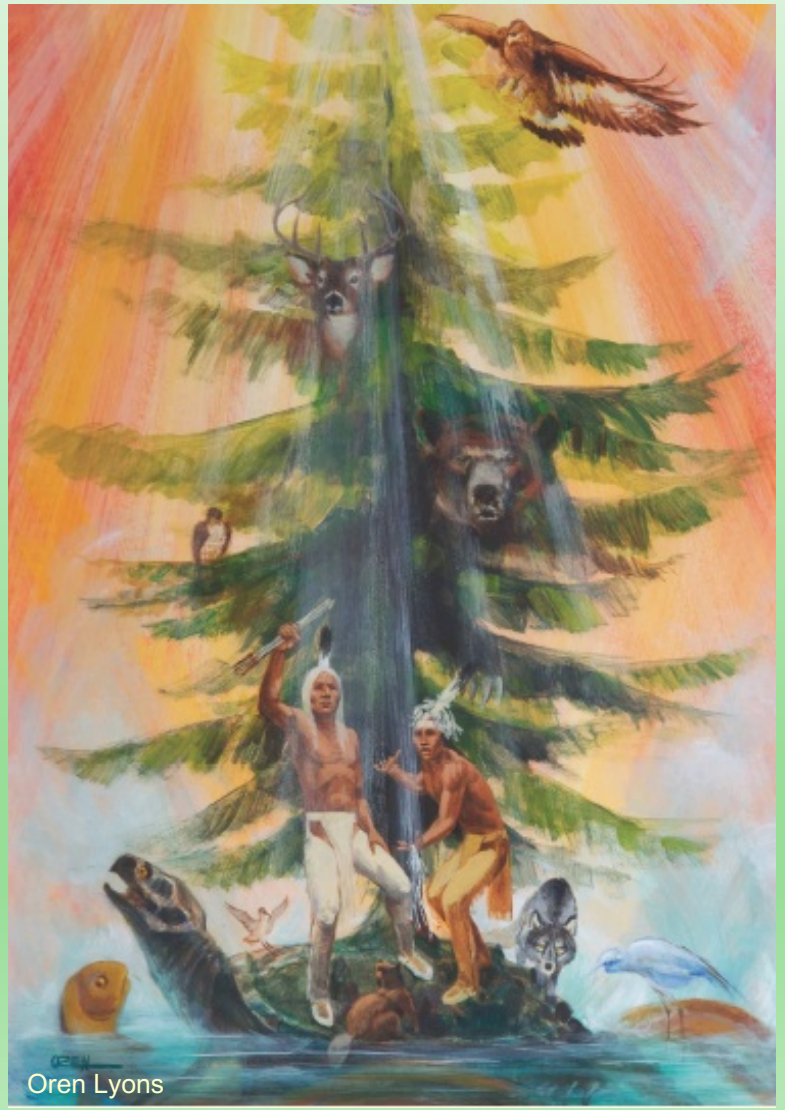
DOCTRINE OF CHRISTIAN DISCOVERY & DOMINATION


Oren Lyons

- *Mother Earth's Pandemic: The Doctrine of Discovery Conference*
- August 13, 2020
- Joe Heath
- General Counsel, Onondaga Nation

Johnson v. McIntosh, 21 US 543 (1823)

"The Indians were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and . . . Discovery gave exclusive title to those who made it.

[T]he different Nations of Europe . . . Asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this **ultimate dominion**, a power to grant the soil, while yet in possession of the natives."

Johnson v. McIntosh—2:

"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 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., at 591.)

Tee-Hit-Ton . US, 348 US 272 (1955)

"Every America schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land." (*Id.*, at 289-290.)

City of Sherrill v. Oneida, 544 US 197 (March 29, 2005)

Footnote # 1:

"Under the doctrine of discovery, fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States." (*Id*., at 203)

*Cayuga Indian Nation v. Pataki,*413 F. 3d 266, (2nd Cir. June 28, 2005)

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

One of the few incontestable propositions about this unusually complex and confusing area of law is that doctrines and categorizations applicable to other areas do not translate neatly to these claims."

Oneida Indian Nation v. County of Oneida, 617 F. 3d 114, August 9, 2010

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

The Oneidas assert that the invocation of a purported laches defense is improper here because the defendants have not established the necessary elements of such a defense. This omission is not ultimately important, as the equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches."

Onondaga Nation v. NY, 500 Fed. Appx, 87 (Argued October 12, 2012, decided October 19, 2012)

"This appeal is decided on the basis of the equitable bar on recovery of ancestral lands in *Sherrill*, and this Court's cases of *Cayuga* and *Oneida*.

Three specific factors determine when ancestral land claims are foreclosed on equitable grounds:

(1) the length of time between an historic injustice and the present day;

(2) the disruptive nature of the claims long delayed; and

(2) the degree to which these claims upset the justifiable expectations of individuals far removed from the events giving rise to the plaintiffs' injury."

McGIRT v. OKLAHOMA, 140 S. Ct. 2452, (July 9, 2020)

5 to 4 vote, with Justice Gorsuch joining the 4 "liberal" Justices and writing the majority opinion.

"At the end of the trail of tears was a promise."

FACTS: Jimcy McGirt is a Seminole Nation citizen, convicted in state court or violent crimes on the Muscogee reservation. His appeal claimed that the state did not have jurisdiction because this was "Indian Country":

"Today we are asked whether the land these treaties promised remains an Indian reservation, for purpose of federal criminal law. Because Congress has not said otherwise, we hold the government to its word." (Emphasis added.)

McGIRT v. OKLAHOMA--2

State defenses rejected by Gorsuch:

- "Now, the State points to historic practices and demographics,"
- "Evidence of the subsequent treatment of the disputed land . . . has limited interpretive value."
- "Finally, Oklahoma points to the speedy and persistent movement of white settlers onto Creek lands."
- "In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially 'transform[ative]" effects of a loss today."
- "[D]ire warnings are just that, and not a license for us to disregard the law,"
- "[M]any of the arguments follow a sadly familiar pattern: Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject such thinking."

Since the result in McGirt is favorable, What is the problem ?

PLENARY POWER ! & THE DOCTRINE OF DISCOVERY !

Joe's take on the case: *The debate in this decision, between Gorsuch's majority opinion and Roberts' rather snarky dissent is:*
What are the rules for how to properly break Indian treaties?

This affirms and strongly reinforces the illegal claim of the US government to have the unilateral right to break any Indian treaty it chooses—PLENARY POWER.

Gorsuch is clever—he never uses the words "plenary power", but had Congress terminated the rez, Gorsuch would have unquestionably ratified that.

Lone Wolf v. Hitchcock, 187 U.S. 553 (1903):

- "But the right which Indians held was only that of occupancy; [and] that occupancy could only be interfered with by the US. It is presumed that the US would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."

- "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been a political one, not subject to be controlled by the judicial department of the government"

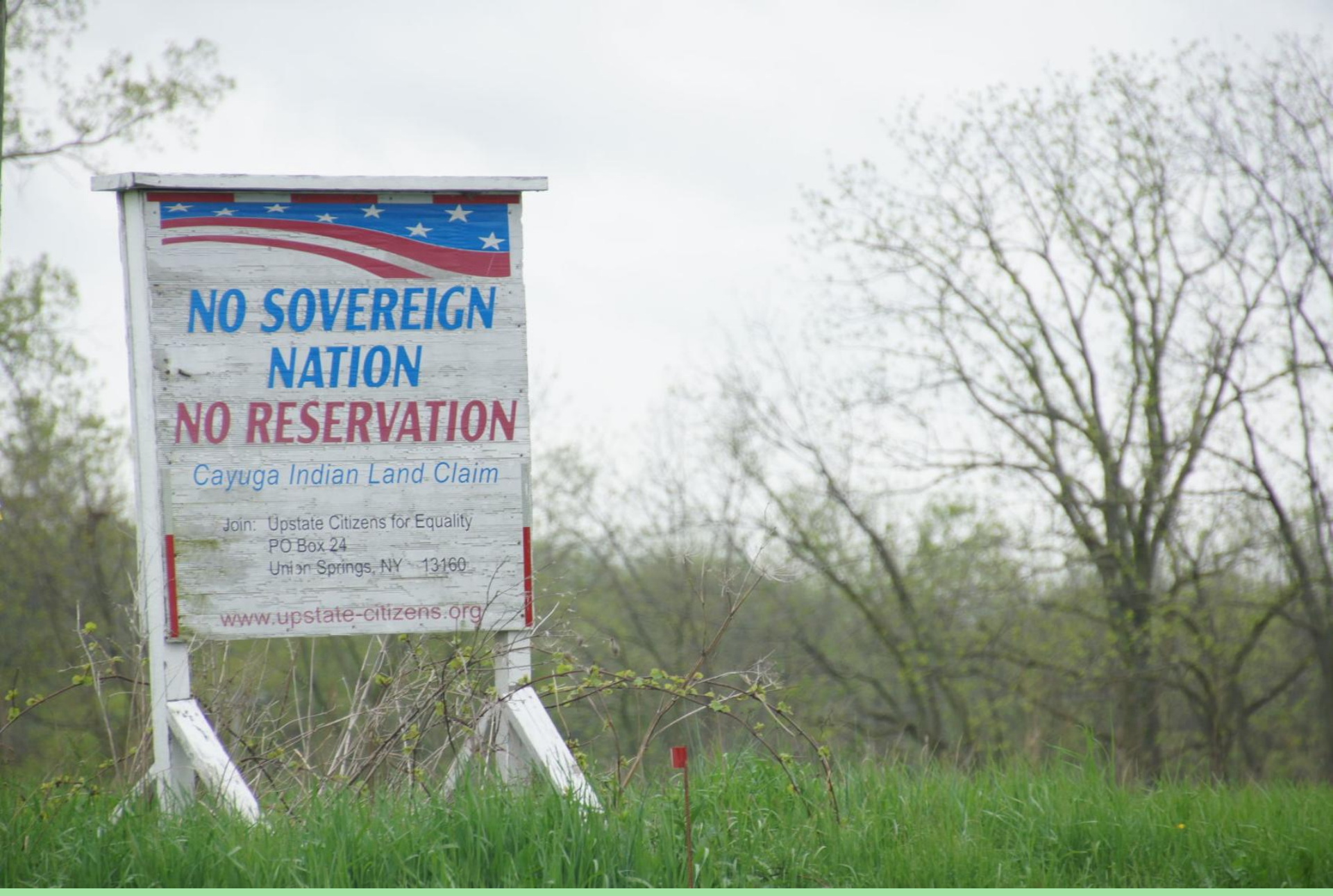
- "When treaties were entered into between the US and a tribe of Indians it was never doubted that the power to abrogate existed in Congress."

Oneida Nation v. Village of Hobart, 7th Circuit, July 30th 2020 WL 4355703—Applies & Extends *McGirt*:

- Questions:
  - Does village have regulatory jurisdiction over Nation's annual Big Apple Festival ?
  - Has reservation been disestablished ?

- Holding: Rez not disestablished, so no village regulatory jurisdiction:

- *"If the Reservation remains intact, then federal law treats the land at issue as Indian Country not subject to most state and local regulation."*



Cayuga Nation Canandaigua Treaty Reservation--2020

Contact information:

Joseph J. Heath, Esq.
Onondaga Nation General Counsel
512 Jamesville Avenue
Syracuse, NY 13210

jjheath1946@gmail.com

Law review articles:

10 Albany Gov't Law Review 112 (2017);
37 American Indian Law Review 351 (2013); &
46 Buffalo Law Review 1011 (1998).

Onondaga Nation: **www.onondaganation.org**