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“Dramatically Altered the Legal Landscape”? *City of Sherrill v. Oneida Indian Nation* in the Lower Courts

Samuel Pokross

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SPECIAL FEATURE

“DRAMATICALLY ALTERED THE LEGAL LANDSCAPE”? CITY OF SHERRILL V. ONEIDA INDIAN NATION IN THE LOWER COURTS

Samuel Pokross*

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Introduction

Indian tribes have suffered many defeats at the Supreme Court in the twenty-first century. Among others, the Court has limited tribal civil jurisdiction over nonmembers,¹ restricted the application of the Indian

* Law Clerk to the Honorable Patti B. Saris, Chief Judge of the U.S. District Court for the District of Massachusetts. J.D., 2018, Stanford Law School; B.A., 2013, Harvard College.

First-place winner, *American Indian Law Review* 2017-2018 Writing Competition.

1. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 320 (2008).

Child Welfare Act,² and diminished federal power to take tribal land into trust.³ Overall, tribes lost 82% of cases before the Roberts Court through 2015.⁴

Of all these defeats, the most significant may turn out to be an idiosyncratic decision from 2005: *City of Sherrill v. Oneida Indian Nation*.⁵ This decision was the last of three times the Supreme Court ruled on the longstanding land claim of the Oneida Indian Nation (OIN) against New York and its municipalities. In the late 1990s, the OIN purchased parcels on the open market within the boundaries of its treaty-guaranteed reservation, land New York unlawfully purchased from the tribe two centuries earlier.⁶ The OIN sought immunity from local property taxation for this land on the ground that Congress never extinguished its sovereign authority over the area.⁷ The Court denied the OIN tax immunity based on the length of time the OIN failed to exercise sovereignty over the area and the justifiable expectations of non-Indian landowners and state and local governments.⁸

Sherrill left scholars confused. In addition to criticizing the Court's analysis,⁹ they wondered how far its reasoning extended. Some thought *Sherrill*'s unique facts involving an open-market purchase of land by a tribe within its historic reservation would make it difficult to apply to other contexts.¹⁰ Others feared courts would adopt the generalizable concerns in *Sherrill* about disruption to non-Indian expectations to deny a wide range of tribal claims.¹¹ The Second Circuit's statement a few months after the

2. See *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641-42 (2013).

3. See *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009).

4. Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General . . . and Beyond*, 2017 U. ILL. L. REV. 1901, 1907 (comparing this percentage to the 71% loss rate for tribes during the Rehnquist Court).

5. 544 U.S. 197 (2005).

6. *Id.* at 211.

7. *Id.* at 211-12.

8. *Id.* at 202-03.

9. See *infra* text accompanying notes 77-86.

10. See, e.g., Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 15 (2008).

11. See Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA. L. REV. 5, 10-11 (2005) [hereinafter Krakoff, *A Regretful Postscript*].

decision that *Sherrill* “dramatically altered the legal landscape” only heightened these fears.¹²

Courts have been equally confused over the extent to which *Sherrill*'s concerns about disruption to non-Indian expectations should bar tribal claims. The Second Circuit, with strong dissents and some pushback from district courts, has read *Sherrill* to require dismissal of all tribal land claims regardless of whether the tribe seeks ejection of current landowners, monetary damages, or declaratory relief.¹³ Courts have split on whether *Sherrill* applies to reservation diminishment and other sovereign treaty rights disputes¹⁴ or prohibits tribes from asserting sovereign immunity in certain cases.¹⁵ In opinions on reservation diminishment and the constitutionality of the land-to-trust process in the Indian Reorganization Act (IRA), Justice Thomas has suggested that he supports a broad understanding of *Sherrill*'s reach.¹⁶ Even a tribal court has applied *Sherrill* to bar recovery in a marital property dispute.¹⁷

These disputes over the true meaning of the *Sherrill* decision have taken on even more significance in the past four years as litigants opposing tribal interests have advanced new arguments based on *Sherrill* at the Supreme Court. In *Nebraska v. Parker*, for example, Nebraska argued the Court should alter its longstanding reservation diminishment test focused on congressional intent to emphasize modern demographics and jurisdictional history because of *Sherrill*'s concerns about disruption to non-Indian expectations; an amicus brief in support of Nebraska even proposed that the Court find diminishment based solely on non-Indian inhabitation and

12. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005); see also Krakoff, *A Regretful Postscript*, *supra* note 11, at 11 (citing this statement as “evidence of *City of Sherrill*'s huge potential outside of the taxation context”).

13. See *infra* Part II.

14. See *infra* Sections II.B.1, II.B.2, II.B.3.

15. See *infra* Section II.B.4.

16. See *Upstate Citizens for Equal, Inc. v. United States*, No. 16-1320, 2017 WL 5660979, at *2 (U.S. Nov. 27, 2017) (Thomas, J., dissenting from the denials of certiorari) (citing *Sherrill* to argue that taking 13,000 acres of OIN land into trust would burden state and local governments and harm neighboring landowners); *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) (“[W]e express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax the retailers of Pender in light of the Tribe's century-long absence from the disputed lands.” (citing *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217-21 (2005))).

17. See *Smith v. Watty*, 6 Cherokee Rep. 31, 31-32 (E. Cherokee Ct. 2007) (using *Sherill* to apply laches as a bar to a woman seeking distribution of her interests in marital property because she made her motion twenty-five years after her divorce and fifteen years after the end of activity in her divorce case).

regulation of the reservation, regardless of congressional intent.¹⁸ During the October 2017 term, the Court granted certiorari in *United States v. Washington*, a dispute between a number of tribes, joined by the federal government, and Washington over whether the state is violating tribal treaty fishing rights by maintaining culverts that prevent the movement of fish.¹⁹ Echoing the position of seven Ninth Circuit judges dissenting from the court's decision not to rehear the case en banc, Washington argued that the panel erred in declining to adjudicate its waiver and estoppel defenses because *Sherrill* held that equitable defenses can apply to Indian treaty rights and thus abrogated circuit precedent to the contrary.²⁰ These recent, broad arguments based on *Sherrill* that litigants have proposed to the Supreme Court make it important to determine whether *Sherrill* reaches as far as they suggest.

Sherrill is a confusing decision because it does not fit in any doctrinal category within federal Indian law.²¹ Although the OIN was attempting to assert sovereign authority within its reservation, the Court explicitly noted that *Sherrill* did not address reservation diminishment.²² The OIN's suit sought tax immunity, but the Court did not cite its jurisprudence on the ability of state and local governments to tax tribes. The Court did not discuss tribal sovereign immunity, despite the obvious question of whether courts could force the OIN to pay property taxes. Given this avoidance of traditional doctrinal analysis, it is easy to dismiss *Sherrill* as inapplicable beyond its unique facts.

But *Sherrill*'s amorphous nature creates the risk of exactly what some courts have done with it: denying a broad range of tribal claims to avoid disrupting non-Indian expectations with "dormant" tribal rights. Many tribes could not exercise their legal rights for many years for a number of reasons, including a lack of resources, barriers in access to the court system, and the attempts of federal, state, and local governments to deny tribes their

18. See *infra* notes 296-97.

19. *United States v. Washington*, 853 F.3d 946, 968 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018).

20. See Petition for Writ of Certiorari at 25-28, *Washington*, 138 S. Ct. 1832 (No. 17-269); see also *United States v. Washington*, 864 F.3d 1017, 1030 (9th Cir. 2017) (O'Scannlain, J., respecting the denial of rehearing en banc) ("*Sherrill* made clear that laches can apply to Indian treaty rights . . ."), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018).

21. See Krakoff, *A Regretful Postscript*, *supra* note 11, at 10.

22. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 215 n.9 (2005).

rights.²³ In some sense then, non-Indians have developed expectations that tribes simply do not exist. By prioritizing non-Indian expectations, *Sherrill* provides a potential basis for a doctrine that prohibits tribes from exercising their legal rights in any capacity. This understanding of *Sherrill* could create a simple rule in federal Indian law: tribes lose.

This reading of *Sherrill* is unwarranted. *Sherrill* does not require courts to always prioritize preventing disruption to non-Indian expectations over tribal rights. Courts applying *Sherrill* this broadly have ignored key aspects of the decision. In the request by the OIN for tax immunity, the Court was confronted with a unique, forward-looking remedy seeking a revival of sovereignty in a tribal land claim, in contrast to the standard tribal request for damages in such actions.²⁴ This remedy concerned the Court because of the risk of prospective disruption to non-Indians, as well as state and local governments, two centuries after the unlawful dispossession of the land.²⁵ The Court did not address the underlying right, other non-disruptive remedies for tribal land claims, or other types of disputes. This more faithful and limited reading of *Sherrill* demonstrates that concerns about disruption to non-Indian expectations should not bar damages and declaratory remedies for tribal land claims.²⁶ Courts faithfully applying *Sherrill* should also decline to utilize its disruption framework in disputes about reservation diminishment, other tribal treaty rights, or sovereign immunity. Those cases involve assertions of tribal sovereignty as the essence of the tribal claim or defense, not solely as the remedy, and concerns about disruption are not as acute in these contexts.²⁷ Only when tribes seek to assert sovereignty as a remedy in a land claim should courts apply *Sherrill*'s disruption analysis.

This paper proceeds in four parts. Part I provides background on the OIN land claim and a summary of the *Sherrill* decision. Part II explores how lower courts have applied *Sherrill* in a range of cases involving Indian tribes, including tribal land claims and sovereignty disputes. Part III closely

23. See, e.g., *id.* at 205-06 (describing the policy of the federal government during the 1800s of removing tribes from their ancestral lands); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 615-27 (2006) (noting many legal and practical obstacles the OIN and other tribes faced in bringing lawsuits to vindicate their tribal land rights).

24. See, e.g., *County of Oneida v. Oneida Indian Nation (Oneida II)*, 470 U.S. 226, 229 (1985).

25. See *infra* Part III.

26. See *infra* Section IV.A.

27. See *infra* Section IV.B.

analyzes *Sherrill* to demonstrate that it only applies to tribal land claims and only bars certain remedies in those cases. Part IV utilizes this understanding of *Sherrill* to explain how lower courts have applied the decision well beyond its limits.

I. City of Sherrill v. Oneida Indian Nation

Before the arrival of European colonists, the Oneidas inhabited approximately six million acres in New York.²⁸ Under pressure to open land for white settlers, New York entered into the Treaty of Fort Schuyler with the Oneidas in 1788 to acquire all but three hundred thousand acres of Oneida land.²⁹ Two years later, Congress passed the Nonintercourse Act, which prohibited sales of tribal land without federal permission.³⁰ In 1794, the United States and six tribes in New York (the Haudenosaunee) signed the Treaty of Canandaigua, which guaranteed the Oneidas use of their reservation.³¹ Ignoring the Nonintercourse Act and this treaty, New York continued purchasing land from the Oneidas without federal approval.³² Most significantly, in 1795, New York bought one hundred thousand acres of the Oneida reservation.³³ Although the federal government initially objected to these transfers, it began to encourage them as part of “a policy designed to open reservation lands to white settlers and to remove tribes westward.”³⁴ In 1838, the Oneidas and the United States signed the Treaty of Buffalo Creek, which permitted the removal of tribal members remaining in New York to Kansas.³⁵ By then, New York had purchased all but five thousand acres of the Oneida reservation.³⁶ Over the next eighty years, the

28. *Sherrill*, 544 U.S. at 203. For the sake of clarity, I use “OIN” to refer to the modern federally recognized tribe that brought the land claim and “Oneidas” to refer to the tribe that resided in New York before the arrival of European colonists. See, e.g., *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 415 n.2 (2d Cir. 2011).

29. Treaty of Fort Schuyler, N.Y.-Oneida, Sept. 22, 1788, reprinted in 2 PROCEEDINGS OF THE COMMISSIONERS OF INDIAN AFFAIRS, APPOINTED BY LAW FOR THE EXTINGUISHMENT OF INDIAN TITLES IN THE STATE OF NEW YORK 241 (Franklin B. Hough ed., Albany, N.Y., Joel Munsell 1861), <https://archive.org/details/proceedingsofcom01newy/page/n263>; *Sherrill*, 544 U.S. at 203.

30. Indian Nonintercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138; *Sherrill*, 544 U.S. at 204.

31. Treaty of Canandaigua, art. 2, 7 Stat. 44, 45 (1794); *Sherrill*, 544 U.S. at 204-05.

32. *Sherrill*, 544 U.S. at 205.

33. *Id.*

34. *Id.*

35. Treaty of Buffalo Creek, art. 2, 7 Stat. 550, 551 (1838); *Sherrill*, 544 U.S. at 206.

36. *Sherrill*, 544 U.S. at 206.

Oneida land holdings in New York dwindled to only thirty-two acres by 1920.³⁷

In 1970, the OIN instituted a test case against Oneida and Madison Counties in New York. The suit alleged that the 1795 sale of one hundred thousand acres to New York “violated the Nonintercourse Act and thus did not terminate the [OIN’s] right to possession”; the OIN sought damages for the fair rental value for 1968 and 1969 of the 872 acres of land the counties owned.³⁸ The OIN land claim took a long, tortured road through the federal courts over forty-one years, reaching the Supreme Court three times.³⁹ The Supreme Court held in *Oneida I* that the suit raised a federal question for the purposes of subject matter jurisdiction.⁴⁰ Eleven years later, the Court determined in *Oneida II* that the OIN had a private right of action under federal common law for the unlawful dispossession of its lands and rejected a number of defenses that might have barred a damages award.⁴¹ The Court declined to decide whether laches barred the OIN’s claim because the counties failed to raise the issue at the Second Circuit; it strongly suggested, however, that laches would not apply because, among other reasons, the “application of the equitable defense of laches in an action at law would be novel.”⁴² The Court left open the question of “whether equitable considerations should limit the relief available” to the tribe.⁴³ Writing for four dissenting justices, Justice Stevens asserted that he would have reached the laches question and barred the claim due to the unjustified delay of over 175 years before the OIN brought suit.⁴⁴ On remand, the district court awarded the OIN approximately \$35,000 plus prejudgment interest.⁴⁵

In an attempt to reconstitute its reservation in the late 1990s, the OIN repurchased on the open market some of the land it sold to New York two centuries earlier.⁴⁶ The City of Sherrill (“the City”) attempted to collect property taxes from the OIN for the parcels within its borders.⁴⁷ When the

37. *Id.* at 207.

38. *Id.* at 208.

39. *See Sherrill*, 544 U.S. 197; *Oneida II*, 470 U.S. 226 (1985); *Oneida Indian Nation v. County of Oneida (Oneida I)*, 414 U.S. 661 (1974).

40. 414 U.S. at 675.

41. 470 U.S. at 233-36, 240-50.

42. *Id.* at 244-45, 244 n.16.

43. *Id.* at 253 n.27.

44. *Id.* at 255-56 (Stevens, J., dissenting).

45. *Oneida Indian Nation v. County of Oneida*, 217 F. Supp. 2d 292, 310 (N.D.N.Y. 2002).

46. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 211 (2005).

47. *See id.*

OIN argued that its sovereign authority over the parcels exempted them from state and local taxation, the City initiated eviction proceedings.⁴⁸ In response, the OIN filed an action in the Northern District of New York to enjoin the proceedings.⁴⁹ Both the district court and the Second Circuit analyzed whether the repurchased parcels were Indian Country and thus exempt from state and local taxation.⁵⁰ The district court held that the 1794 Treaty of Canandaigua created the Oneida Reservation and that no congressional act, including the 1838 Treaty of Buffalo Creek, disestablished it; therefore, the parcels were in Indian Country and not subject to local taxation.⁵¹ The Second Circuit affirmed.⁵² The Supreme Court granted certiorari on four questions relating to whether the parcels were Indian Country.⁵³

In an opinion by Justice Ginsburg, the Supreme Court reversed on grounds distinct from the Indian Country questions on which it granted certiorari.⁵⁴ The Court did not disturb the Second Circuit's holding that the parcels were within the undiminished Oneida Reservation.⁵⁵ Instead, asking whether the OIN could assert sovereignty over the parcels after it "unified fee and aboriginal title" through open market purchases, the Court held that "standards of federal Indian law and federal equity practice" preclude[d] the Tribe from rekindling embers of sovereignty that long ago grew cold."⁵⁶ Recognizing the distinction between rights and remedies, the Court acknowledged that the OIN had a cause of action for damages for unlawful dispossession from *Oneida II*.⁵⁷ But it determined that the relief the OIN sought here, the ability to assert tax immunity for the parcels, was unavailable due to the two centuries of state sovereign control, the

48. *Id.*

49. *Id.* at 211-12.

50. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 145 (2d Cir. 2003); *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp. 2d 226, 241 (N.D.N.Y. 2001).

51. *Sherrill*, 145 F. Supp. 2d at 254.

52. *Sherrill*, 337 F.3d at 167.

53. *See City of Sherrill v. Oneida Indian Nation*, 542 U.S. 936 (2004) (granting the City's writ of certiorari); Petition for Writ of Certiorari at i, *Sherrill*, 544 U.S. 197 (No. 03-855) (listing the four questions presented for review).

54. *See Sherrill*, 544 U.S. at 212, 214 n.8 (acknowledging that it "resolv[ed] this case on considerations not discretely identified in the parties' briefs," but determining that the issue it addressed was "inextricably linked to, and [was] thus 'fairly included' within, the questions presented" (quoting SUP. CT. R. 14.1(a))).

55. *See id.* at 215 n.9.

56. *Id.* at 213-14 (quoting *Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61, 90 (N.D.N.Y. 2000)).

57. *See id.* at 213.

significant increase in the parcels' value over that period, and the delay of the OIN in asserting its sovereignty.⁵⁸ It also emphasized the “justifiable expectations” of the current non-Indian landowners regarding New York’s continuing regulatory authority.⁵⁹ According to the Court, “[t]his long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude[d] OIN from gaining the disruptive remedy it [sought].”⁶⁰

The Court relied on three equitable doctrines to support its holding: laches, acquiescence, and impossibility.⁶¹ First, the Court stated that a “long lapse of time . . . can preclude relief” and that laches “may bar long-dormant claims for equitable relief.”⁶² The Court noted that it had previously applied “laches in *Felix v. Patrick* to bar the heirs of an Indian from establishing a constructive trust over land their Indian ancestor had conveyed in violation of a statutory restriction.”⁶³ According to the Court, the heirs were barred because the land had been sold to other owners, incorporated into a major city, and was worth significantly more than when the Indian received the land.⁶⁴ The Court thought the OIN suit implicated the same “sort of changes to the value and character of the land . . . in even greater magnitude.”⁶⁵

Second, the Court analogized to the doctrine of acquiescence in interstate boundary disputes. The Court recognized that “[l]ong acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary,” regardless of the “original validity of a boundary line.”⁶⁶ The Court

58. *See id.* at 214-15. In a concurrence, Justice Souter argued that these considerations defeated not only the remedy the OIN sought, but also their right. *See id.* at 222 (Souter, J., concurring) (“The Tribe’s inaction cannot . . . be ignored here as affecting only a remedy to be considered later; it is, rather, central to the very claims of right made by the contending parties.”).

59. *See id.* at 215-16.

60. *Id.* at 216-17; *see also id.* at 215 n.9 (“The relief OIN seeks . . . is unavailable because of the long lapse of time, during which New York’s governance remained undisturbed, and the present-day and future disruption such relief would engender.”).

61. *Id.* at 221.

62. *Id.* at 216-17.

63. *Id.* at 217 (citation omitted).

64. *Id.*

65. *Id.*

66. *Id.* at 218 (citing *Ohio v. Kentucky*, 410 U.S. 641, 651 (1973); *Massachusetts v. New York*, 271 U.S. 65, 95 (1926)).

therefore reasoned that “[w]hen a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations.”⁶⁷ Since the OIN had not exercised sovereignty in the area for two centuries, permitting them to reassert sovereignty one parcel at a time “would dishonor ‘the historic wisdom in the value of repose.’”⁶⁸

Third, the Court emphasized “the impracticability of returning to Indian control land that generations earlier passed into numerous private hands.”⁶⁹ Rejecting the argument that the impossibility doctrine did not apply because the OIN did not seek to eject landowners, the Court feared that “the unilateral reestablishment of present and future Indian sovereign control . . . would have disruptive practical consequences.”⁷⁰ With an Indian population in Sherrill of less than 1%, the “checkerboard of alternating state and tribal jurisdiction . . . would ‘seriously burde[n] the administration of state and local governments’ and would adversely affect landowners neighboring the tribal patches.”⁷¹ The Court expressed special concern about the OIN seeking zoning exemptions.⁷²

Justice Stevens dissented alone.⁷³ He thought the majority did “what only Congress may do” by “effectively proclaim[ing] a diminishment of the Tribe’s reservation and an abrogation of its elemental right to tax immunity.”⁷⁴ He also found it nonsensical as a matter of equity to hold that non-Indian reliance interests barred tribal tax immunity but not *Oneida II*’s

67. *Id.*

68. *Id.* at 218-19 (quoting *Oneida II*, 470 U.S. 226, 262 (1985) (Stevens, J., dissenting)).

69. *Id.* at 219.

70. *Id.*

71. *Id.* at 211, 219-20 (alteration in original) (quoting *Hagen v. Utah*, 510 U.S. 399, 421 (1994)).

72. *Id.* at 220 (“If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area.”). The Court cited two pending tribal suits seeking to exempt repurchased land from zoning laws. *See id.* at 220 n.13 (citing *Seneca-Cayuga Tribe v. Town of Aurelius*, No. 5:03-CV-00690 (NPM), 2004 WL 1945359, at *1-3 (N.D.N.Y. Sept. 1, 2004); *Cayuga Indian Nation v. Village of Union Springs*, 317 F. Supp. 2d 128, 131-34, 147-48 (N.D.N.Y. 2004)).

73. His dissent was especially notable given his position in *Oneida II* that laches barred the OIN’s claim for damages. *See supra* text accompanying note 44; *see also Sherrill*, 544 U.S. at 221 n.14 (“Justice STEVENS, after vigorously urging the application of laches to block further proceedings in *Oneida II*, now faults the Court for rejecting the claim presented here.” (citation omitted)).

74. *Sherrill*, 544 U.S. at 225 (Stevens, J., dissenting).

damages remedy.⁷⁵ Finally, he criticized the majority for relying on concerns about future zoning disputes not at issue in the case.⁷⁶

Scholars have criticized *Sherrill* on numerous fronts. On doctrinal grounds, some questioned the Court's focus on laches because it did not apply the traditional laches test of unreasonable delay and prejudice.⁷⁷ If it had done so, it would have recognized the efforts of the OIN to assert its rights despite numerous legal, political, and economic barriers.⁷⁸ Others noted that the Court's worries about checkerboard jurisdiction emerged only because of its jurisprudence on state and tribal authority in Indian Country.⁷⁹ Yet more found unpersuasive the notion that granting the OIN tax immunity would be disruptive.⁸⁰ Property scholars were skeptical about the Court's desire to protect the expectations of non-Indian landowners whose title derived from an unlawful dispossession.⁸¹ They also criticized

75. *See id.* at 226.

76. *Id.* at 222, 226. If such considerations were relevant, Justice Stevens thought the majority exaggerated the risk of excessive tribal powers, noting that New York's strong interest would permit it to continue applying zoning ordinances to the OIN parcels and that the OIN could not tax or otherwise regulate non-Indian lands within their reservation. *See id.* at 226 n.6.

77. *See, e.g.*, Curtis Berkey, Recent Development, *City of Sherrill v. Oneida Indian Nation*, 30 AM. INDIAN L. REV. 373, 378 (2005-2006). Additionally, as Justice Stevens' dissent noted, the City likely waived these equitable defenses. *See Sherrill*, 544 U.S. at 225 n.5 (Stevens, J., dissenting); Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47, 54 (2005) [hereinafter Krakoff, *Renaissance*].

78. *See, e.g.*, Krakoff, *A Regretful Postscript*, *supra* note 11, at 14-15 (arguing that the Tribe did not delay in pursuing its claims because it brought suit against the United States in 1893 and 1951 when the United States waived its sovereign immunity and that it could not sue in New York state courts without statutory authorization); Singer, *supra* note 23, at 615-27 (noting many legal and practical obstacles that prevented the OIN from suing to invalidate New York's land purchase, including the difficulty of finding and paying a lawyer, the inability of tribes to sue in state and federal courts without congressional authorization, state sovereign immunity, and uncertainty over whether the tribe had a private right of action raising a federal question).

79. *See, e.g.*, Joshua L. Sohn, Note and Comment, *The Double-Edged Sword of Indian Gaming*, 42 TULSA L. REV. 139, 163-64 (2006).

80. *See, e.g.*, Krakoff, *A Regretful Postscript*, *supra* note 11, at 16 (noting that the Counties only had to slightly adjust their property tax system to make up for the lost revenue and that the OIN partially compensated local governments for lost revenue); Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 OR. L. REV. 175, 196, 210-11 (2008) (demonstrating that proximity to a reservation does not make land less valuable and arguing that because land would be worth more to a tax-exempt tribe, landowners could sell property to the tribe at a premium).

81. *See, e.g.*, Singer, *supra* note 23, at 610.

the decision for leaving the OIN with title to the land but no associated rights and, conversely, leaving non-Indians with all the property rights associated with ownership without formal title.⁸² Some believed that *Sherrill*'s reasoning conflicted with the Nonintercourse Act, which made New York's land purchase invalid both in law and equity.⁸³ Others noted that the decision presumed a strange notion of sovereignty that fades with time.⁸⁴

Scholars also criticized *Sherrill* on policy grounds. The decision seemingly defied recent federal policy supporting tribal independence and sovereignty.⁸⁵ In doing so, some thought it usurped the role of Congress in managing tribal-state relations, even though Congress never indicated concern about the settled expectations the Court purported to protect.⁸⁶ The Court's decision also permitted New York to avoid the consequences of its misconduct simply because a significant period of time had passed.⁸⁷ The only scholarly defense of *Sherrill* argued that, due to the difficulty of adjudicating historical facts, the Court was right to maintain the status quo and leave what were ultimately policy issues to the political branches.⁸⁸

In the thirteen years since the decision, the Supreme Court has not responded to these criticisms, nor has it explained *Sherrill*'s holding any further. In fact, the justices have cited *Sherrill* only four times. Two of these citations were for matters of Supreme Court procedure.⁸⁹ The other two

82. See, e.g., *id.*

83. See, e.g., *id.* at 608-09.

84. See Krakoff, *Renaissance*, *supra* note 77, at 54.

85. See Krakoff, *A Regretful Postscript*, *supra* note 11, at 6, 18.

86. See, e.g., Seth Davis, *Tribal Rights of Action*, 45 COLUM. HUM. RTS. L. REV. 499, 550 (2014).

87. See, e.g., Krakoff, *A Regretful Postscript*, *supra* note 11, at 6 (“[T]he Court is embracing an apologist stand toward the many instances of immoral and illegal governmental actions against the tribe, and ultimately suggesting that the passage of time renders that history irrelevant, indeed even unmentionable.”); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21, 45 (2005) (arguing that *Sherrill* condoned the behavior of those who have “used physical and political power to dispossess Indian[s] . . . of their lands”).

88. See *Availability of Equitable Relief*, 119 HARV. L. REV. 347, 354-56 (2005). *But see* Krakoff, *A Regretful Postscript*, *supra* note 11, at 11 (arguing that the decision “puts the Court in the role of moral arbiter” by “weighing in on one side of the historical ledger”); Singer, *supra* note 23, at 628-29 (arguing that the Court should have ruled for the OIN and then permitted Congress to figure out how to balance the interests of the OIN and the non-Indian possessors).

89. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 n.1 (2009); *Medellin v. Dretke*, 544 U.S. 660, 685 n.2 (2005) (O'Connor, J., dissenting).

brief citations by Justice Thomas suggested that he believes *Sherrill*'s concerns about disruption to non-Indian settled expectations could bar tribal rights beyond the narrow context of land claim litigation.⁹⁰

II. Applications of Sherrill in the Lower Courts

Despite substantial criticism, *Sherrill* remains good law, and the decision itself is almost all we can utilize to determine its scope. The question then becomes what lower courts should do with the decision. This Part explores how lower courts have evaluated *Sherrill*'s scope. First, although the Second Circuit has encountered some pushback, it has derived a rule from *Sherrill* barring all tribal land claims regardless of the remedy the tribe seeks.⁹¹ Second, courts are split on *Sherrill*'s application to disputes involving tribal sovereignty, including reservation diminishment claims,⁹² suits involving other treaty rights,⁹³ and claims of tribal sovereign immunity from suit.⁹⁴ As is evident from these lower court decisions, no consensus has developed on the reach of the *Sherrill* decision.

A. Tribal Land Claims

1. The Second Circuit's Inherent Disruption Rule

Sherrill's greatest impact has been in tribal land claims in the Second Circuit. Despite adjudicating tribal land claims since the 1970s,⁹⁵ the Second Circuit has read *Sherrill* to bar these claims completely. As the court stated in 2014, "it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence, and impossibility."⁹⁶ The court has been inconsistent in articulating its rule,⁹⁷ but its application seems to bar all tribal land claims.⁹⁸

90. *See supra* note 16.

91. *See infra* Section II.A.

92. *See infra* Section II.B.2.

93. *See infra* Section II.B.3.

94. *See infra* Section II.B.4.

95. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 208 (2005) (noting that the OIN filed its test case against Oneida and Madison Counties in 1970).

96. *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 165 (2d Cir. 2014).

97. Initially, the court articulated a two-step test, first asking whether *Sherrill* applied to the claim and then analyzing whether the factors from *Sherrill* supported dismissal. *See Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 125-29 (2d Cir. 2010); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 276-77 (2d Cir. 2005). Then, likely because it had

Under this “inherent disruption rule,” the court has dismissed five tribal land claims in the twelve years since *Sherrill*.⁹⁹ Because the Supreme Court has denied certiorari in all five cases,¹⁰⁰ this rule has ended the era of land claims in the Second Circuit.

The Second Circuit developed its inherent disruption rule for tribal land claims in two steps. First, in *Cayuga Indian Nation v. Pataki*, the court held that *Sherrill* bars “possessory” land claims because they inherently disrupt non-Indian settled land ownership.¹⁰¹ Before *Sherrill*, the district court in *Cayuga* awarded the tribe almost \$250 million in damages and interest for the fair market value of its dispossessed land and the fair rental value of that land between the dispossession and judgment.¹⁰² After *Sherrill*, the Second

held that *Sherrill* applies to all tribal land claims, the court framed its rule as a three-factor test to determine when *Sherrill* barred the claim. *See Onondaga Nation v. New York*, 500 F. App’x 87, 89 (2d Cir. 2012) (“Three specific factors determine when ancestral land claims are foreclosed on equitable grounds: (1) ‘the length of time at issue between an historical injustice and the present day’; (2) ‘the disruptive nature of claims long delayed’; and (3) ‘the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs’ injury.’” (quoting *County of Oneida*, 617 F.3d at 127)). Eventually, the court stopped applying these factors and instead articulated its inherent disruption bar on all tribal land claims. *See supra* text accompanying note 96.

98. *See, e.g., County of Oneida*, 617 F.3d at 148 (Gershon, J. dissenting) (“With this decision, the majority forecloses plaintiffs from bringing *any* claims seeking *any* remedy for their treatment at the hands of the State.”); Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV’T L. REV. 1, 43 (2017) (arguing that the Second Circuit’s approach “den[ies] New York tribes *any* remedy whatsoever for the illegal taking of their lands”).

99. *See Shinnecock Indian Nation v. New York*, 628 F. App’x 54, 55 (2d Cir. 2015); *Stockbridge-Munsee*, 756 F.3d at 166; *Onondaga Nation*, 500 F. App’x at 89-90; *County of Oneida*, 617 F.3d at 118; *Cayuga*, 413 F.3d at 268. The Northern District of New York ruled on *Sherrill*’s application in a sixth tribal land claim involving the Mohawks. Because the court did not dismiss all of the tribe’s claims, *see Can. St. Regis Band of Mohawk Indians v. New York*, No. 5:82-CV-0783, 2013 WL 3992830, at *22 (N.D.N.Y. July 23, 2013), the tribe could not appeal the ruling to the Second Circuit. Since the 2013 decision, the parties have engaged in extensive settlement negotiations. *See, e.g., Joint Status Report and Request for Extension of Stay Order at 1, Can. St. Regis*, No. 5:82-CV-0783 (N.D.N.Y. Oct. 25, 2017); *Joint Status Report at 1, Can. St. Regis*, No. 5:82-CV-0783 (N.D.N.Y. Dec. 6, 2013).

100. *See Shinnecock Indian Nation v. New York*, 136 S. Ct. 2512 (2016); *Stockbridge-Munsee Cmty. v. New York*, 135 S. Ct. 1492 (2015); *Onondaga Nation v. New York*, 571 U.S. 969 (2013); *Oneida Indian Nation v. County of Oneida*, 565 U.S. 970 (2011); *Cayuga Indian Nation v. Pataki*, 547 U.S. 1128 (2006).

101. 413 F.3d at 275.

102. *See id.* at 271-73.

Circuit reversed.¹⁰³ The court reasoned that *Sherrill*'s broad language about disruption demonstrated that its equitable defense should apply to any disruptive tribal land claim, even those that are "legally viable and [brought] within the statute of limitations."¹⁰⁴ Refusing to distinguish *Sherrill* on the basis that the district court here awarded monetary damages rather than equitable relief permitting the Tribe to assert its sovereignty, the Second Circuit thought the Cayuga claims were premised on "a continuing right to immediate possession" and thus were inherently disruptive, even if relief were monetized.¹⁰⁵ Quoting *Sherrill*, it reasoned that, "[w]hether characterized as an action at law or in equity, any remedy flowing from this possessory land claim, which would call into question title to over 60,000 acres of land in upstate New York, can only be understood as a remedy that would . . . 'project redress into the present and future.'"¹⁰⁶ To justify applying *Sherrill* to actions at law, the court also cited the "unusual considerations at play in this area of the law" and the fact that "ordinary common law principles are . . . 'not readily transferrable to this action.'"¹⁰⁷

Second, *Oneida Indian Nation v. County of Oneida* extended *Cayuga* "to bar any ancient land claims that are disruptive of significant and justified societal expectations that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief."¹⁰⁸ The district court held that *Cayuga* did not bar the OIN's claim for fair compensation for its two-hundred-year-old land sale to New York because the claim sought only retrospective relief for damages and was not based on a continuing

103. *See id.* at 277-78

104. *See id.* at 273-74.

105. *See id.* at 274-75.

106. *Id.* at 275 (quoting *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 n.14 (2005)).

107. *Id.* at 276 (quoting *Cayuga Indian Nation v. Pataki*, 79 F. Supp. 2d 66, 71 (N.D.N.Y. 1999)). Judge Hall dissented. *See id.* at 280 (Hall, J., dissenting). She emphasized that laches and *Sherrill*'s equitable considerations focused not on the entire claim but on the specific remedy requested. *See id.* at 284, 288-89. For the tribe's ejection claim, she thought restoration of possession would be disruptive and prejudicial under *Sherrill* but awarding damages would not be. *See id.* at 284-85. She would also not have barred the trespass claim because it did not depend on actual possession of the land. *See id.* at 285. She took special issue with the majority's contention that monetary damages would be disruptive in the same way as the remedy sought in *Sherrill*. *See id.* at 290 & n.13 ("The contention that a damages award for either past fair rental value or present fair market value would 'project redress into the present and future' . . . vitiates any reasonable meaning the Supreme Court could have intended that phrase to have." (quoting *Cayuga*, 413 F.3d at 275)).

108. 617 F.3d 114, 135 (2d Cir. 2010) (emphasis added).

possessory right.¹⁰⁹ The Second Circuit reversed on this issue. It reasoned that *Sherrill* and *Cayuga*'s equitable defense applied to "all ancient land claims that are disruptive of justified societal interests that have developed over a long period of time, of which possessory claims are merely one type, and regardless of the particular remedy sought."¹¹⁰ The court noted that *Sherrill* and *Cayuga* emphasized the disruptive nature of the remedy or claim, not whether it was possessory; in fact, *Sherrill* did not even involve possession because the OIN already owned the land.¹¹¹ The court recognized two versions of the claim at issue: a contract claim by the OIN for receipt of unconscionable consideration and a claim by the United States for violation of the Nonintercourse Act. However, it dismissed both claims because, although the parties only sought monetary damages, the claims undermined the validity of the land transfer and threw current title into doubt.¹¹²

The Second Circuit's inherent disruption rule is notable for a number of reasons. To start, it permits courts to dismiss tribal land claims on the pleadings.¹¹³ Although *Cayuga* and *County of Oneida* reached the Second Circuit after a trial and on summary judgment, respectively,¹¹⁴ the Second Circuit has affirmed district court decisions applying the inherent disruption rule to bar tribal land claims on Rule 12(b)(6) motions.¹¹⁵ Tribes are not

109. See *Oneida Indian Nation v. New York*, 500 F. Supp. 2d 128, 137-40 (N.D.N.Y. 2007), *aff'd in part and reversed in part sub. nom. County of Oneida*, 617 F.3d 114.

110. See *County of Oneida*, 617 F.3d at 136.

111. See *id.* at 135-36.

112. See *id.* at 129-30, 136-38. Judge Gershon dissented. See *id.* at 141 (Gershon, J., dissenting). Noting the nonpossessory nature of the claim, she argued that it did not implicate land possession or ownership at all and thus did not "project redress into the present and future." *Id.* at 145 (quoting *Cayuga*, 413 F.3d at 275). She thought the presence of the United States in the litigation suing New York for violating a federal statute made the nonpossessory nature of the claim especially clear. See *id.* at 147. She also emphasized that *Sherrill* and *Cayuga* concerned "difficult present-day complications that would affect innocent third-party purchasers and the current value of the developed land"; these concerns were irrelevant to the OIN's fair compensation claim since it was no different today than if it had been brought immediately after the sales to New York. See *id.* ("[A] fair compensation remedy would not upset present-day expectations because it has nothing to do with the present at all."). Thus, she would have limited *Cayuga*'s bar to possessory land claims. See *id.* at 147-48.

113. See Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357, 380 (2009).

114. See *County of Oneida*, 617 F.3d at 117; *Cayuga*, 413 F.3d at 269-73.

115. See *Stockbridge-Munsee Cmty. v. New York*, No. 3:86-CV-1140 (LEK/DEP), 2013 WL 3822093, at *1 (N.D.N.Y. July 23, 2013), *aff'd*, 756 F.3d 163 (2d Cir. 2014); *Onondaga*

entitled to discovery or an evidentiary hearing¹¹⁶ and cannot present evidence outside the pleadings.¹¹⁷ Courts rely on judicial notice for information on the local non-Indian population and development of the area.¹¹⁸

Moreover, the Second Circuit views the rule as a new equitable defense combining laches, acquiescence, and impossibility.¹¹⁹ It has therefore rejected arguments based on traditional laches principles.¹²⁰ Most significantly, tribes cannot argue that their delay in bringing suit was

Nation v. New York, No. 5:05-cv-0314 (LEK/RFT), 2010 WL 3806492, at *1 (N.D.N.Y. Sept. 22, 2010), *aff'd*, 500 F. App'x 87 (2d Cir. 2012); Shinnecock Indian Nation v. New York, No. 05-CV-2887 (TCP), 2006 WL 3501099, at *1 (E.D.N.Y. Nov. 28, 2006), *aff'd*, 628 F. App'x 54 (2d Cir. 2015). The Northern District of New York heard a fourth case on a 12(c) motion for judgment on the pleadings. *See* Can. St. Regis Band of Mohawk Indians v. New York, No. 5:82-CV-0783, 2012 WL 8503274, at *1 (N.D.N.Y. Sept. 28, 2012), *report and recommendation adopted in part and rejected in part*, 2013 WL 3992830 (N.D.N.Y. July 23, 2013).

116. *See* Oneida Indian Nation v. New York, 500 F. Supp. 2d 128, 136-37 (N.D.N.Y. 2007), *aff'd in part and reversed in part sub nom. County of Oneida*, 617 F.3d 114.

117. *See, e.g.,* Can. St. Regis, 2012 WL 8503274, at *6 n.15; *see also* Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 MONT. L. REV. 97, 110 (2015) ("In short, no evidence is necessary in the Second Circuit to dismiss Indian land claims under the Nonintercourse Act—a court may dismiss them as a matter of law.").

118. *See Onondaga*, 500 F. App'x at 89-90. In one case, the district court took judicial notice of U.S. Census data on the local non-Indian population offered by both parties, which differed in the scope of the geographical area measured. *See Can. St. Regis*, 2013 WL 3992830, at *17-18.

119. *See, e.g.,* *Stockbridge-Munsee*, 756 F.3d at 166; *County of Oneida*, 617 F.3d at 127-28.

120. Outside the Second Circuit, some courts have interpreted *Sherrill* to permit the application of traditional laches against tribes. An Arizona district court, for example, applied traditional laches (though without any analysis of whether *Sherrill* required otherwise) to a tribal suit to bar access to a federal right-of-way through its land. *See In re Schugg*, 384 B.R. 263, 277-78 (D. Ariz. 2008). Although the Ninth Circuit reversed the court's laches analysis, it did not contest that laches could apply to the claim. *See Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1076 (9th Cir. 2010); *see also* *Mishewal Wappo Tribe v. Salazar*, No. 5:09-cv-02502 EJD, 2011 WL 5038356, at *6-7 (N.D. Cal. Oct. 24, 2011) (noting that *Sherrill* applied traditional laches and suggesting, while not deciding, that laches could bar a tribal suit for federal recognition and an order requiring the federal government to take its land into trust since the tribe significantly delayed in bringing suit after it was terminated, allowing the local municipalities to have developed justifiable reliance on use of the land at issue); *Ottawa Tribe v. Ohio Dep't of Nat. Res.*, 541 F. Supp. 2d 971, 976-80 (N.D. Ohio 2008) (applying traditional laches to bar a tribe from exercising certain hunting and fishing rights pursuant to its treaty with the federal government), *aff'd on other grounds*, 577 F.3d 634 (6th Cir. 2009).

reasonable,¹²¹ even if state and federal governments contributed to the delay.¹²² The Second Circuit has also held that, since *Sherrill* did not rely on traditional laches, the inherent disruption rule can bar legal relief even if the claim falls within the statute of limitations.¹²³

Additionally, the specifics of the tribe's claims are not relevant to the inherent disruption rule. The rule applies whether the claim is legal or equitable.¹²⁴ It applies to whatever relief the tribe seeks,¹²⁵ even a declaratory judgment, because "the claims themselves expressly seek to undermine the validity of the original transfer of the subject lands and dramatically upset the settled expectations of current land-owners."¹²⁶ The Second Circuit seems to assume a claim is as disruptive as the most disruptive remedy available, even if the tribe does not seek that remedy or the court would never award it.¹²⁷ The inherent disruption rule does not

121. See *Onondaga*, 500 F. App'x at 90; *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 279 (2d Cir. 2005); *Shinnecock Indian Nation v. New York*, No. 05-CV-2887 (TCP), 2006 WL 3501099, at *5 (E.D.N.Y. Nov. 28, 2006), *aff'd*, 628 F. App'x 54 (2d Cir. 2015).

122. See *Onondaga Nation v. New York*, No. 5:05-cv-0314 (LEK/RFT), 2010 WL 3806492, at *8 (N.D.N.Y. Sept. 22, 2010), *aff'd*, 500 F. App'x 87 (2d Cir. 2012).

123. See *Stockbridge-Munsee*, 756 F.3d at 166. In arguing that laches should not bar legal claims within the statute of limitations, tribes have relied on *Petrella v. MGM, Inc.*, 572 U.S. 663, 667-68 (2014), which held that laches did not bar a copyright claim brought within the statute of limitations set in the Copyright Act. See, e.g., Brief of Appellant at 3-15, *Shinnecock*, 628 F. App'x 54 (No. 14-4445(L)), 2015 WL 3901820. The Second Circuit has rejected this argument primarily because it believes Congress has not established a statute of limitations for tribal land claims. See, e.g., *Stockbridge-Munsee*, 756 F.3d at 166. *But see infra* note 274 (noting the unsettled question of whether 28 U.S.C. § 2415 set a statute of limitations for tribal land claims). However, the Second Circuit has also stated that, even if there were a statute of limitations, *Petrella* would not apply because *Sherrill* did not utilize traditional laches. See *id.*; see also *Shinnecock*, 628 F. App'x at 55 (holding that *Stockbridge-Munsee* foreclosed the tribe's argument that *Petrella* abrogated *Cayuga* and *County of Oneida*).

124. See, e.g., *Onondaga*, 2010 WL 3806492, at *5; Fort, *supra* note 113, at 380; *supra* text accompanying notes 106-07 (explaining the Second Circuit's rationale in *Cayuga* for applying *Sherrill* to bar actions at law).

125. See *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 127 (2d Cir. 2010) (barring the tribe's possessory land claims regardless of whether it sought "actual ejection, damages for ongoing trespass liability, or, instead, payment of the fair market value of the property in a single lump sum").

126. *Onondaga*, 2010 WL 3806492, at *7; accord *Onondaga*, 500 F. App'x at 89 ("The disruptive nature of the claims is indisputable as a matter of law. . . . [A] declaratory judgment alone—even without a contemporaneous request for an ejection—would be disruptive.").

127. See Kathryn Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 WYO. L. REV. 375, 400

require the dispute to concern a significant amount of land or number of landowners because “the test for disruptiveness is not based on strict numeric calculations” and *Sherrill* itself involved only small parcels of land.¹²⁸

The Second Circuit has held that its inherent disruption rule applies against the United States in addition to tribes. Although laches traditionally does not bar the United States’ claims, the court in *Cayuga* noted that this was not a per se rule.¹²⁹ It adopted from the Seventh Circuit three contexts where laches could bar the United States’ claims: “egregious instances of laches,” claims with no statute of limitations, and suits to enforce private rights.¹³⁰ The *Cayuga* court found all three exceptions applicable because the United States did not bring suit for two hundred years, there was no statute of limitations for the claim until 1966, and the United States sued on behalf of the tribe.¹³¹ Five years later, the Second Circuit reaffirmed that the intervention of the United States does not prevent application of the inherent disruption rule.¹³²

(2011) (noting that the Second Circuit’s doctrine “combines the disruption and impossibility considerations from cases where ejectment or dispossession is a highly unlikely, but a possible remedy, and applies them to any remedy conceived of by the tribes or district courts for the illegal takings of tribal lands”).

128. See *Shinnecock Indian Nation v. New York*, No. 05-CV-2887 (TCP), 2006 WL 3501099, at *5 (E.D.N.Y. Nov. 28, 2006), *aff’d*, 628 F. App’x 54 (2d Cir. 2015); *accord* *Can. St. Regis Band of Mohawk Indians v. New York*, No. 5:82-CV-0783, 2012 WL 8503274, at *11 n.21 (N.D.N.Y. Sept. 28, 2012), *report and recommendation adopted in part and rejected in part*, 2013 WL 3992830 (N.D.N.Y. July 23, 2013).

129. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 278 (2d Cir. 2005) (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943)).

130. See *id.* at 278-79 (citing *United States v. Admin. Enters., Inc.*, 46 F.3d 670 (7th Cir. 1995)).

131. See *id.* at 279. Judge Hall also dissented from this part of the panel opinion. See *id.* at 286-88 (Hall, J., dissenting). She argued that *Clearfield Trust*, which the majority cited for its contention that there is no categorical bar on subjecting the United States to laches, only applied laches against the United States since there was no statute of limitations and the United States’ claims related to “business and commerce,” not its “sovereign authority and rights.” *Id.* at 286-87. She then rejected the Seventh Circuit’s decision in *Administrative Enterprises* as based on a faulty reading of Supreme Court precedent. See *id.* at 287-88, 287 n.9. Finally, she argued that, even if the three exceptions from *Administrative Enterprises* were legitimate, they did not apply to the United States’ intervention in the Cayuga land claim litigation because the delay in bringing suit may have been reasonable, Congress had set a statute of limitations, and the United States protects a public interest when it sues on a tribe’s behalf. See *id.* at 288.

132. See *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 129 (2d Cir. 2010).

Finally, the Second Circuit has not specified the length of delay and type of disruption required to trigger the inherent disruption rule. As to the former, all the claims the Second Circuit has adjudicated post-*Sherrill* arose out of land transfers that occurred at least 130 years before suit was filed.¹³³ Sometimes, the court has not even relied on the specific length of the delay, but instead only referred to the “tremendous expanse of time”¹³⁴ or stated that “the allegedly void transfers occurred long ago.”¹³⁵ Because the OIN’s delay in bringing suit in *Sherrill* was as long as the shortest period the Second Circuit has considered, the court can easily say that the delays are sufficiently long under Supreme Court precedent.¹³⁶ For a unique claim in one case, however, a district court held that a forty-year delay between the allegedly invalid land transfer and the lawsuit was too short for *Sherrill* to apply.¹³⁷

The Second Circuit has been similarly vague about what level of disruption to non-Indian settled expectations is required to trigger the inherent disruption rule.¹³⁸ In one case, the court simply said the area was “extensively populated by non-Indians” and “predominantly non-Indian today” with “significant material development by private persons and enterprises as well as by public entities.”¹³⁹ In another, the court noted that tribal members “have not resided on the lands at issue since the nineteenth century,” their “primary reservation lands are located elsewhere,” and “the land has been owned and developed by other parties subject to State and

133. See *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 164 (2d Cir. 2014) (144 years); *Onondaga Nation v. New York*, 500 F. App’x 87, 89 (2d Cir. 2012) (183 years); *Cayuga*, 413 F.3d at 269 (174 years); *Oneida Indian Nation v. New York*, 500 F. Supp. 2d 128, 135 (N.D.N.Y. 2007) (almost 130 years), *aff’d in part and reversed in part sub nom. County of Oneida*, 617 F.3d 114 (2d Cir. 2010); *Shinnecock*, 2006 WL 3501099, at *5 (over 140 years).

134. *County of Oneida*, 617 F.3d at 126.

135. *Stockbridge-Munsee*, 756 F.3d at 166.

136. Cf. *Oneida Indian Nation*, 500 F. Supp. 2d at 135 (noting that it was bound by *Sherrill* to find that the OIN’s delay in bringing suit was sufficiently long because the suit involved the same underlying land claim).

137. See *Can. St. Regis Band of Mohawk Indians v. New York*, No. 5:82-CV-0783, 2013 WL 3992830, at *8 (N.D.N.Y. July 23, 2013).

138. See *id.* at *18 (“[N]o bright-line rule exists such that an Indian population of less than X percent establishes a non-Indian character and greater than X percent establishes an Indian character . . .”).

139. *Onondaga Nation v. New York*, 500 F. App’x 87, 89 (2d Cir. 2012) (quoting *Onondaga Nation v. New York*, No. 5:05-cv-0314 (LEK/RFT), 2010 WL 3806492, at *8 (N.D.N.Y. Sept. 22, 2010)).

local regulation.”¹⁴⁰ Where the opinions have specified the size of the local non-Indian population, it has always been over 99%.¹⁴¹ Courts have noted as especially concerning tribal claims that would interfere with major transportation routes¹⁴² and infrastructure developments.¹⁴³ These cases all represented straightforward applications of *Sherrill*, where the non-Indian population was less than 1%, and the tribe owned less than 1.5% of the land.¹⁴⁴

2. Other Courts

Two courts outside the Second Circuit have adopted the inherent disruption rule to dismiss tribal land claims.¹⁴⁵ In *New Jersey Sand Hill*

140. *Stockbridge-Munsee*, 756 F.3d at 166; see also *County of Oneida*, 617 F.3d at 126-27 (stating only that “most of the Oneidas have moved elsewhere, the subject lands have passed into the hands of a multitude of entities and individuals . . . , and these parties have themselves both bought and sold the lands, and also developed them to an enormous extent”).

141. See *Shinnecock Indian Nation v. New York*, No. 05-CV-2887 (TCP), 2006 WL 3501099, at *5 (E.D.N.Y. Nov. 28, 2006) (stating that Suffolk County is 0.2% Indian), *aff’d*, 628 F. App’x 54 (2d Cir. 2015); *Oneida Indian Nation*, 500 F. Supp. 2d at 135 (noting that Oneida and Madison Counties are 0.2% and 0.6% Indian, respectively).

142. See *Can. St. Regis*, 2013 WL 3992830, at *5 (“Ejecting the state or otherwise requiring that the highway be rerouted at this late date would be highly disruptive in precisely the way *Sherrill* laches operates to prevent”); *Shinnecock*, 2006 WL 3501099, at *5 n.9 (“[E]jecting the Long Island Railroad Company from the Subject Lands would have devastating consequences to the region’s economy and a drastic impact on thousands of commuters.”).

143. See *Can. St. Regis*, 2013 WL 3992830, at *9 (dismissing a tribal land claim under *Sherrill* in part because of “the presence of a major hydroelectric facility” on the disputed land).

144. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 211 (2005).

145. Two other courts have also touched on *Sherrill*’s application to tribal land claims, but they did not decide the issue. In *Paiute-Shoshone Indians v. City of Los Angeles*, an Eastern District of California court seemed willing to apply *Sherrill* to a tribal land claim seeking ejection of current owners from land to which the Tribe alleged it did not lawfully surrender its title in 1938, but it refused to do so on the pleadings since “the issue of laches raises significant questions of fact” and *Sherrill* itself was decided on summary judgment. See No. 1:06-cv-00736 OWW LJO, 2007 WL 521403, at *2, *4, *11 & n.4 (E.D. Cal. Feb. 15, 2007), *aff’d on other grounds*, 637 F.3d 993 (9th Cir. 2011). As the court issued this decision before the Second Circuit made explicit that its rule applied at the pleadings stage, it is not clear whether it was affirmatively disagreeing with the Second Circuit on this issue. Because the Ninth Circuit dismissed the Tribe’s complaint under Rule 19 for failing to join the United States as an indispensable party, see *Paiute-Shoshone*, 637 F.3d at 995-96, and the Tribe voluntarily dismissed its amended complaint attempting to do so, see Notice of Voluntary Dismissal Without Prejudice at 2, *Paiute-Shoshone*, No. 1:06-cv-00736 (E.D. Cal.

Band of Lenape & Cherokee Indians v. Corzine, for example, a New Jersey district court dismissed a tribal claim that New Jersey and its counties “ha[d] converted and misappropriated their land and other property rights for more than 200 years.”¹⁴⁶ Similarly, in *Wolfchild v. Redwood County*, a Minnesota district court dismissed a suit on behalf of a class of Indians seeking recognition and possession of a twelve-square-mile reservation they alleged Congress promised their ancestors for remaining loyal to the United States during a Sioux uprising in the 1860s.¹⁴⁷ In both cases, the court emphasized the long delay of the tribe in bringing suit and the inherent risk of disrupting non-Indian settled expectations.¹⁴⁸ In *Wolfchild*, the court also rejected an attempt to distinguish *Sherrill* on the grounds that the OIN’s claim was based on aboriginal title and was equitable, not legal.¹⁴⁹

One district court within the Second Circuit has attempted to mitigate the harsh application of the inherent disruption rule, though seemingly in a way incompatible with the Second Circuit’s guidance. In *Canadian St. Regis Band of Mohawk Indians v. New York*, Judge Kahn of the Northern District of New York permitted two tribal claims to survive a motion for judgment on the pleadings.¹⁵⁰ Analyzing the suit separately for each type and section

Feb. 28, 2012), the court never ruled on the *Sherrill* issue. In *Delaware Nation v. Pennsylvania*, the Third Circuit declined to address *Sherrill*’s application to a tribal claim for possession of 315 acres of land in Pennsylvania 250 years after the alleged dispossession. 446 F.3d 410, 413, 415 n.8 (3d Cir. 2006). Because the court held that Pennsylvania had extinguished the tribe’s aboriginal title with its 1737 land purchase and the Nonintercourse Act did not bar the sale of land held by the tribal chief individually, the court did not reach the defendants’ *Sherrill* argument. *See id.* at 415-19, 415 n.8.

146. No. 09-683 (KSG), 2010 WL 2674565, at *1 (D.N.J. June 30, 2010). The court specifically applied *Sherrill* to bar claims based on a 1758 treaty, *see id.* at *20-21, after dismissing many of the claims on other grounds, *id.* at *5-20.

147. *See* 91 F. Supp. 3d 1093, 1095-98 (D. Minn. 2015), *aff’d on other grounds*, 824 F.3d 761 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 447 (2016).

148. *See id.* at 1102-03, 1105 (noting that the tribal claim arose from an 1863 Act of Congress and a land sale in 1895 and relying on Second Circuit caselaw to find that the claim threatened the expectations of the local municipalities and individual property owners); *Sand Hill*, 2010 WL 2674565, at *21 (stating that “the plaintiffs [sought] possessory redress for an alleged contractual violation that ripened, at the latest, 208 years ago” and that “[t]he grant of such relief would be disruptive to say the least” because “much has happened in the interim”).

149. *See Wolfchild*, 91 F. Supp. 3d at 1105.

150. *See* *Can. St. Regis Band of Mohawk Indians v. New York*, No. 5:82-CV-0783, 2013 WL 3992830, at *8-21 (N.D.N.Y. July 23, 2013). Interestingly, in *Onondaga and Stockbridge-Munsee*, Judge Kahn held that the inherent disruption rule completely barred the tribal suits. *See Stockbridge-Munsee Cmty. v. New York*, No. 3:86-CV-1140 (LEK/DEP), 2013 WL 3822093, at *3-4 (N.D.N.Y. July 23, 2013), *aff’d*, 756 F.3d 163 (2d Cir. 2014);

of land the Tribe claimed,¹⁵¹ he first declined to find that a claim concerning rights-of-way for power-line easements was barred, as only forty years had passed between the signing of the argument and the tribal lawsuit.¹⁵² Second, he permitted the Tribe to pursue its claim for a two-thousand-acre triangle sandwiched by its reservation on two sides.¹⁵³ He noted that, although the claim was over a century old and disruptive, the area did not have a “longstanding distinctly non-Indian character.”¹⁵⁴ He emphasized that the triangle had a “large majority of Indian inhabitants” and a “much higher concentration of Indian inhabitants than the surrounding region.”¹⁵⁵ Further, more Mohawks remained in New York in the 1800s than Cayugas and Oneidas.¹⁵⁶ In reaching his holding, Judge Kahn relied heavily on the fairness considerations of equity and noted that it would be “disturbingly anti-democratic” to read *Sherrill* and its progeny to bar all tribal land claims because Congress has itself set a statute of limitations.¹⁵⁷

Onondaga Nation v. New York, No. 5:05-cv-0314 (LEK/RFT), 2010 WL 3806492, at *7-8 (N.D.N.Y. Sept. 22, 2010), *aff'd*, 500 F. App'x 87 (2d Cir. 2012). The Mohawk land claim's unique facts likely permitted him to distinguish the case from *Cayuga* and *County of Oneida* in a way that the *Onondaga* and *Stockbridge-Munsee* land claims did not.

151. *See Can. St. Regis*, 2013 WL 3992830, at *3-4 (justifying this analysis by noting that, unlike *Sherrill*, *Cayuga*, *County of Oneida*, and *Onondaga*, the Mohawk claims involved rights-of-way, international borders, and land carved out from its reservation in different treaties). This approach seems inconsistent with *Sherrill*, which did not differentiate among the OIN's patchwork of land parcels. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 211-21 (2005). Judge Kahn noted that *Sherrill* involved concerns about checkerboarding jurisdiction and constantly changing parcels as the OIN purchased new land, in contrast to the “easily identifiable and discrete areas” at issue with the Mohawk claims. *See Can. St. Regis*, 2013 WL 3992830, at *4. Although he has a point, the *Sherrill* Court could have, but did not, fashion a test that considered each parcel's disruption separately. *But see infra* note 317 (arguing that the Court should alter the *Sherrill* framework to permit more individualized and fact-specific analyses of disruption).

152. *See Can. St. Regis*, 2013 WL 3992830, at *6-8.

153. *See id.* at *15-20.

154. *See id.* at *16-17.

155. *See id.* at *19.

156. *Id.* at *19-20.

157. *See id.* at *3, *16 & n.24. The Second Circuit would likely take issue with this because it has held that *Sherrill* created a unique defense not tied to traditional equitable concerns, *see supra* text accompanying note 119, and that the Indian Claims Limitation Act did not set a statute of limitations for tribal land claims, *see supra* note 123.

B. Sovereignty

1. Casino Disputes in New York

Sherrill's most direct application has come in two cases in the Northern District of New York that, like *Sherrill*, involved tribal attempts to secure immunity from local laws for activities on repurchased lands within their historic reservations. In these cases, the tribes attempted to construct class II gaming facilities in violation of local zoning laws.¹⁵⁸ Relying on *Sherrill*, both judges ruled against the tribes in terse fashion.¹⁵⁹ If tax immunity was disruptive in *Sherrill*, the judges reasoned, immunity from zoning laws was "even more disruptive."¹⁶⁰ More damning to the tribes, *Sherrill* explicitly mentioned concerns about disruption from zoning law immunity and cited these two cases as examples.¹⁶¹ The judges concluded that the "Supreme Court's strong language in *City of Sherrill* regarding the disruptive effect on the everyday administration of state and local governments bar[red] the Nation from asserting immunity from state and local zoning laws and regulations."¹⁶²

The Eastern District of New York found *Sherrill* applicable in a different casino zoning dispute involving the Shinnecocks. Before the Second Circuit vacated the decision for lack of subject matter jurisdiction, the district court conducted a detailed *Sherrill* analysis after a thirty-day bench trial. The district court concluded that *Sherrill* barred construction of a casino on tribal nontrust land in violation of state and local laws.¹⁶³ The court made

158. *Cayuga Indian Nation v. Village of Union Springs*, 390 F. Supp. 2d 203, 205 (N.D.N.Y. 2005); *Seneca-Cayuga Tribe v. Town of Aurelius*, No. 5:03-CV-00690 (NPM), 2004 WL 1945359, at *1-2 (N.D.N.Y. Sept. 1, 2004).

159. *See Union Springs*, 390 F. Supp. 2d at 206 (granting summary judgment to the Village and vacating the tribe's permanent injunction); *Seneca-Cayuga Tribe v. Town of Aurelius*, 233 F.R.D. 278, 282 (N.D.N.Y. 2006) (granting the Town judgment on the pleadings).

160. *Union Springs*, 390 F. Supp. 2d at 206; *accord Aurelius*, 233 F.R.D. at 281.

161. *Union Springs*, 390 F. Supp. 2d at 206; *accord Aurelius*, 233 F.R.D. at 281; *see also* *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220 (2005) (noting that if it ruled for the OIN, "little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area"); *id.* at 220 n.13 (referring to the attempts of the tribes in *Aurelius* and *Union Springs* "to free historic reservation lands purchased in the open market from local regulatory controls").

162. *See Union Springs*, 390 F. Supp. 2d at 206; *accord Aurelius*, 233 F.R.D. at 282.

163. *See New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 188, 195-96, 279-91 (E.D.N.Y. 2007), *vacated and remanded on other grounds*, 686 F.3d 133 (2d Cir. 2012). The opinion is not clear on the ownership history of the land, but the court suggested that,

three preliminary rulings on *Sherrill*'s applicability. First, even though the Tribe possessed the land continuously, unlike the OIN in *Sherrill, Cayuga* required the court to apply *Sherrill* to any disruptive land claim.¹⁶⁴ Second, because *Sherrill* and *Cayuga* “analyzed . . . potential future disruptiveness that would result from a decision in favor of the tribe,” the state could introduce evidence of possible uses for the land beyond the proposed casino.¹⁶⁵ The court emphasized that it would waste judicial resources to require the state to seek an injunction each time the Tribe conducted a slightly more disruptive activity.¹⁶⁶ Third, since recognizing the Tribe's sovereignty would permit it to ignore state law, the court rejected the argument that it should consider in its disruption analysis the Tribe's agreement to build its casino in accordance with state environmental laws.¹⁶⁷

The court then held that *Sherrill* barred the Tribe from asserting sovereignty over the land to secure an exemption from state and local zoning laws.¹⁶⁸ The court noted that the Tribe had not previously asserted sovereignty on the land and utilized it only “for timber and periodic social gatherings.”¹⁶⁹ The court also recognized that, although the town never imposed property taxes, it had exercised jurisdiction in other ways for centuries without objection from the Tribe.¹⁷⁰ Finally, relying on substantial factual evidence and expert testimony, the court found that the construction

although the tribe ceded title to the land to colonists in the 1600s, it retained possession continuously through the present. *See id.* at 280.

164. *See id.* at 280-81.

165. *See id.* at 281-83. The court noted, however, that even the proposed casino was sufficiently disruptive that *Sherrill* compelled a ruling for the state. *See id.* at 283.

166. *See id.* at 288.

167. *See id.* at 287. The court also held that the Indian Gaming Regulatory Act did not authorize the casino because the tribe was not federally recognized at the time. *See id.* at 293; *see also* 25 U.S.C. § 2703(5) (2012) (requiring a tribe be federally recognized to fall within IGRA's scope). This provided an independent basis for the court's holding, *see Shinnecock*, 523 F. Supp. 2d at 294 (finding that IGRA preempted any common law right for the tribe to engage in gaming), but it also meant that the Tribe would not have to sign a tribal-state compact if the court had recognized its right to build a casino.

168. *See Shinnecock*, 523 F. Supp. 2d at 283-91.

169. *Id.* at 283-84 (citing a lack of permanent structures or fencing on the land; a lack of tribal laws for use of the land; an archeological study finding “minimal human activity” on the land; and the Tribe's failure to protest encroachment by a non-Indian neighboring landowner).

170. *See id.* at 284-85 (noting inclusion of the land in a 1738 subdivision; the town's regulation of timber harvesting and improvement of a public road on the land; and its 1957 zoning ordinance that included the land).

and operation of the casino would disrupt state and local governance, as well as the settled expectations of non-Indian landowners.¹⁷¹ Of most concern were the burdens of providing police, fire, ambulance, water, and other services to the casino; the increased traffic and accompanying safety hazards; and the health and environmental consequences of construction.¹⁷²

2. Reservation Diminishment

Beyond these New York casino disputes, courts have wrestled with whether and how to apply *Sherrill* to sovereignty claims primarily in reservation diminishment cases where a party has argued that Congress shrunk or eliminated a reservation. No court has relied on *Sherrill* exclusively to find a reservation diminished or to deny a tribe the ability to exercise sovereignty over its reservation, but some have suggested they would do so in an appropriate case.¹⁷³

Both the Second Circuit and the Northern District of New York have repeatedly held that *Sherrill* did not disturb the Second Circuit's holding that the Oneida reservation has not been disestablished.¹⁷⁴ They have

171. *See id.* at 285-91.

172. *See id.* at 285-87. In a separate sovereignty question that emerged in a New York casino dispute, the Second Circuit rejected the argument that *Sherrill* made the land-to-trust process of the IRA "the sole means for a tribe to establish jurisdiction over off-reservation fee lands." *Citizens Against Casino Gambling in Erie Cty. v. Chaudhuri*, 802 F.3d 267, 284 n.14 (2d Cir. 2015). The court noted correctly that, while *Sherrill* endorsed the IRA process, it "did not state that this was the *only* avenue" to do so. *Id.*; *see also* *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005) ("[The IRA] provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago."). Thus, Congress can provide a tribe-specific statutory scheme to effectuate the same purpose. *See Citizens Against Casino Gambling*, 802 F.3d at 284 n.14 (noting that the Seneca Nation Settlement Act "provided a mechanism comparable to the IRA through which the Seneca Nation could attain jurisdiction" over newly purchased lands and thus that the Tribe did not "unilaterally assert jurisdiction" over their land like the OIN did in *Sherrill*).

173. In a case not described below, the Eighth Circuit denied South Dakota's motion to amend its petition for rehearing to include a *Sherrill* argument after rejecting its reservation diminishment claim. *See Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985, 992-93 (8th Cir. 2010).

174. *See, e.g.*, *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 563 (2d Cir. 2016), *cert. denied*, No. 16-1320, 2017 WL 5660979 (Nov. 27, 2017); *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443-44 (2d Cir. 2011); *Cent. N.Y. Fair Bus. Ass'n v. Jewell*, No. 6:08-CV-0660 (LEK/DEP), 2015 WL 1400384, at *12 (N.D.N.Y. Mar. 26, 2015), *aff'd* 673 F. App'x 63 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2134 (2017); *Town of Verona v. Jewell*, No. 6:08-cv-0647 (LEK/DEP), 2015 WL 1400291, at *6 (N.D.N.Y. Mar. 26, 2015); *Cent. N.Y. Fair Bus. Ass'n v. Salazar*, No. 6:08-CV-660

emphasized that *Sherrill* explicitly declined to address the disestablishment question¹⁷⁵ and that the decision recognized that only Congress can disestablish a reservation.¹⁷⁶ They further rejected the argument that the OIN reservation must be disestablished simply because “sovereignty is a distinguishing characteristic of an Indian reservation” and *Sherrill* denied the OIN the ability to exercise sovereignty over the land.¹⁷⁷

Similarly, the Eastern District of Michigan has taken a strong stance against reliance on *Sherrill* in reservation diminishment cases.¹⁷⁸ In *Saginaw Chippewa Indian Tribe v. Granholm*, a tribal-state jurisdictional dispute, the court articulated three reasons for its position that *Sherrill* did not affect reservation diminishment cases.¹⁷⁹ First, “the challenged conduct [was] not the same sort of distinct ancient wrong arising from the early days of the Republic,” as was found in *Sherrill* or *Cayuga*, because the reservation diminishment dispute concerned the state’s “incremental assumption of governmental responsibilities” over the reservation since treaties were signed.¹⁸⁰ Second, while *Sherrill* and *Cayuga* involved Nonintercourse Act violations with no statutorily defined remedy, the suit here arose from a treaty violation, a remedy which does not require the same exercise of judicial discretion.¹⁸¹ Third, the Tribe stipulated it was not seeking property tax exemptions, the ability to govern nonmembers, or the “resurrection of an ancient claim to the land” like those at issue in *Sherrill* and *Cayuga*; instead, it merely sought to exercise its treaty right to self-governance.¹⁸² The court recognized that the United States had intervened

(LEK/DEP), 2010 WL 786526, at *11 (N.D.N.Y. Mar. 1, 2010); *New York v. Salazar*, No. 6:08-CV-644 (LEK/GJD), 2009 WL 3165591, at *8-9 (N.D.N.Y. Sept. 29, 2009).

175. See, e.g., *Madison County*, 665 F.3d at 443; *Salazar*, 2009 WL 3165591, at *9.

176. See, e.g., *Cent. N.Y. Fair Bus. Ass’n*, 2010 WL 786526, at *11.

177. See *Town of Verona v. Salazar*, No. 6:08-cv-647 (LEK/GJD), 2009 WL 3165556, at *6 (N.D.N.Y. Sept. 29, 2009), *aff’d sub nom. Upstate Citizens*, 841 F.3d 556, *cert. denied*, No. 16-1320, 2017 WL 5660979 (Nov. 27, 2017). In a case involving the Cayugas, the New York Court of Appeals agreed that *Sherrill* said nothing about reservation diminishment. See *Cayuga Indian Nation v. Gould*, 930 N.E.2d 233, 247-49 (N.Y. 2010).

178. Without much explanation, a judge in the Eastern District of Wisconsin appeared to agree with the Eastern District of Michigan. See *Oneida Nation v. Village of Hobart*, No. 16-C-1217, 2017 WL 4773299, at *2 (E.D. Wis. Oct. 23, 2017) (noting that, unless the town could show that Congress had diminished the reservation, *Cabazon*, not *Sherrill*, governed whether its special events ordinance applied to tribal activities).

179. See No. 05-10296-BC, 2008 WL 4808823, at *1-2, *22-23 (E.D. Mich. Oct. 22, 2008).

180. *Id.* at *22.

181. See *id.*

182. *Id.*

in its sovereign capacity to enforce its treaties with the Tribe and that equitable doctrines cannot alter treaty obligations.¹⁸³ In ruling for the Tribe, the court declined to read *Sherrill* and *Cayuga* for the broad proposition that “Indian tribes are barred by equitable defenses when they request prospective relief contrary to contemporary ‘justifiable expectations’ of a non-Indian population—public and private.”¹⁸⁴

Conversely, the Tenth Circuit has suggested that *Sherrill* might apply to reservation diminishment claims. In *Osage Nation v. Irby*, a dispute concerning state tax authority, the court used the established *Solem* test for reservation diminishment to affirm the district court’s holding that Congress had diminished a reservation in Osage County.¹⁸⁵ The district court had also ruled for the state on its *Sherrill* argument. Due to the state’s governance of the county for over one hundred years, the population makeup containing merely 20.7% Indian and 5.4% Osage, and the Tribe’s delayed challenge to the state’s tax authority, the district court thought that “[r]ecognizing Osage County as a reservation and ousting Oklahoma income taxation over Osage members would have significant practical consequences not only for income taxation, but potentially for civil, criminal and regulatory jurisdiction.”¹⁸⁶ The Tenth Circuit panel did not review this *Sherrill* holding, but it did suggest that “the longstanding

183. *See id.* at *23 (“It would be remarkable to hold that the commitments and obligations of the United States embodied in its treaties may be altered by a judicially endorsed equitable defense based upon the State of Michigan’s inconsistent incremental exercise of governmental authority over time.”).

184. *Id.* at *17 (quoting *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 215 (2005)).

185. 597 F.3d 1117, 1121-27 (10th Cir. 2010), *aff’g sub nom.* *Osage Nation v. Oklahoma ex rel. Okla. Tax Comm’n*, 597 F. Supp. 2d 1250 (N.D. Okla. 2009). The *Solem* test asks whether Congress intended to diminish the reservation by looking at the statutory language of Congress’s enactment, its legislative history, and post-enactment history. *See* COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.04(3), at 199 (Nell Jessup Newton et al. eds., 2012).

186. *Osage*, 597 F. Supp. 2d at 1265-66, 1266 n.15. The court put significant weight on the state’s need to collect taxes to provide services to the County and its residents:

The ability to raise revenues to support its services to Osage County lands and the tax status of Osage tribal members is of critical importance to Oklahoma. If this Court were to now establish Osage County as a reservation more than a century after Congress was understood to have dissolved that status *and* that such status automatically deprives Oklahoma of the ability to fund services in Osage County through income taxes, the State’s provision of services would be severely threatened.

Id. at 1265.

assumption of jurisdiction by the State over an area that is [predominantly] non-Indian, both in population and in land use, may create justifiable expectations' that 'merit heavy weight.'"¹⁸⁷ The import of this statement is unclear. The panel might have thought *Sherrill* was either an alternative means of finding reservation diminishment or instead a doctrine limiting relief after finding a reservation undiminished.¹⁸⁸ Although it may not have been intentional, the district court's language about the disruption from "establishing Osage County as a reservation" suggests that it believed the former.¹⁸⁹

Six years later, however, in *Ute Indian Tribe v. Myton*, the Tenth Circuit refused to apply *Sherrill* to bar a tribal suit enjoining a town from exercising criminal jurisdiction on a reservation on the basis that the Tribe's long delay in bringing suit induced the town to reasonably believe that it did not contain reservation lands.¹⁹⁰ The panel questioned whether *Sherrill* could apply to a suit involving tribal trust lands because the United States is generally not subject to laches.¹⁹¹ It also doubted that the town's belief was justified because the federal government told it in 1945 that the Tribe had jurisdiction within its boundaries, the Tribe consistently objected after the town asserted jurisdiction over the lands, the Tribe won two judgments holding that all or some of the town was Indian Country, and the state and county accepted tribal jurisdiction.¹⁹² The court contrasted this with *Sherrill*, "where the land was sold to nontribal members and neither the tribe nor the federal government did anything to assert their rights '[f]rom the early 1800's into the 1970's.'"¹⁹³ The panel did not say whether it would have followed the *Sherrill*-related concerns its colleagues had

187. *Irby*, 597 F.3d at 1127-28 (alteration in original) (quoting *Sherrill*, 544 U.S. at 215-16).

188. See *infra* text accompanying notes 284-86 (discussing the conceptual distinction between these two issues).

189. *Irby*, 597 F.3d at 1120. An Oklahoma state court has also relied on *Sherrill* as one of multiple reasons to find that land was not Indian Country. See *Murphy v. State*, 124 P.3d 1198, 1206 (Okla. Crim. App. 2005) (finding that a road was not Indian Country for the purposes of criminal jurisdiction where the only Indian ownership interest was a one-twelfth stake in the mineral rights beneath the land in part because considering it Indian Country would create the checkerboard of state and tribal jurisdiction the Court found problematic in *Sherrill*).

190. See 835 F.3d 1255, 1258-60, 1263 (10th Cir. 2016), *cert. dismissed*, 137 S. Ct. 2328 (2017). An earlier iteration of this case reached the Supreme Court in *Hagen v. Utah*, 510 U.S. 399 (1994).

191. See *Ute*, 835 F.3d at 1263.

192. See *id.*

193. See *id.* (quoting *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 (2005)).

expressed in *Osage* if it were less skeptical of the alleged justifiable expectations of the town.

Eschewing either position, the Western District of Michigan has held that *Sherrill* applies only to the remedial stage of a reservation diminishment suit. In *Little Traverse Bay Bands of Odawa Indians v. Snyder*, the court bifurcated the case because the Tribe sought two forms of relief: a declaration that its reservation had not been diminished and a permanent injunction barring the state from asserting jurisdiction over the Tribe or its citizens in a manner inconsistent with federal law.¹⁹⁴ The first stage would cover the question of reservation diminishment; because this question depended solely on congressional intent, the court awarded the Tribe summary judgment on the state's *Sherrill* defense for this issue.¹⁹⁵ However, if Congress had not diminished the reservation, the court concluded that *Sherrill* and its focus on remedies could be relevant in the second stage to determine whether to enjoin the state from asserting jurisdiction on the reservation and what state activities to enjoin.¹⁹⁶ Since the resolution depended on the specific equitable relief the Tribe would seek, the court declined at that point to adjudicate *Sherrill*'s application to this second stage.¹⁹⁷

3. Hunting and Fishing Treaty Rights

Two courts have taken opposite positions on *Sherrill*'s application to treaty-based hunting and fishing rights disputes. In *United States v. Washington*, the Ninth Circuit held that *Sherrill* did not alter the longstanding rule that laches cannot diminish or render unenforceable tribal treaty rights.¹⁹⁸ The State of Washington had appealed an injunction

194. See 194 F. Supp. 3d 648, 650 (W.D. Mich. 2016).

195. See *id.* at 653-54.

196. See *id.* at 654-55.

197. See *id.* at 655. The court noted as an example that *Sherrill* would not bar an injunction preventing the state from interfering in Indian child custody cases; it did not explain why, but its citation to the Indian Child Welfare Act suggests it believed equitable defenses could not interfere with the congressional grant of tribal jurisdiction over such matters. See *id.* (citing 25 U.S.C. § 1911 (2012)).

198. See 853 F.3d 946, 967-68 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018). In a subproceeding of the same action, the district court also declined to apply *Sherrill* to an intertribal dispute about the boundaries of their fishing areas because it involved a delay of no more than thirty-five years, during which the tribes negotiated an informal settlement, and because their failure to resolve their claims during the lengthy litigation meant their expectations were neither settled nor justifiable. See *United States v. Washington*, 88 F. Supp. 3d 1203, 1206, 1211-13 (W.D. Wash. 2015).

requiring it to remove culverts it built that prevented fish from moving freely to and from their spawning grounds in violation of tribal fishing rights.¹⁹⁹ Washington contended that *Sherrill's* equitable considerations permitted the court to find that the United States waived its treaty claims because it helped the state prepare a fish remediation plan and ordered specifically designed culverts on federally funded highways.²⁰⁰ The court rejected this argument by distinguishing *Sherrill* in three ways. First, *Sherrill* involved a claim to sovereignty over land within an abandoned reservation; the Tribes in *Washington* had not abandoned their reservations.²⁰¹ Second, unlike in *Sherrill*, the Tribes had not relinquished their treaty rights in any way.²⁰² Third, Washington and the Tribes had fought over fishing rights for more than a century, whereas the dispute in *Sherrill* lay dormant for almost two centuries.²⁰³

The Northern District of Ohio implicitly disagreed with the Ninth Circuit in its ruling on laches in a dispute over a tribe's exercise of hunting and fishing rights free from state regulation.²⁰⁴ On summary judgment, the court analyzed the state's defense using the traditional laches factors of unreasonable delay and prejudice.²⁰⁵ The court first held that the delay

199. See *Washington*, 853 F.3d at 954.

200. See *id.* at 966-67.

201. *Id.* at 968.

202. See *id.*

203. See *id.*; see also *United States v. Washington*, 864 F.3d 1017, 1021 (9th Cir. 2017) (Fletcher, J., & Gould, J., concurring in the denial of rehearing en banc) (reiterating the same arguments), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018). This holding inspired a strong dissent when the court declined to rehear the case en banc. See *id.* at 1030-31 (O'Scannlain, J., respecting the denial of rehearing en banc). The dissent rejected these three ways of distinguishing *Sherrill*. Since *Sherrill* clarified that laches can bar tribal treaty rights, they thought it irrelevant that *Sherrill* involved sovereignty over land and this dispute concerned rights appurtenant to land. See *id.* Nor did it matter that the Tribes had not acquiesced to the culverts because Washington sought to impose laches against the United States, whom *Sherrill* made subject to laches and who was an essential party to permit the Tribes to sue a sovereign state. See *id.* at 1031 (citing *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 129 (2d Cir. 2010)). Finally, the United States delayed over thirty years from completion of the culverts before bringing suit, which made removal difficult and expensive. See *id.*

204. In dicta, the Eastern District of California has also stated that laches can apply to tribal treaty rights post-*Sherrill*. See *Paiute-Shoshone Indians v. City of Los Angeles*, No. 1:06-cv-00736 OWW LJO, 2007 WL 521403, at *25 (E.D. Cal. Feb. 15, 2007).

205. See *Ottawa Tribe v. Ohio Dep't of Nat. Res.*, 541 F. Supp. 2d 971, 976 (N.D. Ohio 2008), *aff'd on other grounds*, 577 F.3d 634 (6th Cir. 2009). Previously, the court declined to resolve the *Sherrill* issue on a motion to dismiss because of the complicated factual questions involved. See *Ottawa Tribe v. Speck*, 447 F. Supp. 2d 835, 844-45 (N.D. Ohio

between the Tribe's removal from Ohio in 1831 and its lawsuit in 2005 was unreasonable.²⁰⁶ On the prejudice prong, the court found that permitting the Tribe to hunt and fish free from state regulation on public lands and inland waters would pose a threat of injury to state park visitors.²⁰⁷ Further, it would harm wildlife refuges and hinder state conservation efforts.²⁰⁸ The court thought tribal fishing in Lake Erie would not prejudice the state because the lake was under-fished and the state could still regulate non-Indian fishing.²⁰⁹ The court declined to read *Sherrill* to hold that "enforcing a treaty right which inhibits state sovereignty and creates a special sovereign status for [the Tribe] is inherently prejudicial."²¹⁰ Instead, the court distinguished the claim in *Sherrill*, which sought complete freedom from state and local sovereign control, from the Ottawas' claim for "partial displacement of sovereign authority" over hunting and fishing rights.²¹¹

4. Sovereign Immunity

Finally, lower courts have disagreed over the implications of *Sherrill* for tribal sovereign immunity. This issue arose on remand in the *Sherrill* litigation in the *Madison County* decision. After the Court denied the OIN tax immunity, the Tribe sought to enjoin Madison and Oneida Counties from foreclosing on the parcels for nonpayment of taxes on the basis of its sovereign immunity from suit.²¹² Rejecting the counties' argument that *Sherrill* barred the OIN from asserting sovereign immunity, the Second Circuit emphasized the distinction between "tribal sovereign authority over reservation lands and tribal sovereign immunity from suit."²¹³ While tax immunity arises from tribal sovereign authority over specific lands, sovereign immunity operates independently of the status of the land where

2006). The use of traditional laches and adjudication on summary judgment differ from the Second Circuit's treatment of *Sherrill* arguments in tribal land claims. See *supra* text accompanying notes 113-15, 119-23.

206. See *Ottawa*, 541 F. Supp. 2d. at 976-77 (noting that the delay was unreasonable despite the Tribe's lack of financial resources because the Tribe could have sued in state court since 1831 and federal court since at least 1966).

207. See *id.* at 978-79.

208. *Id.*

209. See *id.* at 979-80.

210. *Id.* at 979.

211. *Id.*

212. See *Oneida Indian Nation v. Madison County*, 605 F.3d 149, 151 (2d Cir. 2010), *vacated as moot and remanded*, 562 U.S. 42 (2011).

213. *Id.* at 156.

the relevant tribal activities occur.²¹⁴ The two doctrines also developed separately.²¹⁵ The court declined to read *Sherrill* as implicitly abrogating the sovereign immunity of the OIN simply to permit the counties to enforce their tax laws.²¹⁶ The court observed that our legal system regularly gives rights without remedies and that the counties had other recourse, including damages suits against tribal officers, agreements with the Tribe, and congressional legislation.²¹⁷

The Second Circuit reaffirmed this holding in a factually indistinguishable suit by another New York tribe.²¹⁸ Emphasizing these holdings, the Supreme Court in 2014 reaffirmed the “solicitous treatment of the common-law tribal immunity *from suit*—as opposed to immunity from other, largely prescriptive, powers of the states such as the levying of taxes.”²¹⁹ The court reasoned that reading *Sherrill* to impliedly abrogate tribal sovereign immunity would violate the Court’s admonition that only Congress could do so.²²⁰

Not all courts have agreed with the Second Circuit. At least one has held that tribes cannot invoke sovereign immunity where *Sherrill* bars immunity from state and local laws.²²¹ Other judges have expressed discomfort with

214. *See id.* at 156-58.

215. *See id.* (tracing sovereign authority to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and sovereign immunity to *Turner v. United States*, 248 U.S. 354 (1919)).

216. *See id.* at 159 n.8, 160.

217. *See id.*

218. *Cayuga Indian Nation v. Seneca County*, 761 F.3d 218, 220-21 (2d Cir. 2014) (per curiam).

219. *Id.*

220. *Id.* at 221 (citing *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014)). New Mexico state courts have agreed with the Second Circuit for similar reasons. *See Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 987-88 (N.M. 2016); *Armijo v. Pueblo of Laguna*, 247 P.3d 1119, 1123-24 (N.M. Ct. App. 2010). A Connecticut state court has also suggested that *Sherrill* said nothing about tribal sovereign immunity. *See Van Etten v. Mashantucket Pequot Gaming Enter.*, No. KNLCV044001587, 2005 WL 3112753, at *3 (Conn. Super. Ct. Oct. 31, 2005).

221. *See New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007) (rejecting a tribe’s argument that sovereign immunity barred a suit by the state and town to enjoin it from opening a casino), *vacated and remanded on other grounds*, 686 F.3d 133 (2d Cir. 2012). The Eastern District of Wisconsin arguably reached the same result in *Oneida Tribe of Indians v. Village of Hobart*. *See* 542 F. Supp. 2d 908, 920-21 (E.D. Wis. 2008) (permitting the town to foreclose on property reacquired by a tribe and subject to state and local taxes under *Sherrill*). *Hobart* did not explicitly discuss sovereign immunity, *see Armijo*, 247 P.3d at 1124 (“[T]he basis for the decision in *Hobart* was sovereign authority not sovereign immunity.”), but the court granted summary judgment permitting the town to foreclose on tribal property. *See Hobart*, 542 F. Supp. 2d at 910. A third case, *Poarch Band*

the binding caselaw that required them to rule for tribes on this issue.²²² The theory that *Sherrill* altered the law of tribal sovereign immunity rests on two rationales. First, the *Sherrill* majority disagreed with the dissent's statement that the OIN could assert its tax immunity defensively in a foreclosure action due to the majority's focus on the equitable nature of the relief, stating that "[t]he equitable cast of the relief sought remains the same whether asserted affirmatively or defensively."²²³ One court has interpreted this to mean that tribes cannot assert sovereign immunity defensively when *Sherrill* bars them from exercising sovereign authority affirmatively.²²⁴ Second, *Sherrill*'s holding that state and local laws apply on certain tribal land is meaningless without the power to enforce those laws, so *Sherrill* must have implicitly abrogated sovereign immunity.²²⁵ Even two of the

of Creek Indians v. Moore, also appeared to read *Sherrill* as holding that the OIN could not assert sovereign immunity in suits for nonpayment of taxes, but this reading may have resulted from misunderstanding the distinction between sovereign immunity from taxation and sovereign immunity from suit. *See* No. CA 15-00277-CG-C, 2016 WL 4778788, at *10 (S.D. Ala. Aug. 10, 2016) (noting during its discussion of tribal immunity from the defendant's counterclaim that *Sherrill* held that the OIN "was barred from asserting sovereign immunity from paying city property taxes"), *report and recommendation adopted in part and rejected in part*, 2016 WL 4745185 (S.D. Ala. Sept. 12, 2016). In any event, the court declined to apply *Sherrill* because it thought laches, acquiescence, and impossibility irrelevant to the dispute and because the counterclaim concerned trust land. *See id.* at *11.

222. *See Madison County*, 605 F.3d at 163-64 (Cabranes, J., concurring); *Cayuga Indian Nation v. Seneca County*, 890 F. Supp. 2d 240, 246-47 (W.D.N.Y. 2012), *aff'd*, 761 F.3d 218 (2d Cir. 2014).

223. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 n.7 (2005); *see id.* at 225-26 (Stevens, J., dissenting).

224. *Shinnecock*, 523 F. Supp. 2d at 298. *But see Hamaatsa*, 388 P.3d at 987-88 (noting and rejecting the argument that this language created an exception to tribal sovereign immunity for equitable relief).

225. *See Hobart*, 542 F. Supp. 2d at 921; *Shinnecock*, 523 F. Supp. 2d at 298. In addition, local governments have repeatedly contended that tribes cannot assert sovereign immunity in foreclosure suits because they are *in rem* proceedings. *See, e.g., Seneca County*, 761 F.3d at 221; *Oneida Indian Nation v. Madison County*, 401 F. Supp. 2d 219, 229 (N.D.N.Y. 2005), *aff'd*, 605 F.3d 149 (2d Cir. 2010), *vacated as moot and remanded*, 562 U.S. 42 (2011). Courts have rejected this argument because foreclosure proceedings are really "suit[s] to take the tribe's property," *Madison County*, 401 F. Supp. 2d at 229, and sovereign immunity is a broad doctrine with limited exceptions, *Seneca County*, 761 F.3d at 220-21. *But see* *Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W.2d 685, 694 (N.D. 2002) (rejecting the argument that the court could not adjudicate an *in rem* condemnation action over tribal fee land); *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569, 573-74 (Wash. 2017) (same in an *in rem* quiet title suit), *vacated*, 138 S. Ct. 1649 (2018). This past term, the Supreme Court ruled that *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), did not hold that Indian tribes lack

three judges on the *Madison County* panel, although bound by Supreme Court precedent, felt it “defie[d] common sense” that a “tribe [could] purchase land . . . ; refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed.”²²⁶

III. Toward a Faithful Understanding of *Sherrill*

As is evident from the preceding discussion, courts are in a state of confusion over the effect of the *Sherrill* decision. With significant dissent, the Second Circuit has interpreted *Sherrill* to bar all tribal land claims. The Tenth Circuit and the Western District of Michigan have suggested that *Sherrill* may apply to reservation diminishment cases, but the Second Circuit and the Eastern District of Michigan have held it does not. Courts are also split on whether *Sherrill* permits laches to apply in disputes concerning tribal hunting and fishing rights. Most, but not all, courts have declined to find that *Sherrill* altered the tribal sovereign immunity doctrine. Transcending these doctrinal areas are other conflicts about *Sherrill*'s application, such as whether its framework can apply at the pleadings stage, whether it requires evidentiary findings, whether the United States is subject to arguments based on *Sherrill*, and whether *Sherrill* is a new equitable defense or merely a version of traditional laches.

All this confusion has likely arisen because *Sherrill* does not fit neatly within any preexisting doctrinal category. The Court drew on a number of different doctrines to support the decision, but it acknowledged that none of them directly governed the OIN suit for tax immunity.²²⁷ Although *Sherrill*

sovereign immunity in *in rem* proceedings, but it declined to address whether the common-law immovable property exception applies to tribal sovereign immunity. *See* 138 S. Ct. at 1653-54.

226. *Madison County*, 605 F.3d at 163-64 (Cabrane, J., concurring). The Northern District of Oklahoma rejected an argument that *Sherrill* could deprive tribes of another aspect of sovereignty: the ability to bring *parens patriae* suits on behalf of their members. *See* *Quapaw Tribe v. Blue Tree Corp.*, 653 F. Supp. 2d 1166, 1175, 1190-92 (N.D. Okla. 2009). Unlike *Sherrill*, which involved a tribal attempt to displace state and local jurisdiction, the court reasoned that the tribe in this suit brought claims under state law to abate environmental hazards on land over which it exercised sovereign authority. *See id.* at 1192.

227. *See Sherrill*, 544 U.S. at 215 (noting that the Court has expressed concerns about non-Indian expectations “in the different, but related, context of the diminishment of an Indian reservation”); *id.* at 217 (“The principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various

involved tax immunity, for example, the Court did not mention its precedents on the topic. The decision affected the ability of the OIN to exercise sovereignty on its reservation pursuant to its treaty with the United States, but the Court did not apply traditional reservation diminishment or treaty rights analysis. Nor does the case fit with traditional land claim litigation because the OIN was not seeking ejectment or damages for its dispossessed land.

Furthermore, *Sherrill's* imprecise language leaves the decision susceptible to broad application. The *Sherrill* Court clearly expressed concerns about the delay of the OIN in bringing suit and the settled expectations of non-Indian landowners and state and local governments that the reassertion of tribal sovereignty would disrupt.²²⁸ These concerns could arise in practically any dispute involving Indian tribes. Because tribes fall outside the two-sovereign federalist structure that dominates the American perspective about government,²²⁹ most non-Indians probably do not think about tribes regularly and would be surprised if a tribe sought to exercise land, treaty, or sovereign rights in their neighborhoods.

A broad application of *Sherrill's* concerns about justifiable expectations and disruption could bar any tribal attempt to exercise its rights in a new way or in a way that it has not done for some time. For example, as the Northern District of Ohio has suggested, a tribe's attempt to exercise hunting and fishing treaty rights after many years of not doing so could interfere with the expectations of non-Indians who are using those lands and waters. The exercise of these rights could also interfere with the ability of state and local governments to implement conservation measures.²³⁰ Similarly, construction of a casino could cause disruption to the expectations of non-Indian neighbors about traffic and noise while hindering state and local efforts to maintain zoning and environmental standards.²³¹ The varied contexts in which these concerns could apply make the *Sherrill* Court's failure to specify the limits of its holding

guises."); *id.* at 218 ("This Court's original-jurisdiction state-sovereignty cases do not dictate a result here, but they provide a helpful point of reference . . .").

228. See Fort, *supra* note 113, at 380 (noting that *Sherrill's* "new laches" doctrine differs from traditional laches in part because it focuses on "delay and disruption").

229. Cf. *United States v. Lara*, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment) (arguing that tribes cannot exercise sovereignty over those who do not consent to their jurisdiction because they fall outside the Constitution's two-sovereign structure).

230. See *supra* text accompanying notes 207-08.

231. See *supra* text accompanying notes 162-72.

problematic.²³² Therefore, the first step in making sense of how lower courts should apply *Sherrill* is to figure out what *Sherrill* stood for. The lack of doctrinal rigor in the decision makes this task difficult, but the Court provided four significant hints about the scope of the decision.

First, the Court explicitly said that *Sherrill* did not alter the Court's 1985 holding in *Oneida II*, which permits tribes to sue for damages under federal common law for the unlawful dispossession of their land.²³³ True, *Oneida II* expressly left open the question of whether laches barred the Tribe's possessory land claim.²³⁴ But *Oneida II* also reserved the question of "whether equitable considerations should limit the relief available" to the Tribe.²³⁵ The *Sherrill* opinion plainly addressed only the latter question concerning remedies.²³⁶ It twice mentioned that *Oneida II* reserved this question, including at the beginning of its legal analysis, and omitted any mention of the laches question.²³⁷ The Court strongly hinted in both *Oneida II* and *Sherrill* that applying equitable doctrines to bar suits for damages would be inappropriate,²³⁸ which suggests that *Sherrill*'s equitable concerns do not apply to the *Oneida II* federal common law right. The Court's reaffirmance of *Oneida II* requires that *Sherrill*'s scope be understood in light of the common law cause of action for unlawful dispossession.

Second, although hardly clear, *Sherrill* is a land claim case, not one primarily about sovereignty. In subsequent sovereignty disputes, litigants hoping to apply *Sherrill* have repeatedly argued that the decision concerned

232. The fact that the Court created the *Sherrill* doctrine without briefing from the parties and amici on the specific issue it ultimately decided may partially explain its failure to anticipate and limit the consequences of this new doctrine. *See supra* note 54.

233. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005).

234. *See Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 273-74 (2d Cir. 2005); *see also Oneida II*, 470 U.S. 226, 244-45 (1985) (refusing to rule on the petitioners' laches argument because they did not raise it at the Second Circuit).

235. *Oneida II*, 470 U.S. at 253 n.27.

236. *See Sherrill*, 544 U.S. at 209, 213.

237. *Id.*

238. *See id.* at 221 n.14 ("[A]pplication of a nonstatutory time limitation in an action for damages would be 'novel.'" (quoting *Oneida II*, 470 U.S. at 244 n.16)); *Oneida II*, 470 U.S. at 244 n.16 (suggesting, but not deciding, that laches would not bar the OIN's claim for damages because laches do not apply to actions at law or fit with Indians' ward status, federal policy supporting tribal land claims, and the requirement of a congressional act to extinguish tribal sovereignty); *cf. Cayuga*, 413 F.3d at 290 (Hall, J., dissenting in part and concurring in part) (relying on these statements from *Sherrill* and *Oneida II* to argue that "*Sherrill* limits the application of the equitable defense of laches to the award of forward-looking, disruptive equitable relief").

sovereignty and treaty rights.²³⁹ In support of this argument, Justice Scalia suggested at the *Parker* oral argument that *Sherrill* held that the OIN did not have sovereignty over their repurchased parcels.²⁴⁰ Tribes and the federal government have responded by arguing that *Sherrill* has no application to most sovereignty disputes because it concerned a remedy for the unlawful dispossession of the OIN land.²⁴¹

The *Sherrill* decision does not explicitly resolve this debate, but a close reading demonstrates the tribes are correct. At *Sherrill*'s core is a concern about whether a revival of tribal sovereignty is an appropriate remedy for the *Oneida II* common law right of action.²⁴² This is clear from the beginning of the opinion's legal analysis, where the Court acknowledged the *Oneida II* right and then stated that the Tribe could not reassert tax immunity as a remedy for this violation.²⁴³ The Court reiterated throughout *Sherrill* that it was addressing a remedy for the *Oneida II* right.²⁴⁴ While the OIN sought to assert sovereignty on its reservation, the underlying right concerned New York's unlawful dispossession of tribal lands. The Court's repeated references to the "ancient" wrong reinforce this conclusion;²⁴⁵ only the unlawful dispossession occurring in the late 1700s and early 1800s, and not the sovereignty dispute arising in the late 1990s, could be considered an

239. See, e.g., Brief of Oklahoma Farm Bureau, Inc. et al. as Amici Curiae in Support of Affirmance at 21-22, *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010) (No. 09-5050); Brief of Defendant-Appellee Director of Ohio Department of Natural Resources at 37-38, *Ottawa Tribe v. Logan*, 577 F.3d 634 (6th Cir. 2009) (No. 08-3621), 2008 WL 6123204; State's Brief in Opposition to Tribe's Combined Motion for Partial Summary Judgment and Rule 12(f) Motion to Strike Defenses or Rule 26(b) Limit Discovery at 15-16, *Little Traverse Bay Bands of Odawa Indians v. Snyder*, 194 F. Supp. 3d 648 (W.D. Mich. 2016) (No. 1:15-cv-850).

240. See Transcript of Oral Argument at 46, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406), 2016 WL 524813.

241. See, e.g., Opening Brief of Appellant at 53, *Osage*, 597 F.3d 1117 (No. 09-5050), 2009 WL 2429151; Reply Brief of Appellant Ottawa Tribe of Oklahoma at 26, *Ottawa Tribe v. Logan*, 577 F.3d 634 (No. 08-3621), 2009 WL 1420918.

242. But see Singel & Fletcher, *supra* note 87, at 46 (suggesting that *Sherrill* was not a land case, at least not in the same way as *Oneida I* and *Oneida II*).

243. See *Sherrill*, 544 U.S. at 213-14.

244. See, e.g., *id.* at 202 ("Our 1985 decision recognized that the Oneidas could maintain a federal common-law claim for damages for ancient wrongdoing in which both national and state governments were complicit. Today, we decline to protect redress for the Tribe into the present and future . . ."); *id.* at 221 ("[T]he question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*. However, [the facts of the case] render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.").

245. E.g., *id.* at 216 n.11, 221.

“ancient” wrong.²⁴⁶ The Court also relied most directly on two cases involving Indian land claims: *Felix v. Patrick* and *Yankton Sioux Tribe of Indians v. United States*.²⁴⁷ Finally, *Sherrill*’s application of equitable defenses fits much better in the context of a remedy for the *Oneida II* right rather than a sovereignty or treaty violation. It would be radical to apply equitable defenses to bar an Indian treaty right, which only Congress can abrogate.²⁴⁸ The Court is free, however, to craft defenses to a common law right of action.²⁴⁹

Third, *Sherrill*’s analysis centered on the distinction between rights and remedies. The Court explicitly recognized this distinction²⁵⁰ and stressed that equitable considerations barred only the specific relief the OIN sought, not its entire claim.²⁵¹ This focus on remedies follows from the reaffirmance of *Oneida II* and the emphasis on the underlying land claim.

246. Cf. *Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC, 2008 WL 4808823, at *22 (E.D. Mich. Oct. 22, 2008) (distinguishing a reservation diminishment dispute from *Sherrill* in part by noting that, while *Sherrill* concerned an ancient wrong from over two centuries earlier, the dispute at issue developed incrementally with the state’s assumption of jurisdiction); Krakoff, *A Regretful Postscript*, *supra* note 11, at 12 (noting two timeframes for the claim in *Sherrill*: a long-standing dispute with New York from the 1700s and a new dispute arising when the OIN first repurchased its land).

247. See *Sherrill*, 544 U.S. at 217-19; see also *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 352-53 (1926) (involving a tribe’s suit over title and possession to a tract of land in Minnesota); *Felix v. Patrick*, 145 U.S. 317, 318-19 (1892) (involving a tribal member’s heirs’ suit to establish a constructive trust over lands allegedly fraudulently conveyed to the defendants).

248. See *infra* text accompanying note 287.

249. See, e.g., *Oneida II*, 470 U.S. 226, 240-50, 253 n.27 (1985) (rejecting the relevance of a number of defenses to the common law right of action for unlawful dispossession and reserving the question of whether equitable defenses could bar certain forms of relief). In *Saginaw Chippewa*, the court noted that the *Sherrill* Court was “reasonably, indeed necessarily, involved in the task of fashioning a remedy” for a Nonintercourse Act violation because Congress did not specify one. See 2008 WL 4808823, at *22. This is not completely accurate, as *Oneida II* recognized a federal common law right for unlawful dispossession, not an implied cause of action under the Nonintercourse Act. See *Oneida II*, 470 U.S. at 233. But it is certainly correct that the Court had the authority and responsibility to shape remedies for that common law right.

250. See *Sherrill*, 544 U.S. at 213.

251. See, e.g., *id.* at 216-17 (stating that the long delay in bringing suit and the changes to the region “preclude[d] OIN from gaining the disruptive *remedy* it now seeks” (emphasis added)); *id.* at 215 n.9 (“The *relief* OIN seeks . . . is unavailable . . .” (emphasis added)); see also *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 288-89 (2d Cir. 2005) (Hall, J., dissenting) (collecting quotations that demonstrate that “the clear language of *City of Sherrill* confines its holding to the use of laches to bar certain relief, not to bar a claim or all remedies”).

The Court was simply evaluating a remedy for the OIN's *Oneida II* right that sought to revive tribal sovereignty. Justice Souter's concurrence bolsters this reading of *Sherrill*. If he had to write separately to explain that inaction of the OIN was "central to the very claims of *right*,"²⁵² the majority opinion must have held that equitable considerations barred only the OIN's requested *remedy*.

Finally, the Court's primary concern with the OIN's request for tax immunity was the risk of future disruption from granting a remedy that permitted the Tribe to assert sovereignty. The Court worried that granting this remedy would "project redress . . . into the present and future" and "have disruptive practical consequences."²⁵³ The Court seemingly treated all exercises of tribal sovereignty identically,²⁵⁴ but it was plainly focused on the forward-looking remedy that would have permitted the Tribe to assert its sovereignty, not on the retrospective damages award the Court authorized in *Oneida II*.

Putting these four core aspects of *Sherrill* together demonstrates the narrow scope of the opinion. The Court was solely concerned about the disruptive consequences of a remedy in land claim litigation that would

252. *Sherrill*, 544 U.S. at 222 (Souter, J., concurring) (emphasis added).

253. *Id.* at 202, 219 (majority opinion); *accord id.* at 215 n.9 ("The relief OIN seeks . . . is unavailable because of . . . the present-day and future disruption such relief would engender."); *id.* at 219 (rejecting the "unilateral reestablishment of present and future Indian sovereign control").

254. Although the Second Circuit has taken its inherent disruption rule too far, *see infra* Part IV.A, the *Sherrill* opinion could be read to support an all-or-nothing approach to evaluating assertions of sovereignty. *See Sherrill*, 544 U.S. at 202-03, 219-20 (stating that the OIN could not "unilaterally revive its ancient sovereignty, in whole or in part," evaluating the disruption of the OIN's requested tax immunity based on risks of exemptions from other state and local regulations, and not providing factual support for its conclusory belief that granting the OIN tax immunity would be disruptive). Some courts have adopted this approach and thus failed to use factual evidence to support their conclusion that tribal sovereignty would cause disruption, *see supra* text accompanying notes 158-62 (noting that the courts in *Union Springs* and *Aurelius* simply assumed that building casinos in violation of local zoning laws would be disruptive), or evaluated whether to permit a tribe to exercise its sovereignty based on the most disruptive possible use of the land, *see supra* text accompanying notes 163-72 (noting this approach in *Shinnecock*). Although the *Sherrill* Court may have thought the OIN's assertion of sovereignty in a heavily non-Indian area following its removal from New York two centuries earlier was so disruptive that the specific way in which the OIN sought to exercise its sovereignty was irrelevant (and thus might have evaluated the disruptive effects of the specific exercise of sovereignty under more tribe-friendly facts), this is only speculation. *But see infra* note 319 (arguing that *Sherrill*'s all-or-nothing approach is misguided and that the Court should replace that approach with a more fact-specific analysis of disruption).

permit a tribe to revive its sovereignty over the land. These concerns centered on this forward-looking remedy relating to exercises of tribal sovereignty and did not affect the *Oneida II* cause of action for damages stemming from unlawful dispossession. Although the decision sought to protect non-Indian justifiable expectations in the context of remedies for this particular cause of action, it did not elevate these expectations above tribal rights completely, especially not outside of the land claim context.

IV. Evaluating Sherrill's Applications in the Lower Courts

This understanding of *Sherrill* is key to evaluating how lower courts have interpreted and applied the decision. As described in Part II, some courts have adopted the focus in *Sherrill* on disruption to non-Indian expectations in order to alter established doctrine in tribal land claim and sovereignty litigation. These courts have not remained faithful to *Sherrill's* underlying principles and concerns. As a land claim case involving a unique prospective remedy seeking to permit the exercise of tribal sovereignty, *Sherrill's* application beyond its facts should be limited. Section IV.A explains how the Second Circuit's inherent disruption rule barring all tribal land claims ignores the intact common law right from *Oneida II* and the focus in *Sherrill* on prospective, disruptive remedies. Part IV.B then demonstrates that courts are wrong to apply *Sherrill* to sovereignty disputes because those disputes involve claims of sovereignty as the primary right, not just the remedy, and raise less acute concerns about disruption to non-Indian justifiable expectations.

A. Tribal Land Claims

The Second Circuit has derived from *Sherrill* an inherent disruption rule that bars all land claims regardless of the remedy sought by the tribe.²⁵⁵ This approach is incompatible with *Sherrill* itself. Most fundamentally, the inherent disruption rule ignores that the Supreme Court has decided that tribes are entitled to damages for their land claims. The on-point precedent is *Oneida II*, not *Sherrill*. The Court's reaffirmance of *Oneida II* in *Sherrill* means that tribes are still entitled to pursue at least claims for damages for unlawful dispossession, and the Second Circuit cannot simply overrule *Oneida II* through a convoluted interpretation of *Sherrill*. To the contrary, the Court's statement in *Oneida II* that, although "[o]ne would have thought that claims dating back for more than a century and a half would have been barred long ago . . . , neither petitioners nor we have found any applicable

255. See *supra* Section II.A.1.

statute of limitations or other relevant legal basis for holding that the [Tribe's] claims are barred" is still good law.²⁵⁶

The inherent disruption rule overlooks the fundamental distinction between rights and remedies in *Sherrill*. The inherent disruption bar on all tribal land *claims* regardless of remedy contradicts *Sherrill*'s explicit focus on the specific *remedy* the OIN sought. The Second Circuit in *Cayuga* declared that *Sherrill* primarily concerned "the disruptive nature of the claim itself," but it failed to justify this interpretation: The three quotations it pulled from *Sherrill* all refer to disruption from the OIN's desired remedy, not its entire claim.²⁵⁷ The Second Circuit's categorical ban on tribal land claims is thus inconsistent with the pragmatic focus on remedies in *Sherrill*.

This approach also renders meaningless *Sherrill*'s concern about present and future consequences of recognizing tribal sovereignty. In barring monetary damages, the court has ignored that "the essence of compensatory damages" is "to restore the injured party as nearly as possible to the position he would have been in but for the wrong."²⁵⁸ Money damages are a purely retrospective remedy that focus not on future consequences, but instead on rectifying past wrongful conduct.²⁵⁹ Thus, damages for a land claim redress the past harm the tribe has suffered while not altering the present or future ownership and governance of the land, which were the concern in *Sherrill*. If money damages trigger *Sherrill*'s concern about present and future consequences, it is difficult to imagine a remedy that does not.²⁶⁰ Again, the Second Circuit's approach turns *Sherrill* into a

256. *Oneida II*, 470 U.S. 226, 253 (1985); see also *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 141 (2d Cir. 2010) (Gershon, J., concurring in part and dissenting in part) (criticizing the majority for "foreclos[ing] the Oneidas from obtaining *any* remedy" despite recognition of their common law right in *Oneida II*). Two cases the *Sherrill* Court relied on for their equitable considerations also explicitly stated that tribes are entitled to monetary damages in land claims. See *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 359 (1926); *Felix v. Patrick*, 145 U.S. 317, 334 (1892).

257. See *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 274 (2d Cir. 2005).

258. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 14 (4th ed. 2010); *accord* 1-1 *DAMAGES IN TORT ACTIONS* § 1.01 (2017); 24 *WILLISTON ON CONTRACTS* § 64.1 (4th ed. 2017).

259. See *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (listing "money damages" as the quintessential "retrospective relief"); *Texas v. Lesage*, 528 U.S. 18, 21-22 (1999) (per curiam) (distinguishing the "retrospective" relief of damages with "forward-looking . . . injunctive relief").

260. See *Cayuga*, 413 F.3d at 290 n.13 (Hall, J., dissenting). Although all damages remedies are retrospective, the Second Circuit's holding in *County of Oneida* that even a fair

doctrine about rights even though the Court explicitly stated it was addressing remedies. The concern about present and future consequences in *Sherrill* thus requires distinguishing between more disruptive, prospective, equitable remedies, such as injunctions, and less disruptive, retrospective, legal remedies, such as damages.²⁶¹

Moreover, remedies like declaratory relief and damages do not trigger *Sherrill*'s concerns about disruption in the same way as an assertion of sovereignty. A declaratory judgment against the state for illegally purchasing tribal land declares legal rights but does not require or prohibit action²⁶² and cannot lead to contempt;²⁶³ thus, although a declaratory judgment may be prospective, it does not have practical consequences for non-Indian landowners. Similarly, damages compensate the tribe for prior injury and do not change governance in the area going forward.²⁶⁴ These remedies may be "disruptive" in the literal sense that they alter the status quo; this reasoning, however, would label as disruptive any litigation remedy in any suit, which would conflict with *Sherrill*'s focus on the specific remedy at issue. The Second Circuit has stated that these remedies throw into doubt the validity of current land ownership,²⁶⁵ but the pragmatic principles of *Sherrill* permit courts to fashion remedies to prevent unjustified disruptions while also providing justice for tribes. If a court

compensation claim seeking adequate consideration for a two-centuries-old land sale is forward-looking is especially nonsensical.

261. *See id.* at 289-90. Of course, not all equitable remedies are forward-looking. A constructive trust, for example, is an equitable remedy that redresses past misconduct. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (AM. LAW. INST. 2011). An explanation of *Sherrill*'s applicability to all types of remedies is beyond the scope of this Article, but the prospective or retrospective nature of the remedy, not its status as equitable or legal, appears dispositive.

262. *See* 22A AM. JUR. 2D DECLARATORY JUDGMENTS § 1 (West 2017).

263. *See* *Steffel v. Thompson*, 415 U.S. 452, 471 (1974) ("[A declaratory judgment] is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt." (quoting *Perez v. Ledesma*, 401 U.S. 82, 125-26 (1971) (Brennan, J., concurring in part and dissenting in part))).

264. New York has repeatedly argued that large damage awards would be disruptive because they would significantly impact state and local budgets. *See, e.g.*, Brief for Respondents in Opposition at 24, *United States v. New York*, 565 U.S. 970 (No. 10-1404), 2011 WL 3010263. The higher the damages, however, the more serious the injury the tribe has suffered. It is perverse to permit the state to avoid any remedy for its unlawful actions simply because the wrongdoing was so substantial.

265. *See supra* text accompanying note 106, 112.

awarded damages and the tribe returned to court to eject landowners, for example, the court could deny ejectment as too disruptive under *Sherrill*.²⁶⁶

The Second Circuit's inherent disruption rule goes beyond a faithful reading of *Sherrill* by barring claims brought by the United States.²⁶⁷ The Second Circuit has failed to justify why tribal land claims are not subject to the rule that delay-based equitable defenses cannot bar the United States' claims.²⁶⁸ Most confusing is the court's position that the United States acts on behalf of a private party when it intervenes in tribal land claims. As other courts have recognized, the United States has a sovereign interest both as trustee for tribes²⁶⁹ and in enforcing treaties and federal statutes, like the

266. Relativity of title would prevent anyone else from seeking to eject landowners on the basis of their faulty title. See JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 160 (6th ed. 2014) (“[O]ne who does not have legal title to the land may still protect her rights against a later intruder.”); 90 N.Y. JUR. 2D Real Property-Possessory Actions § 346 (West 2017) (“The plaintiff in an action to recover real property must recover, if at all, upon the strength of his or her own title, and not upon the weakness of the title of his or her adversary . . .”). The argument that granting tribes certain nondisruptive remedies would throw modern land ownership into chaos also incorrectly assumes that property rights are an all-or-nothing proposition. As aboriginal title makes clear, American real property law often divides property rights among multiple parties. See Singer, *supra* note 98, at 45 (rejecting *Cayuga*'s reasoning because aboriginal title demonstrates that it is “nonsense” to argue that only one person can have title to land at once and noting that “[r]ecognizing Indian title within the state of New York would not necessarily mean that longstanding non-Indian possessors would not own their homes or not be able to get mortgages” because courts “could define the relative rights of Indian nations and non-Indian possessors in a way that protected the reliance interests of the non-Indian possessors while vindicating tribal title”).

267. See *supra* text accompanying notes 129-32.

268. See Fort, *supra* note 113, at 388-99.

269. See *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV 13-883 JGB (SPx), 2016 WL 2621301, at *4 (C.D. Cal. Feb. 23, 2016); *Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC, 2008 WL 4808823, at *23 (E.D. Mich. Oct. 22, 2008); Fort, *supra* note 113, at 397; see also *United States v. Minnesota*, 270 U.S. 181, 194 (1926) (noting the United States' interest “as a sovereign” in a suit to recover land wrongly issued to Minnesota instead of a tribe because of “its guardianship over the Indians” and “its right to . . . remov[e] unlawful obstacles to the fulfillment of its obligations”); *Ute Indian Tribe v. Myton*, 835 F.3d 1255, 1263 (10th Cir. 2016) (doubting that *Sherrill* could justify stripping Indian Country status from trust land because “laches is a line of defense that usually may not be asserted against the United States”), *cert. dismissed*, 137 S. Ct. 2328 (2017); cf. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011) (“The difference between a private common-law trust and the statutory Indian trust follows from the unique position of the Government as sovereign.”).

Nonintercourse Act.²⁷⁰ In fact, the Supreme Court has explicitly held that the United States has a sovereign interest in securing redress for a transfer of Indian land in violation of federal law.²⁷¹ *Sherrill* did not alter this doctrine whatsoever. The United States was not a party, and the case did not involve trust land or even turn on the treaties between the OIN and the federal government.²⁷²

Finally, *Sherrill* did not change the favorable federal policy toward tribal land claims, which the inherent disruption rule ignores. This policy began with the Nonintercourse Act, in which Congress promised to protect Indian land holdings. Although the United States has not always lived up to its promise,²⁷³ the intervention of the federal government in a number of Second Circuit land claims shows that it believes tribes are entitled to a remedy. In enacting the Indian Claims Limitation Act (ICLA) to govern tribal land claims, Congress exhibited a desire to permit tribes to pursue these claims, subject to certain restrictions, because it thought the United States had not adequately protected tribal interests.²⁷⁴ Though it expressed

270. See *Saginaw Chippewa*, 2008 WL 4808823, at *23. In *County of Oneida*, the Second Circuit seemed to acknowledge the United States' "own interest in the vindication of a federal statute," but said the same was true in *Cayuga*. *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 129 n.7 (2d Cir. 2010).

271. See *Heckman v. United States*, 224 U.S. 413, 438 (1912) (noting that an unlawful allotment transfer was not "simply a violation of the proprietary rights of the Indian" but also a violation of "the governmental rights of the United States").

272. See *Agua Caliente*, 2016 WL 2621301, at *4. Nor does the allegedly egregious delay in bringing suit or the fact that Congress only enacted a statute of limitations for land claim actions by the United States in 1966 make laches applicable in this context. See *supra* text accompanying note 131. When Congress provided a statute of limitations for the claims of the United States, it restarted the clock for any already accrued actions, see 28 U.S.C. § 2415(g) (2012), demonstrating an intent to permit the United States to pursue "ancient" land claims.

273. See, e.g., *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 205-06 (2005) (recognizing that the federal government played an important role in facilitating the removal of the Oneidas from New York in the early 1800s).

274. See 28 U.S.C. § 2415; *Oneida II*, 470 U.S. 226, 240-44 (1985) (noting that the statute demonstrates congressional "concern that the United States had failed to live up to its responsibilities as trustee for the Indians"). The Second Circuit litigation has produced significant debate over whether ICLA set a statute of limitations for tribal land claims. Compare *Petition for a Writ of Certiorari at 21-22, United States v. New York*, 565 U.S. 970 (2011) (No. 10-1404), 2011 WL 1881816 (arguing that, because 28 U.S.C. § 2415 set a statute of limitations for the OIN land claim that had not run, the Second Circuit's application of laches to bar the claim was inappropriate), with *Brief for Respondents in Opposition, supra* note 264, at 27-28 (arguing that 28 U.S.C. § 2415 did not set a statute of limitations for the OIN land claim). This debate is beyond the scope of this Article, but at the

concern about one specific remedy, *Sherrill* did not undermine the favorable policy toward tribal land claims generally.²⁷⁵

Properly understood, *Sherrill*'s application to tribal land claims should be limited to barring courts from issuing equitable relief that permits tribes to exercise sovereignty after many years of delay in heavily non-Indian communities. Courts should still award monetary damages and declaratory relief to tribes for the unlawful dispossession of their land.

How should courts evaluate arguments based on *Sherrill* in tribal land claims cases? Courts should not rule on the pleadings, as they do under Second Circuit precedent, because *Sherrill* only applies to certain remedies.²⁷⁶ Instead, courts should rely on evidence submitted by the parties to determine whether the length of delay, size of the non-Indian population, and level of non-Indian development trigger the same concerns of disruption to non-Indian expectations that animated *Sherrill*.²⁷⁷ The Second Circuit has not directly addressed whether these factors make a difference because every case it has adjudicated concerned similar facts to

very least ICLA demonstrated congressional intent that time-based defenses should not bar all such claims. *See, e.g., Oneida II*, 470 U.S. at 244 (“[W]e think the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations.”). The Second Circuit’s inherent disruption rule, which effectively bars all tribal land claims, contradicts this congressional intent.

275. The Second Circuit justified its inherent disruption rule in *Cayuga* in part by saying that doctrines applicable in other areas of law do not always apply to tribal land claims. *See supra* text accompanying note 107. As Judge Hall noted forcefully in dissent, courts treat tribal claims differently to provide tribes with “more protection, rather than less, as a result of strong federal policy protecting tribal title from application of state law.” *See Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 283 n.7 (2d Cir. 2005) (Hall, J., dissenting); *cf. Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 846 (1982) (“We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be ‘construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.’” (alteration in original) (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980))).

276. *See supra* text accompanying notes 113-15. The standards for both motions to dismiss and motions for judgment on the pleadings permit courts to throw out a case only when the plaintiff’s factual allegations do not plausibly support a claim that the defendant acted unlawfully. *See, e.g., Concord Assocs., L.P. v. Entm’t Props. Tr.*, 817 F.3d 46, 52 (2d Cir. 2016) (motion to dismiss); *Graziano v. Pataki*, 689 F.3d 110, 114 (2d Cir. 2012) (motion for judgment on the pleadings).

277. On summary judgment, courts can evaluate submitted evidence for this information, instead of relying on judicial notice like the Second Circuit currently does. *See supra* text accompanying notes 116-18.

Sherrill.²⁷⁸ Given its emphasis on the inherent disruption of tribal land claims,²⁷⁹ the Second Circuit may disagree with *Canadian St. Regis* that these factors are relevant in determining whether *Sherrill* applies.²⁸⁰ However, the reason the *Sherrill* Court thought the assertion of tribal sovereignty would be a disruptive remedy was the lengthy period after dispossession before the OIN brought suit and the mostly non-Indian modern population.²⁸¹ An exercise of tribal sovereignty in a predominantly Indian area or after a shorter period of time does not risk disruption to non-Indian expectations in the same way.

B. Sovereignty

As discussed above, lower courts have considered *Sherrill*'s application to a broad range of sovereignty disputes. What is clear is that the courts in *Union Springs* and *Aurelius* correctly deemed *Sherrill* relevant to tribal attempts to build casinos in violation of local zoning laws. Centuries after dispossession, the tribes in both cases were attempting to reassert sovereignty over land purchased within a historic reservation, just like in *Sherrill*. The *Sherrill* Court explicitly mentioned these cases as examples of its concern about disruption to non-Indian justifiable expectations.²⁸² Yet most sovereignty disputes do not fit this unusual paradigm. Courts can easily distinguish these disputes from *Sherrill* on the ground that *Sherrill* was the Court's response to an unusual remedy for a tribal land claim.²⁸³ But beyond this distinction (and largely because of it), *Sherrill*'s concerns about disruption to justifiable expectations simply do not fit within the contexts of reservation diminishment, hunting and fishing treaty rights, or

278. See *supra* text accompanying notes 133-44.

279. See *Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 165 (2d Cir. 2014).

280. See *supra* text accompanying notes 151-57 (describing how the Northern District of New York in *Canadian St. Regis* determined that *Sherrill* should not apply to tribal land claims involving a delay of only forty years or an area with a majority modern Indian population).

281. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 202-03, 214-15, 216-17, 221 (2005).

282. See *supra* text accompanying notes 158-62. Although these cases seem to interpret *Sherrill* correctly, this result conflicts squarely with federal policy. Under IGRA, tribes may pursue class II gaming on their reservations without interference from states. See 25 U.S.C. §§ 2703(4), 2710(b) (2012). As long as the reservations were not diminished, this clear federal policy to permit tribes to pursue self-determination and economic development in the context of gaming leaves no place for *Sherrill*'s equitable concerns. See *id.* § 2702(1) (noting that one purpose of IGRA was to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments").

283. See *supra* text accompanying notes 237-47.

tribal sovereign immunity. The Court has clear doctrine in all of these areas that do not mention *Sherrill*. These doctrines either already incorporate concerns about justifiable non-Indian expectations or do not account for those concerns for logical reasons. There is thus no reason to deem *Sherrill* an independent way to extinguish tribal sovereign rights.

1. Sovereign Treaty Disputes: Reservation Diminishment and Hunting and Fishing Rights

Current analyses of *Sherrill*'s application to sovereign treaty disputes do not sufficiently distinguish between two related but distinct issues that arise in these cases. These two issues involve the questions of right and remedy that were central in *Sherrill*. The first issue is whether the tribe still possesses a sovereign treaty right or whether Congress has diminished the reservation or abrogated other treaty rights. Assuming the sovereign treaty right still exists, the second issue involves fashioning a remedy that permits or prohibits the tribe from exercising sovereignty in a certain way. Although courts often merge these two issues, they are conceptually distinct.²⁸⁴ Only the Western District of Michigan in *Little Traverse* has explicitly recognized this distinction.²⁸⁵ Ultimately, *Sherrill* may not apply to either question, but because the relevant considerations for each issue are different, it is important to recognize the conceptual distinction.²⁸⁶

Within this framework, *Sherrill* plainly does not apply to the first question of whether the tribe has a sovereign treaty right. The Court has made clear that the power to abrogate Indian treaty rights rests only with

284. See *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) (“Because petitioners have raised only the single question of [reservation] diminishment, we express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe’s power to tax the retailers of Pender . . .” (footnote omitted)); Brief for the United States at 53-54, *Parker*, 136 S. Ct. 1072 (No. 14-1406), 2015 WL 9181061 (stating that the reservation diminishment issue is “both analytically distinct from and logically prior to the question whether the Tribe may exercise jurisdiction over non-members within the Reservation’s borders once those borders are properly understood”); cf. *Cayuga Indian Nation v. Seneca County*, 260 F. Supp. 3d 290, 314-15 (W.D.N.Y. 2017) (refusing to consider a *Sherrill* argument for a reservation diminishment counterclaim against the tribe because “[t]he existence of a reservation, sovereign authority over land, and laches are three distinct issues, of which the counterclaim mentions only the first”).

285. See *supra* text accompanying notes 194-97.

286. Among other errors, merging these issues leads to the faulty argument that *Sherrill*, by barring the OIN from exercising tax immunity over its lands, must have found its reservation disestablished. See, e.g., Petition for a Writ of Certiorari at 18-19, *Upstate Citizens for Equal, Inc. v. United States*, No. 16-1320 (U.S. Nov. 27, 2017).

Congress.²⁸⁷ Congress must use “clear and plain” language to abrogate Indian treaty rights, which “are too fundamental to be easily cast aside.”²⁸⁸ And, as the Ninth Circuit recognized in *United States v. Washington*, laches and other equitable defenses cannot defeat Indian treaty rights.²⁸⁹ Applying *Sherrill*’s equitable consideration to abolish tribal hunting and fishing rights would contravene these established principles and intrude on congressional plenary power over tribes.

Since the right to exercise sovereignty over a reservation is one type of treaty right,²⁹⁰ this same logic applies to reservation diminishment cases. The “well settled” *Solem* test focuses solely on whether Congress has clearly manifested an intent to diminish reservation boundaries.²⁹¹ Leaving no room for doubt, the Court has reiterated that “only Congress can divest a reservation of its land and diminish its boundaries.”²⁹² Although the Court has sometimes used imprecise language suggesting that reservation

287. *See, e.g.*, *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *United States v. Dion*, 476 U.S. 734, 738 (1986); *see also Sisseton & Wahpeton Bands of Sioux Indians v. United States*, 277 U.S. 424, 436 (1928) (stating that abrogating treaties and statutes are “political, not judicial, powers”); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”).

288. *Dion*, 476 U.S. at 738-39; *accord Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

289. 157 F.3d 630, 649 (9th Cir. 1998); *see also United States v. Choctaw Nation*, 179 U.S. 494, 533 (1900) (“We are not at liberty to dispense with any of the conditions or requirements of the treaty, or to take away any qualification or integral part of any stipulation, upon any notion of equity or general convenience, or substantial justice.”).

290. *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (stating the question at issue as “whether Congress intended by the 1894 Act to modify the reservation set aside for the Yankton Tribe in the 1858 Treaty”). The subsequent discussion applies to the typical diminishment claim concerning a reservation secured by treaty. But similar principles would apply to a diminishment claim about a reservation set aside via executive order. *See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 185, § 15.04(4), at 1012-13 (explaining the legal status of executive order reservations). Only Congress has the power to alter the boundaries of executive order reservations, 25 U.S.C. § 398d (2012) (“Changes in the boundaries of reservations created by Executive order . . . for the use and occupation of Indians shall not be made except by Act of Congress.”), so courts cannot base diminishment decisions on fear of disruption to non-Indian expectations.

291. *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2016).

292. *Id.* (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)); *accord Yankton Sioux*, 522 U.S. at 343.

diminishment can occur through demographic change,²⁹³ the Court has never adopted this approach. Since only Congress can diminish a reservation, *Sherrill*'s judicially-created equitable doctrine has no place in the inquiry.²⁹⁴

The Court confirmed this analysis in 2016 in its *Nebraska v. Parker* decision by reaffirming, with no mention of *Sherrill*, that reservation diminishment is solely a question of congressional intent.²⁹⁵ This reaffirmation of the *Solem* test is significant in light of two arguments made in the case: 1) Nebraska's argument that the Court should alter the test to emphasize modern demographics and jurisdictional history²⁹⁶ and 2) an argument from amici that under *Sherrill* "a tribe may lose sovereign control over ancient reservation land, regardless of congressional intent, when that area has long been regulated, governed, and populated by non-Indian inhabitants."²⁹⁷ Although the Court ended the *Parker* opinion by leaving open the question of whether *Sherrill* could bar the tribe from taxing non-Indian businesses on the reservation,²⁹⁸ this statement concerned not the

293. See, e.g., *Yankton Sioux*, 522 U.S. at 356 ("Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." (quoting *Solem*, 465 U.S. at 471)).

294. See *Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC, 2008 WL 4808823, at *23 (E.D. Mich. Oct. 22, 2008); cf. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 224-25 (2005) (Stevens, J., dissenting) (criticizing the Court for "do[ing] what only Congress may do" by "effectively proclaim[ing] a diminishment of the Tribe's reservation").

295. See *Parker*, 136 S. Ct. at 1078-79.

296. See, e.g., Brief for Petitioners at 23-24, *Parker*, 136 S. Ct. 1072 (No. 14-1406), 2015 WL 7294863 (arguing that the area's "demographic and jurisdictional history . . . necessitates a finding of *de facto* diminishment" to avoid "seriously disrupt[ing] the justifiable expectations of the people living in the area" (quoting *Hagen v. Utah*, 510 U.S. 339, 421 (1994))).

297. See Brief for Amicus Curiae Village of Hobart and Pender Public Schools in Support of Petitioners at 7, *Parker*, 136 S. Ct. 1072 (No. 14-1406), 2015 WL 7450416. In addition to the local school district, the brief was filed by the Village of Hobart in Wisconsin, which has fought with the Oneidas over its attempts to regulate activity on their land. See, e.g., *Oneida Tribe of Indians v. Village of Hobart*, 732 F.3d 837, 838, 842 (7th Cir. 2013) (affirming a grant of summary judgment to the Oneidas on their claim that the Village could not assess storm water management fees on tribal land); *Oneida Nation v. Village of Hobart*, No. 16-C-1217, 2017 WL 4773299, at *1 (E.D. Wis. Oct. 23, 2017) (resolving burden of proof issues in the Oneidas' suit to prevent the Village from enforcing a special events ordinance on tribal land).

298. See *Parker*, 136 S. Ct. at 1082.

initial question of diminishment but the second issue of what sovereignty the tribe could exercise on its undiminished reservation.

Nothing in *Sherrill* altered the established principle that only Congress can abrogate treaty rights or diminish a reservation. As a land claim decision, *Sherrill* said nothing about sovereign treaty rights whatsoever. The Court stated that its decision did not address the Second Circuit's interpretation of the Treaty of Buffalo Creek or the question of reservation diminishment. In doing so, the Court explicitly recognized that only Congress can diminish a reservation.²⁹⁹ *Sherrill's* focus on remedies also makes it inapplicable to questions about treaty rights: While *Sherrill* evaluated an assertion of tribal sovereignty as a remedy in a land claim, treaty cases involve assertions of tribal sovereignty as the primary right. As such, district courts have consistently held that *Sherrill* did not alter the Second Circuit's holding that Congress has not disestablished the Oneida Reservation.³⁰⁰ The interpretive gymnastics required to read *Sherrill* to permit courts to alter treaty rights are especially inappropriate given that "treaties enjoy a unique position in our law."³⁰¹

The second issue left open in *Parker* is more difficult than the initial question of whether *Sherrill* altered tribal sovereign rights. As the Western District of Michigan suggested in *Little Traverse*, it would be theoretically sound for a court to find that Congress has not abrogated a treaty right but then fashion a remedy that limits how the tribe can exercise that right. Because of *Sherrill's* emphasis on prospective remedies and judicial discretion in fashioning equitable relief, concerns about future disruption fit better at the remedial stage, even in the context of tribal treaty rights.³⁰² Accordingly, litigants have argued that the exercise of certain tribal treaty rights is as, if not more, disruptive of non-Indian justifiable expectations than the tax immunity at issue in *Sherrill*. Tribal reassertions of sovereignty over reservations may disrupt settled expectations by creating a

299. See *Sherrill*, 544 U.S. at 215 n.9; see also *id.* at 215 (referring to the "context of the diminishment of an Indian reservation" as "different" from the situation at issue).

300. See cases cited *supra* notes 174-77.

301. *United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998). A similar analysis shows that *Sherrill* does not permit courts to extinguish aboriginal title even where that title is not secured by treaty, such as in the Shinnecock casino litigation. Just like with treaties, extinguishment of aboriginal title is within the "supreme" power of Congress, *United States v. Santa Fe. Pac. R.R. Co.*, 314 U.S. 339, 347 (1941), and thus not within the purview of the courts.

302. See *Washington*, 157 F.3d at 650-51 (finding that, although the court could not use equitable considerations to interpret Indian treaties, it could do so to craft remedies based on those treaties).

checkerboard of jurisdiction and complicated governance issues.³⁰³ For example, the inability of state and local governments to enforce public safety regulations, such as fire codes and environmental laws, on tribal lands within reservations could jeopardize the safety of non-Indian communities and their ability to govern themselves.³⁰⁴ Recognizing tribal sovereignty could cause substantial litigation because non-Indians have no other method of influencing tribal governments.³⁰⁵ From this perspective, these concerns are most acute when the population is heavily non-Indian and state and local governments have exercised jurisdiction over tribal lands for decades.³⁰⁶

Despite its superficial logic, this argument fails to acknowledge that *Sherrill*'s concerns about disruption were intimately tied to the land claim context in which the dispute arose. A broad application of *Sherrill* to sovereignty disputes would require interpreting the decision not just as crafting a remedy for a land claim, but instead expressing general concern about disruptive tribal activity.³⁰⁷ *Sherrill*, however, expressly emphasized that the assertion of tribal sovereignty arose in the context of a land claim.³⁰⁸

The same concerns about disruption that animated *Sherrill* do not apply to litigation over treaty rights. In the reservation diminishment context, the Court has already incorporated these concerns into the third factor of the

303. See *Osage Nation v. Oklahoma ex rel. Okla. Tax Comm'n*, 597 F. Supp. 2d 1250, 1265-66 (N.D. Okla. 2009), *aff'd sub nom. Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010).

304. See Brief for Amicus Curiae Village of Hobart and Pender Public Schools in Support of Petitioners, *supra* note 297, at 21-24.

305. See Brief of Oklahoma Farm Bureau, Inc. et al. as Amici Curiae in Support of Affirmance, *supra* note 239, at 23.

306. See Brief of the Appellees at 55-56, *Irby*, 597 F.3d 1117 (No. 09-5050) (arguing that the assertion of tribal sovereignty at issue was more disruptive than in *Sherrill* because the reservation covered 1.5 million acres; only 3.5% of the population were tribal members; 85% of the land was unrestricted; the state and county had long exercised criminal jurisdiction, including over crimes involving tribal members, and had provided social services to the entire population; and the Tribe did not seek to exercise jurisdiction over fee land and nonmembers until 2004).

307. See, e.g., Brief of Defendant-Appellee Director of Ohio Department of Natural Resources, *supra* note 239, at 30 (“[B]ecause [*Sherrill*] turned on the nature of the relief sought (equitable) and the fact that the relief sought would disrupt the sovereignty of the State, her counties, and subdivisions, the applicability of these defenses is not limited solely to land claims. Instead, the Court’s reasoning in *Sherrill* applies to any attempt . . . to seek equitable relief that disrupts settled expectations and the sovereignty of the State . . .”).

308. See *supra* text accompanying notes 242-49.

Solem test, which requires consideration of “the subsequent demographic history of opened lands.”³⁰⁹ Under this factor, courts analyze the Indian population and history of state and tribal jurisdiction.³¹⁰ Further, courts consider non-Indian justifiable expectations and the burdens that recognizing tribal sovereignty would have on state and local governments.³¹¹ Allowing litigants to rely on the third *Solem* factor to argue for reservation diminishment and then raise *Sherrill* at the remedial stage would permit two bites at the same apple.

True, a finding of diminishment cannot rest on the third *Solem* factor alone.³¹² However, this reflects the fact that non-Indian expectations are often not justified in the reservation diminishment context. Non-Indian settlers knew they were moving into areas with checkerboard jurisdiction caused by congressional opening of the reservation; in *Sherrill*, only the OIN lawsuit threatened to create a checkerboard of tribal and state sovereignty.³¹³ Relatedly, although the land transfers underlying *Sherrill* were unlawful, New York, its municipalities, and its population reasonably

309. *Nebraska v. Parker*, 136 S. Ct. 1072, 1081 (2016).

310. *Compare* *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356-57 (1998) (recognizing as factors supporting diminishment that Indians owned less than 10% of the land at issue, over two-thirds of the population was non-Indian, the land included several municipalities incorporated under state law, the State had exercised jurisdiction over the land since 1894, and the Tribe only recently attempted to assert jurisdiction over nontrust land), *with Solem*, 465 U.S. at 479-80 (supporting its finding that the reservation was not diminished with evidence that tribal authorities and the federal government exercised jurisdiction in the area, the population was half Indian, and the seat of the tribal government was on the land at issue).

311. *See Hagen v. Utah*, 510 U.S. 399, 420-21 (1994) (finding the reservation diminished in part because reaffirming that predominately non-Indian land was part of a reservation would “seriously burden[] the administration of state and local governments” and would “seriously disrupt the justifiable expectations of the people living in the area” (quoting *Solem*, 465 U.S. at 471)); *cf.* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1, 20-21, 25-26 (1999) (arguing that a desire to protect non-Indian justifiable expectations animates the Court’s reservation diminishment doctrine and that the doctrine only makes sense as a way to determine when a reservation has lost its Indian character).

312. *See Parker*, 136 S. Ct. at 1081-82 (acknowledging that “[t]he Court has never relied solely on this third consideration to find diminishment” and that justifiable “expectations alone, resulting from the Tribe’s failure to assert jurisdiction, cannot diminish reservation boundaries”); *Yankton Sioux*, 522 U.S. at 356 (referring to the third factor as “the least compelling”).

313. For this reason, the *Sherrill* Court repeatedly referred to the OIN’s assertion of sovereignty as “unilateral.” *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203, 219-21 (2005).

believed that these transfers and the removal of the Oneidas had substituted the state sovereign for the tribal sovereign.³¹⁴ This was especially true given the federal government's acquiescence to and assistance in the Oneidas' removal.³¹⁵ In stark contrast, where Congress opened a reservation to non-Indian settlement without diminishing it, the settlers and their successors never had justifiable expectations that there was no tribal sovereign because tribal members always remained in the area.³¹⁶ The non-Indian population cannot develop these justifiable expectations that support restricting tribal sovereignty simply by choosing to ignore the presence of the tribal sovereign.³¹⁷

Applying *Sherrill* in this context would also contradict Congress's view that tribal sovereignty in Indian Country is not overly disruptive. The Indian Country statute delineates land over which tribes and the federal government have primary civil and criminal jurisdiction.³¹⁸ As noted above, *Sherrill* seems to require an all-or-nothing analysis that assumes tribes would exercise sovereignty in a disruptive manner and then bars tribes from exercising that sovereignty in any capacity.³¹⁹ Utilizing such an approach in reservation diminishment cases would deny tribes the ability to govern much of Indian Country, which would contravene congressional intent in

314. *See id.* at 216.

315. *See id.* at 214.

316. Where Congress did intend to diminish a reservation, expectations about the absence of the tribal sovereign are more justified, which is why the third *Solem* factor can only augment more direct evidence of congressional intent. Furthermore, the fact that tribes generally have been consistently present on the reservation in diminishment cases demonstrates another fundamental difference with *Sherrill*. In *Sherrill*, the underlying claim undeniably accrued at the time of the unlawful land transfers. But it is difficult to say when reservation diminishment claims accrue: Does the tribe have one claim that arose when the state or local government first exercised on-reservation jurisdiction? Or does the tribal claim reaccrue each time the state or local government exercises jurisdiction on the reservation?

317. A similar analysis demonstrates that concerns about non-Indian settled expectations are also irrelevant in cases like *Shinnecock*, where the Tribe sought to build a casino on lands to which it alleged it retained aboriginal title outside of any treaty. *See supra* text accompanying notes 163-67. The tribal sovereign and checkerboarding jurisdiction were always present, and the state cannot develop justifiable expectations by selectively ignoring the presence of the tribal sovereign.

318. *See* 18 U.S.C. § 1151 (2012); *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 & n.1 (1998).

319. *See supra* note 254 and accompanying text.

the Indian Country statute to permit tribes to exercise sovereignty on their reservations.³²⁰

Moreover, the argument for applying *Sherrill* to reservation diminishment cases overstates the negative consequences of reaffirming reservations. Tribal governments have no criminal jurisdiction and only limited civil jurisdiction over non-Indians;³²¹ as Justice Sotomayor acknowledged at the *Parker* oral argument, these limits protect non-Indians on reservations from significant disruption at the hands of tribal governments.³²² State and local governments are not powerless to regulate

320. Of course, this argument applies to the dispute in *Sherrill* as well: The Court interfered with congressional intent by extinguishing the OIN's sovereignty on land it acknowledged was Indian Country. See Jennifer R. Sunderlin, Note, *One Nation, Indivisible: American "Indian Country" in the Wake of City of Sherrill v. Oneida Indian Nation*, 70 ALB. L. REV. 1563, 1566 (2007). This is one of many reasons that *Sherrill*'s all-or-nothing approach does not withstand scrutiny. See, e.g., Davis, *supra* note 86, at 550 (criticizing the Court for this aspect of its opinion). This mode of analysis is also incompatible with the case-specific approach courts use to evaluate tribal sovereignty disputes, see, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997), and unnecessary because the Court has so restricted tribal jurisdiction over nonmembers that protecting non-Indian expectations only requires courts to step in under specific circumstances that threaten severe disruption, cf. *Sherrill*, 544 U.S. at 226 n.6 (Stevens, J., dissenting) (criticizing the majority for its "greatly exaggerated" fear of "opening a Pandora's box of tribal powers" that ignored state authority on tribal lands and the limited power of tribes to exercise jurisdiction over nonmembers). In addition, this approach incorrectly assumes that all exercises of tribal sovereignty are equally disruptive to non-Indian expectations and state and local governments. For example, tax immunity is fundamentally the same as a damages award in that it simply denies the government revenue; unless the land at issue covers a significant portion of the municipality, the disruption would be minimal. See, e.g., Krakoff, *A Regretful Postscript*, *supra* note 11, at 16. Exemptions from local zoning laws may be quite disruptive, but their effects depend on the area's population density and traffic patterns. Disruption to "innocent" landowners seems more troubling than disruption to the state government, especially when that government committed an unlawful act by dispossessing tribes of their land. A full analysis of how the Court should reframe its disruption analysis is beyond the scope of this Article, but it should consider a sliding-scale approach that asks, based on evidence from the parties like those in *Shinnecock*, see *supra* text accompanying note 163, how disruptive the assertion of sovereignty would be and whom it primarily would affect.

321. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 329-30, 341 (2008) (delineating limited circumstances under which tribes can exercise civil jurisdiction over nonmembers); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (holding that tribes cannot exercise criminal jurisdiction over non-Indians).

322. See Transcript of Oral Argument, *supra* note 240, at 9 (questioning Nebraska on the effects of finding the reservation undiminished given the Tribe's limited powers on its reservation).

conduct on reservations.³²³ Outside of the Indian context, some federal facilities create checkerboards of jurisdiction with state authority, but post offices, for example, do not create lawless areas that prevent state and local governments from regulating their residents effectively.³²⁴ Adding a third sovereign on reservations does not make the situation any more problematic.³²⁵ Additionally, the risk that reservations would become lawless regions threatening the welfare of non-Indians is overblown. Tribal members, no less than non-Indians, want emergency services, good schools, environmental protections, and more from their governments. Tribal members are just as unlikely to accept the widespread lawlessness and excessive development that concern non-Indian litigants in these cases. Tribes have incentives to protect non-Indians on their reservations and cooperate with state and local governments: If they do not, displeased non-Indians can petition Congress to eliminate their sovereignty completely.

By contrast, allowing *Sherrill* to bar tribes from exercising sovereignty over their reservations would harm Indians and non-Indians alike. Indian and non-Indian defendants would challenge tribal and federal criminal jurisdiction, respectively, by arguing that demographic shifts created “justifiable” expectations that the land where their crimes took place was no longer Indian Country.³²⁶ Throwing the already complicated division of criminal jurisdiction on reservations into more chaos would be dangerous. Applying *Sherrill* in this context would encourage conflict between tribes and non-Indian populations. So as not to appear to relinquish sovereignty, tribes would have a strong incentive to avoid cooperative services agreements with state and local governments and keep non-Indians off their

323. See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989) (permitting state taxation of reservation activity when the tribal, state, and federal interests suggest that federal law does not preempt the tax). Given the Tribe’s limited powers over nonmembers and the ability of the state to regulate some behavior on the reservation, applying *Sherrill* in this context would actually give states three bites at the apple: the *Montana* or preemption analysis; the *Solem* test; and the *Sherrill* analysis.

324. *Oneida Tribe of Indians v. Village of Hobart*, 732 F.3d 837, 839 (7th Cir. 2013) (noting that checkerboarding jurisdiction is “a familiar feature of American government,” including with post offices and military bases).

325. It is also rather unfair to justify restricting tribal sovereignty by citing the harms of alternating state and tribal jurisdiction when that checkerboarding is not inherent to a reservation but is instead the result of the Court’s restrictions on tribal power in Indian Country. See Singer, *supra* note 23, at 609.

326. See Brief for Historical and Legal Scholars as Amicus Curiae Supporting Respondents at 33, *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (No. 14-1406), 2015 WL 9412675.

reservations.³²⁷ Likewise, state and local governments would try to exercise more jurisdiction in Indian Country to create justifiable expectations against tribal sovereignty.³²⁸ Litigation over jurisdiction would soar, as many state and local governments would immediately initiate new reservation diminishment claims.

For similar reasons, *Sherrill*'s concerns about non-Indian justifiable expectations should not apply to the remedial phase in the context of tribal hunting and fishing rights. The notion that non-Indians can develop justifiable expectations in the denial of tribal treaty rights that require courts to continue to deny those rights is strange in light of the status of Indian treaties as federal law.³²⁹ *Sherrill* held that a particular remedy in a specific lawsuit would be disruptive; extrapolating from that reasoning to argue that enforcing federal law, in the form of Indian treaty rights, would be disruptive is radical. Yet that is precisely what non-Indians seeking to rely on their expectations to deny tribal treaty rights must argue. Permitting this sort of reasoning would permit back-door judicial abrogation of treaty rights, which the Court has repeatedly foreclosed.³³⁰

Courts can also distinguish hunting and fishing treaty rights disputes from *Sherrill* on a more practical level. In many treaty rights cases, tribes did not fail to assert their treaty rights to the same extent that the OIN delayed bringing suit in *Sherrill*.³³¹ More significantly, the risk of disruption in this context is not substantial. In finding that laches barred a tribe from exercising hunting rights, for example, the district court in *Ottawa Tribe* had three primary concerns: safety risks to recreational land users, lower state revenue from fewer visitors to public lands, and harm to

327. Courts should also consider cooperative agreements when analyzing disruption under *Sherrill*. The court in *Shinnecock* thought the agreement of the Tribe to follow state environmental laws in building its casino irrelevant because it could choose to violate those laws if the court affirmed its sovereignty. *See supra* text accompanying note 167. By ignoring tribal attempts to lessen the impact of their activities on the surrounding area, this approach disincentivizes tribes from entering into cooperative agreements, which would only cause more disruption to non-Indians.

328. *Cf.* Krakoff, *A Regretful Postscript*, *supra* note 11, at 6.

329. *See* U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”); *Antoine v. Washington*, 420 U.S. 194, 204 (1975) (noting that Indian treaties and congressionally ratified agreements are “the supreme law of the land”).

330. *See supra* notes 287-89 and accompanying text.

331. *See* *United States v. Washington*, 853 F.3d 946, 968 (9th Cir. 2017) (distinguishing a fishing rights dispute from *Sherrill* by noting that, unlike in *Sherrill*, the Tribe did not relinquish its treaty rights), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018).

conservation efforts.³³² None of these concerns merits barring tribes from exercising their treaty rights. Tribes have incentives to stop unsafe hunting or fishing practices to avoid criminal prosecution and maintain good relations with neighbors. Given the tribes' use of these safe practices, visitors would continue to utilize the lands. Tribes and states would likely enter into compacts to restrict where tribes could exercise their treaty rights, further protecting states' interests. States have significant power to regulate the exercise of tribal hunting and fishing treaty rights to protect conservation efforts.³³³ Thus, as the Supreme Court has recognized, "an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over [its] natural resources."³³⁴

2. Sovereign Immunity

Unlike the confusion over sovereign treaty rights, the developing consensus on tribal sovereign immunity is correct: *Sherrill* had no effect on tribal sovereign immunity doctrine.³³⁵ Focused on the availability of a specific remedy in the OIN land claim, *Sherrill* said nothing about sovereign immunity at all. The Court made the OIN's land taxable, but it did not discuss how state and local governments could enforce their taxes. Rather than referring to sovereign immunity, the Court's ambiguous statement that the "equitable cast of the relief sought remains the same whether asserted affirmatively or defensively" more plausibly prohibits the tribe from asserting its sovereign authority and associated tax immunity in foreclosure proceedings.³³⁶ *Sherrill* did not address other defenses, such as sovereign immunity, that could bar methods of tax collection.³³⁷ Similarly,

332. See *Ottawa Tribe v. Ohio Dep't of Nat. Res.*, 541 F. Supp. 2d 971, 978 (N.D. Ohio 2008), *aff'd on other grounds*, 577 F.3d 634 (6th Cir. 2009). The court in this section of its opinion was discussing tribal hunting rights, but similar arguments would apply to fishing rights.

333. See *Antoine*, 420 U.S. at 207 (noting that states can regulate tribal hunting and fishing as long as the regulation does not discriminate against Indians and is "a reasonable and necessary conservation measure" and "its application to the Indians is necessary in the interest of conservation"). Although this standard arose in the context of a particular treaty with a Washington tribe, see *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968), the Supreme Court and others have applied it more generally, see, e.g., *Antoine*, 420 U.S. at 207; *United States v. Eberhardt*, 789 F.2d 1354, 1361-62 (9th Cir. 1986); *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981).

334. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999).

335. See *supra* Section II.B.4.

336. See *supra* text accompanying notes 223-24.

337. Cf. *Oneida Indian Nation v. Madison County*, 401 F. Supp. 2d 219, 228-30, 232 (N.D.N.Y. 2005), *aff'd*, 605 F.3d 149 (2d Cir. 2010), *vacated as moot and remanded*, 562

the Court's statement that "the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue" concerned sovereign authority, not sovereign immunity.³³⁸ Finally, the concern in *Sherrill* about potential disruption from certain remedies does not fit in analyses of sovereign immunity, which serves to bar, rather than grant, remedies.

Courts finding that *Sherrill* can abrogate tribal sovereign immunity have argued that a contrary result would undermine the decision by leaving state and local governments no way to enforce their laws.³³⁹ At its core, this argument supports jettisoning sovereign immunity altogether, whether for tribes or other sovereigns.³⁴⁰ Any assertion of sovereign immunity bars a remedy despite the existence of a right.³⁴¹ It is also something our laws regularly allow: When a court grants a government official qualified immunity in a constitutional tort suit, for example, the plaintiff cannot recover a remedy despite a constitutional violation.³⁴² *Sherrill* itself makes clear that rights and remedies do not always go together by recognizing the distinction between the two. The decision provides no reason to question the Court's general sovereign immunity doctrine.

In fact, the Court has only broadened sovereign immunity law in the past two decades.³⁴³ Under current doctrine, tribes as sovereigns are entitled to

U.S. 42 (2011) (per curiam) (finding that *Sherrill* did not permit foreclosure of the OIN land because the Nonintercourse Act forbids alienation of Indian land without congressional approval and that the footnote in *Sherrill* "does not address the issue of alienability" but "merely suggests that the [OIN] is foreclosed from asserting immunity from taxes as a defense").

338. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005).

339. *See supra* text accompanying notes 225-26.

340. *Cf.* Brief for the Petitioners at 27-30, *Madison County*, 562 U.S. 42 (2005) (No. 10-72) (expressing skepticism of the doctrine's origins and viability in support of the argument that *Sherrill* bars tribes from asserting sovereign immunity in foreclosure proceedings).

341. *See* *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998) ("There is a difference between the right to demand compliance with state laws and the means available to enforce them.").

342. *See* *Madison County*, 605 F.3d at 159 n.8 (giving qualified immunity as an example of how our legal system denies remedies in certain instances where the defendant has committed a wrong).

343. *See* *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 831-32 (2014) (Ginsburg, J., dissenting) (criticizing the Court's expansive view of both tribal and state sovereign immunity).

sovereign immunity³⁴⁴ that, like state and foreign sovereign immunity, does not depend on geography.³⁴⁵ Due to the complex policy considerations at issue, only Congress, not the courts, has authority to create exceptions to tribal sovereign immunity.³⁴⁶ Even when the tribe is subject to state law, the state cannot force compliance via direct suit.³⁴⁷ Significantly, although tribal sovereign immunity has generated controversy among the justices,³⁴⁸ the Court reaffirmed these core tenets in 2014, nine years after *Sherrill*.³⁴⁹

These tenets demonstrate why courts should not read *Sherrill* to alter tribal sovereign immunity. Surely the Court, after repeatedly reaffirming a broad understanding of sovereign immunity, did not revoke it without any mention it was doing so, especially in a case like *Sherrill* that rested on precisely the type of policy balancing the Court has left to Congress. Furthermore, reading *Sherrill* to say that tribes do not have sovereign immunity for disputes concerning land on which they cannot exercise sovereign authority would be tantamount to finding that the Court impliedly overruled the principle that tribal sovereign immunity applies to off-

344. See, e.g., *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986) (“The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance.”).

345. See, e.g., *Bay Mills*, 572 U.S. at 790 (stating that tribal sovereign immunity applies to “suits arising from a tribe’s commercial activities, even when they take place off Indian lands”). The Court has discussed sovereign immunity as emerging from tribal sovereign authority over territory, but only to explain why tribes, and not private landowners, enjoy sovereign immunity. See, e.g., *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). If this was not completely clear in *Potawatomi*, the Court’s holdings in *Kiowa* and *Bay Mills* that tribes are entitled to sovereign immunity even for off-reservation activities make it unarguable.

346. See, e.g., *Bay Mills*, 572 U.S. at 800-01 (recognizing that “it is fundamentally Congress’s job, not [the Court’s], to determine whether or how to limit tribal immunity” because “Congress . . . has the greater capacity ‘to weigh and accommodate the competing policy concerns and reliance interests’ involved.” (quoting *Kiowa*, 523 U.S. at 759)).

347. See *Kiowa*, 523 U.S. at 755 (“To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit.”); see also *Potawatomi*, 498 U.S. at 513-14 (holding that, while the Tribe had a duty to collect state taxes on cigarette sales to nonmembers at its convenience store, the state could not sue the Tribe directly to collect the taxes or require it to collect taxes from buyers in the future).

348. See, e.g., *Bay Mills*, 572 U.S. at 814 (Thomas, J., dissenting) (arguing with three other justices that sovereign immunity should not “bar suits arising out of an Indian tribe’s commercial activities conducted outside its territory”); *Potawatomi*, 498 U.S. at 514 (Stevens, J., concurring) (“The doctrine of sovereign immunity is founded upon an anachronistic fiction. In my opinion all Governments—federal, state, and tribal—should generally be accountable for their illegal conduct.” (citation omitted)).

349. See *Bay Mills*, 572 U.S. at 788-90, 797-803.

reservation activities. Given the disentangling of sovereign immunity from land status, the ability to exercise sovereignty over the land at issue is simply not a prerequisite for asserting sovereign immunity.³⁵⁰ Any force these arguments may have had evaporated when the Court reiterated these principles with no mention of *Sherrill* in the 2014 *Bay Mills* decision.³⁵¹

Conclusion

This Article serves two purposes. First, it demonstrates that *Sherrill* has sown confusion in the lower courts over how to apply its concerns about disruption to non-Indian justifiable expectations. The Court pulled together a new doctrine from themes and principles of established doctrines but failed to provide guidance on when this new doctrine would apply. Lower courts are therefore in conflict over *Sherrill*'s relevance. For example, over strong dissents, the Second Circuit has applied *Sherrill* to create an inherent disruption rule that bars all tribal land claims regardless of remedy. Courts are split on whether and how *Sherrill* applies to reservation diminishment and other treaty rights disputes or assertions of tribal sovereign immunity. Although percolation of ideas among the lower courts can be positive, this confusion creates substantial risk for tribes in litigation: If a tribe is assigned to a judge with a broad understanding of *Sherrill* and its concerns about disruption to non-Indian justifiable expectations, it risks losing its suit despite strong arguments based on traditional doctrine.

In addition, this Article closely analyzes *Sherrill* to develop a faithful interpretation that can inform attempts to apply the decision to new facts. *Sherrill* was the Court's response to a unique prospective remedy in a land claim litigation seeking to permit a tribe to exercise its sovereignty after

350. Both Madison County and New York made this argument in the OIN litigation. *See* Brief and Special Appendix for Defendants-Counterclaimants-Appellants at 61, *Oneida Indian Nation v. Madison County*, 605 F.3d 149 (2d Cir. 2010) (No. 05-6408-cv(L)), 2007 WL 6432637; Brief of Amicus Curiae State of New York in Support of Defendants-Counterclaimants-Appellants Madison County and Oneida County Seeking Reversal at 10, *Oneida Indian Nation v. Madison County*, 605 F.3d 149 (2d Cir. 2010) (No. 05-6408-cv(L)), 2007 WL 6432640.

351. *See* *Cayuga Indian Nation v. Seneca County*, 761 F.3d 218, 220 (2d Cir. 2014) (per curiam) (recognizing that *Bay Mills* provided "further guidance regarding both the continuing vitality of the doctrine of tribal sovereign immunity from suit and the propriety of drawing distinctions that might constrain the broad sweep of that immunity in the absence of express action by Congress."). The Court's reaffirmance in *Bay Mills* that tribal sovereign immunity is broader than tribal sovereign authority also undermines the argument that *Kiowa* said that the two were not coextensive only in dicta. *See, e.g.,* *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 155-56 (2d Cir. 2012) (Hall, J., dissenting).

two centuries. This understanding explains why lower courts should not import *Sherrill*'s equitable concerns about disruption to non-Indian justifiable expectations into every dispute involving Indian tribes. The Second Circuit's inherent disruption rule, for example, ignores *Sherrill*'s focus on only prospective, disruptive remedies and its reaffirmation of *Oneida II*. Courts applying *Sherrill* to tribal sovereignty and treaty disputes have failed to consider that the decision does not fit within those established doctrines and evinces significantly different concerns about disruption than those at issue in these types of disputes.

Although courts should not apply *Sherrill* beyond prospective remedies in tribal land claim litigation on doctrinal grounds, the worst consequence of a broad understanding of *Sherrill* is not muddled doctrine. Resolution of disputes between tribes and non-Indians through litigation inevitably leads to a contentious relationship where both sides seek to "win" completely. An unjustifiably broad understanding of *Sherrill* would accelerate this litigious approach. Knowing they could pull out concerns about disruption to non-Indian expectations to defeat a wide range of tribal rights, state and local governments would exert even more sovereign authority in Indian Country. States and local governments would, along with non-Indian private parties, pursue more litigation against tribes.

This litigious approach makes much less likely the optimal solution to these types of disputes: a negotiated settlement between the parties.³⁵² Such a resolution has special importance in federal Indian law. Disputes between tribes and non-Indians float above a sea of complex policy and moral issues concerning the destruction and subjugation of Indian tribes for over four centuries.³⁵³ These issues defy simple solutions; as a society, we will probably never satisfactorily resolve them. Encouraging tribes and non-Indians to resolve their conflicts through negotiated settlements not only allows both sides to "win," but also helps society take baby steps in coming to terms with these underlying policy and moral questions. An overly broad

352. See, e.g., *Oneida Indian Nation v. Madison County*, 401 F. Supp. 2d 219, 232 n.3 (N.D.N.Y. 2005) (stating that a settlement between the parties would "be the best final result"), *aff'd*, 605 F.3d 149 (2d Cir. 2010), *vacated as moot and remanded*, 562 U.S. 42 (2011) (per curiam); Fletcher, *supra* note 117, at 103 (arguing that the ideal resolution of tribal-state disputes is a negotiated settlement that harmonizes tribal and state interests, such as incorporation of the reservation into local zoning plans, sharing of gaming revenue, or cross-deputization of law enforcement).

353. See, e.g., *Can. St. Regis Band of Mohawk Indians v. New York*, No. 5:82-CV-0783, 2013 WL 3992830, at *16 n.27 (N.D.N.Y. July 23, 2013) (noting that the "historical injustice" in the tribal land claim might not be just the unlawful land transfer but also "the ongoing oppression or mistreatment of native peoples by state and local governments").

application of *Sherrill* does the opposite by giving non-Indians a guaranteed win that allows courts to paper over these questions.