

XVII

Chancellor Kent’s Interpretation of Federal and New York State Laws Regarding Tribes

James Kent, the “American Blackstone.”

Although many leaders of the early republic noted anomalies in the legal status of tribes resident within the bounds of New York State, undoubtedly the most sustained and comprehensive analysis of these anomalies and their implications for U.S. federalism was that made by Chancellor James Kent, often termed the “American Blackstone.”

When John Jay resigned as the first U.S. Supreme Court Chief Justice in order to become Governor of New York in 1795, he had among his top priorities upgrading the State’s judicial system. Jay had been a principal author of the 1777 New York State Constitution, and was not happy with the unprofessional way it was being interpreted. Jay also knew how to mold a judiciary, having himself inaugurated the federal judicial system. The impressive result, the foundation for which was laid during his six years as Governor from 1795 to 1801, must be counted among Jay’s finest career accomplishments.

The person who built most notably on this foundation was James Kent. In 1798, Jay asked Kent, then a thirty-five-year-old Columbia law professor, to accept appointment to New York’s Supreme Court. By the time Kent retired twenty-five years later at the mandatory retirement age of sixty, court procedures had been completely recast. As a Judge on the State Supreme Court from 1798 to 1804, and then Chief Judge from 1804 to 1814, and as Chancellor of the Court for the Correction of Errors from 1814 to 1823, Kent had a lasting impact on the

New York judiciary. A year after Kent's death in 1847, Judge John Duer recalled that when Kent came to the State Supreme Court in 1798,

It was seldom that the opinions of the judges, even in the most important cases, were reduced to writing, and as no reports were then published, and no records preserved of the grounds on which their decisions were placed, the cases were numerous in which they had no rules to direct, no precedents to govern them....[A] great revolution was necessary to be effected; and it was effected, mainly by the efforts and by the example of the man who, at the early age of thirty-five, was now raised to the Bench....[A]t the second term that followed his appointment, in his first meeting for consultation with his brethren, and to their great astonishment, he produced a written opinion in every case that had been reserved for decision....[H]is brethren... at once understood and felt that their own position was materially changed....From that time there was a constant and most honorable emulation in the discharge of their weighty duties.¹

In line with Jay's hopes, Kent's years on the bench were motivated by a strong desire to promote complementarity between State and federal law. Kent believed each had a proper sphere, and that with sufficient effort State and federal laws could be meshed to achieve governmental goals more completely than either could on its own. In tribal regulation, Kent's starting point was a belief that only when both federal and State governments worked together could all kinds of tribes receive suitable regulation.

Goodell v. Jackson: Kent's Response to Johnson v. McIntosh.

Kent's efforts to coordinate federal and State tribal regulation received their fullest expression in his April 1, 1823 Opinion in *Goodell v. Jackson*, written immediately after issuance of U.S. Supreme Court Chief Justice John Marshall's Opinion in *Johnson v. McIntosh*. The New York case that enabled Kent to apply Marshall's landmark federal Opinion concerned whether a member of the Oneida tribe could sell an individually held tract of land without the Legislature's consent. The tract in question had been patented by the State to an Oneida

¹ William Kent, *Memoirs and Letters of James Kent*, Boston: Little, Brown, 1898, 113-14.

individual in return for his service as a member of the U.S. Army in the Revolutionary War. In 1797, this tract was sold by his Oneida son and heir. Unregulated individual land sales by members of tribes were prohibited in 1813, but Chief Judge Ambrose Spencer in his 1822 Opinion for the New York Supreme Court argued that an individual land sale by a member of a tribe made prior to the imposition of restrictions in 1813 would have been legal. “These Indians,” contended Spencer,

are born in allegiance to the government of this state, for our jurisdiction extends to every part of the state; they receive protection from us, and are subject to our laws. Indeed, our legislature regulate, by law, their internal concerns, and exercise entire and perfect control over them...If, then, our jurisdiction exclusively reaches them, if they have no right to punish offenses, if they receive protection from our government, are subject to our legislation, being born within the state, they must owe to this government a permanent allegiance, and they cannot be aliens. It does not affect the question, or make them less citizens, that we do not tax them, or require military or other services from them. This is a mere indulgence arising from their peculiar situation...We do not mean to say, that the condition of the Indian tribes, at former and remote periods, has been that of subjects or citizens of the state. Their condition has been gradually changing, until they have lost every attribute of sovereignty, and become entirely dependent upon, and subject to our government. I know of no half-way doctrine on this subject. We either have an exclusive jurisdiction, pervading every part of the state, including the territory held by the Indians, or we have no jurisdiction over their lands, or over them, whilst acting within their reservations. It cannot be a divided empire; it must be exclusive, as regards them or us...consequently, upon the principles of the common law, they must be citizens.²

Chief Judge Spencer pronounced New York tribal members citizens by birth and natural right, but citizens from whom the State could if it wished withhold some of the usual rights of citizens. Furthermore, argued Spencer, State regulation of collectively owned tribal land could not affect individual members of a tribe in their exercise of private property rights in land. Disregarding all federal laws and court decisions, Spencer made no reference whatsoever to federal policy or to tribes in any other state, and treated the case at hand as exclusively a New York matter.

² *Jackson v. Goodell*, Johnson Reports 20:192-94.

Kent's principal rival in the State judicial system, Chief Judge Spencer was a Jeffersonian-Clintonian adherent of states' rights; in fact Spencer married first one, then another sister of Governor DeWitt Clinton, the nephew of Governor George Clinton. Although Chancellor Kent and Chief Judge Spencer maintained cordial enough working relations, Kent confidentially described "my brother Spencer" as "democratic, and...of a bold, vigorous dogmatic mind and overbearing manner."³ Thus Kent, who was not temperamentally "democratic," might well have reversed the State Supreme Court's decision even if Marshall's federal Opinion, issued at just this time, had not provided Kent with new resources.

Kent was convinced that New York State could not legislate for tribes as if this concerned only the State and tribes within State bounds. In some particulars at least, all U.S. tribes, even those under direct State regulation, were subject to at least indirect federal regulation, so federal policy must be the starting point for any state considering tribal regulation. While Spencer's conclusions regarding the legal status of New York tribes followed logically from consideration of the factors he deemed relevant, Kent introduced as additional considerations the federal Constitution, federal laws---and Marshall's brand-new Opinion in *Johnson v. McIntosh*.

This Opinion with its lengthy discussion of the general nature of aboriginal "Indian Title" undoubtedly stirred Kent to undertake a more comprehensive analysis than he would have otherwise attempted of the land rights of New York tribes, within the authoritative federal setting Marshall had now provided. As Kent himself proudly observed several years later, his State case

was argued and decided in March, 1823, at Albany, and concurrently, in point of time, with that of *Johnson v. McIntosh*, at Washington; and the entire coincidence in the

3 Kent *Memoirs* 118.

doctrine of the two cases, is very apparent, and evidence of the general sense of the nation.⁴

Kent had justification for claiming that Marshall’s Opinion was basically a restatement of principles he (among others) had previously affirmed. Kent nonetheless acknowledged that Marshall had given “the general sense of the nation” enhanced authority. Gratified and stimulated by Marshall’s Opinion, Kent could not resist seizing this opportunity to make an extended statement of his own gradually evolved views, from the perspective of New York State.⁵

Marshall’s Opinion in *Johnson v. McIntosh* focused on the way in which, long before the American Revolution, European power over tribes had been first established. The issues before Kent, as he sought to apply Marshall’s principles to the Oneida case before him, related to a much more recent period. In 1822-23, the Oneidas were not the political power they had been two centuries earlier. And the land at issue was not claimed by aboriginal “Indian Title” but rather was held by an individual by State grant. Kent nonetheless discerned a vital parallel between the issue Marshall had confronted and the one he now faced.

In *Johnson v. McIntosh*, the key contention addressed by Marshall was that the default status of a tribe was that of a sovereign, fee-holding polity. Hadn’t tribes once been wholly free and self-governing nations? Didn’t it make sense that they would have then also owned the fee of their land? No, answered Marshall, the issue was more complicated than that. Although tribes

4 Kent, *Commentaries on American Law* (1st ed.), New York: O. Halsted, 1828, 3:311n.

5 In addition to more general incentives, Kent may have been motivated to speak out by the fact that one of his own Opinions had been cited in arguments presented in *Johnson v. McIntosh*---by the losing side. Lawyers for Plaintiffs cited Kent’s 1810 Opinion in *Jackson v. Wood* (Johnson Reports 7:296). For an early expression of Kent’s understanding of “Indian Title” as a mere right of occupancy, see his 1808 Opinion as Chief Judge of the New York Supreme Court in *Jackson v. Hudson* (Johnson Reports 3:375).

had functioned as free and self-governing polities before the arrival of Europeans, the fact that tribes had never been treated as complete equals by European powers had inescapable legal consequences. In Marshall's words, tribes had been "necessarily considered, in some respects, as a dependent, and in some respects as a distinct people." Because tribes had not been treated as legal equals even when free, a tribe's status was "peculiar." Beginning in the sixteenth and seventeenth centuries, "European policy, numbers, and skill, prevailed." In consequence, European land ownership theories were arbitrarily imposed on tribes, which were designated tenants with an inheritable right of occupancy and therefore "incapable of transferring the absolute title to others." This "pompous" act of political and cultural arrogation implicitly obligated European powers to use their self-asserted authority to protect "Indian inhabitants...while in peace, in the possession of their lands."

In key respects, Chief Judge Spencer's contention that the default condition of an individual member of a New York tribe was that of a citizen of New York State paralleled the contention refuted by Marshall, that the default condition of tribes was that of holders of fee title. In both the federal case and the State case, a simple-sounding argument in favor of equality had the effect of denying governmental protection to tribes. As both Marshall and Kent understood, the argument that tribes and members of tribes should have "equal rights" could be taken advantage of to cheat persons incapable of managing their assets within the context of an alien, imposed legal framework.

In order to assure protection for vulnerable members of tribes, Kent like Marshall found himself obliged to make fine distinctions. Chief Judge Spencer had sweepingly argued that members of tribes must logically be either citizens or aliens, and since they were no longer aliens they must now be citizens. In reply, Kent recalled that,

The Oneidas, and the other tribes composing the six nations of Indians, were, originally, free and independent nations. It is for the counsel, who contend that they have now ceased to be a distinct people, and become completely incorporated with us, and clothed with all the rights, and bound to all the duties of citizens, to point out the precise time when that event took place. I have not been able to designate the period, or to discover the requisite evidence of such an entire and total revolution.

Throughout this State Opinion, Kent used the words “us”, “our” and “we” to refer to New York State, and not to the United States as a whole. He continued:

Do our laws, even at this day, allow these Indians to participate equally with us in our civil and political privileges? Do they vote at our elections or are they represented in our legislature, or have they any concern, as jurors or magistrates, in the administration of justice? Are they, on the other hand, charged with the duties and burthens of citizens? Do they pay taxes, or serve in the militia, or are they required to take a share in any of the details of our local institutions? Do we interfere with the disposition, or descent, or tenure of their property, as between themselves? Do we prove their wills, or grant letters of administration upon their intestate’s estates? Do our Sunday laws, our school laws, our poor laws, our laws concerning infants and apprentices, or concerning idiots, lunatics, or habitual drunkards, apply to them? Are they subject to our laws, or the laws of the United States, against high treason; and do we treat and punish them as traitors, instead of public enemies, when they make war upon us? Are they subject to our laws of marriage and divorce, and would we sustain a criminal prosecution for bigamy, if they should change their wives or husbands, at their own pleasure, and according to their own customs, and contract new matrimonial alliances? I apprehend, that every one of these questions must be answered in the negative, and that, on all these points, they are regarded as dependent allies and alien communities. It was, therefore, with some degree of surprise, that I observed the Supreme Court laying down the doctrine in this case, that these Indians of the six nations were “as completely the subjects of our laws as any of our own citizens.” In my view of the subject, they have never been regarded as citizens or members of our body politic, within the contemplation of the [State] constitution. They have always been, and are still considered by our laws as dependent tribes, governed by their own usages and chiefs but placed under our protection, and subject to our coercion, so far as the public safety required it, and no further.

The five nations once formed the fiercest and most formidable confederacy of Indian republics ever known in North America; and, by their prowess and enterprise, they held distant tribes of Indians under dominion and tribute. But after the settlement of the colony, and their communication with the whites, they began to degenerate, and to descend by gradual but perceptible degrees, from their original elevation. Ever since the war of 1756, their fall has been more precipitate, and with a more sensible diminution of their population, power and territory, as

well as of their pride and glory. The whites have been pressing upon them as they kept receding from the approaches of civilization. We have, at length, intruded our influence into their domestic concerns. We have purchased the greater part of their lands, destroyed their hunting grounds, subdued the wilderness around them, overwhelmed them with our population, and gradually abridged their native independence. Still, however, they are permitted to exist as distinct nations, and we continue to treat with their sachems in a national capacity, and as being the lawful representatives of their tribes.

Using language closely paralleling Marshall's in *Johnson v. McIntosh*, Kent further emphasized that

No argument can be drawn against the sovereignty of these Indian nations, from the fact of their having put themselves and their lands under British protection....One community may be bound to another by a very unequal alliance, and still be a sovereign state. Though a weak state, in order to provide for its safety, should place itself under the protection of a more powerful one, yet...if it reserves to itself the right of governing its own body, it ought to be considered as an independent state....The submission may leave the inferior nation a part of the sovereignty, restraining it only in certain respects, or it may totally abolish it, or the lesser may be incorporated with the greater power, so as to form one single state, in which all the citizens will have equal privileges. Now, it is very apparent, from our whole history, that the submission of the six nations has been of the former kind, and that, as an inferior nation, they were only restrained of their sovereignty in certain respects. Though born within our territorial limits, the Indians are considered as born under the dominion of their tribes.⁶

Building on and extending Marshall's argument that ever since European contact the default condition of tribes was one in which they were deemed in need of governmental protection, Kent believed he could discern a similarly fundamental trusteeship agenda pertaining to individual members of tribes. Indeed, noted Kent, "Frauds are much more likely to happen in contracting with a single, half naked, unsheltered and unprotected Indian, than with an assembly of grave chiefs, distinguished not only for valor in war, but for wisdom in council."⁷ This norm

⁶ *Goodell v. Jackson*, Johnson Reports 20:710-12.

⁷ *Goodell v. Jackson*, Johnson Reports 20:726.

of protection for tribes, and even more for individual members of tribes, extended to their rights as persons and to all their assets, but especially their land rights.

Kent contended that from the outset of the Revolution forward there had been a general State as well as national U.S. norm that all “*Indian property in land*” was to be protected, whatever the mode of tenure by which it was held, and whether held by a tribe collectively or individually by a single member of a tribe:

The government of the United States had, in the earliest and purest days of the republic, watched with great anxiety over the property of the Indians intrusted to their care. It must have been immaterial from what source the property proceeded, and whether it was owned by tribes, or families, or individuals. *If it was Indian property in land*, it had a right to protection from us as against our own people.⁸

Kent pointed out that New York had been sharing responsibility for tribal regulation with central U.S. authorities ever since adoption of the 1777 State Constitution, and presumed that this sharing had not been terminated following adoption of the federal Constitution. Indeed, in Kent’s view, on-going State regulation of tribes was not optional, not something that the Legislature might choose to exercise at its discretion but rather a solemn duty grounded in New York’s 1777 Constitution, which Kent believed had implicitly proclaimed that all members of tribes were legally incompetent to manage their assets. In Kent’s words,

The 37th article of the constitution of 1777 declared it to be “of great importance to the safety of this state, that peace and amity with the Indians within the same, be at all times supported and maintained; and that the frauds too often practiced towards the Indians, in contracts made for their lands, had, in divers instances, been productive of dangerous discontents and animosities.” It, therefore, ordained, “that no purchases or contracts for the sale of lands, made with, or of the said Indians, shall be binding on them, or deemed valid, unless made under the authority, and with the consent of the legislature.”

Noting that the Constitution said nothing about the possibility of “fraud or imposition committed by them upon the whites”, Kent concluded that Article 37 meant that “the Indians, in their

⁸ *Goodell v. Jackson*, Johnson Reports 20:724. Emphasis in original.

commercial dealings with the whites, were, comparatively, a feeble and a degraded race, who stood in need of the arm of government constantly thrown around them.”⁹

In 1787, ten years after adoption of the New York Constitution, the Continental Congress had passed the Northwest Ordinance, extending somewhat comparable protections to tribes in the federal Northwest Territory. These protections implied, Kent argued, “a state of dependence and imbecility on the part of the Indians, and...[a] correspondent claim upon us for protection arising out of the superiority of our condition.”¹⁰ Kent found these Continental Congress norms, applying to members of tribes in directly governed federal territory, paralleled in numerous acts of the New York Legislature. As Kent had noted in his 1810 Opinion in *Jackson v. Wood*,

The various regulations in the act of 1801, all show the sense of the legislature, that an Indian, in his individual capacity, is, in a great degree, *inops consilii*, and unfit to make contracts, unless with the consent and under the protection of a civil magistrate.¹¹

Default State citizenship therefore did not make sense to Kent. Whether or not the Legislature had addressed the specifics of a particular case, under no circumstances could an individual living as a member of the Oneida tribe be considered a citizen of New York State. If for no other reason, this was ruled out simply by the fact that a tribal member deemed a State citizen would also be a U.S. citizen, and this did not accord with U.S. policy toward tribes.¹²

In his 1823 Opinion, Kent theorized that Article 37 of the 1777 State Constitution had mandated that the protective arm of State government was to be immediately extended over all “Indian” land within the claimed bounds of New York State, whether held individually or collectively, by State patent or aboriginal claim:

9 *Goodell v. Jackson*, Johnson Reports 20:721-23.

10 *Goodell v. Jackson*, Johnson Reports 20:715.

11 *Jackson v. Wood*, Johnson Reports 7:290.

12 For this argument, see *Goodell v. Jackson*, Johnson Reports 20:714.

It is probable, the convention, when they passed the [37th] article of the [1777 State] constitution...may not have anticipated the conveyance of lands from the whites to the Indians, as a probable event. But their provision did not, and ought not, to have rested upon the inquiry, from what source the Indian title was acquired. It was immaterial whether the Indians held their lands by immemorial possession, or by gift or grant from the whites, provided they had an acknowledged title. In either case, the lands were of equal value to them, and required the same protection, and exposed them to the like frauds. As early as the year 1788, individual Indians had acquired titles from the whites, and in September, 1788, we have the remarkable fact of the Oneidas ceding the whole of their vast territory to the people of this state, and accepting a retrocession of a part, upon restricted terms, and with permission only to lease certain parts for a term not exceeding twenty-one years. No one will pretend that these Oneida lands were not, after the cession, and retrocession, as well as before, within the protection of the constitution, and of the act of March, 1788.¹³

Kent here distinguished two basic types of “Indian” land tenure, one involving “immemorial possession” and the other involving “gift or grant from the whites.” Kent speculated that these two types had not been explicitly spelled out in the 1777 Constitution because the second type had not been anticipated in 1777. But while State land grants to Iroquois nations, both as tribes and as individuals, had been innovations, they could not be considered exempt from the general principles articulated in the 1777 Constitution.

The September 22, 1788, State-Oneida Treaty had for example extinguished all Oneida land rights held by “immemorial possession” and replaced them with a State grant of land held by “retrocession...upon restricted terms.” But even after extinguishing the Oneidas’ aboriginal “Indian Title” and creating a reservation for them, New York had appropriately continued to regulate these State-granted lands. As Kent recounted,

The act of the 11th of March, 1793, appointed agents on the part of this state, to make further purchases of lands of the Oneida, and other Indian tribes, and to propose to them that certain officers of government, and their successors, should be vested, as trustees for the Indians, with the property which they might choose to retain, in order to prevent any encroachments thereon, and to bring actions of trespass for the benefit of the Indians. By the act of the 27th of March, 1794, six persons, by name, were appointed trustees for the

13 *Goodell v. Jackson*, Johnson Reports 20:729.

Indians residing within this state, and for each tribe, with power to make such agreements with the Oneida, Onondaga and Cayuga Indians respecting their lands, as should produce to them an annual income; and every grant and conveyance to be obtained from any of the said Indians, or nations, or tribes, was to be to the use of the people of this state. By the act of the 9th of April, 1795, commissioners were again appointed to make arrangements with those Indians, relative to their lands, parts of which they had, sometimes collectively, and sometimes individually, leased to the whites, under a prior authority, for terms not exceeding twenty-one years....These commissioners were directed to agree with the Indians, to set apart lands for them, collectively, by tribes, or individually, by families, and such lands were to remain to them and their posterity unalienable and without power to lease. The improvidence with which the Indians had used the power to lease, was, probably, the reason why it was so soon withdrawn from them; and by the subsequent act of the 1st of April, 1796, certain lands were to be quit claimed to the Oneidas, under a stipulation that they were not to be sold or leased, without the express consent of the legislature.¹⁴

Kent described this series of actions taken by the Legislature between 1793 and 1796 as responses in evolving circumstances to the Oneidas' on-going need for State supervision of their State-granted land assets.

In Kent's view, both New York State and the national U.S. government from the Revolution's outset in 1775-77 shared the same basic objective of extending trusteeship protection to all members of all tribes. In 1789, following adoption of the federal Constitution, the way the State and national governments divided this responsibility had been modified but not radically transformed. In the new, post-1789 division of responsibility, Kent argued, tribes that were still independent polities were to be dealt with directly by federal authority, whereas tribes that had either voluntarily submitted themselves to State regulation, as the Oneidas did on September 22, 1788, or for whatever other reason ceased functioning as independent polities, were to be directly regulated by the State. But State authority over these no longer independent tribes had to be exercised in strict subordination to all federal guidelines.

¹⁴ *Goodell v. Jackson*, Johnson Reports 20:731.

Underlying both federal and State tribal policy was a presumption of steady evolution in the condition of members of tribes. The State was for example currently regulating the affairs of the Oneidas and a number of other New York tribes as “distinct” communities of resident aliens considered incapable of managing their affairs. At some future point, members of these once-independent tribes would presumably be designated citizens of New York State and therefore of the United States. In that event, Kent emphasized,

when the time shall arrive for us [i.e., New York State] to break down the partition wall between us and them, and to annihilate the political existence of the Indians as nations and tribes, I trust we shall act fairly and explicitly, and endeavor to affect it with the full knowledge and assent of the Indians themselves, and with the most scrupulous regard to their weaknesses and prejudices, and with the entire approbation of the government of the United States.¹⁵

Kent’s dedication to affirming State trusteeship of tribes, and his also strong Federalist determination to subordinate State protection of tribes to national policy guidelines, did not go unnoticed at the federal level. Just as Kent’s State Opinion in *Goodell v. Jackson* had been influenced by Chief Justice Marshall’s federal Opinion in *Johnson v. McIntosh*, so Kent’s ambitious 1823 State Opinion in *Goodell v. Jackson* became an influence on subsequent federal decisions.

Kent’s *Commentaries on American Law*.

Kent retired as Chancellor later the same year, and returned to teaching law at Columbia. Between 1826 and 1830, he published volume-by-volume the first edition of his monumental *Commentaries on American Law*, which surveyed both federal and state laws and established his

¹⁵ *Goodell v. Jackson*, Johnson Reports 20:717.

reputation as the “American Blackstone.” Writing his *Commentaries* enabled Kent to articulate his mature understanding of fundamental features of the American legal and political system.

Kent’s discussion of federal and state regulation of tribes appeared in the third volume of his *Commentaries*. From a twenty-first century perspective, perhaps the most striking aspect of this 1828 discussion is what it omitted. Kent made no specific reference to either the 1789 federal Constitution or the Indian Trade and Intercourse Act, first passed in 1790 and currently in force in its 1802 version. Kent emphasized that the basic rules governing all U.S. tribal regulation had been set in the very first days of the American Revolution, and apparently considered that these rules had been merely summarized and clarified in 1789 and 1790. Kent in other words read the 1789 federal Constitution and the 1790 federal Indian Trade and Intercourse Act as preserving rather than changing the pattern of shared responsibility for tribal regulation established in 1775-77. Even after 1789, Kent presumed that states were expected to continue regulating directly those tribes that had already accepted, or would in the future accept, ordinary state jurisdiction. The federal Constitution made clear that such regulation was subject to appeal, and Kent believed this was certainly an improvement. But the division of day-to-day tribal regulation between states and the central U.S. government had not been altered.

As for the 1790 Indian Trade and Intercourse Act, Kent evidently viewed this as referring---like the Northwest Ordinance---only to geographic regions of direct federal responsibility, and also as far less satisfactory than the Northwest Ordinance as an affirmation of U.S. intent to safeguard tribal interests. Federal responsibility under the land sale section of the Indian Trade and Intercourse Act was limited to extinguishment, whereas the Northwest Ordinance spoke positively of “justice” for tribes, and protection of tribal “property, rights, and liberty.” Downplaying the Indian Trade and Intercourse Acts, Kent saw in federal treaties far

clearer evidence of a positive federal willingness to benefit tribes. Though limited to particular tribes, such treaties bespoke a federal disposition to become active guardians of tribal welfare, whereas the Indian Trade and Intercourse Acts merely outlined a minimal, generic standard of fair treatment for all tribes, good or bad, with whom the federal government dealt directly.

While numerous controversies regarding jurisdiction over tribes had arisen in the first decade after Independence, Kent evidently assumed these had been resolved through the cessions of western land claims made by various states, cessions that established a clear territorial boundary between areas of direct federal and areas of direct state regulation of tribes. One reason for the minimal impact on tribal regulation of the 1789 federal Constitution and the 1790 federal Indian Trade and Intercourse Act was the fact that the process of cession had not been completed. Not until the 1802 Georgia Compact was there a fully agreed line between areas of direct state and areas of direct federal authority over tribes. Limited to the region of undisputed direct federal authority, the tribal provisions of the 1787 Northwest Ordinance had been far more precise than those in the 1789 Constitution or the 1790 Indian Trade and Intercourse Act, obliged as were these latter documents to comprehend the entire, evolving United States.

Kent deemed the 1787 Northwest Ordinance the foundation of federal authority to regulate tribes in federal territory, and state constitutions as the foundations of state authority over tribes within state boundaries. Protection of tribal land rights by both states and the central U.S. government, Kent contended,

has been the invariable American policy down to this day; and the prohibition of individual purchases of Indian lands without the consent of the government, has been made even a constitutional provision in some of the states; as, for instance, in New York, Virginia, and North Carolina.¹⁶

¹⁶ Kent, *Commentaries* (1st ed.) 3:315n.

Kent emphasized that central U.S. governments had been no less conscientious:

The government of the United States, since the period of our independence, has also pursued a steady system of pacific, just, and paternal policy towards the Indians, within their wide spread territories. The United States have never insisted upon any other claim to the Indian lands, than the right of pre-emption, upon fair terms; and the plan of permanent annuities, which the United States, and which the state of New York, among others, have adopted, as one main ingredient in the consideration of purchases, has been attended with beneficial effects.¹⁷

In his most comprehensive 1828 statement of the respective spheres of federal and state authority to regulate tribal lands, Kent argued that

It was shown, in *Goodell v. Jackson*, that the government of New York had always claimed the exclusive right to extinguish Indian titles to lands within their jurisdiction, and had held all individual purchases from the Indians, whether made from them individually, or collectively as tribes, if made without the previous authority of the government, to be null and void. The legislature of Virginia, in 1779, asserted the same exclusive right of pre-emption, and the colonial and state authorities throughout the Union, always negotiated with the Indians within their respective territories as dependent tribes, governed, nevertheless, by their own chiefs and usages, and competent to act in a national character, but placed under the protection of the whites, and owing a qualified subjection, so far as was requisite for the public safety. The Indian tribes within the territorial jurisdiction of the government of the United States, are treated in the same manner, and the numerous treaties, ordinances, and acts of Congress, from the era of our independence down to the present time, establish the fact. But while the ultimate right of our American governments to all the lands within their jurisdictional limits, and the exclusive right of extinguishing the Indian title by possession, is not to be shaken, it is equally true, that the Indian possession is not to be taken from them, or disturbed, without their free consent, by fair purchase, except it be by force of arms in the event of a just and necessary war.¹⁸

Kent's Cherokee Brief.

Kent's optimistic 1828 theory that there was a workable territorial division of responsibility for regulation of tribes between states and the federal government appeared just as this theory was about to undergo its greatest test. Georgia's decision to extend its state

17 Kent, *Commentaries* (1st ed.) 3:317.

18 Kent, *Commentaries* (1st ed.) 3:311-12.

jurisdiction over the directly federally regulated Cherokees, in complete disregard of promises made by Georgia by terms of the 1802 Georgia Compact, precipitated a crisis that would convulse the nation for a decade. As a nationally respected authority on Constitutional law as well as an authority on state and federal regulation of tribes, Kent could scarcely have avoided becoming involved in this crisis. In connection with the Cherokees' effort to persuade the Supreme Court to issue an injunction on their behalf restraining Georgia, Kent prepared a comprehensive Brief, dated October 23, 1830, that was submitted to the Court by counsel for the Cherokees.

On the merits of the Cherokee complaint, Kent's Brief was unequivocal. Kent contended that the Cherokees had definitely been wronged by Georgia, and that President Jackson had misinterpreted his Constitutional duty to enforce U.S. treaty commitments to the Cherokees, and that the Supreme Court could properly tell him so. Kent condemned the Act passed by the Georgia Legislature as intended to bring about

the entire destruction of the Cherokees in their national capacity. It annihilates all the rights, privileges, powers and relations, which they had before enjoyed as a distinct and independent community. As a consequence of the annihilation of the Cherokee nation, the act of Georgia, by necessary implication, abrogates all the treaties, laws and ordinances of the United States, applicable to that nation.

Kent therefore considered President Jackson's duty clear:

I would observe, with great respect and submission, that I cannot perceive upon what sound principle the president of the United States has formed the opinion that he was no longer bound to cause to be executed the treaties of the United States with the Cherokees, or the Indian intercourse act of 1802.

Kent considered the Court's authority to intervene equally clear:

The executive power, in the exercise of its functions, may often be obliged to judge in the first instance of the extent of its duty under any given law; but it always judges at its peril, and the law of the land is and must be sovereign over all the officers of the government; and neither the executive nor judicial department possesses any dispensing

power. Neither of them can set aside a treaty, or dispense with its provisions, any more than with a statute law. They are both equally laws of imperative obligation, though the former is the paramount law, and the most sacred in its nature; for it involves in its observance a breach of peace, and the good faith of the nation. The judiciary is the regular organ of the constitution, for construing laws and judging of their extent and force; and the executive capacity, on this point, arises only incidentally in the due course of executive duty. The judicial power is a distinct and independent branch of the government, created and set apart, and clothed with peculiar qualifications for the very purpose of declaring the law in all questionable and controverted cases. Its power and functions cannot be affected or impaired by any interpretation of statutes or treaties, or by any opinion as to their force and application which the executive power may have thought it expedient or necessary to form.

I am therefore of opinion that the president's construction of the treaties with the Cherokees is not conclusive or binding upon the supreme court.¹⁹

As to whether the Court could grant the injunction that the Cherokees were presently seeking, Kent was less emphatic. Hoping for swift action, the Cherokees had taken their case directly to the Supreme Court, claiming standing as a "foreign state" capable of suing a state of the Union, as provided for by Article Three, Section Two of the Constitution. Kent argued that the Cherokees' position was defensible, but only in a qualified sense. The federal government had certainly negotiated treaties with the Cherokees, treaties which had recognized "the competence of the Cherokees to treat and act as a sovereign and independent nation." But these very treaties had simultaneously designated the Cherokees "a nation willingly placed...under our protection, and qualifying their sovereignty in some degree for the sake of friendship and security, according to the usage of nations where the strong and the weak are placed side by side." This demonstrated that "the Cherokee nation of Indians" were in an intermediate status, being "an independent people, placed under the protection of the United States; and entitled to the privilege of self government within their own territory; and to the exclusive use, enjoyment

19 Richard Peters, *The Case of the Cherokee Nation against the State of Georgia...with an Appendix Containing the Opinion of Chancellor Kent on the Case*, Philadelphia: John Grigg, 1831, 227, 244, 245.

and government of their laws.”²⁰ Although Kent concluded that the Cherokees could be considered technically a “foreign state” within the meaning of the Constitution, he also conceded that this interpretation was open to question because the Cherokees were at best a weak, subordinate sovereign. Kent therefore pointed out alternate ways for the Cherokees to bring their case to federal court, for example as individual aliens, if the Supreme Court were to reject their current suit.

The principal issue confronted in Kent’s 1823 Opinion in *Goodell v. Jackson* had been whether the New York tribe of Oneidas were citizens. Presented with this question, Kent had argued strongly that the Oneidas could not be citizens. In 1830, Kent felt even more strongly that the Cherokees also were “certainly not to be considered as *citizens* of the United States.” Moreover, “The statute of Georgia could not make them citizens...for it belongs *exclusively* to the congress of the United States to prescribe the rule of naturalization.”²¹

As a further example of the federal government’s authority over and obligation to protect the Cherokees, Kent’s 1830 Brief cited the 1790 federal Indian Trade and Intercourse Act:

In pursuance of these general powers [contained in the Constitution], congress, as early as July 1790, passed a law *to regulate trade and intercourse with the Indian tribes*; and it prohibited all trade and intercourse with them without a license under the authority of the United States, and declared void all sales of lands by any tribe or nation of Indians within the United States, to any person *or state*, except under the like authority.²²

Later in his 1830 Brief, Kent summarized the 1802 Act then in force, noting, “All conveyances of land from any Indian nation or tribe within the bounds of the United States, are declared to be invalid, unless made by treaty, pursuant to the constitution and under the authority of the United

20 Peters 234, 235.

21 Peters 246-47. Emphasis in original.

22 Peters 233. Emphasis in original.

States.”²³ Kent’s 1830 Brief focused on the Cherokees, and it does not seem to have occurred to Kent that the 1790 Act might be interpreted as mandating federal treaty regulation of the sales of lands held by tribes legitimately under direct state regulation. As Kent pointed out in the 1840 fourth edition of his *Commentaries*, in later versions of the Act a territorial boundary limited the extent of federal jurisdiction over tribal land sales and Kent, who had already in 1828 expressed his belief that there had always been a territorial division of responsibility between states and the federal government for supervising tribal land sales, both before and after 1789, apparently read a territorial limitation as already implicit in the 1790 Act, one that assigned the Cherokees to direct federal jurisdiction and the Oneidas to direct New York State jurisdiction.²⁴

In composing his 1830 Cherokee Brief, Kent had clearly given thought to New York tribal issues and to his own earlier writings about them. On one point, Kent acknowledged that his position had changed from that articulated in his 1823 Opinion in *Goodell v. Jackson*. Kent had then defended the Legislature’s 1822 Act extending State criminal jurisdiction over the Senecas in order to terminate the infliction by the Senecas of punishments for witchcraft and their use of “private and family revenge.” Kent had argued that the Senecas’

foul executions were shocking to humanity, and were not to be tolerated in the neighborhood, and under the eye of a civilized and Christian people. Under the circumstances in which we were placed in relation to those Indians, as their guardians and protectors, we had a right to avail ourselves of the superiority of our character, and put a stop to such irregular and horrible punishments.²⁵

In 1830, Kent acknowledged that his views on this point had changed, and he now believed that, like the Cherokees, the New York Senecas retained their political independence. As result, the New York Legislature had erred in

23 Peters 235-36.

24 See Kent *Commentaries* (4th ed.) 3:400.

25 *Goodell vs Jackson*, Johnson Reports 20:717.

asserting exclusive criminal jurisdiction over the Senecas and other tribes of Indians within the limits of the state, even as to crimes and offences committed by Indians against each other, upon their own territory.... [This] cannot easily be reconciled to sound principles, or to the authority of the act of congress of 1802, or to the treaties made with the Six Nations. It cannot be justified, unless it be upon the ground that the Indians in New York have ceased, by their paucity of numbers and by their insignificance, to exist in a distinct national capacity, regularly exercising self government.

This may, perhaps, be the case with the Mohawks, Tuscaroras, Onondagas, and Cayugas, but I think it could not be so with the Senecas; and the act was carried to an unjustifiable extent upon strict principles of national law. It came incidentally into view in the case of *Goodell v. Jackson* 20 Johns. Rep 716; and it was supposed, in the opinion then delivered in the court of errors, to be warranted upon principles of necessity and humanity, and to prevent gross and barbarous punishments in the presence of our own mild and Christian people. But these principles will not sustain it when tested by the laws and treaties of the United States; and however just and meritorious the intention of the law giver was, in that particular case, I am now satisfied, upon a more thorough consideration of the subject, that the statute alluded to could not endure a judicial scrutiny, if the constitution, laws and treaties of the union were brought to bear against it.²⁶

Kent's 1823 Opinion had principally concerned the Oneidas, and had alluded only in passing to the fact that the Oneidas and Senecas were both members of the historic "Six Nations" Confederacy. Without analyzing the Senecas specifically, Kent in his 1823 Oneida Opinion evidently assumed that a substantial degree of comparability existed between the Senecas and other "Six Nations" tribes in New York with which he was more familiar, such as the Oneidas. Upon closer examination, Kent in 1830 concluded that the Senecas were still politically independent. Under federal law, the Senecas were therefore entitled to continue imposing sentences for witchcraft on their own people within the confines of their reservations.

Kent's 1830 list of New York "Six Nations" tribes that were *not* politically independent omitted the Oneidas. This omission may have been an error. Or Kent may have omitted them on the theory that there was no need to allude to them since they had been the focus of his 1823 Opinion. In any event, Kent subsequently made explicit that he considered the Senecas the *only*

²⁶ Peters 237.

New York tribe that could be considered to have retained political independence. In the 1840 fourth edition of his *Commentaries on American Law*, Kent wrote that

The Six Nations of Indians within the State of New York, by their paucity of numbers and insignificance, (with the exception perhaps of the Senecas,) have at last ceased to exist in a distinct national capacity as tribes, exercising self-government, with a sufficient competency to protect themselves.²⁷

Justice Smith Thompson’s *Cherokee* Dissent.

In the U.S. Supreme Court’s decision in *Cherokee Nation v. Georgia*, announced March 9, 1831, a majority of the Court’s seven Justices rejected the Cherokee claim to be a “foreign state” capable of directly suing a U.S. state in the Supreme Court. But a Dissenting Opinion written by Justice Smith Thompson and joined by Justice Joseph Story endorsed the Cherokees’ “foreign state” hypothesis for reasons in line with those advanced by Chancellor Kent.

Forty years earlier, Justice Smith Thompson had begun his legal career as a legal apprentice in Kent’s law office. Appointed to the New York Supreme Court in 1802, Thompson had served with Kent from 1802 to 1804, then under Kent while Kent was Chief Judge from 1804 to 1814, and succeeded Kent as Chief Judge when Kent became Chancellor. Thompson served as Chief Judge from 1814 to 1818. Then, after a stint as U.S. Secretary of the Navy, Thompson joined the U.S. Supreme Court on December 9, 1823. Without leaving the Court, he ran for Governor of New York in 1828 but after losing to Martin Van Buren, Thompson remained on the Court until his death in 1843.

In his *Cherokee* Dissent, Thompson argued in language evocative of Kent’s 1830 Brief that

27 Kent *Commentaries* (4th ed.) 3:395n.

Every nation that governs itself, under what form soever, without any dependence on a foreign power is a sovereign state... We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance... [A] weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority is left in the administration of the state.

In words that closely paralleled Kent's 1823 Opinion, Thompson asked rhetorically, "if the Cherokees were then a foreign nation, when or how have they lost that character, and ceased to be a distinct people, and become incorporated with any other community?"

Thompson emphasized that not all U.S. tribal groups retained the governmental character of a "weak state." This term could be properly applied

only to such as live together as a distinct community, under their own laws, usages and customs, and not to the mere remnants of tribes which are to be found in many parts of our country, who have become mixed with the general population of the country, their national character extinguished and their usages and customs in a great measure abandoned, self-government surrendered, and who have voluntarily, or by the force of circumstances which surrounded them, gradually become subject to the laws of the States within which they are situated.

Elaborating the distinction between self-governing tribes such as the Cherokees and what he called "remnants," Thompson referred to Article One, Section Three of the Constitution, dealing with "the apportionment of representatives." In Thompson's view, this provision of the Constitution illustrated the fact that U.S. tribal groups were

divided into two distinct classes, one composed of those who are considered members of the State within which they reside and the other not; the former embracing the remnant of the tribes who had lost their distinctive character as a separate community and had become subject to the laws of the States, and the latter such as still retained their original connexion as tribes, and live together under their own laws, usages and customs, and, as such, are treated as a community independent of the State.

Discussing the 1802 Indian Trade and Intercourse Act at a later point in his Dissent, Thompson again referred to

that class of Indians...consisting of the mere remnants of tribes which have become almost extinct and who have, in a great measure, lost their original character and abandoned their usages and customs and become subject to the laws of the State, although in many parts of the country living together, and surrounded by the whites. They cannot be said to have any distinct government of their own, and are within the ordinary jurisdiction and government of the State where they are located.

Thompson called such formerly sovereign tribal groups “remnants.” But since his immediate concern was the Cherokee nation, which was definitely not a “remnant” in any sense, he only alluded in passing to the fact that non-self-governing tribal groups could be found in widely varied conditions and legal situations. New York State was not mentioned, but as a native New Yorker who had served on the New York Supreme Court for sixteen years, Thompson no doubt had New York examples in mind when he spoke of tribal “remnants.”

Although he did not refer directly to Kent’s 1830 Brief submitted in the immediate case, Thompson did quote a lengthy description of the Oneidas from Kent’s 1823 Opinion in *Goodell v. Jackson*, which he praised as a “very elaborate and able opinion.” Thompson then remarked,

If this be a just view of the Oneida Indians, the rules and principles here applied to that Nation may with much greater force be applied to the character, state, and condition of the Cherokee Nation of Indians, and we may safely conclude that they are not citizens, and must, of course, be aliens.

The dissenting position taken by Thompson and Story in *Cherokee Nation v. Georgia*, that the Cherokee nation was a “weak...foreign state” consisting of aliens on U.S. soil and under U.S. protection, was not so far from the position expressed by Chief Justice Marshall in his majority Opinion, that the Cherokees were a “domestic dependent nation.” The distinction was basically of procedural significance only, affecting whether or not the Cherokees could come directly to the Supreme Court. The substantial overlap between the Thompson-Story position and

Marshall's position was made clear a year later in Marshall's 1832 Opinion in *Worcester v. Georgia*. Not only did Thompson and Story endorse this Opinion, but in it Marshall drew on Thompson's 1831 Dissenting Opinion. Since they had already indicated their understanding that the Cherokees were at best only technically foreign, Thompson and Story had no difficulty falling in line with the position defined by Marshall in 1831-32. Kent too considered admirable Marshall's solution to the Cherokee-Georgia dilemma. In their respective *Commentaries*, both Kent and Story subsequently defended Marshall's Cherokee-Georgia position as entirely compatible with the Constitution.

Justice Story and Chancellor Kent.

Kent's *Commentaries on American Law*, published in four editions between 1826 and 1840, and Story's *Commentaries on the Constitution*, first published in 1833, drew heavily on the Opinions penned by Marshall as Chief Justice since 1801. Kent and Story also relied heavily (and happily) on each other. Close personal and professional friends, Chancellor Kent and Justice Story exchanged compliments in private correspondence as well as in published discourses. In his *Commentaries on the Constitution*, Story contended of one point made by Kent that "Mr. Chancellor Kent has, in a few pages of pregnant sense and brevity, condensed a decisive argument." Another issue was described by Story as having been settled by "Mr. Chancellor Kent, with pithy elegance."²⁸ In a personal letter expressing admiration for an address given by Kent, Story remarked, "You throw over everything which you touch a fresh and mellow coloring, which elevates while it warms, and convinces us that the picture is truth and the artist a

28 Joseph Story, *Commentaries on the Constitution of the United States*, Boston: Little, Brown, 1873,1:395, 624. (First published 1833.)

master.”²⁹ For his part, Kent praised Story’s “transcendent genius” and in 1836, a year after Marshall’s death, described Story as “the most accomplished and ardent and enlightened intellect extant.”³⁰

On the Cherokee issue, both Kent and Story cited as authoritative the Cherokee-Georgia Opinions of Marshall, rather than their own slightly different views expressed prior to Marshall’s 1832 *Worcester* Opinion. On related questions having to do with state regulation of tribes, Story cited approvingly Kent’s 1823 Opinion in *Jackson v. Goodell*, as well as Kent’s *Commentaries*.³¹ Moreover, discussing the Constitution’s provisions for apportioning representation, Story endorsed the view expressed by Justice Thompson in the 1831 Cherokee Dissent joined by Story, that the Constitution’s exclusion from representation of “Indians not taxed” reflected the fact that

There were Indians also in several, and probably in most, of the States at that period, who were not treated as citizens, and yet who did not form a part of the independent communities or tribes exercising general sovereignty and powers of government within the boundaries of the States. It was necessary, therefore, to provide for these cases, though they were attended with no practical difficulty. There seems not to have been any objection in including in the ratio of representation persons bound to service for a term of years, and in excluding Indians not taxed.³²

The Constitution itself thus recognized ordinary state jurisdiction over “Indians” who were not self-governing but also not citizens. Whether states could exercise some jurisdiction over some “Indians” was therefore not a question for Story. Only specifics, such as where precisely to draw the line between federal and state spheres, needed to be examined. The best such examinations,

29 Letter dated October 25, 1831, in *Kent Memoirs* 229.

30 *Kent Memoirs* 268, 267.

31 Story *Commentaries* 2:40, citing Kent, *Commentaries*, (1st ed.), Lecture 50, 3:308-318.

32 Story *Commentaries* 1:451.

in Story's estimate, were those made by U.S. Supreme Court Chief Justice Marshall and New York State's Chancellor Kent.

Chief Justice Marshall's role in shaping the early republic is recognized to have been both monumental and unique. Equally well recognized is the fact that Marshall's role in shaping federal tribal policy was an important part of his overall contribution. Harriet Martineau was in the Supreme Court Chamber on June 24, 1832, when the Chief Justice read his *Worcester* Opinion. She described the other six Justices as sitting "on either hand, gazing at him more like learners than associates."³³ Of these six "learners," the one closest to Marshall both personally and ideologically was Justice Story, who joined the Court in 1811, ten years after Marshall. In 1833, when Story published his *Commentaries on the Constitution*, he dedicated them to Marshall as a person whose "friendship...has for so many years been to me a source of inexpressible satisfaction," and one

whose youth was engaged in the arduous enterprises of the Revolution, whose manhood assisted in framing and supporting the national Constitution, and whose maturer years have been devoted to the task of unfolding its powers and illustrating its principles. When, indeed, I look back upon your judicial labors during a period of thirty-two years, it is difficult to suppress astonishment at their extent and variety, and at the exact learning, the profound reasoning, and the solid principles which they everywhere display.³⁴

In addition to seconding Marshall's work on the Court, Justice Story made a perhaps equally important contribution in his various *Commentaries*, especially his *Commentaries on the Constitution*, through which he extended and communicated to a wider public Marshall's legal reasoning, which was largely embodied in Opinions that were not always easy reading.

33 Leonard Baker, *John Marshall*, New York: Macmillan, 1974, 742.

34 Story *Commentaries* 1:iii-iv.

Chancellor James Kent similarly contributed to national understanding of Marshall's work through his *Commentaries on American Law*. In addition, during his years of service in the New York judiciary, Kent had availed himself of numerous opportunities to apply Marshall's interpretations of federal law to State legal issues. Because of the importance within New York State of issues affecting tribal regulation, and because of the unusual complexity of New York's tribal situation, Kent's efforts to bring Marshall's principles to bear on tribal questions within New York State acquired national importance. Kent's service as a New York State Judge (1798-1823) substantially overlapped Marshall's service as U.S. Supreme Court Chief Justice (1801-1835), and Kent eagerly absorbed each new Marshall Opinion as it emerged. In his *Commentaries*, Kent also noted with satisfaction instances in which his own State Opinions had anticipated conclusions reached later by Marshall.³⁵ Looking back in 1840 at Marshall's landmark tribal Opinions of 1810, 1823, 1831 and 1832, Kent saw no reason to modify the basic position he had himself evolved over the years, that regulation of tribes was both a federal and a state responsibility.

In drawing the line between State and federal responsibility for tribal regulation, the most difficult challenges stemmed from the fact that tribes were evolving rapidly. All tribes had once been self-governing, but numerous tribes had already ceased to govern themselves, while remaining unprepared for citizenship. Members of tribes had the ability to learn how to become competent to function within the U.S. legal system, and ultimately attain citizenship, but this would take time.

So long as tribes continued to function as viably self-governing polities, they would remain a direct federal responsibility, whereas state regulation was appropriate for a tribe that

³⁵ See Kent *Commentaries* (4th ed.) 3:378.

was for whatever reason no longer politically self-governing even though still “distinct” and in various respects self-regulating. Terminating a tribe’s right to political self-government could in theory be done consensually, with the full approval of the federal government and the tribe and state concerned. But Kent conceded that states might sometimes be obliged to extend their jurisdiction over tribes that could no longer govern themselves, even if such tribes mistakenly believed themselves still capable of self-government. In such instances, tribes could object, as the Senecas had to the New York Legislature’s unilateral extension of its criminal jurisdiction in 1822, and in any disputed case the federal government would have the last word.

There would always be ambiguous situations, but Kent identified two clear cases. At one pole were the Cherokees, determined to preserve their political independence, and tenaciously opposed to any state regulation. At the other pole were the Oneidas who had placed themselves voluntarily under New York State regulation. Thereafter, though they remained tribal and preserved many customs at variance with ordinary New York State practice, they were subject to State law, which explicitly authorized their retention of distinctive customs and allowed them substantial autonomy within the context of State responsibility. The federal government continued to deal with the Oneidas for such limited purposes as compensating them for Revolutionary War losses, but after 1788 the tribal Oneidas were by their own choice regulated in their persons and property by New York State.

The existence of a federal treaty relationship with a tribe could not in itself determine whether the tribe was politically self-governing. The specific content of each treaty had to be examined. Kent noted for example that the federal government had signed treaties with the Cherokees explicitly “recognizing their national and self-governing authority,” but that such

treaties “did not exist in the case of New York.”³⁶ Treaties with the Cherokees even dealt with such matters as tribal criminal jurisdiction over U.S. citizens within tribal territory, formally acknowledging the existence of an independent Cherokee government and legal system.

In his 1831 *Cherokee* Dissent joined by Justice Story, Justice Thompson had referred to tribes that were no longer self-governing as “remnants.” Instead of Thompson’s term *remnant*, Kent preferred to call them non-self-governing *tribes*. Such tribes were “distinct” groups of resident aliens possessing rights (e.g., of inheritance) and assets (e.g., communally and individually held lands) and could be communities capable of substantial self-regulation. These non-self-governing tribes retained social coherence and were allowed by the State to make collective decisions about community issues, such as whether to sell or divide communally held lands, but were not even “weak” polities.

Toward the end of his career, Kent grew increasingly pessimistic about tribal prospects. Kent’s early New York State Opinions had resounded with awed accounts of the past prowess of the Iroquois Confederacy, whom Kent in 1828 called “intrepid...generous barbarians.”³⁷ Such praise was combined with expressions of concern about the now “degraded” condition of the Iroquois tribes remaining within the State. But Kent also looked forward to a time when these groups, currently protected by the Legislature from abuse by citizens, would themselves become citizens fully capable of protecting their own interests. In later years, as Kent turned his attention to the plight of tribes elsewhere in the nation, Kent’s tone became increasingly alarmed. In 1828,

36 Kent *Commentaries* (4th ed.) 3:383n. In 1830, Congressman John Bell also commented on the fact that “The United States have held frequent treaties” with “the confederacy of Indians, so long known by the name of the Six Nations...yet this circumstance does not seem to have altered the relations between them and the State which they inhabit.” 21st Cong., 1st Sess., House Report 227, 11.

37 Kent *Commentaries* (1st ed.) 3:316.

Kent was still able to maintain that, like New York, “The government of the United States, since the period of our independence, has also pursued a steady system of pacific, just, and paternal policy towards the Indians, within their wide spread territories.”³⁸ But under President Jackson the federal executive failed in its responsibility to many tribes under its direct supervision. In the 1840 fourth edition of his *Commentaries*, Kent retained his praise for the past record of the U.S. government, but could no longer be optimistic about the future. Kent concluded his more than thirty-year-long examination of U.S. tribal prospects by translating the recently published observations of the young French visitor Alexis de Tocqueville, who had called on Kent in New York City in 1831, and to whom Kent had given a copy of the first edition of his *Commentaries*:

“Who can assure the Indians,” says Tocqueville, (*De la Democratie en Amerique*, t. 2 298, 299), “that they will be permitted to repose in peace in their new asylum? The United States engage to protect them, but the territory which they occupied in Georgia was guarantied to them by the most solemn faith. In a few years the same white population which pressed upon them in their ancestral territory, will follow them to the solitudes of Arkansas, and as the limits of the earth will at last fail them, their only relief will be death.”³⁹

38 Kent *Commentaries* (1st ed.) 3:317.

39 Kent *Commentaries* (4th ed.) 3:400.

