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The Right to Be Heard in City of Sherrill v. Oneida Indian Nation: Equity and the Sound of Silence

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The Right to Be Heard in *City of Sherrill v. Oneida Indian Nation*: Equity and the Sound of Silence

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> From the beginning of your troubles, in the late Revolution, to the time you publicly declared yourselves a free and independent people, I, my Nation, were a constant spectator—not only a constant spectator—but our minds united with yours in that final declaration; as all hopes of a reconciliation were then passed. The frequent & repeated declarations of the King, that the Americans with all who joined them, would be reduced to wretchedness, had no effect upon the minds of my Nation. And on the other hand, his promises of a rich reward, on condition of our adhering to his councils, did not excite covetous desires in us; but the love of peace, and the love of our land which gave us birth, supported our resolutions.[1]

Introduction

While recent court decisions have gone a long way toward recognizing American Indians' rights to lands from which they have been illegally dispossessed,[2] the recent Supreme Court decision in *City of Sherrill v. Oneida Indian Nation of New York*[3] now threatens to inflict further injustice on not only the Oneida, but on all American Indian tribes seeking redress for historical wrongs related to their lands.[4] The case concerns properties

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1. Lagwilondonwas, an important Oneida leader and public speaker, Oneida Indian Nation, Culture & History, *available at* http://www.oneida-nation.net/pt3.html.

2. *See* County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226 (1985) [hereinafter Oneida II]; Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661 (1974) [hereinafter Oneida I]. *But see* Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266 (2d Cir. 2005).

3. City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005).

4. *See generally Cayuga Indian Nation*, 413 F.3d 266.

purchased on the open market by the Oneida Indian Nation of New York (Oneida or OIN), which are located in the City of Sherrill, New York.[5] Because these parcels of property were located within their historical reservation, the Oneida refused to pay property taxes to the City of Sherrill on their newly acquired property.[6] The Oneida sought a declaration that, *inter alia*, the City of Sherrill could not impose property taxes on the Oneida's lands.[7] Conversely, the City of Sherrill's primary claim is that it may properly assess such taxes.[8] The United States District Court for the Northern District of New York determined that the parcels were not taxable,[9] and the city appealed. On appeal, the United States Court of Appeals for the Second Circuit affirmed the District Court regarding the taxation claim.[10] The case came before the Supreme Court after it granted the City of Sherrill's Petition for Writ of Certiorari.[11]

The Supreme Court certified four questions for review,[12] but rested its final holding on issues not explicitly raised for review.[13] The majority opinion denied relief to the Oneida based on the equitable principles of laches, acquiescence, and impossibility.[14] Neither party fully briefed the Court on these issues in their briefs pending certiorari,[15] leaving the Court without important information and legal arguments necessary for the proper application of these principles to the present case.[16] This article

5. Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 145 F. Supp. 2d 226, 232 (N.D.N.Y. 2001).

6. *Id.* at 236-38.

7. *Id.* at 237.

8. *Id.* at 237-38.

9. *Id.* at 255-56.

10. Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 337 F.3d 139, 171 (2d Cir. 2003).

11. City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 542 U.S. 936 (2004) (granting certiorari to City of Sherrill).

12. Petition for Writ of Certiorari, City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (Dec. 11, 2003) (No. 03-855), 2003 WL 22977923 [hereinafter Petition].

13. *See* City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197, 202 (2005).

14. *Id.*

15. *See* Brief for Petitioner, City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (August 12, 2004) (No. 03-855), 2004 WL 1835364; Brief for Respondents, City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (Sept. 30, 2004) (No. 03-855), 2004 WL 2246333; Petitioner's Reply Brief, City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (Nov. 18, 2004) (No. 03-855), 2004 WL 2671307.

16. *See infra* Part IV.

argues that full briefing is necessary for the proper application of these principles, which is in turn necessary to do justice for the Oneida as well as other tribes seeking relief for similar claims presently and in the future.[17] The Supreme Court's failure to allow full briefing on the issues upon which the case was ultimately decided violates the Court's own rules in a manner that denies the Oneida their due process right to be heard.[18] Had the Court heard the Oneida on these issues, the Oneida could have made several very persuasive arguments to show the injustice of invoking equity to deny relief to a valid cause of action.[19]

Part I of this article will set out the legal history and context of the Oneida claims and property rights, illustrating the basis of their cause of action for dispossession of historical tribal lands, and the facts and procedural history of this case. Part II will discuss the Supreme Court's rules regarding the contents of a Petition for Writ of Certiorari, the purpose of these rules, and the due process implications of refusing to follow them. Part II will then argue that the Court was not fully briefed by the parties regarding the equitable principles it applied, as its own rules and precedent strongly suggest it should. The Court, therefore, was lacking legal arguments and factual information, resulting in an unjust adverse judgment for the Oneida, as well as a denial of the Oneida's due process right to be heard.[20] Part III will discuss the principles of equity the majority applied in *City of Sherrill*. Part IV will lay out several equitable arguments that the Oneida would have been allowed to make had they been given their Due Process right to be heard. Part IV will first argue that although the Court applied equitable principles based on the premise that the Oneida sat on their cause of action for close to 200 years, the actual cause of action did not accrue until the Oneida purchased the properties at issue and the City of Sherrill attempted to levy taxes upon them.[21] Second, Part IV will argue that even if the Court's purported length of time over which the Oneida were guilty of laches and acquiescence is applied, the Court fails to recognize that the Oneida actually made continued objections to the loss of their lands over that period.[22] Next, Part IV will show that certain

17. *See infra* Part II.
18. *See infra* Part II.
19. *See infra* Part IV.
20. *See infra* notes 83-125 and accompanying text.
21. *See infra* notes 147-54 and accompanying text.
22. *See infra* notes 155-68 and accompanying text.

legislation and Congressional history are in direct contravention to the majority's application of equitable principles used to deny the Oneida the relief sought.[23] Finally, Part IV will discuss the concept of applying laches against a sovereign entity charged with the duty of protecting the public interest, and will show how this concept logically applies to American Indian tribes as well as the United States Government.[24]

I. Purchases Made in Violation of the Non-Intercourse Act and the Historic Title to and Possession of the Oneida Lands Led the Courts to Recognize the Oneida's Valid Claim to These Lands

A. History, Title, and Possession of Oneida Lands

The Oneida are one of the Five Nations of the League of the Iroquois, which dominated most of the Northeastern United States before the American Revolution.[25] The Oneida's aboriginal lands originally encompassed some six million acres in New York State.[26] During the Revolution, the Oneida gave considerable aid to the colonists,[27] and the United States subsequently recognized the importance of the Oneida's role by securing to them their lands in the Treaty of Fort Stanwix.[28] In 1788, the State of New York purchased the vast majority of the Oneida's lands, leaving some 300,000 acres as a reservation for the Oneida.[29] These lands were again secured to the Oneida in the Treaty of Fort Harmar[30] and the Treaty of Canandaigua,[31] with the latter treaty including the parcels at issue in *City of Sherrill*. Such treaties "made. . .under the Authority of the United States . . .[are] the Supreme Law of the Land,"[32] and should thus be given the proper respect in a court

23. *See infra* notes 169-74 and accompanying text.

24. *See infra* notes 175-77 and accompanying text.

25. PHILIP WEEKS, FAREWELL, MY NATION 15 (Harlan Davidson, Inc. 2001) (1990).

26. *See* Oneida II, 470 U.S. 226, 230 (1985).

27. *See generally* BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION (Syracuse University Press 1972).

28. Treaty of Fort Stanwix, art. 2, Oct. 22, 1784, 7 Stat. 15, 15 (promising that "[t]he Oneida . . . nation[] shall be secured in the possession of the lands on which they are settled").

29. *Oneida II*, 470 U.S. at 231.

30. Treaty of Harmar, Jan. 9, 1789, 7 Stat. 33.

31. Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44.

32. U.S. CONST. art. VI, § 1, cl. 2.

of law.

After New York State's purchase of lands from the Oneida in 1788, Congress passed the first Indian Trade and Intercourse Act, commonly referred to as the Non-Intercourse Act, which prohibited conveyance of Indian lands except by treaty with the United States federal government.[33] In 1795, despite warnings from Secretary of War Pickering that the transactions would be illegal, New York State purchased most of the remaining Oneida land in violation of the Non-Intercourse Act.[34] The land was thereafter sold to private purchasers on the open market.[35] The Supreme Court later held that this initial illegal purchase by New York State gave rise to a federal common law right of action for violation of the Oneida's possessory interest in the land.[36]

After the United States government turned to a policy of removing the American Indians from their lands, the Oneida entered into the Treaty of Buffalo Creek[37] with the federal government.[38] This treaty negotiated an exchange of Oneida lands in New York for lands reserved for the Oneida in Kansas.[39] The Oneida did not, however, actually relocate to Kansas.[40] The Treaty of Buffalo Creek did not disestablish the Oneida's reservation,[41] but over the years the Oneida did lose the vast majority of their New York lands primarily through private sales not sanctioned by the federal government, with the total acreage dwindling to as little as 32 acres in 1920.[42]

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33. *See* Indian Trade and Intercourse Act, July 22, 1790, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177 (2000)).

34. *Oneida II*, 470 U.S. at 232.

35. Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 145 F. Supp. 2d 226, 234 (N.D.N.Y. 2001).

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

37. Treaty with the New York Indians, Jan. 15, 1838, 7 Stat. 550.

38. *See, e.g., Oneida Indian Nation of N.Y.*, 145 F. Supp. 2d at 234-35.

39. *Id.* at 235.

40. *Id.*

41. Both the United States District Court for the Northern District of New York and United States Court of Appeals for the Second Circuit agreed that this treaty did not diminish the Oneida's historic reservation and that the lands remained Indian Country, which is not subject to taxation by Sherrill. *See id.* at 254. ("[T]his land is Indian Country and is not taxable by Sherrill and the Counties."); Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 337 F.3d 139, 165 (2d. Cir. 2003) ("Construing the Buffalo Creek Treaty liberally and resolving, as we must, all ambiguities in the Oneidas' favor, we conclude that neither its text nor the circumstances surrounding its passage and implementation establish a clear congressional purpose to disestablish or diminish the OIN reservation."); *see also* 18 U.S.C. § 1151 (2005) (defining Indian Country).

42. JACK CAMPISI & LAURENCE HAUPTMAN, THE ONEIDA INDIAN EXPERIENCE:

During the time that the Oneida were being divested of their land by the State of New York, "the Oneidas contacted the federal government in protest over what they perceived as improper, deceitful, and overreaching conduct by the State. Their protest continued, especially between 1840 and 1875, and between 1909 and 1965."[43]

B. The Recent Oneida Legal Actions

In 1970 the Oneida sought damages from two counties in New York State for the fair rental value of lands taken in violation of their possessory rights.[44] The case was dismissed by the District Court for lack of jurisdiction; and after the dismissal was affirmed by the United States Court of Appeals for the Second Circuit,[45] the Supreme Court granted certiorari and reversed and remanded in *Oneida I*.[46] Upon remand, the District Court heard the case, entered judgment for the Oneida, and awarded damages accordingly.[47] After appeal,[48] the case again came before the Supreme Court in *Oneida II*.[49] The Supreme Court held that, *inter alia*, the Oneida have a "live cause of action for a violation of [their] possessory rights that occurred 175 years ago."[50] While the Court did not rule on whether the doctrine of laches could apply to the action, it did note in dicta that "the equitable doctrine of laches. . .cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions."[51]

Subsequently, in the 1990s the Oneida began reacquiring their lost tribal lands in free market transactions,[52] eventually giving rise to the dispute that came before the Supreme Court in

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TWO PERSPECTIVES 61 (1988).

43. *See* Oneida Indian Nation of N.Y. v. Oneida County, 719 F.2d 525, 529 (2d Cir. 1983).

44. Oneida Indian Nation of N.Y. v. County of Oneida, 464 F.2d 916 (2d Cir. 1972).

45. *Id.*

46. Oneida I, 414 U.S. 661 (1974).

47. Oneida Indian Nation of N.Y. v. County of Oneida, 434 F.Supp. 527 (N.D.N.Y. 1977).

48. *See generally Oneida Indian Nation of N.Y.*, 719 F.2d 525.

49. Oneida II, 470 U.S. 226 (1985).

50. *Id.* at 230.

51. *Id.* at 244-45 n.16 (citing Ewert v. Bluejacket, 259 U.S. 129, 138 (1922)).

52. Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 145 F. Supp. 2d 226, 236 (N.D.N.Y. 2001).

City of Sherrill.[53] The Oneida sued the City of Sherrill to terminate its efforts to assess property taxes on land owned by the tribe and located within the City of Sherrill, because the lands are a part of their reservation as recognized by the Treaty of Canandaigua.[54] The Oneida claimed that because the properties constitute reservation land and are, therefore, Indian Country as defined by federal law,[55] the state and its political subdivisions are precluded from imposing taxes.[56] The City of Sherrill sought a declaration that it may properly assess taxes on the properties at issue as well as any properties that may come into the Oneida's possession in the future.[57] While the parties brought a welter of claims and counterclaims before the District Court, the issues in dispute were significantly narrowed by the time the case came before the Supreme Court on certiorari.[58] The Supreme Court certified four questions of law,[59] but the majority dedicated almost its entire analysis to the principles of equity upon which it ultimately decided the case.[60]

II. The Supreme Court Deprived the Oneida of Due Process and Violated Its Own Rules by Basing Its Decision on Principles Not Presented in the Petition for Writ of Certiorari and Not Fully Briefed by Either Party

A. The Court's Own Rules Provide Procedural Protections that Should Not Be Contravened

The Court's Rule 14 is titled "Content for a Petition for a Writ of Certiorari" and sets out the requirements for such a petition.[61] According to this rule, a Petition for a Writ of Certiorari must

53. City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005).

54. *See Oneida Indian Nation of N.Y.*, 145 F. Supp. 2d at 236-37.

55. *See* 18 U.S.C. § 1151 (2005) (defining Indian Country).

56. *Oneida Indian Nation of N.Y.*, 145 F. Supp. 2d at 237; *see also* U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the power. . .to regulate commerce. . .with the Indian tribes.").

57. *Oneida Indian Nation of N.Y.*, 145 F. Supp. 2d at 237-38.

58. *Compare* Complaint, Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 145 F. Supp. 2d 226 (N.D.N.Y. Jun 04, 2001) (No. 5:00-CV-223, 5:00-CV-506, 5:00-CV-327, 5:00-CV-1106) *with* Petition, *supra* note 12.

59. *See* Petition, *supra* note 12 (stating the four questions Petitioner requested the Court to resolve).

60. *See* City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197, 215-21 (2005).

61. *See* SUP. CT. R. 14.

contain "[t]he questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive."[62] Notably, the rule also states that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court."[63]

After granting certiorari in *Ballard v. Commissioner*,[64] Justice Ginsburg, writing for the majority, noted that the basis of the Court's decision was not discretely presented as a question for review by the Court.[65] It was, however, considered "a question *anterior* to all other questions the parties raised, and the [basis of the decision was] indeed aired in the [parties'] briefs."[66] For a question to be "fairly included within" the questions presented for review, it must be truly *anterior* to the questions presented."[67] The specific meaning of "anterior" thus becomes significant because the Court has made clear that a "subsidiary question" is not a question that is simply related to or complementary to those presented, but must actually be fairly included *within* the questions specifically presented.[68]

In his dissent, Justice Rehnquist argued that "[i]t bespeaks the weakness of the [petitioner's] arguments that the Court hinges its conclusion on an argument not even presented for our consideration."[69] Citing to the same rule as Ginsburg, Justice Rehnquist concluded that the Supreme Court "does not consider *claims* that are not included within a *petitioner's questions* presented."[70] To support his argument, Justice Rehnquist cited to *Yee v. City of Escondido, Cal.*,[71] which offers a more thorough discussion of the purpose and practice regarding the Court's Rule 14.[72] In *Yee*, the majority explained that the petitioner (for a Writ

62. *Id.*

63. *Id.*

64. Ballard v. Comm'r Internal Revenue, 544 U.S. 40, 47 n.2 (2005)

65. *Id.*

66. *Id.* (emphasis added).

67. *See id.* (emphasis added).

68. *See* Yee v. City of Escondido, Cal., 503 U.S. 519, 537 (1992) (noting that question not presented in petition for certiorari was a "question *related* to the one petitioners presented, and perhaps *complementary* to the one petitioners presented, but it is not 'fairly included therein.'") (emphasis added in footnote quotation).

69. *Ballard*, 544 U.S. at 45 n.1.

70. *Id.* (emphasis added).

71. *Yee*, 503 U.S. at 535-38.

72. *See id.*

The language used by Justice Rehnquist seems to distinguish a *claim* not

of Certiorari) controls the scope of the questions presented, and is able to frame these questions as broadly or narrowly as is necessary to the case and disputes at issue.[73] How questions are framed for review is significant because the Court will only address those questions that are either set forth in the petition or fairly included therein.[74] However, it "ordinarily [will] not consider questions outside those presented in the petition for certiorari."[75]

One of the important purposes of Rule 14.1(a) is to give the respondent notice of the grounds on which certiorari is being sought, so that respondents can direct their arguments toward those specific grounds.[76] Beyond the arguments that a respondent can make to the Court that it should deny certiorari, the notice given in the petition is also important to allow both sides to fully brief the actual issues that the Court will consider. The Court must have a full briefing of the issues so it is capable of the sound analysis required for a just result.[77] Notably, rulings that are not based on such a full briefing are not typically given the same precedential value as those that are fully briefed.[78] Indeed, the Court has stated clearly that "[t]he fundamental requisite of due process of law is the opportunity to be heard."[79] The opportunity to respond is also fundamental to due process.[80] Furthermore:

> For more than a century the central meaning of procedural

> presented from a *question* not presented. While, as Justice Ginsburg argues, Supreme Court Rule 14 allows for the Court to consider subsidiary questions, there is a difference between a legal claim, and a subsidiary question necessary to answer the questions actually presented to the Court.

Id. (emphasis added in footnote quotation).

73. *Yee*, 503 U.S. at 535.

74. *Id.*

75. *Id.* (citing Berkemer v. McCarty, 468 U.S. 420, 443 n.38 (1984)); *see also* Hagen v. Utah, 510 U.S. 399, 409-10 (1994) (refusing to consider question of collateral estoppel that was not raised in the Petition for Writ of Certiorari, noting that "[t]he question presented in the petition was whether the reservation had been diminished by acts of congress. This Court's Rule 14.1(a) does not appear to allow different issues to be raised").

76. *Yee*, 503 U.S. at 535-36.

77. Lytle v. Household Mfg., Inc., 494 U.S. 545, 552-53 n.3 (1990) ("Applying our analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion.").

78. Hohn v. United States, 524 U.S. 236, 251 (1998) ("[W]e have felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument.").

79. Grannis v. Ordean, 234 U.S. 385, 394 (1914) (citing Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 236 (1900); Simon v. Craft, 182 U. S. 427, 436 (1901)).

80. *See* Nelson v. Adams USA, Inc., 529 U.S. 460, 466 (2000).

> due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[81]

Thus, by only addressing those questions presented or fairly included *within* those questions, the Supreme Court ensures that both parties have an opportunity to be heard in accordance with due process requirements when certiorari is granted.[82]

B. The Principles Upon Which the Court Based Its Holding in City of Sherrill *Were Not Addressed by the Actual Questions Presented for Review*

The Supreme Court ultimately decided that the Oneida could not "rekindl[e] embers of sovereignty that long ago grew cold."[83] The Court admitted that it was resolving the case "on considerations not discretely identified in the parties' briefs."[84] In a footnote, the Court continued:

> But the question of equitable considerations limiting the relief available to OIN, which we reserved in *Oneida II,* is inextricably linked to, and is thus "fairly included" within, the questions presented. See this Court's Rule 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein."); *Ballard v. Commissioner,* 544 U.S. ——, ——, n. 2, 125 S.Ct. 1270, 1275, n. 2, 161 L.Ed.2d 227 (2005); *R.A.V. v. St. Paul,* 505 U.S. 377, 381, n. 3, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). See generally R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 414 (8th ed. 2002) ("Questions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented.").[85]

Petitioner City of Sherrill presented the following questions

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81. Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (citations omitted).

82. While the facts of *Grannis* and *Nelson* are distinguishable from the case at issue here, there are strong arguments for the extension of the principles presented in those cases. For a thorough discussion of the implications of these principles, see Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard,* 39 SAN DIEGO L. REV. 1253, 1291-93 (2002).

83. City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197, 214 (2005).

84. *Id.* at 214 n.8.

85. *Id.*

to the Court:

> 1. Whether alleged reservation land is Indian Country pursuant to 18 U.S.C. § 1151 and this Court's decision in Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) ("Venetie") where the land was neither set aside by the federal government nor superintended by the federal government?
>
> 2. Whether alleged reservation land was set aside by the federal government for purposes of Indian Country analysis under 18 U.S.C. § 1151 and Venetie where the alleged reservation was established by the State of New York in the 1788 Treaty of Fort Schuyler, and not by any federal treaty, action or enactment?
>
> 3. Whether the 1838 Treaty of Buffalo Creek, which required the New York Oneidas to permanently abandon their lands in New York, resulted in the disestablishment of the Oneida's alleged New York reservation?
>
> 4. Whether alleged reservation land may (i) remain Indian Country or (ii) be subject to the protections of the Non-Intercourse Act, 25 U.S.C. § 177, if the tribe claiming reservation status and Non-Intercourse Act protection ceases to exist?[86]

There is neither mention of any principles of equity in the preceding questions nor what might be an appropriate remedy in this case. The Court itself notes that "[t]he substantive questions whether the plaintiff has any right or the defendant any duty, and if so what it is, *are very different questions* from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is."[87] In keeping with such an understanding, the Oneida submitted a brief to the Court that did not address any of the questions regarding principles of equity or appropriate remedies.[88] While the City of Sherrill did mention briefly the long lapse of time since the Oneida were dispossessed of their lands illegally, the argument was in a reply brief filed over a month after the Oneida filed their Respondent Brief with the Court.[89] Thus, the Oneida had no fair opportunity to address the

86. Petition, *supra* note 12.

87. *City of Sherrill*, 544 U.S. at 213 (citing DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 1.2 (2d ed. 1973)) (emphasis added).

88. *See* Brief for Respondents, *supra* note 15.

89. *See id.*; Petitioner's Reply Brief, *supra* note 15.

issues upon which the Court ultimately decided the case.

Despite not being briefed on the issues of laches, impossibility, or acquiescence, the Court considered those principles "inextricably linked" to the above-listed questions regarding the establishment and alleged disestablishment of the Oneida's reservation.[90] In a footnote, the majority glossed over its weak support for considering these questions at all.[91] Further, the majority ignored several important arguments that would defeat recognition of such equitable principles as being "*fairly* included within" the questions actually presented for review.[92]

C. *The Court's Past Discussion of Rule 14 Does Not Support Inclusion of the Relevant Equitable Principles into the Questions Presented for Review in* City of Sherrill

The Supreme Court has often noted that it will not address questions not presented for review in a Petition for Writ of Certiorari.[93] The principles upon which the majority decided *City of Sherrill* clearly were not presented in the Petition for Writ of Certiorari, but more importantly, they also cannot fairly be included within those questions.

As Justice Ginsburg noted in *Ballard*, a question may fairly be included within those presented if that question is *anterior* to those presented.[94] "Anterior" is defined as "situated before or toward the front," or "coming before in time or development."[95] To be included fairly within questions presented to the Court, an issue must not simply be complementary or related to those presented, but must be a question required for the analysis of the questions actually presented to the Court.[96] Both the United States District Court for the Northern District of New York and the United States Court of Appeals for the Second Circuit

90. *City of Sherrill*, 544 U.S. at 214 n.8.

91. *Id.*

92. *Id.* (emphasis added).

93. *See, e.g.*, Bragdon v. Abbott, 524 U.S. 624, 638 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari.") (citing Blessing v. Freestone, 520 U.S. 329, 340 n.3 (1997)) (declining to address an issue because it was not presented in the petition in accordance with SUP. CT. R. 14.1(a)).

94. Ballard v. Comm'r Internal Revenue, 544 U.S. 40, 47 n.2 (2005).

95. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 49 (10th Ed. 1999).

96. *See Ballard*, 544 U.S. at 47 n.2.

analyzed the issues presented in the Petition for Writ of Certiorari without finding it necessary to address the equitable issues and considerations of appropriate remedy considered by the Supreme Court.[97] Thus, the majority did not need to address the equitable principles to analyze the legal questions actually presented for review.

Furthermore, the questions presented to the Court were connected to the legal analysis of the Oneida's right to tax exemption as it sprung from the confirmation that the lands they recently purchased were a part of the tribe's historic reservation.[98] The question as to remedy is one logically considered only after a finding that a party is indeed entitled to any remedy. Therefore, the Court could not maintain that the question of the appropriate remedy was anterior to the analysis of the legal questions presented. By definition, determining the propriety of a remedy was inherently posterior to the question of whether a party was entitled to any remedy at all.

While Supreme Court Rule 14 is prudential in nature, the Court disregards it "only in the most exceptional cases."[99] The rule is also "more than a precatory admonition."[100] The Court will only make an exception to the rule when overruling a prior decision (even when neither party has requested it), when seeking to avoid deciding a case on constitutional grounds when it is capable of doing otherwise, when raising *sua sponte* in absence of jurisdiction, and when under Supreme Court Rule 24.1(a) there is a plain error evident in the record and within the Court's jurisdiction to decide.[101] Having such specific exceptions ensures that the Court will not be "tempted to engage in ill-considered decisions of questions not presented in the petition."[102] The Court here did not overrule any of its prior decisions,[103] was not explicitly declining to rule on constitutional grounds[104] or consider

97. *See* Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 145 F. Supp. 2d 226 (N.D.N.Y. 2001); Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 337 F.3d 139 (2d. Cir. 2003).

98. *See* Petition, *supra* note 12.

99. Yee v. City of Escondido, Cal., 503 U.S. 519, 535 (1992).

100. *Id.*

101. *See* Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 33 (1993).

102. *See id.* at 34.

103. City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197, 221 (2005) (declining to address legal questions decided in other previous cases, and noting "we therefore do not disturb our holding in *Oneida II*.").

104. While the issues in question did *relate to* constitutional issues, the

a jurisdictional issue, and was not addressing what it thought was a clear error in the lower courts.[105]

The issues upon which the Court decided the case were barely discussed in any brief,[106] something to which the Court typically attaches great weight when making a decision. In very clear language, the Court has stated that analyzing facts without the benefit of a full record or a lower court's determination on an issue is not a sensible exercise of the Court's discretion.[107] Questions not raised or briefed by the parties for the Supreme Court are typically "questions for the Court of Appeals or the District Court to consider and determine in the first instance."[108]

Perhaps most convincing is the confession by Justice Souter in his concurring opinion that "the subject of inaction was not expressly raised as a separate question presented for review."[109] Justice Souter goes on to conclude that because the parties addressed the equitable issues during oral arguments there was no difficulty with addressing these "separate questions."[110] A brief inspection of the transcript of the oral argument shows that oral arguments ran a total of one hour and one minute.[111] Presumably, Petitioner and Respondent each received one half-hour to split between themselves and their respective supporting amicus curiae.[112] Considering that at least half of that time was devoted to the legal issues of the case, there remained very little time for the Oneida to make their case regarding equitable issues to the Court.[113]

Given the scant time available, the Oneida surely did not fully prepare to argue issues not even contained in the petition. Rather, it is likely that the Oneida's counsel was only prepared to argue the issues in dispute in the case—the issues upon which the Supreme Court granted certiorari. Further, Justice Ginsburg, the

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questions presented were asking the Court to analyze 18 U.S.C. § 1151 and 25 U.S.C. § 177, and to interpret the language of a treaty, not its constitutionality. *See* Petition, *supra* note 12; *City of Sherrill*, 544 U.S. at 197-200.

105. *See City of Sherrill*, 544 U.S. at 197-200.

106. *See* Brief for Respondents, *supra* note 15.

107. Lytle v. Household Mfg., Inc., 494 U.S. 545, 552 n.3 (1990).

108. *See* Glover v. United States, 531 U.S. 198, 205 (2001).

109. *City of Sherrill*, 544 U.S. at 222.

110. *Id.*

111. Transcript of Oral Argument, City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (Jan. 11, 2005) (No. 03-855), 2005 WL 148904.

112. *Id.*

113. *Id.* While it is difficult to determine precisely when the parties and Court spoke specifically to the equitable issues, the transcript supports this estimate.

author of the majority opinion in *City of Sherrill*, has herself pointed out that "the brief is *far more persuasive* than the oral argument."[114] Other authorities also have noted that oral arguments are not nearly as important or decisive for a party presenting their case as the written briefs.[115] Thus, Justice Souter's note that the parties were able to offer cursory and superficial arguments on what were eventually the most important issues for the case is not availing, and does not cure the infirmity of deciding this case without comprehensive briefing.

The Court here ignored its own rule and a multitude of its own statements regarding the propriety of deciding a case on an issue not raised or fully briefed by either party. As will be discussed below, the majority did not fully hear several strong arguments that would have made apparent the unjust and ill-informed nature of the result it sought to justify in its decision.

D. Considering the Principles of Equity Upon Which the Court Rests Its Decision Is an Unjust and Unfair Denial of the Oneida's Due Process Right to be Heard

Supreme Court Rule 14 serves to give a party notice of the issues that the opposing party is seeking to have reviewed.[116] Normally, the Court "strongly 'disapprove[s] the practice of smuggling additional questions into a case after [it] grant[s] certiorari.'"[117] When the parties do not have notice of what the issues coming before the Court will be, and are therefore unable to fully brief the Court, they are being denied the right to be fully heard on what may become the most pertinent and decisive issues in their case.[118] The right to be heard by the Court and to respond to the opposing party's arguments are both fundamental aspects of due process.[119]

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114. Sarah E. Valentine, *Ruth Bader Ginsburg: An Annotated Bibliography*, 7 N.Y. CITY L. REV. 391, 421 (2004) (discussing generally the importance of briefs over oral arguments) (emphasis added).

115. *See* Mark Cooney, *Get Real About Research and Writing*, 32(9) STUDENT LAWYER, May 2004, *available at* http://www.abanet.org/lsd/studentlawyer/may04/get-real.html (discussing the diminished importance oral arguments have on the outcome of a case).

116. SUP. CT. R. 14. *See also* Yee v. City of Escondido, Cal., 503 U.S. 519, 535-36 (1992).

117. Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 34 (1993) (citing Irvine v. California, 347 U.S. 128, 129 (1954) (plurality opinion)).

118. *See supra* notes 71-76 and accompanying text.

119. *See* Grannis v. Ordean, 234 U.S. 385, 394 (1914) (citing Nelson v. Adams

The majority significantly hindered the Oneida's ability to respond to their opponent's arguments and to be fully heard by the Court because the equitable issues on which the case was ultimately decided were raised only after the Oneida had filed their brief. The City of Sherrill did not raise the issue of laches, acquiescence, or impossibility in its original brief to the Court; in fact, it devoted only a small section of a reply brief to the issue.[120] More importantly, because the reply brief was filed over a month after the Oneida presented their written arguments to the Court,[121] the Oneida neither had an opportunity to raise several very important legal arguments nor provide factual information that had great bearing on the case. While there was some discussion of these equitable principles during oral argument with counsel for the Oneida and the United States as amicus curiae,[122] the majority of the oral arguments were devoted to the legal questions addressed in the Petition for Writ of Certiorari.[123] Nevertheless, the Court rested its holding almost entirely on these principles of equity.[124] This decision is of immense importance for the Oneida as well as many other American Indian tribes.[125] The Court must have the issues fully briefed and argued in order to make a just decision and ensure that the Oneida are not deprived of their due process right to be heard. Even if the Court refused to recognize the violation of the due process rights of the Oneida, there are still several arguments not fully presented to the Court that demonstrate the gross inequity of denying the Oneida relief based upon principles of equity such as laches.

III. The Supreme Court Invoked Principles of Equity to Justify Its Holding Rather than Relying on Legal Principles Alone

The majority begins its analysis in *City of Sherrill* by stating

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USA, Inc., 529 U.S. 460, 466 (2000) (holding that the opportunity to respond is "fundamental to due process"); Simon v. Craft, 182 U.S. 427, 436 (1901); Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 236 (1900)).

120. *See* Brief for Petitioner, *supra* note 15; Petitioner's Reply Brief, *supra* note 15.

121. *See* Brief for Respondents, *supra* note 15; Petitioner's Reply Brief, *supra* note 15.

122. Transcript of Oral Argument, *supra* note 11, at 32-34, 43-46.

123. *See* Petition, *supra* note 12.

124. City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005).

125. *See, e.g.*, Brief for Petitioners, Cayuga Indian Nation of New York v. Pataki, 02-6111 (L), 413 F.3d 266 (2d Cir. 2005).

that "[t]he substantive questions of whether the plaintiff has any right or the defendant any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is."[126] The relief sought by the Oneida was evaluated within the context of the long history of sovereign control of the lands at issue by the State of New York.[127] After noting the Court's authority to apply laches,[128] the majority compares the present case to *Felix v. Patrick*.[129] In that case, the Court barred the heirs of an American Indian from establishing a constructive trust over lands that had been conveyed by their ancestor in violation of a statutory restriction, noting that it would be inequitable to void that grantee's title because of the lapse of time and increased value of the land at issue.[130] The changes to the land at issue in *Felix* are similar to changes in the land at issue in *City of Sherrill*.[131]

While laches is often compared to a statute of limitations, it is important to note, as the Court did in *Felix*, that this equitable doctrine also considers the change in conditions of the parties and the negative impact enforcement of a claim may have on the defendant.[132] "[T]he essence of laches is not merely lapse of time. It is essential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy."[133] However, the failure of plaintiffs to discover the appropriate remedy for their action does not necessarily establish laches or acquiescence.[134]

Closely related to the doctrine of laches in this context is the

126. *City of Sherrill*, 544 U.S. at 213 (citing DOBBS, *supra* note 87, at 3).

127. *Id.* at 214.

128. *See id.* at 217 (citing Badger v. Badger, 69 U.S. 87, 94 (1865)) ("[C]ourts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights.").

129. Felix v. Patrick, 145 U.S. 317 (1892).

130. *See id.*

131. *See City of Sherrill*, 544 U.S. at 217. The Court emphasizes this aspect of laches with language stating that it is not "a mere matter of time; but principally a question of the inequity of permitting a claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." *Id.*

132. *See generally* 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA (5th ed. 1941); 3 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA (14th ed. 1918).

133. S. Pac. Co. v. Bogert, 250 U.S. 483, 488-89 (1919).

134. *Id.* at 490 ("Nor 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.").

rule that "long acquiescence may have [a] controlling effect on the exercise of dominion and sovereignty over territory."[135] Despite their continuous protests,[136] the Court concluded that the Oneida were acquiescent in the taking of their lands. The majority discusses several cases concerning state sovereignty[137] which do not dictate a result for the Oneida's claim, but purportedly "provide a helpful point of reference."[138] The "longstanding observances and settled expectations" of sovereign control are important considerations when considering the boundaries of sovereign control of a territory.[139]

Finally, the majority addresses the principle of impossibility, arguing that it would be impractical to return the lands at issue to Indian sovereign control after the lands have been outside its control for so long.[140] The Supreme Court has historically applied this doctrine of impossibility to American Indian tribes seeking title to lands that had passed to numerous private landowners.[141] The Court, in lieu of restoring the American Indian tribes rightful title to their lands, orders guilty parties to compensate them for the loss of their lands.[142] The majority also discusses the burden on the administration of a "checkerboard" of alternating state and tribal jurisdiction for state and local governments.[143]

Using the preceding principles to deny the Oneida the remedy they seek, the majority then turns to a brief discussion of

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135. *City of Sherrill*, 544 U.S. at 217 (citing Ohio v. Kentucky, 410 U.S. 641, 651 (1973)).

136. *See* Oneida Indian Nation v. Oneida County, 719 F.2d 525, 529 (2d Cir. 1983).

137. *See* California v. Nevada, 447 U.S. 125 (1980); Michigan v. Wisconsin, 270 U.S. 295 (1926); Massachusetts v. New York, 271 U.S. 65 (1926).

138. *See City of Sherrill*, 544 U.S. at 218.

139. *Id.*

140. *Id.* at 217-20. It should be noted at the outset, and will be argued subsequently, that the Oneida did not ask for the return of *all* tribal sovereignty rights, but rather simply an exemption from taxation by the State of New York. *See id.* (noting that if the OIN may reassert sovereign control to take the lands off of the tax rolls, little would stop them from initiating other litigation to free the parcels from *other* regulatory controls). Justice Stevens also makes this point indirectly in his dissent, arguing that the majority's fear of opening a "Pandora's Box" of *other* tribal powers is unfounded. *See id.* at 227 n.6.

141. *See* Yankton Sioux Tribe of Indians v. United States, 272 U.S. 351 (1926) (directing compensation to be paid to the Yankton Sioux because the United States was unable to restore their fee title after having opened their lands to settlement by numerous innocent purchasers).

142. *See City of Sherrill*, 544 U.S. at 219 (discussing *Yankton Sioux Tribe of Indians*, 272 U.S. 351).

143. *Id.*

what they deem to be the appropriate remedy, requesting that Congress take the lands into trust for the Oneida in accordance with federal regulations[144] promulgated toward that end.[145] The Court does, however, note that "Indian Tribes are having extreme difficulty completing the 25 C.F.R. Part 151 fee-to-trust acquisition process because of political issues within the Department of Interior."[146] Such significant difficulties make the Court's purported remedy highly unlikely to serve the ends of justice for the Oneida.

IV. Equitable Arguments Not Heard by the Court Demonstrate that Denying the Oneida the Relief Sought Was an Erroneous and Inequitable Decision

A. The Oneida Are Not Guilty of Laches because they Promptly Brought this Action After it Accrued

The majority notes that "[t]he fact that OIN brought this action promptly after acquiring the properties does not overcome the Oneidas' failure to reclaim ancient prerogatives earlier."[147] The Court posits that the Oneida have failed to "reclaim ancient prerogatives." This is, however, a mischaracterization of what the Oneida are seeking, and blurs the relief requested in the Oneida's Complaint with the Court's general understanding of principles of tribal sovereignty.

In their District Court Complaint, the Oneida requested both a declaratory judgment and an injunction to shield them from the imposition of the *ad valorem* property taxes from Defendants (Petitioners).[148] The essential argument of the Oneida is that the lands at issue are a part of their reservation and are therefore not subject to state and local taxation.[149] The federal government has the power to tax Indian tribes under the Commerce Clause of the United States Constitution.[150] The Oneida did not purchase fee

144. *See* 25 U.S.C. § 465 (1983).

145. *City of Sherrill*, 544 U.S. at 220.

146. Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U DET. MERCY L. REV. 1, 24 (2004).

147. *City of Sherrill*, 544 U.S. at 217 n.11.

148. Complaint, *supra* note 58.

149. *See supra* notes 52-56 and accompanying text.

150. *See* U.S. CONST. art. I, § 8 ("Congress shall have the power . . . to regulate commerce . . . with the Indian tribes.").

title to the property at issue here until the 1990s.[151]

It is a "standard rule that the limitations period commences when the plaintiff has a 'complete and present' cause of action."[152] "[A] cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief."[153] The Oneida could not have a "complete and present cause of action" for tax exemption from the City of Sherrill until it had acquired the relevant properties within the city and the city attempted to tax them. Only then could the Oneida file a suit and obtain relief from the City's attempt to foreclose on the lands that the Oneida had recently purchased. Thus, the Court's cursory dismissal of the possibility that the Oneida were in fact timely in bringing this action was erroneous.[154]

B. The Oneida Did Not Sit on Their Rights for Two-Hundred Years

Even if it were accepted that the Oneida's cause of action somehow accrued long before they purchased the parcels of land at issue here, laches still should not be applied. Contrary to the Court's representation, the Oneida were not complacent or acquiescent in the taking of their land between the late 1700s and the present. "Shortly after [land purchases made in 1784, 1787 and 1788] the Oneidas contacted the federal government in protest over what they perceived as improper, deceitful, and overreaching conduct by the State."[155] The Oneida's complaints about the taking of their land were not well documented prior to 1909, but "expert witnesses testified that between 1840 and 1875 the Oneidas often attempted to petition the federal government."[156] The Oneida typically petitioned through their Indian agent, and in 1874 a group of Oneida actually traveled to Albany, New York, to

151. *See* Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 145 F. Supp. 2d 226, 236 (N.D.N.Y. 2001).

152. Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp., Inc., 522 U.S. 192, 201 (1997) (citing Rawlings v. Ray, 312 U.S. 96, 98 (1941)).

153. *Id.* (citing Reiter v. Cooper, 507 U.S. 258, 267 (1993)).

154. City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y., 544 U.S. 197, 217 n.11 (2005) ("The fact that OIN brought this action promptly after acquiring the properties does not overcome the Oneidas' failure to reclaim ancient prerogatives earlier . . . ."). The Court makes this statement briefly in a footnote, but it begs the question; why does such promptness *not* overcome a limitations defense?

155. *See* Oneida Indian Nation of N.Y. v. Oneida County, 719 F.2d 525, 529 (2d Cir. 1983) (citing American State Papers, 1 Indian Affairs 139 (1834)).

156. Oneida Indian Nation v. Oneida County, 434 F. Supp. 527, 536 (N.D.N.Y. 1977).

consult with a private law firm.[157] "Between 1909 and 1965, the Oneidas contacted the federal government innumerable times in connection with land claims and other grievances."[158]

While these persistent complaints did not take the form of legal actions in the appropriate federal court in New York, such a requirement would be unconscionable at least in the early years. Due to the fighting with the French and British during the formative years of the United States, the Oneida were displaced from their lands, disorganized, poverty stricken, and dealing with rampant alcoholism among their people.[159] Literacy in the English language was another great challenge for the Oneida trying to retain their tribal lands.[160] The Oneida required translators to explain the actions of the federal government until 1950.[161]

Basic principles of equity lay bare the injustice of faulting the Oneida here and claiming that they negligently sat on their rights. "[E]quity regards substance rather than form," and "looks to intent rather than to the form."[162] The Oneida's persistent complaints about the loss of their lands may not have taken the form preferred by the Supreme Court, but history reflects not a people acquiescing in their dwindling power, but rather using any means they could to try to save their lands. The Court, however, focused on the injustice that could be wrought on the City of Sherrill and the State of New York if the Oneida were granted tax exemption on their lands.

This raises another fundamental principle of equity: "[h]e who comes into equity must come with clean hands."[163] When an actor is guilty of violating the "fundamental conceptions of equity jurisprudence, [the court] refuses him *all* recognition and relief with reference to the subject-matter or transaction in question."[164] The State of New York purchased the Oneida lands in violation of the Non-Intercourse Act,[165] which was intended to protect the American Indians from the very loss of lands such as are at issue

157. *Id.*
158. *Id.* at 536-37.
159. *Oneida Indian Nation*, 434 F.Supp. at 536.
160. *Id.*
161. *Id.*
162. POMEROY, *supra* note 132, at 40.
163. *Id.* at 90.
164. *Id.* at 91 (emphasis added).
165. Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y., 145 F. Supp. 2d 226, 234 (N.D.N.Y. 2001).

here.[166] Secretary of War Pickering specifically notified the State that they would be making illegal purchases in violation of an Act intended to protect American Indians from precisely such land transactions.[167] It should also be noted that the Non-Intercourse Act considered all sales outside of federal treaties to be void "in law *or equity*."[168] The Non-Intercourse Act recognizes the significant responsibility the United States Federal government has to respect and protect American Indian lands reserved by treaty. Regardless of the difficulties that might be faced by the State of New York or the City of Sherrill, it is contrary to this fundamental maxim to invoke principles of equity to deny the relief to which the Oneida are entitled as a matter of law. This is especially true when the Oneida are the victims of the State of New York's *intentional* violation of the Non-Intercourse Act. Thus, for the Court to ignore the persistent protests of the Oneida over the loss of their lands because they did not take the proper form, and to invoke principles of equity to protect the State of New York and City of Sherrill when they came with "guilty hands," is a perversion of the fundamental maxims of equity, and far from the classic conception of equity as the conscience of the law.

C. Legislation and Legislative History Indicate that Congress Would Not Approve of Invoking the Doctrine of Laches to Limit American Indian Land Claims

The Non-Intercourse Act was the first action taken by the United States Congress to protect American Indians from the loss of their land without giving fair compensation.[169] The Act states in very clear language that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law *or equity*, unless the same be made by treaty or convention entered into pursuant to the Constitution."[170] Congress made clear its intent that purchases such as those made by the State of New York from the Oneida give void title, and cannot be saved even by an equitable doctrine such as laches.

Further, Congress has passed legislation determinative of the

166. *See* Indian Trade and Intercourse Act, ch. 33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 177 (2000)).

167. *See* Oneida II, 470 U.S. 226 (1985).

168. 25 U.S.C. § 177 (2000) (emphasis added).

169. *See* Indian Trade and Intercourse Act.

170. *Id.* (emphasis added).

time for commencing actions brought by the United States.[171] Therein, Congress set out specific time periods for the United States government to bring claims for damages on behalf of American Indians unjustly or illegally divested of their lands.[172] Immediately following the provisions that set the time periods for bringing these actions, the statute notes that "[n]othing [t]herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property."[173] Thus, while this legislation is not directly applicable to the cause of action brought by the Oneida, it does evidence a congressional intent to distinguish between limiting claims for money damages and claims regarding title and possession of real property. The Supreme Court in *Oneida II* also discussed this congressional policy against limiting claims.[174] This indicates that Congress believed land claims should be recognized if supported by a treaty and should not be denied on the basis of passage of time.

The preceding actions of Congress signify a desire to protect American Indians and their tribal lands from encroachment by powers other than the federal government. While this is not necessarily controlling, the Supreme Court, in invoking principles of equity in lieu of clearly established legal principles, should take note of the intentions of the legislative branch of the United States government. These intentions not only indicate the protective policy of the federal government, but also emphasize the historical vulnerability of American Indian tribes in land transactions. If equity is to be invoked to eschew legal principles, it should be to aid American Indians, not to bar them relief to which they are legally entitled.

D. Laches Does Not Typically Apply to the United States as a Sovereign, and Should Not Apply to the Oneida for the Same Reasons

The historical vulnerability of the Oneida is also important to note because of its relationship to the principle "*quod nullum tempus occurit regi*—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of

171. *See* 28 U.S.C. §§ 2415-16 (2000).
172. *See* 28 U.S.C. § 2415(b) (2000).
173. 28 U.S.C. § 2415(c) (2000).
174. Oneida II, 470 U.S. 226, 240-42 (1985).

limitations."[175] Justice Story has noted that the reason for this doctrine is the "great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers."[176]

While this principle has traditionally only been invoked on behalf of the United States as a sovereign, the rationale for the principle is equally pertinent for American Indian tribes. The majority in *City of Sherrill* holds the Oneida Indian Nation accountable for the losses of its individual members, thus according it the obligations of a sovereign. Important *privileges* of a sovereign, however, are completely absent. While the principle of *quod nullum tempus occurit regi* may not be controlling law, it is highly persuasive authority that implicates the serious impropriety of invoking the equitable doctrine of laches to deny the Oneida relief. The Oneida complained often of their treatment and the loss of their lands,[177] and requiring the Oneida Indian Nation to fulfill every obligation as a sovereign while allowing them none of the privileges works a grave injustice on the individual members who were not in control of the tribe's transactions.

The principle of *quod nullum tempus occurit regi* and the other aforementioned equitable arguments are all compelling reasons not to use equity to deny the Oneida the relief they seek for a valid cause of action. The Court did not simply reject these arguments, but violated its own rules in a manner that barred the Oneida from even making them in full to the Court.

Conclusion

The horrific treatment that American Indians in the United States have received is no secret to the general public. Stories about this tragic history are still printed across the country. Jim Dawson, writing for the Minneapolis Star Tribune, noted:

> How many Indians died isn't known, but the numbers are likely in the tens of millions. While estimates vary greatly, the consensus is that there were from 50 to 60 million Indians in the hemisphere when Columbus came, and that number had dropped by an estimated 70 to 80 percent by the end of the 1800s. While anthropologists disagree about the numbers,

175. United States v. Peoples Household Furnishings, Inc., 75 F.3d 252, 254 (6th Cir. 1996) (citing Guar. Trust Co. of N.Y. v. United States, 304 U.S. 126, 132 (1938)).

176. *Id.* (citations omitted).

177. *See supra* notes 155-61 and accompanying text.

> they agree on the biological devastation that exterminated countless Indian tribes and rapidly reduced others from great civilizations to fragile shells of existence.[178]

The shameful treatment of American Indians at the hands of the United States government often has little bearing on the specific legal principles applied to cases in a court of law. When the Supreme Court goes beyond strictly applying the law, however, and delves into the realm of equity, *the conscience of the law*, consideration of this long history of injustice is of utmost importance. The majority in *City of Sherrill* makes much of the difficulty that would be worked on the City of Sherrill if they allowed the Oneida to exercise their sovereign right to be free of local taxes on the parcels of land at issue.[179] If the majority considers the hardships worked on the City of Sherrill because it cannot tax Oneida tribal lands, it follows that it should also consider the hardships worked upon the Oneida after hundreds of years of physical and cultural genocide, and the impracticality of requiring the oppressed Oneida Indian Nation to take prompt legal actions that are not even required of the much more powerful and organized United States government.

Outside the realm of equity, the Supreme Court has recognized the unique obligations of the United States to American Indians, as well as the unique nature of tribal sovereignty. The Court has stated that, "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."[180] It must be noted that the Court was here discussing the possible surrender of sovereign powers via a commercial contract. The Court was, however, very adamant about the nature of sovereign powers in general, noting that "[t]o presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head."[181] The point is that silence is not equivocal to a relinquishment of sovereign powers.

American Indian tribal sovereignty is not simply a privilege

178. Jim Dawson, *Exploration brought devastation; Disease and warfare decimated native cultures*, STAR TRIB., Oct. 5, 1992, at 1A.

179. *See supra* notes 140-43143 and accompanying text.

180. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982).

181. *Id.*

granted to American Indians by their benevolent conqueror; it is a right that was never ceded, but was slowly eroded by the United States government through years of warfare.

Further, if one considers that the Court has previously recognized that money damages for land claims are an acceptable remedy,[182] the Court's reasoning becomes suspect. Forcing the City of Sherrill or State of New York to pay a large sum in compensation for lands illegally taken from the Oneida, or forcing them to lose money by an inability to tax the Oneida, would seem to result in a similar financial hardship. Regardless, when one group is subjugated and oppressed by another, justice and *equity* will require a change in situations, wherein the oppressed group gains ground, while the oppressor loses some.

The majority here decided a case on equitable principles not raised or fairly included within the questions raised in the Petition for Writ of Certiorari, and has denied the Oneida their due process right to be heard. This alone is a grave injustice. According to the Court's own rules and precedent, allowing a party to respond to all arguments against it is fundamental to due process. To invoke equity to deny the Oneida relief for a valid cause of action without even allowing the Oneida to fully address those equitable principles is a perversion of the very concept of equity.

Lagwilondonwas once spoke of the Oneida's fierce loyalty to the United States, even while others in the Iroquois confederacy were supporting the British government. He said:

> [the Loyalist Iroquois] are wallowing in plenty, while we are pining in poverty and all this is occasioned by our attachment to you. Brothers—It is well known that the defection of part of our Confederacy is owing to the frequent presents made them by the King, but we are determined to adhere to you.[183]

It is a sad memorial to such loyalty and bravery that the United States Supreme Court now denies the great Oneida Indian Nation the relief and rights they are owed. Such was not the sentiment of the Oneida when their people suffered and their warriors fought and died to help the founding fathers create the United States of America. "Great nations, like great men, should keep their word."[184] The Oneida kept theirs.

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182. *See* Oneida II, 470 U.S. 226 (1985) (holding that the Oneida have a live cause of action for lands taken illegally and allowing them to sue for fair rental value).

183. Lagwilondonwas, *supra* note 1.

184. Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).