

Grave but Ancient Wrongs: How the Past Conspires With the Present and What *City of Sherrill v. Oneida Indian Nation* and *Oneida Indian Nation v. Madison County* Hold for the Future of Tribal Sovereignty

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*“Unlike the executive and legislative branches of government, the judiciary cannot turn a deaf ear in the face of disputes such as these. Rather, a judge must put aside any personal opinions or ideas and apply the Constitution, Treaties, and laws of this great country.”*¹

I. Introduction

*City of Sherrill v. Oneida Indian Nation*² was decided by the Supreme Court on March 29, 2005.

The issue presented was whether the Oneida Indian Nation of New York (hereinafter Oneida or Nation) could avoid state taxation by asserting sovereignty over parcels of reservation land that were long ago sold to non-Indians in violation of the Non-intercourse act and recently reacquired by the Nation in open-market transactions.

In its opinion, the Court holds that “standards of federal Indian law and federal equity practice”³ preclude the Oneidas from reviving ancient sovereignty over the land. In its analysis, however, the Court relies on the common law doctrines of laches, acquiescence and impossibility to the near exclusion of federal Indian law. Moreover, there exists ample evidence to suggest that the Oneidas sought redress from state and federal governments for many years and were denied a forum in both state and federal courts, thereby seriously calling into question the application of laches and acquiescence. The more pressing issue, however, is what practical effects this decision will have on the future of tribal sovereignty. The past few years have marked the beginning of a new era for tribes like the Oneida who, after decades of mistreatment and

¹ *Oneida Indian Nation of New York v. City of Sherrill*, New York, 145 F. Supp. 2d, 226 (2001).

² *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 125 S. Ct. 1478, 1488 (2005)

³ *Id.* at 1490.

mismanagement at the hands of state and federal governments, have begun to succeed economically by way of a thriving gaming industry. With a growing business (publicly traded on the stock market) and the capital to purchase land, the Nation is now operating firmly within the American tradition. The natural desire is to use this newfound empowerment to accomplish something that the Federal Government in 200 years was never able (or willing) to do; return illegally sold reservation land to the Tribe.

In the present case the Court denied the Nation's claim of tax-exemption on the repurchased reservation land, one of the pillars of tribal sovereignty, suggesting instead that it petition the Secretary of the Interior to take land into trust on their behalf. But what - if any - sovereignty remains within these repurchased parcels of reservation land? The lower courts recognized that the land is still part of the Oneida reservation because it was never explicitly disestablished by Congress.⁴ The Supreme Court, preferring to dance around the issue, referred to the land as "*once* contained within the historic Oneida Reservation."⁵ Has the Court understood from Congress' actions (or inactions) an explicit intent to disestablish the reservation? Or has the Court simply taken it upon itself to do so, despite the well-established prerequisite that Congress act explicitly? Do other aspects of sovereignty remain on this land, such as the right to establish a tribal court system or the right to run a casino? These and other questions were left unanswered.

In October of this year, the New York District Court held that foreclosure of the Nation's land is not a remedy available to New York in their attempt to recuperate the unpaid taxes at issue in the

⁴ *City of Sherrill, New York*, 145 F. Supp. 2d at 246 (stating "Sherrill's argument that the properties are not Indian Country because federal set aside and superintendence have not been shown fails. The federal government confirmed and guaranteed the Oneidas' Reservation by the Treaty of Canandaigua in 1794. Federal set aside and superintendence are inherent in that Reservation").

⁵ *Oneida Indian Nation of New York*, 125 S. Ct. at 1480 [emphasis added].

present case. The court held that “[T]he seizing of land owned by a sovereign nation strikes directly at the very heart of that nation’s sovereignty,”⁶ suggesting that, in the eyes of the lower courts at least, there remains some sovereignty on the repurchased land, even if it hasn’t been placed into trust by the federal government. The question, of course, is how much. This decision is likely to be appealed to the 2nd Circuit and perhaps the Supreme Court. If presented with the opportunity, the Supreme Court should grant certiorari in order to clarify the issues it left unresolved in the present case.

II. Topics to be Discussed

In this article I will give some background on the Oneida people and the history giving rise to the present legal dispute. The majority of the article will be spent explaining and analyzing the Court’s opinion in *City of Sherrill v. Oneida Indian⁷ Nation* and showing that it rests upon an unstable foundation of common law doctrines and an equally questionable evasion of the honest historical discussion called for by the facts. I will show that the Court’s decision was a clear departure from established principles of federal Indian law and that important questions were left unanswered concerning tribal sovereignty in “buy back” cases such as the one at issue here.

III. Background on the Tribe

The Oneida, whose connection to the land we now call North America dates back some 10,000 years,⁸ believe that earth appeared in the form of a turtle to save a woman falling from the sky

⁶ *Oneida Indian Nation of New York v. Madison County*, United States District Court, N.D. New York, 11 (2005).

⁷ *Oneida Indian Nation of New York*, 125 S. Ct. at 1488.

⁸ *A Brief History of the Oneida Indian Nation* at www.oneida-nation.net (last visited Oct 15, 2005).

towards what was then only darkness and water.⁹ European culture, by contrast, operates under the belief that God created the earth to be used by humans to their benefit,¹⁰ (often to the exclusion of non-Christian people). One theory sees the earth as a gift – a favor in a time of need; the other sees the earth as a right – a divine and unquestioned inheritance.

The Oneidas are part of the Six Nations of the Iroquois Confederacy,¹¹ properly referred to as the Haudenosaunee.¹² They took up arms along side Americans at major battles throughout the Revolutionary War, including the Battle of Oriskany.¹³ During the winter of 1777-78 the Oneida brought corn to George Washington’s starving troops and taught them how to prepare it.¹⁴ In recognition of these and other deeds, the American Congress thanked the Oneida, saying “[Y]ou stood forth, in the cause of your friends, and ventured your lives in our battles. While the sun and moon contrive to give light to the world, we shall love and respect you.”¹⁵ Shortly after the War the Continental Congress recognized the Oneida’s acts of sacrifice and, in what would prove to be a foreshadowing of Justice Marshall’s “aboriginal title” theory in 1823,¹⁶ promised the tribe the “sole use and benefit” of their land.¹⁷

⁹ *Id.*, stating “In the beginning, this place was only darkness and water until the time when a woman fell from the sky world. Water creatures dwelling here, concerned for the woman’s safety, created this land as a platform for the woman with turtle agreeing to hold the land upon his back, which became known as Mother Earth.”)

¹⁰ 1 Genesis 1:28 (stating “[B]e fruitful and multiply! Fill the earth and subdue it! Rule over the fish of the sea and the birds of the air and every creature that moves on the ground”).

¹¹ FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 416 (1942 ed., U.S. Gov’t Printing Office).

¹² The term “Iroquois” is a French pejorative name given to the Haudenosaunee by other tribes with whom they had fought. See Ray Halbritter and Steven Paul Mcsloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, New York University Journal of International Law and Politics, 1 (Spring 1994).

¹³ *Id.* at www.oneida-nation.net.

¹⁴ *Oneida Indian Land Claims: A Time Line* at <http://www.oneida-nation.net> (last visited Oct. 22, 2005).

¹⁵ *Id.*

¹⁶ *Johnson v. M’Intosh* 21 U.S. 543, 561 (1823) (holding that Indians retain the right of occupancy upon their aboriginal lands).

¹⁷ 25 J. CONTINENTAL CONG. 681, 687 (Oct. 15, 1783) available at [http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc02537](http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc02537) (last visited Oct. 15, 2005).

IV. Background on the Dispute

In 1805 a seemingly innocuous transaction occurred within the State of New York in which the Nation exchanged 100 acres of reservation land for a barn belonging to a fellow Oneida by the name of Cornelius Dockstader. Dockstader, in turn, sold the land to a non-Indian named Peter Smith, who then subdivided it for sale to non-Indian settlers.¹⁸ For the following 192 years, the land remained outside the jurisdictional control of the Nation as it passed from one innocent non-Indian purchaser to the next. In 1997, the Nation purchased the land in an open market transaction where they now operate a gasoline station, convenience store, and textile factory.¹⁹ Sherrill, as it had done for generations, continued to tax the land. The Nation, reasoning that they now had fee title to land still within their federally recognized reservation, refused to pay. But in order to understand the legal and historical significance of this transaction, it is necessary first to understand the treaties, acts of Congress and Supreme Court decisions that preceded it, for they are the established law of the United States and the reason that a controversy can be said to exist at all.

In 1783, shortly after the Revolutionary War, the Continental Congress confirmed the Oneida's right to the lands they claimed as their inheritance.²⁰ A year later the United States and the Oneidas entered the Treaty of Fort Stanwix, wherein the U.S. recognized the Oneida's support during the war and guaranteed them security "in the possession of the lands on which they are settled."²¹ In the 1788 Treaty of Fort Schuyler, New York State purchased six million acres from the Oneidas, who in turn agreed to "cede and grant all their lands to the people of the State

¹⁸ George C. Shattuck, *The Oneida Land Claims: A Legal History* 5 (Syracuse University Press 1991).

¹⁹ *Oneida Indian Nation of New York*, 125 S. Ct. at 1488.

²⁰ 25 J. CONTINENTAL CONG. at 687.

²¹ Treaty of Fort Stanwix, Oct. 22, 1784, 7 Stat. 15 at www.digital.library.okstate.edu/kappler/Vol2/treaties (last visited December 13, 2005).

of New York forever.”²² In the same treaty, the State created a 300,000 acre reservation for use by the Oneidas.²³ In the 1789 treaty of Fort Harmer, the U.S. confirmed all the terms of the Treaty of Fort Stanwix.²⁴ The United States Constitution, which took effect on March 4, 1789, assigned to the Federal Government the sole power of regulating trade with the Indians.²⁵ One year later the 1790 Trade and Intercourse Act (“Non-Intercourse Act”) was passed, requiring Federal Government approval for all sales or transfers of land from any Indian nation or tribe.²⁶ Finally, in the Treaty of Canandaigua (1794), the Federal Government acknowledged the 300,000 acre reservation established by Fort Schuyler and guaranteed the Oneidas’ “free use and enjoyment” of the land.²⁷ The U.S. also stated that the Tribe could only sell their land “to the people of the United States, who have the right to purchase.”²⁸ To this day, the Oneida Nation receives a piece of muslin cloth from the Bureau of Indian Affairs as a symbol of fulfillment by the U.S. of one of the provisions of that treaty.²⁹ It was against this backdrop of treaties, and only 14 years after the passing of the Non-Intercourse Act, that the Nation sold the land in question to Cornelius Dockstader, from whose hands it passed to Peter Smith and innumerable purchasers thereafter.

V. Procedural History

²² Treaty of Fort Schuyler section 1 (1788) (stating the Indians “do cede and grant all then lands to the people of the State of New York forever”).

²³ *Id.*

²⁴ Treaty of Fort Harmer, Jan. 9, 1789, 7 Stat. 33 (reaffirming the Treaty of Fort Stanwix).

²⁵ U.S. CONST. Article I, § 8.

²⁶ Trade and Intercourse Act, 25 U.S.C. § 177 (1790).

²⁷ Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44, 45.

²⁸ *Id.*

²⁹ Shattuck, *Supra* 7.

The Nation purchased the land in question through open-market transactions and thereafter refused to pay property taxes or collect sales tax on merchandise sold at their businesses.³⁰ Sherrill sent a notice of tax delinquency and conducted a tax sale wherein the City purchased the properties and initiated eviction proceedings against the Nation in New York State Supreme Court.³¹ The Nation filed a complaint in the United States District Court for the Northern District of New York on February 4, 2000 seeking to prevent the City of Sherrill from enforcing state tax laws on properties owned by them and comprising part of their historic reservation.³² Justice Hurd of the District Court held that the recently purchased land was part of the original Oneida reservation and therefore Indian Country and not subject to state taxation.³³ The Court of Appeals for the 2nd Circuit affirmed.³⁴ The Supreme Court reversed, holding that the equitable doctrines of laches, acquiescence and impossibility barred the claim that the reservation land was tax free.³⁵

VI. The Supreme Court's Decision

In an opinion written by Justice Ginsburg with seven justices joining, Souter concurring and Stevens dissenting, the majority held that “standards of federal Indian law and federal equity practice preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.”³⁶ The land, held the Court, is subject to state taxation. Despite finding that New York State was liable for its violation of the Non-Intercourse Act in *Oneida II*,³⁷ the Court did not agree that

³⁰ Petition for a Writ of Certiorari (Dec. 11, 2003) WL 22977923.

³¹ *Id.*

³² *Id.*

³³ *City of Sherrill, New York*, 145 F. Supp. 2d at 266.

³⁴ *Oneida Indian Nation of New York v. City of Sherrill, New York*, 337 F. 3d 139 (2003) (holding that “the property at issue was within Indian country” and therefore not taxable).

³⁵ *Oneida Indian Nation of New York*, 125 S. Ct. at 1478.

³⁶ *Id.*

³⁷ *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985).

redress for that violation should include the restoration of the Nation's sovereign immunity from local taxation,³⁸ and ultimately ruled against the proposition. The Court cited a New York District Court opinion (excluding liability against private landowners) that pointed to a "sharp distinction between the *existence* of a federal common law right to [Oneida] homelands," which the court recognized in *Oneida II*, "and how to *vindicate* that right."³⁹ The Court agreed with the District Court's conclusion that it was high time "to transcend the theoretical,"⁴⁰ meaning that the monetary awards against New York in *Oneida II* did not and could not mean that the Nation should be awarded equitable relief, such as a return to tax exemption or in the theoretical extreme, a full return of the lands gained in violation of the Non-Intercourse Act and various treaties.

Between the parties' briefs there raged a high-pitched battle, ammunition and shields taking the form of established precedents of federal Indian law, treaties and acts of Congress. Sherrill argued that the alleged reservation land is not Indian Country as that term is defined by 18 U.S.C. § 1151⁴¹ and the Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*;⁴² that § 1151 would not apply anyway because it was the State of New York that established the reservation in the 1788 Treaty of Fort Schuyler, and not the Federal Government, as required by the statute, and that the 1838 Treaty of Buffalo Creek required the Oneidas to abandon their land in New York, resulting in the "disestablishment" of the alleged New York

³⁸ *Oneida Indian Nation of New York*, 125 S. Ct. at 1483 (holding "[W]e decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns.").

³⁹ *Oneida Indian Nation of N.Y. v. County of Oneida*, 199 F.R.D. 61, 90 (N.D.Y.Y. 2000).

⁴⁰ *Oneida Indian Nation of New York*, 125 S. Ct. at 1488, (quoting 199 F.R.D. at 90).

⁴¹ *Id.* at 1489, FN5 (Indian country is reservations, dependent Indian communities and allotments).

⁴² *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) (holding that the term dependent Indian communities as used in statute defining Indian country "are neither reservations nor allotments, and [were] set aside by Federal Government for use of Indians...and are under federal superintendence.").

reservation.⁴³ Finally, Sherrill argued that any Oneida reservation that may have been Indian Country at one time or subject to the protections of the Non-Intercourse Act had lost those protections when the Tribe had “cease[d] to exist.”⁴⁴

For their part, the Nation argued that Congress never terminated the Oneida reservation and therefore it continues to enjoy “reservation” protection under 18 U.S.C. § 1151(a).⁴⁵ Further proof of this categorization within § 1151(a), the Nation contests, is the acknowledgement of the reservation by a Congressional resolution and three federal treaties.⁴⁶ Sherrill’s allegation that a disagreement exists with respect to *Alaska v. Native Village of Venetie*⁴⁷ (“whether a statutorily terminated reservation could become Indian country”)⁴⁸ was rebuffed by the tribe as having no relevance to the current case. The Nation suggested that Sherrill was not so much contesting the legal principles applied by the Second Circuit as they were the logical consequences of *Oneida II*,⁴⁹ namely that “local governments liable to the Oneidas as trespassers on Oneida land cannot reasonably claim the right to tax the land when it is in the hands of the Oneidas.”⁵⁰ Next, the Nation argues that the 1838 Treaty of Buffalo Creek did not, as contended by Sherrill,

⁴³ Petition for a Writ of Certiorari (Dec. 11, 2003) WL 22977923.

⁴⁴ *Id.*

⁴⁵ Section 1151 Classifies as Indian country “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government.”

⁴⁶ 25 J. Cont. Cong. 681, 687 (Oct. 15, 1783) (Oneida lands “reserved for their sole use and benefit”); Treaty with the Six Nations [Ft. Stanwix], 7 Stat. 15 (Oct. 22, 1784) (Oneidas “secured in the possession of the lands on which they are settled”); Treaty with the Six Nations [Ft. Harmer], 7 Stat. 33 (Jan. 9, 1789) (Oneidas “are also again secured and confirmed in the possession of their...lands”); Treaty with the Six Nations [Canandaigua], 7 Stat. 44 (Nov. 11, 1794) (acknowledging “what lands belong to the Oneidas” and assuring their “free use and enjoyment” as their “reservation[.]” and “property”).

⁴⁷ *Native Village of Venetie*, 522 U.S. at 520.

⁴⁸ Respondents’ Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (2004 WL 114479).

⁴⁹ 470 U.S.

⁵⁰ Respondents’ Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (2004 WL 114479).

disestablish the Oneida reservation and that the Oneidas' lands did not lose reservation status through a cessation of tribal existence.

In the end, however, it was all for naught, as the court resolved the case “on considerations not discretely identified in the parties’ briefs.”⁵¹ In practical terms this meant that the Court was not persuaded that treaties, prior Supreme Court decisions, and Acts of Congress - or the violations thereof – should have any bearing upon their decision, let alone direct a result in favor of the Nation. In place of an analysis of Federal Indian law, the Court decided that “[T]he appropriateness of [the Nation’s] relief must be evaluated in light of the long history of state and sovereign control over the territory.”⁵²

In order to illuminate the “historical reality”⁵³ upon which the Nation’s claim of tax exemption would ultimately turn, the Court offered a list of largely undisputed facts, pointing first to the reality that for the past 200 years the United States Government voiced no opposition whatsoever to New York’s governance of the land in question⁵⁴ or the illegality of its transfer from the Nation to the State.⁵⁵ “[I]n fact,” noted the Court, “the United States’ policy and practice through much of the early 19th century was designed to dislodge east coast lands from Indian possession,”⁵⁶ despite numerous treaties in which the U.S. promised exactly the opposite. During this time the properties involved increased in value, and it was not until recently⁵⁷ that

⁵¹ *Oneida Indian Nation of New York*, 125 S. Ct. FN 8 at 1490.

⁵² *Id.* at 1480.

⁵³ *Id.* FN 11 at 1491.

⁵⁴ *Id.* at 1480 (2005), (stating that “For two centuries, governance of the area in which the properties are located has been provided by the State and its county and municipal units”).

⁵⁵ *Id.* at 1488.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1491 (stating “The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970s”).

the Oneida sought to regain sovereignty over land long ago “converted from wilderness.”⁵⁸ Further, the Court suggested that “justifiable expectations” had been created by New York’s longstanding jurisdiction over an area 90% or more non-Indian.⁵⁹ The Court did not concern itself with the existence or non-existence of an Oneida reservation (or the effect of the Treaty of Buffalo Creek upon that issue), holding simply that to allow the tax exempt status of the land was not possible because of the long lapse of time, the Nation’s failure to seek relief other than against the U.S., and the disruption such relief would bring to Sherrill and presumably other areas in New York facing similar land claim issues. The Court acknowledges that grave wrongs were committed against the Nation but suggests that those wrongs have somehow been tempered by the passage of time.⁶⁰

The legal doctrines relied on by the Court in finding that the Oneida land is subject to state taxation are laches, acquiescence and impracticability. The doctrine of laches focuses on “one side’s inaction and the other’s legitimate reliance” to bar long-dormant equitable claims.⁶¹ As the court points out, much time has passed since the illegal transaction, most of the area is now non-Indian,⁶² the property has greatly increased in value,⁶³ justifiable expectations have been created through New York’s longstanding jurisdiction,⁶⁴ and “it was not until lately that the

⁵⁸ *Id.*

⁵⁹ *Id.* at 1490 (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605 (1977)).

⁶⁰ *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 125 S. Ct. 1478, 1491 FN11 (2005) (stating “OIN’s claim concerns grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality”).

⁶¹ *Id.* at 1491.

⁶² *Id.* at 1488 (stating that “over 99% of the population in the area is non-Indian”).

⁶³ *Id.* at 1490.

⁶⁴ *Id.*

Oneidas sought to regain ancient sovereignty over [the] land.”⁶⁵ For these reasons, the Court found that laches bars the Nation’s claim of tax-immunity.

Next, the Court applied the doctrine of acquiescence, whose focus is on one party’s failure over a long period of time to contest the possession of territory by another.⁶⁶ Acquiescence attaches no importance to the original validity of the boundary (i.e. the fact that the illegal transactions between the Nation and New York resulted in invalid boundaries is irrelevant), but instead attaches legal consequences to the longstanding observance of a boundary.⁶⁷ In its opinion the Court returns time and again to the idea that the Nation simply allowed too much time to pass without asserting their right to sovereign control over the land in question.⁶⁸ For this reason, the Court concludes that the Nation has acquiesced in New York’s governance of their reservation land.

Lastly, the Court employs the doctrine of impossibility, defined by Black’s Law Dictionary as “[A] fact or circumstance that cannot occur, exist, or be done.”⁶⁹ Here, the circumstance that “cannot occur” is the granting of tax exempt status to the Nation. The Court refers to it’s decision in *Yankton Sioux Tribe v. United States*⁷⁰ where, in similar circumstances, the impossibility doctrine barred the restoration of the Sioux’s former rights “because the lands have been opened to settlement and large portions of them are now in the possession of innumerable

⁶⁵ *Id.*

⁶⁶ *Id.* at 1492.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1494 (stating “the Oneidas’ long delay in seeking equitable relief against new York or its local units...render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate”).

⁶⁹ Black’s Law Dictionary 334 (8th ed. 2001).

⁷⁰ *Yankton Sioux Tribe of Indians v. U.S.*, 272 U.S. 351, 357 (1926).

innocent purchasers.”⁷¹ The Court also cites *Felix v. Patrick*⁷² where, in declining to award equitable relief, it observed “[t]hat which was wild land thirty years ago is now intersected by streets, subdivided into blocks and lots, and largely occupied by persons who have bought upon the strength of Patrick’s title, and have erected buildings of a permanent character.”⁷³ In the present situation, the Court finds that allowing the Oneidas to reassert sovereign control over the land in question would have “disruptive practical consequences,”⁷⁴ create a checkerboard of state and tribal jurisdiction, and seriously burden the administration of the area by local governments. The Court ends with a Pandora’s Box justification, stating that if the Oneidas were granted the sovereignty they seek, little would prevent them from bringing new claims for *all* the sovereign rights that have been promised over the years.⁷⁵ The Court declines to disrupt “the historic wisdom in the value of repose,”⁷⁶ and reverses the Court of Appeals for the Second Circuit.

The solution, the Court suggests, lies in 25 U.S.C § 465, a Congressional enactment that allows the Secretary of the Interior to acquire land in trust for Indians that is exempt from state taxation. This mechanism “takes account of the interests of others with stakes in the area’s governance and well being.”⁷⁷ In deciding to grant such a request, the Secretary will take into account the tribe’s need for additional land, purposes for which the land will be used, the impact on the state and its political subdivisions, and jurisdictional problems and potential conflicts of land use which may arise.

⁷¹ *Oneida Indian Nation of New York*, 125 S. Ct. at 1482.

⁷² *Felix v. Patrick*, 145 U.S. 317, 334 (1892).

⁷³ *Oneida Indian Nation of New York*, 125 S. Ct. at 1492 (quoting *Felix v. Patrick*, 145 U.S. 317, 334 (1892)).

⁷⁴ *Id.* at 1493.

⁷⁵ *Id.* (stating “if OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls...”).

⁷⁶ *Id.* at 1492 (quoting *Oneida II*, 470 U.S. at 262).

⁷⁷ *Id.* at 1493.

In a concurring opinion, Justice Souter takes a different view concerning the way in which the Court should approach the reassertion of tribal sovereignty in cases such as this. The fundamental claim being made by the Tribe, he says, is that it has retained its sovereign status and should be recognized as sovereign by the State. Souter suggests that the claim of sovereign status itself turns on “the Tribe’s behavior over a long period of time,”⁷⁸ and that this behavior is “central to the very claims of right made by the contending parties.”⁷⁹

Justice Stevens opens his dissenting opinion with two facts; first, the case involves an Oneida’s claim to tax immunity on property within the established and acknowledged boundaries of its reservation. Secondly, the Tribe seeks only tax immunity, not immunity from other forms of state regulation or authority over property owned by non-Indians. He notes that “it is undisputed that the City seeks to collect property taxes on parcels of land that are owned by the Tribe and located within the historic boundaries of its reservation.”⁸⁰ The thrust of the parties argument in the Federal Court and the Court of Appeals rallied around the issue of whether or not the land in question is Indian Country.⁸¹ Stevens, for the reasons set fourth in the courts below, finds it “abundantly clear” that it is,⁸² and argues that the decision made by the Court is one that should have been left to Congress. Instead, the Court took it upon itself to settle the issue, violating two “bedrock principles” of Federal Indian law in the process (only Congress may diminish a tribe’s reservation and tribal immunity from state taxation must be explicitly revoked by Congress).

⁷⁸ *Id.* at 1494.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1495.

⁸¹ *Id.* (stating “since the outset of this litigation it has been common ground that if the Tribe’s properties are “Indian Country,” the City has no jurisdiction to tax them without express congressional consent”).

⁸² *Id.* (stating “it is abundantly clear that all the land owned by the Tribe within the boundaries of its reservation qualifies as Indian Country”).

Stevens points out the theoretical conflict in the Court's holding that non-Indian justifiable expectations do not prevent the Tribe from getting damage remedies, but do forfeit tribal immunity from taxation.⁸³ Stevens notes that the Tribe "reacquired reservation land in a peaceful and lawful manner that fully respected the interests of innocent landowners."⁸⁴ To deny sovereignty in the form of tax-exemption violates the principle that only Congress may abrogate tribal rights. "The answer to the question whether the city may require the Tribe to pay taxes on its own property within its own reservation is pellucidly clear. Under settled law, it may not."⁸⁵

VII. Analysis and Critique of the Supreme Court's Decision

The Court, in finding that the doctrines of laches and acquiescence bared the Nation's claim to tax-exemption, declined to consider a well-documented and readily available history; a history that strongly suggests the Oneidas did not sleep on their rights but, in fact, asserted them over and over to the deaf ears of state and federal governments while at the same time being denied access to state and federal courts. There exists an impressive amount of evidence which, at the very least, called for a more inclusive consideration of the Nation's rich history of petitioning the state and federal governments for redress. More grievous, however, was the short shrift given to the Court's own decision in *Oneida I*,⁸⁶ a monumental change in law that opened the door to federal courts for the Nation's land claims in 1974. Perhaps the most compelling question is why the Court avoided a true analysis of whether or not the land is "Indian Country," an issue that was hotly debated in the lower courts and justifiably viewed by both parties to be one of the major issues upon which the case would ultimately turn. Cohen's Handbook of Federal Indian

⁸³ *Id.* at 1497.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Oneida Indian Nation of N.Y. State v. Oneida County, New York*, 414 U.S. 661, (1974).

Law points out that “states generally lack jurisdiction to tax Indians in tribal Indian country.”⁸⁷

The Court surely knew that a simple analysis would determine that the land was in fact Indian country and thus exempt from State taxation. Perhaps this was not the result they were seeking.

The evidence contradicting the Court’s application of laches and acquiescence was, to a large extent, rediscovered and documented by the Nation’s attorney, George C. Shattuck, during his research for the *Oneida I*⁸⁸ and *Oneida II*⁸⁹ cases. First, the social disadvantages that plagued the Oneidas cannot simply be swept under the rug of history. During the time of the illegal transactions at issue in *Oneida I* and *II*, “only a few Oneidas had even a minimal ability to understand English,” and “[N]one could read or write.”⁹⁰ In fact, the Nation required a translator at meetings through the 1950s in order to explain the actions of the federal government.⁹¹ If this were the only fact going against the Court’s application of laches and acquiescence, it would nevertheless present a compelling justification for the Tribe’s alleged failure to pursue their claims. In reality, however, the Tribe’s unfamiliarity with America’s language and legal system merely served as the backdrop for a parade of judicial and governmental blockades, all acting in concert through the years to ensure that no forum would exist to hear the Oneida’s land claims until it was too late. Today’s Supreme Court has, in effect, conspired with these misdeeds of the past by vindicating the land-hungry desires that inspired them.

a. Federal Attempts

⁸⁷ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, 1982 Edition, Ch. 7, Sec. A.

⁸⁸ *Oneida County, New York*, 414 U.S. at 661.

⁸⁹ *Oneida II*, No. 70-CV-35, United States District Court, N.D. New York, 3 (1977) (affirmed by *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985)).

⁹⁰ *Id.*

⁹¹ *Id.*

The Court finds fault with the Nation's "long delay in seeking equitable relief against New York or its local units."⁹² However, any attempts to gain such relief must be considered not only in terms of the steps the Nation actually took against the County and State, but also in light of the attempts that were made to enlist the federal government as "guardian" for that purpose. In *Johnson v. M'Intosh*, Chief Justice Marshall introduced the "trust doctrine," which stated that the United States has a duty to protect the Indians in their right of occupancy. Later, in *Cherokee Nation v. Georgia*, Marshall described the relationship between the United States and Indian Nations as "ward to guardian." As Shattuck said, "[U]nder Federal Indian Law, Native Americans are wards of the U.S. government, which is supposed to protect them and to obtain redress for wrongs against them."⁹³ Therefore, any attempt on the part of the Nation to convince the federal government to help with these claims must also be seen as a step taken against New York and its local units.

In 1965, Jake Thompson (then President of the Nation) wrote to Congressman James M. Hanley of central New York about obtaining federal help in pursuing land claims. The U.S. Bureau of Indian Affairs responded by letter, stating that the Oneida treaties with New York "were not available to this Bureau" and that "[N]either this Bureau nor the Department of Interior employs attorneys to provide legal services to individual Indians or Indian tribes in the prosecution of claims which they believe they have against others; nor do we have any funds which we could give or lend to the tribe for this purpose."⁹⁴ In 1967, Shattuck sent a formal petition to President Lyndon B. Johnson on behalf of the Oneidas. The government responded that it had no duty to aid the Oneidas in pursuing their claim since the Oneidas had already filed suit against the

⁹² *Oneida Indian Nation of New York*, 125 S. Ct. at 1494.

⁹³ Shattuck, *supra* 16.

⁹⁴ *Id.* at 14.

United States in the Indian Claims Commission.⁹⁵ By statute, recovery against the U.S. in that forum was limited to the value of the land at the time of the alleged illegal taking, without interest,⁹⁶ leaving the Nation with no hope of an equitable solution. In 1968, another letter was sent to Johnson asking for review of the federal government's decision not to help the Oneidas. This too was rejected.⁹⁷ But the Nation (and their lawyer) were not to be brushed off so easily. Next, they petitioned Congress under a provision of the constitution that grants the right to petition for redress and grievances. Again denied.⁹⁸ Shattuck then petitioned President Nixon when he took office as well as Senator Edward Kennedy. The answers were the same; "the laws and treaties notwithstanding, the United States would not help pursue the claim against New York State."⁹⁹ During this time the federal government displayed its complete unwillingness to help the Nation as its "guardian" in pursuing claims of illegal land transactions against the State of New York. To bar the Nation's claim of tax exemption with the doctrines of laches and acquiescence implies that a similar, but earlier, attempt would have garnered a different result. To suggest that the federal government would have acted otherwise at some earlier time in history, before laches and acquiescence would have been applied, is to ignore history. The door to federal help was, and always had been, closed to the Oneidas.¹⁰⁰

b. State Attempts

⁹⁵ *Id.* at 17.

⁹⁶ *Id.* at 10.

⁹⁷ *Id.* at 18.

⁹⁸ *Id.* at 19.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at xviii (stating "[F]ederal officials had always responded to the Oneidas by denying the merit of their claims and by discouraging legal action. The Oneidas were wrongly advised many times that they had no federal tribal status in New York; they were also wrongly advised that Congress would retroactively ratify any illegal land sales even if they won in court; and they were also told that they were under state jurisdiction, which precluded any federal action of redress. Because the Indian nations were also barred from New York State courts by the long-held principle that state courts cannot hear Indian land cases, the Oneidas were in effect denied a legal forum").

The Nation fared no better in their overtures to New York State. In the early 1960s, Jake Thompson sent a letter to Louis Lefkowitz, the New York State Attorney General, and John Hathorn, the Director of New York State Indian Services. In it, he asked the State leaders for a settlement of the Oneida's long-standing land claims based on New York's violation of the Nonintercourse Act. He received no response.¹⁰¹ This should not have come as a great surprise. The State had always insisted that the Nonintercourse Act (barring land transactions between Indian Nations and states without approval of the federal government) did not apply to New York.¹⁰² This, coupled with New York's assertion that Tribes were not "persons" entitled to commence an action in New York courts, effectively barred the Nation from bringing their land claims in the State's courts. "If you are not a 'person,'" explains Shattuck, "you cannot start a lawsuit."¹⁰³ Indeed, in *Johnson v. Long Island Railroad Co*, the court insisted that "[Indians] are regarded as wards of the State, and generally speaking possessed of only such rights to appear and litigate in courts of justice as are conferred on them by statute."¹⁰⁴ Abiding by the State's requirement of statutory authorization to sue, Shattuck in 1967 delivered a petition to the Constitutional Convention of New York State, requesting recognition of the State's treaty obligations. Shattuck asked that the jurisdiction of the New York Court of Claims be changed in order to permit a hearing of the land claim.¹⁰⁵ In opposition to this request and in perfect keeping with New York's stance on the subject, the Attorney General for the State submitted a memo arguing that the Nonintercourse Act did not apply to New York and that the courts should not be open to the Oneidas.¹⁰⁶ The Convention denied the Oneida's request, despite the holding

¹⁰¹ *Id.* at 14.

¹⁰² *Id.* at 21 ("[T]he state made the broad argument that the Nonintercourse Act did not apply to New York – the same argument it had been making since 1784").

¹⁰³ *Id.* at 24.

¹⁰⁴ *Johnson v. Long Island Railroad Co*, 162 N.Y. 462 (1900).

¹⁰⁵ Shattuck, *supra* 15.

¹⁰⁶ *Id.*

in *Tuscarora v. N.Y. Power Authority* that New York is subject to the Nonintercourse Act.¹⁰⁷ As Shattuck pointed out with increasing exasperation, “[U]nder both federal and state law the Oneidas could not sue in the courts of New York State; nor, if they could, would they get a fair deal. Case after dreary case had proved that.”¹⁰⁸

c. Federal Court Blockade

Until 1974, the Oneida’s land claims were effectively blocked from federal court due to the Federal Question (well pleaded complaint) doctrine,¹⁰⁹ the interpretation of which bared suit by a Native American tribe to recover land.¹¹⁰

The Supreme Court’s decision in “*Oneida I*”¹¹¹ represented a major breakthrough for the Oneidas and all Native tribes in the United States. In that case, the Court held that a tribe’s possessory claim to land was no longer blocked from federal court by the constraints of the well-pleaded complaint rule. The rule that a cause of action that can initially be brought under state law cannot be a Federal Question had, for decades, barred Federal court review of Indian land claims because an action to recover land, an “ejectment” action, may be heard in state courts.¹¹² Thus, the legal catch-22 that Federal courts cannot hear Indian land claims because there is no Federal Question jurisdiction, and state courts cannot hear Indian land claims because they are a federal matter, which state courts are barred from hearing,¹¹³ was at least partially alleviated.

The Court reasoned that because the “Oneidas assert a present right to possession based in part

¹⁰⁷ *Id.* at 21.

¹⁰⁸ *Id.* at 34.

¹⁰⁹ 25 U.S.C. § 1331.

¹¹⁰ Shattuck, *supra* 24.

¹¹¹ *County of Oneida, New York*, 414 U.S. at 661.

¹¹² Shattuck, *supra* 21.

¹¹³ *Id.* at 24.

on their aboriginal right of occupancy,”¹¹⁴ the complaint on its face raised a federal question. In his argument before the Supreme Court that federal courts should grant jurisdiction to the Oneida’s land claim in *Oneida I*, Shattuck contended that “both under the state law up to 1958 and the federal law down to this date there is no way that the Oneida Indians or any other Indian tribe can bring an action in a court, a state court of New York State, for a question dealing with land claims.”¹¹⁵ In deciding in favor of the Oneidas, the Court held that “Federal courts do have basic Federal Question jurisdiction to hear Indian land claims, even though the Indians are not in possession of the land. The Nonintercourse Act always forbade states, including New York, to acquire Indian land without federal consent. A cause of action exists to recover such land. Indian tribes or nations may bring such actions.”¹¹⁶

In 1975, a year after the Court’s granting of jurisdiction to the Oneidas, the Corporation Counsel of the City of Oneida wrote to Shattuck, “The City of Oneida does not acknowledge the existence of an Oneida Indian nation, and much less, Jacob Thompson as the, so called, President thereof.”¹¹⁷ Thus, even after the holdings that New York is subject to the Nonintercourse Act and that the Oneida’s claim presents a federal question, the State of New York had yet to admit to the *existence* of the Oneida Indian Nation. This begs the question; how could the Court justify ruling against the Nation by citing their “long delay in seeking equitable relief against New York or its local units,” when those units categorically refused to acknowledge even the existence of the Oneida Nation? Again, the application of laches and acquiescence implies that the Nation had a forum through which to seek redress from New York earlier. As the above history clearly

¹¹⁴ *County of Oneida, New York*, 414 U.S. at 677.

¹¹⁵ Shattuck, *supra* 35.

¹¹⁶ *Id.* at 38.

¹¹⁷ *Id.* at 80.

shows, this is false. The Nation sought redress from the State for many years and, as anyone with even an elementary grasp of Federal Indian law knows, the further back in time one goes, the less likely one is to find a State of New York that is amicable to Indian land claims. The earlier the claims are made, the more the pressures of expansionism prevent the existence of a forum (much less redress), while the longer the Tribe waits to assert the claims, the more applicable are the common law doctrines of laches and acquiescence. This interplay bifurcates America of the past and America of the present, allowing today's Court to separate itself from and validate the Country's transgressions. In effect, America of the past has successfully conspired with America of the present.

In 1977, armed with a new right to be heard in federal court, the Nation continued its suit against Madison and Oneida Counties in *Oneida II*,¹¹⁸ seeking damages for the illegal use and occupancy of their land measured by the fair rental value of 872 acres for the years 1968 and 1969. An expert hired by Shattuck discovered so many Oneida petitions to federal and state agencies over the years that he decided to present only a representative sampling to the Court.¹¹⁹ Additionally, the Bureau of Indian Affairs files from 1910 to 1945 were introduced as evidence and “clearly negated any claim that the Oneidas had not pursued their rights.”¹²⁰ In finding New York liable for violation of the Nonintercourse Act,¹²¹ the district court noted that “[T]he trial of this case demonstrated that [the Oneidas] have patiently for many years sought a remedy by other means – but to no avail. The aid of the United States as guardian has been sought for the purpose of instituting claims against the State of New York.” Indeed, the court makes a point of

¹¹⁸ *County of Oneida, New York*, No. 70-CV-35. United States District Court, N.D. New York.

¹¹⁹ Shattuck, *supra* 43.

¹²⁰ *Id.*

¹²¹ *County of Oneida, New York*, No. 70-CV-35. United States District Court, N.D. New York, 26 (1977) (holding “[T]he plaintiffs have established a claim for violation of the Nonintercourse Act”).

preserving for the record that, for the better part of the 20th Century, the Nation contacted the federal government “innumerable times”¹²² in connection with land claims. The holding was affirmed by the Supreme Court in 1985.

This history makes abundantly clear that the doctrines of laches and acquiescence were misplaced and used for the benefit of non-Indian landowners in Sherrill without even a pretence of historical consideration.

VIII. Departure From Established Principles of Federal Indian Law

The Court’s decision was a departure from an astounding number of Federal Indian law principles. The right of Indian self-governance on Indian territory was recognized in 1832 by Chief Justice Marshall in *Worcester v. Georgia*.¹²³ Thirty five years later in *The Kansas Indians*,¹²⁴ the Court found unconstitutional the application of state tax laws to tribes still recognized by the federal Government.¹²⁵ Here, the Court denied the Oneidas the right to self-government by allowing New York State to tax the land, and ignored the fact that the federal government has not ceased to recognize the Oneidas or their reservation. This is in direct conflict with the notion in *Worcester* that Congress has exclusive (plenary) power over Indian affairs. Although the Court’s decision would suggest otherwise, recent history in the form of the Court’s own precedents makes clear that the judiciary simply does not have the power to diminish Indian sovereignty and thus may not purport to change tax-exempt status on reservation

¹²² *Id.* at 3.

¹²³ *Worcester v. Georgia*, 31 U.S. 515 (stating that “implicit in treaty-making with the Indians is a recognition of their national character and right to self-governance”).

¹²⁴ *The Kansas Indians*, 70 U.S. (3 Wall.) 407 (1866).

¹²⁵ *Id.* at 755-57 (1866) quoting *Worcester v. Georgia* (“As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State [taxes]”).

land. In 1976 the Court held that “absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxation of Indian reservation lands...”).¹²⁶ In 1993, the Court held that a tribal member in Indian country is outside a state’s taxing jurisdiction.¹²⁷ Past Supreme Court’s decisions stating exactly the same are simply too many to mention. Despite this history, the Court effectively strips Congress of its plenary power in this area, planting it squarely within the realm of the judiciary.

In *Cherokee Nation v. Georgia*,¹²⁸ the Court enunciated the doctrine of “ward to guardian,”¹²⁹ in which the United States government was to act as a guardian in protecting the interests of its Indian wards. As simple as the concept is in theory, it has proven nearly impossible for the United States to uphold in practice. The federal government’s consistent refusal to take action on behalf of the Oneidas in furtherance of their land claims against New York leads to the inescapable conclusion that the United States as guardian is at best unreliable, self-interested and dishonest. As the Court itself pointed out, the federal government “[made not] even a pretense of interfere[ing] with [the] State’s attempts to negotiate treaties [with the Oneidas] for land cessions.”¹³⁰ The Court chose not to uphold the ward to guardian principle, a doctrine created within its own walls, opting instead to legitimize the illegal transfer by allowing New York State to keep that which it set out to gain by violating the law in the first place: ownership of the land.

IX. The Effect on Native Sovereignty in Future “Buy Back” Cases

¹²⁶ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

¹²⁷ *Oklahoma Tax Com’n v. Sac and Fox Nation*, 508 U.S. 114 (1985).

¹²⁸ *Cherokee Nation v. State of Ga.* 30 U.S. 1 (1831).

¹²⁹ *Id.* at 2.

¹³⁰ *Oneida Indian Nation of New York*, 125 S. Ct. at 1485 (quoting *Oneida Nation of N.Y. v. United States*, 43 Ind. Cl. Comm’n 373, 385 (1978)).

This case suggests that grounded federal Indian law doctrine such as the Non-intercourse Act, the trust relationship, Congress' plenary power over Indian affairs, and sovereignty on reservation land can be entirely overcome by the selective employment of common law principles such as laches, acquiescence, and impracticability. Further, the case implies that Indian law doctrine need not be used at all in resolving a land-dispute between a tribe and a state. The Court's decision further advances the issue of tribal sovereignty towards the murky waters of the vague and unclear. Perhaps in partial recognition of its inability to do so, the Court did not explicitly hold that reservation land purchased by tribes was divested of all sovereignty. As a result, the scope of this holding will have great consequences on similar "buy back" cases in the future. For now, questions continue to loom as to what sovereign rights – if any - are retained in situations like this. A judicial divestiture of Native sovereign rights (although unsupported by law and precedent) should, at the very least, be held to the same standards as a congressional divestiture; that of a *clear and explicit* statement. A narrow reading of the holding, and one sure to be argued by Tribal advocates in future cases, is that *Sherrill* applies only to the sovereign right of tax-exemption. Equally foreseeable will be the state advocates' argument that *Sherrill* stands for the divestiture of all sovereign rights in buy back cases. A clear statement concerning the rights that remain on repurchased reservation land unaffected by Congressional divestiture of sovereignty was clearly lacking in the Court's decision and will likely lead to more litigation in the future.

X. Conclusion

Land is and always has been the standard by which American society measures wealth, power, and success. Land was the driving force behind New York's violations of law; unwillingness to

disrupt non-Indian land ownership was behind years of federal government acquiescence in the face of endless pleas for help from the Oneidas, its “wards”; and today land is as coveted as ever for its cultural and economic implications. As the Court made clear, non-Indian landownership is not to be disturbed by notions of equity, fairness and the seemingly ever-present struggle between recognizing what is right and acting upon that understanding. The Federal Court suggested that in resolving land claim and sovereignty issues such as this, “a judge must put aside any personal opinions or ideas and apply the Constitution, Treaties, and laws of this great country.”¹³¹ Now that the Court has declined to apply all but common law when tribes acquire the resources to buy back illegally transferred reservation land, it must at the very least grant certiorari to deny New York’s attempts to foreclose the land which, by all accounts, is still a part of a sovereign Oneida Indian Nation. The Court should also grant certiorari to send a clear message about what sovereignty remains in buy-back cases such as these. The answer to this question implies a more important issue, one that has hung over the collective head of America for 200 years and speaks directly to the morality of its people and the validity and humanity of its laws: will United States allow its Native people to succeed as Americans and at the same time succeed and grow as *Indians*? Or has the Court signaled the beginning of a new assimilationist era, one in which the judiciary tacitly encourages wrongs of the past by utilizing common law doctrine to prevent their equitable redress? As usual, only time (and the Supreme Court) will tell.

¹³¹ *Oneida Indian Nation of New York v. City of Sherrill*, New York, 145 F. Supp. 2d, 226 (2001).