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The New Laches: Creating Title Where None Existed

The New Laches: Creating Title Where None Existed

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"Laches can scarcely create title where none existed."[1]

"A thousand years in the sight of the Chancellor are but as yesterday."[2]

"[In] a suit brought by the United States in its sovereign capacity . . . , it is clear state limitations period[s] do not apply."[3]

Introduction

Legal decisions in Indian land claims, at least in New York state, have been creating

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[1] Ziegler v. Simmons, 353 Mich. 432, 440 (1958).

[2] George Wharton Pepper, *The Effect of Lapse of Time on Suits in Equity*, 41 AM. L. REGISTER AND REV. 319, 331 (1893).

[3] Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 377-378 (1977) (Rehnquist, J., dissenting) (citing Bd of Comm'rs of Jackson County v. United States, 308 U.S. 343, 351 (1939)).

title for private property owners where none exists. As has been explored by others, various areas of property law have been turned upside down in the pursuit to defeat tribes in court.[4] However, one area, equity, has received special attention from the courts. Specifically, the equitable defenses of laches, acquiescence, and impossibility were used by the Supreme Court to hand defeat to the Oneida Indian Nation on a tax issue. Since then, lower courts in the Second Circuit have used this precedent to deny Indian land claims. But are these three defenses based on precedent themselves? Rarely. Instead, they have been combined to create a new defense, what I will call the "new laches." This new defense, so far used successfully in Indian land cases in New York state and unsuccessfully elsewhere,[5] has been so broadly construed by the Second Circuit that, if this view is adopted nationwide, it could apply to any treaty-based claim brought by Indians or Indian tribes.[6]

Laches is rarely used outside of some narrow areas of common law,[7] and had been all but barred from federal Indian law cases.[8] The Supreme Court's decision in *City of*

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[4] Joseph W. Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 610 (2006).

[5] Paiute-Shoshone Indians of Bishop Commty of Bishop Colony v. City of Los Angeles, No. 1:06-cv-00736 OWW LJO, 2007 WL 521403, *8 (E.D. Cal. Feb. 15, 2007) ("Here, whether this claim is premised upon the 1937 Act or the Non-Intercourse Act or a combination of both, the source of the Tribe's ejectment claim is *federal* not state law." (Emphasis in original). The Court goes on to discuss and cite to the *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005)).

[6] Mem. in Support of Non-State Defs.' Mot to Dismiss at 17, Onondaga Nation v. New York, No. 5:05-cv-00314 (N.D.N.Y., Aug. 15, 2006) ("Aboriginal land claims that have a disruptive effect on the governance of state and local jurisdictions and upon the long-settled, justifiable, expectations of current landowners are subject to dismissal, on a motion to dismiss, based upon well-recognized equitable principles."). The state does not limit its conclusion to land claims based on the Non-Intercourse Act, which it could, given it is fighting a claim based on violation of the Non-Intercourse Act. Instead it chose to broaden the holding of *Sherrill* and follow Cayuga Indian Nation of New York v. New York, 413 F.3d 266 (2d Cir. 2005) to include any aboriginal land claim which may be considered disruptive.

[7] *See* Artuz v. Bennett, 531 U.S. 4 (2000) (habeas petitions), Ledbetter v. Goodyear Tire & Rubber Co. Inc., 127 S. Ct. 2162 (2007) (Title VII claims).

[8] Ewart v. Bluejacket, 259 U.S. 129, 138 (1922) ("[T]he 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."); *Bd. of Comm'rs. of Jackson County*, 308 U.S. at 351 ("[S]tate notions of laches and state statutes of limitations have no applicability to suits by the government, whether on behalf of Indians

Sherrill v. Oneida Indian Nation,[9] however, injected this new equitable defense into the area of federal Indian law to be used by state and local government defendants to eliminate land claims before they begin.[10] Given the broad reading of the new laches defense by the Second Circuit, states and others opposing tribal claims will be using this argument against any tribal treaty a claim based on so-called "ancient"[11] transactions and treaties.

The *Sherrill* Court analyzed two other equitable defenses in addition to laches, including acquiescence and impossibility,[12] but lower courts have focused more on laches.[13] However, it would be more accurate to label this defense "new laches," a

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or otherwise."); Swim v. Bergland, 696 F.2d 712, (9th Cir. 1983) ("Laches or estoppel is not available to defeat Indian treaty rights. This is true even where the Indians have long acquiesced in use by others of affected lands or have purported to grant away their occupancy and use rights without federal authorization.") (citations omitted); United States v. 7,405.3 Acres of Land in Macon, Clay and Swain Counties, N.C., 97 F.2d 417, 423 (4th Cir. 1938) ("It is beyond the power of the state, either through statutes of limitation or adverse possession, to affect the interest of the United States; and the United States manifestly has an interest in preserving the property of these wards of the government for their use and benefit."); Canadian St. Regis Band of Mohawk Indians v. New York, 278 F.Supp.2d 313, 330-333 (N.D.N.Y. 2003) (The court chastises the state defendants for three pages for continuing to argue laches against the tribe's claims, finishing with "laches has no place in Indian land claim actions."); Schaghticoke Tribe of Indians v. Kent Sch. Corp., 423 F. Supp. 780, 784-85 (D.C. Conn. 1976) ("The cases make plain that limitations, adverse possession, laches and estoppel cannot bar recovery of Indian lands in a suit brought to recover protected territory . . .the inapplicability of these affirmative defenses extends to suits by individual Indians and is not solely a product of the sovereign immunity of the United States. The determination is rooted in the language and purpose of federal protective statutes like the Non-Intercourse Act.").

[9] *City of Sherrill*, 544 U.S. 197.

[10] Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius, 233 F.R.D. 278 (2006) (dismissed under FRCP 12(c), Motion for Judgment on the Pleadings); Shinnecock Indian Nation v. New York, No. 05-CV-2887 (TCP), 2006 WL 3501099 (E.D.N.Y., Nov. 28, 2006) (dismissed under FRCP 12(b) (6), Failure to State a Claim); Oneida Indian Nation of New York v. New York, 500 F.Supp.2d 128 (N.D.N.Y., 2007) (partially dismissed under FRCP 56, Summary Judgment). *But see*, *Paiute-Shoshone Indians of Bishop Colony*, 2007 WL 521403, at 11 ("Here, however, because the issue of laches raises significant questions of fact that cannot be resolved on a motion to dismiss, it is most efficient to deny they [sic] City's motion to dismiss on the ground of laches, without prejudice to its renewal.").

[11] *City of Sherrill*, 544 U.S. at 202 ("In the instant action, OIN resists the payment of property taxes to Sherrill on the ground that OIN's acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas' *ancient* sovereignty piecemeal over each parcel . . . Our 1985 decision recognized that the Oneidas could maintain a federal common-law claim for damages for *ancient* wrongdoing in which both national and state governments were complicit.") (emphasis added).

[12] *Id.* at 217-221.

[13] Cayuga Indian Nation of New York v. New York, 413 F.3d 266, 277 (2d Cir. 2005) ("Inasmuch as the instant claim, a possessory land claim, is subject to the doctrine of laches, we conclude that the present case

defense created from a combination and (mis)understanding of laches, acquiescence and impossibility, applicable *only* against Indian claims. Rather that being based solely upon the length of time from the original wrong to its arrival in federal court, the new laches defense is based upon the disruption a successful claim may cause to the "settled expectations" of state and local government defendants. It is not clear what character of disruption is necessary to justify the invocation of the new laches defense. While elements of impossibility and acquiescence form part of this new defense, the easiest way to demonstrate the difference of this defense is to compare it to traditional laches. Only by tracing the original defenses can one see the major shifts from standard laches to new laches. New laches barely resembles the traditional defense of laches that has been used with relative consistency since the fourteenth century.

The first part of this article will review the Supreme Courts' application of laches and equity to the Oneida Indian Nation's claim to immunity from state and local taxation, as well as the aftermath of that decision where the Second Circuit dismissed a major land claim in reliance upon the Court's decision. The second part will trace the history of laches, from its first use in England through its adoption by the United States. The third part will discuss the differences between traditional laches and new laches.

The fourth part will analyze the significant pragmatic problems the Supreme

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must be dismissed because the same considerations that doomed the Oneidas' claim in *Sherrill* apply with equal force here . . . We thus hold that the doctrine of laches bars the possessory land claim presented by the Cayugas here."); Cayuga Indian Nation of New York v. Village of Union Springs, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) ("The Nation is seeking relief that is even more disruptive than non-payment of taxes"); *Shinnecock*, 2006 WL 3501099, at 5 ("We find that plaintiffs' possessory land claim is subject to laches, and dismiss on that basis."); New York v. Shinnecock Indian Nation, 400 F.Supp.2d 486, 496 (E.D.N.Y. 2005) ("[N]ot the least of which may be the question of the extent of the impact of the "disruptive" claims, the nature of the Indians' present titles and possibly the length of delay and the question of laches, and appropriate remedies."); Oneida Indian Nation of New York v. New York, 500 F. Supp. 2d 128, 133 (N.D.N.Y., 2007) ("[T]he Court now holds that Defendants can assert a laches defense against Plaintiffs' possessory land claims.").

Court and the Second Circuit have created in applying the new laches defense to Indian tribes and the United States.

I. *City of Sherrill* and Beyond

The *City of Sherrill v. Oneida Indian Nation*[14] opinion is full of contradiction, introducing the equitable defenses of laches, acquiescence, and impossibility into an area where courts had almost always barred them from being used as a defense.[15] Based on lower court interpretations of *City of Sherrill*,[16] it might also appear to a casual reader that the *City of Sherrill* case was a land claims case, when, in fact, the claim involved a tax dispute.[17] The city attempted to tax land purchased (with land claims settlement trust funds) by the Oneida Nation within the boundaries of its own reservation. The Nation sought immunity from the taxes, seeking to exercise its own sovereignty over its own lands. The Supreme Court chose not to follow its long line of cases focusing on tribal tax immunities, which are abundant,[18] but rather the disruptive nature that the exercise of the Nation's sovereignty would have on the "governance of New York's counties and

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[14] *City of Sherrill*, 544 U.S. 197 (2005).

[15] *See Bd. of Comm'rs. of Jackson County*, 308 U.S. 125 *and* County of Oneida v. Oneida Indian Nation, 470 U.S. 266 (1985).

[16] *Cayuga*, 413 F.3d at, 275 ("Under the *Sherrill* formulation, this type of possessory land claim—seeking possession of a large swath of central New York State and the ejectment of tens of thousands of landowners—is indisputably disruptive."). Indeed, at the point the Second Circuit heard the *Cayuga* case, there was no large scale possessory land claim. Instead, the Nation was seeking to enforce the monetary reward it received from the District Court. *See* Cayuga Indian Nation v. Pataki, 165 F.Supp.2d 266 (N.D.N.Y. 2001) (Cayuga XVI).

[17] *City of Sherrill*, 544 U.S. at 202 ("In the instant action, OIN resists the payment of property taxes to Sherrill on the ground that OIN's acquisition of fee title to discrete parcels of historic reservation land . . . the Tribe maintains [,] regulatory authority over OIN's newly purchased properties no longer resides in Sherrill.")

[18] *E.g.* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991); Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163 (1989); Merrion v. Jicarilla Apache Tribe, 445 U.S. 130 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 138 (1980); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).

towns."[19] The Court applied three defenses to the Nation's claims: laches, acquiescence, and impossibility. The serious doctrinal problems with this case have been well documented by others,[20] and a recent case demonstrates these important commentaries have not gone unnoticed.[21]

City of Sherrill's direct progeny and the case with the potential to be the most harmful to tribal interests was decided later that same year. In 2005, the Second Circuit in *Cayuga Indian Nation of New York v. Pataki*[22] took *City of Sherrill* out of the area of taxation and into the area of general Indian land claims.[23] The Second Circuit held that "based on *Sherrill*, we conclude that the possessory land claim alleged here is the type of claim to which a laches defense can be applied."[24] The case also began a trend in the Circuit to combine all three defenses separately identified in *City of Sherrill* into one defense called "laches," sometimes expressed as "disruption."[25] The Cayuga Nation was initially seeking possession of the land purchased by the State in violation of the Non-Intercourse Act, a purchase never ratified by the federal government.[26] In addition, the Nation sought monetary compensation in the form of trespass damages, and proceeds connected with natural resources.[27] However, after nineteen years, the federal courts determined that ejectment would not be a proper remedy and that "monetary damages will produce results which are as satisfactory to the Cayugas as those which they could

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[19] *City of Sherrill,* 544 U.S. 197, 202 (2005).
[20] Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5 (2005); Joseph Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006).
[21] Oneida Nation of New York v. New York, 500 F.Supp.2d 128, 137 n.3 (N.D.N.Y, May, 2007) (citing Singer, *supra* n.4).
[22] *Cayuga*, 413 F.3d 266.
[23] This was easy to do, given the *Sherrill* court's focus on the Oneida Indian Nation's land claims, *City of Sherrill*, 544 U.S. at 203-217.
[24] *Cayuga*, 413 F.3d at 268.
[25] *See text supra* n.13.
[26] *Cayuga,* 413 F.3d at 269.
[27] Cayuga Indian Nation of New York v. Pataki, 79 F. Supp. 2d 66 (N.D.N.Y. 1999) (Cayuga XI).

properly derive from ejectment."[28] Though this statement may not be an accurate reflection of the Cayuga Nation's position, by the time the case arrived in the Second Circuit in 2004, the case was entirely about monetary damages. After a long procedural history, the District Court had awarded the Nation $247,911,999.42,[29] which both parties appealed to the Second Circuit.

The Second Circuit held that because the monetary damages were based on a claim that "is and has always been sounding in ejectment,"[30] and that ejectment is "indisputably disruptive."[31] Because of this disruption, the Nation would be subject to the "equitable considerations" – no longer defenses – described in *City of Sherrill,* [32] even though ejectment is a legal, not equitable, claim.[33] This case is where the defenses of laches, acquiescence and impossibility start to merge into a new legal argument, the new laches. The Second Circuit does this by giving short shrift to the other two defenses, and by creating new prongs for laches, rather than following the traditional definition. Traditional laches has two prongs, delay and injury. The Court, instead of injury to the parties, focuses on the disruption of the tribal claim. In fact, the Second Circuit has taken the Supreme Court's "impossibility" doctrine, normally a contract defense, and labeled it "laches."[34] The "impossibility" defense, its history described in section three below, stands for the proposition that any exercise of tribal sovereignty over newly re-acquired

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[28] Cayuga Indian Nation of New York v. Cuomo, Nos. 80-CV-930, 80-CV-960, 1999 U.S. Dist. LEXIS 10579 at *78-9 (N.D.N.Y. July 1, 1999) (Cayuga X).
[29] *Cayuga* XVI, 165 F. Supp. 2d at 366.
[30] *Cayuga*, 413 F.3d at 274.
[31] *Id* at 275.
[32] *Id.*
[33] DAN B. DOBBS, 1 LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 11 n.2 (2d ed., 1993).
[34] *See* Kathryn E. Fort, *The (In)Equity of Federal Indian Law*, 54 FED. LAW. 32, March/April 2007, for a discussion of "impossibility doctrine" which was created by the Supreme Court in *City of Sherrill*, and appears to appeal directly to the judge's need to have a solution the judge does not consider "impossible." Therefore, anything the judge considers "disruptive" is therefore an "impossible" solution. Rather than continuing to make these distinctions, the *Cayuga* (specify) court and others put this all together into a discussion of laches.

tribal land is "impossible" because of the "disruption" it would cause.[35] Given that the "disruption" in *Sherrill* was set at such a low bar, the Nation's exercise of sovereignty over land it already owned, the impossibility defense could be used to block any tribal claim. The new laches is the "impossibility" doctrine restated, and the "impossibility" doctrine has the potential to block all tribal claims.

Stating that federal Indian law is "unusually complex and confusing," the Second Circuit held that the "doctrines and categorizations applicable in other areas" did not apply to Indian land claims.[36] Ironically, the Court cites cases which uphold provisions protecting Indian lands due to their status as sovereigns and federally protected lands.[37] Unfortunately, the complexity and confusion surrounding the Indian land claims only increased with the Court's ruling in this case.

Cases after *Cayuga* used *City of Sherrill* and *Cayuga* to dismiss various claims at the pleadings stage, all using a combination of delay and disruption, sometimes characterized as laches, or a combination of disruption and impossibility, to deny tribal claims.[38] What is common regardless of terminology is the so-termed "disruptive" nature of the tribal claims. Delay in bringing the claim seems primarily to be a problem as an element of disruption. In addition, while these are all claims based in New York, the use of laches by cities and states to defend against any kind of tribal claim has not gone

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[35] *City of Sherrill*, 544 U.S. at 219 ("Finally, this Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands. . . . In this case, the Court of Appeals concluded that the "impossibility" doctrine had no application because OIN acquired the land in the open market and does not seek to uproot current property owners. But the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at market price, would have similar *disruptive* practical consequences . . ."(citations omitted) (emphasis added)).

[36] *Cayuga*, 413 F.3d at 276.

[37] Mohegan Tribe v. Connecticut, 638 F.2d 612, 614-15, 615 n.3 (2d Cir. 1980) (holding that adverse possession does not run against Indian land).

[38] *See Village of Union Springs*, 390 F.Supp.2d 203 (summary judgment in light of the *City of Sherrill* decision; "disruption"); *Town of Aurelius*, 233 F.R.D. 278 (judgment on the pleadings; disruption, impossibility) *and Shinnecock Indian Nation*, 2006 WL 3501099 (failure to state a claim; laches).

unnoticed. In *Paiute-Shoshone Indians of Bishop Community of Bishop Colony v. City of Los Angeles*,[39] the Eastern District of California discussed equitable defenses at length with regard to a land claim only 65 years old that also implicates water rights. While the tribe avoided summary judgment, the court's discussion of the defenses is not necessarily a win for tribes, since the court agreed with *Cayuga* that an ejectment claim in federal Indian law is no longer an action at law,[40] and citing to the case of *Felix v. Patrick*.[41] Also in *Ottawa Tribe of Oklahoma v. Speck*,[42] the district court did not dismiss under a 12(b)(6) motion, but did discuss the current state of laches under *City of Sherrill* and *Cayuga*. The Court did not dismiss on laches, but did leave the door open for the parties to continue to use the defense.[43]

These cases demonstrate either a fundamental misunderstanding of laches and equity or an active attempt by courts to dismiss tribes' claims regardless of precedent. Either way, this body of law has now created the defense of new laches, which is not based in the original definition of laches. By tracing the defense from its earliest origins, tribes and courts can see the fundamental changes in the law since *Sherrill*.

II. Traditional Laches and Court of Equity in England

A lengthy historical study of laches has not been done for many years.[44] Given the current blend of law and equity, laches is perceived as an anachronism, especially

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[39] *Pauite-Shoshone Indians of Bishop Colony*, 2007 WL 521403.
[40] *Id*. at *9.
[41] Felix v. Patrick, 145 U.S. 317 (1892). For a discussion of why this reference is particularly troubling, *see, e.g.*, Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005).
[42] Ottawa Tribe of Okla. v. Speck, 447 F. Supp. 2d 835, 844-45 (N.D. Ohio 2006).
[43] *Id*. ("A court may look at the disruptive effect a plaintiff's relief would have on other parties . . .the state of the current record is inconclusive and the Court cannot dismiss at this juncture.") (citations omitted).
[44] *See generally* Gail L. Heriot, *Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 B.Y.U. L. REV. 917 (1992).

with the prevalence of statutes of limitations.[45] However, only by comparing the laches used in Indian land cases with the common understanding of laches can the practitioner see the stark differences between the two.[46] In a case from 1962 (not cited in *City of Sherrill*), the Supreme Court provided a definition of laches, highly cited in the federal courts. *Costello v. United States* defined laches as a defense which "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."[47] Instead, the *Sherrill* Court cited far older cases. By citing such old cases the Court reinforced the age of the Nation's claim and its perceived obscurity.[48] The cases the Court cites lead back to even older cases, to cases from England and to a specific definition of laches. After these citations, however, the Court goes on to apply a new defense, one based on laches, but at the same time *not* laches.

Laches is a defense in equity. It stands for the proposition that a court will not find for the plaintiff if the plaintiff delayed in brining the case, and that delay harmed the

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[45] Note, *Developments in the Law – Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950) ("In the United States today, for the great majority of actions the time for bringing suit is governed by general statutes of limitations found in every state.")

[46] The Supreme Court cited to particularly old cases in *Sherrill.* ("It is well established that laches, a doctrine focused on one side's in action and the other's legitimate reliance, may bar long-dormant claims for equitable relief. See, *e.g.*, *Badger v. Badger* 2 Wall. 87, 94, 17 L.Ed. 836 (1865) . . . ; *Wagner v. Baird*, 7 How. 234, 258, 12 L.Ed. 681 (1849) (same); *Bowman v. Wathen*, 1 How 189, 194, 11 L.Ed. 97 (1843). . . . *Felix v. Patrick,* 145 U.S. 317, 12 S.Ct. 862, 36 L.Ed. 719 (1892)). *City of Sherrill*, 544 U.S. at 217

[47] *Costello v. United States*, 365 U.S. 265, 283 (1961). This case was cited by the Supreme Court as recently as 2002 in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121–122 (2002).

[48] While some other court cases cite to the older cases cited in *City of Sherrill*, they usually start with *Costello* or *National Railroad Passenger Corp*. Given the Court's focus on the length of time since the Oneida Indian Nation last held the land: *City of Sherrill*, 544 U.S. at 202 ("For two centuries, governance of the area in which the properties are located has been provided by the State of New York . . . "; *Id.* at 203 ("[T]he Tribe cannot unilaterally revive it s ancient sovereignty . . ."); *Id.* at 215 ("[I]t was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness . . ."; *Id.* at 261 ("The wrongs of which OIN complains in this action occurred during the early years of the republic. For the past two centuries, New York and its county and municipal units have continuously governed the territory."); *Id.* at 218 ("There is no dispute that it has been two centuries since the Oneida last exercised regulatory control over the properties here."); *City of Sherrill*, 544 U.S. at 221 ("Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago."); *Id.* ("The distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief . . . and developments in the city of Sherrill spanning several generations."), it is possible to read the Court's citation of 19th century cases as yet another way to reinforce the perception of the length of time since the land was first taken illegally by the state of New York.

defendant. Different courts state the proposition in different ways. In his article *Time on Suits in Equity*, George Pepper argued laches only applies "if during the delay of the plaintiff there has been a loss of evidence, or by reason of the delay of the plaintiff the defendant or third persons have altered their position for the worse."[49] Thus laches has traditionally had two, or at most three, components – delay and a position change for the worse, or a loss of evidence.[50]

Laches developed in English courts of equity. These courts of equity began as chancery courts. The chancellor, the highest counselor to the king or queen and a direct representative of the king or queen, heard cases outside of the jurisdiction of the court of common law.[51] Because of the strictness of the courts of common law regarding the forms of lawsuits, parties seeking justice outside of these forms appealed directly to the king via the chancellor, who had broad jurisdiction.[52] These courts were separate until the 1870's, when England reorganized its courts and give each the power to hear cases in both law and equity.[53] Prior to the reorganization, the courts of England were much as they had been for centuries, and the court of the chancery occupied the place where cases not available to be heard in the court of common pleas could be decided.

Based on pleading justice to the King himself, the Chancellor decided all cases

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[49] Pepper, *supra* note 2 at 321.

[50] *See*, Fort *supra* note 34 at 34 (Loss of evidence in Indian land cases is rarely a problem. The federal government has meticulous records of treaties, land transactions and other evidence which can be, and have been, used in Indian land claims.).

[51] SIR ROBERT MEGARRY & P.V. BAKER, SNELL'S PRINCIPLES OF EQUITY 8 (27th ed. 1973).

[52] *See Id.*, at 8 ("The Chancellor acted at first in the name of the King in Council, but in 1474 a decree was made on his own authority, and this practice continued, so that there came to be a Court of Chancery as an institution independent of the King and his Council.") *and* SAMUEL R. GARDINER, 3 HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR 10 (1895) ("A custom had gradually arisen of seeking redress in Chancery, in cases where the Common Law courts had failed to do justice on account of the strictness of the rules which they had laid down for their guidance.").

[53] PHILIP S. JAMES, INTRODUCTION TO ENGLISH LAW 41 (5th ed. 1962) ("By these Acts the superior courts were entirely reorganized and were placed substantially upon their present-day footing.").

based on his conscience.[54] Because of this, for many years there was no precedent,[55] as each chancellor had a different conscience, giving rise to the oft-cited quote: "Equity is a roguish thing. For law we have a measure, . . . equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity."[56] Records indicate the chancellor, began hearing disputes on behalf of the king during the reign of Richard II (1377-99).[57] The rise of the equitable courts of the chancery corresponds directly with a time of violence and unrest when no fewer than four kings were murdered by their successors from 1399-1485.[58] As one commentator noted,

> [i]t is in brief the complete breakdown of the system of criminal justice which occasioned the Chancellor's action. Beyond question appears the imperative need in mediaeval England for a great judge who had the prestige and power to suppress the outrages of offenders who were strong enough to put at naught the ordinary processes of law. . . . certainly the petitions [in equity] bear witness to the belief among all classes that in the Chancellor resided a general power to redress all wrongs if for any reason the person injured could not protect himself through the common law."[59]

Why a period of regal weakness led to the rise of the chancellor's jurisdiction is not immediately apparent. Few commentators or current writers mention this parallel.[60] Perhaps the rule of law expressed through the common law courts had no efficacy to the

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[54] MEGARRY & BAKER *supra* note 51 at 8 ("In the Middle Ages the Chancellor's jurisdiction was undefined. His powers were wide by vague, and coextensive only with the necessity that evoked them. He exercised his powers on the ground of conscience.").

[55] Fiona Burns, *The Court of Chancery in the 19th Century: A Paradox of Decline and Expansion*, 21 UNIVERSITY OF QUEENSLAND LAW JOURNAL 198, 201 (2001).

[56] Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 445 (2003).

[57] Willard Barbour, *Some Aspects of Fifteen-Century Chancery*, 31 HARV. L. REV. 834, 840 (1917-1918), *See also* JOHN REEVES 3 HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE SAXONS TO THE END OF THE REIGN OF PHILIP AND MARY 194 (2nd ed. 1787) (citing a statute by Richard II establishing the jurisdiction of the chancery, which "may be considered as a legislative sanction to is establishment . . .")

[58] CHRISTINE CARPENTER, THE WARS OF THE ROSES: POLITICS AND THE CONSTITUTION IN ENGLAND, C. 1437-1509 9 (1997) (Richard II deposed in 1399 by Henry IV); *Id.* at 116 (Henry VI deposed by Edward IV in 1461); *Id.* at 209 (Edward V deposed by Richard III in 1483): *Id.* at 217 (Richard III deposed by Henry VII in 1485); Barbour *supra* note 57 at 849 (noting the rise of petitions to the Chancellor "very common" by the time of Henry V).

[59] Barbour, *supra* note 57 at 840.

[60] J.A. Guy, *The Development of Equitable Jurisdictions, 1450-1550* in LAW, LITIGANTS AND THE LEGAL PROFESSION 81 (E.W. Ives & A.H. Manchester eds., 1983) (discussing M.E. Avery's contention that the rise of the chancellor was for protection of private rights during the Wars of the Roses).

citizens suffering from the wars between the king and his nobles. For whatever reason, however, by the end of the period of disruption, the power of the chancellor to decide cases was firmly established. Cardinal Wolsey, who exercised tremendous power under Henry VIII,[61] used his chancery decisions to further the reach of equity jurisprudence, creating four equity courts to hear additional petitions. Interestingly, this expansion was later used by Parliament against him during his removal.[62] During the reign of James I, a dispute broke out between the proponents of the law and equity.[63] The King, understanding equity to be his power, sided with those promoting equity, and the courts of both have continued to this day, though they now have merged in both England and the United States.[64]

Eventually, even though chancery began with equity jurisdiction that changed with the chancellor, maxims developed, particularly as the chancellor began farming out his work to lower courts.[65] The maxims provided guidance for the judges and developed both the claims and defenses in equity.[66] One of the defenses was laches, which was one way the court of chancery determined the fairness of a claim. Long delays in bringing a claim created a number of harms, including the loss of evidence, the position of the defendant and the perception of unstable law.[67]

The word laches itself stems from the French word, "la lachesse," of similar

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[61] Barbour *supra* note 57 at 858.
[62] JOHN REEVES, 4 HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE SAXONS TO THE END OF THE REIGN OF PHILIP AND MARY, 368-370 (2nd ed. 1787).
[63] GARDINER, *supra* note 52 at 1-37; Main, *supra* note 56 at 439-40 (This is the relatively famous dispute in London between Lord Coke and Lord Bacon).
[64] Main, *supra* note 56 at 446.
[65] REEVES, *supra* note 62; MEGARRY & BAKER *supra* note 51at 9 ("What had begun as an irregular process of petitioning the Crown in extraordinary circumstances had become a regular system of courts with a recognised jurisdiction").
[66] JOHN M. GOODENOW, HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE 83 (1819).
[67] Smith v. Clay, 3 Bro. C. C. 646, 29 E.R. 743, 745 (1767) ("And the public peace requiring an end of suits.").

pronunciation, for "negligence" or "delay."[68] Even before the rise of the courts of the chancery, delay in bringing a claim was something the courts looked to avoid. The doctrine was used as early as 1311 in a property inheritance dispute.[69] A woman brought a claim through her second husband regarding a land issue. The claim itself was old and, in its decision, the court discussed the issue of laches. The plaintiff had to wait until the death of her first husband to bring the claim. Though written in 1311, the court's discussion of laches is recognizable to modern legal scholars, since its definition has changed only slightly since then; the party bringing the claim is accused of a delay which harmed the defendant. The court appeared ready to apply laches if the petitioner had been a man; however, because the petitioner was a woman, it decided laches was not an appropriate remedy. The fact that the petitioner was a woman made the application of laches unfair, because she had to wait until her husband's death to bring the claim. The court was not a court of equity, but still viewed laches as malleable, requiring a balancing of fairness on both sides. This doctrine also gave the court flexibility, as there was no set time to how long of a delay invoked laches.

This flexibility in the doctrine was cited more than 500 years later by another English court: in *Lindsay Petroleum v. Hurd,*[70] Sir Barnes Peacock held that "the doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine."[71] An even earlier English case held that "[m]ere lapse of time does not bar in equity any more than at law: it is an ingredient which, with other circumstances, may lead the [c]ourt to draw

[68] Antoni Vaquer, *Verwirkung Versus Laches: A Tale of Two Legal Transplants*, 21 TUL. EUR. & CIV. L.F. 53, 55 (2006).
[69] Gascelyn v. Rivere, 4 Edward II (1311), 9 YEAR BOOK SERIES 50, 52 (1925) (cited in Vaquer, *supra* note 68 at 55).
[70] LR 5 Privy Council 221 (1874).
[71] *Id.* at 239–240.

inferences unfavourable to the claim of a party who has let twenty or nearly twenty years elapse without asserting his right."[72]

As with other equitable defenses, certain maxims developed around the use of laches. There was tension in the old English equity courts over what John Kroger differentiates as traditional equity and modern equity.[73] Traditional equity was enforcing "natural law," having no set rules or precedent.[74] Modern equity, as defined by Blackstone, had rules and precedent and was similar to the common law.[75] In regards to laches, those rules included the definition of laches, delay and injury; the establishment of laches as an equitable defense rather than a legal one; the fact that laches required a balancing of equities, and it did not apply when statutes of limitations existed; the defendant must have clean hands when arguing laches; and most importantly for this article, laches could not be applied to the sovereign.[76]

III. Equity in the United States

Equity jurisprudence survived in the United States after the Revolutionary War and was based entirely on English equity jurisprudence. While is it true "there was no confusing the Supreme Court with a Chancellor who wielded the Crown's delegated prerogative to 'do justice' according to conscience and despite the law,"[77] by 1787 each

[72] Penny v. Allen, 44 E.R. 160, 166; 7 De G M & M. 409, 426 (1855).
[73] John R. Kroger, *Supreme Court Equity, 1789-1835, and the History of American Judging*, 34 HOUS. L. REV. 1425, 1437 (1997-1998).
[74] *Id.* at 1438 (citing HENRY HOME, LORD KAMES: PRINCIPLES OF EQUITY (1760)).
[75] WILLIAM BLACKSTONE, COMMENTARIES at 824 (cited by Kroger, *supra* note 73 at 1438.).
[76] 4 JOHN NORTON POMEROY, POMEROY'S EQUITY JURISPRUDENCE §1446 (4th ed. 1919); 21 C.J. §216 (1920).
[77] Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1254 (2001).

of the thirteen colonies had given their courts the power to hear cases in equity.[78] Article III, section n2 of United States Constitution gave the newly established federal court jurisdiction to hear "all cases in law and equity." Justice Story, as a circuit justice in 1821, found that the equity jurisdiction of the federal courts "does not depend on what is exercised by courts of equity, or courts of law, in the several states; but depends upon what is a proper subject of equitable relief in the courts of equity in England, the great reservoir from which we have extracted our principles of jurisprudence."[79] In addition, *Story's Commentaries on Equity Jurisprudence* asserts that an 1877 judiciary statute "would seem . . . there could be no doubt that the legislature intended to confer upon the court jurisdiction as developed in equity in England at that time."[80] Indeed, early jurists believed the "and" in the clause of the Law and Equity portion of the Constitution required separate rules and separate causes of action.[81] In addition, the Federal Rules of Equity, first adopted by the Court in 1822, stated whenever existing rules in the United States did not apply to a case in equity, "the practice of the Circuit Courts shall be regulated by the practice of the High Court of Chancery in England."[82] This rule was modified twenty years later to state that the practice of the High Court of Chancery in England may be used "not as positive rules, but as furnishing just analogies to regulate the practice."[83]

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[78] Kroger, *supra* note 73 at 1438.
[79] Bean v. Smith, 2 Mason 252, 2 F.Cas. 1143, 1150 (Story, Circuit Justice, C.C. R.I. 1821).
[80] MELVILLE M. BIGELOW, 1 JOSEPH STORY COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 28 (13th ed. 1886) (referring to Pub. Stats. Ch. 151 §4); See also Main, *supra* note 56 at 450.
[81] JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 2 (1913).
[82] Rule 33, Federal Rules of Equity (1822) *reprinted in* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES, (8th ed. 1933).
[83] Rule 90, Federal Rules of Equity (1842) *reprinted in* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES, (8th ed. 1933).
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While the United States did not have a separate court system to hear cases in equity, the Federal Rules of Equity governed all federal equity cases until 1938, when they were merged with the with the Federal Rules of Civil Procedure.[84] However, the Supreme Court in 1893 stressed equity's service to the law, holding in *Hedges v. Dixon County*[85] that:

> [c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction or the contract is declared void because not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof.[86]

A. Laches and the Supreme Court

As pointed out in 1998, there are few historical discussions of Supreme Court equity jurisprudence.[87] Kroger argues there were two models for equity jurisdiction, one highly discretionary, and the other more formal and constrained.[88] This plays out in these early laches cases as a "lack of interest" in precedent. Kroger argues that between 1789 and 1801, the Court cited to only two cases in their seventeen equity opinions.[89] However, with the advent of Marshall's court, highly influenced by Blackstone,[90] the Court began using a more modern, familiar decision style, dispensing with seriatum opinions for the most part. A result of this change was the Court's refusal to use laches,

[84] *See* Main, *supra* note 56 (For a discussion of the merger of law and equity, and the role the Rules of Equity played in developing the Rules of Civil Procedure.).
[85] Hedges v. Dixon County, 150 U.S. 182 (1893).
[86] *Id.* at 192.
[87] Kroger, *supra* note 73 at 1427.
[88] *Id.* at 1439.
[89] *Id.* at 1440.
[90] *Id.* at 1447.

because of its elastic tendencies.[91] Again, later in time, the Court's philosophy switches, evoking a description by Kroger of the later Marshall Court's equity jurisdiction as "unprincipled discretion" and a definition of which would be familiar to those reading *City of Sherrill*, "the approach is unprincipled because the Court never admits that its equitable justice is, in every case, discretionary. Instead, the Court claims that its reasoning is formal, outcome-neutral, and precedent-bound when that approach serves its own purpose, but invokes discretionary powers when it wishes to intervene to protect powerful or highly valued interests."[92]

While the Supreme Court has developed precedent around the equitable defense of laches and decided a highly cited case on the defense as recently as 1961,[93] the *Sherrill* Court cited to far older cases in its discussion. These cases lead back to their precedent: the older, English cases. The 1843 case cited in *City of Sherrill* was *Bowman v. Wathen.*[94] The case concerned the competing claims of a ferry permit, one of many cases concerning the development of new cities, territories and states as each entity purported to pass valid title to different devisees. The defendants considered their title to be settled for at least thirty-eight years, and while the court acknowledged the defendants likely maintained their ferry for profit, the "undertaking highly promotive of public advantage."[95] This is illuminating because of the Court's adoption of weighing public rights and interests against the implementation of laches. In the Court's discussion of laches, the Court cites approvingly[96] to *Smith v. Clay*,[97] an English case from 1767,

[91] *Id.* at 1453.
[92] Kroger, *supra* note 73, at 1466.
[93] *Costello*, 365 U.S. 265.
[94] *Wathen*, 42 U.S. 189, 1 How. 189.
[95] *Id.* at 195.
[96] *Id.* at 193 ("They have been imbodied by Lord Camden, with a succinctness, and at the same time with a comprehensiveness, compressing within a few sentences almost a system of equity jurisprudence . . .").

decided by Lord Camden. In that case, Lord Camden discussed a petition to review a decree which was between 30 and 40 years old. While he stated that after twenty years most appeals would be barred, he wrote,

> that a court of equity, which never is active in relief against conscience of public convenience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing can call forth this court into activity but *conscience, good faith, and reasonable diligence*. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court.[98]

Smith v. Clay is a highly influential case on the Supreme Court and English courts looking to define laches. It is one of the first laches cases to cite to its own precedent, *Edwards v. Carroll*[99] and *Fitton v. Lord Macclesfield*.[100] Tracing laches through precedent stops at these cases (1760 and 1684, respectively),[101] the *Lord Macclesfield* case holds that "though there be no limitation of time to the bringing a bill of review; yet after two and twenty years he should not reverse a decree, but upon very apparent and flat errors."[102] In addition, *Smith v. Clay* stands for the proposition that "when the Legislature has fixed the time at law, it would have been preposterous for equity (which, by its own proper authority, always maintained a limitation), to countenance laches beyond the period, that law had been confined to by parliament."[103]

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[97] *Smith*, 3 Bro. C.C. 646; 29 E.R. 743 (1767).
[98] *Id.* at 744 (emphasis added).
[99] Edwards v. Carroll, 2 Bro. P.C. 98 (1760).
[100] Fitton v. Lord Macclesfield, 1 Vern 287, 23 E.R. 474 (1684) (Fitton is transcribed as "Fitter" in *Smith*, 29 E.R. at 744).
[101] *See* Main *supra* note 56 at 448 (*Carroll* was decided around the time the Courts of the Chancery began using precedent to decide cases. Cases after *Carroll* tend to cite precedent, cases before tend not to, at least regarding laches.).
[102] *Lord Macclesfield*, 23 E.R. 474 at 477.
[103] *Smith*, 29 E.R. 743 at 744.

While these historic cases generally find length of time a bar, they still illustrate a way for the plaintiff to argue against the application of laches. For example, in *Wagner v. Baird*,[104] a case cited in *City of Sherrill*, the court does state that length of time "operates by way of presumption in favor of the party in possession."[105] However, it also holds that "long acquiescence and laches . . . cannot be excused but by showing some actual hindrance or impediment cause by the fraud or concealment of the party in possession."[106] In *Badger v. Badger*,[107] the primary case cited by the *Sherrill* Court for the proposition that equity courts refuse old cases "for the peace of society,"[108] also states that "the numerous cases in the books as to dismissing a chancery bill because of staleness, would seem to be contradictory if the dicta of the chancellors are not modified by applying them to the peculiar facts of the case under consideration."[109]

U.S. v. Costello,[110] the Supreme Court case from 1961, is a highly cited case for the definition of laches. When the Supreme Court decided *U.S. v. Costello*, it cited multiple cases to come up with its two step definition of laches.[111] Cases included *Galliher v. Cadwell*,[112] which states "[t]hey [multiple past cases] all proceed upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced,-an inequity founded upon some change in the condition or relations of the property or the parties."[113] The *Costello* Court

[104] Baird, 48 U.S. 234, 7 How. 234.
[105] *Id*. at 258.
[106] *Id.*
[107] *Badger*, 69 U.S. 87, 2 Wall. 87.
[108] *City of Sherrill,* 544 U.S. at 218.
[109] *Badger,* 69 U.S. at 92.
[110] *Costello*, 365 U.S. 265 (1961).
[111] *Id.* at 281 ("Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.").
[112] Galliher v. Caldwell, 145 U.S. 368 (1892).
[113] *Id.* at 373.

also cited *Southern Pacific Co. v. Bogert*,[114] which states "[n]or does failure, long continued, to discover the appropriate remedy, though well known, establish laches where there has been due diligence, and, as the lower courts have here found, the defendant was not prejudiced by the delay."[115] Finally, the Court cited to *Gardner v. Panama*,[116] which discussed laches as an elastic defense,

> Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations. The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief.[117]

Most recently, *U.S. v. Costello*'s laches definition was quoted by the Supreme Court in 2002.[118] While the Court was not reaching a finding on laches, it was trying to illustrate some defenses an employer might use against a Title VII suit. Even with all of this precedent and historical background, the Court in *City of Sherrill* still did not use these cases, and in failing to do so created a new defense for states and cities against Indian land and treaty claims.

B. New Laches: Acquiescence and Impossibility in *City of Sherrill*

New laches is the merging of acquiescence, impossibility and the delay prong of laches. Acquiescence and impossibility were both used by the *City of Sherrill* Court. Acquiescence, like laches, is based in history and precedent, and was also an equitable defense. Acquiescence is at times confused with laches, but commentators insist there is

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[114] S. Pac. Co. v. Bogert, 250 U.S. 483 (1921).
[115] *Id.* at 498.
[116] Gardner v. Panama, 342 U.S. 29 (1951).
[117] *Id.* at 30-31.
[118] *Nat'l R.R. Passenger Corp.*, 536 U.S. at 122.

a distinct difference between them.[119] Acquiescence requires knowledge by the plaintiff at the time of the wrong and requires the plaintiff to actively assent to the performance. An English case from 1861 held "acquiescence . . . imports knowledge, for I do not see how a man can be said to have acquiesced in what he did not know . . ."[120] In addition, the case of *DeBussche v. Alt* holds that acquiescence cannot happen after the injury has occurred because "*mere submission* to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right [to sue]."[121]

While acquiescence has been used in other legal settings, most Supreme Court jurisprudence in the area is in the area of in state boundary disputes, and indeed, these are the cases the Court cites in *Sherrill*.[122] In most these cases, years go by while one state exercises sovereignty over a piece of land. Eventually, a second state challenges that exercise, and the Supreme Court exercises its limited original jurisdiction. In one of the earliest of these cases, Indiana and Kentucky fought over the ownership of the Green River Island.[123] The Court held that for 70 years, Indiana "never exercised, or attempted to exercise, a single right of sovereignty or ownership over its soil,"[124] and that Indiana's "acquiescence in the assertion of authority by the state of Kentucky, such omission to take any steps to assert her present claim by the state of Indiana, can only be regarded as

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[119] POMEROY, *supra* note 76 §1440 at 3410 ("The subject is further complicated by a hopeless confusion in nomenclature. The term 'acquiescence,' in one of its two legal significations, is often used interchangeably with the term 'laches.'").
[120] Life of Scotland v. Siddal, 3 De G.F. & J. 58; 45 E.R. 800, 806 (1861).
[121] DeBussche v. Alt, L. R. 8 Ch. Div. 286, 314 (1878) (emphasis in original) (cited in POMEROY *supra* note 76 §965 at n.1).
[122] *City of Sherrill*, 544 U.S. at 218 (citing Ohio v. Kentucky, 410 U.S. 641 (1973); Michigan v. Wisconsin 270 U.S. 295 (1926); Massachusetts v. New York, 271 U.S. 65 (1926) and California v. Nevada, 477 U.S. 125 (1980)).
[123] Indiana v. Kentucky, 136 U.S. 478 (1890).
[124] *Id.*at 510.

a recognition of the right of Kentucky too plain to be overcome except by the clearest and most unquestioned proof."[125] This language has been quoted approvingly by the Court in 1926[126] and in 1973, two of the acquiescence cases the *Sherrill* Court cites.[127]

However, as an illustration of a traditional difference between acquiescence and laches, the Court will generally not apply laches to land claims between states, even when the claim is old. Because of the confusion between laches and acquiescence, this is a small distinction, but nonetheless, claims between states are not summarily barred based on the length of time since the start of the claim. One illustrative case demonstrates this distinction. In a dispute between Rhode Island and Massachusetts,[128] all that was required of Rhode Island to avoid a summary judgment based on laches was to "aver . . . she never acquiesced in the boundary claimed by the defendant, but has continually resisted it, since she discovered the mistake; and that she has been prevented from prosecuting her claim, at an earlier day, by the circumstance mentioned in her bill."[129] Massachusetts agreed that Rhode Island "never acquiesced, and has, from time to time, made efforts to regain the territory, by negotiations with Massachusetts, and was prevented . . . from appealing to the proper tribunal to grant her redress."[130] This boundary claim dispute, which one lawyer claimed was about "territory [that] is densely inhabited, and under a high state of improvement . . . . occupied by seven thousand people, all of whom, as did their ancestors to remotest time, deem themselves to be citizens, and most of the native citizens of Massachusetts; and that there is upon it not

[125] *Id.*
[126] *Michigan*, 270 U.S. 295.
[127] *Ohio*, 410 U.S. 641.
[128] Rhode Island v. Massachusetts, 40 U.S. 233 (1841).
[129] *Id.* at 272.
[130] *Id.*

less than a million dollars of taxable property,"[131] was more than 100 years old. Laches did not bar the claim because "here two political communities are concerned, who cannot act with the same promptness as individuals."[132]

Both laches and acquiescence in *City of Sherrill* have historical underpinnings, but the Court's use of "impossibility," does not comport with any historical understanding of that remedy. Impossibility, as an equitable doctrine, was only used in contract cases where it would be "impossible" for one party to perform on the contract. The famous case in this area is *Taylor v. Caldwell*, [133] which involved the destruction of a music hall before the contracted performances could be held. The court held that "[t]he principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[134] While *Taylor v. Caldwell* is the most famous of impossibility cases, one commentator has found English cases from as early as 1536 which allow impossibility as an excuse for performance.[135] However, impossibility as a remedy does not exist outside of contracts (and a narrow area of criminal law) except as the Supreme Court used it in *City of Sherrill*. Impossibility in the *City of Sherrill* means any exercise of tribal sovereignty which might have "disruptive practical consequences" is unconstitutional. This is not the understanding of impossibility in any other legal

[131] *Id.*at 236.
[132] *Id.*at 273.
[133] Taylor v. Caldwell, 122 E.R. 309 (1863).
[134] *Id*. at 314.
[135] James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 53 AM. J. COMP. L. 513, 521 (2004).

circumstance. The Court's basis of it on *Yankton Sioux v. United States*[136] is problematic, since *Yankton Sioux* did not stand for that proposition.

The *Yankton Sioux* Court used impossibility to interpret a contract, and the Court's use of it in *Sherrill* is based on *dicta* in *Yankton Sioux*. The Supreme Court heard the *Yankton Sioux* case as it was appealed through the Court of Claims.[137] In a treaty from 1858, the Yankton Band of Santee Sioux reserved 400,000 acres of land known as the red pipestone quarries.[138] Later the Congress unilaterally and bilaterally attempted to take the land from the tribe. The Supreme Court was asked to determine whether the red pipestone quarries had been wrongly taken by the United States, and if so, what just compensation the tribe deserved.

The federal government, basing its argument on an 1894 agreement with the tribe it claimed was void, argued the federal government owed the land and did not owe just compensation. The Supreme Court, however, interpreted the provision otherwise. The provision of the 1894 agreement stated if Congress questioned the ownership of the Pipestone reservation, the Secretary of the Interior was to refer the question to the Supreme Court within one year.[139] If the matter was not referred within the year, the land would automatically become the tribe's "in fee."[140] Since referring the matter to the Supreme Court would be an illegal expansion of the Court's original jurisprudence, the federal government claimed the clause was impossible, and therefore the entire agreement void.[141]

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[136] Yankton Sioux v. United States, 272 U.S. 351 (1926).
[137] *Id.* at 352.
[138] *Id.* at 353
[139] *Id.* at 355.
[140] *Id.*
[141] It is not clear from the record why the federal government did not argue the agreement was unconstitutional. According to the Court, the Secretary of the Interior "conclude[ed] that the provision for

Congress eventually authorized the Court of Claims to hear the case, because while the land was reserved to the tribe in an 1858 treaty, it had been opened up for settlement through a series of unilateral Congressional acts.[142] The federal government argued the tribe did not own the land in fee because the 1891 agreement was void. The Court found, however, that the second portion of the clause, which passed fee to the tribe if the government did not act, was an alternative option which was not impossible.[143] Therefore, finding the agreement void because of the impossible term would be "most inequitable and utterly indefensible on any moral ground."[144] The tribe held the land in fee, but it was agreed that the federal government was in possession. The Court awarded "just compensation" to the tribe for the taking by the government.[145]

Yankton Sioux is now cited for the proposition that if there are two alternative manners of performing on a contract, and one is impossible, the contract is not rendered void if the alternate manner is available. Various federal courts have cited this case for this proposition and go so far as to state that the case "is one of the best examples of the application of this doctrine."[146] The only time the Court in *Yankton Sioux* specifically discusses equity is regarding the federal government's attempt to claim the entire agreement void because of the impossibility of performance. In dicta, the Court did state that returning land to the Indians which has already been sold to "innocent" purchasers

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referring the matter to this court was beyond the constitutional power of Congress." *Yankton Sioux*, 272 U.S. at 355.
[142] *Id.* at 354-6.
[143] *Id*. at 357-8.
[144] *Id.* at 357.
[145] *Id*. at 359.
[146] Ashland Oil & Ref. Co. v. Cities Service Gas Co., 462 F.2d 204, 212 n.5 (10th Cir. 1972).

would be "impossible."[147] The ultimate holding of the case, however, was that the United States took the land, and the tribe was due just compensation for the taking.

Yankton Sioux did not create a new impossibility defense for Indian land claims. Rather, it expressed a new wrinkle to the contracts impossibility defense. The *Sherrill* Court, however, cites it for the stance that the "Court has recognized the impracticablility of returning to Indian control land that generations earlier passed into numerous private hands."[148]

The *City of Sherrill* Court used pieces of acquiescence, impossibility and laches to create the new laches defense. For example, *Sherrill* Court pulled from acquiescence was a reinforcement that simple length of time can bar a claim. Specifically, that "long-standing observances and settled expectations are prime considerations,"[149] in a land claim. The Court even goes so far to state that "the acquiescence doctrine does not depend on the original validity of a boundary line; rather, it attaches legal consequences to acquiescence in the observance of the boundary,"[150] which divides the taking of land in violation of federal law from the consequences of that taking. This reasoning helps lift any need to evaluate past inequities in the face of the current situation, focusing court opinions back on disruption of current land owners rather than a more traditional weighing of equities.

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[147] *Yankton Sioux*, 272 U.S. at 357 ("It is impossible, however, to rescind the cession and restore the Indians to their former rights, because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers, and nothing remains but to sanction a great injustice or enforce the alternative agreement of the United States in respect of the ownership of the Indians.").
[148] *City of Sherrill*, 544 U.S. at 219. Of course, in *Yankton Sioux* the land had only been in "private hands" for 26 years, hardly "generations."
[149] *City of Sherrill*, 544 U.S. . at 218.
[150] *Id.*

The Court's discussion of impossibility also fits as part of the larger creation of the defense of new laches. Impossibility goes also to the delay and disruption definition, specifically, disruption, of new laches. The language used in the *Shinnecock Indian Nation v. New York*[151] demonstrated the courts understanding that the defense used in these cases is new, and not closely related to traditional laches. For example, the judge in *Shinnecock* states that the *Cayuga* case "unveiled" three principles relating to laches and Indian land claims. They are that equitable defenses apply to disruptive claims, that equitable defenses apply at law and equity, and that equitable defenses can apply at the pleadings stage.[152] These principles were "unveiled" because there is no precedent for them in any other case. Interestingly, the judge in *Shinnecock* also pointed out that the facts in *City of Sherrill* caused the Supreme Court to "initiate" the impossibility doctrine.[153] While the court in this case held against the tribe, the judge's language reveals an understanding of this defense as fundamentally different from precedent. The revealing of "new" doctrines and understanding of the law was done specifically to find against Indian land claims and not used in any other area of law. By doing this, the courts undermine the rule of law, since this defense has no basis in precedent and was created for one purpose—to defeat tribal claims.[154]

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[151] Shinnecock Indian Nation v. New York, 2006 WL 3501099.
[152] *Id.* at *4.
[153] *Id.* at *5.
[154] *Cayuga*, 413 Fed.3d at 276 ("One of the few incontestable propositions about this unusually complex and confusing area of law is that doctrines and categorizations applicable in other areas do not neatly translate neatly to these claims . . .[i]n light of the unusual considerations at play in this area of the law, and our agreement that ordinary common law principles are indeed 'not readily transferable to this action,' we see no reason why the equitable principles identified by the Supreme Court in *Sberril* [sic] should not apply to this case, whether or not it could be technically classified as an action at law . . .[p]laintiffs urge us to conclude that, as a legal remedy, ejectment is not subject to equitable defenses, relying, *inter alia*, on the Supreme Court's statement in *Oneida II* that 'application of the equitable defense of laches in an action at law would be novel indeed.'"(citations omitted)).

However, it may be possible to find some distinct rules regarding new laches, primarily as they are in opposition to maxims surrounding traditional laches. Traditional laches was about delay and injury, new laches is about delay and disruption. Traditional laches was an equitable defense, new laches in both a legal and equitable defense. Traditional laches requires an evaluation of the facts and "equities" of the case, new laches can apply at the pleadings stage. Traditional laches was generally not applied if a statute of limitations already was in place, new laches can (and will) apply within a statute of limitations. Traditional laches usually required clean hands, new laches does not. Traditional laches does not usually apply to a sovereign, new laches has applied to sovereigns, though this question is open at the Supreme Court level, and has only been discussed in one case. All of these distinctions demonstrate why countering a traditional laches argument has not worked for tribes.

C. New Laches as Precedent in the Lower Federal Courts

Understanding that the laches used in *City of Sherrill* and its progeny is related to traditional laches in name only is key to facing this defense in federal courts. Arguments relating to traditional laches have repeatedly failed in the Second Circuit, and given that precedent, it would seem unlikely they will prevail elsewhere. This new laches is a combination of the Court's discussion of impossibility, acquiescence, and laches. Impossibility and acquiescence have their own difficult history, and later cases have combined them into one discussion of laches. These discussions in various opinions, almost all in the Second Circuit, lay out some major distinctions between laches and new laches.

1. Definitional change: delay and injury v. delay and disruption

There are many differences between new laches and traditional laches, but the most important is the difference in their basic definition. As discussed, traditional laches had two requirements: delay and injury or prejudice. New laches also has two requirements, but they are delay and disruption. Articles, testimony and briefs have demonstrated that tribes did not delay in bringing their claim, that tribes were prevented by being heard in the courts and that in working to bring their claim, the defendants were aware of these claims.[155] As discussed earlier, the *Rhode Island* case demonstrates the proposition that when a party cannot avail itself of a court, laches should not apply to a delay.[156] One author also notes that "defendants may not assert laches against a plaintiff whose delay is justified, even if the defendant is prejudiced by the delay."[157] Either of these statements would apply to most Indian land claims.

However, rather than focusing on the equities of delay, the courts are instead focusing on the disruption to the current land owners. By the time the Second Circuit interpreted new laches in *Cayuga*, the land claims themselves are inherently "disruptive,"[158] which requires nothing of the defendant. Prejudice, on the other hand, requires a showing by the defendant of a change in circumstances such that the defendant is injured by the plaintiff in bringing the claim late. While it can hardly be argued that the circumstances surrounding the land accounted for in most of the New York claims has not changed, there are multiple reasons why this is a specious argument. First, in *Sherrill*, the land in question, again, was held by the Nation. The defendants were not

[155] *See eg*. Plaintiff's Mem. in Opposition to Defendants' Motions to Dismiss at 16-21, Onondaga Nation v. New York, No. 05-cv-00314 (N.D.N.Y., Nov. 16, 2006), *and* Singer, *Nine-Tenths of the Law*, *supra* note 4.
[156] *Rhode Island*, 40 U.S. at 238, 272.
[157] Joseph Mack, *Nullum Tempus: Governmental Immunity to Statues of Limitation, Laches and Statutes of Repose*, 73 DEF. COUNS. J. 180, 183 (2006).
[158] *Cayuga*, 413 F.3d at 277 ("'[D]isruptive,' forward-looking claims . . . are subject to equitable defenses, including laches.").

forced to argue what prejudice it would suffer by the exercise of tribal sovereignty. Second, in *Cayuga*, the claim was for monetary damages, which would not be prejudicial to other land owners as it does not affect their ownership or title to the land. Finally, as one commentator writes, laches "exacts of the plaintiff no more than fair dealing with his adversary."[159] The prejudice behind laches implies a plaintiff holding on to his claim until the defendant will certainly be injured by bringing the claim itself.

Disruption, on the other hand, requires none of these things. Simply the bringing of the claim is disruptive.[160] The defendant is not required to show how the claim will be prejudicial. The claim does not even have to touch the title of the landowners. Disruption, in other words, is a lower standard than prejudice.

Disruption also takes part of its definition under new laches from impossibility, because in the Court's circular reasoning, any disruption of current landowners would be impossible and thus disruptive.[161] Disruption evokes images of innocent parties subject to forces beyond their control, forced off their land or otherwise "disrupting" their lifestyle.[162] It implies the exercise of tribal sovereignty is inherently disruptive rather than orderly.[163] A fear of disruption weighs heavily in the courts, and the disruption of the current land owners has so far weighed more heavily than the inequities toward tribes,

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[159] POMEROY *supra* note 76 at §1443 at 3423.

[160] *Cayuga*, 413 F.3d at 277 ("[T]he import of *Sherrill* is that 'disruptive,' forward looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches.").

[161] *City of Sherrill*, 544 U.S. at 219 ("The unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led this Court in *Yankton Sioux* to initiate the impossibility doctrine.").

[162] *Cayuga*, 413 F.3d at 275 ("Under the *Sherrill* formulation, this type of possessory land claim—seeking possession of a large swath of central New York State and the ejectment of tens of thousands of landowners—is indisputably disruptive. Indeed, this disruptiveness is inherent in the claim itself—which asks this Court to overturn years of settled land ownership . . .").

[163] *City of Sherrill*, 544 U.S. at 220 ("If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area."); *Village of Union Springs*, 390 F.Supp.2d at 206 ("If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive.").

as shown by the almost universal losses by tribes when faced with new laches. Even demonstrating the tribe did not actually delay in bringing the claim has so far been futile against the court's perception of potential disruption in allowing the claim to proceed.[164] This also means the disruption prong of new laches is more important than the delay prong, dooming tribes that only argue against the delay aspect of new laches.

2. Theoretical Change: equitable defense v. legal defense

Traditional laches was used in equitable cases. As discussed above, laches originated in the courts of the chancellor and of equity and was imported to U.S. courts through the Constitutional clause allowing the Supreme Court to hear cases in both "law and equity."[165] It is true that the difference between the two types of cases has blurred significantly. The U.S. courts never had separate equity and law courts, though there were separate rules of procedure for both until 1934.[166] When the two courts merged, however, there were still specific differences between claims brought in equity and claims brought in law. Applicable to this discussion is the general rule that equitable defenses can only be used against claims for equitable remedies.[167] As the Supreme Court stated in Oneida II, "application of the equitable defense of laches in an action at law would be novel indeed."[168]

In merging equitable and legal defenses, or "abolishing the law-equity distinction," one writer noted, "may increase the risk that courts would treat [equitable]

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[165] U.S. CONST. art. III, §2.
[166] Main, *supra* note 56 at 469.
[167] Shelby D. Green, *Specific Relief for Ancient Deprivations of Property*, 36 AKRON L. REV. 245, 280-1 (2003).
[168] *County of Oneida*, 470 U.S. at 277 n. 16.

defenses as all-or-nothing propositions."[169] Since using equity and equitable defenses still allowed the plaintiff to bring a claim at law, barring the claim using an equitable defense was often not the end of the case.[170] However, since new laches applies to legal claims as well as equitable ones, applying what was a traditionally equitable defense to a legal claim, new laches becomes an all-or-nothing proposition, barring Indian land claims at the first whiff of disruption.

In *City of Sherrill*, Oneida Indian Nation specifically did not request an equitable relief. In their brief, the Nation wrote, "[i]n *Oneida II*, the Court left open whether "equitable considerations" might limit ejectment as a remedy with respect to land that is not in the Oneidas' possession. The issue here is not remedy for dispossession, but protection of actual possession accompanied by an unextinguished federally protected possessory right."[171] However, the *Sherrill* Court characterized the claim as Nation seeking "equitable relief prohibiting, currently and in the future, the imposition of property taxes."[172] By framing the case in this way, the Court was able to introduce equitable defenses into a legal claim.

Reframing the tribe's claim was not limited to the *Sherrill* decision. Other cases in the Second Circuit have been reframed from a legal to an equitable claim, even if the tribe expressly stated the claim was not equitable. In doing this, the courts can then apply "laches" rather than focusing on the legal discussion. In *Cayuga*, the original claim for ejectment was also a *legal* remedy.[173]

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[169] Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201, 1238 (1990).
[170] *Id*. at 1237.
[171] Brief of Respondent at *19 (citations omitted), *City of Sherrill*, 544 U.S. 197.
[172] *City of Sherrill*, 544 U.S. at 212.
[173] *Cayuga*, 413 F.3d 266 at 275 (In finding laches did apply to a legal claim the *Cayuga* court used the "complexity" of federal Indian law against the tribe, stating that "in light of the unusual considerations at play in this area of the law and our agreement that ordinary common law principles are indeed 'not readily

3. Application Change: evaluating the equities v. summary judgment

Perhaps the most distressing aspect of new laches is the dispatch at which the court is willing to use it. Traditional laches required a balancing of equities. As has been quoted previously, laches was not simply the passage of time. For example, in 1857, an English court held "[m]ere lapse of time does not bar in equity any more than at law: it is an ingredient which, with other circumstances, may lead the Court to draw inferences unfavourable to the claim of a party who has let twenty or nearly twenty years elapse without asserting his right."[174] Traditional laches was an elastic defense, which required some work on the part of the defendant to demonstrate why the shield of laches should apply to him.

As noted above, in a boundary dispute between Rhode Island and Massachusetts, Rhode Island avoided summary judgment based on laches only because the state did not acquies to the boundary. The avoidance of dismissal was primarily based on the fact that laches cannot be weighed on the pleadings.[175] No plaintiff, particularly one specifically not arguing an equitable claim, would argue against laches. That would require the plaintiff to anticipate the defendant's laches defense, essentially forcing the plaintiff to plea the defendant's unclean hands. Since traditional laches required a balancing of the equities and was deployed as a defense to a claim for equitable remedy, dismissing a claim at the 12(b)(6) stage simply ignores the basic requirements of laches. In doing this,

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transferable to this action,' we see no reason why the equitable principles identified by the Supreme Court in *Sberrill* [sic] should not apply to this case, whether or not it could be technically classified as an action at law.").

[174] *Penny*, 7 De G M & M. 409; 44. E.R. 160, 166 (1857).

[175] *See also* United States v. Dalles Military Road Co., 140 U.S. 599, 631 (1891).

the courts are using new laches, which can be dispatched at the earliest opportunity, since any forward movement on the case would bring "disruption" to the defendants.[176]

4. Procedural Change: statute of limitations v. discretionary limits

Historically, laches was obedient to statues of limitations. That is, if a statute of limitations exists, laches must follow that time frame. In a case written by Lord Redesdale, both highly cited and citing to *Smith v. Clay*[177] he wrote "I think it is a mistake in point of language to say that Courts of Equity act merely *by analogy* to the statutes; they act in *obedience* to them."[178] He goes on to write

> I think, therefore, courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity; for when the legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore, it must be taken to have virtually enacted in the same cases a limitation for courts of equity also.[179]

In the absence of a statue of limitations, courts of equity looked to analogous statutes, and then weighed the equities.[180] However, without a statue of limitations, mere length of time was not enough to invoke the laches defense. As one U.S. commenter

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[176] Plaintiff's Mem. of Law in Opposition to Defendants' Motions to Dismiss at 3, Onondaga Nation v. State of New York, No. 05-CV-314 (N.D.N.Y. Nov. 16, 2006) ("Fed. R. Civ. P. Rule 8(c) requires that affirmative defenses, such as laches, 'must be set forth affirmatively.' Further, Rule 12 requires that such affirmative defenses be raised in a pleading, not in a Rule 12 (b) motion. Thus, the equitable defenses of laches, acquiescence and impossibility are not appropriate subjects for a Rule 12(b)(6) motion to dismiss, because they are fact-based, affirmative defenses that raise matters outside the complaint.")

[177] Hovenden v. Annesley, 2 Sch. & Lef. 607, 629 (1806) (emphasis in original). *See also*, Thomas G. Robinson, *Laches in Federal Substantive Law: Relation to Statute of Limitations* 56 B.U. L. REV. 970, 973-4 (1976) (claiming that "federally developed laches doctrine applies only to those claims based upon a federal equitable or maritime rights for which Congress has *neglected* to establish a limitations period" (emphasis added)).

[178] *Hovenden.* at 629.

[179] *Id.* at 630.

[180] Hedges v. Dixon County, 150 U.S. 182, 192 (1893); *see also* Heriot, *supra* note 44, at 953.

wrote, "a thousand years in the sight of the Chancellor are but as yesterday."[181] If the claim is a legal one and there is still no statute of limitations, laches will not apply since the claim is legal, not equitable.[182]

However, the courts have applied laches to legal Indian land claims, which are supposed to be governed by an applicable statute of limitations. The Indian Claims Limitation Act specifically states that no time bar will govern in cases "for bringing an action to establish the title to, or the right of possession of, real or personal property."[183] As in other areas of Indian land claims, the courts apply new laches while ignoring both Congressional intent and the rules surrounding laches.

5. Doctrinal Change: Clean Hands v. Illegal Actions

A basic maxim in all of equitable jurisprudence, not just laches, is "he who comes into equity must come with clean hands."[184] Unclean hands is an equitable defense, generally used against the plaintiff. However, as one author writes, "the point . . . is not that the plaintiff's unclean hands furnish a 'defense' to the defendant, but rather that the court itself wishes to avoid participating in inequity."[185] Unclean hands often refers to illegality or fraud associated with the claim the plaintiff brings, specifically if the plaintiff is "seeking to secure a benefit 'from the very conduct' which is inequitable."[186] While in current tribal land claims, the tribes are often the plaintiffs, so that the plaintiff's would be put in the position of arguing the defense of unclean hands of the defendant.

[181] Pepper, *supra* note 2 at 331.
[182] Green, *supra* note 167at 282-283.
[183] 28 U.S.C.§2415(c).
[184] 21 C.J. §163 at 180.
[185] DOBBS, *supra* note 33 at 92-93.
[186] *Id.* at 95.

However, it has been amply illustrated here that the traditional rules regarding equitable defenses and remedies have shifted dramatically. Both the *Sherrill* Court and the *Cayuga* Court claim to be to be evaluating these claims under "equitable considerations."[187] Certainly the state defendants in these cases are looking to benefit from illegal and fraudulent activity. The land in question in the New York cases was all taken in violation of federal law, and usually under questionable circumstances.[188] For the state to benefit from an *equitable* defense given its illegal and certainly inequitable dealings with the tribes is "novel indeed."[189]

However, courts using the new laches defense so far seem not to consider the state's actions regarding the land claims. Again, simple delay, whether justified or not, and disruption weigh more heavily than other equities. This separation of equity from equitable defenses allows the courts to rule in favor of the non-tribal defendants regardless of their actions.

In new laches, the defendant's illegal actions do not weigh in the balancing of equities. While no court has discussed clean hands in the context of these claims, the state comes to these cases with unclean hands. Tribes continue to brief this in their memorandums of law,[190] but thus far the courts have not considered them under new laches. Even in cases where the judge acknowledges the state's action and culpability, the court still applies new laches regardless of the wrong. Oddly, in most cases an action in violation of law, including the wrongful taking of land, does not become legal simply

[187] *City of Sherrill*, 544 U.S. 197 at 213.
[188] *See* Krakoff, *supra* note 20 at 13-14 *and* Singer, *supra* note 4 at 612-614.
[189] *County of Oneida*, 470 U.S. 226 n. 16.
[190] Plaintiff's Mem. of Law in Opposition to Defendants' Motions to Dismiss at 17, Onondaga Nation v. State of New York, No. 05-cv-00314 (N.D.N.Y. Nov. 16, 2006).

by the passage of time.[191] However, under new laches, the courts are only concerned about the current disruption to current landowners. An honest evaluation of past actions by the tribes and past actions by the state are not part of the opinion. This is fundamentally different from traditional laches, where the past weighs heavily on the determination of the claim.

D. Sovereign Immunity from Laches

The rest of this Part discusses the maxim of sovereign immunity from laches. Because this is one area where new laches is not fully settled, it is an area for tribes to focus on when faced with the defense. Sovereign immunity from laches an area where the law is relatively clear in traditional laches, and unclear in new laches. The *Sherrill* Court did not consider the issue, and the *Cayuga* Court discussed its application only as to the United States. Tribes should still be arguing that they are immune from laches, even after the *Cayuga* opinion. Tribal sovereign immunity is still a viable defense in federal courts, particularly if the case is tied to the tribe's inherent sovereignty.[192] Given the similar roots between sovereign immunity from suit and sovereign immunity from

[191] *See, e.g.,* Causey v. United States, 240 U.S. 399, 402 (1916) ("And when a suit is brought to annul a [land] patent obtained in violation of these restrictions [on disposal of public lands] the purpose is not merely to regain the title, but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor suing to annul a sale fraudulently induced must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrong doer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded.").

[192] Kiowa Tribe v. Mfg. Techns., Inc., 523 U.S. 751 (1998); *but see* C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411 (2001) (where the Court found the tribe waived sovereign immunity) *and* TTEA v. Ysleta del Sur Pueblo, 181 F.3d 676 (5th Cir. 1999) (allowing a case to be brought against a tribe for injunctive relief, but holding on other grounds the tribal court retained jurisdiction over the case).

laches,[193] an argument drawing this parallel for tribal sovereign immunity from suit and from laches may be one way to counter new laches. As discussed below, sovereign immunity from laches is discussed in the *Cayuga* opinion, but is tenuously based on inapplicable court opinions.

1. The Original Understanding of Sovereign Immunity from Equitable Defenses.

Our legal notions of sovereignty, embodied in certain legal defenses such as sovereign immunity and immunity from laches, originates in the western, English, understanding of the king and the law. Bracton referred to the king as "*vicarious Dei in terris*."[194] This understanding of the king led to certain doctrines which protected the role of the king as God's servant, and protector of his subjects.[195] Specifically relating to laches, the concept of *nullum tempus occurrit regi*, or that no time runs against the king prevented the defense of laches from applying to the king.[196] Since the king was the sovereign of the country and representative of his people, doing the people's business could not interfere with timely court claims.[197] The king could do no wrong, and he was assumed to be permanently occupied with the people's business,[198] thus allowing the king to be subject to laches would be a direct contradiction of this legal understanding of sovereignty. Much like sovereign immunity, which protected the king from lawsuits,

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[193] United States v. Thompson, 98 U.S. 486, 490 (1878) ("The exemption of the United States from suits, except as they themselves may provide, rests upon the same foundation as the rule of nullum tempus with respect to them.").

[194] Fritz Schultz, *Bracton on Kingship*, 60 THE ENGLISH HISTORICAL REVIEW 136 at 149 (May, 1945).

[195] CARPENTER *supra* note 58 at 28 ("At first, since they had themselves given the law to their subjects, to regulate the subjects' dealings with one another, kings saw no reason themselves to feel constrained by their law. . . . However [post-Magna Charta], paradoxically, kings were set above all other forms of authority, answerable only to God; even if they broke or disregarded the law there was no legitimate way of bringing them to account.").

[196] 1 WILLIAM BLACKSTONE, COMMENTARIES *240 ("In farther pursuance of this principle, the law also determines that in the king can be no negligence, or laches, and therefore no delay will bar his right.").

[197] *Id.*

[198] *Id* at 238 ("Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection. The king can do no wrong.").

protection from laches originated ultimately from the understanding that any jurisdiction over the king would lessen his power. "His supreme sovereignty makes him immediate under God; . . . It makes all lands to be holden of him, every surrender unto him to be good, no action to lie against him, for who shall command the king?"[199]

Immunity from laches has also been linked to the understanding of sovereign immunity as far back as 1716, and likely before.[200] Since all justice flowed from the king, and the king was the source of all law, equitable defenses such as laches, and later acquiescence, could not be then used against the king. The sovereign was immune from the defense of laches, and this understanding carried over in Supreme Court decisions such as *United States v. Kirkpatrick*,[201] perhaps the first case discussing the issue. The Court held that "[t]he general principle is, that laches is not imputable to the Government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy."[202]

That public policy became the public interest doctrine, a democratic adaptation of *nullum tempus*. In a case decided by Judge Story for the state of Massachusetts before he became a Supreme Court Justice, he discusses the adoption of *nullum tempus* to the United States. He surveys English law and English commentators and ends with the conclusion that "the true reason . . . there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right, though sometimes asserted to be, because the king is always busied for the public good, and therefore, has not the leisure to

[199] 2 SIR HENRY FINCH, LAW OR DISCOURSE THEREOF 83 (1759).
[200] The Attorney General v. Norstedt, 146 E.R. 203 (1716).
[201] United States v. Kirkpatrick, 22 U.S. 720 (1824).
[202] *Id.* at 735.

assert his right within the times limited to subjects."[203] He goes on to hold that this understanding of *nullum tempus* is "to be found in the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public exception, introduced for the public benefit, and equally applicable to all governments."[204] Accordingly, as the courts refined ideas of sovereign immunity from laches, they began to call this public policy the called public interest doctrine.[205] In 1840, the Supreme Court held "[n]ot upon any notion of prerogative; for even in England, where the doctrine is stated under the head of prerogative this, in effect, means nothing more than that this exception is made from the statute, for the public good; and the king represents the nation. The real ground is a great principle of public policy, which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers."[206]

The public right doctrine is based on the government's role to protect public interests or enforce public rights. To avoid laches, the sovereign must be protecting some public interest. Using this doctrine to keep laches from applying to a government in a case does provide a court with some leeway, allowing laches to attach if the government is protecting a *private* right. These cases are rare, but tended to be used in land title cases, when the current owner is trying to quiet title, and the original deed to the land came from the government.[207] These cases tend to be older, since outside of Indian law

[203] United States v. Hoar, 26 F.Cas. 329, 330 (1821).
[204] *Id.*
[205] Green, *supra* note 167 at 282.
[206] United States v. Knight, 39 U.S. 301, 315 (1840).
[207] United States v. Beebe, 127 U.S. 338 (1888); United States v. Fletcher, 242 F. 818, 820 (8th Cir. 1917) ("While the United States is not barred by laches from maintaining a suit brought to enforce a public right or to assert a public interest, and in which it is the real party in interest, it is so barred from maintaining suits in which it is merely a formal party, brought to enforce the rights of individuals and involving no

rarely does a quiet title action now trace its way back to the original government land grant.

For example, in *U.S. v. Thompson*,[208] the Court states *nullum tempus* is an "incident[s] of sovereignty," held by each state and the United States after independence.[209] The "exception is equally applicable to all governments."[210] This same statement was upheld by the Court in 1938, when, in *Guaranty Trust Co. v. New York*,[211] it added that this immunity is "equally applicable to all governments," including "domestic 'sovereign'" governments."[212] As late as 1991, the Court stated "laches is generally inapplicable against a state."[213] Any sovereign, therefore, ought to be immune from the defense of laches. The public interest doctrine is can also broad, incorporating everything from state medical licensing boards[214] to the collection of debts.[215] Anything that can be qualified as beneficial to the sovereigns' citizens can fall under the public interest doctrine. If the sovereign is acting on behalf of its people when bringing a claim, any delay in that claim ought to be excused.

Similarly, the Supreme Court has held that acquiescence, like laches, cannot be held against the federal government. In a dispute with the state of California over a three mile belt of ocean off the coast of the state, the Court held that "officers who have no

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interest of the government. This distinction has often been declared in suits brought in the name of the United States to cancel grants of the public lands." (citing to *Beebe*)).

[208] United States v. Thompson, 98 U.S. 486 (1878)

[209] *Id.* at 489; *See also* United States v. Verdier, 164 U.S. 213, 218-219 (1896) ("The truth is that, in its dealings with individuals, public policy demands that the government should occupy an apparently favored position.").

[210] *Thompson*, 98 U.S. at 489-90.

[211] Guarantee Trust Co. v. New York, 304 U.S. 126 (1938).

[212] *Id.* at 133.

[213] Illinois v. Kentucky, 500 U.S. 380, 388 (1991); *But cf. Developments in the Law*, *supra* note 45 at 1251-2 (pointing out exceptions to state sovereign immunity such as in federal courts, and with regards to state political subdivisions).

[214] Stein v. State Psychology Examining Bd., 265 Wis.2d 781 (Wis. Ct. App. 2003).

[215] Oregon v. Ingram, 63 F.2d 417 (9th Cir. 1933).

authority at all to dispose of government property cannot by their conduct cause the government to lose its valuable rights by their acquiescence, laches or failure to act."[216] More importantly, the officers with "no authority" worked at the Department of the Interior, where they denied oil and gas permits because they believed the land was owned by California. The Court held otherwise, and the officials' actions were not enough to overcome the federal government's ownership. Seven years earlier, in a dispute with the city of San Francisco, the Court found that the "U.S. is neither bound nor estoppped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." Again, the actions and agreements were those of the Department of the Interior.[217]

2. State Sovereign Immunity from Laches

In addition to a long federal history of sovereign immunity from laches, most states have a history of similar holdings. Much like sovereign immunity from suit, sovereign immunity from laches applies to sovereigns, but not lesser organized governments such as cities or municipalities.

In a survey of state cases, only six states have expressly overturned the doctrine of *nullum tempus*.[218] A majority of state courts consider the state government immune from laches. As early as 1840 a Supreme Court case found that the principle had "been

[216] United States v. California, 332 U.S. 19, 40 (1947).
[217] United States v. City & County of San Francisco, 310 U.S. 16, 32 (1940).
[218] Michigan (State v. Campbell, 107 Mich. 561 (1981)), Colorado (Shootman v. Dep't of Transp., 826 P.2d 1200 (1996)), Arizona (United States v. Blackburn, 5 Ariz. 162 (1897), Pennsylvania (Weinberg v. Commonwealth, 509 Pa. 143 (1985)), New Jersey (New Jersey Educ. Facilities Auth. v. Gruzen P'ship, 592 A.2d 559 (N.J. 1991) (with relation to statutes of limitations); South Carolina (South Carolina *ex rel.* Condon v. City of Columbia, 528 S.E. 2d 408 (2000)). *See also* Sigmund D. Schutz, *Time to Reconsider Nullum Tempus Occurrit Regi – The Applicability of Statutes of Limitations Against the State of Maine in Civil Actions*, 55 ME. L. REV. 373 (2003).

decided in New york, Massachusetts, Pennsylvania, and no doubt, in other states . . ."[219] Much like the application of sovereign immunity, some states have found that *nullum tempus* only applies to the state and does not apply to municipalities,[220] highway boards,[221] licensing boards[222] or cities.[223] In at least one case, a state which rejects state sovereign immunity from laches still requires a stronger showing of laches when suing the state than would be required for a private individual.[224]

Three examples from New York, Illinois and Oregon demonstrate the majority law across the country regarding sovereign immunity from laches. In New York State from 1881 to 2004, state courts consistently found that laches did not apply to state actions, with one exception.[225] In a 1995 case where the state Attorney General entered a money judgment six years after "entry of the judgment holding respondents liable for restitution to its defrauded customers," the New York Supreme Court Appellate Division let the money judgment stand, holding that "the doctrine of laches does not apply to the State when it acts in a governmental, as opposed to private or proprietary, capacity to enforce a public right or protect a public interest."[226]

In Illinois, a 1873 case which has not been overturned held that "it is well settled that no laches can be imputed to the government, and by the same reasoning which

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[219] *Knight*, 39 U.S. at 315.
[220] Royal Oak Twp. v. Sch. Dist. No. 7, 322 Mich. 397 (1948) (applying laches to a municipal corporation).
[221] Dalton Highway Dist. Of Kootenai County v. Sowder, 88 Idaho 556 (1965) (applying laches to a county highway district).
[222] Shah v. State Bd. of Med., 589 A.2d 783 (Pa. Commw. Ct. 1991). *But see Stein*, 265 Wis.2d 781 (holding laches did not apply to a psychology examining board).
[223] Boise City v. Wilkinson, 16 Idaho 150 (1909) (applying laches to a city).
[224] Weinberg v. Pennsylvania, 509 Pa. 143 (1985).
[225] Carney v. Newburgh Park Moters, 84 A.D.2d 599, 600 (N.Y. App. Div. 1981) (applying laches to the State Insurance Fund because "while the State Insurance Fund is an agency of the State, its function is akin to that of a private insurance carrier.").
[226] New York v. Astro Shuttle Arcades, 221 A.D.2d 198 (N.Y. App. Div. 1995).

excuses it from laches, and on the same grounds, it should not be affected by the negligence or even willfulness of any one of its officials"[227]

Finally, in 1968, the Oregon Supreme Court surveyed state and federal cases on the issue and held laches did not apply to the State Land Board, and asserted this was majority law in the country.[228] This holding has been cited approvingly in Oregon since.

3. The Problem with *Cayuga* and Sovereign Immunity from Laches

The Supreme Court has consistently held that laches does not generally apply to a sovereign.[229] The *Sherrill* Court case did not directly address this issue, though the Court was applying laches to not one, but two sovereigns: the federal government and the tribal government. The *Cayuga* court attempted to address this issue in its opinion, though the cases it cited are odd choices, and are well addressed in the dissent. In particular, the *Cayuga* court specifically holds that laches can apply to not only the sovereign Cayuga Nation, but to the United States government as well. In addition to the other problematic parts of this opinion, the application of laches to the United States is a rare occurance, much less in a land claim situation.

The *Cayuga* court focused on two cases, *United States v. Administrative Enterprises, Inc*.[230] and *National Labor Relations Board v. P*I*E Nationwide*,[231] both opinions by Judge Posner. In these cases, the 7th Circuit used three Supreme Court opinions to make the startling conclusion that "laches is generally and we think correctly

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[227] Illinois v. Brown, 67 Ill. 435, *2 (1873). *See also* Nebraska v. Platte Valley Public Power & Irrigation Dist., 143 Neb. 661 (1843).
[228] Corvallis Sand & Gravel Co. v. State Land Board, 250 Or. 319 (1968) (cited approvingly in Lane County v. Oregon Builders Inc., 44 Or. App. 591 (1980)).
[229] *See, e.g., Kirkpatrick*, 22 U.S. 270 *and Costello*, 365 U.S. 265 (1961).
[230] United States v. Admin. Enters., Inc., 46 F.3d 670 (7th Cir. 1995).
[231] Nat'l Labor Relations Bd. v. PIE Nationwide, 894 F.2d 887 (7th Cir. 1990).

assumed to be applicable to suits by government agencies as well as by private parties."[232]

First, *P*I*E Nationwide.* In a case involving the National Labor Relations Board, the court determined whether laches would apply to the Board due to its delay in bringing an enforcement action for an unfair labor practice order. While the court ultimately held that laches did not apply to the National Labor Relations Board, the court acknowledges the Supreme Court "used to say that laches was not a defense to a suit by the United States,"[233] citing an 1888 case.[234] The court does not cite examples of the Supreme Court holding the same thing, as recently as 1961.[235] However, Judge Posner seems ready to apply laches, but for the harm prong of the defense. Since no one was harmed by the delay in the case, the court held laches would not apply against the National Labor Relations Board.

United States v. Administrative Enterprises, decided five years later, goes further in its discussion of laches by seeking to interpret *Occidental Life Ins. Co. v. EEOC*,[236] as a case where the Supreme Court may have opened the door for the application of laches to the United States. Oddly, the *Occidental Life* case is not about laches, but about a statute of limitations, or lack there of. The *Occidental Life* Court held that importing a state statute of limitations into the case would be "inconsistent with the congressional intent underlying the enactment of the 1972 amendments [to Title VII]."[237] In the case, a company was involved with an EEOC case for three years. At the end of the three years,

[232] *Id.* at 894.
[233] *Id.*
[234] *Id*. (citing *Beebe*, 127 U.S. 338).
[235] *Costello*, 365 U.S. 265.
[236] Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977).
[237] *Id.* at 369.

the EEOC brought an enforcement action.[238] The company moved to have the action dismissed because of the passage of time. One of its arguments was to adopt a relevant state statute of limitations, in this case, one year.[239]

In finding against the company, and against the adoption of a state statute of limitations, the Supreme Court held that in a future, imaginary, case, the EEOC may delay too long in bringing an enforcement action. The Court held "if such cases arise the federal courts do not lack the power to provide relief. . . the same discretionary power to locate 'a just result' in light of the circumstances peculiar to the case,' can also be exercised when the EEOC is a plaintiff."[240] Indeed, the dissent in the case is an argument *for* limitations to apply to the government. Given that this case is cited to demonstrate limitations can apply to the federal government, it seems odd the *dissent* would be arguing this point. However, even in the dissent, Justice Rehnquist would impose a deadline on the EEOC, but makes a distinction between the United States suing "in its sovereign capacity" and an enforcement suit from the EEOC. Referring to *Board of County Commissioners of Jackson County v. United States*,[241] a federal Indian law case, Rehnquist states this case is inapplicable to the case at hand because "it involved a suit brought by the United States in its sovereign capacity, to which it is clear state limitations period do not apply."[242]

The *Administrative Enterprises* opinion acknowledges that there is "no dearth of statements that laches cannot be used against the government."[243] However, the court

[238] *Id.* at 357-358.
[239] *Id.* at 358.
[240] *Id.* at 373.
[241] *Bd. of Comm'rs. of Jackson County*, 308 U.S. 343.
[242] *Occidental Life Ins. Co.*, 432 U.S. at 378 (J. Rehnquist dissent).
[243] *Admin. Enters.*, 46 F.3d at 673.

goes on to discuss the ways the door has been kept open on the question, specifically citing *P*I*E Nationwide*.[244] The court also mentions that perhaps laches will only apply to the government in "egregious instances,"[245] or when there is no applicable statute of limitations,[246] or if the government is looking to enforce a "private right."[247] All of this is dicta, however, since the court then states "we need not pursue the question of the existence and scope of a defense of laches in government suits to resolve this case."[248] On other grounds, the court found for the government. Unfortunately, the 7th Circuit's perusal of laches in a case when laches wasn't needed for the holding only lent the 2nd Circuit citations to use in its claim in *Cayuga* that laches no longer applied to the government. To the contrary, as illustrated above, there is a long history of the Supreme Court, lower courts, state courts and commentators all agreeing that laches does not apply to a sovereign. At the very least, laches does not apply when a sovereign is enforcing a public right or protecting a public interest, nor does the laches of its agents bind a sovereign.

The two other cases the *Cayuga* court cites are Supreme Court cases, *Heckler v. Community Health Services of Crawford County*[249] and *Irwin v. Department of Veterans Affairs*.[250] *Heckler* is concerned with estoppel against the government, not laches. The *Heckler* Court states that it is "well settled that the Government may not be estopped on the same terms as any other litigant."[251] The Court does go on to state that it was "hesitant" to hold that there "are no cases in which the public interest in ensuring that the

[244] *Id.* at 672.
[245] *Id.* at 673.
[246] *Id.*
[247] *Id.*
[248] *Admin. Enters.*, 46 F.3d at 673
[249] Heckler v. Cmty. Health Servs. of Crawford County, 467 U.S. 51 (1984).
[250] Irwin v. Dep't. of Veterans Affairs, 498 U.S. 89 (1990).
[251] *Heckler*, 467 U.S. at 60.

Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government."[252] The Court does not reach this decision because it is "unnecessary to decide" the case.[253] *Irwin* is another EEOC case concerned with equitable tolling, not laches.[254] While the Court did state that "we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits,"[255] the key provision is the beginning of that sentence, which states "Once Congress has made such a waiver [of sovereign immunity]."[256] The Court held that equitable tolling could only apply to the government when Congress had made an *express* waiver of *sovereign immunity*."[257]

The *Cayuga* court makes the broad assertion that the Cayuga Nation land claim did not involve a public right or public interest and that the United States is therefore somehow not serving in its sovereign capacity. Given that the role of the United States in this case is as the trustee for the tribe, and that the reason for the case in the first place was the exclusive role the United States government had in dealing with Indian tribes, it seems odd that bringing a land case with an Indian tribe would *not* be an express exercise of its sovereignty. The *Cayuga* case takes the three exceptions from dicta in *Administrative Enterprises*, and finds that this was an "egregious" case of laches, that though a statute of limitations does indeed apply, it didn't apply when the case should have been brought (150 years ago) and that the United States was not acting as a

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[252] *Id.*
[253] *Id.*
[254] *Irwin*, 498 U.S. 89.
[255] *Id.* at 96.
[256] *Id.*
[257] *Id.* at 96 (emphasis added) (A waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'") (quoting U.S. v. Mitchell 445 U.S. 535, 538 (1980).

sovereign in this case.[258] Given the clear precedent holding otherwise, sovereign immunity from laches must still be an open question in the other circuits. In addition, the Court does not address tribal sovereign immunity from laches. Given this argument has not been countered by any court so far, it is still an open question in defining new laches.

4. Possible Implications of Arguing for Sovereign Immunity from Laches by both Tribes and the Federal Government

While a few cases have weighed the equities of an individual versus the government,[259] no court has explicated addressed when two sovereigns' public rights and interests come into conflict. While the Supreme Court has addressed state boundary disputes using the equitable defense of acquiescence, there has not been a weighing of public rights. The *Sherrill* Court places the public rights as represented by the City (and state) higher than those represented by the tribe or the federal government. While this is not expressly stated anywhere in the opinion, it is apparent in the outcome.

Perhaps by getting the court to determine the relative value of public rights, a more honest evaluation of the equities of a land claim will be evaluated. Rather than framing the argument over the prongs of laches, the argument is between the public rights of the tribal citizens and of the state. How would these be weighed? Might a court engage in a clean hands analysis at that point, or otherwise concern itself with the ramifications of a laches defense against a sovereign? The courts generally gloss over exactly what a public right is, but needless to say, if a sovereign is suing on a public right,

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[258] *Cayuga*, 413 F.3d at 278-279.

[259] *Verdier*, 164 U.S. 213, 219 (1896) ("In short, the equities which arise as between individuals have but a limited application as between the government and a citizen" because the government is enforcing a public policy.). *See also Rhode Island*, 40 U.S. at 273 (Laches did not bar the claim because "here two political communities are concerned, who cannot act with the same promptness as individuals.").

that sovereign is not subject to laches. Other defenses may apply, but getting past laches is a vital first step for any tribe in the post-*Sherrill* environment.

While one of the aspects of different Indian land claims cases now includes proof of constant attempts to settle the claim, which counters one prong of laches (that the plaintiff did not delay in bringing the claim), a tribe in its sovereign capacity should not even be required to argue that aspect. In countering an equitable defense, particularly laches, the tribe should use a multiprong argument. This argument should begin with the claim that laches does not apply to sovereigns. The tribe is a sovereign, enforcing the public right of its citizens to its land, and laches cannot apply to them. Indeed, the tribe should not have to prove any constant attempt to bring the claim, because even if tribal leaders had not, the tribal citizens, as members of a sovereign entity, should not be harmed by the actions of past tribal leaders. In bringing the land claim, the tribe is simply protecting the public interest of its citizens.

The main problem, however, with the defense of new laches is the second prong, that the defendant will be disrupted as the result of the delay of the plaintiff, will always weigh heavily in the federal courts. It is easy for the defendants in these cases to argue disruption, certainly if the title to the land is returned to the tribes. This is simple for the courts to understand, usually far more than the first prong—that the tribe did not actually delay. For a tribe to demonstrate it did not delay, it must bring in historians, cite to old statutes, and difficult case law. In addition, in new laches a tribe must do that in its original pleadings, lest the claim be dismissed at summary judgment.

Nonetheless, any statement which demonstrates laches is more than just the passage of time is important for tribes to have at their disposal. The second prong is

easy. The state simply says it has taxed the land for 200 years, that its citizens have lived on the land for 200 years and to disturb the title at this point would lead to . . . disruption. Tribes must continue to point out the many contradictions. For example, a polluter does not get to keep polluting just because he has done it for a long time without the government noticing and suing.[260] A law deemed to be unconstitutional does not get to be constitutional just because it has been on the books for a long time.[261] Length of time does not always ensure a right. In some states, misbehavior on the part of a physician or lawyer does not prevent the state from taking the professional license, just because the misbehavior happened a long time ago and the state did not interfere.[262] The physician cannot rely on the state's inaction in enforcing its licensing laws. Laches does not become an exemption for bad behavior.

For example, in a case from 1891, "bona fide purchasers" of land from a company which was supposed to build a road on the land were not "entitled to rely upon the acts of Congress of 1867 and 1874, the act of the state of Oregon, the certificate of the governor of that state, the withdrawal of the lands from sale, and the issue of the patent," because of the apparent fraudulent activities of the company (and perhaps the state) against the federal government.[263] The Court also refused to allow the current land holders to argue laches against the government, nor would allow laches to apply at the summary judgment stage.[264]

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[260] Pennsylvania v. Barnes & Tucker Co., 455 Pa. 392, 415 (1974) (Even though Pennsylvania does not recognize state sovereign immunity from laches, the court did hold that "stream polluters can acquire no prescriptive or property right to pollute as against the Commonwealth no matter how long their conduct had been tolerated.").
[261] Sears v. Treasurer & Receiver Gen., 327 Mass. 310, 326-327 (1951) ("an unconstitutional law cannot be made valid by the laches of anyone or by any lapse of time.").
[262] *Stein*, 265 Wis.2d 781.
[263] *Dalles Military Road Co.*, 140 U.S. at 615.
[264] *Id.* at 632.

The other important point about arguing against laches as a sovereign versus as a private party is adverse possession. Anytime a court uses laches against a sovereign in a land case, be it tribal, federal or state, the court is saying that the party arguing laches has been able to obtain land through adverse possession from the sovereign. Even the Supreme Court, recognized that by allowing a private party to win on the issue of laches in a land case meant that a private party could obtain title through adverse possession against the United States.[265] Whether the Court realized it at that time, this was essentially their holding in *City of Sherrill*. Since the federal government was on the side of the Oneida Nation, the Court held the equitable defenses also ran against the federal government. Certainly any number of private parties would be interested in the possibility of developing some federal land and waiting for the federal government to notice and sue. The federal government would certainly be surprised to hear that laches of the government could apply to a federal land case. Indeed, tribes would be interested to know that the claims the federal government has not brought on their behalf could be subject to the federal government's laches.

Conclusion

A vast majority of states and the federal government recognize laches does not in fact apply to a state or federal government claim. And the courts have long held that tribes are not subject to claims without their consent. The defense of laches should not run against tribes as sovereigns, and the link between laches and sovereign immunity

[265] Lindsey v. Miller, 31 U.S. 666, 673 (1832) ("If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands, to maintain their possessions, until the statute of limitations shall run; and then they would become invested with title against the government, and all persons claiming under it. In this way the public domain would soon be appropriated by adventures.").

should be perhaps made clear. Unfortunately, the litigation on laches is moving faster than the research. This seems to be that courts, at least in the Second Circuit, feel that they have found the magic bullet which will automatically eliminate all land claims.

Comfort, perhaps cold, can be found in a district court judgment from the *Canadian St. Regis Band of Mohawk Indians v. New York*.[266] Two years before *City of Sherrill*, the judge there wrote three pages chastising the state for bringing the equitable defense of laches before him again.[267] He concluded that "laches has no place in Indian land claim actions."[268] If the state can argue laches for years before it becomes law, tribes will do the same. Laches should not apply to tribes, because of clean hands, and because the tribe has worked to bring the claim for years. More importantly, however, laches should not apply to the tribe as a sovereign, enforcing the public interest of its citizens. Whether sovereign immunity from new laches is possible is debatable. However, as federal courts continue to change the rules as tribes bring their land claims, reinforcing that these claims as an extension of tribal sovereignty demonstrates to the courts tribes' continued willingness to fight long and hard battles on an uneven and ever changing playing field.

[266] *Canadian St. Regis Band of Mohawk Indians*, 278 F. Supp. 2d 313.
[267] *Id.* at 330-333.
[268] *Id.* at 332.