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THE MISUSE OF HISTORY IN DISMISSING SIX NATIONS CONFEDERACY LAND CLAIMS

Curtis G. Berkey, * *Alexandra C. Page*** & *Lindsay G. Robertson* ***

In 1790, President George Washington promised that the United States would shield the Six Nations Confederacy against New York State's relentless efforts to take its lands.¹ He assured the leaders of the Six Nations that federal law would protect them and that the federal courts would remedy any wrongdoing by the State.² In the two hundred years since the President made this solemn commitment, however, the Six Nations have suffered dispossession and dislocation on a massive scale, and, despite

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1. Modern historians trace the formation of the Six Nations Confederacy to sometime between 1450 and 1600, when the Mohawk, Oneida, Onondaga, Cayuga, and Seneca Nations came together. BARBARA GRAYMONT, *THE IROQUOIS IN THE AMERICAN REVOLUTION* 14 (1972). The Tuscarora Nation joined the Confederacy in 1722. *See* ANTHONY F.C. WALLACE, *TUSCARORA: A HISTORY* 2 (2012). The Six Nations Confederacy refer to themselves as Haudenosaunee. *See Oneida Indian Nation of Wis. v. New York*, 732 F.2d 261 (2d Cir. 1984) (granting Haudenosaunee, or the Six Nations Iroquois Confederacy, intervention in land claims asserted by the Oneida Indian Nation of Wisconsin). The member nations of the Six Nations Confederacy owned and occupied by aboriginal right and treaty guarantee most of New York State before the founding of the United States.

2. In response to Six Nations' complaints that they had been defrauded of their lands, President Washington pointed to the recently enacted Trade and Intercourse Act as "the security for the remainder of your lands" and promised that

[t]he general Government will never consent to your being defrauded—But it will protect you in all your just rights.

.....

If, however you should have any just cause of complaint against [land speculators], and can make satisfactory proof thereof, the federal Courts will be open to you for redress, as to all other persons.

Letter from George Washington to the Seneca Chiefs (Dec. 29, 1790), *in* 7 *THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES* 146 (Jack D. Warren, Jr. ed., 1998).

steadfast efforts over many decades, have yet to secure any protection from the Executive Branch or adequate remedy from the federal courts.

The question of whether and how President Washington's promise will be fulfilled remains a defining issue in relations between the Six Nations and the United States. Recent court developments suggest that fulfillment of Washington's promise may elude this generation, as it has many generations past. In a series of rulings beginning in 2005 with *City of Sherrill v. Oneida Indian Nation*,³ the federal courts have closed the courthouse doors to Indian claims deemed to disrupt the "settled expectations" of non-Indian landowners, even when it is beyond dispute that Indian land was taken in violation of federal law and when Indians seek only money damages from the New York State government.⁴

The courts' conclusion that equitable considerations should be applied to deny remedies to Indian nations required an intentional disregard of several centuries of history. In *City of Sherrill*, the Court relied on an incomplete and one-sided historical record to find that the Oneida Nation had inexcusably delayed asserting its jurisdiction over the parcels of land taxed by the City.⁵ The historical record was necessarily spotty because the Court announced the new equitable defense without first affording the Oneida Nation an opportunity to develop and present its historic efforts to assert its sovereignty over the area.⁶

3. 544 U.S. 197 (2005).

4. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006) (reversing \$248 million judgment on basis of *City of Sherrill*); *Oneida Indian Nation v. Cty. of Oneida*, 617 F.3d 114 (2d Cir. 2010), *cert. denied*, 565 U.S. 970 (2011); *Onondaga Nation v. New York*, 500 F. App'x 87 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 419 (2013); *Shinnecock Indian Nation v. New York*, 628 F. App'x 54 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2512 (2016); *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1492 (2015).

5. *See City of Sherrill*, 544 U.S. at 221. The Court announced a new equitable defense that appears to apply only to Indian nations. The Court drew on the doctrines of laches, acquiescence, and impossibility to conclude that the Oneidas' assertion of jurisdiction over lands they lost in 1805 and only recently acquired through purchase on the real estate market was "inequitable" and therefore barred.

6. The Questions Presented for Review in the Petition for Certiorari were limited to the following: 1) whether the Oneida Reservation is Indian Country under 18 U.S.C. § 1151 and *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998); 2) whether the subject land was Indian Country in light of the fact that the reservation was established by a treaty with New York State, rather than a federal treaty; 3) whether the 1838 Buffalo Creek Treaty disestablished the Oneidas' New York reservation; and 4) whether the Oneida Reservation may remain Indian Country if the tribe claiming such status has ceased to exist. Brief for Petitioner at 1, *City of Sherrill*, 544 U.S. 197 (No. 03-855), 2004 WL 1835364, at

Scholarly criticism of the Court's misuse of history may undermine the legitimacy of *City of Sherrill* and perhaps even limit its application.⁷ But the untold story of the Six Nations Confederacy's efforts to assert their land rights and jurisdiction is relevant for other reasons, including the Nations' ongoing efforts to obtain a remedy for the loss of their lands.

It remains unknown whether the equitable defenses announced in *City of Sherrill* are a detour or a dead end on the Six Nations' road to achieving justice for the loss of their lands. There can be no doubt that the leaders of the Six Nations are committed to obtaining redress for this dispossession. In the face of these court decisions, obtaining relief for the Six Nations will likely require renewed focus on the political branches, particularly Congress.

Careful review of the historical record demonstrates that courts denying land claims made by the Six Nations fundamentally misconstrue two key facts: first, for nearly two centuries, Indian nations could not access state or federal courts to vindicate their land rights. Second, despite lack of access to the courts, from the very beginning the Six Nations vigorously protested the taking of their lands to the New York State Legislature, Congress, and the public at large. Those efforts continue today. An informed understanding of this history is necessary in order to determine whether a political solution to the problems created by the unlawful taking of Six Nations' land is possible. Without a thorough examination of the history of

*i. Justice Souter, acknowledging that the Court's decision turned on issues not fully briefed or developed by the parties, suggested that reargument was not necessary, and no opportunity to develop the factual record on delay need be provided, because the question of inaction was addressed briefly at oral argument. *City of Sherrill*, 544 U.S. at 222 (Souter, J., concurring).

7. See Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation: A Regretful Postscript to the Taxation Chapter* in Cohen's Handbook of Federal Indian Law, 41 TULSA L. REV. 5, 16 (2005) ("The Oneida Indian Nation was as active as could be expected under the coercive historical circumstances. The Court overlooks the history, seemingly willfully, in concluding the Oneidas failed to take action in a timely manner."); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006) (analyzing legal, political and practical obstacles Indian tribes faced in asserting their rights in court); see also Richard B. Collins & Karla D. Miller, *A People Without Law*, 5 INDIGENOUS L.J. 83 (2006) (analyzing judicial decisions and other authorities regarding Indian tribes' historic lack of capacity to sue). The U.S. Supreme Court does not appear eager to extend *City of Sherrill* beyond the unique facts of that case, despite the lower courts' willingness to do so. The Court recently declined to address the question of whether *City of Sherrill* should limit an Indian tribe's governmental powers in a reservation boundary disestablishment case. *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016).

the Six Nations' efforts to assert their land rights, *City of Sherrill* and its progeny may legitimize the dispossession of their land.

The New York Indian Land Claim Framework: History and Law

The Six Nations' land rights actions arose because the State of New York violated federal law when it repeatedly purchased Indian lands—often under fundamentally unfair conditions—without congressional approval.⁸ Courts have confirmed these violations of federal law.⁹ By the turn of the eighteenth century, if not before, New York officials knew that the 1790 Trade and Intercourse Act required federal supervision and approval for any land deals with Indian nations.¹⁰ Yet for nearly five decades, between 1788 and 1845, the State embarked on a systematic and aggressive campaign to acquire the lands of the Six Nations in violation of that statute.¹¹ The State's

8. The New York Indian land claims are based on the Trade and Intercourse Act of 1790, which provides:

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

Trade and Intercourse Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138 (current version at 25 U.S.C. § 177). The Act was re-enacted several times after 1790, with this provision or nearly identical language included in each. *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 668 n.4 (1974). Because only Congress may ratify treaties under the Constitution, the Act meant that neither individuals, states, nor political subdivisions of states could acquire Indian land without authorization and approval from Congress.

9. See, e.g., *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230 (1985); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006).

10. See *Cayuga Indian Nation v. Pataki*, 165 F. Supp. 2d 266, 334 (N.D.N.Y. 2001) (noting that in 1795 during New York's land negotiations with several Indian nations, U.S. Secretary of War Timothy Pickering sent New York Governors Clinton and Jay the legal opinion of U.S. Attorney General Bradford that the Trade and Intercourse Act prohibited the sale of Indian lands to the State except pursuant to a federal treaty).

11. See generally Robert N. Clinton & Margaret Tobey Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 43 (1979) (noting that New York State entered into nearly 200 treaties with Indian nations to acquire their land). See, e.g., *Cayuga Indian Nation v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990) (finding that New York State's acquisition of 64,015 acres of Cayuga land in 1795 and 1807 violated the Nonintercourse Act); *Oneida Indian Nation v. Cty. of Oneida*, 199 F.R.D. 61 (N.D.N.Y. 2000) (allowing filing of amended complaint by Oneida alleging that thirty separate transactions purportedly conveying 250,000 acres violated the Nonintercourse Act); *Seneca Nation of Indians v. New York*, 206

efforts yielded one of the largest illegal transfers of Indian land in American history. The Six Nations were dispossessed of most of their treaty-protected aboriginal territory, an area encompassing central and western New York State and parts of present-day Pennsylvania.¹² In many cases, the State made deals with individuals it knew lacked authority to negotiate land cessions.¹³ In some cases, the State deceived Indian nations into thinking they were leasing rather than selling their land.¹⁴ The State typically paid

F. Supp. 2d 448 (W.D.N.Y. 2002) (discussing facts of New York State's acquisition of Seneca Islands in the Niagara River); *Canadian St. Regis Band of Mohawk Indians v. New York*, 278 F. Supp. 2d 313 (N.D.N.Y. 2003) (discussing New York State's acquisition of 15,000 acres of Mohawk land); *Onondaga Nation v. New York*, No. 5:05-cv-0314, 2010 WL 3806492, at *2 (N.D.N.Y. Sept. 22, 2010) (discussing New York State's acquisition of two million acres of Onondaga land); see also Barbara Graymont, *New York State Indian Policy After the Revolution*, 57 N.Y. HIST. 438, 440 (1976) (discussing State's land acquisition policy).

12. See, e.g., *Cty. of Oneida*, 470 U.S. at 230 (stating that the Oneidas' aboriginal land was "approximately six million acres, extending from the Pennsylvania border to the St. Lawrence River, from the shores of Lake Ontario to the western foothills of the Adirondack Mountains").

13. For example, upon learning in 1789 that New York State had made land cession treaties with the Onondagas, Oneidas, and Cayugas, the Six Nations Confederacy informed New York Governor Clinton that such agreements were invalid because they had been entered into by "a few of our wrong headed young Men, without the Consent or even Knowledge of the Chiefs." Message from Six Nations Council to Governor Clinton (June 2, 1789), in 2 PROCEEDINGS OF THE COMMISSIONERS OF INDIAN AFFAIRS, APPOINTED BY LAW FOR EXTINGUISHMENT OF INDIAN TITLES IN THE STATE OF NEW YORK 331, 331 (Franklin B. Hough ed., Albany, N.Y., Joel Munsell 1861), <https://archive.org/details/proceedingsofcom02newy> [hereinafter PROCEEDINGS OF THE COMMISSIONERS]; see *Pataki*, 165 F. Supp. 2d at 315 (noting evidence that in land transaction with the Cayugas, Onondagas, and Oneidas, the State dealt with minority factions and not the authorized leaders).

14. For example, at Fort Schuyler in 1788 during the State's negotiations to acquire Oneida lands, Governor Clinton falsely told the Oneidas that it was not the State's "Intention to . . . Purchase Lands from you for our People." Address by Governor Clinton to the Oneidas (Sept. 20, 1788), in 1 PROCEEDINGS OF THE COMMISSIONERS, *supra* note 13, at 223, 224, <https://archive.org/details/proceedingsofcom01newy>. After the agreement that sold their lands, the Chiefs believed the Nation had negotiated a lease: "We returned home possessed with an Idea that we had leased our Country to the People of the State, reserving a Rent which was to increase with the increase of the Settlements on our Lands until the whole Country was settled, and then to remain a standing Rent forever." Message from the Oneida Council to Governor Clinton (Jan. 27, 1790), in 2 PROCEEDINGS OF THE COMMISSIONERS, *supra* note 13, at 360, 360. The Fort Schuyler Treaty of 1788 purported to convey all of the Oneida's aboriginal lands of six million acres except for a reservation of 300,000 acres.

Indian nations a small fraction of what the land was worth.¹⁵ When the land rush was over, the Six Nations held only one-tenth of one percent of their treaty-protected aboriginal lands.

The experience of the Onondaga Nation was typical. The Onondagas owned approximately two million acres as their aboriginal territory, stretching in a fifty mile-wide strip from the Canadian border to Pennsylvania through what is now the City of Syracuse. Even before the formation of the United States, the Nation's right to these lands was protected by treaty.¹⁶

In 1784, the Six Nations and the United States entered into the Treaty of Fort Stanwix.¹⁷ The Six Nations ceded lands in the Ohio Valley in return for guarantees that they "be secured in the peaceful possession of the lands they inhabit east and north" of a boundary line drawn south from Lake Erie.¹⁸ The United States also agreed to protect the Onondagas' land by "receiv[ing] [the Onondagas] into their protection."¹⁹ The United States made additional promises to protect the lands of the Six Nations and the Onondagas in the Treaty of Canandaigua of 1794.²⁰ In article II of the Treaty, the United States acknowledged as the property of the Onondaga Nation the lands reserved in the "treaties" with New York State.²¹ The Treaty further declared that the reserved lands "shall remain theirs, until they choose to sell" to the United States.²²

Despite these federal protections, New York State waged a targeted campaign to dispossess the Onondagas of their lands. In 1788, the State entered into an agreement with the Onondagas that purported to cede all but about 300,000 acres to the State, an area that was subsequently reduced to 6900 acres. Although State negotiators knew that the individuals who signed the 1788 cession had no authority to act on the Onondaga Nation's

15. See, e.g., *Pataki*, 165 F. Supp. 2d at 348 (finding that payment by the State to the Cayuga for lands conveyed under the 1795 Treaty of fifty cents per acre was nine times less than what private landowners were willing to bid for such lands).

16. The 1768 Treaty of Fort Stanwix established a boundary line between the Six Nations and the colonies of Great Britain. 1 E. B. O'CALLAGHAN, *THE DOCUMENTARY HISTORY OF THE STATE OF NEW-YORK* 587-91 (Albany, N.Y., Weed, Parsons & Co., 1849), <https://babel.hathitrust.org/cgi/pt?id=coo.31924055329670;view=1up;seq=9>.

17. Treaty of Fort Stanwix, Six Nations-U.S., Oct. 22, 1784, 7 Stat. 15.

18. *Id.* at art. III.

19. *Id.* at pmbl.

20. Treaty of Canandaigua, Six Nations-U.S., Nov. 11, 1794, 7 Stat. 44. *But see* Treaty with the Seven Nations of Canada, Seven Nations-N.Y., May 31, 1796, 7 Stat. 55.

21. Treaty of Canandaigua, *supra* note 20, at art. II.

22. *Id.*

behalf, the State nonetheless consummated the transactions and proceeded to take possession of this vast tract.²³ Moreover, in later fraudulent transactions, such as a purported purchase in 1793, the State deceived the Onondagas by stating they were leasing, rather than selling, their lands.²⁴ By any standard, the terms of these deals were grossly unfair. For all of the Onondaga land lost between 1788 and 1822, the Onondagas received only \$33,380 in cash, \$1000 in clothing, an annuity of \$2430, and 150 bushels of salt.²⁵ The State's predatory conduct, and the one-sided nature of the transactions, underscore the wisdom of Congress's requirement in the Trade and Intercourse Act that the federal government supervise the State's land dealings with the Six Nations and approve any cessions.

In dealing with the Onondagas and others of the Six Nations, New York confiscated land protected by federal statute and ratified treaties. Nonetheless, lawyers for the modern-day defendants within the former Six

23. On June 2, 1789, the Five Nations protested to the President that the lands "sold" to the State "by our Young men and wrong-headed People" were "Contrary to our Ancient Customs & in direct Contradiction to the Governors own Language to us and not confirm'd at our great Council Fire at Buffaloe Creek." Letter to the President of the United States from the Sachems, Chiefs and Warriors of the Five Nations Assembled in Council at Buffalo Creek (June 2, 1789), in *Grievances from the Five Nations to Congress*, PAPERS OF THE WAR DEP'T 1784-1800, <http://wardepartmentpapers.org/document.php?id=3589> (last visited May 8, 2018). The chiefs also protested to Governor Clinton on July 30, 1789:

We endeavoured to explain to you that you had not treated with the Chiefs, nor with Persons authorised by them to dispose of our Country, but we are now sorry to find you do not wish to be convinced of an Error, which you took no previous Steps to avoid.

Letter from Joseph Brandt and Other Indians to Governor Clinton (July 30, 1789), in 2 PROCEEDINGS OF THE COMMISSIONERS, *supra* note 13, at 340, 340.

24. At the negotiations for the 1793 Onondaga agreement, the State's representative unequivocally stated that they "did not come to buy your land," but rather sought only a lease. Proceedings of the Negotiations Between the Onondaga Nation and Commissioners of the State of New York, Simeon De Witt and John Cantine (1793), *quoted in* Declaration of J. David Lehman in Opposition to Defendants' Motions to Dismiss at 34, *Onondaga Nation v. New York*, No. 05-CV-314 (N.D.N.Y. Nov. 16, 2006), 2006 WL 6897841. The State's record of the negotiations confirms that the Onondagas believed they had entered into a lease: "After deliberating on our last speech the Onondagae informed us that they had agreed to lease part of their Reservation . . ." *Id.*, *quoted in* Declaration of J. David Lehman, *supra*, at 35.

25. The New York State agreements with the Onondagas are compiled in N.Y. LEGISLATURE SPECIAL COMM., REPORT OF SPECIAL COMMITTEE TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK, APPOINTED BY THE ASSEMBLY OF 1888, at 190-211 (Albany, N.Y., Troy Press Co. 1889), <https://books.google.com/books?id=uReLy9BjUDIC&printsec=frontcover#v=onepage&q&f=false>.

Nations territory have argued it would be unjust for the courts to provide any remedy for wrongs committed nearly 200 years ago. In response, the Six Nations have proposed remedies that would not disturb the possession of present-day landowners or impose upon them any responsibility for righting these centuries-old wrongs.²⁶

Resolving these claims politically requires careful attention to complex historical and juridical questions: why did the litigation to remedy the loss of Indian land begin nearly two hundred years after the takings? Could Indian nations have sought a remedy earlier? What opportunities were available to Indian nations to resolve claims to land based on the Trade and Intercourse Act? What did Indian nations do to protest the loss of their lands? What political and legal obstacles may have prevented Indian nations from pursuing their claims? The answers to these questions lie in the historical record that courts thus far have largely ignored.

Lack of Access to Federal Courts

Modern efforts to remedy historic wrongs should take into account the extent to which Indian nations had access to the courts to seek redress for the loss of their lands. Indian nations did not have access to the federal courts until 1974, when the U.S. Supreme Court ruled that land claims against New York State raised federal issues within federal jurisdiction.²⁷ New York state courts were likewise unavailable because of state law doctrines holding that the nations lacked the legal capacity to sue.²⁸

From the beginning, relations between Indian nations and the United States were carried out on a nation-to-nation basis.²⁹ As a result, Indian

26. For example, the Onondaga Nation sought only a declaratory judgment against the State, governmental entities, and several corporations that had polluted the claimed lands. No dispossession of non-Indian landowners was sought. *See Onondaga Nation v. New York*, No. 5:05-cv-0314, 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010).

27. *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661 (1974). The basis of federal jurisdiction is the principle that federal treaties with the Six Nations and the federal common law protect the tribal right to possession of their lands.

28. *Id.* at 674.

29. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). The Court stated that although the Cherokees were not a foreign state in the constitutional sense,

[s]o much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. . . . The acts of

relations have always been “the exclusive province of federal law.”³⁰ In one of the first Supreme Court cases involving Indian nations, the Court declared that “[t]he treaties and laws of the United States contemplate . . . that all intercourse with [Indians] shall be carried on exclusively by the government of the union.”³¹ This description of the relationship was more than an abstract legal doctrine; as a practical matter, the federal-Indian treaties meant that virtually all aspects of the relationship with the United States had a federal character. For example, article VII of the Treaty of Canandaigua of 1794 requires the Six Nations to use diplomacy with the President to resolve complaints about the conduct of United States citizens.³² Naturally, then, if executive action could not resolve a dispute, the federal courts should have been an appropriate forum.

Before the early twentieth century, history records few instances in which Indian nations sought relief in federal courts for loss of their lands. Indian litigants might have had two avenues available: an original suit in the Supreme Court under its jurisdiction between states and foreign states,³³ or a suit in the federal district courts.³⁴ The first option was foreclosed very early in United States’ history. In 1831, the Supreme Court ruled that the Cherokee Nation was not a “foreign state” for purposes of the Court’s original jurisdiction, and as a result, the Nation could not file suit directly in that Court against the State of Georgia to stop its seizure of Nation lands.³⁵ This ruling meant that after 1831, near the end of New York’s most aggressive period of land acquisition, the Six Nations could not have filed suit in the Supreme Court to vindicate their land and treaty rights.

Similar obstacles were present with regard to the lower federal courts. Congress established federal courts in New York State in the Judiciary Act of 1789,³⁶ but the courts’ jurisdiction was limited to cases in which the

our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

Id.

30. *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985).

31. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

32. Treaty of Canandaigua, *supra* note 20, at art. VII.

33. U.S. CONST. art. III, § 2.

34. *See, e.g.*, Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73, 73-74 (establishing federal district courts in New York State); Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (establishing jurisdiction of lower federal courts over certain actions).

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

36. Judiciary Act of 1789, §§ 3-5, 1 Stat. at 73-75.

litigants had citizenship from different states.³⁷ As an avenue for land rights litigation, the diversity of citizenship requirement was problematic for two reasons. First, Indian nations have never been considered citizens for purposes of federal law.³⁸ Second, with few exceptions (not including the Six Nations), individual members of Indian nations did not obtain citizenship status until a 1924 act of Congress.³⁹ Even after 1924, federal diversity jurisdiction over Indian land rights cases would most likely not have been available because the defendants had the same New York state citizenship status as the individual Indian litigants. Additionally, because Indian land rights are held by the Indian nation rather than citizens of the nation, the cause of action for violation of the Trade and Intercourse Act is held by the nation and individuals cannot sue to vindicate such rights.⁴⁰

Indian nations would have fared no better under the expanded basis for federal court jurisdiction that Congress enacted in 1875.⁴¹ In that statute, Congress authorized federal courts to hear claims based on federal treaties, statutes, and the Constitution.⁴² From the perspective of Indian nations, the new statute would have appeared to be a natural option for land rights claims, as federally ratified treaties were at the heart of such claims. Remarkably, however, the promise of the 1875 statute was not realized for nearly one hundred years after its enactment. In 1914, in *Taylor v. Anderson*, the Supreme Court turned back an effort to have a federal court in Oklahoma decide whether certain Choctaws had conveyed an allotment to a non-Indian in violation of a federal statute that prohibited such conveyances without the approval of the Bureau of Indian Affairs.⁴³ The Court ruled that the federal question must arise from the “plaintiff’s statement of his own claim” and cannot arise “in anticipation or avoidance

37. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (noting that the jurisdictional act required that the suit be between a “citizen of a state where the suit is brought, and a citizen of another state”).

38. *See Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997) (“Because the case for considering an Indian tribe a citizen of a state is tenuous at best, the diversity statute’s provision for suits between citizens of different states, strictly construed, cannot be said to embrace suits involving Indian tribes.”) (citation omitted).

39. Act of June 2, 1924, ch. 233, 43 Stat. 253. The Act declared all non-citizen Indians “born within the territorial limits of the United States” to be citizens of the United States. *Id.*, 43 Stat. at 253.

40. *See, e.g., Canadian St. Regis Mohawk Tribe v. New York*, 573 F. Supp. 1530 (N.D.N.Y. 1983) (dismissing such claims by individual Mohawk plaintiffs).

41. Act of Mar. 3, 1875, ch. 137, 18 Stat. 470.

42. *Id.* § 1, 18 Stat. at 470.

43. *Taylor v. Anderson*, 234 U.S. 74 (1914).

of defenses which it is thought the defendant may interpose.”⁴⁴ This case failed that test because the federal question arose as a defense. The plaintiffs claimed the land and sought to evict the defendant; the defendant claimed good title under a conveyance from the Choctaws; and the plaintiff responded that the defendant’s title was invalid under the federal statute requiring federal approval of the conveyance.⁴⁵

Taylor presented a particularly difficult legal obstacle because the procedural posture of that case was similar to the way Indian claims would likely be presented to the federal courts. And, in fact, *Taylor* was invoked by the federal courts in New York in 1929 in a Mohawk lawsuit seeking to evict a power company alleged to be occupying land belonging to the Mohawk Nation under the Treaty of 1796.⁴⁶ *Deere v. St. Lawrence River Power Co.* was a major test case of the legality of New York State’s acquisition of Six Nations’ land in violation of federal treaties and the Trade and Intercourse Act.⁴⁷ The Mohawk plaintiffs argued that because federal law and federal treaties protected their rights to land, the action arose under federal law and the federal court therefore had jurisdiction.⁴⁸ Citing *Taylor*, the *Deere* court rejected the Mohawk suit and held that the federal courts lacked jurisdiction over such claims.⁴⁹

Combined with the absence of federal diversity jurisdiction, the courts’ rejection of claims to federal question jurisdiction meant the federal courts were closed to Six Nations’ land rights actions. The denial of access lasted until the 1970s, nearly two hundred years after the State of New York’s unlawful takings. Throughout this long period, the Six Nations could not have obtained a remedy in federal court for New York State’s seizure of their lands, even if they had had the financial means to hire attorneys to file such actions. Even when they persuaded the federal government to sue on their behalf during this period, the Six Nations fared no better. When the United States sought a remedy in federal court for the taking of Mohawk

44. *Id.* at 75-76.

45. *Id.*

46. *Deere v. St. Lawrence River Power Co.*, 32 F.2d 550 (2d Cir. 1929).

47. *See Indians Claim Half of New York: Test Suit Is Based on an 18th Century Treaty Which Is Still in Force*, N.Y. TIMES, Dec. 7, 1924, at 4 (noting hiring of legal counsel to press claim to land confirmed in federal treaties and lost without meeting the “requirements laid down by the federal government”).

48. *Deere*, 32 F.2d at 551.

49. *Id.* at 552 (“A guaranty of the right of possession by a treaty of the United States does not render an action in ejectment to recover possession of the property a case arising under a treaty of the United States, in so far as the jurisdictional statute is concerned.”).

lands in violation of the Trade and Intercourse Act, the federal court held that the Act did not apply to New York State.⁵⁰

Not until 1974 did the Supreme Court rule that, contrary to *Taylor and Deere*, Indian claims based on New York's violations of the Trade and Intercourse Act raised federal questions subject to the jurisdiction of the federal courts.⁵¹ That year, in *Oneida Indian Nation v. County of Oneida*, the Supreme Court ruled that federal courts had jurisdiction to hear claims based on violations of the Trade and Intercourse Act because the Oneidas' complaint "asserted a current right to possession conferred by federal law, wholly independent of state law."⁵² The Court observed that from the time of the formation of the United States, "federal law, treaties, and statutes protected Indian occupancy, and . . . its termination was exclusively the province of federal law."⁵³ The Court's clarification of the federal legal basis of Indian land rights was a significant legal development implicitly confirming that the federal courts had been closed to land claims by Indian nations for more than 150 years. Although the Court traced the federal protection of Indian land rights to the formation of the United States, as a practical matter, this principle was not available to Indian nations to vindicate their land rights until the Court issued its ruling in 1974.

Lack of Access to State Courts

The option of pursuing Trade and Intercourse Act claims in New York state courts raised similarly insurmountable challenges. State courts generally have been inhospitable fora for the adjudication of claims to vindicate Indian rights. The Supreme Court has recognized this fact, finding that the states are often the "deadliest enemies" of Indian nations.⁵⁴ Nevertheless, access to state courts might have been better than no court

50. *United States v. Franklin Cty.*, 50 F. Supp. 152, 156 (N.D.N.Y. 1943). The Court candidly admitted that its decision was motivated in part by the desire to "remove any cloud upon the validity" of numerous titles derived from state "treaties" that were made with Indian nations without the authorization or approval of the United States, as required by the Trade and Intercourse Act. *Id.*

51. *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661 (1974).

52. *Id.* at 666.

53. *Id.* at 670.

54. *United States v. Kagama*, 118 U.S. 375, 384 (1886). The Court attributed this condition to "local ill feeling" and the fact that Indian nations owe no allegiance to the states and receive no protection from them; *see also* *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 143 (2d Cir. 2012) (Hall, J., dissenting) (stating that the development of federal Indian law reflects an accommodation of the "historically thorny nature of tribal-state relations and a fear of 'home cooking' in state courts").

access at all, and Indian nations tried diligently to avail themselves of this forum.

The historical record reveals that the New York State Legislature erected significant obstacles to state court actions claiming violations of Indian land rights under federal law. In its earliest relations with Indian nations, the legislature acted on the assumption that the nations lacked the capacity to bring legal actions in their own name, and that, as a result, the State needed to appoint attorneys as “trustees” to represent their interests. This strategy also gave the State substantial control over what actions it filed on behalf of Indian nations and how those suits were litigated.

The earliest such legislation, enacted in 1793, concerned the Onondagas, Oneidas, and Cayugas. The 1793 Act appointed three individuals to negotiate for the sale of these nations’ land, as well as authorized them to propose that the State’s Attorney General would act as trustee “to bring suits for trespass [on their lands], and to prosecute the same to effect for the benefit of said Indians.”⁵⁵ A similar law was enacted in 1796 with regard to the Brothertown Indians.⁵⁶ That Act provided that the governor and the Council of Appointment should appoint an attorney for the Nation to “defend all suits brought against any of them by any white person, and commence and prosecute all such suits and actions for them or any of them as he may find necessary or proper.”⁵⁷

Another example concerned the Mohawk Nation. In 1808, the state legislature enacted a law providing that “it shall be the duty of the district attorney, residing in the county of Washington, to . . . commence and prosecute all such actions for [the St. Regis Indians] . . . as he may find proper and necessary.”⁵⁸ Because the St. Regis Indians held their lands as tenants in common, the statute was amended in 1811 to clarify that it would be

lawful for the [Washington County] district attorney, in all suits which he may find proper and necessary to commence and prosecute on behalf of the said Indians, to bring the same in the name of the Saint Regis Indians, without naming any of the

55. An Act Relative to the Lands Appropriated by This State to the Use of the Oneida, Onondaga and Cayuga Indians, ch. 51, 1793 N.Y. Laws 454, 455.

56. An Act for the Relief of Indians Who Are Entitled to Lands in Brothertown, ch. 22, 1796 N.Y. Laws 655, 657.

57. *Id.*

58. An Act Relative to the Lot of Land Appropriated for the Use of the Missionary to the Oneida Tribe of Indians, and for Other Purposes, ch. 236, 1808 N.Y. Laws 410, 410.

individuals of the said tribe, any law, custom or usage notwithstanding.⁵⁹

These laws reflected the widespread State practice of authorizing the appointment of attorneys to represent Indian nations during the period of New York's most aggressive land deals. The state courts soon concluded that state-appointed attorneys had exclusive authority to bring actions on behalf of Indian nations. In 1817, the Supreme Court of New York ruled that state-appointed attorneys had exclusive authority "to prosecute and defend all actions by or against any of the *Indians*, whose interests are committed to [them]."⁶⁰ The court reasoned that if Indians were allowed to choose their own attorneys, "they may be involved in ruinous litigation; and they may too carelessly vex against whom they have resentments."⁶¹ The court did not name the State as a party that might stir Indian "resentments," but at the time of the decision, the Six Nations were carrying out a twenty-year crusade to protest New York's taking of their lands in violation of federal law. In any event, *Reynolds* put Indian nations in the untenable position of having to depend on the State itself—the entity that wrongfully took their lands—to challenge the wrongful takings in court.

In some cases, the State attorneys' interests were further misaligned with their Indian nation clients' because of personal ties to the disputed lands or broader political ambitions at odds with their Indian clients' goals. The historical record demonstrates the impact of this misalignment at Onondaga and St. Regis.

After illegally acquiring 640 acres from the St. Regis Mohawk Indians in 1824, the State sold the tract to a relative of the county attorney assigned to represent the interests of the St. Regis Indians in court.⁶² Two decades later, William Almon Wheeler, who represented the St. Regis Mohawks as Franklin County District Attorney in the mid-1800s, pursued state and national political ambitions at the same time. Wheeler was elected to the New York State Legislature immediately following his term as Franklin County attorney and to the Vice Presidency of the United States twenty years later. Not a single suit challenging the State's unlawful land

59. An Act Supplementary to the Act Entitled, "An Act Relative to the Lot of Land Appropriated for the Use of the Missionary to the Oneida Tribe of Indians, and for Other Purposes," ch. 243, 1811 N.Y. Laws 326, 326.

60. Jackson *ex dem.* Van Dyke v. Reynolds, 14 Johns. 335, 336 (N.Y. Sup. Ct. 1817).

61. *Id.* at 337.

62. See An Act for the Relief of the St. Regis Indians, ch. 80, 1824 N.Y. Laws 73 (appointing Asa Hascall to represent St. Regis); An Act for the Relief of Lemuel Hascall, ch. 129, 1825 N.Y. Laws 228 (conveying the mile square to Lemuel Hascall).

acquisitions was brought on the Mohawks' behalf throughout the nineteenth century, despite the Mohawk Nation's vociferous objections to those takings in other fora.

The Onondagas' experience with legislatively-appointed attorneys was similarly bleak. On April 7, 1806, the legislature authorized the Council of Appointments to choose an attorney for the Onondagas, who would be paid \$50 a year to file such actions "as he may find necessary and proper."⁶³ The attorney appointed, Medad Curtis, proved to be unsatisfactory to the Onondagas, who five years later petitioned the legislature to appoint a "resident agent" to address the "numerous and unprovoked trespasses and injuries which evil minded white persons commit upon the property and persons" of the Onondagas.⁶⁴

In 1811, Ephraim Webster was appointed as agent for the Onondagas to "hold that office during the pleasure of the legislature."⁶⁵ Although Webster was not a lawyer, his duties included advising the Onondagas "in controversies amongst themselves, and with other persons," and prosecuting trespass actions against "any white person" that he may think was "necessary and proper."⁶⁶ Webster instead became an agent for the dispossession of the Onondagas. He facilitated two of the State's unlawful agreements with the Onondaga Nation by acting as interpreter in the discussions, and pursuant to the 1817 agreement, received 300 acres of Onondaga land for his trouble. The Onondagas complained bitterly to New York's Governor, arguing that Webster should be replaced because "we have been deceived by him, and . . . he does not attend to our concerns as he ought to do."⁶⁷ The Governor refused to replace Webster, who remained the Onondaga agent until his death in 1824, two years after the final Onondaga-State land transaction.

Accordingly, under New York state law and practice, the decision to challenge New York's taking of Indian lands was not within the Nations'

63. An Act to Amend an Act, Entitled "An Act Relative to Indians," ch. 161, § 9, 1806 N.Y. Laws 601, 604.

64. JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, 34th Sess. 296-97 (Albany, N.Y., S. Southwick 1811), <https://babel.hathitrust.org/cgi/pt?id=chi.74626361;view=1up;seq=1>.

65. An Act for the Benefit of the Onondaga Tribe of Indians and for Other Purposes, ch. 79, § 2, 1811 N.Y. Laws 168, 168.

66. *Id.* § 2, 1811 N.Y. Laws at 168-69.

67. Petition from the Onondagas to Governor Clinton (Mar. 10, 1819), in JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW-YORK, 42d Sess. 731, 731 (Albany, N.Y., J. Buel 1819) (on file with the *American Indian Law Review*).

control. Lacking independent attorneys, the Onondagas and Mohawks were essentially powerless to use the state courts to vindicate their land rights.

State-court created rules confirming this powerlessness kept the Six Nations from vindicating their land rights in state court for over a century. For example, in *Strong v. Waterman*, the Seneca Nation brought an ejectment action in its own name.⁶⁸ The New York Chancery Court ruled that the Nation lacked capacity to sue in the absence of specific state legislation authorizing the suit.⁶⁹ Although *Strong* suggested that the Seneca Nation could authorize individual Nation members to bring the suit, that suggestion was not supported by New York state law at the time, which held that individual Indians were not citizens of the state and therefore lacked access to state court.⁷⁰ Moreover, *Strong* addressed only lands within the recognized territory of an Indian nation, not those lands unlawfully acquired by New York State.⁷¹

For nearly a century, the New York state courts applied the lack of capacity doctrine developed in *Strong* to other Indian nations, including the Onondaga Nation. In 1899, in *Onondaga Nation v. Thacher*, the Nation sued in the Supreme Court of Onondaga County to recover four wampum belts held by a non-Indian.⁷² The court dismissed the Nation's claim for lack of capacity:

[T]he statutes of the state . . . indicate the intent upon the part of the state to treat the Indians as wards, and, except when otherwise specially provided, to trust the protection of their rights, as tribes or nations, to its agents, rather than to proceedings by themselves. Where it was deemed wise to have tribal action in relation to tribal rights, as in the case of trespasses upon tribal lands . . . express authority is given for the prosecution of suits in the name of the 'nation' interested.⁷³

On appeal, the court of appeals denied capacity on either the part of the Nation or individuals authorized by the Nation to file suit: "[N]either the

68. 11 Paige Ch. 607 (N.Y. Ch. 1845).

69. *Id.* at 612.

70. *See Goodell v. Jackson ex dem. Smith*, 20 Johns. 693, 709-18 (N.Y. 1823).

71. *Strong*, 11 Paige Ch. at 611-12.

72. *Onondaga Nation v. Thacher*, 61 N.Y.S. 1027 (Sup. Ct. 1899).

73. *Id.* at 1030.

Onondaga Nation, nor the individual Indians named as plaintiffs, had legal capacity to bring and maintain the action.”⁷⁴

Under *Strong* and *Thacher*, Onondaga and other Indian nations were barred from filing suit in state court absent express authorization by the state legislature. With limited exceptions, such authorization was not forthcoming. In 1940, the legislature authorized the Onondaga Nation to sue the Tully Pipe Line Company for injury to the cemetery on the Nation’s territory caused by the company’s failure to prevent salt from leaking from its pipeline.⁷⁵ This exception proved the rule that the doors of the New York state courthouses were closed to Indian nations for more than a century.

It was only in the mid-twentieth century that the New York State Legislature took any action to address Indian nations’ lack of access to state courts. In 1953, the legislature enacted a provision that purported to open the courts to Indian litigants.⁷⁶ The law provided that “[a]ny action or proceeding between Indians or between one or more Indians and any other person or persons may be prosecuted in any court of the state to the same extent as provided by law for other actions or special proceedings.”⁷⁷

The statute was not, however, widely interpreted to establish the right of Indian nations to seek state court review of unlawful land purchases. In 1956, the St. Regis Mohawk Tribe filed a state court action challenging the illegal appropriation of some of its lands by the state power authority.⁷⁸ The Mohawks did not dispute the State’s contention that

unless there is statutory authority no action for damages caused by the appropriation of tribal property may be brought by a tribe as an entity, or by an individual in a representative capacity on behalf of the tribe, or by an individual on behalf of himself insofar as his interests in such tribal property are concerned.⁷⁹

Instead, the Mohawks argued and the court agreed that a state statute authorizing suits by “[t]he owner of any property . . . appropriated” for public highways enabled the St. Regis Mohawk Tribe to pursue its claims.⁸⁰

74. *Onondaga Nation v. Thacher*, 62 N.E. 1098, 1098 (N.Y. 1901), *aff’d*, 189 U.S. 306 (1903).

75. Act of Apr. 22, 1940, ch. 694, 1940 N.Y. Laws 1889.

76. Act of Apr. 13, 1953, ch. 671, 1953 N.Y. Laws 1517.

77. *Id.* sec. 1, § 5, 1953 N.Y. Laws at 1517.

78. *See St. Regis Tribe of Mohawk Indians v. State*, 158 N.Y.S.2d 540 (Ct. Cl. 1956).

79. *Id.* at 547.

80. *Id.* at 548; *see also Mohawk Tribe v. New York*, 152 N.E.2d 411 (N.Y. 1958) (noting on appeal that the State’s concession that the highway law overcame the Mohawks’ lack of capacity).

The Tribe argued that the State had not acquired good title to islands in the St. Lawrence River because it neither paid the Mohawks for them nor obtained the consent of Congress, as required by the Trade and Intercourse Act.⁸¹ While the state court acknowledged the Mohawks' right to file suit, it denied their claim, holding that the Trade and Intercourse Act did not apply to New York State.⁸²

Even if the lack of capacity to sue could have been overcome, Congress erected a new jurisdictional barrier to state courts hearing Indian land claims in New York. In 1950, Congress prohibited New York state courts from exercising jurisdiction over Indian land claims arising before 1952, a category encompassing virtually all claims based on violations of the Trade and Intercourse Act by the State.⁸³ As a result, whether because of lack of capacity to sue or the absence of jurisdiction, New York state courts were closed to Indian nations seeking remedies for New York's violations of federal law.

Six Nations' Protests

The futility of court action did not deter the Six Nations from protesting the loss of their lands or New York State's duplicity. The Onondagas, for example, vigorously protested the bad faith of the State's negotiators following each illegal land transaction. They emphasized the fact that the State made deals with individual Onondagas who did not have authority from the Council of Chiefs to negotiate about land. Onondaga Chief Clear Sky's protest following the purported cession of 1793, the largest of the State's land deals, is typical of the efforts of the Onondagas to protest the unlawful sales and to hold onto their land:

[W]e wish to see the Governor and reveal our minds to him. As he has not before paid that attention to the principal Chiefs which he ought, as he has been trading with but few of the Indians living at Cayuga and Onondaga, which we consider as it

81. *Mohawk Tribe*, 152 N.E.2d at 417.

82. *Id.* at 419 (citing *United States v. Franklin Cty.*, 50 F. Supp. 152 (N.D.N.Y. 1943), discussed *supra* note 50).

83. Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 (codified at 25 U.S.C. § 233 (2012)). The statute provided

[t]hat nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the law of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952.

Id. § 1, 64 Stat. at 845-46.

were but Children with whom he has traded, which was not properly entitled to dispose of the lands without our consent. But has generally confirmed his bargains with those few and neglected the principal Chiefs who are the proper owners of the land.

. . . [W]e consider [the Governor] as one who wishes to defraud us of our land.⁸⁴

Direct appeals to New York State's Governor did not result in a single instance where land was returned or any other remedy provided for the massive loss of Onondaga land. The Onondagas thus took their case about the illegality of the land cessions directly to the President. In 1802, for example, a delegation of Six Nations chiefs, including the Onondagas, met with President Jefferson and then with the Secretary of War to discuss possible redress for the State's violations of Six Nations' land rights. Secretary of War Henry Dearborn responded: "Your good father the President of the United States having seen your talk of yesterday directs me to assure you, that his ears are ever open to the just complaints of his red children and his heart ever disposed to afford them relief."⁸⁵ The President then issued an executive order confirming Onondaga title to "all lands claimed by and secured" to them by "Treaty, Convention or deed."⁸⁶ This additional measure of protection for Six Nations land did not deter New York State from forcing further cessions of their lands, nor did it provide the basis for a federal remedy for those lands already lost.

Like the Onondagas, the Mohawks attempted to use political avenues to vindicate their land rights when judicial options were unavailable. Prior to filing suit over the St. Lawrence islands, the Mohawk Nation petitioned the state legislature for recognition of their rights to the islands and demanded that rent and damages be paid by those in unlawful possession.⁸⁷ While the

84. Chief Clear Sky, Address to General Israel Chapin (Mar. 4, 1794), in N.Y. SENATE COMM. ON INDIAN AFFAIRS, TESTIMONY TAKEN BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS RELATIVE TO THE CAYUGA INDIANS UNDER RESOLUTION OF MAY 15, 1889, at 464, 465 (Albany, N.Y., James B. Lyon 1890), <https://books.google.com/books?id=9bwRAAAAYAAJ&printsec=frontcover#v=onepage&q&f=false>.

85. Henry Dearborn, Sec'y of War, Confirmation of Land Rights of Senecas and Onondagas (Mar. 17, 1802), *quoted in* Declaration of J. David Lehman, *supra* note 24, at 26.

86. *Id.*

87. Report of the Commissioners of the Land Office on the Petition of the Trustees of the St. Regis Indians in Relation to Certain Islands in the River St. Lawrence (Mar. 23, 1843), in 6 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, 66th Sess., No. 136 (Albany, N.Y., Carroll & Cook 1843); Report of the Committee on Claims on the Petition of

St. Regis Tribe succeeded in winning legislative recognition of their title to the islands, they did not receive any full measure of justice for their dispossession and continued to press the state legislature to vindicate their claims.⁸⁸ The nineteenth century decision by the state legislature to provide a modest payment in lieu of back rents was later interpreted by the State courts as having extinguished title.⁸⁹

Throughout history, and whenever their means allowed, the Six Nations have protested the loss of their lands at state and federal levels. One prominent protest opportunity arose in 1919 in the form of the Everett Commission. In that year, the federal court of appeals in New York ruled in *United States v. Boylan*⁹⁰ that the mortgage of Oneida land without congressional authorization or approval violated the Trade and Intercourse Act and that any non-Indian interest derived from the foreclosure of the property upon the death of the Oneida owner was invalid.⁹¹ Although *Boylan* did not address the question of whether Indian nations themselves could bring such suits under the Trade and Intercourse Act, the court's ruling raised the possibility that the purported cessions of millions of acres of Indian land were void for violation of the Act if the United States sued on the nations' behalf, and that some, if not all, of the land would need to be returned.

The specter of being held accountable for the State's conduct in acquiring Six Nations land, and in particular, the implications of the *Boylan* court's eviction of the non-Indian occupiers of Oneida land, spurred the creation of a commission to study the problem. Known as the Everett Commission after its chair, State Assemblyman E.A. Everett, the group of thirteen commissioners held hearings throughout Six Nations communities in 1920 to investigate concerns about land and jurisdiction. Tadadaho and Onondaga Chief George Thomas told the commissioners that the federal government should "see that the treaties of 1795 (sic)" between the Six Nations and the United States should "be lived up to by the said government. We firmly believe that the State of New York has no

the British St. Regis Indians (Jan. 25, 1854), in 1 DOCUMENTS OF THE ASSEMBLY OF THE STATE OF NEW-YORK, 77th Sess., No. 27 (Albany, N.Y., C. Van Benthuysen 1854).

88. See, e.g., *Defender of Indian Claims and Rights*, WAR WHOOP (St. Regis Reservation), May 22, 1941, at 1 (vol. 1, no. 4) (on file with the *American Indian Law Review*) (report of Peter Johnson regarding 1935 St. Regis appeal to Albany in connection with land claim).

89. *Mohawk Tribe v. New York*, 152 N.E.2d 411, 418 (N.Y. 1958).

90. 265 F. 165 (2d Cir. 1920).

91. *Id.* at 174.

jurisdiction over the [Six] Nations of New York State.”⁹² Another Onondaga, Jarvis Pierce, told the commissioners:

I hold that the state has no jurisdiction and therefore all of the lands will have to be thrown up and you will have to clear the city of Syracuse as you said you would redeem all lands taken wrongfully. Shall we call for a new treaty or go to the United States and say the State has taken our land wrongfully?⁹³

Another witness framed the question for the Commission in these terms: “The fundamental of this question is to get back to whether the whole of the State of New York belongs to these Indians and if they should have compensation for what they have lost.”⁹⁴

Chairman Everett agreed with the fundamental justice of the Six Nations’ complaints:

I maintain that you are the owners of all the territory that was ceded to you at the close of the Revolutionary War and unless you disposed of that property by an instrument as legal and binding and necessary as the conditions of that treaty was to place the property in your possession, you are still the owners of it.⁹⁵

Not surprisingly, the New York State Legislature did not act on the Everett Commission’s findings and conclusions. The Commission’s work, however, was widely disseminated in the media at the time, further giving voice to the Six Nations’ protests. On February 10, 1922, the *Syracuse Post-Standard* reported that the findings of Chairman Everett that the “Six Nations of Indians residing within New York state have title to lands estimated at 6,000,000 acres” were being “mailed to tribal chiefs throughout the state.”⁹⁶

92. N.Y. STATE INDIAN COMM’N, REPORT TO INVESTIGATE THE STATUS OF THE AMERICAN INDIAN RESIDING IN THE STATE OF NEW YORK 63 (1972 reprint), http://nysl.cloudapp.net/awweb/guest.jsp?smd=1&cl=all_lib&lb_document_id=10512 (the “Everett Report”). The original report, dated March 17, 1922, “had almost completely vanished” after its rejection by the legislature, until its public release in 1972. *Id.* at i.

93. *Id.* at 64.

94. *Id.* at 38-39 (statement of George E. Vaux, chairman of the Federal Indian Commission).

95. *Id.* at 320.

96. *Indians Own Ceded Lands: Chairman of State Commission Sends Findings to All Chiefs: Many Titles Clouded: Assemblyman Everett Admits Other Members of Board May Disagree*, SYRACUSE POST-STANDARD, Feb. 10, 1922, at 3 (on file with the *American Indian*

During this period, the Six Nations also took their protests to Congress. In 1929, the Senate undertook a survey of the conditions of American Indians, and the Six Nations took advantage of this opportunity to raise the illegality of New York State's acquisition of their lands. A formal petition was submitted that identified the loss of their lands as the principal concern of the Six Nations with regard to their relations with the United States. The Six Nations' Petition summarized the history of their land cessions as follows:

2. That the officials of the State of New York from 1784 through the years willfully defied President Washington and his successors; defied the Congress of the United States, the Supreme Court, and the United States Constitution.

....

4. That every foot of land bought from the Mohawks, Oneidas, Cayugas, and Onondagas was illegally obtained in absolute contravention to the laws of Congress, to the United States Constitution, and to the treaties.

5. That President Washington vigorously protested to Governor Clinton that these so-called State treaties were made and the land taken away in utter contempt of Federal authority.

....

8. That the State of New York has taken these lands illegally procured from nations of the Six Nations and has issued State patents to its citizens for same.

9. That the United States Government has issued no patents for any of this land and that the patents issued by the State are null and void and have no force or effect.

10. That a great deal of this land, especially city real estate, has no title but is strictly on lease.⁹⁷

The Petition presaged the modern courts' concerns about the effect of the passage of time on the ability of the Six Nations to assert their claims in court and correctly pointed out that legal doctrines of repose cannot properly be applied when the courts were not open to assert such claims:

Law Review), quoted in Declaration of Robert E. Bieder in Opposition to Defendants' Motions to Dismiss at 15, *Onondaga Nation v. New York*, No. 05-CV-314 (N.D.N.Y. Nov. 13, 2006), 2006 WL 6897839.

97. *Survey of Conditions of the Indians in the United States: Hearings Before a Subcomm. of the S. Comm. on Indian Affairs: Part 12, New York Indians*, 71st Cong. 4871 (1931), <https://archive.org/details/surveypart12ofconditiounitrich>.

“That the Six Nations Confederacy vigorously protested to the Federal Government through the years so that no statute of limitations can run against them; that the law of laches does not apply to people who have no power to sue.”⁹⁸ Throughout the twentieth century, the Six Nations continued to press their claims in Congress.⁹⁹

The Six Nations weighed in on congressional proposals to address relations between New York State and the Six Nations and criticized measures that would hinder their ability to seek justice for their land claims against the State. For example, in 1948, several bills were introduced giving the State civil and criminal jurisdiction over the Six Nations and their lands. Among the Six Nations, opposition to these bills was unanimous and leaders from the Onondaga, Mohawk, and other Nations attended hearings to protest the proposed legislation. An overriding concern was the effect the legislation would have on land claims. The Nations saw the State’s attempt to seize jurisdiction as a means to escape liability for the taking of Six Nations’ land. Tadadaho and Onondaga Nation Chief George Thomas explained:

The whole thing in a nutshell is this, and that is that [sic] we have been trying to ascertain. The claims that we have against the State of New York are enormous, probably one of the biggest cases in the whole history of Indian relations, and we have been beating around the bushes so much, I notice, and we all point to this fact that we have this tremendous claim.¹⁰⁰

Chief Thomas predicted that the passage of the bills would “hamper the transaction of the negotiations for a settlement of these claims if we transfer the jurisdiction. That would be the most dangerous weapon that they could use against us, and we are not going to allow that to happen, if we can help it.”¹⁰¹ Onondaga Chief Livingston Crouse echoed that concern: “In other words, once the State takes over, that means we are diminished, absolutely ruined. There is no confederacy any longer. . . . That is the way to break up

98. *Id.*

99. *See, e.g.*, Chiefs and Members of the Hudenosaunee, Petition to the U.S. Congress (Nov. 18, 1947) (noting also Hudenosaunee petitions filed with Congress in 1945 and 1946), in *People of the Reservation Draw Up Protest to Bills in Congress*, KA-WEH-RAS (St. Regis Reservation), Nov. 21, 1947, at 1 (vol. 1, no. 3) (on file with the *American Indian Law Review*).

100. *New York Indians: Hearings Before a Subcomm. of the S. Comm. on Interior & Insular Affairs*, 80th Cong. 166 (1948), <http://heinonline.org/HOL/Page?collection=congreg&handle=hein.amindian/nyincin0001&id=170> (via subscription).

101. *Id.* at 167.

the Indians so they won't have to pay any of these tremendous claims that the Indians have."¹⁰²

Conclusion

For nearly two hundred years, federal and state courts were closed to the Indian nations whose lands were taken illegally by the State of New York. While they could not seek redress in court, the Six Nations vigorously protested the loss of their lands in public and legislative fora, negating any suggestion that they acquiesced in the illegal takings. Nonetheless, in *City of Sherrill*, the U.S. Supreme Court held that the Oneidas' "long delay in seeking relief" against New York and decades of development of the land justified application of the equitable doctrines of "laches, acquiescence and impossibility" to preclude relief.¹⁰³ Centuries of history contradict that conclusion. If equitable considerations are to be dispositive in resolving Six Nations' land claims, any fair balancing of equities must take into account the documented fact of the Six Nations' historical efforts, against enormous obstacles, to obtain justice. A permanent resolution of the Six Nations' land claims will not be possible without fidelity to even-handed and accurate history.

102. *Id.* at 168.

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