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# Debating the Transformation of American Law: James Kent, Joseph Story, and the Legacy of the Revolution

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# Debating the Transformation of American Law: James Kent, Joseph Story, and the Legacy of the Revolution

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MOST HISTORIANS WOULD SETTLE FOR ONE LANDMARK BOOK. MORTON Horwitz has published two already. The two volumes of *The Transformation of American Law* exist, however, in uneasy relation.[1] To risk the reductionism that Professor Horwitz has always avoided, *Transformation I* was framed within historical materialism and strove to debunk the celebratory narratives of early American legal history. *Transformation II*, on the other hand, mapped onto an intellectual history that takes ideology seriously, and not only as an expression of Gramscian hegemony that dominant interests had to take seriously, too.[2] An interesting counterfactual question is how *Transformation I* would differ if Professor Horwitz had written it in the spirit of *Transformation II*. What would the antebellum judiciary look like if its doctrines were viewed as something other than the expression of a legal profession that, in exchange for a monopoly on commercial dispute resolution, dedicated itself to the expansion of capitalist markets? If we took the legal reasoning of judges in the early Republic as seriously as Professor Horwitz took those of the "old" and "new" conservatives of the late nineteenth century, how would we characterize their decisions?[3] The revision would not alter the outlines of Professor Horwitz's compelling argument about the economic consequences of doctrinal change. But it would at least complicate and humanize a judiciary that, in *Transformation I*, appears largely unitary and nameless.

It might also return early American legal culture to its transatlantic and post-

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Revolutionary context. Professor Horwitz demonstrated that the "Commonwealth" historians who preceded him and examined some of the same issues, such as Oscar and Mary Handlin, Louis Hartz, and Willard Hurst, did not account for the distributional consequences of legal change.[4] Yet both the Commonwealth historians and Professor Horwitz treated the reshaping of American law as a national phenomenon of the early nineteenth century while also describing a model of publicly subsidized economic development that could be applied to other places or times—and even revived in the United States a century later to help legitimize the New Deal. A step toward mediating the tension between exceptionalism and universalism in these narratives is to explore how the experience and memory of the Revolution affected legal reasoning into the nineteenth century.

Most early American lawyers saw history playing out on a stage larger than the nation, but not marching across the entire globe. For decades they wrestled with the meaning, for law, of the Revolution. Internally, the British Empire had left them with a fragmented and pluralist legal order; the reconstitution of authority on the basis of popular sovereignty restructured but did not eliminate that fragmentation. Externally, they still derived most of their legal learning from Europe, especially England. The American constitutions did not specify how the legal systems in the new Union would operate. Their structure, personnel, and doctrine were left primarily to the legal professionals themselves. They had to solve problems of institutional design such as, Which structures worked best? What were the appropriate sources of law? And what literary forms should be used to teach and communicate law?

Seeing early American judges as actors in a fluid, pluralist, and transatlantic legal culture throws a different light on the central theme of *Transformation I*. There, judicial decisions appear to flow from courts that, for the most part, agreed on their primary task: transforming law to subsidize economic development at the expense of agrarian producers. Professor Horwitz acknowledges that a few judges remained committed to agrarian values and dissented from the transformative consensus. Because of the deterministic premise of *Transformation I*, he treats these dissenters as voices from a fading world rather than as worthy opponents of modernization. It is correct, at least, not to treat them with nostalgia, because some of the dissenters objected less to economic transformation than to the reasoning process by which their brethren fostered it. In other words, even judges who supported commercial development disagreed about the limits that legal reasoning placed on those means. Instead of marching in lockstep, early American judges were arranged in constellations defined by region, education, training, and political ideology.[5] Some constellations contained internal disagreement, too. The doctrinal changes that Professor Horwitz characterized as a single transformation reflected a variety of attempts, by many judges, to manage legal diversity among the states and, by some of them, to integrate the Union into the Atlantic world.

This essay does not attempt to chart all the constellations of judges in the early United States.[6] Instead, it explores disagreements between two of its most influential judges, Chancellor James Kent of New York and Justice Joseph Story of the U.S. Supreme Court, to illuminate how even judges committed to the same project—commercial union and international respect—disagreed about such fundamental questions of law as the extent of the federal commerce power, the reach of federal court jurisdiction, and the discretion of criminal juries. These disagreements reflected different understandings of the sources and methods of legal reasoning, as well as diverging assessments of the role of state, local, and popular institutions in American constitutionalism. Both were seeking to define who would administer legal change as the states evolved from a patchwork of British colonies into a federal union.

These historical questions push beyond, or in different directions from, Professor Horwitz's monumental research agenda in *Transformation I*. They reopen the problem of law's role in developing not just the American economy but also its political economy. They also encourage us to view the early United States as a collection of postcolonial provinces rather than as a young nation on an inevitable path toward modernization. From this perspective, the root of all these questions was how early American lawyers and judges made sense of the Revolution's effect on law.

## KENT AND STORY IN THE NARRATIVE OF TRANSFORMATION

Chancellor Kent and Justice Story are among the few judges identified by name in *Transformation I* and usually appear as instrumentalist decision makers.[7] The treatment of Kent and Story reveals the strengths and weaknesses of the argument that the judiciary used law to subsidize economic growth: each lines up on both sides of the transformation scorecard, favoring traditional notions of property or contract in some areas, and dynamic conceptions in others. For example, Professor Horwitz views Kent and Story as instrumentalists when they initiated the treatise tradition to generate national commercial law.[8] They were also instrumentalist when permitting tenants to remove fixtures that they had built on their landlords' property, thus providing an incentive for improvement. Kent, on the other hand, was a traditionalist when criticizing the statutory trend allowing a good-faith possessor to recoup the value of his improvements when ousted by the holder of a superior title.[9] On the basis of an 1822 chancery decision, Kent is held up as a lonely defender of the just price theory of consideration in contract law. On the next page, Professor Horwitz highlights *Seixas v. Woods*, a New York case decided two decades earlier, as evidence of the rise of the contrary doctrine of caveat emptor.[10] But Kent wrote one of the seriatim opinions for the majority

in *Seixas*. To defend caveat emptor, Kent observed that "the only writer of authority, that calls this doctrine into question, is professor *Woodeson*, in his *Vinerian Lectures*, and he does not cite any judicial decision as the basis of his opinion."[11] Kent believed that caveat emptor was endorsed by overwhelming authority and, therefore, uncontroversial. However, in a hard case of a land sale by a dissolute father, which were the facts in the 1822 case, he refused to enforce an unfair bargain. For Kent, the difference between the two cases turned on something other than the just price theory or economic transformation.[12]

At times in *Transformation I*, Story and Kent appear as transitional figures. One example is their defense of state-chartered monopolies as a means of encouraging investment in public works, a compromise that subsidized development but also hampered competition. This compromise is best memorialized in Justice Story's dissenting opinion in the *Charles River Bridge Case*,[13] in which Chief Justice Roger Taney's majority opinion represented the more dynamic approach to property rights.[14] Another instance is their support of the will theory of contract, in which subjective agreement between contracting parties trumped calculations of equitable exchange. Professor Horwitz argues that early in the century, judges like Kent and Story used the will theory to defeat the just price theory of consideration. Soon, however, they were overtaken by supporters of an objective theory of contract, who rejected the will theory in favor of standardized interpretation of contract terms to facilitate interstate commerce.[15]

Additional evidence of their transitional status comes from their early support of the just compensation principle, which Professor Horwitz argues vaulted a new private conception of property above a traditional public one. However, Kent and Story also awarded consequential damages in eminent domain proceedings, while other instrumentalist judges denied them in an effort to reduce the cost of improvements undertaken by private transportation corporations.[16] Compensation was a liberal principle; some judges believed that awards should not be too liberal. Again, Kent and Story shared a transitional approach to riparian rights, moving crabwise away from natural use and prior appropriation rules toward a reasonable use standard.[17] In these transitional situations, the truly instrumentalist judges were not these elite jurists but instead a group of mostly forgotten state judges who were openly consequentialist.[18] Finally, Professor Horwitz sometimes portrays Kent as simply confused.[19]

Despite the spread of their decisions across the spectrum of transformation, Professor Horwitz is right to treat Kent and Story as partners in the project of economic development. In meetings, correspondence, and mutual citations, they communicated their shared view that the United States ought to have a national commercial law. When President Madison appointed thirty-two-year-old Joseph Story (his third choice) to the Supreme Court in 1811, the forty-eight-year-old James Kent had been on New York's supreme court for thirteen years, and its chief justice for seven years. Three years later Kent became New York's chancellor,

the highest judicial officer in the state.[20] The relationship, however, was one of equality and mutual admiration—though never quite friendship. By 1820, Story was praising the New Yorker as "another Hardwicke," the great eighteenth-century English chancellor.[21] This was a tribute to Kent's almost single-handed creation of American equity jurisprudence, which covered a significant amount of commercial law. When he became New York's chancellor in 1814, he published the first regular equity reports in the Union. Story relied heavily on these reports when deciding equity cases on circuit in Massachusetts, which had no chancery court. There, federal equity law was largely Kent's equity law. Kent, in turn, complimented Story, probably the most learned American admiralty judge in the nineteenth century, for writing admiralty decisions like those of Wm. Scott, later Lord Stowell, who was the chief judge of the High Admiralty Court in Britain.[22]

These transatlantic comparisons were full of meaning. Hardwicke and Stowell were, along with Lord Mansfield, the most influential judges in England since the Glorious Revolution. A signal reason for their influence was that their decisions were published and circulated widely across the Atlantic. Kent and Story emulated these judges while also seeking to improve their methods. Kent, for example, remade the judicial opinion into its modern form, carefully sifting through authorities to discover the guiding principles of decision, ranging over the arguments for and against applying those principles to the plaintiff's case, and then concluding with a clear judgment.[23] He also helped shape the doctrinal treatise as a genre. His four-volume *Commentaries on American Law* (1826–30) went through fourteen editions and found its way onto almost every American lawyer's bookshelf in the nineteenth century. Story, in turn, was perhaps the most creative judge of his time and published ten treatises that stretched from constitutional law to promissory notes. For thirty years his hands were all over the publication process of the *United States Reports*, and he drafted congressional legislation specifying the Court's own jurisdiction.[24] Both believed that lawyers and judges played an indispensable role in American constitutionalism, not least as guardians of constitutional interpretation through judicial review, an institution they promoted on the bench and in their books.[25] Both opposed the reduction of suffrage requirements at their respective state constitutional conventions in 1820 and 1821.[26] Both also drew on the law of nations and the Continental civil law to place American law in a cosmopolitan framework.[27] The point of all this writing was not only to resolve individual disputes. It was also to solidify and broadcast principles of American law within and beyond their jurisdictions.

For Professor Horwitz, these projects were all of a piece—a Weberian piece. The new treatises helped transform a static body of law that safeguarded traditional uses of land and protected individuals from commercial exploitation into a modern instrument of capitalism. Their writers sought to "creat[e] uniformity" to help merchants gauge commercial expectations and to "suppress all the centrifugal legal tendencies before they could even be conceived."[28]

Again, much of this account is true. Kent and Story had similar training, admired and learned from each other, and agreed on many principles. They and like-minded judges embraced commerce. In the sociology of the Scottish Enlightenment, which both had learned from British books, commerce was the primary index of civilization.[29] Buying and selling was central to commerce, and they designed doctrines to foster such exchange within and across the states. But commerce was a means to two related ends: political union within the United States, and reintegration of the Union into the Atlantic world.[30]

Broad agreement on political ends, and on the role of private law as a means to attain those ends, did not mean that they agreed about the reach of Congress's commerce power, the extent of federal admiralty jurisdiction, and the law-finding power of criminal juries. These were not just marginal differences. Instead, they revealed fundamental disagreement about the nature of legal reasoning, which in turn depended on their understandings of English legal materials, the relationship between jurisdictions in a pluralist Union, and the degree to which a legal culture should respect popular decision making.

These questions had puzzled Anglo-American legal culture for generations. The failure of the British Empire to resolve them had contributed to the American Revolution. Although the state and federal constitutions provided new blueprints, they did not settle all jurisdictional relationships or interpretive rules. Debates about locating precise boundaries, which began during the ratification of the federal Constitution, only established a modus vivendi (soon called "constitutional law") for interpreting them.[31]

Beneath the enduring problem of competing jurisdictions lay a deeper question that was genuinely new because it was a consequence of the Revolution: What was the appropriate historical context for construing the American constitutions that structured the state and federal legal environments? The constitutions did not answer this question. Despite occasional calls from legal nativists for the indigenization of authority to reflect the popular sovereignty on which the constitutions rested, most lawyers and judges assumed that legal authority would remain transatlantic, especially English. That, at least, is how they behaved. Their educational routines and resources, for example, changed little for at least three decades after the Revolution.[32]

The imperial legacy was, however, various. Story was more eclectic in his use of legal resources, which also made him seem, to Kent, more instrumentalist. He treated the Revolution as a legal as well as political revolution, one that gave talented jurists an opportunity to curate constitutional ideas from whatever time or place suited their understanding of the best interpretation. Kent, on the other hand, believed that most baseline questions had to be answered against the background of English law as understood in the late eighteenth century and as confirmed or changed by the experience of the Revolution. In assessing that experi-

ence, he was more willing to refer to the practices of the other institutions and levels of government.

Both Kent and Story were seeking ways to mark out a realm of law separate from the new and dynamic republican politics. They experimented with new and old techniques of legal thinking and expression to develop a mode of reasoning that captured their felt sense that law was not just politics. As in politics, there was disagreement; in contrast with partisan politics, they aspired toward civility, articulation, and persuasion. The medium was part of the message: each tried to persuade the other without criticizing him strongly in print. Frank assessments were kept private.

The clashes between Kent and Story about congressional power, federal court jurisdiction, and the criminal jury are not well known now, and they were not well publicized then. Kent and Story, however, were aware of them. They exchanged their interpretations, respectfully disagreed, and tried to explain why one was right and the other wrong. They also carried their debates into their publications, so that the canon of nineteenth-century law was written intertextually. In his *Commentaries*, Kent criticized some of Story's decisions, and Story answered in his *Commentaries on the Constitution* (1833). Kent then amended his text in later editions to respond to Story's reading of his work.[33] A central issue in the dialogue was the meaning and practice of the rule of law in a new constitutional system based on popular sovereignty.

## THE BOUNDARIES OF FEDERALISM: CONCURRENT VERSUS EXCLUSIVE COMMERCE POWER

At first glance, it seems remarkable that Kent and Story disagreed at all about Congress's power to regulate commerce. In their respective *Commentaries*, each emphasized the importance of the federal power to regulate international and interstate commerce. Story described the power as "exclusive"; Kent wrote that it was "plenary and absolute within its acknowledged limits."[34] They disagreed, however, about how much power the states retained to regulate activity within their borders that affected or overlapped with interstate commerce.

Kent, who authored the key opinions in the New York State cases that evolved into *Gibbons v. Ogden*,[35] embraced the flexible standard that the states and Congress had "concurrent" power over activity that might be characterized for some purposes as internal commerce and for others as interstate commerce. Even when praising and citing Kent, Story drew on dicta in *Gibbons* to formulate a more categorical interpretation of exclusive federal power and endorsed the dormant commerce clause. Their different interpretations influenced other judges when they measured state laws against federal commercial statutes (now called the doc-

trine of preemption) and when they considered whether or not to embrace the dormant commerce power.[36]

*Gibbons* involved the conflict between a New York State grant of a ferry monopoly on the Hudson River and the Federal Coastal Licensing Act of 1793. In 1824, the Supreme Court held that the state law conflicted with the federal statute. In addition, Chief Justice John Marshall declared in dicta that the federal power to regulate commerce was exclusive.[37] It was conceivable, therefore, that state statutes might transgress federal power even when not preempted by a specific congressional statute. On the other hand, Marshall also admitted that "the line cannot be drawn with sufficient distinctness between the municipal powers of the one, and the commercial powers of the other."[38]

When New Jersey competitors had challenged the monopoly in New York's courts a decade earlier, the state supreme court upheld the charter in *Livingston v. Van Ingen*. Kent, who wrote an opinion in the case, dismissed the claim that the state statute conflicted with the federal commerce power because he saw no conflict with any congressional statute. He invoked the distinction between internal and external regulation, which the North American colonists had used to oppose parliamentary legislation before the Revolution, and defined the commerce clause as relating "to external not to internal commerce and it is confined to the *regulation* of that commerce." He argued that this power was "not . . . susceptible of precise definition" and had to be interpreted flexibly. "It may be difficult to draw an exact line between those regulations which relate to external and those which relate to internal commerce," Kent wrote, "for every regulation of the one will, directly or indirectly, affect the other. To avoid doubts, embarrassment and contention on this complicated question, the general rule of interpretation . . . is extremely salutary. It removes all difficulty, by its simplicity and certainty." Kent's "general rule of interpretation" gave deference to federal power *when* it was exercised. He denied that the power operated independently of legislation. "The states are under no other restrictions than those expressly specified in the constitution," he added, "and such regulations as the national government may, by treaty, and by laws, from time to time, prescribe. Subject to these restrictions, I contend, that the states are at liberty to make their own commercial regulations."[39]

When the Livingston-Fulton ferry group sought to enforce its monopoly with an injunction from Kent's equity court a few years later, the competitors raised the new claim that the charter conflicted with the federal Coastal Licensing Act. Kent dismissed that defense too, concluding that the federal statute was not "incompatible with an exclusive right . . . to navigate steamboats upon the waters of this State" and "never meant to determine the right of property, or the use or enjoyment of it, under the laws of the States." At the least, the "clear manifestation of some constitutional law, or some judicial decision of the supreme power of the Union, acting upon those [state] laws" was necessary before the state courts could "retire from the support and defense of them."[40]

Kent was of course a *state* judge and thus more sympathetic to state regulation than some federal judges. More than jurisdictional loyalty, however, was at work. Kent's reasoning demonstrates that his vision of federalism was more subtle and flexible than Story's. Both agreed that congressional legislation could trump state legislation, but Kent knew that the states and localities undertook most commercial regulation in America, and he supported that regulation. His use of the familiar language of colonial discourse—internal versus external regulation—signaled that he viewed the Constitution as a compromise designed to settle, or work out, the tensions that had split the old empire rather than replace them with a new analytic understanding of interstate commerce.

Related to both this political realism and historical perspective was Kent's adherence to a form of constitutional behaviorism or respect for experiential construction that has lately been cataloged as one mode of "popular constitutionalism." This meant simply that legislative practice helped flesh out the meaning of constitutional powers. "There were members in that legislature [i.e., the state legislature that granted the steamboat monopoly], as well as in all the other departments of the government," Kent recalled,

> who had been deeply concerned in the study of the constitution of the United States, and who were masters of all the critical discussions which had attended the interesting progress of its adoption. Several of them had been members of the state convention, and this was particularly the case with the exalted character, who at that time was chief magistrate of this state, (Mr. Jay,) and who was distinguished, as well in the council of revision, as elsewhere, for the scrupulous care and profound attention with which he examined every question of a constitutional nature.[41]

In addition, New York's judges and governor sat on the Council of Revision, which reviewed all state legislation to see if it conformed to the state or federal constitution, or whether it reflected wise policy.[42] The council—again including John Jay—had reviewed the monopoly grant and not seen a conflict with federal law. This process served as additional evidence that the statute was permissible under any conventional interpretation of the commerce power.[43]

When the Supreme Court reversed the New York courts in *Gibbons* and held that the steamboat monopoly conflicted with the federal licensing statute, Kent accepted the high court's doctrine: a federal statute regulating interstate commerce trumped a state statute regulating the same activity. But the account of the case in his *Commentaries* suggests that he still did not see a conflict between the two statutes. "The only great point on which the Supreme Court of the United States and the courts of New York have differed," Kent concluded, "is in the construction and effect given to a coasting license." They did not disagree "in any general view of the powers of Congress." Finally, Kent maintained that "the Supreme Court expressly waived any inquiry or decision on the point, whether the exercise of the power assumed by the steamboat laws would have been illegal,

provided there was no existing regulation of Congress that came in collision with them."[44] Kent still believed that there was no dormant commerce clause. The federal power was large—but only when exercised.[45]

Kent included a lecture entitled "Of the Concurrent Jurisdiction of the State Governments" in his *Commentaries* and cited Story's concurrence in a militia regulation case for the principle that the powers granted to Congress are concurrent with similar state powers, except when the Constitution declares them to be exclusive. Kent then elaborated his understanding of this principle of concurrent powers that were bounded by Congress's preemptive right to regulate exclusively: "The powers granted to Congress were never exclusive of similar powers existing in the states, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power was prohibited to the states, or there was a direct repugnancy or incompatibility in the exercise of it by the states. This is the same description of the nature of the powers as that given by the Federalist."[46]

Kent never cited or discussed *Gibbons* in this lecture. Instead, he again quoted his own opinion in *Livingston*. "'Our safe rule of construction and action,' as it was there observed, 'was this, that if any given power was originally vested in this state, if it had not been exclusively ceded to Congress, or if the exercise of it had not been prohibited to the states, we might then go on in the exercise of the power until it came practically in collision with the exercise of some congressional power.'"[47] In his discussion of concurrent powers, Kent presented *Livingston* as correct in principle and did not refer to the dormant commerce clause.

In his own *Commentaries on the Constitution*, Story lauded Kent's analysis of *Gibbons* and the commerce power in the *Commentaries on American Law* as "very able and candid." He added that "I gladly avail myself of this, as well as of all other occasions, to recommend his [i.e., Kent's] learned labours to those, who seek to study the law, or the constitution, with a liberal and enlightened spirit."[48] However, Story's description of the commerce power differed markedly. Whereas Kent wrote of overlapping powers of commercial regulation and the uncertain line between internal and external activity, Story declared simply that the federal power was exclusive. "The reasoning, by which the power given to congress to regulate commerce is maintained to be exclusive, has not been of late seriously controverted," Story wrote, "and it seems to have the cheerful acquiescence of the learned tribunals of a particular state, one of whose acts brought it first under judicial examination," citing Kent's discussion in his *Commentaries*.[49] According to Story, the states had no power to touch the regulation of interstate commerce. They did have the power to regulate "things having connexion with commerce" pursuant to their police powers, such as through health, safety, inspection, ferry, and turnpike laws. But there was a bright line between "police" and interstate commerce: "They are not so much regulations of commerce, as of police; and may truly be said to belong, if at all to commerce, to that which is purely internal."[50]

Story, therefore, marginalized evidence of concurrent state power. The Supreme Court case of *Wilson v. Blackbird Creek Marsh Co*. in 1829 raised the question of whether a state could dam a navigable river within its borders.[51] The court held that it could. Story treated the state power to regulate internal navigable waters as an exception to the rule of exclusivity, and not a violation of the dormant commerce clause.[52] For Kent, on the other hand, *Wilson* was the exception that disproved the rule: when tested, there was no dormant power.[53]

Story held on to the exclusive-and-dormant-power conception of the commerce clause through the next decade. In a case upholding a New York statute that required a ship captain to post bonds for immigrant passengers, Story dissented, finding that a "state cannot make a regulation of commerce, to enforce its health laws, because it is a means withdrawn from its authority. . . . If the power to regulate commerce be exclusive in congress, then there is no difference between an express and an implied prohibition upon the states."[54] The Supreme Court marked out a compromise position by maintaining that the states had concurrent power to regulate at least some sorts of commercial activity—those deemed "local"—with interstate consequences, while Congress retained exclusive control over "national" commerce.[55] Which was which remained unclear—and still does.[56]

In sum, Kent and Story both celebrated commerce as a means of uniting the states and tying them to the larger world. They also endorsed the federal power to regulate commerce. They disagreed, however, about how to interpret this power. Included in this area of disagreement were both the controversial dormant commerce power and the relative inclination to find federal preemption.

## FEDERAL ADMIRALTY JURISDICTION: THE BOUNDARIES OF JURYLESS CENTRAL COURTS

Both Kent and Story championed the exclusive admiralty jurisdiction of the federal courts and the international body of law they applied. Admiralty law was at the core of the law of nations, with both wartime and peacetime branches. The former covered privateering; the latter covered civil causes relating to shipping, including in some nations maritime insurance contracts. Early modern England, however, excluded maritime insurance contracts from the admiralty courts. Kent and Story disagreed about whether such cases should be excluded from the federal admiralty courts, too. Once again, their disagreement turned on different historical contexts for interpreting the Constitution.

Justice Story joined the Supreme Court just as the War of 1812 broke out with Britain. The spike in federal prize litigation, combined with his fascination with the origins and extent of admiralty jurisprudence, led Story to become an avid student of prize and maritime law. He also had an antiquarian streak and

enjoyed perusing medieval yearbooks and statutes. From these older sources, he learned that English admiralty courts used to have greater subject matter jurisdiction, including over maritime contracts not directly relating to sea voyages. Some of this jurisdiction had been lost as recently as the seventeenth century; it had been taken by common-law judges rather than by statute. Story concluded that admiralty jurisdiction, at least dating from statutes under Richard II in the fourteenth century until Sir Edward Coke restricted the jurisdiction of non-common-law courts in the seventeenth century, had covered contracts made on land that were executed on the sea, including insurance contracts. Maritime subject matter jurisdiction remained capacious in continental Europe. It had also been larger in colonial North America than in England.

In *DeLovio v. Boit*,[57] Story marshaled English legal history, Continental maritime law, and the jurisdiction of colonial vice-admiralty courts to hold that federal admiralty jurisdiction permitted federal courts to hear those insurance cases concurrently with state courts. The advantage of federal admiralty jurisdiction to at least some insurance companies was that it operated without juries. Federal judges, rather than juries, determined the facts and calculated damages. The case also fit into Story's program to expand admiralty jurisdiction in general, including his failed attempt to reach criminal cases.[58] After reviewing piles of medieval and early modern reports, statutes, and commentaries from England, the colonies, and Europe, Story concluded that Anglo-American admiralty courts had once had jurisdiction over maritime contracts and, for convenience at least, should again. Crucially, he declared that contemporary English doctrine denying this jurisdiction to the admiralty courts was no bar. "Whatever may in England be the binding authority of the common law decisions upon this subject," Story concluded, "in the United States we are at liberty to re-examine the doctrines, and to construe the jurisdiction of the admiralty upon enlarged and liberal principles."[59] The upshot was that he thought it constitutional and politically wise to extend federal admiralty jurisdiction to such contracts. But it would be concurrent rather than exclusive jurisdiction. "There can be no possible question," he added in a footnote at the end of his opinion, "that the courts of common law have acquired a concurrent jurisdiction, though, upon the principles of the ancient common law, it is not easy to trace a legitimate origin to it."[60] In sum, Story grudgingly accepted concurrent subject matter jurisdiction and then expanded it to increase the power of the federal courts.

Professor Horwitz interprets Story's decision in *DeLovio* as a boon to insurance companies, which feared jury determinations of verdicts and damages, although he notes that, in practice, the retention of concurrent state court jurisdiction limited the decision's impact.[61] He also links the decision with other attempts to expand federal jurisdiction, such as the famous 1842 case of *Swift v. Tyson*,[62] in which Story held for the Supreme Court that federal courts could refer to the

"general commercial law" rather than state law when hearing commercial cases under diversity jurisdiction.[63]

Professor Horwitz does not note that some judges sympathetic to Story's expansive claims criticized *DeLovio* on legal rather than political or economic grounds. Kent, for example, did not oppose broad federal court jurisdiction. On the contrary, he welcomed federal participation in developing common-law doctrine. Where the federal courts had jurisdiction, he wrote in his *Commentaries*, "the common law, under the correction of the Constitution and statute law of the United States, would seem to be a necessary and a safe guide, in all cases, civil and criminal, arising under the exercise of that jurisdiction, and not specially provided for by statute." The common law provided a safe "guide" to decision making and was not a license for "dangerous discretion," nor did it permit judges to "roam at large in the trackless field of their imaginations."[64] The Judiciary Act of 1789 directed federal courts to apply the law of the states where they sat. In the fifth edition of his *Commentaries*, Kent cited Story's decision in *Swift v. Tyson* as a salutary rule: the act "only extended to the statutes and permanent local usages of a state," not to "contracts, or other instruments of a commercial nature."[65]

However, Kent had long thought that Story's opinion in *DeLovio* exhibited poor reasoning in two respects. First, it conflicted with the Court's own interpretation of the meaning of "exclusive jurisdiction" in Article III's grant of the judicial power in the federal Constitution. Second, it dismissed two hundred years of common-law development, which by the time of the American Revolution had restricted admiralty court jurisdiction within England, if not in the colonies.

Kent devoted several pages to criticizing Story's reasoning in *DeLovio* in the first edition of his *Commentaries*. He buffered his criticism of any judge with respect, a technique he learned from reading the decisions of English judges.[66] Kent therefore praised the Massachusetts Circuit Court's "great ability and research," and his published criticism (which never mentioned Story by name) was muted. He also recapitulated the court's reasoning and historical references, as if to allow the reader to come to her own conclusion. On the merits, Kent noted that Article III of the Constitution extends the judicial power to "*all cases* of admiralty and maritime jurisdiction."[67] Story's opinion, however, stated that federal admiralty jurisdiction over maritime contracts would be concurrent with, rather than exclusive of, the jurisdiction of state courts. Kent, on the other hand, believed that "all cases" meant just that: all cases classified as admiralty had to be tried in federal court.

If Story was right, all maritime contracts "must be tried in the admiralty by a single judge, to the exclusion of the trial by jury, and the state courts would be devested, at one stroke, of a vast field of commercial jurisdiction."[68] It was not within Congress's power to enlarge admiralty jurisdiction beyond "what was understood and intended when the constitution was adopted, because it would be depriving the suitor of the right of trial by jury, which is secured to him by the

constitution in suits at common law" in the "saving to suitors" clause.[69] Similarly, Kent objected to the trend toward prosecuting violations of federal navigation and impost laws in admiralty court, where there were no juries. He conceded that the colonial vice-admiralty courts had prosecuted such cases. He also reminded his readers that this jurisdiction was a source of protest on the eve of the Revolution.[70] All these gambits contradicted the "active practice under the English jurisprudence when the constitution was made." Instead, they followed practices prior to the time that "admiralty had been invaded and partly subdued by the bold and free spirit of the courts of common law, armed with the protecting genius and masculine vigour of the trial by jury."[71] English legal history and colonial resistance had left Kent suspicious of expansive admiralty jurisdiction.

Finally, the New York Supreme Court had always heard maritime contract cases. Kent wrote many opinions in those cases, devoted over two hundred pages to the subject in his *Commentaries*, and took extensive notes on the leading Continental treatise on maritime insurance law.[72] He was confident that, in this area as in others, expert opinions like his own would operate as persuasive authority in all the states courts. Here, at least, federal jurisdiction was unnecessary.

Kent's analysis of *DeLovio* nettled Story. In his *Commentaries on the Constitution*, Story defended his interpretation and suggested that Kent's reasoning was itself "founded in a mistake." Prize jurisdiction in the federal courts was exclusive because in England it was vested exclusively in the English admiralty courts. "But," Story added, "in cases, where the jurisdiction of the courts of common law and the admiralty are concurrent, (as in cases of possessory suits, mariners, wages, and marine torts,) there is nothing in the constitution, necessarily leading to the conclusion, that the jurisdiction was intended to be exclusive; and there is as little ground, upon general reasoning, to contend for it."[73] It was true that state and federal courts had concurrent jurisdiction already over possessory, marine tort, and mariners' wage suits. The difference in *DeLovio* was that common-law courts by the eighteenth century had *exclusive* jurisdiction over marine contracts, including insurance contracts. Story challenged contemporary English doctrine on that exclusivity while at the same time accepting the contemporary distinction between prize cases (exclusive) and, say, mariners' wage cases (concurrent).

Kent pointed out in the third edition of his *Commentaries*, published three years after Story's treatise on the Constitution, that Story's logic conflicted with the Supreme Court's opinion—Story's opinion—in *Martin v. Hunter's Lessee* in 1816.[74] Responding directly to Story's charge that he had been "mistaken," Kent reminded the reader that Story had interpreted "all cases" in Article III as an imperative that gave the federal courts exclusive jurisdiction; it was concurrent only when the phrase "all cases" was omitted.[75] Kent agreed with Story's opinion in *Hunter* that state courts could exercise concurrent jurisdiction "only . . . in those cases where, previous to the constitution, state tribunals possessed jurisdiction independent of national authority."[76] The issue joined on the question of

where marine insurance contracts fell in the distribution of jurisdiction between the two courts: was it exclusively in the common-law courts (Kent's interpretation, following contemporary English law), exclusively in admiralty courts (English medieval practice), or concurrent (Story's interpretation in *DeLovio*)? For Story, the interpretation of Article III depended on a combination of the best comparative legal wisdom as he understood it and "public convenience."[77] For Kent, English jurisdictional law in the eighteenth century was the correct context for interpreting Article III.

Story's use of history was the second failure of legal reasoning in *DeLovio*. Kent praised Story's understanding of the historical conflict between the common-law and admiralty courts, and he was persuaded by Story's "exposition of the ancient cases" that "Lord Coke was mistaken, in his attempt to confine the ancient jurisdiction [i.e., territorial jurisdiction] of the admiralty to the high seas, and to exclude it from the narrow tide waters, and from ports and havens."[78] Neither would Kent have disagreed with the general proposition that American courts could reevaluate English precedent in light of local needs and circumstances. Kent was less persuaded by the argument that medieval admiralty courts had subject matter jurisdiction over all maritime questions. The key disagreement, however, was whether, as Story claimed, "public convenience," "the enlightened reason of the civil law," and "the customs and usages of the maritime nations" were enough to sustain his interpretation of the Constitution.[79] His historical investigation demonstrated only that admiralty jurisdiction had changed over time. It could not answer the question of whether the Supreme Court should interpret the Constitution according to medieval or early modern understandings of maritime jurisdiction—or by some other standard.

For Kent, the baseline for interpreting the historical meaning of key constitutional terms lay in late eighteenth-century England. He had no desire to return to medieval English law. If Story accepted the medieval bounds of admiralty jurisdiction, he would also have to accept other incidents of that era and forgo later improvements. On the flyleaf in his personal copy of the report containing *DeLovio*, Kent asked:

> But Quere: did not the Constitution of US. mean by *admiralty & maritime jurisdiction*, that which was *then settled* as such in the English Jurisprudence. Did they mean to go back to the *Gothic Ages* for the Jurisdiction then existing? When the Constitution says *Trial by Jury* shall be preserved, & their verdicts not re-examined than according to the rules of the com. law, did they mean the com. law before *Lord Coke's* day when no new Trial could be awarded, & the Jury were carried from County to County in Carts? When the Constitution said Cases in *Equity* should be included in the judicial Power, did it not mean Equity as improved & settled *since* the time of Lord Coke? Why should one paragraph of the Constitution be construed by old usage & another by the new? To embrace *Policies* [i.e., insurance policies] in admiralty & maritime Jurisdiction, deprives the Insurer of *Trial by Jury*, & is trying to recover conquered ground.[80]

If Story wanted the extensive admiralty court jurisdiction of the era before Coke, he would have to do without recent innovations like the new trial, by which a judge could overturn a civil jury verdict and command a new trial under stern instructions. Losing the new trial was, of course, a stiff price that neither Story nor Kent would have paid.[81] Kent's point was that American judges could not rummage through English legal history to find their preferred institutions and rules. They had discretion, but not the freedom that Story claimed.

In his first edition, Kent implied that the Supreme Court might overturn *DeLovio* just as it had Story's contemporaneous circuit court decision claiming non-statutory jurisdiction over maritime crimes.[82] Kent recorded in later editions that some federal courts had embraced *DeLovio* while others had rejected it. In his fifth edition, published in 1844, Kent pleaded that it was "high time" for the Supreme Court to resolve the circuit split. It finally did so after the Civil War, when it embraced Story's construction.[83]

Perhaps this sharp disagreement is why Story considered the third volume of the *Commentaries*, which surveyed commercial, law, to be superior to the first two volumes, most of which covered jurisdiction and status categories. Whether it was because the subject matter was "commercial & general Law, which have been your favorite Studies, or whether that you are grown more anxious for public favour, I know not," Story wrote to Kent upon receiving the third volume, "but I cannot but think, that the present volume has more of your self thrown into it; in learning; in spirit; in judicial sagacity, than either of the former volumes, excellent as they were."[84] Eight years later, when Story received Kent's gift of the third edition of his *Commentaries*, he further marked out the terms of respectful disagreement:

> Even where you have come across some of my own views, I see the diligence, with which you have examined the topics, & the vast force, as well as the unsullied candour, with which you point out your own opinions. If I am not quite convinced, that my own notions in these cases are erroneous, I perceive, that there is very strong reasons for maintaining the opposite opinions. Nay; I rejoice at the difference, because it makes me feel the full value of an independent search into the great elements of judicial truth. Your work must forever remain the true Standard for all future American Text Writers.[85]

Kent never accepted Story's willingness to resort to "public convenience" when interpreting the Constitution. That was too instrumental. For his part, Story might never have shaken his early and modest estimation of Kent. "On the whole, if he be not a very great man," Story concluded in 1807, "I am satisfied that he is not humble in his acquirements."[86] It was as if Story believed that his description of another New York lawyer, reputedly the best litigator in the state, fit Kent too: "He wants specific greatness, original and striking energy, and a bold superiority to the mere reasoning of authorities. He would apply settled principles with great precision, but it may be doubtful if he could create elementary ones."[87]

These evaluations revealed more about Story's self-conception than about their putative subjects: a great judge knew when to set aside old principles and make new ones. His creative powers reached their height whenever he got near a jury.

## THE LAW-FINDING DISCRETION OF CRIMINAL JURIES: MARKING THE BOUNDARIES OF JUDICIAL POWER

The jury offers a good example of how Kent and Story shared general principles but differed about how to derive and apply them. Both sought to curb the power of civil juries. They did so by developing a clear law-fact distinction, delivering strong instructions, and granting post-verdict remedies. Both also agreed that U.S. judges should interpret the constitutional rights to jury trials in the Sixth and Seventh Amendments against the backdrop of English practice. They disagreed, however, on the historical boundaries of that practice.

In 1812, Story argued that the common-law jury guaranteed in the Seventh Amendment ought to be defined by the historical meaning of jury in England. The case involved a civil suit brought by the federal government against a Massachusetts merchant who was accused of violating the Embargo Act, which forbade exports to Britain. The trial jury held for the defendant. The U.S. district attorney wanted to retry the case on appeal because Massachusetts law permitted the retrial of facts on appeal. The question was whether congressional statutes that gave the federal courts appellate jurisdiction in admiralty and equity cases also gave them appellate jurisdiction in common-law cases, or whether that review was still limited to writs of error. Story construed the statutes to mean the latter because the guarantee of the jury trial was to be interpreted against English common law rather than Massachusetts law. "Beyond all question," Story held, "the common law here alluded to [i.e., in the Seventh Amendment] is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law."[88] The point was to prevent a new trial of the peculiar New England variety, at the losing party's demand rather than at the judge's discretion, and force Story's circuit court to sit through another jury trial. Story used the English jury as the measuring stick to mitigate the problem of procedural diversity among the states. The answer had not been "obvious" during the ratification period. Indeed, the question had bred an early discussion about legal federalism.[89] And to which era of "the history of law" was Story referring? The Supreme Court now assumes that his "historical test" referred to the late eighteenth century, but his reasoning left this unclear.[90] Story's ambiguity on this point was the gist of Kent's criticism of *DeLovio*.

Elsewhere Story engaged in a more controversial historical interpretation of

the jury. In *United States v. Battiste*,[91] a circuit court case in1835, Story instructed jurors in a criminal case that even under a general plea of not guilty, they could only determine facts, not law. Story conceded that every general issue mixed fact and law, but he maintained that the definition of law was for the judge, and fact for the jury. He therefore admitted that the jury had the practical power of nullification ("the physical power to disregard the law, as laid down to them by the Court") while questioning the constitutionality of that power. "I hold it the most sacred constitutional right of every party accused of crime, that the jury should respond as to the facts, and the Court as to the law," he instructed the jury. "It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as laid down by the Court."[92] Story also included this charge in his published opinion.

The instruction cut against a venerable strand of common-law thought, especially prominent during the Revolutionary era, that a jury was the voice of the community and, in particular, that juries had the power to interpret criminal statutes under the general issue.[93] Although a jury's power to interpret civil law was less clear historically, and its practical power to do so was in decline, the law-finding prerogative of criminal juries was upheld in several, though not all, of the American states.[94]

The different understandings of Kent and Story reflected that regional diversity. Story's opinion shocked Kent. "I was quite confounded," he noted in his copy of the Massachusetts Circuit Court reports,

> when I read the monstrous heretical doctrine in the charge to a Jury at pa. 243. My judicial opinion against such a Doctrine is to be seen in *Croswell's Case* in *3 Johnson's* Cases, in the Appendix. If the Jury have nothing to do with *the law* on the plea of not guilty on Trials in capital cases, if whether the accused did the Act traiterously or feloniously, Be not a proper question for the Jury, then I think the boasted Trial by Jury evaporates in Smoke, & our English & American Ancestors were in gross Error in asserting with such vehemence the right to *Trial by Jury* as the Safety & Glory of the common law. *Actus non facil rerum nisi meus sit rea*, & whether the mind be or be not in fault is a question that a jury can decide better & safer than a learned & technical Judge. When the law says that the Jury may lawfully take on themselves the whole Issue, it means that they may do it *rightfully* & *morally rightfully*, for it would be monstrous, & destructive of all Principles & Integrity, for the law to tell the Jury that they may *lawfully* judge both law & fact in criminal Cases, on the Plea of not guilty, & yet that if they do it, they *break the moral law*. Such a solecism & inconsistency cannot be well founded. The Doctrine that the Jury have a *right* in *every Cause* to judge of law & fact [under] the general Issue in criminal Cases, has had the Sanction of ages & the higher legislative declaratory Authority.[95]

Again, Kent and Story both sought to restrict the power of the civil jury. But Kent defended an interpretation of the criminal jury's power that had played a role in the Revolution and persisted into the partisan seditious libel trials in the

early Republic, including the famous *Croswell* case, in which a jury refused to convict a Federalist editor of libeling President Jefferson.[96] Kent continued to see the criminal jury as a bulwark against oppressive government. It is also possible that he held the criminal jury in esteem because he wanted to contrast it to the more flexible civil jury, whose power had been curtailed in both England and the United States. It was almost as if inroads against the civil jury had to be compensated for by a stern defense of the criminal jury. In addition, criminal law never interested Kent the way civil law did. He barely discussed criminal law in his *Commentaries*. Criminal law remained state or local law, and within it the jury retained much power. The criminal jury was powerful in England, too, at the end of the eighteenth century, which was Kent's historical baseline. Innovations there and in the states came from legislatures rather than the bench.

Story, on the other hand, sat on a federal court and dealt with a limited number of federal crimes. In particular, he supported the cessation and criminalization of the slave trade. The statute at issue in *Battiste* made it a capital crime to carry slaves on the high seas.[97] The U.S. attorney charged a crew member of a vessel that had transported slaves along the African coast from one Portuguese colony in Africa to another, rather than across the Atlantic. Although Story supported criminalization of the trade, he did not believe that Congress intended to penalize the intra-imperial transportation of slavery as severely as it did the international slave trade. The key was the intent of the defendant: was it to "impress" on someone or "continue" the condition of slavery in the future, which would require "some title or interest in or power over" slaves? Or "merely" to transport them? "It seems to me impossible to believe," he instructed the jury, "that congress could have intended to punish capitally, as a piracy, such an act as the mere transportation of slaves from one port to another of the same country. It would confound all moral distinctions in regard to crimes. It would punish an act involving not the slightest moral turpitude, in the same manner, as it would punish the hardened atrocity, inhumanity, and horrible iniquities attending the slave trade on the coast of Africa."[98] In addition, he informed the jury that there was a federal noncapital statute that penalized the "mere transportation" of slaves on the seas. In essence, Story directed the jury to find the defendant not guilty and signaled to the prosecutor that he should charge the defendant under the noncapital statute. That is what happened. The jury found the defendant not guilty, and apparently after being charged under the other statute, he pleaded guilty to a noncapital offense.

In *Battiste*, Story attempted to reconceptualize a classic instance of jury nullification as something more ambiguous: judge-instructed acquittal paired with judge-directed recharging. He put heavy hands on the two discretionary end points of the criminal process: the prosecutor's charge and the jury's verdict. If not heresy, as Kent charged, it was definitely heterodox.

## CONCLUSION

Both Chancellor Kent and Justice Story favored a strong central government, fostered commerce through legal doctrine, and sought to contribute to a transatlantic legal culture. They disagreed, however, about such fundamental questions as the extent of the federal commerce power, the reach of federal admiralty jurisdiction, and the discretion of the criminal jury. These disagreements do not disprove Professor Horwitz's claim in *Transformation* I that American lawyers used law to assist economic development so much as illuminate the variety of institutional forms and modes of legal reasoning that were in play in the early Republic. There were changes, but they were not inevitable, and there was no single transformation—much like the legal world of the late nineteenth century that Professor Horwitz analyzed in *Transformation II*.

Disagreements between these two like-minded jurists reflected different approaches to interpreting the English legal legacy as well as their different roles in the constitutional system. Their visions of the rule of law in a pluralistic republic kept diverging throughout their acquaintance. From the beginning, Chancellor Kent was a state judge and a more devoted student of contemporary English law. He came of age during the Revolution and Constitution-making period, gained office through Federalist patronage, and idolized his friend Alexander Hamilton, whom he saw as a consummate lawyer and the ablest proponent of an independent judiciary. He never accepted partisan politics as an unqualified good, but late in life he fit comfortably within the Whig Party. Story, on the other hand, began his life as a Republican, albeit a New England Republican, but by the end of his life was deeply suspicious of representative government.[99] In those later years, he too began to invoke Hamilton, but it was a different and more extremist Hamilton than Kent's old friend.

Kent witnessed Story's trajectory and took notes on it. In the winter of 1835, Story visited Kent's office in New York City, as he often did when visiting New York. On this day Story was melancholy and anxious about the nation's future. He began by telling Kent that he was planning to write one treatise a year for a dozen years. So far, he had completed three. The point, evidently, was to rein in state judges, whom he did not trust because they were increasingly elected rather than appointed on the basis of merit. Under President Jackson, Story told Kent, all government was infected by partisan elections. He had come to appreciate the skepticism that Aristotle, Cicero, and Burke had about democracy. "In a French Translation of Aristotle on Politics," Kent noted in his copy of Story's *Commentaries on the Constitutions*, Story had "found that *Aristotle* treated of representative Government of the People, & said it could not do & never could do, because the People never could be brought for any length of time to choose the most wise & virtuous men to govern them. Whoever reads Cicero *De Republica* would see the Evils of democracy as they are & always will be." Finally, Story invoked

Hamilton as "the greatest & wisest man of this Country." He, like the others in Story's pantheon, was skeptical of elected governments. "He saw fifty Years ahead, & what he saw then is *fact now*."[100]

What Hamilton saw, according to Story, was the hopelessness of representative government. Story reported to Kent that

> all sensible men at Washington in private Conversation admit that the Government is deplorably weak, factious & corrupt. That every thing is sinking down into despotism under the disguise of a democratic Government. He [i.e., Story] says the Sup. Court is sinking, & so is the Judicial in every State. We began with first rate men for judicial Trusts, & we have now got down to the third rate. In 25 years there will not be a Judge in the US. who will not be made elective, & for short Periods, & on slender Salaries. Our Constitutions were all framed for Man *as he should be*, not for Man *as he is* & *ever will be*. . . . Indeed the case of this Country & the cause of popular representative Government are conducive to Liberty & Justice & Wisdom, is as Hamilton suspected & rather believed it to be, a mere *ignii fatuis* or dream of the Imagination.[101]

Story started as a Republican and became a reactionary. Kent, who had opposed populist politics his entire life, took Jacksonian democracy in stride. He also enjoyed political struggle, while Story saw it as evidence of decay. They had long disagreed about the virtue of local political and legal institutions. By 1835, they also disagreed about the viability of representative government. Although Kent did not trust all local juries, state judges, and legislators, his experience in New York taught him to trust at least *some* of them.

These differences were about more than the jurisdictional boundaries of three central institutions of the constitutional system. Beneath them lay a disagreement about the nature of legal reasoning and the means of distinguishing law from politics—themes that are central to all of Professor Horwitz's work. Both judges were cosmopolitan when they celebrated the best English judges, the law of nations, and Continental civil law. When it came to marking the baselines of American constitutionalism, however, Kent focused on the experience of the American founding generation: the words they used, the imperial and revolutionary context of those words, and the definitions available in contemporary English common law. Story, on the other hand, was attracted to elementary principles wherever and whenever they could be found. The legal eclecticism that marked their shared project of developing a national commercial law extended for Story into basic legal and constitutional reasoning. For him, independence was an opportunity to remake legal culture rather than just an historical event that marked its boundaries. In their letters and treatises, Kent and Story continued till they died in the 1840s to debate the legal transformation wrought by the Revolution. Not least because they embedded their arguments in the canon of American legal literature, that debate lives on today.

## NOTES

1. Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977); Morton J. Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992). See also Eben Moglen, "The Transformation of Morton Horwitz," *Columbia Law Review* 93 (1993): 1042–60. (arguing that "the richness and complexity of his arguments [in *Transformation II*] so far exceeds that of the his first volume as to justify his faith in the newer styles of discourse").

2. See, e.g., Horwitz, *Transformation II,* 10. See also Robert Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57–125.

3. Professor Horwitz discusses the conflict between "old" and "new" conservatism in his analysis of corporate theory in *Transformation II,* 65–107.

4. See Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy, Massachusetts, 1774–1861* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1969); Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania* (Cambridge, Mass.: Harvard University Press, 1948); J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956).

5. For regional differences in early nineteenth-century American law, see Alfred L. Brophy, "Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists," *Boston University Law Review* 80 (1999): 1161–213; Peter Karsten, *Heart versus Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); Renée L. Lerner, "American Judges, English Judges, and the Power to Comment on Evidence" (unpublished manuscript, 2007).

6. For a preliminary sketch, see Daniel J. Hulsebosch, "Writs to Rights: The Transformation of the Anglo-American Common Law in the Age of Revolution" (unpublished manuscript, 2005).

7. Other judges who appear a few times each are Chief Justices Isaac Parker and Lemuel Shaw of Massachusetts, Chief Justice Roger Taney of the Supreme Court, and Lord Mansfield and Sir William Blackstone of England.

8. Horwitz, *Transformation I,* 144, 257–58.

9. Ibid., 55–56, 61–62, 132.

10. Horwitz, *Transformation II,* 179–80.

11. *Seixas v. Woods,* 2 Cai. R. 48, 55 (N.Y. Sup. Ct. 1804) (Kent, J.).

12. Compare *Seixas* with *Seymour v. Delancey,* 6 Johns. Ch. 222, 232, 233, 234 (N.Y. Ch. 1822), rev'd, 3 Cow. 445 (N.Y. Ct. Err. 1824) (reversing, 14–10). New York's High Court of Errors, with fourteen state senators voting to reverse, reversed Kent's equitable decree two years later.

13. *Charles River Bridge v. Warren Bridge,* 36 U.S. (11 Pet.) 420 (1837).

14. Horwitz, *Transformation I,* 117–18, 123–28, 138–39. Kent sympathized with Story's position in *Charles River Bridge*: "though the Constitution . . . does not reach such state laws, they remain, nevertheless, to be in most cases strongly condemned, as being contrary to right and justice." James Kent, *Commentaries on American Law,* 4th ed. (1840), 1:*456 n. (b).

15. Horwitz, *Transformation I,* 183–85, 196–201.

16. Ibid., 73.

17. Ibid., 39, 43.

18. See, e.g., *Carson v. Blazer,* 2 Binn. 475 (Pa. 1810), which altered the legal meaning of

"navigable," thereby taking property rights away from riparian holders without compensation and giving them to canal companies. See also Daniel J. Hulsebosch, "Writs to Rights: 'Navigability' and the Transformation of the Common Law in the Nineteenth Century," *Cardozo Law Review* 23 (2002): 1090–92.

19. Kent's treatment of riparian rights and the doctrine of ancient lights could justify that conclusion. Horwitz, *Transformation I,* 43, 281 n. 63; Hulsebosch, "Writs to Rights," 1084–85.

20. For Story's biography, see R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985). For Kent, see John T. Horton, *James Kent: A Study in Conservatism, 1763–1847* (New York: D. Appleton-Century, 1939).

21. Johnson to James Kent, Nov. 16, 1816; Moss Kent to James Kent, Feb. 1, 1817 (reporting that Story called Kent "another *Hartwick*" [sic]), James Kent Papers, Library of Congress (microfilm, New York University School of Law).

22. James Kent, back flyleaf notes to volume 1 of Charles Sumner's *Reports of Cases Argued and Determined in the Circuit Court of the United States for the First Circuit* (Boston: Hilliard, Gray, 1836) (complimenting a Story opinion that was "full of the classical Taste of Lord Stowell"), James Kent Library, Rare Book Collection, Columbia Law School, New York.

23. See Daniel J. Hulsebosch, "Crafting Authority: James Kent and the Development of American Law" (unpublished manuscript, 2008).

24. Story's involvement in the reporting process is evident in his correspondence with Henry Wheaton, who was the Court's reporter from 1816 to 1827. See Henry Wheaton Papers, Pierpont Morgan Library. For his legislative drafting, see "The Project of Extending Admiralty Jurisdiction over the Lakes and Rivers of the United States," *Western Law Journal* 2 (1845): 563–67; *Jackson v. The Magnolia,* 61 U.S. (20 How.) 296, 342 (1857) (Campbell, J., dissenting) (stating that Justice Story "has the reputation of being the author of the act"). See also Joseph Story, *Life and Letters of Joseph Story,* ed. William W. Story (1851), 1:293–303, 315, 437.

25. Kent wrote an early and influential defense of judicial review in the 1790s, exercised it while on the bench, and argued that it was the defining feature of American constitutionalism in his *Commentaries*. James Kent, *An Introductory Lecture to a Course of Law Lectures, delivered November 17, 1794* (1794), 9–12; Kent, *Commentaries,* 1st ed. (1826), 1:22–26. Story also exercised judicial review, and in his *Commentaries on the Constitution* his chapter on judicial review was entitled "Who Is Final Judge or Interpreter in Constitutional Controversies." Joseph Story, *Commentaries on the Constitution* (1833), 1:344. Neither ever held that a federal statute was unconstitutional.

26. See Merrill D. Peterson, ed., *Democracy, Liberty and Property: The State Constitutional Conventions of the 1820's* (Indianapolis, Ind.: Bobbs-Merrill, 1966), 77–91, 190–97.

27. Both cited civilian sources often, especially in private law cases, although the depth of their learning is in doubt. See Alan Watson, "Chancellor Kent's Use of Foreign Law," in *The Reception of Continental Ideas in the Common Law World, 1820–1920,* ed. Mathias Riemann, 45–62 (Berlin: Duncker & Humblot, 1993); Alan Watson, *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws* (Athens: University of Georgia Press, 1992).

28. Horwitz, *Transformation I,* 249.

29. Kent's general library, for example, contains central works of the Scottish Enlightenment, including those by David Hume, Lord Kames, William Robertson, and Adam Smith. James Kent Library, Rare Book and Manuscripts Library, Columbia University, New York. On the stadial

theory in law, see Peter Stein, *Legal Evolution: The Story of an Idea* (New York: Cambridge University Press, 1980), 23–50.

30. On this theme in early American law, see Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: University of North Carolina Press, 2005), 274–302; Daniel J. Hulsebosch, "A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review," *Chicago-Kent Law Review* 81 (2006): 825–66. Kent's dedication to this project pervades his *Commentaries*. For example, in a striking departure from the model of William Blackstone's *Commentaries on the Laws of England* (1765–69), Kent devoted a quarter of his work to personal property and commercial law (five times more than Blackstone), placed it before the law of real property, and stated that the learning surrounding the former "overshadows" that of the latter. Kent, *Commentaries*, 1st ed., 1:278. See also Joseph Dorfman, "Chancellor Kent and the Developing American Economy," *Columbia Law Review* 61 (1961): 1290–317. For his part, five of Story's ten treatises were on commercial law topics.

31. Hulsebosch, *Constituting Empire,* 237–58.

32. See Steve Sheppard, ed., *The History of Legal Education in the United States: Commentaries and Primary Sources,* 2 vols. (Pasadena, Calif.: Salem Press, 1999).

33. Professor Horwitz long ago observed that "I cannot emphasize enough how valuable I have found working with consecutive editions of treatises," especially Kent's *Commentaries*. Morton J. Horwitz, "Sources of American Legal History: Treatise Literature," *Law Library Journal* 49 (1976): 460–61.

34. Story, *Commentaries on the Constitution*, vol. 1, sec. 1063; Kent, *Commentaries,* 1st ed. (1826), 1:409–10.

35. 22 U.S. (9 Wheat.) 1 (1824).

36. For recent analysis of the history of dormant commerce clause jurisprudence, see Norman R. Williams, "*Gibbons*," *New York University Law Review* 79 (2004): 1398–499.

37. *Gibbons,* 22 U.S. at 227, 236 (reasoning that the commerce power "must be exclusive; it can reside but in one potentate; and hence this power carries with it the whole subject, leaving nothing for the State to act upon").

38. Id. at 238.

39. *Livingston v. Van Ingen,* 9 Johns. 507, 578 (N.Y. Sup. Ct. 1812) (Kent, C. J.).

40. *Ogden v. Gibbons,* 4 Johns. Ch. 150, 156–57, 158–59 (N.Y. Ch. 1819).

41. *Livingston,* 9 Johns. at 573. See also *Ogden,* 4 Johns. Ch. at 158–59 (observing that the charters were granted after the federal statute "and it must have struck every one, at the time, to have been perfectly idle to pass such laws . . . if a coasting license . . . was sufficient to interpose and annihilate the force and authority of those laws"). On political construction of the Constitution, see Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, Mass.: Harvard University Press, 2001); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

42. See Alfred B. Street, *The Council of Revision of the State of New York: Its History, a History of the Courts with Which Its Members Were Connected; Biographical Sketches of Its Members; and Its Votes* (Albany, N.Y.: W. Gould, 1859).

43. *Livingston,* 9 Johns. at 573 (Kent, C. J.). See also id. at 564 (Thompson, J); id. at 507 (arguments of T. A. Emmett for the holders of the monopoly charter).

44. Kent, *Commentaries,* 1st ed., 1:411.

45. See ibid., 1:406. Kent added in his second edition, published after the decision in *Wilson v. Blackbird Creek Marsh Co.*, that "the state legislation in [*Wilson*] was not considered as repugnant to the power in Congress in its *dormant* state to regulate commerce." Kent, *Commentaries*, 2d ed. (1832), 1:439. This statement of principle replaced two paragraphs in the first edition that defended *Livingston* directly. Kent, *Commentaries,* 1st ed. (1826), 1:411–13.

46. Kent, *Commentaries*, 1st ed. (1826), 1:365–66. His examples of exclusive powers included those to control forts, coin money, naturalize immigrants, and create admiralty jurisdiction.

47. Ibid., 1:367 (quoting *Livingston v. Van Ingen*; footnote omitted).

48. Story, *Commentaries on the Constitution,* vol. 2, sec. 1067, n. 40.

49. Ibid., sec. 1067.

50. Ibid., sec. 1068

51. 27 U.S. (2 Pet.) 245 (1829).

52. Story, *Commentaries on the Constitution,* vol. 2, sec. 1069.

53. Kent, *Commentaries,* 2d ed. (1832), 1:439.

54. See *Mayor of New York v. Miln,* 36 U.S. (11 Pet.) 102, 153, 156–57 (1837) (upholding New York City's alien registration ordinance) (Story, J., dissenting).

55. *Cooley v. Bd. of Wardens,* 53 U.S. (12 How.) 299 (1851) (upholding state pilotage law as local rather than national).

56. The local-national distinction gave way to new formulations in the twentieth century turning on direct versus indirect effects and, more recently, the degree of discrimination against interstate commerce. For recent analysis, see Norman R. Williams, "Why Congress May Not 'Overrule' the Dormant Commerce Clause," *UCLA Law Review* 53 (2005): 153–238.

57. 2 Gall. Rep. 398, 7 Fed. Cas. 418 (C.C.D. Mass. 1815). See also *Hale v. Washington Ins. Co.,* 2 Story 176, 11 Fed. Cas. 189 (C.C. Mass. 1842) (Story, J.) (stating belief that Chief Justice John Marshall and Justice Bushrod Washington agreed with Story's interpretation).

58. See *United States v. Coolidge,* 14 U.S. (1 Wheat.) 415 (1816); *United States v. Bevans,* 16 U.S. (3 Wheat.) 336 (1818).

59. 7 Fed. Cas. at 441.

60. Id. at 444 n. 48.

61. Cf. William A. Fletcher, "The General Common Law and Section 34 of the Judiciary Act of 1789," *Harvard Law Review* 97 (1984): 1562–75 (arguing that state and federal courts drew on the same sources in marine insurance cases and coordinated their decisions).

62. 41 U.S. (16 Pet.) 1 (1842).

63. Horwitz, *Transformation I,* 250–52.

64. Kent, *Commentaries*, 1st ed. (1826), 1:320–21.

65. Kent, *Commentaries,* 5th ed. (1844), 1:*341. Kent made clear in the last edition he prepared that he also agreed with the specific commercial doctrine that Story applied in *Swift*: a holder in due course could enforce commercial paper against the maker even if the paper had originally been obtained by fraud if the holder took it as security for a preexisting debt. Kent had endorsed that rule as a judge, but it had been cast in doubt after he left the bench. Kent, *Commentaries,* 6th ed. (1848), 3:*81 n. (b).

66. "The great Civility & profound Respect with which they treat each other's opinions is proof of the polished Manner & high Cultivation of the English Jurists." James Kent, back flyleaf

notes to volume 2 of John Schoales and Thomas Lefroy's *Reports of Cases Argued and Determined in the High Court of Chancery, in Ireland, during the Time of Lord Redesdale* (1806), James Kent Library, Rare Book Collection, Columbia Law School, New York.

67. Kent, *Commentaries*, 1st ed. (1826), 1:351.

68. Ibid., 1:346–47.

69. Ibid., 1:347.

70. Ibid., 1:351.

71. Ibid., 1:352.

72. Ibid., 3:93–306; Charles E. Shields III, "Chancellor Kent's Abridgment of Emerigon's Maritime Insurance," *Penn State Law Review 108*(2004): 1123–247. See also Fletcher, "The General Common Law," 1566–68 (noting that "the marine insurance law developed in New York was particularly influential").

73. Story, *Commentaries on the Constitution,* vol. 3, sec. 1666 n. 3.

74. 14 U.S. (1 Wheat.) 304 (1816).

75. Kent, *Commentaries*, 3d ed. (1836), 1:*377 n. (c) (citing *Martin*).

76. Kent, *Commentaries,* 1st ed. (1826), 1:372. However, in the third edition Kent wrote that he was "happy to be taught . . . that the state courts have all the concurrent cognizance, which they had originally in 1787 over maritime contracts, and that this concurrent jurisdiction does not depend . . . on the pleasure of congress." Kent, *Commentaries,* 3d ed. (1836), 1:*377 n. (c).

77. 7 Fed. Cas. at 441.

78. Kent, *Commentaries,* 1st ed. (1826), 1:344.

79. Ibid., 1:345–46.

80. Kent, back flyleaf notes to volume 2 of John Gallison's, *Reports of Cases Argued and Determined in the Circuit Court of the United States for the First Circuit* (1817), James Kent Library, Rare Book Collection, Columbia Law School, New York.

81. On the development of the new trial in the United States, see Renée B. Lettow, "New Trial for Verdict against Law: Judge-Jury Relations in Early Nineteenth-Century America," *Notre Dame Law Review* 71 (1996): 505–53; William E. Nelson, *The Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, Mass.: Harvard University Press, 1975), 165–71.

82. Kent, *Commentaries,* 1st ed. (1826), 1:346. Kent was referring to *United States v. Coolidge*, 14 U.S. 415 (1816), in which the Supreme Court praised Justice Story's "learned and elaborate opinion" on circuit but rejected it, citing *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812), for the proposition that the federal courts had no jurisdiction over common-law crimes. *Coolidge,* 14 U.S. at 416.

83. Kent, *Commentaries,* 5th ed. (1844), 1:*371 n. (a).; *New England Mut. Ins. Co. v. Dunham,* 78 U.S. (11 Wall.) 1 (1871).

84. Joseph Story to James Kent, Nov. 25, 1828, fragment pasted into back flyleaf of volume 3 of the first edition of Kent's C*ommentaries*, James Kent Library, Rare Book Collection, Columbia Law School, New York.

85. Joseph Story to James Kent, Aug. 13, 1836, pasted to back flyleaf of volume 1 of the third edition of Kent's C*ommentaries*, James Kent Library, Rare Book Collection, Columbia Law School, New York.

86. Joseph Story to Samuel P. P. Fay, May 18, 1807, in *Life and Letters of Joseph Story*, 1:145.

87. Joseph Story to Samuel P. P. Fay, June 21, 1807, in *Life and Letters of Joseph Story,* 1:156.

88. *United States v. Wonson,* 28 Fed. Cas. 745 (C.C.D. Mass. 1812).

89. On the ratification debates over the meaning of the jury and federal appellate jurisdiction, see Hulsebosch, *Constituting Empire,* 243–46.

90. See, e.g., *Gasperini v. Center for the Humanities,* 518 U.S. 415, 452 (U.S. 1996) (citing *Wonson*).

91. 2 Sumn. 240, 24 Fed. Cas. 1042 (C.C.D. Mass., 1835).

92. 24 Fed. Cas. at 1043.

93. See Mark DeWolfe Howe, "Juries as Judges of Criminal Law," *Harvard Law Review* 52 (1939): 582–616.

94. Cf.Stanton D. Krauss, "An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America," *Journal of Criminal Law & Criminology* 89 (1998): 111–215. On the decline of civil juries, see James Oldham, *Trial by Jury: The Seventh Amendment and Anglo-American Special Juries* (New York: New York University Press, 2006), 25–44.

95. Kent, flyleaf note pasted to volume 2 of Charles Sumner's *Reports of Cases Argued and Determined in the Circuit Court of the United States for the First Circuit* (1837), James Kent Library, Rare Book Collection, Columbia Law School, New York.

96. *People v. Croswell,* 3 Johns. Cas. 337 (N.Y. 1804).

97. The statute declared that any U.S. citizen owning or on an American ship who "shall land from any such ship or vessel, and on any foreign shore, seize any negro or mulatto, not held to service or labor by the laws of either of the states or territories [of the United States], with intent to make such negro or mulatto a slave; or shall decoy, or forcibly bring or carry, or shall receive such negro or mulatto, on board of any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate, and on conviction thereof, &c. shall suffer death." *Battiste,* 24 Fed. Cas. at 1044.

98. Id. at 1045.

99. See Newmyer, *Joseph Story,* 389–92.

100. Kent, notes, March 18, 1835, pasted into the back flyleaf of volume 1 of Joseph Story's *Commentaries on the Constitution*, James Kent Library, Rare Book Collection, Columbia Law School, New York.

101. Ibid.