

The (In)Equities of Federal Indian Law

In 2005, the Supreme Court used the equitable defenses of laches, acquiescence, and impossibility to dismiss the Oneida Indian Nation's request to remove its land from city tax roles. Later cases have extended the use of these defenses into other New York land claims. Only with an understanding of the historical origins of equity and these three defenses, will Indian law practitioners be able to counter the potential use of them to destroy all Indian land claims.

By Kathryn Fort

"Every true definition of equity must, therefore, be, to a greater or less extent, a history."

George T. Bispham, *The Principles of Equity*

A recent decision by the Supreme Court has introduced the issue of equitable remedies into the field of Indian land claims. Nevertheless, even though equity often should fall on the side of the tribes, the Court chose to focus on the state's claim of equity rather than the tribe's claim. Because the Court surprised most observers with this foray into equitable defenses, few practitioners have had the time to do historical research and determine a way to use this defense to serve tribal interests. Practitioners need to find a way to demonstrate to the courts that the balance of equity falls on the side of the tribes. Thus far, courts other than the Supreme Court have been unwilling to balance the interests required by equity, rejecting the claims outright instead. Recent cases decided in federal district court in New York and the Second Circuit have taken the Court's use of equitable defenses and expanding them into other Indian land claims cases in New York state.¹

The ancient defenses of laches, acquiescence, and impossibility, which are based in medieval English law, have been a part of American jurisprudence since the Constitutional Convention. In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Supreme Court signaled to lawyers that in equity the state could find relief from Indian land claims. In its ruling, the Court held that the equitable defenses of laches, acquiescence, and impossibility barred the Oneida Nation's claim that land the tribe owned in fee simple within historical reservation boundaries was Indian land and therefore exempt from the city's regulations and taxes. The *City of Sherrill* case has been discussed elsewhere, and its inconsistencies have been examined, but a closer look at the history of equitable jurisprudence and the defenses of laches, acquiescence, and impossibility may help further illustrate the new way the Court is using equity and may provide some needed background research for practitioners. In addition, the Court's citation to ancient cases of its own from 1843, 1849, 1865, and 1892—rather

than more recent decisions—requires a historical understanding of the basis for these cases and their place in early federal jurisprudence.

Equity Follows the Law: A Brief History of Equity Jurisprudence

Equity jurisprudence can be traced back in early English history, to after the Norman Conquest. The king was the source of all justice and, as such, determined all laws and remedies. Prior to the development of the common law courts in England, the king determined the outcome of all disputes, based on his own conscience. These decisions, or writs, later became the common law and provided a pattern for the courts to follow. As the common law courts and Parliament used the writs to determine law in England, the king's equitable jurisprudence narrowed, and the requirements to bring a case in the common law courts became more and more particular. When cases did not fit into specific writs, the common law provided no way for petitioners to seek the king's justice.²

The chancellor, the king's primary adviser, began hearing disputes on behalf of the king during the reign of Richard II (1377–1399) and deciding them based in equity.³ The cases were decided according to the conscience of the chancellor, as a direct representative of the king. There were neither maxims nor precedent, and each case was determined independently. The goal of the chancellor—and later of the Court of Chancery—was to take all the facts into account and determine an outcome based on fairness. The rise of the equitable Courts of the Chancery corresponds directly with a time of violence and unrest, when no fewer than four kings were murdered by their successors between 1400 and 1485. As one commentator noted, "certainly the petitions [in equity] bear witness to the belief among all classes that in the chancellor resided a general power to redress all wrongs if for any reason the person injured could not protect himself through the common law."⁴

Equity jurisprudence, however, as developed during this time, was based entirely on the conscience of one chancellor, and as such, he had absolute power to determine the outcome of the disputes. This was the basis for the oft-quoted line "Equity is a roguish thing. For law we have a measure, ... equity is according to the conscience of him that is [c]hancellor, and as that is larger or narrower, so is equity."⁵ Cardinal Woolsey, a powerful figure under Henry VIII, used his chancery decisions to further the reach of equity jurisprudence, creating four equity courts to hear additional petitions. Interestingly, Parliament used this expansion against him during his removal.⁶ During the reign of James I a great dispute broke out between the proponents of the law and equity. The king, understanding equity to be his power, found for equity, and the courts of both have continued to this day, though they now have merged in both England and the United States.⁷



Canyonlands, Utah. Photo by Lawrence Baca.

English equity jurisprudence was a strong enough institution to survive in the United States after the Revolutionary War. Article III, § 2 of the U.S. Constitution gives the federal courts jurisdiction to hear “all cases in law and equity.” Justice Story, a circuit judge in 1821, held that the equity jurisdiction of the federal courts was based “upon what is proper subject of equitable relief in Courts of Equity in England.” Story’s 13th edition of *Commentaries on Equity Jurisprudence* asserts that according to an 1877 judiciary statute it “would seem ... there could be no doubt that the legislature intended to confer upon the court jurisdiction as developed in equity in England at that time.”⁸ In addition, the Federal Rules of Equity, first adopted by the court in 1822, stated that, whenever existing rules in the United States did not apply to a case in equity, “the practice of the [c]ircuit [c]ourts shall be regulated by the practice of the High Court of Chancery in England.”⁹ This rule was modified 20 years later to state that the practice of the High Court of Chancery in England may be used “not as positive rules, but as furnishing just analogies to regulate the practice.”¹⁰

While the United States did not have a separate court system to hear cases in equity, the Federal Rules of Equity governed all federal equity cases until 1938, when they were merged with the Federal Rules of Civil Procedure. However, in 1893, in *Hedges v. Dixon County*, the Supreme Court stressed equity’s service to the law, holding that “[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction or the contract is declared void because [it is] not in compliance with express statutory or constitutional provision, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof.” 150 U.S. 182, 192 (1893).

Even though this partial history of equity is by no means complete, it should be sufficient to demonstrate that the basis for the U.S. system of equity was wholly based on equity as it was developed by the English courts. And even as late as 1910, federal courts of equity were to look to England for guidance, when no federal rule applied. The basis and development, therefore, of laches, acquiescence, and impossibility are found in ancient English cases, which provide insight into the Supreme Court’s use of them today.

Equity Aids the Vigilant: Laches

The first use of the doctrine of laches by an English court occurred before the rise of the equity courts in the chancery. The doctrine was used in 1311 in a property inheritance dispute.¹¹ The court would have applied the defense if the petitioner had been a man; however, because the petitioner was a woman, laches was not an appropriate remedy. The discussion of the case encapsulates the judges’ understanding of equity. As in modern times, a delay in bringing a claim cuts against a petitioner. Yet, in this case, the fact that the petitioner was a woman would make the application of laches unfair, because she could not bring the case prior to her husband’s death. The court’s use of equity required both a full understanding of the facts and flexibility in applying the doctrine. This flexibility in the doctrine was cited more than 500 years later by another English court: in *Lindsay Petroleum v. Hurd*, Sir Barnes Peacock held that “the doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine.” LR 5 Privy Council 221, 239–240 (1874).

The word “laches,” itself stems from the French word, “la lachesse,” of similar pronunciation, meaning negligence or delay.¹² Even though later courts did not always use the term “laches,” it is clear that a delay in taking action would result in an adverse result for the plaintiff. However, mere delay was not enough to invoke laches; rather, the defen-

dant must have relied on the plaintiff's inaction. Of course, if the plaintiff was unaware of his or her rights or the defendant used fraud to conceal the plaintiff's rights, laches could not apply. For example, in 1857, an English court held that "[m]ere lapse of time does not bar in equity any more than at law: it is an ingredient which, with other circumstances, may lead the [c]ourt to draw inferences unfavourable to the claim of a party who has let twenty or nearly twenty years elapse without asserting his right." *Penny v. Allen*, 7 De G M & M. 409 (1857).

The U.S. Supreme Court adopted this understanding of laches. *Pomeroy's Equity Jurisprudence* cites *Lindsay Petroleum v. Hurd* in the discussion of laches. As early as 1843, the Supreme Court considered the "doctrine of an equitable bar by lapse of time, so distinctly announced by the chancellors of England and Ireland" to be settled law. *Bowman v. Watthen*, 42 U.S.189, 195. From this adoption, the federal courts also grappled with the same issues that faced English cases in equity. For example, when there was an applicable statute of limitations, the courts of equity refused to apply the laches defense, and historically, the defendant was not required to plead laches for it to be considered by the court.¹³ These particular issues are of concern given that the Court disregarded them in *City of Sherrill* and should be pointed out in future cases. Even though a court of equity is not bound by a statute of limitations, one case the Court cited in *City of Sherrill* also holds that "[c]ourts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy." *Badger v. Badger*, 69 U.S. 87, 94 (1864). However, if the court finds that it is not bound by the applicable statute of limitations, the burden is on the defendant if the case is brought before the end of the time period.¹⁴

In the *City of Sherrill* case there was no statute of limitations, because the case was concerned with the recovery of tax immunities. However, other land claims cases do have statutes of limitations, such as those included in 28 U.S.C § 2415(a). In those cases, practitioners should point out this line of argument, because laches should not apply to those cases. Also, recent cases using laches—such as *U.S. v. Costello*, which has been cited by the Court as recently as 2002¹⁵—provide the currently accepted definition of laches, which "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." 365 U.S. 265, 283 (1961). The *Costello* Court's definition seems to require action on the part of the defendant to prove lack of diligence and prejudice—something the Court did not require in *City of Sherrill*.

Two major issues, which especially apply in Indian land claims, include loss of evidence and settled expectations or prejudice. One justification for the use of laches is that, as time passes, evidence is lost and memory passes. In cases when a court is concerned about the status of the evidence, many courts cite *Prevost v. Gratz*, which states that "length of time necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means

to verify the nature of the original transactions, it operates by way of presumption, in favour of innocence, and against imputation of fraud." 19 U.S 481, 498 (1821). Indian law practitioners should counter this argument directly, because evidence of land claims and land takings is rarely lost to history. In fact, historical evidence of the dealings between the federal government and tribes has been painstakingly preserved and is in the possession of federal and state authorities. Treaties remain available and relatively easy to research. Even after Congress ended treaty making, both bilateral and unilateral actions related to Indian lands remain available because they are recorded in acts of Congress and executive proclamations. Additional research is also preserved in court records from the Court of Claims and in the treaty journals prepared by negotiators of federal treaties. Maps of land takings are available to the public online at no cost on the Library of Congress' Web site; the site provides color-coded and meticulously detailed maps of land cessions through 1894.¹⁶

At times, a laches defense has been improperly used to maintain the status quo, regardless of the equity interests. At least one 19th-century commentator mentioned the Court's improper use of laches to preserve settled expectations. Simply because one party had owned land for a number of years generally did not provide a sufficient reason for guaranteeing a laches defense. As stated above, "mere lapse of time" is but one ingredient in laches. However, in the early 1900s, John Pomeroy lamented its use as a tool for the public policy of settled expectations, particularly if the value of the land had increased. This policy of not disturbing land titles, regardless of the source of the claim, led courts to improperly use laches, an equitable defense, without considering the equity of the situation. If the land had been stolen but the title settled, or if the value of the land had increased, the courts at times used laches as a means to preserve the status quo.¹⁷

One case that illustrates this use of laches is *Harkness & Wife v. Underbill*, in which the Court stated that a land transaction made "to defraud the Government; ... was contrary to public policy ... [and] [s]uch an agreement can have no standing in a court of justice." However, the Court found an "equally conclusive" defense in the delay in bringing the claim (18 years), the fact that the land now "laid off into lots, and became city property," and importantly, the "land had greatly increased in value." 66 U.S. 316, 325 (1861). Because of these considerations, the Court upheld the dismissal of the complaint. The Court's ruling never mentions laches but does hold that the facts regarding the status of the land "present a case on which a court of equity cannot decree for the complainant, if there was no other defense"—the defense being, of course, a fraudulent agreement that apparently did in fact have standing in a court of justice. This case is not unlike an early and aberrant Indian land case, *Felix v. Patrick*, 145 U.S. 317 (1892), in which the Court refused to believe that the defendant's fraudulent dealings had been designed to evade federal law and dispossess a tribal citizen of her land and therefore used laches to maintain the status quo. As noted by Pomeroy, when laches was improperly used for this purpose, the Court often focused

on the increased value of the land, which was also the case in *Felix*.

The *Felix* case is aberrant not because the court found against the Indian landholder, but because it used laches to do so. The application of laches to Indian land claims has limited precedence. In many cases, the claims were brought with the United States as a party, and the application of laches does not apply to the sovereign. Based on the fact that the United States has immunity from laches, in 1939, the Court stated that “state notions of laches and state statutes of limitations have no applicability to suits by the [g]overnment, whether on behalf of Indians or otherwise.” *Board of Com’rs of Jackson County v. United States*, 308 U.S. 343, 351 (1939). That same year, the Court held that a lower court had been wrong in applying laches to void the transfer of title to restricted land. The Court ruled that, because the original transfer of title was void, the defendant’s title could not later be made whole by the equitable doctrine of laches, which had been “developed and designed to protect good faith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them.” *Ewart v. Bluejacket*, 259 U.S. 129, 138 (1939). In 1998, the Ninth Circuit held that, even though the tribes that were signatories to the Stevens treaties “waited” 135 years to assert treaty rights, “defenses based on delay in bring claims such as laches and estoppel are inapplicable to claims to enforce Indian rights.” *U.S. v. State of Washington* 157 F.3d 630, 649 (9th Cir. 1998).

The recent Indian land claims cases that have used the defense of laches are reminiscent of the way the Court used laches in the 19th century. This is a difficult area for tribes to counter, especially because, in the *City of Sherrill* case, the Oneida Indian Nation had been attempting only to exercise jurisdiction over land it already owned, and yet the Supreme Court still held that exercising that right would “have disruptive practical consequences.” Requests for ejecting or otherwise dispossessing current so-called innocent landowners could lead to tribal land claims cases to be rejected outright, with little weighing of the actual equities. Courts are not even considering alternative remedies, such as remuneration, when they are brought in tandem or as an alternative, such as in the *Cayuga* or *Shinnecock* cases. Monetary judgments do not disturb settled expectations or land titles, and this point should be made by any practitioner looking to bring a claim for money in an Indian land case.

One reason the courts did not apply laches to tribal land claims is sovereign immunity. Immunity from laches has also been linked to the understanding of sovereign immunity as far back as 1716 and likely before.¹⁸ Because all justice flowed from the king and the king was the source of all law, equitable defenses such as laches and later acquiescence could not be then used against the king. The sovereign was immune from the defense of laches, and this understanding carried over into U.S. Supreme Court decisions, such as its ruling in *United States v. Kirkpatrick*, 22 U.S. 270 (1824). Later cases tied the roots of the government’s immunity from laches to its sovereign authority. In *Guaranty Trust Co. v. New York*, the Court added that this immunity is “equally applicable to

all governments,” including “domestic ‘sovereign’” governments.” 304 U.S. 126, 133 (1938). As late as 1991, the Court stated that “laches is generally inapplicable against a state.” *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991). Any sovereign, therefore, should be immune from the defense of laches. In fact, this understanding of laches is one of the reasons the courts rarely used laches in Indian land claims cases prior to *City of Sherrill*. Because even recent Court decisions continue to recognize tribal sovereign immunity, such as *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751 (1998), invoking sovereignty as a shield against laches may be beneficial to tribes in their land claims.

The Court’s application of laches in the *City of Sherrill* case is unique and contrary to the Court’s own precedent and a huge departure from the rule that laches do not apply to a sovereign. In many Indian land claims cases—and certainly in *City of Sherrill* and *Cayuga*—the United States was a plaintiff. By using laches in these cases against the United States, the courts are implicitly questioning the basis of sovereign immunity. As an equitable defense, laches requires a balancing of equities. The laches doctrine involves more than just the passing of time, its application should be more nuanced and should require an understanding of the history of the claim, not just the fact that the claim is “ancient.”

The Person Who Comes to Equity Must Do Equity: Acquiescence

Acquiescence exists in many legal areas. In its equitable role, it can be traced back to 1578, when the defense was used in a land title case. The term “acquiescence” was not used in the three-line report of the case, but the reporter classified the case under “acquiescence and waiver.”¹⁹ Other early cases focused on monetary debts, merchants’ accounts, and other contractual issues. The famous English case defining acquiescence, *Duke of Amberst v. Earl of Leeds*, in which the judge held that “a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence.” 41 ER 886, 888 (1846). This case was careful to distinguish between laches (delay of time) and acquiescence (lack of action at the time of the wrong). Acquiescence has also been used in cases involving trusts, principals or agents, issues dealing with real property. Acquiescence is sometimes termed “equitable estoppel” when it is used to evaluate prescriptive easements or other land takings that involved trespassing.

Acquiescence is sometimes confused with laches, but there is a distinct difference between the two defenses. Acquiescence requires knowledge by the plaintiff at the time of the wrong and requires the plaintiff to actively assent to the performance. Another English case from 1861 held that “acquiescence imports full knowledge.”²⁰ In addition, the judge in *DeBussche v. Alt* pointed out that acquiescence cannot happen after the injury has occurred because “mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action cannot take

away such right.” All E.R. 1247 (1878).

The Supreme Court adopted England’s application of acquiescence along with other equitable defenses, even though judges demonstrated “hopeless confusion in nomenclature,” often substituting laches for acquiescence or vice versa.²¹ The Supreme Court’s decision in *Pence v. Langdon* adopted the theory that acquiescence requires full knowledge of the transaction on the part of the petitioner, holding that “there can be neither [acquiescence or waiver] without knowledge.” 99 U.S. 578, 581 (1878). Pomeroy also states that, when acquiescence is applied to property rights, the party committing the wrong must be “ignorant of the real condition of the title, and in the supposition that he was rightful in his own dealing.”²²

Acquiescence has been used in other legal settings, but a search of Supreme Court cases reveals that the term “acquiescence” has been used primarily in cases involving state boundary disputes. In most cases, many years elapse with one state exercising sovereignty over a piece of land; eventually, the second state challenges that exercise, and the case goes to the Supreme Court as a dispute between the states. In one of the earliest of these cases, Indiana and Kentucky fought over the ownership of Green River Island. The Court held that for 70 years, Indiana had “never exercised, or attempted to exercise, a single right of sovereignty or ownership over its soil,” and that Indiana’s “acquiescence in the assertion of authority by the state of Kentucky, such omission to take any steps to assert her present claim by the state of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome except by the clearest and most unquestioned proof.” *Indiana v. Kentucky*, 136 U.S. 478, 510 (1890). The Court has quoted this language approvingly in 1926 (in *Michigan v. Wisconsin*, 270 U.S. 295) and in 1973 (in *Ohio v. Kentucky*, 410 U.S. 641).

It is interesting to note, however, even though the Court is willing to apply acquiescence in these cases, it will not apply laches, even when the land claim is old. This is a minor distinction, to be sure; nonetheless, claims between states are not summarily barred based on the length of time since the start of the claim. One illustrative case demonstrates this distinction. In a dispute between Rhode Island and Massachusetts, all that was required for Rhode Island to avoid a summary judgment against it based in laches was to “aver ... she never acquiesced in the boundary claimed by the defendant, but has continually resisted it, since she discovered the mistake; and that she has been prevented from prosecuting her claim, at an earlier day, by the circumstance mentioned.” Massachusetts agreed that Rhode Island “never acquiesced, and has, from time to time, made efforts to regain the territory, by negotiations with Massachusetts, and was prevented ... from appealing to the proper tribunal to grant her redress.” This boundary claim dispute—which one lawyer claimed was about “territory [that] is densely inhabited, and under a high state of improvement ... occupied by seven thousand people, all of whom, as did their ancestors to remotest time, deem themselves to be citizens, and most of the native citizens of Massachusetts; and that there is upon it not less than a million dollars of taxable property”—was more

than 100 years old. Laches did not bar the claim because “here two political communities are concerned, who cannot act with the same promptness as individuals.” *Rhode Island v. Massachusetts*, 40 U.S. 233, 238, 272 (1841).

Even though acquiescence can apply to disputes between states, the Supreme Court has held that acquiescence cannot be applied in cases against the federal government. In a dispute with the state of California over a three-mile belt of ocean off the coast of the state, the Court held that “officers who have no authority at all to dispose of government property cannot by their conduct cause the government to lose its valuable rights by their acquiescence, laches or failure to act.”²³ What is more important is that the officers “who have no authority” worked at the Department of the Interior, and they denied oil and gas permits, because they believed the land was owned by California. The Court held otherwise, and the officials’ actions were not enough to overcome the federal government’s ownership. Seven years earlier, in a dispute with the city of San Francisco, the Court found that the “U.S. is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.” Again, these actions and agreements were undertaken by the Department of the Interior. *United States v. City and County of San Francisco*, 310 U.S. 16, 32 (1940).

Given this history of acquiescence in the United States, the use of the defense in *Sherrill* is difficult to understand. If the Court is arguing the United States acquiesced in the illegal transfer of the land under the Non-Intercourse Act, the justices’ reasoning is not upheld by the Court’s own precedent. The government cannot acquiesce in an illegal taking of government property or a taking of land contrary to federal law and policy, regardless of whether the action occurred 30 years earlier or 100 years earlier.

Acquiescence has been used rarely in Indian land claims prior to the *Sherrill* case. The earliest case, *Kinney v. Clark*, 43 U.S. 76 (1844), was a land claim dispute between two private individuals. If Clark’s claim was made while the land was still considered Cherokee land, then it was invalid. The Court found that the land was considered Chickasaw land by treaty boundaries and the acquiescence of the Cherokee Tribe to the boundary that had been established. Even though this case did not involve a boundary dispute between the Cherokees and Chickasaws, the Cherokee Tribe is treated much the same way as the Court treated the states in later boundary disputes described above.

The Court also used acquiescence in *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941). The Court determined that an 1881 request by the Walapai Tribe for a reservation and the granting of one by executive order in 1883 was an acquiescence that allowed for settlement of all lands not reserved to the tribe. The language on acquiescence was primarily dicta, because the claim was for the Santa Fe Pacific Railroad to have the right to use land that was Walapai land in 1872. The Court ordered a survey of the reservation’s land to determine if it was encumbered by “Indian title” and found that the railroad did not have proper title if the land was Walapai tribal land. The tribe’s

“acquiescence” would not be enough to overcome the federal determination of Indian land.

In 1976, the Ninth Circuit Court of Appeals held that the defense of acquiescence would not overcome the lack of a valid right of way by a railroad company over the Walker River Paiute Tribe’s reservation. *United States v. Southern Pac. Transportation Co.*, 543 F.2d 676, 699 (1976). Even though the railroad had been operating on the reservation for more than 90 years, the court stated that “it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owner, we conclude that an even older policy of Indian law compels this result. Southern Pacific does not have and has never had a valid right-of-way across lands within the original 1874 executive order boundaries of the Walker River Reservation.”

The Court did not consider these cases in its *City of Sherrill* decision. Together with further arguments that state boundary cases the Court did use do not merely involve settled expectations but also invoke sovereignty concerns, these cases may provide a tribe with another line of argument. In addition, Indian land claims are far more than simple boundary disputes; they strike at the very heart of tribal sovereignty and sovereign territory. In some cases, a land claim case can represent the tribe’s entire land base. Because laches cannot apply in a state boundary case and acquiescence requires a very specific action on the part of the state in boundary cases, and in light of the far greater importance of Indian land claims, these defenses should not apply in these cases as well.

Equity Involves Substance Rather than Form: Impossibility

While equity, acquiescence, and impossibility are historical defenses, the Supreme Court’s use of impossibility in the *City of Sherrill* case is not based on the historical contract defense. Rather, the Court’s recent use of impossibility as an equitable defense in property cases was first done by the Court in the *City of Sherrill* case. Its development is based on the type of remedy involved. Even though the Court used this defense in the *City of Sherrill* case, it should only be applied when a tribe is asking for the return of land or ejection of current landowners. *City of Sherrill* broadened the impossibility defense to include removing land from city tax roles, because the land has been settled by non-Indians and because the town has come to rely on the tax income. This doctrine is based on a court’s ability to envision a possible remedy that it feels is not too disruptive.

Both laches and acquiescence as used in *City of Sherrill* have historical underpinnings, though whether the Supreme Court followed its own precedents is questionable. The Court’s use of impossibility however, does not comport with any historical understanding of that remedy. Impossibility, as an equitable doctrine, was only used in contract cases in which it would be “impossible” for one party to fulfill terms of the contract. The famous case that illustrates this concept—*Taylor v. Caldwell*—involved the destruction of a music hall before the contracted performances could be held. The existence of the music hall was “essential to

[the owner’s] performance” and its destruction excused the owner because it was “impossible” for him to perform. 122 Eng. Rep. 309 (K.B. 1863). Even though *Taylor v. Caldwell* is the most famous case to use the impossibility defense, one commentator has found cases that date back to as early as 1536 that allow impossibility as an excuse for nonperformance.²⁴ However, impossibility as a remedy does not exist outside of cases involving contracts (and a narrow area of criminal law) except as the Supreme Court used this defense in *City of Sherrill*.

Impossibility was also a common law contracts claims defense until the advent of the Uniform Commercial Code. Although the Court also mentions impracticability in *City of Sherrill*, there is no common law defense of impracticability separate from the contracts defense of impossibility. The doctrine of impracticability stems from § 2-615 of the Uniform Commercial Code, which states that a seller is not in breach of a contract if “performance as agreed has been made impracticable by the occurrence of a contingency a non-occurrence of which was a basic assumption on which the contract was made.” The “basic assumption” clause is included in order to demonstrate that the focus of impracticability is on commercial contracts, in contrast to impossibility or frustration, which can occur in any context. *Id.* Comment 3.

To support its conclusion that there is an “impossibility doctrine” as it applies to Indian land claims, the Court cited *Yankton Sioux v. United States* 272 U.S. 351 (1926). However, the Court’s use of impossibility in *Yankton Sioux* is based in contract law. In *Yankton Sioux*, the Court analyzed an 1891 agreement that the federal government claimed was void because of the doctrine of impossibility. The agreement included a provision that, if Congress questioned ownership of the Pipestone reservation, the secretary of the interior was to refer the question to the Supreme Court within one year. If the matter was not referred within the year, the land would automatically become the tribe’s “in fee.” Because referring the matter to the Supreme Court would be an illegal expansion of the Court’s original jurisprudence, the federal government claimed that it was impossible to fulfill the terms of the clause and therefore the agreement was void.

Congress eventually authorized the Court of Claims to hear the case, because, even though the land had been reserved to the tribe in an 1858 treaty, Congress had opened up the land for settlement through a series of unilateral congressional acts. The federal government argued that the tribe did not own the land in fee because the 1891 agreement was void. The Court found, however, that the second portion of the clause, which passed fee title to the tribe if the government did not act, was an alternative option that was not impossible to fulfill. Therefore, finding the agreement void because of the impossible term of the agreement would be “most inequitable and utterly indefensible on any moral ground.” The tribe held the land in fee, but it was agreed that the federal government was in possession of the land. The Court awarded “just compensation” to the tribe for the taking of the land by the government. 272 U.S. 351, 57, 59.

This case is now cited to support the proposition that, if there are two alternative manners of fulfilling terms of a contract and one is impossible, the contract is not rendered void if the alternative manner is available. Various federal courts have cited this case and go so far as to state that the case “is one of the best examples of the application of this doctrine.” *Ashland Oil & Refining Co. v. Cities Service Gas Co.*, 462 F.2d 204, 212 n.5 (10th Cir. 1972). The only time the Supreme Court specifically mentions equity in its *Yankton Sioux* decision is in the discussion of the federal government’s attempt to claim that the entire treaty is void because of the impossibility of performance. The Supreme Court did state that returning land to the Indians that has already been sold to “innocent” purchasers would be “impossible.” The ultimate holding of the case, however, is that the United States took the land, and the tribe is due just compensation for the taking.

It is important to understand that the Supreme Court’s application of the impossibility defense is not the same as the contracts doctrine of impossibility in order to argue Indian land claims. Practitioners will need to argue how a remedy is possible, and—as in the discussion of laches—a remedy requesting the return of land is likely to be dismissed before the claim is even considered. This will not be an easy task, given that the remedy requested in the *City of Sherrill* case, in which the Court used this doctrine, was not to eject the current landowners. The practical ramifications of the remedy, such as remuneration for the land, should be explicitly spelled out for the court. The impossibility doctrine should not foreclose all land claims, particularly when the remedy sought is a monetary award.

Conclusion

Even though the Supreme Court has already set a precedent on this issue with its *City of Sherrill* decision, lower courts can still limit or narrow the Court’s ruling. Unfortunately, thus far the two decisions in New York have done the opposite: they have broadened the holding in a way that could include virtually any Indian land claim. Appellate briefs on behalf of Indian tribes cannot ignore these defenses, which will be used by every state and local attorney to block any type of land claim, whether the claim be in law or in equity. Tribal attorneys will have to find a way to deal with inequitable application of ancient Western law to their tribe’s claims. Understanding the history of these defenses may provide one way to argue against them. In the *Shinnecock* decision, the judge claimed that any consideration of how the state of New York obtained title was barred by “equitable considerations.” Unfortunately, the court considered only the equity of the state, not the equity of the tribe. Given that equity is based on an understanding of fairness and a balancing of interests, equity of the tribal claim will always be high. The challenge will be to convince the court of this and not to allow the defenses argued in *City of Sherrill* to be used as a shorthand to dismiss all Indian land claims. The understanding of such facts by the court is exactly why equity was created in the first place. **TFL**

Kathryn Fort is a staff attorney and adjunct instructor at the Indigenous Law and Policy Center at Michigan State University College of Law. © 2007 Kathryn Fort. All rights reserved.

Endnotes

¹*Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2005); *Shinnecock Indian Nation v. New York*, 2006 WL 3501099 (E.D.N.Y.) (Nov. 28, 2006).

²Frederick Pollack and Frederic William Maitland, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, vol. 1, 196 (2d ed. 1898).

³Willard Barbour, *Some Aspects of Fifteen-Century Chancery*, 31 HARV. L. REV. 834, 840 (1917–1918).

⁴*Id.*, 857.

⁵Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 445 (2003) (citing John Selden, *THE TABLE-TALK* 64 (The Legal Classics Library 1989)).

⁶4 John Reeves, *HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE SAXONS TO THE END OF THE REIGN OF PHILIP AND MARY* 368–370 (2d ed. 1787).

⁷Main, *supra*, note 5 at 446.

⁸Joseph Story, *COMMENTARIES ON EQUITY JURISPRUDENCE*, 27, n.b. (13th ed. 1886) (citing Pub. Stats. ch. 151 § 4).

⁹Federal Rules of Equity, 1822, Rule 33, in *THE NEW FEDERAL EQUITY RULES* (8th ed. 1933).

¹⁰Federal Rules of Equity, 1842, Rule 90, in *THE NEW FEDERAL EQUITY RULES* (8th ed. 1933).

¹¹*Gascelyn v. Rivere*, 4 Edward II (1311), YEAR BOOKS SERIES, vol. 9, 50, 52 (1925) (cited in Antoni Vaquer, *Verwirkung Versus Laches: A Tale of Two Legal Transplants*, 21 TUL. EURO. CIV. LF 53, 55 (2006)).

¹²Vaquer, *supra*, note 11.

¹³*Badger v. Badger*, 69 U.S. 87, 95 (1864).

¹⁴4 John Norton Pomeroy, *POMEROY’S EQUITY JURISPRUDENCE* §1441 at 3415 (4th ed. 1919).

¹⁵*National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121–122 (2002).

¹⁶Indian Land Cessions in the United States, 1784–1894, memory.loc.gov/ammem/amlaw/lwss-ilc.html, accessed Jan. 17, 2007.

¹⁷Pomeroy, *supra*, note 14, §1444 at 3428.

¹⁸*The Attorney General v. Norstedt*, 146 E.R. 203 (1716).

¹⁹*Kinston v. Pigot*, Cary 110 (1578).

²⁰*Life of Scotland v. Siddal*, 3 De G.F. & J. 73, 74 (1861).

²¹Pomeroy, *supra*, note 14, § 1440 at 3410.

²²2 John Norton Pomeroy, *POMEROY’S EQUITY JURISPRUDENCE* § 818 (4th ed. 1919).

²³*United States v. State of California*, 332 U.S. 19, 40 (1947).

²⁴James Gordley, *Impossibility and Changed and Unforeseen Circumstances*, 53 AM. J. COMP. L. 513, 521 (Summer 2004).