2007

This Land Is Your Land, This Land Is My Land: Cayuga Indian Nation of New York v. Pataki

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Recommended Citation
Katherine E. Germino, This Land Is Your Land, This Land Is My Land: Cayuga Indian Nation of New York v. Pataki, 52 Vill. L. Rev. 607 (2007).
Available at: https://digitalcommons.law.villanova.edu/vlr/vol52/iss3/6

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2007]

THIS LAND IS YOUR LAND, THIS LAND IS MY LAND:
CAYUGA INDIAN NATION OF NEW YORK v. PATAKI

I. INTRODUCTION

Adorned in headdresses and bonnets, each year elementary schoolchildren throughout the United States reenact the story of the First Thanksgiving.1 Woven into this tale of teepees, turkey and thankfulness are stories of cultural exchange and respect between the Pilgrims and Indians.2 Often missing in this depiction of camaraderie are the years of stolen land, discrimination and ruffled feathers that followed.3 The unfair


2. Compare Carol Quinn, It’s Time to Give Thanks, WEEKLY READER, Nov. 1, 2005, at 81 (depicting Pilgrims and Native Americans as friends), with Chuck Larson, Teaching About Thanksgiving (1986), available at http://www.halcyon.com/pub/FWDP/Americas/tchthnks.txt (“Every year I have been faced with the professional and moral dilemma of just how to be honest and informative with my children at Thanksgiving without passing on historical distortions, and racial and cultural stereotypes.”).

In this Note, I refer to a 1995 Census Bureau study that questioned members of various ethnic and racial groups to determine what term they preferred to be called. See generally CLYDE TUCKER ET AL., BUREAU OF THE CENSUS & BUREAU OF LABOR STATISTICS, A STATISTICAL ANALYSIS OF THE CPS SUPPLEMENT ON RACE AND ETHNIC ORIGIN 17-18 tbl. 4 (1995), cited in Jonathon B. Tingley, Stealing From the Poor to Give to the Rich: Why New York Should Abandon Attempts to Collect Fuel Taxes on Reservations, 69 ALB. L. REV. 357, 357 n.1 (2005). According to the study, nearly 50% of American Indians preferred the term “Indian” and 37% preferred the term Native American. Id. (summarizing findings of Census Bureau study). An “Indian” can be defined as a person that had some ancestors living in America before it was discovered by the Europeans and as a person who “is considered an Indian by the community . . .” in which he/she resides. See FELIX S. COHEN, FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 2 (1986) (introducing important Federal Indian Law definitions).

3. See, e.g., Robert T. Coulter & John D. B. Lewis, Cayugas Denied Fairness, N.Y. L.J., Sept. 29, 2005, at 2 (“History attests that Indian nations and peoples have long been denied the even-handed application of the law.”); see also William Bradford, Beyond Reparations: An American Indian Theory of Justice, 66 OHIO ST. L.J. 1, 1 (2005) (“It is perhaps impossible to overstate the magnitude of the human injustice perpetrated against American Indian people: indeed, the severity and duration of the harms endured by the original inhabitants of the U.S. may well rival those suffered by any other group past or present, domestic or international.”); Felix S. Cohen, Original Indian Title, 32 MINN. L. REV. 28, 29 (1948) (dispelling notion that United States acquired its land through various treaties with Europe). “As for the original Indian owners of the continent, the common impression is that we took the land from them by force and proceeded to lock them up in concentration camps called ‘reservations’.” Id. at 34-35. “New York State made numerous deals to get Indian

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removal of Indian tribes from their sacred land has been an important topic in American law for over two hundred years. Recently, the Second Circuit created a new chapter in this tangled tale with its holding in Cayuga Indian Nation of New York v. Pataki.

The seminal Supreme Court case regarding Indian land claims is the City of Sherrill v. Oneida Indian Nation. The City of Sherrill Court determined that laches barred the Oneida Indian Nation from receiving tax immunity on lands that the government unlawfully took from their original reservation in the early 1800s, which the Indian Nation later repurchased on the open market. City of Sherrill marked the third time land claims involving the Oneida Indian Nation reached the Supreme Court; however, this was the first time the Court used laches as a defense and held, "standards of federal Indian law and federal equity practice preclude[d] the Tribe from rekindling embers of sovereignty that long ago land, almost all of them without federal approval. This lamentable history of fraud, deceit and dishonorable conduct is set out in the district court's decision. The Cayuga Nation was left entirely landless. . . ." Coulter & Lewis, supra (illustrating how Indian Nations were treated with disrespect).

4. See Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 272 (2d Cir. 2005) (recognizing two hundred year history behind their holding); Wenona T. Singel & Matthew L.M. Fletcher, Power, Authority and Tribal Property, 41 TULSA L. REV. 21, 21-22 (2005) (recounting history of Indian land claim cases). See generally Arlinda Locklear, Morality and Justice 200 Years After the Fact, 37 NEW. ENG. L. REV. 593 (summarizing Indian law history); Judith T. Younger, Book Review, Whose America?, 22 CONST. COMMENT. 241, 241 (2005) ("The 3.6 million square miles of [America] . . . once belonged to Indian tribes. Now Indian lands comprise only a tiny fraction of the whole, about 4"). This transfer of land possession from Indian tribes to settlers "has been and continues to be a source of tension between tribes on the one hand and federal, state and local governments and non-Indians on the other." Id.

Indian law is the "body of law dealing with the status of Indian tribes and their special relationship to the federal government. . . . 'Indian Law' might be better termed 'Federal Law About Indians.'" WILLIAM C. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 1 (1988). Four themes emerge in Federal Indian Law: (1) Indian tribes have their own tribal governments, (2) Congress has the power to regulate tribal governments, (3) only the federal government can control tribal governments, and (4) the federal government has the duty to protect the interests of the Indian tribes. See id.; see also COHEN, supra note 2, at xxiii (exploring basis of Federal Indian Law).

5. See Cayuga Indian Nation, 413 F.3d at 274 (ruling that Indian Nations are not entitled to monetary damages for land that was unjustly taken from them).

6. 544 U.S. 197 (2005); see Cayuga Indian Nation, 413 F.3d at 273 ("City of Sherrill has dramatically altered the legal landscape against which [courts] will consider [tribes'] claims."); Singel & Fletcher, supra note 4, at 22 (asserting that City of Sherrill and Cayuga Indian Nation rejected "long-established middle ground" in Indian land claim cases and created new ground).

7. See City of Sherrill, 544 U.S. at 202-21 (ruling laches barred Indian Nations from receiving equitable relief). The Oneida Nation is a "federally recognized Indian tribe" and "one of the six nations of the Iroquois." See id. at 203 (presenting background information on Oneida). "At the birth of the United States, the Oneida Nation's aboriginal homeland comprised some six million acres in what is now central New York." Id.
grew cold." Nonetheless, City of Sherrill is presently the standard that lower courts must follow in Indian land claim cases.

Cayuga Indian Nation is the first appellate level case to interpret City of Sherrill. The Second Circuit concluded that City of Sherrill "dramatically altered the legal landscape" against which courts consider Indian land claim cases. In effect, the Second Circuit held that laches barred the Cayuga Indian Nation from receiving monetary damages for land that the state government unlawfully took from them. This holding, however, is based on an erroneous and overly broad reading of City of Sherrill and leaves Indian Tribes without any remedy.

8. Id. at 214.
9. See Cayuga Indian Nation, 413 F.3d at 267-68 (recognizing that court must examine Cayuga's claim "against a legal backdrop that has evolved since the [district court's rulings]"). The Court in City of Sherrill held that laches barred the Indians' claim for relief. See City of Sherrill, 544 U.S. at 221 (rejecting Oneidas' claim on basis of laches). The Court stated: [T]he distance from 1805 to the present day, the Oneida's long delay in seeking equitable relief against New York or its local units, and developments in the City of Sherrill spanning several generations, evoke the doctrine of laches . . . render[ing] inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.

Id.

Lower courts are bound by the precedent set forth by the courts above them. See Amy Borgman, Stamping Out the Embers of Tribal Sovereignty: City of Sherrill v. Oneida Indian Nation and Its Aftermath, 10 GREAT PLAINS NAT. RESOURCES J. 59, 71 (Spring 2006) (commenting on ramifications of City of Sherrill decision). Accordingly, City of Sherrill's "selective and expansive" style could cause lower courts to read too much into its holding. See Singel & Fletcher, supra note 4, at 46 (theorizing on effects of City of Sherrill).

10. See Coulter & Lewis, supra note 3 (explaining Cayuga Indian Nation was decided only three months after City of Sherrill); Singel & Fletcher, supra note 4, at 22 (acknowledging Cayuga Indian Nation decision came shortly after City of Sherrill).

11. Cayuga Indian Nation, 413 F.3d at 273; see also New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 496 (E.D.N.Y. 2005) (dismissing summary judgment claim on basis that facts of case could be differentiated from holding in Cayuga Indian Nation and City of Sherrill, but acknowledging that Cayuga Indian Nation and City of Sherrill cases may ultimately effect outcome of case); Cayuga Indian Nation v. Vill. of Union Springs, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) (dismissing complaint and granting motion for summary judgment in light of holdings in Cayuga Indian Nation and City of Sherrill).

12. See Cayuga Indian Nation, 413 F.3d at 268 (reversing district court judgment).

13. See id. at 290 (Hall, J., dissenting) ("Nothing in City of Sherrill suggests a total bar on the ability of Indian tribes to obtain damages for past wrongs where Congress has explicitly provided for it"); see also Adams, Supreme Court Drops Cayuga Land Claim Case, INDIAN COUNTRY TODAY (Oneida, N.Y.), May 24, 2006, at A1 (explaining that Judge Jose Cabranes's Second Circuit opinion was sweeping and "filled with legal errors"). "[T]he court ha[s] become 'result-driven,' bending legal principles or making them up to frustrate Indian claims based on solid precedent." Id.

This result is particularly disturbing because on May 15, 2006, the Supreme Court refused to review the Cayuga land claim appeal. See id. (discussing reaction to Supreme Court decision); William Kates, Denial of Cayuga Claim Applauded, BUFFALO NEWS, May 16, 2006, at A5 (supporting Supreme Court's decision); Scott
This Note explores the potential consequences of the Second Circuit’s conclusion. Part II explores the background for Indian land claim cases. Part III examines the relevant facts and traces the procedural history of the case. Part IV analyzes the Second Circuit’s reasoning behind their decision in Cayuga Indian Nation. Part IV offers an explanation as to why the Second Circuit decided Cayuga Indian Nation incorrectly. Part V concludes the discussion of Indian land claims by focusing on the impact this decision has had on the economically struggling Indian reservations, and the effect it will continue to have on Indians seeking land claim remedies.

Rapp, Supreme Court Rejects Land Claim, POST-STANDARD (SYRACUSE, N.Y.), May 16, 2006, at A1 (reviewing Supreme Court’s decision). The Supreme Court accepts a case by issuing a writ of certiorari. See Adams, supra (explaining Supreme Court’s decision process). Each year, the Supreme Court typically grants one hundred appeals. See id. (same). The Cayuga Indian Nation’s case appeared on a list with 240 other rejected appeals and appeared without a comment by the Supreme Court. See id. (illustrating that Cayuga Indian Nation’s certiorari rejection was one of many by Supreme Court). “[T]he court might not necessarily have agreed with the Second Circuit ruling and might have wanted to wait for the issues to be developed further before making a ruling.” Id. (hypothesizing that Indian land claim cases will eventually be granted certiorari).

14. For a discussion of the background of Indian land claim cases, see infra notes 19-60 and accompanying text.

15. For a discussion of the facts and procedural history of Cayuga Indian Nation, see infra notes 61-82 and accompanying text.

16. For a discussion of the Second Circuit’s analysis in Cayuga Indian Nation, see infra notes 83-123 and accompanying text.

17. See Cayuga Indian Nation, 413 F.3d at 280 (Hall, J., dissenting) (“While City of Sherrill v. Oneida Indian Nation, ... has an impact on this case, it does not compel the conclusion that the plaintiffs are without any remedy for what the [d]istrict [c]ourt found to be the illegal transfer of their land.” (internal citation omitted)); Singel & Fletcher, supra note 4, at 23 (“We argue the underlying purpose of laches is inconsistent with the exercise of laches by the City of Sherrill and Cayuga Indian Nation courts.”); see also Adams, supra note 13 (citing brief written by Solicitor General of United States Paul D. Clement) (declaring Cabranes’s analysis was “deeply flawed,” “fundamentally misguided” and “marked by serious legal errors”). For a critique on the Second Circuit’s holding, see infra notes 124-88 and accompanying text.

18. See Sam Lewin, Supreme Court Under Fire From Tribal Leaders, NATIVE AMERICAN TIMES (Glenpool, Okla.), May 26, 2006, at 1 (“It continues to amaze me at how biased the courts have become towards Natives.” (quoting member of St. Regis Mohawk Tribal Council)). “The current make-up of the United States Supreme Court is being called the ‘most anti-Indian court in the history of the country....” Id. (discussing Supreme Court’s refusal to review Cayuga Indian Nation). “In light of Cayuga’s broad interpretation of Sherrill, similarly-situated tribes seeking retribution for past wrongs will be faced with yet another battle.” See Borgman, supra note 9, at 71. “Our history has taught us to expect little and today’s decision confirms what we always suspected—that we can’t and should never have trusted this process.” See Adams, supra note 13 (quoting Clint Halftown, federally recognized chief of Cayuga Indian Nation). If the recent Supreme Court decisions are any guide, Indian Nations should not expect to have their rights protected by the Supreme Court. See Joseph William Singer, Symposium Foreword: Indian Nations and the Law, 41 TULSA L. REV. 1, 4 (2005) (hereinafter Singer, Symposium Foreword) (expressing disgust with recent Supreme Court decisions). For a further discussion on the
II. BACKGROUND

A. The Nonintercourse Act

Since the passage of the Nonintercourse Act in 1790, various laws and court rulings determined how the federal government would treat Indian Nations and how they would compensate Indian Nations for the unjust dispossession of their tribal land. Under the Nonintercourse Act, impact this holding will have on Indian Nations, see infra notes 189-204 and accompanying text. For a conclusion on Cayuga Indian Nation, see infra notes 205-08 and accompanying text.

19. 25 U.S.C.A. § 177 (2007) ("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."); see also Oneida Indian Nation of N.Y. State v. Oneida County, New York (Oneida I), 414 U.S. 661, 664 (1974) (explaining that Nonintercourse Act did not allow "the conveyance of Indian lands without the consent of the United States"). Initially, the Federal Government pursed a "policy protective of the New York Indians," striving to secure their rights to Indian lands. See County of Oneida, New York v. Oneida Indian Nations of N.Y. State (Oneida II), 470 U.S. 226, 231-32 (1985) (tracing historical developments in Indian law); see also COHEN, supra note 2, at 68-71 (acknowledging initial legislative efforts to protect Indians).

20. See 25 U.S.C.A. § 177 (defining Congress's duties regarding Federal Indian law and Commerce Clause). The Nonintercourse Act was the first act by Congress to regulate Indian affairs. See COHEN, supra note 2, at 69 (analyzing history of Nonintercourse Act); Locklear, supra note 4, at 595 (explaining why land claims exist). The Constitution grants Congress the power to control all of the territory within the United States. See U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."). Nevertheless, Congress's authority is not absolute. See COHEN, supra note 2, at 96 (describing scope of Congress's power on Indian land claim cases). Congress's power must be "founded upon some reasonable basis." Id. Thus, the actions of Congress are subject to judicial review. See id. (explaining check on Congress's power in Indian land claim cases). The Court emphasizes "Congress' unique obligation toward the Indians." See Morton v. Mancari, 417 U.S. 535, 554-55 (1974) (upholding previous Supreme Court decisions that "single[ ] out Indians for particular and special treatment").

Prior to the passage of the Nonintercourse Act, the United States abided by the "doctrine of discovery." See Locklear, supra note 4, at 594 (reviewing history of Indian land claims). The Doctrine of Discovery was a principle of International Law that stated that whoever discovered the land had legal title to the land. See Johnson v. M'Intosh, 21 U.S. 543, 573 (1832) ("This principle was, that discovery gave title to the government by . . . whose authority, it was made, against all other European governments, which title might be consummated by possession."); see also Michael C. Blumm, Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy Indian Country, 28 VT. L. REV. 713, 714 (2004) (tracing history of discovery doctrine).

President George Washington urged Congress to pass the Nonintercourse Act in 1790 and then in 1793, Congress passed a more detailed version of the Act. See Oneida II, 470 U.S. at 230 (holding that Indians could maintain right of action for unjust dispossession from their land). The Nonintercourse Act only applied to Indian Country. See COHEN, supra note 2, at 6 (tracing history of term "Indian Country"). Indian Country was deemed "country belonging to the Indians, occu-
the sale of Indian tribal land is only valid if the federal government ratifies the treaty. Nonetheless, many states still negotiated treaties with Indian tribes without approval from the federal government.22

B. Remedies in Tribal Lands Cases

When Indians sought to have their land restored, courts had the option of whether to dismiss Indian land claims, restore the land or choose a middle ground.23 In Johnson v. M'Intosh,24 Chief Justice Marshall illustrated the Supreme Court’s reluctance to re-establish Indian Nations’ tribal lands when he held, “[c]onquest gives a title which the Courts of conqueror cannot deny.”25 From that point on, the Supreme Court made

ied by them and to which the government recognized as having some kind of right or title.” Id. Various versions of this act have been in force since 1790. See Cayuga Indian Nation, 413 F.3d at 268-69 (stating history of Cayuga land claim case).

The purpose of the Nonintercourse Act was to prevent unfair and improper disposition of Indians from their native lands. See Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 119-21 (1960) (holding land could be taken from Tuscarora Indian Nation in order to build dam so long as Tuscarora Indian Nation received just compensation). The Nonintercourse Act, however, did not attempt to control the conduct of Indians. See Canby, supra note 4, at 11-12 (offering historical overview of Federal Indian Law).

The United States federal government has plenary power over the Indian tribes, which stems from three sources. See Monroe Price, Law and the American Indian: Readings, Notes and Cases 16 (1973) (exploring federal government’s sources of power in Federal Indian Law). The Constitution grants the President powers to make treaties and also grants Congress power “to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .” See U.S. Const. art. I, § 8, cl. 3 (“[Congress has power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”); see Price, supra, at 16 (analyzing federal government’s power over Indian affairs). In addition, the Supreme Court has applied a canon of construction to justify their power over Indian tribes. See id. at 17 (same). For a further discussion of the court’s canon of construction, see infra note 25. Moreover, the federal government’s authority is “inherent in the federal government’s ownership of the land which the tribal units occupy.” Id. (citing Johnson v. M’Intosh, 21 U.S. 543 (1832) (footnote omitted)).

21. See Oneida I, 414 U.S. at 678 (concluding Indians could bring claim against government for land treaties that were invalid under Nonintercourse Act).
22. See Locklear, supra note 4, at 595 (detailing unjust practices of state governments).
23. See Singel & Fletcher, supra note 4, at 22 (explaining “spectrum of choices” for courts when examining Indian land claim cases).
24. 21 U.S. 543 (1832).
25. Id. at 588. The courts have traditionally employed a canon of construction that when given the option, they construe treaties in favor of Indian Nations. See Canby, supra note 4, at 12 (describing canon of construction); see also Borgman, supra note 9, at 63 (summarizing canon of construction). Three Chief Justice Marshall opinions helped form this canon of construction: Johnson v. M’Intosh, Cherokee Nation v. Georgia and Worcester v. Georgia. See, e.g., Borgman, supra note 9, at 63 (citing holdings in each of these cases (footnote omitted)). In Johnson v. M’Intosh,
it clear that when given the option, they would not restore tribal lands, but instead would turn to other remedies, such as monetary damages. Two Supreme Court cases involving the Oneida Indian Nation demonstrate this "middle ground." In *County of Oneida v. Oneida Indian Nations* ("Oneida I"), the Supreme Court ruled that Indian Nations had a right to bring land claims to federal court. *County of Oneida v. Oneida Indian Nations* ("Oneida II") expanded upon that ruling and held that Indian Nations could seek monetary damages for land that the state governments unlawfully took from them. In the most recent Indian land claim cases, however, the American Court system took a much harsher approach on reparation claims and used laches as an equitable defense.

Chief Justice Marshall recognized the legal right of Indians to their lands, but also noted that those rights existed at the "sufferance of the federal government." See 21 U.S. at 546 ("[A]ll the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognised in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians."). discussed in, CANBY, supra note 4, at 12-13 (surveying development of this doctrine). The second case was *Cherokee Nation v. Georgia*, in which Marshall characterized Indian tribes as "domestic dependent nations" and "wards." See 30 U.S. 1, 16-17 (1831) (holding that Indian tribes were not foreign states but rather "ward" nations within "guardian" United States), quoted and discussed in, CANBY, supra note 4, at 14-15. The final case was *Worcester v. Georgia*, whereby Marshall concluded that the Cherokee Nation, and in effect all Indian Nations, are distinct communities where the state has no jurisdiction. See generally 30 U.S. 515 (1832), quoted and discussed in, CANBY, supra note 4, at 15-16.


27. See *Singel & Fletcher*, supra note 4, at 22 ("Until recently, courts have chosen a version of the middle ground, best exemplified by the Supreme Court’s decisions in the Oneida Indian Nation’s land claims where Indian tribes brought legal (as opposed to equitable) claims against states, political subdivisions and private landowners.").


29. See id. at 667 ("Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws or treaties of the United States.").


31. See id. at 230 (allowing Indian Nations to bring land claims).

32. Compare *Oneida II*, 470 U.S. 226, 244-45 n.16 (1985) (holding that counties and state of New York were liable for damages to Oneida tribe but also noting "it is questionable whether laches properly could be applied"), and *Ewert v. Bluejacket*, 259 U.S. 129, 137 (1922) (rejecting use of laches defense), with *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005) (holding that laches bars Indians’ claim for relief), and *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005) ("We understand *Sherrill* to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations."). See also *Borgman*, supra note 9, at 60 ("After these two cases, the message is clear: the American Court system will no longer sympathize with tribes seeking retribution for past wrongs.").
1. The Doctrine of Laches

Laches is an equitable doctrine, by which a court denies relief to a party that waited too long to bring a claim when that “delay that makes it inequitable to accord the relief sought.” Thus, “one party’s inaction and the other’s legitimate reliance” are the underlying principles of the laches doctrine. The laches doctrine was developed to “protect good faith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them.” The laches defense, however, may only be used in courts of equity and does not apply in actions at law.

Before 2005, it seemed unclear whether the laches doctrine could bar Indians from land claims in cases involving treaties made in violation of the Nonintercourse Act. This uncertainty is apparent in several Su-

33. 30A C.J.S. Equity § 128; see, e.g., Felix v. Patrick, 145 U.S. 317 (1892) (holding doctrine of laches barred Indian from recovering their tribal land).
34. City of Sherrill, 544 U.S. at 217; see also Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965) (“[T]he right to be free of stale claims in time comes to prevail over the right to prosecute them.”).
35. Ewett, 259 U.S. at 138 (concluding that doctrine of laches did not bar Indians from their land claims).
36. 30A C.J.S. Equity § 128 (defining laches).

When examining whether the laches defense applies courts may consider the lapse in time, the change in the character of the property and the “iniquity of permitting the claim to be enforced.” See, e.g., City of Sherrill, 544 U.S. at 217-18 (explaining long lapse of time where Oneida Indian Nation did not bring claim and change in “character of the property” could bar Oneida Nation from remedy); see also Galliher v. Cadwell, 145 U.S. 368, 373 (1892) (declaring lapse of time is not sole determinant in applying laches doctrine). In the Second Circuit, laches is a question of fact for the district court. See Tri-Star Pictures, Inc. v. Leisure Time Prods., 17 F.3d 38, 44 (2d Cir. 1994) (recognizing that appellate courts could not order complete dismissal of laches claim).

Traditionally, the United States is not subject to the defense of laches. See Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 279 (2d Cir. 2005) (arguing why laches should apply to present case). Previously, the Second Circuit held that laches could not be applied to a suit by the United States. See Oneida Indian Nation v. New York, 691 F.2d 1070, 1074 (2d Cir. 1982) (“It is clearly established that a suit by the United States as trustee on behalf of an Indian tribe is not subject to state delay-based defenses.”). Nonetheless, the Seventh Circuit outlined three exceptions in which the defense of laches could apply to the United States. See United States v. Admin. Enters., Inc., 46 F.3d 670, 672-73 (7th Cir. 1995) (holding that doctrine of laches did apply to federal government).
preme Court opinions. In 1892, the Court in *Felix v. Patrick* used the laches doctrine to bar Indian claims. The *Felix* Court explained that if it allowed the Dakota Indian tribe to bring its land claim, the Court would encourage other Indian Nations to bring similar land claims, which the Supreme Court wanted to discourage as it would inconvenience non-Indian settlers. Conversely, in *Ewert v. Bluejacket*, the Court rejected the laches doctrine and explained that it could not be used to protect someone who committed an unlawful act. Both of these holdings have been used to justify Supreme Court, circuit and district court holdings.

2. The Oneida Trilogy

The most noted and recent Supreme Court cases involve the Oneida Indian Nation, one of the six nations of the Iroquois. In *Oneida I* and *Oneida II*, the Supreme Court ruled tribal nations could bring land claims. Most recently, the Supreme Court in *City of Sherrill* ruled laches barred Indian nations from bringing land claims.

In *Oneida I*, the first in the Oneida Indian Nation trilogy, the Oneida Indian Nation asserted that the land they ceded to the New York state government in 1795 violated the Nonintercourse Act Treaty because the federal government did not ratify the treaty.

38. See, e.g., *City of Sherrill*, 544 U.S. at 216 (asserting laches bars Indian land claims); *Felix*, 145 U.S. at 330 (allowing laches to bar Indian land claims). But see *Oneida II*, 470 U.S. 226, 226 (1985) (allowing Indians to bring forth land claims); *Ewert*, 259 U.S. at 138 (ruling laches does not bar Indian land claims).


40. See id. at 335 (forbidding Indian Nations from bringing land claims).

41. See id. at 335 (explaining that if Indians bring land claims, non-Indians will be forced to leave their homes and progress that non-Indians made with land will be undone).

42. 259 U.S. 129 (1922).

43. See id. at 138 (“An act done in violation of statutory prohibition is void and confers no right upon the wrongdoer.”).

44. Compare *City of Sherrill* v. Oneida Nation of N.Y., 544 U.S. 197, 217 (2005) (electing to base its holding on *Felix*), with *Oneida II*, 470 U.S. 226, 232 (1985) (using *Ewert* as its precedent). Nevertheless, in *City of Sherrill*, the Court asserted that it did not overrule *Oneida II* because “the question of damages for the Tribe’s ancient dispossession [was] not at issue in [City of Sherrill]. . . .” *City of Sherrill*, 544 U.S. at 221.

45. See generally, *City of Sherrill*, 544 U.S. 197; *Oneida II*, 470 U.S. 226; *Oneida I*, 414 U.S. 661, 678 (1974) (concluding Indians could bring claim against government for land treaties that were invalid under Nonintercourse Act); see also Coulter & Lewis, supra note 3 (differentiating between *Oneida II* and *City of Sherrill* while also discussing importance of both holdings).

46. See *Oneida II*, 470 U.S. at 230 (holding Indians “may have a live cause of action for a violation of its possessory rights that occurred 175 years ago”); *Oneida I*, 414 U.S. at 678 (concluding Oneida Indian Nation could bring claim against government for land treaties that were invalid under Nonintercourse Act).

47. See, e.g., *City of Sherrill*, 544 U.S. at 221 (using laches as defense).

48. See *Oneida I*, 414 U.S. at 664 (reviewing allegations set forth in Oneida Indian Nation’s complaint).
sought "fair rental value" for that land.\textsuperscript{49} After the New York district court and Second Circuit dismissed the claim, the Supreme Court ruled that Indian Nations could bring land claim suits to the federal government because they were cases that "[arose] under the Constitution, law or treaties of the United States."\textsuperscript{50} The Supreme Court did not mention whether or not laches barred Indian Nations from recovery in land claim cases.\textsuperscript{51}

In \textit{Oneida II}, the Oneida Indian Nation sought monetary damages for land that was unlawfully taken from them by New York State in 1795.\textsuperscript{52} At trial, the County of Oneida argued that laches barred the Oneida Indian Nation from monetary recovery; however, the district court rejected this argument, and the county did not reassert this defense at the appellate level.\textsuperscript{53} Subsequently, the Supreme Court did not rule on the laches claim.\textsuperscript{54} The Supreme Court noted, however, that the "application of the equitable defense of laches in an action of law would be novel indeed."\textsuperscript{55} In addition, the Supreme Court indicated that the logic utilized in \textit{Ewert}, whereby the Supreme Court rejected the laches defense in certain circumstances, also applied to this Indian land claim case.\textsuperscript{56}

In contrast to \textit{Oneida I} and \textit{Oneida II}, where the Oneida Indian Nation sought monetary compensation, the Oneida Indian Nation in \textit{City of Sherrill} sought equitable relief—specifically, exemption from property taxes both in the present and in the future.\textsuperscript{57} The Oneida Indian Nation argued that their current property should be exempt from taxation because it was once part of their original reservation that the New York State government bought unlawfully in the early 1800s, which the Oneida later re-

\textsuperscript{49} See \textit{id.} at 664-65 (explaining that Oneida Indian Nation wanted "fair rental value of the land" because "1795 cession was for an unconscionable and inadequate price").

\textsuperscript{50} See \textit{id.} at 663-82 (analyzing whether federal courts had jurisdiction over Oneida Nation's challenge under 28 U.S.C. §§ 1331 and 1362 and holding that federal jurisdiction was proper).

\textsuperscript{51} See \textit{id.} (including no discussion of laches).

\textsuperscript{52} See \textit{Oneida II}, 470 U.S. 226, 229 (1985) (stating issue of case). "The Oneidas alleged that their ancestors conveyed 100,000 acres to the State of New York under a 1795 agreement that violated the Trade and Intercourse Act (Nonintercourse Act)." \textit{Id.}

\textsuperscript{53} See \textit{id.} at 245 (indicating why Court would not address laches in its \textit{Oneida II} opinion).

\textsuperscript{54} See \textit{id.} at 244-45 (rejecting dissent's argument that laches should be applied).

\textsuperscript{55} \textit{Id.} at 244 n.16.

\textsuperscript{56} See \textit{id.} (quoting \textit{Ewert v. Bluejacket}, 259 U.S. 129, 138 (1922)). The Court stated: [T]he equitable doctrine of laches, developed and designed to protect good-faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions. \textit{Id.} (quoting \textit{Ewert}, 259 U.S. at 138).

\textsuperscript{57} See \textit{City of Sherrill v. Oneida Indian Nation of N.Y.}, 544 U.S. 197, 198 (2005) (differentiating \textit{City of Sherrill} from previous land claim holdings).
purchased on the open market. The Court in City of Sherrill ruled that laches barred the Oneida Indian Nation from receiving any equitable remedy because, similar to Felix, where the Supreme Court applied laches, the value of the land increased and the character of the property changed. The City of Sherrill Court noted, however, that this holding did not overturn their holding in Oneida II.

III. TRAIL OF TEARS: FACTS AND PROCEDURAL HISTORY

Cayuga Indian Nation v. Pataki was the culmination of two hundred years of wrongdoing and mistreatment by the United States government. Up until the eighteenth century, the Cayuga Indian Nation, one of the six nations of the Iroquois, inhabited nearly three million acres of land in present-day New York State. On February 25, 1789, before Congress

58. See id. at 198 (explaining Oneida Indian Nation's argument as to why it should be exempt from paying property taxes on its land). In the early nineteenth century, New York State federal agents made illegal land treaties with the Indians and "took an active role . . . in encouraging the removal of the Oneidas . . . to the west." See id. at 205 (quoting 26 Ind. Cl. Comm'n 138, 145 (1971) (omissions in original)) (tracing history of Oneida tribal land). By 1890, the Oneida Nation of New York held only three hundred and fifty acres of their original six million acres. See id. at 207 (recounting removal of Oneida). In 1951, the Oneida "initiated proceedings before the Indian Claims Commission" for land that New York State took from them in violation of the Nonintercourse Act. See id. at 207-08 (summarizing Oneida land claim cases). In 1985, the Supreme Court ruled that the Oneida could seek compensation for the "violation of their possessory rights based on federal common law." See id. at 198 (quoting Oneida II, 470 U.S. at 236) (providing history of Oneida land claim cases).

59. See id. at 217 (citing Felix v. Patrick, 145 U.S. 317, 326, 333-34 (1892)) ("The sort of changes to the value and character of the land noted by the Felix Court are present in even greater magnitude in this suit.").

60. See id. at 221 ("In sum, the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in Oneida II.").

61. See generally Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266 (2d Cir. 2005). See also Rapp, supra note 13 (quoting Glenn Feldman, who represented Seneca-Cayugas after Supreme Court refused to hear appeal) ("The Cayugas have gotten the shaft twice—once by the state when it took their land illegally some 200 years ago and now today with the Supreme Court refusing to hear their appeal."); Coulter & Lewis, supra note 3 (presenting history of Cayuga Indian Nation land claim case); John Woods, Big Indian Land Claim Verdict Grew from Two-Decade Suit, N.Y. L.J., Nov. 26, 2001, at 1 (calling district court's judgment "golden opportunity to correct two centuries of wrongdoing by New York State") (quoting two attorneys who represented Cayuga Indian Nation).

62. See Cayuga Indian Nation, 413 F.3d at 268 ("[F]rom time immemorial until the late eighteenth century the Cayuga [Indian] Nation owned and occupied approximately three million acres of land in what is now New York State."). The Cayuga Indian Nation's land ran from Lake Ontario to the Pennsylvania border. See id. (discussing wide tract of land formerly occupied by Cayuga Nation). New York is home to the sixth largest Indian population in the United States of America. See Tingley, supra note 2, at 360 (examining Indian population in New York State). Presently, there are seven federally recognized tribes in New York State, one of which is the Cayuga Nation. Id. (same). Most of the tribal land for the seven Indian Nations is located in western New York. Id. (same).
passed the Nonintercourse Act in 1790, the Cayugas ceded all but 64,015 acres of that land.\textsuperscript{63} On July 27, 1795, New York State and the Cayuga Indian Nation entered into a treaty that violated the Nonintercourse Act.\textsuperscript{64} The treaty ceded the Cayuga Nation’s remaining 64,015 acres to New York, and the State promised to pay the Cayuga Nation $1800 “annually in perpetuity.”\textsuperscript{65} Following this treaty, the Cayuga Nation only owned a three-square mile area.\textsuperscript{66} In 1807, New York State violated the Nonintercourse Act once more when they purchased the Cayuga Nation’s remaining three-square mile area for $4800.\textsuperscript{67} Both of these treaties violated the Nonintercourse Act because the federal government did not ratify the treaties.\textsuperscript{68}

\textit{Cayuga Indian Nation} involved twenty-five years of intense litigation, debate and calculations.\textsuperscript{69} On November 19, 1980, the Cayuga Nation filed a complaint alleging that they were the rightful owners of the aforementioned 64,015 acres because both treaties were invalid under the Nonintercourse Act.\textsuperscript{70} Initially, the Cayuga Nation requested that the district court restore their right to possession and grant them monetary dam-

\textsuperscript{63} See Cayuga Indian Nation, 413 F.3d at 268 (describing 1789 treaty). In the 1789 treaty, the Cayuga tribe ceded all of its land except for an area of 64,015 acres, referred to as the “Original Reservation.” See id. (same). The “Original Reservation” refers to the land on “the eastern and western shores of the northern end of Cayuga Lake.” See id. (same).

The Cayuga Indian Nation is a member of the Six Iroquois Nations along with the Oneidas, the Mohawks, the Senecas, the Onondagas and the Tuscaroras. See \textit{id.} at 269 n.1 (citing Cayuga Indian Nation v. Cuomo, 565 F. Supp. 1297, 1303 (N.D.N.Y. 1983)) (detailing member nations of Six Iroquois Nations). The Six Iroquois Nations and the United States entered into the Treaty of Canandaigua on November 11, 1794. See \textit{id.} at 268-69 (citing 7 Stat. 44) (explaining history of Cayuga Indian land claim). The Treaty of Canandaigua recognized the Cayuga’s Original Reservation and promised that “the land would remain theirs until they ‘chose to sell the same to the people of the United States who have the right to purchase.’” \textit{Id.} at 269 (quoting 7 Stat. at 45). At that time, land sales were only valid if the treaty was between the Indian Nations and the federal government. See \textit{id.} (reiterating Nonintercourse Act requirements).

\textsuperscript{64} See \textit{id.} (explaining that federal government never explicitly ratified treaties involving sale of Cayugas’ lands). New York violated the Nonintercourse Act because the Act specifically required that treaties for the sale of Indian land be between the Tribe and the federal government and not the Tribe and the state government. See 25 U.S.C. § 177. For a further discussion of the Nonintercourse Act, see \textit{supra} notes 19-22 and accompanying text.

\textsuperscript{65} See Cayuga Indian Nation, 413 F.3d at 269 (exploring history of Cayuga claim).

\textsuperscript{66} See \textit{id.} (providing background for \textit{Cayuga Indian Nation} land claim case).

\textsuperscript{67} See \textit{id.} (presenting facts of case).

\textsuperscript{68} See \textit{id.} (“[T]he treaty was never explicitly ratified by a treaty of the Federal Government.”).

\textsuperscript{69} See Coulter and Lewis, \textit{supra} note 3 (noting extensive litigation in Cayuga land claim case).

\textsuperscript{70} See Cayuga Indian Nation, 413 F.3d at 269 (tracing history of case). In their complaint, the Cayuga alleged that they were the “owners of and have the legal and equitable title and the right of possession” to the land known as the Original Reservation. See \textit{id.} (quoting Cayuga Indian Nation complaint)
ages, such as tax funds from the possessors of the land and fair rental value of the land.71

At the district court level, the Cayuga Nation case involved two phases: a liability phase and a damages phase.72 In the liability phase, the court ruled that the Cayuga Nation could sue under the Nonintercourse Act because they were an “Indian tribe.”73 The United States entered as a plaintiff-intervener because the federal government moved to mediate on behalf of the Cayuga Indian Nation in order to “enforce the [Nonintercourse Act], overcome New York’s sovereign immunity, and make possible an award of damages against New York.”74 In addition, the court recognized that Second Circuit precedent dictated that this land claim was brought “timely.”75

After the district court concluded the liability phase, the district court turned to the issue of damages.76 In the damages phase, the district court ruled that monetary damages were a sufficient remedy, while ejectment and repossession were not because they were too drastic.77 After analyzing the market value damages, fair rental value damages and prejudgment in-

71. See id. (explaining what Cayuga Indian Nation sought in their complaint).

72. See id. at 270–72 (reciting phases of district court’s procedure).

73. See id. at 270 (explaining process of liability stage). After the Cayuga filed the complaint, they moved to name a “defendant class of landowners.” See id. at 269 (reviewing history of land claim). Miller Brewing Company was named a representative of the defendants. See id. (same). Also, in 1981, the district court allowed the Seneca-Cayuga tribe of Oklahoma to enter the case as “plaintiff-intervenor.” See id. at 269–70 (same). The Seneca-Cayuga tribe filed a complaint very similar to the original complaint. See id. at 270 (same). The United States government was also a “plaintiff-intervenor.” See id. at 270–71 (same).

The defendants tried various legal tactics to dismiss the case. See id. at 270 (detailing Cayuga land claim case). First, the defendants tried to dismiss the case for lack of subject matter jurisdiction and for failure to state a claim. See id. (illustrating legal tactics defendants tried to use). The district court denied both of these motions. See id. (same). Then, in the complaint, the defendants contended that the Cayugas were barred by various doctrines, including abandonment laches. See id. (same). The district court denied both of those defenses. See id. (same). The district court concluded that the plaintiffs could sue under the Nonintercourse Act and that the Cayuga Nation’s action was timely. See id. (deciding Cayuga Indian Nation could go forward with case). Because the district court deemed the Cayuga’s action timely, it meant that the Cayuga Nation was not barred by laches as dictated by Second Circuit precedent. See id. (noting that Second Circuit precedent allowed this case to proceed).

74. See Coulter & Lewis, supra note 3 (noting federal government’s role in Cayuga Indian Nation); see also Cayuga Indian Nation, 413 F.3d at 270–71 (explaining government’s entrance as plaintiff-intervenor).

75. See Cayuga Indian Nation, 413 F.3d at 270 (citing Oneida Indian Nation v. Oneida County, 719 F.2d 525, 538 (2d Cir. 1983)). In total, the liabilities phase lasted eleven years. See id. (tracing history of land claim case).

76. See id. at 271 (moving on to damages phase).

77. See id. (“[M]onetary damages will produce results which are as satisfactory to the Cayugas.”).
terest, the district court determined that the Cayuga Indian Nation was entitled to $247.9 million dollars on October 2, 2001.78 Following the judgment, the district court faced additional motions.79 The district court granted permission for the defendants to appeal on June 17, 2002.80 On December 11, 2002, the Second Circuit granted the district court’s certification of appeal.81 On appeal, the Second Circuit concluded that City of Sherrill controlled the analysis of the case and ruled that laches could be applied to Indian land claims and reversed the $247.9 million judgment.82

IV. ANALYSIS

A. Latching onto Laches: Second Circuit Clings to City of Sherrill

In Cayuga Indian Nation, the Second Circuit began its analysis of Indian land claims by examining the Supreme Court’s holding in City of Sherrill.83 The Second Circuit needed to determine whether City of Sherrill directly applied to the Cayuga’s case.84 After addressing the equitable doctrine of laches, the Cayuga Indian Nation’s initial ejectment claim and its monetary claim, the Second Circuit determined that the “broadness of the Supreme Court’s statements” affected the district court’s holding.85 Consequently, the Second Circuit held that even though the Cayuga Indian Nation did not seek equitable relief, laches barred them from a mon-

78. See id. (stating district court’s holding).
79. See id. at 273 (describing post-judgment motions). The district court denied New York State’s motion “for judgment as a matter of law and for a new trial,” but granted the motion to amend the judgment. See id. The district court held that the motion could be amended so that it ran jointly in favor of the U.S. government, “as trustee,” and the Cayuga Indian tribe; the motion, however, could not be amended so that it ran solely in favor of the U.S. government. See id. (ruling on both parties’ motions). The district court also denied the motion to reconsider the interest and the ejectment remedy. See id. (same).
80. See id. (reciting procedural history).
81. See id. (explaining how case arrived at Second Circuit).
82. See id. (reversing district court).
83. See id. at 273-80 (analyzing whether Second Circuit was bound by City of Sherrill’s precedent). City of Sherrill involved the land claim of the Oneida Indian Nation. Id. at 273 (detailing City of Sherrill). Like the Cayuga Indian Nation, the Oneida Indian Nation is one of the Six Iroquois Nations. See id. (drawing similarities between City of Sherrill and Cayuga Indian Nation). In City of Sherrill, the Supreme Court denied Oneida’s effort to regain sovereignty over land that they abandoned in 1805, thereby denying the Oneida a right to tax exempt property. See City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 202, 214 (2005) (“[The Oneida were] preclude[d]... from rekindling embers of sovereignty that long ago grew cold” because of the “long history of state sovereign control.”) For a further discussion on the doctrine of laches, see supra notes 32-44 and accompanying text.
84. See Cayuga Indian Nation, 413 F.3d at 268 (asserting that court would base its decision on City of Sherrill).
85. See id. at 274 (justifying Cayuga Indian Nation holding).
etary remedy.\(^{86}\) Thus, the Second Circuit reversed the district court’s $247.9 million judgment for the Cayuga Indian Nation.\(^{97}\)

City of Sherrill held that the Oneida Nation could not receive a tax exempt status for parcels of land that they held two hundred years ago.\(^{88}\) The Court based its conclusion on three principles.\(^{89}\) First, the Supreme Court determined that the wrong occurred too many years ago to be addressed in the present-time case.\(^{90}\) Second, the Court held that the Oneida Indian Nation should have sought a remedy sooner.\(^{91}\) Third, the Court reasoned that the nature of the properties changed dramatically in the past two hundred years.\(^{92}\) Hence, City of Sherrill found that the laches doctrine barred the Oneida from relief because the Oneida Nation did not take timely action and the government legitimately relied upon the land.\(^{93}\)

The Second Circuit found that the same considerations that City of Sherrill used to justify the laches defense were also present in Cayuga Indian Nation.\(^{94}\) For example, in Cayuga Indian Nation, nearly two hundred years passed between when the wrong occurred and when the Cayuga Indian

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86. See id. (explaining court’s holding). In post-Sherrill briefs, both the plaintiffs and the defendants asserted that the City of Sherrill holding did not affect the monetary damages judgment. See id. (disagreeing with Second Circuit’s determination). The Second Circuit believed otherwise, explaining that, “[w]hile the equitable remedy sought in Sherrill—a reinstatement of Tribal sovereignty—is not at issue here, this case involves comparably disruptive claims, and other, comparable remedies are in fact at issue.” Id.

87. See id. at 273 (stating case’s holding).

88. See City of Sherrill, 544 U.S. at 202-03 (finding Oneida Nation was not entitled to tax exempt status).

89. See id. (outlining Court’s decision); see also Cayuga Indian Nation, 413 F.3d at 276 (comparing Cayuga Indian Nation to City of Sherrill).

90. See City of Sherrill, 544 U.S. at 215 (noting two hundred year difference between time wrong occurred and present day); see also Harvard Law Review Association, Availability of Equitable Relief, 119 Harv. L. Rev. 347, 356-57 (2005) (supporting Supreme Court decision in City of Sherrill). “The substantial passage of time since both the wrongs against Indians and the enactment of the governing laws and treaties often leaves courts poorly positioned to adjudicate these disputes.” Id.

91. See City of Sherrill, 544 U.S. at 215-16 ("Similar justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by OIN [Oneida Indian Nation], merit heavy weight here."). For a further discussion of the judicial obstacles facing the Oneida Indian Nation, see infra notes 161-71 and accompanying text.

92. See id. at 215 (noting that property has increased substantially in value in past two hundred years and that area is now 90% non-Indian as opposed to two hundred years ago).

93. See Cayuga Indian Nation, 413 F.3d at 277 (recounting similarities of this case to City of Sherrill).

94. See id. at 277 (noting that City of Sherrill overturned Second Circuit holding in Oneida Indian Nation v. New York, 691 F.2d 1070, 1084 (2d Cir. 1982), in which Second Circuit concluded that laches defense could not apply).
Nation brought their action.\textsuperscript{95} Additionally, the “Original Reservation” was no longer inhabited by Indians, but was inhabited predominantly by non-Indians, and had been for generations.\textsuperscript{96} Finally, the Cayuga Indian Nation, like the Oneida, waited too long to bring their claim.\textsuperscript{97}

In \textit{Oneida II}, where the Oneida Indian Nation sought monetary remedies, the Supreme Court left open the question of injunctive relief because the petitioners did not present it to the Court.\textsuperscript{98} Correspondingly, the Court in \textit{City of Sherrill} stressed that it was important to distinguish “between a claim or substantive right and a remedy,” emphasizing that there was a “sharp distinction between the existence of a federal common law right to Indian homelands and how to vindicate that right.”\textsuperscript{99} In turn, the \textit{City of Sherrill} Court framed its analysis in terms of this equitable relief, rather than the monetary remedy.\textsuperscript{100}

The Cayuga Indian Nation argued that the doctrine of laches should not apply to this case because it was an “action at law,” as opposed to an “action at equity.”\textsuperscript{101} The Second Circuit acknowledged that, even though

\textsuperscript{95} See id. (considering time lapse between 1794 and 1980). For a further discussion of the judicial obstacles the Indian Nations faced in bringing their cases to court, see infra notes 161-71 and accompanying text.

\textsuperscript{96} See id. (citing \textit{City of Sherrill}, 544 U.S. at 202) (noting that “[g]enerations have passed during which non-Indians have owned and developed the area that once composed the Tribe’s historic reservation;” and “the longstanding, distinctly non-Indian character of the area and its inhabitants” (alteration in original)).

\textsuperscript{97} See id. (explaining that Cayuga, like Oneida, waited too long to seek “equitable relief”).

\textsuperscript{98} Compare \textit{Oneida II}, 470 U.S. 226, 230 (1985) (“[W]e granted certiorari to determine whether an Indian tribe may have a live cause of action for a violation of its possessory rights that occurred 175 years ago.”) (citation omitted), with \textit{City of Sherrill}, 544 U.S. at 213-14 (“In this action, [Oneida Indian Nation] seeks declaratory and injunctive relief. . . .”); “The question whether equitable considerations should limit the relief available to the present day Oneida Indians was not addressed by the Court of Appeals or presented to this Court by petitioners. Accordingly, we express no opinion as to whether other considerations may be relevant. . . .” \textit{Oneida II}, 470 U.S. at 253 n.27.

\textsuperscript{99} \textit{City of Sherrill}, 544 U.S. at 213 (citing Navajo Tribe of Indians \textit{v. New Mexico}, 809 F.2d 1455, 1467 (10th Cir. 1987)) (establishing Court’s framework for its analysis); see also id. at 214 (distinguishing action at law from action in equity); \textit{Cayuga Indian Nation}, 413 F.3d at 289 (Hall, J., dissenting) (offering \textit{City of Sherrill’s} analysis on difference between right and remedy as proof that “\textit{City of Sherrill} Court addresses laches in the context. . . . specific [to] equitable relief. . . .”); “The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is.” \textit{City of Sherrill}, 544 U.S. at 213 (quoting \textit{Dan B. Dobbs, Law of Remedies} \textsection 1.2, p.3 (1st ed. 1973)).

\textsuperscript{100} See \textit{City of Sherrill}, 544 U.S. at 213-21 (emphasizing Oneida sought equitable relief as opposed to monetary relief); see also \textit{Oneida II}, 470 U.S. at 244 n.16 (explaining that it would be inappropriate to discuss laches defense in action at law).

\textsuperscript{101} \textit{Cayuga Indian Nation}, 413 F.3d at 275 (presenting Cayuga’s argument). \textit{City of Sherrill} relied “heavily on the fact that the Tribe [was] seeking equitable relief in the form of an injunction” to explain how their holding did not differentiate
the "Supreme Court did not identify a formal standard for assessing when [an] equitable defense[ ] applies," the holding of City of Sherrill could be read broadly to include all "‘disruptive’ Indian land claims," regardless of whether the claims were actions at law or actions in equity.\footnote{See City of Sherrill, 544 U.S. at 223 (Stevens, J., dissenting) (summarizing majority opinion); id. at 213-21 (distinguishing City of Sherrill from holding in Oneida II).} Comparatively speaking, the Second Circuit reasoned that the Cayuga Indian Nation was similar to the Oneida Indian Nation in City of Sherrill because both presented land claims.\footnote{See Cayuga Indian Nation, 413 F.3d at 274 (extending City of Sherrill’s holding). The Second Circuit also noted that City of Sherrill does not explicitly limit its application of “equitable defenses to claims seeking equitable relief.” Id. at 275 (discussing same).} In Cayuga Indian Nation, the Cayuga Indian Nation wanted to repossess a large portion of land, which would thereby displace thousands of non-Indian homeowners.\footnote{See id. (disregarding Supreme Court statement in Oneida II that explained that it would be peculiar to apply laches defense to action at law). The Second Circuit responded to this by quoting the holding in City of Sherrill: Whether characterized as an action at law or in equity, any remedy flowing from this possessory land claim, which would call into question title to over 60,000 acres of land in upstate New York, can only be understood as a remedy that would similarly ‘project redress into the present and future.’ See id. (footnote omitted).} Ultimately, the Second Circuit concluded that it was irrelevant whether the case in question was an action at law or an action in equity.\footnote{See id. (comparing present case to City of Sherrill). The Second Circuit reasoned that in their complaint, the Cayuga Indian Nation requested “immediate possession” of the land. See id. at 274 (citing Cayuga’s initial complaint).} 

After determining that the repossessory claim was barred by the laches defense, the court turned to the monetary damages award.\footnote{See id. at 275 (rejecting Cayuga argument).} According to the Second Circuit, it was irrelevant that the district court substituted monetary damages for the Cayuga tribe’s preferred ejectment remedy.\footnote{See id. at 278 (examining Cayuga request for trespass damages).} The Second Circuit, however, concluded that the Cayuga’s $247.9 million dollar award stemmed from its ejectment claim and that the ejectment claim should be considered when the court determined whether the Cayuga Indian Nation was entitled to relief.\footnote{See id. (explaining that trespass claims are “predicated entirely upon plaintiffs’ possessory land claim, for the simple reason that there can be no trespass unless the Cayugas possessed the land in question”).} In reaching its conclusion, the Second Circuit reasoned that because the Cayuga Indian Nation was barred from regaining their former tribal land, possession of

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between the holding in Oneida II. See City of Sherrill, 544 U.S. at 223 (Stevens, J., dissenting) (summarizing majority opinion); id. at 213-21 (distinguishing City of Sherrill from holding in Oneida II).
land could not be the basis for other damages.¹⁰⁹ Because the trespass claim and subsequent monetary damages depended upon the possessor land claim, then, the monetary damages claim was also barred by the laches defense.¹¹⁰

The Second Circuit acknowledged that the United States government has “traditionally not been subject to the defense of laches.”¹¹¹ Nonetheless, turning to the Seventh Circuit, the Second Circuit determined that the United States as a plaintiff-intervenor was still subject to the doctrine of laches in this case.¹¹² In United States v. Administrative Enterprises,¹¹³ the Seventh Circuit outlined three situations in which laches might apply to the federal government.¹¹⁴ First, the laches doctrine may be applied against the government “in the most egregious instances.”¹¹⁵ Second, laches may be used in cases against the government when there is no applicable statute of limitations.¹¹⁶ Third, the laches doctrine may be used “to draw a line between government suits in which the government is seeking to enforce either on its own behalf or that of private parties what are in the nature of private rights and government suits to enforce sovereign rights.”¹¹⁷

Similarly, the Second Circuit found that all three of the Administrative Enterprises principles applied to the Cayuga land claim.¹¹⁸ The Second Circuit noted that a two hundred year old case was “egregious,” emphasizing that the United States has only been a country for slightly longer than that.¹¹⁹ Next, the Second Circuit reasoned that the statute of limitations for this case did not begin until 1966, a full “one hundred and fifty years

¹⁰⁹. See id. (reiterating that doctrine of laches bars Cayuga Indian Nation from their possessor land claim).

¹¹⁰. See id. (reversing district court’s judgment).

¹¹¹. Id. at 279 (differentiating Cayuga Indian Nation and Oneida Indian Nation v. New York, 691 F.2d 1070 (2d Cir. 1982), in which Second Circuit ruled that suit where United States was trustee for Indian tribe was not subject to “delay-based defenses”).

¹¹². See id. 279 (noting Seventh Circuit’s precedent that laches can be applied in suits involving United States government). For a further discussion of how the United States government entered the case as plaintiff-intervenor, see supra notes 73-74 and accompanying text.

¹¹³. 46 F.3d 670 (7th Cir. 1995).

¹¹⁴. See id. at 672-73 (delineating instances when laches doctrine applies to United States government).

¹¹⁵. Id. at 672.

¹¹⁶. See id. (confining “doctrine [of laches] to suits against the government in which . . . there is no statute of limitations”).

¹¹⁷. Id. (detailing why laches defense may be appropriate in cases pertaining to federal government).

¹¹⁸. See Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 279 (2d Cir. 2005) (comparing Cayuga’s claim to claim at issue in Administrative Enterprises).

¹¹⁹. See id. (explaining that doctrine of laches should be applied because situation is “egregious”).
after the cause of action accrued." Moreover, the Second Circuit concluded that because the United States entered the case to assist the Cayuga Indian Nation, with which it had a trust relationship, the laches defense could also apply.

The Second Circuit recognized that the Cayuga Indian Nation was not responsible for any delay in bringing this suit because of the judicial obstacles they previously faced. Nevertheless, the Second Circuit did not consider the procedural obstacles to be of much importance to the case; rather, it found that the case should still be weighed in favor of the defendant. Accordingly, the Second Circuit reversed the decision of the district court.

B. Dancing with Wolves: The Second Circuit Takes Fierce Bite Out Of Cayuga Indian Nation’s Remedy

The Second Circuit correctly noted that “[o]ne of the few incontestable propositions about this unusually complex and confusing area of law is that doctrines and categorizations applicable in other areas do not translate neatly to these claims.” Perhaps because applying the law in Indian land claim cases may be difficult, the Second Circuit incorrectly applied the laches doctrine and read the City of Sherrill holding too broadly, leaving Indian tribes without any remedy.

120. Id. (finding that statute of limitations that begins to run one hundred and fifty years after cause of action arises is substantially similar to not having statute of limitations at all).

121. See id. (concluding that third element in Administrative Enterprises analysis applies).

122. See id. (finding that, although Cayugas were not responsible for any delay, this fact is not “dispositive for [the court’s] consideration”).

123. See id. at 279-80 (disagreeing with district court’s assessment that “prejudicial factor” was too important to ignore). As a final note, the Second Circuit acknowledged the efforts of the district court judge who presided over this case for over twenty-five years. See id. at 280 (applauding efforts of Judge McCurn). The Second Circuit assured the district court judge that although it overturned his holding, the district court judge could not have predicted the new developments that would arise in Indian land claim cases after City of Sherrill. See id. (“Our decision is based on subsequent ruling by the Supreme Court, which could not be anticipated by Judge McCurn in his handling of this case over more than twenty years.”).

124. See id. (reversing district court judgment that was in favor of Cayuga Indian Nation).

125. Id. at 276; see also Walter K. Olson, Give It Back to the Indians?, City Journal (2002), available at http://www.cityjournal.org/html/12_4_give_it_back.html (describing Indian law as “murky”).

126. See Cayuga Indian Nation, 413 F.3d at 289 (Hall, J., dissenting) (“The City of Sherrill opinion is not support for the application of the equitable defenses of laches as a bar to money damages in this case.”; see also Rapp, supra note 13 (explaining that “no one case is binding on another case” in Indian land claim cases).
The Second Circuit inaccurately interpreted City of Sherrill for five reasons. First, the Second Circuit did not heed the “clear language” used in City of Sherrill. Second, the Second Circuit failed to separate the Cayuga Indian Nation’s money damages claim from its ejectment claim. This distinction is crucial considering that the Oneida claim in City of Sherrill was a claim at equity and the Cayuga claim in Cayuga Indian Nation was a claim at law. Third, the Second Circuit, like the Supreme Court in City of Sherrill, failed to fully acknowledge and appreciate the prejudices and judicial obstacles facing Indian Nations over the past two hundred years. Fourth, both City of Sherrill and Cayuga Indian Nation ignored the Court’s canon of construction and Congress’s “unique obligation” to Indian Nations. Finally, the Second Circuit in Cayuga Indian Nation erroneously reversed the district court’s judgment.

1. The Second Circuit Disregarded Narrow Language of City of Sherrill

The language used in the City of Sherrill opinion “confines its holding to the use of laches to bar certain relief, not to bar a claim or all remedies.” On numerous occasions City of Sherrill explicitly referred to the Oneida claim as “equitable relief.” In so doing, the Court in City of Sherrill

127. For a discussion of the four reasons the Second Circuit incorrectly applied City of Sherrill, see infra notes 134-88 and accompanying text.
128. For a discussion on the “clear” language used in City of Sherrill, see infra notes 134-39 and accompanying text.
129. For a discussion concerning the difference between money damages claim and ejectment claim, see infra notes 140-58 and accompanying text.
130. See Cayuga Indian Nation, 413 F.3d at 290 (Hall, J., dissenting) (explaining Cayuga Indian Nation’s claim). For a discussion concerning the difference between claim at equity and claim at law, see infra notes 140-58 and accompanying text.
131. See 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, 5 (2005) ("In applying equitable defenses to the Oneida Indian Nation, the Court is embracing an apologist stand toward the many instances of immoral and illegal government actions against the tribe, and ultimately suggesting that the passage of time renders that history irrelevant, indeed unmentionable."); see also Adams, supra note 13 ("Ignoring these historic wrongs and injustices is just another chapter in this shameful history of the genocide against Native peoples in this country.") (quoting Onondaga Nation Council of Chiefs). For a further discussion on the judicial obstacles that the Oneida Indian Nation and Cayuga Indian Nation faced, see infra notes 159-72 and accompanying text.
132. See Borgman, supra note 9, at 68 (rejecting City of Sherrill’s analysis). For a further discussion of canons of construction courts should apply in Indian law cases, see infra notes 173-80 and accompanying text.
133. For a further discussion of how the Second Circuit erroneously reversed the district court’s holding, see infra notes 181-88 and accompanying text.
134. See Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 289 (2d Cir. 2005) (Hall, J., dissenting) (arguing against majority opinion’s reading of City of Sherrill).
135. See, e.g., City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 212 (2005) (noting that Oneida Indian Nation sought equitable relief), quoted in Cayuga Indian Nation, 413 F.3d at 289 (Hall, J., dissenting); id. at 221 (observing
rill framed its analysis of laches to apply specifically to equitable relief and did not extend their analysis to monetary damages. Furthermore, the City of Sherrill Court distinguished its holding from those of the Supreme Court in Oneida I and Oneida II, where the Oneida sought monetary damages. As the City of Sherrill Court explicitly stated, “[T]he question of damages for the Tribe’s ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in Oneida II.” This clear distinction supports the notion that City of Sherrill intended to limit “the application of the equitable defense of laches to the award of forward-looking, disruptive equitable relief[.]”

2. The Second Circuit Did Not Distinguish Between Nature of the Claims

As the Supreme Court once noted, “an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for . . . ejectment from land. . . .” Unlike the Oneida Nation in City of Sherrill, which was seeking a claim in equity, the Cayuga Indian Nation was seeking a claim at law for damages. And, as the Court stated in Oneida II, “application of the equitable defense of laches in an action at law would be novel indeed.”

“long delay in seeking equitable relief” existed), quoted in Cayuga Indian Nation, 413 F.3d at 289 (Hall, J., dissenting); id. at 216-17 (“This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [Oneida Indian Nation] from gaining the disruptive remedy it now seeks.”), quoted in Cayuga Indian Nation, 413 F.3d at 289 (Hall, J., dissenting).

136. See Cayuga Indian Nation, 413 F.3d at 289 (Hall, J., dissenting) (“This language makes clear that the City of Sherrill Court addresses laches in the context specific equitable relief sought in that case.”).

137. See City of Sherrill, 544 U.S. at 211-12 (distinguishing holding and stating “[i]n contrast to Oneida I and Oneida II, which involved demands for monetary compensation, [Oneida Indian Nation] sought equitable relief prohibiting, currently and in the future, the imposition of property taxes”).

138. Id. at 221.

139. See Cayuga Indian Nation, 413 F.3d at 290 (Hall, J., dissenting) (striking down majority opinion’s analysis).

140. Id. at 275 (quoting Bowen v. Massachusetts, 487 U.S. 879, 893 (1988)).

141. See Singel & Fletcher, supra note 4, at 44 (“[T]he Oneida Indian Nation brought City of Sherrill as a claim in equity, a request for injunctive relief against the State and a political subdivision. Cayuga Indian Nation was a claim at law for possession and damages.”) (footnotes omitted). “The plaintiffs here seek relief under two theories, ejectment and trespass. As noted, all claims were brought prior to expiration of the relevant statutes of limitations. Historically, both ejectment and trespass are actions at law.” Cayuga Indian Nation, 413 F.3d at 283 (Hall, J., dissenting).

142. Oneida II, 470 U.S. 226, 244 n.16 (1985).
Even though the Cayuga Nation initially sought ejectment, it never abandoned its right to monetary damages. The Cayuga Indian Nation sought monetary damages, which were not contingent upon the Nation’s ejectment claim, since it initiated its case. Further, the only necessary element for a monetary damages claim is “wrongful possession of the land,” and since the treaties violated the Nonintercourse Act, those currently in possession of the land were wrongfully in possession.

Another key distinction between a claim for injunctive relief and a claim for damages is the “disruptive” nature of an injunction. A claim for ejectment and repossesson would be considered “disruptive” because it would dislocate landowners and it would affect the way the local government operated. The Court in City of Sherrill reasoned that the Oneida Indian Nation’s “reassertion of sovereignty” would result in “a checker-
board of state and tribal jurisdictions," which would be disruptive to the "administration of state and local governments." 148 In addition, the City of Sherrill Court explained that the "unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences." 149

As the dissenting opinion in Cayuga Indian Nation noted, however, there does not seem to be "anything in the money damages award in this case that would be disruptive." 150 Nonetheless, the majority in Cayuga Indian Nation found the monetary remedy equally "disruptive" merely because the district court "monetized the ejectment remedy." 151 As one Indian Law expert noted, "[t]his holding is in direct opposition to a 1982 precedent that laches does not bar Indian land claims under the Trade and Intercourse Acts." 152 The case the expert referred to is the Second Circuit decision in Oneida Indian Nation v. New York, 153 which the Supreme Court affirmed in Oneida II. 154

The monetary remedy in Cayuga Indian Nation can also be differenti-
ated from City of Sherrill because the Cayuga Indian sought a backward-looking remedy as opposed to the forward-looking remedy the Oneida sought in City of Sherrill. 155 In City of Sherrill, the Oneida sought "equitable relief prohibiting, currently and in the future, the imposition of property

148. See City of Sherrill, 544 U.S. at 199 (finding restoration of possession after two hundred years of unlawful possession was sufficiently "disruptive remedy").
149. Id. at 219 (citing Yankton Sioux Tribe v. United States, 272 U.S. 351, 357 (1926)) ("It is impossible . . . 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 possession of innumerable innocent purchasers. . . .").
150. See Cayuga Indian Nation, 413 F.3d at 284-85 (Hall, J., dissenting) (explaining that "proof involved with the remedy of damages will be radically different than that involved with a claim for an injunction, specific performance, or equitable re-possession in real property"); see also Singel & Fletcher, supra note 4, at 43-44 (comparing City of Sherrill's six justifications for use of laches to Cayuga Indian Nation and explaining Cayuga Indian Nation should have distinguished itself).
151. See Cayuga Indian Nation, 413 F.3d at 274-75 (concluding laches applies to "disruptive" Indian land claims "more generally").
152. Coulter & Lewis, supra note 3 (citing Oneida Indian Nation v. New York, 691 F.2d 1070 (2d. Cir. 1982)).
153. 719 F.2d 525 (2d. Cir. 1983).
154. See Oneida II, 470 U.S. 226, 230 (1985) (affirming Second Circuit's ruling that Indian tribes may bring a "cause of action"). The holding in Oneida II, which affirmed the Second Circuit ruling, still applied to Cayuga Indian Nation. See City of Sherrill, 544 U.S. at 221 ("In sum, the questions of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in Oneida II.").
155. See Cayuga Indian Nation, 413 F.3d at 290 ("An award of money is not an equitable remedy, nor is it forward-looking or disruptive in the way dispossession inherently is."). Backward-looking remedies look to correct past injustices. See Eric A. Posner & Adrian Vermeule, Reparations for Slavery and Other Historical Injustices, 103 COLUM. L. REV. 689, 692 (2003) (defining reparations terms). Conversely, forward-looking remedies look to promote "distributive justice" in the present and future. See id. (classifying forward-looking and backward-looking remedies).
taxes.”  

3. The Second Circuit Ignored “Historical Realities” Facing Indians

In both City of Sherrill and Cayuga Indian Nation, the respective courts acknowledged that the Indian nations brought their cases as promptly as possible; however, both courts failed to fully appreciate that, prior to the tribes’ suits, “historical realities” defeated the Indian nations’ land claims. "Because laches is an equitable doctrine created by the chancery courts to promote justice and morality, the historical context in which Indian nations lost their land is relevant to current day decisions on the applicability of doctrines whose effect is to deny those claims." Rather than recognizing the steps both of these Iroquois tribes took to bring their cases before the federal courts, the opinions in City of Sherrill and Cayuga Indian Nation reiterated that “[i]t is well established that laches, a doctrine focused on one side’s inaction and the other’s legitimate reliance, may bar long-dormant claims for equitable relief.”

156. See City of Sherrill, 544 U.S. at 211-12 (contrasting remedy Oneida sought in this case as opposed to Oneida I and Oneida II).

157. See id. at 221 (differentiating its holding from Oneida II). In City of Sherrill, the Supreme Court noted that the Court in Oneida II observed that the “application of a nonstatutory time limitation in an action of damages would be ‘novel.’” Id. at 221 n.14 (citing Oneida II, 470 U.S. at 244 n.16).

158. See City of Sherrill, 544 U.S. at 198 (explaining that their holding is “[i]n contrast to Oneida I and Oneida II, which involved demands for monetary compensation”); Oneida II, 470 U.S. at 231-32 (holding that Indians could maintain right of action for unjust dispossession from their land); Oneida I, 414 U.S. 661, 678 (1974) (concluding Indians could bring claim against government for land treaties that were invalid under Nonintercourse Act); Cayuga Indian Nation, 413 F.3d at 289 (Hall, J., dissenting) (illustrating how City of Sherrill distinguished its holding from Oneida I and Oneida II).

159. See City of Sherrill, 544 U.S. at 217 (noting that Indians brought claim at appropriate time considering circumstances); Krakoff, supra note 131, at 15 (advocating that Oneida did “all that could reasonably be expected of an Indian tribe to address allegations of illegal dispossession of property”).

160. Singer, Symposium Foreword, supra note 18, at 2 (rejecting Supreme Court analysis of laches in City of Sherrill).

161. See City of Sherrill, 544 U.S. at 217 (ignoring judicial obstacles that long faced Oneida tribe); see also Cayuga Indian Nation, 413 F.3d at 275-74 (reiterating City of Sherrill’s holding). But see Coulter & Lewis, supra note 3 (noting that Cayuga Indian Nation had to wait more than 185 years before they were allowed to bring their lawsuit); Krakoff, supra note 131, at 14 (tracing steps Oneida of City of Sherrill took for judicial relief); Locklear, supra note 4, at 600 (“[The Indians] knew their land had been effectively stolen by the states involved, and they began a series of complaints that lasted from that time until the lawsuits were filed.”). As one commentator notes:
The Oneida in *City of Sherrill* were not inactive, but "extraordinarily active in pursuing the wrongs against them."\(^{162}\) The Oneida in *City of Sherrill* initially turned to the federal government and then, when "it was legally and practically capable of doing so, to the counties for relief from what the Supreme Court found in *Oneida II* to be clear violations of the Oneida Indian Nation's property rights."\(^{165}\) Similarly, as the dissent notes in *Cayuga Indian Nation*, "the nature of [the] delay is quite notable.\(^{164}\)

New York State knew that it had covered this up for generations. New York State knew that the Iroquois people had complained consistently. The fact that the lawsuits were filed 150 years later is not a function of the fact that the Indian people slept on their rights, it is a function of the State's own duplicity in, first of all, taking the land illegally, and secondly, doing everything in its power over the last 150 years to refuse to address and set right those wrongs. When you balance those moralities, it seems to us that the balance weighs heavily in favor of the Iroquois plaintiffs.

*Id.* at 601 (arguing that Indians in land claim cases were not deliberately inactive).

162. See Krakoff, *supra* note 131, at 14-16 (exploring various steps Oneida Indian Nation took to move their case forward). The Oneida could not get "judicial relief for either New York or the United States' actions" until 1895 during the "heyday of the allotment period." *See id.* at 14 (explaining that Oneida's 1895 litigation was their first opportunity to bring their claim). In 1951, the Oneida initiated another proceeding before the Indian Claims Commission Act "to seek further compensation for the divestment of their reservation lands." *See id.* (rejecting *City of Sherrill*’s analysis). One commentator notes:

Again, while the *City of Sherrill* Court described this as 'a half century' after the 1893 litigation, it would have been impractical, bordering on impossible, for the Oneidas to litigate against any party other than the United States. In addition, the Oneidas' ability to sue the federal government was dependent on the United States' consent pursuant to the establishment of the Indian Claims Commission in 1946. In short, the Oneidas, in joining in the 1893 litigation and suing the United States as early as 1951, were doing all that could reasonably be expected of an Indian tribe to address allegations of illegal dispossession of property.

*Id.* at 14-15 (describing barriers that persisted until 1966). The Oneida instituted a "test case" before the court in 1970, shortly after it was clear they could "maintain suits in federal court against state and local governments." *See id.* at 15 (illustrating Oneida's efforts to bring forth their claim in *Oneida I*). Oneida's second round of litigation came with *Oneida II* in the 1980s. *See id.* at 15 (recounting Oneida's efforts).

163. *See id.* at 16 (rejecting *City of Sherrill*’s laches argument); *see also* Singel & Fletcher, *supra* note 4, at 47 ("[T]he New York Indians had long sought relief from the State of New York.").

164. *See Cayuga Indian Nation*, 415 F.3d at 288 (Hall, J., dissenting) (rejecting majority's opinion that *Administrative Enterprises*’s "egregious delay factor" applied to Cayuga). "[W]hile two hundred years is surely a significant length of time, the majority fails to consider the nature of that delay and to what extent it may be excused." *Id.*

Indians could not formally sue the government until 1946 when Congress created the Indian Claims Commission Act. *See* 25 U.S.C. § 70 (1988) (establishing Indian Claims Commission, which could hear all Indian land claims involving equitable claims based on treaties, laws and Constitution). Prior to 1946, Indians faced many obstacles when trying to bring land claims. *See Oneida II*, 470 U.S. 226, 255 (1985) (Stevens, J., dissenting) (noting obstacles facing Indian nations in American legal system); *see* Borgman, *supra* note 9, at 66 (exploring Indians' "judicial disenfranchisement"). For example, there was not a substantive standard for In-
This delay is significant because, as one commentator notes, "[i]n virtually every one of these cases there is a continuous history of petitions to the President and complaints to the governor, to the point where the State of New York's own records document the existence of the continuous complaints by the Iroquois people." Oftentimes, though, New York State neglected to address the wrongs that occurred. Moreover, it was not until the 1974 decision in Oneida I that the Supreme Court determined that Indian Nations could bring a suit for damages under the Nonintercourse Act.

Furthermore, City of Sherrill and Cayuga Indian Nation based their holdings upon Felix v. Patrick, which was "tainted by racism." In Felix, the Supreme Court discouraged Indian land claims because it feared that the work of non-Indian settlers would be undone. In addition, the Supreme Court in Felix questioned why the Indians could not bring this claim earlier, asserting that "the courts of Nebraska were open to them, as they are to all persons irrespective of race or color" even though numerous obstacles, such as language barriers and lack of knowledge, stood in the Indian Nations' way. The courts in City of Sherrill and Cayuga Indian

dian land claim cases. See Price, supra note 20, at 471-72 (recounting history of Indian Claims Commission Act). Congress designed the Commission to "investigate historical wrongs and to provide assistance" to Indian Nations seeking claims. See id. (same). The Commission could only hear cases that arose before 1946 and had a limited number of years to do so. See id. (same).

165. Locklear, supra note 4, at 600.


167. See Oneida I, 414 U.S. 661, 684 (1974) (noting that Indians' right to possession is guaranteed under Nonintercourse Act of 1790); see also Coulter & Lewis, supra note 3 (asserting that "[t]he federal government did nothing to stop this lawlessness").

168. See Singel & Fletcher, supra note 4, at 46-48 (asserting that Supreme Court followed wrong precedent in City of Sherrill and Cayuga Indian Nation and should have "correct[ed] this oversight"). "[T]he defendants in the New York land claims argue that they are 'innocent landowners.' And, like the defendant in Felix, they have 'developed' the land taking it from 'wild' Indian Country to 'thriving and rapidly growing' development." Id. at 46 (citing City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 217 (2005); Felix v. Patrick, 145 U.S. 317, 334 (1892)).

169. See Felix, 145 U.S. at 335 (contending that if Court allowed Indians to sue, this would "offer a distinct encouragement to the purchase of similar claims, which doubtless exist in abundance through the western territories . . . and would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation").

170. See id. at 332 (downplaying Indian attempts to bring land claims). But see Singel & Fletcher, supra note 4, at 40 (asserting that "[t]he courts were often at such a distance that the Indians could not avail themselves of their right to sue") (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 163 (U.S. Gov't Printing Office 1941) (citations omitted)). "[T]he City of Sherrill Court, like the Felix Court, denigrated Indian attempts to recover their lands." Singel & Fletcher,
Nation elected to follow Felix when they should have followed the more current and less discriminatory analysis in Ewert v. Bluejacket. In Ewert, the Supreme Court recognized that the laches defense should be reserved for bad faith delays and should not be used to protect those who took land unlawfully.

4. The Second Circuit Failed to Apply Canons of Construction

Both City of Sherrill and Cayuga Indian Nation breached canons of construction and ignored the “unique obligation” of Congress to the Indians. “The standard canon of Indian law that [o]nce powers of tribal self-government or other Indian rights are shown to exist, by treaty or otherwise, later federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights.” Like the Court in City of Sherrill, the court in Cayuga Indian Nation failed to fully protect the interests of the Indians, particularly because their claim was “within the statute of limitations” and was “legally viable.”

supra note 4, at 46-47 (arguing that Felix and City of Sherrill ignore “complex legal relationship between Indians and Indian tribes and the federal government”). At least nine barriers stood in the way for Indian Nations who wanted to bring land claims: (1) “finding a lawyer”; (2) “hiring and paying for a lawyer”; (3) “finding a court to sue in”; (4) “obtaining the capacity to sue”; (5) “getting tribal property claims recognized as raising federal questions”; (6) “finding a private right of action”; (7) “overcoming sovereign immunity”; (8) “finding a breach of trust” and (9) “overcoming power politics.” Singer, Nine-Tenths Law, supra note 147, at 615-27 (exploring obstacles facing Indian Nations).

171. See Singel & Fletcher, supra note 4, at 45-46 (hypothesizing that City of Sherrill’s “selective use” of precedent indicates “the weakness of its overall argument”).

172. See Ewert v. Bluejacket, 259 U.S. 129, 138 (1922) (“The equitable doctrine of laches, developed and designed to protect good-faith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions.”).

173. See Borgman, supra note 9, at 68-71 (criticizing holding in City of Sherrill); see also Krakoff, supra note 131, at 19 (“[T]he Court, like courts during the mid-twentieth century, must at some level think Indian nations are a thing of the past. And with that unspoken assumption, the Court in City of Sherrill has taken the opposite approach of Justice Marshall in his famous trilogy.”) For a further discussion of the canon of construction, see supra note 25 and accompanying text.

174. Borgman, supra note 9, at 69 (quoting Oneida II, 470 U.S. 226, 247 (1985)). “Indians have long occupied a protected status in our law, and in the 19th century they were often characterized as wards of the State.” Oneida II, 470 U.S. at 258 (Stevens, J. dissenting). This Indian law standard also extended to cases that the Supreme Court needed to interpret treaties where ambiguities arose. See Tingley, supra note 2, at 365 n.57 (“Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.” (citations omitted)).

175. See Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 273 (2d Cir. 2005) (rejecting district court’s reasoning); see also Borgman, supra note 9, at 71 (asserting that City of Sherrill and Cayuga Indian Nation failed to protect interests of Indian Nations). Previous caselaw notes that laches will not bar a claim for damages if it is within the statutes of limitations. See Ivani Contracting Corp. v. City of
At the very least, the Second Circuit should have considered Justice Stevens’s dissent in *City of Sherrill*, which suggested that “the Court has ventured into legal territory that belongs to Congress.”\(^\text{176}\) Regardless of what may happen to a “block of land” that was initially an Indian reservation, until Congress advises to the contrary, the land will be considered a reservation.\(^\text{177}\) Congress repeatedly upheld legislation that “singles out Indians.”\(^\text{178}\) Indian Nations have maintained this “unique legal status” for a long time.\(^\text{179}\) “As long as the special treatment can be tied rationally to the fulfillment of Congress’s unique obligation toward the Indians, such legislative judgments will not be disturbed.”\(^\text{180}\)

5. **The Second Circuit Erroneously Reversed the Judgment of the District Court**

Furthermore, the Second Circuit should have remanded this case for review in the lower court rather than simply reversing the judgment.\(^\text{181}\) First, laches is a question of fact for the district court.\(^\text{182}\) A district court, and not an appellate court, should have determined the factual issues surrounding laches, such as “the length of any delay, the reasonableness of any delay, the extent of any prejudice to defendants, and whether defendants have ‘unclean hands.’”\(^\text{183}\) Moreover, previous Second Circuit decisions N.Y., 103 F.3d 257, 260 (2d Cir. 1997) (holding claim for damages is not barred if brought within statute of limitations).

176. *See City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 224 (2005) (Stevens, J., dissenting) (“First, only Congress has the power to diminish or disestablish a tribe’s reservation.” (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)); *see also Cayuga Indian Nation*, 415 F.3d at 266-80 (failing to discuss role of Congress).

177. *See City of Sherrill*, 544 U.S. at 224 n.2 (“Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.” (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984))).


179. *See Morton*, 417 U.S. at 555 (supporting Congress’s role in Indian relations).

180. *Id.* (laying out Congress’s policy towards Indians and Court’s obligation to follow it).


182. *See Tri-Star Pictures*, 17 F.3d at 44 (explaining that laches is question of fact and not question of law).

183. *See Coulter & Lewis*, *supra* note 3 (implying that Second Circuit “brushed aside” these findings of fact whereas district court would have examined them more closely); *see also Stone*, 873 F.2d at 624 (“Although laches promotes many of the same goals as a statute of limitations, the doctrine is more flexible and requires an assessment of the facts of each case.”). Courts generally consider: unreasonable delay, “prejudice to the defendant,” potential “loss of evidence” and the “change
sions mandate that findings on laches are reviewed for "abuse of discretion." This is particularly important because the "majority seemed unaware of the crucial fact that no court was open to the Cayugas to file this action until 1974 at the earliest."

As a final note, in Indian land claim cases, laches prevents Indian nations, who have long suffered at the hands of the United States government, from pursuing any recourse, rather than serving its intended purpose: preventing those who have merely "slept upon their rights" while another "legitimately relied" upon the land from receiving relief. The Court's recent eagerness to protect the interests of non-Indians rather than Indian Nations suggests that Indian Nations can no longer expect to have "their rights protected" by the court. Even though this may be a confusing area of law, the Second Circuit erroneously abandoned the middle ground of earlier cases, such as Oneida I and Oneida II, and instead established an "unpredictable and unjustified ground" that leaves the Indian Nations without remedies.


184. See Stone, 873 F.2d at 624 (citing Czaplicki v. S.S. Hoegh Silvercloud, 351 U.S. 525, 534 (1956)) (ruling courts may over turn laches defense when its use "constitutes an abuse of discretion").

185. Coulter & Lewis, supra note 3. But see Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 266-80 (2d Cir. 2005) (neglecting to fully address judicial obstacles). For a further discussion of the obstacles facing the Cayuga prior to 1974, see supra notes 159-72 and accompanying text.

186. See City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 217 (2005); Ewert v. Bluejacket, 259 U.S. 129, 138 (1922); Singel & Fletcher, supra note 4, at 45 (reiterating that Supreme Court wrongfully used equitable doctrines). "History attests that Indian nations and peoples have long been denied the even-handed application of the law." Coulter & Lewis, supra note 3. For a discussion on laches, see supra notes 33-44 and accompanying text. For a discussion of the judicial obstacles that have longed faced Indian Nations, see supra notes 159-72 and accompanying text. For a discussion of some prejudices facing Indians in the past 200 years, see supra notes 3-4 and accompanying text. For a discussion of the current state of Indian Nations, see infra notes 189-208 and accompanying text.

187. See Locklear, supra note 4, at 598 (questioning why laches is being used to protect those "sitting on, taking advantage of, and enjoying the benefit of land that belongs to the Iroquois people"); see Singer, Symposium Foreword, supra note 18, at 4 (criticizing recent Court decisions).

188. See Borgman, supra note 9, at 60 (critiquing recent Indian land claim decisions); Singel & Fletcher, supra note 4, at 22 (enumerating options Court can take in Indian land claim cases and expressing dissatisfaction with recent holdings); Coulter & Lewis, supra note 3 (acknowledging that "it seems as if the law was changed or ignored to the Indians' extreme prejudice"). As Judge Hall noted in his Cayuga Indian Nation dissent:

Such complexity is best addressed by relying on relevant precedent and established principles. Congressional action and centuries of precedent with regard to both Indian land claims and foundational between rights and remedies, coercive relief and damages, and legal claims and equitable relief, should guide the attempt to resolve this historic dispute.
V. IMPACT: THIS LAND IS MADE FOR YOU AND ME?

After the district court's holding, Timothy Twoguns, a representative of the Cayuga Indian Nation wrote, "[t]his settlement will enable the Cayuga people to establish itself in its traditional lands, which it lost more than 200 years ago. It will also provide us with damages for our long displacement, and financial security."189 Regrettably, the Second Circuit reversed that judgment and left the Cayuga Indian Nation without any remedy.190 The holding's effects can already be felt throughout the Indian Nation.191 Cayuga Indian Nation will continue to affect other court decisions, Indian Nations' morale and the economic situation in Indian territories.192

If the majority opinion is any indication of what is to come in future Indian land claim cases, the door will continue to be slammed in Indian Nations' faces and similar lawsuits may be threatened.193 Recently, two district courts extended City of Sherrill and Cayuga Indian Nation even further when they ruled that Indian tribes were not entitled to "immunity

Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 283 (2d Cir. 2005) (Hall, J., dissenting) (rejecting majority's reasoning).


190. See Cayuga Indian Nation, 413 F.3d at 291 (Hall, J., dissenting) (rejecting majority's reading of City of Sherrill to "bar all remedies"); Scott Rapp, U.S. Joins Cayugas in Seeking Case Review: Supreme Court Urged to Examine Cayugas' Land Claim Dismissed by Circuit Court, Post-STANDARD (Syracuse, N.Y.), Jan. 18, 2006, at A1 (noting that Cayuga Indian Nation hoped for "lucrative casino deals" with $247.9 million judgment that Second Circuit overturned).

191. See Krakoff, supra note 131, at 19 ("Today, with no remorse and little comprehension, the Court is unilaterally forcing a state of dependency on tribes at a time when they are finally emerging from that state with the support, albeit uneven and often inadequate, of the other branches of the federal government.").

192. For a discussion of the consequences of this decision, see infra notes 193-204 and accompanying text.

193. See Singer, Symposium Foreword, supra note 18, at 4 (theorizing that if recent decisions are any indication, Supreme Court will not protect rights of Indian Nations); Rapp, supra note 13 ("As far as the land claim is concerned in the federal courts, the door was slammed in the Cayugas' face this morning.") (quoting Glenn Feldman, lawyer representing Seneca-Cayugas); see also Kates, supra note 13 ("This land claim has hung over the heads of our citizens for 26 years and finally, finally, that cloud has been lifted. As far as the land claim goes, this is the end of the road. It's over." (quoting Seneca County Attorney, Steven Getman)). Only a year and a half ago, Governor Pataki and the New York Cayugas and the Seneca-Cayugas had tentative deals to exchange land claim for two "lucrative Indian casino deals"; however, after City of Sherrill, Pataki pulled the offers. See Rapp, supra note 13 (contrasting outlook of Indian land claims before City of Sherrill and Cayuga Indian Nation to present-day outlook).
against state or local zoning and land use regulations.”

Both opinions justified their expansive readings by reiterating what Cayuga Indian Nation expressed: “[City of Sherrill] dramatically altered the legal landscape against which we consider plaintiffs’ claims.”

Local politicians are using the decision in Cayuga Indian Nation to advocate for dismissal of all Indian land claims and express their delight with the recent holdings. In addition, “citizen groups” who live near Indian reservations have also increased their efforts to restrict tribal land claim cases. These recent decisions, and the accolade that followed, could cause a further divide among Indians and non-Indians. As a result, this

194. See Seneca-Cayuga Tribe of Okla. v. Town of Aurelius, New York, 233 F.R.D. 278, 280 (N.D.N.Y. 2006) (agreeing with defendants that argued that “based on Cayuga, the Tribe is precluded from arguing against application of the doctrines of laches, acquiescence or impossibility to this case”); Cayuga Indian Nation v. Vill. of Union Springs, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) (explaining “strong language” in City of Sherrill justified this holding). “If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive.” Id. A spokesperson for the attorney general of New York noted:

What makes this significant is the judge in this case applied the Sherrill decision, which was based on taxes, to zoning and building codes. He has expanded Sherrill to find that the land purchased by the Cayuga Nation in the open market would need to comply with local regulations in regard to building and zoning codes.


195. Cayuga Indian Nation, 413 F.3d at 273 (reading City of Sherrill broadly); see also Seneca-Cayuga Tribe of Okla., 233 F.R.D. at 280 (reiterating Cayuga Indian Nation); Cayuga Indian Nation, 390 F. Supp. 2d at 205 (same).

196. See, e.g., Adams, supra note 13 (describing local politicians and activists who are advocating for “an end to all land claims negotiations with the state’s Indians and an immediate effort by the state to dismiss the half-dozen other ongoing suits”); Lewin, supra note 18 (“For more than 25 years, I have fought this land claim by the Cayuga Indian Tribe, and it is extremely satisfying to see the highest court in the land, the U.S. Supreme Court, reject all claims by the Cayuga Nation.”) (quoting New York State Senator Michael Nozzolio); Glenn Coin, Moves Made to Dismiss All Land Claims, POST-STANDARD (Syracuse, N.Y.), May 17, 2006, at A1 (“I urge you to seek immediate dismissal of any and all Indian land claims brought against New York state in light of the landmark decisions of the U.S. Supreme Court.”) (quoting letter from Assemblyman David Townend, R-Kirkland to Governor Pataki).


198. See Kates, supra note 13 (“We can’t and should never have trusted this process.” (quoting Clint Halftown, Federal Representative of New York Cayugas)). “Ignoring these historic wrongs and injustices is just another chapter in this shameful history of the genocide against Native peoples in this country.” Adams, supra note 13 (quoting statement from Onondaga Nation Council of Chiefs). Governor Pataki of New York indicated the importance of “cooperation, not confrontation” and the need to “respect and appreciate Native American history and culture.” See Tingley, supra note 2, at 380-81 (quoting Governor Pataki’s veto of Spano Bill that attempted to tax Indian reservations).
response could lead Indian Nations to become even more disenfranchised.\textsuperscript{199}

Rulings such as \textit{Cayuga Indian Nation} will drive Indian Nations even further into poverty and undermine tribal sovereignty at a time when Indian Nations are beginning to strengthen their institutions and sovereignty.\textsuperscript{200} "Misguided and disastrous federal policies up until the 1960s" pushed the Indian Nations into a state of poverty.\textsuperscript{201} The economies of reservations in upstate New York are struggling tremendously with an unemployment rate that is significantly higher than the national average and a median income that is approximately $15,000 less than the national annual income.\textsuperscript{202} There is also a high poverty rate on Indian reservations that "far surpasses the national poverty rate."\textsuperscript{203} If property interests were restored, tribal economies would be better situated for recovery; however, rulings such as \textit{Cayuga Indian Nation} prevent this from happening.\textsuperscript{204}

\begin{itemize}
  \item \textsuperscript{199} See, e.g., Adams, supra note 13 ("The latest decision by the Supreme Court sounds an alarm to all tribes that it’s open hunting season on them in the judicial system and that Indian issues have no chance in being fairly resolved if they are taken into the courts." (quoting St. Regis Tribal Chief Lorraine M. White)); Sean Kirst, \textit{Land-Claim Legal Ground Expected to Stay Shaky, POST-STANDARD} (Syracuse, N.Y.), May 10, 2006, at B1 (analogizing \textit{Cayuga Indian Nation} outcome to \textit{Dred Scott} decision). \textit{But see} Rapp, supra note 13 ("After this loss [for] the Indians I can’t imagine Congress would want to pass a law that would harm the counties. . . . There’s no wrong to correct. The wrong was [twenty-six] years of litigation. The wrong was the Indians trying to get something for nothing.” (quoting William Dorr, attorney for Oneida county)).
  \item \textsuperscript{200} See Singer, \textit{Symposium Foreword}, supra note 18, at 2 (declaring that City of \textit{Sherrill} and its progeny will "undermine tribal sovereignty just as Indian nations are strengthening their governmental institutions and revitalizing that very sovereignty"). One commentator notes: Indian people and Indian tribes that now have the capability and the resources to pursue Indian land claims, by conducting the research that allows them to discover the abuses of physical and political power leading to the illegal dispossession of their lands, must now pass the arbitrary and vague legal test set forth by a High Court that actively seeks to protect those who have benefited from the illegal dispossession of Indian lands.
  \item \textsuperscript{201} See Krakoff, supra note 131, at 17 (detailing United States government’s poor policy choices); \textit{see also} Tingley, supra note 2, at 361-63 (explaining impoverished state of Indian reservations).
  \item \textsuperscript{202} See, e.g., Tingley, supra note 2, at 362-64 (citing 1 U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, NO. PHC-2-34, NEW YORK: 2000; \textit{SUMMARY SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS} 255 tbl. 11 (2003)) (demonstrating present-day disparity between Indians and non-Indians); \textit{see also} Carpenter, supra note 166, at 84-89 (recounting challenges facing Indian nations).
  \item \textsuperscript{204} See Carpenter, supra note 166, at 79 (citing Padraic I. McCoy, The Land Must Hold the People: Native Modes of Territoriality and Contemporary Tribal Justifications for Placing Land Into Trust Through 25 C.F.R. Part 151, 27 AM. IN-
\end{itemize}
Children are often taught that the Indians and Pilgrims remained friends for years to come after the First Thanksgiving. History dictates, however, that this is not always the case. Today, the courts have an opportunity to correct those past injustices, but in light of the recent decisions, it seems as though the court system is not interested. As the courts close the door on Indian land claims and leave Indians without any remedy, you have to wonder, is this land really “made for you and me?”

Katherine E. Germino

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DIAN L. REV. 421, 422 (2003)) (explaining that “[t]ribal land ownership is a “key factor in community revitalization, allowing tribes to foster tribal jurisdiction, economic development, housing, environmental health, subsistence patterns, and spirituality”); see also Tingley, supra note 2, at 362 (hypothesizing effect property rights could have on Indian reservations).

205. For a discussion of the often inaccurate portrayal of Thanksgiving, see supra notes 1-3 and accompanying text.

206. For a discussion of the history between Indians and non-Indians, see supra note 3 and accompanying text.

207. For a discussion of the recent decisions, see supra notes 10-13 and accompanying text. For a discussion of the impact of the decisions, see supra notes 189-204 and accompanying text.
