NOTE

CONUNDRUMS ALONG THE MOHAWK: PRECONSTITUTIONAL LAND CLAIMS OF THE ONEIDA INDIAN NATION

I

INTRODUCTION

Indian land claims litigation demands careful historical analysis for fair judicial decision making. Preconstitutional land claims create a special problem of analysis because of the existence of three separate sovereignties: the federal government, the individual state government, and the Indian tribe or nation.

The Six Nations of the Iroquois once controlled most of the lakes and woodlands of the northeastern United States.[1] Following the Revolutionary War,[2] because they were not included in the Treaty of Paris, the Iroquois were forced to negotiate treaties for their lands with both the federal government[3] operating under the Articles of Confederation[4] and with the State of New York.[5] In *Oneida Indian Nation v. New York,*[6] the Oneida Nation of the Iroquois Confederacy challenged New York's acquisition of approximately five and one-half million acres of tribal land. The challenge was based on the statutory provisions of the Fort Stanwix Treaty of 1784,[7] and

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1. *See generally* G. HUNT, THE WARS OF THE IROQUOIS: A STUDY IN INTERTRIBAL-TRADE RELATIONS (1940); H. UPTON, THE EVERETT REPORT IN HISTORICAL PERSPECTIVE 7-15 (1980); Tooker, *The League of the Iroquois: Its History, Politics, and Ritual,* in 15 HANDBOOK OF NORTH AMERICAN INDIANS 418-41 (1978).

2. In 1783, Sir John Johnson, the superintendent general and inspector general of British Indian affairs in North America, explained the Treaty of Paris and the new boundaries established between England and the new United States and their impact upon the Iroquois:

> You are not to believe or even think by that the line which has been described it was meant to deprive you of an extent of country of which the right of soil belongs to you and is in yourselves as sole proprietors as far as the boundary line agreed upon [by the Fort Stanwix Treaty of 1768] and established in the most solemn and public manner in the presence and with the consent of the governors and commissioners deputed by the different colonies for that purpose * * *

W. MOHR, FEDERAL INDIAN RELATIONS: 1774-1788 118 (1933).

3. Canandaigua Treaty, November 11, 1794, 7 Stat. 44 (1853); Fort Harmar Treaty, January 9, 1789, 7 Stat. 33 (1853); Fort Stanwix Treaty, October 22, 1784, 7 Stat. 15 (1853).

4. 5 JOURNALS OF THE CONTINENTAL CONGRESS 674 (1776) *reprinted in* 1 Stat. 1 (1845).

5. Fort Schuyler Treaty, September 16, 1788; Fort Herkimer Treaty, June 23, 1785.

6. 520 F. Supp. 1278 (N.D.N.Y. 1981) (hereinafter cited as *Oneida Indian Nation I), aff'd in part and rev'd and remanded in part,* 691 F.2d 1070 (2d Cir. 1982) (hereinafter cited as *Oneida Indian Nation II).*

7. 7 Stat. 15 (1853). This treaty has been construed by the Supreme Court in *New York Indians,* 72 U.S. (5 Wall.) 761 (1866).

the Articles of Confederation.[8] The Oneidas asserted that these documents gave the federal government the sole authority to make treaties with Indians.[9]

This Note proposes a means of analysis for use in preconstitutional Indian land claims which takes into account the effect of tribal and state sovereignty. The *Oneida Indian Nation* land claims indicate the need for such analysis and demonstrate its usefulness.

II

THE IMPORTANCE OF HISTORY TO NATIVE AMERICAN LAND CLAIMS

The disposition of North American land claims often depends upon a court's interpretation of the distant past. The task of constructing an accurate picture of what occurred so many years ago and then applying modern law to these facts is analogous to the task of the archeologist. The judge, like the archeologist, must reconstruct the past with the imperfect artifacts and remains which she finds while avoiding the pitfalls of hindsight and twentieth century ethnocentrism. Once the image of the past has been formed, the judge must apply the existing body of law to these facts in order to fashion a fair remedy.

Land claims are an emotional issue. A judge must look carefully at the evidence with the patience and deliberateness of an archeologist, carefully examining each document and each word for its import and meaning. "[B]eyond an appeal to conscience and legal documents the best evidence in most Indian cases is the testimony of history, especially the use, possession, practice, and expectation concerning the lands."[10]

The use of history in Indian law cases is often similar to a court's use of stare decisis. History, like the law, develops a precedential value; once stated

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8. *See* 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 4.

9. *See Oneida Indian Nation II,* 691 F.2d at 1071; *Oneida Indian Nation I,* 520 F. Supp. at 1309.

10. C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 24 (1969). The perspective of the Supreme Court towards history has been seen as twofold:

> [H]istory may be defined as that which, in opinion of the Supreme Court, is believed to be true about the past—about past facts and past thoughts . . . . For purposes of analysis it may . . . be divided into two categories: history internal to the law and history external to the law. This distinction, like many other distinctions, is blurred at the boundaries but clear at the center. History internal to the law consists of precedents . . . and legal history. Legal history pertains to the history of legal terms and doctrine, legal systems and judicial practices. . . . Somewhere on the borderline between legal history, which is internal to the law, and general political history, which is external to the law, lies the history used in . . . litigation involving Indian tribes. In no other fields of public law does history play so decisive a role, a role and a decisiveness accepted by all parties to the litigation as well as the Court.

Id. at 21-23.

by a court, it is unlikely to be questioned later. As a result, a single court's perception of history may become institutionalized and conventionalized by subsequent decisions.

The classic example of institutional history is the courts' reliance on the case of *Johnson v. M'Intosh.*[11] This case involved a dispute which arose when federal courts were asked to respect interests in tribal lands obtained by American citizens in derogation of federal law. The decision by Chief Justice John Marshall legitimized federal sovereignty over the disposition of Indian lands by use of a fiction which transmuted the rule of discovery[12] into one of the conquest.[13]

In *Johnson v. M'Intosh,* Congress's power of preemption regarding Indian lands was placed in question by the acts of Georgia officials. While the preemption rights of the British supposedly were conveyed to the federal government by the Paris and Ghent treaties which fixed the boundaries of the United States, there was no agreement as to the western lands outside the states' boundaries. Chief Justice Marshall held in *Johnson* that the mere discovery, in the absence of successful opposing claims by the Indians, was

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11. 21 U.S. (8 Wheat.) 543 (1823).

12. The discovery doctrine, which vests the discovering sovereign with fee title was developed by the European states to resolve competing claims to Indian land. *See* Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States,* 27 BUFFALO L. REV. 637, 655 (1978). This right of fee is not the same as absolute ownership, but is a right of preemption over all others to purchase the Indian title or right of occupancy from the Indian inhabitants. The right of preemption, however, does not confer any possessory interest in the land by virtue of fee title. Possession is governed by the theory of Indian title which recognizes the Indians as the rightful occupants with valid legal claims to possession until title is extinguished by relinquishment of the right of occupancy through sale or conquest. As the Supreme Court stated in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546 (1832), the fee title "asserted a title against Europeans only, and [was] considered as blank paper so far as the rights of the natives were concerned." Thus, the right of discovery only gave the sovereign an ultimate reversion in fee subject to the tribe's right to perpetual possession. *See* Mitchel v. United States, 34 U.S. (9 Pet.) 711, 745-46, 756 (1835). As one commentator has written, the fee title is merely a "perfectable entitlement" that remains limited by Indian title until the Indian title is extinguished by sovereign act. *See* Henderson, *Unraveling the Riddle of Aboriginal Title,* 5 AM. INDIAN L.J. 75, 90-91 (1977).

13. 21 U.S. (8 Wheat.) at 591-92. Chief Justice Marshall stated:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. . . . Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and the usages of civilized nations, yet, if it be indispensible to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason and certainly cannot be rejected by Courts of justice.

Id.

the equivalent of conquest of the land, giving the United States legitimate title to them.[14] Marshall characterized the Indian's status as one of limited sovereignty; explaining that although the tribes' "rights to complete sovereignty, as independent nations, were necessarily diminished" by his holding, they "were, in no instance, entirely disregarded."[15] This characterization was pure fiction, requiring the Chief Justice to alter facts concerning the tribes' histories and their relations with whites in America.

Chief Justice Marshall described Indians as "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."[16] Indians were portrayed as chasing the dwindling game into the thicker uninhabited recesses of the forest,[17] and their disappearance was considered the result of their inability to "advance" and adapt to the "civilized" agricultural European lifestyle.[18] With this fictionalized view of the Indian in America and the transformation of discovery into conquest, Marshall then completed the ruse, describing the Indians' relationship with the federal government in feudal terms. The tribes were characterized as merely occupying the land owned by the United States in fee, just as medieval tenant farmers occupied their lands at the sufferance of the fee holder.[19] While much of the legal effect of *Johnson v. M'Intosh* was undercut by *Worcester v. Georgia,*[20] Chief Justice Marshall's politically expedient

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14. *Id.* at 589-91. The Indians were faced with a "catch-22." If they fought the Americans, war would legitimize conquest; if they did not go to war, they were considered conquered anyway. *See* Henderson, *supra* note 12, at 91-93, 115.

15. 21 U.S. (8 Wheat.) at 574 (limited sovereignty restricted Indian treaty making, trade and war).

16. *Id.*

17. The major cause of the Indians' retreat from their aboriginal lands was not the search for game. While the depletion of fur sources did cause some tribes to journey west in the 1660's, *see, e.g.,* T. BRASSEN, RIDING THE FRONTIER'S CREST 24-27 (1974), the more prevalent causes of the depopulation were war, disease and European dispossession. Together these killed off some Indian populations and forced others to seek refuge with neighboring tribes. *See, e.g.,* Hauptman, *Refugee Havens: The Iroquois Villages of the Eighteenth Century,* in AMERICAN INDIAN ENVIRONMENTS 128-139 (R. Venables & C. Vecsey, eds. 1980).

18. Most Indian tribes in the Eastern United States grew crops for subsistence or trade, *see generally* D. Snow, *Late Prehistory of the East Coast,* in 15 HANDBOOK OF NORTH AMERICAN INDIANS, *supra* note 1, at 58-69, and some tribes were quite civilized by European standards. The Cherokee, for example, lived in log cabins, dressed in European style clothing, and developed their own alphabet by 1821. *See* S. CARTER, CHEROKEE SUNSET (1976); M. STARKEY, THE CHEROKEE NATION (1972 ed.)

19. *See* R. BARSH & J. HENDERSON, THE ROAD (1982) (citing Johnson v. M'Intosh, 21 U.S. (8 Wheat.) at 592).

20. 31 U.S. (6 Pet.) 515 (1832). *Johnson v. M'Intosh,* decided in 1823, was a decision which attempted to preserve federal sovereignty over Indian affairs, particularly land claims. But, given the delicate balance of power between the states and the federal government, the decision had to be a compromise of sorts. The later opinion of *Worcester v. Georgia* attempted to undo some of the wrongs of *Johnson v. M'Intosh* and Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), by recognizing a less limited form of Indian sovereignty.

terminology, theory and view of history still have found their way into subsequent decisions.[21]

Thus, once a court interprets history, it forms a factual precedent for judicial decision making. Subsequent revision of the interpretation is difficult and unlikely. A judge should be careful to avoid adopting the conventional view of history without question because this history is often homogenized by subsequent historians who choose to leave out the injustices and blemishes of the past. It is most important that the judge zealously search for the history herself in the relevant remaining political, social, economic and cultural artifacts.

An examination of the *Oneida Indian Nation* case serves a dual purpose. First, both the district and appellate opinions accentuate the importance of history in Indian land claims and offer insights into the use of historical evidence. Second, this case illustrates the need for and usefulness of a different means of analysis in preconstitutional land claims which incorporates the Indians' perspective and sovereignty.

III

HISTORICAL BACKGROUND

The Iroquois Confederacy was a powerful force in North America prior to the Revolutionary War. Their tribal organization[22] and geographic position facilitated a rise to power which accompanied the growth of the North American fur trade in the early seventeenth century.[23] When the Revolution-

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21. *See, e.g.,* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669 (1974); Choctaw Nation v. Oklahoma, 397 U.S. 620, 623 & n.2 (1970); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 280 (1955); *Oneida Indian Nation I,* 520 F. Supp. at 1293-94.

22. The League of the Iroquois (or Iroquois Confederation) was formed by the five tribes of New York State (the Senecas, Cayugas, Onondagas, Oneidas, and Mohawks) and was "an extension of the kinship principle to a larger group." B. GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION 13 (1972). The confederation or *Ganonsyoni* (Houdenosaunee) as it was called ("The Lodge Extended Lengthwise") was a symbolic household and all the tribes and their members were considered as one family inhabiting one lodge. *Id.* The Tuscaroras, the sixth nation, were admitted to the Confederacy in 1722. H. UPTON, *supra* note 1, at 7. The purpose of the Confederacy was essentially twofold: "It declared war and made peace, sent and received embassies, entered into treaties of alliance, regulated the affairs of subjugated nations, received new members into the League, extended its protection over feeble tribes, in a word, took all needful measures to promote their prosperity, and enlarge their dominion." L. MORGAN, 1 LEAGUE OF THE HO-DE-NO-SAU-NEE OR IROQUOIS 63 (1971); *see also* Tooker, *supra* note 1. Ironically, the Articles of Confederation, a major source of the confusion associated with the case at hand, were patterned after the Iroquois Confederacy. *See* Letter from Benjamin Franklin to James Parker (March 20, 1750), *reprinted in* 4 THE PAPERS OF BENJAMIN FRANKLIN 118-119 (L. Labaree ed. 1969); *see also* B. JOHANSEN, FORGOTTEN FOUNDERS (1982).

23. One commentator explained the source of the Iroquois' power in this way:

> A final advantage was the strategic Iroquois location, offering access to both the western fur supply and the eastern market at Albany. Their resultant buying power

ary War began, the Iroquois Confederacy initially decided upon neutrality. Later, however, the individual tribes decided to support the side of their choice.[24] The Tuscaroras and Oneidas fought with the rebelling patriot forces while the Cayugas, Onondagas, Mohawks and Senecas fought with the British.[25]

The Treaty of Paris, which ended the hostilities between the Americans and the British in 1783, contained no provisions pertaining to the Iroquois. As a result, the peace between the Iroquois and the new nation had to be negotiated separately.[26] The negotiations between the Iroquois and the governments of the State of New York and the Confederacy ensued soon after the Treaty was signed. The problems created by this bifurcation of the treaty process still exist today.[27]

The positions of the federal government and the State of New York towards the Iroquois differed in this early period because their respective interests differed.[28] New York almost immediately sought Iroquois lands within her territorial borders, in part, to fulfill promises made to Revolutionary soldiers.[29] Before such lands could be distributed, title had to be obtained from the Indians. Since the Confederacy was also negotiating with the Iroquois during this period, it was important that New York State act

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> helps to explain the supply of firearms, which in turn caused the English after 1664 to propitiate them with still more arms in order to prevent their defection to the French. . . . Pure chance put them athwart the only "water-level route" between the English (or Dutch) and the Great Lakes and enabled them to acquire so much armament by means of the western fur trade; superior organization enabled them to use this strength more effectively; and, finally, a reputation for success bred further success.

A. TRELEASE, INDIAN AFFAIRS IN COLONIAL NEW YORK 24 (1960).

24. *See* McCandless v. United States, 25 F.2d 71, 72 (3d Cir. 1928).

25. Upton has suggested that the Iroquoian concern over the erosion of their land holdings was an important influence on the choice between the British and the Americans. In addition, the role of New England Puritan missionaries (especially Samuel Kirkland) has been seen as particularly influential in gaining the support of the Oneidas and Tuscaroras. *See* H. UPTON, *supra* note 1, at 13-14. Upton's history is used generally throughout this Note. Her book relied heavily on NEW YORK STATE INDIAN COMMISSIONERS, PROCEEDINGS OF THE COMMISSIONER OF INDIAN AFFFAIRS (F. Hough ed. 1861) (hereinafter cited as PROCEEDINGS). Direct citation to the original source is indicated where applicable. The original source is recommended for serious scholars.

26. *See* W. MOHR, *supra* note 2.

27. The Iroquois land claims have resulted in much litigation concerning lands in New York. *See generally* Comment, *Indian Land Claims Under the Nonintercourse Act,* 44 ALB. L. REV. 110-138 (1979); van Gestel, *The New York Indian Land Claims: An Overview and a Warning,* 53 N.Y. ST. B.J. 182, 212-13 (1981).

28. *See* W. MOHR, *supra* note 2, at 108-10.

29. H. UPTON, *supra* note 1, at 17. In 1781, the New York State Legislature pledged to give each enlistee who served for three years (or until the end of the war) 600 acres of land and, on July 25, 1782, a military tract of 1,680,000 acres in the central part of the state was specified for such use. *Id.* at 17-18.

quickly if it was to succeed in obtaining title. As a result, a dispute arose as to which government had proper authority and jurisdiction.

A. New York State's Claim of Authority

New York State's claim of authority was based upon its history of relations with the Iroquois. Although New York had ceded its claims to any western lands through the adoption of the Articles of Confederation,[30] it claimed that it had retained jurisdiction over all other Iroquois lands.[31] The state claimed that despite language giving Congress the power and right to "[r]egulat[e] the trade and manag[e] all affairs with the Indians, not members of any of the States,"[32] New York's authority over Iroquois affairs was protected by a limitation in article IX of the Articles of Confederation "that the legislative right of any State, within its own limits, be not infringed or violated."[33] It was upon this ground that the state attempted to negotiate with the Indians.

The New York State Legislature authorized the governor's appointment of three Commissioners of Indian Affairs on March 25, 1783. In doing so, New York sought "to rid the state of the hostile Senecas, Cayugas, Onondagas, and Mohawks and to move the friendly Oneidas and Tuscaroras to a small part of the lands of the Senecas in western New York."[34] When rumors of New York's actions reached the Commissioner for the Confederacy's Northern Department of Indian Affairs, he urged the federal government to act, but little was done.[35]

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30. 1 Stat. 4-9 (1845).

31. While neighboring Pennsylvania surrendered its claims to Iroquois land, "New York asserted that it had recognized Iroquois dependency on her since the establishment of the Board of Indian Commissioners in 1696 and that when William Johnson became director of Indian affairs in the 1750's, he acknowledged the sovereignty of this board." H. UPTON, *supra* note 1, at 18. Thus, New York argued that it maintained control and, more importantly, acted as if it possessed this authority in taking control of Indian lands through direct negotiation. *Id.*

32. 1 Stat. at 7.

33. *Id.*

34. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 418 (1971). The district court noted plaintiffs' allegation that the New York State Legislature had instructed its commissioners as follows:

> [You are] to accomplish an Exchange of the District claimed by the Oneida's [sic] and the Tuscaroras, for a district of vacant and unappropriated Lands within this state. In the execution of this trust, you are to proceed with caution and reserve, so as not to alarm the Oneida's and Tuscarara's [sic] with apprehensions that there is the most remote Intention to deprive them of the enjoyment of the District belonging to them. On the contrary you are on all proper occasions to impress them with a confidence that this State will suffer no encroachment to be made within their limits nor any Settlement thereon without their free consent.

Oneida Indian Nation I, 520 F. Supp. at 1287.

35. *See* W. MOHR, *supra* note 2, at 97-100 (The commissioner was Phillip Schuyler).

On April 26, 1784, the New York legislature authorized the governor and the state commissioners "to enter into compacts or agreements with any Indians residing within this state."[36] The treaty negotiations were to be secret[37] and the governor issued instructions on how to deal with certain Indians.[38] The Iroquois responded favorably but insisted that the meeting be a formal one held at Fort Stanwix.[39] They also noted the problems their "brethren the southern Indians" experienced in dealing with Virginia and requested that all issues should be dealt with in one meeting.[40] While the Iroquois expressed their intention of meeting with New York officials, they noted their desire to make peace with the federal government: "at the same time we wish to see proper persons from the different States present and we Expect to make one peace with the whole."[41]

Incidents throughout the preconstitutional period evidence the rivalry between New York and the federal government.[42] Such incidents occurred despite Governor Clinton's outward pledge of cooperation with the federal government.[43] When the state was confronted by federal officials claiming that the state had different objectives and had initiated secret separate negotiations with the Iroquois, New York declined to respond "as an Answer such as their Letter merits, might occasion Altercation."[44]

On August 31, the state representatives met with representatives of the Mohawk, Onondaga, Seneca and Cayuga nations. The Oneida and Tuscarora Nations initially were not represented because they believed the state intended to take their lands.[45] They arrived after being assured of New York's "friendly Disposition and Attachment."[46] The state, in its meetings with the Iroquois, stated that it had no intention of taking their land: "We have no Claim on your Lands; its just extent will ever remain secured to

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36. H. UPTON, *supra* note 1, at 19 (footnote omitted).

37. *Id.*

38. These instructions were explicit (e.g., "[Mohawk leader] Brant should be praised for his generous treatment of war prisoners and should be made to understand that he could become a 'Great Man' if he indicated friendly sentiments toward the commissioners"). *Id.*

39. *Id.*

40. *Id.* The Indians in Virginia had their lands taken because of the acts of speculators and the confusion over authority to approve land transfers. *Id.*

41. *Id.* (quoting I PROCEEDINGS, *supra* note 25, at 15).

42. Felix Cohen noted correspondence between Richard Henry Lee and George Washington discussing New York's efforts to block treaty-making attempts. F. COHEN, *supra* note 34, at 418 n.13. In fact, two federal commissioners were arrested by New York authorities when they were in New York negotiating with the Iroquois. *Id.* at 418.

43. H. UPTON, *supra* note 1, at 20. It should be noted that Clinton's pledge was qualified by an assertion of sovereignty over those Indians residing within New York's jurisdiction. *Id.*

44. *Id.* at 22 (quoting I PROCEEDINGS, *supra* note 25, at 33).

45. H. UPTON, *supra* note 1, at 22.

46. *Id.*

You."[47] At the same time the state claimed it had authority over any land transfers and asserted that any sale without the state's express consent would be illegal.[48]

While the Iroquois were encouraged by assurances that the state had no designs on their land, they were confused about the bifurcation of authority concerning Indian affairs between the state and federal governments.[49] Joseph Brant, a famous Mohawk leader and representative, exclaimed: "Here lies some difficulty in our minds, that there should be two Separate Bodies to manage these affairs, for this does not agree with our ancient Customs."[50] The Indian representatives also noted that they had no authorization to cede any lands, and that they had been instructed to meet first with the commissioners of all thirteen states and then, if necessary, with the individual states.[51]

No actual treaty or agreement was reached at these meetings between the state and the Iroquois representatives apart from a general agreement that land sales had to be approved by the state.[52] After the talks two New York commissioners remained at Fort Stanwix to spy on the treaty negotiations between the Iroquois and the federal government.[53] The resulting Treaty of Fort Stanwix between "Commissioners Plenipotentiary from the United States in Congress assembled, on the one Part, and the Sachems and Warriors of the Six Nations, on the other,"[54] forced the state to press its efforts to negotiate with the Iroquois to counter this new federal challenge to its treaty-making authority.

On April 11, 1785, the New York legislature enacted a law "to facilitate the settlement of the Waste and Unappropriated Lands within this State."[55] The governor and state commissioners were instructed to obtain any lands which the Indians would sell for a reasonable sum before October 1.[56] Initial negotiations were held with the Oneidas and Tuscaroras because their lands were closest to Albany, and the lower expenses would leave more money for the purchase of land.[57]

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47. *Id.* (quoting I PROCEEDINGS, *supra* note 25 at 39).
48. H. UPTON, *supra* note 1, at 22.
49. *Id.*
50. *Id.* (quoting I PROCEEDINGS, *supra* note 25, at 54.)
51. H. UPTON, *supra* note 1, at 22-23.
52. *Id.* at 23.
53. *Id.*
54. Treaty of Fort Stanwix, *supra* note 3, at preamble. The preamble states: "Articles concluded at Fort Stanwix, on the twenty-second day of October, one thousand seven hundred and eighty-four, between Oliver Wolcott, Richard Butler, and Arthur Lee, Commissioners Plenipotentiary from the United States in Congress assembled, on the one Part, and the Sachems and Warriors of the Six Nations, on the other." *Id.*
55. H. UPTON, *supra* note 1, at 24 (quoting I PROCEEDINGS, *supra* note 25, at 167).
56. H. UPTON, *supra* note 1, at 24.
57. *Id.*

On June 23, 1785, the state met with the Oneidas, Tuscaroras and Stockbridge Indians.[58] Despite the governor's pledge to protect Indian lands from any further incursions in return for the purchase of a large tract of land which would act as a buffer zone between the whites and Indians,[59] the Oneidas refused to sell, believing that such a sale would destroy their hunting grounds and their children's futures.[60] Instead, they proposed to lease a small mountainous tract along the southern boundary.[61] The governor rejected this offer and warned the Oneidas that if they refused to sell the land, the state would be unwilling to protect it from trespass.[62]

The Oneidas responded by asserting that they were told that the meeting was not being held for the purpose of making a sale.[63] After further discussions with the state, the Oneidas offered 30,000 acres along the Unadilla at their southern border with the disclaimer that this was done "more out of Friendship, than out of pecuniary Reward, and that they could not part with any more."[64] According to the Oneidas, the treaty was made "only because it was necessary to preserve the friendship between New York and the Indians."[65]

Soon after the treaty was signed a quarrel arose between New York and Massachusetts. Massachusetts claimed sovereign title to a large section of New York, including some Iroquois land, as the result of her sea-to-sea charter.[66] New York responded that the land was part of its commonwealth by virtue of the state's 1701 protectorate over the Iroquois Confederacy.[67] After the states' attempt at resolution through congressional action failed,[68] they produced a compact specifically dealing with the Indian lands.[69] This

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58. *Id.* at 25.
59. *Id.*
60. The Indian spokesman declared:

> We had determined not to sell any of our Lands, and that the Boundaries fixed should remain. *The United States have informed Us that the Soil of our Lands was our own,* and we wish your Assistance to prevent your People from coming among Us for that purpose.

Id. (quoting I PROCEEDINGS, *supra* note 25, at 91-92).
61. H. UPTON, *supra* note 1, at 25.
62. *Id.*
63. *Id.* at 25-28.
64. *Id.* at 28-29 (*quoting* I PROCEEDINGS, *supra* note 25, at 103).
65. H. UPTON, *supra* note 1, at 28-29.
66. *Id.*
67. *See* A. FLICK, 5 HISTORY OF THE STATE OF NEW YORK 110 (1933); H. UPTON, *supra* note 1, at 28.
68. In 1784, Massachusetts appealed to Congress in accordance with article IX, clause 3 of the Articles of Confederation in an attempt to resolve the dispute between the states. Congress was delayed by its attempts to find suitable judges and so New York and Massachusetts proceeded without congressional guidance or authority. H. UPTON, *supra* note 1, at 28.
69. In the compact, New York ceded to Massachusetts "the right of preemption of the soil from the native Indians and all their estate, right, title and property which the state of

agreement, though recognized by courts, has never been ratified by Congress.[70]

Land speculation began to threaten Iroquois property at this time. The Indians decided to lease their land in order to avoid the bad experiences they had had earlier with sales of land.[71] They expressed mixed feelings about the state's broad assertion of authority over them.[72] On November 30, 1787, the Six Nations were induced to sign a 999 year lease with the New York Genesee Company[73] for $2,000 per year. In 1788, a similar lease was made with the Oneidas for all their lands.[74] When the company petitioned the legislature for approval of the transactions, the leases were declared null and void. The practical effect of the legislature's nullification of the leases was to protect the Indians' clear title to their lands and to preserve the state's opportunity for negotiations.

The state first met with the Onondagas who were anxious to form a treaty. In the wake of the deceptions committed by the land speculators, the governor undoubtedly appeared to be a savior to the Indians.[75] In their treaty with the state, the Onondagas granted all their lands to New York

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New York hath of in or to 230,400 acres . . . ." *Id.* at 28-29. Massachusetts in turn ceded to New York the "government, sovereignty and jurisdiction over the disputed area." *Id.* at 28.

70. Since this agreement was not recognized by Congress, it could be considered invalid in light of articles IX, clause 3 and XIII, clause 1 of the Articles of Confederation which require resolution of all controversies concerning claims of land by states by Congress and which hold the states to the provisions of the Articles of Confederation. 1 Stat. at 32, 35.

71. The Indian representative asserted:

> [T]he Experience of all the Indian Nations to the East and South of us has fully convinced us, that if we follow their Example we shall soon share their Fate. We wish that our Children and Grand Children may derive a comfortable living from the Lands which the Great Spirit has given us and our Forefathers. We therefore determined to lease them; our Friends in different parts of the Country hearing of our Determination, and being willing that we should still continue a Nation, have offered to take our Lands by Lease, and give us a generous Rent. We were loth to affront you again by the Offer of our Lands on such Terms, and have therefore agreed to the Proposals of our Friends.

Id. at 30-31 (quoting I PROCEEDINGS at 125).

72. The Iroquois expressed surprise at the State's assertion of authority:

> We are surprised to hear that you are displeased because others have accepted that, which your Chiefs have told us is beneath your Nation. But, Brothers, we are more surprised still to learn you claim a Right to control [sic] us in the Disposal of our Lands; you acknowledge it to be our own as much as the Game we take in hunting. Why then do you say that we shall not dispose of it as we think best?

H. UPTON, *supra* note 1, at 31.

73. The members of this group were primarily New York politicians who represented themselves as being authorized by the state. *See* H. UPTON, *supra* note 1, at 30.

74. *Id.*

75. While some of the Iroquois clearly chose to deal with the federal government, *see id.* at 34-35, it would appear that the Oneidas initially favored the state and planned to meet with the Governor claiming "they belong[ed] to this State."
Id. at 34.

forever,[76] retaining only a small tract of land for themselves and hunting and fishing rights to the ceded lands. In exchange they were paid "1,000 French crowns and 200 pounds in clothing plus a $500 annuity which on proper notice could be taken in goods."[77] In addition, the state promised to protect the land from intruders.

A similar proposal was offered to the Oneidas. A treaty, the state told the Oneidas, would rescue them from their predicament:

> [I]t is not yet too late to make all Things right, and if you attend at the Council Fire which will be lighted at Fort Schuyler the 10th day of July next, your true and ancient Friends the Governor and Chiefs of the State will meet you there, and will brighten the Chain of Friendship, and will put you in the right Way and will support you in it.[78]

Some of the Oneidas feared that suits for breach of contract would be instituted by the land companies if they ceded their lands to the state. New York, however, pledged its protection against such actions and assured the Oneidas that the state had no intention of purchasing any additional land. Instead, the state proposed that the Indians would cede their land to the state and reserve a section for themselves. Since the tribes had been tricked by the lease company, the state argued, they needed to protect themselves against fraud.[79] The Commissioner urged:

> Consider what would be your Situation if we were not to take Care of you. You have given a Lease of your Lands, and the people to whom you have given the Lease have promised to pay you an annual Rent. If we were to suffer them to come and settle on your Lands they would soon be stronger than you, and if they should then refuse to pay the Rent, how will you compel them?[80]

The Oneida's spokesman believed the Treaty's purpose was to resolve the questions concerning Indian lands and not to purchase more land.[81] He appealed to the governor to prevent the disintegration of the Indian nations. The governor rejected the Oneidas' initial proposals because the area sought for a reservation was too large. After further negotiation, the Oneidas accepted the arrangement suggested by the state for "a consideration of

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76. *Id.* at 35.
77. *Id.*
78. *Id.* at 34 (citing I PROCEEDINGS, *supra* note 25, at 135).
79. H. UPTON, *supra* note 1, at 36.
80. *Id.* (citing I PROCEEDINGS, *supra* note 25, at 226).
81. While the Oneidas were concerned about their sovereignty, their primary concern was the protection of their lands. *See* H. UPTON, *supra* note 1, at 36-37.

$2,000 in specie, $2,000 in goods and clothing, $1,000 in provisions, and a $600 annual annuity."[82]

The Treaty, however, did not solve all of the Oneidas' problems. In June 1789, they arrived to collect their annuity only to find that no food had been provided.[83] They were also disturbed to learn that no reservation boundaries had been drawn and that Pennsylvania had taken some of their land.[84] Finally, the Oneidas began to fear that the governor sought to drive them out and that the western tribes planned their extermination because of their treaties with New York. The Oneidas voiced these and other concerns to the state and requested reassurances that the problems would be resolved as originally promised.[85] Governor Clinton assured the Oneidas that all of these matters would be resolved.[86]

In 1790 the Oneidas requested additional annuities and a new boundary, claiming that they had misunderstood the treaty.[87] The state commissioners denied this request, and suggested that "some wicked people" were causing unrest in order to get the Oneidas' lands: "Do not believe any Person who shall tell you that your Brothers the Great Council of the State mean to injure you. They have your Interest and Happiness at Heart."[88]

Notwithstanding these and other promises, New York failed to make all of its periodic payments and to pay rent increases. In 1839, the state legislature capitalized the periodic payments and ceased making payments altogether.[89] Future payment obligations were extinguished by paying a lump sum.[90]

B. Federal Negotiations with the Iroquois

The federal government's negotiations with the Iroquois, while based on a different conceptual approach, employed techniques similar to those of the state. While the state viewed Indians as independents, the federal government tended to see them as separate sovereigns.[91] The Iroquois had been

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82. *Id.* at 37 (The Treaty was signed on September 22, 1788).

83. *Id.* at 38.

84. *Id.*

85. *Id.*

86. *Id.* Joseph Brant replied to the Governor and complained that he had not really answered the Iroquois' letters. He said the major issue—that the treaties were unauthorized—had not been addressed. He claimed Clinton was trying to ruin the Iroquois by splitting them up. Self-interest and not the "good of the State" was behind the treaties; "therefore, we wish our Differences to be determined by Congress." *Id.* (citing II PROCEEDINGS, *supra* note 25, at 342).

87. H. UPTON, *supra* note 1, at 39.

88. *Id.* (citing II PROCEEDINGS, *supra* note 25, at 367).

89. *See* H. UPTON, *supra* note 1, at 72-73; *see also Oneida Indian Nation I,* 520 F. Supp. at 1288.

90. *Oneida Indian Nation I,* 520 F. Supp. at 1288; Chap. 518 N.Y. Laws, 1839.

91. This is evidenced by the preamble of the Treaty of Fort Stanwix of 1784 where the Iroquois are dealt with as equals to the United States of America. *See supra* note 54.

considered a strong force in the Revolutionary War and, although the infamous Sullivan Campaign decimated the "hostile" nations,[92] the leaders of the new government felt that matters should be resolved with the Iroquois.[93] George Washington thought that driving the Iroquois from New York would lead to an expensive and bloody war.[94] He believed that the western expansion should be orderly and that the cost of purchasing the land would be cheaper than the cost of war.[95] On September 22, 1783, Congress took steps to protect Indian lands against illegal occupation by issuing a proclamation prohibiting encroachment on lands reserved to the Indian tribes.[96] Despite the intent of this act, the federal policies often were inadequate to protect the Indians' claims to their land.[97]

In the spring of 1784, the Continental Congress appointed commissioners to negotiate with the Indians and gave the commission full authority to draw boundaries and to conclude a peace.[98] The commissioners were instructed to make it clear to the vanquished Nations of the Iroquois (the Cayugas, Mohawks, Onondagas and Senecas) that their territory was forfeit as a result of the military victory over the British.[99] The Oneidas and Tuscaroras, who had been allied with the colonists, were to receive favored treatment.[100]

The purpose of the Fort Stanwix Treaty was "to end hostilities between the United States and the four adverse units of the Six Nations as well as regularize relationships with all of the Six Nations."[101] This intent is shown in the resolution authorizing the treaty which was passed in 1783:

> [W]hereas the Oneida and Tuscarora tribes adhered to the cause of America and joined her arms in the cause of the late war, and Congress have frequently assured them of peculiar marks of friend-

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92. The Sullivan Campaign was a major military offensive against the hostile tribes of the Iroquois which took place during the close of the Revolutionary War. Its objective was to annihilate the Indians: "[P]arties should be detached to lay waste all [Indian] settlements around, with instruction to do it in the most effectual manner, that the country may not be merely overrun, but destroyed." Instructions to Major General Sullivan, 31 May 1779, 7 THE WRITINGS OF GEORGE WASHINGTON 461 (W.C. Ford ed. 1890); *see also* A. WALLACE, THE DEATH AND REBIRTH OF THE SENECA 141-48 (1970).

93. *See* W. MOHR, *supra* note 2, at 97-102.

94. *Id.* at 101.

95. *Id.*

96. Proclamation of Continental Congress, September 22, 1783, 25 JOURNALS OF THE CONTINENTAL CONGRESS 602 (1783); *see also* F. PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 3 (1975).

97. The federal government neglected its obligations under this proclamation to a large degree as is evidenced by the large scale trespass upon Indian lands. *See, e.g.*, W. MOHR, *supra* note 2, at 103.

98. *Id.* at 108.

99. *Id.*

100. *Id.* at 109.

101. 25 JOURNALS OF THE CONTINENTAL CONGRESS 687 (1783).

> ship, the said commissioners are therefore instructed to reassure the said tribes of their friendship of the United States and that they may rely that the lands which they claim as their inheritance will be reserved for their sole use and benefit until they may think fit for their own advantage to dispose of same.[102]

Similar assurances were made prior to the entreatment[103] and during the discussions at Fort Stanwix.[104]

The negotiations opened on October 12 with speeches by the representatives of the parties. Arthur Lee, an Indian commissioner, set forth the United States' claim of sovereignty over all Indian lands, demanded the return of prisoners of war, and called for a boundary adjustment "in order to prevent future difficulties or disputes."[105] The Iroquois, aware that wampum no longer was sufficient to record this type of negotiation, requested a copy of this speech and were refused.[106] The Iroquois' sovereignty was asserted in a speech of one spokesman: "We are free, and independent, and at present under no influence . . . we have hitherto been bound by the Great King but he having broke the chain, and left us to ourselves, we are again free and independent."[107]

The negotiations could hardly be characterized as evenhanded. While the Treaty was between two supposedly sovereign nations, the sovereignty of the Iroquois Confederacy was never actually acknowledged. The Indians had little choice but to accept the conditions of the Treaty because the negotiations were held at gunpoint and Indian hostages were taken to ensure the return of white prisoners-of-war.[108] Aaron Hill, a Mohawk representative, asked that other Iroquois "not think too harshly of anything the Indians might do at Stanwix for they were obliged to comply with whatever the Commissioners dictated—that in short, they were as Prisoners."[109] The language of the federal negotiators toward the Six Nations was threatening. This language even shocked members of the Pennsylvania delegation: "It alarmed us very much but had a very good effect and deserves great credit."[110]

Under the provisions of the Treaty, the United States "[gave] peace to the Senecas, Mohawks, Onondagas and Cayugas, and receive[d] them into

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102. *Id.*

103. 26 JOURNALS OF THE CONTINENTAL CONGRESS 71 (1784) (motion of Jacob Read); B. GRAYMONT, *supra* note 22, at 265-66.

104. B. GRAYMONT, *supra* note 22, at 277-80.

105. B. GRAYMONT, *supra* note 22, at 279 (citing PROCEEDINGS, *supra* note 25, at 88; N. CRAIG, 2 THE OLDEN TIME, 413-15).

106. B. GRAYMONT, *supra* note 22 at 279-80.

107. *Id.* at 280.

108. *See id.* at 282; *see also* A. WALLACE, *supra* note 92, at 152.

109. *See* B. GRAYMONT, *supra* note 22, at 282 (citing Dease to Fraser, November 26, 1784, 15 INDIAN RECORDS 158-61).

110. *Id.* (citing H. RAUP, JOURNAL OF GRIFFITH EVANS).

their protection" upon the condition that they returned the prisoners taken during the war. The Treaty stipulated that the "Oneida and Iroquois nations shall be secured in the possession of the lands upon which they are settled."[111] In article III of the Treaty, a boundary line was defined and the Iroquois ceded "all claims to the country west of said boundary and then shall be secured in the peaceful possession of the lands they inhabit east and north of same."[112] Under article IV, the United States "in consideration of the present circumstances of the Six Nations, and in execution of the humane and liberal views of the United States," was to "order goods to be delivered to the Six Nations for their use and comfort."[113]

The Iroquois repudiated the Treaty two years later by reasserting their sovereignty and claiming that the Treaty was invalid because it had not been approved by their chiefs.[114] The Iroquois and other Indians who disapproved of similar treaties looked to the British for support and were encouraged to defend their rights.[115] In addition several attempts were made to obtain redress from the federal government.[116]

During the summer of 1786, the Six Nations met with deputies from other western Indian tribes.[117] In November and December of the same year, these Indians met again at Detroit and decided to send a message to Congress criticizing its policies and asking that all land cessions require a united vote of the Confederacy.[118] "[T]he Indians proposed a treaty to be held the following spring and insisted that all surveyors and others be prevented from coming across the Ohio; they were determined to defend their rights with their united forces."[119] Initially the federal government responded with a threat of force,[120] but decided it would be more effective to negotiate with the Indians.[121]

On May 2, 1788, Secretary of War Henry Knox recommended that Congress change its policy and pursue the outright purchase of the western territories described in earlier treaties.[122] Congress, in response, appropri-

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111. Treaty of Fort Stanwix of October 22, 1784, art. II, *supra* note 3.

112. *Id.* at art. III.

113. *Id.* at art. IV.

114. During the entreating period, Joseph Brant noted, as he did with the New York treaties, that the warriors had authority to make peace only: "[W]e are sent in order to make peace and . . . we are not authorized to stipulate any particular cession of land." A. WALLACE, *supra* note 92, at 152.

115. *See* W. MOHR, *supra* note 2, at 119-21.

116. *Id.* at 121-23.

117. These Indian tribes (the Wyandots, Chippewas, Mingoes, Ottawas, Pottawatomis, Shawnees and Cherokees) had experienced similar difficulties with the federal government. *Id.* at 123.

118. *Id.* at 124.

119. *Id.*

120. *Id.* at 125.

121. *Id.* at 128.

122. *Id.* at 132.

ated $20,000 on July 2, 1788. These funds, together with what remained of the funds allocated on October 22, 1787 for land purchases, were earmarked for extinguishing Indian claims to the ceded lands.[123] In 1789, pursuant to this authorization, the United States and the Iroquois entered into a treaty at Fort Harmar confirming the obligations undertaken in the Treaty of Fort Stanwix.[124] Again the government promised that the Oneida Nation would be "[secure] in the possession of [its] lands."[125]

As this discussion has shown, both the federal government and the State of New York entered into treaties with the Iroquois. This Note concerns the present attempt by the Oneida Indian Nation to void the 1785 and 1788 treaties with New York State as prohibited by the federal treaty-making authority. This attempt involves the delineation of authority between two sovereignties, the state and federal governments, regarding the very existence of a third: the Oneida Indian Nation.

IV

ONEIDA INDIAN NATION v. NEW YORK

A. The Opinion of the District Court

Plaintiffs in *Oneida Indian Nation v. New York* stated five claims for relief: 1) the 1785 and 1788 treaties between the Oneida Indian Nation and New York were void because they violated article IX of the Articles of Confederation, the Proclamation of 1783 and the 1784 Treaty of Fort Stanwix;[126] 2) the misconduct of the state officials, the unequal bargaining power of the parties and the allegedly unconscionable consideration imposed by the state created a constructive trust with the state as trustee and the Oneidas as beneficiaries;[127] 3) the Oneidas were deprived of the use and possession of their lands because they relied upon the state's misrepresentations of the purpose and intent of the 1785 and 1788 treaties;[128] 4) the 1788

123. *Id.*

124. *See id.* at 135-37. During the negotiations with Fort Harmar, two treaties were made. The first treaty was with the Six Nations of the Iroquois. The second was with the Wyandots, Delawares, Chippewas and Ottawas.

125. Fort Harmar Treaty, *supra* note 3. The Iroquois subsequently denounced the Treaty of Harmar at which point the Canandaigua Treaty was negotiated. *See infra* note 259. Several other treaties were made with other tribes during this period as well. *See* F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1934 34 (1962).

126. The claim asserted that the treaties were void because the Proclamation of September 22, 1783 and the negotiation and promulgation of the Fort Stanwix Treaty were examples of the legitimate exercise of the exclusive authority granted the federal government under the Articles of Confederation. *Oneida Indian Nation I,* 520 F. Supp. at 1288.

127. *Id.* at 1288-89.

128. *Id.* at 1289.

Treaty did not constitute an outright sale but rather was either a perpetual lease or an express or implied trust;[129] and 5) the 1788 Treaty was void for vagueness because the provisions concerning the periodic increases in annual payments failed to specify the rate or amount of increase.[130] The Oneidas sought restoration of lands, an award of fair rental value for the entire period of dispossession, a declaration of possession and an award of all costs and attorneys' fees.[131]

The defendants[132] moved for dismissal on a number of grounds: 1) lack of justiciability, 2) failure to state a claim upon which relief could be granted, 3) various state law defenses, and 4) the eleventh amendment to the United States Constitution.[133] The court, while finding the justiciability and eleventh amendment challenges without merit, held that the plaintiffs had failed to state a claim upon which relief could be granted and dismissed the action pursuant to Federal Rule of Civil Procedure 12(b)(6).[134]

The court recognized that it had jurisdiction over the Oneidas' claim under the Constitution, federal treaties, and the Articles of Confederation.[135] The claims met the standard for jurisdiction set out by the Supreme Court in *Oneida Indian Nation v. Oneida County*[136] because the complaint asserted claims of right conferred by federal law. The case was not distinguishable because it involved preconstitutional treaties and unresolved questions of federal authority over the Indians.[137] The court added that, even if jurisdiction was lacking under the Articles and the Proclamation of 1783,[138] it would exercise pendent jurisdiction in the event that no independent federal jurisdiction could be found.[139]

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129. *Id.*

130. *Id.*

131. *Id.*

132. Defendants included the State of New York, numerous public officials, the counties of New York encompassed in the claim in question, "individually and as representatives of all others similarly situated," and several large land holders. *Id.* at 1285.

133. *Id.* at 1290.

134. *Id.* The motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. The well-pleaded allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted for consideration of the motion. Because pleadings are liberally construed, a complaint should not be dismissed for insufficiency unless it appears certain the plaintiff is entitled to no relief under any state of facts which could be proved. A motion to dismiss for failure to state a cause of action is treated as a motion to dismiss for failure to state a claim upon which relief can be granted. 2A J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 12.08 (2d ed. 1976).

135. *Oneida Indian Nation I,* 520 F. Supp. at 1291 (quoting Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666 (1974)).

136. 464 F.2d 916 (2d Cir. 1972), *rev'd,* 414 U.S. 661 (1974), *on remand,* 434 F. Supp. 527 (N.D.N.Y. 1977).

137. *Oneida Indian Nation I,* 520 F. Supp. at 1291.

138. The court decided, however, that plaintiffs' claim under the Treaty of Fort Stanwix of 1784 falls within the "arising under" jurisdiction of 28 U.S.C. §§ 1331, 1362. *Oneida Indian Nation I,* 520 F. Supp. at 1291 & n.12.

139. *Id.*

The court found the claim was justiciable because the Oneidas 1) enjoyed proper standing,[140] 2) presented claims and sought relief appropriate for judicial resolution,[141] and 3) raised issues not barred by the political questions doctrine.[142] However, while the claim was justiciable, the court said that it did not state an actionable claim.

The court noted that "[d]efendants' motions place in controversy the correct interpretation of, and the legal rights and duties created by the documents relied upon by the plaintiffs, including the Articles of Confederation, the Proclamation of September 22, 1783, the Treaty of Fort Stanwix of 1784, the United States Constitution, the Nonintercourse Act, and the Treaty of Canandaigua of 1794."[143] The court held that "the documents fail[ed] to provide a sufficient legal basis for plaintiffs to sustain the validity of any of their five claims for relief"[144] and, accordingly, dismissed the complaint.

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140. The issue of standing was dispensed with easily. The court noted that plaintiffs had "at this point alleged a sufficient interest to give them standing to proceed on their claims," while acknowledging that a tribe must establish that it has existed as a tribe at all relevant times. *Id.* at 1292.

141. The court held that the claims for relief were appropriate for judicial resolution and that "[t]he Court is obligated to go as far as it properly can in the exercise of its jurisdiction over those issues which are found to be justiciable." *Id.* at 1295. The court noted that 1) the justness of the 1785 and 1788 Treaties may not present an ultimately nonjusticiable issue, 2) relief may not be judicially molded, and 3) if fashioned, such relief could "create utter chaos and disaster to many, [sic] socially, economically and politically," but ultimately held that plaintiffs should be allowed to pursue their claim for declaratory relief even if the court is unable to fashion a further remedy in this case. *Id.* at 1295-97. The court recognized the general reluctance of the federal government and the State of New York to confront the issue of Iroquois land claims. While conceding that Indian land claims litigation "tend[ed] to defy the application of any traditional label," the court noted that standards do exist "which could in all likelihood serve as a basis for the formulation of a remedy. . . ." *Id.* at 1297.

142. The court declined to dismiss the claim on the ground that the action presented a political question because 1) the claims did involve a textually demonstrable constitutional commitment of congressional power, 2) land claims litigation did not interfere with congressional power since Congress delegated the power to the President to deal with violations of Indian property rights and the Interior Department had not taken action on these claims, and 3) the resolution of the claims did not require an initial policy decision of a clearly nonjudicial nature. *Id.* at 1297-1301.

The court rejected the eleventh amendment defense because it was "convinced that in enacting § 1362 Congress intended to remove [New York State's] Eleventh Amendment immunity to suits such as those now before it," adding that the purpose of the bill's passage was "to insure that Indian tribes would have access to federal courts with respect to claims which could be brought on the tribes' behalf by the United States . . . ." *Id.* at 1306; *see also* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) (Supreme Court's interpretation of the legislative history of § 1362). The court further added that state consent is not required when Congress acts pursuant to article I powers, including those under article I, section 8, clause 3. *Id.* at 1308.

143. *Oneida Indian Nation I,* 520 F. Supp. at 1309.

144. *Id.* The court rejected plaintiffs' contention that "[b]ecause of the enormity of this case and the factual and legal complexity of the issues, they [the issues] can only be resolved after a trial on the merits." *Id.* at n.33 (citing Plaintiffs' Memorandum at p. iii).

In rejecting the plaintiffs' assertion that the federal government had the exclusive authority to manage relations with the Oneidas, the court held that the New York Treaties of 1785 and 1788 did not violate the Articles of Confederation.[145] The resolution of this question concerning the allocation of authority over the Indians during the Confederacy period involved a two-step process:

> [I]t is incumbent upon the Court to initially determine the extent of the States' sovereign powers with respect to the Indian tribes within their borders prior to ratification of the Articles. Then it must determine the impact of Article IX, if any, on the exercise of those powers under the Articles of Confederation.[146]

The court first examined the allocation of authority prior to the American Revolution and the Confederacy and noted that "as discovering sovereign, [the Crown] had exclusive authority over the extinguishment of the Indians' possessory interests in their aboriginal lands."[147] While conceding that the authority over Indian land eventually was centralized by the Crown,[148] the court stated that "regardless . . . , it is clear that upon the signing of the Declaration of Independence both of the powers [of extinguishment and preemption] became vested in the States, either because it was already possessed by them as Colonies, or, as later confirmed by the Treaty of Paris ending the Revolutionary War, because all of the powers of government and the right to the soil held by the Crown passed to the States upon their independence."[149] The court then reasoned that since the states had exclusive authority to extinguish aboriginal title to lands located within their geographical boundaries, this authority could have been ceded only to the federal government through an express grant under article IX, clause 4 of the Articles of Confederation.[150]

The court then shifted its attention to an analysis of article IX, clause 4 and the proper interpretation of the clause's two limiting provisos. Article IX, clause 4 provided:

> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . [r]egulating the trade and managing all affairs with the Indians, *not members of any of the*

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145. *Oneida Indian Nation I*, 520 F. Supp. at 1309.
146. *Id.* at 1310.
147. *Id.*
148. *Id.* at 1310-11 (citing Taylor & Parker, *Development [of] Tripartite Jurisdiction in Indian Country*, 22 KANS. L. REV. 351 (1974); Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 ME. L. REV. 17, 20 (1979-80).
149. *Oneida Indian Nation I*, 520 F. Supp. at 1311 (citing Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823)).
150. *Oneida Indian Nation I*, 520 F. Supp. at 1311-12.

> *States;* provided that the legislative right of any State *within its own limits* be not infringed or violated.[151]

The court noted that "[n]o consensus as to the correct construction of the two limiting provisos in article IX, clause 4 was ever reached during the Confederacy period, leaving the federal government and the states to act more or less in accordance with their respective interpretations of the powers either granted or left to them by th[is] provision."[152] Because this issue was one of first impression,[153] the district court examined the historical background, legislative history, and the contemporaneous interpretations of the provisions and case law.

The court rejected the Oneidas' contention that the provisos merely retained the restrictions placed upon imperial and federal authority during the colonial and preconstitutional periods.[154] The plaintiffs asserted that authority over Indian affairs was bifurcated during the colonial period, with the Crown holding the sole and exclusive authority to manage Indian affairs (which included the right of extinguishment of Indian land title) and the colonies retaining the right of preemption, which they considered to be "limited to fee title to the soil occupied by the Indians with concommitant rights to convey legal title subject to the Indians' occupancy rights and to purchase Indian lands."[155] The phrase "not members of any of the states," plaintiffs reasoned, referred only to individual Indians who had abandoned tribal relations, while the second limitation merely preserved the legislative rights of the states within their limits and indicated a limited form of preemption.[156] The defendants offered three alternate constructions demonstrating that no express delegation of authority was made.[157] As a result of these unresolved internal inconsistencies, the court held the provision could not be construed as an express delegation to the federal government.[158]

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151. *Id.* at 1310 (citing 1 Stat. 16-19 (1814) (emphasis added).

152. *Oneida Indian Nation I*, 520 F. Supp. at 1312 (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Clinton & Hotopp, *supra* note 148, at 25).

153. The court noted that this preconstitutional claim was a case of first impression. *See Oneida Indian Nation I*, 520 F. Supp. at 1312.

154. *Id.* at 1313.

155. *Id.*

156. The court noted that under this construction the states expressly delegated all other powers which were acquired from the Crown upon declaration of independence (including the authority over extinguishment of Indian title) to the government under article IX, clause 4. *See id.*

157. The defendants argued: 1) the limitation "not members of any of the States" was a territorial restriction which gave the states the right to manage the affairs of all tribes located within their geographical boundaries; 2) the limitation regarding "the legislative right of any State" was designed to protect the preemption rights belonging to the states and, as a result, the states retained the right of extinguishment within their boundaries; and 3) the limitations and content of article IX, clause 4 were, in effect, an internally inconsistent nullity of no value in limiting the sovereign power of the states in managing Indian affairs. *Id.* at 1313.

158. *Id.* at 1313-14.

The legislative history offered no apparent solution to this problem. The court noted:

> [I]f the legislative history shows anything, it is that the final text of Article IX, Cl. 4 was the result of a compromise reached to resolve conflicts between the landed and landless States and more importantly between the States and the federal government by delegating authority over Indian affairs to the federal government while leaving a vaguely defined portion of that authority in the States.[159]

The court analyzed the development of the text of article IX, clause 4 from Benjamin Franklin's proposed draft in 1775 to its final form.[160] The court believed that these disagreements over the management of Indian affairs led to a compromised version of article IX, clause 4 by which the drafters "endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom by taking away a part and letting the whole remain."[161]

Focusing on contemporaneous interpretations of article IX, clause 4, the court found that the actions of the Continental Congress and authorized representatives "demonstrated a clear lack of certainty over the extent of the central government's authority over purchases of Indian land by the States within whose boundaries it was located."[162] The court noted several examples of actions taken by the Continental Congress as supporting its conclusion that clause 4 did not constitute an effective delegation of the states' sovereign power.

The court noted first that the limited application of the Proclamation of September 22, 1783 to only those lands "without the limits or jurisdiction of any particular state" indicated "either that the Continental Congress did not believe it had any authority to regulate land cessions within the boundaries of the States or that it was at least unsure enough of its power that it did not attempt to do so."[163]

The court also rejected plaintiffs' suggestion that the relations between the Continental Congress and Pennsylvania indicated congressional veto power over state land transactions with Indians. While the court agreed that Pennsylvania consulted with Congress about state negotiations with Indians

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159. *Id.* at 1314.

160. The court noted that the development of the text indicated the "serious conflict between those favoring a strong central government in the management of Indian affairs and those interested in protecting the sovereign power of the States," *id.* at 1316, but declined to resolve the conflict with regard to the clause in question. Instead, the court believed that "because of its internal ambiguities, [article IX, clause 4] did not constitute an effective delegation of the states' sovereign power with regard to the extinguishment of Indian title to land." *Id.*

161. *Id.* (citing *The Federalist* No. 42 (J. Madison)).

162. *See Oneida Indian Nation I*, 520 F. Supp. at 1316.

163. *Id.* at 1316-17.

prior to the signing of the Fort Stanwix Treaty of 1784, the court interpreted the state's actions as a mere show of respect for the federal government.[164] Specifically, it noted that the commissioners were instructed to assist rather than to direct the state representatives in any particular manner.[165]

The court saw further evidence of this uncertainity of federal authority in the federal government's weak response to New York's attempts to purchase Indian land, and in the federal government's failure to perfect its authority. Despite federal awareness of New York's intentions, the federal government *merely requested,* but did not *demand,* New York's cooperation.[166]

The court found that George Washington's speech to the Seneca Indian Nation in 1789 indicated that he too was uncertain whether the federal government had exclusive authority to manage Indian affairs under the Articles.[167] Based on the above evidence as well as other contemporary views and case law, the court concluded that plaintiffs had failed to demonstrate that New York delegated to Congress its authority over land within New York's borders.[168]

Noting once again that the Proclamation of September 22, 1783 did not by its own terms apply to land within New York State, the court held that even if the proclamation did apply to such lands, it could not provide them with a legal basis for relief because article IX, clause 4 did not constitute an effective delegation of the states' sovereign power to extinguish Indian title within its boundaries; the Continental Congress was without authority to prohibit New York purchases within its boundaries.[169] As a result, any attempt to prevent the states from purchasing Indian land would have been *ultra vires* and without effect.[170]

The court likewise held that the Treaty of Fort Stanwix could not provide a legal basis for relief. If article IX, clause 4 did not grant the

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164. *Id.* at 1318. The court cited the request by Pennsylvania, *see* 25 JOURNALS OF CONTINENTAL CONGRESS 766-67, as recognition that the state had acted out of respect for the central government, not as evidence of compulsion. *Oneida Indian Nation I,* 520 F. Supp. at 1318.

165. *Oneida Indian Nation I,* 520 F. Supp. at 1318.

166. *Id.* at 1319.

167. *See id.* at 1321 (citing 4 AMERICAN STATE PAPERS 142 (1 INDIAN AFFAIRS 1832)).

168. The court cited but was unpersuaded by the report of the Committee on Southern Indian Affairs, appointed by the Continental Congress, which concluded that the federal government had exclusive authority. *Id.* at 1319-20. The court also cited dicta in other cases indicating that the clause was ambiguous. *Oneida Indian Nation I,* F. Supp. at 1321 (citing Worcester v. Georgia, 31 U.S. (6 Pet.) at 558-59; United States v. 43 Gallons of Whiskey, 93 U.S. 188, 194 (1876); Mohegan Tribe v. Connecticut, 638 F.2d 612, 615 (2d Cir. 1980), *cert. denied,* 452 U.S. 968 (1981)).

169. *Oneida Indian Nation I,* 520 F. Supp. at 1322.

170. *Id.*

federal government authority to prevent the states from purchasing land within state boundaries, no treaty could provide such authority.[171]

Similarly, the court rejected plaintiffs' claim that article I, section 8, clause 3 and article I, section 10, clause 1 of the Constitution, which granted Congress the power to "regulate commerce with the Indian tribes" and prevented states from "entering into any treaty," precluded New York from making these purchases.[172] The court reasoned that the Constitution was not operative until the first Wednesday in March of 1789,[173] over five months after the objectionable treaties had been concluded on June 23, 1785 and September 22, 1788.[174]

The court then rejected plaintiffs' remaining claims. Plaintiffs' claims of a constructive trust and fraudulent representation arising out of the circumstances surrounding the 1785 and 1788 Treaties[175] were denied because the fairness of the treaties is not open to review in federal courts.[176] Plaintiffs' claim that New York had a perpetual lease or trust obligation on the property,[177] with the property still belonging to the Oneidas under these treaties was likewise dismissed, the court holding that the plaintiffs' only identifiable interest under state law was the right to receive rent. Since the Nonintercourse Act of 1790 protected only those Indian land interests acquired after 1790, and the Oneidas had been deemed to have lost any reversionary interest in the land, the above holdings denied plaintiffs any claim under the Act.[178]

Plaintiffs' final claim that the 1788 Treaty was void for vagueness in that the provisions to periodically increase the rental payments were indefi-

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171. *Id.* at 1322-23.

172. *Id.* at 1323.

173. *See id.* (citing Owings v. Speed, 18 U.S. (5 Wheat.) 420, 422 (1820)).

174. The court added in a footnote that it was unclear whether the plaintiffs' claims could, in any case, provide a legal basis for recovery since the constitutional provisions alone were arguably ineffective in terminating the states' preemptive rights. *Oneida Indian Nation I*, 520 F. Supp. at 1323 n.45.

175. The plaintiffs asserted that 1) the state's misconduct, combined with the unequal bargaining power of the parties and the allegedly unconscionable consideration paid by the state for the land, gave rise to a constructive trust, with the Oneida Nation as holder of beneficial title to the lands conveyed under the Treaties, and 2) the State of New York was liable to them because it intentionally misled the Oneida Nation about the purpose and intent of the 1785 and 1788 Treaties. *Id.* at 1323-25.

176. If the court was correct in concluding that it could not review the justness of the claim, then there is, in effect, no court that can review the justness of extinguishing the Indian title because the Oneidas cannot bring suit in New York State against the state. *See* Goodell v. Jackson, 20 Johns. 693 (N.Y. Ct. Err. 1823) (art. 37 proceedings challenging constitutionality of agreements with Indians only applies to private transactions).

177. *Oneida Indian Nation I*, 520 F. Supp. at 1325. The court decided that the plaintiffs' allegation that the transfer constituted a trust lacked adequate factual support because neither the language of the Treaty nor the circumstances surrounding it could be interpreted to create an express trust. *Id.* at 1326.

178. *Id.* at 1328.

nite was dismissed also. The court noted that while the Oneidas were led to believe that the rent would be increased periodically and that courts may look behind treaties' written words to determine the Indians' understanding of their meaning,[179] the 1788 Treaty contained no provision for increasing rental payments. Since there was no such provision, there was no vagueness problem.[180] The court concluded that recognizing this claim would, in effect, require rewriting the Treaty in such a way as to destroy its validity.[181]

B. The Opinion of the Second Circuit Court of Appeals

The Second Circuit Court of Appeals reversed the district court's dismissal of plaintiffs' claims on the central legal question, the distribution of federal and state power under the Articles of Confederation, and affirmed the district court's rejection of defendants' eleventh amendment, nonjusticiability and time bar defenses. In his decision, Judge Mansfield articulated a different interpretation of the preconstitutional history and attempted to resolve some of the ambiguities which plagued the lower court. The court remanded those evidentiary and factual issues left unresolved to the district court for final resolution.

The court stated that where ambiguities exist, it is the court's duty "to make every effort to give effect to every word of a constitution . . . to resolve ambiguities, and reconcile inconsistencies."[182] This approach differed from the district court in that the Second Circuit was willing to resolve the ambiguity instead of interpreting the ambiguity as an absence of a delegation of authority. Accordingly, one should start with the document itself—in this case, the pertinent Articles of Confederation—and then use contemporary construction, the Continental Congress's own interpretation and the surrounding circumstances[183] to resolve any facial ambiguity or internal inconsistencies which may exist.

The circuit court noted that the district court had drawn "heavily . . . [on] extrinsic historical evidence as the basis for its interpretation of the Articles,"[184] even though the parties disagreed about the historical facts. The court held that the admission of the evidence was an error because judicial notice of pertinent historical data as evidence is admissible only when the "historical evidence" is uncontrovertible and not disputed.[185]

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179. *Id.* at 1328 (citing Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943)).

180. *Oneida Indian Nation I*, 520 F. Supp. at 1328.

181. *Id.*

182. *Oneida Indian Nation II*, 691 F.2d at 1085 (citations omitted).

183. The surrounding circumstances include "custom, usage and the factual context in which the words were used." *Id.* at 1085-86.

184. *Id.* at 1086.

185. *Id.* (citing Alvary v. United States, 302 F.2d 790, 794 (2d Cir. 1962); 10 J. MOORE, MOORE'S FEDERAL PRACTICE § 201.50 (1976); MCCORMICK, EVIDENCE 708 (1954); *see also* 1 J. WEINSTEIN, WEINSTEIN'S EVIDENCE: UNITED STATES RULES ¶ 200[06], at 200-30.

The court also held that the district court erred in dismissing, without an evidentiary hearing, plaintiffs' claim that the states delegated their treaty-making authority concerning Indians to the Continental Congress by adopting article IX, clause 1 of the Articles of Confederation. Article IX, clause 1 granted Congress "the sole and exclusive right and power of determining on peace and war."[186] Based on the court's findings that the Continental Congress enjoyed exclusive authority to make war or peace with foreign sovereignties under clause 1,[187] and that the 1784 Treaty of Fort Stanwix was an exercise of Congress's peace-making authority under that clause, the court held that both clause 1 and the Treaty of Fort Stanwix were binding upon the state in the absence of further evidence.[188]

The court noted that this holding was subject, first, to the possible modifying effects of clause 4 upon clause 1.[189] If clause 4 did not modify Congress's treaty-making ability under clause 1, the next question would be whether, regardless of clause 4, the 1784 Treaty of Fort Stanwix must be interpreted as precluding New York from "unilaterally extinguishing Indian title to Oneida tribal land located within [its] geographical borders."[190] The circuit court, however, only outlined the issues and arguments presented by both these questions, leaving the final decision on them for the district court on remand.[191]

In addition, the court decided that plaintiffs' claim that the 1785 and 1788 purchases were prohibited by Congress's Proclamation of 1783 was not amenable to summary disposition, and that a more thorough review of the

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186. 1 Stat. at 6.

187. *Oneida Indian Nation II*, 691 F.2d at 1086-88.

188. *Id.* at 1088-90.

189. The court noted that it was unlikely that clause 4 would modify the grant of authority under clause 1 because this would, in effect, frustrate Congress's power to make peace with the Indians by interfering with Congress's ability to guarantee the Indians continued occupancy of their lands (thus, in effect eliminating any peaceful bargaining). *Id.* at 1091.

The court suggested that one possible construction giving effect to both clauses would allow state exercise of rights under clause 4 except when such exercise would conflict with Congress's exercise of its exclusive external authority to enter into peace treaties and alliances. *Id.* Under such a construction, exclusive authority under clause 1 would be retained while recognizing a limited degree of state sovereignty.

190. *Id.* at 1092.

191. *Id.* at 1091-93. Although the court noted that the treaty language does not expressly prohibit the states from purchasing Indian lands, the plaintiffs argued that "federal treaties with Indians are to be liberally construed and that an explicit prohibition is unnecessary when it may be implied from the surrounding circumstances." *Id.* The plaintiffs reasoned that allowing the extinguishment of the Oneidas' title would be paramount to vitiating article II of the Fort Stanwix Treaty ("[t]he Oneida and Tuscarora nations shall be secured in the possession of their lands on which they are settled"). To support this contention, plaintiffs offered historical evidence indicating how contemporaries viewed the treaty. *See, e.g.*, Brief for *Amicus Curiae* The Houdenosaunee at 34-36, Oneida Indian Nation v. New York, 691 F.2d 1070 (2d Cir. 1982).

historical evidence offered by the parties was required. The court noted that the question whether the clause "without the limits or jurisdiction of any particular State" is a geographical or a jurisdictional restriction was linked to the resolution of the ambiguity regarding article IX, clause 4. The court agreed that the phrase in clause 4, "not members of any of the States," was ambiguous, and that the other phrase, "legislative right of any State within its own limits," apparently undermined the effect of clause 1 which granted to Congress the "sole and exclusive right and power of . . . managing all affairs with the Indians." However, it did not believe that this provided grounds for summary dismissal.[192] Instead, the court saw this as cause for further efforts to resolve the facial ambiguity and inconsistency through an evidentiary hearing.[193]

Judge Mansfield attempted to shed light upon this difficult construction problem by reviewing the evidence supporting the view that clause 4 was jurisdictional rather than geographical. He rebutted the district court's position that Madison saw the clause as "obscure and contradictory" by noting that three years prior to Federalist No. 42 Madison had construed the phrase "not members of any of the States" to mean Indians "'who do not live within the body of Society, or whose Persons or property form no objects of its laws' (i.e., those who left their tribe and were no longer subject to its laws)."[194] Further, Judge Mansfield posited that the reference in clause 4 to the "legislative right of any State within its own limits" most likely meant that the states reserved their right to the underlying fee title and not the right to extinguish Indian title.[195]

Finally, the court ruled on the protective trust and lease issues, and made mention of the defense based on the superceding effect of the Treaty of Canandaigua. The Second Circuit affirmed the dismissal of plaintiffs' claim asserting a protective trust, ruling that the language of the 1785 and 1788 treaties amounted to a sale and not a trust.[196] Similarly, the claims that

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The defendants responded that the instructions to federal negotiators indicate, to the contrary, that the treaty was primarily a peace treaty which did not prohibit disposal of Indian lands or affect the states' territorial claims or legislative rights within their limits. *See* 25 JOURNALS OF THE CONTINENTAL CONGRESS 693 (1783). Indeed, the defendants claimed that since the treaty was never actually ratified by Congress, it was nothing more than an executive agreement and was therefore not binding against the states. *See* Brief for Defendants-Appellees (The State of New York) at 36-38, Oneida Indian Nation v. New York, 691 F.2d 1070 (2d Cir. 1982).

192. *Oneida Indian Nation II*, 691 F.2d at 1093-94.

193. *Id.* at 1094.

194. *Id.* (citing letter to James Monroe dated Nov. 27, 1784, 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON (G. Hunt ed. 1901)).

195. *Oneida Indian Nation II*, 691 F.2d at 1094. The court suggested that the purpose of this language was to prevent Congress and the "landless" states (e.g. Pennsylvania, Rhode Island, and Delaware) from restricting the western boundaries of the so-called "landed" states (e.g., New York and Virginia). *Id.* at 1095.

196. *Id.* at 1095-96.

the treaties involved a lease were denied, since under the terms of the treaties the Oneidas had reserved only the right to rent, not a reversionary interest or right of reentry.[197] The court also noted that the possible defense that the Six Nations relinquished all of its disputed land claims under the Canandaigua Treaty with the federal government but refused to rule on the "serious questions of construction" raised without an evidentiary hearing.[198]

V

Analysis of Preconstitutional Land Claims and Indian Sovereignty

The proper analysis of preconstitutional land claims should involve several levels of examination. First, the court must consider whether the Indian tribe or nation was considered sovereign with respect to the state and federal governments. Second, the court must decide when the Indian tribe first made a valid recognition of either government.[199] Third, the court must decide whether the Articles of Confederation or any other statute or treaty limited the authority of either white sovereign to deal with the Indians.[200] Then, after these determinations have been made based upon historical

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197. *Id.*

198. *Id.* at 1096-97. The defendants claimed that the later federal treaty, under which the United States acknowledged only those lands "reserved" to the Indians by New York, had the effect of a retroactive ratification of the New York treaties, while the plaintiffs claimed that the treaty left undisturbed their claims to their reserved aboriginal lands in New York and, in any case, referred only to Ohio territorial lands outside of the United States.

199. The purpose of this step of analysis is to determine the Indians' perception of their own status. First one must determine whether the group of Indians who negotiated the treaty were authorized by the tribal government to do so. Then, if the Indians as a sovereign nation recognized the federal government first, this would suggest that they were sovereign to deal with either government. This in turn would indicate that they were recognized as not being under the jurisdictional limits of the state.

In the case of the Iroquois and the Oneida Indian Nation, the fact that separate peace negotiations were conducted indicates that neither the state nor federal government exercised control over the Iroquois prior to the treaty-making. Indeed, the state itself was aware of the problems concerning the issue of Indian sovereignty and governmental recognition. In a letter to Governor DeWitt Clinton, James Duane, Chairman of the Committee on Indian Affairs in the Continental Congress and a New Yorker, emphasized that recognition of control depended upon whether the Iroquois were considered as dependents or not:

> Great difficulty arises from the interference of the proposed Treaty [of Fort Stanwix of 1784] with the Authority and the views of Congress . . . . Congress . . . on the 9th art. of the Confederation claims the exclusive right to make this peace; and If the tribes are to be considered as independent nations, detached from the State, and absolutely unconnected with it, the Claim of Congress would be uncontrovertable.

H. Upton, *supra* note 1, at 20 (citing George Clinton, 8 Public Papers of George Clinton, First Governor of New York 328 (1904)).

200. If the Articles of Confederation effectively limited either sovereign, the treaties made would therefore be void. *See Oneida Indian Nation I,* 520 F. Supp. at 1309; *Oneida Indian Nation II,* 691 F.2d at 1084-85.

evidence, the court must decide whether the Indian recognition of white sovereign authority has any impact upon the validity of the treaty or treaties in question, and whether the court is the proper body to make such a decision.[201] Applying this approach, one gains a different perspective of the legal claims here in question.

As the Second Circuit correctly noted,[202] the use of historical evidence by the district court was erroneous. A court should only take judicial notice of historical evidence when its accuracy is unquestioned. Given the controversial constructions and interpretations of the Articles of Confederation and the impact of the treaties, it was wrong for the district court to grant a motion for summary judgment based on the limited and conflicting facts before it.[203] Although the Second Circuit correctly admonished the district court for taking improper judicial notice of disputed historical facts, it, like the district court, employed an inadequate means of analysis to the question of preconstitutional land claims.

A. Perceptions of Iroquois and Oneida Sovereignty

In land claims litigation, courts have traditionally construed treaties in light of common notions of the day and the assumptions of the drafters.[204] Treaties are generally construed in those terms most favorable to the Indian parties involved.[205] Thus a proper understanding of how the Oneidas and the state and federal governments perceived the Indians' status is vital to the interpretation of the treaty.

Neither the district nor the circuit court, however, offers an accurate analysis of the Oneidas' own perception. While the district court acknowledged that it "may look behind the written words to determine how the Indians understood the agreement,"[206] it does not appear that either court did so to any great extent. In addition, the district court misconstrued the

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201. Several commentators have advocated legislative resolution of disputes; *see* Comment, *Indian Land Claims Under the Nonintercourse Act*, 44 ALB. L. REV. 110, 134-38 (1979); Comment, *Resolution of Eastern Indian Land Claims: A Proposal for Negotiated Settlements*, 27 AM. U.L. REV. 695, 727-29 (1978). Others have posited the use of international law in sovereignty issues. *See* Clinebell & Thompson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFFALO L. REV. 669-714 (1978).

202. *See Oneida Indian Nation II*, 691 F.2d at 1085-86.

203. *Id.*

204. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1979); Choctaw Nation of Indians v. United States, 397 U.S. 620 (1970); United States v. Winans, 198 U.S. 371 (1905); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Mohegan Tribe v. Connecticut, 638 F.2d 612, 621 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

205. *See* United States v. Winans, 198 U.S. at 380-81; Jones v. Meehan, 175 U.S. 1, 10-11 (1899); *see generally* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows or Grass Grows Upon the Earth—How Long a Time is That?*, 63 CAL. L. REV. 601, 608-19 (1975).

206. *Oneida Indian Nation I*, 520 F. Supp. at 1328.

nature of the treaty-making process and, as a result, limited the scope of the sovereignty inquiry to the distribution of power between the state and federal governments, ignoring the effect of Indian sovereignty on the land transaction.[207] The court of appeals while applying careful historical analysis, failed to properly construe the basic nature of the treaties between the Oneidas and New York State.[208] A careful exposition of the relevant history demonstrates that the Iroquois and the Oneidas considered themselves discrete sovereigns and had only intended to lease their lands.[209] The Oneidas' loss of land was not the result of an unfamiliarity with the treaty-making process, as the district court suggested,[210] but instead was the result of misconceptions concerning the Anglo-European conception of property, uncertainty over the distribution of treaty-making powers between the state and federal governments, and fraud.[211]

Analysis of the treaty must also include an analysis of the federal government's estimation of the extent to which it maintained exclusive treaty-making authority with the Indians. The Second Circuit recognized the importance of looking to extrinsic evidence and the common notions and assumptions of those who drafted Indian legislation and treaties in its analysis of the Indian Nonintercourse Act in *Mohegan Tribe v. Connecticut*.[212] There the Second Circuit noted that the maintenance of peace on the frontier and the enforcement of treaty obligations were an important impetus in the passage of the Nonintercourse Acts.[213] More importantly, the court noted that the federal government's failure to enforce the Nonintercourse Act provisions did not indicate that no obligation to do so existed nor that the states had the authority to purchase land without statutory limita-

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207. *See infra* notes 225-34 and accompanying text.

208. *See infra* notes 261-65 and accompanying text.

209. *Id.*

210. The court's acceptance of the distinction between Indian treaties and other foreign treaties, *Oneida Indian Nation I*, 520 F. Supp. at 1310 n.34 (citing Note, *State Sovereignty and Indian Land Claims: The Validity of New York's Treaties Prior to the Nonintercourse Act of 1790*, 31 SYRACUSE L. REV. 797, 816-17 (1980)) indicates an acceptance of the underlying basis for that distinction—the notion that Indian nations were less able than European nations to understand the impact of treaties they signed. The historic record does not support this view of the Iroquois as unsophisticated in treaty-making or as distinct from European nations with respect to treaties. *Cf.*, F. VITTORIA, DE INDIS ET DE JURE BELLI REFLECTIONES, 120, 159-60 (E. Eys ed. 1917) (Indian tribes recognized as foreign sovereignties during the preconstitutional period under international law); H. GROTIUS, THE LAW OF WAR AND PEACE 120 (F. Kelsey trans. 1925) (same); E. DE VATTELL, 1 THE LAW OF NATIONS § 4 (Am. ed. 1805) (same).

211. The confusion concerning the authority to make treaties with the Iroquois and the Iroquois conception of community property was probably the greatest cause of the great loss of Iroquois land in New York State. *See* Venables, *Iroquois Environments and "We the People of the United States"*, in AMERICAN INDIAN ENVIRONMENTS, *supra* note 17, at 81-127; R. BARSH & J. HENDERSON, *supra* note 19, at 32-34.

212. 638 F.2d at 621.

213. *Id.* at 622.

tion.[214] Similarly, the failure of the federal government in *Oneida Indian Nation* to preserve and protect its exclusive treaty-making authority does not mean that such authority did not exist nor that the state had any similar or coequal power.

The Iroquois considered themselves a separate sovereignty during the Confederacy period.[215] After the Revolutionary War, the Iroquois did not acknowledge obedience to any foreign sovereign. While it is generally assumed that the right of preemption lay with the states, this was not apparent from the perspective of the Indians. Although the Iroquois had recognized a relationship with the British Crown,[216] they did not do so with the federal government until the Fort Stanwix Treaty in 1784.[217] In fact, the British supported the Iroquois' view that they were an independent sovereignty following the Treaty of Paris.[218] Because the Iroquois were never included in the treaty, the right of preemption or extinguishment could not be transferred. Since these rights were never ceded by the British, they logically reverted to the Iroquois.[219]

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214. *Id.* at 623.

215. *See, e.g., supra* notes 2 and 72. The statements made by the Oneidas to New York State support this point: *"The United States have informed Us that the Soil of our Lands was our own*, and we wish your Assistance to prevent your People from coming among Us for that Purpose." 1 PROCEEDINGS *supra* note 25, at 92 (emphasis in the original).

216. *See supra* note 23 and accompanying text. The Iroquois saw their relationship to the Crown as like that between two different nations: there was no relinquishment of sovereignty. This point can be inferred from the Iroquois view of their relationship to the Crown, *see* J. BRODHEAD, 3 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 347 (1853) ("That being a free people uniting themselues [sic] to the English, it may be in their power to give their land to what Sachim they please"), and the British view of its relationship with the Iroquois. *See id.* at 799 ("This would be of great advantage to Your Majesty not only in the encrease [sic] of your revenue but also so endear the Indians to us, that they would continue to be the preservation of this and the rest of Your Majestys adjacent Colonys . . .").

217. It could be argued that the federal government could claim sovereignty over the conquered tribes because of the Sullivan Campaign but this is not persuasive considering the fact that the Indians did not surrender as the British did at Yorktown, *see* A. WALLACE *supra* note 91 at 149, 151-52, and because there is debate as to whether the Indians were coerced, *id.* at 151-52; and the Mohawks took part in the Treaty of Fort Stanwix. *See* Vanables, *supra* note 17, at 105-06.

218. *See* supra note 2.

219. As Chief Justice Marshall noted in *Johnson v. M'Intosh*, title to Indian land could not be extinguished without consent by the Indian sovereign. *See supra* note 12. The right of preemption or extinguishment could only be utilized through the Indians and they would have to recognize the sovereign in question. As a result, the district court's view that the states would have to delegate the right of preemption and extinguishment to the federal government is flawed. Since these rights were European constructions for regulating the transfer of Indian lands, they could only be transferred with all parties agreeing to such a transfer. Indeed, the treaty obligations between the British and the Indians were not transferred to the federal government with the Treaty of Paris and thus the rights would not be transferred either. Otherwise, the Treaty of Paris would be construed as binding upon the Iroquois ability to negotiate treaties and this authority was not recognized at this time nor did such an authority exist.

The relationship between the Crown and the Iroquois was much like that of a feudal vassalage with the Indians pledging homage to the Crown as an ally. Britain had actively "courted and conciliated" the Iroquois and their "national character was scrupulously observed and recognized."[220] The British claim of jurisdiction over the Iroquois was based on two major treaties between the French and the British: the Treaty of Utrecht in 1713[221] and the Treaty of Paris in 1763.[222] The boundaries between the colonies and the Iroquois were later defined by the Fort Stanwix Treaty of 1768 which set apart the lands of the Colony of New York from the Iroquois lands.[223] When the British signed the Treaty of Paris in 1783, these treaties served as the premise upon which the rights of preemption and extinguishment were believed to be transferred from the Crown to the states.[224] With the adoption of the Articles of Confederation, these rights were conferred upon the federal government.

The district court's conclusion that the rights of preemption and extinguishment were transferred from the Crown to the states, however, is not supported by the historical record. The Treaty of Utrecht did not treat all Indian tribes equally; some tribes were recognized as independent.[225] These independent Indians were separate from the subjects of the Crown, and thus no proposals could be made concerning their sovereignty. Since the Iroquois were singled out as an independent group, the Treaty of Utrecht conferred no jurisdiction over them. Thus, with regard to the Iroquois, the Treaty was merely an attempt to ensure French noninterference in the British sphere of interest.

Similarly, the Treaty of Paris in 1763 did not treat the Iroquois as British subjects. This is evidenced by the Proclamation of 1763 which deprived the colonies of their western lands and attempted to put an end to

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220. F. COHEN, *supra* note 34, at 417.

221. *See* F. DAVENPORT, 3 EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES 193 (1967 ed.).

222. *See* 4 EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES, *supra* note 221, at 92-93.

223. F. COHEN, *supra* note 34, at 417-18 & 418 n.9.

224. Although courts have generally accepted this view, if one views the Iroquois as a separate sovereign this does not necessarily follow. *See* R. VENABLES, *supra* note 17, at 121-22.

225. *See* F. DAVENPORT, *supra* note 221, at 2020. The text of the treaty demonstrates this:

> If the savages were dependent on either crown on the score of the terrain thereto belonging it would be useless to stipulate anything for them, since they should then be regarded as subjects; and if they were independent, no proposals could be made regarding their concerns. The boundaries to be fixed between New France, New England, and New York would indicate what savage nations depended upon them. They should trade only in the countries where they were established and not pass the colonial boundaries.

Id.

widespread speculation in Indian lands.[226] Through this action, the Crown obtained centralized control over Indian affairs which it had not previously enjoyed.[227]

This conclusion that the Iroquois were sovereign is supported by the historical evidence. Both the British and the Americans considered the Iroquois as separate sovereign entities. The British had recognized that the Iroquois were not subjects of the Crown in a series of Privy Council decisions in the early eighteenth century.[228] As the British General Thomas Gage had written, a contrary conclusion would have been most dangerous.[229] The American government also recognized the importance of dealing with the Iroquois. It initiated relations during the early part of the Revolutionary War and moved quickly to establish peace between the Iroquois and the new nation.[230]

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226. *Id.* at 213. A translation from the French text reads:

> The inhabitants of Canada and other subjects of France will not bother in the future the Five Nations or the cantons [a canton is a territorial division of a confederation] of Indians subject to Great Britain, nor the other Indians or other nations of America friendly to this crown. Similarly, the subjects of Great Britain will comport themselves peacefully toward American subjects or friends of France, and one as well as the other will enjoy full liberty to go to the British colonies to promote trade in both directions without being hindered by the French. In addition, the Commissioners will rule exactly and distinctly those who will be considered subjects and Friends of France or of Great Britain.

Id. (translation provided by the author of this Note).

227. DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 96, at 47-50.

228. In 1769, the Privy Council upheld a 1743 Court of Commissioners' ruling that restricted colonial land purchases to treaties with legitimate tribal officers:

> The Indians, though living amongst the king's subjects in these countries, are a separate and distinct people from them, they are treated with as such, they have a policy of their own, they make peace and war with any nation of Indians when they think fit, without controul from the English.

BARSH & HENDERSON, *supra* note 18, at 32 & 32 n.3 (citing THE GOVERNOR AND COMPANY OF CONNECTICUT AND MOHEGAN INDIANS (London: 1769), in the collection of the Houghton Library, Harvard University; 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES 218 (London 1912); J.H. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 418 (New York 1950); J.Y. Henderson, Unraveling the Riddle of Aboriginal Title, 5 AM. INDIAN L. REV. 75, 96-102 (1977)).

229. He wrote to Sir William Johnson:

> As for the Six Nations having acknowledged themselves Subjects of the English [as was contended in London] that I conclude must be a very gross Mistake and am well satisfied were they [the Iroquois] told so, they would not be well pleased. I know I would not venture to treat them as Subjects . . . I believe they would on such an attempt, very soon resolve to cut our Throats.

Venables, *supra* note 17, at 100 & 100 n.42 (citing letter from General Thomas Gage to Sir William Johnson (Oct. 7, 1772)).

230. Despite the successful Sullivan Campaign which destroyed several Iroquois villages, *see* letter from George Washington to the Marquis de Lafayette (Oct. 20, 1779), 8 THE WRITINGS OF GEORGE WASHINGTON 85 (W.C. Ford ed. 1890), Washington saw peace between the Iroquois and the new nation as a necessity:

As a result, Iroquois sovereignty after the Revolutionary War could only be effected by a treaty recognized by the Iroquois, or through subjugation or dependency resulting from conquest. While it may be argued that the Iroquois nations which opposed the colonists and fought with the British were considered "conquered" nations after the war and therefore had lost their sovereignty, such an assertion could not be made concerning the Oneidas and Tuscaroras, who fought with the American colonists as allies.[231] Although courts subsequently recognized New York State's authority over the Iroquois, the historical record severely undermines the justness or legal validity of such recognition.

Thus, during the preconstitutional period, the Iroquois were regarded as a separate sovereign nation. This view of the Iroquois sovereignty is consistent with the views of jurists and political philosophers of the day,[232] and is also supported by the British and American histories of foreign policy during this period.[233] As a result, under international law Indian nations could enter into binding treaties.[234]

B. The Effect of the Articles of Confederation, the Fort Stanwix Treaty, and the Proclamation of 1783 upon State and Federal Sovereignty

Both the district court[235] and the Second Circuit Court of Appeals[236] examined the Articles of Confederation, the Treaty of Fort Stanwix, and the Proclamation of 1783 to determine whether those documents contain any

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> The hour of victory, we are informed by Lord North, is the time for negotiation. That hour, so far as they are concerned, is come; and it would be wrong in my judgment, to force them, irrecoverably, into the arms of the enemy. To compel a people to remain in a state of desperation, and keep them at enmity with us, when no good is to be expected from it and much evil may follow, is playing with the whole game against us. If any security therefore can be had of their Aid, (if circumstances should require it)—or neutrality under all circumstances, We should, by being rid of a dangerous and distressing Foe (which they certainly are,) be relieved of a heavy expence [sic], and acquire more freedom to our Arms in other quarters—and, which is a consideration of no small weight, must embarrass the enemy not a little in the field, the cabinet, and at negotiation, if matters come to this.

Letter from George Washington to Major General Phillip Schuyler (Jan. 30, 1780), *id.* at 184-85.

231. While the Iroquois nations which fought with the British could be considered "conquered" because of Sullivan's Campaign, *see supra* notes 92 & 230, at 86, the Oneidas and Tuscaroras who fought with the Americans as allies could in no way be thought of as conquered.

232. *See supra* note 210 and accompanying text.

233. *See supra* note 22; *see also* V. DELORIA, BEHIND THE TRAIL OF BROKEN TREATIES 2 (1974); W. WASHBURN, RED MAN'S LAND—WHITE MAN'S LAW (1971); J.R. BRODHEAD, DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF NEW YORK (O'Callaghan ed. 1856-87).

234. *See* F. COHEN, *supra* note 34, at 34.

235. *Oneida Indian Nation I,* 520 F. Supp. at 1309-23.

236. *Oneida Indian Nation II,* 691 F.2d at 1084-94.

indication of treaty-making authority regarding the Iroquois or the Oneidas. Both courts found the Articles ambiguous.[237] The theory that the federal government had proper and exclusive authority to make peace with the Iroquois, and that the Articles of Confederation and the Fort Stanwix Treaty bound the State of New York is supported by a close reading of the historical evidence.[238] This historical evidence and the views of contemporaries demonstrate that New York's sovereignty was indeed restricted and that dismissal by the district court was not warranted.

The federal government had authority over treaty negotiations with the Iroquois Nations before the Treaty of Paris and the independence of the colonies. As early as 1775, the Second Continental Congress enacted a centralized Indian policy and appointed commissioners for the northern, southern and middle colonies.[239] The Articles of Confederation then incorporated this centralization of federal Indian affairs. Article IX, clause 1 granted Congress the "sole and exclusive right and power of determining on peace and war . . . [and] entering into treaties and alliances."[240] This broad grant of authority may be limited, however, by article IX, clause 4, [241] a fact addressed by both the district[242] and appellate courts.[243]

Clause 4 limits interstate authority to Indians "within the limits or jurisdiction of the States" and extends congressional authority over only those "Indians [who are] not members of any state."[244] These phrases must be read in light of their contemporary meaning. The Treaty of Utrecht, for example, had differentiated between dependent and independent Indians, and clause 4 uses the same dependent-independent terminology. Thus, the limiting phrase could be interpreted as applying only to those Indians considered dependent subjects of the Crown, and not to the Iroquois, who had previously been recognized as being distinct from New York.[245]

The views of contemporaries of the Articles supports this conclusion. James Madison, as the Second Circuit noted,[246] believed that the clause gave exclusive power to the federal government to manage the affairs of all independent Indians:

> The foederal [sic] articles give Congs. [sic] the exclusive right of *managing all affairs* with Indians *not members* of any State under a

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237. *Oneida Indian Nation I,* 520 F. Supp. at 1312; *Oneida Indian Nation II,* 691 F.2d at 1085-86.
238. *Oneida Indian Nation II,* 691 F.2d at 1090-91.
239. E.C. BURNETT, THE CONTINENTAL CONGRESS 97 (1964).
240. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 3.
241. *Id.*
242. *Oneida Indian Nation I,* 520 F. Supp. at 1312-14.
243. *Oneida Indian Nation II,* 691 F.2d at 1090-94.
244. 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 4.
245. *See supra* notes 225-26 and accompanying text.
246. *Oneida Indian Nation II,* 691 F.2d at 1094 & 1094 n.20.

> proviso, that the *Legislative authority* of the State within its own limits be not violated. By Indian[s] not members of a State, must be meant those, I Conceive who do not live within the body of the Society, or whose Persons or property form no objects of its laws.[247]

Madison also noted:

> [A]s far as N.Y. may claim a right of treating with Indians for the purchase of lands within her limits, she has the confederation on her side; as far as she may have exerted that right in contravention of the Genl. Treaty, or even unconfidentially with the Commisrs. of Congs., she has violated both duty & decorum.[248]

Thus, Madison noted that the Articles were breached by New York's treaty-making actions with the Iroquois because these negotiations involved Indians who did not "live within the body of society" in contravention of the Fort Stanwix Treaty.

Contemporaries of Madison also support this view. George Washington realized the importance of peace between the nation and the Iroquois and expressed dismay over the state's infringement upon the federal government's exclusive authority.[249] Similarly, as the Second Circuit noted, Thomas Jefferson had written that "neither under the present constitution, nor the ancient confederation, had any state or person a right to treat with

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247. Letter from James Madison to James Monroe (November 27, 1784), 2 THE WRITINGS OF JAMES MADISON 91 (G. Hunt ed. 1901) (emphasis in the original) (hereinafter cited as *Letter of November 27, 1784*). The Second Circuit noted, *see Oneida Indian Nation II,* 691 F.2d at 1094 n.20, the error in the district court's citation of the Federalist Papers, which were polemic and advocated a change to the constitutional government. The district court's use of "biased" history is misleading. Alternatively, Madison's response to Monroe's letter asking whether the Iroquois were members of New York or simply living in New York to the exclusion of a European power, *see* Letter from James Monroe to James Madison (November 15, 1784), 1 THE WRITINGS OF JAMES MONROE 46-50 (S. Hamilton, ed. 1878), is in accord with the view suggested by the Treaty of Utrecht, which treated the Iroquois as a separate sovereign.

248. Letter of November 27, 1784, *supra* note 247.

249. Letter from George Washington to Alexander Hamilton (April 4, 1791), 12 *The Writings of George Washington* 33 (W.C. Ford ed. 1890). Washington wrote:

> It is not more than four or five months since the Six Nations, or part of them, through the medium of Colonel Pickering, were assured, that henceforward they would be spoken to by the government of the United States *only*, and the same thing was repeated in strong terms to the Cornplanter at Philadelphia afterwards. Now . . . the legislature of New York were going into some negotiations with these very people. What must this evince to them? Why, that we pursue no system, and that there is no reliance on any of our declarations. To sum the whole up into a few words, the interference of the States, and the speculations of individuals, will be the bane of all our public measures.

Id.

the Indians, without the consent of the General Government."[250] In light of the views of these statesmen, the district court erred in claiming that the federal government did not believe it had the authority to regulate land cessions or, alternatively, or that it was so unsure of its power that it did not attempt to do so.[251] The evidence shows that the federal government had the authority but failed to exercise it.[252] As was the case in *Mohegan Tribe v. Connecticut,* this failure by the federal government does not diminish its authority nor does it grant the authority, when not exercised, to the states.[253] Therefore, the historical evidence supports the Second Circuit's interpretation of the Articles of Confederation.

The Treaty of Fort Stanwix, as the Second Circuit noted, effectively asserted the federal government's sovereignty over the state government.[254] The Treaty recognized peace between the United States and the Iroquois nations in attendance; it also recognized the Iroquois' cession of their empire west of Pennsylvania and preserved the integrity of the Oneida and Tuscarora lands.[255] While the Treaty was not explicit about its exclusivity, it would nevertheless be binding upon New York State,[256] absent a successful challenge to its validity.[257]

The Fort Stanwix Treaty, if considered valid, would predate any treaty or agreement made by the State of New York. Because of the exclusivity of

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250. 691 F.2d at 1095 (citing 8 WRITINGS OF THOMAS JEFFERSON 225-26 (A. Bergh ed. 1905)).

251. If the federal government had the power, yet failed to exercise it, this does not mean that the state could exercise the power instead. Thus, the Second Circuit was correct in reversing and remanding for trial. *See Oneida Indian Nation II,* 691 F.2d at 1086-87.

252. Enforcing its authority posed a problem for the new nation. Use of federal forces against the states would have led to anarchy during the preconstitutional period. As a result, the federal government had little enforcement power over the states. This "bane" upon the federal government proved to be particularly detrimental to the Native Americans inhabiting the eastern United States. The inability of the federal government to deal with this problem is evidenced by the letters of the federal officials, *see supra* notes 46-49 and accompanying text, and by the repeated interferences on Indian lands despite federal assurances and treaties of protection. *See generally* F. PRUCHA, AMERICAN INDIAN POLICY 235-36 (1962) (intrusions on Cherokee lands in Georgia); W. MOHR, *supra* note 2, at 117. The State of New York continued to make treaties with the Iroquois despite the enactment of the Indian Nonintercourse Act. *See* United States v. Oneida Indian Nation of New York, 576 F.2d 870, 871-81 (Ct. Cl. 1978).

253. *See supra* notes 213-14 and accompanying text.

254. *Oneida Indian Nation II,* 691 F.2d at 1088.

255. *See* Venables, *supra* note 17, at 105-06; *see also* B. GRAYMONT, *supra* note 22, at 286.

256. The Treaty would be binding upon New York State under article IX, clause 1, as an exercise of the power to make peace and enter into alliances. Congress indicated that the Treaty was binding. *See* 29 JOURNALS OF THE CONTINENTAL CONGRESS 806 (1785).

257. A possible challenge to the validity of the Fort Stanwix Treaty could be that it was not recognized by the Indians and that it was coerced. *See* A. WALLACE, *supra* note 92, at 152-53. If the Treaty was considered void, the assertion of federal authority would rest upon the Articles and the Proclamation of 1783. The resulting analysis would be different. The Treaty of Fort Stanwix was repudiated by some Iroquois nations but not by the Oneidas.

federal treaty-making authority and the federal protections given to the Iroquois by the Treaty, the Iroquois' recognition of the federal sovereign by the Fort Stanwix Treaty would invalidate the later state treaties. As a result of the Treaty, the Articles of Confederation and the subsequent affirmation of the Proclamation of 1783, "tribal rights to Indian lands became the exclusive province of federal law."[258]

If one construed the Treaty of Fort Stanwix as an invalid recognition of federal authority due to coercion or the absence of Indian ratification, a more extensive analysis would be needed. Then, the subsequent treaties between New York State and the Oneidas would not be bound by the Fort Stanwix Treaty and would be valid unless the Articles were construed to confer exclusive authority on the federal government. This result is unlikely because the validity of the Fort Stanwix Treaty was later affirmed by the Canandaigua Treaty[259] and because questions remain about the validity of the ratification of the New York Treaties.

C. Oneida Sovereignty and the Effect of State and Federal Treaties

When the perspective of the sovereign Oneidas is considered, the validity of the so-called New York Treaties is placed in doubt by the existence of the Articles, the Fort Stanwix Treaty, and the Proclamation of 1783. Additionally, questions are raised about the nature of the New York Treaties themselves. Both district and appellate courts viewed these agreements as "sales" of Oneida lands to the state. The historical record, while unclear on this issue, does not support this conclusion. The 1788 Treaty was apparently never ratified by the Oneida Nation or the Six Nations. The Treaties were never intended as sales, but as leases of Indian lands.

The 1785 Treaty was negotiated under pressure. The Oneidas, facing white incursions on their land, responded to Governor Clinton's requests for a land sale with the counteroffer of a lease. The governor refused a lease and threatened to decline to protect Indian lands against trespass if a sale could not be made. A sale was made out of friendship in response to this pressure.[260]

The historical evidence demonstrates that the treaties were not made by the chiefs or sachems of the Oneida Nation or the Iroquois Confederacy.

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258. F. COHEN, *supra* note 33, at 48.

259. The Treaty of Canandaigua was negotiated after the Iroquois denounced the Treaty of Harmar. Treaty with the Six Nations, 7 Stat. 44 (1789). The United States in the Canandaigua Treaty acknowledged the lands reserved to the Oneidas, Onondagas and Cayugas, and the Indians conceded any claims to any other lands within the United States. *Id.* at 44. The defendants claimed that the limiting language of the treaty precluded the Oneidas' claim; the Second Circuit stated that the district court should decide after examining all the relevant evidence. *See Oneida Indian Nation II,* 691 F.2d at 1096-97.

260. *See supra* notes 63-65 and accompanying text.

Instead, the treaties were signed by Indian representatives, who were not authorized to make land cessions and did not intend to do so.[261] In fact, the leaders of the Six Nations Confederacy and the Oneida Nation protested the "treaty" immediately because the proper tribal officials had not ratified it.[262] While the representatives may have been appointed by the Great Council, only authorized chiefs or sachems, negotiating in full council at the proper place and time, could effect a treaty of cession.[263] Neither consummated by proper representatives nor ratified, the 1788 agreement cannot be deemed to have ever been legitimately in force in New York State.

The Indians' continued protest bolsters this conclusion. When New York sent a commissioner to deliver the first payment upon the treaty, the Great Council of the Iroquois told him that they disapproved of the treaties and that the treaties were not authorized. The Great Council then sent a message to Governor Clinton criticizing the treaties and repudiating their supposed approval and ratification.[264] In short, the treaties were invalid and unauthorized because they violated Iroquois law.

In response to the protests, Governor Clinton offered to meet with the Six Nations' sachems "in order that a full Explanation of all of the Transaction between those Tribes and the Commissioners in the Purchases of Lands may take place."[265] Governor Clinton told the Iroquois that the land would not be formally granted nor settlements made until after the time he had suggested for a meeting. A survey of the Oneida lands, however, did proceed.[266]

The surveying triggered another series of protests by the Oneida Indian Nation. The Oneidas' protests indicate that the agreement of 1788, if valid, was understood by the Indians to be a lease.[267] The Oneidas' perception is

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261. *See supra* notes 71-75 & 86 and accompanying text.

262. *See* 2 PROCEEDINGS, *supra* note 25, at 330-50 (letters exchanged between Governor Clinton and various Iroquois representatives).

263. *See* B. GRAYMONT, *supra* note 22, at 20-23; *see generally E. Tooker, supra* note 1, at 428-29.

264. The Grand Council wrote:

> We have been informed of the Purchases you made of some of our young Men, both of the Onondaga and Kayuga Country, and we have considered long and seriously on the Consequences that may arise from suffering Individuals (without Authority) to dispose of Property that was given by the Great Spirit to our Forefathers and handed down by them to their Children the Five Nations in general. We have not been hard with the white People who has made an open and fair Application for Lands at our Council Fire; but we have accommodated them, and we hold the Sales sacred, because it was done in full Council and at a proper Place; but what is partially purchased from Individuals, at improper Places, we are bound by ancient Customs of our Forefathers to disapprove of.

Id. at 331.

265. 2 PROCEEDINGS, *supra* note 25, at 344.

266. *See* H. UPTON, *supra* note 1, at 38-39.

267. 2 PROCEEDINGS, *supra* note 25, at 359-62. A letter of January 27, 1790 underscores this:

supported by the circumstances surrounding the two agreements, the language of the 1788 Treaty and the statements made by the Indians who negotiated the agreement.[268] The Indians repeatedly voiced an aversion to a sale of their lands, desiring to protect the ability of future generations to make a living.[269]

New York State offered to protect the Oneidas' land with a treaty in 1788 and, instead, the Oneidas sought a lease to protect their lands from white trespass. The Second Circuit was correct in that the Oneidas did express the view that the rent "was to increase with the increase of the Settlements on our lands until the whole Country was settled, and then to remain a standing Rent forever."[270] But the court erred in construing the agreement as a sale. The historical evidence indicates that the Oneidas viewed the agreement as a lease.

The terms of the lease reflect the Oneidas' desire to protect their lands in the face of seemingly inevitable white trespass. It allowed for an increase in rent based upon the increase in white settlements on the lands unsettled by the Oneidas. This is reflected by the Oneidas' understanding of the agreement: "We supposed that we had at the same time reserved a sufficient Tract of Country for our own Cultivation . . . ."[271] Indeed, the text of the treaty supports this construction of the lease.

> When you kindled the late Council Fire at Fort Schuyler and called us to sit around it with you, we were told that our Interest as well as yours was to be consulted, and that our mutual Happiness and Prosperity was to be the Object of the Treaty. It is unnecessary to repeat all of what was said on the Occassion; you have it all in Writing. We returned home possessed with an Idea that we had leased our Country to the People of the State, reserving a Rent which was to increase with the increase of the Settlements on our Lands until the whole Country was settled, and then to remain a standing Rent forever. This, Brother, was our Idea of the Matter. We supposed that we had at the same time reserved a sufficient Tract of Country for our own Cultivation.

Id. at 360-61.

268. *See supra* note 60.

269. *See supra* note 71. Instead, the Indians proposed a lease:

> We are however willing and ready to lease one Tier of Farms in the Manner they are done by the White People, along the Boundary Line throughout the Extent of our Country and that People of Influence might be settled on these Farms to prevent Encroachments, and that a Person might be appointed to collect our Rents annually.

1 PROCEEDINGS, *supra* note 25, at 93-94.

270. *Oneida Indian Nation II,* 691 F.2d at 1096 (citing 2 PROCEEDINGS, *supra* note 25, at 360).

271. 2 PROCEEDINGS, *supra* note 25, at 361. The Indians also believed that the purpose of the meeting was not to sell lands but to settle the dispute over the earlier treaty:

> You observed, Governor, that the Design of this Council Fire was to remove the Confusion that had taken Place in our Landed Affairs (which has indeed become continued Scene of Confusion and Disorder) and not to purchase Lands for your

In the Treaty, some of the ceded lands are specifically to be leased for periods of no more than twenty-one years.[272] This does not support the Second Circuit's interpretation of the situation.[273] Furthermore, the Treaty explicitly protects the Oneidas' "free right of hunting in every part of the said ceded lands, and of fishing in all the waters within the same."[274] Other special protections and the later acts of the New York State Legislature support the view that the 1788 Treaty constituted a lease.[275] Given the historical evidence supporting the view that the agreement constituted a lease in which the Indians retained an interest, the dismissal of this claim for relief was premature. An evidentiary hearing should have been held before a final conclusion was made.

VI

How to Return Brick and Asphalt to the Oneidas: Remedies

The creation of remedies in the Native American land claims context is exceedingly difficult because twentieth century New York State is nothing like the world of James Madison and Joseph Brant. Factories, cities, and farms now stand where forests once stood. As a result, the difficulties in fashioning a remedy may affect a judge's ability to decide and delay the ultimate resolution of the claim. Yet, even though judicial resolution is fraught with problems of community and tribal divisiveness and Native American dissatisfaction with monetary awards, it is the best means of fairly resolving lands claims disputes.

Native American land claims present an opportunity to rewrite history. A judge, through her decision, possesses the power to undo the wrongs of

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People, for that you had Lands enough and more than sufficient for the People you yet had to settle on them.

1 Proceedings, *supra* note 24, 226-27.

272. 1 Proceedings, *supra* note 25, at 242-43.

273. The Second Circuit stated that "[e]ven if the terms 'cede and grant all their lands' were so construed [as to give rise to a lease] they would amount to a perpetual lease under which the lessee had the right to possession and the Oneidas reserved only the right to rent with no reversionary interest or right of re-entry." *Oneida Indian Nation II,* 691 F.2d at 1096. But, the conclusion that no reversionary interest remains is not supported by the experience of the Seneca Indian Nation. The Senecas leased land, including the entire town of Salamanca, New York, through ninety-nine year leases and currently seek to raise rent. *See Senecas Seek to Raise Lease Fees for Salamanca,* N.Y. Times, Jan. 28, 1980, at B1, col. 1. One Seneca representative explained the difference between lease ownership and conventional ownership this way: "The nation grants possession with the lease, but it retains a reversionary interest . . . . The land reverts to the Senecas if the annual lease fee isn't paid or if the lease expires." *Id.*

274. Fort Schuyler Treaty of 1788, *reprinted in* Report of Special Committee to Investigate the Indian Problem 237-39 (1889).

275. *See* H. Upton, *supra* note 1, at 72-73. The continuing relationship between the state and the Indians would be more akin to that of a leasehold relationship than that associated with a sale.

the past and transfer the land back to its original owners. However, the magnitude of the judge's power and the difficulty of fashioning a remedy can create hesitancy to change the status quo.[276] Thus, when judges are asked to turn back time and give millions of acres of land back to Indians, they are more likely to maintain the status quo than to produce such a radical change in ownership, regardless of the relative strengths of the legal arguments.[277]

Cultural stereotypes and biases against Native Americans complicate this task.[278] While there may be a nostalgic sentimentality among whites concerning the noble savage, ironically, the idea of taking land from those who have lived on it for centuries and giving it back to the Indians seems "unfair" to some whites.[279] Thus, prejudice and persecution are perpetuated in the refusal to amend past wrongs.[280] Whites base this refusal to amend past wrongs upon the rationale that the current generation of whites should not have to pay for the wrongs they did not commit.[281] The pervasiveness of this view makes litigation complex, lengthy, and difficult,[282] and divides communities with hate and racism.[283] In this context it becomes

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276. *See Oneida Indian Nation I*, 520 F. Supp. at 1296-97, 1298-99 & 1299 nn. 22-23; Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 531-32 (N.D.N.Y. 1977).

277. [S]ince the judge is a human being and since no human being in his normal thinking processes arrives at decisions . . . by the route of any such syllogistic reasoning, it is fair to assume that the judge, merely by putting on the judicial ermine, will not acquire so artificial a method of reasoning. Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.

J. FRANK, LAW AND THE MODERN MIND 109 (1970) (citing Dewey, *Logical Method and the Law*, 10 CORNELL L.Q. 17, 20 (1924)).

278. The Iroquois have been the subject of stereotypes ever since they came into contact with the white man. These stereotypes continue to be perpetuated and could easily affect a judge's decision making. *See* Hirschfelder, *The Treatment of Iroquois Indians In Selected American History Textbooks*, AMERICAN INDIAN STEREOTYPES IN THE WORLD OF CHILDREN (A. Hirschfelder 1982).

279. *See Narragansetts, Land Suit Settled, See Small Victory*, N.Y. Times, Aug. 19, 1979, at 48, col. 3; *see also* van Gestel, *supra* note 27, at 182-84.

280. P. MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE xxii (1983).

281. *See* van Gestel, *supra* note 27, at 182-84; *see also Gay Head Indian Land Claims Suit Nears April Trial Date with Mixed Assessment*, Vineyard Gazette, March 11, 1983, at 1, col. 2.

282. *See generally* Comment, *Indian Land Claims Under the Nonintercourse Act*, 44 ALB. L. REV. 111 (1979); Comment, *Resolution of Eastern Indian Land Claims: A Proposal for Negotiated Settlements*, 27 AM. U. L. REV. 695 (1978).

283. Mr. Allan van Gestel, a prominent land claims attorney and one of the defense attorneys in the *Oneida Indian Nation* claims, expressed the perspective of the landowner:

When land claim suit cases go to court and landowners, who have worked to pay for the land, have gone through the time and expense of title searches, are threatened with losing their land, 'it's easy to see why they get defensive. It leads to terrible divisions, antagonism, racism. The court is not the place to work out these problems.'

Id. at 7.

difficult for a judge to make a sweeping decision which may be required by the facts of the case.

Courts have often expressed difficulty with the idea of giving large areas of land back to Native Americans and have instead resorted to monetary awards as substitutes. Thus, even a court victory on behalf of the Native Americans does not guarantee satisfaction.[284] After the recent Supreme Court decision in *United States v. Sioux Nation* [285] which upheld an award of over $100 million, the Native American plaintiffs protested the decision and sought to retake their sacred lands.[286] Because Native Americans often favor land over money for spiritual and cultural reasons, court awards of damages to victorious plaintiffs often leave both parties dissatisfied.[287]

While litigation offers no panacea, there are no proven alternatives. Congressional action and attempts at settlement are also time consuming and divide the community. Congressional attempts to resolve Native American land claims have enjoyed mixed results. While the Indian Claims Commission, created by Congress to resolve land claims,[288] enjoyed a modest success, it is no longer in existence and the claims have been left for resolution in the United States Court of Claims.[289] Congressionally initiated

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284. The Klamath Indians' experience underscores this. The Klamath received $81.54 million in a land settlement in 1961 and the tribe has little to show for it today. *See New Cash and an Old Lesson for Tribe*, N.Y. Times, Sept. 22, 1980, at A14, col. 2. The article noted that a "study by two University of Oregon staff members found that by 1965, a quarter of the recipients [of $43,000 each in 1961] had less than $5,000 of the money left, half had between $5,000 and $30,000 and the remaining one-quarter still had $30,000 or more." *Id.*

285. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

286. Native Americans first protested the Court of Claims' decision. *See Court Awards $100 Million to Indians in Land Claim*, N.Y. Times, June 14, 1979, at A20, col. 3 (city ed.). President of the Oglala Sioux at Pine Ridge, Elijah Whirlwind Horse, commented: "'The sacred Black Hills are not for sale,' . . . adding that the individual Indian would not benefit from the claim. The benefactors, he said, would be the Federal Government 'and the Washington lawyers who have worked on this case for the last 40 or 50 years.'" *Id.*; *see also Sioux Chiefs Urged to Reject U.S. Offer*, N.Y. Times, Sept. 2, 1979, at 22, col. 1. After the Supreme Court affirmed the Court of Claims' decision, the Oglala tried to block the payment of the Black Hills claim but were unsuccessful. *See* Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States, 650 F.2d 140, 142 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). The Oglala also contemplated taking their claim to the International Court of Justice at the Hague, *see* N.Y. Times, Sept. 2, 1979, at 22, col.2, and failed in an occupation effort. *See Indians Ordered to Leave Black Hills Encampment*, N.Y. Times, Aug. 27, 1981, at A14, col. 6; *Indians Await Confrontations*, N.Y. Times, Sept. 7, 1981, at A6, col.1; *Sioux Protesters Leave One Site in Black Hills*, N.Y. Times, Sept. 9, 1981, at A22, col. 6; *Sioux Lose Fight For Land in Dakota*, N.Y. Times, Jan. 19, 1982, at A14, col. 2.

287. *See In the Braves' New World, Indians Like Land, Not Cash*, N.Y. Times, Nov. 2, 1982, at 8, col. 1; *see also* N.Y. Times, Aug. 19, 1979, at 48, col. 3.

288. Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70-70w (1976 & Supp. 1981); *see generally* D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 152-57 (1979).

289. *See* 25 U.S.C. §§ 70v, 70v-3 (1976 & Supp. V 1981).

solutions such as the Ancient Indian Land Claims Settlement Act[290] and Congressman Morris K. Udall's attempt at resolving the Cayuga land claims in New York[291] offer new approaches to the problem but each of these attempts presents problems.

The Ancient Indian Land Claims Settlement Act is a poor remedy because it limits the amount of recovery available and the types of claims that may be brought.[292] Such a remedy is unfair because Native Americans, who have little political representation in Congress, cannot effectively object to these restrictions on their ability to recover. The Act also favors monetary compensation. Where Native American acquisition of state lands is possible the Native Americans and the lands are placed under state jurisdiction denying them any separate sovereignty that they may currently enjoy.[293] In addition, the final validity of a settlement claim rests with the Secretary of the Interior.[294] Thus while the Act would hasten claim resolution and uncloud title, it would hamper the Native Americans in their efforts to obtain full redress and deny them sovereignty over their new lands as well. This would seem to be too high a price for rapid resolution of claims.

The experience with the Cayuga claims in New York offers a compromise solution: return federal and state lands to Native Americans in small parcels. In 1979, the Cayuga Indian Nation reached a tentative accord regarding a 64,000 acre claim against the state and federal governments.[295] Under Congressman Morris K. Udall's proposed settlement, the Cayugas were to relinquish their claim in return for 1,852 acres at New York's Sampson State Park and 3,629 at the Hector Federal Land Use Area.[296] The settlement legislation, however, was defeated in the House of Representatives when local political pressures undermined support.[297] As a result, the

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290. H.R. 5494, S. 2084, 97th Cong., 2d Sess., 128 CONG. REC. H390 (daily ed. Feb. 10, 1982).

291. Cayuga Indian Claims Settlement Act of 1980, H.R. 6631, 96th Cong., 2d Sess., 126 CONG. REC. 1938 (1980); *see generally Cayuga Indians Reach Accord in Land Claim on Finger Lakes Area*, N.Y. Times, Aug. 21, 1979, at D17, col. 2 (city ed.).

292. The Act would limit recovery to the fair market value of the property when it was taken, in addition to two or five percent simple interest computed per annum. S. 2084, 97th Cong. 2d Sess. § 6(c) (1)-(c) (2) (1982). The Act also prohibits recovery when "the United States establishes that the Nonintercourse Act provision of the Trade and Intercourse Act of 1790 was not applicable to such transfer" or when a transfer made before July 22, 1790 is not proved to have been "invalid unless approved by the United States and . . . no such approval was obtained." *Id.* at § 6(b).

293. *Id.* at § 5(e).

294. *Id.* at § 5(c)(1).

295. *See* N.Y. Times, Aug. 21, 1979, at D17, col. 2.

296. *See* H.R. 6631, 96th Cong., 2d Sess., 126 CONG. REC. H1928-30 (daily ed. March 18, 1980).

297. The bill was defeated 201-187. 126 CONG. REC. H1938 (daily ed. March 18, 1980). *See also* N.Y. Times, March 23, 1980, at 42, col. 3; *Land Claim By Cayugas Stirs Anger*, N.Y. Times, Aug. 25, 1979, at 20, col. 2.

Cayugas were forced to sue and settlement negotiations are currently underway.[298]

The option of giving federal and state lands to Native Americans as a settlement device provides a good solution when it is available. The Indians are able to recover some former lands which often hold important religious and cultural significance. The cost to white society is not high. While some whites may protest the loss of land and the recreational and business opportunities accompanying it, the recreational needs of the community can be fulfilled by other parks, and federal assistance can be made available to businesses forced to relocate. Moreover, such aid may not be necessary. In the past, where ownership has been transferred from whites to Indians, little or no disruption has occurred.[299] Given the attractiveness of this option, judges should try to fashion remedies like this in resolving Native American land claims.

The Cayuga experience also highlights the importance of public opinion in land claims. Public sentiment was largely responsible for the defeat of the Udall proposal. This unfortunate result might have been avoided if the process were depoliticized. If dispute resolutions moved from the legislatures to the federal courts, compromises would no longer be undermined by the whims of the public.

At the same time, the Cayuga incident demonstrates the need for public education and acceptance. The history of the land claims should be publicized to educate people about the nature of the dispute. This would not only aid in promoting the acceptance of a judicial decision or settlement but also foster a better relationship between whites and Native Americans. Indeed, the very magnitude of some claims requires education to prevent relations between whites and Native Americans from worsening.[300]

In sum, a federal court provides the best forum for dispute resolution because the federal judge is divorced from direct political pressures. In addition, the court can suggest settlement terms and attempt to resolve the claims without litigation. A federal court puts the politically underrepresented Native Americans on equal footing with the defendants, regardless of the inherent biases and stereotypes which may exist. The court, given the absence of an alternative, is the most effective separate neutral body for the resolution of claims.[301]

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298. Cayuga Indian Nation v. Fox, 544 F. Supp. 542 (N.D.N.Y. 1982); Cayuga Indian Nation v. Carey, 33 Fed. R. Serv. 2d (Callaghan) 272 (N.D.N.Y. 1981).

299. In Maine, despite the return of Indian aboriginal land, whites have not been radically displaced, nor have white loggers lost their jobs in significant numbers. *Maine Indians Still Awaiting Economic Gain in Land Deal*, N.Y. Times, Sept. 12, 1982, at 77, col. 1.

300. The return of a significant portion of the six million acres claimed by the Oneidas could result in public unrest. Thus, it would be imperative to carefully explain to the public the reasoning behind the decision, its historical basis, and the result.

301. The recent Congressional Commision on Wartime Relocation and Internment of Civilians suggests a possible alternative for extensive Indian land claims. American-Japanese

VII

CONCLUSION

In Native American land claims litigation, history often develops a precedential value. As a result, it is most important that courts search the historical record in each case for relevant political, social, economic and cultural artifacts which may offer insight into the views of the parties who made the treaties and into the Indians' understanding of the treaties. The complexity of preconstitutional land claims makes several levels of analysis necessary to achieve this result.

With such claims, courts should first consider whether the Indians were considered sovereign with respect to the states and the federal government. Second, the court should determine whether the authority of either the states or the federal government to make treaties with Indians was limited by the Articles of Confederation, by statute or by any other previous treaty. Third, the court should determine when the Indians' first recognition of either sovereignty took place and then decide whether this recognition has an impact upon the validity of the claim in question.

An application of this analysis to *Oneida Indian Nation v. New York* provides support for many of the conclusions made by the Second Circuit Court of Appeals. The early preconstitutional history indicates that the Iroquois Confederacy and the Oneida Indian Nation were considered sovereign and that the states' treaty-making authority was considered limited by the Articles of Confederation despite the lack of federal enforcement. The historical record further indicates that the Fort Stanwix Treaty was the first valid recognition of American sovereignty by the Oneidas after the Revolutionary War and that both the Treaty and the Articles would undercut the validity of the 1785 and 1788 Treaties made between New York State and

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Evacuation Claims Act, 50 U.S.C. Appendix § 1981 (Supp. IV 1980 & Supp. V 1981). *See* N.Y. Times, Feb. 25, 1983, at A1, col. 2. A similar commission formed in New York in 1919 examined the Indian "problem" in New York and the history of Indian-white treaties and relations. *See* H. UPTON, *supra* note 1, at 77-103. The report of that commission, the "Everett Report," found that "Indians of the state of New York, as a nation, are still the owners of the fee simple title to the territory ceded to them by the [Fort Stanwix] Treaty of 1784 unless divested of the same by an instrument of equal force and effect as the said treaty of 1784." *Id.* at 103. The state did not act on this report and the New York State Legislature refused to accept the Commission's findings. *Id.*

A commission today could alleviate the burden of further litigation concerning the Iroquois claims. Such a body could be comprised of representatives of all the interested parties and disinterested representatives selected at large. If the injustice to the Japanese-Americans can be redressed thirty-eight years after their internment, there should be no reason why a similar body could not attempt to resolve a dispute which is over two hundred years old. The flexibility and broad scope of a congressional commission's investigatory powers are well-suited to deal with the unique complexity and difficulty of the Iroquois claims. The de-emphasis on political outcomes would also contribute to facilitating adequate remedies. While the Iroquois do not have the same political force in Congress as do the Japanese-Americans, the injustice committed against them is no less grievous.

the Oneida Indian Nation. Because of the question of the Treaties' validity and also because the effect of the 1788 Treaty is open to debate, it is important that evidentiary hearings be held on these issues prior to dismissal on a motion for failure to state a cause of action.

While the issue of a remedy in cases such as this one creates a difficult problem, courts must be careful not to let the difficulty affect their decision-making ability. Judicial notice of pertinent historical data is permissible only when the accuracy of that evidence is not under debate. The importance of history in Native American land claims litigation requires that courts first examine the historical data proffered before they make a decision. This approach is essential to the careful rendering of fair decisions which avoid bias and the use of stereotypical history.

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