

Nine-Tenths of the Law: Title, Possession & Sacred Obligations

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Possession is nine-tenths of the law.

—Proverb

*[The Indians'] right of occupancy is considered as sacred as the fee simple of the whites.*¹

—Mitchel v. United States (1835)

I. INTRODUCTION

Some twenty years ago, the Supreme Court ruled that the state of New York illegally seized the lands of the Oneida Indian Nation in 1795 in violation of treaties between the Oneida Indian Nation and the United States,² a federal statute passed one year after adoption of the Constitution³

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¹ Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835).

² As noted in *Oneida Indian Nation of New York v. County of Oneida (Oneida I)*, 414 U.S. 661, 664 n.3 (1974):

Three treaties with the Six Indian Nations of the Iroquois Confederacy in New York were alleged: the Treaty of Fort Stanwix of 1784, which provides in part that “[t]he Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled”; The Treaty of Fort Harmar of 1789 where the Oneida and the Tuscarora nations were “again secured and confirmed in the possession of their respective lands”; and the Treaty of Canandaigua of 1794, Art. II of which provides: “The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.” The treaties referred to are found at 7 Stat. 15, 7 Stat. 33, and 7 Stat. 44, respectively.

³ Section 4 of the Trade and Intercourse (Nonintercourse) Act of 1790 provided that:

and federal common law.⁴ The United States had promised in those treaties that the Oneidas would be “secure” in “possession” of their retained lands, but it did nothing to stop New York from taking those lands.⁵ The bad faith of the United States in no way altered the Supreme Court’s conclusion in 1985 that the 1793 version of the Trade and Intercourse (Nonintercourse) Act meant exactly what it said: “That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution”⁶ This meant that unless the United States agreed to the sale in a treaty between the Indian nation and the United States, the transfer of title would be meaningless. Interpreting the statute literally, the Supreme

[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Nonintercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (current version at 25 U.S.C. § 177 (2000)).

Section 8 of the statute, as amended in 1793, provided that:

[N]o purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution

Trade and Intercourse (Nonintercourse) Act of 1793, ch. 19, § 8, 1 Stat. 329, 330 (current version at 25 U.S.C. § 177), *quoted in* County of Oneida v. Oneida Indian Nation of N.Y. (*Oneida II*), 470 U.S. 226, 238 (1985).

The current version of the Nonintercourse Act, 25 U.S.C. § 177, provides:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

⁴ *Oneida II*, 470 U.S. at 233–36. The Court did not consider whether the taking was in accord with the law of the Oneida Indian Nation of New York.

⁵ “[I]n the Treaty of Fort Stanwix, 7 Stat. 15 (Oct. 22, 1784), the National Government promised that the Oneidas would be secure ‘in the possession of the lands on which they are settled.’” *Id.* at 231. The Court also noted:

The Treaty of Fort Harmar of 1789 stated that the Oneidas and the Tuscaroras were “again secured and confirmed in the possession of their respective lands.” 7 Stat. 34. The Treaty of Canandaigua of 1794 provided: “The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.” 7 Stat. 45.

Id. at 231 n.1.

⁶ Nonintercourse Act of 1793, § 8, 1 Stat. at 330.

Court ruled in *County of Oneida v. Oneida Indian Nation of New York (Oneida II)*⁷ that the purported transfer of title from the Oneida Indian Nation to the state of New York conducted without a treaty signed by the United States was not “valid.”⁸ Consequently, title to the lands taken by the state of New York from the Oneidas and other Haudenosaunee nations, such as the Cayuga Indian Nation,⁹ in violation of the Nonintercourse Act, remains to this day in the hands of those nations. This accords with the longstanding law to the effect that only Congress can extinguish Indian title. As the Court noted in *Oneida II*, “the Nonintercourse Acts simply ‘put in statutory form what was or came to be the accepted rule—that the extinguishment of Indian title required the consent of the United States.’”¹⁰

Of course, this is not the end of the story. These tribes retain title to their lands, but the question is what rights are associated with their retained title. If the Supreme Court’s recent decision in *City of Sherrill v. Oneida Indian Nation of New York*¹¹ means what it appears to mean, then the answer is “not much” or perhaps even “nothing at all.”¹² The issue in *Sherrill* was whether the city of Sherrill had the power to impose property taxes on land whose title was held by the Oneida Indian Nation when the Nation had purchased that land from the non-Indian possessor.¹³ The Oneida Indian Nation argued that it had never lost title to its land, and that once it obtained peaceable possession from the non-Indian occupant, then title and possession were reunited in its hands and the property should be treated as tribal land exempt from state jurisdiction, at least to the extent of being exempt from local property taxation, given the fact that the Oneida Indian Nation is a sovereign government entity. The Supreme Court disagreed, finding that the claim was barred by several doctrines, including laches, acquiescence, and impossibility. The claim was barred by laches, according to the Court, because the tribe had waited too long to bring suit; the taking of Oneida land had occurred in 1795 and the Oneida Nation did not file a lawsuit until 1970.¹⁴ The Oneida Indian Nation had also acquiesced in state governance of the land for almost 200 years and the Supreme Court believed that the

⁷ 470 U.S. 226 (1985).

⁸ *Id.* at 232–33, 253.

⁹ See *Cayuga Indian Nation of N.Y. v. Pataki*, 165 F. Supp. 2d 266, 271 n.1, 271–72, 304 (N.D.N.Y. 2001), *rev’d*, 413 F.3d 266, 268 (2d Cir. 2005).

¹⁰ *Oneida II*, 470 U.S. at 240 (quoting *Oneida Indian Nation of N.Y. v. County of Oneida (Oneida I)*, 414 U.S. 661, 678 (1974)).

¹¹ 544 U.S. ___, 125 S. Ct. 1478 (2005).

¹² See, e.g., *Oneida Indian Nation of N.Y. v. Madison County*, 376 F. Supp. 2d 280, 283 (N.D.N.Y. 2005) (granting a preliminary injunction to allow the court to determine whether Oneida lands could be foreclosed by the state to pay property taxes that arguably became owed in light of the *Sherrill* decision).

¹³ *City of Sherrill*, 544 U.S. at ___, 125 S. Ct. at 1483.

¹⁴ *Id.* at ___, 125 S. Ct. at 1486, 1491.

piecemeal recovery of sovereignty would result in checkerboard jurisdiction that would make governance untenable.¹⁵

II. PROBLEMS WITH THE REASONING IN *SHERRILL*

There are significant problems with the Supreme Court's reasoning in *Sherrill*. For one thing, it is ironic that a Supreme Court comprised of a number of justices who espouse the virtues of original intent and textualism find it so easy to ignore the plain language of a federal statute that has been in effect since one year after the Constitution was adopted. The 1790 version of the Nonintercourse Act makes painfully clear that the courts of the United States should refuse to recognize any transfer of title from any Indian nation to anyone unless the United States agreed to the transfer. The original version of the statute was crystal clear that sales of Indian lands shall not be valid "to any state";¹⁶ the fact that it was the state of New York that took the Oneida land rather than some private citizen in no way changes the outcome. This means that the fact that New York purported to obtain sovereignty over the land, as well as property rights, in no way changes the equation.

Moreover, the statute was amended in 1793, one year before the United States entered a treaty with the Oneida Nation guaranteeing it "free use and enjoyment" of its reserved territory¹⁷ and two years before New York took the land in 1795.¹⁸ The 1793 version states not only that no transfer of "title" shall be valid without the agreement of the United States, but adds that no "claim" to Indian lands "shall be of any validity in law or equity" unless the United States agrees to the sale.¹⁹ Sovereignty is a "claim" based on the transfer of title and, according to the text, it "shall [not] be of any validity in law or equity." I tell my first-year students that when you see the word "any" in a statute, you seize on it because it doesn't have to be there; the fact that Congress put it in is a message to the courts not to interpret the law in a way that will narrow its scope or create a loophole. Moreover, the Congress added, again unnecessarily, that the claim shall not be "of any validity in law or equity."²⁰ The "law" part refers to rights recognized by the law courts, such as a claim for damages for trespass; the "equity" part refers to claims cognizable in the equity courts which included any suit brought to obtain an injunction that would keep the

¹⁵ *Id.* at ___, 125 S. Ct. at 1491–93.

¹⁶ Nonintercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (current version at 25 U.S.C. § 177 (2000)).

¹⁷ Treaty of Canandaigua with the Six (Iroquois) Nations, art. 2, Nov. 11, 1794, 7 Stat. 44, 45.

¹⁸ *City of Sherrill*, 544 U.S. at ___, 125 S. Ct. at 1484.

¹⁹ Nonintercourse Act of 1793, ch. 19, § 8, 1 Stat. 329, 330 (current version at 25 U.S.C. § 177 (2000)).

²⁰ § 8, 1 Stat. at 329–30.

Indians off their own land or otherwise give control of the land to anyone other than the Indian nation whose land it was. The statute is written in a manner that has superfluous language and it is written in emphatic terms to apply to acts of the states “whether having the right of pre-emption to such lands or not”²¹ and to deny any rights whatsoever over lands taken in violation of the Act. In other words, for the state of New York to win, it had to argue that this statute, although clear on its face, was always subject to interpretation or even amendment by the judges through application of equitable principles and powers to shape the available remedies. Judges who espouse the doctrine of judicial restraint usually denounce discretionary doctrines because they allow judges to make law rather than apply it; although such judges usually bemoan such practices, they indulged themselves in them in this case.

The second irony is that it takes *chutzpah* for the Supreme Court to complain about the untenability of checkerboard jurisdiction when it was the Supreme Court that created checkerboard jurisdiction in a series of cases based on its ruling in *Montana v. United States*.²² Those cases granted Indian nations substantial sovereign powers over their own lands and over non-Indians who enter tribal lands, but nearly eliminated tribal sovereign powers over non-Indian lands inside Indian country.

A third irony is that a Supreme Court that portrays itself as an enemy of judicial activism felt the need to march into political terrain and define the relationship between the sovereign powers of the state of New York and the Oneida Indian Nation when it has ruled, time and again, that Congress has “plenary power” over Indian affairs and that any problems arising from shared sovereignty between the Oneida Indian Nation and the state of New York can be fixed by a congressional statute that can be passed without obtaining the consent of the tribe. The Congress could also choose to repeal the 1871 statute that prohibited the President and Senate from entering into treaties with Indian nations²³—a statute that may well be unconstitutional given the fact that the Constitution specifically grants the treaty power to the President and the Senate. A ruling in favor of the tribe could have been overturned or limited by Congress; thus, the parade of horrors that the Court imagined would almost certainly never have occurred.

Finally, the Supreme Court relied heavily on the fact that “the longstanding assumption of jurisdiction by the State over an area that is

²¹ Nonintercourse Act of 1790, § 4, 1 Stat. at 138. This language was added to make clear that the statute applied to the original thirteen states which were thought to have preemptive rights to Indian lands within their borders, while the United States held the preemptive right to lands in the territories and states that joined the Union after the original thirteen.

²² 450 U.S. 544 (1981); see *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Brendale v. Confederated Tribes & Bands of the Yakima Nation*, 492 U.S. 408 (1989).

²³ Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (current version at 25 U.S.C. § 71 (2000)).

over 90% non-Indian, both in population and in land use, may create ‘justifiable expectations.’”²⁴ Those expectations appear to be both on the part of the state and on the part of the local non-Indian population. Those non-Indian owners have interests in treating the land as theirs, and those interests are not *per se* illegitimate; after all, both the state of New York and the United States have acquiesced in the situation for 190 years. This might give those owners some reason to expect that their property rights will be recognized in courts of the United States.

But there is a minor problem with their root of title. It is a fundamental principle of property law in the United States that thieves cannot convey good title; it is recognized law in every jurisdiction that a forged document does not convey title even if the land is subsequently purchased by a bona fide purchaser. There is no question that the state of New York did not obtain valid title in 1795; in fact, the statute tells us that neither the state of New York nor any other person has the right to make any “claim” of any kind in either “law or equity” unless the United States formally approves.²⁵ The seizure of the land violated an unambiguous federal statute that has been amended but never repealed, remains in effect to this day, and contains no statute of limitations.²⁶

The Supreme Court rejected this argument. It held that the longstanding usage of land is normally allowed to continue, under doctrines such as adverse possession law, in order to ensure “the peace of society” from assertion of “antiquated demands.”²⁷ The failure to act expeditiously to recover one’s lands can be seen as a form of negligence on the part of the entitlement holder who could have avoided the reliance by faster action. As the Supreme Court explains: “laches, a doctrine focused on one side’s inaction and the other’s legitimate reliance, may bar long-dormant claims for equitable relief.”²⁸ In other words, if an owner acquiesces in the use and governance of land by another for a long time, the owner forfeits its rights partly because of the owner’s own negligence and partly because the failure to act sends a message to the wrongful occupant that continued occupation will be permitted.²⁹

²⁴ *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. ___, 125 S. Ct. 1478, 1490 (2005) (internal quotations omitted) (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604–05 (1977)).

²⁵ Nonintercourse Act of 1793, ch. 19, § 8, 1 Stat. at 330. Indeed, the current version of the statute retains the language clarifying that no purchase or claim to land purchased outside the prescribed fashion “shall be of any validity in law or equity.” 25 U.S.C. § 177.

²⁶ See *County of Oneida v. Oneida Indian Nation of N.Y. (Oneida II)*, 470 U.S. 226, 232–33, 240 (1985).

²⁷ *City of Sherrill*, 544 U.S. at ___, 125 S. Ct. at 1491 (“[C]ourts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights.” (quoting *Badger v. Badger*, 69 U.S. (2 Wall.) 87, 94 (1864) (internal quotation marks omitted))).

²⁸ *Id.* at ___, 125 S. Ct. at 1491.

²⁹ See generally Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611

Sherrill concerns sovereignty rather than property rights, but the Court clearly sees the same argument as relevant to property claims. As Justice Ginsburg's opinion explains: "[T]his Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands."³⁰ The result is a rather extraordinary situation. The Indian nations situated in New York may have title to hundreds of thousands of acres in that state but no rights over the land they own. The non-Indian trespassers have all the property rights associated with ownership, even though they lack the formal title. Now it is true that property rights are often divorced from title; this is obvious, for example, in the case of landlords and tenants. It is often the case that individuals without title have rights to control or access land owned by others. However, it is very unusual—actually, it is bizarre—to have legal title to property but no rights in the property whatsoever. This is an odd situation and not exactly what one would expect from a Supreme Court that is usually counted as a friend to property owners.

I must admit I am of two minds about this issue. On one hand, I am delighted that the Supreme Court recognizes that property rights come from informal as well as formal sources. Expectations based on longstanding possession, custom, family arrangements, oral statements, a course of dealing, acquiescence, and tacit agreement may give rise to property rights just as much as do government patents, formal deeds, written contracts, leases, mortgages and marriage certificates. In particular, the Supreme Court appears to have given whole-hearted support for what I have called the "reliance interest in property"—a principle I identified and argued for in an earlier law review article. I then observed that the law often grants a significant amount of protection to non-title holders when the title holder has acquiesced in the nonowner's use of the owner's property for a significant period of time.³¹

On the other hand, I react to the Supreme Court's reasoning in the *Sherrill* case with a fair amount of astonishment and anger. The Supreme Court has divorced title from ownership in a manner more radical than ever previously done in U.S. law and did so by blaming the victim. According to the Justices, the Oneida Indian Nation waited too long to vindicate its rights and the Oneidas have no one to blame but themselves for the loss of rights in their lands.³² In making this argument, however, the Court ignores certain facts—facts that are well-known to those versed in federal Indian law, as the Supreme Court certainly should be. A number of principles of both jurisdiction and substantive law barred the Oneidas from

(1988) (recognizing and supporting this principle).

³⁰ *City of Sherrill*, 544 U.S. at ___, 125 S. Ct. at 1492.

³¹ See Singer, *supra* note 29, at 663–66.

³² See *City of Sherrill*, 544 U.S. ___, 125 S. Ct. at 1494.

suing either the state of New York or the United States until the 1960s, and New York's sovereign immunity may bar suit even today. These facts make it ludicrous to blame the Oneida Indian Nation for waiting too long to file a lawsuit to recover the lands illegally transferred to the state of New York in the early 19th century. To add insult to injury, *Sherrill* suggested that the United States itself might also be barred from suing the state of New York on behalf of the Nation—either because the Oneida Nation waited too long to sue to vindicate its rights or because the United States acquiesced in the illegal seizure of Oneida land by the state of New York.³³ Using laches to bar the United States from bringing a claim is highly unusual. Blaming the Oneida Indian Nation because the United States failed to act on its behalf in a timely fashion is Kafkaesque.

This symposium marks the publication of the 2005 edition of *Cohen's Handbook of Federal Indian Law*. I chose to focus on the *Sherrill* case because it shows the Supreme Court's ignorance of—or willful blindness to—crucial facts about the history of the United States and of federal Indian law. The case therefore demonstrates the importance of a book that clarifies and makes accessible both this history and this law.

III. TITLE AND ENTITLEMENT

In 1788, the Oneida Indian Nation ceded most of its six million acre homeland to the state of New York, reserving only 300,000 acres for itself.³⁴ The cession was tragic but apparently lawful. The Oneida Indian Nation made the decision to do this, albeit under duress. The Articles of Confederation in effect at the time appeared to grant New York the right to deal with Indian nations within its borders.

One year later, everything changed. The Constitution of the United States was formally adopted in 1789, and it stripped New York of all its powers over its relations with the Indian nations situated within its borders. The adoption of the Constitution had a radical effect on the law governing the relations between the Oneida Indian Nation and the state of New York. This was fundamental but widely misunderstood; it was roundly ignored by the government of the state of New York in the years following adoption of the Constitution and has been similarly cast aside, at least in part, by the Supreme Court in recent years.

One of the core innovations of the Constitution was to centralize power over Indian affairs in the federal government. The Articles of

³³ *Id.* at ___, 125 S. Ct. at 1490 (“From the early 1800’s into the 1970’s, the United States largely accepted, or was indifferent to, New York’s governance of the land in question and the validity *vel non* of the Oneidas’ sales to the State. . . . In fact, the United States’ policy and practice through much of the early 19th century was designed to dislodge east coast lands from Indian possession.”).

³⁴ See *County of Oneida v. Oneida Indian Nation of N.Y. (Oneida II)*, 470 U.S. 226, 231 (1985).

Confederation adopted in 1781 had pointedly refused to reach a definitive answer to the question of the relative powers of the federal and state governments in relation to Indian affairs. In fact, it intentionally muddied the issue by appearing to grant exclusive control over such matters to the federal government while reserving two undefined areas of authority in the states. On one hand, the Articles granted the federal government the exclusive right to manage Indian affairs; at the same time it reserved certain powers to the states.³⁵ Article IX conferred on the Continental Congress “the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated”³⁶ Thus, the states appeared to reserve power over Indians who were “members” of the states (perhaps Indians who had left tribal communities and resettled among the whites). The Articles of Confederation also protected the state’s “legislative right” within “its own limits”³⁷—a phrase that was left undefined and therefore productive of immense confusion.³⁸ James Madison made fun of this provision in Federalist Paper No. 42, noting that it was contradictory and unclear to grant the federal government exclusive powers over Indians while reserving undefined powers to the states. Madison wrote:

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State is not yet settled; and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom by

³⁵ See ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 23 (4th ed. 2003).

³⁶ ARTS. OF CONFEDERATION art. IX.

³⁷ *Id.*

³⁸ See CLINTON ET AL., *supra* note 35, at 23.

taking away a part and letting the whole remain.³⁹

While this ambiguity may have been deliberate (putting off the issue until later) the failure to resolve definitively the question of the respective spheres of power of the states and the federal government over relations with Indian nations created numerous difficulties. The displeasure of some tribes with their treatment by states that were eager to obtain Indian land⁴⁰ led to the provisions of the United States Constitution adopted in 1789 that clearly centralized power over Indian affairs in the national government, excising the two exceptions that had reserved undelineated state powers over relations with Indian nations.

The United States Constitution ratified in 1789 resolved the question of the allocation of power over Indian affairs between the states and the federal government by clearly vesting exclusive power over Indian affairs in the federal government. First, the Indian commerce clause in Article 1, section 8, clause 3, gave Congress the power to regulate “Commerce . . . with the Indian Tribes.”⁴¹ It therefore not only designated tribes as sovereigns alongside “foreign Nations” and “the several States,”⁴² but centralized control over Indian affairs in the federal government and deprived the states of the undefined powers they had reserved over Indian affairs in the Articles of Confederation.⁴³ Congress asserted this exclusive authority immediately after adoption of the Constitution by passing the Nonintercourse Act of 1790,⁴⁴ centralizing and regulating trade with the Indian nations.⁴⁵

Although the Constitution formally and decisively resolved the prior ambiguities in the Articles of Confederation that had divided authority over Indian affairs between the Continental Congress and the states in undefined ways, the conflict between the federal government and the states over control of relations with Indian nations did not end in 1789. During the formative

³⁹ THE FEDERALIST NO. 42, at 268–69 (James Madison) (Clinton Rossiter ed., 1961); see also Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 132–33 (2002) (quoting THE FEDERALIST NO. 42, at 284–85 (James Madison) (J.E. Cooke ed., 1961)).

⁴⁰ See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790–1834*, at 35–37 (1970).

⁴¹ U.S. CONST. art. I, § 8, cl. 3.

⁴² *Id.*

⁴³ See Clinton, *supra* note 39, at 131.

⁴⁴ Nonintercourse Act of 1790, ch. 33, 1 Stat. 137 (current version at 25 U.S.C. § 177 (2000) and 25 U.S.C. § 261 (2000)).

⁴⁵ The Constitution further acknowledged the sovereignty of Indian nations by excluding “Indians not taxed” from population counts for the purposes of apportionment of representatives. U.S. CONST. art. I, § 2, cl. 3 (apportionment of representatives in Congress). The Fourteenth Amendment similarly excluded “Indians not taxed” from the count for apportioning representatives. U.S. CONST. amend. XIV, § 2. Along with granting the Congress the power to regulate commerce with the Indian nations, the Constitution gave the President power to negotiate treaties and made those treaties enforceable once ratified by the Senate. U.S. CONST. art. II, § 2. The treaty clause made no distinction between treaties made with Indian nations and other nations and was the source of federal power to negotiate treaties with Indian nations.

years after 1789, the United States entered many treaties with Indian nations. Those treaties were the “supreme Law of the Land”⁴⁶ and overrode any state law to the contrary. However, some states, such as New York and Georgia, continued at times to deal with Indian nations on their own and sometimes in the face of conflicting federal demands and operative federal statutes. The state of New York ignored the Nonintercourse Act when it entered negotiations with the Oneida Indian Nation to take its remaining lands. Unprotected by the United States, the Oneida Nation was effectively compelled to relinquish more of its lands to the state of New York in violation of federal law. The Supreme Court suggests that the Oneida Nation should have immediately brought a lawsuit to vindicate its rights. The question is: would such a lawsuit have been feasible?

IV. BARRIERS TO BRINGING A LAWSUIT

A. *First Barrier: Finding a Lawyer*

We are talking about an illegal taking of land by the state of New York in 1795. Suppose the Oneida Indian Nation had brought a lawsuit against the state of New York in 1796 to recover the land. Could it have brought such a lawsuit? The first thing it would have needed was a lawyer. To my knowledge, there were no Indian lawyers in 1796. Indeed, there were almost no Indian lawyers up until the 1960s when American Indians started attending law school in significant numbers.⁴⁷ This means that the tribe would had to have found a non-Indian lawyer admitted to the bar in the state of New York willing to bring the lawsuit—not an easy task. Such a lawyer would had to have wanted to aid the tribe, either because he believed in protecting the property rights of Indian nations or because he believed in protecting the power of the new federal government within the

⁴⁶ U.S. CONST. art. VI, § 1, cl. 2.

⁴⁷ The website of the extraordinarily important American Indian Law Center, located at the University of New Mexico, explains:

During the school year 1966–67, The University of New Mexico School of Law applied for and received funding for a Special Scholarship Program in Law For American Indians (now called PLSI), a program to increase the number of Indians and Alaska Natives in law schools throughout the nation. The SSPILFAI included an eight-week summer prelaw institute, placement in law school, financial assistance and informal counseling for students throughout their law school careers (the present-day PLSI no longer has scholarship funds available). At the time of the creation of the program by then-Dean Tom Christopher and Visiting Professor (and later Dean) Fred Hart, fewer than 25 Indian lawyers and 15 law students could be identified in the country. Now, largely through the pump-priming of that program, the number of Indian lawyers tops 3,000. In addition to its impact on the legal profession and legal education, the Special Scholarship Program also led to the creation of the American Indian Law Center.

American Indian Law Ctr., Inc., AILC’s History, <http://lawschool.unm.edu/ailc/history.php> (last visited Feb. 21, 2006).

constitutional system just adopted. Some tribes did obtain lawyers to litigate on their behalf. For example, the Cherokee Nation sued the state of Georgia in the Supreme Court only to have its case thrown out of court for lack of jurisdiction in 1831.⁴⁸ But the availability of a lawyer willing to take such a case is not a foregone conclusion.

B. *Second Barrier: Hiring and Paying for a Lawyer*

Even if the tribe could have found such a lawyer, it would have faced impediments to hiring him. During much of the history of the United States, Indians were treated as “wards” of the government and this status resulted in treatment similar to that accorded married women and children; they lacked capacity to contract without the consent of their “guardian.” Thus, for much of U.S. history, most tribal contracts had to be approved by the Secretary of the Interior.⁴⁹ This included contracts to hire lawyers.⁵⁰ Not until the Indian Reorganization Act of 1934 did federal law authorize tribes to hire lawyers and even then they were required to obtain the consent of the Secretary of the Interior.⁵¹

Moreover, unless the lawyer worked for free, the tribe would have had to pay the lawyer. Yet given the state of affairs in the eighteenth and nineteenth centuries, it is not clear the tribe would have had funds available to pay such a lawyer. If it used funds given to the tribe by the United States, it might not have been able to use such funds to pay a lawyer without obtaining the prior approval of the Secretary of the Interior to hire the lawyer in the first place.⁵² Thus, the Court of Claims ruled in 1908 that a contract between an Indian nation and a lawyer could not be enforced in court if the contract had not previously been sanctioned by the Secretary of the Interior.⁵³ The lawyer who rendered services to the Osage Nation in that case was thus limited to the compensation voted to him in an appropriations act by Congress. Moreover, the Secretary would refuse to agree to spend federal funds for a tribal attorney if the federal government

⁴⁸ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15, 20 (1831).

⁴⁹ See, e.g., 25 U.S.C. § 81(b) (2000) (“No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.”).

⁵⁰ See *In re Darch*, 265 N.Y.S. 86 (Sup. Ct. 1933) (establishing that contract by tribe with attorneys made without Secretarial approval is invalid and works no estoppel against the tribe). *But see* *Brown v. United States*, 486 F.2d 658, 661 n.2 (8th Cir. 1973) (noting that 25 U.S.C. § 81 does not prohibit attorney from agreeing to represent a tribe without a contract).

⁵¹ Ch. 576, § 16, 48 Stat. 984, 987 (current version at 25 U.S.C. § 476(e) (2000), amended by Indian Tribal Economic Development and Contracts Encouragement Act of 2000, Pub. L. No. 106-179, § 3, 114 Stat. 46, 47 (deleting requirement of secretarial approval)).

⁵² § 16, 48 Stat. at 987 (codified at 25 U.S.C. §§ 81, 476(e) (2000), amended by Indian Tribal Economic Development and Contracts Encouragement Act, § 3, 114 Stat. at 47 (deleting the words “the choice of counsel and fixing of fees to be subject to the approval of the Secretary” from § 476(e))).

⁵³ *Bailey v. United States*, 43 Ct. Cl. 353, 357 (1908).

did not view the tribal claim as having a substantial basis in law.⁵⁴ Indeed, it is an extraordinary fact that it was not until the year 2000 that Congress amended federal statutes to authorize Indian nations to contract to hire an attorney without the prior approval of the Secretary of the Interior.⁵⁵

Thus, the Oneida Indian Nation would have faced difficulties finding a lawyer willing to bring the lawsuit. It would have faced difficulties obtaining the consent of the United States to use funds given to it by the federal government to pay for such a lawyer. We know this partly because the United States refused to act to prevent the taking of Oneida lands at the time even though those takings were unlawful and flew in the face of the newly created federal authority.⁵⁶ Nor can we say that this impediment to suit was something that only affected the Oneida Nation in the early years of U.S. history. If anything, the capacity to find and hire a lawyer and to obtain the consent of the United States to pay for the lawyer would have gotten more difficult over time.

C. *Third Barrier: Finding a Court to Sue In*

1. *No Jurisdiction in State Court*

Suppose the Oneida Indian Nation had sued the state of New York in state court in New York in 1795 to undo or prevent the seizure of Oneida lands by the state of New York. The move would have been unavailing. New York law bars suits by Indian nations against the state, including actions to recover real property, without a special jurisdictional act.⁵⁷ Since New York went to the trouble of negotiating to take most of the land of the Oneida Indian Nation, it is a little difficult to see how such a legislative act would have been forthcoming. This bar against suits by Indian nations was based on the premise that Indians were wards of the state with no capacity to sue and that it was against public policy to allow such suits absent the express consent of the legislature.⁵⁸ This bar to suit was partially removed in 1953 when 25 U.S.C. § 233 conferred jurisdiction on New York courts over civil actions in which Indians brought suit for damages under state tort law against another “person or persons.”⁵⁹ The New York Indian Law also was

⁵⁴ The Attorney General opined in 1928 that the Secretary should refuse to approve a contract to pay a fee to a tribal attorney if the claim proposed to be asserted was without any substantial basis in law or equity. 35 Op. Att’y Gen. 421, 426 (1928).

⁵⁵ Indian Tribal Economic Development and Contracts Encouragement Act, § 2, 114 Stat. at 47 (amending 25 U.S.C. §§ 81 and 476).

⁵⁶ See discussion *supra* Part I.

⁵⁷ *Johnson v. Long Island R.R. Co.*, 56 N.E. 992, 993 (N.Y. 1900); *Seneca Nation of Indians v. Christy*, 27 N.E. 275, 281 (N.Y. 1891).

⁵⁸ *Johnson*, 56 N.E. at 993.

⁵⁹ *Oneida Indian Nation of N.Y. v. Burr*, 522 N.Y.S.2d 742, 743 (App. Div. 1987) (citing 25 U.S.C. § 233 (1982)).

similarly amended in 1953 and contains similar language.⁶⁰ However, the state of New York is not a “person” because the courts do not find waivers of sovereign immunity by implication.⁶¹

2. *No Jurisdiction in Federal Court*

Nor could the Oneida Indian Nation have brought suit in federal court. Although the Congress first created lower federal courts in 1789, their jurisdiction was limited, and Indian nations, like others, were “disabled from suing the Government without first obtaining a private bill from Congress permitting suit.”⁶² Moreover, the Supreme Court ruled in 1831 that the Cherokee Nation was not a foreign nation that could sue the state of Georgia in the Supreme Court under its original jurisdiction.⁶³ Indian nations did bring many lawsuits in the 19th century but these claims in federal court required special jurisdictional acts of Congress.⁶⁴ These acts often limited the claims that could be brought and, because they waived sovereign immunity, were interpreted narrowly by the courts.⁶⁵ This means that the Oneida Indian Nation could not have sued anyone in federal court without the consent of Congress and passage of a special act.

3. *No Jurisdiction in the Court of Claims*

In 1855, Congress created the Court of Claims to hear suits by citizens against the United States for certain claims based on “any law of Congress, or any regulation of the executive department, or upon any contract, express or implied, with the government of the United States.”⁶⁶ Yet that law was amended in 1863 to except claims “dependent on treaty stipulations entered into with foreign nations or with the Indian tribes.”⁶⁷ As Professor Nell Newton explains: “Remarkably, neither the bench nor the bar attempted to read this provision narrowly to permit claims by tribes not based on treaties to proceed in the Court of Claims. Instead, all assumed that the clause excepted any claim brought by an Indian tribe against the Government.”⁶⁸ Thus, no suit could have been brought in the

⁶⁰ N.Y. INDIAN LAW § 5 (McKinney 2000).

⁶¹ In *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund*, 658 N.E.2d 989, 993 n.3 (N.Y. 1995), the New York Court of Appeals held that both 25 U.S.C. § 233 and § 5 of the Indian Law allowed actions among Indians in state court but that the tribes were not “persons” subject to suit under those laws. By implication, the same conclusion would follow for the state of New York.

⁶² Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 770 (1992).

⁶³ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

⁶⁴ Newton, *supra* note 62, at 769–71.

⁶⁵ *Id.* at 771.

⁶⁶ Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 612 (creating Court of Claims).

⁶⁷ Act of Mar. 3, 1863, ch. 92, § 9, 12 Stat. 765, 767 (codified as amended at 28 U.S.C. § 1491 (2000)).

⁶⁸ Newton, *supra* note 62, at 770 (citing Richard Hughes, *Can the Trustee Be Sued for Its Breach? The Sad Saga of United States v. Mitchell*, 26 S.D. L. REV. 447, 461–62 & n.108 (1981) (criticizing

Court of Claims against the United States to complain about the loss of Oneida lands. Of course, the statute creating the new court said nothing about claims against the states, such as the Oneida claim against the state of New York for the unlawful taking of its lands.

4. *No Federal Question Jurisdiction Until 1875*

The Oneida Indian Nation also could not have sued in federal court because there was no general federal question jurisdiction until 1875. The Constitution gave Congress the power to create lower federal courts but did not mandate that it do so.⁶⁹ Congress did not grant lower federal courts jurisdiction over cases arising under “federal questions” until 1875⁷⁰ when it enacted the predecessor of 28 U.S.C. § 1331.⁷¹ Thus, even if the tribe had found a lawyer willing to bring the lawsuit, obtained the funds to pay the lawyer, as well as the consent of the United States to hire the lawyer and pay his fees, it could not have brought the claim in federal court until 1875.

D. *Fourth Barrier: Obtaining the Capacity to Sue*

So finally by 1875, there was a court willing to hear claims based on federal Indian law. Yet even then the tribes were at a loss. Like slaves and married women and children, they did not have capacity to sue on their own behalf. Early Marshall Court cases referred to Indian nations as being like “wards” in relation to their “guardian,” the United States.⁷² This language suggested that Indian tribes were like children or married women who did not have the capacity to sue without the consent of their “guardian.” More specifically, when the Supreme Court ruled in 1831 that the Cherokee Nation was not a foreign nation that could sue the state of Georgia in the Supreme Court under its original jurisdiction,⁷³ it also suggested, more generally, that Indian tribes “cannot maintain an action in

virtual exclusion of Indians from Court of Claims and noting that Indian claims could only be heard in Court of Claims pursuant to special jurisdictional statutes conferred by Congress) (parenthetical by Newton)); *see also* *Jaeger v. United States*, 27 Ct. Cl. 278, 282, 285 (1892) (noting that the “courts have not been opened to the Indian” and that “[w]hensoever [the Indians] have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them the civil rights of suitors”).

⁶⁹ U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

⁷⁰ Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2000)).

⁷¹ Section 1331 currently provides: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”

⁷² *E.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *see also* *United States v. Kagama*, 118 U.S. 375, 382 (1886) (indicating that Indians are referred to as “wards of the nation” and “pupils”).

⁷³ *Cherokee Nation*, 30 U.S. at 20.

the courts of the United States.”⁷⁴

It was not until 1966, when Congress passed 28 U.S.C. § 1362, that federally recognized Indian nations had the power to bring a lawsuit in federal court without first obtaining the consent of the United States. In 1966, federal law already allowed claims to be brought in federal court arising out of federal questions. Why would it be necessary to pass a statute granting federal district courts original jurisdiction over civil claims brought by a federally recognized “Indian tribe or band . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States”⁷⁵ when 28 U.S.C. § 1331 already gave those courts civil jurisdiction over “all civil actions arising under the Constitution, laws, or treaties of the United States”? One purpose was to exempt tribes from the jurisdictional amount that had required the claim involve an amount of at least \$10,000.⁷⁶ Land claims cases almost inevitably were able to meet this threshold, however. The more important aim of the statute was to clarify that the federal courts were open to lawsuits brought by Indian nations that could have been brought on their behalf by the United States when the United States chose not to bring the lawsuit.⁷⁷ As the Eighth Circuit explained:

Prior to the enactment of 28 U.S.C. §1362 in 1966, considerable uncertainty existed regarding the capacity of a tribe to sue or be sued in the absence of a specific statute conferring such capacity When Congress enacted 28 U.S.C. §1362 in 1966, it intended to authorize Indian tribes to bring suits in federal court to protect their federally derived property rights in those situations where the United States has declined to act in their behalf. *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016 (9th Cir. 1973); *see Salt River Pima-Maricopa Indian Community v. Arizona Sand and Rock Co.*, 353 F. Supp. 1098 (D. Ariz. 1972). Thus, “one of the purposes of the legislation was to permit the Tribes to initiate litigation involving issues which could have been instituted by the United States as trustee.” *Moses v. Kinnear*, 490 F.2d 21, 25 n.9 (9th Cir. 1974); *Confederated Salish and Kootenai Tribes v. Moe*, [392 F. Supp. 1297 (D. Mont. 1974)].⁷⁸

⁷⁴ *Id.* at 20; *see also* Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 46 (1979) (noting that it was widely believed that Indians and Indian nations did not have capacity to sue).

⁷⁵ 28 U.S.C. § 1362 (2000).

⁷⁶ H.R. REP. NO. 89-2040, at 1 (1966), *as reprinted in* 1996 U.S.C.C.A.N. 3145, 3145-46 & S. REP. NO. 89-1507, at 2 (1966) (both accompanying S. 1356).

⁷⁷ *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974).

⁷⁸ *Id.* at 1139-40 (citing United States Department of Interior, Federal Indian Law 490-91 (1972)).

The House and Senate Reports accompanying Public Law 89-635 which enacted 28 U.S.C. § 1362 explained that the bill had the dual purpose of removing the jurisdictional amount and allowing all Indian nations to bring claims which could have been brought by the United States as trustee of Indian lands “in those cases where the U.S. attorney declines to bring an action and the tribe elects to bring the action.”⁷⁹ The report goes on to state:

[T]he tribes would then have access to the Federal courts through their own attorneys. It can therefore be seen that the bill provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys.⁸⁰

E. *Fifth Barrier: Getting Tribal Property Claims Recognized as Raising Federal Questions*

The Oneida Indian Nation brought suit four years after passage of § 1362 in 1966—not an unreasonable delay. But at that point, the Oneida Nation faced still another hurdle. They had finally gotten into court. Did they have a claim? Did the Nonintercourse Act imply a private right of action creating a federal claim upon which the tribe could have sued? Until 1974, the consistent answer of the courts was “no.” When the Oneida Indian Nation brought its lawsuit in 1970, both the district court and the Second Circuit rejected the claim, holding first, that the Nonintercourse Act provided no private right of action and second, that tribal property rights were based on state not federal common law.⁸¹ The Second Circuit stated that the tribal claim was essentially a claim for ejectment and that such claims were premised on state statutes providing a remedy for the wrongful possession of land.⁸² Thus, it held that “a long and unbroken line of Supreme Court decisions holds that the complaint in such an action presents no federal question even when a plaintiff’s claim of right or title is founded on a federal statute, patent or treaty.”⁸³

It was not until 1974 that the Supreme Court affirmed that the Marshall Court’s affirmation of federal supremacy over the states in Indian affairs

⁷⁹ H.R. REP. NO. 89-2040, at 2, as reprinted in 1966 U.S.C.C.A.N. 3145, 3146–47; see also S. REP. NO. 89-1507, at 2.

⁸⁰ H.R. REP. NO. 89-2040, at 2–3, as reprinted in 1966 U.S.C.C.A.N. 3145, 3147; see also S. REP. NO. 89-1507, at 2.

⁸¹ *Oneida Indian Nation of N.Y. v. County of Oneida*, 464 F.2d 916 (2d Cir. 1972), *rev’d*, *Oneida Indian Nation of N.Y. v. County of Oneida (Oneida I)*, 414 U.S. 661 (1974).

⁸² *Oneida Indian Nation*, 464 F.2d at 920.

⁸³ *Id.* (citing, *inter alia*, *Florida Cent. & Peninsular R.R. v. Bell*, 176 U.S. 321 (1900)); see also *Deere v. St. Lawrence River Power Co.*, 32 F.2d 550 (2d Cir. 1929) (holding treaty claims do not create a federal question).

meant that an allegation of wrongful possession of Indian property in violation of the Nonintercourse Act was a claim based on federal common law, raising a federal question upon which the claim is based and allowing federal question jurisdiction under 28 U.S.C. §§ 1331 and 1362. The Supreme Court held in *Oneida I* that the Oneida Nation's possessory claim was "conferred by federal law, wholly independent of state law."⁸⁴

Tribal title was protected by federal common law even before the passage of the Nonintercourse Act and even in the case of the original thirteen states which, like New York, retained the right of preemption in Indian lands. It was the Constitution that divested the states of power over Indian affairs and subjected the tribes to the sole authority of the federal government.⁸⁵ The fact that the United States did not hold the right of preemption in Indian lands in New York "did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law."⁸⁶ Justice White further explained that the Oneida claim was based not only on its federal common law property rights, but on the Nonintercourse Act itself and treaties between the Oneida Indian Nation and the United States.⁸⁷

F. *Sixth Barrier: Finding a Private Right of Action*

When the Oneida claim reached the Supreme Court for the second time in 1985, the Court ruled, for the first time ever, that a remedy was available to the tribes themselves under federal common law for the wrongful taking of land by one of the original thirteen states in violation of the

⁸⁴ *Oneida I*, 414 U.S. at 666. Justice White explained:

It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States—a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. This the United States did with respect to the various New York Indian tribes, including the Oneidas. The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This has remained the policy of the United States to this day.

Id. at 667–68.

⁸⁵ *Id.* at 670.

⁸⁶ *Id.*

⁸⁷ *Id.* at 677–78.

Nonintercourse Act.⁸⁸ The Court reaffirmed its view that Indian nations had “aboriginal title” to the lands “they had inhabited from time immemorial,” but that the “doctrine of discovery” gave colonial nations, and later the United States, the ultimate fee title to those lands such that “no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign.”⁸⁹ Moreover, “[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law.”⁹⁰ The Court then ruled that the Nonintercourse Act did not preempt federal common law because it contained no remedies and thus was not a comprehensive regulatory scheme displacing federal common law.⁹¹ The Court thus avoided the need to determine whether to imply a private right of action in the Nonintercourse Act by finding that it merely reaffirmed and left in place any remedies available under federal common law. Under the Supremacy Clause, such common law rights displaced state law to the contrary, including, importantly, state adverse possession law and statutes of limitations for bringing possessory claims and suits in ejectment.⁹²

The Supreme Court then held that no federal statute of limitations barred the bringing of a claim under the Nonintercourse Act. In other cases, such as federal civil rights statutes, the Supreme Court has sometimes borrowed state law statutes of limitation to fill the gap left by a federal law that contained no statute of limitation. But here the Court came to the extraordinary conclusion that borrowing state statutes of limitation applicable to wrongful possession of land would contradict the substance of federal law and policy and thus the federal law protection for Indian title embodied both in federal common law and the Nonintercourse Act preempted state law to the contrary. “We think the borrowing of a state limitations period in these cases would be inconsistent with federal policy.”⁹³

Finally, the Supreme Court addressed the question of laches. The dissenting Justices, including Justices Stevens, White, Rehnquist and Chief Justice Burger, opined that the claim was barred by laches.⁹⁴ The majority opinion refused to reach this issue on the ground that it had been waived below. But Justice Powell noted that “it is far from clear that this defense is available in suits such as this one,” explaining in a footnote that laches is normally not applied to legal claims for damages, that “extinguishment of Indian title requires a sovereign act,” and that the statutory restraint contained in the Nonintercourse Act of 1793 “is still the law.”⁹⁵ He went

⁸⁸ *County of Oneida v. Oneida Indian Nation of N.Y. (Oneida II)*, 470 U.S. 226 (1985).

⁸⁹ *Id.* at 233–34.

⁹⁰ *Id.* at 234.

⁹¹ *Id.* at 236–39.

⁹² *Id.* at 236, 240–41.

⁹³ *Id.* at 241.

⁹⁴ *Id.* at 255–56 (Stevens, J., dissenting).

⁹⁵ *Id.* at 244 & n.16.

on: “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.”⁹⁶

G. *Seventh Barrier: Overcoming Sovereign Immunity*

Even if the Oneida Indian Nation could have found an attorney, secured the money to pay for the attorney and the consent of the United States to enter a contract with the attorney, found a state or federal statute that gave the court jurisdiction to hear the case as well as a private right of action, and then convinced a judge that it had the capacity to bring the lawsuit without first convincing the United States to act on its behalf, the lawsuit still would have come to nothing. Why? The state of New York has sovereign immunity and since the state of New York had never waived its immunity and the Congress had never abrogated its immunity, the Oneida Indian Nation could never have brought the lawsuit on its own.

The Supreme Court itself reaffirmed state sovereign immunity from suits by Indian nations in 1991 in the case of *Blatchford v. Native Village of Noatak*.⁹⁷ Indeed, it extended this ruling in 1999 in *Alden v. Maine*, ruling that the Eleventh Amendment not only protected the states from being sued in federal court but that the Eleventh Amendment reflected a structural constitutional principle protecting the states from suit in state court unless they voluntarily waive their immunity or the federal government abrogates that immunity either by passing a federal statute or by the United States deciding on its own behalf to sue the state.⁹⁸ To pile the barriers even higher, the Supreme Court ruled in 1996 in *Seminole Tribe v. Florida* that the Congress has no power to abrogate state sovereign immunity pursuant to its powers under the Indian Commerce Clause.⁹⁹

There were thus only two ways for the Oneida Indian Nation to bring a lawsuit against the state of New York. One would be to convince New York to pass a law waiving its sovereign immunity and conferring jurisdiction in New York courts to hear the claim. The second would have been to convince the United States to bring the lawsuit on its behalf.¹⁰⁰

Why did the Oneida Indian Nation sue the County of Oneida rather than the state of New York in its lawsuit in 1970? It did so because it

⁹⁶ *Id.* at 245 n.16.

⁹⁷ 501 U.S. 775 (1991).

⁹⁸ 527 U.S. 706 (1999).

⁹⁹ 517 U.S. 44 (1996).

¹⁰⁰ The United States did intervene as a plaintiff, for example, in the case brought by the Cayuga Indian Nation of New York against Governor Cuomo (and later Pataki). See *Cayuga Indian Nation of N.Y. v. Pataki*, 80-CV-930, 80-CV-960, 1999 U.S. Dist. LEXIS 5228, at *1 (N.D.N.Y. Apr. 15, 1999), *rev'd on other grounds*, 413 F.3d 266 (2d Cir. 2005).

feared that the courts would rule that New York has sovereign immunity protected by the Eleventh Amendment—a protection that does not extend to subdivisions of the states. This fear was given support in Section V of Justice Powell’s majority opinion in *Oneida II* when he explained that New York had not waived its sovereign immunity merely because it had violated the federal Nonintercourse Act.¹⁰¹ Nor did the court reach the question of whether the Nonintercourse Act abrogated state sovereign immunity, but under current case law, there is a good chance the Supreme Court would hold that no such abrogation occurred. The Supreme Court generally requires clear and unmistakable language to override state sovereign immunity in a federal statute and this is arguably not the case in the Nonintercourse Act. The Indian law canons of construction suggest reading the statute more broadly, however, to find an abrogation of state sovereign immunity. But the result of this debate is still not settled.

H. *Eighth Barrier: Finding a Breach of Trust*

Could the tribe have forced the United States to bring a lawsuit on its behalf? The answer again is “almost certainly not.” The Supreme Court ruled in *United States v. Mitchell* that tribes cannot sue the United States for breach of trust unless a statute gives them a right to sue for money damages for such a breach.¹⁰² This was recently reaffirmed in *United States v. Navajo Nation*.¹⁰³ The only exception to this principle is if the United States itself takes control over the land as it did in *United States v. White Mountain Apache Tribe*¹⁰⁴—something that clearly did not happen in the case of the Oneida Indian Nation.¹⁰⁵

The Oneida Nation did sue the United States in 1951 in the Indian Claims Commission to obtain damages for the loss of its land to the state of New York in twenty-five treaties of cession from 1795 to 1846.¹⁰⁶ The Claims Commission determined that the Nonintercourse Act imposed a fiduciary obligation on the United States to ensure that the Oneidas received “conscionable consideration” from the state of New York for the

¹⁰¹ County of Oneida v. Oneida Indian Nation of N.Y. (*Oneida II*), 470 U.S. 226, 251–52 (1985).

¹⁰² *United States v. Mitchell (Mitchell II)*, 463 U.S. 206 (1983); *United States v. Mitchell (Mitchell I)*, 445 U.S. 535 (1980).

¹⁰³ 537 U.S. 483 (2003).

¹⁰⁴ 537 U.S. 465 (2003).

¹⁰⁵ Although the First Circuit recognized a trust obligation rooted in the Nonintercourse Act that might obligate the United States to sue to prevent the wrongful transfer of tribal land, it acknowledged that the federal government retained prosecutorial discretion in the matter. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975). Moreover, this opinion has been effectively superseded by the two *Mitchell* decisions, as elaborated in *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *United States v. White Mountain Apache*, 537 U.S. 465 (2003).

¹⁰⁶ *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. ___, 125 S. Ct. 1478, 1486 (2005); see *Oneida Indian Nation of N.Y. v. County of Oneida*, 622 F.2d 624, 626 & n.4 (2d Cir. 1980).

lands taken.¹⁰⁷ This is an odd reading of the Nonintercourse Act. The Act prohibits transfer of title without the consent of the United States and settled law requires an explicit act of Congress to extinguish tribal title; mere nonaction by the United States is insufficient to establish the requisite consent.¹⁰⁸ The Claims Commission interpreted its charge as limited to assessing damages for the lands wrongfully taken or taken for less than adequate compensation and thus had no authority to declare transfers of property unlawful or to issue injunctive relief settling title to land.¹⁰⁹ It could, of course, have denied damages on the ground that the transfer of title was void, that it had never been approved by the United States, and that assessing damages would amount to a conclusion that the Oneida Nation had lost title to its land, a finding that the Claims Commission had no authority to make under the Nonintercourse Act. Filing suit in the Claims Commission was thus a two-edged sword; it did result in a judgment that the United States had a fiduciary duty to the Oneida Nation but it limited that obligation to ensuring adequate compensation. Thus, the Claims Commission process gave the Oneida Nation no path toward claiming that the transfer of title was void and of no effect and provided no way to sue the United States to make such a claim.

I. *Ninth Barrier: Overcoming Power Politics*

These legal impediments to suit must be added to the obvious political ones. At the time the Oneida land was taken by New York in 1795, the federal government did not have the resources or will to enforce the Nonintercourse Act. Nor could the Oneida Indian Nation have believed that a judge of any court, whether federal or state, would intervene to stop the seizure of tribal lands that had been agreed to in a treaty between the Oneida Indian Nation and the state of New York under circumstances which appeared to leave the Nation little choice but to acquiesce yet again in the loss of more of its lands. Since the Revolution, the Oneidas had been dealing both with New York and the United States, meeting with representatives of both governments. The niceties of federal jurisdiction

¹⁰⁷ *Oneida Nation of N.Y. v United States*, 26 Ind. Cl. Comm'n 138, 145 (1971). The Court of Claims affirmed this ruling, but held that "the United States' duty extended only to land transactions of which the Government had knowledge." *City of Sherrill*, 544 U.S. at ___, 125 S. Ct. at 1486 (citation omitted). On remand, the Commission found "that the Federal Government had actual or constructive knowledge of all of the treaties and would be liable if the Oneidas had not received conscionable consideration." *Id.* (citation omitted).

¹⁰⁸ See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (Nell Jessup Newton et al. eds., 2005 ed.) [hereinafter COHEN'S HANDBOOK]; *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R.*, 314 U.S. 399, 346, 353 (1941) (congressional intent to abrogate aboriginal property rights must be "plain and unambiguous" or "clear and plain").

¹⁰⁹ COHEN'S HANDBOOK, *supra* note 108, § 5.06[3].

could have been no clearer to the Oneida government than to the officials in the state of New York who apparently did not believe that the Nonintercourse Act applied to them.

Over time, the will of the United States to seize Indian land got even stronger, with removal in the 1830s, the Indian wars at the end of the 19th century by which the United States acquired most of the land in the West and the allotment policy after 1887. It was not until the Indian Reorganization Act of 1934 that tribal governments were given (relatively) strong support by the federal government, and even then the tribes were not allowed to hire a lawyer without the consent of the Secretary of the Interior. The Indian Claims Commission Act, passed in 1946, gave Indian nations the right to go to an administrative tribunal to make claims against the United States for wrongful taking of tribal lands, but it did not authorize lawsuits against the states.¹¹⁰ Not until the 1960s, at the dawn of the self-determination era, and passage of the 1966 federal statute that finally gave Indian nations the unambiguous power to bring suits in federal court to vindicate their rights under federal law, was it clear that a claim based on violation of the Nonintercourse Act and federal common law might be viable. The Oneida claim was brought four years later.

It is one thing to argue that the non-Indian possessors of land have substantial reliance interests that might outweigh claims by the Haudonesaunee to recover possession of their lands in New York. It is another to blame the Indian nations of New York for having caused their own problems by waiting too long to attempt to vindicate their rights when both Congress and the Supreme Court made it impossible for those claims to be brought until they were in fact brought. Not only was there no unreasonable delay in this case, but the Oneida Indian Nation acted with admirable haste, once the law allowed it to bring its suit.

V. THE CONSTITUTIONAL SOLUTION

What to do? The best solution to these controversies would be for the United States to negotiate, finally, in good faith with the sovereign nations situated within the borders of the state of New York. The Constitution created the solution here. The President, with the consent of the Senate, may enter into treaties with Indian nations. The 1871 statute prohibiting this is arguably unconstitutional. Even if it is constitutional, the result is simply that the House of Representatives, as well as the Senate, must agree to legislation signed by the President and negotiated with the relevant Indian nations determining the property and sovereignty issues at stake here.

The Supreme Court has ruled that Congress has plenary power simply to

¹¹⁰ Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (codified at 25 U.S.C. § 70 (2000)).

extinguish the title of the Oneida Indian Nation and put an end to the controversy once and for all. Congress has not done so. The non-Indian possessors of New York might be thought to favor such a solution. Why has Congress not done this? It may perhaps be that Congress recognizes the great injustice this would entail. It has deferred to judicial determinations that the property rights of the Oneida Indian Nation have not been extinguished in the past and has sat by and allowed the courts to determine the consequences of the split between title and possession that this involves.

Judicial protection for the property rights of Indian nations would not result in the displacement of millions of people. The fears of non-Indians that this might occur and the worries of title insurance companies in New York that lands possessed by non-Indians might revert to Indian possession were wholly unrealistic. After all, it is not as if the non-Indian population of New York is wholly without power in the halls of Congress. Given the Supreme Court's gift of plenary power to Congress in these matters, does anyone seriously believe that Congress would not have protected the non-Indian population from wholesale displacement at the hands of the Oneida Indian Nation? And although the Oneida Nation did seek declaratory relief that would allow it to recover land that had been illegally taken by the state of New York and even attempted to join 20,000 private landowners as defendants in 2000,¹¹¹ arguing that as the title holder of the lands they unlawfully possessed, it had a right to eject them, there was never any indication that the Oneida Indian Nation actually intended to eject all the non-Indian trespassers on its lands.

Either by treaty or statute, political negotiations could have taken place, and still could take place, between the sovereigns that the Constitution identified as the ones with the legitimate power to resolve questions over Indian land: the Indian nations themselves and the United States. Of course, the state of New York has significant interests in the outcome of those negotiations. As a political matter, it is unlikely the United States would force a result on New York that New York did not agree to itself. It is important to reiterate that the Constitution and federal statutes deny New York the power to take either tribal land or diminish tribal sovereignty. However, the Supreme Court, in *Sherrill*, has accomplished this result through federal common law.

The future of the *Sherrill* ruling depends on the way it is interpreted by federal courts in general and the Supreme Court in particular. As of March 2006, we have evidence that the decision may result either in grave damage to Indian property rights or constitute a tempest in a teapot.

On the grave damage front, a three-judge panel of the Second Circuit has applied the *Sherrill* decision to throw out not only claims for ejectment

¹¹¹ *Oneida Indian Nation of N.Y. v. County of Oneida*, 199 F.R.D. 61, 67 (N.D.N.Y. 2000).

but a claim for damages by the Cayuga Indian Nation that had succeeded after many years of litigation in the district court.¹¹² This ruling is particularly disturbing because payment of damages by the state of New York in no way interferes with reliance interests of current possessors of Cayuga land and because the district court had found, as a factual matter, that the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma had *not* delayed in asserting their possessory claims but had done everything possible over 200 years to press those claims.¹¹³

On the hopeful front, District Judge David Hurd has ruled that, despite the *Sherrill* ruling that the state of New York has the power to impose property taxes on Oneida lands repurchased from non-Indian owners, the law may provide no ready remedy to enforce any such obligation. In *Oneida Indian Nation of New York v. Madison County*, the court ruled that Madison County could not lawfully foreclose on tribal land for nonpayment of property taxes because (1) the Nonintercourse Act prohibits alienation of tribal land without the consent of Congress; (2) the Oneida Indian Nation of New York has sovereign immunity protecting it from suit and that immunity has not been waived by the tribe or abrogated by Congress; (3) the county failed to give the Oneida Indian Nation the requisite amount of notice required by state statute, thereby violating the Nation's due process rights; and (4) the Oneida Indian Reservation has not been disestablished or diminished and only a clear act of Congress can accomplish that result.¹¹⁴

Possession may be nine-tenths of the law, but federal law also proclaims that Indian title is "as sacred as the fee simple of the whites."¹¹⁵ If Indian title means nothing, does that mean that the fee simple of the whites also means nothing? Or does it mean that the courts of the United States now reject the principle that Indians have "the same right [to own property] as is enjoyed by white citizens"¹¹⁶ and that their title remains unless extinguished by Congress? The reliance interests of long-term possessors deserve respect but this does not mean that title holders whose rights persist to the present day are not also entitled to some form of legal protection. Compromise is possible here but it will not happen if the federal courts simply wipe out the tribal claims completely.

¹¹² *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *see also* *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005) (extending *Sherrill* to authorize the county to impose its zoning and other land use regulations on Cayuga lands).

¹¹³ I volunteered my services to work on an amicus brief supporting the Cayuga claim.

¹¹⁴ *Oneida Indian Nation of N.Y. v. Madison County*, 5:00-CV-506, 2005 U.S. Dist. LEXIS 25287, at *32 (N.D.N.Y. Oct. 27, 2005).

¹¹⁵ *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835).

¹¹⁶ 42 U.S.C. § 1982 (2000).