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TRIBAL DISRUPTION AND INDIAN CLAIMS

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Legal claims are inherently disruptive. Plaintiffs' suits invariably seek to unsettle the status quo. On occasion, the remedies to legal claims can be so disruptive—that is, impossible to enforce or implement in a fair and equitable manner—that courts simply will not issue them. In the area of federal Indian law, American Indian tribal claims not only disrupt the status quo but may even disrupt so-called settled expectations of those affected by the claims.[1] The U.S. Court of Appeals for the Second Circuit has dismissed a round of Indian land claims at the pleading stage, including *Onondaga Nation v. New York*,[2] because it considered the claims so disruptive.

We agree that Indian legal claims are inherently disruptive and may implicate the centuries-old settled expectations of state and local governments and non-Indians. It is empirically and categorically false, however, that the remedies tribal interests seek are impossible to enforce or implement in a fair or equitable manner. Every year in cases against state governments and their political subdivisions, Indian tribes settle long-standing claims that at their

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1. *See* Jeremy Waldron, *Supersession and Sovereignty* 3 (New York University School of Law Public Law & Legal Theory Research Paper Series, Working Paper No. 13-33, 2013), *available at* http://ssrn.com/abstract=2205708 ("So if we were to pay proper attention to historic entitlement, we would stop acting as though the rights of the settler regimes were beyond question and begin acting as though the right of indigenous self-rule still existed as it existed in 1790 or 1840 or whenever the events complained of took place.").

2. 500 F. App'x 87, 89 (2d Cir. 2012) ("The disruptive nature of the claims is indisputable as a matter of law."). The petition for certiorari is currently pending before the Supreme Court. Petition for a Writ of Certiorari, Onondaga Nation v. New York, No. 12-1279, *available at* http://turtletalk.files.wordpress.com/2013/04/onondaga-petition-for-a-writ-of-certiorari.pdf.

outset, often appear intractable, if not downright impossible, to remedy. The recent settlements of claims by the Oneida Indian Nation of New York,[3] the Saginaw Chippewa Indian Tribe,[4] and five Michigan Anishinaabe tribes[5] demonstrate the falsehood of the idea that Indian claims are too disruptive to be remedied. These negotiated settlements powerfully illustrate that the disruption produced by Indian claims has an important function: forcing federal, state, and tribal governments to creatively seek solutions to difficult governance issues in Indian country.

Part I of this Essay describes recent common law, which dismisses Indian claims on the grounds that they are too disruptive. Part II briefly surveys the history of the relationship between Indians and the United States. Part III describes recent settlements between tribal and local governments. Part IV presents our theory of tribal disruption based on notions of ecological disturbance, studied in ecology and related fields. We argue that ecological disturbance in linked social–ecological systems offers a useful analog to the disruptive nature of Indian claims. These claims can be compared to disturbances in rivers, forests, or other ecosystems. Floods, forest fires, and windstorms break down existing structures, allowing space for reorganization, diversification, and new growth. Tribal claims similarly clear out a legal space for creative and improved governance institutions.

I. THE NEW LAW OF DISRUPTION AND INDIAN CLAIMS

In the 2005 case *City of Sherrill v. Oneida Indian Nation*, the Supreme Court introduced the idea that disruption to the settled expectations of non-Indian governments and landowners could foreclose tribal claims.[6] In the case, the Oneida Nation purchased land in fee that had been ancient tribal land. The Nation sought immunity from local regulations and taxes on the land. The Court rejected this claim, holding that too much time had passed since the Nation had controlled the land and that the checkerboarded juris-

3. Settlement Agreement by the Oneida Nation, the State of New York, the County of Madison, and the County of Oneida (May 20, 2013) [hereinafter Settlement Agreement], *available at* http://turtletalk.files.wordpress.com/2013/05/142783486-oneida-indian-nation-settlement-agreement.pdf.

4. Joint Motion to Enter Order for Judgment upon Completion of a Public Comment Period and Opportunity for the Parties to Respond, Saginaw Chippewa Indian Tribe of Michigan v. Granholm, No. 05-10296-BC (E.D. Mich. Nov. 9, 2010), *available at* http://turtletalk.wordpress.com/2010/11/10/saginaw-chippewa-reservation-boundaries-settlement-materials/.

5. *See* Consent Decree, United States v. Michigan, No. 2:73-cv-00026-RAE (W.D. Mich. Nov. 2, 2007), *available at* http://turtletalk.wordpress.com/2007/11/07/inland-settlement-consent-decree-materials/.

6. 544 U.S. 197 (2005).

dictional pattern that would have resulted from the immunities would undermine the settled regulatory framework.

Over the next several years, the Second Circuit applied the *Sherrill* reasoning to dismiss the land claims of the Haudenosaunee nations in New York.[7] These land claims arose from transactions more than 200 years old. Land claims had been largely successful pre-*Sherrill*: twice in the 1970s and 1980s, the Supreme Court affirmed the federal common law right of the Oneida Indian Nation to bring claims for trespass damages against non-Indian governments and property owners.[8] Other Haudenosaunee land claims had been successful on the merits in the lower courts, resulting in multiple judgments totaling millions of dollars.[9] In dismissing the post-*Sherrill* claims, however, the Second Circuit used a theory that the disruption inherent in the claims must foreclose the claims on their face. The Second Circuit even rejected the Onondaga appeal, where the Nation, hoping to acquire the legal authority to clean Lake Onondaga, had sought only a declaratory judgment rather than damages or possessory claims. The court reasoned that "[t]he disruptive nature of the claims is indisputable as a matter of law."[10]

The Second Circuit's summary dismissal of the Onondaga claims is startling. As Learned Hand wrote, "It is, of course, true that equity will at times affirmatively restore the status quo ante pending the suit. But never, so far as I know, will it take jurisdiction over a legal claim merely to hurry it along by granting final relief at the outset of the cause."[11] In dismissing the Onondaga claim on summary judgment, or at the outset of the case, the Second Circuit denied the Nation the most important piece of equity—the right to have the equities weighed and balanced by the court *before* a final determination is reached.

II. A BRIEF HISTORY OF THE INDIAN AFFAIRS AND DISRUPTION

Affairs between Indian tribes and the United States have been riddled with disruption. From before the establishment of the United States through

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7. *See* Oneida Indian Nation v. County of Oneida, 617 F.3d 114 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 452 (2011); Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, United States v. Pataki, 547 U.S. 1128 (2006); *see also* Kathryn Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 WYO. L. REV. 375 (2011).

8. County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

9. *E.g.*, Cayuga Indian Nation v. Pataki, 165 F. Supp. 2d 266, 366 (N.D.N.Y. 2001) (awarding $248 million in damages).

10. Onondaga Nation v. New York, 500 Fed. Appx. 87, 89 (2d Cir. 2012).

11. Sims v. Stuart, 291 F. 707, 707–08 (S.D.N.Y. 1922) (citations omitted).

the late nineteenth century, contact between tribal groups and European and American governments, entities, and individuals involved incredible and acute disruption to Indian people. Warfare and disease often dominated relations between groups on the North American frontier. For example, up and down the Eastern Seaboard, tribal groups such as the Powhatan and the Beothuk suffered dramatic population reductions due to disease introduced by European explorers and settlers. European settlements suffered their own disasters, exemplified by the incredible death rate of settlers at the Jamestown settlement in the seventeenth century.[12] At the same time, however, relations at the personal level between Indians and non-Indians might have been cordial and progressive. Trade and intermarriage between Indians and non-Indians dictated relations between sides.[13] European and American nations and Indian tribes engaged diplomatically through treaty rather than through open warfare.[14] Ultimately, however, inequitable treaty negotiations, the unilateral end of treaty making by the United States, the allotment of tribal lands, and the attempt to "terminate" Indian tribes entirely led to a tremendous and disruptive loss of land and attendant wealth throughout the nineteenth century and into the mid-twentieth century.

Since the 1970s, when federal Indian policy shifted to a policy of tribal self-governance, tribal governance capabilities have advanced dramatically. Hundreds of Indian tribes regulate their businesses and land use, exercise criminal jurisdiction over their land, and manage million-dollar enterprises.[15] Through a combination of litigation and negotiation, they can handle conflicts that arise with federal, state, and local governments.[16] The mere ability of Indian tribes to bring suit often forces state and local governments to the negotiating table.[17]

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12. *See* CHARLES C. MANN, 1493: UNCOVERING THE NEW WORLD COLUMBUS CREATED 51–95 (2011).

13. *See* RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650–1815 (1991); CATHERINE J. DENIAL, MAKING MARRIAGE HUSBANDS, WIVES & THE AMERICAN STATE IN DAKOTA & OJIBWE COUNTRY 4 (2013).

14. *See* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800 (1997).

15. *See* THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 5–13 (2008).

16. *See* Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 81–83 (2007); Tassie Hanna, Sam Deloria & Charles E. Trimble, *The Commission on State-Tribal Relations: Enduring Lessons in the Modern State–Tribal Relationship*, 47 TULSA L. REV. 553 (2012).

17. *See* Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal–State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 17–19 (2004).

III. THE VERIFIABLE REALITY OF MODERN TRIBAL DISRUPTION

In recent years, Indian tribes and state and local governments have concluded several negotiated settlements arising out of disruptive tribal claims. In two of the settlements, the local governmental defendants initially sought dismissal of the suits under *Sherrill*, expressly alleging that the remedies for the claims were impossible to implement.[18] Each of these settlements demonstrates that it is empirically false to claim that ancient tribal claims are too disruptive to the settled expectations of local governments and non-Indians to pursue.

A. *The Michigan Inland Treaty Rights Settlement*

In 2004, Michigan filed a supplemental complaint in the *United States v. Michigan* litigation to address whether tribal treaty signatories to the 1836 Treaty of Washington retained off-reservation rights to hunt, fish, and gather on ceded lands.[19] This complaint led to the Inland settlement agreement addressing these issues. Article 13 of the 1836 treaty provided that "[t]he Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement."[20] The initial round of the suit, initiated in the 1970s, established a treaty right for the Indians to fish in the waters of the Great Lakes connected to the ceded territory.[21] The initial litigation resulted in a negotiated settlement that is remarkable on its own,[22] but it only resolved the least controversial questions. On land, where many state and local governments and individual non-Indians owned property not "required for settlement," the potential for conflict was high. In the Inland settlement, the five treaty tribes, the State of Michigan, and the federal government agreed that tribal members could exercise treaty rights on state and federal public lands within the ceded area under tribal regulation and under restrictions approximating (but deviating in important respects from) those under state law.[23] The settlement did not endanger private property rights; in fact, the settlement ended any possibility that private property would play a role in relation to inland treaty rights.

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18. Oneida Indian Nation v. County of Oneida, 617 F.3d 114, 126–29, 135–40 (2d Cir. 2010) (dismissing land claims based on *Sherrill* defenses), *cert. denied*, United States v. New York, 132 S. Ct. 452 (2011); Saginaw Chippewa Indian Tribe v. Granholm, No. 05-10296-BC, 2008 WL 4808823, at *17–24 (E.D. Mich. Oct. 22, 2008) (rejecting *Sherrill* defenses).

19. *See* Consent Decree, *supra* note 5, at 5.

20. Treaty with the Ottowa, Etc., 1836, U.S.-Ottowa-Chippewa, art. XIII, Mar. 28, 1836, 7 Stat. 491.

21. United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979).

22. United States v. Michigan, 12 Indian L. Rep. 3079 (W.D. Mich. 1985).

23. *See* Consent Decree, *supra* note 5, at 13–16.

B. *The Saginaw Chippewa Reservation Boundaries Claim*

In 2005, the Saginaw Chippewa Indian Tribe (SCIT) sued the governor of the State of Michigan and several local governments for a judgment on the Tribe's reservation boundaries.[24] A series of treaties created in the nineteenth century guaranteed the reservation for the exclusive use of the Tribe and its members, a guarantee that was routinely disregarded for over 100 years. The SCIT had numerous conflicts with state agencies, Isabella County, and the City of Mount Pleasant over taxes and regulations on fee lands within the reservation, as well as criminal jurisdiction over the Tribe's members. After the Tribe survived a motion to dismiss based on *Sherrill*,[25] SCIT, the governor, and the local units of government reached a far-ranging settlement regarding criminal jurisdiction, environmental regulation, taxes, land use, and public safety that provided the Tribe with nearly everything it had originally sought on filing the suit.[26] In exchange, the defendants received what they wanted—certainty in jurisdictional questions, cooperation from the Tribe, and resources to implement the agreement. This case caused a disruption of established governance structures; the disruption opened an opportunity not only to redefine jurisdictional roles but moreover to clarify previously muddled jurisdictional issues allowing for improved public-service delivery.

C. *The Oneida Omnibus Settlement*

The Oneida Indian Nation has been in long-standing and virulent political conflict with the State of New York and Madison and Oneida Counties over a wide variety of issues, most notably the Oneida's land claims.[27] The Nation has been repurchasing large amounts of land within Madison and Oneida Counties, which constitute the historic Oneida reservation. These purchases have generated conflict over taxation and regulation on tribally

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24. Amended Complaint for Declaratory and Injunctive Relief at 11–12, Saginaw Chippewa Indian Tribe v. Granholm, No. 1:05-cv-10296-TLL-CEB (E.D. Mich. Mar. 31, 2006), *available at* http://turtletalk.files.wordpress.com/2007/10/amended-complaint.pdf.http://turtletalk.files.wordpress.com/2007/10/us-intervenor-complaint.pdf.

25. Saginaw Chippewa Indian Tribe v. Granholm, No. 05-10296-BC, 2008 WL 4808823, at *17–24 (E.D. Mich. Oct. 22, 2008).

26. Order Granting Joint Motion for "Order for Judgment" at 2–3, Saginaw Chippewa Indian Tribe v. Granholm, No. 05-10296-BC (E.D. Mich. Dec. 17, 2010), *available at* http://turtletalk.files.wordpress.com/2010/12/dct-order-approving-settlement.pdf.

27. *See, e.g.*, Oneida Indian Nation v. County of Oneida, 617 F.3d 114 (2d Cir. 2010), *cert. denied*, United States v. New York, 132 S. Ct. 452 (2011).

owned fee lands.[28] Litigation over the trust acquisition and local taxes is pending; the Nation's land claims have already been dismissed. And yet the Nation and its adversaries have reached an omnibus agreement couched as a gaming compact that settles the taxation and land disputes between the parties.[29] All the parties, assuming the deal concludes successfully, will receive the same benefits as the parties in the Saginaw Chippewa settlement.

In sum, these three settlements between multiple sovereigns establish that even Indian claims that have the potential to be highly disruptive can be settled through negotiation. The threat of disruption should not stop litigation from moving forward. Had the parties not reached a settlement and had instead proceeded to litigate to the end, the costs of litigation would have far exceeded the benefits to the prevailing party. For example, in the Michigan inland case, private property owners and individual tribal members exercising treaty rights would have continued to be at loggerheads for generations to come. In the Saginaw Chippewa and Oneida cases, the uneven governance structure in place for the last several decades would have continued and local units of government would have footed the bill while disruptions to their governance from tribal business activities continued unabated. Litigation of disruptive claims ultimately led to important changes—changes that appear to be very beneficial to all parties.

IV. A SIMPLE THEORY OF TRIBAL DISRUPTION

Tribal disruption may be caused by a tribal government exercising increased self-determination or by the initiation of litigation. Tribal governments invariably seek to protect tribal lands and individual rights of their citizens; this occasionally butts up against state and local governments. History and federal Indian affairs policy has given Indian country a system of checkerboard jurisdictions with boundaries confounding good governance.[30] These are local problems that cannot be solved by Congress but must be worked through by the parties on the ground.

Imagine a wildfire clearing a forest of many of its trees and undergrowth, creating a massive disruption with wide-ranging consequences. While the initial impact might appear drastic and be perceived negatively, the long-term effects could be very beneficial. Disturbances redistribute resources such as nutrients and reorganize biological communities in ways

28. *See, e.g.*, Madison County v. Oneida Indian Nation, 131 S. Ct. 704 (2011), *vacating* 605 F.3d 149 (2d Cir. 2010) (addressing the issue of tribal immunity from local taxation); City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) (same).

29. Settlement Agreement, *supra* note 3. The settlement is not final, in that the necessary approvals and legal challenges may still be pending.

30. *E.g.*, Hydro Resources, Inc. v. EPA, 608 F.3d 1131, 1135–38 (10th Cir. 2010) (en banc) (discussing checkerboarding at the Navajo Nation's reservation in New Mexico).

that build ecosystem resilience. To analyze the outcomes of disturbance events, it is important to carefully consider these events' spatial and temporal scale and intensity. Ecologically beneficial disturbances are often low intensity and occur at small, localized spatial scales. Their full effects are perceivable only at a landscape scale where many localized disturbances collectively create a diverse ecological patchwork.[31]

For a century, we have tried to control disturbances in the United States.[32] In recent decades, however, we have begun to recognize the importance of disturbance in ecosystems. There have been calls for and efforts to manage ecosystems based on their natural disturbance patterns. We are calling for the legal system to jump on that same progressive train.

Tribal disruption often works the same way. Litigation forces the stakeholders to the table to negotiate away the jurisdictional conundrums left behind by federal Indian policy. Too often, judicial decree allows the victorious side to dictate terms, meaning that the legitimate settled expectations of non-Indians or the legitimate historic claims of Indians can be ignored completely. The disruption does not abate, and litigation moves to another area of the relationship. Such a result is antithetical to good governance for any entity. The dismissal of tribal claims on their face for their disruptive value is harmful to all and solves nothing. Rather, tribal claims should be litigated and negotiated to clear the underbrush of bad law and begin to create a fresh, flexible, viable law.

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31. MANN, *supra* note 12, at 30–31.

32. *See* C.S. Holling & Gary K. Meffe, *Command and Control and the Pathology of Natural Resource Management*, 10 CONSERVATION BIOLOGY 328, 329 (1996).