Tulsa Law Review

Volume 41
Number 1 *Indian Property Rights*

Volume 41 | Number 1

Fall 2005

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

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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*

Sarah Krakoff*

I. INTRODUCTION

It is a tough time to be teaching American Indian law. As a professor, one tries to maintain at least some semblance of respect for the various branches of government, hoping to encourage serious examination of divisive issues of law and policy. Yet, I know I am not alone in trying desperately to avoid lapsing into unseemly cynicism, bordering on whiny sarcasm, when it comes to teaching some of the recent United States Supreme Court decisions in the field. It is not merely the pathetic whine of the sore loser. It is true that most American Indian law scholars tend to support the long-standing view that inherent tribal sovereignty is a crucial moral and legal first principle. But most of us recognize there are some cases that erode tribal self-governance, either by allowing concurrent state authority or finding an absence of tribal inherent sovereignty, that are nonetheless decided on defensible and well-articulated grounds. There is also a rich scholarly debate about the legitimacy and extent of federal power over tribal nations,[1] and a range of disagreement over the appropriate responses to recent Supreme Court decisions.[2] In short, the professoriate is not a monolith in terms of its values about the field or its views about the law. But as legal academics, we hope for at least some

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1. *See e.g.* William Bradford, *"Another Such Victory and We Are Undone": A Call to an American Indian Declaration of Independence*, 40 Tulsa L. Rev. 71 (2004); Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113 (2002); Robert Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams'* Algebra, 30 Ariz. L. Rev. 413 (1988); Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's* Learning to Live with the Plenary Power of Congress Over the Indian Nations, 30 Ariz. L. Rev. 439 (1988).

2. *See e.g.* L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After* Atkinson *and* Hicks, 37 New Eng. L. Rev. 669, 674–75 (2003) (arguing the absence of constitutional underpinnings to tribal inherent sovereignty explains the Supreme Court's reluctance to recognize tribal control over non-members); Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. Pa. J. Const. L. 271, 284–85 (2003) (proposing congressional restoration of tribal inherent powers and, ultimately, a constitutional amendment protecting sovereignty); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 New Eng. L. Rev. 641, 657–59 (2003) (asserting that inherent tribal sovereignty is recognized and affirmed in the United States Constitution).

consistency with identifiable principles, whether through the professed jurisprudential, social, or even political commitments of the Justices, or some over-arching commitment to the particular substantive field of law. We want, at least, something identifiable to analyze and critique. We certainly are all realists now, and many of us are firmly in the critical camp, from the theory perspective. But still, to feel forced to conclude that the only unifying theme running through recent Indian law cases is that the Court either does not care about, or is hostile to, the interests of American Indians is cause for despondence. Perhaps it is simply not the time to be commenting on the field. Unfortunately, the Court's case law affects disputes on the ground in profound ways, and there is a need to comprehend the decisions at least in terms of their practical effects. *City of Sherrill v. Oneida Indian Nation of New York*[3] warrants scrutiny for that reason, and so although the opinion is one of the most cringe-inducing of late, it is nonetheless the focus of this essay.

In *City of Sherrill*, the Court held that the Oneida Indian Nation is barred by the equitable defenses of laches, acquiescence, and impossibility from asserting its immunity from state taxation of tribally owned lands within reservation boundaries.[4] The Court's odd and cowardly avoidance of the substantive legal question has an up-side. *City of Sherrill* will be difficult to apply as a precedent in other cases involving tribal claims of immunity from state and local taxation. Still, *City of Sherrill* will cause uncertainty on the ground, and embolden state and local tax authorities to push even further into Indian country than they have already.[5] It also obscures the historical record, and makes unwarranted assumptions about the future. *City of Sherrill* appears in many ways to revive the underlying assumptions of some federal and state courts at mid-twentieth century—that tribal sovereignty is a waning concept, a historical relic that has outlived its usefulness, and has little, if any, legal force.[6] As many commentators have noted, this assumption is directly at odds with the federal policies of the last three decades, which promote tribal independence and self-determination.[7]

In applying equitable defenses to the Oneida Indian Nation, the 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. Note the despondent tone? In order to keep the despondency separate from the practical legal analysis, from here on this article will do its best to compartmentalize. Part II is a detached assessment of how *City of*

3. 125 S. Ct. 1478 (2005).

4. *Id.* at 1480.

5. Almost immediately after the *City of Sherrill* decision, Oneida County filed foreclosure actions on fifty-nine parcels of land within the Oneida Indian Nation. Jim Adams, *New York Tax Foreclosures Revive Painful Memories*, http://www.indiancountry.com/content.cfm?id=1096411557 (Sept. 12, 2005). Several other local governments and taxing authorities have similarly asserted claims, resulting in a flurry of additional litigation. *Id.*

6. *See* Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* 27 (Yale U. Press 1987).

7. *See e.g.* 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 (1999); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 Minn. L. Rev. 267 (2001); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U. L. Rev. 1177 (2001).

Sherrill fits into the body of federal Indian law regarding taxation of tribal property. Part III is an unbuttoned editorial, replete with the occasional cynical and whiny flair, on what is wrong with the decision and the Court.

II. A POSTSCRIPT TO THE TAXATION CHAPTER OF *COHEN'S HANDBOOK OF FEDERAL INDIAN LAW*

Cohen's Handbook of Federal Indian Law[8] is the leading treatise in the field. The recent revision, long awaited after twenty-three years, was in press when the *City of Sherrill* decision was published, and there was only a short period of time to add a cursory footnote or two about the case. What follows in this article is a longer description of how *City of Sherrill* fits into the body of federal law concerning state taxation of Indian nations.

The Taxation chapter declares "[t]he limitations on state power to tax in Indian country apply with full force when the tax is imposed on tribes or tribal members."[9] Local government taxes, such as the property taxes asserted by Sherrill against the Oneida Indian Nation, are treated the same as state taxes.[10] In general, state and local governments may not tax Indian tribes or individuals for activities, including property ownership, occurring within Indian country.[11] This categorical prohibition on state taxation may be overcome if Congress has authorized state taxation of tribes or tribal members. However, "[a]uthorization will only be found . . . when Congress has made its intention to allow state taxes 'unmistakably clear.'"[12]

Given this categorical immunity from state taxation within Indian country, the following questions remain: (1) on whom does the burden of taxation rest, the tribe or tribal member, or a non-Indian?;[13] (2) does the activity being taxed take place in Indian country, or is the property being taxed located within Indian country?;[14] and (3) has Congress authorized state taxation of tribes or tribal members within Indian country?[15] However, in *City of Sherrill*, the Supreme Court does not ground its decision in any of these three avenues of inquiry. Instead, it applies the equitable doctrines of "laches, acquiescence, and impossibility"[16] to deny the Oneida Indian Nation's claim of tax immunity.[17]

The parties in *City of Sherrill* assumed the third question, whether Congress had authorized state taxation of the Oneida Indian Nation, would control the outcome of the case.[18] The Second Circuit Court of Appeals had affirmed the Oneida Indian Nation's

8. *Cohen's Handbook of Federal Indian Law* (Nell Jessup Newton et al. eds., 2005 ed., LexisNexis 2005).
9. *Id.* at § 8.03[1][b], 692.
10. *See id.* at § 8.03[1][b].
11. *See id.* (listing tribal and tribal member immunity from a variety of state and local taxes, including excise taxes on motor fuels, motor vehicle excise taxes, net income taxes, personal property taxes, real property taxes, cigarette excise taxes, vendor license fees, and hunting and fishing licenses).
12. *Id.* at § 8.03[1][c], 696 (quoting *Mont. v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985)).
13. *Cohen's Handbook of Federal Indian Law*, *supra* n. 8, at §§ 8.03[1][b], 8.03[1][d].
14. *Id.* at § 8.03[1][b].
15. *Id.* at § 8.03[1][c].
16. *City of Sherrill*, 125 S. Ct. at 1494.
17. *Id.*
18. *See id.* at 1483.

tax immunity on the grounds that clear congressional authorization was lacking,[19] and thus, the parties briefed the issue extensively before the Supreme Court.[20] The form this question would have taken, had the Court considered it, would have been whether Congress diminished or disestablished the Oneida Indian Nation's reservation when it ratified a treaty that encouraged tribal members to remove to Kansas.[21]

The Oneida Indian Nation's argument rested on the fact that the lands Sherrill was attempting to tax, which the tribe had acquired on the open market as part of a process of restoring their aboriginal land base, were within the historic Oneida Indian Reservation.[22] The lands had been set aside for the tribe under the *Treaty of Fort Schuyler*,[23] entered into with New York in 1788, and confirmed in the Treaty of Canandaigua with the Six (Iroquois) Nations in 1794.[24] The federal policy of removing Indian nations from their coveted parcels on the east coast to the mid-west territories resulted in a new treaty with the Oneidas in 1838, the Treaty with the New York Indians ("Treaty of Buffalo Creek").[25] The Treaty of Buffalo Creek was intended, in part, to encourage any Oneidas remaining on their reservation lands to remove to lands reserved for them in Kansas.[26] But, as the Supreme Court in *City of Sherrill* explained, a condition of the Treaty's ratification required a federal commissioner to "'fully and fairly explai[n]' the terms to each signatory tribe and band."[27] The federal officer who met with the Oneidas "assured them they would not be forced to move but could remain on 'their lands *where they reside*,' *i.e.*, they could 'if they ch[ose] to do so remain *where they are* forever.'"[28]

Rather than confront the question of whether the Treaty of Buffalo Creek explicitly diminished the Oneidas' reservation, the Court stated in a footnote:

> [We] need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation . . . . The relief [Oneida Indian Nation] seeks—recognition of present and future sovereign authority to remove the land from local taxation—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.[29]

Notwithstanding the categorical prohibition on state taxation within Indian country, the *City of Sherrill* decision upholds a tax imposed within what the Court assumes to be an in-tact reservation.

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19. *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 161 (2d. Cir. 2003).

20. *See* Br. of Amicus Curiae for Respts. at 16, *City of Sherrill*, 125 S. Ct. 1478 [hereinafter Br. for Respts.]; Reply Br. at 7, 9, 16–17, *City of Sherrill*, 125 S. Ct. 1478 [hereinafter Reply Br.].

21. *See City of Sherrill*, 125 S. Ct. at 1485, 1490 n. 9 (citing *Treaty with the New York Indians* (Jan. 15, 1838), 7 Stat. 550 [hereinafter *Treaty of Buffalo Creek*]).

22. *Id.* at 1488.

23. *Id.* at 1495–96 (citing *Treaty of Fort Schuyler* (Sept. 22, 1788) (available in Pet.'s Writ of Cert., *City of Sherrill*, 125 S. Ct. 1478)).

24. *Id.* (citing *Treaty of Canandaigua* (Nov. 11, 1794), 7 Stat. 44).

25. *Id.* at 1485 (citing *Treaty of Buffalo Creek*, *supra* n. 21).

26. *City of Sherrill*, 125 S. Ct. at 1485.

27. *Id.* (quoting *N.Y. Indians v. U.S.*, 170 U.S. 1, 21–22 (1898)) (bracket in original).

28. *Id.* (quoting Jt. App. at 146, *City of Sherrill*, 125 S. Ct. 1478) (emphasis in original, bracket in original).

29. *Id.* at 1490 n. 9 (citation omitted).

Had the Supreme Court reached the question of diminishment and resolved that question in favor of Sherrill, the Court's decision would have fallen into a line of cases, beginning with *Goudy v. Meath*,[30] permitting increasingly less explicit congressional language to result in the abrogation of tribal tax immunity.[31] *Goudy*, along with *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*[32] and *Cass County v. Leech Lake Band of Chippewa Indians*,[33] involved tribal reacquisition of lands that had been alienated due to allotment policies.[34] Language in *Yakima* "appeared to cabin *Goudy*'s broad language concerning the equivalence of alienability with taxability."[35] But in *Cass County*, the Court clarified that when Congress explicitly makes Indian lands freely alienable, state taxation is permissible unless Congress clearly states otherwise.[36]

The Taxation chapter, discussing *Goudy*, *Yakima*, and *Cass County*, ends with the following: "Together, *Goudy*, *Yakima*, and *Cass County* stand for the proposition that Congress is presumed to authorize state taxation of real property when it renders lands freely alienable. This rule only applies when Congress has clearly removed the restrictions on the land."[37]

The Supreme Court's *City of Sherrill* decision leaves the current state of the law regarding Congressional authorization of state taxation in-tact. In avoiding the substantive question, the Court resisted Sherrill's argument that reservation disestablishment or diminishment, and therefore authorization of state taxing authority, could be inferred from the circumstances surrounding the Treaty of Buffalo Creek.[38] Sherrill argued the history of federal efforts to remove the Oneidas from New York established that the Treaty's purpose was to "complete the removal of the Oneidas from [the state]."[39] The Oneida Indian Nation and the United States, as amicus, asserted that the focus of the Treaty was to substitute Kansas lands for those in Wisconsin, which had been proposed as the removal territory in an earlier treaty.[40] Therefore, the United States and the Oneidas argued the Oneidas' New York lands were not directly at issue, and no congressional purpose to disestablish or diminish the New York reservation could be inferred.[41] Furthermore, as the Supreme Court noted, the federal officer who met with the Oneidas assured them they would not be compelled to move, and could remain where they currently resided.[42] For the Court to find express congressional authorization to tax in these circumstances—by finding clear congressional diminishment or

30. 203 U.S. 146 (1906).
31. *See Cohen's Handbook of Federal Indian Law*, *supra* n. 8, at § 8.03[1][c], 698–99.
32. 502 U.S. 251 (1992).
33. 524 U.S. 103 (1998).
34. *See Cohen's Handbook of Federal Indian Law*, *supra* n. 8, at § 8.03[1][c], 699–700.
35. *Id.* at § 8.03[1][c].
36. *Id.* (citing *Cass County*, 524 U.S. at 114).
37. *Id.* at § 8.03[1][c], 700–01.
38. *See* Reply Br., *supra* n. 20, at 9.
39. *Id.*
40. *See* Br. for Respts., *supra* n. 20, at 6, 16.
41. *Id.*
42. *City of Sherrill*, 125 S. Ct. at 1485; *see also supra* n. 28 and accompanying text.

disestablishment of the Oneidas' New York reservation—would have stretched the current doctrines well beyond previous applications.[43]

Thus, *City of Sherrill* makes no new statements concerning the requirements for congressional authorization of state taxation. But in dismissing the Oneida Indian Nation's claims of tax immunity based on the equitable defenses of laches, acquiescence, and impossibility, the Court nonetheless injects an entirely new kind of uncertainty into the realm of tribal/state tax relations. Even in the absence of clear congressional authorization to tax, state and local taxing jurisdictions may hereafter feel emboldened to tax Indian property within reservation boundaries, depending on the specific factual history and character of the surrounding lands. For litigants attempting to predict outcomes, one way to read *City of Sherrill* is that it covertly lines up with *Goudy*, *Yakima*, and *Cass County* with regard to the Court's position that Indian real property purchased on the open market is taxable. The Court could not come to this latter conclusion directly without departing dramatically from precedents regarding treaty interpretation,[44] reservation diminishment,[45] and congressional authorization to tax,[46] therefore instead it pressed its case quietly through the discretion available in equitable doctrines. For other courts considering these questions, the better approach is to treat *City of Sherrill* as an anomalous case, so specific in its holding that it will rarely apply to other circumstances. The weight of federal Indian law counsels against the application of time-bound defenses to Indian tribes for the good reason that, for long stretches of that time, federal and state governments actively prevented tribes from attempting to vindicate their rights, even rights solemnly set out in treaties and statutes.[47]

III. AARRRGHHH!

When drafting a treatise, one must always keep the audience in mind. Practitioners and judges are constrained to try to make sense of the law. They look to a treatise for assistance in that regard. In one respect, *City of Sherrill* is an easy case to fit into a treatise. The case provides little substance with regard to core doctrinal areas, such as when Congress has authorized taxation, or when Congress has diminished or disestablished a reservation, that the descriptions of those areas of law can remain fairly untouched.

Yet, *City of Sherrill* simultaneously flings open the doors of equitable discretion. Relying on *City of Sherrill*, litigants will ask courts to dismiss tribal claims grounded in historical wrongs more frequently, and courts will grant those requests for dismissal more frequently. The substantive law is relatively untouched, but it will rarely be applied.

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43. *See Cohen's Handbook of Federal Indian Law*, *supra* n. 8, § 8.03[1][c].

44. *See Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Cohen's Handbook of Federal Indian Law*, *supra* n. 8, at § 2.02.

45. *See Cohen's Handbook of Federal Indian Law*, *supra* n. 8, § 3.04[3] (discussing reservation diminishment).

46. *See Blackfeet*, 471 U.S. at 761–62; *Cohen's Handbook of Federal Indian Law*, *supra* n. 8, at ch. 8.

47. *See* Wilkinson, *supra* n. 6, at 32, 37–41, 44–46, 53, 58, 69–75.

There is already evidence of *City of Sherrill*'s huge potential outside of the taxation context. In *Cayuga Indian Nation of New York v. Pataki*,[48] the Second Circuit relied on *City of Sherrill* in reversing a $248 million dollar damages award to the Cayuga Indian Nation and other tribes for what the district court found to be clear violations of the Non-Intercourse Act.[49] The *Cayuga Indian Nation* court stated that *City of Sherrill* "dramatically altered the legal landscape against which we consider plaintiffs' claims."[50] A treatise, in its necessarily compartmentalized and detached description of the law, cannot convey this sense in which the Court has undermined core legal principles without having the courage to say it is doing so. Practitioners and judges may well want to know this too; and therefore, a rant can serve some functions that a treatise cannot.

A rant can also take a much more pointed position with respect to the morality of the Supreme Court's decision. The *City of Sherrill* decision, more than any other in recent times (and that is saying a lot), puts the Court in the role of moral arbiter. The Court is weighing in on one side of the historical ledger, and to put it bluntly, it is the wrong side for our times. As discussed below, the Court distorts the history of our government's suppression of tribalism and uses those distortions as the basis for its current unilateral perpetuation of that suppression. The Court, which has no American Indian members and never has; the Court, which is the non-representative branch of government; the Court, which has ostensibly been relegated to the role of deferring to Congress in Indian affairs; the Court, which instead is reviewing anything it can get its hands on in order to weigh in on the side of non-Indians, who have greater potential to influence the legislative process; the Court, which is therefore perverting the core doctrines of law that apply to federal-tribal relations. This Court: Indians should just stay out of it. Unfortunately, Indian nations are often constrained to pursue issues before the Supreme Court.

In *City of Sherrill*, the Oneida Indian Nation won in the Second Circuit, and the City petitioned the Court to hear the case.[51] Following the decision in *Cayuga Indian Nation*, there will be a strong temptation to pursue Supreme Court review, given the Second Circuit dismissed not only the Cayuga Indian Nation's claim for eviction, but the entire suit on the grounds that the damages claims stemmed from an underlying claim of possession.[52] Therefore, the Cayuga Indian Nation and other tribes are faced with the following choice: allow the Circuit decision to remain uncontested and abandon their land claims for now, or take the Supreme Court gamble, risking the poor odds that the Court will do anything other than affirm, resulting in the end of most tribal land claims permanently.

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48. 413 F.3d 266 (2d Cir. 2005).

49. *Id.* at 268 (citing Pub. L. No. 1-33, 1. Stat. 137 (1790) (codified at 25 U.S.C. § 177 (2000)) [hereinafter Non-Intercourse Act]).

50. *Id.* at 273.

51. 125 S. Ct. at 1478.

52. *See Cayuga Indian Nation*, 413 F.3d at 279.

A. *Laches?!?*

It is important to be clear about the issue before the Court in *City of Sherrill*. The issues were *not* whether the Oneida Indian Nation could tax or assert regulatory control over non-Indians in Sherrill.[53] Instead, the issue was solely whether the Oneida Indian Nation had to pay property taxes to Sherrill on land that the Nation owns in fee simple, that is within the boundaries of their reservation, and that was alienated from them in violation of federal law.[54]

There are two ways to conceptualize the relevant time frame for the dispute that resulted in the *City of Sherrill* decision. The first is to consider the question of Sherrill's tax authority as the latest instantiation of the long-standing disputes between the Indian Nations of the Iroquois Confederacy and the State of New York. The second is to narrow the frame to fit around the specific legal issue: whether Sherrill has the authority to tax lands reacquired by the Oneida Indian Nation on the open market. In the first time frame, the dispute begins in 1795, when New York first attempted to purchase lands from the Oneidas, in violation of the 1794 Treaty of Canandaigua[55] and the Non-Intercourse Act.[56] In the second, the dispute begins in 1997 when the Oneida Indian Nation purchased the first parcel of fee land that would become the subject of this dispute.[57] Under either time frame, applying laches and other equitable defenses to the Oneida Indian Nation's claim of tax immunity is inappropriate. Had the Oneida Indian Nation or the United States been given the chance to brief the issue, it is likely they would have made these and other compelling arguments to the Court.[58]

1. The "Historical Wrongs" Time frame

The Oneida Indian Nation is the successor tribe to the Oneida Nation, one of the tribes of the great Iroquois Confederacy.[59] Despite early efforts by the United States Continental Congress to protect the Confederacy's rights to their aboriginal lands,[60] New York asserted itself as the government with which the tribes would have to negotiate.[61] In 1788, New York and the Oneida Nation entered into the Treaty of Fort Schuyler,

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53. *See City of Sherrill*, 125 S. Ct. at 1495 (Stevens, J., dissenting).

54. *Id.*

55. *Id.* at 1484 (citing *Treaty of Canandaigua*, *supra* n. 24).

56. *Id.* (citing 25 U.S.C. § 177).

57. *Id.* at 1482–83.

58. *See City of Sherrill*, 125 S. Ct. at 1497 n. 5 (Stevens, J., dissenting). Justice Stevens noted that Sherrill attempted to add the defense of laches to its answer in the district court, but the district court refused on futility grounds. *Id.* The Second Circuit upheld that determination, and Sherrill failed to preserve the issue of laches in its petition for certiorari or brief on the merits before the Court. *Id.* The Court thus determined the outcome of the case on grounds neither raised nor briefed by any of the parties. *Id.* at 1490 n. 8 ("We resolve this case on considerations not discretely identified in the parties' briefs."). The majority opinion in *City of Sherrill* is an excellent object lesson for why the Court should restrain itself from deciding cases on grounds not actually raised or briefed by the parties.

59. *Id.* at 1483.

60. *See* Jay Donald Jerde, *Learning to Sell Grandmother: Why* City of Sherrill, New York v. Oneida Indian Nation of New York *Should be Upheld to Preserve Tax-Free Status of Tribal Real Estate Acquisitions*, 28 Hamline L. Rev. 341, 348 (2005).

61. *See id.*; *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 418 (1942 ed., Five Rings Corp. 1986).

which required the Oneidas to cede "all their lands"[62] to New York in exchange for cash and in-kind payments.[63] The Treaty also set aside a 300,000 acre tract as the Oneidas' reservation, and promised the state's protection of the Oneidas' rights therein.[64] The United States Constitution vested sole authority to engage in commerce with the Indian Tribes in the United States,[65] and early federal policy reinforced the notion that the federal government, and not the states, would have sole authority to enter into treaties with tribes.[66] Thus, despite New York's efforts to be the sole arbiter of the Oneidas' fate, the federal government "initially pursued a policy protective of the New York Indians, undertaking to secure the Tribes' rights to reserved lands."[67] In 1790, Congress passed the first Non-Intercourse Act, prohibiting the sale of tribal lands without federal approval.[68] And in 1794, the United States entered into the Treaty of Canandaigua, affirming the Treaty of Fort Schuyler, and promising to protect the Oneidas' "'free use and enjoyment'"[69] of their reservation.[70]

Despite the United States' assertion of control, New York immediately resumed its practice of attempting to purchase lands from the Oneidas. In 1795, New York entered into negotiations to purchase 100,000 acres of the Oneidas' reservation without federal approval.[71] Then, as the *City of Sherrill* Court dryly noted, "[t]he Federal Government's policy soon veered away from protection of New York and other east coast reservations."[72] Indeed, the United States embarked on the policy period known as "removal," which entailed uprooting tribes and moving them primarily to the western territories of Oklahoma and Kansas in order to open up more land for non-Indian settlement.[73] Consistent with the removal policy, the Oneidas were encouraged to move first to lands in Wisconsin, and then, through the Treaty of Buffalo Creek in 1838, to the lands in Kansas.[74] As noted above, the Treaty of Buffalo Creek included a condition that the Treaty's terms be fully and fairly explained to the Oneidas, and the Treaty negotiator's explanation included assurances that the Oneidas could remain "where they are forever,"[75] if they chose not to relocate.[76]

For the Oneidas, neither the promise of removal nor the promise to be allowed to remain in New York was kept. By the mid-1840s New York had acquired most of the remaining acres of Oneida reservation land, and by 1920 "only 32 acres continued to be

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62. *Treaty of Fort Schuyler*, *supra* n. 23.
63. *See City of Sherrill*, 125 S. Ct. at 1495.
64. *See id.*
65. *See* David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 61–62 (5th ed., West 2004); Clinton, *supra* n. 1, at 131.
66. *See* Getches, Wilkinson & Williams, *supra* n. 65, at 62, 84–86.
67. *City of Sherrill*, 125 S. Ct. at 1484.
68. *Id.* (citing 25 U.S.C. § 177).
69. *Id.* (quoting *Treaty of Canandaigua*, *supra* n. 24).
70. *Id.*
71. *Id.*
72. *City of Sherrill*, 125 S. Ct. at 1485.
73. *See id.*; Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* 6–8 (U. Tex. Press 1983); Getches, Wilkinson & Williams, *supra* n. 65, at 126–27 n. 2.
74. *City of Sherrill*, 125 S. Ct. at 1485 (citing *Treaty of Buffalo Creek*, *supra* n. 21).
75. *Id.* (quoting Jt. App. at 146, *City of Sherrill*, 125 S. Ct. 1478).
76. *Id.*

held by the Oneidas."[77] At the same time, the United States abandoned the idea of removing the Oneidas to Kansas, and ultimately restored the Kansas lands to the public domain in order to open them to non-Indian settlement.[78]

The *City of Sherrill* Court stated "[i]t is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief."[79] The Oneida Indian Nation's actions throughout the period from 1795, when New York first attempted to circumvent the Non-Intercourse Act, through the present, must therefore be examined in order to determine whether the Court appropriately applied laches to their claim of tax immunity. As the *City of Sherrill* Court noted, "[e]arly litigation concerning the Oneidas' land claims trained on monetary recompense from the United States."[80] In 1893, during the hey-day of the allotment period, the United States agreed to be sued for disposing of the Kansas lands to non-Indian settlers, and the Oneidas "shared in the resulting award of damages."[81] It would have been all but impossible for the Oneidas to get judicial relief for either New York or the United States' actions up until this point.[82] First, claims against the United States required their consent, due to sovereign immunity. Second, with regard to New York, it was the consistent position of New York state courts that New York Indian nations lacked capacity to sue, absent statutory authorization by the state.[83] Therefore, up to that point, Oneidas' participation in the 1893 litigation is all they could have reasonably done to seek legal redress.

The Oneida Indian Nation next initiated proceedings before the Indian Claims Commission in 1951 to seek further compensation for the divestment of their reservation lands.[84] Again, while the *City of Sherrill* Court described this as "a half century"[85] after the 1893 litigation, it would have been impractical, bordering on impossible, for the Oneidas to litigate against any party other than the United States. In addition, the Oneidas' ability to sue the federal government was dependent on the United States'

77. *Id.* at 1486.

78. *Id.*

79. *City of Sherrill*, 125 S. Ct. at 1491. Interestingly, the only Indian law case cited by the Court in support of its application of laches is *Felix v. Patrick*, 145 U.S. 317 (1892), an allotment-era decision denying the remedy of establishing a constructive trust over lands conveyed by an Indian allottee to non-Indians in violation of statutory restrictions. That case touched only on appropriate remedies for alleged violations of individual property rights, not on the question of states' abilities to restrict tribal inherent powers. It was also decided during a time when the Court regularly deferred to congressional policies of allotment that were bent on dispossessing Indian tribes of their land. Today, the Court simultaneously ignores the doctrine of deferring to congressional policy towards tribes while reviving the long-abandoned allotment and removal era policies. *See generally* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1 (1995) (documenting the tendency throughout the modern era cases to revive allotment policies long repudiated by Congress).

80. *City of Sherrill*, 125 S. Ct. at 1486.

81. *Id.*

82. *See* Richard B. Collins & Karla D. Miller, *A People Without Law* 32 (unpublished paper, copy on file with author) (noting that throughout the nineteenth century "the American legal system was woefully inadequate for Native Americans and tribes. Their abundant grievances against the federal government and lawless settlers had no reasonable legal redress.").

83. *Id.* at 42–45.

84. *City of Sherrill*, 125 S. Ct. at 1486.

85. *Id.*

consent pursuant to the establishment of the Indian Claims Commission in 1946.[86] In short, the Oneidas, in joining in the 1893 litigation and suing the United States as early as 1951, were doing all that could reasonably be expected of an Indian tribe to address allegations of illegal dispossession of property.[87]

As the *City of Sherrill* Court further conceded, the claims proceedings continued until 1982, with the Oneidas receiving largely favorable rulings on their allegations that the United States violated fiduciary duties to ensure the tribe received adequate compensation from New York for its acquisitions during the period from 1795 through 1846.[88] Importantly, the Court of Claims affirmed that the United States' quiet acquiescence in New York's gobbling up of the Oneida reservation was an abdication of the federal government's legal obligations under the Non-Intercourse Act.[89] This acknowledgment should support the view that the Oneidas' reliance on the United States to protect their interests throughout the period from 1795 through 1846 was reasonable, and that they could not have been expected to fend off New York's attempts to dislodge them from their treaty lands on their own. Yet, in *City of Sherrill*, the Court implied the United States' abandonment of its guardian role should be used against the Indian nations that it wronged.[90]

In 1970, shortly after it became clear, as a matter of both legal and practical realities, that Indian nations could maintain suits in federal court against state and local governments,[91] the Oneidas "instituted a 'test case' against the New York Counties of Oneida and Madison."[92] In the first round of this litigation, in *Oneida Indian Nation of New York v. County of Oneida* ("*Oneida I*"),[93] the Supreme Court affirmed that the Oneidas' claim was grounded in federal law, and upheld the federal court's subject matter jurisdiction.[94] In the second round, in *County of Oneida v. Oneida Indian Nation of New York State* ("*Oneida II*"),[95] the Supreme Court rejected the counties' assertion of equitable defenses, including laches, and ruled that New York had illegally acquired the Oneidas' lands in violation of federal-tribal treaties, the Non-Intercourse Act, and federal common law.[96] The Court in *Oneida II* did note that the lower courts had not considered

86. Claims cases were the only plausible avenue for tribes up until the late 1960s. *See* Collins & Miller, *supra* n. 82, at 3 (observing that until the late 1960s, suits by Indian nations, other than claims cases, were rare for a variety of reasons born of the history of suppression, poverty, and discrimination faced by tribes).

87. *See* Joseph William Singer, *Nine-Tenths of the Law: Title, Possession, & Sacred Obligations*, 38 Conn. L. Rev. ___ (forthcoming 2006) (describing the myriad practical, legal, and political barriers to tribes initiating litigation against state or local governments that persisted up until 1966).

88. *City of Sherrill*, 125 S. Ct. at 1486.

89. *Id.*

90. *Id.* at 1484 (noting that throughout the nineteenth century, the federal government did nothing to interfere with New York's acquisitions of Oneida land); *id.* at 1492 n. 12 (emphasizing that "for generations" the Oneidas sought relief for their mistreatment by the federal government, rather than seeking redress from New York).

91. *See* Singer, *supra* n. 87, at ___ ("It was not until 1966, when Congress passed 28 U.S.C. § 1362, that federally-recognized Indian nations had the power to bring a lawsuit in federal court without first obtaining consent of the United States.").

92. *City of Sherrill*, 125 S. Ct. at 1486.

93. 414 U.S. 661 (1974) [hereinafter *Oneida I*].

94. *City of Sherrill*, 125 S. Ct. at 1486–87.

95. 470 U.S. 226 (1985) [hereinafter *Oneida II*].

96. *City of Sherrill*, 125 S. Ct. at 1487.

whether equitable doctrines should apply to the remedies sought by the Oneida Indian Nation.[97] In subsequent litigation, the Oneida Indian Nation relied on the favorable decisions in the *Oneida II* litigation to expand its land claims to include longer time frames as well as more defendants, including private property owners.[98] The district court did apply equitable doctrines to these claims, and in 2000 refused to join the private defendants on futility grounds.[99] Meanwhile, using a different tactic in the over-all strategy of reacquiring some of the land within its reservation boundaries, the Oneida Indian Nation began purchasing land in fee simple on the open market—acquiring the parcels that would become the subject of the tax litigation in 1997 and 1998.[100]

It is important to emphasize two themes that emerge from this litigation history. First, the Oneidas have been extraordinarily active in pursuing the wrongs against them, first turning to the federal government and then, as soon as it was legally and practically capable of doing so, to the counties for relief from what the Supreme Court found in *Oneida II* to be clear violations of the Oneida Indian Nation's property rights.[101] Second, the lower courts appear to be applying equitable doctrines in a context-sensitive manner, allowing the bulk of the Oneidas' legal claims against government entities to go forward while limiting the relief available and excluding private landowners.[102]

These two themes undermine the Court's reasoning with regard to the application of laches. First, as the Court notes, "one side's inaction"[103] is a prerequisite to the application of laches.[104] That element simply does not exist with regard to the Oneidas' long-standing efforts to redress the United States' and the local and state governments' illegal actions. The Oneida Indian Nation was as active as could be expected under the coercive historical circumstances. The Court overlooks the history, seemingly willfully, in concluding the Oneidas failed to take action in a timely manner. Second, the risk of grave disruption to the settled expectations of property owners was non-existent with regard to the Oneidas' claim in *City of Sherrill*, which was solely to assert immunity from local property taxes for the parcels that it had purchased. No non-Indians would be ousted from their lands. No enormous bill would have to be paid by Sherrill. Rather, Sherrill would have to adjust to a slightly lower property tax base, something municipalities are accustomed to in the contexts of property ownership by non-profits or other governments.[105] The more disruptive land claims issues were not present in *City*

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

98. *City of Sherrill*, 125 S. Ct. at 1487.

99. *See Oneida Indian Nation of N.Y. v. County of Oneida*, 199 F.R.D. 61, 79–85 (N.D.N.Y. 2000).

100. *City of Sherrill*, 125 S. Ct. at 1488.

101. *See Oneida II*, 470 U.S. 226.

102. *See Oneida Indian Nation of N.Y.*, 199 F.R.D. at 93–95.

103. *City of Sherrill*, 125 S. Ct. at 1491.

104. *Id.*; *see also* Dan B. Dobbs, *Law of Remedies: Damages-Equity-Restitution* 89 (2d ed., West 1993).

105. Even with regard to this fairness issue, the Court overlooks facts on the ground. The Oneida Indian Nation maintains a grant program to compensate local governments for lost revenues. *See Oneida Indian Nation of N.Y. v. City of Sherrill*, 145 F. Supp. 2d 226, 232 (N.D.N.Y. 2001); *see also* Jerde, *supra* n. 60, at 356. The program is not a perfect substitute for reliable income flows from taxation, *see id.* at 356 n. 90, but in the subjective mix of factors that can be considered when determining whether equitable relief is warranted, the Court should have at least acknowledged it.

of Sherrill, and moreover, were being handled in a manner the Court apparently approved of in the lower courts.[106] Ironically, the Court's "parade of horribles"[107] is contradicted by the Court's own recounting of the litigation history.[108]

2. The "Open Market Acquisition" Time Frame

The second way to evaluate whether the Oneida Indian Nation was dilatory in asserting its tax immunity against Sherrill is to evaluate the time frame from when Oneida purchased the parcels at issue in the case through when Oneida began objecting to Sherrill's taxes. The Oneida Indian Nation acquired the parcels in 1997 and 1998.[109] In 1997, Sherrill assessed property taxes against the parcels acquired in 1997.[110] However, the Oneida Indian Nation "did not pay the assessed taxes, asserting that the properties are contained within the Oneida Indian Reservation . . . and therefore are nontaxable by state municipalities."[111] Therefore, the Oneida Indian Nation objected to the city's taxation immediately. Litigation about the issue began not long after, in 2000.[112]

The Oneida Indian Nation could not possibly assert its immunity from taxation for the parcels obtained in 1997 and 1998 at any time prior to the acquisition of those parcels. Thus, it is painfully obvious that under this narrower time frame, laches should not apply.

Even if a broader context to the Oneidas' land purchases is considered, it is inappropriate to apply equitable doctrines implying sloth and undue passivity, as laches and acquiescence do,[113] to their claim of tax immunity. Like all other American Indian nations, the Oneidas were in no position to enter the property market until well into the period in federal-tribal relations known as "the self-determination era."[114] Charles Wilkinson forcefully documents the poverty, despair, and powerlessness that dominated Indian country, due to misguided and disastrous federal policies up until the 1960s.[115] Particularly for the New York tribes, whose land bases had been severely eroded, it could hardly be expected that they could engage in market transactions to purchase valuable property until they had restored, by other means, their political and economic well-being.

106. *See City of Sherrill*, 125 S. Ct. at 1489.

107. *See id.* at 1493 (asserting that recognizing the Oneidas' tax immunity could ultimately result in adverse consequences to private landowners).

108. *See id.* at 1488–89.

109. *Id.* at 1488.

110. *Oneida Indian Nation of N.Y.*, 145 F. Supp. 2d at 232.

111. *Id.* at 232.

112. *Id.* at 231.

113. *See* William M. Tabb & Elaine W. Shoben, *Remedies in a Nutshell* 49 (West 2005) (Laches is governed by the maxim that "'[e]quity aids the vigilant, not those who slumber on their rights.'").

114. *See* Getches, Wilkinson & Williams, *supra* n. 65, at 216–26 (describing self-determination policies).

115. *See* Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* pt. 1 (W.W. Norton & Co. 2005) (describing removal, allotment, and termination policies and their effects on tribes).

B. *The Court as Dependency-Forcing*

The Supreme Court, through a flawed historical analysis and consequent inappropriate application of equitable doctrines, is substituting its own judgment about the fate of tribes for that of the other branches of government. It has been clear, ever since President Nixon articulated the current policy framework in 1970, that a major federal goal is to continue to provide financial support to Indian nations, but simultaneously to release them from the bureaucratic and paternalistic control of the Bureau of Indian Affairs ("B.I.A.").[116] In the period of self-determination, Congress has passed numerous statutes encouraging tribal self-governance and independence, all of which reflect that goal in various ways.[117]

The Oneida Indian Nation, in re-purchasing its homelands in fee simple, is perfectly enacting the federal aspiration of tribal sovereign existence without federal micro-management. The Supreme Court, by contrast, is pushing the Oneida Indian Nation and other tribes back into the dysfunctional state of dependence on the B.I.A. As part of its rationale for applying equitable doctrines to the Oneidas' claim of sovereign tax immunity, the Court suggests that the appropriate route for the Oneida Indian Nation is to petition the Secretary of the Interior to take the Tribe's fee lands back into trust status.[118] Indeed, left with no other options, the Oneida Indian Nation is pursuing trust status for its lands, and with luck will succeed in this second-best alternative to asserting its sovereignty.[119] But is the Court wholly unaware of the *Cobell v. Norton*[120] litigation occurring just down the street in Washington, D.C., in which the B.I.A. has been roundly chastised, albeit in a different trust status context, for its gross mismanagement of Indian property?

The Court is prolonging the "dependent" state of Indian nations by forcing them to seek shelter from the federal government—by necessitating taking land back into trust status—during a time when at least some Indian nations finally have the resources to begin to act as *independent*, albeit unique, sovereigns. The irony of this is sad indeed; the Court, per Justice John Marshall, created the "'domestic dependent nation[]'"[121] status as a means of mediating colonialism.[122] Today, the Court forces the dependent status to continue, despite the repudiation of colonialism and its moral underpinnings that we allegedly embrace.

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116. *See* Richard Nixon, *Message from the President of the United States Transmitting Recommendations for Indian Policy*, H.R. Doc. No. 91-363, 91st Cong., 2d Sess. (July 8, 1970).

117. *See* Getches, Wilkinson & Williams, *supra* n. 65, at 221–25 (listing some of the many congressional statutes that promote tribal self-determination).

118. *See City of Sherrill*, 125 S. Ct. at 1493–94.

119. *See* Adams, *supra* n. 5.

120. 377 F. Supp. 2d 4 (D.D.C. 2005).

121. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 397 (1993) (citing *Cherokee Nation v. Ga.*, 30 U.S. 1, 17 (1831)) (bracket in original, footnote omitted).

122. *See id.*

IV. CONCLUSION

In *City of Sherrill*, the Court did little to change core doctrines of federal law governing taxation of Indian nations. At the same time, the Court dramatically altered the backdrop against which some tax immunity claims, and almost all land claims, will be judged. Continuing in its vein of eviscerating Indian law by ignoring it, the Court makes easy work for treatise drafters, but hard work for anyone trying to understand what is actually going on. What is actually going on is that the Court, like courts during the mid-twentieth century, must at some level think Indian nations are a thing of the past. And with that unspoken assumption, the Court in *City of Sherrill* has taken the opposite approach of Justice Marshall in his famous trilogy. Marshall struggled to mediate the realpolitik of the times; Indian nations had been absorbed within the American legal framework against their will, and there was little the Court could do but recognize their status as "dependent" sovereigns, but sovereigns nonetheless.

Today, with no remorse and little comprehension, the Court is unilaterally forcing a state of dependency on tribes at a time when they are finally emerging from that state with the support, albeit uneven and often inadequate, of the other branches of the federal government. Tribal success on the ground is thus in direct disproportion to tribal success in the Highest Court. The best thing for Indian nations, and Indian law, is to stick closely to the ground. With that strategy, with any luck there will still be cause to update *Cohen's Handbook of Federal Indian Law* in another twenty-some years. Otherwise, there is the grim possibility that before too long, no updates will be necessary because no federal Indian law, as such, will be left.