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## TAKING THE LAND BACK: HOW TO RETURN STOLEN LAND TO THE INDIGENOUS PEOPLE OF NEW YORK STATE THROUGH EMINENT DOMAIN

*Devin Nicole Barbaro\**

“The land knows you, even when you are lost.”

– Robin Wall Kimmerer<sup>1</sup>

*From the moment that European colonizers landed in North America hundreds of years ago, land rights have been stripped away from the Indigenous people of this land. Land Back is an activism and advocacy movement to regain land rights for the Tribal Nations across the United States. Returning stolen land to Tribal Nations is a form of reparations for the atrocities the United States has inflicted upon these Nations for hundreds of years. Additionally, land that is managed by Indigenous communities is proven to be more resilient against the detrimental effects of climate change, making the return of land to Tribal Nations a necessary tool in the mitigation of the climate crisis here in the U.S. This Note focuses primarily on the Tribal Nations of New*

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\* J.D. Candidate, Brooklyn Law School, 2024. B.A., Marist College, 2015. This Note is dedicated to the Land Back Movement and the Indigenous People of Turtle Island, who continue to fight every day for their rights in the United States, a country which exists entirely on stolen land. This Note is indebted to their activism and advocacy. Thank you to all of my friends and family for your endless encouragement and support, especially Ally Barbaro, Jenna Campolieto, Jenna Bresge, Olivia Curcio, Caroline Godino, and Elizabeth Loizides, my biggest cheerleaders. Thank you to my editors at the *Journal of Law & Policy* and the entire editorial staff for all of your hard work, time, dedication, and feedback that helped me bring this Note over the finish line. Lastly, thank you to my entire support system at Brooklyn Law School for fostering an environment for me to learn and succeed in my legal career.

<sup>1</sup> Robin Wall Kimmerer, *Braiding Sweetgrass* 36, MILKWEED EDITIONS (2013).

*York and their fight for their land back across the State. From broken treaties, lost lawsuits, and legal battles against local, state and the federal government, this Note argues that there is a need for a statutory method for Tribal Nations to obtain land rights in New York State. Through an amendment in the New York State Eminent Domain Procedure Law, the state government would be able to exercise a taking of private property and transfer the land rights to a Tribal Nation. Such an amendment would be an important step in righting the wrongs of the past and creating a more equitable property distribution to the Tribal Nations of New York State.*

## INTRODUCTION

Land Back.<sup>2</sup> Two simple words. Without context, these two words seem straightforward, but behind these words lives a movement that is far more complex.<sup>3</sup> Land Back is a centuries-long battle fought by the Indigenous people of the United States to regain control of Indigenous lands.<sup>4</sup>

From the moment European colonizers arrived on the shores of North America in the seventeenth century, Indigenous people who had lived there for hundreds of years were robbed of their land rights.<sup>5</sup> In New York State, the Dutch colonizers were the first Europeans to settle in what is present-day Manhattan.<sup>6</sup> At the time, this territory was occupied by the Lenape Tribe.<sup>7</sup> According to

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<sup>2</sup> LANDBACK, <https://landback.org/> (last visited Aug. 14, 2023).

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See* Stephen Blauweiss & Karen Berelowitz, *The Lenape, Mohicans and Iroquois Were Native to New York State*, HUDSON VALLEY ONE (Oct. 13, 2021), <https://hudsonvalleyone.com/2021/10/08/the-lenape-mohicans-and-iroquois-were-native-to-new-york-state/>.

<sup>6</sup> *See* Colleen Connolly, *The True Native New Yorkers Can Never Truly Reclaim Their Homeland*, SMITHSONIAN MAG. (Oct. 5, 2018), <https://www.smithsonianmag.com/history/true-native-new-yorkers-can-never-truly-reclaim-their-homeland-180970472/>.

<sup>7</sup> *See id.*

history from the Dutch perspective, the Lenape sold their land on the island of Manhattan to the Dutch in 1626 for about \$24 in today's currency.<sup>8</sup> From the Native<sup>9</sup> perspective, it is much more likely that the Lenape never saw this transaction as a sale that would relinquish their land rights.<sup>10</sup> Instead, descendants of the Lenape contest that the Tribe viewed this "sale" as an exchange of gifts to share the land.<sup>11</sup> But from that point on, European colonizers callously forced the Lenape out of their land and pushed them further and further west, leaving a miniscule population of Lenape in their native New York City.<sup>12</sup> The rest of the Native American Tribes throughout New York followed a similar story.<sup>13</sup> Today, there are only eight federally recognized Tribal Nations present in New York State.<sup>14</sup> The territory owned by these Tribes makes up a very small portion

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<sup>8</sup> Jenna Kunze, *Native New York: Dispelling the Myth of the Sale of Manhattan & More*, NATIVE NEWS ONLINE. (Dec. 8, 2021), <https://nativenewsonline.net/arts-entertainment/native-new-york-no-manhattan-wasn-t-sold-to-the-dutch-for-24-worth-of-trinkets-and-beads>.

<sup>9</sup> Throughout this note, the terms Indigenous, Native, and Native American will all be used. All are acceptable and considered interchangeable terminology, as are the terms Tribe and Nation. While the best term is always what an individual person or community uses to describe themselves, for the purposes of this note, the author has chosen to follow the terminology choice of the cited source when possible. See National Museum of the American Indian, *The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?*, SMITHSONIAN INSTITUTION, <https://americanindian.si.edu/nk360/informational/impact-words-tips> (last visited Aug. 24, 2023); see also National Museum of the American Indian, *Teaching & Learning About Native Americans*, SMITHSONIAN INSTITUTION, <https://americanindian.si.edu/nk360/faq/did-you-know> (last visited Aug. 24, 2023).

<sup>10</sup> Kunze, *supra* note 8.

<sup>11</sup> *Id.*

<sup>12</sup> See Connolly, *supra* note 6.

<sup>13</sup> Blauweiss, *supra* note 5.

<sup>14</sup> *Indian Affairs, Search Federally Recognized Tribes*, U.S. DEP'T OF THE INT., <https://www.bia.gov/service/tribal-leaders-directory/federally-recognized-tribes> (last visited Aug. 24, 2023) (search the term "New York" in order to learn about the federally recognized Tribal Nations of New York State).

of all the land in New York.<sup>15</sup> These Nations have been fighting and advocating to regain land rights across the state for hundreds of years, and the fight is ongoing.<sup>16</sup>

In June 2022, the United States government and the Onondaga Nation of New York State signed a historic agreement.<sup>17</sup> In this agreement, the federal government promised to return over 1,000 acres of ancestral land to the Onondaga Nation, making it one of the largest land returns to a Tribal Nation in history,<sup>18</sup> and the largest return in the state of New York.<sup>19</sup> While the Onondaga people see this return as a historic win, they also view this agreement as just one step in regaining their land rights in New York State.<sup>20</sup>

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<sup>15</sup> *Map of Indian Lands in the United States*, BUREAU OF INDIAN AFFS., [https://www.doi.gov/sites/doi.gov/files/uploads/12\\_bia\\_regions.pdf](https://www.doi.gov/sites/doi.gov/files/uploads/12_bia_regions.pdf) (last visited Aug. 24, 2023). In order to find the small specks of tribal land in New York on a general map of officially recognized tribal lands in the United States, it is necessary to zoom in on the state of New York. *Id.*

<sup>16</sup> See generally Sid Hill, *Why We Accepted a Thousand Acres of Land Back from New York State*, THE NATION (July 6, 2022), <https://www.thenation.com/article/environment/onondaga-land-new-york/>; CAYUGA NATION, <https://cayuganation-nsn.gov/index.html> (last visited Aug. 14, 2023); *Land Rights*, ONONDAGA NATION, <https://www.onondaganation.org/land-rights/> (last visited Aug. 14, 2023); Bruce Lambert, *Shinnecock Tribe Plans Suit, Claiming Land in Hamptons*, N.Y. TIMES (June 12, 2005), <https://www.nytimes.com/2005/06/12/nyregion/shinnecock-tribe-plans-suit-claiming-land-in-hamptons.html>.

<sup>17</sup> Press Release, *Secretary Haaland Applauds Return of Traditional Homelands to Onondaga Nation*, U.S. DEP'T. OF THE INTERIOR (June 29, 2022), <https://www.doi.gov/pressreleases/secretary-haaland-applauds-return-traditional-homelands-onondaga-nation>.

<sup>18</sup> *Id.* This land return came about through a settlement agreement from the Natural Resource Damage Assessment and Restoration Program (NRDAR) between the Natural Resource Trustees and Honeywell International, Inc. *Id.* Honeywell was ordered to transfer the title of land to the Onondaga Nation as part of their settlement for polluting Onondaga Lake. Glenn Coin, *1,000 Acres of Forest to Be Returned to Onondaga Nation in Historic Lake Cleanup Agreement*, SYRACUSE.COM (Aug. 4, 2022, 12:10 PM), <https://www.syracuse.com/news/2022/06/1000-acres-to-return-to-onondaga-nation-in-historic-lake-cleanup-agreement.html>.

<sup>19</sup> Hill, *supra* note 16.

<sup>20</sup> *Id.*

A major land return such as the Onondaga's exemplifies just one success of the Land Back movement. At its core, the goal of Land Back is to regain land rights and re-establish the sovereignty of the Tribal Nations.<sup>21</sup> The Land Back movement has gained momentum in name within the last decade, but the idea behind the movement has existed for generations.<sup>22</sup> “#LandBack” began trending as a hashtag across social media platforms in 2016 during the Standing Rock protests against the North Dakota Access Pipeline on the Sioux Reservation.<sup>23</sup> This hashtag helped bring attention to the movement itself, as well as the challenges faced by Indigenous communities.<sup>24</sup> The term “Land Back” continued to spread, next becoming a rallying cry during the July 2020 protests at Mount Rushmore.<sup>25</sup> Soon after these protests, an Indigenous rights

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<sup>21</sup> Ruth Hopkins, *What Is the Land Back Movement? A Call for Native Sovereignty and Reclamation*, TEEN VOGUE (Oct. 12, 2021), <https://www.teenvogue.com/story/what-is-the-land-back-movement>.

<sup>22</sup> *Id.*; *Campaigns*, NDN COLLECTIVE, <https://ndncollective.org/campaigns/> (last visited Aug. 14, 2023).

<sup>23</sup> Cheyenne Bearfoot, *Land Back: The Indigenous Fight to Reclaim Stolen Lands*, KQED (Apr. 21, 2022), <https://www.kqed.org/education/535779/land-back-the-indigenous-fight-to-reclaim-stolen-lands>. These protests sought to put a stop to the plans to build the Dakota Access Pipeline route under the Missouri River, which would threaten the main water source for the Standing Rock Sioux tribe's reservation as well as disrupt and destroy sacred tribal sites. Rebecca Hersher, *Key Moments in The Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017, 4:28 PM), <https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight>.

<sup>24</sup> Bearfoot, *supra* note 24.

<sup>25</sup> *Id.* In 2020, Donald Trump planned a Fourth of July rally at Mount Rushmore with an elaborate fireworks display. Juliet Eilperin, Darryl Fears & Teo Armus, *Rocket's Red Glare and Protests: Trump's Mount Rushmore Fireworks Anger Tribes*, THE WASH. POST (July 2, 2020, 11:43 AM), <https://www.washingtonpost.com/climate-environment/2020/07/02/mount-rushmore-protest-sioux-trump/>. Tribal leaders in South Dakota objected to the event because of the damage that could be caused to the sacred Black Hills land on which Mount Rushmore sits. *Id.* The day of the event, protests broke out, blocking the road to Mount Rushmore, before being shut down by the National Guard. Ashley Collman, *Native American Protesters Blocked the Road Leading Up to Mount Rushmore and Faced off with the National Guard in the Hours*

organization known as the NDN Collective created a formal campaign centered around the “Land Back” slogan.<sup>26</sup> The momentum continues to grow, and the movement has even been given exposure in Hulu and FX’s hit television series *Reservation Dogs*.<sup>27</sup>

While the priority of Land Back is to regain land rights, the movement also seeks climate justice, cultural preservation, and liberation from white supremacy.<sup>28</sup> The injustices done to Tribal Nations and their people for centuries by the United States government calls for reparations in the form of land rights.<sup>29</sup> As Sid Hill, *Tadodaho* (chief) of the Onondaga, describes it, the recent return of the 1,000 acres in New York “begins to redress the unjust dispossession of the Onondaga Nation from their ancestral lands.”<sup>30</sup> Further, Indigenous land ownership is vital in the fight to combat

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*Before Trump’s Fiery Speech*, BUS. INSIDER (July 4, 2020, 5:22 AM), <https://www.businessinsider.com/native-americans-blocked-road-to-mount-rushmore-before-trump-speech-2020-7>.

<sup>26</sup> Bearfoot, *supra* note 24. The NDN Collective is an indigenous led organization that seeks to build and defend Indigenous rights and power. See NDN COLLECTIVE, <https://ndncollective.org/campaigns/> (last visited Aug. 14, 2023).

<sup>27</sup> Hopkins, *supra* note 21. *Reservation Dogs* is a scripted television series which follows the lives of four Indigenous teens who live on a reservation in Oklahoma. In the opening scene of episode three in season one, the show depicts a white couple driving by a “Welcome to Oklahoma” sign with the words “Land Back” graffitied across. The white couple then gets into a discussion about their understanding of what “Land Back” means, which the show uses satirically to emphasize white Americans’ narrow understanding of Indigenous land rights. See *Reservation Dogs*, *Uncle Brownie* (FX television broadcast Aug. 6, 2021). See also Kali Simmons, *Reservation Dogs Recap: Creator’s Medicine (Buds, Beer, and Backstrap)*, VULTURE (Aug. 16, 2021), <https://www.vulture.com/article/reservation-dogs-recap-season-1-episode-3-uncle-brownie.html>.

<sup>28</sup> Cheyenne Bearfoot, *Land Back: The Indigenous Fight to Reclaim Stolen Lands*, KQED (Apr. 21, 2022), <https://www.kqed.org/education/535779/land-back-the-indigenous-fight-to-reclaim-stolen-lands>.

<sup>29</sup> *Id.*

<sup>30</sup> Hill, *supra* note 16.

climate change.<sup>31</sup> In 2019, the United Nations' Global Assessment on Biodiversity and Ecosystem Services published a report which found that negative environmental impacts were either not as severe, or avoided entirely, in places that were owned or managed by Indigenous communities.<sup>32</sup> For the Onondaga people, their Land Back victory in the Onondaga Creek area will allow them to apply their ecological expertise to the land and water.<sup>33</sup> Their stewardship in caring for the land in this region is rooted in tradition, and will allow the environment to be restored and preserved after suffering from years of pollution by industrial waste.<sup>34</sup>

The idea of Land Back should be as simple as the term itself. The United States should return the tens of millions of acres of land that it stole from the Indigenous People of North America.<sup>35</sup> Of course, the solution is not that simple. There are 1.9 billion acres in the United States,<sup>36</sup> nearly all of which can already be accounted for, owned either privately or by the government.<sup>37</sup> There is no clear-cut solution to regaining land rights, and Tribal Nations have used different methods to reclaim their land.<sup>38</sup>

One method that Tribal Nations could use in their fight to regain land rights is eminent domain. Eminent domain is a legal method of land acquisition which allows the government to take control over

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<sup>31</sup> Bearfoot, *supra* note 25.

<sup>32</sup> *Stewarding Native Lands*, FIRST NATIONS DEVELOPMENT INSTITUTE, <https://www.firstnations.org/our-programs/stewarding-native-lands/> (last visited Aug. 14, 2023).

<sup>33</sup> Hill, *supra* note 16.

<sup>34</sup> *Id.*

<sup>35</sup> See Kira Kay and Jason Maloney, *Why Native Americans Are Buying Back Land that Was Stolen from Them*, PBS (Oct. 16, 2021, 4:13 PM), <https://www.pbs.org/newshour/show/why-native-americans-are-buying-back-land-that-was-stolen-from-them>.

<sup>36</sup> See generally Dave Merrill and Lauren Leatherby, *Here's How America Uses Its Land*, BLOOMBERG (July 31, 2018), <https://www.bloomberg.com/graphics/2018-us-land-use/?leadSource=uverify%20wall>.

<sup>37</sup> See *id.*

<sup>38</sup> See Hopkins, *supra* note 21.



private land by forcing the owners to sell it.<sup>39</sup> An exercise of eminent domain often results in the government selling the newly acquired private land to another private entity,<sup>40</sup> so the government could use eminent domain to acquire privately owned land and transfer that land to Tribal Nations.

This Note examines how the Tribal Nations of New York State have been stripped of their land rights over the past 400 years, why it is necessary and important to re-establish those land rights, and the ways in which Tribal Nations can win their land rights back. Part I of this Note scrutinizes the history of the Tribal Nations in New York State and how the law has deprived these Nations of their land and property rights for hundreds of years. Part II discusses the reasons why returning stolen land to Tribal Nations is a necessary action that must be taken, both for the fight against climate change and for reparations. Part III will explore the methods that are currently being used to return land to Tribal Nations. Finally, Part IV proposes an amendment to New York State Eminent Domain Procedure Law to empower Tribal Nations to utilize a government taking of private land in order to return that land to their communities. New York State should amend its Eminent Domain Procedure Law to include a definition that allows takings to be exercised for the purposes of returning land title to Tribal Nations to right the wrongs of the past and to bolster the state's fight against the climate crisis.

## I. HISTORY OF INDIGENOUS LAND RIGHTS & NEW YORK STATE TRIBAL NATIONS

### *A. History of the United States Policy Towards Indigenous Land Rights*

To understand the modern land rights of Tribal Nations and Indigenous people, it is important to examine the history of the

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<sup>39</sup> See Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 53 (2005).

<sup>40</sup> See *id.* at 54–55.

relationship between the United States and Native Americans in the context of sovereignty and land title.

The United States government derived its historical policy decisions towards Native Americans and Tribal Nations under the Indian Trust Doctrine.<sup>41</sup> In the early years of the United States, the Indian Trust Doctrine was created by Chief Justice John Marshall over three Supreme Court cases involving both individual Native Americans and whole Tribal Nations, referred to collectively as the Marshall Trilogy.<sup>42</sup> The first case in which Chief Justice Marshall began to spell out the relationship between the United States and Native Americans was *Johnson v. M'Intosh*.<sup>43</sup> This case established the doctrine of discovery as it relates to land title and rights for Native Americans.<sup>44</sup> In a title dispute between Johnson, who had purchased land from a Native American Tribe before the Revolutionary War, and McIntosh, who was granted title to the same land from the United States government, the Supreme Court ruled in favor of McIntosh, stating that the land title of the United States was supreme to any land title of, or granted by, a Tribal Nation.<sup>45</sup> The Court explained that under the idea of discovery, any land that had been discovered and conquered by European explorers was exclusive to those settlers, meaning that the United States possessed the ultimate right to all land within the U.S., regardless of Native American occupancy on such land.<sup>46</sup>

In the second case of the Marshall Trilogy, *Cherokee Nation v. State of Georgia*, when a Cherokee Chief filed a lawsuit against the State of Georgia to protect the Cherokee Nation's land, the Court denied the Nation's injunction, claiming that it was not up to Native

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<sup>41</sup> See Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 274 (2003).

<sup>42</sup> *Marshall Trilogy*, UNIV. OF ALASKA FAIRBANKS, <https://uaf.edu/tribal/academics/112/unit-1/marshalltrilogy.php> (last visited Aug. 17, 2023).

<sup>43</sup> See *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

<sup>44</sup> See *id.* at 573, 587.

<sup>45</sup> See *id.* at 560–61, 586, 604.

<sup>46</sup> See *id.* at 473.

Americans to protect their land, but instead it was up to the United States government.<sup>47</sup> In his opinion, Chief Justice Marshall described the relationship between the United States and Native Americans as one like “a ward to his guardian.”<sup>48</sup> He believed Native Americans should look to the government of the United States for support, the way a child would from their caretaker,<sup>49</sup> infantilizing Native Americans and building upon the idea of discovery to strip away Native autonomy to decide which land was rightfully theirs. From this case, the federal government decided it had a trust responsibility to Native Americans, meaning that Native Americans should be in the government’s care, or “protected” by the government.<sup>50</sup> In reality, this was not so much an exercise of care as it was total control.

In the final case of this trilogy, *Worcester v. State of Georgia*, a missionary was imprisoned for breaking a Georgia state law, even though he was in Cherokee territory.<sup>51</sup> In what seems contradictory to the holdings of the first two cases, here the Court held that the Georgia laws did not apply on Cherokee land because the Cherokee were a sovereign nation.<sup>52</sup> This established the sovereignty of Tribal Nations<sup>53</sup>, but only on land that the United States government designated as such.<sup>54</sup> This decision came with another caveat: Tribal

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<sup>47</sup> See generally *Cherokee Nation v. State of Ga.*, 30 U.S. 1 (1831).

<sup>48</sup> *Id.* at 17.

<sup>49</sup> *Id.*

<sup>50</sup> See *id.* at 15, 17. This is the case that established the Indian Trust Doctrine. Christopher J. Allen, *What is the Federal Indian Trust Responsibility?*, U.S. DEP’T OF THE INT. (Nov. 8, 2017 10:13 PM), <https://www.bia.gov/faqs/what-federal-indian-trust-responsibility>.

<sup>51</sup> See *Worcester v. State of Ga.*, 31 U.S. 515 (1832).

<sup>52</sup> See *id.*

<sup>53</sup> The power of sovereignty gives Tribal Nations the right to govern their community, preserve their culture, and control their own economy. *Understanding Tribal Sovereignty*, FED. BAR ASS’N. (Mar. 1, 2017), <https://www.fedbar.org/blog/understanding-tribal-sovereignty/#:~:text=Tribal%20sovereignty%20includes%20the%20right,Indian%20nations%20still%20remains%20today>.

<sup>54</sup> See *id.*

sovereignty could be diminished by Congress.<sup>55</sup> Power ultimately remained with the United States government and not the Tribal Nations.<sup>56</sup>

Although one case in the Marshall Trilogy, *Cherokee Nation v. State of Georgia*, established the duty of the United States to care for Tribal Nations,<sup>57</sup> the United States has failed in this duty since the issuance of these decisions. In 1830, President Andrew Jackson signed the Indian Removal Act.<sup>58</sup> This Act was in direct conflict with the principles established by the Supreme Court at that time.<sup>59</sup> Instead of caring for Tribal Nations, the Indian Removal Act forcibly relocated thousands of Native Americans from their homes and sent them to Oklahoma on a deadly journey known as the Trail of Tears.<sup>60</sup> Over 4,000 Native Americans died on the Trail of Tears due to exposure, disease, and starvation, and the land they were forced to leave behind passed into the hands of white settlers.<sup>61</sup>

Just a few decades later in 1887, Congress passed the Dawes Act, causing devastating economic problems for Native land ownership, the effects of which are still felt today.<sup>62</sup> The Dawes Act set out to break up Native American reservations by parceling out millions of acres to individual Native Americans in smaller allotments. While the idea behind this practice was supposedly to protect Native American property rights, the goal of the United States government underneath the veil of these allotments was to

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<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *See generally* *Cherokee Nation v. State of Ga.*, 30 U.S. 1 (1831).

<sup>58</sup> *Andrew Jackson Signs the Indian Removal Act into Law*, HISTORY (Aug. 30, 2021), <https://www.history.com/this-day-in-history/indian-removal-act-signed-andrew-jackson>.

<sup>59</sup> *See* Christopher J. Allen, *What is the Federal Indian Trust Responsibility?*, U.S. DEP'T OF THE INT. (Nov. 8, 2017 10:13 PM), <https://www.bia.gov/faqs/what-federal-indian-trust-responsibility>.

<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> Natural Resources Revenue Data, *Native American Ownership and Governance of Natural Resources*, U.S. DEP'T OF THE INTERIOR, <https://revenue.data.doi.gov/how-revenue-works/native-american-ownership-governance/> (last visited Aug. 17, 2023).

assimilate Native Americans into white culture.<sup>63</sup> The government wanted Native Americans to farm the land divided out in these allotments like the white settlers and ranchers of the American West,<sup>64</sup> but in reality, most of the land was unsuitable for farming, and Native Americans either did not want to or could not successfully tend the land.<sup>65</sup> The Dawes Act caused further issues for Native Americans, resulting in many of the individual Native American landowners losing their land title.<sup>66</sup> The economic constraints of taxes on the allotted land that was no longer held in a trust by the government often proved too burdensome for Native Americans,<sup>67</sup> and they would be forced to sell their title to non-Native landowners, for which they were often underpaid.<sup>68</sup> Any allotments that went unclaimed by individual Native Americans were considered surplus land, and the government sold this surplus land to white homesteaders.<sup>69</sup> The consequences of the Dawes Act saw a reduction in Tribal land ownership from 138 million acres to just 48 million acres over the course of less than fifty years.<sup>70</sup>

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<sup>63</sup> Milestone Documents, *Dawes Act (1887)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/dawes-act> (last visited Aug. 17, 2023).

<sup>64</sup> *The Dawes Act*, NPS, <https://www.nps.gov/articles/000/dawes-act.htm> (last visited Aug. 17, 2023).

<sup>65</sup> Milestone Documents, *Dawes Act (1887)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/dawes-act> (last visited Aug. 17, 2023).

<sup>66</sup> Natural Resources Revenue Data, *Native American Ownership and Governance of Natural Resources*, U.S. DEP'T OF THE INTERIOR, <https://revenue.data.doi.gov/how-revenue-works/native-american-ownership-governance/> (last visited Aug. 17, 2023).

<sup>67</sup> *Id.*

<sup>68</sup> *The Dawes Act*, NPS, <https://www.nps.gov/articles/000/dawes-act.htm> (last visited Aug. 17, 2023).

<sup>69</sup> Natural Resources Revenue Data, *Native American Ownership and Governance of Natural Resources*, U.S. DEP'T OF THE INTERIOR, <https://revenue.data.doi.gov/how-revenue-works/native-american-ownership-governance/> (last visited Aug. 17, 2023).

<sup>70</sup> *Id.*

In the twentieth century, the Dawes Act was replaced by the Indian Reorganization Act.<sup>71</sup> Signed in 1934, the Indian Reorganization Act was the first major legislation towards Indigenous land rights.<sup>72</sup> This act restored any remaining previously unallotted lands back to Tribal ownership and ended the previous practices from the Dawes Act.<sup>73</sup> At this time, the United States government also started supporting Tribal self-governance by encouraging Tribal Nations to adopt their own U.S.-style constitutions and governments.<sup>74</sup> The Indian Reorganization Act moved away from the previous policy of assimilation and instead promoted Native self-determination and preservation of culture.<sup>75</sup>

Today, there are two ways in which Tribal Nations hold land rights.<sup>76</sup> A Tribal Nation's territory is either a Trust land or a Fee land.<sup>77</sup> Trust land is land that is held in a trust by the United States, meaning the government holds the legal title to the land.<sup>78</sup> Fee land is land that has been purchased by Tribes, meaning that much like any individual or business who owns property, the Tribe holds the legal title to the land.<sup>79</sup> Most of the Tribal land in the United States is still held in a trust.<sup>80</sup> While the Dawes Act era exposed the risk of taking Tribal land out of federal trust and breaking up reservations,<sup>81</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See W. Roger Buffalohead, *The Indian New Deal: A Review Essay*, 48 MINN. HIS. 8 (1983), [https://www.jstor.org/stable/pdf/20178854.pdf?refreqid=excelsior%3Ab0bcd1141db0167cdc23e26ee4a4dcfc&ab\\_segments=&origin=&acceptTC=1](https://www.jstor.org/stable/pdf/20178854.pdf?refreqid=excelsior%3Ab0bcd1141db0167cdc23e26ee4a4dcfc&ab_segments=&origin=&acceptTC=1).

<sup>76</sup> Natural Resources Revenue Data, *Native American Ownership and Governance of Natural Resources*, U.S. DEP'T OF THE INTERIOR, <https://revenue.data.doi.gov/how-revenue-works/native-american-ownership-governance/> (last visited Aug. 17, 2023).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., NPS, *The Dawes Act*, <https://www.nps.gov/articles/000/dawes-act.htm> (last visited Aug. 17, 2023); Milestone Documents, *Dawes Act (1887)*,

today, individual Native Americans and Tribal Nations face economic challenges because of their lack of legal title on reservations.<sup>82</sup> For example, a Native American who lives on a reservation is unlikely to be able to build a home, because they cannot get a mortgage on land that is held in trust by the federal government.<sup>83</sup> Without the ability to buy, sell, or borrow against reservation land, Native Americans and Tribal Nations have a difficult time building equity.<sup>84</sup>

Throughout history and to the present day, the policies exercised by the United States surrounding Native American property rights have severely inhibited the power of Tribal Nations to exercise self-determination.<sup>85</sup> After centuries of these policies, today there are about 56 million acres of land across the United States that are held in trust for Native Americans.<sup>86</sup> This is out of the 1.9 billion acres of land that makes up the entirety of the United States.<sup>87</sup>

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NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/dawes-act> (last visited Aug. 17, 2023); Natural Resources Revenue Data, *Native American Ownership and Governance of Natural Resources*, U.S. DEP'T OF THE INTERIOR, <https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance/> (last visited Aug. 17, 2023).

<sup>82</sup> Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, THE ATLANTIC (July 30, 2016), <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See Jessica A. Shoemaker, *Transforming Property: Reclaiming Indigenous Land Tenures*, 107 CALIF. L. REV. 1531 (Oct. 2019).

<sup>86</sup> Natural Resources Revenue Data, *supra* note 85.

<sup>87</sup> Merrill, *supra* note 37.

*B. The Tribal Nations of New York State & Their Fight for  
Land Rights*

In New York State, there are eight federally recognized Tribal Nations.<sup>88</sup> New York is approximately 30.2 million acres large.<sup>89</sup> For perspective, just one of the Seneca Nation's territories is only 21,618 acres,<sup>90</sup> which amounts to about 0.07% of land in the entire state. Comparatively, the Shinnecock Nation, located in Southampton, Long Island, owns just a 1.5 square mile tract of land along the south shore Atlantic bay<sup>91</sup> for its approximately 1,500 members.<sup>92</sup>

Six of the federally recognized Tribal Nations in the State of New York are members of the Haudenosaunee alliance of Native

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<sup>88</sup> The eight recognized tribes are Cayuga Nation, Oneida Indian Nation, Onondaga Nation, Saint Regis Mohawk Tribe, Seneca Nation of Indians, Tonawanda Band of Seneca, Shinnecock Indian Nation, and Tuscarora Nation. *Indian Affairs, Search Federally Recognized Tribes*, U.S. DEP'T OF THE INT., <https://www.bia.gov/service/tribal-leaders-directory/federally-recognized-tribes> (last visited Aug. 24, 2023).

<sup>89</sup> Taken in its entirety, New York State is 61% forested land, accounting for about 18.6 million acres. Department of Environmental Conservation, *Forests*, N.Y. STATE, <https://www.dec.ny.gov/lands/309.html> (last visited Aug. 17, 2023). This means that millions of acres of forest land are technically available to be transferred back to Tribal Nations across the state, making it a good place to start for returning land to the Tribal Nations of New York. *Id.*

<sup>90</sup> *About the Seneca Nation*, SENECA NATION OF INDIANS, <https://sni.org/about#> (last visited Aug. 17, 2023).

<sup>91</sup> Somini Sengupta & Shola Lawal, *The Original Long Islanders Fight to Save Their Land from a Rising Sea*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2020/03/05/climate/shinnecock-long-island-climate.html>. For perspective, Long Island in total is about 1,400 square miles, stretching 120 miles long and 23 miles wide. New York Water Science Center, *Long Island – Location and Physical Setting*, U.S. GEOLOGICAL SURVEY (June 8, 2017), <https://www.usgs.gov/centers/new-york-water-science-center/science/long-island-location-and-physical-setting#:~:text=The%20total%20length%20of%20Long,is%20about%201%2C400%20square%20miles>.

<sup>92</sup> SHINNECOCK INDIAN NATION, <https://www.shinnecock-nsn.gov/> (last visited Aug. 17, 2023).



Nations.<sup>93</sup> In 1794, the newly formed United States of America signed the Treaty of Canandaigua with the Haudenosaunee Confederacy, which affirmed the six nations' sovereignty and land rights.<sup>94</sup> However, shortly after the Treaty was signed, the state of New York ignored it, taking land from the six nations until they were left with the small amount they now own today.<sup>95</sup> According at least to the Cayuga Nation, this treaty is still technically in full effect.<sup>96</sup>

The Tribal Nations of New York, like all of the Indigenous people of North America, have been fighting to regain their land rights since the first colonizers arrived on their land.<sup>97</sup> These fights continued well into the twentieth century, when Tribal Nations in New York began bringing lawsuits against the government to prevent even more land from being stripped away.<sup>98</sup> None of the lawsuits were successful for Tribal Nations.<sup>99</sup> One of the more egregious modern examples of the fight to prevent land being taken away was the 1936 Congressional authorization of the building of the Kinzua Dam.<sup>100</sup> With this authorization, the Army Corps of

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<sup>93</sup> CAYUGA NATION, <https://cayuganation-nsn.gov/index.html> (last visited Aug. 14, 2023).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See *Campaigns*, NDN COLLECTIVE, <https://ndncollective.org/campaigns/> (last visited Aug. 14, 2023). See also Tenzin Shakya & Anthony Rivas, *To Native Americans, Reparations Can Vary from Having Sovereignty to Just Being Heard*, ABC NEWS (Sept. 25, 2020 4:15 PM), <https://abcnews.go.com/US/native-americans-reparations-vary-sovereignty-heard/story?id=73178740>.

<sup>98</sup> See, e.g., *United States v. 21,250 Acres of Land, More or Less, Situated in Cattaraugus Cnty.*, 161 F. Supp. 376 (W.D.N.Y. 1957); *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *Seneca Nation of Indians v. United States*, 338 F.2d 55 (2d Cir. 1964).

<sup>99</sup> See *21,250 Acres of Land, More or Less, Situated in Cattaraugus Cnty.*, 161 F. Supp. at 376; *Fed. Power Comm'n*, 362 U.S. at 99; *Seneca Nation of Indians*, 338 F.2d at 55.

<sup>100</sup> Maria Diaz-Gonzalez, *The Complicated History of the Kinzua Dam and How It Changed Life for the Seneca People*, ENV'T HEALTH NEWS (Jan. 30, 2020), <https://www.ehn.org/seneca-nation-kinzua-dam-2644943791.html>.

Engineers planned to seize Seneca land to build flood control solutions for the Ohio River Basin.<sup>101</sup> When the Seneca people knew their land was at risk, they hired a civil engineer to explore alternative flood control solutions that would not deprive the Seneca people of their land.<sup>102</sup> For years the Seneca argued before Congress that the Kinzua Dam was not an optimal solution to the flooding issue.<sup>103</sup> But eventually, Congress determined that the solution presented by the Seneca Nation was too expensive, and proceeded to move forward with their plans for the Kinzua Dam anyway.<sup>104</sup> After the title had been transferred over to the government and the Seneca people fled their land, the Army Corps burned the Seneca homes to the ground in order to clear way for the dam construction.<sup>105</sup>

In the 21<sup>st</sup> century, Tribal Nations across New York again began filing lawsuits in the hopes to win back land that had been forcibly stripped away over centuries.<sup>106</sup> In the 2010 court case *Oneida Indian Nation of New York v. County of Oneida*, the Oneida Tribal Nation sued for the return of 250,000 acres of ancestral land of which they had been unjustly deprived nearly 200 years prior.<sup>107</sup> This case came to the Second Circuit after being originally brought in the 1970s in the Northern District of New York.<sup>108</sup> The Second Circuit examined two previous related cases, *Cayuga Indian Nation*

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See, e.g., *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005); *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *Oneida Indian Nation of New York v. Cnty. of Oneida*, 617 F.3d 114 (2d Cir. 2010); *Canadian St. Regis Band of Mohawk Indians v. New York*, No. 5:82-CV-0783, 2013 WL 3992830 (N.D.N.Y. July 23, 2013); *Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369 (2013), *aff'd in part, vacated in part, remanded*, 782 F.3d 1345 (Fed. Cir. 2015).

<sup>107</sup> See *Oneida Indian Nation of New York v. Cnty. of Oneida*, 617 F.3d 114, 117 (2d Cir. 2010).

<sup>108</sup> *Id.* at 116.

of *N.Y. v. Pataki*, and *City of Sherrill*, *N.Y. v. Oneida Indian Nation of New York*.<sup>109</sup> Following the binding precedent in *Cayuga*, the Second Circuit determined that the claims for relief which the Oneida Nation sought would be “too disruptive.” It held that because the Oneida sought a massive land return that for hundreds of years had been occupied, owned, and operated by both New York State and private owners, the Court would not “inflict injustices” on the current landowners as a means to remedy the injustices suffered by the Oneida Nation in the past.<sup>110</sup>

These lawsuits and stories are just a few examples of the legal battles and land rights struggles that have plagued Tribal Nations for hundreds of years. This Note only scratches the surface of the historical context, but nevertheless underscores how time and time again, the United States government, the New York State government, and the citizens of this country have downright dismissed the claims of Indigenous people and actively worked against the Land Back movement.

## II. REASONS TO RETURN LAND TO TRIBAL NATIONS

There does not need to be a reason to return land to Tribal Nations, outside of the reason that the land was ruthlessly and unequivocally stolen, and should therefore be returned. However, there are both moral and practical reasons why it would be in the best interest of the government and private citizens to be a part of the Land Back movement and work towards reestablishing the land rights of Tribal Nations.

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<sup>109</sup> *See id.*

<sup>110</sup> *See id.* at 130; *see also City of Sherrill, N.Y.*, 544 U.S. at 200; *Cayuga Indian Nation of N.Y.*, 413 F.3d at 274.

### A. Climate Change & Indigenous Stewardship

Climate change poses the greatest threat to planet Earth and human existence.<sup>111</sup> The climate crisis has already begun to wreak havoc on the environment and on communities around the world.<sup>112</sup> The world will have to grapple with millions of climate refugees in the years to come;<sup>113</sup> millions of species are already under threat of extinction;<sup>114</sup> and entire ecosystems are already changing due to rising temperatures.<sup>115</sup> There is no one-size-fits-all method to mitigate and reverse the damage that has already been done by climate change.<sup>116</sup>

Indigenous land management is one solution in the toolkit to combat the climate crisis.<sup>117</sup> A recent study has shown that when land is managed by Indigenous peoples, the biodiversity in the environment is equal to the biodiversity of federally protected

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<sup>111</sup> Press Release, United Nations Human Rights Office of the High Commissioner, Climate change the greatest threat the world has ever faced, UN expert warns (Oct. 21, 2022).

<sup>112</sup> *Id.*

<sup>113</sup> Abrahm Lustgarten, *How Climate Migration Will Reshape America*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/09/15/magazine/climate-crisis-migration-america.html> (last visited Aug. 18, 2023).

<sup>114</sup> See Somini Sengupta, Catrin Einhorn & Manuela Andreoni, *There's a Global Plan to Conserve Nature. Indigenous People Could Lead the Way.*, N.Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2021/03/11/climate/nature-conservation-30-percent.html>.

<sup>115</sup> Benji Jones, *5 Signs of How Climate Change Is Unraveling Earth's Ecosystems*, VOX (Mar. 1, 2022, 9:30 AM), <https://www.vox.com/down-to-earth/2022/3/1/22954531/climate-change-ipcc-wildlife-extinction>.

<sup>116</sup> See *Responding to Climate Change*, NASA (Nov. 30, 2023), <https://climate.nasa.gov/solutions/adaptation-mitigation/>; see also Jeff Turrentine, *What Are the Solutions to Climate Change?*, NRDC (Dec. 13, 2022), <https://www.nrdc.org/stories/what-are-solutions-climate-change#fossil-fuels>.

<sup>117</sup> Jim Robbins, *How Returning Lands to Native Tribes Is Helping Protect Nature*, YALE ENV'T 360 (June 3, 2021), <https://e360.yale.edu/features/how-returning-lands-to-native-tribes-is-helping-protect-nature>.

areas.<sup>118</sup> Additionally, other scientific studies have shown that overall, nature is healthier in the areas that are managed by Indigenous populations.<sup>119</sup> This is due to the ways Indigenous communities tend their land.<sup>120</sup> Indigenous practices and the Indigenous relationship to nature includes living in harmony with the environment and taking very little from it, which allows plants, animals, and natural resources to not only survive, but also thrive.<sup>121</sup> Another report shows that Indigenous resistance to twenty-one different fossil fuel projects in North America has accounted for the prevention of or delay of pollution equal to 25% of annual greenhouse gas pollution, meaning that the protests and resistance to such projects have been effective at reducing or slowing fossil fuel pollution.<sup>122</sup> Indigenous activism and protests have been successful in thwarting these projects that would have caused more damage and harm to the environment.<sup>123</sup>

In New York State, one Indigenous community that has combatted climate change is the Shinnecock Nation of Long Island.<sup>124</sup> The Shinnecock take the approach that humans must

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<sup>118</sup> Richard Schuster et al., *Vertebrate Biodiversity on Indigenous-Managed Lands in Australia, Brazil, and Canada Equals that in Protected Areas*, 101 ENV'T SCI. & POL'Y 1 (2019). Areas of nature and wilderness that are federally protected are done so with the goal of preserving biodiversity. Federally protected areas are specifically managed to achieve this goal. Land outside of these areas that do not have federal protection suffer from a severe loss of biodiversity and many species are at risk. See Catrin Einhorn & Nadja Popovich, *This Map Shows Where Biodiversity Is Most at Risk in America*, N.Y. TIMES (Mar. 3, 2022), <https://www.nytimes.com/interactive/2022/03/03/climate/biodiversity-map.html>.

<sup>119</sup> Sengupta, *supra* note 113.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Adam Mohoney, *Study: Indigenous Resistance Has Staved off 25% of U.S. and Canada's Annual Emissions*, GRIST (Sept. 10, 2021), <https://grist.org/protest/indigenous-resistance-has-cut-u-s-and-canadas-annual-emissions/>.

<sup>123</sup> *Id.*

<sup>124</sup> Sengupta & Lawal, *supra* note 90.

“work with [nature]” rather than fight against it.<sup>125</sup> They use nature-based solutions in order to mitigate the effects of climate change that are threatening their land.<sup>126</sup> By planting sea grasses and laying oyster shells in the water, for example, they are able to calm the waves in the bay on the South Shore of Long Island.<sup>127</sup> This regenerative practice helps to stave off erosion of their shores, which has become more of a threat in recent years due to rising sea levels and extreme weather such as hurricanes and tropical storms.<sup>128</sup>

Caring for the environment also has a deeper meaning for Indigenous communities, for whom nature is an important part of their spirituality and culture.<sup>129</sup> The return of the land in the Onondaga Creek to the Onondaga Nation is so much more than a return of the waters and forests.<sup>130</sup> For the Onondaga, this land represents a “cultural linchpin of [their] very existence,” where Tribal history tells the story of how “the Great Peacemaker brought together five warring nations” 1,000 years ago.<sup>131</sup> Like the Onondaga, other Indigenous communities share a deep emotional and spiritual attachment to place.<sup>132</sup> In her book *Braiding Sweetgrass*, Robin Wall Kimmerer describes the relationship between Indigenous people and land, and how protecting nature is connected to spirituality.<sup>133</sup> She explains that Indigenous people

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Isvett Verde, *The Guardians of the Future*, N.Y. TIMES (Oct. 1, 2022), <https://www.nytimes.com/2022/10/01/opinion/climate-change-indigenous-activists.html>.

<sup>130</sup> Hill, *supra* note 16.

<sup>131</sup> *Id.*

<sup>132</sup> See Emma Newburger, *How a Native American Tribe on Long Island Is Losing Its Land to Rising Seas*, CNBC (Dec. 5, 2021, 9:55 AM), <https://www.cnbc.com/2021/12/05/long-island-native-american-tribe-is-losing-land-to-rising-seas-.html>.

<sup>133</sup> Kimmerer, *supra* note 1.

“need acts of restoration, not only for polluted waters and degraded lands, but also for our relationship to the world.”<sup>134</sup>

### *B. Reparations*

“Reparations are measures that seek to rectify a heinous injustice with an acknowledgment and an apology.”<sup>135</sup> Tangibly, reparations are a form of compensation.<sup>136</sup> The idea of reparations has become more present in the public consciousness in recent years, and discussions of reparations has become more common.<sup>137</sup> Reparations take a variety of forms that go beyond demanding territory to be returned. “[R]eturning resources, buildings, and smaller swaths of land” also contribute.<sup>138</sup> For example, in 2022, a county in Southern California gave back land to the descendants of a Black family who had purchased the land in 1912 and had it taken away from them wrongfully by the county in the 1920s.<sup>139</sup>

While much of the recent conversation around reparations is focused on Black Americans,<sup>140</sup> Indigenous activists point out that Native Americans need to be a part of the conversation as well if the United States truly wants to right the wrongs of its past.<sup>141</sup> The key

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<sup>134</sup> *Id.*

<sup>135</sup> Adeel Hassan, *Where Reparations Stand in the U.S.*, N.Y. TIMES (July 1, 2023), <https://www.nytimes.com/2023/07/01/us/black-americans-reparations.html>.

<sup>136</sup> *See id.*

<sup>137</sup> *#LandBack is Climate Justice*, LAKOTA PEOPLE’S L. PROJECT (Aug. 14, 2020), <https://lakotalaw.org/news/2020-08-14/land-back-climate-justice>.

<sup>138</sup> *Id.*

<sup>139</sup> Jesus Jiménez, *Los Angeles County Votes to Return Beach Seized in 1924 From a Black Family*, N.Y. TIMES (June 28, 2022), <https://www.nytimes.com/2022/06/28/us/bruces-beach-black-descendants.html>. The county had used eminent domain to condemn and take the land in the first place. *Id.*

<sup>140</sup> *See* Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

<sup>141</sup> LAKOTA PEOPLE’S L. PROJECT, *supra* note 135.

difference is that many Native Americans argue that their reparations should be made in the form of land, and not money.<sup>142</sup>

There has been one large-scale attempt at monetary reparations for Native Americans, but it was largely unsuccessful.<sup>143</sup> After World War II, President Harry Truman signed a bill that established the Indian Claims Commission.<sup>144</sup> The Commission was created as an attempt to provide reparations to the Native American population by compensating Tribes for the land that had been taken from them by the United States.<sup>145</sup> The Commission struggled to adequately compensate Tribes, mainly due to a lack of land title records and an inability by white government leaders to place a sufficient value on land that was sacred to Tribal Nations.<sup>146</sup> By the time the Commission dissolved in the late 70s, it had paid out approximately \$1.3 billion, which amounted to less than \$1,000 per individual Native American, making it an insignificant attempt.<sup>147</sup>

In 1980, the nine Tribes of the Great Sioux Nation were awarded \$102 million in compensation for the wrongful taking of their land in the Black Hills of South Dakota.<sup>148</sup> The Sioux refused to collect the funds, and as of 2011 the trust had grown to over \$1 billion.<sup>149</sup>

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<sup>142</sup> Daniel R. Wildcat, *Why Native Americans Don't Want Reparations*, THE WASH. POST (June 4, 2014, 10:00 AM), <https://www.washingtonpost.com/posteverything/wp/2014/06/10/why-native-americans-dont-want-reparations/>.

<sup>143</sup> Adeel Hassan & Jack Healy, *America Has Tried Reparations Before. Here Is How It Went.*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/us/reparations-slavery.html>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> The payout was not even a direct payout, as the government followed the same “protective” approach that had been infantilizing Native Americans since the Marshall Trilogy. The compensation was put into trust accounts that couldn’t be directly controlled by Native Americans. *Id.*

<sup>148</sup> Tom LeGro, *Why the Sioux Are Refusing \$1.3 Billion*, PBS (Aug. 24, 2011, 3:57 PM), [https://www.pbs.org/newshour/arts/north\\_america-july-dec11-blackhills\\_08-23](https://www.pbs.org/newshour/arts/north_america-july-dec11-blackhills_08-23).

<sup>149</sup> *Id.*



The Sioux continue to refuse the money.<sup>150</sup> For these Tribes, it is their land that they want.<sup>151</sup> The Black Hills are not only resource-rich, but they also hold deep spiritual value for the Tribal Nations.<sup>152</sup> Much like the failed payouts of the Indian Claims Commission, even if the Sioux did cash out and the money was distributed across the members of the nine Tribes, the money would be insignificant on an individual basis.<sup>153</sup> It would not make a permanent financial difference in the lives of Tribal Members, and it would concede the land to the federal government once and for all.<sup>154</sup>

Reparations in the form of land rights would be much more significant to Tribal Nations because it is more effective in addressing the harm done to Indigenous people by the forced removal from their land.<sup>155</sup> Many Indigenous people believe that you cannot put a price on land that is sacred to Tribal Nations.<sup>156</sup> Monetary compensation has proved to be ineffective at combating the poverty faced by so many Indigenous people and is unlikely to make a real difference in the lives of Tribal members the way land return could.<sup>157</sup> For Indigenous people, justice should come in the restoration of land, not money.<sup>158</sup>

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<sup>150</sup> Lori Walsh & Chris Laughery, *United States v. Sioux Nation of Indians: The Supreme Court Case to Buy the Black Hills*, S.D. PUB. BROAD. (May 12, 2022, 3:48 PM), <https://listen.sdpb.org/arts-life/2022-05-12/united-states-v-sioux-nation-of-indians-the-supreme-court-case-to-buy-the-black-hills>.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* See also Hassan & Healy, *supra* note 141.

<sup>154</sup> LeGro, *supra* note 146.

<sup>155</sup> Wildcat, *supra* note 140.

<sup>156</sup> See e.g., Wildcat, *supra* note 140; LeGro, *supra* note 146.

<sup>157</sup> See Wildcat, *supra* note 140; LeGro, *supra* note 146.

<sup>158</sup> See Wildcat, *supra* note 140; LeGro, *supra* note 146.

## III. CURRENT LAND BACK STRATEGIES

As Land Back has gained momentum in recent years,<sup>159</sup> the movement has seen victories across the U.S.<sup>160</sup> These victories have focused primarily on public land and private land that has been put up for sale.<sup>161</sup> The strategies that have been employed in these victories are limited by the type of land that can be acquired, and these strategies lack the ability to help Tribal Nations acquire the rights to private land from unwilling sellers. While the current methods do have their merits and have seen some success, there are deficiencies and constraints to their effectiveness.

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<sup>159</sup> Hopkins, *supra* note 21.

<sup>160</sup> See e.g., Mario Koran, *Northern California Esselen Tribe Regains Ancestral Land After 250 Years*, THE GUARDIAN (July 28, 2020, 3:59 PM), <https://www.theguardian.com/us-news/2020/jul/28/northern-california-esselen-tribe-regains-land-250-years>; Isabella Grullón Paz, *Redwood Forest in California Is Returned to Native Tribes*, N.Y. TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/26/us/california-redwoods-native-american-conservation.html>; Alice Hutton, *Native American Tribe in Maine Buys Back Island Taken 160 Years Ago*, THE GUARDIAN (June 4, 2021, 4:00 AM), <https://www.theguardian.com/us-news/2021/jun/04/native-american-tribe-maine-buys-back-pine-island>; Shirley Sneve, *Tribes Reclaiming Lands 'Actually Happening'*, ICT NEWS (Jan. 15, 2021), <https://indiancountrytoday.com/news/tribes-reclaiming-lands-actually-happening>.

<sup>161</sup> See e.g., Mario Koran, *Northern California Esselen Tribe Regains Ancestral Land After 250 Years*, THE GUARDIAN (July 28, 2020, 3:59 PM), <https://www.theguardian.com/us-news/2020/jul/28/northern-california-esselen-tribe-regains-land-250-years>; Isabella Grullón Paz, *Redwood Forest in California Is Returned to Native Tribes*, N.Y. TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/26/us/california-redwoods-native-american-conservation.html>; Alice Hutton, *Native American Tribe in Maine Buys Back Island Taken 160 Years Ago*, THE GUARDIAN (June 4, 2021, 4:00 AM), <https://www.theguardian.com/us-news/2021/jun/04/native-american-tribe-maine-buys-back-pine-island>; Shirley Sneve, *Tribes Reclaiming Lands 'Actually Happening'*, ICT NEWS (Jan. 15, 2021), <https://indiancountrytoday.com/news/tribes-reclaiming-lands-actually-happening>.

*A. Government Action*

Just as the government has exercised its authority to take away land rights from Tribal Nations in the past, it can also exercise its power to give back land rights today. Government action can be exercised in many forms. Executive action can be taken, like in the 1981 decision of New York State to transfer over 795 acres of land to the Seneca Nation.<sup>162</sup> Of the land transferred, 750 acres had previously been part of Allegany State Park, a New York State park.<sup>163</sup> Additionally, legislation and administrative law can allow the government to allocate land to Native Americans.<sup>164</sup> One example of this is the National Forest Allotments statute.<sup>165</sup> This statute allows the Secretary of the Interior “to make allotments [of land] within national forests” to any Native American living on the land within the forest if they are not entitled to an allotment on an existing reservation, or if there is no reservation for their tribe at all.<sup>166</sup> Further government action can come in the form of funding Tribal Nations specifically to purchase land, like the Cobell Buy-Back Program.<sup>167</sup> This funding came from a settlement agreement from the United States for mismanaging Indian Trust funds.<sup>168</sup> The agreement allocated \$1.9 billion as part of a Trust Land Consolidation Fund so that Native Americans could buy back parcels of land that had been fractioned off and lost as a result of the

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<sup>162</sup> *New York State Gives 795 Acres to Indian Tribe*, N.Y. TIMES (Sept. 22, 1981), <https://www.nytimes.com/1981/09/22/nyregion/new-york-state-gives-795-acres-to-indian-tribe.html>.

<sup>163</sup> *Id.* “The 750 acres of parkland that were part of Allegany State Park . . . [were] replaced by the state through the purchase of private land nearby.” *Id.* This shows that the State has the power and the resources to purchase and transfer private land.

<sup>164</sup> *See* 25 U.S.C. § 337.

<sup>165</sup> *See* 25 U.S.C. § 337.

<sup>166</sup> *See id.*

<sup>167</sup> *See* Rebekah Martin, Comment, *Defending the Cobell Buy-Back Program*, 41 AM. INDIAN L. REV. 91, 91 (2016).

<sup>168</sup> *See id.*

Dawes Act.<sup>169</sup> Government action can also come in the form of a settlement agreement between the government and a private entity, as was the case in the Onondaga Creek return discussed in the Introduction and Part II(A).<sup>170</sup> There, the previous owner of the land was an industrial manufacturer called Honeywell, Inc., and they were ordered to return the land to the Onondaga Nation as part of a settlement agreement with the federal government for pollution.<sup>171</sup>

Another way that Tribal Nations can exercise some land rights in conjunction with government action is through collaborative management of federal lands, such as national parks.<sup>172</sup> While collaborative management does not constitute complete ownership, under co-management, Tribal Nations work hand in hand with the federal government to be stewards of the land and help care for the natural resources in federally protected areas.<sup>173</sup> Co-management is the current goal of the Land Back movement when it comes to the Black Hills area in South Dakota.<sup>174</sup> After years of trying other methods, the goal is now to work with the Department of the Interior to work and manage the land.<sup>175</sup>

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<sup>169</sup> See *id.* at 105; see also BrieAnn West, Comment, *Mediating Our Future: The Role of the Land Buy-Back Program in Rebuilding Confidence and Strengthening Trust Between Tribal Nations and the United States Government*, 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 481, 482, 498 (2015).

<sup>170</sup> Coin, *supra* note 18. Another example is a land return to an Indigenous community in California that came about as a result of a bankruptcy settlement. Jane Braxton Little, *Reclaimed homelands of Northern California tribes fulfill a prophecy of renewal*, CALMATTERS (Aug. 14, 2020), <https://calmatters.org/commentary/my-turn/2020/08/reclaimed-homelands-of-northern-california-tribes-fulfill-a-prophecy-of-renewal/>.

<sup>171</sup> Coin, *supra* note 18.

<sup>172</sup> See Kekek Jason Stark et al., *Re-Indigenizing Yellowstone*, 22 WYO. L. REV. 397, 448 (2022).

<sup>173</sup> *Id.*

<sup>174</sup> Claire Elise Thompson, *How the Indigenous Landback Movement Is Poised to Change Conservation*, GRIST (Jan. 13, 2022), <https://grist.org/fix/conservation/indigenous-landback-movement-poised-to-change-conservation/>.

<sup>175</sup> See *id.*

*B. Private Land Sales and Donations*

Another successful method in achieving land rights for Indigenous people has been with the help of Conservancies, Land Trusts, and other environmental non-profits that are helping Tribes purchase land.<sup>176</sup> These groups can raise funds through donations to either purchase land that is for sale on behalf of Tribal Nations, or they can offer grants through their funding directly to Tribal Nations to make the purchases of land that is for sale on their own.<sup>177</sup>

While it is also possible for private citizens to give away their land, such reparations are rare.<sup>178</sup> In one instance, a woman in Southern California donated the one-acre estate that she inherited from her family to the Tongva Tribe.<sup>179</sup> In another, a farmer in Nebraska signed over the deed to his land to the Tonca Tribe.<sup>180</sup> Stories like these are hard to find. Giving land back is a complex issue, since not all stolen land can be returned or replaced.<sup>181</sup> While land donation from individuals is an option, it is not realistically feasible for the average American, whose income across age brackets is only about \$31,000 to \$64,000 per year,<sup>182</sup> making it

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<sup>176</sup> See e.g., Koran, *supra* note 158; Grullón Paz, *supra* note 158, at 19; Hutton, *supra* note 158; Sneve, *supra* note 158.

<sup>177</sup> See Hutton, *supra* note 158.

<sup>178</sup> See Jessica P. Ogilvie, *Why a Property Worth Millions Was Returned to the Tongva Tribe*, LAIST (Oct. 10, 2022 6:00 AM), <https://laist.com/news/la-history/why-a-property-worth-millions-was-returned-to-tongva-tribe>.

<sup>179</sup> See *id.*

<sup>180</sup> See Mark Hefflinger, *In Historic First, Nebraska Farmer Returns Land to Ponca Tribe Along "Trail of Tears"*, BOLD NEB. (June 11, 2018), <https://boldnebraska.org/in-historic-first-nebraska-farmer-returns-land-to-ponca-tribe-along-trail-of-tears/>.

<sup>181</sup> See Brian Patrick Green, *Regarding Reparations, the US Should Adhere to the Highest Standards of Justice*, SANTA CLARA UNIV. (July 15, 2020), <https://www.scu.edu/ethics-spotlight/ethics-and-systemic-racism/regarding-reparations-the-us-should-adhere-to-the-highest-standards-of-justice/>.

<sup>182</sup> See Kathy Haan, *Average Salary by Age in 2023*, FORBES (May 23, 2023 12:07 PM), <https://www.forbes.com/advisor/business/average-salary-by-age/>. According to a recent study by the Chamber of Commerce, “[m]ore than one quarter of homeowners in the United States are ‘house poor,’ spending more

unlikely that the average American even owns land they could be in a position to donate.<sup>183</sup> And while the goal is to take all of the stolen public land back,<sup>184</sup> Tribal leaders acknowledge that there are many non-Native Americans living on the land, and there is not an intention to displace people.<sup>185</sup> While land donations from private citizens are a welcome win, this is an unreliable method for the Land Back movement.

*C. A Lack of Autonomy for Tribal Nations Within Current Land Acquisition Methods*

While both of these routes to land acquisition are important tools for the Land Back movement, neither method allows Tribal Nations to exercise complete autonomy in the decision-making process of which land will be returned. As noted above, when the government is proactive in giving land back to Tribal Nations, it typically involves land that is public, such as State Parks and National Parks. The government may also intervene and mandate that land be returned to Tribal Nations when it becomes available through lawsuits between private companies and government agencies.<sup>186</sup> Both of these actions rely on decisions by the government, not Tribal Nations. Likewise, private sales rely on sellers to put their land up on the market, and donations rely on the generosity of private citizens who are in a position to give away their land.<sup>187</sup>

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than 30 percent of their income on housing costs.” Debra Kamin, *More than 1 in 4 American Homeworkers Is ‘House Poor,’* N.Y. TIMES (May 30, 2023), <https://www.nytimes.com/2023/05/30/realestate/homeowners-house-poor-affordability.html>.

<sup>183</sup> See Kamin, *supra* note 180.

<sup>184</sup> See *Campaigns*, *supra* note 23.

<sup>185</sup> See LeGro, *supra* note 146.

<sup>186</sup> See, e.g., *Secretary Haaland Applauds Return of Traditional Homelands to Onondaga Nation*, *supra* note 17; Coin, *supra* note 18; Braxton Little, *supra* note 167.

<sup>187</sup> See, e.g., Ogilvie, *supra* note 174; Hutton, *supra* note 158; Hefflinger, *supra* note 176.

Tribal Nations only have two ways to assert their autonomy when it comes to choosing which land to regain: lawsuits and advocacy. Both methods for autonomy can be arduous and time-consuming, and there is no guarantee they will be effective. The lawsuits filed by Tribal Nations of New York against the state to regain stolen land have been unsuccessful. Precedent allows many of these lawsuits to be dismissed outright because the courts will not grant relief in the form of giving land back.<sup>188</sup> Advocacy relies on social pressure to persuade the government and lawmakers to act, it often focuses on public land, and success can take a very long time.<sup>189</sup> The Shinnecock Tribe was able to advocate for the return of a small parcel of land from the town of Southampton, but this took decades of work before the town agreed to a deal.<sup>190</sup> Advocacy to return the Black Hills and close Mount Rushmore has been going on for decades, with multiple approaches to work with the government that have thus far been unsuccessful.<sup>191</sup>

Tribal Nations need a legal tool that they can actually wield to achieve autonomy in their Land Back decisions. There needs to be another way for Tribal Nations to bridge the gap between government action and private land sales in order to take back more control in this fight for their land.

#### IV. USING EMINENT DOMAIN TO RETURN LAND TO TRIBAL NATIONS IN NEW YORK

Eminent domain is a method of land acquisition that should be utilized as part of the Land Back movement. The law of eminent

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<sup>188</sup> See, e.g., *United States v. 21,250 Acres of Land, More or Less, Situate in Cattaraugus Cnty.*, 161 F. Supp. 376, 379 (W.D.N.Y. 1957); *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 123–24 (1960); *Seneca Nation of Indians v. United States*, 338 F.2d 55, 56–57 (2d Cir. 1964).

<sup>189</sup> See, e.g., J.D. Allen, *At Long Last, Ancestral Burial Ground to Be Returned to Shinnecock Nation*, WSHU (July 21, 2021, 5:01 PM), <https://www.wshu.org/news/2021-07-21/at-long-last-ancestral-burial-ground-to-be-returned-to-shinnecock-nation>; Thompson, *supra* note 170.

<sup>190</sup> Allen, *supra* note 187.

<sup>191</sup> Thompson, *supra* note 172.

domain in the United States allows the government to take private land, following what is supposed to be fair compensation.<sup>192</sup> Utilizing eminent domain would bridge the gap between government action and private land sales, carving out a third and more autonomous method for Tribal Nations to acquire land rights. By exercising this law with the explicit goal of returning land to Tribal Nations, the government has the potential to make a significant, positive impact in the Land Back movement.

#### *A. Eminent Domain Law & Tribal Nations*

The theory of eminent domain comes from the Fifth Amendment in the United States Constitution.<sup>193</sup> The Takings Clause states “nor shall private property be taken for public use, without just compensation.”<sup>194</sup> This means that while the government has the right to seize private property without the consent of the owner, it may not do so without compensating the owner for the land.<sup>195</sup> While eminent domain is meant to be exercised for a “public use”, the government can condemn an area and sell the land to a private entity under the theory that it is “in the public’s best interest,” even if there is an economic benefit for that private entity.<sup>196</sup>

Throughout the drafting and framing of the Constitution, the Takings Clause was never intended to apply to Native Americans.<sup>197</sup> As a result, from the time the Constitution was ratified into law and well into the 20<sup>th</sup> century, the government took away land from Native Americans *without* just compensation.<sup>198</sup> While Tribal governments can exercise eminent domain over Tribal land, they do not have the authority to exercise eminent domain over United

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<sup>192</sup> See Leeds, *supra* note 40, at 53.

<sup>193</sup> See U.S. CONST. amend. V.

<sup>194</sup> *Id.*

<sup>195</sup> See *id.*

<sup>196</sup> See Leeds, *supra* note 40, at 55–56.

<sup>197</sup> See Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CAL. L. REV. 1751, 1799–800 (2017).

<sup>198</sup> See, e.g., *id.* at 1780–81; Leeds, *supra* note 40, at 63.



States land.<sup>199</sup> For this reason, it rests in the hands of the state and federal government to exercise their eminent domain power in conjunction with and on behalf of Tribal Nations. Because of the ways in which government takings have been used to strip Native Americans of their land rights, the government should use the same theory of property law to course-correct those unjust takings.

### *B. Public Use*

A prominent Supreme Court eminent domain case, *Kelo v. City of New London*, explored the definition of “public use.”<sup>200</sup> In this case, a neighborhood in New London, Connecticut was set to be seized by the state government and sold to a private developer.<sup>201</sup> The Supreme Court ruled in favor of the City, holding that the plans for economic development by the private entity constituted a “public use” under the Takings Clause.<sup>202</sup> The *Kelo* decision generated immense public outcry.<sup>203</sup> The neighborhood that was at issue in this case was relatable to the average American.<sup>204</sup> New London was a typical working class town which many Americans felt resembled their own homes.<sup>205</sup> In prior eminent domain cases where entire neighborhoods were condemned and sold to a private developer, the area was in a state of blight.<sup>206</sup> When a neighborhood is determined to be in a state of blight, it means that it is so run-down, unsanitary, crime-ridden and dilapidated that courts determine it will be for the good of the public to condemn it and let someone else come in and develop it.<sup>207</sup> *Kelo* was different.<sup>208</sup> While the city was not thriving economically, the houses at issue in this case were not in a state of

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<sup>199</sup> See Leeds, *supra* note 40, at 75.

<sup>200</sup> See *Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>201</sup> See *id.* at 472–73.

<sup>202</sup> *Id.* at 489–90.

<sup>203</sup> See Leeds, *supra* note 40, at 58.

<sup>204</sup> See *id.* at 57–58.

<sup>205</sup> See *id.*

<sup>206</sup> See *id.* at 55–56.

<sup>207</sup> See *id.* at 55.

<sup>208</sup> *Id.* at 57.

blight.<sup>209</sup> But the city government was determined to pursue their economic redevelopment plan, partially motivated by the promise of Pfizer, the powerhouse pharmaceutical company, to build a \$300 million research center in the area.<sup>210</sup>

The precedent set in *Kelo* continues to influence eminent domain.<sup>211</sup> A recent example from New York State is the Atlantic Yards development in Brooklyn.<sup>212</sup> Here, the City of New York seized a neighborhood in Brooklyn in order to sell it to a private developer whose plans included building a brand-new arena for the National Basketball Association (NBA) team the Brooklyn Nets.<sup>213</sup> Despite protests and advocacy from the local community, the taking went through and the neighborhood was condemned for reasons of economic development.<sup>214</sup>

If the definition of “public use” can be stretched to justify a taking for a private entity which will benefit financially from the taking, then it should also be stretched to include a taking for the Land Back movement. There is already one precedent of the definition of public use being used for a similar purpose, and that comes from *Hawaii Housing Authority v. Midkiff*.<sup>215</sup> In this case, the

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<sup>209</sup> *Kelo v. City of New London*, 545 U.S. 469, 483 (2005).

<sup>210</sup> *Id.* at 473–74.

<sup>211</sup> See Leeds, *supra* note 40, at 57–58.

<sup>212</sup> See Charles V. Bagli, *Ruling Lets Atlantic Yards Seize Land*, N.Y. TIMES (Nov. 24, 2009), <https://www.nytimes.com/2009/11/25/nyregion/25yards.html>; see also N. R. Kleinfeld, *Opponents of Atlantic Yards Are Exhausted by a Long, Losing Battle*, N.Y. TIMES (Nov. 25, 2012), <https://www.nytimes.com/2012/11/26/nyregion/exhausted-from-an-angry-and-losing-battle-against-barclays-center.html>.

<sup>213</sup> See Charles V. Bagli, *Ruling Lets Atlantic Yards Seize Land*, N.Y. TIMES (Nov. 24, 2009), <https://www.nytimes.com/2009/11/25/nyregion/25yards.html>; see also N. R. Kleinfeld, *Opponents of Atlantic Yards Are Exhausted by a Long, Losing Battle*, N.Y. TIMES (Nov. 25, 2012), <https://www.nytimes.com/2012/11/26/nyregion/exhausted-from-an-angry-and-losing-battle-against-barclays-center.html>.

<sup>214</sup> *Id.*

<sup>215</sup> See Leeds, *supra* note 40, at 56.

Housing Authority of Hawaii used eminent domain to redistribute land wealth.<sup>216</sup> By the 1960's, 47% of all the land in Hawaii was owned by only seventy-two private landowners.<sup>217</sup> In order to make land ownership more equitable and promote public welfare for the people of Hawaii, the state created a plan to break up the excess of some of the wealthiest and largest private landowners in the state.<sup>218</sup> The plan would force these large landowners to turn over parcels of their land which were being leased by homeowners for just compensation.<sup>219</sup> The state would then sell the land titles to the parcels to the tenants, and lend them up to 90% of the purchase price, or sell the parcels to someone else.<sup>220</sup> The Supreme Court held that under the theory of eminent domain law, the reason for this taking fell under the definition of "public use."<sup>221</sup> This case should work as a blueprint for redistributing land from the wealthiest land owners with the most excess of land to Tribal Nations. This case would be of particular interest for land in the Hamptons for the Shinnecock Tribe, because *Hawaii Housing Authority* stands as a rare example in which the government exercised a taking against wealthy property owners in order to create more equity in land ownership across the state.<sup>222</sup>

Because the definition of "public use" is broad, the Land Back movement should be an acceptable exercise of eminent domain. The Land Back movement should be considered a "public use" because the results of returning land to Tribal Nations include both climate crisis mitigation and reparations. Eminent domain is exercised frequently for private developers,<sup>223</sup> so there is precedent for a

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<sup>216</sup> See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

<sup>217</sup> *Id.* at 232.

<sup>218</sup> See *id.* at 233.

<sup>219</sup> See *id.*

<sup>220</sup> See *id.* at 234.

<sup>221</sup> See *id.* at 239–40.

<sup>222</sup> See *Hawaii Hous. Auth.*, 467, U.S. 229.

<sup>223</sup> See Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*, 4 ALB. GOV'T L. REV. 154 (2011).

taking to go to a private entity, which, for the purposes of Land Back, the taking would go to Tribal Nations.

*C. An Amendment to Eminent Domain Law*

Under New York law specifically, the procedure of eminent domain allows for the condemnation of private property for a public project.<sup>224</sup> “Public project” is defined as “any program or project for which acquisition of property may be required for a public use, benefit or purpose.”<sup>225</sup> In New York State, a condemner<sup>226</sup> must follow the procedures of the law before the taking can occur.<sup>227</sup> Generally speaking, this procedure includes a proposal stating the public purpose of the taking, appraisal of the area, public hearings on the proposal, proper notice to the landowners in the proposed area, and just compensation.<sup>228</sup>

While the broad definitions of “public use” and “public project” can be utilized to propose and exercise a taking for a Tribal Nation, specific language within legislation and sweeping legislative action must be employed to secure the success of this method of land acquisition. Even though there is precedent that should allow the definition of “public project” in New York State Eminent Domain Procedure Law to include takings for the purposes of giving land back to Tribal Nations, the courts in New York State tend to rule against Tribal Nations when it comes to regaining land rights. To be certain that eminent domain can be exercised in this way and not rely on the vague definition of “public project”, the Eminent Domain Procedure Law in New York must be amended to carve out specific language for the use of eminent domain for returning lands to Tribal Nations, in addition to “public use.” Adding in language to the statute that states “a government taking of private property can

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<sup>224</sup> See N.Y. EM. DOM. PROC. LAW § 204 (McKinney 2005).

<sup>225</sup> N.Y. EM. DOM. PROC. LAW § 103(G) (McKinney 2005).

<sup>226</sup> See N.Y. EM. DOM. PROC. LAW § 103(D) (McKinney 2005).

“‘Condemner’ means any entity vested with the power of eminent domain.” *Id.*

<sup>227</sup> See generally, N.Y. EM. DOM. PROC. LAW § 204 (McKinney 2005).

<sup>228</sup> See *id.*

occur if the taking is for the purposes of returning land to Tribal Nations” would allow the government to propose<sup>229</sup> a taking of any private piece of real property in New York State. Knowing the government had this specific power would also allow Tribal Nations, or any other private entity (such as a non-profit or a conservation trust), to work in conjunction with the government to pursue this kind of taking.

There are several New York State government agencies that already have an interest in cultural and historical preservation,<sup>230</sup> and even more that have an interest in protecting New York’s natural resources and fighting climate change, based on the goals and missions of these agencies.<sup>231</sup> With a specific carve out in the Eminent Domain Procedure Law, these government agencies would easily be able to exercise their power to take private land and return it to Tribal Nations. Realistically, these agencies could likely already exercise an eminent domain proposal under the definition of “Public Project” for this purpose, but an amendment would strengthen a taking proposal of that nature.

In theory, there should be public support for this kind of legislation. Indigenous Rights have become more mainstream in the public consciousness, and there is more widespread support of the cause than ever before.<sup>232</sup> But in reality, the support for eminent domain projects is already low,<sup>233</sup> and history has shown how this

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<sup>229</sup> See N.Y. EM. DOM. PROC. LAW § 204 (McKinney 2005).

<sup>230</sup> See PARKS, RECREATION & HIST. PRES., <https://www.parks.ny.gov/> (last visited Aug. 22, 2023); see COUNCIL ON THE ARTS, <https://arts.ny.gov/> (last visited Aug. 22, 2023); see also DIV. OF HUM. RIGHTS, <https://dhr.ny.gov/> (last visited Aug. 22, 2023).

<sup>231</sup> See e.g., Indian Nation Consultation, DEP’T OF ENV’T CONSERVATION, <https://www.dec.ny.gov/public/974.html> (last visited Aug. 22, 2023); The South Shore Estuary Reserve Council, SSER Council, DEP’T OF STATE, <https://dos.ny.gov/sser-council> (last visited Aug. 22, 2023) (SSER sits under the Department of State); CENTRAL PINE BARRENS, <https://pb.state.ny.us/> (last visited Aug. 22, 2023); ADIRONDACK PARK AGENCY, <https://apa.ny.gov/> (last visited Aug. 22, 2023).

<sup>232</sup> See Hopkins, *supra* note 21

<sup>233</sup> See Rikon, *supra* note 217.

country treats Native Americans, which does not indicate realistic support for this idea. To give an example of the disconnect between public support and tangible action, the Shinnecock Nation has been trying and failing for years to build a casino on their land in the Hamptons, a beachside area in Eastern Long Island known for its lure of wealthy and elite residents and celebrities.<sup>234</sup> Although the casino would be built on Tribal land, the Shinnecock Nation still faces resistance from local residents who oppose the plans.<sup>235</sup> Said one homeowner in the Hamptons, “a lot of us are bleeding-heart liberals and sympathetic to the oppressed, and we understand their attempt for economic development . . . but it’s not the right location.”<sup>236</sup> Based on reactions like this, it is likely that many communities would oppose legislation that could put their land at risk of being taken by the government.

General opinions on Native Americans also present an obstacle to winning support for this kind of legislation. A 2018 study revealed a severe lack of awareness about discrimination against Native Americans, finding that “[o]nly 34 percent of Americans believe Native people face discrimination.”<sup>237</sup> Negative stereotypes about Native Americans and government handouts are also widely believed, reinforcing prejudice amongst non-Native Americans.<sup>238</sup> The same survey found only about half of all Americans even believe that the government should do more to help Native Americans.<sup>239</sup>

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<sup>234</sup> Corey Kilgannon, *Why the Shinnecock Tribe Is Clashing with the Hamptons’ Elite*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/04/22/nyregion/casino-hamptons-shinnecock.html>.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Research Reveals America’s Attitudes About Native People and Native Issues*, CULTURAL SURVIVAL (June 27, 2018), <https://www.culturalsurvival.org/news/research-reveals-americas-attitudes-about-native-people-and-native-issues>.

<sup>238</sup> *See id.*

<sup>239</sup> *Id.*

Even the current New York Governor's office presents obstacles to success. As of 2023, Democratic Governor Kathy Hochul has taken several actions that have damaged the Tribal Nations confidence in this governor's office as an ally, and have driven a wedge between state and Tribal officials.<sup>240</sup> The Governor vetoed a bill that would have granted state recognition to the Montaukett Tribe of Long Island, as well as a bill that would have protected unmarked burial grounds.<sup>241</sup> Governor Hochul also increased tensions between the State and the Seneca Nation by freezing their bank accounts as a hostage move to collect a payout from the Tribe in order to finance a new stadium for the billionaire owners of the New York National Football League (NFL) team, the Buffalo Bills.<sup>242</sup> While Hochul's office and political allies claim that she is one of the most supportive governors for strengthening the relationship between the state and the Tribal Nations, and by all accounts this is true compared to previous governors, there is still a long way to go for the state government to prioritize the interests of Tribal Nations.<sup>243</sup>

Amending the New York State Eminent Domain Procedure Law would require considerable advocacy to gain widespread public support, as well as the support of the New York State Assembly, Senate, and Governor's Office in order to make the change. This change would be an uphill battle, like nearly all the battles in the Land Back Movement, but it is one worth pursuing.

The use of eminent domain to achieve the goals of the Land Back movement would provide immense benefits to the Tribal Nations of New York. The success that has been celebrated and the joy that has been expressed across other Land Back victories would continue if more land was able to be returned. The Land Back movement is about so much more than land rights – it is about the

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<sup>240</sup> Jay Root, *Clash Over Building Atop Native Burial Sites Angers N.Y. Tribes*, N.Y. TIMES (Mar. 27, 2023), <https://www.nytimes.com/2023/03/27/nyregion/kathy-hochul-native-americans-graves.html>.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

respect and preservation of both Indigenous culture and the natural environment.<sup>244</sup> Empowering Land Back in New York State through eminent domain would continue to strengthen and uplift Tribal Nations and add a significant avenue for Indigenous communities to regain the land rights they are owed.

#### CONCLUSION

Land Back is not a movement that can achieve its goals with just one solution.<sup>245</sup> As Krystal Two Bulls, the director of the Land Back campaign, puts it, “[W]e are no longer asking permission.”<sup>246</sup> Asking for land back has not been effective enough for Indigenous communities to regain land rights. Instead, Indigenous communities need tools to take their land back, and one way to take it back is through takings. To facilitate the ability of Tribal Nations to regain land via takings, New York State should amend its Eminent Domain Procedure Law by expanding the definition of “public use” to include the acquisition of land rights for Tribal Nations. If New York State took this step to return more land to Tribal Nations, it would be an investment in the fight against climate change and would mitigate some of the damage the climate crisis has already caused. Returning land would also be a major step in rectifying the wrongs of the past, as a form of reparations for the land, lives, and wealth of Indigenous people that has been compromised by New York State. It is the right thing to do. For these reasons, returning land to the Tribal Nations of New York is a benefit to the public, and should be explicitly defined as such in the New York State Eminent Domain Procedure Law as a means to achieve the goals of the Land Back movement.

“We organize our lives around the belief that what we do today is designed to benefit those seven

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<sup>244</sup> See Thompson, *supra* note 172.

<sup>245</sup> See *id.*; LANDBACK, <https://landback.org/> (last visited Aug. 14, 2023).

<sup>246</sup> Claire Elise Thompson, *Returning the Land*, GRIST (Nov. 25, 2020), <https://grist.org/fix/justice/indigenous-landback-movement-can-it-help-climate/>.



generations into the future, as we build on what was left for us seven generations into the past.”

– Sid Hill, Chief of the Onondaga Nation<sup>247</sup>

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<sup>247</sup> Hill, *supra* note 16.