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A Constitutional Crisis When the U.S. Supreme Court Acts in a Legislative Manner? An Essay Offering a Perspective on Judicial Activism in Federal Indian Law and Federal Civil Procedure Pleading Standards

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The United States Supreme Court is one of the three branches of federal government in the U.S. governmental system of checks and balances. The primary purpose of the Court is to resolve live controversies as final arbiter on the interpretation of the U.S. Constitution and the federal legislation implementing that foundational document. For scholars of federal Indian law, the U.S. Supreme Court has acted extra-constitutionally since it first heard a case involving tribal rights and has continued its "legislative" function in this area of the law ever since.[1] Recently, the Court has stepped outside of the bounds of textual interpretation by creating a new level of civil pleading standards based on a "plausibility" requirement, rather than on the established

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1. *See* Matthew L.M. Fletcher, THE SUPREME COURT'S INDIAN PROBLEM, 59 HASTINGS L.J. 579, 584-85 **2008) ("Indian law scholars have been decrying the lack of principled decision-making about federal Indian law for decades.") .

Federal Rules of Civil Procedure notice pleading standard. While the judicial activism and unrestrained extra-textual interpretations in federal Indian law have been known to a core group in the field, the Court's recent unmooring of civil pleading standards from the Federal Rules and settled precedent has come as a shock to many.

This essay will examine the U.S. Supreme Court's judicial activism in relation to federal Indian law as a beginning point to discuss the recent introduction of the "plausibility" requirement in federal pleading sufficiency determinations. By examining the decisional law in the field of federal Indian law, the claimed power by the Court to redefine the legal status of Tribal Nations will become apparent. Next, the consequences of the U.S. Supreme Court's unfettered ability to reshape law and limit access to the federal courts will be discussed. Finally, the essay will offer some conclusions on the constitutional crisis presented by the Court's lack of judicial restraint in the legislative and political arenas.

Scholars of federal Indian law have pondered how to curb the highest court in the United States from running rampant over Tribal Nations when the court creates new standards, principles and laws out of thin air.[2] Chief Justice Marshall in a series of cases commonly known as the Marshall Trilogy set the foundational principles of federal Indian law and the status of Tribal Nations in relation with the United States.[3] In *Johnson v. McIntosh*,[4] Marshall opined that European supremacy gave superior title to tribal lands and that Tribes merely had occupancy rights in their property after a European nation claimed "discovery" of those lands.[5] There was no constitutional or statutory basis for this judicial opinion and it still continues to be adhered to by the United States as definitive of establishing supremacy in the U.S. to all tribal lands and relegating tribal land rights to mere occupancy rights.[6] It should be noted that there was no tribal participation in the case whatsoever.[7]

Marshall continued his legislative bent in federal Indian law with the other two cases that form the Marshall Trilogy – *Cherokee Nation v.*

2. *Id.* at 585. ("Nothing stops the Court – no constitutional provision, common law principle, or anything else – from working radical transformations of federal Indian law at any moment.").

3. *See* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 630-648 (2006).

4. Johnson v. M'intosh, 21 U.S. (8 Wheat) 543 (1823).

5. *Id.* at 588.

6. *See* Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 69-76 (2005).

7. *See* Robert N. Clinton, Carole E. Goldberg & Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System, Cases and Materials* 5th ed., 60 (Matthew Bender ed., Lexis Nexis 2007).

Georgia[8] and *Worcester v. Georgia*.[9] In the first case, the Cherokee Nation relied on the Supremacy Clause in the U.S. Constitution to enforce its treaty rights to enjoin the state of Georgia from seizing tribal lands and ousting tribal jurisdiction.[10] Marshall never got to the Supremacy Clause argument, instead he focused on whether the Cherokee Nation had standing to seek an injunction in the U.S. Supreme Court.[11] Through his analysis, he defined the Cherokee Nation (and all Tribal Nations) out of foreign nation status and into a new construct he created – "domestic dependent nations."[12] Finding that the U.S. Constitution did not grant standing to his newly created construct, "domestic dependent nations," he dismissed the case for lack of standing.[13] Marshall used the opportunity in the second case to flesh out his new status for Tribes as "domestic dependent nations" and give future judges interpretative leeway over tribal affairs by introducing the "ward/guardian" relationship between Tribes and the United States.[14]

In the third case in the trilogy, a U.S. citizen, Samuel Worcester, brought a habeas petition against the state of Georgia for imprisoning him when he entered Cherokee lands under the protection of the federal government.[15] Here, Chief Justice Marshall articulated a federal preemption doctrine to displace the assertion of a state to take over Cherokee lands in violation of the treaties previously entered into. [16] In the Marshall Trilogy, the Chief Justice of the Supreme Court legislated on: 1) the property rights of all Tribes to their lands; 2) the governmental status of Tribal Nations as "domestic dependent nations," and 3) subsumed tribal sovereignty into a wardship status subject to the guardianship of the U.S. government.

Any scholar of federal Indian law is familiar with the Marshall Trilogy which continues to be cited as precedent in contemporary federal judicial decisions and is the starting point for analysis on the tribal-federal relationship.[17] Knowing that the U.S. Supreme Court legislates in federal Indian law has resulted in the Tribal Supreme Court Project which seeks to limit the opportunities the U.S. Supreme Court will have to further define away tribal human rights, tribal land rights, tribal

8. Cherokee Nation v. State of Georgia, 30 U.S. (5 Pet.) 1 (1831).
9. Worcester v. State of Georgia 31 U.S. (6 Pet.) 515 (1832).
10. *Cherokee*, 30 U.S. at 15.
11. *Id.* at 15-20.
12. *Id.* at 17.
13. *Id.* at 20.
14. *Id.* at 17.
15. *Worcester*, 31 U.S. at 540.
16. *Id*. at 561.
17. *See, e.g.*, United States v. Lara, 541 U.S. 93, 204-05 (2004).

governmental rights, tribal judicial rights, tribal economic rights, and tribal jurisdictional rights.[18] Since the formation of the United States, Tribes have been subject to the legislative functioning of the U.S. Supreme Court and only once has the U.S. Congress responded to the Court's extra-constitutional actions.

The common law legislative function of the U.S. Supreme Court has only once been limited by the U.S. Congress. In part, the U.S. Congress has benefitted from the U.S. Supreme Court's rampage in federal Indian law. Early on the U.S. Supreme Court opined that in regards to upholding treaty rights, the U.S. Congress through the ward/guardian relationship had plenary power over Tribes and therefore, the authority to unilaterally abrogate treaties entered into with Tribal Nations.[19]

> By definition, no unlimited and absolute power should exist in the United States, since the Constitution limits the powers of both the federal and state governments to those powers expressly enumerated. In other words, governments possess only those powers that the Constitution very explicitly names. There is nothing in the U.S. Constitution granting the federal government "unlimited or absolute" authority over anything or anyone. After all, our nation was founded in direct opposition to the unlimited and absolute powers claimed by Europe's royal crowns. And yet the Supreme Court has ruled, more than once, that the Congress has unlimited and absolute power over tribes.[20]

Such broad power sanctioned by the U.S. Supreme Court to the U.S. Congress was welcomed and a wave of federal legislation passed in the late 1800s throughout the early 1900s controlled every aspect of tribal life.[21]

In the 1970s, the U.S. Supreme Court announced a new limitation on tribal sovereignty in the criminal jurisdiction realm. In *Oliphant v. Suquamish Tribe*,[22] the Court declared that Tribes lacked criminal authority over non-Indians[23] and relied on questionable textual support

18. *See* Bethany Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 19 (2004).

19. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565-566 (1903).

20. DAVID WILKINS AND K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 106 (2001).

21. *See* DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., CASES AND MATERIALS ON FEDERAL INDIAN LAW, 5th ed., 184-86 (2005).

22. Oliphant v.Suquamish Indian Tribe, 435 U.S. 191 (1978).

23. *Id.* at 208.

for its decision.[24] Closely following the *Oliphant* decision, the Court in *Duro v. Reina*[25] held that a Tribal Nation lacked criminal authority over a non-member Indian.[26] Tribal leaders gathered forces and sought a federal legislative fix to override the Court's pronouncement further limiting tribal law enforcement and tribal judicial systems to protect tribal communities.[27] The "*Duro* fix" was enacted into federal law as an amendment to the Indian Civil Rights Act and recognized the inherent authority of Tribes over any Indians.[28]

In *U.S. v. Lara*,[29] a split Court upheld the plenary authority of the U.S. Congress to relax restrictions on the inherent authority of Tribes and therefore, found the "*Duro* fix" legitimate.[30] In Justice Thomas' concurrence, he questioned the textual reference for the entire field of federal Indian law as extra-constitutional and paradoxical as placing limits on another government's sovereignty.[31] By accepting the authority of the Marshall Trilogy, the majority in *Lara* ignored the extra-constitutional nature of judicial precedent and focused on reconciling the Trilogy's "domestic dependent nation" status with the "ward/guardian" principle and found that the "plenary power" recognized by the Court applied to the Court's decisions as well.[32]

In the last two decades, the U.S. Supreme Court has taken the federal Indian law legislative function to new heights by: 1) recognizing state power within tribal territories in contravention of the U.S. Supremacy Clause triggered by Tribal-U.S. treaties;[33] 2) developing the "implicit divestiture doctrine" where the Court defines a governmental power as implicitly divested due to the "domestic dependent status" of the Tribes;[34] and 3) applying past congressional policies of allotment and assimilation to contemporary tribal land issues allowing for "disestablishment" and "diminishment" of tribal land holdings.[35] While

24. *See* Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole is Greater Than the Sum of the Parts*, 19 J. CONTEMP. L. 391, 402-31 (1993).

25. Duro v. Reina., 495 U.S. 676 (1990).

26. *Id.* at 679.

27. *See* Berger, *supra* note 18, at 11-19.

28. 25 U.S.C. § 1301(2) (1990).

29. U.S. v. Lara, 541 U.S. 193 (2004).

30. *See* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.05 (Nell Newton, ed., Lexis Nexis, 2005) (1941) [hereinafter, "COHEN'S"].

31. *Lara*, 541 U.S. at 214-26.

32. *Id.* at 204-07.

33. *See* Nevada v. Hicks, 533 U.S. 353, 361-62 (2001).

34. *See* Montana v. United States, 450 U.S. 544, 563-65 (1981).

35. *See* DeCoteau v. District County Court, 420 U.S. 425, 432-46 (1975); Solem v. Bartlett, 465 U.S. 463, 466-73 (1984). *See also* Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 25-44 (1995).

Tribes have proposed and supported federal legislative "fixes" in these areas, the U.S. Congress has failed to respond.[36]

In 1996, the U.S. Supreme Court in an opinion authored by Chief Justice Rehnquist held that the U.S. Congress lacked the power to legislate a remedial scheme allowing Tribes to sue state governments in federal court when the states failed to negotiate tribal-state gaming compacts in good faith. In *Seminole Tribe v. Florida*,[37] the Court held that Congress lacked the authority to abrogate the Eleventh Amendment sovereign immunity of states and force them into federal court under the remedial scheme in the Indian Gaming Regulatory Act (IGRA).[38] Congress had enacted the IGRA pursuant to the Indian Commerce Clause, Art. 1, sec. 8 cl. 2 of the U.S. Constitution, and pursuant to strident pressure from the states to participate in the tribal gaming industry.[39]

By denying that the U.S. Congress had the authority to legislate the IGRA remedial scheme, the Court held that the Eleventh Amendment protection of state sovereign immunity trumped the congressional "plenary power" to legislate in federal Indian law when that legislation impacted states' rights.[40] In doing so, the Supreme Court characterized the Tribe as a state citizen barred from bringing suit against the state under the Eleventh Amendment.[41] Over the last several decades, the U.S. Supreme Court has consistently failed to regard Tribal Nations as sovereigns with full territorial jurisdiction and instead, has rationalized the re-characterization of tribal government in ever limiting ways, such as limited to governmental authority over members or as nothing more than a state citizen under the Eleventh Amendment.[42]

In regards to tribal interests, the U.S. Supreme Court has apparently taken over the role of colonizer and harkened back to the mid-1800s to legitimize denial of tribal authority in tribal territories in its judicial

36. *See, e.g.*, Gale Courey Toensing, *Dorgan's 'Carcieri fix' Introduced to Senate*, INDIAN COUNTRY TODAY, Sept. 25, 2009, *available at* http://www.indiancountrytoday.com/national/61472297.html. *See also* Marie Quasius, *Native American Rape Victims: Desperately Seeking an Oliphant-Fix*, 93 MINN. L. REV. 1902, 1906-07 (2009).

37. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

38. *Id.* at 47.

39. *See, e.g.*, Chris Rausch, *The Problem With Good Faith: The Indian Gaming Regulatory Act a Decade After Seminole*, 11 GAMING L. REV 423, 423-24 (2007).

40. *Seminole Tribe*, 517 U.S. at 72.

41. *Id.*

42. *See* Jesse Sixkiller, *Procedural Fairness: Ensuring Tribal Civil Jurisdiction After Plains Commerce Bank*, 26 ARIZ. J. INT'L & COMP. L. 779, 785-87 (2009).

decisions.[43] With no direct representation in the U.S. Congress and trapped in a judicially constructed governmental status of "domestic dependent nations," Tribes have had little recourse to withstand the Court's attacks on tribal sovereignty.[44] Tribal Nations are not in control of lawsuits brought by private industry or states which seek to diminish tribal lands or otherwise divest Tribes of governmental authority.[45] As outside of the U.S. Constitution and yet at the mercy of the branches of federal government, the Tribes are constantly on the defensive as the U.S. Supreme Court runs roughshod through Indian Country purposefully trampling on tribal rights and sovereignty in the process.

Chief Justice Marshall's foundational cases have been the judicial license to freely construct new standards, rules and limitations on Tribal Nations throughout the last two centuries.[46] Justice Rehnquist picked up the thread in the *Oliphant* decision and began the modern era of defining away tribal governmental authority.[47] Former law clerk for Justice Rehnquist and current Chief Justice of the Supreme Court, John Roberts has vehemently carried forward the anti-tribal sentiment of the Court in recent years.[48] To scholars of federal Indian law, the Roberts Court has been a dangerous and disastrous forum for tribal interests, thus far.[49]

Turning to the U.S. Supreme Court's newly developed heightened pleading standard of "plausibility" in *Bell Atlantic Corp. v. Twombly*[50] and *Ashcroft v. Iqbal*,[51] the parallels to federal Indian law are important. The "plausibility" standard adds a hurdle to the plaintiff filing a civil

43. *See, e.g.*, Bethany R. Berger, *Red: Racism and The American Indian*, 56 UCLA L. REV. 591, 629-32 (2009) (describing the Court's decision in the late 1880's as justifying the vast federal power over Indian tribes in explicitly racial terms).

44. *See, e.g.*, G. William Rice, *Teaching Decolonization: Reacquisition of Indian Lands Within and Without The Box – An Essay*, 82 N.D. L. REV. 811, 833-34 (2006).

45. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (Where oil company brought suit against state challenging state tax on oil production from tribal lands).

46. *See* Robert Odawi Porter, *American Indians and the New Termination Era*, 16 CORNELL J.L. & PUB. POL'Y 473, 488 (2007) ("U.S. law dealing with Indigenous peoples is still predicated upon the constitutionally bankrupt Indian control doctrines like the Discovery Doctrine, Domestic Dependent Nationhood, and the Plenary Power Doctrine that were spawned during the nineteenth century.").

47. *See* David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit Of States' Rights, Color-Blind Justice, And Mainstream Values*, 86 MINN. L. REV. 267, 273-80 (2001).

48. *See* Thomas A. Hensley, Joyce A. Baugh & Christopher E. Smith, *The First-Term Performance of Chief Justice John Roberts*, 43 IDAHO L. REV. 625, 628 (2007).

49. *See, e.g.*, Matthew L.M. Fletcher, *Review of OT 2008: Indian Law Cases in the Supreme Court*, TURTLE TALK BLOG, June 14, 2009, *available at* http://turtletalk.wordpress.com/2009/06 /14/review-of-ot-2008-indian-law-cases-in-the-supreme-court/.

50. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

51. Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

case in federal court that has no basis in Federal Rule of Civil Procedure 8(a).[52] There are three basic requirements in FRCP 8(a): 1) a statement of the court's jurisdictional authority to hear the case; 2) "a short and plain statement of the claim showing that the pleader is entitled to relief;"[53] and 3) the plaintiff's demand for relief. The short and plain statement of the claim has been liberally interpreted by the U.S. Supreme Court and the most oft-cited case to give effect to the standard has been found in *Conley v. Gibson*.[54] In that case, the Court held that as long as the pleading demonstrated that the plaintiff was entitled to relief upon any set of facts then the plaintiff's burden of pleading was satisfied by putting the defendant on notice of the plaintiff's legal claim.[55]

The notice pleading process allowed a plaintiff to substantiate the claim through gathering information in the extensive discovery process outlined in Federal Rules of Civil Procedure 26 through 36.[56] With the new "plausibility" requirement, plaintiffs in federal civil proceedings must have enough facts to meet a plausibility review of the complaint to proceed in federal court, otherwise the federal judge may dismiss the complaint as "implausible."

In the larger scheme of things, the "plausibility" requirement serves to limit the ability of plaintiffs to bring suit in federal court under federal private causes of action.[57] When the U.S. Congress legislates and provides that lawsuits may be brought to enforce federal rights in the federal courts, presumably potential plaintiffs will have access to vindicate those rights by filing a pleading and stating the claim from the federal law.[58] However, the "plausibility" standard now gives federal judges the ability to go beyond reading the complaint for compliance with the short and plain statement of the claim under federal law. Now, federal judges can assess the complaint based on the facts asserted to

52. *Bell Atlantic*, 550 U.S. at 556; *Iqbal*, 129 S.Ct. at 1949.

53. FED. R. CIV. P. 8(a)(2).

54. Conley v. Gibson, 355 U.S. 41 (1957).

55. *Id.* at 45-46.

56. *Id.* at 47-48.

57. *See, e.g.*, Suja A. Thomas, *The New Summary Judgment Motion: The Motion To Dismiss Under Iqbal And Twombly*, 14 LEWIS & CLARK L. REV. 15, 33-38 (2010) (discussing the impact on the "plausibility" standard in federal employment discrimination lawsuits).

58. *See* Howard M. Wasserman, *Iqbal, Procedural Mismatches, And Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 178 (2010) ("The substantive consequence will be a significant decrease in vindication of federal constitutional and civil rights, and of the values and principles underlying those rights. We can predict less private attorney general activity, less exposure of governmental wrongdoing, less enforcement of constitutional and civil rights, and less opportunity to even make a serious inquiry into the underlying facts and events for failure to clear the pleading hurdle.").

uphold the "plausibility" of the plaintiff's alleged claim.[59] Under the Federal Rules of Civil Procedure, heightened pleading standards are required in two instances under F.R.C.P. 9(b) – 1) fraud or 2) mistake. This new heightened pleading standard of "plausibility" for all civil actions is inconsistent with Federal Rule 9(b)'s particularity for only two types of claims requiring more than simply putting the defendant on notice as to the plaintiff's claims under Rule 8(a)(2).

By requiring a heightened pleading standard, plaintiffs are losing access to federal courts when their federal private causes of action are dismissed for not meeting the U.S. Supreme Court's new "plausibility" standard. There is no textual basis for the "plausibility" standard in the Federal Rules of Civil Procedure. If there were, then the standard would presumably be open to challenge under the Federal Rules Enabling Act (REA).[60] Under the REA, the Supreme Court's power to create federal rules is subject to the limitation that "such rules shall not abridge, enlarge or modify any substantive right."[61] The "plausibility" standard is extra-textual and not contained in a federal rule and thus, presumably not subject to the limitation cited to above.

This brings the discussion back to the similarity to the Court's legislative function in federal Indian law. Where the U.S. Supreme Court has unmoored its decisions from textual authority, the ability to rein the Court back in is a dilemma. In federal Indian law, there is precedent through the *Duro* fix to suggest that the U.S. Supreme Court will follow specific federal legislation overriding a judicial decision. Tribal Nations are not part of the U.S. constitutional structure.[62] The relationship between Tribal Nations and the United States has been created whole cloth through U.S. Supreme Court decisions, federal policy initiatives and federal legislation. The role of the federal courts to hear live controversies involving federal law, including interpretation of the U.S. Constitution, is grounded in the U.S. Constitution Art. III § 2.

In conclusion, the U.S. Congress has recognized authority to override the U.S. Supreme Court in federal Indian law in certain situations according to the U.S. Supreme Court. With the Roberts Court handing down recent anti-tribal decisions,[63] the pressure for federal

59. The "plausibility" standard also serves as a barrier for plaintiffs bringing diversity of citizenship cases in federal courts where the complaint is found to be "implausible" and subject to dismissal.

60. 28 U.S.C. § 2072.

61. *Id.* at § 2072(b).

62. *See* Talton v. Mayes, 163 U.S. 376, 382 (1896).

63. *See, e.g.*, Carcieri v. Salazar, 129 S.Ct. 1058 (2009); Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S.Ct. 2709 (2008) (as two recent examples of Roberts Court decisions adverse to tribal interests).

legislative fixes is being asserted by Tribal Nations on the U.S. Congress.[64] In the realm of the pleading standards for civil actions in federal courts, the Roberts Court has added a heightened "plausibility" requirement forcing the hand of the U.S. Congress to pass a legislative fix which would be subject to U.S. Supreme Court interpretation.[65]

As the Court continues to issue judicial opinions unhinged from textual support and enters into the legislative realm of the federal government, a crisis of constitutional dimension looms ahead.[66] For scholars of federal Indian law, the Court's judicial activism has been a constant complaint rarely heeded by Congress.[67] Now that the Court has expanded its judicial activism to limit vindication of federal rights created by Congress, the Court's oppressive tactics in federal Indian law may gain much needed attention. A re-envisioning of the U.S. Constitution's checks and balances may now be at hand. For Tribal Nations, a check on the unrestrained power of the U.S. Supreme Court in federal Indian law cannot come soon enough. Without the ability of the U.S. Congress to sufficiently re-align the U.S. Supreme Court to a textual basis for its decision-making, a full-scale constitutional convention may be necessary to re-assess the role of the Court.

64. *See, e.g.*, G.Willliam Rice, *Rice: Nothing Scary in Carcieri Fix*, INDIAN COUNTRY TODAY, Nov. 6, 2009, *available at* http://www.indiancountrytoday.com/opinion/69370402.html .

65. *See, e.g.*, Proposed "Open Access to Courts Act of 2009," H.R. 4115, 111th Congress, First Session, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4115ih.txt.pdf .

66. *See also* Stephen B. Burbank, *Pleading And the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 561-64 (2009) (predicting that the "plausibility" standard signals the ability of the U.S. Supreme Court to shift foundational societal opportunities for resolution of everyday disputes). "In any event from this perspective, it is again apparent that the policy questions are not the sort that should be answered by nine judges in the exercise of Article III judicial power, with little information, less experience, and no power to implement nonlitigation alternatives." *Id.* at 561.

67. *See, e.g.*, Patrick W. Wandres, *Indian Land Claims: Sherrill and The Impending Legacy of the Doctrine Of Laches*, 31 AM. INDIAN L. REV. 131, 139 (2006) ("In several regards, the Court in Sherrill over-stepped legal boundaries reserved for Congress and supported by judicial precedent, and essentially established new principles for federal Indian law in a manner that can only be viewed as judicial activism.").