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Constructing an Ideal: Chancellor Kent, Justice Story, and the Surprising Revival of Equity in Early Nineteenth-Century America

Towards the end of the eighteenth century, an observer of the American legal landscape may well have predicted that the English tradition of equity as a distinct body of law and courts was soon to disappear in the newly established republic – along with other legal relics inherited from England's feudal and monarchical past, such as primogeniture and the fee tail. While courts of chancery had been established in several colonies (including most notably New York and South Carolina), these were long viewed with suspicion[1]. Such suspicion was, in part, a legacy of the seventeenth-century English Revolution, during which the conflict between parliamentarians and royalists manifested itself in an institutional struggle between courts of common law and courts of equity respectively. Embracing the common law courts as bastions of England's ancient constitution, and thus, its citizens' immemorial, customary rights (including rights to sovereignty)[2], parliamentarians depicted equity courts as emanating from (and thus tending slavishly to serve) the royal will[3]. This inherited notion that courts of equity promoted tyranny was then reinforced in colonial America by the common practice of appointing the royal governor as chancellor – namely, the head of the Court of Chancery and thus the colony's primary equity judge. Accordingly, as animosity towards England and its monarchy increased in the decades leading up to the American Revolution, so too did enmity toward equity. Reflecting

1. S.N. Katz, "The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century", in D. Fleming and B. Bailyn (eds.), *Law in American History*, Boston, Little, Brown, 1971, p. 263-73, 282-83.

2. J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of the English Historical Thought in the Sevteenth Century*, 2d ed., Cambridge: Cambridge University Press, 1987 ; D.E.C. Yale, Introduction to *Lord Nottingham's Manual of Chancery Practice and Prolegomena of Chancery and Equity*, D.E.C. Yale (ed.), Cambridge, Cambridge University Press, 1965, p. 7-8.

3. L.A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere*, Cambridge, Cambridge University Press, 1977, p. 162-63.

such enmity, the landmark Judiciary Act of 1789 – in which Congress established the framework for the federal judiciary – provided that all federal courts were to conduct proceedings (and in particular, the taking of testimony) in the manner of courts of common law, rather than of equity[4].

Surprisingly, while the fate of equity in the early republic seemed anything but rosy, this distinctive legal tradition experienced a remarkable rebirth in the first decades of the nineteenth century. Admittedly, this renaissance was short lived: Equity thereafter came to be dismantled between the mid-nineteenth and early twentieth centuries. But equity's legacy was profound in that the unified legal system that eventually emerged (and continues to this day) was significantly imprinted by it. Given the ongoing importance of this legacy, it is a matter of no small importance to inquire into how precisely this seemingly disfavored legal tradition came to take such firm (if brief) root.

To the limited extent that legal historians have examined this question, they have tended to embrace a functionalist account, emphasizing the needs of a growing commercial society[5]. Pursuant to this account, equity – with its traditional focus on multi-party actions and complex agency relationships (of the kind undergirding partnerships and the business corporation) – was of limited use in the primitive colonial period and early republic, but became vital for facilitating later commercial development. While it is surely true, however, that various claims and devices available in equity proved useful for new commercial interests, the notion that these were necessary for facilitating commercial growth seems to be exaggerated. After all, there were commercially successful states like Massachusetts that steadfastly resisted developing a distinct equity system[6]. To explain the rebirth of equity in early nineteenth-century America thus requires us to look beyond allegedly objective social needs and to ask instead in whose eyes it came to be viewed as desirable and why. Who, in other words, advocated for equity in the early American republic? And what led them to do so?

There were two figures above all others who took the lead in this respect: James Kent, Chancellor of the New York Court of Chancery, and Joseph Story, Associate Justice of the United States Supreme Court. As early as his own

4. In particular, Section 30 provided that federal courts must adopt the common-law method of presenting testimony orally in the courtroom, thus eschewing the equitable tradition of testimony gathered (and kept in secret) on the basis of pre-prepared, written interrogatories. *An Act to Establish the Judicial Courts of the United States*, ch. 20, 1 Stat. 73, 88, § 30 (1789).

5. See, for example, J.R. Bryant, "The Office of the Master in Chancery: Colonial Development", *American Bar Association Journal*, 40, n°7, July 1954, p. 595 (arguing that equity was of little use in colonial America because it is suited to the needs of "a more complicated society").

6. L. M. Friedman, *A History of American Law*, 3d ed., New York, Simon and Schuster, 2005, p. 98.

lifetime, Kent was widely credited with establishing equity on American soil. And Story, who played a key role in transmitting Kent's vision of equity across the nation (and over the Atlantic), was hailed as his natural successor – and thus in many respects, as a second founding father of the American equity tradition. Such claims that American equity owed its existence entirely to the efforts of these two jurists were clearly overstated, since there is ample evidence that well before Kent's chancellorship, New York had already embraced key aspects of the traditional, English model of equity practice[7]. At the same time, however, it seems likely that but for their extensive efforts – as judges, treatise-writers, and acclaimed intellectual leaders of the day – the tenuous equity tradition inherited by the new republic may never have taken root. Accordingly, if we are to understand how and why equity survived (and briefly flourished) in the early American republic, it is vital that we come to grips with Kent and Story's conception of this legal tradition.

A Predominantly Procedural Conception

Kent and Story were, of course, two different people, and their views on equity (as on all matters) necessarily differed to some extent. Overall, however, it is clear that, as concerns equity (and much else besides), they shared a common vision. At the heart of this common vision lay an idealized, heroic image of the equity judge. For both men, it was an article of faith that the role of the judge in equity was quite distinct from that of his common-law counterpart. As Kent argued, "[t]he systems [of law and equity] were essentially different in their character, and relations, and objects; and each of them required a distinct preparation, and study, and qualifications"[8]. Along similar lines, Story opined that "[a] man may be a great common law judge, but may have no relish for equity. The talents required for both stations are not necessarily the same; and the cast of mind and course of study adapted to the

7. A court of chancery in New York dated back to 1683 and operated continuously from 1711 until the Revolution. J. Smith, "Adolph Philipse", in L. Hershkowitz and M.M. Klein (eds.), *Courts and Law in Early New York: Selected Essays*, Port Washington, NY, Kennikat Press, 1978, p. 30 ; S.N. Katz, "The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century", p. 273. Moreover, court rules, published opinions, and archival court documents all suggest that well before Kent assumed the chancellorship in 1814, New York Chancery had already committed itself to the traditional, English model of equity practice. A.D. Kessler, "Equity in Practice" (unpublished paper on file with author).

8. N.H. Carter and W.L. Stone, *Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New York*, Albany, E. and E. Hosford, 1821, p. 506.

one, may not insure success in the other"[9]. To comprehend this distinctive image of the equity judge, it is necessary first to recognize the extent to which Kent and Story's conception of equity was a profoundly procedural one.

The distinction between substantive and procedural law that seems so self-evident today arose remarkably late in the United States, developing only over the course of the nineteenth century. As a result, as I have argued elsewhere, contemporaries had no conception of procedure as such[10]. Until the late nineteenth century, standard American legal dictionaries did not even include the term "procedure," containing entries instead for the more traditional (writ-based) notions of "pleading" and "practice". As the United States Supreme Court observed in 1883, "[t]he word 'procedure,' as a law term, is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country"[11]. The notion that substance and procedure were distinct bodies of law began to emerge slowly over the course of the nineteenth century – perhaps in part as a result of Jeremy Bentham's influential writings to this effect[12]. But likely more important in promoting the conceptual divide between substance and procedure was the late-eighteenth and early-nineteenth century process by means of which the common law itself was gradually transformed from a mass of procedural writs into a coherent system of substantive rights. As previously disparate writs, granting the right to file suit under particular sets of circumstances, were grouped together into broad categories of contract and tort, substantive rights under the law came to appear as distinct from the particular procedural mechanisms allowing for recovery[13]. Thus, ironically, it was only when procedure (in the form of the writ) began to lose its dominance in legal practice and culture – giving way to a newfound belief in the overarching importance of substantive legal rights – that the notion of procedure as such finally emerged.

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9. J. Story, "Chancery Jurisdiction", *The Miscellaneous Writings of Joseph Story*, W.W. Story (ed.), Boston, C.C. Little & J. Brown, 1852, p. 169-70 (originally published in 1820).

10. A.D. Kessler, "Deciding Against Conciliation: The Nineteenth-Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication", *Theoretical Inquiries in Law*, 10, July 2009, p. 480-81.

11. *Kring v. Missouri*, 107 U.S. 221, 231 (1883). Moreover, the 1897 edition of this dictionary, in finally defining "procedure," was careful to emphasize that "[t]he term is, with respect to its present use, rather a modern one". *Bouvier's Law Dictionary*, s.v. "Procedure", Boston, The Boston Book Co., 1897, 2, p. 764.

12. T.C. Grey, "Accidental Torts",*Vanderbilt Law Review,* 54, April 2001, p. 1231 n. 10.

13. W.E. Nelson, *Americanization of The Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830*, 2d ed., Athens, University of Georgia Press, 1994, p. xv-xvi; D.J. Hulsebosch, "Writs to Rights: 'Navigability' and the Transformation of the Common Law in the Nineteenth Century", *Cardozo Law Review,* 23, 2002, p. 1050-54.

Writing in the early-to-mid nineteenth century, Kent and Story came of age as jurists just as the substance/procedure divide was beginning to take root within the common law, and thus had yet to reshape traditional understandings of equity. Their writings on equity therefore make no clear distinction between substance and procedure – and, as is clear in retrospect, tend to focus on procedural mechanisms over and above substantive rights. Consider, in this respect, Story's two master treatises on equity: *Commentaries on Equity Jurisprudence*, first issued in 1835-1836, and *Commentaries on Equity Pleadings*, published shortly thereafter in 1838. In concluding his Preface to the first of these works (*Equity Jurisprudence*), Story observed, "I hope ... to find leisure to present, as a conclusion of these Commentaries, a general review of the Doctrines of Equity Pleading, and of the Course of Practice in Equity Proceedings" [14]. As suggested by this language, as well as the quick succession in which the two treatises appeared, Story evidently planned to write both books from the outset, viewing them as separate components of an integrated whole. That he thus intended to publish distinct treatises on equity jurisprudence, on the one hand, and pleading and practice, on the other, might suggest to the modern reader that his goal was to distinguish between the substantive and procedural law of equity. But to thus transpose our modern-day substance/procedure divide into the early to mid-nineteenth-century would be anachronistic and therefore misleading.

A brief review of Story's *Equity Pleadings* suffices to reveal that he had no conception of procedure as such. Like other contemporary jurists (with the partial exception of Bentham) [15], he never employed the term procedure to describe the various formalities by means of which a cause of action was initiated and then made its way through court proceedings to final judgment. Instead, he spoke of pleadings and practice – two components of litigation that he viewed as clearly distinct. Whereas pleadings constituted "the written allegations of the respective parties in the suit", or the means by which the parties brought their claims and defenses before the court, practice consisted of the proceedings by means of which these claims were then adjudicated [16].

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14. J. Story, *Commentaries on Equity Jurisprudence, as Administered in England and America*, 2d ed., London, A. Maxwell, 1839, 1, p. viii.

15. Bentham conceptualized the substance/procedure divide, but he tended to speak of "adjective law," rather than "procedure". G.J. Postema, *Bentham and the Common Law Tradition*, Oxford, Oxford University Press, 1986, p. 342.

16. J. Story, *Commentaries on Equity Pleadings and the Incidents Thereof According to the Practice of the Courts of Equity of England and America*, 2d ed., Boston, Charles C. Little & James Brown, 1840, p. 3. As Story explained, "By the Practice in a suit in Equity we are to understand all the various proceedings in the suit, whether by the positive rules or the usage of the Court, ... which may become necessary or proper for the due conduct thereof from the beginning to the final determination thereof". *Ibid*.

Story recognized that "[t]he principles, which regulate the pleadings, are sometimes ... intimately connected with the practice of the Court", such that there was no way to discuss the one without alluding to the other. But he nonetheless concluded that these were distinct topics, which ought therefore to be treated separately[17]. Evidently deeming pleadings to be of greater significance than practice, he decided to devote the treatise to the former and to leave the latter to another day, when he hoped "to find leisure to complete my original design by furnishing an elementary outline of the Practice of Courts of Equity, from the first inception of the cause, through all its various stages, to the execution of its final decree..."[18]. Committed to the notion that pleadings and practice were distinct subjects, meriting distinct treatment, Story had in no way embraced the modern-day conception of procedure as the sum total of formal mechanisms necessary for the adjudication of a distinct set of substantive legal rights.

Just as Story's *Equity Pleadings* was by no means a treatise on procedure, so too his *Equity Jurisprudence* should not be viewed as an account of the substantive law of equity. In the book's opening chapter, he endeavored to define "The True Nature and Character of Equity Jurisprudence"[19]. Rejecting as mistaken the prevalent view that equity was synonymous with "natural justice"[20], he explained that "[i]n England, and in the American States ... Equity has a restrained and qualified meaning"[21]. According to Story, this narrower, technical meaning of equity was far too complex to reduce to "direct definitions", and accordingly, a series of "explanatory observations" would have to suffice[22]. Strikingly, almost all of the "explanatory observations" that he then offered as a way of defining equity jurisprudence were procedural, rather than substantive, in nature. As this suggests, it is clear in retrospect that

17. *Ibid*.

18. *Ibid*., p. x. That Story thus concluded that pleadings were more important than practice is in itself a measure of the extent to which he lacked any conception of procedure as such. From the modern perspective, practice (or the rules governing the adjudication of claims) bears the closest resemblance to our notion of procedure and is clearly more important than mere technicalities concerning the framing of claims and defenses (namely, pleadings). But for Story, writing in an early-to-mid-nineteenth-century world in which the common law writ system of pleading was only just beginning to lose its dominance, it was pleading, and not practice, that continued to seem of primary importance.

19. J. Story, *Equity Jurisprudence*, 1, p. 1.

20. *Ibid*.

21. *Ibid*., 1, p. 21.

22. *Ibid*.

Story's conception of equity – much like the traditional writ-based conception of the common law – was predominantly procedural.

In his first "explanatory observation", Story noted that "Equity Jurisprudence may ... properly be said to be that portion of remedial justice which is exclusively administered by a Court of Equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a Court of Common Law"[23]. The content of equity, in other words, was *not* defined by reference to particular categories of substantive law. Instead, it was determined by a purely procedural hurdle – namely, the jurisdiction before which various claims were to be made. Equity jurisprudence was thus synonymous with those claims that – as a matter of the procedural law of jurisdiction – were to be brought before courts of equity.

Furthermore, as suggested by this same language, Story viewed equity as a form of "remedial justice" – as a set of procedural remedies for enforcing substantive legal rights, or in his words, "for the redress of wrongs, and for the enforcement of rights"[24]. That he thus prioritized the remedial (and therefore the procedural) is also evident from his subsequent "explanatory observations", where he continued to define the content of equity jurisprudence by reference to the various remedies that were available in courts of equity as opposed to common law. Common law courts, he observed, required that all suits be filed pursuant to "certain prescribed forms of action", such that judgment would "be given for the plaintiff or for the defendant, without any adaptation of it to particular circumstances"[25]. The problem with this approach was that "there are many cases, in which a simple judgment for either party, without qualifications, or conditions, or particular arrangements, will not do entire justice *ex aequo et bono* to either party", and thus "[s]ome modifications of the rights of both parties may be required; ... some adjustments involving reciprocal obligations or duties"[26]. Unlike common law courts, Story emphasized, courts of equity were "not so restrained"[27]. Endowed with a procedural, remedial flexibility lacking in their common law counterparts, equity courts were able to "vary, qualify, restrain, and model the remedy, so as to suit it to mutual adverse claims, controlling equities, and the real and substantial rights of all the parties"[28]. Moreover, as Story was careful

23. *Ibid*.

24. *Ibid*.

25. *Ibid*., 1, p. 21-22.

26. *Ibid*., 1, p. 22.

27. *Ibid*.

28. *Ibid*., 1, p. 22.

to observe, the distinctive ability of equity courts to craft such a nuanced remedy hinged, in turn, on their unique procedural authority to call before them all interested parties. "[W]hereas Courts of Common Law are compelled to limit their inquiry to the very parties in the litigation before them, although other persons may have the deepest interest in the event of the suit", equity courts had the power to "bring before them all parties interested in the subject matter, and adjust the rights of all, however numerous" [29]. In all these respects, therefore, equity jurisprudence was defined primarily by procedural considerations – and, in particular, by the distinctively flexible and broad scope of equity courts' remedial authority.

It was only after thus defining equity jurisprudence in procedural terms that Story finally suggested a more substantive definition – though here as well he began his "explanatory observation" by prioritizing procedural remedy over substantive right. As he argued, "[a]nother peculiarity of Courts of Equity is, that they can administer remedies for rights, which rights Courts of Common Law do not recognize at all ..." [30]. Equity jurisprudence, in other words, was defined not by its recognition of a distinctive set of substantive legal rights, but instead by the fact that it afforded procedural remedies for the enforcement of such rights. Having yet again prioritized the procedural, Story briefly proceeded to identify a number of the substantive rights for which equity, unlike the common law, provided a procedural remedy. He highlighted, in particular, the law of trusts and "losses and injuries by mistake, accident, and fraud", which we would now view as falling largely within the law of contracts.

Story's (partial) turn to the substantive, however, was but a momentary detour, followed by a set of further "explanatory observations" focused once more on primarily procedural considerations. Equity jurisprudence, he suggested, was characterized not only by the distinctive post-trial relief that it was able to afford, but also by its unique pre-trial and trial procedure. In his words, "[t]he modes of seeking and granting relief in Equity are also different from those of Courts of Common Law" [31]. Just as equity courts had far greater remedial authority than their common-law counterparts, so too they had far greater authority to seek evidence – including, crucially, the testimony of the parties themselves. Thus, while common law courts obtain evidence "not from the parties, but from third persons, who are disinterested witnesses", equity courts "address themselves to the conscience of the defendant, and require him to answer upon his oath the matters of fact stated in the bill,

29. *Ibid*.

30. *Ibid*., 1, p. 23.

31. *Ibid*., 1, p. 24.

if they are within his knowledge ..." [32]. And perhaps most importantly, common law and equity courts differed on the key question of what sort of adjudicatory personnel were to have primary responsibility for conducting trial. While common law courts "proceed to the trial of contested facts by means of a jury", equity courts relied for judgment exclusively on a single judge. It was this reliance on a single judge – one endowed, as we will see, with superior moral and intellectual gifts – that, in Kent and Story's view, permitted the distinctive procedural flexibility and authority that were the hallmarks of equity.

An Idealized, Heroic Image of the Equity Judge

As Kent and Story saw it, the extensive procedural flexibility and authority that were the defining features of equity were made operative through the unique wisdom – and power – of the equity judge. Only a judge of such unique wisdom would be able to gather all relevant evidence (including that provided by the parties themselves), adjudicate the claims of all interested persons (rather than merely those between a single plaintiff and defendant), and craft a remedy that was perfectly suited to the particulars of the case (finding neither for the plaintiff nor the defendant, but instead balancing the equities, often through complex injunctive relief). Underlying Kent and Story's conception of equity and its distinctive procedural traits was thus an idealized, even heroic image of the judicial role in equity – a role, not surprisingly, of which they deemed themselves the ultimate embodiment.

In their view, a defining feature of the equity judge – and one that clearly distinguished him from his common-law counterpart – was his refined moral sensibility. Empowered with the discretionary, procedural authority necessary to enter a complex judgment balancing the equities, the equity judge could not simply look to the narrowly applicable legal rule, but was instead required to rely to some degree on moral intuition. It was for precisely this reason that those of "great mind" felt "cramped and fettered" by the kinds of narrow pursuits that typified the common law and were drawn instead to equity [33]. Moreover, a powerful moral intuition was particularly vital for the equity judge because his jurisdiction had emerged, in part, to provide justice where the common law and its writs failed to do so – in the many cases, in other words, in which an otherwise just legal rule threatened to work an injustice due to

32. *Ibid*.

33. J. Story, "Progress of Jurisprudence", *Miscellaneous Writings*, p. 234 (originally published in 1821).

power differentials, miscommunication, and the like. As Story explained: "There are ... many cases ... of losses and injuries by mistake, accident, and fraud; ... and many cases of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains; in all of which Courts of Equity will interfere and grant redress; but which the common Law takes no notice of, or silently disregards"[34]. Only a judge of high moral character could be expected to correct such wrongs, and thus to ensure justice for the poor, weak, and abused – including minors, women, and the mentally ill. Similarly, an elevated moral sensibility was required for overseeing the many cases in equity concerning agency relationships (such as trusts and partnerships) that imposed a high fiduciary duty of good faith.

The extent to which a refined moral character defined Kent's idealized conception of the equity judge is evident, perhaps first and foremost, in his reflections on his own experience as Chancellor of New York. In describing his approach to resolving equity suits, he emphasized his extensive reliance on moral intuition: "I saw where justice lay and the moral sense decided the cause half the time, and I then set down to search the authorities until I had exhausted my books and I might once in a while be embarrassed by a technical rule, but I most always found principles suited to my views of the case ..."[35]. Along similar lines, Story argued that "[t]he principles of equity jurisprudence are of a very enlarged and elevated nature. They are essentially rational, and moulded into a degree of moral perfection which the law has rarely aspired to"[36]. As he elsewhere implied, it was precisely this aspiration towards "moral perfection" that ensured the "natural elevation" of equity courts and their judges, rendering them clearly superior to their common law counterparts[37]. Indeed, in Story's view, the moral superiority of the equity judge was such that all appeals from his judgments ought themselves to be heard by a separate equity appeals court, capable of respecting such elevated moral sensibilities.

In thus emphasizing the equity judge's refined moral character, Kent and Story were at the same time careful to insist on the importance of a high degree of intellectual sophistication and rigor. The equity judge whom they described was not an untutored, natural man, but instead the product of great discipline and learning. The reason for this was that, contrary to popular belief, decisions in equity were not simply a product of the judge's personal conscience. As Kent insisted in his *Commentaries on American Law*, courts of equity had become just

34. J. Story, *Equity Jurisprudence*, 1, p. 23.

35. James Kent to Thomas Washington, 6 October 1828, p. 9, New York, reel 3, container 5, United States Library of Congress.

36. J. Story, "Progress of Jurisprudence", p. 233-34.

37. J. Story, "Chancery Jurisdiction", p. 171.

as rule-bound as courts of law: "[Chancery] has no discretionary power over principles and established precedents; and ... [it] has grown to be a jurisdiction of ... strict technical rule ..." [38]. Likewise, Story refuted the "often repeated" belief "that Courts of Equity are not, and ought not, to be bound by precedents; ... but that every case is to be decided upon circumstances, according to the arbitration or discretion of the Judge, acting according to his own notions of *ex æquo et bono*" [39]. The greatness of equity lay precisely in the fact that it combined a deep moral orientation with a commitment to rational predictability. And only a very particular kind of judicial character – one uniting elevated moral sensibilities, on the one hand, with intellectual acuity and discipline, on the other – was capable of promoting this complex, equitable balance [40].

In insisting on the equity judge's unique blend of intellectual and moral capacities, Kent and Story drew on tropes of both the Enlightenment and the romantic era. As men who bridged the eighteenth and nineteenth centuries, they created a portrait of the idealized equity judge (and thus of themselves) that merged Enlightenment conceptions of scientific and commercial modernity with romantic notions of natural genius.

Like the enlightened *philosophe*, the equity judge devoted his great intellectual prowess, discipline, and learning to the pursuit of philosophical inquiry. As Story wrote of Kent's equity jurisprudence, "Look to the chancery decisions of New York. Where shall we find in our times ... a more philosophical spirit than is displayed in the elaborate arguments of her late chancellor?" [41]. In the view of both jurists, there was no better evidence of the equity judge's commitment to such philosophical, scientific inquiry than the fact that he embraced the study of Roman, civil law. Though a matter of some

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38. J. Kent, *Commentaries on American Law*, 3d ed., New York, E.B. Clayton, James Van Norden, 1836, 1, p. 489.

39. J. Story, *Equity Jurisprudence*, 1, p. 16.

40. The prototype of such a judge was, of course, none other than Kent himself, whom Story lauded as the founder of American equity. Looking beyond legal formalities to the deeper animating (often moral) principles of the law, Chancellor Kent possessed a rigorous mind and sense for justice that enabled him to be at once true to the letter and to the spirit of the law: "It required such a man, with such a mind, at once liberal, comprehensive, exact, and methodical; always reverencing authorities and bound by decisions; true to the spirit, yet more true to the letter of the law; pursuing principles with a severe and scrupulous logic, yet blending with them the most persuasive equity; – it required such a man, with such a mind, to unfold the doctrines of chancery in our country, and to settle them upon immovable foundations". J. Story, "Chancery Jurisdiction", p. 150.

41. J. Story, "Growth of the Commercial Law", *Miscellaneous Writings*, p. 288 (originally published in 1825).

dispute among legal historians today[42], it was widely believed well into the nineteenth century that equity (unlike the common law) derived in significant measure from this continental European tradition. As Kent observed, "[t]he great body of the Roman or civil law ... exerts a very considerable influence upon our own municipal law, and particularly on those branches of it which are of equity ... jurisdiction"[43]. Likewise, Story claimed that English chancellors borrowed extensively from Roman, civil law: "[F]rom the moment when principles of decision came to be acted upon and established in Chancery, the Roman law furnished abundant materials to erect a superstructure, at once solid, convenient, and lofty, adapted to human wants, and enriched by all the aids of human wisdom, experience, and learning"[44]. Because of equity's presumed roots in Roman, civil law, Kent and Story believed that a close familiarity with this tradition was essential for the equity judge. And the defining feature of this tradition – in sharp contrast to the primitive and arbitrary system of the common law – was its modern, scientific sophistication.

According to Kent and Story, there was much to be celebrated in the common law – including especially its distinctive commitment to preserving (interrelated) property rights and political liberties[45]. But the fact remained that the common law dated back to the middle ages and was thus a product of an ignorant, feudal, and monkish age. The baleful remnants of this unfortunate inheritance were evident in its great technical complexity, its mass of illogical and palpably false fictions, and the numerous pre-modern doctrines – such as rights of primogeniture and infeudation – that the several states had managed to overcome only by legislation. As Story opined, "the English common law ... [was] churlish and harsh as was its feudal education"[46].

The primitive nature of the common law contrasted starkly with the comparative sophistication of the civil law tradition of continental Europe, which borrowed heavily from the law of the Romans. The world's most erudite and complete body of law, Roman law was created to serve a complex

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42. J. Baker, *The Oxford History of the Laws of England*, vol. 6, *1483-1558*, Oxford, Oxford University Press, 2003, p. 180-81.

43. J. Kent, *Commentaries*, 1, p. 515.

44. J. Story, *Equity Jurisprudence*, 1, p. 20.

45. See, for example, J. Story, "Course of Legal Study", *Miscellaneous Writings*, p. 66 (arguing that "[w]hatever of rational liberty and security to private rights and property is now enjoyed in England, and in the United States, may, in a great degree, be traced to the principles of the common law") ; J. Kent, *Commentaries*, 1, p. 546 (observing that "[i]n every thing which concerns civil and political liberty", nothing was comparable to "the free spirit of the English and American common law").

46. J. Story, "Progress of Jurisprudence", p. 235.

commercial society – ultimately, a commercial empire. Rediscovered by continental Europeans just as the dark ages had passed, and developed to heights of perfection in the early-modern period, Europeanized Roman law, or civil law, embodied nothing short of civilization itself. In Story's words:

> "Where shall we find more full and masterly discussions of maritime doctrines, coming home to our own bosoms and business, than in the celebrated Commentaries of Valin? Were shall we find so complete and practical a treatise on insurance as in the mature labors of Emérigon? Where shall we find the law of contracts so extensively, so philosophically, and so persuasively expounded, as in the pure, moral, and classical treatises of Pothier? Where shall we find the general doctrines of commercial law so briefly, yet beautifully, laid down, as in the modern commercial code of France? Where shall we find such ample general principles to guide us in new and difficult cases, as in that venerable deposit of the learning and labors of the jurists of the ancient world, the Institutes and Pandects of Justinian? The whole continental jurisprudence rests upon this broad foundation of Roman wisdom ..." [47].

And unlike the common law, equity had wisely opted to borrow from this fount of Roman, continental learning.

As suggested by Story's language in praise of the civil law (including his reference to its "maritime" and "commercial law" doctrines), the greatness of this legal tradition lay not only in its scientific sophistication, but also in its commitment to deploying such wisdom towards the betterment of the human condition – including, in particular, commercial development. The English tradition of equity, Story implied, had borrowed from Roman, civil law with an eye towards furthering precisely such modern, commercial ends. Rising to prominence during the Renaissance, and expanding its power during the seventeenth-century age of commerce, chancery was created by modern commercial men – quite unlike the feudal legists who bore primary responsibility for the emergence of the common law. As Story explained, "[t]he law of contracts ... in England" – much of which arose within Chancery – "has been formed into life by the soft solicitudes and devotion of her own neglected professors of the civil law" [48]. Working within this longstanding civilian tradition, the equity judge was therefore the very embodiment of a man of modern, enlightened science, seeking to deploy his sophisticated learning to promote commerce, and thus human welfare.

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47. *Ibid*., p. 234-35.

48. *Ibid*., p. 235.

Like all enlightened men of science, moreover, the equity judge did not work alone, but instead participated in an international community of scholarship. Familiarity with the civil law tradition was thus not simply a marker of the equity judge's deep enlightenment. It was also a kind of lingua franca, enabling him to converse across borders with the most important jurists of the civilized, continental European world[49]. In this respect, the American equity judge continued to inhabit an Enlightenment republic of letters, in which leading intellectuals engaged in an ongoing transnational conversation about great questions and ideas.

As the very embodiment of his own ideal of the equity judge, Kent himself corresponded extensively with scholars abroad. And it was precisely his familiarity with Roman, civil law that helped make such correspondence possible, since his European interlocutors quite naturally sought to share with him writings from their own legal tradition[50]. Well aware that participation in this transnational republic of letters required some familiarity with Roman, civil law – and thus with the languages that served as its gatekeepers – Kent, moreover, took great pride in his efforts to master these languages. He began these efforts, he recounted, when in 1786, long before he was appointed to the bench, he was put to shame by Edward Livingston – a man who, because of his role in drafting the Louisiana Civil Code, was also to gain fame as one of the new nation's great civilians. Livingston evidently recited to Kent some passages from Horace in the original Greek. Unable to follow, Kent was deeply traumatized and committed himself to mastering the great languages of the civilized world:

> "[F]lung with shame and mortification for I had forgotten even my Greek letters[,] ... I purchased immediately Horace and Virgil, a dictionary and grammar, and a Greek lexicon and grammar, and the testament and I formed my resolution promptly and decidedly to recover the lost languages. I studied in my little cottage mornings and devoted one hour to Greek and another to Latin daily. I soon increased it to two for each tongue in the 24 hours. My acquaintance with the languages increased rapidly. After I had read Horace and Virgil,

49. Indeed, unlike their successors, early nineteenth-century American jurists, including in particular, Kent and Story, regularly cited civil law sources. J. Gordley, "Comparative Legal Research: Its Function in the Development of Harmonized Law", *American Journal of Comparative Law,* 43 (Fall 995), p. 558-59.

50. To give but one example, Nicolaus Heinrich Julius wrote to Kent from Berlin in April 1838, sending "a couple of pamphlets, one in French, the other in Latin", the last of which, he noted, was "by a friend of mine ...". Nicolaus Heinrich Julius to James Kent, 30 April 1838, p. 2, Hamburg, reel 5, container 9, United States Library of Congress.

> I ventured upon Livy for the first time in my life and I can hardly describe at this day the enthusiasm with which I perseveringly read and studied in the originals Livy and Illiad. It gave me inspiration. I purchased a French dictionary and grammar and began French and gave an hour to that language daily"[51].

While legal historians have questioned the extent of Kent's fluency in foreign languages, as well as his mastery of Roman, civil law[52], it is evident that he gained sufficient competency to participate regularly in dialogue with scholars abroad – and thus to embody his conception of the enlightened, equity judge. Writing to Kent from Berlin in 1838, Nicolaus Heinrich Julius, a noted advocate of prison reform[53], referred to himself as "only one of the most insignificant among the numerous foreign ... worshippers continually presenting themselves at the shrine of the oracle of American law"[54]. While clearly intended to flatter Kent's not insubstantial ego, these words reflected the extent to which the American jurist had indeed succeeded in gaining a reputation abroad – a product not only of his achievement in publishing the first major treatise on American law, but also of his success in acquiring the legal and linguistic knowledge necessary to maintain extensive contacts with European scholars. Those seeking to honor Kent as the very prototype of the equity judge thus made particular reference to his mastery of the learned civil law tradition. For example, when Hamilton College's Phoenix Society voted to make him an honorary member, they so informed him in a letter praising his long-established reputation as "the acute and learned Civilian"[55].

A man of enlightened, philosophical spirit, the equity judge was also for Kent and Story – and especially the latter – a kind of romantic hero. Sixteen years Kent's junior (and thus more truly a man of the nineteenth century), Story described the equity judge by appealing to the romantic discourse of genius, portraying him as an individual whose expansive mind and hypersen-

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51. James Kent to Thomas Washington, 6 October 1828, p. 3-4.

52. D.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, p. 283; A. Watson, "Chancellor Kent's Use of Foreign Law", in M. Reimann (ed.), *The Reception of Continental Ideas in the Common Law World, 1820-1920*, Berlin, Duncker and Humblot, 1993, p. 45.

53. R.J. Evans, *Tales from the German Underworld: Crime and Punishment in the Nineteenth Century*, New Haven, Yale University Press, 1998, p. 63.

54. Nicolaus Heinrich Julius to James Kent, 30 April 1838, p. 1.

55. Charles Jerome, G.T. Curtis and J.K. Will, Committee of Hamilton College to James Kent, 27 October 1838, p. 1, Hamilton College, Clinton [New York], reel 5, container 9, United States Library of Congress.

sitive spirit set him apart from all others. While at first glance, the equity jurist would appear to be a mere pedant, burying his nose in books and scurrying after ancient wisdom, he was, in fact, the very prototype of the romantic voyager, engaged in a perilous, personal quest for deeper knowledge and refinement.

It was in precisely such terms that Story characterized Kent, the great titan of American equity. Noting that Kent's "life has been devoted, sedulously and earnestly, to professional studies", Story went on to suggest that such study was nothing short of an adventure. Through his studies, Kent was required, like the hero of some *bildungsroman*, to "fathom[] the depths and search[] the recesses", to "trace[] back the magnificent streams of jurisprudence to their fountains, lying dark and obscure", to "pursue[]" knowledge "amidst the dust and the cobwebs", to "dare[] to examine", and perhaps most importantly, to "master[]"[56]. Along similar lines, more than a decade later, Story concluded his *Commentaries on Equity Jurisprudence* by addressing himself to "the ingenuous youth" who was just setting out on the quest to master equity[57]. Warning the youth not to imagine that a mere reading of the *Commentaries* was sufficient to prepare him for the journey ahead, Story depicted the totality of equity jurisprudence and learning as a "magnificent temple reared by the genius and labours of many successive ages"[58]. It was through a similar combination of romantic genius and steadfast discipline, he advised, that the young, would-be master of equity might, like those before him, attain to heights of learned glory.

True to the romantic ideal of the genius as a man of unique spiritual – and, in particular, artistic and literary – sensibilities, Story was careful to emphasize the aesthetic merits of the equity judge's written prose. Thus, in describing the commercial-law jurisprudence that Kent developed while serving as chancellor, Story observed that he "contributed to the[] beauty and perfection" of this body of law. Along similar lines, elite New York lawyers seeking to honor Kent on his eightieth birthday made a particular point of highlighting the refined literary and stylistic quality of his chancery opinions: "Nor is it merely as legal disquisitions that these decisions demand our praise, their literary merits are of the highest order", and "the occasional splendor of their eloquence" was nothing short of breathtaking[59]. Indeed, when asked to account for his

56. J. Story, "Chancery Jurisdiction", p. 149.

57. J. Story, *Equity Jurisprudence*, 2, p. 686.

58. *Ibid*., 2, p. 687.

59. David B. Ogden, John Ducy, George Woods, Dabiel Lords, Jr., George Griffens, Beverly Robinson, Benjamin F. Butler, Charles Channoy, J. Prescott Halls, Samuel B. Ruggles, Francis B. Cutting, James W. Gesard, George H. Strong, Thomas L. Ogden, David S. Jones, Samuel A. Foot, Benjamin D. Silliman, Ofden Hoffman, James R. Whiting, James S Brady, David

emergence as one of the nation's greatest jurists, Kent himself emphasized the important role that literature had played in the development of his mental and moral capacities. Beginning in his early twenties, he observed, he "appropriated the business part of the day to law ... [but] accorded evenings to English Literature in company with my wife"[60]. And "[f]rom 1788 to 1798", the year he was first appointed to the bench, he "steadily divided the day into five portions and allotted them to Greek, Latin, Law & Business, French and English varied literature"[61]. In this way, he developed his legal capacities in tandem with his literary sensibilities and "mastered the best of the Greek, Latin and French classics, as well as the best English and Law books at hand"[62].

Enlightened man of letters and romantic genius – enjoying acute powers of scientific reasoning, but endowed at the same time with refined moral and literary sensibilities – the equity judge was, in sum, nothing short of heroic. But why precisely was he so central to Kent and Story's shared vision of equity? What purposes, in other words, did these jurists hope to serve by creating such an idealized, heroic image of the equity judge?

The Appeal of the Image

For Kent and Story, the idealized image of the equity judge represented a solution to a number of intersecting personal and political problems. These included, most importantly, the challenges posed to their career ambitions by their backward, American origins, and the increasingly democratic (and thus, to them, distasteful) thrust of American political life.

The image they created of the equity judge as a man of superior intellectual and moral capacities was, in part, a response to the fact that the United States in which they lived and worked remained a remote backwater of the civilized world. By developing an idealized image of the equity judge, and thus of themselves, Kent and Story sought to promote their own reputations both within and beyond the borders of the United States. Towards this end, they each made great efforts to be recognized as the founding fathers of American equity – and thus as the very prototypes of the idealized equity judge. Kent, in particular, took great pride in insisting with some (though, as noted, only limited) accuracy, that he was the primary founder of American equity – and

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Graham, Jr., R. L. Robertson, Theodore Scogisick, John Anthow, Murray Hoffman, Abraham Priest/Crist, Joseph S. Bosworth, Ambrose L. Jordan, John W. Edmonds, Edward Sandford to James Kent, 31 July 1843, p. 2, New York, reel 5, container 10, United States Library of Congress.

60. James Kent to Thomas Washington, 6 October 1828, p. 4.

61. *Ibid*.

62. *Ibid*.

in fact, that prior to his chancellorship, equity as such hardly existed in the United States:

> "In 1814 I was appointed Chancellor... The person who left it was stupid and it is a curious fact that for the nine years I was in that office, there was not a single decision, opinion, or dictum of either of my two predecessors (Ch. Livingston and Ch. Lansing) from 1777 to 1814 cited to me or even suggested. I took the court as if it had been a new institution and never before known in the world. I had nothing to guide me, I was left at liberty to assume all such English Chancery powers and jurisdiction as I thought applicable under our constitution. This gave me grand scope and I was only checked by the revision of the Senate or Court of Errors" [63].

In much the same way, Story – who had become known though his judicial opinions and treatises as a great exponent of American equity law and practice – sought to position himself as Kent's natural successor, and thus as a kind of cofounder of American equity. As Story's son would later report in an hagiographic account of his father's life that clearly gave voice to the elder Story's own self-conception, "To the united efforts of my father and Chancellor Kent the enlightened system of Equity, which now prevails in this country, is chiefly due. Kent, indeed, led the way, but he found in my father an equal coadjutor. They stood shoulder to shoulder in this work, and divide the honor between them" [64].

It bears emphasis, however, that in thus developing and promoting an idealized model of the equity judge, Kent and Story understood themselves to be doing more than simply advancing their own career interests and ambitions. As they were well aware, the eyes of the civilized, European world were watching to see what would become of the great American experiment in government – and in the realm of the law, it was prominent jurists like themselves who came to represent American legal culture as a whole. By creating an idealized image of the equity judge, which they themselves undertook to embody, they sought to elevate not only their own personal status, but also that of the new nation as a whole. Offering one another the praise that each evidently hoped to obtain for himself, they therefore made a particular point of emphasizing the extent to which the other's writings – especially in equity – had gained acclaim across the Atlantic. Story, for

63. *Ibid*., p. 8.

64. W.W. Story, *Life and Letters of Joseph Story, Associate Justice of the Supreme Court of the United States and Dane Professor of Law at Harvard University*, Boston, Charles C. Little and James Brown, 1851, 2, p. 586.

example, observed in praise of Kent's chancery reports that they could easily rival the tremendous jurisprudential achievements of the English legal tradition. In Story's words, Kent's chancery reports were "a monument of [Chancellor Kent's] learning, industry and integrity, which will endure as long as the law shall be studied as a science ... [and which] will not suffer in the comparison with those of the highest age of the British Empire"[65]. Along similar lines, in proposing a toast in Story's honor, Kent emphasized the wonderful reputation that his colleague's treatises and judicial decisions had acquired abroad, particularly among European scholars, intimately familiar with the great works of both the English and the Roman, civil law traditions: "We have long been accustomed to receive with diffidence and submission the authority of Westminster Hall, and especially to contemplate with wonder, if not with despair, the massy piles of Gothic lore and court-law learning accumulated by the civilians of Europe. But some of the treatises as well as decisions of the gentleman to whom I have alluded, are well calculated to teach our trans-Atlantic teachers"[66]. Thus, for both Kent and Story, the idealized image of the equity judge, which they sought to create – and then claimed to embody – served as evidence not only of their own greatness, but also of the fact that the nascent American legal culture and its institutions could rival those of the new nation's more powerful and established European ancestors.

At the same time, for both men, the heroic conception of the equity judge was, at least in part, a response to the perceived dangers of democratic rule. As represented by the Jeffersonian electoral victory of 1800 (and the consequent routing of the Federalists), the early decades of the nineteenth century witnessed the dramatic democratization of the United States – a turn of events with which neither jurist ever fully reconciled himself. As Kent explained in 1828: "I had commenced in 1786 to be a zealous federalist. I read everything in politics. I got the Federalist almost by heart and became intimate with Hamilton. I entered with ardor into the federal politics against France in 1793 and my hostility to the French democracy and to French power beat with strong pulsation down to the Battle of Waterloo. Now you know my politics"[67]. Pursuant to Kent's Federalist conception of good government, the survival and success of the republic hinged on the leadership of a select few men of

65. William Johnson to James Kent, 22 November 1816, p. 2, New York, reel 2, container 4, United States Library of Congress. That Story so asserted was reported to Kent by William Johnson, his close friend and the court reporter with whom he compiled New York's first continuous law and equity reports.

66. W.W. Story, *Life and Letters*, p. 180 (quoting May 15, 1834 letter from James Kent to Joseph Story).

67. James Kent to Thomas Washington, 6 October 1828, p. 5.

extraordinary intelligence and virtue, who possessed not only the innate character, but also the requisite property necessary to rise above the demands of faction and mass and to act in the best interest of the public as a whole. In his view, in short, "[a]ll theories of government that suppose the mass of people virtuous and able, and willing to act virtuously are plainly utopian and will remain so until the return of the Saturnian age ..." [68].

In contrast to Kent, Story's political leanings were somewhat more nuanced and complex. He began his life as a devoted member of the Republican Party; and it was, in fact, in recognition of his service to this party that, in 1811, he obtained his position as a justice of the United States Supreme Court. Story, however, quickly gained a reputation as a traitor to the cause [69]. Devoted to promoting both a strong national government and extensive commercial development, he was described by none other than Jefferson himself as a "pseudo-republican" [70] and would later profess loyalty to the Whig Party, decried by old-school Republicans as a reincarnation of the Federalists [71]. Like Kent, moreover, he saw in Andrew Jackson's rise to power the fearful prospect of mass rule – or as he (and other critics) termed it, "the reign of king 'Mob'" [72] – and he sought to deploy his position as supreme court justice as a mechanism for resisting the mounting democratic tide [73].

For Kent and Story, the idealized, heroic image of the equity judge that they created was, in part, a response to the growing prospect (and reality) of mass democratic rule. The equity judge was, in short, the very prototype of the elite, educated, and independent men – or in Story's words, "men of talent, 'men of virtue', 'the truest of true'" [74] – whom both jurists believed ought to bear primary responsibility for guiding the helm of state. As we have seen, it was in their view, precisely because the equity judge was such a unique and superior individual that he was entrusted with extensive – and discretionary –

68. James Kent to Daniel Webster, 21 January 1830, p. 3, New York, reel 3, container 6, United States Library of Congress. See also J.T. Horton, *James Kent: A Study in Conservatism, 1763-1847*, New York, D. Appleton-Century Co., 1939, p. 292 (discussing Kent's distaste for "radical democracy", as embodied by the presidency of Andrew Jackson – a man whom he viewed as "'a detestable, ignorant, reckless, vain, and malignant tyrant'" (quoting Kent)).

69. R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic*, Chapel Hill, University of North Carolina, Press, 1985, p. 53-56.

70. *Ibid.*, p. 59 (quoting Jefferson); J. Story, "Autobiography", *Miscellaneous Writings*, p. 33 (quoting January 23, 1831 letter from Joseph Story to William W. Story).

71. R. Kent Newmyer, *Supreme Court Justice Joseph Story*, p. 172-73.

72. *Ibid*., p. 158 (quoting Story).

73. *Ibid*., p. 162.

74. *Ibid*., p. 162 (quoting Story).

procedural power. In this sense, their conception of the equity judge was a last vestige of an early modern ideal of elite rule that persisted well beyond the formation of the republic. And it was in their effort to restore such rule that both Kent and Story struggled (with some brief success) to establish a fully flourishing system of equity on American shores.

Theirs, however, was to be but a short-lived victory. In Kent's very own state of New York, the Field Code of 1848 merged law and equity in a manner that, while preserving certain elements of equity practice, sought to eliminate much of the judge's discretionary, procedural authority – not least by assigning the vast majority of cases to jurors. While defenders of equity would continue to promote the existence of separate court systems well into the twentieth century – and merger would not, in fact, occur in the federal system until as late as 1938 – the Field Code nonetheless represented the beginning of the end of American equity as a distinct body of law and courts. As such, the Code (like the Constitutional Convention that called it into being) marked the triumph of new ideals of mass democracy, and with these, the collapse of Kent and Story's heroic – and elitist – vision of equity.