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The County of Oneida v. Oneida Indian Nation: The Continuing Saga of American Indian Territorial Wars

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I. Introduction

In *County of Oneida, New York v. Oneida Indian Nation of New York State (Oneida II)*, the United States Supreme Court addressed whether the Oneida Indian Nation may bring suit for damages based on the occupation and use of aboriginal land conveyed unlawfully to New York State in 1795.[1] The Court held that the Oneidas have a federal common law right of action for violation of possessory rights[2] and that right of action is not pre-empted by the Indian Trade and Nonintercourse Act of 1793 (Nonintercourse Act).[3] The Court also held that the suit is not barred by statutes of limitations, abatement, ratification or nonjusticiability.[4]

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1. 105 S. Ct. 1245 (1985) (*Oneida II*). The complaint was filed by the Oneidas in the United States District Court for the Northern District of New York, in 1970. That court dismissed the claim for lack of federal question jurisdiction, in an unpublished opinion in 1971. The court of appeals affirmed. Oneida Indian Nation of New York v. County of Oneida, 464 F.2d 916 (2d Cir. 1972). The Supreme Court reversed and remanded, holding that the claim was not state law based and was not so frivolous as to preclude federal jurisdiction to decide the substantive issues. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) *(Oneida I)*. On remand, the district court trifurcated trial of the issues. Oneida Indian Nation of New York v. County of Oneida, 434 F. Supp. 527 (N.D.N.Y. 1977). Phase one dealt with the liability of the counties. Phase two dealt with damages. Phase three dealt with indemnification by the State of New York, a third-party defendant brought into the case by the counties. This note addresses only the issue of liability, focusing on the actions of Congress regarding tribal land conveyances and aboriginal land claims. All parties concede the conveyance was illegal.

2. *Oneida II*, 105 S. Ct. at 1251-52. *See also Oneida I*, 414 U.S. at 661. *Oneida I* held that this controversy arises under the Constitution, laws or treaties of the United States and therefore invokes federal jurisdiction under 28 U.S.C. §§ 1331 - 1362.

3. An Act to regulate trade and intercourse with the Indian tribes, first promulgated in 1790, ch. XXXIII, 1 Stat. 137, now codified in 25 U.S.C. § 177 (1983), regulates tribal land conveyances.

4. *Oneida II*, 105 S. Ct. at 1255-60.

Part II of this Note presents the primary principles of law applied to the case, including the Supreme Court's interpretation of the Nonintercourse Act, statutes of limitations, laches, abatement, ratification and nonjusticiability. Part III examines the facts of *Oneida II* and the procedural history of the case. Part IV sets forth both the majority and the dissenting opinions. Part V presents an analysis of the majority opinion juxtaposed against the views of the dissent. Finally, Part VI concludes that although the analysis of the United States Supreme Court is imperfect, its attempt to trace one hundred seventy-five years of Congressional intent was the correct analytical approach.

II. Background Law and Historical Development

A. *The Nonintercourse Act*

The Nonintercourse Act was first promulgated in July 1790, to regulate trade with all Indian nations.[5] After five reenactments,[6] the Act today serves the two-prong purpose of protecting tribal lands while preserving congressional authority to control those lands.[7] Although the present version contains little deviation from the first, regarding tribal land conveyances, it is the congressional intent of the 1793 enactment which must be the focus here.[8] The 1793 Act provided that no tribal land conveyance would be valid unless made by treaty entered into with an agent of the United States who possessed the authority to enter into such an agreement.[9] The Act provided for criminal penalties,[10] but no civil remedies were

5. Trade and Intercourse Act, ch. XXXIII, 1 Stat. 137 (1790).

6. Act of March 1, 1793, ch. XIX, 1 Stat. 329 (repealed 1796); Act of May 19, 1796, ch. XXX, 1 Stat. 469 (expired 1799); Act of March 3, 1799, ch. XLVI, 1 Stat. 743 (1799) (expired 1802); Act of March 30, 1802, ch. XIII, 2 Stat. 139 (1802) (repealed 1834); Act of June 30, 1834, ch. CLXI, 4 Stat. 729.

7. *See* United States v. University of New Mexico, 731 F.2d 703, 706 (10th Cir. 1984); 25 U.S.C. § 177 (1982).

8. "[O]ur focus must be on the intent of Congress when it enacted the statute in question." Daily Income Fund, Inc. v. Fox, 104 S. Ct. 831, 839 (1984). *See also* Touche Ross & Co. v. Redington, 442 U.S. 560, 568-69 (1979).

9. *See infra* Appendix § 8.

10. *See infra* Appendix.

authorized.

B. *Statutes of Limitations*

1. *General Principles*

Statutes of limitations are statutes of repose, enacted by legislatures, prescribing periods within which actions may be brought.[11] The life of a cause of action is limited to promote substantial justice and provide stability to potential defendants by protecting them from having to answer to stale claims.[12] If a particular federal cause of action has no applicable federal statute of limitations, the court may judicially create a limitation,[13] borrow a statute from another federal claim,[14] borrow a state statute of limitations for an analogous claim,[15] find there is no limitation period,[16] or apply the equitable doctrine of laches.[17]

If the particular federal cause of action is without a statute of limitations, federal courts usually prefer to borrow a state statute of limitations.[18] Two constraints, however, restrict such borrowing. First, federal courts may only borrow a state statute when Congress has not spoken on the subject.[19] Second, borrowing may only occur if it does not frustrate national policy.[20] The *Oneida II* Court did not borrow an analogous New York statute of limitations because, it stated, to do so would frustrate national policy.[21] It found that there is no

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11. Black's Law Dictionary 477 (5th ed. 1983).

12. *See* Burnett v. New York Cent. R.R., 380 U.S. 424, 428 (1965). Substantial justice is promoted by preventing a potential plaintiff from waiting so long that valuable evidence or potential witnesses are lost. This is not an issue in *Oneida II* because the case presents only issues of law, not of fact.

13. Fischbach & Moore, Inc. v. International Union of Operating Eng'rs, 198 F. Supp. 911, 915 (S.D. Cal. 1961), *rev'd on other grounds*, 350 F.2d 936 (9th Cir. 1965).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See* Johnson v. Railway Express, 421 U.S. 454, 462 (1975).

19. *See* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977).

20. *Id. See also Johnson*, 421 U.S. at 465.

21. County of Oneida, New York v. Oneida Indian Nation of New York, 105 S. Ct. 1245, 1255 (1985) *(Oneida II)*.

applicable statute of limitations.[22]

2. *Indian Claims and the United States Code*

The United States is in a trust relationship with the Indians.[23] In its role as trustee, the federal government may bring actions on the Indians' behalf.[24] Section 2415 of Title 28 of the U. S. Code provides statutes of limitations for such actions brought under contract and tort law.[25] Section 2415(c)

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22. *Id.* at 1255-56.

23. *See* FPC v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960); United States v. University of New Mexico, 731 F.2d 703, 706 (10th Cir. 1984). G. Hall, The Federal-Indian Trust Relationship (1979). *See also infra* notes 140-42 and accompanying text.

24. 28 U.S.C. § 2415 (1982). It is also well established that Indians may bring these claims on their own behalf, as if the United States were bringing the claims for them under the Nonintercourse Act. Narragansett Tribe v. S.R.I. Land Dev. Corp., 418 F. Supp. 798, 805-06 (D.R.I. 1976). *See generally* Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968).

25. 28 U.S.C. § 2415 provides:

> (a) . . . every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: . . . *Provided further,* That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further,* That an action for money damages which accrued on the date of enactment of this Act . . . brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Act of 1982: *Provided,* That, for those claims that are on either of the two lists published pursuant to the Indian Claims Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.
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> (b) . . . every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first

provides, however, that no statute of limitations shall apply to land claims.[26]

C. *Laches*

The equitable doctrine of laches, like statutes of limitations, is a doctrine of repose. Laches acts as a bar in equity where the plaintiff has unreasonably neglected to bring a claim which should have been brought.[27] In essence, the doctrine punishes inexcusable delays by a plaintiff and protects a defendant from prejudice occasioned by such delay.[28] Courts are reluctant, however, to apply laches in actions at law.[29] Nevertheless, it is settled that laches *could* supply a temporal limitation when the borrowing of a statute of limitations would frustrate federal policy.[30]

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accrues: *Provided,* That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act of the list required by section 4(c) of the Indian Claims Act of 1982: *Provided,* That, for those claims that are on either of the two lists published pursuant to the Indian Claims Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim. 28 U.S.C. § 2415 (1982), *amended by* 28 U.S.C.A. § 2415 (1985).

26. "Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property." 28 U.S.C. § 2415(c) (1982).

27. Black's Law Dictionary 453 (5th ed. 1983).

28. *See* Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946). *Cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 423-25 (1975).

29. *See, e.g.,* International Union of Operating Eng'rs v. Fischbach & Moore, Inc., 350 F.2d 936 (9th Cir. 1965).

30. *Cf.* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) (EEOC enforcement actions, brought under Title VII of the Civil Rights Act, are not subject to state

A question remains whether laches can be applied in cases where an Indian nation brings an action on its own behalf, rather than the United States bringing the action as trustee.[31]

D. *Abatement*

Abatement is a common law canon of construction used by the judiciary to determine congressional intent regarding causes of action which arise from repealed statutes.[32] The doctrine holds that upon expiration of a statute all actions brought under the statute abate.[33]

Congress reversed the common law abatement doctrine as to criminal actions in 1871. Repeal no longer extinguishes criminal causes of action unless the repealing act expressly provides for abatement.[34] Congress has not, however, modified the abatement doctrine with regard to civil suits.

E. *Ratification*

The United States may, through legislation, expressly ratify illegal conveyances which contravene the Nonintercourse Act.[35] Ratification also may be deemed to exist through implication.[36] If Congress is not explicit in its ratification, discern-

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statutes of limitations; federal courts do not lack the power to provide relief and reach a just result specific to the facts of the case); Holmberg v. Armbrecht, 327 U.S. 392 (1946).

31. *See infra* notes 144-47 and accompanying text.

32. Hamm v. Rock Hill, 379 U.S. 306, 322 (1964) (Harlan, J. dissenting).

33. *Id.*

34. Act of Feb. 25, 1871, ch. LXXI, § 4, 16 Stat. 431, 432 (1981):

> Sec. 4. *And be it further enacted,* That the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

35. *See, e.g.,* 25 U.S.C. § 1712 (1982) (Approval of prior transfers and extinguishment of claims and aboriginal title outside town of Charlestown, Rhode Island and involving other Indians of Rhode Island); 25 U.S.C. § 1723 (1982) (Approval of prior transfers and extinguishment of Indian title and claims of Indians within State of Maine).

36. *Cf.* FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960). *See also* Shoshone

ible congressional intent is controlling.[37] Congressional intent is determined by examining the applicable statute's operative language, legislative history, related circumstances and the historical exercise of state or tribal jurisdiction over a particular territory.[38]

F. *Nonjusticiability: The Separation of Powers Doctrine*

The political question doctrine arises from the separation of powers between the executive, legislative and judicial branches of government.[39] The doctrine holds that a particular question is beyond judicial competence when authority over the subject matter is delegated to another branch of government by the Constitution.[40]

Article I, Section 8, of the Constitution commits responsibility for regulation of Indian trade and intercourse to Congress.[41] Congress has delegated some of its authority to the President by both statute[42] and treaty.[43]

Tribe v. United States, 299 U.S. 476, 495 (1937).

37. *See* United States v. Santa Fe Pac. Ry. Co., 314 U.S. 339, 346-47 (1941).

38. *See* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586-87 (1977); DeCoteau v. District County Ct. for the Tenth Judicial Dist., 420 U.S. 425, 444 (1975).

39. *See generally* U.S. Const., arts. I, II & III.

40. *See* Marbury v. Madison, 5 U.S. 137 (1803). Modern courts apply the following test to determine justiciability:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

41. U.S. Const., art. I § 8 provides "The Congress shall have Power States, and with the Indian Tribes; . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."

42. *See infra* Appendix, §§ 1, 2, 5, 6, & 9.

43. Treaty with the Six Nations, 1794, art. VII, 7 Stat. 44 (also referred to as the Treaty at Canandaigua):

> [T]he United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place; but,

These legal doctrines—statutes of limitations, abatement, ratification and nonjusticiability—constitute the weapons with which the Indians and the White Man wage a modern-day battle over aboriginal lands.

III. Factual Setting and Procedural History

A. *Factual Setting*

The Oneida Indian Nation inhabited land, in what is now central New York State, from time immemorial until shortly after the Revolutionary War.[44] Their aboriginal land extended from Pennsylvania to the Saint Lawrence River and from Lake Ontario to the western foothills of the Adirondack Mountains.[45]

Traditionally, the Oneidas were allies of the British.[46] At the outset of the Revolutionary War, however, they became allied with the Colonists.[47] After the war, the United States sought to reaffirm its alliance by promising, in the Treaty at Fort Stanwix, that the Oneidas would be secure in the possession of their lands.[48] Nevertheless, acquiescing to pressure to

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instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendant by him appointed: . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature . . . of the United States shall make other equitable provision for the purpose.

44. Oneida Indian Nation of New York v. County of Oneida, 434 F. Supp. 527, 533 (N.D.N.Y. 1977). *See also* 15 Handbook of North American Indians 481-90 (B. Trigger ed. 1978) [hereinafter Handbook].

45. Oneida Indian Nation of New York v. County of Oneida, 434 F. Supp. 527, 533 (N.D.N.Y. 1977).

46. *See* Handbook, *supra* note 44, at 482-83.

47. *Oneida*, 434 F. Supp. at 533. *See also* Handbook, *supra* note 44, at 483.

48. Treaty with the Six Nations, Oct. 22, 1784, art. III, 7 Stat. 15 (also referred to as the Treaty at Fort Stanwix):

A line shall be drawn, beginning at the mouth of a creek about four miles east of Niagara, called Oyonwayea, or Johnston's Landingplace, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly in a direction always four miles east of the carryingpath, between Lake Erie and Ontario, to the mouth of Tehoseroron or Buffaloe Creek on Lake Erie; thence south to the north boundary of the state of Pennsylvania; thence west to the end of the said north boundary; thence south along the west boundary of the said state, to the river Ohio; the said line from the mouth of the

open the Oneida territory for settlement, New York State entered into an agreement with the Oneidas in 1788 to purchase the majority of their aboriginal land.[49] The Oneidas retained a reservation of approximately three hundred thousand acres.[50] In 1789, the United States once again affirmed its commitment to the Oneidas when it executed the Treaty at Fort Harmar.[51]

Oyonwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claims to the country west of the said boundary, and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, to the United States, for the support of the same.

49. *Oneida*, 434 F. Supp. at 533. *See also* Handbook, *supra* note 44, at 484.

50. *See* Handbook, *supra* note 44, at 484.

51. Treaty with the Six Nations, Jan. 9, 1789, 7 Stat. 33 (also referred to as the Treaty at Fort Harmar):

ART. 1. . . . And whereas the said nations have now agreed to and with the said Arthur St. Clair, to renew and confirm all the engagements and stipulations entered into at the beforementioned treaty at fort Stanwix: and whereas it was then and there agreed, between the United States of America and the said Six Nations, that a boundary line should be fixed between the lands of the said Six Nations and the territory of the said United States, which boundary line is as follows, viz: Beginning at the mouth of a creek, about four miles east of Niagara, called Ononwayea, or Johnston's Landing Place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly in a direction always four miles east of the carrying place, between lake Erie and lake Ontario, to the mouth of Tehoseroton, or Buffalo creek, upon lake Erie; thence south, to the northern boundary of the state of Pennsylvania; thence west, to the end of the said north boundary; thence south, along the west boundary of the said state to the river Ohio. The said line, from the mouth of Ononwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claim to the country west of the said boundary; and then they shall be secured in the possession of the lands they inhabit east, north, and south of the same, reserving only six miles square, round the fort of Oswego, for the support of the same. The said Six Nations, except the Mohawks, none of whom have attended at this time, for and in consideration of the peace then granted to them, the presents they then received, as well as in consideration of a quantity of goods, to the value of three thousand dollars, now delivered to them by the said Arthur St. Clair, the receipt whereof they do hereby acknowledge, do hereby renew and confirm the said boundary line in the words beforementioned, to the end that it may be and remain as a division line between the lands of the said Six Nations and the territory of the United States, forever. . . .

ART. 3. The Oneida and Tuscarora nations, are also again secured and

Congress passed the first Nonintercourse Act in 1790.[52] The Act purported to regulate trade with the various Indian tribes. It was reenacted in 1793. The Act of 1793 provided for federal regulation of all tribal land conveyances.[53] In 1795, the Governor of New York authorized a purchase of virtually all the remaining Oneida territory.[54] The Oneidas sold their land in exchange for annual cash payments of $2,952.[55] The conveyance was transacted without the approval of the federal government and in the absence of any agent of the United States, thereby violating the Nonintercourse Act.[56]

B. *Procedural History*

The Oneidas instituted this action in 1970 in the United States District Court, Northern District of New York.[57] They alleged the 1795 conveyance violated the Nonintercourse Act of 1793.[58] They argued that the conveyance was therefore void

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confirmed in the possession of their respective lands.

ART. 4. The United States of America renew and confirm the peace and friendship entered into with the Six Nations (except the Mohawks,) at the treaty beforementioned, held at fort Stanwix, declaring the same to be perpetual . . . .

52. Nonintercourse Act, ch. XXX, 1 Stat. 137 (1790).

53. Nonintercourse Act, ch. XIX, § 8, 1 Stat. 330, 330 (1793). *See infra* Appendix, § 8.

54. *Oneida*, 434 F. Supp. at 533-35.

55. Brief for Petitioner at 103, County of Oneida, New York v. Oneida Indian Nation of New York State, 105 S. Ct. 1245 (1985)(*Oneida II*) (citing the Treaty of 1795) [hereinafter Brief for Petitioner].

56. *Oneida*, 434 F. Supp. at 535. Attorney General William Bradford interpreted the Nonintercourse Act to expressly forbid New York's purchase of Indian land without the intervention of the federal government. Governor Jay, of New York, was aware of the interpretation when, on behalf of New York, he purchased one hundred thousand acres of the Oneida reservation. The purchase constituted a violation of the Nonintercourse Act because no federal representative participated in the transaction, as required by § 8 of the 1793 Act. This fact was conceded by all parties and was not in issue in *Oneida II*. *Id.*

57. *See* Oneida Indian Nation of New York v. County of Oneida, 719 F.2d 525 (2d Cir. 1983). The Oneidas initiated the action in the federal court by asserting diversity of citizenship and the required jurisdictional amount. Federal question jurisdiction was asserted by amendment to the complaint. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 663 n.2 (1974)(*Oneida I*).

58. *Oneida I*, 414 U.S. at 664-65.

and their right of possession was never terminated.[59] The Oneidas sought damages representing the alleged fair rental value of the land for the two-year period from January 1968 to December 1969.[60]

The federal district court dismissed the action for lack of subject matter jurisdiction.[61] The court ruled the cause of action was created under state law,[62] therefore no federal question jurisdiction existed.[63] The Second Circuit Court of Appeals affirmed the district court's holding in 1972, ruling that a complaint seeking relief based on possession of real property did not raise a federal question.[64]

The United States Supreme Court reversed the court of appeals in 1973,[65] holding that the complaint stated a cause of action which arose under federal common law.[66] Consequently, jurisdiction was asserted and the case was remanded.[67]

On remand, the district court found that the conveyance violated the Nonintercourse Act.[68] The counties were held liable for wrongful possession. [69] The court reasoned that a good

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59. *Id.*

60. *Id.* at 665.

61. *Id.*

62. *Id.*

63. *Id.* The district court ruled that the possible necessity of interpreting federal law or treaties to resolve a defense was not sufficient to sustain federal question jurisdiction.

64. Oneida Indian Nation of New York v. County of Oneida, 464 F.2d 916 (2d Cir. 1972). Although the Nonintercourse Act is a law of the United States, the court of appeals ruled that actions alleging possessory rights do not arise under the Act. Therefore, the court reasoned, no federal question was raised by the complaint.

65. *See generally* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974)(*Oneida I*). The Supreme Court ruled that a federal question was raised under the Nonintercourse Act. Furthermore, this was a meritorious issue which did not arise solely in anticipation of a defense.

66. *Id.* at 666-74. The Court found federal common law governs Indian land rights where there is no such statutory law.

67. *Id.* at 682.

68. *Oneida,* 434 F. Supp. at 541. The district court relied upon the Nonintercourse Act now codified at 25 U.S.C. § 177, which states that no purchase of Indian land, unless made by treaty or convention entered into pursuant to the Constitution, shall be of any validity in law or equity.

69. *Id.* at 527. The district court ruled that the Oneida land came within the protection of the Nonintercourse Act and that the Act had been violated by convey-

faith purchase would not render valid title where the Act had been violated.[70] The district court concluded that the action was timely[71] and was not defeated by any statute of limitations or by adverse possession.[72]

The court of appeals affirmed,[73] sustaining the Oneidas' right to bring a federal common law action for wrongful possession.[74] The court of appeals held the Nonintercourse Act did not pre-empt the federal common law action,[75] that an implied private right of action existed under the Act,[76] and that the Oneidas' cause of action was not barred by the passage of time.[77]

The Supreme Court granted certiorari in 1984.[78] The task which lay ahead of the Court was a cumbersome one. Determination of the case depended upon legislative history and case law dating back to the 1700's. The Court trudged through the mire and held, in March 1985, that the Oneidas' claim was indeed a viable one, nearly two hundred years after the cause of action accrued.

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ance without federal intervention.

70. *Id.* at 530.

71. *Id.* at 541-44.

72. *Id.*

73. Oneida Indian Nation of New York v. County of Oneida, 719 F.2d 525, 525 (2d Cir. 1983).

74. *Id.* at 530. Citing U.S. Const. art. I, § 8, cl. 3, which empowers Congress to regulate commerce with the Indians, the court of appeals held a federal common law cause of action exists.

75. *Id.* at 531. The court of appeals found that the Act augmented the federal common law protecting Indian property rights.

76. *Id.* at 532. The court found it was the intent of Congress to create a private right of action under the Nonintercourse Act because the purpose of the Act is to benefit the Indian tribes.

77. *See generally Oneida*, 719 F.2d at 525. The court held the Oneidas' claim was not barred by abatement, ratification or any statute of limitations.

78. The counties petitioned for review of the court of appeals' rulings. The Supreme Court, recognizing that the issues raised may apply to future aboriginal land claims, deemed it necessary to resolve the issues herein. County of Oneida v. Oneida Indian Nation, 104 S. Ct. 1590 (1984).

IV. Supreme Court Opinions

A. *Majority Opinion*

After granting the counties' writ of certiorari, the United States Supreme Court affirmed the Second Circuit Court of Appeals' finding of liability under federal common law.[79] The Court reasoned that federal common law is a necessary expedient where Congress has not spoken directly to a particular issue.[80] It found that Congress did not address the availability of civil remedies in the 1793 Act.[81] Therefore, the Court held, that the Nonintercourse Act did not pre-empt the Oneidas' federal common law right of action.[82]

On the issue of statutes of limitations, the Court held that none would bar the Oneidas' claim.[83] The court determined there was no applicable federal statute of limitations[84] and ruled that borrowing New York's statute of limitations for an analogous claim would be inconsistent with national policy.[85]

The counties contended that the Oneidas' cause of action abated when the Nonintercourse Act expired in 1796.[86] The Court disagreed and concluded that a sovereign act was required to extinguish aboriginal title.[87] The abatement ration-

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79. County of Oneida, New York v. Oneida Indian Nation of New York State, 105 S. Ct. 1245 (1985) (*Oneida II*).

80. *Id.*

81. *Id.* at 1253-54. Finding the Act made no mention of available civil remedies, the Court concluded that Congress merely failed to address the issue. Furthermore, the Court asserted this was not an oversight, but that Congress affirmatively contemplated that civil suits would be brought by the Indians. In support of its assertion, the Court cites a letter from George Washington (4 American State Papers, Indian Affairs, vol. 1 at 142 (1832)) to the Chief of the Seneca Nation assuring the Chief that the federal courts would be open to the Indians to redress any just complaints regarding unauthorized land transfers.

82. *Oneida II*, 105 S. Ct. at 1252-54.

83. *Id.* at 1255-57.

84. *Id.* at 1255.

85. *Id.* at 1255-57. Although Congress did give limited jurisdiction to New York in civil matters involving Indians, it explicitly withheld jurisdiction from New York in matters regarding Indian land claims. *See infra* note 135.

86. Brief for Petitioner at 35-36.

87. *Oneida II*, 105 S. Ct. at 1257. The Court held that § 8 of the 1793 Act merely codified the principle that a sovereign act was necessary to extinguish aboriginal title.

ale was particularly unconvincing to the Court because each reenactment contained virtually the same provisions as the enactment before it.[88]

The Court was similarly unpersuaded by the counties' ratification defense.[89] Congress did not ratify the 1795 conveyance by entering into subsequent treaties with the Oneidas, the Court held, because Congressional intent to extinguish aboriginal title in land must be plain and unambiguous.[90] No language indicating such intent was found in subsequent treaties.[91]

On the issue of nonjusticiability, the Court held that Congressional power over Indian affairs is not absolute in all respects.[92] Some matters, such as the Oneidas' claim, may be adjudicated.[93]

B. *Dissenting Opinion*

In a dissenting opinion, joined by Chief Justice Burger and Associate Justices White and Rehnquist, Justice Stevens recognized there was no applicable statute of limitations but asserted that some doctrine of repose must be applied to the claim.[94] The dissent acknowledged the trust relationship between the Government and the Indians but suggested that such a relationship is outdated today.[95] Abolishment of the trust relationship would allow the Court to apply the doctrine of laches to Indian land claims.[96] The dissent, therefore, urged the adoption of laches to this case, thereby time-barring the Oneidas' cause of action.[97]

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88. *Id.* All subsequent versions of the Act contain the same restraint on alienation of tribal lands. Therefore, the Court reasoned, Congress did not intend a cause of action grounded in the 1793 Act to abate upon expiration or amendment of the Act.

89. *Id.* at 1258-59.

90. *Id.*

91. *Id.* at 1259.

92. *Id.* at 1259-60.

93. *Id.* Applying the test for nonjusticiability enunciated in Baker v. Carr, 369 U.S. 186, 217 (1962), the Court held the Oneida's claim is justiciable.

94. *Oneida II,* 105 S. Ct. at 1262-72.

95. *Id.*

96. *Id.*

97. *Id.*

The dissent also suggested that while modern statutes are useful in determining current national policy, such an analysis is irrelevant because the laws of the eighteenth century, and the Congressional intent behind them, must be applied here.[98] Addressing the modern statute relied on by the majority of the Court, Justice Stevens noted that the legislative history of 28 U.S.C. § 2415 indicates that the statute applies when Indian claims are brought by the United States, as trustee for the Indians, but is not applicable when claims are brought by the Indians themselves.[99] This supported his assertion that laches may be applied to the Oneidas' claim.[100]

The dissent asserted further that no civil remedy is available after so long a period because Constitutional intent is to honor legitimate expectations in the ownership of real property.[101]

V. Analysis

A. *The Nonintercourse Act*

Indian relations became the exclusive province of federal law with the signing of the Constitution.[102] Consequently, the first Indian land claims presented to the Court were recognized as coming within federal jurisdiction.[103] *Oneida I* established the Oneidas' claim within the purview of the federal court.[104] *Oneida II* held it was a common law claim which was not defeated by any act of Congress or by any of the principles of law raised on appeal.[105] Recognizing that resolution of the case must begin by turning the clock back to 1795,[106] the

98. *Id.* at 1270-72.

99. *Id.*

100. *Id. But see infra* notes 144-47 and accompanying text.

101. *Oneida II*, 105 S. Ct. at 1270-72.

102. U.S. Const. art. I, § 8, cl.3. *See also* Worcester v. Georgia, 31 U.S. 515 (1832).

103. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M'Intosh, 21 U.S. 543 (1823).

104. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) (*Oneida I*).

105. County of Oneida, New York v. Oneida Indian Nation of New York, 105 S. Ct. 1245 (1985) (*Oneida II*).

106. *See supra* note 8.

Court examined the 1793 enactment of the Nonintercourse Act. Applying a test first enunciated in *Milwaukee v. Illinois*,[107] the Court found that the 1793 Act did not speak directly to the question of civil remedies.[108] It ascertained that Congress contemplated the possibility of Indians initiating legal actions to establish their property rights.[109] Based upon that finding, the Court held that the Nonintercourse Act of 1793 did not pre-empt common law tribal land claims.[110]

A contrary determination may, however, be reached by delving into the opinions held by those who were alive during the relevant time period. Chief Justice John Marshall stated, in 1831:

> At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. . . . This was well understood by the statesmen who framed the constitution . . . and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the union.[111]

Evidence supporting Justice Marshall's position, and opposing

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107. "[T]he question was whether the legislative scheme 'spoke directly to a question' . . . not whether Congress had affirmatively proscribed the use of federal common law." Milwaukee v. Illinois, 451 U.S. 304, 315 (1981) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978)).

108. *Oneida II*, 105 S. Ct. at 1253.

109. *Id.* at 1254. The Court concluded the 1793 Act did not establish a comprehensive remedial plan responding to Indian property rights violations and that no legislative history exists indicating Congressional intent to pre-empt common law remedies.

110. *Id.* The Court looked to the Act of 1822 in reaching its conclusion that the 1793 Act did not preempt common law remedies. However, early history of the United States indicates a rapid evolution of the Government's relations with the Indians. This may be one reason why each reenactment of the Nonintercourse Act was of a temporary nature. It was imprudent for the *Oneida II* Court to interpret the 1822 Act in reaching its preemption determination.

111. Cherokee Nation v. Georgia, 30 U.S. 1 (1831). The Cherokee Nation sought an injunction to restrain the State of Georgia from enforcing its laws within the Cherokee territory, as designated by treaty. Justice Marshall declined jurisdiction, holding "an Indian tribe or nation . . . cannot maintain an action in the courts of the United States." *Id.* at 20.

the position taken in *Oneida II*, is found in the Judiciary Act of 1796, which suggests that Indian right of access to the courts may have been attained only through specific statutory grant.[112]

In light of this legal posture, any provision in the 1793 Act denying Indians access to the Court would have been unnecessary surplusage.[113] It can be concluded, therefore, that the Oneidas did not have a common law right of access to the courts in 1795.

Modern case law also assists in determining Congressional intent. *Cort v. Ash*,[114] a 1975 case, delineated a four-part test to determine when private rights of action may be implied from federal statutes.[115] The first question posed is whether the plaintiff is a member of the class for whose special benefit the statute was enacted. Because there is virtually no legislative history relating to the Nonintercourse Act, relevant history and Presidential communications may be considered when construing the Act.[116] Congressional records indi-

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112. *See* Crane, *Congressional Intent or Good Intentions: The Inference of Private Rights of Action Under the Indian Trade and Intercourse Act*, 63 B.U.L. Rev. 853, 853 (1983) (which notes that the Judiciary Act of 1796 restricted Indian access to the Court).

113. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. . . so that no part will be inoperative or superfluous. . . . " 2A Sutherland, Statutes & Statutory Construction § 46.06 (C. Dallas Sands ed., 4th ed. 1985).

114. Cort v. Ash, 422 U.S. 66 (1975).

115.

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted[?]" . . . Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78.

116. 2A Sutherland, Statutes & Statutory Construction §§ 48.03, 48.05 (C. Dallas Sands ed., 4th ed. 1985).

> § 48.03. Preenactment history.
>
> It is established practice in American legal processes to consider relevant information concerning the historical background of enactment in making de-

cate concern about the welfare of the Indian nations. The concern, however, was motivated by a desire to ensure expansion of White settlement. The federal government sought to achieve its goal through wars, treaties and statutes. Recognizing that pioneers would move west more readily in a peaceful atmosphere, the Nonintercourse Act was promulgated as one means of maintaining peace on the frontier. The rationale was that federal intervention in negotiations with the Indians would prevent misunderstandings which could lead to frustration, anger and Indian violence against white settlers. Clearly, the Indians may have reaped the benefit of peace through the Nonintercourse Act, but the Act was promulgated for the special benefit of the pioneers of our new nation.[117]

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cisions about how a statute is to be construed and applied. . . . These extrinsic aids may show the circumstances under which the statute was passed, the mischief at which it was aimed and the object it was supposed to achieve.

§ 48.05 Messages of the executive.

It is customary for the executive to address the legislature at the beginning of each of its sessions concerning conditions in the nation or state that require its attention. . . . In construing ambiguous statutes, courts have referred to messages of the executive to the legislature. . . . Executive messages may contain relevant historical information even when not addressed to the legislature. . . .

Id. (citations omitted).

117. Hostilities between many of the Indian nations and settlers were uncontrollable. Prior to promulgation of the Nonintercourse Act, only two avenues of recourse were available to Congress — war and treaty. War inhibited pioneer settlement and Indian nations were growing reluctant to enter treaty agreements. *See* Speech of the President of the United States to Congress (Jan. 8, 1790), *reprinted in* State Papers and Publick Documents of the United States (1789-1796) at 13; Speech of the President of the United States to Both Houses of Congress (Oct. 25, 1791), *reprinted in* State Papers and Publick Documents of the United States (1789-1796) at 19; Speech of the President of the United States to Congress (Nov. 6, 1792), *reprinted in* State Papers and Publick Documents of the United States (1789-1796) at 27; Speech of the President of the United States to Both Houses of Congress (Dec. 8, 1795), *reprinted in* Debates and Proceedings in the Congress of the United States, 4th Cong., 1st Sess., at 12; W. Washburn, Red Man's Land/White Man's Law: A Study of the Past and Present Status of the American Indian, 52 (1971) (writing of George Washington dated 1784). *See also* F. Prucha, Indian Policy in the United States: Historical Essays 77 (1981). The Intercourse Act provided a third means of attaining peaceful expansion of White territory. *See* Letter from George Washington to James Duane (Sept. 7, 1783), *reprinted in* F. Prucha, Documents of United States Indian Policy 1 (1975). *See also* 4 American State Papers, Indian Affairs, Vol.1 (1789-1797); W. Graves, The Evolution of American Indian Policy: From Colonial Times to the Florida Treaty 185-86 (1982).

The second question raised is whether the Nonintercourse Act served its purpose. The imposition of criminal penalties, expressly enumerated in the 1793 Act,[118] adequately ensured compliance with the law and promoted its purpose of achieving peace to promote white expansion. There was, and is, no need to create an implied private right of action through judicial legislation.

The third question is whether implying a remedy is consistent with the purpose of the statutory scheme. The purpose of the Nonintercourse Act was to protect Indians from alienation of aboriginal land as a means of promoting peaceful white settlement.[119] The Act was enforced through criminal actions commenced by government authorities.[120] Implying a private right of action is inconsistent with this scheme. Assuming, *arguendo,* that a private right of action may be consistent with Congressional purposes, it is, nonetheless unnecessary because the express provisions of the Act adequately ensured its stated goal — to preserve peace. It would be an abuse of judicial power to imply a remedy where Congress has exerted its authority.[121]

The fourth, and final, question posed is whether the cause of action is traditionally an area of state concern. The Constitution answers this question — Congress is given power over Indian affairs.[122]

Oneida II did not apply the four-part test examined above. Had it done so, the Court would have found the Oneidas do not possess an implied right of action under the Nonintercourse Act of 1793.[123]

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118. *See infra* Appendix.

119. *See supra* note 117 and accompanying text.

120. *See infra* Appendix.

121. Congress exercised its Constitutional authority over trade with Indians when it promulgated the Nonintercourse Act. The separation of powers doctrine prohibits the Judiciary from creating law where Congress has acted. *See supra* notes 39-40 and accompanying text.

122. U.S. Const. art I, § 8, cl.3.

123. *Contra* Note, *Indian Law-Access to the Federal Courts, County of Oneida, New York v. Oneida Indian Nation of New York State, 105 S. Ct. 1245 (1985),* 21 Land & Water L. Rev. 89 (1986) (which applies the *Cort v. Ash* test and concludes an implied remedy is available to the Oneidas in this case).

The next step in the Court's analysis was to examine whether any Congressional action occurred since 1795 which would defeat the Oneida's claim today.

B. *Abatement*

Oneida II held that subsequent repeal and reenactment of the Nonintercourse Act did not abate the Oneidas' claim. The Court, adhering to case law[124] and established rules of statutory construction,[125] reasoned that because each reenactment contained the same restraint on alienation of aboriginal land, that provision (section 8 of the 1793 Act) never terminated.

The question, however, is not whether alienation of land is prohibited. The question is whether the cause of action is viable today. Rules of statutory construction direct that " any provisions . . . which are inconsistent with the reenactment are repealed."[126] The 1796 and 1799 re-enactments each contained a savings clause, preserving any cause of action which may have arisen under the previous version of the Nonintercourse Act.[127] The 1802 re-enactment did not contain

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124. Bear Lake & River Water Works & Irrigation Co. v. Garland, 164 U.S. 1 (1896).

> Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act . . . when these similar provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is . . . entirely correct to say that the new act should be construed as a continuation of the old.

Id. at 11-12.

125. "The reenactment of a statute is a continuation of the law as it existed prior to the reenactment as far as the original provisions are repeated without change in the reenactment." 1A Sutherland, Statutes & Statutory Construction § 23.29 (N.S. Singer, ed., 4th ed. 1985).

126. *Id.* (citation omitted)

127. Nonintercourse Act, ch. XXX, § 21, 1 Stat. 469, 474 (1796).

> *And be it further enacted,* That all and every other act and acts, coming within the purview of this act, shall be, and they are hereby repealed: *Provided, nevertheless,* that all disabilities, that have taken place, shall continue and remain; all penalties and forfeitures, that have been incurred, may be recovered; and all prosecutions and suits, that may have been commenced, may be prosecuted to final judgment, under the said act or acts, in the same manner, as if the said act or acts were continued, and in full force and virtue.

Nonintercourse Act, ch. XLVI, § 21, 1 Stat. 743, 749 (1799).

a similar provision.[128] Therefore, all causes of action which arose prior to 1802, including the Oneida's claim, abated in that year.

C. *Ratification*

The unlawful conveyance of Oneida land in 1795 was never expressly ratified by Congress, although the Oneidas subsequently ceded land to the United States, by treaties dated 1798 and 1802. The boundaries, as described in those treaties, are ambiguous.[129] In the presence of ambiguity, the Court must liberally construe treaties in favor of the Indians.[130] In light of the confusion raised by the 1798 and 1802 treaties, the Court prudently determined that the 1795 conveyance was never ratified by Congress.[131]

> And all disabilities which have taken place shall continue and remain; and all penalties and forfeitures, that have been incurred, may be recovered, and all prosecutions and suits which may have been commenced, may be prosecuted to final judgment, under the act, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.

128. Nonintercourse Act, ch. XIII, 2 Stat. 139 (1802).

129. The 1798 Treaty provided:

> [T]he said Indians do cede release and quit claim to the people of the State of New York forever all the lands within their reservation to the westward and southwestward of a line from the northeastern corner of lot No. 54 in *the last purchase from them* running northerly to a Button wood tree . . . standing on the bank of the Oneida lake.

County of Oneida, New York v. Oneida Indian Nation of New York, 105 S.Ct. 1245, 1258 n.19 (1985) (*Oneida II*) (citing Ratified Indian Treaties 1722-1869, National Archives Microfilm Publications, Microcopy No.668 (roll 2) (emphasis added)). The 1802 Treaty provided:

> The said Indians do cede . . . All that certain tract of land, beginning at the southwest corner of the land lying along the Genesee road, . . . and running thence along the last mentioned tract easterly, to the southest corner thereof; thence southerly, in the direction of the continuation of the east bounds of said last mentioned tract, to other lands heretofore ceded by the said Oneida nation of Indians, to the People of the State of New York. . . .

Reprinted in 4 American State Papers, Indian Affairs, Vol. 1, at 664 (1832).

130. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586 (1977); DeCoteau v. District County Court for the Tenth Judicial Dist., 420 U.S. 425, 444 (1975); Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943); Choate v. Trapp, 224 U.S. 665, 675 (1912). *See also* McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 174 (1973).

131. Brief for Petitioner at 43, argued, if the 1795 conveyance is declared invalid and unratified, the tract of land ceded in 1798 "would be floating, unattached, in a

D. *Statutes of Limitations*

There was no federal statute of limitations applicable to Indian claims until 1966.[132] The limitations then imposed applied only to contract and tort claims.[133] In 1982, the statute was amended to specifically reject application of any time limitation to aboriginal land claims.[134] The Court, therefore, correctly held there is no federal statute of limitations barring the Oneidas' claim.

It also held that borrowing a New York statute of limitations for an analogous claim would frustrate current national policy.[135] *Oneida II* examined 25 U.S.C. § 233, a congressional grant of jurisdiction to New York over civil actions involving Indians. The scope of power granted to New York specifically excluded Indian land claims which arose prior to passage of § 233, in 1952.[136] The Court concluded, therefore, that Congress intended that no state statute of limitations be applied to this case.

Justice Stevens, in his dissent, emphasized that the laws contemporaneous with the unlawful conveyance must be ap-

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sea of Oneida territory" and this would create a burdensome "checkerboard jurisdiction."

132. Act of July 18, 1966, Pub. L. 89-505, 80 Stat. 304.

133. 28 U.S.C. § 2415(a)-(b) (1966).

134. *See supra* note 26.

135. *Oneida II*, 105 S. Ct. 1245, 1255-57 (1985).

136.

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State . . . nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for the State or local purposes, nor as subjecting any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land . . . nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952 [the effective date of this Act].

plied.[137] There were, however, no statutes of limitations in the late eighteenth and early nineteenth centuries which would bar the Oneida's claim today. As noted above, no federal statute of limitations existed prior to 1966. Moreover, the borrowing of a New York statute would be improper. As Justice Stevens observed, it is inappropriate to borrow a state statute of limitations where there is a "unique federal interest in the subject matter."[138] The United States had a unique interest in aboriginal lands. As the conquering nation, the United States held a right of title in the land, but the Indians, as the conquered people, held a right of occupation.[139] These unique circumstances placed the United States in the role of trustee of aboriginal lands.[140] The trust relationship has continued since the birth of our nation.[141] This continuum signifies the importance accorded this unique subject matter by the federal government.

Therefore, although the Court erred in its choice of analytical method, it reached the correct conclusion — there was and continues to be no statute of limitations which would bar the Oneidas' claim.

E. *Laches*

In the absence of an applicable statute of limitations, the dissent asserted that some principle of repose must be exercised. Justice Stevens urged the application of laches to the Oneidas' claim, acknowledging that this equitable doctrine is not usually applied to claims brought at law.[142] Bridging the gap between law and equity is, however, only a small obstacle

137. *Oneida II*, 105 S. Ct. at 1263. *See also supra* note 8 and accompanying text.

138. *Oneida II*, 105 S. Ct. at 1263.

139. *See* United States v. Santa Fe Pac. Ry. Co., 314 U.S. 339 (1941); Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1980).

140. Johnson v. M'Intosh, 21 U.S. 543, 569 (1823). *See also* Worcester v. Georgia, 31 U.S. 515, 560-61 (1832);

141. FPC v. Tuscarora Indian Nation, 362 U.S. 99, 119 (1960); United States v. University of New Mexico, 731 F.2d 703, 706 (10th Cir. 1984). *See also* H.R. Rep. No. 807, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. Code Cong. & Ad. News 206, 207; H.R. Rep. No. 954, 97th Cong., 2d Sess. 5 (1982).

142. *Oneida II*, 105 S. Ct. 1245, 1266 (1985).

facing a court which would attempt to apply laches to an aboriginal land claim.

Justice Stevens' suggestion embraces several problems which stem from the trust relationship between the United States and the Indians. The United States, as trustee, may bring claims on the Indians' behalf.[143] As the sovereignty, the United States is immune from the laches doctrine.[144] The courts have held that Indians bringing actions on their own behalf are accorded the same privileges and immunities extended to the United States, as trustee.[145] Congress has not spoken directly to the issue, but the legislative history of 28 U.S.C. § 2415 contains congressional dialogue regarding a time limit in which to commence aboriginal land claims.[146] An examination of this congressional record reflects a tacit concurrence with judicial law.

This issue is beyond the scope of this casenote. It must be noted, however, that Congress is the only branch of our Government which has the constitutional authority to clarify this issue. Judicial determination regarding the application of laches to aboriginal land claims brought by Indians on their own behalf would be an impermissible act of judicial legislation under the separation of powers doctrine.

F. *Justiciability*

The Constitution grants power over Indian affairs to Con-

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143. *See supra* note 24 and accompanying text.

144. United States v. Kirkpatrick, 22 U.S. 720, 735 (1824). *See also* Utah Power & Light Co. v. United States, 234 U.S. 389, 409 (1916).

145. *See* Oneida Indian Nation v. State of New York, 691 F.2d 1070, 1084 (2d Cir. 1982) (Action brought by the Oneidas to invalidate land purchases made by New York prior to the adoption of the United States Constitution; held: it would be "anomolous to allow the trustee to sue under more favorable conditions than those afforded the tribes themselves."); Schaghticoke Tribe v. Kent School Corp., Inc., 423 F. Supp. 780, 784 (D. Conn. 1976) (Action to regain possession of land transferred in violation of the Nonintercourse Act; held: "delay-based defenses were not available in actions by Indians to recover lands alienated in violation of the Nonintercourse Act."); Narragansett v. S.R.I. Land. Dev. Corp., 418 F. Supp. 798, 805-06 (D.R.I. 1976).

146. *See generally* 123 Cong. Rec. 22164-72 (1977)(House debate); 126 Cong. Rec. 3287-91 (1980) (Senate debate).

gress.[147] Congress has not delegated that power to the Court. The function of the Court, in matters of Indian affairs, is to interpret the laws enacted by Congress.[148] The *Oneida II* Court adhered strictly to its task. The Court refrained from judicially creating new Indian law. It painstakingly attempted to trace nearly two hundred years of congressional intent and legislation. This case does not represent a breach of constitutional authority.[149] The Oneidas' claim, as addressed by the Court, therefore, presents a justiciable question.

VI. Conclusion

The ramifications of *Oneida II* are overwhelming. Encouraged by the progress of this case, Indian nations across the country have initiated similar claims. Thousands of acres of settled and developed land are currently in litigation.[150] This type of protracted litigation promises to have a devastating effect on property values, local businesses and local economies. The judicial disposition of these lawsuits may result in ejectment of current good-faith purchasers, or, perhaps, the payment of high rental or purchase fees.[151]

This is a vexing scenario, but it is not preordained. Congress has the power to alter the course of Indian land claims. *Oneida II* exhibits the Court's strong adherence to the separation of powers doctrine. The Court demonstrated its willingness to follow the path forged by Congress. Congress has the duty to unambiguously point the proper direction. If Congress neglects its responsibility the Court may unintentionally blaze a new trail into the congressional realm of Indian relations.

Nina Dale

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147. U.S. Const. art I., § 8, cl. 3.

148. *See* Marbury v. Madison, 5 U.S. 137 (1803); *See also Oneida*, 691 F.2d at 1082.

149. *See supra* notes 39-41 and accompanying text.

150. *See, e.g.*, South Carolina v. Catawba Indian Tribe, 740 F.2d 305 (4th Cir. 1984), *cert. granted*, 105 S. Ct. 2672 (1985), *rev'd & remanded*, 106 S. Ct. 2039 (1986) (144,000 acres); Mohegan Tribe v. Connecticut, 638 F.2d 612 (2d Cir. 1981) (2,500 acres); Cayuga Indian Nation v. Kirk, 565 F. Supp. 1297 (N.D.N.Y. 1983) (64,015 acres).

151. *See* Crane, *supra* note 112, at 853-55.

APPENDIX

An Act to regulate Trade and Intercourse with the Indian Tribes.

Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that purpose; which superintendent, or person so authorized shall, on application, issue such license, for a term not exceeding two years, to any proper person, who shall enter into bond with one or more sureties approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons licensed, as aforesaid, shall be governed, in all things touching the said trade and intercourse, by such rules and regulations, as the President of the United States shall prescribe.

Sec. 2. *And be it further enacted,* That the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions, provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained.

Sec. 3. *And be it further enacted,* That every person, who shall attempt to trade with the Indian tribes, or shall be found in the Indian country, with such merchandise in his possession, as are usually vended to the Indians, without lawful license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, in the Indian country, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days, at the

discretion of the court, in which the trial shall be: *Provided,* That any citizen of the United States, merely travelling through any Indian town or territory, shall be at liberty to purchase, by exchange or otherwise, such articles as may be necessary for his subsistence, without incurring any penalty.

Sec. 4. *And be it further enacted,* That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen thereof, would be punishable by the laws of such state or district, such offender shall be subject to the same punishment, as if the offence had been committed within the state or district, to which he or she may belong, against a citizen thereof.

Sec. 5. *And be it further enacted,* That if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months, in the discretion of the court, before whom the trial shall be: And it shall, moreover, be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon.

Sec. 6. *And be it further enacted,* That no person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act: *Provided also,* That every person, who shall purchase a horse or horses, under such

license, before he exposes such horse or horses for sale, and within fifteen days after they shall have been brought out of the Indian country, shall make a particular return, to the superintendent, or other person, from whom he obtained his license, of every horse by him purchased, as aforesaid, describing such horses, by their color, height and other natural or artificial marks, under the penalties contained in their respective bonds. And every person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars, to be recovered in any court of record having competent jurisdiction. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed, as above, to purchase the same, shall forfeit the value of such horse: one half for the benefit of the informant, the other half for the use of the United States, to be recovered, as aforesaid.

Sec. 7. *And be it further enacted,* That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian; and that any person, offending herein, shall forfeit one thousand dollars, and be imprisoned, at the discretion of the court, before which the conviction shall be had, not exceeding twelve months.

Sec. 8. *And be it further enacted,* That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title

or purchase of any lands by them held, or claimed: *Provided nevertheless,* That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

Sec. 9. *And be it further enacted,* That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall and may be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and also to furnish them with goods or money, in such proportions, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think proper: *Provided,* That the whole amount of such presents, and allowance to such agents, shall not exceed twenty thousand dollars per annum.

Sec. 10. *And be it further enacted,* That the superior courts of each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes in each district of the United States, into which any offender against this act shall be first brought, in which he shall be apprehended, shall have, and are hereby invested with full power and authority, to hear and determine all crimes, offences and misdemeanors against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective district: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States, in their respective districts, shall have, and are hereby invested with like power to hear and determine the same.

Sec. 11. *And be it further enacted,* That it shall and may be lawful for the President of the United States, and for the

governors of such territorial districts, respectively, on proof to them made, that any citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law. And in all cases, where the punishment shall be death, it shall be lawful for the governor of the district, into which the offender may be first brought, or in which he may be apprehended, to issue a commission of oyer and terminer to the superior judges of the district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such districts have, in their ordinary session: And when the offender shall be brought into, or shall be apprehended in any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any two judges of the supreme court of the United States, and the judge of the district, in which the offender may have been apprehended or first brought; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do.

Sec. 12. *And be it further enacted,* That all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use.

Sec. 13. *And be it further enacted,* That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

Sec. 14. *And be it further enacted,* That all and every other act and acts coming within the purview of this act, shall

be and are hereby repealed.

Sec. 15. *And be it further enacted,* That this act shall be in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer.

Approved, March 1, 1793.

Ch. XIX, 1 Stat. 329 (1793).