection than another citizen’s property right and vested business interest. It would, moreover, have granted sweeping powers to the inspectors. And while it may have been that the legislature fully intended to empower the inspectors and favor the wetlands proprietors, under Kent’s analysis, this is not what the statute would be read to say.

Instead, Kent explained that the unfettered powers granted to the inspectors were *proof* that the legislature could not have intended to go so far. “It is an invasion of the rights of property; and it is evident that the act could only have had in view cases of the most immaterial and trifling consequence,

109. *Id.*

110. *Id.*

or the power would never have been granted with so little check.”¹¹¹ Analogizing to the Highway Act, he explained:

How cautiously and guardedly are powers given, even to public officers, to lay out highways for the use of the public, over private property. They are not to be laid out over cultivated grounds, without the certificate of twelve freeholders, that the road is necessary, nor through any orchard or garden of four years’ growth, without the owner’s consent. Can we suppose that this act intended that these inspectors should carry their ditches where they pleased, without any regard to the improvements of others?¹¹²

Kent knew the Highway Act well, of course, because he put it together while revising New York statutes. The purpose and care he imputed to the legislature, therefore, was based on an analogy to an act that he had a chance to revise and approve in advance.¹¹³

A modern lawyer reading Kent’s opinions may recognize familiar canons of statutory interpretation, some of which we use today in similar contexts. In fact, his cases interpreting private acts use not only the same tools but arrive at the same conclusions as many modern judges would. But the similarities can make the differences even more startling. When Kent interpreted the statutes before him in private controversies, he often played a role quite different from that of the modern judge. While a justice and while a chancellor, Kent was simultaneously sitting on the Council of Revision and actively monitoring the legislature’s amendments to statutes he had revised. It is not surprising, therefore, that there was nothing “pure” about his legal decisions. Policy judgments crept into them all the time. This is not to demean Kent’s stature as a judge—in fact, as one of the greatest judges of his century. It is only to acknowledge that the creature called a judge in early nineteenth-century New York is not what we would call a judge today.

C. *Kent’s Style of Interpretation of Public Acts*

The difference between Kent’s approach to statutory interpretation and modern interpretation is all the more striking in his cases dealing with public statutes, especially when Kent wrote as a member of the Court for the Correction of Errors. The Court for the Correction of Errors was New York’s

111. *Id.*

112. *Id.* at 472.

113. Kent’s revised highway act was an amalgamation of many lengthy statutes, passed several times in every year. The Highway Act, ch. 52 (May 4, 1784), reprinted in 1 LAWS OF THE STATE OF NEW YORK 105–14 (New York, 1792). The process he approves of in *Belknap* was not Kent’s invention, however—the outlines were present in the 1784 Highway Act, and he supplied only details; “a garden of four years’ growth” was borrowed from English law, for example, and the requirement of four years’ growth actually reduced the amount of process required before a road could be laid. *Belknap*, 2 Johns. Ch. at 472.

highest court of appeals, and it comprised the chancellor, all of the state's senators, the lieutenant governor, and the justices of the New York Supreme Court. It heard appeals from both the Court of Chancery and the New York Supreme Court. Because the members of the Court for the Correction of Errors were recused from cases which they had decided and because the Court's opinions were usually drafted by a judge, Chancellor Kent would write the decision whenever a case was appealed from the New York Supreme Court. With the members of the Supreme Court recused in these cases, Kent was the only legal figure on the panel, and as a result, he often had total freedom to craft the panel's rulings. The resulting opinions do not read like the products of collaboration. They are written entirely in Kent's voice, and their rationales are consistent with Kent's related cases.

Kent's sense of his responsibility to the state emerges very strongly in his cases dealing with public acts. In these decisions, the mischief rule takes on a life of its own, justifying leaps of inference so huge that they begin to look like flights of fancy. What his extremely broad constructions reveal, however, is that while dealing with public acts, Kent saw himself as a member of the policymaking branch of government, not just an interpreter of its work. He was committed to making law that would help to realize the great ambitions of the legislature, particularly when he believed that those ambitions were in the best interests of the State of New York.

*Rogers v. Bradshaw*¹¹⁴ was one of these cases. Three statutes were involved. The first, passed in 1816, empowered commissioners appointed to oversee the construction of the Erie Canal to enter private lands as needed to explore and examine the most eligible routes and to make surveys, levels, and plans to fix the canal's final route.¹¹⁵ The second statute, passed in 1817, empowered the commissioners to:

enter upon and use . . . any [public or privately owned] lands, waters, and streams, necessary for the prosecution of the improvements intended by the act, and to make all such canals, locks, dams, and other works and devices, as they might think proper, for making said improvements; doing, nevertheless, no unnecessary damage.¹¹⁶

This statute included a clause requiring the commissioners to estimate the damages to any person whose lands were confiscated and to pay compensation.¹¹⁷ The third statute, passed in 1820, required canal commissioners to create and render passable a new public road in any part of the state where

114. 20 Johns. 735 (N.Y. 1823).

115. *Id.* at 738.

116. *Id.* at 738–39.

117. *Id.* at 741.

canal work would destroy an existing public road and to register the change of the road's location at the appropriate county office.¹¹⁸

The controversy in *Rogers v. Bradshaw* arose when the commissioners found that the best route for the canal cut through a turnpike.¹¹⁹ With this road disrupted, the commissioners realized that another road would need to be built in the vicinity to facilitate the transport of construction materials. In anticipation of destroying the turnpike to dig the canal, the commissioners plotted a course for the new road through Bradshaw's private land. According to Bradshaw, the road crew had cut fifty dollars' worth of his timber before he filed suit.¹²⁰

The Supreme Court of New York ruled for Bradshaw. That court held that the land was not taken for "canal improvements" at all—a substitute road was nothing like a "lock" or a "dam"—and that the taking, therefore, did not come within the powers granted by the act of 1817.¹²¹ The court also held that the commissioners could not claim the power to take Bradshaw's land under the 1820 road act because a turnpike—a privately owned and operated toll road—was not a "public road or highway."¹²² The court also pointed out that the 1820 road act contained no provision for compensating landowners, so any reading of the act that allowed the commissioners to take Bradshaw's land would render the act unconstitutional.¹²³

Kent reversed. He began his opinion with a logical argument. The plaintiff had argued that a new road was not an improvement necessary to the construction of the canal. Kent pointed out,

if the turnpike road was *unavoidably encroached* on by the canal, and *another road was indispensable* at that place, before the canal was commenced, and the land taken was *necessary* for the road, (and all this was proved in the cause,) it would seem to follow, as a clear logical deduction, that the land taken was necessary for the prosecution of the improvements intended by the act.¹²⁴

But Kent couldn't rest his opinion there because there were good arguments from the text of the statute against this "clear logical deduction," and he had to refute the much narrower interpretation of the statute that all of the justices of the New York Supreme Court had agreed on in the decision below.

Kent therefore focused on what he saw as the underlying issue and the crux of his disagreement with the court over how to interpret the statute: just

118. *Id.* at 742.

119. *Id.* at 735–36.

120. *Id.* at 735.

121. *Id.* at 737–38.

122. *Id.* at 737.

123. *Id.* at 737–38.

124. *Id.* at 739.

how much authority did three canal statutes mean to grant the commissioners? In Kent's view, that authority was sweeping. Again, his opinion relied on the canon that public acts are to be broadly construed. He began his opinion with this observation:

This [1816] act was the commencement of that great undertaking, which, in the language of one of our statutes, was "to advance the prosperity and elevate the character of the *United States*." It began by sketching out the duty of the commissioners upon a liberal scale, and with just confidence in their discretion. They were to explore and examine lands, and to cause surveys and levels to be taken. Nothing was said about impediments to be thrown in their way by trespasses upon private right, or that they were to make the course of the canal bend to the interest, or the unreasonableness of individuals.¹²⁵

Compare this to his much more cautious approach in *Belknap*. There, he judged that the legislature's silence on limits to the officer's powers implied that those powers were only to be used sparingly. Here, he argued, "[s]urely, a statute, vesting large powers, resting very much for their exercise in undefined discretion, and checked only by the gentle admonition of doing 'no unnecessary damage,' ought to be construed more benignly and more liberally."¹²⁶ He did not have to rest his opinion on his judgment that the new road was in fact an improvement required for the canal. He could rest it on the authority of the canal commissioners to make any decision as to what the canal required, so long as those decisions were made in good faith and were not an egregious abuse of their powers.

The difference between Kent's treatment of the commissioners here and the inspectors in *Belknap* was that the canal statutes concerned a grand public works project, one which would be impossible "[i]f private rights of every description were not to give way . . . to the permanent interest of the public."¹²⁷ His broad construction was just what Justice Wilson described as "equity"—supplying details to statutes that the legislature would have added if only they had considered the question before the court. When Kent interpreted words in a public statute, it was not enough to ask after their plain meaning and go from there. Instead, he wrote, "we [must] give to the expressions the sense most suitable to the subject, and best adapted to the facility and success of a great and generous scheme of public policy."¹²⁸

125. *Id.* at 738.

126. *Id.* at 740.

127. *Id.* at 738.

128. *Id.* at 740.

The success of the Erie Canal required that Kent read the expressions in the statute as granting the commissioners a great deal of discretion. A modern judge might employ the canon that the legislature is not to be presumed to have intended an absurd or manifestly unjust result.¹²⁹ Kent believed that “[e]very interpretation which leads to an absurdity, or to embarrass or defeat the purposes of the statute, is to be avoided.”¹³⁰ The practical consequence of the New York Supreme Court’s reading was that “[t]he line of the canal must have been either diverted from its course . . . or else the progress of the canal must have been suspended, until an opportunity was given for an application to the legislature for new powers.”¹³¹ Kent concluded, “I should doubt, whether any construction would be a just one, that leads to such inconvenience or absurdity.”¹³²

Here, it would be an “absurdity” to require the commissioners to apply to the legislature for a clarification of their powers to take private property. By contrast, in several cases in which Kent interpreted private statutes granting privileges to individuals or corporations, he had required that the defendants get legislative amendments before encroaching on private rights.¹³³

Having upheld the commissioners’ interpretation of the 1817 act, Kent still had to answer the part of the Supreme Court’s opinion in which it had ruled, reasonably, that the 1820 public road act was inapplicable to a privately owned turnpike and would be unconstitutional if it authorized the taking of Bradshaw’s land because it failed to provide for just compensation. He answered the first challenge with an extremely broad construction of the word “public” in the term “public roads.” “I think,” he wrote, “the construction [the New York Supreme Court gave] is too limited for the object, and the subject matter of the provision.”¹³⁴ He continued,

A turnpike is a public road or highway, in the popular and ordinary sense of the words, and in that sense the legislature are to be presumed to have employed them. Turnpike roads are, in point of fact, the most public roads or highways that are known to exist, and, in

129. See *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); see generally EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 148 (2008).

130. *Rogers*, 20 Johns. at 740–41 (emphasis added).

131. *Id.* at 741.

132. *Id.* at 740–41. Something like this reemerged briefly in the United States Supreme Court of the 1940s, articulated best in *United States v. American Trucking Associations, Inc.* United States v. Am. Trucking Ass’ns, Inc., 310 U.S. 534, 543 (1940) (footnote omitted) (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922) (“[E]ven when the plain meaning [of a statute does] not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words.”)).

133. See, e.g., *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816).

134. *Rogers*, 20 Johns. at 742.

point of law, they are made entirely for public use, and the community have a deep interest in their construction and preservation. They are under legislative regulations¹³⁵

This strained explanation did not answer another pesky problem—the requirement in the statute that the commissioners register the change in the public road with the local county office. This would only be possible if “public roads” were what the Supreme Court had said they were because privately owned turnpikes were not registered at county offices at all. Kent dismissed this objection as “not . . . sufficient to control the construction.”¹³⁶ After all,

[t]here is no repugnancy in the law in applying that act even to a turnpike road. It is, at least, a very harmless proceeding, and it may, on many occasions, be important to the public, that there should be this documentary evidence . . . of the change of the tract of the turnpike road.¹³⁷

The second objection—the lack of a compensation clause in the 1820 act—should have been more difficult for Kent to dismiss, given his consistent approach to plaintiffs objecting to the incursions of corporations created by private bills. In those cases, he expressed the emphatic belief that an “equitable and constitutional title to compensation . . . imposes it as an absolute duty upon the legislature to make provision for compensation, whenever they authorize an interference with private right.”¹³⁸ But he had a creative solution to this problem in *Rogers*. The 1817 canal act *had* authorized the commissioners to assess the damage they created and pay compensation, and Kent simply read the 1817 act and the 1820 act together:

All statutes, said Lord *Mansfield*, which are *in pari materia*, are to be taken together, as if they were one law; and, in many instances, a remedy provided by one statute, will be extended to cases arising on the same subject matter under a subsequent statute. The act of 1820 was only a specification of the course of duty of the commissioners in a particular case; and it would have been quite unnecessary, and, in my humble opinion, quite idle, to have provided, that the general remedy for all damages occasioned by the exercise of any part of the whole mass of undefined power given by the act of 1817, should apply to a portion of that power exerted in the particular manner provided for by the act of 1820.¹³⁹

135. *Id.*

136. *Id.* at 743.

137. *Id.*

138. *Id.* at 745.

139. *Id.* at 744 (citation omitted).

In a subsequent opinion, Kent was just as expansive in construing the canal acts. In *Jerome v. Ross*,¹⁴⁰ the canal commissioners broke up five thousand loads of stone from a hillside on the plaintiff's land, which lay at a distance of sixty rods from the path of the canal.¹⁴¹ The commissioners needed stone in order to complete a lock and dam on the Hudson River, which would open the Champlain Canal to sloop navigation.¹⁴² If the work were delayed, the commissioners said, a freshet in the river, which had been sunk to allow the work to go forward, would fill with water, and the canal would not be completed in the current season. This would cause additional expense and redundant work for the contractors and would be detrimental to the public because the canal system couldn't be used until the dam was completed. Although other land (and, the plaintiff claimed, other sources of stone) lay between the plaintiff's land and the site of the canal, the commissioners asserted that they had the power to take the stone from his land under the provision in the 1817 canal act which said "that it shall . . . be lawful for the said canal commissioners . . . to enter upon, take possession of, and use all and singular any lands, waters, and streams, necessary for the prosecution of the improvements intended by this act."¹⁴³

The court below ruled for the plaintiff on the ground that the commissioners did not "take possession of" the plaintiff's land as authorized under the statute but merely entered it in order to harvest and take the rock away.¹⁴⁴ As a result, the commissioners would only pay for the damages to the land, rather than paying for the entire parcel of land as the compensation clause of the statute envisioned. The court also reasoned that this use of the plaintiff's land was not "*necessary* for the canal improvements [intended by the act]" but merely "*more suitable* and convenient than any other upon the same side of the river."¹⁴⁵ It pointed out, furthermore, that the plaintiff's land was "sixty rods distant from the bank of the river, on the other side of a public highway, with severa[l] buildings and tiers of lots between them."¹⁴⁶ The judge wrote:

If the words of the statute warrant the taking of the stone under these circumstances, I can imagine no possible limit to the authority or discretion of the commissioners. . . . I see nothing to prevent their taking from the lands and inclosures [sic] of individuals, any

140. 7 Johns. Ch. 315 (N.Y. Ch. 1823).

141. *Id.* at 316–17.

142. The Champlain Canal was part of the great system of four canals, including the Erie, necessary to complete the legislature's vision of having a route that would connect manufacturers and farmers in upstate New York to markets in other states and even international markets via sloop-navigable waters.

143. *Jerome*, 7 Johns. Ch. at 323–34 (quoting Act of Apr. 15, 1817, ch. 262, 1817 N.Y. Laws).

144. *Id.* at 340–41.

145. *Id.* at 326–27.

146. *Id.* at 327.

other materials they may fancy, in any situation, or at any distance. Such a construction, therefore, is unreasonable and dangerous; and, if adopted, would give sanction to a stretch of power never contemplated by the act.¹⁴⁷

Kent reversed, again confirming and extending the authority of the canal commissioners. He recurred to the *in pari materia* argument he had used in *Rogers*, explaining that “these several canal acts constitute a distinct code of statute law, and are to be taken and construed together, as being made in furtherance of one great, useful, and splendid public object.”¹⁴⁸ Kent pointed out that the 1816 statute authorized the commissioners to enter private lands temporarily for the purpose of surveying and leveling and that an 1820 statute authorized the commissioners to take rock from private lands in order to *repair* the canals:

The commissioners would then be authorized to take the stone from the ledge of rock in question to repair this dam in the *Hudson*; and can it be reasonably supposed, that the legislature did not intend they should have this power for the necessary construction of the dam in the first instance?¹⁴⁹

He also dismissed the other objection—that the commissioners could only take permanent possession of private land, not borrow it—as nonsensical: “what possible objection can there be to the construction, allowing them to make as much use of the adjoining grounds as should be necessary for the prosecution of the improvements, *and no more*?”¹⁵⁰

To counter the lower court’s strongest argument—that the word “necessary” in the statute could not allow the commissioners to travel a distance of sixty rods, across private plots and onto the other side of a public highway, eschewing other possible sources, to seize the plaintiff’s rocky ledge for use in the dam building project—Kent relied on the maxim that “[s]tatutes made for the public good, and for general and beneficent national purposes, are to receive a very liberal construction, and to be expounded in such a manner, as that they may, as far as possible, attain the end.”¹⁵¹ He wrote:

The word “*necessary*” does not mean absolute and indispensable, or that without the use of the land, in the given case, the work could not possibly go on. That would be the same as extreme necessity. The legislature used the word in a more reasonable and popular sense. It is sufficient that the land used, and the materials taken

147. *Id.* at 327–28.

148. *Id.* at 341–42.

149. *Id.* at 341.

150. *Id.*

151. *Id.* at 342.

from it, are needful and conducive to the object, and more convenient in the application, and less valuable, and the use of them less injurious to the owner, than any that might readily be selected.¹⁵²

Kent reiterated his holding in *Bradshaw* that the commissioners had a great deal of discretion under the canal acts. And he voiced his approval for the commissioners' decision, especially given that the plaintiff "[did] not state that the rock was of any use to him, as proper or fit for building, fencing, &c., or that it was even desirable as an object of ornament or taste."¹⁵³ In that sense, he concluded, the commissioners "did take care, as the act required, to do *no unnecessary damage*. The materials must have been taken from some adjoining land; and from whence could they have been taken with more discretion?"¹⁵⁴ Compare Kent's use of the word "adjoining" here to his definition of the same word in *Belknap*.

Viewed out of their historical context, Kent's use of interpretive canons—for example, his invocation of the principle that statutes *in pari materia* be read together—may seem like creative contortions. But Kent wrote before the states and federal government kept neat statutory codes, properly indexed, and updated each year. Today's codes are constantly updated as legislatures pass new statutes amending the old. When a lawyer wants to understand the meaning of a statutory provision, she begins by reading the entire codified act. And she reads it with the presumption that it forms a coherent whole that does not contradict itself even though, chances are, the act is like Frankenstein's monster—an amalgam of provisions and amendments tacked on at different times. In Kent's day, legislatures simply passed new laws on the same subjects as existing acts, sometimes styling the new enactments as amendments but just as often not. Every twenty years or so, the legislature had to hire someone like Kent to "revise" the acts—to collate laws that belonged together and make sure they didn't contradict each other or other parts of the code. As a judge, Kent retained his revisers' sensibility, developed over his years working to forge New York's statutes into a sound code. A reviser's role was to put statutes on the same topic together into one coherent larger statute and smooth away the contradictions that accumulated over time—exactly what Kent did when he interpreted public acts. In other words, Kent's decisions not only reflected his work as a reviser, they continued it. And by interpreting acts in ways that made them harmonious, Kent created a

152. *Id.* at 340. Note that this is exactly the argument that Alexander Hamilton made against Thomas Jefferson in the debate over the chartering of the first national bank. Alexander Hamilton, *Opinion as to the Constitutionality of the Bank of the United States*, in 3 THE WORKS OF ALEXANDER HAMILTON 445–95 (Henry Cabot Lodge ed., 1904). Kent, who idolized Hamilton, would have known this argument.

153. *Jerome*, 7 Johns. Ch. at 331.

154. *Id.* at 340.

body of law that New Yorkers could rely upon and in which their rights and duties were more predictable.

More difficult to explain in terms acceptable to the modern lawyer is Kent's use of expansive constructions—for example, his reading of the term “necessary” to mean “convenient.” The fact is, Kent felt personally invested in the Erie project. He made it possible with his crucial swing vote on the Council of Revision, and he came truly to believe that the success of the canal was important to New York's economic wellbeing. This may not seem like a judicial concern, but one must recall that he wrote these opinions while sitting on the Court of the Correction of Errors—a court that could not exist under a modern understanding of the requirements of “separation of powers.” He simply was not called on to play what we might think of today as a “purely” judicial role.

Kent finished the substantive part of his opinion in *Jerome* declaring, “[w]e have advanced too far to recede. The whole entire plan must and will be completed.”¹⁵⁵ The rights of the commissioners, he said, must be sufficient to surmount “[a]ll little impediments” that stood in the way of the canal.¹⁵⁶ These words advert to a legal holding—the precise limits of an officer's authority under a statute—but hardly read like a legal text. Kent continued that he “presume[d]” that he wrote with “the entire approbation of the senate,” in quoting himself from *Rogers v. Bradshaw* to say:

[W]e must take expressions in the most extensive sense, when it is probable the lawgiver had in view every thing pointed out by that extensive sense . . . the sense most suitable to the subject, and best adapted to the facility and success of a great and generous scheme of public policy.¹⁵⁷

Kent had cause to presume that his opinion carried the Senate's approbation—not only because he had played a role in the legislative process but also because he wrote his opinion from a court made up almost entirely of senators.

III. AN AGE OF COLLABORATION

Kent's style when interpreting public acts was in part the result of his place in a unique constitutional structure. But the practice of interpreting statutes equitably was a generational phenomenon. Legal publishing in the first two decades of the nineteenth century was spotty, but we do have good records from some jurisdictions and especially good records from those judges who, with Kent, historians have remembered as the most influential

155. *Id.* at 343.

156. *Id.*

157. *Id.*

legal minds of his generation. These records suggest that equitable interpretation, and the attendant sense that judges were responsible for the legal coherence of statutory modifications to the common law, was a cultural and intellectual orientation that Kent had in common with a small class of exceptionally experienced and educated early American lawyers.

Many of these men also had diverse careers in government that made them broad political as well as legal thinkers. In this first post-revolutionary generation, perhaps because of the loss to the former colonies of lawyers who had sided with the British, there seemed to be a shortage of qualified men for important government positions. This, in addition to the stratified class structure that persisted in many states, meant that a handful of men cycled through every important government post. Those who ended their varied careers in the judiciary could not help but approach their cases with a broader and more comprehensive view of the needs of their “nations” (as they called the new states) and a sense of competence in multiple forms of government decision-making.

Equitable interpretation flourished in states with a strong bench and bar and where judicial power was not made a bone of contention in a struggle between different political factions. These conditions held as we have seen in New York, but also in Massachusetts and South Carolina, where moderate Republicans and Federalists were able to cooperate on judicial appointments, the publication of opinions, and judicial reform measures in the early nineteenth century, even as curbing the power of the judiciary became a key issue for Jeffersonians on a national level.¹⁵⁸

Thus, South Carolina’s Chancellor Henry William De Saussure shared Kent’s perspective on the judge’s duty to make legal sense out of an awkward statute. De Saussure was a Federalist who had served in multiple offices of government before he became a judge. He started his public life as a soldier in the Revolutionary War, then served as the Mayor of Charleston, then became a member of the legislature, where he was influential in the promotion of the bill to establish the University of South Carolina.¹⁵⁹ In private life he ran a very successful law practice, in which he mentored John C. Calhoun as an apprentice, among other eminent South Carolinians.¹⁶⁰ After ten years as a chancellor, De Saussure published a commentary on the case law of his court, hoping to codify his efforts toward a coherent law of equity. In that commentary, he defined equity just as Justice Wilson had and as Kent would,

158. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 249 (1971).

159. WILLIAM HARPER, *MEMOIR OF THE LIFE, CHARACTER, AND PUBLIC SERVICES, OF THE LATE HON. HENRY WM. DE SAUSSURE* 22–23 (Charleston, 1841).

160. 27 *THE PAPERS OF JOHN C. CALHOUN, 1849–1850*, at 278 (Clyde N. Wilson & Shirley Bright Cook eds., 2003).

as “a judicial interpretation of the laws, which presupposing that the legislator intended what is just and right, pursues and effectuates such intention.”¹⁶¹ When he spoke generally of law and what “law” is, De Saussure described a shared legislative and judicial responsibility for creating the governing code of a nation. “In a country where the citizens acknowledge no master but the laws,” he said, “it is becoming that they should be well informed what the laws are.”¹⁶² But where could citizens find the law?

These are to be found, in the first place, in the statutes enacted by the legal representatives, duly elected. But as no legislator, however learned or sagacious, ever did, or can provide by statute for the infinite variety of cases perpetually growing out of the complex and ever varying relations and transactions of men, a much greater body of law is formed by the decisions of courts of justice, pronounced upon causes requiring some exposition or construction of the statutes when these are not sufficiently explicit, or founded on the great and immutable principles of justice, where the statutes are silent.¹⁶³

This was De Saussure’s vision as well as Kent’s: the judge was meant to cooperate with the legislature to make law, construing statutes with “equity”; reading in them only “right and just” intentions; fixing the statutes’ defects when necessary; adding in details and provisos as cases called for clarification of statutory rules; and maintaining as well the background norms of the common law where statutes were “silent.” One sees his theory of interpretation in action in cases like *Croft v. Arthur*.¹⁶⁴ In *Croft*, he criticized the decision of an earlier South Carolina court, which had held that it “could not add words [to a statute] to give the law a different effect from that which it admitted on its face, nor to make that clear and perfect which was doubtful and imperfect—especially as penal laws are to be construed strictly.”¹⁶⁵ Interpreting the same statute, De Saussure dismissed this precedent as unhelpful:

With the highest deference for the authority of the learned judges who decided this case, I have not been able to satisfy my mind with this decision Doubtless the act was very obscurely worded, but still I think the intention of the legislature was clear, and that intention was sufficiently though darkly expressed.¹⁶⁶

161. 1 HENRY WILLIAM DESAUSSURE, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF CHANCERY OF THE STATE OF SOUTH-CAROLINA: FROM THE REVOLUTION TO DECEMBER, 1813, INCLUSIVE xxxi–xxxii (Columbia, Cline & Hines 1817).

162. *Id.* at xxvi.

163. *Id.*

164. 3 S.C. Eq. (3 Des. Eq.) 224 (Ct. App. 1811).

165. *Id.* at 234.

166. *Id.* at 234–35.

He found that intention, not in the words of the act, which provided no guidance at all, but in the act's purpose. To follow precedent, he said, would be to agree that "the legislature meant to enact a nullity," which De Saussure refused to do.¹⁶⁷

Massachusetts Chief Justice Isaac Parker, who would later help to found Harvard Law School, also displayed a Kent-like approach to statutory interpretation in his dissent from the opinion of his court in *Holbrook v. Holbrook*.¹⁶⁸ There, he showed that he believed himself responsible for both the legal soundness and also in some sense, the policy choices behind acts that he was called upon to construe. *Holbrook* concerned a religious liberty statute that allowed a citizen to claim an exemption from tithing to his town's parish if he paid his tithes to another church of which he was a member instead.¹⁶⁹ The question before the court was whether this exemption applied to a man who wanted to attend a church of the same denomination in a neighboring town or whether its benefit was intended to extend only to those who worshiped at churches of a different denomination than that of their home church.¹⁷⁰ The statute provided:

[W]hensoever any person shall become a member of any religious society, corporate or unincorporate, within this commonwealth, such membership shall be certified by a committee of such society, chosen for this purpose, and filed with the clerk of the town where he dwells, such person shall for ever afterwards be exempted from taxation for the support of public worship and public teachers of religion in every other religious corporation whatsoever, so long as he shall continue such membership.¹⁷¹

The plain text would seem to allow the plaintiff his choice of churches even if he decided to transfer his membership to another church of the same denomination.

But Chief Justice Parker refused to read the statute this way. The whole point of the act, Parker insisted, was to protect religious dissidents, not town troublemakers. He explained:

[S]tatutes are not to be taken according to their very words, but their provisions may be extended beyond, or restrained within the words, according to the sense and meaning of the legislature apparent from the whole of the statute, or from other statutes enacted before and after the one in question.¹⁷²

167. *Id.* at 235.

168. 18 Mass. (1 Pick.) 248 (1822).

169. *Id.* at 249.

170. *Id.*

171. *Id.* at 249.

172. *Id.* at 254 (Parker, C.J., dissenting).

He also argued that statutes should not be interpreted to conflict with “[t]he general system of legislation” on any given topic.¹⁷³ These precepts expounded, he was inclined to rule against the plaintiff, a result that he insisted was not based on his personal feelings. In coming to this conclusion, he said,

I think I have not been influenced by any apprehensions of the injurious effect of a different determination, for I do not know whether it would be expedient, or inexpedient, to destroy what remains of the obligations of citizens to contribute to the support of public worship by the corporations of which they are members. Perhaps so much has been done, that to do the rest will do no harm. At any rate, the legislature is to judge of this, and whenever it shall express its will in clear and unequivocal terms, I shall very readily submit.¹⁷⁴

It would be difficult to imagine, however, how the legislature could have expressed itself more clearly in the first instance. Parker’s decision would seem to require legislative *reiteration* before its statutes could be taken as law.

Some of the confident equitable interpretation opinions of this period emerged from jurisdictions in which judicial power *was* controversial. In a dissent to an opinion reading a new law on inheritance in Virginia, Judge Spencer Roane also showed a tendency to consider the policy behind the law before giving effect to its provisions. Roane came to the bench after serving in the Virginia Council of State and the Virginia Senate, and he would be chosen to revise Virginia’s laws twice over the course of his career. In *Tomlinson v. Dillard*,¹⁷⁵ Judge Roane wrote that while he had been “[h]abituated to respect the Legislature of our country,” he nevertheless felt “no hesitation to say, that this law . . . was anti-republican and aristocratic; founded on false principles, and on a total dereliction of the policy of the [earlier] act.”¹⁷⁶ The new statute governing descents was, he explained, “anti-republican and aristocratic, because it tended to keep up the wealth of families; and so contravene the wise policy which annihilated entails in 1776.”¹⁷⁷ For this and other reasons, he voted to limit the effect of the change in the law by reading part of the statute as a mistake.

Interestingly, North Carolina’s Thomas Ruffin, who was celebrated as a great judge in a state especially hostile to the judiciary, also gave statutes

173. *Id.*

174. *Id.* at 261.

175. 7 Va. (3 Call) 105 (1801).

176. *Id.* at 110.

177. *Id.*

atextual interpretations.¹⁷⁸ Ruffin began his judicial career after having served for four years in the North Carolina House of Representatives, including one term as its Speaker. He is remembered for his position as Chief Judge of North Carolina's Supreme Court in the 1830s, but brief stints as a superior court judge earlier in his career, from 1816 to 1818, and then again from 1825 to 1828, established his reputation as a judge and a systemic thinker.¹⁷⁹ During these years, his statutory interpretation cases showed greater concern for his own sense of the justice and the legal coherence of the outcome of a case than any precedential opinions construing the same statute or even the text of the statutes he construed.¹⁸⁰ Ruffin believed that the role of the judge was to incorporate legislation into the general fabric of jurisprudence by interpreting it to cohere, rather than conflict, with preexisting legal structures. In some statutory interpretation cases, Ruffin made no pretense of parsing the language of the act itself, relying for his judgments on common sense informed by common law norms and values.¹⁸¹ In others, Ruffin bolstered his interpretation by showing that, under the common law, the case would have turned out the same.¹⁸² His court also made use of the common law to supply defects in legislation even when this resulted in a broader interpretation and application of criminal statutes.¹⁸³

178. See generally LAURA F. EDWARDS, *THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH* (2009) (offering an important and interesting study exploring Thomas Ruffin's jurisprudence).

179. William A. Graham, *Life and Character of the Hon. Thomas Ruffin, Late Chief Justice of North Carolina* (Raleigh, 1870), in 1 *THE PAPERS OF THOMAS RUFFIN* 19, 23–25 (J. G. de Roulhac Hamilton ed., 1918).

180. See, e.g., *Frew v. Graham*, 4 N.C. (Taylor) 609, 609 (1817) (deciding whether a federal tax act intended to tax pig iron manufactured into bars in the same foundry just once or twice—once for each stage of production). In *Frew*, Ruffin relied on no precedent, no rules, and no authority except his own common sense—and, perhaps, an exclamation point and italicization—to carry the opinion. *Id.*

181. See, e.g., *id.* Likewise, in *Perry v. Perry*, Ruffin was asked to decide whether the portion a widow had taken out of her husband's estate was justified by the statute granting her dower. 4 N.C. (Taylor) 617, 618 (1817). He said simply that the allowance she had taken was “so palpably extravagant and bottomed on such a wrong construction of the law,—that it must be set aside and a new one made.” *Id.* Again, he cited no authority.

182. See, e.g., *State v. Wasden*, 4 N.C. (Taylor) 596, 597 (1817) (concurring in the judgment and admitting that the case was controlled by a statute but also pointing out that the answer would be the same even without the statute); *Hood v. Orr*, 4 N.C. (Taylor) 584, 584 (1817) (“The act of Assembly is positive upon this subject; and since the case of *Robertson v. Stone*, 2 N.C., 402, the courts have always refused to relax the rule of law, without any regard to the causes of failure of the appellant. Those decisions appear to me to be very proper, independent of the statute.”).

183. See, e.g., *State v. Walker*, 4 N.C. (Taylor) 661, 662 (1817) (holding, in an opinion by Seawell, that even though the indictment for forgery under the forgery statute was insufficiently proven, no appeal would be taken because the defendant was still guilty of forgery as defined under the common law). The interpretive canon that penal statutes are to be strictly construed was not thought applicable although it would most likely prevent a judgment like this today.

In Pennsylvania, on the other hand, the politicization of judicial power clearly had an impact on judges' use of equitable interpretation. Pennsylvania's court, which was the victim of several legislative experiments aimed at democratizing and de-professionalizing adjudication, shows a particularly interesting duality in its statutory interpretation cases. In cases concerning statutes that modified or elaborated subjects that remained chiefly governed by the common law, Pennsylvania's judges, and particularly Pennsylvania's eminent judge John Bannister Gibson, used equitable construction as the norm whenever the statute seemed incomplete or contained an awkward phrase.¹⁸⁴ But in cases interpreting those statutes, like Pennsylvania's mandatory arbitration acts, which specifically constrained the court's jurisdiction, the judges seemed to take a perverse enjoyment out of reading legislation strictly to the letter even when those textualist readings resulted in inconvenience and injustice.¹⁸⁵

Government and especially legislative experience also made an impact on how judges interpreted statutes, even though these other members of

184. *See, e.g.,* *Hersha v. Breneman*, 6 Serg. & Rawle 2, 4 (Pa. 1820).

[I]f . . . rigidity of construction were to prevail, it would prevent grand-children from petitioning the Court to award an inquest, and their right as to that, I believe, was never doubted. Although not within the words, they are so entirely within the equity of the act, which intended to invest them with all the interest and privileges which their father could, if he had survived the intestate, have claimed, that we cannot hesitate.

Id.; *see also* *Waln v. Shearman*, 8 Serg. & Rawle 357, 360 (Pa. 1822).

These are strong expressions; so strong indeed, that I was at first induced to think it was impossible to get over them, even in cases where they produced extreme inconvenience; because, where the intention of the Legislature is clear, the Courts of justice are to carry it into effect, and are not responsible for consequences. This is a principle not to be contradicted, but at the same time it must be acknowledged, that general expressions are sometimes to be modified where they are inconsistent with other parts of the same law, or of other laws on the same subject; or where they would produce a degree of injustice not to be attributed to the Legislature.

Waln, 8 Serg. & Rawle at 360.

185. *See, e.g.,* *Flanegan v. Negley*, 3 Serg. & Rawle 498, 499 (Pa. 1817).

The Court, however, are not ignorant of many inconveniences attending the arbitration system. They have, on several occasions, pointed them out. But it would be a breach of duty in them, to assume the right of amending the law. They are bound to give an honest interpretation to the acts of the legislature, according to what appears to them to be their true meaning. When inconveniences are felt, it is to be presumed, they will be remedied, by those to whom the constitution has entrusted the power. In conformity to the construction already established, I am of opinion, that the judgment in this case should be affirmed.

Id.; *id.* (Duncan, J., concurring) ("The inconveniences arising from this construction, are many, and call loudly on the legislature for amendments and alterations. But this consideration will not justify the Court in departing from the provisions of the act."); *see also* *Morrison v. Weaver*, 4 Serg. & Rawle 190, 190–91 (Pa. 1818) ("An appeal . . . is certainly not expressly given [in one section of the arbitration statute]; and this Court cannot supply that which the legislature has totally omitted, even though we should suppose the omission arose from an oversight.").

Kent's generation did not hold their several government posts simultaneously, as Kent did. As a result, a researcher must always read statutory interpretation cases with an eye to the biography of the men who wrote them. For example, Nathaniel Chipman of Vermont, whose early career switched back and forth between legislative and judicial office, also served on Vermont's Council of Censors, an institution charged with reviewing legislation for constitutionality before it became law. Knowing his career history, one reads Chipman differently when he subsequently interprets statutes in court. To understand his interpretation of ambiguous laws, one must check to see whether he had a prior chance to study and approve them as a censor or whether he was serving as a representative in the state assembly when those acts were passed. In fact, he did participate in the assembly debate on an act that came before his court in an 1814 case.¹⁸⁶ Therefore his decision in that case, citing the principle that "the Court ought anxiously to avoid any construction of a law, which would imply in the legislature, either an ignorance of their powers and duties, or a design to violate the national constitution,"¹⁸⁷ cannot be read as a dry recital of a canon of construction. He is relying on memory and, if memory fails, he is giving himself the benefit of the doubt.

One judge whose experience clearly played a role in interpretive style was Zephaniah Swift of Connecticut. When Swift wrote his first digest of Connecticut law, *A System of the Laws of the State of Connecticut*, his public service had been confined to the legislative branches. He had served in the state legislature for twelve sessions, including four terms as the clerk of the Connecticut Assembly and one term as Speaker, and he had also served for four years as one of Connecticut's representatives to Congress.¹⁸⁸ His 1795 treatise included a list of canons of statutory construction, including the idea of construing statutes equitably. But he warned that reading statutes atextually "gives too great latitude to judges, and may be improved to oppressive purposes. It destroys that uniformity, certainty and precision, which are the essence of law. It throws the rights of mankind afloat, by placing them upon the arbitrary opinions and capricious whims of judges."¹⁸⁹ If judges strayed too far from the text, "[t]he lawyer can never tell, how to advise his client, and the people cannot know the law. This rule therefore should be admitted with great caution, and practiced upon with great prudence."¹⁹⁰ Admitting,

186. *Starr v. Robinson*, 1 D. Chip. 257 (Vt. 1814).

187. *Id.* at 261; see generally DANIEL CHIPMAN, *THE LIFE OF HON. NATHANIEL CHIPMAN, LL.D.* (Boston, Charles C. Little & James Brown 1846).

188. 4 FRANKLIN BOWDITCH DEXTER, *BIOGRAPHICAL SKETCHES OF THE GRADUATES OF YALE COLLEGE WITH ANNALS OF THE COLLEGE HISTORY: JULY, 1778–JUNE, 1792*, at 60 (1907).

189. 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 49 (Windham, John Byrne 1795).

190. *Id.*

then, that interpreting statutes equitably was within the judicial toolkit, Swift expressed serious misgivings about its usefulness and propriety.

After this first 1795 publication, in 1799 and again in 1801, Swift was elected to Connecticut's "Council"—consisting of the governor, lieutenant governor, and twelve assistants. Until 1806, this branch of government exercised veto power over all legislation and also convened as Connecticut's highest court of appeal.¹⁹¹ Swift was then appointed a judge of Connecticut Superior Court, a position he held for eighteen years, the last five as chief justice.¹⁹² While on the court, he became increasingly frustrated with legislative interventions into legal causes, and he even published an angry pamphlet denouncing the assembly for reversing one of his decisions.¹⁹³ In short, he went from holding office as the assembly's champion, to an office that made him its guardian, to one that forced him to be its critic. The final public office of his career made him into the assembly's editor: when the 1818 ratification of Connecticut's first written constitution removed Swift from his judgeship, Connecticut's legislature commissioned him and two others to revise its laws to conform to the new constitutional order.¹⁹⁴ Swift performed the majority of this work and subsequently published his second digest and commentary on the laws of Connecticut.¹⁹⁵

Between the publication of this first digest and his second in 1822, Swift's views had undergone a shift. In the 1822 work, Swift defined law as the realization of "certain first principles existing in the nature and fitness of things" which "have been introduced by the statutes of the legislature, or have been derived from the dictates of reason," as well as from policy considerations.¹⁹⁶ Swift's later work discussed methods of statutory interpretation, including an expanded list of canons of construction. In the 1822 list, he described equitable construction simply as "sometimes necessary."¹⁹⁷ He explained that judges must sometimes decide that "acts within the letter shall not be considered within the meaning, and acts not within the letter shall be

191. *See id.* at 63 (providing Swift's view of this branch of government and its duties under "Of the Legislative Power"); *id.* at 93 (providing Swift's view of this branch of government and its duties under "Of the Judicative Power").

192. DEXTER, *supra* note 188, at 61.

193. ZEPHANIAH SWIFT, VINDICATION OF THE CALLING OF THE SPECIAL SUPERIOR COURT, AT MIDDLETOWN, ON THE 4TH TUESDAY OF AUGUST, 1815, FOR THE TRIAL OF PETER LUNG, CHARGED WITH THE CRIME OF MURDER. WITH OBSERVATIONS ON THE CONSTITUTIONAL POWER OF THE LEGISLATURE TO INTERFERE WITH THE JUDICIARY IN THE ADMINISTRATION OF JUSTICE (1816).

194. DEXTER, *supra* note 188, at 61.

195. 1 ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT (New Haven, S. Converse 1822).

196. *Id.* at 10.

197. *Id.* at 11.

considered within the meaning.”¹⁹⁸ The warning against judicial power, so prominent in the 1795 edition, had vanished. Toward the end of Swift’s career, Swift sometimes showed a willingness to expand statutes—even penal statutes—by importing common law norms in order to embrace behavior that their text did not reach.¹⁹⁹

In sum, the states’ most influential judges tended, like Kent, to see themselves as responsible for the coherence, justice, and sometimes even the policy behind the statutes they were asked to construe. They would add provisos, expand coverage, or narrow the effects of statutes whenever they felt it was necessary. These men made up the small group of judges who played an outsized role in the government of their states and whose works cast a long shadow over their state’s subsequent jurisprudence.

Equitable interpretation seems startling to a modern observer, but early nineteenth-century interpretation must be viewed in its context. That context includes not only rafts of unconstitutional statutes but also extremely poorly drafted ones. In a Virginia case, for example, judges and lawyers made reference to the legislative history of a statute to argue over what text was meant to fill a *blank* line left in the statute book by the clerk of the assembly, where part of the text of the law should have been.²⁰⁰ In an opinion from Pennsylvania, the question under discussion was whether a senseless parenthesis mark should have been placed in front of one word or another and which other words or marks might have to change in order to read anything rational in the badly transcribed text of the law.²⁰¹ In a case from Connecticut, a judge faced a question of whether an amendment to a statute appearing after a general revision of the laws was actually intended by the legislature or whether it was a revisers’ error.²⁰²

One thing that judges practicing equitable construction had in common, therefore, was that they frequently had to deal with obvious and inescapable legislative mistakes and instances of carelessness. With this understanding, the freedoms they took with legislative work of all kinds seem less strange. A second commonality among these judges was their legislative experience, which they probably believed equally useful when deciding whether a parenthesis was misplaced or whether the legislature really intended to change the

198. *Id.*

199. See *Fox v. Hills*, 1 Conn. 295, 299–300 (1815) (expanding a fraudulent conveyance statute to prohibit conveyances that would tend to defeat the claims of a judgment creditor even though the statute only intended to protect the claims of a contract creditor).

200. *Tomlinson v. Dillard*, 7 Va. (3 Call) 105, 118 (1801).

201. *Simpson v. Morris*, 3 Yeates 104, 117–18 (Pa. 1800).

202. *White v. Wilcox*, 1 Conn. 347, 349 n.(a) (1815) (“Whether the committee of revision in digesting the materials of the present statute, or the legislature in giving it their sanction, intended to vary the act of 1744 in substance, or only to adapt its phraseology to its new connexions [sic] must, at this day, rest upon conjecture.”).

law of descents. In any case, so long as the task of interpretation constantly called upon the judge to revise entire sentences to give them rational or grammatical structure, it is not hard to see how a jurisprudence of equitable interpretation might persist.

One characteristic which did *not* unite these judges was their politics. Although Jeffersonian rhetoric of the early nineteenth century vilified meddling Federalist judges, the jurisprudential tendencies I describe were more clearly a matter of state constitutional structure, along with the states' politics of judging and the individual judge's experience, education, and personality. Spencer Roane, who would have edited out troublesome amendments to Jefferson's statute abolishing primogeniture, was a leading Jeffersonian Republican and one of the members of the "Essex Junto." He would later, under a penname, engage in an acrimonious pamphlet debate with John Marshall over states' rights and Marshall's Federalist jurisprudence.²⁰³ Zephaniah Swift of Connecticut, who was much more hesitant to bend the language of a statute even when his feelings ran high, participated in the Federalists' Hartford Convention. Although it is tempting to parrot the trope of the high-handed Federalist bench, it is actually unhelpful to think of statutory interpretation philosophies in terms of political orientation. But whether motivated by partisanship or not, and however the poor quality of legislative drafting may explain it, equitable construction afforded these judges enormous political power.

This is especially interesting because during the first few decades of the nineteenth century, that classic measure of judicial power—judicial review for constitutionality—was still only very rarely used. Judges of this generation understood that a decision striking down a statute was fraught with danger to the institution of the court and should be hazarded only in extreme and unavoidable cases of legislative wrongdoing.²⁰⁴ What this history of equitable statutory interpretation reveals, however, is that the pre-history of judicial review represented an opportunity for judicial creativity and strength. Because courts could not easily set legislation aside, they instead took a greater role in molding statutes into acceptable forms. Although only some judges saw this as their responsibility, these were scattered throughout the nation's jurisdictions—those I've mentioned in New York, Massachusetts, Connecticut, Pennsylvania, North Carolina, South Carolina, Virginia, and Vermont, along with Francois-Xavier Martin in Louisiana, whose work became a

203. See F. THORNTON MILLER, *JURIES AND JUDGES VERSUS THE LAW: VIRGINIA'S PROVINCIAL LEGAL PERSPECTIVE, 1783–1828*, at 87–90 (1994).

204. When early nineteenth-century judges did strike down statutes, it was with an extremely apologetic tone. See, e.g., *Merrill v. Sherburne*, 1 N.H. 199, 202 (1818).

model for codifiers,²⁰⁵ and Jeremiah Smith from New Hampshire, the home jurisdiction of Daniel Webster and other important lawyers.²⁰⁶

Equitable interpretation was accepted by the leading thinkers (perhaps I should say the loudest, or most published, thinkers) on American law, but my sense is that many judges considered creative interpretations of statutes out of bounds. One point of similarity between Kent and the other judges who practiced equitable interpretation was their extreme erudition. Through extensive preparation for their role as judges, they had achieved a perspective from which they believed they could judge whether a statute transgressed a legal norm. Not all early nineteenth-century judges were well-educated in the law, however, so many had no basis from which to oppose or correct the direction their legislatures had taken. Also, whether as a result of their take on Jeffersonian Republican ideology or simply because of their jurisprudential philosophy, many believed that state constitutions had made the legislature the ultimate authority on how law should develop, and their opinions reflected that perspective.²⁰⁷ In 1803, when a lawyer urged an enlarged, or “equitable,” construction of a public statute to a Kentucky court, the court responded that if its members,

had been in the legislature when the law was on its passage, their humanity and justice might have induced them to have provided for those cases; but in their judicial capacity they are bound by settled rules of construction, and it is their duty to declare what the law is and not what it should have been.²⁰⁸

My sense is that more decisions like this one show up in the case law of this period than those claiming the right through “equity” to alter statutory language. But the judges that practiced equitable interpretation also wrote the treatises on their states’ law. Through law journals’ selective reporting of important decisions and other sources, these were the jurists who spread

205. See Michael Chiorazzi, *Francois-Xavier Martin: Printer, Lawyer, Jurist*, 80 L. LIB. J. 63 (1988) (providing a pithy overview of Martin’s life and significance and a very helpful bibliography of works both by and about him).

206. See JOHN PHILLIP REID, *LEGITIMATING THE LAW: THE STRUGGLE FOR JUDICIAL COMPETENCY IN EARLY NATIONAL NEW HAMPSHIRE* 6–8 (2012) (identifying some of the great lawyers who originated from New Hampshire).

207. See JOHN PHILLIP REID, *LEGISLATING THE COURTS: JUDICIAL DEPENDENCE IN EARLY NATIONAL NEW HAMPSHIRE* 4 (2009) (offering a broad perspective on judging, which “recounts the struggles in the early republic of two extremes . . . those who wanted a government of law defined and administered by men educated in the common-law jurisprudence of England, making rulings and applying principles without regard for the politics of the day” and “at the other extreme . . . people who mistrusted the law of professional lawyers and wanted all law to originate from republican institutions, whether law-applying jurors or law-creating legislators”); see also ELLIS, *supra* note 158, at 4.

208. *Nichols v. Wells*, 2 Ky. (Sneed) 255, 259 (1803).

their influence to subsequent generations of lawyers in their own states and across state lines.

Among these influential judges, James Kent was at an extreme, in his position in government, his ambition, and his philosophy of jurisprudence, but he was also the most influential of this group and the representative of this generation of great legal thinkers. A populist majority definitively rejected both Kent and the institutions that had shaped him in New York's Constitutional Convention of 1821, when they abolished the Council of Revision, diluted the power of the Chancellor, and capped judicial careers at sixty years of age (Kent was then in his fifty-ninth year). But Kent's influence only grew, both through the opinions published in *Johnson's Reporter* and through his great opus, *Kent's Commentaries*. If, for political, philosophical, or constitutional reasons, many judges felt they could not use Kent's expansive style of equitable construction or cite to English precedent alone when interpreting statutes, they could and did cite Kent as an authority on the construction of similar statutes in New York. Through the *Commentaries*, Kent influenced the legislatures of other states as they passed laws, informed two generations of lawyers and judges as they interpreted statutes, and provided one of the basic texts for American legal education through the remainder of the nineteenth century.

IV. KENT'S COMMENTARIES AS AN EXTENSION OF HIS LEGISLATIVE WORK, AND THEIR INFLUENCE

Kent's *Commentaries* are a collection of his Columbia University lectures on law. Focused as they are on serving up what Lawrence Friedman called "the meat and potatoes of law,"²⁰⁹ the text can be dry in places. It is more utilitarian than philosophical, aimed at the law student and practitioner. But to a reader familiar with Kent's life, the *Commentaries* read as something of a memoir—the self-justifying memoir of the fallen statesman. He lavishes attention on difficult questions that came before him in particular cases and on areas of law in which he revised New York's statutes. One sees echoes, too, of opinions he wrote during his tenure on the Council of Revision.

Although not without its critics, *Commentaries on American Law* was, according to contemporary observers, the best-selling American law book yet.²¹⁰ It became the basic text for legal education at Harvard, Yale, West Point, and the University of Nashville, among other places.²¹¹ And its success brought Kent's particular style of interpretation and his view on how

209. Lawrence M. Friedman, *Heart Against Head: Perry Miller and the Legal Mind*, 77 YALE L.J. 1244, 1251 (1968).

210. HORTON, *supra* note 91, at 303–04.

211. *Id.* at 302–03.

statutes and common law should interact to a wide and receptive audience of students and practitioners.

One of the lectures in the *Commentaries* is dedicated to statutes and their interpretation. The discussion begins with William Blackstone's injunction that an act of the legislature is "the exercise of the highest authority that the kingdom acknowledges upon earth" and that an act "delivered in clear and intelligible terms, cannot be questioned, or its authority controlled, in any court of justice."²¹² But Kent immediately qualified these statements, explaining that one of the ways courts respect the absolute authority of the legislature is by interpreting their acts to fit with background law:

When it is said . . . that a statute contrary to natural equity and reason, or repugnant, or impossible to be performed, is void, the cases are understood to mean that the courts are to give the statute a reasonable construction. They will not readily presume, out of respect and duty to the lawgiver, that any very unjust or absurd consequence was within the contemplation of the law.²¹³

It is true, Kent acknowledged, that there are some statutes that simply have no ambiguities to exploit in this way, and "if it should happen to be too palpable in its direction to admit of but one construction, there is no doubt in the English law as to the binding efficacy of the statute. The will of the legislature is the supreme law of the land, and demands perfect obedience."²¹⁴ But he qualified even this statement by adding that, though this supremacy exists in principle, "we cannot but admire the intrepidity and powerful sense of justice which led Lord Coke . . . to declare . . . that the common law doth control acts of Parliament, and adjudges them void, when against common right and reason."²¹⁵ After citing several examples of great jurists of the past who dared to uphold the integrity of the common law against the depredations of Parliament, he finally turned to the interpretation of American statutes, starting (of course) with the principle of judicial review.²¹⁶

Kent then turned to the nuts and bolts of interpretation, offering a list of interpretive canons, many of which would be familiar to the modern lawyer, and directing students on such diverse points as how much weight to give the titles of statutes, how provisos should operate, how to read technical words, narrowly construe penal statutes, and broadly construe remedial ones. Apart from these textual guidelines, however, Kent stressed that "[t]he real intention [of the legislature] . . . will always prevail over the literal sense of

212. 1 KENT, *supra* note 22, at 447.

213. *Id.*

214. *Id.* at 447–48.

215. *Id.* at 448.

216. *Id.* at 449–50.

terms.”²¹⁷ And as his judicial opinions revealed, the search for the legislature’s “real intention” left room for quite a bit of judicial discretion:

When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the objects and the remedy in view; and the intention is to be taken or presumed, according to what is consonant to reason and good discretion. These rules, by which the sages of the law . . . have ever been guided in seeking for the intention of the legislature, are maxims of sound interpretation, which have been accumulated by the experience, and ratified by the approbation of ages.²¹⁸

The statutory interpretation section of the *Commentaries* certainly received its fair share of citations in judicial opinions of the nineteenth century, but the collection and dissemination of bare maxims of interpretation was only the least of the ways in which Kent influenced American judges’ interpretation of statutes. Kent also showed how courts could interpret statutes without running afoul of background legal norms by explaining the construction New York had placed on its own statutes, often referencing his own opinions. For example, he illustrated the canon on remedial statutes with his opinion interpreting New York’s Mortgage Registry Act.²¹⁹ In his lectures on the law of husband and wife, he described New York’s divorce statute in detail, and then he went on to discuss defenses to a divorce suit—defenses which were not in the statute but which were drawn from common law precedent, such as lapse of time, cohabitation, and proof of the plaintiff’s adultery.²²⁰ Similarly, he included common law elaborations and references to his own opinions in his discussion of New York’s extradition statute²²¹ and its habeas statute,²²² among many others.

Judges from other states leaned heavily on Kent in their own statutory interpretation cases. Sometimes, they looked to him as a source of canons of interpretation.²²³ But more often, judges cited Kent’s substantive interpretation of similar New York statutes. In *Prescott v. Carr*,²²⁴ a New Hampshire case involving a dispute over a will, the presiding judge was confronted with issues that New Hampshire’s inheritance statute left ambiguous. He cited

217. *Id.* at 462.

218. *Id.* (footnote call number omitted).

219. *Id.* at 465.

220. 2 KENT, *supra* note 22, at 96–107.

221. 1 KENT, *supra* note 22, at 36–37.

222. 2 KENT, *supra* note 22, at 26–32.

223. *See, e.g.*, *Shillaber v. Waldo*, 1 Haw. 21, 22 (1847) (referring to the “late and deeply lamented Chancellor Kent” for general principles of interpretation).

224. 9 N.H. 453 (1854).

Kent's *Commentaries*, and all of the sources that Kent included in that section, for the principle that whole- and half-blood descendants inherit equally. And he ruled that real and personal property "goes alike to the same persons and in the same proportions."²²⁵ In doing so, he relied on the English statute of distributions, explaining that this was an authority "which, says Chancellor *Kent*, being founded in justice, and in the wisdom of ages . . . has been well selected as the most suitable and judicious basis on which to establish our American law of descent."²²⁶ The ruling required no other justification. *Hays v. Thomas*,²²⁷ an 1826 Illinois opinion, used the *Commentaries* to resolve the same ambiguity as to whole- and half-blood inheritance under Illinois law.²²⁸

Even when courts did not rely solely on the *Commentaries*, they used the *Commentaries* to lend weight to their opinions. This was true even in decisions driven by the plain meaning of the statutory text, which would seem to require no support at all. In *Guion v. Burton*,²²⁹ an 1838 Tennessee case, the dispute was over whether a parcel of uncultivated land could pass by descent from a man who, under English law at least, had never actually been "seised" of the land; although he owned the land in question by a grant from the government, he had never set foot on the property himself.²³⁰ The Supreme Court of Tennessee cited Kent for the observation that the rule requiring actual possession of the land was "founded in feudal reasons" and "can have very little force when applied to our modes of conveyance, and the circumstances of this country."²³¹ In the United States, most of the land remained uncultivated; actual entry into lands given by grant was often "difficult, if not impossible" and actual possession by the purchaser of a plot of land could not easily be proved even if it had occurred.²³² Furthermore, many parcels were owned by absentee English investors and other speculators. The court concurred with Kent that "[t]o a country such as this, a strict adherence to the common-law doctrine of seisin would be exceedingly inconvenient, and destructive of rights which it is the office of the law to preserve."²³³ Having made these observations, the court looked at last to the text, which said in black and white that actual possession was not a requirement of Tennessee's inheritance statute. The court observed, however, that "[i]f this view of

225. *Id.* at 460.

226. *Id.*

227. 1 Ill. (Breese) 180 (1826).

228. *Id.* at 181 n.a.

229. 19 Tenn. (Meigs) 565 (1838).

230. *Id.* at 568.

231. *Id.* at 570–71.

232. *Id.* at 571.

233. *Id.*

the effect of our statute required support, it is to be found in the construction Chancellor Kent gives to the New York statute upon this subject.”²³⁴

An 1851 Pennsylvania case concerned whether a woman could convey real estate that she owned separately from her husband. Here, too, Kent supplied the reasoning and supported the rule of decision. “The weight of authority, as Chancellor Kent remarks, would seem to be in favor of the existence of a general rule of law, that the husband *must* be a party to the conveyance.”²³⁵ The Supreme Court agreed with Kent: “[s]uch a rule is founded on sound principles arising from the relation of husband and wife . . . to avoid family discord and to protect her interests.”²³⁶ Although some states had made exceptions to this rule, the court said it was “happy to say Pennsylvania is not one of them.”²³⁷ Only then did the court look to the text of the statute, which said, as plainly as possible, that both the husband and wife must execute a deed disposing of the wife’s property.²³⁸

Even where judges looked to the decisions of other courts for support, it seems that they often relied on the *Commentaries* to find the relevant precedent. Their citations were therefore subject to Kent’s editing and pre-approval. For example, in a dispute over which words were necessary to create a warranty under Alabama law that a parcel of land was being sold free of encumbrances, the Supreme Court of Alabama found a decision interpreting Pennsylvania’s identical statute helpful. But the court did not cite Pennsylvania’s reporter—it cited Kent. The court noted that Kent believed the Pennsylvania case “furnish[ed] a correct exposition, not only of the Pennsylvania, but of our own statute also” and the court quoted Kent’s explanation of why Pennsylvania had gotten it right.²³⁹

As the success of the *Commentaries* confirmed Kent’s stature as one of the nation’s foremost jurists, citations to his opinions recorded in New York’s *Johnson’s Reporter* also became more frequent. In *Ricks v. Doe* ex rel. *Wright*,²⁴⁰ the Supreme Court of Indiana had to decide whether a deed later in time, though first recorded, would take legal precedence over a prior, unrecorded deed of which the subsequent purchaser had actual notice. The case turned on interpretation of Indiana’s 1818 registry act.²⁴¹ The court decided

234. *Id.*

235. *Trimmer v. Heagy*, 16 Pa. 484, 487 (1851).

236. *Id.*

237. *Id.*

238. *Id.*

239. *Roebuck v. Duprey*, 2 Ala. 535, 541 (1841) (citing *Lessee of Gratz v. Ewalt*, 2 Binn. 95 (Pa. 1809)).

240. 2 Blackf. 346 (Ind. 1830).

241. *Id.* at 347.

that one of Kent's decisions was "directly in point . . . as the act of [the] assembly of *New-York* is the same as ours."²⁴² The court agreed with Kent that the statute, though silent on this issue, implied a requirement of good faith.²⁴³ The Alabama Supreme Court similarly turned to one of Kent's opinions for aid in the interpretation of a statute concerning promissory notes. The court noted with gratitude that "Chancellor Kent, in his opinion . . . has imparted both light and order, to the dark and confused mass of adjudication upon this subject."²⁴⁴ In a Pennsylvania case interpreting an inheritance statute, the court also turned to *Johnson's Reporter*, noting that the question "has been deliberately examined in the Court of Errors in New York (where they have a similar statute)."²⁴⁵ The court relied, in part, on "Chancellor Kent, who has examined the case with great care, and whose views we adopt" for the conclusion that "a nuncupative will is not good, unless it be made by the testator, when he is *in extremis*."²⁴⁶

Even when courts chose not to rely on Kent, he remained present in their opinions because lawyers made heavy use of him in their arguments. Because the *Commentaries* was both convenient and comprehensive, citations to it frequently dominated lawyers' briefs. As a result, judges often felt the need to explain themselves when their conclusions as to the meaning of their own states' statutes differed from Kent's interpretation of similar New York statutes. In *Wilson v. Clarke*,²⁴⁷ for example, the Supreme Court of Pennsylvania pointed out that New York had retained the fourth section of the British Statute of Frauds, which explained Chancellor Kent's conclusion in a case with similar facts. "But we are enabled to escape [his conclusion]," the court explained, "by the fact that this section has been omitted in the statute of Pennsylvania."²⁴⁸

In *Tomlinson's Lessee v. Devore*,²⁴⁹ the question was whether a Maryland statute vested exclusive jurisdiction in chancery over the real estate of the mentally ill or whether chancery shared jurisdiction with courts of law. Chancellor Kent had interpreted New York's statute on this subject to mean that chancery had exclusive jurisdiction, and his opinion rested on a particular provision of the New York statute. The Maryland Court of Appeals felt it necessary to explain that the language of Maryland's statute was slightly different. "The negative expression in the *Statute of New York*, the Chancellor

242. *Id.* at 348.

243. *Id.* (citing *Jackson ex rel. Gilbert v. Burgott*, 10 Johns. 457 (N.Y. Sup. Ct. 1813)).

244. *Bloodgood v. Cammack*, 5 Stew. & P. 276, 281 (Ala. 1834).

245. *In re Will of Yarnall*, 4 Rawle 46, 64 (Pa. 1833).

246. *Id.*

247. 1 Watts & Serg. 554 (Pa. 1841).

248. *Id.* at 557.

249. 1 Gill 345 (Md. 1843).

construes to confer exclusive jurisdiction, and without this provision, the irresistible inference is, that his jurisdiction would be concurrent with the courts of common law.”²⁵⁰ Only after distinguishing its case from Kent’s could the court move on to consider the actual text of the law and hold that Maryland’s act required a different outcome.²⁵¹

Whether they wished to or not, when nineteenth-century judges interpreted statutes, they had to contend with Kent—he was there in the courtroom with them, shaping the possible outcomes the case could take. Kent’s *Commentaries*, including his substantive teaching on how to interpret statutes in particular areas of law, became a reference work used in the courts of every state. It was a text, moreover, with a bent in favor of judicial power to review, challenge, and mold legislation.

Kent had always opposed codification of law, but when New York’s legislature made its first moves toward what would culminate in the Field Code of 1848, Kent greeted the news with equanimity. His influence over the law, as a drafter of legislation, a defender of the Constitution, and an interpreter of statutes, was quite secure. Even under the most comprehensive code, he wrote, citizens would find,

“that new and unthought of emergencies often happen that necessarily require new supplements, abatements or explanations” and that “the body of laws that concern the common justice applicable to a great [commonwealth] is vast and comprehensive, consists of infinite particulars and must meet with various emergencies, and therefore requires much time and much experience as well as much wisdom and prudence successively to discover defects and inconveniences, and to supply apt supplements and remedies for them.”²⁵²

Where this was true, there was room for what James Wilson had termed “equity”—for interpretation of the code, just as the earlier statute law had needed interpretation. Kent could be justly confident that the judges of New York State would consult his writings first whenever these exigencies arose.

The history of American statutory interpretation would be incomplete without a chapter on James Kent, even though the place he occupied in New York’s constitutional structure, poised between the judicial and legislative

250. *Id.* at 348.

251. *Id.* at 348–49; *see also* *State v. Granville Alexandrian Soc’y*, 11 Ohio 1, 14 (1841) (“We are also referred to the opinion of Chancellor Kent That opinion, however, is based, not upon the charter itself, but upon the decision of the court above referred to. The chancellor, if adjudicating this case, would, probably, hold that decision obligatory. We do not, for the reasons already stated.”).

252. JOHN THEODORE HORTON, *JAMES KENT: A STUDY IN CONSERVATISM, 1763–1847*, at 298 (1969) (alteration in original) (quoting Letter from James Kent to Peter L. Duponceau (Apr. 19, 1826)).

branches, belongs to a lost world; even though his politics became obsolete during his lifetime; and even though his high-handed style, the product of his role in New York's formative years, was necessarily distinctive. The *Commentaries* could not have emerged from any other source—they reveal the meticulousness of the compiler, the experience of the judge, and the vision and mind of the lifelong legislator. With their constant notation on the proper interleaving of statutes and common law, the *Commentaries* became the basic educational and source text for American lawyers. And Kent's career, which began before the turn of the nineteenth century, would have an impact into the twentieth; Oliver Wendell Holmes Jr. edited one of the final editions of the *Commentaries* before he took his place on the Supreme Court.²⁵³

Kent's period of statutory interpretation, though brief-lived, had a long-term impact on the development of American law. This is at least in part because the wariness toward legislatures and statutes that ran throughout Kent's work and the work of his peers in other states did not become a fringe attitude. Even as Kent's elitist rhetorical phrasings became untenable, and even as the deference the legislature had showed toward him became a dim memory, his fundamental orientation toward legislatures remained mainstream. The political rhetoric of Jacksonianism, the first great American populist political movement, maintained the theme that legislatures could be dangerous and, above all, needed direction. Jacksonians maintained a sharp distinction between "the people," who would "remain . . . uncorrupted and incorruptible," and their representatives, who could be "misle[]d and deceive[d]."²⁵⁴ The executive veto was the first and the favorite Jacksonian solution to the problem of legislative overreaching, but when this did not prove sufficient to dam the flow of statutes, Jacksonians turned to what they saw as its corollary, the interpretation and invalidation of statutes by democratically elected judges.²⁵⁵ And those judges reached for Kent in part because it was easy—Kent provided accessible answers to judges less professionally prepared for their roles, and he was, as we have discussed, already a

253. 1 KENT, *supra* note 22; *see also* 2 KENT, *supra* note 22.

254. 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 306 (Washington, 1896). Indeed, Marvin Meyers points out that the seeds of this future Jacksonian position can be found in the speeches of Kent's opponents at the 1821 New York Constitutional Convention. MARVIN MEYERS, THE JACKSONIAN PERSUASION: POLITICS & BELIEF 250 (1960) (distinguishing between Democratic "radical[s]" at the convention and the "Democratic moderates" whose positions were not so different from Kent's and who differed from Kent "mainly by dropping references to endangered property rights, and by distinguishing more sharply between the virtues of the people and the vices of their representatives").

255. *See generally* JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012) (offering a study of the hows, whens, and whys of judicial elections in the nineteenth century).

fixture in the lawyers' arguments—but also because his methods and doctrines about statutes suited the Jacksonian preoccupation with returning power from the legislatures back to the people.²⁵⁶

V. KENT AND TWENTIETH-CENTURY THEORIES OF INTERPRETATION:
SOME OBSERVATIONS

Kent's approach to statutes had elements in common with twentieth-century movements, particularly the teachings of the Legal Process School of the early twentieth century. Like Hart and Sacks, he would have rejected the notion that law and society are separate. He frequently eschewed tried-and-true English precedents because they did not suit the American context, sometimes for purely practical reasons but just as often because they failed to capture the philosophical gains New York had paid for with the Revolution. Kent's statutory interpretation was also based in what Professors Eskridge and Frickey describe as "Organic Rationality."²⁵⁷ That is, as a rationalist, he believed that legal questions could only be answered by reference to principles that fit into a systematic structure of law, one that was internally consistent and reasoned. But like John Chipman Gray,²⁵⁸ Roscoe Pound,²⁵⁹ and Benjamin Cardozo,²⁶⁰ Kent believed that the principles motivating legal commands evolved with society. Indeed, the leading judges of his generation had to believe this; how else were they to make sense of legislative requests that they comb through the common law and accept only those aspects of it suited to the American context?²⁶¹ And as Lon L. Fuller urged of twentieth-century jurists,²⁶² Kent believed that the soundness of the *policy* those principles furthered was just as important as the systematic coherence of the outcome of any particular case.

256. See MEYERS, *supra* note 254, at 250.

257. See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* lxii (1994).

258. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 286 (1909).

259. ROSCOE POUND, *LAW AND MORALS* 55 (1924).

260. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921) (describing how "principles that have served their day expire, and new principles are born").

261. See, e.g., SAMUEL ROBERTS, *DIGEST OF SELECT BRITISH STATUTES, COMPRISING THOSE WHICH, ACCORDING TO THE REPORT OF THE JUDGES OF THE SUPREME COURT MADE TO THE LEGISLATURE, APPEAR TO BE IN FORCE IN PENNSYLVANIA* (Philadelphia, James Kay, Jon & Brother 1817). This compilation, published by Pennsylvania judges in obedience to a statute passed by the Pennsylvania Legislature, asked "[t]he judges of the Supreme Court to examine and report, which of the English Statutes are in force in this Commonwealth;—and which of those Statutes, in their opinion, ought to be incorporated into the statute laws." *Id.* at xiii; see also ELIZABETH GASPAR BROWN, *BRITISH STATUTES IN AMERICAN LAW, 1776–1836*, at 29–34 (1964).

262. See LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 10 (1940).

There were also, of course, striking differences between the way Kent interpreted statutes and the approach of the Legal Process School, differences that speak to the realities of judging during the decades just after the Revolution. Legal Process scholars taught, for instance, that the resolution of complex social problems should be left to agencies and legislatures, whose superior fact-finding abilities and capacity for planned regulation would lead to better, more consistent, and more democratically accountable outcomes. But any concerns about the comparative competence of institutions of government would have led the lawyers and jurists of Kent's generation in the opposite direction. As we have seen, Kent's generation saw what legislatures did as piecemeal and ad hoc compared to the judicial lawmaking, which, at the time, more often took into account long-standing traditions and systematic concerns. As such, the consensus of the Legal Process School that judges should acknowledge their role in the development of policy goals, but that they should do so as the *junior* partners to legislatures and agencies, would not have resonated with Kent or his peers. That aspect of the Legal Process School depended on the existence of legislatures and agencies of high and growing institutional capacity. Indeed, the practical difficulty of working with the legislatures of the early nineteenth century does much to justify the intuition of Cass Sunstein and Adrian Vermeule that the method of statutory interpretation should be chosen based on the relative institutional capacities of the relevant players.²⁶³

The most striking difference between Kent's generation and jurists of the twentieth century, however, was that Kent's consideration of the policies underlying his decisions and inherent in the legal principles he announced was neither subconscious, nor clandestine, nor something that he needed a "theory" to justify. He frankly avowed his policy rationales on the face of his opinions. His jurisprudence is, in this sense, offensive to the wide swath of twentieth-century legal theories, which have in common their genesis in the progressive critique of *Lochner v. New York*²⁶⁴ and the related labor cases. The motivating concern of twentieth-century legal scholars has been either how to limit the policymaking function of the judiciary through textualism and other muzzling doctrines, or how to bring that policymaking out of the shadows and channel it in ways that pose less of a challenge to democracy. But this concern over "activist judging" that has motivated post-*Lochner* judges and theorists, and to some extent still characterizes the constitutional law curriculum, is a problem that grows out of that strict separation of powers

263. See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886–88 (2003); see also Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014) (arguing that strict textualism can only be justified when a legislature has high institutional capacity).

264. 198 U.S. 45 (1905), *abrogated by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

that we see as central to republicanism. Kent's view of "separate powers" was something that we would not recognize as such. The lines we are used to, the lines we now depend upon and police as central to the structure of American constitutionalism, were for the following generation to define.

When Holmes wrote, in *The Path of the Law*, that "[b]ehind the logical form" of statutory interpretation decisions "lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding,"²⁶⁵ he threw aside a veil that had been drawn over the judicial process for almost a century. Kent's generation of jurists operated before the veil. This Article should not conclude, however, without some notes on why the following generation found it necessary to disavow policymaking, and how they did so.

During the Jacksonian era, the American judiciary was forced to redefine itself, now as an integral part of a *democratic* republican government. The surge of populism that carried Jackson into the presidency in 1828 signaled the rise of a political party obsessed with democratic legitimacy in government office and deeply suspicious of delegated authority. These trends, combined with Democrats' disdain for erudition and their repudiation of the condescension of an earlier generation's "natural aristocracy,"²⁶⁶ forced judges interpreting statutes to find new ways to justify their role in the law-making process. At the same time, the great legal controversies of Jackson's presidency and the lead-up to the Civil War were more delicate and more political than ever before. The questions raised in statutory interpretation cases were existential; they asked courts to decide—to name just two—whether and to what extent a human subject to the laws was a "person" under the laws and whether and how much governmental authority could be given away to private corporations.

So what tools did the judiciary develop to deal with statutes produced by majoritarian legislatures—statutes that were increasingly dangerous to construe? Courts managed the problem in two ways. First, they recast legal

265. OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 181 (1920).

266. See Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in 8 THE WRITINGS OF THOMAS JEFFERSON 394, 396 (1905). Jefferson wrote:

For I agree with you that there is a natural aristocracy among men. The grounds of this are virtue and talents. . . . The natural aristocracy I consider as the most precious gift of nature, for the instruction, the trusts, and government of society. And indeed, it would have been inconsistent in creation to have formed man for the social state, and not to have provided virtue and wisdom enough to manage the concerns of the society. May we not even say, that that form of government is the best, which provides the most effectually for a pure selection of these natural aristoi into the offices of government?

Id.

questions as questions of institutional power. At the federal level, the judiciary was more a victim of this process than its protagonist. Chief Justice Roger Taney's Supreme Court created doctrines that minimized its power in order to avoid entanglement in the biggest problems of state, an effort that succeeded until *Dred Scott v. Sandford*.²⁶⁷ But at the state level, the "Judicial 'Can't,'" as Robert Cover called it,²⁶⁸ became not only a mantra but even a badge of pride.

The second, related way, was by speaking and thinking of jurisprudence as a science—rather than as a form of governance, which highlights the authority of the judge to make political decisions, or an art, which draws attention to the judge as a personality.²⁶⁹ This was the veil drawn to obscure the policymaking power of the judiciary, and it involved both a new way of talking about the legal process and a new definition of the judge's turf. In order to assert that statutory construction was a science requiring specialized expertise, judges had to take the work of interpreting law away from other institutions, including juries and even legislatures. In the process, equitable interpretation, and judges' other more collaborative means of directing statutory innovations, fell away, and judicial review for constitutionality took their place.²⁷⁰ Judicial review, while more rigid and more authoritarian, was more acceptable to the new political culture because it represented a claim to a specialized expertise that legislatures did not share. These moves preserved a sphere for judicial action that was not poisonous to Jacksonian political tendencies. Legal "science" does not compete with popular sovereignty, because it posits a law that *is* rather than a law that *does*.

The reinvention of judicial authority complemented changes to the legislative branches of the states. In the 1840s and 1850s, some state constitutions were amended to prohibit private, special, and local legislation.²⁷¹ The resulting increase in general legislation shifted the administration of whole swathes of social and economic relations to the courts. Divorces, incorporations, and other legal transactions previously handled case-by-case by the legislatures were now governed by generally applicable statutes, interpreted to fit the facts of specific cases by courts. Yet, while delegates to these constitutional conventions spoke of curtailing the discretion of the legislatures,

267. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

268. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 119 (1975).

269. See M. H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 114–16 (1986); Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 L. & HIST. REV. 421 (1999).

270. See Farah Peterson, *Statutory Interpretation and Judicial Authority, 1776–1860*, at 222–47 (unpublished Ph.D. dissertation).

271. *Id.* at 247–59.

they expressed remarkably little concern over the transfer of that discretion to the courts. Rather, in testament to the success of the new view of law as science, the debates show that delegates imagined that they were eliminating certain types of discretion from government altogether.²⁷² And the change in legislation gave judges more raw material on which to apply their “scientific” methods. As statutes focused more on general principles, judges shifted from the mechanical application of private bills to individuals to the more “law-like” distillation of rules in particular cases. Although a complete shift to general legislation did not occur until well after the Civil War, general governing statutes were increasingly common and became the rule in at least some states.

VI. CONCLUSION

Kent was the most influential of an important generation of American judges whose impact helps explain the development of American law and legislation in subsequent years. If Willard Hurst’s claim is right, that later nineteenth-century judges were able “to take for granted the law’s framework-setting function to an extent that did not do justice to its actual importance,”²⁷³ it is only because that frame had already been built before their time. American law did not fall apart in the nineteenth century—rather, common law legal doctrines were elaborated, explained, and reinforced, building over time to a more national, rather than state-by-state, American system of law. Kent’s overview of American law, his influence, along with other members of his generation, on judicial interpretation, and the rise of legal professionalism in the United States more generally, provided both structure for the legislatures who consulted the texts and precedents and safeguards for those that did not. The new American treatise writers, including Justice Story, were part of this evolution, but Kent and other early writers like Swift and De Saussure were the vanguard. As the next generation of American jurists turned toward a more “scientific” approach to interpretation, those later jurists found the basic principles of law and discovered the eternal themes of the law in the materials that Kent’s generation had provided.

Understanding how this first generation of nineteenth-century jurists bridged what we think of as judicial and legislative roles, one begins to see how the first century of Americans overcame the central problem of legislation—the problem that arises when non-experts write laws that must interact with the constitutional rights and common law norms that citizens depend upon. These great legal minds contributed to a new level of substantive consistency in drafting and interpretation, which would be necessary before

272. *Id.* at 254.

273. HURST, *supra* note 4, at 10.

American legislatures could move beyond piecemeal and private legislation and toward larger public projects and regulatory acts. Only after this contribution did judges begin to assert lines of demarcation between judicial work and the legislative prerogative, effectively obscuring the judiciary's original role in supplying the substantive norms through which statutes are interpreted.