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NEWS & ANALYSIS

Gayanashogowa and Guardianship: Expanding and Clarifying the Federal-Tribal Trust Relationship

by Kavitha Janardhan

Editors' Summary: The Onondaga Nation of New York is currently involved in a lawsuit seeking to nullify a series of treaties executed by the state of New York and thereby assert title to over 3,100 square miles of land in Central New York State. The goal of the suit is to enforce an environmental restoration of culturally and historically significant aboriginal lands. In order to bring a claim against the state, the Nation must first compel the federal government to act on its behalf. By emphasizing distinctive features of Iroquois self-government, Kavitha Janardhan suggests ways to expand the federal government's trust responsibility to protect cultural interests in land against state intrusion. To do so, she explores the complex tension between Euro-American conceptions of governance and the Native American, particularly Iroquois, law of Gayanashogowa*, or the Great Law of Peace.*

I. Introduction

In March of 2005, the Onondaga Nation, a member of the Six Nations Iroquois or *Haudenosaunee* Confederacy, filed a complaint in a federal district court seeking legal recognition of its title to 3,100 square miles of land in the state of New York.[1] Like other Native American land claims before it, the Onondaga suit asserts that a series of treaties conveying land to the state of New York were unlawfully executed and are therefore void.[2] In order to redress over 200 years of spiritual, cultural, and emotional harm, the Onondaga request a declaratory judgment stating that its members are the rightful owners of the lands at issue, which roughly center on the city of Syracuse.[3] The Nation alleges that all treaties held by the state are in violation of the federal Indian Trade and Intercourse Act,[4] the U.S. Constitution,[5] the Treaty of Fort Stanwix,[6] and the Treaty of Canandaigua.[7] Additionally, the Onondaga call for the federal government to file an identical suit against the state of New York, a duty that comports with the government's trust obligation.[8]

Though the lawsuit is, in many respects, similar to other Native American land claims,[9] the Onondaga's pursuit of justice does not seek immediate monetary relief or gaming rights.[10] Instead, the Nation raises concerns about environmental damage imposed on its ancestral land by current occupants.[11] In doing so, the Onondaga contest the use of Western norms in evaluating the extent of harm it seeks to

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1. Plaintiff's Complaint at 1-2, 14, *Onondaga Nation v. New York* (No. 05-CV-314) (N.D.N.Y., filed Mar. 11, 2005) [hereinafter Complaint]; Indian Law Resource Center, *Onondaga Nation Land Claim 2005*, http://www.indianlaw.org/onondaga.html (last visited July 10, 2006).
2. Indian Law Resource Center, *supra* note 1.
3. *Id.*
4. 25 U.S.C. §177.
5. U.S. Const. art. I, §8, cl. 3.
6. The Treaty of Fort Stanwix was signed in October of 1784. Characterized as an inauspicious beginning to federal/tribal relations, the Treaty granted land cessions and six prisoners to the U.S. government following the Revolutionary War, in return for promises of peace and protection. Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly 45-48 (Univ. of Cal. Press 1994).
7. Complaint, *supra* note 1, at 13; Prucha, *supra* note 6, at 94-96. This Article will not discuss the Treaty of Canandaigua nor the Treaty of Fort Stanwix (above). Under *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), the U.S. Supreme Court held that: (1) both treaties only applied to reservation lands; and (2) the Treaty of Canandaigua only applied to federal relations with the Seneca Indians, the tribe who signed the treaty. Similarly, the Supreme Court in *Oneida Indian Nation v. County of Oneida, New York*, 414 U.S. 661 (1974), found that the case did not rest on treaty rights but rather the validity of land transfers to the state of New York. Prucha, *supra* note 6, at 392-95.
8. Complaint, *supra* note 1, at 4 (the United States has previously intervened or filed suits against the state of New York on behalf of the Cayuga, Mohawk, Oneida, and Seneca Nations).
9. The legal arguments made by the Onondaga mirror those made by the Oneida Nation in *County of Oneida v. Oneida Nation*, 470 U.S. 226 (1985). *See infra* notes 186-95 and accompanying text.
10. Kirk Semple, *Tribe Lays Claim to 3,100 Square Miles of New York State*, N.Y. Times, Mar. 12, 2005, *available at* http://www.indianlaw.org/Onondaga_NYTimes_20050312.pdf.
11. *See* Complaint, *supra* note 1, at 1-3.

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redress.[12] Members of the Onondaga Nation claim that the environmental degradation caused by private parties has disrupted their cultural and spiritual connection to their native land, thereby interfering with their system of government.[13] As such, this lawsuit calls for a recognition of and respect for Native American conceptions of property and governance—traditions that have been disregarded in favor of Western theoretical and common-law constructions.[14]

The Onondaga brings its claim as a plea for justice, seeking a declaration that its relationship with its native land "goes far beyond federal and state legal conceptions of ownership, possession, or other legal rights."[15] On one hand, this assertion suggests a necessary shift in our inquiry into Native American land claims: it asks us to examine, from an indigenous perspective, the true intentions of tribes regarding early federal land transactions.[16] More importantly, the Onondaga suit serves as an opportunity to rethink what constitutes "justice" for Native American tribes seeking retribution for environmental harm to culturally significant lands.[17]

This Article contends that, after over 200 years of dispossession, "justice" may be achieved by first recognizing Native American conceptions of property and then incorporating indigenous beliefs into the existing trust relationship between the federal government and Native American tribes. As a historical/legal study, this Article explores the complex tension between two systems of property in North America—the Native American, namely Iroquois, conception of *Gayanashogowa* and the American legal framework for property ownership—and the effect of this tension on federal-tribal relations. In doing so, this Article will highlight the role of the federal government in promoting a cross-cultural approach to Native American relations—a trust relationship that protects the realities and needs of its beneficiaries.

In order to provide context for examining these issues, Part II of this Article discusses elements of the Onondaga claim in detail: the significant parties involved; the cultural significance of the land at issue; and the legal arguments set forth by the Onondaga regarding each individual treaty executed by the state of New York. Part III compares the Western "labor" justification for settlement—a background principle of property law set forth by John Locke—with the Iroquois conception of sovereignty and land use, codified in *Gayanashogowa* or the Great Law of Peace. Part IV examines the existing trust relationship between the federal government and Native American tribes, developed through both statutes and common law. Part V underscores the position the Onondaga Nation must take to expose the injustice caused by the treaties and to enforce the federal government's duty to act on the Nation's behalf.

12. *See id.* at 1-2.

13. *See id.* at 1-6.

14. *See id.* at 1-2.

15. *Id.*

16. *See id.*

17. *See id.* ("[T]he Onondaga people wish to bring about healing between themselves and all others who live in this region that has been the homeland of the Onondaga Nation since the dawn of time.").

II. The Onondaga Land Claim

A. The Parties

1. The Onondaga Nation

The Onondaga Nation is an officially recognized Native American tribe residing within a 7,300-acre reservation south of Nedrow, New York.[18] The Nation brings its land claim under the authority of the Onondaga Council of Chiefs, discussed below as the Nation's governing body.[19]

The Nation is a member of the *Haudenosaunee* (People of the Longhouse) Confederacy, known in English as the "Six Nations Iroquois Confederacy."[20] The Confederacy is an alliance of six individual nations—the Cayuga, Mohawk, Oneida, Onondaga, Seneca, and Tuscarora—who are unified under a common traditional law called *Gayanashogowa* or the Great Law of Peace.[21] Within this indigenous system of government, the Onondaga have maintained a status as the fire keeper, the spiritual center for the *Haudenosaunee*, for several centuries.[22] Therefore, the Onondaga brings suit on its own behalf and on behalf of the *Haudenosaunee* Confederacy.[23]

2. Corporate Defendants

 Honeywell International, Inc. Honeywell International, Inc. (Honeywell), a New Jersey corporation, owned industrial property along the southwest shore of Onondaga Lake from the 1880s until the 1980s.[24] According to the Onondaga complaint, Honeywell and its predecessor companies contributed to the environmental degradation of the area by dumping mercury and other chemical contaminants into the lake.[25] Sources indicate that most of the lake's pollution can be specifically attributed to the actions of Allied Chemical Corporation, which closed in 1986 and merged with Honeywell in 1999.[26] As such, Honeywell has been held legally responsible for almost all cleanup costs in the area and is the main corporate defendant in this action.[27]

 Clark Concrete Company, Inc. and Valley Realty Development Company. Clark Concrete Company (Clark) and its affiliate, Valley Realty Development Company, are Syracuse-based corporations occupying large portions of the land at issue.[28] Clark operates the Tully gravel mine, which the Onondaga allege has both degraded the headwaters of the Onondaga Creek and disrupted "areas of extreme arche-

18. *Id.*

19. *Id.*

20. *Id.*

21. Haudenosaunee Confederacy, *Great Law of Peace*, *available at* http://sixnations.buffnet.net/Great_Law_of_Peace/.

22. Complaint, *supra* note 1, at 3.

23. *Id.*

24. *Id.* at 5; William Kates, *State Presents Final Lake Cleanup Plan, Tribe Calls It Inadequate*, Associated Press, July 1, 2005, http://www.onondaganation.org/news.july05.html.

25. Complaint, *supra* note 1, at 5; Kates, *supra* note 24.

26. Kates, *supra* note 24.

27. *See id.* Honeywell is legally responsible for the cleanup of Onondaga Lake under the Resource Conservation and Recovery Act (RCRA).

28. Complaint, *supra* note 1, at 5.

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ological and cultural sensitivity."[29] The area where Clark began mining operations in 1997 is the site where wampum, discussed below as part of the Iroquois method of recording history, was first found.[30]

 Trigen Syracuse Energy Corporation. Trigen Syracuse Energy Corporation (Trigen) operates an energy "cogeneration" plant near Syracuse.[31] The plant emits significant amounts of hydrochloric acids and dioxins while burning coal and plastic waste.[32] The Onondaga include Trigen in its suit because of its role in the degradation of air quality throughout the region.[33]

3. Government Defendants

Although the Onondaga Nation names both Onondaga County and the city of Syracuse as parties in their complaint, the principal government defendant in this case is the state of New York.[34] The state is the professed original "purchaser" of the subject land, having conducted numerous treaties with the Onondaga from the late 18th through early 19th centuries.[35] The state has since conveyed the land to private parties, including the corporate defendants listed above.[36]

The state has the right to claim sovereign immunity against this action under the Eleventh Amendment of the Constitution.[37] Accordingly, the Onondaga request the state to waive its immunity "in the interest of fairness toward the other defendants and in the interest of justice."[38] In the event that the state does not waive its immunity, the Onondaga also brought suit against Gov. George E. Pataki (R-N.Y.), in his official capacity as the governor of New York and in his individual capacity, alleging that he is acting beyond the scope of his authority by claiming an interest in the land.[39] Most importantly, the Onondaga request the U.S. government to file an identical suit against the state as a trustee/fiduciary to the Nation.[40] If the United States acts on behalf of the Onondaga, its suit will bypass any sovereign immunity asserted by the state.[41]

B. The Land and the Lake

Until 1788, the Onondaga held a 40-mile wide slice of New York State.[42] According to its claim, the Onondaga's aboriginal land extends south from Canada to the Pennsylvania border, and east from the St. Lawrence River to Lake Ontario—situated between the native land of the Cayuga to the west and the Oneida to the east.[43] This area includes most of present day Cortland, Jefferson, Onondaga, and Oswego counties, encompassing approximately 3,100 square miles.[44] Today, the Nation resides on only 11-square miles of land, with nearly 875,000 non-Indian residents occupying former Onondaga territory.[45]

Though all of the land at issue is of vital importance to the Onondaga, its claim focuses on the environmental degradation of Onondaga Lake.[46] Accordingly, this section focuses on the Onondaga's deep cultural connection to the lake and the lake's current condition.

1. The History of Onondaga Lake

Historians trace human settlement of Onondaga Lake as far back as 8000 BC, when the retreat of glaciers opened up large areas of inhabitable land around present day Central New York.[47] Until its acquisition by the state of New York in 1795, the lake and the hills surrounding it served as the cultural and economic center of the Onondaga Nation.[48] As an essential transportation and communication route, the lake and its tributaries connected the Onondaga to other native communities.[49] These interactions compelled five separate nations from the area to unite on the Lake's shores several hundred years ago to form the *Haudenosaunee* Confederacy.[50] As Chief Sid Hill of the Onondaga Nation stated in 2004:

> The Onondaga Nation . . . is connected to this body of water by ties that transcend time and space. Our ancestors walked the paths around Onondaga Lake. They hunted, fished and paddled across its once-blue waters. Most certainly, they stopped on the shores to give thanks for all that the Creator had given them.[51]

In addition to its strong historical significance, the lake is often characterized as the lifeblood of Iroquois, particularly Onondaga, civilization.[52] Prior to European settlement, the lake had an unusually vast growth of algae and was thus capable of supporting a cold water fishery habitat.[53] An extensive supply of fresh fish sustained the Onondaga for several centuries.[54]

29. *Id.*
30. Mike McAndrew, *Onondagas File Huge Land Claim*, POST-STANDARD, Mar. 11, 2005, *available at* http://www.indianlaw.org/Onondaga_PostStandard_20050311.pdf.
31. Complaint, *supra* note 1, at 6.
32. *Id.*
33. *Id.*
34. *See id.* at 3-5.
35. *See id.* at 7-10.
36. *Id.* at 3-6.
37. *See* U.S. CONST. amend. XI. Seminole Nation v. United States, 316 U.S. 286 (1942).
38. Complaint, *supra* note 1, at 4.
39. *Id.*
40. Indian Law Resource Center, *supra* note 1.
41. Complaint, *supra* note 1, at 4.
42. *How the Onondaga Territory Shrank*, POST-STANDARD, Mar. 11, 2005, http://www.syracuse.com/printer/printer.ssf?/news/indianlandclaims/story5.html.
43. *Id.*; Complaint, *supra* note 1, at 6-7.
44. Complaint, *supra* note 1, app. at 15; Semple, *supra* note 10.
45. McAndrew, *supra* note 30.
46. *See* Indian Law Resource Center, *supra* note 1.
47. Onondaga Lake Partnership, *Lake Area Settlement & Development*, http://www.onlakepartners.org/p1102.html (last visited July 10, 2006).
48. *See id.*
49. *Id.*
50. *See* McAndrew, *supra* note 30. In an interview, Chief Sid Hill, referring to the Lake, stated: "That's our cathedral, right there." *Id.*
51. Sid Hill, *Letter to the Editor*, POST-STANDARD, Dec. 4, 2004, http://www.onondaganation.org/news.sid12504.html (last visited Aug. 21, 2006).
52. *See id.*
53. *See id.*
54. Upstate Freshwater Institute (UFI), *Onondaga Lake*, http://www.upstatefreshwater.org/html/onondaga_lake.html (last visited July 10, 2006).

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2. The Settlement and Environmental Degradation of Onondaga Lake

In 1654, the Onondaga Nation revealed the existence of salt springs within the lake to French settlers.[55] Settlement increased in the 18th century, as Jesuit missionaries, trappers, and traders began following French explorers into the area.[56] The completion of the Erie Canal in the early 1800s fully opened Central New York State to new settlement, and a booming salt industry.[57]

The industrial revolution brought various chemical operations to the Onondaga Lake area, including Allied Chemical, now known as Allied Signal, Inc.[58] The state first interfered with the lake's natural ecosystem in 1822 when it dredged the outlet of the lake to lower the water level and drain wetlands.[59] The dredged area has since become lower downtown Syracuse.[60]

As a result of over 100 years of chemical dumping by industries such as Allied, Onondaga Lake is now considered to be the most polluted lake in the United States.[61] With its ecosystem completely disrupted, the lake has an excessive growth of algae, making the water unviable as an economic resource.[62] Swimming in the lake was banned in 1940 and fishing in 1970.[63] A combination of industrial and municipal waste, mainly from sewage and mercury, has caused a significant decrease to the lake's value as a recreational area.[64] Under state regulations, New York filed a national resources damages claim in 1989 against Honeywell.[65] Five years later, the Lake was listed as a Superfund site under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.[66]

C. The Treaties

The Onondaga allege that five treaties conveying aboriginal land to the state of New York were illegally executed and are therefore void.[67] Each treaty is briefly discussed below and identified by date.

1. 1788

In 1788 the Onondaga Nation conveyed two million acres of aboriginal territory to the state of New York.[68] In addition, the treaty established that Onondaga Lake and its surrounding areas would be held for the shared benefit of the state and the Onondaga for the exclusive purpose of making salt.[69] The state, in return for the agreement, paid the Nation $1,000 French crowns and 200 pounds of clothing, with an additional promise to make payments of $500 per year.[70]

Through this treaty, the Onondaga lost all but 108 square miles of its aboriginal land.[71] The treaty came about when New York's then governor, George Clinton, told the Onondaga that white settlers would steal its land without granting compensation.[72] In response to the apparent threat, two members of the Nation, Kahikton and Tehonwaghsloweaghte, negotiated with the state.[73] The Onondaga claim that these two individuals were not chiefs and therefore did not have the authority to settle treaties on behalf of the Nation.[74]

Following protests made by the Onondaga Council of Chiefs, the state met with the Onondaga in the spring of 1790 to ratify and confirm the 1788 treaty.[75] The treaty was ratified on June 16, 1790, only one month prior to the passing of the federal Indian Trade and Intercourse Act—discussed below as the legislation that prohibited states from conducting land dealings with Native American tribes without congressional approval.[76]

Though the treaty was signed *prior* to the passing of the Trade and Intercourse Act, the Onondaga argue that under a New York State real property law the treaty was legally ineffective until its date of *recording*—November 25, 1791.[77] Therefore, the Onondaga's claim to over one-half of the disputed land rests on a contingency that the court will apply the New York State recording statute.[78]

2. 1793

In a 1793 treaty the state purchased about 79 square miles of territory—which is now comprised of Syracuse and its surrounding suburbs—for a total payment of $410.[79] In order to circumvent the Trade and Intercourse Act of 1790, the State Surveyor General Simeon DeWitt and state land agent John Cantine assured the Onondaga that the state intended to lease, rather than buy, its land.[80] The treaty itself states that New York is the new owner of the land, though the U.S. Congress never approved of the sale as required by the Act.[81] Accordingly, the court will determine the legitimacy of this treaty under the factors used to determine a Trade and Intercourse Act violation.[82]

3. 1795

The Onondaga lost all rights to Onondaga Lake in a 1795 treaty with the state.[83] In direct violation of the Trade and In-

55. Onondaga Lake Partnership, *supra* note 47.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. UFI, *supra* note 54.
62. *Id.*
63. *Id.*
64. Onondaga Lake Partnership, *supra* note 47.
65. *Id.*
66. *Id.*; 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.
67. POST-STANDARD, *supra* note 42.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. Complaint, *supra* note 1, at 8-9.
76. *Id.* 25 U.S.C. §177 was passed on July 22, 1790. Complaint, *supra* note 1, at 8.
77. *See* Complaint, *supra* note 1, at 9.
78. *See id.* The elements needed for establishing a Trade and Intercourse Act violation are listed *infra* Part III.
79. POST STANDARD, *supra* note 42.
80. *Id.*
81. *Id.*
82. *See id.*
83. *Id.*

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tercourse Act, the state purportedly bought the rights to Onondaga Lake and the one-mile area around for $500 and 100 bushels of salt per year.[84] Although U.S. Attorney General William Bradford notified Governor Clinton that the state could not buy land unless the treaty was approved by Congress, Clinton followed through with the sale.[85] He later gifted the three Onondagas who signed the treaty one square mile each.[86]

4. 1817 and 1822

The formation of these two treaties involved the participation of Ephraim Webster, an interpreter secured by the state and the first white settler of Syracuse.[87] Although the Onondaga accused Webster of betraying their trust through intentional misinterpretation, they nonetheless lost a total of 4,893 acres of reservation territory through these two treaties.[88] Both treaties were never approved by Congress and will therefore be scrutinized by the court as potential violations of the Trade and Intercourse Act.[89]

D. The Remedy

If this suit prevails, the Onondaga Nation does not intend to evict business and homeowners from the land.[90] Nor do they plan to collect rents or operate gaming facilities.[91] Rather, the Nation's members hope to use a declaratory judgment in their favor to force the state to restore their indigenous territory to its original condition.[92] In recent years, the Onondaga has shown its sensitivity toward non-Indian neighbors residing in its aboriginal territory by collaborating with both rural and urban community organizations engaged in environmental cleanup.[93] As Sid Hill stated in a 2005 interview, "We're trying to do a different land-rights action here. Our concern is the environment and how we as two peoples can live in the area that was our ancestors [sic]."[94] As such, this claim arises solely out of the Onondaga's desire to have some control over the well-being of its aboriginal land.[95]

The restoration of Onondaga Lake is the central focus of this lawsuit.[96] Under New York State's current cleanup plan, Honeywell will spend $451 million over the course of seven years to dredge 2.65 million yards of contaminated sediment from the bottom of the lake.[97] In addition, the plan calls for a cap made of sand, gravel, and other material to be placed over the remaining 579 acres.[98] Honeywell has proposed a less expensive and extensive cleanup plan: a $237 million dollar, three-year plan to dredge 508,000 cubic yards and cap the remaining 350 acres.[99] The Onondaga, on the other hand, call for an extremely thorough cleanup.[100] For their plan, they demand nearly 22 million cubic yards of sediment dredged with a cap over the entire lake bottom of 2,329 acres.[101] The Onondaga plan will cost $2.3 billion and will take 17 years to complete.[102]

By making environmental cleanup the cornerstone of this lawsuit, the Onondaga emphasizes its strong historic connection to the land at issue—a relationship that it believes trumps any concern over money.[103] Therefore, this suit is, above all, an effort to hold the state of the New York and private corporations fully accountable for disrupting and disrespecting the Onondaga's centuries old existence.[104] The theory used to justify this (mis)treatment is discussed in the following section.

III. Conflicting Conceptions of Property

In *Two Treatises of Government*, John Locke constructed the formative assumptions used by European settlers to justify the acquisition of property rights over Native American land.[105] As James Tully, the author of *Aboriginal Property and Western Theory*, states, it is Locke's principle assumptions that "conjoin to misrecognize two conditions of [Native American] peoples at the time of European arrival and settlement: their systems of property and their political organizations."[106] Despite Locke's fundamental misrecognition, his assumptions regarding Native American political and economic "underdevelopment" formed the basis for Western constructions of control and ownership.[107] This section first examines Locke's prevailing theory of private property rights and Western attitudes toward Native American societies, and then distinguishes key European assumptions from existing Native American conceptions of property.

A. The Western Notion of Property: Locke's Labor Justification

Locke's theory, as articulated in the *Second Treatise*, rests on the belief that Native Americans were in a pre-political "state of nature" phase of historical and political development, a phase that European societies had long surpassed.[108] As Locke stated, "in the beginning, all the World was America"[109]—with no system of government or property—and, since then, Europeans developed complex legal systems governing land ownership and commercial agriculture.[110]

84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *See id.*
90. McAndrew, *supra* note 30, at 1-2.
91. *Id.*
92. Complaint, *supra* note 1, at 1-2; McAndrew, *supra* note 30, at 1-2.
93. Onondaga Nation, *The Onondaga Nation and Environmental Stewardship*, http://www.onondaganation.org/media.environment.html (last visited July 10, 2006).
94. McAndrew, *supra* note 30.
95. *See id.*
96. *See* Kates, *supra* note 24.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. James Tully, *Aboriginal Property and Western Theory: Recovering a Middle Ground*, Social Phil. & Pol'y, 158-59 (1994) (discussing John Locke, Two Treatises of Government §§14, 30, 49, 108, 109 (1970)).
106. Tully, *supra* note 105, at 158.
107. *See id*. at 164-67.
108. *Id.* at 159.
109. *Id.* (quoting Locke, *supra* note 105, §49).
110. *Id.*

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From this belief, Locke came to the widely accepted conclusion that Europeans could settle and acquire private property rights to "vacant" land through means of labor—as defined by European norms of agriculture and mercantilism.[111] Under Locke's view, the primary reason for the so-called underdevelopment of Native American peoples was their limited use for property, demonstrated by their inclination toward hunting and gathering rather than cultivation and commercial sale.[112] Since Native American communities did not use land to produce surplus, Locke conceived that their property rights rest in the products of their labor—"the fish that they catch, the deer that they hunt, the corn they pick"—rather than in the land itself.[113]

With an understanding that the European system of surplus was far superior to the Native American system of subsistence hunting and gathering, Locke claimed that settlement and exercise of dominion over Native American lands served *both* societies by: (1) using the land more efficiently; (2) producing a greater number of amenities; and (3) creating more work through a division of labor.[114] Accordingly, Locke's arguments were used by theorists throughout the 18th and 19th centuries to defend European settlement and the dispossession of Native American lands.[115] For example, Emeric de Vattel, in *The Law of Nations or Principles of Natural Law*, wrote:

> Every Nation is therefore bound by the law of nature to cultivate that land which has fallen to its share. There are others who, in order to avoid labour, seek to live upon their flocks and the fruits of the chase. Now that the human race has multiplied so greatly, it could not subsist if every people wished to live after that fashion. Those who still pursue this idle mode of life occupy more land than they would have need of under a system of honest labour, and they may not complain if other more industrious nations, too confined at home, should come and occupy part of their lands.[116]

De Vattel, like other theorists following Locke's arguments, perpetuated a misunderstanding that settlers were entitled to Native American lands.[117]

Locke's foundational assumptions regarding European rights over Native American lands circumvents a basic principle of Western law: the requirement of consent in the formation of contracts.[118] The labor justification may have played a part in the Onondaga case because, as discussed below, the tribe was dispossessed of its land without any clear indication of mutual assent or even knowledge.[119] Since the federal government's fiduciary duty, discussed in Part III, ensures that Native American tribes are contracted with equitably, the state's disregard for mutual assent therefore imposes a strong obligation upon the federal government to intervene on the Onondaga's behalf.[120]

B. Gayanashogowa*: The Great Law of Peace and Native American Conceptions of Property*

Despite Locke's contention that Native American societies were in a pre-political, "underdeveloped" state, historical evidence indicates that a highly developed, complex, and vibrant system of governance and property ownership existed among Iroquois tribes prior to European arrival.[121] Iroquois nations were governed by an extensive network of consensual village politics negotiated by longhouses, or councils, of chiefs (*sachems*) derived from familial, matrilineal clans.[122] Each nation was comprised of several governing elements: "clearly demarcated and defended territory, a decision-making body, a consensus-based decision-making procedure, and a system of customary laws and kinship relations."[123] Though nations did not have standing armies, bureaucracy, or police, individual nations engaged in trade, diplomacy, and war as distinct, self-governing entities.[124] When the *Haudenosaunee* confederacy was formed, five individual Iroquois nations joined to form one union, governed by the Grand Council of Chiefs.[125]

The central feature of Iroquois governance among nations was *Gayanashogowa*, or the Great Law of Peace, the oldest living constitution in North America and the founding constitution of the *Haudenosaunee* confederacy.[126] At its core, *Gayanashogowa* defines the functions of the Grand Council of Chiefs and dictates how the six nations resolve conflicts among one another.[127] Though *Gayanashogowa* is an oral tradition, it has been recorded and translated several times.[128] These written accounts describe strong cultural metaphors associated with the land:

> The Peacemaker established the symbols of the Great Law. The longhouse has five fireplaces but one family . . . . The Tree of Peace was planted in the center of the circle of chiefs. An eagle was placed on top to watch out for enemies. The White Roots of Peace stretched out across the land . . . . A meal of beaver tail was shared . . . .

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 160 (citing Locke, *supra* note 105, §§37, 40-43, 48-49).

115. *See id.*

116. *Id.* at 165 (discussing Emeric de Vattel, Le droit des gens, ou principle de la loi naturelle (1758), *reprinted in* The Law of Nations or the Principles of Natural Law 207-10 (1902)). Ironically, the Onondaga refers to their own system of property ownership and use as "Natural Law." The Honorable Oren Lyons, Chief, Onondaga Nation, *Sovereignty and Sacred Land*, 13 St. Thomas L. Rev. 19, 20 (2000).

117. Tully, *supra* note 105, at 159.

118. *Id.* at 160 (discussing quod omnes tangit ab omnibus tractari et approbari debet ("what touches all must be agreed upon by all")).

119. *See id.*

120. *See infra* notes 217-21 and accompanying text.

121. Tully, *supra* note 105.

122. *Id.* at 163; William N. Fenton, The Great Law and the Longhouse: A Political History of the Iroquois Confederacy 7 (1998). *See also* Arthur C. Parker, *The Constitution of the Five Nations, or the Iroquois Book of the Great Law*, *in* Arthur C. Parker, Parker on the Iroquois 41 (1968) (Arthur Parker published a written account of *Gayanashogowa*, stating: "The War Chiefs shall be selected from the eligible sons of the female families holding the head Lordship titles.").

123. Tully, *supra* note 105, at 163.

124. *Id.*

125. The Haudenosaunee Confederacy, *The Great Law of Peace: What Are the Values and Traditions of the Founding Constitution of the Iroquois Confederacy?* 1, *available at* http://sixnations.buffnet.net/Great_Law_of_Peace [hereinafter Haudenosaunee]. The Tuscarora Nation joined the Haudenosaunee Confederacy from the South in 1712. Complaint, *supra* note 1, at 3.

126. Haudenosaunee, *supra* note 125, at 1. *See* Parker, *supra* note 122, at 7-13.

127. *Id.*

128. *Id.*

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> These are all symbols of power that comes from the unity of peace.[129]

The Peacemaker, who constructed *Gayanashogowa*, instructed each individual and nation to make decisions on behalf of the seventh generation to come—a notion embedded in the *Haudenosaunee* and Onondaga worldview.[130] Thus, under the principles of "good word, peace, and power" the Onondaga maintained sovereignty over their lands throughout several centuries.[131]

1. Native American Traditions of Land Ownership

Unlike Western societies, the *Haudenosaunee* believed in collective, common ownership of real property among members of the Confederacy.[132] Though the territory of each nation became *Haudenosaunee* land, individual nations maintained a special interest in their historic territory and ultimate title rested in female members of each nation.[133] Jurisdiction over the land was held in trust by a council, comprised of two types of chiefs: (1) war chiefs, who dealt with the other nations under *Gayanashogowa*, and (2) peace chiefs, who dealt mainly with civil affairs.[134] The primary responsibility of the Council of Chiefs, as protectors of the land, rested in maintaining the nations' territorial sovereignty.[135]

In most respects, the identity of a nation as a distinct people was indivisible from its historical relationship to the land in *all* of its uses, its domestic animals, its ecology, and the spirits that share the land with living beings.[136] A common spiritual conception was that the earth, particularly the North American continent, is a great turtle, with all of life's necessities on its back.[137] With this strong identification with the land came rights and responsibilities, which were conveyed through matrilineal ties and oral traditions.[138] Though this "bundle of rights" scheme initially appears similar to Western conceptions of property ownership, its distinctive feature was an understanding that property rights relate to *forms of activity on the land*, rather than the material products of such activities or the monetary value of the land itself.[139]

As such, there was no right of sale within the *Haudenosaunee* conception of property.[140] The confederacy may convey a right of co-use—to temporarily join in its existence and relationship to the land.[141] However, as the *Haudenosaunee* Grand Council states, "This land, the Turtle Island, was created for all to use forever—not to be merely exploited for this present generation. In no event is land for sale."[142]

2. *Kahswentha*, The Two Row Wampum

From 1645 to 1815, the *Haudenosaunee* conducted international-style dealings called *Kahswentha*, or Two Row Wampum Treaties.[143] The treaties involved the gifting of wampum belts—used to visually represent relations among Native American nations and outside parties—to Europeans.[144] The wampum belt now serves as an historical artifact, signifying the true understanding of Native American, particularly Iroquois, nations concerning negotiations and transactions.[145]

The three visual components of a wampum belt represent an approach that differs greatly from those set forth by Locke and other European theorists. A white background symbolizes the purity of an agreement,[146] two parallel rows of purple beads symbolize the autonomy of native and non-native parties taking part in the negotiation, and three individual beads set between the two rows of purple beads symbolize peace, friendship, and respect.[147] In a presentation made to the Canadian House of Commons Committee on Indian Self-Government in 1983, the *Haudenosaunee* Confederacy clarified the meaning of the two parallel rows:

> [The beads] symbolize two paths or two vessels, traveling down the same rivers together. One, a birch bark canoe, will be for the Indian people, their laws, their customs, and their ways. The other, a ship, will be for the white people and their laws, their customs, and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will make compulsory laws nor interfere in the internal affairs of the other. Neither of us will try to steer the other's vessel.[148]

This view is consistent with the text of *Gayanashogowa*, which states that "[a foreign nation] must never try to control, to interfere with or to injure the Five Nations nor disre-

129. *Id.*

130. Oren Lyons, Council of Chiefs Onondaga Nation, *Letter to Editor*, POST-STANDARD, http://www.onondaganation.org/news.oct1705.html.

131. *See id.* As Syracuse religion professor Phil Arnold recently stated: "Only three Indian nations [in the United States] are still governed by sacred means. Onondaga is one of them." Charles J. Reith, *First Onondaga Land Rights Action Talk Gathers a Crowd*, http://www.Peacecouncil.net/NOON/commonfuture/media/NationMidstRept.htm (last visited July 10, 2006). Complaint, *supra* note 1, at 1-2 (stating: "[T]he Nation and its people have a unique spiritual, cultural, and historic relationship with the land, which is embodied in Gayanashogowa, the Great Law of Peace.").

132. FENTON, *supra* note 122, at 7.

133. Haudenosaunee Confederacy, Grand Council, *What Are the Land Rights of the Haudenosaunee?* (1981), http://sixnations.buffnet.net/Grand_Council/?article=land_rights.

134. FENTON, *supra* note 122, at 7.

135. *See id.*

136. Tully, *supra* note 105, at 164. As discussed above, every aspect of the indigenous land held a distinct place within the Iroquois constitution. Therefore, each nation's identity was linked to its existence with nature. This principal, embodied in *Gayanashogowa*, indicates that the balance between mankind and nature is crucial to Iroquois self-governance.

137. Haudenosaunee Confederacy, *supra* note 133.

138. *See* FENTON, *supra* note 122, at 27, 129; Tully, *supra* note 105, at 164.

139. FENTON, *supra* note 122, at 113-14; Tully, *supra* note 105, at 164.

140. Haudenosaunee Confederacy, *supra* note 133.

141. The text of *Gayanashogowa* provides for the temporary sharing of lands. Parker, *supra* note 122, at 51.

142. Haudenosaunee Confederacy, *supra* note 133.

143. *See generally* RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815, 305-17 (Cambridge Univ. Press 1991) (discussing early treaty relations).

144. Tully, *supra* note 105, at 177.

145. *Id.*

146. *Id.*

147. *See id.*; Parker, *supra* note 122, at 51.

148. Tully, *supra* note 105, at 177 (quoting Haudenosaunee Confederacy, *Presentation to the House of Commons Committee on Indian Self-Government* (1983), *reprinted in* Michael Mitchell, *An Unbroken Assertion of Sovereignty*, *in* DRUMBEAT: ANGER AND RENEWAL IN INDIAN COUNTRY 109-10, (Boyce Richardson ed., Summerhill Press 1989)).

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gard the Great Peace or any of its rules or customs . . . Then should the adopted nation disregard these injunctions, their adoption shall be annulled and they shall be expelled."[149] As demonstrated by these historical records, the *Haudenosaunee* viewed its political system—based on spiritual and ancestral rather than commercial ties to land—as everlasting and dominant.[150]

IV. The Trust Relationship

The relationship between Native American tribes and the federal government is predicated upon a principle that "powers which are lawfully vested in an Indian tribe are . . . inherent [residual] powers of limited sovereignty which [have] never been extinguished."[151] Within the realm of "limited sovereignty" retained by tribes exists the right of self-government, defined by Felix Cohen as "the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing."[152] The trust relationship therefore adheres to a basic tenet of the theory of conquest: "It is only by positive enactments, even in the case of conquered and subdued nations, that their laws [are] changed by the conqueror."[153]

Though tribes hold the power of self-government, their status as "conquered," dependant entities places them under the protection of the U.S. government.[154] Accordingly, the trust relationship includes a series of moral and legal obligations and expectancies, the most important being a legal fiduciary duty on the part of the executive branch.[155] The fiduciary duty obligates the federal government to act on behalf of Native American tribes to protect the tribes' inherent, residual sovereignty against intrusions by states and private parties.[156] As a necessary element of the fiduciary duty, the federal government must act as an intermediary between states and tribes, ensuring the best interests of the Native American in all circumstances.[157] The trust relationship therefore serves as a shield "to protect tribes from the ever-encroaching fangs of the states"[158]—a protection that Congress alone has the authority to sever.[159]

The nature of the federal-tribal relationship raises a key issue in the case of the Onondaga because the Nation's right to be governed under *Gayanashogowa* comports with its right to self-government.[160] Any infringement upon the Onondaga's form of governance by the state triggers a duty on the part of federal government to intervene.[161] As such, the Onondaga must establish that unlawful dealings by the state of New York directly imposed upon the tribe's ability to follow *Gayanashogowa*.[162]

This section explores the statutory and common-law constructions of the trust relationship, underscoring the fiduciary responsibilities of the federal government with regard to tribal/state relations.[163] Because the scope and reach of the trust relationship is largely undefined, the information presented below signals an opportunity for litigants like the Onondaga to craft boundaries that protect a broader range of native interests.[164]

A. Constitutional Origins of the Trust Relationship

The textual origins of the federal-tribal relationship derive from the U.S. Constitution.[165] Immediately after the Ameri-

149. This portion of the text refers to the *Haudenosaunee*'s temporary adoption of foreign nations. *Gayanashogowa* commands the War Chiefs to carry out an expulsion by stating:

> Now the Lords of the Five Nations have decided to expel you and cast you out. We disown you now and annul your adoption. Therefore you must look for a path in caused this sentence of annulment. So then go your way and depart from the territory of the Five Nations and from the Confederacy.

Parker, *supra* note 122, at 51.

150. *See id.*

151. Felix Cohen, Handbook of Federal Indian Law 122 (1988).

152. Cohen explains that within the complex and largely undefined relationship between tribes and the federal government, self-government is the most significant remnant of Native American sovereignty: "the Indian's last defense against administrative oppression." Other elements of tribal self-government include "the power to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice." *Id.*

153. *Id.*

154. *Id.* at 116; United States v. Kagama, 118 U.S. 375, 383-85 (1886), stating:

> They [Indian tribes] are dependent on the United States . . . dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the *duty of protection*. . . .

(Emphasis added.)

155. Cohen, *supra* note 151, at 123. William C. Canby Jr., American Indian Law in a Nutshell 33 (3d ed. 1998). The Bureau of Indian Affairs (BIA), located within the U.S. Department of the Interior (DOI), is the administrative agency responsible for the fulfillment of the federal trust relationship. Unfortunately, threats to the well-being of Indian tribes often come from other agencies within the DOI and their constituents. As such, the BIA has been criticized by tribes who believe it succumbs to non-Indian over Indian interests. The U.S. Supreme Court has previously ruled that the interests of federal agencies working alongside the BIA must supplant those of Indian tribes. *See* Nevada v. United States, 463 U.S. 110, 127, 13 ELR 20704 (1983) (stating that the BIA's obligation to its other beneficiaries excuses the government from following "the fastidious standards of a private fiduciary"); Scholder v. United States, 428 F.2d 1123, 1130 (9th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970) (involving the BIA's failure to provide irrigation for Indian residents, despite providing for non-Indians). Canby, *supra* note 155, at 43-52.

156. Cohen, *supra* note 151, at 123.

157. *See id.*

158. Peter D. Lepsch, *A Wolf in Sheep's Clothing: Is New York State's Move to Clean Up the Akwesasne Reservation an Endeavor to Assert Authority Over Indian Tribes?*, 8 Alb. L. Envtl. Outlook J. 65, 85 (2002). *Kagama*, 118 U.S. at 383 (stating "[b]ecause of the local ill feeling, the people of the States where they [Native tribes] are found are often their deadliest enemies").

159. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 380 (1st Cir. 1975) (denying state's claim that the tribe is precluded by acquiescence from asserting a trust relationship and stating that "once Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease").

160. Cohen, *supra* note 151, at 122-23.

161. *See id.*

162. *See id.*

163. Worchester v. Georgia, 31 U.S. (6 Pet.) 515, 558 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831); *Passamaquoddy*, 528 F.2d at 370.

164. *See* Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 Utah L. Rev. 109, 122-23.

165. *See* U.S. Const. art. I, §8; U.S. Const. amend. XIV, §2 (excluding the state from conducting trade and limiting the right to tax on Native Americans to the federal government); 25 U.S.C. §177.

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can Revolution, the Articles of Confederation, quite vaguely, declared that "[t]he United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of the any of the States within its own limits be not infringed or violated."[166] With the adoption of the new Constitution, the general trend toward increasing federal authority extended to Indian affairs.[167] Therefore, Article I, section 8, clause 3 of the Constitution (the Indian Commerce Clause) granted Congress the broad authority "[t]o regulate commerce with foreign Nations, and among the several States, and *with the Indian Tribes*."[168] This clause, in conjunction with the Supremacy Clause, creates a grant of power to Congress for legislation dealing with Native American tribes.[169] The authority bestowed upon the federal government by the Constitution established a federal-tribal relationship, which would evolve into a trust relationship under U.S. Supreme Court decisions discussed below.[170]

B. The Indian Trade and Intercourse Act

In the early federal period, Congress constructed the basis for federal Native American relations through laws designed "to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontier."[171] These laws, commonly known as the Non Intercourse Act, were formulated to realize a number of goals, articulated by Francis Paul Prucha as: (1) allocating the power to manage Native American affairs between states and the federal government; (2) extinguishing, in an organized manner, Native American title in order to expand white settlements; (3) restraining nongovernment entities and "frontiersman" from invading territory still claimed by Native Americans; and (4) "fulfilling the responsibility that the Christian whites had to aid the savage pagans along the path toward civilization."[172] In sum, the laws were designed to eradicate Native American ownership of land without igniting a violent backlash.[173]

1. The Origins of the Trade and Intercourse Act

The first Native American Trade and Intercourse Act was passed in 1790—two years after the state of New York negotiated its first treaty with the Onondaga.[174] The Act was a necessary means to suppress foreseeable conflict between white settlers and Native American tribes.[175] Even before 1790, the federal government had set explicit boundaries for Indian Country by excluding white settlers from entering the area, and denying the right of private individuals or local governments to acquire land from the Native Americans.[176]

The architect of this policy, then president George Washington, envisioned peace with native tribes through organized, steady occupation rather than exercises of conquest.[177] As such, upon hearing disturbing accounts of violence on the American frontier, Washington urged Congress to pass legislation placing a sharp boundary between white settlers and Native American tribes.[178]

After six enactments, the Trade and Intercourse Act reads, in pertinent part, "No purchase, grant, lease or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or conveyance entered into pursuant to the Constitution."[179] As Prucha points out, the Act only indirectly affects Native American tribes by limiting them in their ability to trade and sell land.[180] It does not, in and of itself, provide any sort of protection by the federal government.[181] Rather, the Act merely conforms to the political agenda of the early federal period: defining the relationship between the federal government and the states.[182] By granting the federal government the sole right to purchase and acquire Native American lands, the Act forecloses states from dealing directly with Native American tribes.[183]

2. *Oneida Indian Nation v. County of Oneida*[184]

In *County of Oneida v. Oneida Nation of New York*,[185] the Oneida Nation, also a member of the *Haudenosaunee* confederacy, sought monetary damages for the use and occupancy of lands acquired by the state of New York in 1795.[186] The case is remarkably similar to the Onondaga case: the complaint alleged, "from time immemorial to shortly after the Revolution, the Oneidas inhabited what is now central New York State."[187] From 1795 to 1846, 25 treaties were executed between the state and the Oneida Nation.[188] Of these, "[o]nly two . . . were conducted under federal supervision, as required by the Non Intercourse Act."[189] By 1846, the Oneida's land had diminished from nearly six million acres to only a few hundred acres.[190]

166. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW: CASES AND MATERIALS 33 (1979) (citing ARTICLES OF CONFEDERATION art. IX).

167. *Id.*

168. U.S. CONST. art. 1, §8, cl. 3 (emphasis added).

169. GETCHES ET AL., *supra* note 166, at 33; Wood, *supra* note 164, at 122-23.

170. *See* GETCHES ET AL., *supra* note 166, at 33. Though the trust relationship is a function of judicial decree, the exclusion of states from tribal relations provides a textual basis for the Marshall decisions (discussed *infra*).

171. FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, 2 (Harvard Univ. Press 1962).

172. *Id.* at 1-2.

173. *Id.* at 3.

174. *Id.* (The final, most lasting Act was passed in 1834).

175. *Id.*

176. *See id.* at 45-49.

177. *Id.* at 45.

178. *See id.* at 45-49.

179. 25 U.S.C. §177.

180. PRUCHA, *supra* note 171, at 48.

181. *See id.*

182. *See id.*

183. *See id.*

184. 434 F. Supp. 527 (N.D.N.Y. 1977).

185. 470 U.S. 226 (1985).

186. *Id.* at 229-230.

187. *Id.* at 230.

188. *Oneida Indian Nation*, 434 F. Supp. at 535, *aff'd*, *County of Oneida*, 470 U.S. at 226.

189. *Id.*

190. *Id.*

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In assessing whether the conveyance comported with the requirements of the Non Intercourse Act, the district court listed four elements needed by Native American plaintiffs to establish a prima facie case:

> (1) it is or represents an Indian "tribe" within the meaning of the Act;
> (2) the parcels of land at issue herein are covered by the Act as tribal land;
> (3) the United States has never consented to the alienation of the tribal land;
> (4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.[191]

The first element was easily met because the Oneida, like the Onondaga, is a tribe recognized by the U.S. Bureau of Indian Affairs.[192] Since the six-million-acre territory within the boundaries of New York State was part of the Oneida's original land, the court confirmed that the second element was also fulfilled.[193] The state failed to produce any evidence of a subsequent treaty by Congress ratifying or consenting to the transaction, so the court established that the third element was met.[194] Finally, the court found no explicit congressional termination of the trust relationship between the Oneida Nation and the U.S. government.[195] Therefore, the court held that all land transfers executed by the state were in clear violation of the Non Intercourse Act.

C. The Evolution of the Trust Relationship at Common Law

Though some form of a fiduciary duty may have been implicit in the Constitution and the Trade and Intercourse Act, the trust relationship primarily grew out of common-law decisionmaking.[196] An expansive body of case law has defined the modern trust relationship, as federal courts play a key role in demarcating relationships among the federal government, state governments, tribes, and individuals.[197]

1. The Marshall Trilogy

The Marshall Trilogy—consisting of *Johnson v. M'Intosh*,[198] *Cherokee v. Georgia*,[199] and *Worchester v. Georgia*[200]—marks the early development of the trust relationship.[201] There, Supreme Court Chief Justice John Marshall set forth a direct conceptual approach on the legal status of Native American tribes.[202] The three decisions collectively establish the core principles of inherent, residual sovereignty and the fiduciary duty:

> (1)[B]y virtue of aboriginal, political, and territorial status, Indian tribes possessed certain incidents of preexisting sovereignty;
> (2) this sovereignty was subject to diminution or elimination by the United States, but not by the individual states;
> (3) the tribes' limited inherent sovereignty and their corresponding dependency upon the United States for protection imposed on the latter a trust responsibility.[203]

As such, the common-law fiduciary duty derives from a tension inherent in all aspects of Native American law—"between the sovereign status of tribes existing as of the time of Euro-American settlement and the . . . imposition of a new and ultimately dominant government resulting from that settlement . . . ."[204]

In *Johnson*, Chief Justice Marshall held that a conveyance of native land to a private individual by tribal chiefs was invalid.[205] In referring to the doctrine of discovery,[206] Marshall stated that, although Native American tribes held a right to occupy the land, alienable or legal title ultimately rested in the hands of the federal government.[207] The federal government gained this right through the conquest of inhabited country and the subsequent formation of Euro-American societies upon Native American soil.[208] Therefore, only the United States could extinguish aboriginal title through continued conquest or purchase.[209]

191. *Id.* at 537.

192. *Id.* at 538; Complaint, *supra* note 1, at 2-3 ("[The Onondaga] has been at all relevant times, an "Indian nation" within the meaning of the federal Indian Trade and Intercourse Acts of 1790 and later, now 25 U.S.C. §177."). The responsibilities of the BIA are discussed *supra* note 155.

193. *Oneida Indian Nation*, 434 F. Supp. at 538. The court cites an earlier Oneida case, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-69 (1974), in which the Supreme Court held that Indian title in their aboriginal land is entitled to federal protection.

194. *Oneida Indian Nation*, 434 F. Supp. at 538. Under the Trade and Intercourse Act, any treaty conveying land from a tribe to a state must be ratified by Congress. *See* 25 U.S.C. §177.

195. *Oneida Indian Nation*, 434 F. Supp. at 538. In *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), the U.S. Court of Appeals for the First Circuit ruled that "any withdrawal of trust obligations by Congress would have to have been 'plain and unambiguous' to be effective." *Passamaquoddy*, 528 F.2d at 380. Accordingly, the Onondaga complaint asserts that "[t]he relationship of the Onondaga Nation to the United States has never been terminated." Complaint, *supra* note 1, at 3.

196. *See Oneida Indian Nation*, 434 F. Supp. at 538.

197. *See* United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Seminole Nation v. United States, 316 U.S. 286 (1942); Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); *Passamaquoddy*, 528 F.2d at 370.

198. 21 U.S. (8 Wheat.) 543 (1823).

199. 30 U.S. (5 Pet.) 1 (1831).

200. 31 U.S. (6 Pet.) 515 (1832).

201. *See Worchester*, 31 U.S. at 518; *Cherokee Nation*, 30 U.S. at 1; *Johnson*, 21 U.S. at 543. This section will refer to the relationship envisioned by Marshall as a "trust," though, as discussed later on, the Marshall Trilogy construed a ward/guardian, rather than trust, relationship.

202. Clay Smith, American Indian Law Deskbook: Conference of Western Attorneys General 5 (Univ. Press of Colo. 2004) [hereinafter CWAG].

203. *Id.*

204. *Id.* at 6.

205. 21 U.S. at 602.

206. *Id.* at 573. As Marshall states: "The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements on it." *Id.*

207. *Id.* at 591.

208. Marshall states:

> However extravagant the pretension of converting the discovery of 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.

Id. The "principle" which Marshall referred to appears to be Locke's labor justification. *See supra* notes 111-17 and accompanying text.

209. 21 U.S. at 587.

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Cherokee Nation[210] and *Worchester*[211] serve to clarify the holding in *Johnson* by affirming the distinct, yet subjugated, status of Native American tribes.[212] In *Cherokee*, Marshall first defined the legal status of Native Americans as "domestic dependant nations" whose "relation to the United States resembles that of a ward to his guardian."[213] Marshall expanded upon this guardianship principle in *Worchester*, where he characterized the Cherokee Nation as "a distinct community" in which Georgia laws are inapplicable.[214] In both decisions Marshall set forth our understanding of Native American sovereignty: Native American tribes are sovereign entities vis-à-vis the states but conquered and dependent entities in relation to the federal government.[215] In doing so, Marshall envisioned a ward/guardian relationship between the federal government and tribes—propounding a view that the federal government must protect uncivilized and vulnerable Native American tribes from the states.[216]

2. The Canons of Construction

In light of the guardianship imposed between the federal government and Native American tribes under the Marshall Trilogy, courts have developed specific canons of construction used to interpret treaties negotiated between tribes and the federal government.[217] Three interpretive principles, designed to rectify bargaining inequality between the government and tribes, provide: "(1) ambiguous expressions must be resolved in favor of the Indian parties concerned; (2) Indian treaties must be interpreted as the Indians themselves would have understood them; and (3) Indian treaties must be liberally construed in favor of the Indians."[218] In most instances, testimony is taken from tribal members, historians, and anthropologists familiar with circumstances that may have existed during the time the treaties were negotiated.[219]

Though the canons afford some protection to Native American interests, their scope is limited to tribal dealings with the federal government.[220] Therefore, in the case of the Onondaga, the issue remains whether the canons of construction can be extended to apply to, and thereby nullify, treaties made between states and Native American tribes.[221] This determination turns on the extent of the federal government's fiduciary duty to protect tribes against illegal and intrusive treaty-making by the states.[222]

3. *Montana v. United States*[223]

Since the Marshall Trilogy, the trust relationship has experienced little expansion beyond the protection of commercial interests, such as gaming, and an extraconstitutional status to maintain control over internal affairs.[224] The narrow construction of the trust relationship was exemplified in *Montana*, a 1981 case where the Crow Tribe attempted to prohibit non-members from hunting and fishing on fee lands.[225]

In *Montana*, the Supreme Court introduced the general principle that the "exercise of tribal power beyond what is necessary to protect *tribal self-government or to control internal relations* is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."[226] The Court once again affirmed that, through conquest, Native Americans had divested control over their "external" relations with non-Indians.[227] In doing so, the Court rejected the Crow's sovereignty to proscribe hunting and fishing on land held in fee by non-Indians.[228]

Montana does, however, provide some benefit to the Onondaga's claim for declaratory judgment.[229] The second exception to the Montana rule states that a tribe may "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the *political integrity*, the economic security, or the health and welfare of the tribe."[230] After asserting its claim to fee title through a declaratory judgment, the Onondaga may establish that hazardous environmental conditions caused by private property owners threatens its political existence.[231] If successfully argued, the Montana exception would allow the Onondaga to exercise civil regulatory authority over its land.[232]

V. Establishing Title Using the Trust Relationship: Cultural Interests as an Element of Self-Government

Though the trust relationship purports to respect the sovereignty of Native American societies, its limitations impose serious obstacles in the fair adjudication of land disputes.[233] As the discussion above indicates, the fiduciary duty currently obligates the federal government to protect the right

210. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

211. Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

212. Tully, *supra* note 105, at 175.

213. *Cherokee*, 30 U.S. at 16.

214. *Worchester*, 31 U.S. at 560.

215. *See id.* at 560-61. The Native American right to self-government is subject to diminution by positive enactments by the federal government, not the states.

216. *See id.* at 560. The ward/guardian relationship advanced by Marshall should be distinguished from the trustee-beneficiary relationship, which is far less paternalistic. Courts in recent years have advanced the latter view with respect to the relationship between the federal government and Tribes. This issue will discussed at greater length in Part IV.

217. GETCHES ET AL., *supra* note 166, at 200.

218. *Id.* at 35.

219. *Id.* at 36.

220. *See* CWAG, *supra* note 202, at 17.

221. *See id.*

222. *See id.*

223. 450 U.S. 544 (1981).

224. *See* CWAG, *supra* note 202, at 6.

225. 450 U.S. at 566. Following a late 19th century congressional policy of allotting reservation lands to individual tribal members, Indian allottees received fee patents and subsequently transferred property to nonmembers of the tribe. Because there was no actual "diminishment" of Indian lands, these allotments remained part of the reservation. They are subject to federal rather than state control under 18 U.S.C. §1151. CWAG, *supra* note 202, at 71-72.

226. 450 U.S. at 564 (referring to the residual, limited sovereignty discussed throughout this section) (emphasis added).

227. *See id.*

228. *Id.* at 566.

229. *See id.*

230. *Id.* (emphasis added). The first exception, inapplicable in the Onondaga case, allows tribes to exercise civil authority over nonmembers "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565.

231. *See id.*

232. *See id.*

233. *See supra* notes 186-96 and accompanying text.

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of self-government, viewed as strictly political in nature.[234] However, our courts have thus far failed to recognize that Native American self-government, in order to survive, must reestablish *spiritual* connections to aboriginal land.[235] In the case of the Onondaga, this connection has been tarnished by years of environmental degradation by Honeywell, Clark, and Trigen.[236]

This section suggests that the strength of the Onondaga claim lies within the common-law trust doctrine rather than the federal Trade and Intercourse Act.[237] The Onondaga Nation has the opportunity to enforce the trust relationship to protect culturally and spiritually significant lands from state and private intrusion. After focusing on true intentions of the Onondaga regarding the five treaties at issue in their litigation, the analysis below emphasizes the political disruption caused by the treaties and the subsequent obligations of the federal government.

A. The Onondaga's True Intent

The Onondaga must initially establish a lack of mutual assent and fairness in their negotiations with the state. The Nation can use the visual representation of the wampum, as well as the textual constitutional basis of *Gayanashogowa*, to assert the Onondaga's intention to preserve its system of government. The Onondaga must then emphasize that under *Gayanashogowa*, maintaining political sovereignty as an independent nation and member of the *Haudenosaunee* required retaining ownership and control over aboriginal land.

1. The Onondaga's Status as a "Domestic Dependant Nation"

Chief Justice Marshall defined the federal government's role as "protecting" Native American tribes against intrusions by states and private entities.[238] Though this formulation is popularly characterized as a "trust" relationship, it more closely resembles a guardianship or paternalistic bond.[239] The distinction at first seems narrow, but it is in fact a critical shortcoming in our legal analysis of Native American land claims.[240] The approach taken by Marshall, and followed in subsequent decisions, perpetuates the Lockean misconception that Native American societies like the Onondaga were weak and underdeveloped prior to European arrival.[241]

As described in Part III, the Onondaga, in the tradition of the *Haudenosaunee* Confederacy, visually recorded dealings using wampum beads.[242] Belts constructed using wampum connote a tribe's true understanding of each interaction—an understanding of equal affiliation, peace, and friendship.[243] The parallel beads signifying "two paths or two vessels traveling down the same rivers together" seem to indicate a perception much different from the ward/guardian relationship envisioned by Justice Marshall.[244] Regardless of whether they dealt with states, individuals, or directly with the federal government, the Onondaga apparently viewed themselves as the ultimate keepers of the land rather than a "domestic dependant nation."[245]

2. Transferring Alienable Title

Locke's foundational belief that property ownership stems from commercial production sharply contradicts the *Haudenosaunee* conception that property should be held, in its natural state, for the "seventh generation."[246] *Gayanashogowa*, in its written form, states that a visiting nation, using *Haudenosaunee* land, must never interfere with a tribe's relationship to the land.[247] These words indicate that the Onondaga perceived its treaties with the state of New York as invitations of co-use, contingent on the visiting parties' acceptance of its system of government and way of life.[248] The relationship between the original five nations of the *Haudenosaunee* and the Tuscarora Nation, which joined the Confederacy in 1712, exemplifies this principle.[249] Given the Onondaga's deeply embedded belief that land should be preserved, its seems unlikely that the Nation would contemplate permanently transferring large portions of their territory.[250]

Another key piece of evidence establishing the Onondaga's lack of intent to transfer title was their strong reliance on land for self-government.[251] The text of *Gayanashogowa* suggests that the *Haudenosaunee's* political system was synonymous with its cultural and spiritual ties to land.[252] *Gayanashogowa's* significance stems from the *land* it was founded upon.[253] The land and all of its physical characteristics was an integral part of each individual nation's identity, a notion that survived even the formation of the Confederacy itself.[254] References to living inhabitants and resources establish that political strength was derived from natural surroundings.[255] Accordingly, control over land corresponded to political power, the power of chiefs as trustees and women as the ultimate holders of title.[256]

234. *See supra* notes 105-10 and accompanying text.

235. *See* Haudenosaunee, *supra* note 125, at 4.

236. *See* Complaint, *supra* note 1, at 1-2.

237. *See supra* notes 147-53 and accompanying text.

238. CWAG, *supra* note 202, at 6 (describing tribes as "extraconstitutional political bodies").

239. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) (stating: "[T]heir relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.").

240. *See id.*

241. *See supra* notes 105-10 and accompanying text. Marshall's words, cited in *supra* note 208, suggest that, although he believed Native American societies had some form of government, it was insignificant in comparison to that of the "conqueror." Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 591 (1823).

242. Tully, *supra* note 105, at 177.

243. *Id.*

244. *See* Haudenosaunee Confederacy, *supra* note 148.

245. *Cherokee*, 30 U.S. at 16.

246. *See* Tully, *supra* note 105, at 153.

247. Parker, *supra* note 122, at 51.

248. *See supra* note 141 and accompanying text.

249. *See* Haudenosaunee, *supra* note 125.

250. *See id.*

251. *See supra* notes 132-35 and accompanying text.

252. *See* Haudenosaunee, *supra* note 125.

253. *See id.*

254. *See* Haudenosaunee Confederacy, *supra* note 148.

255. Haudenosaunee, *supra* note 125.

256. *See supra* note 134 and accompanying text.

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B. Extending and Enforcing the Trust Relationship

As stated in Part II, the Onondaga's claim to nearly two million acres of land under the Trade and Intercourse Act is contingent on the federal district court's adherence to a New York real property recording statute.[257] Though the 1788 treaty that transferred most of the Onondaga's land was recorded after the passing of the 1790 Trade and Intercourse Act, it was negotiated in 1788 and purportedly reaffirmed a month prior to the Act's enactment.[258] In the event the court determines that the 1788 treaty does not fall within the scope of the Trade and Intercourse Act, the Onondaga must construct an alternative common-law argument in support of their land claim.[259] This alternative presents a rare opportunity to clarify and enforce the federal government's fiduciary duty.

1. Use of the Canons of Construction for State/Tribal Treaties

Under the canons of construction, treaties that do not clearly represent the tribe's true intent and understanding at the time of signing are construed as void.[260] As discussed in Part IV, the canons currently apply to Native American treaties with the executive branch and Congress.[261] However, as a fiduciary, the federal government is arguably under an obligation to ensure that all treaties executed by the states comport with the same common-law contractual requirement of mutual assent.[262] The federal government's acquiescence to the treaties made by the state of New York imposes a responsibility on the federal government to ensure that these treaties were fairly executed.[263] As established above, the Onondaga did not intend to convey title to its land under the treaties.[264] Therefore, the canons of construction, though loosely defined, provide a basis for enforcing the fiduciary duty and thereby nullifying the 1788 treaty.

2. An Expansion of "Political" Protection: From Guardianship to *Gayanashogowa*

In addition to using the canons of construction as a basis for nullifying the 1788 treaty, the Onondaga Nation can assert that the treaty violated its inherent, residual sovereignty. Under the current common-law construction of the trust relationship, the federal government's fiduciary duty rests on protecting the political, rather than cultural, sovereignty of tribes from the intrusion of states and private parties.[265] For that reason, a pressing concern in the Onondaga case is whether the trust relationship can be enforced to remedy environmental harms to culturally significant Native American lands.[266] The background discussed in this Article suggests that in order to trigger the federal government's fiduciary duty, the cultural harm inflicted on the Onondaga Nation must be characterized as an infringement upon its right of tribal self-government.[267]

Since the common-law fiduciary duty is intended to protect Native American sovereignty in relation to the states, the Onondaga must argue that their system of tribal government, *Gayanashogowa*, is coexistent with their deep cultural affiliation with their land.[268] Accordingly, the environmental degradation caused by private parties and, indirectly, the state, constitutes a violation of the Onondaga's inherent, residual sovereignty.[269]

If successfully asserted, an established imposition on tribal self-government obligates the federal government to intervene as a fiduciary—protecting the tribe's political integrity against the state and private parties.[270] In an identical or intervening action, the federal government's argument would inevitably assert that the established, constitutional basis of *Gayanashogowa*—a political system that predates European arrival on this continent—trumps state and private fee ownership of Onondaga territory.[271] By making this argument on the Onondaga's behalf, the federal government would acknowledge that the land at issue was governed by a sophisticated, mature, and developed society.[272]

3. The Remedy: Using Declaratory Judgment to Force Environmental Rehabilitation

Equating self-government with the environmental well-being of aboriginal lands raises a subsequent common-law option.[273] The Onondaga have stated that they do not intend to physically reoccupy their aboriginal land.[274] Rather, they aim to secure some power over the cleanup of sacred areas such as Onondaga Lake.[275] Accordingly, under *Montana*, the Onondaga have the option of arguing that the conduct of the non-Indian entities, such as the state of New York and the named corporate defendants, threatens the political integrity of the tribe.[276] Thus, having established fee title by demonstrating the illegality of the treaties, the Onondaga fit squarely into the second exception presented by the Supreme Court in *Montana*.[277] This argument would allow the Onondaga to exercise civil authority over the cleanup of Onondaga Lake and other culturally significant areas.[278]

Alternatively, if fee title is not established, the Onondaga may once again hold the federal government, as a fiduciary, responsible for ensuring that the land is brought back to its natural state. As long as environmental degradation infringes upon Onondaga self-government, the Bureau of Indian Affairs is under a duty to adhere to the Onondaga Nation's standard for environmental restoration.

257. *See supra* notes 77-78 and accompanying text.

258. *See* POST-STANDARD, *supra* note 42.

259. *See id.*

260. *See* GETCHES ET AL., *supra* note 166, at 200.

261. *See* CWAG, *supra* note 202, at 17.

262. *See supra* notes 201-216 and accompanying text.

263. *See id*.

264. *See* Haudenosaunee, *supra* note 125.

265. *See supra* note 215 and accompanying text.

266. *See id.*

267. *See id.*

268. *See* Lepsch, *supra* note 158, at 8-9 (stating that the trust doctrine is a shield "to protect tribes from the ever-encroaching fangs of the states").

269. *See id.*

270. *See id.*

271. *See supra* notes 139-49 and accompanying text.

272. *See id.*

273. *See* Montana v. United States, 450 U.S. 544, 566 (1981).

274. Complaint, *supra* note 1, at 7.

275. *See id.* at 6-7.

276. *See Montana*, 450 U.S. at 566.

277. *See id.*

278. *See id.*

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VI. Conclusion

The Onondaga Nation's land claim raises a novel challenge in the area of federal-tribal and tribal-state relations. The fiduciary duty, though intended to serve as a "shield" against state intrusion, is fairly limited in scope. This Article suggests that any limitation can be overcome through the use of historical evidence indicating a correlation between culturally significant lands and tribal self-government. Such evidence would not only expose the level of harm suffered by tribes like the Onondaga, but would also highlight the absence of mutual assent in land treaties executed by states and private parties.

Since federal power over Native American affairs imposes a duty upon the executive branch to protect residual, inherent tribal sovereignty, it is imperative for tribes to characterize cultural ties to land as creating unique political rights. As the Onondaga Nation declares in its complaint, its relationship with the land extends beyond "ownership" or "possession." Therefore, it is in the Nation's best interests to articulate the cultural and political injustice caused by the dispossession and environmental degradation of its territory.