NOTE

ONE NATION, INDIVISIBLE: AMERICAN “INDIAN COUNTRY” IN THE WAKE OF CITY OF SHERRILL V. ONEIDA INDIAN NATION

Jennifer R. Sunderlin*

I. INTRODUCTION

In an age where patriotism and national unity are stressed in this proud “melting pot,” it can be difficult to remember that the United States was once entirely subject to the dominion of native tribes.1 Since the time when manifest destiny pushed European Americans westward, the land controlled by American Indians has diminished to a mere sliver of what it once was, as various instruments set aside reservations, allotments, and individual parcels along the countryside that was to be settled by non-Indians. Today, many such holdings exist as relatively small but separate sovereigns within this one nation.2

“Indian country” is broadly defined as “land within the limits of any Indian reservation [or allotment] under the jurisdiction of the United States,”3 a definition which has been evolving since the colonies were first settled by Europeans.4 Originally, during the colonial period, the term “Indian country” referred to the separate

---

* Jennifer Sunderlin received her Juris Doctor from Albany Law School, and her Bachelor of Arts from Hamilton College, in Clinton, New York. Jennifer would like to thank Robert Batson, Patricia Salkin, and Brittany Young for their guidance and support in the evolution of this Note, Mrs. Lena O’Brien for the grammar lessons that made Law Review an attainable goal to begin with, and her parents, Thomas and Cathy Sunderlin, for everything.


2 Id. at 2–3.


4 FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 27–38 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN’S HANDBOOK].
territory that was occupied by the Indian tribes.\textsuperscript{5} It was later used in the Trade and Intercourse Act to define the purely geographic scope of Indian dominion.\textsuperscript{6} Practically speaking, however, the term “Indian country” in present day politics refers to land which, though subject to federal jurisdiction, is recognized as existing under the sovereign authority of tribal government and is exempt from state and municipal taxation.\textsuperscript{7} This includes “formal and informal reservations, dependent Indian communities, and Indian allotments.”\textsuperscript{8} Further, it has been firmly established that the power to modify the status of land determined to be an Indian Reservation lies only with Congress through the Commerce Clause in Article I, Section 8 of the United States Constitution.\textsuperscript{9}

Since the middle of the last century, tribes across the nation have

\textsuperscript{5} See id. at 29. The occupation of the land by Indian tribes did not affect the traditional European or colonial understanding that, through “the doctrine of discovery,” legal title to all lands in the “New World” vested in the crown that commissioned the discovery. See Vine Deloria Jr. & David E. Wilkins, Tribes, Treaties, and Constitutional Tribulations 4 (1999). After the Revolution, Americans embraced this European philosophy in their belief that the land, which they “wrestled away” from the British, belonged to America and not its native occupants. Id. at 6. In fact, one of the first acts of the new American Congress was to declare jurisdiction over the Indian tribes. Cohen’s Handbook, supra note 4, at 58 (citing 2 Journals of the Continental Congress 1774–1789, at 175 (July 12, 1775) (Worthington Chauncey Ford ed., 1905)).

\textsuperscript{6} See Cohen’s Handbook, supra note 4, at 29–30. The Trade and Intercourse Act defined “Indian country” as: [All] that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished . . . . Trade and Intercourse Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729, 729 (current version at 25 U.S.C. § 177 (2000)); see also infra Part IV.A (illustrating the historical significance of checkerboarding as permitted by subsequent acts of Congress and acknowledged in the Trade and Intercourse Act by the inclusion of lands described as “east of the Mississippi”).

\textsuperscript{7} 18 U.S.C. § 1151; 25 U.S.C. § 465 ([S]uch lands . . . shall be exempt from State and local taxation.); see Pivar, supra note 1, at 21 (summarizing the American Civil Liberties Union’s understanding of the meaning of “Indian country”); see also Okla. Tax Comm’n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (holding that a state lacks jurisdiction to tax in Indian country); Okla. Tax Comm’n v. Sac & Fox Nation, 508 U.S. 114, 128 (1993) (holding that a state cannot tax within Indian country, regardless of whether the territory is designated as “a formal or informal reservation, allotted lands, or dependant Indian communities”); McClanahan v. Ariz. State Tax Comm’n, 411 U.S. 164, 168–69 (1973) (outlining the history of the Supreme Court’s recognition of Indian sovereignty and the denial to states of the permission to tax Indian lands); Oneida Indian Nation v. City of Sherrill, 145 F. Supp. 2d 226, 241 n.7 (N.D.N.Y. 2001) (noting that “[n]o argument [was] made [by the parties] that should a finding be made that the [Oneida lands were] Indian country, they [would] nonetheless” be subject to state and local taxes).

\textsuperscript{8} Sac & Fox Nation, 508 U.S. at 123.

\textsuperscript{9} U.S. Const. art. I, § 8, cl. 3; see, e.g., County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247–49 (1985) (observing that when Congress acts under its Commerce Clause powers, the courts should interpret with particular care any purported “congressional intent to extinguish Indian title”).
brought actions to reclaim and preserve lands set aside for tribal use by the United States government or its colonial predecessor.\(^{10}\) These actions have ranged from petitions for the ejectment of non-Indian residents and reversion of the land to Indian control,\(^{11}\) to petitions for the payment of monetary damages for the occupation of Indian land in violation of eighteenth century treaties\(^{12}\) and for the recognition of the sovereign status of ancestral lands purchased on the open market after 200 years under non-Indian jurisdiction.\(^{13}\)

In the recent decision of \textit{City of Sherrill v. Oneida Indian Nation}, which addressed the taxable status of Indian-owned land located within the tribe’s original reservation,\(^{14}\) the United States Supreme Court has changed the legal landscape for the acquisition of tribal lands as Indian country. In its attempt to balance the interests of both state and tribal governments, the Court has forgotten the role of Congress in properly dealing with Indian affairs.\(^{15}\) In essence, the Court has afforded itself the ability to expand or diminish Indian lands in a manner that may contradict both legislative intent as well as the Court’s own intent in ruling as it did.\(^{16}\)

In Part II, this Note will outline the specific history behind the

\(^{10}\) E.g., \textit{City of Sherrill v. Oneida Indian Nation}, 544 U.S. 197, 202–03 (2005) (describing the tribe’s claim that ancestral lands purchased on the open market should be incorporated as Indian country).

\(^{11}\) E.g., Cayuga Indian Nation v. Cuomo, Nos. 80-CV-930, 80-CV-960, 1999 WL 509442, at *29–*30 (N.D.N.Y. July 1, 1999) (rejecting ejectment as a remedy for the Tribes).

\(^{12}\) E.g., \textit{Oneida Indian Nation}, 470 U.S. at 229, 232 (seeking monetary damages for lost aboriginal lands); Cayuga Indian Nation v. Pataki, 413 F.3d 266, 267–68 (2d Cir. 2005) (seeking judgment against the State of New York for the unlawful occupation of Indian land).

\(^{13}\) See \textit{City of Sherrill} , 544 U.S. at 202–03.

\(^{14}\) Id.

\(^{15}\) See \textit{id.} at 224–25 (Stevens, J., dissenting).

\(^{16}\) See \textit{id.} The provisions for the “Allotment of Indian lands,” codified in 25 U.S.C. Chapter 9, essentially allow for the express creation of small and separate pockets of non-taxable, sovereign Indian land intermixed with areas under state regulatory control, during the period that such Indian land is held in trust by the Secretary of the Interior. 25 U.S.C. §§ 348–49 (2000) (outlining the process through which Indian allotments, reservations, or other land holdings are taken into trust by the federal government); see also 25 U.S.C. § 465 (2000) (allowing the United States to take Indian lands into trust). This may occur whether the land was property of the tribe at the time of partition or was purchased by a member of an Indian tribe on the open market. 25 C.F.R §§ 151.3–4, .10 (2006). Congress has also expressly allowed for several factors to be considered when taking Indian lands into trust and thus creating Indian country beyond the sole factor of burden on local governments. \textit{Id.} § 151.10.

On the contrary, the Supreme Court significantly considered only one factor in adjudicating the Oneidas’ claim, which was the burden on state governments. \textit{City of Sherrill}, 544 U.S. at 219–21. Basing its holding on such a principle, it appears as though the Court must then support the creation of Indian country out of land purchased on the open market, so long as it is a contiguous mass of Indian lands (not a criss-cross of tribal and state jurisdictions) that would not pose the same “significant” administrative confusion and imposition on state governments.
Oneida land claim, which concerns the status of once-reserved Indian land that 200 years ago was sold to non-Indians, only recently to be repurchased by the Oneidas. Part III puts forth that the logic of the decision in *City of Sherrill* is inconsistent with judicial precedent and intent, inasmuch as it would theoretically allow for an undivided mass of land purchased on the open market to be regarded as Indian country because it would not pose as significant of a burden on the administration of state regulatory authority. Part IV will further assert that the logic of the Supreme Court in *City of Sherrill* is inconsistent with the current policy regarding Indian sovereignty as embodied by the Dawes Act of 1887, the federal provision relating to acquisition of Indian lands as codified in 25 U.S.C. § 465, and section 383 of the New York Executive Law passed pursuant to the Indian Gaming Regulatory Act. Further, Part V will discuss how the remedy recommended to the Oneida Indian Nation by the majority—to effectually create Indian country in the contested lands through an appeal to the Secretary of the Interior, whereby the lands would be taken into trust for the use and benefit of the Oneida Indian Nation—certainly poses no less a burden to the outlying community. As such, the decision of the Supreme Court, as suggested in the dissent of Justice Stevens, unreasonably encroaches on the sole congressional authority to expand or diminish the size of native lands regarded as Indian country.

II. THE HISTORY OF THE ONEIDA LAND CLAIM

On March 29, 2005, the U.S. Supreme Court decided *City of Sherrill v. Oneida Indian Nation*, holding that land bought in fee on the open market by an Indian tribe could not be regarded as “Indian country” so as to remove the land from local regulatory jurisdiction. Furthermore, the decision specified that such lands should not be considered Indian country especially because the ratification of a “checkerboard of state and tribal

17 *City of Sherrill*, 544 U.S. at 202.
21 *City of Sherrill*, 544 U.S. at 220.
22 Id. at 224–25 (Stevens, J., dissenting).
23 Id. at 202–03 (majority opinion).
jurisdiction... would ‘seriously burde[n] the administration of state and local governments’ and would adversely affect landowners neighboring the tribal patches’ and that such burden, after the Oneida’s 200 year absence from regulatory control, could not be justified against the interests of the current local residents.24

This decision came after two lower courts determined that the contested Oneida land was unquestionably Indian country.25 The District Court in the Northern District of New York found that the Oneida Indian Nation provided “undisputed evidence that the 1794 Treaty of Canandaigua confirmed and guaranteed” the Oneida’s tribal reservation, which was partially situated in the present city of Sherrill.26 In so holding, the District Court then confirmed that the Indian status of the contested Oneida land had not been disestablished by any prior instrument between the federal government and the tribe,27 that it fit well within the statutory definition of Indian country, and that it was henceforth exempt from state and local taxation.28

The Second Circuit affirmed the decision of the District Court and further added that the land at issue was Indian country because it was located on the original reservation of Oneida land, that there was no express congressional action or intent to disestablish said reservation, and that the tribe did not need to demonstrate its “continued existence” on that land to claim it as Indian country.29 On certiorari to the Supreme Court, the Indian country status of the Oneida land was not debated, meaning that it was not an issue to be reviewed on appeal.30 As such, the Supreme Court did not factually deny the Indian country status of the Oneida land; however, it did rule to limit the sovereign right to such status.31

The land in question was purchased by the Oneida Indian Nation on the open market between 1997 and 1998 and consists of separate parcels located within the City of Sherrill.32 The Oneida Indian Nation, one of six tribes comprising the once-powerful Iroquois

24 Id. at 219–20 (quoting Hagen v. Utah, 510 U.S. 399, 421 (1994)).
27 Id. at 248–54 (discussing the effect of the Treaty of Buffalo Creek, U.S.-N.Y. Indians, Jan. 15, 1838, 7 Stat. 550).
28 Id. at 255.
29 City of Sherrill, 337 F.3d at 155–67.
30 City of Sherrill, 544 U.S. 197, 216 n.9 (2005).
31 Id.
32 Id. at 202.
Confederacy, claimed an “aboriginal homeland [of nearly] six million acres in . . . central New York” at the time of the American Revolution.\textsuperscript{33} After the Revolution, the settlement of New York was pushed westward from the Hudson River, which pressured the State to make agreements with the Indian Tribes.\textsuperscript{34} Subsequently, the Oneidas ceded all of their lands to the State of New York for nominal monetary consideration through the 1788 Treaty of Fort Schuyler, leaving a reservation of only 300,000 acres over which the tribe remained sovereign.\textsuperscript{35}

This reservation was preserved after the 1790 Indian Trade and Intercourse Act through the Treaty of Canandaigua in 1794.\textsuperscript{36} The treaty ensured federal protection of the lands as reserved in the Treaty of Fort Schuyler for the “free use and enjoyment” by the Oneidas.\textsuperscript{37} The Trade and Intercourse Act intended to protect Indian lands from wrongful alienation or exploitation by mandating federal approval of all land transactions involving tribal holdings.\textsuperscript{38} This was the first decree by the fledgling nation, in furtherance of the Commerce Clause, which reiterated the principle that only Congress could regulate commerce with the Indian tribes.\textsuperscript{39} Commerce in this context was intended to include the transfers of tribal lands, as well as the establishment or disestablishment of Indian reservations.\textsuperscript{40}

\textsuperscript{33} Id. at 203.
\textsuperscript{34} See id.
\textsuperscript{35} Id.
\textsuperscript{36} Id. at 204–05.
\textsuperscript{37} Id. (internal quotation marks omitted) (quoting Treaty of Canandaigua, \textit{supra} note 26, art. II, 7 Stat. at 45). The first Indian Trade and Intercourse Act, passed in 1790, provided that:

\begin{quote}
[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.
\end{quote}


\textsuperscript{39} See U.S. CONST. art. I, § 8, cl. 3; Trade and Intercourse Act § 1, 1 Stat. at 137. The Indian Trade and Intercourse Act of July 22, 1790 is among the first acts listed in the U.S. Statutes at Large which purports to regulate relations with the Indian tribes. \textit{See List of the Public Acts of Congress Contained in Volume First}, 1 Stat. xvii, xx.

\textsuperscript{40} Indian Trade and Intercourse Act § 4, 1 Stat. at 138. Implicit in this statute, which mandates congressional involvement in the transfer of lands under the Indian Commerce Clause of the U.S. Constitution, is that if alienation of a reservation disestablishes the rights and privileges of Indian country, and only a congressional mechanism can \textit{disestablish} said status, then, reciprocally, only an act of Congress can establish Indian country. \textit{See U.S. CONST. art. I, § 8, cl. 3; Indian Trade and Intercourse Act § 4, 1 Stat. at 138.}
Thus, Indian country, as statutorily defined, was created in the remaining 300,000 acres, which included the City of Sherrill, and was preserved through a treaty made by the federal government, the Treaty of Canandaigua. Nonetheless, in violation of the Trade and Intercourse Act, a majority of the Oneidas’ reservation lands were purchased by the State of New York throughout the mid-1800s and subsequently developed by the new settlers. Although the state instruments by which the majority of the Oneida lands were transferred were invalid under federal law and technically failed to dissolve the reservation status of those lands, possession remained with the subsequent non-Indian purchasers of these reservation lands for two centuries.

The Oneidas of New York first sought damages for portions of these illegally transferred properties through proceedings initiated before the Indian Claims Commission in 1951. A series of claims were asserted before the commission assessed the fiduciary duty of the United States to compensate the Oneidas for these wrongful land transfers. However, after a drawn out attempt to sway the federal government to grant damages, the Oneidas gradually abandoned this avenue to instead pursue land claims, beginning in 1970, against local governments in the State of New York.

As all of these cases proved futile in achieving the goal of re-establishing sovereign Indian land in central New York, the tribe began purchasing lands scattered around and within Madison and Oneida Counties. Although these lands had been alienated from

42 Treaty of Canandaigua, supra note 26, art. II, 7 Stat. at 45.
43 City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 205–06 (2005).
44 Id. at 202, 205–06.
45 Oneida Indian Nation v. County of Oneida, 622 F.2d 624, 626 (2d Cir. 1980).
46 Oneida Nation v. United States, 26 Ind. Cl. Comm’n 138, 145 (1971). The Claims Commission held that the United States had an obligation to ensure that the Oneidas were given “conscionable consideration” from the State of New York. Id. However, on appeal, the Court of Claims held that the obligation extended to the Oneidas only if the federal government had knowledge of the fraudulent state transactions and that there was an unresolved factual issue as to whether the government had such constructive knowledge. United States v. Oneida Nation, 477 F.2d 939, 944–45 (Ct. Cl. 1973).
47 City of Sherrill, 544 U.S. at 208; Oneida Nation v. United States, 231 Ct. Cl. 990, 990–91 (Ct. Cl. 1982) (per curiam).
48 See generally City of Sherrill, 544 U.S. at 207–12 (outlining the judicial history of unsuccessful proceedings brought before the courts regarding the appropriateness of the Oneidas’s acquisition of additional Indian lands, most of which are and have been privately owned and occupied, in and around central New York). The tribe currently owns 17,000 acres of land between Madison and Oneida Counties; however, this land does not exist in the form of a single parcel. Id. at 211.
49 Id.
tribal ownership since 1807, they were once part of the original reservation as preserved through the Treaty of Canandaigua.\textsuperscript{50} The parcels at issue in \textit{City of Sherrill} were transferred by the Oneida Nation—predecessor to the Oneida Indian Nation—to a tribesman in 1805; the land was then sold to a non-Indian in 1807.\textsuperscript{51} The Oneida Indian Nation then claimed its newly-acquired acreage as sovereign Indian country—the land was situated on a reservation as ratified and undissolved by a federal instrument.\textsuperscript{52} The Oneida Indian Nation then opened several commercial enterprises on the land and also claimed the properties to be tax exempt.\textsuperscript{53} Hence, \textit{City of Sherrill} began as a tax eviction case in which the tribe sought to suspend current and future taxation on the subject lands.\textsuperscript{54} The United States Supreme Court held that lands once part of an original reservation that are bought on the open market by an Indian tribe are subject to taxation.\textsuperscript{55} Yet, in the wake of this decision, a narrow application of the Court’s holding has developed.

\textbf{III. APPLICATIONS OF THE \textit{CITY OF SHERRILL} DECISION}

The judicial intent behind the holding in \textit{City of Sherrill} was clearly to limit future litigation between Indian tribes and local governments.\textsuperscript{56} The Court cited the proverbial “flood gates” analysis in stating that if it were to recognize the Oneida lands as Indian country “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.”\textsuperscript{57} Yet the floodgates of litigation remain open because, in its lengthy discussion of equitable remedies and undue burden,\textsuperscript{58} the Court failed to proffer an affirmative statement against the creation of Indian country out of a large parcel within a municipality when that parcel does not create alternating jurisdictions of local and tribal sovereignty. Thus, it is still unclear whether the Court disapproves of all purchases of Indian land on the open market, or solely the

\begin{itemize}
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.; see Treaty of Canandaigua, supra note 26, art. II, 7 Stat. at 45.}
\item \textsuperscript{53} \textit{City of Sherrill, 544 U.S. at 211.}
\item \textsuperscript{54} \textit{Id. at 212; see Oneida Indian Nation v. City of Sherrill, 337 F.3d 139, 144 (2d Cir. 2003); Oneida Indian Nation v. City of Sherrill, 145 F. Supp. 2d 226, 231 (N.D.N.Y. 2001).}
\item \textsuperscript{55} \textit{City of Sherrill, 544 U.S. at 221.}
\item \textsuperscript{56} \textit{Id. at 220.}
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id. at 213–16, 219–20.}
\end{itemize}
creation of confusing “checkerboards” of jurisdiction.

The possibility remains, whether or not this point will be tested by the Oneidas, that a tribe could bring another claim involving a contiguous parcel of tribally-owned land. This would not have the feared detrimental effect on neighboring land owners because the contiguous Indian parcel would not cause the same confusion as a checkerboard-type jurisdiction; the jurisdictional line would be no more difficult to discern than the boundaries of present reservations, state and national parks, and even local townships, all of which are only subtly identified but are, nonetheless, recognized by governments and courts at all levels.

Moreover, because the final City of Sherrill decision focused so heavily on the negative impacts of tax exemption and alternating jurisdictions on local residents, the Court has merely redefined the scope of United States v. Sandoval,59 rather than overruling it entirely. In Sandoval, the Supreme Court rejected the argument that Indian country status was disallowed because land was held in fee simple by the New Mexico Pueblo tribe.60 Additionally, in a later decision involving the status of the Pueblo communal holdings, the Supreme Court held that the Pueblo lands could not be alienated without the consent of the federal government.61 As such, lands inhabited by dependent Indian communities are Indian country, even if they are not located on an original reservation and regardless of when they were established.62 Thus, the potential remains for similar claims (alleging a lesser burden on municipalities and residents) to persist indefinitely against local governments because, as the law remains, the claimed land need not be on an original reservation—it need only be undisruptive to the regulatory administration of the surrounding community.63

In the majority opinion of Sherrill, Justice Ginsburg encourages tribes to pursue the congressional mechanism for the acquisition of lands available on the open market by appealing to the Department of Interior.64 However, this process could potentially subject the

59 231 U.S. 28 (1913).
60 Id. at 48 (holding that, although the Pueblos held fee title to their land following Spanish grants of ownership, the lands were considered to be “Indian country” in the newly-created state of New Mexico because of the Pueblos’ status as a dependent Indian community).
62 See id. at 441–42; see also 18 U.S.C. § 1151(b) (2000) (including “dependent Indian communities” in its current statutory definition of Indian country).
63 See City of Sherrill, 544 U.S. at 219–20.
64 Id. at 220–21.
local residents to an ongoing bureaucratic hassle and more jurisdictional confusion—concerns that were heavily acknowledged in Justice Ginsberg’s rationale for disregarding the status of the subject lands as Indian country. Moreover, this process, which the Oneida Indian Nation is presently pursuing, could apply to lands that are situated both on and off the original reservation under the Treaty of Fort Schuyler. Far from protecting local citizens from confusing tax and zoning administration, this congressional mechanism for holding Indian lands in trust for perpetuity could expose more residents to this bureaucratic hassle, many of whom could be unfamiliar with these proceedings and may live away from the contemplated parcels.

Furthermore, it is unclear whether the Court is trying to follow or diverge from the policies embodied by the congressional statutes, which allow for Indian country to be created through the purchase of land (on or off an original reservation) on the open market and for the blatant creation of scattered lands alternating between tribal and state jurisdiction.

In essence, the Court has stated that the creation of sovereign

---

65 See Elizabeth Cooper, Public Input Urged on Land Trust, OBSERVER-DISPATCH (Utica, N.Y.), Jan. 9, 2006, at 1B; see also infra note 68 (discussing articles on the land trust hearings that occurred concerning Oneida Indian Nation lands located within Oneida County).
66 See Jennifer Fusco, Big Crowd Expected at Land-Trust Hearing, OBSERVER-DISPATCH (Utica, N.Y.), Jan. 11, 2007, at 1B (“The Oneida Indian Nation has applied to place 17,370 acres of its non-reservation land into federal Indian trust. If that plan is approved, those parcels, including the Nation’s Turning Stone Resort and Casino, would be exempt from state and local taxes and regulatory codes.”).
68 Land trust hearings, announced in December 2005, would allow the public to gain information and express concerns about placing non-reservation land in Oneida and Madison counties into trust. Elizabeth Cooper, Land-Trust Hearing Planned, OBSERVER-DISPATCH (Utica, N.Y.), Dec. 24, 2005, at 1A. The first hearing in January of 2006 packed the local high school auditorium to capacity with more than 900 people, many of whom were deeply concerned with the loss of jobs, the loss of tax revenues from the Turning Stone Casino (which was not part of the original litigation in City of Sherrill v. Oneida Indian Nation), and the overall economic uncertainty that this land-trust process seemed to bring upon the state’s smallest city. Elizabeth Cooper, Emotional Crowd Packs Hearing on Nation Land, OBSERVER-DISPATCH (Utica, N.Y.), Jan. 11, 2006, at 1A. The Bureau of Indian Affairs held a hearing in December 2006 to address public concern about the land-into-trust process in the nearby city of Utica, and due to the demand of residents in the immediate vicinity of the disputed area, another public hearing was planned for February 2007 to provide continued information about the land trust process. See Fusco, supra note 66. Nearly two years after Sherrill, calm still seems to be out of reach for those immediately affected by the decision on both sides of the case.
Indian country that alternates among parcels subject to both state and local jurisdiction would cause too many difficulties for local regulatory authorities.\textsuperscript{70} Looking closely at this decision, a large loophole for the Indian tribes was created in what would have otherwise been a bright-line tax ruling, namely, if an undivided parcel of land, situated on a tribe’s original reservation, was bought on the open market, the court could recognize the land as tax-exempt Indian country because it would appear no different from a traditional Indian reservation within a larger community and place no more of a burden on local regulatory authority than a traditional reservation. A contiguous parcel would not cause the infamous checkerboarding in tax collection or garbage collection, and it would no more disrupt the daily lives of the citizens of Sherrill than the existing reservation.

Furthermore, although the \textit{Sherrill} decision has been narrowly read as confined to the issue of taxation on “discrete parcels of historic reservation land,”\textsuperscript{71} there is strong language within the majority opinion—with respect to impossibility, impracticability, and reasonably “settled expectations”—that makes this holding suitable for analogy to the zoning and regulatory issue.\textsuperscript{72} At present, the decision stands to profoundly impact other Indian tribes in New York State by extending jurisdiction over the use of Indian lands not subject to any other land claim issue.\textsuperscript{73} Therefore, it appears as though this holding will yield more, rather than less, litigation between state and tribal governments, and it will result in heightened confusion among local residents regarding the administration of regulatory authority.

\section*{IV. The Background Behind the Checkerboard Dilemma}

“Checkerboarding” is not a novel idea; rather, it dates back to early dealings between the United States and the native tribes as the nation outgrew its westward colonial boundaries and settled around the pockets of land occupied by the tribes.\textsuperscript{74} As discussed

\begin{footnotesize}
\textsuperscript{70} \textit{City of Sherrill}, 544 U.S. at 219–20.
\textsuperscript{71} \textit{Id.} at 202.
\textsuperscript{72} \textit{Id.} at 218–19.
\textsuperscript{73} \textit{See} Cayuga Indian Nation v. Village of Union Springs, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) (holding that the \textit{Sherrill} decision enables the District Court to extend its regulatory jurisdiction to the zoning of Indian-owned lands situated on an original reservation).
\textsuperscript{74} \textit{See} DELORIA & WILKINS, supra note 5, at 7. This, of course, is again prefaced by the understanding that occupancy by the tribes did not, politically or culturally, confer upon them true ownership. \textit{Id.} at 4–5. Belief in this philosophy persists, as Deloria and Wilkins explain:
below, beyond these informal variances of sovereignty, the federal government has expressly anticipated and allowed for the checkerboarding of Indian and non-Indian territory in both the Dawes Act of 1887\textsuperscript{75} and the acquisition of Indian lands provision under 25 U.S.C. § 465.\textsuperscript{76} Further, the State of New York has otherwise welcomed the idea of checkerboarding through its allowance for casino development outside the confines of existing reservations.\textsuperscript{77} The following subsections will analyze each of these examples of checker-boarding as it relates to the City of Sherrill decision.

A. The Dawes Act of 1887 and Checkerboard Jurisdictions

The Dawes Act was first promulgated by Congress in 1887 and provided for the partition of reservations into smaller parcels to be held in severalty by individual Indians or Indian families.\textsuperscript{78} The Act also allowed for lands not situated on an original reservation to be allotted similarly through a special appeal and petition to the local land office—an arm of the Department of the Interior.\textsuperscript{79} Essentially, requested land need not be on, adjacent to, or near a former reservation, so long as the petitioner is a member of a federally-recognized Indian tribe and is otherwise qualified under the Act to receive an allotment—there is no requirement that the petitioner’s tribe previously held an existing reservation for an allotment to be requested.\textsuperscript{80}

One of the initial aims of the Dawes Act was to slowly assimilate Indians into standard American culture by moving them off unified reservations and away from the notion of sovereign Indian country.\textsuperscript{81} The grand plan was for land to be patented in fee to an
allottee, but the patent would be held in trust by the federal government for a period of twenty-five years, during which time the allotted land could not be alienated, encumbered, or taxed by states or municipalities. By definition, much like the Supreme Court's definition as set forth in Sandoval and Candelaria, such allotments continued in their status as Indian country during the time the land was held in trust and were viewed as "dependent Indian communities." After the expiration of the holding period, the Indian would possess fee title to the land and the government assumed that Indian country would be disestablished. The previously allotted land could then be legally bought or sold without encumbrance and without respect to the Trade and Intercourse Act because the Indian status of the land had been terminated by the Dawes Act, an Act of Congress.

The Homestead Acts were passed in 1862 and promised plots of land to settlers who moved west. The Homestead Acts came into fruition concomitant to the onset of Indian allotments under the Dawes Act and otherwise unreserved lands were purposely opened for development by settlers. During homesteading, lands once occupied by the plains and prairie tribes were essentially advertised as if they were surplus for the taking by pioneers. Furthermore, the trust status of the Indian lands could be extended or terminated by an Executive Act. This meant that neighboring lands allotted to individual Indians at the exact same time could have been treated differently by the federal government. It can be inferred (explaining the aims of the Dawes Act in relation to the taxable status of Yakima Indian land held in fee).


84 Dawes Act §§ 5–6, 24 Stat. at 389–90.

85 Id. § 5, 24 Stat. at 389–90.


87 Dawes Act § 5, 24 Stat. at 398–90 (“That all lands . . . sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers . . .”); see also PUB. LAND LAW REVIEW COMM’N, ONE THIRD OF THE NATION’S LAND 28 (1970) (describing the policy of the United States as one to “encourage settlement and development of the country”).

88 See Homestead Acts § 1, 12 Stat. at 392 (advertising that pioneers in the western plains may enter surrounding land, not to exceed 160 acres).

89 Dawes Act § 5, 24 Stat. at 389.
from the location and the timing of these instruments that the federal government recognized and intended to create pockets of alternating tribal and state jurisdictions in the newly-settled territories of the “wild west.” It is as if “checkerboarding” was a forethought that was insignificant in comparison to the value of opening the lands to others and diminishing tribal identity.

However, the allotments did not succeed in demolishing all notions of Indian reservations and Indian country. Large Indian communities, like the Pueblo and the Navajo in the Southwest, remained intact after the allotment phase.90 Further, smaller reservations that remained in the east after the majority of the tribes had been previously relocated westward, such as Oneida lands, remained intact because there was no Act of Congress officially extinguishing the aboriginal right to those lands and the right to claim them as Indian country.91

Although the Dawes Act has been largely repealed by Congress,92 its application remains significant in the analysis of the City of Sherrill decision. This is first because the Indian Reorganization Act of 1934 halted further allotments and extended indefinitely the existing trust periods for allotted Indian lands, preserving the image of the checkerboard in the west.93

Additionally, nothing was done to discourage the likelihood of checkerboarding during the period between when the perpetual trusts of the Dawes Act were established in 1934 and the present. During this time, several tribes such as the Oneidas had already initiated their test cases for land claims.94 This shows that Congress had been on notice of several attempts to create pockets of separate jurisdiction outside of those provided by the Dawes Act. Nonetheless, the Dawes Act was not repealed for the burdens that such “checkerboarding” was imposing on local regulatory authority. On the contrary, the era of Dawes allotments appeared to come to an end at a time when Native Americans were asserting their right

---

90 See Paul Shagen, Comment, Indian Country: The Dependent Indian Community Concept and Tribal/Tribal Member Immunity from State Taxation, 27 N.M. L. Rev. 421, 425, 429 (1997).
94 See supra Part II.
to self-determination without forfeiting their right to a tribal community—contrary to the implied intent of the Dawes Act.\footnote{See PEVAR, supra note 1, at 9–10.} Although the policy that officially created the checkerboarding between Indian and non-Indian land has been repealed,\footnote{See supra note 92 and accompanying text.} no congressional mechanism has yet been established to oppose the creation of the small, alternating jurisdictions described in City of Sherrill.

\textbf{B. The Present Acquisition of Indian Lands Under Federal Law}

There is presently a provision in 25 U.S.C. chapter 14 entitled “Acquisition of lands,” which provides that a member of a federally-recognized tribe may petition to the Secretary of the Interior for the requested lands to be taken into trust by the federal government for the use and benefit of the petitioner’s tribe.\footnote{25 U.S.C. § 465 (2000); 25 C.F.R. §§ 151.3–.4, .9–.10 (2006).} The statute provides that “[t]he Secretary of the Interior is authorized, in his discretion, to acquire . . . any interest in lands, . . . including trust or otherwise restricted allotments . . . for the purpose of providing land for Indians. . . . and [that] such lands or rights shall be exempt from State and local taxation.”\footnote{25 U.S.C. § 465.}

This means that after repeal of the Dawes Act, Congress preserved a mechanism for Indians to petition for the creation of Indian country and, as such, preserved the possibility of creating alternating jurisdictions of tribal and state sovereignty.

This statute, however, differs from the Dawes Act in several ways, most notably in that the Indian landholder does not forfeit any tribal ties when the land is taken into trust and there is no set guideline for when the trust period should terminate.\footnote{Id.} Unlike the Dawes Act, where the government assumed that the resultant checkerboarding would fade as fees were patented in the Indian landholder, these land trusts are established indefinitely.\footnote{Id.} However, similar to the Dawes Act, the probability of checkerboarding state and tribal jurisdictions is implicit in the allowances of the present statute.\footnote{Id. The Code of Federal Regulations, which outlines the authority of the Secretary of the Interior to take tribal lands into trust under the provisions set forth in the United States Code, further acknowledges the jurisdictional difficulties that such trust status can create. 25 C.F.R. § 151.10(f).} Further, while the implications
of checkerboarding are acknowledged in 25 U.S.C. § 465 and the Code of Federal Regulations, there is no policy expressed or implied in the language of the statute that opposes creating a pocket of sovereign Indian country, if so doing does not violate the list of statutory considerations.\footnote{25 C.F.R. § 151.10. Although the Code of Federal Regulations acknowledges the complications that Indian country status can create, and gives some attention to the burden placed on local governments, these are merely factors for consideration and not prohibitions against the checkerboards that these trust agreements create. Id.}

As it remains today, any Indian qualified under 25 U.S.C. § 465 may still petition to bring land into trust status, whether or not it was part of an original reservation or purchased on the open market.\footnote{25 U.S.C. § 465; 25 C.F.R. §§ 151.3–.4, .9–.10.} The possibility of a landholding in trust existing as a small island of Indian country surrounded by lands under local administration has become increasingly likely since the concept of Indian land trusts was established in the 1800s. This is because the “American wild” that was described in the homesteading era has largely disappeared, and oftentimes one town now seamlessly picks up where the last has left off.\footnote{See Shagen, supra note 90, at 450.} Nonetheless, the checkerboarding spirit of the Dawes Act endures today.

One crucial difference between the legislative intent behind 25 U.S.C. § 465 and the decision in City of Sherrill is that the Supreme Court in City of Sherrill seemed to give great weight to only one factor: “[j]urisdictional problems and potential conflicts of land use which may arise.”\footnote{City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 219–21 (2005); 25 C.F.R. § 151.10(f).} The Court chose to rely most heavily on only one factor, while the statutory mechanism requires the consideration of eight.\footnote{25 C.F.R. § 151.10.} These factors include: “[t]he existence of statutory authority for the acquisition and any limitations contained in such authority,” the need for the tribe to acquire the additional land, “[t]he purposes for which the land will be used,” the amount of land already held in trust by that tribe/individual, the effect of removing the proposed trust land from the state and local tax rolls, and potential jurisdictional and land use conflicts.\footnote{Id.}

It could also be argued that the trust status of the land under 25 U.S.C. § 465 is fundamentally different from the outright creation or acceptance of Indian country out of land held by an individual Indian or tribe in fee-title-absolute. However, this argument can be
easily dismissed because, as previously discussed, the statutory definition of Indian country may be attached regardless of trust or fee title to the land.  

Similarly, the practical application of the trust under 25 U.S.C. § 465 ensures no less of a burden on state and local governments or on the neighboring non-Indian residents of the municipality because the trust can endure indefinitely under this provision; there is still no end in sight as to when the Indian sovereignty would cease. Furthermore, the character of a town and its residents is always in a state of evolution as businesses come and go, people move in and out, and large family farms are sold and turned into suburban subdivisions. Thus, regardless of the time span, there will always be some notion of newness with regards to the regulation of any given area.

In addition, local government and private property lines seldom remain unchanged for a span of twenty-five years. Thus, the creation of Indian country by taking land into trust or by accepting it unconditionally as previously established by the federal government would have a comparatively negligible impact on the practical administration of that individual local regulatory authority. There will always be an inevitable inconvenience on local governments, but whether it is 25 years or 200 years, Congress has explicitly condoned this inconvenience on local regulatory authority with regards to the rights of Native Americans who purchase or otherwise acquire lands by preserving the provisions for the “Allotment of Indian lands” in the United States Code.

The Court, although appearing to endorse the statutory mechanism for land acquisition in the City of Sherrill opinion, has, in its failure to analyze the remaining factors in the rationale of the ruling, fundamentally diverged from the logic and spirit of the legislation. By encouraging remedy only through the statutory mechanism for allotment, the Court has all but denied the existence of Indian country as preserved by the Treaty of Canandaigua even though such preservation has not been disestablished by any act of Congress. The fact that the Oneidas are now petitioning to acquire in trust the land subject to the City of

---

108 See supra notes 59–60 and accompanying text.
110 See supra note 16.
112 Id.
Sherrill controversy should be indicative not of progress, but of the slippery slope down which the Court has descended.

C. Checkerboarding in the Catskills

A third example in which the federal government both acknowledges and condones the creation of a small checkerboard of tribal sovereignty interspersed with state-regulated communities can be found in a 2001 amendment to the New York State Executive Law. In the aftermath of September 11, 2001, in an attempt to boost the state economy, a bill was proposed to allow the governor to enter into a tribal-state compact with the Seneca Indians for the establishment of “up to three Class III gaming facilities” in Sullivan and Ulster Counties. This compact was enacted pursuant to the Indian Gaming and Regulatory Act (IGRA), which provides that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.” However, the aboriginal land of the Senecas is located in western New York—not the Catskill region that is encompassed by Sullivan and Ulster Counties; the casinos were approved to be built outside the boundaries of an Indian reservation and on land that was not held in trust by the Seneca Nation of Indians prior to the enactment of IGRA.

Gaming is generally disallowed on lands taken in trust by the Secretary of the Interior after the passage of IGRA. An exception exists, however, to allow gaming like that promoted in the 2001

113 Letter from Roy Halbritter, Nation Representative, Oneida Indian Nation, to Franklin Keel, Reg’l Dir., Bureau of Indian Affairs (Apr. 4, 2005), available at http://www.dec.state.ny.us/website/ogc/oneida/oinrequest.pdf (petitioning the Secretary of the Department of the Interior, six days after the filing of the City of Sherrill opinion, to acquire the land in trust).
115 Id. § 12(b).
116 Id.
118 The Senecas have three reservations in the State of New York: the Allegany Reservation in Cattaraugus County; the Oil Springs Reservation on the border of Cattaraugus and Allegany Counties; and the Cattaraugus Reservation, which spans parts of Cattaraugus, Chautauqua, and Erie Counties. The Seneca Nation of Indians, http://www.sni.org/res.html (last visited Feb. 13, 2007).
119 See Dalton v. Pataki, 835 N.E.2d 1180, 1190 (N.Y. 2005) (discussing, in relation to the land in Sullivan and Ulster counties, the portion of IGRA that applies to land acquired by the Secretary of the Interior after IGRA’s enactment).
amendment to the New York State Executive Law if the Secretary of the Interior consults with both tribal and local officials, finds that the gaming facility would be in the best interest of the tribe and would not harm the outlying communities, and if the governor of the state concurs in this finding. As such, land can be taken into trust through 25 U.S.C. § 465 to be used for otherwise prohibited casino development, creating a small pocket of Indian jurisdiction with a large-scale gaming facility, so long as the governor approves. Thus, the allowance of gaming on Indian lands held in trust and not situated on a tribal reservation only attaches the additional element of state approval.

The allowance of these Seneca casinos was the subject of Dalton v. Pataki, a dispute before the New York Court of Appeals barely two months after the Supreme Court decision in City of Sherrill. It was argued in Dalton that IGRA failed to preempt article 1, section 9 of the New York State Constitution and that, as a result, the gaming negotiated under the tribal-state compact was unconstitutional. The court nonetheless found that the express intent of IGRA was to preempt state law in the area of Indian gaming. In so finding, the Court of Appeals cited the Supreme Court decision in California v. Cabazon Band of Mission Indians, decided before the enactment of IGRA, which allowed conduct on Indian land so long as it was in accordance with the public policy of the state. The application of Cabazon in this context connotes not only the importance of state public policy support for the expansion of Indian country activities, but also support for the expansion of Indian country generally. This is because subsequent to the analysis in Cabazon, the New York Court of Appeals relied on the inherent creation of Indian country to hold that the casinos in Ulster and Sullivan Counties were consistent with both the public policy and the state’s constitution.

As it stands today, section 12 of the New York Executive Law

---

121 Id. § 2719(b)(1)(A).
122 Id.
123 Id.; cf. 25 C.F.R. § 151.10 (2006) (detailing the criteria the Secretary must consider in evaluating requests for the acquisition of non-reservation land in trust status).
124 Dalton, 835 N.E.2d 1180.
125 Id. at 1186; see also N.Y. CONST. art. I, § 9.
126 Dalton, 835 N.E.2d at 1188 (“Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities [in Indian country] are allowed.” (quoting S. REP. NO. 100-446, at 6 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3076 (internal quotation marks omitted))).
exemplifies both the federal acceptance of small and separate Indian territories within the larger state municipalities and the State of New York's enthusiasm to allow this checkerboarding generally when there stands to be economic gain. Although in *Dalton* the Court of Appeals reasoned that its decision was consistent with the logic of the decision in *City of Sherrill*, since deference was still given to the potential detriment on the surrounding community, the fact remains that it was the creation of “[a] checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at [the] behest [of the Oneida Indian Nation]” that triggered the “detrimental” analysis in *City of Sherrill*. In encouraging off-reservation casino development, virtually the same result is achieved—the board is simply being set by someone else.

V. DIVERGENCE(S) IN OPINION

Since the Supreme Court decision *City of Sherrill*, some academics have argued that the holding was correct inasmuch as it encouraged a remedy for the tribe through the political process because the legislative branch is “better positioned than the judiciary to provide . . . justice.” The fact remains, however, that if the Supreme Court was not the proper forum to adjudicate the claim, then why was certiorari granted in the first place? And further, why did the majority not stop at a specific tax ruling and instead choose to independently redefine Indian country in this specific instance if it truly thought that the political process could dispense with the appropriate remedy?

The traditional role of the Supreme Court in Indian law has been to give great deference to Congress and its authority to regulate commerce and transactions with the Indian tribes through the Commerce Clause power in Article I, section 8 of the United States Constitution. Congress has expressed its clear intent on this matter, as discussed above, yet the Supreme Court has nonetheless forged its own divergent opinion. This conflict between the judiciary and legislative branches leaves much room for potential errors in the interpretation of the holding of *City of Sherrill* and vagueness as

---

129 Id. at 1191 n.6.
132 See U.S. CONST. art. I, § 8, cl. 3.
to its impact on future cases.\footnote{133}{Although relevant to the analysis in this Note, a full and adequate discussion of the separation of powers conundrum is outside the scope of this Note.}

The marked split in opinion and in policy between the judiciary and Congress does not help to relieve the confusion surrounding federal Indian law generally or the process of tribal land claims specifically. The Court in \textit{City of Sherrill} arrived at its decision through a detailed consideration of relevant case law and public policy. Nonetheless, the provision for acquisition of Indian lands under 25 U.S.C. § 465, which is codified federal policy, precisely allows for the kind of checkerboard jurisdiction that the Supreme Court shunned in \textit{City of Sherrill} during the indefinite period while the Secretary of the Interior holds Indian land in trust.\footnote{134}{See 25 U.S.C. § 465 (2000); 25 C.F.R. §§ 151.3–4, .9–10 (2006); \textit{supra} notes 94–100 and accompanying text.}

It was argued that congressional inaction in New York following the Trade and Intercourse Act, while the state was openly purchasing tribal lands without federal consent, was indicative of its intent to allow the dissolution of the original Indian reservation preserved in 1794.\footnote{135}{See \textit{Brief for Citizens Equal Rights Foundation as Amicus Curiae Supporting Petitioner}, at 9–10, \textit{City of Sherrill v. Oneida Indian Nation}, 544 U.S. 197 (2005) (No. 03-855), 2004 WL 1835365.} Because one motivation behind the Dawes Act was also to divest the reservations and to eventually create Indian holdings that were both alienable and taxable,\footnote{136}{See \textit{County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation}, 502 U.S. 251, 269–70 (1992).} one can argue that the inconsistencies between the \textit{City of Sherrill} decision and codified federal law are irrelevant.\footnote{137}{See \textit{City of Sherrill}, 544 U.S. at 221; cf. 25 U.S.C. § 465; 25 C.F.R. §§ 151.3–4, .9–10.}

However, both of these arguments are unpersuasive because there are always numerous motivating factors behind the passage of any act of Congress—such is the explicit result of a representative democracy. No single motivating factor behind the laws should speak louder toward judicial interpretation than the affirmative action of that representative body, the codified law itself. Thus, although relevant portions of the Dawes Act have been repealed,\footnote{138}{\textit{Act of Nov. 7, 2000, Pub. L. No. 106-642, § 106(a)(1), 114 Stat. 1991, 2007 (repealing 25 U.S.C. §§ 331–333); \textit{Act of Oct. 21, 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2743, 2787 (repealing 25 U.S.C. § 337a); \textit{Act of Nov. 24, 1942, ch. 640, § 4, 56 Stat. 1021, 1022 (repealing 25 U.S.C. § 344a); \textit{Act of May 29, 1928, ch. 901, § 64, 45 Stat. 986, 991 (repealing 25 U.S.C. § 338).}}} the allowance of separate sovereignties of Indian country taken into trust by the Secretary of the Interior preserved the checkerboarding
spirit of the Dawes Act and remains intact to this date. Furthermore, the Trade and Intercourse Act still provides the basis for many claims that the Court hears. This indicates the legislature’s clear intent to preserve its authority to tax and regulate transactions of and pertaining to Indian reservations and, upon request, to establish Indian jurisdictions intermingled with areas under state and local regulatory authority.

Consequently, present legislative intentions should be given more weight than those of the past. Although the Supreme Court, through the City of Sherrill decision, may have initiated a new trend curtailing the special rights embodied by Indian country land status, Congress has yet to follow suit.

Furthermore, as suggested in Justice Stevens’s dissenting opinion in City of Sherrill, it is not the place of the Court to make policies simply because they are (or could be) in the best interest of local residents or to adjudicate policies that are otherwise unambiguous. Justice Stevens stated that the City of Sherrill decision was “at war with at least two bedrock principles of Indian Law.” Those principles are that “only Congress has the power to diminish or disestablish a tribe’s reservation [and that] as a core incident of tribal sovereignty, a tribe enjoys immunity from state and local taxation of its reservation lands, until that immunity is explicitly revoked by Congress.”

The determination of the taxable status of the Oneida Indian Nation land should have hinged simply on whether or not the subject land was Indian country. It was agreed at the outset of the City of Sherrill litigation that “if the Tribe’s properties are ‘Indian Country,’ the City has no jurisdiction to tax them without express congressional consent.” Although it was “abundantly

141 See generally City of Sherrill, 544 U.S. at 220 (expressing concerns that holding the Oneida land in question to be Indian country would set precedent allowing claims to free tribal lands from local zoning ordinances); Cayuga Indian Nation v. Village of Union Springs, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) (holding that sovereign Indian country is nonetheless subject to local zoning ordinances).
142 City of Sherrill, 544 U.S. at 223 (Stevens, J., dissenting).
144 City of Sherrill, 544 U.S. at 224 (Stevens, J., dissenting) (footnote omitted).
145 Id. at 223; see Oneida Indian Nation v. City of Sherrill, 145 F. Supp. 2d 226, 241 n.7 (N.D.N.Y. 2001) (stating that if the subject lands are determined to be Indian country, then they will not be subject to local taxation and the City of Sherrill has raised no argument contrary).
146 City of Sherrill, 544 U.S. at 223 (Stevens, J., dissenting).
clear that all of the land owned by the Tribe within the boundaries of its reservation qualifies as Indian country,” the Court decided to extinguish the Indian country status by virtue of the fact that the land had been under non-Indian governance for too long a time and to embark on a separate analysis for why taxation of Indian country would prove to be the lesser evil.\textsuperscript{147}

However, although taxation was presumed to be at the heart of the litigation surrounding this case and the source that would cause such a great burden to the City of Sherrill (as it was presently the only ripe concern at issue), the Court nonetheless considered issues not under review in reaching its decision.\textsuperscript{148} The Court stated that “[i]f [the Oneida Indian Nation] 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.”\textsuperscript{149} This language, which puts forth as its worst case scenario a situation where the Oneidas are able to free their land from local zoning and regulatory controls, clearly lends itself to an argument involving the burdens of checkerboard zoning rather than checkerboard taxation, although one does not necessarily lead to the other. Basically, the Court is sending a clear message that a reassertion of sovereign Indian rights that demands an exemption from state or local zoning and regulatory authority, which may or may not include exemption from taxation, on traditionally state-regulated lands will not be allowed. However, as it has been argued, \textit{City of Sherrill} was not necessarily the appropriate instance to assert that view.\textsuperscript{150}

Nonetheless, the impact of \textit{City of Sherrill} has already begun in the area of zoning, as evidenced by \textit{Cayuga Indian Nation v. Village of Union Springs}.\textsuperscript{151} Originally, in 2004, the District Court granted both declaratory and injunctive relief to the Cayuga Tribe, blocking the application of zoning regulations on property which the Cayugas

\textsuperscript{147} Id.

\textsuperscript{148} See id. at 219–20 (majority opinion). The Supreme Court was blatantly concerned that a ruling that the Oneida land was tax exempt would rob local governments of their zoning authorities, although zoning was not at issue in the \textit{City of Sherrill} case. See supra notes 56–58 and accompanying text (highlighting the judicial concern with future zoning implications if the Oneida lands were recognized as tax-exempt).

\textsuperscript{149} \textit{City of Sherrill}, 544 U.S. at 220.

\textsuperscript{150} See generally \textit{Cayuga Indian Nation v. Village of Union Springs}, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) (dealing specifically with the application of the \textit{City of Sherrill} decision to the municipal zoning of Indian country).

\textsuperscript{151} Id.
were renovating to be used as a gaming facility.\textsuperscript{152} There, the tribe had sold reservation land to the State of New York at the turn of the nineteenth century, and nearly 200 years later, in 1999, those conveyances were held to be void \textit{ab initio} and the tribe was awarded monetary damages.\textsuperscript{153} The District Court then held that such reacquired land within the former reservation, similar to the land claimed by the Oneidas, was Indian country that was not subject to local zoning regulations.\textsuperscript{154} In so holding, the court relied on the District Court holding in \textit{City of Sherrill}.\textsuperscript{155} However, nearly immediately following the Supreme Court’s \textit{City of Sherrill} ruling, the former \textit{Cayuga Indian Nation} decision was also reversed.\textsuperscript{156} As such, it could be argued that the bold holding of \textit{City of Sherrill} was issued as it was to quell lower zoning cases, such as \textit{Cayuga Indian Nation v. Village of Union Springs}.

The extracted rule from \textit{City of Sherrill} restricts the statutory definition of the term “Indian country” by admitting that the land in question was technically such, but denying a key benefit of that status, tax exemption.\textsuperscript{157} However, defining (or redefining) the terms crucial to statutory interpretation is the express duty of Congress, rather than the judiciary. The courts are left only to interpret the existing statutory language in light of relevant case law and legislative intent.

It is well-acknowledged that in the absence of clear congressional authorization, states lack the power to tax any property, even property that is not held in trust by the Secretary of the Interior, when it is owned by a tribal member and is situated on that tribe’s reservation.\textsuperscript{158} The Supreme Court should not have authorized the State of New York to tax the Indian country in question.\textsuperscript{159} As discussed above, compared to the probable result of the recommended statutory remedy, the policy interests in favor of

\begin{itemize}
  \item \textsuperscript{153} \textit{Cayuga Indian Nation v. Pataki}, 79 F. Supp. 2d 78, 84 (N.D.N.Y. 1999).
  \item \textsuperscript{154} \textit{Cayuga Indian Nation}, 317 F. Supp. 2d at 151–52.
  \item \textsuperscript{155} \textit{Id.} at 148 n.19; \textit{see generally Oneida Indian Nation v. City of Sherrill}, 145 F. Supp. 2d 226, 241–42 (N.D.N.Y. 2001) (asserting that reacquired lands on an original reservation are still considered to be of sovereign Indian country status).
  \item \textsuperscript{156} \textit{Cayuga Indian Nation}, 390 F. Supp. 2d at 206.
  \item \textsuperscript{157} \textit{City of Sherrill v. Oneida Indian Nation}, 544 U.S. 197, 223 (2005) (Stevens, J., dissenting).
  \item \textsuperscript{159} \textit{County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation}, 502 U.S. 251, 268–70 (1992) (prohibiting a state from levying an excise tax on the sale of Indian land).
\end{itemize}
tribal tax immunity are so strong and the corresponding state interest is so weak, that the interests need not have been rebalanced in this instance.160

Contrary to the City of Sherrill decision, the definition of Indian country as codified in both the United States Code and in the Code of Federal Regulations, in its modern application, is conscious of the potential burdens placed on local governments but delegates the power to designate land as Indian country, through acquisition and trust-acquisition, to the Secretary of the Interior.161 As such, the City of Sherrill decision amounts to judicial activism.

VI. CONCLUSION

In sum, the inconsistencies in the U.S. Supreme Court holding in City of Sherrill v. Oneida Indian Nation leaves the proverbial “door” open to a plethora of future litigation regarding the status of Indian country. The crucial loophole created is that its holding allows for land purchased on the open market to be regarded as Indian country because it would not pose as significant a burden on the administration of state and local regulatory authority, while it simultaneously encourages a remedy which would achieve, at least, a similar effect on that same regulation. Further, as suggested in the dissenting opinion by Justice Stevens, the Court has exceeded the scope of its constitutional authority by redefining a pivotal application of Indian country status through its conclusion that the State of New York could tax tribally-owned lands situated on that tribe’s reservation.162 Lastly, in its wake, this change in policy by the Court leaves an uncertain future for the acquisition of Indian country and harkens back to an earlier time and an old notion that the United States should be one nation, undivided.

161 See supra notes 97–98 and accompanying text.
162 City of Sherrill, 544 U.S. at 224 (Stevens, J., dissenting).