

Tulsa Law Review

Volume 41
Issue 1 *Indian Property Rights*

Fall 2005

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Recommended Citation

Wenona T. Singel, & Matthew L. Fletcher, *Power, Authority, and Tribal Property*, 41 Tulsa L. Rev. 21 (2013).

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POWER, AUTHORITY, AND TRIBAL PROPERTY

Wenona T. Singel* & Matthew L.M. Fletcher**

I. INTRODUCTION

Indian land claims have long been a foundational and fundamental subject of American law. For an equal period, Indians and Indian tribes have been acutely aware that their land base has been shrinking since the beginning of the European invasion.¹ Outnumbered, outgunned, and out-brutalized, Indians have had little choice but to recede. Nevertheless, Indians and Indian tribes have never forgotten their sacred homelands, and continuously seek to restore their lands. This behavior, it seems, baffles non-Indian legal experts² and legal philosophers³ who often argue these “ancient” Indian land claims should be dismissed.⁴ Conversely, some tribal people argue Indian rights to

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1. Arrell M. Gibson, *Indian Land Transfers*, in *Handbook of North American Indians: History of Indian-White Relations* vol. 4, 211 (Wilcomb E. Washburn & William C. Sturtevant eds., U.S. Govt. Printing Off. 1988).

2. E.g. Richard A. Epstein, *Property Rights Claims of Indigenous Populations: The View from the Common Law*, 31 U. Toledo L. Rev. 1 (1999).

3. E.g. Samuel T. Morison, *Prescriptive Justice and the Weight of History*, 38 Creighton L. Rev. 1153 (2005).

4. On the issue Morison, *id.* at 1177, argues:

Whatever the outer limits of the reach of compensatory justice might be, it seems to me that placing reasonable limits on the temporal scope of such claims is a more rationally satisfying alternative than attempting to reconstruct a hypothetical profile of holdings by speculating about what rational actors might have done over a period of several hundred years in a rectified world. This is especially true where the social costs incurred by engaging in such counterfactual speculation would be substantial, to put it mildly. Hence, I see no compelling reason why we should accord any particular normative weight to counterfactual reasoning in the context of distant historical injustices.

Equivocating on the issue, Epstein, *supra* n. 2, at 15, comments:

I have always had an inordinate fondness for the first possession rule, and will happily defend its place in the legal hierarchy against any and all comers. I think the principle has as much relevance to the key claims of indigenous populations as it does the claims of everyone else. But, lest it appear that I am squarely in their camp, recall that I give equal weight to the rule of prescription, the validity of treaties, and the principle of finality. If you put the two halves of the debate together, the subtle appreciation of the rich theory of property rights shows that the upshot is a mess.

land justify the restoration of large amounts of land to Indian tribes.⁵ In short, there is a wide spectrum of choice for courts regarding Indian land claims—courts can dismiss the claims altogether, restore the vast tribal land base, or choose a middle ground. However, the first major Indian law case the United States Supreme Court decided, *Johnson v. M'Intosh*,⁶ makes clear that courts will never choose to restore the vast tribal land base. There, Chief Justice Marshall famously held that “[c]onquest gives a title which the Courts of the conqueror cannot deny.”⁷

Until recently, courts have chosen a version of the middle ground, best exemplified by the Supreme Court’s decisions in the Oneida Indian Nation’s land claims where Indian tribes brought legal (as opposed to equitable) claims against states, political subdivisions, and private landowners.⁸ The federal courts might not approve of tribes suing hundreds or thousands of these so-called “innocent” landowners for eviction,⁹ but were willing to allow tribes to sue for trespass damages.¹⁰ The Second Circuit recently rejected this long-established middle ground in *Cayuga Indian Nation of New York v. Pataki*,¹¹ and dismissed the Cayuga Indian Nation’s land claims based on the equitable doctrine of laches, relying on a recent Supreme Court case, *City of Sherrill v. Oneida Indian Nation of New York*.¹²

This article rejects the conclusions of the Second Circuit, and argues that there is no principled reason to depart from the middle ground of earlier cases. We choose to begin by discussing, in Part II, two instances of tribal land dispossession suffered by the Michigan Anishinabeg¹³ that have yet to be remedied. We argue that non-Indians forced the dispossession of tribal lands as an exercise of their power in three ways: first, lacking legal authority, often accompanied by pure brute force; second, the abuse of apparent legal authority; and third, the exercise of legal authority in accordance with the letter of federal law. We argue that tribal land dispossession under the first two methods was illegal and a product of an abandonment of the rule of law. These forms of tribal land dispossession are remediable under the middle ground of analyzing Indian land claims and should not be subject to equitable defenses. Part III further discusses the theoretical

5. E.g. John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 Great Plains Nat. Resources J. 40 (2001); Nell Jessup Newton, *Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System*, in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* 166–67, 261 (Roy L. Brooks ed., NYU Press 1999).

6. 21 U.S. 543 (1823).

7. *Id.* at 588.

8. *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) [hereinafter *Oneida II*]; *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661 (1974) [hereinafter *Oneida I*].

9. E.g. *Cayuga Indian Nation of N.Y. v. Pataki*, 165 F. Supp. 2d 266 (N.D.N.Y. 2001); *Cayuga Indian Nation of N.Y. v. Cuomo*, 1999 WL 509442 at *8 (N.D.N.Y. July 1, 1999).

10. *Cayuga Indian Nation of N.Y.*, 165 F. Supp. 2d at 366 (awarding a \$248 million land claims judgment against the State of New York), *rev'd*, 413 F.3d 266 (2d Cir. 2005).

11. 413 F.3d 266 (2d Cir. 2005).

12. 125 S. Ct. 1478 (2005).

13. The Anishinabeg, or Anishinabek, are the Odawa (Ottawa), the Ojibwe (Chippewa), and Bodewadimi (Potawatomi) people of the Great Lakes, known as the “Three Fires” in Michigan. See generally Edward Benton-Benai, *The Mishomis Book: The Voice of the Ojibway* (Joe Liles ed., Indian Country Press 1979); Charles E. Cleland, *Rites of Conquest: The History and Culture of Michigan's Native Americans* (U. Mich. Press 1992); James A. Clifton, George L. Cornell & James M. McClurken, *People of the Three Fires: The Ottawa, Potawatomi and Ojibway of Michigan* (Grand Rapids Inter-Tribal Council 1986).

basis for the distinction between the three methods of land dispossession. We argue that legal authority is based in the rule of law, whereas the exercise of physical force or abuses of apparent political power are not. In particular, the abuses of political power we describe tended to be illegitimate tricks and frauds sanctioned by government officials. Part IV discusses the origin of equity and its relationship to the law. We introduce the notion that laches is a powerful judicial tool subject to arbitrary and abusive exercise by the judiciary. In Part V, we conclude our argument by asserting that laches is an improper judicial tool for resolving Indian land claims brought at law. We note that non-Indian defendants have long argued that Indian land claims should be barred by laches and, even in the most persuasive cases, those defenses have been rejected. We argue the underlying purpose of laches is inconsistent with the exercise of laches by the *City of Sherrill* and *Cayuga Indian Nation* Courts. In Part VI, we conclude by lamenting that the dispossession of tribal lands has moved from the nineteenth century notion of brute force and the twentieth century notion of corrupt political processes, to the twenty-first century notion of final and complete *judicial* action to eradicate Indian land claims all together.

II. SNAPSHOTS OF THE DISPOSSESSION OF TRIBAL PROPERTY RIGHTS

The dispossession of the lands of the indigenous peoples of what is now the United States is an old story, told many times over. Non-Indians often resorted to fraud and trickery to dispossess Indians of their lands. The King of England acknowledged: “[G]reat Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of said Indians.”¹⁴ Similarly, Justice Blackmun noted:

[T]he South Carolina Provincial Council took legislative notice in a 1739 statute that lands purchased from Indians were “generally obtained . . . by unfair representations, fraud and circumvention, or by making them gifts or presents of little value, by which practices, great resentments and animosities have been created amongst the Indians toward the inhabitants of this Province.”¹⁵

In other circumstances, states and local governments simply began imposing taxes on Indian lands, usually in violation of federal law, and issued tax foreclosures when Indians did not pay.¹⁶ Some states merely granted (or deeded) Indian lands to its citizens, again in direct contravention of federal law, and often with the tacit approval of federal officials.¹⁷ When fraud and illegal state action failed, non-Indians turned to brute force. In a nineteenth century case, the Mississippi High Court of Errors and Appeals described how a white man had simply “procured a man to pull down the [Choctaw] Indian’s house, to put him off by force and drive him away, after his crop was planted.”¹⁸ Even President George Washington and Congress, in recommending and

14. King George III, *The Royal Proclamation of 1763*, in Robert Odawi Porter, *Sovereignty, Colonialism and the Indigenous Nations: A Reader* 145 (Carolina Academic Press 2005).

15. *S.C. v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 513 (1986) (Blackmun, J., dissenting).

16. *E.g. Bd. of County Commrs. v. Seber*, 318 U.S. 705, 710 n. 7 (1943).

17. *E.g. Alabama-Coushatta Tribe of Tex. v. U.S.*, 2000 WL 1013532 at *52 (Fed. Cl. June 19, 2000).

18. *Coleman v. Tish-Ho-Mah*, 12 Miss. 40, 47 (Miss. Err. & App. 1844).

enacting the Trade and Intercourse Acts, recognized that “artful scoundrels”¹⁹ motivated by “the greed of other races”²⁰ would take every opportunity to exploit Indians.

The methods used by non-Indians to take Indian lands, in short, had no boundary. As one federal district court judge bluntly stated, “the Indians were cheated out of their land.”²¹ Part II will discuss two general methods of dispossessing Indians and Indian tribes of their lands that often merged together: physical power and political power.

A. The Use of Physical Power Mixed with the Abuse of Apparent Legal Authority to Dispossess Tribal Property Rights: The Burt Lake Anishinabeg

Professor Felix Cohen refuted the myth perpetrated by the Supreme Court that the vast majority of Indian lands had been simply taken through physical power. The Court in *Tee-Hit-Ton Indians v. United States*,²² for example, had written,

[e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.²³

That statement was ironic considering the Indian nation bringing the suit was located in Alaska and had not been vanquished “by force.”²⁴ Professor Cohen, writing nearly a decade before the *Tee-Hit-Ton* decision, wrote:

Fortunately for the security of American real estate titles, the business of securing cessions of Indian titles has been, on the whole, conscientiously pursued by the Federal Government, as long as there has been a Federal Government. The notion that America was stolen from the Indians is one of the myths by which we Americans are prone to hide our real virtues and make our idealism look as hard-boiled as possible.²⁵

Professor Joseph William Singer, in criticizing the *Tee-Hit-Ton* opinion, agreed.²⁶ But, as Professor Singer noted, not all Indian land dispossession was compensated.²⁷ Non-Indians also took Indian lands through pure physical power mixed with the abusive exercise of apparent legal authority.

One powerful example of the use of physical power to dispossess Indians of their lands is the so-called “burnout” of the Burt Lake Indian Village in 1900. The Odawa and Ojibwa Indians from the area were successors to the Cheboygan band that executed the

19. *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1358 (9th Cir. 1993) (quoting *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885, 888 (2d Cir. 1958)).

20. *Id.* (quoting *U.S. v. Candelaria*, 271 U.S. 432, 442 (1926)).

21. *U.S. v. Mich.*, 471 F. Supp. 192, 226 (W.D. Mich. 1979).

22. 348 U.S. 272 (1955).

23. *Id.* at 289–90.

24. Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 *Hastings L.J.* 1215, 1244 (1980) (“The only sovereign act that can be said to have conquered the Alaska native was the *Tee-Hit-Ton* opinion itself.”).

25. Felix S. Cohen, *Original Indian Title*, 32 *Minn. L. Rev.* 28, 34 (1947).

26. Joseph William Singer, *Introduction to Property* 716–17 (Aspen L. & Bus. 2001).

27. *Id.* at 717 (discussing the claims filed with the Indian Claims Commission by the 1950s that were too numerous to resolve). See also *Notice of All Statute of Limitations Claims*, 48 *Fed. Reg.* 13698 (Mar. 31, 1983) (displaying thousands of the known Indian land claims that remained unsettled in 1983).

treaties between the Michigan Anishinabeg and the United States in 1836 and 1855.²⁸ By the 1840s, the band lived in a town on Burt Lake known as Indian Village, located on land held in trust by the governor of Michigan.²⁹ In addition, individual members of the band acquired land under the Treaty with Ottawas and Chippewas's ("Treaty of Detroit")³⁰ allotment process, lands that would not be taken out of federal trust until years later.³¹ These lands bordered the main body of Indian Village that was held in trust by the Governor.³² By 1875, the allotments started to be taken out of trust status one by one.³³ Professor Richard White opined that "[t]hese two kinds of title—one providing for permanent trust status, the other for a temporary trust, represented a potential source of confusion for local, state, and federal authorities."³⁴

At that time, despite federal or state law to the contrary, local governments in Michigan placed Indian lands on the tax rolls whether they were held in trust or not.³⁵ Federal officials went as far as to seek assistance from state officials to force the local officials to cease placing Indian lands on the tax rolls, but were denied.³⁶ Burt Lake Indian community members, nevertheless, paid taxes on their trust lands in order to

28. *Proposed Finding Against Federal Acknowledgment of the Burt Lake Band of Ottawa & Chippewa Indians, Inc.*, 69 Fed. Reg. 20027, 20027 (Apr. 15, 2004); Pl.'s Compl. for Eq. & Declaratory Relief ¶ 2, *Burt Lake Band of Ottawa & Chippewa Indians v. Norton*, 217 F. Supp. 2d 76 (D.D.C. 2002) (copy on file with authors). See also *Treaty with Ottawas and Chippewas* (July 31, 1855), 11 Stat. 621 [hereinafter *Treaty of Detroit*]; *Treaty with the Ottawas, Etc.* (Mar. 28, 1836), 7 Stat. 491 [hereinafter *Treaty of Washington*].

29. George L. Cornell, *The Ojibway*, in Clifton, Cornell & McClurken, *supra* n. 13, at 75, 100. See also 69 Fed. Reg. at 20027 ("The Cheboygan band had a historical village on Burt Lake near the northern tip of Michigan's Lower Peninsula on land acquired between 1846 and 1849, from the United States land office, patented to the Governor of Michigan in trust for the Cheboygan band."); Defs.' Ans. to Compl. for Eq. & Declaratory Relief ¶ 7, *Burt Lake Band of Ottawa & Chippewa Indians*, 217 F. Supp. 2d 76 ("Defendants admit . . . that land patents were issued in township 36 north, range 3 west to 'the Governor of Michigan in trust for the Sheboygan Band of Indians of whom Kie-she go way is chief.'") (copy on file with authors).

30. *Treaty of Detroit*, *supra* n. 28.

31. Richard White, *The Burt Lake Band: An Ethnohistorical Report on the Trust Lands of Indian Village* 69–70 (unpublished & undated report) (copy on file with authors). See also *Treaty of Detroit*, *supra* n. 28, at 626; Defs.' Ans. to Compl. for Eq. & Declaratory Relief ¶ 9, *Burt Lake Band of Ottawa & Chippewa Indians*, 217 F. Supp. 2d 76 (copy on file with authors). The *Treaty of Detroit* specified that once an Indian had selected a parcel, the parcel would be held in restricted status (i.e., inalienable and non-taxable) for ten years. See *Treaty of Detroit*, *supra* n. 28, at 622–23.

32. White, *supra* n. 31, at 69.

33. *Id.* at 70.

34. *Id.* At the time of this report Professor White was Assistant Professor of History at Michigan State University.

35. See *id.* at 73. See also James M. McClurken, *Gah-Baeh-Jhagwah-Buk: The Way it Happened* 79 (Mich. St. U. 1991). McClurken comments:

Some [Emmett] county officials claimed that the Odawa owed taxes the day they received certificates even though the parcels remained under federal jurisdiction until a patent was issued. Because of this, many Anishnabek lost their lands to the benefit of land speculators and lumber companies that acquired the timber-rich parcels for low prices.

Id. at 79. See also James M. McClurken, *The Ottawa*, in Clifton, Cornell & McClurken, *supra* n. 13, at 1, 34 ("In Mason County, for example, the tax rate was set at twice the amount paid by American settlers, a price the Ottawa could not always pay. Because of such practices, more Indian land was confiscated for back taxes . . . than was lost by Americans for nonpayment."); Bruce Alan Rubenstein, *Justice Denied: An Analysis of American Indian-White Relations in Michigan, 1855–1889*, at 117 (unpublished Ph.D. dissertation, Mich. St. U. 1974) (copy on file with authors) ("In the Little Traverse region in 1877 Indians paid . . . twice the amount levied on whites, and local officials promised that it would keep increasing until the community had 'relieved itself of the presence of the Indians.'" (footnote omitted)).

36. White, *supra* n. 31, at 73.

avoid forfeiture in the 1860s.³⁷ Ironically, since the band held the land in common, the local assessors could not decide what name to put down as owner.³⁸ Adding to the confusion, from 1871 to 1877, the local county treasurer would refuse to accept the money offered by the tribe because he determined that the land was not taxable.³⁹ When a new treasurer was elected in 1878, the band's land went back on the tax rolls.⁴⁰ By that point, the tribal community assumed the questionable taxation of their lands had ceased for good and stopped paying.⁴¹ The new county treasurer was Watts S. Humphrey, a local lawyer and tax deed speculator.⁴² He had been busy quietly buying up tax deeds over the years in and around Indian Village before being elected, and continued to do so after becoming county treasurer.⁴³ Another local tax deed speculator who began buying up tax deeds on the lots in Indian Village in the 1880s was John McGinn.⁴⁴

The community remained on the land, not knowing several of their lots had been clouded by various tax deeds sold by the county without their knowledge.⁴⁵ Soon timber thieves began trespassing on tribal lands, and selling tribal timber to dealers in Cheboygan, Michigan.⁴⁶ The presence of valuable timber on the tribal lands made them valuable to land speculators. And in 1897, McGinn began to take action to evict the Burt Lake community from their lands in Indian Village.⁴⁷ In another twisted irony, the local county treasurer at the time had taken the position that the lands in Indian Village were tax-exempt.⁴⁸ McGinn persisted in his legal efforts throughout 1898, but the band's pro bono lawyer helped to delay the final eviction.⁴⁹ Throughout 1899, he "continued to threaten and harass the Indians . . . , breaking into their houses and taking possession while they were away."⁵⁰ But by 1900, most of the Indians of the community remained.

The actions of the non-Indians led by John McGinn that followed in the fall of 1900 were, to paraphrase the words of Professor White, "cruel and decisive."⁵¹ He wrote:

Using [a] writ of possession [McGinn] obtained two years before, he got the aid of Sheriff Fred Ming and some deputies and on October 15, 1900 went to the village for the last time. Most of the men of Indian Village were away at the time. They had gone to Cheboygan to cash the checks given them for work in the neighboring lumber camps. McGinn and the posse arrived at a village of old men, women, and children. The sheriff and his deputies

37. *Id.* at 74.

38. *Id.*

39. *Id.* at 75.

40. *Id.*

41. White, *supra* n. 31, at 75.

42. *Id.*

43. *Id.* at 75–76.

44. *Id.* at 76.

45. *Id.* at 76–77.

46. White, *supra* n. 31, at 77. Adding to the confusion, some parcels may have been lawfully taken out of trust status in accordance with the Treaty of Detroit and would have been taxable.

47. *Id.* at 82.

48. *Id.* at 83.

49. *Id.* at 83–84.

50. *Id.* at 84.

51. White, *supra* n. 31, at 85.

removed the household goods from the homes. They offered the Indians the windows and doors of the houses, but the people refused them. The band members just sat patiently on their goods in the road, waiting for the deputies to leave so they could move back into their homes. But late in the afternoon McGinn systematically moved from house to house dousing each with kerosene and, as the Indians and the posse watched, set them on fire. He spared only the church.⁵²

The members of the Burt Lake community left Indian Village and moved in with relatives in Harbor Springs, Cross Village, and other Anishinabeg communities.⁵³ Eleven years after the burnout, the United States sued McGinn, alleging,

[a]ll of the tax deeds made, executed and delivered . . . and all the deeds and attempted conveyances made by the persons named as grantees in the deeds . . . , and the petition for writ of assistance [used by McGinn to force the assistance of the sheriff], are wholly null and void.⁵⁴

That case was dismissed in 1917 largely based upon an erroneous interpretation of the 1855 Treaty of Detroit⁵⁵ that the band's relationship with the federal government had been terminated, depriving the band of legal standing and property rights—the same interpretation propagated by numerous courts and bureaucrats until ultimately corrected in recent federal court decisions.⁵⁶ The band continues to seek federal recognition and the return of its lands to this day.⁵⁷

52. *Id.* at 85–86 (footnotes omitted).

53. *See id.* at 86.

54. Compl. at 11, *U.S. v. McGinn*, Eq. No. 94 (E.D. Mich., June 11, 1911) (copy on file with authors).

55. *See* Pl.'s Compl. for Eq. & Declaratory Relief ¶ 11, *Burt Lake Band of Ottawa & Chippewa Indians*, 217 F. Supp. 2d 76 (copy on file with authors) (citing *U.S. v. Shepherd*, Eq. No. 94 (E.D. Mich. May, 31 1917)).

56. *E.g. U.S. v. Mich.*, 471 F. Supp. 192. The district court held:

Article Five of the Treaty of 1855 ended an artificial construction—the Ottawa and Chippewa Nation—which the United States had created in order to obtain the cession of 1836. It did not result in any change in the way in which the Indians of the treaty area functioned politically or in the way in which they were dealt with by the federal Indian agents, save one: they were never again convened or dealt with as one entity, not even to assent to the Senate amendments to the treaty. To the Indians the article meant only that they would not be considered a single entity. The termination of this entity, not the termination of the Ottawa and Chippewa tribes or bands, was all that was accomplished by this Article.

Id. at 280. *E.g. Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Atty. for the W.D. Mich.*, 369 F.3d 960, 961 (6th Cir. 2004) (“In 1872, then-Secretary of the Interior, Columbus Delano, improperly severed the government-to-government relationship between the Band and the United States, ceasing to treat the Band as a federally recognized tribe. This occurred because the Secretary had misread the 1855 Treaty of Detroit, [11 Stat. 621].” (footnote omitted)).

The Sixth Circuit reported the underlying cause of this political decision, which could only charitably be called a misunderstanding, as follows:

Henry Schoolcraft, who negotiated the 1836 Treaty of Washington on behalf of the United States, combined the Ottawa and Chippewa nations into a joint political unit solely for purposes of facilitating the negotiation of that treaty. In the years that followed, the Ottawas and Chippewas vociferously complained about being joined together as a single political unit. To address their complaints, the 1855 Treaty of Detroit contained language dissolving the artificial joinder of the two tribes. This language, however, was not intended to terminate federal recognition of either tribe, but to permit the United States to deal with the Ottawas and the Chippewas as separate political entities. Ignoring the historical context of the treaty language, Secretary Delano interpreted the 1855 treaty as providing for the dissolution of the tribes once the annuity payments it called for were completed in the spring of 1872, and hence decreed that upon finalization of those payments “tribal relations will be terminated.” Beginning in that year, the Department of the Interior, believing that the

This story of brute physical force of burning people's homes as they watch on the side of the road, helpless to stop private actors acting under the protection of government officials, is one example of the physical power, aided by the abuse of apparent legal authority, used to dispossess tribal peoples of their lands. The local law enforcement officials that served to evict the Burt Lake Indian community before McGinn burned their homes appeared to act under the color of state law, creating a mixture of apparent legal authority and physical power that is pervasive in tribal lands dispossession.

B. The Abuse of Apparent Legal Authority Mixed with Express Legal Authority to Dispossess Tribal Property Rights: South Fox Island

Non-Indians also used strained or invalid constructions of statutory authority to dispossess tribal communities of their lands. Returning to the notion that the United States compensated Indians and Indian tribes for their land cessions, there still remain the lands government officials sold without the consent of Indians and Indian tribes under the color of federal law. While there are numerous types or classes of lands dispossessed in accordance with the political will of non-Indians, the focus of this Part is on the so-called "secretarial transfers,"⁵⁸ a subset of the kind of transactions often grouped together with "forced fee patents."⁵⁹ In a secretarial transfer, "BIA officials approved sales of inherited allotments on reservations without the consent of all beneficial heirs."⁶⁰ Under federal law, many secretarial transfers were valid. For example, the Secretary had authority to take an allotment out of trust status where the Indian beneficiary passed away and had one or more heirs who were "competent to manage their own affairs."⁶¹ However, as discussed below, the Secretary abused this

federal government no longer had any trust obligations to the tribes, ceased to recognize the tribes either jointly or separately.

Id. at 961–62 n. 2 (citation omitted) (quoting *Letter from Secretary of the Interior Delano to Commission of Indian Affairs* 3 (Mar. 27, 1872)).

57. See *Proposed Finding Against Federal Acknowledgment of the Burt Lake Band of Ottawa & Chippewa Indians, Inc.*, 69 Fed. Reg. at 20027; White, *supra* n. 31, at 86.

58. *Covelo Indian Community v. Watt*, 1982 U.S. App. LEXIS 23138 at *8 n. 9 (D.C. Cir. Dec. 21, 1982), *aff'g*, 551 F. Supp. 366 (D.D.C. 1982).

59. *Nichols v. Rysavy*, 809 F.2d 1317, 1322 (8th Cir. 1987), *aff'g*, 610 F. Supp. 1245 (D.S.D. 1985). See also e.g. *U.S. v. Nez Perce County*, 95 F.2d 232, 233 (9th Cir. 1938); *U.S. v. Benewah County*, 290 F. 628, 630 (9th Cir. 1923); *Covelo Indian Community*, 1982 U.S. App. LEXIS 23138 at *7; *Sioux Tribe of Indians v. U.S.*, 7 Cl. Ct. 468, 477 (1985); *Manypenny v. U.S.*, 125 F.R.D. 497, 501 (D. Minn. 1989); *U.S. v. Frisbee*, 165 F. Supp. 883, 887 (D. Mont. 1958); *Bordeaux v. Hunt*, 621 F. Supp. 637, 640 (D.S.D. 1985); *U.S. v. Ferry County*, 24 F. Supp. 399 (E.D. Wash. 1938).

The D.C. Circuit in *Covelo Indian Community*, 1982 U.S. App. LEXIS 23138 at *8 n. 8 (citations omitted), defined forced fee patent claims as such:

Forced fee patent claims refer to attempts to revoke fee patents erroneously issued by the Secretary of the Interior for lands that the United States had previously held in trust for the Indians. Congress has in the past allotted certain lands to individual Indians in trust. The United States holds these lands for the use and benefit of the allottee. While these lands are in trust status they are exempt from state ad valorem taxes and are subject to various restrictions. In 1906, Congress provided that the Secretary of the Interior could issue fee simple patents to an Indian before the trust period expired if the Secretary were satisfied that the allottee was competent and capable of managing his affairs. The issuance of a fee simple patent removed all restrictions, including immunity from taxation. The Secretary could issue a fee patent.

60. *Covelo Indian Community*, 1982 U.S. App. LEXIS 23138 at *8 n. 9.

61. 25 U.S.C. § 372 (2000) ("If the Secretary of the Interior decides the heir or heirs of such decedent

authority on numerous occasions, illegally extending the authority to lands that would not have been covered by the statutory authority.⁶²

Indian communities in the Great Lakes states suffered severely during the Termination Era⁶³ as the Department of Interior began to issue thousands of invalid forced fee patents and illegally sell tribal lands without the consent of the Indians affected, often without adequate notice to the Indian landowners.⁶⁴ The political blowhards of the era favoring termination supported what they called “removing federal restrictions on the property and the person of the tribes and their members.”⁶⁵ Federal bureaucrats trumpeted the benefit of removing federal restrictions on the alienation of tribal lands as a rhetorical attack on the Soviet Union, arguing, “in the Soviet Union and other communist countries . . . individual property rights are either not recognized at all or regularly or systematically subordinated to the interests of the State or the larger group.”⁶⁶ Despite these grandiose statements of federal policy, local private interests remained the driving force for the dispossession of tribal lands. Three political interests combined with vague statutory proscriptions and authorizations to cause the alienation of Indian lands to non-Indians. These three interests were: (1) Indian freedom from federal supervision, (2) Cold War rhetoric, and (3) local private interests.

This Part focuses on the circumstances surrounding the dispossession of tribal lands on South Fox Island, located in Lake Michigan off the shore of Leelanau County, where much of the Grand Traverse Band Reservation is located, well within the traditional territory of the Grand Traverse Band of Ottawa and Chippewa Indians.⁶⁷ In

competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; . . .”).

62. See *infra* nn. 94–105 and accompanying text.

63. The “Termination Era” is so-called because the policy of Congress, beginning in 1953 and ending in the mid-1960s, was to terminate the trust relationship between specific Indian tribes and the federal government, also known as taking tribes out of federal supervision. See Donald L. Fixico, *Termination and Relocation: Federal Indian Policy, 1945–1960* (U.N.M. Press 1986); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 Am. Indian L. Rev. 139 (1977). Yet, the Era was an unmitigated disaster. See Winona LaDuke, *Recovering the Sacred: The Power of Naming and Claiming* (South End Press 2005) (describing the impact of termination at Klamath); Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 81–84 (W.W. Norton & Co. 2005) (documenting impacts at Klamath and Menominee).

64. See Memo. from Elmer T. Nitzschke, Field Sol., Twin Cities, Minn., to Dept. Int. Sol. 1 (Mar. 7, 1978) (copy on file with authors) (“If there were 2,000 of such [Secretarial transfer] sales on the six Minnesota Chippewa Tribe reservations alone, it is likely that the figure is even greater on the reservations under the jurisdiction of the Great Lakes Agency and the Michigan Agency.”); see also Memo. from Thomas Fredericks, Assoc. Sol., Indian Affairs, to Dept. Int. Sol. 1 (May 31, 1979) (copy on file with authors) (“[I]t appears that numerous transactions were entered into without the requisite authority [i.e., the consent of the Indian allottees] and are therefore void.”) (citing *Ewert v. Bluejacket*, 259 U.S. 129 (1922)); Memo. from Hans Walker, Jr., Acting Assoc. Sol., Indian Affairs, to Asst. Sec. for Indian Affairs 1 (Feb. 16, 1979) (copy on file with authors) (“[B]etween the years 1948 and 1958 Bureau personnel . . . authorized conveyances of trust allotments without the consent of all the beneficial heirs under circumstances where one of the heirs was determined to be incompetent.” (emphasis in original)).

65. Arthur V. Watkins, *Termination of Federal Supervision: The Removal of Restrictions Over Indian Property and Person*, in *The Annals of The American Academy of Political and Social Science: American Indians and American Life* 47, 47 (George B. Simpson & J. Milton Yinger eds. 1957).

66. Glenn L. Emmons, Bureau Indian Affairs, Press Release, *Emmons Issues Policy Statement on Sale of Individually Owned Indian Lands* 2 (May 15, 1958) (copy on file with authors).

67. James M. McClurken, Expert Report, *South Fox Island: Its Historical Importance to the Grand Traverse Band of Ottawa and Chippewa Indians* ii (Aug. 28, 2001) (copy on file with authors).

accordance with the 1836 Treaty with the Ottawas, Etc. ("Treaty of Washington"),⁶⁸ the Grand Traverse Band ceded South Fox Island to the United States.⁶⁹ Despite ceding the land in the treaty, Grand Traverse Band members still used the island's resources in the nineteenth Century, deciding occasionally to remain on the land during the winter.⁷⁰ In 1848, the United States, seeing no permanent settlement on the island, put the land up for public sale.⁷¹ The purchasers of the land, however, later abandoned the island by 1860.⁷² Other non-Indians came and went; but, by 1880, most non-Indians had left the island.⁷³

Congress enacted three statutes in 1872, 1875, and 1876,⁷⁴ opening up more lands for the selection of allotments by certain Grand Traverse Band Odawa and Ojibwe Indians, in a half-hearted and belated attempt to fulfill the requirements of the 1855 Treaty of Detroit.⁷⁵ Three prominent, intermarried Grand Traverse Band families occupied South Fox Island by the 1890s,⁷⁶ apparently in conformance with the statutes enacted after the 1855 Treaty of Detroit.⁷⁷ Though the patents issued to the South Fox Island homesteaders provided that the trust status (and, therefore, tax exemption) would expire, Presidential Executive Orders extended the trust status indefinitely.⁷⁸ Nevertheless, at the request of the Odawa landowners, the Secretary converted some parcels into fee simple status.⁷⁹ This mixture of fee simple lands and trust lands, similar to the mixture at Indian Village on Burt Lake, may have contributed to later confusion.

At first, the United States respected the land ownership rights of the Odawas living on South Fox Island. Dr. James M. McClurken recounted that timber thieves had cut logs on trust lands, and federal officials expended great resources to win compensation for the landowners.⁸⁰ One federal agent even memorialized in writing a pledge not to sell the land from under the Odawa landowners.⁸¹ Federal agents also protected the lands from being taxed by Leelanau County.⁸²

68. *Treaty of Washington*, *supra* n. 28.

69. McClurken, *supra* n. 67, at 1.

70. *Id.* at 2-3.

71. *Id.* at 32.

72. *Id.*

73. *Id.* at 32-33.

74. *An Act for the Restoration to Market of certain Lands in Michigan*, Pub. L. No. 42-424, 17 Stat. 381 (1872); *An act to amend the act entitled "An act for the restoration to homestead-entry and to market of certain lands in Michigan," approved June tenth, eighteen hundred and seventy-two, and for other purposes*, Pub. L. No. 43-188, 18 Stat. 516, 516-17 (1875); *An act extending the time within which homestead entries upon certain lands in Michigan may be made*, Pub. L. No. 44-105, 19 Stat. 55, 161 (1876).

75. See McClurken, *supra* n. 67, at 39 ("To remedy [the] flawed system [created in the 1855 treaty], the United States Congress passed special homestead laws in 1872, 1875, and 1876 that allowed Grand Traverse Band members to make homesteads on their reservations.").

76. *Id.* at 5.

77. *Id.* at 42-43 ("Twenty-two Grand Traverse Band members selected homesteads on South Fox Island under provisions of the 1862, 1875, and 1884 legislation.").

78. *Id.* at 44-45; e.g. *Executive Orders Relating to Indians on Public Domain*, in *Indian Affairs: Laws and Treaties* vol. 4, 1053-56 (Charles J. Kappler ed., Govt. Printing Off. 1929).

79. McClurken, *supra* n. 67, at 43-44.

80. *Id.* at 53-54.

81. *Id.*

82. *Id.* at 54-55.

In 1934, Congress passed the Indian Reorganization Act.⁸³ Various Michigan Anishinabe tribes, including the Grand Traverse Band, attempted to reorganize under the Act,⁸⁴ but the Bureau of Indian Affairs refused to begin recognizing the tribes until 1980.⁸⁵ Even after the denial of federal recognition in the 1930s, the federal government continued to protect the Indian homesteaders from state and local taxation.⁸⁶ But as the Termination Era approached, the federal government's view of the homesteaders on South Fox Island apparently began to change.

Professor Cohen described the beginnings of the Termination Era as it took place quietly in the federal bureaucracy in his groundbreaking article, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*.⁸⁷ The article broadly details the changes wrought in the Bureau of Indian Affairs during the late 1940s and early 1950s.⁸⁸ He stated:

Within the past two years, the former habit of Indian Bureau officials of disposing of Indian tribal lands without the consent of the Indians—a practice which has already resulted in more than 80 million dollars in judgments against the United States by its own courts—generally has been reestablished as approved Interior Department practice.⁸⁹

As former Associate Interior Solicitor during the 1930s and 1940s, Professor Cohen had a unique perspective on the damage done under the new regime.⁹⁰ He described the practices of the Interior Department in issuing leases of tribal lands at Blackfeet and San Ildefonso Pueblo without tribal consent.⁹¹ Professor Cohen also reported that the Interior Department had proposed new legislation that would “re-establish the infamous ‘forced patent’ system.”⁹² As evidenced by the Department of Interior's own memoranda from the 1970s, the Bureau of Indian Affairs did not wait for such legislation.⁹³

At South Fox Island, the national calls for termination of Indian tribes fueled a renewed federal interest in disposing of the South Fox Island homesteads.⁹⁴ Non-Indian timber barons also asked the federal government to end the trust status of the homesteads in the archipelago.⁹⁵ Shortly thereafter, the federal government sought bids for the parcels of land occupied by the homesteaders at South Fox Island, and accepted the

83. 25 U.S.C. §§ 461–479 (2000).

84. See 25 U.S.C. § 476 (allowing tribes to reorganize and create a governmental structure).

85. *Grand Traverse Band of Ottawa & Chippewa Indians*, 369 F.3d at 962.

86. See McClurken, *supra* n. 67, at 65.

87. 62 Yale L.J. 348 (1953).

88. *Id.*

89. *Id.* at 364 (footnote omitted).

90. See Felix S. Cohen's *Handbook of Federal Indian Law* vii (Rennard Strickland et al. eds., 1982 ed., Michie 1982).

91. Cohen, *supra* n. 87, at 364–65.

92. *Id.* at 374.

93. Example memoranda include those by Nitzschke, Fredericks, and Walker that assert the Secretary restarted the forced fee patents system without mention of new statutory authority. See *supra* n. 64 and accompanying text.

94. McClurken, *supra* n. 67, at 66–67. See generally Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* vol. 2, 1027 (U. Neb. Press 1984).

95. McClurken, *supra* n. 67, at 67.

offers of Sterling Nickerson, one of the non-Indian lumbermen.⁹⁶ Dr. McClurken documented that the federal government sold the lands with the consent of few, if any, of the Indians with property interests in the lands.⁹⁷ Most of the parcels became, and to this day are listed as, potential land claims in the Federal Register.⁹⁸

These are painful events for the Anishinabeg Indians affected. As Dr. McClurken noted:

The events by which the United States conveyed title to the South Fox Island trust properties took place less than fifty years ago. The events are still fresh in the memory of living Grand Traverse Band members who were directly involved in the search for heirs and know that their parents and grandparents refused to sign away their title claim to the South Fox Island homesteads.⁹⁹

Dr. McClurken reported that heirs to South Fox Island properties rarely returned the forms sent by the Bureau of Indian Affairs seeking their authorization to sell the allotments.¹⁰⁰ Some of them thought the government would not care because the land values were relatively small.¹⁰¹ Others did not understand the meaning of the document, thinking that they were merely authorizing the government to lease the land out for a time to timber interests.¹⁰² One family, after not returning the form seeking their consent to sale of their lands, received a check for five dollars for the value of the land sold.¹⁰³ Eva Petoskey, former Vice-Chair of the Grand Traverse Band Tribal Council, recalled a story whereby a federal agent visited her grandmother seeking consent to sell the lands:

She [Isabelle Oliver] was a tiny little woman, but she went on a tirade I guess and said, "Don't ever come here again." I don't know what she . . . I wish I could have been there. She threw him out of her house and said, "Don't ever come back. We've all suffered through enough injury and if you think I'm going to relinquish anything, you're crazy."¹⁰⁴

Despite the obvious rejection of the federal government's request for consent to sell these lands, the government sold them anyway.¹⁰⁵

To this day, the Michigan Odawas have been unsuccessful in restoring their rights to the lands on South Fox Island, particularly the cemetery that is located on land currently owned by a private real estate developer.¹⁰⁶ The political power of lumber

96. *Id.* at 68–69.

97. *Id.* at 71–73.

98. *Notice of all Statute of Limitations Claims*, 48 Fed. Reg. at 13876. The Secretary of Interior created this list in accordance with the Indian Claims Limitation Act of 1982, Pub. L. 97-394. *See* 48 Fed. Reg. at 13698.

99. McClurken, *supra* n. 67, at 73.

100. *Id.* at 73–74 (quoting John Bailey, a Grand Traverse Band member).

101. *Id.*

102. *Id.* at 75 (quoting Darrell Wright, a Grand Traverse Band member).

103. *Id.* at 74 (citing Eva Petoskey, a Grand Traverse Band member).

104. McClurken, *supra* n. 67, at 75 (quoting Eva Petoskey, a Grand Traverse Band member).

105. *E.g. id.* at 72 ("The evidence . . . indicates that the federal government knowingly sold the Gagkishin/Raphael [homestead without] permission of its Grand Traverse Band owners.").

106. *See* Associated Press, *Developer Gives Job to Former DNR Chief: K.L. Cool Will Work as a Consultant for a Company He Helped with a Land Swap While with the State*, Grand Rapids Press B3 (Oct. 17, 2004); Associated Press, *Owner Denies Plans for Island Golf Course*, Grand Rapids Press A20 (Nov. 23, 2001) [hereinafter *Owner Denies Plans for Island Golf Course*]; John Flesher, *Tribe Sues to Block South Fox Swap*, Grand Rapids Press A5 (Jan. 5, 2002); Cari Noga, *Grand Traverse Ancestral Land in Conflict*,

barons in the 1950s¹⁰⁷ and real estate developers in the 2000s,¹⁰⁸ along with the complicity of the federal government and state agencies, continues to deny Michigan Anishinabeg lands to which they are entitled.

III. POWER AND AUTHORITY

In legal theory, power and authority are very similar. *Black's Law Dictionary* defines "power" as:

1. The ability to act or not act; esp., a person's capacity for acting in such a manner as to control someone else's responses.
2. Dominance, control, or influence over another; control over one's subordinates.
3. The legal right or authorization to act or not act; a person's or organization's ability to alter, by an act of will, the rights, duties, liabilities, or other legal relations either of that person or of another.¹⁰⁹

"Authority" is practically a synonym: "The right or permission to act legally on another's behalf; esp., the power of one person to affect another's legal relations by acts done in accordance with the other's manifestations of assent; the power delegated by a principal to an agent."¹¹⁰ But in reality, power and authority are very different. As Thomas Cooper famously stated in 1830, "The law, unfortunately, has always been retained on the side of power: laws have uniformly been enacted for the protection and perpetuation of power."¹¹¹ On occasion, the law recognizes that power is to be considered in the context of the impact of power upon the powerless. Professor Jane Rutherford identified *Mathews v. Eldridge*,¹¹² a critical Supreme Court decision relating to due process of law that created a three-part test that balances the interests and rights at stake, the risk of error, and the government's interest,¹¹³ as an example of when the government must consider whether its decision "enhances participation and equality for the relatively powerless."¹¹⁴ As we have shown, in federal Indian law and policy, brute physical power was sufficient to dispossess tribal lands.¹¹⁵

Legal authority, for purposes of this article, refers to some form of valid written acknowledgment that the government or individual can take a certain action. "Law," as famously described by Justice Holmes, "in the sense in which courts speak of it today does not exist without some definite authority behind it."¹¹⁶ In federal Indian law, legal

<http://www.indiancountry.com/content.cfm?id=2306> (July 18, 2001); *Treasure Island: Wrong Direction—South Fox Island Should Belong to All of Michigan*, Grand Rapids Press A8 (Mar. 17, 2003).

107. McClurken, *supra* n. 67, at 68–69.

108. See *Owner Denies Plans for Island Golf Course*, *supra* n. 106 ("Handwritten notes from a conversation between two federal officials include a reference to a proposed golf course on the Lake Michigan island.")

109. *Black's Law Dictionary* 1207 (Bryan A. Garner et al. eds., 8th ed., West 2004).

110. *Id.* at 142.

111. Thomas Cooper, *A Treatise on the Law of Libel and the Liberty of the Press* ix, in Fred R. Shapiro, *The Oxford Dictionary of American Legal Quotations* 240 (Oxford U. Press 1993) (footnote omitted).

112. 424 U.S. 319 (1976).

113. Jane Rutherford, *The Myth of Due Process*, 71 B.U. L. Rev. 1, 81–82 (1992).

114. *Id.* at 82.

115. See generally Gibson, in *Handbook of North American Indians*, *supra* n. 1, at 211–25 (chronicling the use of military and other force to dispossess tribal lands).

116. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

authority over the property rights of Indians and Indian tribes is a subject of great dispute amongst academics and courts.¹¹⁷ Assuming Congress has the requisite legal authority to legislate in the area of tribal property rights, which is the current state of the law,¹¹⁸ we must look to acts of Congress as a possible source of legal authority for the federal government to dispose of tribal trust lands without Indian consent.¹¹⁹

Non-Indians used power and authority in three ways to dispossess Indian lands. First, non-Indians used brute physical force to take land. Historian Francis Paul Prucha described that “[t]he great distinguishing feature of English relations with the Indian groups was replacement of the Indians on the land by white settlers.”¹²⁰ He referred to this kind of land dispossession as “[f]orced conquest”¹²¹ and “conquest in a ‘just war.’”¹²²

Another kind of Indian land dispossession arose during the pre-American period as well—that of exercising and often abusing legal authority to take Indian lands. Prucha wrote that the colonizers applied the theory of first discovery and later preemption, “a theory developed by the European nations without consultation with the natives but one that did not totally disregard the Indians’ rights.”¹²³ That theory morphed into the doctrine of discovery, made law by Chief Justice Marshall’s opinion in *Johnson v. M’Intosh*,¹²⁴ and marked the intention of European and then American governments to dispossess Indian lands through the rule of law. The early American government chose to “nationalize” land transfers and relied upon treaties to ratify Indian land dispossession.¹²⁵ Congress retained the authority under the Indian Commerce Clause to control Indian land sales¹²⁶ and enacted statutes authorizing federal actions to dispossess Indian lands, such as the Removal Acts¹²⁷ or the Allotment Acts.¹²⁸

117. Compare *U.S. v. Lara*, 541 U.S. 193, 200 (2004) (holding that Congress has “plenary and exclusive” powers “to legislate in respect to Indian tribes”); Robert Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 Ariz. L. Rev. 413 (1988); Robert Laurence, *On Eurocentric Myopia, The Designated Hitter Rule, and “The Actual State of Things,”* 30 Ariz. L. Rev. 459 (1988), with *Lara*, 541 U.S. at 224 (Thomas, J., concurring) (“The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty.”); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 Am. B. Found. Research J. 1 (arguing that Congress does not have plenary power to legislate in the field of Indian affairs); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113 (2002); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 Wis. L. Rev. 219 (1986); Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence’s Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 Ariz. L. Rev. 439 (1988).

118. See *Lara*, 541 U.S. at 200.

119. E.g. 25 U.S.C. § 372 (2000) (authorizing the Secretary of Interior to sell Indian lands “if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold.”). See generally Jill Norgren, *Protection of What Rights They Have: Original Principles of Federal Indian Law*, 64 N.D. L. Rev. 73, 82 (1988) (“[The Trade and Intercourse Acts and the Northwest Ordinance] represented a critical commitment to law over raw power at precisely the time when the pressure for more land among whites was growing, and questionable land speculation deals were on the rise in the United States.” (footnote omitted)).

120. Prucha, *supra* n. 94, at vol. 1, 11.

121. *Id.* at 14.

122. *Id.* at 15.

123. *Id.* at 15–16.

124. 21 U.S. 543.

125. See Gibson, in *Handbook of North American Indians*, *supra* n. 1, at 218.

126. See *id.* at 218–19.

127. See *id.* at 221.

It was non-Indians acting under the color of these treaties and statutes that dispossessed Indian lands under the second and third methods articulated in this article. The second method is the abuse of apparent legal authority and the third method is the valid exercise of legal authority. But brute force did not disappear with the enactment of statutes designed to cloak Indian land dispossession with legality. Government officials and private actors often conspired to stretch the law past the breaking point with the additional and unnecessary use of violence.

In the case of the tribal lands at Indian Village on Burt Lake, the legal authority for the burning of Indian homes—a writ of eviction based on the tax foreclosure of Indian trust lands—was highly dubious.¹²⁹ Even the federal government belatedly alleged the writ was “null and void.”¹³⁰ The Burt Lake burnout attests to the reality of the mixture of the first and second methods of Indian land dispossession. We showed in Part II that vague, confusing, and occasionally conflicting federal statutes, treaties, and regulations can also be used by the politically powerful to dispossess tribal lands.

In addition, government officials with valid legal authority to dispossess Indian lands often extended their actions to include Indian lands that should not have been subject to that authority. In the case of the tribal lands on South Fox Island, national politicians and local business leaders conspired to allow the federal bureaucracy to dispose of tribal lands without Indian consent.¹³¹ While the government may have had authority to sell some of the homesteads on South Fox, it did not stop there, rather it sold all of them, an example of the mixture between the second and third methods of Indian land dispossession.

There are thousands of examples of the use of pure, brute physical power to destroy the property interests, liberty interests,¹³² and even lives¹³³ of Indians—far too many to discuss in this short article. And there are also thousands of examples whereby those with political power are able to force the destruction of tribal interests and rights. The most obvious is the power of Congress to abrogate Indian treaties without valid tribal consent.¹³⁴

In federal Indian law, the confusion as to the legal authority of any given parcel, coupled with the ever-present reality of overwhelming physical force, contributed to much illegal Indian land dispossession. Since the legal authority of Congress and the Executive branch to legislate upon and regulate tribal property rights and interests is uncertain, non-Indians often have relied more on physical and political power to achieve

128. See *id.* at 226–27.

129. *E.g. Swope v. Purdy*, 23 F. Cas. 576, 576 (D. Kan. 1870) (holding that a sale of tax-exempt Indian reservation land for taxes is void).

130. Pl.’s Compl. for Eq. & Declaratory Relief ¶ 11, *Burt Lake Band of Ottawa & Chippewa Indians*, 217 F. Supp. 2d 76 (citing *McGinn*, Eq. No. 94).

131. McClurken, *supra* n. 67, at 70–73.

132. *E.g. Prucha*, *supra* n. 94, at vol. 2, 652 (detailing the capture and internment of the Chiracahua Apache nation at Fort Sill).

133. *E.g. Russell Thornton, American Indian Holocaust and Survival: A Population History Since 1492*, at 49 (U. Okla. Press 1987) (“We do know that in Texas and California, particularly northern California, there was blatant genocide of American Indians by non-Indians during certain historic periods.”).

134. *E.g. Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

their goal of dispossessing Indians and Indian tribes from their lands. Legal authority, or the lack of legal authority, is an afterthought.

IV. EQUITY, POWER, AND THE LAW

The law developed to soften the impact of legal authority and political power, and offered some form of protection to the powerless; equity was often the vehicle protecting the property rights of Indians and Indian tribes. In part, equity was a response to the formalism of the common law courts.¹³⁵ Equity arose out of the

blind conservatism with which the common-law judges were accustomed to regard the rules and doctrines which had once been formulated by a precedent, and the *stubborn resistance* which they interposed to any departure from or change in either the spirit or the form of the law which had been thus established.¹³⁶

Injustice or unfairness might often be the result of this blind application of the law.¹³⁷ Courts of equity placed “emphasis on moral rectitude”¹³⁸ and “natural justice, in honesty and right.”¹³⁹

It goes without saying that a court exercising its equitable authority, exercises incredible power. A court exercising this authority can “interfere with and prevent the practical operation of legal rules.”¹⁴⁰ As a result, equitable remedies such as injunctions are “coercive.”¹⁴¹ Courts could enforce these remedies using their contempt powers, even placing people in jail “until [they] complied or indicated a willingness to do so.”¹⁴² But judges are not unconstrained in their exercise of equitable authority—there is “a vast body of case law to bind [them].”¹⁴³

One of the greater maxims announced by the courts of equity is “*Vigilantibus non dormientibus aequitas subvenit*,” meaning equity aids the vigilant.¹⁴⁴ This equitable maxim, which Pomeroy referred to as “a most important rule controlling and restraining the courts in the administration of all kinds of reliefs,”¹⁴⁵ is possibly the strongest exercise of judicial authority. Here, courts are authorized to deny plaintiffs access to

135. See Joseph Story, *Commentaries on Equity Jurisprudence* § 3 (13th ed., Little, Brown & Co. 1886) (referring to equity as used “in contradistinction to strict law”).

136. John Norton Pomeroy, *A Treatise on Equity Jurisprudence* vol. 1, §§ 16, 21 (5th ed., Bancroft-Whitney Co. 1941) (emphasis added).

137. See Story, *supra* n. 135, at § 27 (“But there are many cases in which a simple judgment for either party, without qualifications or conditions or peculiar arrangements, will not do entire justice . . . to either party.”); see also *U.S. v. Forness*, 125 F.2d 928, 937 (2d Cir. 1942) (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”).

138. Dan B. Dobbs, *Dobbs Law of Remedies: Damages—Equity—Restitution* vol. 1, § 2.1(3) (2d ed., West 1993).

139. Story, *supra* n. 135, at § 1; see also Dobbs, *supra* n. 138, at § 2.1(3) (equating “equitable” with “fair, compassionate, or flexible”).

140. Pomeroy, *supra* n. 136, at vol. 1, § 54.

141. Dobbs, *supra* n. 138, at § 2.1(1).

142. *Id.* (footnote omitted).

143. Garrard Glenn & Kenneth R. Redden, *Equity: A Visit to the Founding Fathers*, in *Selected Essays on Equity* 12, 16 (Edward D. Re ed., Oceana Publications 1955).

144. Pomeroy, *supra* n. 136, at vol. 2, § 418.

145. *Id.*

relief “wholly independent of any statutory periods of limitation.”¹⁴⁶ Thus, Pomeroy identified the doctrine of laches, defined as “such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.”¹⁴⁷ The foundation of this equitable doctrine is the even more fundamental (and yet vague) notion that, “[h]e who seeks equity must do equity.”¹⁴⁸ Therefore, the doctrine of laches “cannot be used to . . . defeat justice’ and ‘cannot be used as an instrument of oppression.”¹⁴⁹

However, as Professor Gail Heriot has argued, laches is a powerful judicial tool,¹⁵⁰ subject to potential abuse.¹⁵¹ Long ago, William Billson reported a “hardening of equity”¹⁵² and a “softening of the common law”¹⁵³ in his discussion of the merging of law and equity courts. Professor Heriot argued that a modern day version of this hardening and softening continues today in the context of the doctrine of laches (equity) and the statutes of limitations (law).¹⁵⁴ According to Professor Heriot, the doctrine of laches is “standardlike,”¹⁵⁵ “allow[ing] a broad range of facts to be considered.”¹⁵⁶ Statutes of limitations are “rulelike,”¹⁵⁷ “characterized by simplicity of administration [and turning] on a very limited number of easily ascertainable facts.”¹⁵⁸ Professor Heriot concluded that the equitable doctrine of laches and the statutes of limitations had “converged.”¹⁵⁹ Courts have “[moved] the statute of limitations in the direction of the standardlike laches doctrine,”¹⁶⁰ while also “simply apply[ing] the period specified in the most analogous statute of limitations unless unusual or extraordinary circumstances dictate otherwise.”¹⁶¹

Federal courts have long rejected the equitable defense of laches as to Indian land claims. Three cases, *Narragansett Tribe of Indians v. Southern Rhode Island Land*

146. *Id.* at § 418.

147. *Id.* at § 419 (quoting *Cahill v. Superior Ct. of City & County of S.F.*, 78 P. 467, 469 (Cal. 1904)) (footnote omitted).

148. *Id.* at § 418 (footnote omitted); see also Story, *supra* n. 135, at § 64e (“[T]he court will never assist a wrong-doer in effectuating his wrongful and illegal purpose.”) (footnote omitted).

149. Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 BYU L. Rev. 917, 918 (footnotes omitted) (quoting, respectively, *Westworth Village v. Mitchell*, 414 S.W.2d 59, 60 (Tex. Civ. App. 1967); *Cleveland Clinic Found. v. Humphrys*, 97 F.2d 849, 858 (6th Cir. 1938)).

150. *Id.* at 918–19 (arguing that laches “vests [courts] with nearly full discretion to dismiss a claim they believe ought to be time barred”).

151. Professor Heriot quoted Lord Camden as arguing that “[t]he discretion of a judge is the law of tyrants: . . . In the worst it is every vice, folly, and passion, to which human nature can be liable.” *Id.* at 919 (footnote omitted).

152. William W. Billson, *Equity in its Relations to Common Law: A Study in Legal Development* 9 (Riverdale Press 1917).

153. *Id.*

154. See Heriot, *supra* n. 149, at 920–21.

155. *Id.* at 921 (footnote omitted).

156. *Id.* at 929.

157. *Id.* at 921 (footnote omitted).

158. *Id.* at 927.

159. See Heriot, *supra* n. 149, at 952–62, 967 (“[R]ecent history has witnessed a near convergence between statutes of limitation and the doctrine of laches.”).

160. *Id.* at 954.

161. *Id.* at 953 (footnotes omitted).

Development Corp.,¹⁶² *Schaghticoke Tribe of Indians v. Kent School Corp.*,¹⁶³ and *Brooks v. Nez Perce County*¹⁶⁴ exemplify this analysis.¹⁶⁵ In *Narragansett*, another case where a tribe brought a Non-Intercourse Act claim,¹⁶⁶ the district court wrote that Congress has a “unique [fiduciary] obligation toward the Indians,’ embodied in an extensive statutory scheme which is to ‘be construed liberally . . . and never to the Indians’ prejudice.”¹⁶⁷ In *Schaghticoke*, the district court noted that the Non-Intercourse Act was meant to “protect the Indians from their own improvidence and to prevent the unfair or improper disposition of Indian lands.”¹⁶⁸ Moreover, the Act “establishes a relationship of trust and guardianship between the United States and the Indians which the federal government alone may terminate. Insofar as state statutes of marketable title or limitations interfere with [the] trust, they cannot be enforced.”¹⁶⁹ Both district courts rejected the laches defense.¹⁷⁰ In *Brooks*, the Ninth Circuit rejected the laches defense from an Idaho county.¹⁷¹ By the time *Brooks* was decided, the applicable federal statute of limitations on the Indian land claim would not expire until December 31, 1982.¹⁷² The Ninth Circuit refused to apply the laches defense, holding:

When Congress extended this statute of limitations to actions for money damages brought prior to December 31, 1982, it was aware that claims as old as 180 years might be protected and that extension of the statute would impose burdens on state and local governments. It concluded, nonetheless, that failure to extend the statute would result in inequities to Indians who would otherwise be deprived of rights due to “delinquent and dilatory” action by the government in processing claims.¹⁷³

Although not discussed in these opinions, these Indian land claims were brought as claims at law, not as claims at equity.

Despite Congressional statements of policy to the contrary, courts move closer to a convergence of statutes of limitations and the doctrine of laches. The potential for the use of laches by courts to deny Indians and Indian tribes opportunities to remedy land claims, characterized by some as “ancient,”¹⁷⁴ is significant. The remainder of this

162. 418 F. Supp. 798 (D.R.I. 1976).

163. 423 F. Supp. 780 (D. Conn. 1976).

164. 670 F.2d 835 (9th Cir. 1982).

165. The Second Circuit in *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1980), decided that adverse possession did not run against Indian lands. See *id.* at 614–15, 615 n. 3.

166. *Narragansett Tribe of Indians*, 418 F. Supp. at 802–03.

167. *Id.* at 806 (citing, respectively, *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *Antoine v. Wash.*, 420 U.S. 194, 199–200 (1975); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)) (bracket in original).

168. *Schaghticoke Tribe of Indians*, 423 F. Supp. at 784.

169. *Id.* at 784 (footnote omitted).

170. *Id.*; *Narragansett Tribe of Indians*, 418 F. Supp. at 806.

171. *Brooks*, 670 F.2d at 837.

172. *Id.* (citing Pub. L. No. 96-217, 94 Stat. 126 (1980)). Congress amended title 28, section 2415 in 1983 to extend the statute of limitations indefinitely. See 28 U.S.C. § 2415(b) (1988).

173. *Brooks*, 670 F.2d at 837 (footnote omitted).

174. E.g. H.R. Subcomm. on Indian Affairs of the Comm. on Int. & Insular Affairs, *Indian Claims Comm. Act Extension & Enlargement: Hrgs. on H.R. 2536 & Related Bills*, 90th Cong. 83 (Mar. 2, 1967) (Indian Claims Commissioner Watkins, stating “[W]e are an arm of the Congress for one definite purpose: to consider these ancient Indian claims.”) (quoted in *Navajo Tribe of Indians v. N.M.*, 809 F.2d 1455, 1461 (10th Cir. 1987)); Gus P. Coldebella & Mark S. Puzella, *The Landowner Defendants in Indian Land Claims: Hostages to History*, 37 New Eng. L. Rev. 585, 586 (2003). Cf. *City of Sherrill*, 125 S. Ct. at 1490 (“Notably,

article will discuss a fourth, and final, avenue for the dispossession of Indian lands—the federal judiciary’s equitable powers.

V. AGAINST THE CONTINUED DISPOSSESSION OF TRIBAL PROPERTY RIGHTS

A. *The Use of Judicial Power to Dispossess Tribal Property Rights*

1. *Felix v. Patrick*

In 1892, the U.S. Supreme Court affirmed the dismissal of an Indian land claim on the basis of laches in *Felix v. Patrick*.¹⁷⁵ The plaintiffs, heirs of Sophia Felix, a Dakota Indian from Minnesota, alleged the defendants were beneficiaries of a land fraud.¹⁷⁶ Specifically, Sophia received a scrip for 480 acres of land in accordance with the July 15, 1830 Treaty of Prairie du Chien with the Sauk and Foxes, Etc.,¹⁷⁷ and the July 17, 1854 Act to authorize the President of the United States to cause to be surveyed the tract of land in the Territory of Minnesota, belonging to the half-breeds or mixed-bloods of the Dacotah or Sioux nation of Indians, and for other purposes.¹⁷⁸ Sophia received her scrip in 1857, but in 1860, “certain persons unknown, ‘by certain wicked devices and fraudulent means,’ procured the said Sophia with her husband . . . to execute a power of attorney in blank, also a quitclaim deed in blank.”¹⁷⁹ Matthewson T. Patrick purchased the scrip in 1861.¹⁸⁰ Patrick’s attempt to secure the property at first failed and “he endeavored for several years to secure the execution of a deed by the said Sophia and her husband without letting them know the character of the instrument.”¹⁸¹ Patrick eventually secured a warranty deed for himself to the property and took possession, despite the fact that the United States issued a patent to Sophia.¹⁸² The 480 acres at issue were located in the heart of what is now Omaha, Nebraska.¹⁸³

Nearly twenty-seven years passed from the date Patrick took possession until Sophia’s heirs brought suit in 1887 or 1888 to recover the property.¹⁸⁴ Perhaps this is explained by the perception, albeit untrue, that Dakota Indians were “incapable of suing in any of the courts of the United States.”¹⁸⁵ Indicative of the Court’s unrepentant

it was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill.”).

175. 145 U.S. 317.

176. *Id.* at 318.

177. *Id.* at 318, 325; see also Felix S. Cohen, *Handbook of Federal Indian Law* 503 (U.S. Govt. Prntg. Off. 1941) (citing *Treaty with the Sauk and Foxes, Etc.* (July 15, 1830), 7 Stat. 328).

178. *Felix*, 145 U.S. at 318, 325; see also Cohen, *supra* n. 177, at 510 n. 34 (citing 10 Stat. 304 (July 17, 1854)).

179. *Felix*, 145 U.S. at 318, 325.

180. *Id.* at 318–19, 325.

181. *Id.* at 320.

182. *Id.* at 325–26.

183. *Id.* at 326.

184. *Felix*, 145 U.S. at 330.

185. *Id.* Felix Cohen’s treatise dedicated a section to the right of individual Indians to sue, noting that some jurisdictions, including Nebraska, questioned or even rejected the competency of Indians as witnesses. Cohen, *supra* n. 177, at 163, 163 n. 176 (citing *Pumphrey v. State*, 122 N.W. 19 (Neb. 1909)).

racism toward American Indians of that time, the Court noted “the conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people.”¹⁸⁶ The Court then treated the plaintiffs in an undeniably racist manner—by second-guessing their claim using specious reasoning, and assuming the facts from the best possible light in favor of the defendant, the person who committed the fraud. The Court noted *twice* that it believed it was suspicious that the plaintiffs did not bring the suit earlier, placing the onus on the plaintiffs to “show how the fraud came to be discovered, and why it was not discovered before.”¹⁸⁷ Later, the Court wrote, “[t]he mere fact that in 1887 these plaintiffs took their lands in severalty and became citizens, does not adequately explain how they so quickly became cognizant of this fraud, or why they had remained so long in ignorance of it.”¹⁸⁸ Frankly, the Court here assumed the plaintiffs were mere liars or, at best, opportunists. However, the Court had already answered these questions by repeating the allegation that “Patrick never informed the said Sophia or her husband that he had located such scrip, but, on the contrary, fraudulently concealed the same, and exercised every precaution to prevent such proceedings coming to the knowledge of the party.”¹⁸⁹ The Court dismissed this allegation by later deciding that Patrick never “actually [intended] to defraud Sophia Felix”¹⁹⁰ and his actions lacked “the element of wickedness necessary to constitute moral turpitude.”¹⁹¹ In short, the deception alleged by the Indian plaintiffs was not wicked.

Moreover, the Court asserted that, despite the bar to federal courts, “the courts of Nebraska were open to them, as they are to all persons irrespective of race or color.”¹⁹² Of course, the Court did not mention that, only six years previous, it had stated, “Because of the local ill feeling, the people of the States where [the Indians] are found are often their deadliest enemies.”¹⁹³ Furthermore, as Felix Cohen famously wrote:

As a practical matter, the Indians have frequently been at a decided disadvantage in safeguarding their legal rights.

The courts were often at such a distance that the Indians could not avail themselves of their right to sue. Their ignorance of the language, customs, usages, rules of law, and forms of procedure of the white man, the disparities of race, the animosities caused by hostilities, frequently deprived them of a fair trial by jury. They were sometimes barred by state statutes from serving on juries, and deemed incompetent as witnesses.¹⁹⁴

The Court’s stern admonition that the plaintiffs could have found relief in state courts seems at best to be a “cruel joke.”¹⁹⁵

186. *Felix*, 145 U.S. at 330 (quoting *In re Kansas Indians*, 72 U.S. 737, 758 (1866)).

187. *Id.* at 331.

188. *Id.* at 332.

189. *Id.* at 331.

190. *Id.* at 334.

191. *Felix*, 145 U.S. at 334.

192. *Id.* at 332.

193. *U.S. v. Kagama*, 118 U.S. 375, 384 (1886).

194. Cohen, *supra* n. 177, at 163 (footnotes omitted).

195. *U.S. v. John*, 437 U.S. 634, 653 (1978).

Finally, in perhaps the worst instance of pure racism in the opinion, the Court congratulated the defendant's "foresight and sagacity"¹⁹⁶ in choosing that particular parcel in which to steal, because it would turn out to be located in "one of the most thriving and rapidly growing cities of the West."¹⁹⁷ Sophia Felix, on the other hand, would not have had the foresight and sagacity to hold the land long enough to "[realize] a title of the sum her heirs now demand from [the] defendant."¹⁹⁸ Here, then, is the rub of this case: Patrick procured the land fraudulently. Patrick was a man of foresight and sagacity. And, when men of Patrick's foresight and sagacity obtain title to and from Indians, there is no "element of wickedness."¹⁹⁹

In the background of the racism inherent in *Felix v. Patrick*, lay the notion of Manifest Destiny. The Court noted the land that should have gone to Sophia Felix was "wild land thirty years ago [and] is now intersected by streets, subdivided into blocks and lots, and largely occupied by persons who have bought upon the strength of Patrick's title, and have erected buildings of a permanent character upon their purchases."²⁰⁰ Sophia, a "wild" Indian (at least until 1887), would not have been capable of helping Omaha become "one of the most thriving and rapidly growing cities of the West."²⁰¹ Allowing these Indians to sue, according to the Court, "would offer a distinct encouragement to the purchase of similar claims, which doubtless exist in abundance through the Western Territories . . . and would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation."²⁰² In other words, allowing Indians to pursue their land claims once they have the legal capacity to do so should be precluded, lest the advancement of non-Indian civilization be undone.

Where is justice in an opinion like *Felix v. Patrick*?

2. *City of Sherrill v. Oneida Indian Nation of New York*

In 2005, the Supreme Court decided *City of Sherrill v. Oneida Indian Nation of New York*.²⁰³ *City of Sherrill* marked the third time issues relating to the land claims of the Oneida Indian Nation reached the Court.²⁰⁴ In *Oneida Indian Nation of New York v. County of Oneida* ("*Oneida I*"), the Court held the Oneida Indian Nation had properly brought a claim under federal law, and that federal courts would have jurisdiction over their claims.²⁰⁵ In *County of Oneida v. Oneida Indian Nation of New York* ("*Oneida II*"), the Court upheld lower court decisions finding liability on the part of the counties and the State of New York against various defenses,²⁰⁶ but explicitly left open the

196. *Felix*, 145 U.S. at 334.

197. *Id.*

198. *Id.* at 335.

199. *Id.* at 334.

200. *Id.*

201. *Felix*, 145 U.S. at 334.

202. *Id.* at 335.

203. 125 S. Ct. 1478.

204. See *Oneida II*, 470 U.S. 226; *Oneida I*, 414 U.S. 661.

205. *Oneida I*, 414 U.S. at 675.

206. *Oneida II*, 470 U.S. at 236.

question of whether laches might serve to bar the land claims.²⁰⁷ Justice Powell, writing for the majority, responded to Justice Stevens's dissent, arguing the land claims should be dismissed on the basis of laches.²⁰⁸ Justice Powell stated that "it is questionable whether laches properly could be applied."²⁰⁹

Justice Powell relied mostly on *Ewert v. Bluejacket*.²¹⁰ *Ewert* involved a petty, corrupt Indian affairs agent, Paul Ewert, who had been hired to prosecute claims to set aside deeds to allotments in the Quapaw Indian Agency.²¹¹ In spite of a clear statutory proscription against Indian affairs employees purchasing Indian land,²¹² Ewert purchased Indian lands; particularly lands located in the Quapaw Indian Agency.²¹³ Charles Bluejacket sued to recover the lands.²¹⁴ Despite an apparent open-and-shut case, Ewert won at the district court on the outrageous theory that the statutory proscription did not apply to that transaction.²¹⁵ On appeal, Ewert lost on his original theory, but won on a theory of laches, because the plaintiff waited seven years, from 1909 to 1916, to file suit.²¹⁶ The Supreme Court reversed, noting that the statutory proscription was intended to protect Indians from the "avarice and cunning of unscrupulous men in official position, and at the same time to prevent officials from being tempted . . . to speculate . . . upon the necessities and weaknesses of these 'wards of the [government].'"²¹⁷ The Court seemed disturbed that Ewert had purchased land located in the very tribal community he had been hired to represent in land claims cases.²¹⁸ The Court reiterated a general rule: "[A]n act done in violation of a statutory prohibition is void and confers no right upon the wrongdoer."²¹⁹ The Court then rejected the laches argument, holding:

The equitable doctrine of laches, developed and designed to protect good-faith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions.²²⁰

The Indian land claims in *Oneida I* and *Oneida II* were based on the Non-Intercourse Act, which now states, "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention

207. *Id.* at 244.

208. *Id.* at 258 (Rehnquist, C.J., Stevens & White, JJ., dissenting) ("[R]outine application of our practice in dealing with limitations questions would lead to the conclusion that this claim is barred by the lapse of time.")

209. *Id.* at 244 n. 16.

210. 259 U.S. 129 (1922).

211. *Id.* at 133–36.

212. *Id.* at 135 (quoting Rev. Stat. § 2078, which read in relevant part, "No person employed in Indian affairs shall have any interest or concern in any trade with the Indians." (repealed 1980)).

213. *Id.* at 134.

214. *Id.* at 133–34.

215. *Ewert*, 259 U.S. at 135.

216. *Id.*

217. *Id.* at 136 (quoting *U.S. v. Hutto*, 256 U.S. 524, 528 (1921)).

218. *See id.* ("Ewert was specially employed . . . specifically to institute and prosecute suits relating to lands of the Quapaw Indians, with which we are here concerned.")

219. *Id.* at 138 (quoting *Waskey v. Hammer*, 223 U.S. 85, 94 (1912)).

220. *Ewert*, 259 U.S. at 138.

entered into pursuant to the Constitution.”²²¹ Like the statute in *Ewert* prohibiting federal Indian agents from speculating in Indian lands, the Non-Intercourse Act is a clear statutory prohibition. Hence, Justice Powell and the *Oneida II* majority doubted laches would apply to a transaction made in violation of the Non-Intercourse Act, which under the *Ewert* rule would be void.²²² But, largely due to the defendants’ waiver of the argument in the Second Circuit, the Court did not address the issue.²²³

In *City of Sherrill*, the Court ruled that laches could apply,²²⁴ and sent a lightning strike through the heart of the New York land claims.²²⁵ The *City of Sherrill* Court did not overrule *Oneida I* and *Oneida II* because “the question of damages for the Tribe’s ancient dispossession [was] not at issue in [the] case.”²²⁶ What was at issue was the Oneida Indian Nation’s argument that certain lands it owned in fee, that were located within the boundaries of its original reservation, should be exempt from state and local taxation.²²⁷ Sherrill initiated eviction proceedings after the Nation refused to pay taxes and, in response, the Nation sued in federal court.²²⁸ In short, the Nation’s theory, as encapsulated by Justice Stevens in his dissent, was that “a State’s attempt to tax reservation land is illegal and inconsistent with Indian title.”²²⁹

Justice Ginsberg, writing for the majority, focused on numerous pragmatic factors that justified for the Court the imposition of the equitable defense of laches. First, “[f]or two centuries, governance of the area in which the properties are located has been provided by the State of New York and its county and municipal units.”²³⁰ Second, non-Indians have “owned and developed the area”²³¹ Third, “most of the Oneidas

221. 25 U.S.C. § 177 (2000).

222. See *Oneida II*, 470 U.S. at 244–45; *Ewert*, 259 U.S. at 138.

223. *Oneida II*, 470 U.S. at 245.

224. *City of Sherrill*, 125 S. Ct. at 1491–92.

225. See e.g. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 277, 280 (2d Cir. 2005) (reversing a \$248 million land claims judgment against the State of New York, Cayuga County, Seneca County, and others on the basis that laches barred the claim and relying heavily on *City of Sherrill*).

226. *City of Sherrill*, 125 S. Ct. at 1494.

227. *Id.* at 1483, 1488.

228. *Id.* at 1488.

229. *Id.* at 1496 n. 3 (Stevens, J., dissenting) (citing *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764–65 (1985)). The Second Circuit stated:

Three basic principles inform the disposition of this action. The first is the Indians’ right of occupancy on tribal land, or “Indian country,” which “may extend from generation to generation, and will cease only by dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption.” The second, embodied by the Nonintercourse Act, is federal preeminence over the disposition of land in Indian country. Since “Congress alone has the right to say when the [United States’] guardianship over the Indians may cease,” the sale or conveyance of reservation land can only be made with congressional sanction, that is, “by treaty or convention entered into pursuant to the Constitution.” The third is federal preemption, which prohibits states from imposing property taxes upon Indian reservation land without congressional approval.

Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139, 152–53 (2003) (citations omitted) (bracket in original), *rev’d*, 125 S. Ct. 1478.

230. *City of Sherrill*, 125 S. Ct. at 1483 (emphasis added); see generally *id.* at 1493 (“A checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at [Oneida Indian Nation’s] behest—would ‘seriously burde[n] the administration of state and local governments’” (quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994) (first bracket added))).

231. *Id.* at 1483 (emphasis added).

have resided elsewhere.”²³² Fourth, upholding the tax immunity of the Oneida Indian Nation’s landholdings would “disrupt the justifiable expectations of the people living in the area.”²³³ Fifth, the Court held that upholding the Nation’s tax immunity would be “impracticabl[e].”²³⁴ Finally, the Court noted that the Nation did not seek to acquire its tax immunity by attempting to place the land in trust in accordance with title 25, section 465 of the United States Code.²³⁵ Utilizing section 465 and its implementing regulations²³⁶ allows for analysis of “the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over a territory.”²³⁷

Shortly after the Court decided *City of Sherrill*, the Second Circuit dismissed the Cayuga Indian Nation’s land claims in *Cayuga Indian Nation of New York v. Pataki*.²³⁸ The Second Circuit asserted that the decision in *City of Sherrill* “has dramatically altered the legal landscape against which we consider plaintiffs’ claims.”²³⁹ Relying on *City of Sherrill*, the *Cayuga Indian Nation* decision held that “equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, *even when such a claim is legally viable and within the statute of limitations*.”²⁴⁰ In other words, at least in the Second Circuit, individual Indians or an Indian tribe that research and prepare a land claim for the return of lands, *or* for money damages based on a statutory violation or federal common law cause of action, *and* do so within a relevant statute of limitations, can still have the claim dismissed on the basis of laches or another equitable defense.

But the Oneida Indian Nation brought *City of Sherrill* as a claim in equity, a request for injunctive relief against the State and a political subdivision.²⁴¹ *Cayuga Indian Nation* was a claim at law for possession and damages.²⁴² Like *Oneida II*, the *Cayuga Indian Nation* claim was based on a violation of the Non-Intercourse Acts.²⁴³ These claims fit into the first method of Indian land dispossession—lack of legal authority—where New York ignored federal law that prohibited it from buying Indian land. There was a simple way for the Second Circuit to distinguish *City of Sherrill* and not apply equitable remedies to the patently illegal transactions, but they chose another direction.

232. *Id.*

233. *Id.* at 1490 (quoting *Hagen*, 510 U.S. at 421); *see generally City of Sherrill*, 125 S. Ct. at 1492 (“When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations.”) (footnote omitted)).

234. *Id.* at 1492.

235. *Id.* at 1493–94.

236. *See* 25 C.F.R. §§ 151.1–151.15 (2005).

237. *City of Sherrill*, 125 S. Ct. at 1494.

238. 413 F.3d at 277, 280 (2d Cir. 2005).

239. *Id.* at 273.

240. *Id.* (emphasis added).

241. *See City of Sherrill*, 125 S. Ct. at 1488.

242. *See Cayuga Indian Nation*, 413 F.3d at 269.

243. *See id.* at 269 (citing *Cayuga Indian Nation v. Cuomo*, 565 F. Supp. 1297, 1305 (N.D.N.Y. 1983)); *id.* at 273–74 (citing *Oneida II*, 470 U.S. at 229–30).

B. Bringing Disrepute to the Judiciary

City of Sherrill and its progeny (and there will likely be more cases like *Cayuga Indian Nation*) have performed a service to the people and entities such as John McGinn and Matthewson Patrick, who used physical and political power to dispossess Indian people and communities of their lands. Indian people and Indian tribes that now have the capability and the resources to pursue Indian land claims, by conducting the research that allows them to discover the abuses of physical and political power leading to the *illegal* dispossession of their lands, must now pass the arbitrary and vague legal test set forth by a High Court that actively seeks to protect those who have benefited from the illegal dispossession of Indian lands.²⁴⁴ The Court has chosen to elevate Manifest Destiny, as exemplified by *Felix*,²⁴⁵ above attempts by Indian tribes to restore some of their land base through use of the legal process. The Indian land claims are brought by people and communities that have suffered all of the ravages that non-Indian societies could think to bear upon them.²⁴⁶ It bears repeating that the purpose of the Courts of Equity, according to Lord Blackstone, was

to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune and oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law.²⁴⁷

Valid Indian land claims fit this category. An American court exercising its equitable powers should not choose one party over the other where the favored party is seeking to defend legal rights obtained through illegal means. In short, it is our contention that the *City of Sherrill* decision has brought great disrepute to the Court in the exercise of its equitable powers.

The reliance of the *City of Sherrill*'s decision on *Felix v. Patrick* is unconscionable, especially considering that the relevant precedent of *Ewert*,²⁴⁸ which postdated *Felix*, was not even *mentioned* by the Court. The Court's obvious selective use of precedent, perhaps, indicates the weakness of its overall argument. *Ewert* is directly on point. There, a federal Indian affairs employee, Paul A. Ewert, violated a

244. See Arlinda Locklear, *Morality and Justice 200 Years After the Fact*, 37 New Eng. L. Rev. 593 (2003). As Locklear points out, *id.* at 598, when filing suit,

we are not at all embarrassed to include those who now occupy the land as defendants as well. First of all, they are not innocent in any sense of the word. They are trespassers. They have been sued because they are sitting on, taking advantage of, and enjoying the benefit of land that belongs to the Iroquois people. Second, even had they not been aware of that fact 100 years ago, if I had to venture a guess, I would say that a good 75% of them had personal knowledge of that fact when they acquired the land.

245. 145 U.S. 317.

246. David E. Stannard, *American Holocaust: The Conquest of the New World* 146 (Oxford U. Press 1992) ("The worst human holocaust the world had ever witnessed, roaring across two continents non-stop for four centuries and consuming the lives of countless tens of millions of people, [leveled off only when there] was, at last, almost no one left to kill.").

247. St. George Tucker, *Blackstone's Commentaries* 92 (William Young Birch & Abraham Small 1803).

248. 259 U.S. 129.

federal statute proscribing exactly the kind of transaction Ewert admitted to performing.²⁴⁹ The Court held that a transaction performed in violation of a federal statute was void.²⁵⁰ And the equitable doctrine of laches “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.”²⁵¹ The *City of Sherrill* Court did not acknowledge that, under the rule stated in *Ewert*, the title to land that the State of New York, the counties, the municipalities, and others at issue is void. *Ewert*’s holding is that one may not assert the laches defense where the underlying right being defended is void. Why, then, did the Court not mention its own precedent?

There is one easy answer and one difficult answer. The easy answer is that *City of Sherrill* is not a land claims case like *Oneida I* and *Oneida II*. As the Court noted, “we . . . do not disturb our holding in *Oneida II*.”²⁵² And perhaps the Second Circuit read too much into *City of Sherrill*, likely because *City of Sherrill* is expansively and selectively written. A simple vacatur of the *Cayuga Indian Nation* decision by the Court would correct this oversight, but that result appears unlikely. The hard answer is that the defendants in the New York land claims argue they are “innocent landowners.”²⁵³ And, like the defendant in *Felix*, they have “developed” the land,²⁵⁴ turning it from “wild” Indian Country to “thriving and rapidly growing”²⁵⁵ development. Whatever the Court’s intentions, the *City of Sherrill* decision may have the effect of placating those non-Indian individuals who fear that, with the rise of Indian tribes and their intention to preserve and expand tribal rights, “We won the Indian wars and gave it all away.”²⁵⁶ The Court’s decision to ignore *Ewert* and grant, through the use of its judicial power, the equitable defense of laches to non-Indians, who hold void title, turns equity on its head.

Finally, the Court’s decision to equate the Oneida Indian Nation’s land claims with *Felix v. Patrick* solidifies, it seems, that federal Indian law is no longer about the complex legal relationship between Indians and Indian tribes and the federal government, but about “historical reality.”²⁵⁷ This kind of talk was presaged by the Vermont Supreme Court in *State v. Elliott*.²⁵⁸ In *Elliott*, harshly criticized by Professor Singer, the Court stated Indian land claims could be defeated by the novel notion that, as Professor Singer put it, “Indian title can be extinguished by the ‘increasing weight of history.’”²⁵⁹ After *City of Sherrill* and *Cayuga Indian Nation*, one does not need to

249. *Id.* at 136.

250. *Id.* at 138.

251. *Id.*

252. *City of Sherrill*, 125 S. Ct. at 1494.

253. See generally Coldebella & Puzella, *supra* n. 174, at 585.

254. See *City of Sherrill*, 125 S. Ct. at 1493; see also *Oneida Indian Nation of N.Y. v. County of Oneida*, 199 F.R.D. 61, 92 (N.D.N.Y. 2000) (alleging that “development of every type imaginable has been ongoing for more than two centuries”).

255. *Felix*, 145 U.S. at 334.

256. Keith Bradsher, *Michigan Pact Resolves Battle over Limits on Indian Fishing*, 149 N.Y. Times A16 (Aug. 8, 2000) (quoting John Lindenau, non-Indian fisherman in Leelanau County, Michigan).

257. *City of Sherrill*, 125 S. Ct. at 1491 n. 11 (“[Oneida Indian Nation’s] claim concerns grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality.”).

258. 616 A.2d 210 (Vt. 1992).

259. Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 Ga. L. Rev. 481, 482 (1994) (quoting *Elliott*, 616 A.2d at 218) (footnote omitted).

show that history had served to render an Indian land claim invalid, rather one only need to raise the equitable defense of laches. But that, as Professor Singer argues, “not only fails to accord American Indian nations adequate protection for their property rights, but also denies Indian nations equality under the law by treating non-Indian property rights as more sacred and inviolable than tribal rights.”²⁶⁰ *City of Sherrill*, like *Elliott*, treats basic and fundamental Indian property rights in an inequitable manner when compared with non-Indian property rights. The Court notes that “most of the Oneidas have resided elsewhere.”²⁶¹ As Professor Singer stated in another context, “Why this is relevant to an ownership claim is uncertain; there is no rule that limits the amount of property one or two or 65 people may own.”²⁶²

Moreover, the *City of Sherrill* Court, like the *Felix* Court, denigrated Indian attempts to recover their lands. As noted earlier, the *Felix* Court ridiculed the Indian plaintiffs for waiting to sue until Omaha had risen, which coincided, it seems, with the fact that the Indian plaintiffs could not sue until they were legally competent under federal law.²⁶³ The *City of Sherrill* Court acknowledged that “[Oneida Indian Nation] brought this action promptly,”²⁶⁴ but “historical reality”²⁶⁵ served to defeat their claim. As Arlinda Locklear documented in 2003, the New York Indians had long sought relief from the State of New York.²⁶⁶ Once again, the Court did not note this in its opinion, instead choosing to resurrect a *Felix v. Patrick* decision tainted by racism.

C. *Against the Application of Laches to Indian Land Claims*

The *City of Sherrill* decision was far from a foregone conclusion, at least under an analysis rooted in equity. As a general matter, “[w]hen laches is invoked to bar a claim that is valid on the merits and one that is permitted under an appropriate statute of limitations, however, the defense has little place in a modern scheme of procedure and justice.”²⁶⁷ As a result, *Ewert v. Bluejacket* could have been part of the decision in an important way, but was instead ignored. *Ewert*, however, correctly stated the law that should have been applied in *City of Sherrill* and *Cayuga Indian Nation*:

[T]he equitable doctrine of laches, developed and designed to protect good-faith transactions against those who have slept upon their rights, with knowledge and ample

260. *Id.* at 483; see also Singer, *supra* n. 26, at ch. 15.

261. *City of Sherrill*, 125 S. Ct. at 1483.

262. Singer, *supra* n. 26, at § 15.4.1 (discussing *Tee-Hit-Ton Indians*, 348 U.S. 272).

263. See *Felix*, 145 U.S. at 332, 334.

264. *City of Sherrill*, 125 S. Ct. at 1491 n.11.

265. *Id.*

266. See Locklear, *supra* n. 244. As an example, Locklear, *id.* at 596, comments on Good Peter:

Good Peter, who had been a leader of the Oneidas at the time, actually went to Governor Clinton [in 1788] and said, “We thank you. The Oneida people thank you for restoring our land to us because until you came and did this the bad white people among us attempted to take it away.” The Oneidas actually believed that the Governor had said to them: “We will protect your land, and we will not allow non-Indians to take it from you.” That is what they believed. The very next year the Governor said, “No, you misunderstood. We purchased your land. It is now ours. It belongs to the State.”

267. Dobbs, *supra* n. 138, at § 2.6(1).

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.²⁶⁸

What is missing, perhaps, from *Ewert* is a discussion of the doctrinal underpinning for that holding. This section provides that support.

1. “He Who Comes Into Equity Must Come With Clean Hands”²⁶⁹

The “clean hands” doctrine, which the Supreme Court held is “far more than a mere banality,”²⁷⁰ would serve to deny the relief requested by the State of New York in the *City of Sherrill* and *Cayuga Indian Nation* cases. The doctrine arises out the Court’s desire “to avoid participating in iniquity.”²⁷¹ According to Pomeroy, this maxim “is merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence.”²⁷² The “clean hands” doctrine is “rooted in the historical concept of [the] court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.”²⁷³

Federal courts have applied the “clean hands” doctrine against individuals and entities who acquired Indian lands in plain contravention of federal statutory proscriptions. In *Beck v. Flournoy Live-Stock and Real Estate Company*,²⁷⁴ the Eighth Circuit held that a party that “deliberately took the chances of violating the law, in the belief, no doubt, that the government of the United States would be powerless to recover possession of the demised premises.”²⁷⁵ That party took the action it did—purchasing Indian lands in plain contravention of federal statute—“in the belief that a suit in ejectment would prove a barren remedy; and that *the law might be violated with impunity*.”²⁷⁶ Given these factors, the Eighth Circuit refused to grant relief to such a party because “it is not within the legitimate province of a court of equity to assist a wrongdoer . . . in retaining the possession of property which it has acquired in open violation of an act of [C]ongress.”²⁷⁷

The Court in *City of Sherrill* and the Second Circuit in *Cayuga Indian Nation*, however, do what the Eighth Circuit would not—“assist a wrongdoer.” In those cases, the wrongdoer is the State of New York. A “very common occasion for invoking the [“clean hands” doctrine] is illegality.”²⁷⁸ Pomeroy noted that “a court of equity will not

268. 259 U.S. at 129.

269. Pomeroy, *supra* n. 136, at vol. 2, § 397.

270. *Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 814 (1945).

271. Dobbs, *supra* n. 138, at § 2.4(2) (footnote omitted); *see also Bein v. Heath*, 47 U.S. 228, 247 (1848) (“The equitable powers of this court can never be exerted in behalf of one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. *To aid a party in such a case would make this court the abetter of iniquity.*” (emphasis added)); *Kinner v. Lake Shore & M. S. Ry. Co.*, 69 N.E. 614, 615 (Ohio 1904) (“[A] court of equity is not an avenger of wrongs committed at large by those who resort to it for relief.”).

272. Pomeroy, *supra* n. 136, at vol. 2, § 398 (footnote omitted).

273. *Precision Instrument Mfg. Co.*, 324 U.S. at 814.

274. 65 F. 30 (8th Cir. 1894).

275. *Id.* at 37.

276. *Id.* (emphasis added).

277. *Id.* at 38.

278. Pomeroy, *supra* n. 136, at vol. 2, § 402 (footnote omitted).

aid a *particeps criminis*, . . . by enforcing the contract or obligation.”²⁷⁹ As Justice Stevens noted in his *City of Sherrill* dissent, laches should be applied “with an even hand.”²⁸⁰

2. “Where there is Equal Equity, the Law Must Prevail”²⁸¹

The second foundational equitable maxim that underlies the importance of the *Ewert* decision in the context of the so-called “innocent” landowners is the maxim that “[w]here there is equal equity, the law must prevail.”²⁸² Assuming that the counties and the private landowners in the Oneida and Cayuga land claim areas are innocent, as represented by their counsel,²⁸³ then let us assume for a moment that they are not parties with the same unclean hands as the State. Perhaps these landowners have a measure of equity on their side as well, functionally equivalent to the tribal plaintiffs who have suffered and continued to suffer from “[a]ncient deprivations of property.”²⁸⁴

If the equities, so to speak, are relatively equal, then, according to Pomeroy, “the court of equity [would refuse] to interfere at all, and thereby [leave] the parties to conduct their controversy in a court of law.”²⁸⁵ The Oneidas and Cayugas have already proven their legal claim—that the defendants acquired their property as a direct result of a series of violations of the Non-Intercourse Act.²⁸⁶ Given that the equity is equal, the law should prevail. In fact, this is even the implicit judgment of Congress, as reflected in the relevant statute of limitations.²⁸⁷ “Large conflicts of policy and pragmatism arise if laches, a judge-made defense, is allowed to operate without regard to the statute of limitations[, which] reflects the judgment of lawmakers as to what is a reasonable time within which to assert a right.”²⁸⁸

VI. CONCLUSION

Non-Indians, as private actors, lacking legal authorization, used brute physical power to dispossess Indian tribes of tribal lands in the nineteenth century. Similarly, non-Indians and government agents abused apparent legal authority to dispossess Indian lands. These avenues are no longer available to serve as tools for massive dispossession of tribal lands. What is left, then, is the federal judiciary. *City of Sherrill* and *Cayuga Indian Nation* are not welcome decisions. It appears the federal courts have chosen to adopt the crabbed view of tribal entitlement posed by theorists such as Samuel T.

279. *Id.*

280. *City of Sherrill*, 125 S. Ct. at 1497 (Stevens, J., dissenting).

281. Pomeroy, *supra* n. 136, at vol. 1, § 7.

282. *Id.*

283. See e.g. Coldebella & Puzella, *supra* n. 174, at 585.

284. Shelby D. Green, *Specific Relief for Ancient Deprivations of Property*, 36 Akron L. Rev. 245, 245 (2003).

285. Pomeroy, *supra* n. 136, at vol. 2, § 417.

286. E.g. *Oneida Indian Nation of N.Y. v. County of Oneida*, 217 F. Supp. 2d 292, 310 (N.D.N.Y. 2002); *Cayuga Indian Nation of N.Y.*, 165 F. Supp. 2d at 366.

287. See H.R. Rep. 97-954 at 3 (Dec. 10, 1982) (“The purpose of H.J. Res. 553 . . . is to provide for an extension of the Statute of Limitations imposed on certain claims of Indian tribes and [individuals] against parties other than the United States.”). See generally 28 U.S.C. § 2415 (2000).

288. Green, *supra* n. 284, at 281.

Morison, who argue that “the existence of distant historical injustices does not present an insuperable moral obstacle to placing temporal limits on claims for compensation.”²⁸⁹ Despite what Morison alleges are substantial social costs,²⁹⁰ Congress has, in the words of the Ninth Circuit, made the choice in favor of Indian tribes over state and local governments.²⁹¹ Exercising a court’s equitable powers on behalf of landowners who “are sitting on, taking advantage of, and enjoying the benefit of land that belongs to”²⁹² Indian people is unjustified.²⁹³

And federal courts should not ignore the stated public policy of Congress, which has quite simply rejected the laches defense to Indian land claims. Federal courts confronted with an equitable defense to Indian land claims should take these policy choices seriously. Equity is not intended, in this circumstance, to defeat valid claims, proven by Indian tribes in accordance with clear federal statutes. As Professor Charles Knapp has written: “Equity without law would be tyranny indeed—shapeless, unpredictable, reflecting nothing more than the judge’s personal predilections.”²⁹⁴ *City of Sherrill* and *Cayuga Indian Nation* appear to represent a tyranny of the sort feared by Professor Knapp.

289. Morison, *supra* n. 3, at 1177.

290. *Id.*

291. *Brooks*, 670 F.2d at 837.

292. Locklear, *supra* n. 244, at 598.

293. *Id.*

294. Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 *Hastings L.J.* 1191, 1334 (1998).