NOTE

The Power to Tax Is the Power to Foreclose: Reuniting Law and Logic in Tribal Immunity from Suit

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INTRODUCTION

Mother, may I go out to swim?

Yes, my darling daughter;

Hang your clothes on a hickory limb,

And don't go near the water.[1]

This nursery rhyme, invoked by the Second Circuit in its decision in *Oneida Indian Nation of New York v. Madison County & Oneida County, New York*,[2] captures the

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1. The author of this nursery rhyme is unknown. The works it appears in include PARKER M. FILLMORE, THE HICKORY LIMB (1907), *available at* www.gutenberg.org/files/28886/28886-8.txt.

2. Oneida Indian Nation of N.Y. v. Madison Cnty., 605 F.3d 149, 159 & n.7 (2d Cir. 2010), *vacated*, 131 S. Ct. 704 (2011). Following the Second Circuit's decision in the case, the United States Supreme Court granted certiorari to determine whether tribal immunity from suit protected OIN from foreclosure actions to collect property taxes. Madison Cnty. v. Oneida Indian Nation of N.Y., 131 S. Ct. 459 (2010). Shortly thereafter, OIN passed an ordinance waiving its sovereign immunity with respect to such foreclosure actions. *See infra* Part III.C. As a result, the Supreme Court vacated its judgment granting cert and remanded the case to the Second Circuit to "revisit its ruling on sovereign

essence of the illogical result the court reached. While the court conceded that the counties could collect real property taxes on the fee (non-reservation) land owned by the Oneida Indian Nation of New York ("OIN"), it held they could not initiate foreclosure proceedings on the land because of OIN's immunity from suit.[3]

In the 1990s, OIN began to acquire land that had been part of the original Oneida Nation over 200 years ago.[4] The Nation operates several commercial enterprises on or near this land, including Turning Stone Casino, two hotels, golf courses, gas stations, and convenience stores.[5] But it has failed to pay property taxes on the land.[6] OIN first argued that the land held the status of "reservation land," and was exempt from state taxation.[7] In *City of Sherrill v. Oneida Indian Nation of New York*, however, the United States Supreme Court held that "standards of federal Indian law and federal equity practice preclude[d] the Tribe from rekindling embers of sovereignty that long ago grew cold," and as such, the land was taxable as if owned by any other private owner.[8] Even after *Sherrill*, OIN continued to refuse to pay property taxes on the land, which led Oneida and Madison Counties to begin foreclosure proceedings.[9] This time, OIN argued, inter alia, that it was not subject to the foreclosure proceedings because of its tribal immunity from

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immunity on light of this new factual development." Madison Cnty. v. Oneida Indian Nation of N.Y., 131 S. Ct. 704, 704 (2011); *see also infra* Part III.C.

3. *Id.* at 159-60.

4. *Id.* at 153.

5. Brief of Amici Curiae Town of Verona, New York et al. in Support of Petitioners Madison County and Oneida County, New York at 6, Madison Cnty. v. Oneida Indian Nation of N.Y., 131 S. Ct. 704 (2011) (No. 10-72) [hereinafter Brief of Town of Verona].

6. *Madison Cnty.*, 605 F.3d at 154-55.

7. *Id.* at 153 ("[B]ecause the [United States Supreme] Court . . . recognized the Oneidas' aboriginal title to their ancient reservation land and because the Tribe has now acquired the specific parcels involved in this suit in the open market, it has unified fee and aboriginal title and may now assert sovereign dominion over the parcels." (quoting City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 213 (2005))).

8. *Sherrill*, 544 U.S. at 214 (citations omitted) (internal quotation marks omitted).

9. *Madison Cnty.*, 605 F.3d at 154-55.

suit.[10] The Second Circuit agreed, drawing a fine distinction between the doctrines of *sovereign authority over reservation lands* (which *Sherrill* said OIN lacked because the lands were not reservation lands) and *sovereign immunity from suit*, which protected OIN from foreclosure proceedings brought against it.[11]

This distinction is merely "illusory,"[12] however. And in drawing the distinction, the Second Circuit missed a more critical distinction—between in personam actions, to which tribal sovereign immunity from suit applies, and property-based in rem actions, to which immunity does not attach.[13] The Second Circuit's decision, which allows Indians to evade lawfully owed property taxes, has devastating consequences for local governments because it denies them the tax revenues necessary to provide the appropriate amount of services.[14] In addition, the decision encourages a disregard for similar legitimate enforcement actions,[15] creating a "checkerboard"[16] of competing jurisdictions.

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10. *Id.* at 155. OIN's other arguments are beyond the scope of this Note. These arguments, which the district court also found to preclude foreclosure, were (1) the Nonintercourse Act rendered the OIN's properties inalienable, (2) the Due Process Clause was violated by the counties failure to give adequate notice, and (3) the land cannot be taxed under New York State law. *Id.* at 155; *see also infra* note 83.

11. *Id.* at 157 ("[The doctrine of sovereign authority over reservation lands] is different, however, from the doctrine of tribal immunity from suit.").

12. Brief for the State of New York et al. as Amici Curiae in Support of Petitioners at 3, Madison Cnty. v. Oneida Indian Nation of N.Y., 131 S. Ct. 704 (2011) (No. 10-72) [hereinafter Brief for the State of New York et al.].

13. *See* Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 265 (1992) (highlighting the distinction between in personam and in rem jurisdiction); *In re* Burg, 295 B.R. 698, 703 (Bankr. W.D.N.Y. 2003) ("Because tax foreclosures in New York are inherently proceeding in rem, the property owner is not a defendant."); *see also* Brief for the Petitioners at 20-21, Madison Cnty. v. Oneida Indian Nation of N.Y., 131 S. Ct. 704 (2011) (No. 10-72) ("[T]his Court in *Yakima* recognized the distinction between an *in rem* proceeding involving real estate held by a tribe, on the one hand, and an *in personam* proceeding against a tribe, on the other hand. . . . [A]n in rem proceeding to take title to property for unpaid taxes is directed to the 'res,' not the tribe, and is not disruptive of tribal self-government." (footnote omitted)).

14. *See* Brief of Town of Verona, *supra* note 5, at 4-8.

15. *See* Brief of the California State Ass'n of Counties as Amicus Curiae in Support of Petitioners at 12, Madison Cnty. v. Oneida Indian Nation of N.Y.,

Part I of this Note will provide an overview of some important concepts in Indian law, particularly the doctrine of tribal immunity from suit and the different types of Indian land. Part II will outline the Second Circuit's majority opinion and concurrence in *Madison County*, noting the concurring judges' plea that the Supreme Court "reunite[ ]" "law and logic."[17] Part III will demonstrate that tax assessment and tax enforcement are merely two sides of the same coin, such that the power to tax also includes the power to enforce the collection of taxes. Part IV will explain how the in rem nature of foreclosure proceedings prevents OIN from asserting tribal immunity from suit as a defense. Finally, Part V considers the harm to local governments that results from the Second Circuit's decision.

I. INDIAN LAW CONCEPTS

A. *Tribal Immunity from Suit*

Tribal immunity from suit, which evolved from the federal common law,[18] allows an Indian tribe to raise immunity as a defense.[19] Essentially, therefore, Indian tribes cannot be sued.[20] The "passing reference"[21] to tribal

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131 S. Ct. 704 (2011) (No. 10-72) [hereinafter Brief of the California State Ass'n of Counties] (discussing impact on environmental enforcement); Brief of Town of Verona, *supra* note 5, at 11 (discussing impact on zoning, municipal planning, and public health ordinances).

16. Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 478 (1976) ("'Such an impractical pattern of checkerboard jurisdiction,' was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction." (quoting Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351, 358 (1962) (citation omitted))).

17. Oneida Indian Nation of N.Y. v. Madison Cnty., 605 F.3d 149, 164 (2010), *vacated*, 131 S. Ct. 704 (2011) (Cabranes, J., concurring).

18. Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 662-63 & n.6 (2002).

19. Eric Governo, Comment, *Tribal Sovereign Immunity: History, Competing Policies, and* Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 34 NEW ENG. L. REV. 175, 176 (1999).

20. *Id.*

immunity from suit in *Turner v. United States*[22] was more clearly articulated in *United States v. United States Fidelity & Guaranty Co.*, which stated explicitly: "These Indian Nations are exempt from suit without Congressional authorization."[23] The latest iteration of the doctrine of tribal immunity from suit comes from the 1998 United States Supreme Court case *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, in which the Court stated: "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."[24] In *Kiowa*, the Supreme Court also explained that the location and nature of the tribe's activities are irrelevant in determining its immunity from suit.[25] The Court held that the Kiowa tribe could not be sued for breach of contract, even though the contract was made off-reservation and dealt solely with commercial, rather than governmental, activities.[26]

It has been argued that tribal immunity from suit should be narrowed because in many instances, Indians are significant commercial actors less in need of protection. As the Supreme Court stated in *Montana v. United States*, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes."[27] For example, in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Supreme Court held that tribal immunity from suit prevented the Oklahoma Tax Commission from suing the Potawatomi Tribe to collect unpaid state taxes, even though the taxes were lawfully imposed on cigarettes sold on-reservation to

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21. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 757 (1998) ("*Turner*'s passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit.").

22. 248 U.S. 354, 358 (1919) ("Without authorization from Congress, the [Creek] Nation could not then have been sued in any court; at least without its consent.").

23. United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940) (citations omitted).

24. *Kiowa*, 523 U.S. at 754.

25. *Id.* at 754-55.

26. *Id.* at 760.

27. Montana v. United States, 450 U.S. 544, 564 (1981).

both Indians and non-Indians.[28] The State of Oklahoma argued that tribal sovereign immunity should be restricted because "tribal business activities . . . are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense in this context."[29]

Yet despite these critiques, the Supreme Court has "retained the doctrine . . . on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency."[30] But that does not prevent the common law doctrine from being limited in the future. It rests on an "unsound foundation,"[31] that "develop[ed] almost by accident."[32] Even in *Kiowa*, a decision that upheld tribal immunity from suit, the Court stated that "[t]here are reasons to doubt the wisdom of perpetuating the doctrine" because "tribal immunity extends beyond what is needed to safeguard tribal self-governance."[33] Several Justices in concurring and dissenting opinions have also questioned the legitimacy of the doctrine of tribal immunity from suit in today's world.[34]

B. *Categories of Indian Land*

A state's power to tax Indian land depends on the status of the land. Land that is considered part of "Indian country," which includes reservation land and trust land,[35]

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28. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 508-14 (1995).

29. *Id.* at 510; *see also Kiowa*, 523 U.S. at 758 ("Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians." (citations omitted)). Indians in New York and California are also commercially active. *See* Brief of the California State Ass'n of Counties, *supra* note 15, at 4, 6; Brief of Town of Verona, *supra* note 5, at 6.

30. *Kiowa*, 523 U.S. at 757-58 (citing *Potawatomi*, 498 U.S. at 510).

31. Brief for the Petitioners, *supra* note 13, at 28.

32. *Id.* (quoting *Kiowa*, 523 U.S. at 756).

33. *Kiowa*, 523 U.S. at 758.

34. Brief for the Petitioners, *supra* note 13, at 28-29. For example, "Justice Blackmun doubted 'the continuing vitality in this day of the doctrine of tribal immunity' and believed 'the doctrine may well merit re-examination in an appropriate case.'" *Id.* (quoting Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165, 178-79 (1977) (Blackmun, J., concurring)).

35. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.04(2)(c) (Nell Jessup Newton ed., 2005) [hereinafter COHEN'S HANDBOOK].

is exempt from state taxation.[36] But "tribal property outside of Indian country is generally subject to state taxation," including real property taxes.[37]

1. *Reservation Lands.* The prohibition of state taxes on reservation lands is the most basic. "'[A]bsent cession of jurisdiction or other federal statutes permitting it,' . . . a [s]tate is without power to tax reservation lands."[38] Whether or not OIN's land was considered reservation land was at the heart of the *Sherrill* case.[39] In *Sherrill*, OIN argued that its non-payment of property taxes was justified because although it purchased the parcels at issue on the open market, the parcels were part of the original Oneida Reservation.[40] In its view, the sale of this reservation land by the Oneida Indians (from which OIN descends) in the early nineteenth century violated the Nonintercourse Act, which required federal approval (none was obtained) before any tribal land could be sold.[41] Thus, OIN concluded that because it owned the "ancient reservation land," it could once again "assert sovereign dominion over the parcels,"[42] which would exempt them from taxation.[43] The Supreme Court disagreed because it had been too long since the Oneidas exercised sovereign dominion over the land—a period of time during which neither the Oneida Nation nor OIN made any claim for it.[44] In the meantime,

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36. *Id.* § 803(1)(b).

37. *Id.* § 803(2)(b).

38. Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 258 (1992) (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)).

39. City of Sherrill v. Oneida Indian Nation of N.Y., 554 U.S. 197, 211-14 (2005).

40. *Id.*; *see also* Oneida Indian Nation of N.Y. v. Madison Cnty., 605 F.3d 149, 153 (2010), *vacated*, 131 S. Ct. 704 (2011).

41. *Sherrill*, 554 U.S. at 204-11; s*ee also Madison Cnty.*, 605 F.3d at 152-53.

42. *Sherrill*, 544 U.S. at 213.

43. *See Madison Cnty.*, 605 F.3d at 153. The Second Circuit had agreed with OIN's argument. Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139, 153-58 (2d Cir. 2003), *rev'd*, 544 U.S. 197 (2005).

44. *Sherrill*, 544 U.S. at 214; *see also Madison Cnty.*, 605 F.3d at 153. The Court held that "'standards of federal Indian law and federal equity practice' preclude[d] the Tribe from rekindling embers of sovereignty that long ago grew cold." *Sherrill*, 544 U.S. at 214 (citations omitted).

"developments in the city of Sherrill spanning several generations . . . render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate."[45] Thus, the land was not reservation land, but remained fee land purchased on the open market.[46]

2. *Trust Lands.* Congress, however, devised a way for Indians to purchase land on the open market and obtain the protected status of reservation lands.[47] 25 U.S.C. § 465 allows the Secretary of the Interior to collect land in trust for Indians, which "shall be exempt from State and local taxation."[48] Thus, as the Court in *Sherrill* stated, "Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago."[49]

3. *Fee Lands.* Finally, tribes can own land in fee, which provides no protection from state taxation.[50] In *Cass County Joint Water Resource District v. 1.43 Acres of Land in Highland Township*, the Supreme Court of North Dakota characterized fee land as land "purchased in fee by an Indian tribe, but which is not reservation land . . . or trust land[.]"[51] When a tribe's land is simply in fee, the tribe is just like any other owner of private property who must pay property taxes. For example, the United States Supreme Court in *County of Yakima v. Confederated Tribes & Bands*

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45. *Sherrill*, 544 U.S. at 221.

46. *See id.* at 214 ("We now reject the unification theory of OIN."); *see also Madison Cnty.*, 605 F.3d at 153-54.

47. *Sherrill*, 544 U.S. at 220.

48. 25 U.S.C § 465 (2006).

49. *Sherrill*, 544 U.S. at 221. OIN had applied for trust status for the land at issue. *See Madison Cnty.*, 605 F.3d at 155-56. On May 20, 2008, the Department of the Interior approved the taking of 13,003.89 acres of land owned by OIN, which, as trust land, will no longer be subject to taxation. *Id.* OIN will secure the payment of taxes, penalties, and interest due on the land, as is necessary to satisfy the requirements for the trust. *Id.* at 156. The Second Circuit noted that even though "it appears that the Counties will receive back payment of all taxes, penalties, and interest due on the property at issue in this lawsuit. . . . [W]e reiterate that it does not render moot any of the issues raised on nor affect our consideration of this appeal." *Id.*

50. *See* COHEN'S HANDBOOK, *supra* note 35, § 803(2)(b).

51. Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 6, 643 N.W.2d 685, 688.

of the Yakima Indian Nation held that a county can "impose an ad valorem tax on reservation land patented in fee."[52] Similarly, the Court in *Sherrill* held that OIN's land was not reservation land, and thus not exempt from state taxation.[53]

II. THE SECOND CIRCUIT'S DECISION IN *ONEIDA INDIAN NATION OF NEW YORK V. MADISON COUNTY & ONEIDA COUNTY, NEW YORK*

By holding that the counties could not foreclose on parcels of OIN land for non-payment of taxes,[54] the Second Circuit in *Madison County* refused to recognize the obvious implications of *Sherrill*, which allowed the counties to levy property taxes on the land at issue.[55] In its opinion, the Second Circuit drew a misleading distinction between sovereign dominion over tribal lands and tribal immunity from suit. At the same time, it failed to make the critical distinction between in personam actions and in rem actions. For in personam actions, tribal immunity from suit is an appropriate defense. But because in rem actions are against the property—not the person or group with immunity—tribal immunity from suit is irrelevant.[56] Missing this distinction led the judges of the Second Circuit to a result—that governments had the power to tax without the means to ensure collection of those taxes—that they themselves characterized as "inconsistent and contradictory,"[57]

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52. Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 270 (1992). "Fee-patented" refers to land held in fee by an individual Indian as opposed to land held in trust for a tribe under 25 U.S.C. § 465. The "patented" part of the designation refers to the "obsolete federal allotment policy, whereby reservation land was divided into allotments to be held in trust by the Government for a period of 25 years." Christopher A. Karns, Note, County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*: State Taxation as a Means of Diminishing the Tribal Land Base*, 42 AM. U. L. REV. 1213, 1213 n.5 (1993).

53. *Sherrill*, 544 U.S. at 221.

54. *Madison Cnty.*, 605 F.3d at 159.

55. *See Sherrill*, 544 U.S. at 214.

56. *See infra* Part IV.

57. *Madison Cnty.*, 605 F.3d at 159.

"def[ying] common sense," "anomalous," and divorced from "law and logic."[58]

A. *Summary of the Majority Opinion*

The Second Circuit began by addressing the background of the "lengthy dispute over the payment of state and local taxes" by OIN.[59] First, the court noted that after the Treaty of Fort Schuyler, the Oneida Nation had a reservation of 300,000 acres in central New York State.[60] But, in violation of the Nonintercourse Act, which required federal approval before the sale of reservation land, the Oneida Nation sold some of that land to New York State and private owners, who eventually sold the land to non-Indians.[61] OIN was eventually left with thirty-two acres by 1920.[62] In the late twentieth century, OIN initiated a two-pronged attack to reassert dominion over their former reservation lands. First, they filed suit claiming they had a right to the lands sold by the Oneida Nation in the early 1800s because the Oneida Nation had not obtained the federal authorization required by the Nonintercourse Act.[63] In addition, OIN began to purchase former Oneida reservation lands on the open market.[64]

To provide context for the issue in *Madison County*, the court next reviewed the case of *City of Sherrill v. Oneida Indian Nation of New York*,[65] decided by the United States Supreme Court in 2005. The lands in that case, located in the City of Sherrill in Oneida County, New York, were part of the 300,000 acres of the post-Fort Schuyler reservation, but were sold in 1807 to a non-Indian.[66] In 1997 and 1998,

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58. *Id.* at 163-64 (Cabranes, J., concurring). Judge Hall joined this concurrence. *Id.* at 163.

59. *Id.* at 151 (majority opinion).

60. *Id.* at 152.

61. *Id.*

62. *Id.* at 153.

63. *Id.* (citations omitted).

64. *Id.* (citations omitted).

65. 544 U.S. 197 (2005).

66. *Id.* at 211; *see also Madison Cnty.*, 605 F.3d at 152-53.

OIN repurchased the land.[67] It then commenced an action in the United States District Court for the Northern District of New York seeking declaratory and injunctive relief that the parcels were exempt from state and local property taxes.[68] Because the land was Indian country due to OIN's "unified fee and aboriginal title"[69] of the recently repurchased land,[70] OIN argued that the land was not taxable.[71] The Supreme Court rejected that argument, on the theory that the "doctrines of laches, acquiescence, and impossibility" made it inequitable for state and local government to suddenly be subject to a "piecemeal shift in governance . . . ."[72] The Supreme Court emphasized that because it had been so long—200 years—since the Oneida Nation had jurisdiction over the land, the "embers of sovereignty" had "long ago gr[own] cold."[73]

The Second Circuit next described the steps towards foreclosure taken by Madison and Oneida Counties. Ever since OIN purchased the Madison County parcels, Madison County had begun foreclosure proceedings against the delinquent parcels yearly in state court, but would delay the resolution of the foreclosures, waiting for a decision in *Sherrill*.[74] Beginning in 2003 (when the court separated the *Madison County* and *Sherrill* litigation),[75] Madison County ceased abandoning the yearly foreclosure proceedings against the OIN lands in Madison County.[76] Thus, that year, the county sent a Petition and Notice of Foreclosure to OIN,

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67. *Sherrill*, 544 U.S. at 197; *see also Madison Cnty.*, 605 F.3d at 153.

68. *Sherrill*, 544 U.S. at 211-12; *see also Madison Cnty.*, 605 F.3d at 153; Oneida Indian Nation of N.Y. v. City of Sherrill, 145 F. Supp. 2d 226, 254-59 (N.D.N.Y. 2001), *aff'd*, 337 F.3d 139 (2d Cir. 2003), *rev'd*, 544 U.S. 197.

69. *Sherrill*, 544 U.S. at 213.

70. *Madison Cnty.*, 605 F.3d at 153.

71. *Id.*

72. *Sherrill*, 544 U.S. at 221; *see also Madison Cnty.*, 605 F.3d at 153-54.

73. *Sherrill*, 544 U.S. at 221; *see also Madison Cnty.,* 605 F.3d at 153.

74. *Madison Cnty.*, 605 F.3d at 154 (citation omitted).

75. *See* Oneida Indian Nation of N.Y. v. City of Sherrill, 337 F.3d 139, 171 (2d Cir.), *rev'd*, 544 U.S. 197 (2003) (remanding the litigation between OIN and the counties back to the district court which separated the counties' litigation from that of the City of Sherrill).

76. *Madison Cnty.*, 605 F.3d at 154 (citation omitted).

and in 2005, moved for summary judgment on the foreclosure proceedings in state court.[77] However, the United States District Court for the Northern District of New York issued a preliminary injunction enjoining those foreclosure proceedings.[78]

Oneida County uses a somewhat unusual foreclosure proceeding, where the county has a tax auction for the sale of property with delinquent taxes of greater than six months.[79] Oneida County followed this procedure for all OIN-owned property within the county.[80] In 2005, the County delivered Final Notices Before Redemption to OIN, who subsequently obtained a restraining order that stopped any additional foreclosure efforts until the resolution of the *Madison County* case.[81]

Next, the *Madison County* court provided an overview of the two district court proceedings. The Northern District had granted summary judgment in favor of OIN in both proceedings, holding that the counties could not initiate or continue foreclosure proceedings against OIN for four reasons.[82] The reasoning relevant to this Note is that tribal immunity from suit prevented the foreclosure proceedings.[83] The counties appealed, and the State of New York joined as amicus curiae.[84] The United States, at the direction of the

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77. *Id.* (citation omitted).

78. Oneida Indian Nation of N.Y. v. Madison Cnty., 376 F. Supp. 2d 280, 283 (N.D.N.Y. 2005) (preliminary injunction); *see also Madison Cnty.*, 605 F.3d at 154 (citations omitted).

79. *Madison Cnty.*, 605 F.3d at 154-55 (citation omitted).

80. *Id.* at 155.

81. *Id.* (citations omitted).

82. *Id.* at 155. The two decisions by the district court that the Second Circuit consolidated on appeal and affirmed in *Madison County* were *Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285 (N.D.N.Y. 2005), and *Oneida Indian Nation of New York v. Madison County*, 401 F. Supp. 2d 219 (N.D.N.Y. 2005).

83. *Madison Cnty.*, 605 F.3d at 155. The other reasons preventing the counties from pursuing foreclosure were: (1) the lands in question were inalienable by virtue of the Nonintercourse Act, (2) the counties violated the Due Process Clause because they did not give OIN notice of the end of the redemption period, and (3) the land at issue was exempt from taxation by the State of New York. *Id.*

84. *Id.*

Second Circuit, also submitted an amicus curiae brief that argued for an affirmance of the district court's decisions.[85] The Second Circuit then discussed developments that, while not making the issues in this case moot, "affect[ed] the practical implications of this Court's decision . . . ."[86]

The Second Circuit then examined tribal sovereign immunity and the application of this immunity to the case.[87] The court noted that the counties invoked *Sherrill*, arguing that the power of taxation recognized by that case meant that the counties were able to initiate foreclosure proceedings to collect those taxes.[88] But, said the court, "[w]e think this argument improperly conflates two distinct doctrines: tribal sovereign authority over reservation lands and tribal sovereign immunity from suit," and the immunity rejected in *Sherrill* was related to the former.[89] The court cited a line of cases, including *Worcester v. Georgia*[90] and *Mescalero Apache Tribe v. Jones*,[91] that demonstrated that Indians have ultimate control over reservation lands.[92] Further, the Supreme Court has "'categorical[ly]' maintained that '[a]bsent cession of jurisdiction or other federal statutes permitting it, . . . a State is without power to tax reservation lands and reservation Indians.'"[93] The Second Circuit explained that this is the type of sovereignty that underlies the *Sherrill* decision.[94]

The Second Circuit distinguished the above doctrine of tribal sovereignty over its lands, which is "closely tied to the

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85. *Id.*

86. *Id.* at 155-56. For further discussion of these developments, see *supra* note 49.

87. *Madison Cnty.*, 605 F.3d at 156-60. The Second Circuit's examination of abstention, *id.* at 160-61, and the Stockbridge Band's motion to intervene, *id.* at 161-63, are outside the scope of this Note and will not be discussed.

88. *Id.* at 156.

89. *Id.*

90. 31 U.S. (6 Pet.) 515, 556-57 (1832).

91. 411 U.S. 145, 148 (1973).

92. *Madison Cnty.*, 605 F.3d at 156-57 (citations omitted).

93. *Id.* at 157 (quoting Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 258 (1992)).

94. *See id.* (noting that tribal immunity from suit is distinct from tax exemption of tribal land).

question of whether the specific parcel at issue is 'Indian reservation land,'" from a tribe's immunity from suit, which is "independent of its lands."[95] The court used the Supreme Court's decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,[96] to further explicate the doctrine of tribal immunity from suit.[97] *Kiowa* outlined the "distinctive history" of tribal immunity from suit, beginning with its "passing reference" in *Turner v. United States*,[98] to *United States v. United States Fidelity & Guaranty Co.*'s[99] "explicit holding" that Indian tribes were immune from suit.[100] The *Kiowa* Court had pointed to *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*[101] as a recent challenge to this doctrine, but noted the doctrine remained intact "on the theory that Congress had failed to abrogate it."[102]

The Second Circuit continued to highlight the *Kiowa* Court's ruling. The *Kiowa* Court had recognized that tribal immunity from suit might need to be limited, for example, by "confin[ing] it to reservations or to noncommercial activities," but it deferred to Congress to make that judgment.[103] The Second Circuit then emphasized *Kiowa*'s distinction between tribal sovereignty over lands and tribal immunity from suit: "To say substantive state laws apply . . . is not to say that a tribe no longer enjoys immunity from suit. . . . There is a difference between the right to demand compliance with state laws and the means available to enforce them."[104] Thus, based on its interpretation of *Kiowa*,

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95. *Id.* (citations omitted).

96. 523 U.S. 751 (1998).

97. *Madison Cnty.*, 605 F.3d at 158-59.

98. 248 U.S. 354, 358 (1919).

99. 309 U.S. 506, 512 (1940).

100. *Kiowa*, 523 U.S. at 757 ("*Turner*'s passing reference to immunity, however, did become an explicit holding that tribes had immunity from suit."); *see also Madison Cnty.*, 605 F.3d at 158 (citations omitted).

101. 498 U.S. 505 (1991).

102. *Kiowa*, 523 U.S. at 757; *see also Madison Cnty.*, 605 F.3d at 158 (quoting *Kiowa*, 523 U.S. at 757).

103. *Kiowa*, 525 U.S. at 758; *see also Madison Cnty.*, 605 F.3d at 158 (quoting *Kiowa*, 525 U.S. at 758).

104. *Madison Cnty.*, 605 F.3d at 158 (quoting *Kiowa*, 523 U.S. at 755).

the Second Circuit found that *Sherrill* did not "implicitly abrogat[e] the OIN's immunity from suit,"[105] as *Sherrill* concerned the "right to demand compliance with state laws"[106] (i.e., taxation) and not "the means available to enforce them."[107]

In applying the above analysis to the facts in *Madison County*, the Second Circuit acknowledged that the power to tax but not foreclose is "inconsistent and contradictory," seemingly "'eviscerates' *Sherrill*" and "mak[es] that essential right of government [to tax properties] meaningless."[108] It noted, however, that the Supreme Court rejected a similar argument in *Potawatomi* when they held that a government entity could not use foreclosure proceedings to recover unpaid state taxes on cigarettes sold on the Potawatomi reservation.[109] The Court in *Potawatomi* denied that Oklahoma was given a "right without any remedy," explaining that just because Oklahoma could not pursue the most efficient remedy did not mean it had no remedy at all.[110] Similarly, the Second Circuit explained that Madison and Oneida Counties had alternatives other than foreclosure: they could sue individual tribal members and tribal officers in their official capacities, or appeal to Congress to limit tribal immunity from suit.[111] The Second Circuit then affirmed the district court's decisions in favor of OIN, on the basis of its immunity from suit.[112]

B. *Judge Cabranes's Concurrence*

The concurrence in this case, which Judge Hall joined, is noteworthy for its dramatic appeal to the Supreme Court.

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105. *Id.* at 159.

106. *Id.* (quoting *Kiowa*, 523 U.S. at 755).

107. *Id.* (quoting *Kiowa*, 523 U.S. at 755).

108. *Id.* (quoting Brief and Special Appendix for Defendants-Counterclaimants-Appellants at 51, Oneida Indian Nation of N.Y. v Madison Cnty., 605 F.3d. 149 (2d Cir. 2010) (No. 05-6408-cv)).

109. *Id.* (citing Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 512-14 (1995)).

110. *Id.* at 160 (quoting *Potawatomi*, 498 U.S. at 514).

111. *Id.* (citations omitted).

112. *Id.*

Judge Cabranes recognized that something is seriously wrong with the decision; it "defie[d] common sense."[113] Yet his hands were tied: "But absent action by our highest Court, or by Congress, it is the law."[114] The "unambiguous guidance" from the Supreme Court in *Kiowa* and *Potawatomi* led him also to conclude that "although the Counties may tax the property at issue here, they may not foreclose on those properties because the tribe is immune from suit."[115] But he continued, characterizing that result as "anomalous," lamenting that "intermediate appellate courts" are not "empowered to revisit" the decisions in *Kiowa* and *Potawatomi*, and exhorting the Supreme Court or Congress to "reunite" "law and logic . . . in this area of the law."[116]

III. TAX ASSESSMENT AND TAX ENFORCEMENT ARE TWO SIDES OF THE SAME COIN

The reason the Second Circuit's result in *Madison County* "defies common sense"[117] is because the court mistakenly treated assessment of taxes and foreclosure to collect unpaid taxes as separate, each informed by separate doctrines. To the Second Circuit, the counties' ability to assess taxes on the land at issue is supported by *Sherrill* as a limit on a tribe's sovereign authority over its land, which depends on whether a "specific parcel at issue is 'Indian reservation land.'"[118] By contrast, the enforcement mechanism—the foreclosure proceedings to collect the unpaid taxes—is controlled by a different doctrine, a tribe's sovereign immunity from suit.[119] This conclusion is a misreading of prior case law, contrary to the analogous doctrines of foreign and state sovereign immunity, and

113. *Id.* at 163 (Cabranes, J., concurring).

114. *Id.*

115. *Id.* at 164 (citations omitted).

116. *Id.*

117. *Id.* at 163.

118. *Id.* at 157 (majority opinion) (quoting Cass Cnty. v. Leech Lake Band of Chippewa Indians, 524 U.S. 103, 110 (1998)).

119. *Id.* at 158 (citing Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 755 (1998)).

inconsistent with OIN's recent decision to allow foreclosure actions against them to proceed.

A. *Prior Case Law*

The Supreme Court in *Sherrill* confirmed that the enforcement through foreclosure of a government's taxation power over fee lands owned by Indians is included within their power to tax. The Court explained that "the equitable cast of the relief sought [tribal immunity] remains the same whether asserted affirmatively [against the taxation] or defensively [against the enforcement of the taxation, i.e., collection proceedings]."[120] This explanation was a rejection of Justice Stevens's dissenting argument that tribal immunity from suit could still simply be "raised by a tribe as a *defense* against a state collection proceeding."[121] Thus, because the tribe could not use immunity from suit to avoid collection, the majority implicitly recognized that taxation and enforcement proceedings like collection or foreclosure were part of the same right. The Department of Interior similarly understood that the counties' powers recognized in *Sherrill* included foreclosure proceedings: "[I]t is our opinion that the Court in *City of Sherrill* unmistakably held that the lands at issue are subject to real property taxes. In the event the taxes are not paid, we believe such lands are subject to foreclosure."[122]

The *Sherrill* Court's conclusion is supported by *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*.[123] In *Yakima*, the Supreme Court faced a question similar to the one presented in *Madison County*: whether a county could impose an *ad valorem* tax on Indian-owned non-reservation, non-trust lands.[124] The lands at issue in that case were "fee-patented,"[125] and, like the fee

120. City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 214 & n.7 (2005).

121. *Id.* at 225 (Stevens, J., dissenting).

122. Brief for the Petitioners, *supra* note 13, at 16-17 (quoting Letter from James E. Cason, Associate Deputy, Secretary of the Interior, to Ray Halbritter, OIN representative (June 10, 2005)).

123. 502 U.S. 251 (1992).

124. *Id.* at 253-56.

125. See *supra* note 52 for a discussion of fee-patented lands.

lands at issue in *Madison County*, were "alienable and encumberable," which "rendered them subject to assessment *and forced sale for taxes*."[126] Thus, *Yakima* confirms that the ability to foreclose upon land for non-payment of property taxes is "concomitant" with the power to tax those lands in the first place.[127]

Additional cases have confirmed that taxation and foreclosure are two sides of the same coin; that the power to tax necessarily includes the ability to foreclose. In *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, the Supreme Court of Washington stated: "[T]he decision in *County of Yakima* . . . based state jurisdiction to tax *and foreclose* on reservation fee land exclusively *in rem*."[128] Similarly, in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin*, the United States District Court for the Eastern District of Wisconsin held that lands owned in fee by Oneida Indians in Wisconsin could be subject to forced alienation through condemnation.[129] In the Eastern District's view, "implicit in the Court's holding [in *Sherrill*] that Indian fee lands are subject to *ad valorem* property taxes is the further holding that such lands can be forcibly sold for nonpayment of such taxes."[130] The district court continued: "Land is either exempt from state law, or it is not. . . . [I]t hardly makes sense to permit taxation while at the same time prohibiting the only means of collecting such taxes."[131] Thus, foreclosure is clearly part of a government's power to assess property taxes, or else, as the court explains, the holdings from *Yakima*, *Sherrill*, and similar cases are "nothing more than an elaborate academic parlor game."[132] "Unless a state or local government is able to

126. *Yakima*, 502 U.S. at 263-64 (emphasis added).

127. Reply Brief at 4, Madison Cnty. v. Oneida Indian Nation of N.Y., 131 S.Ct. 704 (2011) (No. 10-72) (citing *Yakima*, 502 U.S. at 256, 263-64).

128. Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379, 386 (Wash. 1996) (emphasis added).

129. Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis., 542 F. Supp. 2d 908, 921, 934 (E.D. Wis. 2008).

130. *Id.* at 921.

131. *Id.* (citing Goudy v. Meath, 203 U.S. 146, 149 (1906)).

132. *Id.*

foreclose on Indian property for nonpayment of taxes, the authority to tax such property is meaningless."[133]

B. *The Result in* Madison County *Would Give Indian Tribes "Super-sovereignty" Greater than That of Foreign Nations or States*

The holding that Madison County and Oneida County may tax, but not foreclose on, OIN's property is inconsistent with principles of foreign and state sovereignty, as it confers upon Indian tribes a degree of sovereignty far greater than that afforded to foreign countries or states. Indeed, the counties argue that "OIN offers no explanation *why* it should enjoy 'super-sovereign' immunity greater than that of a state."[134] This is particularly significant because tribal immunity is not considered as strong or as broad as either foreign or state sovereign immunity.[135] Though the doctrines of foreign sovereign immunity and state sovereign immunity are separate from tribal sovereign immunity, courts have held that they "provide a helpful point of reference."[136]

1. *Foreign Sovereign Immunity*. Courts have often used the limits of foreign sovereign immunity in their analyses of tribal sovereign immunity.[137] As the amicus curiae Town of Lenox, New York explained, "[u]nder international law, a [foreign] state is not immune from the jurisdiction of the

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133. *Id.*

134. Reply Brief, *supra* note 127, at 8 (quoting Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 466 (1995)).

135. *See Chickasaw*, 515 U.S. at 466 ("We do not read the Treaty as conferring super-sovereign authority to interfere with another jurisdiction's sovereign right to tax income, from all sources, of those who choose to live within that jurisdiction's limits."); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890-91 (1986) ("[B]ecause of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy." (citations omitted)); *see also* Brief of Amicus Curiae Town of Lenox, New York in Support of Petitioners Madison County and Oneida County, New York at 5, 14-15 Madison Cnty. v. Oneida Indian Nation of N.Y., 131 S. Ct. 704 (2011) (No. 10-72) [hereinafter Brief of Town of Lenox] (citing *Chickasaw* and *Three Affiliated Tribes*).

136. City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 218 (2005).

137. Brief of Town of Lenox, *supra* note 135, at 5 (citations omitted).

courts of another state with respect to claims . . . to immovable property in the state of the forum," so long as the property is not used for diplomatic or consular purposes.[138] The town continued: "This lack of immunity extends to the *enforcement*, not simply the rendition of judgments."[139] Essentially, a foreign government that did not pay real property taxes on its land is not immune from foreclosure proceedings, so long as the land is not part of the consular lands.[140] Thus, enforcement mechanisms are meant to be included in a "sovereign's 'primeval' interests in controlling real property within its jurisdiction."[141] In 1976, the Foreign Sovereign Immunities Act ("FSIA")[142] made this "immovable property" exception from foreign sovereign immunity part of federal statutory law.[143] Federal common and statutory law demonstrate that foreign sovereign immunity does not automatically protect a foreign nation from enforcement proceedings. Therefore, because tribal sovereign immunity is no greater than foreign sovereign immunity, an enforcement proceeding like foreclosure for nonpayment of property taxes should not trigger a tribe's immunity from suit.

2. *State Sovereign Immunity*. The doctrine of state sovereign immunity has a similar exception. The leading case is *Georgia v. City of Chattanooga*, in which the State of Georgia had purchased land in Chattanooga for a railroad yard.[144] The City of Chattanooga wanted to condemn the property, and Georgia sued to stop them, arguing that they

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138. *Id.* at 7 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 455(1)(c) (1987)).

139. *Id.*

140. This distinction between consular and private commercial land is comparable to the distinction in tribal sovereignty between Indian country (reservation or trust lands) and land owned by Indian tribes in fee. *See supra* Part I.B.

141. Brief of Town of Lenox, *supra* note 135, at 10.

142. Foreign Sovereign Immunities Act of 1972, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

143. Brief of Town of Lenox, *supra* note 135, at 8. The FSIA provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which . . . rights in immovable property situated in the United States are at issue." *Id.* (quoting 28 U.S.C. § 1605(a)(4) (2006)).

144. Georgia v. City of Chattanooga, 264 U.S. 472, 478 (1924).

had sovereign immunity over the land.[145] The Supreme Court rejected Georgia's sovereign immunity claim and found for Chattanooga.[146] The Court ruled that Georgia was just like any other private landowner:

> Land acquired by one State in another State is held subject to the laws of the latter and to all the incidents of private ownership. The proprietary right of the owning State does not restrict or modify the power of eminent domain of the State wherein the land is situated.[147]

The Court further explained that the city's eminent domain power "does not depend on the consent or suability of the owner" and that as simply a private property owner, "Georgia can claim no sovereign immunity."[148]

Here, the condemnation proceedings are analogous to the foreclosure proceedings the counties are trying to bring against OIN's land. Much like the State of Georgia, OIN owns land privately in another state, New York. In *Chattanooga*, Georgia was unable to use sovereign immunity to escape a taking of its private property in Tennessee. Similarly, OIN cannot use tribal sovereign immunity to escape the forced sale of its private property in New York, particularly since tribal sovereign immunity is narrower than state sovereign immunity.[149]

Thus, allowing OIN to use tribal immunity from suit to avoid enforcement of legitimate state property taxes levied against it would give OIN more sovereignty than either a foreign country or a state would enjoy—"super-sovereign[ty]"[150]—which conflicts with the Supreme Court's narrower conception of tribal sovereign immunity.[151]

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145. *Id.* at 478-80.

146. *Id.* at 479-80.

147. *Id.* at 480 (citations omitted).

148. *Id.* at 479-80, 482.

149. *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 466 (1995); Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890-91 (1986); *see also* Brief of Town of Lenox, *supra* note 135, at 5, 14-15.

150. *Chickasaw*, 515 U.S. 450, 466 (1995).

151. *See* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 165 (1980) (Brennan, J., concurring in part and dissenting in part) ("While they are sovereign for some purposes, it is now clear that Indian reservations do not partake of the full territorial sovereignty of States or foreign

C. *OIN's Waiver of Immunity*

Finally, the Oneida Indian Nation of New York's waiver of immunity seems to concede that tribal immunity from suit cannot bar the counties' foreclosure proceedings. At the end of November 2010, one month after the Supreme Court granted the counties' writ for certiorari, OIN passed a tribal declaration and ordinance waiving "its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States."[152] As a result, the case was vacated and remanded to the Second Circuit.[153] While not determinative, the passing of the ordinance suggests that OIN recognized the weakness of its position and the likelihood the Supreme Court would rule that tribal immunity from suit does not protect against foreclosure actions.[154]

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countries."); *see also* Brief of Town of Lenox, *supra* note 135, at 3 ("But tribes do not retain the full sovereignty of foreign nations or the fifty states.").

152. Oneida Indian Nation, Ordinance No. O-10-1 (2011); *see also* Oneida Indian Nation of N.Y. v. Madison Cnty., Nos. 05-6408-cv, 06-5168-cv, 06-5515-cv, 2011 WL 4978126, at *7 n.11 (2d Cir. Oct. 20, 2011) (text of ordinance in footnote of Second Circuit's opinion).

153. Madison Cnty. v. Oneida Indian Nation of N.Y., 131 S. Ct. 704 (2011). In October 2011, the Second Circuit ruled that by passing the ordinance, OIN had abandoned any claims for relief based on tribal immunity from suit and so the court need not reach them. *Madison Cnty.*, 2011 WL 4978126, at *10 ("There may well be, as the Counties urge, remaining disagreements as to whether the OIN possessed tribal sovereign immunity from suit at the time that these cases were before the district court and then on appeal to us in the first instance. But these questions have now become academic.").

154. *See* Kathryn Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 WYO. L. REV. 375, 403-04 (2011) ("Unfortunately, the Supreme Court granted Madison County's petition for certiorari, which meant the case involving tribal sovereign immunity and the Oneida Indian Nation would have been in front of one of the most hostile Courts in recent memory. Luckily the Oneida Indian Nation waived its sovereign immunity for this case after certiorari was granted." (footnotes omitted)).

IV. FORECLOSURE PROCEEDINGS DO NOT IMPLICATE TRIBAL IMMUNITY FROM SUIT

The Second Circuit in *Madison County* made much of a supposed distinction between tribal sovereignty and tribal immunity from suit.[155] But they failed to recognize a distinction critical to the resolution of the issue: the difference between actions in personam and actions in rem and how it affects the application of tribal immunity from suit. Specifically, enforcement proceedings like foreclosure are actions in rem, and tribal immunity from suit is not implicated because the proceeding is against the property, rather than the tribe.

A. *Foreclosure Proceedings Are Actions In Rem*

Jurisdiction in rem, as opposed to jurisdiction in personam, refers to "[a] court's power to adjudicate the rights to a given piece of property, including the power to seize and hold it."[156] A court has in rem jurisdiction over a foreclosure action because such action "culminates in a forced sale of the property (the res) to satisfy the tax obligation. It is not a proceeding against the delinquent taxpayer and thus does not fall within any sovereign immunity prohibition concerning in personam lawsuits."[157] Indeed, New York specifically recognizes that a "foreclosure action is not a proceeding against the taxpayer; it is an in

155. Oneida Indian Nation of N.Y. v. Madison Cnty., 605 F.3d 149, 157 (2010), *vacated*, 131 S. Ct. 704 (2011) ("[The tribal sovereign authority over reservation lands] doctrine is different, however, from the doctrine of tribal immunity for suit. . . . [A] tribe's immunity from suit is independent of its lands.").

156. BLACK'S LAW DICTIONARY 856 (7th ed. 1999).

157. Brief for the Petitioners, *supra* note 13, at 3-4 (citing Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 265 (1992)).

rem proceeding directed to the tax-delinquent parcel."[158] Other enforcement proceedings are similarly in rem.[159]

B. *Tribal Immunity from Suit Does Not Affect Actions In Rem*

The doctrine of tribal immunity from suit is only relevant to actions in personam, because it is the person, not the property, who has the protection of immunity. In actions in rem, "the property itself . . . is the defendant,"[160] and whether its owner is subject to the court's in personam jurisdiction is irrelevant.[161] Tribal immunity from suit evolved from foreign and state sovereign immunity, which did not apply to actions in rem.[162]

Yakima, in which the Supreme Court held that Yakima County could impose a property tax on reservation fee lands of the Yakima Indian Nation, is the most recent case to make the important distinction between in rem and in personam jurisdiction.[163] The Court reasoned that "[w]hile . . . *in personam* jurisdiction over reservation Indians . . . would [be] significantly disruptive of tribal self-government, the mere power to assess and collect a tax on certain real estate is not."[164] Thus, in rem jurisdiction, which is targeted at the property rather than the tribe, does not interfere with

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158. *Id.* at 21 n.8 (citing *In re* Berg, 295 B.R. 698, 703 (Bankr. W.D.N.Y. 2003)). Madison County's foreclosure proceedings are judicial, while Oneida County's foreclosure proceedings are administrative. *Id.*; *see also* N.Y. REAL PROP. TAX LAW § 1120 (McKinney 2010) (in rem proceedings are used to foreclose tax liens).

159. *See* Brief for the State of New York et al., *supra* note 12, at 10-12 (describing foreclosure as one of multiple "*in rem* remedies" that can be used against taxable parcels of land).

160. Freeman v. Alderson, 119 U.S. 185, 187 (1886).

161. Sheree R. Weisz, Case Comment, *Federal Indian Law: The Erosion of Tribal Sovereignty as the Protection of the Nonintercourse Act Continues to be Redefined More Narrowly:* Cass County Joint Water Resource District v. 1.43 Acres of Land, *2002 ND 83, 643 N.W.2d 685*, 80 N.D. L. REV. 205, 211 (2004).

162. Brief for the Petitioners, *supra* note 13, at 25-27; *see also supra* Part III.B.1-2.

163. Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 265, 270 (1992).

164. *Id.* at 265.

what the doctrine of tribal immunity from suit seeks to protect—tribal self-government.

Two state courts of last resort have made the same distinction. In *Cass County Joint Water Resource District v. 1.43 Acres of Land*, the Supreme Court of North Dakota, following the United States Supreme Court in *Shaffer v. Heitner*,[165] stated that an action in rem was an "action against the property itself" and that in personam jurisdiction was not required to bring such an action.[166] Similarly, in *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, the Supreme Court of Washington held that tribal immunity from suit was only implicated in actions in personam.[167]

Finally, the Supreme Court has held that seizure of tribal personal property for collection for non-payment of taxes is permissible.[168] As the counties note, "[g]iven the 'primeval' importance of a sovereign's control over real property within its jurisdiction . . . , it would be irrational to allow *in rem* actions against tax-delinquent *personal* property but not against tax-delinquent tribal *real* property."[169]

V. EFFECTS OF THE *MADISON COUNTY* DECISION

A. *Lack of Remedy*

The Second Circuit's decision, before waiver of immunity by OIN, would have left Madison and Oneida Counties without a remedy. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Supreme Court ruled in favor of the Potawatomi Indians, holding that while Oklahoma could collect state taxes on

165. 433 U.S. 186, 199 (1977) ("The effect of a judgment in [an action in rem] is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.").

166. Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land, 2002 ND 83, ¶ 8, 643 N.W.2d 685, 689.

167. Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379, 386 (Wash. 1996).

168. *See* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 160-61 (1980); *see also* Reply Brief, *supra* note 127, at 11.

169. Reply Brief, *supra* note 127, at 11 (citations omitted).

cigarettes sold on the reservation, tribal immunity from suit prevented Oklahoma from suing to collect the taxes owed.[170] Overriding Oklahoma's complaint that this left the State with a "right without [a] remedy," the Court stated that "[t]here is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives," such as "collect[ing] the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores."[171]

For Madison and Oneida Counties, there are no such similar remedies. Foreclosure proceedings are essentially the "only means of collecting [real property] taxes."[172] The Second Circuit suggests methods such as suing individual tribe members, entering into voluntary agreements with tribes, and petitioning Congress,[173] but these are unlikely to be successful.

B. *Disastrous Consequences for Local Governments*

The reasoning followed in *Madison County* also results in several indirect, but no less significant, consequences, the largest of which is the continuing losses in tax revenues. For example, the failure of OIN to pay property taxes in 2006 resulted in a 20% loss in the budget of the Town of Verona (home to Turning Stone Casino).[174] Such a result is especially dire considering the heavy burden OIN places on local government resources. For example, Turning Stone Casino uses a considerable amount of water, much more than the 150,000 gallons per day the tribe is allotted.[175] Also, the heavy traffic to the many OIN commercial enterprises—Turning Stone Casino and its surrounding

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170. Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 512 (1995).

171. *Id.* at 514 (citations omitted).

172. Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis., 542 F.Supp. 2d 908, 921 (E.D. Wis. 2008).

173. Oneida Indian Nation of N.Y. v. Madison Cnty., 605 F.3d 149, 160 (2010), *vacated*, 131 S. Ct. 704 (2011).

174. Brief of Town of Verona, *supra* note 5, at 5.

175. *Id.*

hotels and golf courses—strains the local communities' highway budgets because of the need for more plowing, salting, sanding, and general maintenance of the roads.[176] In addition, Turning Stone Casino is located within the Verona volunteer fire district, which uses tax revenues to purchase needed equipment.[177] OIN requires significant coverage from the fire district, yet pays no taxes to support it.[178] Finally, the local school districts (where OIN children also go to school) lose out on a large amount of revenue because of OIN's failure to pay property taxes, which causes the taxes of non-Indians to increase.[179] Therefore, "[t]he OIN enjoys the benefits, . . . but it is the wider community, which is 99% non-Indian, which foots the bill."[180] Plus, OIN enjoys an "unfair competitive advantage over all the local businesses that do pay their taxes."[181]

The Second Circuit's decision in *Madison County* also hinders the counties' ability to enforce rules apart from the payment of taxes, such as land use and environmental regulations. For example, in the planning and zoning context, OIN's construction of a "casino [and] hotels, restaurants, golf courses, gas stations, convenience stores, and campgrounds" interferes with the "rural nature" of the community and the importance of agribusiness within it.[182] OIN's claimed exemption from land use regulations "undermines the local government's ability to manage shared resources, to preserve the character of the community and to protect the land from environmental harm, governmental prerogatives for which the residents have justified expectations."[183] Environmental issues are also a concern: for example, OIN's construction of its golf courses caused the spread of smoke to surrounding areas, and local residents worried that the lack of oversight over chemicals and pesticides applied to maintain the courses

176. *Id.* at 6.

177. *Id.* at 7.

178. *Id.*

179. *Id.* at 8.

180. *Id.*

181. *Id.* at 9.

182. *Id.*

183. *Id.* at 10.

would affect water runoff.[184] Local governments in central New York are concerned that "[t]he impact of this case [*Madison County*] is far-reaching. . . . If counties cannot enforce the payment of property taxes, then towns will encounter similar obstacles in implementing their municipal plans, zoning ordinances, and other laws designed to protect public health, safety, and welfare."[185] This is precisely the situation that the Supreme Court in *Sherrill* wished to prevent.[186]

Local governments in New York are not alone in their concern over the *Madison County* decision. The California State Association of Counties submitted an amicus brief in support of Madison and Oneida Counties which outlined the national implications of the Second Circuit's ruling.[187] In the brief, the Association explained how "a decision by [the Supreme] Court allowing tribes to raise the defense of sovereign immunity to prevent land use enforcement actions on non-trust lands would create significant health and safety issues," by providing examples of problematic activities by Indian tribes, such as refusal to pay property taxes or to comply with land use regulations.[188]

The brief also mentions another important (perhaps unexpected) consequence of the *Madison County* decision—that the process of converting fee lands to trust lands through the Department of Interior will be obliterated.[189] This is problematic because the process exists to ensure that concerns of local governments are taken into account when deciding whether the federal government should hold out Indian land as exempt from state regulation.[190] If the *Madison County* decision and its lack of support for enforcement methods stands, then "[m]ere purchase of

184. *Id.*

185. *Id.* at 11.

186. *See* Oneida Indian Nation of N.Y. v. Madison Cnty., 605 F.3d 149, 159 (2010), *vacated*, 131 S. Ct. 704 (2011) (noting the counties' argument that a holding that foreclosure proceedings were not possible would "eviscerate" *Sherrill*).

187. Brief of the California State Ass'n of Counties, *supra* note 15.

188. *Id.* at 5-6.

189. *Id.* at 10; *see also supra* Part I.B.2.

190. Brief of the California State Ass'n of Counties, *supra* note 15, at 11-12.

property in fee would be sufficient to obviate taxes and land use regulations."[191]

These consequences for local government are inconsistent with the spirit behind tribal sovereignty—to protect Indian tribes from state usurpation.[192] Instead, the pendulum appears to have swung the other way. It is now the local governments that need protection, as tribes are able to utilize sovereign immunity to interfere with local government administration.

CONCLUSION

In a decision that "defie[d] common sense,"[193] the Second Circuit held in *Madison County* that while Madison and Oneida Counties could assess property taxes on fee lands owned by the Oneida Indian Nation of New York, they were unable to foreclose on the land when OIN refused to pay the taxes. The court mistakenly separated tax assessment from tax enforcement, using a tortured analysis of tribal sovereign immunity to apply tribal immunity from suit to in rem foreclosure proceedings that are not included within it. Further, the *Madison County* decision could have a severe negative impact upon the funding and administration of local governments across the country. Despite OIN's last-second agreement to submit to state, county, and local foreclosure proceedings, the Supreme Court should still clarify that in rem enforcement proceedings like foreclosure do not implicate a tribe's immunity from suit.

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191. *Id.* at 12.

192. *See supra* notes 27-29 and accompanying text.

193. Oneida Indian Nation of N.Y. v. Madison Cnty., 605 F.3d 149, 163 (2010), *vacated*, 131 S. Ct. 704 (2011).