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The Promises of Great Nations

The Oneida Land Claims Cases

For a nation famously unconcerned with its history, the last third of a century has seemed almost like an uninterrupted indulgence of mythmaking and nostalgia creation. The bicentennial of our revolutionary birth was commemorated; the bicentennial of our constitutional foundation celebrated; the bicentennial of the Bill of Rights feted. These celebrations coexisted uneasily with another kind of return to the early history of the United States. American Indian tribes also have been returning to North America's history, albeit with a markedly different intent. From the late 1960s to the present, American Indian tribes have stepped up their efforts to convince U.S. Courts and Congress, as well as state courts and legislatures, to invalidate land transactions completed in the late eighteenth and early nineteenth centuries and to return huge tracts of land to the original and, as the tribes contend, rightful owners. Among the most contested land claims have been those brought by Eastern Indian tribes, relying upon the federal government's promises made to them, in the form of treaties and laws regulating trade, that appear to contravene land transactions in which title passed from Indian tribes to states, and thence to individuals.

The American Indian land claims threaten to undermine central components of American political identity. The land claims pierce the myth of the "newness" or "virginity" of the New World, and put in its place a more troubling portrayal of deceit, conquest and extermination, suggesting that the United States is not an exception to the tainted roots of virtually every nation-state. The early history of violence, deception, and fraud documented by American Indian tribes also calls into question the centrality to our political and legal identity of treaties and contracts. If deception and coercion accompanied treaties and contracts, and promises were not kept, then our faith in the power of promising to cement political and legal relationships, a fundamental tenet of American political thought, appears naive or duplicitous. Finally, our very sense of "at-homeness" is at risk, for implicit (and at times explicit) to Indian land claims is the troubling conclusion that present-day owners are but strangers on the land, squatting without rightful legal title.

This chapter follows the largest and oldest set of land claims in the United States, that pursued by the Oneida Indians of New York, Wisconsin, and Ontario against the federal government, New York State, upstate counties of New York, and at times, individual landowners. The chapter analyzes the manner in which legal and political questions have been framed, partly in order to minimize the threats to American identity and interests. As noted in the Introduction, three primary issues must be clarified in thinking through the existence and nature of present political responsibilities for past wrongs. The wrong and the wronged must be defined, the responsible party identified, and how far back in history the present generation should go to respond to wrongs determined. This chapter, as it focuses on deeds done in the eighteenth and nineteenth centuries, must consider the import of the passage of time on the land claims. If New York State did, indeed, secure title to the Oneida Tribe's lands illegally approximately two hundred years ago, should the intervening history and change of circumstances diminish the rights of the Oneidas or the responsibilities of present political bodies? Finally, the chapter briefly

examines which institutions of government are best positioned to craft a suitable remedy that would take into consideration the interests of the various Oneida tribes, the U.S. government, New York State, the local counties, and private individuals who firmly believe they hold legal title to the land. Ultimately, the chapter suggests there is a political responsibility at both the state and national levels to address the Oneida land claims, although with so many competing interests, and such thorny past and present legal and political complexities, a resolution that all parties can agree to appears unlikely.

The past thirty years or so have seen a dramatic surge in the number of Indian land claims filed in state and federal courts across the country. The increase is due partly to Indian tribes' responses to legal and political actions by the federal government. Federal courts have lifted a number of legal barriers that had impeded tribal access to the courts, and the U.S. Congress, attempting to remove conclusively any future threat of land claims, passed legislation in 1966 giving Indian tribes six years to file suits for damages resulting from trespass.[1] The original six-year limit was extended to 1977, then to 1980, and finally to 1982.[2] With each advance of the deadline, Indian tribes protected their legal rights to sue by initiating lawsuits.[3] During the past thirty years Eastern Indian tribes filed land claims in Maine, Massachusetts, Connecticut, Rhode Island, New York, South Carolina, and Louisiana, covering somewhere between 16 and 17 million acres.[4]

Settlements have been reached in many of these claims, including an agreement with the Passamaquoddy and Penobscot tribes in Maine that granted them 350,000 acres of land and approximately $80 million,[5] and a $50 million settlement with the Catawbas of South Carolina.[6] The claims of the Oneidas of New York, Wisconsin, and Ontario, however, as of this writing, remain unresolved, even though the Oneidas have carried their arguments from the Indian Claims Commission in the 1950s to the Court of Claims, from the U.S. District Court to the Court of Appeals, and twice have been heard before the Supreme Court. After nearly fifty years of litigation, negotiation, and legislation the

claims remain unsettled. In February 2002, the New York Oneidas and the state of New York announced, prematurely, that they had reached a tentative settlement that would pay the Oneidas of New York, Wisconsin, and Ontario $500 million in return for the tribes' dropping their land claims. Under the terms of the proposed settlement, half of the money would come from New York State and half from the federal government. However, neither federal officials nor the Oneidas of Wisconsin and Ontario supported the settlement. The Wisconsin and Ontario Oneidas opposed it because they wanted land, not money, and the federal government claimed they were not consulted about the terms of the settlement prior to its announcement. Most recently, in December 2004, Governor Pataki announced a far-reaching tentative agreement with the Oneidas of Wisconsin, in which the tribe would agree to drop its claim to 250,000 acres in upstate New York in exchange for the rights to build a casino in the Catskill mountains as well as the rights to buy 1,000 acres in the tribe's ancestral homelands. The agreement would represent a dramatic policy shift in Indian affairs, for it would mark the first time that the federal government would allow out-of-state tribes to obtain land beyond their current reservation state. The proposed settlement, however, faces a number of significant obstacles, including the fact that only one of the original three Oneida tribes have agreed to the terms. The settlement would require passage of legislation at both the state and federal level. Its fate remains uncertain, as of this writing.[7]

Actually, three sets of claims comprise the overall Oneida claim, all of which are rooted in treaties signed between 1785 and 1842 between the State of New York and the Oneida Indian Nation. The first and second land claims concern actions taken after 1790 (and thus after New York had adopted the U.S. Constitution) and the third concerns actions that predate the Constitution, and required courts to base their rulings on interpretations of the Articles of Confederation. The treaties in total transferred approximately 6 million acres of land from the Oneidas to New York State. The first lawsuit, filed in 1970 and intended by the Oneidas as a test

case, concerned portions of land transferred from the Oneidas to New York by a 1795 lease. The suit alleged that the 1795 agreement violated the 1790 Trade and Non-Intercourse Act, as well as the federal Constitution. This first suit called only for damages representing the fair rental value of land presently owned and occupied by the counties of Oneida and Madison for the period from January 1, 1968 through December 31, 1969.[8]

A second lawsuit was filed in 1974 in which the Oneidas challenged purchases made between 1795 and 1842. The second claim, building upon the arguments enunciated in the first, encompassed a much larger tract of land (approximately 250,000 acres), and asked for the restoration of the lands, an award of fair rental value for the entire period of dispossession, a declaration of dispossession, and an award of all costs and attorneys' fees. In 1978 the Oneidas brought a third claim, alleging that land purchases that took place in 1785, prior to the adoption of the U.S. Constitution, violated the 1784 Fort Stanwix Treaty and the Articles of Confederation. This third claim, asking for restoration of approximately 4.5 million acres, has been dismissed (*Oneida Indian Nation v. New York,* No. 78-CV-104, slip op. [N.D.NY Nov. 19, 1986]).[9]

The Original Promise and Purchase

At the time of the American Revolution, the Oneida Indian Nation was part of the powerful Six Nations or Iroquois Confederacy. The Oneidas held aboriginal title to more than 6 million acres of land in central New York (see *Oneida Indian Nation of NY v. County of Oneida,* 434 F. Supp. 527, 533 [N.D.NY 1977]). The Oneidas traditionally had been allies of the British, but during the American Revolution they split from the pro-British Confederacy and allied themselves with the colonists. After the war, the newly formed United States sought to reaffirm its alliance by entering into a series of treaties in which the United States formally recognized the Oneidas and promised that they would be secure in the possession of their lands ("Treaty with the Six Nations," Oct. 22, 1784, Art. III, 7 Stat. 15) unless they sold their land to the United States. The

treaties stipulated that if a state wished to purchase land from the Oneidas, federal consent would have to be obtained.

Many states, however, refused to recognize federal supremacy in the area of Indian affairs. New York was particularly brazen in this regard. Aware of the federal treaties with the Oneidas that outlawed outright purchase of the Indian land by states, New York State resorted to deception to meet public pressure to open up the Oneida's land for white settlement (*Oneida,* 434 F. Supp. at 533). In 1788, New York secured a lease with the Oneidas, assuring them that the lease would allow them to keep their land, and would allow New York to "extend its protection over their property, against the dealings of unscrupulous white land speculators."[10] Historian Jack Campisi explains why the Oneidas would enter into such an agreement:

> The New York commissioners . . . led them to believe that they had [already] lost all their land to the New York Genesee Company, and that the commissioners were there to restore title. The Oneidas expressed confusion over this since they had never signed any instruments to that effect, but Governor Clinton just waved that aside . . . Thus the Oneidas agreed to the lease arrangement with the state because it seemed the only way they could get back their land. The state received some five million acres for $2,000 in cash, $2,000 in clothing, $1,000 in provisions, and $600 in annual rent.[11]

The Oneidas retained a reservation of approximately 300,000 acres at this point.

In 1790, Congress, at the behest of President Washington and Secretary of War Knox, passed the first Indian Trade and Non-Intercourse Act.[12] The Commander-in-Chief and Secretary of War, realizing that the United States was at this time militarily weak compared to the bordering Indian nations, sought to reduce the possibility of warfare by prohibiting all settlement until the federal government negotiated a treaty with the Indian tribes. If the federal government regulated all trade with the Indians, it was thought that Indian land could be taken over in a relatively peaceful and orderly manner.[13] The 1790 Act declared that "no sale of lands made by any Indians . . . shall be valid to any persons or

person, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."[14] When the 1790 Act expired, a revised and more detailed version was passed in 1793 that called for criminal penalties for violation of its terms. The 1793 Act allowed states to negotiate with Indian tribes, although it stipulated that:

> No purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution . . . [and] in the presence, and with the approbation of the commissioner or commissioners of the United States [appointed to supervise Indian land sales.][15]

President Washington, soon after the 1790 and 1793 Acts were passed, explained their import to the Seneca Indians of New York:

> No state, nor person can purchase your lands unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights . . . [w]hen you may find it in your interest to sell any part of your lands, the United States must be present, by their agent and will be your security that you shall not be defrauded in the bargain you make.[16]

Neither President Washington's promise nor the Trade and Non-Intercourse Acts could withstand the eastern states' hunger for Indian land, however. Eastern states methodically acquired part or all of tribally held lands, blatantly ignoring the law's requirement to gain federal authorization. In fact, New York's Governor Clinton and later Governor Jay were warned by Secretary of War Pickering that the Non-Intercourse Act required that their negotiations with the Oneidas be attended by federal commissioners to supervise any land transaction.[17] Both governors ignored these warnings, and New York finalized an agreement in 1795 in which the Oneidas conveyed virtually all of their remaining land to New York for annual cash payments of $2,952.[18] Evidence introduced during

the initial Oneida trial revealed that, contrary to the dictates of the Non-Intercourse Act, the transaction was not approved by the federal government nor was any agent of the United States present during the negotiations. This 1795 transaction stands at the heart of the initial Oneida land claim case.

The Oneida Land Claims Reach Federal Court

Through the nineteenth and much of the twentieth century, the Oneidas periodically struggled, albeit unsuccessfully, to dispute the legality of the 1795 land transaction.[19] In 1951, the Oneidas filed a petition against the United States before the newly instituted Indian Claims Commission.[20] The commission, as noted in the Introduction, had been established in 1946 with a broad mandate "to settle finally any and all legal, equitable and moral obligations that the United States might owe to the Indians."[21] The Oneidas sought judgment against the United States, as trustee, for the fair market value of their lands sold to New York since the eighteenth century.[22] The Oneidas argued that the United States had fallen short in its fiduciary duty toward them, and thus was responsible for damages. Twenty-seven years later, the Oneidas did finally prevail, in 1978,[23] although the tribe decided afterward to dismiss the case, for fear that obtaining monetary damages might prejudice their land claim.[24] Under the provisions of the Indian Claims Commission, only monetary damages could be awarded, and damages were limited to the value of the land *at the time of the illegal taking*, without interest. The Oneidas decided to drop their case against the United States and pursue two suits against counties of New York, various state agencies, and New York State itself. Private landowners were not named in these original suits.

The Oneida's initial forays into the federal courts were repulsed by the New York counties' argument that the damage suits did not present a federal question, and thus the suits must be pursued in state courts. Defeat in New York state court was all but guaranteed, owing to the state's sovereign immunity and various time-based limitations on claims.[25] The Oneidas persisted, however, and the

Supreme Court, in a unanimous 1974 decision, reversed the lower federal courts' decision. Justice White, writing for the Court, explained that "federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law."[26] The Court conclusively put to rest the notion that the original thirteen states had preserved their sovereignty over Indian lands, and that disputes regarding these lands must be resolved in state courts.[27] The Supreme Court remanded the case to the District Court for trial on the merits. There, Judge Edmund Port expressed his displeasure that the courts, and not Congress, had been called upon to resolve the dispute.[28] Rather than ducking the substantive issues, however, Judge Port decided that the 1795 transaction between the Oneidas and the State of New York was contrary to the Non-Intercourse Act and thus void. Although this decision "may seem harsh," wrote Port, "by the deed of 1795 the State acquired no rights against the plaintiffs . . . consequently, its successors, the defendant counties, are in no better position."[29] The Oneidas were entitled to fair rental value of the land presently owned by the counties. In a later hearing Judge Port determined the fair rental value to be $16,694.00 plus interest for the years 1968 to 1969 covered in the initial, narrowly defined, complaint.

The defendant counties, anticipating that the consequences of Judge Port's decision could go much beyond the $16,694.00 award, promptly appealed. The U.S. Court of Appeals, Second Circuit, in a two-to-one decision, affirmed the lower court's ruling that the counties were liable for damages.[30] The dissenter, Judge Meskill, voiced the fears of the counties, the state, and private landowners when he wrote that "nothing in the Court's opinion would prevent tribes from suing for the full value of all land taken from them at any time during our nation's history in contravention of federal law—to say nothing of an action for ejectment."[31] Where was the limiting principle, he worried? The counties, buoyed by Meskill's dissent and alarmed at the potential ramifications of the case, appealed the Court of Appeals decision to the Supreme Court. The Supreme Court agreed to hear the case "to determine whether an Indian tribe may have a live cause of action for a violation of its

possessory rights that occurred 175 years ago."[32] Oral argument was scheduled for the opening day of the 1984 Supreme Court's fall term.[33]

Oral Arguments at the Supreme Court

Allan van Gestel represented the counties of Oneida and Madison. Van Gestel opened his oral argument by placing before the Court the specter of Indian land claim cases let loose across the land. An affirmance of the lower court ruling, van Gestel warned, would encourage other Indian tribes to proceed with their claim cases now pending in the lower courts. If the Oneidas were to prevail, van Gestel predicted that they would sue for ownership of the land, which would imply sovereignty. The private landowners residing on the contested 100,000 acres of land would find themselves living under Indian sovereignty (related claims were later consolidated with this claim, and thus currently the acreage under dispute stands at 250,000).[34] Indian sovereignty would throw into doubt all matters of governmental services and taxation.[35] Having shared these fears with the justices, van Gestel then proceeded to his core legal arguments.

Van Gestel presented three primary arguments before the Court. First, he contended that the Non-Intercourse Act of 1790 and 1793 did not entail a private right of action—that is, if action is to be taken to enforce these Acts, it was up to the federal government to do so, and not private citizens. Second, if the Oneidas did have a private right of action, surely it was no longer live after 175 years. Reciting the time-based defenses that failed to convince the lower courts, van Gestel argued that state statutes of limitations should be applied where the federal law was silent; that the action had abated since the 1793 Act expired; and that the federally approved treaties of 1798 and 1802 represented a subsequent ratification of the earlier land transactions. Finally, providing the Court with a graceful means of sidestepping the thorny issues raised by the Oneida claims, van Gestel argued that this case presented a non-justiciable political question, and that the Court should defer to Congress on this matter.[36]

Whereas the counties' attorney attempted to place before the justices' minds the potential future consequences of their decision, Arlinda Locklear, the Oneida's attorney, tried to make the past come alive again. She began her oral argument by reminding the justices of the precariousness of the United States' revolutionary struggle and the pivotal role played by the Oneidas to that struggle. The Iroquois Confederacy was a powerful military force in the eighteenth century, sought after as an ally by both the British and the Americans. While four of the six tribes of the Confederacy sided with the British, the Oneidas gave active military support to the Americans. During and after the war, the American Congress assured the Oneidas that "[W]hile the sun and moon contrive to give light to the world, we shall love and respect you. As your trusty friends, we shall protect you; and shall at all times consider your welfare as our own."[37] Promises such as these, Locklear implied, should be honored if a nation considered itself honorable.

Locklear then turned to refuting the counties' arguments. Responding to the argument that the Oneidas did not have a private right of action, Locklear first established that the United States, as the guardian of most Indian resources, plainly could take action for the benefit of the Oneidas in the present case. She then posed before the Court the question of whether the wards, the Oneidas, should be able to do in their own name what their guardian, the United States, could do if it so chose.[38] Then, marshaling various legal doctrines that display solicitude for Indians, Locklear answered the counties' time-based defenses by arguing that to apply here state statutes of limitations would be inconsistent with the underlying federal policy, as expressed by Congress on various occasions from 1952 to 1982, to enable Indians to pursue land claims. Reminding the justices of the canons of construction dictating that treaties be construed liberally in favor of Indians, and that if the Court is to find that Indian title has been extinguished, then congressional intent must be "plain and unambiguous," Locklear countered the counties' theory that the land transactions implicitly had been subsequently ratified by later treaties.[39] And although the 1793 Act may have expired, Locklear directed the Court's

attention to subsequent versions of the Act, including 25 USCS 177, now in force, that contain substantially the same principle—a sovereign act is required to extinguish Indian title.

The record of the oral argument before the Supreme Court suggests that two primary issues had to be addressed to make possible an Oneida legal victory. The first was evident in the Court's order granting certiorari: the 175-year gap between the alleged wrong and the filing of the Oneida's suit. The passage of time, and the concerns encapsulated by the legal doctrines of statutes of limitations and laches, as well as the related issues attending to the passage of time (What had transpired during those 175 years? Hadn't the wronged party died? Hadn't the responsible party died? Hadn't innocent third parties developed settled expectations and rights to the land in question? Hadn't the background circumstances changed so dramatically that it no longer made sense to claim the Oneidas had possessory rights to the land?) vexed the justices.[40]

The second principal issue was apparent in a question bluntly put to Locklear by a Supreme Court justice: "How many millions of dollars are involved here?"[41] If the Oneida's claim were in fact still live, and the Court were persuaded that the Oneidas had been wronged, then how expensive would it be to remedy the wrong, and were courts institutionally equipped to implement a remedy? The justices assumed, as van Gestel had predicted, that if the Oneidas prevailed in this case, they would sue for ownership of the 100,000 contested acres (if not more); the Court wanted to know the financial consequences of an Oneida legal victory. It is worth noting that the justice who posed the question, "How many millions of dollars are involved here," seemed to assume that the case boiled down to money rather than the return of land. Locklear spoke of Congressional action in similar Indian land claim cases and of the Oneida's preference for a negotiated settlement. The Court, Locklear argued, rather than becoming entangled in the Oneida case for years, would be spurring Congress to live up to its constitutional duties with regard to Indian affairs by upholding the lower court's decision.

The 1985 Supreme Court Decision

One commentator described the Court's decision as a "shockwave." ("The Supreme Court sent a shockwave through the eastern United States by holding that the Oneidas could maintain an action for violation of their possessory rights based on federal common law."[42]) The Court held, in a five-to-four decision, that while "one would have thought that claims dating back for more than a century and a half would have been barred long ago," there is no "applicable statute of limitations or other relevant legal basis for holding that the Oneida's claims are barred or otherwise have been satisfied."[43] The Supreme Court did not settle on the legal remedy, but remanded the case to the Court of Appeals for a determination of the damages to be awarded. (Nearly twenty years later, and countless court battles hence, a final legal determination as to damages has yet to be finalized.)[44]

Statutes of limitations and other time-based rules are intended to bar stale legal claims. Locklear succeeded in persuading five justices (Powell, Blackmun, O'Connor, Brennan, and Marshall) that the Oneida claims were not stale, and that the long delay in bringing these suits was due to the fact that until recently federal courts were practically closed to the Oneidas. The Oneida's attorney argued that the courts, until recently, had been effectively closed to American Indian tribes due to the use of the political questions doctrine,[45] the 1863 requirement that Indians seeking justice in a treaty dispute needed special legislation giving the Court of Claims jurisdiction over its claim,[46] and the unsettled legal question as to whether Indian tribes had the capacity to sue in their own names, separate from their trustee, the federal government.[47] The lower court had found these arguments persuasive, and had noted that the Oneidas "never acquiesced in the loss of their land, but have continued to protest its diminishment up until today."[48] Rather than sleeping on their rights, the Oneidas had shown remarkable perseverance.

For the four dissenting justices, however, the Oneida's claim was "barred by the extraordinary passage of time."[49] In dissent, Justice Stevens, joined by then Chief Justice Burger, and Justices

White and Rehnquist, reminded the majority of "the historic wisdom in the value of repose."[50] In an intriguing distinction between that which is historic and that which is ancient, the dissenters called upon "historic wisdom" to defend the irrelevance of what they deemed an "ancient wrong."[51] Footnoting Blackstone's and Kent's *Commentaries on Law*, quoting Justice Story and Chief Justice Marshall, and concluding by likening the Oneidas to those whom "Abraham Lincoln once described with scorn [as sitting] in the basements of courthouses combing property records to upset established title,"[52] the dissenting justices deemed the various quoted authorities (written at approximately the same time the Oneida's title to their land was extinguished contrary to the dictates of the Non-Intercourse Act) as historic, whereas the wrongs done the Oneidas were "ancient." Remembered words of the past were cited to legitimate forgetting past illegal deeds.

Justice Stevens's dissent focuses on the economic consequences of the Court's decision upon counties and private landowners in the area. "Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate," Stevens quoted from an 1831 Supreme Court decision.[53] Stevens argued that the settled expectations of the present landowners had to be enforced rather than an "ancient" Indian right to the land.[54] Additionally, the counties could not be considered "responsible for their predicament," nor were "the taxpayers, who will ultimately bear the burden of the judgment in this case . . . in any way culpable for New York's violation of federal law in 1795."[55] For Stevens and the three other dissenting justices, the case offered a fundamental choice between burdening innocent counties and private landowners, or allowing past illegal governmental actions to go unrectified. The latter was deemed preferable, for, even if the original land transactions were invalid under the Non-Intercourse Act, as the framers recognized, Stevens wrote that, "no one ought to be condemned for his forefathers' misdeeds."[56]

Stevens's dissenting opinion reflects stark "either/or" thinking in which the alleged innocence of present non-Indian residents leads to the conclusion that the Oneidas should be barred from

having their land claims respected. But that conclusion does not necessarily follow. Even if present-day residents are innocent (and one could question this innocence, given the fact that, as A. John Simmons writes, "We all know the history of theft, broken agreements, and brutal subjugation on which our holdings in land and natural resources historically rest,"[57] or as Martha Minow suggests, all of us have benefited from the expropriation, and thus are less than completely innocent[58]), the innocence of present-day inhabitants does not wipe away the damage done to the Oneidas. It could be argued that the Oneidas have been wronged, and that the (partial?) innocence of present-day upstate New York residents suggests that they should not alone bear the burden of making amends to the Oneidas for wrongs chiefly done by New York state officials in the late eighteenth and early nineteenth centuries. Ultimately, if there is present responsibility to make amends to the Oneidas, then it must be determined whether the brunt of that responsibility lies with local, state, or federal governmental entities. Connected to that question is which body of government is best equipped to respond to claims such as these that take us back to the early history of the nation and encompass hundreds of thousands of acres of land and entangle hundreds of thousands of lives.

Legislative or Judicial Remedy?

If the more than thirty year history of the Oneida land claims can teach us anything, it is the utter difficulty of developing a remedy to which all parties can agree. When the 2002 settlement agreement fell apart, officials from New York State and local counties, and the Oneidas of New York, Wisconsin, and Ontario had agreed to a number of points: government payments of $500 million to the Oneidas of New York, Wisconsin, and Ontario; the sale of approximately 1,000 acres of land in New York to the New York Oneidas; and the promise that current residents would not be ejected from their homes. However, as earlier noted, the Wisconsin and Ontario Oneidas wanted land as well, and the federal government claimed

it had not agreed to pay half of the $500 million settlement. A number of other issues remained unresolved as well, including disputes over sales taxes and property taxes on Indian land, and related controversies concerning the New York Oneida's lucrative Turning Stone casino.[59]

It remains uncertain how Governor Pataki's December 2004 settlement proposal will fare. As noted above, it too faces considerable hurdles, including the fact that only one of the tribes, the Oneidas of Wisconsin, has agreed to its terms. Neither the Oneida tribes of New York and Ontario, nor a third tribe recently joined to the claim, the New York Brothertown Indian Nation, have signed on to the settlement. Both the New York Oneidas and the Brothertown tribe have stated that they will contest the settlement being imposed on them.[60] In addition, Pataki's proposal calls for five casinos in the Catskills of New York, two of which have yet to be authorized by the state legislature. Pataki's plan to add two more casinos than currently allowed faces resistance from upstate residents, some legislators, as well as the gaming interests that would face added competition. The plan will surely face opposition at the state legislature and in Congress, and then may be met by legal challenges by the three tribes who have not yet agreed to its terms.[61]

The seeming near-impossibility of resolving the Oneida land claims brings into sharp relief the question of which institutions of government are best equipped to resolve complex claims of this sort. During the course of the protracted litigation, several judges have voiced frustration that they, rather than legislative bodies, have been asked to resolve the dispute. Even the five justices of the Supreme Court who sided with the Oneidas in their historic 1985 decision seemed to ask Congress to step in and take the lead in resolving this dispute. In a final footnote to their decision, the majority wrote:

> The question whether equitable considerations should limit the relief available to the present-day Oneida Indians was not addressed by the Court of Appeals or presented to this Court by petitioners. Accordingly, we express no opinion as to whether other

> considerations may be relevant to the final disposition of this case should Congress not exercise its authority to resolve the far-reaching Indian claims.[62]

The Court here seems to be suggesting that Congress is best-positioned to resolve this dispute in that they would be able to consider all relevant factors in crafting a remedy to suit all the parties. Legislative bodies, the Court suggests, have greater leeway in crafting a compromise that all parties could agree to and are better able to create a non–zero-sum resolution. Congress also may be more legitimate than courts to settle disputes of this sort, particularly if a resolution is to include a large compensatory payment from the state and federal government to the Oneidas, or involve a major change in policy such as additional casinos in a state. Legislatures, more accountable and arguably more representative of the people than judges, should initiate policy with regard to far-reaching disputes of this type. Of course, the representativeness of legislative bodies and their greater responsiveness to majority interests pose classic problems for minority interests. The intensity of many private landholders' objections to the Oneida claims has been evident both within and without the political system. Incidents of racial hatred greeted the Oneida's claims, and a local group, Upstate Citizens for Equality, as well as a national organization, the Interstate Congress for Equal Rights and Responsibilities, formed to oppose Indian claims, and are still actively opposing them.[63] The U.S. Congress responded to this pressure, and both the House and Senate held hearings in 1982 on a bill designed to extinguish the land claims, ("The Ancient Indian Land Claims Settlement Act of 1982," HR 5494 and S 2084). The bill was introduced in the House by Representative Gary Lee (R., NY) along with four other New York congressional cosponsors, and in the Senate by Strom Thurmond (R., SC) and Alfonse D'Amato (R., NY). The bill, written to address directly the Oneida claims, would have solved the claims problem by prohibiting Indian tribes from regaining their lands and strictly limiting any monetary compensation.[64]

This is neither to argue that judges are immune to public pressure, nor that they necessarily will be sympathetic to the claims of

American Indian tribes. In fact, legal scholar Joseph Singer has observed that judges have open to them a distinctive style of thinking that allows them to decide against American Indian land claims while abjuring responsibility for their decisions. Singer notes that:

> Courts continue to cite, or rather to miscite, the older cases as a way to remove responsibility from themselves. . . . To the extent they are read to authorize unjust expropriation of Indian lands, they provide a convenient scapegoat. They shift responsibility from current judges to a Court led by perhaps the most respected of all Chief Justices [John Marshall]. . . . To the extent that the process entails injustice, it is safely relegated to the past.[65]

The long and, at this point, still unresolved history of the Oneida land claims attests to the myriad obstacles along both the legislative and the judicial routes of resolution. In most cases where resolutions of American Indian land claims have been reached, both legislative and judicial bodies have been involved, and both state and federal officials involved. Legal victories by American Indian tribes have pressured typically recalcitrant legislative bodies (as well as governors) to attempt to craft non–zero-sum resolutions in which both the settled expectations of current residents are recognized as well as the rights of American Indian tribes to be rectified for past wrongs.[66]

Passage of Time

One way to view the Oneida's land claims cases is as a fundamental conflict between a dominant culture's and a minority culture's understanding of the relationship between past and present, fought out on a playing field the boundaries of which have been established by the stronger party. From this standpoint, the claims present the question: To what extent will the dominant culture take into consideration the perspective of the minority culture? The Oneidas argue that the land, theirs by original acquisition, and never rightfully relinquished, still belongs to them and must be returned, or some rectification made. The intervening

history has not diminished their rights to the land. Promises made by the federal government to their ancestors have not been eviscerated by the passage of time, for the tribe exists over time, as does the state and federal government, and thus neither the wronged nor the wrongdoer are dead, which, in turn, implies that the promises are still binding.[67] Legislative action to extinguish their claims, and legal judgments that fail to recognize their claims, represent yet another indication that the state and federal governments reject the dictates of fair play to placate the majority's hunger for land.[68]

The New York counties, on the other hand, attend not to past promises, but to the present occupants of the land, and to the present circumstances of the Oneidas, arguing that the rights of current residents are paramount. If there were wrongdoing, it is as Justice Stewart wrote, "ancient history," and sometime over the past 175 years, custom and settled expectations created new rights to the land.[69] The counties and private landholders contend that they are not responsible for any past wrongdoing, and as innocent parties, should not bear the burden of remedying past wrongs. Theirs is a discontinuous political collectivity, in which obligations do not devolve upon future generations. The counties also call into question the Oneida's status as "successors in interest" to the wrongs done to their ancestors. In this view, neither responsibilities nor wrongs outlive a generation.

New York state officials also had declared in 2002 that they would refuse to continue negotiations unless the Oneidas agreed to also discuss disputes surrounding the New York Oneida's immensely profitable Turning Stone casino. This position underscores the fact that within the long period between the alleged wrongs and the present much has happened; not only has time passed, but circumstances have changed. The Oneidas of New York are no longer a poverty-stricken American Indian tribe, and no longer is it accurate or honest to represent a response to the Oneida land claims as an attempt to both rectify past wrongs and reduce present inequities. If the Oneidas are due land and or money, their claims must stand on the independent basis of rectifying past wrongs, rather than any present redistributive

impulse. Though I do think that rectification alone suggests that a response to the claims is due, I would add that I do not think that the New York Oneida's recent financial success diminishes their present claims. Such an argument would seem to have perverse implications. The lower courts as well as the Supreme Court found that the Oneidas did not sleep on their rights, but rather that the courts had been effectively closed to them. And, until very recently the Oneidas were severely handicapped in pressing their claims in the American political and legal environment due to financial limitations and political and legal inexperience. It was only when certain background circumstances changed—that is, when the Oneidas developed financial resources which enabled them to obtain political and legal resources—that they had a realistic chance to effectively pursue their claims. To contend that the change in the Oneida's financial circumstances argues against their claim seems to suggest that the Oneidas should not be able to vindicate their claims only because they finally stand a chance of doing so. This perspective implies that only when practical considerations dictate that the Oneidas would be unable to mount an effective political and legal campaign should their claims be recognized.

The Oneida land claim cases disclose the disquieting possibility that "ancient crimes" have tainted our history. What is at issue here is both a conflict between a dominant culture's and a minority culture's understanding of the relationship between past and present, as well as different versions of that past; one celebratory, and the other more ambivalent in which ancient crimes have tainted not only our past, but continue into the present. The Oneida cases present competing visions of the relationship between past and present, conflicting versions of the content of the American past, and of the very nature of our collectivity and of what responsibilities we may owe to others. The Oneidas contend that their claims are not only a part of the American past, but of the present, and that present-day citizens have a responsibility to right a historic wrong. New York counties respond that the Oneida claims are more akin to the dusty property records in the basements of

courthouses, referred to by Justice Stevens in his dissenting opinion. The past is buried, and better left to collect dust. Present-day citizens, in this portrayal, innocent of any wrongdoing themselves, bear no responsibility to address ancient crimes. Chapters 3 and 4 more fully examine these competing visions of political identity and political responsibility. Before we move on to these broader issues, we now move on to explore another case history, that of Japanese Americans interned during World War II.