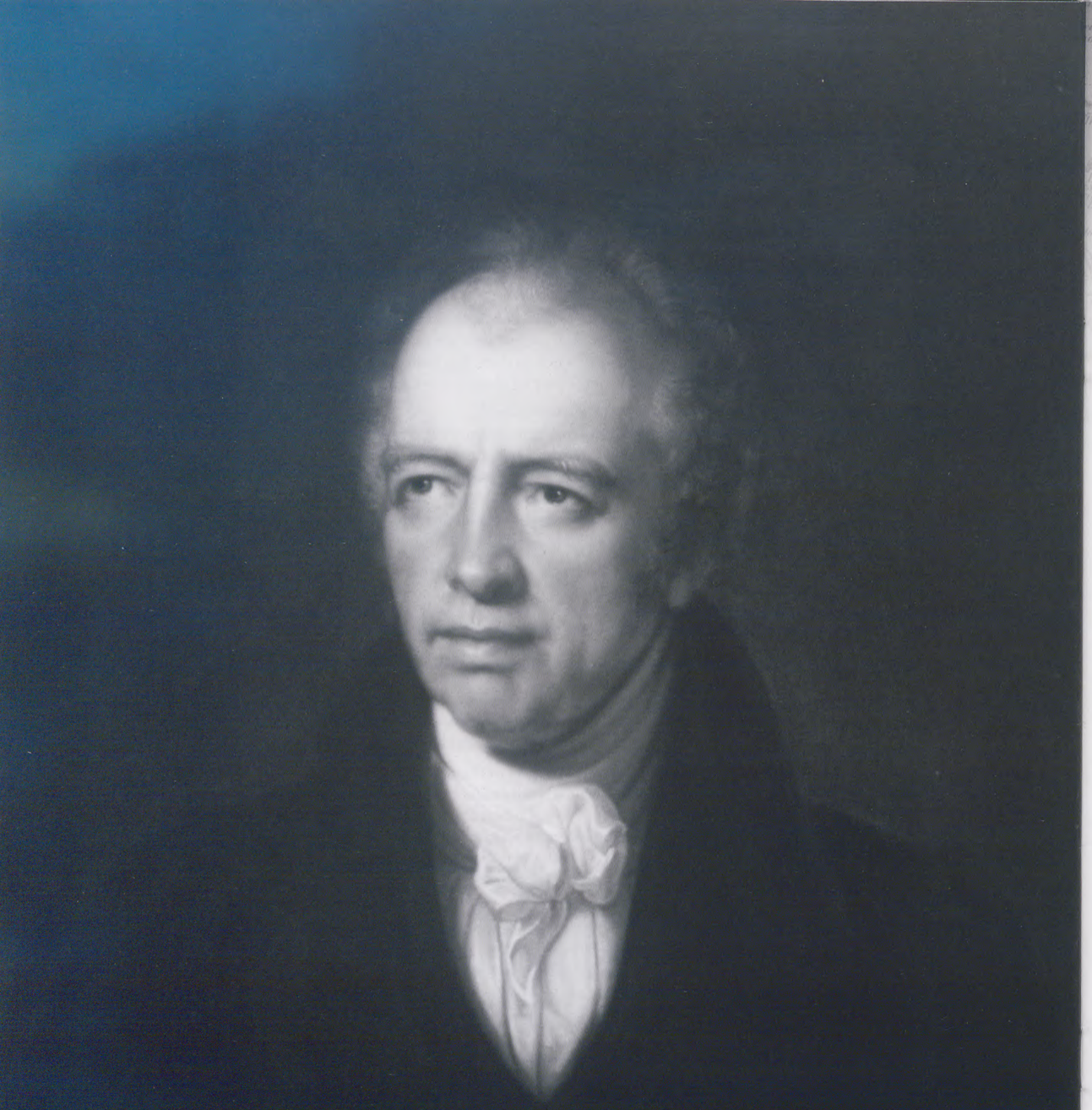
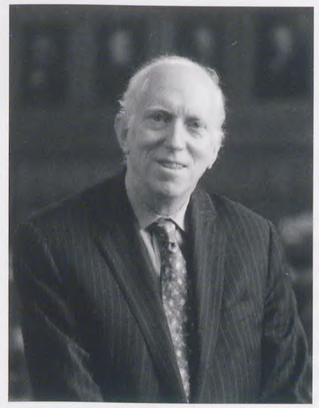


Portrait of Chancellor James Kent by Rembrandt Peale. Court of Appeals Collection.
Courtesy of the Historical Society of the New York Courts

Chancellor James Kent:

FATHER OF AMERICAN JURISPRUDENCE

by Hon. Robert S. Smith



The Honorable Robert S. Smith (Ret.) is head of the appellate practice at Friedman Kaplan Seiler & Adelman LLP in New York. He served as Associate Judge of the New York State Court of Appeals, New York's highest court, from 2004-2014. Before serving on the Court of Appeals, Judge Smith practiced law in New York City. He has argued dozens of appeals before federal and State appellate courts, including two appeals before the United States Supreme Court.
Judge Smith graduated with great distinction in 1965 from Stanford University and received his law degree, magna cum laude, in 1968 from Columbia Law School, where he was editor-in-chief of the Columbia Law Review. He later taught at Columbia, from 1980 until 1990, and at the Benjamin N. Cardozo School of Law from 2006 until 2015.

Who was James Kent? Very few people have any clear idea—even people who went to Chicago-Kent College of Law, or to Columbia Law School back in the day when it was in Kent Hall. Even Columbia students who were honored with the title of James Kent Scholars would probably flunk a quiz on who James Kent was. Yet there was a time when his was a household name to every New York lawyer, and when he was known throughout the country as the "Father of American Jurisprudence."

First the basics: Kent was born in Doanesburg, New York in 1763, the year the French and Indian War ended, and died in 1847, during the Mexican War. He went to Yale, where his studies were disrupted by the Revolutionary War. Law schools didn't exist then, so after Yale he went back to New York, served an apprenticeship and started practicing law. In the mid-1790s, he was a professor, lecturing undergraduates at Columbia College. He served on the New York Supreme Court from 1798 until 1814, when he became the Chancellor of New York. He left the bench at 60, in 1823 (the mandatory retirement rules were even tougher then than now), and wrote a four-volume book, *Commentaries on American Law,* that was published between 1826 and 1830.

If you and I had met James Kent, we might not have liked him. I love practicing law, and if you are reading this maybe you do too. Kent wrote that he "always extremely hated" it.[1] As a lecturer, he was reputed to be very boring. He quit teaching in 1787 because no one showed up for his lectures.[2] So if you didn't want him as your law partner or law professor, maybe you could just go out and have a good time with him? I doubt it. Here is his description, written in old age, of himself at 18, when he was studying law with other apprentices in a Poughkeepsie law office:

> *My fellow students, who were more gay and gallant, thought me very odd and dull in my taste.... I was free from all dissipations; I had never danced, played cards, or sported with a gun, or drunk anything but water.*[3]

Of those fellow students, he reported with seeming satisfaction that "out of five of them, four died in middle life, drunkards."[4]

Above: Map of New York State, 1869. Library of Congress, Geography & Maps Division, G3801.P3 1869 .R5 RR 485

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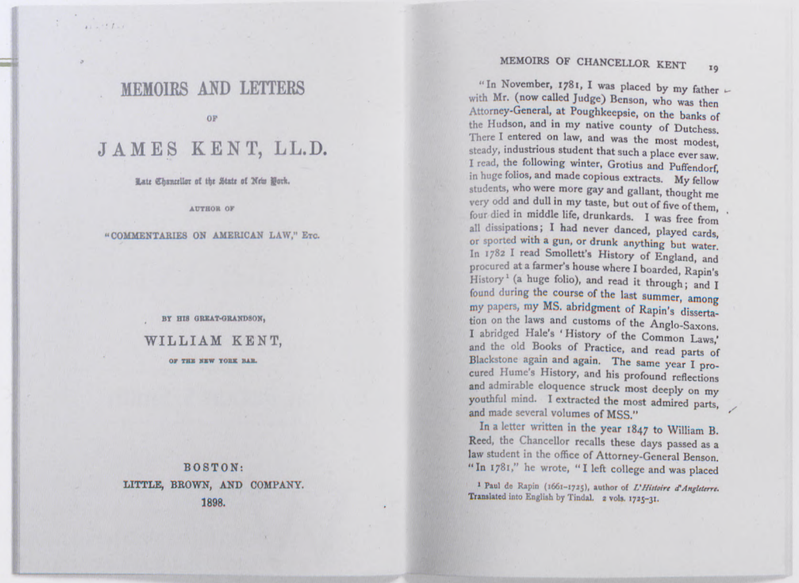


MEMOIRS AND LETTERS

OF

JAMES KENT, LL.D.

Late Chancellor of the State of New York.

AUTHOR OF

"COMMENTARIES ON AMERICAN LAW," Etc.

BY HIS GREAT-GRANDSON,

WILLIAM KENT,

OF THE NEW YORK BAR.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1898.

MEMOIRS OF CHANCELLOR KENT 19

"In November, 1781, I was placed by my father with Mr. (now called Judge) Benson, who was then Attorney-General, at Poughkeepsie, on the banks of the Hudson, and in my native county of Dutchess. There I entered on law, and was the most modest, steady, industrious student that such a place ever saw. I read, the following winter, Grotius and Puffendorf, in huge folios, and made copious extracts. My fellow students, who were more gay and gallant, thought me very odd and dull in my taste, but out of five of them, four died in middle life, drunkards. I was free from all dissipations; I had never danced, played cards, or sported with a gun, or drunk anything but water. In 1782 I read Smollett's History of England, and procured at a farmer's house where I boarded, Rapin's History[1] (a huge folio), and read it through; and I found during the course of the last summer, among my papers, my MS. abridgment of Rapin's dissertation on the laws and customs of the Anglo-Saxons. I abridged Hale's 'History of the Common Laws,' and the old Books of Practice, and read parts of Blackstone again and again. The same year I procured Hume's History, and his profound reflections and admirable eloquence struck most deeply on my youthful mind. I extracted the most admired parts, and made several volumes of MSS."

In a letter written in the year 1847 to William B. Reed, the Chancellor recalls these days passed as a law student in the office of Attorney-General Benson. "In 1781," he wrote, "I left college and was placed

[1] Paul de Rapin (1661–1725), author of *L'Histoire d'Angleterre*. Translated into English by Tindal. 2 vols. 1725–31.

Pages from *Memoirs and Letters of James Kent, L.L.D., Late Chancellor of the State of New York, Author of "Commentaries on American Law," Etc.* by William Kent, 1898. Courtesy of the Internet Archive

So what did he do that might make us feel more warmly toward him? Two things: He was a great judge, and he wrote the *Commentaries*.

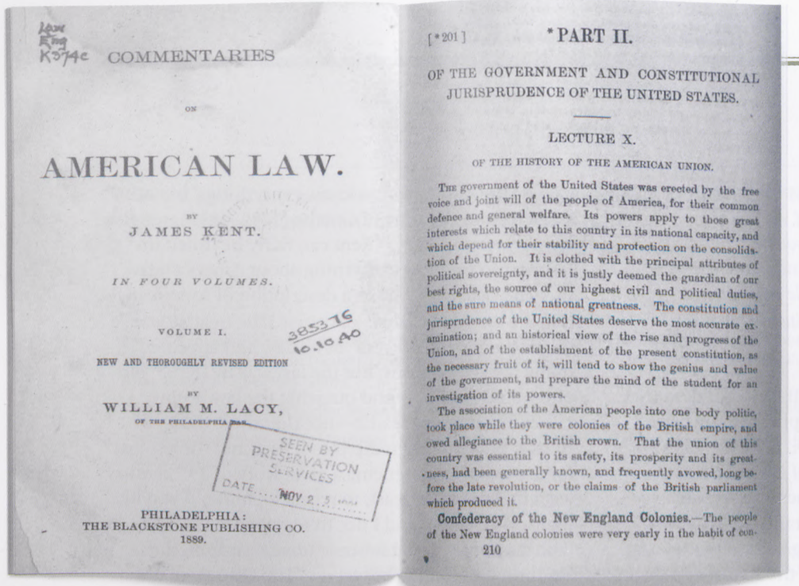
In Kent's time, law and equity cases were litigated in separate courts in New York, and Kent distinguished himself as a judge in both. He was a justice of the New York Supreme Court, a law court, for 16 years. At that time, the title "Supreme Court" was less confusing then than it is today. It was then, as it is now, the most exalted trial court in the state, and it also heard appeals, sitting in banc and reviewing decisions by single justices. It was "supreme" (if you don't count the separate-but-equal Chancery Court) in the sense that there was no real appellate court with jurisdiction over it. There was something called the "Court for the Trial of Impeachments, and the Correction of Errors" (usually shortened, probably sometimes sardonically, to "Court of Errors"), which reviewed both law and equity decisions, but that wasn't what we think of as a court. Its members, when Kent became a Supreme Court justice, were the five justices of that court; the Chancellor; and all the members of the New York State Senate. (Just picture appearing today in a tribunal like that.) The first real appellate court in New York, the Court of Appeals, didn't come into existence until 1847, the year Kent died.

The five Supreme Court Justices rode circuit all over the state—and of course, in the early 19th century, that meant they rode on horses or in stagecoaches. It was a taxing job, and it has been speculated that Kent was not sorry to leave it at the age of 50 for the Court of Chancery, a one-judge court that sat mainly in Albany, but sometimes in New York City.[5] As "Chancellor Kent," Kent became legendary—so much so that one could think, in reading about him, that "Chancellor" was the name his parents had given him.

Perhaps his greatest contribution as a judge was to invent a major part of what we now think of as a judge's job: he instituted the custom, new in American jurisprudence, of writing and publishing opinions. When he came to the bench in 1798, he wrote years later, "there [were] no reports or State precedents.... We had no law of our own, & nobody knew what it was."[6] Other judges took up the practice of opinion writing, but Kent, in his own (probably correct) estimation, "gradually acquired preponderating influence," and most of the opinions from his years in Supreme Court, including the many signed *per curiam*, are his.[7]

A sampling of Kent's opinions as justice and Chancellor does not convey, to an uninitiated reader of today, a clear sense of what so awed his contempo-

What kind of legal protection would you have if every man could be a lawyer? All things are changing, it is true, but when you find law made easy to the meanest comprehension, look out for countless volunteers in our noble profession, to whom good Latin and correct English are alike inaccessible.



COMMENTARIES

ON

AMERICAN LAW.

BY

JAMES KENT.

IN FOUR VOLUMES.

VOLUME I.

NEW AND THOROUGHLY REVISED EDITION

BY

WILLIAM M. LACY,

PHILADELPHIA:
THE BLACKSTONE PUBLISHING CO.
1889.

[*201] *PART II.

OF THE GOVERNMENT AND CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES.

LECTURE X.

OF THE HISTORY OF THE AMERICAN UNION.

The government of the United States was erected by the free voice and joint will of the people of America, for their common defence and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their stability and protection on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness. The constitution and jurisprudence of the United States deserve the most accurate examination; and an historical view of the rise and progress of the Union, and of the establishment of the present constitution, as the necessary fruit of it, will tend to show the genius and value of the government, and prepare the mind of the student for an investigation of its powers.

The association of the American people into one body politic, took place while they were colonies of the British empire, and owed allegiance to the British crown. That the union of this country was essential to its safety, its prosperity and its greatness, had been generally known, and frequently avowed, long before the late revolution, or the claims of the British parliament which produced it.

Confederacy of the New England Colonies.—The people of the New England colonies were very early in the habit of con-

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Pages from *Commentaries on American Law* by James Kent, 1889.
Courtesy of the Internet ArchiveCourtesy of HathiTrust

raries. The opinions are clear, well-written and persuasive, written in the typical elevated and discursive style of the age. They are a pleasure to read if you like that sort of thing (I do), but the same is true of many other judicial writings from a century or two ago. Reading his opinions alongside those of his colleagues on the Supreme Court, you do not get the sense—as you do when you read, say, Holmes or Cardozo or Learned Hand—that you have encountered a rare master of the craft of judging.

Still, I think I detect in Kent's opinions some things that may be characteristic of their author. It seems that he had one quality I value highly in judges: the ability, or willingness, to put one's personal preferences, and one's vanity, aside. In *Seixas v. Woods*[8]—a case of such enduring fame that I studied it, if my memory does not deceive me, in law school a mere half century ago—Kent upheld the *caveat emptor* principle in a case where goods were not as the seller had represented them to be, but there was no express warranty, and no fraud. Kent found the case "clear... for the defendant" on the basis of "the ancient, and the uniform, language of the *English law*"[9]—though he said that the rule in civil (i.e., Roman) law jurisdictions was otherwise, "and, if the question was *res integra* [an open one] in our law, I confess I should be overcome by the reasoning of the *Civilians*."[10] Years later, Kent as Chancellor decided *Ogden v. Gibbons*,[11] a case that, under the name *Gibbons v. Ogden*,[12] would become one of Chief Justice Marshall's most famous decisions. Of course Kent knew that there was an important constitutional issue in the case; but he resisted any temptation to vent his views about it for posterity, saying only that the right of the New York legislature to pass the legislation at issue (which the United States Supreme Court was to hold invalid under the Commerce Clause) "has been settled (as far as the Courts of this state can settle it)."[13] Kent decided the case on less exciting grounds: the interplay between the state statute and a federal license.

According to the legal historian John Langbein, Kent's place in judicial history owes much to his role in the successful struggle to convert the law into a learned profession. He was an unremitting foe of what Langbein calls "folk law"—the idea, popular in the early days of our republic, that "[o]rdinary people, applying common sense notions of right and wrong, could resolve the disputes of life in localized and informal ways."[14] If there was anything Kent was not, it was a populist. He was quoted as rejecting the idea of translating the "Latin and intricate technical phrases" in his *Commentaries* by saying:

> *What kind of legal protection would you have if every man could be a lawyer? All things are changing, it is true, but when you find law made easy to the meanest comprehension, look out for countless volunteers in our noble profession, to whom good Latin and correct English are alike inaccessible.*[15]

Kent obviously loved Latin. It is no accident that *"caveat emptor"* and *"res integra"* appear in my brief summary of *Seixas*. And in *Ogden*, his Latin became more literary. The case, readers of Chief Justice Marshall's opinion may remember, concerned a monopoly of steamboat traffic granted by the New York legislature. A mere "coasting license" could not, Kent held, overcome the force of the statutory monopoly. Only some federal statute or Supreme Court decision could do that. Or, in other words:

> "We must be satisfied that
> *Neptunus muros, magnoque emota tridenti*
> *Fundamenta quatit."*[16]

That means, I am reliably informed, "Neptune shakes the walls, and the foundations are uprooted by his great trident." It's a vision of the fall of Troy, from the Aeneid.[17] Its connection to the steamboat-monopoly issue may be peripheral. But Kent is entitled to a little fun, and so am I.

As I've said, the modern reader of Kent's opinions doesn't intuitively grasp what made him a great judge. But the *Commentaries* are different—the amazing nature of that achievement leaps out at once. Kent set out to do nothing less than summarize American law—*all* of American law. He wanted to be to the law of his country what Blackstone was to the law of England. By common consent, he succeeded brilliantly. In 67 chapters, he explains international law, constitutional law, personal and real property, and pretty much everything else.[18] No one had ever done that before—and no one ever did it, or ever can do it, again. As the body of knowledge in law, or any other field, becomes more complicated, even the greatest intellect cannot contain it all; today, we admire anyone who even tries to do for any one of those fields what Kent did for all of them. A number of figures in history—Aristotle, Roger Bacon, Da Vinci—have been called "the last person to know everything," but none since around the time of Goethe (1749–1832), roughly Kent's contemporary.[19] Kent can fairly be called the last person to know everything about American law.

The *Commentaries*, as a description of American law, are long out of date, of course. The treatise was "a huge commercial success" in its day, and appeared in many revised editions, but the last was in 1896.[20] No one would read it to find out what the law is now.

But you might read it—not the whole thing, of course, but you might dip into it here and there—just for the joy of experiencing a great work of 19th century legal literature—at least, to repeat a phrase, if you like that sort of thing, and I do. To tempt you, I'll close with a sample picked more or less at random, the beginning of Kent's chapter on "The History of the American Union":

> *The government of the United States was erected by the free voice and joint will of the people of America, for their common defense and general welfare. Its powers apply to those great interests which relate to this country in its national capacity, and which depend for their stability and protection on the consolidation of the Union. It is clothed with the principal attributes of political sovereignty, and it is justly deemed the guardian of our best rights, the source of our highest civil and political duties, and the sure means of national greatness. The constitution and jurisprudence of the United States deserve the most accurate examination; and an historical view of the rise and progress of the Union, and of the establishment of the present constitution, as the necessary fruit of it, will tend to show the genius and value of the government, and prepare the mind of the student for an investigation of its powers.*[21]

They don't make 'em like that anymore.

EDITOR'S NOTE

At the end of this issue, we include excerpts of a letter James Kent wrote to Thomas Washington in 1828, which provides a unique view the Chancellor's life and career.

ENDNOTES

1. James Kent, *Memoranda of My Life* (unpublished manuscript, on file in James Kent Papers, National Archives, microfilm on file at NYU School of Law), quoted in Daniel J. Hulseboch, "An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic," 60 Ala. L. Rev. 377, 389 n.41 (2009).
2. John H. Langbein, "Chancellor Kent and the History of Legal Literature," 93 Colum. L. Rev. 547, 558–59 (1993).
3. William Kent, *Memoirs and Letters of James Kent., LL.D.* 19 (1898), *available online at* https://archive.org/details/memoirsandlette00kentgoog.
4. *Id.*
5. Langbein, *supra* note 2, at 564.
6. Letter from James Kent to Thomas Washington, New York City (Oct. 6, 1828) *reprinted in* "An American Law Student of a Hundred Years Ago," 2 Am. L. Sch. Rev. 547, 551 (1911), *available online at* https://books.google.com/books?id=7xZCAQAAMAAJ.
7. *Id.*
8. 2 Cai. 48 (N.Y. Sup. Ct. 1804)
9. *Id.* at 54.
10. *Id.* at 55.
11. 4 Johns. Ch. 150 (N.Y. Ch. 1819).
12. 22 U.S. (9 Wheat.) 1 (1824).
13. *Ogden*, 4 Johns. Ch. at 156 (citing *Livingston v. Van Ingen*, 9 Johns. 507 (N.Y. 1812)).
14. Langbein, *supra* note 2, at 566.
15. William Kent, *supra* note 3, at 200.
16. *Ogden*, 4 Johns. Ch. at 159.
17. Emails from Emlen Smith to the author (Nov. 11–12, 2017).
18. See, for instance, 1 James Kent, *Commentaries on American Law* 200–19 (6th ed. 1848), *available online at* https://archive.org/details/commentariesonam01kent.
19. *See* "So You Think You're Smart: The Last Person to Know Everything," Climateer Investing (July 25, 2015, 9:46 AM), http://climateerinvest.blogspot.com/2015/07/so-you-think-youre-smart-last-person-to.html.
20. Langbein, *supra* note 2, at 565.
21. 1 James Kent, *supra* note 20, at 201.