

THE DOCTRINE OF CHRISTIAN DISCOVERY: ITS FUNDAMENTAL IMPORTANCE IN UNITED STATES INDIAN LAW AND THE NEED FOR ITS REPUDIATION AND REMOVAL

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INTRODUCTION

The doctrine of Christian discovery has been a foundational principle in United State Indian law since the 1810 Supreme Court decision in *Fletcher v. Peck*² and the 1823 decision in *Johnson v. M'Intosh*.³ Vine Deloria, Jr. reminded us of this, when he wrote a chapter entitled *Conquest Masquerading as Law* in 2006:

[T]he treaties with Native Americans have been negotiated, ratified, and concluded under a cloud of impotence so that clear promises have dissolved into rhetoric when put to the judicial test. Federal Indian law actually begins with a sleight-of-hand decision that proclaimed that the United States had special standing with respect to ownership of the land on which the Indigenous people lived. This nefarious concept was called the "Doctrine of Discovery."⁴

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² *Fletcher v. Peck*, 10 U.S. 87 (1810).

³ *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

⁴ Vine Deloria, Jr., *Conquest Masquerading as Law*, in UNLEARNING THE

The foundational importance of the doctrine was recognized by Rev. Martin Luther King, Jr., in his 1964 book: *Why We Can't Wait*, in which he wrote:

Our nation was born in genocide when it embraced the doctrine that the original American, the Indian, was an inferior race. Even before there were large numbers of Negroes on our shores, the scar of racial hatred had already disfigured colonial society. From the sixteenth century forward, blood flowed in battles over racial supremacy. We are perhaps the only nation which tried as a matter of national policy to wipe out its indigenous population. Moreover, we elevated that tragic experience into a noble crusade. Indeed, even today we have not permitted ourselves to reject or feel remorse for this shameful episode. Our literature, our films, our drama, our folklore all exalt it.

Our children are still taught to respect the violence which reduced a re-skinned people of an earlier culture into a few fragmented groups herded into impoverished reservations. . . .

It was upon this massive base of racism that the prejudice toward the nonwhite was readily built, and found rapid growth.⁵

The doctrine of discovery has continued to be the cornerstone of United States Indian law. A series of recent, disturbing decisions by the Supreme Court and some of the Circuit Courts of Appeal, over the last decade, have used the doctrine to further limit the rights of Indigenous peoples and nations. These recent decisions have “dramatically altered the legal landscape”⁶ of United States’ Indian⁷ law, with an extremely negative impact on Indian

LANGUAGE OF CONQUEST: SCHOLARS EXPOSE ANTI-INDIANISM IN AMERICA 94, 96 (Don Trent Jacobs ed., 2006).

⁵ MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT*, 120 (Signet Classics 1964).

⁶ *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005).

⁷ There is no correct English word to collectively describe the Indigenous peoples of what is now North and South America. Indian is a noun or adjective that relates back to the fact that Columbus thought that he had “discovered” India when his ships landed on the islands in the Caribbean. This article will use the terms Indian, Native, and Indigenous interchangeably. The more

nations, their land rights, and other treaty rights.

Few attorneys or legal scholars who do not practice, teach, or study Indian law are familiar with the doctrine, with its central role in United States' Indian law, or with the recent series of purported equitable decisions that have severely negatively impacted Indian nations and peoples.

This article will begin with a definition of the basic meaning of the doctrine of Christian discovery, and how it has been used by federal courts to justify the wholesale taking of Indigenous lands and to deny Indian nations protection of their treaty rights.

Next, I will provide a brief description of the traditional government and culture of the Onondaga Nation and the Haudenosaunee⁸ and their culturally distinct approach to outside governments. The Nation's position on the doctrine will also be explained.

The third section will discuss the 15th century Papal Bulls, which were the original justification for the doctrine of Christian discovery, as the language used by the Vatican in this series of decrees clearly demonstrates that this doctrine is founded upon a presumed superiority of the Christian religion and civilization, over "pagans", "infidels" and "savages." Currently there are renewed political efforts to have the Vatican rescind these

substantive terms of nations and peoples will be used collectively in their international law sense, rather than the pejorative term "tribe".

⁸ "Haudenosaunee" is the English translation of the term used by the native peoples themselves to collectively describe the Iroquois or Six Nations Confederacy. Haudenosaunee translates to mean the people of the Longhouse. The English, and later the Americans, referred to the Haudenosaunee as the "Six Nations" or the "Six Nations Confederacy." The French referred to the Haudenosaunee as the "Iroquois". Over the past 50 years, as they have worked tirelessly to reaffirm their sovereignty, the Haudenosaunee have endeavored to reject these colonial or imperialist terms of domination and strongly prefer to be called the Haudenosaunee.

The Haudenosaunee consists of the traditional governments of the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora Nations. Each of these Nations has preserved their original clan and nations systems of government with varying degrees of success. The Haudenosaunee Grand Council consists of fifty (50) Chiefs of the six Haudenosaunee Nations, who still meet at Onondaga and who still governs the collective affairs of the Confederacy, while each Haudenosaunee Nation still governs its own internal affairs. Each Haudenosaunee Nation has preserved and still speaks its native language and conducts its government in accordance with the Gayanashagowa, or the Great Law of Peace, as given to them by the Peacemaker over 1000 years ago, and as was done before the European imperial intervention. Further the Haudenosaunee culture, which is shared by all six nations, has been preserved and its ceremonies are still actively carried on in the Longhouses.

harmful Bulls.

The fourth section will review several key Supreme Court decisions from 1810 to 2005, which have been used to erode Indian nations' land rights, as well as hunting, fishing, and other treaty rights. It will also review the use of the doctrine as a foundation for the dismissals of the Onondaga Nation's and other Haudenosaunee land rights cases; and it will review the progression of the "new laches" defense, as the federal courts have created the first new purported equitable defense in centuries to defeat treaty rights. The courts blatantly admit that this "new laches" defense only applies to Indigenous nations' land rights cases.

Finally, this article will compare the actual rulings of the Supreme Court, over the past 200 years, as discussed in the fourth section, with the questionable positions taken in the recently published Native Land Law book⁹ by West publishing, in which the claim is made that: "[N]o [United States] court has ever held, that is, made a formal decision, that the United States validly acquired ownership of Native lands under the doctrine of discovery."¹⁰

I. THE DOCTRINE OF CHRISTIAN DISCOVERY AND ITS APPLICATION AGAINST INDIAN NATIONS:

For two centuries, the Supreme Court has defined the doctrine of Christian discovery to mean that title to Indigenous lands immediately was transferred to the "discovering", or colonizing European, Christian nations when they landed on the shores of Turtle Island.¹¹ The Indigenous inhabitants were then left with only a "right of occupancy," which United States courts have ruled, could be terminated at will by the federal government.¹² One of the worst insults came in 1955, when the Supreme Court ruled that no compensation was due when Indian lands, or the right of occupancy, was taken unilaterally.¹³

⁹ INDIAN LAW RESOURCE CENTER, NATIVE LAND LAW: GENERAL PRINCIPLES OF LAW RELATING TO NATIVE LANDS AND NATURAL RESOURCES § 2.3 (2016).

¹⁰ *Id.* at 21 (emphasis added).

¹¹ Turtle Island is the name the Haudenosaunee and other Indigenous peoples use to describe North America.

¹² *M'Intosh*, 21 U.S. at 585.

¹³ *Tee-Hit-Ton v. United States*, 348 U.S. 272, 288–90 (1955).

II. THE ONONDAGA NATION AND THE HAUDENSAUNEE CONFEDERACY:

The author has been fortunate to have been the General Counsel for the Onondaga Nation since the early 1980s, and to have learned from their traditional Chiefs, Clan Mothers, and Faithkeepers about their ancient culture and system of government. Onondaga has fought consistently against forced assimilation into the dominant culture, and they have preserved their language, their ceremonies, and their traditional governmental structure.¹⁴ The Nation remains one of the leaders in the struggle for Indigenous sovereignty and the right of self-determination and self-government.¹⁵

Onondaga is the central fire, or capital, of the Haudenosaunee Confederacy,¹⁶ which is also known as the Iroquois—a pejorative French colonial term, as the French were aligned with the Algonquin peoples to the north, while the Dutch and then the English interacted more closely with the Haudenosaunee in the struggles between the European and Christian colonial powers over the fur trade.¹⁷ Their name for themselves is Haudenosaunee, which roughly translates as “People of the Longhouse.”¹⁸

Onondaga is a traditional nation,¹⁹ which still governs itself by the Gayanashagowa, the Great Law of Peace, which was brought to them over a thousand years ago by the Peacemaker, when he instructed the then Five Nations to end their fighting and to join together into the Haudenosaunee Confederacy.²⁰ Onondaga is

¹⁴ Robert B. Porter, *Building a New Longhouse: The Case for Government Reform within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 865–67 (1998).

¹⁵ *Id.*

¹⁶ The Six Nations of the Haudenosaunee Confederacy are the Mohawk, Oneida, Onondaga, Cayuga, Seneca and Tuscarora Nations.

¹⁷ Harold Blau et. al., *Onondaga*, in 15 HANDBOOK OF NORTH AMERICAN INDIAN 491, 493-5 (William C. Sturtevant ed., 1978).

¹⁸ *Supra* note 7 and accompanying text.

¹⁹ See Joseph J. Heath, *Review of the History of the April 1997 Trade and Commerce Agreement Among the Traditional Haudenosaunee Councils of Chiefs and New York State and the Impact Thereof on Haudenosaunee Sovereignty*, 46 BUFF. L. REV. 1011, 1012 n.2 (1998).

²⁰ See Onondaga Nation, *History*, ONONDAGANATION.ORG/HISTORY (last visited September 9, 2016).

governed by a Council of Chiefs, who are selected by the Clan Mothers, who also have the authority to remove.²¹ The Nation has maintained its active clan system, and their citizens still perform their ceremonies and speak their language.²² The Onondaga Nation does not accept any federal funding.²³

The positions taken in this paper are consistent with those of the Onondaga Nation Council of Chiefs.

A. *The Nation Agrees with Vine Deloria, Jr., that We Must Expose and Reject the Doctrine of Christian Discovery:*

In 1972, Vine Deloria Jr., openly challenged the doctrine of discovery, when he wrote, “An Open Letter to the Heads of the Christian Churches in America,”²⁴ an essay in which he focused on the Christian-centric nature of this excuse for taking Native lands. Vine attached the word “Christian” to the doctrine in this article and in another, later chapter which he wrote for the book *Unlearning the Language of Conquest*²⁵ just before he passed over. For decades, Vine taught that the struggle for land rights had to include education around and eventual repudiation of the doctrine of Christian discovery.²⁶ His words from 43 years ago remain correct to the Onondaga Nation, when he wrote that, after the Europeans “discovered” the “new world”: “questions of a theological nature arose. Who were these newly discovered peoples? What rights did they possess? How were they to be treated?”²⁷ He went on to point out that the Christian monarchs of Western Europe created a system: “*that whoever discovered lands inhabited by non-Christian peoples would have the exclusive rights to ‘extinguish’ such [Indian] title as against any other Christian nation.*”²⁸

His essay continued to observe the consequences of the doctrine in the 20th century in the United States:

The present position of the United States is that it

²¹ *Id.*; See Heath, *supra* note 19, at 1012 n.2

²² *See id.*

²³ *See id.* at 1022 n.33.

²⁴ See VINE DELORIA, JR., *FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA* 77–83 (James Treat ed., Routledge 1999).

²⁵ See Deloria, *supra* note 4, at 94–107.

²⁶ See Delora, *supra* note 24, at 82.

²⁷ *Id.* at 77.

²⁸ *Id.* (emphasis added).

holds our lands and communities as its wards. When this [current] doctrine is traced to its origin[,] it lands comfortably within the Doctrine of Discovery and the United States claims its rights over us not by right of conquest but by having succeeded to the rights of Great Britain to extinguish our titles to lands.²⁹

Vine concluded by pointing out how critical it is to work against the doctrine, when he wrote the Indian nations will continue to have great difficulties “maintain[ing] our lands, our communities and cultures so long as the major reason that they are protected is to enable the United States to one day extinguish them as is legal right against the other Christian nations.”³⁰

I agree that rejecting the doctrine of Christian discovery, and removing it from United States law, must be central in our efforts to preserve Indian sovereignty and lands. The author also rejects these “discovery” claims to Indian nations’ rights by the United States, as being unilateral and in violation of international law.

III. THE HISTORICAL ORIGINS OF THE DOCTRINE OF CHRISTIAN DISCOVERY: THE PAPAL BULLS OF 1455 AND 1495, AND THE 1496 PATENT GRANTED BY KING HENRY VII TO JOHN CABOT

We only need to look at and understand three proclamations of Christian superiority and their alleged rights to dominate and conquer Indigenous peoples to realize that this doctrine is entirely unacceptable and that it must be erased from American law. Much has been written by scholars about these proclamations, so only a brief review of their statements and claims will be provided.

It should be noted that Marshall specifically invoked the 1496 Cabot Patent in *Johnson v. M’Intosh*,³¹ when he wrote: “[s]o early as the year 1496, [the English] monarch granted a commission to the Cabots, to discover countries unknown to the *Christian people*, and to take possession of [the lands] in the name of the king of England.”³²

I will return to *Johnson* in the next section of this article, but it

²⁹ *Id.* at 81.

³⁰ *Id.*

³¹ See *Johnson*, 21 U.S. at 576 (1823).

³² *Id.* (emphasis in original).

is a good starting point for this historical understanding of the origins of the doctrine. This seems particularly appropriate given the multiple references to *Johnson in County of Oneida v. Oneida Indian Nation*,³³ and many other decisions that have eroded Indigenous rights.

A. 1496 Patent granted by King Henry VII to John Cabot

In 1496, eager to get England into the race among European powers competing to create empires by carving up the new world, King Henry VII issued a patent to John Cabot and his sons.³⁴ Henry granted Cabot “full and free authority” to sail under the flag of England:

[T]o find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatsoever part of the world placed, which before this time were **unknown to all Christians**. . . . And that the before-mentioned John and his sons or their heirs and deputies may conquer, occupy and possess whatsoever such towns, castles, cities and islands by them thus discovered that they may be able to **conquer, occupy and possess**, as our vassals and governors lieutenants and deputies therein, **acquiring for us the dominion, title and jurisdiction** of the same towns, castles, cities, islands and mainlands so discovered;³⁵

United States law relative to Indian land rights is fundamentally unfair and unacceptable because it accepts and has adopted the mind-set of these 15th century proclamations.³⁶ The one above is by the king of England, who purported to give an Italian citizen³⁷ the right to conquer, occupy, and possess any

³³ See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 235 (1985).

³⁴ THE PRECURSORS OF JACQUES CARTIER 1497-1534: A COLLECTION OF DOCUMENTS RELATING TO THE EARLY HISTORY OF THE DOMINION OF CANADA 7-10 (Henry Percival Biggar ed., Ottawa Government Printing Bureau, 1911) [hereinafter THE PRECURSORS].

³⁵ *Id.* at 9 (emphasis added).

³⁶ Robert Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 2-4 (2005).

³⁷ See THE PRECURSORS, *supra* note 34, at 9 (John Cabot was born in Venice,

land not occupied by Christians.³⁸ Cabot was not to intrude on Spanish or Portuguese “discoveries”, as these were “discoveries” by Christian nations.³⁹ It should also be noted that Henry reserved one fifth of the value of merchandise brought back to England, though he invested no money of his own.⁴⁰ From its conception, the doctrine has been about Christians profiting from illegally seized and claimed Indian lands and resources.

The federal government’s claim of the right to “conquer, occupy, and possess” any and all of Indigenous lands, is a very serious threat to Indian nations’ sovereignty and their very existence as distinct nations, with their own cultures, languages and governments.

B. The 1455 Papal Bulls Romanus Pontifex

In 1496, Henry VII merely adopted the concept of Christian discovery, which had been created and blessed by the Popes for at least a half century.⁴¹ In 1455, Pope Nicholas V had issued the Bull *Romanus Pontifex*,⁴² to King Alfonso V of Portugal, which declared war against all non-Christians throughout the world, and specifically sanctioned and encouraged the conquest, colonization, and exploitation of non-Christian nations and peoples.⁴³ The Pope directed the king “to invade, search out, capture, vanquish, and subdue all Saracens and pagans whatsoever, and other enemies of Christ,” to “reduce their persons to perpetual slavery,” and “to take away all their possessions and property, both movable and immovable.”⁴⁴ This remarkably suspect authorization was used by Portugal to excuse its slave trafficking from, and exploitation of, Africa.⁴⁵

C. The 1493 Papal Bull Inter Caetera

Italy as Giovanni Caboto and the 1496 Patent from the King refers to him as a “citizen of Venice”).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Miller, *supra* note 36, at 17.

⁴² EUROPEAN TREATIES BEARING ON THE HISTORY OF THE STATES AND ITS DEPENDENCIES 9 (Frances G. Davenport ed. 1917) [hereinafter EUROPEAN TREATIES].

⁴³ *Id.* at 12.

⁴⁴ *Id.* at 23 (emphasis added).

⁴⁵ *Id.* at 10.

Later, on May 4, 1493, just after Columbus landed in the Caribbean, Pope Alexander VI issued the Papal Bull *Inter Caetera*,⁴⁶ to capitalize on the voyage of Columbus by granting Spain the title to all discovered lands in order to advance the spread of Catholicism, which was the Christendom's attempt to dominate the world.⁴⁷ Spain was granted title to all discovered lands to the west of a pole-to-pole line 100 leagues west of any of the islands of the Azores or the Cape Verde Islands, while Portugal was granted title to all discovered land to the east of this Line of Demarcation.⁴⁸

Alexander VI wrote that his god was pleased “that in our times especially the Catholic faith and the Christian religion be exalted and be everywhere increased and spread, . . . and that **barbarous** nations be **overthrown** and brought to the faith itself.”⁴⁹ Alexander also called for the propagation of the Christian empire (“*emperii christiani*”).⁵⁰ The Pope claimed that god favored this “*saving of the heathens and barbarians,*” by noting that Columbus had sailed “*with divine aid*” and that he had “discovered certain very remote islands and even mainlands that hitherto had not been discovered by others; and therein dwell very many peoples living in peace, and, as reported, going unclothed . . . these very peoples living in the said islands and countries believe in one God, the Creator in heaven.”⁵¹

Despite this acknowledgment that the indigenous peoples had their own culture and religion the Bull went on to convey title to, dominion over and jurisdiction of the discovered lands:

And, in order that you may enter upon so great an undertaking with greater readiness and heartiness endowed with the benefit of our apostolic favor, we, of our own accord, . . . and out of the fullness of our apostolic power, by the authority of Almighty God conferred upon us in blessed Peter and of the vicarship of Jesus Christ, which we hold on earth, do by tenor of these presents, should any of said islands have been found by your envoys and

⁴⁶ *Id.* at 56.

⁴⁷ *Id.* at 71.

⁴⁸ EUROPEAN TREATIES, *supra* note 42, at 71.

⁴⁹ *Id.* at 75.

⁵⁰ *Id.* at 76 (emphasis added).

⁵¹ *Id.* at 62 (emphasis added).

captains, give, grant, and assign to you and your heirs and successors, kings of Castile and Leon, . . . forever, together with all their dominions, cities, camps, places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, discovered and to be discovered. . . .⁵²

However, the Pope went on to make it clear that such claims to title, dominion, jurisdiction, and rights relative to any discovered lands, could not be made if another Christian nation had previously discovered [arrived at] the lands:

With this proviso however that none of the islands and mainlands, found and to be found, discovered and to be discovered, beyond that said line towards the west and south, be in the actual possession of any Christian king or prince; . . . with this proviso however, that by this our gift, grant, and assignment, and investiture no right acquired by any Christian prince, who may be in actual possession of said islands and mainlands, . . . is hereby to be understood to be withdrawn or taken away.⁵³

The Declaration of Vision, which is supported by the Onondaga Nation, calls for the revocation of the 1493 Vatican papal bull. The Declaration states in part:

We call upon the people of conscience in the Roman Catholic hierarchy to persuade [the] Pope . . . to formally revoke the Inter Certera Bull of May 4, 1493, which will restore our fundamental human rights. That Papal document called for our Nations and Peoples to be subjugated so that the Christian Empire and its doctrines would be propagated. The United States Supreme Court ruling [in] *Johnson v. McIntosh* (in 1823) adopted the same principle of subjugation expressed in the Inter Caetera Bull.

⁵² *Id.*

⁵³ *Id.* at 63.

This Papal Bull has been, and continues to be, devastating to our religions, our cultures, and the survival of our populations [nations and peoples].⁵⁴

IV. THE HISTORY OF SUPREME COURT DECISIONS WHICH INVOKE THE DOCTRINE OF DISCOVERY

Indian title and rights to land were first addressed by the Supreme Court in 1810 in *Fletcher v. Peck*:⁵⁵

What is the Indian title? It is a **mere occupancy** for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. **It is not a true and legal possession. . . . It is a right not to be transferred, but extinguished.**⁵⁶

The Court went on to justify this claim by observing:

The Europeans found the territory in possession of a rude and **uncivilized** people, consisting of separate and **independent nations**. They had no idea of property in the soil but a right of occupation. A right not individual but national. This is the right gained by conquest. The Europeans always claimed and exercised the right of conquest over the soil.⁵⁷

After this extremely negative beginning, the Supreme Court has repeatedly used the doctrine of Christian discovery to claim the right to take Indian peoples' sovereignty and rights to land.

Acknowledging these negative rulings does not mean that we accept them; it does mean that we must understand the status of United States Indian law and the arguments and assumptions of the Supreme Court and other federal courts' rulings before we can move forward to successfully defend Indigenous sovereignty

⁵⁴ *Declaration of Vision: Toward the Next 500 Years*, TURTLE QUARTERLY, Fall-Winter 1994, at 8.

⁵⁵ *Fletcher v. Peck*, 10 U.S. 87 (1810).

⁵⁶ *Id.* at 125 (emphasis added).

⁵⁷ *Id.* (emphasis added).

and land rights. The citing of *Johnson v. M'Intosh*, on page 30 of Native Land Law, in a favorable light is deeply troubling to the Nation, and so, we will begin with a careful look at this leading case on the doctrine and then identify other Supreme Court cases, wherein the doctrine has been applied to erode Native land rights.⁵⁸

A. *Johnson v. M'Intosh*⁵⁹

There is no dispute that this is the leading case, when the Supreme Court articulated that the doctrine of Christian discovery would be the foundation of United States Indian law. The more legal scholars research this case and its background, the more troubling its history and impact becomes. Lindsay G. Robertson is a professor of law, history, and Native America Studies at the University of Oklahoma and he is one of the legal and historical experts who submitted Declarations⁶⁰ in support of the Onondaga Nation's opposition to the state's motion to dismiss the Nation's Lands Rights Action. Lindsay's 2005 book: *Conquest by Law, How the Discovery of America Dispossessed Indigenous Peoples of Their Lands*,⁶¹ exposes many new details about this troublesome case, and its jacket cover states:

In 1823, Chief Justice John Marshall, a Revolutionary War veteran, former Virginia legislator, and a **well-know land speculator**, handed down a Supreme Court decision of monumental importance in defining the rights of indigenous peoples. . . . The case was *Johnson v. M'Intosh*, and from the beginning, it was all about land: 43,000 square miles of lush, rolling farmland commanding the junctures of four major rivers in Indiana and Illinois. At the heart of the decision was a "discovery doctrine" that gave rights of ownership to the European sovereigns who

⁵⁸ See INDIAN LAW RESOURCE CENTER, *supra* note 9, at 30.

⁵⁹ *M'Intosh*, 21 U.S. at 543.

⁶⁰ Declaration of Lindsay G. Robertson in Opposition to Motions to Dismiss at 1–2, *Onondaga Nation v. New York* (N.D.N.Y. 2006) (No. 05-CV-314), 2006 WL 689740.

⁶¹ Lindsay G. Robertson, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (Oxford Univ. Press 2005).

“discovered” the land and converted the indigenous owners into tenants. Though its meaning and intention have been fiercely disputed, **more than 175 years later this doctrine remains the law of the land** and indigenous peoples all over the world have been dispossessed of their property as a result. . . .

The tale . . . is unsettling. *Johnson v. M'Intosh* was a collusive case, an attempt to buy off many of the leading figures of the early republic, including the lawyer for the [Wabash Land] Companies' opponent, and to take advantage of loopholes in the early federal judicial system in order to win a favorable decision from the Supreme Court. Acting in his own interests, Marshall extended his opinion in the case from the necessary one paragraph to one comprising more than thirty-three pages. When the legitimacy of the decision came under scrutiny in a subsequent Supreme Court case, *Worcester v. Georgia*, Marshall tried to back-track and repudiate the doctrine. By then, however, it was too late. . . .

This . . . is a story of how **a spurious claim gave rise to a doctrine—intended to be of limited application--that itself gave rise to a massive displacement of persons and the creation of a law that governs indigenous people and their lands to this day.**⁶²

It is my position that this nefarious case must be denounced, just as the doctrine must be, and that all Indian nations and their lawyers must work to overturn the decision and to fully repudiate the doctrine. This is true even though there may be some, limited favorable language tucked away in the shadows of the case. This case was the beginning of the federal courts' efforts to limit the sovereignty of Indian nations and to progressively take Indian peoples' rights of ownership to their ancestral homelands.

In *Johnson*, the dispute over this land was between one group of land speculators who traced their title to purchases, in 1773 and 1775, from the Native nations themselves; and another group

⁶² *Id.* (emphasis added).

of land speculators who traced their title to an 1813 purchase from the United States government.⁶³ The ruling favored the later groups and stated: “A title to lands, under grants to private individuals, made by Indian tribes or nations, . . . cannot be recognised (Sic.) in the Courts of the United States.”⁶⁴ Unfortunately, Marshall did not stop there but went on to write that:

The [Indians] were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; **but their rights to complete sovereignty, as independent nations, were necessarily diminished**, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that **discovery gave exclusive title to those who made it**.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the **ultimate dominion** to be in themselves; and claimed and exercised, as a consequence of this **ultimate dominion**, a power to grant the soil, while yet in possession of the natives.⁶⁵

It is difficult to understand how Native Land Law⁶⁶ can cite this passage from *Johnson*, as not harmful to Indian nations, but actually claims this ruling is favorable:

This opinion conforms precisely to the principle which has been supposed to be recognised (Sic.) by all European governments, from the first settlement of America.⁶⁷ **The absolute ultimate title has been considered as acquired by the discovery**, subject only to the Indian title of

⁶³ *M'Intosh*, 21 U.S. at 571.

⁶⁴ *Id.* at 543.

⁶⁵ *Id.* at 574 (emphasis added).

⁶⁶ See INDIAN LAW RESOURCE CENTER, *supra* note 9, at 30.

⁶⁷ *Id.* (quoting *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 592 (1823)). (“The first settlement of America”? The presumption seems to be that no human beings were living here, prior to the European colonization.)

occupancy, which title the discoverers possessed the exclusive right of acquiring.⁶⁸

When the federal courts write that Indigenous sovereignty has been diminished and that “exclusive title” to, and “ultimate dominion” over, Native lands has been lost to the Christian “discoverers”, this is overtly negative. We need to denounce this ruling and the doctrine, not attempt to sugar coat it.

Marshall then wrote many pages reflecting that all the European “discoverer” nations claimed their “right of dominion” to “acquire and dispose of the soil which remained in the occupation of Indians.”⁶⁹

*“Thus has our whole country been granted by the crown while in the occupation of the Indians. These grants purport to convey the soil as well as the **right of dominion** to the grantees. . . .”*⁷⁰

“Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians.”⁷¹

“The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.”⁷²

After this extensive discourse on the history of taking Indian lands by Spain, France, Holland and England, Marshall summed up by writing:

The United States, then, have unequivocally acceded to that great and broad rule by which its **civilized** inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that **discovery gave an exclusive right to extinguish the Indian title of occupancy**, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them

⁶⁸ *Id.*

⁶⁹ *Mintosh*, 21 U.S. at 575.

⁷⁰ *Id.* at 579 (emphasis added).

⁷¹ *Id.* at 584.

⁷² *Id.* at 586.

to exercise. . . . All our institutions recognise **the absolute title of the crown**, subject only to the Indian right of occupancy, **and recognise (Sic.) the absolute title of the crown to extinguish that right**. This is incompatible with an absolute and complete title in the Indians.⁷³

Marshall did not hide his racist opinion of Native Americans: “[b]ut the tribes of Indians inhabiting this country were fierce **savages**, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness.”⁷⁴

The right of discovery given by this commission, is confined to countries “then unknown to all Christian people;” and of these countries Cabot was empowered to take possession in the name of the king of England.⁷⁵ Thus asserting a right to take possession, notwithstanding the occupancy of the natives who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.⁷⁶

The same principle continued to be recognized. The charter granted to Sir Humphrey Gilbert, in 1578, authorizes him to discover and take possession of such remote, **heathen, and barbarous lands**, as were not actually possessed by any Christian prince or people.⁷⁷

Another quotation from Marshall’s *Johnson* opinion should leave no doubt about its negative ruling and its claim of severe diminishment of sovereignty and land rights:

The **absolute ultimate title** has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a [possession] in fee, than a lease for years, and might as effectually bar an ejectment.⁷⁸

⁷³ *Id.* at 587–88 (emphasis added).

⁷⁴ *Id.* at 590 (emphasis added).

⁷⁵ *Mintosh*, 21 U.S. at 576.

⁷⁶ *Id.* at 576–77.

⁷⁷ *Id.* at 577 (emphasis added).

⁷⁸ *Id.* at 592 (alteration to the original) (emphasis added).

Marshall removed all doubt that the doctrine of Christian discovery was based upon the presumed superiority of the Christianity and his definition of civilization when he wrote: “*The potentates of the old world found no difficulty in convincing themselves that they **made ample compensation** to the inhabitants of the new, **by bestowing on them civilization and Christianity, in exchange for unlimited independence.***”⁷⁹ In other words, Marshall reasoned that the seizing of title to Indigenous lands, along with the domination of the Indigenous peoples and the severe diminishment of sovereignty were justified because the colonial powers were forcing them into Christianity and into their concept of civilization.⁸⁰

So, we see that *Johnson* ruled that Native sovereignty and land rights were severely diminished upon discovery by Christian people. The right of Indian peoples to their lands was reduced to no more than that of a lessee.

B. Other Negative Supreme Court Decisions Following Johnson

In 1842, in *Martin v. Lessee of Waddell*,⁸¹ the Supreme Court ruled that:

The English possessions in America were not claimed by right of conquest, but by right of discovery. According to the principles of international law, as then understood by the civilized powers of Europe, the **Indian tribes in the new world were regarded as mere temporary occupants of the soil; and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered.** Whatever forbearance may have been sometimes practiced

⁷⁹ *Id.* at 573 (emphasis added).

⁸⁰ See *id.*; See also Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v M'Intosh*, 75 GEO. WASH. L. REV. 329, 347 (2007) (discussing the European encounter with the Native Americans and Chief Justice Marshall's rationalization of the aggressive tactics used to colonize Native American land).

⁸¹ *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842).

towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe, at their pleasure, **as if it had been found without inhabitants.**⁸²

The book *Native Land Law* mentions the *Martin* case.⁸³ However, the book attempts to dismiss its ruling by rather flippantly labeling it as “judicial puffery” and “simply false.” It is not helpful to attempt to dismiss this decision by observing that it is internally inconsistent, or by recognizing the fact that much of the discussion about the doctrine of discovery is “not essential to the reasoning of the case.”⁸⁴ Many of the more negative Supreme Court decisions are internally inconsistent, defy all normal rules of precedent and procedure which apply to other litigants, and gratuitously grab at any excuse to further limit Indian nations’ rights and sovereignty. The author certainly does not agree with the *Martin* ruling, or any of the other difficult cases quoted in this section, but they must be acknowledged and then refuted.⁸⁵

After *Martin*, the law limiting Indian land rights did not improve over the next 100 years, as can be seen by examining the 1945 decision by the Supreme Court, in *Northwestern Band of Shoshone Indians v. United States*,⁸⁶ in which the Court ruled that:

Even where a reservation is created for the maintenance of Indians, their right **amounts to nothing more than a treaty right of occupancy.** Prior to the creation of any such area, formally acknowledged by the United States as subject to such right of Indian occupancy, a certain nation, tribe or band of Indians may have claimed the right because of immemorial occupancy to roam certain territory to the exclusion of any other Indians. . . . [W]e shall refer to the aboriginal usage

⁸² *Id.* at 409 (emphasis added).

⁸³ INDIAN LAW RESOURCE CENTER, *NATIVE LAND LAW: GENERAL PRINCIPLES OF LAW RELATING TO NATIVE LANDS AND NATURAL RESOURCES* 35 (Indian Law Resource Cntr. Ed., 2016).

⁸⁴ *Id.* at 35–36

⁸⁵ *See id.*

⁸⁶ *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335 (1945).

without definite recognition of the right by the United States as Indian title.

Since *Johnson v. McIntosh*, decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, **the extinguishment of Indian title by that sovereignty has proceeded, as a political matter**, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss. **Exclusive title to the lands passed to the white discoverers**, subject to the Indian title with power in the white sovereign alone to extinguish that right by "purchase or by conquest."⁸⁷

Additionally, the heavily negative ruling in *Tee Hit Ton Indians v. United States*,⁸⁸ must be acknowledged. In 1955, the Supreme Court held that Alaskan Natives had no right to compensation for timber resources removed from their lands against their will.⁸⁹

All Indian law practitioners and scholars recognize that this case clearly limited Native land rights, when the court held that:

Indian Title.-- The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or **permission** from the whites to occupy. That description means **mere possession not specifically recognized as ownership by Congress. . . .** This is not a property right but amounts to a right of occupancy which the sovereign grants, . . . **but which right of occupancy may be terminated and such lands**

⁸⁷ *Id.*, at 338, 339 (citations omitted) (emphasis added).

⁸⁸ See *Tee-Hit-Ton Indians*, 348 U.S. at 272.

⁸⁹ See *id.* at 288–89.

fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.⁹⁰

The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale but the conquerors' will that deprived them of their land.⁹¹

This remarkable ruling denies Constitutional protection to Indian nations and their lands. It is alarming knowing that it came just one year after the historic landmark civil rights case of *Brown v. Bd. of Educ.*⁹² So, on one hand, the Court made history in boldly reversing negative and incorrect precedent, to begin to correct racism against African Americans; but then in the very next year, the Court not only continued the racist treatment of Native Americans, but made it worse by refusing to follow one of the most basic of Constitutional principles—the Fifth Amendment's prohibition of taking property without just compensation.⁹³

The doctrine has also been used by the Supreme Court to extend the jurisdiction of the federal government over Indians to create the claim of "plenary power" over Indians.⁹⁴ The leading case in this regard was *U.S. v. Kagama*,⁹⁵ in which criminal jurisdiction was extended over Indians even though the Court openly admitted that the Constitution did not give such power to

⁹⁰ *Id.* at 279 (emphasis added).

⁹¹ *Id.* at 289–90 (emphasis added).

⁹² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁹³ *See id.* at 495; *See Tee-Hit-Ton Indians*, 348 U.S. at 279; U.S. CONST. amend. V.

⁹⁴ Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1070–71.

⁹⁵ *United States v. Kagama*, 118 U.S. 375 (1886).

Congress.⁹⁶ Citing to the doctrine of Christian discovery as its reason, the Court wrote:

Following the policy of the European governments in the discovery of America, towards the Indians who were found here, the . . . United States since, have recognized in the Indians a possessory right to the soil over which they roamed and hunted and established occasional villages. But they asserted an **ultimate title** in the land itself, . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, **not as possessed of the full attributes of sovereignty . . .**⁹⁷

They are spoken of as “wards of the nation;” “pupils;” as local dependent communities. . . .

These Indian tribes are the wards of the nation. They are communities dependent on the United States,-dependent largely for their daily food; dependent for their political rights. . . . The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.⁹⁸

This case is still recognized as one of the leading precedents for United States Indian law, despite its 19th century racist language and assumptions of racial superiority.⁹⁹ In 1978, *Kagama* was cited by then Justice Rehnquist, in his majority opinion in *Oliphant v. Suquamish Indian Tribe*,¹⁰⁰ which was the 20th century Court’s most important decision on severely limiting the jurisdiction of Indian nations. In *Oliphant*, Rehnquist ruled that Indian nations do not have criminal jurisdiction over non-Natives, even when they murder or rape citizens of a nation on

⁹⁶ *See id.* at 379.

⁹⁷ *Id.* at 381 (emphasis added).

⁹⁸ *Id.* at 383–84.

⁹⁹ *See infra* note 100 and accompanying text.

¹⁰⁰ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

nation territory.¹⁰¹

The *Kagama* opinion cited over a dozen 19th century Supreme Court precedents, executive branch statements, and Congressional laws and reports to attempt to justify this limitation of Nations' sovereignty and jurisdiction.¹⁰² Essentially, Rehnquist ruled that Indian nations were so culturally inferior that they should not be permitted to exercise criminal jurisdiction over crimes committed against their own citizens. This racist conclusion was reached by citing to another 19th century decision: In *In re Mayfield*, 141 U.S. 107, (1891), the Court noted that:

the policy of Congress had been to allow the inhabitants of the Indian country such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization.¹⁰³

This is one of over a dozen citations by Rehnquist to 19th century sources of racist attitudes towards Indians. He even relied upon an 1834 Congressional report, which was generated during the peak of the racist, removal era of United States Indian policy. Shamelessly, this racist discourse from the past permeated the Court's decisions when Rehnquist became Chief Justice and remains dominant in the Roberts Court.

C. The Recent and Continuing Use of the Doctrine by United States Courts to Deny Rights of Indian Peoples

The doctrine is still being used by the federal courts to erode Indian land rights. The recent 6th Circuit decision in *Ottawa Tribe v. Logan*,¹⁰⁴ which affirmed the District Court's dismissal of the Ottawas' action for a declaratory judgment stating that the Ottawas' retained fishing rights in Lake Erie in the 1795 Treaty of Greenville: "[w]e hold that, because the Tribe, under these treaties, retained **at most a right of occupancy** to the lands in

¹⁰¹ *Id.* at 212.

¹⁰² *United States v. Kagama*, 118 U.S. 375, 380–82 (1886).

¹⁰³ *In re Mayfield*, 141 U.S. 107, 115–116.

¹⁰⁴ *Ottawa Tribe of Okla. v. Logan*, 577 F. 3d 634 (6th Cir., 2009).

Ohio, and that this right was extinguished upon abandonment, any related fishing rights it may have reserved were similarly extinguished when the Tribe removed west of the Mississippi.”¹⁰⁵

The Circuit acknowledged that this so-called “abandonment” had actually been forced removal in the 1830s.¹⁰⁶ The 1795 Treaty of Greenville states that the United States “relinquish[ed] their claims to all other Indian lands,”¹⁰⁷ and the Treaty also provided that: “the Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States. . . .”¹⁰⁸ Additionally, the subsequent Treaty of Detroit, in 1807, provided that: “[I]t is further agreed and stipulated, that the said Indian nations shall enjoy the privilege of hunting and fishing on the lands ceded as aforesaid. . . .”¹⁰⁹

It should also be noted parenthetically, that the Circuit dismissed a number of other treaty-based claims by the Ottawa on the basis of laches, without reference to *Sherrill*, while clearly relying on the doctrine of discovery.¹¹⁰

Thus, as recently as 2009, the 6th Circuit has denied treaty fishing rights because of the doctrine of Christian discovery and in so doing, they relied upon the 1917 Supreme Court decision in *Williams v. Chicago*,¹¹¹ which had earlier interpreted the 1795 Treaty of Greenville. In *Williams*, the Court acknowledged the claim of the Pottawatomie Nation, that: “from time immemorial . . . the Pottawatomie Indians were the owners and in possession as a sovereign nation, as their country, of large tracts of lands around and along the shores of Lake Michigan.”¹¹² And then the Court went on to flatly reject the Pottawatomie’s rights:

The only possible immemorial right which the Pottawatomie Nation had in the country claimed as their own in 1795 was that of **occupancy**. . . . We think it entirely clear that this treaty did not convey a fee-simple title to the Indians; that under

¹⁰⁵ *Id.* at 634 (emphasis added).

¹⁰⁶ *See id.* at 636–37.

¹⁰⁷ *Id.* at 635.

¹⁰⁸ *Id.* at 638.

¹⁰⁹ *Id.* at 636.

¹¹⁰ *See Logan*, 577 F.3d. at 638–39.

¹¹¹ *Williams v. Chicago*, 242 U.S. 434 (1917).

¹¹² *Id.* at 435–36.

it no tribe could claim more than the right of continued occupancy; that when this was abandoned, all legal right or interest which both the tribe and its members had in the territory came to an end.¹¹³

Even more recently, on August 27, 2014, the 9th Circuit referred to the doctrine and directly quoted from both *Tee-Hit-Ton* and *Johnson v. M'Intosh*. This case was *White vs. University of California*,¹¹⁴ and it involved a NAGPRA¹¹⁵ based dispute over two sets of ancestors' remains which were found to be 9000 years old. The Circuit reached the correct conclusion: to uphold the District Court's dismissal of this suit by professors, who opposed repatriation, because the Kumeyaay Nation and its Repatriation Committee were necessary and indispensable parties, who could not be joined due to sovereign immunity.¹¹⁶

However, in the process of reaching this correct result, in footnote 2, the Circuit, yet again, invoked the doctrine of Christian discovery:

Aboriginal interest in land generally is described as a tribe's right to occupy the land. It is not a property right, but "amounts to a right of occupancy which the sovereign grants and protects against the interests or third parties." That right, which is residual in nature, comes from the legal theory that **discovery and conquest gave conquerors the right to own the land** but did not disturb the tribe's right to occupy it.¹¹⁷

From these and other recent decisions, we can see that there can be no doubt that the doctrine of Christian discovery is still very much alive in the federal courts, and it is being used to this day in detrimental rulings, against Indian peoples.

D. The Sherrill "Doctrine" and the Dismissals of the

¹¹³ *Id.* at 437–8 (emphasis added).

¹¹⁴ *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014).

¹¹⁵ Native American Graves Protection and Repatriation Act, 101 P.L. 601 (1990).

¹¹⁶ *White*, 765 F.3d at 1025–27.

¹¹⁷ *Id.* at 1015 (citations omitted) (emphasis added).

Haudenosaunee Land Rights Cases

Over the past decade, the 2nd Circuit Court of Appeals has affirmed the Western and Northern District Courts of New York's dismissals of the Seneca, Cayuga, Onondaga and Oneida Nation land rights cases; and these dismissals have been significantly justified by fundamental reliance on the doctrine of discovery.¹¹⁸ To justify these dismissals, the federal courts have concocted a new "equitable" defense. This defense ignores the fundamental principles of equity and is only applicable to Indian nations' land rights cases.¹¹⁹

From the early 1970s until 2005, the Haudenosaunee land rights cases benefitted from a positive set of rulings, despite intermittent setbacks, that recognized the rights of the Nations to file federal cases based upon New York State's historic and willful violations of the three treaties, the Constitution, and the 1790 Trade and Intercourse Act.¹²⁰ However, within weeks of the filing of the Onondaga Nation's land rights action, the legal landscape changed and a disturbing series of rulings created what is now being termed the *Sherrill*¹²¹ "doctrine," which denies judicial redress for any treaty violation.

On March 11, 2005, the Onondagas filed what they called their land rights action¹²² because they did not attempt to evict all of the settlers from their original territory, but only sought two declaratory judgments: (a) that New York had knowingly violated federal law, the Constitution, and treaties when it illegally took vast portions of Onondaga territory in the 1790s and early 1800s, and (b) that therefore, pursuant to the clear terms of the Trade

¹¹⁸ The Second Circuit has also affirmed the dismissals of the land rights cases for the: *Stockbridge Munsee, Stockbridge Munsee Community v. N.Y.*, 756 F.3d 163 (2d Cir. 2014); and the *Shinnecock Nation, Shinnecock Indian Nation v. N.Y.*, 2015 WL 6457789 (2d Cir. 2015).

¹¹⁹ See Kathryn Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 WYO. L. REV. 375 (2011) [hereafter: Fort, *Disruption*]; Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009); Sarah Krakoff, *City of Sherrill New York: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5 (2005); Wenona T. Singel & Matthew L. M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006).

¹²⁰ 25 U.S.C. § 177 (1790).

¹²¹ *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

¹²² See *Onondaga Nation v. New York*, 2010 U.S. Dist. LEXIS 99536 (N.D.N.Y. 2010).

and Intercourse Act, these takings are void.

In addition to naming New York State and lesser political subdivisions as defendants, the Nation also sued five corporate defendants because they were the worst polluters of the aboriginal Onondaga lands and waters, particularly Onondaga Lake.¹²³ One of these corporate defendants was Honeywell International.¹²⁴ From 1888 to 1987, Honeywell and its predecessors, Allied Chemical and Solvay Process, heavily polluted Onondaga Lake, the sacred lake on the shores of which the Confederacy was formed.¹²⁵ The lake is also the birthplace of western democracy.¹²⁶

Onondaga Lake once was so abundant with cold-water fish the visitors to Onondaga territory in the 1700s wrote about it,¹²⁷ but these corporations had turned it into the most polluted lake in the country, by using the lake and its shore areas as dumping grounds for their toxic chemical wastes.¹²⁸

The Onondaga Chiefs, Clan Mother, and Faithkeepers engaged in diplomatic work between their Nation lands and surrounding communities for several decades to call attention to these issues.¹²⁹ This cooperative work with their neighbors generated a considerable amount of support for their land rights action. The Nation and its leaders have worked cooperatively with a local support group, Neighbors of Onondaga Nation (NOON), as one example of implementing the Nation's call for healing the natural world together and for healing the relationship with its neighbors. The judicial relief which the Onondaga Nation sought was not disruptive, and the filing of the land rights action was not, in fact, disruptive, but it has been generally supported by the non-Indian citizens and politicians.¹³⁰

¹²³ *Id.* at *4–6.

¹²⁴ *Id.* at *2.

¹²⁵ LEWIS HENRY MORGAN, *LEAGUE OF THE IROQUOIS* 7 (Herbert M. Lloyd ed., Dodd, Mead and Co. 1922); *Honeywell & Onondaga Lake: A Timeline*, ONONDAGA NATION, (last visited Oct. 1, 2016), <http://www.onondaganation.org/land-rights/the-offenders/honeywell-onondaga-lake-a-timeline/>.

¹²⁶ See H.R. Con. Res. 331, 100th Cong. (1988).

¹²⁷ See generally JOHN BARTRAM, LEWIS EVANS & CONRAD WEISER, *A JOURNEY FROM PENNSYLVANIA TO ONONDAGA IN 1743* 61–64 (Imprint Society 1973).

¹²⁸ Onondaga Nation, 2010 U.S. Dist. LEXIS 99536, at *5–6; *Onondaga Lake – The Most Polluted Lake in America*, ONONDAGA NATION (last visited Oct. 1, 2016), <http://www.onondaganation.org/land-rights/onondaga-lake/>.

¹²⁹ *Neighbors of Onondaga Nation*, SYRACUSE PEACE COUNCIL (last visited Oct. 1, 2016), <http://www.peacecouncil.net/noon>.

¹³⁰ *Onondaga Land Rights Action*, SYRACUSE PEACE COUNCIL (last visited Oct. 1, 2016), <http://www.peacecouncil.net/programs/neighbors-of-the-onondaga->

1. *City of Sherrill v. Oneida Indian Nation*, March 29, 2005

Just three weeks after the Onondaga filing, on March 29, 2005, the Supreme Court issued its remarkable decision in *City of Sherrill v. Oneida Indian Nation*.¹³¹ This landmark decision was written by Justice Ginsberg, with an 8 to 1 majority; and, the 2nd Circuit has subsequently ruled that *Sherrill* “has dramatically altered the legal landscape”¹³² for Indian nations’ land rights cases. *Sherrill* was not a land claim or a land right case, but it has had a dramatic impact on the viability of such claims.

The Oneida Nation, after earlier District Court rulings that it could not reclaim illegally taken lands in the court system,¹³³ had begun to purchase property from willing sellers, within the boundaries of their reservation that had been recognized in the 1794 Treaty of Canandaigua.¹³⁴ Since the lands had been under the sovereign jurisdiction of the Oneida Nation before New York knowingly violated the Trade and Intercourse Act, the Constitution, and three treaties when it took the land, the Oneidas took the position that any properties which they obtained on the open market, should be sovereign and under their jurisdiction once again.¹³⁵

Therefore, the Oneidas refused to pay the local property taxes, and the City eventually brought the dispute into court to collect the accumulated taxes.¹³⁶ There was no dispute that the property was within the Canandaigua recognized Oneida reservation, which had not been disestablished or diminished.¹³⁷

Despite this historical and factual background, the Supreme Court held that the City was authorized to tax the property, and in the process of reaching this conclusion, the Court created a new “equitable” defense, which it labeled as “laches.” The Court,

nation/onondaga-land-rights-action.

¹³¹ *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

¹³² *Id.* at 202; *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005).

¹³³ *Oneida Indian Nation v. N.Y.*, 500 F. Supp. 2d 128, 133 (N.D.N.Y. 2007).

¹³⁴ *Indian Treaties*, 7 Stat. 44–45 (1794) (For an in depth analysis of the 1794 Treaty of Canandaigua. See *Cayuga Indian Nation v. Cuomo*, 758 F. Supp. 107, 110–11 (N.D.N.Y. 1991)).

¹³⁵ *City of Sherrill*, 544 U.S. at 202.

¹³⁶ *Id.* at 511.

¹³⁷ *Id.* at 202, 212.

in creating this new defense, ignored many of the fundamental principles of equity—such as that a defendant must have clean hands, that the courts are required to balance the equities, or that any injury should have a remedy. Much has been written by legal scholars in criticism of this unprecedented decision.¹³⁸ In reaching this result, the Court did not undertake a proper analysis of equity as it applied to the Haudenosaunee nations and people, as it created this novel application of the “new laches doctrine”, or how “disruptive” this doctrine is to the Haudenosaunee.

As disturbing as this ruling is, perhaps of even more concern is the reliance it placed on the doctrine of discovery, as shown in footnote # 1: Under the “doctrine of discovery,” “fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States.”¹³⁹ The footnote went on to acknowledge that New York “after the adoption of the Constitution . . . acquired vast tracts of land from Indian tribes . . . without National Government participation.”¹⁴⁰ Such New York takings of Haudenosaunee lands were illegal and in violation of the Constitution and the Trade and Intercourse Act, but this was conveniently ignored by the Court.

2. *Cayuga Indian Nation v. Pataki*, Dismissal, June 28, 2005

To legal professionals working to preserve and strengthen Indian nations’ sovereignty and land rights, *Sherrill* was a very difficult decision. However, we did not have to wait long for the other shoe to drop and for even more bad news. Just three months later, on June 28, 2005, the 2nd Circuit dismissed the entire Cayuga Nation land claim, using the *Sherrill* decision as its rationale.¹⁴¹

The Circuit’s legal discussion began by recognizing the sweeping changes generated by the *Sherrill* decision, with this language: “The Supreme Court’s recent decision in *City of Sherrill v. Oneida Indian Nation* has dramatically altered the legal landscape against which we consider plaintiffs’ [Indian

¹³⁸ See *supra*, note 120 and accompanying text.

¹³⁹ *City of Sherrill*, 544 U.S. at 203 (citations omitted).

¹⁴⁰ *Id.* at 203, n.1.

¹⁴¹ *Pataki*, 413 F.3d at 280.

nations' land] claims.”¹⁴² The ruling continued with:

[w]e understand *Sherrill* to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and **within the statute of limitations**.¹⁴³

The Circuit noted the passage of more than 200 years since the Cayuga land had been illegally¹⁴⁴ taken and “the disruptive nature of the claim itself,”¹⁴⁵ combined to justify the dismissal. This result was reached despite the fact that the only relief that had been granted to the Cayugas by the Northern District Court was a monetary award of \$247 million. The Circuit did not explain how making New York compensate for illegally taking the Cayuga lands would be disruptive, as stated by the court.

The Circuit attempted to justify this “new laches” defense with this statement: “[o]ne 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 translate neatly to these claims**.”¹⁴⁶

In other words, the new laches defense only applies to Indian nation land rights cases. So, the United States courts' treatment of Indigenous land rights and treaty rights cases is separate and unequal.

I would submit that the reason that United State Federal Indian law is so “complex and confusing” is because it is based upon the immoral and illegitimate doctrine of Christian discovery, and because the courts keep changing the rules as it suits their purpose to further limit Indian sovereignty. As Vine Deloria, Jr. wrote in his 2006 essay, *Conquest Masquerading as Law*:

Although guaranteed justice in the federal courts, Indians have discovered that far too often legal doctrines purported to ensure their political and

¹⁴² *Id.* at 273.

¹⁴³ *Id.* (emphasis added).

¹⁴⁴ *Cuomo*, 730 F. Supp. at 493.

¹⁴⁵ *See Pataki*, 413 F.3d at 273.

¹⁴⁶ *Id.* at 276 (emphasis added).

treaty rights are used to confiscate their property, deny their civil rights, and deprive them of the benefits that accrue with United States citizenship. So bizarre are the rulings of the federal courts when deciding an “Indian” case that the decisions appear to have come through the Looking Glass of Lewis Carroll.¹⁴⁷

At repeated intervals over the past two and a quarter centuries, the Haudenosaunee have attempted to have the United States courts address the clearly illegal theft of their lands by New York.¹⁴⁸ These attempts have initially seemed to gain some traction, only to have the courts take sudden and unexplained turns to deny any justice of fairness. Rather than the Queen’s default position of “off with their heads”, the Haudenosaunee have repeatedly been told “out with your claims”.

3. Oneida Nation’s Land Claim Dismissal, August 9, 2010

For the next five years, those of us representing Indian nations and scholars of Indian law studied the *Sherrill* and *Cayuga* decisions, as we searched to find ways to reconcile them with true equitable principles and centuries old rules. However, in the summer of 2010, in its dismissal¹⁴⁹ of the long running Oneida Nation land claim, the Circuit admitted that essentially, they had concocted a new defense, which I would submit is far from equitable.

In the Oneida dismissal decision the Circuit ruled that:

We have used the term “laches” here, . . . as a convenient shorthand for the equitable principles at stake in this case, but the term is somewhat imprecise for the purposes of deciding those principles . . .

The Oneidas assert that the invocation of a purported laches defense is improper here because

¹⁴⁷ Deloria, *supra* note 4 and accompanying text.

¹⁴⁸ Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State’s Indian Law*, 63 ALB. L. REV. 125, 141–142 (1999).

¹⁴⁹ Oneida Indian Nation v. Cty of Oneida, 617 F.3d 114, 140 (2d. Cir. 2010), *cert. denied*, 565 U.S. 970 (2011)

the defendants have not established the necessary elements of such a defense. This omission, however, is not ultimately important, as the equitable defense recognized in *Sherrill* and applied in *Cayuga* **does not focus on the elements of traditional laches.**¹⁵⁰

In other words, this is an entirely new “equitable” defense, which does not require the defendants to comply with the traditional principles of equity and this new defense only applies to Indian nations’ land rights cases.¹⁵¹ Once again, separate and more unequal.

4. Onondaga Nation’s Land Rights Action Dismissal, October 19, 2012

After the Circuit’s dismissals of the Cayuga and Oneida land claims, the eventual dismissal of the Onondaga land rights action was entirely predictable. First, the Northern District made a formal decision to dismiss,¹⁵² based on *Sherrill*, as applied in *Cayuga* and *Oneida*. The Nation then appealed this dismissal to the 2nd Circuit; the case was fully briefed; and I was summoned to oral argument in the Circuit on October 12, 2012—Columbus Day. The irony of this timing was not lost on the Nation’s leaders.

One week later, on October 19, 2012, the Circuit dismissed the Onondaga case in a summary, one page decision.¹⁵³ This immediate and summary affirmance of the dismissal is a clear indication of how entrenched “the Sherrill doctrine” has become. The Circuit reinforced this clarity when it wrote: “This appeal is decided on the basis of the equitable bar on recovery of ancestral lands in *Sherrill*, and this Court’s cases of *Cayuga* and *Oneida*.”¹⁵⁴

The summary decision did provide a clear articulation of the few elements of the new laches defense.

Three specific factors determine when ancestral land claims are foreclosed on equitable grounds: (1) “the length of time at

¹⁵⁰ *Id.* at 127 (emphasis added).

¹⁵¹ *Id.* at 117.

¹⁵² *Onondaga Nation v. N.Y.*, No. 5:05-cv-0314, 2010 WL 3806492, at *39 (N.D.N.Y. Sept. 22, 2010).

¹⁵³ *Onondaga Nation v. N.Y.*, 500 F. App’x 87, 90 (2d Cir. 2012)

¹⁵⁴ *Id.* at 89.

issue between an historic injustice and the present day”; (2) “the disruptive nature of claims long delayed”; and (3) “the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs’ injury.”¹⁵⁵ Before *Sherrill*, in both the *Oneida* and *Cayuga* cases, the District Court had heard historical evidence about the original takings of the land by New York State, and in both cases, determined that New York knowingly violated the Trade and Intercourse Act, the Constitution and the 1784, 1789 and 1794 Treaties.¹⁵⁶ The historical facts relative to the State’s illegal takings of Onondaga lands were the same, and New York has never even denied that their takings were illegal. For any other defendant, this admitted illegal activity would preclude them from successfully invoking an equitable defense.

Instead, the State is now able to invoke the new laches defense to overcome their admitted illegal acquisition of Haudenosaunee lands. Once again, the Circuit failed to apply the traditional rules of equity. Further, when we examine these three elements, the rulings become even more suspect. The treaties are more than 220 years old, that is a given; and yet the Constitution still says they are the “supreme law of the land.”¹⁵⁷ There has never been a scintilla of proof that Onondaga’s land rights action has been disruptive. Likewise, the Circuit has simply claimed that it can take judicial notice of the “justifiable expectations” of the current land owners.

In summary: New York knowingly took the Onondaga land illegally, sold it almost immediately for five (5) times what they had paid; and Indian nations were barred from seeking legal relief in the federal court until 1974.¹⁵⁸ The land in question is protected by federal treaties and those treaties are recognized in Constitutional law as being the supreme law of the land.¹⁵⁹ Additionally, the Trade and Intercourse Act¹⁶⁰ prohibited such takings without federal involvement and ratification. Yet, the federal courts have concocted an “equitable” defense they have awarded to the State, to prevent any redress for these

¹⁵⁵ *Id.*

¹⁵⁶ *Cuomo*, 730 F. Supp. at 489.

¹⁵⁷ U.S. CONST. art. VI, cl. 2.

¹⁵⁸ *See Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 663–665 (1974).

¹⁵⁹ U.S. CONST. art. VI, cl. 2.

¹⁶⁰ *See* 25 U.S.C. § 177 (2012).

Constitutional, statutory and treaty violations.¹⁶¹

The Chiefs, Clan Mothers, and Faithkeepers of the Onondaga Nation cannot accept this injustice and so, at their direction, on April 15, 2013, we filed a Petition in the Organization of American States Inter-American Commission on Human Rights, which charges the United States with human rights violations based upon: (a) the original, illegal takings of the lands, (b) the lack of any remedy in United States Courts for treaty violations; and (c) the environmental destruction that has been allowed by the outside governments of the Onondaga lands and waters.¹⁶²

5. Dismissals of Other Indigenous Land Claims by the 2nd Circuit

In the past two years, the 2nd Circuit has affirmed the District Court's dismissals of two more Indian nations' land claims. On June 20, 2014, the Circuit affirmed dismissal of the *Stockbridge Munsee* claim, once again, in a per curiam, summary decision.¹⁶³ The absolute bar of any Indian nation land rights action was made clear when the Circuit ruled that: “[i]t is **well-settled** that claims by an Indian tribe alleging that it was unlawfully dispossessed of land early in America's history are barred by the equitable principles of laches, acquiescence, and impossibility. We therefore affirm.”¹⁶⁴

That this “equitable” rule only applies to Indian nation land rights claims was also reinforced, as the Circuit went on to distinguish the recent Supreme Court decision in *Petrella v. MGM*,¹⁶⁵ in which the Supreme Court discussed the application of laches to defeat a claim filed within a three-year statute of limitations:

Petrella establishes that the equitable defense of laches cannot be used to defeat a claim filed within the Copyright Act's three-year statute of limitations. The Supreme Court commented on the

¹⁶¹ See *Onondaga Nation v. N.Y.*, 134 S. Ct. 419 (2013). (The Nation also filed a Petition for certiorari to the Supreme Court, which was denied).

¹⁶² Petition to the Inter-American Commission on Human Rights submitted by The Onondaga Nation and The Haudenosaunee against the United States at 37, *Onondaga Nation v. U.S.* Case No.: P-624-14 (2014).

¹⁶³ *Stockbridge-Munsee Cmty. v. N.Y.*, 756 F.3d 163, 166 (2d Cir. 2014).

¹⁶⁴ *Id.* at 164 (emphasis added).

¹⁶⁵ See *Petrella v. MGM*, 134 S. Ct. 1962, 1985–86 (2014).

applicability of laches to actions at law generally, but ultimately confined its ruling “to the position that, in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.

Congress has not fixed a statute of limitations for Indian land claims. . . . And even if a statute of limitations applied, “the equitable defense recognized in *Sherrill* . . . does not focus on the elements of traditional laches.” Rather, laches is but “one of several preexisting equitable defenses, along with acquiescence and impossibility, illustrating fundamental principles of equity that preclude[] . . . plaintiffs ‘from rekindling embers of sovereignty that long ago grew cold.’”¹⁶⁶

Here we have yet another example of the courts’ fast footwork when it comes to finding any way plausible to dismiss Indian nations’ land rights action. In *Cayuga*, the Circuit had ruled that these “equitable doctrines . . . can . . . be applied to Indian land claims, even when a claim is legally viable and **within the statute of limitations**.”¹⁶⁷ Different inequitable rules apply to Indian nations’ land rights cases than to any other litigant.

Most recently, on October 27, 2015, the Circuit also affirmed the dismissal of the *Shinnecock Nation* land claim, in another summary order, issued just two weeks after oral argument, in which they relied upon *Sherrill*, *Cayuga* and *Oneida*.¹⁶⁸

The Shinnecock Nation also raised the claim that the taking of their lands constituted a Fifth Amendment violation, by arguing that the District Court dismissal of their land claim pursuant to *Cayuga*, retroactively applied a “new rule of limitations” to extinguish a property right, without due process.¹⁶⁹

The Circuit’s dismissal is so summary that it does not even address this argument, which demonstrates that the argument in Native Land Law, that the Constitution provides meaningful

¹⁶⁶ *Stockbridge-Munsee Cmty.*, 756 F.3d at 166.

¹⁶⁷ *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2004) (emphasis added).

¹⁶⁸ *Shinnecock Indian Nation v. N.Y.*, No. 14-4445(L), 2015 WL 6457789, at *1.

¹⁶⁹ Brief for Defendants-Appellees at 37, *Shinnecock Indian Nation v. New York*, 628 Fed. Appx. 54 (2015) (No. 14-4445).

protection for Indigenous lands, is a false promise.¹⁷⁰

The brief filed by New York State, in support of affirmance of the dismissal,¹⁷¹ contains this interesting argument:

The Nation's due process argument also fails because Sherrill was not a "new" rule but one firmly rooted in existing case law. As this Court explained in *Oneida* and again in *Stockbridge-Munsee*, the equitable defense recognized in *Sherrill* is the embodiment of "several preexisting equitable defenses" and longstanding principles of federal Indian law and federal equity practice. This is reflected in the authority cited by the Supreme Court in *Sherrill* dating back to the late nineteenth century.¹⁷²

This reasoning is disappointing. We should not look to 19th century legal authority when we seek to resolve 21st century political, cultural and historical inequities. If we did look back as they argue, separate but equal educational institutions would still be the norm, and women would not be allowed to vote.

Additionally, the State continues to try to bolster the "Sherrill doctrine" by denying the reality that it was a radical departure from precedent and a glaring example of judicial activism which ruled on issues not briefed or argued in the lower courts.

V. OTHER RECENT CIRCUIT COURT DECISIONS THAT HAVE INVOKED THE DOCTRINE, TO LIMIT INDIGENOUS RIGHTS

There should be no doubt that the doctrine is still being used by the United States courts to take away Indian land rights. We only need to look at the very recent 6th Circuit decision in *Ottawa Tribe of Oklahoma v. Logan*,¹⁷³ in which the 6th Circuit affirmed the District Court's dismissal of the Ottawas' action for a declaratory judgement that they retained fishing rights in Lake Erie. In the 1795 Treaty of Greenville: "[w]e hold that, because the Tribe, under these treaties, retained **at most a right of**

¹⁷⁰ See *Shinnecock Indian Nation*, 2015 WL 6457789, at *1.

¹⁷¹ Brief for Defendants-Appellees at 7, 43, *Shinnecock Indian Nation v. New York*, 628 Fed. Appx. 54 (2015) (No. 14-4445).

¹⁷² *Id.* at 40.

¹⁷³ *Ottawa Tribe of Okla. v. Logan*, 577 F.3d 634 (6th Cir. 2009).

occupancy to the lands in Ohio, and that this right was extinguished upon **abandonment**, any related fishing rights it may have reserved were similarly extinguished when the Tribe removed west of the Mississippi.”¹⁷⁴

The Circuit acknowledged that this so-called “abandonment” had actually been forced removal in the 1830s. This denial of treaty fishing rights was upheld despite the fact that in the 1795 Treaty of Greenville, the United States “relinquish[ed] their claims to all other Indian lands”;¹⁷⁵ and the Treaty also provided that: “[t]he Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States.”¹⁷⁶ Additionally, the subsequent Treaty of Detroit, in 1807, provided that: “[I]t is further agreed and stipulated, that the said Indian nations shall enjoy the privilege of hunting and fishing on the lands ceded as aforesaid. . . .”¹⁷⁷ It should also be noted, parenthetically, that the Circuit dismissed a number of other treaty based claims by the Ottawa on the basis of laches, without reference to *Sherrill*.¹⁷⁸

Thus, as recently as 2009, the 6th Circuit has denied specifically preserved, treaty fishing rights because of the doctrine of Christian discovery and in so doing, they relied upon the 1917 Supreme Court decision in *Williams v. Chicago*,¹⁷⁹ which had earlier interpreted the 1795 Treaty of Greenville. In *Williams*, the Supreme Court acknowledged the claim of the Pottawatomie Nation, that: “from time immemorial, . . . the Pottawatomie Indians were the owners and in possession as a sovereign nation, as their country, of large tracts of lands around and along the shores of Lake Michigan”;¹⁸⁰ and then the Court

¹⁷⁴ *Id.* at 634 (emphasis added).

¹⁷⁵ *Id.* at 635 (quoting Treaty with the Wyandots, *infra*, note 176 at arts. 3 & 4).

¹⁷⁶ Treaty of Peace, Wyandots-Delawares-Shawanoes-Ottawas-Chipewas-Putawatimes-Miamis-Eel-river-Weea’s-Kickapoos-Piankashaws-Kaskaskias-U.S., Art. 5, Aug. 3, 1795, 7 Stat. 49.

¹⁷⁷ Treaty of Peace, Ottawas-Chippewas-Wyandots-Pottawatimies-U.S., Art. 5, Nov. 17, 1807, 7 Stat. 105.

¹⁷⁸ *Onondaga Nation’s Preliminary Response To Questionnaire*, ONANDOGA NATION (Sept. 21, 2009), <http://www.onondaganation.org/news/2009/onondaga-nations-preliminary-response-to-questionnaire/>.

¹⁷⁹ See *Williams v. Chicago*, 242 U.S. 434 (1917); See *Ottawa Tribe of Okla. v. Logan*, 577 F.3d 634, 637–38 (2009) (“The United States Supreme Court has had occasion to explain its view of the Treaty of Greenville with some precision. In *Williams v. City of Chicago* . . .”).

¹⁸⁰ *Chicago*, 242 U.S. at 435–36.

went on to flatly reject the Pottawatomie's rights:

The only possible immemorial right which the Pottawatomie Nation had in the country claimed as their own in 1795 was that of occupancy. . . . We think it entirely clear that this treaty did not convey a fee-simple title to the Indians; that under it no tribe could claim more than the right of occupancy; that under this was abandoned, all legal right or interest which both the tribe and its members had in the territory came to an end.¹⁸¹

Even more recently, on August 27, 2014, the 9th Circuit referred to the doctrine and directly quoted from both *Tee-Hit-ton* and *Johnson v. M'Intosh*. This case was *White vs. University of California*,¹⁸² and it involved a NAGPRA based dispute over two sets of ancestors' remains which were found to be 9000 years old. The Circuit reached the correct conclusion: to uphold the District Court's dismissal of this suit by professors, who opposed repatriation, because the Kumeyaay Nation and its Repatriation Committee were necessary and indispensable parties, who could not be joined due to sovereign immunity.

However, in the process of reaching this correct result, in footnote #2, the Circuit, yet again invoked the doctrine of Christian discovery:

Aboriginal interest in land generally is described as a tribe's right to occupy the land. It is not a property right, but "amounts to a right of occupancy which the sovereign grants and protects against the interests or third parties." That right, which is residual in nature, comes from the legal theory that discovery and conquest gave conquerors the right to own the land but did not disturb the tribe's right to occupy it.¹⁸³

There can be no doubt that the doctrine of Christian discovery is still very much alive in the United States courts and that it is

¹⁸¹ *Id.* at 437–38 (Citing *Johnson v. M'Intosh*, 21 U.S. 543 (1823)).

¹⁸² *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014).

¹⁸³ *Id.* at 1015, n.2.

being used to this day in extremely negative ruling against Indian peoples.

VI. HOW THE TEXT OF NATIVE LAND LAW FALLS SHORT OF
PROVIDING AN ACCURATE REVIEW OF THE SUPREME COURT
PRECEDENTS ON THE DOCTRINE

Given the severity of the negative impacts of these judicial rulings on Indigenous sovereignty, treaty rights, and land rights, it is important for Indian law practitioners to acknowledge the problems caused by the series of Supreme Court and Circuit decisions reviewed in sections IV and V above, and to work in and out of court towards the complete removal of the doctrine of Christian discovery from United States Indian law.

Unfortunately, the approach to this problem and the legal discussion in the recently published Native Land Law book¹⁸⁴ by the Indian Law Resource Center, claims that: “no [United States] court has ever held, that is, made a formal decision, that the United States validly acquired ownership of Native lands under the doctrine of discovery.”¹⁸⁵

It appears that one of the main reasons for this book’s failures is that the “general principles” listed in the book are aspirational—what the law should be, but are portrayed as what the law actually is and what the Supreme Court rulings actually have been. This confusion is illustrated by the opening paragraph on the book, under § 1.1–Overview, “[t]he draft General Principles of Law state what we the believe the federal law *actually is* or what it *ought to be* concerning Indians and Alaska Native lands and resources.”¹⁸⁶

As known by most Indian law practitioners and as documented above, the difference between what the United States Indian law actually is and what it ought to be, is vast; and the book’s attempts to blur this difference only leads to confusing and incorrect conclusions, which are not helpful in the field.

If the Supreme Court rulings had actually complied with the General Principles, there would be no need for this book; and the federal courts would not be producing unfavorable case law against Indigenous nations when they attempt to enforce their treaties.

¹⁸⁴ INDIAN LAW RESOURCE CENTER, *supra* note 9, at 35.\.

¹⁸⁵ *Id.* at 21 (alteration to original).

¹⁸⁶ *Id.* at p. 1 (italics in original).

I will focus my discussion on Chapter 2: “Native Land Ownership and the Doctrine of Discovery”,¹⁸⁷ which begins with three principles:

- 1) The legal rights of Indian nations to lands and resources are the full rights of ownership without any diminishment;¹⁸⁸
- 2) The doctrine of discovery gave the “discovering” nations no legal right as against Indian nation;¹⁸⁹ and
- 3) The doctrine of discovery and terra nullis are inconsistent with the Constitution.¹⁹⁰

These are excellent goals as to where we think United States Indian law should be; but they are in complete contradiction with the current rulings of the Supreme Court and various Circuit Courts, as well as with Justice Marshall’s rulings in *Fletcher* and *Johnson v. McIntosh* and the litany of later decisions that followed these two landmark rulings.

Section 2.1 does admit that the doctrine “continues to infect and pervert legal thinking by courts;” and that it “continues to be referred to as if it were justification for many kinds of unjust and racist decisions”.¹⁹¹ I certainly agree that: “[t]his doctrine has no place in modern law and ought to be universally repudiated and rejected in all its aspects.”¹⁹² I also agree that: “[u]ntil this mistaken, legally unsupportable set of ideas is thoroughly repudiated, it will likely continue to be used to give some seeming excuse for decisions and policies that diminish and impair the land rights of Indian and Alaska Native peoples.”¹⁹³

However, such a repudiation will not be possible until we admit the complexity of the problem and the series of racist rulings which have accumulated since 1810. From these lofty goals, in § 2.3, the book stumbles into several inaccurate statements about Supreme Court case law. It is difficult to understand how these statements could be justified:

A. Although United States courts have repeatedly asserted **in dicta** that the doctrine of discovery gave the United States title to Native lands and

¹⁸⁷ *Id.* at p. 15.

¹⁸⁸ *Id.* at 16.

¹⁸⁹ *Id.*

¹⁹⁰ INDIAN LAW RESOURCE CENTER, *supra* note 9, at 16.

¹⁹¹ *Id.* at 17.

¹⁹² *Id.*

¹⁹³ *Id.* at 18.

resources, **no court has ever held, that is, made a formal decision, that the United States validly acquired ownership of Native lands under the doctrine of discovery.**¹⁹⁴

B. The general conclusions concerning the nature of Indian ownership of their property and the doctrine of discovery that emerge from these cases [*Fletcher, Johnson v. M'Intosh, Worcester*¹⁹⁵ & *Mitchel*¹⁹⁶] indicate that the doctrine of discovery, as a technical legal matter, did not give 'discovering' nations, or the United States as successor in interest, ownership of Native lands and resources.¹⁹⁷

C. [T]hese decisions rejected the idea that the doctrine of discovery gave colonizing state or the United States **any** actual title in the sense of ownership of Native lands and resources.¹⁹⁸

The Onondaga Nation simply does not agree with these statements or the subsequent legal discussion.¹⁹⁹ As shown by the quotes, in Section IV above, from several key Supreme Court rulings which claimed to limit Indian land rights, these are not accurate statements of the current status of United States Indian law, as applied by the courts. The federal courts have consistently held all title, except the Indian right of occupancy, transferred to the Christian discoverer Nation. This right of occupancy can be terminated at will by the dominant government; and that Native sovereignty was significantly limited upon discovery. Further, as noted in Section VI-D above, the doctrine of Christian discovery has been recently used against Onondaga and Haudenosaunee land and treaty rights.

Once the federal courts ruled that sovereignty was diminished, and that exclusive title and "ultimate dominion" passed to the "discoverer;" then the slicing away of sovereignty began down a

¹⁹⁴ *Id.* at 21 (emphasis added).

¹⁹⁵ *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁹⁶ *Mitchel v. United States*, 34 U.S. 711 (1835).

¹⁹⁷ INDIAN LAW RESOURCE CENTER, *supra* note 8, at 22–23.

¹⁹⁸ *Id.* at 25 (emphasis added).

¹⁹⁹ Kavitha Janardhan, *Gayanashogowa and Guardianship: Expanding and Clarifying the Federal-Tribal Trust Relationship*, 36 ENVTL L. REP. 10786, 10792 (2006).

very dangerous slippery slope. I would submit that rather than assist Indian nations in their efforts to preserve sovereignty and treaty rights, this book may actually make that slippery slope steeper and more difficult.

The Nation recognizes that it will not be an easy task to get *Johnson* and *Sherrill* reversed and in effect, to get the doctrine of Christian discovery removed completely from United States law. However, they advocate that this is the proper task for Native peoples and their legal teams, as the best protection of Indigenous rights to lands and sovereignty. The Nation is aware that it took decades to reverse another racist Supreme Court ruling: *Plessy v. Ferguson*,²⁰⁰ a 7 to 1 decision that claimed that racial segregation, even in public places (particularly railroads) did not violate the equal protection provisions of the United States Constitution.²⁰¹

The tireless and concerted political, cultural and legal efforts, brought about the reversal of *Plessy* in 1954, by *Brown v. Board of Education*.²⁰² Indian nations must do the same: they must face the realities of the racism of these rulings against sovereignty and human rights and work collectively to reverse them. To be successful in these efforts, we must always denounce the doctrine of Christian discovery and its use against Indian nations by the United States courts.

It is extremely ironic that one year after issuing the landmark decision in *Brown*, the same Supreme Court handed down the *Tee-Hit-ton* decision. This irony helps illustrate the level of racism that persists against Indigenous peoples, to justify this wholesale denial of human and treaty rights.

The Nation agrees with Prof. Robert A. Williams, Jr., when he wrote that:

My argument on the need for this type of confrontational strategy that focuses on identifying and bringing to the fore the nineteenth-century racist judicial language on Indian savagery used by the present-day Court in its major Indian rights decision does not entail one axiom of belief and Native knowledge: Indian rights will never be

²⁰⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁰¹ *See Plessy*, 163 U.S. at 548.

²⁰² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

justly protected by any legal system or any civil society that continues to talk about Indians as if they are uncivilized, unsophisticated, and lawless savages. The first step on the hard trail of decolonizing the present-day U[nited] S[tates] Supreme Court's Indian law is changing the way the justices themselves talk about Indians in their decisions on Indian Rights.²⁰³

I submit that the legal argument in Chapter 2 is incorrect and selective. Further, the entire position of the Native Land Law on the doctrine of Christian discovery is unacceptable because it ignores the historical origins of the doctrine and because it fails to address the cultural and religious components of the doctrine; and Native Land Law does not properly state or address the legal framework of United States Indian law which has sprung from the doctrine.

CONCLUSION

The Haudenosaunee Nations have now been clearly told by the United States Courts that their treaty and land rights cannot be addressed in federal courts, because their treaties are 220 + years old and because "the reasonable expectations" of the settlers who have polluted their lands and waters might be "disrupted". Settlers "expectations" trump treaty rights and past centuries of living on and caring for the land and waters. The Haudenosaunee have been denied any justice by this recently concocted "equitable" defense which only applies to Indian land rights cases. This does not fit within my understanding of true equity.

So, the Nation has become a leader in the movement to call upon the Vatican to rescind the offensive Papal Bulls of the 15th century as a step towards removal of the doctrine of Christian discovery completely from United States Indian law.

The Onondaga Nation has strongly urged all Native peoples and nations to join in the efforts to:

A. Encourage President Barack Obama to fully implement the

²⁰³ Robert A. Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* xxviii-xxix (U of Minnesota Press 2005).

United Nations Declaration on the Rights of Indigenous Peoples,²⁰⁴ and to abandon the current position that domestic law trumps the human rights recognized in the Declaration;

B. Participate in the international movement to annul the doctrine of discovery and to rescind the Papal Bulls which are used for its justification;

C. Advocate in international forums and venues, such as the United Nations, as a means of advancing sovereignty and the rights of all Indigenous nations and peoples; and

D. Strengthen their sovereignty and jurisdiction over their lands.

The Onondaga Nation is a sovereign Nation with valid treaties with the United States in 1784, 1789 and 1794. The Haudenosaunee travel on their own passports, because they are citizens of their Nations and their Confederacy; they are not United States citizens. They believe that their best hope for regaining their lost homelands does not lie within the United States court system or reliance on constitutional protections. Indigenous nations' best hope have been and will be found within international law, by exercising and expanding upon the rights in the United Nations Declaration of Indigenous Rights and by working cooperatively with their non-Native neighbors for positive changes.

The Haudenosaunee are aware that their rights must be asserted against both the United States and Canada because the existence of their Nations and the Confederacy long predates the artificial creation of that "border", and because there are Haudenosaunee communities and citizens on both sides of the Great Lakes and the St. Lawrence River Valley.

They further believe that the doctrine of Christian discovery must be exposed, renounced, and annulled and they are engaged in international efforts towards this goal. While they support all nations' efforts to bring about change "domestically", they urge all Native peoples and nations to recognize the limitation of this approach and to look to work more in international venues.

The Onondaga Nation has grave concerns that the Native Land Law could undermine the decades of effort of indigenous peoples to expose and renounce the Doctrine of Discovery and preserve their land rights based on human rights.

²⁰⁴ United Nations Declaration on the Rights of Indigenous Peoples, G.A. RES. 61/295, U.N. Doc. A/RES/47/1, (Sept. 13, 2007).

Given that the *Sherrill* decision was an 8 to 1 vote, written by Justice Ginsberg; and that the 2nd Circuit has now adopted the “Sherrill doctrine” to summarily dismiss all Indigenous nations’ land and treaty rights actions; it is difficult to see how working within United States courts will produce any different results. It is also difficult to have any faith that the Congress, with its current make up, will provide any meaningful relief in the foreseeable future. Therefore, Onondaga and the Haudenosaunee have engaged in, and suggest that other join them in, a political and cultural campaign, to lay a more position foundation in the general, non-Native population. It is hoped that grass roots level organizing and working together will bring about meaningful change.

We need to continue to work in religious and academic communities for a better understanding of the doctrine of Christian discovery, to pressure the Vatican to unequivocally rescind the 15th century Papal Bulls. With that “moral” cover removed, we can then move on to building pressure on the United State government and institutions to admit that this racist doctrine has no place in a true democracy.