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January 2011

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WYOMING LAW REVIEW

VOLUME 11 *2011* NUMBER 2

DISRUPTION AND IMPOSSIBILITY: THE NEW LACHES AND THE UNFORTUNATE RESOLUTION OF THE MODERN IROQUOIS LAND CLAIMS

*Kathryn Fort**

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> It is true that the district court in this case did not make findings that the Oneidas unreasonably delayed the initiation of this action or that the defendants were prejudiced by this delay—both required elements of a traditional laches defense. This omission, however, is not ultimately important, as the equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches . . . .[1]

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[1] Oneida Indian Nation of N.Y. v. Cnty. of Oneida, 617 F.3d 114, 127 (2d Cir. 2010) (citations omitted).

I. INTRODUCTION

That the law changes over time is no secret. That the law changes based on the parties involved is less obvious but is still no secret. In the case of the Haudenosaunee land claims cases, however, the law shifted dramatically and quickly based entirely on the identity of the parties.[2] In less than five years, the federal appellate courts changed the law so drastically to all but end more than thirty years of modern Indian land claims litigation, reversing years of relative fairness at the district court level.[3] These actions required a fundamental shift in the law of equity: the creation of a new equitable defense for governments against Indian land claims. Thus far there does not appear to be a way for Indian tribes to counter the defense, and the latest case to be decided puts an end to the first of the great modern Indian land claims.[4] How the courts accomplished so much in such a short amount of time requires a close reading of the cases and a few logical leaps.

The first part of this article gives a brief history of the New York land claims, focusing on the Oneida Indian Nation and the Cayuga Indian Nation of New York. While the tribes have been fighting the status of this land since the original agreements were signed in the late eighteenth and early nineteenth centuries, this article looks to the modern era of land claims in the federal courts.[5] The second part of this article reviews how a decision in the Oneida claims case directly informed *City of Sherrill v. Oneida Indian Nation*.[6] The third part focuses on the Cayuga Nation line of cases and how *Cayuga Indian Nation of New York v. Pataki* changed the fundamental understanding of the equitable defense of laches into a new defense used to defeat tribal land claims.[7] Finally, the fourth part of this

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[2] *See* Robert Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 806–07, 811–12 (1998). *Haudenosaunee* means People of the Longhouse in the language. *Id.* at 806 n.1. Also referred to as the Iroquois Confederacy, it is made of up the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora Nations. *Id.* at 806–08.

[3] *See Oneida Indian Nation*, 617 F.3d at 140–41 (affirming the district court's dismissal of the tribe's possessory claims, reversing the district court's affirmation of the tribe's nonpossessory claims, and remanding for entry of judgment); Cayuga Indian Nation v. Pataki (*Cayuga XVI*), 413 F.3d 266, 267–68 (2d Cir. 2005) (reversing the district court's award to the Cayuga Nation and entering judgment for the defendants); Onondaga Nation v. New York, No. 5:05-cv-0314, 2010 WL 3806492, at *1 (N.D.N.Y. Sept. 22, 2010) (dismissing the land claim with prejudice).

[4] *See Oneida Indian Nation*, 617 F.3d at 140–41.

[5] *See* Oneida Indian Nation v. Cnty. of Oneida (*Oneida I*), 414 U.S. 661, 663–66 (1974) (holding that there was federal jurisdiction over violations of the Non-Intercourse Act); *infra* Part II.

[6] *See* 544 U.S. 197, 202–03, 221 (2005) (holding that the equitable principles of equity, acquiescence, and impossibility foreclosed the Oneida Indian Nation from exercising tribal jurisdiction over lands held in fee by the tribe); *infra* Part III.

[7] *See infra* Part IV. *See generally* 413 F.3d 266 (2005).

article examines the most recent loss, *Oneida Indian Nation v. County of Oneida*, where the court admitted the creation of a new equitable defense.[8] This defense, identified as "new laches" or "Indian law laches," can prevent a land claim from getting past a summary judgment motion. This defense is no longer traditional laches but rather an equitable defense that follows none of the rules of equity and exists only in federal Indian law.[9]

II. A BRIEF HISTORY

The modern land claims stemming from illegal land transactions between the State of New York and Haudenosaunee tribes have taken more than forty years to make their way through the courts.[10] These claims have generated famous cases about tribes, land, the Constitution, history, and an unpredictable time in the early Republic.[11] While originally limited in scope to the tribes directly affected by the State of New York's violation of the federal Non-Intercourse Act,[12] the cases decided at the Supreme Court level affect all tribes, not just the ones involved.[13]

These land claims cases are approaching an end, given the recent United States Court of Appeals for the Second Circuit decision in the Oneida land claims case.[14] A brief recounting of the legal history of the cases provides a useful reminder of the environment in which the claims were filed and shows what the claims face today. In addition, following the cases through the courts can be complicated

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[8] *See* 617 F.3d at 118; *infra* Part V.

[9] *See infra* Part V.

[10] *See Oneida Indian Nation*, 617 F.3d at 114, 116 (noting the original claim, which was decided in 2010, was filed in 1970); GEORGE C. SHATTUCK, THE ONEIDA LAND CLAIMS: A LEGAL HISTORY 27 (1991) (discussing the history of the beginning of *Oneida Indian Nation* in 1970).

[11] *See generally* Oneida Cnty. v. Oneida Indian Nation (*Oneida II*), 470 U.S. 226 (1985); *Oneida I*, 414 U.S. 661 (1974); Oneida Indian Nation v. Oneida Cnty. (*Port Decision*), 434 F. Supp. 527 (N.D.N.Y. 1977).

[12] Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 177 (2006)). The law originally passed in 1790 was designed to prevent states from negotiating land treaties or agreements with tribes. *Id.* The final version of this Act was passed in 1834. Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 161, § 12, 4 Stat. 729, 730 (codified as amended at 25 U.S.C. § 177).

[13] *See* Kathryn Fort, *The Vanishing Indian Returns* 29 (Mich. State Univ. Coll. of Law, Working Paper No. 9-04, 2011), *available at* http://ssrn.com/abstract=1752430. The result of this can be either good or bad. *Compare Oneida I*, 414 U.S. at 674 (allowing tribes to bring land claims as a federal common law cause of action), *with* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 202–03, 221 (2005) (holding tribes cannot reassume jurisdiction over land they hold in fee).

[14] *See Oneida Indian Nation*, 617 F.3d at 140–41.

for the casual observer. While many of the tribes of the Haudenosaunee brought cases, this history will focus on the Oneida Indian Nation and the Cayuga Indian Tribe because of the finality of the Second Circuit decisions in those claims.[15]

The claims are based on violations of the Non-Intercourse Act, a law originally passed in 1790, preventing states from negotiating land treaties or agreements with tribes.[16] Because of the turmoil and power allocations stemming from the Articles of Confederation, passed in 1781, and then the federal Constitution, ratified by New York in 1788, New York claimed the Non-Intercourse Act did not apply to its actions involving tribes within its borders.[17] New York's Indian policies are detailed elsewhere by historians;[18] needless to say, the State, through its actions and policies, worked to take land from the tribes as quickly and as cheaply as possible, including sending state agents to disrupt federal treaty negotiations with the tribes.[19] Though the United States had promised to protect the land of tribes it considered loyal during the revolution, the federal government took no affirmative actions against the State.[20] Pleading ignorance was difficult, given Congress's New York location at the time.[21]

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[15] *See* Onondaga Nation v. New York, No. 5:05-cv-0314, 2010 WL 3806492, at *1 (N.D.N.Y. Sept. 22, 2010) (dismissing the land claim with prejudice); *see also* Canadian St. Regis Band of Mohawk Indians v. New York, 573 F. Supp. 1530, 1538 (N.D.N.Y. 1983) (dismissing the land claims for want of subject matter jurisdiction).

[16] Ch. 33, § 4, 1 Stat. at 138.

[17] Barbara Graymont, *New York State Indian Policy After the Revolution*, 78 N.Y. HIST. 374, 379 (1997).

[18] *See, e.g.*, Jack Campisi, *From Stanwix to Canandaigua: National Policy, States' Rights and Indian Land*, *in* IROQUOIS LAND CLAIMS 49 (Christopher Vescey & William A. Starna eds., 1988); Graymont, *supra* note 17; Howard A. Vernon, *The Cayuga Claims: A Background Study*, 4 AM. INDIAN CULTURE & RES. J., no. 3, 1980 at 21.

[19] Cayuga Indian Nation v. Pataki (*Cayuga XV*), 165 F. Supp. 2d 266, 311 (N.D.N.Y. 2001).

[20] *See* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 205 (2005).

[21] Graymont, *supra* note 17, at 381. There is an interesting historical note during this time. Edward B. Foley, *The Founders'* Bush v. Gore*: The 1792 Election Dispute and Its Continuing Relevance*, 44 IND. L. REV. 23, 26 (2010). In 1792, just after the passage of the Non-Intercourse Act, there was a contested governor's race in New York. John Jay, who was a Federalist and eventually became the governor of New York in 1795, lost to George Clinton, who claimed state jurisdiction over all Indian tribes and treaty making within the state. *Cayuga XV*, 165 F. Supp. 2d at 309; Foley, *supra*, at 28, 53. While it is unclear whether Jay would have stopped violations of the Non-Intercourse Act in 1792, at least philosophically he was in favor of the Act. *See Cayuga XV*, 165 F. Supp. 2d at 333–34. Disputed ballots from Otsego County, specifically Cooperstown, decided the election. Foley, *supra*, at 28, 47. This area included the land at stake in the claims by the tribes against the State. Treaty of Fort Stanwix of 1784, 7 Stat. 15; Treaty of Fort Harmar of 1789, 7 Stat. 33; Treaty of Canandaigua of 1794, 7 Stat. 44.

III. ONEIDA INDIAN NATION: MODERN LAND CLAIMS CASES

Though the Oneida Nation protested the takings of their land since the final agreement with the State of New York was signed in 1846,[22] the first time the Nation succeeded in the courts was in the modern era.[23] The Oneida Nation was guaranteed its land by the United States in appreciation for the tribe's help in the Revolutionary War, but within sixty years, the land had been lost to New York.[24] In twenty-seven agreements between the Oneidas and the State, only two had the required approval of the federal government.[25]

In 1970, the Oneida Indian Tribe brought a test suit[26] against Madison and Oneida Counties arguing for the right to be heard in court on the land claim.[27] Initially a claim to start negotiations between the State and the Nation, the case became the basis for larger land claims.[28] Since the State generally refused to negotiate with the tribes, the tribes needed leverage to bring the parties to the table. If a tribe has no legal recourse, it has no way of encouraging the State to negotiate on land issues; such legal recourse had been lacking for the past seventy-five years.[29] Originally land claims could not be heard in federal courts due to a United States Court of Appeals for the Second Circuit decision that held the federal court could be called on to interpret the Non-Intercourse Act but not enforce it.[30] In addition, New York continued to block tribal attempts at suit in state court.[31] The object of the Oneida test case was to obtain jurisdiction in federal court and was limited only to rent from the current occupants for lands taken from the tribe in one state treaty.[32] The test case lost at the lower levels and arrived at the United States Supreme Court in 1974, in what became known as

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[22] *Port Decision*, 434 F. Supp. 527, 535–56 (N.D.N.Y. 1977).

[23] *See Oneida I*, 414 U.S. 661, 666, 682 (1974).

[24] Arlinda F. Locklear, *The Oneida Land Claims: A Legal Overview*, *in* IROQUOIS LAND CLAIMS, *supra* note 18, at 146–47.

[25] *Id.* at 147.

[26] *Oneida I*, 441 U.S. at 663–66; *see* Oneida Indian Nation of N.Y. v. Cnty. of Oneida (*McCurn Decision*), 199 F.R.D. 61, 65 (N.D.N.Y. 2000). Originally the case was brought by the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin. Later the Oneida Indian Nation of the Thames was added to the suit. *McCurn Decision*, 199 F.R.D. at 69–70; *Port Decision*, 434 F. Supp. at 532.

[27] *See* SHATTUCK, *supra* note 10, at 20–22.

[28] *Id.* at 65.

[29] *Port Decision*, 434 F. Supp. at 531; SHATTUCK, *supra* note 10, at 13–19.

[30] Deere v. St. Lawrence River Power Co., 32 F.2d 550, 552 (2d Cir. 1929) (holding that a claim for ejectment was not a federal question).

[31] SHATTUCK, *supra* note 10, at 24–26.

[32] *Id.* at 26–27 ("1795 New York-Oneida 'treaty' purchase, which involved about 100,000 acres of land in Madison and Oneida counties.").

Oneida I.[33] At that point, the federal government opposed the Oneida Nation's petition for a writ of certiorari. Regardless, the case was granted certiorari by the Supreme Court.[34] In what was essentially a jurisdiction case, the Nation won at the Supreme Court.[35]

Able to bring the claim in federal court, the Nation went on to prove its case in the federal district court of New York.[36] The trial court bifurcated the case into a decision on the law and a decision for remedies.[37] In the *Port Decision*, the court found for the Nation. The court made clear that it realized the larger import of this test case, specifically that "the problem is [not] limited to this case, this particular land transaction, the Oneida Indian Nation, or even this area."[38] The court also stated it would rather not be deciding this issue, and that it perhaps "could be avoided by seeking solutions through other available vehicles," including either negotiations with the State or congressional action.[39]

Still, the court characterized the claim as "uncomplicated:"[40] the Nation owned land, it was illegal for the State to purchase land from Indian tribes without the consent of the United States, the State did just that, and thus the Nation's title was never terminated.[41] The court found a prima facie case existed both for a violation of the Non-Intercourse Act and that the land was never abandoned.[42]

The lower court also discussed the issue of laches. Laches, truly an ancient defense, is an affirmative equitable defense.[43] A defendant argues the plaintiff

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[33] 414 U.S. 661, 661–66 (1974).

[34] Oneida Indian Nation of N.Y. v. Cnty. of Oneida, 412 U.S. 927 (1973); Memorandum for the United States as Amicus Curiae, *Oneida I*, 414 U.S. 661 (No. 72-851), 1973 WL 173860, at *13. The timing of the Oneida petition was fortuitous, given the Court's later stance on petitions brought by an Indian tribe that are also opposed by the Solicitor General's Office. *See* Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as a Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 940–41 (2009) (analyzing the weight given by the certiorari decision-making process to the opinion of the Solicitor General).

[35] *Oneida I*, 414 U.S. at 675, 682.

[36] *Port Decision*, 434 F. Supp. 527, 548 (N.D.N.Y. 1977).

[37] *Id.* at 532, 548.

[38] *Id.* at 530.

[39] *Id.* at 531.

[40] *Id.* at 537.

[41] *Id.*

[42] *Id.* at 540–41.

[43] Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357, 368 (2009) [hereinafter *The New Laches*] (noting the first use of laches in English courts was in 1311); *cf.* 2 ALFRED JOHN HORWOOD, YEARBOOKS OF THE REIGN OF KING EDWARD THE FIRST 118, 598 (1873) (noting two cases mention laches earlier than 1311: *A. v. B.* (1293) (a writ of cessavit) and *le Franceys v. de Harcla* (1294) (a writ of debt)). Boston University has developed a new searchable database of the *Yearbooks*, available at www.bu.edu/law/seipp/.

delayed too long in bringing the claim and the defendant was harmed by the delay.[44] Laches is essentially a form of prejudicial delay.[45] The counties asserted that the Nation had waited more than 175 years to bring the claim and they were harmed by the delay.[46] As the court held, and has been detailed elsewhere, the Nation had been petitioning in whatever manner available to it for years prior.[47] The court stated, "It is quite clear that state statutes of limitations and state laws of adverse possession and laches would not bar a suit brought by the United States on behalf of an Indian nation."[48] Though this case was not brought by the United States, the court went on to hold that "it would be anomalous to permit the government as trustee for the Indians, to achieve a result more beneficial to the Indians than the Indians could, suing on their own behalf."[49] The counties appealed the decision even though damages had not yet been determined. The Second Circuit upheld the lower court and remanded for further proceedings on damages.[50] The counties appealed the decision of the Second Circuit to the Supreme Court, which granted certiorari and issued *Oneida II*.[51]

In *Oneida II*, the Supreme Court held the Nation could bring suit under federal common law.[52] The Court also held that the counties did not have any defenses of merit, including statute of limitations, abatement, ratification, and nonjusticiability.[53] Unfortunately for the Nation, while the Court offered a spirited argument against laches in a footnote,[54] the Court claimed it did not

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[44] DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 2.4(4) (2d ed. 1993).

[45] Costello v. United States, 365 U.S. 265, 282 (1961).

[46] *Port Decision*, 434 F. Supp. at 541.

[47] *Id.* at 536–37; Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 616–27 (2006).

[48] *Port Decision*, 434 F. Supp. at 542.

[49] *Id.* at 543.

[50] Oneida Indian Nation of N.Y. v. Oneida Cnty., 719 F.2d 525, 544 (2d Cir. 1983).

[51] *Oneida II*, 470 U.S. 226, 254 (1985).

[52] *Id.* at 236 ("Numerous decision of this Court prior to *Oneida I* recognized at least implicitly that Indians have a federal commonlaw right to sue to enforce their aboriginal land rights.").

[53] *Id.* at 240–50.

[54] *Id.* at 244 n.16 ("In these circumstances, it is questionable whether laches properly could be applied."). The Court continued,

> Furthermore, the statutory restraint on alienation of Indian tribal land adopted by the Nonintercourse Act of 1793 is still the law. This fact not only distinguishes the cases relied upon by the dissent, but also suggests that, as with the borrowing of state statutes of limitations, the application of laches would appear to be inconsistent with established federal policy. Although the issue of laches is not before us, we add these observations in response to the dissent.

Id. (citation omitted).

reach the issue in the decision because it was not preserved in the record.[55] This paragraph left the question of laches open, and Justice Stevens's dissent outlined how the State might continue to argue laches in the lower courts.[56]

Justice Stevens pointed out the ease with which laches could be applied and that it would avoid the need for "a historian's inquiry" into "archaic limitation doctrines."[57] In addition, his dissent likely helped convince the tribe that it needed to start arguing why its so-called "delay" was justified, hoping to convince courts on that arm of laches. When the tribes were able to demonstrate their continued attempts to regain the land, the courts shifted what laches meant, moving from delay to disruption.[58] As in other decisions in this line of cases, Justice Stevens's repeated use of the word "ancient" in association with the land claim drove home the assertion that these claims were just too old and ultimately too disruptive to go forward.[59]

A. *Oneida Land Claims After* Oneida II

After *Oneida I*, the Nation proceeded to challenge a larger claim that covered around thirty tribal state agreements that led to the loss of approximately 250,000 acres.[60] That claim, filed in 1974, was stayed by the court from 1978 through 1998 to accommodate sporadic settlement negotiations.[61] By 2000, the Oneida Indian Nation expanded its request for damages, which was originally $10,000 in 1974.[62]

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[55] *Id.* at 244–45.

[56] *Id.* at 261–70 (Stevens, J., dissenting).

[57] *Id.* at 261–62.

[58] *See Cayuga XVI*, 413 F.3d 266, 277 (2d Cir. 2005) ("To summarize: the import of *Sherrill* is that 'disruptive,' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches.").

[59] *Oneida II*, 470 U.S. at 261 (Stevens, J., dissenting) ("this ancient claim at common law"); *id.* at 262 ("governing ancient Indian claims"); *id.* at 270 ("The remedy for the ancient wrong"); *id.* at 272 ("with respect to ancient claims"); *id.* ("the intention of reviving ancient claims"); *id.* at 273 ("common-law wisdom the ancient claims"); *id.* at 272 n.28 ("hospitable treatment that these ancient claims received"). The dissent points out that it is "worthy of emphasis that this claim arose when George Washington was the President of the United States," indicating that events at this time occurred too long ago to be litigated. *Id.* at 256. However, for strict textualists, and certain elements of society today, the days of the Founding are of recent enough vintage to emulate. *Id.* Either the claims and the actions of the government are "ancient" or they are relevant today. *Id.*

[60] *McCurn Decision*, 199 F.R.D. 61, 66 (N.D.N.Y. 2000).

[61] *Id.* at 73.

[62] *Id.* at 67. The court stated,

> On the face of it, the monetary damages which the Oneidas are now seeking are quite broad, especially when considered in light of the potential liability of any single, individual private landowner. More specifically, they are claiming entitlement "to *damages* from *each member* of the Landholder Class . . . , *with interest*, in the amount of (a) the fair market rental value of the relevant portions of the subject lands, as improved, for the period of their occupancy *by that member* of the Landholder

In addition, in a move which ultimately harmed its case, the Nation sought to add individual landowners, including non-state actors, to the case.[63] Presumably, this was in response to the failed negotiations that led to the case being reassigned in 1998 and a decision handed down in 2000. This brinksmanship on the part of the Nation to include individual landowners in the claim after thirty years of claiming the opposite was to force the counties and State back to the negotiating table in good faith, but it infuriated a court already upset at the failure of nearly twenty years of negotiations.[64]

When the Oneida Nation, and the United States as plaintiff-intervenor, decided to include individual landowners in its complaint as part of a bargaining tactic against the State, the court wrote a memorandum expressing its displeasure.[65]

> Class, (b) the amount by which the value of any relevant portion of the subject lands was diminished by any damage, pollution or destruction that occurred during the period of their occupancy *by that member* of the Landholder Class, (c) the value of all minerals and other resources taken from the subject lands *by that member* of the Landholder Class (and those purporting to act with that member's permission) during the period of that member's occupancy of the subject lands, equal to the price of such minerals and other resources in their final marketable state and (d) any diminution in value of the subject lands as a result of any injury to the subject lands arising from the taking of such resources." Considering the extensive nature of these damages which they are claiming, and based upon the court's experience in similar litigation, in all likelihood, any amount which the Oneidas eventually may recover will far exceed the $10,000 specified in their original complaint.

Id. (citation omitted).

[63] *Id.*

[64] Regardless of which party was at fault for the failure of the negotiations, the State benefits from not acting, while the tribe is harmed by lack of action. This has put the tribe in the unenviable position of constantly shifting strategies to force action on the part of the State. *See* SHATTUCK, *supra* note 10, at 19.

[65] *McCurn Decision*, 199 F.R.D. at 70 n.9, 76 n.15. The court stated,

> What is even more bothersome to the court, however, is the fact that both the Tribal plaintiffs' and the U.S.' supporting memoranda were almost completely bereft of any analysis. They contained only an extremely brief recitation of the standards governing motions to amend—standards with which this court is fully familiar. In short, these two memoranda were practically useless and indicative of the cavalier attitude of these parties, and the Nation in particular, which has pervaded this litigation and settlement efforts since reassignment of this case in September 1998.

Id. at 70 n.9. The court further stated,

> Curiously, the U.S. did not bother to address the prejudice issue in its moving papers, except to baldly state that the Counties would not be prejudiced. The U.S. gave no consideration to the potential prejudice to the landowners, especially in terms of the fact that like the Oneidas, for years they too have taken the position that the private landowners would not become political pawns in this litigation. Yet that is precisely what has happened by the filing of these motions.

Id. at 76 n.15.

Strategically, it might have forced the hand of the State, but in court, Judge McCurn was not interested in this type of maneuver. The Nation seemed to lose any sympathy it might have had from the individual landowners. The judge was incensed at the idea and unhappy with both the Nation's and the United States' briefs on the issue.[66]

In a consequence perhaps more difficult to predict, the move on the part of the tribe in adding individual landowners brought in at least one large business, the Oneida Limited Company (Oneida Limited). Known primarily as a producer of flatware, the company moved to intervene as a large landholder and employer in the area but ended up filing an amicus brief.[67] The attorneys from Oneida Limited did not give any quarter to the idea the Nation might add individual landowners to the case.[68] More importantly, though, Judge McCurn relied heavily on the Oneida Limited amicus brief in his opinion and helped open the door to what became the new equitable defense.[69]

The opinion itself is a decision as to whether the tribe could add individual landowners to the land claims. The court weighed the elements under a Federal Rules of Civil Procedure 15(a) analysis, which includes undue delay, undue prejudice, bad faith, and futility.[70] Although the court said the finding involved balancing all the factors involved, the court did not find any "*un*due delay,"[71]

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[66] *Id.* at 70.

[67] *Id.*; *see generally* Memorandum of Law of Proposed Intervenor Oneida Ltd., in Partial Opposition to the Plaintiffs' Motions to Amend Their Complaints, *McCurn Decision*, 199 F.R.D. 61 (No. 74-cv-187) [hereinafter Oneida Ltd. Memorandum].

[68] *McCurn Decision*, 199 F.R.D. at 73–74 ("Unlike the Counties, who all but conceded the timeliness of these motions to amend, *amicus* Oneida Ltd. vigorously presses the undue delay argument.").

[69] *See id.* at 88 n.24. The court stated,

> Cursory treatment . . . is the hallmark of plaintiffs' supporting memoranda. . . . In fact, the *pro forma* nature of plaintiffs' supporting memoranda, in part, motivated the court to grant Oneida Ltd.'s *amicus* status. As the court anticipated, the comprehensive and thoughtful analysis set forth in Oneida Ltd.'s memorandum, had the desired effect of forcing plaintiffs, in response to those arguments, to hone in on the futility issue in their supplemental memoranda (filed after oral argument).

Id.

[70] *Id.* at 70–72. The court stated,

> In a pithy opinion, the Supreme Court in *Foman v. Davis*, identified several factors which have become the benchmark for courts faced with Rule 15(a) motions to amend. In deciding such motions the *Foman* Court instructed district courts to consider the following: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc[.]"

Id. at 70–71 (citation omitted) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)).

[71] *Id.* at 75–76.

nor did it "find that there is undue prejudice."[72] It did, however, find bad faith.[73] From the start of the litigation, the Oneida Nation claim was designed to avoid ejecting private landowners.[74] Though the amended claim did not mention the word ejectment, the court did find that the assertion of possessory claims had the effect of an ejectment action.[75] This led to the court's analysis on the futility argument—the analysis that later informed the *Sherrill* Court's creation of "new laches."

Oneida Limited argued that adding private landowners to the litigation with the possibility of ejectment was a futile proposition, because "'no court in this land has to date ever evicted' the same, where they have been in possession for 'the last 140 to 200 years.'"[76] The court held,

> To the extent that the Oneidas in this particular case eventually may be able to establish that they have possessory rights in the claim area, such rights do not necessarily encompass the concomitant right to obtain relief directly from the current landowners. Similarly, the fact that the Oneidas' proposed claims against the private landowners may well be justiciable does not necessarily mean, *a fortiori*, that they are entitled to seek monetary damages from or to evict current landowners.[77]

To arrive at this holding, the court relied on Oneida Limited's *Yankton Sioux* "impossibility" defense.[78] This defense holds, at its most basic, that it is impossible to return land to the tribes when that land is currently held by private, non-Indian landowners. The court recognized the case was distinguishable from the Oneida Nation land claim but still found the case useful.[79] Claiming the litigation needed a practical solution and based on its experience in the *Cayuga* litigation, the court found it was "impossible" to eject the private landowners.[80] In addition, the court did not allow the tribe to recover monetary damages against the private

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[72] *Id.* at 79.

[73] *Id.* at 85.

[74] *See* SHATTUCK, *supra* note 10, at 9.

[75] *McCurn Decision*, 199 F.R.D. at 82. The finding disregarded the Nation's stipulation that it would not seek rent, damages, or ejectment. *Id.*

[76] *Id.* at 89.

[77] *Id.* at 90.

[78] *Id.* at 91–93 (citing Yankton Sioux v. United States, 272 U.S. 351, 357, 359 (1926)); *see* Oneida Ltd. Memorandum, *supra* note 67, at 10–14 (asserting the impossibility defense derived from *Yankton Sioux*).

[79] *McCurn Decision*, 199 F.R.D. at 91.

[80] *Id.* at 92.

landowners.[81] There may be precedent for the argument that land cannot be taken back from subsequent private owners, regardless of how the previous owners took the land from the tribes.[82] And as discussed later, dicta in *Yankton Sioux* can be read as supporting that proposition.[83] What is clear, however, is that the practical impossibility defense was used to keep the tribe from adding *private* landowners to the land claim.[84] It did not apply to the claim against the counties or the State.[85] This litigation demonstrates the way holdings in this line of cases that apply to certain facts (ejectment of private landowners) can and will be adopted by the court for other fact patterns (tribal jurisdiction over tribally owned fee land).

From a negotiation standpoint, it is perhaps easy to see why the Nation might have used the addition of landowners to the case as a way to bring the State and counties to the bargaining table.[86] Unfortunately, the Nation seemed to have misread the court's patience with this tactic. There could be many reasons for this, including the twenty year stay in the proceedings immediately prior to this move. While the tribe had consistently won in the 1970s and early 1980s, by the time the stay was lifted and the tribe moved to add the landowners in 2000, the mood had shifted.[87] While not yet in the so-called "post-racial" jurisprudence tribes are facing today,[88] the election of George W. Bush and the increase in conservative originalists on the bench was not in the tribe's favor.

However, the same judge did decide in favor of the Cayuga Indian Nation in 2005,[89] so it may have just been the actions of both the Oneida Indian Nation and the United States that led to the angry 2000 opinion, from which the

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[81] *Id.* at 94.

[82] *See* Oneida Ltd. Memorandum, *supra* note 67, at 11–12 (conceding, however, the cases indicate there "continues to be a sovereign obligation to pay damages").

[83] *See infra* Part III.B.

[84] *McCurn Decision*, 199 F.R.D. at 92.

[85] *Id.* at 94–95 (granting the tribe's motion to add the State of New York as a party defendant and quoting *Cayuga Indian Nation of New York v. Pataki* (*Cayuga XI*), 79 F. Supp. 2d 66, 70 (N.D.N.Y. 1999), "Thus, although there is a strong argument to be made that the State properly could be held liable for all of the damages sustained by the Cayugas, it would be absurd to hold that a single present day landowner could likewise be held liable for all of these damages.").

[86] *See, e.g.*, SHATTUCK, *supra* note 10, at 80 (noting a full year after the Supreme Court decided *Oneida II*, the City of Oneida still refused to recognize the existence of the Oneida Indian Nation, much less negotiate).

[87] *Oneida I*, 414 U.S. 661 (1974); *Port Decision*, 434 F. Supp. 527 (N.D.N.Y. 1977); Oneida Indian Nation of N.Y. v. Oneida Cnty., 719 F.2d 525 (2d Cir. 1983); *Oneida II*, 470 U.S. 266 (1985).

[88] *See* Fort, *supra* note 13, at 38–44; *see also* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1614–21 (2009).

[89] *Cayuga XV*, 165 F. Supp. 2d 266, 366 (N.D.N.Y. 2001), *rev'd sub nom. Cayuga XVI*, 413 F.3d 266, 267–68 (2d Cir. 2005).

Oneida land claim never really recovered. Whether or not the landowners are indeed "innocent" as they claim, or had constructive notice, as the Nation claims, attempting to add them to the case gave the opposition all the ammunition it needed to start the slow repeal of prior decisions. Looking back over the case history, it seems clear that the district court decision on the addition of individual landowners to the case in 2000 was the beginning of the end of the case.

B. City of Sherrill v. Oneida Indian Nation

City of Sherrill v. Oneida Indian Nation, a Supreme Court decision, was not directly related to the Oneida land claims line of cases. The Court, however, tied it tightly to the land claims cases, though the case ultimately involved a tax issue. The Oneida Nation repurchased land on the open market and held it in fee simple.[90] The land, located within historic reservation boundaries, was not trust land held by the federal government for the tribe.[91] Nonetheless, the tribe ceased paying property taxes to the local governments on the theory that the tribe had reestablished jurisdiction over these parcels of land.[92] Thus, as the case proceeded to the Court, it was structured as a tax case, albeit with sovereignty implications.

In *Sherrill*, the Court went out of its way to ignore the tax questions and focus almost entirely on the sovereignty questions.[93] The Court relayed the long history of the Oneida Nation land claim through the courts and spent two paragraphs on the 2000 *McCurn Decision* denying the tribe the right to add individual landowners to the case.[94] The Court wrote the "District Court refused permission to join the landowners so late in the day, resting in part on the Oneidas' bad faith and undue delay."[95] The Court proceeded to quote the decision that since the land had been taken 200 years prior and there had been "'development of every type imaginable'" there must be a distinction between the "'*existence* of a federal common law right to Indian homelands'" and "'how to *vindicate* that right.'"[96] The Court used some of the reasoning in the *McCurn Decision* to create the "new laches" defense.

Relying on three equitable considerations in making its decision, the Court found that the tribe had waited too long to unilaterally reestablish sovereignty over the land.[97] Oddly, nothing was stopping the tribe from trying to get the

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[90] City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 202 (2005).

[91] *Id.* at 211–12.

[92] *Id.* at 202.

[93] *Id.* at 202–16.

[94] *Id.* at 209–10.

[95] *Id.* at 210.

[96] *Id.* (citing *McCurn Decision*, 199 F.R.D. 61, 79–85 (N.D.N.Y. 2000)).

[97] *Id.* at 221.

land into trust with the federal government, in which case, the tribe would then have "sovereignty" over the land. The Court's use of the equitable defenses of laches, acquiescence, and impossibility were strange choices for many reasons.[98] As detailed elsewhere, the use of these defenses was questionable at best.[99] The parties did not have the opportunity to brief these defenses;[100] laches is generally not used against a sovereign or in Indian land cases; an acquiescence analysis does not fit the fact pattern; and impossibility is a contract defense, not usually an equitable one.[101] In addition, the opposing party came to the case with unclean hands, which should have forestalled laches and delay.[102] Regardless, the Court used what *it* called laches, impossibility, and acquiescence to defeat the claim.[103] Later courts may argue that the Court was using a new defense, finely honed for Indian land claims, but the Court itself made no such argument in *Sherrill*. Rather, the Court seemed to go out of its way to use very old laches cases to give the appearance that it was not creating a defense specific to tribes.[104] The Court's holding would later be used by lower courts to extend and stretch laches into something entirely new.[105]

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[98] *See The New Laches*, *supra* note 43, at 375 ("Acquiescence requires knowledge by the plaintiff at the time of the wrong and requires the plantiff to actively assent to the performance."); *id.* at 376 (noting impossibility usually refers to a contract defense where there is an impossibility of performance).

[99] *Id.* at 374–80; Sarah Krakoff, City of Sherrill v. Oneida Indian Nation of New York*: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5, 7–11 (2005); Singer, *supra* note 47, at 608–12; *see* Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 590 (2007); Sarah Krakoff, *The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797, 800 (2006); Patrick Wandres, *Indian Land Claims:* Sherrill *and the Impending Legacy of the Doctrine of Laches*, 31 AM. INDIAN L. REV. 131, 140 (2006).

[100] Derrick Braaten, *The Right To Be Heard in* City of Sherrill v. Oneida Indian Nation*: Equity and the Sound of Silence*, 25 LAW & INEQ. 227, 237 (2007).

[101] *The New Laches*, *supra* note 43, at 362, 374–76, 388.

[102] *Id.* at 385–87. In addition—and as has been explained at length in another article—the opposing party has unclean hands as,

> [c]ertainly the state defendants in these cases were looking to benefit from illegal and fraudulent activity. The land in question in the New York cases was all taken in violation of federal law, and usually under questionable circumstances. According to Professor Campisi, "[i]n 1788 and 1789 [New York] took by fraud and deceit over seven million acres of land, the largest amount from the Oneidas." For the state to benefit from an *equitable* defense given its illegal and certainly inequitable dealings with the tribes is "novel indeed."

Id. (citations omitted).

[103] City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 221 (2005).

[104] *Id.* at 217 (citing Badger v. Badger, 69 U.S. (2 Wall.) 87, 94 (1864); Wagner v. Baird, 48 U.S. (7 How.) 234, 258 (1849); Bowman v. Wathan, 42 U.S. (1 How.) 189, 194 (1843)); *see* Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21, 45–47 (2005) (citing Felix v. Patrick, 145 U.S. 317, 329 (1892)) (discussing the ramifications of *Felix*, which was also cited by the *Sherrill* Court as support for its use of laches).

[105] *Cayuga XVI*, 413 F.3d 266 (2d Cir. 2005); Oneida Indian Nation of N.Y. v. Cnty. of Oneida, 617 F.3d 114, 127 (2d Cir. 2010).

An important aspect of new laches, and really the basis for it, is the insertion of a so-called impossibility defense into the proceedings. Further inquiry into the *Yankton Sioux* decision, especially as it is used by the Supreme Court, demonstrates that the case does not stand for the impossibility of returning land to the original owners, the tribe. Indeed, while the decision stated that it is "impossible, however, to rescind the cession and restore the Indians to their former rights, because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers," it further noted,

> and nothing remains but to sanction a great injustice or enforce the alternative agreement of the United States in respect of the ownership of the Indians. The latter course is so manifestly in accordance with ordinary conceptions of fairness that it would be unfortunate if any positive rule of law stood in the way of its accomplishment. We are of opinion that none exists. The judgment of the Court of Claims, that such an obstruction is to be found in the conclusion that the provision for referring the controversy to this court was legally impossible of execution, cannot be sustained.[106]

Opponents to the land claims and proponents of the impossibility doctrine like to quote the first half of this paragraph but usually leave out the second half, which points to the legal impossibility doctrine illustrated by *Yankton Sioux*.[107] The Yankton Sioux were suing for monetary relief because of misappropriation by the United States. As discussed elsewhere, the impossibility doctrine in *Yankton Sioux* is a contract defense, where the United States claimed it could both take the land and not pay for it.[108] The Court found that the United States must pay for the land it stole; *Yankton Sioux* does not stand for the proposition that Indian land claims are impossible to adjudicate.

One older decision in the *Oneida* line of cases held that the *Yankton Sioux* use of impossibility is related to the land rather than the treaty.[109] This is not,

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[106] Yankton Sioux v. United States, 272 U.S. 351, 357–58 (1926).

[107] *Sherrill*, 544 U.S. at 219; *McCurn Decision*, 199 F.R.D. 61, 91 (N.D.N.Y. 2000); Oneida Ltd. Memoradum, *supra* note 67, at 10.

[108] Fort, *supra* note 13, at 378.

[109] Oneida Indian Nation of N.Y. v. New York, 691 F.2d 1070, 1083 (2d Cir. 1982). The court stated,

> Moreover, as the Supreme Court held in *Yankton Sioux Tribe v. United States*, if the ejectment of current occupants and the repossession by the Indians of a wrongfully taken land is deemed an "impossible" remedy, the court has authority to award monetary relief for the wrongful deprivation. The claim for "fair rental value" is not so vague or indeterminable that an appropriate remedy could not be designed."

Id. (citations omitted).

technically, what the Court held. Later courts have found the use of the word "impossible" in the *Yankton Sioux* case to be the main holding, when it is part of the remedy. The true impossibility in the case was between two promises the United States made in the original treaty. Specifically, the language of the treaty reads,

> Art. XVI. If the government of the United States questions the ownership of the Pipestone reservation by the Yankton Tribe of Sioux Indians, under the treaty of April 19, 1858, including the fee to the land as well as the right to work the quarries, the Secretary of the Interior shall as speedily as possible refer the matter to the Supreme Court of the United States, to be decided by that tribunal. . . .
>
> If the Secretary of the Interior shall not, within one year after the ratification of this agreement by Congress, refer the question of the ownership of said Pipestone reservation to the Supreme Court, as provided for above, such failure upon his part shall be construed as, and shall be, a waiver by the United States of all rights to the ownership of the said Pipestone reservation, and the same shall thereafter be solely the property of the Yankton tribe of the Sioux Indians, including the fee to the land.[110]

Therefore, the impossibility was the constitutional question—whether the Secretary of the Interior could refer the question of ownership to the Supreme Court, which it could not. When the United States did not act on that promise, which was constitutionally *impossible*, the tribe gained fee title over the land. As quoted in most of the contracts cases, *Yankton Sioux* is cited for and the circuits agree that "[t]here hence were alternative methods of performance; and it is well settled that when a contract provides for one of two alternatives, impossibility of performance of one alternative does not excuse the promisor from performing the other."[111] The Court held that the tribe did have fee title over the land, but

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[110] *Yankton Sioux*, 272 U.S. at 355.

[111] Crowley v. Commodity Exch., 141 F.2d 182, 189 (2d Cir. 1944) (citing *Yankton Sioux*); *see* Ashland Oil & Ref. Co. v. Cities Serv. Gas Co., 462 F.2d 204, 211 (10th Cir. 1972); Brangier v. Rosenthal, 337 F.2d 952, 954 (9th Cir. 1964); Emery Bird Thayer Dry Goods Co. v. Williams, 98 F.2d 166, 173 (8th Cir. 1938) ("Where there are promises in the alternative, the fact that one of them has become impossible of performance does not in itself relieve the promissor from performing the other."); Draken Grp., Inc. v. Avondale Res., Inc., No. 06-CV-595-SAJ, 2008 WL 151901, at *3 (N.D. Okla. Jan. 14, 2008). The *Ashland Oil* court stated,

> What is the consequence of failure because of impossibility of one of two alternative performance provisions in a contract? The cases hold that where a contract requires a promisor to do a certain thing or to do something else the impossibility of one mode of performance "does not discharge him from his obligation to render the alternative performance which has not become impossible. . . ."

when crafting a remedy, the Court did not remove the settlers who had illegally lived there for the past few years. This was impossible. Not legally impossible, but culturally impossible, for the Court in 1926, a time of allotment and assimilation. The Supreme Court was not going to move white settlers from the land, regardless of how it was taken. However, the impossibility defense used in *Yankton Sioux* was also used to grant title and a remedy to the tribe, not as an excuse to get out of a monetary remedy. In the New York line of cases, impossibility, or disruptive, reasoning now is used to deny tribes monetary remedies for the disputed land.[112] *Yankton Sioux* held that the impossibility of returning land to the tribe *required* a monetary remedy for the taking.[113]

Prior to the New York land claims, *Yankton Sioux* was used in a fairly limited basis in Indian land claims, and the case has had limited use in federal Indian law cases.[114] While used a great deal in the *Oneida* and *Cayuga* line of cases, there does not appear to be a line of cases, or a "progeny"[115] that stands for the proposition that it is impossible to give land back to tribes. Instead, when used in Indian law cases, the proposition is usually that Indian title is as good as fee simple, or at least deserving of recompense for a taking.[116] The *Yankton Sioux* case was based on

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> One of the best examples of the application of this doctrine is *Yankton Sioux Tribe v. United States*. Here an Indian treaty provided that if the government questioned the ownership of certain reservation lands the Secretary of the Interior should refer the matter to the United States Supreme Court for a decision, or, alternatively, if it failed to do so within one year after ratification of the agreement by Congress this would be regarded as a waiver which could result in vesting the land and fee in the tribe. This was antecedent condition of impossibility, but in the course of its opinion the Supreme Court made clear that the rule applied as well to subsequent impossibility.

462 F.2d at 211 (citations omitted).

[112] Oneida Indian Nation of N.Y. v. Cnty. of Oneida, 617 F.3d 114, 124 (2d Cir. 2010); *Cayuga XVI*, 413 F.3d 266, 277 (2d Cir. 2005) (citing *Yankton Sioux* and characterizing the monetary claim as "disruptive" and "forward-looking").

[113] *Yankton Sioux*, 272 U.S. at 359 ("That the United States had taken and holds possession of the entire quarry tract of 648 acres is not in dispute; and since the Indians are the owners of it in fee, they are entitled to just compensation as for a taking under the power of eminent domain.").

[114] *See, e.g.*, Shoshone Tribe of Indians of Wind River Reservation v. United States, 299 U.S. 476 (1937) (cited for the proposition that the right of Indians to the occupancy of the land is "'as sacred as that of the United States to the fee'" and was remanded for monetary compensation); United States v. Washington, 157 F.3d 630, 654 (9th Cir. 1998) (citing *Yankton Sioux* for the proposition that monetary relief is allowed "in lieu of ejectment of innocent land purchasers"); Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455 (10th Cir. 1987); Assiniboine Indian Tribe v. United States, 121 F. Supp. 906 (Ct. Cl. 1954). So far the case has been used by one other private party outside of the New York cases seeking to avoid an adverse decision on treaty rights. Brief for Respondent at 22, Klamath Tribes of Or. v. Pacificorp, 129 S. Ct. 109 (2008) (No. 07-1492), *cert. denied*.

[115] *McCurn Decision*, 199 F.R.D. 61, 91 (N.D.N.Y. 2000).

[116] *Shoshone Tribe*, 299 U.S. at 498; *Assiniboine Indian Tribe*, 121 F. Supp. at 913 ("Moreover, we believe appellee correctly states that before and after appellant's former suit the Supreme Court had consistently held that land granted by the United States to Indian tribes by treaty represented

the purposeful and illegal taking and destruction of a religious and cultural land base.[117] Courts using such precedent show their hands when they are attempting to dispossess. The initial use of the case by Oneida Limited had its purpose—to limit the potential remedy of ejectment. By the time *Yankton Sioux* was used by the Supreme Court in *Sherrill*, however, the facts no longer included an ejectment issue.

IV. THE CAYUGA LAND CLAIM

The Cayuga land claim took an equally long trip through the court system. Much like the Oneidas, the Cayuga Nation had an extensive history prior to the current litigation of trying to get its land back from the illegal treaties[118] entered into with the State of New York.[119] New York had a history, prior to the Constitution, of entering into agreements with tribes to obtain land from them directly, without federal approval.[120] In addition, New York chose to interpret the Articles of Confederation to allow this. Though the document gave Congress the right to enter into treaties with tribes and the "exclusive right of 'regulating the trade and managing all affairs with the Indians, non members of any of the states,'" the clause further stated, "provided that the legislative right of any state within its own limits be not infringed or violated."[121]

The State entered into at least one agreement in 1784 before ratifying the Constitution in 1788.[122] The Cayugas entered into an agreement in 1789, just before the passage of the first Non-Intercourse Act.[123] Ten days after the passage of the second Non-Intercourse Act, New York State passed a statute authorizing agents to claim all of the land from the Oneida, Onondaga, and Cayuga Nations.[124] In 1795 and again in 1807, the State entered into agreements with the Cayuga

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a property right protected by the Constitution and that the taking of such property right under the power of eminent domain required the payment of just compensation."); Blackfeet & Gros Ventre Tribe of Indians v. United States, 119 F. Supp. 161, 165 (Ct. Cl. 1954).

[117] *The New Laches*, *supra* note 43, at 377 n.202.

[118] Cayuga Indian Nation of N.Y. v. Cuomo (*Cayuga III*), 730 F. Supp. 485 (N.D.N.Y. 1990) (granting partial summary judgment on the issue that the 1795 and 1807 agreements between the State and the tribe were invalid).

[119] *See* Vernon, *supra* note 18, at 21.

[120] *See* Graymont, *supra* note 17, at 376 ("New York State Indian policy after the Revolution can be succinctly summarized under three headings: 1. Extinguish any claim of the United States Congress to sovereignty over Indian affairs in the State of New York. 2. Extinguish the title of the Indians to the soil. 3. Extinguish the sovereignty of the Six Nations."); Vernon, *supra* note 18, at 22.

[121] *Cayuga XV*, 165 F. Supp. 2d 266, 309 (N.D.N.Y. 2005).

[122] *Id.* at 311.

[123] *Id.* at 314–15.

[124] *Id.* at 330.

Nation, depriving them of all their land save one square mile tract.[125] The Nation worked from 1807 to the present to regain the land or receive compensation for the taking.[126] Like the Oneida Nation, prior to 1958, the tribe could not get into the state courts, and prior to 1974, the tribe could not get into the federal courts.[127] Regardless, because the State tried to argue the defense of laches, the Cayugas also had to demonstrate this long history of fighting the takings to avoid the defense.

The modern Cayuga land claim began, after the Oneida test case, with the first decision in 1983.[128] Judge McCurn found that the parties could present evidence in the land claim based on a violation of the Non-Intercourse Act.[129] The case was stayed for nine years after the United States intervened on the side of the tribe. Negotiations between the tribe and the State failed, and as a result the case continued in the courts. The court allowed equitable principles into the proceeding, including laches.[130] Additionally, the court did not allow testimony on the cultural, emotional, and psychological damages to tribal citizens over the loss of the land,[131] nor did the court allow the tribe's real estate witnesses to testify at trial.[132]

However, the tribe won at the district court level, where the court held the State had violated the Non-Intercourse Act and owed damages to the tribe for the land.[133] In a bifurcated trial, the jury concluded the tribe was owed an additional $1.9 million for the fair rental value of the land and $35 million for future loss on the land.[134] This was considered at the low end of even the State's assessment of the total damages, which was between $40 and $62 million.[135] In the second half of the trial, the bench heard testimony on the issue of prejudgment interest. The court awarded the tribe $247,911,999.42.[136] On the issue of laches, the district court stated,

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[125] Vernon, *supra* note 18, at 23.

[126] *Cayuga XV*, 165 F. Supp. 2d at 357; *see* Vernon, *supra* note 18, at 25–31 (detailing the actions taken by Cayuga tribes on both sides of the United States-Canadian border to force New York to act in good faith).

[127] SHATTUCK, *supra* note 10, at 21–26.

[128] Cayuga Indian Nation of N.Y. v. Cuomo (*Cayuga I*), 565 F. Supp. 1297 (N.D.N.Y. 1983).

[129] *Id.* at 1329.

[130] Cayuga Indian Nation of N.Y. v. Cuomo (*Cayuga XII*), 79 F. Supp. 2d 78 (N.D.N.Y. 2000).

[131] *Id.* at 95.

[132] Cayuga Indian Nation of N.Y. v. Cuomo (*Cayuga XIII*), 83 F. Supp. 2d 318 (N.D.N.Y. 2000).

[133] *Cayuga XV*, 165 F. Supp. 2d 266, 366 (N.D.N.Y. 2005).

[134] *Id.* at 274 (finding the tribe was owed $3.5 million for the fair rent value of the claim area and that the State had already paid the tribe $1.5 million).

[135] *Id.* at 288.

[136] *Id.* at 365.

> [t]he court cannot find that the Cayuga are responsible for any delay in bringing this action. The Cayuga's efforts to seek redress from the State for the loss of their homeland in 1795, as recounted above, attest to their perseverance and fortitude. Those efforts do not support a finding that the Cayuga should be denied prejudgment interest simply because they took advantage of the legal and political mechanisms available to them through the years.[137]

This victory for the Cayugas was short-lived. *Sherrill* devastated the Oneida Indian Nation's theory of reassumption of tribal jurisdiction over lands reacquired by the tribe. There was still the possibility, however, that the holding would be narrowly construed to tribes hoping to resume jurisdiction over lands not taken into trust by the federal government. However, the Second Circuit decided the *Cayuga* appeal provided an out to the modern Iroquois land cases that had been in the courts since the 1970s.[138] Rather than reading *Sherrill* narrowly, the Second Circuit decided to read it broadly, extending it far beyond the *Sherrill* holding.[139] The court started with the *Cayuga* decision.

Cayuga XVI[140] changed the legal landscape for the New York land claims far more than the *Sherrill* decision. Although the district court decision awarded the Cayuga Nation monetary damages for the taking of its land but did not award the Nation any actual land to exercise jurisdiction over, the Second Circuit still found that this was a "type of claim to which a laches defense can be applied."[141] The Second Circuit specifically looked to the *Sherrill* laches defense and not to a traditional laches defense.[142] Interestingly, however, the *Cayuga* court still spent considerable time explaining why laches applied against the United States in this case, presumably because the application of laches to a sovereign is a relatively new interpretation of the defense.[143] While tribes had been explaining why laches did not apply to Indian land claims because of delay, the Second Circuit moved on to a defense it called "disruption," characterized also by impossibility.[144] Claiming that the original pleading sounded in ejection, the court found that ejection is

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[137] *Id.* at 357.

[138] *Cayuga XVI*, 413 F.3d 266 (2d Cir. 2005).

[139] *Id.* at 275.

[140] *Id.* at 266.

[141] *Id.* at 268.

[142] *Id.*

[143] *Compare The New Laches*, *supra* note 43, at 394–96 (discussing the long history of laches as it applies to a sovereign), *with* Lantz v. Comm'r, 607 F.3d 479, 483 (7th Cir. 2010) (questioning sovereign immunity from laches in the United States Court of Appeals for the Seventh Circuit).

[144] *Cayuga XVI*, 413 F.3d at 277.

"indisputably disruptive" subjecting the claim to the equitable considerations from *Sherrill*.[145] The court reversed the district court's finding, and the Cayuga land claim, for all intents and purposes, ended.[146]

V. THE NEW LACHES DEFENSE

The Second Circuit combined laches, impossibility, and acquiescence into a new defense: the "new laches."[147] This defense was constructed specifically for Indian land claims and differs from traditional laches in a number of ways.[148] The elements of new laches are disruption and impossibility, or prejudice. Indian land claims are considered disruptive if they may upset the settled expectations of current landowners. Furthermore, the implementation of any remedy which is disruptive is impossible, and therefore the claim must be dismissed. Importantly, the level of disruption needed to dismiss the claim under new laches was set at the lowest bar, making it possible for states and counties to argue any remedy is disruptive, even if the remedy is monetary and would come from state coffers, not from individual landowners.

The courts created a defense that changed the definition of laches and created a new theoretical, procedural, and doctrinal defense.[149] No court openly admitted this shift, but it was apparent in the case law. Traditional laches would not have applied in the cases in front of the courts, and even if it had, a number of barriers inherent in the defense would have arisen. These barriers include a weighing of the equities, an evaluation of the state's unclean hands, the role of sovereigns in the case, and previous court precedent.[150]

The problem for tribes occurs when courts apply new laches but do not admit the shift.[151] This maneuver can lead tribal litigators to believe they are defending against traditional laches but are instead defending against a defense designed specially to defeat the Haudenosaunee land claims. In the latest case, the court finally admitted what had been obvious to readers of the cases—the defense the courts were using to defeat the land claims was not laches but rather a new defense which "evoked" the defense of laches.[152]

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[145] *Id.* at 274–75.

[146] *Id.* at 280.

[147] *See The New Laches*, *supra* note 43, at 357–58.

[148] *Id.* at 381–88.

[149] *Id.* at 374–88.

[150] *Id.*

[151] Osage Nation v. Oklahoma *ex rel.* Okla. Tax Comm'n, 597 F. Supp. 2d 1250, 1265–66 (N.D. Okla. 2009).

[152] Oneida Indian Nation of N.Y. v. Cnty. of Oneida, 617 F.3d 114, 123 (2d Cir. 2010).

A. Oneida Indian Nation v. County of Oneida *at the District Court*

The Second Circuit's 2010 *Oneida* decision took the new laches to its final conclusion, all but ending the Oneida land claim.[153] After the *Cayuga* decision ended the Cayuga land claims, the counties brought the same defenses used in that decision to the *Oneida* claims. While the district court was bound by the *Cayuga* decision on the issue of new laches and possessory land claims, Judge Kahn still attempted to limit the *Cayuga* decision in the *Oneida* district court case.[154]

Judge Kahn identified three elements of new laches as it applies to possessory land claims. First, the "transactions at issue before the Court are of particularly ancient pedigree; however, Plaintiffs did not seek redress until relatively recently."[155] Second, "[m]ost of the Oneidas have lived elsewhere since the mid-nineteenth century and the land in the claim area has a distinctly non-Indian character."[156] And third, "[n]on-Indians have greatly developed the area in question and have justified expectations that they will continue to maintain their lives there."[157] Using these elements, the court found that the tribe's possessory claims were barred by both *Sherrill* and *Cayuga*. The court stated, "[T]he Second Circuit was very clear in *Cayuga*: Indian possessory land claims that seek or sound in ejectment of the current owners are indisputably disruptive and would, by their very nature, project redress into the present and future; such claims are subject to the doctrine of laches."[158] However, the elements the court identified are *not* the elements of the doctrine of laches; they are the elements of new, Indian land claims laches.[159]

In addition, the court noted that the "Second Circuit dismissed the Cayugas' claims in substantial part because the same considerations that doomed the Oneidas' claim in *Sherrill* applied with equal force to the Cayugas' claims."[160]

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[153] *Id.* at 140–41 (affirming the dismissal of possessory claims, reversing the nonposessory claims, and remanding for entry of judgment and resolution of pending motions).

[154] Oneida Indian Nation of N.Y. v. New York, 500 F. Supp. 2d 128 (N.D.N.Y. 2007).

[155] *Id.* at 134.

[156] *Id.* at 135.

[157] *Id.* at 136.

[158] *Id.*

[159] *The New Laches*, *supra* note 43, at 400. Laches is delay and prejudice; new laches is disruption and impossibility. *Id.* In reality, delay is a tertiary consideration, if at all. *Id.* This may be because of the evidence the tribe submitted demonstrating the opposite, the number of scholars who pointed out the long history of the tribes in attempting to bring these claims, and the precedent of court opinions holding such. *Id.*; *see Oneida Indian Nation*, 500 F. Supp. 2d at 137 ("Under the factors to be considered in a laches analysis, as set forth in *Cayuga*, it is not necessary to determine whether Plaintiffs unreasonably delayed in pursuing their claims.").

[160] *Oneida Indian Nation*, 500 F. Supp. 2d at 136.

The sad reality, however, is that the *Sherrill* considerations could have been limited to the *Sherrill* fact pattern, which was very different than the Cayuga land claim. A double leap of logic occurred, which particularly injured the Cayuga Nation.[161] The impossibility defense was first used by the district court to prevent the addition of individual landowners to the Oneidas' claim. That impossibility defense was then used in *Sherrill* to create the new laches and prevent the Oneidas from exercising jurisdiction over land the tribe already owned. The Second Circuit then applied the *Sherrill* defense to the Cayuga claim, which was entirely a monetary judgment.

The district court tried to save some of the Oneida claims from the same fate as the Cayuga claims. During a motion hearing prior to Judge Kahn's decision, Judge Kahn showed some discomfort with the idea that all of the claims involved could be described as "disruptive" and simply ended.[162] He tried to see if the counties or tribes could explain a way for the tribe to obtain some relief following the *Cayuga* decision. The attorney for the Oneida of the Thames explained the contract defense the tribe believed could be used to avoid the disruption prong of new laches.[163] In essence, the tribe's final line of defense was a fair compensation argument. Since the State paid so little for land it then sold for far more, the tribes were at least owed the actual value of the land when it was originally taken.

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[161] This reasoning also damaged the Onondaga Nation. *See* Onondaga Nation v. New York, No. 5:05-cv-0314, 2010 WL 3806492 (N.D.N.Y Sept. 22, 2010). A full analysis of that case is beyond the scope of this article, but the court used new laches to dismiss with prejudice the Onondaga Nation's claim of environmental stewardship over the lands in question. *Id.*

[162] Transcript of Proceedings, Motion Hearing at 5, *Oneida Indian Nation*, 500 F. Supp. 2d 128 (No. 74-cv-0187). The transcript states:

> THE COURT: In what way would it be disruptive? I know that's a key word throughout these cases. But if the Oneida Indians and the plaintiffs are seeking non-possessory rights, money damages, and if there is title insurance involved, what would be—we're not going to talk about lands being taken from anyone—what is the disruption we're talking about?

Id.

[163] *Id.* at 31. The transcript further reads:

> Mr. Ramos: . . . .
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> . . . But we also quite clearly allege a fair compensation claim. It's laid out in the tail of the paragraphs that Mr. Smith referred to, and we clearly seek relief in the form of the difference between the value of the property when it was purchased from the Oneidas and the amount that was paid. This debated as to whether or not that claim arises from some possessory right, your Honor, I would submit is really a scholastic debate. There's no meaning to it for the simple reason that if this Court were to dismiss, issue an order dismissing possessory claims, that would resolve all the disruption issues the other side has raised.

Id.

The court used this argument and identified non-possessory claims in the opinion. The Oneidas asserted that the State "inadequately compensated the Oneida Indian Nation for the land transferred to it."[164] The court found this claim was not "disruptive" but rather a "retrospective relief in the form of damages . . . not based on Plaintiffs' continuing possessory right to the claimed land, and [did] not void the agreements."[165] The remedy would be equitable in nature, a contract modification by the court of the original agreements between the tribe and the State. The remedy would also be far more limited than the original claim, but Judge Kahn preserved a part of the *Oneida* claim in accordance, he wrote, with both Supreme Court and Second Circuit precedent.[166] The Second Circuit did not agree.

B. Oneida Indian Nation v. County of Oneida *in the Second Circuit*

In the appeal of the 2007 decision, the Second Circuit found the equitable considerations barred even the limited remedy Judge Kahn allowed.[167] The court explained that its decision was not based on traditional laches but on a new equitable remedy.[168] The new remedy is limited to tribal land claims, and rather than address the issues inherent in applying laches to a sovereign, within a statute of limitations for a non-possessory claim at law, the *Oneida* court argued that there is a new equitable defense that originates from the *Sherrill* Court. The tribes maintained correctly that the State and counties failed to "establish the elements of a laches defense," and the United States argued that "it is not subject to laches when acting in its sovereign capacity."[169] The court replied, "We have used the term 'laches' here, as did the district court and this Court in *Cayuga*, as a

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[164] *Oneida Indian Nation*, 500 F. Supp. 2d at 140.

[165] *Id.*

[166] *Id.* at 147.

[167] Oneida Indian Nation of N.Y. v. Cnty. of Oneida, 617 F.3d 114, 140 (2d Cir. 2010).

[168] *Id.* at 127. The court stated,

> The Oneidas assert that the invocation of a purported laches defense is improper here as the defendants have not established the necessary elements of such a defense. It is true that the district court in this case did not make findings that the Oneidas unreasonably delayed the initiation of this action or that the defendants were prejudiced by this delay—both required elements of a traditional laches defense. This omission, however, is not ultimately important, as the equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches, but rather more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of the claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury.

Id. (citations omitted).

[169] *Id.* at 126.

convenient shorthand for the equitable principles at stake in this case, but the term is somewhat imprecise for the purpose of describing these principles."[170] In doing this, the court rendered all of the plaintiffs' arguments against the application of laches moot, since the court was not applying laches, but rather a new defense, or new laches.[171]

This is the first time a court in this line of cases admitted that the *Sherrill* laches did not follow the rules of laches. It also may be the first time an equitable defense has been created by a court since the 1800s. While laches is a particularly ancient defense, many equitable defenses also are rooted in fairly old decisions. Though difficult to establish with complete certainty, one of the more recent equitable defenses in the United States at the federal level is change in position, first appearing in a Supreme Court case in 1877.[172] Thus, the most recently created equitable defenses are almost as old as the land claims themselves.

The Second Circuit admitted that the district court did not make findings as to whether the Oneidas "unreasonably delayed" or "that the defendants were prejudiced by this delay—both required elements of a *traditional* laches defense."[173] In addition, the *Cayuga* court "applied not a traditional laches defense, but rather a distinct, albeit related, equitable considerations that it drew from *Sherrill*."[174] Few federal courts have ever modified laches with the term "traditional." Since 1790, the term only appears in fifteen federal cases.[175] This is probably because

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[170] *Id.* at 127.

[171] *Id.* at 129 n.7 ("*Sherrill*'s equitable defense"); *id.* at 136 ("the equitable defense originally recognized in *Sherrill*"); *id.* ("the applicability of *Sherrill*'s equitable defense"); *id.* at 138 ("the relevant defense, originally articulated in *Sherrill*"); *id.* ("the defense established in *Sherrill* and *Cayuga*"); *id.* at 139 ("the equitable defense recognized in *Sherrill*"); *id.* at 140 ("the defense recognized in *Sherrill* and *Cayuga*").

[172] Jones v. United States, 96 U.S. 24 (1877); *see also* Bein v. Heath, 47 U.S. (6 How.) 228 (1848) (duress); The Dawn, 7 F. Cas. 204 (D.C. Me. 1841) (No. 3,6660) (frustration of purpose).

[173] *Oneida Indian Nation*, 617 F.3d at 127 (emphasis added).

[174] *Id.* at 128 ("Either way, we are bound by *Cayuga* and therefore reject the Oneidas' and United States' contention that the district court erred by failing to consider the elements of a traditional laches defense."). The court went on to state,

> This omission, however, is not ultimately important, as the equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches but rather more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury.

Id. at 127.

[175] These numbers are the result of a search of allfeds database on Westlaw for the term traditional /2 laches, omitting *Oneida Indian Nation*, 617 F.3d 114, and *Onondaga Nation v. New York*, No. 5:05-cv-0314, 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010), from the count.

the definition of laches has been fairly constant since 1293.[176] The courts that used the modifier used the term "traditional laches" not as one of comparison but as a description of laches being a traditional equitable defense.[177] Only one used the term to distinguish it from another version of laches, prosecutorial laches.[178]

Instead, the equitable defense at play in the modern land claims cases focuses on the "length of time at issue," disruption, and the justifiable expectations of those "far removed from the events giving rise to the plaintiffs' injury."[179] Length of time is less important in the new defense, since the element is not about the length of time it took the tribe to bring the claim but simply the length of time from the initial harm to the present.[180] This formulation of delay makes it impossible for tribes to defend against, because while tribes can show historic attempts to make their claims, tribes can do nothing about the fact that the illegal takings happened 200 years prior to the current litigation.

The justifiable expectations prong arises from the impossibility defense discussed earlier.[181] The presence of non-Indians on the land, and their expectations, make a dispossession or ejectment remedy "impossible." This, while parties may disagree, is a colorable argument. The physical removal of current landowners, colored as the title may be, would certainly be disruptive and seems impossible to the courts. As noted, however, the issue at hand in the 2010 *Oneida* decision is limited to nonpossessory claims, a monetary, equitable remedy that seeks fair pay for the land. New laches combines the disruption and impossibility considerations from cases where ejectment or dispossession is a highly unlikely, but a possible remedy, and applies them to any remedy conceived of by the tribes or district courts for the illegal takings of tribal lands.

Though briefly addressed by the Second Circuit, another important consideration in new laches is its relationship to sovereign immunity. Generally laches did not apply to the sovereign, which was the federal government's argument in this case.[182] The *Cayuga* court's reasoning on this issue was problematic for

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[176] *See supra* note 43.

[177] *See, e.g.*, Perez v. Holder, Nos. 06-74403, 08-74373, 2010 WL 5393905, at *2 (9th Cir. 2010) ("Regarding laches, '[t]he traditional rule is that the doctrine of laches is not available against the government.'"); Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176, 1180 n.7 (9th Cir. 1988) ("These considerations parallel those of traditional laches analysis . . . ."); Pegues v. Morehouse Parish Sch. Bd., 632 F.2d 1279, 1282–83 (5th Cir. 1980) ("[W]e believe that the more traditional laches inquiry is the proper manner in which to deal with the tardiness of this suit.").

[178] Lucent Techs. Inc. v. Microsoft Corp., 544 F. Supp. 2d 1080 (S.D. Cal. 2008).

[179] *Oneida Indian Nation*, 617 F.3d. at 127.

[180] *Id.* (nothing the elements focus "more generally on the length of time at issue between an historical injustice and the present day").

[181] *See supra* notes 20–24 and accompanying text.

[182] *See supra* notes 20–24 and accompanying text.

a number of reasons.[183] While the Second Circuit discussed the application of the new defense to the United States in a brief paragraph, stating the "United States is traditionally not subject to delay-based equitable defenses under most circumstances, *Cayuga* expressly concluded the United States *is* subject to such defenses under circumstances like those presented here."[184] The benefit of a new defense is the lack of precedent. While laches has a long history of not applying to a sovereign, new laches always has. This consideration is another reason for the court to acknowledge the new defense rather than trying to fit the facts to match a traditional laches defense.

A key point, however, is that Eleventh Amendment sovereign immunity still protected New York State from the limited contract remedy Judge Kahn proposed.[185] While states are not protected by sovereign immunity from the federal government, they can be from tribes.[186] Therefore, in suing the State in this matter, the Second Circuit held the tribe and the United States needed to bring identical claims against the State.[187] The Second Circuit found that the claims in the United States and Oneida Nation complaints were not identical.[188] The court did not find adequate language in the United States' complaint to match the contract claim the district court found in the Oneida complaint.[189] As such, the court held the State was protected by sovereign immunity from the claim since it only came from the tribe. This twist of logic means that the State enjoys immunity from the suit, while the United States does not enjoy immunity from new laches. The court's cursory review of United States' sovereign immunity stands in contrast to the multiple pages the court spends on the subject of New York State's sovereign immunity.[190] The United States attempted to counter this issue by arguing it could amend its complaint to incorporate the new claim Judge Kahn pointed out. The court responded, "[W]e have our doubts that this casual approach to analysis of a state's assertion of sovereign immunity could ever be appropriate."[191]

Finally, another concern about new laches involves the breadth of the defense. The court found that new laches is "properly applied to bar any ancient land claims that are disruptive of significant and justified societal expectations that have arisen

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[183] *The New Laches*, *supra* note 43, at 394–97.

[184] *Oneida Indian Nation*, 617 F.3d at 129 (citations omitted).

[185] *Id.* at 131.

[186] Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991).

[187] Seneca Nation of Indians v. New York, 178 F.3d 95 (2d Cir. 1999).

[188] *Oneida Indian Nation*, 617 F.3d at 133.

[189] *Id.*

[190] *Id.* at 131–36.

[191] *Id.* at 135; *see also* Stephen I. Vladeck, *State Sovereign Immunity and the Roberts Court*, 5 CHARLESTON L. REV. 99 (2010) (discussing the rise of state sovereign immunity under the Eleventh Amendment in the Rehnquist Court and its probable extension into the Roberts Court).

as a result of a lapse of time during which the plaintiffs did not seek relief."[192] Further, the defense "is potentially applicable to all ancient land claims that are disruptive of justified societal interests that have developed over a long period of time, of which possessory claims are merely one type, and regardless of the particular remedy sought."[193] These statements are much broader than necessary, lacking any factual based limits.[194] Because the defense arose in *Sherrill*, a case that did not turn on a violation of the Non-Intercourse Act, and the defense now has a loose set of elements not based on the Non-Intercourse Act, the court was able to make a sweeping declaration of the application of new laches. Whether other courts outside the Second Circuit will choose this course is questionable;[195] what is certain is that opponents of tribal land claims will.[196]

New laches is not properly an equitable defense. It is a defense and applies to Indian land claims, but it does not seek to weigh the equities in a case. The new laches does not provide any way for Indian tribes to combat it—their equities are never weighed in this equation. Although the Supreme Court claims it is informed by equitable considerations, new laches does not fit into the rubric of equity. If a tribe cannot use any equitable pleading, such as unclean hands, against the new laches, the words "equitable" or "equity" should be removed from this defense entirely.

Counterintuitively, then, equitable principles are not as helpful as they ought to be for tribes. A balancing of equities ought to be beneficial for most tribes as land claims and other cases often arise out of treaty violations or illegal actions on the part of a state or the federal government. In addition, the Indian canons of construction take equitable considerations into account for tribes.[197] However, states seem to have taken the advantage in these balancing areas. For

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[192] *Oneida Indian Nation*, 617 F.3d at 135.

[193] *Id.* at 136.

[194] The facts in the New York land claims are specific to Non-Intercourse Act violations, which ought to limit new laches to those specific land claims. The court uses broad language, however, which could be used to include all tribal claims. *See, e.g.*, Kristen A. Carpenter, Limiting Principles and Practices in American Indian Religion and Culture Cases, AALS Annual Meeting, Section on Law and Anthropology Panel, San Francisco, Cal. (Jan. 8, 2011) (paper presentation on file with author) (noting the implications of the lack of limiting principles in religious freedom cases).

[195] Saginaw Chippewa Indian Tribe of Mich. v. Granholm, No. 05-10296-BC, 2008 WL 4808823, at *23 (E.D. Mich. Oct. 22, 2008) (drawing extensively from the dissent in *Cayuga XVI* to counter the state's laches argument).

[196] *See* Brief for Respondent at 22, Klamath Tribes of Or. v. Pacificorp, 129 S. Ct. 109 (2008) (No. 07-1492), *cert. denied*.

[197] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1], at 119–24 (Nell Jessup Newton et al. eds., 2005) ("The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians; and all ambiguities are to be resolved in favor of Indians. In addition, treaties and agreements are to be construed as the Indians would have understood them . . . .").

example, in *United States v. Washington*, those opposing the tribe argued for using equitable principles in interpreting treaty rights.[198] As the United States Court of Appeals for the Ninth Circuit noted, "[P]ersuasive and unambiguous Supreme Court authority"[199] is more helpful for tribes than equitable principles. Unfortunately, that type of Supreme Court authority is now usually anti-tribal and often unhelpful.[200]

VI. A BRIEF RESPITE FROM EQUITY

In all of this change, one court did hold for the tribal interests, however.[201] After the *Sherrill* decision, the counties involved brought foreclosure attempts against the Oneida Nation on the land at issue in *Sherrill*. The Second Circuit surprisingly found that while the tribes could not avoid paying property taxes on the land that was owned by the tribe, but not held in trust by the federal government, the local municipalities could not foreclose on the properties due to tribal sovereign immunity.[202] Sovereign immunity, which does not help against new laches, still worked as a shield for the tribe in this case. Unfortunately, the Supreme Court granted Madison County's petition for certiorari, which meant the case involving tribal sovereign immunity and the Oneida Indian Nation would have been in front of one of the most hostile Courts in recent memory.[203] Luckily the Oneida

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[198] 157 F.3d 630, 650 (9th Cir. 1988). The court stated,

> In support of its use of equitable principles the district court and Appellants primarily rely on five cases: *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 357, 47 S. Ct. 142, 71 L.Ed. 294 (1926) (awarding Indians monetary payment rather than ejecting "innumerable innocent purchasers" from tribal land); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 519 n.5, 106 S. Ct. 2039, 90 L. Ed. 2d 490 (1986) (Blackmun, J., dissenting) (citing *Yankton* and acknowledging that equitable considerations might have limited the remedies available had the plaintiff tribe prevailed on its claim to 144,000 acres of land); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 260, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) (Stevens, J., dissenting) (urging that laches be applied to bar Indians' claim to lands); *Brooks v. Nez Perce County, Idaho*, 670 F.2d 835 (9th Cir. 1982) (in an action to quiet title to a parcel of land, equitable considerations would not bar the claim to the land entirely, but "[l]ack of diligence by the government in exercising its role as trustee may be weighed by the district court in calculating damages" for several decades of loss of use of the land); *United States v. Imperial Irrigation Dist.*, 799 F. Supp. 1052 (S.D. Cal. 1992) (employing tort-law equitable principles to award monetary damages to the plaintiff Indians, rather than restoring tribal land to them).

Id.

[199] *Id.*

[200] *See* FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 211–58 (2009) (discussing why the Supreme Court's oft-changing precedent is generally unhelpful for tribal interests and potentially unconstitutional).

[201] Oneida Indian Nation of N.Y. v. Madison Cnty., 605 F.3d 149 (2d. Cir. 2010).

[202] *Id.*

[203] Madison Cnty. v. Oneida Indian Nation, 131 S. Ct. 459 (2010) (mem.).

Indian Nation waived its sovereign immunity for this case after certiorari was granted. The Supreme Court vacated and remanded the decision to take this change into consideration.[204] The case is still in litigation, but at this moment, the Supreme Court will not be hearing a case on tribal sovereign immunity. In fact, despite Justice Ginsberg's recent appearance in the dissent in a few Indian law cases, she wrote the original *Sherrill* opinion.[205] Whether Justice Ginsberg would stay in the dissent given her infamous writing about the Oneida Indian Nation's *lack* of tribal sovereignty over the lands in question was a serious concern.[206]

VII. CONCLUSION

The modern Haudenosaunee land claims began in the early 1970s. This is not, however, the first time the tribes sought redress for the wrongs done to them in the early days of the Republic. And though the modern claims appear to be over in the courts, there is no doubt that the tribes will continue to fight these injustices into the future. How, and in what form, remains unknown, but claims this long in coming do not disappear because a court finds a new way to dismiss them. Perhaps the newly-adopted United Nations Declaration on the Rights of Indigenous Peoples will provide new opportunities for the tribes.[207]

The courts' creation of a new defense specifically targeted at these land claims undermines the courts' authority and demonstrates the importance of a party's identity in litigation. As the attorney for the Oneida of the Thames pointed out, using laches to dismiss a case after thirty-seven years of litigation sends a signal about the willingness of courts to redress wrongs done to tribes.[208] At the same

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[204] Madison Cnty. v. Oneida Indian Nation, 131 S. Ct. 704 (2011) (per curiam.).

[205] Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008) (Ginsburg, J., concurring in part and dissenting in part); Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) (Ginsburg, J., dissenting).

[206] *Cf.* Carole Goldberg, *Finding the Way to Indian Country: Justice Ruth Bader Ginsburg's Decisions in Indian Law Cases*, 70 OHIO ST. L.J. 1003 (2009) (arguing that perhaps Justice Ginsburg is moving in her stance on Indian law issues from a low water mark of *Sherrill* to her recent dissents in *Wagnon* and *Plains Commerce*).

[207] Matthew L.M. Fletcher, *Pres. Obama Announces Support for UNDRIP*, TURTLE TALK (Dec. 16, 2010, 11:29 AM), http://turtletalk.wordpress.com/2010/12/16/pres-obama-announces-support-for-undrip/; *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, TURTLE TALK (Dec. 17, 2010, 12:32 PM), http://turtletalk.files.wordpress.com/2010/12/12-17-10-announcement-of-us-support-for-undrip.pdf.

[208] Transcript of Proceedings, Motion Hearing at 34–35, Oneida Indian Nation v. Cnty. of Oneida, 500 F. Supp. 2d 128 (Apr. 20, 2007) (No. 74-cv-0187). The transcript reads,

> Mr. Ramos: . . . Your Honor, my, my point is very simple. This case is not an academic debate. This case is about righting a wrong that was done years ago to real people whose descendents are here in this courtroom, three generations of Oneidas in this courtroom, your Honor, right down to Christopher, who's 10 years old, who was born 27 years after this case started, and the irony that this case could be, could

time, courts are not always the ideal body to decide far reaching and long running claims. The State of New York and Oneida and Madison Counties took a serious risk in refusing to negotiate with the tribes, a risk that appeared to be a bad choice initially but served them well in the end. A more interesting question, however, is whether the tribes would have ever won these claims in federal court. While the courts at times find in a fair manner for tribes, using the courts of the conqueror to achieve these ends has more risk for tribes than for states.

New laches, a pernicious defense not properly called "equitable," denies all relief for any land claim, putting a court solution out of the hands of tribes for now. Ultimately, the new laches fits in with a twenty-first-century "post-racial" jurisprudence where all harms are equal. Under this reasoning, the illegal and devastating takings from the tribes in the nineteenth century are equal to any potential harm done to current landowners through these claims. In actuality, the courts have found that the harms done to the tribes so long ago are not as severe as any potential harm to non-Indian landowners today. As the district court wrote in the 2007 *Oneida* opinion, "Past injustices suffered by the Oneidas cannot be remedied by creating present and future injustices."[209] This statement entombs in case law the idea that it is not the fault of the state, counties, or current landowners for any harm that happened at the hands of the state, counties, or landowners in the past. And while there could be arguments over the equities of physically removing non-Indians from the land at issue, equity is supposed to provide a remedy for illegal takings, even if that remedy is monetary. For that reason, new laches is not an equitable defense but something else—a defense of the majority for the wrongs it never made right.

> be dismissed on the grounds of laches after 37 years of litigation, I think it would be painful and I think it would send a signal, your Honor, with regard to the availability of redress for wrongs in United States courts. This is a very important decision before your Honor.

Id.

[209] *Oneida Indian Nation*, 500 F. Supp. 2d at 137.