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# Indian Land Claims: Sherrill and the Impending Legacy of the Doctine of Laches

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# NOTES

## INDIAN LAND CLAIMS: *SHERRILL* AND THE IMPENDING LEGACY OF THE DOCTRINE OF LACHES

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### *Introduction*

Indian land disputes have been the source of legal controversy since the founding of the United States. In 1970, lands purchased, confiscated, or otherwise acquired by the United States from Indian tribes had an estimated value of over $560,000,000,000.[1] Indian tribes had remote success in the hard-fought federal litigation of land claims until recently, but their future success is unlikely. Through its decision in *City of Sherrill v. Oneida Indian Nation*,[2] the Supreme Court essentially accomplished what Justice Powell urged Congress to do in the majority opinion of *County of Oneida v. Oneida Indian Nation* (*Oneida II*) ten years prior[3]: It virtually extinguished redress for Indian land claims against states by using the doctrine of laches as a defense, essentially time-barring such claims due to undue or inexcusable delay. As a decade passed without legislation by Congress in this regard, Justice Stevens' dissent in *Sherrill* exposed what can only be called judicial activism involved in Justice Ginsberg's majority opinion, and how the Court effectively overlooked and overruled good standing law to reach its decision.[4] The Court's decision in *Sherrill* will more than likely severely disrupt all Indian property right remedies in the lower courts, as exemplified by the decision in *Cayuga Indian Nation v. Pataki*.[5]

This note will address a general background of relevant Indian land claims and their success in the judicial system up to *Sherrill*, paying special attention to the *Oneida* case regarding the use of the doctrine of laches as applied to Indian land claims. This note will then discuss the likely consequences that

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1. Russel L. Barsh, *Indian Land Claims Policy in the United States*, 58 N.D. L. REV. 7, 8 (1982) (citing 1 HISTORICAL STATISTICS OF THE UNITED STATES 252 (Series No. 7362-7364, 1975)).

2. 544 U.S. 197 (2005).

3. *See id.* at 221.

4. *See generally id.* at 222-27 (Justice Stevens' dissent).

5. 413 F.3d 266 (2d Cir. 2005).

the *Sherrill* decision will have on Indian land claims, particularly eastern Indian claims in the judicial system post-*Sherrill*. The Second Circuit's decision in *Cayuga* is a preliminary example of what is to come regarding Indian land claims cases and takes the *Sherrill* decision several steps farther in applying the doctrine of laches. Denied upon appeal by the Second Circuit, the Court will likely affirm the *Cayuga* decision if it chooses to hear the case on writ of certiorari, and re-affirm the *Sherrill* decision by clarifying the broad scope which the *Sherrill* decision inevitably opened regarding the application of laches.

### *Background*

To understand why the Court found the doctrine of laches a valid defense to Indian land claims, the historical background leading up to Indian land claims must be understood, bearing in mind that no brief historical explanation could ever encompass the entirety and depth of all Indian land rights litigation in the United States. Before the Revolutionary War, colonists recognized the right of the numerous eastern Indian tribes to the possession of their aboriginal land title, and termination of such title was restricted.[6] In 1790, Congress passed the first Indian Trade and Intercourse Act, commonly referred to as the Non-Intercourse Act (NIA), prohibiting conveyance of Indian lands except by treaty with the federal government or by congressional action.[7] By the early 1800s, federal policy had shifted away from the protection of Indians' right of possession of aboriginal lands.[8] In order to make eastern land available for white settlers, the government removed the Indians to reservation land set aside in western territories.[9] Congress passed the Indian Removal Act in 1830, which authorized the exchange of Indian land in the east for land reserved west of the Mississippi River.[10] By the end of the nineteenth century, federal policy had shifted toward the assimilation of Indians into the dominant white culture through land allotments.[11] The surplus land acts allotted set amounts of acreage to individual Indians, with the land inalienable for twenty-five years,

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6. Oneida Indian Nation v. City of Sherrill, 145 F. Supp. 2d 226, 233 (N.D.N.Y. 2001) (citing County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985) (*Oneida II*)).

7. 25 U.S.C. § 177 (2000); *Oneida II*, 470 U.S. at 231-32.

8. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 205 (2005).

9. *See* FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 78 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

10. *Id.* at 81; *see also* Treaty of Buffalo Creek, U.S.-NY Indians, Jan. 15, 1838, 7 Stat. 550.

11. Solem v. Bartlett, 465 U.S. 463, 466 (1984); *see also* Dawes Act, ch. 119, 24 Stat. 388 (1887).

after which it was believed that the Indians would be assimilated into the culture of the white settlers who purchased the surrounding surplus land.[12] Un-allotted lands were opened for homesteading to white settlers who claimed more than ninety million acres of surplus reservation land, which "resulted in a checkerboard pattern of Indian and non-Indian ownership of reservation lands."[13]

By the early 1900s, federal policy had shifted again, as the government recognized that assimilation was not occurring as expected and preservation of the Indian culture was actually more acceptable and desirable than assimilation.[14] Allotment ended in 1934 with the Indian Reorganization Act,[15] which "encouraged tribal self-government, made funds available for economic improvement of the Indians, and made further provisions for protecting Indian lands."[16] Resistance to this act surfaced shortly thereafter, aiming at the termination of tribal sovereignty status.[17] However, in 1958, an era of Indian self-determination began repudiating this termination policy.[18]

Direct litigation of Indian land claims by Indian nations is a somewhat recent occurrence in the history of the United States. "From the late 1700's until the middle 1960's the Oneidas attempted, in vain, to obtain redress for land claims and other grievances."[19] Until quite recently, several legal barriers had kept the majority of Indian claims out of both federal and state courts. One of these barriers was the inability to access the judicial system at both federal and state levels. In 1831, the Supreme Court held that "an Indian tribe or nation within the United States is not a 'foreign state' in the sense of the Constitution, and cannot maintain an action in the courts of the United States."[20] Indian tribes thereafter were generally held not to be foreign states, but rather, domestic dependent nations;[21] thus, tribes could not invoke the original jurisdiction of the Supreme Court. Access was barred to lower federal courts for many years because Indians were not recognized as citizens of the

12. Oneida Indian Nation v. City of Sherrill, 145 F. Supp. 2d 226, 235 (N.D.N.Y. 2001).
13. *Id.*
14. *Id.* at 235-36 (citing COHEN, *supra* note 9, at 144).
15. 25 U.S.C. § 461 (2000) (originally enacted as Act of June 18, 1934, ch. 576, 48 Stat. 984).
16. *Sherrill*, 145 F. Supp. 2d at 235 (citing COHEN, *supra* note 9, at 147-49).
17. *Id.* (citing COHEN, *supra* note 9, at 152-59).
18. *Id.* (citing COHEN, *supra* note 9, at 180).
19. *Id.* (citing Oneida Indian Nation v. County of Oneida, 719 F.2d 525, 529 (2d Cir. 1983)).
20. Cherokee v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831).
21. *Id.* at 27.

United States.[22] In 1875, Congress created federal question jurisdiction,[23] but whether Indians could invoke that jurisdiction to sue in federal court remained unclear.[24] Tribal land claims were generally barred by the sovereign immunity accorded to the states under the Eleventh Amendment.[25] Of 135 cases filed by 67 tribes between 1881 and 1945, under special legislation, 103 were dismissed, primarily on jurisdictional rationalizations.[26] Of the remaining cases in which courts awarded compensation to tribes, offsets and legal fees generally exceeded the award.[27]

State court access was also often problematic. Since many Indian land claims were usually brought against the states themselves, not surprisingly, state courts did not warmly receive the claims of Indian tribes.[28] States passed laws that often weighted the legal process against Indians by excluding them from juries or declaring them incompetent as witnesses.[29] For the few cases which actually reached the trial stage, the juries chosen were generally prejudiced against Indians, which further served as a disincentive to bringing actions in state courts well into the present century.[30]

Congress formed the Indian Claims Commission in 1946.[31] This Commission had the authority to hear and to finally determine all claims of Indian tribes against the federal government that accrued before the Commission was created in August 13, 1946, a task Congress intended for the Commission to complete in ten years.[32] The Commission's decisions were appealable to the U.S. Court of Claims, and ultimately to the Supreme Court.[33] Despite recognizing equitable claims, the Commission and the Court of Claims

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22. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 255 n.1 (1985). Native Americans were finally officially recognized as citizens of the United States on June 2, 1924. Act of June 2, 1924, ch. 233, 43 Stat. 253.

23. *Indian Land Claims*, 99 HARV. L. REV. 254, 260 (1985).

24. *See id.* at 260-61.

25. *Id.* at 261.

26. June Lorenzo, Summary of Land Rights in the United States, http://web.archive.org/web/20040828201511/http://www.firstpeoples.org/land_rights/united_states/us_summary.htm (last visited Oct. 25, 2006).

27. *Id.*

28. *Indian Land Claims*, *supra* note 23, at 261.

29. Nell J. Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 217 (1984).

30. *Id.*

31. Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049.

32. Lorenzo, *supra* note 26..

33. *Id.*

limited relief to monetary compensation.[34] It soon became apparent that the Act failed to meet the expectations of either tribes or of Congress.[35] In 1965, "Congress explicitly dispelled the notion that Indian tribes could not bring suits in federal court on their own."[36] In the early 1970s, President Nixon declared that the termination policy under the Indian Claims Commission Act was a failure, and he pronounced a new policy of self-determination.[37] As a result, the number of land claims rose, with significant victories for the tribes.[38]

The Supreme Court decided two of the most significant land claim cases in 1974 and 1985: *Oneida Indian Nation v. County of Oneida (Oneida I)*,[39] and *County of Oneida v. Oneida Indian Nation (Oneida II)*.[40] The *Oneida I* decision established that tribes present federal questions[41] within federal jurisdiction when asserting "possessory rights . . . to their aboriginal lands, particularly when confirmed by treaty."[42] The *Oneida II* decision firmly established that the clear policy embodied in the Non-Intercourse Act (NIA) was that no state "should purchase Indian land without the acquiescence of the Federal Government,"[43] and expressed that those states that violate the rule are subject to suits for damages.[44] This case essentially influenced numerous tribes to pursue land claims against states, though success never came easily.

In *Oneida II*, three Indian tribes brought an action against Madison and Oneida Counties of New York, seeking trespass damages for fair rental value of land presently owned and occupied by the counties.[45] The tribes alleged that the 1795 agreement which conveyed the land to New York was void because the federal government did not approve the sale as required under the NIA.[46] The district court agreed and granted damages of $16,694 plus interest.[47] Upon appeal, the Second Circuit affirmed the decision, and the

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34. *Id.*
35. *See id.*
36. *Id.*
37. Indian Self-Determination and Education Assistance Act (1975), Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 450 (2000)); Lorenzo, *supra* note 26.
38. Lorenzo, *supra* note 26.
39. 414 U.S. 661 (1974).
40. 470 U.S. 226 (1985).
41. *Id.* at 250.
42. *Oneida I*, 414 U.S. at 667.
43. *Oneida II*, 470 U.S. at 232.
44. *See id.* at 233 ("Indians' commonlaw right to sue is firmly established.").
45. *Id.* at 239.
46. *See id.* at 232.
47. *Id.* at 230.

Supreme Court also affirmed the finding of liability.[48] The 5-4 majority held that Indian tribes have a federal common law cause of action to enforce their aboriginal rights, citing numerous prior decisions for support, and stating "[i]n keeping with well established principles . . . the Oneidas can maintain this action for violation of their possessory rights based on federal common law."[49] The Court rejected the counties' asserted affirmative defenses to the claims, including that no state or federal statute of limitations barred the suit.[50] The Court also dismissed the argument that the 1795 conveyance was ratified by Congress through the approval of two treaties in which the tribe granted additional land to the state,[51] by stating that "plain and unambiguous action" is needed to deprive Indians of title to their land.[52] Finally, the Court found that the affirmative defense claim, that the Oneidas' suit presented a non-justiciable political question, to be without merit.[53] In closing, the Court urged Congress to enact legislation extinguishing future Indian land claims of this type, stating, "[o]ne would have thought that claims dating back for more than a century and a half would have been barred long ago."[54] The opinion, however, stopped short of addressing whether the doctrine of laches could bar these types of claims, because though the counties argued it at trial, this defense was not preserved on appeal.[55] The Court therefore declined to address it, and only mildly rebutted Justice Stevens' dissent regarding laches.[56]

In his dissent, Justice Stevens stated that the Court should have barred the Oneidas' claims using the doctrine of laches.[57] Justice Stevens stated that the decision was "an unprecedented departure from the wisdom of the common law."[58] Justice Stevens noted that while there is no federal statute of limitations governing Indian tribes' ability to enforce property rights, the "settled practice has been to adopt the state law of limitations as federal law."[59] "Given their burden of explaining nearly two centuries of delay in the prosecution of this claim, and considering the legitimate reliance interests of

48. *Id.* at 233.
49. *Id.* at 236.
50. *Id.* at 233.
51. *Id.* at 246.
52. *Id.* at 248.
53. *Id.* at 249.
54. *Id.* at 253.
55. *Id.* at 245.
56. *Id.* at 245 n.16.
57. *See id.* at 258 (Stevens, J., dissenting).
58. *Id.* at 256.
59. *Id.* at 256-57.

the counties and the other property owners whose title is derived from the 1795 conveyance, the Oneida have not adequately justified their delay."[60] To support his position, Justice Stevens referred to three Supreme Court decisions which "illustrate the application of the doctrine of laches to actions seeking to set aside conveyances made in violation of federal law."[61] According to Justice Stevens, these three cases "establish beyond doubt that it is quite consistent with federal policy to apply the doctrine of laches to limit a vendor's power to avoid a conveyance violating a federal restriction on alienation."[62] In Justice Stevens' view, applying laches as a defense to Indian land claims would "maintain the proper measure of flexibility to protect the legitimate interests of the tribes, while at the same time honoring the historic wisdom in the value of repose."[63]

### *City of Sherrill v. Oneida Indian Nation*[64]

Though the Court took a strong leap forward by declaring that Indian tribes have a cause of action under federal common law for land claims of this nature, the Court's failure to fully rebut whether the doctrine of laches could be used as a valid future defense left the question open for future litigation.[65] Congress refrained from enacting legislation extinguishing Indian land claims as the Court suggested in *Oneida II*.[66] Ten years later, the Court's decision in *City of Sherrill v. Oneida Indian Nation*[67] sent a shockwave through Indian tribes throughout the country, with the full ramifications of the decision not yet fully realized.

In *Sherrill*, the Court held that the doctrine of laches barred the Oneidas' assertion of sovereign immunity from property taxation, due to the long lapse in control over land recently re-acquired from the state of New York through purchase.[68] The Oneidas' claim stemmed from reservation land sold to a non-Indian without regard to the provisions of the NIA in 1805.[69] The land

60. *Id.* at 267-68.
61. *Id.* at 263.
62. *Id.* at 265.
63. *Id.* at 262.
64. 544 U.S. 197 (2005).
65. *Indian Land Claims*, *supra* note 23, at 259.
66. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 253 (1985).
67. 544 U.S. 197 (2005).
68. *Id.* at 202, 221.
69. *See id.* at 211.

remained outside of tribal ownership until the Oneida Indian Nation reacquired eighteen thousand acres on the open market nearly two hundred years later.[70] Once re-purchased, the Oneidas asserted that the properties retained sovereign immunity from state and local taxation, as acquisition of fee title revived the ancient sovereignty.[71] Since the parcels of land lay within the boundaries of the reservation originally occupied by the tribe, the Oneidas refused to pay the property tax assessed by the City of Sherrill, claiming that the land should hold the same status as all land which remained in its control from the time of New York's settlement.[72] In contrast to the previous Oneida decisions, the Oneidas sought equitable relief prohibiting the imposition of all current and future property taxes on the parcels of land, rather than monetary compensation.[73]

The district court concluded that the parcels of land owned by the Oneidas in the two counties were not taxable.[74] The Second Circuit affirmed, ruling that the parcels of land "qualify as 'Indian country' as that term is defined in 18 U.S.C. § 1151, because they fall within the boundaries of a reservation set aside by . . . treaty for Indian use under federal supervision."[75] The lower court also found no legal requirement "that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land."[76] Upon writ of certiorari, the Supreme Court reversed the judgment of the court of appeals.[77] The majority rejected the unification theory of the Oneidas, applied the doctrine of laches to bar relief, and held that "standards of federal Indian law and federal equity practice preclude the Tribe from

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70. *Id.*

71. *Id.* at 202.

72. *Id.* at 211.

73. *Id.* at 211-12.

74. *Id.* at 212.

75. *Id.* Title 18 U.S.C. § 1151 provides, in relevant part:

> the term "Indian country" . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2000).

76. *Sherrill*, 544 U.S. at 212 (citing Oneida Indian Nation v. City of Sherrill, 337 F.3d 139, 165 (2003)).

77. *Id.*

rekindling embers of sovereignty that long ago grew cold."[78] The majority of the Court expressed that federal Indian law and equity standards preclude the tribe from reviving ancient sovereignty over the parcels at issue due to 1) the longstanding, distinctly non-Indian character of the area and its inhabitants, 2) the regulatory authority exercised by New York and its counties over the area consistently for the past two hundred years, and 3) the Oneidas' long delay in seeking judicial relief against the State.[79] In the words of the Court,

> The principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises. It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief.
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> . . . .
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> . . . There is no dispute that it has been two centuries since the Oneidas last exercised regulatory control over the properties here or held them free from local taxation. Parcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor "the historic wisdom in the value of repose."[80]

*Over-Stepping Boundaries*

In several regards, the Court in *Sherrill* over-stepped legal boundaries reserved for Congress and supported by judicial precedent, and essentially established new principles for federal Indian law in a manner that can only be viewed as judicial activism. In his dissent, Justice Stevens stated that "[w]ithout the benefit of relevant briefing from the parties . . . the Court has done what only Congress may do — it has effectively proclaimed a diminishment of the Tribe's reservation and an abrogation of its elemental right to tax immunity."[81] Regarding the Court's care in not overruling *Oneida II*, Justice Stevens stated,

> It seems perverse to hold that the reliance interest of non-Indian New Yorkers that are predicated on almost two centuries of inaction by the Tribe do not foreclose the Tribe's enforcement of

78. *Id.* at 214.

79. *Id.* at 202.

80. *Id.* at 217, 218-19 (quoting County of Oneida v. Oneida Indian Nation (*Oneida II*), 470 U.S. 226, 262 (1985) (Stevens, J., dissenting)).

81. *Id.* at 224-25.

> judicially created damages remedies for ancient wrongs, but do somehow mandate a forfeiture of a tribal immunity that has been consistently and uniformly protected throughout our history . . . To now deny the Tribe its right to tax immunity — at once the most fundamental of tribal rights and the least disruptive to other sovereigns — is not only inequitable, but also irreconcilable with the principle that only Congress may abrogate or extinguish tribal sovereignty.[82]

Thus, the Court took a broad step towards extinguishing tribal sovereignty through its decision in *Sherrill*, imposing a power which is explicitly reserved to Congress.

The Court's opinion essentially ignored the explicit instructions of Congress, and established new law in several regards. First, 25 U.S.C. § 177 is quite clear in its directive: an unauthorized purchase of Indian land is without "validity in law or equity."[83] Effective since 1793, and maintained for over two centuries, the holding in *Sherrill* is inconsistent with this statute by giving effect to purchases on the basis of laches. In fact, Congress has specifically spoken to the question of whether the Oneidas' rights are simply too old to now be recognized, and answered in the negative.[84] The Court also overlooked its own precedent to reach its conclusion, and neglected to mention applicable analysis. In discussing alienation of unallotted land (which warrants weaker statutory protection), the Court stated, in *Ewert v. Bluejacket*,[85] that "the equitable doctrine of laches, developed and designed to protect good faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions."[86]

### *Sherrill's Legacy: Cayuga Indian Nation v. Pataki*[87]

The effects of the *Sherrill* decision on Indian land claims is already proving to be devastating to their possibility of success. A key example of what lies ahead regarding the likelihood of tribal land claim success is the decision in

82. *Id.* at 226.
83. 25 U.S.C. § 177 (2000).
84. *See* 28 U.S.C. § 2415(a), (b) (2000).
85. 259 U.S. 129 (1922).
86. *Id.* at 138.
87. 413 F.3d 266 (2d Cir. 2005).

*Cayuga Indian Nation v. Pataki*.[88] In *Cayuga*, the Court of Appeals for the Second Circuit interpreted the *Sherrill* decision as precluding the tribe's "disruptive" possessory land claim based on a violation of the Non-Intercourse Act, regardless of whether the relief sought was legal or equitable in nature, and applied the doctrine of laches to bar both ejectment and damages claims.[89] The damages, which the court of appeals barred in this case, previously resulted in an almost $248 million judgment for the tribe in the district court.[90]

Holding that *Sherrill* had "dramatically" altered the legal landscape of Indian land claims throughout New York, the court also held that the doctrine of laches "can apply against the United States in these particular circumstances."[91] Stating that the traditional rule that the United States is not subject to laches "does not seem to be a *per se* rule,"[92] the court held that laches could apply here because the delay was "as egregious . . . as can be imagined,"[93] because the statute of limitations was not enacted "until one hundred fifty years after the cause of action accrued,"[94] and because the "United States intervened in this case to vindicate the interest of the Tribe, with whom it has a trust relationship."[95] Thus, the doctrine of laches can be applied to the United States when acting in a sovereign capacity, regardless of whether the suit is filed within an applicable statute of limitations.

The decision of the New York Court of Appeals in *Cayuga* is not supported by the decision in *Sherrill* in several regards. While *Sherrill* concerned a particular and unique equitable remedy concerning the assertion of tribal sovereignty, the district court awarded only damages in the *Cayuga* case, which is the type of relief that the Court approved of in the *Oneida* decisions.[96] The *Sherrill* Court's discussion of laches was limited to equitable remedies, repeating an observation from *Oneida II* that "application of a nonstatutory

88. *Id.*

89. *Id.* at 275.

90. Cayuga Indian Nation v. Pataki, 165 F. Supp. 2d 266, 366 (N.D.N.Y. 2001), *rev'd*, 413 F.3d 266 (2d Cir. 2005).

91. *Cayuga*, 413 F.3d at 279.

92. *Id.* at 278.

93. *Id.* at 279.

94. *Id.*

95. *Id.*

96. County of Oneida v. Oneida Indian Nation (Oneida II), 470 U.S. 226, 229-30 (1985); *see also* Oneida Indian Nation v. County of Oneida (*Oneida I*), 414 U.S. 661, 664-65 (1971). In fact, the *Sherrill* Court explicitly noted: "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*." City of Sherrill v. Oneida Nation, 544 U.S. 197, 221 (2005).

time limitation in an action for damages would be 'novel.'"[97] Furthermore, the *Sherrill* Court repeatedly referred to the district court's decision in *Oneida Indian Nation v. County of Oneida*,[98] which denied ejectment as a remedy while recognizing that the Oneidas could obtain monetary damages.[99] Therefore, the Court's holding in *Sherrill* does not support the majority opinion in *Cayuga* that the doctrine of laches can apply to bar an award of damages against the state, and leave both the tribe and the United States with no remedy whatsoever.

Subject to the decision of *Sherrill*, and the expansion of the application of laches to equitable damages in *Cayuga*, it can be said with some certainty that beyond the unlikely chance that a writ of certiorari will be granted by the Supreme Court, these decisions appear likely to end all Indian land claim cases and settlement efforts currently pending. *Sherrill* and its successor cases will in all likelihood effectively put an end to Indian land claims of this nature throughout the nation, as the application of laches to bar relief quickly expands.

The Non-Intercourse Act was enacted to protect Indian tribes against bad faith acquisition of tribal land, and the *Sherrill* decision unfairly bars tribes, as well as the United States, from enforcing the meaning of the Act.[100] While *Sherrill* may have "dramatically altered the legal landscape against which Indian land claims are considered,"[101] the *Cayuga* holding reaches far beyond what can logically be taken from the majority opinion in *Sherrill*. *Sherrill* holds that the doctrine of laches can bar a tribe from obtaining the disruptive remedy of equitable relief in the form of re-attaining tribal sovereignty or repossession in land long since changed.[102] The district court's award in *Cayuga* of money damages is not an equitable remedy, and nothing in *Sherrill* suggests that the ability of Indian tribes to obtain money damages for past wrongs, where Congress explicitly provided for such damages, should be barred through laches.

97. *Sherrill*, 544 U.S. at 221 n.14 (citing *Oneida II*, 470 U.S. at 245 n.16)).
98. 199 F.R.D. 61 (N.D.N.Y. 2000).
99. *Id.* at 93.
100. *See* 25 U.S.C. § 177 (2000).
101. Cayuga Indian Nation v. Pataki, 413 F.3d 266, 273 (2d Cir. 2005).
102. *Sherrill*, 544 U.S. at 217.